OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1531 & 84-1539

TITLE MICHIGAN, Petitioner V. ROBERT BERNARD JACKSON; and
MICHIGAN, Petitioner V. RUDY BLADEL

PLACE Washington, D. C.

DATE December 9, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHIGAN, :

Petitioner, :

v. : No. 84-1531

ROBERT BERNARD JACKSON; :

and :

MICHIGAN, :

Petitioner, :

v. : No. 84-1539

RUDY BLADEL :

- - - - - - - - - - - - - - - - - - :

Washington, D.C.

Monday, December 9, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:15 o'clock a.m.

APPEARANCES:

BRIAN E. THIEDE, ESQ. Jackson County Prosecutor, Jackson, Michigan; on behalf of the Petitioner.

JAMES KROGSRUD, ESQ., Detroit, Michigan, on behalf of Respondent Robert Bernard Jackson.

RONALD J. BRETZ, ESQ., Lansing, Michigan; on behalf of Respondent Rudy Bladel.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

THE CHIEF JUSTICE: Mr. Thiede, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF BRIAN E. THIEDE, ESQ.,

ON BEHALF OF PETITIONER

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

I feel compelled to, at the beginning at least, reference why it is that we are here, the underlying circumstances, and that is that Mr. Rudy Bladel, in the City of Jackson, the State of Michigan, killed three people who happened to work for the railroad because he didn't like the railroad, not because he had any complaint with them, but they just happened to be railroad employees.

Mr. Jackson in the City or County of Wayne killed a Mr. Perry because Mr. Perry's wife didn't like him any more but wanted to collect the insurance money. We have some very serious cases here, serious on the facts and serious to the people of the State of Michigan because of that.

Despite the fact that the motivations of the killings in these cases are different, they do present a common legal proposition. That proposition was ruled on

by the Michigan Supreme Court where they created what they thought to be an analogous rule to Edwards versus Arizona.

Simply stated, the Michigan Supreme Court held that if a defendant, while at his initial appearance before a magistrate who has no jurisdiction to accept a final plea in the case, whose only job is ministerial, in other words to advise a defendant of the charge against him, set bond if bond is appropriate, and to advise him of his right to counsel and to get the administrative process going if he's indigent, the Michigan Supreme Court said if the defendant asked for appointed counsel at that stage, the police are forevermore precluded from initiating interrogation of that defendant.

Reading the cases of this Court, it seems that there are two bases upon which this Court has excluded confessions. One is, when there is some impingement on a constitutional right such as the Fifth Amendment setting or Henry and Brewer and cases like that where it's the Sixth Amendment, or in the alternative, where the confession itself is unreliable.

I don't think either of those factors exist in this case. There is simply no reason for the rule established by the Michigan Supreme Court. As Justice

White noted in, I believe Selum versus Stooms, the follow-up case on Edwards, in discussing its retroactivity, the Edwards rule has very little to do with the reliability of a confession.

It hasn't a real great deal to do with the truth telling process, because there remains at all times, apart from any per se rule, the ability of the defense to challenge the voluntariness, and that of the confession. So, the per se rule does not change that. It does not preclude the defendant from having an opportunity to challenge the reliability of the statement itself.

Edwards, however, did have the salutory effect of giving the defendant some security in that while asking for counsel during police interrogation, the police could no longer return and re-initiate interrogation. That seems to be a logical result. There seems to be a logical flow between a request for counsel during interrogation and the secession of interrogation, and a per se rule that the police cannot re-initiate interrogation until counsel has been provided.

I see no logical connection between the request for counsel such as we had in these cases where the Judge advises a defendant, you have a right to have

counsel represent you at a preliminary examination, and other judicial proceedings thereafter.

QUESTION: May I ask at this point, supposing the judge -- at that point there had been a lawyer sitting in the courtroom and he said, "I'll appoint Mr. Smith as your lawyer." Smith said, "I'm too busy to talk to you now. I'll see you in three or four days."

Would the rule the apply, or not?

MR. THIEDE: I think the Michigan Supreme Court's rule would apply.

QUESTION: I mean, under your view should --

MR. THIEDE: No, I don't think so.

QUESTION: You would say, then the police could still initiate interrogation?

MR. THIEDE: Exactly. I think that's necessary. I think it's necessary because under the Michigan Supreme Court rule, we get into all kinds of problems that they have obviously not anticipated with a non-indigent defendant.

Oftentimes we find it necessary to kind of bolster the position of the indigent defendant so he's on equal footing with a non-indigent. But I think in this case, the result is to do the opposite. It is to actually put the non-indigent defendant in a lower position, because what the Michigan Supreme Court

doesn't even take into consideration --

QUESTION: Let me just stop you there for a minute. Suppose he was non-indigent, had his own lawyer and knew it all the time. Is it proper in the -- he already had a preliminary hearing and the police know who his lawyer is.

In your view, is it all right for the police to initiate interrogation without telling counsel?

MR. THIEDE: I would say, perhaps after the preliminary hearing, would have a different setting.

QUESTION: Well, this is after the preliminary hearing.

MR. THIEDE: No, this is an initial appearance. That's one thing that I hope the Court understands. All that we have had happen is, a warrant is issued and an arrest --

QUESTION: The case has begun, though, hasn't it? The criminal process has begun?

MR. THIEDE: Well, I don't know. Again --

QUESTION: There is a charge?

MR. THIEDE: There is an outstanding charge. we have a warrant. That is what we have. We have a man arrested. He is in custody. And then, this is under our speedy arraignment, like Federal Rule 5-A. We have to hustle him into court and advise him of his right to

counsel, set bond and tell him about the prelim and things like that, and tell him about the charge.

QUESTION: Well, suppose he shows up with a lawyer at that hearing. He's got plenty of money. And then the lawyer leaves and the police take him back to the police station after that very hearing.

Can they initiate --

MR. THIEDE: Yes, I think so, and I think there's some important reasons for that. First of all, as a practical matter, at least in our courts, the police are rarely present for arraignment, for this type of an arraignment, for an initial appearance, I guess we should use the terminology.

The prosecutor is not there for initial appearance. We have people brought through a tunnel. A court officer picks them up. They take them down and the judge goes through this procedure.

There is typically nobody from our side, if you will, there to see what's going on. The Michigan Supreme Court said, well, that's no problem because they can go check the court file and see what has happened.

Well, I submit that there are a million and one problems with the Michigan Supreme Court's thinking on that. First of all, what the defendant does there, and this would really preclude your first example, is

the district court judge cannot appoint an attorney. He has no authority to, this judge that he is standing before.

All he can do is say, here, Mr. Defendant, here's a form. Fill it out. It's a financial form, says how much money he makes, how much he spends out, to see if he's indigent. All he can do is swear to the truth of that form, and then he sends that form to the circuit court administrator's office, and that's where it goes.

If these diligent police officers run over and pull open the court file, there's going to be nothing in there that tells them that the man has requested counsel in this setting. They just aren't going to know, and then they're going to walk next door --

QUESTION: You don't think it's possible to set up a procedure whereby as soon as he makes a request like that you would immediately be notified? You don't think you're capable of doing that?

MR. THIEDE: No, I don't think so, and one problem becomes, we don't always know if they're going to get court appointed counsel. Sometimes they are rejected because they are not indigent.

QUESTION: What happens if the man says, I want a lawyer, my own lawyer, at this preliminary

hearing. Can he have a lawyer?

MR. THIEDE: At the preliminary hearing he can have a lawyer. He can have his own lawyer --

QUESTION: Well, then why can't he have a court appointed lawyer?

MR. THIEDE: Hmm?

QUESTION: Why can't he have a court appointed lawyer?

MR. THIEDE: Well, he can. It's just --

QUESTION: If he can have a paid lawyer, why can't he have a court appointed lawyer?

MR. THIEDE: I suppose he could, but as far as the system works, the district court judge, that's not his decision as to whether somebody is in fact indigent or not. He just doesn't have the authority to make that decision.

You see, that's why I think, Justice White, with your comment about, haven't the proceedings begun, I think we are so short into what's going on when we're talking about the juncture here --

QUESTION: Well, when you pick him up and you give him the Miranda warnings --

MR. THIEDE: Hm-hmm.

QUESTION: And you tell him you will appoint a lawyer for him, you don't appoint him until after the

preliminary hearings?

MR. THIEDE: Well --

QUESTION: Is that right?

MR. THIEDE: If I --

QUESTION: Is that correct?

MR. THIEDE: No.

QUESTION: I thought you said the Magistrate couldn't appoint him.

MR. THIEDE: No, the magistrate cannot.

QUESTION: Well, who can appoint him?

MR. THIEDE: What happens, we have a different system when there's a requirement of counsel for interrogation purposes, for lineup purposes and the like. There's a list of attorneys who the defendant can choose from to call and the county will pay the expense of an attorney for that purpose.

So, if someone is arrested and they get the Miranda rights --

QUESTION: Is there a list of lawyers for a preliminary hearing?

MR. THIEDE: There is. On preliminary hearings we have a contract with certain defense firms, and they are selected at random, yes.

QUESTION: I thought you said you didn't.

MR. THIEDE: Well, I think you are confusing

two of the -- the system, and how it works.

QUESTION: Am I confusing, or are you confusing?

MR. THIEDE: I think you are, sir, with all due respect. Initially there is the warrant issued. The warrant was issued in this case. The man was arrested pursuant to that.

Then he goes for the speedy arraignment before a district court judge, or a magistrate who has no jurisdiction to accept a plea. The only thing he has jurisdiction, to tell him at this point what the charge is, to set bond, and to tell him that he has a right to counsel, and if he is indigent, that he has a right to fill out this form and that, and that's what happened here.

Then, within 12 days under Michigan law, there is required to be a preliminary examination and we --

QUESTION: And in the meantime anybody can question him?

MR. THIEDE: Yeah, I think so. Because what we are --

QUESTION: Why did you mean when you said you would appoint a lawyer for him, you meant 12 days hence?

MR. THIEDE: No, I think in this case --

QUESTION: Well, you just said so.

MR. THIEDE: No, I think --

QUESTION: Did I misunderstand that?

MR. THIEDE: I think we're not communicating too well, sir. What happens, you mentioned, if he asks for an attorney when he's given his Miranda rights on arrest by the police officers, then we hustle an attorney down right away, or we simply don't question him and we will not return, because we can't return under Edwards.

QUESTION: You don't question him until he gets a lawyer?

MR. THIEDE: Right. If he asks --

QUESTION: Is that correct?

MR. THIEDE: That's exactly right. If he asks during custodial interrogation, like the Edwards type case, if during custodial interrogation the guy asks for an attorney when given his Miranda rights or any time thereafter during custodial interrogation, he will not be questioned again unless he initiates the contact and we again advise him of his rights and he waives them.

QUESTION: What is this 12-day period?

MR. THIEDE: That is the time under statute that we have to bring a person for a preliminary examination to see if there is probable cause to hold him for trial.

QUESTION: You mean, during those 12 days he's not examined by the police?

MR. THIEDE: If he has requested counsel at any time during Miranda -- during custodial interrogation, he will not be questioned by police. That's what happens.

So, what we're saying here, the difference between our rule, what we think the law is, and the Michigan Supreme Court, is that gives us the opportunity once he's asked for counsel in the -- during the judicial process, if that's what you want to call it, give us the opportunity to go and advise him of his Miranda rights, make sure that when he says, "I want an attorney to represent me in the judicial proceedings," that means also, "I want an attorney to represent me during custodial interrogation."

And if he says that, we don't question him. That's the only burden on the defendant in this case, is to have to sift through Miranda rights after this arraignment and be able to say, "I want an attorney." And they say, "Okay, fine," and the walk away, because that's what they have to do.

QUESTION: Mr. Thiede, does Michigan also proceed sometimes by way of indictment following grand jury investigation?

MR. THIEDE: Sometimes.

QUESTION: And then there would be no preliminary hearing, there would be a grand jury indictment, arraignment and trial?

MR. THIEDE: When there is a grand jury indictment, there is also a right to a preliminary examination by either party.

QUESTION: But it can precede the trial?

MR. THIEDE: Yes, it is theoretically possible.

QUESTION: And in that circumstance, would your position be the same?

MR. THIEDE: I would think --

QUESTION: The police wanted to question after the arraignment and when counsel had been requested?

MR. THIEDE: I think it would have to be, for some practical reasons. It need not be for us to prevail in this case.

QUESTION: It would have to be -- what would your position be?

MR. THIEDE: I think our position would still have to be that it is appropriate only to preclude further interrogation when the defendant asks for counsel in a context which shows that he wants counsel during interrogation, not simply during the judicial process.

QUESTION: I suppose it is not explained to a defendant at arraignment in Michigan that there is this difference, as you see it?

MR. THIEDE: No, it's not. But in contrast to many of the federal courts, I know of no circumstances in Michigan where Miranda rights are given during this arraignment, and that's what distinguishes many of the federal cases as well.

Many of the federal cases, the magistrate not only advises him of his right to counsel during the judicial process, but also reads the Miranda rights to him.

QUESTION: Do you think the defendant would perhaps -- if unsophisticated, at least, understand that the attorney that was requested at arraignment would be an attorney that would be available to assist during questioning or a lineup or something of that --

MR. THIEDE: Sure, no question about that, no question about that. And, that's why we're not saying that the police can now come in and get a confession out of the man. All we're saying is, the police can go in and advise him of his Miranda rights, and then he has an opportunity to clarify that.

The whole purpose, as I see it --

QUESTION: And they can get a confession? I

mean, I'm confused.

MR. THIEDE: Well, they can get a confession if he waives counsel for that purpose, but we'll have to get a subsequent specific waiver of the right to counsel during interrogation before we can get a confession from him.

So, we really aren't playing games. The defense has continuously tried to put on us that we are playing games between the Fifth and Sixth Amendments. I'm not. What I'm trying to do is provide a basis where the subjective intention of the defendant can be made objective by the advice of specific rights that talk about, when do you want an attorney.

The judge at this initial appearance, says, "Do you want an attorney during judicial proceedings?" The defendant says, "Yes." As we noted in Nash versus Estelle, as in our case of Bladel --

QUESTION: What is the language used at arraignment, when the defendant is asked --

MR. THIEDE: Okay. At arraignment in district court, there is -- it is set up by statute as well as by rule, and the judge says, you have a right to an attorney at the preliminary -- well, first he says, you have a right to a preliminary examination within 12 days, you have a right to representation by counsel at

the preliminary examination and throughout the judicial proceedings, and that's the language, throughout the judicial proceedings.

There is no intimation in what he states that, you have a right to counsel during police interrogation or anything like that.

QUESTION: May I interrupt with a question?

MR. THIEDE: Yes, sir.

QUESTION: Supposing a particular judge or magistrate, I forget the exact title, at that particular hearing went ahead and said, by the way, I might as well also explain to you what the Miranda warnings are, and he reads him the Miranda warning and then gets all through and says, now, do you want to fill out the form.

The fellow says, yes, I want a lawyer, but it's kind of ambiguous. What would your position be?

MR. THIEDE: Well, I think where it's especially ambiguous, I think the police ought to have the opportunity to clarify.

QUESTION: Even if the judge had given him the substance of the Miranda warning?

MR. THIEDE: That's a more difficult question, but I think that would depend on a factor -- a case by case basis, as this Court has dealt with, I think it's Smith versus Illinois, the ambiguity or potential

ambiguity of the request for counsel.

QUESTION: You are saying the police would have -- even if it's ambiguous and even if the other case is -- even if he has a lawyer, you still say the police have a right to initiate --

MR. THIEDE: Yes, because otherwise there's just going to be a whole host of problems, and especially, the biggest problem is you may preclude the police from the opportunity to seek a confession from a defendant who wants to confess. That's the biggest point.

All I want is the opportunity for the police to get a clarification from the defendant of whether he wants to talk without an attorney, and if he wants --

QUESTION: I guess they can do that before arraignment. Don't they have that interval of time before arraignment?

MR. THIEDE: Yes. What we have in this case, let me reference the facts in --

QUESTION: Isn't there a period of time before arraignment?

MR. THIEDE: Yes. In each of these cases there was some time.

QUESTION: When the police clearly can go in and make an inquiry after giving Miranda rights?

MR. THIEDE: Yes, and typically --

QUESTION: And you simply want to extend that time to post-arraignment and until the preliminary hearing?

MR. THIEDE: Right.

QUESTION: That's what you're saying?

MR. THIEDE: Right, yeah, and the typical defendant who doesn't want to give a confession is already going to have asserted his Miranda rights before we ever get to this stage, and so the police have already been precluded by Edwards from re-initiating interrogation.

QUESTION: Wait a minute. I thought that during this 12-day period they could come in 20 times a day and ask him again about the Miranda --

MR. THIEDE: No. What I said was, if he ever, during Miranda warnings --

QUESTION: Didn't you say that you can ask him if he's changed his mind?

MR. THIEDE: No, not under Miranda. Not under Miranda. If during the advice of Miranda rights, he ever tells the police, "I want an attorney" --

QUESTION: How many times can you advise him of his Miranda rights?

MR. THIEDE: You can advise him a million

times, if every time he waives.

QUESTION: And all of the million times, you can ask him a question?

MR. THIEDE: Yes, if he waives every time.

QUESTION: Is that your idea of not questioning?

MR. THIEDE: Pardon?

QUESTION: Is that your idea of not questioning?

MR. THIEDE: No. You see, what I'm talking about --

QUESTION: You said that if he doesn't get a lawyer, you should stop questioning.

MR. THIEDE: If he asks for a lawyer.

QUESTION: And in the second breath you say, you continuously question about his Miranda rights.

MR. THIEDE: Your Honor, I think, again we're not communicating because there are two separate things. If he -- if during the advice of Miranda rights he says, "I want an attorney," then we will never advise him of his Miranda rights again. We will never talk to him unless he initiates the interrogation.

If during Miranda rights he says, "I don't want an attorney," then we can interview him as often as we want and we will, as with both of these defendants,

one of them was given Miranda rights seven or eight times and each time said, "I don't want an attorney," and confessed, made a statement.

That's when I am saying, they can return. But once at any point the defendant says to the police, "I want an attorney," Edwards versus Arizona says he can't come back.

QUESTION: Did these ask for an attorney?

MR. THIEDE: Pardon?

QUESTION: Did these petitioners ever ask for an attorney?

MR. THIEDE: Not during interrogation, not during an interrogation. Jackson was interrogated seven times and he never -- every time he was advised of his Miranda rights, every time he waived them.

Bladel was interrogated four different times. Each time he was advised of Miranda rights. Each time he waived.

QUESTION: Well, why?

MR. THIEDE: In each of these circumstances, the reason --

QUESTION: Didn't get enough out of him the other times?

MR. THIEDE: Well, what happened in Bladel is, he was first picked up just for questioning in January

and -- on two occasions for just general discussion, given Miranda rights, and he waived them and didn't give any statements of substance.

Later on we got a warrant for him, as we got some ballistics evidence that gave us probable cause, so we brought him in on the arrest. He was again advised of his rights, and then gave a statement that was a little more inculpatory.

Then, after the initial appearance, we got some more information back, more evidence, went and talked with Bladel about it. He says at that point, "You got me," and confessed.

But in that case he said -- when he got to the point of -- and advice of Miranda, he mentioned that he had asked for counsel at arraignment but specifically said, "I don't need him here. I will talk. I'm going to plead guilty anyway." And, that's the situation we face.

We're not in here asking for a rule that allows police to badger the defendant into relinquishing a right. All we're here is asking for a rule that lets the police ask the question of the defendant, whether he wants an attorney during interrogation. If he does, the police will leave him, forever leave him alone. If he doesn't, then the police will ask him more questions.

That's all. It's no big deal.

QUESTION: May I just ask one other question. At the point in -- that the Michigan Supreme Court considers significant in this case, the hearing, whatever you properly call it, in your view had the Sixth Amendment right to counsel attached?

MR. THIEDE: I would say that, assuming that the Iowa procedures are similar to Michigan, then I would have to say under Brewer versus Williams they had, because we're in essentially the same position as we were in Brewer.

I don't know especially about Iowa law and I don't know if that's that significant. If we say, though -- and here's where we get into another problem, I think, with Sixth Amendment rights, and if we get into the question of waiver, what content is necessary for defendant to make a knowing waiver, is if we're going to talk about when the trenches are dug and when the lines are aligned, we're going to have to say it either begins at the issuance of a warrant or at the preliminary examination.

Because, this little event that we have here, this little meeting in the courtroom, does nothing to change the position of the parties. They aren't now more committed to go after each other or less committed

to go after each other. The judge is merely taking care of some administrative functions.

So, I think you're going to have to either go to the issuance of the warrant when the State has said, we at least have probable cause and we're at least going to arrest the guy and at least go to preliminary hearing, or you're going to have to go all the way to preliminary hearing as you have in Coleman versus Alabama.

QUESTION: The thing that puzzles me about your position is, if you agree that he Sixth Amendment right is attached, normally we're a little more strict after the Sixth Amendment right attaches than under the Fifth Amendment right under Miranda.

You are in effect saying that there should be less protection in the Sixth Amendment context than there would be in the Miranda context?

MR. THIEDE: I don't view it as less protection. I view it as --

QUESTION: Well, in one case you could initiate conversation and in the other you can't?

MR. THIEDE: Yes, but I think again, the request for counsel is separate. What I would say -- perhaps this will illustrate where I'm coming from better, the Michigan Supreme Court claimed that their

rule was analogous to Edwards, and I think this is completely wrong.

The analogy to Edwards in the Sixth Amendment setting of these particular requests for counsel would be to show up at preliminary examination without having appointed counsel and start to have a prelim, because he's asked for counsel during the judicial process and now you return to the judicial process without counsel, the same as in Edwards you ask for counsel during interrogation, you return to interrogation without counsel.

That's the real analogy. That's where logic would take you if you were trying to make a logical and analogical analysis of this case.

QUESTION: Mr. Thiede, would you be making the same argument in a jurisdiction which used office of the public defender for representation of indigents, and where after the arraignment, if counsel is requested and the public defender is designated, the public defender traditionally steps in and takes over for all purposes including lineups or questioning by the police and so forth?

MR. THIEDE: Yes, I think it would be the same argument.

QUESTION: You would make the same argument?

MR. THIEDE: I think I would, but --

QUESTION: You think you would be as persuasive about it?

MR. THIEDE: I think I would, but I think as a practical matter we wouldn't have the problem because the public defender would have been there already and said, "Shut up." And so, we wouldn't have had anything.

He would have told the attorney -- he would have told the prosecutor immediately, he would have filed an appearance in the case, and said, "Don't talk to him.

QUESTION: So, your argument really is a result of an unusual procedure for representation for indigents?

MR. THIEDE: I don't think it is. I think the practicalities of that have some impact. But I don't think that that comes down to it.

Let's take an example. Suppose under the Michigan rule the defendant were to come into this initial appearance with counsel in hand. There is not always something in the record that says there is an attorney there.

The judge goes through the same advice, says, "You have a right to an attorney," and all that. He asks the defendant if he wants to stand mute. The guy

says, "Yes, stand mute." And he says, "Okay, I'll set this for preliminary examination in 12 days."

Now, the police would go and look at this file, as the Michigan Supreme Court suggested, and they'll look in there and most of our attorneys at least don't file appearances right away, retained counsel, and he'll look in there and there's nothing in the file that says he's ever asked for an attorney even at this initial appearance.

So, now we go over to the police, the police station, and start giving him his Miranda warning. We've got a validly waived Miranda warning and they're going to suppress the confession because the police didn't have some crystal ball to look into to know that there was an attorney standing next to him.

Or, the other alternative, the man who knows he's not indigent and goes into the courtroom for this initial appearance, and the Judge says, "You have a right to an attorney. If you don't have any money we will appoint an attorney for you. Do you want an attorney appointed?" "No," he says, because he knows he's going to go get somebody else.

The police come in, they look at the court file. There's an absense of -- if you will, a denial of the request for attorney.

Now, should we treat that differently --

QUESTION: Why shouldn't the line be drawn at the initial appearance or arraignment stage? What's the matter with that? Does everybody understand that?

MR. THIEDE: Well, I don't think there needs to be a line to cut off the interrogation. I don't think that counsel, in Justice Rehnquist's words, at one point, is a guru that the defendant always has to go through.

We're trying -- we're creating this creature of a counsel who is always going to come in front of defendant, and I don't suggest that that's appropriate, especially under this Court's analysis in Faretta and that, but it's the defendant's right, not the attorney's right.

Again, what we're saying in response to this, the only burden we're placing on the defendant, the highest burden he ever has is to, after this initial appearance, say when the police mandatorily give him Miranda rights, "I want an attorney." And it all stops.

QUESTION: In your sequence, supposing during this 12-day period they decide to question him, say two or three days later, and just before they question him a lawyer calls up and says, "I've been appointed and I want to come in and talk to him." Could they say,

"We're sorry, you can't talk to him for two days because we want to find out if he wants to waive"?

MR. THIEDE: No, and Michigan law specifically speaks to that and says the attorney has the right to see his client at any time, and I think that should be the rule.

QUESTION: Well, what if he says, "I'll be over there in two hours," and they then say, "Well, before he gets here I'd like to ask him if he would like to waive his rights." Could they do that?

MR. THIEDE: Well, I think that they ought not be precluded from going in and talking to him. They may have to advise him of the fact --

QUESTION: Before the lawyer does?

MR. THIEDE: Yes, but I think maybe the content of what they tell him, in addition to Miranda rights, might need to be also, "Your attorney has called us."

QUESTION: You think they would have that obligation?

MR. THIEDE: I think thats a fair requirement, and I think you are going to probably address that in Virbine to some extent, when you decide that.

QUESTION: Why doesn't Massiah just prevent the officers from going to him at all once the criminal

proceeding has started?

MR. THIEDE: Well, I think Massiah, Brewer, Henry, all those cases have the same problem, that there was never a waiver. I think Massiah has a problem of, when you've got the surreptitious entry of the government, there's no basis to find a waiver because there's never any advice of the circumstance that the defendant's in, that he's even being interrogated.

QUESTION: Well, I know, but when they go to him at all, once the right to counsel is attached and the case is begun, what they want is information, they want to interrogate him?

MR. THIEDE: Yeah, exactly, but --

QUESTION: Why shouldn't Massiah just prevent them from even --

MR. THIEDE: I don't think Massiah was that broad. I think Massiah simply said that in this context the Sixth Amendment was violated because it was never waived. He was never advised of his rights in this circumstance. He never had the opportunity to waive his rights, because it was all surreptitious.

And Brewer, the same thing, there he was advised of rights but there was no waiver, and I think in our circumstances we have to say that the police had the opportunity even after the Sixth Amendment has

attached, because I think, really, the logical place to put the Sixth Amendment attachment is at the issuance of the warrant, and if that's the case then once a warrant's issued the police are mum. They go and arrest the guy, and then they can't tell him Miranda rights even before this initial appearance.

I don't think the initial appearance is a significant procedural step in the program. I think the warrant is one, the preliminary examination is one, but I don't think this little deal that we have here is important.

QUESTION: So, the Michigan Court said this request for counsel at the arraignment, that is what triggered a rule like Edwards?

MR. THIEDE: Right. They specifically said, we find no Fifth Amendment -- no right under the Fifth Amendment invoked by the statement. We find no Fifth Amendment violation. We find simply a Sixth Amendment invocation and a Sixth Amendment violation, and I say that there is just no close nexus between the request and the event to create the problem that the Michigan Supreme Court saw.

If there are no other questions I would like to reserve a couple of seconds, I guess I don't have many seconds.

THE CHIEF JUSTICE: Mr. Krogsrud.

ORAL ARGUMENT OF JAMES KROGSRUD, ESQ.

ON BEHALF OF RESPONDENT ROBERT BERNARD JACKSON.

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

Before beginning my argument I would like to first note that I do not intend to argue the first issue in the brief. We are not waiving that issue. That is the issue dealing with the independent state grounds.

The important question before this Court deals with the question of waiver of the constitutional right to counsel. That is the right that gives meaning to all other rights.

In our brief we have set out three alternatives for analysis. One was that the request for counsel at arraignment was at least an ambiguous request for counsel under the Fifth Amendment; second, the Edwards analogy that the Michigan Supreme Court adopted; and third, a general waiver rule analysis.

What I'd like to do this morning is approach this case from the point of view of general waiver, the general waiver rule. I think in doing so it will become very clear why the Michigan Supreme Court ruling offers a great deal of appeal and is an appropriate rule for this Court to adopt.

In 1938, in Johnson versus Zerbst, this Court announced a general rule of waiver for the right to counsel. There are two aspects of that rule which I think I would like to just mention.

First, it's required that the waiver be voluntary, knowing and intelligent. Intelligent means that there must be an understanding of it.

Second, and this may be the key in this particular case, courts indulge every reasonable presumption against waiver. What the State is arguing today is that the burden should be on the defendant to say that he didn't mean -- he didn't really mean when he requested counsel at the arraignment that he wanted it for arraignment, he just wanted it for court proceedings. State has put the burden on the defendant.

The Court, in 1938 and in many cases subsequent to 1938, the Johnson versus Zerbst opinion, has said, courts indulge every reasonable presumption against waiver.

There are two critical facts and two well-founded presumptions which, I think, are applicable in this case and perhaps virtually every other case like the cases of Mr. Jackson and Mr. Bladel.

The first key fact is that we're dealing with -- the adversary proceedings have begun. I take issue

with the State this morning that says that arraignment is merely a ministerial function and it has no meaning. It is the time when the State has formally said, we are going to charge and we are going to prosecute and try to convict this individual.

There is no reason except for the gathering of evidence against the accused why the police are talking to -- want to talk to the individual after adversary proceedings have begun.

The second important fact is that in this case, Mr. Jackson has made an unequivocal and affirmative request for counsel. He did so at arraignment.

I believe that under those circumstances the likelihood of an understanding waiver while solely in police custody is so remote that the Edwards rule, which in essence is a prophylactic rule barring the police from interrogating an individual except under unusual circumstances --

QUESTION: Well, Mr. Krogsrud, do you think that the right to counsel made available by the Miranda case under the Fifth Amendment is a more easily waived right than the right to counsel contained in the Constitution in the Sixth Amendment?

MR. KROGSRUD: I do, Your Honor.

QUESTION: Well, why should that be?

MR. KROGSRUD: Well, I think that it may not necessarily be in every case. The Court has said that in deciding whether there is waiver of either the Fifth or Sixth Amendment right to counsel, that the same test applies, that is, the Johnson versus Zerbst standard, and that looks to the totality of the circumstances.

Perhaps I went to far in assuming -- or I assumed too much in your question, but my assumption was that the Fifth Amendment right to counsel is one that is ordinarily assumed to apply prior to arraignment, prior to the time the State has formally charged the individual. At that time, it may be that the police are trying to find -- decide whether the individual is a suspect to be accused, or whether he is to be let go.

There are some circumstances under which it may be appropriate for the individual to want to talk to the police; not so after arraignment has begun.

QUESTION: Well, but of course if an individual clearly wants to talk to the police, no matter how high the standard of waiver, that standard could be met. We're talking about, I suppose, slightly more ambiguous circumstances, and then you say that -- where it's the Miranda right to counsel involved, you need less in the way of waiver than where it's the Sixth

Amendment right to counsel?

MR. KROGSRUD: Yes, Your Honor. I would like to state, as I said earlier, that there are two presumptions that are important to consider and which -- in viewing these presumptions will make it clear that the Edwards rule is one that is appropriate.

The first presumption is that a layman is unlikey to understand the value of counsel. I think that is abundantly clear from reading many of the decisions of this Court, particularly starting with Powell versus Alabama in 1932 where the Court said, even the intelligent and educated layman requires the guiding hand of counsel at every step of the proceedings against him.

The second presumption is that a layman is unlikely to understand the dangers of talking with police. There has been a decision to prosecute in these cases. These individuals have been formally charged. They are no longer suspects; they are defendants. The police are no longer seeking to exculpate; they are seeking to convict.

These presumptions are so strong that there are virtually no reasons for waiver and a prophylactic rule is very appropriate in this case. The cases that have found that there has been waiver under the

circumstances of this case, like the State today, have made an upside-down application of the rule of Johnson versus Zerbst.

That is, they have said, in essence, that the burden is on the individual to show that he wants counsel, whereas courts must indulge every reasonable presumption against the waiver.

If you look at what happened in the case of Robert Jackson, I think that these cases take on life. The police are not in a position to advise the defendant of the value of counsel or of the dangers of talking with the police.

In this particular case, Robert Jackson's case, the police told Mr. White, a co-defendant, what the value of a lawyer was. They said, if you want a lawyer he'll tell you, don't talk to the police. But the lawyer doesn't go to jail, does he? The lawyer gets paid by how many days in trial, and if you talk with us there will be a guilty plea and no trial.

When it came to advising regarding the dangers of talking with police, the police said, we control the criminal justice system. We tell the prosecutor what's going to be charged, whether it's going to be murder one, murder two or manslaughter, or something less. We are the ones that advise the probation department

whether you have cooperated with the police, and the judge looks to the pre-sentence report and the probation officer to decide what sentence will be imposed.

In conclusion, in the landmark decision of Powell versus Alabama, Justice Sutherland stated, "Even the intelligent and educated layman requires the guiding hand of counsel at every step in the proceedings against him. Every intelligent and wealthy person will have counsel after they have been formally charged by the State. No lawyer or judge would allow a friend or relative to talk to police without counsel after formal charges have been brought."

This Court must ensure that the precious right to counsel, guaranteed to the poor and ignorant --

QUESTION: Well, counsel, suppose -- suppose the defendant had not, at the arraignment said, "I want counsel."

MR. KROGSRUD: He did say that in this case.

QUESTION: I know, but what if he hadn't said it?

MR. KROGSRUD: Well, if he had not said it --

QUESTION: The right to counsel attached then, didn't it?

MR. KROGSRUD: Yes, Your Honor.

QUESTION: And he said, I don't care to have

counsel appointed. Could the officers then have gone to him?

MR. KROGSRUD: I think not. I think that under --

QUESTION: That's what I -- that's what your argument that you're just making says, once the criminal process is really begun, the officers must stay away from him unless he goes to them?

MR. KROGSRUD: That's correct, Your Honor.

QUESTION: Whether or not he's said what he said at the arraignment?

MR. KROGSRUD: I agree, Your Honor, unless -- I will add one proviso. Perhaps the magistrate could go through the analyis in -- the specific analysis in Johnson versus Zerbst that says a judicial officer could inquire as to all the circumstances, perhaps could obtain a waiver, but those would be the only circumstances under which the police could then interrogate.

Let me add that once a citizen has been formally charged and has requested counsel, that citizen is entitled to due process, not police process.

QUESTION: What if the defendant in this case had approached the officers?

MR. KROGSRUD: Well, Your Honor, if we look at

the Edwards analogy, there still has to be a decision --

QUESTION: I was thinking you would say that a much higher standard of waiver would be required than in Edwards.

MR. KROGSRUD: I agree, Your Honor, and I think in offering the Edwards analogy, we're simply saying if this Court --

QUESTION: You are asking for a good deal more than the Michigan Supreme Court gave you.

MR. KROGSRUD: Your Honor, the reason --

QUESTION: Aren't you?

MR. KROGSRUD: I am, Your Honor.

QUESTION: Yes, because they hinge their entire analysis on his request for counsel.

MR. KROGSRUD: That is correct, Your Honor.

QUESTION: And you say that isn't even necessary to win this case?

MR. KROGSRUD: That is correct, Your Honor. I think that it's not a position -- or it's not something that this Court has to reach, but I think that --

QUESTION: That's the only argument you've made.

MR. KROGSRUD: I did that, Your Honor, and I said so at the outset because I think in looking down the road, I think you can see the value of taking the

step that the Michigan Supreme Court did take.

QUESTION: Let me ask, at this hearing as it is handled in Michigan, what does the judge do if the defendant says, "I don't want a lawyer"? Does he have kind of a Faretta type waiver, or does he just say, no lawyer requested, ani that's the end of it?

Is there any careful inquiry?

MR. KROGSRUD: No, there is no careful inquiry required.

THE CHIEF JUSTICE: Mr. Bretz.

ORAL ARGUMENT OF RONALD J. BRETZ, ESQ.

ON BEHALF OF RESPONDENT RUDY BLADEL

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

I join in counsel for Respondent Jackson's arguments concerning the higher standard of waiver for the Sixth Amendment. I would like to spend my limited time before the Court discussing the specific holding of the Michigan Supreme Court and the application of the Edwards rule.

The court's holding, and our position in this case is that the interrogation of the respondents following their unequivocal request for counsel at arraignment violated thri Sixth and Fourteenth Amendment rights.

The court's holding was based on one elementary premise, and that is that the Sixth Amendment right to counsel is a broad, fundamental right to counsel that is provided for specifically in the Constitution, and as a result it differs significantly from the Miranda right to counsel which is referred to as the Fifth Amendment right to counsel.

The Sixth Amendment provides the right to counsel at all stages of the proceedings including, in this case, the post-arraignment interrogations. I think under this Court's decision in Brewer it is very clear that the Sixth Amendment right to counsel applied during that interrogation.

The Fifth Amendment right was designed only to protect the defendant's rights to remain silent and as has been stated before this Court, it routinely applies in the pre-arraignment cutodial interrogation.

The premise of the Sixth Amendment right is a broader and more fundamental right than the judicially created Fifth Amendment right, I believe is self evident, and is amply supported by this Court's decisions. It follows, I believe, from that premise that the Sixth Amendment right to counsel must be at least as scrupulously honored as the Fifth Amendment right.

In the cases before this Court, specifically in my client's case, Mr. Blaiel requested counsel from a judge at arraignment. Following that request he told the police officers during the Miranda warning at the point where they advised him, "You have a right to an attorney," he advised them, "I already asked the Judge for an attorney."

Under the Sixth Amendment he had the right --

QUESTION: You don't mean to suggest that that suspended any need for the warning, do you?

MR. BRETZ: Absolutely -- well, my initial argument is that they shouldn't even have been in there giving him the warnings in the first place, under the application of the Edwards rule, the police officers. They should have left him alone pursuant to the rigid prophylactic rule of Edwards.

QUESTION: Even if they were not aware that a warning had in effect been given and that counsel was on the way?

MR. BRETZ: Assuming that they were not aware of that, I believe that at the point that my client advised the police that, "I've already asked for an attorney at arraignment," and according to the police, he said, "I haven't seen him yet. I don't know where he is."

I think, yes, in answer to your question, that should have stopped it right there. The police had been made aware of the circumstances. The defendant had alerted them of his request for counsel. That should have stopped the proceedings, that is, the interrogation until counsel was made present.

I think it's also important in this case that my client had sat in this jail for three full days without speaking to any lawyer. The only people he spoke to were the police officers.

At a minimum, I would ask this Court to apply the rigid bright line rule of Edwards versus Arizona to this case and to any case where the defendant has invoked his right to counsel whether that request is directed to a judge or to a police officer.

That is the distinction that petitioner has raised before this Court today. The way I hear his argument is that, somehow my client's request for counsel was less effective because he directed it only to a judge and not to the police officers.

In his brief, petitioner argues that respondent only exercised a portion of his Sixth Amendment right to have counsel present in the courtroom and not the interrogation room.

QUESTION: How often does a defendant say at

his arraignment, "I don't want counsel"?

MR. BRETZ: Well, Your Honor, in my experience I don't see that.

QUESTION: You hardly ever see it?

MR. BRETZ: Absolutely not, even in --

QUESTION: Well, I suppose you could argue that any police officer who knows that an arraignment has taken place should assume that he's asked for counsel?

MR. BRETZ: Exactly, and in this case the facts are -- that is the Bladel case -- the facts are that the interrogating officers' superior, that is, the chief investigator on the case, was in fact present at arraignment, so there's no great burden of having to read ambiguous court files, they just call the boss and he could have told him.

But, that's okay because my client told them. The petitioner's distinction between where this request is directed, I believe is artificial. The Sixth Amendment as I have said applies to all stages including this interrogation.

While there are differences in the Fifth and Sixth Amendment rights that the Prosecutor hinges his entire argument upon, I think it is highly improbable that these distinctions are understood by a typical

criminal defendant, and this goes to the question Justice O'Connor directed to petitioner.

I believe a typical criminal defendant, once he has told a judge, "I want counsel," has done all that he can do to have his right honored. The right to counsel, to this defendant or to any defendant, is in fact the right to counsel. Hair-splitting does not enter into the picture.

He should be entitled to presume that he has done all that he can do to secure this valuable right without having to worry about whether he has directed his request to the right authority. This Court should adopt the rule that any request bars further interrogation, and there is yet another reason for adopting this rule, other than the Sixth Amendment.

It is a bright line rule. I think that's extremely important. That's what makes Edwards and Miranda, because I believe they must be read together, that's what makes them such effective decisions.

Such a bright line rule as we are proposing in this case would in fact ease the administration of justice, would make the job of the courts much easier. Counsel is requested; that's it. No interrogation, unless defendant initiates it.

It would make the job of the police, I

believe, much easier, and I believe as this Court has stated before, that the police operating in the field need bright line rules.

I also don't think it is wise, after the Sixth Amendment has attached, to make the police the legal advisor of the defendant. Perhaps that is necessary in Miranda because in Miranda the defendant -- prior to the Miranda decision the suspect did not have a right to counsel in an interrogation room.

This Court in Miranda felt that was necessary, and I believe the waiver designed in Miranda is adequate for that situation. I believe that the purpose of Edwards as defined by this Court in Illinois versus Smith is furthered by the decision in this case.

The purpose of Edwards was to prevent the badgering or the wearing down of the suspect into giving up a right once he has invoked it. If you look at the facts of this case, that is my case, the Bladel case, he sat there for three days after asking for an attorney, not knowing what was happening.

He testified at his suppression hearing that, "I really didn't know if I was qualified, if they were going to give me an attorney." The finder of fact at the suppression hearing did not discredit that testimony and in fact that testimony was adopted in the Michigan

Supreme Court's decision.

I think it's important. There is the possibility here that the failure to provide counsel timely, the re-interrogation by the police in the absence of counsel, had the effect of wearing down Mr. Bladel into giving up the right he had already invoked.

But again, I would remind the Court that under the Illinois versus Smith decision, actual coercion is not relevant in an Edwards inquiry. If this Court finds the Edwards rule applicable, whether directly or by analogy, I think that's the end of the question. The cases here have to be affirmed, the decision of the Michigan Supreme Court.

Waiver is not an issue. If the Court does not accept the Edwards analysis, I think there is still the question of waiver that must be reached, which is why we have briefed that issue and raised it before the Court.

Very briefly, I think counsel for respondent Jackson gave the waiver argument to this Court, and as I said I join in it, but I would just ask this Court to look very carefully at that because this Court has never defined precisely the standards for waiver in a Sixth Amendment interrogation context as we have in these cases.

The Massiah, Henry -- the trio of cases

dealing with Sixth Amendment confessions, this Court found a violation of the right in all those cases.

QUESTION: Brewer.

MR. BRETZ: Thank you, Justice White. Massiah, Henry and Brewer, there was a violation of the Sixth Amendment right in all three of those cases. Waiver did not become the issue.

The only Sixth Amendment waiver cases that this Court has deal with the right to counsel at trial or at a guilty plea refer to Faretta, Johnson versus Zerbst, by Moltke versus Gillies.

As I have argued in my brief and as the Second Circuit has adopted, a Faretta type waiver is certainly a more appropriate standard of waiver in this context, now that the Sixth Amendment has attached, more appropriate than the Miranda waiver, and I would ask the Court to look at that for purposes of a waiver decision in this case.

In conclusion, I would ask this Court to adopt the decision of the Michigan Supreme Court. I think that it is a rational, logical decision; that it is constitutionally necessary to protect the valued Sixth Amendment right to counsel. I would ask this Court to affirm the decision of the Michigan Supreme Court.

THE CHIEF JUSTICE: There are no further

questions?

Thank you, gentlemen. The case is submitted.

(Whereupon, at 12:00 o'clock noon, the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1531 - MICHIGAN, Petitioner V. ROBERT BERNARD JACKSON; and

#84-1539 - MICHIGAN, Petitioner V. RUDY BLADEL

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

BY Paul A. Richardson

(REPORTER)