In the

# Supreme Court of the United States



GEORGE WILLIAM MILTON,

Petitioner,

v.

LOUIE L. WAINWRIGHT,
Director, Florida Division
of Corrections,

Respondent.

No. 70-5012

Washington, D. C.
January 12, 1972

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Respondent.

Washington, D. C.,

Wednesday, January 12, 1972.

The above-entitled matter came on for argument at 10:10 o'clock, a.m.

BEFORE:

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

APPEARANCES:

NEAL P. RUTLEDGE, ESQ., Duke University Law School, Durham, North Carolina 27706, for the Petitioner.

J. ROBERT OLIAN, ESQ., Assistant Attorney General of Florida, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida 33136, for the Respondent.

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 70-5012, Milton against Wainwright.

Mr. Rutledge, you may proceed whenever you're ready.

ORAL ARGUMENT OF NEAL P. RUTLEDGE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is on review of a decision of the United States Court of Appeals for the Fifth Circuit, which affirmed a denial of a writ of habeas corpus which was challenging a conviction of first-degree murder in the State Courts of Florida.

The first-degree murder conviction occurred in 1958, and became final, that is, in the sense that the appeal procedures were completed and the time expired for petition for certiorari in this Court in 1960, after -- I mention that fact because this is after, of course, the decision of this Court in Spano vs. New York, a 1959 decision which occurred after the conviction in the trial court and before that conviction became final.

The facts involving the alleged crime itself are fairly simple. The petitioner in this case, the defendant in the State trial court, was a black man from Mississippi. He had completed less than six years of schooling in the

Mississippi schools. He was age 23 at the time of his conviction. He was working as a porter in a Miami Beach hotel, and he was living in the black ghetto section of Miami with his common-law wife, who was at that time pregnant.

On the evening of May 31, after he got off work, he purchased a cheap used car for approximately $100, and then that evening he took his wife out for a joy ride, which ran through the evening. Apparently there was some drinking during the course of that evening in the ride in the new car.

In the early morning hours of June 1, that is about 2:00 or 3:00 a.m., he ran the car into the Miami River, and his wife was drowned.

The petitioner himself barely escaped with his life. He was fished out of the Miami River by a boat captain, and he was incoherent, and he was injured. He was prostrate on the bank of the river when the police came, and the police took him to the Dade County Hospital, where he was admitted to the colored section -- the hospital at that time being segregated -- and he was held there overnight.

And then the next day he was taken to the City Jail. No charge was made against him. And he was placed in the City Jail in a cell three feet -- or four feet by six feet in dimensions, with no window, and with a solid door. There was an electric light in the cell which at times would be turned on and at other times he would be in complete darkness.

And he was held incommunicado in that box of a cell for 16 days. During that time he was taken out, from time to time, for interrogation. He was put in that cell on June 2nd. On June 3rd he was taken out early in the morning, at 6:00 a.m., and was taken by a detective to a room where a medical doctor, a psychiatrist, and a Ph.D. psychologist administered truth serum to him; shot him in the arm with the truth serum. He was then questioned.

Of course he had no lawyer, he had no friends, he was not allowed to make any telephone calls. He asked to. He asked to call his wife's family, but he was not allowed to communicate in any way with the outside world.

After the session with the doctors, and under the truth serum, he was then, the next day, taken out and "hooked up to wires", to use his words, and administered a polygraph test. And then the day following that he was again questioned, at which time an alleged consent to searching his rooming house quarters were extracted from him.

And pursuant to that alleged consent the detectives and the Medical Examiner for the County searched his quarters.

He was questioned again at various times, he says, almost daily, for long periods, up until June 11th, at which time he was taken from his cell, at about 5:00 p.m.,and was not returned to the cell until about 1:00 a.m. the following morning.

During that time, from 5:00 p.m. on June 11, until the early morning hours of June 12, two confessions were extracted from him.

He claims, and the evidence of course is in dispute on this, he claims that he was subjected to threats and coercion, that the detectives threatened to take him for a ride out in the country, and so forth, at that time, and that he had no choice ultimately but to agree to confess that he had driven into the river deliberately in order to murder his wife; the motive being to collect insurance on her life.

And it is true that he had an insurance policy, actually it was a policy that covered both him and his wife, covered health care, and it was an accidental death policy. It was one of these policies that's commonly sold in the black ghetto, where the collector comes around every week. And it's very expensive insurance, actually, but you pay your premiums in cash each week.

Q How long had it been in effect, Mr. Rutledge, at the time of the death of the wife?

MR. RUTLEDGE: A relatively short time. I think the policy had been in effect only several months. I'm not sure that the precise date that the policy was taken out appears in the record, but there is some evidence from which you could conclude that he originally had one kind of policy and then he changed it a comparatively short time before this incident.

During this session on June 11th, he was questioned *in extenso* by two detectives, Detective Holmes and Detective McClure, and they resorted to the rather customary technique of tandem questioning, that is one man would question while the other one was in a secret room adjoining, from which he could observe through a one-way mirror what was going on, and of course, unbeknownst to him, the room was wired so that whatever he said in there would be recorded. And the man in the secret room, behind the one-way mirror, could turn on the recording device and record what was said.

The detective testified that he had only one hour of tape, and so, out of the entire time from 5:00 p.m. to 1:00 a.m., that he was out of his cell, only one hour was put on tape.

And the tape begins at a point where the petitioner was saying that he wanted to confess, and that he proposed a little charade, where he would go out of the room and then knock on the door and come in and say, "I'm appearing here voluntarily to confess." And it was stated that he had asked that this little charade be gone through in order to demonstrate that he was doing this voluntarily and freely.

He says that he had been coerced into doing this, and that once he decided he had to confess, why, he wanted to get whatever benefit he could from it.

In any event, it was only after they had extracted

these confessions on June 11th that -- and then the next day, on the 12th, they took him down to the scene of the incident, and took photographs of him. That was, in a sense, the third confession; the first one was on tape; the second one was a transcribed, secretary-typed-up confession which he signed; the third was this incident on the 12th when he was taken to the scene.

And then, again on the afternoon of the 12th, he asked to change his statement, and a fourth confession was typed up, which he signed.

Only after that was an attempt made to arrest him for any specific crime. After these confessions were extracted, the detective went down to the magistrate and swore out a warrant for his arrest for first-degree murder.

This resulted in his being transferred from the City Jail to the County Jail, and in the County Jail he was allowed finally to make a telephone call. He called out and obtained a lawyer immediately. Even though he had been arrested and changed to the County Jail, he still was not brought before any committing magistrate. And the attorney that he was able to contact by making a telephone call on the 19th of June filed a habeas corpus petition, which resulted in a preliminary hearing; and at that time he was brought finally before a magistrate and was committed over to the grand jury.

And the grand jury indicted him for first-degree

murder on July 1, 1958.

He was not able to post bail, and so he was held in the County Jail pending his trial, which occurred in December of 1958.

In July, on July 18th, the State, for some reason unexplained, feeling that it needed more information from him, knowing that he was represented by counsel, knowing that he had been indicted, decided that the way to obtain this information was not in a straightforward way by either approaching counsel or even by calling him in and seeing if he would voluntarily answer questions; instead they resorted to the technique of taking a Negro police officer and dressing him in civilian clothes and having him pose as a fellow prisoner and one who supposedly was in jail, being held also on a charge of murder. And this police officer, whose name is Archie Langford, entered petitioner's cell on July 18th, at about 4:00 or 5:00 p.m., and then stayed in that cell continuously with him, except for one brief moment when he was taken out, shortly after he entered the cell, on that Friday, July 18th, evening.

Other than that short time of less than five minutes when he was taken from the cell, Officer Langford was in the cell continuously for 45, approximately 45 hours, from 4:00 to 5:00 p.m., on Friday -- I mean -- excuse me -- 7:00 to 8:00 p.m., on Friday, until 4:00 to 5:00 p.m. on the following

Sunday.

The testimony of Officer Langford is clear that he was trying to extract information. He went into the cell with instructions to get information from the petitioner, and he tried to get petitioner to talk about his case.

Petitioner refused. Petitioner told him that he had been instructed by his lawyer not to talk about his case, and he repeatedly, over and over and over again, said, "I don't want to talk about the case."

He didn't talk about the case that Friday, even though that Friday evening he was waked up out of his sleep by the officer, and still refused to.

The following morning he refused to talk about his case. It wasn't until approximately noon the following day that the officer, by use of rather clever and adroit psychological techniques, was able to get the petitioner to start talking in little bits and phrases about the case, and then it really wasn't until, in the wee, small hours of Sunday morning, that, as Officer Langford describes it himself, the petitioner broke down under this continuous pressure, and told, as Officer Langford states it, the full story about why he went into the river, saying that he had gone into the river in order to collect the insurance, to kill his wife and collect the insurance.

Q Mr. Rutledge, at this time, as I think I under-

stood you to have told us, the authorities already had one or more confessions, didn't they?

MR. RUTLEDGE: They did, Your Honor.

Q Is there any -- but what this confession did was to supply motive, is that it? By that method?

MR. RUTLEDGE: It certainly amplified motive, and it implied -- this confession, this last confession was the one used and relied upon most heavily by the State in the trial. The first one introduced. And it was referred to repeatedly in the final argument.

One purpose, obviously, that they used this last confession was because the State was going for the death penalty. And in the course of this confession to Officer Langford, the petitioner had commented to Langford, who supposedly was being held for being involved in a murder with a white man -- actually a Chinese man, was his fake story.

Q Right.

MR. RUTLEDGE: Petitioner had said, "I'm being held for allegedly killing a black man, and they don't care whether you kill a black man." And this was the theme of the final argument, was: We want to prove that it's as serious to kil. a black man in this State as it is to kill a white man.

And, therefore, that was the premise on which the State was asking for the death penalty.

Q But was there -- except for that flavor, was

there anything additional revealed in this prison confession to the other officer that hadn't been already confessed to?

MR. RUTLEDGE: There were details, colaration in detail, there was a much more graphic description than the formal language that had been written out.

Now, I haven't heard, frankly, the tape that was recorded, so I don't know how I could compare what was on the tape with what Officer Langford said the petitioner had said.

Q And, finally, is there any indication in the record or from anything at the trial as to why, after they had two or three confessions, they felt the need to get an additional one?

MR. RUTLEDGE: I can speculate on that, but I can't say that there's anything in the record, Your Honor, that --

Q Well, what was the inference?

MR. RUTLEDGE: The inference is that the State was worried that the confessions that it had extracted on the 11th and the 12th would be held inadmissible because of the description of the events that I've just described, that they were afraid that they would be deemed to be coerced confessions.

Q Because of the circumstances that were --

MR. RUTLEDGE: Because of the circumstances, because he had been held incommunicado, because he had been cut off from getting a lawyer during this period of time.

Q Yes.

Q I suppose that speculation is somewhat diluted by the fact that running afoul of not only the Massiah case but Escobedo by these processes after the man had a lawyer.

MR. RUTLEDGE: I'm not sure that I follow Your Honor's question. Of course neither Massiah nor Escobedo had been rendered at this time.

Q No. This is all pre.

MR. RUTLEDGE: All pre.

Q They're running afoul of standards of those cases.

MR. RUTLEDGE: That's correct.

Q Which -- I don't know that it's important, but which do you regard as the more offensive, the extraction after he was a lawyer or the extraction before?

MR. RUTLEDGE: Well, Your Honor, no court, and it's significant that no court has ever looked at the totality of the situation involving this petitioner. His appeal was taken but he escaped pending his appeal, and that appeal was dismissed without opinion and without review of the record. He then applied for certiorari to Florida Supreme Court, and that was denied without opinion.

He then filed a series of collateral attacks, but none of these presented the total situation before the court; and the total situation here is that the Sixth Amendment

violation, that is the violation of the right to counsel, began from the very day he was taken into custody on June 1, and continued right through this July interrogation, this Officer Langford interrogation. And that seems to me to be the most -- the fact that stands out in this case is that here is a man who was blocked from having any legal aid and he needed it desperately, until after these confessions of the 11th and 12th were extracted.

Q Are you really arguing that independent of standards of Massiah and Escobedo, without getting into the question of retroactivity of Massiah, that this case is one that can't stand?

MR. RUTLEDGE: Absolutely, Your Honor. We certainly contend, even if you were to take the extreme position, which I submit would be an extreme position, that the legality of his custody could be judged only by decision rendered by this Court at the time that his conviction became final; that even under those standards, his conviction cannot stand.

Q Mr. Rutledge, was this argument made through the Florida courts, this totality of circumstances argument that you're now making?

MR. RUTLEDGE: Your Honor, he was -- he filed this petition for habeas corpus in the Federal District Court in Miami, and counsel was appointed for him, and the court considered both, and ruled both on the voluntariness of this

confession and also on the question of whether Massiah was retroactive or not.

But counsel, that is his appointed counsel, argued primarily the retroactivity question.

Q This was in the Federal District Court.

MR. RUTLEDGE: This was in the Federal District Court.

Q How about the Florida State courts?

MR. RUTLEDGE: I can't answer that question, Your Honor, because it doesn't appear. The only opinion that discusses the merits of this case is a habeas corpus case in the Florida Supreme Court, State v. Cochran; all the others are per curiam without opinion; so --

Q Did he ever go for collateral relief in the Florida courts?

MR. RUTLEDGE: Yes, he did, Your Honor. He appealed, that appeal was dismissed; he applied for certiorari, that was denied. He then filed a series of habeas corpus and Rule 1, which is a --

Q Did he present the -- as Mr. Justice Rehnquist inquired, present the totality issue in those proceedings?

MR. RUTLEDGE: In those proceedings, Your Honor, so far as I can tell from the record, he would attack one of these confessions but not the entire, the total picture.

In other words, as far as I can tell, his State v. Cochran, he attacked the voluntariness of the first four

confessions, these ones on June 11th and June 12th. In the later collateral attacks in the Florida courts, as far as I can tell, he attacked the admissibility of this July confession as being involuntary; although I can't say categorically that that's so, because the opinions don't shed any light.

There is no doubt that the petition that he filed in the federal court below in this case squarely attacked this July 12th confession. And that the principal argument of counsel was that it was inadmissible because of Massiah and that Massiah should be the normal application.

Now, --

Q Mr. Rutledge, before you leave that point, are you contesting here today the validity of the first four confessions as well as the fifth?

MR. RUTLEDGE: Your Honor, I stated in my brief that I couldn't say candidly that the petition in the lower court presented, as a matter of pleading or as a matter of argument, the validity of these first four confessions. However, the evidence that was before the judge, which was the State trial transcript, did contain all of this information, and we do submit that it is relevant in the totality of the circumstances that you can't simply sever this case into independent blocks, and that the confession that was extracted in July by the use of Officer Langford was merely a continuation of a whole scheme of depriving this man of his right to counsel.

But even if you look and address yourself only to this confession that was extracted in July, we say, first of all, that clearly there is no way to distinguish what the State did in that case from what was held in Massiah to be impermissible.

Here is a man who was indicted on the most serious charge of all, involving a capital offense, and he had a lawyer and by subterfuge and trickery the State seeks to go around the lawyer and extract a confession from the accused in a way which, obviously, it could not have done if he had been -- if he had had the benefit of counsel present, if there had been notice.

Now, the real question is whether that case, the Massiah case,should be given the normal usual application, or whether it should be limited by what we say is a comparatively new doctrine, the doctrine of nonretroactivity.

Now, this doctrine is new in the sense that up until the Linkletter case in 1965 no decision of this Court overruling a prior decision, based on the Constitution, interpreting the Constitution, had ever been limited to prospective effect only or given less than the total effect that normal decisions have.

Now, the doctrine of -- the Linkletter doctrine, the doctrine of nonretroactivity of course has roots going back to the Sunburst case of Mr. Justice Cardozo, which held that a

State court, a Montana court, could give only prospective effect to a decision in a civil case without violating the due process clause. And certainly it is now settled by this Court that there is no constitutional impediment to giving a new decision of this Court, a new decision, only prospective effect or limited prospective effect.

And we don't propose to challenge that contention, but we do say that one, the doctrine of nonretroactivity is a new one; secondly, that there are obvious disadvantages to it as well as advantages. And these have been discussed at length by the late Mr. Justice Black, the late Mr. Justice Harlan, and Mr. Justice Douglas, who have dissented consistently from the application of this doctrine.

Now, what are these disadvantages? One is obvious, and that is that it produces an apparent inequality right away. In other words, as Professor Currier, in his article in '51 Virginia Law Review, cited in the Williams case, poses the prospect of two men involved in the same crime in the same cell, and one of them, simply by the chance that his case was tried earlier, gets the benefit of a new constitutional ruling and goes out, whereas the other man, at the same time that the first man is freed on habeas corpus, the other man is led down to the gas chamber.

And this inequality, this service inequality, certainly is something that causes people to pause.

There is also the fact that if the logic of the non-retroactivity doctrine were followed completely, that we would have merely an advisory opinion, obiter dicta.

But the most important reason for not applying it, we submit, is that the doctrine itself has the potential of doing serious damage to the image of this Court, in that the power of this Court, from Marbury vs. Madison, has been the respect of the people for this Court as the final expounder of a constitution, as a court that does not make law. And when the Court acts like a legislature and limits its opinions only to prospective effects, the Court then is subject to the charge, well-founded or not, of legislating like a legislature rather than interpreting and applying the constitution as a court.

And so we submit, for this reason, the doctrine should not be applied unless there is a sudden new change in the law; and Massiah, we say, was not a sudden new change. Massiah, as the opinion itself states, stemmed from Powell v. Alabama. It was expressly anticipated by Spano vs. New York. And the Spano case, as I pointed out at the very beginning, came down before the conviction in this case was final.

Q Of course the district judge in this case quite misstated the doctrine of Massiah, didn't he?

MR. RUTLEDGE: I think he did, Your Honor.

Q I was just reading his opinion, he says that it

held"that confessions are involuntary, per se, if induced by officers or their agents from an accused after his indictment while he is without assistance of counsel."

And then he says the Powell case was quite different, that the Powell case involved the Sixth Amendment.

Well, the fact is that Massiah involved the Sixth Amendment.

MR. RUTLEDGE: Exactly, Your Honor.

Q It did not hold that confessions were involuntary, per se, did it? It held that interrogation after indictment deliberately undertaken by the government was a denial of his Sixth Amendment right to counsel.

MR. RUTLEDGE: Yes, Your Honor.

Q And then of course the Court of Appeals affirmed this case based on the District Court's opinion.

MR. RUTLEDGE: That's incorporated --

Q -- by reference. That could have been what led the court into thinking it was new law.

MR. RUTLEDGE: I think there was a confusion between the Fifth and the Sixth Amendment.

Q Right.

MR. RUTLEDGE: And we say, of course, that this was, even if you examine this confession only by Fifth Amendment standards, that it was not a voluntary --

Q Well, that's your second point.

MR. RUTLEDGE: That's the second point, and I certainly will leave that to my brief.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rutledge. Thank you.

Mr. Olian.

ORAL ARGUMENT OF J. ROBERT OLIAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

At the outset, for the sake of clarification, I think that we ought to talk about the confessions, plural, that were involved. In fact, I think if you -- and the best way to look at these confessions is, one, the major confession that's being talked about in the petition for certiorari, which was the confession which was elicited by Officer Langford in the cell of the petitioner.

Secondly, there is one other confession which also was discussed by the courts at the State level, which is referred to in the petitioner's brief as four or five confessions; in fact, what it is is one confession. It was taped, it was transcribed, it was changed, it was initialed; but essentially we have two, and the second one I'll refer to is that confession which was made to Officers Holmes and McClure.

Now, there is in fact in the record, and I think

you'll find it in our brief, one statement which might in fact be considered a third confession, and that statement has never been challenged at any level, and that is from the record on page 148, when Officer McGraw arrived at the scene of the crime he was asked: "When you saw this defendant lying on the pavement describe, if you will, what he was doing, what he was saying, if anything."

He replied: "Well, he kept insisting that he drove his car into the river."

Now, in terms of our argument, this is quite important. So, again, there's the Langford, Holmes and McClure, and this other confession to Officer McGraw. And I think that these distinctions have to be kept in mind.

Q Well, is there any question that he drove the car in the river?

MR. OLIAN: Mr. Justice, there's no question except the meaning of what he said. That's what I am saying, that there is some -- you could call that a third confession. Whether he drove it in or not, the State's contention --

Q Well, a confession that he drove the car in the river has nothing to do with murder, does it?

MR. OLIAN: Mr. Justice, the State's contention at the trial was he did not drive the car in the river, he jumped out of the car before it went into the river; so I think --

Q Well, how does this confession help you on that

point?

MR. OLIAN: Well, in this case he is saying, in effect, that he did drive it into the river, whereas, at the trial, I think it goes more to the question of credibility. At the trial, what he said was he blanked out, he doesn't remember what happened, as far as his story of what happened. Here he says, "Yes, I did drive it into the river."

Again, I think this is equivocal, I think it raises some question about credibility of his own story of what took place. And I think that's important in terms of the facts that were presented at this trial, because there are constant discrepancies in terms of the stories that were told; and I think there are constant considerations here of credibility.

I would like to talk about those considerations somewhat further.

Again, that is equivocal as a confession, but it does disagree with the story that he told that he blanked out, that he doesn't remember what happened. So, how this is interpreted is not totally clear.

Now, as far as the facts in this case go, there are a number of things. It was stated by the petitioner he was questioned almost daily. A couple of these questioning periods had to do with cases which were in other jurisdictions, they asked, "Would you hold him for investigation", they came down, they did interrogate him.

The longest questioning period was one where -- it was either Polk County, Florida, or Mississippi, I forget which one of the two -- they came down and questioned him for six hours about another alleged crime.

Now, they asked him at the State hearing, and this is quite important, and it's in our brief, they said to him: "You weren't questioned between the 4th and 11th."

Now, you notice they're saying "constant questioning", "long questioning", " a great deal of psychological coercion and pressure", and this kind of thing.

The petitioner was asked: "You weren't questioned between the 4th and the 11th?"

He answered: "I could have been."

"The Court: Not could have been. Were you or weren't you? You were there, you know about it. You are the only one that can tell us."

And it's in -- the petitioner: "From the fourth day to the eleventh, I believe that I was questioned. I mean, I was trying to think. I believe that I was questioned some time during the time from the 4th to the 11th of June", and on it goes. He can identify three periods, Your Honor; the longest period being roughly one and a half hours during this time that he was held for questioning.

So this matter of "constant questioning" in terms of all the confessions, now this goes to the Holmes-McClure

confession, which is not the one which is the primary basis for the petition here.

He says petitioner claims, well, he asked to write to his wife's family. This has to be clarified. He apparently has another wife. Minnie is not his real wife, as far as we can tell. And he said, "No, I couldn't. I couldn't. I wasn't even allowed to write to her."

I think if you look at the Appendix you will find three pages later, where he says, "Yes, I did write to her." He said, "I wasn't even given stationery"; three pages later he said, "Yes, I did write to her."

Now, another point as far as facts goes, the petitioner points out that this is a common type of policy. I think it's also worth pointing out that in the record John Tyler took the stand, he said, "I was asked by the petitioner where I could get, in his own words, a good insurance."

I think it's also very important to note that the petitioner was unable to sustain himself very effectively. In fact, one witness took the stand and told of how he hocked a suit for two dollars because he was short of cash, yet he managed to keep up the payments on these insurance policies.

Now, with that in mind, I'd like to get to the issues in terms of the structure of our brief.

First of all, as we pointed out in our brief, in regard to the Langford confession, if there is any error at all,

which we deny -- and I'd like to get to this in more detail in a moment -- but if there is any error at all, it is clearly a harmless error.

First, we still have the Holmes-McClure confession.

Q Of course, that's a matter that the Court of Appeals never reached in this record?

MR. OLIAN: That's correct, Your Honor. That was never brought up to that court, and I think that, as we pointed out in our brief, that cases by this Court have said, if you don't raise it in your petition that it perhaps should not be considered by this Court.

But --

Q No, no. You're not the petitioner.

MR. OLIAN: No, I'm --

Q You can do whatever you want to support the judgment.

MR. OLIAN: Right. No, I'm talking about from the petitioner's side.

Q Well, he's not going to bring up the point that it's harmless error, is he?

MR. OLIAN: No, I wasn't referring to that point, Your Honor. He wasn't bringing up these other confessions.

Q No. Well, I'm talking about what you're just beginning to address yourself to, the proposition that this was harmless error; the admission of this confession, even if

error, was harmless. Isn't that what you're going to say?

MR. OLIAN: Yes. Yes.

Q That's the question, that's an issue that the Court of Appeals and the District Court did not reach; isn't that correct?

MR. OLIAN: Yes.

As far as the evidence, though, is involved, we have the confession, we have the evidence. As far as the evidence goes in this case, there was overwhelming proof of guilt.

Just to go through some of these facts very quickly, because they are not all in the Appendix. It's a very long record. But we did cite these facts in our brief.

First of all, the car was purchased nine hours before this accident took place. I told you about the insurance. Much of this insurance would only pay in case of accident; would not pay in case of natural death.

There is a lot of testimony about his relationship toward the deceased, Minnie Claybon, that he doesn't particularly care for her; that he has written to others, telling them how he was going to come into a great deal of money, which would further his boxing career.

If you look at the record, on page 150 to 152, it tells us some important things about the scene of the accident. It was well lit. There was good weather. At most there was one space, with estimates ranging from 15 to 25 feet

of opening, the rest was a solid line of boats. So that if someone lost control of a car, the odds on getting in that particular 15 to 25-foot opening certainly weren't very great.

And, Your Honors, this is particularly important in this trial: the back windows in this car were closed. The deceased was sitting on the back seat. The back doors could not be opened, they were latched closed.

Now, the previous owner of the car was asked about the car, and what he testified to was this: those ornaments had never kept the back doors closed, that the doors freely opened. At the time of the accident, the police officers pointed out that when they removed the car from the Miami River they had to use tools to get those doors opened.

At the trial they pointed out that there was no evidence of any scratches or anything else on these chrome ornaments, which indicated that they were force-closed, by the collision, by going into the water at that time.

Q Well, I take it, what you're arguing in effect is that this conviction might have been obtained without the use of the confessions?

MR. OLIAN: Yes, Your Honor.

Q In other words, --

MR. OLIAN: Yes, Your Honor.

Q -- it's a harmless error in that sense.

MR. OLIAN: Yes, Your Honor.

I think that's also true when you couple it with the confession to Holmes and McClure, which was at no point in the Federal Courts raised again, on that particular regard.

Now, I think that confession is particularly important, and I think two things ought to be noticed, not only about that confession, which I think adds to the harmless error argument, but the confession to Langford.

I think when you examine this trial transcript you find a tremendous concern of the trial judge for a fair trial, a meticulous examination of all the parties involved. He used that procedure which was prescribed by this Court in Jackson v. Denno. They went into all the details in great detail. He decided that it was admissible. And it was not until then that it was turned over to the jury.

Q In your view, how many of these confessions were put in? Was all of the material relating to his admissions and confessions put in?

MR. OLIAN: Yes, Your Honor. Both --

Q You began with the last one.

MR. OLIAN: Yes. Your Honor, the Holmes-McClure was put in and put in in detail, and the Langford testimony was put in and put in in detail. The petitioner suggested that the Langford was the most important. I think if you examine the transcript, examine the length of the trial, you'll discover that very clearly both of these confessions were put

into evidence with great force. So the Holmes-McClure confession is just as important.

Your Honors, I think that if you also examine the relation to the Holmes-McClure confession and the other confession, the instructions of the judge to the jury, you will find again evidence of his very meticulous concern, that he cautioned them that as to the reconsidering whether or not the confessions were voluntary, and told them they could disregard them entirely if they so desired.

I think that what also is important is some of the evidence of other --

Q Did he instruct them particularly as to the policemen's testimony?

MR. OLIAN: Specifically --

Q Or was it just general as to all of them?

MR. OLIAN: Well, Your Honor, I think he -- he didn't separate the two confessions as he talked about confessions and their voluntariness.

Q Well, I mean, in the eyes of a layman wouldn't he think that his talk with the policemen was voluntary?

MR. OLIAN: Well, I don't think that just inherently he would think so. They examined this thoroughly outside the presence of the jury, and they submitted it to the jury with these precautionary instructions. I don't think that a layman thinks it's --

Q Well, why did the State get the last one? What was the reason for it?

MR. OLIAN: Mr. Justice, I have --

Q Well, let's make this in two parts: one, why did you get it? And then, why did you use it?

MR. OLIAN: Mr. Justice, I have no idea. This trial took place in 1950, and I think the total atmosphere at that time was quite different. What they did, I think, what their motives were, are impossible to decide at this time. I think, as a matter of law, however, I do feel that these factors were effectively handled at trial.

And that's the point that I'm trying to introduce.

Q Mr. Olian, did you call our attention to any cases here in this Court where admitting an inadmissible confession has been held to be a harmless error?

MR. OLIAN: Your Honor, I cited Harrington and Chapman, and I think that they talk about the proposition here that is --

Q Well, do you think either one of them held that an involuntary confession could be admitted and be held to be harmless error?

MR. OLIAN: Your Honor, first of all, I'm not saying it's involuntary. I don't think it is.

Q Well, I know, but your proposition is that even if it were, if these confessions were inadmissible, it was harmless error to admit them?

MR. OLIAN: Your Honor, I would make a distinction --

Q I mean, you wouldn't have to be arguing harmless error if they were voluntary.

MR. OLIAN: Well, I would make a distinction, it seems to me, in terms of the case law, between a coerced confession and a confession which violates Massiah.

Q I see.

MR. OLIAN: And I think it has to be one or the other.

Q I see. Now, would you say -- let's assume the confession was involuntary --

MR. OLIAN: In the sense of coercion?

Q -- and it was -- yes, and it was --

MR. OLIAN: Then I would not be arguing harmless error in that context.

Q I see. But if it's just a confession that's taken without the presence of counsel --

MR. OLIAN: Yes, I think harmless error applies in that context.

Q -- you would say that --

Q Well, do you know any --

Q Even though Massiah might be held to apply retroactively?

MR. OLIAN: Well, that's another issue, which I haven't gotten to.

Q Yes, but you wouldn't have to argue harmless error unless Massiah were retroactive?

Q There's no error.

MR. OLIAN: That's correct, Your Honors.

Q So if Massiah is retroactive, you nevertheless would say that the confession taken in violation of Massiah could be admitted if it were --

MR. OLIAN: Yes. Yes.

Q -- if admitted, could be held to be harmless error?

MR. OLIAN: Yes, Mr. Justice; that's right.

Q Well now, do you have any precedents for that proposition?

MR. OLIAN: Well --

Q Or for the proposition that the admission of -- the wrongful admission, the erroneous admission of any extra-judicial confession can ever be harmless error?

MR. OLIAN: Your Honor, I said that in our brief we cited Harrington and Chapman --

Q Well, that's not an extrajudicial confession.

MR. OLIAN: Well, it's not exactly the same, but we do have --

Q No.

MR. OLIAN: -- confessions which were inadmissible.

Q Well, my question is, do you know of any case

in this Court that has held that the admission in violation of the Constitution of an extrajudicial confession could ever be harmless error?

Q Any Miranda cases, for example?

MR. OLIAN: Any Miranda -- no, I'm sorry, Your Honor, I didn't cite any.

Q Well, do you know of any?

Q Do you know of any?

Q Just for information.

MR. OLIAN: Offhand, I don't know, no. Sorry.

Q Hasn't this Court, and haven't other courts often commented on the fact that confession by its very nature is so devastating a piece of evidence that it just can't be disregarded?

MR. OLIAN: Your Honor, my reading of the case which suggests it to me is that where you clearly found that a confession was coerced, in the sense of psychological, physical, and the like, that that is true.

I don't feel that in terms of a Massiah type situation that that rule should be applied. I don't think it's the same kind of thing. I think what we're talking about is a situation -- and, again, I'm not granting that Massiah governs this, I'm not granting that Massiah should be granted retroactively.

But it seems to me that that abridgement of that Sixth Amendment right, under those circumstances, should not

automatically result in a reversal.

I think in that context, yes, the harmless error doctrine in that context should apply.

That is how I read the cases the petitioner is primarily relying upon, and how I read the cases of this Court, and that's what I'm urging.

I think, perhaps, I ought to turn to the question of Massiah and retroactivity. I've suggested in my brief, and I would get to this quickly as far as the facts go, that I don't feel that it is desirable to extend Massiah, and I think that particularly we pointed out in this case that what you have is a situation where the prisoner volunteered his information to a total stranger. I think that's a distinction worth considering.

Because I think if Massiah --

Q How do you get this "volunteered"; is that the word you just used?

MR. OLIAN: I might have, Mr. Justice. He --

Q Do you really mean that?

MR. OLIAN: Yes, I do. I do. I think if he was --

Q On the basis of this record?

MR. OLIAN: Mr. Justice, we're talking about the statements to Officer Langford now, who was put in the cell.

Q Yes.

MR. OLIAN: And in that case I think if you look at what the petitioner said at the trial, he said he didn't even

talk to the man.

Now, later, in his petition, now he turns around and he says, "Oh, yes, he elicited a confession from me." But at the trial --

Q How long did it -- how many days was it?

MR. OLIAN: It was a matter of hours. It was a matter of --

Q Wasn't it a whole day?

MR. OLIAN: Oh, more than a day, yes. But it was something like --

Q But if he volunteered it, why did it take that long for him to volunteer?

MR. OLIAN: Well, what I'm saying is --

Q You don't really mean he volunteered, do you?

MR. OLIAN: Mr. Justice, what I mean in this situation is that what happened in that cell did not amount to a coerced confession. What did he do? He asked him some --

Q Well, suppose when he was first arrested the police questioned him when they first picked him up, and then questioned him again later in the afternoon, and then the next morning, woke him up in the middle of the night and questioned him, and then woke him up again in the middle of the night and questioned him. Would you think that would be coercive?

MR. OLIAN: Mr. Justice, there are cases --

Q Would you consider that to be coercive?

MR. OLIAN: Mr. Justice, there are cases that this Court has ruled on which come close to the facts which you're talking about, which this Court has said are coercion.

Q Well, now, the only difference is that in my hypothetical the man knew he was a policeman, and in this case he didn't know he was a policeman.

MR. OLIAN: No, Mr. --

Q Are there any other differences?

MR. OLIAN: Yes, Mr. Justice, I think there are a lot of differences. I think what has happened here is that he's in the cell and he's asking him some questions. He makes some absurd accusations.

He said, "What kind of psychological inducement was there?"

"Well, he shared his oatmeal in the morning." He let him steal some candy bars. "And a few times", he said, "well, I acted crazy."

Now, I don't think that that's psychological coercion of the petitioner. As far as the petitioner goes, he said in his own testimony at the trial: "No, he didn't wake me up at all."

Officer Langford said, "I woke him up about twice." Woke him twice.

Q Well, my final question is: how do you explain

Officer Langford's statement that "He broke down"?

MR. OLIAN: Your Honor, I don't think we have to examine each word that meticulously. Why he used those particular words, I don't know.

But I think if you view the facts, even as Officer Langford told those facts, that it doesn't come close to any of the cases where this Court has ruled that a confession was coerced.

There is no constant questioning by a large number of officers for hours on end, in the odd hours in the morning. Officer Langford said, "Well, he woke up a couple times; he woke up easily." But he didn't question, he didn't constantly interrogate him. He was in the cell, and occasionally, as Langford tells it, the petitioner even denies it -- as Langford tells it, he says, "Well, I got back to the subject again; I accused him of all kinds of things," and he said, "I acted crazy."

But I don't think that this case in any sense compares to the cases where this Court has ruled that a confession was coerced.

Q How do you think it compares to the Massiah case?

MR. OLIAN: Mr. Justice, I think it comes much closer to --

Q Which didn't have anything to do with whether or

not a confession was coerced, --

MR. OLIAN: Right, it does not.

Q -- contrary to what the District Court said.

MR. OLIAN: It does not. That's right. I think those two issues have to be kept quite clear. I think it comes much closer to Massiah.

I think we have urged in our brief that Massiah should not be extended, because the implications are that, for example, you could have the situation where you say, Well, the guard in the jailhouse said to another prisoner, asked him if he killed him; and he says, "Yeah, I killed him", to the guard. You say, Well, the guard can't come into court.

Q Well, in that -- my question is: do you think that this comes within the Massiah case? Quite apart from whether Massiah is retroactive, that, after all, is the basic issue in this case.

MR. OLIAN: Mr. Justice, as I suggested, I think it comes closer to Massiah than to coercion. I don't think Massiah should necessarily govern.

Q You contend in your brief that Massiah is distinguishable, do you not?

MR. OLIAN: Yes, Your Honor. That's correct. I contend it's distinguishable, and the point I'm trying to make is, I don't think Massiah should be extended beyond its facts. And I set forth the reationale.

I think perhaps the most important issue --

Q Do you know the McLeod case from Ohio?

MR. OLIAN: Yes, I do. Yes, I do.

In that particular case, however, Mr. Justice, it was -- there was nothing in what this Court said to indicate the position of this Court.

Q No, I'm just talking about your claim that Massiah should not be extended beyond its own facts. It has been extended, at least to the facts of the McLeod case, has it not?

MR. OLIAN: Mr. Justice, it has; I would urge that it should not be extended any more than absolutely necessary.

Q Beyond Massiah and McLeod?

MR. OLIAN: Yes.

Q Do you know what the facts were in the McLeod case?

MR. OLIAN: I have them here somewhere.

Q Well, let it go; you needn't find them.

MR. OLIAN: At the moment I can't recall.

Q Well, Mr. Olian, no matter how much we undertake to -- you undertake, I should say, to rationalize the officer in the cell, the stark fact is that that's what he was put there for.

MR. OLIAN: Yes.

Q And he stayed there, what, 24 hours?

MR. OLIAN: It was more than that; maybe 36, 40 hours, something like that.

Q Forty-eight hours.

MR. OLIAN: Yes.

Q He stayed there 48 hours, and got what he went for?

MR. OLIAN: Yes.

Q After the man had a lawyer?

MR. OLIAN: Correct. Correct.

I would like to point to the other issue that I think that we've been talking about.

I think if all of these -- I've been presenting these arguments as "even ifs", I think that perhaps I have not made clear to the Court. I do feel that if you feel that this case is governed by Massiah, even in view of what I've told you before, that Massiah should not be declared retroactively. Up to this point four circuits have said Massiah should not be declared retroactively.

Now, the petitioner suggests, well, that this would be a normal application. I don't think that in modern criminal law retroactivity is a normal application. And I think that the decisions of this Court have made that absolutely clear.

You've stated the factors that are important. You've stated that is the combination of those factors, and you've

ruled in a number of cases on whether particular decisions should be retroactive or not.

And it seems to me that the same rationale which governed in the Johnson case, the same rationale which governed, in fact, in Linkletter, applies to this particular case.

We talk about the purpose to be served. The purpose to be served in this particular case is to deter the police from interrogating when a lawyer is not present.

Now, that purpose has already been solved by Massiah; to make Massiah retroactive adds nothing additional to the utility, to the practical outcome of that particular decision.

Q Did Massiah overrule any previous decisions?

Let's see, Mapp did, and which would -- you've mentioned Linkletter. But did Massiah?

MR. OLIAN: I don't think it did, Mr. Justice. I didn't feel, personally, reading the cases of this Court I don't feel, and I didn't feel, and I still don't feel that that single explicit point is telling one way or the other. I think the rationale --

Q But it has to do with reliance --

MR. OLIAN: Yes. The prior history, prior reliance, it gets to two different doctrines, which have been stated by this Court. I don't think that specific question alone should tell, should be telling in terms of the final outcome of this case.

I do feel that the rationale is clear enough, again, and it's the combination of all these factors. And I think the decisions in Johnson, the decision in Linkletter, make it clear enough that the purpose, first of all, the purpose would not be served by making it retroactive.

I think, secondly, that in this type of situation, in a Massiah situation, in Massiah, the confession that was elicited in Massiah was not one that was believed to be coerced, it was not one that was believed to be unreliable; in fact, it was believed to be all too reliable.

And so the basis for getting rid of that kind of evidence by making the rule retroactive, again, is not necessary in this particular situation. We're not talking about right to counsel at trial, which so infuses the entire trial with possibilities of error that you have to make it retroactive to protect the right of the individual.

Third, --

Q But Massiah specifically said that this was true since Powell v. Alabama.

MR. OLIAN: Mr. Justice, I think there are some distinctions there. I think --

Q That's on page 205. "This view no more than reflects the constitutional principle established long ago in Powell v. Alabama." And then it quotes from Powell.

MR. OLIAN: Your Honor, I feel that what we're

talking about in those two decisions are distinguishable. In the broad sense they're talking about right to counsel, but Massiah is very specific, and Massiah is talking about a situation where he's in custody, he's released, and they have this setup with an informer. Powell is --

Q And he's been indicted.

MR. OLIAN: And he's been indicted.

Q And he has a lawyer.

MR. OLIAN: Yes.

Q Yes.

MR. OLIAN: In this particular situation what we're talking -- and in Powell what we're talking about was the right to have an appointed lawyer in a capital case; and I don't think that, although they talk about Sixth Amendment guarantees in the broad context, I don't think they're exactly the same.

And again in terms of the three criteria set up by this Court, I don't think, I don't see, and in terms of the decisions in Miranda and Escobedo, I don't see any other possibility, logically, but to make Massiah non-retroactive.

The third factor is the strain on the judicial system, and here I think in one of those two decisions, which I was just referring to, this Court pointed out the problems related to hearings on evidence long destroyed and hearings based on memories that are dimmed by time.

Q How common do you think -- how common a practice was this, do you suppose, before Massiah?

MR. OLIAN: Mr. Justice, --

Q Going now to your point as to the strain on the judicial system.

MR. OLIAN: Mr. Justice, in Johnson and in Young vs. United States, in the Fifth Circuit, there are comments to the effect that these were common practices. And I think that there's another --

Q Post-indictment, after a man's been indicted and after he has a lawyer, for the government deliberately to get at him and interrogate him further.

MR. OLIAN: Mr. Justice, it's awfully hard to get statistics on that.

Q Well, I ask this only because -- I just relied on my own recollection -- I don't remember that since McLeod we've had a single -- that this question has arisen here, on the --

MR. OLIAN: No, Your Honor, this follows --

Q -- retroactivity of Massiah.

MR. OLIAN: Yes.

Q And that's the reason that that suggests to me that this is a very rare practice. I would hope it was.

MR. OLIAN: Well, the other -- those two cases you suggest, it is not a rare practice.

Secondly -- oh, my time has expired.

MR. CHIEF JUSTICE BURGER: Well, you may answer the question, of course.

MR. OLIAN: Okay.

Secondly, I think that one of the problems in this particular type of situation is that, whether or not there is a great deal of reliance, a lot of petitioners are going to be sitting there and thinking, Well, what I can say is that this kind of, whatever you want to call it, duplicity or deception was practiced on me; now let's go and get an evidentiary hearing.

How are those claims going to be solved?

The reason that they're going to do that is obvious. They can't get Miranda and Escobedo applied retroactively, so they'll say, Well, I'll change my story, so that it falls within the aegis of Massiah, and therefore I can get an evidentiary hearing and perhaps get a new trial and get it dismissed.

Q Well, they could change their story to say they were denied their rights guaranteed by Powell v. Alabama or by Gideon v. Wainwright.

MR. OLIAN: Well, that's true, Mr. Justice, but those are things which can easily be established one way or another by the record. This type of situation cannot so easily be established by the record. He could say, Well, --

Q Well, it was in this case.

MR. OLIAN: It was in this case, but I'm --

Q Why wouldn't the record show?

MR. OLIAN: Well, what I'm getting at is that, within the broad purview of Massiah, a prisoner could say, Well, at the time I was questioned this policeman told me he was someone else, not a policeman but someone else; now I realize that --

Q The record would show that, wouldn't it? The record of the trial, whether or not a policeman interrogated a man after he'd been indicted and after he had a lawyer, and then, further, testified at that man's trial on behalf of the prosecution; and the record would show that for all time, wouldn't it?

MR. OLIAN: Mr. Justice, I think that record would show it in 1970 or '71; but we're talking about a case which took place before Massiah, and those records would not have raised this issue of deception, it seems to me, because I don't think it was ever clear at that time, and this Court points it out in Johnson --

Q Well, if there had been any cross-examination at all of the prosecution witness, it would have been brought out, the circumstances under which he --

MR. OLIAN: Well, they might have, Your Honor, but not as a constitutional right which was --

Q But the facts would be in the record?

MR. OLIAN: Yes. Oh, it's possible. It's possible, but not always.

We read many records every day where --

Q But we wouldn't have any problem if the record was like this one, would we?

MR. OLIAN: Mr. Justice, I think you still have some problems, because there are --

Q No, I mean about your problem, you wouldn't --

MR. OLIAN: Not that problem, but you still have problems --

Q That's the only case we have right now is that one.

MR. OLIAN: Yes, Mr. Justice, but we're talking about the broad application of this rule. And I'm trying to suggest that, consistent with standards set forth by this Court, Massiah should not be applied retroactively; and I've been trying to suggest why it should not be.

Q All right.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Olian.

Do you have anything further, Mr. Rutledge?

MR. RUTLEDGE: No, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Rutledge, you acted at the request of the Court and by appointment of the Court. We wish to thank you for your assistance to us and of course your assistance to the client you represent.

MR. RUTLEDGE: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 11:13 o'clock, a.m., the case was submitted.]

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