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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 02-1183

SAMUEL FRANCIS PATANE :

- - - - -X

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 WICHLANS, ESQ., Assistant Federal Public Defender,
Denver, Colorado; on behalf of the Respondent.

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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

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

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

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

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

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

23 MR. DREEBEN: The Fifth Amendment. What the -

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

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

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

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

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

19 MR. DREEBEN: Well -

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

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

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

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

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

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

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

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

11 QUESTION: The threat of contempt, yeah.

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

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

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

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

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

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

1 determined based on the totality of the circumstances.

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

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

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

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

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

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

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

10 QUESTION: Mr. -

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

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

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

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

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

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

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

25 QUESTION: You know what's in your bedroom

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

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

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

25 QUESTION: Well, Mr. Dreeben, supposing that the

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

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

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

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

21 QUESTION: What's your -

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

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

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

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

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

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

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

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

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

1 (Laughter.)

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

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

19 MR. DREEBEN: That - that's -

20 QUESTION: - thrust of the argument.

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

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

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

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

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

1 from having to provide.

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

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

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

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

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

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

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

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

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

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

1 in either case?

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

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

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

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

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

3 MR. DREEBEN: It -

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

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

10 QUESTION: Right.

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

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

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

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

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

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

24 MR. DREEBEN: Well, I -

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 QUESTION: Yeah.

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

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

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

24 If I could reserve the remainder of my time.

25 QUESTION: Very well, Mr. Dreeben.

1 Ms. Wichlens, we'll hear from you.

2 ORAL ARGUMENT OF JILL M WICHLENS

3 ON BEHALF OF THE RESPONDENT

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

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

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

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

1 that is exactly what the Government is attempting -

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

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

4 QUESTION: It's not the statement.

5 MS. WICHLENS: Correct.

6 QUESTION: It is - it is derivatively obtained
7 information.

8 MS. WICHLENS: Absolutely, absolutely.

9 QUESTION: Which might make a difference to you.

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

11 QUESTION: At least I've thought so.

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

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

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

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

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

22 MS. WICHLENS: Your Honor -

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

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

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

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

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

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

20 MS. WICHLENS: Well -

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

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

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

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

8 MS. WICHLENS: Your Honor -

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

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

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

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

2 MS. WICHLENS: If -

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

9 MS. WICHLENS: Perhaps, Your Honor, I -

10 QUESTION: That - that is anything but bright.

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

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

18 MS. WICHLENS: Under an -

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

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

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

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

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

14 MS. WICHLENS: Correct.

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

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

18 QUESTION: I know my rights.

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

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

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

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

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

12 MS. WICHLENS: Correct.

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

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

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

19 MS. WICHLENS: That's correct.

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

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

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

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

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

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

14 (Laughter.)

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

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

1 the first part of the rule.

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

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

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

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

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

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

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

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

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

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

22 QUESTION: What -

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

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

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

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

14 (Laughter.)

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

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

18 MS. WICHLENS: With respect -

19 QUESTION: There's your simplicity.

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

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

6 MS. WICHLENS: That was one of the factors.

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

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

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

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

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

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

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

3 MS. WICHLENS: Understood.

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

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

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

19 MS. WICHLENS: Correct.

20 QUESTION: - or a blood test.

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

1 Your Honor. There's no tree, so there can be no fruit.

2 Here, we do have a violation.

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

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

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

18 MS. WICHLENS: It's -

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

23 MS. WICHLENS: It -

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

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

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

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

14 MS. WICHLENS: That's correct.

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

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

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

25 MS. WICHLENS: It's a -

1 QUESTION: - we keep it out -

2 MS. WICHLENS: It's a -

3 QUESTION: - we keep it out.

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

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

14 MS. WICHLENS: We don't -

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

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

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

25 (Laughter.)

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

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

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

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

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

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

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

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

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

25 QUESTION: Well, what - what is your authority,

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

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

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

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

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

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

1 going to make the case?

2 In this case is a perfect example of that.

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

11 And I could add -

12 QUESTION: All right. So what? That's - we're
13 going to the same thing - let's suppose they found out
14 about that gun without compelling anything, no compulsion
15 -

16 MS. WICHLENS: But violating Miranda.

17 QUESTION: - no testifying against yourself.

18 MS. WICHLENS: But violating the Miranda rule.

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

21 MS. WICHLENS: And we -

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

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

1 assume there is no compulsion.

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

5 MS. WICHLENS: Absolutely.

6 QUESTION: Fine.

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

9 QUESTION: Does that apply to the physical
10 evidence too?

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

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

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

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

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

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

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

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

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

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

1 ears, saying, I don't want to hear them, I don't want to
2 hear them

3 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

25 If there are no further questions from the

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

5 QUESTION: Thank you, Ms. Wilkens.

6 Mr. Dreeben, you have three minutes remaining.

7 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF THE PETITIONER

9 MR. DREEBEN: Thank you, Mr. Chief Justice.

10 Miranda is a rule that is perfectly matched to the problem
11 that the Court sought to address, namely the risk that the
12 defendant's own self-incriminating statements would be
13 obtained by compulsion and admitted against him to prove
14 his guilt. That risk implicated two central concerns of
15 the Fifth Amendment, one going to reliability, the other
16 going to the state's burden to prove guilt with evidence
17 other than that extracted from the defendant's own mouth.

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

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

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

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

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

1 case.

2 Thank you.

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

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

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

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

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