OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-899

TITLE CONNECTICUT, Petitioner V. WILLIAM BARRETT

PLACE Washington, D. C.

DATE December 9, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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CONNECTICUT, :

Petitioner, : No. 85-899

v. :

WILLIAM BARRETT :

- :

Washington, D.C.

Tuesday, December 9, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 o'clock a.m.

APPEARANCES:

JULIA DiCOCCO DEWEY, ESQ., Assistant State's Attorney, Wallingford, Connecticut; on behalf of the petitioner.

CHARLES A. ROTHFELD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting petitioner.

ROBERT L. GENUARIO, ESQ., Norwalk, Connecticut; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE REHNQUIST: Ms. Dewey, you may proceed whenever you are ready.

ORAL ARGUMENT OF JULIA DiCOCCO DEWEY

ON BEHALF OF PETITIONER

MS. DEWEY: Mr. Chief Justice, and may it please the Court:

The respondent in this case, William Barrett, was arrested on a charge of sexual assault. Shortly after his arrest, within a matter of hours, he was given four separate sets of Miranda warnings. He told police officers that he had no problem talking about the incident, but he would not give a written statement without an attorney.

The question presented in this case is whether an oral statement given by the respondent is admissible as evidence in the subsequent criminal trial. As I just indicated, Mr. Barrett was arrested on a charge of sexual assault. At the time of his arrest he was warned in accordance with Miranda versus Arizona.

He was then transported to a nearby town. Upon arriving he was again given his Miranda warnings. He received a third set of Miranda warnings prior to the actual interrogation.

The Connecticut trial court and the Connecticut Supreme Court both found that the defendant stated he had no problem talking to the officers but he would not give a written statement without an attorney.

Mr. Barrett then proceeded to give a narrative account of the incident, admitting that he and his co-defendant had intercourse with their victim. He claimed, however, that this was a consensual act, despite the fact that during the act he had in his hands a screwdriver.

The police had unsuccessfully attempted to tape record the defendant's first statement. In an effort to get a valid tape recording of this statement, they once again advised Mr. Barrett of his Miranda rights.

Again the defendant repeated that he had no problem talking with the officers but he would not give a written statement in the absence of counsel. The defendant then proceeded to give a narrative account paralleling the first account.

At trial the defendant contended that his two statements were involuntary. However, at the conclusion of a suppression hearing the trial court held that the defendant had made a knowing, voluntary and intelligent waiver of his right to remain silent. Therefore, the

two statements were both introduced.

On appeal, Mr. Barrett again contended that the statements were involuntary, but he added the contention that the statements were taken in violation of Edwards versus Arizona. The trial court's factual finding was basically not challenged by the Connecticut Supreme Court.

Instead, that Court held that the defendant's refusal to give a written statement without an attorney present was a clear request for the assitance of counsel to protect his Fifth Amendment rights. In reaching this conclusion the Connecticut Supreme Court never considered the fact that the defendant had not invoked his right to remain silent for purposes of that oral interrogation.

Thus, the Connecticut Supreme Court misconstrued this Court's holding in Miranda and in Edwards. This Court has consistently made it clear that the purpose of the Miranda warnings is to dispel that coercion that is inherent in police interrogation. Additionally, Miranda is designed to assure that a suspect in police custody is adequately advised of his Fifth Amendment rights prior to giving any statements.

Custodial interrogation was viewed as inherently coercive. However, under the Miranda

holdings, once a suspect has been adequately advised, it is possible for a trial court to find that that suspect did in fact waive his Fifth Amendmen right against self-incrimination and that waiver was an act of free will.

The state does acknowledge that there is a bright line if a defendant does request counsel at the interrogation.

QUESTION: Mrs. Dewey, what if a defendant -- or the defendant in this case in this case refused to sign a written confession because of a belief that only written statements could be introduced in evidence against him?

MS. DEWEY: Justice O'Connor, I don't believe that this Court has every held that the individual knowledge of a defendant or a suspect, a knowledge that's not communicated to the police officers, would have any bearing on whether there was a free and voluntary act by the defendant.

Of course, at a suppression hearing that would become a factor that would be considered by the trial court.

QUESTION: The trial court would have to determine, would it not, that the respondent knowingly gave up his right, understanding that the statements

could be used against him?

MS. DEWEY: It would still be a factual determination for the trial court, if evidence of that nature came before the trial court at a suppression hearing.

QUESTION: Do you think that when someone, a defendant, makes a waiver of this type which is selective or perhaps conditional, that that suggests that there may be some uncertainty on the part of the defendant about what statements can be used against him?

MS. DEWEY: A selective or conditional waiver has never been held to be an equivocal or an ambiguous situation. It could be a factor --

QUESTION: Well, I didn't ask or suggest that it was ambiguous, but does it possibly suggest a lack of knowledge of how the statements could be used?

MS. DEWEY: Under the facts of a particular case, it might be possible that a selective waiver, if it were somehow inherently inconsistent, could suggest a lack of knowledge or could suggest that the defendant did not truly comprehend his Miranda rights.

But again, that would be a factual determination for the trial court, and in this particular case the determination by the trial court was that that waiver, that selective waiver, was not an

indication of -- an indication of a right to counsel or any undertainty, but rather that the defendant was so aware of what his rights were that he chose to exercise some of the rights but not the other. He chose not to have counsel present for the oral aspect, as opposed to the written aspect of the interrogation.

In the present case the Connecticut Supreme Court applied the Edwards rationale in a vacuum.

QUESTION: Excuse me. Before you -- what if in fact he had been under the misperception that anything that he said orally couldn't be used and only the material that he subscribed to in writing could be used. Then what would the result be?

MS. DEWEY: The result should be the same as was held by the Connecticut trial court. The fact that the defendant, or the suspect, hasn't made a shrewd choice once advised of his Miranda rights does not bar the subsequent admission of that statement that the defendant subsequently makes.

An ill-advised choice, an ill choice, rather; a shrewd choice, a choice not in the defendant's interest is not what Miranda was designed to protect. Miranda was just designed to assure that the defendant was in fact advised.

QUESTION: Well, he was advised and he said he

understood it, but in fact he didn't understand it if he thought that anything he said orally couldn't be used against him.

MS. DEWEY: But in the present case, the defendant himself testified that he did understand the Miranda rights and he did understand that what was said could be used against him. He -- and the officers had also testified that in their perception the defendant understood what the Miranda rights entailed. So, in this case there is no question.

QUESTION: You are saying that my question is not this case?

MS. DEWEY: Yes.

QUESTION: Well, part of the Miranda warning, Ms. Dewey, is that whatever you say may be used against you in court, isn't it?

MS. DEWEY: Yes, it is part of the Miranda warning, a warning this defendant received on four separate occasions. Therefore, in this particular case he knew that his actions, his oral statement, could be used against him and he also knew that for purposes of his oral statement he had the right to have an attorney present.

QUESTION: He said explicitly, "I know that anything that I say can be used against me"?

MS. DEWEY: Oh, no. He never said that explicitly. The officer --

QUESTION: You only inferred from the nature of the warning, of the Miranda warning?

MS. DEWEY: The nature of the Miranda warnings, plus the fact that the officers testified that upon each individual right they asked the defendant, "Do you understand this?" "Yes, I do."

QUESTION: "Do you understand," what?

MS. DEWEY: "Do you understand what I've just stated? I believe you understand."

I don't believe they repeated the Miranda warnings.

QUESTION: They didn't say, "Do you understand that anything you say now, we're going to use against you?"

MS. DEWEY: No, I don't believe that they used those exact terms. It would have possibly been better police practice but they did not use those exact terms.

QUESTION: Mrs. Dewey, may I ask you a question, because you referred to what the trial court found. As I understood the appellate court's opinion, it treated it as two questions, one whether he invoked his right to counsel, and then secondly whether he waived the right.

The only question you present in your cert petition goes to whether he invoked the right to counsel, I believe?

MS. DEWEY: Yes.

QUESTION: And the Supreme Court of Connecticut said that the trial court impliedly found that the defendant had requested counsel, and then they point out in a footnote that that's what -- they support that with a footnote.

Now, if that's true, then we have both the trial court and the Supreme Court of Connecticut agreeing that there was a request for counsel, so to the extent there's a factual question, I guess they've resolved it against you, haven't they?

MS. DEWEY: There's an inconsistency in the Connecticut Supreme Court's decision in that regard, where they state that the trial court impliedly found that the defendant had requested counsel. What they are doing is taking the trial court's holding, which is in the joint appendix, and the part of that holding that indicates that the defendant had no problem talking with the officers but would not put anything in writing.

The trial court -- and that was all that the trial court found about the defendant's asserting the right to counsel. There was never an explicit finding

by the trial court regarding an assertion of the right to counsel.

QUESTION: We should appraise -- we should look at the trial court's finding ourselves and not accept what the Supreme Court said about it then?

MS. DEWEY: That is the state's position, yes, Your Honor, that there was never a factual finding made concerning the invocation, and because there was never a factual finding, the Connecticut Supreme Court by applying an automatic rule whenever the word "attorney" is mentioned, was in error.

QUESTION: Do you -- is there any explanation for the fact that, "I won't make a written statement but I will make an oral statement," other than you can't use an oral statement? Is there any other reason he would have made the statement, that you can think of?

MS. DEWEY: Yes, Justice Marshall. There are situations where naturally people are reluctant to put anything in writing but often people aren't reluctant to talk at all. They're willing to say whatever comes into their minds, as long as it is not preserved.

QUESTION: Do you mean, yet, he knew that the officer was going to testify?

MS. DEWEY: There is no indication that he knew the officer was going to testify in this case.

QUESTION: Well, why did he not want a written statement?

MS. DEWEY: There could be any number of reasons including just a reluctance to put anything in writing which would not be dispositive, or the fact that he felt more comfortable talking about the incident.

QUESTION: But he didn't have the slightest idea that it would be used against him?

MS. DEWEY: He was told that anything he said could be --

QUESTION: I said, do you think he had any idea it was going to be used against him when he made the statement?

MS. DEWEY: One would have to presume that having been warned four times that it would be used against him, that he knew that that statement would be used against him. Additionally, Mr. Barrett testified that he understood the rights as given, and having understood the rights it would be natural to conclude that he knew that what he said could be used against him.

QUESTION: Well, what in the rights that he was read said that, "Don't make an oral" -- I mean, "Don't make a written statement"?

MS. DEWEY: Absolutely nothing. The rights didn't talk about the written statement. They talked

about the oral statement, which is what this defendant did give.

Had there been a written statement that the police attempted to utilize, then of course that written statement would have been inadmissible. That was the right that this defendant had invoked.

QUESTION: Didn't he go again the next day?

MS. DEWEY: Excuse me?

QUESTION: Didn't he go after two days in a row?

MS. DEWEY: No. It was all part of one process.

QUESTION: Yes, but it was two times, two separate times?

MS. DEWEY: Only because the --

QUESTION: You said, standing there, that they gave him four warnings.

MS. DEWEY: Within a matter of hours, yes, they did.

QUESTION: Well, that was four different times.

MS. DEWEY: Yes, it was, because of four different situations that had happened between --

QUESTION: And each one of the those occasions, he had no idea that they were going to use it against him?

MS. DEWEY: One would have to assume that, having been advised and having had no -- there being no indication that he didn't comprehend, that he did know that they would be used against him.

QUESTION: May I ask this question, was the respondent ever informed that the police were attempting to tape his statement?

MS. DEWEY: It's not a matter of record that the respondent was informed that they were attempting to tape record it.

QUESTION: The police tried twice to do it?

MS. DEWEY: Yes, they did.

QUESTION: And when they discovered they'd funbled that, then they undertook to write out their recollection of what he had said?

MS. DEWEY: They tried twice to tape it and within a matter of days they did reduce the narrative statement to writing, yes.

QUESTION: They did attempt to write it out?

MS. DEWEY: Yes.

QUESTION: And they used that to refresh their recollection before they testified?

MS. DEWEY: Yes, they did use their written notes to reflect their recollection.

QUESTION: Is it reasonable for us to suppose

that if respondent had known they were trying to tape his statement, or to write it out, that he might have declined to talk to them any further?

Do you understand my question?

MS. DEWEY: Yes, if he had known that they were attempting to tape record it, would he have been more reluctant to give an oral statement.

QUESTION: Yes, yes. In other words, it seemed obvious that he was primarily concerned in not giving a written statement. If he was taped, wasn't that the functional equivalent, equivalent of a written statement?

MS. DEWEY: But it was also obvious in this case that he wanted to tell the police officers his version of the events in order to possibly exculpate himself from any involvement in the sexual assault.

QUESTION: He was willing to do it orally, but my question is whether or not, in view of his not being informed, that actually he was misled?

MS. DEWEY: I don't believe he was misled in this situation. The police didn't do anything that was over-reaching or coercive in this regard. And the mere fact that a conversation would have been tape recorded wouldn't have been dispositive.

It would have been a matter for consideration,

to see whether there had been a knowing, voluntary waiver but it was not a dispositive factor.

QUESTION: Mrs. Dewey, earlier I asked you about the trial court and the Supreme Court. Are the trial court's findings in the materials before us anywhere?

MS. DEWEY: Yes, they are. They're on the Joint Appendix on pages 70 and 71 A, I believe.

QUESTION: 70 and 71 E, thank you.

MS. DEWEY: Yes, they are.

In essence, the Connecticut Supreme Court refused to reach the issue of whether there had been a waiver of rights, and whether that waiver of rights had been an act of free will. We agree that a request for counsel must be narrowly construed, but here the Connecticut trial court ignored the clear tenor of the defendant's own request, giving a talismanic quality to the word "attorney."

This, in effect, engrafted an additional prophylactic rule upon this Court's Miranda mandate. This unwarranted expansion of federal law created obstacles to legitimate waivers and to legitimate choice by defendants.

It thus restricted interrogation in ways not contemplated by the Miranda decision. For that reason,

the opinion of the Connecticut Supreme Court should be reversed and the trial court decision affirmed.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Dewey. We'll hear now from you, Mr. Rothfeld.

ORAL ARGUMENT OF CHARLES A. ROTHFELD, ESQ.

AS AMICUS CURIAE, SUPPORTING PETITICNER

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

I think it's important in the resolution of this case to focus on precisely what went on and what the findings were of the lower courts, because I think that frames the question that's presented to the Court here.

The first point to make, I think, in that regard relates to questions that were asked by Justices O'Connor, Marshall and Brennan and Scalia about precisely what the suspect understood he was doing and what he knew about his rights.

I think it's clear on the record here that respondent testified at trial. The trial court expressly found that he understood the nature of his rights, he understood what he had been told by the police, and that understanding of course included the statement that, "Anything you say can and will be used

against you at trial."

That factual determination was nowhere challenged by the Connecticut Supreme Court. Nothing in its opinion suggests that there's anything wrong with that factual finding by the trial court.

I think that it's also important to recognize that there's nothing inherently contradictory between an understanding of that right, understanding of the consequences of speaking, and the course of action followed by the suspect here where he chose to make an oral but not a written statement.

I think it is a common experience, courts have frequently recognized that people simply are reluctant to put things in writing even though they appreciate that their oral statements have legal consequences. This Court encountered something very similar to this in Butler versus North Carolina, where a suspect refused to sign a waiver statement but proceeded to waive his rights.

The Court found that his waiver was effective because. not the necessary inconsistencies, so long as he appreciated what he was doing. The fact that he didn't make a sensible distinction in his actions is not of any relevance for purposes of Miranda.

Courts of appeals and other lower courts have

encountered situations almost identical to the one involved in this case where a suspect refuses to put a statement in writing, refuses to sign a statement. Those courts have recognized that suspects frequently are simply reluctant to put statements in writing even though they fully appreciate the nature and consequences of what they are doing.

QUESTION: In any of those cases was the refusal accompanied by a request for counsel as it was here?

MR. ROTHFELD: Well, I think in those cases they have refused at least on some occasions to sign statements without the advice of counsel.

QUESTION: Which one? Can you cite any of those?

MR. ROTHFELD: A number are cited in our brief, Justice Stevens, but I cannot tell you specifically.

QUESTION: Because I thought this case was a rather unusual fact pattern myself, but you say there are a lot of cases just like it?

MR. ROTHFELD: Well, I think probably the typical fact pattern is the suspect simply refuses -- says something to the effect that, "I will not make a written statement."

QUESTION: Correct, so --

MR. ROTHFELD: Essentially asserting his right to remain silent rather than his right to request the presence of an attorney.

QUESTION: The cases in which he says, "I won't sign until my lawyer gets here," they're rather rare, I think, aren't they?

MR. ROTHFELD: I think that's true, Your Honor, but I think that the point that I'm trying to make is the rationality of the defendant's decision and whether or not he appreciates -- whether or not there is an inconsistency between the action that he took and his understanding of his rights.

I think the observations made by those courts that people in fact are reluctant to put things in writing even though they're aware of the consequences of what they're doing --

QUESTION: What do you say about the Supreme Court's reference to all the phone calls and the failure of the police to inquire whether he was trying to locate his lawyer or not?

MR. ROTHFELD: Well, I think one statement to make at the outset is that apparently respondent was not in fact trying to contact his attorney. So, whatever the police may have thought he was attempting to do --

QUESTION: How do we know that?

MR. ROTHFELD: I believe there was testimony to that effect at the trial. I may be mistaken about that, Justice Stevens.

So, I think the understanding of the police is not of any relevance to whether or not he was actually --

QUESTION: But the state Supreme Court seemed to think they had a duty to find out whether he wanted to wait for his lawyer?

MR. ROTHFELD: Well, I think I should say something alsc about the factual findings of the lower courts here, as you were discussing before. First, I think there is no disagreement between the two Connecticut courts in this case as to what respondent understood and what the factual setting of the case was.

The courts agreed as to what respondent actually said, that he was willing to make a statement but that he would not put it in writing until his lawyer arrived.

The Connecticut Supreme Court nowhere attempted to overturn any of the factual findings.

QUESTION: No, but isn't it correct that they in effect treated the trial court as having held that there had been an intelligent waiver after a request for counsel, whereas -- and they treated the two questions

separately, and that issue isn't involved here?

MR. ROTHFELD: Well, I think what the Connecticut Supreme Court did, Your Honor, was accept the trial court's findings about what occurred and went on to make a legal conclusion about the significance.

QUESTION: Well, but they also said, the trial court impliedly found that the defendant had requested counsel. Do you think we should just ignore that statement?

MR. ROTHFELD: No, not at all. But I think that what that statement means, Justice Stevens, is a factual account of what the trial court did. The trial court found that he had requested counsel before making a written statement, and the holding of the Connecticut Supreme Court was based on a legal conclusion about the significance of the request that the respondent made.

The Connecticut Supreme Court found that when the suspect stated, "I am willing to speak to you but I will not make a written statement until counsel arrives," that that was an invocation, a legal invocation of his Miranda rights within the meaning of Edwards versus Arizona.

QUESTION: Mr. Rothfeld.

MR. ROTHFELD: Yes, Justice Marshall.

QUESTION: Does the FBI rule still say that if

a prisoner asks for a lawyer you stop questioning him?

MR. ROTHFELD: I think that clearly is the rule, yes, Justice Marshall.

QUESTION: You said what?

MR. ROTHFELD: Yes, indeed it is.

QUESTION: That's still the rule, so it's a good rule, isn't it?

MR. ROTHFELD: It's the rule the Court set down in Miranda. I think the FBI, as any other law enforcement agency, must follow it.

QUESTION: Once a man asks for a lawyer, you stop questioning him?

MR. ROTHFELD: That's correct, Justice Marshall.

QUESTION: And this time you questioned him four times?

MR. ROTHFELD: Well, the question here is whether or not he in fact requested a lawyer. He stated that he was perfectly willing to speak to the police but that he would not make a written statement without the presence of counsel. But he had no objection to talking to the police before counsel arrived.

The question here is the legal significance of this type of partial invocation of Miranda rights. Now, a partial invocation is just that, a partial, limited

invocation and nothing more.

The requirements of Miranda are satisfied if the inherently coercive effects of custodial interrogation are dispelled and that is accomplished by advising the suspect of his Miranda rights and honoring whatever decision he makes about whether or not he is willing to speak to the police, make a statement.

If the suspect freely, voluntarily chooses to invoke his rights only for a limited purpose, which is what the respondent did here, and he then proceeds to voluntarily make a statement to the police, nothing in Miranda or in any of this Court's other decisions would prevent him from doing so or would prevent the police from listening to what he has to say.

The difficulty with the Connecticut Supreme Court's decision -- I think this returns to Justice Stevens' reading of it and exactly what the Court meant to hold -- the Connecticut Supreme Court, I think understood the meaning of Miranda to be that any time a suspect recognizes the value of counsel in any of his dealings with the police, that all questioning must come to a halt until an attorney is present.

But this idea that the police or the courts have some obligation to safeguard the interests of the suspect more fully than the suspect himself thinks

necessary or wants, is completely alien to Miranda which was designed to insure that it is the person who is being interrogated who controls whether or not he is able to make a statement.

The Court emphasized that its holding in Miranda was not designed to make interrogations impossible. It was not designed to prevent suspects from confessing. And the Miranda rules are not intended to insure that a suspect will always act in his own best interest or will always make the wisest possible decision when he --

QUESTION: Do you agree that if he had known that this would be used against him, he would have continued to talk?

MR. ROTHFELD: I think that that was the factual finding of the trial court, Justice Marshall.

QUESTION: I'm asking you.

MR. ROTHFELD: Well, I -- not having participated in the proceedings I can't give a personal opinion, but I think we have to accept the trial court's conclusion that he understood his rights and nevertheless proceeded to talk.

He testified himself at trial that he understood those rights.

QUESTION: Not a general understanding of his

rights, it's a particular one that, "If you talk to this officer he will testify against you"?

MR. ROTHFELD: The respondent was told here, Justice Marshall, "Anything you say can and will be used against you." He was told that four times and each time stated that he understood that.

QUESTION: But he also said, "I won't put it in writing but I will talk."

MR. ROTHFELD: Well, I think as I was suggesting, there are these two types of reasons the suspect may rationally make that distinction. He may think that it is in his interest to try to talk his way out of it, but that he is reluctant to commit himself in writing because if he wants to change his story, it would be more effective if there is no written statement, that in that case it would only be his word against the policeman's.

So, there are all kinds of entirely rational reasons that a suspect may make the distinction. The suspect may in fact be right, that an oral statement carries less weight with the jury than a written statement.

And, again as the Court at least implicitly recognized in Butler and the lower courts have explicitly recognized, people are reluctant to put

things in writing even though they appreciate that their oral statements have legal significance.

I think, given the fact that the suspect was explicitly warned on a number of occasions that everything he said could be used against him, he stated that he understood that, the trial court found that he understood that, there is no reason for anyone to second-guess that conclusion.

If there are no further questions, Your Honor--

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rothfeld.

We will hear now from you, Mr. Genuario.

ORAL ARGUMENT OF ROBERT L. GENUARIO, ESQ.

ON BEHALF OF RESPONDENT

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

The case at bar, like the case in Smith versus Illinois, deals with the threshold inquiry that is mandated by this Court's decision in Edwards versus Arizona, and that threshold inquiry is whether or not the accused in the first instance has invoked his right to counsel.

If the accused has not invoked his right to counsel, then this Court should reverse and remand. If the accused has invoked his right to counsel in the

first instance, then under the standards set forth in Edwards, in Smith versus Illinois, in Michigan versus Jackson most recently, there could be no waiver of that right to counsel unless there was a cessation of the interrogation and then further discussions and conversations were initiated by the defendant.

QUESTION: Is that the only question in the case, Mr. Genuario? There is no question about whether your client understood his rights, whether he understood that these statements could be used against him?

MR. GENUARIO: The question of whether or not he understood his rights and understood that his oral statements could be used against him bears on a decision that this Court might make in finding whether his request for counsel was ambiguous or not. The statements that he made, on their face, are ambiguous and give rise to questions about his understanding.

QUESTION: If he asked for counsel, it may go to that?

MR. GENUARIO: That is correct.

QUESTION: You didn't argue below, did you, that he didn't understand his rights?

MR. GENUARIO: We did argue on appeal, and I would like to correct both the Solicitor General's office and Attorney Dewey. It is not a situation where

the trial court found no -- where the Supreme Court of Connecticut found no difference with the trial court's opinion.

Rather, the Connecticut Supreme Court decided that it did not have to reach the issue of voluntary, knowing and intelligent waiver because as a matter of law he had invoked his right to counsel. So, we didn't even have to get into that issue of the voluntariness and the intelligence of his waiver.

QUESTION: Was that argued before --

MR. GENUARIO: That was argued before the Conecticut Supreme Court.

QUESTION: That he didn't know that the oral statements could be used against him?

MR. GENUARIO: That is correct, Your Honor. There is nothing in the --

QUESTION: The trial court found against your client on that latter point, didn't it?

MR. GENUARIO: The trial court found that there had been a knowing and voluntary waiver. The Connecticut Supreme Court reversed the trial court. We claimed in the Connecticut Supreme Court that the trial court erred in failing to take into consideration certain factors. The Connecticut Supreme Court never had to reach that issue.

QUESTION: Mr. Genuario, I'm not sure I understand why the waiver here could be considered ambiguous. It seemed perfectly clear on its face that counsel was requested for any -- before making any written statement.

What's ambiguous about that?

MR. GENUARIO: I think there is quite a bit ambiguous about it, Your Honor, and the ambiguity arises on two levels. In the first place it is ambiguous as to, under what circumstances the defendant is willing to speak without counsel.

The defendant said --

QUESTION: He said, "I'm willing to speak without counsel but I won't sign anything in writing without counsel." Now, how is that ambiguous?

I can understand that conceivably there might be some question about his knowledge of whether the oral statements could be used. I fail to understand how there's any ambiguity.

MR. GENUARIO: Well, if I might, Your Honor, the defendant did not say that, "I will not sign a statement." The defendant did say that, "Until my attorney arrives I will make no written statement." "Nothing in writing" was the testimony of Officer Cameron.

I think the question is, in relation to the ambiguity, what do those words mean?

QUESTION: Well, he said more than that. Hue not only said, "nothing in writing," he said, "as much as you want orally."

That is from the statements. The police officer says, "He indicated to me that he would not give the police any written statements but he had no problem in talking about the incident."

Again, "He would give no written statement to the police, nothing in writing. However, he would be more than happy to talk about it. He had noi problem with that. He said he was willing to talk about it verbally but he did not want to put anything in writing."

And so on and so forth, 12 different times in the record. It's very clear that he not only said that he wouldn't put anything in writing, but he repeatedly said he would converse.

MR. GENUARIO: That's absolutely correct, Your Honor, and the question --

QUESTION: Well, what's ambiguous about that?

MR. GENUARIO: Well, let me illustrate it this way. If we asked ten Wallingford police officers what Mr. Barrett meant by, "Nothing in writing but I'll be happy to talk about it; I have no problem in talking

about it," I'm sure those ten Wallingford police officers would say that, "Nothing in writing and no written statement," in that context means that, "We won't take out a particular form and we won't have Mr. Barrett write out a statement and we won't have Mr. Barrett sign that statement.

On the other hand, if we asked ten 19 or 20-year old individuals who had no prior dealing with the police, as in the case of my client, that what the words "nothing in writing" mean, I suggest that they would say, "It means you're not going to write down what I say."

I might emphasize, one of the arguments that Attorney Dewey gave during oral argument was one of the reasons somebody would make that distinction is because he wouldn't want his statement preserved. I suggest that the ambiguity, "nothing in writing," deals with the basis upon which -- the very fundamental basis upon which the defendant was willing to speak with the police.

QUESTION: So, you would have no quarrel, then, under these circumstances if the police had not made any notes of defendant's statements and had simply relied on their recollection in the testimony at trial?

MR. GENUARIO: Well, I think the issue goes further than that.

QUESTION: Well, could you answer my question?

MR. GENUARIO: Certainly, Your Honor. In that situation, I think that the statements would still be excluded and the reason for that is that he has expressed affirmatively a desire for assistance of counsel.

There are two questions here. One is whether it was ambiguous, and two, whether it was selective.

QUESTION: Now, do you agree that my hypothesis meets your ambiguousness argument? In other words, the ambiguity as you see it, I understood, was that he might have meant that nothing should be written down.

My hypothesis is, nothing is written down. Does that meet your ambiguity problem?

MR. GENUARIO: It does on the first level, Your Honor, but it doesn't answer the question that Justice Marshall has asked, doesn't it imply that he doesn't understand the distinction and that therefore the reason he wants counsel, and the request for counsel.

QUESTION: Well, I think alot of people probably didn't realize that Miranda was quite this complicated. I can see from the way you view it that a hearing like this could go on for days, while we get into first levels of ambiguity and second levels of

ambiguity.

It's a fairly complicated process, I take it, in your view.

MR. GENUARIO: On the contrary, Your Honor. The position that we take is a fairly straightforward position, that if the defendant has affirmatively requested counsel, and not just in any setting but the setting where he's dealing with the police and he wants counsel to assist him in dealing with the police, that under Edwards all we're asking is that the police step back for a moment.

QUESTION: But he requested counsel conditionally here. He said, even granting all your business about ambiguity, "If it's going to be put in writing I want counsel, but I'm perfectly willing to talk."

MR. GENUARIO: Well, nothing in any of the decisions of this Court have indicated that a conditional request for counsel is not an invocation of that right.

QUESTION: Well, but a good many of our decisions see Miranda as a plain, simple, easy to follow principle, very simple. And we have refused times and again to add on any additional prophylactic rules such as the one you're asking us to add on here.

MR. GENUARIO: I don't think I'm asking for any additional rules to be added on. What I'm suggesting is that when an accused in custody, in dealing with the police, requests counsel that under Edwards it requires the cessation of interrogation.

QUESTION: Suppose he said, "I'll be happy to talk to you. I will be happy to give a written statement. In fact, here." He writes out a written statement and he signs it.

However, "As soon as I give this to you, I'm tired, I want to see counsel," afterwards. As soon as he says that magic word "counsel," suddenly everything changes, is that it?

MR. GENUARIO: Your Honor, we are not making the argument that counsel is --

QUESTION: But why is that any more absurd than the argument you are making? All he did was mention the word "counsel." But he made it very clear to all the officers, "The only thing I want counsel for is a written statement. I'm happy to talk without counsel."

MR. GENUARIO: He requested counsel for assistance with the police.

QUESTION: Only for a written statement? He did not request counsel for assistance with talking with

the police. He explicitly said, "I'll be happy to talk to you without counsel."

MR. GENUARIO: And therein lies a very basic ambiguity in the situation in which he wanted counsel. He wanted counsel to keep his statement from being written down. He wanted counsel to --

QUESTION: That's not what he said. He said, "I will not give a written statement." I don't find that terribly ambiguous. He would not give a written statement unless his attorney was present, would not make a written statement until his lawyer was there.

MR. GENUARIO: Again, I believe that a common man's interpretation of "nothing in writing" would lead to the conclusion that the statements were not to be written down, and I think that the --

QUESTION: Well, Mr. Genuario, do you take the position that every selective or conditional waiver of Miranda such as is in this case constitutes a full invocation of counsel for all purposes?

MR. GENUARIO: If the request is in the --

QUESTION: It sounds like that's your position, that there just can't be a selective waiver. It is impossible to have one, under your view..

MR. GENUARIO: Nothing we're saying would countermand the ruling of this Court in Edwards, which

says that a defendant can in fact waive his right to counsel. But before he does that --

QUESTION: Selectively? What are the magic words that a defendant has to say to ask for counsel only for a written statement?

MR. GENUARIO: There are no magic words, Your Honor, and I think that the request that the individual makes has to be looked at in each and every case. But the issue, of course, is whether he wanted counsel to assist him in his dealings with the police.

QUESTION: Counsel, wouldn't you be much better off if he had testified as to why he did that? I mean that, "A jailhouse lawyer told me, or somebody told me"?

MR. GENUARIO: Well, in that hypothetical --

QUESTION: Wouldn't you be better off?

MR. GENUARIO: We might be better off, depending on what he said in his testimony.

QUESTION: Well, you can't substitute your testimony..

MR. GENUARIO: Absolutely not, and I wouldn't try to.

QUESTION: So, wouldn't you be better off, and isn't it a missing point in your case?

MR. GENUARIO: Well, if in fact -- if in fact

there were some evidence to the effect --further evidence to the effect of a lack of understanding, that certainly would be a stronger case for us. But --

QUESTION: We have a finding of understanding, don't we, by the trial court and no finding on that point by the Court of Appeals?

MR. GENUARIO: We have a finding by the trial court and no finding by the Supreme Court of Connecticut. That's correct, Your Honor. That's correct.

But the issue before this Court deals with a balancing, a balancing of the interest in a right to counsel versus the legitimate interest in interrogation by law enforcement officials.

QUESTION: I thought you were just arguing this as a straightforward application of Miranda.

MR. GENUARIO: I think it is a straightforward application of --

QUESTION: What is there to balance, then?

MR. GENUARIO: Well, the question that this Court has to decide is under what circumstances --

QUESTION: Well, suppose we didn't hold this in Miranda. You are asking us to nevertheless hold it in this case by balancing?

MR. GENUARIO: What I'm suggesting is --

QUESTION: Is that right?

MR. GENUARIO: No, Your Honor. I don't think it is.

QUESTION: What's wrong with it?

MR. GENUARIO: The question that I'm asking this Court to decide, or the question that I think is before this Court, is when does someone invoke his right to counsel.

QUESTION: Well, does that mean how we should read Miranda, is that it?

MR. GENUARIO: I think it means -- I think it certainly deals with an interpretation.

QUESTION: Let's suppose we read Miranda as not covering this case. Then -- but you still are arguing that you should win?

MR. GENUARIO: Well, I think that our reasoning follows from Miranda, and I think it's consistent with Edwards. Matter of fact, perhaps the best factual pattern is a reading of the facts in Edwards, but we've been talking about a conditional waiver.

But in the Edwards case, the defendant invoked his right to counsel and the Arizona Supreme Court and this Supreme Court found that he had in fact invoked his right to counsel by using the words, "I do not want to

make a deal until my attorney arrives." This Court expressly found that that was an invocation of the right to counsel.

Rather than our approach being a novel approach, the novel approach is to say that, having requested counsel in dealing with the police, we can now back away from our holding in Edwards to the --

QUESTION: So, it doesn't require a lot of balancing, then, does it?

MR. GENUARIO: No, I don't believe it does, Your Honor. I think it's ingrained in the Edwards case. Similarly, in Oregon versus Bradshaw, the statement made by the defendant in invoking his right to counsel is, "I would like to have counsel before this goes much further."

What I would suggest to this Court is that if we too narrowly construe request for counsel, then the ease with which that right can be circumvented becomes too apparent. And indeed the facts in this case -- the facts in this case are illustrative of that, "I will not make a written statement," and then we attempt to tape record it.

QUESTION: What if the defendant -- "I want to talk to the police. I want to curry favor with them. I hope that by getting my story out before the police

investigate further they may drop the whole thing," okay.

On the other hand, "I want to be able to change my story and I think, you know, things that are in writing are a lot more impressive on the jury," and what not.

If I want to achieve that result, how do I do it? How could I possibly do it in a fashion clearer than what this defendant did? I mean, beyond telling the police, "I'll be happy to talk to you, indeed, I want to talk to you, let me talk to you but I won't sign anything in writing until I have counsel," what more could I do?

MR. GENUARIO: I think that when a defendant requests counsel in a situation like that, then he has requested counsel and unless after a cessation of interrogation he comes back to the police, there can be no waiver.

This is not an absolute, for all time, "I won't talk to the police" holding.

QUESTION: He hasn't said, "I want counsel," now. He hasn't requested counsel in that sense at all.

You say he requested counsel. He hasn't requested counsel.

MR. GENUARIO: He has indicated a need to have an attorney assist him.

QUESTION: If he gives a written statement.

MR. GENUARIO: That's correct.

QUESTION: And you're saying, "If I want an attorney for a written statement, I have to have an attorney for everything," even though I say, "I don't want an attorney for all things"?

MR. GENUARIO: There's no claim that subsequently he could not waive that right. But there is a claim that at that point, at that point the interrogation should cease because it's more important -- it's more important that that special right to counsel be protected at that point than we continue with the interrogation.

He can waive it. He can waive it, but there has to be a time period in which he's given a little more room, and that's all we're saying. That's all we're saying.

Your Honors, if there are no more questions, I think I will conclude there. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Genuario.

Ms. Dewey, do you have anything more? You have three minutes left.

ORAL ARGUMENT OF JULIA DiCOCCO DEWEY, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MS. DEWEY: Just briefly, Your Honor.

The defendant in this case was given control over the course of his interrogation. He was given a choice by the police officers, and the police officers respected that choice.

My opponent suggests that what the defendant did in this case was give an ambiguous statement, and that that ambiguity that he alleges mandates a presumption that there has been invocation of the right to counsel. But that is a factual question that was never reached by any of the courts below.

He is relying upon a factual determination that was never made by the trial court or by the Connecticut Supreme Court. Instead, the Connecticut Supreme Court applied a bright line rule: any time the word "attorney" is mentioned, it is automatically an invocation of a right to counsel.

They reached that determination without a factual basis, and therefore their decision should be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Dewey. The case is submitted.

(Whereupon, at 11:50 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#85-899 - CONNECTICUT, Petitioner V. WILLIAM BARRETT

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BY Paul A. Richardson

(REPORTER)