In the

Supreme Court of the United States

STATE OF OHIO, Petitioner,	)	
v.	)	No. 74-492
TERRY L. GALLAGHER, Respondent.	)	

Pages 1 thru 31

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STATE OF OHIO,

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v. No. 74-492

TERRY L. GALLAGHER,

Respondent.

Washington, D. C.

Tuesday, December 2, 1975

The above-entitled matter came on for argument at 2:23 p.m.

BEFORE:

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

APPEARANCES:

HERBERT M. JACOBSON, ESQ., Chief Trial Counsel, Montgomery County Courts Building, 41 N. Perry Street, Suite 308, Dayton, Ohio 45402, for the Petitioner.

JACK T. SCHWARZ, ESQ., Harrison & Schwarz, 730 South Main Street, Dayton, Ohio 45402, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: We will hear argument next in 74-492, Ohio against Gallagher.

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

ORAL ARGUMENT OF HERBERT M. JACOBSON

ON BEHALF OF PETITIONER

MR. JACOBSON: Mr. Chief Justice, and may it please this Court: Our respondent in this case is a man by the name of Terry Gallagher, and in a resume of the facts as they developed at trial, he was tried without a jury and the court found him guilty in November of 1972. The offense was armed robbery, and he was thereafter sentenced to the Ohio penitentiary.

At the time of the offense, however, Gallagher had been on parole. He had been placed on parole in February of that year. His parole official was one William Sykes, who was a member of the Ohio Parole Authority and was assigned to our area.

Upon being informed of the armed robbery, Sykes, saying that it was part of his duty to do so and part of his job, visited Sykes at the county jail. He visited Gallagher at the county jail. Sorry.

Now, there are two visits that Sykes made to Gallagher. One was on June 26 of 1972, and the respondent did not speak to him and failed to make any statement whatsoever,

and there was no conversation.

Four days before that, however, on June 22, the respondent Gallagher had been contacted by deputy sheriffs of our county who were investigating the armed robbery offense and had presented him with the printed Miranda form which had all of the warnings on them, and he acknowledged these Miranda warnings and signed the stenciled form that had Miranda on them. This was admitted to be a voluntary act by him and that he fully understood that he was signing an acknowledgement that Miranda had been uttered.

This in effect was one of the reasons why Gallagher did not talk to Mr. Sykes when he visited him the first time on June 26th, keeping in mind that he also was on parole and had been in contact with the criminal system before. And when Sykes then determined that in furtherance of his duty as a State Parole Officer to go back and visit with him, and he did so a week later, on July 3rd. Now, this was 11 days after he received his full panoply of rights under Miranda. And in an informal conversation at that time Sykes obtained, or rather heard from the respondent, Gallagher, of his participation in this armed robbery.

There were no Miranda warnings given at that conversation that took place between Mr. Sykes and Terry Gallagher on July 3rd. Later at the trial the State called Mr. William Sykes as a witness, and he testified on behalf of

the State indicating what Gallagher had acknowledged to him, and of course his statements were inculpatory. And he further indicated that he was not forced to talk to his parole officer.

The objections were made at the time of trial to Mr. Sykes' testimony. The trial court overruled the objections, and the matter was taken to our second district court of appeals, and in a unanimous opinion, the appellate court there held that there was no error prejudicial to the respondent Gallagher and affirmed the trial court.

The matter then went to the Supreme Court of our State, leave having been granted for the appeal, and they in turn found that the utterances that were made by the respondent to Sykes on July 3rd were inadmissible because the parole officer had failed again to warn the respondent of his rights under Miranda.

QUESTION: Mr. Jacobson, I am looking at the opinion of your Supreme Court at page 17 of the petition for certiorari. And the opening sentence is: "The question presented is whether testimony, concerning certain statements made by appellant to his parole officer ...was received at trial in violation of appellant's privilege against self-incrimination, as guaranteed by Section 10, Article I of the Ohio Constitution, and the Fifth Amendment to the United States Constitution."

On what did the affirmative answer to that question that there was a violation of the appellant's privilege

against self-incrimination rest? On a violation of the Ohio Constitution, of the United States Constitution, or on both?

MR. JACOBSON: The Supreme Court in our State indicated that it was both. They did not use "or". They said it was a violation of rights of self-incrimination guaranteed by Section 10, Article I of our constitution and --

QUESTION: So it was a violation of both?

MR. JACOBSON: It's a violation, in my opinion, of both, not one without the other, it's a violation, and the court specifically stated it was --

QUESTION: My question is did your Ohio Supreme Court hold that it was a violation of both constitutions?

MR. JACOBSON: Yes.

QUESTION: Then aren't you out of court?

MR. JACOBSON: No, sir, because Oregon v. Haas indicated that a holding --

QUESTION: What jurisdiction do we have?

MR. JACOBSON: Under the Fifth Amendment and under the due process clause of the Fourteenth.

QUESTION: No, no, no, no. When a State court decision rests on both State and Federal grounds, are we not without jurisdiction to entertain the appeal?

MR. JACOBSON: No. The Supreme Court of Ohio did not use the word "or". It said and it was in violation of the Fifth Amendment to the United States --

QUESTION: That is exactly my point and you're out of court, you don't belong here.

QUESTION: In other words, is there not an adequate State ground for the decision of the Supreme Court of Ohio which you challenge?

MR. JACOBSON: No. We are challenging the application of the Fifth Amendment to the United States --

QUESTION: Is there also not a State ground which would reach the same result, to put it another way.

MR. JACOBSON: Well, they reached it under Section 10, Article I of the Ohio --

QUESTION: Is that not an adequate State ground?

MR. JACOBSON: No. In my opinion it is not, because it makes the State --

QUESTION: Isn't it the duty of the Supreme Court of Ohio to enforce and apply the Ohio Constitution?

MR. JACOBSON: Of course it is their duty.

QUESTION: They applied it here, did they not?

MR. JACOBSON: They applied it and also under the Fifth --

QUESTION: They did apply it.

MR. JACOBSON: Yes.

QUESTION: And concluded that under the Ohio Constitution this was the proper result, as well as under the Federal Constitution.

MR. JACOBSON: Yes, but we are also going under the jurisdictional question as issued in Oregon v. Haas which indicates that the State is an aggrieved party for the purposes of review to this Court.

QUESTION: But only of a Federal question. If we were to decide in your favor on the Federal question and say, no, Miranda doesn't require this, and send this case back to the Supreme Court of Ohio, your response to Mr. Justice Brennan's question suggests to me that the Supreme Court of Ohio would say, well, we were wrong on that one, but we are the final judges of the Supreme Court of Ohio Constitution and the conviction is nonetheless reversed.

MR. JACOBSON: I hold that we are here rightfully under the Oregon case, we are here rightfully under the fact that the Supreme Court of Ohio stated that it was also a violation of the Fifth Amendment to the United States, and also under the due process clause of the Fourteenth, which we --

QUESTION: You might have an argument if there was some evidence here that the Supreme Court of Ohio felt compelled to construe its own constitution the same as the Federal and that the Federal cases force them to construe their constitution this way. I don't see any evidence in this opinion to that effect.

As Mr. Justice Rehnquist said, if we reversed here, it would still leave standing the judgment of the Ohio court

that the procedure violated the Ohio constitution. We have no power to overturn that. That judgment has already been entered. That judgment isn't here.

MR. JACOBSON: Well, U.S. v. Deaton also indicated -- they indicated in their opinion and quote United States v. Deaton. Certiorari was denied, but it said that "It squarely confronts the precise question." And there they held that the Miranda warnings, having not been given, they predetermined --

In deciding the Deaton application, they decided that --

QUESTION: Don't feel too badly. We are the ones who granted the petition for certiorari.

QUESTION: And may I suggest that perhaps this isn't as simple as some of us might have initially thought. My brother Brennan read you that first paragraph and particularly the last clause of it. But then the very next paragraph says, "The opinion of the Court of Appeals and the brief of appellee cite cases from other jurisdictions which had considered this question." Now, how possibly could other jurisdictions have considered the question of the validity of what happened here under the Ohio constitution?

MR. JACOBSON: They could not have, your Honor. It would have to be under the Fifth Amendment to the U.S. Constitution.

QUESTION: Well, I suggest what we ought to do with this, then, is what we have done in other cases with this

ambiguity, not hear any more of this argument, but refer it to your Supreme Court to tell us whether they rested in on your State constitution.

QUESTION: Well, you presumably have a number of points to make, and whatever disposition the Court makes of the matter ultimately, if I were in your position, I don't believe I would want to be in the position of voluntarily surrendering it.

MR. JACOBSON: Well, I am not, your Honor. We feel that we are rightfully here.

QUESTION: That's right. And we granted certiorari.

MR. JACOBSON: That's right.

QUESTION: We said you were here.

QUESTION: Unanimously.

QUESTION: The only problem I want from you is one case that you had to support that -- a case of this Court.

MR. JACOBSON: Well, U.S. v. Deaton indicated that was a Federal question.

QUESTION: What? A Federal question as to whether it's on a State and Federal ground?

MR. JACOBSON: No, that it was on a Federal one. Haas backs that up by holding that the State is a proper aggrieved party.

QUESTION: I want the case.

MR. JACOBSON: It's Oregon v. Haas. It's 95 S. Ct.

1215, cited in '75.

QUESTION: But that was in the context of contention that if a State court ruled against a State, the State had no right to come to this Court even to assert that the State court had been wrong on the Federal ground.

The suggestion here made is that the State court didn't rule against you just on the Federal ground, but also on a State ground.

MR. JACOBSON: All the Supreme Court of Ohio did was to cite Federal law, and based on Federal law is why they came to that conclusion, and that is so indicated in Deaton. Deaton is a Federal case, and that's the very case upon which they rested the basis and foundation of their reversal.

QUESTION: Let me ask you this, Mr. Jacobson. We have confused you and ourselves sufficiently already, so, with your leave, I will add to it a little bit.

I am familiar with the syllabus rule in Ohio, and I have checked the Ohio State reports and I find that the syllabus has the footnote -- the headnote is reprinted on page 13, Appendix A of the petition is precisely the syllabus as it appears in the Ohio State reports. That is the law of the case. That's the law under Ohio. The opinion is just something extra. There is not a word of the State or Federal Constitution in that, and indeed in the italicized language above, this is said to be the law of criminal law and of evidence, not

constitutional law at all.

What significance, if any, do you think that has?

MR. JACOBSON: My only answer is that the statements so uttered by the accused to his parole officer became the vital issue in the case under the Fifth Amendment upon which Miranda is wholly based.

QUESTION: It would appear the man who wrote the syllabus and the judge who wrote the opinion didn't talk to each other very much about this case.

They are the same man, unless it has changed since my father was a member of that court.

QUESTION: They didn't talk to each other much.

(Laughter.)

MR. JACOBSON: Well, the Supreme Court of Ohio in making its ruling in which they did reverse indicated in their finding that there was an inherent compulsion in the parole officer-parolee relationship.

Our position is that we do not believe that this is to be consonant with the Fifth Amendment principles, and that is the reason we petitioned for the writ to this Court, and that's the basis, in my judgment, upon which it was granted.

Now, basically, one of the questions involved here is whether the principle of Miranda under the Fifth Amendment to the Federal Constitution should be extended or not. Now, it was Miranda itself that made applicable under the Fifth

Amendment to the area of confessions obtained at a police station, and this had formerly always been an area where the reliability of confessions and the principle of voluntariness as developed by this Court were fashioned under the due process of the Fourteenth Amendment.

The Fifth Amendment speaks of compulsion. A witness may not be compelled to testify against himself. And that would apply to the area of the courtroom. So when Miranda came out and said that to circumvent this compulsion idea as a necessary component for the usage of the Fifth, that the atmosphere was inherently compulsory and therefore the Miranda warnings were developed in the famous case of Miranda v. Arizona and that automatically now creates compulsion when these statements are not given. So it takes statements which have been obtained from an accused, a statement which is purely voluntary, a statement which is reliable and truthful and stands the tests of due process under the Fourteenth Amendment under the theory of voluntariness, it takes it out of that area of the Fourteenth and places it squarely under the Fifth, because Miranda says so. And I feel that this is really an arbitrary, artificial test to say that just because Miranda is not cited or there is a failure to give the full panoply of rights which otherwise would be a voluntary statement without Miranda and now it becomes a compulsory statement compelled by the accused to be made just merely because of a

failure of giving the warnings.

QUESTION: You are just rearguing Miranda.

MR. JACOBSON: I am rearguing Miranda because I think the test there is such that -- I will tie it in later -- goes into -- Miranda first took it out of the courtroom into the jailhouse where statements are made. They then have indicated, our Supreme Court of Ohio, that they are now taking out of the jailhouse and they are putting it into the area of the parole officer-parolee relationship.

QUESTION: But the interrogation here was in the jailhouse, wasn't it?

MR. JACOBSON: The interrogation was in the jailhouse.

QUESTION: And it was about a crime, it was about a robbery.

MR. JACOBSON: That's right.

QUESTION: Suppose that immediately after the parole officer left, a tax investigator shows up and wanted to talk to him about some tax crime. So he interrogated him without any Miranda warnings. And then what he said was offered against him in a tax prosecution. Now, that's Mathis, isn't it?

MR. JACOBSON: That's Mathis.

QUESTION: I suppose you would argue, well, he had been given Miranda warnings once and that's enough, no matter who was interrogating him. That's one of your arguments, isn't

it?

MR. JACOBSON: I believe in that case the Internal Revenue agent went to the penitentiary and talked to the individual there.

QUESTION: He went to where he was in custody. There is no question, he was under restraint.

MR. JACOBSON: Yes. But the point is that an Internal Revenue agent is still one who is trying to seek out, trying to find where fraud may be involved, trying to see whether or not he can file charges. He acts in the same capacity as a policeman does.

QUESTION: Yes, but this parole officer is the one who asked this man about the robbery. It wasn't any volunteered statement. He asked him this question about the robbery.

MR. JACOBSON: They had a conversation and --

QUESTION: Well, yes, but he asked him about the robbery, didn't he?

MR. JACOBSON: Yes, that's right. We say that he was not --

QUESTION: And he told somebody else what the answers were, namely, the prosecution, and they put him on the stand.

MR. JACOBSON: That's right.

QUESTION: Does the record show whether Sykes knew at the time of this interview with the parolee that he was

likely to be a witness in the case?

MR. JACOBSON: Not at that particular time, no.

QUESTION: Does the record show whether Sykes had customarily testified in cases involving his interviews with his particular parolee?

MR. JACOBSON: No, he did not. This was his first exposure as a witness in a criminal matter, his first exposure of being called to testify in any of his work as a parole officer.

QUESTION: Is that in the record that this was the first time he ever testified?

MR. JACOBSON: Yes. You will find that in our appendix. It further indicates that he was just notifed hours by subpoena before he took the stand. This was an unusual incident.

QUESTION: How did they ever know what the respondent said to Sykes? How did the prosecution ever know?

MR. JACOBSON: The statement originally given by the respondent to the police officials was never suppressed.

QUESTION: I understand that, but how did they know what he said to his parole officer? How did the prosecution know what he said to his parole officer on the second visit?

MR. JACOBSON: The parole officer had indicated that later.

QUESTION: To whom?

MR. JACOBSON: One of the officials at the county jail.

QUESTION: What for?

MR. JACOBSON: He just said he had a talk with him and he indicated that he had admitted the offense. And later when the suppression statement was --

QUESTION: There wasn't much doubt about what happened then, is there, when he said that,about being a witness.

MR. JACOBSON: They had not indicated at that time that they were going to call him as a witness. At least the prosecution didn't until the statement was suppressed.

QUESTION: I suppose if the statement to the police had been admissible in evidence, there would have been no need to call the parole officer.

MR. JACOBSON: That's exactly right, your Honor. It just became a matter of necessity following the court's ruling in suppressing the statement that had formerly been given when the officers took the Miranda warning from him and he signed the Miranda warning indicating that he knew his rights completely and that he at that time then waived them.

The position if the Supreme Court of Ohio and the position of perhaps three other States are upheld by this Court, then the question is what exactly are we going to put in the way of future parole officers-parolee relationships? Now, here

we have Miranda basically referring to a policeman, a law enforcement officer, and in some States they argue that a parole officer is a law enforcement officer. But we challenge that statement because parole officers are not in the field of general interrogations and general investigations. They are not there to put an individual into the jail. Their job begins when the policeman's job ends, and that's the way it should be,at that point it is the duty of a parole officer or a probation officer to maintain a dialog with his parolee, to maintain a cordial relationship, to try to see if he can help him get back onto the road where he will stay out of the jailhouse in the future. His job is to try to reform, to help this man.

Now, if we say that he is a law enforcement officer and therefore comes under Miranda and that every time he sees his parolee, we are going to put up a wall between them, a wall of hostility, then the entire relationship, the entire area of a parole officer and parolee is endangered.

QUESTION: Does it really make a great deal of difference whether you call this officer a law enforcement officer or not? We know he was a parole officer. He had a certain law enforcement authority. He had the right to carry a gun under Ohio law. He had the right to arrest the parolee under Ohio law. He had no right to arrest non-parolees, as I understand it. But does it make any difference to your case?

MR. JACOBSON: Yes. We feel that a parole officer is separate completely from the type of work from the background training he gets, from his position as day is to night. We say that the fact that he is authorized to carry a weapon, as you say, yes, that's given to him. There may be occasions when his parolee could be abusive. But if a parolee becomes abusive, I say then that the parole officer has failed somewhere, and he knows that. His job is not to make use of his weapon. His job is not to go out and see if anybody escapes that he is going to shoot them down. That is a policeman's job. His job is to rehabilitate, keep the individual out of jail and not put him in.

QUESTION: For purposes of compulsion, your court said that interrogation by a parole officer may be even more compulsive than interrogation by an ordinary policeman because of the powers that the parole officer has over the person.

MR. JACOBSON: That is true in some of the States. I think Kansas, Missouri, and California have that.

QUESTION: Apparently it's true in Ohio, too.

MR. JACOBSON: It is now since the Supreme Court ruled a few months back would also have that in the probation process. Statements may be made though no warnings are given. This is not a novel idea that a parole officer may talk without any prior warning.

QUESTION: Mr. Jacobson, isn't the Supreme Court of

Ohio the final arbiter of Ohio law and what it means?

MR. JACOBSON: Not where there is a violation of Federal constitutional rights, your Honor.

Texas, Florida, if I may name a few States, South Dakota, New York, Colorado, they have all indicated that no warnings are required of parole officers. They put them in a different field. A parole officer goes to school, his formal training is contrary to that of a policeman.

Miranda has to do with police work, police tactics, the jailhouse atmosphere, the overbalance of the will. That is not true in a parole officer's --

QUESTION: Can't the Ohio Supreme Court say that it does apply to a parole officer?

MR. JACOBSON: It has ruled that in reversing the Court of Appeals that Miranda applies to a parole officer, yes.

QUESTION: My question is can the Supreme Court of Ohio say nothing more, say that this applies, the Miranda rule must be given by parole officers at all times?

MR. JACOBSON: Oh, we say that's violative of the rights of the State as an aggrieved party under U.S. v. Haas.

QUESTION: As we interpret the constitution of Ohio, a parole officer is required to give the exact same warnings as a police officer.

MR. JACOBSON: No. It's based under Miranda --

QUESTION: Why couldn't it say what I said? I didn't

say a word about Miranda. I said the court says, "Our interpretation of Ohio law means that a parole officer must give the exact same warning as a police officer, period.

MR. JACOBSON: Oh, that's not true.

QUESTION: Could Ohio say that, the Ohio Supreme Court say that?

MR. JACOBSON: The Ohio court did not indicate --

QUESTION: Could it?

MR. JACOBSON: I fail to see that it has any right to say that.

QUESTION: Why not? The Supreme Court of Ohio cannot interpret its own constitution?

MR. JACOBSON: But its own constitution, your Honor, is based upon the Fifth Amendment rights as established by the Miranda case, and we cannot avoid that.

QUESTION: Who interprets the Ohio constitution? The Supreme Court of Ohio, not you, and not us.

MR. CHIEF JUSTICE BURGER: Your time is expired, Mr. Jacobson.

Mr. Schwarz, before you get under way, let me ask you a question. Did you file an opposition to the petition for a writ of certiorari here? I don't have one.

MR. SCHWARZ: I don't believe I did, your Honor.

MR. CHIEF JUSTICE BURGER: And in your brief you do not raise the question that Ohio has decided this case on the

basis of the Ohio constitution, and I suppose that's because you are following the Ohio rule perhaps that the syllabus is the controlling law.

ORAL ARGUMENT OF JACK T. SCHWARZ

ON BEHALF OF RESPONDENT

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

MR. CHIEF JUSTICE BURGER: May I get an answer?

MR. SCHWARZ: Yes. I am going to answer it right now.

MR. CHIEF JUSTICE BURGER: All right.

MR. SCHWARZ: I believe I was appointed --

MR. CHIEF JUSTICE BURGER: I have your copy of the brief of respondent opposing writ of certiorari.

MR. SCHWARZ: I was going to say I believe I was appointed, and then I filed a typed and xeroxed brief, but I did not file any printed type of response to that. I did not raise the question of the fact that this case had been decided on a State basis and there was no Federal question.

MR. CHIEF JUSTICE BURGER: If it is on the State basis, I take it you would say this Court has no jurisdiction. Is that not so?

MR. SCHWARZ: Yes, sir.

MR. CHIEF JUSTICE BURGER: Has no power, I should say. We have jurisdiction because we granted the writ, but we would have no power to construe the Ohio Constitution, you would

agree.

MR. SCHWARZ: That is correct, sir.

MR. CHIEF JUSTICE BURGER: If the Court should so decide, and I emphasize the "if", that this case should be remanded to the Ohio Supreme Court under the Krivda holding of this Court requiring, requesting them to state whether they decided this on Federal or State grounds, that would suit your purposes, I take it.

MR. SCHWARZ: Yes, sir.

MR. CHIEF JUSTICE BURGER: You may proceed if you have anything further.

Or if we should dismiss the writ because we determined that it was decided on both State and Federal grounds, that would suit your purposes even better, wouldn't it?

MR. SCHWARZ: Yes, sir.

MR. CHIEF JUSTICE BURGER: I suppose we have the power to read the opinion and not be bound by the Ohio rule that the law of the case is the syllabus. What do you say about that?

MR. SCHWARZ: You know, I think the Court in determining that question has to consider the Ohio law, and it is that the syllabus is --

MR. CHIEF JUSTICE BURGER: Well, we have held that we must recognize that the Ohio law, isthat the law of the case is the syllabus. We so held in Beck v. Ohio.

It doesn't tell us anything on this question, does it? It doesn't say a word about any constitution, State or Federal.

MR. SCHWARZ: That's correct.

MR. CHIEF JUSTICE BURGER: It indicates that this is a question so far as the Ohio Supreme Court goes of the law of evidence and the law of criminal law of Ohio.

QUESTION: There might be a rule of evidence in Montgomery County.

MR. CHIEF JUSTICE BURGER: Right.

QUESTION: Only.

QUESTION: Is there an Ohio syllabus heading called "Constitutional Law"?

MR. SCHWARZ: Yes, there is. Do you mean State or Federal, your Honor?

QUESTION: May I ask you this? I know that the Supreme Court of Ohio itself prepares the so-called syllabus. Who prepares the italicized language above the syllabus? If you will look at the petition for writ of certiorari in this case and turn to page 13, which is the first page of Appendix A, you will see above the syllabus italicized language.

MR. SCHWARZ: Yes, sir.

QUESTION: Who composes that? Do you know?

MR. SCHWARZ: I assume that the person who prints that in the Ohio bar does that.

QUESTION: The reporter.

MR. SCHWARZ: Yes, sir.

QUESTION: Or the editor, not the court.

MR. SCHWARZ: Not the court. I think the court writes only the syllabus and the decision.

QUESTION: Well, the syllabus the court writes, and then an individual justice writes an opinion, is that right?

MR. SCHWARZ: Yes, sir.

QUESTION: If it hasn't changed, that's the way it is.

MR. SCHWARZ: I think in this case they were both written by the same person.

QUESTION: They generally have been.

MR. SCHWARZ: Just in the event that the jurisdictional question is resolved in the manner that this Court does consider the case, the chronology of the case, I believe, is a little bit other than reported by the petitioner. The respondent was, in fact, interrogated on June 22, 1973, in a small police interrogation room by two detectives and by a member of the probation authority, not the parole authority, but the probation authority was confronted with another alleged accomplice who had supposedly already pled guilty to this charge.

Prior to discussing the matter with the respondent, the police did in fact have him execute a Miranda warning form and read them to him. It was subsequent to that that the police or the detectives in fact obtained statements against

interest from the respondent and obtained them by promises of leniency. As the record shows, the police promised to drop some 20 charges against this individual or would not file 20 additional charges which they could not prove anyhow. So they in effect gave him nothing for something and got the admissions.

It was not until at the time of trial when the motion to suppress was sustained that the parole officer came into the picture. I think any discussion involving this can only go back to the Mathis case, and that case indicates that any person who is one of the authorities who may put someone in jail or who may cause criminal prosecution at a subsequent time must in fact give the warnings. In the Mathis case, of course, it was the tax investigator, and there was a subsequent prosecution based on information gained while he was in custody.

I think the rights waiver in this case is entirely ineffective in any manner inasmuch as it was gotten, or it was used only as a tool in obtaining a confession rather than as a deterrent to a person incriminating himself.

QUESTION: Well, did the Supreme Court of Ohio hold that the rights waiver was ineffective for purposes of even the police interrogation, or did they hold that the man's statements were induced by a promise of leniency? Those would be two quite different things, I would think.

MR. SCHWARZ: The Ohio Supreme Court held that the

defendant operated under a promise of leniency in accordance with the trial court. The trial court also held that there was a promise of leniency which made the statements to the police officers, the police detectives, inadmissible.

QUESTION: But they were inadmissible then, not for failure to give Miranda warnings, but for the misplaced promise of leniency.

MR. SCHWARZ: That's correct. After the waiver was in fact signed, then the promises of leniency were made, and it was subsequent to that that the parole officer made his first visit to the man who was then incarcerated in the Dayton jail.

QUESTION: Why weren't the original Miranda warnings given by the police good enough for the parole officer's visit?

MR. SCHWARZ: Because subsequent to that time promises of leniency had been made to him by the police in order to obtain admissions against interest. At that time the promises of leniency operated to vitiate the rights waiver.

QUESTION: What about the fact of whether he knew all of what a Miranda warning would tell him. I thought that's what Mr. Justice Rehnquist was probing at.

MR. SCHWARZ: I think the --

QUESTION: He had the warning. Why did he need another one, if he knew what it would say?

MR. SCHWARZ: Because that warning had in effect been vitiated and had been made null and void by the subsequent

promises of leniency.

QUESTION: You mean that washed it out of his mind?

MR. SCHWARZ: No, sir, but I think the decision in Miranda v. Arizona states that even if a lawyer were in fact arrested, he would be entitled to have these warnings read, and I assume a lawyer would know his rights to have counsel and to remain silent.

QUESTION: But I don't see how a promise of leniency could somehow erase the effect of a previous warning that you have a right to remain silent, the right to have a lawyer. I don't see how that would have any connection.

MR. SCHWARZ: It's my position that the connection is in the mind of the person who has been given the promises, having already made statements against interest that he has no way of knowing will be kept out of the trial,will talk to this parole officer and tell him anything.

QUESTION: Presumably even if he had gotten another set of Miranda warnings under your hypothesis.

MR. SCHWARZ: That's only a hypo. But, no, I don't think that's the case. Having been made the promise, he would then tell this to his parole officer because the parole officer had the authority, if he doesn't cooperate, to return him to the institution or to recommend that he be returned.

QUESTION: Mr. Schwarz, relating to the Miranda issue, is it your position that whenever a parole officer

interviews his parolee and moves into the question that relates to another crime, that the Miranda rule applies?

MR. SCHWARZ: Yes, sir.

QUESTION: In other words, no question whatever as to whether or not the statement may have been entirely voluntary, a matter of free will under the circumstances?

MR. SCHWARZ: Yes, sir. I think in that situation it's even more important that the parole officer give the warnings because that parolee may rely upon some confidential relationship which we all know does not exist in the law.

QUESTION:This would also be your view, I take it, if the parole officer were visiting the parolee in the parolee's residence in an environment that was not normally regarded as coercive.

MR. SCHWARZ: No, sir, then I think it's out of the in-custodial range of Miranda.

QUESTION: You are aware -- or I will put it to you -- in Ohio could a parole be revoked for failure of the parolee to cooperate with his parole officer?

MR. SCHWARZ: No, sir.

QUESTION: It could not?

MR. SCHWARZ: I don't think it could without a formal hearing and some other justification other than --

QUESTION: Assume a formal hearing. It developed that he refused to answer questions of the parole officer about

the commission of criminal acts while on parole, and certainly in Ohio I would assume that after a hearing, parole would be revoked on that ground, would it not?

MR. SCHWARZ: I don't think so. If that case were pending and ready to go to trial, no, I don't think so.

QUESTION: Oh, yes, but it may be that you would say whatever the parolee says to his parole officer may not be admissible in a separate criminal prosecution.

MR. SCHWARZ: That's correct, sir.

QUESTION: Let's suppose that the only thing that Sykes' testimony was used for in this case was for revocation of parole. You wouldn't suggest that it wasn't admissible for that purpose?

MR. SCHWARZ: No, sir. I think that's an entirely different situation.

QUESTION: So you are really saying that the parole officer needs to give Miranda warnings only when he is interrogating in custody and asking him about a separate crime.

MR. SCHWARZ: Crimes other than the one for which he is on parole and at which the officer may testify.

QUESTION: Is it your view that in the formal hearing on parole revocation,forget about another trial, but in the formal hearing on parole revocation that the statements made by the subject to the parole officer are not admissible even in the parole hearing unless he had a Miranda warning?

QUESTION: No. He says they were admissible.

MR. SCHWARZ: No, I said they would be admissible in that case.

QUESTION: I misunderstood your response.

MR. SCHWARZ: But not at the subsequent trial for the subsequent crime.

QUESTION: In other words, the bar that you want to put up is that the man simply can't testify in a court with reference to that -- the trial for that particular crime.

MR. SCHWARZ: That's correct, sir.

Thank you.

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

[Whereupon, at 3:08 p.m., the oral argument in the above-entitled matter was concluded.]