In the

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

vs.

WILLIAM ROBERT HASS,

Respondent.

No. 73-1452

Washington, D.C.
January 21, 1975

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STATE OF OREGON, Petitioner, v. WILLIAM ROBERT HASS, Respondent.	:	No. 73-1452

Washington, D. C.

Tuesday, January 21, 1975

The above entitled matter came on for argument at 1 p.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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

THOMAS H. DENNEY, ESQ., Assistant Attorney General, State Office Building, Salem, Oregon 97310, for the petitioner.

SAM A. McKEEN, ESQ., 230 Main, Klamath Falls, Oregon 97601, for the respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1452, Oregon against Hass.

Mr. Denney, you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS H. DENNEY ON BEHALF OF PETITIONER

MR. DENNEY: Mr. Chief Justice, and may it please the Court: This case is here on the State of Oregon's petition for certiorari to review a decision of the Oregon Supreme Court holding that statements made by a criminal defendant who has been advised of his constitutional rights in accordance with the requirements of Miranda v. Arizona and who has expressed a desire to talk to an attorney or has at least inquired about the availability of counsel, may not be used to impeach his trial testimony.

From the State's point of view, the holding of the Oregon Supreme Court in this case denies to Oregon prosecutors the right to use statements, evidence which is constitutionally admissible under this Court's holding in Harris v. New York, and we therefore seek reversal of the Oregon Supreme Court's decision.

Perhaps from a broader point of view this case presents the Court with an opportunity to delineate more fully the extent of the holding in Harris, and I should hope if the Court chooses to do so, that some of the tangential

material that is put in the brief of the petitioner in footnotes may be of some assistance.

Before I turn to the merits of the case, there are two objections to the State's being here at all that are raised in the brief of respondent that I would like to deal with very briefly.

The first of these is the contention that the State of Oregon has no standing to be here because we are not aggrieved by the judgment of the Oregon Supreme Court. Well, I think it's fairly clear that a holding of the Oregon Supreme Court that the State of Oregon may not use evidence that is constitutionally permissible does make us a party aggrieved, and I don't think that the right of the State to seek certiorari in such cases is open to very serious question. The most recent case that I could find in which the State's petition for certiorari was granted in a similar case was California v. Green in 1970, but I am sure there have been many petitions sought since and certainly perhaps a few granted, and certainly I don't think this is an issue.

Of a little more substance perhaps is the argument raised in Question One in the respondent's brief to the effect that the State cannot prevail in this case because the States are free to impose higher or different standards of the constitutional guarantees of liberty, let me say, than those enunciated in this Court's interpretation of the Constitution.

Well, we don't quite agree with the argument that is advanced. As we understand the law, of course, this Court is the final interpreter of any question arising under the Federal Constitution and the States are not free to predicate any holdings contrary on grounds of the Federal Constitution. We think, as I have indicated in the brief for the petitioner, among other places, I think Cooper v. California clearly implies what I have just said.

QUESTION: Is that one of the cases we remanded to the Supreme Court of California to ask them to state clearly whether they acted on the Federal or the State Constitution? Or is that another case?

MR. DENNEY: I believe that was what was done in that case, Mr. Chief Justice. I am not positive. I think Ker v. California was another such case, and this is one that is cited in the respondent's brief.

QUESTION: You don't challenge the right of the Supreme Court of Oregon interpreting its own search and seizure constitutional provisions to come to a different conclusion than this Court?

MR. DENNEY: Oh, certainly not, Mr. Justice Rehnquist. But my point -- incidentally, this is not the search and seizure. This is a confession question. But my point is that this case is just clearly not decided on State constitutional grounds. And I think I have indicated that in the reply brief.

To expand a little more fully on it, the State constitution was not invoked in connection with this assignment of error by either side below. The State constitution is not even mentioned in the opinion of the Oregon Supreme Court. The court's opinion instead distinguishes this case from Harris. In addition, the cases on which the Oregon Supreme Court relied, the Oregon cases of State v. Brewton and State v. Neely, are themselves not predicated on the Oregon constitution. The State constitution isn't even mentioned in State v. Brewton. It is mentioned in State v. Neely, but only to say that we are not predicating our holding on the Oregon State constitution.

Now, I cannot say that the State constitution did not come up at all in this case because during the oral argument in this case before the Supreme Court of Oregon, the Chief Justice of the Oregon Supreme Court asked if the Supreme Court were not free to predicate its holding on the Oregon constitution and reach a different result from whatever this Court might reach.

We agreed that they had that power. But the discussion ended there. So we submit that this case just simply is not a case predicated on State constitutional grounds, and I don't think there is anything in the record of this case which would support what might otherwise argue for a remand of this case for clarification.

QUESTION: I gather the judgment does have a counterpart in the self-incrimination clause.

MR. DENNEY: Yes. I believe it's set forth in the respondent's brief at Article 1, Section 12: "No person shall be put in jeopardy twice for the same offense nor be compelled in any criminal prosecution to testify against himself."

QUESTION: So had they rested this decision on that provision you would not be here.

MR. DENNEY: Absolutely not. But my point is they didn't and that is why we contend we have every right to be here.

Now, turning to the facts of this case, the facts are simple, relatively undisputed, and it would be a trivial case if it were not for the fact that the Harris issue is clearly presented here. Basically it involves the theft of a bicycle out of the garage of a residence in Klamath Falls, Oregon. The owner of the bicycle and his father saw the thief, who was, we think it clear now, defendant's accomplice, drive the bicycle or ride the bicycle out of the driveway. They gave chase, they ultimately intercepted the defendant's Volkswagen, the bus, the defendant was driving it, the bicycle was in the back. The father and son recovered the bicycle and called the police.

In response to that call, a State police officer

traced the Volkswagen bus and went to the defendant's home. He advised him of his Miranda rights and his advice, incidentally, included a specific warning that the defendant could stop talking at any time, in addition to the usual four-fold right to remain silent, et cetera.

Hass admitted that he had taken two bicycles that day and he wasn't sure which one the officer was talking about. Upon further conversation, he said that he had given one bicycle back, which I gather is his interpretation of the incident where the father and son demanded it back, and that he had concealed the other, and he agreed to show the officer where he had concealed the second bicycle.

On the way to the spot where the second bicycle was concealed, however, Hass who already had admitted his guilt in the offense to this extent, indicated, and the exact wording he used is a little bit in dispute, the two versions are set forth in the petitioner's brief, indicated that he would like to consult with an attorney.

The officer said that he couldn't make counsel available to him right then. However, he would make counsel available, or at least a phone would be provided to him as soon as they got to the State police headquarters. According to the officer, in response to a specific question from Hass, he then said that he was not going to force Hass to continue with the investigation, but he would like to clear the matter

up.

Now, Hass' version of the event is that the officer said, "I can't let you see a lawyer, but I'll let you when we get down to the station." And even Hass' version of the events does not claim that there was any greater degree of coercion or pressure put upon him than that.

In any event, they went to the spot where the second bicycle was recovered, and it turned out to have been taken from another residence in the same general area at approximately the same time. There was no evidence in the record indicating specifically that the bicycle had been taken the same day except for the defendant's later testimony to that effect.

There was an in camera hearing to determine whether or not the police officer's testimony would be admissible with respect to everything that the defendant Hass had said and done at the time of this interrogation or this questioning.

After hearing the testimony the trial court ruled that everything Hass did and said, in fact, defense counsel conceded this, that everything Hass did and said up to the time he inquired about the availability of counsel would be clearly admissible, but that this inquiry brought Miranda into play and that nothing else would be admissible in the State's case in chief and nothing else was admitted in the State's case in chief.

Hass then took the stand and testified that he and two other fellows had been driving around in the general area where the bicycles were taken, that the other two persons had taken the bicycles without his prior knowledge and that he didn't know exactly where they came from. This was all on direct examination. In short, he admits his part in the theft of the bicycles in the sense of receiving and concealing the stolen property. He conceded that he figured they were stolen from the way his two friends brought them to him. But he claimed that he had no prior knowledge of the crime and he therefore wasn't guilty of the burglary with which he was charged. And this is particularly significant in Oregon, or it was particularly significant, still is, actually, because Oregon some months before the trial in this case, adopted a same transaction tdst of determining when jeopardy attaches. And it is very probable under the teachings of that particular case, which was State v. Brown, again cited in the brief, that had the jury believed Hass' testimony and acquitted him of the burglary charge, double jeopardy as interpreted by the Supreme Court of Oregon, construing the Oregon constitution, would have barred a second trial for the theft of which he then admitted his guilt.

In rebuttal to Hass' testimony after the case of Harris v. New York was called to the trial court's attention,

the State recalled the State police officer who testified that after he had obtained the admissions from Hass that he had previously testified to, Hass had taken him around to the residential area where the bicycles were taken and that Hass had pointed out the precise locations of the two houses from which those bicycles had been taken.

The court then instructed the jury that this testimony was to be received only for impeachment purposes and then on surrebuttal Hass went ahead to deny that he had pointed out the houses in question.

There is very little I can say about this case because basically when we get to the legal issues presented, it seems to me that it comes so clearly within the parameters of Harris that it's almost pointless to draw the distinctions that the Oregon Supreme Court did.

In the first place, here, as before, we have, as in Harris, we have the defendant affirmatively stating on direct examination testimony when he knows that the State is not going to be able to present contrary testimony, at least in its case in chief and wasn't able to do it. They knew that this testimony existed and they knew it had been ruled inadmissible. It seems that this presents in this kind of context -- I'm not necessarily saying that it happened here -- that we have a marvelous opportunity for criminal defendants to tailor their testimony in accordance to account for anything

they may have said prior to the time they may have asked for counsel under the circumstances of this case.

There is no contention, as I have mentioned before, that Hass' statements or what he did was in fact coerced or involuntary or that any pressure was put on him. He had been advised of his Miranda rights; he had been told he could stop answering questions at any time. He asked for a lawyer, he was told that counsel would be made available to him when he got to the police station. And that's it. He doesn't claim that there was any coercion at all put upon him to continue beyond the mere request of the officer. This, we submit, is enough to satisfy the pre-Miranda standards of voluntariness and trustworthiness which would render the statements he made and the things he did after he inquired about the availability of counsel admissible, at least for impeachment purposes.

As I have noted in a footnote, it seems to be an open question yet, at least this Court hasn't directly spoken on the issue, of whether advice of rights which tells an accused that counsel will be made available to him at a later time, such as when and if you go to court is one example, makes the statements inadmissible in the case in chief. We are not contesting this because the argument wasn't raised below, and I don't feel that I am entitled to make the contention here that the statements Hass did were admissible

in the case in chief, nor do I need to. But it certainly seems to me that this kind of a statement should be admissible for impeachment purposes under the facts of this case, particularly where, as again here, the jury was carefully instructed that the statements were limited to impeachment and were not to be considered in determining the guilt or innocence of Hass per se.

QUESTION: Was that prior opinion in Brewton -- that was 1967, wasn't it?

MR. DENNEY: Yes, your Honor.

QUESTION: Is that properly grounded?

MR. DENNEY: Yes, it is. It is an attempt to --

QUESTION: The reason I ask is that this partly was a situation that arose before Miranda.

MR. DENNEY: The trial had, yes.

QUESTION: Well, it says at page 29, whether or not Miranda is binding upon Oregon courts with reference to trials concluded before the Miranda decision was published.

MR. DENNEY: Yes.

QUESTION: That's whether or not, in either event.

MR. DENNEY: Yes.

QUESTION: They apply what they did in Brewton as to impeachment.

MR. DENNEY: Let me expand on that a little, Mr. Justice Brennan. The Oregon Supreme Court prior to Johnson v.

New Jersey, this Court's decision, had --

QUESTION: That was the same day as Miranda.

MR. DENNEY: A week later.

QUESTION: A week later, right.

MR. DENNEY: Well, perhaps they weren't aware of it because the Oregon courts had held that -- are holding, Oregon holding in State v. Neely, which was kind of an anticipation of Miranda, decided post-Escobedo and pre-Miranda, was retroactive to a greater degree than this Court subsequently held Miranda to be retroactive. And I think this language is getting at that problem because --

QUESTION: Well, if this was decided in '67, but what date in '67?

MR. DENNEY: The exact date --

QUESTION: In relation to the date we decided Johnson.

MR. DENNEY: I'm afraid I don't know, but Johnson was in '66.

QUESTION: June '66 Miranda and Johnson was, both.

MR. DENNEY: But the Oregon rule was, as I recall it, that Neely and subsequently until we had a case somewhat later, even Miranda would apply retroactively to cases which were not terminated, concluded, and that included a 90-day period after a final judgment of the Oregon Supreme Court within which the defendant or the other side could petition for certiorari.

QUESTION: The reason I ask this, in the present case it would appear at page 15 that your court decided this case -- you can read it, I suggest, this way -- jointly on Brewton and Harris.

MR. DENNEY: Yes.

QUESTION: But Brewton was contrary to Harris and they followed Brewton. Is that what they did?

MR. DENNEY: Yes. Well, they distinguished also between --

QUESTION: Yes, they did later. But if it can be read as based on the State ground, even if it's also based on a Federal ground, and even though it's erroneous in its interpretation of the Federal ground, I guess we have no jurisdiction to review it, if it's based jointly on the State and Federal ground, do we?

MR. DENNEY: That would be true, but my position is --

QUESTION: Yes, but don't we have to decide then whether the recent Brewton was decided on the State or Federal grounds?

MR. DENNEY: Yes, I suppose that's part of the decision you will have to undertake. I think when you read the Brewton opinion, as no doubt you have, but when you --

QUESTION: It's that language I just read to you that I wasn't clear just precisely what it meant, whether or not Miranda --

MR. DENNEY: Yes. As I say, I think it turns into what the Oregon Supreme Court had done with regard to its retroactivity rules about the application of Miranda and Neely. I think the opinion as a whole in Brewton clearly is an attempt to predict what the Supreme Court of the United States will do --

QUESTION: Well, certainly all that discussion at 29 and 30 is in relation to developing law under the 14th amendment as this Court had developed it.

MR. DENNEY: Yes. But they are again also applying the Neely case in the Brewton case, and the Neely case is not clear.

QUESTION: What was the middle ground in Tate. I haven't read Tate. It gives a good deal of attention, Tate v. United States.

Don't waste time on it.

MR. DENNEY: I don't recall it offhand.

The distinction that the Oregon Supreme Court drew between this case and Harris is one we submit is not one that calls for a different result. In either event, whether the police are to be faulted for not advising a man of his constitutional rights properly in the first place or whether they continue to question him to some degree at least with as tentative a request for counsel as we are confronted with here --

QUESTION: May I interrupt you once again?

In Brewton Justice Perry dissented, and the next to the last paragraph on page 33, "I know of no reason why this Court should go beyond the requirements of the Supreme Court of the United States in announcing a rule," and so forth.

MR. DENNEY: Yes.

QUESTION: Doesn't that suggest that at least he read the majority opinion in Brewton as going beyond any decision of this Court?

MR. DENNEY: Well, it very probably does, but I submit that thinking that he's going beyond the requirements of this Court's previous decision does not necessarily indicate at all that the case is predicated on State grounds rather than Federal.

I return to my basic position that I think the Brewton case is more of an attempt to predict what this Court would do with the Federal question than an attempt to predicate something separately on State grounds.

QUESTION: He relied on the Walder case much as the court did in Harris.

MR. DENNEY: Yes, he did. And I found it rather strange --I was not very frequently before the Supreme Court of Oregon at the time -- that the majority opinion doesn't even talk about Walder.

QUESTION: Is that the judge who is now a Federal

Circuit Judge?

MR. DENNEY: Yes, it is.

Unless there are no further questions, I will reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Denney.

Mr. McKeen.

ORAL ARGUMENT OF SAM A. McKEEN ON

BEHALF OF RESPONDENT

MR. McKEEN: Mr. Chief Justice, and may it please the Court: counsel for the State has indicated, and some of the Justices questioned him to the point that if this case was decided on State grounds, that the Supreme Court of the United States would have no jurisdiction, and counsel said that the case wouldn't be here.

It's my understanding that this Court has also expressed a doctrine that when a State has within its governmental framework the mechanics to cure any problem themselves, that the Supreme Court of the United States will not interfere in determining how they should interpret constitutional provisions.

In this case the State of Oregon has a constitution that includes very similar words to the United States Constitution. They will have the opportunity if it comes before them in appropriate case to decide whether to overrule Brewton or to decide whether to follow the Federal rule as

set out in Harris v. New York. But in this case whether their interpretation was correct or incorrect, it was still an interpretation that's more restrictive to the prosecution than that of the Supreme Court of the United States. And this Court has said many, many times that in such a situation, the States are free to adopt their own rules.

QUESTION: Haven't we added certain qualification to that, if they place it on their own law?

MR. McKEEN: Well --

QUESTION: Their own constitution or statutes presumably?

MR. McKEEN: My reading of the cases, I didn't believe that until Green v. California, your Honor, but it appears to me that as long as the State's interpretation, even of the Federal constitutional provision was more restrictive, then there is no constitutional question before this Court.

QUESTION: Why do you suppose we sent some of those cases back to the State Supreme Court to ask them to make it clear whether they were acting under the Federal or under their State Constitution, if that's not the case?

MR. McKEEN: Well, I wasn't aware of that, your Honor.

I was aware of your concurring opinion in Green v. California which I thought you put there for the very purpose

of showing that the States are free to adopt their own rules and that the State of California could very well, when you sent the case back, could very well resolve it the same way, and we are trying to tell them not to,so long as they didn't misinterpret the Federal Constitution.

In that case, Green v. California, the California legislature had passed a law that was constitutional and the California legislature was recognized by this Court as being a proper party to legislate for California and the California Supreme Court erroneously held the statute to be unconstitutional under Federal law. So this put a Federal restriction on the State of California, and that isn't the case in Hass. In the Green case there was a restriction put on the legislature to pass this particular law. This Court removed that restriction by holding that the law was not unconstitutional. But in that case the State had a proper standing before the Court because they have the right to legislate in the area of criminal law.

The case that is before the Court here, the State of Oregon v. Hass, how do we get by the opinion that this Court, or the statement this Court made, in Florida v. Mellon cited in my brief? This Court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actually threatened operation upon rights properly falling under judicial cognizance.

Cooper v. California, "Our holding does not affect the State's power to impose higher standards on search and seizures." Ker v. California --

QUESTION: Are you intending for anything more than that the Supreme Court of Oregon, or the Oregon legislature, has a right under State law or State constitutional law to impose more rigorous requirements on the prosecution than is imposed by the Federal Constitution ?

MR. McKEEN: Yes, your Honor, that is exactly what I attempted to say in my brief.

QUESTION: But are you saying anything more than that?

What I am -- in order to evaluate your point, do we look to the Supreme Court of Oregon opinions and see whether they appear to be based on the Federal Constitution or on the Oregon constitution as well?

MR. McKEEN: Well, I wouldn't think that it would really make any difference. It would appear to me that as long as the State has within its framework the mechanics to make the opinion that they made, then this Court would have no real purpose in examining those opinions unless there was a federally protected right violated or a Federal constitutional question raised.

QUESTION: Mr. McKeen, are you saying something like this: Are you familiar with the differences among us of this Court on the question of the constitutionality of obscenity

laws? There are members of this Court who think that no obscenity law is constitutional, that it violates the first amendment. Others think there may be within certain limits constitutionality of obscenity laws.

Now, suppose you had a prosecution under the obscenity laws and there were a conviction and it was within the scope of the principles this Court has stated that are permissible to a State, but your Supreme Court were to say, "I don't agree with the majority of the Supreme Court. We agree with Mr. Justice Douglas that no obscenity law is constitutional," under the Federal Constitution, and were to reverse the conviction on that ground. Are you suggesting that that would be conclusive on the State of Oregon because that was the holding of your Supreme Court? It interpreted the Federal Constitution as it thought it ought to be rather than the way this Court had?

MR. McKEEN: It would still appear to me, your Honor, to be an academic opinion of this Court if the Supreme Court of Oregon chose to violate no one's constitutional rights and still make a finding different from this Court. It's my understanding that the two courts are parallel to each other, that this isn't a court that stands above a State Supreme Court with respect to .. opinion.

QUESTION: That they may interpret the Federal Constitution more restrictively, it can't interpret more

expansively than the Court does, but may interpret more restrictively.

MR. McKEEN: That was my understanding. And, your Honor, the Supreme Court of Oregon said that. The Supreme Court of Oregon said in the Florance case that is cited in both briefs that if we choose,we can continue to imply this interpretation. We can do so by interpreting Article 1, Section 9, of the Oregon constitution,prohibition of unreasonable search and seizure, to being more restrictive than the fourth amendment --

QUESTION: There is no question about that. That wasn't my question, though.

MR. McKEEN: I understand, your Honor, but in the next sentence was your question. Or we can interpret the fourth amendment more restrictively than interpreted by the United States Supreme Court.

QUESTION: I see.

MR. McKEEN: Now, that was said by a justice of the Supreme Court of the State of Oregon.

QUESTION: I see.

MR. McKEEN: It would appear to me, and there are some cases that are cited where this Court has said that we are not here concerned if an act is unconstitutional or if the Constitution has been violated; we are concerned only if the proper party brings the proper matter before this Court. This

isn't a forum where the Court should give opinions that will lay persons interpreting the law unless the parties before it are properly before the Court?

QUESTION: I notice that neither you nor your friend have said that the Krivda case, K-r-i-v-d-a -- are you familiar on it?

MR. McKEEN: No, your Honor.

QUESTION: That is I think perhaps the most recent case which we sent back -- that was California, wasn't it? -- to the California Supreme Court and said please tell us whether you are deciding this case under the Federal Constitution or under your own. There have been several of those. If they decided it under their own constitution, that's the end of the case. That's their responsibility and authority. If they decided it under the Federal Constitution, it's ours. That's the burdening of the Krivda case.

MR. McKEEN: Well, the Oregon Supreme Court from the text of their opinion in the Hass case recognizes the importance of following the interpretation of the Federal court. But they still have within the framework of the judicial system in Oregon the power or the means to resolve this question without interfering with the Federal Constitution. And therefore, under the abstention doctrine that this Court has stated, it would appear to me that this Court should have no real interest in which way the State of Oregon chooses to go.

I understand that there have been statements made by the Court that I am not familiar with that are opposed to my opinion, but that was my opinion.

QUESTION: Would you have the same view if the police officer was sued for invading someone's constitutional rights and awarded damages made against him based on the Supreme Court of Oregon's holding and he said, Well, that may be the opinion of the Supreme Court of Oregon, but the Supreme Court of the United States says that I didn't violate somebody's constitutional rights. Do you think he ought to pay the damages based on the Oregon constitution?

MR. McKEEN: Then there would be a violation of that police officer's federally constituted rights.

QUESTION: Well, the Supreme Court of Oregon says that he's at fault, the Supreme Court of the United States says he isn't.

MR. McKEEN: But in any areas, your Honor, where a State Supreme Court is less restrictive, I am certainly not contending that the Supreme Court of the United States doesn't have jurisdiction.

QUESTION: I understand.

MR. McKEEN: But with the police officer, if he's required to pay damages when his act was proper under the Federal Constitution, then I would think that he's properly before this Court --

QUESTION: The Supreme Court of Oregon says it isn't proper under the Federal Constitution. The Supreme Court of the United States says it is.

MR. McKEEN: I would think in that case he should have access to this Court.

QUESTION: There's a long line of cases that this Court has taken where there has been an appeal by the State from a judgment of a State supreme court saying that the State couldn't impose a tax on a potential taxpayer either for due process or for commerce clauses. I would think that would cut against your reasoning here.

MR. McKEEN: That the State can appeal if it affects their property interest the same as any person, they have standing before this Court.

QUESTION: But does the State have property interests under the Constitution? Does it have any greater interest in collecting revenue than in enforcing a criminal law?

MR. McKEEN: Well, I believe the distinction that has been made by the Supreme Court of the United States is just that, that the State is a proper party when the suit involved its property, its land, or a situation, say, when the Federal Government wants to put a Federal park within a State. It involves the State's own proprietary interest, and then it's a proper person that can come before this Court. But they have no property rights in a conviction of a burglar. They have no

real interest in whether the Oregon Supreme Court is more restrictive or not than the Federal Supreme Court. The State of Oregon has no interest in it. They are there to follow whatever the law of the Supreme Court of Oregon is, not to claim any interest in what it is, and enforce the law as it is.

QUESTION: What you are suggesting is at least in criminal prosecutions, while the Supreme Court of Oregon can't narrow constitutional guarantees of the opinions as we interpret them, it can extend them.

MR. McKEEN: Yes, your Honor.

QUESTION: What you are suggesting, I gather, and the extensions do not have to be based upon the State constitution. They can be based on the Oregon Supreme Court reading of the Federal Constitution, is that it?

MR. McKEEN: I would think so. Of course, I have the feeling that I am not completely right on that, but that's my understanding.

QUESTION: Well, you have some authorities cited. I don't know much about them. Your brief would suggest that, I gather.

MR. McKEEN: Well, Cooper v. California says -- now, Cooper v. California was a search where the State had a statute also and the Supreme Court considered the case only as to whether or not the search was reasonable under the Federal Constitution. And they said the State is free, if it

chooses to do so, without review by us, to apply its own State's harmless .. rule to such errors of State law, there being no Federal constitutional error here, there is no need for us to determine this matter.

QUESTION: Your response about reading the Constitution, the Federal Constitution, more expansively than it's read up here would bring you right up against the proposition Mr. Justice White suggested to you, that if that reading then imposed a liability on a police officer for damages for violating the fourth amendment or any other provision in a way that we did not countenance, then you did say that the officer would have a claim that this rights under the Federal Constitution had been violated because he regarded, had been taught to regard the United States Constitution as the supreme law of the land.

MR. McKEEN: Well, that still, your Honor, is the way I think it would be. If I can follow the thread of the fact situation correctly, the officer is a citizen of the United States and under the Federal Constitution, he would have a right to have done what he did and therefore his constitutional rights have been violated by the damages and he should have proper standing before this Court.

QUESTION: Of course, the other side of the argument is that the Oregon Supreme Court hasn't expanded the constitutional protection at all, that it's wholly consistent

with Miranda. How about the merits of this question? Do you say that it is true, indeed, that the Oregon Supreme Court made a decision that was outside the bounds of our cases?

MR. McKEEN: Absolutely not, your Honor. What I attempted to say was that it wouldn't make any difference, that the Supreme Court of Oregon interpreted their --

QUESTION: I know you said it didn't make any difference, but what if you lose on that? What if we are sitting here and have proper authority to review the Oregon Supreme Court's decision? What about it then?

MR. McKEEN: Well, it's my feeling that through trying the case and through the record that has been submitted to the Court, the difference is clear between Harris and Hass because the Harris case was an unintentional negligence failure to say some magic words, and that's all it was. The Hass case, the defendant was fully advised of his rights, the police officer knew he was advised of his rights and knew he had the right to a lawyer, he asked for a lawyer, and the police officer at that point in time chose to continue the investigation and caused this boy to incriminate himself and point out bicycles and point out a house that the bicycles had been stolen from. And so at that point in time this police officer knew that he had nothing to lose by purposely violating that boy's constitutional rights, your Honor, because if he didn't, he wouldn't get anything, and if he gave him a lawyer,

any lawyer--any lawyer--would have told that boy to quit incriminating himself. So the police officer knows it's all or nothing, I can go ahead and violate his constitutional rights, take a chance of getting the statement in, or at least use it for impeachment purposes, and that's better than stopping the investigation. So they have affirmatively -- and that's what the Supreme Court of Oregon has said, that's what it based its difference on, and the difference is there.

The restriction against police for purposely and knowingly violating a person's constitutional rights in face of the knowledge of this Court's requirements is a different set of facts than an unintentional failure to say the few words that are necessary. And the Harris case said that also. The Harris case said statements otherwise trustworthy. Some of the cases that have not followed the Harris case have used backward reasoning. There is a case where the Supreme Court has held that because the prior statement was given at a preliminary hearing that Harris didn't apply, but actually if the statement was given at a preliminary hearing, then it would be more trustworthy than one given to a police officer. So States refuse to follow there based upon reasons that aren't really related to anything except the reasons do not follow Harris.

QUESTION: Are you referring to any State cases since Harris in which they sought review here, the States sought

review here? Or did the State just acquiesce?

MR. McKEEN: I am not sure if that was -- this was one of the cases cited in the appellant's brief as authority for the States that had followed and hadn't followed Harris, but I am not sure if that was appealed to this Court.

QUESTION: Do you have the name of the particular case in mind?

MR. McKEEN: I just don't. I believe that that is Commonwealth v. Horner, 453 Pa. 435, 309 A. 2d 552, a 1973 case.

QUESTION: But there is no indication in the citation that certiorari was sought and denied, is there?

MR. McKEEN: No. But the reason that they didn't follow Harris --

QUESTION: Well, I'm not sure, but I think the Pennsylvania Supreme Court is one supreme court that has gone rather far in saying that it's adopting a State law in certain decisions of this Court. I have some recollection that Horner is one of them.

Incidentally, I think you opened your argument by suggesting that the 1967 Brewton should be read in any event as a decision of State law, or did I understand you correctly?

MR. McKEEN: Your Honor, it is an opinion of the State Supreme Court of Oregon --

QUESTINO: I know, but is it to be read as rested on

State law and Federal law, or which?

MR. McKEEN: I don't know. I thought that I had a copy of Brewton, and it has been some time since I have read it.

QUESTION: Well, it's attached to the petition, the full opinion is attached to the petition, page 38, and so forth.

MR. CHIEF JUSTICE BURGER: Mr. Denney, do you have anything further?

REBUTTAL ARGUMENT OF THOMAS H. DENNEY ON BEHALF OF PETITIONER

MR. DENNEY: Mr. Chief Justice, and may it please the Court, yes, two very brief points.

First of all, with regard to the issue of whether this is decided on State or Federal grounds, I think, and I don't want to take a great deal of time with the basic proposition, it makes all the difference in the world whether this case is predicated on State or Federal grounds.

Counsel mentioned in his argument the case of State v. Florance which we cited in our brief in a footnote to point out that the Oregon Supreme Court does think itself entitled to interpret Federal questions more restrictively than this Court does. This is the sentence which Mr. McKeen just mentioned in his oral argument, at the end of it, "We can interpret the fourth amendment more restrictively than interpreted by the United States Supreme Court."

QUESTION: You agree to that.

MR. DENNEY: Yes, we certainly do.

QUESTION: What is your distinction?

MR. DENNEY: Footnote 12, page 9, of the petition, your Honor, I am quoting from State v. Florance. It was just decided about a month after this case, your Honor. It's 527 P.2d 1202. I didn't have the full citation at the time I wrote that brief, though I do have it in the files.

QUESTION: Was that a search and seizure?

MR. DENNEY: Yes, it was a search and seizure issue.

The Oregon Supreme Court decided to follow this Court's interpretation of the fourth amendment as enunciated in U.S. v. Robinson , your Honor, so it is kind of dictum. They were saying, well, in the full context of the opinion, the opinion runs something to the effect that the Robinson opinion somewhat surprises us, we had thought the law was a little more restrictive. If we choose,we can continue to apply a more restrictive interpretation of the law, either by interpreting the Oregon constitution provision on search and seizure or by interpreting the fourth amendment more restrictively.

QUESTION: You agree on the first.

MR. DENNEY: Certainly we agree on the first.

QUESTION: But not on the second.

MR. DENNEY: No. And the mere fact that the court

in this case indicates that they think they are free to do it, I think sheds some light on what they are doing in this case.

QUESTION: I thought the court in this case expressly put aside this whole issue, it didn't make any difference what this rule was, that this was just a different case, completely different case, and that they didn't have to interpret -- they certainly didn't concede here they were interpreting the Federal Constitution more restrictively than this Court.

MR. DENNEY: It seems to me, your Honor, that the very fact that they have to distinguish the Harris case is some indication that they --

QUESTION: It is an indication that they were deciding it on the basis of Federal law, that's what you were going to say.

MR. DENNEY: That was my point, yes, in addition to the other factors --

QUESTION: They may be wrong, but they are not claiming in this case that they have a right to be wrong.

MR. DENNEY: Not expressly. My point is that implicitly they think they do.

QUESTION: Well, but if they felt an obligation, as you just said, to distinguish the Harris case, the implication would be in this case they thought they didn't, they didn't feel free to disregard Harris, in other words.

MR. DENNEY: Yes, that is correct.

QUESTION: They felt an obligation to distinguish Harris.

MR. DENNEY: That is why I am saying --

QUESTION: Which would lead to the inference they felt themselves not free to interpret the Federal Constitution in a different way from its interpretation by this Court. Do you see what I mean? Or else they wouldn't have felt any obligation to distinguish Harris, they could have just said, We --

MR. DENNEY: On the contrary, because Harris is a ruling that is favorable. I suppose the argument can be made either way. But the fact is that the Harris decision cuts against the Oregon Supreme Court's decision in this case. The distinction that they have to draw is to say on its facts this isn't Harris, and therefore they are still interpreting the Federal Constitution is the position I am taking.

Turning to the merits of the issue just briefly, there was one other point that came up in counsel's argument for the respondent. The Harris case does not pause to consider whether the police officer's failure to advise the man in toto of his constitutional rights was inadvertent or whether it was unintentional, or whether it was intentional. Similarly, we think that the kind of question that goes on here, asking the defendant to continue the investigation even

if this could be construed as an intentional violation of constitutional rights and on the facts of this case we don't think it rises to that level, we still think that the policy enunciated in Harris is applicable to this case simply because in either situation, as the Court held, the prophylactic purpose of Miranda is sufficiently served by keeping the statements subsequently obtained out of the case-in-chief but keeping it available to prevent perjury, possible out and out perjury when the defendant takes the stand and keeping it available for impeachment purposes.

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

(Whereupon, at 1:48 p.m., oral arguments in the above-entitled matter were concluded.)