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

This case concerns itself with the conviction of a defendant of two crimes of rape and kidnapping, the sentences on each count of 20 to 30 years to run concurrently.

I should point out to the Court, in an effort to avoid possible confusion, that the defendant was convicted in a companion case of the crime of robbery in a completely separate and independent act; however, the Supreme Court of the State of Arizona treated that conviction as a companion case in a companion decision, and portions of that record have been appended to the record in this case, as it bears on the issue before the Court.

Now the issue before the Court is the admission into evidence of the defendant's confession, under the facts and circumstances of this case, over the specific objections of his trial counsel that it had been given in the absence of counsel.

The Trial Court in June of 1963, prior to this Court's decision in *Escobedo,* allowed the confession into evidence. The Supreme Court of the State of Arizona in April of 1965, after this Court's decision in *Escobedo,* affirmed the conviction and the admission of the confession into evidence. This Court has granted us review.

The facts in the case indicate that the defendant was 23 years old, of Spanish-American extraction; that on the morning of March 13, 1963, he was arrested at his home, taken down to the police station by two officers named Young and Cooley; that at the police station he was immediately placed in a line-up. He was here identified by the prosecutrix in this case and later identified by the prosecutrix in the robbery case. Immediately after the interrogations' he was taken into the police confessional at approximately 11:30 a.m. and by 1:30 they had obtained from him an oral confession.

MR. JUSTICE BRENNAN: What is the "police confessional?"

MR. FLYNN: The interrogation room, described in the transcript as Interrogation Room No. 2, if Your Honor please.

He denied his guilt, according to the officers, at the commencement of the interrogation, and by 1:30 he had confessed. I believe the record indicates that at no time during the interrogation and prior to his oral confession was he advised either of his rights to remain silent, his right to counsel, or of his right to consult with counsel; nor, indeed, was such the practice in Arizona at that time, as admitted by the officers in their testimony.

The defendant was then asked to sign a confession, to which he agreed. The form handed him to write on contained a typed statement as follows, which precedes his hand-written confession:

"I, Ernesto A. Miranda, do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me."

This statement was read to him by the officers, and he confessed in his own handwriting. Throughout the interrogation the defendant did not request counsel at any time. In due course the Trial Court appointed counsel to defend him in both cases, and defense counsel requested a psychiatric examination, which has been made—and the medical report—has been made a portion of the transcript of the record in this case, as it enlightens us to a portion or some of the factual information surrounding the defendant.

MR. JUSTICE FORTAS: Mr. Flynn, I am sorry to interrupt you, but you said that Miranda was not told that he might remain silent? Did you say that?

MR. FLYNN: That is correct, Your Honor.

MR. JUSTICE FORTAS: Is there a dispute as to that?

MR. FLYNN: Yes, there is, Your Honor, and I believe it arises as a result of the appendix to the robbery conviction. In this respect, I would answer Your Honor's question by referring to page 52 of the petitioner's brief, to the appendix at the top, at which the question was asked by Mr. Moore, the trial counsel:

Question: "Did you state to the defendant at any time before he made the statement you are about to answer to, that anything he said would be held against him?
Answer: ''No, sir."
Question: "You didn't warn him of that?"
Answer: ''No, sir.''
Question: "Did you warn him of his rights to an attorney?"
Answer: ''No, sir."
"Mr. Moore: We object, not voluntarily given.
"Mr. Turoff: I don't believe that is necessary.
"The Court: Overruled."
On page 53, the succeeding page, a portion of the same record indicates further examination concerning this conversation, and starting approximately one-third down the page.

Question: "Had you offered the defendant any immunity?"
Answer: "No, sir."
Question: "In your presence, had Officer Cooley done any of these acts?"
Answer: "No, sir."
Question: "About what time did this conversation take place, Officer?"
Answer: "Approximately 1:30."
Question: "Shortly after Miss McDaniels made her first statement, is that correct?"
Answer: "Yes, sir."
Question: "Can you tell us now, Officer, regarding the charge of robbery, what was said to the defendant and what the defendant answered in your presence?"
Answer: "I asked Mr. Miranda if he recognized—" and there the questioning terminates.
MR. JUSTICE FORTAS: I was referring to page 4 of your brief in which you say that Officer Young believes that Miranda was told that he need not answer their questions.

MR. FLYNN: I was about to continue, if Your Honor please, to page 54, in which we find the question:

"You never warned him he was entitled to an attorney or anything he said would be held against him, did you?

"Answer: We told him anything he said would be used against him; he wasn't required by law to tell us anything."

Consequently, this would answer Your Honor's question, except bearing in mind that the record clearly reveals that from the line-up and the identification to the interrogation room, the officers established the time as 11:30, and that the confession was completed and signed at 1:30.

Reading the testimony of the robbery conviction, it is apparent to me that the officers, when they recite or answered on page 54 of the transcript that he had been advised of his rights, were again relating to this formal typed heading, which would be at 1:30, at the time he signed a confession; that, hence, there really is no conflict in the record as to when he was advised of his rights.

The further history relating to this defendant found in the psychiatric examination would indicate that he had an eighth-grade education, and it was found by the Supreme Court that he had a prior criminal record and that he was mentally abnormal. He was found, however, to be competent to stand trial and legally sane at the time of the commission of the alleged acts.

Now, the critical aspect of the defendant's confession, I think, is eminently demonstrated when, during the trial, the prosecutrix was asked the question concerning penetration, in which she first responded that she thought it was by finger, under questioning by the prosecuting attorney. Immediately thereafter, she expressed uncertainty as to the manner or method of penetration and, after some prompting, responded to the prosecuting attorney that it had been, in fact, by the male organ. On cross-examination, she again expressed the uncertainty in relation to this penetration which, of course, is the essential element of the crime of first-degree rape in the State of Arizona, when she responded to his question that she simply was unsure whether it had been by finger or by penis.

Now of course the defendant's confession neatly corrects this "reasonable doubt" that otherwise would have been engendered, when in precise terminology he wrote, "Asked her to lie down, and she did. Could not get penis into vagina. Got about one-half(half) inch in."

The only thing missing, or the only thing that the officers failed to supply in words to this defendant at the time he wrote this confession, was in violation of Section 13-611, Arizona Revised Statutes. Then, of course, they would have had the classic confession of conviction, because they could have argued that the man even knew the statutory provisions relating to rape.

The State, as I read their response, takes no issue with the statement of facts as I have outlined them to this Court, except to say that we overstate his mental condition and minimize his educational background; and also the concern that is expressed by Mr. Justice Fortas concerning at what stage of the proceeding he may have been advised of his right to remain silent.

Now the Petitioner's position on the issue is simply this: The Arizona Supreme Court, we feel, has imprisoned this Court's decision in *Escobedo* on its facts, and by its decision is refusing to apply the principles of that case, and for all practical purposes has emasculated it. Certainly every court desiring to admit a confession can find distinguishing factors in *Escobedo* from the fact situation before it.

I would like to very briefly quote from the transcript of the record which contains the Arizona decision at page 87:

"It will be noted that the Court in the *Escobedo* case set forth the circumstances under which a statement would be held admissible, namely: One, the general inquiry into an unsolved crime must have begun to focus on a particular suspect; two, a suspect must have been taken into the police custody; three, the police in its interrogation must have elicited an incriminating statement; four, the suspect must have requested and been denied an opportunity to consult with his lawyer; five, the police must not have effectively warned the

suspect of his constitutional rights to remain silent. When all of these five factors occur, then the *Escobedo* case is a controlling precedent."

The Arizona Supreme Court, having indicated its clear intention to imprison the *Escobedo* decision, set about to do precisely that. First, as to the focusing question, it indicated that this crime had occurred at night. Consequently, despite the positive identification of the defendant by two witnesses, which the State urged were entirely fair line-ups, the Supreme Court of Arizona indicated that even then perhaps under these facts, attention had not focused upon this defendant.

I think this is sheer sophistry and would indicate the obvious intent of the Arizona Supreme Court to confine *Escobedo* and to distinguish it whenever possible.

Next, the Court found that the defendant was advised of his rights in the reading of the typed portion immediately preceding its transcript. They permitted that document to lift itself by its own bootstraps, so to speak, and to indicate that here was a man who was knowledgeable concerning his legal rights, despite the facts and circumstances of his background and education. They further found that he was knowledgeable because he had a prior criminal record, though in the decision he indicated this would be knowledge of his rights in court and certainly not his rights at the time of the interrogation.

I think the numerous briefs filed in this case indicating the substantial split in the decisions throughout the various states, the circuits and the Federal district courts, indicate the interpretation that has been placed upon *Escobedo.* On the one hand, we have the California decision in *Dorado.* We have the Third Circuit decision in*Russo,* which would indicate that principle and logic are being applied to the decision, and in the words of Mr. Justice Goldberg, that when the process shifts from the investigation to one of accusation, and when the purpose is to elicit a confession from the defendant, then the adversary process comes into being.

On the other hand, the other cases that would distinguish this have found and give rise to what I submit is not really confusion by merely straining against the principles and logic in that decision.

MR. JUSTICE STEWART: What do you think is the result of the adversary process coming into being when this focusing takes place? What follows from that? Is there, then, a right to a lawyer?

MR. FLYNN: I think that the man at that time has the right to exercise, if he knows, and under the present state of the law in Arizona, if he is rich enough, and if he's educated enough to assert his Fifth Amendment right, and if he recognizes that he has a Fifth Amendment right to request counsel. But I simply say that at that stage of the proceeding, under the facts and circumstances in *Miranda* of a man of limited education, of a man who certainly is mentally abnormal who is certainly an indigent, that when that adversary process came into being that the police, at the very least, had an obligation to extend to this man not only his clear Fifth Amendment right, but to accord to him the right of counsel.

MR. JUSTICE STEWART: I suppose, if you really mean what you say or what you gather from what the *Escobedo* decision says, the adversary process starts at that point, and every single protection of the Constitution then comes into being, does it not? You have to bring a jury in there, I suppose?

MR. FLYNN: No, Your Honor, I wouldn't bring a jury in. I simply would extend to the man those constitutional rights which the police, at that time, took away from him.

MR. JUSTICE STEWART: That's begging the question. My question is, what are those rights when the focusing begins? Are these all the panoply of rights guaranteed to the defendant in a criminal trial?

MR. FLYNN: I think the first right is the Fifth Amendment right: the right not to incriminate oneself; the right to know you have that right; and the right to consult with counsel, at the very least, in order that you can exercise the right, Your Honor.

MR. JUSTICE STEWART: Well, I don't fully understand your answer, because if the adversary process then begins, then what you have is the equivalent of a trial, do you not? And then I suppose you have a right to a judge, and a jury, and everything else that goes with a trial right, then and there. If you have something less than that, then this is not an adversary proceeding and then you don't mean what you're saying.

MR. FLYNN: I think what I say - what I am interpreting "adversary proceeding" to mean is that at that time, a person who is poorly educated, who in essence is mentally abnormal, who is an indigent, that at an adversary proceeding, at the very least, he is entitled at that stage of the proceeding to be represented by counsel and to be advised by counsel of his rights under the Fifth Amendment of the Constitution; or, he has no such right.

MR. JUSTICE STEWART: Well, again I don't mean to quibble, and I apologize, but I think it's first important to define what those rights are—what his rights under the constitution are at that point. He can't be advised of his rights unless somebody knows what those rights are.

MR. FLYNN: Precisely my point. And the only person that can adequately advise a person like Ernesto Miranda is a lawyer.

MR. JUSTICE STEWART: And what would a lawyer advise him that his rights were?

MR. FLYNN: That he had a right not to incriminate himself; that he had the right not to make any statement; that he had a right to be free from further questioning by the police department; that he had the right, at the ultimate time, to be represented adequately by counsel in court; and that if he was too indigent or too poor to employ counsel, the state would furnish him counsel.

MR. JUSTICE STEWART: What is it that confers the right to a lawyer's advice at that point and not an earlier point? The Sixth Amendment?

MR. FLYNN: No. The attempt to erode, or to take away from him, the Fifth Amendment right that already existed—and that was the right not to convict himself, and be convicted out of his own mouth.

MR. JUSTICE STEWART: Didn't he have that right earlier?

MR. FLYNN: If he knew about it.

MR. JUSTICE STEWART: Before this became a so-called "adversary proceeding"?

MR. FLYNN: Yes, Your Honor, if he knew about it and if he was aware—if he was knowledgeable.

MR. JUSTICE STEWART: Then did he have the right to a lawyer's advise earlier?

MR. FLYNN: If he could afford it, yes; and if he was intelligent enough and strong enough to stand up against police interrogation and request it, yes.

MR. JUSTICE STEWART: What I'm getting at is, I don't understand the magic in this phrase of "focusing," and then all of a sudden it becomes an adversary proceeding. And then I suppose if you literally mean that it becomes an adversary proceeding, then you're entitled to all the rights that a defendant is given under the Constitution that would be given in a criminal trial. If you mean less than that, then you don't really mean it has now become the equivalent of a trial.

MR. FLYNN: Well, I simply mean that when it becomes an adversary proceeding, at the very least, a person in Ernest Miranda's position needs the benefit of counsel, and unless he is afforded that right of counsel he simply has, in essence, no Fifth or Sixth Amendment right, and there is no due process of law being afforded to a man in Ernest Miranda's position.

MR. JUSTICE FORTAS: Is it possible that prior to this so-called "focusing," or let's say prior to arrest—if those don't mean the same thing—that a citizen has an obligation to cooperate with the state, give the state information that he may have relevant to the crime; and that upon arrest, or upon this "focusing," that the state and the individual then assume the position of adversaries, and there is, at the very least, a change in that relationship between the individual and the state; and, therefore, in their mutual rights and responsibilities? I don't know whether that's what my Brother Stewart is getting at, and perhaps it is unfair to discuss this through you—

[Laughter.]

MR. JUSTICE FORTAS: —but if you have a comment on it, I'd like to hear it.

MR. FLYNN: I think the only comment that I could make is that, without getting ourselves into the area of precisely when focusing begins, that I must in this instance limit it to the fact situation and the circumstances of Ernest Miranda, because for every practical purpose, after the two-hour interrogation, the mere formality of supplying counsel to Ernest Miranda at the time of trial, is what I would submit would really be nothing more than a mockery of his Sixth Amendment right to be represented in court, to go through the formality, and a conviction takes place.

Well, this simply is not a matter of the record. It is in the robbery trial, and I think it so illustrates the position of what occurs in the case of persons who have confessed, as Ernest Miranda. The question was asked in the robbery trial—which preceded the rape trial by one day—of Mr. Moore:

> "THE COURT: Are you ready to go to trial?
>
> "MR. MOORE: I have been ready. I haven't anything to do but—and sit down and listen."

MR. JUSTICE BLACK: May I ask you one question, Mr. Flynn, about the Fifth Amendment? Let's forget about the Sixth. The Amendment provides that no person shall be compelled to be a witness against himself. It's disassociated entirely from the right to counsel.

You have said several times it seems, during the case, that in determining whether or not a person shall be compelled to be a witness against himself, that it might depend to some extent on his literacy or his illiteracy, his wealth or his lack of wealth, his standing or his lack

of standing—why does that have anything to do with it? Why does the Amendment not protect the rich, as well as the poor; the literate, as well as the illiterate?

MR. FLYNN: I would say that it certainly, and most assuredly, does protect; that in the state of the law today as pronounced by the Arizona Supreme Court, under those guiding principals, it certainly does protect the rich, the educated, and the strong— those rich enough to hire counsel, those who are educated enough to know what their rights are, and those who are strong enough to withstand police interrogation and assert those rights.

MR. JUSTICE BLACK: I am asking you only about the Fifth Amendment's provision that no person shall be compelled to be a witness against himself. Does that protect every person, or just some persons? I am not talking about in practical effect; I am talking about what the Amendment is supposed to do.

MR. FLYNN: It protects all persons.

MR. JUSTICE BLACK: Would literacy or illiteracy have anything to do with it if they compelled him to testify, whatever comes within the scope of that?

MR. FLYNN: At the interrogation stage, if he is too ignorant to know that he has the Fifth Amendment right, then certainly literacy has something to do with it, Your Honor. If the man at the time of the interrogation has never heard of the Fifth Amendment, knows nothing about its concept or its scope, knows nothing of his rights, then certainly his literacy—

MR. JUSTICE BLACK: —he'd have more rights, because of that? I don't understand. The Fifth Amendment right, alone, not to be compelled to be a witness against himself? What does that cover?

MR. FLYNN: Perhaps I have simply not expressed myself clearly.

MR. JUSTICE BLACK: Does that cover everybody?

MR. FLYNN: It covers everybody, Your Honor. Clearly in practical application, in view of the interrogation and the facts and circumstances of Miranda, it simply had no application because of the facts and circumstances in that particular case, and that's what I am attempting to express to the Court.

Now the Arizona Supreme Court went on, in essence we submit, to turn its decision primarily on the failure of the defendant in this case to request counsel, which is the only really distinguishing factor that they could find.

MR. JUSTICE STEWART: Is there any claim in this case that this confession was compelled was involuntary?

MR. FLYNN: No, Your Honor.

MR. JUSTICE STEWART: None at all?

MR. FLYNN: None at all.

MR. JUSTICE WHITE: Do you mean that there is no question that he was not compelled to give evidence against himself?

MR. FLYNN: We have raised no question that he was compelled to give this statement, in the sense that anyone forced him to do it by coercion, by threats, by promises, or compulsion of that kind.

MR. JUSTICE WHITE: "Of that kind"? Was it voluntary, or wasn't it?

MR. FLYNN: Voluntary in the sense that the man, at a time without knowledge of his rights—

MR. JUSTICE WHITE: Do you claim that his Fifth Amendment rights were violated?

MR. FLYNN: I would say his Fifth Amendment right was violated, to the extent—

MR. JUSTICE WHITE: Because he was compelled to do it?

MR. FLYNN: Because he was compelled to do it?

MR. JUSTICE WHITE: That's what the Amendment says.

MR. FLYNN: Yes, to the extent that he was, number one, too, poor to exercise it, and number two, mentally abnormal.

MR. JUSTICE WHITE: Whatever the Fifth is, you say he was compelled to do it?

MR. FLYNN: I say it was taken from him at a point in time when he absolutely should have been afforded the Sixth Amendment -

MR. JUSTICE WHITE: I'm talking about violating the Amendment, namely the provision that he was—to violate the Fifth Amendment right, he has to be compelled to do it, doesn't he?

MR. FLYNN: In the sense that Your Honor is presenting to me the word "compelled," you're correct.

MR. JUSTICE WHITE: I was talking about what the Constitution says.

MR. JUSTICE BLACK: He doesn't have to have a gun pointed at his head, does he?

MR. JUSTICE WHITE: Of course he doesn't. So he was compelled to do it, wasn't he, according to your theory?

MR. FLYNN: Not by gunpoint, as Mr. Justice Black has indicated. He was called upon to surrender a right that he didn't fully realize and appreciate that he had. It was taken from him.

MR. JUSTICE WHITE: But in all the circumstances—I'm just trying to find out if you claim that his Fifth Amendment rights were being violated. If they were, it must be because he was compelled to do it, under all circumstances.

MR. FLYNN: I would say that as a result of a lack of knowledge, or for lack of a better term "failure to advise," the denial of the right to counsel at the stage in the proceeding when he most certainly needed it, that this could, in and of itself—and certainly in most police interrogations—constitute compulsion.

MR. JUSTICE BLACK: Why wouldn't you add to that the fact that the State had him in its control and custody? Why would that not tend to show some kind of coercion or compulsion?

MR. FLYNN: The whole process of a person, I would assume, having been raised to tell the truth and respect authority.

MR. JUSTICE BLACK: Was he allowed to get away from there, at will?

MR. FLYNN: No, Your Honor. He was in confinement and under arrest.

MR. JUSTICE BLACK: The State had moved against him by taking him in to question him, did it not?

MR. FLYNN: That is correct.

Flynn, you would say that if the police had said to this young man, “Now you are a nice young man, and we don’t want to hurt you, and so forth; we’re your friends and if you’ll just tell us how you committed this crime, we’ll let you go home and we won’t prosecute you,” that that would be a violation of the Fifth Amendment, and that, technically speaking, would not be “compelling” him to do it. It would be an inducement, would it not?

MR. FLYNN: That is correct.

MR. CHIEF JUSTICE WARREN: I suppose you would argue that that is still within the Fifth Amendment, wouldn’t you?

MR. FLYNN: It is an abdication of the Fifth Amendment right.

MR. CHIEF JUSTICE WARREN: That’s what I mean.

MR. FLYNN: Because of the total circumstances existing at the time—the arrest, the custody, the lack of knowledge, the—

MR. CHIEF JUSTICE WARREN: In fact, we have had cases of that kind, that confessions were had, haven’t we, where they said it would be better for you if you do; we’ll let you go; and so forth?

MR. FLYNN: That, of course, is an implied promise of some help or immunity of some kind.

MR. CHIEF JUSTICE WARREN: Yes, but that isn’t strictly compulsion that we have been talking about?

MR. FLYNN: That certainly is not compulsion in the sense of the word, as Mr. Justice White had implied it.

MR. JUSTICE BLACK: As I recall, in those cases—I agree with the Chief Justice—as I recall, in those cases that was put under the Fifth Amendment, and the words of the Fifth Amendment were referred to in the early case by Chief Justice White, I believe it was, and the fact that inducement is a compulsion and was brought in that category, and therefore it violated the Amendment against being compelled to give evidence against yourself.

MR. FLYNN: I am sure Mr. Justice Black has expressed it far better than —

MR. JUSTICE BLACK: So it’s a question of what “compel” means, but it does not depend, I suppose—I haven’t seen it in any of the cases—on the wealth, the standing, or the status of the person, so far as the right is concerned.

MR. FLYNN: Yes, I think perhaps that was a bad choice of words, in context, if Your Honor please, at the time I stated them.

I would like to state, in conclusion, that the Constitution of the State of Arizona, for example has, since statehood, provided to the citizens of our State language precisely the same as the Fourth Amendment to the Federal Constitution as it pertains to searches and seizures. Yet from 1914 until this Court’s decision in *Mapp* v.*Ohio,* we simply did not enjoy the Fourth Amendment rights or the scope of the Fourth Amendment rights that were enjoyed by most of the other citizens of the other states of this Union, and those persons who were under Federal control.

In response to the *Amicus* for New York and the *Amicus* for the National Association of Defense Attorneys that would ask this Court to go slowly and to give the opportunity to the states, to the legislature, to the courts and to the bar association to undertake to solve this problem, I simply say that whatever the solutions may be, it would be another 46 years

before the Sixth Amendment right in the scope that it was intended, I submit, by this Court in *Escobedo,* will reach the State of Arizona.

We're one of the most modern states in relation to the adoption of the American Law Institute rules. We have a comparable rule to Rule 5. To my knowledge, there has never been a criminal prosecution for failure to arraign a man. And there is no decision in Arizona that would even come close to the McNabb or Mallory Rule in Arizona. In fact, the same term that *Miranda* was decided, the Arizona Supreme Court indicated that despite the necessity and requirement of immediate arraignment before the nearest and most successful magistrate, that *Mallory* v. *McNabb* did not apply.