

1/10/69

Supreme Court of the United States

October Term, 1968

In the Matter of:

-----X
REYES ARIAS OROZCO,
Petitioner,
vs.
TEXAS,
Respondent.
-----X

Docket No. 641

Office-Supreme Court, U.S.
FILED
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Date February 26, 1969

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C O N T E N T S

ORAL ARGUMENT OF::

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Charles W. Tessmer, Esq.
on behalf of Petitioner 12

Lonny F. Zwiener, Esq.
on behalf of Respondent 16

REBUTTAL ARGUMENT OF:

Charles W. Tessmer, Esq.
on behalf of Petitioner 28

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - - x
4 Reyes Arias Orozco, :
5 Petitioner, :
6 v. : No. 641
7 Texas, :
8 Respondent. :
9 - - - - - x

10 Washington, D. C.
11 Wednesday, February 26, 1969.

12 The above-entitled matter came on for argument at
13 10:59 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

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Counsel for Petitioner

26 LONNY F. ZWIENER, Esq.
27 Assistant Attorney General
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29 Austin, Texas 78711
30 Counsel for Respondent

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 641, Reyes Arias
3 Orozco, Petitioner, versus Texas.

4 THE CLERK: Counsel are present.

5 MR. CHIEF JUSTICE WARREN: Mr. Tessmer.

6 ORAL ARGUMENT OF CHARLES W. TESSMER, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. TESSMER: I am Charles Tessmer of Dallas, Texas.
9 I represent Reyes Orozco, the Petitioner, who stands convicted
10 of murder upon circumstantial evidence by a jury in a criminal
11 District Court of Dallas County Texas, with a penalty assist
12 that penal servitude of ten years.

13 This is a classic case, presenting a violation of
14 the Petitioner's rights under the Fifth, Sixth and Fourteenth
15 Amendments of the Constitution.

16 In this case the Petitioner was the prime murder
17 suspect, had been so for four hours. At the time of his
18 interrogation he was under arrest, whether legal or not is not
19 important.

20 He was surrounded in his bedroom by four armed
21 officers. He was either asleep or had just been awakened when
22 the officers entered without his invitation or consent.

23 In this case no new trails in the criminal law need
24 be blazed by this Honorable Court. In this case, no inter-
25 pretation of prior case law need take place by this Honorable

1 Court.

2 What we have here is a simple refusal of the Texas
3 Court of Criminal Appeals to follow the simple words and
4 cautions of Miranda, Escobedo and cases involving that situa-
5 tion.

6 The facts in this case are quite simple. The de-
7 ceased was found dead at around midnight or 12:30 by a uniformed
8 policeman. A crowd had gathered. He was slumped over the wheel
9 of a car at a cafe.

10 After some investigation the detectives learned that
11 there was a possible eye witness named Miramontes. The police
12 found Miramontes, arrested him, took him downtown to point out
13 where a woman had been let out of the car who was present at
14 the scene also.

15 Then they had Miramontes direct them to Lemon Avenue,
16 some two or three miles from the center of the city of Dallas.
17 And there Miramontes pointed out the house where his friend,
18 the Petitioner, lived and the car that he was in that night.

19 Then the officers proceeded back downtown, put
20 Miramontes in jail for investigation of murder and then after
21 this belated attempt of some four hours, went back to the
22 house with three other officers. An uninvited entry was made,
23 except there was an invitation by an unidentified woman, and,
24 of course, no consent there under Amos, Stover versus California,
25 where Federal standards apply.

1 What we have here is a simple case of this: The
2 minute the Detective Brown got into that house, he admitted
3 that when he said, "What is your name?" and Petitioner said,
4 "Reyes Orozco" that he was under arrest. He was the prime
5 suspect.

6 This was no general inquiry at the scene of an un-
7 solved crime where threshold statements may be used or even res
8 gestae and the State of Texas makes no contention that we have
9 here a threshold statement or admission of guilt or that we have
10 a res gestae statement of whether Miranda applies to that or
11 not.

12 Here we have a blatant violation of Petitioner's
13 rights. What happened?

14 Q What time of the night was this?

15 A Fourty-thirty a.m. in the morning, Mr. Chief
16 Justice. Here is what happened to Petitioner.

17 Mr. Brown said, "What is your name?"

18 "Orozco."

19 "Were you at the El Farleto Cafe last night? The
20 murder scene."

21 "Yes."

22 "Do you own a gun?"

23 "Yes."

24 "Where is that gun?"

25 And Brown himself admitted that it took two times of

1 questions before Petitioner said, "I will show you."

2 Or proceeded to show where the gun was in a washing
3 machine in another part of the house.

4 Now those are the simple facts. Now what were the
5 fruits of this interrogation? Simply this.

6 If Petitioner had said, "I am guilty. I did it," the
7 facts developed from this interrogation were more damaging in
8 this circumstantial evidence case than a direct confession,
9 signed, sealed, under oath.

10 What did they get from this interrogation? An ad-
11 mission he was at the murder scene. Four hours after the
12 officers knew there had been a homicide, four hours after they
13 knew this was the prime suspect, his own friend put him at the
14 scene, his own friend pointed the house out, car.

15 Secondly, "Do you own a gun?"

16 "Yes, I do."

17 No real admission there. Many people own guns and
18 have a right to in Texas in their own home.

19 Q I take it you don't object to it.

20 A I don't contend that it is illegal because the
21 grant of certiorari was not on that basis although I think his
22 Fourth Amendment rights were surely violated by this arrest.

23 Q And certainly no probable cause?

24 A Yes, your Honor, based upon Agrila against
25 Texas, Jordanillo against United States and Barnes against

1 Texas, holding that where an arrest and search ---

2 Q Well, we are proceeding in this case on the
3 assumption that the arrest was valid?

4 A I have no -- I concede that it makes no difference
5 for the argument concede is val.

6 Although there is some question under Texas law.
7 Our law is more lenient than the laws of most States. It
8 requires a credible person to say that you have committed a
9 felony and further that you are about to escape.

10 This man was arrested at home in bed. Very unlikely
11 situation, with no warrant, no search warrant.

12 Q You mean the law is stricter.

13 A At any rate, we find the produce of that inter-
14 rogation was simply this. The admission he was at the scene
15 of a murder, the admission he owned a gun.

16 After being questioned the two times about where the
17 gun was he finally showed the Detective Brown where it was.
18 What was the fruit of this interrogation? The murder weapon
19 possibly?

20 Ballistics testimony was offered at the trial
21 showing the body from the deceased, the bullet from that body
22 matched test bullets fired from that gun.

23 Q Now just what was that introduced in evidence
24 at the trial?

25 A The testimony of his friend concerning the
altercation, leaving the question open as to whether Petitioner

1 really killed the man or his lady-friend who was not used as
2 a witness who was standing there.

3 The witness actually didn't see the shooting but was
4 close. And they jumped in the car and he saw Orozco with a gun
5 but so the woman was there, too, and wasn't used at the trial.
6 That is why the court charged on circumstantial evidence, I
7 assume.

8 Q What, resulting from ---

9 A From this interrogation.

10 Q From this interrogation was used at the trial?

11 A The damaging admissions. I was there at the
12 murder scene. The fact that his car was identified, that he
13 owned a gun, that the gun was produced and entered in evidence
14 as a State exhibit, and further that the gun was used to
15 condemn him with scientific evidence, ballistics, test shots
16 fired through that gun according to the experts introduced at
17 the trial matched the murder bullet removed from the deceased.

18 Q The gun was introduced in evidence?

19 A Yes, your Honor.

20 Q And the testimony of the arresting officer?

21 A Yes, your Honor. All of the interrogation, and
22 banning admissions made at 4:30 in his own bedroom.

23 Q What? That his name was Orozco?

24 A Orozco.

25 Q And that he owned a gun? And that he had said

1 his gun was in the washing machine and that they had gone and
2 found it there?

3 A But he had been at the scene, the El Farleto
4 Cafe ---

5 Q Well several eye-witnesses had put him at the
6 scene?

7 A All right.

8 Q With a gun in his hand?

9 A No.

10 Q Not?

11 A Not with a gun in his hand. The gun in his hand
12 after the shooting. It was dark. Two people were in an
13 altercation with the deceased, or could have been. The
14 Petitioner and the woman, Joan Perris who was not a witness at
15 the trial. I think that is why the Trial Court charged on
16 circumstantial evidence.

17 Q Circumstantial evidence, yes.

18 A But ---

19 Q Does the record show why she wasn't a witness?

20 A No, your Honor. She was evidently an eye-
21 witness who could have elucidated the transaction for both
22 sides.

23 Now, we rely without any further discussion on
24 Miranda and the guidelines which are so simple set out therein,
25 Escobedo ---

1 Q Of course, Miranda had to do with interrogation
2 in a jail or in a police station?

3 A Yes, your Honor. I think here this man was as
4 surely in jail at that moment when ---

5 Q But he was in bed in his own home.

6 A But he was surrounded by four officers at 4:30
7 in the morning who had known about him for four hours. And,
8 further, they had time to take a man back to jail, come back,
9 no warrant. They really didn't believe he was going to escape
10 or they would have gone in that house when it was first pointed
11 out.

12 But, be that as it may, here unless Miranda is to be
13 meaningful, and unless it applies to this situation where the
14 man is clearly under arrest, the police could delay taking him
15 to the stationhouse, and say, "Well, he is in his own home and
16 we can question him there without the warnings" and thereby keep
17 him ignorant of his Fifth Amendment and Sixth Amendment rights
18 under the Constitution.

19 I think this Court would agree with me that these
20 rights belong to the guilty as surely as to the innocent, as
21 to the illiterate, the naive and to the organized criminal,
22 who knows his rights and doesn't need them explained.

23 Q Your position is that the police should have
24 done -- that the Constitution required that the police do what
25 under ---

1 A That they caution him of his right to counsel.

2 Q And send for a lawyer for him?

3 A Or, further, that he need answer no questions
4 mainly.

5 Q Or arrest him.

6 A Or take him to the police station after they
7 had arrested him instead of proceeding with the interrogation
8 of ---

9 Q What if he had said, "My name is John Smith?"

10 Q And, "That I wasn't at the scene of the crime."

11 A Well, then you would have an exculpatory
12 statement which if it later turned out to be true would be
13 as damaging against him at his trial as if he said I am guilty,
14 probably more so.

15 Q Well, they might not have ever arrested him?

16 Q No.

17 A This is true, but with an eye-witness who had
18 described his car sitting in the drive-way ---

19 Q And it might have been that he wasn't at the
20 scene of the crime.

21 A This is true. I concede that.

22 Q They should take him to the police station anyway?

23 A Well, your Honor, all I can say that once he
24 said what his name was, away he went, and further they thought
25 enough about him to return twice to the scene, to order

1 additional assistance, a squad of armed police officers to
2 help with the arrest. They had made up their mind to take him
3 under arrest.

4 Q Well, you say he was just suspected of having
5 killed a man in cold blood, wasn't he?

6 A Yes. No question about that.

7 Q It is not unreasonable to ask for a little
8 additional help when you are arresting somebody like that.

9 A No question about their knowing that they claimed
10 to use any admissions he made as damaging evidence at his
11 trial. Now I point this out to this Honorable Court that this
12 Court I believe said quite lucidly in Miranda that, or in
13 Escobedo that if he is deprived of his freedom of movement in
14 any substantial way, then the cautions must be given whether he
15 be in the county jail, in his house or in a taxicab where he is
16 being questioned, or in a squad car on the way down town, unless
17 some valid exception, such as a threshold statement, a res
18 gestae, which this is four hours later questions no spontan-
19 eity there.

20 I think Professor Wigg would agree more that this
21 wasn't any res gestae. The Government of the State of Texas
22 doesn't argue that at all.

23 Now I would like to point out further that the State
24 of Texas simply argues this in their brief. And I think it is
25 all they could argue. That he was in familiar circumstances

1 or surroundings at the time he was interrogated. Were they
2 familiar, a boarding house at 4:30 in the morning, four armed
3 officers around his bed and he has just been awakened from sleep.
4 Hardly a familiar place not subject to police domination.

5 I can concede or think believe that the police
6 station would be less dominating than your own bedroom under
7 those circumstances at 4:30 in the morning, surrounded by four
8 armed officers, no cautions, no warnings, nothing.

9 I think that is the State of Texas' main argument. I
10 can believe they wish to elucidate and use the doctrine of
11 fictitious waiver that although Mr. Barkley, the trial counsel
12 objected and objected and asked for voir dire, that he didn't
13 draw the Trial Judge a motion picture of Miranda.

14 Now in answer to that I would point out that we have
15 had, since Miranda, and since it became effective, two statutes
16 in the Texas Code of Criminal Procedure that go further than
17 Miranda and require more warnings.

18 They are namely Article 15.17 and Article 38.22;
19 15.17 requires that he be taken before a magistrate as soon as
20 possible, and there given the cautions. Then a constitutionally
21 admissible admission or statement may be used.

22 Article 38.22 provides that the officer who takes a
23 statement must repeat and give the same warning and they go
24 beyond Miranda so there is no argument that can reasonably be
25 made that the Trial Judge didn't know what Mr. Barkley was

1 talking about. I think he presumed to know the import of
2 Miranda and these statutes.

3 Now, what do I mean by fictitious waiver argument?
4 Many decisions in the Court of Appeals for the Fifth Circuit
5 have applied the doctrine and refused to accept it to racial
6 discrimination in the selection of juries.

7 Most States require that you make the motion before-
8 hand, before you select the jury to quash it and put in
9 evidence. Numerous decisions hold that it may be made as late
10 as on appeal. You have here a constitutional right, a consti-
11 tutional violation and, therefore, State procedural grounds
12 may not wash out that right even though it is admirable to have
13 State criminal process move quickly.

14 But where you have justice on one side and consti-
15 tutional rights of this magnitude and on the other the question
16 of whether you timely objected or you were just a little late
17 or you didn't draw a motion picture of the objection, I think
18 the decision in O'Conner versus Ohio is recognized and the
19 constitutional right may not be waived on that basis.

20 Also in the decision of Fahey versus Connecticut
21 where there was a violation of the Petitioner's Fourth
22 Amendment rights and he took the stand and admitted certain
23 things, still the finding of the paint in the garage where he
24 had marked the Swastika on the synagogue was a right he could
25 complain about.

1 Q Did he object to any of it?

2 A I don't believe so. Now, I would further point
3 out ---

4 Q I looked in the record, and I didn't see any
5 objection at all.

6 A He continued to object throughout in the record.
7 He did not say Miranda versus ---

8 Q Did he object to the introduction of the state-
9 ments?

10 A He continued to object to all of the interro-
11 gation in the record. It is in the Appendix, Mr. Justice Black.

12 Q Yes, I was looking at the Appendix.

13 A We have it there I am certain. I reread it this
14 morning. A careful reading will show on the voir dire ---

15 Q I believe the State says he did not object.

16 A The State says that he didn't object specifically,
17 Mr. Justice Black.

18 And they cite 40.09 of the Texas Code of Criminal
19 Procedure. They do not cite 40.09.13 which allows the Texas
20 Court of Criminal Appeals to consider any constitutional error
21 or any error in the interest of justice.

22 Now the answer to this argument simply is this: The
23 Texas Court did consider and then the majority opinion written
24 by his Honor, Judge Woodley, they did discuss Miranda and they
25 sought to rely upon decisions where he is just a suspect, what

1 do you have in the truck, and he says, "Cigarettes."

2 And there you have a search after that, not Miranda
3 protected, on the street. The man wasn't the suspect. That is
4 the answer to that.

5 Q Isn't it also true that the Trial Judge when he
6 asked for the voir dire cut him off and he couldn't continue
7 his objection?

8 A He certainly did cut him off, overruled him and
9 would not allow any second voir dire of the witness and,
10 Mr. Justice Marshall, all of this took place in the presence
11 of the jury which, of course, as lawyers we all know can be
12 very damaging where you are asserting constitutional rights in
13 front of laymen who don't understand there are certain rules to
14 be evaded.

15 Q Now I would further point out that in our
16 petition for the writ, our supporting brief we point out the
17 Wong Son decision, the Silver Phone Lumber Company versus
18 U.S. and decisions of that ilk which present the fruit of the
19 Poison Tree Doctrine and certainly what came of this illegal
20 interrogation, damaging admissions, I was at the scene of the
21 murder, I own a gun. The gun itself in acting out a nonverbal
22 confession in getting the gun.

23 It is like the re-enactment of a murder scene. A
24 suspect. And then the ballistics evidence which followed. So
25 I think in view of the circumstances of this case we simply

1 have here a simple failure of our Court of Last Resort of Texas
2 to follow the simple words and guidelines set down by this
3 Honorable Court.

4 We, therefore, respectfully submit that this con-
5 viction should be reversed and a new trial awarded.

6 In conclusion I can think of no other case that
7 presents the clear picture of the Fictitious Waiver Doctrine
8 as used to wash out constitutional rights in some courts than
9 Labette against Bennett, 365 Federal, 2nd, 695, the Court of
10 Appeals for the Fifth Circuit involving a State prosecution in
11 the State of Texas.

12 If there are no questions, I have nothing further.

13 MR. CHIEF JUSTICE WARREN: Mr. Zwiener.

14 ORAL ARGUMENT OF LONNY F. ZWIENER, ESQ.

15 ON BEHALF OF RESPONDENT

16 MR. ZWIENER: Mr. Chief Justice, and may it please
17 the Court.

18 I am Lonny Zwiener, representing the Respondent. I
19 am an Assistant Attorney General of the State of Texas.

20 I agree with counsel for the Petitioner, I think the
21 main question in this case involves the interpretation of
22 Miranda and what that holds.

23 I would like to point out initially that it involves
24 a Miranda question. I just go that far. I say Miranda, I
25 think is decisive of a decision in this case.

1 I would like to initially point out the entry which
2 he condemned at least mildly into the rooming house, the record
3 does show that the police were admitted by a woman. This was
4 not explored for either by the defense or the prosecution but
5 apparently they did not force an entry into the rooming house.

6 Q Apparently they did not what?

7 A Did not force an entry into the rooming house.
8 This was a rooming house where Petitioner was located. Appar-
9 ently he was a boarder there. The record is not clear on that
10 point.

11 But the record does show that a woman admitted the
12 officers to the rooming house.

13 Q At 4 o'clock in the morning?

14 A Yes, sir.

15 Q How many officers were there?

16 A There were two detectives that had done the
17 investigatory work and they were joined by two policemen at
18 about the time they arrived at the house.

19 Q So at 4 o'clock in the morning there are four
20 police officers at the house and they were voluntarily admitted?

21 A I say the record does not show this, Mr. Justice
22 Marshall.

23 Q Who was the woman?

24 A But I would say that this is exactly what
25 happened. I think they were admitted by the land-lady.

1 Q Voluntarily by the land-lady?

2 A Yes.

3 Q You think she has access to everybody's room
4 at 4 o'clock in the morning?

5 A No, your Honor, I don't make that contention. I
6 certainly don't make it. I was replying really to this
7 suggestion or I may have misunderstood counsel that there was
8 something perhaps improper about the initial entry.

9 Now certainly she does not -- I would not contend
10 that she can permit the officers to search or enter apartments
11 in the house ---

12 Q Do they use search warrants in Texas?

13 A Yes, your Honor.

14 Q Somebody showed me some statistics the other
15 day. I don't know if they are genuine or not, showing the
16 percentage is very, very, very small that the conventional way
17 is to go in. Is that true?

18 A Your Honor, I don't think that is true. As a
19 matter of fact we have several cases pending before this Court
20 now. I will not mention their names, where there are far too
21 many search warrants.

22 Q You have form search warrants down there you
23 use in all cases?

24 A No, I ---

25 Q That is the impression that ---

1 A No, however, there are some counties that have
2 been inclined to use form search warrants. Unfortunately the
3 case that I alluded to, this Court denied certiorari in a case
4 involving a type of search warrant and the officer seized on
5 this as the stamp of approval. I have run with that type ever
6 since.

7 Q At the Court of Inquiry you didn't need anything?

8 A I don't know, your Honor.

9 Q Mr. Zwiener, I understood you to say just a
10 moment ago you wouldn't contend that a land-lady had the right
11 any time to admit people to rooms of her boarders at 4:30 in
12 the morning. What right did she have to do it here?

13 A Your Honor, I was speaking to the initial entry
14 of the house. Actually I don't think this is the critical ---

15 Q I don't care whether it is critical or not.
16 What right did she have to admit the police to this man's room?

17 A Well, your Honor, I don't know what right that
18 she had, your Honor.

19 Q If you don't know what right, she probably had
20 no right.

21 A I might go so far as to say that, Your Honor.

22 Q Very well.

23 A I am sorry that I got off on this entry, because
24 I think counsel and I agree that the entry and the arrest were
25 not really the controlling thing. I do think they were

1 certainly probable cause to make the arrest at this particular
2 juncture.

3 Q There was an arrest made at this juncture?

4 A Yes, sir, and this is, of course, what gives us
5 perhaps the fact that there was probable cause raises into the
6 State's focus this Miranda problem, because certainly, sus-
7 picion focused on a certain man that was at this cafe.

8 Q When you say at this juncture you mean when the
9 man was in bed? He was arrested when he was in bed?

10 A Yes, sir, he was, but what I was saying is the
11 fact that there was probable cause meant that suspicion had
12 focused on him and this brings into play Miranda even more
13 strongly.

14 Q He was arrested after he stated his name?

15 A That is true.

16 Q Up until then they didn't know who he was, is
17 that right?

18 A Well, that is true.

19 Q When he said his name, when he said his name,
20 then the officers said at that point he was under arrest because
21 they had evidence that a man by that name had just shot and
22 killed somebody. Isn't that right?

23 A That is true, sir.

24 Q But you take the record as Judge Morrison read
25 it, there was an arrest?

1 A I beg your pardon?

2 Q You take the record as your Judge Morrison took
3 it, not necessarily in the final result but in the terms of
4 there being an arrest?

5 A Your Honor, I don't know. The police officer
6 did state that after he identified himself that he considered
7 that he was under arrest. I am not sure that that is determina-
8 tive what a police officer says. I think a court can look
9 farther into the fact and perhaps judge that not only is the
10 name necessary but were you on the scene of the crime, and so
11 forth.

12 But actually ---

13 Q But you are not contending there was not an
14 arrest then are you?

15 A No.

16 Q You are conceding that there was one as soon as
17 he spoke his name?

18 A I say the police officer so testified. I think
19 they were.

20 Q Well, do you think that if they had said, "What
21 is your name? You are under arrest." Drive him to the police
22 station they would have had to give him the Miranda rule?

23 A I would say yes it would be required with this
24 qualification which is the point that the State relies on in
25 this case. It is a question of waiver. This is our main

1 contention. We did mention in our brief that this was not
2 distinguishable from Miranda in that he was not at the police
3 station but really our principal contention is that there was
4 a waiver here.

5 This was in January. The arrest was in January,
6 1956. This case was tried in August of -- did I say '56? I
7 meant '66. The case was tried in August of 1966. Miranda was
8 handed down in June of 1966.

9 And what we are saying is that lawyer, that defense
10 lawyer, had the advantage of Miranda when this case was tried
11 in August, an advantage which the police officers did not have
12 in January of 1966. They didn't know about Miranda at that
13 time.

14 Q When you talk about waiver you are not talking
15 about waiver by Mr. Orozco, at the time of the interrogation?

16 A No, sir. I am not. I am talking ---

17 Q You are talking about waiver at the trial by
18 his counsel?

19 A Yes, sir, I am.

20 And I would like to distinguish O'Connor versus
21 Ohio, a case that I used to cite until this Court sent it back
22 -- it went back to Ohio and came back up here that there could
23 be a waiver of constitutional rights. O'Connor, I believe this
24 court said, that if the right was unknown to defense counsel,
25 defense counsel could not be expected to urge this constitutional

1 right, later defined in this case the constitutional right was
2 defined some two months prior to this trial. They were saying
3 that counsel did, he did make objections but he seemed to be
4 objecting on an entirely different basis than Miranda.

5 Q He was -- he was conoid, wasn't he?

6 A I don't think he was, your Honor. He was given
7 the witness on voir dire and he examined him on voir dire and
8 then at a later point after the State was taking him, had the
9 witness back, he made objections and he said, "Well, can I have
10 him on voir dire?"

11 "Not at this time." Or something like this.

12 Q Where do we find that colloquy in the appendix?

13 A You are referring to exactly what, your Honor,
14 what ---

15 Q The objections, any objections that he made to
16 the introduction of this kind of testimony?

17 Q Fifteen to seventeen.

18 A Page 17 is his, I would call it, cumulative
19 objection. Right in the middle of the page,

20 "MR. BARCLAY: All right, now at this time we will
21 object to any testimony." With reference to the conversation
22 and then goes on to relate his objections.

23 He says they failed to lay a proper predicate, he
24 objected to the manner of arrest, and that the -- whatever this
25 means -- it failed to comport with the Code of Criminal

1 Procedure and that the prosecution failed to show why it did
2 not get an arrest or a search warrant.

3 Q Don't you run into difficulty though in that
4 argument with the fact that your Appellate Courts passed on the
5 Miranda question?

6 A Well, your Honor, I would be less than candid
7 if I didn't think there were difficulties in this case.
8 Certainly there are.

9 Q And that is one of them.

10 Q Well, I was putting it perhaps under statement,
11 doesn't it wash your point out?

12 A I beg your pardon?

13 Q Doesn't it wash your point out on waiver?

14 A No, sir, I don't think that it ---

15 Q So far as we are concerned.

16 Q Your appellant court of your State could have
17 said "This Federal question was never raised and, therefore,
18 we ---

19 A Never properly raised.

20 Q Never properly raised and, therefore, we will
21 not consider it and that might have been a perfectly good
22 ground but the fact they did consider Miranda and Escobedo
23 and everything else, they did consider the Federal question
24 and pass on it.

25 So, doesn't that as Justice Harlan says, "Will your

1 point operate?"

2 A Well, I would not concede that it would. I
3 think that if I had been writing an opinion I would have
4 written it on a different basis. I would distinguish Miranda
5 differently.

6 It possibly would present a case for reinterpretation
7 of the law by the Court but I don't think that it necessarily
8 does wash the point out.

9 Q Your Texas Appellate Court considered and passed
10 on the Federal constitutional question. Is that fair? Is that
11 correct?

12 A I hate to be evasive with the Court and I hate
13 to make this statement that I am going to make, too, because I
14 would hate for this Court to write an opinion that the Assistant
15 Attorney General is not quite sure what basis the Court of
16 Criminal Appeals decided this case.

17 But in fairness I am not exactly sure how they
18 arrived at their decision. I think they just decided -- well,
19 I have some difficulty. I trust these words will not come back
20 to me in an opinion but I do have difficulty rationalizing
21 their decision.

22 Actually the majority ended dissent. But I do,
23 nevertheless, I do urge that counsel should have pointed out
24 with some particularity what he was meaning if he had Miranda
25 in mind at the time of the State trial, what it was that he was

1 objecting to so that the trial court could be apprised of the
2 Miranda question and this matter could have been corrected and
3 cured at that time because I think the case could have been
4 tried a won without the use of this testimony and actually
5 without the gun that was seized at the rooming house.

6 And had that objection been made, had the trial court
7 had the opportunity to pass on it, then perhaps as I say, a
8 conviction would have been had and this matter would not have
9 gone this far.

10 Q Can you distinguish Miranda, Mr. Attorney
11 General?

12 A Well, this was not at a police station, your
13 Honor.

14 Q Not what?

15 A This interrogation did not take place at a
16 police station. In candor I cannot distinguish Miranda. That
17 is the reason I am arguing waiver.

18 Q Aren't armed police officers a part of the
19 police station?

20 A No, I wouldn't say that, your Honor.

21 Q You mean that when ---

22 A We could make them, we could make any little
23 place that they happened to be a police station, but I would
24 not say it.

25 Q Well, have you ever seen a police station

1 without armed policemen?

2 A A police station. I don't know that I have,
3 your Honor.

4 Q I doubt it.

5 I, for one, can see very little difference between
6 four police officers armed and holding a man in complete
7 restraint in a police station, a precinct, the middle of the
8 street, the middle of Madison Square Garden or in his own
9 bedroom.

10 I think it is the restraint and the policemen that
11 makes it necessary to give the warning.

12 A I would say that I don't agree with all that
13 because I would say if you are in restraint with members of
14 your family, members of the Supreme Court, it would make a
15 big difference on, of course, the pressures the police would
16 apply.

17 If four police had a man in custody in this court I
18 don't think he would be as inclined to confess.

19 Q Now wait a minute. I don't think I meant in any
20 of my hypothetical there was any family around.

21 A Well, your Honor, you were saying wherever.
22 And in this particular case I don't see much difference.

23 Q Because there was no family there. He was in
24 a rooming house. So don't you agree that if he had said to
25 the judge, "I object to this and cite Miranda verbatim," with

1 the citation that you wouldn't have any case?

2 A Yes, sir, I would say so.

3 Q You agree?

4 A We are arguing waiver. That is our principal
5 contention here that the trial court should have had the
6 opportunity to pass on the Miranda question at that time so
7 that this issue would not be litigated at this point.

8 If there are no other questions, thank you.

9 MR. CHIEF JUSTICE WARREN: Mr. Tessmer.

10 REBUTTAL ARGUMENT OF CHARLES W. TESSMER, ESQ.

11 ON BEHALF OF PETITIONER

12 MR. TESSMER: By way of brief rejoinder, the record
13 is not clear on the identity of the woman who admitted the
14 police. There is no evidence that she was the landlady or
15 whatever the case may be.

16 Further, I would like to point out briefly that when
17 the objections were made numerously over some seven pages of
18 the record by Mr. Barclay, he used the word predicate and
19 predicate means what must be shown prior to using the evidence,
20 authenticating a document, proving up a letter.

21 Now, certainly any trial judge is presumed to know
22 that a predicate for admissions this damaging must be a com-
23 pliance with the caution.

24 Further, had there been no objection at all, by
25 trial counsel, then I think the only waiver you could have in

1 that situation would be that it was concurred in by the accused
2 or at least it was trial strategy.

3 In Henry versus Mississippi, the first submission,
4 this Honorable Court held that Fourth Amendment rights weren't
5 necessarily waived by failure of the Mississippi attorney to
6 object and I believe the case was remanded for a hearing to
7 determine why he failed to object to an illegal search and
8 seizure.

9 If there are no questions, thank you, your Honors.

10 (Whereupon, at 11:35 a.m. the oral argument in the
11 above-entitled matter was concluded.)
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