ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1857

TITLE OREGON, Petitioner
v.
JAMES EDWARD BRADSHAW

PLACE Washington, D. C.

DATE March 28, 1983

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Washington, D. C.

Monday, March 28, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:50 p. m.

APPEARANCES:

DAVID B. FROHNMAYER, Esq., Attorney General of Oregon, Salem, Oregon; on behalf of the Petitioner.

GARY D. BABCOCK, Esq., Salem, Oregon; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BERGER: We will hear argument next in Oregon versus Bradshaw. Mr. Frohnmayer, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID B. FROHNMAYER, ESQ.

ON BEHALF OF THE PETITIONER

MR. FROHNMAYER: Thank you, Mr. Chief Justice, and may it please the Court.

Today, the state of Oregon asks this Court to finetune a salutary rule in order to make it more workable in the real world. The question is whether Miranda versus Arizona allows reasonable police investigation into serious crime, including allowing the innocent to clear their names from suspicion, or whether the Miranda and Edwards doctrines will be misconstrued to imprison potential suspects in a web of their privileges or prohibit them from changing their minds.

This case is here today because the Oregon Court of Appeals overextended Edwards versus Arizona and distorted the very protections this Court established in Miranda versus Arizona. The facts, I believe, may be briefly summarized.

Bradshaw's contact with law enforcement authorities arose both because he was a suspect in a vehicular homicide and because he claimed to have been

the victim of a criminal assault. At the request of the Oregon state police, he answered questions about inconsistencies between the story he had volunteered and the accounts of other witnesses.

Prior to this questioning, he was advised of his Miranda rights and he was told that he was not under arrest and that he was free to leave. Based on certain admissions that Bradshaw made during questioning at the Rockaway police station, Corporal Hays then placed him under arrest for furnishing liquor to a minor and advised him again of his Miranda rights.

Shortly thereafter, when Corporal Hays suggested to the accused a theory that Bradshaw had been the driver of the car and was responsible for the homicide, Bradshaw stated he wanted an attorney "before it goes very much further." The interview was promptly terminated and Bradshaw was transported to Tillamook county jail for booking.

At some point during this process, Bradshaw asked the question, "Well, what is going to happen to me now?" The testimony is unchallenged that Corporal Hays then immediately reminded the accused of his right to counsel and that he did not have to talk. Bradshaw stated, "I understand."

QUESTION: May I interrupt with one question?

Does the record tell us when he first got the assistance of counsel?

MR. FROHNMAYER: As far as the record is clear, Your Honor, he first received actual counsel sometime after his arraignment the following day. There is no point in this exchange I've described at which counsel was available.

QUESTION: Is there any evidence that the state made any effort to get him counsel before that time?

MR. FROHNMAYER: There is evidence that the state -- there is not only evidence, there is testimony by Corporal Hays that he suggested that he call an attorney and Corporal Hays further testified that he believed that there was time for him during his stay at the station house to have called an attorney. And the record also shows that the police contacted, at the request of the accused, Bradshaw, a person by the name of Irma Stockdale, but beyond that, the record is silent with respect to --

QUESTION: Well, was he represented by retained counsel in the proceeding that followed?

MR. FROHNMAYER: I do not believe so, no.

QUESTION: He was represented by appointed counsel?

MR. FROHNMAYER: Yes, sir.

QUESTION: And so -- but no effort was made to obtain appointed counsel until after his arraignment, is that right?

MR. FROHNMAYER: That's correct, bearing in mind, of course, that the events I'm describing occurred on a Sunday evening, during the weekend period of time in a small town on the Oregon coast.

The interview -- testimony is unchallenged that, of course, the accused was immediately reminded that he did not have to talk and that he had the right to an attorney. Bradshaw stated that he understood. In the wide-ranging conversation that then ensued in the drive to the Tillamook county jail, no incriminating statements were elicited, but Bradshaw did agree to take a polygraph test the next morning to test the veracity of his story.

The next morning, which was a Monday morning, another Oregon state police officer explained to Bradshaw the polygraph test procedures and readvised him again of his Miranda rights. He told Bradshaw that although he waived the right to counsel he could stop the test and speak to an attorney at any time.

Bradshaw then signed a written acknowledgement and waiver of his rights. The waiver included both a

consent to take the polygraph test and a consent to talk to the Oregon state police. After the test and in the course of a conversation initiated by defendant's questions relating to polygraph procedures, Bradshaw ultimately made the incriminating admissions which are in issue today.

The trial court found after hearing testimony concerning these events that there had been no threats, promises or enducements leading to these admissions, and that although Bradshaw had once expressed a desire for counsel, he had simply changed his mind.

We come to the Court today with three contentions, which I would like to argue in reverse order to the --

QUESTION: On what basis is it alleged that he changed his mind? Did he say, I change my mind?

MR. FROHNMAYER: No, he didn't say that precisely, Your Honor.

QUESTION: Well, where did we get the conclusion that he did change his mind?

MR. FROHNMAYER: Well, the trial court, of course, heard the testimony of the corporal, and the defendant was present in the courtroom, and then various of the other police officers. And among the facts that the court was entitled to consider were these: the

defendant, by the time he made these statements, had been twice advised of his Miranda rights and after he asked the question, "What is going to happen to me?" he was reminded again immediately by Corporal Hays that he had the right to counsel and that he did not need to talk to the police officer, and that the testimony is uncontroverted that he then said, "I understand." Further evidence --

QUESTION: Is the testimony also undisputed that before that, he asked for a lawyer and that he didn't get one?

MR. FROHNMAYER: It is undisputed that he said, "I would like an attorney before it goes very much further."

QUESTION: And that he didn't get one.

MR. FROHNMAYER: Yes, but the interview was promptly terminated --

QUESTION: Does the record show that he didn't get one?

MR. FROHNMAYER: Yes, the record shows that he did not get one.

QUESTION: And then he was continually questioned?

MR. FROHNMAYER: No, sir. The questioning was promptly ceased. Corporal Hays terminated the interview

as soon as he said "I want an attorney before this goes very much further." It was only when the accused reinitiated conversation by saying "What is going to happen to me?" that there is any further dialogue between the police officer and the accused, so far as the record reflects.

QUESTION: Is that where the waiver comes in?

MR. FROHNMAYER: No, that's where the initiation comes in and that's where the waiver faults.

QUESTION: What is the initiation you are talking about?

MR. FROHNMAYER: What, I'm sorry --

QUESTION: What is -- the initiation comes in, you say?

MR. FROHNMAYER: The initiation, and that is our first --

QUESTION: What is that? What is initiation?

MR. FROHNMAYER: The initiation of dialogue between the accused and the police.

QUESTION: Oh, I see. Well, suppose he had asked for a drink of water. That would have done it?

MR. FROHNMAYER: That might well have been the initiation of dialogue within the meaning of this Court's decision in Edwards versus Arizona, and that is precisely what we are here to determine today and that

is our first contention.

Our contention is, in fact, that the Edwards case should squarely have controlled the disposition by this case of the Oregon Court of Appeals but that the Oregon Court of Appeals misconstrued this Court's decision in Edwards versus Arizona, misapplied it and completely ignored the carefully tailored Footnote 9 of that decision.

In that decision, the Edwards decision, this Court stated, as an exception to its rule, that further communications, exchanges or conversations by the police would be an exception if they were initiated by the accused and of course, this is precisely what happened in the case that we have before us today.

QUESTION: Couldn't he -- as I understand the question, what are you going to take -- what are you going to do with me? I don't see anything in his statement that said I want to be questioned.

MR. FROHNMAYER: I think that --

QUESTION: I don't -- is there anything in there to suggest that to you, that I want to be questioned?

MR. FROHNMAYER: Let me answer your question --

QUESTION: Yes or no. If you say yes, then point it out to me.

MR. FROHNMAYER: There are two separate questions -- there are two separate responses to your question, if I may, and they are terribly important so I would like to give them in order. Two issues have to be separated.

First of all, whether under the Edwards test including Footnote 9, defendant initiated, reinitiated dialogue or conversations with the police and then, secondly, whether thereafter the defendant under the totality of the circumstances knowingly, voluntarily and intelligently waived his right to counsel.

So our point is, as we understand the meaning of the Edwards decision, is not that the first utterance of the defendant has to be a total Johnson versus Zerbst waiver in itself, which only a law -- honors graduate of a law school could think of to utter, but simply whether it constitutes a break in the silence upon which the defendant has first insisted upon. That's what happened here.

This is a classic textbook example, in our judgment, of what constitutes the initiation of dialogue or conversations or further exchanges with the police, within the square meaning of the language used in Edwards, within the meaning of the words that this Court established in its Wyrick versus Fields per curiam

decision today -- this term, and actually, Justice Marshall, a point which you made in your own dissenting opinion in Wyrick versus Fields, in the per curiam decision.

And if I may, I think that the words that you wrote demonstrate the point I am trying to make, when you wrote, "When a suspect commences a conversation with a policeman, he has reason to expect that, as in any conversation, there will be a give and take extending beyond the subject matter of his original remarks. It may therefore be appropriate to conclude that the suspect's waiver of his Fifth Amendment rights extends to the entire conversation."

Now, that's our contention of the kind of case that we have today --

QUESTION: I know that's out of context.

MR. FROHNMAYER: I'm sorry, sir.

QUESTION: I know that is out of context.

(Laughter.)

MR. FROHNMAYER: Well, but it is within the context, if I may offer, of both Footnote 9 of the Edwards decision and of the language of that decision.

And again, let me reemphasize that what we have are two separate inquiries. Whether or not the absolute, apparently absolute requirement of silence

imposed by Edwards once the defendant has asked for his right to counsel and secondly, what follows upon the initiation by the accused of further conversations with the police. It is our understanding that --

QUESTION: That rule about not asking any questions after asking for a lawyer did not originate with Edwards. It goes back to around 1935, in the handbook of FBI agents, which was quoted in the Miranda case.

MR. FROHNMAYER: I understand the origins of --

QUESTION: Right. It was way back. It's not new.

MR. FROHNMAYER: Well, I'm not contesting our compliance with the Miranda doctrine, and in fact that's precisely what's in --

QUESTION: But the Miranda doctrine, I thought, said that when he asked, when he says I want a lawyer, you quit questioning.

MR. FROHNMAYER: That's right, and the Edwards decision, which construes the Miranda decision, says there must be no further questioning by the police after a right to counsel is asserted, and that was scrupulously honored by the police in this case.

Not only was it honored because the conversation was terminated immediately but when the

defendant uttered his question, which reinitiated the conversation, the very first thing that the police officer did was not to pounce on the opportunity but rather to remind the defendant that he had previously asserted a right to counsel and previously asserted his right to silence, followed by the defendant's statement, "I understand."

Now that, it seems to me, is exemplary police procedure and yet, it's ironic that the Oregon Court of Appeals, purporting to apply the decision of this Court in Edwards versus Arizona said that that was somehow improper police activity. And that is what it is that is at issue today.

And so to repeat our first contention, it is our judgment, our belief that what occurred here falls squarely within the meaning of this Court, both in the text of and in Footnote 9 to the decision of this Court in Edwards versus Arizona.

And consider the differences between this case and what was presented to you in the Edwards decision when you concluded, as a Court, that -- unanimously -- that it was inappropriate for the police to resume questioning of the defendant. Unlike Edwards, in this case the police did not initiate the exchange.

QUESTION: Well, what if -- suppose he said, I

want a lawyer and the police terminated, said all right, the discussion is over, and the defendant then says well, when am I going to get my lawyer? Now, is that reopening the dialogue?

MR. FROHNMAYER: Your Honor, I -- it's not clear to me what the Court precisely meant by reopening the dialogue, except that I --

QUESTION: I know, but I'm interested in what you think reopening the dialogue is. That would be any kind of, any way in which he -- any subject that he reopens with the police like --

MR. FROHNMAYER: Yes.

QUESTION: Please tell my mother, or could I have a drink of water or give me some writing paper, that's reopening a conversation?

MR. FROHNMAYER: Yes. I think that's the best meaning that can be put on that language because I think any other meaning you put on it, any higher threshold of attempting to ask the court to parse the defendant's statements in order to decide whether it's one of substance or of procedure, one of policy, one of trying to find out where the facilities are and so forth, would get this Court into a hopeless quagmire of --

QUESTION: Oh, really. Do you mean that? Why not confine it to something having to do with the

investigation, as the opening?

MR. FROHNMAYER: Well. You see, I don't think --

QUESTION: Certainly, may I have a glass of water just can't be what the Court meant in Edwards.

MR. FROHNMAYER: Well, I don't know whether the Court did or not but let me suggest this --

QUESTION: Well, suppose he says, now I lay me down to sleep, would that do it?

(Laughter.)

MR. FROHNMAYER: That is not the initiation of dialogue. That is not the resumption of conversation. That is not an exchange.

QUESTION: Oh, then there is some point.

MR. FROHNMAYER: Well, sure. The Court has said iniatiates dialogue, which presumes some intelligent exchange between human beings and not simply a declaratory statement.

QUESTION: Then a question about when am I going to get the lawyer that I just asked you for, that reopens the dialogue? Because it calls for some kind of a response?

MR. FROHNMAYER: I think it certainly calls for a response and I think that it would reopen the dialogue, but let me be very clear about what we are

asserting. We're not asserting that simply because that reopens the dialogue, that anything that's immediately said thereafter is fair game.

We're simply saying that, having reopened the dialogue, you then have crossed the threshold which this Court set as the basis beyond which you couldn't tread once a person asserted the right --

QUESTION: And then it's just a question of voluntariness and the totality of the circumstances?

MR. FROHNMAYER: Yes, but we don't believe that that is necessarily an easy test to be met, Justice White.

QUESTION: Oh, I understand. I understand that.

MR. FROHNMAYER: We're simply saying that we believe this Court was establishing a threshold that said we don't want the police simply to go back and reask and reask and reask a person, well, do you really waive your right to counsel, did you really mean it.

So apparently the thrust of the Edwards test, as we understand it, was to require some kind of initiation of conversation that would not only show that the defendant was not standing firmly on his right to silence but that he wanted further information of some kind.

QUESTION: Well, what if the defendant says I'd like a glass of water and the police officer says, fine, I'll go get you one, did you really mean to waive your rights or did you really want an attorney?

MR. FROHNMAYER: Fine. I think that under the Johnson versus Zerbst standard of waiver that that would not be found to be a voluntary, knowing and intelligent waiver of his right to counsel.

QUESTION: Of course, you don't know what he's said yet. All you know is that the police officer has said two things, that I'll get you a glass of water and are you sure you want a lawyer. Now if the defendant responds at that point, on second thought I don't want a lawyer, then you say Johnson against Zerbst is not met?

MR. FROHNMAYER: It probably would not be met in those cases.

QUESTION: But it's a factual inquiry?

MR. FROHNMAYER: Yes, it's a factual case. And let me say this, that even if, even in this calculus, what the defendant says in the course of the initiation of his exchange may well bear on the Johnson versus Zerbst calculus of knowing, intelligent and voluntary waiver.

And let me return then to what, in fact, the defendant said in this case because it was not may I

have a drink of water, or when is my lawyer coming, again. It was a question which was, at worst, ambiguous.

In our judgment, it could well have been a global question, in the largest sense. What's going to happen to me, as a consequence of my involvement in the criminal justice process. That may be why the question was immediately followed by Corporal Hays' reassertion and reminder to the defendant that he might be about to say something very damaging and that he ought to know that he had a right to an attorney and a right to remain silent.

But in any event, it clearly was not a trivial question that was asked in this case, and the police officer, out of an abundance of caution, wanted to make it clear to the accused, and the record shows he did so because he wanted to be fair to the accused, that before anything else transpired, that the accused was reminded of his rights. So quite apart from whatever might be low-level exclusions from the notion of initiating dialogue, this example hardly falls within that outer periphery.

As I mentioned, unlike Edwards, the police didn't initiate this exchange. Unlike Edwards, the accused was not told by a jailer or by a police officer that he had to talk. Unlike Edwards, the accused did

not decline to meet with the police. Unlike Edwards, upon the reinitiation of conversation, the police promptly showed exemplary respect for the defendant's rights. Unlike Edwards and other cases, there is not a whisper of police trickery or deceit in this case. The facts show, in fact, a reasonable response by a police officer to the accused's ambiguous question about his status and the context shows an abundance of caution lest the defendant's question could reasonably be understood to be a global one.

QUESTION: Mr. Frohnmayer, at what point would you say that police interrogation resumed? When the policeman said, let me tell you about my theory of the case?

MR. FROHNMAYER: Well, of course, the policeman had already offered that theory of the case in the tape-recorded interview at the police station. In fact, it's a little bit hard to tell from the record precisely when that occurred and it's interesting to note that the trial judge felt that the agreement to take the polygraph was itself not the result of interrogation at all.

Now that decision, of course, by the police officer -- by the trial judge was made prior to whatever information of his judgment might have been rendered by

Rhode Island versus Innis, decided subsequently to be the facts in this case. But certainly, the ride in the police car is a -- and the wide ranging conversation shows itself a low level of coercion, if any at all. Far from the station house, Mutt and Jeff, two on one, incommunicado type questions.

QUESTION: But under Innis, you would concede that there was some interrogation there in the car?

MR. FROHNMAYER: I would concede that at some point there was interrogation, certainly by the time the individual was interviewed following the polygraph test. But I'm not prepared to concede that the low-level wide ranging conversation initiated by the defendant itself was inevitably characterized as an interrogation.

And even if it were, no incriminating admissions whatever emerged from the conversation held by Corporal Hays and the accused, all the way to the Tillamook county jail and in fact, nothing incriminating happened until after the conclusion of the polygraph test, the next morning. I think it's worth remembering from --

QUESTION: Would you characterize the statements made by the police officers in the hearing of Innis, in Innis against Rhode Island, were suggestive

and prompting type of statements?

MR. FROHNMAYER: I'm sorry, Mr. Chief Justice --

QUESTION: Were they suggestive, were they prompted -- were they prompting statements, to prompt an accused, an arrested person to open up?

MR. FROHNMAYER: Well, we have two different occasions on which that might have occurred. The record is unclear with respect to the first because we have only the recollection of the officer, which is, although it is uncontroverted by the accused, as to what occurred in the Rockaway county jail and enroute to the Tillamook county jail. And there the defendant apparently repeated his story that he had been the victim of an assault and the thrust of the police officer's response to that was a polygraph would help to clear this up. And the defendant's apparently repeated statements that I want to clear this thing up.

Now, that certainly is a far cry from some forms of interrogation which this Court has found to be impermissible and I suppose it's a debatable question whether under the Rhode Island versus Innis standard, it amounts to interrogation at all.

QUESTION: Well, didn't the Court indicate in Rhode Island against Innis that the statements made by

the police were indeed suggestive and of a prompting nature? And yet we approved it.

MR. FROHNMAYER: Yes, well, I believe that that's correct. It was certainly not of a -- the best that can be said of it is that the defendant was told that he could clear up his story by taking a polygraph test. And he was told that the police officer had a different theory about what had happened than the theory offered by the defendant himself.

The second -- let me conclude this portion of my argument this way. If the language in Edwards about reopening dialogue means what it says, it's hard to understand what other police response would have been appropriate.

QUESTION: I can tell you one. He says what happens to me now, you say you sit down and wait for your lawyer. Wouldn't that be a good response?

MR. FROHNMAYER: I think it would have been a nonresponsive response. I think that the response that he gave was the most responsible one that a police officer of this nation would be asked to give and that is, before I say anything to you, I want you to understand you've already asked for counsel and that you've already said -- that I've told you you could be silent.

QUESTION: Did he say that?

MR. FROHNMAYER: He reminded him of it.

QUESTION: He just gave him the same Miranda warning over again, the boiler plate.

MR. FROHNMAYER: No, sir. I believe he in fact reminded him in a much more extended way, which is actually set forth in detail in the transcript and is available for the Court's perusal.

But here is our problem. If the initiation standard of Edwards means something more than the initiation of dialogue, however trivial or however serious, then the police officer's only response may well be one of silence because of the officer's uncertainty with respect to whether or not the question is one of overall significance to the case or merely a trivial one. Now that is precisely the kind of Kafkaesque imprisonment of a person in the web of his or her own privileges, the denial of meaningful information to the accused, which members of this Court have long condemned as being counter to the meaning of the First Amendment.

The second point of my argument is this, that the Johnson versus Zerbst standard was met after the threshold of initiation was passed. The defendant has never challenged Zerbst below and its objection in this

Court is, we believe, misdirected. Applying Zerbst to the facts of this case, it was clearly a knowing waiver.

He was told. He was reminded of his rights -- he was told of his rights, read his rights twice, reminded a third time and then, before he took the polygraph that ultimately was the only device that secured from him his incriminating admissions, he was advised in oral and written form, comprehensively and exhaustively, in eight checked-off places on a form that he signed.

It was intelligent, because he said I understand. The trial court finding was that there was no duress or coercion. He said repeatedly to the officer, and the testimony is uncontroverted, I want to clear this thing up. Unlike Edwards, he was not told he had to talk. It was precisely the converse. The first thing that he was told in response to the assertion of his rights was that he had -- he was reminded of his rights.

Consider how far afield this is from the Miranda cases and its progeny and the coercion that they were designed to prevent. No wearing down of the defendant. No incommunicado holding, no trickery, deceit, no evidence of insufficient intelligence. Repeated efforts to advise of rights, a wide ranging

conversation about everything from police officers one knows to who lives in St. Helens, Oregon, showing if anything the low level of coercion, if any. No undermined will. Repeated attempts by the police to inform the defendant where he stood.

Our final contention is that if the initiation requirement of Edwards must be construed to compel the result in the Oregon Court of Appeals, then we respectfully suggest that the modified per se test of Edwards should be reformulated because we believe that that modified per se test establishes a distinction between the Fifth Amendment right to silence and right to counsel, which is not in that amendment itself and was suggested by Miranda.

And we suggest that it is a per se rule which ironically enough could encourage the police rather than discourage them from answering legitimate questions that help inform the defendant about his own status. And of course, it may completely exclude a voluntary change of mind of the defendant because a particular initiation threshold doesn't happen to be present in a given case.

We fail to understand, and that's why the perplexity we advance in our brief, why, though both rights are derived from the Fifth Amendment and why it's the Fifth Amendment right to silence that is being

protected, a waiver of the right to silence is less rigorous than a waiver of the derivative Fifth Amendment right to counsel.

Our response to the Court would simply be that the request for counsel does not invariably mean the defendant is less able to protect his own rights under all circumstances. That assumption is not, we believe, invariably warranted by the endless variety of facts which other tests can better measure.

Mr. Chief Justice, I would like to reserve the balance of my time.

CHIEF JUSTICE BERGER: Very well, Mr. Attorney General.

MR. FROHNMAYER: Thank you, sir.

CHIEF JUSTICE BERGER: Mr. Babcock?

ORAL ARGUMENT OF GARY D. BABCOCK, ESQ.

ON BEHALF OF THE RESPONDENT

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

There are four criteria or things that can be raised that will show that Bradshaw did not initiate the dialogue with the police officers in this case. And I would like just to briefly mention these four criteria as a useful test and then get into them a little more elaborately as it relates to the facts of Bradshaw.

First of all as it relates to initiation or reopening the dialogue, to initiate, the accused must say something that is relevant to the criminal investigation to reopen the dialogue. Second, and probably most important in this case, there must be some passage of time between the request for the lawyer and any language that's claimed by the prosecution to be initiatory.

Now, another factor and the third factor to be considered is that if there is any physical separation between the accused and the police officers in space which goes along with the time aspect. And fourth, and more important I think probably is the initiation words using implication -- must be an implication of giving up the previous request for the lawyer. The defendant must move from Mosley representing himself or Edwards asking for help over to the Mosley side of it, where he is going to represent himself, he is going to keep the lines of communication open.

This Court has recognized that conversations between police officers, like in Innis, are going to happen, which are commonplace, not necessarily relevant to the criminal investigation. Likewise, I think in Edwards, this Court acknowledges the fact that there are going to be conversations between the defendant and the

police officer that aren't necessarily tied to the criminal investigation. Examples have been asked for and given here today.

Now again the idea here -- we're not just dealing with a Mosley situation, we're dealing with a request for a lawyer which carries a much heavier burden of proof because it incorporates also the idea of the self-incrimination aspect. He's asking for assistance, for help.

This standard -- and third, the idea of initiation is not just a voluntary thing, it also involves the more complex aspect of the intelligent, understanding, knowing waiver aspect that this Court discussed about the Arizona Supreme Court's interpretation using a consent Fourth Amendment claim. It has to involve the passage of time and some meditation, some thought process, to give up the seating of interrogation, which Bradshaw asked for when he asked for a lawyer.

Now moving first of all to the words relevant to the criminal investigation, what's going to happen to me now, I don't read the record the same way as the Attorney General reads it. I read it this way. Officer Hays, the police officer, he arrests Bradshaw on the furnishing charge and at that time, right within seconds

he accuses him of killing Reynolds, being responsible for killing Reynolds. Then he advises him of his Miranda rights. And then Bradshaw says, I want a lawyer, or words to that effect. And then within seconds, although the record doesn't reflect this but it has got to be seconds, the only act or the only thing that happened between his request for a lawyer and this comment here about what's going to happen to me now, is handcuffing. And that was at the police station and that was within seconds, I would say to give the state the benefit of the doubt, 120 seconds, two minutes.

QUESTION: Isn't there some dispute in the record, Mr. Babcock, as to when the statement was made, whether it was made before being shipped from Rockaway to Tillamook, or whether it was made during the car journey?

MR. BABCOCK: Your Honor, I've taken this portion of the transcript, and I'll read it very shortly -- no, I don't believe so. There --

QUESTION: I thought the Oregon Court of Appeals said there was, or am I thinking of the wrong --

MR. BABCOCK: Your Honor, I don't think so. You've got the tape recording on the request for the lawyer. Officer Hays cuts off -- he cuts off the interrogation and he said, now you've asked for a lawyer

and then Bradshaw says, yes, I agree with you, and that's the end of the tape. And you have to hook into the officer's testimony which I'm only taking -- they have the burden of proof in this case. I'm talking from page 23 of the transcript, there was several comments made about where he was going to go and what he would be charged with and I put him in the police car.

QUESTION: Well, here's what the Oregon Court of Appeals said, at least what it seems to me it's saying and that is on page eleven of the petition for certiorari. Sometime thereafter, either prior to or during the course of his transfer to the Tillamook county jail, defendant inquired of the officer -- defendant recalls this was while he was enroute by automobile from the police station to the county jail.

The state interprets the records as indicating the query was made while he was still in the police station. And the Oregon Court of Appeals seems to say there is a dispute and really doesn't try to resolve it, as I read it.

MR. BABCOCK: No, Your Honor, I think what had happened with the Court of Appeals was they construed Edwards as a per se rule and really didn't get into weighing exactly what happened. When he asked for a lawyer and the next thing that happened on the record,

like I say, at least -- we don't know -- I say in the police station, from this transcript reading, was his remark, what's going to happen to me now. It was a natural response to being handcuffed.

And I think the Supreme -- or the Court of Appeals, although they didn't get into saying, you know, what they thought the time was, I'm just taking Officer Hays' testimony and he did submit that the police car to take him down to the jail --

QUESTION: Did the trial court make a finding on this point?

MR. BABCOCK: No, Your Honor.

QUESTION: So you're simply really arguing what's basically a factual question to us.

MR. BABCOCK: Well, I'm just using -- yes, I'm just using -- again, I'm just using Officer Hays' testimony about when the remark occurred. I thought everybody had agreed that this remark occurred in the police station.

QUESTION: Well, I don't think the Oregon Court of Appeals agreed with you.

MR. BABCOCK: I don't think they addressed it, Your Honor.

QUESTION: No. They said there was a dispute.

MR. BABCOCK: The assumption was, since they

applied -- I mean they applied this rule, the assumption was, I thought, that although they didn't give a reason for it, was that when he made this remark it was not initiation.

I'm using the time factor here as a very important fact in the sense of the understanding, knowing waiver aspect. It doesn't really intelligently -- it can't really intelligently be put into the record unless it really occurs fairly close to the request for the lawyer.

Now another thing that's not mentioned here, and that's what I just read, is that in the police station there's no ambiguity with his statement about what's going to happen to me now. And we can sit around and argue about that but the record shows that Officer Hays answered the question.

QUESTION: In Innis against Rhode Island, how did the challenge to the events become initiated? Whose voice began the discussion?

MR. BABCOCK: I think that's a -- Your Honor, I think that's a classic case of initiation by the accused. He initiates --

QUESTION: The accused?

MR. BABCOCK: Innis. There was --

QUESTION: It was the police officer who said

to his colleague, in the hearing of Innis, who was two or three feet away, it will be a terrible thing if the children in the retarded school get hold of this gun and the ammunition, or words to that effect. Did the police not open the dialogue?

MR. BABCOCK: Well, Your Honor, I think the question there was whether or not there was interrogation. I don't think that was an opening of the dialogue. I think that was a recognition that police officers are going to talk about --

QUESTION: Did not the crucial event come immediately after the policeman said that?

MR. BABCOCK: It was short in time, Your Honor.

QUESTION: Innis then said --

MR. BABCOCK: I'll show you where the shotgun is.

QUESTION: I'll tell you where it is. Go up two miles and one mile to the left, or something like that. Did not the police initiate that dialogue?

MR. BABCOCK: Well, Your Honor, assuming that --

QUESTION: Isn't that -- wouldn't that a reasonable reading of Innis?

MR. BABCOCK: I think, of course, if that's a reasonable reading of that, then, of course, it would

have to have been concluded that that was interrogation, Your Honor.

QUESTION: Well, except the courts concluded that it was not interrogation.

MR. BABCOCK: It was not interrogation.

QUESTION: And therefore, it is not a reasonable reading.

MR. BABCOCK: I conclude then that the initiation in that case was Innis. Otherwise it was --

QUESTION: His response was what opened it. I see. In your view.

MR. BABCOCK. Yes. It was sparked, maybe, by those police officers. I thought of Innis only in a sense that that is a classic case of initiation involving not a defense but actually, inculpatory statements. I think initiation shouldn't necessarily be limited to just some kind of defense, I've got alibi witnesses, but also, lookit, I've decided to let you know where the gun is, or whatever the case may be.

Again, there is no problem with calling this ambiguous, as the Attorney General suggests, because the record shows, again the testimony of Officer Hays shows that he answered his question. That was after he readvised him, when he made this remark, what's going to happen to me now.

A clear case, in answer to Justice O'Connor's question, the true, the true example of initiation can be found again in Officer Hays' testimony. Right after he readvises Bradshaw of his rights, after Bradshaw has said, hey, what's going to happen to me now. Then Officer Hays answers the question, puts him right into the police car in the front seat to talk. And if you'll look at the record, the first two things that Officer Hays testifies to is I put him in the front seat to talk and I accused him of killing Reynolds, again.

It's a classic case of initiation, very similar to what happened in Mosley, but they visited him the next day. But again, that's the real case of initiation and not what's going to happen to me now, right after being handcuffed. And that's in the transcript, and that's the record.

The one real single factor, and I think in this case, that really stands out as the most important criteria, if I can get to that, is the fact that from the time of the request for the lawyer and from the time that he makes this remark, again we're talking about just seconds, even in Mosley talking about the self-incrimination aspect, there was at least over two hours, a different police officer and a different crime, when this standard of an intelligent waiver could be

applied to this case.

It is difficult for me to understand, if we're going to use this initiation concept as a rule that can cut off and cease questioning, like happened with Mosley, and apply this qualified rule and not as strict rule where we have to wait to have a lawyer come in and talk to him, where we have to have that buffer, and certainly under these, Johnson versus Zerbst and all these cases, we can't have Bradshaw making an intelligent decision to initiate this thing and to reopen the dialogue in 60 seconds.

If we take the attorney -- and this is also, I might add, if you take this event of initiation and move it closer in time to the request for the lawyer and eventually where they almost stand on top of each other, we've almost got this conjunctive of Bradshaw saying, I want a lawyer, and what's going to happen to me, now.

As you move these two events closer and closer, I think to have any real meaning to initiation, you have to come closer and closer to an express form of recision of that request. And that's consistent with Butler, which of course was a nonrequest for attorney case.

QUESTION: Your basis for saying it's virtually simultaneous is the fact that it happened

right after he was handcuffed?

MR. BABCOCK: Yes, sir.

QUESTION: Well, I suppose then if the second hypothesis of the Oregon Court of Appeals that it occurred in the car from Tillamook to -- Rockaway to Tillamook is right, he certainly wouldn't -- he would have been handcuffed before he got in the car, I suppose.

MR. BABCOCK: Yes, Your Honor.

QUESTION: So either you're wrong or the second hypothesis of the Oregon Court of Appeals is wrong.

MR. BABCOCK: The court -- Your Honor, I don't know -- again I'm reading off of what Officer Hays says before he puts him in the police car. I think it's clear from the record, beyond a shadow of a doubt, that he was handcuffed in between his request for a lawyer and his statement, his remark. Because during the trip to the --

QUESTION: Do you suggest that there is anything unusual about handcuffing where there is a murder, a homicide case?

MR. BABCOCK: No, Your Honor.

QUESTION: I wasn't sure, because you mentioned it several times.

MR. BABCOCK: No, I'm sorry. He was arrested

for furnishing, which was a -- it's a violation in Oregon that carries a $200 fine and I think, as a matter of common practice, police officers when they arrest, they're going to put handcuffs on him.

I use handcuffs only in the illustrative sense of this is probably why he said, you know, what are you going to do with me now. Officer Hays had about ten or twelve opportunities before this to arrest him for the same thing. All the way back in the preceding night, on the 13th. Bradshaw told the police officers he'd given the deceased alcohol. So you see, Officer Hays had a whole day and a half to arrest him but he didn't have probable cause on the automobile accident, on the manslaughter and that is what he was working for. And he can't be criticized for that. Innis recognizes his right to -- in fact, we recognize the right for him to even interrogate him if he doesn't exercise his rights. And it is certainly a right he exercised.

QUESTION: Let me clear up one other factual matter. Is it not correct that he was handcuffed before he said he wanted a lawyer?

MR. BABCOCK: Your Honor, as I understand this, he was arrested, the officer said to him I'm going to arrest you for furnishing.

QUESTION: Right.

MR. BABCOCK: Then he said, you can't leave. Now, he said, I'm going to give you my theory on this, Bradshaw. I think you were -- let me give you the theory on this. And then he tells him that he's going to take -- and he thought that he was driving the vehicle and that he had been injured and Reynolds had died.

Then he readvises -- or, I'm sorry, he advises Bradshaw of his Miranda rights. And then, after he advises him of his Miranda rights, then Bradshaw exercises them. And then right after that, the officer handcuffs him. And then right after that, he's still in the police station, he says what's going to happen to me now. And then Bradshaw --

QUESTION: Well, there's a dispute on whether he said that in the police station or not. You seem to just totally overlook his own testimony, which the Court of Appeals said he recalled it as being in the car.

You are concentrating on the police officer's testimony. Each of them testified contrary to his own interest, I guess, but the Court of Appeals, as Justice Rehnquist has pointed out, says in so many words defendant recalls this was while he was enroute by automobile from the police station to the county jail.

MR. BABCOCK: The handcuffing.

QUESTION: No. That's referring to the well, what is going to happen to me now, which I guess must also -- the sequence is very puzzling to me.

MR. BABCOCK: Yes, and Your Honor, it's -- the point I make on that, if there is a point to be made, that there is --

QUESTION: You're the one who emphasized the importance of the proximity in time and that's why it seemed to me you ought to be pretty sure of your facts.

MR. BABCOCK: Well, yes, sir. I'm sorry I'm not -- certainly I'm not trying to misstate the record. I'm going solely on the basis of, and I didn't know -- I'm going solely on the basis of what the officer testified to.

QUESTION: But of course, there's no reason to think that any of the Oregon courts have engaged in fact-finding, were bound to believe the officer's testimony perhaps against the best interests of the state as opposed to the defendant's testimony against his best interests. And most assuredly we can't resolve a factual dispute like that.

You are simply saying that -- I mean, we are not a jury. You can argue the fact that the officer said this and therefore, you ought to find that. But that's really not what we're here for.

MR. BABCOCK: Yes. Well, my argument from this particular record is that the state has the burden of proof. And it is a heavy burden, as it relates -- we do know on the face of the record that Bradshaw asked for a lawyer. That's on the face of the record. And initiation, as I understand Edwards, must be shown by the accused -- I mean, sorry, by the state that Bradshaw had initiated this conversation.

The most that shows up on the face of this record is the remark of what's going to happen to me now. And I read that in a context of the trip to -- from the police station to the jail encompassed the reaccusation and then the working out of the agreement to take the polygraph examination. To view this -- to view this in a context, if the event of what's going to happen to me now occurred after Officer Hays' second accusation, accusing him of killing -- of killing Reynolds, then still on the face of this record, what do we have by way of initiation?

The most that Bradshaw ever said in this case was I understand, when Officer Hays readvised him. We don't have anything from the defendant's mouth initiating this dialogue or reopening this dialogue. It was Officer Hays, as you view the record in any particular way you want to look at the record, who kept

the dialogue going.

He asked him -- Officer Hays asked him to take the polygraph test. He reaccused him. He readvised. We don't have anything out of the defendant's mouth except what's going to happen to me now, and I understand. There's nothing on this record.

I emphasize the time aspect because, again, it's difficult to understand -- I don't want to be dogmatic about that. It may be read differently by the Court of Appeals. If you look at this, though, at the existing state of the record, you're looking at a situation, if you accept the state's argument, you're looking at a situation where Bradshaw asked for a lawyer, the interrogation ceases, the defendant says what's going to happen to me now. And for the state to be successful on showing some form of waiver here, that's got to be equivalent to saying no, Officer Hays, forget the lawyer. And there's no way, by any stretch of the imagination, to conclude that he says I want a lawyer and then, I don't want a lawyer.

Two other aspects of the case that may bear upon how you interpret this particular statement is, there was no physical separation for sure between Officer Hays and the defendant for a very short period of time. I think we are looking at, at the outside, the

record's not clear, of maybe fifteen minutes here. So really --

QUESTION: Is there anything in the record as to how long it takes to go from Rockaway to Tillamook?

MR. BABCOCK: No, Your Honor. There is no way to know exactly what happened enroute, though Bradshaw finally did agree to take the polygraph examination.

With the idea, again, of initiation, the fourth thing I would mention is that there would be some words, some way to imply a waiver of this request in looking at the words of initiation, and most certainly, what's going to happen to me now doesn't really imply any kind of a waiver, I think, any way you want to read it, at least in the Johnson versus Zerbst environment.

And for this reason, I think that as far as all four of these criteria that I'm talking about, the concept of initiation in creating that buffer and that protection for the accused is pretty much going to mean not very much any time you say anything that's going to allow the police officers to reaccuse you and keep the dialogue going.

Thank you.

CHIEF JUSTICE BERGER: Do you have anything further, Mr. Attorney General?

ORAL ARGUMENT OF DAVID B. FROHNMAYER, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. FROHNMAYER: Thank you very much, Mr. Chief Justice.

Three quick remarks on the factual statements, two responses to the public defender, and then I will conclude.

First, in reference to the Joint Appendix, on pages 17 and 18, there is no basis for concluding that Corporal Hays put the defendant in the squad car and then immediately accused him of killing the victim. The only evidence is that, on the way from Tillamook -- from Rockaway to Tillamook, there was a wide ranging conversation covering this and many related matters.

QUESTION: What is your version of the record, or do you think it's important, as to when Bradshaw asked him what's going to happen to me now.

MR. FROHNMAYER: Our view is frankly that the timing of the statement is not relevant to the question of initiation.

QUESTION: Well, what if it were? What's your view of when it took place?

MR. FROHNMAYER: Our view of what is to happen to me now, is that it took place either at the station or shortly after he went into the police car.

QUESTION: And of course, the officer

testified that he -- he then asked me at this time, which was at the end of the tape recording, I handcuffed him there and then he asked me, at this time.

QUESTION: But there's testimony of Hays' --

QUESTION: I understand that. I'm trying -- wonder what your view is. It is one or the other, and it doesn't make any difference which.

MR. FROHNMAYER: Well, our view is that it may be relevant to one of many factors in the Johnson versus Zerbst formula. It's not relevant to the question of initiation. Probably the better reading is that it probably happened in the police station but the Court of Appeals of Oregon, as Justice Rehnquist has noted, indicates that there is some confusion on that. Our view is, in any event, it doesn't matter.

QUESTION: And it doesn't matter -- in your view it could have happened in the police car and it wouldn't make a bit of difference.

MR. FROHNMAYER: That's correct because that's the question of iniatiation.

QUESTION: Or at the station, it wouldn't make any difference.

MR. FROHNMAYER: That is correct.

QUESTION: Mr. Attorney General, this 16 and 17, what was this, a hearing or the trial itself?

MR. FROHNMAYER: At six -- I'm sorry, Your Honor.

QUESTION: At page -- you just read from page 17.

MR. FROHNMAYER: I don't believe --

QUESTION: Of the Joint Appendix.

MR. FROHNMAYER: On the Joint Appendix. At pages what?

QUESTION: Sixteen and 17 and 18, around in there. There was a whole lot of testimony there. Oh, that was a pretrial hearing.

MR. FROHNMAYER: Yes, that would be at the pretrial hearing, which is required in Oregon under State versus Brewton and which is the Jackson versus Denno hearing of the state, yes. The record would also show that the defendant was not handcuffed prior to arrest.

At bottom, let me summarize our response to defendant's arguments this way. There are two fundamental flaws to Bradshaw's argument. First of all, it confuses initiation and waiver. It telescopes two distinct but related inquiries into one which is directly contrary, in our view, to the Edwards footnote and to Wyrick versus Fields.

Initiation is only the threshold incurring

which must be overcome after which waiver is determined. Second, if initiation means something more than the simple face of the language, which the Edwards decision suggests, then this Court inherits a legal quagmire, a hopeless series of legal Rubic's cubes of dispute as to the meaning of thousands of potential utterrances that might be initiated by defendant as to whether they do or they don't have particular legal significance.

We believe in fact that the question uttered by defendant here did and was related to the investigation. But the point is, one can't always tell. It ignores the give and take of conversation, which this Court wisely recognized in Footnote 9 of Edwards. The mixed conversation, which this Court recognized would occur once defendant and the police officers again begin their conversation.

And ironically enough, if one telescopes both inquiries, initiation and waiver, into one, as the public defender would have us to do, it leaves nothing for the waiver issue to be decided under the separate Johnson versus Zerbst test, which this Court has set forward. In that sense --

CHIEF JUSTICE BERGER: I think that's -- your time has expired.

MR. FROHNMAYER: Thank you very much, Mr. Chief Justice.

CHIEF JUSTICE BERGER: Thank you, counsel. The case is submitted.

(Whereupon, at 2:41 p. m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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Oregon, Petitioner v. James Edward Bradshaw No. 81-1857

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