Conference
March 18, 1966

No. 759 -- Miranda v. Arizona

CJ reads a printed statement he had prepared — does not accept my approach that this is legislative problem only — does not accept the view that "totality" governs — basically issue is under 5th A "being a witness against himself" — might be 6th A in case there was a lawyer being sought — right to interrogation involves 5th A now — talking to police is different from being interrogated by the police — rt. to counsel commences at least when a man is taken into custody or when police undertake to put him there — our system is accusatory — no rt. to arrest for investigation — only "probable cause" or a warrant — his right to counsel commences at that moment — the case commences then — does not mean that lawyer must be appointed then but later — interrogation is such a later time — he must be advised of (1) rt to remain silent

(2) what he says may be used against him (3) in time of trial appoint a lawyer (4) he must be given opportunity to get lawyer before he is interrogated unless he waives (5) burden on gov to show waiver (6) no distinction should be made between one who has a lawyer & one who does not or between one who can hire one & one who cannot

Sidion controls — routine of "booking" is not violation of 5th A — follows Linkletter & does not make it retroactive —

S Cis letter on FBI practice states his views down to the point where the man does not have a lawyer — FBI leaves to discretion of agent whether there has been a "waiver" — CJ does not agree with that

reviews in Miranda — no warning by police

" " No 760 — same

from plus fact that state barred petition pending at trial that no warnings were given

In No 761 he reverses because he was not advised of rt to counsel

In 762 he affirms – the rule is not retroactive – also no involuntariness issue as it was waived at the trial

In 584 affirms on failure to give adequate warning

HLB agrees with large part of what CJ says – he focuses on rt. not to be a witness against oneself – refers to Magna Carta – he is entitled to all benefits of a def when government moves against him – he refers to Ashcraft – rt. not to be witness against himself – no right of questioning while he is in custody – when a man is in custody he's a witness against himself – no rare at that stage he can be put into a line up or finger printed –

when arrested he cannot be asked questions — you can't get him a lawyer then — he relies on coercion — he gives no credence to "warning the accused" — he reverses all except Calif v Stewart — probably goes along in affirming in 762 tho he votes to reverse

WOV agrees largely with the CJ —

TC pretty close to CJ — when does gov. "move"? when you put it under 5th A you must put it under "interrogation" — we do not have proportionality or line up or photography — his entitled to counsel if he can't afford one & can't will appoint one — statements not elicited by interrogation should not be barred —

in Stewart record is silent — burden is on the state to show waiver

JMH — what CJ, HLB, WOV have said repudiate all our precedents & history & ABA proposals — he would leave law reforms to others — why have information & ability

our conference room is in an abstract medium — he can't see why we should reverse the course of history & make these "radical" changes — all studies going on become abortive — he's not prepared to slam the door on more deliberate & more empirical data being assembled — what we do (if CJ's news obtain) should be done by constitutional amendment — he would modify Linkletter to make this new rule applicable only to cases that start after these decisions

WJB agrees substantially with CJ he would make the new rule applicable to all pending cases not to these five alone — time of warning — if you wait until "interrogation" rather than arrest, you get into difficulties — "focus" on him is not enough — when he is "arrested" is the better test — as to "retroactivity" we might make them apply to

date of Wallace — in Texas we made it retroactive from date of Griffin — perhaps it should be made retroactive to Escobedo

PS — he disagrees with CJ — "compulsion" is not present here within the framework of our coerced confession cases — he would stick to the totality of facts on "coercion".

BW disagrees with CJ — agrees with JMH + PS

AF in general agrees with the