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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will 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 receiving 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, if
11 I have it right, said, "I'll talk to you." So that was
12 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 in course of
2 conduct, because the -- the inference can be drawn from
3 the words and actions drawn from the person
4 interrogated. And 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 think you 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 two
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 of 2 hours and
2 15 minutes of saying nothing.

3 MR. RESTUCCIA: Well, we -- I would say that
4 that -- that's gone past the point where -- well,
5 this -- if you are looking at what has been clearly
6 established from this Court, this Court has never -- I
7 mean, one of the arguments raised against the position I
8 am advocating is there is an immediacy requirement.
9 Well, this Court in Butler didn't say that the waiver
10 had to occur immediately.

11 JUSTICE BREYER: In Butler he said, "I will
12 talk to you but I'm not signing any forms."

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

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

23 MR. RESTUCCIA: Right.

24 JUSTICE BREYER: But the prosecution's
25 burden is greater.

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

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

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

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

19 MR. RESTUCCIA: Well, the --

20 JUSTICE SOTOMAYOR: I mean, we have said
21 that.

22 MR. RESTUCCIA: Well, the --

23 JUSTICE SOTOMAYOR: So that is pretty
24 clearly established statement by the Court.

25 MR. RESTUCCIA: The courts on direct review

1 have allowed, where there is a knowing reception of
2 one's rights, have allowed the answers themselves to
3 provide the evidence that the person did waive his
4 rights. In fact --

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

9 MR. RESTUCCIA: But that would be -- that
10 would be an expressed waiver, though.

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

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

23 JUSTICE GINSBURG: It didn't say -- we don't
24 have any decision that says the police are home free for
25 2 and a quarter hours. You said that that this was not

1 lengthy interrogation.

2 MR. RESTUCCIA: Right.

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

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

12 JUSTICE GINSBURG: He said "yes," "no," and
13 "I don't know."

14 MR. RESTUCCIA: Right. But he was
15 participating. The fundamental difference between
16 remaining absolutely silent --

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

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

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

22 MR. RESTUCCIA: No there's no case law to
23 that effect.

24 JUSTICE SCALIA: And therefore there is no
25 clearly established Supreme Court law that 2 and a

1 quarter hours is too long.

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

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

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

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

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

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

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

24 JUSTICE KENNEDY: Your -- your position
25 is that if -- same facts, but it's 10 hours instead of

1 2-1/2, is that a closer case, at least? For --

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

8 JUSTICE KENNEDY: Does that show -- that the
9 circumstances are coercive, so even if there were a
10 waiver it would be --

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

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

20 MR. RESTUCCIA: That's right. Ultimately
21 the question is what guidance is there to the State of
22 Michigan in applying the implied waiver doctrine to
23 indicate that the implied waiver couldn't come after 2
24 hours and 15 minutes of interaction in which it
25 concluded that the -- that the suspect had been a

1 willing participant. The testimony from detective
2 Helgert, which he was the only person who testified at
3 the evidentiary hearing, is that --

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

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

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

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

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

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

22 MR. RESTUCCIA: If there is a --

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

25 MR. RESTUCCIA: Yes, and if there is --

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

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

7 JUSTICE BREYER: So the question is not
8 this. The question is whether after 2 hours and
9 15 minutes of silence it is clear -- it's nothing about
10 Supreme Court law. Supreme Court law is clear, you
11 cannot question him after he makes clear he hasn't
12 waived his right. So then the question becomes, is it
13 reasonable for a State court to say after 2 hours and
14 15 minutes of asking questions and he says nothing, is
15 it reasonable to hold that he has not -- conclude that
16 he has not waived his rights? Now answer that question.

17 MR. RESTUCCIA: Yes. The question as I see
18 it is that -- let me see if I understand. Let me see if
19 I understand your question. There is a difference
20 between refusing to waiver, saying I will not waive my
21 rights. Essentially if you make an expressed statement
22 that you are unwilling to waive, then essentially it is
23 in that case -- I want to keep this separate, but that
24 would be an invocation: I do not want to answer your
25 questions. If you make a crystal-clear statement like

1 that, it's a different question.

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

5 JUSTICE KENNEDY: You are saying there is a
6 difference between a waiver and a failure to assert?

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

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

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

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

24 MR. RESTUCCIA: I understand that's the fact
25 of Butler. But the standards under which all the courts

1 are operating, including the Michigan court, are the
2 standards articulated by Butler. Butler says that the
3 waiver can be inferred by the words and actions of the
4 person interrogated, indicating that the --

5 JUSTICE SOTOMAYOR: But we go back to the
6 point you made earlier. Your position is the moment
7 that someone confesses that's an implicit waiver.

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

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

18 MR. RESTUCCIA: That's right.

19 JUSTICE SCALIA: Why shouldn't we have a
20 rule which simply says if you don't want to be
21 interrogated, all you have to say is "I don't want to
22 answer your questions"?

23 MR. RESTUCCIA: Mr. Thompkins --

24 JUSTICE SCALIA: That's nice and clear,
25 wouldn't be any problem at all. That was never said

1 here. He in fact submitted to having these questions
2 asked of him.

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

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

20 MR. RESTUCCIA: I think that's right. Here
21 hear Mr. Thompkins at any point could have said "I want
22 to stop" --

23 JUSTICE BREYER: What would you do with
24 Miranda's statement "But a valid waiver will not be
25 presumed simply from the silence of the accused" -- I

1 grant you, as modified in Butler to say that the State
2 has a heavy burden of showing that the silence followed
3 by a confession -- the State has a heavy burden of
4 showing that that is an affirmative waiver. Now, those
5 I think are the two statements of law, the third being
6 that after, if there is no waiver, the police cannot
7 continue to question. Now, I thought that was the clear
8 law. I grant you, you might argue for a change in the
9 law.

10 MR. RESTUCCIA: But, but this language from
11 Miranda that says the silence of the accused after
12 warnings are given would not be sufficient, that's
13 right, but Butler then fully explained. And think about
14 the State courts are coming in and they then -- this
15 Court then made clear that even silence after having
16 received Miranda warnings -- that if you knowingly
17 receive your rights and there is a course of conduct
18 that indicates waiver, that there can be a waiver.
19 That's exactly what the Federal courts have done in
20 direct review.

21 Now, thinking about the Michigan courts and
22 trying to determine how these rules are to be applied,
23 the Federal courts have found, in the absence of a
24 waiver, where a suspect knowingly receives his rights
25 and then answers questions implicating himself that the

1 answers themselves can serve as the basis for the
2 finding of a waiver.

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

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

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

15 JUSTICE SCALIA: Is every failure to assert
16 a waiver?

17 MR. RESTUCCIA: No, because at the point --
18 the point at which Mr. Thompkins waived is when he acted
19 inconsistent with the exercise of his rights. When he
20 answers questions knowing that he doesn't have to
21 answer, that is the waiver.

22 JUSTICE SCALIA: What about before that?
23 What is happening before that? He hasn't asserted his
24 right. I mean, he hasn't said --

25 MR. RESTUCCIA: Right. So what happens is

1 he has not waived and he has not invoked.

2 JUSTICE SCALIA: He has done neither.

3 MR. RESTUCCIA: He has does neither.

4 JUSTICE SCALIA: He has neither waived nor
5 asserted.

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

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Ms. Saharsky.

14 ORAL ARGUMENT OF NICOLE A. SAHARSKY

15 ON BEHALF OF THE UNITED STATES,

16 AS AMICUS CURIAE SUPPORTING PETITIONER

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

19 Respondent's confession was properly
20 admitted at his trial. I would like to go right to some
21 of the questions that this Court had about the language
22 that was used in the Miranda decision and in the Butler
23 decision. Both -- all of this language comes up in
24 Butler. Now, Butler was a case not about the waiver of
25 the right to silence, but a waiver of the right to

1 counsel. So the suspect said "I will talk to you," but
2 the North Carolina Supreme Court said: Well, we don't
3 know if he waived his right to counsel, and that's why
4 the court got into a question of implied waiver.

5 So the Court in its analysis in Butler first
6 reviewed this language that the Court has talked about
7 this morning from Miranda that says "A valid waiver will
8 not be presumed simply from the silence of the accused
9 or simply from the fact that a confession was in fact
10 eventual obtained." And this is our understanding of
11 that language: First, it is not the case that a failure
12 to invoke Miranda rights will be taken in the Miranda
13 context as a waiver. Now, Justice Scalia, I think you
14 alluded to the fact that the normal rule for the Fifth
15 Amendment at trial is that you assert your rights or
16 they are waived. But Miranda's an exception to that,
17 that the failure to assert we are not going to take as a
18 waiver. The government has to do something more.

19 JUSTICE KENNEDY: So do you read -- yes. So
20 do you read Miranda as saying that there cannot be
21 questioning unless there is a waiver, and then we'll go
22 on to -- or do you --

23 MS. SAHARSKY: No.

24 JUSTICE KENNEDY: Okay, you do not.

25 MS. SAHARSKY: No.

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

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

16 Just to get back to the second thing that
17 the Court said in Miranda that was picked up in Butler,
18 it said: We are not going to assume that there is a
19 waiver simply from the fact that a confession was
20 eventually obtained; there is a burden on the
21 government. And the way that we understand it is that
22 the government can't just go into court and say: Look,
23 we have a confession; we know he waived his rights.

24 JUSTICE KENNEDY: But why isn't that
25 language that you quote a negative inference that there

1 must be a waiver?

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

14 JUSTICE KENNEDY: So there is a difference
15 between waiving at the time of the interrogation and
16 then waiving it at the time of trial? I don't
17 understand that.

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

1 of police coercion.

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

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

14 The course of conduct doesn't mean anything
15 more than that. It means that at the time the guy
16 spoke --

17 JUSTICE KENNEDY: But in this case it was
18 the fact of the concession -- the confession that
19 constituted the waiver.

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

1 And I think that that comes through directly
2 in the language that's at issue in Butler. The Court
3 said in expressed oral or written statement of waiver to
4 remain silent or the right to counsel is strong proof of
5 the validity of the waiver but not inevitably necessary.
6 The question is not one of form, but whether the
7 defendant, in fact, knowingly and voluntarily waived the
8 rights delineated in Miranda.

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

11 MS. SAHARSKY: Yes.

12 JUSTICE KENNEDY: You are not -- you -- you
13 are conceding, it seems to me, that there must be a
14 waiver?

15 MS. SAHARSKY: Before the evidence can be
16 admitted at trial.

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

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

20 JUSTICE KENNEDY: We have to guide the
21 police.

22 MS. SAHARSKY: Yes.

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

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

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

11 But you are not saying that. You are
12 admitting there has to be a waiver.

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

15 JUSTICE BREYER: Why do you say it would
16 change the police's behavior? Invale and Reed and, you
17 know, the -- the -- the defense lawyer's brief here is
18 filled with quotations from typical police manuals, and
19 they all seem to say things like, you have to have at --
20 once the waiver is given, the police may proceed with
21 interrogation. That seems to be what police today are
22 instructed across the country.

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

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

4 MS. SAHARSKY: Not every police --

5 JUSTICE BREYER: Let me hear your response.

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

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

13 JUSTICE BREYER: Which -- which of the
14 police manuals that go your way, because I want to look
15 at those, too.

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

22 And, again, that was what Justice Brennan
23 said in -- in dissent in Butler, is that the police have
24 to seek an immediate waiver. And the Court said, no,
25 the Fifth Amendment is -- compel -- about compelled

1 statements being introduced at trial. We don't need
2 this protection, the police need to seek an immediate
3 waiver. In fact, if you adopted a rule like that, it
4 would essentially take any burden off the suspect to
5 invoke his rights.

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

9 JUSTICE SCALIA: Well, you are saying
10 there -- there is a difference, I -- I assume, between
11 not waiving and positively asserting your right not to
12 be interrogated?

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

15 JUSTICE SCALIA: So, if -- if he had -- here
16 he simply refused to sign the -- the Miranda form,
17 right?

18 MS. SAHARSKY: That's right.

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

25 MS. SAHARSKY: Then the interrogation stops.

1 JUSTICE SCALIA: Okay.

2 MS. SAHARSKY: And that --

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

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

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

15 MS. SAHARSKY: Yes, at the time that the
16 person makes the inculpatory statements that are going
17 to be introduced at trial, it must be the case that he
18 decided he was going to talk to the police knowingly,
19 intelligently, and voluntarily.

20 JUSTICE SOTOMAYOR: Excuse me. As I read
21 this transcript, the police's tactic, by their own
22 statement, was to approach him and say, this is our
23 evidence, explain yourself. Explain -- that's the words
24 the officer used. But he's entitled to an alternative
25 explanation, tell us.

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

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

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

15 And I understand that in Butler when someone
16 says I don't want to sign that, but I'm going to spill
17 my guts now, and does, that's a course of conduct one
18 could view as voluntary.

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

25 JUSTICE SCALIA: Unless, I assume, that

1 you -- you -- you acknowledge that if the interrogation
2 had go on -- had gone on for so long that it had become
3 coercive, then that -- that -- that last statement would
4 not -- would not be a voluntary waiver.

5 MS. SAHARSKY: That's right. But Respondent
6 made it voluntary in his argument throughout all of his
7 courts in this case and every court has rejected it.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Ms. Saharsky.

10 Ms. Jacobs.

11 ORAL ARGUMENT OF ELIZABETH L. JACOBS

12 ON BEHALF OF THE RESPONDENT

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

15 When I review Miranda, I find language from
16 Miranda that says that you have to have a -- an advice
17 of rights and a waiver before you question. And I just
18 want to direct the Court to page 475 of Miranda,
19 requirement of warnings and waiver is a fundamental
20 aspect of the Fifth Amendment privilege and not simply a
21 preliminary ritual to existing interrogation methods.

22 CHIEF JUSTICE ROBERTS: What happens when
23 you read Butler?

24 MS. JACOBS: Butler, I think, is an
25 interesting case, because Butler is mostly aimed at the

1 right to counsel. When you talk about the right to
2 counsel and the right to remain silent, you have really
3 two different kinds of rights. And there is an
4 assertion requirement and the right to counsel. You
5 can't exercise that right without getting some help from
6 the police.

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

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

14 MS. JACOBS: Essentially, yes.

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

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

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

23 One is the person walks into the police
24 station and he says I want to confess. That's a
25 voluntary confession. You don't have to assert

1 anything. He's -- he's going to confess.

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

5 Someone who says I'll only talk about drugs
6 but I'm not going to talk about murder, you can implied
7 he waived his right to that.

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

12 JUSTICE ALITO: Basically what you were
13 saying is that if the defendant here had said at the
14 beginning, I don't know whether I -- I'm going to talk
15 to you or not, but I'm going to listen to your questions
16 and I might answer some and I might answer others, that
17 would be a different case?

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

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

23 MS. JACOBS: Well, Davis is a case that
24 talks about the assertion of the right to counsel, but
25 does not apply to the right to remain silent. So I

1 think as long as you still have the presumption of --
2 the presumption of the privilege against
3 self-incrimination as a presumptive right, the police
4 have to do something to move you off square one in order
5 to make it voluntary.

6 Am I answering your question, Justice Alito?

7 JUSTICE ALITO: I'm not sure I really --

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

13 But if by the "it" you mean to make the
14 continuation of the interrogation voluntary, that's a
15 different question. And I don't know that our cases
16 establish that you cannot continue the interrogation
17 until there has been a waiver.

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

23 JUSTICE SCALIA: Does that make it clear
24 that -- that there has to be a waiver before the
25 interrogation can continue? And if it does how does it

1 square with Butler?

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

4 JUSTICE SCALIA: They are both under -- they
5 are both under Miranda. Both of those rights are
6 Miranda rights.

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

13 Now that is a voluntary act: "I'm going to
14 talk to you." That is clearly a waiver. That isn't
15 what we got in this case. You have a young man who is
16 sitting in a chair, looking at the ground; he's sullen.
17 The only time he looks at the officer is when the
18 officer directs him to look.

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

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

24 JUSTICE BREYER: Well, Miranda does not say
25 that. I mean, I think -- I think Justice Scalia is

1 right on that. But Miranda doesn't say you can't
2 question him. The pages that you read to us say that if
3 you have a lengthy questioning, then the fact that he
4 then gives a statement cannot be taken as a -- cannot be
5 admitted. That's -- that's what it seems to say on page
6 476 --

7 MS. JACOBS: Okay.

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

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

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

15 MS. JACOBS: Um --

16 JUSTICE BREYER: I'm asking because I don't
17 know. I didn't see it in --

18 MS. JACOBS: And I want to answer you with
19 what -- what I read. The requirement of warnings and
20 waiver is fundamental. My argument is that you cannot
21 continue to question someone who has not waived the
22 right.

23 JUSTICE ALITO: So what if the person says
24 I'm not waiving but I'm not saying that I will never
25 waive. I will listen to your questions.

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

2 JUSTICE ALITO: When he says I'm not
3 waiving?

4 MS. JACOBS: But he's willing to talk to the
5 police. In my case, Mr. Thompkins was unwilling. He
6 could -- he would not look at anybody. He would not
7 answer questions. We don't know what the "I don't know"
8 and the "yes" was to. So that's a very -- my case is a
9 very different case than what you are proposing. There
10 is no willingness to engage with the police; there is in
11 fact this feeling there is coercion going on. The
12 longer that interrogation --

13 JUSTICE ALITO: Can I interrupt? Before I
14 can understand your case, I would like to understand
15 this hypothetical. If the person says, "I'm not waiving
16 but I'm not telling you that I won't waive at some point
17 in the future. I will listen to your questions."

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

20 JUSTICE ALITO: That's a waiver.

21 MS. JACOBS: I think he's engaging in a
22 conversation with the police and that the police at that
23 point can continue to talk. But that is not what
24 happened in this case. There was no indication by my
25 client that he wanted to listen, that he wanted to talk.

1 The longer that interrogation lasted, the more --

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

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

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

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

20 JUSTICE STEVENS: Because that was present
21 in Butler.

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

1 JUSTICE SCALIA: It was read to him.

2 MS. JACOBS: Yes.

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

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

7 JUSTICE SCALIA: Huh?

8 MS. JACOBS: -- Justice Scalia.

9 JUSTICE SCALIA: What?

10 JUSTICE KENNEDY: I thought in order to test
11 his knowledge of English they had him read one or two
12 paragraphs.

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

14 MS. JACOBS: Okay. I guess it just that
15 they didn't ask him to write anything, so that they
16 didn't know whether he write in English. Yes, Justice
17 Scalia, you're correct.

18 JUSTICE SCALIA: So I -- boy, I -- what more
19 do you need?

20 MS. JACOBS: You need --

21 JUSTICE SCALIA: I mean, he -- he is
22 listening when -- when they read it to him. He -- he --
23 he can read it himself.

24 MS. JACOBS: You are presuming that a
25 defendant thinks that they've got the kind of power to

1 look at a police officer and say, "I don't want to talk
2 to you. Remove me."

3 JUSTICE SCALIA: Maybe -- maybe he doesn't
4 want to talk for the moment, but he does want to listen.
5 I'm not sure you are doing defendants a great -- a great
6 favor. I mean, some of them might want to listen to --
7 to the police telling them, you know, by the way, your
8 co-conspirator is singing like a bird and he's trying to
9 pin it all on you, and maybe, you know, if -- if you
10 don't want to get left holding the bag, maybe you ought
11 to talk to us and tell us what really happened.

12 I'm not sure that -- that if I were there,
13 even if I didn't want to talk right now, I might still
14 want to listen, which is apparently what this -- what
15 this person did. He could have said, I don't want to --
16 I don't want talk.

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

20 MS. JACOBS: What --

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

24 MS. JACOBS: There is nothing in -- on this
25 record that indicates that he wanted to listen to them

1 as opposed to what Justice Alito's hypothetical is,
2 where the gentleman says, "well, I'm not going to say
3 anything but I want to hear what you have to say." We
4 don't have that here.

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

8 MS. JACOBS: There is no clearly established
9 law that says that he has to assert his right to remain
10 silent.

11 CHIEF JUSTICE ROBERTS: Is it there any
12 clearly established law the other way, which is the
13 pertinent question?

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

23 CHIEF JUSTICE ROBERTS: We are not talking
24 -- we are not talking about the Fifth Amendment right.
25 We are talking about the Miranda warnings. There is no

1 issue of voluntariness in this case. Right?

2 MS. JACOBS: Well, when --

3 CHIEF JUSTICE ROBERTS: There is no
4 suggestion that there is -- that the statements are not
5 voluntary. The suggestion is that they may have
6 violated Miranda.

7 MS. JACOBS: Right. That's correct. But if
8 you are going to adopt the suggestion of the government
9 that you do pre-interrogation waiver, which I think is
10 what we are talking about -- that is, you don't give him
11 his rights and then you can just talk and -- talk to him
12 until you are blue in the face, that that ends up being
13 a more coercive situation than we have now.

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

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

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

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

23 MS. JACOBS: Then -- then he is not
24 cooperating, he is not waiving his rights, it's not
25 voluntary. Take him back to the cell, that's it.

1 Because the police --

2 JUSTICE GINSBURG: What you are saying then,
3 is the defendant has to -- never has to invoke his
4 right? That --

5 MS. JACOBS: The state of the -- the state
6 of the law is a defendant does not have to invoke his
7 right to remain silent. Davis is the invocation case,
8 it applies to the second stage of -- of the
9 interrogation. And it has to --

10 JUSTICE GINSBURG: Was the Miranda warning
11 adequate in this case? He got the four warnings, but
12 then, unlike some police forms that then ask the
13 defendant, do you waive your rights, this form never
14 asked, did you waive your rights. It just said: Do you
15 acknowledge that we have informed you of your rights.

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

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

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

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

11 MS. JACOBS: The State actually found two --
12 I think you are saying that there was an objectively
13 unreasonable determination of the facts in this case?

14 CHIEF JUSTICE ROBERTS: Yes.

15 MS. JACOBS: And I think that --

16 CHIEF JUSTICE ROBERTS: Maybe.

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

18 CHIEF JUSTICE ROBERTS: Right.

19 MS. JACOBS: And I think clearly that there
20 -- that there were facts that the Michigan court of
21 appeals found that were not supported by the record and
22 were objectively unreasonable.

23 CHIEF JUSTICE ROBERTS: What are those?

24 MS. JACOBS: The Sixth Circuit found that
25 when the Michigan Court of Appeals said the defendant

1 continued to talk with officers, the Sixth Circuit said
2 that that was an objectively unreasonable finding
3 because there was no continuation, there was no talking.
4 They also found unreasonable that the defendant talked
5 with officers sporadically. The Sixth Circuit said that
6 that was a misrepresentation of the record.

7 The last fact that they talked about is, the
8 Michigan Court of Appeals said that the defendant made
9 eye contact several times or a number of times. And the
10 Sixth Circuit said, quote: "This is what the" -- they
11 said that that was incorrect, what the officer said at
12 the hearing was that eye contact came only at the end,
13 one of the very -- one of the very first times came only
14 at the end.

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

19 JUSTICE SCALIA: Those facts are relevant
20 only if we accept your principal assertion, which is
21 that you -- you don't have to invoke the right and
22 interrogation must cease immediately. If we agree with
23 that, then all of these facts become relevant. But if
24 we think that until you invoke the right the police can
25 continue to ask you questions and it's up to you to

1 answer or not, then those facts are really not relevant
2 at all, are they?

3 I think that's true.

4 MS. JACOBS: I don't want to say it's true
5 --

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

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

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

12 JUSTICE SCALIA: On your theory, those --
13 those factual things are irrelevant, whether --

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

16 JUSTICE SCALIA: Exactly, exactly.

17 MS. JACOBS: Yes.

18 Returning now to -- to the idea of the
19 pre-interrogation waiver, I would suggest to the Court
20 that that would return this -- this Court back to the
21 kind of test that Miranda stopped, which was the
22 applying the totality of the circumstances test; and
23 that you would then revert to pre-Miranda law, where --
24 and this I believe is what the Wayne County prosecutor
25 amicus wants to do, is apply totality of the -- the

1 circumstances test to whether in fact someone has waived
2 their rights. And I would suggest to you that Miranda
3 has not been a failure, that this bright-line rule, you
4 get the rights, you get the waiver, then can you talk,
5 that --

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

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

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

20 MS. JACOBS: And we would just suggest that
21 the State court applied Mosley incorrectly in applying
22 Miranda, that those are the clearly established law --

23 JUSTICE SCALIA: I like clear rules. Your
24 rule is a clear one. Another clear one would be just
25 the opposite of yours, that is that interrogation can

1 continue unless he asserts his right. That's another
2 clear rule. We can go either way and it will be clear.

3 MS. JACOBS: But if interrogation continues,
4 the longer it continues the less likely that the
5 statement that is taken is going to be the product of my
6 client's free will. So the government is going to have
7 an even greater burden in trying to prove that this
8 statement was voluntary or that the waiver of rights is
9 voluntary. So this Court should not adopt a
10 pre-interrogation waiver rule, especially not one
11 that -- that ends up being as long as this case is, and
12 just in case --

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

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

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

23 MS. JACOBS: Then that's it.

24 JUSTICE SCALIA: -- impassively.

25 MS. JACOBS: Then that's it.

1 JUSTICE SCALIA: Then they have to stop?

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

6 JUSTICE KENNEDY: I don't see how do you
7 square that with Mosley.

8 MS. JACOBS: Well, Mosley says that the
9 longer that you question someone, that -- Mosley is the
10 persistent questioning case, where you keep questioning
11 the guy and questioning the guy. And this is very
12 clearly a Mosley case. You have got two officers in the
13 room and they talk about the fact that -- they are both
14 questioning and they talk about the different themes
15 they used. And the very fact that they had to change
16 themes showed that the defendant was not being
17 cooperative and not -- and was not engaging in this
18 conversation willingly.

19 CHIEF JUSTICE ROBERTS: And all he has to
20 say is "I don't want to talk to you;" it's over.

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

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

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

10 MS. JACOBS: Because they are leaving --
11 they're not moving off of square one. They're leaving
12 this, where they are not looking for an answer to
13 whether the rights want to be waived and they are
14 immediately, as they did in this case, going into
15 interview mode. They are going to start to question
16 him.

17 This gets to Mosley, where in fact you end
18 up you are badgering somebody, and in this case they
19 used many different tactics: The softening technique --
20 - here, have a mint.

21 CHIEF JUSTICE ROBERTS: Well, I guess this
22 gets back to the question I had earlier. I thought
23 there was no dispute on this record that there was no
24 involuntariness. We are talking about a violation of
25 the technical, important but formal, Miranda

1 requirements. This is not a case where the person says:
2 My statements were involuntary.

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

7 CHIEF JUSTICE ROBERTS: If that's correct --
8 and that's how I read Butler; you have to look at the
9 circumstances. And you are saying no, you don't look at
10 any circumstances; they have got to ask the question and
11 he has to waive.

12 MS. JACOBS: Yes.

13 CHIEF JUSTICE ROBERTS: The other
14 circumstances are irrelevant.

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

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

25 CHIEF JUSTICE ROBERTS: That issue is not in

1 this case, though.

2 MS. JACOBS: Well --

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

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

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

11 MS. JACOBS: Yes.

12 JUSTICE KENNEDY: Same result?

13 MS. JACOBS: Yes.

14 JUSTICE KENNEDY: 30 minutes?

15 MS. JACOBS: Yes.

16 JUSTICE KENNEDY: 15?

17 MS. JACOBS: Yes.

18 CHIEF JUSTICE ROBERTS: One? I mean,
19 that's -- I don't want to piggyback off
20 Justice Kennedy's point, but that's the whole point, is
21 you do not look at any of those circumstances, you say.
22 Before they can say anything more, they have to get a
23 waiver. So it's 30 seconds if they go on, before
24 they -- if they sit there for how long before -- how
25 long do they have to ask do you want to waive?

1 MS. JACOBS: If -- if you were going to go
2 and use implied waiver, if -- and I think you can use an
3 implied waiver, you -- you are interested in looking at
4 what happened in this case to decide whether, in fact,
5 the yes answers were an implied waiver. And that's why
6 I'm arguing about the circumstances, that there's
7 nothing in these circumstances that can lead you to
8 believe that after 2 hours and 45 minutes, there was a
9 voluntary waiver, the implied waiver.

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

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

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

22 MS. JACOBS: Okay.

23 CHIEF JUSTICE ROBERTS: So, is --

24 JUSTICE SCALIA: Wait. Excuse me. A waiver
25 of what? I thought the Chief Justice was talking about

1 a waiver of your right to remain silent.

2 MS. JACOBS: Yes.

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

4 MS. JACOBS: Okay.

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

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

9 JUSTICE SCALIA: I'm willing to talk to you,
10 I'm willing to listen to you. It seems to me you are
11 confusing a -- a waiver of -- of the right to remain
12 silent with a waiver of the right not to be
13 interrogated, which is the right that you are asserting
14 here.

15 A right not to be interrogated, unless going
16 in you say I waive my right to remain silent. That's --
17 that's the new right that you are asserting.

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

19 JUSTICE SCALIA: The right not to be
20 interrogated.

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

1 Without obtaining the waiver, questioning
2 cannot ensue, because then the rest of the questioning
3 becomes trying to talk the defendant into waiving the
4 rights, trying to talk the defendant into confessing,
5 and you have badgering and you have consistent
6 questioning, and you don't end up with a volitional
7 waiver or volitional statement --

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

10 MS. JACOBS: Well, it's -- the implied
11 waiver case is North Carolina v. Butler.

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

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

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

24 CHIEF JUSTICE ROBERTS: So, there's --
25 there's -- so, there's no implied waiver with respect to

1 the right to remain silent?

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

10 U.S. v. Cardwell I think is an implied
11 waiver where the defendant starts to talk to the officer
12 there -- there in the police car and the defendant
13 starts to talk to the officer after an hour and-a-half
14 of silence, although that again isn't a custodial
15 situation, but the police found -- but the court found
16 that that was, in fact, a waiver.

17 So if there are no further questions, I
18 will -- my time. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Restuccia, you have four minutes
21 remaining.

22 JUSTICE KENNEDY: I -- I have to say that --
23 page 475 and 476, particularly of Miranda do talk in
24 terms of a -- of a waiver. Did -- are there -- did the
25 subsequent cases indicate an articulation of that view

1 that is closer to your position?

2 REBUTTAL ARGUMENT OF B. ERIC RESTUCCIA

3 ON BEHALF OF THE PETITIONER

4 MR. RESTUCCIA: Well, I think Miranda itself
5 contemplates pre-waiver interrogation. If you look at
6 page 14 of the -- of the reply brief, the yellow brief,
7 in the quote from Miranda talking about the process is,
8 on page 14, "Once warnings have been given the
9 subsequent procedure is clear. If" --

10 JUSTICE GINSBURG: Where is it?

11 MR. RESTUCCIA: Page 14 on the left side in
12 the middle, the block quote from Miranda. This is
13 Miranda's description of the processes: "Once warnings
14 have been given, the subsequent procedure is clear. If
15 the individual indicates in any manner at any time prior
16 to or during questioning, that he wishes to remain
17 silent, the interrogation must cease."

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

22 MR. RESTUCCIA: That's right.

23 JUSTICE BREYER: Then it says, clearly, that
24 even if the police and the prosecution testify he did
25 waive it, even if they say he did, explicitly, still, if

1 there's a long questioning, even then, the court should
2 be very careful about admitting it.

3 MR. RESTUCCIA: Right. But then --

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

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

10 JUSTICE BREYER: He answered three
11 questions.

12 MR. RESTUCCIA: Right.

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

15 Two, do you pray to God? Yes.

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

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

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

24 JUSTICE BREYER: So, in this case, after 2
25 hours and 15 minutes when he gave the answers I just

1 said, when did he waive his Miranda rights?

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

4 JUSTICE BREYER: Then Miranda is -- it says
5 you can't admit the stuff after a long questioning
6 unless he waives. Obviously, he says something or there
7 would be nothing to admit.

8 MR. RESTUCCIA: The -- that's what the
9 Federal courts have done in applying Butler, because the
10 words and actions of the person interrogated can give
11 rise to the inference that the person has waived. Where
12 the person has taken action that's inconsistent with the
13 exercise of his rights, it's improper to find waiver.
14 The -- this --

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

21 MR. RESTUCCIA: Right.

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

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

5 JUSTICE STEVENS: -- that any -- any -- in
6 any manner that he wished to remain silent. And until
7 the 2 hours and-a-half later when he did answer the
8 three questions, that's pretty -- it's at least arguable
9 that his silence indicated he wished to remain silent.

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. RESTUCCIA: Thank you.

3 CHIEF JUSTICE ROBERTS: The case is
4 submitted.

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

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