OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: PAUL McNEIL, Petitioner,

v. WISCONSIN

CASE NO: 90-5319

PLACE: Washington, D.C.

DATE: February 26, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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PAUL McNEIL, :

Petitioner :

v. : No. 90-5319

WISCONSIN :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, February 26, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

GARY M. LUCK, ESQ., Milwaukee, Wisconsin; on behalf of the Petitioner.

DAVID J. BECKER, ESQ., Assistant Attorney General of Wisconsin, Madison, Wisconsin; on behalf of the Respondent.

STEPHEN L. NIGHTINGALE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting the Respondent.

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PROCEEDINGS

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear next in argument No. 99-5319, Paul McNeil v. Wisconsin.

Spectators are admonished to remain silent. The Court is still in session. Do not talk until you get outside the courtroom.

Mr. Luck, you may proceed whenever you're ready.

ORAL ARGUMENT OF GARY M. LUCK

ON BEHALF OF THE PETITIONER

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

The relevant facts in this case are not in dispute. I would like to outline them briefly and then propose three scenarios that support McNeil's proposed rule that a defendant who requests or appears with counsel at an initial appearance may not be questioned by police while he remains in continuance custody unless the defendant initiates that interrogation.

The defendant was taken into custody on May 13th, 1987 in Omaha. That was pursuant to a Milwaukee, Wisconsin warrant and complaint for an armed robbery which had occurred in the Milwaukee jurisdiction. He waived extradition. On May 20th, after being held in continuous custody in Omaha, he was taken into custody by two

Milwaukee deputy sheriff detectives.

At the time that they took him into custody, they advised him of his Miranda rights from a written text which is used by the sheriff's department -- that's in the appendix. And one of the rights read to him was if you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you so choose.

McNeil refused to make a statement at that time and did not request counsel. He was accompanied by officers that day in a search of Omaha for a codefendant which was unsuccessful. On May 21st, McNeil was transferred to the Omaha Airport for conveyance back to Milwaukee. During that transportation, Detective Smukowski of the Milwaukee Sheriff's Department advised McNeil that it would be to his advantage if he would tell his side of the story referring to the armed robbery and to a homicide investigation which was taking place involving a Milwaukee County Sheriff by the name of Butts and the Caledonia Police Department, which is part of Racine County, a separate jurisdiction from Milwaukee County.

Smukowski, after advising McNeil that it would be in his interest to cooperate and tell his side of the stories, was met by a silence from the part of McNeil. He

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did not make any statements concerning either of those offenses.

McNeil was returned to Milwaukee on the evening of the 21st. The following morning, May 22nd, which was a Friday, he was brought before a court commissioner, a judicial officer, and with him at that time was a public defender. When McNeil appeared at the initial appearance, he was advised of the penalties for armed robbery. He acknowledged it by saying, I do, when he was asked if he understood, and those are the only words he spoke at that initial appearance.

Bail was set at $25,000 and a preliminary examination was set.

QUESTION: That's the appearance of May 22nd that's set forth in the -- joint appendix at page 8?

MR. LUCK: That's correct, Justice Kennedy.

QUESTION: Is it -- is it the practice in this State for magistrates to advise suspects generally of their rights? I see that wasn't done here.

MR. LUCK: No, unfortunately, because of the crush of cases in Milwaukee County, sometimes the niceties of informing defendants of their full panoply of rights, which they might get from a Federal magistrate, do not take place.

QUESTION: Is there any requirement in the

Wisconsin statute --

MR. LUCK: Yes.

QUESTION: -- that this be done by the arraigning officer?

QUESTION: There are requirements. But one of the requirements does not include -- I ought to rephrase that -- the magistrate is not required to advise the defendant of his right to remain silent at that initial appearance, unlike under Rule 5 in the Federal system. The magistrate is suppose to advise the defendant of the charges against him, of his right to counsel, to set bail, his right to a preliminary examination.

And if you will look at the text of that initial appearance, you'll notice that there's really a colloquy that goes on between defense counsel and the magistrate and the only participation of the defendant is to acknowledge what he has been charged with. The -- to push that a little further, Your Honor, the public defender has a meeting with the defendants in Milwaukee County prior to their appearance -- at the initial appearance, albeit a perfunctory meeting in a small room off to the side. And we can presume that that occurred before the appearance before the magistrate.

After this exchange took place, McNeil was returned to the Milwaukee County jail where he was held

continuously until that evening at 7:55 p.m. when Detective Butts of the Milwaukee Sheriff's Department went to see McNeil for the purposes of interrogating him about the armed robbery, and according to his testimony, possibly the homicide. Keep in mind that Detective Butts had been involved in a homicide investigation from another jurisdiction, that is, Racine County, because he had informants apparently that led him to believe that McNeil was involved in that Racine homicide.

As a result, Detective Butts was in communication with police authorities from Racine County concerning that homicide. So when he went to see McNeil that evening at 7:55 p.m. at the Milwaukee County jail, I think they can say to a certainty that he went there to speak to him about the armed robbery and the homicide.

When he arrived, he again read from the standard Milwaukee County Sheriff's Department text concerning Miranda rights, which is in the appendix. At this time, McNeil signed a waiver of his rights and said to Butts, I suppose you want to talk about that thing in Caledonia. And of course, Butts said yes, and they had a conversation about the Caledonia homicide. Didn't discuss the armed robbery, and at that time McNeil gave a statement that was totally exculpatory.

Detective Butts testified that he informed

McNeil that he wasn't satisfied with what he had been told and that he would return. He returned 2 days later on a Sunday in the early evening hours with a representative of the Caledonia Department who had primary jurisdiction of the homicide together with, between three or four City of Milwaukee -- not County of Milwaukee -- City of Milwaukee detectives from the homicide division with expertise in the area of homicide interrogation.

QUESTION: Did the robbery take place in the City of Milwaukee?

MR. LUCK: It took place in a suburb called West Allis, a city adjacent to Milwaukee but part of Milwaukee County, which gave jurisdiction to the Sheriff's Department. Ordinarily you'd think that maybe West Allis police would be involved, but because it was in the county the Sheriff was -- and that's how Butts got involved in the homicide. Apparently in developing his investigation of the armed robbery, he received information concerning the homicide passed out to Caledonia and remained active.

QUESTION: And the homicide had occurred in Caledonia in Racine County?

MR. LUCK: That's correct. That's correct.

On the 24th, after 5 hours of -- approximately 5 hours of meeting in the early to late evening with these various agencies, McNeil made a statement that was heavily

inculpatory, partially exculpatory. Butts was still not satisfied, said he was going to come back again, and he returned 2 days later on a Tuesday again with approximately three or four officers. Took another statement after approximately an hour and a half which he felt was -- sewed up the case, let's say.

Consequent -- or subsequent to that, Racine County issued a homicide warrant on May 27th and Mr. McNeil was transferred from the Milwaukee facility to Racine, where he was subsequently arraigned, and subsequently, after various motions to suppress the statements which I've alluded to were denied, he entered pleas to charges of second-degree murder, attempted murder, and armed burglary.

After that, motions were brought to bring to the trial court's attention the Seventh Circuit case of Espinoza v. Fairman, which I don't think it's necessary for me to go into facts, except to say that there's a tremendous similarity between the two fact situations. And at that time, Fairman held that the kinds of statements that had been developed in McNeil should have been suppressed. The trial court felt that even if that case had been brought to its attention during the pending case, it would have had the -- it would have made the same decision that the statements needn't have been suppressed.

The case was then appealed to the intermediate appeals level in Wisconsin, which certified to the Wisconsin Supreme Court, because they felt there was no applicable Wisconsin law.

The Wisconsin Supreme Court, after full briefing and oral argument, felt that when McNeil appeared at the initial appearance, it was purely a Sixth Amendment right to counsel that he had invoked when he appeared with counsel. They use the word transmutation, and they say that it is not possible to transmutate the Sixth Amendment into the Fifth Amendment. And the reasoning was that they felt that there was no interrogation taking place at the initial appearance, and in the absence of interrogation, you cannot invoke your Fifth Amendment right.

Your Honor, we believe that there's three scenarios that support the rule that we're proposing. The first is, if Mr. McNeil, when he was confronted by the Milwaukee sheriffs in Omaha on May 20th, 1987, had, after being advised of his rights, said, I want an attorney, I don't think we'd be here today. And I think the State and the United States would agree under the Edwards and the Roberson doctrines.

A second scenario is when the police from Milwaukee approached Mr. McNeil, if he, sui sponte, without being informed by the police of his Miranda

rights, had said, I want an attorney, I don't think we would be here today.

QUESTION: None of those -- neither of those scenarios happened, did they?

MR. LUCK: Absolutely not, Judge, they did not. What did happen was an invocation of right to counsel with a variation in time and a variation in place. The difference is, is that McNeil waited until he was in Milwaukee to have counsel and it took place at an initial appearance. And we have built our case, Your Honor, around the Edwards-Roberson doctrine as amplified by Michigan v. Jackson.

There is a footnote which appears in our briefs, footnote 7, where in Jackson this Court said that jurists may understand the subtle distinctions between the Fifth and Sixth Amendment, but when an average person invokes his right to counsel, he does not know which constitutional right his invocation rests upon. All he knows when he invokes his right to counsel, whether it's in front of a magistrate or a police officer, is that he needs the assistance of counsel to stand between him and his adversaries, be they the prosecutor or the police.

So that's --

QUESTION: Suppose a suspect, after being advised of his rights says, I want a counsel. I want an

attorney; but I'm pleased to talk with you now.

MR. LUCK: Well, I think that if -- if we take Connecticut v. Barrett, which really doesn't amplify it -- restates the rule in Jackson that the request for counsel should be given a broad rather than a narrow interpretation and that it -- that if there's a plain meaning to the defendant's innovation, we don't have to move to that type of interpretation. Therefore, as in Connecticut and Barrett where the person said, I'll give you an oral statement, but I want a counsel for a written statement, the court said, well, that's plain on its face. We don't have to interpret that.

So if a suspect says, I want an attorney, but I want to talk to you, the plain meaning there would be, I want to talk to you. But if said, I want an attorney, I think you have to stop right there, because you have to give it its broadest interpretation.

That's not the scenario in this case, Your Honor. The scenario in this case is that the defendant appeared in court with his counsel, and I think that his mere appearance --

QUESTION: Well, the principle is that the mere request for or invocation of right to counsel is not in all respects tantamount to an exercise of your Fifth Amendment rights.

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MR. LUCK: Well, if I understand the question, Justice Kennedy, it's where you have this issue of how do you interpret that invocation. And I guess I'm going back to Connecticut v. Barrett, where the invocation of counsel is plain on its face as to what it is. It isn't necessary to interpret it. It's where there's ambiguity that you have to interpret. And when you have to interpret, this Court has said you give it a broad interpretation when you're talking about the request for counsel.

Now, the State of Wisconsin has argued that the plain meaning of an appearance with a defendant at an initial appearance is that it's the Sixth Amendment. But Jackson says that that's not so clear. That when a defendant appears at an initial appearance, he doesn't know whether it's the Fifth or Sixth Amendment. He wants counsel. Therefore, the broad interpretation of Jackson, because it's ambiguous, that's not like the defendant appearing at the initial appearance and saying, Judge, yes, I want a lawyer just for this charge and only for this charge and I don't need his help when I'm interrogated by police.

QUESTION: But -- but how -- how did the lawyer get in the picture here?

MR. LUCK: He was a public defender, Your Honor, and what -- the procedure in Wisconsin is is that the

public defender has an obligation to interview all persons brought into custody before they make an initial appearance to ascertain whether or not they're indigent. If a person is indigent and wants them to appear with them, they will appear.

QUESTION: Does it have -- does it have to be shown that -- that the indigent wants the lawyer to appear with him?

MR. LUCK: It doesn't have to appear on the record, but the public defender will not appear with someone who does not want counsel or says to them, I will get my own counsel. Then that person will appear at the initial appearance by themselves. The public defender may say at that time, this individual want -- is going to get their own attorney. We're not involved in the case.

That's not on the record, though, Your Honor. I want to make that clear. I'm not presenting it as though it's part of the record.

QUESTION: Mr. Luck, what -- what happens under your theory if a -- if a defendant requests counsel, he's given counsel, and then he's released on bail. And while he's out on bail, he commits another crime. He's arrested. He's brought in. Waives his Miranda rights and confesses.

MR. LUCK: He's in big trouble.

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QUESTION: Why -- why is that?

MR. LUCK: Because the break in custody --

QUESTION: Wouldn't U.S. Erie protect him?

MR. LUCK: No, because under Roberson, this Court required -- it's my understanding -- continuous custody when --

QUESTION: It's a break in the custody that's --

MR. LUCK: It's a break in the custody and --

QUESTION: Suppose he stabs somebody while he's in custody, and they question him about that incident?

MR. LUCK: No. He's invoked his right to counsel between himself and police --

QUESTION: That doesn't break the -- that doesn't break the --

MR. LUCK: No, he's still in custody. We see the magic formula as being in custody, having invoked a right to counsel, and being interrogated. Those are three requirements for our rule. If you take any of those three requirements, our rule fails. And we think that that rule falls within Roberson.

QUESTION: What did the defendant actually do in this case to invoke his right to counsel? He had an appearance before a magistrate in Milwaukee County.

MR. LUCK: That's right.

QUESTION: And did he say anything at that time?

MR. LUCK: No, the record is silent on that. And that's where we see the ambiguity. The United States has suggested that they agree with us that an individual can invoke his right to Miranda in a noncustodial -- I'm sorry -- in a noninterrogation setting much as this Court said in -- I believe it was the Chief Justice who wrote that opinion in Michigan v. Harvey -- that it's recognized that you can invoke that right in a noninterrogation setting. They simply say that McNeil didn't do it. And we're saying that they're disregarding the principle in Jackson that when a person appears before a magistrate and invokes his right to counsel, he doesn't know whether it's the Fifth or Sixth Amendment. Therefore, the court has to give a broad interpretation to the immediate situation.

QUESTION: Well, but Michigan against Jackson didn't for -- specifically left open the question that's here, did it not?

MR. LUCK: It left -- absolutely -- left open the Fifth Amendment, because the Michigan court had found in its proceedings that the Fifth Amendment had been waived. This Court specifically said they don't have to reach that, because it's Sixth Amendment. But that didn't prevent this Court from using a Fifth Amendment analysis just like it didn't prevent this Court from using a Fifth Amendment analysis in Patterson. Because basically this

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Court has said, we're going to get away from the artificiality of saying, this right to counsel comes from the Fifth Amendment. This right to counsel comes from the Sixth Amendment.

QUESTION: Well, what's -- what's artificial about that? It has two different sources. Miranda was not dependent on the Sixth Amendment at all. It was dependent on -- it's a entirely different amendment.

MR. LUCK: Well, except that the --

QUESTION: It created a right of counsel more or less out of whole cloth.

MR. LUCK: Right, but it also used a Sixth Amendment analysis for waiver. Just as in Patterson you used a Fifth Amendment analysis for waiver in the Sixth Amendment context.

QUESTION: Don't you -- don't you think the basis for saying that in the Miranda context that when the -- when the suspect invokes his right to counsel -- don't you infer from that that he is saying, I don't feel competent to be interrogated without counsel?

MR. LUCK: I think that's how -- that's how --

QUESTION: That's -- that's the basis for the rule --

MR. LUCK: That's how Edwards rules, Your Honor. That's correct.

QUESTION: Yeah.

MR. LUCK: That's how it rules, but we may --

QUESTION: Then that's the basis for saying that on the -- the police can't go back to them at any time without his -- without being asked to do so. Because he -- they know that he just doesn't feel confident. But do you think -- do you make that same inference from just the fact that appearing in court with a lawyer?

MR. LUCK: Yes. I think that much --

QUESTION: You have to say yes with your case I guess.

MR. LUCK: Well, I base that not just on the necessity to say yes, but on the practicalities of the criminal justice system.

QUESTION: Well, the public defender goes to him and -- and talks to him and says, do you want me to appear with you? It might help you out a little, and he says, sure.

MR. LUCK: Well, Your Honor, I don't think it's quite like that, where he says it might help you out a little bit. He says that you have a right to counsel, and if you can't afford counsel, we're going to represent you. And it puts that defendant in the same position as the individual who is --

QUESTION: He says, well, I want you to

represent me -- I want you to represent me.

MR. LUCK: We don't know, Judge, and that's why footnote 7 in Jackson is so important, because of that ambiguity. Because what we're faced with when the United States agrees that that invocation can take place at the initial appearance -- it says, there's going to be a colloquy between the magistrate and the defendant. Well, what do you mean now? Do you want this attorney for your Fifth Amendment rights as well as your Sixth Amendment rights?

Because it's -- what's going to happen, Judge -- I'm sorry -- Justice White, is that defense counsel throughout this country are going to learn -- I've been trained where I do most of my work, Your Honor -- what's going to happen is defense counsel throughout this country who keep up with the case law are going to start telling their clients and the magistrates, he's invoking his Fifth Amendment rights. No one can come and talk to him or her. The only ones who are not going to be able to do that are those defendants who don't appear with counsel.

Then we're going to have a situation of people raising the issue later. Well, I meant to invoke my Fifth Amendment right. What the United States has proposed is is that, yes, this can happen at the initial appearance.

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But we're going to put the burden on the defendant to show that he meant invoke his Fifth Amendment rights, and we say that's contrary to Jackson. It says the burden's on the State and that the courts are mandated to give a broad interpretation to the request for counsel, not a narrow one.

Your Honor, we recognize that the -- we are proposing a new rule to the extent that the rule that we're proposing is in the context which has not arisen before this Court before. But we don't think it's a radical departure. I think that Justice Scalia in his dissent in Minnick noted that the request for counsel at the Jackson situation is a general request for counsel. And when you combine the force of that general request with the rules developed in Edwards v. Roberson, we feel that we're falling within the logical meaning of those cases when they're read together.

Your Honor, to --

QUESTION: I guess the Court didn't agree with me in Minnick though.

MR. LUCK: I guess --

QUESTION: It was a dissent.

MR. LUCK: I know. Your Honor, the United States has recognized in their own brief the general principles that I have laid out for the Court. And I

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think that the only differences -- they're saying that these should -- these situations should be examined on a case-by-case basis instead of the rule that we're proposing, which is a bright line rule.

Our bright line rule is in direct distinction or counter distinction to the State's proposed bright line rule. They have proposed to this Court that the Court forbid a defendant from invoking his Fifth Amendment rights at an initial appearance. It's the contrary of our rule.

And the United States, it seems to me, falls somewhere in between that. And we feel that under Jackson, the Wisconsin proposed rule that Fifth Amendment right cannot be invoked in the -- at the initial appearance has no foundation in the jurisprudence of this Court. And we feel that our bright line rule meets the requirements set out in Edwards and Roberson and Minnick for that matter, and fulfills all the needs -- in fact, has less impact on law enforcement than those decisions did. And we would ask the Court to reverse appeals --

QUESTION: Why -- why shouldn't your rule apply to interrogation on a different offense that this counsel is not involved in?

MR. LUCK: Because that invocation of counsel -- because it's ambiguous and may involve the

Fifth Amendment, is not investigation-specific any more than the invocation of counsel under Roberson as this Court found. It's not investigation-specific.

QUESTION: Well, but when he appears on a particular charge, and simply stands mute, the court appoints counsel to defend him on that charge, doesn't it?

MR. LUCK: If he wants counsel, that's correct.

QUESTION: Yes.

MR. LUCK: But when --

QUESTION: So why do you say it's not in -- crime-specific or investigation-specific?

MR. LUCK: Because there's nothing from the defendant to indicate that.

QUESTION: Well, the -- the defendant said absolutely nothing --

MR. LUCK: That's right.

QUESTION: So it isn't up to the defendant to decide. It's up to the court to decide what the appointment constitutes.

MR. LUCK: It's up to the defendant, Your Honor, did you say?

QUESTION: No, if the defendant has said nothing -- if the -- at the arraignment, then --

MR. LUCK: Correct.

QUESTION: -- then to decide what the scope of

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the appointment of counsel is surely depends on the court if the defendant has done nothing.

MR. LUCK: Well, I don't -- I respectfully disagree. I don't think that the court in that situation is deciding what the scope of the defendant's need for counsel is. When the defendant appears with counsel whether it's retained, whether some attorney walks in or whether it's a public defender, I don't think is relevant. I want to make sure I say that.

QUESTION: Well, you say that -- if you say that appearing with counsel justifies an inference that I don't -- justifies an inference that he's saying that I'm not competent to deal with the police except with counsel.

MR. LUCK: That's correct.

QUESTION: I suppose it goes to any offense.

MR. LUCK: That's right. That's right.

QUESTION: You set your argument.

MR. LUCK: That's my argument. Well, I would like to reserve my remaining time.

QUESTION: Very well, Mr. Luck.

Mr. Becker, we'll hear now from you.

ORAL ARGUMENT OF DAVID J. BECKER

ON BEHALF OF THE RESPONDENT

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

Before I proceed to the argument that I prepared to present this morning, I think I want to clear up one thing with respect to our position. Mr. Luck asserts that our position would forbid an invocation of the Fifth Amendment right to counsel which would thereby trigger the Edwards rule at a court appearance on a charged defense.

I think that mischaracterizes our position. And in making that characterization of our position, he attempts to drive a wedge between our position and the position of the Solicitor General appearing on behalf of the United States.

Our position, I think, and the Solicitor General's position really -- those two positions are identical. All we're saying is that if a defendant makes an appearance with an attorney at a hearing on a charged offense, he does not thereby or as I think is stated in the brief of the Solicitor General, he does not by that fact alone invoke his Fifth Amendment right to counsel so as to trigger the Edwards rule.

We are not suggesting that a defendant could not, if he clearly stated, I am not comfortable in dealing with the police in a custodial interrogation situation, and I want an attorney present whenever I am interrogated -- we're not suggesting that that kind of a request could not come at any stage of his being in

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custody whether that be when he's in the custody of police officers or when he's in court.

QUESTION: And I suppose his lawyer who is with him can say -- ask him, and by the way, I am your counsel here and do you -- do you expect -- do you want to have counsel at any other time the police may want to interrogate you? And he says, yes. Would that be enough?

MR. BECKER: I suppose he could do that. I suppose that could be done. I don't know that that is going to end up being the practice if this Court rules in favor of the State in this case. But I suppose that could be done.

I think there might still remain a question as to whether or not that would invoke the protection of Edwards, because I'm not so sure -- I'm not so sure that that really sends the message that needs to be sent to trigger the Edwards rule. It seems the message that needs to be sent is a message from the defendant himself. That knowing that what he is about to be subjected to what this Court has characterized as the inherently coercive pressures of custodial interrogation, he does not feel comfortable in dealing with the police singlehandedly in that situation. And I think that really is a message that we have to --

QUESTION: Let me be sure I understand you.

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You're saying to me that if the lawyer said to him, would you feel comfortable without a lawyer if you have an interrogation in custody, and he answered yes -- or he answered no -- that wouldn't do it? He can't -- he can't do it by responding to a question from his lawyer?

MR. BECKER: Well, I guess I wouldn't go that far. I don't see that situation arising.

QUESTION: I would assume if we decide the case your way, public defenders will routinely, when they make a public appearance like that, ask their clients that very question.

MR. BECKER: Well, I --

QUESTION: I think that's really what's at stake in this case is to -- what procedure will lawyers follow in the future at procedures such as this?

MR. BECKER: Well, I'm not so sure, because I'm not so sure that a defense attorney sees his -- or a public defender or a private attorney who is representing a person on a specific charged offense sees his job as extending beyond the representation in that charged defense to protecting his client in any other situations to which he --

QUESTION: Well, do you suppose this public defender, if they started to question him on the second offense, he said can I call a lawyer and ask him? He

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called up that public defender, and he said, I'm only representing you on charge A and I won't talk to you. Is that the way your public defender's office works?

MR. BECKER: That may well -- that may well be, because I'm not so sure that the public defender has any obligation to be providing -- or perhaps even any right to be providing -- representation absent the filing of the charges. The public defender's representation is to provide the representation --

QUESTION: Well, then, if that's the case, it shouldn't really matter -- oh, I see what you're saying. All right, I see the point.

MR. BECKER: I think the obligation that we're trying to fulfill with our public defender system is the a -- providing the representation that is required by the Sixth Amendment. And there is no Sixth Amendment right to counsel in that interrogation that you've just described.

QUESTION: Well, but you've just -- if the defendant himself appears and he said, by the way, Judge, I want everybody to know that I don't want the police interrogating me about anything in the future without my having a lawyer. He didn't say that in response to the lawyer's question, but he just -- he's -- he's been there before, so he -- he knows he should say it, and he says it.

MR. BECKER: Well, I don't know that he knows that he should say it. I think I would have to concede that it that happened that that would have to be -- that would be an invocation of the Fifth Amendment privilege.

QUESTION: You didn't say Fifth Amendment.

MR. BECKER: Well, no, I realize that. But if he says that I'm uncomfortable with custodian interrogation about any crime and I'm not just concerned about this crime that I'm appearing before you on. This -- as a practical matter though that doesn't occur. I mean defendants now know that they have -- many defendants know that they have right to silence and rights to counsel, but they aren't standing up at court appearances and invoking those rights, because they know the appropriate place to invoke those rights is when the -- when the situation requires it; i.e., when the police administer the Miranda warnings in anticipation of beginning interrogation.

QUESTION: But you don't suppose that if you follow your rule I have to back off the notion of questioning. But the lawyer might not advise him that it would be in your best interest to make this statement to the court during the hearing, and then they go ahead and make the statement. Don't you think that would happen rather frequently in the future if we adopt your rule?

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MR. BECKER: I --

QUESTION: -- or do you think counsel will probably figure that's ultra vires, so you never give the defendant that advice?

MR. BECKER: I think that and I also really have a serious question whether or not -- if that were to turn out to be the practice -- whether this Court could really feel that that ought to be the kind of request for an attorney's representation at custodial interrogation -- that that ought to be the kind of request that triggers the Edwards rule.

As I indicated earlier, it seems to me that what we really -- what really ought to trigger Edwards and what the record really ought to clearly show is that a defendant basically on his own has come to that conclusion. I don't know that a defendant prompted by defense counsel really raises the kind of concerns --

QUESTION: Depending on this unusual advice that you probably are not competent to deal with the police on your own.

MR. BECKER: Well, but that's advice that is I think contrary to I think what -- what underpins Miranda and Edwards and all the rest, and that is that the defendant generally is competent to deal with the police on his own and to make that decision as to whether or not

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he can handle custodial interrogation without an attorney present or whether or not he does feel those inherently coercive pressures that the Court talked about in Miranda and has talked about in every Miranda decision since --

QUESTION: Well, the end -- the end result of your argument is -- is that if the -- I think you can see that the magistrate here didn't go through the full panoply of what usually is gone through.

MR. BECKER: Well, he went through the full panoply of what usually goes through -- what is usually gone through in Wisconsin, because all that Wisconsin basically requires is what went on here, and that is that the judge has informed the defendant of the charge -- of his right to counsel. He didn't have to do that, because he had counsel.

QUESTION: All right -- all right, he'd be advising of the -- they say you have the right to counsel.

MR. BECKER: Sure.

QUESTION: And the fellow says, and by the way, I certainly want counsel and I don't want to be interrogated about anything without counsel being present. And the judge says, awfully sorry, but all that -- that will be true with respect to this charge. But I have no authority and you have no authority to keep the police away from you with respect to any other charge. I would

think that's the -- that's exactly what you have to be arguing.

MR. BECKER: No, I -- what I'm arguing is that, number one, the scenario that you paint I don't think is going to ever -- is going to occur. I mean we don't see it now. I don't know why we should see it after this case arises. A defendant is fully capable of exercising that right when the time comes to exercise it; i.e., when the police begin their questioning.

So I don't think it's going to --

QUESTION: I don't think that is going to answer my question. Suppose the judge says that?

MR. BECKER: No, I don't think a judge is going to say that, because I think perhaps in that situation where a defendant not coached by an attorney but truly because he feels that he's incapable of dealing with custodial interrogation without an attorney makes that assertion in the context of a court hearing, I think that would have to be treat --

QUESTION: And then police should not --

MR. BECKER: Then the police should not interrogate.

QUESTION: The police should stay away from him.

MR. BECKER: Then the police should stay away from him. I don't see that situation arising. It hasn't

arisen so far and I don't think that that's going to arise in the future.

And I think that you're -- that basically I think what this Court has to do is to -- is to reach the right result in this case on the basis of its prior precedent. And -- and adopt the rule that properly reflects the law, and then if it turns out that there are ways in which smart defense attorneys can somehow manipulate that rule so as to perhaps arguably get around it, then this Court is going to have to, down the road, be confronted with the question of whether or not we're going to allow that kind of manipulation.

But I think we have to take this one step at a time, and I don't think it is any reason not to adopt a rule that it --

QUESTION: I don't -- I didn't know that we were adopting rules. I -- you know, I really thought we were dealing here with constitutional rights. I mean there -- you talk as though we're -- we're writing some code of procedure year by year. You know, just write a new section later on if this doesn't work. Is that what we're doing?

MR. BECKER: I think to a large extent that when you're -- when we're in the area of the prophylactic rights that have been developed under Miranda, your

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description comes very close to what this Court is doing. It adopts the Edwards rule. It then proceeds to adopt the Michigan v. Jackson rule of saying Edwards now applies in the Sixth Amendment context.

Then in Roberson it has to decide how far Edwards goes with respect to uncharged offenses. Now it's being asked to decide whether or not the Jackson situation should also trigger the Roberson rule. I -- I think probably you --

QUESTION: Enough, enough -- you've persuaded me.

(Laughter.)

MR. BECKER: And I think you've -- you've hit on something though here. What -- what is really being requested here is an extension of a prophylactic rule. And I think that when -- when we're talking about that that really there's some burden that is on the person who is seeking that extension to justify it.

And while I don't think it's possible in the time that I have remaining here in my argument probably to fully develop the question, it seems to me that in deciding whether or not there is -- a showing has been made that the rule should be extended so that Edwards -- Edwards-Roberson rule should apply in this situation whether your request for counsel comes not in

the context of custodian interrogation but rather in the context of a court appearance, that the -- and -- and when that request for counsel then is going to bar interrogation with respect to uncharged offenses, I think that what this Court has to do is basically a cost-benefit analysis. And I don't think that once you weigh the costs against the benefits that you really will find a persuasive case made for the extension that is being sought.

And in that regard, I'd like to address the two -- the two prongs of that analysis -- the costs and the benefits of an extension of the Edwards-Roberson rule to the present situation. The costs we would submit would be exceedingly high. As a practical matter what you would be basically holding is once a defendant is charged with a crime, he is, from that point on, off limits to police-initiated interrogation as long as he remains in custody. And he's off limits to police-initiated interrogation not only with respect to that charged crime, but also with respect to any other crimes.

And why do I say that? I say that because almost immediately after a charge is made you're going to have an invocation of the right to counsel. And you're going to have that invocation in one of two ways. You're either going to have it the way it was done here where you

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have a public defender system in place that basically provides attorneys who will make an appearance at the initial court proceeding. And that will obviously have to be deemed an invocation of the right to counsel.

Or you'll have the situation that you have in other States where you do not have a public defender system in place necessarily or the public defender does not arrive on the scene quite as quickly as he does in Wisconsin, where you'll have a court making inquiry at initial appearance as to the defendant's wishes with regard to counsel which will, in the normal course, it would seem to me, invoke a request for counsel.

And so, as a practical matter as I indicated, what you're going to be doing is you're going to be saying that as soon as a defendant is charged with a crime, he is going to become off limits for police-initiated interrogation with respect to any offense.

QUESTION: You mean off limits without advising counsel?

MR. BECKER: Exactly. Exactly. Obviously I'm speaking a little bit in shorthand here against the backdrop of all the decisions. They're obviously -- if they're ready to provide counsel and have counsel present at the interrogation, the interrogation could proceed.

Now, why do I say --

QUESTION: Assuming counsel advises him to proceed in the interrogation.

MR. BECKER: Which, as I think you pointed out, Justice Scalia, purporting from Justice Jackson's earlier opinion, that isn't very likely to happen. And when I say you pointed out, I'm talking about your dissent in Minnick.

The -- now why do I say that that's going to be -- have a detrimental impact on effective law enforcement? Well, I think we all know -- I think common sense and -- and experience teach -- teach us that as Justice Kennedy pointed out in his dissent in Roberson, it is not a rare situation that a defendant charged with one offense is a suspect with regard to other offenses.

And if you need some kind of empirical data to support that, I would suggest that you go and read -- if you haven't done so already -- the brief amicus filed by the Illinois Attorney General's office. I do -- I think they do a marvelous job of showing just what kind of an impact -- or just how often, rather, this kind of situation arises and how often it arises in very serious cases. Because defendants are arrested for some -- very often for very petty crimes. But as a result of investigation, they -- they are -- they become suspects relatively quickly in very serious crimes.

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And I think the situation --

QUESTION: I suppose you could always get around the rule sought by the defendant here if you -- you just let him out for a day on the petty crime and then rearrest him on the more serious one. Well, he'd get counsel right away on that one, too, wouldn't he?

MR. BECKER: Well, not necessarily if you -- if you arrested him for purposes of interrogation and didn't -- didn't bring him before the court. You'd have a -- there would be a little leeway in there.

QUESTION: Of course, in this very case, as I remember the facts, they were already investigating him on the second crime. And if they arrest him on the minor offense first in order to get him into custody where they can interrogate him more effectively on the second crime, then it's advantageous for law enforcement purposes to be able to do that without having to notify counsel. That's what they do, as I understand it. They invest him on the less serious offense, bring him into custody, and then you want to question him on the more serious offense which was under investigation at the time of the first arrest. That's a typical scenario, too, isn't it?

MR. BECKER: Yeah, I think that is sometimes the -- the scenario.

QUESTION: Well, unless -- if they let him out,

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why they certainly couldn't interrogate him if he didn't want to be interrogated without -- without probable cause to arrest him.

MR. BECKER: That's true. That's true. I mean they'd have -- they'd have to have probable cause to arrest him on that second offense, and which he may be nothing more than a suspect which of course raises the whole problem of whether or not it's not in the defendant's interest perhaps to have -- to be questioned about these other crimes that he's suspected of, because he may be able to clear himself of all suspicion.

The -- the situation in that regard, by the way, that a -- that a suspect charged with one offense may well turn out to be a -- a person charged with one offense may turn out to be a suspect in other offenses, I think has only become exacerbated as we see the -- with the advent of these computerized fingerprint matching systems which I think are going to result in even more cases in -- in which we are able to, as a result of arrest on one charge and -- and bringing him to -- and bringing those charges before the court, we are going to find out that this fellow may have been involved in other activity about which we would want to question him.

And what the -- what the defendant's proposed extension of -- of the Edwards rule would do then would

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be, in this kind of a situation that I have described, would be to borrow what this Court has labeled absolutely essential activity in the enforcement of our criminal laws. The essential activity being noncoercive questioning in counsel's absence with a view toward obtaining a voluntary statement where the defendant admits his guilt of the crime of which he's suspected.

Now, that interference might be tolerable if there was a significant benefit to be gained by the extension of the rule that the defendant proposes. And our position would be that there really is not much of a benefit. The Edwards rule is -- is designed to protect against police badgering.

I think the apparent concern of this Court -- it was certainly the concern that Justice Kennedy identified as the apparent concern of this Court in his dissent in Roberson -- is that if you -- if you go ahead an interrogate the guy after he's requested an attorney -- and we're talking about a situation in Edwards where he requested an attorney during the course of custodial interrogation -- if you go ahead and reinitiate interrogation, the defendant is going to wonder, do I really have a right to counsel? I mean didn't I invoke this right. Why didn't that result in something? Why isn't that attorney here now to assist me? Why are they

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starting this questioning over again?

I don't think that describes how a defendant would view the situation when he has appeared in court with counsel on a charged offense, and then the police approach him to interrogate him with respect to a completely separate and distinct offense. I don't think he perceives that as being inconsistent with what happened there in court, because I think a normal defendant perceives that what happened there in court was that he had the -- an attorney to represent him on that charged offense. And -- and I don't think he perceives it to be inconsistent when he is questioned about completely separate and distinct offenses that that -- he does not perceive that to be inconsistent with his appearance with counsel on the charged offense.

So I don't think there is really much of a benefit to be gained. And with the terrific cost in terms of the detriment on effective law enforcement, I don't think a case can be made for an extension of the Edwards rule in the manner in which the defendant has requested --

QUESTION: Thank you, Mr. Becker.

Mr. Nightingale, we'll hear now from you.

ORAL ARGUMENT OF STEPHEN L. NIGHTINGALE

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE RESPONDENT

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

The issue here is -- is we believe is more narrow than some of the discussion has indicated. It is whether anything that happened in petitioner's first appearance -- a first appearance that is fairly typical of proceedings that occur many, many times each day around the United States -- is fairly regarded as a basis for triggering Edwards no-waiver presumption. We submit that there is no basis for the triggering of Edwards in this situation for two basic reasons.

First, applying a presumption that an otherwise valid waiver of Miranda rights is a product of coercion is not necessary in this situation to protect the individual's free exercise of his privilege against compelled self-incrimination. And that after all is the purpose of all the Miranda rules.

Secondly, that sort of a rule would needlessly undercut the other interest which factors into the Miranda complex and that is the public's interest in the effective investigation of -- of crimes.

QUESTION: Would -- would your case be a stronger one or a weaker one here if the committee magistrate had advised the defendant of his Fifth Amendment rights and asked the defendant if he understood

that advice? Or would the case be just the same?

MR. NIGHTINGALE: I'm not sure I understand, because the difficulty is that the magistrate follows the same procedure regardless of whether the individual is in custody or not in custody. So nothing typically occurs at a first appearance which is tailored to the situation of the --

QUESTION: Well, I'm saying would the case for the rule you propose be a better or a worse case if the arraigning magistrate had given that advice?

MR. NIGHTINGALE: Your Honor, if the arraigning magistrate gives that advice so that the defendant's --

QUESTION: He just advises him in open court of his Fifth Amendment right of self-incrimination. He says, do you understand you don't have to talk with the police, and the suspect says, yes, I understand that.

MR. NIGHTINGALE: I think it would be a stronger case, because then the gentleman clearly understands that he has the freedom to resist the police if he so chooses. It would be a protection in addition to the Miranda warnings that he will receive if and when he --

QUESTION: And if his attorney had told him the same thing, it would also be a stronger case, I take it?

MR. NIGHTINGALE: Yes, Your Honor, I believe so. It's important, I think, to recognize that Edwards is

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a -- is a rather extraordinary rule. It provides that an otherwise completely valid waiver of a Miranda right to counsel is rendered invalid by virtue of the circumstances that have occurred before. And for that reason, we think it's important to limit the Edwards rules to those situations in which it can fairly be said that something has occurred to cast doubt on the defendant or the suspect's ability to exercise his free choice when he is given Miranda warnings and simply asked, are you prepared to talk to us without a lawyer present?

And there really is nothing that happens -- happened in this case or in many similar cases -- that cast doubt on -- on Mr. McNeil's ability to make that sort of free choice. All that happened in his -- his first appearance was that the case was called. The charges were explained. The defendant indicated that he understood the charges. There was a brief colloquy, a setting of bail, a waiver of the reading of the complaint, and the setting of a preliminary hearing. There was nothing in that proceeding that touched on what Mr. McNeil might wish to do or say if the time came when he was questioned in custody about offenses which after all had occurred in a different jurisdiction and were not the subject of this proceeding at all.

QUESTION: Do you think we ought to judge the

case sort of on the assumption that this defendant is a lawyer?

MR. NIGHTINGALE: No, Your Honor, I don't --

QUESTION: Well, I'm -- but -- but otherwise I suppose that it would be wrong to go back to the lawyer.

MR. NIGHTINGALE: Your Honor, under Michigan v. Jackson, the State will have to go through the lawyer with respect to the offenses that are charged in this case.

QUESTION: Well, I understand that. But if the defendant himself was a lawyer, and he appears as the lawyer, and just like this defendant, I suppose that if we rule against the State, the police can't even go back to the lawyer for interrogating without some other ground.

MR. NIGHTINGALE: The effect of the rule that petitioner advocates is that once you've appeared with a lawyer, the State can't go back to you without your lawyer present. That is the effect of the rule that petitioner argues for.

QUESTION: Yes, yes.

MR. NIGHTINGALE: Very definitely, Your Honor.

QUESTION: So, certainly the -- there wouldn't be anything happening at -- and a lawyer's attendance -- appearance would indicate that he wouldn't be competent to deal with the police by himself.

MR. NIGHTINGALE: That's correct.

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QUESTION: One would hope so.

QUESTION: Is it -- is it your position that the police are not permitted to interrogate with reference to the same investigation or the same offense?

MR. NIGHTINGALE: The same offense. Sixth Amendment --

QUESTION: Felony murder and he's given a -- a -- well, I guess both -- that would be both robbery and the murder.

MR. NIGHTINGALE: The issue --

QUESTION: And I think we may have some problems in -- in writing the case the way you propose --

MR. NIGHTINGALE: I don't believe --

QUESTION: -- if you talk just about the legal elements of the offense.

MR. NIGHTINGALE: I don't believe so, Your Honor, because the issue that you're addressing is what the scope of the Sixth Amendment right is that's invoked by virtue of an appearance with an attorney at the first appearance. But this case involves is whether the defendant has done or said anything that justifies relieving him of a subsequent valid waiver of Fifth Amendment rights in this case with respect to a different crime. But the case you've been addressing concerns the scope of the -- the definition of the Sixth Amendment

right that is defendant's by virtue of an appearance with an attorney, not what sorts of events trigger the Miranda right to counsel, and more specifically the second layer of protection -- the Edwards rule.

There is a certain artificiality in discussing this case in terms of the Fifth and Sixth Amendment as such. Petitioner's attorney has put a good deal of emphasis on the footnote in the Jackson case that ordinarily individuals don't understand the difference between the Fifth and the Sixth Amendment. And I agree if you put the question in those terms, you may get a good number of blank stares from your average criminal defendant.

But the -- but if you put the question in layman's terms; do you understand the difference between being represented in a pending criminal case with respect to charges that have been brought against you by the State, and being represented with respect to a questioning that may or may not occur with respect to other offenses that may have occurred in other jurisdictions.

I submit that the average defendant understands that distinction. And if asked upon leaving a First Amend -- first appearance, well which right to counsel have you just enjoyed? Many, if not all, would say, I've just enjoyed my right to be represented in that pending

case.

And taking it one step further, the fact that -- let's assume there may be some people who might be somewhat confused about that -- each of these people at a subsequent stage is going to get a set of Miranda warnings in which he is told or she is told, you have a right to an attorney during questioning.

QUESTION: Well, what if -- do you concede that the -- that the defendant could when he's asked about do you understand these rights -- he says, I not only understand them, but I exercise my rights under both of the amendments.

MR. NIGHTINGALE: We've assumed that for purposes of the case and because so much weight has been put on --

QUESTION: I know, but you -- but -- what is the Government's position? Could he -- would he be permitted to exercise his rights under the Fifth at a first appearance?

MR. NIGHTINGALE: I don't believe the Court's past cases compelled that conclusion. Justice Kennedy's hypothetical poses a number of difficulties. Can you invoke your rights with respect to questioning about offenses that may not have occurred? A defendant brought into custody may not get out of jail in -- for a good

number of years, and during that period of time he may be transferred from place to place.

QUESTION: So you don't -- you don't know what the Government's position about that?

MR. NIGHTINGALE: No, I -- I believe, Your Honor, that thus far this Court has restricted the Edwards rule to a narrow core set of cases, a paradigm --

QUESTION: So what is the Government's position?

MR. NIGHTINGALE: I believe that a -- that a living will sort of invocation -- a rote invocation of the right to the Fifth Amendment for all purposes for all time, would not necessarily be regarded as binding under this Court's precedence.

QUESTION: Thank you, Mr. Nightingale.

Mr. Luck, do you have rebuttal? You have 4 minutes remaining.

REBUTTAL ARGUMENT OF GARY M. LUCK

ON BEHALF OF THE PETITIONER

MR. LUCK: Both the United States and the State of Wisconsin it seems to petitioner, disregard of one of the fundamental purposes of Miranda, which is to deal with the question of custody and the resulting coercive atmosphere that results from custody when it's put in the interrogation setting, and which this Court most recently recognized in Minnick.

The fact of the matter is that once the defendant is arraigned or appears at an initial appearance and has bail set and he's indigent -- and for all practical purposes, McNeil was never going to make bail. He was indigent and he had $25,000 bond. It's unrealistic to think that the -- the continued custody doesn't work on an increased coercive effect on the ability to exercise the free will to speak or not to speak.

He is not in the same position as a suspect in the police station who has just been arrested, who still has the ability to not be charged and to go home. He already is incarcerated, no different than if he had been found guilty, except that he's awaiting trial and he has a presumption of innocence. But he's being treated like a prisoner who's already been found guilty. And he is sitting in that jail cell and police are coming to see him on two or three different occasions.

Now, Miranda recognizes that, and Miranda said that if the suspect indicates in any manner at any time prior to or during interrogation that he wishes counsel, there shall be no interrogation. Well, he indicated in a manner that he wanted counsel when he appeared at the initial appearance.

As far as costs and benefits are concerned, it's -- it's the petitioner's position that the net of the

Roberson and Edwards is much greater than the net of what we're talking about. If they talk about the number of individuals who have been charged who could be interrogated in the jail because they've committed other offenses, think of all those individuals who were in the police station who've invoked their right to counsel and cannot be questioned any further. I don't know what the statistics are, but we know it's a pyramid and the number of people who are taken into custody are not equal to the number of people who appear in court and they have bail set.

I think it's also unrealistic to say that individuals want an opportunity to explain to the police when they're sitting in a jail cell about how they weren't involved in a particular offense. The fact of the matter is is that this Court has recognized that counsel is needed in the custodial setting as a guiding hand to assist individuals, to enable them to decide whether or not they want to respond to questioning.

The fact of the matter is, is that defense attorneys are not necessarily the manipulators that counsel indicates they are. I mean this Court is well aware that defense counsel can also serve as facilitators. When the police know that they have other crimes, they contact the district attorney, who contacts the defense

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attorney, who says, you know, we've got other information on your guy. Why don't you go talk to him? And you know something, that happens. Because sometimes the defense attorney can advise and consult with his client and do him more good sometimes to have him cooperate, than when he tells him not to. And it's done in an orderly fashion where fundamental rights under the Constitution are abided by. And they don't take place in jail cells when the defendant's attorney are not present.

Finally, we feel that the -- the rule of Roberson and Edwards is really what opposition is arguing against, because what we're talking about is really when counsel is invoked and --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Luck. The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

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