ORIGINAL

In the

Supreme Court of the United States

UNITED STATES	)	
	)	
PETITIONER,	)	
	)	
V.	)	No. 78-777
	)	
KEITH CREWS,	)	
	)	
RESPONDENT.	)	
	)	

Washington, D. C.
October 31, 1979

Pages 1 thru 41

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v. No. 78-777

KEITH CREWS,

Respondent.

Washington, D. C.,

Wednesday, October 31, 1979

The above-entitled matter came on for oral argument at 2:33 o'clock p.m.

BEFORE:

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

APPEARANCES:

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

W. GARY KOHLMAN, ESQ., Public Defender Service, 451 Indiana Avenue, N. W., Washington, D. c. 20001; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-777, United States v. Crews.

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

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case began on January 3, 1974, when Carol Owens, a student visiting Washington, D. C. for a brief course of study, was robbed at gunpoint and sexually molested by the respondent in a stall of the women's rest room near the Washington Monument.

During the course of what must have been a most harrowing experience, Owens had an extended opportunity to observe her assailant at close range. She promptly reported the crime to the police and provided them with a description of the robber.

Three days later two other women were robbed under similar circumstances in the same rest room and they too gave the police a description of their assailant which generally corresponded with the description given by Owens.

Subsequently, on January 9th, two Park Policemen on duty at the Monument grounds spotted the respondent who appeared

to them to fit the description given by the robbery victims. They approached him and during a brief conversation were told that his name was Keith Crews, that he had walked away from school, that he was 16 years old.

After the respondent went into the men's room, the officers conversed with a tour guide who told him that he believed respondent had been at the Monument grounds on the day of the Owens robbery. On the basis of this additional information the officers detained respondent and called for the assistance of the detective who was investigating the robberies. He arrived shortly and attempted to take a photograph of respondent, but was unsuccessful.

He thereupon ordered that respondent be taken to the nearby Park Police station, which was done. Respondent was detained at the station for perhaps as long as an hour, during which time his photograph was taken and his school was called. He was then released.

Several days later the photograph taken during the detention was shown to Owens, the robbery victim, in a photo array, and she identified respondent as her assailant. On the basis of this identification he was arrested, again identified in a lineup, and ultimately brought to trial.

Upon respondent's motion to suppress all identifications of him, the trial court determined that the act of taking respondent to the police station was an illegal arrest. The

pretrial identifications were a fruit of that arrest and must be suppressed, but that the in-court identification of respondent by his alleged victims had an independent basis derived from their substantial opportunity to observe him during the course of the crime and would not be suppressed.

The trial was then held. Owens positively identified respondent as her assailant, and he was convicted by the jury of armed robbery.

On appeal, the en banc District of Columbia Court of Appeals reversed. It concluded that Owens' in-court testimony identifying respondent as the robber should have been suppressed as the fruit of the initial illegal detention of Owens.

Now, we argue in this case for reversal of the judgment of the Court of Appeals on three separate grounds, any one of which would be sufficient to justify reversal.

The first ground is our contention that the in-court identification testimony was not a fruit of the illegal police conduct.

The second ground is that under attenuation analysis any taint, if it was a fruit, should be held attenuated.

The third ground is that in any event, under the circumstances of this case at least, if not generally, the testimony of the victim of a crime, particularly a crime of violence, ought not to be excluded as a matter of exclusionary rule policy.

Now, I'd like to consider first the question which I think is a perplexing one of whether Owens' in-court identification testimony was a fruit of the illegal detention of Respondent Crews, a subject on which both sides have spilled a great deal of ink.

It is a given in this case that from the time of the robbery to the time of trial Owens possessed, on the basis of her observations during the robbery, the ability to identify her assailant. Nothing that happened during the course of the investigation of this case altered or enhanced that ability except in one respect: Respondent was in court to be identified because of a chain of events proceeding from the unlawful taking of his photograph, and of course if he were not present in court, Owens could not have identified him as her assailant.

We stress the untainted nature of Owens' inherent ability to identify the respondent, while he stresses the uselessness of that ability without his presence to be identified.

What is really going on here? Is it, as the Court of Appeals and respondent insist, simply a wholly conventional application of the fruit of the poisonous tree doctrine? Is the victim's identification of her attacker really no different from drugs seized from a house during an illegal, warrantless search or a firearm seized from the person of an illegally-arrested suspect? It doesn't seem to be the same on the surface, at least to us, but let's look more deeply and

see whether the superficial appearances are deceiving.

Now, we submit that a close look at this case reveals what is actually happening here, and that is that the court is suppressing the defendant's presence at trial on the ground that the probable cause underlying his arrest and indictment is the product of the illegal detention.

Respondent would agree, I think, that the court was not suppressing and could not properly have suppressed Owens' testimony describing the circumstances of the crime or generally describing her recollection of the assailant. It's just inconceivable that those things could be fruits. The only arguable suppressible ingredient of her testimony concerns her ability to point to the respondent in the courtroom and say, "That's the man."

Now, the reasoning of the Court of Appeals in this regard is perhaps most clearly laid out in a portion of the opinion where they are actually discussing the temporal proximity factor, and this is at page 38A to 39A of the Appendix to the petition. The court says, "While the initial arrest and the taking of the photograph did occur on January 9, 1974, the illegality in this case did not end on that date. The eventual rearrest" --

QUESTION: Did not end on that date?

MR. FREY: Did not end on that date. "The eventual rearrest and confinement of Mr. Crews and his ultimate

appearance at trial were all based on tainted facts. The government demonstrated no independent basis for rearrest."

QUESTION: Well, on that basis I suppose you could argue that you could never try a person after an illegal arrest?

That is -- based on any evidence, because you can't have a trial unless he's there, and if he's there, he's only there because he's been illegally arrested, and hence you've got --

MR. FREY: In fairness to the Court of Appeals, I think the issue is a little bit more complicated than that, because the court I think suggests and I believe respondent suggests --

QUESTION: You hope it isn't, though, don't you?

MR. FREY: You may have an independent -- no, even if it is more complicated, we're still going to win this case, I think. But the court suggests that if you had an independent, wholly untainted basis for probable cause, then there would be no problem even though he may have been illegally arrested at some stage in the proceedings, because you could justify bringing him into court on that basis.

QUESTION: That may be so, but you still have got him there by an illegal arrest; you got possession of him by an illegal arrest.

QUESTION: Isn't it, in logic, my brother White's

suggestion inevitable?

MR. FREY: Well, if where we're heading is toward the Ker-Frisbie kind of problem, I will get to that in just a moment, because I think it is very pertinent to this, and if you will just bear with me very briefly, I'll be right there.

What the Court of Appeals said was the entire course of events was accomplished in violation of the Fourth Amendment; since apparently there was no independent probable cause for official detention the wrong thus continued. And respondent in his brief also suggests that, I think it's page 46, Note 37, that the identification testimony by Owens would not be suppressible if the government had untainted, independent probable cause to try the respondent.

And I think, although you'll have to ask him, that he would accept that view even if the proceedings in some way originated with an illegal arrest of the respondent.

Now, we are prepared to accept the notion that the respondent's presence in court in this case was logically a fruit of his illegal detention. What we do not accept because it is contrary to settled law, is that his presence in court is subject to suppression. That a defendant may not object to being tried on the ground that his presence in court is the product of an illegal seizure of his person is settled by the Ker-Frisbie line of cases.

And this Court said in Gerstein against Pugh the

following on this point: "In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead we adhere to the Court's prior holdings that a judicial hearing is not prerequisite to prosecution by information, nor do we retreat from the established rule that illegal arrests or detention does not void a subsequent conviction."

Now, in my view there is only one arguably material distinction between the Ker-Frisbie line of cases and the present case, and I think that the Court of Appeals relied on it, and I should address it. The distinction is that in the Ker-Frisbie line of cases, the probable cause to try the defendant was possessed by the police prior to the time that the defendant was kidnapped in violation of his Fourth Amendment rights and brought to court for trial. And I think respondent would say that is a critical difference.

We say that distinction does not help the respondent and we rely for that on the Costello-Blue-Collander line of cases, and we have not discussed that in the brief, so I do want to stress it here. It's the fruit of some further thought in the course of preparing the argument.

He is saying, "You can't bring me to trial because in effect the Grand Jury proceeding that found probable cause

to try me was tainted. It was based on illegally-seized evidence, this photograph and the out-of-court identification. You have no business having me in this courtroom and therefore the inchoate ability that the police already possess to have Owens identify me should not be usable by the prosecution because it can't properly be put together with her pointing the finger at me."

Now, however, Collander establishes, Costello establishes, Blue establishes that you cannot attack the indictment or your presence in court on the basis that that is predicated on illegally seized evidence or, indeed, on the general lack of probable cause to support the indictment. So if we are right that respondent cannot suppress the fact of his presence in court, then the only logical basis for his claim that Owens' in-court identification was the fruit of his illegal detention disappears.

Now, I would like to present a hypothetical at this point which I think is quite illuminating. Let us suppose that during the course of the robbery Owens had a camera and she took a picture of her assailant, and when she went to the police she gave the police the undeveloped roll of film, and she said, "I think I have a picture of him on this roll of film." She also gave the general description, as she did in this case.

While the film is being developed the police officers

see the respondent. Exactly the same procedure as here goes on. They say to themselves, "We'd better get his picture so that we can compare it with what may come out on the film." They get his picture, they compare it with what came out on the film, and they say it's a perfect match. He's indicted, he's brought into court, we introduce the picture and we say to the jury, "Look at this picture. Look at the man. It's the same man."

Now, in our view this undeveloped photograph is the same thing as the mental image that Owens had of the crime and of her assailant, and we do not see how it could possibly be concluded in the photograph hypothetical that the photograph is a fruit.

QUESTION: Mr. Frey, suppose you have an arrest, lineup, and the person is identified and he is then, a charge is filed against him or he is indicted, and the same person who identified him in the lineup is going to testify in court. So as it turns out, the lineup was invalid, there was only one person in the lineup or something, just invalid. What determines -- and let's assume that that's the only reason for the arrest, for the continued custody, was the lineup. Otherwise they'd have turned him loose.

MR. FREY: You're saying invalid on Stovall or Wade grounds, or invalid on Fourth Amendment grounds?

QUESTION: Whatever those grounds are, Mr. Frey.

The lineup was bad, and if there hadn't been an identification at the lineup, they would have turned him loose. Now, certainly the identification in the courtroom isn't necessarily barred?

MR. FREY: Definitely not.

QUESTION: And if there is some independent basis for the --

MR. FREY: It has to be found that it's untainted by the --

QUESTION: Well, is that any different than this case?

MR. FREY: Well, the Court of Appeals, and I'm sure that my colleague will perhaps be more motivated to answer that question than I am. The Court of Appeals believed it was different because it believed that in the case of a Sixth Amendment violation, different policies were involved than in the case of a Fourth Amendment violation. They said what they had here was a fruit of the poisonous tree case under the Fourth Amendment under Wong Sun and Brown v. Illinois. And therefore they said the cases like Manson that say you can use the identification if it's not tainted by the improper out-of-court identification or not controlling.

Now, we say that they are at least instructive on the matter of exclusionary rule policy.

QUESTION: I would think this case would be a

fortiorari from those cases. Suppose the arrest is, the so-called probable cause is based solely on an illegal show-up and anyone would agree that the arrest is invalid.

MR. FREY: Well, the Court of Appeals --

QUESTION: The arrest was invalid, they never let us put him on trial, and he is identified in the courtroom.

MR. FREY: The Court of Appeals would say that he couldn't be. That's the issue that's before the Court, assuming --

QUESTION: I thought we had already decided those cases.

QUESTION: But Mr. Frey, isn't this a different case? Isn't this a case where the witness has independent, reliable basis for her in-court identification?

MR. FREY: That would be necessary in Justice White's hypothetical.

QUESTION: And I would in my example say that the person has independent basis for the identification, the testimony comes in, it doesn't exclude it.

MR. FREY: The past cases of this Court that have dealt with the Wade-Gilbert-Stovall line of cases have addressed it in terms of due process and Sixth Amendment right to counsel policies.

Now, I think they are instructive. I think they are helpful. But when we analyze the thing through, we did not

feel that they were necessarily controlling, in the same sense that I feel analysis leads us to the conclusion that Frisbie combined with Costello and Collander are necessarily controlling here.

QUESTION: In those cases, Mr. Frey, wasn't it indicated that the defendant can of course attack the in-court identification by showing that it had this tainted basis, in an effort to persuade the jury to disregard the in-court identification? Or to undermine it?

MR. FREY: Well, but those cases are concerned in part with reliability, and I take it the Fourth Amendment exclusionary rule, as the Court said in Ceccolini, does not focus on the reliability of the testimony that is or is not subject to exclusion.

I think that my colleague will be far more motivated to press these distinctions than I am.

Now, if I can move from this point, although it could be discussed at some length, to a second point which is also hotly disputed between us, in connection with the attenuation analysis, we -- excuse me a second.

The Court of Appeals and respondent and we all seem to be agreed that the focal or critical concern with regard to attentuation, and I am now assuming that you somehow conclude that this is a fruit and attenuation analysis is proper, is the gravity of the constitutional violation.

Now, our submission is relatively straightforward in this regard. First we say that there is absolutely no basis in this record for concluding that the police acted in knowing or willful disregard of their constitutional obligations. In fact, the Court of Appeals does not deny that they had a reasonable suspicion of respondent's possible involvement in the crimes. He fit the general description; he was identified as having been at the scene on the day of the robbery; and the police had at least substantial cause to wonder what he was doing at the Monument grounds on a rainy January day.

Now, under the circumstances it was entirely reasonable for the police to detain him briefly, even to the extent of trying to get his photograph. Now, it may be, as the lower courts have held, and we haven't sought review of that question here, that the basis for their suspicion was not enough to justify the further step of taking him to the police station, detaining him for an additional hour or so, taking his photograph and calling his school while he was being held there.

But whether that's so or not so, it simply seems inconceivable to me that it can be argued that their actions were a flagrant violation of the Fourth Amendment rights of this defendant in the same sense that it was concluded by the court in Brown v. Illinois.

Indeed, I might mention that there are cases of the District of Columbia Court of Appeals that suggest in closely analogous situations that a suspect detained on reasonable suspicion may be taken for a show-up to the scene of the crime. Now, perhaps those cases would not control this case, but in any event, I think there is no basis for concluding that the officers knew what they were doing was wrong and flagrantly ignored their --

QUESTION: Well, the present posture of this case, Mr. Frey, you necessarily conceded arguendo that there had been a Fourth Amendment violation?

MR. FREY: Yes. But --

QUESTION: I'm correct in that understanding, am I?

MR. FREY: That's correct. We do not challenge that. We do not ask the Court to review that, except insofar as the Court reaches the question of the flagrancy of the violation as a consideration in attenuation analysis.

Now, it's equally significant that the scope of the violation in this case was not serious. I mean, compare it to Brown v. Illinois: The police break into Brown's apartment when he is not there. When he comes home they grab him with guns drawn and say he's under arrest. They take him down to the stationhouse with, mind you, no basis at all for doing this, and they hold him for I think six hours, during which he's interrogated.

QUESTION: Mr. Frey, I'd be interested in knowing whether you think the flagrancy or lack thereof of the Fourth Amendment violation is a proper consideration in attenuation analysis?

MR. FREY: Yes, I think it is proper.

QUESTION: You do. Do you -- so you don't think attenuation is a matter of cause and effect, but it's kind of a balancing act?

MR. FREY: It is not just a matter of cause and effect. I think this Court's decisions make that quite clear. It's certainly not a matter of but for causation.

In Ceccolini I think the Court stated that we are not talking about causation in the sense of the physical sciences, but a different concept, and I think Justice Powell in his concurrence in Brown, if I am not mistaken, said that what we are trying to do is determine the circumstances in which exclusion is useful as a means of controlling police misconduct as against the cost to society of the result that's being achieved by excluding the evidence.

QUESTION: I understand there is support for the view. I just was interested in whether you think it's a correct approach.

MR. FREY: I think it's definitely a correct approach, yes.

Now, respondent repeatedly asserts in his brief that

there was bad faith and that the officers knew they didn't have probable cause and that this was a flagrant violation, but I have read it carefully and all I find are assertions.

Now, I think I'd like to conclude, because I want to save some time for rebuttal. Respondent in his brief has repeatedly accused us of using abstruse metaphysical concepts in arguing this case. All right. Let's put sophisticated legal argument aside, and let's look at this case as an intelligent layman might.

Common sense simply crys out for reversal of the decision of the Court of Appeals in this case. There is simply no process of dry logic that ultimately can justify the holding that Carol Owens may not stand at the bar of justice and identify to a Jury the man who robbed her, when her knowledge of the man and his actions are the product of her experiences during the crime itself, and not of any subsequent police misconduct.

The D.C. circuit aptly summarized this common sense policy aspect of the case in Payne, where they said, "The consequence of accepting appellant's contention in the present situation would be that the witness would be forever precluded from testifying against the defendant in court merely because he had complied with the request of the police that he come to police headquarters and had there identified the defendant as the robber. Such a result is unthinkable. The suppression of

the testimony of the complaining witness is not the right way to control the conduct of the police but to advance the administration of justice."

Accordingly, for that reason and the others that I have discussed, we submit that the judgment of the Court of Appeals should be reversed, and I will reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Mr. Kohlman.

ORAL ARGUMENT OF W. GARY KOHLMAN, ESQ.,

ON BEHALF OF RESPONDENT CREWS

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

We, too, ask this Court to use common sense ultimately in deciding this case, and we submit that common sense dictates that if there ever is a case in which the exclusionary rule ought to be applied, it's to the facts of this particular case.

We view the facts in this case the same way that the Court of Appeals did, and we see this case, therefore, as a very simple, straightforward case. The police illegally arrested respondent. They deliberately, according to the Court of Appeals and the Trial Court's findings, violated his Fourth Amendment rights. And they had a purpose.

QUESTION: So you would have a different case if she had seen him walking down the street and went to a policeman

and said, "That's the man."

MR. KOHLMAN: No question about it; yes, Your Honor.

QUESTION: If there were an accidental encounter of that kind?

MR. KOHLMAN: That's correct, Your Honor. But in this particular case, the police at the time they made the arrest knew only the following: They were looking for a suspect that was from 15 to 17 years old, was a Negro youth, and had a smooth complexion. And the police happened to be in a public area, the Washington Monument, six days after the offense. They also knew that the respondent might have been in that public area six days earlier. That's all the police knew at the time that they arrested the respondent in this case. And they did put him under arrest.

The Court of Appeals, further looking at these facts, saw that they put him under arrest for a purpose, for a design. They wanted one specific fruit: They wanted identification testimony. The record is absolutely clear on that and, in fact, the police officers at the hearing conceded that, that that was their purpose for conducting this flagrant unlawful arrest.

QUESTION: What if the policeman taking the picture at the Washington Monument, right at the outset, had succeeded and got a good picture and she identified that? Would you be here?

MR. KOHLMAN: That is a closer question, Your Honor. The respondent never had to address the illegality of either the first detention, when they stopped and talked to the respondent for three to five minutes, or the second detention, if they had just simply been able to take his picture, because this particular event went much longer. This respondent, Your Honors, was taken to the police station, held for over an hour. He was fingerprinted, searched, questioned, and his picture was taken.

QUESTION: How does that affect the identification in the courtroom?

MR. KOHLMAN: As the Court of Appeals saw it --

QUESTION: As the matter, now, I take it, you have adopted the standard of the intelligent layman exercising common sense?

MR. KOHLMAN: Yes, Your Honor, and we do at this point have an exclusionary rule, and if there ever is a case in which the exclusionary rule should be applied, it's in a situation where the police have identifiable fruits in mind at the time they conduct the illegal arrest. And in this case the record is clear that the police wanted the fruits of a photographic identification, a lineup identification, and an in-court identification, and common sense dictates, common sense dictates --

QUESTION: What would you say if the police

illegally arrested, as they did in this case, to the station house, and they bring a witness down to identify, he's identified and he goes on trial, and they don't use that particular witness, they use another witness, another victim, this particular victim, say. Would you say that that testimony has to excluded because of the illegal arrest and the illegal pretrial identification?

MR. KOHLMAN: Perhaps not, Your Honor, and the reason for it is again the question of foreseeability, and it would go to the question of the police's intent at the time they committed the illegal arrest. If they in fact had the scenario in mind that Your Honor just described, then yes, again, the exclusionary rule ought to bar that, as the Fourth Amendment in fact does, ought to bar unlawful arrest.

QUESTION: You're just saying that once you -- really, if you deliberately arrest somebody unlawfully, you shouldn't be able to try them?

MR. KOHLMAN: No, Your Honor, not at all. And let me give another example --

QUESTION: Well, you would if you would exclude this testimony of the second witness.

MR. KOHLMAN: Only in this sense would I say that it should be excluded, Your Honor, and that's if the police --

QUESTION: Well, suppose that's the only evidence they have?

MR. KOHLMAN: If it's a situation where the police are in fact creating a situation as Your Honor described, then I think the exclusionary rule ought to bar that. If they're setting up an illegal arrest to get one identification and they have in mind later on a trial introducing yet a second identification, then we submit again common sense says that that is a fruit, in the traditional sense of the Fourth Amendment.

QUESTION: "Fruit" in the sense that the -- not in the sense that the in-court identification is the product of a pre-trial identification?

MR. KOHLMAN: In the sense, Your Honor, of a question of what is foreseeable at the time that the police committed the illegality. Did they have in mind --

QUESTION: Well, let's just suppose that the witness they use is the brother, the victim was a brother of the defendant, and everybody knows that a brother knows a brother, and they want to use his testimony in court, and there's no question that there's an independent basis for it.

MR. KOHLMAN: Yes, Your Honor.

QUESTION: It couldn't be the fruit of any pre-trial illegality. The only sense it's a fruit is in the sense that the fellow's in the courtroom, and he is therefore subject to identification, where otherwise he might not be.

MR. KOHLMAN: And my answer in response, answer to

the Court is simply that if the police had that in mind, if they had the idea of a subterfuge, that we will illegally arrest the defendant, have him seen at the police station by Witness A so that we'll have a basis for bringing him into the court so Witness B, his brother, can then make an identification, then as we see it, that is a fruit of the illegal arrest.

Now, a different set of facts --

QUESTION: Well, suppose they say, "Let's just arrest a man illegally, we really believe he's committed this crime but we don't have probable cause, but we'll arrest him and we'll get the evidence," and they do. They put him on trial.

MR. KOHLMAN: The case that this Court --

QUESTION: Do you think the conviction should be set aside because of the bad intentions, which I think are not very desirable either, but is the conviction vulnerable?

MR. KOHLMAN: No, Your Honor. At least as respondent views the Court of Appeals decision, it is much, much more narrow than that. In this particular case, the police had an identifiable fruit in mind at the time that they committed the illegal arrest. If it's a situation where they just illegally arrest somebody and hope serendipitously that other evidence will come to their attention, we submit that that might very well present a different type of case. It may or may not be the type of case that the Court would want to consider applying

an exclusionary sanction.

Another type of case that this Court has decided is Davis v. Mississippi. Davis was illegally arrested and his fingerprints were taken, and that was the basis for him being in the courtroom at the time of his trial. To the suprise of the police, to the government's surprise, the complaining witness in Davis made an in-court identification. Now, we don't necessarily see that as a fruit of the earlier illegality, because the police did not foresee that particular fruit. But in this case, the police clearly had that fruit in mind at the time it committed the illegal arrest.

QUESTION: It made no difference to your argument, then, that the trial court here concluded that he would exclude the photographic identification, but that there was an independent satisfactory basis for the in-court identification?

MR. KOHLMAN: That's absolutely right, Your Honor, for this reason: As the Court of Appeals pointed out, the independent source determination of the trial court only went to the reliability of the in-court identification. Now, that is a Fifth Amendment doctrine that has nothing whatsoever to do with the Fourth Amendment doctrine of --

QUESTION: Do you think the Court of Appeals opinion is entirely consistent internally?

MR. KOHLMAN: Yes, Your Honor, we stand behind the

Court of Appeals. Certainly --

QUESTION: I realize you stand behind it. Do you think it's internally consistent throughout?

MR. KOHLMAN: Well, to the extent that -- yes, Your Honor. To the extent that the Court of Appeals opinion primarily focuses on the question of deterrence, does it make sense in this particular case, what kind of message are we going to give the police in the District of Columbia based on our holding? Are we going to give them a message that they can conduct an illegal, flagrantly illegal arrest, and be able to profit or benefit from the fruits, or instead are we going to give them a different message, that in the District of Columbia, at least, that type of police practice is improper?

QUESTION: Well, what kind of message are we going to give robbers at the Washington Monument?

MR. KOHLMAN: Well, Your Honor, this comes down to the basic question of the exclusionary rule in the first place. As we see this case, however, it really doesn't turn on the message in the sense that the Court is using it, as far as the exclusionary rule.

QUESTION: Well, you used the term "message," I didn't.

MR. KOHLMAN: Yes, Your Honor. But what really is operating here, and the whole reason that we're in court today, is because of a violation of the Fourth Amendment; not

necessarily the exclusionary rule, but the Fourth Amendment. It's the Fourth Amendment that tells the police or should tell the police that when they have a general description and no more, that they can't make an arrest based on suspicion for the attempt of trying to produce evidence. It's the Fourth Amendment that stands at the bar on January 9, 19-- --

QUESTION: You say "produce evidence." Do you mean have a lineup in which someone, possible victims, can identify, is that producing evidence; is that what you mean by producing evidence?

MR. KOHLMAN: Yes, Your Honor. As we see it --

QUESTION: Then are you attacking the very idea of having a lineup?

MR. KOHLMAN: No, Your Honor. We only mean producing evidence in this sense: In the District of Columbia on arrests such as this based on a photographic identification is almost inevitably going to lead to a lineup, the request for a lineup, and if there's a lineup identification, then inevitably to a situation where there'll be a courtroom identification. The police clearly had all those three things in mind at the time that they arrested Mr. Crews. They had in mind all those fruits. And what the Court of Appeals decision simply says is that we have to exclude all those fruits, not just simply one or two of them but all three of them, or we will not be able to deter that type of police misconduct in the future in

the District of Columbia.

Their opinion, the Court of Appeals opinion, is really literally that simple and straightforward.

QUESTION: Well, I should think they would deter, because no one would ever be arrested.

MR. KOHLMAN: This case, Your Honor, looking through the opinions of the Court of Appeals in the District of Columbia in the last --

QUESTION: Nobody would ever be tried.

MR. KOHLMAN: Your Honor, this case stands out as a unique case on its facts, in the sense that -- as to the degree of the flagrancy and the bad faith of the police misconduct. And I think that's exactly why the District of Columbia Court of Appeals felt it incumbent to decide the case the way they did, because it really is out of the mainstream. The police misconduct here is much much more severe than is usually the typical police practice in the District of Columbia.

QUESTION: I take it from what you have just said you would regard this as much more severe than the police misconduct in Brown?

MR. KOHLMAN: Well, we submit that it's on a parallel certainly with the conduct in Brown.

QUESTION: You just said this was the most flagrant.

MR. KOHLMAN: In the District of Columbia, the facts of this case do stand out as a particularly obnoxious form of

police misconduct.

Again, they had nothing more than the most general of descriptions; a description, Your Honors, that would describe hundreds of thousands of youths in the District of Columbia.

QUESTION: Didn't they have that guide who was located there who thought he looked like a friend of his?

MR. KOHLMAN: Yes, Your Honor.

QUESTION: That's a little bit more than just one out of a hundred thousand.

MR. KOHLMAN: But still it is in a public place.

QUESTION: It is a little unusual for someone to keep coming back to the same area day after day, isn't it?

MR. KOHLMAN: Well, the guide at best said that he thought the respondent might have been at the Monument six days before.

QUESTION: Looked like a friend of his whom he -- gave him some reason to identify him?

MR. KOHLMAN: That's right.

QUESTION: It seemed to me that your argument would lead logically, and maybe you're right, to overruling Frisbie.

MR. KOHLMAN: No, Your Honor.

QUESTION: Because the police conduct there, I think, is probably more egregious than here.

MR. KOHLMAN: We think of this case and the decision of the Court of Appeals can be side by side with Frisbie and

the Ker -- and we had anticipated the government's grand jury argument as well. We're not attacking as in Collander the sufficiency of the indictment nor does this case go to the jurisdiction of the Court of Appeals.

QUESTION: In other words, would you say this is the same case as if, apart from the illegality here, they had probable cause to bring him to trial? You'd still say her testimony should be suppressed?

MR. KOHLMAN: That's correct. Now, however, if the --

QUESTION: Then how do you get around Frisbie?

MR. KOHLMAN: If the police had independent probable cause, independent from this illegal arrest, then they could bring the complaining witness to adduce an in-court identification. If the police in this case or the government in this case had independent basis for the --

QUESTION: Let's just suppose that this arrest had been made without probable cause; it's an illegal arrest; there never was a lineup; they just put the person on trial and they called this complaining witness, and she identified him in the courtroom?

MR. KOHLMAN: We submit that that would be a fruit of the illegal arrest if that was the purpose of the --

QUESTION: Well, they just arrested him. Their purpose was to put him on trial and they thought somebody could identify him, and they got somebody to identify him.

MR. KOHLMAN: That in effect is what happened in this case, because the out-of-court identifications were excluded and the government was able, however, to introduce the in-court identification. And the police, upon seeing that a conviction results in these facts and an in-court identification can still come in, notwithstanding the flagrant misconduct, we submit again, the message to the police is very clear. You can go out, particularly if you can't solve an offense otherwise, you can go out and arrest whoever you want and get him into a courtroom --

QUESTION: What about the illegal lineup cases where the identifying witness at an illegal lineup is still permitted to testify at trial, although evidence of his out-of-court identification is excluded?

MR. KOHLMAN: Well, we submit that that, again --

QUESTION: What's the message to the police then?

MR. KOHLMAN: Well, in those situations, as this Court has made clear, there are mixed reasons for suppressing the lineup identification. In part you want to deter the government from having counsel-less lineups, for instance, or unduly suggestive lineups, and therefore you might exclude the lineup. But it would accomplish too much in those situations needlessly to also exclude reliable evidence at trial.

We know that the Fourth Amendment, however, contemplates in certain circumstances, because this Court said so in

Davis v. Mississippi, excluding even reliable evidence at trial, and that's why we submit that the independent source finding of the trial judge here does not preclude or stand in the way of the Court of Appeals finding that this in-court identification, as surely as the lineup and as surely as the photographic identification, were indeed intended fruits of this particular --

QUESTION: Well, what's the message to the police if they illegally arrest and say, "Well, we'll get the evidence," and they do?

I would suppose you would argue that they shouldn't be able to try him.

MR. KOHLMAN: Respondent certainly agrees that that is a case as well that might call for the application of the exclusionary rule. The easiest case --

QUESTION: Or the no trial rule.

MR. KOHLMAN: The easiest case for applying the exclusionary rule, or if it makes any sense at all to apply the exclusionary rule, we submit, is in a situation where you have flagrant, deliberate violation of the Fourth Amendment and you have a specific purpose. The police have a specific purpose at the time they committed the illegality.

Now, it may very well be, as Your Honor is positive, if the specific purpose is just to hold the defendant --

QUESTION: So you wouldn't be here if these officers

had just been mistaken, but they had acted in good faith?

MR. KOHLMAN: We think --

QUESTION: That's never been the basis for the exclusionary rule.

MR. KOHLMAN: We submit that that would radically change the facts in this case. It is because the trial judge and the Court of Appeals found it deliberate violation and found a flagrant violation and found a purposeful violation that we submit that this case does call for --

QUESTION: You think this is more flagrant and more purposeful than the conduct of the police in bringing Frisbie to trial?

MR. KOHLMAN: Well, in Frisbie the police already had, the government already had probable cause, and frankly, except for notions of federalism, the idea that the police can go into a neighboring state and bring somebody back when they already have probable cause, when they have a basis for prosecution, is not that shocking to respondent.

QUESTION: When they do it by kidnapping instead of using the extradition procedures?

MR. KOHLMAN: Well, as the Court has pointed out in Frisbie and in Ker, it could very well be that Congress itself would want to create remedies or sanctions against the municipalities or government that actually did that, but as far as Fourth Amendment law goes, again, the defendants in

those cases, the government did have a prosecution, did have probable cause, and the difference between the two cases is exactly why the exclusionary rule needs to be applied in this particular case. Because here the government, the police had nothing; they had no way of solving this particular offense unless they committed the illegal arrest. And they knew that. They clearly knew that.

QUESTION: They were acting in a purposeful manner; do you mean that they knew they were violating the Fourth Amendment, or that they intended to find out if this man was the one who perpetrated the crime?

MR. KOHLMAN: In both senses, Your Honor. The Court of Appeals found that this was a deliberate Fourth Amendment violation in the sense that the police knew that they did not have probable cause but committed the arrest anyway. It was also purposeful in the sense that they had an object in mind, a specific fruit in mind, and that is identification testimony. So in both senses, the illegal arrest was exactly what this Court found in Brown v. Illinois, a situation where the police committed a flagrantly improper arrest and they had a deliberate goal in Brown in mind as well, a fruit in mind in Brown, and that is the confession. And in a situation where you can see what the police are doing or why they're doing it, we submit that that is a classic situation where the exclusionary rule needs to be applied.

Now, as far as the question of Frisbie goes and as far as the question of the grand jury goes, we are not challenging, and the Court of Appeals made it clear that we are not challenging the jurisdiction of the court to try this particular case, and if the government had independent evidence they could have elicited the in-court identification, or if they had other evidence they could have convicted the respondent in the case. But they did not. As it turns out in this particular case, the only evidence the government did have was the in-court identification, the very fruit that the police had in mind at the time the illegal arrest was made.

As we see this case, the decision that this Court makes will really be very similar to the decision that the Court of Appeals made when they faced these facts, and that again is a question of whether or not to sanction police misconduct in a situation where they have deliberately overstepped the line with a specific fruit in mind. And if this Court upholds the Court of Appeals decision, we think again the message will be as clear as this Court had made it in Brown v. Illinois and Dunaway v. New York, and that is that the police cannot overstep the Fourth Amendment with a specific purpose in mind, and if they do so, that that fruit cannot be used.

There are no further questions?

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

ORAL ARGUMENT BY ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. FREY: Just a couple of things, Mr. Chief Justice.

First of all, respondent states that the Court of Appeals found that the police knew they were acting unlawfully, and I simply have not found that in the Court of Appeals opinion anywhere. It is true that the Court of Appeals characterized the action as flagrant, and the basis for its characterization of it as flagrant was that it was purposeful for an investigative motive.

Now, the difficulty that we have with respondent's effort to use that as a touchstone is that it sweeps far too broadly. Virtually all searches -- there may be a few exceptions -- are made for an investigative motive or detentions of suspected individuals, and you may have the occasional case like Ceccolini where it's random curiosity, or a case where they're investigating one crime and stumble across evidence of another. But normally it's the element of purpose. That can't be the end of the analysis. It must be that in determining whether this is the kind of conduct that justifies exclusion under the circumstances you look at the flagrancy and the wilfullness of the misconduct.

Now, here it has been suggested that the police had no way of apprehending Mr. Crews and carrying on their

investigation of this quite serious crime if they didn't take him illegally to the police headquarters to photograph him. Now, that obviously is not so. They knew his name; they knew he was a student. If they had realized that what they were doing was illegal -- which by the way had the consequences of costing them the out-of-court identifications and which for all they knew at the time might have cost them the in-court identification, if the trial court had not found that to be independent -- they could have called the school system, said, "Where does Keith Crews go to school?" They could have sent an officer out there and taken his photograph at school.

So it isn't as though this was a question of the only way to enforce the law is to violate the Fourth Amendment, which is what they seem to be saying. There were other alternatives.

And the conventional deterrence that derives from excluding conventional fruits of an illegal search is, in our view, ample to deter this kind of misconduct. Of course it won't always deter it, but it's clear that the policy of this Court is not to press the principle of deterrence inexorably to its furthest point. All one needs to do is look at the standing cases to see that there are other factors that must be balanced against deterrent.

One final thing, with regard to this argument that focuses on the purpose to get a particular kind of evidence,

the consequence of that argument is that in a case like Davis against Mississippi or Bynum, which Davis discussed, the first fingerprint taken from the scene of the crime ought to be suppressed, because the purpose of the police in arresting or rounding up people was to take their fingerprints to match against the fingerprints at the scene of the crime.

Now, I don't think that there's anything in Davis that remotely suggests, and indeed it approves Bynum with the notion that at the re-trial, you could still use that first fingerprint. And here we say that Carol Ownes' recollection of the robbery is like that first fingerprint.

QUESTION: Mr. Frey, let's suppose an illegal arrest and then a perfectly good lineup and a perfectly good identification. I mean, the lineup is perfectly good in every way except that it just happens to have come about as a result of an illegal arrest. Then a trial, and this identifying witness who has independent grounds for identification is going to testify, and the government also wants to introduce the testimony of the out-of-court identification:

Is the out-of-court identification admissible?

MR. FREY: I think not, if the --

QUESTION: Do you think that's the fruit of the illegal arrest?

MR. FREY: I think it is.

QUESTION: Then why isn't the in-court identification

approved?

MR. FREY: Well, because what you have in the case of the out-of-court identification is testimony about an event, that is a lineup, which was held -- let's take the photo array first; that's the easy case.

The photo array involved the use of a photograph --

QUESTION: Let me crank in that there's no other evidence, no independent evidence of probable cause. It's just that lineup, and then there's a trial, and the only evidence at the trial is that identification.

MR. FREY: Is the lineup identification or the in-court identification?

QUESTION: Well, the prosecution wants to introduce at the trial evidence of both the out-of-court identification and the in-court identification.

MR. FREY: I think our position in this case is that the in-court identification, if it were found not to be a fruit of the out-of-court identification, would be admissible.

QUESTION: No, it's independent, everybody agrees that it's independent.

MR. FREY: The in-court identification should come in, the out-of-court identification -- I found that a difficult question, but --

QUESTION: Why would that be a fruit?

MR. FREY: Why would that be a fruit? Well, the

evidence about the out-of-court identification is evidence about an event which was created by the police in the process of conducting the investigation which began with illegally securing his photograph.

QUESTION: Well, the trial is --

MR. FREY: I understand that, but --

QUESTION: -- as a result of an official proceeding.

MR. FREY: But what we're talking about a trial is not testimony about an event that occurred subsequent to and as a product of the police illegality. We're talking about the testimony of the witness about the crime. The crime was not the fruit of an illegality. The witness' recollection was not the fruit. And the trial is the main event. The defendant is there --

QUESTION: I know, but the crucial question at the trial is, "Do you see the man who attacked you in the courtroom?"

MR. FREY: And we are confident that the answer is --

QUESTION: "Yes, I do," and so it's the identification that's the --

MR. FREY: That's correct.

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

(Whereupon, at 3:24 o'clock p.m., the case in the above-entitled matter was submitted.)