IN THE SUPREME COURT OF THE UNITED STATES

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MARY BERGHUIS, WARDEN, :

Petitioner :

v. : No. 08-1470

VAN CHESTER THOMPKINS :

- x

Washington, D.C.

Monday, March 1, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

B. ERIC RESTUCCIA, ESQ., Solicitor General, Lansing, Michigan; on behalf of Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

ELIZABETH L. JACOBS, ESQ., Detroit, Michigan; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in case 08-1470, Berghuis v. Thompkins.

Mr. Restuccia.

ORAL ARGUMENT OF B. ERIC RESTUCCIA

ON BEHALF OF THE PETITIONER

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

In rejecting Mr. Thompkins's Miranda claim and ineffective assistance of counsel claim, the Michigan courts did not unreasonably apply clearly established Supreme Court precedent. I plan to focus on the Miranda claim.

Now, with respect to the Miranda claim, there really are two distinct inquiries at issue. The first is whether Mr. Thompkins impliedly waived his rights under the Fifth Amendment and, second, whether he invoked his right to remain silent during a police interview.

Regarding the waiver question, this Court established in Butler that there may be an implied waiver, even where a suspect remains silent after having received his Miranda warnings, where that suspect

knowingly receives his rights and there is a course of conduct that indicates waiver.

The Michigan courts here did not unreasonably conclude that Mr. Thompkins had impliedly waived his rights where he expressly acknowledged his rights under -- from his form. After having read out loud from that form, he participated in a limited fashion during the interview.

JUSTICE GINSBURG: But he didn't -- he didn't waive them. And quite unlike Butler -- Butler, if I have it right, said, "I'll talk to you." So that was a statement --

MR. RESTUCCIA: But --

JUSTICE GINSBURG: -- that he was waiving the right to remain silent. He volunteered to talk. Here there was no such indication that there was a waiver of his right to remain silent.

MR. RESTUCCIA: Although in Butler this Court noted that -- that Butler himself had remained silent and did not answer the -- answer at all, or remained silent when asked whether he wished to waive his right to counsel. So the -- the standard that was established from which the Michigan courts relied is really on this -- this language of the standard established from Butler, that you can -- you can imply

waiver from the knowing reception, and then a course of conduct, because the -- the inference can be drawn from the words and actions of the person interrogated. And here --

JUSTICE SOTOMAYOR: Could you tell me without more detail, which is what the circuit court said, about what the limited responses -- I'm using your word -- were. How do we -- how can we imply waiver?

MR. RESTUCCIA: Well --

JUSTICE SOTOMAYOR: Meaning if all he said was, yes, I want them in, that's much different than saying, if someone had asked him, do you want to leave, and he shakes his head no. The latter might imply to me that he waived, but the former certainly would be neutral.

MR. RESTUCCIA: I have to carefully delineate between waiver and invocation. So here the waiver occurs at the time that he is asked the series of questions: Do you believe in God? Do you pray to God? Did you pray for forgiveness --

JUSTICE BREYER: That happened about 2 hours and 15 minutes into the exercise, didn't it?

MR. RESTUCCIA: That's right. It happened near the --

JUSTICE BREYER: Okay. So -- so what we

have here is a course of conduct, 2 hours and 15 minutes of saying nothing.

MR. RESTUCCIA: Well, we –

JUSTICE BREYER: Would you say that that's -- that's gone past the point where --

MR. RESTUCCIA: Well, this -- if you're looking at what has been clearly established for this Court, this Court has never -- I mean, one of the arguments raised against the position I'm advocating is that there is an immediacy requirement. Well, this Court in Butler didn't say that the waiver had to occur immediately.

JUSTICE BREYER: In Butler he said: I will talk to you, but I am not signing any forms.

MR. RESTUCCIA: That's right. But if you look at what's the clearly established law -- this Court identified the standard, what can be inferred from the words and actions of the person interrogated. And if you look at what the two --

JUSTICE BREYER: What they say is, "a course of conduct" -- we will not hold -- "This does not mean a defendant's silence, coupled with an understanding and a course of conduct indicating waiver, may never support a conclusion...."

MR. RESTUCCIA: Right.

JUSTICE BREYER: But the prosecution's burden is great.

MR. RESTUCCIA: Right. And if -- if you look at the two aspects of what constitutes a waiver, it's knowing and intelligent, and voluntary. At the time that Mr. Thompkins gave his answer to that series of questions, there's nothing in the course of that interview that suggested that no longer did he know that he didn't have to answer questions.

JUSTICE BREYER: But going back to Justice Sotomayor's question, is there anything during the 2 hours and 15 minutes that could suggest a waiver?

MR. RESTUCCIA: The -- the -- the waiver occurs at the time that he answered the question. So the answer is that he didn't waiver before then, but that -- it still is evidence to show that that course -- that nothing the police had done -- there were no threats --

JUSTICE SOTOMAYOR: So what do we do with our case law that says that you can't infer waiver simply from the confession?

MR. RESTUCCIA: Well, the --

JUSTICE SOTOMAYOR: I mean, we have said that. So that's pretty clearly established statement --

MR. RESTUCCIA: Well, the --

JUSTICE SOTOMAYOR: -- by the Court.

MR. RESTUCCIA: The courts on direct review have allowed -- where there's a knowing reception of one's rights, have allowed the answers themselves to provide the evidence that the person did waive his rights. In fact --

JUSTICE SOTOMAYOR: Well, I think certainly in -- in Butler, if someone in their confession says, I know I don't have to talk to you, but I want to, that that would be using those words.

MR. RESTUCCIA: But that would be --

JUSTICE SOTOMAYOR: So how can you say --

MR. RESTUCCIA: That would be an express waiver, though.

JUSTICE SOTOMAYOR: How can you say that an appeal to someone's religious position after 2 and a quarter hours is a voluntary waiver?

MR. RESTUCCIA: Well, if you look at what this Court has provided in terms of guidance regarding what constitutes a lengthy interrogation, Miranda notes that a lengthy interrogation would be strong evidence against there being a valid waiver. But what this Court has determined to be a lengthy interrogation were interrogations of much longer duration. In fact, Miranda even talks about --

JUSTICE GINSBURG: We didn't say -- we don't have any decision that says the police are home free for 2 and a quarter hours. You said that that this was not lengthy interrogation.

MR. RESTUCCIA: Right.

JUSTICE GINSBURG: But we -- we have no decision that says that the police, faced with a silent suspect, goes after that suspect, questioning him incessantly for 2 and -- 2 hours and 15 minutes, that that is not lengthy.

MR. RESTUCCIA: Well, I think it's important to remember that the factual record here was established by the State court, and the factual record isn't that he remained absolutely silent, but that he participated --

JUSTICE GINSBURG: He said "yeah," "no," and "I don't know."

MR. RESTUCCIA: Right. But he was participating. There's a fundamental difference between remaining absolutely silent and participating --

JUSTICE SCALIA: Wait. Do -- do we have any case that says that 2 and a quarter hours is too long?

MR. RESTUCCIA: No, and in fact --

JUSTICE SCALIA: And that there can't be a waiver after 2 and a quarter hours?

MR. RESTUCCIA: No, there's no case law to

that effect.

JUSTICE SCALIA: And, therefore, there's no clearly established Supreme Court law that 2 and a quarter hours is too long.

MR. RESTUCCIA: That's the position that --

JUSTICE SCALIA: Isn't that the name of the game here?

MR. RESTUCCIA: That's the position --

JUSTICE KENNEDY: Is there a clearly established rule that in all of the circumstances of the case, we can find that there is coercion, time being one aspect of those circumstances?

MR. RESTUCCIA: I think that's right. And what -- one of the --

JUSTICE KENNEDY: And so that is a clearly established rule, and then it's a question whether 2 and a half, 3 and a half, 4 and a half suffices. -

MR. RESTUCCIA: Right. The -- the case that I cited was Frazier v. Cupp, in which the interview started at 5:00 p.m. and it finished at 6:45 p.m., and the Court called that an interrogation of short duration. And it is important to remember that this Court has stated expressly in Davis that once you have knowingly received your rights, that the knowing reception itself dispels the inherently coercive

aspect --

CHIEF JUSTICE ROBERTS: The question --

JUSTICE KENNEDY: But your -- your position is that if -- same facts, but it's 10 hours instead of 2 and a half, is that a closer case, at least? For --

MR. RESTUCCIA: That's a very different case, because there is case law -- like I cited Blackburn was an interview that ran 8 or 9 hours, and this Court found that that person was probably incompetent or insane. But that duration is -- there's been guidance about that kind of long duration, whereas in our --

JUSTICE KENNEDY: And does that show that – that the circumstances are coercive, so that even if there were a waiver it would be --

MR. RESTUCCIA: Right. That's the suggestion from Miranda, that a lengthy interrogation preceding the waiver can suggest the waiver was not valid.

CHIEF JUSTICE ROBERTS: The question, of course, is not whether we think 2 and a quarter hours under all the circumstances is -- is too long under our precedent. The question is, instead, whether it would be unreasonable for the State court to determine otherwise.

MR. RESTUCCIA: That's right. And, ultimately, the question is what guidance is there to the State of

Michigan in applying the implied waiver doctrine to indicate that the implied waiver couldn't come after 2 hours and 15 minutes of interaction in which it concluded that the -- that the suspect had been a willing participant. The testimony from detective Helgert, which -- he was the only person to testify at the evidentiary hearing, is that --

JUSTICE BREYER: I thought Miranda held that you can't question a person unless he waives his right.

MR. RESTUCCIA: No, Miranda in fact talks about --

JUSTICE BREYER: You can question him even after he -- it's clear that he hadn't waived his right. Is that -- that's Miranda? Or at least that's unclear? Is that --

MR. RESTUCCIA: Warnings -- warnings is a prerequisite to questioning, but the waiver is not. In fact --

JUSTICE BREYER: No, I'm not talking about the waiver. I'm saying, imagine that it's clear that a person hasn't waived his right. Now let's suppose he says, "I do not waive my right." Okay?

Now, is it clear law that once he says "I do not waive my right," the police cannot continue to question him?

MR. RESTUCCIA: If there is a --

JUSTICE BREYER: Is that clear law, yes or no?

MR. RESTUCCIA: Yes, that if there is --

JUSTICE BREYER: Okay, yes. If that's clear law, would you say that at some point before the 2 hours and 15 minutes expires where they're continuously asking him questions and he says nothing, that it has become clear that he has not waived his right?

MR. RESTUCCIA: No. The factual record --

JUSTICE BREYER: For the question is not this. The question is whether, after 2 hours and 15 minutes of silence, it is clear -- it's nothing about Supreme Court law. Supreme Court law is clear: You cannot question him after he makes clear he hasn't waived his right. So then the question becomes, is it reasonable for a State court to say -- after 2 hours and 15 minutes of asking questions and he says nothing, is it reasonable to hold that he has not -- conclude that he has not waived his rights? Is that the question?

MR. RESTUCCIA: Yes. The question as I see it is that -- let me see if I understand. Let me see if I understand your question. There’s a difference between refusing to waive, saying I will not waive my rights. Essentially if you make it an expressed statement

that you are unwilling to waive, then essentially it is in that case -- I want to keep this separate, but that would be an invocation: I do not wish to answer your questions. If you make a crystal-clear statement like that, it's a different question.

But here Mr. Thompkins didn't say he was unwilling to waive. He's participating. Now, you suggest that there was silence --

JUSTICE KENNEDY: You're saying there's a difference between a waiver and a failure to assert?

MR. RESTUCCIA: Yes, exactly. Here -- the fact pattern here is he did not say "I am unwilling to waive, I do not wish this interview to go forward." He doesn't do that. He just doesn't assert --

JUSTICE SOTOMAYOR: You want to change the Miranda rule to say: Tell someone their rights, and unless they explicitly say "I don't want to talk to you," then they implicitly under virtually any circumstance haven't. That's what you believe the rule in Miranda and Butler and Davis sets forth?

MR. RESTUCCIA: Butler states that where there was silence after the provision of the Miranda warnings, silence, that where the subsequent conduct, where knowing reception of rights and the course of conduct indicates waiver --

JUSTICE SOTOMAYOR: There wasn't -- there wasn't silence in Butler. There was an express "I want to talk to you."

MR. RESTUCCIA: I understand that's the facts of Butler. But the standards by which all the courts are operating, including the Michigan court, are the standards articulated by Butler. Butler says that the waiver can be inferred from the words and actions of the person interrogated, indicating that the --

JUSTICE SOTOMAYOR: My -- but we go back to the point you made earlier. Your position is the moment that someone confesses, that's an implicit waiver.

MR. RESTUCCIA: No, because there could have been actions taken by the police during the course of this interview. There were no threats. There were no improper promises.

JUSTICE SCALIA: I don't understand how this person could just sit there for 2 hours and didn't want to be interrogated and doesn't say: You know, I don't want to answer your questions. He just sits there, and some questions he doesn't answer. And he does make a few comments, anyway.

MR. RESTUCCIA: That's right.

JUSTICE SCALIA: Why shouldn't we have a rule which simply says if you don't want to be

interrogated, all you have to say is "I don't want to answer your questions"?

MR. RESTUCCIA: Mr. Thompkins --

JUSTICE SCALIA: That's nice and clear, wouldn't be any problem at all. That was never said here. He, in fact, submitted to having these questions asked of him.

MR. RESTUCCIA: I think that that kind of cuts to the nub of what Miranda says. Miranda says that ultimately the statement has to be the free election of the suspect. And here when Mr. Thompkins answered the series of questions, he knew that he didn't have to answer those questions, and nothing the police had done during the course of the interview had undermined the provision of rights, because it's those two aspects which are the core, the knowing and intelligent and when it's voluntary. Nothing the police had done had undermined --

JUSTICE SCALIA: Why should the police have to play this game of, you know, an hour and a half, 2 hours, 2 hours and 15 minutes, 5 hours, 7 hours? Why don't we have just a clear rule: You're read your rights; if you don't want to be questioned all you have to say is: I don't want to be questioned.

MR. RESTUCCIA: I think that's right, that here

Mr. Thompkins at any point could have said: I want to stop" --

JUSTICE BREYER: What would you do with Miranda's statement "But a valid waiver will not be presumed simply from the silence of the accused" -- I grant you, as modified in Butler to say that the State has a heavy burden of showing that the silence followed by a confession -- the State has a heavy burden of showing that that is an affirmative waiver. Now, those I think are the two statements of law, the third being that after, if there is no waiver, the police cannot continue to question. Now, I thought that was the clear law.

MR. RESTUCCIA: It's a --

JUSTICE BREYER: I grant you, you might argue for a change in the law.

MR. RESTUCCIA: But -- but this language from Miranda that says the silence of the accused after warnings are given would not be sufficient, that's right, but Butler then fully explained. And think about the State courts are coming in that they then -- this Court then made clear that even silence after having received Miranda warnings -- that if you knowingly receive your rights and there is a course of conduct that indicates waiver, that there can be a waiver.

That's exactly what the Federal courts have done on direct review.

Now, thinking about the Michigan courts and trying to determine what's -- how these rules are to be applied, the Federal courts have found, in the absence of a waiver, where a suspect knowingly receives his rights and then answers questions implicating himself, that the answers themselves can serve as the basis for the finding of a waiver.

That's what the -- the conclusion that Mr. Thompkins waived here is a reasonable one. It's not objectively unreasonable. And, of course, you have to recall the overarching habeas law that governs this, that not just does a Michigan court decision have to be incorrect, it has to be objectively unreasonable.

JUSTICE SCALIA: Is there any difference between -- between waiving your right and a failure to assert your right?

MR. RESTUCCIA: Yes, there is a difference, that here Mr. Thompkins did not assert his right. He did not --

JUSTICE SCALIA: Is every failure to assert a waiver?

MR. RESTUCCIA: No, because at the point -- the point at which Mr. Thompkins waived is when he acts

inconsistent with the exercise of his rights. When he answers questions knowing that he doesn't have to answer, that is the waiver.

JUSTICE SCALIA: What about before that? What is happening before that?

MR. RESTUCCIA: Before -- in that --

JUSTICE SCALIA: He hasn't asserted his right. I mean, he hasn't said I --

MR. RESTUCCIA: Right. So what happens is he has not waived and he has not invoked.

JUSTICE SCALIA: He has done neither.

MR. RESTUCCIA: He has does neither.

JUSTICE SCALIA: He has neither waived nor asserted.

MR. RESTUCCIA: And there's nothing -- the way the Miranda rule works is that the waiver is a -- is a prerequisite for the -- for admission of the evidence, but not for the interrogation itself. So what happens is the -- well, if there are no further questions, I'd like to reserve my remaining time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Saharsky.

ORAL ARGUMENT OF NICOLE A. SAHARSKY

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE SUPPORTING PETITIONER

MS. SAHARSKY: Mr. Chief Justice, and may it please the Court:

Respondent's confession was properly admitted at his trial. I'd like to go right to some of the questions that this Court had about the language that was used in the Miranda decision and in the Butler decision. Both -- all of this language comes up in Butler. Now, Butler was a case not about the waiver of the right to silence, but a waiver of the right to counsel. So the suspect said "I will talk to you," but the North Carolina Supreme Court said: Well, we don't know if he waived his right to counsel, and that's why the court got into a question of implied waiver.

So the Court in its analysis in Butler first reviewed this language that the Court has talked about this morning from Miranda that says "A valid waiver will not be presumed simply from the silence of the accused or simply from the fact that a confession was in fact eventually obtained."

And this is our understanding of that language: First, it is not the case that a failure to invoke Miranda rights will be taken in the Miranda context as a waiver.

Now, Justice Scalia, I think you alluded to the fact that the normal rule for the Fifth Amendment at trial is that you assert your rights or

they are waived. But Miranda's an exception to that, that the failure to assert we are not going to take as a waiver. The government has to do something more.

JUSTICE KENNEDY: So do you read -- yes. So do you read Miranda as saying that there cannot be questioning unless there is a waiver? Then we'll go on to -- or do you --

MS. SAHARSKY: No.

JUSTICE KENNEDY: Okay, you do not.

MS. SAHARSKY: No.

JUSTICE KENNEDY: So are you going to go on -- because this is right where you are. Are you going to go on to say that, in the Miranda context, the failure to assert can -- can suffice to allow the questioning to proceed?

MS. SAHARSKY: As long as the warnings are given, the accused has been told of his rights, and that the police will respect his rights, and questioning can proceed. The Court said in Davis and said in other cases, Moran versus Burbine, that the primary protection afforded by Miranda is to level the playing field by letting the accused know of his rights and that the police will respect them. And after the point that he gets his rights and understands them, the police can question him. You'd have to overrule Butler to say that there has to be a waiver before any questioning.

Just to get back to the second thing that the Court said in Miranda that was picked up in Butler, it said: We are not going to assume that there is a waiver simply from the fact that a confession was eventually obtained; there is a burden on the government.

And the way that we understand that is that the government can't just go into court and say: Look, we have a confession; we know he waived his rights.

JUSTICE KENNEDY: But why isn't that language that you quote a negative inference that there must be a waiver?

MS. SAHARSKY: Well, if you look back at the language -- the other language in Miranda, it says that a waiver is a prerequisite to the admission of the evidence at trial. We know that to be able to use that evidence we have to know that he made a knowing and intelligent and voluntary decision to talk. But that he -- that doesn't mean he has to make the decision to talk right away. He might want to listen to what the police have to say about the benefits of cooperation or the evidence that they have in his case. And that -- those are the kinds of things the police could say that could be understood to be custodial interrogation.

JUSTICE KENNEDY: So there’s a difference

between waiving at the time of the interrogation and then waiving it at the time of trial? I don't understand that.

MS. SAHARSKY: I'm sorry. I didn't mean to suggest that. What I'm saying is at the time the Respondent makes his statements, that waiver -- there has to be a waiver and it has to be a knowing, intelligent, and voluntary one. That at the time he makes his statement -- here when he admitted that he shot the boy down, he had to understand what his rights were and there had -- those statements had to not be the result of police coercion.

And no court here has found that they were the result of police coercion. There is no question about voluntariness here.

So what we understand this language in Butler to mean about an implied waiver is the fact of a confession itself is not enough to show the government has met its burden. When the Court talked about a course of conduct, it talked about the same standard that it's always used in the Miranda context, that came up again recently in this Court's decision in Shatzer, which is that the ultimate question is a knowing, intelligent, and voluntary waiver.

The course of conduct doesn't mean anything

more than that. It means that at the time the guy spoke --

JUSTICE STEVENS: But in this case, it was the fact of the concession -- the confession that constituted the waiver.

MS. SAHARSKY: That shows that he decided to talk, but the confession itself isn't enough. We needed to have -- the State needed to have evidence that he understood his rights, which he said he did, and that there was -- that the confession was not the product of police coercion.

And I think that that comes through directly in the language that's at issue in Butler. The Court said “an express written or oral statement of waiver” -- to remain silent or the right to counsel -- “is strong proof of the validity of the waiver but not inevitably necessary…. The question is not one of form, but whether the defendant, in fact, knowingly and voluntarily waived the rights delineated in Miranda.”

JUSTICE KENNEDY: But I just want to make sure where we are.

MS. SAHARSKY: Yes.

JUSTICE KENNEDY: You’re not -- you’re conceding, it seems to me, that there must be a waiver?

MS. SAHARSKY: Before the evidence can be

admitted at trial.

JUSTICE KENNEDY: I just don't understand -- why -- why can't --

MS. SAHARSKY: Okay. It's --

JUSTICE KENNEDY: We have to guide the police.

MS. SAHARSKY: Yes.

JUSTICE KENNEDY: Why don't we tell the police, there must be a waiver before you can continue to interrogate?

MS. SAHARSKY: That would -- that would exact a substantial price on law enforcement, and that's the exact argument that Justice Brennan made in the Butler case that was rejected. He was in dissent in that case. He said the police should always have to -- have to seek a waiver before they interrogate.

JUSTICE KENNEDY: I don't know why you didn't answer Justice Stevens's questions by saying, Justice Stevens, I don't care about waiver. There was no -- there was no assertion of the right.

But you're not saying that. You are admitting there has to be a waiver.

MS. SAHARSKY: Yes. To admit the evidence at trial, there has to be a waiver.

JUSTICE BREYER: Why do you say it would

change the police's behavior? Inbau and Reid and, you know, the -- the NAC -- the Defense Lawyers' brief here is filled with quotations from typical police manuals, and they all seem to say things like you have to have at -- once the waiver is given, the police may proceed with interrogation. That seems to be what police today are instructed across the country.

It says you cannot question people until he indicates after the warning is given a willingness to answer questions. That's the police manual.

So why do you say this would extract a price on law enforcement when the typical police manuals seem to say what the Petitioner here is saying?

MS. SAHARSKY: Not every police --

JUSTICE BREYER: I mean the Respondent.

MS. SAHARSKY: -- manual says that. That brief itself cites many examples going both ways.

It is often the case, and it is often the case in Federal law enforcement, that the police try to seek a waiver immediately after giving rights because we want to avoid the problems of proof that come up at trial if we don't have a written waiver.

JUSTICE BREYER: Which -- which are the police manuals that go your way? Because I want to look at those, too.

MS. SAHARSKY: I'm sorry, I don't -- I don't have the specific citations from the brief. I -- I know from asking the Federal law enforcement agencies -- DHS, the FBI, and the DEA -- that the DEA does not invariably seek a waiver and that we don't understand that we need to get an immediate waiver.

And, again, that was what Justice Brennan said in -- in dissent in Butler, is that the police should have to seek an immediate waiver. And the Court said, no, the Fifth Amendment right is -- compel -- about compelled statements being introduced at trial. We don't need this protection, that the police have to seek an immediate waiver. In fact, if you adopted a rule like that, it would essentially take any burden off the suspect to invoke his rights.

He wouldn't need to invoke his rights, because the police would just -- if the police didn't seek a waiver.

JUSTICE SCALIA: Well, you're saying there -- there's a difference, I -- I assume, between not waiving and positively asserting your right not to be interrogated?

MS. SAHARSKY: That's exactly right. If the person --

JUSTICE SCALIA: So, if -- if he had -- here

he simply refused to sign the -- the Miranda form, right?

MS. SAHARSKY: That's right.

JUSTICE SCALIA: Which would have -- which would been the -- the waiver. And -- and you're saying it's his later behavior that -- that showed that, in fact, he waived. What if instead of just refusing to sign, he had said, I do not want to be interrogated?

MS. SAHARSKY: Then the interrogation stops.

JUSTICE SCALIA: Okay.

MS. SAHARSKY: And that --

JUSTICE SCALIA: So -- so he has the right to terminate the whole thing by asserting his right. If he neither asserts the right nor grants the waiver, the police can continue to try to obtain a statement from him?

MS. SAHARSKY: Right. A contrary rule would have to overrule Butler, because the Court said you can clearly infer waiver from the actions and words of the person interrogated. That assumes that the person is being interrogated. Just to talk a minute about the --

JUSTICE KENNEDY: But there also assumes there has to be a waiver.

MS. SAHARSKY: Yes, at the time that the person makes the inculpatory statements that are going

at be introduced at trial, it must be the case that he decided he was going to talk to the police knowingly, intelligently, and voluntarily.

JUSTICE SOTOMAYOR: Excuse me. As I read this transcript, the police's tactic, by their own statement, was to approach him and say: This is our evidence. Explain yourself -- that's the words the officer used -- but he's entitled to an alternative explanation. Tell us.

What's clear is that at no point did he answer those questions, because nothing about the nods of the head or anything else showed a willingness to confess.

And even in the responses he gave, he answered a series of questions with a “yes,” but not with an explanation, which was what was being requested.

So my question is, how does one infer a voluntary statement from a situation in which someone's really not talking? I've never understood how a yes or a nod to questions that don't -- that's what the circuit said, to questions that we don't know what they were about -- do you want a mint or not, I don't even know that -- can reflect voluntariness?

And I understand that in Butler when someone says I don't want to sign that, but I'm going to spill

my guts now, and does, that's a course of conduct one could view as voluntary.

MS. SAHARSKY: Right. And we say that the waiver occurred at the time he answered the questions about his belief in God. And it doesn't matter what he said in response to the earlier questions, as long as at the time that he answered questions about God, his decision to talk was a knowing and intelligent and voluntary one.

JUSTICE SCALIA: Unless, I assume, that you -- you -- you acknowledge that if the interrogation had go on -- had gone on for so long that it had become coercive, then that -- that -- that last statement would not -- would not be a voluntary waiver.

MS. SAHARSKY: That's right. But Respondent made a voluntariness argument throughout all of the courts in this case, and every court has rejected it.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Saharsky.

Ms. Jacobs.

ORAL ARGUMENT OF ELIZABETH L. JACOBS

ON BEHALF OF THE RESPONDENT

MS. JACOBS: Mr. Chief Justice, and may it please the Court:

When I review Miranda, I find language from Miranda that says that you have to have a -- an advice

of rights and a waiver before you question. And I just want to direct the Court to page 475 of Miranda: Requirement of warnings and waiver is a fundamental aspect of the Fifth Amendment privilege and not simply a preliminary ritual to existing interrogation methods.

CHIEF JUSTICE ROBERTS: What happens when you read Butler?

MS. JACOBS: Butler, I think, is an interesting case, because Butler is mostly aimed at the right to counsel. When you talk about the right to counsel and the right to remain silent, you have really two different kinds of rights. And there's an assertion requirement in the right to counsel. You can't exercise that right without getting some help from the police.

But the right to remain silent -- we don't require that it be asserted. It is a presumption. And that presumption remains.

JUSTICE ALITO: Your argument is that you can infer waiver of the right to counsel from conduct, but you can't infer waiver of the right to remain silent from conduct?

MS. JACOBS: Essentially, yes.

JUSTICE KENNEDY: What's your best authority for that proposition?

MS. JACOBS: Let me make sure that I -- that I said yes to the right thing.

You can -- I do -- you can take an implied waiver of the -- of the right to silence. I -- I do agree with that. And I look at the cases that have been cited, and I know that there are three kinds of examples.

One is the person walks into the police Station, and he says I want to confess. That's a voluntary confession. You don't have to assert anything. He's -- he's going to confess.

If you have a steady stream of speech in which he says, I don't want to talk but I'll tell you about this, again, you have somebody acting voluntarily.

Someone who says I'll only talk about drugs but I'm not going to talk about murder -- he's implied he's waived his right to that.

But in this case, when you look at this case, the key issue really is was it volitional? What fact would lead a court to decide that there -- that my client --

JUSTICE ALITO: So, basically what you're saying is that if the defendant here had said at the beginning, I don't know whether I -- I want to talk to you or not, but I'm going to listen to your questions and I might answer some and I might answer others -- that

would be a different case?

MS. JACOBS: Yes, absolutely. You have an implied waiver.

JUSTICE ALITO: And where is there -- what Supreme Court case establishes the distinction between those two situations clearly?

MS. JACOBS: Well, Davis is a case that talks about the assertion of the right to counsel, but does not apply to the right to remain silent. So I think as long as you still have the presumption of -- the presumption of the privilege against self-incrimination as a presumptive right, the police have to do something to move you off square one in order to make it voluntary.

Am I answering your question, Justice Alito?

JUSTICE ALITO: I'm not sure I really understand.

JUSTICE SCALIA: It depends on what you -- what you need to make "it," it depends on what "it" is. If -- if you mean the ultimate confession, I think I don't agree. Ultimately, if he confesses and hasn't been coerced, it's voluntary.

But if by the "it" you mean to make the continuation of the interrogation voluntary, that's a different question. And I don't know that our cases

establish that you cannot continue the interrogation until there has been a waiver.

MS. JACOBS: Well, Justice Scalia, I just read you page 475 from Miranda that says the requirement is warnings and waiver, and that's not, as they said, a preliminary ritual. That means more. Seibert -- and I know it's a preliminary -- a plurality --

JUSTICE SCALIA: But does that make it clear that -- that there has to be a waiver before the interrogation can continue? And if it does, how does it square with Butler?

MS. JACOBS: Again, Butler is really a right to counsel case.

JUSTICE SCALIA: They're both under -- they're both under Miranda. Both of those rights are Miranda rights.

MS. JACOBS: In Butler the -- the waiver, the voluntary act of the person being interrogated really occurred very, very early. There wasn't any kind of a gap. He said, I don't -- I believe he said, I don't want to -- I don't want to do something in writing, but I'll talk to you.

Now, that is a voluntary act: I'm going to talk to you. That is clearly a waiver. That isn't what we've got in this case. You have a young man who is

sitting in a chair, looking at the ground; he's sullen. The only time he looks at the officer is when the officer directs him to look.

JUSTICE ALITO: I thought your answer was that there does not have to be a waiver before questioning can occur.

MS. JACOBS: No, there must be a waiver. There's no such thing as --

JUSTICE ALITO: There must be --

JUSTICE BREYER: Well, Miranda does not say that. I mean, I think -- I think that Justice Scalia is right on that, that Miranda doesn't say you can't question him. The pages that you read to us say that if you have a lengthy questioning, then the fact that he then gives a statement cannot be taken as a -- cannot be admitted. That's -- that's what it seems to say on page 476 --

MS. JACOBS: Okay.

JUSTICE BREYER: -- in the absence of some special circumstance.

MS. JACOBS: In this case, because it went -- because the interrogation lasted so long --

JUSTICE BREYER: Am I right? I mean Miranda does not explicitly say that you cannot continue questioning. Am I right about that?

MS. JACOBS: Um --
JUSTICE BREYER: I'm asking because I don't know. I didn't see it in the --
MS. JACOBS: And I -- and I want to answer you with what -- what I read. "The requirement of warnings and waiver is fundamental." My argument is that you cannot continue to question someone who has not waived the right, that there's --
JUSTICE ALITO: So, what if the person says: I'm not waiving, but I'm not saying that I will never waive. I'll listen to your questions.
MS. JACOBS: I think you've got a waiver.
JUSTICE ALITO: When he says --
MS. JACOBS: You've got a waiver.
JUSTICE ALITO: -- I'm not waiving?
MS. JACOBS: But he's willing to talk to the police. In my case, Mr. Thompkins was unwilling. He could -- he would not look at anybody. He would not answer questions. We don't know what the "I don't know" and the "yeah" was to. So that's a very -- my case is a very different case than what you are proposing. There is no willingness to engage with the police; there is, in fact, this feeling that there is coercion going on. The longer that interrogation --
JUSTICE ALITO: Can I interrupt? Before I

can understand your case, I would like to understand this hypothetical. If the person says: I'm not waiving, but I'm not telling you that I won't waive at some point in the future. I'll listen to your questions.

MS. JACOBS: I think he is engaging in a conversation.

JUSTICE ALITO: That's a waiver.

MS. JACOBS: I think he's engaging in a conversation with the police and that the police at that point can continue to talk. But that isn't what happened in this case. There was no indication by my client that he wanted to listen, that he wanted to talk. The longer that interrogation lasted, the more --

JUSTICE KENNEDY: Well, he -- he didn't say anything. You -- I think you could say that his conduct implied the very kind of statement that Justice Alito suggested in his hypothetical: I'll listen to you guys for a while.

MS. JACOBS: What is key, I think, in your -- in your hypothetical and in Justice Alito's hypothetical, is that you have a defendant that feels comfortable, that is not being oppressed by this coercive atmosphere. My client did not engage in anything, and the longer he sat there, the greater the chances that anything he said was the product of

coercion.

JUSTICE STEVENS: May I -- just refresh my recollection. In the record in this case, do we know whether he said he understood his rights?

MS. JACOBS: Justice Stevens, that's kind of iffy. The police officer --

JUSTICE STEVENS: Because that was present in Butler.

MS. JACOBS: Yes, the police officer in this case said either “I don't remember whether I asked him” or “I think he nodded that he understood.” I don't think we've got a real solid proof of that.

JUSTICE SCALIA: It was read to him.

MS. JACOBS: Yes, it was read to him.

JUSTICE SCALIA: And they had him read a portion of the Miranda warning.

MS. JACOBS: I don't think they had him read a portion --

JUSTICE SCALIA: Huh?

MS. JACOBS: -- Justice Scalia.

JUSTICE SCALIA: What?

JUSTICE KENNEDY: I thought, in order to test his knowledge of English, they asked him to read one or two paragraphs.

MS. JACOBS: Okay.

JUSTICE SCALIA: Yes, they had him read --
MS. JACOBS: I guess it was just that they didn't ask him to write anything, so that they didn't know whether he could write in English. Yes, Justice Scalia, you're correct.
JUSTICE SCALIA: So I -- boy, I -- what more do you need?
MS. JACOBS: You need --
JUSTICE SCALIA: I mean, he -- he's listening when -- when they read it to him. He -- he -- he can read it himself.
MS. JACOBS: You are presuming that a defendant thinks that they've got the kind of power to look at a police officer and say, "I don't want to talk to you. Remove me."
JUSTICE SCALIA: Maybe -- maybe he doesn't want to talk for the moment, but he does want to listen. I'm not sure you're doing defendants a great -- a great favor. I mean, some of them might want to listen to -- to the police telling them, you know, by the way, your co-conspirator is singing like a bird and he's trying to pin it all on you, and maybe, you know, if -- if you don't want to get left holding the bag, maybe you'd better to talk to us and tell us what really happened.
I'm not sure that -- that if I were there,

even if I didn't want to talk right now, I might still want to listen, which is apparently what this -- what this person did. He could have said, I don't want to -- I don't want talk.

And it -- and it would have ended. That would have been an assertion of his right. He didn't assert his right, but --

MS. JACOBS: What --

JUSTICE SCALIA: -- he -- he sat there and listened. Now, maybe he wanted to find out what the police would have to say to him.

MS. JACOBS: There is nothing in -- on this record that indicates that he wanted to listen to them as opposed to what Justice Alito's hypothetical is, where the gentleman says: Well, I'm not going to say anything, but I want to hear what you have to say. We don't have that here.

CHIEF JUSTICE ROBERTS: Well, we have it to the extent that he was told he had right to remain silent and he didn't say, I'm not going to talk to you.

MS. JACOBS: There's no clearly established law that says that he has to assert his right to remain silent.

CHIEF JUSTICE ROBERTS: Is it there any clearly established law the other way, which is the

pertinent question?

MS. JACOBS: I think that because there is the presumption of the -- the privilege is a presumptive right, that he does not have to assert it. This is -- this is -- the right, or the privilege against self-incrimination, the constitutional command, is the one right that really defines our criminal justice system. It means that you cannot talk to -- the police do not have the right to talk to the defendant. It makes us an accusatorial system --

CHIEF JUSTICE ROBERTS: We're not talking -- we're not talking about the Fifth Amendment right. We're talking about the Miranda warnings. There's no issue of voluntariness in this case. Right?

MS. JACOBS: Well, when --

CHIEF JUSTICE ROBERTS: There's no suggestion that there's -- that the statements are not voluntary. The suggestion is that they may have violated Miranda.

MS. JACOBS: Right. That's correct. But if you are going to adopt the suggestion of the government that you do pre-interrogation waiver, which I think is what we're talking about -- that is, you don't give him his rights and then you can just talk and talk until you are blue in the face, that that ends up being

a more coercive situation than we have now.

This is the kind of situation that could have been easily resolved just by the officer asking Mr. Thompkins, do you want to talk to us? Instead, once they establish --

CHIEF JUSTICE ROBERTS: What if he said, do you want to remain silent?

MS. JACOBS: He could -- that's fine.

CHIEF JUSTICE ROBERTS: And he doesn't answer either one.

MS. JACOBS: Then -- then he’s not cooperating. He’s not waiving his rights. It's not voluntary. Take him back to the cell, that's it. Because the police --

JUSTICE GINSBURG: Then you’re saying then that the defendant has to -- never has to invoke his right? That --

MS. JACOBS: The state of the -- the state of the law is a defendant does not have to invoke his right to remain silent. Davis is the invocation case; it applies to the second stage of -- of the interrogation. And it has to do with --

JUSTICE GINSBURG: Was the Miranda warning adequate in this case? He got the four warnings, but then, unlike some police forms that then ask the

defendant, do you waive your rights, this form never asked, did you waive your rights? It just said: Do you acknowledge that we have informed you of your rights?

MS. JACOBS: That's correct, Justice Ginsburg. That's all that form said. And what the officer said is once Mr. Thompkins would not sign it, he then moved into interview mode. There was no further -- if this was an ambiguous act to him, then the officer should have asked a clarifying question.

CHIEF JUSTICE ROBERTS: You say you don't have to invoke your rights, but Butler also says that you can impliedly waive them. You don't have to expressly waive them.

MS. JACOBS: I'm saying you don't have to invoke the right to remain silent, that that’s not the state of the law, that only the right to remain -- I'm sorry -- the right to counsel must be invoked.

CHIEF JUSTICE ROBERTS: Right. So the question under AEDPA -- you agree there can be an implied waiver; that's what Butler says, right? So the question under AEDPA is whether the State court was unreasonable to determine that there was an implied waiver on these facts?

MS. JACOBS: The State actually found two -- I think you’re saying that there was an objectively

unreasonable determination of the facts in this case?

CHIEF JUSTICE ROBERTS: Yes.

MS. JACOBS: And I think that --

CHIEF JUSTICE ROBERTS: Maybe.

MS. JACOBS: It's one way or the other.

CHIEF JUSTICE ROBERTS: Right.

MS. JACOBS: And I think clearly that there -- that there were facts that the Michigan Court of Appeals found that were not supported by the record and were objectively unreasonable.

CHIEF JUSTICE ROBERTS: What are those?

MS. JACOBS: The Sixth Circuit found that when the Michigan Court of Appeals said the defendant continued to talk with officers, the Sixth Circuit said that that was an objectively unreasonable finding because there was no continuation, there was no talking. They also found unreasonable that the defendant talked with officers sporadically. The Sixth Circuit said that that was a misrepresentation of the record.

The last fact that they talked about is the Michigan Court of Appeals said that the defendant made eye contact several times or a number of times. And the Sixth Circuit said, quote -- this is what the -- they said that that was incorrect. What the officer said at the hearing is that eye contact came only at the end,

one of the very -- one of the very first times came only at the end.

So -- but those are important facts. The fact that he was not continuing to talk -- he wasn't talking at all. How do you find this -- this voluntariness, that the rights are waived --

JUSTICE SCALIA: Of course, those facts are relevant only if we accept your -- your principal assertion, which is that you -- you don't have to invoke the right and interrogation must cease immediately. If we agree with that, then all of these facts become relevant. But if we think that, until you invoke the right, the police can continue to ask you questions and it's up to you to answer or not, then those facts are really not relevant at all, are they?

I think that's true.

MS. JACOBS: I don't want to say it's true --

JUSTICE SCALIA: It wasn't meant to be a trick question.

MS. JACOBS: -- just because you are asking it.

If you invoke those -- if you invoke -- if you hold that he has to invoke those rights.

JUSTICE SCALIA: On your theory, those --

those factual things are irrelevant, whether --

MS. JACOBS: Well, my theory is that you don't get past the failure to get the waiver.

JUSTICE SCALIA: Exactly, exactly.

MS. JACOBS: Yes.

Returning now to -- to the idea of the pre-interrogation waiver, I would suggest to the Court that that would return this -- this Court back to the kind of test that Miranda stopped, which was the applying the totality of the circumstances test, and that you would then, again, revert to pre-Miranda law, where -- and this I believe is what the Wayne County prosecutor amicus wants to do, is just apply totality of the -- the circumstances test to whether in fact someone has waived their rights. And I would suggest to you that Miranda has not been a failure, that this bright-line rule -- you give the rights, you get the waiver, then can you talk -- that that's --

JUSTICE SCALIA: I must say I've never understood that to be the law, and I don't think it's generally understood to be the law, that unless you get a waiver right at the outset, you have to -- you have to terminate interrogation. I think there are a lot of police departments that don't -- I've never understood that to be the rule.

MS. JACOBS: Justice Scalia, the opposite of that then becomes the ability to keep the defendant in a room, and the longer --

JUSTICE SCALIA: I'm not saying it isn't a good rule. It may be a good rule. But the issue here is whether it is so clearly established that it was unreasonable for the State court to think otherwise.

MS. JACOBS: And we would just suggest that the State court applied Moseley incorrectly and applied Miranda, that those are the clearly established law in that case.

JUSTICE SCALIA: I like clear rules. Your rule is a clear one. Another clear one would be just the opposite of yours; that is, that interrogation can continue unless he asserts his right. That's another clear rule. We can go either way, and it will be clear.

MS. JACOBS: But if interrogation continues, the longer it continues the less likely that the statement that is taken is going to be the product of my client's free will. So the government is going to have an even greater burden in trying to prove that this statement was voluntary or that the waiver of rights is voluntary.

So this Court should not adopt a pre-interrogation waiver rule, especially not one

that -- that ends up being as long as this case is, and just in case --

JUSTICE SOTOMAYOR: Could you tell me when the police have to stop? They read somebody their rights; the person says nothing. Are you saying at that point they have to stop?

MS. JACOBS: I think that they can say to the person: Do you now want to waive your right and talk to us or do you want to remain silent? I think that that's an easy and expedient answer. If --

JUSTICE SCALIA: But he doesn't answer. He just sits there --

MS. JACOBS: Then that's it.

JUSTICE SCALIA: -- impassively.

MS. JACOBS: Then that's it.

JUSTICE SCALIA: Then they have to stop?

MS. JACOBS: There's no burden -- I mean, then the burden isn't met, this heavy burden that he has knowingly, intelligently, and voluntarily waived those rights.

JUSTICE KENNEDY: I don't see how you square that with Moseley.

MS. JACOBS: Well, Moseley says that the longer that you question someone, that -- Moseley is the persistent questioning case, where you keep questioning

the guy and questioning the guy. And this is very clearly a Moseley case. You've got two officers in that room, and they talk about the fact that they are both questioning and they talk about the different themes they used. And the very fact that they had to change themes showed that the defendant was not being cooperative and not -- and was not engaging in this conversation willingly.

CHIEF JUSTICE ROBERTS: And all he has to do is say: I don't want to talk to you. It's over.

MS. JACOBS: And all they had to say -- I've got to take the flip side -- is -- and because it's their house, because if they don't want to create the ambiguity, they are the ones that have to say: Will you talk to us now?

They don't even have to ask him to sign the waiver, although I think the waiver is proof positive. Once he signs the waiver, you know, I haven't got much to argue in terms of the admissibility of the confession. But if they create the ambiguity, then according to Miranda, that ambiguity is resolved against them.

CHIEF JUSTICE ROBERTS: I don't understand how they create the ambiguity.

MS. JACOBS: Because they are leaving --

they're not moving off of square one. They're leaving this, where they are not looking for an answer to whether the rights want to be waived and they are immediately, as they did in this case, going into interview mode. They are going to start to question him.

And this gets to Moseley, where, in fact, you end up where you are badgering somebody, and in this case, they used many different tactics: the softening technique -- - here, have a mint.

CHIEF JUSTICE ROBERTS: Well, I guess this gets back to a question I had earlier. I thought there was no dispute on this record that there was no involuntariness. We are talking about a violation of the technical, important but formal, Miranda requirements. This is not a case where the person says: My statements were involuntary.

MS. JACOBS: If you are going to base this on an implied waiver, don't you have to look to see what the circumstances were that were going on? How can you look at the very end of a 2-hour and --

CHIEF JUSTICE ROBERTS: But that's correct -- and that's where -- how I read Butler; you have to look at the circumstances. And you're saying no, you don't look at any circumstances; they have got to ask the question and

he has to waive.

MS. JACOBS: Yes.

CHIEF JUSTICE ROBERTS: The other circumstances are irrelevant.

Well then, if yes, why are you talking to me about 2 hours 15 minutes, what they are doing? You say that circumstances don't matter.

MS. JACOBS: If you find that the officer does not have to ask the question, does not have to clarify whether in fact the defendant is remaining silent, then I do have to talk to the rest to try and persuade you that in those 2 hours and 45 minutes he was not being cooperative, he was not willingly entering into --

CHIEF JUSTICE ROBERTS: That issue is not in this case, though.

MS. JACOBS: Well --

CHIEF JUSTICE ROBERTS: As I understand it, you've lost at every stage on the voluntariness and have not renewed that, correct? This is a Miranda case; it's not a Fifth Amendment case.

MS. JACOBS: I did -- I did talk about voluntariness in my brief to this Court.

JUSTICE KENNEDY: Your argument would be the same if this was compressed to 45 minutes?

MS. JACOBS: Yes.
JUSTICE KENNEDY: Same result?
MS. JACOBS: Yes.
JUSTICE KENNEDY: 30 minutes?
MS. JACOBS: Yes.
JUSTICE KENNEDY: 15?
MS. JACOBS: Yes.
(Laughter.)
CHIEF JUSTICE ROBERTS: One? I mean, that's -- I don't want to piggyback off Justice Kennedy's point, but that's the whole point, is you do not look at any of those circumstances, you say. Before they can say anything more, they have to get a waiver. So it's 30 seconds if they go on, before they -- if they sit there for how long before -- how long do they have to ask, do you want to waive?
MS. JACOBS: If -- if you were going to go and use implied waiver, if -- and I think that you can use an implied waiver, you -- you are interested in looking at what happened in this case to decide whether, in fact, the “yes” answers were an implied waiver. And that's why I'm arguing about the circumstances, that there's nothing in these circumstances that could lead you to believe that after 2 hours and 45 minutes, there was a voluntary waiver, the implied waiver.

CHIEF JUSTICE ROBERTS: Could -- could you describe a situation where you think there would be an implied waiver?

MS. JACOBS: I'm willing to talk to you, but I won't put anything in writing. I'll willing to listen to what you have to say, but I'm not going to answer your questions. And then your -- then as the conversation -- a conversation ensues, and I think this is what Justice Alito --

CHIEF JUSTICE ROBERTS: Well, I thought that -- that doesn't sound implied. That sounds express to me.

MS. JACOBS: Okay.

CHIEF JUSTICE ROBERTS: So, is --

JUSTICE SCALIA: Wait. Excuse me. A waiver of what? I thought the Chief Justice was talking about a waiver of your right to remain silent.

MS. JACOBS: Yes.

JUSTICE SCALIA: That wasn't a waiver --

MS. JACOBS: Okay.

JUSTICE SCALIA: -- of his right to remain silent.

MS. JACOBS: Then let me give another example of a waiver of the right to remain silent.

JUSTICE SCALIA: I'm willing to talk to you,

I'm willing to listen to you. It seems to me you're confusing a -- a waiver of -- of the right to remain silent with a waiver of the right not to be interrogated, which is the right that you are asserting here, a right not to be interrogated, unless going in you say, I waive my right to remain silent. That's -- that's the new right that you are asserting.

MS. JACOBS: Well, it's not a new right.

JUSTICE SCALIA: A right not to be interrogated.

MS. JACOBS: It's -- it's not a new right. It's not a new right. The police cannot interrogate the defendant unless they read him his rights and my understanding of Miranda is that they obtain a waiver of those rights.

Without obtaining the waiver, questioning cannot ensue, because then the rest of the questioning becomes trying to talk the defendant into waiving the rights, trying to talk the defendant into confessing, and you have badgering and you have persistent questioning, and you don't end up with a volitional waiver or a volitional statement.

CHIEF JUSTICE ROBERTS: Okay. So what -- what is an implied waiver case?

MS. JACOBS: Well, it's -- the implied

waiver case is North Carolina v. Butler.

CHIEF JUSTICE ROBERTS: Well, that's right. Now, getting back to Ms. Saharsky's point, she said if you prevail, you have to overrule Butler. And it seems to me that that's the point we're at.

MS. JACOBS: But Butler -- I don't think you have to overrule Butler, because Butler really was a right to counsel case. It did talk about the right to remain silent, but most of language has to do with the fact that this gentleman did not waive the right to counsel.

So, I don't think you have to. I think you can still have implied waivers.

CHIEF JUSTICE ROBERTS: So, there's -- so, there's no implied waiver with respect to the right to remain silent?

MS. JACOBS: That's a hard question, and I don't have -- I don't have an easy answer or a hard answer for you. I -- I don't think that -- I don't think that you want to hog-tie the police. I agree with that. I think that the police should be able to talk to a defendant, but there's got -- but it's got to be voluntary, and that in order to do that, you really have to get a waiver.

U.S. v. Cardwell I think is an implied

waiver where the defendant starts to talk to the officer there -- they're in a police car, and the defendant starts to talk to the officer after an hour and a half of silence, although that, again, isn't a custodial situation, but the police found -- but the court found that that was, in fact, a waiver.

So if there are no further questions, I'll cede my time. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Restuccia, you have 4 minutes remaining.

JUSTICE KENNEDY: I -- I have to say that -- page 475 and 476, particularly, of Miranda do talk in terms of a -- of a waiver. Did -- are there -- did the subsequent cases indicate an articulation of that view that's closer to your position?

REBUTTAL ARGUMENT OF B. ERIC RESTUCCIA

ON BEHALF OF THE PETITIONER

MR. RESTUCCIA: Well, I think Miranda itself contemplates pre-waiver interrogation. If you look at page 14 of the -- of the reply brief, the yellow brief, and the quote from Miranda talking about the processes is, on page 14, "Once warnings have been given, the subsequent procedure is clear. If" -- it's on page --

JUSTICE GINSBURG: What page is --

MR. RESTUCCIA: Page 14 on the left side in

the middle. It's a block quote from Miranda. This is Miranda's description of the processes: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." The --

JUSTICE STEVENS: Well, why doesn't it --

JUSTICE BREYER: But I don't think that was the question. The question, at least as I understood it, is that Miranda says you cannot admit a confession into evidence unless he has first waived it.

MR. RESTUCCIA: That's right.

JUSTICE BREYER: Then it says, clearly, that even if the police and the prosecution testify he did waive it, even if they say he did, explicitly, still, if there's a long questioning, even then, the court should be very careful about admitting it.

MR. RESTUCCIA: Right. But then --

JUSTICE BREYER: And doesn't it flow from that a fortiori that if he doesn't admit it and all there is, is the long questioning that, there has been no waiver?

MR. RESTUCCIA: But here Mr. Thompkins answered a series of questions knowing --

JUSTICE BREYER: He answered three

questions.

MR. RESTUCCIA: Right.

JUSTICE BREYER: All right. One, do you believe in God? Yes.

Two, do you pray to God? Yes.

Three, have you asked God for forgiveness for shooting the boy? Yes.

Okay. So, where -- where did he waive it?

MR. RESTUCCIA: He -- that's what the Federal courts have done on direct review -- this is what Cardwell did, and there are five or six circuits have found the answers to the questions themselves can be the best --

JUSTICE BREYER: So, in this case, after 2 hours and 15 minutes when he gave the answers I just said, when did he waive his Miranda rights?

MR. RESTUCCIA: When he answered those questions, because the --

JUSTICE BREYER: No, I think any then -- then Miranda is --

MR. RESTUCCIA: No, because --

JUSTICE BREYER: It says you can't admit the stuff after a long questioning unless he waives. Obviously, he says something or there would be nothing to admit.

MR. RESTUCCIA: The -- that's what the

Federal courts have done in applying Butler, because the words and actions of the person interrogated can give rise to the inference that the person has waived. Where the person has taken action that's inconsistent with the exercise of his rights, it is proper to find waiver. The -- this --

JUSTICE STEVENS: May I ask, can you go back to page 14 in your reply brief? "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."

MR. RESTUCCIA: Right.

JUSTICE STEVENS: So the question is whether during those two hours by not answering a -- a number of questions, did he indicate in any way that he wished to remain silent?

MR. RESTUCCIA: Right. That this -- so if you look at the implication analysis, did he make it clear that I don't want to participate in this interrogation? Detective Helgert's testimony --

JUSTICE STEVENS: Then it says that any -- in any manner that he wished to remain silent. And until the 2 hours and a half later when he did answer the three questions, that's pretty -- it's at least arguable

that his silence indicated he wished to remain silent.

MR. RESTUCCIA: Well, what happens, though, in Davis, this Court made clear for the purpose of invocation, that the invocation has to be unambiguous because the police have to know when they have to cut off their questioning. The -- so, if it's ambiguous, it's ultimately, for the question of invocation, his burden to assert the right to take an affirmative action to show, I don't want to answer any questions.

Detective Helgert believed, through his limited responses, the give and take of part of this interview, that he was a willing participant in the interview. This is the factual record that was established by the State courts. It's important to remember that this case being reviewed in habeas that those factual determinations are entitled to deference unless disproven.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. RESTUCCIA: Thank you.

CHIEF JUSTICE ROBERTS: The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)