ORIGINAL

In the

Supreme Court of the United States

MASSACHUSETTS,

PETITIONER,

V.

JOSEPH MEEHAN,

RESPONDENT.

No. 78-1874

Washington, D. C.
January 9, 1980

Pages 1 thru 56

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IN THE SUPREME COURT OF THE UNITED STATES

MASSACHUSETTS, Petitioner,	:	
v.	:	No. 78-1874
JOSEPH MEEHAN, Respondent.	:	

Washington, D. C.,

Wednesday, January 9, 1980.

The above-entitled matter came on for oral argument at 11:50 o'clock a.m.

BEFORE:

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

APPEARANCES:

BARBARA A. H. SMITH, ESQ., Assistant Attorney General of Massachusetts, One Ashburton Place, Boston, Massachusetts 02108; on behalf of the Petitioner

DAVID A. MILLS, ESQ., Mills & Teague, 75 Federal Street, Boston, Massachusetts 02110; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1874, Massachusetts v. Meehan.

I think you may proceed whenever you are ready, Miss Smith.

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

ON BEHALF OF THE PETITIONER

MISS SMITH: Mr. Chief Justice, and may it please the Court: I am Barbara A. H. Smith. I am Assistant Attorney General for the Commonwealth of Massachusetts, and I represent the commonwealth seeking review of an order of the Supreme Judicial Court of Massachusetts which required --

MR. CHIEF JUSTICE BURGER: I'm not sure that the amplifying system is working here, Miss Smith. If you will just desist for a moment.

Are we functioning now? Very well, you may proceed.

MISS SMITH: The commonwealth seeks review of an order of the Supreme Judicial Court requiring suppression of a confession of certain real evidence which was obtained pursuant to a search warrant based upon that confession and a subsequent and culpatory statement by the defendant to his mother. The basic issue is whether the Fifth Amendment requires such suppression.

I shall limit discussion of the facts to those surrounding the confession since the legality of the arrest

is not at issue.

The body of the victim was discovered in the early morning hours of June 11, 1976. After being informed by neighbors that they had heard a scream and seen a young man, approximately five-foot-ten, wearing dungarees and with his shirtsleeves rolled up, leaving the scene, the police conducted general inquiries as to young men who were known to frequent that particular area. These inquiries took place at the police station.

One young man said that he knew the victim and that he had seen her sitting on some church steps with a young man in his teens, with dark hair, who was at that time shirtless. Another young man came to the station, one John Carroll, who told the police that he knew the victim and that he had seen her on those church steps with Joseph Meehan. As he was telling the police this, he looked out the window and saw Joseph Meehan hitch-hiking on the street outside. He told the police this, they immediately exited the station, went to Mr. Meehan, told him of their general investigations and asked him to accompany them to the police station.

He agreed after first noting that he was on his way to the unemployment office either to pick up his check or to appeal the denial of benefits. He accompanied the police to the station and a Detective Solari began asking him general questions when he noticed what appeared to him

was blood on the defendant's sneakers. He mentioned this to the defendant who stated, no, it was mud, but that if it were blood in any event he had gotten the blood in a fight with one George Quish the previous Tuesday.

The detective asked Mr. Meehan for the sneaker and he gave it to the detective who left the room. As it happened, Frank Quish was also being questioned at the station at this time and he denied having the fight with Joseph Meehan. Another officer looked at the sneaker and he concluded that it was blood. This was later confirmed by the police chemist that afternoon.

Detective Solari returned to the defendant, advised him of his rights under Miranda and advised him that he was under arrest. At 11:20, Officer Kelley commenced an interrogation of the defendant. This interrogation was recorded. The interrogation began with the full recitation of the Miranda rights again, and the defendant responded that he understood them. He did respond, "right," "yes," one word responses, and he agreed to speak about the victim.

The defendant first denied he knew her and then agreed that he knew her generally, had seen her around town but that he had last seen her on the previous Tuesday. This is a Friday morning. The officer mentioned the blood on his sneakers and the defendant responded that it had come from a fight on Tuesday. The officer said it was too fresh to have

gotten there on Tueday and the defendant suggested the freshness was due to the fact that he was swimming the day before but that he had last seen her on Tuesday.

The officer then advised him that witnesses had seen them together last night. He suggested that this was serious and said, "I think truth is the best thing at this time, the victim is dead and you are under arrest." The defendant said, "Under arrest for what?" and the officer said, "For the death, for the murder, and we have witnesses who saw you together."

The defendant then asked if he could see those witnesses and the officer declined to do that at that time. He then admitted that he had in fact been with the victim the previous night, that they had met in a bar, that they had two beers, that they discussed getting some pot or marihuana and that they left the bar around 11:30 or so and had proceeded to the church steps where they sat for fifteen or twenty minutes but then that he had left and the victim had gone in one direction and he had gone in another.

After some discussion about what the victim had been wearing at this time, the defendant blurted out, "I was whacked out last night." He then talked about having taken pills, some 15 Valiums of 5 milligrams each, he specified the milligrams, and that they had been drinking beer, but he continued to deny that anything had happened between he

and the victim.

At this point there is a pause in the interrogation and another detective suggests that the defendant hd asked him what bearing it would have if he told them what had happened, what degree it would be. The police responded that they had no control over that, and Sgt. Kelley responded, "I can't promise you anything, I have no jurisdiction over anything like that," that he would inform the District Attorney and the court and defense counsel of cooperation, but said, "I can't say you are going to get a break." He continued, "All I can promise you is that I will make your cooperation known, but again I can't promise you anything." He then continued, "If you wish to tell the truth of what happened, then I can say in all fairness it will probably help your defense. Is there anything else you want to know?"

The defendant asked if he could go home and get some clothes and the officer said that he would get them, that the police would get them, and then referring to the drinking of the night before, asked the defendant if he were still high. The defendant responded, "A little jiggy," but then said that he could understand what was going on. The officer again said --

QUESTION: The defendant responded what? I didn't hear you.

MISS SMITH: His words are "A little jiggy,"

Your Honor.

The officer again asked if he wanted to tell him what the story was and the defendant said, "Yes. But if I tell you, is it going to come out in court?" The officer said it will anyway, we have a good case and my suggestion is that the truth is going to make a good defense in this particular case. The defendant responded, "I don't know." The officer asked, "You don't know what? Do you want to tell us about it?" And then said, "Did you say she provoked you? Is that my understanding?" The defendant responded, "Yes." And the officer advised him to tell the story in his own words and the defendant, stating that he had been high on Valium and drunk, stated he flipped out when she made fun of him and then proceeded to confess and describe the events surrounding the killing.

QUESTION: Now this all comes from the tape recording --

MISS SMITH: It is all on the tape record, Your Honor. While the interrogation --

QUESTION: How old was this man?

MISS SMITH: 18 years old.

QUESTION: And the victim?

MISS SMITH: She was somewhat older, I believe. I don't think that came out in the probable cause hearing. Somewhere between 18 and 20 years old I think would be fair

to say.

QUESTION: Is the transcript from which you have been quoting in the appendix?

MISS SMITH: Yes, Your Honor, it is, and it is tape recorded.

QUESTION: How long did this whole process take?

MISS SMITH: An hour or somewhat less than an hour.

QUESTION: What is your position with when the duty, the statutory duty to tell him about his right to telephone arose? There was a duty that did --

MISS SMITH: Yes, there is a duty under Massachusetts law to tell him of the right to use the telephone. I don't think the failure -- and it would appear on the record there was no such advice -- renders the statement involuntary. I also would suggest --

QUESTION: But my question is under the statute when were the police supposed to have told him?

MISS SMITH: The police under the statute should have told him --

QUESTION: At the same time --

MISS SMITH: -- after he was taken into custody and he had the right to make a phone call I believe within one hour after that time. So that would be -- I would say they should have told him at the initiation --

QUESTION: When they started to question him.

MISS SMITH: -- of the questioning.

QUESTION: Do you mean after he was arrested?

MISS SMITH: Yes.

QUESTION: Or taken into custody?

MISS SMITH: After he was arrested, Your Honor.

QUESTION: Is that the --

MISS SMITH: It was found that he voluntarily went to the police station.

QUESTION: It was only after some questions that he was arrested?

MISS SMITH: That's correct, Your Honor.

QUESTION: And that is a state statutory --

MISS SMITH: That's correct.

QUESTION: And when did the duty to notify about the telephone --

MISS SMITH: After the formal --

QUESTION: -- after the arrest?

MISS SMITH: After the formal arrest. While this interrogation was in progress, Officer Solari who had received the sneaker from the defendant went to court in order to secure a search warrant. While he was there, he was advised by telephone of the confession and included the fact of the confession in the affidavit to support probable cause for the search warrant, admitting the reference to the bloody sneakers and the other identification of the defendant,

a pair of blood-stained dungarees recovered from the defendant's home.

At approximately 4:00 p.m., the defendant's mother and brother arrived at the police station and were escorted to the defendant's cell. As they approached he blurted out, "Ma, I didn't mean to hit her so hard."

The defendant filed a motion to suppress and in an affidavit stated his grounds, his prior ingestion of alcohol and drugs and that he did not know that he had a right or a need of a lawyer and he was frightened.

The Supreme Judicial Court held that the confession must be suppressed as involuntary and that the dungarees must be suppressed on the grounds that the confession was involuntary and therefore directly offensive to the Fifth Amendment, and that the afternoon statement must also be suppressed under the "cat out of the bag" theory.

The common law submits that the lower court has misconstrued what is constitutionally permissible police interrogation and it has based its decision on a misconstruction of the scope and applicability of the Fifth Amendment privilege to the context of police interrogation.

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

(Whereupon, at 12:00 noon, the court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION -- 1:00 O'CLOCK P.M.

MR. CHIEF JUSTICE BURGER: Miss Smith, you may continue.

MISS SMITH: Thank you.

In holding the confession -- as discussed earlier -- holding that that confession must be suppressed, the Supreme Court of Massachusetts initially referred to that portion of Miranda which places a heavy burden on the prosecution to prove a knowing and intelligent waiver. However, the court continued stating that rather than basing on the lack of an effective waiver, they found the confession to be involuntary and directly offensive to the Firth Amendment.

It is the common law's position that it is the Fifth Amendment which is deemed to have been offended by the conduct here, that actual official compulsion or coercion must be demonstrated, and that this cannot be accomplished merely by adding together a number of factors which are not in themselves coercive.

The factors considered below are relevant to the question of voluntariness only in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect. Thus, two circumstances are necessary: One, an act of coercion by an official and a setting, and then I believe the compulsion or the pressure exerted by the police is measured in terms of the setting or the

totality of the attendant circumstances in order to determine whether that act is sufficient to have overcome the will of a defendant --

QUESTION: Is it your suggestion that the court used the wrong standard in arriving at a conclusion that there was compulsion here?

MISS SMITH: I believe that the court was of the view that it was not necessary in a Fifth Amendment context to demonstrate any actual compulsion. They seem to go along on a view that viewed the conduct of the police in terms of the age and condition of the defendant and then reached a conclusion that somehow this isn't fair and make a leap to actual compulsion.

QUESTION: So your answer is yes --

MISS SMITH: Yes.

QUESTION: -- they used the wrong legal standard?

MISS SMITH: The wrong legal standard, that they did not properly apply the Fifth Amendment which by its own terms addresses compelled testimony. And my position is that actual compulsion --

QUESTION: You don't think they said we must look at the totality of the circumstances and then decide whether his will was overcome by all the circumstances?

MISS SMITH: They looked at all the circumstances and the language in the opinion is not that the will was

overcome but his ability I believe to make a decision was undermined. Now, this I do not believe constitutes compulsion or involuntariness as contemplated by the Fifth Amendment.

The factors that the court relied upon are not in themselves coercive and the police practices involved are not constitutionally forbidden. The defendant was 18 years of age, he had completed the ninth grade and two years of high school. And while it was true he was not specifically informed of his statutory right to use the phone, he was twice informed of his right to speak with an attorney and have an attorney present with him. As to his psychological condition, assuming that he had voluntarily ingested alcohol and drugs the night before, the defendant also testified at the probable cause hearing that he had been using drugs since the age of 14, and it suggested that the voluntary use of drugs does not allow one to avoid responsibility for the criminal acts and I suggest that it does not permit one to avoid accountability for their own words. And in this case it can hardly be said that the defendant was rendered incapable of making a voluntary decision when the court below found that the defendant had voluntarily accompanied the police to the station, that he had voluntarily given up the sneakers.

Moreover, the defendant was sufficiently rational

as to have formed an intent to go to the unemployment office either to pick up his check or to challenge the denial of his benefits. He is quite capable of answering general questions as to his name, his address, he described the physical structure of his home. He was capable of thinking of rational explanations to explain the condition of his sneakers. He corrected Sgt. Kelley on several occasions, both as to his correct name when the sergeant referred to him as Robert, he said no, it was Joseph. He corrected the sergeant as to the name of the bar he had been in with the victim, and he questioned the sergeant as to whther it was one or both of his sneakers which were blood-stained.

Moreover, he had sufficient presence of mind to try to mitigate his conduct by offering the excuse that he had been whacked out, drunk, and that he flipped out after the victim had made fun of him.

Moreover, the police testified that he exhibited no aberrational conduct at the police station, that his eyes were not glassy, that he had no difficulty in walking. And I would suggest that the tape supports that view. In addition, a doctor who listened to the tape testified that there were no apparent drug effects. So there we have conditions which might, if there were actual coercion, tend to magnify that coercion into some kind of unconstitutionally permissible behavior, but here we have no actual coercion on

the part of the police. They are criticized in addition for having conducted a skillful investigation, for making a misrepresentation as to the number of identifying witnesses.

In Frazier v. Cupp, the defendant was falsely told that his codefendant had confessed and it was sympathetically suggested to him that it had been the victim who had promoted the fight that led to the killing. Neither of these practices were found to be coercive by this Court, and neither were held sufficient to render a statement involuntary.

A suggestion to tell the truth, especially when it is not made in a threatening context, does not constitute coercion under the case law. Indeed, the Constitution does not prohibit every element which influences a defendant to incriminate himself. If it did, I think we would have to totally do away with police interrogation.

Finally, the police made no promises to the defendant. They specifically advised him on more than three occasions that they could make no promises. Therefore, we suggest that in this case there are no acts of official compulsion, and furthermore that the suggestion that the concept of police interrogation is in itself inherently compulsion cannot furnish this necesary factor to a finding of involuntariness.

In Miranda, in extending the Firth Amendment

privilege to the context of police interrogation, the court posited the factual premise that the police interrogation was inherently coercive. The safeguards of the warning requirements of Miranda were then designed to dispel that inherent coercion. In this case, it is quite clear that those safeguards were complied with. He was fully advised of his Miranda warnings. Therefore, the inherent compulsion of police interrogation must be deemed to have been dispelled and cannot be utilized to provide the necessary factor of actual official coercion.

The Court generally stated in United States v. Washington in the context of a grand jury proceeding that any possible coercion or unfairness resulting from a defendant or a witness' misimpression that he must necessarily tell the truth is completely removed by the warnings. In this case, the warnings were fully given.

Also we would suggest that this Court recently has rejected the factual premise of inherent coercion in police interrogations. Primarily in Michigan v. Tucker, rather than view police interrogation as inherently coercive, the Court focused on basic traditional Fifth Amendment considerations in finding that the police conduct in Michigan did not deprive respondent of the privilege against self-incrimination as such, even though there was a disregard of Miranda.

We suggest that if the Court were of the continued view that custodial interrogation itself supplied the compulsion necessary to involve the Firth Amendment, the question of the degree of compulsion or the particular acts of the police involved would not arise.

Most importantly, we think that this Court's decision in cases holding that statements taken involving violation of Miranda are not per se inadmissible at trial for all purposes.

In Harris v. New York and Oregon v. Hass, the Court focused on whether the trustworthiness of the statements satisfied legal standards. An inquiry into trustworthiness, at least under the rule of Rogers v. Richmond, is irrelevant, that the question is only whether the statements were involuntary. Therefore, we suggest that if custodial interrogation itself does not render a statement involuntary in a fundamental constitutional sense --

QUESTION: There is at least one case in this Court that we did find interrogation only to be wrong, Haley v. Ohio?

MISS SMITH: Yes, Your Honor.

QUESTION: Do you remember that?

MISS SMITH: Was that decided under the Firth Amendment, Your Honor?

QUESTION: The Fourteenth, due process.

MISS SMITH: I think that is another consideration. Now, the Court --

QUESTION: This is the Fourteenth, too.

MISS SMITH: No, this Court directly --

QUESTION: Now, wait amendment. The Firth Amendment is applicable only to the federal government and you represent the State of Massachusetts.

MISS SMITH: Yes, but I am merely replying as to what the Supreme Judicial Court said, and they said --

QUESTION: Well, they couldn't, and they were obviously wrong if they said the Fifth Amendment applied to the State of Massachusetts because everybody knows that it does not.

MISS SMITH: Well, I agree with Your Honor, but in their reasoning of the Supreme Judicial Court opinion, they not only stated that it was directly offensive to the Fifth Amendment but used that amendment as the basis to exclude automatically the real evidence seized pursuant to the search warrant. And I suggest that, yes, it is due process which controls.

QUESTION: Well, it may be the Fifth Amendment as incorporated in the Fourteenth.

MISS SMITH: The Fourteenth.

QUESTION: Miss Smith, at page 21a of the petition which is part of the opinion of the Supreme Judicial Court,

towards the bottom of the page, Mr. Justice Kaplan makes a comment, "Finally, the confession" -- and here he is referring to the second confession of that afternoon -- "was rendered involuntary by police misconduct which cannot be termed inadvertent." What is the court referring to there?

MISS SMITH: The court must be referring to either one of two circumstances which they set out as a factor leading to their finding of involuntariness: One, the police represented that witnesses had identified Meehan as being with the victim when in fact it is only one witness which specifically named Meehan, as knowing Meehan as being with the victim. The other witness described him as a young man, he did not know his name.

QUESTION: Well, do you think the Supreme Judicial Court then means that any second confession is rendered involuntary if there has at any stage in the confession proceeding been police misconduct which cannot be termed inadvertent?

MISS SMITH: That is certainly the import of their decision as far as I understand it, Your Honor. And even when the second confession as in this case involved no conduct whatsoever on the part of the police, it was simply a spontaneous expression of regret to his mother who happened to be overheard by the police who were standing in the corridor outside the cell. There was no police involvement

at all in this confession, yet our Supreme Judicial Court held that it must be suppressed.

QUESTION: May I ask a question going back to the first confession and to the Massachusetts court's opinion at pages 11a through -- I guess it is about page 17a or 18a -- they are discussing the confession and its voluntariness throughout that period and they rely in that portion of their opinion on seven or eight different Massachusetts cases and they stress the fact that under Massachusetts law the duty to tell the person in custody has a right to telephone his family is relevant, and they end up by concluding that the trial judge's conclusion that the confession was involuntary was correct. Can we be positive that that conclusion is reached entirely independently of Massachusetts law and, secondly, to what extens should we give any weight to the violation of the Massachusetts rule about telephoning when they relied on it as they obviously did?

MISS SMITH: As to your first question, I think there is no indication in this case either in the briefs or argument or in the Supreme Court's decision that it is based upon the Massachusetts amendment. Those cases referred to by the court themselves rely upon Massachusetts interpretation of federal constitutional law.

Now, as to the effect of the failure to warn about the telephone, that has never been held in Massachusetts to

require the suppression of a statement. And I would suggest that there are cases in this Court which have held that the violation of a state statute, particularly in terms of bringing one before a magistrate within a certain period of time, does not require or --

QUESTION: Of course, here the court didn't hold that it required exclusion. They merely held, as I understand them, that it was a factor that must be weighed in making the voluntariness determination.

MISS SMITH: Well, I have no quarrel with it as a factor.

QUESTION: Would you agree that the failure -- that that is a factor that we should also consider?

MISS SMITH: As part of the totality of the circumstances, yes, Your Honor, but --

QUESTION: Because they had the plain duty to tell him this and they failed to do it.

MISS SMITH: Yes, Your Honor, they do.

QUESTION: Then you would say that if this case would come here from Rhode Island where there was no such statute, the factors to be weighed would be different because nothing would be held against the Rhode Island police by reason of their failure to inform the defendant?

MISS SMITH: I think that is true, and I think it also indicates just how much weight should be given to this

factor in the absence of any additional evidence that the police failed to make this news available to the defendant in the course of trying to keep him incommunicado position. I think these factors have to be considered in terms of what in fact actually happened, what were the police doing. I mean was there ever any evidence in this case of an intent on the part of the police to isolate the defendant and to continue prolonged interrogation of him in that isolated --

QUESTION: You are going to get to your other point, I suppose --

MISS SMITH: Immediately.

QUESTION: -- but even if the confession was involuntary, the evidence was admissible?

MISS SMITH: Yes, Your Honor. As to the real evidence, the dungarees, the court below held that they must be suppressed because the confession was involuntary and directly offensive to the Fifth Amendment. Assuming such a violation, the exclusionary aspect of the Fifth Amendment does not extend to the instant situation. The Fifth Amendment historically and by its terms speaks to the use of testimony compelled under oath at trial. Here it is not testimony that is sought to be used at trial but real evidence, and the Fifth Amendment does not direct itself or bar the compulsion of real physical evidence, as evidence in Schmerber and that line of cases.

QUESTION: So you say the fruits of the Fifth Amendment violation have to be testimentary --

MISS SMITH: The Fifth Amendment only addresses itself to one compelled testimonial evidence and it precludes its use at trial, and I would say that it does not address itself to physical evidence that is sought to be introduced at trial. And I think that the suggestion of counsel that we extend the principle of Counselman v. Hitchcock is without justification. The underlying considerations of the privilege in the judicial context are different from here.

And one final point is that even when this Court has ordered suppression of physical evidence, they focus on the purpose and flagrancy of police interrogation, and here the intent was merely to solve an unsolved crime to determine the truth surrounding a death, and it cannot be said here, as it was in Spano and Haynes --

QUESTION: This isn't the first time your court has decided this, is it?

MISS SMITH: No, Commonwealth v. White, Your Honor. In that case though, that was purely only a Miranda waiver question.

QUESTION: It is still a Fifth Amendment question.

MISS SMITH: Well, only if one views the Fifth Amendment as totally --

QUESTION: Well, a fortiori under Commonwealth v.

White, a fortiori your point would apply, I suppose.

MISS SMITH: I'm sorry, Your Honor?

QUESTION: It wouldn't be a fruit if you were --

MISS SMITH: I don't believe it is a fruit, no.

QUESTION: If it isn't a fruit, if physical evidence gathered by a search warrant using a compelled confession isn't a fruit of a Fifth Amendment violation, surely the same evidence gathered because of the failure to give Miranda warnings wouldn't be a fruit.

MISS SMITH: No, definitely, Miranda wouldn't be a fruit because there would be no --

QUESTION: What happened to that case?

MISS SMITH: The court summarily affirmed divided four-to-four last year.

QUESTION: At least --

MISS SMITH: So this question is still open.

QUESTION: At least apparently four people disagree with you though.

MISS SMITH: Four people did agree with us, too, Your Honor.

QUESTION: What about the other evidence, the evidence of fresh blood on some part of his clothing or his shoes, what happened --

MISS SMITH: Unfortunately, the police officer

didn't put that in the affidavit after he received notice that he had confessed. He had that information. He was the officer who took the sneaker. He also had the information that the victim has been identified as being with Mr. Meehan. Unfortunately --

QUESTION: Well, was that evidence ever introduced in this case?

MISS SMITH: This case has not gone to trial, Your Honor. We just had a probable cause hearing.

QUESTION: But has the -- I don't recall the opinion here -- does the opinion address those fresh blood stains on the shoes?

MISS SMITH: The opinion notes the blood stains, yes, Your Honor, and they --

QUESTION: You have blood stains in two different pieces of evidence, don't you?

MISS SMITH: Right, blood stains on the sneakers and blood stains on the dungarees that were seized pursuant to the search warrant.

QUESTION: May I ask a question in that connection. The officers not only had the blood stains but they also had, as you just said, the identification by two witnesses of the suspect in the neighborhood within a very short time of the crime. One of the people who identified him also identified the young woman and said they were together. Now, didn't the

search warrant allude to those two identifications?

MISS SMITH: No, Your Honor. It talked about the neighbors' description of the defendant, and it omitted evidence which was in the knowledge of the police officer --

QUESTION: The police had the evidence that the Chief Justice has alluded to, that is the blood on the shoes before the arrest --

MISS SMITH: That's right.

QUESTION: -- plus the evidence of these two witnesses, which would have been abundant to establish probable cause to search the residence, I would have thought.

MISS SMITH: Yes, Your Honor, and the Supreme Judicial Court noted that they had sufficient evidence, sufficient probable cause to have obtained the warrant.

MISS SMITH: So at the very least, isn't this a plain error case?

MISS SMITH: I'm sorry, Your Honor?

QUESTION: It just seems to me to be error beyond a reasonable doubt. The people just left out evidence in their possession when they drew up the affidavit for the warrant.

MISS SMITH: That's simply it, the police could have come by the dungarees independently of the confession. They had the probable cause.

QUESTION: So you are compelled to rely on the

confession when appropriate facts were available that would have justified identifying the dungarees and the underpants?

MISS SMITH: Yes, Your Honor, there was but the Supreme Court of Massachusetts ruled that all of the evidence must be suppressed.

QUESTION: Miss Smith, help me out a minute.

MISS SMITH: Yes, sir.

QUESTION: The exact provision of Judge Kaplan's opinion where he stresses the Fifth Amendment --

MISS SMITH: On page 77 of the appendix, Your Honor, "So the question is raised, whether the warrant can legalize the seizure of the dungarees when it is held that the confession must be suppressed."

QUESTION: Page 77?

MISS SMITH: Of the appendix, Your Honor.

QUESTION: Well, what about this opinion that is in the petition for cert?

MISS SMITH: Pardon me, Your Honor?

QUESTION: You've got an opinion here, too, haven't you?

MISS SMITH: The opinion is included in the appendix, Your Honor, at page 77.

QUESTION: It is in petition for cert, too, isn't it?

MISS SMITH: I'm afraid I don't have a copy of

the petition.

QUESTION: Maybe it is -- page --

MISS SMITH: 77.

QUESTION: 76?

MISS SMITH: 77, Your Honor.

QUESTION: 77. I just conceive of how you get the Fifth Amendment in this case.

MISS SMITH: Well, Your Honor, that has been the commonwealth's contention throughout, that supposedly due process. If we agree that the answer is no as to the dungarees -- and this is explained simply on the ground that the confession was involuntary and thus directly offensive to the Fifth Amendment, they then go on to discuss the conditions in Commonwealth v. White where the finding had only been the lack of a waiver under Miranda.

QUESTION: Thank you.

MISS SMITH: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Mills.

ORAL ARGUMENT OF DAVID A. MILLS, ESQ.,

ON BEHALF OF THE RESPONDENT

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

QUESTION: Can you help me with this Fifth Amendment point?

MR. MILLS: Your Honor, that is --

QUESTION: Applying the Fifth Amendment to a state?

MR. MILLS: Pardon, Your Honor?

QUESTION: Applying the Fifth Amendment to a state?

MR. MILLS: I'm sure that the court assumed when it wrote that, Your Honor, that it was the Fifth Amendment applicable to the state because of the Fourteenth Amendment.

QUESTION: Well, what was your position before the fourt?

MR. MILLS: Before the lower court, Your Honor?

QUESTION: Or this court.

QUESTION: The highest court of Massachusetts?

QUESTION: Or the next court. Are you relying on the Fifth Amendment?

MR. MILLS: Well, the Fifth Amendment insofar as it is applicable to the states through the Fourteenth Amendment, Your Honor.

QUESTION: Why do you need the Fifth Amendment? You've got due process in the Fourteenth as applied to a state and you've got opinions of this Court using due process as applied to the state. Haley v. Ohio, which you have in your brief.

MR. MILLS: Well, because of the Court's initial discussion, Your Honor, with respect to involuntariness and

its cases relied upon in that regard, perhaps that is why the court said what it said.

Before I begin the age of the decedent in the case, although not appearing precisely on this record, appeared in the proceedings as both age 23 and 24. Also with respect to the dungarees, there is nothing in the record to indicate the presence of blood on any clothing taken from the home of the defendant. There is similarly nothing in the record to indicate that the defendant, when he was thumbing a ride on Hyde Park Avenue, was on his way to anything in the nature of an appeal or a contested proceeding at the unemployment office.

At the outset, the defendant would like to make clear that there were not two witnesses who saw him in the company of the decedent on the evening in question. The uncontradicted evidence in a six-day trial before a state court --

QUESTION: Are you relying there on the fact that one of them gave his name, one witness gave a description which fit him? Do you mean that only one named him should be counted?

MR. MILLS: There was one witness who told the police that he saw the decedent and the victim together at 12 o'clock in the evening, Your Honor. There was another witness who said he saw a young man, and it is not apparent

and it is not clear that the two descriptions coincided with any precision at all. There were two descriptions and the descriptions were different. The description of the defendant on the morning when he was in the custody of the police, the description that one of the neighbors in the neighborhood gave the police when she saw someone at 2:00 o'clock in the morning ant the description that a witness was giving to the police at 11:00 o'clock in the morning are all substantially different, Your Honor.

QUESTION: Mr. Mills, perhaps I misunderstood an earlier part of your argument. At 5a again of the petition for writ of certiorari, which is the Supreme Judicial Court's opinion, as I read it, and I think I am reading it correctly, it said he was willing but was going to the unemployment office and did not want to be late. I don't know if that makes any great difference, but the Supreme Judicial Court said he was on his way to the unemployment office.

MR. MILLS: Significant, Your Honor, that he was going to the unemployment office. There is nothing in the record to indicate that he was going there for the purpose of a contested appeal or anything that would require his deliberate attention.

QUESTION: Do you feel that makes a great deal of difference?

MR. MILLS: I would not want the Court to be left with the impression that he was going to a contested appeal as opposed to picking up ministerially an unemployment check or something else.

QUESTION: The court held admissible anything up until the time he was arrested, didn't they?

MR. MILLS: No, Your Honor, but nonetheless the condition of the defendant on that day and time he was interrogated is significant --

QUESTION: I see.

MR. MILLS: -- and that would be a circumstance in the totality.

QUESTION: I take it that you are focusing on the notion that it would take a good deal more perspicacity to deal with a contested hearing than to pick up a check.

MR. MILLS: Precisely, Your Honor.

QUESTION: Is that what you are driving at?

MR. MILLS: Yes, Your Honor, and there is no evidence one way or the other. The uncontradicted evidence from several witnesses is that on the evening and night of June 10, 1976, this particular respondent ingested some 10 to 15 Valium pills of the 5 milligram variety and also on the same night ingested 12 containers of beer and also partook of marihuana that was infected in some way with some other drug. In the six-day trial before the state

trial judge, a Dr. Greenblat, who was then the Acting Chief of Clinical Pharmacology at the Massachusetts General Hospital and a professor of medicine at the Harvard Medical School, was asked a hypothetical question precisely tracking the evidence as to the mount of chemical ingested by this particular individual on the evening. The medical testimony and the opinion was with respect to a person's condition at 11:20 the following morning, that the ingester would experience drowsiness, sedation, impairment of judgment and impairment of intellectual function. That was the evidence before the trial judge which was apparently believed when matched with the uncontradicted testimony of the amount of chemicals that were ingested. 11:20, of course, is precisely the time which is indicated upon the transcript of the interrogation as the time that the interrogation started.

QUESTION: The trier of those issuers could either believe or not believe his statement about the amount of drugs and liquor he had ingested.

MR. MILLS: Yes, Your Honor.

QUESTION: The doctor's opinion would of necessity be on the assumption that those statements were accurate.

MR. MILLS: Yes, Your Honor.

QUESTION: Did the trier make any findings on whether those statements were accurate?

MR. MILLS: By implication, Your Honor, the trier

must necessarily have found the ingestion of drugs and must necessarily have believed at least part of the medical testimony of the expert because the same language is recited or substantially similar language is recited in the memorandum of the trial judge in his order on suppression of certain of the evidence.

At 11:20 the following morning, a Boston police detective was in the Hyde Park police station in Boston interviewing one witness who was also a suspect. At that very time that witness said, "And I saw Joseph Meehan in the company of the decedent at 12:00 o'clock on the previous evening, and coincidentally there he is on Hyde Park Avenue."

QUESTION: What did the trial court do with reference to the motion to suppress the evidence?

MR. MILLS: The trial court allowed it in part, Your Honor, and denied it in part. There were four parts of evidence before the trial judge on the motion to suppress, sneakers, a 12:00 o'clock confession, dungarees and clothing taken pursuant to the search warrant, and a 3:00 o'clock enculpatory admission. The trial judge --

QUESTION: Is that the one to his mother?

MR. MILLS: Yes, Your Honor, the 3:00 o'clock statement was to his mother. The trial judge denied the motion with respect to the sneakers and the statement to

the mother, and allowed the suppression as to the involuntary 12:00 o'clock confession and the dungarees that were taken pursuant to the search warrant. The police officer --

QUESTION: If this case comes to trial under the decision of the Supreme Judicial Court of Massachusetts, the only evidence against the defendant will be that of the witnesses who saw him on the church steps with the victim at midnight on the night on which she was murdered, right?

MR. MILLS: Yes, Your Honor, and the sneakers that were taken from him in the police station.

QUESTION: And the sneakers with the blood stains on them.

MR. MILLS: Yes.

QUESTION: Wait a minute, you agreed real fast there. Suppose somebody comes in and he confesses to the crime, could they put that in evidence?

MR. MILLS: Under the decision --

QUESTION: If we sent it to trial now and tomorrow morning somebody confesses, you can't say now what evidence will be in that next trial, can you?

MR. MILLS: No, I cannot, Your Honor.

QUESTION: But you just did.

MR. MILLS: Excuse me, Your Honor --

QUESTION: The evidence you now know about and is now available.

MR. MILLS: The evidence not excluded by the lower court, Your Honor.

QUESTION: The evidence for the prosecution would be limited under the judgment of the highest court of Massachusetts to the two witnesses who saw the respondent and the victim on the church steps.

MR. MILLS: Not two, Your Honor, just one.

QUESTION: One, all right, plus the fact that he had bloody sneakers on at the time he was --

MR. MILLS: Which was not fresh, Your Honor. There was nothing in the record that --

QUESTION: Well, the bloody sneakers at the time that he was taken in for questioning.

MR. MILLS: Yes, Your Honor.

QUESTION: And that is it and that is hardly a case, is it?

MR. MILLS: From the record before this Court, that appears to be the evidence at this point.

QUESTION: Everything else having been suppressed, yes, Your Honor.

MR. MILLS: Yes, Your Honor.

QUESTION: In advance of trial.

MR. MILLS: Yes, Your Honor.

QUESTION: All right.

MR. MILLS: The police detective who was taking

part in this interrogation jumped out the window after alerting two other police officers to go out the front door, take a police cruiser and pursue the defendant. He was confronted on the street. He was not told he was free to go, and he was brought back into the police station.

During his interrogation, there were at least three other police officers present, it appears, at all times in the room. The actual interrogation was recorded on a tape recording machine that was present in the room. The transcript of that taped proceeding was available to the trial judge, it was available to the lower court, the Massachusetts Supreme Court. It is reprinted in the appendix to this Court. The actual tape was available to the trial judge and it was listened to by him in open court. It was apparently listened to by the Massachusetts Supreme Court and it is part of the record before this Court.

At the conclusion of that interrogation, the record is silent. It discloses only that the defendant was placed in a cell and continued in detention until the time that his mother and brother arrived. The defendant has bie fed, and I will argue to this Court, three principal arguments: First, that the Supreme Court was correct in excluding the 12:00 inculpatory admission as involuntary in the totality of the circumstances; second, that the clothing that was taken from his home was properly excluded

because the search warrant rested on an involuntary confession; and, thirdly, that the 3:00 o'clock inculpatory admission supposedly made to the mother in the presence of the police officers should be excluded under the criteria of Brown v. Illinois and Darwin v. Connecticut.

In determining the issue of involuntariness, the court explicitly did not rely upon one of the alternative theories that had been incorporated in the decision of the trial judge. The trial judge found a Miranda violation and also determined independently that the confession was involuntary. The Massachusetts Supreme Court, the lower court in determining voluntariness, looked to the totality of the circumstances and did not adopt the Miranda violation.

The initial confrontation with the police I have already mentioned. I think it is significant to say that the police were clearly anxious to apprehend defendant Meehan. He weighed 135 pounds and was confronted on the street by three mature police officers. He was not told that he was free to go and the respondent argues to this Court now that if your decision in Dunaway v. New York had been decided at the time the case went to trial on the issue of suppression, probably an arrest would have been determined at that time and the sneakers similarly excluded.

During the course of the interrogation and early

interview --

QUESTION: Are you alleging that here there was an arrest contrary to the finding of your courts?

MR. MILLS: No, I am not, Your Honor. The interrogator early on into the interrogation made misrepresentations of fact to the defendant. In fact, I would use the word "interrogators" in the plural because although there was one Sgt. Kelley doing most of the talking, or so it appears, there were three other police officers intimately present in this confrontation between a citizen and his police. And so to some extent the representations of one were the representations of four. And indeed at one point in the interrogation, Sgt. Kelley said, "And you could ask two others who are right here."

The defendant was told that he was seenwith the decedent by two witnesses on the previous evening. This misrepresentation was repeated at least seven times by the interrogator. This misrepresentation was further punctuated by the representation that the witnesses were positively sure of their identification and that they had known the defendant for a long time. This is inaccurate.

The lower court also concluded that the interrogator lied when intimating to the defendant things about the strength of the government's case, to the effect that the case had already been proven against him.

The interrogator also misrepresented to the defendant, "We are here to help and the truth is going to be a good defense in this particular case."

QUESTION: Did the defendant also lie as to his encounter with Quish?

MR. MILLS: There is some indication that there were contrary representations by Quish, Your Honor. There is no testimony to that effect in the record, I don't believe.

So initially the defendant suggested the cases of this Court have noted misrepresentation of fact as one of the criteria in the totality of determining involuntariness.

Secondly, or thirdly, promises were made by the police interrogator to the defendant while he was in custody, during the interrogation in express terms, Sgt. Kelley told the defendant that a confession would help the defendant in the defense of the charge. It is suggested that Sgt. Kelley made personal assurances as well as his, the police interrogator's personal intervention with the law in the matter of this case. Sgt. Kelley said, "I will bring it to the attention of your attorney, the District Atrorney, the local court judge and right up the line."

QUESTION: Well, can one be sure that that was a false statement? In other words, if the police had some of the evidence that your opposition describes and they ask for the search warrant so that they felt they had a strong

case without the confession, might not the sergeant's statement have been perhaps not good advice but not necessarily false?

MR. MILLS: It was a promise of leniency, Your Honor, and a promise and inducemtn and its truth or falsity in this context as an inducement and a promise and a reward is immaterial, truth or falsity we suggest is immaterial. It might also be a misrepresentation which would be another factor in the totality. But I suggest that that promise of personal intervention was an inducement by the police officer which has been prescribed by this Court in Malloy v. Hogan --

QUESTION: But not by itself.

MR. MILLS: Not by itself, and at no point does the respondent argue that any one individual factor in this case is a factor by itself which would --

QUESTION: And didn't they also say at least three or more times that, you know, we can't do anything about that? Is that true?

MR. MILLS: The psychological --

QUESTION: Is that true? Of course, it is true because it is in the record.

MR. MILLS: Yes, Your Honor. But on pages 22 and 23 of the respondent's brief, that particular promises speech which was intimately examined by the trial judge and

we suggest intimately examined as is reflected by the Massachusetts Supreme Court's opinion is interspersed with promises and rewards and all to the alternating dynamic of "we can't promise you anything but we will give you the world, we can't promise you anything but I will go to the District Attorney, I can't promise you anything but it helps in cases like this." This was precisely the type of dynamic that was focused in by the trial judge in determining that the will of this individual had been overborne by the police promises.

Both lower courts relied upon the evidence of intoxication and the impaired psychological condition of this respondent at the time of his interrogation. In addition to the drugs, the uncontradicted evidence of much drug ingestion and alcohol ingestion on the evening of the 10th, there was also evidence of the ingestion of four or five milligram Valium capsules at 10:30 in the morning of June 11, 1976.

I would like to not fail to bring to the attention of the Court that in addition to what I have already argued with respect to intoxication, the interrogators were aware of the drug ingestion and on three separate occasions during the course of the interrogation the defendant brought that message to the interrogators, that he had taken the Valium, that he was geeling jiggy, and that he was confused.

QUESTION: You said that they were aware of it. They were only aware of it to the extent that he told them, right?

MR. MILLS: Yes, Your Honor.

QUESTION: The interrogation was on the 11th, was it?

MR. MILLS: Correct, Your Honor, apparently at 11:20 in the morning.

QUESTION: And that was the day after the --

MR. MILLS: That would have been about twelve hours after the wholesale ingestion of the chemicals and it would have been about --

QUESTION: How long after?

MR. MILLS: -- eight or nine hours after a victim had --

QUESTION: The victim.

MR. MILLS: -- the victim in this case had been killed by someone.

QUESTION: And that was in the early morning hours of the same date?

MR. MILLS: Yes, both on the 11th.

QUESTION: And no other evidence of it except his word?

MR. MILLS: Of which, Your Honor?

QUESTION: That he had taken drugs, et cetera.

MR. MILLS: Yes, there was ample evidence. There were four or five witnesses --

QUESTION: I know you are not abandoning it, but I am wondering why you hadn't mentioned it. If I go out and murder somebody and I go to the police and say I took dope and I would be turned loose, I might be tempted.

MR. MILLS: Your Honor, there were three or four -- I only mentioned initially one of the witnesses who said 12 or 15. Someone else may have said 15 or 20, and indeed somewhere in the record there appears 20 Valium pills going into this individual the night before. But there were five -- four witnesses, perhaps five witnesses who testified to the chemical ingestion.

Both of the courts, the trial court and the lower court noted the age of the respondent. At the time he was 18 years old. His poor educational background and his lack of worldly experience which have all been --

QUESTION: How much high school did he have?

MR. MILLS: Two floundering years as indicated by his high school record, Your Honor.

QUESTION: He had ten grades then. He wasn't a fourth grader or --

MR. MILLS: Nine grades, Your Honor. I believe it was to the ninth grade.

QUESTION: Well, might not worldly experience

have been a substitute for high school education?

MR. MILLS: Yes, and he had none, Your Honor. Both courts found that he had no worldly experience. He had been only out of his own neighborhood overnight on two or three occasions.

QUESTION: Do you mean by worldly experience a trip to Florence?

(Laughter)

MR. MILLS: Perhaps someone from Hyde Park, Massachusetts, Your Honor, a trip into Boston would be some indication of more worldly experience than a life pretty much confined to a single rather sociological deprived neighborhood in Boston, and so both of the lower courts looked at this and considered it a factor.

QUESTION: Sometimes people who know their way around to get prohibited drugs are called street wise. Would you say that he was street wise?

MR. MILLS: Not on this record, Your Honor, and apparently both of the lower courts also felt that way.

QUESTION: Any evidence that these drugs were given by prescription?

MR. MILLS: None at all, Your Honor.

QUESTION: So we can assume he got them the way drug users usually get them.

MR. MILLS: There is testimony in the transcript

as to how he got them, Your Honor. He got them from two other of his young friends in an automobile the same night.

QUESTION: Well, that is what I thought was called street wise.

MR. MILLS: Perhaps a type of street wise, Your Honor.

QUESTION: Is there any testimony about prior use of drugs?

MR. MILLS: There was testimony in the form of hypothetical questions to a state medical expert on the hearing on the motion to suppress. There was some cross-examination of the defendant. There was, the respondent tells you and suggests to this Court, nowhere near the evidence in the proceeding below as was made the subject of hypothetical questions to the state's medical witness. There was some, yes, Your Honor.

QUESTION: Well, then I think there was evidence in any case that there was 15 Valium or whatever it was, and there was some question of "is that as much as you usually take" or something like that, or something along those lines, indicating a period of habit or use.

MR. MILLS: The lower court also paid significance as a single factor in the totality of the fact that the defendant was not even forthwith the information as to his right under Massachusetts statute to use the telephone.

On all of these factors, both Massachusetts courts concluded the involuntariness and in the Massachusetts Supreme Court did that unanimously.

The state has suggested in its petition and in its arguments to this Court that there should be some further active act of official coercion in the nature of injection of truth serum or the active use of hypnosis in order to be a prerequisite to the finding of involuntariness, and the respondent suggests that such is not consistent with the applicable opinions of this Court.

With respect to the clothing that was taken from the defendant's house, the respondent notes that there is no case of this Court that it can cite which is precisely on all fours with the case that is now before the Court. However, in a series of cases which begins with Counselman v. Hitchcock in 1892 and continues to suggest, and I have included in the brief the five cases, concluding with Mandujano in 1976, although each of the cases deals in the context of this Court's examination of an immunity statute and the scope of an immunity statute, the language is explicit that the fruit or derivative evidence of Fifth Amendment violation shall be excluded, and it is on this basis that the respondent has argued the propriety of the Massachusetts Supreme Court's exclusion of the dungarees.

QUESTION: Mr. Mills, in your view do you think

this case has anything to do with the doctrine of the Miranda case?

MR. MILLS: No, none at all, Your Honor. The lower court mentioned Miranda.

QUESTION: I know.

MR. MILLS: And at one point in the interrogation the --

QUESTION: Talking about waiver.

MR. MILLS: Yes, Your Honor -- in one point in the interrogation the police officer said, "Do you want to tell us anything more, Joe?" And the respondent answered, "No." Nevertheless, the police officer went on with the interrogation.

QUESTION: Well, do you or don't you? I thought you said no.

MR. MILLS: It is a factor, Your Honor. Miranda had nothing to do with the state Supreme Court's opinion. Any of the --

QUESTION: It didn't have anything to do with your argument.

MR. MILLS: No, it does not, Your Honor, and it --

QUESTION: It did in the state courts though, didn't it?

MR. MILLS: My argument to the state Supreme Court?

QUESTION: Yes.

MR. MILLS: No, it did not, Your Honor.

QUESTION: You never said this was a violation of Miranda?

MR. MILLS: I think I mentioned that there was a violation of Miranda and that it was something -- the attitude of the police and whether or not the police would honor a respondent's answer to a question, are you willing to talk to us more, and the respondent says no, I am not, and the questioning continues, I think that that is a factor of --

QUESTION: What if we reversed the holding that this was an involuntary confession, it would be admissible, wouldn't it, unless somebody excluded it on the Miranda basis?

MR. MILLS: The confession, Your Honor?

QUESTION: The confession, yes.

MR. MILLS: Yes, I believe it would be admissible.

QUESTION: Well, is it the law of the case that it was not a violation of Miranda?

MR. MILLS: The Massachusetts Supreme Court preferred to rest, the language of the court --

QUESTION: I understand that, but that isn't -- how about my question?

MR. MILLS: I don't think it decided, Your Honor.

QUESTION: That is what I wanted to know. Is it still open, that question?

MR. MILLS: It would be open for a matter of rehearing before the Massachusetts Supreme Court on the Miranda issue.

QUESTION: Miranda wasn't Fifth Amendment?

MR. MILLS: Excuse me, Your Honor?

QUESTION: Miranda wasn't Fifth Amendment, was it? In this case, this is a Fifth Amendment case you said.

MR. MILLS: Miranda is not in this case, Your Honor.

QUESTION: Are any of the cases that you rely on in this Court Fifth Amendment cases, confessions held out because of the Fifth Amendment?

MR. MILLS: Well, the criteria in federal cases applied by this Court, yes, Your Honor.

QUESTION: My point was have you got a United States Supreme Court case that says a state in administering its criminal laws is obliged to follow the Fifth Amendment?

MR. MILLS: I believe that when this Court made the Fifth Amendment applicable to the states through the Fourteenth Amendment, I thought that that is what it did, Your Honor.

QUESTION: Well, I am asking you not what you

thought. I am asking you do you have a case that this Court said the granting of a portion or not excluding a confession is a violation of the Fifth Amendment if done by a state.

MR. MILLS: To the extent that it may be said, in Malloy v. Hogan I believe, yes.

QUESTION: The standard said so.

QUESTION: Well, it couldn't have said so, if I may differ with my brother. It might have been the Fifth Amendment as incorporated in the Fourteenth against state action.

MR. MILLS: Without being perhaps said explicitly, Your Honor.

QUESTION: It went beyond that. It said the precise test under the Fourteenth Amendment as to a state is what it is under the Fifth Amendment as to the federal government. Thatis what it held, that is what it said.

MR. MILLS: Right.

QUESTION: That is not what this case said. This case said the Fifth Amendment, and I can't find the Fourteenth Amendment in any of the opinions or the briefs.

MR. MILLS: Perhaps I intended to --

QUESTION: But I cannot operate on what you intended, I'm sorry.

MR. MILLS: May I proceed to the third argument,

Your Honor. The third argument is that the 3:00 o'clock inculpatory admission made to the mother should be excluded on the principle of Brown v. Illinois and Darwin v. Connecticut. The evidence and the facts with respect to the third argument of the respondent before you is simple. He was taken to a cell and detained. At some point his mother and a brother arrived at the police station and they were escorted to his cell, despite their requests to be left alone with the defendant, they were not allowed that. And I might add nor was an attorney who eventually arrived at the police station allowed to be alone to confer with his client.

At that point --

QUESTION: Does that affect the case, any evidence in the case?

MR. MILLS: I believe that it is a criteria that the court may look at in determining the attitude of the police throughout the confrontation that began on Hyde Park Avenue, Your Honor, and ended at the point where his attorney left the station late that night.

QUESTION: And who was present when he said to his mother, "I didn't intend to hit her so hard," or who was present then?

MR. MILLS: There were at least two and perhaps three police officers. The evidence is somewhat

contradictory -- not contradictory, but it was different. There is at least one Feeney, there could be also Madden and one of the witnesses testified that there were three other police officers, two of them in plain clothes.

There is nothing to indicate a break in the stream of events, and with respect to this 3:00 o'clock afternoon statement the respondents suggest that the language of this Court in Brown v. Illinois is particularly appropriate when this Court suggested that the later inculpatory admission that had been made by Brown in that case, that his initial inculpatory admission vitiated any incentive on his part to avoid self-incrimination.

In Meehan, in this case, in the context of his involuntary remarks made during the interrogation that was tape recorded, had confessed to first degree murder. What more heinous matter under Massachusetts law could vitiate any incentive on the part of a person in custody to avoid further self-incrimination. But suffice it to say --

QUESTION: What is the sentence on conviction for first degree murder in Massachusetts?

MR. MILLS: Life in prison, Your Honor.

QUESTION: With or without the possibility of parole?

MR. MILLS: Without parole, Your Honor. And using the criteria of Darwin v. Connecticut and Brown v.

Illinois, there was no break in circumstances between the time that he was interrogated initially, with the confession found to be involuntary and this later inculpatory admission.

QUESTION: Mr. Mills, I didn't want to interrupt you until your time was up. It is a fairly minor point. On page 4a again of the petition, which is the Supreme Court opinion, there is a footnote that says, "The defendant has not briefed or argued certain assignments of error and they are considered waived." Were any of those federal constitutional arguments?

MR. MILLS: I don't believe so, Your Honor. I briefed and argued the case in the state Supreme Court, but I don't believe that I waived any federal constitutional arguments.

QUESTION: Well, the Supreme Court felt you had waived some arguments by not briefing or arguing them. What I am curious to know is if you know now whether they were federal constitutional arguments.

MR. MILLS: I do not know. Under our practice, if an assignment is not made it cannot be briefed. Once you come to the point of finally choosing three or four issues that are significant or chosen to be significant, those that are not then briefed and argued have been waived under Massachusetts practice.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Mills. Thank you, Miss Smith. The case is submitted.

(Whereupon, at 1:55 o'clock p.m., the case in the above-entitled matter was submitted.)

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