

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BEN CHAVEZ, :

4                      Petitioner                      :

5 v. : No. 01-1444

6 OLIVERIO MARTINEZ. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, December 4, 2002

10           The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 11:09 a.m.

13      APPEARANCES:

14 LAWRENCE S. ROBBINS, ESQ., Washington, D.C.; on behalf  
15 of the Petitioner.

16 PAUL D. CLEMENT, ESQ., Deputy Solicitor General,  
17 Department of Justice, Washington, D.C.; on behalf of  
18 the United States, as amicus curiae, supporting the  
19 Petitioner.

20 RICHARD S. PAZ, ESQ., Los Angeles, California; on behalf  
21 of the Respondent.

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1 P R O C E E D I N G S

2 (11:09 a.m.)

3 JUSTICE STEVENS: We'll hear argument in  
4 Number 01-1444, Chavez against Martinez.

5 Mr. Robbins, whenever you're prepared, you may  
6 proceed.

7 ORAL ARGUMENT OF LAWRENCE S. ROBBINS

8 ON BEHALF OF THE PETITIONER

9 MR. ROBBINS: Thank you, Justice Stevens, and  
10 may it please the Court:

11 The Ninth Circuit held in this case that  
12 petitioner Ben Chavez could not assert a qualified  
13 immunity defense to a section 1983 lawsuit alleging that  
14 his interrogation of respondent violated the Fifth and  
15 Fourteenth Amendments. We believe that ruling to be  
16 mistaken.

17 First, there was no constitutional violation at  
18 all on these facts. But second, if there was a  
19 constitutional right implicated, that right was not  
20 clearly established in the particularized sense required  
21 by this Court's qualified immunity cases. Officer Chavez  
22 could not reasonably have known that what he was doing  
23 violated that right, and the judgment of the Ninth Circuit  
24 should, therefore, be reversed.

25 QUESTION: May I ask this question on that point

1     that you addressed before you get through?  Supposing he  
2     thought at the time of the questioning that the  
3     material -- the answers would be used in evidence later  
4     on, and he knew that it would have been a violation of the  
5     Constitution to use those answers later on.  Would he be  
6     entitled to qualified immunity then?

7                 MR. ROBBINS:  Yes, because the Constitution --  
8     well, because the first inquiry would be has the  
9     Constitution been violated.  Whether he thought --

10                QUESTION:  But your -- I'm just directing my  
11     question at -- you sort of said even assuming a  
12     constitutional violation, he nevertheless is entitled to  
13     good faith immunity.  And I'm saying, well, assume the --  
14     the facts I've just granted, including an assumption that  
15     the -- it would have been a constitutional violation to  
16     use the evidence.

17                MR. ROBBINS:  Well, I think -- I think the --  
18     the answer is that while -- while he might have believed  
19     that the Constitution would in time be violated, because  
20     he could not himself violate it, he couldn't -- he  
21     couldn't be liable under section 1983 for committing a  
22     Fifth Amendment violation.  So the point is you don't even  
23     get to the question of clearly established if there's no  
24     established constitutional violation at all.

25                QUESTION:  But we -- we do somehow extend the

1 Fifth Amendment protection to the period before the actual  
2 introduction of the evidence in a criminal trial. That is  
3 to say, we -- we permit a witness to refuse to answer  
4 unless the witness is given -- is given immunity from  
5 prosecution. Now, how do you explain that, unless somehow  
6 the Fifth Amendment has some antecedent application before  
7 the evidence is actually --

8 MR. ROBBINS: Well --

9 QUESTION: -- introduced at trial?

10 MR. ROBBINS: I -- I think you've put it exactly  
11 right. It has some antecedent application. That is to  
12 say, it applies prior to the moment at which it's actually  
13 violated. The premise is we need to ensure against -- in  
14 a way it's a prophylactic protection much like Miranda is.  
15 That is to say, we will let you assert it in what is  
16 concededly, for example, a civil litigation setting, a  
17 simple deposition. No one would suggest that that is a  
18 use in a criminal case. But we allow you to assert it  
19 because if we didn't, it would compromise your ability to  
20 ensure that the right is protected later.

21 QUESTION: Well, suppose in a civil case, the  
22 judge orders the witness confined to custody until he  
23 testifies in violation of what we can say in common  
24 parlance is his Fifth Amendment right to self-  
25 incrimination. Is that not a violation then and there

1 to -- to confine the -- the defendant until he testifies?

2 MR. ROBBINS: I think it is consistent with a  
3 body of well -- well-developed law that to penalize  
4 someone, particularly through that kind of a sanction, for  
5 the assertion of a right is in the nature of a -- sort of  
6 an unconstitutional condition. And there's a well-  
7 established body of law that says --

8 QUESTION: I -- I don't know that we usually  
9 talk about a violation as an unconstitutional condition.  
10 We -- we would say, Your Honor, I want my client released  
11 because you are violating his Fifth Amendment rights.

12 MR. ROBBINS: But I -- I --

13 QUESTION: And I think in a very realistic --  
14 real sense you are.

15 MR. ROBBINS: Yes. I -- I think there is a body  
16 of case law that says that if you are punished for the  
17 assertion of a right, then under the Constitution you can  
18 be relieved of that coercion.

19 However -- but let me be clear -- the actual  
20 violation of the Fifth Amendment is exactly what the text  
21 of the Fifth Amendment says. It says that your right is  
22 not to be a witness against yourself in a criminal case.  
23 I suggest, Justice Kennedy, that the result -- that the  
24 holding in Murphy against the Waterfront Commission is  
25 inexplicable if you believe, as the Ninth Circuit does,

1     that it is sufficient simply to coerce an otherwise  
2     incriminating statement because in Murphy against the  
3     Waterfront Commission, the holding of that case is that  
4     the State court was correct in requiring the witness to  
5     testify even though there wasn't a statute that protected  
6     him against incrimination because the Fifth Amendment  
7     itself provides the fail-safe that if you are coerced into  
8     giving an otherwise incriminating statement, it cannot be  
9     used against you.

10             And my central submission on the Fifth Amendment  
11     point -- and of course, this is before we even get to the  
12     question whether Office Chavez could have -- you know, has  
13     qualified immunity. Our central submission on this is  
14     that you don't even have to get to that point because the  
15     fail-safe of the Fifth Amendment ensures that  
16     Mr. Martinez's statements could not be used against him in  
17     a criminal case if they were indeed legally compelled --

18             QUESTION: What -- what in your opinion in the  
19     Constitution prevents a policeman from going and beating  
20     up a witness?

21             MR. ROBBINS: The Fourteenth Amendment.

22             QUESTION: So, the Fourteenth Amendment means  
23     that you could -- in other words, your -- your client  
24     could have violated the Fourteenth Amendment if -- other  
25     things being equal --

1 MR. ROBBINS: Well --

2 QUESTION: -- because he was a witness. He gets

3 at least -- at least the suspect --

4 MR. ROBBINS: Yes.

5 QUESTION: -- gets the same pre-trial protection

6 as a witness would, and the Fourteenth Amendment prevents

7 coercion being used against a witness who doesn't want to

8 testify.

9 MR. ROBBINS: Well, let's be clear. It doesn't

10 prevent all coercion. It prevents a subset of coercion

11 that shocks the conscience for purposes of the -- the

12 substantive component of due process.

13 QUESTION: The substantive due process.

14 MR. ROBBINS: Yes, Justice O'Connor. That's

15 correct.

16 But -- but I think it is important that we not

17 torture the language of the Fifth Amendment to accommodate

18 the worry that police officers will torture witnesses

19 because that concern is completely -- can be completely

20 accommodated, and routinely is in the courts of appeals,

21 under the aegis of the --

22 QUESTION: You're not saying -- those things

23 that would violate the Fifth Amendment weren't introduced

24 into trial do violate the Fourteenth Amendment for the

25 similar reasons.



1 MR. ROBBINS: I'm sorry.

2 QUESTION: Well, I mean, could you say --

3 MR. ROBBINS: Yes.

4 QUESTION: -- that those things -- you could say

5 that.

6 MR. ROBBINS: Yes. You -- you could say --

7 QUESTION: All right. Then why didn't he

8 violate the Fourteenth Amendment?

9 MR. ROBBINS: Well, he -- well, again, let me --

10 I -- I want to answer that, but I -- I -- because this is

11 a qualified immunity case, I always want to drop the

12 footnote that we have an extra layer of protection here

13 arising from the fact that none of these propositions

14 could have been -- none of the propositions adverse to us

15 could plausibly be said to be clearly established within

16 the right sense of the term.

17 Getting to your question, Justice Breyer, he did

18 not violate the substantive component of the Due Process

19 Clause because that inquiry turns on a set of concerns,

20 including did the acts shock the conscience. Were they

21 committed with the intent to harm the witness in the sense

22 required by Sacramento against Lewis?

23 The failure of the Ninth Circuit in this case

24 with respect to the substantive due process analysis was

25 that it thought that any interrogation which would render

1 a statement involuntary and therefore inadmissible at  
2 trial must, therefore, give rise to a freestanding  
3 substantive due process claim, actionable and enforceable  
4 under section 1983. That's just wrong.

5 QUESTION: Mr. Robbins, going back to the Fifth  
6 Amendment self-incrimination privilege, I take it the  
7 thrust of your argument is that a police officer who fails  
8 to give Miranda warnings quite deliberately, doesn't say  
9 you have a right to remain silent, doesn't say any of the  
10 rest of it, never commits a violation of 1983 unless and  
11 until there's attempt to use the information in court. So  
12 you can say, police officer, you're not required to give  
13 Miranda warnings if we're not going to use this testimony  
14 in court.

15 MR. ROBBINS: I am saying -- I think the answer  
16 to that is yes. The -- the --

17 QUESTION: So that the Miranda is -- is not an  
18 obligation of the police officer.

19 MR. ROBBINS: I -- I respectfully beg to differ,  
20 and I -- I also think -- I must say, given the prominence  
21 of the Miranda discussion in the respondent's brief and in  
22 the green -- green brief supporting respondent, I believe  
23 the Miranda concerns in this case are an utter red  
24 herring, and let me say why.

25 The sanction for the violation of Miranda is, in

1 fact, that the statements taken in violation of Miranda  
2 cannot be used in the direct case of the government.  
3 That's the penalty for Miranda, and if that happens, you  
4 get the statement struck in the direct case for the  
5 government.

6 QUESTION: But there -- you're saying there is  
7 no 1983 penalty. The penalty is you can't --

8 MR. ROBBINS: I -- I think there is no 1983  
9 penalty, but the suggestion that as a consequence, because  
10 you don't have a freestanding section 1983 claim when the  
11 evidence never comes in, when the statement is never  
12 offered, the suggestion that that is therefore going to  
13 be -- send a signal to police officers that they should  
14 violate Miranda, you know, at their -- at their discretion  
15 I think is terribly mistaken, and for a very important  
16 reason and it's this: If you don't give Miranda warnings,  
17 you run a serious risk that the failure to give those  
18 warnings will be taken as part of the calculus under the  
19 Fifth Amendment voluntariness inquiry. And a statement  
20 which is involuntary for Fifth Amendment purposes is  
21 unusable for any purpose at all, direct case, impeachment,  
22 derivative use. The government then has to put on a  
23 Kastigar hearing to show that all of its evidence was  
24 independently derived, which is, as the Court said in  
25 Kastigar, a heavy burden for the government to meet.

1           It is a fool's errand I suggest, Justice  
2   Ginsburg -- a fool's errand -- to go about deliberately  
3   violating Miranda simply because the violation will not  
4   cause -- give rise to a section 1983 violation.

5           QUESTION: I -- I just have to tell you, I -- I  
6   can see your -- your point on Miranda. Miranda is an  
7   exclusionary rule. But I'm not sure that all of the Fifth  
8   Amendment is -- is treated in that way because of the  
9   questions we've initially covered.

10          MR. ROBBINS: Well --

11          QUESTION: If -- if you beat the defendant to  
12   get the defendant -- to get the confession, it seems to me  
13   there's a very strong argument that that is a Fifth  
14   Amendment violation --

15          MR. ROBBINS: I think --

16          QUESTION: -- A Self-incrimination Clause  
17   violation.

18          MR. ROBBINS: I think -- respectfully, Justice  
19   Kennedy, I think there is a wealth of this Court -- this  
20   Court's cases that cannot be reconciled with the  
21   proposition that coercing a statement is enough by itself  
22   to constitute a Fifth Amendment violation.

23          QUESTION: All right. You -- I think you could  
24   say after -- after 30 years or 50 years of -- of  
25   jurisprudence, policemen know they're not supposed to beat

1 up suspects or the -- the equivalent. And -- and you can  
2 say, all right, at this point, I would think that does  
3 shock the conscience for a policeman to beat a confession  
4 out of somebody, and so I don't care if you call it  
5 Fourteenth or Fifth.

6 But then the question here would be, why in  
7 heaven's name, when the person is undergoing serious pain,  
8 or he thinks he's dying, where the doctors are saying, get  
9 out of here, et cetera, whatever they're saying, and he  
10 continues to press and then says, well, you're going to  
11 get your treatment after you confess -- not confess --  
12 after -- after you answer my question. What were you  
13 doing? Then we'll treat you. He says, you want your  
14 treatment, you'd better -- you better say something,  
15 et cetera, et cetera. Why isn't that the equivalent of  
16 beating somebody up?

17 MR. ROBBINS: Well, let me attempt, if -- if I  
18 might, Justice Breyer, to -- to very quickly answer  
19 Justice Kennedy's question. I -- I think the belief that  
20 the Ninth Circuit held that it's enough under the Fifth  
21 Amendment simply to coerce a statement that would  
22 otherwise be incriminating cannot be reconciled with  
23 Murphy and with the -- with Balsys, with the immunity  
24 cases, with all the cases that stand for the proposition  
25 that so long as the use immunity has not been compromised,

1 you do not yet have a substantive Fifth Amendment  
2 violation.

3 To turn, Justice Breyer, to your question, I  
4 acknowledge that there is coercion in this case. We  
5 don't -- we don't blanch on that. There was coercion and  
6 the facts of this case are tragic, but the -- but the  
7 reality is this. This officer was there to find out a  
8 very important piece of information under extraordinarily  
9 exigent circumstances.

10 QUESTION: Well, was this tried below with a  
11 Fourteenth Amendment substantive due process claim?

12 MR. ROBBINS: I don't know that it was  
13 denominated substantive due process. I think --

14 QUESTION: Is that in the case?

15 MR. ROBBINS: I --

16 QUESTION: I mean, is it open to resolution on  
17 that basis?

18 MR. ROBBINS: There's -- there's no question  
19 that the Ninth Circuit decided a Fourteenth Amendment due  
20 process question. I don't think they -- they labeled it  
21 substantive versus procedure. And indeed, as we  
22 suggest --

23 QUESTION: Well, if --

24 MR. ROBBINS: -- they conflated the two.

25 QUESTION: -- if -- if we think the facts here

1 show sufficient coercion to rise to the level of a  
2 violation of substantive due process under the Fourteenth  
3 Amendment, should the judgment be affirmed --

4 MR. ROBBINS: No.

5 QUESTION: -- but on a different basis?

6 MR. ROBBINS: The judgment must be reversed,  
7 first, because there is not even a suggestion that the  
8 intent to harm requirement under Sacramento against Lewis  
9 has been satisfied. And under this -- in this kind of a  
10 case, you cannot have a substantive due -- due process  
11 violation without that. No one before you today has  
12 argued that that Sacramento against Lewis --

13 QUESTION: What is -- what is the source of the  
14 substantive -- of the intentional harm requirement?

15 MR. ROBBINS: Is that -- the source I -- I  
16 suggest is the -- the principles this Court articulated in  
17 Sacramento against Lewis for police conduct that's taken  
18 in enormous haste where -- where there is not the  
19 opportunity for a second chance.

20 But let me go -- there's a terribly important  
21 thing, Justice O'Connor, I have not yet gotten to say in  
22 answer to your question. The further and perhaps most  
23 fundamental reason why it would be a mistake, I  
24 respectfully suggest, to affirm this judgment, even on the  
25 due process argument, is that this is a qualified immunity

1 case. So you must conclude not only that on balance this  
2 rises to the shock-the-conscience standard, but that it  
3 does so with such remarkable clarity that it must have  
4 been surely apparent to this officer that he was violating  
5 that standard. You cannot find that on this record.

6 The Ninth Circuit thought so because of Mincey,  
7 which is a fair trial and admissibility of evidence case,  
8 not a freestanding substantive due process case and which  
9 had all manner of important differences from the facts of  
10 this case, including an absence -- a total absence -- of  
11 exigency.

12 With the Court's permission --

13 QUESTION: Exigency. May I ask you a question  
14 about that? You said the man was dying. This was the  
15 only -- only chance. But there was an`eyewitness, Flores,  
16 to this entire thing. Why wasn't it enough for the  
17 police, if they wanted some view other than the police  
18 officers who engaged in the -- in the shooting, just to  
19 interview Flores?

20 MR. ROBBINS: Well, I -- I think the record  
21 suggests that he was not a completely clear -- did not  
22 have a completely clear view of the facts. But he's just  
23 one witness. This is the man who was there.

24 QUESTION: Wouldn't he be a lot clearer than a  
25 man who -- who is -- who has been blinded, who has -- was



1 paralyzed, who's under heavy medication?

2 MR. ROBBINS: Well, he -- he was the most  
3 important non-police witness to these events, and I  
4 suggest that the officer would have been derelict not to  
5 have found out what happened from him, which is what he  
6 was trying to do.

7 And with the Court's permission, I'd like to  
8 reserve the balance of my time.

9 QUESTION: Yes, you may do so, Mr. Robbins.

10 Mr. Clement, we'll hear from you.

11 ORAL ARGUMENT OF PAUL D. CLEMENT

12 ON BEHALF OF THE UNITED STATES,

13 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

14 MR. CLEMENT: Thank you, Justice Stevens, and  
15 may it please the Court:

16 The Fifth Amendment privilege against self-  
17 incrimination safeguards the integrity of the criminal  
18 trial process and ensures that an individual is not  
19 convicted on the basis of a coerced confession.

20 But the privilege against self-incrimination is  
21 not a direct limit on the primary conduct of the law  
22 enforcement officers. This is not to say that there are  
23 no substantive constitutional limits on what law officers  
24 may do to obtain information or to secure a confession.  
25 But those limits are to be found in the Fourth Amendment

1 and in the law of substantive due process, not in the  
2 Fifth Amendment self-incrimination privilege --

3 QUESTION: So beating a prisoner to compel a --  
4 a statement is not a Fifth Amendment violation.

5 MR. CLEMENT: That's right, Justice Kennedy.  
6 It's not a Fifth Amendment violation. It very well might  
7 be --

8 QUESTION: But it could be a Fourteenth  
9 Amendment violation.

10 MR. CLEMENT: It very well -- Justice O'Connor,  
11 it very well could be a Fourteenth --

12 QUESTION: And very likely would be.

13 Is there some intent element in that for the  
14 shocks-the-conscience --

15 MR. CLEMENT: Well, I think generally, at least  
16 as I understand this Court's decision in -- in Sacramento  
17 against Lewis, in these kind of executive action contexts  
18 where things are ongoing, I think there is some kind of  
19 intent element. I think that --

20 QUESTION: It's not enough, you think, to find  
21 that the officer should have known that you couldn't ask  
22 questions in the manner that was done here under these  
23 circumstances, and that to proceed gives rise to an  
24 inference of intent.

25 MR. CLEMENT: Well, I'm not sure how intent

1 would need to be proven in any particular case, but I  
2 would say the critical difference between the Fifth  
3 Amendment inquiry and the Fourteenth Amendment inquiry,  
4 when it's -- when it's done in the context of the  
5 admissibility of a coerced confession, is in that context,  
6 what the courts are taking into account is the effect on  
7 the integrity of the trial process of using a coerced  
8 confession.

9           It's a different calculus, though, when you're  
10 trying to regulate primary law enforcement conduct because  
11 it strikes me that not everything that a law enforcement  
12 officer could do to coerce a confession -- there -- there  
13 may be some acts that may be sufficiently problematic that  
14 you'd certainly want to keep the confession out of the  
15 trial.

16           QUESTION: What about the order of a trial judge  
17 in a civil case who orders the witness held in contempt  
18 and confined unless he testifies, and -- and there's a  
19 valid Fifth Amendment privilege that the judge is  
20 overlooking? No Fifth Amendment violation there?

21           MR. CLEMENT: No. I don't think there's a Fifth  
22 Amendment -- I don't think there's a complete Fifth  
23 Amendment violation. The courts intervene there to  
24 protect the privilege.

25           QUESTION: So, if you go in and you want a writ

1 of habeas corpus and you don't mention the Fifth  
2 Amendment.

3 MR. CLEMENT: You mention the Fifth Amendment,  
4 but I think the important thing is the Fifth Amendment in  
5 this context works a -- a bit like the takings clause.  
6 And Justice Souter, for the opinion for the Court in  
7 *Balsys*, noted that the self-incrimination privilege is  
8 unusual because it's not purely and simply binding on the  
9 government. It doesn't say that in all contexts, the  
10 government cannot coerce confessions. What it says --

11 QUESTION: Well, if there's a 1983 suit against  
12 a judge in -- in this hypothetical case, what's -- what's  
13 the violation?

14 MR. CLEMENT: Well, typically those cases have  
15 been dealt with on -- on habeas. And what I would say  
16 is --

17 QUESTION: Suppose it's a 1983 suit.

18 MR. CLEMENT: If there's a 1983 suit in that  
19 context, I actually don't think a 1983 suit would lie in  
20 that context.

21 QUESTION: Why wouldn't there be a 1983 suit  
22 provided that -- and I think this is the assumption of  
23 Justice Kennedy's question -- provided that the witness  
24 had invoked the Fifth Amendment? There would be a 1983  
25 action there because that is one at least of two instances

1 in which we allow the Fifth Amendment to have an  
2 application in anticipation. We say if he raises it, and  
3 they don't come forward with immunity, we're not going to  
4 let this entire process go forward to no avail since  
5 nothing can ever be admitted in evidence anyway. The fact  
6 is we -- the -- the rule allowing it to be raised in  
7 anticipation I suppose would be the predicate for 1983  
8 liability here. That's not this case, but that -- that  
9 would be true in the -- in the case of the -- the civil  
10 example that Justice Kennedy gave, wouldn't it?

11 MR. CLEMENT: I think that's a very good point,  
12 Justice Souter, and the Court has also treated in the  
13 penalty context --

14 QUESTION: Well, is it good enough so that you  
15 concede there would be 1983 liability there; i.e., that  
16 there would be a violation of the Fifth Amendment in that  
17 case?

18 MR. CLEMENT: I don't think so, but I think it  
19 would --

20 QUESTION: Not that good.

21 MR. CLEMENT: -- at least be a better case.

22 But as I was trying to say --

23 QUESTION: Is there any violation in the case  
24 that I put, any constitutional violation? I mean,  
25 that's -- that's extraordinary.

1                   MR. CLEMENT: There is a -- there is a --  
2   there -- what there is is there is an ongoing interference  
3   with the Fifth Amendment right that the courts will  
4   vindicate, but there isn't a complete constitutional  
5   violation. And I think the critical distinction is that,  
6   as -- as Justice Souter said for the Court in *Balsys*, the  
7   privilege against self-incrimination is not purely and  
8   simply binding on the government. The government can  
9   compel testimony in exchange for a valid grant of  
10   immunity. What it can't do is compel testimony and  
11   attempt to use it in a criminal case. And --

12                  QUESTION: Well, maybe the -- the point where it  
13   would make a difference I guess -- nobody is talking about  
14   weakening or overruling *Miranda*. We have *Miranda* on the  
15   books, and *Miranda* set some technical requirements. You  
16   have to give a warning. Now, a failure to give a warning,  
17   pure and simple, is not going to hurt anybody if that's  
18   never used in trial, so there isn't 1983 damages, unless  
19   you beat the person up. Then there is. And that comes  
20   under the Fourteenth.

21                  But there are a set of cases where it will hurt  
22   people. The set of cases where it will hurt people is  
23   where because they violated *Miranda* but didn't beat him  
24   up, and got a statement, they kept him in jail. That's  
25   rather like the case Justice Kennedy's thinking of. So

1     there he is in jail for a week or a month and he's been  
2     hurt, all right.

3             And the question I guess is -- it's really not  
4     this case, but the question is, is there going to be a  
5     1983 action in that kind of case? And if you say it comes  
6     under the Fifth Amendment, the answer is going to be yes.  
7     And if you say it comes under the Fourteenth Amendment,  
8     the answer is going to be no. I don't know if we  
9     should -- it seems to me what we're going to decide in  
10    this case is effectively going to decide that.

11            MR. CLEMENT: No. I don't think that's true.  
12    I think that, for one thing, if the person is imprisoned  
13    on some basis, that may raise an independent Fourth  
14    Amendment violation. There may be other --

15            QUESTION: Then he goes under the Fourth, and he  
16    claims he's wrongly seized and imprisoned because they got  
17    this statement out of him in violation of the Fifth.  
18    That's -- I mean, this is -- this is what's -- what's  
19    worrying me is not so much this case, but what we're going  
20    to write and the implications of it.

21            MR. CLEMENT: And -- and I think that this Court  
22    has already clarified in *Balsys* that what you need for a  
23    self-incrimination violation is both the coercion of the  
24    testimony and the use of it in a criminal case.

25            QUESTION: But may I just interrupt,

1 Mr. Clement? Supposing there's a witness, a reporter or  
2 somebody, who claims a -- a privilege against divulging  
3 information, and that -- and the court holds him in  
4 contempt and locks him up for 30 days or something, and he  
5 claims he -- his Fifth Amendment right was violated, you'd  
6 say there's no Fifth Amendment violation.

7 MR. CLEMENT: I would say there's no -- there's  
8 no damages action. Of course, he could get --

9 QUESTION: So how could he get out of jail then?

10 MR. CLEMENT: Well, he could get a habeas action  
11 to get out because the court would be granting relief --

12 QUESTION: Well, I -- I think --

13 MR. CLEMENT: -- to protect the Fifth  
14 Amendment --

15 QUESTION: With all respect, I think you're  
16 evading the point that there -- let's assume there's  
17 damage. He's -- he's locked up, as Justice Breyer says,  
18 for 5 days for not testifying, and you say there's no  
19 Fifth Amendment violation. I can't understand that.

20 MR. CLEMENT: Well, in any event, let me just  
21 say that the privilege works quite differently in the  
22 custodial context. The reason that hypo even comes up is  
23 that in the context of a civil trial, the individual has  
24 to raise the -- the Self-incrimination Clause themselves.  
25 And we have a different rule that operates in the context



1 of police custodial interrogation. In that context, the  
2 privilege is self-executing. The individual doesn't have  
3 to raise it.

4 And -- as -- the other thing that's different  
5 about the custodial context is that in the custodial  
6 context, this Court has not insisted on a pre-testimony  
7 grant of immunity. They've always held that the  
8 exclusionary rules prevent a constitutional violation from  
9 occurring.

10 And if I could resort to the analogy to the  
11 takings clause. In that context, it's not enough for the  
12 government to take property. It's only a constitutional  
13 violation if the -- if the government simultaneously takes  
14 property and refuses to grant just compensation. In the  
15 same way, there's no self --

16 QUESTION: But are you saying that -- to go back  
17 to a question that was asked earlier, that if there -- if  
18 the police just take somebody into custody and beat him up  
19 in order to get -- get him to talk with no intention of  
20 using the evidence at all -- they're just trying to  
21 investigate a crime -- is there any constitutional  
22 protection against that kind of conduct?

23 MR. CLEMENT: Yes, and it's the substantive due  
24 process protection.

25 QUESTION: Okay.

1                   MR. CLEMENT: And I think to get back to that  
2 point, what's important is in the context of trying to  
3 protect the integrity of the criminal trial process, I  
4 would think the courts would want to be quite careful  
5 about what they let into evidence. But in the context of  
6 law enforcement officers, they're dealing with other  
7 objectives than simply trying to get a confession to  
8 secure a guilty verdict.

9                   QUESTION: Well, on the facts of this case,  
10 should it be analyzed then under the Fourteenth Amendment  
11 for coercion --

12                  MR. CLEMENT: It --

13                  QUESTION: -- an activity that might violate the  
14 Fourteenth Amendment?

15                  MR. CLEMENT: I think it should, Justice  
16 O'Connor, and I would respectfully suggest that that's  
17 best done on remand --

18                  QUESTION: Yes.

19                  MR. CLEMENT: -- because, although there is a  
20 due process argument in this case, it's nobody's fault  
21 that in light of the -- the governing precedent in the  
22 Ninth Circuit, the Cooper decision, that nobody thought  
23 that they had to prove shocks-the-conscience, or any of  
24 the factors relevant to a substantive due process inquiry.  
25 Again, that's not the way respondents briefed the case,

1 but one can hardly blame them for briefing the case they  
2 did, given that the Ninth Circuit had held under Cooper  
3 that as long as the conduct was sufficiently egregious to  
4 have the evidence be inadmissible, therefore you have a  
5 full substantive due process violation. And I think  
6 it's --

7 QUESTION: And you disagree with Mr. Robbins who  
8 said, but because of the qualified immunity, you wouldn't  
9 send this back in any case.

10 MR. CLEMENT: Well, I -- I don't really disagree  
11 with him. I think this Court could reach the qualified  
12 immunity issue if it wanted to, but I think perhaps the  
13 path of least resistance would be to just note that there  
14 is a substantive due process limit, and that's something  
15 that's best to be resolved on -- on remand.

16 I think the important -- oh, sorry.

17 QUESTION: That's all right. You can make that  
18 sentence, if you want to.

19 MR. CLEMENT: No.

20 QUESTION: Okay.

21 MR. CLEMENT: Thank you very much.

22 QUESTION: Mr. Paz.

23 ORAL ARGUMENT OF RICHARD S. PAZ

24 ON BEHALF OF THE RESPONDENT

25 MR. PAZ: Justice Stevens, and if it pleases the

1 Court:

2 I -- I would start with simply the simple  
3 observation that the district court made a finding of fact  
4 in this case at page -- it's 28a and 29 of the petition  
5 for writ of certiorari in the -- in the appendix. And it  
6 goes directly to the issue of what we've been discussing  
7 and that is the -- the intent.

8 And just if I can back up a little bit  
9 procedurally, in argument today, for the first time I  
10 heard counsel say that they acknowledge there's no quarrel  
11 that there was coercion in this case. In the district  
12 court, the entire argument was there was no coercion.  
13 At the court of appeals, the entire argument was there was  
14 no coercion.

15 At the court of appeals and the district court,  
16 the -- there was never a discussion or -- or even was the  
17 case of Urquidez -- Verdugo Urquidez cited for the fact  
18 of -- that this was -- the Fifth and the Fourteenth  
19 Amendments were only a trial right. Those issues are  
20 being heard here for the first time. They were briefed  
21 for the first time in the opening brief.

22 Cert was granted in this case on whether there  
23 was a violation of the Fifth Amendment, not -- the  
24 Fourteenth Amendment wasn't even discussed on cert.

25 So we've gone through this journey of ever-

1 changing theories of -- of liability in this case, but I  
2 think we have to go back to the beginning.

3 The district court found at page 28, finally  
4 defendants argued that Chavez was not attempting to  
5 abridge the right against self-incrimination to -- to  
6 exact -- extract self-inculpatory data or leads. And the  
7 court goes on to then describe what was argued by the  
8 defense, that Mr. Chavez was there simply to find out what  
9 happened.

10 The court directly rejected that.

11 QUESTION: Mr. Paz, I'm sorry. I don't -- your  
12 page 28 in the cert petition?

13 MR. PAZ: It's 28a in the appendix of the -- of  
14 the petition for cert, yes, Justice Stevens.

15 QUESTION: And where? I didn't -- I don't find  
16 it on that page.

17 MR. PAZ: It starts at the -- at approximately  
18 the -- the bottom of the page.

19 QUESTION: "Finally defendants argue --"?

20 MR. PAZ: Yes.

21 QUESTION: Okay. I'm with you.

22 MR. PAZ: Yes.

23 So the district court carefully looked at the  
24 evidence that had been presented, and the district court  
25 decided the case really because the testimony of Chavez at

1 the time the tape recordings that he made on the day of  
2 the incident and his deposition testimony -- he said  
3 simply, I'm investigating the crime. I was there to  
4 investigate what -- the crime had been committed, the  
5 crime of attempted murder on two police officers on the  
6 theory that somehow or other this farm worker had taken  
7 away the officer's gun and was going to use it on the  
8 officers when they shot him. That was the core of the  
9 case. That was all of the evidence in the case.

10 The subsequent declarations that were submitted  
11 were only submitted after -- after Mr. Martinez submitted  
12 a motion for summary judgment that as a matter of law,  
13 using all of the evidence provided by the defense and  
14 giving them the benefit of the doubt on all the evidence,  
15 that there was a violation of the Fifth and the Fourteenth  
16 Amendment.

17 QUESTION: Mr. Paz, let me -- let me tell you  
18 why I have difficulty with the proposition which you're  
19 urging, which is that any coercion that would suffice to  
20 require the confession to be excluded from -- from trial  
21 is also a coercion that violates the Fifth Amendment,  
22 not -- leaving substantive due process aside.

23 Suppose you have a situation in which a --  
24 a felon has taken a hostage and buried the hostage  
25 somewhere, and suppose that it is possible for the police

1 official to use a degree of coercion which would not shock  
2 the conscience. It isn't beating the person with a rubber  
3 hose, but let's say failing to give a Miranda warning, or  
4 using a -- a sort of trickery that -- that would amount to  
5 coercion, threatening perhaps, you know, if you don't  
6 confess, your brother will be prosecuted or something like  
7 that. It would be sufficient to exclude the testimony  
8 from the confession from the trial, but the policeman  
9 doesn't care about that. He wants to save the life of  
10 the -- of the hostage who's been -- who's been buried.

11 Now, you would say that that -- that policeman  
12 by extracting that confession has violated the Fifth  
13 Amendment.

14 MR. PAZ: There may be a violation, and -- and I  
15 would agree that most likely if -- if it was in violation  
16 of Miranda, there would be -- there would be no -- it  
17 would not be admitted into a criminal case. Maybe -- it  
18 may be under the Quarles exception.

19 QUESTION: What -- you'd say that the person  
20 would -- would have a -- a 1983 action against the  
21 policeman?

22 MR. PAZ: No. No, I think clearly that's the  
23 kind of a case in which qualified immunity was designed to  
24 prevent. Qualified immunity gives as -- as it did in --  
25 in --

1           QUESTION: Only because of qualified immunity?

2           QUESTION: Well -- well, let -- let's assume  
3 that we decide the case, and then this happens a second  
4 time.

5           MR. PAZ: Then -- then clearly --

6           QUESTION: You have to answer Justice Scalia's  
7 question. You can't get away on qualified immunity.

8           MR. PAZ: Oh, no, no. I would say --

9           (Laughter.)

10          MR. PAZ: I -- I would say Quarles gives us the  
11 direction. When there is an immediate danger, when  
12 there's a danger to the public, then clearly there would  
13 be no constitutional violation. The Court has already  
14 made that decision. I -- I don't think that that's really  
15 an issue that we have to struggle with.

16          QUESTION: You can violate the Fifth Amendment  
17 when there's a danger to the public?

18          MR. PAZ: That's what Quarles, I believe, says.  
19 Quarles says that -- that the Miranda violation was not --  
20 was not sufficient. And I -- as I -- as I recall in  
21 Quarles, the evidence was admitted against him. He -- he  
22 said, the gun is over there, and that evidence came in to  
23 prove the violation of -- of possession of a weapon. So I  
24 think that the Court implicitly said that we're -- in this  
25 emergency situation, that there is no -- no Fifth



1 Amendment --

2 QUESTION: You -- you think this applies not  
3 only to the -- the unique aspect of the Fifth Amendment  
4 that -- that Miranda constitutes, but to all Fifth  
5 Amendment violations.

6 MR. PAZ: No. What I -- I think once it becomes  
7 coercive, once it becomes physical, once it becomes --  
8 then I think that you would interfere with the core values  
9 of -- of the Fifth Amendment.

10 QUESTION: Justice Scalia's hypothetical asked  
11 about coercion. There was no coercion in Quarles. There  
12 was just an absence of Miranda warning.

13 Forget Miranda. Let's just talk about coercion.  
14 Is there a Fifth Amendment violation in the case that he  
15 put where there was -- there's an element -- there's a --  
16 there's a degree of coercion? There's no Miranda warning.  
17 That's out of the case. There's no sovereign -- qualified  
18 immunity. That's out of the case.

19 QUESTION: Coercion to keep it out of trial.

20 MR. PAZ: I -- I would say yes that there is a  
21 Fifth Amendment violation. The question then would be,  
22 what is the remedy?

23 Under those --

24 QUESTION: -- section 1983.

25 MR. PAZ: No.

1           QUESTION: I mean, if it's a Fifth Amendment  
2 violation, you can sue the policeman.

3           MR. PAZ: Under those circumstances --

4           QUESTION: Well, this person who goes to prison  
5 for -- for putting this person in a -- in a grave begins a  
6 suit when he's in prison suing the -- suing the policeman.

7           MR. PAZ: And I don't believe that's -- that  
8 would be the conclusion because the remedy would not be  
9 appropriate because there had been, as we saw in -- in  
10 Saucier versus Katz, there's a situation in which the  
11 police have to act, and so the police act if it's  
12 reasonable, even if it's a reasonable mistake, even if  
13 they have the wrong guy and they try to coerce the wrong  
14 person, it may be reasonable under an emergency  
15 circumstance.

16           QUESTION: I see. So let's assume somebody  
17 is -- you think he's going to blow up the World Trade  
18 Center. I suppose if -- if we have this necessity -- this  
19 necessity exception, you -- you could beat him with a  
20 rubber hose.

21           MR. PAZ: I would hope not, Your Honor.

22           QUESTION: Oh, it's necessary.

23           MR. PAZ: No. I think --

24           QUESTION: Since when is -- is necessity a --  
25 you know, a justification for ignoring the Fifth

1 Amendment?

2 MR. PAZ: Your Honor, only in the limited  
3 situation. I think the first hypothetical you gave me --  
4 gave us was you simply were going to ask him questions  
5 repeatedly. Now, I -- I don't think the rubber hose  
6 example was before me.

7 QUESTION: Do you know -- okay. Do you know any  
8 of our -- any of our cases that -- other than Miranda  
9 which, you know, is -- is in a field by itself, do you  
10 know any of our cases that say that there is a necessity  
11 exception to the coercion prohibition of the Fifth  
12 Amendment?

13 MR. PAZ: Not at all, Your Honor.

14 QUESTION: So maybe the answer would be that --  
15 that it's not -- the Fifth Amendment -- the -- the Miranda  
16 rules are methods of enforcing the Fifth Amendment so that  
17 if all is violated in -- in Justice Scalia's hypothetical  
18 is a Miranda rule and the person is not proceeded against  
19 in court and the person has not been physically injured in  
20 any way and has not suffered any real harm except not  
21 being read a right that didn't matter anyway, he would  
22 have no damages.

23 MR. PAZ: That would be correct.

24 QUESTION: So he could bring his lawsuit, but  
25 he'd gain nothing.

1 MR. PAZ: I would agree with that analysis.

2 QUESTION: Except that my hypothetical was not

3 Miranda. My hypothetical was that he was coerced in some

4 fashion other than the failure to give a Miranda warning,

5 and short of beating with a rubber hose.

6 QUESTION: Yes.

7 MR. PAZ: The distinct -- the distinct

8 difference in this case is -- and I understand that the

9 exigence is -- the exigent -- the -- the terrorist

10 situation is a difficult one. It's not our case.

11 Mr. Martinez was riding a bicycle home.

12 QUESTION: It's not your case. That's right.

13 MR. PAZ: There was no call. There was no

14 crime. There was nothing that had happened except he was

15 riding his bicycle home. So we really can't -- I don't

16 think that this is an appropriate vehicle. There may be

17 such a case that will at some time --

18 QUESTION: Well, maybe this is a Fourteenth

19 Amendment case, not a Fifth Amendment case at all.

20 MR. PAZ: I did -- I did consider that. And --

21 and I think clearly it is a Fourteenth Amendment violation

22 under all the cases --

23 QUESTION: Was it tried on that basis --

24 MR. PAZ: Yes.

25 QUESTION: -- presented on that basis?

1 MR. PAZ: Yes, Justice O'Connor, it was. It  
2 was -- it was -- that was the allegations from -- from the  
3 beginning. But -- but --

4 QUESTION: I don't see why the Fourteenth. I  
5 mean, the Fourteenth -- the Fifth applies to the States  
6 because it's incorporated in the Fourteenth.

7 MR. PAZ: Correct.

8 QUESTION: And -- and therefore, if in fact you  
9 violate the Fifth in -- in a way that's significant, not  
10 just -- I mean, causes significant harm, not just you  
11 didn't read a Miranda right, but you hurt somebody, then  
12 why wouldn't the Fourteenth carry that through to the --

13 QUESTION: By way of the Fourth Amendment.

14 MR. PAZ: Yes. I believe it does. I believe  
15 the history -- and the history -- the early cases, the --  
16 the Bram case in 1897 began with the concept of the -- of  
17 the Fifth Amendment protecting all of the rights. And of  
18 course, Bram was a case in which -- it was against the  
19 United States.

20 But as -- as -- there's an evolution that  
21 I've -- I've seen through our cases that -- that show that  
22 the Fourteenth Amendment, once it was incorporated, it  
23 actually incorporated the Fifth Amendment privileges. It  
24 actually -- the Fifth Amendment was really the -- the core  
25 values of what the Constitution meant to embody. It goes

1 back to -- Bram cites the early -- early cases in England  
2 where, although the right against self-incrimination was  
3 an evidentiary rule, in Bram they -- they laud the fact  
4 that it became a constitutional rule, that it became  
5 immutable so that no act of Congress -- as we decided in  
6 Dickerson not too long ago, no act of Congress could  
7 change that. So --

8 QUESTION: But isn't it clear by now in our  
9 cases that if a policeman uses excessive force that rises  
10 to the level of a Fourth Amendment violation, that we will  
11 address it under that amendment, that the Fifth Amendment,  
12 the language of it refers to use in trial of the  
13 testimony? And -- and you don't have that limitation --

14 MR. PAZ: I would --

15 QUESTION: -- under a substantive due process  
16 claim.

17 MR. PAZ: I would disagree with you on one  
18 point, and that is the -- the language of the amendment  
19 talks about a criminal case, and in our brief, we did talk  
20 about the meaning, the distinction between a criminal  
21 trial and a criminal case. And all of the -- all of the  
22 language -- the most recent is in Hubbell. There's the  
23 discussion about the fact that the Fifth Amendment  
24 covers -- the values of the Fifth Amendment covers  
25 everything from civil to administrative to bankruptcy

1 cases. The Arnstein case in 1923 talked about the Fifth  
2 Amendment protecting a bankrupt person in a bankruptcy  
3 proceeding, not even involving a criminal proceeding at  
4 all. So the extension of the Fifth Amendment goes to  
5 really the core values. We just don't force people to  
6 talk, and the State can't do it. And --

7 QUESTION: Excuse me. I -- you -- you mean --  
8 you say it extends to a bankruptcy proceeding. You mean  
9 you can refuse to provide testimony that can be used  
10 against you in a bankruptcy proceeding?

11 MR. PAZ: That was the holding in Arnstein in --  
12 in 1923, and a bankrupt person who was under the  
13 bankruptcy proceeding simply said, I have a right to  
14 remain silent. I don't want to answer these questions.  
15 The court upheld that right in the bankruptcy proceeding.  
16 So early law certainly didn't -- didn't say it had --

17 QUESTION: Simply because he didn't want to  
18 answer the questions, or because --

19 MR. PAZ: They may --

20 QUESTION: -- the -- the questions would  
21 incriminate him --

22 MR. PAZ: That's correct.

23 QUESTION: -- in a criminal proceeding.

24 MR. PAZ: That's correct.

25 QUESTION: Well --

1                   MR. PAZ: But -- but there was no criminal  
2 proceeding --

3                   QUESTION: Well -- yes. There wasn't any yet  
4 pending. I mean, I think we all understand that you --  
5 that you acquire some pre-trial Fifth Amendment rights  
6 to -- to remain silent, but whether that means that there  
7 has been a Fifth Amendment violation before the entrance  
8 is -- evidence is introduced in trial is -- is a separate  
9 question.

10                  MR. PAZ: I --

11                  QUESTION: Nobody questions that -- that there  
12 are some aspects of our Fifth Amendment law which -- which  
13 allow you to plead the Fifth Amendment before the evidence  
14 has been introduced in trial.

15                  MR. PAZ: And -- and once the -- the right has  
16 been given to the -- to the American people to plead the  
17 Fifth Amendment in any pre-trial proceeding, including  
18 an -- an interrogation at -- after a -- after a shooting  
19 such as this, and after the person is the sole suspect of  
20 a horrible crime, then obviously that is part of the  
21 criminal case. That is part of the entire criminal  
22 process.

23                  If we would say we only have a Fifth Amendment  
24 right to remain silent if we introduce it into a court --  
25 into a court proceeding, then Mr. -- persons like



1 Mr. Martinez who were never charged with a crime would  
2 have no remedy.

3 QUESTION: But it doesn't have to be part of the  
4 criminal case. I mean, as -- as your bankruptcy example  
5 indicates.

6 MR. PAZ: I agree. I agree, Justice Scalia.

7 I think it's important that we try to focus on  
8 what really are the bright lines here. We have three  
9 bright lines that were violated by -- by Sergeant Chavez  
10 in this case. The first is clearly coercion that goes  
11 back to -- to the early cases.

12 The second bright line is that there was --  
13 there was an invocation in this case. Mr. Martinez twice  
14 said, I don't want to talk. Leave me alone until they  
15 give me medical treatment.

16 There was invocations implicitly. When he first  
17 opened his mouth, he says, leave me alone. Leave me  
18 alone. I'm dying. Those are the first words out of his  
19 mouth. That's an invocation. No reasonable police  
20 officer, no -- no basically trained police officer could  
21 believe that questioning a fellow in his condition was  
22 permissible.

23 QUESTION: This -- this question is somewhat  
24 like Justice Scalia's question. Suppose the same facts so  
25 far as the hospital was concerned, but that the -- that

1 the incident involved a kidnapping and the injured person,  
2 your client, was a witness to the kidnapping. We wanted  
3 to know what the kidnapper looked like so we could get the  
4 child back.

5 MR. PAZ: Then it's clearly -- he's not a  
6 suspect. Clearly, it -- questioning is -- is obviously  
7 needed. It's necessary. Of course. But -- but --

8 QUESTION: Well, if -- if the questioning -- and  
9 suppose he says, go away, I'm sick, I'm sick. And they  
10 said, no, no, we want your answer. Why is there coercion  
11 in -- no coercion in that case --

12 MR. PAZ: Because he's --

13 QUESTION: -- but coercion in your case?

14 MR. PAZ: Because he's not a suspect. Because  
15 he's -- he isn't the sole --

16 QUESTION: But that's -- that's a Miranda  
17 question.

18 MR. PAZ: I think not.

19 QUESTION: And -- and it's a -- well, it's also  
20 a basic Fifth Amendment question.

21 MR. PAZ: It is.

22 QUESTION: But why isn't -- why isn't the  
23 element of coercion the same in each case?

24 MR. PAZ: Because the -- the constitutional  
25 obligation. When the person is a suspect, the

1 constitutional obligation rises above. That's the  
2 difference.

3 QUESTION: Well, that -- for purposes of a  
4 damage action, not for purposes of Miranda, or what's  
5 admissible. But for purposes of a Miranda action, should  
6 a suspect be in a better position than a totally innocent  
7 witness insofar as the police beating him up is concerned?

8 MR. PAZ: No, I would think not.

9 QUESTION: No. All right. Well, if they're --  
10 if they're the same, then I -- I guess it would be --  
11 you'd get to the same result. If they had beaten him up  
12 or been coercive, it should be the same problem whether  
13 he's the witness or the suspect. And if they've gone past  
14 whatever point is reasonable, I guess there should be  
15 damages. And if they're doing it for a good reason  
16 because they want to stop an attack or something, well,  
17 that's just the way it is. And -- and that's -- I'm  
18 trying to figure out if that's what the law is and what  
19 the right words are to get to that place and how you deal  
20 with this mass of -- of constitutional rules, if -- if  
21 that's the proper result.

22 MR. PAZ: I think the proper result is -- is  
23 given -- given Justice Kennedy's hypothetical, the proper  
24 result is if this is a -- a witness who has information  
25 about some exigent circumstance, then there -- the Fifth

1 Amendment doesn't attach at all. And obviously the  
2 officer is not going to use leading questions, coercive  
3 questions to get information. The basic concept of  
4 getting information under those circumstances is you want  
5 it to be trustworthy. You don't want the officer putting  
6 words into the person's mouth and brow-beating them to  
7 come up with something that's a bad lead. So obviously we  
8 want to have the kind of questioning that would be, in  
9 fact, seeking the truth as opposed to putting words into  
10 someone's mouth as what occurred in this case.

11           The -- I'd like to address a point that's been  
12 raised, and -- and it may not be totally necessary. I'd  
13 just like to make the distinction that the -- the basis,  
14 the entire heart of the discussion that coercion is  
15 somehow permissible unless the cases are introduced into a  
16 criminal case or into a criminal trial are -- are the --  
17 the immunity cases.

18           In the immunity cases, they -- they -- I believe  
19 that the defense has -- or that the petitioners have  
20 totally confused the grant of immunity and coercion in a  
21 public trial after a grant of immunity where a person is  
22 told, you must answer the questions. And -- and the  
23 distinctions is one is an inquisitional situation where if  
24 the officer has a person alone and they're forcing them to  
25 answer questions, there is no public trial, there is no

1 judge there to make sure that they're -- they're not  
2 being -- there is no overreaching, there is no brow-  
3 beating. The person who was even under a grant of  
4 immunity can say, I'm not going to talk, and face the  
5 consequences of going to jail and sit in jail with dignity  
6 and say, I'm not going to talk. I believe that it's more  
7 important to assert my right not to speak than to be --  
8 than -- than sitting in jail. Our law still doesn't allow  
9 the court or the jailers to use coercion to extract their  
10 statement. A person in this country still could have the  
11 dignity to say I don't want to speak and I'll take the  
12 punishment, and if it's just punishment, that it's been  
13 done by a court, then that is not coercion, the kind of  
14 inquisitional coercion that this -- that this Court and  
15 the United States has always said we don't tolerate.

16 Are there any other questions?

17 QUESTION: Going back to your earlier  
18 distinction between the suspect and a witness, if someone  
19 is suspected of kidnapping a child, and that child is not  
20 going to live without some medication -- I believe this  
21 example was brought up in one of the briefs -- and the  
22 suspect, whatever answer, will certainly be incriminating,  
23 the police may not exercise any coercion to get the  
24 suspected kidnapper to tell where the child is so the  
25 child could get life-saving medication?

1                   MR. PAZ: I believe that there can be some  
2     questioning, and I think that the questioning has to be --  
3     even if it's forceful questioning, there must be limits.  
4     And it's -- certainly it's a balance because it has to  
5     take into account what is the circumstance of this person.

6                   The danger in saying I agree with that  
7     hypothetical, Your Honor, is that what if the person is  
8     the wrong person. What if the suspect really isn't the  
9     person who kidnapped the person? What if they're just  
10    wrong and they got the wrong person? That's the danger,  
11    and that's why we have to --

12                  QUESTION: And on the other side is -- is the  
13    life of a child.

14                  MR. PAZ: That's correct. And it's -- it's  
15    always a difficult choice, but we have -- we have to --

16                  QUESTION: -- it's difficult at all if they know  
17    that this is the fellow that did the -- they have all  
18    sorts of evidence. They know this is the guy that -- that  
19    buried the child, or deprived the child of medication or  
20    whatever. It's not a hard question at all.

21                  MR. PAZ: Then I think -- I think that there  
22    is -- we have to look at Quarles for guidance and, again,  
23    it has to be the degree of the -- the degree of coercion  
24    that is permissible. It's difficult to say that any  
25    coercion is permissible. But again, given -- with the

1 limited hypothetical and limited facts, it's -- it's  
2 difficult to make a judgment at this point.

3 QUESTION: Mr. Paz, what do you -- what do you  
4 do with the Murphy case that's relied upon so extensively  
5 by -- by Mr. Robbins? As I understand that case, it was a  
6 State legislative commission which accorded immunity to  
7 the witness under State law, but of course could not  
8 accord immunity under Federal law. And we held that the  
9 witness, nonetheless, had to testify, and we said, of  
10 course, if the feds try to use the evidence, it will not  
11 be admissible because it was -- it was obtained under  
12 coercion. But we, nonetheless, allowed the State to  
13 compel the testimony. Now, were we allowing a Fifth  
14 Amendment violation?

15 MR. PAZ: No, Your Honor. That -- that was, as  
16 I understood, that the -- the use immunity that was  
17 granted in -- in Waterfront was extensive with the  
18 privilege. It was allowed -- that is, as I understand the  
19 reading of the case, was that the privilege that -- that  
20 the -- the immunity that was granted was sufficient to  
21 cover both any State prosecution as well as Federal  
22 prosecution.

23 QUESTION: No, no, no. That wasn't the case.  
24 That was the whole problem. The State could not grant  
25 immunity from Federal prosecution. It -- it granted

1 immunity only from State prosecution. And we said,  
2 nonetheless, the State could -- could lock the person up  
3 until he testified. And the only consequence would be  
4 that if he did testify, it would not be introducible in  
5 Federal trial because it -- it had been coerced.

6 Now, I -- you know, it's a bizarre case, but it  
7 does seem to stand for the principle that Mr. Robbins  
8 asserts, which is that there's no Fifth Amendment  
9 violation until the evidence is introduced.

10 MR. PAZ: We all make mistakes, Your Honor.

11 (Laughter.)

12 QUESTION: You think -- you think that was one  
13 of our mistakes.

14 (Laughter.)

15 QUESTION: Did you -- did you come up anywhere  
16 in your -- in your research on this with anything that  
17 suggests that -- that once the person is a suspect, and  
18 once he's in custody of the police, that the criminal case  
19 has begun?

20 MR. PAZ: Yes.

21 QUESTION: Or is it clear that that isn't? Is  
22 it clear that the criminal case that the Constitution  
23 refers to is -- is not really begun until it's what we'd  
24 call technically is a criminal case, the filing, you know,  
25 indictment, or -- et cetera?



1                   MR. PAZ: I -- I think there was good language  
2 in -- in Colorado versus Connelly. Justice O'Connor wrote  
3 a concurring opinion I think that covers the point quite  
4 well that said that -- and there was also the --

5                   QUESTION: It says that -- what? That the  
6 criminal case had begun at the time he was in custody?

7                   MR. PAZ: As I recall, the -- the discussion was  
8 that there had been an argument that the -- that Mosley's  
9 statement -- that that by using Mosley's statement,  
10 because there had been no police coercion, that it was  
11 permissible because the purpose of the -- of the rights,  
12 the Fifth Amendment, was to prevent police misconduct and  
13 coercion. And -- and in that context there was a -- there  
14 was a discussion about -- that the -- that the -- that  
15 there was -- that because the rights protect outside of  
16 the criminal case and outside of the trial, that there was  
17 no -- there would be no deterrence. There would be no  
18 reason to enforce it at that point.

19                   Also there was Michigan versus Tucker. Both  
20 Michigan and -- and Colorado versus Colony -- Connelly  
21 both discuss about a two-part inquiry. Should -- should  
22 we -- and the Court indicates in both of those cases that  
23 there's an analysis of whether the police officer conduct  
24 violated the Fifth Amendment, and then secondly, what is  
25 the remedy. So really, those two cases talk about the

1 difference between the right pre-trial in the custodial  
2 interrogation setting, as well as -- as does Miranda, and  
3 the difference between the remedies that the court  
4 considered.

5 Any further questions?

6 Thank you.

7 QUESTION: Thank you, Mr. Paz.

8 Mr. Robbins, you have, I think it's, 3 minutes.

9 REBUTTAL ARGUMENT OF LAWRENCE S. ROBBINS

10 ON BEHALF OF THE PETITIONER

11 MR. ROBBINS: Thank you, Mr. -- Justice Stevens.

12 Let me just quickly make a couple of points.

13 It seems to me that petitioner can win this case  
14 the hard way or the easy way. The easy way is recognizing  
15 that this body of law is, as one of the members said this  
16 morning, a complex of constitutional issues with cross  
17 currents that cut in a variety of directions, that in  
18 light of Verdugo Urquidez, in light of Sacramento against  
19 Lewis, it cannot be said that any of these constitutional  
20 principles was sufficiently clearly established to warrant  
21 the rejection of qualified immunity. But I want to win it  
22 the hard way.

23 First, because under Sacramento against Lewis,  
24 the standard for substantive due process is intent to  
25 harm. That wasn't pled. That wasn't tried. There's no

1 such argument before you today. No one thinks that if  
2 Sacramento against Lewis applies, there can be a  
3 substantive due process claim at all. That's why it  
4 wasn't in the complaint. And no one here before you is  
5 suggesting intent to harm.

6 Now, on the Fifth Amendment, Justice Kennedy,  
7 I'd like to take one more crack at the concern that you've  
8 articulated because I think it is -- it is in fact  
9 possible to square those concerns with the holding in  
10 Murphy against Waterfront Commission which, as far as I  
11 can tell, is perfectly good law and consistent with what  
12 this Court said in footnote 8 of Balsys about the fail-  
13 safe of use immunity provided directly by the Fifth  
14 Amendment. So long as the government has not compromised  
15 the availability of use immunity under the Fifth  
16 Amendment, there hasn't been a Fifth Amendment violation.

17 In each of the penalty cases that are suggested  
18 by your hypothetical, that's what the government has done.  
19 They have said to the witness, you may not have immunity.  
20 You may not assert your Fifth Amendment. If you assert  
21 your Fifth Amendment right, we're going to put you in  
22 lock-up right now. The Court has consistently said, you  
23 know, if you forfeit the use immunity and actually put a  
24 guy in jail because he insists on it, that's as good as  
25 use. That's a protection that stems from the Fifth

1 Amendment itself.

2 And that's -- that explains all of the so-called  
3 penalty cases. The police -- the Garrity case in New  
4 Jersey, the two Lefkowitz cases out of New York. That  
5 explains -- what is, in fact, going on there is someone is  
6 being punished or penalized for the assertion of a  
7 privilege, including the right against use.

8 But as long as the fail-safe in the words --  
9 Justice Souter, that you used in -- in footnote 8 of  
10 Balsys, as long as the fail-safe of use immunity has not  
11 been compromised, as it has not been in this case, there  
12 is not yet a full Fifth Amendment violation, which can  
13 only happen when there's a use in a criminal case.

14 And that is exactly the point that this Court in  
15 Verdugo Urquidez said in the passage that the Ninth  
16 Circuit decided to call dictum and ignore. That was a big  
17 mistake. And on that ground alone, it's the Fifth  
18 Amendment portion of its decision --

19 QUESTION: But, Mr. Robbins, why couldn't -- why  
20 couldn't --

21 MR. ROBBINS: -- that should be reversed at the  
22 first threshold.

23 QUESTION: Why couldn't you view the continued  
24 questioning under the circumstances of this case as  
25 tantamount to punishment when you have locked somebody up

1 who won't answer questions?

2 MR. ROBBINS: Well, I -- I think because --  
3 well, for one thing, the availability of use immunity is  
4 still there. What you -- what I think it would -- what I  
5 think -- what I think it would amount to is continued  
6 coercion of a statement which arguably at some threshold,  
7 once you cross it, does indeed become too coercive to  
8 render the statement admissible. But that's when the  
9 Fifth Amendment fail-safe steps in and says, you may not  
10 use it. That would violate the Fifth Amendment. But  
11 because the fail-safe wasn't compromised in this case, as  
12 it was in the line of cases suggested by Justice Kennedy's  
13 hypothetical, there cannot be a Fifth Amendment, and we  
14 don't even have to reach the question of qualified  
15 immunity.

16 JUSTICE STEVENS: Thank you very much,  
17 Mr. Robbins.

18 The case is submitted.

19 (Whereupon, at 12:06 p.m., the case in the  
20 above-entitled matter was submitted.)  
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23  
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