

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1485

TITLE JOHN MORAN, SUPERINTENDENT, RHODE ISLAND DEPARTMENT OF
CORRECTIONS, Petitioners V. BRIAN K. BURBINE

PLACE Washington, D. C.

DATE November 13, 1985

PAGES 1 thru 58



(202) 628-9300
20 F STREET, N.W.
WASHINGTON, D.C. 20001

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x
JOHN MORAN, SUPERINTENDENT, :
RHODE ISLAND DEPARTMENT OF :
CORRECTIONS, : No. 84-1485
Petitioners :
v. :
BRIAN K. BURBINE :

- - - - -x
Washington, D.C.
Wednesday, November 13, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 2:03 o'clock p.m.

APPEARANCES:

CONSTANCE L. MESSORE, Special Assistant
Attorney General of Rhode Island, Providence, R.I.;
on behalf of Petitioners.
ANDREW L. FREY, Deputy Solicitor General,
Department of Justice, Washington, D.C.;
on behalf of the United States, as amicus curiae,
in support of Petitioners.
ROBERT B. MANN, Providence, R.I.;
on behalf of Respondents.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
MRS. CONSTANCE L. MESSORE, ESQ.,	
on behalf of the Petitioners	3
ANDREW L. FREY, ESQ.,	
on behalf of the United States,	
as amicus curiae, in support of Petitioners	19
ROBERT B. MANN, ESQ.,	
on behalf of Respondent	30

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

2 CHIEF JUSTICE BURGER: Mrs. Messorre, I think
3 you may proceed whenever you're ready.

4 ORAL ARGUMENT OF

5 MRS. CONSTANCE L. MESSORE, ESQ.

6 ON BEHALF OF THE PETITIONERS

7 MRS. MESSORE: Thank you, Mr. Chief Justice,
8 and may it please the Court:

9 This case is here on Petitioner's petition for
10 certiorari to the First Circuit Court of Appeals. The
11 Petitioner in this case contends that the First Circuit
12 erred when it reversed the judgment of the federal
13 district court and issued the Respondent's petition for
14 a writ of habeas corpus.

15 In doing so, the First Circuit held that the
16 Respondent's three written waivers of his Miranda rights
17 and his three signed confessions should be suppressed
18 because, although he had been given the complete Miranda
19 warnings prior to each confession and he had agreed to
20 waive his rights, his waivers were not knowingly made
21 because an attorney, whom he had not requested, had
22 called the police station where he happened to be in
23 custody, had been given misleading information by
24 whomever answered the telephone and was told that there
25 would be no further interrogation of the Respondent that

1 night, and the Respondent was not informed of this
2 telephone call.

3 I feel in this particular case that it's
4 important to briefly summarize the facts, and then I
5 would like to explain why the First Circuit has
6 misconceived the role of the attorney under the Miranda
7 case in our opinion.

8 The Respondent, Brian Burbine, was arrested
9 with two other men on a breaking and entering charge by
10 the Cranston police. He was taken to the police station
11 and he was -- the other two men were interrogated by the
12 Cranston police. As a result of this interrogation,
13 there was suspect cast on Brian Burbine that he might be
14 a suspect in a murder that had taken place in a
15 neighboring town -- city of Providence three months
16 prior to his present arrest.

17 At this time the Cranston police called the
18 Providence police, who came to the Cranston police
19 station. They gave Burbine his Miranda rights, and
20 first he said that he had had nothing to do with Mary
21 Jo's murder. And so they put him back into the smaller
22 room where he had been kept.

23 But about ten minutes later, they heard a
24 banging and a kicking on his door, and he was brought
25 out into the main room and he told them that he was

1 sorry for what he'd done, he was disgusted, and that he
2 wanted to confess. At this time the Providence police
3 again gave him his Miranda warnings orally, he read
4 them, he signed a waiver, and then eventually signed a
5 written confession implicating him in the murder of Mary
6 Jo Hickey.

7 He was placed back in the room and shortly
8 thereafter he again initiated a conversation with the
9 police, saying that he had left something out, there was
10 more that he wished to say. He was brought out, again
11 given his Miranda rights orally, signed a written
12 waiver, and gave an additional confession.

13 It just so happened that this same evening
14 somehow his sister had discovered that he had been
15 arrested on this breaking and entering, and she called
16 the public defender's office about 8:00 o'clock in the
17 evening to get an attorney for him. It appears that
18 Brian Burbine himself had an appointment with a public
19 defender named Casparian that afternoon at 4:00 o'clock,
20 but he'd been unable to keep the appointment because of
21 his arrest.

22 The person who answered the phone at the
23 public defender's office said that Casparian was not
24 available, but she got another attorney, attorney
25 Munson, who at 8:15 called the police station and asked

1 if Brian and Sparks, the other man with him, were being
2 held.

3 She said she asked for the detective division
4 and somebody, a male voice, answered "detectives," said
5 that, yes, he was being held. She said, although
6 Casparian was the attorney who represented Burbine, he
7 was not available, but if he was to be placed in a
8 lineup or further interrogated that evening she would be
9 available.

10 The answer that she got, she testified, was
11 that he was not going to be further interrogated that
12 evening; in fact, "we're through with him for the
13 night."

14 At this point she did not pursue the
15 conversation, she did not leave any instructions as to
16 Burbine, nor did she ask that any message be given to
17 him. And in fact, Burbine was never told about this
18 telephone call.

19 The next morning, Burbine was taken to the
20 Cranston police district court, he was arraigned and he
21 was handed over to the Providence police, who took him
22 to their station, gave him again his Miranda warnings.
23 He again signed a waiver, gave a confession. And at
24 this point the Providence police said: We're going to
25 get an attorney for you because you're about to be

1 placed in a lineup.

2 He still said he did not want an attorney.
3 But at this time, when he was told that he must have
4 one, he mentioned Casparian's name and the public
5 defender's office was contacted.

6 All of the police who testified at the
7 suppression hearing in this case, the Cranston
8 detectives and the Providence detectives, claimed that
9 they had not received a telephone call from the
10 attorney, nor did they know anything about it. At the
11 suppression hearing, it was the state's position that
12 this call had never been made.

13 But the trial judge did find that the call was
14 made and that someone, whomever it was, had received
15 this call. In addition, the trial court --

16 QUESTION: I suppose that's binding on us,
17 isn't it?

18 MRS. MESSORE: Yes, I believe it is, Your
19 Honor.

20 The trial justice also found that he could
21 find no conspiracy or collusion on the part of the
22 Cranston police in attempting to keep Burbine from an
23 attorney, that he had knowingly waived his rights, and
24 that he had not asked for an attorney.

25 QUESTION: That he had not asked for one?

1 MRS. MESSORE: That he did not ask for an
2 attorney, that's correct, Your Honor.

3 QUESTION: At any time?

4 MRS. MESSORE: No, he did not. Even at the
5 very end, when he was giving the third confession, he
6 said he didn't want one, but the police insisted.

7 QUESTION: And at that stage they said you
8 have to have one.

9 MRS. MESSORE: That's correct, Your Honor.

10 QUESTION: Now, the difference between them
11 not producing the lawyer and insisting that he take a
12 lawyer was the confession?

13 MRS. MESSORE: Well, it was -- yes, because
14 now he was going to be placed in a lineup.

15 At his trial --

16 QUESTION: Well, the police required a lawyer
17 at the lineup --

18 MRS. MESSORE: Yes, that's correct.

19 QUESTION: -- following what judges have told
20 them they must do.

21 MRS. MESSORE: Yes, that's correct.

22 QUESTION: Even if they have waived a lawyer
23 earlier.

24 MRS. MESSORE: Yes. Well, he told Brian at
25 that time: It's our procedure and you must have a

1 lawyer.

2 The Rhode Island -- he was convicted at a jury
3 trial of first degree murder of Mary Jo Hickey and then
4 the Rhode Island Supreme Court upheld the conviction,
5 stating that the Miranda rights are personal rights and
6 that he had the right to waive them, and that it hardly
7 seemed conceivable to them that an attorney whom he had
8 not requested if he had known about it would have gone
9 upon his information necessary to make a knowing waiver
10 of his rights.

11 QUESTION: That was a three to two decision?

12 MRS. MESSORE: That's correct, Your Honor, it
13 was.

14 The federal district court, giving substantial
15 deference to the state court's finding of historical
16 fact, agreed with the Rhode Island Supreme Court and
17 they did not grant his petition for a writ of habeas
18 corpus.

19 But the First Circuit court reversed and they
20 gave what they described as a limited ruling when they
21 said deliberate or reckless misleading of an attorney
22 who has a legitimate professionally ethical interest in
23 a suspect in custody, who expresses to the police a
24 desire to be present at any interrogation of the
25 suspect, combined with a police failure to communicate

1 that exchange to the suspect, is more than just one
2 factor in the calculus of waiver.

3 This combination of circumstances, the First
4 Circuit said, clearly vitiates any claim that a waiver
5 of counsel was knowing and voluntary.

6 QUESTION: Mrs. Messore, do you think this
7 case would be any different from your perspective if the
8 defendant had actually engaged an attorney or had
9 reached arrangements with someone specifically to
10 represent him and the police acted as they did here in
11 refusing to let the attorney see the defendant?

12 MRS. MESSORE: Do you mean -- excuse me, Your
13 Honor -- prior to his arrest?

14 QUESTION: Prior to the questioning, in any
15 event.

16 MRS. MESSORE: Well, I'm afraid I don't really
17 understand that. I think if he had an attorney -- and
18 we would say here that Casparian was his attorney -- and
19 then he was arrested and brought to the police station,
20 that, no, the police -- our argument would be that the
21 attorney had no right at that particular time to see him
22 unless he himself requested the attorney.

23 It's our argument that the First Circuit
24 has --

25 QUESTION: Would your argument be the same

1 regardless of the degree or extent of the deception by
2 the police? Is there any point at which you would --

3 MRS. MESSORE: Our argument would be the same,
4 Your Honor, in any circumstances.

5 The ruling of the First Circuit goes way
6 beyond the purpose of Miranda, we maintain, because
7 Miranda when it extended into the police station these
8 procedural safeguards to prevent the police from
9 violating a suspect's right to be free from coerced
10 self-incrimination guaranteed to him under the Fifth
11 Amendment, these procedural guidelines and Miranda
12 rights were to protect his rights when he was in custody
13 and when he was being subjected to interrogation.

14 But they were also to provide the police with
15 guidelines, or these bright-line rules, as they're
16 called, which could be readily understood and easily
17 applied by the police, and thereby relieve them and the
18 lower courts from making exceedingly difficult case by
19 case judgments as to whether a particular confession was
20 voluntary.

21 The police are required to give the well-known
22 Miranda warnings and any time that they did not give
23 these warnings obviously his confession would have been
24 inadmissible. But these Miranda warnings are not
25 themselves rights protected by the Constitution.

1 They're only the procedural safeguards designed to
2 provide a practical reinforcement for his right against
3 compulsory self-incrimination.

4 And Burbine was given these rights verbally at
5 least three times. He read them, he said he understood
6 them, he said that he was able to read fairly well. He
7 also was told at the time that he signed the
8 confession. The questions were read to him. He would
9 answer them and they were typed by the police as the
10 questions were asked and read.

11 He was told that he could stop in the middle
12 of the questioning any time that he wished to, and
13 again, do you understand that you do have a right to an
14 attorney, and he said yes.

15 So our argument is that he certainly well
16 understood these rights before he signed the waiver
17 forms.

18 QUESTION: Well, even if you're right on the
19 Fifth Amendment point, what about the Sixth Amendment?
20 And do the cases of this Court leave open, in your view,
21 any question about whether the Sixth Amendment protects
22 an established attorney-client relationship from state
23 interference with it?

24 Is that question open? You want us to assume
25 there was an established attorney-client relationship

1 here, do you?

2 MRS. MESSORE: Well, originally in the state
3 court it was argued that there was not, and I believe
4 the state court found that there was not. But when the
5 federal district court received this case, apparently
6 for some reason -- and I'm not familiar with the tactics
7 of the persons that handled this case -- they decided to
8 drop that argument.

9 QUESTION: Well, how do you propose that we
10 treat it for purposes of the Sixth Amendment, as though
11 there is an established attorney-client relationship
12 here?

13 MRS. MESSORE: I think for this case certainly
14 we'll have to accept that. But I would say the Sixth
15 Amendment we will claim does not apply to this
16 particular case because adversarial proceedings had not
17 yet been instituted against him.

18 QUESTION: Well, you're relying on Gouveia.

19 MRS. MESSORE: That's right, Your Honor.

20 QUESTION: But you recognize that there could
21 be an established attorney-client relationship before a
22 formal proceeding in court?

23 MRS. MESSORE: Yes, I do.

24 QUESTION: And you think that the state at
25 that stage is free to interfere with that relationship?

1 MRS. MESSORE: Under the Fifth Amendment --

2 QUESTION: Under the Sixth Amendment?

3 MRS. MESSORE: Under the Sixth Amendment, yes,
4 I think until the adversarial proceedings or a lineup
5 have been instituted against him that he is not entitled
6 to have that attorney unless he requests the attorney's
7 presence, if he has been given his complete Miranda
8 rights, of course.

9 QUESTION: Well, I had thought those cases
10 were dealing with when an attorney had to be provided,
11 but had not decided the question of state interference
12 with an existing relationship before that time if it
13 existed.

14 MRS. MESSORE: We don't argue that he's
15 entitled to this attorney until the adversarial
16 proceedings have been instituted, whether or not he has
17 been retained in the past.

18 QUESTION: I'm still confused a little bit.
19 Perhaps I didn't hear you correctly. Do you concede
20 that there was an established attorney-client
21 relationship here, or do you take the position that it
22 has not been established.

23 MRS. MESSORE: I think I'm bound to in this
24 position, Your Honor, because the state when this case
25 went before the federal district court seemed to concede

1 that issue, that there was an attorney --

2 QUESTION: Even though the prisoner didn't
3 know it?

4 MRS. MESSORE: Well, in his own mind, he knew
5 he had an appointment with an attorney that afternoon.
6 He certainly knew there was one available to him and one
7 who was dealing with him on another criminal matter. So
8 he certainly knew that there was an attorney available
9 and he knew of an attorney by name.

10 QUESTION: Well, he didn't know he was
11 available for this action.

12 MRS. MESSORE: Well, he didn't request him.

13 QUESTION: Well, he didn't even know he was
14 available for this action. He didn't know whether the
15 attorney would represent him for this purpose also, did
16 he?

17 MRS. MESSORE: At this particular time --

18 QUESTION: He didn't know.

19 MRS. MESSORE: -- no, he didn't.

20 QUESTION: Maybe his family did.

21 MRS. MESSORE: Yes.

22 All the courts who reviewed this case,
23 including the First Circuit, found that this was a valid
24 and knowing waiver if you excluded the evidence about
25 the telephone call. But the First Circuit is the first

1 court that felt that this particular call changed the
2 outlook of the case.

3 The police neglect in telling Burbine of the
4 attorney's call was not an inherently coercive action
5 directed towards him which could produce a per se
6 involuntariness or overbear his will and capacity for
7 self-determination, and we argue that any Fifth
8 Amendment situation must have an element of coercion in
9 it to say that he has not knowingly and willingly waived
10 his rights.

11 The action of the police in providing this
12 information to the attorney, which is what the suspect
13 in this case is complaining of, we say was not improper
14 under the Fifth Amendment, because even the First
15 Circuit said: "Our analysis being on the suspect's
16 Fifth Amendment rights, the question is not how badly
17 counsel was misled, but the effect of any
18 misrepresentations on the knowingness and voluntariness
19 of the suspect's waiver."

20 We claim that the Miranda rights are personal
21 rights of the suspect. As long as he is given the
22 Miranda warnings which are required by this Court, then
23 he in his own will should have the ability to waive
24 those rights and he does not need the added advice of
25 any third person, whether or not it be an attorney. We

1 would like to mention --

2 QUESTION: You tell him in the Miranda that
3 you will appoint a lawyer for him, don't you?

4 MRS. MESSORE: Yes, if he requests one.

5 QUESTION: When?

6 MRS. MESSORE: Whenever he does, whenever he
7 wants it.

8 QUESTION: You'll give him a lawyer right
9 then, that day?

10 MRS. MESSORE: It says: Prior to questioning,
11 if you should require a lawyer we will see that one is
12 appointed for you.

13 QUESTION: No, I mean when you first give him
14 Miranda warnings, you will give him a lawyer if he wants
15 one that day?

16 MRS. MESSORE: If he is to be interrogated.
17 The requirement of the lawyer --

18 QUESTION: You don't give him one until he's
19 being interrogated?

20 MRS. MESSORE: That's correct. I believe
21 that's what Miranda requires.

22 QUESTION: I don't think interrogation was in
23 Miranda at all. Go ahead.

24 MRS. MESSORE: The serious impact we feel of
25 the First Circuit's ruling is the loss of the clearcut

1 rules for reviewing the admissibility of statements.

2 QUESTION: Let me ask just one question on
3 that point. The First Circuit opinion cites several
4 different state court opinions that generally take the
5 same position. There are differences in the facts of
6 the cases. Are there any states other than the Rhode
7 Island Supreme Court that have taken the position that
8 you advocate?

9 MRS. MESSORE: Two I believe I'm aware of.
10 One of them is Georgia and one is the state of
11 Missouri.

12 We feel that the police are not equipped to
13 make all of the decisions in the busy police station
14 that would be required of them by the ruling of the
15 First Circuit, and we feel that therefore the First
16 Circuit has expanded the ruling of Miranda by requesting
17 that the call of an attorney be put through to the
18 suspect even though he has been warned and given his
19 warnings and has said definitely that he does not want
20 an attorney.

21 We would therefore ask this Court to please
22 reverse the ruling of the First Circuit.

23 If there are no further questions, I'd like to
24 reserve the remainder of my time for rebuttal.

25 CHIEF JUSTICE BURGER: Very well.

1 Mr. Frey.

2 ORAL ARGUMENT OF ANDREW L. FREY, ESQ.

3 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

4 IN SUPPORT OF PETITIONERS

5 MR. FREY: Mr. Chief Justice and may it please
6 the Court:

7 I wasn't planning to address the Sixth
8 Amendment issue, but in response to your question let me
9 just say that I think that what triggers the Sixth
10 Amendment is the existence of a criminal prosecution,
11 not the existence of an attorney-client relationship.
12 The Sixth Amendment I believe simply --

13 QUESTION: Well, here we have an arrest and an
14 interrogation and an attorney-client relationship.

15 MR. FREY: Yes, and none of those things are
16 enough to trigger the Sixth Amendment. It no more
17 addresses that issue than the Seventh Amendment does.
18 It simply -- and I believe that the way Gouveia dealt
19 with Escobedo would establish that. In Escobedo there
20 was I think an existing attorney-client relationship,
21 but my recollection is that Gouveia said that the
22 criminal prosecution hadn't begun for the Sixth
23 Amendment. That was a false start.

24 Let me say that when the relevant and
25 well-established constitutional principles and policies

1 are considered, the conclusion that the First Circuit
2 erred in this case is logically inescapable. First of
3 all, the Court has said too many times to leave the
4 issue in any doubt that there's no constitutional policy
5 against obtaining and using voluntary confessions.

6 Similarly, it has repeatedly said that the
7 purpose of Miranda is to protect the Fifth Amendment
8 privilege against compelled self-incrimination; that the
9 requirement of warnings and waivers represents a means
10 of ensuring that the elements of compulsion in the
11 stationhouse interrogation have been satisfactorily
12 counteracted.

13 Thirdly, the Court has made it perfectly clear
14 that you do not need a lawyer to waive your rights to a
15 lawyer or to waive your other Miranda rights. In fact,
16 the notion that Miranda creates a right to counsel is I
17 think a fundamental misunderstanding of the parties on
18 the other side of this case. There is no direct
19 constitutionally created right of an arrested suspect to
20 the assistance of counsel.

21 Rather, the Miranda warnings tell him he has a
22 right to counsel because it is believed important that
23 he understand that he can have that kind of help so that
24 we can have assurance that when he chooses to speak --

25 QUESTION: It's important he understand he has

1 a right even if he doesn't have a right; that's your
2 point?

3 MR. FREY: That's correct, that's correct. I
4 think the purpose is to ensure the voluntariness of his
5 statement. The purpose is to dispel what was found to
6 be the inherent coerciveness of custodial interrogation,
7 and in that case it is a sort of a white lie that seems
8 to me quite harmless and in fact useful, considering the
9 purposes of Miranda.

10 And the fact is that the police do not have to
11 provide a lawyer if he asks for a lawyer. They need
12 simply terminate the interrogation. They only need to
13 provide a lawyer if they want to continue the
14 interrogation.

15 So I think it's quite clear that there is no
16 Fifth Amendment right to counsel.

17 QUESTION: Or when they arraign him, or when
18 the criminal prosecution is --

19 MR. FREY: When they arraign him.

20 QUESTION: It's really started when they start
21 the prosecution.

22 MR. FREY: Yes, but that's a Sixth Amendment
23 right to counsel.

24 QUESTION: Exactly.

25 QUESTION: How about the lineup?

1 MR. FREY: They would not have had to provide
2 him a lawyer at the lineup in this case under Kirby
3 against Illinois. It was Rhode Island policy to do so.

4 Now, the central constitutional --

5 QUESTION: Mr. Frey, were we not informed that
6 a Rhode Island case holds that, or is it just a policy?

7 MR. FREY: I don't know the answer to that.

8 QUESTION: I thought there was reference to a
9 case.

10 MR. FREY: I don't think it would matter for
11 your purposes.

12 The central constitutional issue in this case,
13 therefore, has to be, in light of the settled principles
14 that I've alluded to, whether Respondent's decision to
15 speak was coerced. Now, it's logically impossible, I
16 think, that the failure to tell him about attorney
17 Munson's phone call could bear on that inquiry.

18 Everybody agrees that he was given the
19 warnings correctly and that he made what in all other
20 respects is a voluntary waiver, knowing his rights.

21 QUESTION: Mr. Frey, you take the argument to
22 its logical conclusion, as your associate does also, I
23 take it, that this is true no matter how serious the
24 deception by the police to the lawyer might be?

25 MR. FREY: I think that's true, and I'm going

1 to come to the deception point. But I want to make this
2 point because it seems to me a point of logic. You just
3 would have to say white is black to get around it, it
4 seems to me.

5 If this was a perfectly good -- if his state
6 of mind was adequate to make a voluntary waiver of his
7 rights, then some fact that occurred that he didn't know
8 anything about couldn't have affected his state of
9 mind. Therefore, in terms of the voluntariness or the
10 degree to which he may have been coerced, there simply
11 is no possible effect of the failure to tell him.

12 Now, all of this seems so obvious that it is
13 puzzling how the First Circuit and so many state courts
14 could possibly have reached a contrary conclusion.

15 QUESTION: Well, there is concern about police
16 deception. I mean, if you're right it would be
17 preferable for the police to say, as they have in some
18 cases: We know you're the attorney for Mr. Jones and we
19 are in the process of interrogating him and you can't
20 see him.

21 MR. FREY: I agree that that would be, I
22 believe, within their rights to say that to the
23 attorney; and I think the issue of misleading a lawyer
24 is a total red herring in this case, because there is
25 not -- as long as they have a right to say that --

1 QUESTION: If they have a right to say that?

2 MR. FREY: As long as they have the right to
3 say that, there is no causal connection between any
4 deception. This is not a case about lawyer's rights;
5 this is a case about the rights of Mr. Burbine. This is
6 not a case about etiquette. We may condemn their
7 deception, if indeed there was deception in this case.
8 The question is whether --

9 QUESTION: Why would one condemn deception in
10 reviewing a state proceeding unless there was something
11 in the Constitution that prohibited it?

12 MR. FREY: I absolutely, absolutely agree with
13 that. I think that what is not a red herring or what is
14 more to the point in this case -- and it's a problem
15 that has been discussed by this Court before -- is
16 whether knowing that a lawyer had called would affect
17 his decision whether or not to invoke his rights. I
18 think that is what is at the bottom of this, that he
19 would be better informed and make a better advised
20 decision if he knew that a lawyer had called.

21 Now, that is what I think explains the
22 decisions and I think that is based on fallacy, and it's
23 precisely the issue that was the point of disagreement
24 in United States against Washington in this Court. What
25 he needs to know in order to make a satisfactory waiver

1 of his Fifth Amendment rights is his rights. He does
2 not need to know the facts that bear on a wise exercise
3 of his rights.

4 QUESTION: Are you going to include Escobedo
5 in this?

6 MR. FREY: Well, I think Escobedo was a dead
7 end and I think the Court has since made clear that --

8 QUESTION: In Escobedo the lawyer was in the
9 building trying to get to the man and they kept him from
10 getting to him. Wasn't that Escobedo?

11 MR. FREY: But Escobedo wanted to talk to his
12 lawyer as well.

13 QUESTION: That's what I mean.

14 MR. FREY: Nobody is questioning that if the
15 Respondent in this case wanted a lawyer they would not
16 have been able to continue interrogating him without
17 giving him a lawyer.

18 QUESTION: Well, I thought he said he wanted
19 one.

20 QUESTION: No.

21 MR. FREY: He did not say he wanted one. He
22 said he did not want one. He said he did not want one.
23 The argument is that if he had only known, if he had
24 only known that this lawyer who he had never heard of
25 has called, that might have affected his decision.

1 This is precisely the point that Justice
2 Brennan made in his dissent in United States against
3 Washington. If he had known he was a target, he might
4 have been better able to decide whether to speak or not
5 to speak.

6 My point is simply that the Constitution
7 doesn't call for him making a wise decision.

8 QUESTION: Your argument is that even though
9 that may be empirically true, it still doesn't doesn't
10 make any difference as a matter of law, even if better
11 advice might have caused him to make a different
12 decision or better information? That's still too bad,
13 because he had enough?

14 MR. FREY: I think the better advice would
15 probably cause most suspects whose cases reach the
16 appellate courts not to have spoken.

17 QUESTION: Which is precisely why the police
18 don't want them to talk to them.

19 MR. FREY: Well, and precisely why society
20 wants to establish a set of rules that do not needlessly
21 discourage them from talking.

22 QUESTION: Why society establishes a rule that
23 if voluntarily, even if we know perfectly well he would
24 have made a different decision if he'd been fully
25 advised?

1 MR. FREY: Absolutely. I think that clearly
2 comes from this Court's cases. And I don't see that
3 there is very much room --

4 QUESTION: Well, it would seem to follow from
5 the fact that you don't need a lawyer to waive a
6 lawyer.

7 MR. FREY: That is of course one of the points
8 that seems quite clear. You could have a different rule
9 if the focus were on knowing, and this gives rise to all
10 kinds of problems, because there are lots of things
11 other than whether a lawyer has called that would be
12 quite relevant to an intelligent decision of whether to
13 speak to the police about the matter or not.

14 You might want to know what the punishment is
15 for the offense. You might want to know whether the
16 victim has died or not. You might want to know what the
17 sentencing practices of the judges are. You might want
18 to know what kind of deal prosecutors are likely to make
19 to people who confess.

20 There's an endless list of things that may
21 indeed have a bearing on making an intelligent decision
22 whether or not to speak. The focus of the Fifth
23 Amendment voluntariness or coercion inquiry is precisely
24 on knowing your rights.

25 If you know your rights, you choose not to

1 exercise them, then you may be a fool, and I think in a
2 case like this, where we have been able to convict
3 somebody who has committed quite a serious crime, I
4 think there is nothing wrong with that outcome.

5 And of course, this Court is not the Cranston,
6 Rhode Island, police department, it's not the Rhode
7 Island legislature, and it's not the United States
8 Congress. Now, any of them may elect as a matter of
9 policy to adopt a rule that a call from a lawyer should
10 be relayed in to the client. I don't think would be
11 good policy --

12 QUESTION: Well, there have been occasions in
13 the past, I guess, when the Court has stepped in out of
14 its concern about police deception under the rubric of
15 due process. And you don't see that as being a source
16 of any --

17 MR. FREY: I think the focus is on deception
18 of the party before the Court. If there had been
19 deception of Mr. Burbine -- and I'd like to say, because
20 in Miller against Fenton, the New Jersey confession
21 case, you asked a question about whether deception would
22 be condoned there, and I think my answer would have been
23 a little different from the answer of counsel.

24 I don't think deception is condoned in
25 procuring a waiver, deception of the suspect. Deception

1 of the lawyer --

2 QUESTION: You say the Miranda warning itself
3 is a lie. He tells him he's got a right he doesn't
4 have. The whole thing is a charade.

5 MR. FREY: No, the whole thing is not a
6 charade. The whole thing is something that the Court
7 has designed for a particular purpose and that the Court
8 has concluded and I assume experience has shown, since
9 the Court has adhered to it, is effective for
10 accomplishing that purpose.

11 It's not a charade. Just because you tell him
12 he has a right to a lawyer --

13 QUESTION: How many cases have we seen in
14 which, after saying you can have a lawyer right away and
15 he says I'd like a lawyer, how often does he get the
16 lawyer right away? They just don't question him. They
17 never provide him a lawyer.

18 MR. FREY: I'm not sure how that would come
19 up, because once he's given the lawyer, which I assume
20 he may often be given, or he may not -- once he's given
21 the lawyer, there's no confession.

22 CHIEF JUSTICE BURGER: Your time has expired,
23 counsel.

24 MR. FREY: Thank you.

25 CHIEF JUSTICE BURGER: Mr. Mann.

1 ORAL ARGUMENT OF ROBERT B. MANN, ESQ.,

2 ON BEHALF OF RESPONDENTS

3 MR. MANN: Mr. Chief Justice and may it please
4 the Court:

5 In this case, Brian Burbine's lawyer, Allegra
6 Munson, called the Cranston police station. She
7 indicated that she was counsel, and we've had a
8 concession that there was an attorney-client
9 relationship. She said that she would make herself
10 available if Burbine was going to be put in the lineup
11 or questioned.

12 And she was told that he was not going to be
13 questioned. Based on that explicit representation that
14 they were through with Brian Burbine for the night, she
15 took no further action.

16 What the state and what the Government seek to
17 do in this case is erect an iron curtain between the
18 client and his or her attorney. I think it's --

19 QUESTION: Well now, Mr. Mann, would this case
20 be different in your view if the police, instead of
21 being deceptive, if they were here -- I'm not sure, but
22 if they were -- if they had just said, we're talking to
23 Mr. Burbine right now and you can't see him?

24 MR. MANN: Well, I think the attorney -- yes,
25 it would be different. I think the attorney would have

1 had a number of responses she could have made. She
2 indicates explicitly on --

3 QUESTION: What could she have done and what
4 right, if any, would be violated, and why?

5 MR. MANN: What could she have done?

6 QUESTION: Yes.

7 MR. MANN: If she -- I think the first thing
8 she could have done was she could have asked the police
9 to put her through and allow her to speak with her
10 client. It would seem anomalous --

11 QUESTION: And they said no, we're talking to
12 him now, you cannot see him.

13 MR. MANN: The next step she probably would
14 have taken is she probably would have called up the
15 prosecuting attorney for that municipality and said, I'm
16 being denied access to my client.

17 That is in fact what happened to me about two
18 months ago in a case in Rhode Island. I called the city
19 solicitor and said: A lawyer is being denied access to
20 the client; can we do something about this or do we have
21 to go call up a judge? And within 20 minutes the police
22 were allowing the lawyer access to the client.

23 So that's the first step. She would have
24 called up the prosecuting agency. And this was about
25 8:00 o'clock --

1 QUESTION: Was that a matter of prosecutorial
2 grace, so to speak, or was it compelled by some
3 constitutional provision?

4 MR. MANN: I think it's more than
5 prosecutorial discretion. I think it is compelled by
6 some constitutional consideration.

7 QUESTION: What?

8 MR. MANN: I think it's the right -- I think
9 it's two rights. I think it's at least the right of the
10 client to be informed of their attorney's availability.
11 That's not an attorney's --

12 QUESTION: And you find that under what
13 clause, what provision of the Constitution?

14 MR. MANN: I concede I can't find a case that
15 explicitly says that. I obviously can start with
16 Escobedo, that talks about the right of an attorney's
17 access to a client. I recognize that it's been
18 limited.

19 QUESTION: Who asked for him.

20 MR. MANN: I recognize that that's a
21 significant difference. But it seems to me that in a
22 sense, no, I don't have a case that I can point you to,
23 and I don't think there is one, that says an attorney
24 has a right of access to their client, at least not
25 pre-commencement of judicial proceedings.

1 But yet it seems to me that that is so
2 axiomatic to the whole process under which we operate
3 that to say that there is not even a right of the client
4 to be informed of the client's attorney -- and we've
5 agreed that this is the client's attorney -- of that
6 attorney's availability would so fundamentally change
7 the structure of things that it would really change the
8 way we operate.

9 It would say that once we get a client into
10 the police station, they can close the door and that's
11 it, and unless the client calls and says I want to speak
12 to my lawyer or specifically calls that lawyer, there's
13 no access at all to the client.

14 QUESTION: I guess you think also that the
15 remedy for this breach of right is to hold that his
16 confession is involuntary?

17 MR. MANN: Yes, I do. But I don't think it's
18 just because -- I think that the reason the First
19 Circuit found that it was involuntary was all the
20 factors that went into considering what the
21 circumstances were when he made his confession.

22 QUESTION: Well, that's usually the test: In
23 the totality of the circumstances, is it voluntary? And
24 you say that's a determinative fact?

25 MR. MANN: No, I do not contend it is a

1 determinative fact. I contend it is a very significant
2 fact. I disagree with the characterization of the First
3 Circuit opinion that it was only because of the failure
4 to tell the client about the attorney's call. They took
5 into consideration a number of factors when they made
6 their decision that the waiver was not knowing,
7 voluntary, and intelligent.

8 They certainly focused on the consequences of
9 failing to inform Burbine of the client's -- of the
10 attorney's call.

11 QUESTION: How many times did he waive and how
12 many times did he confess here?

13 MR. MANN: He confessed three times. He
14 waived three times. The first time -- and plus, there's
15 a fourth time when he was allegedly informed orally of
16 his rights. They didn't get a signed waiver. I
17 understand that's not critical to the question. And
18 then he informed them of his name and his address.

19 That of course raises, I suppose, the question
20 of whether or not the state might have made an argument
21 that's never been made except in one footnote by the
22 Solicitor General, that maybe some of the -- two
23 arguments. One is that maybe he volunteered statements;
24 or secondly, that maybe some of the subsequent
25 confessions might have been admissible even if the first

1 one or two weren't. But those are arguments that have
2 not been made, I would suggest.

3 I think you go to the question of was the
4 waiver voluntary and you have to look at the full set of
5 circumstances. And I'd like to at least illuminate some
6 of the facts that I think are critical to this
7 question.

8 When Burbine was arrested, he was brought into
9 the police station, booked, processed, and not put in a
10 cell block. He was brought up to an interrogation room,
11 and the clear but nonverbal communication of that was:
12 You're going to be interrogated. He was put in that
13 interrogation room until the detective went in and
14 started questioning him.

15 The detective went in, asked him a question
16 about his name and where he lived. He says he gave him
17 his Miranda rights, but didn't bother getting a written
18 waiver. At that point the detective leaves.

19 Burbine is still kept in the interrogation
20 room.

21 QUESTION: Where -- at that point, since you
22 emphasize that, where do you think they should have put
23 him?

24 MR. MANN: In the cell block area. They had
25 -- it's their discretion where to put him, Your Honor.

1 But what I think does become important when one
2 considers all of the circumstances in this case --

3 QUESTION: Well, if an interrogation room is
4 theoretically forbidding, isn't a cell block a little
5 more forbidding?

6 MR. MANN: But a cell block has the
7 connotation, if you're put in a cell block, I think to
8 the prisoner, we're done with you. If you're put in one
9 of these interrogation rooms -- and the record is clear
10 that --

11 QUESTION: You mean that's generally known in
12 the community?

13 MR. MANN: I think to an inmate -- I think --

14 QUESTION: To lawyers or to laymen?

15 MR. MANN: I think to the person who's
16 arrested, Your Honor, who's put in a cell block -- who
17 is put in an interrogation room right off the main room
18 where the detectives are working, the perception is, I'm
19 going to be questioned. The perception if you're thrown
20 in the tank, so to speak, is different.

21 It's not -- it's only one factor, I would
22 agree with you, and it's only one factor in all of the
23 factors that I think have to be considered in terms of
24 determining whether or not under the totality of the
25 circumstances this was a knowing, voluntary, and

1 intelligent waiver.

2 After the first set of questions, he is put
3 back in, he is put back into the interrogation room.
4 It's after that first set of questions at about 4:30 or
5 5:00, some time after that, that the Providence police
6 are contacted. Then around 7:30, around 8:00 o'clock,
7 the lawyer makes her phone call. Still never telling
8 the client about the telephone call.

9 About an hour later, while he's still in that
10 interrogation room -- and I think at that point it's
11 around 9:00 o'clock -- and the message begins to get
12 clear that they're pushing this guy Burbine on
13 something. He's still in the interrogation room.

14 They go in and they question him.

15 QUESTION: What if that call had come from a
16 stranger instead of from his sister? Any difference?

17 MR. MANN: No, because there was an
18 established attorney-client relationship. It would have
19 been different if there had not been an established
20 attorney-client relationship, and there could be a
21 number of factors --

22 QUESTION: A total stranger hearing about the
23 circumstances could establish an attorney-client
24 relationship between the --

25 MR. MANN: No, I don't say that at all. But

1 in this case, the call was -- in this case, there were
2 two factors the First Circuit considered in concluding
3 that there was an established attorney-client
4 relationship.

5 One was that it was a family member that had
6 called and ask this specific attorney or asked this
7 office to become engaged in representing her brother.
8 And there are lots of the state court opinions that have
9 discussed this issue that have held that it's
10 appropriate for a family member to retain counsel.

11 The second factor that the First Circuit
12 considered was that there was an ongoing relationship
13 between this office and this client.

14 QUESTION: Do you think it's open to the First
15 Circuit to make a de novo determination of
16 voluntariness?

17 MR. MANN: I think it's a mixed question of
18 law and fact and I think that my understanding of the
19 habeas cases is that that's a question that still is
20 deserving of plenary review by this Court. I understand
21 Miller versus Fenton raises that issue before this
22 Court.

23 QUESTION: Is it true that he never asked for
24 a lawyer?

25 MR. MANN: It's true there's nothing in the

1 record that indicates that he ever did anything except
2 maybe mumble that he wanted one and that wasn't -- his
3 testimony was discredited, Your Honor. So there is
4 nothing in the record to indicate that he wanted a
5 lawyer, and in fact the testimony even with respect to
6 the lineup question is that he said he didn't want a
7 lawyer.

8 I might briefly respond to a question that was
9 asked earlier. I think the reason for the question
10 about the lawyer at the lineup was the question, the
11 issue was still unsettled under Rhode Island
12 constitutional law, and it was finally resolved in a
13 manner similar to Kirby in a case called State versus
14 Delahunt. But that I think explains that.

15 QUESTION: Mr. Mann, could we go back for a
16 minute to the fact that the state court made an express
17 determination that there was no attorney-client
18 relationship established. Now, the Court of Appeals for
19 the federal review altered that finding.

20 Was that finding a finding of fact or a
21 finding to which the federal court should have
22 deferred?

23 MR. MANN: I don't believe it was an
24 historical finding of fact to which Sumner versus Mata
25 deferral is required, first of all. I think certainly

1 the historical facts are that the sister --

2 QUESTION: It just seemed to me that it's kind
3 of your classic case of a factual determination: Was
4 there an attorney-client relationship?

5 MR. MANN: Secondly, what -- I think that I
6 would certainly argue that it is a legal question
7 whether or not there was an attorney-client
8 relationship.

9 I would also point out that the Rhode Island
10 Supreme Court decision was a 2-1-2 decision, and it was
11 a concurring opinion with the majority opinion that
12 talked about the history of the Public Defender's Act
13 and from that concluded that this attorney didn't have
14 authority to represent Burbine.

15 But I would submit that that position that
16 there was not an attorney-client relationship has, as
17 Mrs. Messorre has conceded, not been argued all the way
18 through. I think it was appropriate, and I think there
19 clearly -- if one looks at the facts, there clearly was
20 enough, certainly compared to the other state court
21 cases, and they've all found an attorney --

22 QUESTION: Well, even if it was a question of
23 state law, why wouldn't the federal court defer to
24 that? It just struck me as very strange that the
25 federal court would take upon itself the right to

1 overturn that.

2 MR. MANN: I don't think -- I don't think it
3 was a question of state law whether or not there was an
4 attorney-client relationship with respect to
5 representing this client in a criminal case. It was a
6 question of state law whether or not it was appropriate
7 for the public defender's office to initiate action at
8 that stage.

9 In fact, one of the justices in dissent found
10 that the attorney was acting in a private capacity.
11 Whether the attorney was acting privately or publicly --
12 and I think you've emphasized in your cases that you're
13 not going to draw a distinction between public defender
14 attorneys and private attorneys.

15 There is a federal Constitutional question of
16 whether or not this attorney -- whether or not this
17 client had a right to counsel and whether or not that
18 attorney-client relationship had been created, and I
19 would submit that that is not a question of state law.

20 QUESTION: Supposing an attorney comes into
21 state court and sues a client that he's represented in a
22 criminal case in federal court, saying, you promised me
23 10,000 bucks for defending you, you've never paid it.
24 Is that relationship governed by federal law, whether --
25 the nature of an attorney-client relationship, just

1 because the suit took place in federal court?

2 MR. MANN: No, no. And I didn't mean to argue
3 that if I did. What I think I would argue is that
4 whether or not Munson was acting as his attorney, as
5 Burbine's attorney for Fifth and Sixth Amendment
6 purposes, that there was no question of her right at
7 that point, and that it's a federal question whether or
8 not she was acting to protect his federal rights at that
9 point.

10 QUESTION: Well, is that any different than
11 saying it's a federal question whether or not there was
12 an attorney-client relationship created?

13 MR. MANN: I think that is a federal question,
14 at least in the context of an interrogation of a
15 defendant in a stationhouse in a criminal case.

16 QUESTION: Mr. Mann, may I put a
17 hypothetical. let's assume that a public defender
18 office had enough lawyers so that it was able to call
19 the police department in a city of modest size and say:
20 We have enough lawyers to provide counsel in every
21 felony case, and we put you on notice now that we want
22 to be advised whenever you arrest a person charged with
23 a felony, and we will send a lawyer promptly to
24 represent him.

25 Would that be different from your case?

1 MR. MANN: Very different.

2 QUESTION: In what respect?

3 MR. MANN: First, I don't think the right --
4 independent of the Sixth Amendment right to counsel,
5 which I hope to address, the Fifth Amendment right
6 doesn't attach until custodial interrogation begins. In
7 that case, the attorney is attempting to --

8 QUESTION: Had it begun in this case? It was
9 about to begin, but it hadn't begun.

10 MR. MANN: Well, but had the attorney been
11 told it was going to begin, then the attorney said she
12 would have acted differently. And they said, we're
13 through with Burbine for the night. I think that the
14 question --

15 QUESTION: In my case the only difference is,
16 instead of a sister saying that she had engaged a
17 particular lawyer who wanted to be present for the
18 interrogation, the public defender's office said, we'll
19 provide a competent lawyer to represent every felon and
20 we put you on notice we want our lawyer to be present
21 before any interrogation begins.

22 MR. MANN: But I think that's different for
23 another reason, too. The public defender's office in
24 that case has no right to say that about people who are
25 about to be arrested. They have no more right than a

1 private lawyer to solicit clients who are in the future
2 going to commit a crime.

3 And in this case, it was a situation in which
4 there was this existing relationship and the client had
5 already been --

6 QUESTION: Suppose a friend had called instead
7 of a sister. Would that make a difference?

8 MR. MANN: It wouldn't in this case, but I
9 admit it gets closer. It wouldn't in this case because
10 of the fact that this office also had this prior
11 relationship with Burbine. And you add those two
12 factors together and you have an ongoing relationship.
13 I think it wouldn't if it were a friend that called in
14 this case.

15 QUESTION: I don't see that it matters at all,
16 because you don't know who they talked to. They might
17 have talked to the third janitor.

18 MR. MANN: I'm sorry? Who might have talked?

19 QUESTION: When they called the police
20 station, who did they talk to? They talked to a man who
21 said "detectives." They don't know who they talked to.
22 Until today we don't know who they talked to.

23 MR. MANN: No, the record is barren on that
24 point, sir.

25 QUESTION: So what difference does it make who

1 called?

2 MR. MANN: Who calls the lawyer in the first
3 instance?

4 QUESTION: Yes.

5 MR. MANN: Oh, I don't think it's the province
6 of the police to inquire as to how an attorney-client
7 relationship is established, and certainly how
8 attorney-client relationships are established, at least
9 in those first few hours after arrest, are varied and
10 not with written retainer agreements.

11 QUESTION: There's nothing in this case that
12 applies to this party, because you don't know who it
13 went to. I would assume that you have to put this
14 information in the hands of the detectives who were
15 questioning him. You don't even get close to that. Am
16 I right?

17 MR. MANN: Maybe I didn't understand your
18 question.

19 QUESTION: This call that was made advising
20 the "police department" that he had a lawyer, right?

21 MR. MANN: Yes, sir.

22 QUESTION: Well, who was given that
23 information? You don't know.

24 MR. MANN: Well, the testimony, sir, was that
25 she called, got the police station, asked for

1 detectives, there was a switching sound, somebody picked
2 up on the phone and the answer was "detectives."

3 QUESTION: And who was the somebody?

4 MR. MANN: Well, that's the gap in the --

5 QUESTION: We don't know until today. So how
6 can we hold anybody responsible for it?

7 MR. MANN: Well, I would argue that that
8 became a question factfinding. The trial justice made a
9 finding of fact that the telephone call had been made.
10 The state argued very strongly throughout the
11 suppression hearing that the telephone call by the
12 attorney had not been made, that -- to believe the three
13 police officers.

14 The state in rebuttal in the suppression
15 hearing put on the senior police officer at the
16 suppression hearing to establish that the call could not
17 have been made. And the state's argument was, stripped
18 of nice words, that the attorney was lying.

19 And the trial justice didn't accept that
20 argument, and the trial justice accepted the fact -- and
21 I think that that's a finding of fact that is now
22 controlling in the case -- that the call was made.

23 QUESTION: To whom?

24 MR. MANN: The trial justice does not say
25 explicitly in his relatively short opinion that it was

1 made to the detective division, but --

2 QUESTION: Does anybody else say to whom?

3 MR. MANN: No, there's no place in the
4 record.

5 QUESTION: We don't know whom is yet, do we?

6 MR. MANN: No, sir.

7 QUESTION: Well, if that's a finding of fact,
8 why isn't the state court's finding of fact -- why isn't
9 it a finding of fact that there wasn't an
10 attorney-client relationship at all?

11 MR. MANN: Well, first I would argue that the
12 question of whether -- that whether or not there's an
13 attorney-client relationship is not the same kind of
14 historical fact that mandates --

15 QUESTION: Well, is it a historical fact or is
16 that a judgment about the law?

17 MR. MANN: I think it's at least a mixed
18 question of law and fact. It is at least, it seems to
19 me -- we have the historical facts on which we can make
20 that decision. We know that the call was made by the
21 sister, that attorney one called attorney two, that
22 Munson called the police station, that there was a prior
23 relationship.

24 Based on those facts, it seems to me it's at
25 least a mixed question of law and fact whether or not

1 there was an attorney-client relationship.

2 QUESTION: Suppose, instead of the facts you
3 just recited, the policeman came into Burbine and said:
4 There are five lawyers out here that would like to
5 represent you; do you want one of them. Could that
6 establish an attorney-client relationship, unless he
7 said, yes, send in the oldest one?

8 MR. MANN: No. Burbine has the absolute right
9 to say he doesn't want a lawyer. We've never argued for
10 the New York rule --

11 QUESTION: That's what he did say, didn't he?

12 MR. MANN: But he was never informed of his
13 lawyer's call, and I think that the question is how
14 important is that piece of information and does it
15 matter? And I think, for example, that certainly when
16 the police are dealing with a client alone -- and I'm
17 obviously referring to a footnote by Justice White,
18 where you have discussed, sir, that when the police are
19 dealing with an individual unrepresented by counsel,
20 there's a greater obligation to inform the client, to
21 keep the client abreast of what's taking place.

22 The question is would this have mattered in
23 this context, when you consider all of the factors that
24 existed that night?

25 I should -- in discussing whether or not was

1 voluntary, there are certain other facts that I'd like
2 to bring out. There has not been much discussion of
3 Burbine's condition when he finally made the
4 confession. He basically broke down.

5 What happened was that he was clearly, by the
6 state's own testimony, the state's witnesses, he was
7 very nervous, he was shaking, he was tearful. This was
8 a man clearly on the edge, and the question is would it
9 have made a difference to have told him this? This was
10 a person who didn't confess until about 9:20 in the
11 evening after having been held in one of these
12 interrogation rooms from about 3:00 o'clock on.

13 This is different, it seems to me, than the
14 situation in Mosley, where you had the client being
15 questioned about a separate crime in a separate location
16 by different officers. Here you had the client kept in
17 the same interrogation room, questioned by the same
18 officers or officers working in tandem, about the same
19 crime, time after time, never yet, never once telling
20 him about his attorney's call.

21 I think the First Circuit opinion addresses
22 clearly what the effects of the call would have been on
23 Burbine. It wouldn't have just told him that there was
24 an attorney available. It would have told him that he
25 wasn't isolated. It would have communicated to him,

1 albeit indirectly, that his family was with him.

2 It would have told him that the police were
3 saying one thing to an attorney and another thing to
4 him, and that was that --

5 QUESTION: You would think if this were really
6 the case there would be some voluntariness cases before
7 Miranda, and there were a whole lot of them about
8 lawyers, weren't there?

9 MR. MANN: Yes, sir, there were.

10 QUESTION: Have you got any case from that era
11 that supports your position?

12 MR. MANN: No, I don't, I think, other than to
13 some extent Escobedo.

14 QUESTION: Yes.

15 QUESTION: Mr. Mann, did I understand you to
16 say that Burbine was put under intensive pressure by the
17 police?

18 MR. MANN: I think the effect was to place
19 incredible pressure on him, yes, sir. And I think it's
20 not tantamount, I would agree, to the kind of factual
21 situation that existed in Miller versus Fenton. He
22 didn't collapse out of unconsciousness.

23 On the other hand, he broke down. He was
24 crying. He was -- this is their own, the police
25 description of him. He was shaking. He was very

1 nervous. I think he was kept in this interrogation room
2 for about six hours.

3 QUESTION: Am I reading the right place? I
4 think it's the district court opinion that says that:
5 "There is no suggestion here of political" -- "of police
6 brutality or of coercion, psychological duress, illicit
7 inducement, intimidation, or the like. Burbine was not
8 grilled for long stretches of time, nor in an unusually
9 oppressive circumstance."

10 It's on appellate 37 -- appendix page 37.

11 MR. MANN: I don't have any quarrel with that
12 characterization. I think the question is, at the time
13 when he finally broke and gave his first confession
14 about 9:20 at night, what was the cumulative effect of
15 the events that had transpired?

16 And it was not a grilling. The first
17 questioning was very short. The second questioning was
18 very short. But the cumulative effect, I would suggest,
19 was significant.

20 Even the United States Government has
21 suggested in its brief, I think, that, in footnote 16,
22 that they suggested that maybe it makes sense to keep
23 successive police officers more informed when a person
24 invokes their right to silence and maybe the effect of
25 not -- of successive questioning on the client may

1 undermine the effectiveness of a right, of an invocation
2 of the right to silence.

3 Here Burbine had refused to cooperate with the
4 police on two prior occasions. He had totally denied
5 involvement.

6 QUESTION: Two prior occasions, what were
7 those? You mean on another?

8 MR. MANN: No, on this case, on this case. At
9 4:30 to 5:00, he didn't even sign the waiver of rights
10 form that was supposedly read to him. At about 9:00
11 o'clock, he signs the waiver of rights form, denies his
12 involvement. And then he comes, then a third time
13 finally he comes around.

14 I would like to briefly address the Sixth
15 Amendment argument or Sixth Amendment question that has
16 been raised, if I could. If you accept that there was
17 an attorney-client relationship in this case, I think as
18 I understand Gouveia what it stands for is that there is
19 not a right to appointed counsel before the commencement
20 of formal judicial proceedings.

21 But in fact one of the points made in Gouveia
22 was that the prisoners had access to counsel, that they
23 had the ability to communicate with counsel. And I
24 would read implicit in that the fact that you could
25 create an attorney-client relationship before the

1 commencement of formal proceedings. Whether or not you
2 have a right to appointed counsel is a separate question
3 and that's not the issue here.

4 It seems to me that clearly criminal
5 defendants or targets of criminal investigations
6 routinely establish attorney-client relationships long
7 before the commencement of attorney-client
8 relationships. Certainly that's true in almost any
9 white collar case, almost any federal prosecution. The
10 negotiations with the U.S. Attorney's Office commence
11 long before the initiation of formal charges.

12 QUESTION: Well, what's that got to do with
13 this kind of a case?

14 MR. MANN: Well, I think the question -- we
15 have also argued --

16 QUESTION: The fact that a big corporation may
17 have 40 lawyers in their legal staff, of course they're
18 getting legal advice all the time -- but what's that got
19 to do with this kind of a case?

20 MR. MANN: It has this, I think it has this to
21 do. The question is this: Does Burbine also have a
22 Sixth Amendment right to counsel? And we've argued that
23 he does.

24 And could that right attach even though formal
25 judicial proceedings had not been commenced other than

1 the arrest of Burbine? And if it did attach -- and we
2 argue that it does -- then there was also, as we've
3 argued in our brief, an interference with the Sixth
4 Amendment right to counsel by denying him access, by
5 denying his lawyer access to him at least to communicate
6 with him.

7 Now, clearly Burbine continued to have the
8 right to waive even his Sixth Amendment right to counsel
9 without his lawyer being present. We don't quarrel with
10 that. But the reason I think it's relevant is that we
11 have also argued that he has a Sixth Amendment right to
12 counsel independent of the right to counsel that he has
13 because the custodial interrogation had commenced
14 pursuant to, under Miranda.

15 QUESTION: Do you think a waiver after being
16 given Miranda rights would also constitute a waiver of
17 any Sixth Amendment right he might have had?

18 MR. MANN: I don't think the standard would be
19 the same, though oftentimes similar language has been
20 used. As I understood, the question is, certainly with
21 respect to a Sixth Amendment violation, the Sixth
22 Amendment waiver, there'd be a knowing, voluntary, and
23 intelligent waiver.

24 With respect to the Fifth Amendment, the same
25 thing. With respect to violation of Miranda -- of one

1 of the rights generated by Miranda, I think Mr. Justice
2 Blackmun has raised the question of whether or not the
3 same standard would apply.

4 I would argue that certainly for a Sixth
5 Amendment waiver you would need the Johnson versus
6 Zerbst type of waiver. Now, in this case we've argued
7 all the way through that it didn't exist, but if you had
8 a waiver that was a Fifth Amendment at least in this
9 case I don't see the difference. If you had a waiver
10 that was only with respect to Miranda rights as opposed
11 to the Fifth Amendment question, then I could see a
12 difference and a higher standard being imposed with
13 respect to the waiver of Sixth Amendment rights.

14 I think that there is a single point on which
15 I'd like to conclude. The state and the Solicitor
16 General's Office have both said that there is no limit,
17 there is no limit or no effect to the endless deception
18 that could be committed, and that's an incredible
19 comment, it seems to me.

20 Nowhere has the state, nowhere has the United
21 States Government, ever suggested that there is any
22 limit to the deception that could be visited either on
23 the client or on the lawyer. There was deception of the
24 lawyer in this case, but there was at least also
25 implicit deception to the client by not telling the

1 client what was going on, by not telling the client
2 about the attorney's call.

3 QUESTION: All the assertion was that it
4 wouldn't violate either the Fifth or the Sixth
5 Amendments, what they did. They didn't say that it was
6 proper conduct, didn't say that people who did that
7 wouldn't be subject to discipline.

8 MR. MANN: But I think as an effective means
9 of deterring that kind of deception you have
10 traditionally used the deterrent, the exclusionary
11 rule. In Tucker you indicated, Michigan versus Tucker,
12 I think you indicated that it would be applicable in
13 Fifth Amendment as well as Fourth Amendment cases, even
14 if it's not applicable in good faith cases, in that case
15 you indicated that at least in cases where the conduct
16 rose to the level of negligence or something more
17 culpable.

18 And in this case, the level was even beyond
19 that. It was either deliberate deception or reckless
20 indifference. And I would say to you that the only way
21 to deter -- not the only way. Certainly there are civil
22 rights lawsuits, there are others, disciplinary
23 proceedings, as you suggested, sir.

24 But certainly one of the traditional ways and
25 perhaps from Burbine's perspective the only way that

1 matters to deter that kind of behavior is to utilize the
2 exclusionary rule.

3 QUESTION: I don't get it. Outside of the
4 fact that the police were questioning him, what other
5 acts made it such a deception?

6 MR. MANN: Well, the representation that they
7 were not going to question him and the representation
8 that they were through with him for the night.

9 QUESTION: You mean if the police said, we're
10 through with you for the night, and then questioned you
11 after that, that's deception?

12 MR. MANN: Absolutely, because the attorney
13 relied on that. The police were free to say, we can't
14 tell you what we're going to do and we can't make a
15 decision.

16 QUESTION: Now on the Court's time, not your
17 time, would you tell me this. This crime was committed
18 more than eight years ago.

19 MR. MANN: Yes, sir.

20 QUESTION: Where has this man been in the
21 meantime?

22 MR. MANN: Burbine has been incarcerated. He
23 was denied bail during the pendency of this proceeding
24 and he is currently incarcerated in a maximum security
25 facility.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHIEF JUSTICE BURGER: Thank you.

Do you have anything further? You have one
minute left?

MRS. MESSORE: I have no further rebuttal.

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

(Whereupon, at 3:04 p.m., oral argument in the
above-entitled case was submitted.)

* * *

CERTIFICATION.

erson Reporting Company, Inc., hereby certifies that the
ached pages represents an accurate transcription of
ctronic sound recording of the oral argument before the
reme Court of The United States in the Matter of:

#84-1485 - JOHN MORAN, SUPERINTENDENT, RHODE ISLAND DEPARTMENT OF

CORRECTIONS, Petitioners V. BRIAN K. BURBINE

that these attached pages constitutes the original
nscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

85 NOV 20 A9:44

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE