OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROBERT S. MINNICK, Petitioner V. MISSISSIPPI

CASE NO: 89-6332

PLACE: Washington, D.C.

DATE: October 3, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT S. MINNICK, :

Petitioner :

v. : No. 89-6332

MISSISSIPPI :

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Washington, D.C.

Wednesday, October 3, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:50 p.m.

APPEARANCES:

FLOYD ABRAMS, ESQ., New York, New York; on behalf of the Petitioner.

MARVIN L. WHITE, JR., ESQ., Assistant Attorney General of Mississippi, Jackson, Mississippi; on behalf of the Respondent.

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P R O C E E D I N G S

(1:50 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 89-6332, Robert S. Minnick v. Mississippi.

Mr. Abrams, you may proceed whenever you are ready.

ORAL ARGUMENT OF FLOYD ABRAMS

ON BEHALF OF THE PETITIONER

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

This is a capital case that raises issues about the adherence by the State of Mississippi to this Court's rulings in Edwards v. Arizona and Michigan v. Jackson. The relevant facts are not in dispute. Arrested in California on the basis of capital murder warrants issued in Mississippi, Mr. Minnick was questioned by the FBI. His interrogation was on a Friday. Mr. Minnick spoke with the agents about his escape from a Mississippi prison, and refused to respond to certain questions about two Mississippi homicides for which he had been arrested.

Clearly, expressly, and unambiguously, Minnick on three separate occasions told the agents that he wished to have an attorney. Minnick's language, as recorded by the agents, and in response to their inquiry and their warning to him that he didn't have to speak unless his lawyer was

present, was that they should "come back Monday when I have a lawyer," at which time he said he would, quote -- this is from the FBI report, "make a more complete statement then with his lawyer present." The FBI agents immediately discontinued questioning.

Mr. Minnick spoke to assigned counsel over the weekend. Early Monday morning, a sheriff from Mississippi appeared at the jail. Minnick's jailers told him that he had to go downstairs and talk to him, and that he could not refuse. The Mississippi Supreme Court made a precise, factual finding, not in dispute on this appeal, that, quote, "the jailers told Minnick that he would have to go down and talk with Denham," who was the sheriff.

Deputy Denham, who testified that he had with him a copy of the FBI interview report, the report I referred to earlier, read Minnick the statement of his Miranda rights. According to Deputy Denham, Minnick, after first referring to and answering questions about his escape from the Mississippi jail, then made certain inculpatory statements about his role in the homicide. Those statements were introduced at trial and were referred to throughout the trial by the prosecutor in a case which wound up with a finding of capital murder and the death sentence being imposed.

Not at issue, then, in this case are the facts

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that Mr. Minnick not only asked for counsel, but asked for counsel to be present at any resumption of his interrogation. Not at issue is the fact that, notwithstanding that explicit request on his part, he was required to meet with the Mississippi sheriff without his counsel present, after his jailers told him that he had to talk with Denham and after they brought him down to see Denham.

There is no issue in this case, as has sometimes arisen before this Court, involving anything which conceivably be viewed as reinitiation by Minnick of discussions with the Mississippi sheriff. He was brought down against his will to meet with him, after he had counsel, after he had asked for counsel to be present at any resumption of any -- of any interrogation being resumed and questioned by the sheriff.

QUESTION: It's also undisputed that he had seen counsel in the interim.

MR. ABRAMS: Yes, sir. In the interim. I am sorry if I didn't make that clear. Over the weekend he saw counsel and spoke with counsel.

QUESTION: Can we say that it's also undisputed that this confession is voluntary?

MR. ABRAMS: It is not undisputed that it is voluntary --

QUESTION: For purposes of this case, I should have said. For purposes of the issue presented to us, we can assume the confession was fully voluntary?

MR. ABRAMS: I find that a difficult question, Justice Kennedy, because even the Mississippi -- the Mississippi Supreme Court did not make any specific finding on that, except that Minnick had waived, in their view, his Sixth Amendment rights and, perhaps implicitly, his Fifth Amendment rights.

QUESTION: Well, but the rule you are asking us to adopt certainly is a rule that takes no account of the fact that the confession was fully voluntary?

MR. ABRAMS: Yes, sir. The rule I am advocating to you, and the rule that we believe that the Edwards case, the Jackson, have already established, is that whatever happens, however voluntary it may be, after the resumption by the authorities, is inadmissible. Yes, sir.

The core question in the case, then, is whether these allegedly inculpatory statements made by Minnick on the occasion of the reinterrogation he was required to attend can serve the basis -- as a basis for his conviction and execution.

In our view, if the Court please, this case is governed by and indeed controlled by this Court's ruling in Edwards v. Arizona in its Fifth Amendment aspects, and in

its Sixth Amendment aspects, its ruling of a similar nature in Michigan v. Jackson. As we understand those cases, they conclude that the police, in a situation in which an individual States that he wishes to consult with counsel, must cease the interrogation at that time, and that it may not be resumed unless the defendant or the accused himself has reinitiated further communications with the authorities.

In a sense the issue raised, as we view it, is even narrower than that, because in this case Mr. Minnick not only explicitly sought counsel, but explicitly requested counsel's presence at any resumption of the interrogation.

The basic issue that divides us here is then plain enough. It is the position of both Mississippi and the United States, that since Minnick had access to counsel over the weekend, since he did speak to counsel over the weekend, that that suffices to meet the constitutional requirements of the Fifth and Sixth Amendments. We believe that as a reading of this Court's precedence, that it is a misreading, that Miranda itself determined that if an individual States he wants an attorney, interrogation must cease until an attorney is present.

QUESTION: Well, that is pretty much dicta, isn't it?

MR. ABRAMS: Yes, it is dicta, but it is then read in, as we read the Edwards case, Your Honor, as a good part

of the rationale for Edwards itself. That is to say, in Edwards when the Court considers Miranda, the Court then States that the Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation. We think that that conclusion in Edwards itself, which is the case that we really rely upon here, is a significant part at the least, Your Honor, of the Court's reaching its final conclusion in Edwards.

At the core of Edwards, as we understand this Court to have repeated it again and again through the years, is the unique role that a lawyer can play in protecting Fifth Amendment rights of a client undergoing interrogation. That phrase is one which has recurred with frequency as this Court has explained the purport of Edwards itself. In Roberson v. --

QUESTION: Certainly there is language in Edwards, Mr. Abrams, I just look at what was quoted here by the Mississippi Supreme Court in its -- where they say we further hold that the accused, having expressed his desire to deal with the police only through consult, is not subject to further interrogation by the authority until counsel has been made available to him. Now here counsel was made available to him.

MR. ABRAMS: And the question, Mr. Chief Justice, before the Court, as a matter of interpretation of Edwards

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at least, is the meaning of that phrase, and the meaning of that phrase in context.

QUESTION: But counsel made available to him. Are you saying that seeing the lawyer in the interim was not making counsel available to him?

MR. ABRAMS: I read counsel available to him in the context of this language, Your Honor, as counsel available to him at the interrogation. And I, with all respect I urge upon you that in the context of the two paragraphs from which the Mississippi Supreme Court quoted that phrase, that that is the only fair reading. If I may, the Court said in Edwards we now hold that when the accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights.

We further hold, and this is the sense of the question, that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication. And then the Court says, as if, I would urge upon you, as if to clear up any potential ambiguity in the language, "Miranda itself

indicated that the assertion of the right to counsel was a significant event, and that once exercised by the accused the interrogation must cease until an attorney is present. Our later cases have not abandoned that view."

In case after case -- I appreciate that language is used sometimes which the Court when it considers an issue narrowly may decide that it had not phrase as felicitously as it might have. But in case after case decided Edwards in which this Court has summarized the core of Edwards, it has done so in a fashion consistent at least with the reading that we offer to you today.

When, for example in Patterson v. Illinois, the Court was summarizing Edwards, it said that the essence of both Edwards and Jackson was to preserve the integrity of an accused's choice to communicate with the police only through counsel. It is not communicating with the police only through counsel if all you have is a consultation with counsel over the weekend, and at the interrogation itself counsel is not --

QUESTION: The defendant can't change -- if he said on Friday I want to have the interrogation only with a lawyer, he sees the lawyer, they come back, and he can't change his mind?

MR. ABRAMS: Absolutely, he can change his mind. And indeed, Your Honor, I read it as the holding of Edwards

that he can change his mind, but that he has to reinitiate communications if he does.

QUESTION: Even though he has seen a lawyer in the meantime?

MR. ABRAMS: Even though he has seen a lawyer in the meantime. That is what we argue here.

QUESTION: And even though the lawyer has told him not to talk.

MR. ABRAMS: Even though the lawyer has told him not to talk. It isn't the same as the lawyer being at the interrogation. A lawyer at the interrogation can play all the different roles that this Court has indicated in all its different opinions at an interrogation itself. And it simply doesn't fulfill the same function of the lawyer at the interrogation if the lawyer simply talks to the person in advance.

It seems to me that -- for example, if one were to ask the question what could a lawyer do for him at the interrogation? Why is it really -- I mean in the real world, why is it different if a lawyer had been at this interrogation or had been with him at that time? I would urge on you that that's, I think, a fair question.

One answer is that a lawyer would have told him they can't make you go down and talk to them. They can't make you go down when you don't want to go down. They can't

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make you leave your cell and go down. They can't make you "talk to them," as the jailer told him that he had to do. The lawyer would tell him Sheriff Denham is not your friend. Sheriff Denham, who is going to talk to you about your mama back home, wants to execute you. And the lawyer who is standing with him can play that sort of role.

And as a lawyer, he could explain to Minnick when questions were asked which Minnick, according to Sheriff Denham, answered, he could explain to Minnick that it might not be a defense for Mr. Minnick, even if the alleged confession was exactly what Minnick said, it might not be a defense for him if in fact the other individual accused and convicted of murder had killed one person and put a gun to Minnick's head and say you have to kill the other person or I'm going to kill you. A lawyer present there would have played a role, and a lawyer in advance simply cannot play that role.

And our view is, Your Honor, then it not only makes a difference in this case, it makes a major difference in terms of what Edwards and Jackson and Roberson and a flock of precedence of this Court will be understood to have meant. It would also lead, if this decision were to be affirmed, to a significant moving away from, at the least, what this Court has more than once referred to as the bright-line rule of Edwards.

Edwards is at the very least clear, comprehensible, understood by police. There have not been many cases about it. If that is abandoned in this type situation, there simply is no doubt that we will wind up with Minnick hearings burdening the courts for years to come, and every prosecutor will -- why would he not -- want to reinterrogate an individual after he saw his lawyer, without the lawyers present. What, what good prosecutor wouldn't want to do that, wouldn't try to do that?

QUESTION: Mr. Abrams, I think many people thought Miranda itself was a bight line. And you know, and we know perhaps better than you do, we don't have just hundreds of Miranda petitions. We have thousands over a period of years. Every sentence and every clause has turned on its own little jurisprudence. So I am not at all sure that deciding this case one way or another is going to diminish the amount of Miranda jurisprudence.

MR. ABRAMS: You have had a lot of Miranda jurisprudence, as I understand it, and as I hear you, Your Honor. You really haven't had a lot of Edwards jurisprudence. You have had Edwards jurisprudence on retroactivity and the like. Edwards has worked.

QUESTION: Well then we've had, we've had discussions as to whether, what was reinterrogation. We've had several cases involve that.

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MR. ABRAMS: I just know of one, but I am sure I may have missed them.

What you would have if you ruled against us here are hearings which we do not now have in the legal system, which relate to how often the prosecutors went back to the cell to seek to reinterrogate him after he saw his lawyer, how hard the prosecutor came on --

QUESTION: But all he has to do, all he has to do is tell them again my lawyer told me not to say anything. I am not saying anything. He --

MR. ABRAMS: That's all he had to do --

QUESTION: He holds the keys to his interrogation right there.

MR. ABRAMS: That is all he had to do in Edwards.

QUESTION: Right.

MR. ABRAMS: But that's all he had to do in Roberson. That's all he had to do in a flock of cases in this Court in which, as I read the Court's jurisprudence, what you have said is we will not put an accused who is in a custodial situation into that position --

QUESTION: We have never said that after he has seen a lawyer we won't put him in that position.

MR. ABRAMS: Absolutely not.

QUESTION: That's what you're asking us to say here.

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MR. ABRAMS: That's right. But if you compare this case to cases like Smith v. Illinois or Roberson v. Arizona, I'd submit to you that this is an easier case in terms of adherence to the -- a core principle, as we read it at least, of Edwards and Jackson than either of those harder cases were. We don't deal here with a separate crime. We don't deal here with a situation where in Smith all the prosecutor did, all the policemen did was to finish reading Miranda. And that was held to go too far consistently with Edwards.

One of the advantages of Edwards, not the only one, one of the advantages that this Court has more than one remarked upon, more than once remarked upon, is the fact that that lays down clear rules, and you have not had problems of a serious nature in interpretation of those rules. And perhaps at least as important, the lower courts have not been burdened --

QUESTION: Well, it's clear it's at some expense, though. I mean, it's saying we won't have all these questions about questioning the defendant because basically you can't question the defendant, period.

MR. ABRAMS: Justice Scalia, every bright-line rule imposes a cost, and I don't deny that for a moment. The Edwards rule, by its nature, Jackson, Miranda, all these cases, by their nature -- every time you establish a

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prophylactic rule you are assuming or understanding when you do it that there might be on the periphery some confessions here that might otherwise have been admissible, but which you are ruling to be inadmissible. And that, I agree with you, that comes with the territory.

I don't think I am asking you to expand the territory at all. The United States and Mississippi take the position that we are seeking some sort of extension of the Edwards case, or expansion of the Edwards case. With all respect, that is the normal rhetoric of cases of this sort. One side says I'm just adhering to it; the other side says you are seeking to expand it. I will go one more. I think they are trying to contract it. I think that what is really involved here is that they are attacking the core of these cases themselves. So --

QUESTION: Does the Sixth Amendment get you any farther?

MR. ABRAMS: I don't think we really need the Sixth Amendment, Your Honor. We do argue it because if, for any reason --

QUESTION: What if you lose on the Fifth?

MR. ABRAMS: If we lose on the Fifth --

QUESTION: You know, it's not unimaginable that you would.

(Laughter.)

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MR. ABRAMS: That's why we need it, and that's why -- that's why we argued it.

I understand them to make two Sixth Amendment arguments, and neither of them is the core argument that we have been discussing so far today. They do not maintain, and I don't think they could seriously maintain, that if the Sixth Amendment governs this case, that because counsel had been spoken to over the weekend, his Sixth Amendment rights had been adhered to. No Sixth Amendment case offers any support of that.

They make two arguments against our Sixth Amendment argument. First they claim we didn't raise it in our petition for certiorari. I don't have anything more to say about that than what we said in our responsive papers. We did not phrase it in terms of either the Fifth or Sixth Amendment. We referred in the petition for certiorari to Michigan v. Jackson, which is a Sixth Amendment case.

Their response, the State of Mississippi's response to the petition for certiorari interpreted the question in precisely this fashion. In their brief in opposition they said that what was at issue here is, quote, "petitioner's Fifth and Sixth Amendment rights were not violated by the admission of his confession into evidence."

QUESTION: Is the question which is set forth as the question presented on the first page of your blue brief,

is that the same question as contained in your --

MR. ABRAMS: No, Your Honor, it is a rewritten, I thought a clearer form of the question.

QUESTION: Do you think counsel is free to do that?

MR. ABRAMS: I understand from Rule 24 that so long as we are not expanding the scope of what is before the Court, fairly presented to you, that if we can state it in a fashion which fairly presents what was before you at the time of the petition for cert., that we are permitted to do that. And we think we have done just that, Your Honor.

The precise question as it was phrased in the petition for cert., we referred to neither amendment. I thought it was helpful to try to put that in, or when -- I didn't work on the petition itself -- the petition says whether, once an accused has expressed his desire to deal with law enforcement officers only through counsel, the police may reinitiate interrogation in the absence of counsel as soon as the accused has completed one consultation with the lawyer. I think that fairly encompasses Fifth and Sixth Amendment --

QUESTION: Well, assume it did --

QUESTION: That's your argument on the Sixth Amendment?

MR. ABRAMS: The argument on the Sixth Amendment

is that if we are right, Your Honor, that his Sixth Amendment rights had attached --

QUESTION: Well, that's --

MR. ABRAMS: -- which is the point I would like to address.

QUESTION: If you're going to start there --

MR. ABRAMS: Yes. I was simply starting with the proposition that if we're over that hurdle, we don't think we have any other hurdle, because they do not argue, and can't, that consultation with a lawyer over the weekend satisfies the Sixth Amendment.

Our position on the attachment point, Your Honor, is -- is this. It is perfectly true, it is undeniable that that is a matter of -- it is a matter of Federal constitutional law to -- in any determination of when the Sixth Amendment applies. We understand, though, and it is our position to you that, given that this is a State prosecution, given the fact that the Mississippi Supreme Court has held in this case and before, and that indeed the State of Mississippi so argued before the Mississippi Supreme Court that the right had attached under Mississippi law, and therefore, in the language of Kirby v. Illinois from this Court, that Mississippi was committed to prosecute on the issuance of the arrest warrant. Not the later time when, undeniably --

QUESTION: So that's the beginning of formal proceedings?

MR. ABRAMS: In Mississippi. And that is what the Mississippi Supreme Court held in this case, and that it has held in other cases cited in our brief as well. The argument against us is that there ought to be one body of law, the Federal law, which has basically been established in certain precedence of this case. We think that when you have a State prosecution that it does lie with the State to make a decision as to when it has committed to prosecute. And there are reasons unique to Mississippi set forth in its jurisprudence as to why under Mississippi law that right attaches earlier. The rural nature of the State, the fact that as a matter of common practice indictments are issued long after all the work --

QUESTION: But they do something more to actually bring, to start the proceeding further. They file complaints, don't they?

MR. ABRAMS: Yes, yes.

QUESTION: Or they indict, or have preliminary hearings?

MR. ABRAMS: They -- yes. But what they have concluded, here and elsewhere, what they have concluded is that the issuance of the arrest warrant under Mississippi law is the moment at which this right attaches.

QUESTION: Wouldn't it be easier to have a bright-line rule, Mr. Abrams, so we don't have to go State by State. I mean, just one nice bright-line Federal rule.

(Laughter.)

MR. ABRAMS: There are some times when federalism comes in more than handy, and I think that this is one. This Court has not had this issue before really at all. In Kirby v. Illinois the Court set forth five different times when it could be said that the right attaches, and has never addressed the question in a State context.

QUESTION: Mr. Abrams, may I just interrupt for a second? Is it -- am I not correct that the majority -- the Mississippi Supreme Court was divided -- the majority assumed the Sixth Amendment right had attached and held it had been waived?

MR. ABRAMS: Yes, Your Honor.

QUESTION: Whereas the dissenters thought that -- relied on the Sixth Amendment and felt it had not be waived.

MR. ABRAMS: Yes, Your Honor.

QUESTION: So they all agreed the right had attached.

MR. ABRAMS: All of them agreed that the Sixth Amendment right had attached, and the State of Mississippi so urged that position on them.

QUESTION: We seem to have put a lot on State law

in the Moore case.

MR. ABRAMS: Yes, yes.

QUESTION: And referred to Illinois -- was it Illinois law?

MR. ABRAMS: Yes, yes. And we cited that to you, and we think that it's a fair cite for that proposition. And indeed we think Kirby itself suggests that reliance on State law would be proper here. So our view in the end -- I'll just take a final second.

We think you could write an opinion reversing this opinion which is no more than a series of quotations from the opinions you have written in this area. We think that the summaries which this Court has offered through the years of what Edwards means and why Edwards exists apply on all fours in this case.

There is an enormous difference between a lawyer being present and a lawyer consulting, and we urge that upon you, and we urge you to reverse this conviction. Thank you, Your Honor. I would like to reserve the rest of my time.

QUESTION: Very well, Mr. Abrams.

Mr. White.

ORAL ARGUMENT OF MARVIN L. WHITE, JR.

ON BEHALF OF THE RESPONDENT

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

Today the Court is being asked to determine the effect of counsel actually being furnished to a defendant on his subsequent waiver of his right to counsel in a renewed contact by the police. The State contends that Edwards v. Arizona allows a renewed contact by police after counsel has been made available.

In fact, the concluding substantive paragraph in Edwards points out that the statement in question there was made without having had access to counsel, and therefore did not amount to a valid waiver, and hence was inadmissible.

The same language is again used, or similar language is used again in Arizona v. Roberson, and the phrase there is without counsel having been provided. And in Rhode Island v. Innis the Court said until had consulted with a lawyer. The cases use the terms, those terms -- or that term -- language from Edwards about having had access or having counsel been available over and over.

The factual situation in this case at bar is distinguishable, of course, from the usual Edwards scenario, because here, after Minnick told the FBI agents that he didn't want to talk further until speaking with his lawyer, they ceased questioning and left him. And he told them to come back Monday and he would give a more detailed statement when his lawyer was present.

Some 2 days later, after he had consulted with his

attorney by his own admission two or three times that weekend, not just a brief consultation, but he had met with counsel two or three times over the weekend, the Mississippi deputy sheriff arrived in San Diego and requested to be allowed to speak with Minnick. Minnick was brought to the interview room and then --

QUESTION: May I ask you a question right there? Do you rely on the fact that he was an out-of-State person? In other words, under your Mississippi canons of ethic, as I understand, once a lawyer has been -- this is cited in the dissenting opinion below, once a lawyer is representing a person there is an ethical obligation not to communicate without -- with that client without notice to opposing counsel. Does that have any relevance to this case?

MR. WHITE: I don't think it does, Your Honor. In this, and I think -- I don't think that we can say that the, in that particular, in this particular situation that Mr. Denham was the agent of any lawyer at that point in time.

QUESTION: Would it have made a difference if it had been the prosecutor himself who wanted to talk to him?

MR. WHITE: It could have. I mean, under an ethical type consideration it may have. But that was not the case here, and of course the --

QUESTION: He is not in effect an agent of the

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prosecutor, you don't think?

MR. WHITE: No, he is not. We would not submit that he was an agent of the prosecution. There are law enforcement officers -- our people are sworn offers that are -- actually work in the district attorney's offices and are their agents, I think. But just the police, just a normal deputy sheriff, or a policeman I don't think would be classed as an agent of the prosecutor.

QUESTION: Apparently -- why do you suppose the dissenting opinion made so much of the canons of ethics, then, and the majority didn't disagree at all? I guess you do.

MR. WHITE: Without being disrespectable to the court below, we don't -- that particular justice and I don't see eye to eye on much at all in our opinions and that, and this is I think an extensive ground to --

QUESTION: Well, but you do agree, don't you that --

MR. WHITE: -- to extend those --

QUESTION: You do agree, don't you, that it is generally unethical for a lawyer to consult with an adversary's client without notice to the other lawyer?

MR. WHITE: Sure. I would agree with that.

QUESTION: Which is the principal point he was making.

MR. WHITE: I think so.

The Mississippi deputy arrived in San Diego, and of course advised Minnick when he was brought into the questioning room of his rights according to Miranda. Minnick gave him an oral waiver, and of course subsequently gave this statement implicating himself in the two Mississippi murders for which he stands convicted now.

Clearly there is no question that Minnick had been furnished counsel. By his own admission he had talked to counsel on two or three occasions. And of course he had consulted with him prior to reinitiation of interrogation when the Mississippi authorities arrived.

QUESTION: Mr. White, would you agree that if the defendant's Sixth Amendment right had attached, that there was no waiver of that right?

MR. WHITE: No, I would not agree.

QUESTION: No?

MR. WHITE: I mean, I think that he had time to consult with his counsel, and as this Court has said many times, that he has a right to change his mind and to talk to an attorney -- I mean talk to the police, even without notice to his counsel. It says that in Brewer v. Williams and as recently as in Michigan v. Harvey in a context --

QUESTION: Even though the police approach him, and he is at first reluctant to talk, and finally they get

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him to talk?

MR. WHITE: There was no -- well, maybe if there is a reluctance to talk, but there was no reluctance to talk in this case when he saw Deputy Denham. In fact, he told I have been waiting to see you. I have been expecting you.

QUESTION: I thought somebody told him he had to go down and talk.

MR. WHITE: Well, I think the -- given Miranda warnings and of course the advice of counsel, he knew he didn't have to go down there, and he --

QUESTION: But didn't they, didn't they tell him he had to go and he had to talk to the man?

MR. WHITE: I think that is what he says in the record, yes, sir. But the --

QUESTION: When you say counsel is made available, suppose there is a telephone call between the prisoner and the counsel, and the counsel says I'll be there tomorrow. I am busy, don't talk to anybody. Is that counsel being available?

MR. WHITE: I think that, you know, the bright line that we are suggesting, of course, is that once counsel has -- there's been a consultation.

QUESTION: Well, what is a consultation?

MR. WHITE: Well, that's, that would be something to be determined.

QUESTION: It's not clear to me that that's a very bright line.

MR. WHITE: It would be a consultation in which the attorney had an opportunity to advise that client of just I think what you've said. I think that a telephone call --

QUESTION: So then before the police know whether they can initiate a conversation they have to say now, did you talk with the counsel and what did you talk about?

MR. WHITE: No. I don't think they have a right to do that and go that far.

QUESTION: Well, how would they -- how are they going to know?

MR. WHITE: I think that you --

QUESTION: How is the rule going to be applied?

MR. WHITE: I think that you have a right to reapproach and ask if he has in fact consulted with counsel, and if he says no then the police must leave. If he says yes, then they can Mirandize him again, and if he waives the right to counsel at that point --

QUESTION: What if he says yes, and I don't want to talk to you without counsel?

MR. WHITE: He must leave, or wait until counsel is present.

QUESTION: Until counsel comes in next time, or

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can they go back in a half hour?

MR. WHITE: I think until he has consulted with counsel again I don't think that he would, that they would have that opportunity.

QUESTION: So there is kind of a series of leapfrog, one-shot attempts by the police, and every time he says I want my counsel, then they'd wait until he talks with him on the telephone again, and then they can go back?

MR. WHITE: There again I think you get into the analysis much, very similar to that of Michigan v. Mosley of was the waiver voluntary at that point.

QUESTION: No, the question is whether or not the police can -- can initiate the conversation. And you indicated that if he once had seen counsel, insisted on, at the time the police first contacted again that he wanted counsel again, that the police had to desist, and I thought your rule was until he consulted counsel a second time.

MR. WHITE: Well, no, I think that you have a situation that the number of times, I think, would all go to then a -- you know, how many times did they go back. I think that would all apply to a -- whether the waiver was voluntary.

QUESTION: Well, then you are saying then they can go back as many times as necessary in order to get him to change his mind?

MR. WHITE: But then of course that -- that of course impacts on the voluntariness of that --

QUESTION: Well, assume it's voluntary. They just go by every half hour.

MR. WHITE: I don't see anything -- if he has consulted with counsel every half hour, yes.

QUESTION: I assume that conscientious counsel would probably try to delay conferring with his client as long as possible, isn't that right?

MR. WHITE: That may be the outcome of that.

(Laughter.)

QUESTION: For sure. He'd tell them, you know, ask for a lawyer but don't talk to one. That's the best advice that a criminal, that he could get.

QUESTION: That's a great right to counsel, isn't it?

QUESTION: Did you -- do you mean to say that if the Sixth Amendment had attached in this case -- and by the way, do you, did you concede that it had attached?

MR. WHITE: If the opinion of the Mississippi Supreme Court is read, which, and we contend that the shorthand used there is nothing -- deals nothing with the Federal Sixth Amendment rights, it says Sixth Amendment right to counsel under Mississippi law had attached.

QUESTION: But you don't concede in this Court

that --

MR. WHITE: No, I do not.

QUESTION: -- that the Federal right had attached. But if it has, if it has attached or did attach, do you say that the State may then initiate an interrogation?

MR. WHITE: I think the line is much blurrier there in that situation.

QUESTION: Blurry? How do you read Jackson?

MR. WHITE: Jackson is pretty specific in that -- in that area.

QUESTION: Well, you mean it isn't blurry, is it?

MR. WHITE: Not -- not really, but I think that with the furnishing of counsel there, I think that -- once counsel has been appointed I think the State does have a duty to stay away.

QUESTION: Even under the Sixth Amendment.

QUESTION: I thought you answered me to the contrary. Did I misunderstand you when I asked you about the Sixth Amendment?

MR. WHITE: No, I think that the person can waive at anytime. I thought that was your question. I am sorry.

QUESTION: But may the State initiate --

QUESTION: Well, can the police initiate it like they did here? That was the purpose of the question. I thought you said yes, that was fine --

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MR. WHITE: I think they could, yes.

QUESTION: -- under the Sixth Amendment.

MR. WHITE: Yes.

QUESTION: You don't think Jackson bars that?

MR. WHITE: I think that under the same test that is used in Edwards, which it says is adopting the Edwards test, I think the same test is there.

QUESTION: You mean that the -- you mean the accused has to initiate it?

MR. WHITE: Unless counsel has been provided there. But --

QUESTION: So the Sixth Amendment adds nothing to the case, in your view?

MR. WHITE: No, it doesn't. In fact we, it is our firm contention that the Sixth Amendment right to counsel has not even attached in this case, because there is nothing unusual about Mississippi law, contrary to what Mr. Abrams has said, that would --

QUESTION: Well, are you saying the proper way to interpret the opinion of the Supreme Court of Mississippi about the right to counsel is that the Mississippi law respecting the right to counsel, or the Mississippi law respecting the initiation of prosecutions? I mean, does Mississippi have a more liberal provision as to when you have the right to counsel than the Federal Constitution?

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MR. WHITE: Under these latest decisions of the State constitution, they -- the opinions dealing with this specifically say we reject the Federal approach, and say that we are not relying -- we might be citing Federal cases, but we reject the Federal law, and say that this is purely, exclusively done under State law, this right to counsel. They use this shorthand of the Sixth Amendment, I am afraid, in, just as a shorthand for, instead of saying section 26 or --

QUESTION: Oh, but Mr. White, in the opinion they say the standard for determining whether or not a defendant has waived his Sixth Amendment right to counsel was set out in Brewer against Williams, 430 U.S.

MR. WHITE: That is correct.

QUESTION: That is hardly a Mississippi case.

MR. WHITE: Well, I agree. In this particular case --

QUESTION: And then they argue further that his Sixth Amendment right to counsel under Mississippi law had attached. That's -- the Mississippi law only went to when the right attached.

MR. WHITE: And then they say --

QUESTION: And then they are talking about the -- is the right to counsel in the Mississippi constitution in the sixth amendment, or is it in some other amendment?

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MR. WHITE: It is not in the sixth amendment there.

QUESTION: So when they use sixth amendment, that is a reference to the Federal Constitution?

MR. WHITE: Well, I --

QUESTION: That's rather clear, I think.

MR. WHITE: The case that they rely on, which is Livingston there, states clearly that they are not relying on Federal law to find that right. The -- as I say, the Sixth Amendment -- using the Sixth Amendment is not a clear indication that the Federal Sixth Amendment right is attached. The arrest warrant does not in any way put the, put a State to the burden of prosecuting anybody.

QUESTION: Well, I think what they are saying is they are not relying on Federal law for their determination of when it attaches. But they are making it clear that they think that when it does attach, Federal law comes along with it, that is, the Sixth Amendment. Now, you may argue against that, and maybe that is not their call, it is probably our call rather than theirs.

MR. WHITE: I think under Coleman v. Alabama it is your call. And of course the reason in Coleman v. Alabama, they say we look to the State law to see when those guarantees of the Sixth Amendment are impinged upon, then, you know, as in Coleman, there they say -- you held that the

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preliminary hearing was the stage because if you fail to raise certain defenses at that point you would lose them forever, they would be forever waived. So they said -- found that to be the critical point where the right to counsel attached, and therefore the Sixth Amendment came into play there.

Whereas in Mississippi, the issuance of an arrest warrant -- this was kind of bootstrap from a statute of limitations statutes, two statute of limitations statutes setting out what crimes and when the statute of limitations had begun to run. The statute could just as easily have said that the statute began to run from the time the crime was committed. And of course the Court there would have said well, the Sixth Amendment attached at the time that the crime was committed. That's -- that's what we're saying, that from the point of Federal law that that is just not -- not a reasonable interpretation.

QUESTION: May I go back to the Edwards argument for just a moment? As I understand it, you have conceded that if the police went back a second time after he'd had a chance to talk to counsel over the weekend and been advised not to talk to the police, and said we want to talk to you, and he had said no, I want my lawyer present, that they could not have talked to him?

MR. WHITE: That's right.

QUESTION: But why do you concede that? Because as I understand it, you, the basic proposition you are advancing in this case is that having been advised that he doesn't have to talk to the police, which is presumably the advice he got over the weekend, that is all the protection he needs. And he already had that protection. It seems to me there is some tension between you -- that concession and your basic position.

MR. WHITE: In saying that if he says I don't want to talk again, that they can't force him to talk?

QUESTION: Why can't they go ahead and still read him the Miranda warnings and start asking him questions? Because he has got the advice of counsel then. Why does he have to be told a second time he shouldn't talk to them?

MR. WHITE: Because he also has a right to remain silent there, and I think that, that is, that involves that, the right to silence and the right to have counsel present. And if he wants counsel present, then, and requests counsel to be present at that time, then I think you have to abide by that.

QUESTION: But you're interpreting it as a right to have counsel present, not merely a right to be advised by counsel and have counsel available?

MR. WHITE: No, I think he has a right not to talk to the authorities if he says so. And he says no, I am not

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going to talk to you. My counsel told me not to talk to you. I don't think that there is any way that the State would have a right to go on and --

MR. WHITE: Just keep -- not use force, of course, but just try to persuade him to change his mind. That's all.

MR. WHITE: I think that you would --

QUESTION: There's a lot of difference between telling the man in the courtroom that he doesn't have to talk, telling a man in the street that he doesn't have to talk, and telling him in a jail that he does have to talk. Isn't there a difference?

MR. WHITE: I am sure there is, I think there is a difference, yes. But --

QUESTION: And isn't there also a difference? When a man is out on bail you can't do any of this.

MR. WHITE: That is true.

QUESTION: So solely because he hadn't got money enough for bail he is subjected to all of these things.

MR. WHITE: Mr. Minnick was in for a nonbailable offense, so it didn't matter one way or the other. But also Mr. Minnick of course fancied himself as a jailhouse lawyer, and that is very clear in the testimony in the suppression hearing, that he, that we look at the subjective intent and characteristics of Mr. Minnick here --

QUESTION: Mr. White, can I pursue what Justice Stevens was asking you? As I understand your position, somehow if he says I want a lawyer present at the interrogation, you say they have to stop right away. Although if he just said I don't want to talk, you would still allow them to say, oh, come on, why won't you?

MR. WHITE: No. If he says I don't want to talk, I think there, again, that is saying to cut it off.

QUESTION: But you can go back to him then.

MR. WHITE: Yes. I mean, if someone just says -- in the normal situation if they do not request an attorney under Michigan v. Mosley you can go back after a brief period of time, 2 or 3 hours.

QUESTION: But if he wants counsel he means he doesn't want to talk to the police without counsel present? That is what Michigan -- that is what somebody said in Michigan against Mosley.

MR. WHITE: Yes.

QUESTION: I must say I'm still puzzled by your answer to Justice Stevens and to me. He gets arrested. He asks for counsel. He sees counsel. The police go back. He says I want counsel. Your answer, as I understood it, was they can't talk to him anymore, at least until he sees the counsel a second time, and then they can go back one more time.

MR. WHITE: Well --

QUESTION: And to me, if -- I don't understand how you can say that he can waive counsel when they asked him the first time, but they can't, he can't waive it when they ask him the second or third. Why not? That's the whole theory of your case, that he is well advised so that he can waive.

MR. WHITE: Maybe I wasn't clear. I didn't say that he couldn't waive the second or third time. I am saying that when you get to that point of determining how many times they went back, that is a decision to be made from the totality of the circumstances, whether or not that waiver at that point was in fact voluntary.

I mean, you get to the point of badgering there that's -- you know, that's what we're saying. We're not saying that you should be able to badger this person by continually going back, but I think that a fair opportunity to go back at that time should be allowed by -- to the State.

We submit that all that Mr. Denham would have had -- I mean, Mr. Minnick would have had to do, here when Deputy Denham, or when he was -- Deputy Denham came into the room, was to say that his counsel had advised him not to talk to the police, or that he had counsel and wanted him present before he talked. And that would have ended the

matter.

QUESTION: That would have ended the matter. And then they, if they'd done it a third time and that time he gave in, you say well, they would be badgering him. But I would suppose you would then argue he not only had counsel once, he had him twice, so it is definitely voluntary. The more often he talks to counsel, the more voluntary the statement is when made outside the presence of counsel.

QUESTION: The -- what do you make of the fact that he refused to sign a waiver?

MR. WHITE: Well, I think he was following that much of his attorney's advice.

QUESTION: Well, he refused, but the police kept after him and he finally talked without signing a waiver.

MR. WHITE: Well, I mean, this was not one where they just kept after him. This was, they had a short interview on Friday, and then the interview with Denham on Monday lasted 45 minutes to an hour. Nobody from the police had bothered him in between those times.

QUESTION: Well, what did they do? Make an appointment for the second meeting?

MR. WHITE: No, they brought him down to the room there when the Mississippi deputy arrived from Mississippi.

Of course Minnick knew full well, he had had the -- that he did not have to talk with Denham. And of course

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the, it is clear from the transcript of the suppression hearing that he intended to talk to Denham about this case. He had no reason to believe that any request that he made of Denham to have counsel present would not be honored. His earlier request for counsel had been honored, and there was no reason for him not to believe that this would not be.

This, of course, removes that coercive atmosphere that is the concern of Edwards and Miranda, that once a defendant has requested counsel and it is furnished, then he has no reason to believe that it would not be furnished again, or his request be furnished the second time that he asks that, or any reinvocation of that right. So therefore the -- as we said earlier, that the bright-line test would be that of that once counsel or consultation has occurred, then the police could reinitiate conversations with the defendant.

And then of course whether or not that waiver of rights -- waive the right to counsel was in fact voluntary would be made under the totality of the circumstances test that we find in Michigan v. Mosley for that similar type situation, where the right to silence was invoked.

The fact that a request has been honored counteracts, of course, the pressures of the custodial setting, and actual consultation with counsel removes I think to an even greater extent than just leaving the person

alone and then coming back several hours after counsel had been -- not been appointed.

Briefly, on the Sixth Amendment issue, I think we've covered most of it. But the fact that based on these two statutes the Mississippi Supreme Court has held that the right to counsel attaches at the time the arrest warrant issues, the fact that the legislature set an arbitrary time for the statute to begin running, and the Mississippi Supreme Court has turned it to a point for the attachment of a State law right to counsel should have no effect on when the Federal right attaches.

While it is true that we look to the State court law to make the determination as to when the Sixth Amendment right attaches, the examination of State law is to determine at what point rights guaranteed under the Sixth Amendment are implicated. In Mississippi the court made clear the opinions leading to this, we consider, unusual holding, that it rejected the Federal approach and relied exclusively on State law in citing Page v. State and Cannaday v. State, which both clearly say they reject Federal law there.

The, we would just submit that the issuance of an arrest warrant does not commit the State of Mississippi to prosecute a defendant, and therefore the Federal Sixth Amendment right to counsel had not attached in this case.

Thank you.

QUESTION: Thank you, Mr. White. Mr. Abrams, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF FLOYD ABRAMS

ON BEHALF OF THE PETITIONER

MR. ABRAMS: I would just like to make two points, Your Honor. First, there was no ambiguity in what Mississippi said to its supreme court about the attachment issue. I refer the Court to page JA 68 of the joint appendix. We quote there from the brief of Mississippi to their supreme court in which they said, "It is," after dealing with the Fifth Amendment right having attached, citing Edwards, they then said "It is also evident that under Mississippi law, Minnick's Sixth Amendment right to counsel had attached at the time of the interview since warrants for his arrest had been issued," citing Livingston v. State. That was the position of Mississippi.

If their position now were that they were wrong, or they made a mistake, or they are changing their view, I would be more sympathetic. It is perfectly clear, it is not a subject, it should not be a subject of debate that that is what they said to the Mississippi Supreme Court, nor that the Mississippi Supreme Court is fully aware of what its own constitutional provision is.

QUESTION: Well, they can change their minds?

MR. ABRAMS: Yes, they can change their mind, Your

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Honor. But what they can't do is change retrospectively the mind of the Mississippi court. And it does that court no service here to say that they used shorthand when they talk about their own constitution. Justice Robertson in dissent, for example, in this case cited Article III Section 26 of the Mississippi constitution, which is their right to counsel section. The Mississippi Supreme Court referred to the Sixth Amendment.

The only other point that I --

QUESTION: Excuse me, Mr. Abrams, that's really an accurate statement of the Mississippi Supreme Court's position, that under Mississippi law Minnick's Sixth Amendment right to counsel had attached at the time of the interview.

MR. ABRAMS: Yes.

QUESTION: The issue before us today is whether under Federal law Minnick's Sixth Amendment right to counsel had attached.

MR. ABRAMS: Your decision, I believe Justice Scalia, is whether under -- there is no doubt that it is for you to decide when Sixth Amendment rights attach, and that it is the Federal Constitution that makes that decision.

I think it is State law, however, which is relevant in determining when Mississippi makes a "commitment to prosecute," or when -- I am just about quoting from Kirby

-- "adversary proceedings have begun," as a matter of State law. Those are Mississippi decisions, I believe, not -- they are procedural decisions, almost substantive decisions. But they are Mississippi ones.

QUESTION: It happens when the Mississippi Supreme Court says it happens?

MR. ABRAMS: No. It happens if under Mississippi law -- if it is an accurate statement to make to you that adversary proceedings have commenced as a matter of Mississippi law, or that Mississippi is, quote, committed, unquote, in the language of Kirby to proceed, then that is what I think that you should look to. And in looking to that, I think you should take very seriously indeed the ruling of the Mississippi court.

The final observation I would make, I have decided not to make, except a quote from one line from Arizona v. Roberson, in which this Court said that new Miranda warnings will not reassure a suspect, who has been denied the counsel he has clearly requested, that his rights have remained untrammeled. The argument you have just heard is that what counsel, what Minnick asked for was given him. Hence he could relax. He asked for counsel to be present at the reinterrogation. That's what he asked for. That was not given to him.

Thank you very much, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Abrams.

The case is submitted.

(Whereupon, at 2:44 p.m., the case in the above-entitled matter was submitted.)

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lorraine Hunt

(REPORTER)