ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF MASSACHUSETTS, Petitioner,	)	
v.	)	No. 77-1388
CHARLES F. WHITE, Respondent.	)	

Washington, D. C.
November 28, 1978

Pages: 1 thru 51

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Washington, D.C. 20002
546-6666

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v.	:	No. 77-1388
CHARLES F. WHITE, Respondent.	:	

Washington, D.C.
Tuesday, November 28, 1978

The above-entitled matter came on for argument at 11:13 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

BARBARA A. H. SMITH, ESQ., Assistant Attorney General, Chief, Criminal Appellate Section, Commonwealth of Massachusetts, One Ashburton Place, Boston, Massachusetts 02108, on behalf of the Petitioner.

ROBERT S. COHEN, ESQ., Shenfield & Cohen, 31 Fairfield Street, Boston, Massachusetts 02116, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-1388, Massachusetts against White.

Miss Smith, you may proceed.

ORAL ARGUMENT OF BARBARA A. H. SMITH, ESQ.,

ON BEHALF OF THE PETITIONER

MISS SMITH: Mr. Chief Justice, and may it please the Court:

I am Barbara A. H. Smith. I am Assistant Attorney General. I represent the Commonwealth of Massachusetts, the Petitioner in this matter.

The Commonwealth seeks review of a decision of the Supreme Judicial Court of Massachusetts which interpreted this Court's decision in Miranda v. Arizona as requiring, per se, automatic exclusion of statements obtained in violation of the Miranda prophylactic safeguards for the purpose of establishing probable cause for the issuance of a search warrant.

Specifically, the court held that it was error for the trial judge to have denied the Defendant Charles White's motion to suppress certain physical evidence which had been seized pursuant to a search warrant. The affadavit in support of which search warrant was based upon statements which the trial court had held should be suppressed at trial because they were obtained in violation of the waiver requirement of Miranda v. Arizona. The Supreme Judicial Court, therefore, reversed the

defendant's conviction on four indictments, charging possession of a controlled substance with intent to distribute.

It is the Commonwealth's belief that the facts and the circumstances surrounding the taking of the statements at issue are of crucial relevance to the application of the exclusionary rule, and therefore I will devote myself to explication of those facts with some particularity.

In the motion to suppress, both the arresting officer and the state trooper who received the statement, testified. The arresting officer testified that at 2:00 a.m. on March 28, 1975, he was informed of a motor vehicle accident. He proceeded to the scene of the accident and observed that a car had been driven over an embankment, knocking down several highway posts. He observed the Defendant Charles White in the car at the bottom of the embankment, attempting to drive it back up. The Defendant asked the police officer for a push. The officer determined that that was not going to work and at the same time noticed that the Defendant's speech was slurred, his eyes were glassy and he noticed a strong odor of alcohol. At this time, the police officer instructed the Defendant to turn off the motor of the car, to get out and he instructed him that he was placing him under arrest for driving under the influence of liquor and he advised him of his rights under Miranda.

The Defendant, at this point, expressed some concern that the dome light of his car would not turn off and he was

afraid his battery would run down. However, he agreed to accompany the police officer. They then walked up the embankment and there was testimony from the police officer that the Defendant did stagger, but he walked up the embankment unassisted. They were then met by the state police trooper who agreed to have the car towed to the state police barracks and to go forward and arrange for a breathalyzer test.

When the Defendant and the arresting officer arrived at the state police barracks, the state trooper again advised the Defendant of his rights under Miranda. He advised him of the right to remain silent, a right to have an attorney present, that anything he said would be used against him, and he had a right to have an attorney appointed. He further advised him, under Massachusetts law, of his right to take or refuse a breathalyzer test and of the consequences of refusal in Massachusetts would be a 90-day suspension of license. He further advised the Defendant of his statutory right to make a telephone call and to have a blood test conducted at his own expense by his own physician.

The Defendant responded as to the breathalyzer test that he felt he would lose his license either way, so he might as well take it. He also indicated that he wanted to make some phone calls.

In the course of warming up the breathalyzer machine, the Defendant placed at least two phone calls, both of which

were, apparently, in an attempt to secure the services of an attorney and to arrange for bail. Parts of these telephone conversations were overheard by both officers. However, he apparently was unsuccessful in obtaining the services of an attorney at 2:00 o'clock in the morning. Also, there was testimony that in attempting to use the pay telephone the Defendant dropped coins on the floor and had difficulty in picking them up.

A breathalyzer test was administered and the percentage, by weight, of alcohol found in the Defendant's bloodstream was thirteen one hundredths. Under Massachusetts Law, anything over .10 raises a statutory rebuttable presumption that one is under the influence of alcohol, for the purpose of driving a motor vehicle.

The state police trooper described the Defendant during the taking of the breathalyzer test and making the phone calls as being, in his opinion, under the influence of alcohol, that he was bouncing around, that he was scratching incessantly and that he was dropping coins. However, he also testified that he had no trouble conversing with the Defendant, the Defendant indicated he understood his rights when given and that there was no interrogation of the Defendant. However, prior to placing the Defendant in a cell, having completed all the prearraignment procedures, the trooper searched him and found a marijuana cigarette in the breast pocket of his shirt.

He at that time felt it was a new ball game and advised the Defendant he would be charged with possession of marijuana and again advised him of his rights under Miranda.

The Defendant responded --

QUESTION: Wasn't there some response on the Defendant's part at that time?

MISS SMITH: At this particular -- At this moment, yes, Your Honor. The Defendant said something to the effect, "I don't think possession of a single cigarette is a crime." And the trooper responded, "Well, do you have any more on your person or in your car?" And the Defendant responded, "Yes, I have more in my vehicle."

Then the Defendant attempted to say, "I can name you some biggies," apparently in reference to some narcotic dealers and the state police trooper said, "I don't want to hear anything more," and placed the Defendant in a holding cell.

He then prepared an affidavit and an application for a search warrant, relating the arrest of the Defendant and his response to the question about the marijuana cigarette.

QUESTION: In Massachusetts,would he have been able to get a warrant without reciting the statement made that there was more material in the car, that is, on simply showing that the man was found in a dubious condition of -- disoriented condition and that he had a marijuana cigarette on his person? Would that be enough to support a warrant for the search of the

car?

MISS SMITH: No, Your Honor, I don't believe it would have. In fact, in this case, the Supreme Judicial Court and the trial judge himself found that the validity of the warrant was based on the statement that there was more, that there would not have been enough without it.

QUESTION: That's not quite my question. Is there no search and inventory made of the car when it is taken into possession out in the woods and brought into the pound.

MISS SMITH: Yes, Your Honor, under ordinary course there is provision for inventory. Unfortunately, the record in this case was never established that there was an inventory procedure at this particular state police barracks. There was no evidence introduced on the motion to suppress as to an inventory,and I really don't feel that I could make that argument on the basis of this record. But there are cases that would substantiate an inventory search, that when a car is brought in and in the process of being impounded --

QUESTION: If an inventory search would be supportable -- and I say if -- then how relevant is the warrant in all the other issues?

MISS SMITH: Our court found that quite relevant because the police never indicated --

QUESTION: I know. I am thinking now about what you are presenting to this Court. Do you or do you not argue that

since an inventory search would have been permitted without a warrant, that it doesn't make any difference whether this warrant was or was not supported. Do you make that argument?

MISS SMITH: I have not made that argument, because I don't think the record clearly supports that argument. If there had been evidence that an inventory was the normal course of procedure, then I would make that argument. But I think the fact that the search warrant was invalid would not mitigate against the validity of the inventory search.

QUESTION: I thought you indicated that the inventory search was the usual procedure, but the record doesn't show it was followed here.

MISS SMITH: It was never established it was the usual procedure in the state police barracks that we are dealing with in this case. There was nothing in the record concerning an inventory search.

QUESTION: Isn't it true that the Commonwealth did make the inventory search argument in the Supreme Judicial Court and the Supreme Judicial Court rejected the argument straight on. And then in your questions that you present in your cert petition, you did not raise that issue. So it is not before us.

MISS SMITH: Right, Your Honor. That's absolutely correct. Then the Supreme Judicial Court didn't rule on -- or they rejected it because there was no evidence.

QUESTION: Yes, but they ruled squarely on a contention that the search could be justified on an inventory theory, and you lost on that theory in the Massachusetts Supreme Judicial Court.

MISS SMITH: Yes, Your Honor.

Following the motion to suppress, the trial judge ruled that the Commonwealth could not sustain, or had not sustained its heavy burden of demonstrating that the Defendant had knowingly and intelligently waived his right to self-incrimination, his right to counsel.

They base this conclusion on three findings: One, that the Defendant had demonstrated a desire for counsel and that he had placed two unsuccessful telephone calls to an attorney, that the trooper did not regard the Defendant as having waived his right to counsel and that the Defendant was under the influence, having blown a point one three reading on the breathalyzer test.

However, the Court refused to suppress the evidence seized pursuant to the search warrant. He did not believe that supprassion was required under the "Fruit of the Poisonous Tree" doctrine. He noted that Miranda did not preclude use for all purposes of evidence taken in violation of one of its safeguards, and that there would be no deterrent effect of applying the exclusionary rule in this instance where the police had been scrupulous in their efforts to obey Miranda and that there was

absolutely no actual coercion involved.

The Supreme Judicial Court reversed, treating the Miranda violation as a violation of constitutional guarantees. The Court held that statements, therefore, could not be used for the purpose of establishing probable cause for the issuance of a search warrant. For to do so, reasoned the court, would imply judicial sanction of the initial violation.

The Commonwealth submits that the court below, in reaching this conclusion, has read much too broadly the exclusionary requirements of Miranda, that there is no consitutional requirement mandating exclusion of statements received in violation of Miranda for all purposes, and that the "Fruit of the Poisonous Tree" doctrine is not applicable in this case where there is no initial constitutional violation and the application of that rule would have no deterrent effect.

The court below, we submit, has incorrectly and inconsistently with this Court's more recent cases, equated a violation of Miranda procedural safeguards with a violation of protected constitutional rights.

The court below has interpreted Miranda as requiring, per se, automatic exclusion of statements taken in violation of its prophylactic safeguards for all purposes. Such a position is not required by the Constitution, we submit, and is inconsistent with the recent decisions of this Court.

First, Miranda, itself was limited to the admissibility

of statements in the prosecution's case in chief. Recent decisions have continued to apply this prohibition, that is, that statements taken may not be admitted in the case in chief. However, they have permitted use of the statements for collateral purposes, specifically, in Harris v. New York and in Oregon v. Hass. Statements may be used to impeach credibility if they are otherwise trustworthy.

In Michigan v. Mosely, the Court went one step further in rejecting any literal interpretation of Miranda which would view any statement taken after a suspect invokes his right to remain silent as a product of compulsion to be mandatorially excluded, even if the statement is made voluntarily. Rather than the mandatory exclusion, the admission of the statement, I submit, depends on an examination of whether a defendant's right to cut off questioning was scrupulously honored.

Finally, in Michigan v. Tucker, this Court, holding that the testimony of a witness discovered as a result of a defendant's statement which had been taken in violation of Miranda was admissible in the prosecution's case in chief, specifically distinguished between police conduct which directly infringed on a right against compulsory self-incrimination and conduct which violated only the prophylactic rules.

Commonwealth suggests that certain conclusions may be inferred from these decisions, one, that the Miranda guidelines are not independent constitutional requirements, two,

that all police interrogation is not so necessarily inherently coercive as to implicate the Fifth Amendment, and third, that statements taken in violation of Miranda are not automatically excludable for all purposes, provided they are otherwise trustworthy. Therefore, the question becomes --

QUESTION: While it is certainly true that not all police interrogation is inherently coercive, wasn't the thesis of the Miranda opinion that police interrogation of a person in the custody of the police -- in custody and restraint -- was inevitably inherently coercive?

MISS SMITH: I believe that was the premise of the Miranda decision, Your Honor.

QUESTION: Was it the premise of the whole judgment and opinion?

MISS SMITH: Indeed, I think it was. However, I do believe and my citation of some of the recent cases indicates to me that this Court has withdrawn from that presumption, because otherwise if we are to assume that all police interrogation is necessarily inherently coercive in that it involves the Fifth Amendment --

QUESTION: Not all police interrogation, but all police interrogation of a person in the custody of the police.

MISS SMITH: Yes, Your Honor, in custody interrogation is necessarily and inherently coercive as to implicate the Fifth Amendment, then I would say it would be inconsistent for the

Court to hold that those statements may be admissible for certain purposes if they are otherwise trustworthy.

Traditionally, if a statement is elicited in violation of the Fifth Amendment, in the sense that it is involuntary, we don't go any further. It is inadmissible. We don't even get to the trustworthiness of the statement.

QUESTION: The Miranda opinion, itself, which, of course, covered five different cases, as you know, conceded that some of the statements in at least some of those cases were not involuntary statements in the traditional meaning of that word. Isn't that correct?

MISS SMITH: That's correct, Your Honor, but it seems to me that the recent cases in this Court interpreting Miranda and the scope of the exclusionary rule in Miranda have indicated a willingness to examine the circumstances and distinguish between police conduct which actually abridges a right, where there is actual coercion, psychological or physical, where there are threats, inducements, cajolery, promises, to actually examine the circumstances. And it seems to me to reject a per se assumption that there is a sufficient coercive power at work because of custodial interrogation to render a statement inadmissible because it is in violation of the Fifth Amendment right against compelled testimony.

QUESTION: Well, the statement is admissible if a person is given his so-called Miranda warnings. It is

admissible, it is not inadmissible.

MISS SMITH: But it has also been held admissible for certain purposes.

QUESTION: If it is involuntary, it is inadmissible for any purpose.

MISS SMITH: That's correct, but the fact it is a violation of Miranda --

QUESTION: It is admissible if the Miranda warnings were given.

MISS SMITH: Yes, Your Honor.

QUESTION: Your point, I take it, is that the recent Miranda cases from this Court would not have come out the same way if we had been dealing with confessions that were found to be coerced, but nonetheless trustworthy.

MISS SMITH: In one sense, Your Honor. What I am saying is the recent decisions wouldn't come out the way they have which admitted statements for some purposes which had been taken in violation of Miranda because of a lack of a warning in some instance or the lack of a waiver.

QUESTION: You say that if those statements, instead of having been taken in some violation of Miranda, had been found to be coerced, the inquiry would have stopped there.

MISS SMITH: That's right, and they would not be admissible for any purpose, if they were coerced. But the simple fact that they were taken in violation of Miranda did

not lead this Court to a conclusion that they were coerced without something more.

QUESTION: But the corollary of that, if they were given voluntarily after Miranda warnings, they are admissible.

MISS SMITH: Yes, Your Honor.

QUESTION: And if the Court should conclude that, it would not have to decide any other issues in the case, is that correct?

MISS SMITH: That's correct, Your Honor.

QUESTION: Are you contending there was not a violation of the Miranda --

MISS SMITH: The court ruled there was a violation of the waiver requirement.

QUESTION: Do you challenge that, or are you arguing that even if there was the evidence should be admissible?

MISS SMITH: Oh, yes, Your Honor.

QUESTION: I know you are arguing that, but are you also arguing the threshold question? Are you attacking the finding that that there was a violation?

MISS SMITH: I don't think that the finding was constitutionally required, Your Honor. You are absolutely correct. That there was a lack of knowing and intelligent waiver on his part.

QUESTION: So you concede there was, as Miranda has stated, that there was a violation of the Miranda rules here.

MISS SMITH: Oh, yes, Your Honor. There is a violation of the waiver provision which requires --

QUESTION: That was because of his indication that he wanted a lawyer?

MISS SMITH: That was on two bases, the indication that he wanted a lawyer and the fact that he was under the influence of alcohol. It was not on the basis, nor did the state court find, although my colleague has suggested, that the statement was involuntary. Now, neither the state court findings of fact would support a finding of involuntariness nor did the Supreme Judicial Court make any further findings which would support a finding of involuntariness.

QUESTION: What would be your position with respect to an arrested criminal defendant who was under the influence of alcohol who proceeded to recite a full confession of the act, which amounted to the commission of a crime? Would you feel that was inadmissible?

MISS SMITH: No, Your Honor, I would not. I think the fact that he was under the influence is a factor to be considered, but mere being under the influence of alcohol is not a determinant factor in deciding whether a statement is voluntarily made.

QUESTION: Do you mean it would be a factor to be taken into account on the voluntariness?

MISS SMITH: Yes, Your Honor, I think it should be a

factor.

QUESTION: I've often thought, at least, that alcohol tends to loosen tongues, but you don't think there is anything unconstitutional about a loose-tongued alcoholic confession?

MISS SMITH: No, Your Honor, I don't. And I also would like to make the distinction in Massachusetts between being under the influence for the purposes of driving an automobile and being intoxicated. In this case, we don't have any evidence of intoxication. We have evidence only of being under the influence and having certain motor responses affected, spatial responses affected. But it is not, say, a Townsend v. Sain situation where a defendant has been injected with a truth serum which clearly is going to operate on the faculty by which he determines whether or not to make a statement.

QUESTION: Miss Smith, in addition to the violation of Miranda, which you say relies on both evidence that approaches intoxication and the fact that he tried to contact his lawyer, what about just the second factor, the lawyer point? Was there a violation of his right to counsel?

MISS SMITH: No, Your Honor, I would say not. In this instance he never -- or there is no evidence that he ever advised the police officer that he wanted an attorney present before there was any interrogation.

QUESTION: But I think you indicated that they overheard his conversation and knew he was seeking the assistance

of a lawyer and was dropping coins all over the floor.

MISS SMITH: Yes, and that would appear to be for the purposes of making bail. Since there was no interrogation conducted at all in relation to the original charge of driving under the influence, I don't see why the police should have suspected that he wanted an attorney present at a nonexistent interrogation.

QUESTION: Do you think the case would be different if he had said, unambiguously, "I'd rather not talk to you until I consult my lawyer"?

MISS SMITH: Yes, I do believe that that would make a difference, Your Honor. Here he only indicated he wanted to make a phone call. He never indicated --

QUESTION: If you think that would make a difference -- and I don't think either the trial court or the Supreme Court made a determination of whether there had been an attempt to contact counsel, kind of an Escabido type point -- is it conceivable that the proper disposition of the case would be to send it back to determine whether his telephone call was the equivalent? I suppose one could argue it was substantially the equivalent of an attempt to ask for counsel.

MISS SMITH: I don't believe that the record would support that, Your Honor. Andthe Escabido situation, I would suggest, is entirely different from the situation here. There counsel was present at the police station, the defendant requested

to speak with his counsel, the counsel requested to speak with him and the police affirmatively denied those requests. Here, the police officer never cut off his ability to make the phone calls. He made no attempt to interrogate him and, in fact, the only question -- if you can call that an interrogation -- came on a separate charge, after a new set of warnings had been given, and was in response to a conversation initiated by the defendant, himself.

QUESTION: The thing that puzzles me about this case is why the officer, when the man mentioned he had some information about "biggie," why the officer didn't say tell me about him. I just don't understand it, why he wouldn't be interested in knowing about him.

MISS SMITH: He may have been interested but he may have felt that any interrogation of the Defendant at that time would be improper.

QUESTION: Why, I wonder?

QUESTION: Because the Defendant was drunk, isn't that why?

MISS SMITH: No, Your Honor, the Defendant was not drunk. The Defendant registered a point one three on the breathalyzer, which would show that he is under the influence, but not intoxicated.

QUESTION: Well, in any event, the policeman, apparently accurately, predicted the later decisions of courts of

your state.

MISS SMITH: Yes, Your Honor, I think the police officer was attempting throughout, in the number of warnings given and his whole demeanor to follow the dictates of this Court and the courts of Massachusetts. However, if I may --

QUESTION: Let me pursue it with just one more question, if I may. Is it not correct that if your view of the law is followed by this Court, in a future identical situation the officer would be well advised to pursue the interrogation and find out about the "biggie"?

MISS SMITH: No, I don't think he would be well advised to do that. Why take the chance, Your Honor? He would get right back in the situation where we are here.

QUESTION: He would not be able to use the statement against the man, himself, but he would be able to use the information for further investigative purposes and it might lead to the discovery of other evidence which would be entirely admissible.

MISS SMITH: Your Honor, there, I think, we ought to again look at the circumstances. Here we had an unintentional violation and I think that is important in determining whether the evidence subsequently obtained is actually tainted by the Miranda violation. Now, if we had a situation where the police are going to violate Miranda rules, in the hope that they are going to elicit some evidence that may be used in some other way,

then I don't think that conduct is going to be found to be permissible, because there we had intentional conduct --

QUESTION: That's exactly what this police officer did. He said, "Don't you have anything else in the car?"

MISS SMITH: He did, Your Honor, and I suggest that that was in a response, a quite natural response, to a conversation initiated by the Defendant.

QUESTION: I don't know why it wouldn't have been equally natural to say, when he said, "I know a lot about biggies," to say, "Who are they?" I don't know why one is any more natural than the other. It puzzles me.

MISS SMITH: Well, even if he had done that, would that render the evidence more or less reliable for uses for establishing probable cause?

QUESTION: No, it wouldn't, and it seems to me that if you win that's exactly what police officers ought to do. They ought to follow up on these leads and get the evidence. I don't see anything wrong with it, under your theory as I understand it, because his constitutional rights are not violated unless his own statement is used at his trial against him.

MISS SMITH: Unless there is some element of coercion or trickery.

QUESTION: I don't understand. You are not taking the broad position, or are you -- I am a little puzzled -- that

any derivative evidence may be used in the trial, other than the statement itself, as long as it is not coercive in a constitutional sense.

MISS SMITH: Yes, I am taking that position, Your Honor.

QUESTION: Well, then if you are, you should say they could ask him about the "biggies," then.

MISS SMITH: Possibly, they could ask him about the "biggies," as long as we don't get into a situation where the police actually are abusive or coercive in a sense that the statement is derived in violation of his Fifth Amendment rights.

QUESTION: But that wouldn't violate his Fifth Amendment rights.

MISS SMITH: In that sense, though, then I would argue that the derivative evidence could be used and the "Fruit of the Poisonous Tree" doctrine would not apply.

QUESTION: You do agree then that in the future if you win this case they ought to be able to ask about the "biggies."

MISS SMITH: Yes, Your Honor, I do.

May I reserve -- I think I have a few moments.

MR. CHIEF JUSTICE BURGER: Mr. Cohen.

ORAL ARGUMENT OF ROBERT S. COHEN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

My name is Robert S. Cohen, and I represent the Respondent Charles F. White.

Respondent contends that the decision of the Supreme Judicial Court of Massachusetts lacks finality and is not a final judgment under 28 U.S.C. § 1257(3). Additionally, Respondent submits that because the decision of the Massachusetts Supreme Judicial Court is unclear as to whether it is based on the Massachusetts Constitution or on the Constitution of the United States, that this Honorable Court should either remand the case back to the Supreme Judicial Court for clarification of its decision or, if it decides not to do that and not remand the case back to the court, should dismiss the writ of certiorari as being improvidently granted.

As concerns the merits of the case, Respondent contends that the Supreme Judicial Court was correct in ordering suppression of a contraband and money obtained under a search warrant which was based on information secured in violation of constitutional guarantees.

QUESTION: Your fourth choice then is to affirm the Supreme Judicial Court?

MR. COHEN: My third choice, Your Honor. I would

suggest that it either be remanded or that the writ be dismissed as improvidently granted, or that the case be affirmed.

Addressing the jurisdictional questions first, Respondent contends that since he is subject to further proceedings in the Commonwealth of Massachusetts, including a new trial, that the Supreme Judicial Court's decision is not final. It is submitted that the denial of certiorari for lack of a final judgment in Cohen v. New York, 385 U.S. 976, demonstrates that there is no unvarying rule that all decisions of a state's highest court concerning a motion to suppress evidence are final for purposes of jurisdiction under Section 1257(3).

Turning to the issue of independent state grounds, Respondent contends that the decision of the Supreme Judicial Court is unclear as to whether it is based on the Massachusetts Constitution or the Federal Constitution.

QUESTION: Why did the Supreme Judicial Court of Massachusetts not only cite Miranda, but quote from it?

MR. COHEN: I think, Your Honor, that is still unclear because in addition to, besides citing,--

QUESTION: Cited and quoted it.

MR. COHEN: They cited Miranda, Your Honor. They also cited the two Massachusetts cases when they were directly talking about --

QUESTION: But don't you draw the conclusion that they relied on both?

MR. COHEN: I am saying that it is unclear, Your Honor.

QUESTION: Can't you say it is both?

MR.COHEN: It is both, Your Honor. It is unclear whether it has relied on one or either of them.

QUESTION: Then your point is gone if it is both.

MR. COHEN: I would say not, Your Honor. If it is relied on both, my understanding of the law is that it would be an independent ground.

QUESTION: Give me a citation for that, where they relied on both.

MR. COHEN: I believe, Your Honor, California v. Crivda; when this case was remanded back down to the California courts, they said that they relied on both and that the latter --

QUESTION: I am talking about what -- This Court said that?

MR. COHEN: No, the California court, Your Honor.

QUESTION: I am asking when did this Court say that?

MR. COHEN: It is my understanding, if Your Honor please, that in -- Back to the state court -- if that is a basis for upholding the decision, yes.

QUESTION: Well, why don't you stick on that instead of the other one? And request that it be sent back to determine that point.

MR. COHEN: Well, I say, Your Honor, please, that the

cases seem to indicate in independent state grounds that the Court has taken two approaches. It has either remanded the case back -- Apparently, up to the 1920s the standard approach was to dismiss the writ as being improvidently granted. After that, the Court has taken two approaches. In some cases, they have dismissed the writ as being improvidently granted. In other cases, they have remanded the case back for clarification.

QUESTION: You mean this Court dismissed as improvidently granted cases before 1920?

MR. COHEN: I am sorry, Your Honor. I didn't hear the question.

QUESTION: When did this Court start the dismissing?

MR. COHEN: I believe, Your Honor, that the change came in Herb v. Pitcairn in the Minnesota Tea case, where -- at least in Herb v. Pitcairn -- Justice Jackson said that pursuant -- consistent -- If I may quote, Your Honor --

QUESTION: And that was in 1920?

MR. COHEN: No, Herb v. Pitcairn case was later, Your Honor. I believe the Minnesota National Tea case was earlier.

QUESTION: I don't think Mr. Justice Jackson was here in 1920.

MR. COHEN: No, but in Herb v. Pitcairn he was, Your Honor, and he cited in that case --

QUESTION: So far as I am concerned it is not important

one way or the other. All I am trying to say is why make this a separate point, that the Court did not rely on Miranda, but say that it could have been charged with relying on both, and therefore send it back?

MR. COHEN: I thought that was what I was saying, Your Honor. Apparently, I wasn't saying it too clearly.

QUESTION: If you did, then I am sorry.

MR. COHEN: I apologize for not expressing myself more clearly.

QUESTION: The point is if it is not clear whether or not the state court relied upon an adequate and independent state ground, then it is encumbent upon this Court to remand it to determine whether or not it did. But if it is clear that the judgment rests upon an adequate and independent state ground, then this Court simply has no jurisdiction.

MR. COHEN: That's correct, Your Honor. It should be dismissed if it is clear. If it is unclear, then the case should be remanded.

QUESTION: There is nothing inconsistent between that.

MR. COHEN: I agree, Your Honor.

QUESTION: And if it is clear, from the opinion, that it rested both on the Massachusetts Constitution and the Federal Constitution, then it does rest on an adequate state ground and must be dismissed.

MR. COHEN: Must be dismissed, Your Honor.

QUESTION: The Supreme Judicial Court was quite well aware in its footnote citing Opperman that it had available to it the Massachusetts Constitution and didn't have to decide whether there was a state-federal question there, was it not?

MR. COHEN: I believe so, Your Honor, but this case, in my opinion, does not present an Opperman on inventory situation. It only presents a situation of the use of illegally obtained statements.

QUESTION: All I am saying is that why, when it was so clearly aware that it could rest the decision either on a federal or state constitution, in the Opperman footnote, did it lean so heavily on Miranda here?

MR. COHEN: I don't think that they did lean so heavily on Miranda, Your Honor. I think they leaned heavily on the two prior stated Supreme Judicial Court of Massachusetts cases. Indeed, Your Honor please, the court stated that "from these cases it follows," making reference to two Massachusetts Supreme Judicial Court cases. "From these cases it follows that neither may such statements" --

QUESTION: Where are you reading from?

MR. COHEN: I am reading, Your Honor, please, Appendix 78, the third complete paragraph. The paragraph down at the bottom.

"From these cases it follows that neither may such statements be used for the purpose of considering whether there

was probable cause to obtain a search warrant. To hold otherwise, would, in effect, sanction the initial violations of constitutional guarantees, which the judge found took place in the police barracks. The need to prevent such violations from escapting review underlies the so-called "fruit of the poisonous tree" doctrine set forth in Silverthorne Lumber Company v. United States and Nardone v. United States. Although this exact issue has not been determined by the Supreme Court, but cf. Michigan v. Tucker, we believe that Haas controls the issue in this Commonwealth."

And I am saying that when the --

QUESTION: Wasn't Haas decided on the basis of the Federal Constitution?

MR. COHEN: No, Your Honor, a look at Haas and Hall, the two cases cited by the Massachusetts Supreme Judicial Court, in both Haas and Hall, the Massachusetts Supreme Judicial Court relied on both Massachusetts State cases, on Commonwealth v. Penta and on Miranda.

QUESTION: They may have relied on some previous Massachusetts cases, but what did those cases rely on?

COHEN: I am sorry, Your Honor. I just made a reference to the fact. The two cases they relied on were Commonwealth v. Hall and Commonwealth v. Haas. Those two cases relied on Massachusetts State cases, Commonwealth-Hall --

QUESTION: I understand that, but what did those

cases, in turn, rely on? Were those interpretations of the Federal Constitution?

MR. COHEN: They were interpretations of Constitutional rights, Your Honor.

QUESTION: Which Federal Constitutional rights?

MR. COHEN: Well, the Commonwealth-Hall, that was search and seizure. That was a Fourth Amendment case.

QUESTION: It did deal with the Federal Constitution?

MR. COHEN: Well, it is unclear, again, from those decisions what constitutional rights they were talking about.

QUESTION: You just said a Fourth Amendment issue.

MR. COHEN: I agree with you, but certainly the Federal Fourth Amendment issue was involved. And I would say to you, Your Honor, I don't know if counsel argued or if the motion to suppress in that case alleged state grounds. The motion to suppress in this case alleged state grounds, along with federal grounds.

QUESTION: It may be, but just because the Court here cited some previous Massachusetts cases doesn't indicate to me that there was a state ground involved.

MR. COHEN: I would say, Your Honor, that further evidence --

QUESTION: Those cases might just have been interpretations of the Federal Constitution.

MR. COHEN: I would say that further evidence of a

state grounds, Your Honor, is that this is not a case where the Supreme Judicial Court has reluctantly applied Federal constitutional standards. This is a case where the Supreme Judicial Court suppressed the evidence.

QUESTION: I'll ask you this. There is no mention of the State Constitution in this opinion?

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

QUESTION: Was there any mention of the State Constitution in the two state cases that this opinion cited?

MR. COHEN: There is no direct mention of it made, Your Honor.

QUESTION: Well, was there any direct mention of the State Constitution in any of the state cases that these two cases cited?

MR. COHEN: No, Your Honor, please, but I would say, Your Honor, that that particular fact does not, in itself, say that the case is not ambiguous. The cases seem to indicate that if the thing was cited directly then it would be clear. There would be no problem. Here, the Respondent is arguing that it is unclear, and that because of it being unclear, consistent with the respect due the highest courts of States of the Union, as Justice Jackson said, then the Supreme Judicial Court should be asked and not be told.

QUESTION: Am I right, Mr. Cohen? I have been reading some recent opinions of your Supreme Judicial Court and I have

been interested that it has often -- these opinions often wind up "and we are resting this decision on our State Constitution and not on the Constitution of the United States." Is this a new practice of your court?

MR. COHEN: Well, I think, Your Honor, that they are just attempting now to be more clear, because of the fact that the Supreme Court of the United States may differ with them, as certain policy issues. Indeed, the case that I submitted to the Court after the filing of my brief, Selectmen of Framingham v. the Municipal Court of the City of Boston, was a case where this Court declined to apply United States v. Janis and said that in order to uphold public confidence in the law and judicial integrity and to control misconduct of the police, they would not allow into a Civil Service hearing evidence that was derived in violation of the Fourth Amendment.

QUESTION: But there they did say -- I think that's the one I am thinking of -- that they are resting it squarely on their Constitution, because they did not agree with our interpretation.

MR. COHEN: If that case was up here, it is clear. I am saying that this case is not clear, Your Honor.

QUESTION: Well, what you are saying, at most, then, is that this ought to be clipped, sent back for reconsideration and tell us whether or not they rested on a state constitutional ground as well as the federal.

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

QUESTION: Mr. Cohen, I think there is another problem with your argument here. The Massachusetts law, as I understand it, taking it most favorably to you, is that if there is a constitutional violation then the derivative use of the evidence obtained by means of the constitutional violation cannot be used to get a search warrant.

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

QUESTION: However, your opponent challenges the existence of the constitutional violation. His argument is that Miranda, properly construed, does not involve a constitutional violation. And, as to that point, the Massachusetts Supreme Court relied only on federal law, I think.

MR. COHEN: You are making reference to the waiver, Your Honor?

QUESTION: The question whether the violation of the teaching of Miranda is a violation of the Constitution.

MR. COHEN: I differ with Your Honor. That's when they cited the two Massachusetts cases in that --

QUESTION: Not on page 78. They are talking about -- assuming a violation of the Constitution, may the evidence nevertheless be used to get a warrant? That's what the issue they were discussing there was.

MR. COHEN: It says, Your Honor, "From these cases it follows that neither may such statements be used for the

purpose of considering whether there was probable cause to obtain a search warrant." I was going to address those issues --

QUESTION: In the first sentence of the preceding paragraph, it says, "In the Hall case, we recognized that evidence obtained in violation of constitutional guaranties," and so forth.

MR. COHEN: And I am saying that that could refer to the Massachusetts Constitution, the United States Constitution or both. It doesn't say Federal Constitution, Your Honor. It says "constitutional guarantdes."

QUESTION: Have you read Hall?

MR. COHEN: I have, Your Honor.

QUESTION: He says, "advise of your constitutional guaranties." Is that state or federal?

MR. COHEN: I would say that it is unclear, Your Honor.

QUESTION: No, no. Is it state or federal?

Oh, it is unclear?

MR. COHEN: It is unclear in that case. They do not specifically say "federal constitution." Hall was a case -- one of the points that it went off on was United States v. Giordano of this Court, but the Supreme Judicial Court did not apply United States v. Giordano in toto. So, it is unclear also in that case whether it is a combination of both or based

on just the federal or the state.

QUESTION: But Haas did talk about Miranda?

MR. COHEN: No, Your Honor, Hall stands for the proposition that --

QUESTION: "We held that evidence obtained in violation of the principles laid down in Miranda v. Arizona."

MR. COHEN: That's not in Hall, Your Honor.

QUESTION: Haas, I said.

MR. COHEN: That's Haas, H-a-a-s.

QUESTION: That's what I said, Haas.

MR. COHEN: I am sorry. I didn't hear you. I thought you were saying Hall.

Yes, Haas involved a Miranda situation and it also involved --

QUESTION: It is a good idea to go back and read them all and then --

MR. COHEN: Yes, that's it, Your Honor. I say it should be sent back because of the confusion.

Turning to the merits of the case at bar, Respondent respectfully suggests five interrelated arguments in support of his contention that the unanimous decision of the Supreme Judicial Court of Massachusetts should be affirmed.

Number one, the questioning of the Respondent, absent a valid waiver, and under the circumstances of the case at bar, violated both Miranda v. Arizona and the Fifth Amendment.

Number two, that the evidence obtained pursuant to the execution of the search warrant, in this case, must be suppressed, because its admission would violate Miranda, the Fifth Amendment, and the policy under the "food of the poisonous tree" doctrine.

QUESTION: Is the testimony -- Your argument then is that by having this statement used as a basis for getting the warrant, that's testimony being used against him?

MR. COHEN: Yes, Your Honor.

QUESTION: What if the search had produced nothing? Then would the statement be a statement of his own which is used against him in violation of the Fifth Amendment?

MR. COHEN: Well, the statement would not be able to be used in court, Your Honor, and I am saying that besides the statement not being able to be used in court, the results of the search warrant should not be able to be used in court, at least in the prosecution's case in chief.

QUESTION: Mr. Cohen, you very carefully stated twice that the evidence was obtained in violation of both Miranda and the constitutional guarantee. Apparently, you accept the suggestion of your opponent that there is a distinction between --

MR. COHEN: No, I do not, Your Honor. I say that the holding in Miranda must be based on the Constitution, that this Court has no power to regulate or supervise state courts,

absent a constitutional basis, and that at least this concerns the waiver requirement of Miranda, that that has to be constitutionally mandated.

QUESTION: What do you do with Michigan v. Tucker?

MR. COHEN: Michigan v. Tucker can be distinguished on many points, Your Honor. Michigan v. Tucker was a pre-Miranda case. The wrong in Michigan v. Tucker was the police did not tell the defendant that he was being furnished free counsel. The wrong here is not of one of the warnings, but in an inability of the defendant to waive his constitutional rights. It goes to waiver and not warning.

Number three, the Respondent here wanted counsel. He was trying to reach counsel, where in Michigan v. Tucker the defendant in that case did not want counsel.

QUESTION: Stopping you just a moment on the counsel point. You argue independently there was a violation of the Sixth Amendment?

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

QUESTION: Do you think anything survives of Escabito after Johnson v. New Jersey?

MR. COHEN: I am sorry, Your Honor. I did not hear that.

QUESTION: Do you think there is anything left of Escabito v. Illinois after this Court's per curiam decision in Johnson v. New Jersey in 384 U.S.?

MR. COHEN: I would say certainly, Your Honor, because Escabito was cited with approval in Brewer v. Williams. I would say that a combination of Brewer v. Williams and Escabito results in a determination that the introduction of this evidence would violate the Sixth Amendment right to counsel.

Respondent's fourth argument, besides the violation of Miranda and Fifth Amendment and the right to counsel is that under the standards enunciated by this Court in United States v. Giordano, 416 U.S. 505, both the majority and the dissenting opinions, that the evidence should be suppressed. In Giordano the majority of this Court said that a pen register application was based on illegally monitored evidence and, therefore, the results obtained from the pen-register must be suppressed.

Mr. Justice Powell, in dissenting, in part, said, "The standard should not be a critical element," as the majority indicated, "but the standard should be whether absent the illegally obtained information the application for the search warrant was sufficient to establish probable cause."

In the case at bar, the Supreme Judicial Court and the Superior Court judge found that unquestionably the application for the search warrant looked at without the illegally obtained information, was not sufficient to rise to the level of probable cause.

So, Respondent suggests that under United States v. Giordano both the majority and the minority standards have been

met.

And, finally, if it please the Court, the Respondent suggests that, assuming arguendo, that only the Miranda prophylactic safeguards were violated and not the Constitution, and Respondent previously suggested it was a constitutional violation --But assuming arguendo that only the prophylactic safeguards were violated, the Respondent argues that the evidence should be suppressed. The Respondent says the evidence --

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

(Whereupon, at 12:00 o'clock, noon, the Court recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Counsel, you may resume.

ORAL ARGUMENT OF ROBERT S. COHEN (Resumed)

ON BEHALF OF THE RESPONDENT

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

I will continue to address my arguments to the Fifth Amendment question involved, namely, whether the fruits of evidence seized as a result of this statement should be held suppressible.

Respondent contends that the Fifth Amendment, by its own terms, requires suppression in the case at bar. Unlike the Fourth Amendment, the Fifth Amendment is directly concerned with the introduction of tainted evidence at trial. The primary purpose of the privilege against self-incrimination is protecting the individual against being compelled to furnish evidence to convict him in a criminal trial.

Respondent suggests that the Fifth Amendment interests involved in the immunity cases are equivalent to those interests in the case at bar. In both instances a bar to the use of evidence reinstates the parties to their respective positions and upholds the privilege against self-incrimination.

Concerning the Respondent's final argument, namely, that even if the Fifth Amendment and Sixth Amendment were not

violated, that even under the rationale of Michigan v. Tucker that the evidence in the case at bar should still be suppressed.

Respondent respectfully suggests that the interest of Michigan v. Tucker, that the Government in making available all available evidence to the people who are to determine the facts, is outweighed in the case at bar by the need to deter police conduct, misconduct, by concepts of judicial integrity and by the very nature of our accusatory system of justice.

It is submitted that the allowance into evidence of the property seized pursuant to the search warrant would encourage police violations of the law, because they would have everything to gain and nothing to lose by interrogating defendants without obtaining a valid waiver. Suppression of the contraband and money is necessary to exhibit to the police the fact of judicial disapproval and makes constitutional rights credible to the police.

Respondent also suggests that doubt as to the effectiveness of the Fourth Amendment exclusionary rule in deterring police misconduct is not applicable to the Fifth and Sixth Amendments area of the case at bar. This is so because, as one legal scholar has pointed out, the predominant goal of interrogation is to obtain evidence for use in court. Therefore, police conduct in this area is likely to be responsive to judicial rules of exclusion.

Additionally, Respondent respectfully suggests that

the good faith factor, mentioned in Michigan v. Tucker, is not applicable to the case at bar. The interrogation in this case was post-Miranda and Respondent repeatedly attempted to secure counsel and never abandoned his effort. Indeed, the state trooper questioned Respondent knowing that Mr. White had not waived his rights to silence and to counsel. That's what the Superior Court and the Supreme Judicial Court found.

Alternatively, Respondent argues that sound policy reasons argue against the use of a good faith defense in situations like the case at bar. A good faith defense puts a premium on ignorance of the law and would add an additionaland exceptionally difficult fact-finding process to the already overburdened criminal law process.

Further, the existence of such a defense could generate uncertainty and invite calculated risks on the part of the police, thereby defeating the primary goal of Miranda to give to the police concrete constitutional guidelines.

QUESTION: Counsel, what's your reply to Mr. Justice White's concurring opinion in Stone v. Powell that exclusion of evidence obtained in good faith will never have a deterrent effect because if people are acting in good faith and reasonably they will presumably do the same thing again?

MR. COHEN: Well, I would say, Your Honor, that, number one, the police officer in this case did not act in good faith. The evidence indicates that the police officer

knew that the Respondent had not waived his right to counsel and his right against self-incrimination.

Number two, I would say that there is certainty in the law right now, namely, the police should know and hopefully do know that they cannot interrogate defendants without giving the Miranda warning and without the waiver that is required under Miranda. Adding into a good faith defense would make a subjective determination. As to the police officer, it would aid a police officer who was ignorant. It would not result in police officers seeking additional training to try to learn the law, and --

QUESTION: But if we get conflicts between courts of appeals and state supreme courts on Miranda points, isn't it expecting an awful lot that the police officer on the beat is going to be a final arbiter and know all there is to know about the Miranda doctrine?

MR. COHEN: I think up to this time the law is clear, Your Honor. Namely, without the waiver and without the warnings of Miranda no evidence can be used. That's what Miranda said and that basic issue I don't think is subject to attack.

QUESTION: There is quite a difference of opinion about what a waiver is.

MR. COHEN: That's true, Your Honor. It seems that waiver can be different in Fifth Amendment situations and

different in Sixth Amendment situations. But we have a finding here by the Superior Court which was upheld by the Supreme Judicial Court that there was no waiver. Respondent respectfully suggests that in these circumstances there couldn't be a waiver. The Respondent was described as not knowing what he was doing, as bouncing off the walls. This isn't a case, as the Government has argued, of some motor impairment. This is a person who was described in testimony as not having control of himself. It is not a simple case of just having had a point one three on a breathalyzer test. There is much more here than that. This person could not make a voluntary statement, because of a problem with his faculties.

QUESTION: I take it you would say then that there would be no way that the police, having illicitly heard that there were additional drugs in the car, they could in no way get into the car?

MR. COHEN: I would think, Your Honor, that in order to seize contraband a limited exception could be created that would allow the police only to seize the contraband, because of the nature of contraband.

QUESTION: Are you suggesting then that if the police officer had said, "Well, I know I shouldn't have heard this, but I have heard it. I do know there is contraband in the car, so I will just enter the car and take the contraband."

MR. COHEN: If he had overheard it in the telephone

conversation, there would be no interrogation and Miranda would not be applicable, Your Honor.

QUESTION: I know, but let's just assume that he heard it from him, like he did.

MR. COHEN: Yes, after interrogation.

QUESTION: Well, could he use it at all to get into the car?

MR. COHEN: I would say no, Your Honor.

QUESTION: Even to seize contraband?

MR. COHEN: The only limited exception would be because of the nature of contraband to seize contraband. It certainly could not be used in court.

QUESTION: Well, would there be an exception or not?

MR. COHEN: I would argue that there shouldn't be, Your Honor, but if there was going to be an exception, that should be --

QUESTION: So, your answer is no, there would be no way he could get into the car?

MR. COHEN: I would say that there should not be, or, on the alternative, if the court did see fit to carve out --

QUESTION: Although the police know there is contraband in the car, there is nothing they can do about it, because of this violation of Miranda.

MR. COHEN: I am not saying that they couldn't, Your Honor. I am saying that I would argue that they should not be

able to.

QUESTION: Your view is that constitutionally they are forbidden to get into the car.

MR. COHEN: Yes. Or, in the alternative, if they were able to go into the car, it would only be to seize the contraband, not to present that contraband in evidence in a criminal trial.

QUESTION: Let me test that with a hypothetical question.

Suppose in the trial of this case, with that evidence excluded for the purposes on this record -- In other words, no question about the use of the information to get the warrant -- and your client took the stand and testified and was asked: "Did you have possession of any other drugs, except those found on your person," and he said no. Under Harris v. New York, could his statement be used to impeach him?

MR. COHEN: I would say, Your Honor --

QUESTION: Not your view, but what the view of Harris v. New York.

MR. COHEN: I would say that Harris was a pre-Miranda situation, so Harris would not be authority on point.

QUESTION: Harris pre-Miranda? Oh, no, no.

MR. COHEN: I believe it was a pre-Miranda interrogation, Your Honor.

QUESTION: Not pre-Miranda in terms of --

MR. COHEN: Oregon v. Haas, I believe, Your Honor, was a post-Miranda --

QUESTION: Miranda was on the books for three or four years before Harris was decided.

MR. COHEN: I am sorry, Your Honor, I didn't --

QUESTION: Miranda was on the books three or four years before Harris was decided.

MR. COHEN: Yes, but I think it took that time for litigation to reach this Court. I believe it was a pre-Miranda case. But the Oregon v. Haas situation was a post-Miranda. I would say, Your Honor, that the Court has shown, historically, a concern for perjury. And, in that situation, it may very well be yes, that under Harris and Haas the evidence could be used for impeachment. But that question is not before the Court today, Your Honor.

Finally, Respondent suggests that the nature of the adversary system and the importance of the dignity and integrity of the individual requires suppression of evidence obtained by questioning an individual who was, quote, "bouncing off the walls," and, quote, "didn't know what he was doing" --

QUESTION: Even if he were voluntarily bouncing off the walls?

MR. COHEN: I would say, Your Honor, please, that if a person was voluntarily bouncing off the walls, the previous case heard here this morning may have some applicability. He

may be suffering some type of mental disease. But this is not the case here, Your Honor.

In this case, Respondent was bouncing off the walls from a combination of drugs and alcohol. It is in the record that he was scratching himself incessantly, and that he didn't know what he was doing.

QUESTION: Conduct beyond his own control.

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

Thus, Chief Justice Warren, discussing the privilege against self-incrimination stated, and if I may quote briefly: "The constitutional foundation underlying the privilege is the respect the Government, state or federal, must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the Government to shoulder the entire load, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the Government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel simple expedient of compelling it from his own mouth."

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Miss Smith?

REBUTTAL ORAL ARGUMENT OF BARBARA A. H. SMITH, ESQ.,

ON BEHALF OF THE PETITIONER

MISS SMITH: Yes, very briefly, Your Honor.

I would like to respond to a question of Justice Stevens prior to the lunch break, regarding a Sixth Amendment right to counsel case.

I would suggest that under Kirby v. Illinois that no judicial proceedings had been initiated and the Sixth Amendment right does not apply. This is not a Gruer (?) v. Williams case, in any respect.

As to the allegation that there was an independent state ground for this decision, I would first like to point out to the Court that on page 70 of the Appendix the Defendant's Assignment of Error reads as follows: "Evidence was obtained as a violation of the defendant's rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States." He did not assign his error any violation under the Constitution of Massachusetts.

Furthermore, in the two referenced decisions in the White case, Haas and Hall, there are references to Federal cases, particularly, Miranda v. Arizona and Brown v. Illinois. In none of the referenced cases in those two decisions, or in the referenced cases in those decisions, does any discussion of the Massachusetts constitutional prohibition against compelled testimony take place.

There is simply no ambiguity in the basis for decision in this case.

QUESTION: I suppose if you prevail and it goes back, they can then rest it on the State Constitution, couldn't they, and reinstate their judgment?

MISS SMITH: In the future, in another case, they could rest it on the State Constitution, but I think this case is before this Court now on the basis --

QUESTION: No, no. I say if you prevail here, and there is a reversal and it goes back, can't the Massachusetts Supreme Court rest, reinstate their judgment on the basis of their State Constitution? That's what happened in Opperman, isn't it?

MISS SMITH: It is a possibility, Your Honor.

QUESTION: It is not a possibility --

MISS SMITH: Yes, they could do that, but they have given no indication that they are inclined to do so. In fact, in the only case in which the Court has been asked to apply our constitution more strictly than this Court in a Miranda related situation, they refused to say that our constitution required a different holding than this Court reached in Harris v. New York.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Thank you, Counsel.

The case is submitted.

(Whereupon at 1:14 o'clock, p.m., the case in the