OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: HORACE BUTLER, Petitioner V. KENNETH D. McKELLAR, WARDEN, ET AL.

CASE NO: 88-6677

PLACE: WASHINGTON, D.C.

DATE: October 30, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

HORACE BUTLER,

Petitioner

v. : No. 88-6677

KENNETH D. McKELLAR, WARDEN, ET AL.

Washington, D.C.

Monday, October 30, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

JOHN H. BLUME, ESQ., Columbia, South Carolina; on behalf of the Petitioner.

DONALD J. ZELENKA, ESQ., Chief Deputy Attorney General of South Carolina, Columbia, South Carolina; on behalf of the Respondents.

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PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 88-6677, Horace Butler v. Kenneth D. McKellar. Mr. Blume.

ORAL ARGUMENT OF JOHN H. BLUME

ON BEHALF OF THE PETITIONER

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

The question presented in this case is whether Arizona v. Roberson created a new rule of law for retroactivity purposes. The court of appeals held, with five judges dissenting from the denial of rehearing en banc, that although the facts of this case were not distinguishable from Roberson, that Roberson was not applicable because it was not the law at the time of Mr. Butler's trial in 1980. Since the court of appeals' decision, the law of retroactivity has changed somewhat. In Teague v. Lane, this Court held that new rules of criminal procedure do not apply to cases which are final on direct review at the time the new rule is established.

However, common to all of this Court's retroactivity decisions, is the following principle which is dispositive to this case: when a decision of this Court had done nothing more than apply subtle precedent to a different fact situation, no real question arises as to retroactivity.

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Because Arizona v. Roberson was nothing more than a straightforward application of Edwards v. Arizona, to a slightly different set of facts, it applies retroactively.

The first place to look, I believe, is the, this Court's decision in Roberson. In the first paragraph of the majority opinion, the Court stated that the Attorney General of Arizona asked us to craft an exception to the rule of Edwards for cases in which the police wish to interrogate an individual about charges which are unrelated to the crime for which the person initially invoked the right to counsel. This Court rejected, by a vote of six to two, the Attorney General's proffer distinction of Edwards, and the opinion clearly reveals that this Court believed that Roberson was directly within the logical compass of Edwards.

Thus, as was true in Yates v. Aiken, another South Carolina retroactivity case decided by this Court two terms ago, this case does not involve a new rule of law.

QUESTION: But every -- every decision of ours is -- almost every decision of ours is within the logical compass of another decision. I mean, we could have -- if that is all we meant, we could have been a lot clearer in Teague, and we could have just said that it doesn't apply retroactively if it overrules an earlier line of cases, rather than just following the logic of that earlier line. We didn't say that. We said it has to be compelled by the earlier cases.

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MR. BLUME: The hard facts of Teague, of course, do involve a situation which would require overruling, and the language -- however, of course, I think Teague must go beyond that. I agree with Justice Scalia, with you to that extent. However, the language of Teague, I believe, was that if the result is not dictated by prior precedent. Roberson certainly is dictated by the rule of Edwards, and in essence what the State of Arizona asked was this Court to craft an exception to the rule, not to extend the rule, but to create an exception, and this Court declined to do so.

I think if this Court determines that any time there is an intellectually tenable distinction of one of your cases, that the resolution and rejection of that distinction creates a new rule, then you will in effect be skewing the constitutional balance, and putting a premium on the most grudging interpretation of everything this Court holds, rather than a more faithful interpretation.

QUESTION: What -- let's consider the rationality, the reason we sought to draw the line. The reason we sought to draw it, I thought, was that we came to the conclusion that the main purpose of habeas is to make sure that the state courts are behaving lawfully and doing their best, you know, to follow federal precedent. Now, you think they are behaving unlawfully whenever they would, let's say, reject -- well, let's use the term exception, reject a perfectly plausible

claim for an exception that they thought we might accept. Would that --

MR. BLUME: I think the purpose underlying the rule is does the state have a legitimate, essentially reliance interest, in expecting that the decision will be different. If the definition of what is a new rule is drawn too narrowly, then essentially the states will have an incentive to offer whatever distinctions they have of any case, rather -- that are beyond the hard facts of a particular holding, rather than applying the decision more faithfully.

For example, Edwards contemplates that the police will conduct their behavior in conformity with it. If they don't, then we expect prosecutors will not offer those confessions, and if they do the state judges won't admit them. But, if any time a distinction is rejected that creates a new rule, then police, prosecutors and state judges have no incentive to apply this Court's decisions. Rather, prosecutors will offer the confession, the resulting confession and any distinctions they can offer in support of that.

Now, those distinctions may prevail or may not in convincing a federal judge that Edwards is not controlling. But nevertheless, the state would win either way, for the rejection of the distinction would itself create a new rule and would deprive that person and everyone within that temporal cohort of the benefit of the rule. And that

essentially is the Attorney General's argument here. That the State of Arizona --that the Arizona Attorney General, by litigating Roberson all the way to this Court, and losing and having its distinction rejected, should deprive everyone between Edwards and Roberson of the benefit of Edwards. And that doesn't seem to be a fair interpretation of what can be a new rule.

Every member of this Court agreed in the opinions in either Teague or in Penry that Yates v. Aiken was a case which did not involve a new rule. Yates was a case decided two terms ago, and the question presented in Yates was whether Francis v. Franklin created a new rule, or rather was merely an application of Sandstrom v. Montana to a different set of facts. This case is very similar. Just as Francis merely applied Sandstrom, Roberson merely was an application of Edwards. Thus, because Roberson and Edwards are distinct -- are not distinguishable, and because Roberson was within the logical compass of Edwards, the real question presented in this case is whether Edwards is applicable.

Because Mr. Butler's case was on direct review at the time Edwards was decided, Edwards is clearly applicable, Roberson is clearly applicable, and the court of appeals decision was wrong. For these reasons, the decision of the court of appeals should be reversed.

Unless the Court has any further questions, I will now

turn the podium over to Mr. Zelenka.

QUESTION: Thank you, Mr. Blume.

We'll hear now from you, Mr. Zelenka.

ORAL ARGUMENT OF DONALD J. ZELENKA

ON BEHALF OF THE RESPONDENTS

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

The issue being presented before this Court is whether Arizona v. Roberson, a decision of this Court during the last term, has retroactive application under this Court's analysis in Teague v. Lane to a situation in which a confession was entered in 1980 and an appeal was raised that was resolved in 1982. It is our position that the decision of the Fourth Circuit Court of Appeals, when it concluded that Arizona v. Roberson should not be applied in this case, is well founded in the decisions of this particular Court.

In the Fourth Circuit's decision, it stated that we are fully satisfied that Butler may not claim any retroactive benefit from Roberson. In their panel decision the court held that the interrogation was conducted in strict accordance with the established law in 1980, and there was no support in the record that there was any actual violation of his Fifth Amendment rights in 1980. The court found in its lower decision that it was undisputed at the time of the trial and all the way through the court that Butler twice evidences

knowing consent to interrogation without the presence of counsel by signing his waiver with full understanding of his rights to counsel, particularly asserting that he did not want to have a lawyer represent him in these particular proceedings. Every --

QUESTION: Mr. Zelenka, what happened following the giving of Miranda warnings during the questioning on the assault arrest of --

MR. ZELENKA: There was -- according to the record that is before this Court, there was a statement given at that particular time, according to the testimony --

QUESTION: After the warnings, he did respond to questioning?

MR. ZELENKA: Yes. There was a statement given. Subsequent to that statement being given on August 31st, there was a bond hearing on the unrelated assault charge, at which time, and for the first time, we would submit, retained counsel appeared on his behalf. Later that evening, after, we would submit, there was a reasonable opportunity for Mr. Butler to have consulted with his counsel, at approximately 12:50 in the morning, which would be on September 1st, 1980, another interrogation began.

At the outset of that interrogation, it is undisputed before this Court, we would submit, that Sergeant Frasier did give his Miranda warnings to Mr. Butler, first orally, then in

writing. Mr. Butler then gave an initial statement in which he acknowledged some knowledge of the particular murder that he was charged with. It is important to note that at the outset of the interrogation, before the Miranda warnings were given, Sergeant Frasier particularly advised him that you are being charged now with the murder of Pamela Lane and that will be the focus of the particular inquiry in this case.

During the Miranda warnings that were given after that information was given to him, on two occasions Mr. Butler advised him, when asked about his knowledge of his right to counsel, he asserted clearly, unequivocally, I do not want a lawyer. I do not want a lawyer in these particular matters. And then he chose to give his statement, his initial statement. When further information was revealed to him by Sergeant Frasier, after the initial statement was given, Miranda warnings were again presented to him, he waived his right to counsel, sustenance during the interrogation, again at that time, and entered a statement in which he admitted some significant involvement in this crime. Those statements --

QUESTION: The length of this is all early in the morning?

MR. ZELENKA: Yes, Sir. It occurred between the hours of 12:50 and --

QUESTION: Is there any explanation as to why it had to

be done in the morning, at 3:00 in the morning?

MR. ZELENKA: There is no explanation in this particular record --

QUESTION: Am I free to draw my conclusion as to why?

MR. ZELENKA: The record -- that was not a disputed part of the record before this Court. At the time of the suppression hearing there was an assertion made by Mr. Butler that he was lacking sleep. At that particular time that was a situation that was resolved against him, when he was advised in the language of the lower courts' conclusion was that he was not sleepy. He was provided with a number of breaks, and he was freely advised of his right to remain silent and chose not to do so throughout that period of interrogation. It is clear, they very possibly could have waited until morning. The law enforcement officers chose not to do so. Mr. Butler was aware of his right to remain silent; he did not need to involve himself in the interrogation process at that time, should he have chosen not to do so.

QUESTION: Did the officers work in teams or did they all stay the whole time?

MR. ZELENKA: There -- according to the record there were always two officers present at the time of the interrogation.

QUESTION: Not the same two though?

MR. ZELENKA: Sergeant Frasier was consistent from the

outset of the interrogation throughout. There was another officer; two other officers assisted in the drafting of the particular written statements that he gave.

QUESTION: So I can draw a conclusion that they had rest periods?

MR. ZELENKA: There were three --

QUESTION: But I can't draw that for the defendant.

MR. ZELENKA: Certainly, it is clear in the record that there were at least three coffee breaks where donuts were given to the defendant, at which time no interrogation occurred and the defendant was free to take whatever choice he did on his rights to remain silent during that time period.

QUESTION: Like go home?

MR. ZELENKA: No, sir.

QUESTION: Whatever choice you made, like go home?

MR. ZELENKA: No, sir, he was in custody, but he was free, based upon the Miranda warnings that were given to him on numerous occasions throughout that evening, to remain silent at any time. In fact, prior to the -- the trip out to the crime scene, he was given the opportunity to determine whether in fact he wanted to leave or to stay -- leave and return to the jail, or stay and assist them in going to the crime scene, and he clearly, again, made an unequivocal statement that he would go on at that time.

QUESTION: Mr. Zelenka, it is clear, I mean, you do not

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dispute the fact, or do you, that this interrogation procedure violated the rule of Roberson, if Roberson had been in effect.

MR. ZELENKA: We have raised in our second argument that Roberson would not be applicable to this situation because he never evidenced a right to have the assistance of counsel during his interrogation, during any interrogation or particular time period, and that counsel had been made available to him at the time of the bond hearing, and he made a decision as a result of those situations.

QUESTION: Isn't it true that both the dissenting judges on the court of appeals and those in the majority all assumed, for purposes of their decision, that there was a violation of the Roberson rule?

MR. ZELENKA: They assumed, for purposes of their decision, that Roberson would be applicable under the facts of the case, but they did not conclude, we would submit, with finality that in fact he would be entitled to relief under Roberson. That was an assumption for the purposes of this decision on whether Roberson --

QUESTION: Did you in that court that this rule would not have been violated in any event?

MR. ZELENKA: Yes, we did.

QUESTION: You did.

MR. ZELENKA: On basically the same grounds that we have asserted in our second response, that it would not have

applied. And the court, on the basis of the assumption that it presented, did not accept that, and we have raised that in our petition -- opposition to the petition for certiorari, and we have raised that before this Court as our second argument.

But we would submit that, under this Court's decision in Arizona v. Roberson, that the Teague requirements that this is a new rule, we submit, would be clearly applicable. This was the first time -- not this, but the court's decision in Arizona v. Roberson, was in fact the first time that this Court had specifically addressed the Edwards situation to a situation where there were separate interrogations.

In Arizona v. Roberson, it focused on two separate investigations at that time. The common element between these cases and this case was a continuous custody, but a significant difference was that in Arizona v. Roberson and in Edwards v. Arizona counsel was requested but was never permitted to discuss the matters with the accused under those situations. Whereas, in our situation, counsel was made available.

Roberson was the first case to apply Edwards bright-line test by this Court to separate investigations. We would submit it is a new rule because Edwards itself concerned the same particular investigation. As the dissent in Roberson noted, the rule now would bar law enforcement officers from questioning suspects about an unrelated matter if in custody,

and that he has requested counsel to assist in that particular interrogation.

In the prior decisions of this Court, particularly Maine v. Moulton, the Court held, in footnote 16, that incriminating evidence from statements pertaining to other crimes as to which the Sixth Amendment, right to counsel, had not attached, are admissible in the trial on those particular offenses, even though that same information and the results of those types of interrogations or information would not be admissible in a trial on the original crime.

QUESTION: Was the defendant in custody in Maine v. Moulton?

MR. ZELENKA: No, he was not. That was a --

QUESTION: He was in --

MR. ZELENKA: -- critical distinction that --

QUESTION: He was in custody here.

MR. ZELENKA: He was in custody here throughout the period of time. In Moran v. Burbine, the Court again affirmed the Court's decision in Maine. But particularly noting how this matter would be considered a new rule was Justice Burger's -- Chief Justice Burger's dissent in Maine v. Moulton, where he acknowledged in 1986 that until the day the prevailing view in the state and federal courts was that the case law up to that time, under Messiah and its successors, did not protect the defendant from the introduction of post-

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indictment statements deliberately elicited when the police undertook an investigation for separate crimes.

We would submit that those types of understandings, that was presented throughout the United States by the state court jurisdictions, clearly revealed that when a separate investigation is involved, Arizona v. Roberson, as it applied the Edwards situation, created a new rule of criminal procedure that did not exist, we would submit, prior to the time Roberson was decided. Many state courts, we noted in our brief, have taken the position that, since Edwards and since Maine v. Moulton, have accepted the view that Edwards did not apply to separate investigations. Like Edwards before Roberson, we would submit, is a new rule of criminal procedure. Edwards v. Roberson is not a matter of a constitutional command, but, however, it is a court-made rule of procedure that, we would submit, do not require the application under the retroactivity principles of this Court.

Here, in Edwards and in Roberson, it was developed to protect from police badgering. The constitutional issue -- the current constitutional issue and the constitutional issue that was available to the defendant at the time of his trial in 1981, was whether he knows and understands his constitutional rights and is willing to waive them.

In conclusion on this particular issue, since Roberson is a new guideline, it should not be applied to collateral

review, since it does not fall within either the Teague exceptions or it did not create a new rule under those particular exceptions. As each state court that has addressed this issue has held, and the federal courts below, Butler made a knowing and voluntary statement without coercion, and he waived his Fifth Amendment right to the assistance of counsel during the interrogation in this particular case. The written and oral warnings were given. A clear and unequivocal waiver was made on the record, and no request for the assistance of counsel on the murder charge was ever done.

Now, some nine years later, Butler seeks to have a technical change in the law applied, where the evidence is undisputed that he knowingly waived his right to the assistance of counsel. Habeas corpus relief, where a fundamentally fair trial was held and where the opportunity to litigate this issue at the time of the state trial was available to him, should not allow, where the truth-finding function was not tainted, to allow for him to have a new trial on these particular charges without the admission of this evidence which was proper under the law in 1980.

In our second argument, we would submit that Edwards v. Arizona is factually and legally distinguishable from Butler's case because Butler never requested the assistance of counsel during any of his interrogations and, unlike Edwards and Roberson, and the counsel met with Mr. Butler prior to the

interrogation that was done on this particular charge that resulted in the conviction. Particularly, we have noted that the Sixth Amendment right to counsel had attached on the assault charges; however, he never requested the assistance of counsel at any time during any interrogation which was protected by the Fifth Amendment.

The critical fact is that Butler failed to request his assistance during any interrogation, and that counsel was made available to him for purposes of the bond hearing on the assault charge, where there was a reasonable opportunity to consult with counsel. The concerns of the Fifth Amendment right to have counsel's assistance during a custodial interrogation were satisfied, as we have asserted, when counsel was made available with a reasonable opportunity to meet with him during that time period. The record before this Court reveals that he did in fact meet with him at the time of the jail.

We have raised a final issue for the first time in our brief before this Court concerning a state court bar. It was asserted the Edwards claim --

QUESTION: May I ask one question about your second argument? Do you think the Miranda warnings were necessary under your view, if he had already had counsel tendered to him and never requested him, I suppose -- would there have been -- would it have been necessary to give the Miranda warning?

MR. ZELENKA: We would submit it would have been necessary to give the Miranda warnings on the separate investigation in this case, since he did have counsel at that particular time retained on the assault charge. The law enforcement --

QUESTION: But it seemed to me -- I thought the thrust of your argument was that since he already had a lawyer, that satisfied the constitutional obligation, and he didn't make a further request.

MR. ZELENKA: Under the Sixth Amendment, for the purposes of the assault charge, to assist him in the handling of the assault charge, that is correct. But not for the purposes of the murder charge that he was initially charged with at 12:50 in the morning, after the bond hearing had already been held, with Counsel Hill's presence at that particular bond hearing.

QUESTION: May I also ask, at the time of the arrest, was he already a suspect on the -- at the time of the arrest on the unrelated charge, was he already a suspect on the murder charge?

MR. ZELENKA: The record does not reveal that he was already a suspect on the murder charge at that particular time.

QUESTION: The record doesn't tell us that. It was the same group of officers in both instances?

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MR. ZELENKA: There was a common element in both of the investigating officers. The individual that interrogated him on the first charge, Sergeant Frasier, also interrogated him on the murder charge. There was that common element with both cases.

The final issue we have raised in our brief before this Court for the first time is that there is a state procedural bar that could affect the outcome of this particular case.

QUESTION: Why did you never make that argument before, or make it in your response to the cert petition or at any other time?

MR. ZELENKA: It's -- it's unclear to me why we didn't make it before, Your Honor.

QUESTION: Are you familiar with our decision in Tuttle v. Oklahoma City, where we said that anything that might prevent us from getting to the questions presented must be raised in the opposition to certiorari or if, as long as it is not jurisdictional, be deemed waived?

MR. ZELENKA: That is correct, I am -- I am familiar with that. But I am raising it in this particular proceeding to give that information to the Court that there was a state bar. We are not totally relying upon that, but what it does evidence is, essentially --

QUESTION: But how, if -- do you contend this would be jurisdictional? That -- that it would actually prevent us

from reaching the questions we took the case to reach?

MR. ZELENKA: No, sir, we do not.

QUESTION: Well, then, why are you not barred under our rule in the City of -- Oklahoma City against Tuttle?

MR. ZELENKA: We may very well be barred. I thought it was important to present this to the Court, to give them an understanding as to the way the Edwards v. Arizona claim had been raised throughout the state process. Because up until the time, we would submit, that the federal district court made the decision in the case, which did not find an Edwards violation, that was the first time that any court, on the basis of this particular record, had ever addressed the Edwards claim on the merit.

It was not raised in the appeal before the South Carolina Supreme Court, so there was no state law conclusion on that. The first time it was raised was in the South Carolina post-conviction relief court, which was some two years after the Edwards violation. When it was raised there, they found it to be barred as a matter of state law. They chose not to appeal that, it was not raised in the federal habeas corpus petition, as raised -- presented to the court, and it was, it was addressed essentially before the Fourth Circuit, and we did not raise it before the Fourth Circuit, and we did not raise it in our Respondent's opposition to certiorari.

We recognize this Court's determination, but what I think this reflects to the Court is that the Edwards bar and the Arizona v. Roberson bar that presented to this Court, are not that clear when it comes to the presentation of this issue to the courts.

QUESTION: We take these cases, Mr. Zelenka, not to decide the facts of individual cases, where there was or was a violation of Roberson or Edwards, but to decide some issue of more general importance, such as whether or not Arizona against Roberson is -- is to be given effect under Teague.

MR. ZELENKA: That is correct, and I don't dispute this Court's authority, and proper authority, to do that particular fact. But we -- what we are asserting, what we are presenting to this Court, is merely the belief that this supports our view that Arizona v. Roberson was in fact a new rule of constitutional criminal procedure that this Court evidenced in its decision during the last term. And that supports it because the defendant chose not to assert that strongly throughout the entire court process. That this time, that is the only reason that we are raising that particular issue before this Court.

Unless this Court has any further questions on this matter, I will rest.

QUESTION: Thank you, Mr. Zelenka. Mr. Blume, do you have rebuttal?

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REBUTTAL ARGUMENT OF JOHN H. BLUME

ON BEHALF OF THE PETITIONER

MR. BLUME: Very briefly, Mr. Chief Justice. The Attorney General raised several merits, arguments. I think it is important to note that although the Fourth Circuit saw no distinction between this case -- in fact saw no distinction between this case and Roberson, the Attorney General did not cross-petition on the merits, and therefore I don't think this Court should entertain the merits of the case now.

Finally, the only final point I would like to make is this case is much more --

QUESTION: It is true -- it is true that if we accepted that argument, it would support the judgment below, would it?

MR. BLUME: Yes, but I think that it's discretionary certainly with this Court whether it entertain the merits. I think under circumstances where the Attorney General did not cross-petition and the case came up on retroactivity, that the proper thing to do would be to reach the retroactivity issue, and anything else should be left to the lower courts.

The final point is that this case is much more directly within the line of Edwards than even Roberson itself. While Roberson involved a different charge and different police officers, this case involved a different charge but the same police officers. So some of the concerns in the dissent in Roberson are not present here.

QUESTION: (Inaudible.)

MR. BLUME: Pardon me?

QUESTION: Your position covers both situations, whether the, they were the same or the different police officers.

MR. BLUME: Yes. I was just making the point that this is much more directly within the line of Edwards than even Roberson.

QUESTION: Counsel, what if the Petitioner had been released on the assault charge, and while it was still pending, say two weeks later, he was picked up for questioning on the charge now before us. Would the police be entitled to question him after waiver of counsel?

MR. BLUME: I think the break in custody would again -- I think it would depend on the facts of the case. If the record indicated, for example, that the police released the individual to avoid Edwards, then that might be a -- certainly a dispositive fact. It would depend on the facts of the particular case. A break in custody could, under some circumstances, I believe, take a case out from the bright-line rule.

QUESTION: Well, do you think police officers reasonably could rely on the fact that they could question him after giving him Miranda warning?

MR. BLUME: On an individual who had been released?

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QUESTION: Yes.

MR. BLUME: I think it would depend, again, if the officers did it to avoid Edwards, that might be a source of some concern, and of course, that is not what happened here.

QUESTION: Well, let me just up the ante. Let's assume they didn't do it to avoid Edwards. They just have new information and a new charge. Could they interrogate him after a Miranda warning and a waiver?

MR. BLUME: On different charges?

QUESTION: Yes.

MR. BLUME: Edwards does seem to be, and Roberson, concerned with the pressures inherent in custodial, inherent in custodial interrogation, and thus a break could make a difference. So, yes, I think, yes.

QUESTION: All right. Now suppose we ruled that a break didn't make a difference. Would that be retroactive? Would it be barred by Teague?

MR. BLUME: I -- that situation could still, I think, be within the logical compass of Edwards under some circumstances.

QUESTION: You would have to say that, it seems to me, consistently with the argument you made. And that puts you in the position of saying that where the police reasonably could rely on the earlier state of the law, nevertheless, Teague does not apply to their conduct, and that seems to me

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completely contrary to what we were trying to accomplish in Teague. And I just point that out to show you that the logical compass argument that you make is too universal a principle for the decision of this case.

MR. BLUME: Well, of course in this case, I don't think you can say that the states had any right to rely on an unarticulated exception to Edwards, which is essentially the Attorney General's position in this case.

QUESTION: Articulated where?

MR. BLUME: Unarticulated, not articulated, exception, which is the Attorney General's argument.

QUESTION: But wasn't it -- I -- hadn't there been a lot of cases, some cases that said that Edwards doesn't apply to interrogation on different charges?

MR. BLUME: Yes, there had been. I don't believe, Justice White, to the touchstone for whether a case creates a new rule can be whether there was a division of authority in the lower courts. The same was true in the Perry Francis situation. A number of courts had decided that mandatory rebuttable presumptions did not violate Sandstrom. Nevertheless, this Court held that Francis v. Franklin did not create a new rule, but rather was an application --

QUESTION: How do you go -- how do you go about answering the Teague question, if you can't take -- supposing the lower courts had lined up, you know, ten to two on this

issue, saying that Edwards did not extend to the Roberson situation. Would that play no part at all in the Teague analysis?

MR. BLUME: I don't think, of course, this can be reduced to simple arithmetic, which side it acted -- but more on, I think you would have to look behind it and say did the states have a legitimate reliance interest in relying on it.

QUESTION: But I'm not talking about state law enforcement people. I'm talking about, you know, state high courts, who are presumably interpreting claims to some sort of a Roberson doctrine before we ever got there, just applying Edwards. And supposing they had come out by a very large majority saying that there was no Roberson rule. Should this Court totally disregard that sort of a group of lower court decisions in applying Teague?

MR. BLUME: I don't think it should be disregarded, but I don't think that can be dispositive, because what that would --

QUESTION: So, it's a factor.

MR. BLUME: It's a factor, yes, I believe it is a factor.

QUESTION: (Inaudible) five to four as to whether this is, whether this is dictated by Edwards? It must not have been dictated by Edwards.

MR. BLUME: Again, I think that question is answered

implicitly in Yates. Francis v. Franklin was a five/four decision of this Court. Everyone agrees, every member of this Court agrees that -- had agreed that Francis did not create a new rule. So I don't think, again, whether this Court was divided five/four, six/three, or whatever, or six/two, as in Roberson, is dispositive of whether a case creates a new rule.

QUESTION: Well, didn't -- wasn't -- Teague talked about it being dictated by a prior decision, didn't it?

MR. BLUME: Yes, the language of Teague --

QUESTION: Dictated.

MR. BLUME: -- was dictated.

QUESTION: Dictated, which is quite different, as others have pointed out, between -- it is different than logical parameters, or -- your -- your standard is much different from the Teague standard.

MR. BLUME: Well, Teague did not attempt to define the spectrum of what is or is not a new rule. It gave rather general guidance, I believe, as the opinions acknowledge. Both Teague and Penry, which adopted the Teague standard in capital cases -- of course, we are trying to -- attempting to flesh out how it applies in this case. And because, essentially, Roberson was nothing more than a rejection of the state's purported distinction of Edwards, that can't be a new rule.

QUESTION: Do you think Teague was a new rule?

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MR. BLUME: It certainly was a surprise to many of us.

(Laughter.)

QUESTION: What is it? Is it a -- what was it? Was it a rule of statutory construction? What -- where did the Teague rule come from? What kind of a rule is it? Is it a construction of a statute or what, the Teague rule?

MR. BLUME: I think it has some statutory and some constitutional concerns, depending on the proceeding, but it is a rule which this Court -- the retroactivity principle of this Court to determine when decisions apply to cases, final and direct review.

QUESTION: You shouldn't be so surprised at that. Most of the rules that govern our habeas corpus jurisdiction are -- are -- court -- court created, aren't they? I mean, the whole doctrine of when it is allowable and when it isn't. Aren't they almost all judicially constructed, and have altered considerably over the years?

MR. BLUME: Yes, I think that is true. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Blume. The case is submitted.

(Whereupon, at 1:33 p.m., the case in the above-entitled matter was submitted.)

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BY Lona M. Mayo

(REPORTER)