

ORIGINAL

SUPREME COURT OF THE UNITED STATES

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In the Matter of:

ARIZONA,

Petitioners

v.

RONALD WILLIAM ROBERSON

No. 87-354

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 ARIZONA, :

4 Petitioner, :

5 V. :

No. 87-354

6 RONALD WILLIAM ROBERSON :

7 -----x
8 Washington, D.C.

9 Tuesday, March 29, 1988

10 The above-entitled matter came on for oral argument
11 before the Supreme Court of the United States at 1:38 p.m.

12 APPEARANCES:

13 BRUCE M. FERG, ESQUIRE, Assistant Attorney General of

14 Arizona, Tucson, Arizona,

15 on behalf of the Petitioner.

16 PAUL J. LARKIN, JR., ESQUIRE, Assistant to the Solicitor

17 General, U.S. Department of Justice, Washington, D.C.

18 on behalf of United States as Amicus Curiae supporting

19 Petitioner.

20 ROBERT L. BARRASSO, ESQUIRE, Tucson, Arizona

21 (Appointed by this Court)

22 on behalf of the Respondent.

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1 PROCEEDINGS

2 (1:38 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next in
4 No. 87-354, Arizona versus Ronald William Roberson.

5 Mr. Ferg, you may proceed whenever you're ready.

6 ORAL ARGUMENT OF BRUCE M. FERG, ESQUIRE

7 ON BEHALF OF THE PETITIONER

8 MR. FERG: Mr. Chief Justice, and may it please the
9 Court.

10 The issue before the Court in this case is the proper
11 scope of application of the per se exclusionary rule of Edwards
12 v. Arizona, namely, that the police may not initiate further
13 interrogation of an arrestee who has stated a desire to speak
14 with counsel.

15 More specifically, should, as has been done in some
16 Arizona State cases, the scope of application of Edwards be
17 extended to reach beyond its facts to situations where there is
18 more than one investigation going on, or kept basically as the
19 facts of Edwards were with a single investigation where there
20 were renewed attempts to interrogate on that same
21 investigation, or possibly should Edwards itself be
22 reconsidered.

23 Now, the facts which bring this case before the Court
24 at this time are relatively simple. On April 6, 1985, Ronald
25 Roberson was arrested in the course of a burglary. The

1 arresting officer, Perez, gave him his Miranda warnings, and he
2 said that he wanted a lawyer before answering any questions.

3 However, moments later when Roberson was approached
4 by another officer who was unaware of this indication of
5 rights, who asked whether he'd be willing to make a statement,
6 he indicated that he would, and as a result of this, he was
7 thereafter questioned several different times by a number of
8 different officers.

9 QUESTION: What if he had been aware that he had
10 exercised his right to counsel with respect to another crime
11 being investigated?

12 MR. FERG: The other crime was not in the picture at
13 all at this stage.

14 QUESTION: I know, but what if the second officer
15 knew that he had invoked his right to counsel at an earlier
16 time?

17 MR. FERG: Our position would be if in fact there
18 were a separate investigation as arose in this case, it would
19 be appropriate to ask.

20 QUESTION: So you'd be making the same argument?

21 MR. FERG: Yes, sir.

22 So the situation --

23 QUESTION: Why shouldn't there be a separate warning?

24 MR. FERG: There were in fact separate warnings
25 given.

1 QUESTION: Separate?

2 MR. FERG: Yes, each time.

3 QUESTION: That second one was a separate warning?

4 MR. FERG: Yes, sir. Each time that Mr. Roberson was

5 approached, he was rewarned.

6 QUESTION: He was rewarned?

7 MR. FERG: Yes, sir.

8 QUESTION: So that they admitted that there were

9 separate proceedings?

10 MR. FERG: That's correct.

11 QUESTION: Otherwise, they wouldn't have given the

12 separate warnings?

13 MR. FERG: I believe not.

14 QUESTION: But they if they knew there were separate

15 proceedings, why didn't they abide by the Miranda rule which

16 says, once you want a lawyer and make it clear the questioning

17 stops?

18 MR. FERG: Well, neither in Miranda nor in Edwards

19 was there a multiple investigation situation going on. The

20 Court has not really addressed very specifically what happens

21 when you have multiple investigations except in two situations.

22 One was Westover which was a companion case to

23 Miranda, and the second one was in Michigan v. Mosley and in

24 both of those cases, the Court included language which

25 indicated that if there were --

1 QUESTION: Westover was very well argued.
2 MR. FERG: Pardon me?
3 QUESTION: Westover was very well argued.
4 MR. FERG: And I believe that the Court resolved --
5 QUESTION: I argued it.
6 MR. FERG: The point of Westover though is, and it's
7 connection with Mosley was the indication that if in fact there
8 were a separate investigation that proper warnings were given
9 so that the people in the succeeding investigation were not
10 simply taking advantage of whatever badgering or wearing down
11 had occurred in the first investigation, that that second
12 investigation should be treated separately. And that there
13 shouldn't be an automatic or per se exclusion.
14 So the facts --
15 QUESTION: I don't want to be questioned. I want a
16 lawyer. What reason is there for not leaving him alone and not
17 questioning him about anything including the weather, once he
18 says, I don't want to answer questions without a lawyer? Why
19 keep bringing it up over and over again?
20 MR. FERG: Well, the Court has indicated --
21 QUESTION: Why do you do that?
22 MR. FERG: Because there are legitimate police
23 investigations --
24 QUESTION: Because you expect him to go and give in
25 and breakdown.

1 MR. FERG: I would not characterize it as breaking
2 down. He was put in a position to knowingly exercise his
3 rights under Miranda by being put in the position to realize --

4 QUESTION: Is there any restrictions on how many
5 times you can question a prisoner? How long or anything like
6 that?

7 MR. FERG: The rule that Arizona is suggesting ought
8 to be applied is that if in fact the per se rule of Edwards is
9 maintained at all, that you essentially get one bite at the
10 apple or one chance to interrogate the individual per separate
11 investigation.

12 QUESTION: That's in the Westover case. It says that
13 once he says he wants a lawyer, "all questioning must stop."
14 Isn't that what it says? It's in the opinion. I mean, it
15 hasn't interfered with the efficiency of the FBI. They're
16 still rather efficient, aren't they?

17 MR. FERG: Certainly.

18 QUESTION: And that's what the State court says, just
19 about.

20 MR. FERG: That is the approach that they've taken,
21 but again, it's the State of Arizona's position that what
22 actually happened was an undue extension of Miranda and Edwards
23 beyond their facts. The Court recognized that there in fact
24 legitimate police investigative needs, particularly for
25 example, the language in Moran v. Burbine pointing out that it

1 is not interrogation or admission per se which are deemed
2 unfavorably by this Court, but rather the abuse of that
3 process.

4 And that therefore Miranda itself drew a very subtle
5 balance --

6 QUESTION: Is the State's position the same if the
7 interrogator were to see an individual in both interrogations?

8 MR. FERG: Yes, Your Honor.

9 QUESTION: So it makes no difference even though that
10 might influence the defendant that perhaps it's a continuation
11 of the first interrogation.

12 In fact, here wasn't the detective in the last
13 interview also present at the first interview, one of them?

14 MR. FERG: Detective Quinn was a common element, but
15 he was not present at the time that Mr. Roberson actually said
16 that he wanted a lawyer. The only person present at that time
17 was the arresting officer, Perez. Quinn showed up some time
18 later, and --

19 QUESTION: But Quinn knew about it, didn't he?

20 MR. FERG: No, he did not. The defense counsel below
21 stipulated that none of the officers besides --

22 QUESTION: I know they stipulated, but why wouldn't
23 he be aware of it?

24 MR. FERG: No one told him, including Mr. Roberson.
25 At no point did Mr. Roberson ever indicate any reluctance at

1 all to speak to any of the succeeding officers, and in fact, he
2 was volunteering information which was part of the reason why
3 there were so many other instances of police talking to him.

4 He was indicating that he had information that he was
5 willing to give about drug dealers and about robberies
6 committed by other people. So they were not there badgering
7 him about his offense in which he'd been effectively caught
8 red-handed.

9 QUESTION: It seems to me that in a large and
10 efficiently operated police department, a request for a lawyer
11 ought to be regarded as known to every interrogator, successive
12 or otherwise.

13 MR. FERG: Well, the difficulty is that in a fast
14 breaking situation, even in the best of departments, that
15 doesn't always work. We had one officer here who was on the
16 scene. He was aware of that indication.

17 QUESTION: Well, the fast breaking aspect is one of
18 the difficulties that you face, I think.

19 MR. FERG: So, we have this situation where in fact
20 none of the succeeding officers was aware that any indication
21 for counsel had taken place.

22 QUESTION: Mr. Ferg, as I understood your answer to
23 Justice White, that really doesn't make any difference to your
24 legal position.

25 MR. FERG: No.

1 QUESTION: Your position, as I understand it, is if
2 you have five or six unsolved burglaries in the same
3 neighborhood, you could question him about one. He could ask
4 for a lawyer, and you'd have to stop questioning him about that
5 one, but then the same ones go back ten minutes later and
6 question him about the second one, and do the same thing, the
7 third one, the fourth, the fifth.

8 MR. FERG: Well, what Mosley did and what --

9 QUESTION: Is that right?

10 MR. FERG: Not exactly, sir.

11 QUESTION: Well, why not? Why wouldn't your position
12 permit that?

13 MR. FERG: What we are suggesting is that, as was
14 suggested in Mosley, that there has to be facts which indicated
15 a scrupulous observance and that includes separation in time.
16 There was in fact a different officer, there was a different
17 offense involved.

18 QUESTION: Yes, but a minute ago, you said it didn't
19 have to be a separate officer. But there has to be a time
20 interval, is that what it is?

21 MR. FERG: What we're suggesting is that there really
22 has to be an examination of the totality of the circumstances.

23 QUESTION: Well, I don't understand why. If you wait
24 20 minutes and then go back and say, now I'd like to give you
25 the warnings again, and say, I want to ask you about the second

1 floor robbery. I just talked about the first, and I won't ask
2 you about that any more. But will you talk to me about the
3 second floor.

4 Why can't you just do that under your view?

5 MR. FERG: Under the rule that we're asking for, you
6 could, presuming that it was in fact a separate investigation.

7 QUESTION: Well, yes. It's a separate offense. What
8 is a separate investigation other than a separate offense.
9 You've got 14 offenses on the books, you're asking about each
10 one of them in turn.

11 MR. FERG: Well, there are various ways in which a
12 separate investigation could be conceivably be defined.

13 QUESTION: Well, you have a separate file on each
14 robbery. One was on Thursday, one was on Friday, one was on
15 Saturday, certainly.

16 MR. FERG: There could be a separate type of crime,
17 same type of crime, different events. Could have separate
18 interrogating officers.

19 QUESTION: But none of those are necessary as I
20 understand your argument. Maybe I misunderstand something.

21 MR. FERG: I have been unable to come up with any
22 single factor which would properly distinguish all cases, and
23 that's why it seems to be appropriate to indicate that the
24 totality of the circumstances is the only way to approach it.

25 QUESTION: What you're saying is that the per se rule

1 doesn't apply if it's a separate investigation whatever that
2 means.

3 MR. FERG: Correct.

4 QUESTION: But you would continue to look at the
5 confession to see whether in fact it was coerced?

6 MR. FERG: Yes.

7 QUESTION: Which could take into account all of these
8 other factors that you're concerned about.

9 MR. FERG: Yes.

10 QUESTION: You would absolutely eliminate the per se
11 rule so long as it's a separate investigation?

12 MR. FERG: Yes.

13 No, no, excuse me.

14 QUESTION: No. Well, then I don't understand you.

15 MR. FERG: Assuming that this Court intends to
16 maintain Edwards in some form, what Arizona is arguing for is
17 that it not be applied beyond Edwards facts, namely, in a
18 situation where you have more than one investigation going on.

19 So the result of that would be if you have the man,
20 he's questioned the first time, he invokes his right to
21 counsel, the second situation comes up, separate investigation,
22 come in and all that you can do is ask him can we in fact talk
23 to you about this second investigation, and if he says, no, I
24 still want to talk to my lawyer, then you leave him alone.

25 QUESTION: I thought's that what I said, there's no

1 per se disqualification for the second investigation. You can
2 approach. No per se invalidation if you initiate the contact.

3 MR. FERG: Yes, sir.

4 QUESTION: What exactly did he say, did the prisoner
5 say to the officer? What were his exact words?

6 MR. FERG: Well, the only wording that we have is
7 from a summary police report and whether that is word for word
8 or not is not clear. But what that indicates is that Perez
9 stated in his report that Roberson had indicated that he wanted
10 a lawyer before answering any questions.

11 QUESTION: Well, did, does that not, could that not
12 be forever, that I don't want to answer any questions about
13 anything until I get my lawyer. Couldn't that be interpreted
14 as meaning that?

15 MR. FERG: Well, that is a semantically permissible
16 interpretation of that, but legally it would --

17 QUESTION: But your interpretation is that I don't
18 want to talk about anything else. Now how you get it out of
19 that, I don't see.

20 MR. FERG: Well, the only investigation that was in
21 view to anyone at the time he invoked his rights was the one in
22 which he was in fact grabbed at the scene. Therefore, it seems
23 unreasonable to suggest --

24 QUESTION: He wasn't released was he?

25 MR. FERG: No, he was kept in custody. And he was

1 approached some three days later about this investigation which
2 had been developed out of totally separate things.

3 QUESTION: But he was still under prison, he was
4 still under.

5 MR. FERG: In jail, yes.

6 The reason why Arizona is advocating this particular
7 approach can be based on two types of grounds. First is
8 precedent. As I've already indicated, neither Miranda itself,
9 nor Edwards deals with a multi-investigation type of situation.
10 The only cases that do deal with those are Westover and Mosley
11 and they both indicate that with proper facts, such that there
12 is a reasonable separation of the one investigation from the
13 other, that in fact that kind of a statement which is preceded
14 by another appropriate rights warning ought to be admitted.

15 QUESTION: What happens under your theory if in the
16 second interrogation which is lawful, he admits to something
17 that pertains to the first investigation? Is that admissible?

18 MR. FERG: I would argue that it would be.

19 QUESTION: I thought so.

20 MR. FERG: Because the police have in that instance
21 done nothing inappropriate. The fact that he felt moved to
22 talk about something which was really not germane to the thing
23 that he was being interrogated about at that stage, as Miranda
24 says, things which are volunteered are always admissible.

25 So we have effectively precedent, a situation which

1 permits or suggests that separate investigations ought to
2 indeed be treated differently.

3 Policy question. This Court has made it very clear
4 that exclusionary rules which is effectively what the rule of
5 Edwards is ought not lightly to be extended. And that this
6 kind of resistance to extension is particularly true in the
7 Miranda type of area.

8 Chief Justice Rehnquist's in Chambers opinion in Fare
9 v. Michael C. summarizes a number of cases like that. Since,
10 as was indicated in Moran v. Burbine admissions are in fact
11 favored by the law, it says there that they are more than
12 merely desirable but essential to society's compelling interest
13 in finding convicting and punishing those who violate the law,
14 then there needs to be a weight against that interest what
15 exactly is going to happen.

16 To exclude a properly warned totally voluntary
17 statement which comes out of the separate investigation simply
18 is not a reasonable drawing or weighing of those competing
19 interests. And because the situation with a multi-
20 investigation case is such that there is not likely to be the
21 kind of badgering which were the very reasons for Miranda and
22 Edwards being announced in the first place, it is the State's
23 position that the only appropriate drawing of the line or
24 weighing of the interests is that in a truly separate case or
25 separate investigation, then the police ought to be permitted

1 to at least approach the man and ask him about that separate
2 investigation.

3 And I'll reserve the rest of my time.

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

5 We'll hear now from you, Mr. Larkin.

6 ORAL ARGUMENT OF PAUL J. LARKIN, JR., ESQUIRE

7 AS AMICUS CURIAE SUPPORTING PETITIONER

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

10 It's not uncommon for a suspect to be implicated in
11 two or more crimes that are being separately investigated by
12 different law enforcement officers or even entirely different
13 law enforcement agencies. And I'd therefore like to use an
14 example to help illustrate our position in this case.

15 The Tucson, Arizona police arrest a suspect for the
16 hold-up of a package store. At the same time, the FBI may have
17 reason to believe that this person has been involved in an
18 unrelated armed bank robbery, a crime occurring at a different
19 time and in a different location.

20 If the suspect invokes his right to silence, then
21 under Mosley, the FBI would be able to approach the suspect to
22 see if he is willing to talk with them about the bank
23 robberies. If the suspect invokes his right to counsel, but is
24 later released, then the FBI can approach the suspect about the
25 armed bank robberies.

1 Now, it's our position that the FBI should not be
2 forbidden from approaching the suspect to ask him if he wants
3 to talk about the bank robberies simply because the suspect has
4 invoked his right to counsel, and even though the suspect has
5 not yet been released from police custody. That submission, we
6 believe, is consistent with the Edwards case.

7 Edwards was concerned with the potential for
8 badgering when the police are allowed repeatedly to interrogate
9 a suspect who has asked for a lawyer. When there are truly
10 independent investigations that are underway, that risk we
11 believe is far less likely to be present. That's true whether
12 you look at the problem from the suspect's point of view or
13 from the police point of view.

14 First, when the officers approach the suspect, if
15 they make clear at the outset either before or after giving
16 Miranda warnings, that they are interested in an entirely
17 different matter, the suspect is not likely to believe that his
18 request for counsel has been fictional. He's likely to believe
19 instead that he can control what is out of bounds.

20 QUESTION: About the request for counsel being a
21 fiction, is that true if three or four days go by and no lawyer
22 ever shows up? Isn't he going to think it's a fiction then?

23 QUESTION: And that's what happened here, a three-day
24 interval? I can't remember.

25 Why would he think he's really going to get a lawyer

1 if three days have gone by and none arrives?

2 And as I understand it, they never really do provide
3 counsel. They say it's available but they just don't provide
4 them until he gets arraigned and so forth.

5 MR. LARKIN: But that isn't likely to be something
6 he's going to blame at the doorstep of, in my example for
7 instance, the FBI when they come into to talk to him. If he
8 says in that circumstance, I asked for a lawyer, they didn't
9 give me one, I don't want to talk with you, the FBI can't
10 question him.

11 QUESTION: I understand.

12 MR. LARKIN: Because he has invoked his right to
13 counsel with respect to what's there.

14 QUESTION: But you were making the point the fact
15 there was a different interrogator he would still feel quite
16 confident that his right to counsel was not merely a fiction.

17 But I suggest to you that he would think quite the
18 contrary if no lawyer had been appointed when the police said,
19 all you have to do is ask for a lawyer and you'll get one
20 before there's any further questioning. And then they come
21 around and question him again without providing him a lawyer.

22 MR. LARKIN: Well, he's not going to believe it's
23 fictional in a sense that they are just going to repeatedly
24 interrogate him even though he's asked for it. If he has asked
25 for a lawyer and they have left him alone for three days, he

1 knows that by asking for a lawyer, the police are no longer
2 going to badger him or question him.

3 And if the new officers come in and tell him at the
4 outset that they want to talk about a different matter --

5 QUESTION: And they say again, we will provide you a
6 lawyer if you want one, he'll take that at face value even
7 though that same thing that was said three days earlier and he
8 never got a lawyer.

9 MR. LARKIN: Well, he may not take it at literal face
10 value, but what he will realize is this: he'll realize that
11 these police have told him they're going to talk about a
12 different matter. He knows then that his request for a lawyer
13 has at least allowed him to avoid questioning about the first
14 matter. He's likely to believe therefore that he can control
15 the subject of the questioning.

16 Because he hasn't been questioned beforehand, if he
17 doesn't want to be questioned this time, he's likely to believe
18 he just has to say, I don't want to talk, or I want a lawyer,
19 and then in our submission, that questioning would have to
20 cease. So by fictional, I mean in a sense of just ignoring it
21 right then and there and just going ahead with questioning.

22 QUESTION: I'm a little confused.

23 The first question was by a state officer, right?

24 MR. LARKIN: A local police officer, Your Honor, yes.

25 QUESTION: And the second was an FBI man?

1 MR. LARKIN: In my hypothetical, not in this case.
2 QUESTION: Oh.
3 QUESTION: Would you say that in the second
4 interrogation, it would be appropriate for the FBI in your
5 hypothetical to advise him that they cannot question him about
6 the first crime because he's asked for counsel?
7 MR. LARKIN: It would certainly be an appropriate
8 thing for the FBI to do.
9 QUESTION: Should we require that?
10 MR. LARKIN: Whether you're going to require an
11 additional warning --
12 QUESTION: Yes.
13 MR. LARKIN: -- of that type I think would be
14 inappropriate.
15 QUESTION: Why, if this is what he thinks.
16 You said that he knows that he can't be questioned or
17 he can reasonably assume he can't be questioned about the first
18 crime.
19 What's wrong with making a rule that the FBI has to
20 tell him that.
21 MR. LARKIN: Because I think it would probably become
22 as soon as he starts asking a question.
23 QUESTION: Well, if it's apparent then what's the
24 harm?
25 MR. LARKIN: The harm may simply be that adding an

1 additional type of rule into this circumstance may perhaps
2 complicate the matter unnecessarily.

3 I mean, take this case for example.

4 QUESTION: Let's take this case, Mr. Larkin, your
5 assumption unfortunately that he knows that he can't be
6 questioned about the first crime doesn't fit very well into the
7 facts of this particular case. Because despite his request for
8 counsel at the time of the investigation of the first crime, he
9 was indeed approached, what, three or four times, before the
10 second investigation approached him.

11 MR. LARKIN: Yes.

12 QUESTION: So this particular defendant had no reason
13 to believe that they indeed kept their promise that when he
14 asked for counsel that he wouldn't be bothered further.

15 MR. LARKIN: Well, he -- that's because of the
16 peculiarities of this particular case.

17 QUESTION: Well unfortunately that's the case we're
18 deciding.

19 MR. LARKIN: But what we're asking the Court to do is
20 recognize that this general rule should apply. We don't think
21 that the facts of this case should preclude the Court from
22 adopting it, and we also don't think the facts of this case
23 counsel against it.

24 For example, in this case, the reason he was
25 approached during this interim was he also said at the very

1 outset to the second officer who approached him that he would
2 be willing to talk.

3 QUESTION: Well, in this case, should the confession
4 be suppressed, in this case?

5 MR. LARKIN: The confession in this case should not
6 be. The confession he gave in this case was --

7 QUESTION: Why?

8 MR. LARKIN: -- was one that was on April 19th about
9 the April 16th burglary.

10 QUESTION: And you think the repeated violations of
11 his rights are irrelevant as to the second crime?

12 MR. LARKIN: It's relevant only if you take into
13 account the possibility that his waiver has been overcome
14 because he's been badgered by the police. In that respect,
15 we're not saying that these factors can't be taken into account
16 in deciding whether the suspect has validly waived his rights.

17 Our position is simply that the officer who is
18 conducting the independent investigation should be entitled to
19 approach the person to find out if he is willing to discuss the
20 new subject matter. And the reason why, one of the reasons why
21 he should be allowed to approach him is he may not be aware of
22 the fact that there is a new subject matter at issue.

23 This allows them to bring it to his attention. He
24 may have an alibi in which case that would end the inquiry.
25 Alternatively he may realize now that he's in a lot deeper

1 trouble than he was the first time, and he may be willing to
2 answer questions about the second matter in order to obtain a
3 reduced charge or some other type of benefit.

4 We're not asking the Court to say that the police are
5 just licensed to badger a person simply because they're
6 pursuing a separate investigation. Our request is simply that
7 they be permitted to approach the suspect to find out what his
8 wishes are. The police have to be in fact pursuing a separate
9 investigation and they have to obtain a valid waiver of a
10 person's rights during that --

11 QUESTION: Suppose the police arrest somebody for
12 shop lifting and they think they had a murder. Can they spend
13 three hours with him on the shoplifting charge and then send in
14 a new team --

15 MR. LARKIN: No, I think not.

16 QUESTION: -- to investigate for the murder? Why
17 not? Separate crimes, separate investigation?

18 MR. LARKIN: It's not -- both -- the factors that
19 have to be considered in deciding whether you have a separate
20 investigation we think are first, the subject matter of the
21 inquiry and second the identity of the people conducting it.
22 It's not simply --

23 QUESTION: Well, the subject matter of the inquiry is
24 different and you have a different team?

25 MR. LARKIN: You may have a different team there in

1 that circumstance, but it may also be that the police knew this
2 person had committed the murder at the time they made the
3 arrest, and in that sort of circumstance, it may not be
4 appropriate to apply this sort of rule. Because we're not
5 saying that the police --

6 QUESTION: Well, then you tell me the exception in
7 the rule that you propose which would take care of the case
8 that I hypothesized. How do you formulate your rule?

9 MR. LARKIN: What the second investigation has to be
10 independent of is the episode that led to the suspect's arrest.
11 It is independent in the hypo you gave in the sense that the
12 crime he's being questioned about the second time is a
13 different crime, but it may be as the Court refines this rule
14 in those circumstances that it decides what it would be
15 appropriate is to see whether or not the police knew at the
16 time they made the first arrest that he had committed several
17 different crimes.

18 That's a more difficult case than will happen in
19 most. We think in most cases, it will be fairly easy to tell
20 that the second investigation concerns a matter that's entirely
21 separate from the first, I mean, that for example occurred
22 here. The two burglaries occurred on different days and at
23 different locations in the City of Tucson. It's clear that
24 these investigations were entirely separate even though there
25 was one officer common to both.

1 Unless the Court has any further questions.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Larkin.

3 We'll hear now from you, Mr. Barrasso.

4 ORAL ARGUMENT OF ROBERT L. BARRASSO, ESQUIRE

5 ON BEHALF OF RESPONDENT

6 MR. BARRASSO: Mr. Chief Justice and may it please
7 the Court.

8 I'd like to reiterate the facts of this case because
9 I think they are extremely important; indeed, they are somewhat
10 shameful.

11 On day one, my client was arrested. He was arrested
12 at the scene of a crime, and he was given his Miranda rights
13 and it's important to focus on the rights that he was read. He
14 was told that he had the right to consult with an attorney
15 before answering any questions, and he was also told that he
16 had the right to have the attorney present when he was asked
17 any further questions.

18 He replied, the record reflects, I understand and I
19 want a lawyer before I answer any questions. Moments later,
20 still at the scene of the crime, he was questioned again. At
21 that point, he waived his rights in crime one and made
22 inculpatory statements. Clearly, that was in violation of his
23 Miranda rights.

24 He was again questioned at the scene of the crime.

25 QUESTION: Excuse me. Why is that shameful? I mean,

1 it's obviously in violation but as I understand from the facts,
2 the officer conducting the second inquiry did not know that he
3 had asked for a lawyer.

4 Now, that's negligent, but I wouldn't call that
5 shameful. I mean, we don't have really bad actors going around
6 here. We maybe have some sloppy recordkeeping, but --

7 MR. BARRASSO: Your Honor, it's my position that four
8 times, he was questioned four different times, that we can
9 presume that if it happened in this case, it's going to happen
10 again. One mistake, certainly that would be negligence, but he
11 was questioned again and again, and I've certainly argued that
12 we are going to put a premium on ignorance if we adopt the rule
13 as set for at least in part in the petitioner's brief, and in
14 this case, I think we have seen that all the police officers
15 basically stayed ignorant, and in spite of the clear law that
16 suggests that they should have told each other that this man
17 only wanted to speak through counsel.

18 QUESTION: He only asked the first one for counsel.
19 It isn't that all of them stayed ignorant. It's just that the
20 first one never told the others. He didn't ask for counsel
21 each time. He asked for counsel the first time, and never
22 asked for counsel again. Isn't that right?

23 MR. BARRASSO: Yes.

24 QUESTION: So you have one officer who didn't tell
25 the others.

1 MR. BARRASSO: Correct.

2 QUESTION: And that's bad, it's wrong, but it's not
3 necessarily shameful.

4 MR. BARRASSO: He was then transported to the police
5 station after being questioned twice, and there questioned
6 again by a two new officers. Officer number one who isn't
7 relevant, and then Officer Quinn. This is the first time he's
8 interviewed by Officer Quinn.

9 Then he's booked. He spends overnight in jail and
10 then he is questioned again the next day. The Officer's not
11 important.

12 And then two days later, Officer Quinn who was
13 present two days earlier, and another officer, questioned him
14 about a separate investigation. I think these facts are very
15 important because the fact that Mr. Roberson requested an
16 attorney before answering any questions has to be given a broad
17 interpretation.

18 We have to put ourselves in the common sense position
19 of a person under arrest, told that he has the right to a
20 lawyer before answering any questions --

21 QUESTION: What was he being held under?

22 MR. BARRASSO: Pardon?

23 QUESTION: Was he charged with any crime these three
24 days?

25 MR. BARRASSO: Yes. I believe the record reflects

1 that he was charged -- he had an initial appearance --

2 QUESTION: Was he arraigned?

3 MR. BARRASSO: No, he was not arraigned.

4 QUESTION: How long can you hold somebody in Arizona?

5 MR. BARRASSO: More than three days.

6 The Colorado v. Spring case looked at this same issue
7 from the other point of view. There a defendant waived his
8 right to silence, clear waiver of his right to silence, and the
9 police went on to investigate not just crime one, but crime
10 two. The defendant in that case tried to argue before this
11 Court that his waiver was only a waiver for the purpose of
12 crime one. This Court said, no. When you say any questions,
13 he waived it for all purposes, therefore it was okay for the
14 police to ask him questions about different crimes.

15 It seems like just the opposite is being argued now.
16 They are arguing that we impose on the defendant some narrow
17 vision of the word, any, so that when he says he wants a
18 lawyer, what he is really saying is, I only want a lawyer for
19 this case. There is no reason in fact, there is no reason to
20 presume that he did that.

21 The reading of his rights was broad, referred to any
22 questions, and his statement that he wanted a lawyer before
23 answering any questions clearly in his mind concerned all
24 subject matters.

25 QUESTION: Why is that necessarily true?

1 You know, it seems to me if I were picked up for a
2 crime that I was guilty of, I would not want to answer any
3 questions without a lawyer. But if I was charged with another
4 crime that I was not guilty of and that I had absolutely easy
5 proof that I was not guilty of, I might well want to talk
6 without lawyer, and get this thing off the books right away.

7 It doesn't seem to me that you have people out there
8 walking around, some of whom never want to talk without a
9 lawyer, and others of whom always want to talk without a
10 lawyer. It seems to me much more likely that individuals
11 decide case by case whether they want to talk or not, depending
12 probably upon whether they're guilty or not, or how likely they
13 think they are to incriminate themselves.

14 MR. BARRASSO: Your Honor, my focus, or I think I'm
15 not showing that to say what was in his mind in deciding that
16 he wanted a lawyer, but how he interpreted their statement.

17 They made a representation to him and that is he
18 could have a lawyer before answering any question. When he's
19 requestioned whether it be number one or number two, in this
20 defendant's mind, any questions, here's another question,
21 where's my lawyer. It doesn't matter to him that it's subject
22 matter number one or number two.

23 QUESTION: Well, that may be.

24 QUESTION: He'd only to say that on the fourth day,
25 and he would have accomplished it.

1 MR. BARRASSO: Well, that's the question. He said it
2 on the first day and it was clearly not accomplished. All that
3 was added to that was that they had more on him.

4 QUESTION: Well, it was accomplished for a period of
5 two to three days and then a new circumstance obtains. And the
6 argument is, well, the police should be able to go to him, tell
7 him we have this new circumstance, do you not want to talk
8 about it either, and he can then say, no.

9 Now, maybe that ought not to be the rule of law, but
10 there's nothing unreasonable about it.

11 MR. BARRASSO: Your Honor, he didn't say that he did
12 not want to talk about it. He said, I want a lawyer before
13 answering any questions. So we cannot imply that Mr. Roberson
14 did not want to talk. In fact, chances are he did want to
15 talk, but he wanted to have the advice of counsel in making the
16 decision of what to say and what the consequences of discussing
17 that would be.

18 QUESTION: Well, Miranda means simply that a
19 defendant, as I understand it, has a right to not answer
20 questions unless a lawyer is provided. It doesn't mean that
21 the State has to, if he says, I want a lawyer before answering
22 any questions, send him a lawyer in the next half hour. They
23 have the option of ceasing questioning.

24 MR. BARRASSO: Correct. And that was clearly not
25 done in this case. There was no three days where questions

1 ceased. The questions continued within minutes at the scene of
2 the crime by a different officer. So at the time Mr. Roberson
3 was told about the new investigation, in his own mind, his
4 request for counsel meant what? I meant, now I've got double
5 trouble. There's more things that are happening to me.

6 In the meantime, he has been in jail; he has not been
7 allowed to communicate with anybody. The only new additional
8 facts he has are, a), no attorney; here comes the police again
9 to question me, no attorney; and b) they've got another crime
10 that I'm implicated in.

11 This did not in any way dissipate the coercive
12 environment; if anything, it seems to me that it heightens it.

13 QUESTION: Well, as I say, all he had to say was, no,
14 on the fourth day and it would have been accomplished. And the
15 argument is, why exclude very probative relevant testimony that
16 helped solved this crime for something that really is fairly
17 technical.

18 MR. BARRASSO: Chief Justice, I don't think it is
19 technical; I think it's very substantive. I think that he
20 could not say, no. We had forced him to switch to plan B.

21 His first plan was, I want to talk to the police, I
22 want to talk to the police with my counsel. Three days later,
23 no lawyer, new evidence, things were getting worse for him, and
24 therefore it does not seem to me just a technicality. It seems
25 to me that that would have a coercive effect on him.

1 The statements made by the police whether in good
2 faith or not appeared to him to be an outright lie so that when
3 they come in again and repeat these Miranda warnings with
4 smiles on their faces, I've heard that before, is what's going
5 on in his mind. They've said before. And it's going to give
6 him the perception that perhaps they're going through the
7 motions and in the meantime putting together the case.

8 So I just do not see how after these repeated
9 questionings, he would still feel like he had the right to
10 exercise that.

11 QUESTION: If there had been no repeated
12 questionings, and if there were the preface to the questioning
13 on the second charge that Justice Kennedy suggested, you would
14 have no problem?

15 MR. BARRASSO: I would have a problem because perhaps
16 if we had one more hypothetical, I would have no problem, and
17 that is, the original warnings did not use the broad terms.
18 But the original warnings clearly used broad terms: you have
19 the right to remain silent, you have the right to the presence
20 of a lawyer before any questioning.

21 Now, if for some reason, the original officer said
22 before any questioning on just this case, we could interpret,
23 it would be fair to assume that Mr. Roberson did not think that
24 it was a broad right.

25 QUESTION: I see. So you would want to change the

1 original prologue as well as the prologue to the second one.

2 MR. BARRASSO: And that has been explicitly rejected
3 by this Court in Colorado v. Spring. They do not want to
4 impose the burden on law enforcement officers to elicit what it
5 is exactly that they are going to question.

6 And in the Colorado v. Spring case, the defendant
7 tried to argue that when they went to subject number two, I
8 should have been informed of the Miranda rights and of my
9 subsequent waiver. And the Colorado v. Spring Court said, no,
10 we don't have to inform him of everything.

11 It's very -- just look at the language -- he has the
12 right to silence, in that case, before answering any questions,
13 and indeed that simple language indicates to him that that's
14 crime number one, crime number two, crime number three.

15 QUESTION: But you conceded that this is a separate
16 investigation? That's the way I understood your argument.

17 MR. BARRASSO: I think there's various arguments in
18 the briefs talking about separate members, separate
19 investigations. The Solicitor General asked for a separate
20 investigation requirement.

21 But I would posit to you any type of definition of
22 what a separate investigation is is going to lead this Court to
23 constant review to the hairsplitting that we find so common in
24 the --

25 QUESTION: But I thought you began by saying at the

1 outset that you agreed that this was a separate investigation?

2 MR. BARRASSO: Well, I think, little s and little i,
3 if this Court is going to adopt some concept of separateness,
4 this is way too blurry a case to do it. We have all State
5 police officers. Unlike the Michigan Mosley case where the
6 original Mirandas had to do with robberies that occurred and
7 that the subsequent investigation was about murder in Michigan
8 v. Mosley, notes these are so separate that his right to
9 silence was scrupulously honored in both cases.

10 We don't have that separateness here. He was
11 continually questioned about a series of robberies or of
12 burglaries that took place over a short period of time, often
13 times by common actors in the two separate investigations. I
14 don't think he perceived enough separateness to make this case
15 the distinguishing case that the Solicitor General has argued.

16 This Court in Michigan v. Mosley found that Miranda
17 needed some explaining. The reason for that is that it found
18 that the language about silence could be interpreted too
19 broadly, could be interpreted to mean that if a defendant says
20 he wants to be silent, he could be silent forever through the
21 judicial process. That's bad, the Court said in Michigan v.
22 Mosley for two reasons; it deprives the defendant himself of
23 the right to inquire to find out facts about his own case; and
24 it thwarts police investigation.

25 If we can't talk to the person at all because he's

1 requested his right to remain silent, we have no way of finding
2 further information. Neither of these principles apply when
3 you request the right for an attorney. You can still be
4 explained your options. If there's some quick incriminating
5 evidence that the police think you might have, they can set up
6 an emergency meeting through the lawyer. They can call the
7 lawyer that the defendant has been appointed and say, we think
8 we've got something that's going to get your client off the
9 hook; let's meet right away.

10 A thwarted police investigation? No. Again, the
11 police will still have a means to communicate with the
12 defendant when he requests the right to a lawyer. How can
13 they communicate with him? Of course they can communicate by
14 contacting his lawyer.

15 QUESTION: What about the defendant who wants to talk
16 about the second. I mean, let's assume the one that I posited
17 before. I'd like to get rid of this second charge because
18 there's nothing to it. I have a perfect alibi and I can tell
19 the investigators where I was and there are ten witnesses, so I
20 can get this whole thing off my back.

21 Under what you want us to do, there's no way that
22 could happen, because the first time in connection with the
23 first charge, I've said, I want a lawyer. I'm too poor to get
24 a lawyer. I'm not given one by the police.

25 When the second charge comes in, they are not allowed

1 even to approach me and ask me if I want to say anything to get
2 this second charge eliminated. I'm not sure I'd like that.
3 What if I want to talk?

4 MR. BARRASSO: Well, certainly you can initiate the
5 conversation but you don't know that there's any investigation
6 going on.

7 QUESTION: That's right.

8 MR. BARRASSO: I don't see how it would benefit you
9 by having the police explain to you that investigation. I
10 think that that line of communication is not going to be very
11 helpful to you. Indeed, you'd be better off waiting a day or
12 two and finding this out through your court appointed lawyer.

13 This Court has both made some rulings that have
14 limited the Miranda holding and expanded the Miranda holding.
15 Since the language of Miranda, the Court has made it clear that
16 Miranda is a prophylactic rule. It is a rule that does not
17 necessarily lead to coercion but it is designed to protect
18 against coercion in the custodial environment.

19 The State has argued that this Court should
20 reconsider the Edwards part of the prophylactic rule because
21 the rule is not close enough to the right. And I think to the
22 contrary. I think the Edwards rule is, one has to speculate
23 and think very hard to come up with a situation where a
24 defendant is denied his right to counsel before answering any
25 questions, and there was not actual coercion.

1 If this Court allows the Edwards rule to be limited
2 as set forth by the State, then they are going to allow the
3 defendant to be not implicitly lied to perhaps that's too
4 strong of a word, but basically given a falsehood. We are
5 going to allow the defendant to be told that he has a right to
6 a lawyer before answering any questions, and in spite of that
7 warning, we are going to allow him to be continued to be
8 questioned.

9 This tells the defendant that whatever that rule was,
10 whatever that right was, it's not a very valuable one in my
11 position of sitting here in the jail cell without any input
12 from anybody waiting for that lawyer, the only thing I can find
13 out is that there's more trouble with me, that leads to
14 coercion I think in almost every instance, that this is not a
15 rule that is widely around the Fifth Amendment but a
16 prophylactic rule that is very tightly concealed to just the
17 protection that is needed for the Fifth Amendment.

18 QUESTION: I suppose part of your submission is that
19 any time a person asks for a lawyer and says, I don't want to
20 answer any questions, then everybody in the police department
21 must be assumed to know that?

22 MR. BARRASSO: Yes. I think that that's fair. I
23 don't think that that's too heavy of a burden. I think it
24 exists today. And if this Court looks at several of the cases
25 at issue here, Michigan v. Jackson, Colorado v. Spring, there's

1 continual references to the recordkeeping devices already set
2 up in most police departments.

3 They have the Miranda warnings, they have check
4 lists, those check lists are filed with the police report. As
5 easily as the FBI can find out that the defendant is in jail in
6 Pema County, Arizona, they can ask in that same book of
7 records, has he been Mirandasized, has he requested counsel.

8 This is already being done.

9 QUESTION: Yet it was stipulated here that the
10 officer didn't know.

11 MR. BARRASSO: No, that is, it is stipulated that
12 they didn't know, but it has been argued by the Solicitor
13 General that we will put too heavy a burden on the subsequent
14 investigative agencies to find out. I don't think that that's
15 a valid argument in light of the ease of recordkeeping to
16 simply check off whether he's requested a lawyer or not.

17 QUESTION: Stipulation, they just can't stipulate out
18 from -- the police can't avoid the presumption that everybody
19 in the department knows. Because if they can, what's wrong
20 with this stipulation? Why shouldn't we judge the case based
21 on the fact that these officers just never knew that he had
22 ever invoked his right to counsel?

23 MR. BARRASSO: I think that this Court does have -- I
24 think that's the status of it, but my question is, what is the
25 relevance of their ignorance when the issue here is to prevent

1 coercive confessions, not to put a broad exclusionary rule or
2 to deter --

3 QUESTION: So you say you just don't need a
4 presumption that everybody knew?

5 MR. BARRASSO: No. I think the knowledge of the
6 police officers is irrelevant. I think the earlier examples by
7 the Court are good ones. You could have knowing officers or
8 ignorant officers come in every ten minutes and ask the
9 questions, and every time they say to the defendant, you have
10 the right to a lawyer before answering any questions, and
11 proceed to ask questions, what does that say to the defendant
12 but that what we're saying is not what should be given in its
13 normal meaning.

14 I don't know what it would mean to a defendant.
15 Maybe he's figuring well what does my right to a lawyer mean.
16 When do I get my lawyer. These are questions, these are any
17 questions, and they're still coming, with the added coercive
18 feeling that they are accumulating new evidence while I sit in
19 jail incommunicado with anybody.

20 I'm finished unless this Court has any further
21 questions.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Barrasso.
23 Mr. Ferg, you have three minutes remaining.

24
25

1 ORAL ARGUMENT OF BRUCE M. FERG, ESQUIRE

2 ON BEHALF OF THE PETITIONER - REBUTTAL

3 MR. FERG: Thank you, sir.

4 QUESTION: -- arraigning in your State?

5 MR. FERG: In Arizona, and this is one of the points
6 I wanted to make, the individual must be brought before a
7 magistrate for his initial appearance within 24 hours. At that
8 time, he --

9 QUESTION: Well, was this man brought before a
10 magistrate.

11 MR. FERG: Yes.

12 QUESTION: Did the magistrate ask him about a lawyer?

13 MR. FERG: He was informed at that stage that he had
14 the right to a lawyer, and as an indigent, the exact
15 proceedings --

16 QUESTION: And the magistrate could have appointed a
17 lawyer for him?

18 MR. FERG: My understanding is that if they did
19 things as they were supposed to have done, the initial
20 appearance was not transcribed, but if they followed the rules,
21 he was told that he has the right to a lawyer --

22 QUESTION: But in this case, he wasn't carried before
23 a magistrate.

24 MR. FERG: He was taken before a magistrate, as far
25 as we know.

1 QUESTION: Is that in the record?

2 MR. FERG: In the record which I believe is before
3 this Court, it shows his initial appearance on the 17th, the
4 day after his -- and under the Arizona rules, that initial
5 appearance includes being asked whether he has a counsel.

6 QUESTION: And you give us your word that it's in the
7 record?

8 MR. FERG: I believe that it is, yes, sir.

9 QUESTION: You believe it is.

10 QUESTION: But there's no transcript of what
11 happened, is there?

12 MR. FERG: At a simple initial appearance, no.

13 QUESTION: But ordinarily he would be asked if he
14 wants a lawyer?

15 MR. FERG: He would be informed of his right to
16 counsel and told that if he didn't have one, that the public
17 defender would in fact --

18 QUESTION: Represent him.

19 MR. FERG: -- represent him and someone would be at
20 the jail within a couple of days to see him.

21 QUESTION: So we don't know whether that transpired
22 or not?

23 MR. FERG: I've no reason to believe that it did not
24 because that's what the rules stipulate must happen.

25 QUESTION: Well, do you suppose the officers who did

1 the questioning the second time, knew? Shouldn't they assume
2 that he had gone before a magistrate and know that he'd been
3 offered a lawyer? And for all they knew, the public defender
4 was representing him at that time?

5 MR. FERG: They might well have assumed that, but
6 again, that is talking essentially in Sixth Amendment terms
7 rather than in Miranda Fifth Amendment terms.

8 If we are in fact going to talk Sixth Amendment right
9 to counsel, he was not arraigned or even arrested because
10 nobody knew about the separate offense at that time, and so
11 there'd be no Sixth Amendment right to preclude any
12 interrogation.

13 QUESTION: About that second one.

14 MR. FERG: That's correct.

15 Now, one other point that I wanted to make about the
16 facts of this case is that we are dealing here with someone who
17 is volunteering information and that is the reason why he was
18 repeatedly questioned, not because there was any need to go
19 back and badger him about the offense in which he was caught
20 red-handed.

21 He was talking about his drug contacts, about people
22 who were involved in other burglaries and robberies, and that
23 is the sole reason that the other officers were going back on
24 these other occasions to question him, was to find out about
25 material that he was volunteering, not to badger him.

1 He could not have invoked his rights to a crime
2 which even the police effectively did not know was under
3 investigation at that stage. Otherwise, you are saying that
4 Edwards effectively immunizes a man to the point where he could
5 say, I don't want to talk bout anything, and 25 years down the
6 line, --

7 QUESTION: Let me ask you a question.

8 Supposing at that preliminary hearing, they did in
9 fact appoint a lawyer for the first offense and he just was
10 representing him on the first offense, --

11 MR. FERG: Yes?

12 QUESTION: -- would you think that if the police knew
13 he had a lawyer for the first offense, they could go ahead and
14 question him on the second offense without giving notice to his
15 lawyer that they were going to do so?

16 MR. FERG: I would argue that they could.

17 QUESTION: They could.

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

19 The case is submitted.

20 (Whereupon, at 2:28 p.m., the case in the above-
21 identified matter was submitted.)

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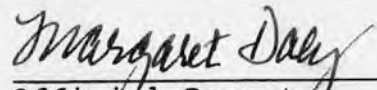
CASE TITLE: ARIZONA v. RONALD WILLIAM ROBERSON

HEARING DATE: March 29, 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: March 29, 1988



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