

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-2121

TITLE ARIZONA, Petitioners V. WILLIAM CARL MAURO

PLACE Washington, D. C.

DATE March 31, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X  
3 ARIZONA, :

4 Petitioners, :

5 v. :

No. 85-2121

6 WILLIAM CARL MAURO :

7 -----X

8 Washington, D.C.

9 Tuesday, March 31, 1987

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

13 APPEARANCES:

14 JACK ROBERTS, Esq., Assistant Attorney General of  
15 Arizona, on behalf of the Petitioners.

16 KATHLEEN KELLY WALSH, Esq., Flagstaff, Arizona, on  
17 behalf of the Respondent.

C O N T E N T S

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On behalf of the Petitioners	
KATHLEEN KELLY WALSH, Esq.	27
On behalf of the Respondent	
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On behalf of the Petitioners - Rebuttal	

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

2                    CHIEF JUSTICE REHNQUIST: We will hear  
3 argument now in Number 85-2121, Arizona versus William  
4 Carl Mauro.

5                    Mr. Roberts, you may proceed whenever you are  
6 ready.

7                    ORAL ARGUMENT OF JACK ROBERTS, ESQ.

8                    ON BEHALF OF THE PETITIONERS

9                    MR. ROBERTS: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11                   The Arizona Supreme Court has said that  
12 permitting William Carl Mauro's wife, at her insistence  
13 and against the advice of a detective, to speak with him  
14 with an officer present constituted the functional  
15 equivalent of custodial interrogation.

16                   We maintain that in reaching that conclusion,  
17 the Arizona Supreme Court misapplied this Court's  
18 reasoning, analysis and concerns in both the Miranda and  
19 Rhode Island versus Innis decisions. When we hearken  
20 back to Innis, it explained in detail what Miranda meant  
21 and that encompasses this Court's definition of  
22 custodial interrogation and the functional equivalent of  
23 it.

24                   We find that the Court's concerns, as voiced  
25 in Innis, were that the combination of interrogation and



1 custody might work a compulsion upon the will of the  
2 accused that might subject him to the will of his  
3 examiner and undermine his privilege against compulsory  
4 self-examination.

5           However, this Court also said in *Innis* an  
6 important thing that was ignored by the Arizona Supreme  
7 Court in its analysis here, and that was that  
8 interrogation as conceived in *Miranda* and as clarified  
9 in *Innis* had to involve a degree of compulsion, and that  
10 must be police compulsion, above that which is  
11 necessarily inherent in custody itself.

12           Now, the only thing, Your Honors, that  
13 happened in this case was that Linda Mauro insisted upon  
14 seeing her husband. The police acquiesced in that  
15 request, and that an officer was present for valid  
16 reasons, the trial court found, and the officer  
17 overheard incriminating statements and tape recorded  
18 them with a tape recorder that was in full view, of  
19 which Mr. Mauro was aware, and the trial court also  
20 specifically made that finding.

21           We submit that simply is not the functional  
22 equivalent of custodial interrogation under this Court's  
23 cases under *Miranda* or under *Rhode Island versus Innis*.  
24 That requires an added degree of compulsion above that  
25 which is inherent in custody itself. That simply is not

1 present.

2 This Court also said in Innis that  
3 "interrogation" means words or actions on the part of  
4 the police, that police should know are reasonably  
5 likely to provoke an incriminating response. But one has  
6 to read that in conjunction with the other requirement  
7 and the other part of the definition of interrogation,  
8 and that is, it has to reflect compulsion above and  
9 beyond that which is inherent in custody itself.

10 That simply -- that test is not made here, and  
11 this Court, reversing the Rhode Island Supreme Court in  
12 Innis, noted that where two patrolmen were talking in a  
13 patrol car in the presence of the defendant and  
14 expressed their concern about some child at a school for  
15 the handicapped finding the shotgun that Innis had  
16 concealed, this Court said that the Rhode Island Supreme  
17 Court correctly found that there was some degree of  
18 subtle compulsion but that was not enough.

19 And there, we have police doing the talking  
20 right in the defendant's presence and the defendant, of  
21 course, in the back of the patrol car was a captive  
22 audience. So, we submit that the standard of Innis is  
23 simply not met in this case. Very simply, there was no  
24 interrogation within the meaning of Innis, which  
25 clarified Miranda.

1           This Court said in Innis also that not all  
2 statements obtained after one has been arrested are  
3 necessarily barred from use and that totally volunteered  
4 statements do not violate the Fifth Amendment  
5 privilege. We have cited to this Court the Seventh  
6 Circuit's decision in United States ex rel. Church  
7 versus DeRobertis.

8           There, Kelly Church, the older brother of  
9 Michael Church, asked the police to please place him in  
10 the cell with his brother Michael, and he told the  
11 police he was going to try to persuade Michael to  
12 confess to get their younger brother, Casey, out of  
13 trouble. Police, knowing Kelly was going to try to  
14 persuade Michael to confess, did place him in Michael's  
15 cell.

16           The Seventh Circuit said that is not the  
17 equivalent of custodial interrogation by the police  
18 under Rhode Island versus Innis.

19           QUESTION: Mr. Roberts, are you asking that we  
20 cut back on Rhode Island against Innis?

21           MR. ROBERTS: No, Your Honor. I am simply  
22 saying that the standard you enunciated there does not  
23 apply to the facts of this case.

24           QUESTION: You don't think this is just a fact  
25 bound application of Innis?

1 MR. ROBERTS: No, Your Honor, because whether  
2 or not it was interrogation is a question of law, and I  
3 am submitting that as a question of law the Arizona  
4 Supreme Court was wrong. But what I am saying was, the  
5 Seventh Circuit rejected a similar attack by Michael  
6 Church in the case we have cited in our brief.

7 The approach used there was a "but-for" test,  
8 and I submit to you with all respect, that is exactly  
9 what the Arizona Supreme Court has applied here.  
10 Michael Church says, "But for the police putting my  
11 older brother in the cell with me and knowing when they  
12 put him there that he was going to try to persuade me to  
13 confess, I would not have confessed."

14 Well, Kelly Church was successful. His  
15 brother later asked for a pencil and paper and wrote out  
16 a confession. Here the Arizona Supreme Court has said,  
17 and I do not think I oversimplify, the police simply  
18 cannot let the defendant's wife talk to him even at her  
19 request and against their advice and stand there and  
20 listen.

21 That is the holding of the Arizona Supreme  
22 Court. Church rejected a similar claim and we ask this  
23 Court to do the same.

24 QUESTION: No charge had been filed yet, or  
25 what?



1 MR. ROBERTS: I think it would be critical,  
2 perhaps in a Sixth Amendment context, Your Honor, but  
3 respondent has conceded at page 9 of her answering brief  
4 and the Arizona Supreme Court's opinion makes it  
5 abundantly clear that they decided this on purely Fifth  
6 Amendment grounds.

7 Let me put it this way. I don't think under  
8 the circumstances of this case it would make any  
9 difference, Your Honor. I don't think there would have  
10 been a Sixth Amendment or a Fifth Amendment violation  
11 because there was no interrogation. There was no  
12 compulsion by police. Neither was there any secrecy or  
13 surreptitious interrogation.

14 QUESTION: What if the right to counsel had  
15 been invoked?

16 MR. ROBERTS: Well, if the right to counsel  
17 had been invoked, Your Honor, I would be taking  
18 precisely the same position because what was it police  
19 did? She wanted to talk to her husband. They allowed  
20 her to.

21 They had a policeman stationed there for valid  
22 reasons, the trial court found after the suppression  
23 hearing even though the Arizona Supreme Court did not  
24 mention those valid reasons. The line of cases this  
25 Court has decided under the Sixth Amendment, Massiah,

1 Henry, Olton versus Maine, cases like that have been  
2 concerned with surreptitious questioning by an informant  
3 or agent of the police.

4 No one disputes here -- it is conceded,  
5 plainly conceded, that Linda Mauro was not an agent or  
6 informant of the police. Yet it was at her request, her  
7 idea to see her husband and certainly nothing was done  
8 surreptitiously.

9 The testimony of Detective Manson at trial and  
10 at the suppression hearing was that they were in a small  
11 room, Captain Latham's office. It has a few chairs,  
12 bookshelves, and Captain Latham's desk but no one was  
13 seated at the desk.

14 They were seated in chairs in the middle of  
15 the room and Detective Manson, who had told Linda Mauro  
16 she might see her husband but he was going to be present  
17 and he was going to record it, sat within three to four  
18 feet of Mr. Mauro with a tape recorder on top of his  
19 knee. He had his legs crossed and the tape recorder was  
20 on top of his knee.

21 The trial court specifically found Mauro knew  
22 the police were listening, the man was only three feet  
23 from him, and that he was also being recorded.

24 QUESTION: Well, Mr. Roberts, do you think the  
25 result would be any different if the police had simply

1 planted a tape recorder on the defendant's wife and let  
2 her speak to the defendant so that it wasn't obvious to  
3 the defendant?

4 MR. ROBERTS: If you mean, Justice O'Connor,  
5 simply planted it on her but all other circumstances  
6 remained the same?

7 QUESTION: No policeman present listening, but  
8 they hear through the tape recorder planted on her. Do  
9 you think the result would be any different?

10 MR. ROBERTS: I don't believe it would, Your  
11 Honor, because still there is no official police  
12 conduct. There is no compulsion that is required under  
13 Innis.

14 As a matter of fact, this Court recently  
15 decided a case, not precisely on point but similar in  
16 some respects, the name of the case, I am sorry --  
17 Kuhlman, Kuhlman versus Wilson where Mr. Wilson was  
18 placed in the cell of an informant, Bennie Lee.

19 Now, the police had told Lee, now just listen,  
20 don't try to stimulate conversation about what he has  
21 been charged with, just listen. And this Court upheld  
22 the admission of statements that Wilson made to Lee on  
23 that basis, and of course that was surreptitious.

24 I mean, Wilson didn't know that Lee was a  
25 government informant and he certainly didn't know he was

1 being recorded, and we don't even have circumstances  
2 like that here. The Arizona Supreme Court --

3 QUESTION: Mr. Roberts, can I just refresh my  
4 recollection. Justice White asked you if it would make  
5 any difference if there had been an invocation of the  
6 right to counsel.

7 MR. ROBERTS: He did invoke his right to  
8 counsel.

9 QUESTION: I thought he did, yes. I see. So  
10 that it is a case in which he had already asked for  
11 counsel?

12 MR. ROBERTS: Yes, Your Honor. Fifteen  
13 minutes previously he had asked for counsel. Police had  
14 ceased questioning him.

15 QUESTION: Did he ask for counsel as well as  
16 wanting to be silent?

17 MR. ROBERTS: That's correct, Your Honor,  
18 fifteen minutes before this, and police ceased  
19 questioning. They asked him nothing after he invoked  
20 counsel at 10:45.

21 This brief exchange between himself and his  
22 wife occurred at approximately 11:00 o'clock, 15 minutes  
23 later.

24 QUESTION: I suppose it would have been  
25 different if the police had secured someone -- had asked



1 his brother to go talk to him and get out of him what he  
2 could ?

3 MR. ROBERTS: I think, Your Honor, it would be  
4 a closer case because then you have the idea --

5 QUESTION: Of approaching him --

6 MR. ROBERTS: Yes, originating with the  
7 police, and they are trying to get the brother to do  
8 something for them. But those aren't the circumstances  
9 of this case.

10 The Arizona Supreme Court further held, and we  
11 submit most erroneously, that the State could not even  
12 use this brief tape in rebuttal, and in so doing it  
13 relied upon this Court's holding in Wainwright versus  
14 Greenfield. We submit that was grievous error because  
15 this tape was used only in rebuttal.

16 The trial court's findings, which I urge you  
17 to scrutinize, are at pages 216 through 220 of the joint  
18 appendices, and he made very complete and specific  
19 findings on all of these matters. The trial court held  
20 that -- well, first let me set the stage.

21 Let me tell you what defense counsel had done  
22 in building the insanity defense. First of all, this  
23 tape was not needed and certainly was not used to prove  
24 that Mr. Mauro committed the murder. He admitted that  
25 to numerous people at a Circle-K shortly after he had

1 done it.

2 It wasn't needed to prove the act. All it was  
3 needed for was to show his mental state to rebut his  
4 insanity defense. What defense counsel had done was to  
5 put on the stand Bruce Griffin, a defense attorney, who  
6 say Mr. Mauro the day of the murder, November 23rd,  
7 1982, but he saw him later in the day after Mauro had  
8 talked with his wife, later in the day.

9 Everything the defense counsel presented on  
10 the day of the murder, so far as the conversations, or  
11 later in the day after the tape between Mauro and his  
12 wife. Mr. Griffin described Mr. Mauro, and I summarize  
13 but fairly, as a salivating or slobbering catatonic  
14 madman. That was the gist of his description.

15 Then, relying upon their psychiatrist, the  
16 defense psychiatrist, Dean Gerstenburger, Mr.  
17 Gerstenburger also observed Mauro later in the day, even  
18 later than Mr. Griffin observed him. Gerstenburger got  
19 in a good many hearsay statements from Mr. Mauro in his  
20 response.

21 But more important than that, Gerstenburger  
22 relied upon a tape recording, Exhibit 172, which was  
23 admitted at defense counsel's request, a tape recording  
24 between another defense attorney, Donald Bayliss, and  
25 Mr. Mauro.

1           Now, Your Honors, what is so important to  
2 realize about this, and I know you have either heard the  
3 tape or you will, is when you hear Mr. Bayliss asking  
4 Mr. Mauro questions, and this is on the day of the  
5 murder but later than the conversation between Mauro and  
6 his wife, when you hear Bayliss asking him questions  
7 what you hear in response from Mauro, and that's why  
8 defense counsel wanted it before the jury, is  
9 unintelligible animal-like sounds more similar to  
10 grunting and moans than anything else, thus portraying  
11 him to the jury as an incoherent, irrational person  
12 sounding more like an animal than anything else.

13           QUESTION: Mr. Roberts, let me ask you  
14 something. Do you think the Arizona court initially  
15 decided this case on the basis of the Fifth Amendment?

16           MR. ROBERTS: Oh, they initially and  
17 exclusively decided this case on the basis of the Fifth  
18 Amendment.

19           QUESTION: Say it again?

20           MR. ROBERTS: They initially and exclusively  
21 decided this case on the basis of the Fifth Amendment  
22 and the Court's holding.

23           QUESTION: Well, then isn't all the talk about  
24 the Sixth Amendment in Greenholtz just pure dicta?

25           MR. ROBERTS: In Greenfield, you mean, Your

1 Honor?

2 QUESTION: Doesn't that defeat you?

3 MR. ROBERTS: I think not, Your Honor, because  
4 they cited no Arizona cases and no Arizona rules of  
5 evidence and no Arizona law for not allowing this in as  
6 rebuttal. They relied exclusively on this Court's  
7 decision in Greenfield.

8 Had they had some Arizona law or some Arizona  
9 rule of evidence they wished to rely upon, they would  
10 have but they did not. They relied upon this Court's  
11 decision.

12 QUESTION: I can't get away from the fact that  
13 this is just a pure factual application of the Innis  
14 case, and all your talk about Greenfield and the Sixth  
15 Amendment is rather by the way.

16 MR. ROBERTS: Well, Your Honor, I agree with  
17 you that it should be decided and reversed on the basis  
18 that there was no interrogation. I agree. But what I  
19 am saying is, if the Court disagrees with that, our  
20 position is that it was not fundamentally unfair to  
21 allow the prosecutor to use this brief exchange between  
22 Mauro and his wife to show several things. That is the  
23 reason we present that argument also.

24 The trial court found it was probative, the  
25 most probative and relevant thing that the prosecutor



1 could present in rebuttal for the following reasons, and  
2 please let me apprise you of those. Number one, it  
3 showed more plainly than anything else that prosecution  
4 could present Mauro's state of mind closest to the time  
5 he committed the murder.

6 The tape between Mauro and his wife was the  
7 closest thing to the time he committed the murder.  
8 Defense counsel, in a lengthy cross examination of Linda  
9 Mauro who was on the stand at least three days, had also  
10 through that examination and through eight pages he  
11 devoted in closing argument, attempted to portray her to  
12 the jury as being at least partially, if not wholly  
13 responsible for the child's brutal murder by suffocation.

14 Having done that, the trial court concluded,  
15 it was legitimate and not fundamentally unfair to allow  
16 the prosecutor to let the jury hear the tape where they  
17 could hear Mauro's voice, judge for themselves his  
18 thinking, his intimations, his pauses, and hear his  
19 wife's voice because of the accusations and implications  
20 that defense counsel had been making against her.

21 It was a most effective thing. The key  
22 question here --

23 QUESTION: I must confess, I am a little  
24 puzzled. What is the relevance of his wife's voice?

25 MR. ROBERTS: The relevance of hearing his

1 wife, Your Honor, was that defense counsel had attempted  
2 to portray his wife as responsible for the murder. This  
3 tape --

4 QUESTION: I still don't understand.

5 MR. ROBERTS: Well, if when you read --

6 QUESTION: This was offered in evidence to  
7 show that his wife was not responsible for the murder?

8 MR. ROBERTS: No, no --

9 QUESTION: To rebut the claim of insanity of  
10 the --

11 MR. ROBERTS: No, Your Honor. No, that wasn't  
12 the purpose for which the State offered it. The State  
13 offered it to rebut his claim of insanity.

14 QUESTION: It's not her voice, it's what she  
15 said, you mean? It wasn't her voice?

16 MR. ROBERTS: Well, the trial court held that  
17 both were important, Your Honor, because you can't, on a  
18 piece of paper you can't get intonations and pauses.  
19 That was simply one of the trial court's findings.

20 QUESTION: For him the tape was important  
21 because the mere tone and everything was important, but  
22 for her it was what she said that was important to the  
23 jury, right, that it was clear she hadn't had anything  
24 to do with the murder?

25 MR. ROBERTS: Oh, yes, I agree with that, and

1 that was simply one reason the trial court gave, but you  
2 are correct, Justice Stevens. The primary reason the  
3 State introduced it was to rebut this insanity defense.

4 I am merely saying the trial court found  
5 additional reasons to allow it also, and of course the  
6 nature of what Mauro said in that very brief exchange  
7 shows better than anyone could that the man was  
8 rational, at least at that time that he spoke to his  
9 wife and something else --

10 QUESTION: What was the Arizona Supreme  
11 Court's response to this argument? Didn't they say, you  
12 could have done the same thing without listening to the  
13 tape?

14 MR. ROBERTS: No, Your Honor. They said,  
15 we'll let you do something but not the same thing and  
16 not as effective, and what we'll let you do is put  
17 carefully framed questions to the witnesses so they can  
18 describe his general demeanor and whether or not he was  
19 generally able to speak rationally.

20 Well, of course that's fine because defense  
21 counsel --

22 QUESTION: Generally, and in this particular  
23 case too. I mean, in this particular interview, that  
24 you could have described the manner in which he talked.

25 MR. ROBERTS: I don't -- well, perhaps we read

1 the opinion differently at that point Your Honor.  
2 Certainly they said you can't make specific reference to  
3 this conversation.

4 QUESTION: You can't quote it?

5 MR. ROBERTS: You can't quote it. Now,  
6 perhaps you could have said, well, did what he said seem  
7 to be rational. But the effect of that is what, when  
8 the jury has before it a defense tape where they hear  
9 him moaning and groaning like an animal in response to  
10 Mr. Bayliss's questions.

11 QUESTION: And you couldn't have testified he  
12 was not moaning and groaning like an animal here?

13 MR. ROBERTS: Certainly we could have done  
14 that, Your Honor, but it would not have been as  
15 effective. What I was about to point out here is that a  
16 significant distinction between this case and Greenfield  
17 also is that Greenfield invoked his own Miranda rights  
18 and this Court found it fundamentally unfair because of  
19 the implicit assurance in Miranda to later let the  
20 prosecutor impeach him with that, which the prosecutor  
21 did in his case in chief, incidentally.

22 So, what we have here is not a person relying  
23 on his own Miranda rights. There was no ambiguity of  
24 silence, which this Court said could unfairly penalize  
25 an innocent person because as the Court pointed out, the



1 innocent as well as the guilty may invoke the right to  
2 silence and the right to consult with counsel.

3 QUESTION: He was invoking his own Miranda  
4 rights when he said he wanted a lawyer before he  
5 testified, wasn't he?

6 MR. ROBERTS: Fifteen minutes earlier, Your  
7 Honor, but no testimony about that.

8 QUESTION: Well, to the extent he invoked  
9 Miranda rights, they were his own Miranda rights?

10 MR. ROBERTS: That is correct, Your Honor, but  
11 not in the exchange with his wife. In the exchange with  
12 his wife he told her to shut up and get an attorney. He  
13 didn't rely on his Miranda rights.

14 QUESTION: You mean, he didn't ask her for  
15 warnings before he spoke to her? I don't understand you.

16 MR. ROBERTS: Okay. Your Honor, there's two  
17 conversations involved. There was one at 10:45, 15  
18 minutes before the tape --

19 QUESTION: Right. He involved his --

20 MR. ROBERTS: That is correct, Your Honor.  
21 Nobody ever gave any testimony about that, about his  
22 invoking his right to remain silent. That wasn't given.

23 The tape 15 minutes earlier when his wife saw  
24 him, there he doesn't rely on his rights. He doesn't  
25 invoke his rights. He says, "You shut up. You can get

1 a public attorney, get one." That's not Greenfield. He  
2 is telling somebody else.

3 QUESTION: Well, the question, as I  
4 understand, is whether the previous invocation of  
5 Miranda rights, and asking for a lawyer, tainted this  
6 conversation because he wasn't given a lawyer, and the  
7 question is whether this was interrogation or not.

8 Isn't that the whole case?

9 MR. ROBERTS: Yes, Your Honor, but going back  
10 to the first point, and as I have argued it is not  
11 interrogation.

12 QUESTION: I understand your point. Of  
13 course, if one -- if you take the view of the Arizona  
14 Supreme Court he adequately invoked his Miranda rights  
15 and he wins. If you disagree with him on interrogation,  
16 he loses.

17 MR. ROBERTS: That's true. That's true. But  
18 I don't see how --

19 QUESTION: I don't understand the invoking  
20 Miranda rights in conversation with his wife. I'm just  
21 kind of puzzled.

22 MR. ROBERTS: What I am saying is, he did not  
23 invoke his Miranda rights. He told her to use her  
24 Miranda rights. That's all I'm saying.

25 Well, that's a distinction from Greenfield.

1 Greenfield invoked his own rights.

2 QUESTION: There are a lot of distinctions  
3 from Greenfield. I just don't understand what they've  
4 got to do with the issue.

5 MR. ROBERTS: We have also cited to this Court  
6 the case of Nichols versus Wainwright, and there the  
7 Eleventh Circuit did not find it impermissible for the  
8 prosecutor to use as impeachment a statement that the  
9 defendant made one-half hour after his arrest. Now, at  
10 the time of his arrest Nichols had invoked his Miranda  
11 rights, right to remain silent, the right to have  
12 counsel.

13 He invoked that, but a half-hour later he made  
14 a statement saying that he did what he did because of  
15 duress. Well, Nichols didn't even take the stand as  
16 Mauro did not take the stand. But his defense attorney  
17 was able to get in that testimony though another  
18 witness, through a police officer who said that, "Yes,  
19 he told me he did what he did because of duress."

20 Now, the Eleventh Circuit said there is  
21 nothing in Greenfield -- or Doyle versus Ohio, that  
22 prohibits this use of it because what this man did was  
23 rely on his Miranda rights, but then he argued -- his  
24 defense attorney argued and got in evidence that  
25 something he did post-Miranda warning, when he made his

1 statement about duress, proved his innocence, and they  
2 said, when you are going to use post-Miranda statements  
3 like that, and specifically rely on their proximity in  
4 time to your arrest for your defense, then we don't  
5 believe Greenfield or Doyle prohibits the prosecution  
6 from impeaching you with even the defendant's own prior  
7 silence.

8 This Court has said, and even if the Court  
9 should disagree about there being a Fifth Amendment  
10 violation, this Court has said in cases such as Harris  
11 versus New York and Oregon versus Haas, that even where  
12 a Fifth Amendment violation has occurred, and we submit  
13 one did not here, that that does not mean the State is  
14 forever prohibited from using the evidence in any  
15 fashion thereafter.

16 The Court will well recall that those cases  
17 involved absence of Miranda warnings, or proper Miranda  
18 warnings. Defendants who took the stand and then were  
19 impeached with prior inconsistent statements because  
20 they were voluntary -- and let me point out here, there  
21 has never been any question that Mauro's brief comments  
22 to his wife were voluntary.

23 The trial court so specifically found, and I  
24 point out, Dr. Gerstenburger, the defense psychiatrist,  
25 himself said that the comments were voluntary and that

1 they showed that at that moment that Mauro made them, he  
2 was much more in touch with reality than he was at the  
3 times later in the day.

4 Why was that important? Dr. Gerstenburger  
5 testified that Mauro fluctuated in and out, in and out  
6 of reality for three weeks prior to the day he committed  
7 the murder.

8 So, as the trial court noted, it was extremely  
9 probative and relevant for the jury to hear this short  
10 tape between him and his wife to see how much in touch  
11 with reality he was, with reality he was, at the time  
12 closest to the murder. But in any case, in Harris  
13 versus New York and in other cases, this Court has said  
14 as long as the statements are voluntary, and they were  
15 here, and the trial court made a separate finding they  
16 were voluntary, knowing and intelligent, he made a  
17 separate finding on all three prongs, that they may be  
18 used in impeachment.

19 That is precisely what was done here and we  
20 submit there was nothing -- we submit, number one --

21 QUESTION: Was it impeachment of what in both  
22 of those cases? Was it impeachment of live trial  
23 testimony?

24 MR. ROBERTS: Yes, it was impeachment of the  
25 defendant who took the stand, Your Honor.



1 QUESTION: Showing that he was perjuring  
2 himself?

3 MR. ROBERTS: That's correct.

4 QUESTION: That isn't the case here, is it?

5 MR. ROBERTS: No, the one we had is, we were  
6 impeaching defense evidence that he was simply a  
7 babbling animal later in the day.

8 QUESTION: That's a little different thing  
9 from saying, we're going to allow it to be used in order  
10 to protect the integrity of the trial system, if  
11 somebody tries to perjure himself at trial, we'll let it  
12 in. But this is just -- you're really saying to refute  
13 anything that can come in?

14 The whole trial is just a refutation of  
15 things, isn't it? Where do you draw the line? I can  
16 see the line between allowing it in to prevent perjury  
17 and others, but I don't see the line you're drawing. So  
18 long as you're refuting something.

19 MR. ROBERTS: Yes, Your Honor. The Nichols  
20 case, decided in the Eleventh Circuit, the defendant did  
21 not take the stand either. But the statement came in,  
22 nonetheless. And the Eleventh Circuit was considering  
23 this Court's holdings in Greenfield and Doyle.

24 You are quite right, Your Honor, the  
25 circumstances and the rationale are different. But what

1 I am saying, I don't see anything fundamentally unfair,  
2 and of course I am analogizing the circumstances -- I am  
3 analogizing to Harris versus New York and Oregon versus  
4 Haas, and saying that, keeping in mind the concerns this  
5 Court voiced there, because I believe, if I am not  
6 incorrect, I believe it was Justice Blackmun who said in  
7 Oregon versus Haas, "We are, after all, engaged in a  
8 search for truth in a criminal trial, so long as that  
9 search is properly surrounded by the proper  
10 constitutional" --

11 QUESTION: Is it not correct, though, that in  
12 this case the tape was -- the Arizona Supreme Court said  
13 it would be all right to use the tape, to play it to the  
14 psychiatrist who could then testify by interpreting  
15 this, as to how rational --

16 MR. ROBERTS: Yes, Your Honor, they could use  
17 that in their opinions, but the defense still has the  
18 benefit of showing the defendant as an unintelligible  
19 person making animal-like sounds, with the tape, a live  
20 tape they can play to the jury, and that's the  
21 impression the jury has the rest of the day. There's  
22 nothing to counter that.

23 QUESTION: They wouldn't treat it as  
24 countervailing evidence that a psychiatrist said, "Well,  
25 I listened to him at this particular time and he was

1 perfectly rational." You mean, they just wouldn't  
2 believe the psychiatrist?

3 MR. ROBERTS: No, I am not saying that, Your  
4 Honor. I am saying it certainly wouldn't be the best  
5 rebuttal.

6 QUESTION: It certainly would show that he did  
7 not always talk in the way in which he was recorded on  
8 one particular point in time.

9 MR. ROBERTS: That is true, it would, Your  
10 Honor. But it would not have been the most effective  
11 rebuttal.

12 Our position is, Your Honor, number one, that  
13 there was simply no interrogation under this Court's  
14 definition in Miranda and Innis, and even if there was,  
15 there was nothing fundamentally unfair in allowing this  
16 to be used simply in rebuttal.

17 Unless the Court has questions, I would like  
18 to reserve my time.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
20 Roberts. We'll hear now from you, Mrs. Walsh.

21 ORAL ARGUMENT OF KATHLEEN KELLY WALSH, ESQ.

22 ON BEHALF OF THE RESPONDENT

23 MS. WALSH: Thank you, Mr. Chief Justice, and  
24 may it please the Court:

25 I would agree with what Justice Blackmun was

1 saying, that perhaps this is just merely a case of  
2 factual application of Rhode Island versus Innis to the  
3 situation that the Arizona Supreme Court chose to find  
4 that the activity of the police department in Flagstaff,  
5 Arizona was nothing more than the functional equivalent  
6 of custodial interrogation.

7 This Court in Rhode Island versus Innis  
8 defined the functional equivalent of custodial  
9 interrogation as being specifically any activity that  
10 the police engage in, in which they know that  
11 incriminating statements were likely to be made.

12 Here you have an absolutely clear case. The  
13 police knew that incriminating statements were likely to  
14 be made. In fact, two of the police officers indicated  
15 specifically that they knew that Linda Mauro may have  
16 been involved in the crime itself and they were somewhat  
17 in the dark about it, or they were afraid that Bill and  
18 Linda Mauro might concoct their stories or might try and  
19 get their stories --

20 QUESTION: Doesn't the Fifth Amendment mean  
21 something more than, the police know that incriminating  
22 statements might be made? Doesn't the push for the  
23 incrimination have to come from the police?

24 MS. WALSH: Yes, it does. It does involve  
25 more than just knowing. It also involves some type of

1 activity, some sort of active role such as allowing this  
2 conversation to commence.

3 QUESTION: Is that an active role, to allow a  
4 conversation to come in? The Fifth Amendment talks  
5 about compulsory self-incrimination. Miranda talks  
6 about the coercion of the station house environment.

7 And to simply let a man talk to his wife  
8 doesn't seem to fit in under those heads.

9 MS. WALSH: Mr. Chief Justice, I would  
10 disagree specifically with that because the police  
11 department controlled whether or not the conversation  
12 took place. You have to look at the scenario. The  
13 police said to Linda Mauro, you may speak to your  
14 husband but you will be taped and we will be present.

15 Now, take a step back into Bill Mauro's shoes.

16 QUESTION: They tried to talk her out of it,  
17 didn't they?

18 MS. WALSH: One of them did, but the  
19 supervisor said no.

20 QUESTION: Is it necessary that more than one  
21 of them do it?

22 MS. WALSH: Pardon?

23 QUESTION: I mean, not only didn't they  
24 instigate it, but they tried to talk her out of it.

25 QUESTION: They did try to talk her -- well,



1 the original police officer tried to talk her out of it  
2 because she was emotionally upset. However, when he  
3 went in to his supervisor, his supervisor said, "Sure, I  
4 don't see a problem. You go in, you listen, you take a  
5 tape recorder in with you."

6 I think that this whole issue of control was  
7 what struck the Arizona Supreme Court in defining that  
8 this was the functional equivalent of custodial  
9 interrogation. You have Bill Mauro who is sitting  
10 there, not knowing what's going on, necessarily.

11 He doesn't know his wife is going to come in.  
12 He doesn't know the police officer is going to be tape  
13 recording this conversation.

14 QUESTION: May I interrupt you, counsel, at  
15 that point?

16 MS. WALSH: Yes, Justice.

17 QUESTION: Didn't the trial court find that  
18 the defendant did know, was told that the conversation  
19 would be taped?

20 MS. WALSH: The trial court did say that.  
21 However, the evidence and the testimony from all three  
22 of the police officers who testified was that no, he did  
23 not know, and the Arizona Supreme Court did find that,  
24 no, he did not know.

25 QUESTION: There is a conflict between what

1 the Arizona Supreme Court found and what the trial court  
2 found?

3 MS. WALSH: Yes, I believe so. He did not  
4 know that the wife was coming in. They just came into  
5 the room.

6 QUESTION: The tape recorder was in plain  
7 view, that's not debated, is it?

8 MS. WALSH: No, that is not debated. In fact,  
9 the presence of the tape recorder is not necessarily  
10 relevant. The same result would occur if it were the  
11 police officer testifying as to the conversation itself,  
12 or whether a tape recording was actually admitted.

13 I don't believe that the tape recording in and  
14 of itself is the operative factor here. I think the  
15 fact that the police officer was in the room, listening  
16 to this conversation, he was not told that this  
17 conversation would take place.

18 QUESTION: You would agree, I suppose, that  
19 the tape recorder would perhaps be more influential with  
20 the jury than the verbal testimony of a police officer?

21 MS. WALSH: I would agree with that.

22 QUESTION: Mrs. Kelly, what is the point upon  
23 which you just said that the trial court, the Superior  
24 Court and the Supreme Court of Arizona disagreed?

25 MS. WALSH: Well, I believe that the trial

1 court found that Mr. Mauro knew that his wife was coming  
2 in and knew that the police officer was going to record  
3 the conversation.

4 QUESTION: Whether he knew in advance -- he  
5 surely knew when she in fact came in, when the police  
6 officer in fact came in and sat down, that that was the  
7 situation.

8 MS. WALSH: Yes, but I would submit that that  
9 is a highly coercive situation. She is hysterical and  
10 the tape bears this out. She is crying. She is  
11 sobbing. He has not seen his wife since he left the  
12 house.

13 QUESTION: It's not enough that it be coercive  
14 as a matter of fact. It has to be coercion produced by  
15 the police under our cases. Wouldn't you agree with  
16 that?

17 MS. WALSH: I would agree that it has to be  
18 coercive in that situation, yes. But I believe that the  
19 police, going into the room with the wife who is  
20 hysterical, the police officer testified that she was  
21 upset, in fact, that's why he didn't want her going in  
22 there, that allowing her to go in and listening to the  
23 conversation they knew that it was likely that there  
24 would be incriminating statements made.

25 It's like the excited utterance exception to

1 the evidentiary laws.

2 QUESTION: But you are suggesting that if the  
3 police know that some incriminating statement is likely,  
4 then it is interrogation on their part, but I think you  
5 are forgetting the necessity that the police have  
6 produced the coercion.

7 MS. WALSH: But I think the police did produce  
8 the coercion by allowing the two to get together. I  
9 think that it's a highly coercive situation, when you  
10 look at the facts of the case. A child is dead. They  
11 have not seen each other since he left the house with  
12 the suitcase.

13 She is an emotional wreck at this point in  
14 time, and because of that, of course, it's coercive. Of  
15 course, like an excited utterance, you can expect that  
16 somebody is going to say something, and they're not  
17 going to be thinking about preserving their Miranda  
18 rights in this situation.

19 This Court, in Rhode Island versus Innis, also  
20 touched upon the fact that incriminating statements  
21 specifically include any statements introduced, whether  
22 they are inculpatory or exculpatory, as long as they are  
23 produced by the prosecution. I think it's not  
24 necessarily relevant that these statements were admitted  
25 in rebuttal as opposed to admitted in the case in chief,

1 because they were inculpatory and they were admitted on  
2 behalf of the prosecution to show the evidence of sanity.

3 QUESTION: Were these statements the result of  
4 questions?

5 MS. WALSH: No. The brief exchange was --

6 QUESTION: Does Miranda require questions?

7 MS. WALSH: No, I don't believe that Miranda  
8 requires questions in and of itself. I think that Rhode  
9 Island versus Innis touched on that in defining the  
10 functional equivalent.

11 You don't need to necessarily ask the  
12 questions. I think Miranda does not require  
13 specifically that questions be asked. I think it's the  
14 coercive police activity that you find that.

15 QUESTION: You assert here, and I guess you  
16 have to assert, that the mere demonstration that you are  
17 rational constitutes an incriminating statement. I  
18 mean, it wasn't the substance of anything he said that  
19 showed him to be guilty of a crime, it was just the fact  
20 that he was rational?

21 Now, there are just a million things the  
22 police could do that would produce that result, just  
23 walking in with his breakfast and saying, "Here's your  
24 breakfast. How are you feeling this morning?" And he  
25 says, "Well, I'm fine. How are you?"



1 Now, the police are not allowed to do that  
2 either, because that is causing him to incriminate  
3 himself?

4 MS. WALSH: No, because I think as this Court  
5 has mentioned, there is contact between a defendant and  
6 police, jailers, at all times, that that could produce  
7 that kind of conversation.

8 QUESTION: So then, what's wrong with what  
9 happened here? I mean, what was introduced was not that  
10 he blurted out, "Yes, I did it," and they are  
11 introducing that at the trial. The only thing they are  
12 introducing is the fact that the man was rational.

13 MS. WALSH: First of all, he did blurt out,  
14 "Yes, I did it. You tried as best you can to stop me."

15 QUESTION: Right, but that wasn't the purpose  
16 for which it was allowed to be introduced?

17 MS. WALSH: No, it was not. It was introduced  
18 in order to rebut the insanity defense. But first of  
19 all it is up to the prosecution to prove sanity beyond a  
20 reasonable doubt.

21 QUESTION: So, any demonstration of sanity  
22 while he is at the police station constitutes  
23 incrimination and the police cannot do anything to him  
24 or with him while he is at the station that might let  
25 him show that he is sane? That's rather an extreme

1 position, isn't it?

2 MS. WALSH: That would be an extreme position,  
3 but I think that what happens here is that the police  
4 officers brought the husband and the wife together  
5 specifically to create a situation where incriminating  
6 statements might be made, and it --

7 QUESTION: I would agree with you if they  
8 tried to introduce it to show that he said he had  
9 committed it, yes. But all they are introducing it for  
10 is to show that he was sane, that's all.

11 MS. WALSH: I think the problem with that is  
12 that if you give the fact that these are Miranda  
13 violative statements, you can't say that Miranda is --  
14 that if you have a Miranda violative situation and you  
15 raise the insanity defense, you waive your Miranda  
16 rights or any other rights protected by the Constitution.

17 What you would be saying is that, of course  
18 they couldn't introduce these statements otherwise, but  
19 if you invoke the insanity defense then indeed you are  
20 waiving your right to exclude Miranda violative  
21 statements. I would submit that that would be an unfair  
22 result and an unfair burden to legitimate criminal  
23 defendants who raise the insanity defense legitimately,  
24 as it was in this case.

25 QUESTION: Well, you then have to be very

1 careful about talking to any prisoner who is in custody  
2 if you think he is going to be raising an insanity  
3 defense. You can't talk to him about anything.

4 MS. WALSH: I don't think --

5 QUESTION: Because as you say, it's not just  
6 the recording of it. The recorder didn't matter. You  
7 shouldn't be able to testify that the man seemed to be  
8 rational. You really have to keep him incommunicado.

9 MS. WALSH: I think the Arizona Supreme Court  
10 addressed that issue. I think that they can testify as  
11 to behavior, but they cannot provoke a situation, as  
12 they did here, by putting the husband and the wife  
13 together.

14 Granted, it was Linda Mauro's idea, but I  
15 don't think -- you know, they can still testify as to  
16 behavior.

17 QUESTION: It doesn't make any sense to talk  
18 about provoking a demonstration of rationality. One can  
19 provoke a confession, yes, I committed the crime. But  
20 here you are talking about provoking a demonstration of  
21 rationality and that seems to me a very strange concept.

22 MS. WALSH: I don't think -- they were not  
23 provoking rationality, per se, but they were attempting  
24 to get anything they could to use against this guy or  
25 his wife in the prosecution, and they introduced it and

1 there were incriminating statements as far as committing  
2 a crime.

3 They introduced it in order to show sanity.  
4 The thing of it is -- and there is a little bit of a  
5 problem with the reason they did it. They say that --  
6 or at this point they attempt to -- the State attempts  
7 to raise an argument that because an attorney testified  
8 as to behavior, and because a tape was admitted, that  
9 another attorney, defense attorney, took between the  
10 client, Mr. Mauro and himself, that somehow there was a  
11 waiver which allowed --

12 QUESTION: Supposing that I am -- let's take  
13 this in a classic Fifth Amendment context. Supposing I  
14 am called before a Committee of Congress and they begin  
15 to interrogate me, and they say, "What's your name," and  
16 I say, "I decline to testify on the ground that it might  
17 incriminate me." And the person asking the question  
18 says, "Well, it's always been held that you have to  
19 answer your name and address. You have to get to  
20 something actually incriminating." And I say, "No, if I  
21 give my name it might prove that I am rational and  
22 therefore" -- now, you wouldn't think that would be a  
23 permissible basis for invoking the Fifth Amendment  
24 before a Committee, would you?

25 MS. WALSH: No.

1 QUESTION: Why does it make any difference  
2 here then, if Miranda is designed to secure the Fifth  
3 Amendment rights?

4 MS. WALSH: I think that what the Arizona  
5 Supreme Court is trying to say is, they do not approve  
6 of the behavior of the police department and they are  
7 not going to be allowed to introduce this tape into  
8 evidence.

9 QUESTION: Well, that's perfectly permissible,  
10 if they want to say that as a matter of Arizona law.  
11 But what they did here, they said the federal  
12 constitution prevents them from doing it. I mean, it's  
13 not enough just that the Supreme Court of Arizona  
14 doesn't approve of the behavior of the police  
15 department, to sustain a federal constitutional  
16 challenge.

17 MS. WALSH: I think what the Arizona Supreme  
18 Court is saying is that if you have a violation of the  
19 federal constitution, if you have a Fifth Amendment  
20 violation as they hold here, then you cannot turn around  
21 and introduce it through the back door because the  
22 insanity defense is raised.

23 And what they are saying is that there is not  
24 going to be a situation where if you invoke or raise the  
25 insanity defense you are going to give up your Miranda



1 rights, because the evidence would not have been allowed  
2 to show that the man committed the crime, assuming a  
3 Fifth Amendment violation.

4 What they say is they are not going to  
5 back-door it, because there are incriminating statements  
6 on there that he did commit the crime. And it was taken  
7 by the police department in what the Arizona Supreme  
8 Court held to be impermissible conduct.

9 QUESTION: I take it if the wife came to visit  
10 her husband and the police said, fine, go ahead, and no  
11 policeman was present, no recording device, and the lady  
12 talked with her husband and came back and then she said,  
13 "I want to tell you what my husband said," and she told  
14 them and it was quite incriminating, and she says,  
15 "Sure, I'll testify to it," would that be a violation of  
16 Miranda rights, just because the police permitted the  
17 wife to talk?

18 MS. WALSH: No, I don't think you could say  
19 that that would be a violation of the Miranda rights,  
20 and I think under that situation, assuming there was no  
21 husband-wife --

22 QUESTION: Even though the police let the lady  
23 in and they gave her permission and they thought to  
24 themselves, well, he may make some incriminating  
25 statements and she may tell us?

1 MS. WALSH: I think we are getting a little  
2 remote in time for something like that. Rather than the  
3 police going in with her, that --

4 QUESTION: So, it's the police presence, is  
5 that it?

6 MS. WALSH: I believe it's the police presence  
7 that the Arizona Supreme Court was condemning.

8 QUESTION: Well, is there anything in our  
9 cases that indicates that that should -- that the case  
10 should turn on that kind of a factor?

11 MS. WALSH: I don't believe so, Justice  
12 O'Connor. I think the case should turn on the fact that  
13 this was found to be the functional equivalent of  
14 custodial interrogation, and it should also turn on the  
15 fact that, assuming the Fifth Amendment violation, you  
16 cannot then introduce the tape into evidence.

17 QUESTION: Well, I am more interested in  
18 whether there is a Fifth Amendment violation at all, and  
19 I don't see that there is. I'm trying to understand  
20 from you what makes it a Fifth Amendment violation.

21 MS. WALSH: The Fifth Amendment violation  
22 comes from the fact that -- and I think the Supreme  
23 Court of Arizona pointed it out -- if Linda Mauro had  
24 not asked to go in and see her husband, the police could  
25 not have gone in and taped statements made in that

1 situation. They could not interrogate him.

2 But what they did was, they put her in there  
3 and while she was not an agent of the police she was  
4 certainly the motivating factor that prompted him to  
5 make incriminating statements.

6 QUESTION: Well, they granted the defendant's  
7 wife's request to talk to him?

8 MS. WALSH: Yes.

9 QUESTION: And sat there in plain view while  
10 she did so?

11 MS. WALSH: Yes.

12 QUESTION: And you say that is coercion?

13 MS. WALSH: I say that under the circumstances  
14 of this case, that was coercive behavior, but if you  
15 take that tack, there is no appropriate waiver under  
16 Edwards. Under Edwards you need some kind of initiation  
17 of contact from the defendant, and you need --

18 QUESTION: In other words, you think that  
19 Edwards means that the police could not permit the wife  
20 to see him?

21 MS. WALSH: I think that once counsel -- the  
22 right to counsel had been invoked, as it had in this  
23 case, then the police could not have gone in there with  
24 the wife, unbeknownst to the husband. There was no  
25 initiation and --

1 QUESTION: This was beknownst to the husband.

2 MS. WALSH: Not until she walked in. He had  
3 no say-so as to whether or not he could see his wife.  
4 He is sitting there. They walk in, the wife, the police  
5 officer, and the tape recorder.

6 She is hysterical and she is sobbing and she  
7 is crying. And she's blurting out things and he's  
8 blurting out things. And I think under an Edwards  
9 analysis, no, you would not have the appropriate -- and  
10 what has not been done in thss case is to completely  
11 analyze the whole situation as under Edwards, not only  
12 as to initiation but as to the voluntariness.

13 First of all, you know, was it a free choice,  
14 and second of all, did he understand the consequences of  
15 what was going on when his wife walks in with a police  
16 officer, and that would get into his mental state as  
17 well as --

18 QUESTION: Did he ask to see his wife? Did he  
19 ask to see his wife?

20 MS. WALSH: No, he did not.

21 QUESTION: Well, I thought the Attorney  
22 General said he did.

23 MS. WALSH: I believe that the testimony --  
24 and there was a brief statement by the trial court judge  
25 that they both knew, but I believe that the testimony

1 was, the consultation between Detective Manson and Linda  
2 Mauro did not include any statements to Bill Mauro by  
3 either Detective Manson or Sergeant Allen or Captain  
4 Latham, or anybody there that he would be -- that he  
5 knew that the wife was coming in.

6 And while the trial judge did make an  
7 offhanded comment about -- that he knew, I think that  
8 the testimony, if you go through the testimony of the  
9 police officers, there was no indication that he knew  
10 that his wife was coming in.

11 QUESTION: Ms. Walsh, let me just see if I  
12 understand your theory. You are saying that he had  
13 invoked his right to counsel, and under Edwards the  
14 police cannot initiate interrogation, and so that if the  
15 police officer had walked in unannounced with the wife  
16 and said to the man, "Will you please tell your wife  
17 everything I've been asking you," that would have been  
18 clearly impermissible.

19 Or if he had said, "I hope you'll talk to your  
20 wife while I sit here and listen," that would be closer,  
21 and you are saying it is just the functional equivalent  
22 if he just walks in and just sits down and listens, that  
23 they all boil down to the same thing? That is your  
24 position, I take it.

25 MS. WALSH: My position is that, yes, it would



1 be the functional equivalent and that there would be no  
2 appropriate waiver.

3 QUESTION: It's just as much interrogation if  
4 he implicitly says, "I'd like you to talk to this lady,"  
5 as if he says, "Please do"?

6 MS. WALSH: That's right. The police officers  
7 testified that basically what they went in there to do  
8 was find out what was going on, and I think it's also  
9 important to remember that it was possible to get the  
10 husband and the wife together and take care of the  
11 problem of escape by allowing -- and take care of the  
12 problem of her safety by allowing them, if that's what  
13 their motives were, to speak in the jail facilities.

14 There was testimony that they could have --  
15 and then everybody knew that they were getting ready to  
16 take Bill Mauro over to the jail and there are  
17 facilities there that they could have allowed Bill and  
18 Linda to talk together, if that's what they had so  
19 desired to do.

20 The fact of the matter is, they wanted to find  
21 out what was going on. They wanted to find out Linda's  
22 involvement. They wanted to find out if the two were  
23 going to concoct stories. And in doing that, their  
24 motive in going in there and listening and even taking a  
25 tape recorder in there was to accumulate incriminating

1 evidence, to see what they could get.

2 I would submit that that, in and of itself,  
3 shows that the activity by the police department that  
4 was so condemned by the Arizona Supreme Court amounted  
5 to the functional equivalent of custodial interrogation  
6 under Rhode Island versus Innis, that the intent of the  
7 police officers by their own testimony was so clear, and  
8 what the Arizona Supreme Court was saying was, that  
9 activity is going to be condemned. We are not going to  
10 allow in the tape recording which was made.

11 I think that the Arizona Supreme Court also  
12 said that just because you invoke the insanity defense,  
13 we are not going to make an exception for you. We are  
14 not going to hold that your Miranda rights, even though  
15 they may have been violated, are going to -- the fruits  
16 of the evidence drawn from that are not going to be  
17 allowed in through the back door, if you will, because  
18 you invoked the insanity defense.

19 I think for those reasons the Arizona Supreme  
20 Court was correct in finding that this was the  
21 functional equivalent of custodial interrogation and  
22 that the tape was correctly held to be suppressed by  
23 that Court.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mrs.  
25 Walsh.

1 Mr. Roberts, you have four minutes remaining.

2 ORAL ARGUMENT OF JACK ROBERTS, ESQ.

3 ON BEHALF OF THE PETITIONERS - REBUTTAL

4 MR. ROBERTS: Thank you, Mr. Chief Justice.

5 It is a little bit late, Your Honor, for  
6 respondent to be arguing an Edwards issue because the  
7 Arizona Supreme Court plainly decided this on the basis  
8 of the Fifth Amendment and Miranda and Rhode Island  
9 versus Innis.

10 QUESTION: Why do you say that?

11 MR. ROBERTS: That was the basis of the  
12 Arizona Supreme Court's decision, Your Honor.

13 QUESTION: Because what?

14 MR. ROBERTS: That was the basis of the  
15 Arizona Supreme Court's decision, not Edwards.

16 QUESTION: No, but the Edwards is clearly  
17 relevant because that's what imposed the obstacle to the  
18 police interrogation, that he would ask for his -- you  
19 know, he invoked Edwards.

20 MR. ROBERTS: All right, Your Honor. In  
21 response to tht, Edwards requires that police initiate  
22 contact.

23 QUESTION: Well, but would you agree with my  
24 hypothetical, if they walked in together unannounced and  
25 the police officer said to the man, "Would you please

1 tell your wife the answer to the questions I have been  
2 asking"?

3 MR. ROBERTS: Yes, I think I would agree with  
4 that hypothetical, Your Honor. But that's not what  
5 happened.

6 QUESTION: That's right. But if he just said,  
7 "Would you please talk to your wife and tell her  
8 everything you can remember"?

9 MR. ROBERTS: Probably the same result. That  
10 also is not what happened.

11 QUESTION: As soon as you take away the  
12 question mark, then it's a different case?

13 MR. ROBERTS: Well, you have no police  
14 initiation of anything here, Your Honor. You just have  
15 them allowing his wife to see him, and that's the --

16 QUESTION: What if the police officer had  
17 brought her to the station -- she hadn't asked it -- and  
18 said, "We would like you to go in and talk to your  
19 husband and we would like to listen," and that's all  
20 they said to her and then they walked in exactly as they  
21 did?

22 MR. ROBERTS: A much closer and much tougher --

23 QUESTION: What's the answer? If they say  
24 nothing in his presence, other than what they said here,  
25 why is that a hard case at all under your theory?

1 MR. ROBERTS: Well, because there you at least  
2 have the police initiating -- encouraging the wife.

3 QUESTION: The difference between the two  
4 cases is that in this case she asked for and they  
5 initially turned her down, and then he talked to his  
6 boss and the boss said, "No, take her in there." It  
7 would have been different if the boss had in the first  
8 instance said, "Go get her and take her in there"?

9 That would be a different case?

10 MR. ROBERTS: That would be a different case.

11 QUESTION: Okay.

12 MR. ROBERTS: But the other point I was going  
13 to make is, Mrs. Walsh is perfectly correct, the trial  
14 judge did say in his findings at pages 218 and 219 of  
15 the joint appendix that they were both told, that is,  
16 Linda Mauro and her husband, that they were being  
17 recorded. Actually, Detective Manson, to keep the  
18 record straight, only told Linda Mauro that.

19 But the answer to that is, it was obvious when  
20 Mrs. Mauro walked in the room, all Mr. Mauro had to say  
21 was, "Get out. I don't want to talk to you." As a  
22 matter of fact, if you look at his last response in this  
23 brief exchange, that's what he finally told her, "Don't  
24 talk to me. Get out."

25 That's what showed he was so rational. He



1 didn't refuse to see his wife. Let me point that out.  
2 It's not like Edwards where the jailer came and said,  
3 there's some police here who want to talk to you, and  
4 Edwards says, "No, I don't want to."

5 The jailer tells him, "You've got to," and  
6 then Edwards talks to them. That's not the case. He  
7 didn't have to talk to his wife. He could have kept his  
8 mouth shut. The trial court made that common sense  
9 observation also.

10 He chose not to. He never said, "I don't want  
11 to see my wife, get out of here." He talked to her.  
12 And all the police did was stand there and listen. It  
13 simply does not meet this Court's requirements under  
14 Innis or Miranda, and we respectfully ask the Court to  
15 reverse.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
17 Roberts.

18 The case is submitted.

19 (Whereupon, at 1:54 o'clock p.m., the case in  
20 the above-entitled matter was submitted.)  
21  
22  
23  
24  
25

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#85-2121 - ARIZONA, Petitioners V. WILLIAM CARL MAURO

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BY Paul A. Richardson

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