

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 81-2149

**TITLE** HERMAN SOLEM, WARDEN, Petitioner  
v. NORMAN STUMES

**PLACE** Washington, D. C.

**DATE** November 28, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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HERMAN SOLEM, WARDEN, :  
Petitioner :  
v. : No. 81-2149  
NORMAN STUMES :  
- - - - - x

Washington, D.C.  
Monday, November 28, 1983

The above-entitled matter came on for oral  
argument before the Supreme Court of the United  
States at 12:59 p.m.

APPEARANCES:

MARK V. MEIERHENRY, ESQ., Attorney General of South  
Dakota, Pierre, South Dakota; on behalf of the  
Petitioner.  
TIMOTHY J. MC GREEVY, ESQ., Sioux Falls, South  
Dakota; on behalf of the Respondent.

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1 attorney had a conversation with the law enforcement  
2 officers in Sioux Falls, South Dakota, and that lawyer  
3 advised the law enforcement officers that if he got a hold  
4 of Mr. Stumes first, he would tell him to turn himself in  
5 for questioning. On the other hand, if the authorities  
6 found him first and arrested him first, that they would  
7 not question him until the attorney, Mr. Jorgensen, was  
8 notified, and that was done.

9 Mr. Jorgensen was notified some time on the 27th  
10 of October 1973 -- or the 27th of September 1973 that Mr.  
11 Stumes had been arrested over in Green Bay. Mr. Jorgensen  
12 then, either on the 28th or the 29th of September in 1973,  
13 called Norman Stumes and told him not to talk to anybody  
14 until he was brought back to South Dakota, to exercise his  
15 right to speak with no one.

16 Upon being arrested by the Green Bay  
17 authorities, he was given his Miranda rights which were  
18 required in 1973 and he made no statements at that time.

19 Later on two police officers, as well as a  
20 deputy sherrif from South Dakota, went to Green Bay to  
21 transport him back and they arrived there on October 1st.

22 They met with Mr. Stumes in Wisconsin, Brown  
23 County, Wisconsin jail at which time Mr. Stumes gave them  
24 voluntary permission to search where he had been arrested,  
25 the place where he had been arrested and his automobile.

1                   He was also given Miranda warnings at that time  
2 by the South Dakota authorities and a conversation ensued  
3 for about an hour and 45 minutes of which nothing  
4 incriminating came out of that.

5                   Later that afternoon there was another  
6 conversation between the Defendant and the authorities.  
7 He was not given his Miranda rights. The record is clear.  
8 And, the only, as found by the District Court, the only  
9 true incriminating thing is that he admitted that he had  
10 intercourse with the dead girl on the day in question and  
11 he also, in answer to a question posed to him, was this  
12 death accidental, he answered that it was.

13                  Of course, he was going to be brought back to  
14 South Dakota on these other charges, not the murder  
15 charges, and so on October 2nd, they proceeded to get an  
16 in automobile and drive the 500 miles from Green Bay,  
17 Wisconsin, back to Sioux Falls, South Dakota.

18                  When they got in the car, he was once again  
19 given his Miranda warnings. And, a conversation about the  
20 case, about the murder part of the case, took place for 20  
21 or 30 minutes.

22                  They left about 9:00 in the morning from Green  
23 Bay, drove in a westerly direction towards Sioux Falls,  
24 South Dakota, arrived back in Sioux Falls, South Dakota  
25 about 6:45 in the evening.

1                   But, about 90 miles from Sioux Falls, Norman  
2 Stumes, and I will take his words, said -- Norman Stumes,  
3 in testifying at various hearings, said, "I had a little  
4 conflict with my emotions," and he began to sob and he  
5 made the statement to the effect, I don't understand why  
6 anybody would want to kill a young girl like Joyce. And,  
7 Detective Green, an officer of the State of South Dakota,  
8 said, Norman, it probably -- Why don't you get it off your  
9 chest, at which time he made admissions that implicated  
10 him and were used against him at his trial.

11                   And, Stumes also said at that time, according to  
12 Detective Green, that I have been wanting to tell somebody  
13 about this but I didn't know how to do it or who to talk  
14 to.

15                   This conversation took place approximately 90  
16 miles from Sioux Falls, and although the record is not  
17 clear, about 5:00 in the afternoon.

18                   Throughout that time, from 9:00 to 9:30,  
19 throughout the day, Norman Stumes himself says he was not  
20 interrogated, that there was general conversation about  
21 the Green Bay Packers, automobile racing, and other such  
22 things. Just prior to his starting to sob and make these  
23 statements -- he describes the situation, the Defendant  
24 does, like this: That there had been no conversation in  
25 the car for 10 or 15 minutes. Officer Skadsen, who was

1 sitting in the front seat of this automobile, was almost  
2 asleep, he was nodding off. The other gentleman was  
3 driving. Detective Green was looking out of the window  
4 somewhat bored. That is when he had his conflict with his  
5 emotions, began with the statement, why would anyone want  
6 to kill Joyce, began to sob. The officer said, Norman,  
7 get it off your chest, at which time he made the  
8 statement.

9 Once they returned back to South Dakota, he was  
10 placed in the jail. The officers broke off all contact  
11 with him. They went to another part. He sent word out  
12 through a jailer, called Detective Skadsen back into the  
13 jail area, and said to Officer Skadsen, please tell them  
14 that I am not a vicious killer, that I didn't mean to do  
15 it.

16 The Eighth Circuit held Edwards to be  
17 retroactive and held that in --

18 QUESTION: What about the rest of the facts? He  
19 sent word out and then what happened?

20 MR. MEIERHENRY: Officer Skadsen came back into  
21 the jail area. Norman Stumes came out to him --

22 QUESTION: What did he say? Did he want to talk  
23 or what, the officer?

24 MR. MEIERHENRY: The officer said basically what  
25 did you want, Norman, or -- I can't recall the exact



1 words, Justice, but words to that effect.

2 QUESTION: And then what happened?

3 MR. MEIERHENRY: He said to Skadsen, Officer  
4 Skadsen, he said tell them that I am not a vicious killer.

5 QUESTION: Then what happened?

6 MR. MEIERHENRY: Then --

7 QUESTION: Were there any other admissions at  
8 that time?

9 MR. MEIERHENRY: No, other than he was not a  
10 vicious killer and he wanted Officer Skadsen to tell  
11 others that he was not a vicious killer.

12 QUESTION: What statements were admitted at his  
13 trial, the ones in the car --

14 MR. MEIERHENRY: Yes.

15 QUESTION: And anything prior to that?

16 MR. MEIERHENRY: Yes.

17 QUESTION: Any of his statements prior to that?

18 MR. MEIERHENRY: Well, a description of his  
19 statements prior to that. The only truly incriminating  
20 statements took place in the automobile and also later.  
21 The threshold --

22 QUESTION: Later when?

23 MR. MEIERHENRY: At the jail, the one we just  
24 alluded to.

25 QUESTION: Is that the only one?

1 MR. MEIERHENRY: The only one from the prior day  
2 of October 1st in the afternoon was he admitted that he  
3 had intercourse and when asked the question, what kind of  
4 death was this, was it accidental? He said it was  
5 accidental. That was admitted as well as the conversation  
6 in general that I have alluded to in the automobile at  
7 approximately 5:00, based on driving times in the  
8 afternoon, and then the one back at the jail after he had  
9 been lodged into jail on these other charges.

10 QUESTION: What is your defense of the  
11 statements made the day before?

12 MR. MEIERHENRY: Well, first of all, it is two  
13 parts. First of all, this Court will should agree, I  
14 guess you would say, to apply the retroactive effect.

15 QUESTION: Right.

16 MR. MEIERHENRY: I don't think we get to that  
17 unless this Court decides to apply Edwards retroactively,  
18 which, of course, we would say this is like Miranda and  
19 the many other cases this Court has not applied  
20 retroactively, shouldn't be applied retroactively, because  
21 the Court has indicated to those of us whose duty it is to  
22 educate the law enforcement officers -- At least in my  
23 state it falls upon the Attorney General, and when this  
24 Court makes a rule like Edwards, a new rule, one that we  
25 were not used to, certain things go into operation. As

1 the Attorney General, my duty is to train all the law  
2 enforcement officers as well as to supervise prosecutors.

3 So, when this Court -- Within days after this  
4 Court makes a new rule like Edwards, we immediately send  
5 out in police parlance, you might say, what can occur and  
6 what cannot occur throughout our state and that is done on  
7 almost an emergency basis, because there is no reason to  
8 start a case and not follow the proper procedures.

9 So, with that in mind, we have to decide whether  
10 this case should be retroactively applied as the Eighth  
11 Circuit did, and, of course, as indicated in the Palteire  
12 case, this is not an appropriate type of case for  
13 retroactive effect. It does not assist in any way the  
14 truth-binding portion of the trial. As a matter of fact,  
15 if we follow what the Eighth Circuit has said, and we go  
16 back and retry Norman Stumes, the truthful statements that  
17 he made to law enforcement officers will be suppressed by  
18 the exclusionary rule, whereas, those matters found to be  
19 untruthful, his version of what happened that day, and his  
20 attempt, testifying under oath before a jury to escape the  
21 culpability that he had admitted to prior, will be allowed  
22 in.

23 In other words, we will have decided a case,  
24 apply the exclusionary rule retroactively, take the truth  
25 out of the case, and leave the Defendant --

1                   QUESTION: But, if he takes the stand and  
2     testifies the way he did, wouldn't some of the statements  
3     that might be excluded initially under Miranda and Edwards  
4     be admissible on cross examination?

5                   MR. MEIERHENRY: Yes, Justice, but I can't  
6     imagine a competent defense attorney would ever put him on  
7     the stand. I mean, from a practical viewpoint, it  
8     wouldn't occur.

9                   QUESTION: But then his statements in the new  
10    trial, his testimony wouldn't be presented any more than  
11    the adverse testimony.

12                  MR. MEIERHENRY: That is right. And, of course,  
13    if you look at this case, and I will not make any  
14    admissions as to what would occur later except that we are  
15    obviously committed to reprosecute if the Eighth Circuit  
16    is confirmed, but this is ten years ago. Officer Green is  
17    dead. There is obviously a different approach as to the  
18    evidence we will have to present at the second trial from  
19    the first.

20                  The removing of his admissions and confessions  
21    in most of these types of cases where the admission or  
22    confession occurred early on effectively denies the public  
23    the right to have a trial on this issue.

24                  First of all, it was not the law in 1973, when  
25    Norman Stumes went to trial, and when the Circuit Judge of



1     our state first ruled on his admissibility or the Supreme  
2     Court of the state. So having had that direct part of the  
3     case over, we do not have at this time the resources to  
4     keep ten years of evidence for every criminal case tried  
5     in the State of South Dakota, which the Eighth Circuit  
6     seems to be saying to us that we must do. We must wait in  
7     case there is a retroactive application of a case like  
8     Edwards. Are we going to build mammoth evidence lockers  
9     in our state to keep the evidence of each and every case  
10    with the chance that it could be applied retroactively,  
11    because the state most certainly does not want Norman  
12    Stumes just turned free.

13               We would have to make an attempt to retry him  
14    for the vicious killing that he really has made any claim  
15    throughout the appeal that he didn't do. It isn't a  
16    question of whether this man killed a young girl for no  
17    reason in Sioux Falls, South Dakota.

18               The question is whether we make a retroactive  
19    application of the exclusionary rule which this Court has  
20    said in different decisions is a rule to prevent, to deter  
21    those of us in law enforcement in the future, but in this  
22    case it will most certainly not do that.

23               The day Edwards was decided and we got word in  
24    the State of South Dakota, law enforcement changed. We  
25    did it on an emergency basis, because the Edwards case --

1                   QUESTION: May I ask, would you tell me exactly  
2 what you did differently after Edwards than what you  
3 thought was required before?

4                   MR. MEIERHENRY: Well, the way we put it out to  
5 our prosecutors and our law enforcement officers is in the  
6 context that it basically added another element of proof  
7 to any case where someone confesses or makes admissions.  
8 And, I know -- I am going to answer your question not  
9 according to what the Court has described it, but the way  
10 we described it to the cop on the street that has to do  
11 this the day after your decision in Edwards.

12                   We said it is like another element of proof. It  
13 has totally changed the way we did it under Miranda.  
14 Therefore, it is up to us to prove that the individual,  
15 once he has made a claim to remain silent or for a lawyer,  
16 we have to be able to prove that not only did he waive  
17 that right, that he did so willingly and he came to you.

18                   So, what we told our officers is that is a very  
19 important -- We can't even get to trial or we will never  
20 be able to use it unless you can prove that it was a  
21 knowing, willing situation.

22                   QUESTION: What did you tell your officers  
23 before Edwards when a person being interrogated asked for  
24 a lawyer? What were the outstanding orders to the police  
25 at that time?

1                   MR. MEIERHENRY: We told them, just as the  
2 District Court Judge, Judge Nichol found in this case, to  
3 scrupulously observe, as was done in this case, that if he  
4 wants to talk to a lawyer, you cease questioning and give  
5 him an opportunity to do so.

6                   And, on two occasions in this very case, that  
7 was done.

8                   QUESTION: Did you have a rule on whether you  
9 could start reinterrogation after any specific --

10                  MR. MEIERHENRY: The State of South Dakota did  
11 not. We were not aware that this Court or any other  
12 federal court said that you can never talk to a criminal  
13 defendant again.

14                  QUESTION: Well, it says -- I mean, the passage  
15 of Miranda they quote, until they had consulted with a  
16 lawyer.

17                  MR. MEIERHENRY: Well, first --

18                  QUESTION: Wasn't that plain in Miranda, that  
19 you weren't suppose to talk to him a second time until he  
20 talked to a lawyer in the interval?

21                  MR. MEIERHENRY: Well, I think that was his  
22 right to exercise. He had to be given the opportunity to  
23 exercise that right. But, again --

24                  QUESTION: Was it your view that the police  
25 could just wait a couple of hours while he had an

1 opportunity to exercise the right and then just go back  
2 in?

3 MR. MEIERHENRY: I think they could go back and  
4 inquire if he wished to talk.

5 QUESTION: The could initiate the second  
6 conversation?

7 MR. MEIERHENRY: They could --

8 QUESTION: Even though they knew he hadn't  
9 consulted a lawyer.

10 MR. MEIERHENRY: Well, if he willingly did so.  
11 Miranda appeared to indicate to the average policeman that  
12 those rights are to be scrupulously observed. And, if the  
13 individual says I want to talk to my lawyer -- Let's take  
14 our case. He freely talked to the authorities. So, it  
15 isn't a question -- He talked to them and at the point he  
16 said, when he was asked if he would take a polygraph,  
17 because others had taken a polygraph, he had made no  
18 admissions at this point. He said I think I want to talk  
19 to Steve before I do that. Steve, referring to Steve  
20 Jergensen, his lawyer back in Sioux Falls, at which time  
21 the questioning stopped. Now, they knew he had talked to  
22 him on the telephone. He was probably never prevented,  
23 although the record would not reflect that, from making a  
24 telephone call.

25 QUESTION: And you are telling me it was the



1 policy of your office, once that is done, you can go back  
2 in and question him again any time you want to?

3 MR. MEIERHENRY: It is no longer.

4 QUESTION: Was it before Edwards?

5 MR. MEIERHENRY: Well, it wasn't my office, but  
6 the policy was -- I was a defense lawyer at that time --  
7 that if he was given his Miranda warnings, he knew them,  
8 he understood them, and he chose to speak, he could do  
9 that. He said, I don't want to talk any more --

10 QUESTION: So, the request for a lawyer did not  
11 deter the prosecutor or the police from reinterrogating  
12 whenever they decided to by just giving the second set of  
13 warnings. That is the way you read Miranda. I mean, your  
14 office read Miranda.

15 MR. MEIERHENRY: At that time, when Stumes was  
16 there, I was defending Stumes, not prosecuting him. I  
17 can't speak what the rules were prior to 1978.

18 What we are saying is --

19 QUESTION: But your whole case depends on there  
20 having been a change in the rules and you say you don't  
21 know what the rules were before.

22 MR. MEIERHENRY: No, I am not saying I don't  
23 know what the rules were before. I am saying I don't know  
24 what the Attorney General of the state had decreed. I  
25 know what the law was and the law allowed authorities to

1 not reinterrogate, but to go back and question whether he  
2 wished to talk some more. This was nothing like in  
3 Edwards where he was told he had to talk. You have in  
4 this case --

5 QUESTION: Will you tell me what in Miranda says  
6 you can go back over and over again?

7 MR. MEIERHENRY: I don't think Miranda teaches  
8 that, but Miranda --

9 QUESTION: I thought you just said that.

10 MR. MEIERHENRY: Miranda teaches that --When you  
11 say go back over and over, there is the illusion that  
12 there is an oppressiveness about this whole conversation  
13 and I would submit from the standpoint of every state in  
14 the union that if an individual says he doesn't want to  
15 talk, he should not be pressured into talking. That does  
16 not stop the authorities from going in and seeing if he now  
17 wishes to discuss this matter, because --

18 QUESTION: Over and over again.

19 MR. MEIERHENRY: Well, again, it is a matter of  
20 degree. As you looked at in some of the progeny of  
21 Miranda.

22 QUESTION: Why did they drive him instead of  
23 flying him from town to town? Did they drive him for the  
24 purpose of talking to him?

25 MR. MEIERHENRY: No. I think I would have to

1 explain to you about South Dakota. First of all, we are  
2 one of the few --

3 QUESTION: Because of airline service?

4 MR. MEIERHENRY: Well, it does, but to transport  
5 a prisoner today on commercial airlines is very difficult.  
6 It is not done very often, number one. It wasn't done in  
7 '73. You can't wear a gun on an airliner, you can't use  
8 handcuffs on an airliner, on and on and on.

9 So, the normal way of doing things in the  
10 midwest is to drive and get them. Secondly, that there is  
11 cost. That would be changed today because we have  
12 purchased our own airplane, but it was the normal course  
13 of transportatoin, not only in South Dakota, but  
14 throughout the midwest. To drive over to Green Bay, which  
15 is only 500 miles -- In South Dakota, we go 170 miles to  
16 go to District Court. It is not even unusual.

17 QUESTION: Or lunch.

18 MR. MEIERHENRY: Or to lunch, yes.

19 (Laughter)

20 MR. MEIERHENRY: There are cases that we have  
21 tried and we don't even have a restaurant in the town we  
22 have tried the case in.

23 QUESTION: It is still a ten-hour drive.

24 MR. MEIERHENRY: Yes. But, it is not unusual.  
25 In fact, until the --

1                   QUESTION: I am not talking about unusual. I am  
2 just talking about to take a lot of time when a man is  
3 just constantly telling him about his Miranda rights and  
4 all, you know.

5                   MR. MEIERHENRY: Well, I think if you look at  
6 the facts of this case, and I think Judge Nichol, who is a  
7 good jurist in our state, he found that that is not  
8 unusual. First of all, they talked about the Green Bay  
9 Packers which has nothing to do with crime. They talked  
10 about racing. This is normal to spend great hours of time  
11 in automobiles where we come from. It is not unusual at  
12 all.

13                  And, besides that, you are talking about an  
14 individual here that willingly talked at every stage which  
15 Miranda never stopped us from listening to people who  
16 wanted to tell us they killed others.

17                  QUESTION: Well, why did you keep giving him his  
18 Miranda warnings?

19                  MR. MEIERHENRY: Because that was --

20                  QUESTION: Wait a minute. You said he just  
21 continued to talk on and on, right?

22                  MR. MEIERHENRY: Yes.

23                  QUESTION: Well, why give him Miranda warnings  
24 over and over again?

25                  MR. MEIERHENRY: I think out of an abundance of



1 caution. If you go back through the records of state  
2 court trials in South Dakota, you will find people that  
3 are simply witnesses, police officers given the Miranda  
4 warnings because they don't want to make a mistake. They  
5 don't want to go too far. They don't want to arrest a  
6 person, convict them, and then at a later date have him  
7 let go on appeal because of their mistake, because they  
8 didn't give a Miranda warning when they should , because  
9 they didn't figure out who initiated it, which is the new  
10 Edwards rule, which, to us, is absolutely new, not an  
11 extension of Miranda, adds an element of proof. If we are  
12 to sustain a conviction, we must prove that if he  
13 confesses as Stumes did here. There is no question about  
14 this man's guilt. It is a question of procedure of  
15 retroactive application of a rule.

16 And, when a case like Edwards comes down, I have  
17 learned as Attorney General, we must immediately put it  
18 into effect, otherwise we will be right back here or my  
19 predecessor will, eight or ten years, not arguing about  
20 the guilt, not arguing about the trial being fair, arguing  
21 about who initiated the statements that lead to the  
22 confession.

23 We think that this case is just like -- not just  
24 like, very similar to Oregon versus Bradshaw in the sense  
25 that in that case a majority of this Court held that first

1 we have to see who initiated the conversation and then,  
2 secondly, we have to show by a totality of the  
3 circumstances that it was a willing and knowing waiver.

4 In this case, the Defendant himself says I  
5 wasn't being interrogated, there was just some  
6 conversation. Then he said, and this was immediately --  
7 during the conversation that is so crucial, he said I had  
8 to tell somebody, I had to get it out, and I wanted to  
9 talk.

10 And, I see nothing in the Constitution that  
11 prevents an individual from confessing to a law  
12 enforcement officer. That is what happened here. And, as  
13 the law was at that time, under Miranda -- Judge Nichol  
14 ruled under Miranda all of this was proper, all of this  
15 was admissible. The only thing that the Eighth Circuit,  
16 and I think it is important to note the times, Judge  
17 Nichol refers to the oral argument reported in Law Week of  
18 the Edwards case, but it was decided after Judge Nichol  
19 made his ruling at the District Court level and obviously  
20 the Eighth Circuit used it in making their decision.

21 But, the Eighth Circuit, in applying the  
22 retroactivity, never had a discussion of how in this case  
23 it would ever help the truth-finding process to make it  
24 retroactive. Miranda itself was not retroactive. How  
25 does it help the truth-finding process to eliminate

1 truthful statements from the trial?

2 It is the same argument we made to this Court,  
3 South Dakota did in Nebel. How does it ever help the  
4 turth-finding process to retroactively exclude the turth?

5 Now, if we -- I will assume for my argument that  
6 we agree with the exclusionary rule as authority in South  
7 Dakota. Once the rule of Edwards came into effect May 18,  
8 1981, of course, we must scrupulously follow it, as we  
9 followed Miranda in 1973 in Mr. Stumes' case, because if  
10 we have the right person, if the jury finds him guilty, we  
11 want it to be upheld. We don't want to lose because of  
12 ignorance or misguided statements taken from other people  
13 or --

14 QUESTION: I notice that you don't say Innis  
15 against Rhode Island. You may recall that case. There  
16 the officers sitting in the front seat of the car engaged  
17 in a conversation which, although not directed at the  
18 accused, clearly prompted him to tell them where the gun  
19 and other incriminating evidence was to be found.

20 MR. MEIERHENRY: I have not referred to that  
21 Innis case or others because of the one question from the  
22 Court already, the assumption that these long drives in  
23 automobiles are somehow set up. You know, either to be  
24 the Christian Burial Speech or the Innis case where some  
25 little girl would be injured by the shotgun.

1                   Here there was no such statement. There was  
2 quiet. We have a nodding-off police officer, one looking  
3 out the window, and the other one driving.

4                   QUESTION: In other words, you are saying this  
5 conduct of the police here is acceptable under Innis?

6                   MR. MEIERHENRY: I most certainly think so. To  
7 refrain -- When they left Green Bay, Wisconsin, there was  
8 testimony about the death of Joyce Hoff. After that, it  
9 became an automobile trip of transporting a prisoner,  
10 proper, normal, usual under all of our practices. They  
11 stopped for lunch, they stopped for gasoline, and so forth  
12 along the way. It was only as the car approached Sioux  
13 Falls, some 60 to 90 miles away, that he blurted out or he  
14 began to blurt out what had occurred. He started sobbing  
15 out of the blue, no conversation, according to the  
16 Defendant himself for 10 or 15 minutes. He said, I don't  
17 know why anyone would want to kill Joyce Hoff, and started  
18 to make the statements. The officer said, why don't you  
19 get it off your chest? And, he then proceeded to do to.

20                   His next statement was I have been wanting to  
21 tell somebody about this. That is a knowing waiver.

22                   MR. MEIERHENRY: Later on Detective Green said,  
23 Norman, we are going to want a written statement when you  
24 get back and your lawyer probably won't let you give it.  
25 And, he says, in effect, I don't give a damn, I will talk



1 to anybody I want to. He was aware of his rights. He was  
2 aware of his Miranda warnings.

3 And, under the facts, should you hold this to be  
4 retroactive, which we most certainly don't think is a  
5 proper case at all for retroactivity, even under the  
6 facts, the Eighth Circuit was incorrect in holding that he  
7 did not knowingly and voluntarily waive his right to have  
8 an attorney present.

9 QUESTION: Well, Mr. Attorney General, do you  
10 challenge any part of the Court of Appeals' version of the  
11 facts?

12 MR. MEIERHENRY: Yes, we do.

13 QUESTION: Well, do you expect us to -- Why  
14 shouldn't we accept those?

15 MR. MEIERHENRY: Well, I don't know if it is  
16 proper for me to argue. That was one of our questions on  
17 our Writ of Cert. It was not granted. But --

18 QUESTION: Well, if that --

19 MR. MEIERHENRY: I think that the District Court  
20 is the proper place to find the facts.

21 QUESTION: Because you say -- In your version  
22 here, you say after they got in the car nothing really  
23 happened relative to the murder until he started sobbing  
24 and yet your position says that the Respondent was advised  
25 of his Miranda rights and questioning began almost

1 immediately. The purpose of the question was to elicit  
2 further incriminating statements from Respondent. Is that  
3 false?

4 MR. MEIERHENRY: If that is your understanding,  
5 I mistated it. I said after he was put in the car he was  
6 questioned for 20 or 30 minutes. Then the rest --

7 QUESTION: Wasn't the questioning aimed at  
8 eliciting incriminating statements?

9 MR. MEIERHENRY: Well, it went over the same  
10 subject matters that they had discussed the prior day and  
11 he was given his Miranda warnings.

12 QUESTION: But, he made no incriminating  
13 statements during that 20 minutes?

14 MR. MEIERHENRY: No, none greater than he had  
15 the prior afternoon when he admitted to having intercourse  
16 with the dead girl and that the death was acidental.

17 QUESTION: That he was present.

18 MR. MEIERHENRY: That he was present, yes, which  
19 is obviously an incriminating element.

20 I have tried to give you --

21 QUESTION: Well, suppose the statements the day  
22 before weren't admissible. Were these statements made in  
23 the car admitted in evidence also?

24 MR. MEIERHENRY: Yes.

25 QUESTION: They were, during this 20 minutes?

1           MR. MEIERHENRY: Yes. And, the District Court  
2 found that there was a knowing, voluntary waiver and the  
3 District Court put out a full factor, which is repeated in  
4 the Eighth Circuit's decision. This was an experienced  
5 criminal. He knew what he was doing. He knew fully well  
6 what he was doing. And, I say in many cases they know  
7 what appellate courts will be looking for in the way they  
8 answer questions.

9           We would urge this Court -- And have a few  
10 moments for rebuttal -- urge this Court to reverse the  
11 Eighth Circuit and simply affirm Judge Nichol's District  
12 Court appeal or District Court case in effect.

13           CHIEF JUSTICE BURGER: Mr. McGreevy?

14           ORAL ARGUMENT OF TIMOTHY J. MC GREEVY, ESQ.

15           ON BEHALF OF THE RESPONDENT

16           MR. MC GREEVY: Mr. Chief Justice, and may it  
17 please the Court:

18           I would like to start out, first of all,  
19 spending a few minutes going over the facts. I think that  
20 in some respects the facts have not been stated as I would  
21 like to have them stated at this point.

22           I think it is important to bear in mind that  
23 while this case originated in 1973, the Miranda decision  
24 of this Court was, of course, handed down seven years, a  
25 full seven years prior to the facts that give rise to this

1 case.

2 And, I think that we need to bear in mind that  
3 while the ten years and two months that Mr. Stumes has  
4 been in prison is a long time, the 17 years since Miranda  
5 is even longer.

6 We have a situation in this case where on  
7 September 17, 1973, the body of the victim is found. My  
8 client, Norman Stumes, is located in Green Bay, Wisconsin,  
9 ten days later. So, it is not a situation where a suspect  
10 is found immediately following an alleged crime and  
11 immediately confesses, thereby making further independent  
12 investigation by the authorities seem pointless. There  
13 was a period of time.

14 The fact of the matter is that by the time these  
15 detectives got to Green Bay to question and transport  
16 Norm Stumes, they already knew they had a murder case.  
17 They had a pathologist who indicated that the cause of  
18 death and the other circumstances of death were such as to  
19 make it a homicide case.

20 QUESTION: Well, they knew they had a murder  
21 case as soon as they found the body, didn't they?

22 MR. MC GREEVY: Well, I suppose one could say,  
23 Mr. Chief Justice, that just by looking at the body you  
24 couldn't necessarily tell that it was a felonious or a  
25 criminal act. But, by the time --



1                   QUESTION: Perhaps I couldn't, but a physician  
2 could and did, did he not?

3                   MR. MC GREEVY: That is correct.

4                   QUESTION: So, I don't get the point of this ten  
5 days that you are talking about.

6                   MR. MC GREEVY: My point is that during the  
7 course of the ten days the authorities took hair samples  
8 from the victim, from the body of the victim, and from the  
9 apartment, from the shower of the apartment, from other  
10 areas of the apartment. They attempted to take, I  
11 believe, fingerprints. They took blood samples from the  
12 body of the victim. So they did a lot of things to  
13 attempt to establish their case and to put their case  
14 together.

15                  MR. MC GREEVY: My point then was that by the  
16 time they went to Green Bay they had a prime suspect and  
17 that appears in the record, I believe, quite clearly.

18                  They also knew, of course, that Norm's  
19 mother -- Yes, sir.

20                  QUESTION: Well, you lose me. The point is, of  
21 course, they wouldn't go five or six hundred miles if they  
22 didn't think they were going to fetch a suspect.

23                  MR. MC GREEVY: Well, I understood the Attorney  
24 General to argue that in cases where you have a confession  
25 that is secured very quickly, and I believe he inferred

1     that occurred here, the police, in effect, have a  
2     disincentive to put together a case that is based on other  
3     than a confession. I was pointing out that that, I don't  
4     think, is the situation here.

5             QUESTION: Do you contend that the statements  
6     made when they were 60 to 90 miles away from Sioux Falls,  
7     as it was described and is described in the record, that  
8     he became emotional and said he wanted to get it out, do  
9     you challenge that?

10            MR. MC GREEVY: Do I challenge the admissibility  
11     of those statements?

12            QUESTION: Yes. Do you challenge that it  
13     occurred first?

14            MR. MC GREEVY: I must say that Mr. Stumes at  
15     trial testified that it never happened, that that is part  
16     of the record made at the trial.

17            For the purposes of this appeal and for the  
18     purposes of the session here today, I think we have to  
19     assume the allegations of the police to have been true.  
20     It is --

21            QUESTION: The jury verdict would suggest that  
22     they rejected his testimony and believed the officers,  
23     does it not?

24            MR. MC GREEVY: I would say that that is  
25     correct.

1           I think that before we get to that conversation  
2   in the car, Mr. Chief Justice, I think we need to back up  
3   to the first session of interrogation. That is the one  
4   that took place from around 9:30 in the morning to  
5   about 11:00 in the morning in the jail in Green Bay,  
6   Wisconsin. That interrogation was conducted primarily by  
7   a single officer, Green, Detective Green, as Mr.  
8   Meierhenry has indicated is now deceased. That  
9   interrogation was preceded by full explanation of Miranda  
10  rights.

11           During that interrogation, Norm indicated that,  
12  yes, he knew the victim, but, no, he had not been to the  
13  victim's residence, he had not been in the victim's  
14  bedroom, he had not had intercourse with the victim.

15           Towards the end of that session, Detective Green  
16  indicates that he wants to know whether Norm is willing to  
17  take a polygraph to clear himself as so many others had  
18  done. Norm indicated that he needed to talk to Steve,  
19  that he needed to talk to Steve before he answered that  
20  question, Steve being the attorney that --

21           QUESTION: This particular question about the  
22  polygraph?

23           MR. MC GREEVY: It was broader than that in the  
24  record.

25           QUESTION: Well, that isn't the way you stated

1 it and it isn't the way the Court of Appeals put it nor  
2 the District Court. He just wanted to talk to a lawyer  
3 about that question about a polygraph.

4 MR. MC GREEVY: I believe in my brief in the  
5 citations to the transcript, I believe I refer to the fact  
6 that it was a broader request than merely in response to  
7 the polygraph question.

8 QUESTION: On what do you base that?

9 MR. MC GREEVY: Pardon me?

10 QUESTION: On what do you base that statement  
11 that it was a broader question than about the polygraph?

12 MR. MC GREEVY: I believe I base it on a  
13 transcript reference and I need to check that right now.

14 QUESTION: What did the District Court find?

15 MR. MC GREEVY: I believe the District --

16 QUESTION: The Court of Appeals purported to  
17 rely on the District Court's findings for its statements.

18 MR. MC GREEVY: The District Court and the  
19 Eighth Circuit, I believe, Mr. Justice, referred only to a  
20 request to talk to Steve prior to answering the polygraph  
21 question.

22 QUESTION: Yes.

23 MR. MC GREEVY: That is true.

24 QUESTION: How are we to understand the record  
25 any other way then?



1           MR. MC GREEVY: I guess the way I would approach  
2           that is to suggest that I don't think that the District  
3           Court or the Eighth Circuit necessarily alluded to every  
4           factual element that appears in the record.

5           QUESTION: Let me ask you this then. We can  
6           read the record. Let me ask you this. Suppose that it  
7           was perfectly clear that all he meant to say was I want to  
8           talk to my lawyer before I answer your question about the  
9           polygraph. Suppose that was it, the questioning stopped.  
10          Then do you think Edwards would prevent the lawyers from  
11          coming back and asking him about something else besides  
12          the polygraph?

13          MR. MC GREEVY: Mr. Justice, I believe that not  
14          only would Edwards --

15          QUESTION: That can be a yes or no answer, can't  
16          it?

17          MR. MC GREEVY: I think it can be a yes answer,  
18          but when you finish I might try and explain a little  
19          further.

20          QUESTION: Well, you say, yes. You say, yes,  
21          they would be prevented from coming back and asking any  
22          questions.

23          MR. MC GREEVY: Yes, sir.

24          QUESTION: I think you have to take that  
25          position. Why? Now tell me why.

1                   MR. MC GREEVY: Thank you. My theory on this  
2 case has been that one need never even get to Edwards to  
3 properly decide this case. It seems to me that what  
4 Miranda says is that if a suspect indicates that he wants  
5 to remain silent questioning must cease.

6                   QUESTION: What in this case was it that he  
7 wanted to remain silent to use your words?

8                   MR. MC GREEVY: Yes, sir.

9                   QUESTION: When did he say that?

10                  MR. MC GREEVY: He didn't in those words. My  
11 point is --

12                  QUESTION: Well, what words do you say he said  
13 that?

14                  MR. MC GREEVY: When he indicated that he wanted  
15 his attorney. To me, that is --

16                  QUESTION: Well, suppose he said I want to see  
17 my attorney to find out what time of day it is? Would  
18 that be all right?

19                  MR. MC GREEVY: I think that is an unlikely  
20 comment for him to make being interrogated regarding a  
21 homicide. But, I suppose if that is what the testimony  
22 was, then we might not be here under these circumstances,  
23 but that is not what he was getting at and that is not the  
24 way the detectives interpreted it.

25                  QUESTION: But, is there anything in the record

1       where he said -- You agree that there is nothing in the  
2       record where he said hold off until I see my lawyer.

3               MR. MC GREEVY: Oh, there certainly is.

4               QUESTION: There is the next day but not on that  
5       day.

6               QUESTION: That is what I am talking about, that  
7       day. Is there anything in the record where he said let's  
8       hold off until I talk to my lawyer or I am not going to  
9       tell you anything until I talk to my lawyer?

10              MR. MC GREEVY: If I might -- I am not sure  
11       which of the Justices I should address at the moment,  
12       but --

13              QUESTION: Take your pick.

14              MR. MC GREEVY: Okay.

15              (Laughter)

16              QUESTION: Address us all.

17              MR. MC GREEVY: All right.

18              A question was raised as to whether the request  
19       was a specific request only to talk to Steve before the  
20       polygraph question was answered.

21              In the brief, we indicate that in the  
22       preliminary hearing transcript at page 49 and 50 -- and  
23       understand that that testimony at the preliminary hearing  
24       doesn't come from Norm Stumes, that comes from a  
25       detective. They indicated that Green in that first

1       interrogation asked if he was responsible for the death of  
2       Joyce Hoff and to that Norman replied he would rather not  
3       answer until he talked to Steve.

4               A moment or two later in the same interrogation,  
5       Green says do you want to clear yourself by taking a  
6       polygraph like everybody else has? "X number of people"  
7       is the term they used. And, he said he would like to talk  
8       to Steve before answering that question.

9               So, two times in a period of apparently a minute  
10       or two there is a request for counsel.

11              Then, what happened --

12              QUESTION: You said it was two hours a minute  
13       ago. Now you say two minutes. Didn't you say they  
14       questioned him for two hours that morning?

15              MR. MC GREEVY: The first interrogation session,  
16       I think, was about one hour and 45 minutes.

17              QUESTION: And, he said, as to two questions in  
18       that time, he said I want my lawyer.

19              MR. MC GREEVY: Those, I believe, the record  
20       would show --

21              QUESTION: Is that it? Is that all you have  
22       got? Have you got some more?

23              MR. MC GREEVY: Yes, I sure -- Yes, I do, Your  
24       Honor. Those two questions that I specifically mentioned  
25       occurred at the end of the hour and 45 minutes in this



1 isolated interrogation with Norman Stumes and Green.

2 QUESTION: But he still said he wanted to talk  
3 to his lawyer before answering the question about the  
4 polygraph.

5 MR. MC GREEVY: And that he wanted to talk to  
6 his attorney before he answered whether he was involved in  
7 the death.

8 QUESTION: Well, that isn't what --

9 QUESTION: Mr. McGreevy?

10 MR. MC GREEVY: Yes, sir.

11 QUESTION: To take just a hypothetical case,  
12 kind of based on the circumstances that you have been  
13 describing, supposing that you have a defendant in custody  
14 like your friend, Norm, as you refer to him, and he is  
15 being interrogated by the police and there have been no  
16 Miranda violations up to that time, and then he is asked  
17 by one of the police will you take a polygraph test to  
18 clear yourself and he replies, before answering the  
19 question about the polygraph test, I would like to talk to  
20 my attorney. And, the police then say, okay, we won't  
21 talk any more about the polygraph test, let's talk about  
22 where you were at the scene of the crime. Now, is there  
23 any sort of a violation by that question?

24 MR. MC GREEVY: Under the way I would interpret  
25 Miranda, I think that that is a violation.

1 QUESTION: Miranda is mostly dicta, isn't it?  
2 MR. MC GREEVY: Not the way I view it, I guess.  
3 QUESTION: Do you think all of those facts were  
4 presented to the case by the situation of the Arizona  
5 imprisonment out of which it arose?  
6 MR. MC GREEVY: No, I am sure that is not the  
7 case.  
8 QUESTION: Then isn't it dicta?  
9 MR. MC GREEVY: Perhaps in a technical sense it  
10 is, but I think that it expressed the opinion of the court  
11 at the time the decision was handed down.  
12 QUESTION: That is true of all dicta, isn't it?  
13 MR. MC GREEVY: I think so, yes, sir.  
14 I wanted to get to the point of the second  
15 interrogation, because I think that may be key to our  
16 analysis.  
17 After this first interrogation of an hour and 45  
18 minutes where we have denials, denials, denials, ending  
19 with two requests to talk to Steve, the detectives leave  
20 or I should say Green leaves. Later in that afternoon  
21 Detectives Green and Skadsen return to once again  
22 interrogate Stumes. There is no advice given regarding  
23 the Miranda rights, the constitutional rights, no advice  
24 of those rights at all.  
25 It is during the course of that interrogation --

1 This is an interrogation that Judge Nichol found to have  
2 violated Miranda. There is no question about that. The  
3 District Court found this interrogation to violate  
4 Miranda.

5 QUESTION: That is not before us though, is it?

6 MR. MC GREEVY: No, but I think that it provides  
7 the linchpin to explain what happened the next day, Mr.  
8 Chief Justice, in my view.

9 During that interrogation, according to the  
10 testimony of the officers, they got Mr. Stumes to admit  
11 that he had lied in the morning. They got him, according  
12 to their testimony, to admit that, yes, I had been there  
13 at the time in question, yes, I had been in the bedroom,  
14 yes, yes, we had had intercourse, and then at the end,  
15 again, without the benefit of Miranda, they asked the  
16 question -- Green asked the question, was it accidental or  
17 intentional and to that Stumes replies accidental,  
18 according to the testimony.

19 The way I see this situation, when the police  
20 had that, in effect, they had their case. They had gotten  
21 the man to acknowledge that he had lied in his previous  
22 answers. They now had him admitting that he was there.  
23 They got him admitting involvement in the death. Yes, he  
24 is claiming that it is accidental. But, they knew that  
25 the facts, the physical facts, belied any claim that the

1 death was accidental.

2 QUESTION: Aren't all of these preliminary  
3 questions really merged into the final statement 60 to 90  
4 miles from Sioux Falls? In other words, suppose nothing  
5 is admissible except that final statement. On the  
6 findings of the District Court and the verdict of the  
7 jury, that is the facts that we are bound to accept.  
8 Isn't that the state of facts?

9 MR. MC GREEVY: I am not positive that I follow  
10 that question.

11 QUESTION: When he got emotionally upset.

12 MR. MC GREEVY: Yes.

13 QUESTION: And said I want to tell you about  
14 this in words to that effect. Nobody has asked him  
15 any questions at that point.

16 MR. MC GREEVY: According to the record, not at  
17 that particular point in time. I think the record does  
18 show that the detectives started the long trip with fresh  
19 Miranda warnings, that they immediately interrogated, and  
20 that the record indicates that the interrogation continued  
21 intermittently during the long trip.

22 But, it is true, I don't believe, anything in  
23 the record that indicates that there was an outstanding  
24 question regarding the interrogation at the time that Mr.  
25 Stumes made that --



1                   QUESTION: Aren't we obliged to accept as a fact  
2   that that was a spontaneous declaration by him?

3                   MR. MC GREEVY: I don't believe so.

4                   QUESTION: Sixty to 90 miles away from Sioux  
5   Falls. Why not?

6                   MR. MC GREEVY: Well --

7                   QUESTION: The jury rejected his testimony on it  
8   and accepted the police testimony on it and that is  
9   consistent with all of the independent fact findings of  
10   the District Judge?

11                  MR. MC GREEVY: The approach that we take on  
12   this case, of course, is that the jury ought not to have  
13   known of the -- I will use your terminology -- the  
14   spontaneous declaration that was made as the neared  
15   Sioux Falls, because, of course, it is our theory of this  
16   case that had it not been for the repeated efforts by the  
17   police to interrogate absent counsel, and if it had not  
18   been for the authorities' interrogation the afternoon  
19   before without even benefit of Miranda, that we would  
20   never have reached the point where we could have this  
21   spontaneous declaration, again, to use your terms, Mr.  
22   Chief Justice, occur.

23                  So, we really fashion an argument, I think, that  
24   builds one step at a time to reach that final conclusion.

25                  Incidentally --

1                   QUESTION: But, Mr. McGreevy, that is basically  
2 a factual conclusion, isn't it, whether something that had  
3 happened the previous afternoon did or did not motivate  
4 the Defendant in this case to make what the Chief has  
5 described as a spontaneous statement? What are the  
6 findings of the District or the Court of Appeals on that  
7 particular issue if there are any findings? We shouldn't  
8 be speculating here whether one thing, in fact, caused  
9 another.

10                   MR. MC GREEVY: I can see the problem that you  
11 would have with that. Insofar as whether either of the  
12 courts below made findings on that specific issue, I don't  
13 think directly that I can recall -- the District Court, as  
14 I indicated, found the interrogation in the afternoon to  
15 have violated the principles of Miranda, but had, for  
16 reasons that I never have been able to understand, held  
17 that that was harmless.

18                   I have to analogize or contrast that, I should  
19 say, to what the Eighth Circuit did when they looked at  
20 this case. The Eighth Circuit looked not only at the  
21 interrogation in the automobile, but they also looked at  
22 the statements attributed to Mr. Stumes upon arriving at  
23 the jail in Sioux Falls.

24                   Counsel for the state has made reference to the  
25 fact that according to the detective's testimony Mr.

1 Stumes asked the detective to come back and it is then  
2 that he is supposed to have said, tell them I am not a  
3 vicious killer.

4 I believe the Eighth Circuit took the view, for  
5 instance, looking at that --

6 QUESTION: He also said I didn't mean to kill  
7 her.

8 MR. MC GREEVY: That is the other one you were  
9 trying to get at. I couldn't recall it either.

10 QUESTION: I wouldn't blame you.

11 MR. MC GREEVY: Okay.

12 The point I was trying to make then, Justice  
13 Rehnquist, was that just as the Eighth Circuit saw that  
14 final incriminating statement as having flowed from the  
15 interrogation in the car, I think it is reasonable to  
16 presume that --

17 QUESTION: When you say "interrogation in the  
18 car," my impression -- One can easily be confused by this  
19 record -- was that the only interrogation in the car took  
20 place the first half hour or so of the trip; that the  
21 spontaneous remarks 90 miles east of Sioux Falls were not  
22 the result of interrogation.

23 Are you saying that the Eighth Circuit found the  
24 statement in Sioux Falls as a result of interrogation  
25 early in the morning?

1                   MR. MC GREEVY: It is my understanding that the  
2 Eighth Circuit found that the interrogation which took  
3 place in the car violated --

4                   QUESTION: Then when did interrogation take  
5 place in the car under your view of the record.

6                   MR. MC GREEVY: Interrogation took place in the  
7 car intermittently throughout the day according to the  
8 record. It was intensive at the beginning according to  
9 the record.

10                  Then, from that point forward, maybe half an  
11 hour into the trip, according to the record it is  
12 intermittent. Now, I realize that is perhaps not the  
13 clearest record we would like to have, but that is what we  
14 have as a record, intermittent questioning.

15                  Then Mr. Stumes is alleged to have said taking a  
16 human life is so useless or words to that effect.  
17 Immediately that was followed by interrogation. There is  
18 no question about that. And, I don't believe that the  
19 state would contend otherwise. There was vigorous  
20 interrogation that then took place.

21                  QUESTION: Of course, that would quite naturally  
22 and I think properly prompt interrogation, couldn't it?  
23 If someone -- a defendant out of clear blue sky said  
24 taking a human life is so useless.

25                  MR. MC GREEVY: Well --



1                   QUESTION: I mean, that is not talking about the  
2 Green Bay Packers.

3                   MR. MC GREEVY: I have difficulty accepting the  
4 terminology out of the clear blue sky, because I think  
5 this entire episode needs to be seen in the context of  
6 what it really was. I think the whole scenario was an  
7 effort to elicit incriminating statements and it lasted  
8 not just a few minutes, but it lasted really a day and a  
9 half.

10                  QUESTION: Suppose we disagreed with you that  
11 the second interrogation on the first day was improper  
12 and, therefore, the interrogation for the first half hour  
13 of the second day was proper. Suppose that we agree to  
14 that. If there hadn't been any prior interrogation at  
15 all, no prior claim of counsel at all, the interrogation  
16 in the automobile for the first half hour would have been  
17 perfectly all right after Miranda warnings.

18                  MR. MC GREEVY: The first half hour in the  
19 automobile under all of those various facts that you would  
20 suggest or assumptions, I would say, yes. But, of  
21 course --

22                  QUESTION: Well, I know, but suppose we disagree  
23 with you that there was nothing wrong with anything that  
24 happened on the first day?

25                  MR. MC GREEVY: All right.

1                   QUESTION: Then I would think the first half  
2 hour of interrogation was quite proper the second day.

3                   MR. MC GREEVY: Well, I don't agree, because the  
4 first day ended with a third request for counsel made that  
5 same day.

6                   QUESTION: At the end of -- At the very end.

7                   MR. MC GREEVY: At the end of the second  
8 interrogation which is at the end of the first day.

9                   QUESTION: Okay.

10                  MR. MC GREEVY: This is the interrogation that  
11 had no Miranda rights.

12                  QUESTION: All right.

13                  MR. MC GREEVY: That one concludes with a very  
14 clear request.

15                  QUESTION: Right.

16                  MR. MC GREEVY: You will recall we mentioned  
17 earlier that according to the evidence Mr. Stumes is  
18 alleged to have said that the death was accidental. He  
19 then goes on to indicate that he is not going to talk  
20 about it any more until he sees Steve, his attorney.

21                  QUESTION: Mr. McGreevy, have you finished  
22 answering Justice White?

23                  MR. MC GREEVY: I think I have.

24                  QUESTION: What I would like to ask is whether  
25 this Court has ever held before Edwards that once a

1 defendant has requested the right to see counsel that the  
2 only subsequent event that would enable law enforcement to  
3 continue any discussions with him whatever was when the  
4 defendant himself initiated that discussion? Prior to  
5 Edwards have we ever held that before?

6 MR. MC GREEVY: Well, I may run into trouble  
7 with you, Mr. Justice, or perhaps one of your colleagues  
8 making a distinction between --

9 QUESTION: Just cite the case.

10 MR. MC GREEVY: Pardon me.

11 QUESTION: Just cite the case in which we held  
12 that.

13 MR. MC GREEVY: Well, the problem I was having  
14 was between dicta and holding and I don't believe that I  
15 can tell you or that I can refer to a holding if you wish  
16 to use that particular term.

17 QUESTION: Did Edwards cite any prior cases  
18 which we --

19 MR. MC GREEVY: Well, certainly. Edwards, of  
20 course --

21 QUESTION: Did it cite any prior cases?

22 MR. MC GREEVY: Yes.

23 QUESTION: Which one?

24 MR. MC GREEVY: Miranda.

25 QUESTION: Miranda?

1 MR. MC GREEVY: That is the key.

2 QUESTION: Did Miranda hold that?

3 MR. MC GREEVY: I think Miranda -- My whole  
4 theory has been that we need never get to Edwards because  
5 Miranda says when counsel is requested, the police  
6 officers must stop questioning.

7 QUESTION: Yes.

8 MR. MC GREEVY: They even went on in Miranda to  
9 explain what the alternatives are that are available to  
10 the police. They say in Miranda you don't need to have a  
11 jailhouse lawyer available or a policehouse lawyer  
12 available because you can make a decision that you are not  
13 going to get an attorney there right away, but just  
14 remember you can't interrogate until you do it.

15 QUESTION: May I ask this? Did Miranda overrule  
16 Zerbst? It said you may waive almost any constitutional  
17 right. You can certainly waive the right to have counsel  
18 when you are being interrogated. And, Zerbst said that  
19 you look to all of the facts and circumstances. Was that  
20 overruled in Miranda?

21 MR. MC GREEVY: I don't believe so. I believe  
22 that Miranda still permits a waiver, but I see Miranda as  
23 saying really -- I think there are two kinds of waivers or  
24 a waiver at two levels that can take place. When a  
25 suspect is advised of his rights, you have a right to have



1 an attorney present, the suspect can at that time make a  
2 knowing, intelligent, voluntary waiver of that right and  
3 say, no, I don't want an attorney, I will talk to you.  
4 That is a waiver.

5 You get a different waiver question, I really  
6 think, when that suspect has said I need my attorney.  
7 Then he has, in effect, said I can't deal with you without  
8 help.

9 QUESTION: Is there any case prior to Edwards  
10 that said that? The answer is no. You haven't been able  
11 to cite one.

12 MR. MC GREEVY: I think that Miranda does, but I  
13 don't think I can say that it is holding in the strict  
14 sense of the word. But, I think clearly --

15 QUESTION: Do you think Miranda modified Zerbst?  
16 It didn't say so.

17 MR. MC GREEVY: Well, I --

18 QUESTION: Zerbst has been cited any number of  
19 times since.

20 MR. MC GREEVY: I am not sure how to respond to  
21 that.

22 The point that I wish to make with respect to  
23 Miranda is that -- and I need to address just for a moment  
24 the retroactivity question if we ever reach that, if the  
25 Court reaches that question.

1           It seems to me that if we view Edwards as  
2   establishing a new principle, then it seems to me it was  
3   abundantly foreshadowed by Miranda, because Miranda said  
4   when they ask for counsel you quit questioning. And, I  
5   think all Edwards did was reinforce that, give life to it,  
6   give vitality to it, and tell the authorities that you  
7   will abide, you will abide by that request. So, that is  
8   the way I view it.

9           By way of conclusion, we do respectfully request  
10   on behalf of our client that the judgment of the Eighth  
11   Circuit in this matter be affirmed.

12           If there are no further questions, I have  
13   concluded my argument.

14           Thank you.

15           CHIEF JUSTICE BURGER: Very well, Mr. McGreevy.  
16   Do you have anything further, Mr. Meierhenry?

17           MR. MEIERHENRY: Very briefly, Your Honor.

18           ORAL ARGUMENT OF MARK V. MEIERHENRY, ESQ.

19           ON BEHALF OF THE PETITIONER.--REBUTTAL

20           MR. MEIERHENRY: As most courts are wont to do,  
21   most of the argument today had to do with how to apply  
22   Edwards retroactively and, of course, it is our strenuous  
23   objection, and I only rise to remind the Court that under  
24   the prior rules and teachings of this Court this is not an  
25   appropriate case to apply retroactively. And, if it is

1 not a proper case and you agree with the state, then  
2 obviously the Eighth Circuit must be reversed because it  
3 most certainly was proper under Miranda and any other case  
4 until the new Edwards rule was adopted in 1981.

5 QUESTION: May I ask you, do you read the  
6 Edwards opinion itself as purporting to announce a new  
7 rule? I have in mind specifically the sentence quoted on  
8 page 11 of your oponent's brief. "We reconfirm these  
9 views, and to lend them substance," we do so and so after  
10 quoting from Miranda.

11 MR. MEIERHENRY: I believe it is a new rule. I  
12 know we --

13 QUESTION: That isn't my question. Do you think  
14 the opinion in Edwards purported to announce a new rule?

15 MR. MEIERHENRY: I believe it did.

16 QUESTION: Is there language in the opinion that  
17 purports to adopt a new rule? Why would they say "we  
18 reconfirm these views?" That is purporting to announce a  
19 new rule?

20 MR. MEIERHENRY: I believe since then that other  
21 members of the Court have looked at it -- not of this  
22 Court but of other courts have looked at it as a new per  
23 se rule. It ws certainly a new rule as far as those of us  
24 who must implement the decisions are concerned, absolutely  
25 new, and, therefore, I think it is a new rule and it

1 should be given retroactive effect, because if it is not a  
2 new rule, then nothing should be reversed that happened in  
3 1973.

4 Thank you very much.

5 CHIEF JUSTICE BURGER: Thank you, gentlemen, the  
6 case is submitted.

7 We will hear arguments next in Badaracco against  
8 Commissioner of Internal Revenue.

9 (Whereupon, at 1:59 p.m., the case in the  
10 above-entitled matter was submitted.)  
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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:  
# 81-2149 - HERMAN SOLEM, Warden, Petitioner v. NORMAN STUMES

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BY

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