The Burger Court Opinion Writing Database

Edwards v. Arizona

451 U.S. 477 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 28, 1981

RE: No. 79-5269, Edwards v. Arizona

Dear Byron:

I cannot agree that the holding of Miranda--or its dicta--compels anything more than our traditional standard of a voluntary renouncement of a known right or privilege. Who starts the resumed conversation is not constitutionally dispositive for me, and I would not want to get into a "special rule" for this.

I shall be writing a brief concurrence, but it will not be ready in time for the case to come down this week.

Regards,

WEB

Justice White

Copies to the Conference

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: APR 30 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5269

Robert Edwards, Petitioner, *v.* State of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[May —, 1981]

CHIEF JUSTICE BURGER, concurring in the judgment.

I concur only in the judgment because I do not agree that either any constitutional standard or the holding of *Miranda* v. *Arizona*, 384 U. S. 436 (1966)—as distinguished from its dicta—calls for a special rule as to how an accused in custody may waive the right to be free from interrogation. The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but as with all "good" things they can be carried too far. The notion that any "prompting" of a person in custody is somehow evil *per se* has been rejected. *Rhode Island* v. *Innis*, 446 U. S. 291 (1980). For me, the inquiry in this setting is whether resumption of interrogation is a result of a voluntary waiver, and that inquiry should be resolved under the traditional standards established in *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938):

> "A waiver is ordinarily an intentional relinquishment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

Accord, *e. g.*, *Fare* v. *Michael C.*, 442 U. S. 707 (1979); *North Carolina* v. *Butler*, 441 U. S. 369 (1978). In this case, the Supreme Court of Arizona described the situation as follows:

"When the detention officer told Edwards the detectives

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 8, 1980

Re: No. 79-5269 - Edwards v. Arizona

Dear Byron,

Like Harry, I am not so sure that the Sixth Amendment claim is not properly before us. The fact that Edwards did mention the Sixth Amendment in his supporting memorandum at trial, albeit ambiguously, might be enough to give us a final judgment here. Since you base the opinion on the Fifth Amendment claim in any event, I wonder whether you need to decide the final judgment issue on the Sixth Amendment claim. Can't you simply state that we need not address that claim in light of our decision on the Fifth Amendment claim?

As for the merits of Edwards' Fifth Amendment claim, like Harry and John, I believe that Miranda contemplated a per se rule -- once the accused, in custodial detention, asks for counsel, all interrogation must cease until he obtains a lawyer. Of course, the accused, on his own initiative and without instigation of any sort from the police, may waive his request for counsel sua sponte and talk to the police, but that is not this case.

Sincerely,

Bill

Justice White

cc. The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 23, 1981

RE: No. 79-5269 Edwards v. Arizona

Dear Byron:

I agree.

Sincerely,

Bill

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 29, 1980

Re: 79-5269 - Edwards v. Arizona

Dear Byron,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 23, 1981

Re: 79-5269 - Edwards v. Arizona

Dear Byron:

I am glad to join your opinion for the Court, as recirculated March 20.

Sincerely yours,

P.S.

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 18, 1980

MEMORANDUM TO THE CONFERENCE

Re: 79-5269 - Edwards v. Arizona

The Conference vote was to decide this case on Massiah and remand for reconsideration under the standards of that case. The draft I am now circulating does not follow this course because there are more problems than I had anticipated with determining that adversary criminal proceedings had begun with the filing of a complaint against Edwards. As I see it, applying Massiah here would considerably extend that decision.

The draft does conclude, however, that the Arizona Supreme Court applied the wrong legal standard in determining that there was a waiver of the Miranda right to counsel in this case. It also concludes that on the undisputed facts stated in the Arizona Supreme Court opinion there was not a valid waiver when the proper standard is applied.

B R W

✓

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall ✓
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 12-16-80

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–5269

Robert Edwards, Petitioner, *v.* State of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[January —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari in this case, 446 U. S. —, limited to question one presented in the petition, which in relevant part was "whether the Fifth, Sixth, and Fourteenth Amendments requires suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further interrogation; . . ."

I

On January 19, 1976, a sworn complaint was filed against Edwards in Arizona state court charging him with robbery, burglary, and first-degree murder.[1] An arrest warrant was issued pursuant to the complaint, and Edwards was arrested at his home later that same day. At the police station, he was informed of his rights as required by *Miranda* v. *Arizona*, 394 U. S. 436 (1966). Petitioner stated that he understood his rights, and was willing to submit to questioning. After being told that another suspect already in custody had implicated him in the crime, Edwards denied involvement and gave a taped statement presenting an alibi defense. He then sought to "make a deal." The interrogating officer told him that he wanted a statement, but that he did not have the

[1] The facts stated in text are for the most part taken from the opinion of the Supreme Court of Arizona.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

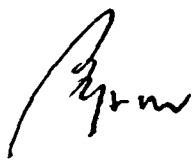
December 31, 1980

Re: 79-5269 - Edwards v. Arizona

Dear Harry, Lewis and Bill,

I appreciate your comments on the circulating draft in this case. It is of some moment that we arrive at a Court opinion and settle the dispute among the circuits with respect to the issue before us. Accordingly, when more Justices have spoken, I shall seriously consider making whatever changes may be necessary to effect that result. Of course, I hope that revisions will not be necessary at all, and it is apparent that I cannot satisfy all of you in any event. For now, I shall await other responses.

Sincerely yours,



Mr. Justice Blackmun

Mr. Justice Powell

Mr. Justice Rehnquist

Copies to the Conference

PP: 2, 7, 9-10

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

2nd DRAFT

Recirculated: 20 MAR 1981

SUPREME COURT OF THE UNITED STATES

No. 79-5269

Robert Edwards, Petitioner, *v.* State of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[January —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari in this case, 446 U. S. —, limited to question one presented in the petition, which in relevant part was "whether the Fifth, Sixth, and Fourteenth Amendments requires suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further interrogation; . . . ."

I

On January 19, 1976, a sworn complaint was filed against Edwards in Arizona state court charging him with robbery, burglary, and first-degree murder.[1] An arrest warrant was issued pursuant to the complaint, and Edwards was arrested at his home later that same day. At the police station, he was informed of his rights as required by *Miranda* v. *Arizona*, 394 U. S. 436 (1966). Petitioner stated that he understood his rights, and was willing to submit to questioning. After being told that another suspect already in custody had implicated him in the crime, Edwards denied involvement and gave a taped statement presenting an alibi defense. He then sought to "make a deal." The interrogating officer told him that he wanted a statement, but that he did not have the

[1] The facts stated in text are for the most part taken from the opinion of the Supreme Court of Arizona.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 2-25-81

- pp. 5, 7, 10 & stylistic -

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5269

Robert Edwards, Petitioner,
v.
State of Arizona.

On Writ of Certiorari to the Supreme Court of Arizona.

[January —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari in this case, 446 U. S. —, limited to question one presented in the petition, which in relevant part was "whether the Fifth, Sixth, and Fourteenth Amendments requires suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further interrogation; . . . ."

I

On January 19, 1976, a sworn complaint was filed against Edwards in Arizona state court charging him with robbery, burglary, and first-degree murder.[1] An arrest warrant was issued pursuant to the complaint, and Edwards was arrested at his home later that same day. At the police station, he was informed of his rights as required by *Miranda* v. *Arizona*, 394 U. S. 436 (1966). Petitioner stated that he understood his rights, and was willing to submit to questioning. After being told that another suspect already in custody had implicated him in the crime, Edwards denied involvement and gave a taped statement presenting an alibi defense. He then sought to "make a deal." The interrogating officer told him that he wanted a statement, but that he did not have the

[1] The facts stated in text are for the most part taken from the opinion of the Supreme Court of Arizona.

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-5269

Robert Edwards, Petitioner, *v.* State of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[January —, 1981]

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari in this case, 446 U. S. 950 (1980), limited to question one presented in the petition, which in relevant part was "whether the Fifth, Sixth, and Fourteenth Amendments requires suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further interrogation; . . . ."

I

On January 19, 1976, a sworn complaint was filed against Edwards in Arizona state court charging him with robbery, burglary, and first-degree murder.[1] An arrest warrant was issued pursuant to the complaint, and Edwards was arrested at his home later that same day. At the police station, he was informed of his rights as required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Petitioner stated that he understood his rights, and was willing to submit to questioning. After being told that another suspect already in custody had implicated him in the crime, Edwards denied involvement and gave a taped statement presenting an alibi defense. He then sought to "make a deal." The interrogating officer told him that he wanted a statement, but that he did not have the

[1] The facts stated in text are for the most part taken from the opinion of the Supreme Court of Arizona.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 19, 1981

MEMORANDUM TO THE CONFERENCE

Cases held for Edwards v. Arizona, No. ~~79-6366~~ 79-5269

There are ten cases held for Edwards.

1. Blakney v. Montana, 79-6366. After being arrested for murdering his girlfriend, petr was questioned on four separate occasions. During the third session, petr admitted to strangling the victim, and his confession was taped during the fourth session. While the facts are subject to some dispute, petr asserted his right to counsel during the second session. The police told him that he could have counsel if he wished, at which time petr continued the discussion. No action was taken with respect to the request. During the third session, which took place a day and half after the second, petr stated "Maybe I should have an attorney." The police began to leave, at which time petr resumed talking. When the police asked about the request, petr responded that he did not want a lawyer.

The trial court found that the statements were voluntary and that petr never effectively asserted his right to counsel. The Montana Supreme Court agreed that the statement was voluntary, but held that petr had properly invoked his right to counsel. The court concluded, however, that petr waived his right to counsel noting the delay between interrogation sessions, the continued giving of Miranda warnings, the signing of a waiver form, and the express statement that he did not want a lawyer.

It may be that a court could find that the continued interrogation was the result of petr-initiated activities since the police began to leave when petr requested an attorney during the third session and petr expressly stated that he did not want an attorney. If petr "initiated" the renewed questioning, then Edwards would not require that the subsequent statements be suppressed. This factual inquiry focusing on the events directly after the request for counsel in light of the factors articulated in Edwards

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 16, 1981

Re: No. 79-5269 - Edwards v. Arizona

Dear Byron:

Please join me.

Sincerely,

T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 23, 1980

Re: No. 79-5269 - Edwards v. Arizona

Dear Byron:

I have read with interest your proposed opinion in this case and have concluded, with some regret, that I cannot join it in its present form. The following outlines my difficulty:

Although I agree with the decision not to rest the case on Sixth Amendment grounds, I am troubled by that portion of the opinion that suggests that the Massiah issue was not properly raised in the Arizona Supreme Court. Edwards adamantly says it was. See Supplemental Brief for Petitioner 1, n. 2. It does not seem right that the Arizona Supreme Court should be able to insulate the question from review by not passing on it. Yet is that not the import of the opinion?

I have now reached the point in my own thinking that if we are to live with Miranda -- and I, like you, am no great fan of that decision -- I think we should hold that that case creates a per se rule barring further interrogation by police once a suspect has invoked his right to counsel, unless the subsequent interrogation was initiated by the defendant. Your opinion, as I read it, rejects this approach. Footnote 15 indicates that at least the Fifth Circuit has adopted that rule. It also approximates what is suggested by Judge Goodwin and two others, concurring and dissenting, in United States v. Rodriguez-Gastelum, 569 F.2d 482, 488 (CA9 en banc), cert. denied, 436 U.S. 919 (1978). I think, too, it has been suggested in some concurring and dissenting opinions here, and was at least intimated in Fare v. Michael C., 442 U.S. 707, 718-719, 726-727 (1979).

I should state, also, that I do not fully understand the stress placed on the accused's being aware of his prior requests for counsel (pp. 12 and 13). Who better than the accused will be aware of any prior requests he made? Must the police go so far as to remind him that he previously requested counsel? I wonder.

Finally, I am not convinced that, as the draft states, the Arizona court failed to focus on whether petitioner understood his right to counsel and intelligently and knowingly waived it. It seems to me that that court considered the issues of knowledge and intelligence to be part of the voluntariness inquiry. There may be some semantic confusion in the court's opinion, but there is a clear finding that "the waiver and confession were voluntarily and knowingly made." App. 19.

In summary, then, I have my problems. I may wait to see what Bill Rehnquist has to say. Or I may separately concur.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

January 7, 1981

Re: No. 79-5269 - Edwards v. Arizona

Dear John:

It may be that I shall join your short opinion concurring in part and dissenting in part. Please do not hold me to this, however. Byron has indicated that he may make some revisions in his proposed opinion for the Court. I would like to see what these are before I cast my vote.

Sincerely,

HAB

Mr. Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 24, 1981

Re: No. 79-5269 - Edwards v. Arizona

Dear Byron:

Please join me in your recirculation of March 20.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 29, 1980

79-5269 Edwards v. Arizona

Dear Byron:

I agree that the right to counsel, having once been claimed, nevertheless may be waived subsequently provided the state proves that the waiver was "knowingly and intelligently" made. I am troubled, however, by some of your "holding" language on pages 11 and 12.

First, my understanding of Miranda is that it applies only to custodial interrogation. On page 11 you refer to an accused who "invokes his right to counsel prior to or during custodial interrogation".

And on page 12, your "holding" sentence states that:

> "When an accused has invoked his right to counsel after Miranda warnings, a subsequent waiver of that right cannot be found unless the accused is aware of his prior request for counsel, understands that his request will be honored if he so desires, and chooses to forego that right."

I am troubled by spelling out these specifics without making clear that whether a waiver is made knowingly and intelligently depends on the facts and circumstances, and these may vary widely.

I agree that there is sufficient doubt in this case to reverse the judgment and remand the case. A critical fact for me is that when the two detectives wished to interrogate petitioner the next morning, he stated that he did not want to talk. This reaffirmed his position when Miranda warnings were given him earlier. The prison guard, however, told petitioner that he "had" to talk to the detectives. This element of compulsion could be sufficient to offset a second giving of Miranda warnings. If

petitioner, when told that the detectives wished to interrogate him, had simply replied that he would be glad to talk to them, and if Miranda warnings had been repeated and petitioner expressed his understanding, this would be sufficient for me. It would be unnecessary for the state to prove that petitioner was "aware of his prior request for counsel" or to prove specifically that he understood "his request [would] be honored if he so desired".

Perhaps I am unduly concerned, but I am afraid the "holding" sentences on pages 11 and 12 will be read as creating a new and more specific formula rather than relying on the traditional "knowingly and intelligently" waiver standard.

Sincerely,

L. Lewis

Mr. Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 23, 1981

No. 79-5269 Edwards v. Arizona

Dear Byron:

Your recirculation of March 20 still troubles me, as it seems to enunciate a per se rule:

> "We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused has himself initiated further communication, or exchanges or conversations with the police." p. 7. (Emphasis added.)

The requirement that the accused must "himself initiate" a further meeting with the authorities, is reiterated on page 8, and again on page 10. There, as one of the reasons for reversal, your opinion states that the discussion at issue "was not at [petitioner's] suggestion or request".

I agree that a waiver of counsel, to be effective in this context, must be made "knowingly and intelligently" as well as voluntarily. That is, the accused must fully understand his right to counsel. But surely a waiver may meet these requirements in some circumstances where the accused himself did not "initiate" the further conversation. For example, there could be a perfectly innocent conversation initiated by a jailer (or someone else in authority) with the person in custody that could evolve into a confession, knowingly and intelligently made.

Putting it differently, your opinion - as I read it - would require a court to find on a motion to suppress, or a jury to be instructed at a trial, that waiver of counsel can be effective only if the "communication, exchange or conversation" was affirmatively "initiated" by the accused. No prior case has so held, and I see no reason to extend Miranda beyond its present boundaries. Whether there has been a valid waiver is an issue of fact that should be determined in light of the circumstances of the case, provided the standard is - as you state - that it must be made knowingly and intelligently as well as voluntarily.

For the reasons stated in my letter to you of December 29, I will join the judgment, but will write separately if your present draft commands a Court. After four months, I am genuinely regretful not to be able to join you.

Sincerely,

Lewis

Mr. Justice White

LFP/lab

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

4-15-81

From: Mr. Justice Powell

Circulated: APR 15 1981

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-5269

Robert Edwards, Petitioner,
v.
State of Arizona.

On Writ of Certiorari to the Supreme Court of Arizona.

[April —, 1981]

JUSTICE POWELL, concurring in the result.

Although I agree that the judgment of the Arizona Supreme Court must be reversed, I do not join the Court's opinion because I am not sure what it means.

I can agree with much of the opinion. It states the settled rule:

> "It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.' *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938); *Faretta* v. *California,* 422 U. S. 806, 836 (1975); *North Carolina* v. *Butler,* 441 U. S. 369, 374–375 (1978); *Brewer* v. *Williams,* 430 U. S. 387, 404 (1977); *Fare* v. *Michael C.,* 442 U. S. 707, 724–724 (1979)." *Ante,* at 5.

I have thought it settled law, as these cases tell us, that one accused of crime may waive *any* of the constitutional safeguards—including the right to remain silent, to jury trial, to call witnesses, to cross-examine one's accusers, to testify in one's own behalf, and—of course—to have counsel. Whatever the right, the standard for waiver is whether the actor fully understands the right in question and voluntarily intends to relinquish it.

Stylistic + P. 4

4-27-81

2nd DRAFT

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens
Mr. Justice Powell

SUPREME COURT OF THE UNITED STATES

No. 79-5269

Circulated:

Recirculated: APR 28 1981

Robert Edwards, Petitioner, *v.* State of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[April —, 1981]

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, concurring in the result.

Although I agree that the judgment of the Arizona Supreme Court must be reversed, I do not join the Court's opinion because I am not sure what it means.

I can agree with much of the opinion. It states the settled rule:

> "It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.' *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); *Faretta* v. *California*, 422 U. S. 806, 836 (1975); *North Carolina* v. *Butler*, 441 U. S. 369, 374–375 (1978); *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977); *Fare* v. *Michael C.*, 442 U. S. 707, 724–724 (1979)." *Ante*, at 5.

I have thought it settled law, as these cases tell us, that one accused of crime may waive *any* of the constitutional safeguards—including the right to remain silent, to jury trial, to call witnesses, to cross-examine one's accusers, to testify in one's own behalf, and—of course—to have counsel. Whatever the right, the standard for waiver is whether the actor fully understands the right in question and voluntarily intends to relinquish it.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 19, 1980

Re: No. 79-5269 Edwards v. Arizona

Dear Byron:

In due course I will circulate an opinion concurring in part and dissenting in part.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 31, 1980

Re: No. 79-5269 Edwards v. Arizona

Dear Byron:

As indicated by my previous letter in this case, I have some difficulty with the draft opinion. In light of the various correspondence which has been circulated, however, I have decided it may be best for me to state my areas of concern before going ahead with a separate opinion.

I agree that we should not base a decision in this case on Massiah and the Sixth Amendment right to counsel, for the reasons stated in Part II of your draft. I also agree fully that the right to counsel, once invoked, may be waived, and therefore am happy to join in the rejection of any per se rule against waiver of this right. Draft Op. at 7-9. (In this context I am somewhat concerned with the discussion of the Fifth Circuit rule on page 8, n. 15. Since the opinion indicates a finding of waiver is at least possible in this case, and since Edwards did not initiate the renewed contact with the officers, I take it that the Fifth Circuit rule that waiver can be found only when the accused initiates the renewed contact is to be rejected, and would specifically note this.)

I am troubled, however, by the draft's discussion of the appropriate standards by which waiver is to be judged on remand. I would much prefer to see the standard applied in Schneckloth -- voluntariness under the totality of the circumstances -- applied across the board. I sense that it is very difficult for police officers to apply differing standards of waiver to the vast array of questions which come up. Schneckloth's discussion of the appropriate standard in Miranda cases was of course dicta, and I regard Johnson v. Zerbst, 304 U.S. 458 (1938) as seriously flawed. Nonetheless I could probably join an opinion using the "knowing and intelligent" waiver standard.

I probably will not, however, be able to join an opinion further fragmenting the appropriate waiver standard by requiring a greater showing for waivers of the right to counsel than for the right to remain silent. I understand the draft to be breaking new ground in this regard, at least so far as concerns the Fifth Amendment. A two-tier test is bad enough; a three-tier test imposes an intolerable burden on law enforcement officers, who we hope will be able to apply our decisions in practice.

The difficulty in cutting the loaf too thin is, I think, shown in the particular additional requirements the draft would impose prior to finding a waiver of the right to counsel as opposed to the right to remain silent. For example, the draft stresses that the accused be "aware of his prior request for counsel", 12, but presumably he would be in every case, amnesiacs aside. It also seems clear from the record that Edwards was in fact aware of his prior request when he met with the second group of officers. He testified below that he did not ask for an attorney at the second meeting because he "didn't think you had to keep asking for a [sic] attorney over and over and over." J.A. 84. This certainly shows awareness, at the time of the second meeting, of his prior request. The draft opinion, in stressing that an accused be aware of his prior request for counsel and understand that a renewed request will be honored, holds the danger of being read, at least by the police who must work within its bounds, "to require an additional question to the already cumbersome Miranda litany ...." Brewer v. Williams, 430 U.S. 387, 436 (1977) (White, J., dissenting).

I am also opposed to saying that waiver cannot be found simply on evidence that an accused answered questions following Miranda rights. In a particular case an accused may show that this is not enough, perhaps when, as here, he was told that he "had" to talk to officers after expressing the desire not to. Absent such circumstances I do not see why answering questions does not signify a voluntary, knowing, and intelligent waiver of rights which had just been specifically enumerated. In any event I would leave

the question of the result here fully open on remand, and would not discuss the evidence as is done in the draft at pages 12-13.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 23, 1981

Re: No. 79-5269 Edwards v. Arizona

Dear Byron:

As you might suppose in light of my previous letter of December 31st concerning this case, I share the concerns raised by Lewis. I shall await his writing before coming to rest.

Sincerely,

W

Mr. Justice White

Copes to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 16, 1981

Re: No. 79-5269 Edwards v. Arizona

Dear Lewis:

Please join me in your opinion concurring in the result in this case.

Sincerely,

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: JAN 5 '81

Recirculated: _____

79-5269 - Edwards v. State of Arizona

JUSTICE STEVENS, concurring in part and dissenting in part.

In my opinion a correct interpretation of the Court's opinion in Miranda v. Arizona, 384 U.S. 436, forecloses a second attempt to question a prisoner who has asked for the assistance of counsel unless either (a) counsel has first been tendered to him, or (b) the prisoner initiates the interview in which subsequent questioning occurs.[1] Any lesser standard

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[1] The Court stated in Miranda:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.
>
> This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to all interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not

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SUPREME COURT OF THE UNITED STATES

No. 79–5269

Robert Edwards, Petitioner, *v.* State of Arizona. | On Writ of Certiorari to the Supreme Court of Arizona.

[January —, 1981]

JUSTICE STEVENS, concurring in part and dissenting in part.

In my opinion a correct interpretation of the Court's opinion in *Miranda* v. *Arizona*, 384 U. S. 436, forecloses a second attempt to question a prisoner who has asked for the assistance of counsel unless either (a) counsel has first been tendered to him, or (b) the prisoner initiates the interview in which subsequent questioning occurs.[1] Any lesser standard substantially undermines *Miranda*'s purported guarantee that

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"This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to all interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." 384 U. S., at 474.

See *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10; *id.*, at 109–110 (JUSTICE WHITE, concurring).

substantially undermines Miranda's purported guarantee that counsel will be provided upon request.[2] Petitioner in this case did not initiate the subsequent interrogation, which occurred before counsel was tendered to him. Accordingly, while I concur in the judgment of reversal, I would hold that the confession in this case is inadmissible.

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qeustion him during that time." 384 U.S., at 474.

See Michigan v. Mosley, 423 U.S. 96, 104 n.10; id., at 109-110 (JUSTICE WHITE, concurring).

[2] As the Court stated:

> "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S., at 467.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 23, 1981

Re: 79-5269 - Edwards v. Arizona

Dear Byron:

Please join me.

Respectfully,

John

Justice White

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