MR. NELSON: Mr. Chief Justice, may it please the Court, counsel:

I'm somewhat caught up in where to begin. I think perhaps the first and most important—one of the most important—things to say right now is concerning Mr. Flynn's last remarks. I, as a prosecutor, even of only short duration, take serious issue—as strenuous issue as I can take—before this Court, in the statement that it will take another 46 years in the State of Arizona for the right to counsel to become full-blown. I just simply think there is no reason for that statement to be made. If there is any reason for it to be made, or any possible justification for it to be made, then there is no point in going any further.

One issue that might be a good starting point is concerning the description of the Arizona court's supposed "off-the-cuff" referral to, or ignoring of, the *Escobedo* decision, or the attempt to void it clearly. There is no such thing in the Arizona Supreme Court opinion, and a reading of it shows that they agreed that they must follow this Court, not begrudgingly.

They simply stated that it's a fact, and then in exploring the case of *Escobedo* in the case of *Miranda* they try to find out what happened in *Miranda,* what the case of *Escobedo* says, and apply those principles There's no attempt to avoid, and I don't think you can read it, implicitly or otherwise, in the Arizona Court's opinion. Clearly they did not base it on a request. They did not say we have A, B, C, D, and E, and F wasn't present, therefore it's not controlling. That is not what they said. They said other courts in that jurisdiction had gone off on that particular area. They mentioned that as a factor, but they discussed hundreds of—no, not hundreds - many other factors in *Miranda,* which differentiated it from *Escobedo.*

To get to the facts in *Miranda* I think it's very clear from the record that Mr. Miranda, as an individual defendant, does not particularly require any special rule. I certainly agree with Justice Black 100 percent that the Fifth Amendment, the Sixth Amendment, and every part of our Constitution applies to everyone - poor, rich, intellectual and so on. There is no possible difference for differentiation.

I don't argue that. I don't think any prosecutor of note argues it. But *Miranda* I think characteristically by the petitioner, is portrayed in this light in an attempt to make something that isn't there. Sure he only went through the 8th grade, and one of the psychiatrist said that he had an emotional illness.

I might say that there is another psychiatric report. It's not in the printed record, and I just discovered it in my file, but it is in the record before this Court - the record that was on appeal, and I would urge the Court to advert to that psychiatric report, also. And as to the fact that Mr. Miranda could not have made the statement that he made, I just don't think there is any basis for alleging that. The fact that he uses the medical words to describe the male and female sex organ rather than some four-letter vernacular words that he might have used, this doesn't condemn him just because he knew those words and maybe felt in this context in writing the statement that he could use them. There is no indication in the record that the police put these words in his mouth. The fact that this particular one-half inch penetration is something that the police conjured up in his mind is just simply not supportable by the record.

You read the psychiatric report that is in the record and he said he was upset when he found out that she had not had sexual relations before. Well, she told him that. The only way he found out was because, obviously from the record, as he said, he was only able to make penetration only a slight way simply because of the fact that the woman's hymen had

not been ruptured. This is a clear fact that he knew why he made that statement and why it was accurate, not a fabrication of the police officers.

MR. JUSTICE FORTAS: Mr. Nelson, on page 19 of your brief you assert, “The petitioner was advised of his Constitutional rights, specifically including his right to remain silent, the fact that his statement had to be voluntary, and that anything he did say could be used against him.” Is the only basis for that the printed legend in the confession that he signed?

MR. NELSON: No, I don’t believe I would have put in as strong a statement concerning his right to remain silent had not we agreed to stipulate to this other portion of the other record. But I believe that as long as that’s in the record, I can make this statement because it’s supported in the finding of the court, based on the interrogation of the officers, the testimony of the officers in the trial that is actually before this Court concerning their advise to him, and the findings of the Court based on his understanding, the reading of the statement, the testimony coupled with this. I believe, then, that the court below, which clearly found that to be true, that he had been fully advised, had a proper basis for finding all of these to exist, except that there is no quarrel that he was not specifically advised that he had a right to counsel.

MR. JUSTICE FORTAS: Is it your position that the record shows that he was advised of these rights somehow, some way, in addition to the legend on his confession? That’s my question.

MR. NELSON: Yes.

MR. JUSTICE FORTAS: How? Where is that?

MR. NELSON: I believe the police officers testified to the fact that they told him of his rights and that they also, besides telling him—perhaps the record is a little unclear, in both cases, as to exactly when it took place—but I believe the record supports a statement that he was advised specifically by them of his rights and then he was adverted to the paragraph and perhaps even again the paragraph was read to him. But the record is not really all four-square. It is not that clear.

MR. JUSTICE FORTAS: Let us assume he was so advised—and I understand you to say that the record is not clear on that point—let us assume that he was advised of his rights. In your opinion does it make any difference when he was advised? That is, whether he was advised at the commencement of the interrogation, or whether he was advised only when he was ready to sign the confession—the written confession? Does that make any difference in the terms of the issues before us?

MR. NELSON: Assuming for a moment that some warning is going to be required, or should have been given, then I would think that to be of any effect it must be given before he had made any statements. Perhaps he might have refused to sign the written confession. Certainly still, the oral statement could have been introduced against him.

MR. JUSTICE FORTAS: So you think that the warning, if necessary, has to be given prior to the interrogation?

MR. NELSON: At some meaningful time, right. I would think it would have to be at some time prior to the fact that after—if they used it before, of course the warning would mean nothing. If they could introduce what they had obtained from the time before they gave the warning, and not afterwards.

MR. JUSTICE FORTAS: Is it your submission to us that a warning is necessary, before a confession, in the absence of counsel, can be taken and subsequently introduced in the trial?

MR. NELSON: No.

MR. JUSTICE FORTAS: What is your Position on that?

MR. NELSON: My Position basically is—concerning the warning - is that each case presents a factual situation in which the Court would have to determine, or a court or a judge or prosecutor at some level, would have to make a determination as to whether or not a defendant, because of the circumstances surrounding his confession, was denied a specific right—whether it be right to counsel, the right to not be compelled to testify against himself - and that the warning, or age or literacy, the circumstances, the length of the questioning, all these factors would be important. But I don't think you can put it to one simple thing such as a warning, because there are perhaps many more situations that we could think of where a warning would be completely inadequate.

MR. JUSTICE FORTAS: Well, tell me some of the factors that would be relevant in the absence of a warning.

MR. NELSON: His age, his experience, his background, the type of questioning, the atmosphere of questioning, the length of questioning, the time of day, perhaps—all of these factors.

MR. JUSTICE FORTAS: Do you think what we ought to do is to devise something like the *Betts* and *Brady* rule, special circumstances?

MR. NELSON: Well, I think that's what the *Escobedo* case indicates. In other words, I am—of course my Opinion is biased—if it's not something like that, then it is an absolute right to counsel. I don't think there can be any in-between unless some other theory. Under the way I read the decisions of this Court, if it is an absolute right to counsel, the same sort of right to counsel that attaches—

MR. JUSTICE FORTAS: We're not talking about right to counsel. We're talking about the warning. When is the warning necessary? As I understand you, you say that if the warning is necessary, if it should be held to be constitutionally necessary in the absence of counsel, then the warning has to be given at a meaningful time.

MR. NELSON: I would think so, certainly.

MR. JUSTICE FORTAS: And I then proceeded to ask you to give us the benefit of your views as to whether a warning was necessary. As I understand it, you say that you have to look at the circumstances of each case?

MR. NELSON: I would say, not absolutely.

MR. JUSTICE FORTAS: I ask you what are the relevant circumstances in each case—the relevant circumstances to look for in each particular case? And how about this particular case? Is the psychiatric report to which you refer, Psychiatric Report No. 2, at material variance with the one to which you are referring?

MR. NELSON: I don't think so. I'm not a psychiatrist, so I can't say. I think both reports say, in effect, the man has an emotional illness that should be treated, but that he knew what was going on. Both the reports say his mental faculties, whatever they were, were sharp, acute, and that he had no psychotic disorders. They both say basically the same thing. I think the diagnosis in the other report said a "sociopathic personality."

MR. JUSTICE FORTAS: So that if the *Betts* against *Brady* test were applied in the way that this Court did apply it prior to *Gideon,* I suppose it's quite arguable that Miranda, this petitioner here, was entitled to a warning. Would you agree to that?

MR. NELSON: It's arguable. I have extensively argued the fact that he wasn't of such a nature, as an individual who because of his mental condition or his educational background, as to require any more than he got. In other words, I'm saying that he got every warning, except the right—the specific warning, of the right to counsel. He didn't have counsel. Counsel wasn't specifically denied to him, on the basis of a request to retain counsel. The only possible thing that happened to Mr. Miranda that, in my light, assuming that he had the capability of understanding at all, is the fact that he did not get the specific warning of his right to counsel.

MR. JUSTICE FORTAS: Well, even if we assume that he got all the other warnings, and putting aside the question of the right to counsel, assume that the record does show that he got these warnings, still is there any evidence - and I have to ask you again— does the record show that he got it at what you would call a meaningful time?

MR. NELSON: Yes. I think the police officers - they were never pinned down, in other words, as to whether at 11:30 when they went into Interrogation Room 2 they immediately warned him. This was not pinned down by either side. But they did say he was warned. And they went on to elaborate that he was warned I believe, if my recollection serves me correctly, in response to a specific question concerning the statement - they said that part of the statement was read to him again.

Now I believe that the Court could find from the record that he was warned at 11:30. If the warning is required in this particular case to protect his rights, and it is found, as a matter of fact— which the court below did not find—that it was not given until the written statement, then I would suppose that it wasn't given at the proper time.

MR. JUSTICE FORTAS: Mr. Nelson, I certainly want your views and only your views, and I don't want to state anything unfairly, but am I correct in inferring from what you have just said, in answer to my questions, that the State of Arizona does agree that there are occasions when the United States Constitution requires that a warning as to the right to remain silent must be given to a person who is in custody, and must be given at a meaningful time? Do I correctly state the position that you are presenting to us here?

MR. NELSON: Not completely. I don't think that the Arizona Supreme Court has worded its holdings, and I cite to the Court the case that followed *Miranda* and referred back to it concerning the point of waiver and they go on to expand on their thinking. I don't believe the Arizona Court has specifically said that warnings, as such, are of a constitutional dimension. The court has said that in some cases warnings may be required in a given case.

In fact, in the *Goff* case, which I cite as the next case in the Arizona Court's determination, they say it's important that all steps be taken at the earliest possible time, when they are indicated by the fact situation, to ensure that the State doesn't overreach, and that the man is given every benefit of his rights under the Constitution; but I don't believe that they have yet said, as a constitutional dimension, any specific warning at any specific situation need be given.

It is my argument concerning the factors surrounding *Escobedo* that if *Escobedo* is a completely distinct and separate determination of a Sixth Amendment right, as divorced from the Fifth Amendment right, which I think is pretty hard to do, then in order for it to be

meaningful and effective—not just to the defendant but to the people of the State, of the country—it's got to announce a rule which forbids affirmative conduct on the basis of police officers or prosecutors calculated in a given situation to deny the man the implementation of his right, whether it be the right to counsel or the right against compulsory self-incrimination.

As I understand it, there is no right not to incriminate himself. The right is for him not to be compelled, whether it's subtle compulsion or direct, but it is still a right not to be compelled to incriminate yourself. At least this is my understanding, and he doesn't have a right not to incriminate himself. He has a right not to be compelled to incriminate himself by some means, either direct or devious. Now I think if the extreme position is adopted that says he has to either have counsel at this stage, or intellectually waive counsel, that a serious problem in the enforcement of our criminal law will occur.

First of all, let us make one thing certain. We need no empirical data as to one factor: what counsel will do if he is actually introduced. I am talking now about counsel for defendant. At least among lawyers there can be no doubt as to what counsel for the defendant is to do. He is to represent him 100 percent, win, lose, or draw—guilty or innocent. That's our system. When counsel is introduced at interrogation, interrogation ceases immediately.

MR. JUSTICE BLACK: Why?

MR. NELSON: Well, for one reason: first of all there are several different situations, but assume counsel is immediately introduced and he knows nothing about the case. He has not talked to the defendant. He has been appointed, say, to an indigent defendant who says "I want a lawyer. I need a lawyer right now. I don't want to talk to you without a lawyer."

He is given a lawyer. He talks to the defendant. First of all he stops the interrogation until he can talk with him. I would think, if he is going to represent him, he cannot allow him to say anything until he finds out what his story is, what he is going to say, and how it is going to affect him. So the interrogation would immediately stop, for that purpose. And after he has had an opportunity to confer with his client—let's assume another thing. Let's assume the client said, "Yes, I am guilty. I did it." He had all the requisite intents. He makes a statement to his lawyer in confidence that he did it, and asks his lawyer what he should do.

Well, the lawyer maybe doesn't know his past history. Maybe the lawyer would want to find out what the police have, if he can. So maybe more time, in order to properly represent him, would be taken up here—time when there would be no interrogation. Let's further assume that he advises his client, "Well, I think you ought to confess. I think there's a possibility for a light sentence. You did it. They have other evidence; or maybe they don't have any other evidence,"—let's say they don't have any other evidence—"and you can confess."

The fellow says, "Well, I don't want to confess. I don't want to go to the gas chamber if I don't have to. Is there anything else that you, as my lawyer, can do for me?" Well, what has he got to tell him? Under our system, he has got to tell him, "Yes, you don't have to say anything. And the fact that you don't say anything can't in any way hurt you, inferred or otherwise, and we can put the State to its burden of proof."

MR. JUSTICE BLACK: Why does our system compel his lawyer to do that?

MR. NELSON: He is compelled by the system to do this.

MR. JUSTICE BLACK: Well, why does it do it? For what purpose? What's the object on the part of the lawyer?

MR. NELSON: Because we believe that it's right, and proper, that the criminal defendant not be deprived of his life, liberty, or property, without due process of law.

MR. JUSTICE BLACK: And something about giving testimony against himself.

MR. NELSON: Right. I mean this is just one issue. The lawyer has to guard all these rights. But I'm saying that the practical effect of introducing counsel at the interrogation stage is going to stop the interrogation for any and all purposes, except what counsel decides will be in the best interest of his defendant. Otherwise, counsel will not be doing his job.

MR. JUSTICE BLACK: Isn't that about the same thing as the practical effect and object of the Amendment, which says he shall not be compelled to give testimony against himself? Is there any difference between the objects there, and purposes of the two— what the lawyer tells him, and what the Fifth Amendment tells him?

MR. NELSON: Well, certainly that's the object of what his lawyer tells him.

MR. JUSTICE BLACK: Isn't that the object of the Amendment?

MR. NELSON: Well, that is the question, of course. The Fifth Amendment, he has the right never to be compelled to incriminate himself at whatever stage, and this is, of course, involves a knowledgeable implementation of that right at this time, if he wants to.

What I am saying is that the State does not have to, at this stage, insist on that right being enforced or waived, because the pre-trial police interrogation does more than just develop confessions. It develops incriminating statements. It develops exculpatory statements which pin a story down to a defendant very closely after the crime is committed, or very closely after he has been taken into police custody, which prevents or effectively makes it unprofitable for him to perjure himself or change his testimony at trial should he take the stand.

MR. JUSTICE BLACK: Is there anything fantastic in the idea that the Fifth Amendment—that the protection against being compelled to testify against oneself—might be read reasonably as meaning there should be no pre-trial proceedings when he was there in the possession of the state?

MR. NELSON: Of course to me, I think there is. I think there is a valid interest—

MR. JUSTICE BLACK: There is a valid interest, of course, if they can convict him—and that's their business, to try to convict him.

MR. NELSON: Right. But I think this is another argument that I think must be made. Our adversary system, as such, is not completely adversary even at the trial stage in a criminal prosecution because Canon Five of the Canons of Ethics of the American Bar Association—which are law in Arizona by rule of court—says that the duty of the prosecution is not simply to go out and convict, but it is to see that justice is done.

In my short time, I have gotten as much satisfaction out of the cases in which I was compelled to confess error in a case where a man had been deprived of his rights of due process as I got satisfaction out of being upheld in a tight case in a court.

MR. JUSTICE FORTAS: Do you give defendants access to the State's evidence against him in your State?

MR. NELSON: Mr. Flynn would tell you more about that at the trial level. I don't believe that the rule has been interpreted very broadly. I think it has been interpreted narrowly. I think he

can get his own statements and perhaps he can get the police officers' reports. There is a rule providing for motions, but the judges, as I understand it, have construed it fairly narrowly.

MR. JUSTICE FORTAS: So that it is possible to speculate, isn't it, that the State has limitations - places limitations upon its obligation to cooperate with the defendant, as witnessed by the denial of discovery to the defendant, discovery of the evidence that the State has against him?

MR. NELSON: Yes. Of course I'm sure the prosecutors would go along 100 percent with full discovery for both sides.

MR. JUSTICE FORTAS: Maybe the prosecutors that you know.

[Laughter.]

MR. NELSON: The defendant, of course, is compelled to no discovery, no ordinary discovery procedures in the scope we think of them in a civil case. I just say that I am not sure that the analogy is completely -

MR. JUSTICE FORTAS: What I was drawing your attention to is that there are, in our system, limitations upon the degree of cooperativeness on both sides. It's not just that the arrested person has, under the Constitution, a Privilege against self-incrimination; it is also that the state, when it assumes an adversary position even before that time, takes advantage of certain "reticence," shall I say, with respect to disclosure to the accused.

MR. NELSON: It surely does. But there is no compulsion. In fact, the compulsion is, to the contrary, on the defense side to cooperate, whereas there is complete compulsion - at least by my interpretation of the law—for the prosecutor to do as much, if it's available to him, to show that the defendant is innocent, as there is to prove he is guilty.

MR. JUSTICE FORTAS: I think we have established, in this colloquy, that complete" is a little bit of an overstatement

MR. NELSON: It doesn't always work that way. I am sure that's the case.

Here again is another point. This is no reason, I don't think, for a constitutional rule which would, in effect, take care of what I consider to be exceptions to the rule rather than the general practice.

I might just say, since I notice that my time is about up, counsel made a statement to the effect, in answer to a question of one of the Justices - and I forgot which one—something about why Miranda talked; that "maybe he was raised to tell the truth; in our society you're raised to tell the truth and respect authority." This brings another thing into play, I believe, which is vitally important - and the prosecutors in my State consider it so—that if, in fact, you either have counsel or you don't, it thereby seriously circumscribes interrogation and confession. You eliminate an early part of one of the most important principles, hopefully, in our criminal law. And that is not just to convict, not just to deter or not just to put somebody away, but to rehabilitate them, and at the earliest possible moment. I don't have that many personal experiences, but we had a meeting of the prosecutors in our State. Many of the cases involving confession and the pre-trial interrogation were the cases where a man has at least admitted he has done something wrong. These were cases where the defendants were much more susceptible to rehabilitation, at this stage, and if you foreclose this, then you develop an attitude in the police officers—you take the personal attitude away.

Many a hardened police officer, when he has developed a case of tremendous circumstancial evidence against a man, and yet the man sits there and keeps telling him “I didn’t do it,” he is going to wonder. There is a personal factor there. He is going to wonder “Why doesn’t this man confess? Why doesn’t he say something about doing it?”

Even assuming, *arguendo,* it is not coercion—and I have no argument that whatever is considered coercion, whether it’s subtle or otherwise, should not be used. Assuming the interrogation is good, except for that. He is going to wonder, and maybe he is going to go out and examine that eye witness who saw him at 2:00 o’clock in the morning under a dark street light, and examine that other evidence, because he wonders—that personal element— he ought to confess. Here is all of the evidence. It’s a *prima facie* case. This is wiped out completely if you terribly circumscribe this particular pretrial investigation. This particular personal element is out, and he can say, “Well, I got the evidence. Maybe he’s guilty or maybe not. I didn’t talk to him. I don’t know how he acts or how he turns up.” And I think defendants could be hurt as much as the prosecution.