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1 P R O C E E D I N G S

2 (10:03 a.m.)

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

6 Mr. Restuccia.

7 ORAL ARGUMENT OF B. ERIC RESTUCCIA

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

13 MR. RESTUCCIA: But --

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

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

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

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

9 MR. RESTUCCIA: Well --

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

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

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

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

25 JUSTICE BREYER: Okay. So -- so what we

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

3 MR. RESTUCCIA: Well, we -

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

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

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

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

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

25 MR. RESTUCCIA: Right.

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

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

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

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

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

21 MR. RESTUCCIA: Well, the --

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

24 MR. RESTUCCIA: Well, the --

25

1 JUSTICE SOTOMAYOR: -- by the Court.

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

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

11 MR. RESTUCCIA: But that would be --

12 JUSTICE SOTOMAYOR: So how can you say --

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

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

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

1 JUSTICE GINSBURG: We didn't say -- we don't
2 have any decision that says the police are home free for
3 2 and a quarter hours. You said that that this was not
4 lengthy interrogation.

5 MR. RESTUCCIA: Right.

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

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

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

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

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

22 MR. RESTUCCIA: No, and in fact --

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

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

1 that effect.

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

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

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

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

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

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

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

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

1 aspect --

2 CHIEF JUSTICE ROBERTS: The question --

3 JUSTICE KENNEDY: But your -- your position
4 is that if -- same facts, but it's 10 hours instead of
5 2 and a half, is that a closer case, at least? For --

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. RESTUCCIA: If there is a --

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

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

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

10 MR. RESTUCCIA: No. The factual record --

11 JUSTICE BREYER: For the question is not
12 this. The question is whether, after 2 hours and
13 15 minutes of silence, it is clear -- it's nothing about
14 Supreme Court law. Supreme Court law is clear: You
15 cannot question him after he makes clear he hasn't
16 waived his right. So then the question becomes, is it
17 reasonable for a State court to say -- after 2 hours and
18 15 minutes of asking questions and he says nothing, is
19 it reasonable to hold that he has not -- conclude that
20 he has not waived his rights? Is that the question?

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. RESTUCCIA: That's right.

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

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

3 MR. RESTUCCIA: Mr. Thompkins --

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

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

19 JUSTICE SCALIA: Why should the police have
20 to play this game of, you know, an hour and a half,
21 2 hours, 2 hours and 15 minutes, 5 hours, 7 hours?
22 Why don't we have just a clear rule: You're read your
23 rights; if you don't want to be questioned all you have
24 to say is: I don't want to be questioned.

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

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

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

14 MR. RESTUCCIA: It's a --

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

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

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

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

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

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

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

22 JUSTICE SCALIA: Is every failure to assert
23 a waiver?

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

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

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

6 MR. RESTUCCIA: Before -- in that --

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

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

11 JUSTICE SCALIA: He has done neither.

12 MR. RESTUCCIA: He has does neither.

13 JUSTICE SCALIA: He has neither waived nor
14 asserted.

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

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Ms. Saharsky.

23 ORAL ARGUMENT OF NICOLE A. SAHARSKY

24 ON BEHALF OF THE UNITED STATES,

25 AS AMICUS CURIAE SUPPORTING PETITIONER

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

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

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

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

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

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

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

8 MS. SAHARSKY: No.

9 JUSTICE KENNEDY: Okay, you do not.

10 MS. SAHARSKY: No.

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

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

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

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

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

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

25 JUSTICE KENNEDY: So there's a difference

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

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

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

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

25 The course of conduct doesn't mean anything

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

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

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

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

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

22 MS. SAHARSKY: Yes.

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

25 MS. SAHARSKY: Before the evidence can be

1 admitted at trial.

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

4 MS. SAHARSKY: Okay. It's --

5 JUSTICE KENNEDY: We have to guide the
6 police.

7 MS. SAHARSKY: Yes.

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

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

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

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

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

25 JUSTICE BREYER: Why do you say it would

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

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

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

14 MS. SAHARSKY: Not every police --

15 JUSTICE BREYER: I mean the Respondent.

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

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

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

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

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

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

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

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

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

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

3 MS. SAHARSKY: That's right.

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

9 MS. SAHARSKY: Then the interrogation stops.

10 JUSTICE SCALIA: Okay.

11 MS. SAHARSKY: And that --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Ms. Saharsky.

19 Ms. Jacobs.

20 ORAL ARGUMENT OF ELIZABETH L. JACOBS

21 ON BEHALF OF THE RESPONDENT

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

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

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

6 CHIEF JUSTICE ROBERTS: What happens when
7 you read Butler?

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

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

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

23 MS. JACOBS: Essentially, yes.

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

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

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

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

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

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

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

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

1 would be a different case?

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

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

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

15 Am I answering your question, Justice Alito?

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

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

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

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

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

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

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

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

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

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

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

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

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

9 JUSTICE ALITO: There must be --

10 JUSTICE BREYER: Well, Miranda does not say
11 that. I mean, I think -- I think that Justice Scalia is
12 right on that, that Miranda doesn't say you can't
13 question him. The pages that you read to us say that if
14 you have a lengthy questioning, then the fact that he
15 then gives a statement cannot be taken as a -- cannot be
16 admitted. That's -- that's what it seems to say on page
17 476 --

18 MS. JACOBS: Okay.

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

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

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

1 MS. JACOBS: Um --

2 JUSTICE BREYER: I'm asking because I don't
3 know. I didn't see it in the --

4 MS. JACOBS: And I -- and I want to answer
5 you with what -- what I read. "The requirement of warnings
6 and waiver is fundamental." My argument is that you cannot
7 continue to question someone who has not waived the
8 right, that there's --

9 JUSTICE ALITO: So, what if the person says:
10 I'm not waiving, but I'm not saying that I will never
11 waive. I'll listen to your questions.

12 MS. JACOBS: I think you've got a waiver.

13 JUSTICE ALITO: When he says --

14 MS. JACOBS: You've got a waiver.

15 JUSTICE ALITO: -- I'm not waiving?

16 MS. JACOBS: But he's willing to talk to the
17 police. In my case, Mr. Thompkins was unwilling. He
18 could -- he would not look at anybody. He would not
19 answer questions. We don't know what the "I don't know"
20 and the "yeah" was to. So that's a very -- my case is a
21 very different case than what you are proposing. There
22 is no willingness to engage with the police; there is, in
23 fact, this feeling that there is coercion going on. The
24 longer that interrogation --

25 JUSTICE ALITO: Can I interrupt? Before I

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

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

7 JUSTICE ALITO: That's a waiver.

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

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

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

1 coercion.

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

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

7 JUSTICE STEVENS: Because that was present
8 in Butler.

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

13 JUSTICE SCALIA: It was read to him.

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

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

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

19 JUSTICE SCALIA: Huh?

20 MS. JACOBS: -- Justice Scalia.

21 JUSTICE SCALIA: What?

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

25 MS. JACOBS: Okay.

1 JUSTICE SCALIA: Yes, they had him read --

2 MS. JACOBS: I guess it was just that
3 they didn't ask him to write anything, so that they
4 didn't know whether he could write in English. Yes,
5 Justice Scalia, you're correct.

6 JUSTICE SCALIA: So I -- boy, I -- what more
7 do you need?

8 MS. JACOBS: You need --

9 JUSTICE SCALIA: I mean, he -- he's
10 listening when -- when they read it to him. He -- he --
11 he can read it himself.

12 MS. JACOBS: You are presuming that a
13 defendant thinks that they've got the kind of power to
14 look at a police officer and say, "I don't want to talk
15 to you. Remove me."

16 JUSTICE SCALIA: Maybe -- maybe he doesn't
17 want to talk for the moment, but he does want to listen.
18 I'm not sure you're doing defendants a great -- a great
19 favor. I mean, some of them might want to listen to --
20 to the police telling them, you know, by the way, your
21 co-conspirator is singing like a bird and he's trying to
22 pin it all on you, and maybe, you know, if -- if you
23 don't want to get left holding the bag, maybe you'd better
24 to talk to us and tell us what really happened.

25 I'm not sure that -- that if I were there,

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

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

8 MS. JACOBS: What --

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

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

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

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

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

1 pertinent question?

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

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

15 MS. JACOBS: Well, when --

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

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

1 a more coercive situation than we have now.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 unreasonable determination of the facts in this case?

2 CHIEF JUSTICE ROBERTS: Yes.

3 MS. JACOBS: And I think that --

4 CHIEF JUSTICE ROBERTS: Maybe.

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

6 CHIEF JUSTICE ROBERTS: Right.

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

11 CHIEF JUSTICE ROBERTS: What are those?

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

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

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

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

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

16 I think that's true.

17 MS. JACOBS: I don't want to say it's true
18 --

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

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

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

25 JUSTICE SCALIA: On your theory, those --

1 those factual things are irrelevant, whether --

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

4 JUSTICE SCALIA: Exactly, exactly.

5 MS. JACOBS: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

13 MS. JACOBS: Then that's it.

14 JUSTICE SCALIA: -- impassively.

15 MS. JACOBS: Then that's it.

16 JUSTICE SCALIA: Then they have to stop?

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

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

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

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

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

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

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

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

25 MS. JACOBS: Because they are leaving --

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

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

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

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

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

1 he has to waive.

2 MS. JACOBS: Yes.

3 CHIEF JUSTICE ROBERTS: The other
4 circumstances are irrelevant.

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

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

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

17 MS. JACOBS: Well --

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

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

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

1 MS. JACOBS: Yes.

2 JUSTICE KENNEDY: Same result?

3 MS. JACOBS: Yes.

4 JUSTICE KENNEDY: 30 minutes?

5 MS. JACOBS: Yes.

6 JUSTICE KENNEDY: 15?

7 MS. JACOBS: Yes.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: One? I mean,
10 that's -- I don't want to piggyback off
11 Justice Kennedy's point, but that's the whole point, is
12 you do not look at any of those circumstances, you say.
13 Before they can say anything more, they have to get a
14 waiver. So it's 30 seconds if they go on, before
15 they -- if they sit there for how long before -- how
16 long do they have to ask, do you want to waive?

17 MS. JACOBS: If -- if you were going to go
18 and use implied waiver, if -- and I think that you can use
19 an implied waiver, you -- you are interested in looking at
20 what happened in this case to decide whether, in fact,
21 the "yes" answers were an implied waiver. And that's why
22 I'm arguing about the circumstances, that there's
23 nothing in these circumstances that could lead you to
24 believe that after 2 hours and 45 minutes, there was a
25 voluntary waiver, the implied waiver.

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

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

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

13 MS. JACOBS: Okay.

14 CHIEF JUSTICE ROBERTS: So, is --

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

18 MS. JACOBS: Yes.

19 JUSTICE SCALIA: That wasn't a waiver --

20 MS. JACOBS: Okay.

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

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

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

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

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

9 JUSTICE SCALIA: A right not to be
10 interrogated.

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

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

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

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

1 waiver case is North Carolina v. Butler.

2 CHIEF JUSTICE ROBERTS: Well, that's right.

3 Now, getting back to Ms. Saharsky's point, she said if you
4 prevail, you have to overrule Butler. And it seems to
5 me that that's the point we're at.

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

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

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

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

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

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

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

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Restuccia, you have 4 minutes remaining.

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

16 REBUTTAL ARGUMENT OF B. ERIC RESTUCCIA

17 ON BEHALF OF THE PETITIONER

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

24 JUSTICE GINSBURG: What page is --

25 MR. RESTUCCIA: Page 14 on the left side in

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

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

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

12 MR. RESTUCCIA: That's right.

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

18 MR. RESTUCCIA: Right. But then --

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

23 MR. RESTUCCIA: But here Mr. Thompson
24 answered a series of questions knowing --

25 JUSTICE BREYER: He answered three

1 questions.

2 MR. RESTUCCIA: Right.

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

5 Two, do you pray to God? Yes.

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

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

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

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

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

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

21 MR. RESTUCCIA: No, because --

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

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

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

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

13 MR. RESTUCCIA: Right.

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

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

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

1 that his silence indicated he wished to remain silent.

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

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

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. RESTUCCIA: Thank you.

20 CHIEF JUSTICE ROBERTS: The case is
21 submitted.

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

24

25

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