In the

Supreme Court of the United States

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MICHIGAN,

Petitioner,

v.

THOMAS W. TUCKER,

No. 73-482

Washington, D.C.
March 20, 1974

Pages 1 thru 78

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MICHIGAN, Petitioner,	:	
v.	:	No. 73-482
THOMAS W. TUCKER	:	

Washington, D.C.

Wednesday, March 20, 1974

The above-entitled matter came on for argument at 11:25 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 REHNQUIST, Associate Justice

APPEARANCES:

L. BROOKS PATTERSON, ESQ., Prosecuting Attorney, Oakland County, 1200 North Telegraph Road, Pontiac, Michigan For Petitioner

EDWARD R. KORMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. Amicus Curiae, supporting Petitioner

KENNETH M. MOGILL, ESQ., 506 Monroe Avenue, Detroit, Michigan 48226, For Respondent, appointed by this Court

ROMAN S. GRIBBS, ESQ., Detroit, Michigan, Detroit Bar Association, Amicus Curiae, supporting Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-482, Michigan v. Tucker.

Mr. Patterson, you may proceed when you are ready.

ORAL ARGUMENT OF L. BROOKS PATTERSON, ESQ.,

ON BEHALF OF PETITIONER

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

My name is Brooks Patterson. I am the prosecuting attorney of OaklandCounty in Michigan, represennting the people of the State of Michigan in this appeal.

Before stating the facts, there are four dates I would like to stress because they have a bearing on the facts of this case.

Chronologically they are the date of the Escobedo decision in June of 1964. Secondly, the date of the offense in this particular case, April 19th, 1966. Third, the date of the Miranda decision, June the 13th, 1966 and, finally, the date of the commencement of trial of the Tucker case, October 18th, 1966.

The facts of the case: On April 19th, 1966, it is undisputed that Marion Corey was brutally beaten and raped in her home where she lived by herself. She was beaten so badly that she was never able to remember, nor did

she recall at the time she testified, or make any identification of the Defendant as her assailant. She was discovered in her home by a coworker who summoned the police. This coworker also noticed inside her home, a dog and since Ms. Corey did not own a pet, he brought this to the attention of the police. The police followed this dog to the residence of the Defendant, Thomas William Tucker.

After making inquiries with the neighbors about the ownership of that particular dog, the police put out a broadcast to pick up the Defendant and later that day he was arrested and brought to the police station.

Before any interrogation of the Defendant, he was advised of his rights as delineated at that time by the Escobedo decision. Specifically, he was advised of his right to remain silent, that anything he said would be used against him at court of law and that he had a right to an attorney.

He was not advised, however, that he had a right to a court-appointed attorney but that right was yet to be mandated in the Miranda decision, two months hence.

During the interrogation that followed, the Defendant said that he had obtained the --

QUESTION: Was he told that he had a right to have a lawyer then and there?

MR. PATTERSON: No. He had a right to an

attorney, but not in those specific words "then and there."

During the interrogation, the Defendant told the police that he had obtained the noticeable scratches on his face from the flailings of a goose that he had killed and this would also account for the blood on his clothing. He said that all of this could be confirmed by one Robert Henderson, who he was with at the time of the alleged rape and thereby creating an alibi.

Later, the next day, in an effort to confirm that alibi the police sought out and talked to one Robert Henderson, who not only failed to corroborate the story told by the Defendant, Tucker, but actually gave testimony or statement that refuted Tucker's claim.

Henderson indicated to the police that, indeed, he did have a conversation with the Defendant on April the 19th, 1966 and that he had asked the Defendant how it came that he had these scratches on his face and whether he had gotten ahold of a wild one or something, to which the Defendant Tucker had replied, "Something like that," and then, moments later, added she was a widow woman in her 30's who lived the next block over.

The case went to trial several months later on October 18th, 1966.

QUESTION: In the City of Pontiac?

MR. PATTERSON: This was a Sheriff's Department

case in Pontiac Township, just outside the City of Pontiac.

On October 18th, it went to trial and because of the intervening decision of Miranda, none of the statements made by Defendant Tucker were introduced into evidence. However, Henderson was called as a prosecution witness and did testify.

The Defendant was convicted by a jury trial and sentenced to a prison term of 20 to 40 years in view of his record. Both the Michigan Court of Appeals and the Michigan Supreme Court affirmed that conviction with unanimous opinions.

Upon application by the Defendant to the United States District Court for the Eastern District of Michigan for a writ of habeas corpus, the Petition was granted under the theory that Henderson's testimony had been improperly admitted into evidence by the trial court because of the trial court's failure to apply the fruit of the poisonous tree doctrine. The Sixth Circuit Court of Appeals affirmed that opinion and we petitioned for a writ of certiorari which was granted by this Court on December 3rd, 1973.

We raise three issues this morning in argument. The first is the question of the retroactivity of Miranda. One week after the Miranda case was decided, this Court held in Johnson versus New Jersey that Miranda would be applicable

to all those trials that commenced after the decision date in Miranda and I think you can see from the dates that I set out when I first commenced that we were caught in a limbo situation.

We had an interrogation under Escobedo on April the 19th, Miranda came down in June and we commenced trial in October and even though Johnson stood for the proposition that Miranda would be prospective in its application, we were experiencing retroactive effect because we were caught in this limbo and this is the particular injustice in this case that we complained about this morning, that at the time the police were interrogating the Defendant Tucker, he was properly advised of his Escobedo rights and the police at that time were doing nothing wrong and now, by operation of the Johnson case and the retroactive effect, we start being told that the interrogation is illegal.

We feel that the Court should modify the retroactive application of Johnson because it places the -- this Court in the position of saying that Tucker's interrogation was improper but it only became improper by an ex post facto situation.

We feel that to make Johnson or effective Johnson to conform to its rationale and make it prospective would be in order. The Court has done this --

QUESTION: Before we decide, however, that the exclusionary aspect does not apply to live human beings who

are ready and able and willing to come in and testify, then you don't need to, because under these problems --

MR. PATTERSON: That right.

QUESTION: -- about retroactivity, do you?

MR. PATTERSON: No, we do not, Mr. Chief Justice, and that takes me immediately to the second issue, which I think is --

QUESTION: Before you get to that, Mr. Patterson, really, your first point is that Johnson versus New Jersey be overruled, because it, itself, dealt with the retroactivity of Miranda and to say that the decision dealing with retroactivity should be accorded only prospective effect is really kind of building anew dimension onto the thing.

MR. PATTERSON: Yes, your Honor, it should be unless it is overruled because I think, according --

QUESTION: In light of Angus, Miranda would be retroactive.

MR. PATTERSON: No, your Honor, I think the -- to overrule Angus, you should use an activity date as opposed to a trial date.

QUESTION: So you would modify it?

MR. PATTERSON: Yes, your Honor, thank you.

QUESTION: Incidentally, how many situations like this do you think can come up now, at this late date, under Johnson?

MR. PATTERSON: I wouldn't believe that many, your Honor.

The second issue --

QUESTION: I don't imagine you know of any likely in Richmond, do you?

MR. PATTERSON: No, your Honor, I personally do not. I've been involved in prosecuting --

QUESTION: There are hardly any now, would there be?

QUESTION: All you'd have would be, perhaps, a new trial.

MR. PATTERSON: That's right.

QUESTION: After the appeal and that is covered by Jenkins against Delaware.

MR. PATTERSON: That is correct.

QUESTION: We'd have heard of them by now.

MR. PATTERSON: I would hope so.

Your Honor, the second issue is the doctrine that you just mentioned, would be the application of the fruit of the poisoned tree doctrine and more specifically, we raise the question whether the fruit of the poisonous tree doctrine should be applied to the testimony and the identify of the witness, who was discovered during what is now declared to be an improper interrogation.

The Solicitor General has intervened on this

particular issue and will be arguing as well on this point, so I'd like to highlight some of the more salient points of our brief.

This precise question of witness testimony being suppressed under the fruit of the poisonous tree doctrine has yet to be presented to this Court and I take that lead from the footnote in Harrison versus United States, 392 U.S. in footnote 9. It would be, to apply the fruit of the poisonous tree doctrine to a witness who testifies, I think, would be an unwarranted extension of that particular doctrine.

It would be unwarranted because the immediate distinction is that in this type of situation with Henderson we have the testimony of a live witness and I do not feel that we should automatically equate a live witness and all that that suggests, the fact that he has his own memory and his own perception and his own will and his own intellect, which are all going to interact on that person when he takes the stand, we should not equate that type of a human being with physical evidence automatically because we have at least that distinguishing characteristic which makes a human being unique.

But I think, more argueably is the fact that this witness, when he comes into court and takes the stand, is going to be subject to the rigorous cross-examination by defense counsel. He is subject to impeachment and all the

devices the defense counsel has to cross-examine and this was done in the case of Henderson when he took the stand before the jury and he, a witness, has the ability to have come forward on his own, possibly, as contrary to physical evidence.

But I think more importantly, is the fact that when Henderson's name was brought up by the Defendant Tucker, at that point, the name Henderson was of no evidentiary value as such. It is not evidence, the mere mentioning of a name, not evidence per se. But independent labors of the police, who sought him out and talked to him, at that point, he begins to take on significance and when he comes into court and testifies, he then becomes evidence.

And I believe this Court addressed this particular problem in a case one week after Miranda, which would be June 20th, 1966, and Schmerber and the language in Schmerber said, "The privilege against self-incrimination is a bar to compelling one to be a witness, to give testimony." But the Court went on to state,but it is not a bar against that compulsion which makes the witness or the defendant or the accused the source of real or physical evidence and in this case, Tucker was the source, we admit, of Henderson's identity. But it is not evidence, the mere mentioning of that name.

The fruit of the poisonous tree doctrine, rather

than being extended, should be curtailed and I think is being curtailed in decisions by this Court and I would cite the Court a couple of the prime examples, would be the case of Harris versus New York in 1970, when the Court permitted the prosecution to use for impeachment the prior statement of the defendant which he was not being permitted to use in its case in chief, even though I think that would be the illegal fruit, it was still being -- the prosecution was being allowed some use of it and in U.S. versus Calandra, evidence which was illegally obtained during an illegal search and seizure was still being permitted to be brought before a grand jury for the use of that grand jury in its investigation.

The Court, this Court, has developed, as well as some of the lower federal district courts, I think theories which are now doctrines of law which permit or avoid the harsh application of the fruit of the poisonous tree doctrine, such theories as attenuation or the independent source. These rules have been carved out judicially from the announced doctrine in order to avoid the extreme, I think, harsh application of the automatic exclusion of evidence by the fruit of the poisonous tree doctrine.

But in the case that we have, the case of Michigan versus Tucker, to apply the fruit of the poisonous tree doctrine in the purpose of that application of that

doctrine, is to deter unlawful police conduct.

In this particular instance would be, in itself, unreasonable and unfair because the police, first of all, were not engaged in any misconduct. Their interrogation of Tucker met the standards then in force under Escobedo and, secondly, when they went out to talk to Henderson, this witness, they were following what was the alibi of the defendant. The defendant had given exculpatory remarks and the police went out to check that alibi and had it checked out, there would have been a good probable belief that Tucker would have been released, had his alibi been confirmed and if the police had ignored that exculpatory remark, they would have been derelict in their responsibility.

The final issue that we raised in our brief was the question of Miranda itself, and we posed --

QUESTION: If you'll pursue that point that you have made, suppose the police had found that Henderson would exculpate the defendant here and they had not produced him as a witness. They would be in violation of Brady and other cases, would they not?

MR. PATTERSON: Absolutely, your Honor, and there would be a very unfair and obviously unethical thing for the prosecution or the police to have even considered, to hide a witness which would have been of benefit to the defense and this is, again, we are now telling them, you have done

something improper, when, actually, what they were doing was being very proper and very ethical.

The question we raise with regard to Miranda is whether the standards which were enunciated in Miranda, whether they are too restrictive in their exclusion of admission and whether they are mandated by the U.S. Constitution? Well, the majority writing in Miranda, I think, answered the second half of that question when they said that"We cannot say that the Constitution necessarily requires adherance to any particular solution for the inherent compulsion of the interrogation process."

In those words, I think they admitted that the Constitution did not require the standards that they developed, but this was a judicially-developed framework to protect the Fifth Amendment privilege.

The other half of the question, is the standards set forth in Miranda too restrictive? And I think at this point it is undebatable that the standards which were enunciated in Miranda tolerate no deviance. The way the phrases were couched, they were couched with the use of the word "must." "These warnings must be given, waivers must be obtained," and if there is any indication he does not want to proceed, you must end your interrogation."

So what the Court did in this instance, was to develop an absolute, inflexible and rigid test and the Court

took what used to be circumstances the Court would look to, the advisement of certain Constitutional rights, and elevated these in the form of standards to what are now almost fundamental Constitutional rights, the violation of which results in the automatic exclusion of a statement made by the defendant regardless if that statement might, in fact, be voluntary.

The Supreme Court, way back in 1883 in Hopp versus Utah, I think said that the -- dealing with the question of confessions, that "We have wisely foregone to mark with absolute precision the limits of admission and exclusion"and I think they foresaw the problem when you do mark with a rigid test what is going to be admissable and what isn't.

What now happens tin the trial court -- and I am sure this Court is aware of it -- the focus is shifted from the will of the accused or what is on his mind or why he made a statement and the first focus is now on the conduct of the police officer and we look to see what he did -- how he acted in order to determine if this man made a voluntary statement when, actually, the test the police officer goes through, the advisement of those four rights and the obtaining of a waiver, is not really bearing upon the question, is this a voluntary confession?

And the police officer's scrutiny, if he makes

one fatal mistake in the advisement of the rights, or later when he testifies in court, at the trial court in a hearing like Jackson v. Denno, we call it "Walker" hearing, if he testifies in his hearing about voluntariness and makes one mistake in how he says he gave his rights, the court stops at that point its inquiry as to the voluntariness of a confession and because the Miranda standards have been violated, maybe one had been omitted or had been incorrectly testified to, the inquiry stops and because of that deviation from the standards set forth, the court trial court will exclude any statement made by the accused.

The test is not longer now -- Miranda, I believe, was supposed to take us away from looking at the totality of circumstances and we are supposed to look at this condition precedent before we get to the confession. There is now a condition precedent, namely, the four rights the officer makes and Miranda was supposed to take us away from examining the totality of circumstances and make it very simple to determine if, indeed, the voluntary statement was made and the old test of looking to the defendant to see if his will was overborn or if there was any inducement or coercion upon him or any threats to make him make a statement or obtain a waiver was supposed to have been taken out of the examination of voluntariness but, in fact, I think that we are fooling ourselves if we don't realize that we are still in the

trial court and very much immersed in a total circumstances examination, a totality of circumstances.

We still look to all these factors in determining whether the rights were properly administered. We still, the trial court still looks to the totality of circumstances to see how the rights were administered. Were they administered after three days of incommunicado interrogation or were they --

QUESTION: By "rights," you mean the warnings?

MR. PATTERSON: The warnings, yes. And, well, even though the warnings are there and it is a condition precedent to getting into the next step of examining the voluntariness, the court still brings in all the circumstance of how that officer gave his rights, when did he give the defendant his rights, under what circumstances were the rights administered and was he intoxicated and so forth.

I think Mr. Justice White, in his dissent, foresaw some of these problems when he wrote, "Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights and whether nontestimoniary evidence introduced at trial is the fruit of statements made during a prohibitied interrogation."

Mr. Justice White was absolutely correct. We now have these minitrials and the prosecution must prevail

in every one of these questions and more and should we fail on just one of these questions, even though we might have prevailed on six, if we miss on one of these minitrials, at that point the inquiry ends and the judge automatically excludes the statement that we obtain as a fruit or an illegal confession.

QUESTION: Mr. Patterson, you said that was -- this whole minitrial is step one and then you go on to see if, in fact, the statement was a voluntary or involuntary one. Are there any cases in Michigan that hold that even after all of the so-called Miranda rights were accorded, that the statement was involuntary?

MR. PATTERSON: Your Honor, I do not believe that I can give a case, a specific case.

QUESTION: I don't think we have ever seen a case here on a petition.

MR. PATTERSON: No, your Honor, but you wouldn't see it if the Court has ever ruled that way and I am sure they have.

QUESTION: Do you think they have?

MR. PATTERSON: Oh, yes, I am sure they have, in instances when the Court has found it involuntary, not because the rights were violated --

QUESTION: No, no, no -- my hypothesis is, all the rights were accorded. He was told that he did not have to

say anything and he was told he could have a lawyer and if he couldn't hire a lawyer, the state would furnish him one then and there and all of that and are there cases in Michigan that after all of that was done, that have held that his statement was involuntary?

MR. PATTERSON: Your Honor, I would cite this case as an example when, at that point in time, in 1966, all the rights that were incumbent upon the police to be administered were given and now we find that the statement --

QUESTION: There is no holding in this case that the statement was involuntary.

MR. PATTERSON: Oh, yes, and the statement that Tucker made was never used, any of his remarks were --

QUESTION: I know, because the Miranda rules were violated; there was no holding that this was involuntary, was there?

MR. PATTERSON: No, that is correct. The rights, the warnings that would have to be properly administered were not technically given and therefore --

QUESTION: Therefore, his statement was inadmissable under Miranda.

MR. PATTERSON: That is correct.

QUESTION: And that is not at issue here at all.

MR. PATTERSON: No, that part is not.

The totality of circumstances, the examination

of all the factors surrounding the voluntariness of the confession is a manageable test and it is still being used, again, the totality to examine how the warnings were given and this Court has reaffirmed the viability of the totality of circumstances test as recently as the Bustamonte case, where totality of circumstances were examined to determine if proper consent had been obtained in order to make a search.

QUESTION: And the opinion of that case sharply distinguished the Miranda situation.

MR. PATTERSON: Yes, it did but I am going now to the totality of circumstances as being the test that the Court found a manageable and a workable test to examine the circumstances under which the defendant then gave his consent and the same thing in the case of Barker v. Wingo, when, again, this Court used the totality of circumstances rather than a fixed rule to determine whether the defendant had been denied his right of a speedy trial.

I suggest that we adopt and we move forward to a flexible standard of looking to the totality of circumstances and use the Miranda warning as criteria in determining whether the defendant had been properly advised and whether he had given proper consent to waive his right to remain silent and that I adopt the language out of the Omnibus Crime Control and Safe Streets Act where they say that the absence of any one fo these particular warnings should not be the

sole determining factor on the admissibility of that confession but ought to be a factor that the judge takes into consideration in determining the voluntariness of a confession.

What is wrong with the warnings as they are required today is what we find wrong in the Tucker situation. I don't think there was any question that Marion Corey was raped and there is no question that the Jury found the Defendant guilty of that offense and there is no question that the police were engaged at that time in a proper pre-Miranda situation, having advised him of his rights under Escobedo and there is no question that the police were doing something very proper in going out checking out his alibi which might well have exculpated him.

But there is a question that if the warnings which are now required in the rigid test that they are in the Miranda Doctrine, that they continue to be enforced in the form that they are as the sole criteria in determining the admissibility, there is going to be a question that Marion Corey and the people of the State of Michigan can have their day in court, but the bigger question is that in the other cases that come after this one, whether defendants who are only tied to their case by an admission can ever be brought to justice.

Thank you. I'd like to reserve a little time.

QUESTION: One question before you sit down. If

the Court should decide the the exclusionary doctrine cannot apply to a live human being who is ready, able and willing to testify, then we don't reach all these nuances, do we?

MR. PATTERSON: That is right, your Honor. I have given the Court, I think, several arguments, any one of which would allow Tucker's case to be -- the conviction of which would be affirmed, and we felt that the Miranda issue did have a bearing because it backs up to the second issue itself and this is how they got into the fruit of the poisonous tree because of a violation of one of the warnings in the Miranda doctrine.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Korman.

ORAL ARGUMENT OF EDWARD R. KORMAN, ESQ.,

Amicus Curiae, supporting Petitioner

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

We are not here asking that Miranda v. Arizona be overruled or that Johnson versus New Jersey be overruled. Rather, the issue is whether the holding in Miranda versus Arizona should be extended to interrogation which elicits statements not admitted into evidence against the accused but merely leads to discovery of other evidence.

The arguments of the party spoke as principally

on whether the so-called "fruit of the poisoned tree doctrine" extends to the testimony of a live witness whose identity was discovered as a result of interrogation without the Miranda warnings.

The critical assumption upon which this argument is based, of course, is that there was, in fact, the poisoned tree, that it was clearly a violation of the self-incrimination clause to engage in informal and custodial interrogation to obtain statements which were not admitted against the accused at trial but merely led to the discovery of other evidence.

While we agree with the State of Michigan that if, in fact, the tree here was poisonous, the fruit should not be suppressed, it is our submission that this case presents two analytically distinct issues. The threshold issue involves the scope of the protection that the self-incrimination clause affords to a subject in the context of informal custodial interrogation.

In Miranda, it was held that during such informal interrogation, an accused may not be compelled to make any statements which could be admitted against him at trial, that custodial interrogation, even without the use of tactics which would render the statement involuntary was inherently coercive and that warnings were necessary to ensure that the privilege against self-incrimination was not violated.

We believe that in the peculiar context of informal interrogation, this protection is adequate to vindicate those bundles of values reflected by the privilege against self-incrimination and there where law enforcement officers elicit statements during such custodial interrogation which are merely used to discover evidence, the privilege against self-incrimination has not been violated.

We do not regard this claim as having been foreclosed by Counselman against Hitchcock where it was held that a witness subpoenaed before a grand jury could not be compelled under a threat of contempt to answer questions where the only use which could be made of the statements was to discover other evidence.

First, the Defendant in this case did not refuse to answer any questions, nor did he assert his privilege, nor is there, as a matter of fact, as opposed to presumption, any basis for the assertion that his statement was compelled in violation of the privilege against self-incrimination.

More significantly, in light of the values reflected by the self-incrimination clause, there is a substantial basis for distinguishing, first, between compelled testimony before a grand jury, a Congressional proceeding or similar inquiry and informal custodial interrogation and, second, distinguishing between interrogation which leads to the admission of statements made by the

accused at his trial and the use of those statements to obtain other evidence.

Those values were the values reflected by the privilege against self-incrimination, a cause comprehensively set forth by Mr. Justice Goldberg in his opinion for the Court in Murphy against the Waterfront Commission and the relevant excerpt from that opinion as set forth at page 15 of our brief.

Unlike grand jury witnesses, the Defendant here was not subject to the cruel trilemna of self-accusation, perjury or contempt. Moreover, he was not subject to inhumane treatment, nor, given the circumstances which led to his arrest, can it reasonably be said that his custodial interrogation improperly infringed on the privacy values which were reflected by the privilege against self-incrimination and here again, such interrogation is substantially different from that before a grand jury or a Congressional committee where a witness can be compelled to appear without the slightest probable cause to believe that he has any information to give to the grand jury.

Moreover, there need be no concern here that the interrogation will lead to the admission at trial of self-deprecatory statements of questionable validity. That concern was important to the Court's decision. It was specifically alluded to twice in the majority opinion in

Miranda and also in the discussion of the purpose of the Miranda warnings which appears in Johnson versus New Jersey.

We do not deny that such interrogation, which is intended to obtain leads to other evidence does implicate the policies reflected by the privilege, that is, that the Government in its contest with the individual should shoulder the entire load and, to a limited extent, the preference for an accusatorial rather than an inquisitorial system but we submit that it does not violate those values any more than has already been sanctioned by this Court in cases such as Schmerber versus California, United States versus Dionisio and Mara and other cases.

If, for example, an individual may be compelled to speak -- and when I use the word "compelled," I mean under the threat of jail so that a witness may be able to testify at trial that his voice was that, for example, of the kidnapper who telephoned to ask for ransom, why may not that individual, if he is apprehended before his accomplices have released the victim, be interrogated without any such overt compulsion regarding the location of the victim and if the victim is found alive, why should not her testimony identifying the suspect so interrogated not be admitted? Or if his fingerprints are found at the location where the victim has been found, why should they be suppressed?

Yet this is the import of the holding of the

courts below.

QUESTION: Can you find me any case -- are you talking about kidnapping -- where this happened?

MR. KORMAN: No, I just --

QUESTION: There has never been such a case.

MR. KORMAN: I don't know whether there has or has not, Mr. Justice Marshall. I am merely citing a hypothetical.

QUESTION: The possibility.

MR. KORMAN: Well, it would clearly come within the import of the holding of the court below and one could only invoke the words of Mr. Justice Marshall in Miranda in his Miranda dissent when he suggested that one is entitled to feel astonished that the Constitution --

QUESTION: I wrote the Miranda case. I didn't decide it.

MR. KORMAN: I'm sorry. I meant Mr. Justice Harlow.

One is entitled to feel astonished that the Constitution can be read to produce such a result. It is our submission that as long as the interrogation is not marred by conduct which would be found offensive on due process grounds that the values implicated by the privilege would be sufficiently protected by the exclusion of statements made by an individual if, in fact, the Miranda

warnings are not given and that the statements are therefore regarded under Miranda as being compelled.

The leads derived from such statements should not be suppressed.

The second aspect of our argument, Mr. Chief Justice, goes to the fruit of the poisoned tree doctrine and it based on the --

QUESTION: Before we leave the first aspect, what if we had here -- a hypothetical case -- a coerced confession and in that coerced confession the -- Mr. Tucker talked about this witness?

MR. KORMAN: I think the case of coerced confession would be more difficult because there we would be dealing with police conduct that would be offense in and of itself, regardless of what use is made of the statement and there it could be reasonably suggested that what we are concerned about is simply deterring this kind of conduct that it is the conduct which the police engaged in which is itself offensive and therefore, perhaps, the exclusionary rule should be applied to its fullest extent but we are not engaged in --

QUESTION: Was it, in fact, applied to its fullest extent, to use your words, back in the pre-Miranda days when the Court thought that what was applicable here was the due process clause of the 14th Amendment?

MR. KORMAN: I believe it was, but I haven't been able to find cases to that effect although we do cite cases at early common law at the time of the adoption of the Constitution of cases involving this very issue, with a live witness, The King versus Lockhart, which is cited in our brief. It's an English case in which confession was obtained which was excludable on traditional voluntariness grounds and English courts held that the witness could be permitted --

QUESTION: Well, that is the rule in England, I know.

MR. KORMAN: Yes, it is.

QUESTION: Of course, England does not have our Constitution.

MR. KORMAN: That's true. On the other hand, when the framers who broke the privilege against self-incrimination sat down to write that clause, what they had in mind was the law of England at the time, as your Honor pointed out.

QUESTION: Well, its phrased as a privilege against compulsory self-incrimination, too, in the Constitution, isn't it?

MR. KORMAN: That's correct, but as it was understood at common law, again, this is a controversy that is engaged in by both sides in the Miranda case. At common law, the notion was that compelled testimony and the compelled

statements which were made by an accused under compulsion, under torture, under threats, were excluded as a matter of a common law evidentiary rule, that those statements were inherently unreliable and that when the privilege was written, the privilege against self-incrimination was written, it was basically intended to reflect the English rule that you could not be compelled to appear under oath and testify as a witness, but it was understood at the time of the adoption of the Constitution that you could be subjected to informal custodial interrogation and statements which were really compelled under torture were excluded, not because it was felt that the principle was violated, but because of statements that were regarded as inherently unreliable.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

[Whereupon, a recess was taken for luncheon, from 12:00 o'clock noon to 1:00 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Korman, you have about -- I'm not sure just how much time. They have probably advised you.

MR. KORMAN: Yes, four minutes.

Just before -- during the argument, Mr. Justice Marshall, you asked for a case involving a potential kidnapping. There are several cases discussed on page 277 of Judge Friendly's book, "Benchmarks," on which he suggests and cites kidnapping cases and other cases where it may be important for law enforcement officers to --

QUESTION: Did he cite a case that had happened?

MR. KORMAN: He cites a kidnapping case in which police attempt to question in order to learn the location of the --

QUESTION: Well, now we have one.

MR. KORMAN: Well, there may be more. Also, Mr. Justice Stewart asked about whether, in a traditional due process violation, the fruits would be excluded? Of course, in Wong Sun versus the United States, was a case in which a confession was the result not of any coercion, but as a result of an illegal arrest.

QUESTION: Fourth Amendment violation.

MR. KORMAN: Yes. And the court applied the fruit of the poisonous tree to tangible fruits.

QUESTION: Right.

MR. KORMAN: Of course, we think this case is different from Wong Sun because there has been no Constitutional violation. That is, it is impossible to say and there is nothing, of course, in this record to indicate that the statement of this defendant was taken in violation of any Constitutional right and that is why it leads me to the other point I'd like to make.

In many ways, the argument we make, although it may be a somewhat broader one than the State of Michigan in the sense that the analysis we suggest would apply to all fruits in this kind of a case without distinction between tangible evidence and live witnesses, it would only apply in a Miranda-type situation and it would not necessarily have to extend to where, in fact, there was a violation of the Constitution.

On the other hand, the live witness, based as it is on the notions of attenuation or notions that relate to -- that we can never know for certain, that this witness would have not come forward or testified, but for the violation would, of course, apply across the board to all cases and to all exclusionary rules and, indeed, the cases in the District of Columbia, if I recall correctly, were not Miranda-type situations but Fourth Amendment violations.

There are several points that I would like to

touch upon as to why, even if we are wrong on our initial argument, even if the Fifth Amendment does protect against compulsion during the course of custodial interrogation relating to both its statements and fruits, why that exclusionary rule of Miranda should not be extended to fruits, first, we not that most of the empirical evidence that is available and that is cited in the brief for the Respondent indicates that Miranda has very little effect on the decision of a defendant on whether to make a statement or not.

In fact, all of the studies suggest that it has had no effect on the decision, that is, where the warnings are given.

QUESTION: Have there been a good many cases on whether failure to comply with Miranda warnings results in exclusion of physical, tangible evidence which is found through the use of the answers to the questions?

MR. KORMAN: Well, I know one case which is cited in our brief, the case called United States versus Castellano, which is now pending on --

QUESTION: Say you asked where is the gun? And he says, It is under the dresser?

MR. KORMAN: That is exactly the facts in United States versus Castellano.

QUESTION: And what happened?

MR. KORMAN: And the Fifth Circuit suppressed it

as the fruit of not having given the Miranda warnings and I might add even though --

QUESTION: And do you think that is an easier or a harder case for you to win?

MR. KORMAN: I don't --

QUESTION: Do you think they are on the same level?

MR. KORMAN: I think they are on the same level. I might say that it might be somewhat harder because when you are dealing with a live witness, you have the additional element that you would never even know. He might have come forward anyway.

QUESTION: Well, of course, if the guy hadn't said anything, you still might have seen the gun under the dresser.

MR. KORMAN: Well, that is exactly the argument we make to the Fifth Circuit and they rejected that, also.

QUESTION: Has the petition been filed yet?

MR. KORMAN: There is a petition for rehearing that is pending now in the Fifth Circuit, but --

QUESTION: You have lost this argument before, I take it?

MR. KORMAN: Well, the United States Attorney lost it.

Thank you.

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

Mr. Mogill.

ORAL ARGUMENT OF KENNETH M. MOGILL, ESQ.,

ON BEHALF OF RESPONDENT

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

The first question presented for the Court's consideration in this case is whether there is any basis and precedent logic or policy for creating a distinction between physical and verbal derivative evidence and refusing to suppress from use in the state's case in chief the testimony of a witness which was illegally obtained where it was the existence and identity of that witness were learned solely as the direct result of illegal -- of admitted illegal police conduct and where it is stipulated by Petitioner that there was no independent source for the discovery of the witness' existence and identity.

While this Court has not previously passed on this precise fact situation, the distinction proposed by Petitioner has never been accepted by this Court and has, in fact, expressly been rejected in circumstances closely similar to those of the case at Bar.

QUESTION: And what case was that you are talking about?

MR. MOGILL: In the Wong Sun case, where this

Court's --

QUESTION: Did they exclude a witness?

MR. MOGILL: The sole distinction between this case and Wong Sun is that the verbal evidence which was rejected in Wong Sun was that of the Appellant, rather than the witness.

QUESTION: It isn't completely a parallel then, is it?

MR. MOGILL: Not completely, that is correct. The sole distinction between Wong Sun and this case is the fact that the witness -- the testimony excluding the witness in Wong Sun was that of the Appellant rather than a witness. However, Petitioner suggests no circumstances which distinguish Wong Sun from the case at Bar and in point of fact, applying this Court's traditional deterrence impact approach to the exclusionary role cases requires application of the same result in Wong Sun to the facts of the case at Bar and if I might, I would like to go into detail regarding the circumstances regarding the proposed test which you authored, Mr. Chief Justice, in the Smith and Bowden case and which, I submit, may not be squared with the exclusionary principles enunciated by this Court in Wong Sun and previously in Nardone and Silverthorne.

The proposed distinction would have the admissibility of the testimony of a witness turn not on the

relationship between the primary police illegality and the discovery of the witness' existence and identity, but rather on the voluntariness of the witness' decision to appear in court.

The test further distinguishes physical from verbal evidence on the grounds that there is no guarantee that a witness' testimony will favor the prosecution, that a witness is subject to cross-examination and that physical evidence speaks for itself.

A further condition which has been articulated in this test is that the admissibility of the testimony of a witness goes to the weight, but not the admissibility of that test, of that evidence.

The voluntariness of a witness' decision to testify is not an appropriate consideration for the reason that it goes not to the relationship between the primary illegality and the discovery of the witness and since the focus that this Court has consistently applied in administering the exclusionary rules is the impact of deterrence, this focus would be ignored by such a test.

Moreover, voluntariness of the witness' decision to testify is not an appropriate consideration because the witness may be compelled to come into court and testify by the subpoena powers of the court and if the witness refuses to testify, the witness is subject to the threat of contempt.

QUESTION: Would you then make a distinction between witnesses who appeared voluntarily and those who appeared under a subpoena, the compulsion of the subpoena?

MR. MOGILL: Such a distinction would have no bearing on the purposes of the exclusionary rule because it has no bearing on the relationship between the primary illegality and the discovery of the evidence.

QUESTION: Well, I wondered then why -- I was waiting for the point you were going to make as to the distinction between the two.

MR. MOGILL: My point was that the distinction which is proposed by Petitioner is not appropriate because the voluntariness of the witness is irrelevant, given the Court's subpoena power.

QUESTION: You have to draw a line between subpoenaed witness and voluntary witness, I submit.

You mean, if a witness comes in and says, "I know about this case and I want to testify," that the bench says "Uh uh."

MR. MOGILL: No, certainly not. Certainly not, your Honor.

QUESTION: I hope not.

MR. MOGILL: I don't mean to suggest for a second that where a witness voluntarily appears, that that witness may not be used. However, in the case before this

Court right now, it is stipulated that there was no independent source and once a primary taint has been established, the prior cases of this Court consistently hold --

QUESTION: Was this witness subpoenaed or not?

MR. MOGILL: I'm sorry?

QUESTION: Was this witness subpoenaed?

MR. MOGILL: I have -- I personally do not know, although I would assume that he was. As a matter of practice, in state courts, subpoenas are sent out prior to trial.

The point I am making is that because of the subpoena power of the Court, because a witness may be made to appear regardless of his voluntariness, apart from an independent source situation, the voluntariness of the witness decision is irrelevant.

QUESTION: Well, if I understand the State and the Government, they say this witness might have volunteered.

MR. MOGILL: There is no basis whatever in the record of this case --

QUESTION: They didn't say it in the record, but they said he might have. And, of course, that is true, is it not?

MR. MOGILL: It is possible.

QUESTION: Right.

MR. MOGILL: It was stipulated, however, that there was no independent source.

QUESTION: The stipulation, as I understand it, is that the state learned of this witness only through the statement made by Mr. Tucker, which statement was made in violation of his Miranda rights.

MR. MOGILL: That is correct.

QUESTION: That is a given in this case.

MR. MOGILL: That is correct and the Petitioner has never alleged that there was an independent source for the discovery of the witness' identity.

QUESTION: Do you think that precludes entirely the possibility that, as happens in many cases, that witnesses volunteer?

MR. MOGILL: It certainly does not preclude entirely, but because of the primary illegality, the burden necessarily shifts to the prosecution.

QUESTION: Your point is that that is purely speculative?

MR. MOGILL: That is correct.

The distinctions that have been urged between physical and verbal evidence regarding the nature of the evidence also are inappropriate for the reason that they ignore the relationship between the primary illegality and the discovery of the evidence. But they are also inappropriate for the reason that, just as a search may not be justified on the basis of what it produces, the admissibility

of the testimony of a witness has never turned on whose side it favors and the admissibility of physical evidence does not turn on whether or not it is, in fact, marijuana, for example, or oregano or is, in fact, heroin as opposed to, for example, lactose.

Similarly, the argument that live evidence is distinguishable from physical evidence on the grounds that live evidence is subject to cross-examination also does not hold up for the reason that, in the case of physical evidence, the defense attorney can and does cross-examine the expert offering the testimony.

Similarly, the claim that the manner by which the witness was discovered goes to the weight and not the admissibility of that witness' testimony is not an appropriate consideration for the reason that the weight of a witness' testimony is determined by his opportunity and capacity for observation and on the basis of any interests or bias the witness may have.

How the police came to find this witness is irrelevant to that consideration and in point of fact, a defense attorney trying a criminal case would not be permitted to ask a witness how did the police find you?

QUESTION: I suppose if the question were made to turn solely on the reliability of the type of evidence, you could make a pretty good argument that physical or

demonstrative evidence tends to be more reliable in many respects than eye-witness evidence, or at least testimonial evidence.

MR. MOGILL: In certain circumstances -- I'm not sure I follow your question, Mr. Justice Rehnquist.

QUESTION: Well, if you are addressing yourself -- and I don't think perhaps you are, but you are at least commenting on this, if we are talking about how reliable is the evidence being excluded, I should think a case could be made for the fact that the gun on which fingerprints were might be a good deal more reliable than a witness who recalls a particular encounter with the Defendant.

MR. MOGILL: Certainly. I am not relying on such a distinction and, in fact, this Court's exclusionary rule cases do not consider the reliability of the evidence as a factor in assessing whether or not to apply the exclusionary rule.

I think that an appropriate case which is analagous for the point of the scope of exclusion necessary is this Court's decision in Kastigar because the interests at stake in Kastigar were the same as those involved here and that is, protection of the privilege and according -- Kastigar was considering the scope of exclusion necessary in order to restore the privilege in order to maintain the privilege, the only difference being that in Kastigar, the view was

prospective in maintaining the privilege where, in this case, the view is retrospective in terms of returning the parties to the status quo.

The Petitioner in Kastigar challenged the sufficiency of the statute under consideration on the ground that that statute would not protect against derivative use of leads and names of witnesses.

This Court rejected that contention specifically stating that not only would the statute not permit derivative use of leads and names of witnesses, but that the statute could not permit such use in order to be consistent with the Constitutional command. In fact --

QUESTION: Then, of course, you have got a plain violation of the Fifth Amendment of a man being compelled to testify against himself, don't you?

MR. MOGILL: Certainly, your Honor.

QUESTION: That isn't the case here.

MR. MOGILL: Well, in this case there is an admitted violation of Miranda.

QUESTION: Yes, but not of the compulsory self-incrimination clause of the Fifth Amendment.

MR. MOGILL: This Court's holding in Miranda was that in the absence of all due warnings required therein, the compulsion inherent in the interrogation process could not be met so that any statement given was for Constitutional

purposes compelled.

QUESTION: How do you define a holding?

MR. MOGILL: I do not -- I don't think that I am in a position to argue holding versus dictum and I don't think it is appropriate because even if Miranda was not decided on Constitutional grounds, this Court has never required a violation to be Constitutional.

QUESTION: Especially if what is used against him aren't his words, aren't his admissions, but some non-testimonial objects, then the question is, how far are you going to extend the fruits doctrine as a rule to implement the basic purpose?

MR. MOGILL: That is correct and it is my position that --

QUESTION: What is your argument? Assume a question in violation of Miranda, where is the gun and he says it and you find the gun and, independently, you connect the gun to the defendant. You never use his admission in court. Then what is your argument?

MR. MOGILL: If there was an independent source for the discovery of the gun --

QUESTION: No, no. No, no. There is no independent source. Concededly it came from the defendant but the gun is found and offered in evidence and it is connected to him by evidence independent of any question.

MR. MOGILL: Such as a fingerprint, I would --

QUESTION: A fingerprint or ballistics. That would still be a direct and immediate result of a Constitutional violation of the defendant's rights.

QUESTION: But it isn't offering his words.

MR. MOGILL: That is correct, but this Court, since Nardone, has refused to distinguish between direct and derivative fruits of illegal activity and, in fact, the Court's concluding paragraph in the Calandra case expressly reiterates the notion that direct and --

QUESTION: Calandra itself is a prophylactic rule.

MR. MOGILL: Certainly, and a prophylactic --

QUESTION: And so now you want to put -- so now you are suggesting you should have a prophylactic rule on a prophylactic rule, to be sure and get all the fruits in order to make the prophylactic rule more prophylactic.

MR. MOGILL: In order for Miranda to be more effective, there must be removed any incentive to violate it and if a police officer is able to use in court verbal evidence which is directly derived from a violation --

QUESTION: He isn't using verbal evidence.

MR. MOGILL: Certainly, the testimony of the witness.

QUESTION: Oh, but it is not his witness. I mean, it is not the defendant's testimony.

MR. MOGILL: It is testimony which was obtained solely and directly as a result of a statement elicited from the defendant in violation of Miranda.

QUESTION: The question is still, though, how far do you carry the fruits doctrine?

MR. MOGILL: Certainly, and I think that this Court has consistently limited the application of the fruits doctrine to those situations where the deterrent aspect would be met and I believe that on the facts of this case, there was no distinction between physical and verbal evidence, that, in point of fact, an officer would be encouraged to violate Miranda if he were able to use a witness such as was found here and that the deterrent purposes recognized in Wong Sun and in the prior cases would require rejection of the proposed distinction between a witness and physical testimony.

QUESTION: You've got into some hypothetical analogies so let me ask you another one that is based partly on this case. Suppose that Henderson, when the police went to him, did what the defendant hoped he would and said, oh, yes, he was with me. And that, notwithstanding, as the prosecution went forward on other evidence, that he was called as an alibi witness by the defense and testified affirmatively in favor of the defendant's theory that he was somewhere else at the time but then, on cross-examination, a vigorous

cross-examination, as it sometimes does, brought out the fact that he was not telling the truth and then he told all the things which he testified to in this case. Would you say that that cross-examination must be stricken? That he must not be permitted to testify?

MR. MOGILL:On the basis of the hypothetical as you pose it, Mr. Chief Justice, I see no relationship between any police illegality and the cross-examination of the witness and for that reason --

QUESTION: You say that the cross-examination could come in?

MR. MOGILL: In that case. There would be no relationship -- there would be no evidentiary gain to the prosecution from its misconduct, if I understand your hypothetical correctly.

QUESTION: Let me make another variation in hypothetical. The question I would put to you on this hypothetical is, would you extend the rule you are now contending forth to this situation? Suppose a kidnapping case of the kind that has been mentioned before occurs and the police have some word that the kidnap victim may be in a particular house -- group of buildings and they go to the house without a warrant. They break into the house, find the kidnapped victim and perhaps one of the kidnappers. Would you say that the testimony of the kidnapped victim must then

be excluded and suppressed because of the illegal entry and break-in without a warrant?

MR. MOGILL: On the basis of the facts that you have hypothesized, the question -- I feel incapable of giving a definitive answer. I think that the question would ultimately depend on the same principles --

QUESTION: I am assuming in my hypothesis that the police conduct was illegal but they finally got the kidnap victim.

MR. MOGILL: If there was no independent source for the discovery of that victim, then, of course, the witness' testimony would be inadmissible. However --

QUESTION: Inadmissible.

MR. MOGILL: Well, yes, however --

QUESTION: She would not be able -- she or he would not be able to testify that, yes, this man or this man had --

MR. MOGILL: However, I don't think that would be the result in your case because since kidnaps are normally for the purpose of ransom, it is in the interest of the kidnapper initially to make the identity of the victim known so that there is no direct relationship between the illegality of that act of breaking in and discovering the existence and identity of the witness so that, in fact, the witness testimony would be admissible.

QUESTION: Notwithstanding the illegal manner in which the witness was found?

MR. MOGILL: Because that did not lead the police to the existence and identity of the witness. There may be a partial exclusion involved, such as is involved in the Wade and Gilbert situation, where if there is an independent source for identifying a defendant apart from an illegal line-up, the witness may still come into court to testify as to the identity of the defendant on the basis of previous observations but not on the basis of the observation of the line-up, so that the witness may well be permitted to testify as a complaining witness, but, perhaps -- and I don't have an answer to that right now -- as to the offense related to the illegal break-in.

The test which was proposed by Petitioner, I submit, for the reasons I have stated, is inconsistent with the deterrence principles of the exclusionary rule as previously fashioned by this Court but I believe that the test should be rejected for reasons beyond that because in those courts which have attempted to apply this test, it has proven to be unworkable.

To begin with, the test attempts to draw definite conclusions from acts which are ambiguous, qualitatively more so than many others which the law permits definite conclusions to be drawn from and I think this is demonstrated in the

experiences of the courts which have attempted to apply the Smith and Bowden test. None has articulated any consistent standard for its application and, in point of fact, while in Smith and Bowden and Edwards, the witness' initial reluctance which was later overcome was viewed as an attenuating factor which justified admissibility of the witness' testimony;in the Tane case, the same factual context was viewed as exploitation of the taint, requiring suppression.

In the original proceeding in this case, in the Michigan Court of Appeals, the same result as was reached in Smith and Bowden was reached on the basis of the exact opposite reasoning, the court presuming, without any foundation in the record, I might add, that Henderson's testimony was probably voluntary, therefore, there was no exploitation, therefore the witness' testimony should be admissible and in Smith and Anderson, the witness initial reluctance -- I'm sorry, the witness' initial willingness was viewed as insufficient to break the causal chain of -- the tainted chain.

There are no policy considerations which permit the Court to distinguish among these contradictory applications because, in fact, none of them go to the traditional test of deterrents which this Court has applied, that is, the relationship between the illegality and the discovery of the evidence sought to be suppressed and,

ultimately, this test, by focussing on the voluntariness of the witness' decision to testify would have administration of important Constitutional principles depend on the emotions of a witness and his feelings towards the defendant, the victim, the courts and the police.

I think that the Smith and Bowden test --

QUESTION: Aren't those things that are traditionally reached by cross-examination? Emotion, bias, attitudes?

MR. MOGILL: Certainly, but how the police came to find the witness is not something which may be breeched by cross-examination so the statement that --

QUESTION: Well, I thought you were linking up the attitudinal factor with the ultimate risk of letting this person testify?

MR. MOGILL: Those factors go the weight of the evidence but not to its admissibility because they have no bearing on the Constitutional principles at stake.

I believe that the Smith and Bowden test has, for these reasons shown itself to be unworkable and that the principles previously enunciated by this Court have shown themselves to be capable of minimizing the loss of evidence by the various requirements of standing, attenuation, independent source --

QUESTION: You have referred several times to the

Smith and Bowden test. I haven't reread it. I don't have that opinion in front of me, but as I recollect, it was the holding in that case, kind of an alternative one, wasn't it? First, that the initial taint had been dissipated.

Am I right about that?

MR. MOGILL: That is correct.

QUESTION: And, secondly, it was emphasized that this was,unlike a gun or other kinds of real evidence, this was a human being and that the elements of volition and so on came into it and made it a different case.

MR. MOGILL: That is correct.

QUESTION: When you talk about the Smith and Bowden test, what are you talking about?

MR. MOGILL: I think that one of the problems which the courts that have come to apply the test have found themselves in is that they have not --

QUESTION: Well, what do you mean by the test, by the Smith and Bowden test?

MR. MOGILL: Distinguishing the -- distinguishing live from physical fruits on the basis of the volitariness of the witness' decision to testify are the characterizations of the decision to testify as attenuation or exploitation has turned on the individual judges' assessments rather than on the facts going to the voluntariness of the decision to testify and so I think the test ultimately is under the

voluntariness --

QUESTION: Well, it is not a per se rule and since it is not, there will always be difficulties in its application. Isn't that right? To a varying factual situation.

MR. MOGILL: I think the difficulties here have shown themselves, however, to be of such a magnitude that the test has been unworkable and I think that for this Court to adopt it would, besides undercutting the established principles of the exclusionary rule, would -- the Court would adopt a test which this Court can see today, on the basis of the tests of the cases which have applied that test, is an unworkable test.

QUESTION: Have you cited us the cases that have held that it was unworkable? Or are you expressing your own analysis of it?

MR. MOGILL: I believe that the -- I cited in my brief. I haven't talked about it here. Judge Gesell's opinion in the Alston case attempted to apply the conflicting opinions from the D.C. circuit and Judge Gesell concluded that the -- it was in such an unusable state that to decide the question in Alston he had to return to the primary principles of the exclusionary rule and he was able to resolve the case that way.

QUESTION: And did he exclude or admit?

MR. MOGILL: The evidence in that case was suppressed.

QUESTION: How do you distinguish the testimony that was admitted in Wong Sun that was obtained from Wong Sun himself?

MR. MOGILL: Well, in that situation, Mr. Wong Sun had been arraigned by a magistrate and had come back voluntarily several days later after having had --

QUESTION: Yes, but they had no idea that he was connected with this crime until -- and they exploited the information they got from Blackie Toy in illegal search.

MR. MOGILL: That is correct.

QUESTION: In order to know about Wong Sun. They did it right then and there. They found out about it immediately and then the information, however, his testimony came later or his information. He came in.

MR. MOGILL: That goes to a distinction, I think, between the position of a witness who has no alternative of not coming into court and testifying and a person who is a potential defendant, such as Wong Sun who, after being arraigned, then came in and this Court held that his decision to testify was sufficiently remote --

QUESTION: I would think it would run the other way.

MR. MOGILL: A witness has no choice not to

testify; once the police have come upon his existence and identity, the court subpoenaes him.

QUESTION: Well, he can have the privilege against self-incrimination, the same way a defendant can.

MR. MOGILL: I am distinguishing between the situation of an accomplice witness who has the privilege and a witness who is not an accomplice who doesn't have the privilege.

QUESTION: Well, but the reason for which both the defendant and the witness have the privilege is the same, it is the privilege against self-incrimination, isn't it?

MR. MOGILL: But in a situation of a witness to a crime who is not himself a suspect, there is no privilege which will permit that witness to come into court and say, I refuse to testify just because I don't want to.

QUESTION: Well, but in either case, it is based on the notion of self-incrimination. Typically, a witness won't incriminate himself by testifying the way a defendant would.

MR. MOGILL: I don't believe I follow your point.

The second question which I wish to address goes to the -- is the Miranda question and the question before this Court at this point in time is not whether Miranda should have been adopted, although I submit that it was correctly adopted, but, rather, given the existence of

Miranda, has the operation of that decision in the last eight years been shown to be so harmful to law enforcement in the exercising of Constitutional rights as to justify departure from the principles of stare decisis?

The available evidence indicates that no harm has come to law enforcement as a result of Miranda.

QUESTION: Do you think the decision of the court of appeals here isn't some harm to law enforcement, suppressing this particular evidence and not just going back to a new trial situation but, in effect, letting this guy go scot-free?

MR. MOGILL: I see no harm to law enforcement in requiring the police to gain -- in permitting the police to gain no evidentiary advantage as a result of their own illegality.

QUESTION: So you say the decision of the Court of Appeals here doesn't represent any harm to law enforcement?

MR. MOGILL: Certainly.

QUESTION: This is so, even though the illegality was not established until after --

MR. MOGILL: Well, unless this Court overrules Johnson, then this case must be viewed in the context of a Miranda violation, which took place after Miranda.

QUESTION: Do you regard Johnson as out of line

with Linkletter and some of the other retrospectivity cases?

MR. MOGILL: I think that -- well, I would urge this Court not to reconsider Johnson --

QUESTION: You have to.

MR. MOGILL: But --

QUESTION: I say, you have to take that position.

MR. MOGILL: Yes, I mean, what I -- I am not attempting to evade your question, Mr. Justice Blackmun, I'm just attempting to put the various points of my answer in an order.

I believe that there is no appreciable impact whatever on the administration of justice by reconsideration of Johnson at this point in time and for that reason alone, it should not be reconsidered.

However, in response to your question, I believe that the centrality of the Fifth Amendment privilege to the integrity of the fact-finding process at trial sufficiently justifies the decision in Johnson as to make that a closed question before this Court today.

The Miranda decision was necessary --

QUESTION: Let me follow through with one more question. What factors that were the foundation for the Miranda decision are impinged upon in this case, in view of the chronology of your case? Improper police conduct is one that is stated and yet at the time, this wasn't regarded as

improper.

MR. MOGILL: What this Court found in Miranda, I submit, is that application of the old due process test had shown itself to be so incapable of protecting the privilege that the integrity of the trial process was in jeopardy and that without a strict rule requiring the police to inform a suspect of all of those rights which are most critical at that time and reminding the police of the restraints the law imposes upon them, that a trial was in danger of becoming a mere appeal from the interrogation process.

These facts go so deeply to the heart of our legal system that the decision in Johnson applying Miranda partially retroactively, is certainly not out of line with other decisions of this Court involving retroactivity.

The police today are familiar with the Miranda decision and have fully incorporated it into their day to day work and Mr. Gribbs, co-counsel representing the Detroit Bar Association will address himself to that point in addition to my remarks.

Miranda has had a beneficial impact on law enforcement in toto in that it provides the police with a clearer standard for determining what their own limits are and what they may and may not do and it also has provided the courts with an objective standard against which to

measure any claims of waiver. And, as to the waiver question, Mr. Justice Stewart asked a question this morning as to any Michigan cases on that point. There is a recent Michigan Court of Appeals case, People v. McClendon, the citation of which escapes me but in that case the defendant had been given the applicable Miranda warnings, had refused to sign a waiver and had made a statement and the trial court had held that there was a valid waiver. The Michigan Court of Appeals vacated that, the conviction, and remanded it for a hearing, saying that the evidence was insufficient on those facts.

QUESTION: Well, so the issue there was whether or not there had been a waiver?

MR. MOGILL: That is correct. I believe that that is what your question had been this morning.

QUESTION: My question was, and I asked your colleague on the other side, did he know of any case, anywhere, really, where Miranda had been fully complied with in every respect and there was a finding that the statement was coerced. It seems to me almost a contradiction in terms but there was suggested an argument that going through the Miranda is just step one and then step two is to find out whether, even though Miranda was complied with, the statement was coerced and I wondered if there was any case anywhere holding that Miranda was fully complied with but, nonetheless, the statement was coerced. It would seem to me rather

an odd situation, if there is such a case.

MR. MOGILL: Unless one can imagine the situation of a police officer brutalizing a suspect and at the same time reciting the warnings, while doing that.

QUESTION: Yes.

QUESTION: Or threatening his family after giving them the warnings.

MR. MOGILL: I hadn't thought of that.

The decision in Miranda is also sound Constitutional policy for -- to paraphrase from the Escobedo decision, there is no place in a democracy for a system of criminal law which comes to depend for its continued effectiveness on citizens' abdication through unawareness of the Constitutional rights.

The objections to the Miranda decision which are urged before this Court do not go to any claim that Miranda has caused an increase of crime, which it clearly has not, but, rather, to its alleged inflexibility. The modifications which are urged, however, each of them, would swallow up the rule and effectively overrule the case.

I think that it is incorrect to state that failure to advise an indigent of his right to court-appointed counsel is a mere technicality, nor could it be considered a technicality not to advise someone of the right to silence and I see no basis for distinguishing among failure to advise a person of any one of those rights.

Inadvertence, like good faith, is irrelevant and I would submit that none of the -- for these reasons, none of the modifications of Miranda would be capable of effectuating that decision, as each of them would swallow the decision and I have yielded the rest of my time to the Detroit Bar Association and Mr. Gribbs will address himself to the experiences of the police in applying Miranda.

MR. CHIEF JUSTICE BURGER: Mr. Gribbs.

ORAL ARGUMENT OF ROMAN S. GRIBBS, ESQ.,

As Amicus Curiae, Supporting Respondent

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

As my brother counsel has indicated, I am here on behalf of the Detroit Bar Association and have filed an Amicus brief in connection with issue number two that is presented by the Petitioner. The brief speaks to that issue and I will limit my remarks to that issue and make them fairly brief.

I would like to speak toward the rationale of the Miranda decision ever so briefly and then the practical results in the last seven and a half, eight years in connection with Miranda and all of its implications.

Before I do, let me simply remind this Court that it is urged that the Court step backwards into history insofar as the practices and procedures required under

Miranda.

Petitioner alleges that Miranda is too restrictive and thus urges this Court to allow the test to go back to the totality of circumstances tested that had been operative before Miranda.

Let me remind the Court that the Miranda warnings were not all new in 1966. One was added, the warning as to a statement that is not to be used against an -- the fact that he need not make a statement was practiced before Miranda -- the fact that if he did and it was used, was practiced before Miranda. Escobedo established the practice of an attorney and finally, Miranda said, "If you can't afford it, the Court will appoint you an attorney," so that is the four-fold statement and, of course, the requirements as to waiver as was set forth, were clearly set forth to settle that question.

QUESTION: Mr. Gribbs, which one do you say is the only addition of Miranda?

MR. GRIBBS: The last.

QUESTION: The fourth one?

MR. GRIBBS: Yes, the attorney appointed by the court, although that is not quite as clear, but assuming Escobedo applied the fact that you can have an attorney present and so construed and then the Miranda warning was really the fourth one.

The rationale, may it please the Court, I am sure is very well-known to this Court. Let me simply point out that what Miranda protects goes to the very roots of the American criminal jurisprudence. It puts life and meaning into provisions that are in the Constitution. What it really does is put into the street, if you will, put into the police station, the knowledge of the protective aspects of the Constitution.

The warnings are given as now required. There are interrogations. They are continued, if there is a waiver. There are, as a result of Miranda, and after Miranda, confessions that are garnered in spite of the Miranda warnings. In the process of applying Miranda, the court found expressly in that case that, as my brother counsel indicated, that other tests of measures to make those that are uninformed aware of these rights and to prevent police practices that were abrogating those rights, that this was the minimum requirement before admissions or confessions were allowed into court.

Court found that in-custody interrogations were inherently coercive, be they physical or, in these modern days, psychological, that there just is no contest between the sophisticated police officer on this side and the accused, that is, frightened, on this side. It was really an adversary and is an adversary proceeding every time that

there is an arrest, generally speaking, of course.

On one hand, we have Lieutenant Patterson here that is trained either, perhaps with a degree or years of experience in interrogations and bringing out, if you will, questions and answers that would incriminate. On the other hand, we have the accused that in all likelihood has no education or very little and, certainly, no sophistication in the rules of law.

QUESTION: How would the disparity that you are talking about, Mr. Gribbs, affect this defendant's giving the name of the alibi witness? Are you here speaking because he was overpowered -- are you speaking of the generality of cases, not this case?

MR. GRIBBS: I am speaking solely to the rationale and the basis and the continuation of Miranda itself, which is the second issue presented to the Court and not to the fruits doctrine.

QUESTION: And then you will bring those backgrounds into this case and the facts of this case?

MR. GRIBBS: I can, if it please the Court, but --

QUESTION: Well, I think it is very vital. Don't you?

MR. GRIBBS: -- I had no intention of doing so and our brief is limited only to the Miranda itself as being directly attacked as being too restrictive and that it and

that rule should be modified.

QUESTION: In other words, you are not necessarily arguing for affirmance of the judgment of the Court of Appeals?

MR. GRIBBS: We join in his general request but the Bar Association, as such, did not brief it and did not speak to it, and we are speaking to Miranda only.

But at any rate --

QUESTION: Well, then, if you are speaking on that level, then perhaps you could help me out. What has the impact of Miranda been?

MR. GRIBBS: That is what I was about to speak to, your Honor. First -- yes?

QUESTION: Do you think it has deterred admissions and confessions or not?

MR. GRIBBS: Ever so slightly and in very insignificant fashion.

QUESTION: And so it really wouldn't make very much difference whether it was overruled or not?

MR. GRIBBS: No, I think it would make a great difference because there are individual cases, I know, where the warnings protect the innocent.

QUESTION: Sure, sure.

MR. GRIBBS: And that is the objective of the law and that is the reason for the protective provisions in

the Constitution.

QUESTION: But you say the impact has been ever so slight?

MR. GRIBBS: Insofar as reducing the confessions or admissions.

QUESTION: I mean, if it has had a very slight impact --

MR. GRIBBS: Impact as to the number of confessions that are introduced, may it please the Court, is what I intended when I said that. For example, a Pittsburgh study --

QUESTION: Well, what other impact has it had?

MR. GRIBBS: It has the impact of professionalizing the operations of the police department. It has the impact of advising individuals of their Constitutional rights and in a number of cases, of voiding the use of their admissions or confessions in their trial.

QUESTION: Well, has it had the impact of preventing some admissions that otherwise might have been made?

MR. GRIBBS: Yes.

QUESTION: A substantial --

MR. GRIBBS: Well, in counting the numbers, we can only cite what the surveys indicate and the numbers indicate in one study in Pittsburgh, where there was a reduction of about a third in the number of confessions

introduced, there were no reductions -- pardon me, there was a one-half of one percent reduction in convictions in that same court.

QUESTION: Well, that isn't what I am asking.

Do you have any evidence one way or another as to whether or not it has prevented admissions or confessions that otherwise might have been made?

MR. GRIBBS: Only the individual cases where they have been excluded. But as to a study of the total exclusions or not, we have just a few that are cited in general terms in the briefs.

For example, a study was conducted here in the District of Columbia to determine the degree of increase or decrease of interrogations after Miranda made in '68 and cited in the Michigan Law Review and they said there was no substantial variation in the number of interrogations here in this area but that does not take away, certainly, and there is no reason, in fact, there is reason to retain the Miranda rule for it does put life into individual cases and it is not a deterrent to law enforcement as such.

The way to determine its impact on law enforcement is to talk to those in law enforcement and there are statements replete in the brief coming from prosecuting attorneys, Mr. Younger, for one, who now joins the prosecutor in opposing and filing a brief in opposition to Miranda but

several years ago, he stated as district attorney, that he did not find any deleterious effects or impact as a result of Miranda in his operations and likewise, Prosecutor Califf in my area and I myself, may the Court please, have been in law enforcement for some 12, 15 years as prosecuting attorney and sheriff of William County, during this time of changing of the rule.

Well, let me conclude, if I may, with just these notations that in 1966 which I feel have bearing on the practical impact of Miranda, in 1966 when this Court was hearing the Miranda case, some 27 states joined in opposition to the proposed then-Miranda Rule and they are cited in the dissent. Today you have but one brief joining the prosecuting attorney in his urging that Miranda be overruled.

Miranda set standards that were minimal and to be enforced, but they did not -- and, in fact, the opinion expressly says that if states so chose, as long as they met the minimal standards, they could use a different means or a mechanism to safeguard these standards. To date, not one state has attempted to set up a different mechanism meeting those same standards set forth in Miranda.

There is by indirection if not directly on occasion, a reference in some of the briefs that because of Miranda the increase in crime that has been reported over a few years is the direct or indirect result of Miranda.

Well, the fact is that crime is going down in many communities and in the City of Detroit, it has gone down three years in a row. In '71 it went down five percent. In '72 it went down 16 percent. In '73 it has gone down an additional five percent in round numbers.

So there is a decrease in crime in certain areas. So we urge, may it please the Court, that the rule not be modified or rescinded.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Patterson, you have about six minutes left.

REBUTTAL ARGUMENT OF L. BROOKS PATTERSON, ESQ.,

MR. PATTERSON: Thank you, Mr. Chief Justice and may it please the Court:

I'll take the points raised by counsels for the Respondent as they raised them serriatim. The first one that Mr. Mogill raised to the Court was a stipulation that appears in the brown Appendix on page 29 where, in his formulation of the question, he said that we stipulated that there was no independent source and says that there could be no independent source and that is not our stipulation.

Our stipulation was -- I think as one of the Justices indicated -- was that we admit that we learned of Henderson only through Tucker. That is not to say that he could not have come forward or would not have come forward

on his own because of his knowledge of particular facts in this particular case.

QUESTION: But it is to say that the police had no independent source.

MR. PATTERSON: At that particular time, that is right, Mr. Justice Rehnquist.

The next point raised by Mr. Mogill was that the granting or failure to apply the fruit of the poisonous tree doctrine to witness testimony would undermine the deterrent purpose of that particular rule and I think there is a presumption here that the police are therefore going to go out and violate Miranda in the hopes of finding evidence of a third independent witness type and then use him and that is not a very good assumption to make, the police are going to deliberately violate the Miranda doctrine in the hopes of finding a third witness which the rule doesn't apply to.

Obviously, the police are going to try in all of their interrogations to stay within their guidelines as the police did in this particular case of interrogating Tucker in April.

The -- Mr. Mogill also indicated that Miranda has not been harmful, as did Mr. Gribbs, that it has not had any harmful effect. They said there was no evidence as such and Mr. Justice Rehnquist pointed out that here is a case before you where we have, I think, a detriment to

certainly the interests of justice as far as Ms. Corey is concerned and the interests of the people of the State of Michigan because we are here.

The Amicus brief that was filed with us by the International Association of Chiefs of Police on page 18 and 19 and 20 and 21 set forth nine or ten cases where the Miranda -- a technical violation in how the rights were administered resulted in a confession being suppressed and the case either being dismissed or sent back for retrial, in many instances tantamount to dismissal.

Mr. Gribbs, in his argument, said that the studies showed that there has been no depreciable effect on law enforcement and he cites the Pittsburgh study and in Pittsburgh, in that particular study, they called the remark that Tucker gave an exculpatory statement and they didn't include that. They said, well, we won't consider that a statement or admission or confession for purposes of this survey. So that report really is not applicable to the situation of this case.

QUESTION: But I always assumed that the purpose of the situation we are discussing was to make it very difficult for Government to do things to citizens and you apparently want it very easy for Government to do things.

MR. PATTERSON: No, your Honor, I have no intention of ever violating or would ever propose to come

before this Court and suggest that we would want to compel somebody to be a witness against himself in a criminal trial. I do not see that that is the situation in this particular instance. I safeguard the Constitution and the Bill of Rights as much as any lawyer and any member of this Bar. But I do not feel at all dirtied by coming into Court and having a proper statement to present to a jury that is tantamount to a confession. I think that is proper evidence. It has always been regarded by all the courts of this land as always being reliable form of evidence which is good evidence to present by way of a trial on the merits of the case.

QUESTION: Which is not in this case.

MR. PATTERSON: No, it is not. It is further removed when it is a confession or an admission of guilt because the evidence we are trying to preserve is that of an independent witness and Mr. Mogill here says that you should not draw any distinction between an independent witness and a direct statement from the accused and I think that you have to see the distinction just on its face, the fact that this witness, and also all the reasons I enunciated in my argument in chief, could have come forward, might have been discovered. He is a human being with all the interaction of his characteristics.

QUESTION: -- Miranda was a prophylactic one to perhaps act as a deterrent to the kind of interrogations that

shouldn't take place and to stop interrogation if the witness, if the defendant who is in custody doesn't want to talk. If that is the purpose of Miranda, then I suppose that purpose is substantially implemented if you say that you may not interrogate him about other evidence, even though you never intend to introduce his statement.

I suppose if you prevail here, the officers may continue to interrogate the defendant in custody as long as their purpose is to build their case through independent evidence or through evidence that he leads them to. So that would be, certainly, quite a motive to continue to interrogate.

MR. PATTERSON: It would all depend on, I believe, Mr. Justice White, on this Court's ruling on the question of how Miranda is going to be continued. If the Court continues that particular --

QUESTION: But if you win this case, I take it one way of putting it is that there is nothing wrong with continuing to interrogate to attempt to get leads to other evidence.

MR. PATTERSON: No, I was starting to say that as long as that provision of the Miranda case which is now something that guides the performance of police is still in force, namely, when he says he does not want to be interrogated, he wishes to exercise his right to remain silent --

and the police do stop.

QUESTION: Yes, but the police continue to interrogate and they say where is the gun or where were you at a certain time and he finally gives an answer and says, "Well, I was with Henderson."

MR. PATTERSON: Mr. Justice White, I am saying that --

QUESTION: And you would say that that was admissible.

MR. PATTERSON: No, I am saying the police do not do that now and they would not do that as long as that particular provision of the Miranda majority is still in force, namely, that when he says, "I don't want to talk, " the police are instructed to stop their interrogation at that point and allow him to exercise his rights.

QUESTION: Well, just from the point of view of the police's own interest, I suppose if they did what Justice White is suggesting to you they would do, they would give up all chance of using a confession that the man might make.

MR. PATTERSON: Yes, Mr. Justice Rehnquist and that is the point I was making. I think it presupposes that they are going to deliberately violate the warnings that are required to be given and so forth in the hopes of finding independent evidence.

QUESTION: Even though they won't be able to use the confession anyway.

MR. PATTERSON: That's right.

QUESTION: And then if they quit interrogating, he certainly isn't going to give one, so they still have a motive to seek other evidence.

MR. PATTERSON: Yes, Mr. Justice, but, in fact, they do stop and they do obey in the great majority of the time, as many times as we have influence on them, the proscriptures that have been delineated in the Miranda decision.

QUESTION: Mr. Patterson, you are still making a distinction, I take it, between the interrogation that produces a pistol as Justice White suggested and the interrogation that leads to finding a witness who then comes into the courtroom to testify under oath.

MR. PATTERSON: Absolutely, Mr. Chief Justice. That is the premise of our whole second issue that we have briefed and argued.

QUESTION: But there is still questioning that could keep on regardless of the man's saying he didn't want to talk any more on the theory that if he got enough and the man made the mistake of taking the witness stand, he could use it.

MR. PATTERSON: Mr. Justice Marshall--

QUESTION: Wouldn't that be an incentive for him to continue?

MR. PATTERSON: No, Mr. Justice Marshall, because as we indicated also in our opening argument, we feel that a totality of circumstances approach to evaluating interrogation would cover that type of situation.

QUESTION: And you say that when he says, "I don't want to talk any more," you cut it off?

MR. PATTERSON: Right, and I --

QUESTION: Didn't he say that when you first started questioning him? I mean, he is not talking voluntarily from the beginning.

Right?

MR. PATTERSON: I respectfully disagree. If he has been advised of his rights and he is making a statement, he is talking voluntarily.

QUESTION: Well, I mean, before you advise him, he doesn't want to be advised of his rights, he'd rather you leave him alone.

MR. PATTERSON: Well, he'd rather not be arrested, I would say.

QUESTION: Well, that's --

MR. PATTERSON: Thank you, Mr. Justice.

MR. CHIEF JUSTICE BURGER: Mr. Mogill, you appeared by the Court's appointment in this case and on

behalf of the Court, I want to thank you for your assistance not only to your client, but to the Court.

MR. MOGILL: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 2:00 o'clock p.m., the case was submitted.]