OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MICHIGAN, Petitioner V. TYRIS LEMONT HARVEY

CASE NO: 88-512

PLACE: WASHINGTON, D.C.

DATE: October 11, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

MICHIGAN,

Petitioner

v. : No. 88-512

TYRIS LEMONT HARVEY,

Washington, D.C.

Wednesday, October 11, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

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APPEARANCES:

TIMOTHY A. BAUGHMAN, ESQ., Assistant Prosecuting Attorney, Detroit, Michigan; on behalf of the Petitioner.

ROBERT M. MORGAN, ESQ., Detroit, Michigan; on behalf of the Respondent.

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P R O C E E D I N G S

10:01 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 88-512, Michigan v. Tyris Lemont Harvey.

Mr. Baughman.

ORAL ARGUMENT OF TIMOTHY A. BAUGHMAN, ESQ.

ON BEHALF OF PETITIONER

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

The issue before the Court today is whether an accused may be cross-examined with the statement taken subsequent to the assertion of his Sixth Amendment right to counsel as that right has been construed in Michigan v. Jackson.

I wish to present for the Court's consideration this morning two principal points. The first is that exclusion of evidence for impeachment purposes is an inappropriate remedy for violation of a prophylactic rule, and that Jackson is such a rule. But, secondly, and perhaps more fundamentally, that exclusion of evidence for impeachment purposes is also inappropriate for violation of the Sixth Amendment as it relates to custodial interrogation.

The facts, very briefly put, in this case are these. The victim in this case testified that respondent raped and beat her, causing three fractures to her left eye socket. Respondent, on the other hand, testified that the episode was

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essentially an agreement to exchange sex for cocaine gone wrong, and that the blows that he struck were in self-defense.The prosecutor questioned respondent about a statement that he had made after arraignment and assertion of the right to counsel. That statement came to be taken when respondent told the police officer that he wished to make another statement.

But he then also said that he didn't know whether or not he should talk to his attorney. The officer stated that that would not be necessary, as his attorney would be supplied a copy of any statement that he might make.

The assistant prosecutor stated that it was because of this colloquy between respondent and the attorney that she did not believe that the statement was admissible in the case in chief. However, she did argue that it was admissible for impeachment purposes, arguing that it was not involuntary.

QUESTION: Mr. Baughman.

MR. BAUGHMAN: Yes.

QUESTION: I guess you concede that there is a Sixth Amendment violation here.

MR. BAUGHMAN: Yes. The prosecutor at trial conceded that the colloquy between the respondent and the police officer rendered the statement involuntary -- I mean, inadmissible in the case in chief, and we are not contesting that.

QUESTION: When did the Sixth Amendment violation occur?

MR. BAUGHMAN: I would say that it occurred when the police officer continued to question respondent after the colloquy about whether or not he should talk to his attorney.

QUESTION: Is the admission of the statements at trial itself a Sixth Amendment violation or not?

MR. BAUGHMAN: Well -- yes. The Sixth Amendment was not violated, I would say, by the taking of the statement. If the prosecutor had never used it for any purpose there wouldn't be a violation.

QUESTION: You don't think there's a violation even though he didn't use it?

MR. BAUGHMAN: Well, I would say if -- if nothing was used at trial, the issue wouldn't be presented as --

QUESTION: I thought you had told me the violation occurred when the statements were taken.

MR. BAUGHMAN: That is correct. The officer should have ceased questioning at that point. At least, we are not contesting that point. We did not raise it in the trial court and we are not raising it here, trying to argue that that --

QUESTION: Well, it makes a difference analytically to know whether it is a violation of the Sixth Amendment when the testimony is offered at trial, or whether it's a violation of some prophylactic rule designed to protect Sixth Amendment rights. Which is it?

MR. BAUGHMAN: Well, the right to counsel with regard to custodial interrogation, it seems to me, can only ripen, if I can put it that way, when some evidence taken from the accused is offered in court.

If the prosecutor had not used this statement in any way, then I would say that the Sixth Amendment right wasn't violated, only a prophylactic rule to protect that right would have been violated by the questioning.

QUESTION: Well, that's a rather curious position to take, I think. I would have thought that the Sixth Amendment was violated when the questions were asked. Then it becomes a question of what's the remedy for that violation.

MR. BAUGHMAN: Well, either the Sixth Amendment or a prophylactic rule would be violated when the questions were asked, I suspect. But it seems to me that in its essence the Sixth Amendment is a trial right or a preparation for trial right, and if counsel is denied, as in Powell, an adequate time to prepare, or denied at trial, as in Gideon, you have a violation of the Sixth Amendment itself.

QUESTION: Suppose the district attorney himself or herself had conducted the questioning after appointment of counsel and without a waiver. Would that have been a violation of the Sixth Amendment?

And let me tell you that the reason I ask the question is because there are many reasons why you may wish to interrogate

a defendant other than simply to obtain evidence. You may want to see his or her demeanor, how they react to a certain line of questioning. And if you say there is no Sixth Amendment violation unless there is some evidence introduced, it would seem to me that there would be many reasons why prosecutors would want to go down and talk to the people they're going to put on trial.

MR. BAUGHMAN: Well, again, I struggle with the question because it seemed to me that the Sixth Amendment was in essence a trial right. And, for example, I can see situations in the Fifth Amendment, if I could compare for just a moment, where an individual could even be coerced into giving a statement, but his Fifth Amendment right wouldn't be violated until the evidence is offered because his right is not to be compelled to be a witness against himself.

QUESTION: But the language of the Fifth Amendment is different, of course.

MR. BAUGHMAN: That's correct.

QUESTION: It suggests that result. That's not the language of the Sixth Amendment.

MR. BAUGHMAN: Well, the Sixth Amendment to me does not suggest on its face any necessary role for counsel at interrogation prior to the attachment of the right.

In the first portion of my brief I attempted to argue or to make the point that there is at least some theoretical

question as to the underpinning of the entire doctrine of counsel even having a role at this stage. I'm not planning to argue that point today, but all I wish to suggest there is that there is an argument to be made that perhaps this court has taken the doctrine of the right to counsel at impeachment as far as it ought to go so that it should not extend it to impeachment use.

What I am suggesting here with the first portion of my argument as to the prophylactic rule is simply that Jackson is a prophylactic rule in terms of guarding the Sixth Amendment right to counsel, and that there hasn't been a finding in this case by any court that the respondent didn't otherwise validly waive his right to counsel. The issue was never litigated in this case.

QUESTION: And the Michigan Court of Appeals relied on Jackson for its holding?

MR. BAUGHMAN: Yes, it did. On appeal what the Michigan Court of Appeals stated was that the -- and I quote -- that the statement was made in violation of defendant's Sixth Amendment right to counsel, see, e.g., Michigan v. Jackson. A statement so acquired may not be used for any purpose, including impeachment. And that was the extent of the court of appeals analysis in this case.

That court made no independent inquiry as to whether there had been an otherwise valid waiver of the right to

counsel, and there was no need for it to do so because in Jackson this Court had held that any waiver of the right to counsel occurring after its assertion and occurring at police-initiated interrogation is simply invalid. There is no need for further inquiry.

That case, Michigan v. Jackson, was premised on Edwards v. Arizona and imported directly the Edwards rule that when an accused asserts his Miranda counsel right to cut off questioning, any waiver occurring subsequently at police-initiated interrogation is simply invalid without any further inquiry into the manner in which that waiver might have occurred. But I would --

QUESTION: Mr. Baughman, would you just -- I was trying to remember this sequence. This was not only after he'd been -- this particular questioning was -- was it after he'd been both charged and after a lawyer had been appointed to represent --

MR. BAUGHMAN: Yes. This was after arraignment and assertion of the right to counsel by a claim of indigency and the appointment of counsel.

QUESTION: So the prosecutor and the police knew he was represented and he had a lawyer that they could contact?

MR. BAUGHMAN: I'm sure the police were undoubtedly aware of that. I can't say this individual officer was that he said he wanted to talk to. But that's -- when he said, "But I

don't know if I should talk to my lawyer," that pretty well told them, I think.

QUESTION: Do you think the case would be any different -- I'm just thinking of Justice Kennedy's question -- if the questioning had been by the prosecutor?

MR. BAUGHMAN: As to the Sixth Amendment I don't think it would make a difference, but I think we'd be into a different question in the State of Michigan as to the application of the ethical standards.

QUESTION: It would be clearly unethical, wouldn't it?

MR. BAUGHMAN: Yes, it would.

QUESTION: It's not unethical for the prosecutor to use an agent to do it? Is that right?

MR. BAUGHMAN: Well, if the prosecutor used an agent, that is, told the police officer to go talk to him, I think that would also be unethical. The cannons say a lawyer can't communicate or cause another.

But the prosecutor did not tell this officer to talk to the individual. In fact, he --

QUESTION: Do you think --

MR. BAUGHMAN: -- did not know this was going on.

QUESTION: Do you think the case would be different if the prosecutor had told the police officer to go ahead and see what you can find out?

MR. BAUGHMAN: Under the cannons I think definitely it

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would be.

QUESTION: How about constitutionally?

MR. BAUGHMAN: No, I don't think it would be different constitutionally. But I think we would not be here because of the cannons and the way Michigan has construed those.

QUESTION: But going back again to the constitutional question, you think it would not be a constitutional violation for the prosecutor himself or herself to go ahead and question the --

MR. BAUGHMAN: I don't think the constitutional question would turn on who does the asking.

QUESTION: I don't understand why you say that the case wouldn't be here because of the violation of the cannons. Do we exclude evidence because of violation of the cannons now?

MR. BAUGHMAN: Well, no. I think if the Michigan Supreme Court or Court of Appeals had said this case is reversed because we find as a matter of state law that a violation of the cannons precludes use of the evidence for any purpose, then I think the case would have been decided on a state law basis and we wouldn't have a federal ground to go on.

This Court has recognized that the in the Edwards context that the court there was not dealing with a constitutional rule. In Solem v. Sterns this Court said, in declining to afford Edwards' retroactive effect that the court in Edwards had created a protective umbrella serving to enhance the

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constitutional guarantee and referred to the rule in Edwards as a prophylactic rule. The court stated that Edwards established a bright-line rule to safeguard preexisting rights, not a new substantive requirement.

So, is it possible to violate a protective rule to, as it were, pierce the protective umbrella, without violating the underlying constitutional principle that the protective rule or umbrella was designed to protect? And I think this Court has answered that question in the affirmative on more than one occasion.

For example, in Miranda this Court has held time and again that the Miranda warnings themselves are not constitutional rights but are prophylactic rules designed to protect the underlying constitutional right, that of a compelled self-incrimination.

QUESTION: Well, Counsel, if you take the position that the violation of the Sixth Amendment occurs at the time the evidence is offered at trial, then it seems to me very difficult to argue that it's only a prophylactic rule. Then you're dealing with the violation itself.

If you took the position that the violation occurred when the questioning occurred, then I can understand that you could have a prophylactic rule that says you won't use it at trial. But I find your argument hard to follow.

MR. BAUGHMAN: I think your Honor is correct, and I see

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your point. I'm tending to confuse the Sixth and the Fifth Amendments. I think that if error occurred in the constitutional sense, whether it be a prophylactic rule or the underlying right, it would have to occur at questioning.

The admission of the evidence is the question of whether or not any remedy springs or not. If it's not admitted, no remedy springs. If it is, then there is a litigable point. So, I think your Honor is correct.

QUESTION: But, Counsel, is it not possible that there is a constitutional violation at both times? That (a) it's a constitutional violation to engage in this kind of questioning when the man is represented by counsel, and (b) it's a constitutional violation to introduce it at trial.

You seemed to think the second was the case just very naturally. I don't think they are necessarily inconsistent with one another.

MR. BAUGHMAN: Well, I think, for example, it's conceivable that the individual could be questioned and then no prosecution brought or the case dropped. I concede that --

QUESTION: Not after -- after he's been indicted, do you think a police officer can come back and say, I've just asked him some questions and he says he's innocent so we'll drop the --

MR. BAUGHMAN: No, I don't think so. But new evidence might be uncovered, for example, pointing in another

direction. Or somebody else might confess and the charges could be dropped. Charges have been dropped up to and including during trial in cases. It's conceivable that it could happen and the evidence never be offered.

I suspect I would not say, given Justice O'Connor's questions -- I think she's correct that I couldn't say that means no violation had ever occurred when the questioning occurred previously. It simply didn't ripen into anything that one would litigate.

QUESTION: It's also true that if a violation -- if you acknowledge a violation occurred at that time, then it's quite different from the Miranda situation in which the warning is given in order to avoid a violation.

MR. BAUGHMAN: Well, I -- but I'm not conceding that what was violated in this case was the constitution of the questioning. I'm not conceding that there was not a valid waiver of the right to counsel.

I'm conceding that Michigan v. Jackson was violated and the question --

QUESTION: Well, what is Michigan v. Jackson? I don't understand that.

MR. BAUGHMAN: Michigan v. Jackson states that if the individual has asserted his right to counsel, the police simply may not initiate any questioning with him unless he goes forward first, which is the precise rule of Edwards

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transposed from the Fifth Amendment into the Sixth Amendment.

The rule of Edwards is that if the individual exercises his Miranda counsel right, he can't be interrogated again unless he initiates. It's the same rule from the Fifth into the Sixth.

And this Court has said in the Edwards context that that's a prophylactic rule designed to protect voluntaryness.

QUESTION: To -- To protect to avoid constitutional violation.

MR. BAUGHMAN: That's -- that's correct.

QUESTION: But here you're saying a constitutional violation has occurred.

MR. BAUGHMAN: No, I'm saying a Jackson violation has occurred. What I am conceding in this case is that -- that this was not an initiation by the defendant. And I'm conceding that simply because of the colloquy that occurred between the police officer and --

QUESTION: I think you changed your position from your answer to Justice O'Connor which was that a constitutional violation occurred at the time of questioning.

MR. BAUGHMAN: Well, let me try to make it clear. The violation that occurred in this case occurred at the time of the questioning is what I'm now conceding to Justice O'Connor. But I'm not conceding that that was a violation of the Sixth Amendment because that question has really never been

litigated. All that was decided was that Jackson was violated.

And what I'm arguing to this Court today in the first portion of my argument is that Jackson establishes a prophylactic rule to protect waivers of counsel so that if an individual has asserted his right to counsel, you just can't question him at all.

But I think that it is certainly conceivable and possible that if the police do initiate interrogation after the assertion of the right to counsel and we examined all the surrounding facts, that one could say as a matter of actual fact that a voluntary and intelligent and knowing waiver of the right to counsel has occurred.

If that can occur, if it is possible to actually voluntarily, knowingly and intelligently waive the right to counsel, when the police initiate the interrogation, then the rule prohibiting that must be a prophylactic rule designed to protect, insure and enhance that guarantee, just as in the Edwards context it seeks to protect.

QUESTION: Well, what if, taking Justice Kennedy's example, the police had taken him up into the courtroom and set him on the witness stand with nobody there except the prosecutor and the police and said, we'd just like to ask you a few questions, and he says, I don't know whether I should or not, and, maybe I ought to talk to my lawyer. Anyway, they go

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ahead and ask him the questions and he goes ahead and answers them. He says, I will do it, maybe they want to see how he performs on the stand.

Would that itself violate a constitutional right, do you think? Do you think he had a right to have a lawyer with him in that proceeding?

MR. BAUGHMAN: In other words, if everything that occurred here had occurred but in a different setting?

QUESTION: In a courtroom and the prosecutor himself or herself present and they say, we may not want to use this, but we just want to see how you respond to questions in a courtroom.

MR. BAUGHMAN: I think it may well be in those circumstances, and it may well be --

QUESTION: The question is would he have a right to have a -- could they do that without having a lawyer with him?

MR. BAUGHMAN: Again, if he validly and intelligently and knowingly waived his right to counsel, I don't think the Sixth Amendment would be violated and it would turn on the facts of each case.

Initiating the contact at all would violate Jackson, but it's possible that after that initiation he may meet a Johnson v. Zerbst standard, or any other standard, for waiver.

In this case, that was never litigated because below the respondent or defense counsel at trial, who was not Mr.

Morgan, did not object to the use of this statement for impeachment purposes and, therefore, there was never any record developed as to what happened in terms of any warning, how the defendant came to speak. That was never fully explored because all that mattered was -- to the Michigan Court of Appeals -- was that Jackson was violated because they treated this as a police-initiated interrogation.

QUESTION: And they ruled that notwithstanding the failure to object to its use in the trial court, they would reach it and reverse the conviction.

MR. BAUGHMAN: That's correct. The Michigan Court of Appeals did three things. They forgave the failure to object; they found a Jackson violation and said that a Jackson violative statement cannot be used for impeachment; and they held that this was not harmless error.

Now, I think as to one in three, as to forgiving the failure to object and a finding of a lack of harmless error, that the court erred egregiously. But they held what they held. And because they held in the way they held, we are here on the second issue with a rather scant record because the issue was never developed in the trial court due to the failure to object.

QUESTION: Has Massiah got anything to do with this case?

MR. BAUGHMAN: Well, if there is a -- if there were a Sixth Amendment violation in this case, then it would be a

violation of Massiah. If --

QUESTION: Well, how about -- is Massiah relevant to deciding whether there was a Sixth Amendment violation?

MR. BAUGHMAN: I don't think absent Michigan v. Jackson what occurred here would necessarily be a Massiah. The question would be --

QUESTION: Why not?

MR. BAUGHMAN: Because the question would be -- which has never been resolved -- did the respondent validly waive his right to counsel when the police initiated the interrogation. Until Jackson, this Court had not said the police can't initiate.

In Massiah and Brewer v. Williams, there was initiated interrogation by the police. But what divided this Court was whether there was an appropriate waiver, not that the police had initiated the contact -- that was not the concern of the Court in those cases. But it was in Michigan v. Jackson.

QUESTION: Yeah, but there was a concern that he had a lawyer.

MR. BAUGHMAN: Yes, there was a concern that he had a lawyer and there was a Sixth Amendment violation found because the right had attached and the court held it wasn't validly waived. It was the waiver question that divided the court in those cases. Did he waive it or not? Not that he couldn't be approached, but that he didn't waive counsel when it was

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approached.

And that question, did he waive counsel --

QUESTION: Well, if he didn't waive it -- but absent waiver, there was a Sixth Amendment violation just from the questioning.

MR. BAUGHMAN: That's true, absent waiver. I'm -- I'm simply saying that the waiver question has never really been explored in this case because if you find a Jackson violation, that's the end of the analysis.

QUESTION: Well, do --

MR. BAUGHMAN: If you don't find an initiation.

QUESTION: Didn't Massiah have an element of surreptitiousness to it on the part of the government?

MR. BAUGHMAN: Yes. In Massiah, the -- Massiah did not realize that he was speaking to a government agent, Colson, who was in the car and wearing a wire, as I recall. So, --

QUESTION: So, just answering the questions didn't amount to a waiver?

MR. BAUGHMAN: That's correct. There was -- he didn't know he was speaking to a government agent so he couldn't very well waive his right to counsel.

QUESTION: Was there any doubt here that the defendant knew he was speaking to a police officer?

MR. BAUGHMAN: Oh, no. None whatsoever.

As I've said, the first part of my argument was simply

that this Court should not find that exclusion of evidence for impeachment purposes is required when a prophylactic rule has been violated, and I tried to urge that Jackson is such a rule.

But, more fundamentally, if this Court were to determine that what happened here was a violation of the Sixth Amendment as well, we would also urge that this Court not call that exclusion of the evidence for impeachment is required.

This Court has considered the question of impeachment use of evidence when it has been obtained in violation of a constitutional principle rather than a prophylactic rule with regard to two amendments, the Fourth and the Fifth. And this Court has reached different conclusions with regard to the remedy, depending on which amendment is involved, and we submit for good reason.

With the Fifth Amendment this Court has held that statements which are compelled are admissible for no purpose whatsoever. Even those cases allowing impeachment use of evidence obtained in violation of one of the Miranda prophylactic rules recognized if those statements are also compelled and therefore taken in violation of the Fifth Amendment and not simply the prophylactic rule, that no use may be made of those statements.

QUESTION: If you have a defendant who has been given counsel and the police know he's got counsel, you think there

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is no violation of the Sixth Amendment if the police go to him and as if he would like to waive his right to counsel and talk?

MR. BAUGHMAN: That's correct. I think that's not a violation of the Sixth Amendment necessarily. We'd look at all the facts.

QUESTION: You don't think it's a violation of the Sixth Amendment when the defendant has counsel for the police or the prosecution to approach the defendant?

MR. BAUGHMAN: Again, not necessarily. Looking to Massiah and Brewer, where this Court was split -- five/four in both cases -- where it focused on the facts was there a waiver. Not that there couldn't be a waver, but was there a waiver.

And I think as to whether the Sixth Amendment was violated, that's what this Court would have to focus on. And if in this case it was found that there is a Sixth Amendment violation, again, I would say that impeachment use should be allowed.

QUESTION: Excuse me. In theory how would we have declared this unlawful if it was not a Sixth Amendment violation? I mean, it's very nice -- you're drawing a line between a Sixth Amendment violation and a prophylactic rule. But the prophylactic rule is enunciated by saying, well, you know, the core of the Sixth Amendment is just this, but in

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order to protect that core we're going to say that a Sixth Amendment violation constitutes this greater body of activity.

MR. BAUGHMAN: Well, I don't know if that's exactly what this Court has done because, again, if you look to the Fifth Amendment, this Court has said the core is this -- compelled self-incrimination -- and here are some rules, prophylactic rules, to protect that core. And if these are violated, you can't use the evidence in the case in chief -- even if this isn't violated.

QUESTION: Of course, if there would be a Sixth Amendment violation just by the police approaching him, Jackson wouldn't have been necessary, I suppose.

MR. BAUGHMAN: That's correct. I think that's true. This Court could have said in Massiah or Brewer, or other cases, that the police approach rendered anything that was voluntary or was impermissible, and you would not have gotten into the splits in the court in those cases as to whether or not the waiver had occurred. They would have been very easy cases to decide, I believe.

In Portash this Court held that the Fifth Amendment violation is admissible for no purpose whatsoever and that that principle did not turn on whether or not the statement might be reliable because there the compulsion was a judicial order rather than physical force.

But in reversing the lower court, this court said that

the linchpin of the Fifth Amendment is not reliability, it's coercion. So, any coerce statements by a governmental agent simply cannot be used for any purpose whatsoever because, as Justice Stewart put it, in that case the court was dealing with the constitutional privilege in its most pristine form.

That's what the Fifth Amendment is for. It's to exclude an evidence from evidence a class of testimonial evidence, compelled statements. That's why it exists.

But with the Fourth Amendment, as contrasted to the Fifth, this Court has reached a different result. This Court has held that when that right is violated, rather than a prophylactic rule designed to protect it -- and I'm unaware of any, frankly -- that use of evidence for impeachment purposes illegally seized under the Fourth Amendment is permissible.

Beginning 35 years ago in Walder, this Court has consistently held to that proposition, recognizing that arriving at the truth is the fundamental goal of our system of justice and that full cross-examination is, as Wigmore has said, the greatest legal engine ever invented.

QUESTION: Counsel, I thought there was some evidence in this case that the defendant himself told the police officer he'd like to make another statement.

MR. BAUGHMAN: That's correct, there is. The -- the --

QUESTION: But you appear to concede that the police approached him. Did you mean to do that?

MR. BAUGHMAN: No, I -- what I'm conceding is -- because we conceded it in the trial court -- is that when the defendant stated, "I wish to make -- I'd like to make another statement," and then said, "I don't know if I should talk to my lawyer or not," and the officer said, "Well, you don't need to because we'll give him the statement," that that should not be treated as initiated by the defendant. That his remark turned it into an initiated interrogation by the police because of his rather ambiguous remark about counsel.

The trial prosecutor conceded that's why she wouldn't use it in her case in chief. And I'm not disputing here that this should not be treated as the police -- that it should be treated as police-initiated interrogation.

QUESTION: Well, if we adopt your rule, what's to prevent the police from just dropping by the jail cell every morning and saying, "Would you like to talk to us today?"

MR. BAUGHMAN: Well, I would submit that certainly abuse of police conduct shouldn't be allowed. And there is a --

QUESTION: Well, is that abusive? They just drop by every morning because there is no deterrent under your rule, as I see.

MR. BAUGHMAN: Well, I think the deterrent is any -- any evidence so gained can't be used in the case in chief. It's admitted -- it's --

QUESTION: Well, they can't -- they don't have that

evidence anyway, by hypothesis. There is no down-side, in other words.

MR. BAUGHMAN: Well, there is --

QUESTION: So far as the defendant is concerned, they are finished with him the minute they have -- he has counsel. But under your rule, they might as well have the evidence for impeachment. That's better than no evidence at all.

QUESTION: A pretty unsanitary prophylactic rule in other words.

MR. BAUGHMAN: This Court faces the very same question in Haas. In Haas what happened was the individual was given his Miranda right to counsel and asked for a lawyer. And the police kept questioning and a statement was taken.

This Court said expressly, "one might concede that when proper Miranda warnings have been given and the officer then continues his interrogation after the suspect asks for an attorney," which I submit is analogous to what your Honor is suggesting, "the officer may be said to have little to lose and perhaps something to gain by way of uncovering possibly impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in Harris and we are not disposed to change it now."

I would submit that the instant situation is really

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almost perfectly analogous to what happened in Haas. Request for counsel and interrogation continued. Here was --

QUESTION: That's because the right to counsel hadn't attached.

MR. BAUGHMAN: That's correct. One is a Fifth Amendment and one is a Sixth Amendment. But as to --

QUESTION: One is not a Fifth Amendment. One is a prophylactic, according to you at least -- a prophylactic rule designed to avoid Fifth Amendment violations.

MR. BAUGHMAN: That's correct.

QUESTION: The other is a consummated Sixth Amendment violation.

MR. BAUGHMAN: That's true, but as to the deterrent effect on the police on exclusion of impeachment evidence, I believe the situations are analogous. The police don't want to get evidence illegally. They're not out there trying to violate all constitutional principles.

And there is a concern that they might get a statement that would be otherwise admissible and now they can't use it. They might evidence which -- a statement which they derive evidence from and they get into the fruit of the poisonous tree analysis.

The police aren't trying to violate the Constitution. There is a good deterrence rationale on excluding it in the case in chief, and I think this Court's remarks in Haas that

it's speculative as to whether there is an increased effect if you exclude it for impeachment use is valid here.

Haas was decided 15 years ago and I've seen nothing in the literature and nothing has been suggested in response to --

QUESTION: But, Mr. Baughman, don't you recognize that there is -- even under your ethical standards you referred to earlier about the prosecutor, if the right had not attached, the prosecutor could go ahead and interrogate the suspect, wouldn't he?

MR. BAUGHMAN: Yes.

QUESTION: There wouldn't be any ethical violation then, but apparently under Michigan law there is a very sharp distinction between the relationship that arises once a man is charged and has a lawyer. Different -- it's a different ball game.

MR. BAUGHMAN: Yes. Yes. But, again, I --

QUESTION: You think it shouldn't be, though?

MR. BAUGHMAN: I think the deterrent principle as to whether or not there's any deterrence gained or it's significant enough to warrant the detraction from the truth-finding process that happens when you exclude the evidence for impeachment purposes is simply the same in this situation as it is in Haas.

Again, I see nothing to suggest that since Haas police

routinely continued to interrogate people after they assert the Miranda right to counsel. And it's been 15 years. I suspect if one were to say that Haas had opened the floodgates to illegal police behavior, that we might have heard about it by now. And I think that translates to the situation also where we would see the same sort of situation.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Baughman.

Mr. Morgan.

ORAL ARGUMENT OF ROBERT M. MORGAN, ESQ.

ON BEHALF OF RESPONDENT

MR. MORGAN: Mr. Chief Justice, may it please the Court, Respondent submits that this case involves the essence, the absolute unqualified essence of the Sixth Amendment right to counsel. There is no question the right had attached; respondent was formally charged. There is no question that he asserted that right; he requested an attorney.

That attorney then stood as the medium, as this Court has indicated in Jackson, between the state and the respondent for all contacts. There is no question, then, notwithstanding that medium, not withstanding that assertion of the right to counsel, the state interfered with that right. The state interfered concededly, deliberately --

QUESTION: When did the violation occur?

MR. MORGAN: The violation occurred both, Justice Connor

-- QUESTION: O'Connor.

MR. MORGAN: O'Connor. I'm sorry, Justice. At the time of the interference. But I don't think that ends the analysis. I think the next step is to look to see is there prejudice. Or, in other words, did the state gain some advantage. Did the state use it, and not just use it in the sense of, as the Solicitor General argued in the amicus brief, that, well, they only used it in essence to generate impeachment and that's not so bad.

Well, there are many uses. The example of put respondent in the witness chair and ask him a few questions and size him up is a use which is to the state's advantage.

QUESTION: Can the defendant waive his Sixth Amendment right to counsel?

MR. MORGAN: A defendant can waive his Sixth Amendment right, certainly, but after assertion of the right then it is respondent's position that counsel has some role in that waiver. And I think that's the essential notion that was contained in Michigan --

QUESTION: There was no determination here, I gather, of whether the defendant waive his right.

MR. MORGAN: There is -- and I don't think there could be, frankly. The record is insufficient --

QUESTION: You don't think the court could have made that determination?

MR. MORGAN: No, not on the record because the state also concedes -- they concede the Sixth Amendment violation. They concede a Miranda defective admonition. And by virtue of that, then, I think implicitly there cannot be a waiver of the Sixth Amendment right.

But it is -- a violation may occur at the time of interference by the state. But it is then -- the next step is prejudice. Was there some use -- did the state gain an advantage? You could have a violation, no question -- a Sixth Amendment violation but no prejudice to defendant, no use.

Weatherford v. Percy, albeit in a civil context, is an example. Undercover officer acting under cover posing as a -- as a defendant, intruding in the attorney-client relationship and intruding in the defense camp. But, of course, the court said that certainly there was a violation. But there was no prejudice because the officer never, never shared anything he learned with the prosecutor. Consequently there was no prejudice, there was no use.

But there are many ways in which the state can engage in a Sixth Amendment violation here and gain an advantage or prejudice --

QUESTION: Well, wouldn't -- wouldn't your argument be just as strong if it were just an Edwards' violation?

MR. MORGAN: No, I don't believe so because --

QUESTION: Well, the -- the police would have every --

the same -- the same possible urge to go ahead and question, knowing that they could use the forbidden statements for impeachment.

MR. MORGAN: Well, I think --

QUESTION: They would also find out how he responds to questions, what his demeanor is.

MR. MORGAN: I think, thought, Edwards involved a prophylactic rule. Here we're talking about the substantive --

QUESTION: No. That's just a --

MR. MORGAN: -- constitutional amendment.

QUESTION: That's just a difference in language as far as the possible advantage to the state is concerned.

MR. MORGAN: Well, it's a critical difference in language because in Edwards certainly there had been no assertion of the right to counsel.

QUESTION: Well --

MR. MORGAN: Edwards is a prophylactic rule which --

QUESTION: Well, for Edwards to take -- for Edwards to take hold at all, there has to be an assertion of the right to counsel. After an assertion you can't -- the police can't go back to him.

MR. MORGAN: But in Edwards I believe it was an assertion of right to counsel in a Fifth Amendment context.

QUESTION: Well, I know, but the --

MR. MORGAN: And some would say --

QUESTION: -- but the rights certainly attach then that he had a right to counsel under the Fifth Amendment to --

MR. MORGAN: The right --

QUESTION: -- to -- for the lawyer to be there and the police weren't supposed to talk to him.

MR. MORGAN: The right --

QUESTION: But they went ahead and talked to him.

MR. MORGAN: The right to counsel in that context attached. The Sixth Amendment right to counsel to have the lawyer serve as the medium for all contacts between the state and the defendant had not attached.

There are many --

QUESTION: Are you saying that the police could not approach a defendant after he has perhaps been assigned counsel and asked him if he wanted to make a statement and the defendant could not waive that right?

MR. MORGAN: That, we submit, is the essence of the court's holding in Michigan v. Jackson.

QUESTION: That's not a prophylactic rule? You say that is -- that is core Sixth Amendment?

MR. MORGAN: That is core Sixth Amendment, that's correct.

QUESTION: How do you get that from the text? I mean, the text says you're entitled to counsel.

QUESTION: Yeah.

QUESTION: Where does it -- how is it the core that since you're entitled to counsel you can't even approach somebody who has counsel and say would you waive your right to counsel? How can you possibly consider that the core rather than prophylactic?

MR. MORGAN: Well, because it is -- that -- you're approaching the defendant in the context of the adversarial process. You're approaching the defendant at a time after the defendant has asserted that right and by asserting that right has said, I realize I cannot deal with the state, I am incapable of dealing with the state.That's what the assertion of the right to counsel means.

QUESTION: No, I don't think it means that. It seems to me that's a prophylactic rule. The assertion of the right to counsel is: I am entitled to deal with the state through counsel. That's what the Sixth Amendment requires. But I'm certainly free to waive that.

Now, as a prophylactic rule we've said you can't even ask for a waiver. But I don't see how the fact that you can't even ask for a waiver is the core of the Sixth Amendment. You really think that's not prophylactic?

MR. MORGAN: It is the presence of counsel at that critical stage which is the core of the Sixth Amendment. Counsel should be there at the time the state approaches the

defendant and asks him to seek to waive his right.

QUESTION: That's the core?

QUESTION: The counsel -- defendant can approach the police and tell them I want to make a statement.

MR. MORGAN: In Michigan v. Jackson the court uses -- makes repeated reference to police-initiated --

QUESTION: Yes.

MR. MORGAN: In this case, though, the state concedes that Michigan v. Jackson is --

QUESTION: Yes, but -- but I thought your position was this right simply could not be waived once it attached. And yet certainly nothing in Michigan v. Jackson holds that a counsel defendant cannot on himself go to the police and say, look I want to tell you something.

MR. MORGAN: But I think the thrust of Jackson is that waiver in that context must be an exacting waiver and the court speaks of Johnson v. Zerbst. Certainly, there is nothing to prevent a defendant from pleading guilty in a case, but we would not countenance a plea proceeding where the defendant --

QUESTION: Well, I'm not talking about a plea proceeding. I'm talking -- the guy is in a jail cell and he says to somebody that comes by, I want to talk to the police. And the police come and he says, I know that I have a lawyer, I have a right to a lawyer, I have a right not to say anything at all,

I've considered all that and I want to say something to you.

MR. MORGAN: It raises a troubling contradiction.

QUESTION: What's the contradiction?

MR. MORGAN: The notion that -- contained in Jackson that in spite of full complete Miranda warnings, in spite of the fact that Jackson evidently made a voluntary statement, in spite of the fact that he made that statement knowingly, intelligently -- a voluntary statement in compliance with Miranda -- the court still held that because the right to counsel had attached that that waiver was not sufficient.

QUESTION: Yes, but the facts in Michigan against Jackson were that the police had initiated the thing. What I'm positing to you is totally initiated by the defendant. Your position is like what Justice Frankfurter criticized in Adams against McCann. You imprison the defendant in his rights.

MR. MORGAN: Well, the defendant is always free to forgo the right to counsel.

QUESTION: And he's -- then, in my example, though, he's free to go to the police or ask the police -- tell them, I want to make a statement. The police are free to receive that statement. Is that correct?

MR. MORGAN: Respondent's position would be that the police have an obligation to provide notice to the defendant's counsel that -- that --

QUESTION: Who -- what case do you rely on for that?

MR. MORGAN: We rely in essence of our reading of Michigan v. Jackson.

QUESTION: Does Jackson say that?

MR. MORGAN: Well, it says that there was no valid waiver. What is the difference if it's police-initiated or defendant-initiated? The court --

QUESTION: Then our Edwards decision and our Michigan against Jackson decision really make little sense because I thought both of those turned on the idea that there is a critical difference whether it's police-initiated or defendant-initiated.

MR. MORGAN: But this Court in Henry, for example, said that within a Sixth Amendment context it is irrelevant who initiated the contact.

QUESTION: Well, there is an element of surreptitiousness that you also had in Massiah.

MR. MORGAN: Yes, sir.

QUESTION: Well, -- there is a violation of the Sixth Amendment somewhere in this process you started to argue about why the -- why the statement that was taken could not be used for impeachment. Why is that? Why is this case different from Walder and the Fourth Amendment cases and the Miranda cases?

MR. MORGAN: Because the analogy to the Fourth Amendment is simply inappropriate. The Fourth Amendment is a right that

all citizens have. It is not a procedural right, such as the Sixth Amendment. It does not extend to the integrity of the trial process. It does not encompass the essential components of the right to counsel, notions of trustworthiness, notions of reliability.

In the Fourth Amendment the harm is complete at the time that it's done. It simply is an inappropriate analogy to a core violation of the Sixth Amendment.

QUESTION: What's the difference between this and the Miranda/Edwards situation?

MR. MORGAN: Because Miranda as a prophylactic rule is just that, judicially crafted as the Fourth Amendment exclusionary rule designed as an outer layer of protection not involving a direct violation of the constitutional amendment itself.

QUESTION: Yeah, but in terms of the theory of our cases that -- allowing the use of this illegally-taken evidence for impeachment, I don't see why the rationale of those cases -- or, maybe you can tell me why the rationale of those cases doesn't apply here.

MR. MORGAN: Because --

QUESTION: The defendant is testifying on the stand and he -- and he testifies quite contrary to some statement he made to the police.

MR. MORGAN: Of course, here it was not quite contrary.

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They're very --

QUESTION: I know. But it were, your argument would cover that like a blanket.

MR. MORGAN: My argument would cover --

QUESTION: Yes.

MR. MORGAN: -- that as well because in essence what I think the state is asking the court to do is to look through the wrong end of the telescope, to focus solely on the truth-seeking function to the exclusion of the larger context. And the larger context is that this was an interrogation in violation of the right to counsel.

QUESTION: So you think the balance should come out differently?

MR. MORGAN: There should be no balancing at all, and that is our position. That this is in the larger context -- it's as much an adversarial proceeding in private as the trial may be. It may be as critical or more critical than the trial. The need for the presence of counsel is just as critical.

The state argues that, well, the rule of counsel in essence -- it's -- it's limited to the trial courtroom, it really doesn't come into play. But, to borrow a phrase from a well-known Congressional investigation, the lawyer is not a potted plant. The lawyer plays a role at that kind of interrogation. The lawyer's role is to ensure that the

questions are fairly stated. More importantly, the lawyer's role is to ensure that the client comprehends the questions.

QUESTION: But if Michigan against Jackson is a prophylactic rule, then presumably we would get into a little balancing to determine if that's violated -- whether the evidence can be used for impeachment.

MR. MORGAN: Assuming Michigan v. Jackson is prophylactic, it's respondent's position that here there was not only a violation of the prophylactic rules conceded by the state but also a substantive violation of the Sixth Amendment itself. And because there was a violation of the Sixth Amendment, we don't get into that balancing.

QUESTION: But that's not what the Michigan Court of Appeals held. They cited Michigan against Jackson, as I recall -- and only Michigan against Jackson.

MR. MORGAN: That's correct. They say that also People v. Gonyea, but that is not a case that rests on state grounds. That was a plurality opinion, three justices basing their opinion on the state constitution, three justices dissenting, saying that use of the state grounds was a pretext to evade review here, and the seventh saying the Sixth Amendment.

QUESTION: It sounds like our court. Yes.

(Laughter.)

QUESTION: Mr. Morgan, you gave you a litany about what the lawyer's role is. The lawyer's role is to do this and the

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lawyer's role is to do that. I guess what this case involves is whether -- at least the issue of whether it's a core Sixth Amendment violation -- involves the issue of whether the lawyer's role is to assist the defendant in deciding whether he wants a lawyer.

And I don't think it necessary follows that just because the lawyer's role is to defend against all sorts of other things, it is also the lawyer's role to -- necessarily the lawyer's role to assist the defendant in deciding whether he wants to waive his right to a lawyer. One can certainly say that that's an entirely different question from other aspects of a lawyer's role.

MR. MORGAN: Well, that is the troubling contradiction that I fumbled badly previously. And the contradiction is, I believe, the defendant who asserts the right implicitly, explicitly evidences his knowing decision that he is incapable to deal with the state.

After making that decision, which no one can contest as knowing and intelligent, it's troubling then to have the same defendant, if you will, who has already recognized that he is incapable of dealing with the state, go to the state, deal with the state, or, in this instance, subject himself to the guiding hand of police officers.

QUESTION: He later recognizes he was wrong. You're saying he has just given away his free will somehow and can no

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longer take it back. He can only speak through a lawyer thereafter.

I don't know of any other area of the law where we say a person can somehow contract away his right to contract. That can't be contracted away.

QUESTION: Mr. Morgan, what about the Faretta context? Do you think the lawyer plays a role in the judge's decision on whether to let the accused represent himself throughout the trial?

MR. MORGAN: I -- I think the lawyer plays a role and ultimately the police don't decide waiver. The court decides waiver. And that's our position here -- is, after assertion of the right to counsel there must be an exacting standard if we're going to get into the question of waiver -- comparable.

In Faretta the court not only ascertained from the defendant that he knew what he was doing, that he wanted to do that. The court not only ascertained and informed the defendant that there were detriments. The court in Faretta actually -- the trial judge actually went beyond that and said this is a real bad idea.

That's the kind of waiver that respondent submits -- that's the kind of exacting waiver that respondent submits is the only permissible waiver of right to counsel after the defendant has asserted the right.

What the state seeks, frankly, is a license to

interrogate the defendant here -- it was six days before trial. There is no restriction in the state's position. So, if it's unsuccessful six days before trial, let them go five days, four days, three days, two days. Let them go to the defendant during the trial itself.

There is absolutely no downside for the police. That's why deterrence really has no --

QUESTION: But the only upside they're asserting is to prevent the defendant from perjuring himself. That's the only upside that they're asserting. And if you assume this is a prophylactic rule, certainly one of the things in the balance is what's at the other end. Is it the introduction of initial testimony or is it rather simply the state preventing perjury from occurring by impeaching the defendant with his contrary statements?

MR. MORGAN: In engaging in the offending interrogation, I would not attribute the motive of preventing perjury to the state, frankly. The state is obviously engaging in something that, number one, generates impeachment material, number two, constitutes a form of discovery that they were not otherwise entitled to, number three, may actually undermine the integrity of the process and inhibit the truth-seeking.

For example, if in this context the police had taken Respondent Harvey's statement six days before trial, in violation of his right to counsel, and shared it with the

complainant and the complainant then used it consciously or unconsciously to -- to prepare herself for testimony, to perhaps consciously or unconsciously to shape her testimony, to steel herself for cross-examination, then this offending interrogation has actually undermined respondent's right of confrontation.

QUESTION: We'd have a different question before us. The only question we have before us here is whether it can be used to counteract what appears to be perjury at the trial.

MR. MORGAN: Well, in this record it does not appear to be perjury. It barely appears to be inconsistent. But respondent's position in essence is that just as we do not permit a compelled involuntary statement, as in Portash, to be used for impeachment, we should not permit, in the name of truth-seeking, a statement taken in clear violation of the right to counsel. That we do not simply engage in that kind of balancing, truth-seeking versus deterrence.

QUESTION: Part of the reason for the Fifth Amendment rule in cases like Portash has been a feeling on the part of the court, hasn't it, that compelled testimony has an element of unreliability to it?

MR. MORGAN: I -- I don't know if it was ever suggested, frankly, in Portash, who was compelled by virtue of an order to testify before a grand jury under oath.

QUESTION: So, you would distinguish that from cases

where there is a suspicion of coercion, of a physical coercion?

MR. MORGAN: They are obviously distinguishable. But both -- both come within the rule that use -- the government or the state cannot use that product to impeach the defendant because it would violate the Fifth Amendment right itself.

QUESTION: But hasn't -- in the coerced confession cases part of the reasoning there has been that the coerced confession is deemed presumptively unreliable?

MR. MORGAN: That's correct.

QUESTION: And certainly that wouldn't be true in this case. The circumstances attending the defendant's statement here would not lead to any presumption of unreliability.

MR. MORGAN: I don't know if it would lead to a presumption of unreliability, but the record in this case implicates or raises a concern for unreliability.

For example, the three areas of impeachment. One of the areas was, you didn't tell the police the name of this person whose name in essence is now uttered in your testimony. "Yes, I did tell them," respondent testifies. "Yes, I told them." Not an answer that is patently perjurious. Not an answer that is even contradicted in any fashion because the prosecutor never completes the impeachment process.

The prosecutor, instead, in this truth-seeking venture -- adventure, as the state uses the term -- insinuates, well, if

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it's not in there, that's the police that must have left it out.

QUESTION: Well, but the Michigan Court of Appeals treated this as impeachment, didn't it?

MR. MORGAN: They did treat it as an impeachment.

QUESTION: I mean, they didn't say it's not proper impeachment under our law. They say under the Federal Constitution you can't use it.

MR. MORGAN: But my point is, the presence of counsel at that interrogation might have ensured that when respondent told the officer the name, it got into the statement. And that involves, I think, the area of reliability, certainly.

There really is no downside for the state -- or, in this instance, the police -- and the state concedes, certainly, that the police in this instance are acting as agents of the prosecutor. There is no downside whatsoever to keep -- to keep coming back at the defendant. And, of course, those defendants that are already in the custody of the state -- the state that confines them, that fees them, and so forth -- are probably the most vulnerable.

And under the rule that the state seeks here, they seek a license to engage in that process not only repeatedly, not only as often as they like, but during the very trial process itself.

QUESTION: Of course, you say it's a constitutional

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violation even if the police are not trying to prompt this -- this statement by the defendant. It's your position, as I understand it, that even if he's there at the cell door banging with his cup on the bars saying, I want to confess, I want to confess, the police say, I'm sorry, your lawyer's not here, we can't reach him, you'll have to wait until tomorrow.

MR. MORGAN: That's my position.

QUESTION: That's your position?

MR. MORGAN: And if the respondent says, --

QUESTION: Yeah.

MR. MORGAN: -- I want to confess, he can go to confess in open court where there is an exacting standard concerning that waiver, an exacting standard concerning all of the rights. And that's in compliance with rule of --

QUESTION: His will by the Sixth Amendment has just maybe been taken over and given to the lawyer. He says, I've talked to my minister; I've decided the decent thing to do is to confess. I'm sorry, your lawyer has your will now, you can't do this.

MR. MORGAN: Well, if that's his will, his will will overbear the lawyer certainly. Where is the harm? Why is it wrong that the state says, no, you've already told us that you can't deal with us, you've already told us that you're incapable of dealing with us.

QUESTION: (Inaudible.)

MR. MORGAN: Absolutely. But you have an attorney and we're going to provide your attorney notice. And since you have a will and it's independent, your will can overbear that of the attorney, just as Faretta will won out and he was permitted to permitted to represent himself.

QUESTION: Counsel, in Michigan I take it the rule is that it's unethical for defense counsel to knowingly introduce a line of perjured testimony?

MR. MORGAN: That's correct.

QUESTION: But what would happen if the police, after the appointment of counsel, took a statement and gave it to the counsel and it was quite clear from the statement, because it linked up with other evidence, that the client's original story he told to the police was perjured testimony?

What would the client's -- what would the attorney's obligation be in that regard?

MR. MORGAN: I think then we've implicated the court's ruling in Nicks v. Whiteside.

QUESTION: In other words, you would -- the defense counsel would have the obligation to take into consideration the statement?

MR. MORGAN: If it is clear, certainly, that the client intends to perjure himself?

QUESTION: Yes.

MR. MORGAN: I believe so.

QUESTION: Well, then why can't the court take it into account?

MR. MORGAN: Because -- well, on this record, of course, we don't have --

QUESTION: Well, I'm -- I'm assuming the more difficult case.

MR. MORGAN: You're assuming the most difficult case, and that is in an absolutely clear, beyond contradiction --

QUESTION: Yes.

MR. MORGAN: -- confession.

QUESTION: Well, isn't the answer to that that if everybody plays according to the rules and they show the statement to the lawyer, the lawyer will not put on the false testimony?

MR. MORGAN: I believe so.

QUESTION: So that if they carried out your suggestion, the problem would be easily solved?

MR. MORGAN: Absolutely. In fact --

QUESTION: Instead of waiting in the bushes and letting him put it in and get caught in the trap, their duty is to show it to the lawyer who then has the duty not to introduce the false testimony.

QUESTION: But it's paradoxical, is it not, that the defense counsel has almost a higher obligation than that of the court? The court can blindfold itself to knowingly

perjured testimony even though the defense attorney cannot.

MR. MORGAN: The confession, or statement, in your hypothet certainly may be no different than the involuntary compelled testimony of Portash. But in order to preserve the right itself, we do not engage in that kind of balancing.

In order to prevent a violation of the Sixth Amendment itself, we don't engage in that kind of balancing. The truth-seeking function versus deterrence.

In essence -- in sum -- it is respondent's position that there is no question in this case that his right to counsel was violated, that analogies or comparisons to the judicially crafted Fourth Amendment exclusionary rule, or the judicially crafted prophylactic rules of Miranda, and the other outer layer of Edwards simply are inappropriate where there is a core violation of the amendment itself.

And the state throughout its brief excises reference to the sword, which I think the court referenced the shield --

CHIEF JUSTICE REHNQUIST: Thank you. Thank you, Mr. Morgan. Your time has expired.

MR. MORGAN: Yes, sir.

CHIEF JUSTICE REHNQUIST: Mr. Baughman, you have one minute remaining.

REBUTTAL ARGUMENT OF TIMOTHY A. BAUGHMAN

ON BEHALF OF PETITIONER

MR. BAUGHMAN: Just a quick factual point. We do not

concede in this case that after the colloquy between the attorney and the police officer improper Miranda warnings were given.

What we concede is -- because we conceded there -- that that cannot be viewed as defendant-initiated interrogation. What happened after in terms of any waiver or warnings just hasn't been litigated in this case, and I think that's the only question I think that's before this court factually.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Baughman.

The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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BY Judy Freilich

(REPORTER)