ORIGINAL

In the

Supreme Court of the United States

NORTH CAROLINA, Petitioner, v. WILLIE THOMAS BUTLER, aka TOP CAT, Respondent.	No. 78-354

Washington, D. C.
March 27, 1979

Pages 1 thru 34

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

NORTH CAROLINA, Petitioner	
v.	No. 78-354
WILLIE THOMAS BUTLER, aka TOP CAT, Respondent	

The above-entitled matter came on for argument at 1:31 o'clock, p.m.

March 27, 1979
Washington, D. C.

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:

LESTER V. CHALMERS, JR., Special Deputy Attorney General of North Carolina, Raleigh, N. C. on behalf of the Petitioner.

R. GENE BRASWELL, Goldsboro, N. C. on behalf of Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Chalmers, you may proceed whenever you're ready.

ORAL ARGUMENT OF LESTER V. CHALMERS, JR.,

ON BEHALF OF THE PETITIONER NORTH CAROLINA

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

The Respondent, Willie Thomas Butler, was apprehended and arrested by Special Agent David C. Martinez and other agents of the Federal Bureau of Investigation, on the third day of May, 1977, in an apartment located in New York City, upon an unlawful flight warrant to avoid prosecution.

Agent Martinez read to the Respondent the card which reads as follows: "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questions if you wish. If you decide to answer questions now without a lawyer present, you will still have a right to stop answering and at anytime until you talk to a lawyer."

The Petitioner asserts that the Federal agent fully complied with the prophylactic rules as announced by Miranda, and the current policy of the Federal Bureau of Investigation

regarding the waiver of rights and the use of Form FD 395, as appears on pages 13 and 14 of the Brief of the Solicitor General.

The Respondent was not questioned at this time about any events that occurred in North Carolina. He was transported by the agents to their New Rochelle Office, about six miles away. He was taken to an interview room at the FBI Office in New Rochelle, and then handed the Advice of Rights form FD 395, and subsequently asked whether he read the form, and he nodded his head and said he had.

He was asked if he understood it and he replied he did.

He was then asked to sign the form and replied that he didn't want to sign the form and stated, "I will talk to you, but I am not signing any form."

Agent Martinez further testified that he did not threaten the Respondent, and he did not offer him any hope of reward or inducement to get the Respondent to talk to him. And he did not use any misrepresentation, trickery, force or coercion to get the Respondent to talk to him. That the Respondent was in possession of his faculties. He did not appear to be under the influence of alcohol or narcotic drugs. That the Respondent told him he had an Eleventh Grade education and that the Respondent appeared to know what was going on about him and appeared to respond to questions in sequential fashion.

Agent Martinez further testified that the Respondent

told him he would speak to him without a lawyer. That the Respondent never told him that he did not want a lawyer present, nor did Respondent tell him that he did want a lawyer present. That he again informed the Respondent that he could have a lawyer and that one would be appointed for him if he so desired. And that he asked the Respondent the following questions:

Will you speak to us knowing full well that you have these rights?

And the Respondent replied, "I won't sign the form. I will talk to you, but I won't sign the form"

Martinez further testified that it was his impression that the Respondent did understand his rights, and did not necessarily want a lawyer; but that he would refuse to sign any type of paper.

The trial Court concluded that any statements made by Respondent to Special Agent Martinez were made freely and voluntarily; that the Respondent had been advised of his Miranda rights, including his right to an attorney, and that the Respondent understood these rights, and that he effectively waived these rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions. And that the statement made by the Respondent was made at a time when the Respondent understood his rights, and that no promise or offer of leniency nor

threats nor pressure nor coercion of any type had been exerted against him. The Respondent -- and that any statement or confession so made was freely and voluntarily given.

The trial Court then admitted into evidence the culpatory statements made by Respondent to Special Agent Martinez.

The Supreme Court of North Carolina reversed the trial Court and held that the evidence on voir dire was insufficient to support the findings that the Respondent waived his rights to counsel by written waiver or a specific oral waiver knowingly made.

It is noted and called to the Court's attention that this interview was conducted by a trained agent of the Federal Bureau of Investigation, and that he rigidly followed the current FBI procedures as they appear in the Brief of the Solicitor General. And it is further noted that Chief Justice Warren at pages 483 and 484 commended to all law enforcement agencies the practice of the Federal Bureau of Investigation as they existed at that time with respect to interviewing suspects.

Mr. Chief Justice Warren stated that the practice of the FBI can readily be emulated by State and local enforcement agencies. And in a footnote on page 55 -- footnote 55, page 485, Mr. Chief Justice Warren stated, "We agree that the interviewing agent must exercise his judgment in determining

whether the individual waives his right to counsel. Because of the Constitutional basis of the right, however, the standard for waiver is necessarily high and, of course, the ultimate responsibility for resolving this Constitutional question lies with the courts.

The Petitioner does not challenge the continuing validity of the Miranda Decision nor any of the guidelines it established to protect what the Court said in Miranda was a person's Constitutional privilege against compulsory self-incrimination.

The issue in this case is as follows: Interpreting this Court's decision in Miranda, in the absence of an oral or express written waiver of right to counsel prior to questioning. Does Miranda allow a finding of implied waiver of right to counsel from the totality of the surrounding facts and circumstances of the case where the suspect has been fully advised of his constitutional rights before making voluntary incriminating statements in response to this question -- to questions.

Resolution of this question turns almost entirely on the interpretation of three passages in Miranda, in the Miranda Opinion, which the North Carolina Supreme Court relied on in finding a per se violation of Miranda.

It is the position of Petitioner that the interpretation of the three passages relied on by the Supreme Court

of North Carolina, at page 470, 475 and 479 of Miranda should not lead to absurd or unintended results and transform the Miranda safeguards into wholly irrational objects -- obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make an informed and intelligent assessment of their interests.

QUESTION: Do you feel the North Carolina rule is rather isolated?

MR. CHALMERS: I'm sorry?

QUESTION: Do you feel the rule enunciated by your Court is rather isolated among other Courts?

MR. CHALMERS: Mr. Justice Blackmun, I do.

QUESTION: Why do you think your Court takes that position?

MR. CHALMERS: I can only say, sir, that in the four or five cases that our Court has had this question raised to, they have strictly interpreted Miranda. And to answer your first question, sir, it is my recollection that every Circuit Court in the United States, including the District of Columbia, and 20 of our sister States interpret Miranda opposite from our North Carolina Supreme Court.

QUESTION: Do you think they're throwing the ball of Miranda back here? Is that what they're doing?

MR. CHALMERS: Mr. Justice Blackmun, yes, sir.

What do these passages mean as interpreted by our

North Carolina Supreme Court?

The Petitioner asserts that they do not mean that an informed waiver of right may be ineffective, even when voluntarily made.

As Mr. Justice White said in his concurring Opinion in Michigan v. Mosley,"Unless an individual is incompetent, we have in the past rejected any paternalistic rule protecting the Defendant from his intelligent and voluntary decision about his own criminal case. To do so would imprison a man in his privileges and to disregard the respect for the individual which is the life blood of the law."

The Petitioner asserts that these words do not prohibit every element which influences a criminal suspect to make incriminating admissions.

As Mr. Chief Justice Burger stated in United States v. Washington, the Fifth Amendment does not preclude a witness from testifying voluntarily in matters which may incriminate him for those competent and free-willed to do so may give evidence against the whole world, themselves included. Indeed, far from prohibiting by the Constitution admissions of guilt by wrongdoers, if not coerced, are inherently desired. In addition to guaranteeing the right to remain silent unless immunity is granted, the Fifth Amendment proscribes only self-incrimination obtained by a genuine compulsion testimony. Accordingly, unless the record reveals some compulsion,

Respondent's incriminating testimony cannot conflict with any Constitutional guarantees of the privilege.

Mr. Chief Justice Burger stated at page 188, "The test is whether considering the totality of the circumstance the free will of a witness was overborne."

QUESTION: Well, that's not the test of Miranda.

MR. CHALMERS: Sir?

QUESTION: The test under Miranda is not whether the free will of a witness was overborne but, rather, whether the Miranda warnings were given, and that's it.

MR. CHALMERS: That is the position?

QUESTION: Miranda is not a voluntariness test.

MR. CHALMERS: No, sir. That is the position of the State of North Carolina, Mr. Justice.

QUESTION: Well, isn't that what Miranda says?

MR. CHALMERS: That's what Miranda says.

QUESTION: What this Court has done in every case that has followed Miranda.

MR. CHALMERS: That's correct, sir, and may I state, sir, there is Michigan v. Mosley. You, sir, stated that a practical prohibition against the taking of voluntary statements are affirmative immunity from further interrogation regardless of the circumstances would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity and deprive suspects of an

opportunity to make an informed and intelligent assessment of their interests.

We say, sir, that our Court has, by its position, taken these words to mean that the suspect is deprived of an opportunity to make an informed and intelligent assessment of his interests, and to take whatever action he voluntarily chooses.

QUESTION: I think that the Respondent will take the position that the Respondent doesn't mind appraising his own position quietly and to himself, but not before public -- and without help from the prosecution.

Why put all the weight on that he wants to sit down and appraise something -- the Respondent? You keep saying that.

MR. CHALMERS: I think--

QUESTION: He's under detention in the FBI Headquarters and he thinks out loud; is that your position?

MR. CHALMERS: No, sir.

QUESTION: I misunderstood you.

MR. CHALMERS: No, sir, Mr. Justice Marshall.

QUESTION: I thought that was what you were saying.

MR. CHALMERS: No, sir.

A further position of the State of North Carolina, the Petitioner, that these words were not intended to create a Constitutional straight-jacket, as Mr. Justice Rehnquist stated in Michigan against--

QUESTION: Mr. Chalmers, I did understand you to be arguing that the rule that the North Carolina Supreme Court followed deprives the suspect of the opportunity to act intelligently in his own way. Aren't you arguing that?

MR. CHALMERS: No, sir. No, sir, I'm saying this, Mr. Justice Stevens, that our Court, by its interpretation of Miranda has placed on the law enforcement agents and the Federal Bureau of Investigation within the confines of North Carolina an express written or oral waiver before any statement can be admitted, disregarding entirely any circumstances, any gesture, any words the Defendant uses to give to the trial judge at the trial level sufficient facts to find out exactly--

QUESTION: Doesn't the rule that the North Carolina Court follows have the advantage of a little more certainty than the finder of fact trying to interpret ambiguous context?

MR. CHALMERS: No, sir. I think, on the other hand, and I'll get to it in just a moment, Mr. Justice Stevens, I think what our North Carolina Court by its rule has done is to, in effect, add another sentence to the litany of the Miranda warning wherein our Court now, by its interpretation of Miranda, would now require this Court to add the litany, "Since you declined to execute a written waiver of your rights, do you now expressly orally waive these rights?"

QUESTION: And what would be wrong with that to be darned sure about what he intends to do?

MR. CHALMERS: Would that solve the question?

QUESTION: Sure, if the answer is yes, the issue is solved.

MR. CHALMERS: All right, sir, and suppose, sir, the Defendant at that time makes no statement, but continues on talking?

QUESTION: Well, suppose he talks before he gets the Miranda warnings at all? It's the same problem. I suppose one of the interests that the law enforcement people have here is to have a clearcut rule where everybody knows when the questioning can commence.

MR. CHALMERS: Yes, sir.

QUESTION: And you know you can't commence at least until you read him the form.

MR. CHALMERS: That's correct.

QUESTION: And the question is can you commence before he answers unequivocally, "I'm prepared to talk".

MR. CHALMERS: Well, we say--

QUESTION: You say yes, well, if we just kind of leave it a little ambiguous, we'll take our chances on what the trial judge will find. If you require him unequivocally how he feels, don't you remove one issue from the trials that follow?

MR. CHALMERS: Yes, sir, except you are adding to the litany of Miranda and making--

QUESTION: For the very reason that you have the Miranda warning, you want to be very sure that the man is prepared to confess voluntarily without counsel.

MR. CHALMERS: That's correct. We have no problem whatsoever with the fact that a prisoner or a suspect should be fully informed and should--

QUESTION: Shouldn't there be a question in your mind when he says, "No, I won't sign a form?"

MR. CHALMERS: No, sir, there's no question in my mind about that.

QUESTION: Supposing your guilty plea cases where you have a set of things that the trial judge has to read to the person who is pleading guilty as to what he is giving up, there has really been nothing yet devised that makes a foolproof situation where the Defendant can't come in and say, "Well, I was under the"-- "I did say yes, I understood it all. I did sign it, but I was under the influence of drugs at the time and, therefore, I want a new hearing on it."

MR. CHALMERS: No, sir, and we face that, Mr. Justice Rehnquist, in North Carolina with respect to post conviction hearings and also habeas corpus hearings, where the long line of questions asked of a Defendant are repudiated at a later date and denied. And I don't think that adding one other or two other sentences to the long list that we have when a Defendant enters a plea would preclude him from recanting or

denying that he voluntarily plead.

QUESTION: No, but you really don't have a problem if he signs the form, do you? Isn't normal practice to try and get them to sign the form?

MR. CHALMERS: No, sir, I can't say that it is. We're dealing -- in the facts in this case, we're dealing with an FBI agent, a highly trained, sophisticated law enforcement agent. And I can't say--

QUESTION: On the one side of the conversation a highly sophisticated law enforcement agent, that's right.

MR. CHALMERS: Yes, the best our country is able to produce.

QUESTION: And he was unable to get him to sign a form.

MR. CHALMERS: No, sir, I don't think there's anything in this record that this FBI agent was unable to get him to sign a form.

QUESTION: He asked him to, didn't he?

MR. CHALMERS: He handed him a form and asked him would he sign it.

QUESTION: Yes.

MR. CHALMERS: Yes, sir, but I don't think -- in fact, I'm certain there's nothing in the record or any allegation by my friend Mr. Braswell representing the Respondent that there was any pressure put on him, on the Respondent. But after he handed him the statement he said, "I won't sign it."

Now to say the fact he won't sign a statement determines fully and completely the involuntariness or the inadmissibility per se of anything he did further is to ignore reality. All of us are raised as children, "Don't put your name on anything." Don't sign anything. And this is exactly what Respondent Butler did. And, with your permission, sir, and with permission of the Chief Justice, if I may, just a moment, we have another case that's pending before this Court now, and it is cited in our brief, where an FBI agent testified with respect to incriminating statements made, again in North Carolina.

The FBI agent in that case terminated the interview as soon as the man said he wanted to talk to his mouthpiece. So, I say that we again--

QUESTION: That's what the FBI regulation says.

MR. CHALMERS: Yes, sir.

QUESTION: To its agents.

MR. CHALMERS: Yes, sir. And, Mr. Justice Marshall, let me say to you that we in law enforcement have no problem living with Miranda. Miranda is good. Those guidelines are good. We're not asking this Court so to expand them as to read into something that this Court which we feel has not -- did not say in Miranda.

I submit that these words do not mean that a suspect is required to execute a written waiver or expressly waive

these rights guaranteed by Miranda.

Mr. Chief Justice Warren stated at page 475 of the Opinion, "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that Defendant knowingly and intelligently waived his privilege against self-incrimination and his rights to retained or appointed counsel. This Court has always set high standards of proof for the waiver of Constitutional rights and we assert these standards as applied to in custody interrogation."

The position of the State of North Carolina, and we assert, that as Mr. Justice Rehnquist stated in Michigan v. Tucker, the Court said, and I'm quoting, "The Court said in Miranda that the Defendant, of course, could waive these rights, but that any waiver must have been made voluntarily, knowingly and intelligently."

We would ask this Court, and we recognize fully that this Court is not bound by any interpretation of any Circuit Court throughout the United States, but each one of the Circuits have interpreted Miranda as was done in United States v. Montos, a Fifth Circuit case where cert was denied and the opinion expressed there was an express statement that the individual does not require a lawyer is not required. However, to show that an individual waives his right to have one present prosecution must show that he was effectively advised of his

rights and he effectively waived them.

QUESTION: Mr. Chalmers, you repeated what you said earlier that each one of the Federal Circuits has expressed disagreement with North Carolina's rule.

MR. CHALMERS: That's correct.

QUESTION: At the time of your petition, I think it was 10 of the 11 Circuits.

MR. CHALMERS: At the time of our petition, we could not and did not find the Sixth Circuit. We were relying on the statement of the Solicitor General in his brief amicus curiae that the Sixth Circuit had ruled that way. That is my reason for saying unanimity.

QUESTION: I see. And at the time of your petition I think you said 16 States and now today you have told us 20 States.

MR. CHALMERS: I believe that in our petition, sir, and in our brief we stated that there were 20.

QUESTION: Twenty.

MR. CHALMERS: Yes, sir.

QUESTION: Are they identified in your brief?

MR. CHALMERS: Yes, sir, they are.

QUESTION: Mr. Chalmers, before the Miranda Case was decided, how many States had adopted the rule of the Miranda Case, do you remember?

MR. CHALMERS: Before Miranda was announced by Mr. Chief Justice Warren?

QUESTION: Yes.

MR. CHALMERS: Mr. Justice Stevens, if you'll pardon my personal observation, I've been in prosecution business for 25 years, and I am not positive that any law enforcement agency outside the Federal Bureau of Investigation--

QUESTION: The FBI had one and it was put in the record. And do you know why I know it was put in the record? I put it in.

MR. CHALMERS: As I say, pre-Miranda, I don't--

QUESTION: At the same time the Miranda Case was argued, United States v. Jackson was argued, because a Federal case, and the one that Chief Justice Warren referred to, the FBI warning regulation was put in in the Jackson Case. It had been used by the FBI for many years.

QUESTION: Haven't you just told us, Mr. Chalmers, that the FBI had followed this practice before Miranda?

MR. CHALMERS: Yes, sir. Yes, sir, to answer his question--

QUESTION: The States have not followed it.

MR. CHALMERS: But the FBI had the policy pre-Miranda, as it appears at page 483 to 486, I believe, of Miranda.

QUESTION: Pre-Miranda no State had it nor any Court of Appeals. But now at least they've got North Carolina on this rule. So there's more support for the rule that the Defendant asked for here in the other courts than there was for Miranda before this Court decided it.

MR. CHALMERS: I cannot take exception to that, sir. Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Braswell.

ORAL ARGUMENT BY R. GENE BRASWELL

ON BEHALF OF RESPONDENT WILLIE THOMAS BUTLER

aka TOP CAT

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

At the outset, I would like to explain the facts, and elaborate upon those a little differently than my brother did, in stating that I think one must see that at the time of six o'clock a.m., seven agents from the FBI arrived at the residence of the Respondent. He was awakened by a loud noise. He was gone in -- the agents went inside and awakened him from his sleep, took him out, advised him orally of his rights. He made no statement. He was taken down to the New Rochelle office--

QUESTION: What significance do you attach to the hour of the day?

MR. BRASWELL: Because I say that his understandingly, intelligently and knowingly waived any rights he may have. I wanted to bring that to the Court's attention that within one hour--

QUESTION: That doesn't relate to six o'clock in the morning as it might at two o'clock in the morning in that sense, does it?

MR. BRASWELL: Well, I think it does depending upon it said that he was very quiet. He took a lot of noise to get him aroused. He was startled at the time. Seven agents, they were prepared to go to any extreme and indicated by Officer Martinez that they took him down approximately 7:15 to the New Rochelle Office. They handed him a form and asked him to read it. Whereupon, I contend that the officer at that time assumed that this man had the intelligence to understand and he could read it simply from stating that he had an Eleventh Grade education.

There is no guarantee that this man possessed the intelligence to understand what he read at that time.

After he read that, he stated, "I will not sign it. I will not sign anything." And at that time the officer proceeded to say, "It is not mandatory that you sign the form. We would like for you to talk to us."

The Respondent contends that at that time the questioning should have stopped unless when the officer made statements, "Well, it's not mandatory that you talk to us, but we would like to ask you some questions". The officer should have said to him at that time, "But if you answer those questions, those rights that are in that written paper that you just had in your hand will still apply." Because, as stated, I believe, that the man at that time felt as he was there, as my brother said, a paper, to me it attaches a different significance and that

the paper writing was something permanent. That he was being offered something to sign saying "I give up these rights." He refused to do it. He refused to take that step. And I believe our Court, the Supreme Court of North Carolina, is in standing with what the Miranda Decision meant and what it implies, that at that time, if in any manner, a suspect in any manner allows or intogates (phonetic) or makes a statement to say that he at that time intends to exercise his rights, there's a duty for the FBI man to stop and not go any further.

QUESTION: Exercise what rights?

MR. BRASWELL: To remain silent, not make any statement or that he wants a counsel. Or to that time he states, he makes a statement, "I'm not going to sign anything. I will not sign the form", at that time Martines (phonetic) or Martinez, whatever's the correct way to pronounce that, should have stopped.

QUESTION: Mr. Braswell, there wasn't any signed statement involved in Miranda, was there?

MR. BRASWELL: No, sir, there was not Justice Marsnall.

QUESTION: Well, where do you put all this on the signed statement and put it on Miranda?

MR. BRASWELL: I think the interrogator set the tone of the interrogation. He orally advised the man of his rights, and the man made no statement. So he then come in and he places a written statement before him and said, "Read this." He at that time sets the tone for what he was going to do about

giving this man his rights.

If he intended to give his rights to him, I contend and Respondent-- on behalf of Respondent that he should have read them to him. That he should have said -- that he should not assume could have read them and understood them. He should have gotten that specific waiver that Justice Stevens is talking about.

QUESTION: My point is why the emphasis on him not signing?

MR. BRASWELL: Because that's what the officer gave him, Justice Marshall. I feel at that time when he gave him that, he, at that time, placed himself, the agent that is, placed himself in this man's mind of saying, "Here is something that you must sign if you want to waive your rights." And the man refused to sign it.

QUESTION: Do you contend that he didn't understand what was printed on the material handed to him?

MR. BRASWELL: I say the record is silent on that, sir. I'm saying that a court--

QUESTION: The record does show that he said he had an Eleventh Grade education.

MR. BRASWELL: He nodded his head, sir. In our State this year we gave an Eleventh Grade competency testwhere approximately 25 percent of the people failed it which, I think, shows that, you know, a person may be ashamed -- he may be

reluctant to admit that he can't read and write.

QUESTION: Normally there is a presumption that somebody who has gone through eleven years of schooling knows how to read and write.

MR. BRASWELL: I grant you that, sir. But I'm saying in this particular case, this man here did not ever acknowledge that he understood everything about it except, "I will not sign it."

QUESTION: Doesn't the record also indicate that he was orally advised of his rights under the Miranda Case?

MR. BRASWELL: Earlier and he exercised--

QUESTION: Now there is no indication that he was deaf, is there?

MR. BRASWELL: No, sir, and he exercised those at that time. And he exercised them again with a written--

QUESTION: He exercised what?

MR. BRASWELL: He exercised his right to remain silent.

QUESTION: No, he talked. He expressed his willingness to talk and he talked.

MR. BRASWELL: He did not talk after the oral advice. He did not talk before offer of the paper. He said, "I will not sign", and he did not make any statement until the officer said to him, "It is not mandatory that you sign the form, but we would like for you to talk to us", which, as indicated here, the man--

QUESTION: Isn't that correct that he's not required to sign it? Isn't that a correct statement of the law?

QUESTION: Not in North Carolina.

QUESTION: In Miranda, under Miranda, is there any requirement?

MR. BRASWELL: No, sir, I say--

QUESTION: North Carolina has held there is--

MR. BRASWELL: Sir?

QUESTION: --in this case. That's what this case is about. North Carolina has now read Miranda to require an explicit waiver.

MR. BRASWELL: Express waiver, either orally or written, not necessarily written, but one or the other.

QUESTION: I think you're back to my original question which has nothing to do with what North Carolina thinks about it. Is there anything in Miranda, in the Opinion, directly or indirectly, which says that a person must sign in writing in order to waive?

MR. BRASWELL: No, sir, there is not.

QUESTION: That's all my question was about.

QUESTION: Mr. Braswell, just so I have the sequence correct, am I not correct in recalling that the oral advice of Miranda rights was given in the Bronx before he was taken to the FBI Office seven or eight miles away?

MR. BRASWELL: That's correct.

QUESTION: And then after he got to the -- and there was no confession after the oral advice, but, after he got to the FBI Office, he was handed the written thing to read to himself but there was no further oral statement of his rights at that time.

MR. BRASWELL: No. In the U. S. Brief filed an Amicus Curiae by the Solicitor General,thhy and I state that it could happen, as I indicated earlier, we would not be here. They indicate that after the reading of the form by my client that at that time the agent advised him that if he didn't sign to talk, then you still have the same rights and if you want an attorney, one will be appointed for you, if you can't afford one. If they had said that, and he had went ahead and made those statements, I'd say there would be no need for us to be here hearing this case. But he did not say that.

He said, "I'm not going to sign anything." Again Martinez said to him, "It is not mandatory that you sign, but we would like to ask you some questions." Whereupon, he said, "Well, I'm not going to sign anything. I'll talk to you." And at that time Martinez, and I refer to the FD 395, the FBI form which sits out the guidelines that one goes through if one encounters this. And I say that was not followed by the agent. There was nothing to indicate that he wrote in the form that the man refused to sign but said he would talk

to us. There was nothing to indicate that my client, the Respondent, ever had an opportunity to read and to see and have read back to him what allegedly he said, which I say goes to one of the tests that's being applied later on trustworthiness by Justice Rehnquist, which says, "If you look at overall and the statement is trustworthy, you go to that."

QUESTION: But that wasn't the basis on which the Supreme Court of North Carolina excluded the test.

MR. BRASWELL: No, sir. They specifically -- they said there must be a specific waiver.

QUESTION: And, Mr. Braswell, the Opinion of the Supreme Court of North Carolina which decided this case in your favor, seems to be inconsistent in its statement of the facts with the answer you gave to my brother Stevens.

It says, in the last paragraph on the page, on page A-3 of the Appendix to the Petition, it says when he was arrested in New York, at 1225 Sheridan Avenue in Brooklyn, "He was immediately and fully advised of his Constitutional rights and transported to the New Rochelle Office where he was again advised of his rights. Defendant, who had an Eleventh Grade education then took the Advice of Rights Form and read it to himself.

Now, you have said, in answer to Justice Stevens, that all that was done at the New Rochelle Office was to give him the Advice of Rights Form and he read it himself. That's not what this Opinion says.

MR. BRASWELL: That's right, I'm sorry I misunderstood. He was arrested and then he was transported.

QUESTION: Yes, he was arrested and advised of his Miranda rights. He was then transported to New Rochelle and again advised of his Miranda rights and then was given the form to read; is that correct? That's what the North Carolina Supreme Court says.

MR. BRASWELL: No, sir. I agree that's what the case says, but the statement of the case by the Petitioner and the Appendix and the record itself says, in any case, that the only thing that ever happened at that time was that he was given the form to read.

QUESTION: Would you show me where in the Appendix?

QUESTION: Top of A-25. It's somewhat ambiguous, actually. "We advised him of his rights and I have a card that I carry with me that I have here. The card reads as follows:"

MR. BRASWELL: Okay, page A-5, starting with the first paragraph "During the trip", "I gave him the Advice of Rights form in the room".

QUESTION: Well, there's no question that he did give him the Advice of Rights Form.

MR. BRASWELL: Yes, sir.

QUESTION: The question is did he orally advise him.

MR. BRASWELL: All right, sir, I read, "During the

trip . . . he was very quiet and he seemed to accept the fact that we had arrested him and he offered no resistance. He knew who we were and I think he knew what was going on. At the office, Special Agent, Richard Berry and I took Butler up to an interview room and gave him the Advice of Rights Form which he read. There were not any papers served on him at that [sic] time." Skipping, "I gave him the Advice of Rights form in the room and I observed whether or not he could [sic] read it. I read it and I don't recall if I read it orally to him."

QUESTION: So the statement in the Opinion of the North Carolina Supreme Court is erroneous?

MR. BRASWELL: Yes, sir.

QUESTION: This is ambiguous, "I don't recall if I read it to him orally or not."

QUESTION: Mr. Braswell, let me be sure as to what you're saying. Do you disagree with the statement that he was given the Miranda warnings by Agent Martinez at the time of his arrest and again back at the agent's office?

MR. BRASWELL: I disagree that inasmuch as if it says he was given them orally back in the New Rochelle Office.

QUESTION: Because what I just read is from the Petitioner's Brief and in your Brief you say that you rely on the statement of the case as set forth in the Petitioner's Brief--

MR. BRASWELL: Yes, sir.

QUESTION: --with one exception, which is not relevant to what I'm asking.

MR. BRASWELL: Right. In that there appears to be again an oversight of the statement. I feel that the--

QUESTION: Oversight on whose part?

MR. BRASWELL: An oversight at the time that the Court read that that we all took it from that, as Mr. Justice Stewart did, at that time, sir. But, in looking back through the case and looking through the evidence and all find that Officer Martinez was very -- could not be very exacting as to reading the rights or whether or not--

QUESTION: Well, you didn't cross-petition for a review of the Findings of Fact of the Supreme Court of North Carolina, did you?

MR. BRASWELL: I did not.

QUESTION: Is there any controversy about whether or not your client was asked if he understood his rights after reading the form and his reply that he did?

MR. BRASWELL: Again, Mr. Justice Stewart, there appears that he indicated by nodding his head and that he said he did.

QUESTION: And, again, I'm just reading from the Opinion of the Court of Appeals in North Carolina.

MR. BRASWELL: Yes, sir.

QUESTION: Which, as I say, was decided in your favor. Are you questioning that statement of fact also?

MR. BRASWELL: Not as this case relates, no, sir. I do question as it having in reality occurred. But, based on the narrow question as I see this, I did not question it, no, sir.

QUESTION: Does the question you think is here -- is it affected by whether or not he was advised orally at that time?

MR. BRASWELL: I think it does, yes, sir.

QUESTION: Why is that?

MR. BRASWELL: Because he said, "I will not sign anything. I will not sign the form." At that time the agent said, "It is not mandatory that you sign. But we would like to ask you some questions."

QUESTION: Would the situation be different if the agent had orally advised him of his rights?

MR. BRASWELL: I believe it would have, yes, sir.

QUESTION: Why is that?

MR. BRASWELL: Well, on the occasion when he was earlier advised of his rights, he made no statement. If three or four minutes occurred, a lapse of three or four minutes occurred after the reading--

QUESTION: I know, but are you suggesting that he did understand his rights from the paper? I guess you assume that

he could read then. And he understood his rights, but he refused to sign?

MR. BRASWELL: That's right.

QUESTION: So you think he was twice given his rights -- twice advised of his rights,once orally and once in writing?

MR. BRASWELL: Yes, sir.

QUESTION: And that he understood them both times?

MR. BRASWELL: That is what he indicated, yes, sir.

QUESTION: Then you don't disagree with that?

MR. BRASWELL: Well, I'm saying that's the agent's assumption of what he said.

QUESTION: You don't disagree that he was given his rights?

MR. BRASWELL: No, sir, I do not disagree that he was orally given them and that he was writtenly given them at the station.

QUESTION: Or that he understood them both times?

MR. BRASWELL: I would disagree as to whether or not there is sufficient evidence to show that he understood them, yes, sir.

QUESTION: Then how about, is there any controversy over the fact that he said, "I will talk to you"?

MR. BRASWELL: "I will talk to you", no, sir.

QUESTION: You accept that as one of the facts?

MR. BRASWELL: I accept that he said that after the

agent made a statement to him, yes, sir. It is not mandatory--

QUESTION: And after at least one oral and one written statement?

MR. BRASWELL: Yes, sir.

QUESTION: He was advised of his rights.

MR. BRASWELL: Yes, sir, that after the agent said, "It is not mandatory for you to sign the form but we would like for you to talk to us."

QUESTION: And he said, "I will talk to you".

MR. BRASWELL: He said, "I will talk to you but I won't sign."

QUESTION: "I'm not signing any form"?

MR. BRASWELL: Right.

QUESTION: You're saying, in effect, that refusal to sign repudiates any kind of consent?

MR. BRASWELL: I'm saying it should have stopped right there. I think it should not have gone any further. I think that is closely akin to the, with the exception of time limit there, of what Brewster states, where the man has gotten on the train and is riding on the train and going to where his other lawyer is.

QUESTION: Wouldn't you be satisfied if the agent asked him, "Do you waive your rights?"

MR. BRASWELL: Yes, sir.

QUESTION: Would that satisfy you?

MR. BRASWELL: If he hada said to him and he hada got a oral answer, "Yes, sir", when he said, "Do you waive these rights?"

QUESTION: That would be all right?

MR. BRASWELL: Yes.

QUESTION: Well, probably, with today's education you explained to us, he wouldn't know what the word "waive" meant?

MR. BRASWELL: That's a very good point, Justice Stewart. Quite candidly a lot of times when a person is on the stand and you use a simply word "prior", he doesn't understand what you mean when you mean "before". It happens all the time.

QUESTION: This man or some other people?

MR. BRASWELL: I can't say for this man, Mr. Chief Justice.

QUESTION: Does the record show how old he was?

MR. BRASWELL: I believe it does. I understand, if I recall correctly, 28, Justice Blackmun.

QUESTION: When you say the FBI should have stopped, I take it what you mean is they should have either given him orally the rights or the substance of them again and had him orally say, "I'll waive"?

MR. BRASWELL: Either stopped or they should have said at that time, "We would like to talk to you, but it's not mandatory for you to sign this form, but if you talk to us the

same rights will apply."

QUESTION: Is that your understanding of what the North Carolina Court held? They didn't hold that he had to sign in writing. They held that he either had to make it unequivocally clear orally or in writing.

MR. BRASWELL: That's correct.

QUESTION: There had to be an explicit waiver?

MR. BRASWELL: Yes, sir.

QUESTION: --a waiver from circumstantial evidence.

MR. BRASWELL: Do not leave it up to the officer to assume, yes, sir.

QUESTION: Anything further?

MR. BRASWELL: Thank you, gentlemen.

QUESTION: Do you have anything further, Mr. Chalmers?

Very well, gentlemen, the case is submitted.

(Whereupon, at 2:18 o'clock p.m. the case was submitted.)

- - -