

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARYLAND, :

4 Petitioner, :

5 v. : No. 04-373

6 LEEANDER JEROME BLAKE. :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, November 1, 2005

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

12 APPEARANCES:

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17 for United States, as amicus curiae, supporting the

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20 of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	KATHRYN GRILL GRAEFF, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JAMES A. FELDMAN, ESQ.	
7	For the United States, as amicus curiae,	
8	Supporting the Petitioner	18
9	ORAL ARGUMENT OF	
10	KENNETH W. RAVENELL, ESQ.	
11	On behalf of the Respondent	30
12	REBUTTAL ARGUMENT OF	
13	KATHRYN GRILL GRAEFF, ESQ.	
14	On behalf of the Petitioner	59
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
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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

1 this case, to consider the age of the person?

2 MS. GRAEFF: Yes. I think you would look at a

3 reasonable person in --

4 JUSTICE O'CONNOR: And --

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

6 JUSTICE O'CONNOR: -- and the fact that, on the

7 charges which he saw, it said he was subject to the death

8 penalty, but that was not correct?

9 MS. GRAEFF: That would go to whether the statement

10 was voluntary, it would not go to --

11 JUSTICE O'CONNOR: It would not --

12 MS. GRAEFF: -- the degree --

13 JUSTICE O'CONNOR: -- you would not consider it in

14 connection with the initiation --

15 MS. GRAEFF: No, the --

16 JUSTICE O'CONNOR: -- question?

17 MS. GRAEFF: No, the purpose of Edwards was to

18 prevent police badgering. To prevent police conduct that,

19 conveys, directly or indirectly, that the police are going to

20 continue questioning until they get a statement, despite the

21 invocation of the right to counsel.

22 JUSTICE KENNEDY: Well, I --

23 JUSTICE O'CONNOR: Counsel --

24 JUSTICE KENNEDY: -- I suppose that if they

25 knowingly put death on in order to get him off his balance,

1 that would be badgering, wouldn't it?

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

5 JUSTICE KENNEDY: Well, but --

6 MS. GRAEFF: The --

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

10 MS. GRAEFF: And my answer is no, that we do not
11 consider what -- the death sentence. There's two. In Bradshaw
12 --

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

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

1 JUSTICE GINSBURG: But the --

2 JUSTICE SOUTER: So, the --

3 JUSTICE GINSBURG: -- but the trial judge made
4 certain findings. He heard these witnesses. He heard the
5 police officers. And he suggested that the -- Police Officer
6 Reese was playing a good-cop/bad-cop game with Detective Johns.

7 And so, that this -- the statement made by Reese, "You'll want
8 to talk to us now, huh?" was designed to elicit an answer. And
9 the trial court also said there is an additional factor, and
10 that is this charge, that was intimidating even if it didn't
11 have death on it, wasn't presented to Blake immediately. It
12 could have been presented when he was put in the cell,
13 initially. So, there were those factors. Those are relevant,
14 are they not, to the character of what Blake said?

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

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

1 voluntary initiated request to talk to the police?

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

5 JUSTICE KENNEDY: Well, but it --

6 JUSTICE SOUTER: Yes, but you're --

7 JUSTICE KENNEDY: -- it has to be --

8 JUSTICE SOUTER: -- you're making --

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

12 MS. GRAEFF: It's involuntary.

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

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

1 JUSTICE KENNEDY: Well, but I -- you can't initiate
2 something involuntarily and have that count, can you? You say
3 --
4 MS. GRAEFF: Our --
5 JUSTICE KENNEDY: -- let's say involuntarily, in the
6 lay sense of the word, in the common sense of the word, where
7 it was actually physically coerced. That wouldn't count.
8 MS. GRAEFF: It would be an involuntary statement
9 under the second --
10 JUSTICE KENNEDY: All right.
11 MS. GRAEFF: -- step of the analysis.
12 JUSTICE SOUTER: No, but what about --
13 JUSTICE KENNEDY: No, no, it's the --
14 JUSTICE SOUTER: -- the first step?
15 JUSTICE KENNEDY: -- first part of the analysis.
16 MS. GRAEFF: In the first part of the --
17 JUSTICE KENNEDY: How --
18 MS. GRAEFF: -- analysis, our --
19 JUSTICE KENNEDY: The first part of the analysis is
20 whether or not he initiates.
21 MS. GRAEFF: Yes.
22 JUSTICE KENNEDY: And you're trying to tell us that
23 the initiation can be involuntarily? I just don't -- I just
24 don't agree with that.
25 MS. GRAEFF: Well, what we're trying to say is that

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

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

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

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

10 JUSTICE SOUTER: No, you're --

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

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

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

1 MS. GRAEFF: You look at whether he understood that
2 the questioning was going to cease, and it was up to him --
3 JUSTICE SOUTER: No, you're --
4 MS. GRAEFF: -- whether to speak.
5 JUSTICE SOUTER: -- you're avoiding my question.
6 MS. GRAEFF: I'm sorry.
7 JUSTICE SOUTER: My question is, Is the act of
8 initiation a purely formal act on your view, so that so long as
9 the suspect says the magic words, it doesn't matter what is in
10 his mind or what he understands? Is it formal or not formal?
11 MS. GRAEFF: No.
12 JUSTICE SOUTER: It's not formal.
13 MS. GRAEFF: What you need to look at is whether an
14 objective person in the suspect's position would understand
15 that questioning was going to cease, and there was -- would be
16 no more questioning. Edwards --
17 JUSTICE STEVENS: But, can I interrupt with --
18 JUSTICE KENNEDY: I think we can --
19 JUSTICE STEVENS: -- with one --
20 JUSTICE KENNEDY: -- I think that's a given. The
21 question is whether or not he agrees -- he indicates
22 affirmatively that he wants to begin talking.
23 MS. GRAEFF: And here, there's no question he wanted
24 to --
25 JUSTICE KENNEDY: That's --

1 MS. GRAEFF: -- begin talking.

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

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

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

7 [Laughter.]

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

15 MS. GRAEFF: Involuntary. Under --

16 JUSTICE BREYER: Fine.

17 MS. GRAEFF: -- the second step --

18 JUSTICE BREYER: Now --

19 MS. GRAEFF: -- of the --

20 JUSTICE BREYER: Now --

21 MS. GRAEFF: -- analysis --

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

25 MS. GRAEFF: It would be involuntary --

1 JUSTICE BREYER: Okay.

2 MS. GRAEFF: -- under the second --

3 JUSTICE BREYER: Now, a minute --

4 MS. GRAEFF: -- test.

5 JUSTICE BREYER: -- passes while he's thinking about

6 it. Okay? Is it -- is it unlawful now, because a minute has

7 passed before he says yes?

8 MS. GRAEFF: It would make it unlawful --

9 involuntary. But, again --

10 JUSTICE BREYER: I just --

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

12 JUSTICE BREYER: I don't -- I don't want legalism.

13 I just want the conclusion. A minute has passed before he says

14 yes. Has that changed everything, and it becomes lawful?

15 MS. GRAEFF: No.

16 JUSTICE BREYER: No. Now it's 15 minutes. Now it's

17 30 minutes. Okay? Now, a court says 30 minutes is the same as

18 one minute, "We don't think the passage of 29 extra minutes

19 made a difference." And what's your reply? Not in legalism.

20 You're going to say, "Oh, no, the passage of 30 minutes, rather

21 than 1 minute, makes all the difference." And I would like to

22 know why.

23 MS. GRAEFF: Actually, our position is more

24 Detective Johns' actions rather than -- the passage of time was

25 a factor, but the more significant --

1 JUSTICE BREYER: I --

2 MS. GRAEFF: -- thing here --

3 JUSTICE BREYER: Yes, that's fine. I'm not -- I'm -

4 - I want you to say that kind of thing. You're saying it's not

5 just 30 minutes, it's "also some other things happened." What?

6 MS. GRAEFF: Significantly, Detective Johns' conduct

7 and his words, when -- when Office Reese made the improper

8 statement, Detective Johns immediately and firmly --

9 JUSTICE SCALIA: The --

10 MS. GRAEFF: -- reprimanded --

11 JUSTICE SCALIA: -- improper statement was, "I bet

12 you want to talk now, huh?"

13 MS. GRAEFF: Yes.

14 JUSTICE SCALIA: Right? And --

15 MS. GRAEFF: Yes.

16 JUSTICE SCALIA: -- immediately, the other

17 detective, Johns -- immediately?

18 MS. GRAEFF: Yes. Immediately --

19 JUSTICE SCALIA: Said what?

20 MS. GRAEFF: -- immediately said, "No, he doesn't

21 want to talk to us. He already asked for a lawyer. We cannot

22 talk to him now" --

23 JUSTICE BREYER: So, that's --

24 MS. GRAEFF: -- and pushed him.

25 JUSTICE BREYER: -- possible. That definitely cuts

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

3 CHIEF JUSTICE ROBERTS: There was --

4 JUSTICE BREYER: -- people --

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

7 MS. GRAEFF: No.

8 CHIEF JUSTICE ROBERTS: -- routine, was --

9 MS. GRAEFF: In fact --

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

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

14 JUSTICE BREYER: But that's --

15 MS. GRAEFF: This was --

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

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

24 JUSTICE BREYER: Yes.

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

1 initiation was terminated. And --

2 JUSTICE BREYER: Yes.

3 MS. GRAEFF: -- then when Detective Johns came back,

4 28 minutes, he didn't say anything.

5 JUSTICE BREYER: Yes.

6 MS. GRAEFF: He didn't ask any questions. And it

7 was Blake who initiated and said, clearly, he wanted to talk to

8 the police.

9 JUSTICE BREYER: All right. Right. So --

10 JUSTICE STEVENS: May I ask --

11 JUSTICE BREYER: -- we have a passage --

12 JUSTICE STEVENS: May I ask you two rather

13 elementary questions?

14 MS. GRAEFF: Yes.

15 JUSTICE STEVENS: One of the issues is whether --

16 when he spoke and said, "Can I talk now?" -- was that voluntary

17 or not? Who has the burden on whether it was, or not,

18 voluntary, the State or the defendant, in your view?

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

20 he initiated.

21 JUSTICE STEVENS: And so, the State did have the

22 burden. And what is your view on the fact that the trial --

23 the judge who heard the evidence said they had not met the

24 burden? What kind of deference is owing to that finding?

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

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

3 JUSTICE GINSBURG: May I --

4 MS. GRAEFF: -- rejected in Seibert --

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

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

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

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

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

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

7 CHIEF JUSTICE ROBERTS: Thank you, Ms. Graeff.
8 Mr. Feldman.

9 ORAL ARGUMENT OF JAMES A. FELDMAN
10 FOR THE UNITED STATES, AS AMICUS CURIAE,
11 IN SUPPORT OF PETITIONER

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

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

18 JUSTICE O'CONNOR: Well, tell us --

19 MR. FELDMAN: -- without counsel.

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

22 MR. FELDMAN: I think --

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

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

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

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

7 MR. FELDMAN: Right, and I --

8 JUSTICE O'CONNOR: -- further discussion?

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

14 Now, in the --

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

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

1 MR. FELDMAN: Yes.

2 JUSTICE STEVENS: And why -- and why should we not

3 credit the finding of fact by the -- by the trial judge --

4 MR. FELDMAN: Well, if the --

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

6 MR. FELDMAN: -- the middle-level -- what --

7 Maryland has --

8 JUSTICE STEVENS: The middle level --

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

10 JUSTICE STEVENS: -- said there was no Edwards

11 violation.

12 MR. FELDMAN: Right.

13 JUSTICE STEVENS: So, that doesn't contribute

14 anything to the dialogue.

15 MR. FELDMAN: But the State has argued that

16 actually, given the procedures in this case, the defendant

17 waived his voluntariness claim. But, in any event, the State -

18 - the Maryland Court of Appeals --

19 JUSTICE STEVENS: Well, you just told me you agree

20 that the burden was on the --

21 MR. FELDMAN: Right. But --

22 JUSTICE STEVENS: -- State to prove voluntariness.

23 But I still haven't heard your answer to why we should not

24 credit the finding of fact by the trial judge.

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

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

3 JUSTICE STEVENS: I don't care --

4 MR. FELDMAN: -- voluntariness.

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

6 MR. FELDMAN: Not the midlevel --

7 JUSTICE STEVENS: -- Appeals said.

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

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

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

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

16 MR. FELDMAN: And --

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

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

1 whatever" --

2 JUSTICE STEVENS: You disagree with the --

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

4 JUSTICE STEVENS: -- finding that -- the -- isn't it

5 -- aren't we entitled to give a -- some presumption of

6 validity?

7 MR. FELDMAN: Yes, but -- well, I think that the

8 trial -- what the trial court -- I think it -- no, I don't

9 think so, because I think the trial court was not operating

10 under the correct standard of what it was supposed to -- of

11 what initiation consists of.

12 CHIEF JUSTICE ROBERTS: Because it's a mixed

13 question of law and fact --

14 MR. FELDMAN: Right.

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

16 --

17 MR. FELDMAN: Right.

18 CHIEF JUSTICE ROBERTS: -- determination.

19 MR. FELDMAN: That's correct.

20 JUSTICE BREYER: If you're going to the standard,

21 which is, I think, the -- actually, the difficult question

22 here, what's wrong -- should you say -- what's wrong with

23 saying -- which is what I was pursuing -- that, where there is

24 a question that's improper, as there was here, by the police,

25 the only real question is, Is a later initiation "the fruit"?

1 MR. FELDMAN: I --

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

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

9 JUSTICE BREYER: Why not?

10 MR. FELDMAN: -- other cases.

11 JUSTICE BREYER: Why -- I understand that --

12 MR. FELDMAN: Because --

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

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

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

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

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

4 JUSTICE SOUTER: All right. So --

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

6 JUSTICE SOUTER: -- that's a wash.

7 MR. FELDMAN: It overlooked --

8 JUSTICE SOUTER: What else did --

9 MR. FELDMAN: -- the fact that --

10 JUSTICE SOUTER: -- it miss?

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

14 JUSTICE STEVENS: Well, Mr. Feldman --

15 MR. FELDMAN: -- which was --

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

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

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

4 JUSTICE SOUTER: Well, how --

5 MR. FELDMAN: -- those are --

6 JUSTICE SOUTER: -- was it that she --

7 MR. FELDMAN: -- extremely ---

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

10 MR. FELDMAN: We --

11 JUSTICE SOUTER: They --

12 MR. FELDMAN: We -- well --

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

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

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

24 MR. FELDMAN: Right.

25 JUSTICE SCALIA: Which is what Edwards is directing.

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

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

5 MR. FELDMAN: That --

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

10 MR. FELDMAN: Coupled --

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

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

17 JUSTICE GINSBURG: But it doesn't count --

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

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

1 MR. FELDMAN: But --

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

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

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

22 MR. FELDMAN: That's --

23 JUSTICE SCALIA: It has --

24 MR. FELDMAN: -- correct.

25 JUSTICE SCALIA: -- to do with --

1 MR. FELDMAN: That's correct.

2 JUSTICE SCALIA: -- with whether --

3 MR. FELDMAN: That's correct.

4 JUSTICE SCALIA: -- the defendant thinks he will be

5 badgered and badgered until he finally talks.

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

7 JUSTICE SCALIA: Which is what Edwards is directed

8 at.

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

10 --

11 JUSTICE SOUTER: Well, Edwards is directed at

12 avoiding badgering, but the issue before us is initiation.

13 That's not a question of badgering, it's a question of

14 initiation. And don't the points that Justice Ginsburg raised

15 go to whether the initiation is likely to have been a voluntary

16 initiation?

17 MR. FELDMAN: I don't think they do, because, under

18 the Court's decision in Bradshaw, there's initiation, and then

19 there's always a separate voluntariness inquiry to take care of

20 those problems.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr. Feldman.

23 Mr. Ravenell.

24 ORAL ARGUMENT OF KENNETH W. RAVENELL

25 ON BEHALF OF RESPONDENT

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

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

7 CHIEF JUSTICE ROBERTS: What if it --

8 MR. RAVENELL: In fact --

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

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

17 CHIEF JUSTICE ROBERTS: Okay. So --

18 JUSTICE KENNEDY: Of course, that factor --

19 CHIEF JUSTICE ROBERTS: -- if you can --

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

1 MR. RAVENELL: And --

2 JUSTICE KENNEDY: Of course, you know, we can play

3 the game -- 5 minutes, 20 minutes --

4 MR. RAVENELL: Right.

5 JUSTICE KENNEDY: -- 30 minutes. We know that.

6 But, it seems to me, when 30 minutes passed here, there were

7 curative measures. Now, you say, at the outset, there can

8 never be a -- curative measures. That -- I don't think you

9 have anything to -- any support for that in the case law.

10 MR. RAVENELL: I certainly believe that the support

11 is, in Edwards versus Arizona, that there should not be a cure

12 unless the defendant himself initiates the contact.

13 JUSTICE SCALIA: A cure --

14 MR. RAVENELL: So, I think there is.

15 JUSTICE SCALIA: A cure of --

16 MR. RAVENELL: And if there is --

17 CHIEF JUSTICE ROBERTS: I would have thought --

18 JUSTICE SCALIA: Sorry, go on.

19 MR. RAVENELL: Sure.

20 CHIEF JUSTICE ROBERTS: I would have thought you

21 would have said, then, 24 hours doesn't make a difference. If

22 there can never be a cure, if there's a violation because the

23 question from Reese constitutes interrogation, and you're

24 telling us there's no cure, it doesn't matter how long it is.

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

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

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

8 MR. RAVENELL: Of a violation.

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

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

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

7 CHIEF JUSTICE ROBERTS: Okay.

8 MR. RAVENELL: -- that causes --

9 CHIEF JUSTICE ROBERTS: Well, assuming --

10 MR. RAVENELL: -- the person --

11 CHIEF JUSTICE ROBERTS: -- there was --

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

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

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

22 CHIEF JUSTICE ROBERTS: So, once Officer --

23 MR. RAVENELL: But --

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

1 relatives come in and say, "We think you ought to talk," no
2 intervening circumstance -- once there is that one sentence of
3 overreaching, he can never initiate contact -- discussion with
4 --

5 MR. RAVENELL: The better --

6 CHIEF JUSTICE ROBERTS: -- the police.

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

9 JUSTICE SCALIA: You're not helping --

10 MR. RAVENELL: -- if the --

11 JUSTICE SCALIA: -- defendants, you know.

12 MR. RAVENELL: -- if I --

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

15 MR. RAVENELL: Well --

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

20 MR. RAVENELL: In my --

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

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

1 communicate with the police without counsel. I have --

2 JUSTICE GINSBURG: Mr. Ravenell --

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

4 JUSTICE GINSBURG: -- you are defending a judgment

5 that no court in Maryland, as far as I know, ever made. All of

6 the courts thought that the law was, yes, the taint of an

7 improper question by the police can be removed.

8 MR. RAVENELL: Correct.

9 JUSTICE GINSBURG: So, let's take the case as it

10 comes to us.

11 MR. RAVENELL: Sure.

12 JUSTICE GINSBURG: The taint can be removed. That

13 is the law.

14 MR. RAVENELL: Correct.

15 JUSTICE GINSBURG: Accepting that to be the law,

16 what, in your judgment, would it take to remove the taint? --

17 the taint here being the statement that Office Reese made.

18 MR. RAVENELL: I'll be happy to participate in that

19 conversation. And this is how we believe that taint can be

20 cured, if at all. Number one, you put the suspect back in the

21 position that he was in before the violation occurred. How do

22 you do that? This is a violation of a right to counsel. Not a

23 right to remain silent; a right to counsel. The suspect asked

24 for counsel. The best way to cure it is, give him counsel.

25 How else do you cure it? You tell him that he no longer -- "We

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

2 JUSTICE KENNEDY: Suppose --

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

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

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

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

19 JUSTICE KENNEDY: Well, Johns --

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

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

23 MR. RAVENELL: We disagree.

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

1 that is exactly what happened here.

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

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

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

11 JUSTICE KENNEDY: That's --

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

13 JUSTICE KENNEDY: But --

14 MR. RAVENELL: -- is a stronger --

15 JUSTICE KENNEDY: -- that's a --

16 MR. RAVENELL: -- case.

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

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

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

3 CHIEF JUSTICE ROBERTS: Well --

4 MR. RAVENELL: -- Johns --

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

6 MR. RAVENELL: -- says --

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

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

13 CHIEF JUSTICE ROBERTS: But it seems --

14 MR. RAVENELL: One of the things --

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

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

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

14 JUSTICE BREYER: Well --

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

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

21 MR. RAVENELL: And --

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

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

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

7 [Laughter.]

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

10 MR. RAVENELL: The right direction would be --

11 [Laughter.]

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

14 [Laughter.]

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

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

8 CHIEF JUSTICE ROBERTS: Well, just to -- stop there.

9 Why is the trial court better suited to apply the Edwards rule
10 to a set of facts that we would -- we accept based on deference
11 to the factfinder?

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

1 JUSTICE STEVENS: Well, are you --

2 MR. RAVENELL: There is no reason --

3 JUSTICE STEVENS: -- arguing that --

4 MR. RAVENELL: -- to be different here.

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

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

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

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

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

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

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

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

16 Parties agree here. In fact, in the SG's, Solicitor
17 General's, brief, on page 25, they say, "If there has been any
18 intentional coercive violation, there should be not be a cure."

19 The trial court found that the act of Office Johns was
20 intentional. I don't think anyone -- anyone, even under -- in
21 -- under any standard of review -- could find that Officer John
22 -- Officer Reese's -- excuse me -- comment was not intentional.

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

25 MR. RAVENELL: Page 25.

1 JUSTICE SCALIA: And what did they say?

2 MR. RAVENELL: If I may --

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

4 surprised if they said that.

5 MR. RAVENELL: I would be happy to read on --

6 "Police officers who engage in interrogation" --

7 JUSTICE KENNEDY: Can you tell us --

8 MR. RAVENELL: I --

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

10 MR. RAVENELL: I'm sorry. Page 25 of the SG's

11 brief. I'm reading. "Police officers who engage in

12 interrogation after a suspect has invoked his right to counsel

13 also run the risk of a judicial finding that any statement

14 given was coerced," as we have here. If I may continue, "In

15 that event, the initial statement would be unusable for any

16 purpose" --

17 JUSTICE SCALIA: Yes, if there was a judicial

18 finding that any statement given was --

19 MR. RAVENELL: Which is --

20 JUSTICE SCALIA: -- coerced.

21 MR. RAVENELL: Which is what we have in the trial-

22 court finding, that there is -- and, in fact, it was coerced.

23 The trial judge made a finding that this was an intentionally

24 coercive act by Officer Reese.

25 JUSTICE SCALIA: We're talking about the confession

1 being coerced, that the statement given was coerced --

2 MR. RAVENELL: Correct.

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

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

9 JUSTICE SCALIA: Yes, we're --

10 MR. RAVENELL: And, in fact --

11 JUSTICE SCALIA: -- only talking --

12 MR. RAVENELL: -- in State --

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

14 MR. RAVENELL: Yes.

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

17 MR. RAVENELL: Right.

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

20 MR. RAVENELL: All right. I understand.

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

24 MR. RAVENELL: Correct.

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

1 here.

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

12 One of the things I believe we learned from what
13 occurred in Elstad and then in Seibert is that -- and, in fact,
14 in the plurality opinion in Seibert, this Court pointed out
15 that after Elstad, some 20-something years, the police created
16 policies and strategies designed to violate what -- the first
17 question first. And, in fact, the plurality opinion pointed
18 out that not only did the police create that strategy, what the
19 police, in fact, started doing was omitting Miranda altogether.

20 And this Court made reference to that in U.S. versus Harris,
21 that what the police will do, if you give them the opportunity,
22 they will abuse the rights and attempt to cure --

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

25 MR. RAVENELL: Yes.

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

3 MR. RAVENELL: Sure.

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

8 MR. RAVENELL: Right.

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

11 Sorry. Strike.

12 The reason that the policeman, to cure, would have
13 to say, "Look, it's not going to help you, in respect to the
14 death penalty, to talk without your lawyer," is because that
15 was the implication of his question, that was the implication -
16 -

17 MR. RAVENELL: Yes.

18 JUSTICE BREYER: -- of the wrongful statement.

19 MR. RAVENELL: Exactly.

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

22 MR. RAVENELL: Correct.

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

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

3 MR. RAVENELL: Correct.

4 JUSTICE BREYER: So timely --

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

9 MR. RAVENELL: Yes.

10 JUSTICE KENNEDY: -- presumably implicated him --

11 MR. RAVENELL: Yes.

12 JUSTICE BREYER: Yes.

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

14 MR. RAVENELL: And the trial --

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

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

21 JUSTICE KENNEDY: And --

22 MR. RAVENELL: -- understood --

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

1 MR. RAVENELL: Yes.

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

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

10 JUSTICE BREYER: All right, so --

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

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

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

24 JUSTICE STEVENS: May I interrupt --

25 MR. RAVENELL: -- to do.

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

2 MR. RAVENELL: Yes.

3 JUSTICE STEVENS: You seem to have taken the

4 position that the State cannot cure an Edwards violation, which

5 seems to me quite different from the trial court's ruling,

6 because the trial court made a number of factual statements

7 that seem to me to be saying, "Had these things been done, the

8 violation might have been a -- cured." She referred to the

9 fact he was still undressed, still in a cold cell, that his

10 parent -- there was no parent present. He was scared, and --

11 he was scared and thought he was facing death. Now, it seems

12 to me the logical inference from the trial judge's statement

13 is, "Had each of those things been different, I might have

14 found a cure."

15 MR. RAVENELL: Correct.

16 JUSTICE STEVENS: And, otherwise, why should -- why

17 would she go through these ventures?

18 MR. RAVENELL: I agree, Your Honor, that the trial

19 court considered that there can be a cure. And, in fact, the

20 Court of Appeals of Maryland said there --

21 JUSTICE STEVENS: So, that --

22 MR. RAVENELL: -- can be a cure.

23 JUSTICE STEVENS: -- it doesn't seem to me -- for

24 you to prevail, you have to take the extreme position that

25 there can never be a cure.

1 cure it in some fairness.

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

12 JUSTICE SCALIA: Mr. Ravenell --

13 MR. RAVENELL: Yes.

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

16 MR. RAVENELL: Sure.

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

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

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

2 MR. RAVENELL: I think the problem --

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

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

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

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

16 JUSTICE GINSBURG: I --

17 MR. RAVENELL: In fact --

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

22 MR. RAVENELL: Correct.

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

25 MR. RAVENELL: It is.

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

4 MR. RAVENELL: Correct.

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

7 MR. RAVENELL: Correct.

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

11 MR. RAVENELL: Correct.

12 JUSTICE GINSBURG: That's --

13 MR. RAVENELL: And --

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

15 MR. RAVENELL: That's --

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

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

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

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

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

13 MR. RAVENELL: Which is what the --

14 JUSTICE SOUTER: That's the way you would phrase the
15 --

16 MR. RAVENELL: Yes.

17 JUSTICE SOUTER: -- issue for us.

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

1 JUSTICE KENNEDY: Well --

2 MR. RAVENELL: -- trust them with it.

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

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

20 CHIEF JUSTICE ROBERTS: Counsel, is my --

21 MR. RAVENELL: -- be the same way.

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

1 MR. RAVENELL: Not if we prevail on suppression, no.

2 If we prevail on suppression, the State still had the right to
3 prosecute Mr. Blake. When the State chose to take an
4 interlocutory appeal, the law was -- no longer the law --

5 CHIEF JUSTICE ROBERTS: Right.

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

10 CHIEF JUSTICE ROBERTS: But that --

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

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

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, Mr. Ravenell.

21 MR. RAVENELL: Thank you.

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

24 REBUTTAL ARGUMENT OF KATHRYN GRILL GRAEFF

25 ON BEHALF OF PETITIONER

1 MS. GRAEFF: Thank you.

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

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

14 MS. GRAEFF: Yes.

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

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

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

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

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

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

25 The Edwards presumption of involuntariness imposes a

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

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

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

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

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

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

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

23 JUSTICE STEVENS: But you do agree --

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

25 JUSTICE STEVENS: -- that the trial judge did assume

1 it could be cured.

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

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

9 MS. GRAEFF: Yes.

10 JUSTICE STEVENS: Yes.

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

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

18 JUSTICE GINSBURG: But --

19 MS. GRAEFF: -- the State court.

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

22 MS. GRAEFF: Yes.

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

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

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

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

11 The case is submitted.

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

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