

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

VERMONT,

Petitioner,

v.

RICK COX

)
)
)
)
)
)
)

No. 86-1108

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

PAGES: 1 through 48

PLACE: Washington, D.C.

DATE: November 3, 1987

Heritage Reporting Corporation

Official Reporters
1220 L Street, N.W.
Washington, D.C. 20005
(202) 628-4888

IN THE SUPREME COURT OF THE UNITED STATES

VERMONT,

Petitioner,

v.

Rick Cox

Washington, D.C.

Tuesday, November 3, 1987

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 1:45 p.m.

APPEARANCES:

SUSAN R. HARRITT, ESQ., Assistant Attorney General of Vermont,
Montpelier, Vermont; on behalf of the Petitioner.

PAUL J. LARKIN, JR., ESQ. Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; as amicus curiae,
supporting Petitioners.

HENRY HINTON, ESQ., Montpelier, Vermont; as amicus curiae, by
invitation of the Court in support of the judgment below.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	SUSAN R. HARRITT, ESQ.	
4	on behalf of Petitioner	3
5	PAUL J. LARKIN, JR., ESQ.	
6	as amicus curiae, supporting Petitioner	18
7	HENRY HINTON, ESQ.	
8	as amicus curiae, in support of Judgment	28
9	SUSAN R. HARRITT, ESQ.	
10	on behalf of Petitioner - Rebuttal	47

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2 (1:45 p.m.)

3 CHIEF JUSTICE REHNQUIST: Ms. Harritt, you may
4 proceed whenever you're ready.

5 ORAL ARGUMENT OF SUSAN R. HARRITT, ESQ.

6 ON BEHALF OF PETITIONER

7 MS. HARRITT: Thank you.

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

9 This cause is before this Court on a writ of
10 certiorari from a decision of the Vermont Supreme Court.

11 That Court erroneously held that this Respondent's
12 Fifth Amendment privilege against compulsory self-incrimination
13 was violated by the state's pre-sentence investigative process.
14 At the pre-sentence investigation interview, where the
15 Respondent was given the choice of participation or not, the
16 Respondent made statements that the Judge considered at the
17 later sentencing hearing.

18 The Vermont Supreme Court also committed error beyond
19 the compulsion decision when it mistakenly relied on Estelle v.
20 Smith and held that the Respondent's sentence had been enhanced
21 despite the fact that Respondent's exposure to his criminal
22 responsibility remained the same as his exposure following his
23 nolo contendere pleas.

24 The state's court's decision improperly extended the
25 Fifth Amendment privilege against compulsory self-incrimination

1 on these facts and created an unwarranted obstacle to the
2 individualized sentencing process.

3 Turning briefly to the facts, the record reveals that
4 the Respondent entered three pleas of nolo contendere at a
5 change of plea hearing, at which time the Court ordered a pre-
6 sentence investigation report. This order was made in the
7 presence of counsel and Respondent, pursuant to Vermont
8 practice.

9 QUESTION: Ms. Harritt, does the record indicate
10 whether either the Court or the probation officer told the
11 Respondent the purpose of the interview?

12 MS. HARRITT: No, the record doesn't indicate whether
13 or not the Respondent was told by the Court or the probation
14 officer. However, the purpose of the interview is clearly
15 spelled out in both criminal rules as well as the statutes in
16 addition to Vermont practice.

17 The pre-sentence investigation report, in fact,
18 follows a prescribed format that is known to all practicing --
19 persons -- pardon me -- practicing criminal law and certainly
20 since the attorney for Respondent was a public defender, the
21 format was not a surprise to her.

22 QUESTION: Well, does the record indicate whether the
23 public defender had notice of the time that interview would be
24 given?

25 MS. HARRITT: No, the record doesn't reveal notice as

1 to the precise time when the interview would take place.
2 However, it's clear from the practice in Vermont that the
3 interview did not take place immediately after the change of
4 plea hearing, and, so, it was, therefore, incumbent on defense
5 counsel to prepare her client knowing the purpose of the report
6 and the fact that the admissions of the Defendant, had he chose
7 to submit to the interview, should be considered.

8 QUESTION: Ms. Harritt, do we know where Respondent
9 is?

10 MS. HARRITT: At this juncture, we do not, Your
11 Honor.

12 QUESTION: This is why we don't have any brief on his
13 behalf, is that it?

14 MS. HARRITT: Well, you have a brief on his behalf as
15 filed by the --

16 QUESTION: I know, but there's no brief of his, is
17 there?

18 MS. HARRITT: I'm not --

19 QUESTION: He had fully served his prison term, had
20 he not?

21 MS. HARRITT: Yes. He --

22 QUESTION: And he was released?

23 MS. HARRITT: Yes, that's correct.

24 QUESTION: And now he's disappeared.

25 MS. HARRITT: Well, he's left the jurisdiction.

1 QUESTION: And he could be dead, couldn't he?

2 QUESTION: What kind of a case do we have here?

3 MS. HARRITT: Well, we submit that the case --

4 QUESTION: A dead case.

5 MS. HARRITT: Well, I would respectfully disagree,

6 Your Honor. We don't believe the case is dead. The order of

7 the Court below indicated that the decision should be reversed,

8 sentencing should take place with a new report prepared, and

9 with the prospect of new sentencing, the Respondent faces a

10 number of alternatives, one of them being the opportunity --

11 QUESTION: How can you get him back here if he

12 served, fully served his prison sentence? Has he?

13 MS. HARRITT: The order of the lower court, Your

14 Honor, indicates that he is to be re-sentenced. There is a

15 benefit and I'm sure --

16 QUESTION: After he's fully served the sentence that

17 was initially imposed, is that right?

18 MS. HARRITT: That's correct.

19 QUESTION: And now they can bring him back for re-

20 sentencing?

21 MS. HARRITT: Well, that's because he might -- if he

22 is re-sentenced, he could face not just a lower sentence, but a

23 deferred sentence which, if he were to satisfy the conditions

24 of the deferred sentence, his conviction would be expunged,

25 thereby avoiding any collateral consequences that attend

1 conviction.

2 QUESTION: But he's the one that has to initiate
3 taking advantage of that option, doesn't he?

4 MS. HARRITT: Well, the Court, lower court, -- there
5 is now a lower court order which mandates that there be re-
6 sentencing in this case. Certainly, the state intends to try to
7 obtain his whereabouts and return him to the jurisdiction.

8 QUESTION: Well, how are you going to return him?
9 How can you force his return?

10 MS. HARRITT: Well, it's --

11 QUESTION: If he's outside of the state?

12 MS. HARRITT: Well, it's in his interests to return.

13 QUESTION: Why is it? He served his term.

14 MS. HARRITT: Well, that's true, but I'm sure the
15 Court would agree that if the conviction was expunged for these
16 -- if there was no record of these convictions, he would be put
17 in a much better position. He would have --

18 QUESTION: Yes, but aren't you overlooking something?
19 If he comes back in and says please sentence me again, is it
20 not possible that he could get a longer sentence?

21 MS. HARRITT: Well, that's an option.

22 QUESTION: Do you think a lawyer would advise him to
23 come back, saying I realize you've served your sentence, but if
24 you take a shot at getting the whole thing expunged, of course,
25 you might have to spend another year in jail, but what do you

1 want to do? Can you imagine a lawyer asking for that risk,
2 after he's served his sentence, to go back in and take a chance
3 at getting exposed to another sentence?

4 MS. HARRITT: He certainly runs that risk, but our
5 understanding of the mootness doctrine is -- would have this
6 Court rule on the merits of the case because there still is a
7 controversy. There is an opportunity or a benefit that could be
8 obtained by the Respondent. He may not obtain that benefit, but
9 it exists nonetheless.

10 QUESTION: What benefit can you get out of winning
11 this case, except an opinion that you would like? I understand
12 the rule of law would be something that interests you. But as
13 far as your fight with this Defendant, what are you going to
14 get that you haven't already gotten?

15 MS. HARRITT: Well, we would like the opportunity to
16 have the case resolved, and we would like the sentence not
17 vacated --

18 QUESTION: Will you ask for a more severe sentence if
19 he comes back?

20 MS. HARRITT: Well, the Attorney General's office was
21 not the prosecuting entity. A different --

22 QUESTION: If you don't, you don't have any interest
23 in the outcome of the case.

24 MS. HARRITT: What I'm --

25 QUESTION: You don't want to have to go about

1 complying with the order, do you?

2 MS. HARRITT: I'm sorry, Your Honor?

3 QUESTION: You're under an order, aren't you?

4 MS. HARRITT: Yes.

5 QUESTION: Well, you don't want to have to comply?

6 QUESTION: They can't comply.

7 QUESTION: Well, I know, but there's the order.

8 There is the order. What are you going to do about it?

9 MS. HARRITT: Well, if this Court were to --

10 QUESTION: Extradite him? You can't extradite him.

11 MS. HARRITT: Well, we might be able to obtain his

12 whereabouts.

13 QUESTION: Is he on parole, by any chance?

14 MS. HARRITT: No, he's not on parole, Your Honor.

15 QUESTION: He's been released?

16 MS. HARRITT: Yes. He has -- incidentally, --

17 QUESTION: I still don't understand. How can you

18 force him back to the state?

19 MS. HARRITT: Well, if he were to return to the

20 jurisdiction, he certainly would --

21 QUESTION: If he were. He'd be a wise man to return,

22 wouldn't he?

23 MS. HARRITT: Well, he runs --

24 QUESTION: You would have him committed to an insane

25 asylum.

1 MS. HARRITT: I would like to continue with the
2 facts, if I may.

3 At the change of plea hearing, the pre-sentence
4 investigator report was ordered, and as I've stated, counsel
5 and the Respondent did have notice and opportunity to consult
6 concerning whether or not the Respondent should submit to the
7 interview and they also had a chance to confer concerning its
8 scope and application to the sentencing process.

9 At a later unspecified time, the probation officer
10 arrived at the Correctional Center where the Respondent was
11 incarcerated and attempted to start the interview. At that
12 time, the Respondent sought to postpone the interview asking
13 that the probation officer wait until the arrival of the
14 defense investigator.

15 At that juncture, the probation officer indicated
16 that she could not wait but that the Respondent had the choice
17 of continuing in the absence of the defense investigator or
18 foregoing the interview at that time.

19 QUESTION: Does the record show why she couldn't
20 wait?

21 MS. HARRITT: No, there is not a specific explanation
22 given for that.

23 QUESTION: Wouldn't have taken very long, would it?

24 MS. HARRITT: We don't know that, Your Honor.

25 QUESTION: Well, the investigator was on the way,

1 wasn't he?

2 MS. HARRITT: That's what was stated, but we, of
3 course, don't know whether he would have arrived in ten minutes
4 or in two hours.

5 Turning to the compulsion argument, it's clear that
6 the Court must find compulsion in order for the privilege
7 against self-incrimination to have been violated. There is no
8 compulsion in this case. The Respondent was given the option of
9 going ahead with the interview or foregoing the interview.

10 The probation officer made no threats concerning
11 whether or not if he exercised the choice some dire consequence
12 would attend.

13 QUESTION: And you say that is not coercion of any
14 kind?

15 MS. HARRITT: No. It certainly put the Defendant to
16 a choice, but it's not coercion.

17 QUESTION: How would you feel if you were
18 incarcerated and this was thrown at you? Would you feel that
19 you were a little pushed at all?

20 MS. HARRITT: Well, it's a choice. There are
21 certainly weighty decisions that all persons make when they're
22 involved in the criminal process, and I'm sure it would give me
23 some reason to pause, and I would try to consider my options,
24 but I don't think --

25 QUESTION: Well, it certainly is a little different

1 than the ordinary day-to-day decisions. He was incarcerated.

2 MS. HARRITT: We don't think that his situation as an
3 incarcerated individual created any additional pressure or
4 coercion.

5 QUESTION: Just like you and I living outside?

6 MS. HARRITT: Well, the individual had been at the
7 Correctional Center for a few months. He had had the
8 opportunity to confer with counsel, to decide whether or not to
9 submit to the interview process in the first place, and the
10 probation officer said, if you'd like to go ahead now, --

11 QUESTION: But the record doesn't tell us whether the
12 Defendant was ever told about the purpose of the interview or
13 whether he could participate in it or not.

14 MS. HARRITT: Well, it --

15 QUESTION: Does it?

16 MS. HARRITT: It doesn't, but we submit that --

17 QUESTION: Does the record tell us anything about the
18 purpose of the state in refusing to wait or why it put the
19 Defendant to the immediate choice it did?

20 MS. HARRITT: No, the record doesn't speak to that,
21 Your Honor.

22 QUESTION: Does the State of Vermont law make it
23 optional with a defendant to participate in a PSI interview?

24 MS. HARRITT: Yes, it does. The criminal rules
25 permit the Court to dispense with the pre-sentence

1 investigative report if the defendant or respondent does not
2 wish to participate. So, that was certainly his option.

3 It would be unreasonable for the Defendant to have
4 assumed that there would be a penalty here. He lost nothing
5 because there are alternative means by which he can put forth a
6 picture of who he is, so the Court can consider his mitigating
7 characteristics at sentencing.

8 As this record demonstrates, defense counsel
9 submitted written affidavits from the victims, and there is
10 nothing in the rules that precludes even the submission of a
11 written statement from the Defendant himself.

12 So, there clearly exists documentary roots by which
13 material can be presented for the Court's consideration at
14 sentencing.

15 Additionally, the rule provides for an opportunity
16 for allocution, both from defense counsel as well as the
17 Respondent, and at the sentencing hearing, Respondent can rebut
18 the accuracy of any material that is conveyed in the pre-
19 sentence investigation report.

20 QUESTION: Can I ask you -- I'm sorry to interrupt
21 your argument on the merits, but is it correct, the Respondent
22 had already served his sentence at the time the case was
23 decided by the Vermont Supreme Court? I noticed their decision
24 was in 1986, which it seems to be about three years after the
25 sentencing date.

1 MS. HARRITT: I am not certain, Your Honor. At the
2 time that the case was briefed, I think he was still serving
3 his sentence, but I'm not certain.

4 QUESTION: His sentence was eighteen months, wasn't
5 it?

6 MS. HARRITT: Yes, with credit for time served.

7 QUESTION: And he was sentenced in 1983, I think.

8 MS. HARRITT: He was sentenced in January of 1984, if
9 I'm not mistaken.

10 QUESTION: January of '84. So, then, by October of
11 '86, he would have served his sentence.

12 Does the Vermont Supreme Court have jurisdiction as a
13 matter of state law to render advisory opinion or do they have
14 the same kind of doctrine we do?

15 MS. HARRITT: I think it's similar to this Court,
16 Your Honor.

17 QUESTION: It is.

18 MS. HARRITT: Since the Respondent had the
19 opportunity to forego participation at the pre-sentence
20 interview and had these alternative means by which he could
21 supply the Court with a picture of who he was, it was
22 unreasonable for the Respondent to assume, even if he did
23 assume, and there is the absence of an assumption on his part,
24 on the record, that he would incur a substantial penalty if he
25 chose to forego the interview, we believe the state court's

1 decision in regard to the compulsion aspect of this case is
2 clearly erroneous as a result.

3 Moreover, in order for there to be a situation of
4 compulsion, the Respondent must assert his privilege against
5 compulsory self-incrimination in a timely fashion, absent
6 certain exceptions.

7 Respondent may assert that one of those exceptions
8 attends here; that is, the one relating to custody. Petitioner
9 respectfully suggests that in this instance, given the purpose
10 of the pre-sentence investigator report and the comments that
11 were made to Respondent at the Correctional Center, that this
12 is not a situation involving custody, so as to excuse the
13 assertion of the privilege.

14 QUESTION: What was the maximum sentence he could
15 have gotten?

16 MS. HARRITT: Originally, Your Honor, he was charged
17 with a felony count that carried a twenty-five year maximum.

18 QUESTION: When do you deliver the maximum?

19 MS. HARRITT: Well, he entered pleas of nolo
20 contendere to reduce charges of simple assault, which carried a
21 one-year maximum. So, instead of receiving one year for each
22 count, he received nine months.

23 QUESTION: And how many -- well, how many were the
24 maximum number of months he could have gotten?

25 MS. HARRITT: He could have gotten thirty-six months,

1 if my mathematics are correct.

2 QUESTION: So, we're arguing about two years.

3 MS. HARRITT: The reason this is not a situation
4 involving custody is that despite his residence at the
5 Correctional Center, he was told by the probation officer that
6 he did not have to participate at the interview.

7 Certainly, this is a situation where his will was not
8 overborne. He was given the opportunity to participate in an
9 interview which would give him a chance to put forth his point
10 of view or he could forego the interview and rely on other
11 means later for presenting his mitigating characteristics.

12 Certainly, this should not be a situation given the
13 philosophy underlying Miranda to warrant the exception to the
14 assertion of the privilege.

15 QUESTION: But he had asked for counsel?

16 MS. HARRITT: No, Your Honor. He had asked that the
17 interview be postponed until the arrival of the defense
18 investigator.

19 QUESTION: But I thought the Vermont Court found that
20 that was a request for counsel.

21 MS. HARRITT: It would appear that they did, Your
22 Honor, but we submit that that was an erroneous determination.
23 Certainly, this Court has --

24 QUESTION: We don't have that question before us
25 here, do we?

1 MS. HARRITT: Well, --

2 QUESTION: I thought we just had to assume that was
3 correct.

4 MS. HARRITT: The Respondent has filed or asked this
5 Court to enlarge the scope of the examination by raising the
6 Sixth Amendment claim. So, that question may be before you,
7 Your Honor.

8 QUESTION: Have they responded to that?

9 MS. HARRITT: Yes. In his brief, he has asserted his
10 Sixth Amendment claim.

11 QUESTION: I thought we didn't have his brief.

12 MS. HARRITT: His cause here --

13 QUESTION: Has the Respondent himself, the now-
14 missing Defendant, --

15 MS. HARRITT: No. The now-missing Defendant did not
16 file a brief with this Court.

17 Moving to the incrimination aspect of the privilege
18 against self-incrimination, we would ask this Court to consider
19 our argument under the heading of Enhancement.

20 We submit that even if the Court found both
21 compulsion and excuse the failure to assert the privilege that
22 the Respondent suffered no incrimination. By incrimination, the
23 state means an enhanced penalty. The privilege is violated
24 when a witness is compelled or a respondent to testify against
25 himself and the result is exposure to a penalty or to some

1 criminal responsibility. .

2 Here, by pleading nolo contendere, Respondent faced
3 particular terms of imprisonment and/or fines, and when he
4 entered his pleas, he would be sentenced in the Court's
5 discretion at the sentencing hearing. His exposure remained
6 the same whether or not he participated at the pre-sentence
7 investigation interview.

8 In the absence of some enhanced penalty, we submit
9 that unlike the situation in Estelle v. Smith, it was wrong for
10 the Court to conclude that the Respondent's sentence had been
11 enhanced where the Government had no burden of proof and where
12 there is no additional element that had to be required prior to
13 the imposition of sentence.

14 If there are no further questions at this point, I
15 wish to save the remainder of my time for rebuttal.

16 CHIEF JUSTICE REHNQUIST: Very well, Ms. Harritt.

17 We will hear now from you, Mr. Larkin.

18 MS. HARRITT: Thank you.

19 ORAL ARGUMENT OF PAUL J. LARKIN, JR., ESQ.

20 AS AMICUS CURIAE SUPPORTING PETITIONER

21 MR. LARKIN: Thank you, Mr. Chief Justice, and may it
22 please the Court:

23 I would like to start, first, by addressing a point
24 Justice Blackmun raising.

25 It's true, Your Honor, that a person in prison is in

1 a different situation than a person who is at liberty and then
2 taken into police custody.

3 QUESTION: I am glad to hear you admit it.

4 MR. LARKIN: There is no question the restraints a
5 person suffers in prison or in jail are quite real and quite
6 tangible, but the fact that he is literally in custody in that
7 sense, we do not believe requires that the Court automatically
8 hold he's also in custody for Miranda purposes.

9 When a person in the words that Miranda used is
10 "swept from a friendly environment" into a hostile environment,
11 dominated by police, he is in a position which there is a risk,
12 Miranda believes, a great risk, Miranda believes, that he will
13 be subject to trickery or intimidation or other types of ploys
14 that would work on his free will.

15 QUESTION: So, if he's already there to begin with,
16 the situation is different?

17 MR. LARKIN: It's not necessarily the same. There are
18 circumstances, of course, and we freely recognize it, in which
19 a person in prison would also be in -- yes, we would not say
20 that the decision in the Mathis case automatically mandates
21 Miranda rulings, excuse me, Miranda requirements for every
22 prisoner before he is questioned in custody.

23 QUESTION: You are going to tell us what the
24 difference is here?

25 MR. LARKIN: The difference, we believe, is this:

1 the restraints that a person has on him in custody imposed the
2 background environment in which he must live, but those
3 restraints are not of the type that would necessarily in every
4 case lead a person to believe that he had no alternative but to
5 confess when he is confronted with someone who is asking him
6 questions.

7 That is the situation that Miranda faced and that is
8 the situation to which Miranda addressed its warnings. A
9 person who is questioned about an unsolved crime in the
10 basement of a police station house not only has a restriction
11 on his freedom of movement, but he also has a dislocation that
12 accompanies the change in the environment from which he was
13 into the one he is in now, and there is also the insinuation by
14 the inquisitor that the questioning will not cease until a
15 confession is obtained.

16 Those factors are not necessarily present in every
17 type of prison questioning. For example, here, the only course
18 or factor that the Vermont Supreme Court pointed to was the
19 fact that Respondent may forfeit the opportunity to engage in
20 the interview with the probation officer. That factor tends to
21 indicate that the Vermont Supreme Court and Respondent saw the
22 interview not as a burden but as an opportunity. Not as a
23 burden in which he had to fend off police efforts to try to get
24 him to incriminate himself, but an opportunity to persuade the
25 probation officer to write a favorable report.

1 In addition, as the Court recognized in Minnesota v.
2 Murphy, one of the risks associated with questioning a person
3 in custody is that the questioning may lead the person to
4 believe that he has no free will to decide not to answer a
5 question, that it will go interminably. That wasn't the
6 situation here.

7 From the record and from the opinion below, the
8 probation officer gave the Respondent the opportunity to decide
9 whether to go forward with the interview at the appointed time
10 in the absence of legal representation or to forego the
11 interview at all.

12 Now, that may be a difficult choice for someone in
13 Respondent's position to make.

14 QUESTION: Kind of an unnecessary choice, too, isn't
15 it?

16 MR. LARKIN: Not necessarily, Your Honor. We don't
17 know the reason why.

18 QUESTION: Well, who has the burden of demonstrating
19 the reason? Maybe she had an appointment to fix her hair or
20 something.

21 MR. LARKIN: We would believe that since Miranda
22 establishes an exception from the general rule that all
23 relevant evidence is admissible, the burden of showing that
24 Miranda is applicable should be on the person invoking that
25 exception. In other words, the Defendant would normally, we

1 believe, have the burden of establishing that he was in custody.
2 and, in this case, the only factor that Vermont pointed to to
3 show that he was in custody was he might forfeit this
4 opportunity.

5 That doesn't seem to us to be comparable to the type
6 of questioning that Miranda was addressing. Respondent, -- an
7 amicus in support of Respondent, rather, have pointed to the
8 fact that the questioning was performed by someone who is
9 outside the normal prison environment. It wasn't a guard. It
10 wasn't a therapist. It was a probation officer.

11 But that fact also does not necessarily amount to the
12 type of compulsion that Miranda was designed to deal with. It
13 is true, he had a difficult choice to make, but the fact that
14 he had a difficult choice to make --

15 QUESTION: Mr. Larkin, would you defend a rule that
16 said that we will have these interviews for a person's pre-
17 sentence report without counsel only and if the defendant wants
18 counsel, he can't have the interview? Would that be a
19 permissible rule? Just as a general state policy. The only
20 way they will have them is without counsel, it's up to the
21 defendant to decide whether to take advantage of it or not.

22 MR. LARKIN: Well, it's not a rule that would arise
23 in the Federal system because --

24 QUESTION: I understand.

25 MR. LARKIN: -- the probation office does object to

1 it.

2 QUESTION: That's, in effect, what happened here
3 because he had asked for a lawyer and she said -- you
4 acknowledge it's the equivalent of asking for a lawyer, I
5 think.

6 MR. LARKIN: Yes. We have taken the position and the
7 state disagrees.

8 QUESTION: And that is considered irrelevant as a
9 matter of law?

10 MR. LARKIN: We don't think forcing him to that
11 choice, even if that was that type of rule, would violate his
12 Sixth Amendment right. If there was a violation, what it would
13 amount to is a violation of perhaps his right whether to go
14 forward with allocution or something along those lines.

15 QUESTION: If there is no constitutional right to a
16 lawyer at an interview of this kind, basically?

17 MR. LARKIN: No. He would have a constitutional right
18 to have his lawyer present if he wanted, but it's not unlawful
19 to force him to make this type of choice. If he wants to have
20 the attorney present and --

21 QUESTION: You say he would have a constitutional
22 right to have a lawyer present?

23 MR. LARKIN: We believe that this would be a critical
24 stage of the proceedings. The state disagrees with that. If he
25 wants to have an attorney present in the Federal system, the

1 probation office doesn't object.

2 QUESTION: Yes. Right.

3 MR. LARKIN: But it is not unlawful, we think, to put
4 him to a choice like this. This isn't the type of attempt to
5 circumvent his right to counsel that the Court has had in the
6 other types of right-to-counsel cases, like Massiah or like
7 Henry or like Moulton.

8 There was an attempt to avoid --

9 QUESTION: You either go ahead without the lawyer or
10 you don't have it. Why isn't that circumventing the right to
11 have a lawyer present?

12 MR. LARKIN: Because they were open and up front and
13 put all their cards on the table. They didn't -- for whatever
14 reason, the probation officer said, according to what we know,
15 that we will have the interview now or if you want your lawyer
16 present, we'll have to forego it. That doesn't mean he didn't
17 have an opportunity to speak to the Judge. He had a right of
18 allocution. It doesn't mean he didn't have an opportunity to
19 speak to the probation officer because we know from the --

20 QUESTION: He did not have the opportunity to have a
21 pre-sentence interview with the lawyer present.

22 MR. LARKIN: At that time. Even if there were an
23 absolute rule --

24 QUESTION: Or at any other time because she said it's
25 either now or never.

1 MR. LARKIN: Even if they had adopted that rule, we
2 would say that it would not violate his Sixth Amendment right.
3 Of course, there's some reason to doubt that that was actually
4 the rule because actually what happened here, because at page
5 14 of the --

6 QUESTION: That's this case. That's this case. You
7 can either forego the interview or -- you can either forego a
8 lawyer or the interview, can't have both.

9 MR. LARKIN: On those facts, we would say it would
10 not violate his Sixth Amendment right to counsel. If it
11 violated anything, it would be a right to present evidence at
12 sentencing. So, it may be a different circumstance in the type
13 of situation we had here where he's being interviewed outside
14 of the actual allocution stage and when he would be in court,
15 if the judge said you can talk now or wait till your lawyer
16 shows up.

17 QUESTION: But I thought you said you agreed this was
18 a critical stage of the prosecution?

19 MR. LARKIN: Yes. We would say that he would have a
20 right, if he demanded to have his lawyer there, not to be
21 questioned in the absence of the lawyer, but they didn't
22 question him --

23 QUESTION: But you're defending the state's right to
24 say we can force you to go through the critical stage of the
25 prosecution. If you want to have the benefit of a critical

1 stage of the prosecution, you must have it without a lawyer
2 present. That's what you're saying.

3 QUESTION: This isn't a required interview.

4 MR. LARKIN: That's right. I mean, he could have
5 foregone the interview entirely, and if he wanted the lawyer
6 present, he could demand it, but it does not, we think, violate
7 the Sixth Amendment to offer him the opportunity to go forward
8 in the absence of his lawyer, which is essentially what
9 happened here.

10 Now, the Sixth Amendment issue is not one that was
11 addressed --

12 QUESTION: To require somebody to do something in the
13 judicial process without a lawyer does not touch the Sixth
14 Amendment?

15 MR. LARKIN: No, we didn't say that. He wasn't
16 required. He wasn't required to go forward with the interview.
17 He was given the option. He was given the option of using that
18 time to help persuade the probation officer that he deserved
19 probation or some other lighter sentence or to abandon that
20 opportunity at that time and talk to the probation officer.

21 I mean, there is evidence in the record, for example,
22 at page 14 where it indicates that the probation officer called
23 the Defendant later to verify an allegation that was made by
24 someone else that would go into the pre-sentence report, the
25 allegation being that the Respondent was a member of a gang.

1 So, it doesn't necessarily seem that this was a now
2 or never situation even with the probation officer.

3 QUESTION: Supposing it was a trial, he wanted to put
4 on his defense, he says my lawyer isn't here yet, the judge
5 said you either put on your defense by yourself or you can't
6 put on a defense, would that be a fair choice for a critical
7 stage?

8 MR. LARKIN: No. The trial is --

9 QUESTION: That's an even more critical stage.
10 That's the point.

11 MR. LARKIN: It is quite a different stage entirely.

12 QUESTION: The difference there, I take it, is that
13 you would say you have to give the man a trial. You don't have
14 to give him this opportunity. If you give it to him, it's
15 critical, but there's nothing in the law that requires you to
16 give him this allocution.

17 MR. LARKIN: There is nothing that requires a pre-
18 sentence report be conducted. There's nothing that requires
19 that an interview with the Respondent be part of the pre-
20 sentence investigation.

21 QUESTION: So, the failure or the refusal to go ahead
22 without a lawyer, you say, if it violates anything, doesn't
23 violate the Sixth Amendment but some right to having that
24 interview --

25 MR. LARKIN: That's right.

1 QUESTION: -- just as in the trial case just given,
2 if there were any violations, what you would have been deprived
3 of was not your right to a lawyer but your right to the trial.

4 MR. LARKIN: That's right.

5 QUESTION: This is a Fifth Amendment case.

6 MR. LARKIN: It is primarily a Fifth Amendment case,
7 and that's the only issue that was addressed below.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Larkin.

9 We will hear now from you, Mr. Hinton.

10 ORAL ARGUMENT BY HENRY HINTON, ESQ.

11 AS AMICUS CURIAE, BY INVITATION OF THE COURT

12 SUPPORTING JUDGMENT BELOW

13 MR. HINTON: Thank you, Mr. Chief Justice, and may it
14 please the Court:

15 The decision of the Vermont Supreme Court in this
16 case is correct on at least two separate grounds.

17 First, the Court's finding of a Fifth Amendment
18 violation, that is, improper compulsion to give up the right to
19 remain silent, correctly decides that Mr. Cox was required by
20 the probation officer unnecessarily to give up a right
21 recognized by the Vermont Supreme Court that he had to make the
22 important decision about participating in the pre-sentence
23 investigation interview, whether to participate, whether to not
24 participate, or to what extent to participate, only after
25 consultation with counsel.

1 Because Mr. Cox was told by the probation officer
2 that he could not make a counsel but only an uncounseled
3 decision about participation in the interview, a choice which
4 wasn't even a correct statement, much less a legitimate
5 statement of his options under state law, his disclosure --

6 QUESTION: Wasn't a correct statement of his options
7 under state law -- why didn't the Supreme Court of Vermont go
8 on that ground rather than raising a federal constitutional
9 question?

10 MR. HINTON: I think they felt that depriving, Mr.
11 Chief Justice, depriving him of a state law benefit, if it be
12 only a state law benefit to have the right to counsel before
13 being required to participate in the pre-sentence investigation
14 interview, was a valuable state benefit, and as this Court has
15 held in its Fifth Amendment penalty cases, when you seek to
16 retain a valuable, albeit state-created benefit, and the
17 Government says you're going to lose that benefit, if you claim
18 the Fifth Amendment, then the Court has found that that is
19 compulsion. It makes a choice in the face of that choice to
20 speak involuntary.

21 QUESTION: I hadn't read the Supreme Court of Vermont
22 opinion quite that way.

23 MR. HINTON: Well, I think that is at least a
24 permissible reading. I do argue that there is a Sixth
25 Amendment violation directly here as an alternative affirming

1 ground.

2 QUESTION: Well, I guess the Court below didn't
3 address that at all, did it?

4 MR. HINTON: The Sixth Amendment? No, no, Your
5 Honor, the Court didn't decide the case on any basis, any
6 federal basis, other than the Fifth Amendment.

7 The fact that the State of Vermont uses the pre-
8 sentence investigation process at all, I think we can concede,
9 is a decision that they would have to undertake as a matter of
10 federal constitutional law or possibly as a matter of federal
11 constitutional law, they wouldn't have to say that in order to
12 be given a valid opportunity, you have to be able to give the
13 counsel an opportunity to participate in the process.

14 But even if these rights are only guaranteed by state
15 law, that doesn't lessen the impropriety of conditioning the
16 right, the federal right to remain silent on giving up these
17 state benefits.

18 In the Court's other cases, holding that states may
19 not condition exercise of Fifth Amendment rights on forfeiture
20 of a benefit, the benefit is typically state-created, the right
21 to employment as a police man or sanitation worker, the right
22 to bid on and to get government contracts, or the right to hold
23 political office.

24 The Solicitor General and the State of Vermont seem
25 to argue that this right isn't very important, that it's

1 minimized as a right that isn't important or isn't that
2 important, so that to lose that right amounts to compulsion to
3 speak. Well, the ABA Standards in the Vermont Court's own
4 decision, I think, as well as its rules and its practice
5 indicate that most people think that for a defendant who has
6 been convicted, there is nothing more important than a pre-
7 sentence investigation report and possibly there is nothing
8 more important about that report than what the defendant does
9 in response to his opportunity to offer a statement or decline
10 a statement to that report.

11 QUESTION: Well, all he was coerced into doing was
12 attending the pre-sentence interview, right? He wasn't coerced
13 into saying anything that would be against his penal interests,
14 was he? He could have attended the interview and only said
15 nice things about himself, couldn't he?

16 MR. HINTON: That's correct.

17 QUESTION: Was there any coercion to provide any
18 incriminating statements about himself?

19 MR. HINTON: There was coercion for him to seize the
20 opportunity to make a statement, I maintain, and the only
21 opportunity offered him because he was told by the probation
22 officer that he would never have another chance, he made, we
23 contend, an ill-advised decision without counsel to offer
24 material that counsel well and probably should have advised him
25 not to give.

1 QUESTION: Well, that relates to the counsel
2 violation, which is a different one. I mean, I understand that
3 had counsel been present, he might not have answered some
4 questions the way he did answer them. But, still and all, he
5 was not -- there was no coercion for him to make any
6 incriminating statements. There was only coercion for him to go
7 to the pre-sentence interview.

8 Isn't that an accurate statement?

9 MR. HINTON: I think that being told that you would
10 never have another chance, incorrectly told that he would never
11 have another chance because the Vermont Court said, in fact,
12 that wasn't an appropriate choice to put him to, was coercive
13 in that --

14 QUESTION: Coercive of what? Coercive of his going
15 to the interview?

16 MR. HINTON: And, also, when there, Your Honor, I
17 think --

18 QUESTION: But he could have gone to the interview
19 and said, you know, just nice good things. Was there any
20 coercion for him to make an incriminating statement or to
21 provide evidence against himself?

22 MR. HINTON: The coercion was the loss of the
23 opportunity to make a decision whether to offer any sort of
24 material with counsel. He would have, in any scenario, had to
25 make a decision at some point whether to participate or not.

1 We're not arguing as the State and Solicitor General suggests
2 against the necessity of having to make a choice.

3 What we're arguing against is the necessity to have
4 to make an uncounseled choice and that inappropriate pressure
5 put on him by the requirement of that choice, we contend,
6 contributed to his decision to speak ill-advisedly.

7 QUESTION: Mr. Hinton, as a matter of practice in
8 these Vermont pre-sentence investigations, I take it would you
9 say ordinarily a defendant does attend with counsel?

10 MR. HINTON: My understanding is that there's no rule
11 in Vermont that says that you can or cannot. My knowledge of
12 the situation is that sometimes counsel does attend, sometimes
13 counsel confers with the individual and decides to let the
14 defendant go on his own.

15 QUESTION: From what you know, is it customary for a
16 lawyer to sit there and then the probation officer to ask
17 questions and the lawyer to advise the defendant not to answer
18 on the grounds it might incriminate him?

19 MR. HINTON: I am not aware if that is commonly done
20 or usually done.

21 QUESTION: It strikes me that whatever the abstract
22 constitutional right of the situation may be, this is not a
23 very good way for a defendant to get a favorable pre-sentence
24 report.

25 MR. HINTON: As a matter of fact, I think, Mr. Chief

1 Justice, you might be correct. I think that it might be decided
2 and maybe in many cases would be decided that the best way to
3 prepare for this is to confer maybe beforehand and then, in
4 part, to suggest to the probation officer that the defendant
5 isn't trying to somehow shield himself with counsel to have a
6 defendant go on his own.

7 In this case, the Vermont Supreme Court found that
8 although I don't see a problem in the usual case in having
9 counsel present during the interview and the Vermont Supreme
10 court didn't seem to think it was a problem, in this case, what
11 defense counsel asked for or said we were seeking to do and it
12 was short-circuited was the right to confer.

13 Mr. Cox said he didn't want to talk to the probation
14 officer until the investigator for the defense counsel's office
15 arrived. It wasn't clear that he necessarily wanted that
16 person to participate and be with him throughout or only to
17 give him some information beforehand about what --

18 QUESTION: And this is the equivalent of counsel in
19 the views of the Vermont Supreme Court, an investigator from
20 the defense counsel's office?

21 MR. HINTON: For the purposes of Fifth Amendment
22 argument, I think that they certainly feel like and have
23 decided that the investigator at least should have a right to
24 investigate. They don't view that as being anything less
25 important in this case than counsel.

1 For the purposes of looking at it as a federal
2 question, whether a request for an investigator is a request
3 for counsel, I've argued that primarily in contrast to a few
4 other cases, the Fare case and a 7th Circuit case, Franzen,
5 that just as in those cases, asking for probation officer
6 shouldn't be something that automatically equates to seeking to
7 remain silent or seeking an attorney; asking for defense
8 investigator should be treated that way.

9 QUESTION: We've never held that, have we?

10 MR. HINTON: No, Your Honor, you've never held that.
11 I essentially would maintain that unlike Fare and Franzen,
12 where the probation officer clearly is not, as this Court has
13 held in Minnesota v. Murphy, is not only a friend, but also
14 maybe a person with adverse interests to the defendant, a
15 defense investigator under Vermont law has -- is, under the
16 rules of Vermont evidence, considered a representative of the
17 attorney and comes within Evidence Rule 502 as a person who has
18 privileged communications.

19 Also, as Vermont public defense system uses defense
20 investigators, they're paralegals. They're trained in advising.

21 QUESTION: Why do you need a lawyer? It's not sworn
22 testimony. You use hearsay. You use toilet paper written on.
23 You use anything. Am I right?

24 MR. HINTON: I think that's correct, that the rules
25 of evidence don't apply at sentencing.

1 QUESTION: Don't apply to the probation report. The
2 probation officer goes around and talks to the bartender.

3 MR. HINTON: The probation -- well, --

4 QUESTION: He talks to anybody. He doesn't need a
5 lawyer.

6 MR. HINTON: The probation officer -- we're not
7 asserting the right, Justice Marshall, to have the probation
8 officer accompanied by a defense investigator or a lawyer in
9 all of his or her investigative efforts.

10 QUESTION: Well, why do you need it with your client?

11 MR. HINTON: The reason is that's a confrontation
12 between the accused and an agent of the state in which, as
13 happened in this case, the accused can, through inadvertence or
14 lack of knowledge, incriminate himself.

15 QUESTION: And can also get himself a low sentence.

16 MR. HINTON: That's right. Client stands to possibly
17 benefit or possibly disadvantage him or herself in that
18 context. In this particular case, Mr. Cox obviously
19 disadvantaged himself in that context.

20 QUESTION: Well, merely incriminating himself isn't
21 enough to make a Fifth Amendment case. You've got to have some
22 compulsion.

23 MR. HINTON: That's correct.

24 QUESTION: And in the usual arrest and interrogation
25 situation, where counsel isn't present, the impression the

1 officers give is that we're going to keep you here till you
2 answer, and that's what triggered the right to have counsel
3 present.

4 But, here, it's just the opposite. If you don't want
5 to stay here, take off.

6 MR. HINTON: That's correct, Your Honor, and I don't
7 maintain that you have to presume as in the Miranda context in
8 this case compulsion. I maintain that there was, in fact,
9 compulsion here based on the probation officer's choice put to
10 Mr. Cox that he would lose the chance to make an informed
11 decision, which the Vermont Court said he had the right to,
12 without participation or declining to participate.

13 QUESTION: Well, he could make his choice, which is
14 worse for him, being quiet or speaking, and that's the kind of
15 choice that people have to make at trial all the time.

16 MR. HINTON: That is the kind of choice people have
17 to make at trial. I think the McGautha v. California decision
18 indicates that there's a lot of hard choices.

19 All we're asking for in this case or all we're
20 complaining about isn't the necessity to make a choice, but the
21 necessity to make a choice without advice.

22 QUESTION: Well, it seems to me that's just your
23 Sixth Amendment claim, not the Fifth Amendment claim. That the
24 Fifth Amendment claim, I find hard to see what the coercion is,
25 but I understand what you're arguing about is the -- being

1 forced to make the decision without advice of counsel about
2 whether to speak or not, whether to participate or not, and
3 that would be a Sixth Amendment claim, right?

4 MR. HINTON: That's correct, but the way the counsel
5 issue, Justice O'Connor, fits into the Fifth Amendment argument
6 is that even if you assume that there is no Sixth Amendment
7 right to counsel conferred by the federal Constitution, which
8 we maintain there certainly should be a critical stage like a
9 PSI interview, but even if you assume there's not, there's a
10 Vermont law right to confer with counsel which the probation
11 officer in this case did not respect, and because the probation
12 officer offered an alternative or a set of alternatives to Mr.
13 Cox that the law of Vermont doesn't even find to be
14 permissible, he made an unfree, if you will, or a coerced
15 choice when he went ahead and spoke.

16 QUESTION: Well, the Vermont Supreme Court, though,
17 went to the Fifth Amendment. Why didn't they just set the
18 sentence aside as violation of Vermont law?

19 MR. HINTON: Well, I asked them to, Your Honor. In a
20 way, I wish they would have.

21 QUESTION: You argued the case in the Vermont court

22 MR. HINTON: In the Supreme Court of Vermont, but not
23 in the trial court.

24 QUESTION: Well, was your office, what is it, the --

25 MR. HINTON: The Defender General's office?

1 QUESTION: Yes. Was that in at the trial stage?

2 MR. HINTON: The public defender in Burlington, the
3 public defender office, represented Mr. Cox at trial and then
4 at the --

5 QUESTION: Did it represent him at the time of this
6 interview with the probation officer?

7 MR. HINTON: That's correct. They were counsel for
8 him at that time.

9 QUESTION: But we don't know whether or not they
10 advised him to act as he did when he submitted --

11 MR. HINTON: From the record, we only know that since
12 counsel claimed that she didn't get an adequate opportunity to
13 advise Mr. Cox and unlike what counsel for the State of Vermont
14 represented, we can't assume from this record that there was
15 some period of time after the guilty pleas or the nolo pleas or
16 some reasonable period of time before she showed up for the
17 interview. We don't know that.

18 We don't know but what that --

19 QUESTION: Tell me, you were not amicus in the
20 Vermont Supreme Court, were you?

21 MR. HINTON: I am only amicus in this Court, Your
22 Honor. No. I'm amicus for my own client, essentially here,
23 because I'm not able to find the man and was unable to have him
24 sign an informal pauper's affidavit and --

25 QUESTION: And you can't find him because he served

1 his sentence and he beat it?

2 MR. HINTON: He's gone from Vermont. I don't know
3 where he is. I had the same investigator try to find him.

4 QUESTION: Would it be good sense for him to come
5 back to Vermont after he served his sentence?

6 MR. HINTON: I think not. I think the possibilities
7 suggested by the state that he could get a deferred sentence is
8 so unlikely that he would be, I think, foolish to come back.

9 QUESTION: If he calls you up and says can I come
10 back, I take it you would tell him, if you can make a living
11 somewhere else, please do?

12 MR. HINTON: I think that's probably what both I
13 would tell him and probably the prosecuting authorities would
14 be happy with.

15 QUESTION: Then, why did you press his case in the
16 Supreme Court of Vermont once he had served his sentence? I
17 gather he had served his sentence before that case was argued.

18 MR. HINTON: I can't recall exactly, Justice Scalia,
19 the chronology. At the time I argued the case, I think some
20 time in 1985, he was still in custody. It was quite a period
21 of time, and I would have to look back to reconstruct it. It
22 was quite a number of months between the time it was argued and
23 the time it was decided.

24 In that interim, I really didn't keep in touch with
25 Mr. Cox. I tried to get back in touch with him when the

1 decision came down, and I couldn't find him.

2 QUESTION: If he comes back and commits another
3 crime, he's going to get another sentence, right?

4 MR. HINTON: Well, he's going to get sentenced --

5 QUESTION: I don't think there's any possibility of
6 him coming back.

7 MR. HINTON: I think he'd be foolish to come back. I
8 agree with you, Justice Marshall. I think that the possibility
9 of him having the benefit of a deferred sentence is not
10 realistic, number one. That's a procedure where you're
11 essentially on probation and then if it's completed
12 successfully, you have your conviction expunged. It can only
13 be offered with the consent of the prosecutor and it's rarely
14 offered to someone like Mr. Cox who independent of these cases
15 that we're here on had a substantial criminal record. It's
16 usually offered to first offenders.

17 So, I don't think he's under any inducement really to
18 come back.

19 QUESTION: If he does come back, though, the state
20 is, on this decision of the Vermont Supreme Court, bound to
21 give him another sentencing hearing?

22 MR. HINTON: I think if he presses --

23 QUESTION: So, it's entirely up to him. It's
24 conceivable that he could commit another crime in Vermont, be
25 prosecuted under a repeat offender law, at which point it would

1 be very much in his interests to get his first conviction
2 expunged.

3 MR. HINTON: Yes, it would be in his interests, but I
4 think the likelihood of getting a deferred sentence, because
5 he's got a prior record of criminal offenses that existed in
6 other states way before these three simple assaults.

7 QUESTION: Mr. Hinton, let me ask you a variation of
8 these questions. Supposing he were to call you up and say I've
9 got lots of money now, so I don't have to have public counsel,
10 how much would it be worth to me to hire a lawyer to defend
11 this judgment, what would you tell him? Nickel, dime, quarter.
12 How much interest does he have in the outcome of this case?

13 MR. HINTON: Very little.

14 QUESTION: He doesn't have any, does he? There's no
15 way in the world he'd go back in and say I want to get re-
16 sentenced, is there?

17 MR. HINTON: I can't imagine, unless it was something
18 that if he like negotiated from afar so that he didn't subject
19 himself to anything unless and until it was all worked out and
20 he came to the Vermont --

21 QUESTION: He certainly would not pay a lawyer a
22 usual and customary rate to argue this case for him, would he?

23 MR. HINTON: I don't think so, Your Honor.

24 The reason why I think independent of the Fifth
25 Amendment argument, which I think I've presented on the

1 assumption that there is no necessary federal right to counsel
2 at this stage, is that there's a state right to counsel and
3 that was burdened by the choices offered.

4 But I also think independent of that, this Court
5 should decide that where there's a guilty pleading or nolo
6 pleading defendant or in any case where there's a conviction
7 and there's no sentence that for the pre-sentence investigation
8 process should be subject to the Sixth Amendment only in this
9 respect, and that is in the respect that when the defendant is
10 interviewed, that defendant, just like in post-indictment line-
11 up, he's confronted with agents of the state who can do things,
12 just like in a post-indictment interrogation, he's confronted
13 with agents of the state in which he needs to make those fine
14 distinctions about what may or may not incriminate him, in the
15 same way that what happens at a line-up or what happens at a
16 post-indictment and pre-trial interrogation can seal the fate
17 of the defendant making the trial a formality, the sentencing
18 hearing in the same way can become a walk-through, if the
19 defendant has essentially operated without counsel during his
20 interview with the probation officer.

21 I think the Court could very well find and given the
22 analogy, I think, to the other processes by which the Court has
23 determined that critical confrontations outside of court
24 between a defendant and the government are -- those kinds of
25 things which Sixth Amendment protects, was designed to protect,

1 I think the Court can support the decision of the Vermont
2 Supreme Court strictly on the basis of the Sixth Amendment.

3 QUESTION: Again, as matter of practice, is it
4 common in a situation like this for a defendant not to
5 participate in the interview with the probation officer?

6 MR. HINTON: If the defendant has got a very terrible
7 record and is very unlikely to do anything more than make it
8 worse, I think non-participation would be what would be called
9 for.

10 QUESTION: And that's the advice that the public
11 defender of Chittenden County would give to somebody like that,
12 I take it? So, it's a fairly recognized practice in Vermont
13 criminal jurisprudence that a certain number of defendants are
14 not going to participate in these interviews.

15 Is that what you're saying?

16 MR. HINTON: Some -- I think that's true. I'm not
17 sure what the percentages are. I think some maybe will refuse
18 to participate even if they're advised to participate, but --

19 QUESTION: Do you think that there's still -- do you
20 think we have jurisdiction to decide this case? Do you think
21 there's still a case for controversy between you and the state?
22 Is the case moot?

23 MR. HINTON: As a practical matter, I don't think
24 there is.

25 QUESTION: As a technical matter, is this moot or

1 not?

2 MR. HINTON: As a technical, theoretical matter, it
3 might be.

4 QUESTION: If we just dismiss it as moot, then the
5 order on the state still stands. Re-sentence him. It may be
6 that they still have to contend with that order.

7 MR. HINTON: Well, they have the order outstanding.

8 QUESTION: I know, but you don't think it means very
9 much as a practical matter.

10 MR. HINTON: I don't think they have -- they don't
11 have to do anything other than worry about it if he comes back.

12 QUESTION: Well, worry about it now. They've got an
13 order. So, you don't think -- technically, is it moot or not?

14 MR. HINTON: I think that only in the most technical
15 way is it not moot.

16 QUESTION: Well, mootness is technical in itself.

17 QUESTION: But is it correct that if he doesn't come
18 back, the state doesn't have to do anything? They won't be in
19 contempt of any order.

20 MR. HINTON: They don't have to grant him a re-
21 sentencing unless he seeks it and --

22 QUESTION: Would you object to if the state said --
23 went back and asked to be relieved from that order?

24 MR. HINTON: On the grounds of mootness?

25 QUESTION: Well, just on the ground that you say

1 there's nothing to the case. Why do you care whether the order
2 is outstanding or not?

3 MR. HINTON: I only care if he comes back.

4 QUESTION: I guess you care enough then.

5 MR. HINTON: Well, perhaps --

6 QUESTION: But you told me that if he came back, he
7 wouldn't ask for anything anyway. He'd be foolish to ask for
8 anything under the order. If he asked for your advice, you'd
9 tell him to stay home, wouldn't you?

10 MR. HINTON: Right.

11 QUESTION: But, then, he wouldn't ask for anything,
12 but if he came back, the police would -- the state would pick
13 him up, pick him up and re-sentence him pursuant to this order.

14 MR. HINTON: I don't know if they would force a re-
15 sentencing on him if he didn't ask for it. I really doubt that
16 that would be the case.

17 QUESTION: The only thing we have is the man is gone.

18 QUESTION: And has served his sentence.

19 QUESTION: And has served his sentence. I don't know
20 what we're all talking about.

21 MR. HINTON: Well, it wouldn't bother me if you all
22 were to find this was a moot case, Your Honor.

23 QUESTION: I know. I don't blame you.

24 MR. HINTON: Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hinton.

1 Ms. Harritt, you have two minutes remaining.

2 ORAL ARGUMENT BY SUSAN R. HARRITT, ESQ.

3 ON BEHALF OF PETITIONER - REBUTTAL

4 MS. HARRITT: Thank you, Your Honor.

5 I want to leave the Court with this impression, which
6 is that it certainly wasn't a coercive situation.

7 We have an individual who had had the opportunity to
8 consult with counsel. It's clear that he made a decision. He
9 thought that he could score some points and possibly persuade
10 the probation officer that he had a particular personality or
11 mitigating circumstances that he thought should be conveyed in
12 the pre-sentence investigation report.

13 This Court should not prohibit him from exercising
14 his own judgment. Rightly or wrongly, we don't think he scored
15 any points, but he thought that he did and he should not be
16 precluded from having that opportunity to make that judgment
17 and present what he thought was in his best interests.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Harritt.

20 The case is submitted.

21 THE MARSHALL: The Honorable Court is now adjourned
22 until tomorrow at 10:00.

23 (Whereupon, at 2:40 o'clock p.m., the case in the
24 above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1108
CASE TITLE: Vermont v. Rick Cox
HEARING DATE: November 3, 1987
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the
Supreme Court of the United States,
and that this is a true and accurate transcript of the case.

Date: November 3, 1987

M. B. White

Official Reporter

HERITAGE REPORTING CORPORATION
1220 L Street, N.W.
Washington, D.C. 20005

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'87 NOV 10 P3:46