OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JACK R. DUCKWORTH, Petitioner, V. GARY JAMES EAGAN

CASE NO: 88-317

PLACE: WASHINGTON, D.C.

DATE: March 29, 1989

PAGES: 1 - 44

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D. C. 20001
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

JACK R. DUCKWORTH,

Petitioner

v. No. 88-317

GARY JAMES EAGAN,

Washington, D.C.
Wednesday, March 29, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

DAVID MICHAEL WALLMAN, Deputy Attorney General of Indiana, Indianapolis, Indiana; on behalf of Petitioner.

MICHAEL R. LAZERWITZ, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting Petitioner.

HOWARD B. EISENBERG, Carbondale, Illinois; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

11:03 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-317 in Jack R. Duckworth versus Gary James Eagan. We'll wait just a minute, Mr. Wallman, until the noise settles down a little.

Very well. Mr. Wallman.

ORAL ARGUMENT OF DAVID MICHAEL WALLMAN

ON BEHALF OF PETITIONER

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

This case raises two issues in regard to two separate Mirandas utilized by the Hammond Police Department to effectuate an arrest in 1982. The second issue raised in our cert petition this Court will not address or does not -- has no need to address unless you find against the petitioning state in regard to the first issue.

The material facts in this case are relatively simple and not in serious dispute and are easily summarized.

In the early -- or, the evening hours of May the 16th of 1982 the Respondent, Gary Eagan, along with some male friends, took a female victim from Chicago across the state line to Hammond, Indiana. There they

engaged in sexual activities with her which culminated in Respondent Eagan hitting her with a brick, stabbing her several times, leaving her at the scene naked and presumably dead.

When Respondent returned to Chicago, he contacted a police officer friend of his and fabricated a story as to finding a dead woman on the beach, took the police -- or, the Chicago police officer across the state line to Indiana, to the scene of the crime where they found the victim who obviously was not dead, and at the scene she identified him and said, "Why did you stab me several times?"

The Chicago -- the Hammond police met Eagan and the Chicago police at the scene, at which point Mr. Eagan returned to the Hammond Police Station and at 11:14 on May the 17th of 1982, after being given a Miranda, the Miranda at issue here, made an exculpatory statement, in essence repeating the story he had fabricated for the Chicago police.

The warning at issue here can be briefly read as follows. "Before we ask you any questions you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advise before we ask you any questions and to have him

with you during questioning. You have this right to the advise and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer."

This warning was read by Mr. Eagan, was read to Mr. Eagan. He did at the time indicate that he had no misunderstandings about it, at which point he gave the exculpatory statement.

The Seventh Circuit decided this Miranda was unduly confusing and was in violation of an earlier 1972 case that they had issued. The Circuit was somehow concerned --

QUESTION: Is that because of the -- the only problem in the view of the court below was this language of "we have no way of giving you a lawyer but one will be appointed for you, if you wish, if and when you go to court"?

MR. WALLMAN: That's correct, Justice O'Connor. Yes. In our view, the --

QUESTION: Are they still using that in Indiana?

MR. WALLMAN: I don't believe so, your Honor. Not after the Seventh Circuit case. I'm not sure in Hammond. I don't -- I don't know if it's being used anywhere else. The Hammond police officer did use it here.

QUESTION: -- in his case or after the '72 decision?

MR. WALLMAN: Well, apparently it was utilized after the '72 decision or we wouldn't have this case. The Hammond Police Department did utilize it then. The '72 decision was an Illinois case, I might add.

QUESTION: What language is used now instead of that?

MR. WALLMAN: The -- the -- I frankly don't know what Hammond does in that regard. I do know that they were aware of what the Seventh Circuit did in this case and have adopted another Miranda.

QUESTION: Has your office done anything to have those old forms put in the wastebasket?

MR. WALLMAN: We have communicated to them the decision in this case.

QUESTION: Is there some specific origin for this wording? Because it's apparently been used -- it's come up in a couple of cases.

MR. WALLMAN: It's come up in a number of

cases, your Honor. In a number of circuits. And we have no explanation as to how it was originally generated. We have discussed in the brief a number of other circuits which had utilized it.

QUESTION: Do you take the position that the warning is factually correct?

MR. WALLMAN: It is factually correct, your Honor. That is the sum total of our argument. Indiana, in accord with most other jurisdictions, do not -- does not have instant counsel available at the police station. We have 92 counties and many of them small, rural. Indeed, all it does is state what is true of the law in Indiana.

QUESTION: Well, isn't --

QUESTION: If an attorney is to be provided, it's provided only at the time that the person charged goes to court and enters the plea and says, "I need counsel"?

MR. WALLMAN: Indiana statutory law provides for the appointment of counsel at the time the individual is first taken to court.

QUESTION: At arraignment?

MR. WALLMAN: At first appearance.

QUESTION: First appearance.

QUESTION: Well, does that comply with

Constitutional standard?

MR. WALLMAN: Yes, it does, as long as we don't force him to answer questions.

QUESTION: Well, isn't that the explanation of why this is such a common formulation? Because a lot of jurisdictions are in the same position. And to tell the individual "you have the right to an attorney," and he says, "Okay, give me an attorney," and you say, "I'm sorry, we don't have an attorney," is sort of like saying, you know, do you want vanilla, chocolate or strawberry ice cream. You know, "I'd like strawberry." "I'm sorry, we don't have strawberry."

(Laughter.)

QUESTION: It's the old -- it's a very honest statement, and probably that's just why -- the same reason other jurisdictions do it.

MR. WALLMAN: That's our view, your Honor. It does no more than simply state the law. If, for example, giving a hypothetical -- if the police officers had continued -- had given Mr. Eagan this Miranda and he had indicated he wanted a counsel and we had continued to question him, then we would be in violation of the Constitution. That simply is not the case here. There are facts in the record that would indicate that was so.

QUESTION: Does the record indicate whether he

was street wise? Had he been through this before or was this --

MR. WALLMAN: I believe in the pre-sentence investigation, which is a part of the record, he had had some earlier charges. I do not know whether they had been reduced to a conviction or not. But he had had contact with the police on a number of other occasions.

QUESTION: Mr. Wallman, what do they do in Indiana if the suspect says, "Yeah, I'd be glad to talk to you. I don't have any money so I can't hire a lawyer, but I'd like to have a lawyer present while we talk"? Would you --

MR. WALLMAN: We would be in violation of the Constitution if we continued the interview at that point.

QUESTION: Well, I understand -- if you continued. But do you just say, "Well, I'm sorry. We can't get you a lawyer so we won't ask you any questions then"? Isn't there any provision for finding a counsel for a man in that position so you can go ahead and complete the interrogation.

MR. WALLMAN: We have no statutory law that would demand that outcome.

QUESTION: No, I didn't say that demands it.

QUESTION: Well, I thought your response was you wait until the first appearance --

MR. WALLMAN: That's correct.

QUESTION: -- and then counsel is appointed. And then you question him. Is that what happens?

MR. WALLMAN: That's correct, your Honor.

QUESTION: Yes. But what if you don't have probable cause? So you can't get an indictment against him. But you're pretty sure -- I mean, you have a good hunch that if he tells you the whole story, you'd then be able to go ahead. Your hands are tied under your procedure?

MR. WALLMAN: In our view that's correct, your Honor. We cannot accept a voluntary statement of an individual --

QUESTION: No, I understand --

MR. WALLMAN: -- who refuses to waive his --

QUESTION: -- you can't accept the statement. But you also -- as a matter of Indiana law you can't find a lawyer who would be willing to represent him?

MR. WALLMAN: Well, if one were available -- readily available -- and happened to be on the site and would volunteer, --

QUESTION: Yeah, but you don't have any procedure for dealing with that situation.

MR. WALLMAN: We have no immediate procedure for dealing with that. No, your Honor.

QUESTION: Of course, isn't the reason for that the likelihood that once he had the attorney he wouldn't answer questions anyway?

MR. WALLMAN: The reason for that is the statutory provision that indicates he shall have a counsel appointed at the time of his first appearance in court. I do not read any devious intent into this. I don't think any can be as to having him --

QUESTION: That's not devious. It's just the real world. Once -- Once an attorney is on the scene, it's unlikely that he's going to make a statement.

MR. WALLMAN: I would presume that's correct in all -- In virtually all Miranda cases that reach any court in this country. Miranda only arises in a situation where classically the individual has waived his right to counsel and made a statement.

The court's doctrine, as we read it, as the State of Indiana reads it, is that all Mirandas are to be viewed in the totality of the circumstances. Clearly, the individual -- the individual Miranda warning that was utilized here warned Mr. Eagan repeatedly of his right to remain silent. Indeed, it made it very clear to him that he controlled virtually the entire course of the interview.

It is our view, and the view, as Judge Coffey

indicated in this dissent in the Seventh Circuit of the view of the Fifth, the Second and the Fourth Circuits -- very similar language has been approved by the Eighth and the Tenth Circuits -- this Court's per curiam opinion in California v. Prysock stands very clearly for the proposition that no particular special or magic language is required for a Miranda warning. Indeed, this Court, as we read the Court's cases, clearly inspire jurisdictions to attempt to make the warnings as clear as possible.

In our view, that's what was done here. The Seventh Circuit, wrongly in our view, relied upon the dicta in Prysock to hold that there was a future appointment of counsel. In a particular way, as we've already discussed, all counsel was a future appointment. If the individual during the interview were to say, "I want counsel now," obviously appointment of counsel would await finding counsel. Whether that would take an hour, a day, or a week, it really makes no -- it makes no difference.

The Constitutional protection is the right to have counsel, if the individual wishes, prior to making the statement.

The second issue that arises in regard to this case is the second Miranda. The day following Mr.

Eagan's first exculpatory statement, a second Miranda was read to him, at which time he confessed. Subsequent to that confession, as a matter of fact, that very day, he took the police officers back to the scene of the crime, assisted them in finding the weapons, and identified the evidence then.

That Miranda itself, while there is some discussion in the brief from Respondent that it is improper, clearly it has been approved by both the Seventh Circuit and the Indiana Supreme Court.

The issue that was remanded by the Seventh Circuit was whether or not there was any taint to the second Miranda. This issue, as I indicated earlier, only arises if this Court finds against the State of Indiana on the first issue. However, we clearly think that this Court's holding in Oregon v. Elstad disavows the fruit of the poisonous tree doctrine that arises in Fourth Amendment cases to this Fifth Amendment right.

Clearly, the next day there was no indication in the record that we had intimidated Mr. Eagan, had in any way forced his testimony, that his statement was anything but voluntary. It is argued that clearly Mr. Eagan had the right -- had been properly warned of his rights and had voluntarily waived them to make that confession.

We see no need for the remand. We would urge the Court to -- if it reaches that second issue, to find that remand is simply inappropriate.

I would reserve my remaining time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wallman.

Mr. Lazerwitz.

ORAL ARGUMENT OF MICHAEL R. LAZERWITZ

AS AMICUS CURIAE, SUPPORTING PETITIONER

MR. LAZERWITZ: Thank you, Mr. Chief Justice, and may it please the Court:

The United States, the State of Indiana, and Respondent, all agree that under this Court's decision in Miranda against Arizona that police must inform a suspect who is in custody of his right to consult with a lawyer before any questioning begins.

The question presented here is not whether a suspect must be so warned but rather what form that warning may take. More precisely, whether advising the suspect that he has the right to the advise and presence of counsel before any questioning, but also that a lawyer will be appointed if and when he goes to court to comply with the requirements of Miranda.

In our view, such warnings, taken as a whole, do adequately inform an indigent suspect of his right to

consult with a lawyer before any questioning. Here the initial set of warnings given to Respondent conveyed all the rights required by the Miranda decision. The Hammond detectives told Respondent that he had the right to remain silent, that he had the right to the advise and to consult with a lawyer, that he had the right to have a lawyer present during any questioning, and that he had this right to the advise and presence of a lawyer even if he could not afford to hire one.

The court of appeals concluded, however, that providing respondent with the additional piece of information that a lawyer would be appointed if and when he goes to court rendered the warnings inadequate. The court of appeals found two reasons for that holding.

First, according to the court of appeals, that statement suggested that only those persons who could afford a lawyer had the right to have a lawyer present before any questioning. And, second, that challenged statement suggested that indigent suspects are not entitled to a lawyer at all either before or during questioning if charges were not filed.

In our view, the court of appeals was mistaken on both grounds. The challenged statement simply explained the mechanics of appointing counsel. The previous two warnings -- that Respondent had the right

to speak with a lawyer before any questioning, that he had the right to the presence of that lawyer during questioning, and that he had this right to the advise and presence of counsel even if he could not afford to hire a lawyer -- made clear that whether respondent could afford to hire a lawyer or not, he had the right not to be questioned until a lawyer -- until he had the chance to talk with a lawyer.

QUESTION: Well, in that view would you say that it's preferable that this additional statement be given in all Miranda warnings?

MR. LAZERWITZ: No. In fact, as we -- as the Court is aware of the litigation that went on during the early '70s, in this case itself, the Federal Government does not use warnings like this. No, we do not prefer to have this language in there because --

QUESTION: Why?

MR. LAZERWITZ: -- it causes unnecessary litigation.

QUESTION: Well, why does it cause unnecessary -- well, we're here now. Should we -- should we say that it's preferable?

MR. LAZERWITZ: We don't think the Court has to decide whether it's preferable or not. The question presented is whether this warning -- providing this

additional statement renders the warnings inadequate. Or, another way of looking at it, whether these warnings comply with Miranda.

QUESTION: Well, what is the government's view? That this is preferable or not preferable? Should we add this to the Miranda one?

MR. LAZERWITZ: No. Our position is the warnings that the court laid down in Miranda itself are fine. They are --

QUESTION: Well, if this is factually correct, why not add it.

MR. LAZERWITZ: Because it's not factually correct in every jurisdiction. For example, in the federal system you can have a lawyer appointed before your initial appearance. And in response to the question before, --

QUESTION: Well, this is factually correct in the State of Indiana.

MR. LAZERWITZ: In the State of Indiana this is absolutely correct.

QUESTION: And presumably some other states that don't appoint until there's a first appearance in court for an indigent.

MR. LAZERWITZ: Yes. And, in fact, to be perfectly candid, the statement is accurate. And,

actually, it's accurate in any jurisdiction in the sense that -- in not any, but most -- in the sense that you have to go to court first. That's who appoints the lawyer. Even in the federal system the magistrate or the judge appoints the lawyer.

But in response to Justice Stevens' question before, it is possible in the federal system to have a lawyer before the formal charging process. Although, if you read the Criminal Justice Act precisely, it doesn't automatically cover it.

But in practice if the police -- for example, if FBI agents arrest a suspect and they bring him down and read him his Miranda warnings, he says, "Look, I'd like a lawyer before I talk to you." What the agents will do or should do, and have done it in practice, is they call up either the Assistant U.S. Attorney on duty or the magistrate himself and say, "Listen, we have a man here in custody. He'd like a lawyer." And you bring him to the magistrate and you give him a lawyer, if he qualifies under the CJA.

And in response to Justice Kennedy's question before, it's not -- although in practice many suspects will no longer talk once they have a lawyer, in the situation which Justice Stevens' posited, depending on the facts of the case, it might be in everyone's

interest, especially the person who is in custody, once he's talked to a lawyer to continue the questioning in the sense that he just might be a material witness and he's not at all suspected of any crime.

QUESTION: In the federal system do you ever go to the Federal Defender Program directly? Or, say, it's late at night or something and a magistrate isn't available, is there any -- do you ever short-circuit this problem?

MR. LAZERWITZ: It can be done ahead of time in the sense that -- at least my experience in Philadelphia in the federal system -- the Federal Defendant Program is always available, and when the person was taken into custody, two calls would be made. The agents would call the United States Attorney's Office and would also call the defenders and say we have someone in our custody who we think will qualify for your services. And it's done -- it's done routinely.

Indiana, according to the briefs, does not have that system. And, again, that system is not Constitutionally required.

QUESTION: You know, there's no reason why we have to pick and choose among permissible Miranda warnings, is there? The Miranda opinion itself left open the possibility of any actual warning.

MR. LAZERWITZ: Yes, Chief Justice. And, in fact, our position in this case is what I stated up front. Which is, as long as the warnings convey the rights required by the Miranda decision and are not completely misleading or confusing, then the warning has complied with Miranda.

QUESTION: Do you think this warning complied with the Seventh Circuit decision in Williams against Toomey?

MR. LAZERWITZ: No, obviously it did not.

QUESTION: How do you explain Indiana continuing to use a form that had been specifically held improper by the Seventh Circuit even if the Seventh Circuit was wrong?

MR. LAZERWITZ: I have no firsthand knowledge of how Indiana --

QUESTION: Because apparently it's a printed form they used.

MR. LAZERWITZ: It makes no sense. It's very easy, after the decision is reported, to rip it up.

QUESTION: Yes.

MR. LAZERWITZ: Or to seek further review. That was not done. From reading the court of appeals' opinion, you can read between the lines and the court of appeals was somewhat irked by that.

QUESTION: Well, they couldn't seek further review. It hadn't been in a case from Indiana, had it? I think it had been an Illinois case.

MR. LAZERWITZ: Well, it was a Seventh Circuit decision.

QUESTION: It was a Seventh Circuit decision but Indiana couldn't have sought further review.

MR. LAZERWITZ: That's true.

MR. WALLMAN: Well, of course, the Supreme Court of Indiana isn't bound by the Seventh Circuit. I mean, each one is free to expound the Constitution for itself.

MR. LAZERWITZ: And, in fact, the Indiana Supreme Court has taken the view that warnings such as this are -- do comply with Miranda. So, there is some -- there might be some reason why the Hammond Police Department wanted to stick with their guns. But we do not know that.

QUESTION: A pretty good reason.

MR. LAZERWITZ: Finally, one final point with respect to the compliance or whether Prysock calls for a different result. We submit that the court of appeals and perhaps Respondent himself have somehow overstated Prysock.

The court's decision in Prysock simply

suggested that warnings would be inadequate if the warning's lengthy appointment of counsel was at a future point in time after police interrogation. If you read the lower court's opinion that this Court cited in Prysock, the problem with those warnings in the Bellnsky case and the Garcia case was that the suspect was never told that he had the right to talk to a lawyer before questioning. They just weren't told for some reason.

Here we have no doubt that respondent was told that. He was told that several times. And so Prysock doesn't call for the result that Respondent or the court of appeals suggested.

If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lazerwitz.

Mr. Eisenberg.

ORAL ARGUMENT OF HOWARD B. EISENBERG

ON BEHALF OF RESPONDENT

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

In Miranda this Court said that in order for a suspect to properly waive his right to counsel at a custodial interrogation the police must tell him that he has the right to counsel before and during the interrogation, and the suspect must knowingly and

intelligently waive the right to counsel.

In this case, Eagan was never told that he had the right to counsel at the interrogation, he could not knowingly or intelligently waive that right because he was told by the Hammond Police that he had no such right. In fact, the police affirmatively told him that the right to counsel in that jurisdiction did not attach until he came to court for the first time.

QUESTION: Well, now, it seems to me that the warning he was given said, "You have the right to the advise and presence of a lawyer even if you can't afford to hire one."

MR. EISENBERG: Yes.

QUESTION: That's pretty clear.

MR. EISENBERG: Not when the entire admonition is read.

QUESTION: The second sentence says, "We have no way of giving you one, but one will be appointed for you if you wish if and when you go to court." Now, that's technically correct, isn't it?

MR. EISENBERG: It is factually correct; it is Constitutionally deficient.

QUESTION: Well, didn't Miranda itself in the opinion say there is no requirement the state have a station-house lawyer present to advise people?

MR. EISENBERG: We don't advocate a station-house attorney Justice O'Connor. What we do say is that in order to interrogate a suspect, you must have a mechanism for complying with Miranda. And it is no answer to say, well, Indiana has elected not to file a Miranda and not to provide counsel.

QUESTION: But as I read this warning, it is in all respects accurate.

MR. EISENBERG: It's factually accurate in that --

QUESTION: And it meets with the requirements we laid down in the Miranda decision.

MR. EISENBERG: I respectfully disagree. Miranda requires that counsel be made available to the suspect at the time of the interrogation.

QUESTION: But that comes up only when there is an interrogation. Indiana can say, if somebody chooses to elect his right to have a lawyer present during interrogation, we can't furnish you a lawyer, so they'll be no interrogation.

MR. EISENBERG: That's right. And had they not interrogated Eagan, this case would not be here. But they did interrogate Eagan. Twenty-three years after Miranda they continue to interrogate suspects in custody without the ability to comply with the basic requirement

of provision of counsel.

QUESTION: But that isn't what the Seventh Circuit said. They said the warning was inadequate.

MR. EISENBERG: Yes. They said that the warning is ambiguous because it first says you have the right to counsel, but then says you don't have the right to counsel at the interrogation, that you only have the right to counsel at the time you come to court. And it is my submission --

QUESTION: So, a defendant in custody can vindicate his Miranda warnings by saying, "I will not respond to questions unless there is a lawyer present."

MR. EISENBERG: That's right, Mr. Chief Justice, he can. But here this person was told I can't have a lawyer there.

QUESTION: So, he should say, "I won't answer questions." He didn't say that. He answered them.

MR. EISENBERG: Well, yes. Maybe you and I would agree that if he'd viewed those --

QUESTION: That's all Miranda requires.

MR. EISENBERG: Miranda, respectfully, Mr. Chief Justice, requires that there be an ability to provide counsel or there will be no interrogation.

QUESTION: Where does it say that?

MR. EISENBERG: Your Honor, the court said

there --

QUESTION: Where?

MR. EISENBERG: At page 475, this Court cited the language in Connolly v. Cochran, saying there must be an offer of counsel at the interrogation, and a valid waiver. They did --

QUESTION: If there is an interrogation --

MR. EISENBERG: If there is an interrogation.

QUESTION: -- an offer of counsel at the interrogation. If there is one.

QUESTION: The way for the person to raise that is to say, "No, I won't answer."

MR. EISENBERG: I think that's right. That is one way he could do it. But here --

QUESTION: That's all Miranda requires.

MR. EISENBERG: Well, I --

QUESTION: Under the view you're propounding, you would require reversal even if the standard Miranda warning were given.

MR. EISENBERG: No, Justice Kennedy, that's not my --

QUESTION: You're opening statement to us was that interrogation may not proceed unless there exists a mechanism for giving a lawyer if requested.

MR. EISENBERG: That's right. Or they have --

QUESTION: And if that mechanism doesn't exist in Indiana, then even the standard Miranda warning won't suffice.

MR. EISENBERG: Miranda represents a balancing between the interests of the prosecution and the interests of the defendant. When you give the proper warnings, that tells him that he has the ability to get an attorney. And if he asks for counsel, this Court has taught that he cannot any longer be interrogated.

QUESTION: Suppose we assume there is no ability to produce an attorney for all interrogations and for this one in Indiana if requested, and suppose further a standard Miranda warning is given, what result?

MR. EISENBERG: The confession is admissible because you have to look at what was told to the suspect. And that's exactly what the Seventh Circuit said. That the warning Eagan was given was at best contradictory, and I submit at worst it told him he did not have the right to counsel at the interrogation.

QUESTION: The Miranda argument, wasn't the rule set down with the FBI's warning which says that when the man asks for a lawyer all questioning must stop?

MR. EISENBERG: That's correct. That's right.

QUESTION: And that was before the Court?

MR. EISENBERG: Yes. Absolutely. And, in

fact, it is my submission, Justice Marshall, that really what the government here and the State of Indiana advocates is backtracking on that explicit holding in Miranda that counsel be made available.

QUESTION: Well, it wasn't a holding in Miranda. All of Miranda was dicta.

MR. EISENBERG: Well, I suppose that's true to some extent. But the Court said that in order to overcome the inherently coercive atmosphere of custodial interrogation the defendant must be afforded counsel or must waive counsel. And that's when the court said it must be offered and the offer must be rejected.

Now, this Court has also said that the rules -- the warnings themselves are not Constitutional rules and that no specific language need be used. That's absolutely correct.

The fact of the matter is here they told Eagan he couldn't have a lawyer at the interrogation. That's exactly the opposite of what Miranda says. And while the warnings certainly are not written in stone or even Constitutionally required, here it was just the inverse of Miranda that this man was told.

QUESTION: Well, this Court in Oregon v. Elstead said that -- and other cases too -- said that a defect in Miranda warnings does not in and of itself

constitute a violation of the Constitution.

MR. EISENBERG: That's correct.

QUESTION: And we're here on federal habeas.

MR. EISENBERG: That's right.

QUESTION: I'm wondering why we should even consider a claim like this on federal habeas. I mean, it isn't a violation of the Constitution. He's not being held in violation of the Constitution. Why should we even entertain this on --

MR. EISENBERG: Because his constitutional right to self-incrimination was violated under the rationale of Miranda, which says that unless the suspect is informed of his right to counsel at the time of the interrogation and waives that, the Fifth Amendment is violated.

QUESTION: Well, as I said, we've held in Oregon against Elstad that it's not a Fifth Amendment violation.

MR. EISENBERG: Well, I read Oregon and Elstad, Justice O'Connor, to mean that deviation from the traditional Miranda warnings do not constitute a Constitutional violation. I had thought and I assert that if counsel is not made available at the time of the interrogation --

QUESTION: Well, the Seventh Circuit went off

on the ground that this was some kind of deviation from the Miranda warning.

MR. EISENBERG: Well --

QUESTION: That's exactly what they went off on. I just -- It's hard for me to see why we should entertain it at all on habeas.

MR. EISENBERG: Because it is more than just a deviation of words. It's more than just a semantical difference. It is an assertion that there is no right to counsel at the time of the interrogation.

This isn't like Prysock where you said, well, you have to have a counsel appointed, or you may have to wait an hour before counsel gets here. It is my submission that they told him counsel could not be made available.

QUESTION: Well, the warning goes on. "You have a right to stop answering at any time until you talk to a lawyer. You have the right to stop answering questions at any time. You have the right to advise and presence of a lawyer even if you can't afford to hire one." Gee, it seems to me the Seventh Circuit and you are reading a lot into this warning that isn't there.

MR. EISENBERG: Well, Justice O'Connor, I think that the reasonable understanding of those words were that this man had no ability to obtain counsel before or

during the interrogation. And that burden's his Fifth Amendment right as identified in Miranda.

And that is the Constitutional deprivation here. The deprivation isn't whether they used the word "appointment" as opposed to some other word. The problem with this warning is that it violated the right to counsel under the Fifth Amendment established in Miranda. And that's why it is here and that's this Court should resolve the question on federal habeas.

This is not just some semantical deviation. This is, in my mind, the repudiation of a basic principle found in the Miranda decision. In terms of what this means, the courts have divided almost equally. And while the Respondent and the Petitioner disagree as to what those cases say, several things are absolutely true.

Number one, no matter what you say, this warning is not clear in terms of the right to counsel. Number two, this warning came ten years after the Seventh Circuit had held verbatim these warnings to be defective.

QUESTION: Well, what's that got to do with the merits of the case now it's in this Court?

MR. EISENBERG: Well, I think it does have some relevance here. Well, obviously this Court can now say

that the Seventh Circuit's '72 decision was wrong.

QUESTION: And the Supreme Court of Indiana could at any time say the Seventh Circuit's decision was wrong.

MR. EISENBERG: And, indeed, they have.

QUESTION: People would get out on habeas because the Seventh Circuit has --

MR. EISENBERG: That's right.

QUESTION: -- but I don't see why it's such an affront, as you seem to say, that they should not have followed Seventh Circuit in this issue if they felt it was wrong.

MR. EISENBERG: My submission is that they have to provide counsel in the way that Miranda requires. The Seventh Circuit ten years earlier had said that this specific warning was wrong. Indiana continued to use this, continued to use language that was not the standard warning. They gave -- they gave a different warning the date after these warnings to the same man, the same police department.

My submission is this is not some deviation because Indiana has some unique -- unique way of providing counsel. This is an instruction designed to obtain statements in violation of Miranda.

And that's why this is important, Mr. Chief

Justice. This is not something about which courts had not spoken prior to 1982 when Eagan gave this statement.

And it strikes me as strange --

QUESTION: Well, there were differences of opinion in the courts, were there not?

MR. EISENBERG: There certainly were. But the Seventh Circuit had ruled -- and while you're absolutely correct, obviously, that the Indiana Supreme Court could deviate from it, why do they continue to give this instruction?

QUESTION: Because they think it's all right, I suppose.

MR. EISENBERG: They why did they give a different instruction the next day?

QUESTION: I don't know.

MR. EISENBERG: Well, the record suggests --

(Laughter.)

MR. EISENBERG: The record suggest that the reason they did that -- the officer who testified at the suppression hearing said, "Well, we didn't think Miranda at all was required before the first statement. And then the second statement we gave him the somewhat better warning because Miranda was required."

So, I don't think it's entirely clear that the state uses this "if and when" warning because they can't

provide counsel. My submission is that they use it in order to obtain statements that violate Miranda or where they view a Miranda as not being applicable, and particularly after this Court's decision in California v. Prysock.

In California v. Prysock, the suspect was informed of his right to counsel and then told that the court would have to appoint a lawyer for him. And this -- the majority of the courts said that was fine because it did not link the appointment of counsel to some future event. He could have had the court appoint the lawyer at that time and place at the interrogation.

And if you look at how courts have construed the Prysock decision, it is that the first set of warnings given Eagan were invalid because they linked the appointment of counsel to some future event. That is, the ultimate and conditional -- the possible appearance in court.

QUESTION: Suppose in this case the standard Miranda warning were given and the suspect then says, "Well, if I wanted a counsel right now, could I get one?" And the police said, "Well, as a practical matter, no, but you don't have to answer any questions until you get one." And he said, "Well, I might as well go ahead and answer." What then?

MR. EISENBERG: That's a closer case. I would submit that the statement would still not be admissible because it is conditioned on an event after interrogation.

QUESTION: There is no -- they are just describing reality.

MR. EISENBERG: Well --

QUESTION: That's all they're doing.

MR. EISENBERG: -- an accurate description of an unconstitutional procedure doesn't make it proper, Justice Kennedy.

QUESTION: It's not an unconstitutional procedure if he waives. That's circular.

MR. EISENBERG: If you --

QUESTION: You see, you're asking us in effect to hold something unconstitutional when it's factually accurate. And that's rather difficult.

MR. EISENBERG: You can waive counsel but only after knowingly being informed of what your rights are. And the rights established my Miranda include the right to counsel at the interrogation.

In my brief I cite a recent decision of the Illinois Supreme Court, Justice Kennedy, which comes close to the facts you've suggested. There the suspect was informed of his right to counsel and he says, "Do

you mean I can have a lawyer here at the interrogation?" And the police said to him, "Yes, we can call the public defender, but it will take a little while."

That was found acceptable and I think that is perfectly -- a perfectly appropriate result. The question you have asked comes closer than the instant case. Saying, "Well, you can't get one until you go to court." Had they said you can't get one until we call the public defender, that, the Illinois court said was all right, and I submit that there is the distinction between the weight that is always going to be required to obtain counsel and conditioning the right to counsel on a future event.

And that is the line this Court drew in Prysock, and that is my submission as to where the Court should appropriately draw the line here.

Turning briefly to the second admonition, again, this was given the next day by the same police department after the police had interrogated the complaining witness, the victim in this case. Again, the warnings did not comply with the traditional Miranda warnings. But they were different. The same police department gave different warnings the day after the "if and when warnings."

These told him that he had the right to a counsel of his choosing at the interrogation. And then they told him later that if he was indigent, counsel could be appointed to represent him at that time.

The Seventh Circuit remanded this case for a determination as to whether the second set of warnings saved the second and that incriminating statement. And I submit to you that that is the appropriate relief.

As I've noted in my brief, the transcript of the suppression hearing was not produced until after the oral argument. It was never made part of the record on appeal in either -- in the Seventh Circuit. And when one looks at the explicit four corners of the second set of warnings, it is clear that these, too, reasonably can be read to have conditioned his ability to have counsel at the time of the interrogation on his ability to retain a lawyer.

And, in any event, looking at the first and second sets together, coming as they do one day apart, it is my submission that again he was never given information regarding the clear right to counsel. And this takes the case out of Oregon v. Elstad where there was a complete and accurate Miranda warning given prior to the second admonition.

It is our submission in this case, your Honors,

that the Seventh Circuit granted very modest relief. That is, to suppress the exculpatory statement and to remand the case to the district court for a determination of the admissibility of the incriminating statement.

I believe that we have shown that the Miranda decision requires the provision of counsel at the time of the interrogation, that the warnings given to Eagan prior to the first interrogation did not give him the right, did not inform him of that right, and, therefore, his waiver was not knowing, not intelligent, and the statement was properly suppressed by the Seventh Circuit.

We ask that the judgment of that court be affirmed. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Eisenberg.

Mr. Wallman, you have nine minutes remaining.

REBUTTAL ARGUMENT OF DAVID MICHAEL WALLMAN

ON BEHALF OF PETITIONER

MR. WALLMAN: Thank you, your Honor. Just briefly, the State of Indiana does not ask for a major revision of Miranda in this case when it's not necessary.

In our view, the warnings we provided, as we have previously discussed, clearly apprised Mr. Eagan of nothing but the truth in this case. Indeed, as the

court is aware, Miranda itself has indicated that if the state can't provide a lawyer on the spot, then the only thing that is prohibited is continued questioning.

To the extent we've gotten somewhat afield in regard to the chronology of events, in our view, stated succinctly, Mr. Eagan or any individual who is Mirandized in this way, has control of the interrogation itself. If he feels that he does not want to continue a statement that he has begun, or he doesn't want to answer any questions in the first instance, all he need do to terminate that interview is to simply say, "I want a lawyer." Clearly -- clearly, that is not a future event.

QUESTION: Of course, even if you're right that this is defensible under Miranda, it's also true that you might avoid some litigation by changing the Miranda warning a little bit.

MR. WALLMAN: Well, your Honor -- that's correct, Justice White. Clearly, we wouldn't --

QUESTION: Unless you think -- Unless you think there's really some advantages to this formulation.

MR. WALLMAN: Well, we think it is, as a practical matter, the kind of question that arises on a fairly regular basis.

If, for example, a standard -- a standard

Miranda were given to an individual who was cognizant, had some ability to think at the time, one of normal intelligence as, "Do you understand this?" "Yes." "Do you have any questions?" Well, the likely first question would be something like this, and that would be, "How do I get a lawyer? When do I get a lawyer?" The truth is our defense in that case.

We think that these kinds of questions probably arise on a fairly regular basis in regard to Miranda. In other words, if you indicate to the gentleman or the person who is being interviewed, "Do you have questions?" he has one, and you give him a truthful answer, we think that that is Constitutionally permissible. Whether it's a part of the Miranda or it's a part of the interview that's recorded, it obviously will be examined at the suppression hearing.

QUESTION: What do they do in this jurisdiction -- when they give them this particular Miranda warning? Then what happens? What do they say, "Do you waive your right to counsel at interrogation?"

MR. WALLMAN: Well, in essence they --

QUESTION: Do they say, "Do you understand?" or do they just say -- just go right ahead and -- if he doesn't -- if he just remains silent or --

MR. WALLMAN: Well, the full Miranda itself --

and we're only discussing a part of it -- appears on page 133 of the Joint Appendix, and it does indeed make those statements. It says, "Do you understand this? Do you have any questions?"

Now, the answers to those questions are not necessarily --

QUESTION: But then what? Then what? Is that the end of it?

MR. WALLMAN: Well, then if the individual wishes to make a statement or the interview continues, then the questions and answers are recorded.

QUESTION: How do you know? Do you just ask him a question?

MR. WALLMAN: Yes. You --

QUESTION: He never says, "I waive," or anything like that? He just --

MR. WALLMAN: Well, this Miranda --

QUESTION: "Do you have any questions?" And he's silent. And he doesn't say, "I want to remain silent. He just is silent. And so then you start questioning him.

QUESTION: Well, then he signs the document and --

QUESTION: Oh, he signs the document. What does it say?

MR. WALLMAN: It indicates that he's read these and he waives his right --

QUESTION: Okay.

MR. WALLMAN: -- to counsel.

QUESTION: Well, it certainly doesn't mean that. He doesn't waive his right to counsel --

MR. WALLMAN: To counsel at the time of the interview.

QUESTION: He's waiving his right to counsel ate the time of the interview?

MR. WALLMAN: Yes.

MR. WALLMAN: Well, now, in this case I take it Mr. Eagan signed, as part of the Miranda warning that was first given --

MR. WALLMAN: Yes?

QUESTION: -- a waiver --

MR. WALLMAN: Yes.

QUESTION: -- in which he says, "I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing," and so forth. Is that right?

MR. WALLMAN: That's correct.

QUESTION: So, he said affirmatively, "I do not want a lawyer." That's part of the waiver that's signed

before --

MR. WALLMAN: That's correct.

QUESTION: -- questioning?

MR. WALLMAN: On page 133 of the Joint Appendix, "I have read and had read to me the statement of my rights. I understand what my rights are. I'm willing to answer questions and make a statement. I do not want a lawyer and I know what I am doing."

QUESTION: In that, "I have read or had read to me," you're supposed to cross out and you didn't cross out one of them there, did you?

MR. WALLMAN: At the suppression hearing and during testimony I believe the testimony from the officers were that he did -- both were done.

QUESTION: He had done both?

MR. WALLMAN: Yes. They were read to him and he read them himself.

QUESTION: And when they read it to him, did they read the waiver language too?

MR. WALLMAN: I believe the testimony in the suppression hearing and at trial was to the effect he read the entire document.

QUESTION: He read it himself?

MR. WALLMAN: I believe so. Yes. We believe, as we have previously indicated, that the warning itself

was indeed clear, it stated nothing more than the truth. We would urge the Court to reverse the decision of the Seventh Circuit in regard to the first Mirandized statement, find Miranda appropriate. We believe that under the Court's previous rulings there is no particularized kind of version of Miranda. Indeed, many potential variants exist. This one was entirely appropriate.

In the alternative, we would urge the Court to reverse the remand on the second issue. We feel that there is sufficient evidence in the record for the Court at this juncture, and surely at the Seventh Circuit level, to make the Elstad v. Oregon determination itself.

I have nothing further.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wallman.

The case is submitted.

(Whereupon, at 11:47 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

derson Reporting Company, Inc., hereby certifies that the
tached pages represents an accurate transcription of
lectronic sound recording of the oral argument before the
upreme Court of The United States in the Matter of:

JACK R. DUCKWORTH, Petitioner, V. GARY JAMES EAGAN. Case No. 88-317

id that these attached pages constitutes the original
ranscript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)