ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v.

LOWELL GREEN

CASE NO: 91-1521

PLACE: Washington, D.C.

DATE: Monday, November 30, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 91-1521

LOWELL GREEN :

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Washington, D.C.

Monday, November 30, 1992

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

APPEARANCES:

JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JOSEPH R. CONTE, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 91-1521, United States against Lowell Green.

Mr. Roberts, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONER

MR. ROBERTS: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here from the District of Columbia Court of Appeals. That court held that in respondent's trial for first degree murder, the jury must never know that he voluntarily confessed to the crime after receiving Miranda warnings and expressly waiving his rights because 5 months before confessing, he invoked his right to counsel when he was arrested on an unrelated drug charge, a charge he resolved with a guilty plea 3 months before being questioned about the murder. The decision of the court of appeals should be reversed.

The facts are not in dispute. Respondent was arrested on a drug charge. He was read his Miranda rights by the book. He invoked his right to counsel. The police immediately stopped the proceedings, and respondent was

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provided with an attorney. 2 months later, he pled guilty to a lesser drug charge as part of a plea bargain.

3 months after that, he was -- while still in custody, he was arrested for murder, a charge unrelated to the drug offense. He was again read his Miranda rights, and this time he chose to waive them, giving the police a videotaped statement in which he confessed to his role in the murder.

The lower courts reluctantly suppressed the confession, even though they found it voluntary and found respondent's waiver knowing and intelligent. They thought this result compelled by this Court's decision in Edwards against Arizona and the rule that once a suspect invokes his right to counsel, the police may not reinitiate questioning, and if they do, the suspect's statements are presumed to be involuntary.

We --

QUESTION: You'd be making the same argument I suppose if the officers went back to him a day after he had invoked his right to counsel as long as it was about a different crime?

MR. ROBERTS: No, Your Honor. That I think would be barred by Roberson. The first argument --

QUESTION: Well, where is your line then?

MR. ROBERTS: Well, the first line -- our basic

submission this morning is that the guilty plea is a dramatic change in circumstances that justifies lifting the presumption. This Court has never had occasion to consider whether the Edwards presumption continues in the face of a guilty verdict, let alone a guilty plea. In Edwards, in Roberson, and in Minnick, the subject was in the same position when he invoked his right to counsel as when the police reinitiated questioning, a pretrial suspect. Here, however, in the meantime, the respondent has been found guilty on the matter that led to his arrest and on which he -- which triggered his Miranda rights in the first place.

QUESTION: Would it make any difference if he had counsel? I suppose he still had counsel. He hadn't been sentenced yet.

MR. ROBERTS: He had counsel, of course, in entering the guilty plea and had consulted with his attorney.

QUESTION: Yes, and then he was going to have counsel I suppose at sentencing.

MR. ROBERTS: Yes. And, of course, the police --

QUESTION: Suppose the counsel had said to the government and, by the way, I don't want you talking -- going back and quizzing my client about anything.

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MR. ROBERTS: Well, he didn't even have to say that, of course, with respect to the drug charge. The Sixth Amendment would prevent the police from interrogating the respondent on the drug charge and using that at sentencing. So, that's not an issue.

The only question would be then whether there's a -- an invocation of the Fifth Amendment right.

QUESTION: Yes.

MR. ROBERTS: And there it seems to us that the invocation is respected, as it was here. The police immediately stopped the proceedings, but when there has been a change in circumstances like the entry of a guilty plea, that there is no reason to presume that the suspect's wishes continue.

Now, we're not saying that the police have free rein to question him, and they should presume now that he's willing to talk to the police without his attorney, just that the situation has changed sufficiently that it's --

QUESTION: Well, it's strange. Isn't it strange that he invoked his right to counsel on a drug charge and -- but with a much more serious charge, he didn't invoke his right to counsel?

MR. ROBERTS: Well, I don't know what his reasoning was. He may have thought, as suspects often do,

that by giving a statement --

QUESTION: Well, he had been in custody all this time, hadn't he?

MR. ROBERTS: He had been in custody.

He may have thought that by giving a statement, he would exculpate himself and direct the police in another direction. The statement had the exact opposite effect. It was tantamount to a confession.

But the point is that the matter on which he was originally arrested and which originally triggered his Miranda rights has been resolved. The investigative process --

QUESTION: You say it has been resolved, and there's a dramatic change in circumstances, but a moment ago you said the Government still could not question him after the guilty plea.

MR. ROBERTS: On -- and use that material in enhancing his sentence on the drug charge.

QUESTION: Because he is still represented by counsel on the drug charge.

MR. ROBERTS: On the drug charge, and the Sixth Amendment right to counsel attaches. The issue here is the Fifth Amendment right to counsel and whether or not the Edwards presumption should continue in effect after a guilty plea.

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QUESTION: But what is the dramatic change other than the fact that if you win this case, there will be a dramatic change? But what else is dramatically different before and after the guilty plea?

MR. ROBERTS: The investigative process --

QUESTION: In terms of rights to talk to people and rights to have access to counsel, what's the difference?

MR. ROBERTS: The difference is that the investigative process on the drug charge, which is of course what Miranda was centrally concerned about, is over.

QUESTION: No, it isn't because he hadn't been sentenced yet.

MR. ROBERTS: The police are unlikely to continue an investigation on sentencing, and if they do, his attorney --

QUESTION: No, but aren't matters relevant to the drug charge, even though he has pleaded guilty, still relevant to the sentencing decision that is yet to be made?

MR. ROBERTS: And if he is questioned --

QUESTION: And isn't that why they can't talk to him? Isn't that why the Sixth Amendment right still applies?

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MR. ROBERTS: As to the drug charge and sentencing on the drug charge. It doesn't apply -- the Sixth Amendment right --

QUESTION: I still don't see what's so dramatically different. That's what I --

MR. ROBERTS: What's dramatically different is that when he invoked his right to counsel, he was a suspect on a drug charge. When the police reapproached him, he was no longer a suspect. He was a convict. He had been found guilty.

QUESTION: Right.

MR. ROBERTS: It is reasonable to assume that that dramatic change in circumstances might alter his judgment about whether to talk to the police without a lawyer.

QUESTION: It seems to me that argument would justify questioning about the drug charge as well.

MR. ROBERTS: No, it would not because the Sixth Amendment protects him there. He has the right to counsel in any custodial interrogation with respect to the drug charge, but as the court explained in McNeil, that doesn't apply to the murder charge.

QUESTION: Well, presumably, if he were allowed to be questioned about the murder charge and confessed it, couldn't that be used at the sentencing then on the drug

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charge to augment his sentence in some way?

MR. ROBERTS: I think not, because again, his lawyer wasn't present at that proceeding. It would then become a stage in the drug proceeding, and I don't think that could be used because of the Sixth Amendment right.

QUESTION: I mean, I'm wondering whether the cutoff time might not be the sentencing on the drug charge rather than the entry of the plea, because it isn't clear to me how the information you would learn on questioning him after the plea and before sentencing wouldn't somehow be used at the sentencing on the drug charge.

MR. ROBERTS: Well, it's not how guilty pleas have been treated elsewhere, for example, in the Federal Rules of Evidence. A guilty plea that is still subject to an appeal, for example, may still be used for impeachment purposes. And the cases have also held, although it's not specifically addressed in the Federal Rules, that if sentencing is still pending on the guilty plea, the guilty plea may be used for impeachment purposes.

QUESTION: Do you agree that there should be some bright line test for any cutoff of the duration of the Edwards rule?

MR. ROBERTS: No, Your Honor, I don't think that the brightness of the line is absolutely paramount to all other factors. The guilty --

QUESTION: You'd have us apply a totality of the circumstances test?

MR. ROBERTS: I don't think it goes that far. The dichotomy between the clear Edwards rule and our proposal today I think is a very false one. When the Court applies Edwards today, it looks at the circumstances of each case. It has to look to see if the individual is in custody. It has to look to see if what he has done amounts to an invocation of his right to counsel. It has to look to see whether or not he has waived that invocation by subsequent initiation. It has to look to see whether or not what the police are doing is interrogation, and although this Court hasn't decided it yet, we think they have to look to see to make sure he has been continuously in custody.

All we are suggesting is that there are additional relevant factors to consider, factors that look to the same concerns that the ones the Court already considers to look to, to determine if there's a reasonable end to the Edwards presumption. Now, to the extent a bright line is needed, the guilty verdict is, of course, a bright line, but beyond that --

QUESTION: And so would sentencing be.

MR. ROBERTS: Sentencing would be another bright line.

The guilty verdict is significant because it is addressed to the same concerns that trigger Miranda. Miranda is concerned about the investigative process. That's at an end when the defendant has been found guilty.

QUESTION: Well, but after a guilty plea and before sentencing, the defendant may feel very real pressure to cooperate with the police in order to obtain lenient treatment on his sentencing.

MR. ROBERTS: And if he's --

QUESTION: And it seems to me that's -- if we're going to draw this line, sentencing is a much more sensible place to draw it if this is how we're going to do it.

MR. ROBERTS: Well, I don't think so, Your Honor, because sentencing isn't directed to the concern of Miranda, which is investigation. A suspect invokes his right to counsel presumably because he's afraid that without counsel he'll say something incriminating and be found guilty.

QUESTION: Well, it's a question of coercive pressures. There are substantial coercive pressures on the prisoner when he knows that he's going to be sentenced.

MR. ROBERTS: Well, Miranda applies to coercive pressures in custodial interrogation. Now, the Sixth

Amendment, as I indicated, protects if the police are questioning him for information to use at sentencing. With a probation officer or something like that, there's certainly a split as to whether the Sixth Amendment applies, but even if it doesn't, that is in our position not custodial interrogation. And so, Miranda and Edwards wouldn't apply in any event.

But with respect to the need for a bright line, our position is that, first of all, the guilty plea is a bright line, but a line needs more than brightness to commend it when it has the consequence of excluding a voluntary, warned confession in the circumstances of this case.

QUESTION: May I just be sure I understand your position, Mr. Roberts? Your view is that after a man pleads guilty, the prosecutor's office may call him in and say we don't want to ask you about the specific crime to which you've pleaded guilty, but we would like you to tell about everything else in your life that might have a bearing on your sentencing.

MR. ROBERTS: It's -- that is what the probation officer does, not the prosecutor's office.

QUESTION: That's what your rule would allow, isn't it? No, but that's what your rule would allow, wouldn't it?

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MR. ROBERTS: Well, it would because --

QUESTION: Of course, you have to give Miranda warnings --

MR. ROBERTS: Assuming there's no Sixth Amendment right in the probation process -- and that's an issue on which the courts have split, yes. But it's because we don't regard the probation procedure as custodial interrogation. So, Miranda isn't triggered by that at all, and neither then, of course, would Edwards be.

But the brightness of the line in our view cannot be the only consideration. You need to look, as this Court has indicated, to the purpose that the rule is serving. This is a prophylactic rule created and imposed by this Court, and it must be justified by reference to its purpose.

Now, the purpose here is not, as it was in Edwards, in Roberson, in Minnick, to prevent police badgering. There's no plausible basis on which that is a concern in this case. The suspect was not questioned by the police for 5 months after he invoked his right to counsel. The police promptly respected his right to counsel when he invoked it. They approached him on a different offense. He has consulted with his attorney. It is implausible to suppose that that suspect's reaction,

when the police come back to him, is going to be I wish you would stop badgering me. The purpose --

QUESTION: Did the Government take a position in Roberson?

MR. ROBERTS: Yes, Your Honor, we did. Our position there was that the approach on a different offense was sufficient to dissipate the concern that Edwards was based upon.

The purpose not -- is here not to prevent police badgering. It's to protect the ease of administration, the bright line aspect, of a prophylactic rule, Edwards, created by this Court to protect another prophylactic rule, Miranda, which in turn is designed to protect the Fifth Amendment.

Here we have no violation of the Fifth Amendment itself. The confession was found by both lower courts to be voluntary. Nor do we have any violation of Miranda itself. The familiar warnings were given and were found by both lower courts to be knowingly and intelligently waived. Nor is there any concern here with police badgering, the concern that led to Edwards in the first place.

In those circumstances, we think protecting the ease of administration of a second level prophylactic rule is an insufficient justification to keep out this

voluntary, warned confession.

QUESTION: I would think your argument so far would cover going back to the defendant asking him about another crime. Say he's out on bail for 5 months before trial. Well, during the fifth month the Government goes back to him and said we don't want to ask -- question you about this drug charge that you're about to be tried for. We want to ask you about a murder.

MR. ROBERTS: Yes, they certainly could do that. We think they could ask him about the drug charge in those circumstances as well, because the break in custody would lift, we think, and all the --

QUESTION: What if he's in jail?

MR. ROBERTS: If he's in jail, we think with a sufficient passage of time, yes, they can. Now, the first thing they say --

QUESTION: Even though he hasn't been tried on the drug charge.

MR. ROBERTS: Yes. Now, the first thing they say, of course --

QUESTION: So, your argument would -- there has been a sufficient passage of time to justify going back to him contrary to Edwards or that Edwards just wears out after 2 or 3 months?

MR. ROBERTS: We think that if the presumption

is no longer justified by its purpose, then there's no basis for the imposition of the prophylactic rule that this Court has imposed.

Now, Edwards, of course, was a quite different case. The second approach was not 5 months later; it was the next morning. It concerned not an entirely unrelated offense, but the same offense. In the meantime, the suspect had no opportunity, was not permitted to consult with his attorney. And, in fact, when the police officers came back the second time, the suspect said I don't want to talk to them, and he was told that he had to. The facts are not at all similar to those in this case, and therefore, we think that yes, the presumption should not continue on indefinitely.

QUESTION: Well, it isn't clear to me what you would say. Suppose he had remained in custody and it had been 3 months and the police hadn't asked him anything and no guilty plea. Now, is that enough?

MR. ROBERTS: Yes, it is, and --

QUESTION: 2 months?

MR. ROBERTS: 2 months is enough and --

QUESTION: 1 month?

MR. ROBERTS: 1 month is enough.

QUESTION: 2 days?

MR. ROBERTS: 2 days is probably not enough.

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Now, it isn't a bright line.

QUESTION: It isn't even a line, is it?

MR. ROBERTS: Well, it is a line that looks -- first of all, as I'll reiterate, our principal submission is the finding of guilt. If brightness is the paramount concern that trumps even keeping out this voluntary, warned confession --

QUESTION: Well, it's one concern certainly.

MR. ROBERTS: Well, then the guilty plea, the finding of guilt, is of course a very sharp and bright line, and that is our principal submission.

We also think that the combination of the factors in Roberson and Minnick, having an opportunity to consult with an attorney and the approach being on an entirely unrelated offense, is also sufficient to lift the Edwards presumption, and that also is a bright line.

Beyond that, we do think time is a relevant factor. Whether or not a suspect is in custody is a critical factor to consider in applying Edwards, and as Your Honor indicated in a prior opinion, that's a very slippery concept, not a bright line. Whether the suspect has invoked his right to counsel, his Miranda right, not his Sixth Amendment right, is not a bright line, as this Court has experienced in some of those cases.

QUESTION: Mr. Roberts, can I ask about a

provision that I didn't even know about? I've been listening to Miranda cases and Edwards cases and Minnick cases for seven terms now. Why has the United States never cited in any of those cases 18 U.S.C. section 3501? Is there some reason?

MR. ROBERTS: Well, I don't know why it has never been cited. That's the provision, of course, that on its face purports to overturn this Court's decision in Miranda.

QUESTION: It says that voluntary confessions shall be admissible and that voluntariness shall be decided on the basis of the totality of circumstances and that no single item, such as whether the defendant was advised or knew that he was required to make a statement, shall alone be determinative.

MR. ROBERTS: Yes. Well --

QUESTION: It's certainly very relevant to this case, very relevant to a lot of other cases. It has never been cited to us.

MR. ROBERTS: Well, we didn't rely on it below in this case, and so we're not in a position to rely upon it here.

QUESTION: Is this sort of executive nullification of a congressional statute?

MR. ROBERTS: I can't explain why it hasn't been

repeatedly cited other than perhaps some concern --

QUESTION: Repeatedly or ever cited?

MR. ROBERTS: Well, I'm not aware that it ever has been. All I can say is it wasn't relied on in this case and, therefore, we're not relying on it here.

The --

QUESTION: Does the Government not rely on that statute in any lower court?

MR. ROBERTS: I'm not aware that we have taken the position that the statute does overrule the need for the Miranda warnings.

QUESTION: Well, but don't -- does the Government not feel any duty to call the statute to the attention of lower courts?

QUESTION: Or to this Court?

MR. ROBERTS: I'm not aware that we have relied on it at any point.

QUESTION: Well, do you feel no obligation to call the statute to the attention of this Court?

MR. ROBERTS: Well, I think in this case I'm not sure -- and in cases like this where we're arguing that the confession should be admitted, it's because we believe it's consistent with Miranda and the other cases as we believe this one is. And so, there's no need to take what would be the ultimate fall-back position that it doesn't

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matter that it violated Miranda because the statute says Miranda is no longer good law.

QUESTION: Well, ordinarily we prefer to decide a case on a statutory basis rather than a constitutional basis.

MR. ROBERTS: Well, yes, and of course, it's open to the Court to decide it on that basis. I just -- since we have not relied on it below, we're not relying on it here.

The reason we think it is important that there be some limitation to the Edwards presumption that it not extend indefinitely into the future is that it imposes a very serious impediment upon law enforcement. People in custody are a very valuable investigative resource for the police. Not only have they often committed other crimes themselves, but often have information about who has committed other crimes.

The question posed by Edwards to the police officer is, can I question this individual who's in custody. People arrive at custody by very circuitous routes. It's not unusual for a defendant to be arrested in California, detained and questioned there, transferred to New York, detained and questioned there by different authorities, and then transferred to Illinois to await trial on still different charges. A police officer in

Illinois may know nothing more than that the individual is in custody and may have information about an offense that he's investigating.

Now, what does the officer have to do? The officer, under the supposedly clear guidance of Edwards, has to find out if the individual has ever invoked his right to counsel, anytime, anyplace before any authorities, whether he has been continuously in custody since that time, whether at any time he has initiated contact with the police and thereby waived his previous invocation. And the answers to those questions don't follow the prisoner around on a card. They may be with the State officials in California, the bail officer in Illinois, with the FBI in New York.

And the reason it is important that there be clear guidance to the police -- we think our rule provides clear guidance -- is that these people have oftentimes valuable information about other crimes. Our submission today would put a reasonable parameter on what the officer has to ask. If he finds out that the defendant is there because he has pled guilty or been found guilty, then the officer doesn't need to go back beyond that in this little mini-investigation he must conduct before even approaching the individual.

And keep in mind that the first thing the

officer says when he approaches is not tell us about this murder. It is, you have the right to have an attorney present before answering any of my questions.

Now, the one thing that a suspect in respondent's position knows from experience and is reminded of by the second administration of the rights is that that right will be respected. That is why this case is very different from Edwards, where he was not allowed to consult with his attorney, and also very different from Roberson where 3 days went by and he was not allowed to consult with his attorney.

It's also different from Minnick because there, although he was allowed to consult with his attorney, the second approach concerned the same offense, and a very short period of time, only 3 days, had elapsed. And again, as in Edwards, the suspect was told he had to talk to the police when he refused to do so.

In all of those cases, Edwards, Roberson, and Minnick, there was a very real concern, the Court concluded, that the suspect would reasonably think that the Miranda rights he was being given were not real. If the police keep coming back to the suspect after he invokes his rights, he could decide they don't mean it when they say I have these various rights. That's not a plausible concern on the facts of this case.

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If there are no further questions, I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Roberts.

Mr. Conte, we'll hear from you.

ORAL ARGUMENT OF JOSEPH R. CONTE

ON BEHALF OF THE RESPONDENT

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

Mr. Green was incarcerated. At 4:00 in the morning, he's taken from his bed. At 6:00 in the morning, he arrives at the District of Columbia courthouse. He's feet away from the courtroom. He's feet away from the Criminal Justice Act, but he sits for another 4 hours and 17 minutes, at which time he is taken from the District of Columbia courthouse to the homicide branch one block away. He sits another 2 hours before he's advised of his Miranda rights.

We believe that this case -- if this case is reversed, that there will create an exception to the bright line rule that has been created by this Court in Edwards, in Roberson, and in Minnick which will have no countervailing -- nothing on the positive side. The Government says in their brief that there is nothing in affirming this case that would not advance the purpose underlying the bright line rule.

Look at the -- what we expect to get from a bright line rule: provide 100 percent assurance that confessions are not the result of a coercive pressure.

QUESTION: Well, do you think Edwards has no time limits at all?

MR. CONTE: That's correct.

QUESTION: None.

MR. CONTE: No, and --

QUESTION: So, if the defendant is sentenced, let's say, to a life sentence in connection with the drug charge, at no time then would the Government ever be able to go back and ask him if he had waived -- give him his Miranda rights and talk to him about the murder.

MR. CONTE: That's correct, and if I may explain. You must keep in mind that this is retroactive. It's not prospective. It only applies to those offenses that the person may have committed before he invoked his Miranda rights. Something that the person does after, say, while he's in prison, that previous request for counsel doesn't apply. The police could question him about that offense. What we're speaking of here is only those activities that he did prior to the date that he was arrested, he requested an attorney, and he was continually incarcerated thereafter.

QUESTION: Well, I would have thought that the

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Edwards rule might expire at some point, certainly after he is sentenced under the drug charge.

MR. CONTE: Well, he -- at the point where he's arrested, he says, I do not feel that I am capable of talking to the police without an attorney present. Why should that expire? We would argue that it doesn't need to expire.

QUESTION: What if --

QUESTION: The concern, of course, was -- in Edwards was to prevent a defendant from being badgered by the police in an effort to get information in connection with the charge that had been made, the drug charge in this case. Now, I wouldn't think that after sentencing, there would be any risk of badgering him about that.

MR. CONTE: Certainly there -- the risk of badgering decreases over time, and certainly after sentencing, the person is in a much stronger psychological position to deal with the authorities. Presentencing he's certainly in his weakest psychological state of mind. He's sitting there waiting for a court to sentence him, and the pressures that bear on a person in that position have to be greater presentencing than postsentencing.

Although my position is that his Edwards right should apply postsentencing, certainly we would still have a bright line if the Court said that after he has been

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sentenced, then the Edwards rule doesn't apply. But my position still would be that since it only applies to those activities that occurred prior to the request for his attorney, that truly the need -- extending it past the time of sentencing just lowers the likelihood that they're going to come to him and question him about a case that occurred in that time frame prior to it.

QUESTION: Do you know the answer to Justice Scalia's question about why the statute, 18 U.S. Code 3501, does not bear on this question?

MR. CONTE: No, I don't. 3501, though, is a -- anytime a statement is made, it seems as though that there is always a hearing to find out whether it was voluntary, whether it met -- meets all the parameters that have been dictated by the United States Code and by this Court. Although not raised by the Government, I think those hearings -- I think 3501 is something that's litigated every day in the criminal courts of this country. Nobody raises that statute by name, but that's the hearings that they have.

QUESTION: But that statute says something to the effect of the presence or absence of the various factors is not conclusive.

MR. CONTE: They still rely on the opinions given by this Court in the Miranda and the Edwards line of

cases and not on section 3501 of the criminal code.

In addition to maintaining the bright line we have, in reversing this case, we would -- of the four factors that have been identified on the need for a bright rule in this area, one, 100 percent assurance that there's no coercive pressure; two, to prevent badgering; three, to conserve judicial resources. Reversing this case will send us then into another totality of the circumstance scenario where we must --

QUESTION: You say there's nothing to be gained by a reversal here, Mr. Conte. Certainly one thing that would be gained would be the admission of more reliable evidence in a trial.

MR. CONTE: When I said nothing to be gained, I was speaking in terms of the bright line rule that this Court has established in Edwards and Roberson. Yes, without the bright line rule, there may be circumstances where more probative confessions or statements are admitted. However, we still don't know at that point whether we've met the first requirement, and that is whether that statement was a result of any coercive pressure.

QUESTION: Well, but you've certainly got a good deal of assurance with, first, the Miranda prophylactic rule and then the Edwards prophylactic rule that any

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coercive pressure that might -- even if it had existed at one time, would have been attenuated by then.

MR. CONTE: Well, if we're talking -- in this -- in Mr. Green's case, in this case, we're talking about eliminating or carving an exception out of the bright line rule. We don't know whether -- if we carve this exception, whether we're making a -- allowing a statement in that was given as a result of some coercive pressures.

QUESTION: Well, would you say -- what if we agree with the Government? Once the plea of guilty is accepted, that's as bright as you can get, isn't it? So is sentencing, I suppose.

MR. CONTE: If you apply it after the guilty plea, you still have a bright line, but one of the purposes of the bright line is to ensure that these things are not the result of coercive pressure. And I think just at the guilty plea, you don't have that assurance. I think --

QUESTION: What about after sentencing?

MR. CONTE: After sentencing, I think you would have that assurance. I think the person is in a much different psychological state of mind after sentencing.

QUESTION: So, you don't -- you say Edwards wouldn't last forever, but after sentencing?

MR. CONTE: I still think it should last

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forever, but after sentencing would certainly be a better break if this Court was going to end it than it would be after a plea and before sentencing.

QUESTION: Nothing lasts forever, Mr. Conte.

(Laughter.)

MR. CONTE: That's true, Your Honor.

QUESTION: In your experience, what is the usual time between a conviction and sentencing or a plea of guilty and sentencing?

MR. CONTE: In the District of Columbia Superior Court, it's 6 weeks to prepare a presentence report. In the United States District Court in most of the jurisdictions, it's now a period of 2 months between the entry of a plea and the preparation of the presentence report and the sentencing hearing.

QUESTION: That's just because of the load, I suppose.

MR. CONTE: And the -- and certainly the load in Superior Court. The Federal sentencing guidelines created -- extended it after -- once they were --

QUESTION: In preparing a presentence report, is it characteristic to talk to the defendant?

MR. CONTE: Yes.

QUESTION: With his lawyer?

MR. CONTE: It can be done with his lawyer. A

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lot of times the presence of a lawyer is waived.

QUESTION: Well, if the defendant requests --

MR. CONTE: If the defendant requests, it can be done in the District of Columbia. I know of other jurisdictions where an attorney is allowed to be present.

QUESTION: What goes into the presentence report if the defendant refuses to talk to the probation officer?

MR. CONTE: They still put his background in, whatever they can gain from his family from the --

QUESTION: But there -- but all they say is he refused to talk?

MR. CONTE: Yes, and some reports -- the person will talk about his background, but not about the offense itself, in which case his background is there, but the offense conduct is missing.

QUESTION: That -- I suppose if he refuses to talk about the offense itself, that would prevent him from getting any points for accepting responsibility under the guidelines.

MR. CONTE: Well, the guidelines changed as of November 1 of this year so that a plea of guilty automatically entitles him to two points off and possibly three if he does it at an early time.

QUESTION: Because he admits his --

MR. CONTE: Just because he stands up in court

and says I'm guilty. He does not have to talk about the offense whatsoever to get either two and possibly even three points off.

QUESTION: Can he get any more points off if he talks about it as well as pleads guilty?

MR. CONTE: The only way he can get any further points off is for him to cooperate with the United States and receive a letter under section 5k.1 of the Federal Sentencing Guidelines. So -- and if he's --

QUESTION: And would that cooperation extend to other offenses and other investigations?

MR. CONTE: Almost exclusively they're not interested in somebody who has already pled guilty. They want his cooperation in charging somebody else. They want him to cooperate either --

QUESTION: Well, I take it that if the defendant cooperated as to other investigations with reference to other crimes, including those that he might have committed, that would be grounds for these additional points and for the letter?

MR. CONTE: For the letter. There's no additional points. It's just -- it's either a 5k.1 letter -- motion to reduce the sentence --

QUESTION: Where is the interview -- where does the interview normally take place with the probation

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officer in -- for the purpose of preparing the presentence report?

MR. CONTE: In the District of Columbia, they take place at the District of Columbia jail. At the Federal court, if it's a Federal prisoner --

QUESTION: So, why doesn't Edwards apply at that juncture?

MR. CONTE: Edwards does apply.

QUESTION: Well, you mean it's violating his rights for the probation officer to go to the jail and approach him?

MR. CONTE: Well, the probation officer isn't law enforcement.

QUESTION: Isn't what?

MR. CONTE: I wouldn't consider the probation officer --

QUESTION: He's part of the government. He's a law enforcement --

MR. CONTE: He's part of the government.

QUESTION: He's a law enforcement officer.

MR. CONTE: He's part of the court system.

QUESTION: Well --

MR. CONTE: And he's only talking in the context of the one offense when he talks to the probation officer.

QUESTION: Well, he talks -- he approaches him

and talks to him. Does the probation officer give him Miranda warnings?

MR. CONTE: No.

QUESTION: So, he talks to them and he -- the defendant says a lot of things that is going to harm him at sentencing.

MR. CONTE: He can. On the other hand, he may hold something back.

QUESTION: So, why doesn't Edwards apply at that juncture?

MR. CONTE: He has the right not to answer the questions of the probation officer --

QUESTION: I know, but he isn't told that he does.

MR. CONTE: Pardon me?

QUESTION: He isn't told that he does.

MR. CONTE: His attorney -- at that time, he should have a Sixth -- he has an attorney at that time who could tell him to cooperate or not to cooperate. And I think the Sixth Amendment right would take over and control that situation. Indeed, if he has a lawyer and there is something out there about the offense that could increase his penalty, the lawyer wouldn't instruct him not to cooperate with the presentence report writer.

QUESTION: Well, it's just a different context I

suppose that you don't say -- you don't tell the probation officer, now, remember, don't go near him unless he asks you to come. You don't say that --

MR. CONTE: No.

QUESTION: -- to the probation officer. Why not?

MR. CONTE: It's --

QUESTION: It's just different.

MR. CONTE: Yes. It's certainly not the police investigating a different offense. They're only there to talk about that offense and his background.

And while we're talking about a guilty plea, there's nothing in a guilty plea that says, listen, I want to open the dialogue with the law enforcement people. Here I am. I'm -- in this limited purpose, I am entering a plea just to this offense, and I have my attorney present. Those are the considerations, and those are what the Government argues in their brief, one of the three considerations that we should -- this Court should change the rule in Edwards, that by pleading guilty, he has opened the dialogue with the police. But as the court of appeals said, he has only opened the dialogue with the police in the context of the one offense with his lawyer present.

The Government's third argument that this case

differs from Roberson v. Arizona and Minnick v. Mississippi -- I believe those two cases should be read together. In Roberson we have police who at 3 days later came and talked to Roberson, and in Minnick we had the case where he comes -- the defendant was permitted to speak with his counsel, but his counsel wasn't present. I think if we read those two cases together, we have exactly the same case that Mr. Green has. He was held. He was permitted to speak with his attorney, and they came and spoke to him about a different offense than the one he was held on.

The 5 months lapse which the Government argues -- the second thing the Government argues as a reason to distinguish Mr. Green. Again, as this Court pointed out in Roberson, coercive pressures increase as custody is prolonged. Keep in mind that every occasion that Mr. Green left the Lorton or D.C. jail, he was met by his attorney in a courtroom. He was dependent upon his attorney during the whole 5 months that he was present.

He was pending sentencing. He's most vulnerable at that time to any -- than any other time in his life. He's waiting for a judge to pronounce the sentence. What sentence that's going to be depends on what he does, what he tells his probation officer, what the police or what the United -- what Government may tell the judge at the

time of sentencing as to --

QUESTION: And yet, at this most vulnerable time, when the probation officer comes to him, you say that the practice is not to give any renewed Miranda warning.

MR. CONTE: That's correct. But he has been advised by his attorney at that time in what context he should speak with the probation officer. He has been advised that they're only going to ask him about the one offense, the offense that he pled guilty to.

QUESTION: Mr. Conte, is it the practice in the probation interview to give the defendant's lawyer notice of when the interview is going to take place so the lawyer can be present if he wants to?

MR. CONTE: Not in my experience.

QUESTION: It's not.

MR. CONTE: There are judges I am aware of who require the lawyers to be present during the interview, and that's all occurred since they passed the Federal Sentencing Guidelines, and those would be district court cases, Federal court cases.

QUESTION: Is it characteristic of lawyers to try to find out when the interview is going to take place?

MR. CONTE: Yes. In the District of Columbia it is.

QUESTION: And the -- I don't suppose the probation officer -- who do they ask? The probation officer?

MR. CONTE: Yes.

QUESTION: And he rarely says it's none of your business, I suppose.

MR. CONTE: No. The lawyer is allowed to attend in the District of Columbia.

QUESTION: Yes.

QUESTION: Let me put the question a little differently. Does the defendant himself get advance notice or do they just kind of walk in on him?

MR. CONTE: They just walk in.

QUESTION: They just walk in.

MR. CONTE: If there's no further questions.

QUESTION: Thank you, Mr. Conte.

Mr. Roberts, you have 8 minutes remaining.

REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF THE PETITIONER

MR. ROBERTS: Thank you, Your Honor.

I think it's important to remember exactly what it is that we're suggesting today. It is not that when there is a finding of guilt or, we think in particular, a guilty plea, police may now presume that the suspect is willing to talk to them without his attorney.

All we're saying is that the facts have changed to such an extent that it is reasonable to once again regard that question as an open question, and the first thing that the suspect will be reminded of is that he has a right not to talk to the police without his attorney. If he still -- given the change in the situation, if he still does not wish to talk to the police without an attorney, all he has to do is say so. It worked the last time, and he knows it will work again.

In other words, the deck has been reshuffled, he has been dealt a new hand, and there's no reason to presume that his opening bid is going to be the same. That's why we think it is the finding of guilt and the guilty plea that is a sufficient change in circumstances that justifies reopening the question once again.

With respect to the difference between the guilty plea and sentencing, under the Sixth Amendment, he cannot be interrogated for information to be used at sentencing on the drug charge, and under -- because it is not custodial interrogation, questioning by a court official -- that's why the warnings are not given -- the Edwards presumption doesn't apply in the first place. That's why we think it is the guilty plea, the guilty verdict, rather than sentencing that is a determining factor.

QUESTION: The probation officer is a court official?

MR. ROBERTS: Is an officer of the court, yes.

QUESTION: Are there cases in the lower courts, Mr. Roberts, involving admissions of statements made to the probation officers that inculpate the defendant in other crimes?

MR. ROBERTS: I'm not aware of those. There are -- there is a split among the -- in the lower courts over whether or not the Sixth Amendment right applies at the probation officer interview. And if it does, of course, then they can't be used at sentencing.

QUESTION: Is counsel correct that the probation officer does not routinely give Miranda warnings when other crimes are to be discussed?

MR. ROBERTS: That's my understanding, yes, that a probation officer does not give Miranda warnings and, we submit, is not required to because that's not custodial interrogation.

If there are no further questions, thank you, Your Honor.

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CHIEF JUSTICE REHNQUIST: Thank you, Mr. Roberts.

The case is submitted.

(Whereupon, at 11:46 a.m., the case in the above-entitled matter was submitted.)

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BY Lynn M. May

(REPORTER)