Supreme Court of the United States

October Term, 1968

In the Matter of:

MARTIN RENE FRAZIER,

Petitioner,

vs.

H. C. CUPP, WARDEN,

Respondent.

Docket No. 643

Place Washington, D. C.

Date February 26, 1969

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Martin Rene Frazier,

Petitioner,

v. No. 643

H. C. Cupp, Warden,

Respondent.

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

The above-entitled matter came on for argument at 11:35 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

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Philadelphia, Pennsylvania
Counsel for Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 643, Frazier, Petitioner versus H. C. Cupp, Warden, Respondent.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Feuerstein.

ORAL ARGUMENT OF HOWARD M. FEUERSTEIN, ESQ.

ON BEHALF OF PETITIONER

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

I am Howard M. Feuerstein of Portland, Oregon, representing the Petitioner, Martin Rene Frazier, who is a prisoner in the Oregon State Penitentiary, serving a 25 year sentence for second degree murder.

This case involves Frazier's petition for writ of habeas corpus and involves three distinct issues.

The first issue is whether Frazier was denied right of confrontation when the prosecution placed before the jury in its opening statement the confession of a co-indictee, who later invoked his Fifth Amendment right not to testify.

The second issue is the admissability of Frazier's written statement and whether the obtaining of that statement violated Escobedo versus Illinois, or in the alternative that statement was involuntarily given.

And finally, the case involves an issue of validity of a search and seizure of certain clothing of Frazier.

The District Court granted the writ of habeas corpus on the right of confrontation and on the confession issue and did not rule on the search and seizure issue.

The warden appealed and the Ninth Circuit reversed the District Court finding against Frazier on all three issues. This Court granted certiorari,

If it please the Court, I will discuss the facts as they pertain to each issue separately.

Frazier and his cousin Rawls were jointly indicted for first degree murder in the strangulation slaying, one Russell Marleau.

Frazier entered a plea of not guilty and at the time of Frazier's trial Rawls had entered the plea of guilty to a reduced charge of second degree murder and was in jail awaiting sentence on that charge.

At Frazier's trial, Frazier's defense attorneys admitted that Rawls, Frazier and Marleau were together at the time of Marleau's death and that an altercation occurred. The defense, however, asserted that it was Rawls that strangled Marleau and that Frazier had no part in the strangulation.

The prosecution, of course, denied this. They had ample evidence placing the three at the secluded scene of the crime. They, of course, had no direct evidence as to who did the strangling because there are no other eye witnesses.

Q He was also hit on the head?

A That is correct. However, that was not the cause of death.

The prosecution primarily tried to impeach Frazier's version of what had transpired. The day in which Frazier's trial was to start, prior to impaneling a jury, the attorneys met with the judge in chambers.

At that time Frazier's attorney informed the District Attorney that he had heard that Rawls had been subpoenaed, that he had just talked to Rawls' attorney and been informed that Rawls would not testify if called to the stand.

We know that prior to this time the District Attorney was in possession of conflicting evidence on whether or not Rawls would testify.

A jury was impaneled and the next day the District Attorney made his opening statement. In the course of the opening statement he said that the officers had talked to Rawls during their investigation and that the District Attorney was going to call Rawls as a witness.

At this point, holding Rawls confession in his hand the District Attorney proceeded to paraphrase that confession. The defense moved for a mistrial after the opening statement which was denied. Later the District Attorney called Rawls to the stand and Rawls appeared with his attorney and refused to testify.

Defense renewed his motion for mistrial and a hearing

was held before the judge. The motion was denied.

Q Is there any rule in your State that if you are going to introduce evidence along a certain line you have to mention it in the opening statement?

A Well there is no requirement that you ---

Q There is none?

A --- have to mention it in the opening statement.

Q There is none?

A No, your Honor.

Q Was the paper that the District Attorney was holding on his opening statement referred to in his opening statement?

A Yes.

Q As a confession?

A It was not referred to as confession. If you read the opening statement which is in the appendix on pages 41 to 43, the relevant part, you will find that, for instance, that near the very first the prosecutor said that it is Rawls' version that such and such occurred.

He stopped and he said, "Maybe I am wrong. I will look here as to whether Rawls said he hit him first." And there are other times we have phrases like "Rawls said" or "Rawls' version" so that there was a clear inference that the officers had talked to Rawls, two, that Rawls had given his version to the officers, and three, the inference is inescapable that what

the District Attorney was doing was setting out before the jury what Rawls' version was and what Rawls had told the police.

Q The written confession itself we have never was introduced?

A That is right. In fact the defense never saw the written confession and so Rawls later changed his plea to not guilty and was introduced in Rawls' trial.

No specific instructions were requested of the judge and the judge did not give one to disregard these particular comments in the opening statement.

The judge did, however, in his general charge to the jury indicate that statements of counsel were not evidence.

Q How long was this trial?

A Pardon, your Honor.

Q How long was this trial?

A I think the trial lasted approximately a week.

The District Court based its decision on this Court's opinion in Douglas versus Alabama. The Court made a recall in that case, the prosecutor by means of leading questions placed the accomplice's confession before the jury while the accomplice was on the stand asserting the Fifth Amendment.

The Ninth Circuit and the warden wished to distinguish Douglas versus Alabama in a later case of Bruton versus United States, on the ground that here the prosecutor acted in good faith, and that the statement was not unfair or prejudicial to

the defendant.

We submit, however, that the rule under Douglas and Bruton is that where the prosecution places the substance of an accomplice's confession before the jury and the defendant is denied the right of confrontation if that is not subject to cross-examination.

We submit that the defendant is just as surely denied his right to confront and cross-examine Rawls whether or not the prosecution acted in good faith or in bad faith or was merely negligent in placing this before the jury.

Perhaps the Ninth Circuit and the warden had confused the right of confrontation which is a fundamental right with the more general due process right against prosecutorial misconduct.

Q Under Oregon law is the State limited to introducing its case in chief, evidence on, said in the opening will be produced?

A No, your Honor. Not that I know of. As far as I know that ---

Q In other words, if the prosecution made no opening statement it could still introduce?

A As far as I know, yes.

The warden also attempted to distinguish the Douglas case from the present case by saying that here the statement was made in the opening statement and was in the form of expected

testimony. As I have already indicated the prosecutor, a district attorney, clearly implied that Rawls had made a statement, that Rawls had said these things, so that he clearly raised the inference of past statements, rather than future statements.

Certainly one cannot constitutionally distinguish remarks that counsel made examining witnesses from remarks of counsel made in opening statements. The right of confrontation is not suspended during opening statements.

The warden has hinted that the statement was not prejudicial. But we would point out that Rawls was the only other eye witness to the crime and there was no other evidence in the case to the effect that Frazier strangled Marleau and this was the key issue in the case.

Nor, particularly under Chapman versus California, can one assume that the jury forgot or ignored what the prosecutor said in his opening statement.

Surely when Rawls took the stand and refused to testify and then the motion for mistrial was made, the jury must have speculated on what Rawls would have testified and on what was said in the opening statement.

Q What was the elapse of time between the opening statement and the appearance of Rawls?

A I would say there was several days.

The prosecution contends that holding the prosecution

accountable for what it says in its opening statement had an adverse effect on future cases.

We submit that this is not true. If I were a prosecutor and I had a case in which I wanted to use a witness who may or may not assert his right to testify, I have a choice. I can say nothing in the opening statement about this witness' testimony and if he does not testify then no harm has been made.

On the other hand, if he does testify, then in my closing argument I can make all the mileage out of it that I want. There may be cases where the testimony of this witness is so critical to the prosecution's case and the prosecution may be so sure that this witness will testify that the prosecution will take a calculated risk by bringing it out in the opening statement, knowing full well that there may be a mistrial if the witness does not testify.

Q Supposing the prosecutor in this case, the morning before he called Rawls, he had gone down to see him and said, "Are you going to claim your privilege or not?"

And Rawls says, "No, I am not going to claim my privilege."

And then he puts him on the stand and Rawls has a change of heart.

What would you say then?

A I would say that the effect on the defendant is just the same even though the prosecutor has the best faith in

the world, the best reason in the world that this man would testify because the fact is that the right of confrontation is basic to our adversary system.

You put in effect a deposition or a written statement of a witness which is subject to cross-examination and if it goes before the jury, no amount of good faith will cure that.

Q So you are arguing in this case excepting the findings of the court below that there was no prosecutorial misconduct?

A Your Honor, more accurately I think I would say that rather than excepting, I would say that it does not matter. I would point out, however, if the Court should find that good faith is critical, then I would say that good faith and bad faith are defined variously for different purposes in the law.

And I would say surely when the prosecutor goes forth blindly with conflicting information and does not conform or deny that information that that is probably bad faith.

Turning to the admissibility of Frazier's confession, at the time Frazier was taken into custody ---

Q Let me ask you one question.

A Yes, sir, your Honor.

Q I have some recollection from the briefs that are intermediate to the first conference before the trial where counsel for the defendant said that Rawls was going to claim his privilege, that there was some other information that the

prosecutor had before Rawls took the stand that he was not going to claim his privilege. Am I wrong about that?

A What occurred was after Rawls refused to testify hearing was held and the prosecutor then told the judge under oath what this information was and as I read that testimony, and as I understand it, prior to the trial the prosecutor had talked with Rawls' attorney or at least the prosecutor's deputy, Rawls' attorney told the deputy they had talked to Rawls, that Rawls would not testify.

However, some time prior to the trial, I think a probation officer or perhaps a relative of Rawls and maybe some other people, they said that they thought that Rawls would testify anyway.

So, in effect, if the prosecutor had conflicting information, when it came time for the trial, as far as I can tell I do not believe the prosecutor indicated that he re-checked on this information after that beginning conference.

On the confession issue, it is clear that the investigation had focused on Frazier and Rawls at the time Frazier was taken into custody. In this case we have a tape recording of the entire interrogation. Briefly it indicates that there was preliminary question prior to any warnings being given at which time Frazier denied having been with Marleau that night.

Frazier was then told that he had a right to attorney

and whatever he said could be used against him. Then the questioning became more accusatory, but Frazier still denied being with Marleau.

At that point the interrogator falsely told Frazier that Rawls was in custody and that Rawls had told everything. In fact Rawls was still free and the police had not yet talked to him.

The interrogator used various standard emotional fields, such that Frazier should not shoulder the entire blame himself, reference to Frazier's dead mother -- he was on emergency leave for a funeral leave at the time -- and after that Frazier admitted having been with Marleau the night of the crime.

And he told the officers what happened up until the time the threesome arrived at the scene of the crime. Then Frazier stopped. He said, "I think I had better get a lawyer before I talk any more. I am going to get into more trouble than I am in now."

The officer replied, "You can't be in any more trouble than you are in." And then proceeded with the interrogation.

Frazier then gave his entire version of what transpired although he still denied that he strangled -- pardon me your Honor. That is right, this was before Miranda.

Q Before Miranda, yes.

A That is correct, your Honor.

Frazier then made a complete oral statement of what transpired although he still denied that he strangled Marleau. The officer offered to type up the statement if Frazier would sign it, pointing out that the officers would testify to his oral admission anyway, and that he would be entitled to an attorney after arraignment, which would be made that night.

Frazier signed a written statement then which contained the standard warnings and waivers, some of which were mimeographed, others were typed on the statement.

Q This was before Miranda and I didn't know that there were any standard warnings before Miranda.

A You see, your Honor, this case is somewhat peculiar in that at the time of this interrogation, the Oregon Supreme Court had decided the Neely Case in which interpreted Escobedo in the broad sense. It was liberal interpretations of Escobedo.

Q Perhaps in a way it rather anticipated the Miranda Case?

A That is correct, your HOnor.

So the officers, I think, only recently instituted this procedure of the standard phrases.

Q I see.

And he was given those warnings?

A These were in the written statement. Of course,

these warnings were not made, at least the warning of the right to remain silent was not made prior to his oral admission.

Q Yes.

A We submit that the written statement was clearly a fruit of the oral interrogation since the officers told him that they would testify to the oral admissions if he didn't sign the written statement so he might as well get it in writing.

This case is also interesting in another facet in that we not only have a tape recording of the entire interrogation, but we have a thorough psychiatric study of the accused. Frazier had an insanity defense of psychiatrists, psychologists and an oral surgeon that testified at the trial.

We know that Frazier had a passive personality. One of the psychiatrists said he was like a leaf blowing in the wind, that he is subject to discipline and direction, that his interal punitive personality in which he tends to turn the blame within or to blame himself for whatever occurs, that he was shy and immature and, of course, we know that Frazier had no prior experience with interrogation.

On the Escobedo ---

Q He was home on leave from the Marine Corps?

A Yes, your Honor.

Q For his mother's funeral?

A That is correct, your Honor.

Q His mother had been a widow. The psychiatric report showed that he had an over-possessive mother or what?

A That is correct.

She had been pretty ill throughout his life and had been on medication and had been abusive at times, yet he was still very close to her.

Q Yes.

A He had no other family other than the Rawls.

Q How old was he?

A He was 20 years old at the time.

With respect to Escobedo, the State contends that this was not an adequate request for counsel. We submit that this timid, plain request for counsel is all that is required. Nothing in Escobedo or why an aggressive demand for counsel.

If Frazier had stopped and said, "I won't say anything more to you until you give me an attorney," he doesn't need an attorney because he won't confess.

He asked for an attorney and his request was turned aside and ignored.

Q Didn't Johnson against New Jersey limit Escobedo on facts?

A That is true. Then the question arises in the context ---

Q What are the facts?

A Yes, and what are the critical facts.

Q Yes.

A Of course, the fact that this man's name is not Danny Escobedo is not a critical fact of that case.

Q But Escobedo did have a retained lawyer who ---

A Yes, that is the other distinction which the State has put forward that in Escobedo the accused already had an attorney where here Frazier did not have an attorney at the time he requested one.

We simply submit that the fact that Frazier did not have the foresight or opportunity to hire a lawyer before he was arrested is not a valid ground for distinction.

As to the voluntariness of the confession, of course, this Court must review all the circumstances which it has now has a great deal of information with which to do that, we submit that under all the circumstances this was a confession, a product of a will overborn.

That this is a case where the will of a passive, immature, interal punitive person, not previously interrogated, was overborn by aggressive interrogation using falsehoods, denial request for counsel, emotional apeals and lack of warning.

There is one other question on the issue ---

Q Was the issue of coercion submitted to the hearing?

A Yes, it was submitted to the jury. That raises

somewhat of a problem, I believe, to the State's next contention that Frazier waived his objection to the admission of the confession because he took the stand and testified.

The fact is that the State agreed to placing the voluntariness of the confession before the jury so the issue was still in the case when Frazier testified.

In any case, the series of State cases are cited in the Warden's brief, state that if the accused takes the stand and repeats substantially the confession, the substance of the confession, that he has waived the right to object to the introduction of the confession under certain circumstances.

The first problem is that even under those cases the State does not fit within the test because the test requires that the defendant not deny, minimize or explain away the statements in his confession.

But in at least two respects Frazier's testimony at the trial differed from his confession and the prosecution on cross-examination brought these out and attempted to impeach Frazier's credibility. And his credibility was one of the key issues in the case.

Moreover, as in the Ninth Circuit in Gladden versus Unsworth, and that is not cited in the briefs, it is 397 Fed. 2d 373, indicated the State cases relied upon by the Warden do not set forth the Federal standard of waiver.

The Federal standard, of course, is an intelligent

relinquishment of a known right. And we can find no indication that Frazier when he agreed to take the stand, being faced with the reference to Rawls' testimony in the opening statement intended to waive his strong objection to the admission of the written statement.

Certainly it cannot be said that there was no prejudice in the admission of the written statement, assuming prejudice is relevant at all under Chapman and other cases dealing with forced confessions.

The fact that Frazier's written statement was used to impeach his testimony and the fact that the State may not have made up a prima facie case without the written statement I think indicates that there was prejudice.

On the search and seizure issue, the facts are relatively simple. Frazier and Rawls shared a bedroom in the home of Rawls' parents. Frazier had all his possessions in his military bag or duffel bag.

Q Frazier and Rawls were first cousins, were they?

A I believe so, your Honor.

Q So Mrs. Rawls was your client's aunt?

A I believe so, although I do not believe that they were close in contact respects. I don't know that they got along very well.

The bag had three separate compartments, two side-zippered compartments and a center compartment. Apparently

Rawls put some of his clothing in a side-zippered compartment, one of them.

Q Is there any contention that that was without Frazier's consent?

A There is no evidence in the case whether Frazier consented or not. There is no evidence one way or the other. We do know that from Rawls expected testimony of the opening statement that Rawls' version is that he had permission.

Q Well, would your argument change if it were clearly shown that he did consent?

A Well, no, because I am willing to assume for purposes of argument that Frazier consented to the placing of the clothes in the side compartment. I have no objection.

Q All right.

A I have no objection to that assumption.

The problem is that when the police arrested Rawls and asked him for the clothes that he wore the night of the crime he said they could have them but they were in a blue flight bag in his room.

The police went up, they took the bag, they took it back to headquarters and searched it.

The State contends that because Rawls was a joint user of the bag he had the power to consent to the search of the bag and the police had the power to seize whatever they found in the course of the search.

There is one difficulty with that, your Honors. That is, that Rawls was a joint user of only the side pocket of the bag.

I see it is time for the recess.

MR. CHIEF JUSTICE WARREN: We will recess.

(Whereupon, at 12 o'clock noon the Court recessed, to reconvene at 12:30 p.m. the same day.)

AFTERNOON SESSION

(The oral argument in the above-entitled matter was resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARREN: You may continue your argument.

ORAL ARGUMENT OF HOWARD M. FEUERSTEIN, ESQ.

ON BEHALF OF PETITIONER

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

On the search and seizure issue our contention is quite simple and straightforward.

First, Rawls was a joint user of only the side pocket of the bag and, therefore, only had the power to consent to a search of the side pocket.

The mere apparent ownership of the bag as a whole would not be enough under Stoner versus California. It is true that the police could seize anything that came into view while searching that side pocket.

But under Harris versus United States they could seize only what came into view when they were in a place where they had a right to be. And since the police had no power and no consent to be in the center pocket they could not seize what came into view in the center pocket.

The transcript indicates that the bulk of Frazier's clothing was found in the center compartment.

Q I know, but what did he tell them? That it is in a blue ---

A He just said it is in a blue bag in my room.

Q Well, do you think they were rightfully in the side pocket?

A Yes, sir. I think that he consented to their taking his clothes out of the side pocket.

Q Well, he didn't say what pocket they were in?

A No, no.

Q How did the police have any knowledge of where his clothes were?

A They did not know but the fact that they did not know did not give them power is my position.

Q Well, I know but you say that they could get into the side pocket.

A Well, I would think -- let us suppose that this would serve ---

Q Well, don't you concede that they were rightfully in the side pocket?

A Yes, I do, your Honor. Yes.

Q And by reason of his consent?

A Yes, your Honor.

Q And that Frazier, although it was Frazier's bag, you feel that he had no right to object to the police being in the side pocket?

A That is right, because of the doctrine of a joint user or joint use of a ---

Q Co-tenants.

A Right. That is established.

Q But the police didn't know -- what if the police had gone in and started to search the bag had looked in the center compartment first?

A My positionwould be that they had no right to be in the center compartment, your Honor.

Q You mean until the search of the bag was complete you couldn't tell in which compartment the police were entitled to be in?

A Well, they didn't know. Of course, they could have always asked, but they did not, your Honor.

Q But you concede they were rightfully in the side pocket?

A Because and only because of consent of a joint user.

Q Well, I know, but he didn't consent for them to be in the side pocket?

A Rawls?

Q He consented for them to go into the bag and look for his clothes?

A Well, he consented to their having his clothes, and that they could have his clothes. He told them generally

where it was. And I would take that probably as being consent to their going in and going wherever necessary to take his clothes.

Q Well, how did they know then that they had all his clothes once they found some of them in the side pocket?

A Well, I assume that they would not have any way of knowing.

Q But you would say then they had to quit?

A It is a question of power. Once they leave the domain of which they had the right to be and their only right was because of consent ---

Q My problem is that it would seem they had the same right or power to be in any pocket of where Rawls' clothes might have been.

A Well, an analogous situation might be suppose that Frazier and Rawls jointly occupied a room and Rawls merely said that, "My clothes are in this room, you can go get them." And that in that room was a dresser exclusively owned and used by Frazier and that the police not knowing where Rawls' clothes were, went in a searched the dresser.

Q Yes.

A Not knowing, I would say that under those circumstances the police exceeded their authority and they were in a place that they did not have the consent to be in which Rawls did not have the power to give them consent to be.

Q Well, isn't that an argument that the legality of the search depended on what turned up?

A No, it is a question of scope and power to consent.

Q Well, I know, but Rawls' clothing or some of his clothing had in fact been in the middle compartment, you would have said that that was a lawful search?

A That is right.

Q The only reason that you are arguing that it was not is that instead of Rawls' clothing in the middle pocket, they came out with Frazier's?

A It was exclusively Fraziers. That is correct. It was exclusively used by Frazier.

Q If Rawls had said, "My pants are hanging on a hook in the room." And you may go get them. They go in and take his pants and hanging right alongside of them is another pair of pants.

A That is right, your Honor.

Q Bloody pants, and it has got a name-tag in them 'Frazier!

A Yes, your Honor.

Q I suppose in that event you would concede that they could seize Frazier's pants?

A That is right. Because that closet is jointly occupied and used by the two and, therefore, either one of

them have the power to consent.

Q And in plain view.

A That is correct. In plain view.

Q And you concede that they were rightfully in the room and rightfully in any part of the grip where they could find Rawls' clothing?

A Any part of the grip that was jointly used by Frazier and Rawls because, therefore, either one of them has the consent to a search of that area.

Q If they had opened the pocket first and found none of Rawls' clothes, but some of Frazier's, and then opened the middle compartment and found Rawls' clothes and none of Frazier's, you would say that they could not have seized Frazier's clothes.

A That is right. I would say the side pocket was exclusively Frazier's.

Thank you, your Honor.

MR. CHIEF JUSTICE WARREN: Mr. Specter.

ORAL ARGUMENT OF ARLEN SPECTER, ESQ.

ON BEHALF OF RESPONDENT

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

Taking up first the initial argument advanced by the Petitioner with respects to the statements by the District Attorney in the opening speech, I think that the record makes

it perfectly plain that this item is even less than what has been characterized by this Court to be a minor lax in the course of a very criminal trial.

The statement made by the District Attorney at the outset amounted to some two pages in the record and five lines. The portion of the transcript where the co-indictee Rawls was called to the stand ---

Q How is Philadelphia interested in this case?

A I am representing the respondent but I have been asked to do so, Mr. Justice Douglas, the National District Attorneys' Association asked if I would represent the respondent here.

Q Well, do they speak for the State of Oregon?

A Yes, sir.

Q The District Attorneys' Association?

A No, Mr. Chief Justice. That is how I came to be in the case. But I am here at the request of the State of Oregon to represent the State of Oregon, and I do not speak for the National ---

Q Who made the request of you?

A The request of me by Roger Rook, the District Attorney of Clackamas County, who is in the courtroom today.

Q Is he authorized to speak for the State of Oregon, a situation of this kind, or is it the Attorney General who is authorized to "Yes, I am going to speak for them."

A It is my understanding that it is the responsibility of Mr. Rook to represent himself here represent Clackamas County in the State of Oregon, and that he is ---

Q Do you vouch for that as a matter of Oregon law?

A I think I had best turn to Mr. Rook to get confirmation of it.

MR. ROOK: Actually this is the Attorney General's position since it is on writ of habeas corpus, your Honor. However, we are working with the Attorney General, and the Attorney General has turned this matter over to me, as District Attorney of Clackamas County. The Attorney General is Mr. Robert Y. Thornton.

I requested a man from the National District Attorneys' Association to have Mr. Specter appear on behalf of the State of Oregon in this matter.

MR. CHIEF JUSTICE WARREN: That is a little unusual way to proceed, it seems to me, because, for instance, we are entitled to know if the representative of the State of Oregon is prepared to vouch for Oregon law and Oregon practice and so forth, and I was just wondering, as I am sure other members of the Court are, whether you are in a position to do that or not, or whether any vouchment that you give for a legal situation in Oregon would be in any way binding on Oregon.

MR. SPECTER: Well, Mr. Chief Justice Warren, I am thoroughly familiar with all matters which are raised in this

case, I think both as to the Federal principles and the Oregon principles, and I have consulted with Mr. Rook about the Oregon principles. His availability here certainly would enable me to respond to any question which might arise as to the Oregon principle.

I have advised the Clerk of my position, Mr. Chief Justice Warren, and made it plain that I was coming in as counsel in the case, not being an Oregon attorney, being a Philadelphia, Pennsylvania attorney, so I have made every effort to make plain my position here, sir.

MR. CHIEF JUSTICE WARREN: Well, you are here then representing the State of Oregon, but not the District Attorneys' Association of the United States?

MR. SPECTER: Correct, your Honor. I am here representing the Respondent only. Yes, sir.

MR. CHIEF JUSTICE WARREN: Very well. You may proceed.

MR. SPECTER: The point that I think is most important on the first argument of the petitioner is that the entire sequence of events concerning the opening statement made by Mr. Rook and the amount of time that the co-indictee was on the stand involved a very small portion of this extensive trial.

Measured by the transcript itself, the opening statement of the two pages and five lines and the time when Rawls was on the stand amounted to somewhat less than three pages, a

total of some five pages on a transcript which runs more than 1,000 pages so that this item accounted for no more than one-half of one percent of this entire trial.

The questions which were asked of Mr. Rawls when he took the stand amounted to only two in number, neither of which was incriminating, substantially less than that which was asked the witnesses in Namet versus the United States when there were four and where those questions did go to incriminating items.

The reference made by Mr. Rook in his opening speech did not involve any direct reference to a confession at all. There was a reference to a statement and there was not even a clear reference to a written statement and the matter was raised immediately after the opening statement on the defendant's motion for a mistrial and as it appears on page 48 of the printed transcript, the Court noted "It wasn't my observation that the District Attorney was reading from anything. I don't know. Were you, Mr. Rook?"

And Mr. Rook responded, "I was not. I was referring to it."

Q Did he have it in his hand while he was talking?

A Yes, your Honor, he did have it in his hand. As it is I think fair to say that he had many papers in his hands as he was making his opening statement, but he never referred to it as a confession and he ---

Q Well, why did he have it in his hands?

A He had it in his hands so ---

Q Accident?

A No. No, so that he could be accurate in terms of what he was saying.

In the course of his opening statement he is very careful in quite a number of places to be circumspect in the positiveness with which he makes representation. And I think that point is a very significant one in terms of the quality of that opening statement where he does not speak of evidence or speak of facts,but speaks of what the prosecutor intends to prove.

And I think Mr. Rook makes that very plain throughout the entirety of his opening statement. And if I can cite just a few examples of that.

At page 30 he says, "I haven't personally talked with the witnesses that the State has and I don't know what it looks like."

And on page 31 he says, "I think our testimony will be ..."

And on Page 33 he says, "I think that the evidence will show ..."

And on page 35 he says, "I don't recall what it is ..."

And a little farther down he points out, quote if my memory serves me right, so that throughout the entire

presentation of Mr. Rook he is doing what any lawyer does in an opening statement. He is outlining what he intends to prove which is something very different from having a witness on the stand as there was a witness on the stand in Douglas where the prosecutor goes over a statement and says, "Now, isn't this what you said?" To which the witness consistently responds with a plea of privilege under the Fifth Amendment.

For this is enormously different from what happened in Bruton where there was a co-defendant in the course of a robbery case to testify so then there is a cautionary instruction.

I think it is important to note that in the context of the opening, there were two other matters deemed by the defense lawyer to be of substantial importance, whereas the comments which Mr. Rook made about the testimony that he intended to produce from Mr. Rawls was not objected to at all, in the course of that opening statement.

Although tit was one of the grounds for a mistrial advanced by defense counsel immediately after the opening statement was concluded so I am not saying that there was no timely objection made. I am merely putting it in the context of the opening statement where there was an interruption and an objection by defense counsel on the question of Mr. Rook's intention to use the statement of the defendant, Mr. Frazier.

And there was an interruption and objection by

defense counsel on the reference to the items of clothing which had been the subject of search and seizure.

But when it came to this question about Mr. Rook's reference to what he intended to produce through the testimony of the co-defendant, there was at that point no objection at all.

Q But when the motion for a mistrial was made and concluded to Rawls' reference, what was the basis of the motion in that respect?

A The basis for the motion at that time, Mr. Justice Harlan, was that the prosecuting attorney, Mr. Rook, had reason to know that the witness, Mr. Rawls, would not take the stand and, therefore, would plead the privilege of self-incrimination and, therefore, it would not be before the jury.

And this matter was inquired into fully and appears in terms of Mr. Rook's reply at page 82 of the printed transcript. And Mr. Rook made reference to three specific reasons why he believed that Mr. Rawls was going to testify.

And those three reasons were: No. 1, that Lieutenant Thomas, of the Sheriff's Office reported to me -- this was his testimony -- that he felt sure that Mr. Rawls was going to testify.

Next he received a statement from Mr. Ore of the Probation Office that Mr. Rawls was going to testify and did not want to take the Fifth.

And, third, that Rawls' two brothers and/or mother -- I am not sure of that from the record here -- at least two of them or three of them had talked to him and advised me that although counsel advised him not to testify, he thought he wanted to testify and he was going to testify.

And Mr. Rook on the next page says, "I am talking about the information I had in my head at the time that these events occur." And, of course, it is not an unusual procedure for the defense counsel thinking, based on information that he may have had perhaps at an earlier day that the plea of privilege would be entered to attempt to dissuade the prosecutor from going ahead with that line of evidence.

Q This took place right after the opening statement?

A These references, Mr. Justice Harlan, took place immediately after Mr. Rawls was placed on the stand.

Q I see.

A So that there is a detailing in terms of what Mr. Rook knew which I think was the more germane time when he actually put him on the stand and that is what he had as he put it in his head at that time.

I think that if the petitioner's point is adopted on this line that there would be a very substantial undercutting of the prosecutor's right to make an opening speech. And I think this case illustrates it very well because there were

objections made to three points, two of them actually directed to the course of the speech and the third one afterwards.

Now three of theessential points of evidence which was going to put forward, first the defendant statement itself, second the expected testimony of the co-defendant, and third, an outline of the evidence which had been subject to search and seizure.

Now, any one of these points might have been rendered inadmissible, although the search and seizure point had been cleared through a pretrial motion. But if we were to take the position of defense counsel at the trial that a prosecutor could not go into these items, it is plain from this case, that the major substance of what the prosecutor was going to talk about to the jury would be stricken from the scope of his opening speech.

And I think that the right of the prosecutor to make that opening outline is a very crucial one when the prosecution has the burden of proof, when the facts very frequently are disjointed, when there has to be some outline to be followed to give the jury some thread as to what is coming, and how they fit into the overall picture, disconnected bits of evidence, and if the defense position were to be upheld here, then on the facts of this case I think it is perfectly plain that ---

Q I was wondering, Mr. Specter, if they merely

wanted to advise the jury what they were doing, why it wouldn't have been sufficient for him to say that he was going to call this man to the witness stand.

Why was it necessary to tell the jury that it was going to put on a confession he made out of court?

A Well, Mr. Chief Justice Warren, I think because there has to be a thread as to what happened when the three men were together, Mr. Frazier, Mr. Rawls and Mr. Marleau. That is the crucial time in this case.

I would want to make one thing perfectly plain and that is that Mr. Rook never referred to a confession at all by Mr. Rawls, never said it was a confession.

He said Rawls had made a statement and I think it is a fair inference, as Mr. Justice Marshall points out, that he had a written statement to that effect. But he never said it was a confession and he then proceeded to outline what happened when those three men were together.

He faced precisely that problem when he was to make references to the statement of the defendant, Mr. Frazier. But t here again, he had identical problems, how much detail does a prosecutor go into in outlining what he intends to prove through that witness.

And I submit to your Honor that you really have to at that point what is going to transpire in the case if they are going to be able to piece together all of the detailed

facts which are present.

Q I have great difficulty with two of your positions. One is, you started off that this was de minimus and now I understand your argument is very important.

A I am saying, yes, the testimony is important had it gotten in.

Q No. I am talking about the opening statement.

A Yes, sir. I am arguing that it is one of three crucial parts of the prosecutor's case but the way it unfolded before this jury it was not put before this jury to any significant extent. It was put to the jury in a very, very abbreviated form, in five pages out of a 1,000 page record.

And that is why I say even though this point was of crucial importance to the prosecution, it was not put before the jury in any detail at all. The record will show that out of the opening speech of some 28 pages in the transcript, this occupied about one-seventh.

Q Well, then if we say that you shouldn't use that one-seventh or one-one hundredth of one percent, that wouldn't wreck all of the future opening statements of prosecutors in Oregon would it?

A Well, yes, sir, I submit that it would.

I respectfully submit that it would because how is a prosecutor to know when he is making his opening speech what evidence is not to be available to him that afternoon or the

next day or a week later. There may be a death of a witness, there may be a witness who flees the jurisdiction, there may be ---

Q None of which is in this case?

A No, sir. No, it is not, but this is the import I submit to your Honor as to what would happen here. Or, a witness who we have positive reason to think is going to testify on the day of the opening speech and then changes his mind the next day, which is a not infrequent occurrence.

Q Well this one is the confession in his hand?

A Your Honor, this is a written piece of paper in his hand that he refers to in terms of what a witness is going to testify to who is called.

Q Maybe I am not getting it through. The witness is not going to testify to this confession, is he? You are either going to put the confession in or put the witness on the stand.

A You cannot put the confession in. You would have to put the witness on the stand.

Q Very well. So what you are doing is waving a confession that you don't ever intend to put in evidence?

A No, your Honor, I do not think that is what was done here. And the best indication that that is not what was done here is what the trial court said on the motion for a mistrial immediately afterward, where contemporaneously put

this event, the trial judge said that there was not a reference to the written statement.

I submit to your Honor, at the very most what was done here was that this piece of paper was held in the hands of the District Attorney just as he would hold his own sheath of notes and that it is all written here as to what he said and he did not make any reference to this being a statement, word by word, as to what this man had said, certainly no reference at all to the issue of a confession.

I think the strongest indication that this item was not of real consequence in this trial is the absence of a request by the defense for a cautionary instruction. A cautionary instruction, of course, may serve to remind the jury as to what has occurred and a cautionary instruction may not be observable by a jury.

But I think it is a fair inference from this record there was a calculated decision made and I think perhaps a wise one from a trial point of view by the defense attorney that there would be no request for a cautionary instruction because this portion of the trial was so minimal that the defendant was better off having it not referred to than he was getting an instruction that the jury should disregard this kind of evidence, as was done for example in United States versus Namet.

So that I think that really puts in perspective the question here as to the factor that it was not of really

substantial importance in the course of this trial.

Q What references, if any, were made to this episode of Rawls' on summation?

A None. Absolutely none.

Q By neither side?

A By neither side. And the Court gave a general charge that statements of counsel were not to be regarded as evidence from Hornbook procedures, so that that was present, and perhaps, more importantly, Mr. Rook's whole tenor of his opening made it plain that he was making representations as to what he intended to prove.

I would like, if I may, to deal directly with the question of search and seizure before coming to the perhaps substantial consideration on the Escobedo argument.

I think that the facts in this case show rather emphatically that the police officers were justified in going through this duffel bag where they had no indication that it in fact belonged to Mr. Frazier, the defendant in this case, that the duffel bag is something of limited size, not knowing which compartment who's clothes were in and then came upon these items of clothing which had in fact been worn by the defendant, Mr. Frazier, blood-spotted stains of clothing.

And under the decision of Harris versus United States last year by this Court coming upon objects falling in the plain view of an officer, that there certainly was a right to

take those items and use them in the course of the trial. The duffel bag, the search of the duffel bag had been consented to by both Mr. Rawls and by Mr. Rawls' mother, the aunt of the defendant, and I think it was well within the ambit of permissibility on search and seizure.

The question on the statement presents some greater difficulty but I would submit to your Honors first of all that the facts of this situation are well within the ambit of permissibility under the Escobedo decision.

There was the single statement by this defendant, Mr. Frazier, that he was about to get himself into more trouble, but he had been advised early in the course of the questioning that he could have an attorney, if he wanted an attorney, "Why you can have one."

And the police further said, "What you say here could be used against you in a trial. Do you understand that?"

And there was an affirmative answer, "Yes."

I think that the case is put in real perspective by the argument by petitioner's counsel when he comes to this question of was the will of the defendant, Mr. Frazier, overborn by aggressive interrogation.

And I would submit to your Honors, that this is a classical case to show from a tape recording which was made at the time of this interrogation, which is reprinted in full, that there was an abundance of fairness and there was an

abundance of propriety by these police officers in the course of their questioning of this defendant.

The arrest in this case, he was taken into custody at 4:15, he arrived at detective headquarters at 4:50 and he was questioned from 5:05 until 5:10 and he ended shortly after 6 o'clock so that there was approximately one hour of questioning in this case.

I would submit to your Honors that if the Court concludes that the statement of the defendant Frazier is not within the purview of the Escobedo decision, that the Court reverse Escobedo and adopt in its place the standards which are set forth in the Crime Control Act adopted by Congress last June.

I would submit to your Honors that this really puts into a focus the test which has been suggested here by counsel for petitioner as to whether the confession was voluntary in its entirety, the Federal Crime Control Act is now the law of the land, presumptively constitutional, and certainly a more stringent standard should not be applied to the States than that which is applied to the Federal Government.

The Crime Control Act has been passed after an exhaustive survey made by the Legislative Branch of Government, taking into account many, many factors which have been provided a very sound statistical basis for concluding ---

Q Was this in the opinion of the judge who we are now considering?

A No, your Honor. It was not there and I think it could not have been as a matter of timeliness. I think that this argument is one which could have originally, in the immediate past, prior to the passage of the Crime Control Act of 1968 which ---

Q Is it briefed here?

A No, your Honor, it is not briefed.

Q It has just come in since you came in the case?

A Yes, your Honor.

Q I see.

A The statistical base to which I was referring has provided a very strong basis for a conclusion by the Congress. Of that there have been substantial reductions in the number of confessions and statements, post Miranda, and in the balancing process which is the essential ingredient on determining constitutionality I would suggest that that determination should be accorded great weight.

Q Is this an argument they overruled and argued?

A Yes, it is an argument to overrule Escobedo, Mr. Justice Brennan, and which would necessarily involve an overruling of Miranda because the Escobedo rules are less stringent on law enforcement than Miranda, but we are faced with here is the Escobedo rule as opposed to the Miranda rule.

Q Does the State of Oregon take that same view of it?

A Mr. Chief Justice Warren, I am authorized to represent the State of Oregon.

Q No, but they didn't brief it. You are not on their briefs. They didn't brief this subject at all and it isn't in the record and I just wondered if you were authorized to speak for the State of Oregon when you say that this is a situation.

A Yes, your Honor, I am authorized to speak for the State of Oregon. I have conferred with Mr. Rook on this point.

Q On that particular respect, when it is not in their briefs?

A Yes, your Honor. I have discussed that aspect with ---

Q With who?

A With Mr. Rook, the attorney who tried the case and the District Attorney of Clackamas County, Oregon. Yes, sir, I have.

I would suggest that under the standards which have been suggested by this Court in terms of alternative procedures to guarantee fairness and to guarantee voluntariness, that this is a classical case supported by a tape recording not which is used for a latter formal portion of a statement but as a tape recording embodying the entire occurrence between the defendant and the interrogating officers that it does comport

with the due process of law and is an ample standard for judging the admissibility of this confession.

MR. CHIEF JUSTICE WARREN: Mr. Feuerstein, I think you have a moment or so.

REBUTTAL ARGUMENT OF HOWARD M. FEUERSTEIN, ESQ.

ON BEHALF OF PETITIONER

MR. FEUERSTEIN: Mr. Chief Justice, I would merely say that it is true that the District Attorney did not refer to this as a confession and in fact it was really an exculpatory statement in which the supposed accomplice placed all the blame on Frazier, and throughout this opening statement such phrases as, "This is Rawls' version and Rawls said that he tripped trying to rob the bank" he said, and the reporter put in quotes, "We took all the clothes off after we got home and put them in the travel bag," was perfectly clear to anyone hearing the opening statement that Rawls had made a statement to the police and that the District Attorney was telling the jury what this statement was.

And there was no way in the world which the defense could test that version of Rawls by cross-examination because Rawls refused to testify. The same would have been true of completely unexpected if Rawls had died and not testified at all.

Q Was the tape recording played to the jury?

A It was played to the judge in chambers in ruling on the confession.

Q Is it part of the record?

A The tape recording itself is not but the transcript is.

Q Yes.

The tape is not part of the record?

A No, your Honor.

Q But the transcript out of the tape recording is?

A That is correct.

Q Yes.

A Everything that has been said has been transcribed and is in the appendix.

Q And this was played in chambers for the judge?

A That is correct.

Q Was there an offer to introduce in evidence that was objected to?

A I am not sure whether -- I think the tape recording may have been in evidence solely for the purpose of the hearing on the voluntariness of the confession.

It was never presented to the jury or played before the jury.

Q Yes. There was no point made of the fact that there had been a tape recording? From the point of view of ---

A It was relied on by both the State and the defense for purposes of indicating whether the confession was voluntary and whether Escobedo and Neely versus State are

complied with.

Q Had it been a surreptitious tape recording; that is, I perhaps didn't use -- did the defendant know that the business was being recorded on a tape at the time?

A Apparently he did. And it was indicated to him that what was on the tape would be orally placed in evidence if he did not sign the written statement.

Q Yes.

Q There is no Jackson-Denno point in this case, is there?

A No, your Honor.

Q As I understand it you say that it was not offered in evidence at all?

A Only for purposes of ruling on the voluntariness or admissibility of a written statement. It was not placed before the jury, your Honor.

Q They didn't hear it?

A That is correct, your Honor.

MR. CHIEF JUSTICE WARREN: Mr. Feuerstein, I understand you were appointed by the Court of Appeals of the Ninth Circuit to represent this indigent defendant and that you have carried on that same assignment to this court.

This court considers it a real public service for the lawyers to represent indigent defendants that the, by assignment from the court and we appreciate what you have done as a

public service.

MR. FEUERSTEIN: Thank you.

(Whereupon, at 1:10 p.m. the oral argument in the above-entitled matter was concluded.)