IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 02-1183

SAMUEL FRANCIS PATANE :

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Washington, D.C.

Tuesday, December 9, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JILL M. WICHLENS, ESQ., Assistant Federal Public Defender, Denver, Colorado; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-1183, the United States v. Samuel Francis Patane.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

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

Before this Court's decision in Dickerson v. United States in the year 2000, it was the uniform rule in the lower Federal courts that the failure to issue Miranda warnings meant that the unwarned statement was not admissible in the Government's case, but that there was no requirement to suppress physical evidence that was derived from those unwarned statements.

Following this Court's decision in Dickerson, which affirmed that Miranda has constitutional stature, the majority of the Federal courts of appeals to address the issue continued to adhere to the pre-Dickerson rule that physical fruits of an unwarned statement were admissible.

In this case, the Tenth Circuit broke ranks with that uniform body of authority and held that, as a result

of Dickerson's ruling that Miranda has constitutional stature, there is a derivative fruits suppression component to the Miranda rule. That holding should be reversed.

Miranda stands as a rule that implements the Fifth Amendment, not by requiring the compulsion that the Amendment literally speaks of, but by providing an extra level of protection for the core of the Fifth Amendment right, the right for the defendant's own statements that are incriminating not to be used against him in a criminal trial.

QUESTION: Is it a Fifth Amendment right or not a Fifth Amendment right?

MR. DREEBEN: Justice Scalia, as I understand it, it is a right that implements the Fifth Amendment's protection.

QUESTION: It - it has to be based on something in the Constitution or we would have had to respect the statute enacted by Congress in Dickerson. So it is - there is obviously some provision of the Constitution that enabled us to disregard that statute. What - what provision is that?

MR. DREEBEN: The Fifth Amendment. What the -

QUESTION: All right. It's a Fifth Amendment right then.

MR. DREEBEN: What the Court concluded in Miranda and then reaffirmed in Dickerson is that the traditional totality of the circumstances test for ascertaining whether a statement is voluntary or has been compelled by the Government is not adequate when the statements are taken in the inherently pressuring environment of custodial interrogation. And to provide an extra layer of protection to avoid the violation of the defendant's Fifth Amendment rights, the Court adopted a prophylactic warnings and wavier procedure.

QUESTION: Whether it's prophylactic or not, it is a constitutional right, is it not? It is a constitutional right.

MR. DREEBEN: Justice Scalia, it is a constitutional right that is distinct from the right not to have one's compelled statements used against oneself.

QUESTION: Well, so is the constitutional right not to be pistol-whipped in order to - to confess.

MR. DREEBEN: Well -

QUESTION: That's distinct from the introduction of the coerced confession at trial, but we don't distinguish between the two, do we?

MR. DREEBEN: Oh, I think you do, Justice Scalia. That is a violation of the core due process right not to have substantive violations of one's liberty interests.

What we're talking about in this case is not a substantive violation of the defendant's rights, but a procedural violation of the Fifth Amendment that this Court has defined in Miranda, but has defined it in a way that is highly distinct from the basic, textually-mandated rule of the Fifth Amendment that compelled statements may not be used.

QUESTION: Let me - let me take out the pistol-whipping. It - it - it is a coerced statement because of the application of mental coercion. Now, that is not a violation of the Fifth Amendment, I suppose, until the product of the - of the coercion is introduced at trial. Will you say the same thing?

MR. DREEBEN: I would - I'm not sure, Justice Scalia, that your question addresses what Miranda addressed. What Miranda addressed was a situation in which it was extremely difficult for the courts to sort out whether a statement was coerced or not coerced, and to avoid the risk that an actually coerced statement would be used in evidence against the defendant, thus violating the core Fifth Amendment right. The Miranda Court, as this Court has later explained, adopted a presumption, a presumption for a limited purpose. In the government -

QUESTION: May - may I ask a - a modified version of Justice Scalia's question? Supposing that the

Government used official powers, such as a grand jury subpoena or a congressional committee subpoena, to - to get a confession out of a person under threat of contempt of court, so it was clearly just a Fifth Amendment was a - he made an answer that revealed the existence of the gun and then he - would that be a - would the gun be admissible or un - inadmissible in that scenario?

MR. DREEBEN: If your hypothetical, Justice Stevens, presupposes an assertion of the Fifth Amendment right and actual compulsion of the -

QUESTION: The threat of contempt, yeah.

MR. DREEBEN: - information, presumably under a grant of immunity, then the gun would not be admissible, because this Court has defined a violation of the Fifth Amendment that involves actual compulsion as entailing two different evidentiary consequences. One evidentiary consequence is that the statements themselves may not be used. The other evidentiary consequence is that nothing derived from the statements may be used. But the critical feature of that hypothetical and its distinction from Miranda, is it involves actual compulsion. Miranda -

QUESTION: Mr. Dreeben - Mr. - Miranda itself said, but unless and until such warnings and waivers are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against

him, no evidence as a result of interrogation. That sounds like a - a - a derivative evidence rule to me.

MR. DREEBEN: It does, Justice Ginsburg, and there are many things in the Miranda opinion that have not stood the test of later litigation in this Court, because they extended the implications of Miranda far beyond where this Court has gone. And let me be precise about this. The rule, at the time of Miranda and today, is that if there is actual compulsion, the Government may not make use of the actual statements that are taken or their evidentiary fruits. The Government may also not use that statement for impeachment, and there is no public safety exception that could -

QUESTION: Well, how are we going to determine actual compulsion if it's a situation where the police knowingly engage in conversation hoping to pick up information without giving the Miranda warnings, and then the minute they start hearing something useful, give the warnings, but then rely on what they learned earlier to further that information gathering. How - how do we parse that out?

MR. DREEBEN: Justice O'Connor, the determination of whether the statements reflect voluntariness at the outset and then a knowing and - and intelligent waiver of Miranda warnings later on after they are given needs to be

determined based on the totality of the circumstances.

But this Court has recognized, in allowing the use of unwarned statements for impeachment and in adopting the public safety exception, and in permitting a second warned statement, as the Court did in Oregon v. Elstad, to be admitted into evidence, notwithstanding an earlier unwarned statement, that there is a difference between the Miranda presumption and a finding of actual compulsion.

QUESTION: May I ask you - you mentioned the public safety exception. We wouldn't - we really don't need a public safety exception if you're correct in this case, do we?

MR. DREEBEN: No, we still do, because the crucial thing about Miranda that is not challenged here is that a failure to issue Miranda warnings, followed by custodial interrogation, means that the unwarned statement is inadmissible in the Government's case in chief. That is the core ruling of Miranda.

QUESTION: But the core ruling of the public safety exception, as I remember it, is that you can use the gun.

MR. DREEBEN: No, the core ruling of the public safety exception is that you can use the statement. The Court held, in New York v. Quarles, that when pressing public safety needs justify the conduct of custodial

interrogation without prior issuance of Miranda warnings, that situation falls outside of the Miranda paradigm, and the statements themselves can be used.

Now, Justice O'Connor's dissenting opinion argued that there should be no exception for public safety for the statements themselves, but the gun, as derivative evidence, should come in, because it was not the product of actual compulsion at which the Fifth Amendment is aimed.

QUESTION: Mr. -

QUESTION: The - the difficulty that I have accepting that as the final answer is that there isn't any functional difference in a case like this between admitting the statement, the admission that he had the gun on the shelf in the bedroom, and admitting the gun. So that, in functional terms, the - the Miranda protection, even as you describe it, disappears on your theory.

MR. DREEBEN: Justice Souter, if - if I accept that that accurately describes this case, it does not accurately describe the large class of cases in which physical evidence is discovered as a result of unwarned statements. In many -

QUESTION: Mr. Dreeben, doesn't it occur - cover quite a wide number of cases? This was a case where the - the crime that the police were after were - was gun

possession. It might be narcotics possession, it might be stolen goods. And in all those situations, are you saying that the constitutional rule is that a police chief can say to his officers, go in and get him to tell you where the narcotics are, where the gun is, where the stolen goods are? We don't worry about his statement, but we want the goods.

MR. DREEBEN: Justice Ginsburg, that is my position, but I don't think it would be a prudent policy for law enforcement to adopt. This case may be one in which the Government can prove knowing possession of a firearm by the defendant even without the benefit of his statements, but police officers are not going to be able to predict in advance that that is going to be true in the vast majority of cases. What they are going to know is that if you have a statement that links the defendant to the gun, that allows you to show knowing possession. In the absence of that, having the physical evidence alone will not necessarily guarantee a conviction.

QUESTION: You don't think the gun on the shelf in the guy's bedroom is going to be sufficient to prove knowing possession?

MR. DREEBEN: Oh, I do in this case, Justice Souter.

QUESTION: You know what's in your bedroom.

MR. DREEBEN: I think that the Court should decide this case not based on the particularities of this factual scenario, but on the class of cases in which physical evidence is at issue, and should regard the question of what incentives the police may have as informed by the totality of cases that may arise.

Police officers who decide to conduct custodial interrogation without giving Miranda warnings know that they will not be able to use the statements that the defendant makes in the Government's case in chief, and they have no way of knowing before they conduct custodial interrogation what the defendant may say. If the defendant offers up information that is incriminating on unanticipated crimes or provides leads to information that the police haven't previously anticipated, then the police officers run two risks.

The first is that they won't be able to use those statements against the defendant in the case in chief. The second is that by failing to issue Miranda warnings, they increase the likelihood that a later court reviewing the facts will conclude that this is not a case of a mere failure to give Miranda warnings, but is a case involving actual compulsion. And if a court concludes that the statements are actually compelled, involuntary -

QUESTION: Well, Mr. Dreeben, supposing that the

police decide that they're going to follow this strategy that is perhaps suggested by Justice Ginsburg. Would that itself be evidence of compulsion? In other words, they won't give Miranda warnings and see - see what the person says, then they give them. Would that be evidence of compulsion?

MR. DREEBEN: It would be evidence that a defendant could argue is relevant, but I don't think that it would be evidence of compulsion. What's relevant in the compulsion analysis is what the police officers actually say and do and communicate to the suspect. Their uncommunicated intent or law enforcement policies would not add up to compulsion by itself.

QUESTION: If we were to reject your position and - and say that this is purely a constitutional violation, would you then lose the case?

MR. DREEBEN: No, Justice Kennedy. The Court should still do as it has done in other contexts, balance the costs of a Miranda suppression remedy against whatever incremental benefits there may have.

QUESTION: What's your -

QUESTION: And why - why is this different than the rule under the Fourth Amendment, say Wong Sun?

MR. DREEBEN: What the Court has done in the Fourth Amendment context is deal with an actual violation

of the Fourth Amendment and establish very exclusion - various exclusionary rules that are designed to deter that kind of police conduct. The Miranda rule is very different, because even if the Court holds that Miranda prescribes a rule of substantive conduct for the police, which we submit it does not, even if the Court were to hold that, it still is a rule that merely presumes compulsion. It doesn't constitute a finding of actual compulsion.

QUESTION: Well, we said last year in Chavez that the Miranda - that the Constitution was not violated by failure to give Miranda warnings until they were offered in evidence, didn't we?

MR. DREEBEN: That - that is correct, Mr. Chief Justice. But what the Court has done under the Fifth Amendment -

QUESTION: Is it correct, was there a majority to take that position?

QUESTION: That was the trial court's opinion, wasn't it?

QUESTION: That - that - I believe to - you're taking all the opinions together. There were six votes for that.

MR. DREEBEN: I think this Court will be better able than I am to say what Chavez held.

(Laughter.)

MR. DREEBEN: But the - the reason that that principle alone does not decide this case is that the Court has, in instances of actual compulsion out of court, applied a derivative evidence suppression rule. That's the rule that the Court adopted in Counselman v. Hitchcock, and it's followed it in its immunity line of cases where it has held that to displace the Fifth Amendment right against compelled self-incrimination, you need to suppress both the statement and the fruits.

QUESTION: Is part of your - is - is part of your reasoning that in the Fourth Amendment violation case, exclusion is the - really the best available, most direct remedy? And in - and in this case, there are other remedies, number one, excluding the statement, so that when you - when you find tangible evidence, it's - it's just a - an ancillary and less necessary remedy. Is that the whole -

MR. DREEBEN: That - that's -

QUESTION: - thrust of the argument.

MR. DREEBEN: That's the core of it, Justice Kennedy. What the Court did in Miranda was create a rule that operates in the very heart of the Fifth Amendment by creating a prophylactic buffer zone against the risk, not the certainty, but the risk, that actual compulsion has

been exacted. It is that risk that the Fifth Amendment targets as the core concern.

QUESTION: What's the theory of the compulsion? That is, what - why, assuming that there's compulsion but there hasn't been an introduction of the statement that was compelled into evidence. Under that - and suppose that the compulsion doesn't rise to the level of the due process violation. I mean, I - maybe - maybe they all do, but - but if they don't, then what's the theory of keeping out the evidence derived from that sort of compulsion.

MR. DREEBEN: Justice Breyer, as the Court explained it in its immunity line of cases, the starting point of analysis is that a defendant under the Fifth Amendment can claim his privilege against testifying based not only on incrimination from the statements that he makes, but also that evidence that the Government can obtain as a result of the statements is incriminating.

If his testimony is a link in a chain of incrimination, he can stand silent, and the Court reasoned from that that the Government should not be able to circumvent that right of the defendant not to be a witness against his - himself, by calling him out of court, compelling testimony over his objection that - based on the Fifth Amendment, and then obtaining the very incriminating information that the privilege shielded him

from having to provide.

QUESTION: So why doesn't all that apply here? I mean, is - is that - I can understand it if they compel the testimony, then you introduce it. Then - then you have the completed violation of what the Fifth Amendment forbids, all right, the completed violation. I can understand it if you compel the person to the extent that it violates the Due Process Clause, beating him up severely, whatever.

Now, I don't understand why, if you have neither of those two things, you would keep the evidence that's the fruits out, under some theory that doesn't also say you should keep this out.

MR. DREEBEN: Well, the - the distinction between this situation and the true compulsion situation is, Miranda does not involve an actual finding of compulsion, and the Court has been very frank about this. As a result, the Court has repeatedly drawn distinctions between the use of unwarned statements and the use of actually compelled statements. Actually compelled statements may not be used to impeach a defendant's trial testimony. That too would violate the Fifth Amendment right.

But the Court held in - in the Hass case and in the Harris case that statements that are merely unwarned,

but not compelled, can be used for impeachment. The Court similarly held in Michigan v. Tucker and then again in Oregon v. Elstad that statements that are unwarned, but not compelled, can be used as leads to find another witness' testimony, or to obtain a second statement from the defendant himself. And if -

QUESTION: So is this distinction that the - that - that one case is just more egregious, more an affront to the Constitution, more dangerous, i.e., physical compulsion as opposed to the compulsion that's just presumed from Miranda?

MR. DREEBEN: One case, Justice Kennedy, involves a literal violation of the Fifth Amendment. Miranda involves a presumption that this Court -

QUESTION: Well, then - then you're back into metaphysics.

MR. DREEBEN: It is a little metaphysical, Justice Kennedy, but there's a - a pot of truth, I think, a pot of gold at the end of the rainbow here, which is that the Miranda presumption does not mean, this Court has held, that a statement is actually compelled. It protects against the most crucial right contained in the Fifth Amendment itself, which is -

QUESTION: But you don't think we should differentiate based on the gravity of the - of the wrong

in either case?

MR. DREEBEN: You could look at it that - that way, Justice Kennedy. What - what the Court has done when it's dealt with a - a failure to issue warnings, is balance. It has recognized that, by providing a rule that presumes compulsion in lieu of proving it, the Court has taken a step beyond the core of the constitutional right itself, and the Court's language in its previous cases of calling Miranda warnings and the exclusionary rule under Miranda a prophylactic right is understandable in that sense. Miranda excludes some statements that are not compelled under the Fifth Amendment.

QUESTION: May - may I ask this question, Mr. Dreeben? The - there's a distinction in - in your - you submit, between a presumption of involuntariness and actual involuntariness. Do you know any other area of the law in which we've differentiated between a presumed result and an actual result?

MR. DREEBEN: I - I - I don't want to go off into an excursion into rules of law that might occur to me as I stand here, Justice Stevens. But what I do know is that the Court's own Miranda jurisprudence -

QUESTION: My understand - you're - you're - there's - there's a lot in the case that support what you say. But I'm suggesting it is kind of a unique

development of the law, because normally I would think if you presume X from Y, that would be the same as proving X.

MR. DREEBEN: It -

QUESTION: But you say that's new - that's not true in this line of - this area of the law?

MR. DREEBEN: There is language in the Miranda opinion, as Justice Ginsburg has mentioned, that would support the view that the original vision of Miranda was that it would constitute compulsion -

QUESTION: Right.

MR. DREEBEN: - not merely presume it. But as the Court developed the rule and considered what the costs and benefits would be of having a rule that merely presumed compulsion, any context in which it was not necessarily true. The Miranda Court itself recognized that not all statements taken in custodial interrogation without warnings are compelled. Once you are dealing with a prophylactic rule, it's incumbent upon the Court to balance the benefits against the burdens of the rule.

QUESTION: Of course, one of the benefits of - under the Miranda analysis, we will - we avoid the necessity of resolving difficult issues of fact sometimes. There are a lot of borderline cases to whether there really was compulsion or it's just presumed. We'll have to get back into that, under your view.

MR. DREEBEN: Well, I think the Court has put itself back into it by adopting the holdings that permit statements that are not warned to be used for impeachment and to be used to obtain leads for other witnesses.

QUESTION: Well, I guess we tell juries they can disregard presumptions, but they can't disregard facts.

MR. DREEBEN: And I think that that's what the Court has really decided is the right approach when you are outside the core concern that the Miranda Court was addressing, namely the use of the unwarned statement itself. There is a terrible cost to the truth-seeking function of a criminal trial to suppress reliable, physical evidence that was obtained not as the result of a core constitutional violation involving literal compulsion or a substantive due process violation, but merely a failure to issue warnings.

QUESTION: It's a terrible cost, but it's a terrible cost for which the law provides a ready means of avoidance. I mean, Miranda's been around for a long time. There is - there's no excuse at this point in our history for the police to say, gee, I - I don't quite understand what Miranda is getting at. And - and that's why it seems to me the cost argument is a weak one -

MR. DREEBEN: Well, I -

QUESTION: - and is a - let me just finish this

sentence. And as against that weak argument, there seems to me a fairly strong argument that if you accept your position, there is a, in - in effect, a recipe for disregarding Miranda, because in every physical evidence case, as in Justice Ginsburg's examples, there's going to be an inducement to say, never mind the statement, just get the evidence, the evidence will take care of the case.

So I - it - it - it's seems to me that we got a weak argument on one side and a strong argument on the other side.

MR. DREEBEN: Well, there - I - the argument based on cost, Justice Souter, is - is not weak, because the costs are quite real. The jury does not hear the evidence that's suppressed -

QUESTION: The costs are quite real, but the state knows how to avoid having to pay those costs. It gives the warning.

MR. DREEBEN: This Court has repeatedly recognized though that there are situations in which there are ambiguities in the way that Miranda actually applies, and law enforcement officers are going to make mistakes in the way that they apply Miranda.

QUESTION: I thought the main rule was, the police, when they take someone into custody, are supposed to give them four warnings, and that seems to me a simple,

clear rule. Now you - you're shifting this to say, well, they don't have to give the warnings up front, that's okay.

MR. DREEBEN: Yes, Justice Ginsburg. Our position is that if they don't give the warnings up front, they lose the statement that is taken without warnings. That is the Miranda rule, and it responds to the core concern that Miranda had.

The question is, how much further should that rule go? And, as I think I answered Justice Souter and yourself earlier, police officers do not know before they get hold of evidence whether they are going to be able to link it to the defendant with other admissible evidence and prove the violation at trial. They are much better off following the Miranda script, getting the admissible evidence of - of the defendant's own statements, and using it to tie the defendant to the evidence. And in a large percent -

QUESTION: Then - then why do we have - if that's the case, why do we have a case coming up in - in a few minutes in which a - a contrary policy has been adopted? I mean, it - your - your statement that - that the police have much to gain and much to lose if - if - if they - if they follow the practice of avoiding the warnings is - is not intuitively clear this morning.

MR. DREEBEN: Justice Souter, I think as the Court will hear more in the next hour, the - the officer in that case acknowledged that he was rolling the dice. There are many reasons why -

QUESTION: And there was a policy to roll the dice.

MR. DREEBEN: That officer testified that he had been trained to do that -

QUESTION: Yeah.

MR. DREEBEN: - and he decided that - that he would in that case. The FBI policy has been, even before Miranda and continuing to this day, that you issue the warnings. You avoid difficult voluntariness inquiries, you smooth the path to admissibility of the evidence, you ensure that the warned statements are admissible.

QUESTION: No, I - I'm - I'm sure that that is the FBI policy, but it - the point is, there is a substantial, apparently a substantial body of thought outside the FBI within American law enforcement that dice-rolling pays off.

MR. DREEBEN: Well, it - I think that in many cases it pays off with risks that responsible law enforcement officers often choose not to run.

If I could reserve the remainder of my time.

QUESTION: Very well, Mr. Dreeben.

Ms. Wichlens, we'll hear from you.

ORAL ARGUMENT OF JILL M. WICHLENS

ON BEHALF OF THE RESPONDENT

MS. WICHLENS: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to begin by responding to the Government's argument that Miranda warnings are not a requirement, they may be simply a matter of proving policy, but are not a requirement. Just three terms ago, this Court reaffirmed in Dickerson that - and I'm quoting from Dickerson - Miranda requires procedures that will warn a suspect in custody of his right to remain silent, which will assure the suspect that the exercise of that right will be honored.

QUESTION: Yeah, but I think, Ms. Wichlens, if you read through the entire opinion in Dickerson, it's clear that the warnings are required in order to make the statements admissible. They don't say that mere failure to give the warnings without seeking to follow up with admission is a constitutional violation.

MS. WICHLENS: That's correct, Your Honor, but in this case they are seeking to admit the evidence. So if there are two components to a Miranda violation, one being the violation in the field by the police officer, the second component is admitting the evidence at trial, and

that is exactly what the Government is attempting -

QUESTION: Well, is - isn't this a fruits case?

MS. WICHLENS: It is a fruits case, Your Honor.

QUESTION: It's not the statement.

MS. WICHLENS: Correct.

QUESTION: It is - it is derivatively obtained information.

MS. WICHLENS: Absolutely, absolutely.

QUESTION: Which might make a difference to you.

MS. WICHLENS: It could make a difference, and -

QUESTION: At least I've thought so.

MS. WICHLENS: Absolutely, Your Honor, and following up on a question asked by Justice Kennedy, whether, if this is a constitutional violation, the derivative evidence rule, the fruits rule, would apply. And my answer to that is yes, absolutely, under Wong Sun. If this is a constitutional violation, it would apply in Chavez, just -

QUESTION: Well, what - what's the magic about that metaphysical rule when we're talking about a different amendment and a different kind of statement or a different kind of - a different kind of evidence than is in the - than the rule itself was designed for primarily? I mean, I don't know why we're just bound by that metaphysical rule.

MS. WICHLENS: Your Honor, I'm speaking of Wong Sun for the general proposition that when we have a constitutional violation, turning to the Fifth Amendment specifically, the amendment that we're, of course, concerned with here. In Chavez, a plurality - the plurality opinion in Chavez made it clear that if we have a violation of the Fifth Amendment, then application of the derivative evidence rule is virtually automatic.

Now, my argument doesn't rest entirely on the argument that this is a constitutional violation. My first position is that, if it is, it's an automatic application of the derivative evidence rule. But even if it is not, then we go to a balancing and we balance the costs, the benefits of applying a derivative evidence rule.

QUESTION: Why - why would there be any cost here to anything if you took the position, as we might take, that if a policeman goes in and purposely doesn't give the warnings when he knows that he should, or even if he reasonably should know and doesn't, we're not going to let in derivatives.

MS. WICHLENS: Your Honor -

QUESTION: But in the unusual case, we're quite - it was an honest mistake, as it could be here, because he tried to give the warnings and the defendant said, no, no,

I know what they are, okay. So - so what cost, if - if - there?

MS. WICHLENS: Justice Breyer, we need a bright line in this area of the law. This Court has virtually always applied bright lines, particularly in the area of a Miranda violation.

QUESTION: Well, we've had - we've had, Ms. Wichlens, probably somewhere between 40 and 50 cases since Miranda was decided, deciding was this interrogation or was it not, was this custody or was it not. There are factual disputes about every single aspect of Miranda.

MS. WICHLENS: I think Your Honor's cases, which were, particularly in the early years following Miranda, have now made those rules quite clear what is interrogation, what is custody -

QUESTION: Well, we - we apply in this area, as regrettably in a lot of others, what we call the totality of the circumstances test. Do you call that a bright line?

MS. WICHLENS: Well -

QUESTION: It seems to me the fuzziest of all lines.

MS. WICHLENS: For the voluntariness determination, it is a fuzzy totality of the circumstances, but no, in Miranda, we apply bright lines

determining whether there was interrogation, whether there was custody. We don't try to get inside the head of the individual police officers -

QUESTION: Well, the brightest line, it seems to me, would be if the policeman knew or should have known that he was supposed to give a warning, fine, the evidence stays out.

MS. WICHLENS: Your Honor -

QUESTION: But now all we're excluding, we're just letting in evidence in those cases where it genuinely is fuzzy and no policeman knows what he's supposed to do, or - or it's at least reasonable for him not to know. Now, under those circumstances, what you do is lose evidence, lose evidence that could be useful in convicting a criminal, and what you gain is precisely nothing, since the policeman, by definition, was confused about the matter and reasonably so. Now, what's the answer to that?

MS. WICHLENS: The answer to that is, drawing that bright line, if it is one, Your Honor, I think does require us to get inside the head of the police officer. It requires us to make determinations about whether it was reasonable or not. An individual police officer may have mixed motives. We're not giving -

QUESTION: We're - we're - we're saying whether a reasonable police officer in the - in the position of this

police officer, would have - would have made the mistake.

MS. WICHLENS: If -

QUESTION: Just as - just as you say, you say for custody we apply a bright line. We don't apply a bright line for custody. The test for custody is whether - whether a - a reasonable person would have believed, given the totality of the circumstances, that he was free to leave.

MS. WICHLENS: Perhaps, Your Honor, I -

QUESTION: That - that is anything but bright.

MS. WICHLENS: Perhaps I shouldn't say bright line. What I mean is objective versus subjective, and what I urge this Court not to do is impose a subjective test, which requires us to get inside the head of the police officer.

QUESTION: Okay. Well, we can apply objective - an objective test then.

MS. WICHLENS: Under an -

QUESTION: If a reasonable police officer in the position of this police officer would - would have been confused about the necessity of giving a Miranda warning, then you're - we're at a different situation.

MS. WICHLENS: And if it is an objective test, Justice Scalia, then in this case the police officer fails that test.

QUESTION: Well, not necessarily. Didn't the suspect here say, don't give me that warning, I know what my rights are, I know about that.

MS. WICHLENS: The record shows that the detective said, you have the right to remain silent. Mr. Patane said, I know my rights. Then the detective - and this is the most crucial thing - is the detective not only didn't go on to read the other very critical Miranda rights, also didn't obtain a knowing waiver. He didn't -

QUESTION: No, wait, you left out - he said it twice, you have the right to remain silent. Patane says, I know my rights. The detective says, you know your rights?

MS. WICHLENS: Correct.

QUESTION: And the - Patane says, yeah, yeah, I do.

MS. WICHLENS: Correct. What he didn't say -

QUESTION: I know my rights.

MS. WICHLENS: What he didn't say was, do you know your right to have counsel here present, Mr. Patane?

QUESTION: No, no, I understand that a lawyer might have - who really knows this area, might have understood that you have to do more than that. But is it fair to ask a policeman who's on the line of duty when he tries twice to read him the rights, and each time the

defendant says, no, I know them, forget it. Is it fair to ask the policeman to be the lawyer who has to know you have to go and get out a paper and have him sign it and so forth?

MS. WICHLENS: It is absolutely fair to require that of a police officer. He doesn't have to be a lawyer, Your Honor. He has to have attended police academy 101. You read four warnings to a defendant, a suspect, after you arrest him. That is not -

QUESTION: Well, we're talking here about fruits, the location of the gun and the gun.

MS. WICHLENS: Correct.

QUESTION: And ever since Oregon v. Elstad, which said it didn't apply to fruits, all the courts of appeals in the Federal circuits, but one, have said it comes in.

MS. WICHLENS: That's correct, Your Honor.

QUESTION: I - this is the - from the one circuit that holds otherwise.

MS. WICHLENS: That's correct.

QUESTION: And it hasn't resulted in disaster, has it?

MS. WICHLENS: I think it is approaching disaster, Your Honor, and the case that's going to follow this one is at one end of the spectrum. We have lawyers in California going on record instructing police officers

to violate Miranda on purpose, and they actually use that word.

QUESTION: When you say violate, Miranda, Miranda is - is not a command that prohibits police officers, or that requires police officers to give the statements. It's a - it's a - it's a conditional thing. Unless they give the statements, the stuff can't be admitted in evidence.

MS. WICHLENS: I respectfully disagree with that, Your Honor. I think Dickerson has made it clear it is a command. Miranda -

QUESTION: I think - well, I think, having written Dickerson, I think differently.

(Laughter.)

QUESTION: You're - and you're entitled to read the opinion as you wish.

MS. WICHLENS: I understand, Your Honor. The way I read Miranda, its progeny, all the way up to Dickerson and including Dickerson, which, of course, you, Your Honor, Mr. Chief Justice, are the authority on, is that there are two components to a Miranda rule. If the exclusion of evidence is the core of the rule, well then the warning requirement is the rest of the apple. There are two components to the rule, and police officers are being instructed out in the field to violate, to ignore

the first part of the rule.

QUESTION: Well, that's not this case. You're arguing somebody else's case. That certainly isn't this case.

MS. WICHLENS: Your Honor, I am trying to argue the implications of this case.

QUESTION: Well, that's why I raised the point, because it seems to me you could have one simple rule maybe. I'm just tying - trying it out for all these cases. You say if the policeman knew or reasonably should have known, well, we're talking about derivative evidence, not - not the evidence itself, but derivative - knew or reasonably should have known, keep it out. But if in fact it was really an honestly borderline thing, at least if we're talking about derivative, then no, you don't have to keep it out.

Now, that's simple and we'd send yours back maybe to find out whether he reasonably knew or should have known, et cetera. And I'm testing it on you. I want to see what your reaction is.

MS. WICHLENS: Understood. Understood, Your Honor. I think we - we could pass that test, and, of course, it would need to be sent back -

QUESTION: Oh no, I'm not - I don't - I'm not so interested whether you pass it or not if you don't have

to. But I'm interested in what you think of it.

MS. WICHLENS: My preferred test is, you have a Miranda violation, you suppress derivative evidence. I think that's the simplest rule, Your Honor, with all respect. But if we do have an objective reasonableness test, in this case and others like it, it's not objectively reasonable to think you can forego three of the four Miranda warnings, and it's certainly not objectively reasonable to think that you don't have to get the suspect to waive those rights before you go on.

QUESTION: Well, so - so far as the defendant is concerned, what - what difference does it make to him whether the officer's failure to give the warnings was intentional or just negligent?

MS. WICHLENS: No difference whatsoever, Your Honor, none whatsoever. The suspect is still not informed of his constitutional rights. That's why I believe a brighter line, a simpler test, if you will, Your Honor, is more appropriate. But even under an objective reasonableness test, the Miranda violation in this case was certainly not objectively reasonable.

QUESTION: What -

QUESTION: May I ask you a background question? I think most cases you know whether there was a duty to give the Miranda warnings. Just take a case where it's

clear the officer failed in the - in the duty to give a warning. Is it not correct, as your opponent argued in the first sentence of his oral presentation, that the law has generally been settled for a long time that fruits are nevertheless admissible, and what's your response to that argument?

MS. WICHLENS: My response to that, Your Honor, is I think the lower courts have been mistaken. What they have done is taken the language in Elstad, and that decision, of course, did include some language about physical evidence, it was dicta in that case, and that's -

QUESTION: But I would think very, very sound dicta.

(Laughter.)

MS. WICHLENS: Well, with respect, Your Honor -

QUESTION: It makes a very simple rule. You can let it in.

MS. WICHLENS: With respect -

QUESTION: There's your simplicity.

MS. WICHLENS: With respect, Your Honor, it makes things simpler, but it doesn't achieve the purposes here for the reasons that some of the Justices here today have pointed out. In the case of physical evidence, the physical evidence is the equivalent of the statements. The police officers -

QUESTION: Well, let me - let me ask you this, and I'll - I'll go back and read Miranda to - to make sure. To what extent was the Miranda rule founded on the concern that compelled statements - we'll call them that - are unreliable? Wasn't that a - a significant factor?

MS. WICHLENS: That was one of the factors.

QUESTION: Now, when you have tangible evidence, then the reliability component substantially drops out of the case.

MS. WICHLENS: That's correct, Your Honor.

QUESTION: And it seems to me that that makes the, what you call dicta in Elstad, with reference to physical evidence, point to a case that's even easier than one - than the one that was in Elstad.

MS. WICHLENS: Well, Your Honor, I disagree with the conclusion there, because the flip side of that is the - the reliability of the physical evidence and the fact that if the police find out where it is through a Miranda violation, they just go and pick it up. That's what makes physical evidence different, and that what - that is what makes the deterrence factors different here. And so -

QUESTION: Well, it certainly is reliable. There's no question that it's reliable.

MS. WICHLENS: There's - there's no question. Physical evidence is what it is. I - I don't -

QUESTION: Then that's - I think that's the point Justice Kennedy was making -

MS. WICHLENS: Understood.

QUESTION: - that the statement might not be reliable. Now, there - there may be other things that work in Miranda, not just to make sure that the statement is reliable.

MS. WICHLENS: Absolutely, Your Honor. The other thing that's at work in Miranda and in the Fifth Amendment itself is the notion that the Fifth Amendment isn't just a rule of evidence, just a rule designed to ensure reliable evidence. It's also a rule that recognizes that in a free society, it's repugnant to the concepts of - concept of ordered liberty to compel a citizen to incriminate himself. And so that -

QUESTION: But we do - we do have a number of things that are permissive - permissible, like a - a voice exemplar -

MS. WICHLENS: Correct.

QUESTION: - or a blood test.

MS. WICHLENS: Because none of those involve any testimonial aspect whatsoever, this Court has made very clear. And so we don't really have the derivative evidence rule, the fruit rule, even at issue in those cases. There's no violation whatsoever in those cases,

Your Honor. There's no tree, so there can be no fruit. Here, we do have a violation.

QUESTION: You have to wind up the rhetoric to a high degree to say that all of society finds this repugnant. The man twice said he didn't want his warnings and he had a gun in the house he wasn't supposed to have.

MS. WICHLENS: And we don't know that he knew he had a right to counsel to be there while Detective Benner was saying, you need to tell us about the gun, Mr. Patane. I'm not sure I should tell you about the gun, you might take it away from me. You need to tell us about the gun. If you want to get in front of the domestic violence case, you need to tell us about the gun. I think that is -

QUESTION: Well, half the problem is that that isn't - I mean, it begs the question to say that that's contrary to established ordered liberty, et cetera, because that is the question.

MS. WICHLENS: It's -

QUESTION: Everybody, I guess, agrees that it does violate those basic principles to permit questioning of the person, compel a statement and then introduce that statement into evidence.

MS. WICHLENS: It -

QUESTION: But apparently, for many, many years, people haven't agreed under the same circumstances that it

violates ordered liberty to get a statement and get physical evidence and introduce the physical evidence.

MS. WICHLENS: What I'm talking about, Your Honor, are the two bases underlying the Fifth Amendment, going way back now, not just reliability, but also concepts of, in a free society, should we compel people to incriminate themselves? I understand that there has been a lot of water under the bridge since the framers came up with the Fifth Amendment, but I was answering the questions in terms of -

QUESTION: And a lot of it was that the police used to beat people up, say, they beat people up. Now, that's very repulsive.

MS. WICHLENS: That's correct.

QUESTION: But the answer to that is that if they come even close to that, we'll keep the statement out and we will also keep the fruits out.

MS. WICHLENS: That's correct, Your Honor. But here -

QUESTION: The - the difference is Miranda doesn't assume compulsion. You're talking as though Miranda - Miranda is a compulsion case. It isn't. It - it's a prophylactic rule, even when there has been no compulsion -

MS. WICHLENS: It's a -

QUESTION: - we keep it out -

MS. WICHLENS: It's a -

QUESTION: - we keep it out.

MS. WICHLENS: It's a prophylactic rule required by the Constitution, of course.

QUESTION: That may well be, but you can't make your argument as though what's at issue here is compulsion and our society has set its face against - against the use of anything obtained by compulsion. There - there is not necessarily compulsion. In fact, there usually isn't compulsion simply because a Miranda warning is - is not given. I expect this - this - this individual in this case did indeed know his rights.

MS. WICHLENS: We don't -

QUESTION: I - I think probably most of the people in this room could read - could - could recite Miranda just from - just from listening to it on television so often.

MS. WICHLENS: Well, Your Honor, when I pose that question at cocktail parties, people generally fall off with the fourth - the fourth warning. They don't realize that they would have a right to counsel appointed -

QUESTION: Well, I mean, that might depend on how late in the cocktail party. I mean, we -

(Laughter.)

QUESTION: I'm not in any position to pose the question later in the cocktail party, Your Honor. The importance is that the Fifth Amendment protects two things, and Miranda, of course, protects the Fifth Amendment. And if we give the police officer in the field a pass to say, Miranda's optional, you can do a cost-benefit analysis, you can decide whether you think the statements are really what's going to be important, or you can decide that it's the derivative evidence, the fruit of those statements that's going to be important. We don't have much of a rule at all.

As the Tenth Circuit summed it up very aptly, I think, quoting from the decision of the Tenth Circuit, from a practical perspective, we see little difference between the confessional statement, the Glock is in my bedroom on a shelf, which even the Government concedes clearly excluded under Miranda and Wong Sun, and the Government's introduction of the Glock found in the defendant's bedroom on the shelf. It's the same thing in the context of physical evidence.

QUESTION: But - but the latter you know is true. The former may - may have been the product of coercion and be false.

MS. WICHLENS: Correct, Your Honor, but this is -

QUESTION: So, I mean, that's a big difference if

you think the primary purpose of Miranda is to prevent false testimony from - from being introduced, then it seems to me quite reasonable to say that police can indeed make the choice, do I want to use this testimony. If I don't want to use this testimony, I won't give a Miranda warning, and anything the testimony leads to, if it leads to anything, I - I don't know how the police will always know that - that it will lead to something, so I - I think it's a - a pretty high risk enterprise.

But what's - what's wrong with it if - if you think the primary - the primary function of Miranda is to prevent browbeaten statements by - by - by confused people in custody who - who confess mistakenly?

MS. WICHLENS: The problem is, it lets the individual officer on the street decide whether he or she is going to give the Miranda warnings in a particular case or not. That's not a rule that law enforcement is behind in, here I'm referring to an amicus filed in - in the companion case of Seibert.

Law enforcement doesn't want such a rule, if I may be so bold to say that, in general. They don't want the police officers to have to be trained in the police academy to be a lawyer basically, Your Honor, and try to decide which evidence is going to be most important -

QUESTION: Well, what - what is your authority,

Ms. Wichlens, for saying that law enforcement doesn't want this sort of a rule?

MS. WICHLENS: Well, Your Honor, what I'm referring to there very specifically is an amicus filed in the Seibert case by former law enforcement and prosecution.

QUESTION: And you think they represent the views of, quote, law enforcement, closed quote, generally?

MS. WICHLENS: Your Honor, I'm a public defender. I can't speak for the interests of law enforcement. Perhaps I've been presumptuous to -

QUESTION: Well, you were - you were told in the argument by Mr. Dreeben that that is the practice of the FBI and the Federal law enforcement officers.

MS. WICHLENS: That's - that's correct. Prudent police officers, as I understood him to say, will go ahead and give the warnings. But we have some very, if I may say imprudent officers out there, at least in Missouri and California. We know about those. And there are now Web sites that police officers can go on to that instruct in this method, instruct police officers to try to decide what's really important in the case, put themselves in the position of the DA, I suppose, and decide whether the statements are really going to make the case or, in a possessory case, is it the physical evidence that's really

going to make the case?

In this case is a perfect example of that. The information was, he keeps it on his person or in his car or in his home. They're going to investigate a felon in possession of a firearm case. If they find that firearm in his bedroom or in his car, that's pretty much all she wrote. The prosecution doesn't need a lot more. They don't need the suspect's statements about where that is, and so that's why we can draw a line between physical evidence and other types of evidence.

And I could add -

QUESTION: All right. So what? That's - we're going to the same thing - let's suppose they found out about that gun without compelling anything, no compulsion -

MS. WICHLENS: But violating Miranda.

QUESTION: - no testifying against yourself.

MS. WICHLENS: But violating the Miranda rule.

QUESTION: But they didn't omit - they omitted the Miranda warning.

MS. WICHLENS: And we -

QUESTION: And the Miranda warning is a way of stopping the compulsion. But if you're willing to assume there is no compulsion, what's so horrible about it?

MS. WICHLENS: Well, I'm - I'm not willing to

assume there is no compulsion.

QUESTION: Ah, well if there is - then what you've got is Miranda as a way of getting at instances where there is compulsion.

MS. WICHLENS: Absolutely.

QUESTION: Fine.

MS. WICHLENS: Absolutely. That is the basic premise of Miranda.

QUESTION: Does that apply to the physical evidence too?

MS. WICHLENS: Yes. I mean, the - the basic premise, if we want police officers to comply with Miranda. And if I could say another word about Elstad, part of - a central part of the holding in Elstad, as I understand it, was that in that case, the initial constitutional violation is cured by the time the subsequent statement comes around. In other words, you have a Miranda violation, the Miranda warnings are not read, the person is interrogated, then the Miranda warnings are carefully and thoroughly read.

And as this Court stated in Elstad, and I'm quoting, a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statements inadmissible. We can't possibly have that type of cure in the case of physical evidence. When

the police officer is going simply to seize the physical evidence, there's no curing of the Miranda violation, and that's another way that Elstad is distinguishable.

QUESTION: But was there never a question in this case of whether the - there was consent to this search, because the defendant said twice, I know my rights?

MS. WICHLENS: And you're speaking of the consent to the search, Your Honor? Because then Detective Benner -

QUESTION: Consent to the questioning, and then voluntarily telling them, it's on a shelf in my bedroom? Why wasn't the - the whole thing pretty much like when you go to the bus terminal and say, mind if I ask you a question?

MS. WICHLENS: Your Honor, because he was under arrest. He - he had been told he was under formal arrest. He was in handcuffs. And so the Miranda warnings - the Miranda warning requirement clearly applied. And so Detective Benner was not to ask those questions without having warned him first.

QUESTION: Okay. Well, that's just a silly rule, isn't it? I mean -

MS. WICHLENS: Miranda's not a silly rule, Your Honor.

QUESTION: Well, it - it is when the person says, I know my right. What if he stuck his fingers in his

ears, saying, I don't want to hear them, I don't want to hear them.

(Laughter.)

QUESTION: But you have to read it to him anyway?

MS. WICHLENS: It's not hard to say, sorry, pal, I have to read them to you, and even if you don't want to require the officer to do that, how about, okay, pal, would you like to waive those rights? That's an important part of Miranda law also: A, inform the suspect of his rights, B, ask him if he would like to waive them.

QUESTION: We take the case on the assumption, the Government's question that there was a failure to give a suspect the Miranda warnings here, do we not?

MS. WICHLENS: Correct. Although the Government's concession in the lower courts, district court and Tenth Circuit, is that Miranda was violated because there was a lack of a knowing waiver of those Miranda rights, and that's the basis on which the district court accepted the Government's concession. But the -

QUESTION: What did the court of appeals - what did the court of appeals -

MS. WICHLENS: The court of appeals assumed a Miranda violation, and I believe repeated the language about the waiver problem.

QUESTION: May I ask you if you - there was a lot

of interruptions to your answer to my question. If you had inadequate time to say everything you wanted to say about the settled state of the law before this case arose by - in the lower courts, that's your opponent's original argument.

MS. WICHLENS: Your Honor, simply that those cases were mistaken. This Court had never spoken directly on the subject of derivative evidence rule in the context of physical evidence. And the times have changed, Your Honor. The time of Elstad and some of this Court's cases, New York v. Harris, that followed Miranda most immediately, we all assumed, naively it turns out, that police officers would at least try to comply with Miranda. And now there's this movement afoot to basically thumb their noses, if you will, at this Court's Miranda decision and say Miranda is just an option.

QUESTION: May I ask you if the state courts were uniform in the same way the Federal courts were?

MS. WICHLENS: The state courts were not. I've cited some cases in my brief, both pre-Dickerson and post-Dickerson, where the state courts were not at all uniform.

QUESTION: And was that on both the matter of subsequent confessions and physical evidence?

MS. WICHLENS: Correct, Your Honor, as I recall.

If there are no further questions from the

Court, I would ask this Court to hold that the derivative evidence rule applies to physical evidence fruit of a Miranda violation and to affirm the judgment of the Tenth Circuit Court of Appeals.

QUESTION: Thank you, Ms. Wichlens.

Mr. Dreeben, you have three minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

MR. DREEBEN: Thank you, Mr. Chief Justice. Miranda is a rule that is perfectly matched to the problem that the Court sought to address, namely the risk that the defendant's own self-incriminating statements would be obtained by compulsion and admitted against him to prove his guilt. That risk implicated two central concerns of the Fifth Amendment, one going to reliability, the other going to the state's burden to prove guilt with evidence other than that extracted from the defendant's own mouth.

Extension of Miranda to this case, which involves physical evidence that does not involve the reliability concerns that are at the heart of the Fifth Amendment, and does not involve the concern about using the defendant's own self-compelled words to incriminate him, would not only be contrary to the body of authority in the lower courts before this Court's decision in Dickerson and largely after it, but would also be contrary

to the purpose of truth-seeking in a criminal trial that is central to the Court's jurisprudence in this area.

Justice Stevens, I - as far as the Government is aware, there was no more than a handful of cases in the state courts that have followed the rule, other than what the Federal rule had been. Justice White's dissenting opinion from the denial of certiorari in the Patterson case, I believe, collects them, but this was by no means a groundswell movement in the state courts.

QUESTION: Well, I understand, but I noticed that in your brief, in your oral statement you said that they were unanimous, your brief said there was a strong majority in the Federal courts. I haven't checked it out myself but is it - is it a unanimous view in the Federal courts?

MR. DREEBEN: My understanding is that there are eight Federal circuits before Dickerson, including the Tenth Circuit, that it held that suppression of derivative physical evidence was not warranted. Since Dickerson, only the Tenth Circuit has changed its position, and there is no other court, other than the First Circuit, which follows a rule that depends on - on balancing deterrence concerns against the loss to - of evidence to the trial, that follows anything akin to the kind of derivative suppression rule that the Tenth Circuit adopted in this

case.

Thank you.

QUESTION: Well, wait, can I - if you have a minute. What if the policeman deliberately fails to give the Miranda warning in order to get the physical evidence?

MR. DREEBEN: In our view, Justice Breyer, no different rule is warranted in that situation, because Miranda continues to protect against the risk that it's aimed at. Absent actual compulsion, there is no warrant for a rule that does anything other than suppress the actual statements.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dreeben. The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)