IN THE SUPREME COURT OF THE UNITED STATES

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MARYLAND, :

Petitioner, :

v. : No. 04-373

LEEANDER JEROME BLAKE. :

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Washington, D.C.

Tuesday, November 1, 2005

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

APPEARANCES:

KATHRYN GRILL GRAEFF, ESQ., Assistant Attorney General, Baltimore, Maryland; on behalf of the Petitioner.

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

KENNETH W. RAVENELL, ESQ., Baltimore, Maryland; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

[10:03 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Maryland versus Blake.

Ms. Graeff.

ORAL ARGUMENT OF KATHRYN GRILL GRAEFF

ON BEHALF OF PETITIONER

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

In Edwards versus Arizona, this Court held that a suspect has a choice, after invocation of the right to counsel, to change his mind and initiate further contact with the police. The question in this case is whether that choice should be taken away, and a suspect's decision to speak presumed involuntary, when a police officer first makes an improper comment.

The answer should be no when the impropriety is cured. When, under all of the circumstances, a reasonable person in the suspect's position would understand that it was the suspect's choice whether to speak or remain silent and that the police would honor that choice and stop questioning, a decision to speak should be deemed initiation, under Edwards.

JUSTICE O'CONNOR: Now, what has to be considered, by way of evidence, in evaluating whether the suspect has initiated the additional conversation? Is it appropriate, in

this case, to consider the age of the person?

MS. GRAEFF: Yes. I think you would look at a reasonable person in --

JUSTICE O'CONNOR: And --

MS. GRAEFF: -- the suspect's --

JUSTICE O'CONNOR: -- and the fact that, on the charges which he saw, it said he was subject to the death penalty, but that was not correct?

MS. GRAEFF: That would go to whether the statement was voluntary, it would not go to --

JUSTICE O'CONNOR: It would not --

MS. GRAEFF: -- the degree --

JUSTICE O'CONNOR: -- you would not consider it in connection with the initiation --

MS. GRAEFF: No, the --

JUSTICE O'CONNOR: -- question?

MS. GRAEFF: No, the purpose of Edwards was to prevent police badgering. To prevent police conduct that, conveys, directly or indirectly, that the police are going to continue questioning until they get a statement, despite the invocation of the right to counsel.

JUSTICE KENNEDY: Well, I --

JUSTICE O'CONNOR: Counsel --

JUSTICE KENNEDY: -- I suppose that if they knowingly put death on in order to get him off his balance,

that would be badgering, wouldn't it?

MS. GRAEFF: The -- the purpose of Edwards was to prevent police questioning. So, when a curative measure conveys that, the police are not going to question any longer.

JUSTICE KENNEDY: Well, but --

MS. GRAEFF: The --

JUSTICE KENNEDY: -- the initial question Justice O'Connor asked is, Do we consider these other factors? And then -- but you're talking now about curing.

MS. GRAEFF: And my answer is no, that we do not consider what -- the death sentence. There's two. In Bradshaw --

JUSTICE SOUTER: Then why consider age? I mean, the -- both of them go to the same point, and that is, What would a reasonable person suppose the suspect's understanding was at that point? And would it be fair to conclude that the suspect was, in fact, initiating conversation, rather than responding to the police or doing something irrational? And I don't see why the -- in effect, the false statement about the death penalty -- or true statement about the death penalty, for that matter -- doesn't go to the same point, just as the suspect's age goes to it.

MS. GRAEFF: Because the critical inquiry is whether the suspect understood that it was his choice and that the police would stop questioning.

JUSTICE GINSBURG: But the --

JUSTICE SOUTER: So, the --

JUSTICE GINSBURG: -- but the trial judge made certain findings. He heard these witnesses. He heard the police officers. And he suggested that the -- Police Officer Reese was playing a good-cop/bad-cop game with Detective Johns. And so, that this -- the statement made by Reese, "You'll want to talk to us now, huh?" was designed to elicit an answer. And the trial court also said there is an additional factor, and that is this charge, that was intimidating even if it didn't have death on it, wasn't presented to Blake immediately. It could have been presented when he was put in the cell, initially. So, there were those factors. Those are relevant, are they not, to the character of what Blake said?

MS. GRAEFF: I think what -- you look at -- the relevant factors are the factors that go to whether a reasonable person would understand that questioning was going to stop. This Court has said that there were two --

JUSTICE GINSBURG: What about the factors that I mentioned? Would they be relevant to a factfinder's determining what a reasonable person in that situation -- with the two police officers appearing, with the charges not being presented immediately, not being presented at the time the Miranda warnings were given, but only after -- would those be -- would those be relevant factors to decide if this was a

voluntary initiated request to talk to the police?

MS. GRAEFF: No, because I think what you're looking at is not voluntariness. You're looking at knowing. Did this suspect know that the questioning was going to stop?

JUSTICE KENNEDY: Well, but it --

JUSTICE SOUTER: Yes, but you're --

JUSTICE KENNEDY: -- it has to be --

JUSTICE SOUTER: -- you're making --

JUSTICE KENNEDY: -- voluntary at some -- if you held the man's hand to a burning iron, we would -- we'd say that's not voluntary.

MS. GRAEFF: It's involuntary.

JUSTICE KENNEDY: So, it has to be voluntary, certainly, in the lay sense of the term. Then the law has certain accretive force when we talk about, you know, involuntary as a matter of law. But what we're -- what we're talking about, it seems to me, is, rather, a commonsense inquiry as to whether or not it was voluntary, as to which I don't think you necessarily lose your case, but it seems to me that at least these have to be considered in determining whether or not it's voluntary.

MS. GRAEFF: Well, I think that's the second step of the analysis. The first step of the analysis, which is what this case is -- before the Court is, on initiation. Now, voluntariness --

JUSTICE KENNEDY: Well, but I -- you can't initiate something involuntarily and have that count, can you? You say --

MS. GRAEFF: Our --

JUSTICE KENNEDY: -- let's say involuntarily, in the lay sense of the word, in the common sense of the word, where it was actually physically coerced. That wouldn't count.

MS. GRAEFF: It would be an involuntary statement under the second --

JUSTICE KENNEDY: All right.

MS. GRAEFF: -- step of the analysis.

JUSTICE SOUTER: No, but what about --

JUSTICE KENNEDY: No, no, it's the --

JUSTICE SOUTER: -- the first step?

JUSTICE KENNEDY: -- first part of the analysis.

MS. GRAEFF: In the first part of the --

JUSTICE KENNEDY: How --

MS. GRAEFF: -- analysis, our --

JUSTICE KENNEDY: The first part of the analysis is whether or not he initiates.

MS. GRAEFF: Yes.

JUSTICE KENNEDY: And you're trying to tell us that the initiation can be involuntarily? I just don't -- I just don't agree with that.

MS. GRAEFF: Well, what we're trying to say is that

the purpose of Edwards was to prevent badgering, where the police convey --

JUSTICE O'CONNOR: All right. But suppose the police are twisting his arm behind his back until he initiates a further discussion. You would say that's fine?

JUSTICE KENNEDY: I mean, you have to concede --

MS. GRAEFF: Well, if they're twisting their back, you're not thinking they're going to stop questioning. I mean, what you're looking --

JUSTICE SOUTER: No, you're --

MS. GRAEFF: -- at is, Did --

JUSTICE SOUTER: Aren't you -- aren't you confusing Miranda, which is a question of comprehension followed by voluntary waiver, with the question of initiation? They are separate questions. And what our -- what we are trying to get at is: If there is going to be an initiation on the suspect's part, doesn't it have to be a voluntary initiation? Your answer consistently is, Did he know that questioning would stop? And those are two different issues. One is understanding Miranda warnings. One is voluntarily initiating a further conversation with the police. So, I don't see it -- let's assume he perfectly understood the Miranda warnings. But if the initiation was not a voluntary initiation, or an initiation at all, it seems to me you lose.

MS. GRAEFF: Well, Maryland's position is that if

you look at the analysis in Elstad and Seibert, where what this Court said is, you don't look at whether something caused something else, you look at whether there was a cure in the sense that the suspect understood his rights --

JUSTICE SCALIA: Ms. Graeff, is there any case which says that an initiation is not voluntary, as opposed to a confession being not voluntary, because the suspect has been charged with a crime greater than what the police believe they can prove, or if the police advise him that he's been charged with a greater crime than what he's really been charged with? Is there any case which says that the effect of that is to cause his initiation of discussion to be involuntary?

MS. GRAEFF: Not that I'm aware of.

JUSTICE SOUTER: Do you take --

JUSTICE STEVENS: May I --

JUSTICE SOUTER: -- the position that initiation is a purely formal inquiry, a matter of magic words? If he says the equivalent of, "I guess I'll talk to you," that's all you look at?

MS. GRAEFF: What you look at as, in Seibert, is, Was he --

JUSTICE SOUTER: No, but ask --

MS. GRAEFF: -- given a genuine choice?

JUSTICE SOUTER: -- answer my question. Is that all you look at?

MS. GRAEFF: You look at whether he understood that the questioning was going to cease, and it was up to him --

JUSTICE SOUTER: No, you're --

MS. GRAEFF: -- whether to speak.

JUSTICE SOUTER: -- you're avoiding my question.

MS. GRAEFF: I'm sorry.

JUSTICE SOUTER: My question is, Is the act of initiation a purely formal act on your view, so that so long as the suspect says the magic words, it doesn't matter what is in his mind or what he understands? Is it formal or not formal?

MS. GRAEFF: No.

JUSTICE SOUTER: It's not formal.

MS. GRAEFF: What you need to look at is whether an objective person in the suspect's position would understand that questioning was going to cease, and there was -- would be no more questioning. Edwards --

JUSTICE STEVENS: But, can I interrupt with --

JUSTICE KENNEDY: I think we can --

JUSTICE STEVENS: -- with one --

JUSTICE KENNEDY: -- I think that's a given. The question is whether or not he agrees -- he indicates affirmatively that he wants to begin talking.

MS. GRAEFF: And here, there's no question he wanted to --

JUSTICE KENNEDY: That's --

MS. GRAEFF: -- begin talking.

JUSTICE KENNEDY: -- the issue, it seems to me.

MS. GRAEFF: And there's no question here that he wanted to begin talking.

JUSTICE BREYER: All right, now suppose -- I don't understand all these legal terms here. Imagine.

[Laughter.]

JUSTICE BREYER: It may be close to the truth. Now, we have a case, a hypothetical. The defendant is sitting there, the police say, "Question?" And he says, "I want to see my lawyer." And the policeman says the following, "That's fine, go ahead, we'll get him. By the way, if you see him, we'll execute you. Are you sure you don't want to talk to us?" That's plainly unlawful, isn't it?

MS. GRAEFF: Involuntary. Under --

JUSTICE BREYER: Fine.

MS. GRAEFF: -- the second step --

JUSTICE BREYER: Now --

MS. GRAEFF: -- of the --

JUSTICE BREYER: Now --

MS. GRAEFF: -- analysis --

JUSTICE BREYER: Now, the same thing happens, but what he says is, "You'd better talk to us, or you'll be executed. Think about it." Equally unlawful, right?

MS. GRAEFF: It would be involuntary --

JUSTICE BREYER: Okay.

MS. GRAEFF: -- under the second --

JUSTICE BREYER: Now, a minute --

MS. GRAEFF: -- test.

JUSTICE BREYER: -- passes while he's thinking about it. Okay? Is it -- is it unlawful now, because a minute has passed before he says yes?

MS. GRAEFF: It would make it unlawful -- unvoluntary. But, again --

JUSTICE BREYER: I just --

MS. GRAEFF: -- with -- There's a two-step process.

JUSTICE BREYER: I don't -- I don't want legalism. I just want the conclusion. A minute has passed before he says yes. Has that changed everything, and it becomes lawful?

MS. GRAEFF: No.

JUSTICE BREYER: No. Now it's 15 minutes. Now it's 30 minutes. Okay? Now, a court says 30 minutes is the same as one minute, "We don't think the passage of 29 extra minutes made a difference." And what's your reply? Not in legalism. You're going to say, "Oh, no, the passage of 30 minutes, rather than 1 minute, makes all the difference." And I would like to know why.

MS. GRAEFF: Actually, our position is more Detective Johns' actions rather than -- the passage of time was a factor, but the more significant --

JUSTICE BREYER: I --

MS. GRAEFF: -- thing here --

JUSTICE BREYER: Yes, that's fine. I'm not -- I'm -- I want you to say that kind of thing. You're saying it's not just 30 minutes, it's "also some other things happened." What?

MS. GRAEFF: Significantly, Detective Johns' conduct and his words, when -- when Office Reese made the improper statement, Detective Johns immediately and firmly --

JUSTICE SCALIA: The --

MS. GRAEFF: -- reprimanded --

JUSTICE SCALIA: -- improper statement was, "I bet you want to talk now, huh?"

MS. GRAEFF: Yes.

JUSTICE SCALIA: Right? And --

MS. GRAEFF: Yes.

JUSTICE SCALIA: -- immediately, the other detective, Johns -- immediately?

MS. GRAEFF: Yes. Immediately --

JUSTICE SCALIA: Said what?

MS. GRAEFF: -- immediately said, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now" --

JUSTICE BREYER: So, that's --

MS. GRAEFF: -- and pushed him.

JUSTICE BREYER: -- possible. That definitely cuts

in your favor, unless, of course, it sounds like a good-cop/bad-cop routine. And --

CHIEF JUSTICE ROBERTS: There was --

JUSTICE BREYER: -- people --

CHIEF JUSTICE ROBERTS: -- there was no finding that this was a good-cop/bad-cop --

MS. GRAEFF: No.

CHIEF JUSTICE ROBERTS: -- routine, was --

MS. GRAEFF: In fact --

JUSTICE KENNEDY: In fact, there was a finding that Johns' testimony was credible.

MS. GRAEFF: Yes, that Johns' testimony was credible, and that Johns did not intend this to happen.

JUSTICE BREYER: But that's --

MS. GRAEFF: This was --

JUSTICE BREYER: -- subjectively true. And so, I'd simply wonder if the fact that it's subjectively true, and there is a finding that the defendant -- here, we have 30 minutes, and we have the fact that the other detective said, "He said he can't talk to us. We can't do anything about it." We have that. Is there anything else?

MS. GRAEFF: We have that Detective Johns then pushed him out of the cell --

JUSTICE BREYER: Yes.

MS. GRAEFF: -- and they left. So the police

initiation was terminated. And --

JUSTICE BREYER: Yes.

MS. GRAEFF: -- then when Detective Johns came back, 28 minutes, he didn't say anything.

JUSTICE BREYER: Yes.

MS. GRAEFF: He didn't ask any questions. And it was Blake who initiated and said, clearly, he wanted to talk to the police.

JUSTICE BREYER: All right. Right. So --

JUSTICE STEVENS: May I ask --

JUSTICE BREYER: -- we have a passage --

JUSTICE STEVENS: May I ask you two rather elementary questions?

MS. GRAEFF: Yes.

JUSTICE STEVENS: One of the issues is whether -- when he spoke and said, "Can I talk now?" -- was that voluntary or not? Who has the burden on whether it was, or not, voluntary, the State or the defendant, in your view?

MS. GRAEFF: The state has the burden to show that he initiated.

JUSTICE STEVENS: And so, the State did have the burden. And what is your view on the fact that the trial -- the judge who heard the evidence said they had not met the burden? What kind of deference is owing to that finding?

MS. GRAEFF: We think none, because the trial court

did not focus on the proper analysis. The trial court focused on a causal connection analysis that this Court has --

JUSTICE GINSBURG: May I --

MS. GRAEFF: -- rejected in Seibert --

JUSTICE GINSBURG: May I -- before we get to that, I read the trial court's opinion, and it didn't seem to me that it was playing, as Justice Breyer said, this game of legal words and labels. It was saying, "There are things to suspect here. Yes, I credited Detective Johns. But he was asked, 'Why did you bring along Reese? You didn't need him?'" And there was no answer to that.

And there was also no explanation, after they left Blake in his cell, Reese just having said, "I bet you want to talk to us now, huh?" -- there was nothing said to assure Blake that that was not a "You'd better talk to us, or you're going to be in trouble" kind of thing. There was just the statement by Blake and another Miranda warning. All of those things, the judge said, weighed on his mind, and he reached the conclusion that the Government hadn't sustained its burden on the basis of those factors.

So, is that clearly erroneous? I mean, don't we defer to the judge's findings?

MS. GRAEFF: If the inquiry is a -- clearly erroneous, yes. But our position is that whether or not there was initiation is a mixed question of fact and law, whether a

reasonable person would understand the questioning was going to stop. And so, when you look at this reasonable-person analysis, you don't give deference to the findings of the lower court.

And if I could reserve the rest of my time, if there are no more questions.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Graeff.

Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

FOR THE UNITED STATES, AS AMICUS CURIAE,

IN SUPPORT OF PETITIONER

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

An improper question or comment under Edwards can be cured if the police terminate the questioning and make it clear to the suspect that they will honor his decision whether or not to talk to them --

JUSTICE O'CONNOR: Well, tell us --

MR. FELDMAN: -- without counsel.

JUSTICE O'CONNOR: -- what factors, in your view, can be considered. The --

MR. FELDMAN: I think --

JUSTICE O'CONNOR: The defendant's age? The improper charge? What else can be considered?

MR. FELDMAN: I think all of those things can be

present in any Miranda case, and are taken care of in a normal Miranda analysis as to whether it was voluntary or not. The problem here is that the --

JUSTICE O'CONNOR: Well, but what we're trying to determine is, What do you consider in determining whether he has -- a reasonable person initiating --

MR. FELDMAN: Right, and I --

JUSTICE O'CONNOR: -- further discussion?

MR. FELDMAN: -- I think you could say that all of those voluntariness factors should be looked at, in terms of initiation, although I just think the analysis would be exactly the same as if you were asking whether he made a voluntary waiver, that it's the same voluntary -- voluntariness analysis. Now, in the --

JUSTICE KENNEDY: Well, I'm not so sure, because a voluntary waiver is measured against a Miranda warning. And, by definition here, you don't have a Miranda warning, because we're asking about "whether initiation." So, it seems to me there's a threshold inquiry of voluntariness to determine whether or not there was a voluntary initiation, and that that -- it does not comprehend or require a Miranda warning. Otherwise, you're double counting.

MR. FELDMAN: But you never -- there's never -- first of all, he had gotten a Miranda warning, initially; and that was when he said he wanted to see a lawyer. That was --

that had happened. Secondly, whenever there's an initiation case, you've never had another Miranda warning before the initiation. And what the police did here --

JUSTICE KENNEDY: I agree with that. But I want -- what I think the Court is trying to find is some explanation of the threshold test for determining whether or not there was a voluntary initiation. Now, I think we agree -- or at least I agree -- that there shouldn't be any Miranda warnings required. That doesn't go into the mix.

MR. FELDMAN: But --

JUSTICE KENNEDY: Any new Miranda warning.

MR. FELDMAN: Right, but I -- still, the -- there has been, already, an -- a Miranda warning.

JUSTICE KENNEDY: Yes.

MR. FELDMAN: But, still, the question should be broken down into two parts. The -- as the Court said, in Oregon against Bradshaw, you have to -- it's useful, at least, to separate the question of initiation, which is a more limited question, from the broader question of voluntariness of a waiver --

JUSTICE STEVENS: But, Mr. --

MR. FELDMAN: -- or voluntariness.

JUSTICE STEVENS: -- Feldman, do you agree that the State had the burden of proving voluntariness at the second stage?

MR. FELDMAN: Yes.

JUSTICE STEVENS: And why -- and why should we not credit the finding of fact by the -- by the trial judge --

MR. FELDMAN: Well, if the --

JUSTICE STEVENS: -- who found it was not voluntary?

MR. FELDMAN: -- the middle-level -- what -- Maryland has --

JUSTICE STEVENS: The middle level --

MR. FELDMAN: -- -- at the middle-level --

JUSTICE STEVENS: -- said there was no Edwards violation.

MR. FELDMAN: Right.

JUSTICE STEVENS: So, that doesn't contribute anything to the dialogue.

MR. FELDMAN: But the State has argued that actually, given the procedures in this case, the defendant waived his voluntariness claim. But, in any event, the State -- - the Maryland Court of Appeals --

JUSTICE STEVENS: Well, you just told me you agree that the burden was on the --

MR. FELDMAN: Right. But --

JUSTICE STEVENS: -- State to prove voluntariness. But I still haven't heard your answer to why we should not credit the finding of fact by the trial judge.

MR. FELDMAN: Well, I'd say -- well, two things.

One is, the Maryland Court of Appeals itself explicitly -- specifically said that it did not --

JUSTICE STEVENS: I don't care --

MR. FELDMAN: -- voluntariness.

JUSTICE STEVENS: -- what the Maryland Court of --

MR. FELDMAN: Not the midlevel --

JUSTICE STEVENS: -- Appeals said.

MR. FELDMAN: -- court, but the --

JUSTICE STEVENS: The highest court in Maryland also credited the finding.

MR. FELDMAN: No, the -- I don't think so. The highest court in Maryland said, "We are not going to decide anything about voluntariness, we're only going to decide something about initiation."

JUSTICE STEVENS: Well, in any event, we have a --

MR. FELDMAN: And --

JUSTICE STEVENS: -- a finding of fact by the trial court before us, and I don't -- I still don't understand. From your point of view, why shouldn't we credit that?

MR. FELDMAN: And I don't think -- oh, because I don't -- the -- that court was relying on a -- on the -- on the -- on the question of initiation. What -- what that court was doing was saying, "We're going to do a kind of voluntariness-lite here and take all the facts that might suggest it's not voluntary, and count them, and say -- well, give -- those, plus

whatever" --

JUSTICE STEVENS: You disagree with the --

MR. FELDMAN: -- means it's not --

JUSTICE STEVENS: -- finding that -- the -- isn't it -- aren't we entitled to give a -- some presumption of validity?

MR. FELDMAN: Yes, but -- well, I think that the trial -- what the trial court -- I think it -- no, I don't think so, because I think the trial court was not operating under the correct standard of what it was supposed to -- of what initiation consists of.

CHIEF JUSTICE ROBERTS: Because it's a mixed question of law and fact --

MR. FELDMAN: Right.

CHIEF JUSTICE ROBERTS: -- and not a purely factual --

MR. FELDMAN: Right.

CHIEF JUSTICE ROBERTS: -- determination.

MR. FELDMAN: That's correct.

JUSTICE BREYER: If you're going to the standard, which is, I think, the -- actually, the difficult question here, what's wrong -- should you say -- what's wrong with saying -- which is what I was pursuing -- that, where there is a question that's improper, as there was here, by the police, the only real question is, Is a later initiation "the fruit"?

MR. FELDMAN: I --

JUSTICE BREYER: And you say the State has to show it wasn't the fruit. That would have the virtue of making the law quite consistent here, as it is with Fourth Amendment/Fifth Amendment cases. That's a well known concept.

MR. FELDMAN: The Court has consistently found, in the Miranda context, that that kind of broad "fruits analysis" doesn't apply in Elstad and --

JUSTICE BREYER: Why not?

MR. FELDMAN: -- other cases.

JUSTICE BREYER: Why -- I understand that --

MR. FELDMAN: Because --

JUSTICE BREYER: -- there's a lot of language --

MR. FELDMAN: Because the -- the point of the fruits analysis is -- has to do with the deterrence function of the Fourth Amendment, which is nonexistent, or much, much reduced, in the Fifth Amendment context, and --

JUSTICE SOUTER: No, but the standard fruit analysis is when you get something like a statement, and that statement then leads to further evidence. We're not -- I mean, Justice Breyer wasn't using the fruits analysis in that sense. He was -- he was getting at the -- at the same question we're all trying to get at: Was the later so-called initiation the product of the improper police comment in the first place, or was it voluntary?

MR. FELDMAN: And I think the Edwards rule is an important, but limited, rule. And the point of the Edwards rule is to address the particular problem that's caused by a question. It's not intended to address all of the other problems that can arise in connection with voluntary --

JUSTICE SOUTER: No, I realize that. But you concede -- I think you concede that the -- that the so-called initiation has got to be a voluntary initiation. You don't take the position that it's merely magic words. Isn't that correct?

MR. FELDMAN: That's correct.

JUSTICE SOUTER: All right. If that is correct, why do we not give some deference to the conclusion of the trial court that this was not voluntary?

MR. FELDMAN: And --

JUSTICE SOUTER: You say there was a legal error. What exactly was the legal error?

MR. FELDMAN: The problem was that the trial court was not looking at all the factors that you would normally look at to decide voluntariness. It thought that, in looking at --

JUSTICE SOUTER: What did it --

MR. FELDMAN: -- initiation --

JUSTICE SOUTER: -- overlook? What did it overlook?

MR. FELDMAN: It overlooked the fact that he had been given the Miranda warnings, that, as far as anybody --

JUSTICE SOUTER: That's always true in every Edwards case.

MR. FELDMAN: Right. Well, it's --

JUSTICE SOUTER: All right. So --

MR. FELDMAN: -- so that's the case.

JUSTICE SOUTER: -- that's a wash.

MR. FELDMAN: It overlooked --

JUSTICE SOUTER: What else did --

MR. FELDMAN: -- the fact that --

JUSTICE SOUTER: -- it miss?

MR. FELDMAN: -- he knew that he had the right to remain silent, and that the particular problem that had been caused by the question --

JUSTICE STEVENS: Well, Mr. Feldman --

MR. FELDMAN: -- which was --

JUSTICE STEVENS: -- I have to interrupt. They did not overlook that he had been given the Miranda warning. She expressly commented on the fact that an hour and 17 minutes had lapsed since that time.

MR. FELDMAN: Right. She didn't overlook the fact. She knew what the facts were. But she overlooked the significance of that in the analysis. But, more importantly, she overlooked the significance of the fact that the defendant, at the time that he decided, a half hour later, that he wanted to talk to the police, the police had terminated the earlier

questioning and had made it clear to him that they were going to honor his decision whether or not to talk to them without counsel present. And --

JUSTICE SOUTER: Well, how --

MR. FELDMAN: -- those are --

JUSTICE SOUTER: -- was it that she --

MR. FELDMAN: -- extremely ---

JUSTICE SOUTER: -- overlooked that? I just don't get it.

MR. FELDMAN: We --

JUSTICE SOUTER: They --

MR. FELDMAN: We -- well --

JUSTICE SOUTER: You know, the evidence is undisputed that one officer made the statement, another officer said no, they left, 30 minutes went by. What exactly did she overlook?

MR. FELDMAN: It -- she did -- what -- she did not give the proper weight to those facts, which, in a proper involuntariness analysis, are ones that are important.

JUSTICE SCALIA: You're saying that those facts could not reasonably be found to be -- to produce a situation in which the defendant believed he would be hounded to talk, so he said, "What the heck, I'll talk."

MR. FELDMAN: Right.

JUSTICE SCALIA: Which is what Edwards is directing.

MR. FELDMAN: Right. And that Edwards was designed to support --

JUSTICE SCALIA: That no factfinder -- and this is mixed fact and law -- could reasonably come to that conclusion.

MR. FELDMAN: That --

JUSTICE SCALIA: When it -- when one of the -- the last he had heard from the officers was, "No, he doesn't want to talk. He already asked for a lawyer. We cannot talk to him now."

MR. FELDMAN: Coupled --

JUSTICE SCALIA: You're saying no reasonable judge could find that that defendant thought he would be hounded.

MR. FELDMAN: Right. And the concern of Edwards -- as the court has repeatedly explained, the concern of Edwards is that the court -- that the police will wear down or badger the defendant. But once there's -- if there's been a --

JUSTICE GINSBURG: But it doesn't count --

MR. FELDMAN: -- single comment, as can happen --

JUSTICE GINSBURG: Mr. Feldman, it doesn't count as badgering, or the equivalent, that the police -- the -- walk in, and they present not only the charges, but they present the application for the charges, which shows that the co-perpetrator had talked to the police, talked his head off, and put all the blame, at every step on the way, on this defendant? That did weigh heavily in the trial judge's mind.

MR. FELDMAN: But --

JUSTICE GINSBURG: And is -- was that improper to take into account? How would a reasonable person in this situation feel?" Would he feel that he was impelled to speak, because the co-perpetrator had --

MR. FELDMAN: That -- I mean, there's two points I'd like to make about that. One is, as far as I know under Maryland practice, what they did is consistent with Maryland practice as part of what's normally attendant on taking somebody into custody. And it's -- and it doesn't count as questioning, under Miranda. And it's a -- it's a different problem. And, secondly, that issue of handing him that charging document -- which I think is probably a sound practice, because it lets the defendant know what he's charged with -- that practice is one that can happen and can have its influence on a defendant's decision whether or to talk, in any case, and should be considered in a general involuntariness analysis. But it's not a decisive factor in this case, and it doesn't have to do with the particular concerns of Edwards.

JUSTICE SCALIA: It has nothing to do with whether the defendant thinks he is going to be hounded.

MR. FELDMAN: That's --

JUSTICE SCALIA: It has --

MR. FELDMAN: -- correct.

JUSTICE SCALIA: -- to do with --

MR. FELDMAN: That's correct.

JUSTICE SCALIA: -- with whether --

MR. FELDMAN: That's correct.

JUSTICE SCALIA: -- the defendant thinks he will be badgered and badgered until he finally talks.

MR. FELDMAN: That's correct. They're all --

JUSTICE SCALIA: Which is what Edwards is directed at.

MR. FELDMAN: That's correct. They're already under --

JUSTICE SOUTER: Well, Edwards is directed at avoiding badgering, but the issue before us is initiation. That's not a question of badgering, it's a question of initiation. And don't the points that Justice Ginsburg raised go to whether the initiation is likely to have been a voluntary initiation?

MR. FELDMAN: I don't think they do, because, under the Court's decision in Bradshaw, there's initiation, and then there's always a separate voluntariness inquiry to take care of those problems.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Feldman.

Mr. Ravenell.

ORAL ARGUMENT OF KENNETH W. RAVENELL

ON BEHALF OF RESPONDENT

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

It is our position that to allow so-called curative measures would lead to police abuses. If curative measures are allowed, intentional coercive violations should never be allowed to be cured.

CHIEF JUSTICE ROBERTS: What if it --

MR. RAVENELL: In fact --

CHIEF JUSTICE ROBERTS: What if, instead of the half hour or so, 24 hours had passed and they got a call from the defendant, said, "I want to talk now"? Still, is that -- is that initiation on his part?

MR. RAVENELL: I think that if there had been 24 hours that had passed, then you would -- it would be a factor that you would consider in deciding whether the defendant has initiated the conversation.

CHIEF JUSTICE ROBERTS: Okay. So --

JUSTICE KENNEDY: Of course, that factor --

CHIEF JUSTICE ROBERTS: -- if you can --

JUSTICE KENNEDY: -- can work the other way. You would be up here, saying, "Oh, he had 24 hours. He thought he was going to get the death penalty. He knew the other man was turning on him to implicate him in the murder. His agony was increasing." I mean, I -- it seems to me the question is whether or not the curative measures were adequate.

MR. RAVENELL: And --

JUSTICE KENNEDY: Of course, you know, we can play the game -- 5 minutes, 20 minutes --

MR. RAVENELL: Right.

JUSTICE KENNEDY: -- 30 minutes. We know that. But, it seems to me, when 30 minutes passed here, there were curative measures. Now, you say, at the outset, there can never be a -- curative measures. That -- I don't think you have anything to -- any support for that in the case law.

MR. RAVENELL: I certainly believe that the support is, in Edwards versus Arizona, that there should not be a cure unless the defendant himself initiates the contact.

JUSTICE SCALIA: A cure --

MR. RAVENELL: So, I think there is.

JUSTICE SCALIA: A cure of --

MR. RAVENELL: And if there is --

CHIEF JUSTICE ROBERTS: I would have thought --

JUSTICE SCALIA: Sorry, go on.

MR. RAVENELL: Sure.

CHIEF JUSTICE ROBERTS: I would have thought you would have said, then, 24 hours doesn't make a difference. If there can never be a cure, if there's a violation because the question from Reese constitutes interrogation, and you're telling us there's no cure, it doesn't matter how long it is.

MR. RAVENELL: Yes, I think what I'm -- with all due

respect, I think what I'm telling the Court is that the practice should be, as it has been the last 25 years, that you do not allow cures of Edwards versus Arizona by the police intentionally violating one's rights and then attempting to cure it. But, if this Court finds that there can be a cure, we want to participate in what would be a proper cure.

JUSTICE SCALIA: A cure of what? That's what --

MR. RAVENELL: Of a violation.

JUSTICE SCALIA: -- it seems to me, a lot of this discussion has come down to. What are you curing? Are you curing involuntariness of the confession, or are you curing the police badgering? I thought that we were just trying to cure the badgering and then let the voluntariness of the confession be decided as voluntariness is normally decided, for which purpose you would take into account that he's been -- erroneously said he was charged with murder, or whatever.

MR. RAVENELL: I disagree with Your Honor on -- for two reasons. First, I think that, as several members have -- certainly have said so far, that we should focus on whether there was a voluntary initiation. That has to be considered. Secondly, I've heard mentioned several times that Edwards only deals with badgering. I commit -- commend this Court to Illinois -- Smith versus Illinois -- and Minnick versus Mississippi, where this Court has said that Edwards is not only about badgering, but the Court said it's about overreaching by

the police, whether it's explicit or subtle. So, it's not badgering, only. And when the Petitioner says that Edwards is only about badgering, this Court has said that it's about more than badgering. It is whether there is overreaching by the police officers that is subtle, that is intentional, that is in deliberate -- that is deliberate, any overreaching --

CHIEF JUSTICE ROBERTS: Okay.

MR. RAVENELL: -- that causes --

CHIEF JUSTICE ROBERTS: Well, assuming --

MR. RAVENELL: -- the person --

CHIEF JUSTICE ROBERTS: -- there was --

MR. RAVENELL: -- to give up his rights.

CHIEF JUSTICE ROBERTS: -- assuming there was overreaching on the part of Officer Reese, my question is, Is there any circumstance in which that overreaching can be cured? And I thought your answer is that, yes, that with the sufficient passage of time, it can be cured.

MR. RAVENELL: No, with all due respect, Your Honor, that was not my answer. My answer is that -- and I will tell Your Honor that I will not change that position -- it should never be allowed to be cured.

CHIEF JUSTICE ROBERTS: So, once Officer --

MR. RAVENELL: But --

CHIEF JUSTICE ROBERTS: -- once Officer Reese made his comment, there was no circumstance, even a week, a month --

relatives come in and say, "We think you ought to talk," no intervening circumstance -- once there is that one sentence of overreaching, he can never initiate contact -- discussion with --

MR. RAVENELL: The better --

CHIEF JUSTICE ROBERTS: -- the police.

MR. RAVENELL: In my opinion, the better policy, the better practice, is that there should not be. Now --

JUSTICE SCALIA: You're not helping --

MR. RAVENELL: -- if the --

JUSTICE SCALIA: -- defendants, you know.

MR. RAVENELL: -- if I --

JUSTICE SCALIA: In some cases, you are not helping defendants.

MR. RAVENELL: Well --

JUSTICE SCALIA: Sometimes, a defendant, after he talks to his relatives, might conclude, "Boy, you know, I'd better cooperate with the police and get a lesser sentence." But you're saying that can't happen. Once --

MR. RAVENELL: In my --

JUSTICE SCALIA: -- once the police make a misstatement, he can never come forward and say, "I want to confess."

MR. RAVENELL: In my 20 years of trial practice, I have never found it to be at the defendant's best interest to

communicate with the police without counsel. I have --

JUSTICE GINSBURG: Mr. Ravenell --

MR. RAVENELL: -- never found it to be --

JUSTICE GINSBURG: -- you are defending a judgment that no court in Maryland, as far as I know, ever made. All of the courts thought that the law was, yes, the taint of an improper question by the police can be removed.

MR. RAVENELL: Correct.

JUSTICE GINSBURG: So, let's take the case as it comes to us.

MR. RAVENELL: Sure.

JUSTICE GINSBURG: The taint can be removed. That is the law.

MR. RAVENELL: Correct.

JUSTICE GINSBURG: Accepting that to be the law, what, in your judgment, would it take to remove the taint? -- the taint here being the statement that Office Reese made.

MR. RAVENELL: I'll be happy to participate in that conversation. And this is how we believe that taint can be cured, if at all. Number one, you put the suspect back in the position that he was in before the violation occurred. How do you do that? This is a violation of a right to counsel. Not a right to remain silent; a right to counsel. The suspect asked for counsel. The best way to cure it is, give him counsel. How else do you cure it? You tell him that he no longer -- "We

were wrong when we told you, you face the death penalty."

JUSTICE KENNEDY: Suppose --

MR. RAVENELL: "You do not face the death penalty."

JUSTICE KENNEDY: -- suppose, again, we do not accept that position. You need another fallback position in our -- in order to argue the case before us.

MR. RAVENELL: I don't agree that I need another fallback position, because I believe that if the Court finds that right to counsel -- giving him counsel is not enough, other things I'm about to tell the Court, I think, will also be a factor.

For example, telling the defendant that he, in fact, does not face the death penalty. Very interestingly, this Court -- and the Seibert case, in fact, Justice Kennedy's opinion, said that one of the things you consider is, when there is a violation of the right to Miranda rights, you tell the suspect, "That was an improper violation of your right. That statement may not be admissible" --

JUSTICE KENNEDY: Well, Johns --

MR. RAVENELL: --- "against you."

JUSTICE KENNEDY: -- Johns, in effect, did that here.

MR. RAVENELL: We disagree.

JUSTICE KENNEDY: Certainly, one of the best curative devices is immediate correction from a superior. And

that is exactly what happened here.

MR. RAVENELL: Interestingly, what Your Honor said in the Seibert case is that when -- and, in fact, the plurality opinion -- when you give an alleged cure in the midst of the violation, the defendant misses it. So, giving this alleged cure in the midst of the violation creates the problem. What you need to do is --

JUSTICE KENNEDY: So, you think you'd have a stronger case if Johns hadn't corrected Reese?

MR. RAVENELL: I think that -- I think --

JUSTICE KENNEDY: That's --

MR. RAVENELL: -- what we would have --

JUSTICE KENNEDY: But --

MR. RAVENELL: -- is a stronger --

JUSTICE KENNEDY: -- that's a --

MR. RAVENELL: -- case.

JUSTICE KENNEDY: -- far stretch. It's --

MR. RAVENELL: No. I think the case would be proper if Johns did certain things. One is, give him counsel. Now, I understand the Court says, "Maybe we won't go that far." But, if you're not going to give him counsel, what else can you do? You can certainly tell him that the comment by Officer Reese was improper, "We will honor your right to an attorney. What Officer Reese said was wrong." As we point out in our brief, there was never a time when Detective Johns spoke to Blake

directly and made any efforts to clarify, or even resolve, the alleged -- the violation. In fact, Detective --

CHIEF JUSTICE ROBERTS: Well --

MR. RAVENELL: -- Johns --

CHIEF JUSTICE ROBERTS: Well, you don't want the --

MR. RAVENELL: -- says --

CHIEF JUSTICE ROBERTS: -- you don't want the officer talking to Blake directly. I thought that would be another violation.

MR. RAVENELL: No. No. Now that there is a violation, you have to cure it. You have to cure it. And the only way to cure it is for someone to speak to him.

CHIEF JUSTICE ROBERTS: But it seems --

MR. RAVENELL: One of the things --

CHIEF JUSTICE ROBERTS: -- to me that it's a bit much to say that the problem is that the -- he didn't talk to Blake directly, because that gets into another extended dialogue with the defendant that the defendant has not initiated. It seems it's much better, in the defendant's presence, to do what Johns did here, which is to rebuke Reese for the interrogation.

MR. RAVENELL: With all due respect, I couldn't disagree more, because I think what has to be is that there has to be a direct comment to the suspect so that the suspect understands that this violation occurred, "It was a violation

of your right, and we, the police, will not countenance what Reese did. And here is what we will do. We will get you counsel, if you wish to have counsel. You are not facing the death penalty, young 17-year-old sitting in a cell in your underwear. That is not correct. Here is what we can do for you. We will" -- in fact, as this Court suggests in the plurality opinion and Seibert, you change location. You change the interrogator. You give him time. As this Court said -- in fact, Justice Scalia's -- maybe dicta in McNeil said -- you look at a lapse of time. You consider that there is a break in time. All of those factors may be -- if all of those things were done, then you could become -- begin to move closer to putting Blake back in the position --

JUSTICE BREYER: Well --

MR. RAVENELL: -- that he was in before.

JUSTICE BREYER: -- what about just simple thing like this, that there is an implication in what Reese said, that he listens to in his cell, "I guess you'd -- he'll want to talk to us now, huh?" The implication is that he faces death, and he'll be better off by talking to them without a lawyer.

MR. RAVENELL: And --

JUSTICE BREYER: So, suppose Johns had said to the defendant, "Mr. Blake, I want to tell you something. My colleague here has implied that you will be better off, because of the death possibility, in talking to us without a lawyer.

We want to tell you, that isn't true. There is no way that you'll be better off talking to us without a lawyer. You will be at least equally, from your point of view, as well off if you talk to a lawyer." Now, that might have cured it, I guess.

MR. RAVENELL: I think that if that was done, then we are moving in the right direction. But --

[Laughter.]

JUSTICE KENNEDY: The right direction would be to say, "Please don't talk to us."

MR. RAVENELL: The right direction would be --

[Laughter.]

MR. RAVENELL: I would -- I would -- as Mr. Blake's attorney, I would have appreciated that.

[Laughter.]

MR. RAVENELL: Now, I will tell the Court that I believe that when you add those factors, you really do get closer to curing what we think should not be cured. Several things this Court said earlier -- and I think is correct, from some of the members of the Court -- is that we have to give deference to the trial court's finding. The Government would have you pay no attention to the trial court's finding when the trial court heard Officer Reese -- in fact, heard Officer Reese sit on the witness stand and lie under oath -- the court found that Officer Reese was not worthy of belief. Not only did he violate Mr. Blake's right, he then sat on the witness stand and

lied about it. Now, do we want to encourage that kind of police abuse, where the police will abuse the rights of someone, then sit on the witness stand and lie, and then we say -- well, the trial judge, who had a chance to observe the demeanor, to watch the witnesses, trial judge, Judge North, who is actually present here, and who had a chance to observe each witness testify --

CHIEF JUSTICE ROBERTS: Counsel, there's no dispute about the historical facts found by the judge. Everybody agrees this is the dialogue that took place, this is the time that it took place.

MR. RAVENELL: Right.

CHIEF JUSTICE ROBERTS: Those are factual questions. It's a very different question of what the significance of that is under the Edwards initiation rule. So, it's not an issue of deference to the trial-court judge. We know what the facts are. We're deferring to those findings of fact. It's a question of what the legal significance is.

JUSTICE KENNEDY: And what the Chief Justice says was true in Bradshaw and in Edwards and in Elstad.

MR. RAVENELL: I will ask --

JUSTICE KENNEDY: All questions, which were mixed questions of law and fact, where this Court took the words, took the facts, and made a rule. And that's this case.

MR. RAVENELL: I will direct the Court to two cases,

Salve Regina College versus Russell, 499 U.S. 225, where this Court said the following, "Deferential review of mixed facts -- mixed questions of law and fact is warranted where it appears that the District Court is better positioned than the appellate court to decide the issue in question, or that probing appellate scrutiny is -- will not contribute to the clarity of legal doctrine." The Court further said, in Miller versus --

CHIEF JUSTICE ROBERTS: Well, just to -- stop there. Why is the trial court better suited to apply the Edwards rule to a set of facts that we would -- we accept based on deference to the factfinder?

MR. RAVENELL: I find that interesting, Your Honor, because the Court did the same thing Elstad. This Court, in fact, gave every deference to the trial court's finding in Elstad. So, there's absolutely no reason why this Court would not give the same deferential treatment to Judge North's decision, when Judge North, just as the trial judge in Elstad, got a chance to observe the witnesses who testified, and found that that violation of Elstad's right was not intentional, that it was, kind of, a good-faith violation. That had an impact. And, in fact, in Seibert, the Court again made reference to that, and, in Justice O'Connor's dissent, made reference to that. So, it is clear that this Court has given deference -- clear deference, on every the -- one of the cases I've mentioned in the past, to a trial court's finding.

JUSTICE STEVENS: Well, are you --

MR. RAVENELL: There is no reason --

JUSTICE STEVENS: -- arguing that --

MR. RAVENELL: -- to be different here.

JUSTICE STEVENS: -- are you arguing that trial court, even though there's agreement -- understanding on most of the historical facts, is still in a better position to make the judgment call as to whether it was voluntary or not?

MR. RAVENELL: Yes, I am. And I will point the Court to Miller versus Fenton, 478 U.S. 104, where this Court said, "Equally clear, an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question."

This Court has made clear that you give deference to the trial judge's findings, even if it may have an impact on the ultimate resolution, even where it is a mixed question of fact and law. And that's all we ask for in this case.

I believe, Your Honor, that when we consider that -- in this particular matter, the evidence is clear that Mr. Blake was responding to the comments by Office Reese. And the trial court made that finding. The trial court made a finding that Office Reese's comment was intended to elicit a response. Same thing this Court has said in Innis.

When you get to the next step, the question is, What that interrogation? The trial court made a factual finding it

was interrogation. In fact, Petitioner concedes it was interrogation.

Next step was, Was it a response, or was it new initiation of a new conversation, by Blake? The trial court found that it was a response by Mr. Blake to the comments by Officer Reese.

The trial court also made a finding that there, in fact, was no cure. That factual finding was given deference by the Court of Appeals. The Court of Appeals considered several things. It said you should consider the attenuation. This Court said you should consider change in interrogation, location of interrogation --change in the interrogator -- excuse me -- change in the location. And I believe that we add the fact that there would have been no further advice to the -- to the suspect that he did not face the death penalty.

Parties agree here. In fact, in the SG's, Solicitor General's, brief, on page 25, they say, "If there has been any intentional coercive violation, there should be not be a cure." The trial court found that the act of Office Johns was intentional. I don't think anyone -- anyone, even under -- in -- under any standard of review -- could find that Officer John -- Officer Reese's -- excuse me -- comment was not intentional.

JUSTICE SCALIA: What was the quote from the SG's brief? I didn't --

MR. RAVENELL: Page 25.

JUSTICE SCALIA: And what did they say?

MR. RAVENELL: If I may --

JUSTICE SCALIA: Maybe they said that. I'd be surprised if they said that.

MR. RAVENELL: I would be happy to read on -- "Police officers who engage in interrogation" --

JUSTICE KENNEDY: Can you tell us --

MR. RAVENELL: I --

JUSTICE KENNEDY: -- where you're reading from?

MR. RAVENELL: I'm sorry. Page 25 of the SG's brief. I'm reading. "Police officers who engage in interrogation after a suspect has invoked his right to counsel also run the risk of a judicial finding that any statement given was coerced," as we have here. If I may continue, "In that event, the initial statement would be unusable for any purpose" --

JUSTICE SCALIA: Yes, if there was a judicial finding that any statement given was --

MR. RAVENELL: Which is --

JUSTICE SCALIA: -- coerced.

MR. RAVENELL: Which is what we have in the trial-court finding, that there is -- and, in fact, it was coerced. The trial judge made a finding that this was an intentionally coercive act by Officer Reese.

JUSTICE SCALIA: We're talking about the confession

being coerced, that the statement given was coerced --

MR. RAVENELL: Correct.

JUSTICE SCALIA: -- not that his decision to talk to the police was coerced.

MR. RAVENELL: I disagree that if there, in fact, was an initial -- if there was, in fact, coercion by the police, that that coercion did not play a part in Mr. Reese -- Mr. Blake deciding to speak.

JUSTICE SCALIA: Yes, we're --

MR. RAVENELL: And, in fact --

JUSTICE SCALIA: -- only talking --

MR. RAVENELL: -- in State --

JUSTICE SCALIA: -- about what the SG has conceded.

MR. RAVENELL: Yes.

JUSTICE SCALIA: He has conceded that if the -- if it is found by the court that the statement given was a --

MR. RAVENELL: Right.

JUSTICE SCALIA: -- coerced statement, in that event, it would be unusable for any purpose.

MR. RAVENELL: All right. I understand.

JUSTICE KENNEDY: And the -- and the Court of Appeals of Maryland said, "We're going to look at this in the legal sense, not the dictionary sense."

MR. RAVENELL: Correct.

JUSTICE KENNEDY: And that's what we're reviewing

here.

MR. RAVENELL: And I think that when we review that in a mixed question of fact or law, giving all deference to the trial court's finding, as this Court has in the past in the cases I've cited, that, in fact, there is -- was a violation, the violation was not cured, and that, even if this Court establishes curative measures, those measures must be designed to put the suspect back in the position that he was in prior to the police violation of his rights. We think that it is a dangerous path to go down to allow the police to abuse a suspect's rights, and then cure it.

One of the things I believe we learned from what occurred in Elstad and then in Seibert is that -- and, in fact, in the plurality opinion in Seibert, this Court pointed out that after Elstad, some 20-something years, the police created policies and strategies designed to violate what -- the first question first. And, in fact, the plurality opinion pointed out that not only did the police create that strategy, what the police, in fact, started doing was omitting Miranda altogether. And this Court made reference to that in U.S. versus Harris, that what the police will do, if you give them the opportunity, they will abuse the rights and attempt to cure --

JUSTICE BREYER: Yes, but if you're looking -- if you're taking your standard seriously --

MR. RAVENELL: Yes.

JUSTICE BREYER: The reason that my -- I was able to give my hypothetical before --

MR. RAVENELL: Sure.

JUSTICE BREYER: -- the reason that you'd have to say, "You will not be better off -- you will not be worse off in respect to the death penalty, by -- you know, we -- it won't" --

MR. RAVENELL: Right.

JUSTICE BREYER: -- "make you any better off to talk to the lawyer" --

Sorry. Strike.

The reason that the policeman, to cure, would have to say, "Look, it's not going to help you, in respect to the death penalty, to talk without your lawyer," is because that was the implication of his question, that was the implication -

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MR. RAVENELL: Yes.

JUSTICE BREYER: -- of the wrongful statement.

MR. RAVENELL: Exactly.

JUSTICE BREYER: The implication was, "You're not going to get death if you talk to us without a lawyer."

MR. RAVENELL: Correct.

JUSTICE BREYER: But if it had been some other questions, some questions, for example, about the crime, all you would have had to do was eliminate whatever negative

implication came out of those questions, which might have been nothing.

MR. RAVENELL: Correct.

JUSTICE BREYER: So timely --

JUSTICE KENNEDY: But there is no finding to support the suggestion that it was just the death penalty that concerned him. He was also concerned, I thought, about the fact that his accomplice, Tolbert, had implicated him, and --

MR. RAVENELL: Yes.

JUSTICE KENNEDY: -- presumably implicated him --

MR. RAVENELL: Yes.

JUSTICE BREYER: Yes.

JUSTICE KENNEDY: -- too far. So is --

MR. RAVENELL: And the trial --

JUSTICE KENNEDY: There's just no finding that it was simply the death penalty that --

MR. RAVENELL: I agree. And the trial court made clear that she was considering everything. But what's important is that the trial court got a chance to hear Mr. Blake testify. The trial court --

JUSTICE KENNEDY: And --

MR. RAVENELL: -- understood --

JUSTICE KENNEDY: -- his concern with Tolbert was a wholly legitimate reason for him to want to talk to the police and --

MR. RAVENELL: Yes.

JUSTICE KENNEDY: -- get things straightened away right away.

MR. RAVENELL: We do not dispute that at all. But what is important is that the trial judge got a chance to assess all of those factors, and the trial judge, even after assessing those factors, concluded that what impacted -- that there was still a great impact on him. And it is the Government's burden --

JUSTICE BREYER: All right, so --

MR. RAVENELL: -- it was their burden --

JUSTICE BREYER: -- maybe you should modify the standard. Maybe the standard ought to be that where you have an improper line of questioning, after the warning, that the police either have to negative the implication of those questions, the relevant implication, or the State has to show that some other series of independent events, such as Justice Kennedy mentioned, made the difference. That is, caused the later request to talk without a lawyer. And if they can't show the one or the other, then they lose.

MR. RAVENELL: Correct. And that is what the trial judge did in this case. The trial judge considered those factors. And that is what -- we leave it to the judges --

JUSTICE STEVENS: May I interrupt --

MR. RAVENELL: -- to do.

JUSTICE STEVENS: -- you with a -- with a question?

MR. RAVENELL: Yes.

JUSTICE STEVENS: You seem to have taken the position that the State cannot cure an Edwards violation, which seems to me quite different from the trial court's ruling, because the trial court made a number of factual statements that seem to me to be saying, "Had these things been done, the violation might have been a -- cured." She referred to the fact he was still undressed, still in a cold cell, that his parent -- there was no parent present. He was scared, and -- he was scared and thought he was facing death. Now, it seems to me the logical inference from the trial judge's statement is, "Had each of those things been different, I might have found a cure."

MR. RAVENELL: Correct.

JUSTICE STEVENS: And, otherwise, why should -- why would she go through these ventures?

MR. RAVENELL: I agree, Your Honor, that the trial court considered that there can be a cure. And, in fact, the Court of Appeals of Maryland said there --

JUSTICE STEVENS: So, that --

MR. RAVENELL: -- can be a cure.

JUSTICE STEVENS: -- it doesn't seem to me -- for you to prevail, you have to take the extreme position that there can never be a cure.

MR. RAVENELL: No. And that's why I think I -- I hope I've made --

JUSTICE STEVENS: And when the trial judge --

MR. RAVENELL: -- it clear that --

JUSTICE STEVENS: -- said they did not cure because they didn't do any of A, B --

MR. RAVENELL: Yes.

JUSTICE STEVENS: -- C, D, E, or F.

MR. RAVENELL: I agree that I do not need this Court to find that Edwards versus Arizona remains untouched for me to win. We do not need that, because, when you consider what the trial court's finding was, and the deference that was given to by the Court of Appeals, we win, as well. What I am trying to say is that I think the better practice is that we do not allow the police to go down this line of starting to abuse rights, and then curing them. But I'd just --

JUSTICE STEVENS: Well, it seems to --

MR. RAVENELL: We don't -- I don't need that to win.

JUSTICE STEVENS: -- it really seems to me you're adopting quite an extreme position, because it does seem to me perfectly obvious if, for example, they got a lawyer or brought his parents in, and they talked it over for 20 minutes and said, "We think he ought to do it." --

MR. RAVENELL: Yes.

JUSTICE STEVENS: -- you could -- you could surely

cure it in some fairness.

MR. RAVENELL: I certainly believe that, from the teachings of Seibert and from other cases, that this Court clearly seemed to be leaning towards cure, that there can be cures. I know that the position on Edwards versus Arizona remaining intact is probably, in many ways, not where this Court is leaning. I understand that. But I certainly also understand we don't need to get to that extreme position to win, because the facts in this case are so clearly in our favor from the trial court's finding that giving it the -- any deference --

JUSTICE SCALIA: Mr. Ravenell --

MR. RAVENELL: Yes.

JUSTICE SCALIA: -- let me tell you the problem -- the problem I have in the case --

MR. RAVENELL: Sure.

JUSTICE SCALIA: -- and with your reliance on the trial court's findings. I do not see how the fact that he's -- he's there in the cell in his underwear, the fact that he's 17, the fact that he thinks, and has been led to believe, erroneously, that there's a death penalty in the offing, has anything to do with the question that Edwards asks, which is whether the police, or this individual, initiated the conversation.

MR. RAVENELL: I think that the problem is --

JUSTICE SCALIA: That is the issue in these cases --

MR. RAVENELL: I think the problem --

JUSTICE SCALIA: -- whether the police initiated the conversation that produced the confession.

MR. RAVENELL: And I think that all those things are factors that the Court can consider in deciding whether Blake voluntarily initiated the contact.

JUSTICE SCALIA: No, I don't think so. I think they go to whether the confession he gave was voluntary, but I don't see how they have anything to do with whether he initiated the conversation.

MR. RAVENELL: Your Honor, with all due respect, this Court, in Elstad and in Seibert, said that psychological pressures, which are very similar to the fruits analysis, can be considered on whether there's a Fifth Amendment violation.

JUSTICE GINSBURG: I --

MR. RAVENELL: In fact --

JUSTICE GINSBURG: -- I think -- tell me if I'm wrong about this particular record. I thought that the trial judge put it rather simply. He said, "There was an interrogation by a police officer named Reese."

MR. RAVENELL: Correct.

JUSTICE GINSBURG: That's conceded, as I understand it from Maryland --

MR. RAVENELL: It is.

JUSTICE GINSBURG: -- that the police asked the question, and then the trial judge said the -- what Blake said was an answer to that question.

MR. RAVENELL: Correct.

JUSTICE GINSBURG: That's how she read what happened.

MR. RAVENELL: Correct.

JUSTICE GINSBURG: There was a question implying, "You'd better speak to us," and there was an answer to that question. Not an initiation.

MR. RAVENELL: Correct.

JUSTICE GINSBURG: That's --

MR. RAVENELL: And --

JUSTICE GINSBURG: -- that's what we're --

MR. RAVENELL: That's --

JUSTICE GINSBURG: -- we're dealing with in this case.

MR. RAVENELL: And I agree. And that's why I said earlier that when we look at what Innis says -- and I made reference to Innis earlier -- that it's any comment, any statement, designed to elicit a response. The trial court that found that what Officer Reese did was designed to elicit a response. This Petitioner agrees that it was interrogation; therefore, designed to elicit a response.

The next question is, Was it -- did Blake respond?

The trial court found, after hearing Blake testify, hearing other witnesses, that Blake was merely -- and I'd say merely, but very importantly -- responding to what Officer Reese said, not initiating a new conversation, that it was a continuous matter of only 28 minutes.

JUSTICE SOUTER: So, your position, I guess, is -- I think it is, in your last answer -- that we really shouldn't be phrasing the inquiry in terms of the voluntariness of the suspect's statement, at this point. We, rather, should be focusing it on whether the statement was, in fact, a spontaneous initiation on his part or a response to the preceding police statement.

MR. RAVENELL: Which is what the --

JUSTICE SOUTER: That's the way you would phrase the --

MR. RAVENELL: Yes.

JUSTICE SOUTER: -- issue for us.

MR. RAVENELL: And which is what the trial judge did below. And when the trial judge made that finding, that what Blake was doing was responding -- because the trial court is in that unique position that this Court or any other public court can never be in, which is listening to the witnesses, we give the trial judges the duty to hear those witnesses and to make judgment calls based on what they hear from those individuals. We --

JUSTICE KENNEDY: Well --

MR. RAVENELL: -- trust them with it.

JUSTICE KENNEDY: -- absent of good-cop/bad-cop finding, and I -- and I repeat that they've credited Johns' testimony here -- this seems to me a very odd sort of interrogation, to say, "No, no, you -- we can't talk to him now." That's an interrogation? That's a stretch.

MR. RAVENELL: Well, I would say this. The trial court certainly said it struck her as a good-cop/bad-cop routine. I will say the following. If you do exactly what Detective Johns and Officer Reese did in this case, and if the person does decide to speak to you -- now, whether you phrase it the same way Detective Johns did or not -- the police are in no worse-off case -- position than they would be if the person had continued to sit in that cell alone and not spoken. Therefore, however you do it -- and the police will always come up with a creative way to do it, we know that from prior experience and past experience -- they will always find a unique way to do it. It may not --

CHIEF JUSTICE ROBERTS: Counsel, is my --

MR. RAVENELL: -- be the same way.

CHIEF JUSTICE ROBERTS: -- is my understanding of the Maryland law in effect when this happened correct that if you prevail on suppression, your client cannot face charges, no matter what the other evidence is?

MR. RAVENELL: Not if we prevail on suppression, no. If we prevail on suppression, the State still had the right to prosecute Mr. Blake. When the State chose to take an interlocutory appeal, the law was -- no longer the law --

CHIEF JUSTICE ROBERTS: Right.

MR. RAVENELL: -- but the law at the time was that if the State was not successful on appeal, it would be barred from prosecuting Mr. Blake. But they were not barred from going forward with their case --

CHIEF JUSTICE ROBERTS: But that --

MR. RAVENELL: -- at the time of suppression.

CHIEF JUSTICE ROBERTS: -- that law applies to this case at this time, correct?

MR. RAVENELL: Correct. And I think that that should have nothing to do with how the Court rules on this particular matter, what the final result will be, whether we go to trial or not.

I'll be happy to answer any other questions. Well, I see my time's up.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Ravenell.

MR. RAVENELL: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Graeff, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF KATHRYN GRILL GRAEFF

ON BEHALF OF PETITIONER

MS. GRAEFF: Thank you.

With respect to the standard of review, this Court said, in Thompson versus Keohane, that custody is a mixed question of fact and law, and voluntariness -- in Miller versus Fenton -- that voluntariness is a mixed question of fact and law. And so, the historical facts are entitled to deference. But there is de novo review of the ultimate question of custody and voluntariness. And, given the questions here about what constitutes a cure, shows that that same standard should apply. It should be a legal standard, not a factual finding.

JUSTICE GINSBURG: How about the trial judge's determination? There was a question. Everybody agrees Reese -- what Reese did was interrogate.

MS. GRAEFF: Yes.

JUSTICE GINSBURG: And the trial judge then finds there was an answer to that question. Is that a matter of fact? It didn't seem that the trial judge was treating that as a matter of law.

MS. GRAEFF: Well, whether there was a cure, and whether he initiated, it's the State's position to be a mixed of question of fact and law. What was said is a historical fact. Whether what -- Detective Johns cured it and allowed Blake to initiate should be reviewed de novo.

And with respect to initiation, it's important to note that, in Bradshaw, the Court said that there's a two-part

inquiry. You look at, one, did the defendant initiate? And, two, if he did, that's when you get to the voluntariness analysis.

JUSTICE BREYER: Is it fact, or is it not fact, law, in respect to the following? He's sitting there. And there is a question of what motivated him. Did it motivate him totally that his -- this thing about his codefendant, or was he moved, in significant part -- moved, motivated -- by the earlier, 30-minute earlier, improper questioning? That sounds like a fact. Or do you think it's not a fact?

MS. GRAEFF: I think that is a fact, but, under Seibert and Elstad, is not the proper analysis. You don't look at -- in Seibert and Elstad, the court did not look at whether the prior unwarned statement caused the second statement. The court looked at whether the cure effectively advised the suspect that he did not have to speak. And we're suggesting that the same analysis applies in the Edwards context. You don't look at whether the improper comment caused the initiation. You look at whether the cure effectively conveyed that there would be no more questioning, that the choice was up to the suspect and the police were going to honor that choice. And once that cure happens and the suspect indicates he wants to speak, there's initiation. And then the court can go on to the voluntariness analysis.

The Edwards presumption of involuntariness imposes a

high cost to the truthseeking function of a trial, to society's interest in having relevant evidence admitted at trial. And when the purpose of Edwards is not served, when a suspect understands that questioning will cease, that high cost is not justified.

JUSTICE STEVENS: May I ask one question before you sit down, if you're through? Is it your understanding that the trial judge held that an Edward violation may not be cured, or that she held that, on the facts here, it was not cured?

MS. GRAEFF: My reading is, she found, on the facts here, it was not cured.

JUSTICE STEVENS: So that, your -- the answer to your -- the question presented in your cert petition really is answered. We all agree, it can be cured.

MS. GRAEFF: Well, it depends what can --

JUSTICE STEVENS: Because the question you asked is whether it can be cured.

MS. GRAEFF: Well, this Court has never addressed -- and, in fact, there is disagreement here as to whether it can be cured. So, here, the trial court did look -- the trial court really didn't look at the analysis in how you look at whether --

JUSTICE STEVENS: But you do agree --

MS. GRAEFF: -- it's cured --

JUSTICE STEVENS: -- that the trial judge did assume

it could be cured.

MS. GRAEFF: Well, she looked at -- she looked at -- I guess it's difficult to understand exactly. She was looking -- she looked at Edwards, she looked at voluntariness, she talked about attenuation. So, she did acknowledge that if it was six months later, he could give a statement.

JUSTICE STEVENS: And so, there could have been a cure.

MS. GRAEFF: Yes.

JUSTICE STEVENS: Yes.

JUSTICE SOUTER: If you lose this case, can the defendant be prosecuted federally under the carjacking statute?

MS. GRAEFF: I'm not aware. He cannot be -- I'm not aware of whether he can be prosecuted federally. He cannot be prosecuted in State court, though. Under Maryland law at the time, if we do not prevail in this appeal, he cannot be prosecuted by --

JUSTICE GINSBURG: But --

MS. GRAEFF: -- the State court.

JUSTICE GINSBURG: -- the prosecutors were well aware of that when they determined to appeal.

MS. GRAEFF: Yes.

JUSTICE GINSBURG: But perhaps they were worried that they didn't have a case without the defendant's statements.

MS. GRAEFF: The statute puts the State in a difficult position. It's been changed now. But, at this time, the prosecution did have to decide whether to appeal the statement, and that law has been changed. But with respect to Blake, he will not be able to be prosecuted if the State does not prevail in this Court.

Detective Johns cured the impropriety here. He made it clear to Blake that there would be no more questioning. And it was Blake's choice whether to speak or remain silent.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

The case is submitted.

[Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.]