

In the

# Supreme Court of the United States

State Of Michigan, )  
 )  
Petitioner, )  
 )  
V. )  
 )  
Richard Bert Mosley, )  
 )  
Respondent. )

No. 74-653

Washington, D. C.  
October 6, 1975

Pages 1 thru 54

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MICHIGAN,

Petitioner,

v.

RICHARD BERT MOSLEY,

Respondent.

No. 74-653

Washington, D. C.,

Monday, October 6, 1975.

The above-entitled matter came on for argument at  
1:04 o'clock, 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  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

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on behalf of the Petitioner.

CARL ZIEMBA, ESQ., 2000 Cadillac Tower, Detroit  
Michigan 48226; on behalf of the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 74-653, Michigan against Mosley.

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

ORAL ARGUMENT OF THOMAS M. KHALIL, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case presents to this Court the questions of whether Miranda vs. Arizona and Westover vs. United States precludes any good-faith non-coercive interrogation subsequent to a defendant's exercise of his right to remain silent.

An additional question that's involved in this case is whether or not the exercise of the right to remain silent relative to one crime, per se, precludes any subsequent interrogation relative to a separate and distinct crime.

Now, the facts in this case arise out of the first degree murder of a man by the name of Leroy Williams. The respondent in this case, Mr. Richard Bert Mosley, was arrested on April the 18th, 1971, at about 1:05 in the afternoon. He was arrested in connection with some unrelated robberies; that is to say, robberies unrelated to the murder for which he was convicted.

The arresting officer in this case, Detective Sergeant James Cowie, initially interviewed the defendant



in this case for about twenty minutes. That interview was undertaken after a full advice of rights was given to the respondent, and after a waiver of those rights was obtained.

After Detective Cowie began to interrogate the defendant in this case, Mr. Cowie began asking Mr. Mosley about the White Tower robbery, one of the robberies for which he was arrested.

At that point in time, Mr. Mosley said, "I don't want to talk about any robberies."

Detective Cowie immediately terminated the question, and didn't see the defendant again except to tell him that he would be questioned later by Detective Sergeant Hill of the Homicide Section.

Mr. Mosley was then taken to the ninth floor lock-up area, at about four o'clock in the afternoon. During this time, Detective Sergeant Hill of the Detroit Homicide Section had been talking with an accomplice in the Leroy Williams murder, a man by the name of Anthony Smith.

Mr. Smith, at about four o'clock or so, made certain statements to Mr. Hill, implicating Mr. Mosley as the shooter in the Leroy Williams slaying. Detective Hill thereafter, at about 6:25 in the evening, took Mr. Mosley from the ninth floor lockup area and took him down to the fifth floor Homicide Section.

At that point in time, Detective Hill gave Mr.

Mosley his rights in explicit detail, specifically, Mr. Hill had defendant Mosley read his rights to himself, then Detective Hill had Mr. Mosley read the rights out loud so that Detective Hill could ascertain whether or not, in fact, the defendant could read.

Detective Hill then read the Miranda rights form back to Mr. Mosley, explaining in detail all of the points contained on that document.

At that point, Mr. Mosley testified that he fully understood his rights, and, in fact, he signed the rights form, informing him that he had been informed of his rights.

Defendant Mosley testified -- yes, Your Honor?

QUESTION: What was his reason for doing this twice? Giving him the Miranda warnings twice, what was the reason for it?

MR. KHALIL: Well, Your Honor, in this case I think that Detective Hill did not know that Mr. Mosley had earlier exercised any right to remain silent.

QUESTION: Why didn't he know? It was all in the same police department, wasn't it?

MR. KHALIL: That's correct, Your Honor.

QUESTION: It was in the same building, wasn't it?

MR. KHALIL: It was on a different floor, Your Honor; it was in the same building, yes.

QUESTION: Well, why did he carry him to a different

floor?

MR. KHALIL: Because it was a different bureau, Your Honor, investigating the crime; it was homicide --

QUESTION: So you sent him around from place to place, and then, all of a sudden, you give him another warning.

MR. KHALIL: Not at all, Your Honor. In fact, the defendant in this case testified that he knew he wasn't being taken place to place. The defendant in this case --

QUESTION: He knew that he wasn't being taken? You said they took him from the fourth floor to the ninth floor, yet he said they didn't do that?

MR. KHALIL: That's exactly where they took him, Your Honor. What I'm saying is that --

QUESTION: That they did move him around.

MR. KHALIL: They took him to the lockup area, Your Honor, and brought him back for further interrogation.

QUESTION: And then they gave him the Miranda warning again.

MR. KHALIL: That's correct, Your Honor.

QUESTION: Why?

MR. KHALIL: Because Detective Hill was going to interrogate him on the Leroy Williams murder, and under the doctrine enunciated by this Court in Miranda vs. Arizona, the rights were a prerequisite to any interrogation.

QUESTION: Is there anything in Miranda about taking

him from place to place and giving him warnings every time you took him?

MR. KHALIL: In the companion case --

QUESTION: Of course not.

MR. KHALIL: In the companion case, Your Honor, there is discussion of that particular point.

QUESTION: Well, I know a little bit about that one.

MR. KHALIL: Westover vs. United States.

QUESTION: Yes, I remember that, but that was State and federal.

MR. KHALIL: That's correct, Your Honor.

QUESTION: But this was all State.

MR. KHALIL: That's correct, Your Honor. In this case we don't feel that it makes a difference. What should make a difference in this case is what the circumstances in this particular case show.

QUESTION: Well, it makes a difference to me as to why you gave him the same warning twice, the same interrogating agency gave him the same warning twice.

MR. KHALIL: In this case, Your Honor, there was a change in circumstances.

QUESTION: Because you thought he was going to change his mind.

QUESTION: Well, is the State to be penalized for overdoing it?

MR. KHALIL: I don't think so, Your Honor. I think that the State in this case should be commended for the reasonable efforts of the law enforcement personnel that are involved in this particular case.

QUESTION: Well, suppose you give him six of them, wouldn't that be penalizing him? You should leave him alone after the first one, as I read Miranda.

MR. KHALIL: Well, Your Honor, that's not the way that we --

QUESTION: That's as I read Miranda.

MR. KHALIL: That's not the way we read Miranda, Your Honor; that's not the way that the majority of jurisdictions in the United States that have addressed that precise question read Miranda.

There is nothing in Miranda, in our opinion, that would adopt a per se rule in every case. That basically is what the Michigan Court of Appeals did in this case, and that is what we assert in this Court was error.

Rather, the test should have been in the Michigan Court of Appeals: Did the defendant in fact knowingly and intelligently waive his rights under Miranda vs. Arizona?

That is to say, did he understand those rights and did he waive those rights?

Now, in the test that we proposed and in the test that we think has been the rule since Miranda, the totality of



the circumstances must be considered in any given case.

And in this case, for example, the fact that he had been questioned earlier is merely one of the circumstances to be considered.

QUESTION: May I ask you, Mr. Khalil, does the record show whether or not Hill knew about the earlier interrogation by Cowie?

MR. KHALIL: Yes, Your Honor, the record indicates that Detective Hill did not know that Mr. Mosley had exercised his right to remain silent relative to the robberies.

QUESTION: Does it show whether or not he knew that Mosley had been interrogated by Cowie?

MR. KHALIL: Yes, Your Honor, he knew that Detective Cowie had interrogated him, and, according to Hill, he had understood that Mosley had denied implications, quote, in any robberies. He did not know that he exercised his right to remain silent.

I might note, Your Honor, that initially Mr. Mosley did not remain silent, he signed the waiver rights form in this case.

QUESTION: Yes.

MR. KHALIL: And only later waived those rights.

QUESTION: And that's Hill's testimony in the record, is it?

MR. KHALIL: That's Hill's testimony, and it's also

Mr. Cowie's testimony, that he did not tell Detective Hill about the prior exercise.

QUESTION: There was no direct contact, as I understand it, between Cowie and Hill. Cowie finished about four p.m., and Mosley was then returned somewhere, and then it wasn't until about six p.m. that he was taken to the ninth floor and interrogated by Hill; is that right?

MR. KHALIL: He was taken to the fifth floor from the ninth, --

QUESTION: Fifth floor, from the ninth.

MR. KHALIL: -- that's correct. But there was some contact between Hill and Cowie. In fact, Detective Hill discovered the presence of Mr. Mosley in the headquarters building from Lieutenant Domm, who was then on duty, and from Detective Cowie. However, there was no elaborate discussion as to what had occurred between Cowie and Mosley.

QUESTION: So that Hill did know about the earlier interrogation, and he did know that Mosley had refused to discuss the robberies?

MR. KHALIL: He did not know that specifically, Your Honor. He knew that -- as far as Detective Hill knew, Mr. Mosley had declined or denied any implication in the robberies.

QUESTION: Denied any implication?

MR. KHALIL: That's correct, Your Honor.

QUESTION: But your argument, I take it, would be the same, whatever he knew.

MR. KHALIL: That's correct, Your Honor. The fact that he had remained silent earlier --

QUESTION: Well, that isn't a critical -- you don't think that's a critical fact in the case?

MR. KHALIL: No, I don't, Your Honor, not at all.

QUESTION: And should we decide the case on the assumption that the second officer knew that he had declined to answer, had decided to exercise his rights?

MR. KHALIL: Well, I think in this particular case, Your Honor, the record is clear that he did not know that he had earlier exercised his rights. But it doesn't matter for purposes --

QUESTION: Well, it might. It might. In any event, you don't know what might matter or not. But, in any event, you say the record is clear that Hill testified, at least, that he did not know that Mosley had exercised his right to remain silent in the earlier interrogation?

MR. KHALIL: That's correct, Your Honor.

QUESTION: And if he had any doubt about whether the warning had been given or what had preceded, I suppose your position would be: the prudent thing was to give the warning again.

MR. KHALIL: That's correct, Your Honor, that's

precisely what Detective Hill did in this case.

QUESTION: And if he hadn't done that, you wouldn't have any case, would you?

MR. KHALIL: That's not necessarily correct, Your Honor.

In this particular case, the fact that Detective Hill did not know, I think, goes to the fact that it was a bona fide investigation, it was a good-faith police effort by Detective Hill in approaching the defendant in this case.

Now, the Michigan Court of Appeals did not even reach that issue. The Michigan Court of Appeals said that this Court intended, under Miranda vs. Arizona, to hold that the mere approaching of a defendant a second time was, per se, coercive.

I would submit that on the record in this case that could not, in any way, be substantiated or justified; that the only way that this case could have been reversed and, indeed, was reversed, was based on a per se rule, which, as I indicated, is contrary to the majority of jurisdictions in the United States, both State and federal.

Now, it's our position here that what the Michigan Court of Appeals should have done was to look at the totality of the circumstances surrounding the interrogations here, and, indeed, look at the waivers in this case. Now, the waivers here are razor-clean. There's no tenable argument that could

be made that these waivers were not knowingly, intelligently, and voluntarily made.

Now, no questioning whatever occurred in this case prior to obtaining of a waiver by either Detective Cowie or by Detective Hill. That is to say, there was no coercion used, no trickery used, nothing along that vein, in order to get a waiver in this case.

The waivers were constitutionally procured in this case, and it's our position that, in fact, the confession was constitutionally procured in this case.

Now, I might point out for the Court's reference that our assertion that the totality of the circumstances should be the test in this case is apparently agreed upon by the respondent here.

Now, at pages 21 and 31 of his brief, and at page 44 in the conclusion of his brief, the respondent indicates that, indeed, the inquiry that this Court should make is whether or not, under the totality of circumstances -- whether respondent Mosley, under all of the circumstances, knowingly and voluntarily and intelligently waived his rights.

Now, that's precisely what we're arguing to this Court.

Now, we don't feel that we're contending for a new rule here in this Court. It's our position that that has always been the rule since Miranda. That, in fact, any new



rule here is the rule that has been promulgated by the Michigan Court of Appeals. And we submit that that rule ought not to stand in this particular case, nor in any other case arising under these same facts.

Now, it cannot be disputed here that Mr. Mosley was twice given his rights. In fact, the Court of Appeals found that in their opinion, and I don't think it's disputed on this record. There were, as I mentioned, two clean waivers of rights, there was no coercion in this case, there were no threats made to the defendant in order to get him to waive. There was no attempt in this case to subvert his previous exercise of the right to remain silent. There was no long incarceration here.

This case was a new investigation being handled by a separate bureau, in charge of -- by a separate police officer, Sergeant Hill.

And, in fact, the interrogation initially, I point out, was only twenty minutes in length, only covered a few preliminary questions.

Now, the many courts that have considered this question, both State and federal courts, have adopted the rule that we are contending for in this case; that is to say that as long as any subsequent inquiry respects the rights previously asserted, and the subsequent inquiry is undertaken for good-faith reasons, there is no reason whatever to hold

that the fact that the man exercise his right previously should taint any subsequent voluntary waiver of rights. That's what we're saying in this particular case, that the rights were knowingly waived previously, then they were exercised relative to robberies; in the second case there was a knowing and intelligent waiver here, and the confession was voluntarily made.

I point out to the Court that there was no badgering here, there was no harassing, as Mr. Justice Marshall is inclined to believe, there was no institutionalized --

QUESTION: What gave you the idea that I -- would you please not characterize what I'm thinking.

MR. KHALIL: My apologies, Your Honor.

QUESTION: Thank you!

MR. KHALIL: But there was, in any event, no bureaucratic harassment in this case, there was no systematic attempt to break down the exercise of his right previously exercised.

In fact, as I indicated, Mr. Hill did not know of that previous exercise. I think that goes to the good faith of his activities in this case.

Now, we feel in this case that the Michigan Court of Appeals erred by adopting the per se rule, and holding the confession should have been suppressed.

We're asking this Court to reverse the Michigan

Court of Appeals and, under the circumstances in this case, to hold the confession to have been voluntarily and intelligently entered into and tendered into evidence.

Now, --

QUESTION: I thought you said earlier that you had in mind a remand to reconsider under the totality of the evidence approach?

MR. KHALIL: No, Your Honor, everything that would be available to a Michigan court is available to this Court.

QUESTION: I see.

MR. KHALIL: What I think I suggested, Your Honor, or attempted to suggest was that defense counsel in this case agreed with us that totality of circumstances should have been the test in the Michigan Court of Appeals and should be the test here. Although his conclusions are somewhat different from the petitioners in this case.

QUESTION: Well, if we reject the per se rule, which you say the Michigan Court of Appeals has adopted, wouldn't we ordinarily simply tell the Michigan Court of Appeals that that was not a proper standard for reversing under the Federal Constitution, and then let them make an assessment as to the totality of the circumstances?

MR. KHALIL: Well, Your Honor, I know that this Court, in Brown vs. Illinois, decided last term, decided the issue rather than submit it back to the trial court; that this

Court will have before it all of the facts that will be available to the Michigan Court. And I think that, given this case, Your Honor, with the importance of this case and the importance of this issue to all of the State and federal courts, not only the Michigan court, that this Court ought to instruct lower courts on what the feeling is of this Court in this area.

And I think that, especially the Michigan court in this case needs some instruction on that particular point.

QUESTION: Let me follow through at this point.

Brown v. Illinois is a little different than this case, in the sense that there, as I recall, the arrest was concededly an illegal one.

If you should prevail on the argument you've made so far, do you think we should, nevertheless, remand the case for determination of the legality or illegality of the arrest, and hence the implication of Brown and Wong Sun?

MR. KHALIL: Well, Your Honor, in this case, I would submit to the Court that enough facts are present here, that this Court could determine whether or not the arrest was valid, if it so desired.

However, the fact remains that the Michigan Court of Appeals only addressed one issue in this case, and that was the Miranda issue.

It's our position that impliedly that meant that

the arrest was lawful here. What we would ask this Court to do would be to reverse the Michigan Court of Appeals relative to the confession and send it back to the Michigan Court for proceedings not inconsistent with that opinion.

I think, under that particular remand, the defendant would be allowed to raise any other grounds that he might feel he was entitled to.

QUESTION: And you would be content with that kind of --

MR. KHALIL: We would be content, Your Honor, with a reversal of the Michigan Court of Appeals and with some instructive language relative to the confession and what Miranda intended, in cases such as this one.

QUESTION: What is a Walker hearing?

MR. KHALIL: A Walker hearing, Your Honor, is the counterpart of the Jackson v. Demo case.

QUESTION: That's a case in Michigan, the Walker case?

MR. KHALIL: The Walker hearing is a Jackson v. Demo hearing, to determine the admissibility and voluntariness of a confession.

QUESTION: The Walker case is a Michigan case?

MR. KHALIL: People vs. Walker; it's a Michigan case, Your Honor.

QUESTION: Thank you.



QUESTION: Every State has a different name.

MR. KHALIL: That's correct, Your Honor; ours is Walker.

QUESTION: Very good, thank you.

MR. KHALIL: Now, it's our position in this case that Miranda did not preclude subsequent interrogation relative to even the same case, that instead, as I indicated, the circumstances of the waiver and the confession have to be looked to on a case-by-case basis.

But, in any event, this case is not a case of continuing or incessant interrogation. This case, indeed, is a case wherein the interrogations, one by Cowie and one by Hill, involved separate, unrelated, distinct crimes.

And it's our position that this case was specifically allowed for in the companion case to Miranda, Westover vs. United States.

Now, this was a different crime, it was a different interrogator, and, may I say, I feel that it was a different place, the interrogation taking place on the fifth floor rather than the fourth, and those circumstances, more importantly, appearing to the defendant, because he testified that he understood that the second inquiry was a homicide inquiry.

QUESTION: But again the Westover was the State court prosecutors and the federal prosecutors. That's entirely

different, isn't it?

MR. KHALIL: I don't think so, Your Honor. I think that it would be merely a form over substance rule that would require that the second authority come from the federal jurisdiction, as opposed to --

QUESTION: Well, you don't see any difference between State and federal?

MR. KHALIL: Not at all, Your Honor. I think the critical question is to look at the state of mind of the defendant in a particular case, and I think that's what this Court did in Westover. Because in Westover, even --

QUESTION: Westover was deliberately, and they emphasize in the opinion that one was federal and one was State.

I'm a little familiar with Westover, I know, I lost it.

MR. KHALIL: That's correct, Your Honor.

QUESTION: That's the best way to remember a case is to lose one.

MR. KHALIL: That's correct, Your Honor, you argued that case, as I remember.

QUESTION: And that was the point, that one was federal and one was State.

MR. KHALIL: But what I'm saying, Your Honor, that, ipso facto, that should not determine what the outcome of a

given case is.

I say that it's merely a formal distinction as to whether one authority is a federal authority or a State authority.

I can visualize certain cases arising, for example, in our jurisdiction, wherein one police agency may come into a case where, say, the Detroit Police Department is holding a particular suspect. And to say that simply because they may be from the same agency, that, per se, precludes an interrogation, I submit that Westover does not go that far.

I think that in Westover, this Court recognized that the questioning there, which went over fourteen hours and was without Miranda rights, could result in a voluntary confession to the FBI, who was the second interrogating authority, as long as Miranda rights were given and as long as the defendant in that case was given an opportunity to exercise those rights.

Now, if that's the case, I submit that in this case wherein we have only a short twenty-minute interrogation, wherein the defendant's rights were honored, in fact he saw that they worked, he exercised the right to remain silent relative to the robberies; questioning ceased.

That in this case, with that short interrogation, a respect of rights, a valid giving of Miranda warnings, that should not taint, per se, the subsequent confession in this

case given to Detective Hill. That's our position as far as Westover goes in this case. We feel that it supports the position in this particular case.

QUESTION: Who has authority in Detroit to prescribe police investigating procedures? Is it the city government or city council or the --

MR. KHALIL: Yes, Your Honor, the city government, the Detroit Police Department prescribes procedures to be followed by its officers in a given case.

QUESTION: And the State has no authority whatsoever or --

MR. KHALIL: No, in the city -- there are State statutes, Your Honor, that guide the city police in certain areas; for example, in the area of arrest.

QUESTION: But the Attorney General's office has no authority?

MR. KHALIL: The Attorney General does not have a direct hand in it, Your Honor. We have the Detroit Police Department, we have the Wayne County Sheriff's Department, and then we have the Michigan State Police.

QUESTION: But in a case like this, it's the local prosecutor's office that has the authority to handle appellate litigation?

MR. KHALIL: That's correct, Your Honor, the Wayne County prosecutor's office.

QUESTION: Then the State Attorney General has no authority in --

MR. KHALIL: Yes, he does, Your Honor, the State Attorney General -- are you speaking about this particular case, coming into this case?

QUESTION: Yes.

MR. KHALIL: The Attorney General has the authority in the State of Michigan to enter any case as the attorney of record on behalf of the people.

QUESTION: Must he consent to bring the case here?

MR. KHALIL: Not that I am aware of, Your Honor.

QUESTION: All right, thank you.

QUESTION: But he may displace the local prosecutor?

MR. KHALIL: He may displace us if he so chose to do so, but in this particular case he did not do that.

Now, as I indicated, it's our position here that the confession was voluntarily made, and knowingly and intelligently made. We would ask this Court, as I indicated to Mr. Justice Blackmun, to reverse the Michigan Court of Appeals on the confession issue, and hold that, indeed, Miranda vs. Arizona did not preclude any subsequent interrogation for good-faith purposes.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ziemba.



ORAL ARGUMENT OF CARL ZIEMBA, ESQ.,  
ON BEHALF OF THE RESPONDENT

MR. ZIEMBA: Thank you, Mr. Chief Justice. Members of the Court:

I think that what we have here is a semantic problem rather than a legal one, or perhaps it comes to the same thing, since we, in law, deal with nothing but words.

I think that the semantic problem initially starts with the meaning of the word "quit".

Now, Mark Twain once told us that quitting smoking is the easiest thing in the world to do, "I've done it hundreds of times".

And apparently this is what the Detroit Police Department and the Wayne County prosecutor says. Miranda says, "true enough, "when an accused under custodial interrogation exercises his right under the Fifth Amendment to remain silent, that election by him must be honored and all questioning must cease." Which means to my mind, "all questioning must quit."

QUESTION: But it doesn't mean forever, obviously.

MR. ZIEMBA: No, not forever.

QUESTION: I mean, if he's released and a year later is apprehended on some separate crime --

MR. ZIEMBA: True. True. But I do not think that this Court meant in Miranda that the police are to quit

questioning for five minutes.

QUESTION: Well, that's just dicta that you're quoting from Miranda, isn't it?

I mean, that hadn't in fact happened to Miranda.

MR. ZIEMBA: Well, no, but the language is there, the questioning --

QUESTION: But it's dicta, though, isn't it?

MR. ZIEMBA: No, not the statement that the questioning must cease, Your Honor.

QUESTION: Well, I thought the definition of "dicta" was any observation by the Court made that was not necessary for decision on the particular facts before it.

QUESTION: Well, under that definition, 99 and a half percent of the Miranda opinion is dicta.

QUESTION: Right.

MR. ZIEMBA: That's my point, which really --

QUESTION: So you concede, then, that you're relying on dicta?

MR. ZIEMBA: Under that definition, yes. Yes.

If it was dicta for this Court to say that when an accused under custodial interrogation elects to exercise the Fifth Amendment right to silence, and it must be honored, and the police must cease questioning. If that is dicta, I am relying on that.

And I think that this Court meant that the police

are not to cease for five minutes, that the police cannot then decide how long they will cease questioning the accused. When a court issues an injunction to a man to stop beating his wife in a divorce case, the court doesn't mean stop for five minutes; the court means what it says: Stop.

If, indeed, according to further dicta in Miranda, --

QUESTION: Well, you're comparing an injunction with something like a sidebar comment in the Miranda opinion now.

MR. ZIEMBA: Well, I would like to elevate it to more than just a sidebar comment.

?

QUESTION: Well, in Hatteras v. New York, we indicated that we were separating the dicta from the substantive aspects of the holding, did we not?

MR. ZIEMBA: That's true. That's true. And then, of course, this Court in Santa Bello, when confronted with a situation where one prosecutor made a promise to a criminal defendant regarding his plea, and another and distinct prosecutor appeared with that same defendant in open court, that the promise of the first out-of-court prosecutor would be binding on the in-court prosecutor; this Court saying --

QUESTION: But that wasn't on a Miranda issue --

MR. ZIEMBA: No, but this Court said if responsibility could be evaded that way, the prosecution would have designed another deceptive contrivance, akin to those we condemned in Mooney vs. Hall, and which is the point of the respondent here.

Here.

The strictures of Miranda can be avoided by the simple expedient of taking the accused and just shuffling him, just sending him from one police officer to another, and requiring him, as the prosecutor suggested, each and every time a police officer undertakes to question you, you must once again say, "I want to remain silent under my privilege, under the Fifth Amendment."

Then, eventually, you're going to overcome and overbear the will of this person not to answer questions. If, indeed, custodial questioning by police in an incommunicado situation, such as we have here, is inherently coercive. And if you allow an accused the opportunity to say, "No, I don't want to answer any questions", and you keep coming back at him by the same police officer or other police officers of the same department, propounding questions to him; Are you not further exerting upon him coercive practice? I think you are.

QUESTION: It makes no difference if the subject matter of the conversation is a totally different --

MR. ZIEMBA: None whatever. And I think this is a -- the case at bar is a most beautiful illustration of that principle that one could hope to find; for this reason: You had the arrest of the respondent here on the basis of an anonymous telephone call, without a warrant. Cowie received it

two or three days before the arrest, he couldn't be sure.

A telephone call from a person he had never heard on the telephone before, whose name he didn't get and didn't know at all. And this person said that the respondent was mixxed up or involved in these robbers on the Southeast side of Detroit.

And Cowie said the man mentioned the Blue Goose Bar and the White Tower Restaurant, and the place where the deceased in this case was killed.

And Cowie went out and picked the respondent up and brought him downtown.

And he said, Cowie said, "I questioned him only on Blue Goose, because I learned that he wasn't responsible for White Tower."

And then Cowie turned him over -- turned him over -- to Hill for further questioning in the Leroy Williams matter.

QUESTION: He questioned him on Blue Goose, which was the name of the cafe where the robberies had been --

MR. ZIEMBA: I think so.

QUESTION: Because I -- he wasn't responsible for what? White Tower?

MR. ZIEMBA: And Cowie mentioned the White Tower robbery also.

QUESTION: I see. I just wanted to be sure I understood what you're saying.

MR. ZIEMBA: Yes. Yes.



Now, if Hill hadn't been successful in the Leroy Williams case, how many other police officers could then have taken the respondent and questioned him about other crimes occurring in the Southeast area of Detroit? If you allow one, why not twenty?

QUESTION: If you, as you indicate in the last paragraph of your brief, stand on the totality of circumstances rule, then there might be quite a different approach if there were ten such or even five such episodes in sequence, as compared with two; is that not correct?

MR. ZIEMBA: I think it would be more gross, certainly, but in principle I do not think that there is any difference at all, because, Mr. Chief Justice --

QUESTION: Isn't that what totality of circumstances means?

MR. ZIEMBA: In my mind, in this case, the totality of circumstances would mean the completely -- the arrest without any probable cause whatever of the respondent. The failure of Cowie, after having taken the respondent downtown, to conform to the Michigan statute which requires the production of an arrested person under felony before a judicial officer without unnecessary delay. We have a parallel to the Federal Rule 5 requirement, and this was not done, and Cowie admitted that there was absolutely no physical obstacle to his taking the respondent before some judicial

officer of the court, which is located just across the street from the Detroit Police Headquarters. Instead, --

QUESTION: One obstacle was he didn't have anything to hold him on.

MR. ZIEMBA: That's true. And precisely, Cowie said, "I didn't take him over, because I didn't think I had enough."

Further, the prosecutore speaks about the non-coercive aspect of the second interrogation of the respondent.

Now, further dicta in Miranda seems to indicate that once an accused has exercised his right under the Fifth not to answer any questions, there might be a waiver, a valid subsequent waiver; but the mere ritualistic incantation of the Miranda warnings followed thereby by a confession, in and of itself, will not be regarded as a waiver. For the reason that if there were no confession, there would be no question. Because we had a confession, we are confronted with the problem of the voluntariness of the confession and the coercive measures.

This Court, according to dicta in Miranda, states that if, indeed, there is a confession under these circumstances, no matter what the testimony of the police is, it is consistent with an involuntary statement, and consistent with the will of the accused being overborne by the procedures.

Now, you had in this additional case this additional

factor, that Hill, when he approached the respondent and read off and gave him the Miranda warnings, immediately stated to the respondent: "Anthony Smith has confessed, and he puts you on the trigger. You're the shooter."

QUESTION: But Mr. Khalil says that when he was there the second time, with the second officer, if he had not given the Miranda ruling, you would be yelling.

MR. ZIEMBA: [Laughing.]

QUESTION: Well, what's your answer to that?

MR. ZIEMBA: I -- I would have yelled in either case.

QUESTION: You would have yelled louder.

MR. ZIEMBA: Louder, yes.

[Laughter.]

MR. ZIEMBA: I would point to another --

QUESTION: Well, then, what was the second man to do?

MR. ZIEMBA: I'm sorry, sir?

QUESTION: The second officer, who questioned him, what was he to do? He couldn't question him at all?

MR. ZIEMBA: That's -- this is the respondent's position: that Cowie had a duty and obligation to inform Hill that he, Cowie, had advised the respondent of his Miranda rights and that the respondent had elected, under the Fifth Amendment privilege, to remain silent.

QUESTION: Suppose after the interrogation on the

robbery had been concluded by Detective No. 1, and he concluded that he did not have enough to hold him or send him across the street for the preliminary hearing, but excused him and he went on home; and then the second detective came along and said, "I wanted to talk to that man before he left, but he's gone." So they send a police car out to his home, pick him up, bring him down.

Now, I assume you would agree that they must give him a Miranda warning then, would you not?

MR. ZIEMBA: Yes. Yes, definitely.

QUESTION: Because the warning that was two or three hours or a number of hours old would not carry over.

MR. ZIEMBA: Yes. I think that there you might -- you might say that an intervening event or series of events broke the causal chain between the first interrogation, the continued custodial retention of the respondent --

QUESTION: By the intervention, you mean going outside the building? And coming back?

MR. ZIEMBA: Going back to his home and telling father or mother what happened, -- this is an 18-year-old boy.

QUESTION: Now, --

QUESTION: Mr. Ziemba, I got -- oh, excuse me, Chief. Go ahead.

QUESTION: Now, in this hypothetical case that I'm suggesting, and a case that might help clear some of these

things up, he comes back to the station house and then, from that point on, everything that occurred was just exactly as it occurred in this case.

Do you think you would have the kind of case, or any kind of a case here now?

MR. ZIEMBA: Just on those facts, very likely I would not. Very likely I would not.

QUESTION: So you put your whole case, or large part of your case, on the absence of an intervening break in the chain of events?

MR. ZIEMBA: Yes, for this reason, that the inherently coercive atmosphere of a custodial interrogation continued and, in my opinion, was made worse by the fact that here you have this -- let us assume an 18-year-old boy, in incommunicado interrogation by a police officer on such a serious charge as robbery is -- he's frightened, he's apprehensive, he has nobody there to advise him, and the officer says: "It's my obligation to inform you, young man, that if you don't want to answer any questions, you have the perfect right to remain silent, and I'll honor that."

And the response is, "Great, I don't want to answer any questions about any robberies." And he relaxes, and another police officer comes, and you know how stern police officers can look --

QUESTION: Mr. Ziemba, can I --



MR. ZIEMBA: -- and takes him down and says, "Now I'm going to question you about murder, sir!"

Not only that, the first thing he does -- not to ask, "Do you want to waive your rights?" -- he doesn't ask that at all, he doesn't ask, "Do you want an attorney?" No, the first thing he says, "Anthony Smith confessed and you're the trigger man. Now, what have you got to say about that?"

This is in effect what happened. And then don't we have the situation that we had in Bram v. United States, where this Court said: What do you expect an individual to do in those circumstances, when the police officer comes and says, "Look: this is what we have. Somebody has confessed or somebody has fully incriminated you."

QUESTION: That's my question.

MR. ZIEMBA: It calls for an answer --

QUESTION: Would you mind getting to this for a minute?

MR. ZIEMBA: Yes, sir.

QUESTION: The same officer that was questioning him, and he said, "I don't want to talk about it, any robberies." Right?

MR. ZIEMBA: Yes.

QUESTION: And the same officer comes back five minutes later and goes out of the room and comes back, he says,

"Oh, by the way, your co-conspirator says you're the one that had the gun. Does that make you change your mind?"

And he says, "Oh, yeah, I want to talk now."

Is that okay?

MR. ZIEMBA: No, I don't think so. I do not think so. According to the dicta of Miranda again. Because this Court has said that when an accused exercises his right to counsel, says "I want counsel", no questioning shall continue until counsel comes.

And then, of course, there are those cases in the lower courts -- well, Fahy, for instance, I think is on point. Where incriminating evidence was presented to a defendant and were it not for that incriminating evidence he wouldn't have confessed.

I think that the only way that we're going to -- if, indeed, there is merit to the rule that the police must warn a suspect in custodial interrogation that he has the right to remain silent, and if we give the right to the accused to remain silent, the only way that we can make that right meaningful is for -- is to require the police to absolutely desist from any further questioning of that defendant before he is presented to a judicial officer, so that the judicial officer may say, "Sir, you are charged or at least accused of a very serious crime; you have a right under the Constitution to an appointment of counsel if you

have no money for counsel. Do you want an attorney?"

I remember when I was on the very same staff of the Wayne County Prosecutor's office a number of years ago, I happened to be the senior man in the office on this afternoon when two homicide detectives brought in this middle-aged man for me to take his formal statement in a homicide. He had done in his paramour, his common-law wife.

And I started out by giving him his rights, and I said, "Sir, you are a citizen of this country, if you want a lawyer and don't have money, I'll go across the street and have a judge appoint one for you. Do you want one?" He said no.

But I was not convinced, with his answer, that he was telling me what he really felt in his heart.

Now I said, "Mr. Smith," -- if that was his name -- "we will leave the room for five minutes and you think about it, and tell me." And so we did. The court stenographer and the two detectives and I. When we came back in, I said, "Sir, have you made up your mind?"

And he was looking out the window and he turned his face toward me and he said, "Are you sure I won't get beat up if I ask for an attorney?"

It's my opinion that it's not sufficient to read off from a form to a person who is in custody. "You have a right to remain silent, and you have a right to a lawyer, if

you don't have money for a lawyer the court will appoint one; and any time you want to interrupt the questioning, you may" --

QUESTION: Going back to my question, you worry me considerably.

MR. ZIEMBA: What is that, Mr. Justice Marshall?

QUESTION: When the officer comes back and says, "Your co-conspirator says you were the guy with the gun. Do you have anything to say?"

That's not really a question, is it?

MR. ZIEMBA: No, it isn't.

QUESTION: Well, why is it barred from Miranda?

MR. ZIEMBA: Why is it barred by Miranda?

QUESTION: Yes.

MR. ZIEMBA: Because its purpose and its design is to overbear the will of the defendant, who has already stated that he wants to exercise his constitutional right to remain silent. It is calculated to throw the fright of Heaven into his soul, so that he will confess. Or at least to make some incriminating statement.

And if we permit that, Mr. Justice, if the man says, "I don't want to say anything"; then five minutes later the same police officer comes back and says, "Not only do we have your rap partner, but we have an eyewitness who says that you pulled the trigger." And things mount, and things mount.

Now, in this particular case, I think the record

indicates that in all likelihood the second police officer, Hill, didn't have a confession from Anthony Smith.

QUESTION: Well, all the defendant said, though, was that he didn't want to answer any questions about any robberies.

MR. ZIEMBA: Yes, and this was a robbery-connected homicide.

QUESTION: Well, it was still a homicide.

MR. ZIEMBA: But it was a felony murder, as we call it in Michigan.

QUESTION: Let's assume he's asking about some crime that's not connected with the robbery at all.

MR. ZIEMBA: I don't think that -- I think we get into --

QUESTION: Just plain murder.

MR. ZIEMBA: Beg your pardon?

QUESTION: Just plain murder.

MR. ZIEMBA: Yes.

I still think that there is that danger that we will open the door to all sorts of subterfuge.

QUESTION: Well, that may be, but it is somewhat of an exaggeration of what the defendant claimed when he said "I don't want to answer any questions about robberies." It's a little exaggeration to say he said he didn't want to answer any questions at all.

MR. ZIEMBA: Yes, but, Mr. Justice, I do pray you to



consider that we here are speaking as --

QUESTION: Well, it doesn't change your case to say he refused to answer any more questions about robberies, and the police came back and asked him about a robbery. That's -- you've still got just as good a case as before, haven't you?

MR. ZIEMBA: If I understand what you're saying. My answer is that we are discussing this thing as trained lawyers. We may know the semantic differences between answering questions about robberies and answering questions about homicide, but here you have an 18-year-old boy who, I think, when he said, "I don't want to answer any questions" is, in effect, saying, "I want to take advantage of this right you say I have to remain silent."

I don't think that it would be fair for us to hold this 18-year-old, untrained in legal distinctions, to a precise, literal interpretation of his answer.

QUESTION: You don't suggest that that would bar him forever --

MR. ZIEMBA: No, no.

QUESTION: -- from --

MR. ZIEMBA: No, absolutely not.

QUESTION: Ten minutes later, before they released him, if they were going to release him for lack of evidence, suppose he said, "I've changed my mind. I think maybe you'll

give me a break if I tell you the whole story, and so I want to tell you the whole story."

Anything wrong with that?

MR. ZIEMBA: I don't think so. I think -- I think that if we can determine that the statement made by the accused is indeed voluntary, is something that he decided without any pressuring, any coercion to make, then, yes, it's voluntary. But when we speak of totality of circumstances, I think we have to look at, No. 1, arrested with utterly no probable cause; No. 2, not taken before a judicial officer, as required by the Michigan statute equivalent to Rule 5 --

QUESTION: But that wasn't the basis of the Michigan Court of Appeals decision, was it, --

MR. ZIEMBA: No.

QUESTION: -- that the totality of circumstances indicated involuntary --

MR. ZIEMBA: No, and of course that has been a keen disappointment to me, because all of these grounds were presented to the Court of Appeals on behalf of the respondent.

QUESTION: Well, presumably if we reversed on your opponent's point, they would still be open to the Michigan Court of Appeals.

MR. ZIEMBA: I certainly hope so. I wouldn't want -- because all of these grounds, separately and together, were presented to the Michigan Court of Appeals and to the

trial court also.

In other words, these very things which I advanced to this Court, the arrest without probable cause, a violation of the Michigan equivalent of Rule 5(a), the, you might say, the trickery involved, that is a Bram vs. United States sort of situation. All of these were preserved from the trial level onward.

QUESTION: Mr. Ziemba, it's not your contention in this case, is it, that this confession was an involuntary confession in the -- under the due process standard that existed as a matter of constitutional law up until 1966 when the Miranda case was decided; is it?

MR. ZIEMBA: No. No, not --

QUESTION: Not that it's an involuntary confession.

MR. ZIEMBA: In terms of its being beaten out or sweated out of him, no.

QUESTION: Or in terms of any of the decisions decided under the due process clause of the Fourteenth Amendment.

MR. ZIEMBA: This is true,, Mr. Justice. I do not --

QUESTION: Well, I thought you did say that you are -- that you did claim in the Court of Appeals that, on the totality, it was involuntary.

QUESTION: No.

MR. ZIEMBA: Well, I --

QUESTION: Totality, but not totality to show that it was an involuntary confession under the due process standard.

The totality of the circumstances made it inadmissible is your claim, because of the involuntary -- because of the warrantless arrest without probable cause, because of the violation of the Michigan equivalent of Rule 5, and because of the trickery. But that that totality did not make it an involuntary confession, as I understand your claim, under the due process standard --

MR. ZIEMBA: The pre-Miranda --

QUESTION: -- the pre-Miranda, constitutional standard.

MR. ZIEMBA: That's true.

QUESTION: That's what I thought.

MR. ZIEMBA: What I did in the Court of Appeals was to present to the Court of Appeals the Brown vs. Illinois argument.

QUESTION: Right. Which is quite different.

MR. ZIEMBA: Yes. Yes.

QUESTION: Would your position here today be different if there had been probable cause for the arrest?

MR. ZIEMBA: No.

QUESTION: You'd make precisely the same argument, wouldn't you?

MR. ZIEMBA: I would, yes.

QUESTION: The issue on which the Michigan Supreme Court -- appellate court decided this case and the issue presented to us has nothing to do with the illegality of the arrest. That's an issue that was not addressed by that court.

MR. ZIEMBA: It wasn't addressed by the court as an appealable issue.

QUESTION: And it's been suggested by some of my colleagues that if we should decide this case against you, there might well still be open -- it might well be said that what this Court should do would be to remand it to the Michigan Appellate Court to consider the other claims that you made there that it did not consider.

MR. ZIEMBA: Yes. Yes, I will agree with that. But I make the further point that I don't think that this Court should decide -- well, the point surely is that after the second Miranda warnings were given, the question is: Did the respondent waive his right to remain silent? Isn't that the operative question?

And we -- I think we can't decide that unless we examine the totality of the circumstances. The arrest without probable cause, or the failure to take --

QUESTION: Why can't you argue all of this as being contrary to the law and the Constitution of the State of



Michigan?

MR. ZIEMBA: Well, ---

QUESTION: I mean if you get back, when you go back that way.

MR. ZIEMBA: I can because we have the same provision in the Michigan Constitution of 1963 as we have in the Fifth Amendment of the Federal Constitution, certainly.

QUESTION: Well, you argued the whole thing before.

MR. ZIEMBA: In the Court of Appeals?

QUESTION: Yes.

MR. ZIEMBA: I really did not touch upon -- I predicated my entire argument on the Federal Constitution, I must admit that. I did not mention the equivalent provision of the Michigan Constitution of 1963, although I could have. And I may assure this Court that at every opportunity in the future, I shall.

[Laughter.]

QUESTION: But you hope you don't have that opportunity in this case.

MR. ZIEMBA: That's right. That's true, Mr. Justice.

QUESTION: As I've understood your argument this afternoon, it has been based almost exclusively on the totality of circumstances line of argument. I had read the decision of the Michigan Court of Appeals as laying down a per se rule, relying on the language it quoted from Miranda.

Would you elaborate on what I've just said? Do you support the per se rule the Michigan Court laid down, or do you agree that it did lay down a per se rule?

MR. ZIEMBA: I do agree that the opinion can be interpreted as a per se rule. I do think that it is a good rule to adopt a per se rule. The Miranda decision seems to set forth, if it is in dicta, the per se rule that if the warnings are not given, we're not going to examine into the knowledge of the accused, if the warnings aren't given, the confession goes down.

And we're going to make -- and I think Miranda also said, per se, if a man asks for an attorney and the questioning continues, the confession goes down.

And I think that it would be well for us to adopt the rule, per se. Once an accused under custodial interrogation exercises the right under the Fifth Amendment to remain silent, the police must stop questioning, and any violation of that rule, that is, any coming back to that defendant, between -- before some judicial process intervenes, such as his arraignment in court or even just his presentation in court, so that he may be advised by the court of his rights, completely taints the confession with unconstitutionality, and --

QUESTION: Would you go so far as this man who is in prison like this man was being held and he said, "I will

not talk", and he can't be questioned, and the next day he kills another inmate, that he can't be questioned about that?

MR. ZIEMBA: Certainly he can be questioned --

QUESTION: No, he has claimed his Miranda rulings today, yesterday, and he says, "I refuse to talk." And then the next day he kills a prisoner.

QUESTION: Or somebody else.

MR. ZIEMBA: Yes.

QUESTION: And he's charged with it.

MR. ZIEMBA: With killing the prisoner.

QUESTION: Yes. He can't be questioned.

MR. ZIEMBA: About killing the prisoner?

QUESTION: Yes. He cannot be questioned.

How can he be questioned? You said this goes on indefinitely.

MR. ZIEMBA: No, I didn't say indefinitely, Mr. Justice, I said --

QUESTION: You said it applied to other crime.

[Laughter.]

MR. ZIEMBA: I said until some intervening judicial act. In other words, we wouldn't be faced with this situation if those detectives --

QUESTION: Well, there's no judicial act here.

MR. ZIEMBA: This is my point, Mr. Justice,

we would not be here if the first detective, Cowie, had, after booking the respondent, walked him over to the court building across the street and presented him to some judge and have the judge say, "Young man, you have these rights. Do you want an attorney?" And then the -- and if the respondent had consulted with an attorney.

Or if after Cowie determined that he had nothing to hold the respondent for, and having arrested him for these particular crimes, on which he had nothing to hold him, had released him, we wouldn't be here, you see.

QUESTION: And then if a murder had been committed, then you would -- that would be Justice Marshall's hypothetical case, then truly you would concede he could be apprehended and questioned about that murder.

MR. ZIEMBA: Yes. Yes.

QUESTION: Even though his custody continues unbroken.

QUESTION: No, no.

QUESTION: My case was, yes.

QUESTION: Mr. Justice Marshall's question was, and I wish you would answer it.

MR. ZIEMBA: Well, in Justice Marshall's hypothesis there was no opportunity for the prisoner winning his freedom, he's in prison, as I understand your hypothesis, he can't walk home, you see, after having been questioned about the first offense.

But our respondent could have, and he should have walked home after refusing to answer any questions, because the detective who arrested him had absolutely nothing to hold him for.

QUESTION: But what is your answer to Mr. Justice Marshall's question?

MR. ZIEMBA: My answer is that it's a difficult question, for the reason that we have this added -- we have this added factor that a prisoner in State prison, I take it you mean, Mr. Justice Marshall?

QUESTION: I'm talking about this prison. I'm talking about Mosley.

MR. ZIEMBA: Oh, you mean if Mosley had been taken back to the lockup and had murdered somebody?

QUESTION: Yes.

QUESTION: Yes.

MR. ZIEMBA: I really don't know. I really don't know the answer to that question.

QUESTION: The answer is pretty clear, it shouldn't be difficult. Of course he could be questioned about it, couldn't he?

MR. ZIEMBA: About the second crime?

QUESTION: Certainly.

MR. ZIEMBA: Can he go back to this first one?

Let's put it this way: certainly I think you will



agree, Mr. Justice Marshall, that if Mosley had been questioned about the first -- had been locked up and had murdered somebody before the first detective questioned him, and told the first detective, "I don't want to answer any questions about any killings," certainly he could not then be questioned about the killing inside the jail.

QUESTION: I'm only interested in my question.

MR. ZIEMBA: Yes.

QUESTION: Well, he could -- but in the hypothetical question this was a later killing, after the interrogation, that's what makes it wholly different from the present case --

MR. ZIEMBA: Yes. I would answer that off the top of my head that questioning could, with propriety, ensue on the second killing, but after exercise of the right to remain silent on the first offense, the police officers could not go back to that interrogation.

Anything further?

MR. CHIEF JUSTICE BURGER: Your time is up.

MR. ZIEMBA: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Khalil, you have eight minutes left.

REBUTTAL ARGUMENT OF THOMAS M. KHALIL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KHALIL: I think from the examples that have been given in this particular case, some of the answers that have

been given by the respondent to them, indicating that some of the answers are very difficult, I think that the Court can see what a Pandora's Box would be introduced into this case should the per se rule stand.

I think that it's clear on that basis why so many States and so many federal jurisdictions in this country have rejected that rule. It's not a workable rule, that the more workable rule is the totality of circumstances test. And many of the examples given by counsel for the respondent are examples of bad faith of the police. For example, failure to take no for an answer, coming back ten times to a particular defendant, to get him to waive his rights under the Constitution.

I think that --

QUESTION: Mr. Khalil, when you say totality of circumstances, you mean totality of circumstances as to whether there is -- that Miranda rights have been waived, and not totality of circumstances as to whether the confession is involuntary under pre-Miranda standards.

MR. KHALIL: That's correct, Your Honor.

QUESTION: If there had been, your point, gross deliberate violation of the letter and spirit of Miranda, then the confession should be inadmissible, regardless of whether or not the confession was in fact involuntary in fact and in law, involuntary under the old due process standard.

MR. KHALIL: That's correct, Your Honor.

The due process clause will take care of those situations.

QUESTION: Yes, but the Miranda case was not decided under the due process clause.

MR. KHALIL: That's correct, Your Honor.

QUESTION: But let me ask you one thing: If we should agree with you and remand it, and the Michigan Court says that this violates Michigan law, that would be all right?

MR. KHALIL: That's correct, Your Honor, we have no objection with what the Michigan Court does based on the Michigan Constitution. But we're here today because the Michigan Court took it upon itself to interpret the federal Constitution more strictly than this Court itself has ever interpreted that document.

QUESTION: Can there be an infringement of one's Miranda rights, that is, in the language of Justice Stewart, sufficiently gross, so that it would require exclusion of a confession under Miranda, but, nonetheless, the statement would be voluntary under the pre-Miranda holdings of this Court?

MR. KHALIL: I think -- there could be, Your Honor. I think that certain behavior by the police department, for example, an overreaching, overbearing, incessant questioning, badgering of a defendant, and obtaining a waiver of rights might result in a violation of Miranda.

QUESTION: You cite cases so holding in your brief.

MR. KHALIL: That's correct, Your Honor.

QUESTION: Those cases, as you say, that they are typified by refusing to take no as an answer.

MR. KHALIL: That's correct, Your Honor, the cases are legion on that point. We have them, I believe, all cited in the brief.

QUESTION: Even though there's not a holding that they were involuntary confessions under the due process clause.

MR. KHALIL: That's correct.

I'd also like to point out to the Court that in this particular case there was no approach by the police, telling Mr. Mosley, "Your rap partner has confessed, come out and waive your rights." In this particular case, no questioning whatever was undertaken by Detective Hill until a waiver of rights was obtained, and thereafter, Mr. Mosley was confronted with his confession.

And I think, in the words of Mr. Mosley, the reason he confessed in this case was because he got scared because of that involvement put on him by Mr. Smith.

One other point that I'd like to point out to the Court is that the issue of the arrest has been raised in this particular case, it's been our position all through these proceedings that the arrest was valid. There are additional

factors which counsel for the respondent hasn't pointed out to the Court. I won't take up the Court's time with those factors, necessarily, except to say that the information that Detective Hill got from Anthony Smith, at that particular point in time probable cause existed to arrest Mr. Mosley for the murder of Leroy Williams.

And I think that this Court, under the analysis undertaken in Brown vs. Illinois, could very well find that, indeed, the confession was not violative of Miranda, was not the result of any illegal arrest, even assuming that the arrest were unlawful in the first instance, any taint would have sufficiently been attenuated, and would have made the confession proper in this case.

I'd just like to say that in this particular matter, I don't think that there could ever be a case presented to this Court in which the waivers that are on this record, the waivers that have been introduced in court, and the conduct of these officers that are on the record here, could be any more admirable than is here. The waivers are crystal-clear, razor-clean.

The behavior of Detective Hill, I think is without question: that of an officer showing respect for Miranda. The question came from the bench earlier as to why the rights were given twice.

I think that the reason could be, if we harken back



to Miranda, itself, I think that Miranda in this case has taught the police officers to give the rights; those rights were fully complied with here.

And we would ask this Court to reverse the Michigan Court of Appeals.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:04 o'clock, p.m., the case in the above-entitled matter was submitted.]

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