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IN THE SUPREME COURT OF THE UNITED STATES

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 TYRONE PATTERSON, :
 :
 Petitioner. :
 :
 v. : No. 86-7059
 :
 ILLINOIS :
 :
 -----X

Washington, D.C.

Tuesday, March 22, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:56 o'clock a.m.

APPEARANCES:

DONALD S. HONCHELL, ESQ., Chicago, Illinois; on behalf of the petitioner.

JACK DONATELLI, ESQ., Assistant Attorney General of Illinois, Chicago, Illinois; on behalf of the respondent.

ANDREW J. PINCUS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae supporting respondent.

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P R O C E E D I N G S

(10:56 A.M.)

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3 CHIEF JUSTICE REHNQUIST: We will hear arguments
4 next in Number 86-7059, Tyrone Patterson versus Illinois.

5 Very well. You may proceed whenever you are ready,
6 Mr. Honchell.

7 ORAL ARGUMENT OF DONALD S. HONCHELL, ESQUIRE
8 ON BEHALF OF THE PETITIONER

9 MR. HONCHELL: Mr. Chief Justice, and may it
10 please the Court, Tyrone Patterson, a 17-year-old youth,
11 was kept in custody for 44 hours without confessing,
12 without seeking to confess, until he was confronted by his
13 indictment, and he asks this Court to apply the safeguards of
14 Edwards versus Arizona and Michigan versus Jackson to protect
15 his constitutional right to counsel, which was automatically
16 applicable upon his indictment.

17 There is no dispute that that Sixth Amendment right
18 to counsel attached in this case, that it apply auto-
19 matically upon the indictment, and that it came into
20 existence without request or action or demand by Tyrone.

21 The question for Your Honors is a narrow one. What
22 is the protection of that right? As in Edwards, as in
23 Jackson, the suitable method to safeguard the Sixth Amendment
24 right to counsel is to bar the government from contact with
25 the accused concerning the case until counsel is present

1 unless the accused initiates communication with the
2 authorities, indicating a desire and willingness to discuss
3 the case. As in Edwards and as in Jackson, this is the only
4 fair way to treat a defendant whose right to counsel has been
5 invoked by the state through the action of indictment.
6 In this cause --

7 QUESTION: Do we know, counsel, in this case, what
8 arrangements had been made for his arraignment after the
9 indictment?

10 MR. HONCHELL: There is no indication --

11 QUESTION: He was indicted in the morning, I
12 take it, on the 23rd.

13 MR. HONCHELL: Yes, that's correct. The police
14 officer returned with the indictment to the police station
15 and that afternoon confronted him with the indictment before
16 the accused had been taken to court, before the accused had
17 been transferred to another facility where he would be
18 housed until taken to court. It is clear that the accused
19 was about to be removed from the custody of the investigating
20 officials, and that they used that opportunity to confront
21 him with the indictment in order to prompt a statement which
22 had not otherwise been obtained.

23 QUESTION: Does the record say that an arraignment
24 hearing had been scheduled?

25 MR. HONCHELL: No.

1 QUESTION: Mr. Honchell, I guess at bottom we are
2 concerned with knowing whether the defendant knowingly and
3 intelligently waived his right to have counsel present for
4 questioning. Is that right?

5 MR. HONCHELL: I don't believe that is the heart
6 of this case. The heart of this case is to protect the
7 Sixth Amendment --

8 QUESTION: I would have thought our concern would
9 be whether he had waived his right to have counsel present.

10 MR. HONCHELL: The question once the Sixth
11 Amendment --

12 QUESTION: A defendant can waive his right to
13 have counsel present, can he not?

14 MR. HONCHELL: Yes. Yes, he certainly can.

15 QUESTION: And what information precisely do you
16 think is needed beyond what this defendant was told in order
17 to be able to make that decision?

18 MR. HONCHELL: The question before the Court is not
19 the knowledge that any accused needs to waive Sixth
20 Amendment rights.

21 QUESTION: Did he need any information beyond what
22 he was given in order to make a knowing and intelligent
23 waiver?

24 MR. HONCHELL: In protecting the Sixth Amendment
25 right to counsel he should not have been approached with any

1 information, including the Miranda warnings, and it would
2 not be the proper protection for this Court to decide the
3 amount of knowledge the accused should obtain for knowing
4 an intelligent Sixth Amendment waiver. It is not the issue
5 for the Court to decide what additional warnings should be
6 created.

7 The question is the protection, and it is our
8 assertion that just as this Court decided in Edwards and in
9 Jackson not to decide what knowledge should be used to waive
10 right to counsel. This Court as well should not decide how
11 much knowledge is appropriate for waiver of counsel. Rather,
12 to protect from -- as a simple and easy surrender of
13 counsel. The Court should protect it by barring any question
14 by the authorities.

15 QUESTION: Or affording any opportunity to try
16 to waive?

17 MR. HONCHELL: Exactly. If the Fifth Amendment
18 right to counsel were under consideration the authorities
19 could secure a waiver by certain knowledge.

20 QUESTION: Unless he asked for counsel.

21 MR. HONCHELL: Yes. If the accused asks for counsel
22 it is appropriate to protect it by barring any contact
23 between the accused and the authorities, whether it involves
24 Miranda warnings, super Miranda warnings, any degree of
25 information.

1 The equivalent protection when the Sixth Amendment
2 right to counsel attaches automatically is equally to forbid
3 providing information to the defendant unless the defendant
4 initiates the interrogation and thereby surrenders the
5 control of the interrogation to the authorities.

6 QUESTION: Mr. Honchell, would you just indulge
7 Justice O'Connor and me? Let's assume that in our wrong-
8 headedness we do think that the issue is whether the accused
9 made a conscious and intelligent waiver. Would you answer
10 the question whether there is any information here that he
11 would have needed to know that was necessary for an
12 intelligent, conscious waiver, that he didn't have?

13 MR. HONCHELL: There has been a wide variety of
14 opinion on the additional warnings beyond Miranda, the way
15 in which they are provided. The authorities seem to
16 indicate that the accused must realize the significance of
17 an indictment and the corresponding significance of the
18 Sixth Amendment right to counsel, that Miranda does not
19 contain provisions by which the accused becomes familiar,
20 and --

21 QUESTION: But for the waiver in this incident,
22 for the waiver that would make admissible these confessions,
23 what additional information would he have had to know to
24 make his waiver of counsel at those confessions conscious
25 and intelligent?

1 MR. HONCHELL: The additional information is
2 difficult to predict as a matter of abstract law. The
3 additional information must familiarize him that he has a
4 Sixth Amendment right to counsel which attaches automati-
5 cally. It is intended to protect him --

6 QUESTION: He was told that, wasn't he? He was
7 told that he had a right to counsel.

8 MR. HONCHELL: He was told -- the word "counsel"
9 was used. He was told he had a right to counsel. But not
10 through information by which it would become meaningful to
11 him, because the method that was used was not designed to
12 alert the accused to the Sixth Amendment rights to counsel.
13 It was designed to offset the --

14 QUESTION: I must say I don't understand what
15 you are saying. You mean they should have said you have a
16 Sixth Amendment right to counsel instead of just, you have
17 a right to counsel?

18 He knew that he had a right to have counsel present
19 before the made the confession. Now, what in addition did
20 he have to know to make the waiver an intelligent one?

21 MR. HONCHELL: He had to meaningfully know he had
22 a Sixth Amendment right to counsel present because --

23 QUESTION: What is the difference between
24 meaningfully knowing and knowing?

25 MR. HONCHELL: Because the warning here used

1 did not convey or express what counsel was intended to do
2 for him after indictment.

3 QUESTION: So then you say in answer presumably
4 to Justice O'Connor's question and Justice Scalia's question
5 he would have had to be told more about what counsel would
6 do for him after indictment before he could intelligently
7 waive?

8 MR. HONCHELL: That there is a right to counsel who
9 would act on his behalf and represent him.

10 QUESTION: Well, don't you think this warning gave
11 him the impression that there was a right to counsel
12 who would act on his behalf and represent him?

13 MR. HONCHELL: No, there is nothing in this warning
14 outside pure Miranda. Miranda was not designed to indicate
15 defense.

16 QUESTION: Well, okay. So it should have said,
17 in addition to saying counsel, counsel who would act on your
18 behalf and represent you? That would have been the magic
19 solution?

20 MR. HONCHELL: That is a possible method, yes.

21 QUESTION: You think that would have made this
22 case come out differently, in your view?

23 MR. HONCHELL: No, because in our view there should
24 not have been any waiver sought through Miranda warnings or
25 otherwise because once the accused is indicted the Sixth

1 Amendment right to counsel is attached and we advocate the
2 same protection that this Court created for indicted
3 defendants or for defendants benefitting from Sixth
4 Amendment in Jackson and defendants requesting counsel in
5 the Fifth Amendment in Edwards.

6 In those two cases Your Honors did not say, well,
7 the additional warnings are necessary, or Miranda is
8 enough, or we are going to allow the police to interrogate
9 the defendants and get a warning. Your Honors said that
10 there can be no interrogation, and that is simply the
11 equivalent protection that this Sixth Amendment right to
12 counsel should provide.

13 QUESTION: Well, in Edwards we said there could
14 be no interrogation when the defendant has said, I want
15 counsel.

16 MR. HONCHELL: Yes.

17 QUESTION: But now here nothing equivalent to that
18 happened, did it?

19 MR. HONCHELL: That's correct, but it is not
20 necessary to ask for Sixth Amendment counsel to be
21 protected by it. It was necessary in Edwards that the
22 accused invoke his right to counsel, to have a right to
23 counsel deserving of protection. There is no necessity in
24 this case that Mr. Patterson invoke his Sixth Amendment right
25 to counsel. It attached automatically upon indictment.

1 The question then becomes --

2 QUESTION: Mr. Honchell, may I ask you --

3 MR. HONCHELL: Yes, sir.

4 QUESTION: -- a question about the standard? Here
5 the officer right after testimony before the grand jury
6 went back, talked to him, told him about the indictment.
7 Would the case be different in your view if there had been
8 a two or three hour interval, and in that interval there had
9 been a counsel designated by the judge to represent him, but
10 there was not an opportunity between the defendant and
11 the counsel to communicate, and the officer then went and
12 did exactly what he did here, gave exactly the same warning.

13 Would the case be the same, in your view, or would
14 it be different? Are we talking -- does it make any
15 difference whether counsel has in fact been appointed?

16 MR. HONCHELL: I don't really think there would
17 be any significant difference.

18 QUESTION: Of course, there would be a very
19 serious ethical difference between the two.

20 MR. HONCHELL: Yes. Oh, certainly.

21 QUESTION: But in constitutional terms I suppose
22 the cases would be precisely the same.

23 MR. HONCHELL: It would be precisely the same
24 because the Sixth Amendment counsel arises merely upon
25 being indicted. It is the other side of the coin when a

1 defendant faces indictment.

2 QUESTION: From the point of view of the
3 defendant I suppose you would tell him the same thing in
4 either situation and he could waive whether he really has a
5 lawyer or not. He could say, I don't need to talk to my
6 lawyer. I can take care of myself.

7 MR. HONCHELL: The protection in either situation
8 would be the same, and it is to bar any effort at getting a
9 waiver, no matter what the warnings are. There is a bar to
10 getting a waiver. There is a shield around the accused
11 through which the police cannot reach the defendant to obtain
12 a waiver, whether there is warnings specified or not, and it
13 is this inviolate protection which cannot be penetrated.
14 The control of the questioning, the control of the
15 interrogation belongs in the hands of the defendant.

16 QUESTION: Here is a police officer comes to tell
17 him about the indictment. I suppose they could do that,
18 or not? Do they have to write him a letter, or what?

19 MR. HONCHELL: There are advantages and dis-
20 advantages to using the indictment as a means of reaching
21 the defendant.

22 QUESTION: Well, the officer comes anyway and
23 tells him about the indictment, and the defendant then says,
24 by the way, I want to make a statement and I don't care to
25 have a lawyer present.

1 MR. HONCHELL: That is a question of initiation,
2 and we would resist that as a means --

3 QUESTION: Well, the officer came to him.

4 MR. HONCHELL: In this case he certainly came
5 to him. He not only told him he was indicted. He began
6 talking to him, began speaking to him. When the accused
7 began asking some questions, if the defendant had wanted to
8 speak to the officer there was plenty of opportunity before
9 this occasion to do so. If the defendant is to be told of
10 the indictment, that should be the sole procedure that
11 occurs. The accused is informed of the indictment. There
12 is no follow-up interrogation. There is no inquiry that it
13 come from a neutral party such as a member of the jail
14 personnel instead of the investigating officer, that the
15 accused not be removed from a cell, taken to a detective
16 bureau, placed within the confines of the police, and thereby
17 put within their control and allowed to be asked about the
18 case or allowed to tell his statement about the case.

19 The police should not manufacture a way to then
20 claim the defendant initiated the interrogation. When the
21 Sixth Amendment right to counsel attaches in this case without
22 any effort by the accused, it is automatic, the fair way to
23 preserve and protect that Sixth Amendment counsel is to use
24 the method this Court itself decided was the fair protection
25 in the Edwards case and later on in the Jackson case when

1 the Sixth Amendment was at stake, and using the information
2 here as a means of reaching the defendant, taking the control
3 away from the accused and by-passing that shield that protects
4 him from interrogation resulted in a statement which was
5 quite literally in violation of his right to counsel, and
6 therefore we would ask Your Honors to use in this case where
7 counsel is equally as important if not more important than
8 in Jackson and Edwards the same protective mechanism. Bar
9 the authorities from reaching the accused unless counsel is
10 provided.

11 QUESTION: Well, in the Fifth Amendment case,
12 there is pre-charge interrogation, in custody?

13 MR. HONCHELL: Yes.

14 QUESTION: There is a right to a lawyer, isn't
15 there, right then and there?

16 MR. HONCHELL: Yes.

17 QUESTION: But it doesn't -- it really has to be
18 exercised, doesn't it?

19 MR. HONCHELL: It has to be exercised to be
20 protected, and the police can seek a waiver of it. This
21 is what Miranda decided.

22 QUESTION: Yes. Well, they interrogate him even
23 though -- they start to interrogate him and notify him
24 about Miranda, and they can go on and interrogate him unless
25 he says, I want a lawyer.

1 MR. HONCHELL: Yes. But it puts the control of
2 the interrogation in the hands of the police.

3 QUESTION: When there is an indictment the right
4 to counsel attaches.

5 MR. HONCHELL: Yes, under the Sixth Amendment.

6 QUESTION: Well, under the Sixth Amendment.

7 MR. HONCHELL: Yes.

8 QUESTION: But why shouldn't it have to be
9 exercised, just like in the Fifth Amendment case?

10 MR. HONCHELL: Because it is a much broader right
11 designed for much greater purposes, and it has been the
12 consistent policy of this Court because of its importance to
13 the trial itself that it attach automatically upon indictment,
14 that it extend to pre-trial proceedings because of the harm
15 done to the accused if he surrenders the Sixth Amendment right
16 to counsel.

17 QUESTION: Yes, but you have been analogizing this
18 to the Edwards situation.

19 MR. HONCHELL: Yes.

20 QUESTION: But of course in Edwards there was an
21 exercise of the right to counsel.

22 MR. HONCHELL: Yes. Yes.

23 QUESTION: There was an exercise of it. The right
24 was already there.

25 MR. HONCHELL: Yes.

1 QUESTION: And the indictment here means you have
2 a Sixth Amendment right. Why shouldn't it have to be
3 exercised?

4 MR. HONCHELL: Because before this Court decided
5 to protect a Fifth Amendment right to counsel, it required
6 that it be exercised. This Court has not required a Sixth
7 Amendment right be invoked. The Fifth Amendment right which
8 exists nevertheless allows the police to --

9 QUESTION: Well, Massiah and other cases like
10 that, the lawyer was actually appointed.

11 MR. HONCHELL: Yes.

12 QUESTION: Or hired, or something.

13 MR. HONCHELL: Yes, that's true.

14 QUESTION: And if he had been arraigned, if he
15 been arraigned and he says, I don't want a lawyer --

16 MR. HONCHELL: Yes.

17 QUESTION: -- would you still have a Sixth Amendment
18 right to counsel that you couldn't -- that you couldn't
19 violate by going to him?

20 MR. HONCHELL: When the accused is represented by
21 counsel, the police would be barred from seeking him unless
22 he permits the police by contacting the authorities when
23 he invokes the Fifth Amendment right to counsel, or in
24 any application of the Sixth Amendment, because we
25 maintain --

1 QUESTION: Well, but Justice White's question was
2 what if he is told he has the Sixth Amendment right at
3 arraignment. He says, no, I don't want a lawyer. I under-
4 stand it all. I don't want a lawyer. Can the police then
5 go to him, and giving him his Miranda warning, ask him
6 questions.

7 You can answer that yes or no, surely.

8 MR. HONCHELL: In that proceeding I think I
9 would indicate yes, he could be approached by the authori-
10 ties, because by waiving his right to counsel at the
11 arraignment in court, it would be an indication he need not
12 have counsel, but I think if the accused is to be fully
13 protected this Court must examine the extent to which he
14 indicates his forfeiture of counsel.

15 If he simply indicates I do not want counsel, that
16 would not be an indication that he is willing to discuss
17 the case with the authorities. If he foregoes his right
18 to counsel and in addition indicates a willingness to
19 discuss the case without counsel, the authorities can then
20 proceed to get the waiver through the particular warnings,
21 but if the accused retains his Sixth Amendment right to
22 counsel by not communicating with the authorities a
23 willingness to discuss the case, then he has not abandoned
24 his Sixth Amendment right.

25 And so long as he retains that Sixth Amendment

1 protection he retains control over the interrogation. This
2 is the distinction which appears before and after indictment.
3 Where should the control over the questioning be placed?
4 And wherever the control is placed, it indicates the
5 protection that that right to counsel receives. After
6 indictment it should remain, as it was in Edwards, as it was
7 in Jackson, at the discretion of the accused, and if he
8 undertakes to forego his right to rely on Sixth Amendment
9 counsel, then he can be confronted by the police, but until
10 he does so, he retains his right, and that is a right which
11 must be protected.

12 So we ask Your Honors to use the protection which
13 was appropriate in Edwards and in Jackson that was not used
14 in this case. The state here seeks to use Miranda warnings
15 as protection for Sixth Amendment counsel. We ask Your
16 Honors to restrict Miranda to the moorings in which it
17 arose --

18 QUESTION: Let me ask you one other question if
19 I may. Supposing a lawyer had been appointed for him. Are
20 you telling me that this protection, the Edwards business
21 of having the police initiate the -- I mean, the accused
22 initiate the conversation would be adequate protection even
23 if there were a lawyer? You don't think there would be any
24 duty on the part of the police to notify counsel who had
25 actually been appointed that they were going to go ahead and

1 interrogate the man?

2 MR. HONCHELL: The police should not be able to
3 interrogate the accused if he is represented by a lawyer.

4 QUESTION: So you would say there should be
5 greater protection if he has actually had a lawyer appointed
6 for him than if he had not.

7 MR. HONCHELL: It should be the equivalent pro-
8 tection. If he is represented by a lawyer or he has the
9 right to be represented by a lawyer he cannot be approached
10 by the authorities.

11 QUESTION: Yes, but see, in the case where a
12 lawyer has been appointed, you seem to be conceding that
13 it would be perfectly permissible for the police to have
14 a situation arise in which the accused initiates some kind
15 of a conversation like this.

16 MR. HONCHELL: Yes.

17 QUESTION: And they could go ahead and
18 interrogate him without ever telling a lawyer.

19 MR. HONCHELL: Oh, no. I understand. No. In
20 that situation the accused lawyer would need to know of
21 the police action. It has not been especially decided as
22 a constitutional issue, but in order to protect the Sixth
23 Amendment right to counsel there would be knowledge.

24 QUESTION: The thing that puzzles me, and it kind
25 of cuts both ways, is why the constitutional protection

1 should change depending on the timing of the interrogation.
2 Say it is the middle of the trial or something. Couldn't the
3 police go to the man and say, you know, initiate a conversa-
4 tion just like this, give him his Miranda warnings, tell him
5 he has got a perfect right to have a lawyer there, but
6 create a situation in which he is willing to talk. Why
7 can't that --

8 MR. HONCHELL: I don't think the protection would
9 change. It begins at the time of indictment. It continues
10 throughout the pretrial, trial, and posttrial stages, but
11 at any step of those proceedings the defendant can initiate
12 contact with the authorities, send word that he wishes to
13 speak to the officials. He would then forego his right to
14 rely upon the Sixth Amendment protection, and if there is
15 counsel introduced in the case, then I think there is the
16 extra protection of advance knowledge to the attorney in
17 the case, but at no time after indictment should the police
18 be allowed to approach the defendant, begin contact through
19 a waiver procedure, and seek a statement. The protection
20 requires that the accused initiate contact with the police,
21 and that did not happen in this case.

22 So relying on the constitutional Sixth Amendment
23 right to counsel, relying on its protection in the similar
24 situations of Edwards and Michigan versus Jackson, we urge
25 that Your Honors find denial of Sixth Amendment counsel in

1 this case, and therefore for that violation reverse the
2 judgment of the Illinois Supreme Court.

3 Thank you very much.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Honchell.

5 We will hear now from you, Mr. Donatelli.

6 ORAL ARGUMENT OF JACK DONATELLI, ESQUIRE

7 ON BEHALF OF THE RESPONDENT

8 MR. DONATELLI: Mr. Chief Justice, and may it
9 please the Court, Your Honors, the State of Illinois does
10 agree that this case is about what effectuates a knowing
11 and intelligent waiver of the Sixth Amendment right to
12 counsel, and on this issue we maintain that the Miranda
13 warnings must be given their common sense meaning, that
14 if they are given this meaning, that the four Miranda
15 warnings which apprise a suspect of his Fifth Amendment
16 privilege against self-incrimination also by their content
17 necessarily apprise him of his Sixth Amendment right to the
18 assistance of counsel and form the basis on which he can
19 make a knowing and intelligent waiver. The --

20 QUESTION: May I ask you the same question I asked
21 your opponent? Would you take the same position if counsel
22 had in fact been appointed?

23 MR. DONATELLI: If counsel is merely appointed by
24 a court, Justice, and the defendant doesn't know about it,
25 I think that plays no role in his -- in the waiver.

1 QUESTION: So in other words, if there were a
2 procedure in Illinois where the judge would, immediately upon
3 the return of an indictment, appoint a lawyer for the man,
4 but there is obviously going to be some delay before they
5 get together, the police could nevertheless still take the
6 indictment, go to the man, and tell him about the indictment,
7 and have a conversation arise like this, and give nothing
8 more than Miranda warnings, and that would be adequate
9 protection?

10 MR. DONATELLI: I think it would be adequate in
11 this regard. It certainly doesn't affect the defendant's
12 comprehension of his rights and his election whether to go
13 with counsel or forego it. So --

14 QUESTION: So his rights, at least until he has
15 talked to the lawyer and the lawyer has given him some
16 additional advice, his rights after indictment and before
17 indictment in this -- in a custodial setting are precisely
18 the same.

19 MR. DONATELLI: There --

20 QUESTION: I mean, there is an additional pro-
21 vision of the Constitution to rely on, but as a practical
22 matter they are exactly the same.

23 MR. DONATELLI: That's right. In terms of the
24 knowing and intelligent waiver of them, I would agree with
25 that point, Your Honor.

1 QUESTION: What about, say, a week after he had
2 met with the lawyer, and so forth and so on, actually, then he
3 knew that he had a lawyer. You would still say the same
4 thing, it is okay for the prosecutor to go talk to him?

5 MR. DONATELLI: If a defendant knew he had a
6 lawyer?

7 QUESTION: Yes.

8 MR. DONATELLI: Once the defendant knows he has a
9 lawyer, and thereby somehow evinces a request for a lawyer,
10 then I think the Edwards rule or the Michigan versus
11 Jackson rule would kick in whereby the police could no
12 longer initiate any kind of interrogation or anything
13 like that, but just having counsel appointed by a court,
14 and that knowledge is not known by the defendant, and he
15 has made no assertion that he might want counsel on his own,
16 I think that has no bearing on the validity of his waiver.

17 QUESTION: Counsel, can the police delay the
18 indictment -- or the arraignment for a few hours in order
19 to talk to him a little bit more?

20 MR. DONATELLI: Could they delay the
21 arraignment? I am not sure --

22 QUESTION: Yes, suppose he is indicted at 10:00
23 in the morning and the judge is available for arraignment
24 any time. Can they delay the arraignment until about 4:00
25 in the afternoon while they talk to him with a Miranda

1 warning?

2 MR. DONATELLI: I don't see any problem with that,
3 Your Honor, so long as before the arraignment they give him
4 his Miranda warnings, advise him, and he makes a knowing
5 and intelligent choice.

6 QUESTION: There is no duty to arraign as
7 promptly as possible?

8 MR. DONATELLI: Well, I know in Illinois the
9 arraignment has to take place within seven days, and a
10 further Edwards response to your questioning of Mr. Honchell,
11 this record is lacking on exactly what -- the arraignment
12 procedure. It does appear that there was no arraignment
13 up until this time, and I can't tell from the record exactly
14 when arraignment did eventually occur.

15 QUESTION: Well, under the rule you propose there
16 would be an incentive to delay arraignment, would there not?

17 MR. DONATELLI: In order to -- the incentive being
18 that they want to talk to the defendant before he ever talks
19 to counsel or --

20 QUESTION: Yes.

21 MR. DONATELLI: -- counsel at arraignment?
22 That could very well be, Your Honor. I will concede that.
23 I don't think that's any problem, because no matter whether
24 there is that incentive, whether they delay it or not, you
25 are still only going to have a waiver based on a full

1 comprehension of the right.

2 QUESTION: Yes, but there is this difference, is
3 there not? The police have an additional fact that may
4 prompt further conversation. Namely, they can go in and
5 say, now you have been indicted. The facts are a little
6 different than they were yesterday. Isn't that of some
7 significance in perhaps --

8 MR. DONATELLI: I think that is the kind of
9 information that is sometimes described as, it might be
10 helpful, it might not be helpful to the defendant, but that
11 is not the question --

12 QUESTION: I mean, it might be helpful to the
13 police in encouraging him to talk, that this is more serious
14 than it appeared yesterday, because now a grand jury has
15 returned an indictment

16 MR. DONATELLI: That's true, too, but again, that
17 is only knowledge that might be helpful to the police action
18 or the defendant's decision. The question before this
19 Court, though, is what is the knowledge that is necessary
20 to fully comprehend the right, and I maintain today that
21 that knowledge is not necessary to the waiver of the right.

22 QUESTION: Mr. Donatelli, I suppose we have been
23 talking about whether counsel has been appointed. I suppose
24 you really don't have counsel until you agree to have that
25 person represent you. Isn't that right?

MR. DONATELLI: That is my position.

QUESTION: I mean, the mere fact that the court has named a counsel, that merely authorizes that individual to come to the defendant and say, will you have me represent you, but the court can't appoint a counsel really.

MR. DONATELLI: I agree with that exactly, and that is certainly the point I was trying to make when I said that knowledge. Unless there is some affirmative response from the defendant saying I want an attorney, the fact that a court on its own appoints an attorney for him is meaningless to the waiver of the right.

QUESTION: Well, Mr. Donatelli, as things actually work in Cook County, Illinois, would a court ordinarily appoint a counsel for a defendant when the defendant wasn't present at an arraignment?

MR. DONATELLI: That would not happen, to my knowledge, Your Honor. In Cook County, the offer of counsel is made at arraignment, and I have never heard of any procedure in Illinois or anywhere actually where counsel is appointed for a defendant outside his presence and without his knowledge.

So the State of Illinois' position is that from listening to the Miranda warnings, those four warnings together with the setting within which they are given, these

1 things convey to the defendant what he needs to know about
2 his right to the assistance of counsel, including that this
3 right could be an advantage to him and that if he foregoes
4 his rights it could be of a disadvantage to him.

5 It is clear from the common sense meaning of the
6 Miranda warnings that by telling him he has a right to
7 counsel, that means he can consult with counsel, he can have
8 counsel present with him at the time, and that he can avail
9 himself of counsel's good professional judgment.

10 QUESTION: May I ask as a matter of practice
11 before indictment when the warnings are given and he knows
12 all this about getting a lawyer, how often does Cook County
13 actually provide a public defender for a person before he
14 has been indicted? Does it ever happen?

15 MR. DONATELLI: How often does --

16 QUESTION: Yes, during a pre-indictment custodial
17 interrogation the Miranda warning is given saying you are
18 entitled to a lawyer and all this. Do they ever actually
19 appoint a public defender before an indictment?

20 MR. DONATELLI: Your Honor, I don't know that --

21 QUESTION: So that really -- that warning is a
22 little misleading, I think, pre-indictment, isn't it? How
23 does he get the lawyer? He says, I want a lawyer. What
24 happens?

25 MR. DONATELLI: At the time of pre-indictment?

1 QUESTION: Yes.

2 They just stop questioning him, don't they?

3 MR. DONATELLI: That is probably true, and either --
4 I think it might be held in a spot where there might be a PD
5 around who could approach the defendant and ask him --

6 QUESTION: What is a PD?

7 MR. DONATELLI: A public defender.

8 QUESTION: There might be a public defender there,
9 but the police actually go out and find one for him? Is
10 that the practice?

11 MR. DONATELLI: That I don't know.

12 QUESTION: I don't think I've ever heard of --

13 MR. DONATELLI: If it is in a setting where there
14 might be one around, that could happen, but I would agree
15 with Your Honor that usually it would be that the -- just
16 questioning would cease until he gets an attorney.

17 Now, along with hearing that he has a right to
18 counsel, of course, the defendant also hears that he has a
19 right to silence, and I think the fact that these warnings
20 are given together suggest to him that these rights are
21 very intertwined at the time of custodial interrogation,
22 in other words, that counsel -- he has to make a decision
23 about counsel before he does another thing. He also has
24 to make a decision about remaining silent, and that counsel's
25 importance to him at that time has to do with his right to

1 silence, and indeed --

2 QUESTION: I take it when counsel is appointed
3 the police are not told now let him alone until counsel
4 has had a chance to talk with him and find out whether he
5 is wanted to represent the accused?

6 MR. DONATELLI: Once counsel is appointed at
7 arraignment, Your Honor, I don't know that there is any
8 mechanism whereby the police are told that they can no
9 longer interrogate him now at their own initiation, but of
10 course Michigan versus Jackson from this Court would tell
11 them that, would tell the police that.

12 QUESTION: Well, suppose counsel has been appointed
13 and counsel has conferred with him and the police know that.
14 Then may the police go and --

15 MR. DONATELLI: I think under the -- the rule set
16 out in Edwards and Michigan versus Jackson is that no, the
17 police cannot initiate an interrogation --

18 QUESTION: Exactly.

19 MR. DONATELLI: -- once he has evinced a desire
20 to proceed with counsel at all encounters with the police.
21 The only thing the police --

22 QUESTION: Of course, we don't need to decide
23 that issue here.

24 MR. DONATELLI: That is exactly right. And I
25 would like to --

1 QUESTION: I take it at arraignment the judge
2 has the obligation to give a more full explanation of rights
3 than just a Miranda warning. Would the Constitution be
4 satisfied if a judge gave a Miranda warning at the
5 arraignment and let it go at that?

6 MR. DONATELLI: I think so, certainly, Your Honor,
7 if that is enough to tell a defendant about his right in
8 one setting --

9 QUESTION: Well, he gives the Miranda warning off
10 the card. Is that enough?

11 QUESTION: No.

12 MR. DONATELLI: I think if that -- yes, because
13 that gives him the basis on which he can fully comprehend
14 and know and intelligently waive his right.

15 QUESTION: You think arraignment proceedings are
16 no more extensive than just reading Miranda rights?

17 MR. DONATELLI: I think practically speaking
18 you are right, it would involve more than that, but I don't
19 think that the way the judge would inform the defendant
20 of his right to assistance of counsel and asking him if he
21 wants counsel appointed, I don't think he would read the
22 Miranda warnings from him, but I am saying their content --
23 in other words, the judge, I think, would give him the
24 equivalent content, but not by reading those warnings off
25 the card. It wouldn't be in the nature of a warning, I

1 would assume.

2 QUESTION: Well, you are really then waiving
3 counsel for trial.

4 QUESTION: Yes, you'd need more than that.

5 MR. DONATELLI: At arraignment? I see the
6 distinction there. You are right. At arraignment that would
7 be a Faretta type waiver, you are right, so the Miranda
8 warnings wouldn't work.

9 QUESTION: Yes.

10 MR. DONATELLI: That clarification is very
11 important. You are right.

12 The Miranda warnings are what conveys the know-
13 ledge and comprehension of the right at the custodial
14 interrogation.

15 QUESTION: Yes. So then there is again the
16 incentive to delay arraignment if the police want further
17 interrogation.

18 MR. DONATELLI: I don't think that is any problem,
19 Your Honor, and the reason is, is that our criminal justice
20 system has a goal of having the most accurate and reliable
21 convictions. I think confessions from a defendant are the
22 best evidence and best assurance that the judgment of
23 guilty is indeed accurate and truthful.

24 QUESTION: And I suppose you would think it would
25 be proper for the prosecutor, not just the police, to go in

1 and tell the defendant about the indictment and let him
2 have a chat with the defendant. That is perfectly all right,
3 too, isn't it?

4 MR. DONATELLI: Yes.

5 QUESTION: Let the lawyer do it, because he is
6 probably professionally better trained even than the police,
7 and he is probably better able to get to the bottom of the
8 true facts.

9 MR. DONATELLI: I would agree with that.

10 QUESTION: That would be an approved procedure,
11 to have the lawyer go to his adversary without counsel and
12 talk with him.

13 MR. DONATELLI: So long as there has been no
14 request for counsel, yes, Your Honor, I would agree with
15 that.

16 QUESTION: I suppose the police can always try
17 to play games with this. If we hold the way petitioner wants
18 I suppose you would have to say that there would be an
19 incentive on the part of the police to delay an indictment.

20 MR. DONATELLI: That is exactly true. There are
21 many stages, you are right, Your Honor, where a delay could
22 be made, whether it is arraignment or indictment, in order to
23 be able to talk with a defendant --

24 QUESTION: In order to be able to talk to him.

25 MR. DONATELLI: -- before he has accepted counsel

1 or requested counsel. There is no problem with that, I
2 think, so long as no request is made --

3 QUESTION: Isn't there some limit on the period of
4 time they can hold a man in custody without charging him?

5 MR. DONATELLI: Well, certainly there is that.

6 QUESTION: They can't just delay indefinitely.

7 MR. DONATELLI: That is exactly right, of course.

8 QUESTION: And I think you said earlier arraignment
9 has to be, what, within seven days?

10 MR. DONATELLI: In Illinois. That's my under-
11 standing, Your Honor.

12 But -- so I think not only do the Miranda warnings
13 convey everything he needs to know at custodial interroga-
14 tion in order to effectuate a valid waiver, but I think
15 what petitioner's position misses is that Miranda, while it
16 serves the Fifth Amendment, it also impacts on the Sixth
17 Amendment concerns, and I think the Miranda opinion itself
18 recognized that.

19 In the opinion written by Chief Justice Earl
20 Warren, this Court explained that these warnings are good
21 not just for the privilege against self-incrimination, but
22 they come with residual benefits, and it talked about some
23 of those residual benefits.

24 So the Miranda opinion itself is replete with
25 such references to Sixth Amendment concerns as counsel's

1 presence in helping to maintain a fair balance between the
2 state and the individual and making available the advice
3 and good professional judgment of counsel, and referring to
4 the custodial interrogation as an adversarial encounter, so
5 I think petitioner's position sells Miranda short by saying
6 it merely protects Fifth Amendment concerns. That may be the
7 purpose of the warning, but even in Miranda this Court noted
8 that the impact was greater than that.

9 I would also like to address what Mr. Honchell does
10 think is the issue today, and that is that no interrogation
11 could take place just by the filing of the indictment. I
12 think that would not be a good result. It serves a function,
13 as I explained a little bit earlier, in the situation where
14 there is a request for counsel. Then it is a good rule,
15 because now we know that the defendant has asked to proceed
16 in all encounters with the police only with the help of
17 counsel.

18 But as I said, our system of justice, criminal
19 justice has a great interest in securing confessions
20 because they make -- they are the best evidence of a
21 reliable guilty verdict, so that police should be able to
22 approach a defendant and talk to him about the case with
23 the intention of using his own words against him in this
24 case even after indictment.

25 I think it helps the criminal justice system

1 because it means the prosecution can come forward not only
2 with an adequate case or with a good case but with the best
3 case it has. So that rule goes way too far and exacts a cost
4 from the criminal justice system, I think, that is
5 unwarranted.

6 One last point I would like to bring up, I would
7 just like to address, in our brief we raised an alternative
8 ground for affirmance. Our position is that the statements
9 were volunteered, so that there is no Sixth Amendment
10 right -- no Sixth Amendment waiver issue here at all.

11 What I would like to say about it is, the response
12 to Mr. Honchell's argument in the reply brief that that
13 issue is waived, in support of his argument, he points out
14 that that issue is not contained in the opinion of the
15 appellate court or the Illinois Supreme Court. Well, as far as
16 that goes, he is correct, but I still think it is disingenu-
17 ous for him to raise the issue, since the state's brief
18 raised this argument on direct appeal, and Mr. Honchell was
19 counsel for defendant on direct appeal, and he responded to
20 that argument in his reply brief on Page 2, and on Pages 6
21 through 7 he argued his response and that the appellate court
22 just didn't address the issue because they affirmed on
23 other grounds.

24 We again re-raised that issue in the Illinois
25 Supreme Court. Again it was not resolved because the issue

1 was affirmed -- the case was affirmed on other grounds. So
2 we have preserved that issue.

3 Therefore, Your Honors, we ask this Court to
4 affirm the judgment of the Illinois Supreme Court.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
6 Donatelli.

7 We will hear now from you, Mr. Pincus.

8 ORAL ARGUMENT OF ANDREW J. PINCUS, ESQUIRE

9 ON BEHALF OF THE UNITED STATES AS

10 AMICUS CURIAE SUPPORTING RESPONDENT

11 MR. PINCUS: Thank you, Mr. Chief Justice, and may
12 it please the Court, we take as our starting point in
13 ascertaining whether the Miranda warning supplied petitioner
14 with the information that he needed for a knowing waiver of
15 his Sixth Amendment right to counsel at the pre-trial
16 interrogation.

17 The test that this Court has announced several
18 times in evaluating the knowing standard of a waiver,
19 whether the suspect knew the nature of the right being
20 abandoned and the consequences of the decision to abandon it.

21 Taking the first part of that test, Miranda
22 warnings expressly convey to petitioner the substance of
23 his Sixth Amendment right. They told him that he had a right
24 to the assistance of counsel at the interrogation, and we
25 think that is the right itself, and it is hard to argue that

1 the warnings do not convey that knowledge of the right.
2 ~~is not true.~~ The Miranda warnings also inform petitioner of
3 the consequences of his decision to waive that right,
4 first, that he would not have the assistance of a lawyer
5 in deciding whether to speak or to stand on his right to
6 remain silent, and second, that if he chose to respond to the
7 questions that he would run the risk that his uncounseled
8 answered would create incriminating evidence that could be
9 introduced against him at trial, and we think again that
10 is the consequence of the decision --

11 QUESTION: What is the Sixth Amendment right to
12 counsel? Is it the right to counsel at trial, or what?

13 MR. PINCUS: Well, the Court has held that it is a
14 right that attaches on indictment and that applies in
15 various critical pretrial proceedings.

16 QUESTION: Well, I know, but it is a right to have
17 counsel at trial, isn't it?

18 MR. PINCUS: Well, at trial and at -- the Court
19 has held it also encompasses various pretrial --

20 QUESTION: Well, are you suggesting that the
21 waiver that was given here waived his right to counsel at
22 trial?

23 MR. PINCUS: No, we think that all it waived
24 was --

25 QUESTION: What did it waive?

1 MR. PINCUS: It waived his right to counsel at
2 the interrogation that was about to take place.

3 QUESTION: And it didn't waive anything else?

4 MR. PINCUS: No, it was limited --

5 QUESTION: It's a waiver but it isn't?

6 MR. PINCUS: Well, it is a waiver of the right
7 to counsel at this pretrial proceeding. The Court has made
8 clear that the right to counsel attaches, in addition to a
9 general right at trial, it is a right that comes into play
10 in critical pretrial proceedings such as interrogation --

11 QUESTION: Why isn't this good to waive counsel
12 at trial?

13 MR. PINCUS: Well, we don't think it conveyed to
14 him the knowledge of what the assistance of counsel
15 embodies at trial. That is obviously the assistance of
16 counsel in a variety of other procedures that take place
17 at trial, cross examination, the rules of evidence, and
18 things like that, and we think that, as the Court indicated
19 in Faretta, there would have to be a colloquy or a warning
20 that gives the defendant the information about what is going
21 to happen at trial so he can knowingly decide whether he
22 wants a lawyer to assist him with those procedures.

23 QUESTION: More important, he wasn't asked to
24 waive counsel at trial here. He was asked to waive counsel
25 at this immediate interview.

1 MR. PINCUS: Well, as I tried to indicate before,
2 I think you are right, Justice Scalia, that it was clear
3 that this was just a limited --

4 QUESTION: Supposing this had been a lineup after --
5 post-indictment lineup, and he gave similar warnings, said,
6 you don't have to have your lawyer there, we would like to
7 have the lineup right away. A lawyer has been appointed for
8 him. Could he waive that Sixth Amendment right to have his
9 lawyer attend the lineup by just response to the -- in jail
10 response to questions like these?

11 MR. PINCUS: Well, we think these warnings
12 wouldn't be adequate because they refer to --

13 QUESTION: Just change them, say we are about
14 to have a lineup and so forth, and we want you to know you
15 have a right to have your lawyer there, would you like to
16 go ahead without it? Would that be sufficient?

17 MR. PINCUS: Yes, we think that that would be
18 sufficient.

19 QUESTION: Without giving notice to the lawyer,
20 that would be perfectly all right?

21 MR. PINCUS: Right. We think that the Sixth
22 Amendment gives the right to the defendant, not to the lawyer,
23 and it is the defendant's assertion of his right to counsel
24 that controls, that controls -- that controlled in Michigan
25 against Jackson and that we think controls in this case, too.

1 If the defendant --

2 QUESTION: Well, Mr. Pincus, even if a lawyer
3 has been appointed, you think there is no obligation
4 whatever on the part of the police to let the lawyer know
5 they are going to be approaching the defendant with a
6 request for waiver of presence during the lineup?

7 MR. PINCUS: Well, I assumed the question was that
8 the lawyer had not been appointed, and an arraignment or some
9 other --

10 QUESTION: No, the lawyer has been appointed.

11 QUESTION: No, I said the lawyer has been
12 appointed.

13 MR. PINCUS: But not as the result of any request
14 by the defendant.

15 QUESTION: Well, he accepted the lawyer --

16 MR. PINCUS: If it is the result --

17 QUESTION: -- but then as the proceeding --
18 critical stage number 2 is a lineup. We have already
19 questioned him, but we now have a lineup. You go to the man
20 without telling the lawyer and say, you have a right to have
21 the lawyer there, but would you be willing to waive it?

22 MR. PINCUS: I think I misunderstood your question,
23 Justice Stevens. We think that if the defendant evidences
24 an attempt to proceed with counsel either by requesting
25 counsel at the arraignment or having his own counsel there

1 by his side at the arraignment, but then the Edwards/Michigan
2 against Jackson type of rule would apply, and the police
3 could not --

4 QUESTION: Supposing the conversation develops
5 this way. They go to him and say, we have scheduled a
6 lineup. So they initiate the -- they certainly have a right
7 to tell him that, just like they told him here, you have
8 been indicted. And then they go ahead, then proceed and
9 say, we can go ahead without counsel if you are willing
10 to do it. You, of course, realize you have a right to have
11 your lawyer there. Would that be consistent with the Sixth
12 Amendment protection if they don't tell the lawyer?

13 MR. PINCUS: Well, I think the question there
14 would be whether there had been an initiation, whether
15 who had -- who had approached whom, and I think --

16 QUESTION: I am saying they initiated precisely
17 as it is here. They told him about the indictment here.
18 They tell him about the lineup in my hypothetical. Why is
19 that different?

20 MR. PINCUS: Well, the difference -- well, the
21 difference with this case is that in the hypothetical the
22 defendant had asserted his right to counsel, so then there
23 is a question of who initiated the interrogation. We think
24 that petitioner is quite wrong in saying that Michigan against
25 Jackson should be transformed into a rule that takes effect

1 upon the assertion of the right by the defendant into a rule
2 that takes effect upon the attachment of Sixth Amendment
3 rights in the air without any decision by the defendant that
4 he wants to proceed with the assistance of counsel.

5 QUESTION: Well, supposing they tell him, look, we
6 can either go ahead with the lineup right now, because we've
7 got these people here, or we can tell your lawyer about it
8 and arrange it at a time that is convenient for him, what
9 do you want to do, and he says, I will go ahead without. Can
10 they do that without telling his lawyer?

11 MR. PINCUS: Well, again, Your Honor, that is
12 not this case.

13 QUESTION: Is there any constitutional objection
14 to their doing that without telling his lawyer?

15 MR. PINCUS: Well, I think the question would be
16 who initiated the inquiry, and --

17 QUESTION: Well, I have given you the facts. They
18 initiate just like they did in this case.

19 MR. PINCUS: Well, Your Honor, again, it is not
20 the facts of this case, because in that case the defendant
21 has already, as in Michigan against Jackson, asserted that
22 he wants to proceed with counsel. This defendant has not --
23 did not ever assert that he wanted to proceed with counsel.

24 QUESTION: Maybe the man never said a word at all.
25 He went in court, they appointed a lawyer for him, and --

1 MR. PINCUS: Well, he evidenced that he wanted
2 to proceed with counsel in that way, by adopting that
3 lawyer as his lawyer. Otherwise, the lawyer couldn't
4 represent him. In this case we think it's fundamentally
5 different, and in fact the Court --

6 QUESTION: So this case would be different if
7 there had been an arraignment? You acknowledge that had
8 there been an arraignment and then they approached him
9 for this interrogation, it would be no good?

10 MR. PINCUS: If there had been an arraignment
11 and he had requested counsel or --

12 QUESTION: He had accepted counsel appointed
13 during the arraignment.

14 MR. PINCUS: Yes, then it would be controlled by
15 Michigan against Jackson. We think the difference here
16 is that Michigan against Jackson doesn't apply, and the Court
17 in Michigan against Jackson said in fact that the request
18 for counsel at the arraignment was, and I am quoting, "an
19 extremely important fact in considering the validity of
20 the waiver."

21 And we think that is the important fact that is
22 missing here, and that is what changes the case. The
23 defendant has not made the choice to be represented by
24 counsel, and what underlies Michigan against Jackson and
25 Edwards against Arizona, the two prophylactic rules, is the

1 fear that the police will try and get the defendant by
2 badgering him to change his mind where he had previously
3 asserted his right to counsel and agree to be interrogated
4 and what the court said is, we are not going to let the
5 police initiate once the defendant has made his choice, and
6 that is all we are asking for here.

7 QUESTION: Well, Mr. Pincus, what about this point
8 of possible manipulation of arraignment time to allow more
9 room for the police to approach the defendant if we were
10 to adopt your rule?

11 MR. PINCUS: Well, Your Honor, the prosecution
12 controls both for the time of indictment and for the time
13 of arraignment, so we don't think that really it's going
14 to make -- moving the time back to indictment will just
15 introduce, as Justice Scalia pointed out, the possibility
16 that the indictment could be pushed back.

17 There are time limits on both. We think there are
18 time limits on arraignment in Illinois, and we think -- and
19 in most systems, and we think there is control -- there
20 is some control, and either rule will not completely bar
21 the government from doing --

22 QUESTION: But if we do rule for you, do you
23 think it is justifiable to delay arraignment in the hopes
24 that a Miranda warning will elicit this kind of
25 confession?

1 MR. PINCUS: Well, Your Honor, we don't think that
2 the Miranda warning elicits the confession, but I think
3 that the prosecutor could delay the time of arraignment,
4 but it doesn't change --

5 QUESTION: And do you think that is desirable and
6 sound policy?

7 MR. PINCUS: Well, I think it depends upon the
8 particular case. There is certainly nothing wrong with
9 the prosecutor telling the defendant his rights and seeing
10 whether the defendant is willing to talk to him. The
11 warnings give, unlike what counsel for petitioner said,
12 the warnings themselves give the defendant control over the
13 interrogation. If he asserts his right to counsel, he
14 will be --

15 QUESTION: Yes, but the fact is different when
16 he -- it is warnings plus indictment in this situation.
17 Before it is just warnings. Is that a difference? Or maybe
18 you think it isn't.

19 MR. PINCUS: Well, we don't think he has to be
20 told that he was indicted in order for there to be a valid
21 waiver. The officers can tell him, and we don't think that
22 that fact changes the calculus, as we discuss in our brief,
23 in any meaningful way.

24 As I was saying, Justice Kennedy, we think the
25 control is always in the hands of the defendant. He is

1 given the warnings. He is told of his rights, and he can
2 decide. If he wants counsel then he knows he has a right
3 to it and he can stop the interrogation right then and there
4 until he has counsel, and we think that really disposes of
5 any problem, because the defendant has control over the
6 proceeding.

7 QUESTION: The defendant in a prison can stop
8 interrogation?

9 MR. PINCUS: He can --

10 QUESTION: Can he?

11 MR. PINCUS: Your Honor, that is what -- he may
12 not be able to physically stop it, but he can prevent --

13 QUESTION: That is what I -- that is what I thought.

14 MR. PINCUS: -- the -- any statements from being
15 introduced against him, so he can protect himself
16 effectively.

17 Thank you, Mr. Chief Justice.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pincus.

19 Mr. Honchell, you have six minutes remaining.

20 ORAL ARGUMENT OF DONALD S. HONCHELL, ESQUIRE

21 ON BEHALF OF THE PETITIONER - REBUTTAL

22 MR. HONCHELL: Thank you, Your Honor.

23 The facts of this case indicate quite vividly the
24 need for the protection and the damage that can happen
25 if this Court allows an indicted defendant to be approached

1 by the authorities. This is a 17-year-old youth who was
2 kept for 44 hours without being indicted, without going
3 to court, without having a lawyer appointed for him,
4 without having hired a lawyer, and during that time the
5 police allowed him to sit. After keeping him for 44 hours
6 they decided that they were going to get an indictment
7 against him, and they still didn't take him to court and
8 they still didn't transfer him out of their custody.

9 They used the form of Miranda warnings.

10 Miranda warnings --

11 QUESTION: If those are problems, I mean, if
12 that length of time is a problem, that is surely a separate
13 one. I mean, maybe we should have a two-hour limit on how
14 long you can hold before indictment, or how long after
15 indictment you can hold before arraignment, but what does
16 that have to do with whether there was a voluntary waiver
17 of counsel here?

18 MR. HONCHELL: What we do have to protect the
19 defendant is that after he is indicted, he is not to be
20 approached by the authorities when they want to use the
21 indictment to get a statement from him. If the authorities
22 seek an indictment, they must respect the Sixth Amendment
23 right to counsel.

24 They did in this case get an indictment. They
25 did not in this case respect his Sixth Amendment right to

1 counsel, and we are in that very vulnerable period when
2 the accused is protected by the automatic attachment of
3 the Sixth Amendment right to counsel, and before he reaches
4 Court where he can meet with counsel or have counsel
5 appointed, and it is in this narrow period of time when we
6 are asking Your Honors to protect a Sixth Amendment right
7 to counsel.

8 QUESTION: He has a right to counsel before
9 the indictment, of course, too, right?

10 MR. HONCHELL: Yes, but that can be overcome
11 when the police approach him and want to discuss the case
12 with him. And that is permissible because he has a Fifth
13 Amendment right which this Court established to protect
14 in custodial settings the right against self-incrimination,
15 and in providing that right this Court provided the waiver,
16 but the state is not seeking a waiver of the Fifth Amendment
17 right. They are seeking a waiver of the Sixth Amendment
18 right. That is established in the Constitution. It is
19 effective only if it can protect the defendant at trial
20 from easy surrender.

21 QUESTION: Fifth Amendment right is not
22 established in the Constitution?

23 MR. HONCHELL: Not the Fifth Amendment right to
24 counsel. That was created by this Court in Miranda to
25 protect the right against self-incrimination, but it is not

1 intended to protect the Sixth Amendment right.

2 QUESTION: We just sort of made that up. That
3 is not in the constitution at all?

4 MR. HONCHELL: There is no constitutional right
5 in the Fifth Amendment to counsel, but Miranda said we are
6 going to apply a right to counsel to protect against self-
7 incrimination, and we are going to allow it to be waived
8 when the police want to use this procedure of warnings. But
9 this Court did not intend that that right be the equivalent
10 of the Sixth Amendment right. This Court did not intend
11 that that waiver be the equivalent of waiver of the Sixth
12 Amendment right.

13 When Your Honors decided to provide a waiver
14 mechanism in Jackson and in Miranda -- I'm sorry, in
15 Edwards versus Arizona, Your Honors decided that the
16 sensible way to protect that right, because it was so
17 crucial, because it was not the equivalent of a pretrial
18 Fifth Amendment right to counsel or a pretrial Miranda right,
19 that the greater the right required greater protection.

20 And it has been discussed here how that right can
21 be avoided, that you can secure an indictment. The police
22 now want to get a statement against the defendant, although
23 our authorities show that there is less need to interrogate
24 after there are formal charges than before because there is
25 some indicia of evidence against the defendant; and they are

1 going to use an indictment to prod a statement from the
2 defendant, so they are going to use it as a weapon, and
3 they are going to use it despite the fact that that very
4 indictment has extended Sixth Amendment protection, and it
5 is this very method that was used in this case when the
6 accused had been detained for such a long period of time,
7 when he was not protected by counsel, under the Sixth
8 Amendment, which has been consistently viewed as auto-
9 matically applicable, that in this situation the control
10 must be in the hands of the defendant.

11 The defendant can't control when he is going to
12 be indicted. The defendant can't control when he is going
13 to be arraigned. The defendant cannot control when he gets
14 counsel, or how soon he will get counsel, or how much he
15 would be able to confer with counsel.

16 QUESTION: What if at the arraignment the judge
17 says, you have the right to counsel, and tells him all
18 about it, now, if you want counsel, speak up, and he doesn't
19 say a word. Do you think that counsel is going to be
20 appointed?

21 MR. HONCHELL: No. I would assume counsel would
22 not be appointed.

23 QUESTION: So you have to exercise your Sixth
24 Amendment right to counsel.

25 MR. HONCHELL: No --

1 QUESTION: There you are at arraignment, here
2 this right is attached, and if you want counsel, you have
3 to exercise it, you have to ask for it.

4 MR. HONCHELL: You would indeed have the right
5 to counsel. You would not have particular counsel
6 appointed.

7 QUESTION: Can you get a Faretta waiver in
8 Illinois by just being silent? He tenders you counsel and
9 you say nothing, the judge won't appoint a lawyer for you?

10 MR. HONCHELL: At arraignment I don't know if
11 a counsel would be appointed.

12 QUESTION: How do you stand --

13 MR. HONCHELL: At the trial he would be appointed.

14 QUESTION: How do you stand moot in Illinois?

15 You stand moot and don't say a mumbling word.

16 MR. HONCHELL: Yes.

17 QUESTION: And the judge appoints a lawyer.

18 MR. HONCHELL: Yes.

19 QUESTION: Isn't that right?

20 MR. HONCHELL: I assume for purposes of the
21 arraignment yes. But nevertheless the right to counsel --

22 QUESTION: For purposes of the whole proceeding
23 unless there is a Faretta type waiver.

24 MR. HONCHELL: Yes.

25 QUESTION: Isn't that true?

1 MR. HONCHELL: Yes. Yes. So to protect the right
2 we ask Your Honors to apply Michigan versus Jackson and
3 Edwards versus Arizona.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Honchell.
5 The case is submitted.

6 (Whereupon, at 11:55 a.m., the case in the
7 above-entitled matter was submitted.)
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REPORTER'S CERTIFICATE1
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DOCKET NUMBER: 86-7059
CASE TITLE: Tyrone Patterson v. Illinois
HEARING DATE: March 22, 1988
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: 3/28/88

Margaret Daly

Official Reporter

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