

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHAEL YARBOROUGH, WARDEN :

4 Petitioner :

5 v. : No. 02-1684

6 MICHAEL ALVARADO. :

7 - - - - -X

8 Washington, D. C.

9 Monday, March 1, 2004

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10: 53 a. m

13 APPEARANCES:

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15 Angeles, California; on behalf of the Petitioner.

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17 Department of Justice, Washington, D. C. ; on behalf of

18 the United States, as amicus curiae, supporting the

19 Petitioner.

20 TARA K. ALLEN, ESQ., Malibu, California; on behalf of the

21 Respondent.

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7	as amicus curiae, supporting the Petitioner	19
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P R O C E E D I N G S

(10: 53 a. m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
next in No. 02-1684, Michael Yarborough v. Michael
Alvarado.

Ms. Chuang.

ORAL ARGUMENT OF DEBORAH J. CHUANG
ON BEHALF OF THE PETITIONER

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

For nearly 4 decades, the ultimate inquiry as to
whether a person is in custody is whether there is formal
arrest or restraint in freedom of movement to the degree
associated with formal arrest.

The Ninth Circuit acknowledged that the State
court had identified the correct legal standard for
determining custody, that no Supreme Court case had
addressed whether age and experience needed to be
considered for that determination, and that it was
borrowing legal principles from another area of
jurisprudence. Yet, it held that it was objectively
unreasonable for the State court to have abstained from
innovating such a new role.

This case illustrates why Federal habeas relief
cannot be granted under 28 U.S.C., section 2254(d), when a

1 State court decision does not extend Supreme Court
2 precedent to a new context. Such relief is incompatible
3 with the provisions of section 2254(d) for three reasons.

4 First, to require a State court to extrapolate
5 Supreme Court precedents from the voluntariness context to
6 the custody context cannot be fairly characterized as
7 applying this Court's custody precedents.

8 QUESTION: Ms. Chuang, there are two questions
9 presented in the petition for certiorari. One is what I
10 took it to be -- is the rule that the Ninth Circuit
11 announced correct under our precedents, and the second,
12 under AEDPA, was it objectively unreasonable for the State
13 court to rule otherwise. Are you going to address both
14 those questions?

15 MS. CHUANG: Yes, Your Honor.

16 QUESTION: Thank you.

17 MS. CHUANG: The Ninth Circuit fundamentally
18 changed the rule for resolving custody claims by juveniles
19 and, second, Federal law as determined by the Supreme
20 Court refers -- is limited to the Supreme Court's
21 holdings. The Ninth Circuit substituted its holding for
22 that of this Court when it recognized that this Court had
23 never held so in the custody context.

24 And third, to say that an extension of Supreme
25 Court precedent to a new context is clearly established

1 law would define clearly established at such a high --

2 QUESTION: But how is it a new context? I mean,
3 the -- the rule was how a reasonable man in the suspect's
4 position would have understood his situation. So is it
5 new to say you -- I mean, it might be new if in fact there
6 was blind person and the agent who was holding him wrote
7 on a note, you are free to leave. You know, he can't read
8 it. Now, would you need a new, special Supreme Court case
9 to say that's ridiculous?

10 MS. CHUANG: No, Your Honor. You -- you would
11 not. What --

12 QUESTION: Then why do you need a new, special
13 Supreme Court to say a very young person might feel very
14 differently about whether he's in custody from a person
15 who's a -- not -- not a child and not a minor?

16 MS. CHUANG: Well, because this Court's
17 precedence as for custody determination has only
18 considered the circumstances encountered by the person --

19 QUESTION: Well, we haven't considered blind
20 people either. We haven't considered deaf people whom
21 someone might whisper, you're free to go. I mean, the
22 point is it's so obvious that -- that being a child or a
23 juvenile would make a difference, that you don't have to
24 write it in all the cases. So my question is, why isn't
25 that obvious?

1 MS. CHUANG: I believe that the answer is that
2 the ultimate inquiry for custody determinations is whether
3 there is a formal arrest or restraint in freedom of
4 movement.

5 QUESTION: How old was the respondent in this
6 case? 17-and-a-half, wasn't he?

7 MS. CHUANG: Yes, Your Honor. He was 17-and-a-
8 half years old during the interview.

9 QUESTION: And I suppose, in the view of the
10 Ninth Circuit, he would have had to be treated quite
11 differently if he were 6 months older, if he were 18.

12 MS. CHUANG: Yes, Your Honor.

13 QUESTION: I thought --

14 QUESTION: What -- what if he were 6? Would --
15 would you acknowledge that -- that that factor should be
16 taken into account?

17 MS. CHUANG: No, Your Honor, I don't believe
18 that a 6-year-old -- that age and experience should be
19 considered because the test -- the ultimate inquiry is
20 whether there is a formal arrest or restraint in freedom
21 of movement.

22 QUESTION: No, but that depends upon what a
23 reasonable person in the circumstances would understand to
24 be his situation whether a reasonable person would believe
25 he was being detained. Isn't that the test? So, I mean,

1 it doesn't -- it doesn't help to simply say that, you
2 know, the question is whether there's an arrest. Yes,
3 there is. That is the question.

4 But our standard for whether there has been an
5 arrest is what would a reasonable person believe. Would
6 he believe he was arrested? Which gets you right back
7 into the determination of what a person would believe.

8 Now, would we take into account the fact that
9 somebody is 6 years old?

10 MS. CHUANG: We don't deny that a 6-year-old
11 would certainly be more vulnerable to overall coercion.
12 Yet, that is -- overall coercion is addressed by the
13 voluntariness test and really the custody question is only
14 concerned with one aspect of coercion and that is custody.
15 And to --

16 QUESTION: Why -- why isn't it? Look, I'm not
17 -- I guess let me try again because I can understand you'd
18 say there's only 6 months difference here. So in this
19 case, being a juvenile didn't matter. But that's not what
20 you're talking about.

21 You're talking about the standard that says the
22 nature of a person as a child or an adult is something
23 that can make a difference. All right? To custody. You
24 agreed being blind could make a difference to custody.
25 You agree being deaf could make a difference to custody.

1 Why can't being a child in principle make a difference to
2 custody? That's the question. And it has only to do with
3 whether the first part of your argument, not the second.

4 MS. CHUANG: Well, Your Honor, I suppose that a
5 blind person, if you hand the blind person a note saying,
6 you are free to leave, would not -- you could not use that
7 note as an indication that he was free to leave. You
8 couldn't use that as a circumstance to show that he was
9 free to leave.

10 QUESTION: Well, isn't what you're objecting to
11 in the Ninth Circuit's decision the idea that there is
12 some sort of a bright line cutoff date when the person
13 turns 18? You don't deny that a person 6 -- 6 years old
14 would be treated differently than a 17-year-old, I
15 suppose, for determining the objective test.

16 MS. CHUANG: That's correct, Your Honor.

17 QUESTION: Is that -- I thought you said age is
18 irrelevant.

19 MS. CHUANG: Yes.

20 QUESTION: That age is -- you -- you said age is
21 irrelevant to the custody determination.

22 MS. CHUANG: That's correct. Age --

23 QUESTION: Other things like language is --
24 language is relevant if the person doesn't -- is not
25 conversant with English.

1 MS. CHUANG: Language might not be relevant,
2 Your Honor, because -- or -- or it might relevant because
3 if the person did not understand English and the officer
4 said, you are free to leave, that is -- that is a
5 circumstance that the person encountered that is within
6 the officer's control that the -- and the person doesn't
7 understand English, that would be something that could not
8 be relied upon later on to show that he was -- he
9 understood that he was free to leave. But then again,
10 that might not mean that he could use it to show that he
11 was in custody as well.

12 QUESTION: Let -- let me ask you about two facts
13 in -- in this particular case. The first one is this.
14 And correct me if I'm wrong. I think I'm right on these.

15 When the -- when the sheriff's department wanted
16 to question this -- this young man, they went to his
17 parents and the parents said, in effect, yes, we will --
18 we will bring him down or take him down with us, and they
19 took him to the station, so that as I understand it, the
20 sheriff's department didn't ask him to make a choice as to
21 whether they would go down to the headquarters and talk
22 with him. The parents did that.

23 The second fact I want you to comment on is that
24 when they got down there, the parents said, in the boy's
25 hearing, can't we go in with him or can we go in with him?

1 They -- they made it clear that they would like to go into
2 this interrogation. And the deputy sheriff said no, kept
3 them out. The sheriff and the boy disappeared.

4 Are those two facts relevant in making the
5 determination of whether he would reasonably understand
6 that he was being under -- held under conditions
7 equivalent to a formal arrest?

8 MS. CHUANG: No, Your Honor, I don't believe
9 they are relevant.

10 QUESTION: Why -- why not? Why not?

11 MS. CHUANG: Because once -- again, if his -- if
12 his parents were asked for permission to interview, the
13 detective had asked the parents for permission to
14 interview him, and his parents said yes, the meaning of
15 that question was that he could have said no, and --

16 QUESTION: Wait a minute. You just lost me.
17 How -- how is it that he could have said no?

18 MS. CHUANG: He could have refused to have
19 submitted to the interview, and there's no indication in
20 the record --

21 QUESTION: Well, but he -- but he -- he didn't.
22 His parents said, yes, you can interview him. We will
23 bring him down, and the boy came along. That's all we
24 know.

25 MS. CHUANG: That's correct, Your Honor. That's

1 -- that's what we know.

2 QUESTION: And why is that? And that is
3 irrelevant you say because the boy might have said, well,
4 I won't go?

5 MS. CHUANG: That -- yes, Your Honor. It's --

6 QUESTION: You don't know whether he would have
7 felt free to say that or not, do you? Do we have anything
8 in the record on that?

9 MS. CHUANG: There's no indication one way or
10 the other. But there was no indication that he was not
11 voluntarily being interviewed.

12 QUESTION: Well, there is an indication. I -- I
13 mean, that's what I'm trying to get at. The -- the
14 indication is that he was taken down to the station house
15 by his parents. He didn't make the choice. And when they
16 got down there, the parents, who wanted to be present
17 during the interrogation, were told that they couldn't.

18 The -- the -- it seems to me that the objective
19 appearance of -- of these two facts is, number one, the
20 boy appears to be under the control of his parents and his
21 parents appear to be under the control of the sheriff's
22 department when they get down to headquarters. And on
23 those two facts, I would think it would be difficult --
24 standing alone, those two facts, it would be difficult to
25 infer that this boy would have felt that he was free to

1 turn around and -- and walk out of the interview and
2 leave. And -- and I don't understand why those facts are
3 not relevant.

4 MS. CHUANG: Well, Your Honor, I -- I -- there's
5 no indication, though, that he was at the station
6 involuntarily. Certainly he came with his parents, but --

7 QUESTION: Well, the indication is that his
8 parents brought him That's all we know.

9 MS. CHUANG: Well, Your Honor, Mr. Alvarado --
10 it indicated in the record that Mr. Alvarado lived at home
11 with his parents and that he did not have a car.

12 QUESTION: He's a minor, isn't he?

13 MS. CHUANG: Yes, Your Honor.

14 QUESTION: He has to go where his parents tell
15 him to, doesn't he? Isn't that what being in the status
16 of -- of a minor means, that if your parents tell you stay
17 at home, you're grounded, you're grounded? Isn't that
18 essentially the disability of being a minor?

19 So I guess maybe the proper inquiry is whether
20 his parents thought that they could let him leave if they
21 wanted to. Either that's the proper inquiry or perhaps no
22 minor can be interrogated in -- in a police station
23 because it always requires the consent of the parents, and
24 when the parents tells him, you know, you go be
25 interrogated, he thinks he can't leave. It's a terrible

1 problem, isn't it?

2 MS. CHUANG: Well, Your Honor, I -- I believe
3 that custody by -- custody in the sense of a parental and
4 juvenile situation is not the same as custody as you are
5 under formal arrest or restrained in freedom of movement
6 to the same degree --

7 QUESTION: Well, then that's the whole point.
8 That's why I think Justice Souter asked that question,
9 saying, look, you're -- you're used to your parents
10 telling you what to do and maybe even sometimes you do it.
11 All right?

12 (Laughter.)

13 QUESTION: So the parents bring them down --
14 bring him down. He doesn't think he has any choice. He
15 then asks Ms. Comstock, I guess, who was the arresting
16 officer that brought him in there, can I take my parents
17 in this room. The parents say we want to go in the room
18 And the policewoman -- I think it was a woman, wasn't it?
19 I think she said no. And they, who desperately -- or
20 certainly want to get into the room, can't. So he's
21 sitting there and that, together with all the other things
22 that are going on -- and there are quite a few -- would
23 lead a reasonable person, who's used to being under the --
24 the rule of his parents, to think, my goodness, this
25 police woman controls the situation. Of course, I have to

1 do what she says, and of course, I can't leave until, as
2 she said, I've finished answering the question and she can
3 -- tells me I can leave. I'm in custody. Now, maybe an
4 adult wouldn't be thinking that. Maybe he would. But
5 that's a reasonable question.

6 But our standard here is, you know, not whether
7 they were right in the State but whether they were
8 reasonable. But a juvenile certainly would be thinking
9 that. That's -- that's I think what the point is.

10 Now, I'd like to hear sort of a full-blown
11 response to that.

12 MS. CHUANG: Yes, Your Honor. Well, first a --

13 QUESTION: Just as full-blown as the question.

14 QUESTION: I mean, not just yes or no.

15 (Laughter.)

16 MS. CHUANG: Yes, Your Honor.

17 A juvenile -- unless the Court is willing to say
18 that the parents in this case operated as agents of law
19 enforcement by bringing him into the sheriff's station and
20 that when the officer -- the detective had asked him if he
21 -- if the parents would give permission, that somehow that
22 really wasn't an option that the detective was giving, Mr.
23 Alvarado was not in custody.

24 QUESTION: What I -- what I can't understand --
25 and this was Justice Souter's question. Forget how these

1 factors play out one way or the other. Are these factors
2 -- the circumstance that the parents brought the juvenile
3 to the station; two, that the parents wanted to go in or
4 asked someone -- asked to go in and they couldn't -- are
5 those objective factors that the Court can consider in the
6 custody determination?

7 MS. CHUANG: No, Your Honor, because --

8 QUESTION: So -- so if -- if the defense counsel
9 bring this up, the judge rules that it's to be excluded.
10 It's irrelevant.

11 MS. CHUANG: Yes, Your Honor.

12 QUESTION: All right.

13 MS. CHUANG: Because as this Court alluded to in
14 Colorado v. Connolly what the Fifth Amendment is concerned
15 with is government coercion, and to the extent that the
16 parents brought Mr. Alvarado to the station, that is not
17 government coercion.

18 And as far as the parents not being allowed in
19 the interview room, there -- Mr. Alvarado actually did not
20 present any evidence that his parents were not permitted
21 into the interview room. And indeed, the interview room
22 door was open, as indicated at joint appendix page 150.

23 QUESTION: Well, would you just correct me on the
24 facts? I thought the -- the record indicated that the
25 parents had asked to go in, and as Justice Breyer pointed

1 out, that in fact the boy at one point said, you know, do
2 I have to go alone? Isn't anybody coming with me? Are --
3 are -- is there testimony to that effect in the record?

4 MS. CHUANG: No, Your Honor. There is no
5 testimony to that. Indeed, it was only argued by his
6 attorney, but his attorney relied upon the transcript of
7 the interview.

8 QUESTION: This was at the suppression hearing.

9 MS. CHUANG: Yes, Your Honor.

10 QUESTION: Okay.

11 MS. CHUANG: And --

12 QUESTION: Did -- did the State object to those
13 facts as being untrue and not in evidence?

14 MS. CHUANG: Well, the State didn't -- no, Your
15 Honor. The State did not, but the -- the State was
16 relying on the fact that it was the interview transcript
17 that Mr. Alvarado's counsel was using, and indeed, at the
18 trial when Mr. Alvarado testified, he never stated that he
19 asked for his parents to be in there, and he had testified
20 that he didn't feel coerced or --

21 QUESTION: May I --

22 QUESTION: Where -- where did this fact come
23 from? It's in the interview transcript?

24 MS. CHUANG: I'm sorry?

25 QUESTION: Where did this fact or factoid come

1 from that -- you know, that -- that his parents wanted to
2 go in but they were told they couldn't? Where did it come
3 from?

4 MS. CHUANG: His -- it came from his attorney's
5 argument during the suppression hearing.

6 QUESTION: It's not in any evidence.

7 MS. CHUANG: No, Your Honor. It's not in any
8 evidence. And to say that -- to require the State court
9 to extrapolate from this Court's voluntariness precedents
10 that predated Miranda to decide what types of individual
11 characteristics needed to be considered for a Miranda
12 custody, is not what section 2254(d) requires. Section
13 2254(d) --

14 QUESTION: May -- may I ask this one question?
15 I thought you conceded that if he were only 6 years old,
16 that would be relevant. And the question presented is
17 whether age is ever relevant. What -- what is your
18 position exactly? Is it it's okay to consider it if he's
19 6 but not if he's 17-and-a-half?

20 MS. CHUANG: No. Actually, Your Honor, it --
21 yet -- we -- my position is that a 6-year-old age would
22 still be irrelevant. It might be relevant for the
23 voluntariness as to overall coercion.

24 QUESTION: But not as to whether he thinks he's
25 free to leave.

1 MS. CHUANG: That's correct. The California
2 court of --

3 QUESTION: Do you know any other category where
4 age is ever and always irrelevant, any other category in
5 the law?

6 MS. CHUANG: Yes, Your Honor. In the Fourth
7 Amendment seizure area, this Court has held that it's a
8 reasonable person, and indeed in *Hodari D. v. California*,
9 this Court used the -- the reasonable person standard
10 without considering age. While this Court did mention age
11 in the *Kaupp* case, which was cited by *Mr. Alvarado*, it's
12 uncertain to what degree age actually was relevant for the
13 seizure question, whether a person felt free to leave.

14 A better reading of *Kaupp* is that it was -- the
15 Court may have mentioned the *Mr.* -- the age of the
16 defendant in that case for the voluntariness of
17 accompanying the officers to the station, as this Court
18 indicated with a citation of *Royer v. -- Royer* and also
19 *Schneckloth*. Both of those cases indicate that age does
20 go to the voluntariness of consenting to go with officers.

21 The California Court of Appeal in this case
22 identified the correct standard for making a custody
23 determination, and it engaged in a reasonable application
24 of existing custody precedent. The Ninth Circuit
25 recognized no Supreme Court case has required age and

1 experience to --

2 QUESTION: Thank -- thank you, Ms. Chuang.

3 MS. CHUANG: Thank you.

4 QUESTION: Mr. Elwood, we'll hear from you.

5 ORAL ARGUMENT OF JOHN P. ELWOOD

6 ON BEHALF OF THE UNITED STATES,

7 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

8 MR. ELWOOD: Mr. Chief Justice, and may it
9 please the Court:

10 The Ninth Circuit erred when it held that a
11 juvenile's age and experience must be considered in
12 determining whether or not he is in custody for purposes
13 of the Miranda test.

14 QUESTION: Do you agree that the fact that the
15 parents brought the person to the station and that they
16 were -- requested to be in the room it -- are -- are not
17 relevant to the custody determination?

18 MR. ELWOOD: I think that they can be considered
19 by the court in determining the -- the circumstances
20 surrounding the interrogation, just as in Oregon v.
21 Mathiason they considered the fact the -- the person came
22 to the station on his own power.

23 QUESTION: So that they are relevant to the
24 objective inquiry whether or not a reasonable person
25 thought he was under custody in these circumstances.

1 MR. ELWOOD: I think that they are facts that
2 can be considered by a -- under the reasonable person
3 standard to determine whether a reasonable person would
4 have felt that he was not free to leave or rather that he
5 was under formal arrest at that point.

6 QUESTION: So you disagree with the State on
7 that point.

8 MR. ELWOOD: I -- I think it's a -- it's a
9 slightly different viewpoint because I -- I don't think
10 that's what the Ninth Circuit was getting at. What the
11 Ninth Circuit was basically saying is that you don't
12 employ the reasonable person standard. You, rather,
13 employ a reasonable juvenile standard, and you view all
14 the circumstances differently.

15 I think, though, that you can consider the fact
16 that he -- particularly the alleged fact that he -- his
17 parents were excluded from the interview in determining
18 what a reasonable person would have felt from that.
19 Unfortunately, because it was simply argued by his
20 attorney at the suppression hearing and there were no
21 findings on it, we don't know exactly how that happened.
22 If --

23 QUESTION: But it is true there was testimony on
24 it, is it not?

25 MR. ELWOOD: I --

1 QUESTION: The -- the -- page 2 of the red brief
2 gives transcript cites for -- as Michael -- his parents
3 asked if they could come in and Detective Comstock refused
4 to do it.

5 MR. ELWOOD: I -- I -- I don't -- unfortunately,
6 I -- I left my transcript at my seat, but it may be that
7 the defendant testified at the trial itself that that is
8 what occurred.

9 QUESTION: J. A. 49 --

10 MR. ELWOOD: In any event, we don't have any
11 findings from the State court about what exactly
12 transpired. I think that if the --

13 QUESTION: But your view is different from your
14 colleague. She said there was nothing in the record. You
15 say there are just no findings on it.

16 MR. ELWOOD: That's correct, that there are no
17 findings on it and that we have the lawyer's assertion and
18 we may have -- I -- I don't recall -- the defendant's own
19 testimony at the -- the trial itself.

20 But in any event, our point with respect to the
21 exclusion is you have to look at what -- how a reasonable
22 person would view that, not necessarily a reasonable
23 juvenile, but a reasonable person. And if the --

24 QUESTION: But do you think the child whose
25 parents were denied permission to come into the room would

1 draw any inference about whether he could leave at --
2 anytime he wanted to?

3 MR. ELWOOD: Again, I think it depends on how it
4 was put because if they just say, no, you may not come in,
5 I think a reasonable person could conclude from that that
6 they're exercising control over the interrogation and that
7 they -- that might extend to whether or not he's free to
8 go. However, if it -- the officer says something more
9 along the lines of, no, we'd rather you not because he'll
10 -- he'll be able to be more candid if there's no one else
11 in there with you, I think that that would express a very
12 different --

13 QUESTION: Do you think it would make a
14 difference in that inquiry if the person being
15 interrogated was 35 years old, on the one hand, and 10
16 years old on the other hand?

17 MR. ELWOOD: I think that it doesn't make a
18 legal difference for Miranda purposes, and that's our
19 basic argument, is that Miranda doesn't -- didn't develop
20 a rule that provides protection tailored for the specific
21 circumstances of -- of the person who's under
22 interrogation. Rather, it's a uniform rule that provides
23 the same level of protection for all people, regardless of
24 whether they're very experienced or inexperienced. And I
25 think --

1 QUESTION: And you're telling me that the 35-
2 year-old example and the 10-year-old example should be
3 treated precisely the same.

4 MR. ELWOOD: I think that they should be treated
5 the same for purposes of the Miranda prophylactic rule.
6 They should not be treated differently for voluntariness.

7 QUESTION: For the purposes of determining
8 whether he thinks he's in custody.

9 MR. ELWOOD: Yes, that is correct. And I think
10 that traditionally what the Court has done is it has
11 viewed the circumstances that you look to, the totality of
12 the circumstances, as being external to the reasonable
13 person. I think that's the inference you get from
14 Thompson v. Keohane.

15 QUESTION: A person of borderline competency who
16 doesn't speak the language is -- we don't consider that
17 a --

18 MR. ELWOOD: You don't consider that for
19 purposes of the -- of the altering the reasonable person
20 view. You don't say a reasonable person of borderline
21 competency. You can, I think, consider it for different
22 purposes like in Justice Breyer's example of the blind
23 person. One of the very important things to figure out
24 before you apply the reasonable person standard and our
25 basic objection to the Ninth Circuit's rule is it altered

1 the reasonable person standard and said it's a reasonable
2 juvenile standard when you're determining --

3 QUESTION: All right. So your point is instead
4 of having a standard of a reasonable blind person, you
5 have a standard of a reasonable person and one -- in the
6 circumstances and one of the circumstances is that he's
7 blind.

8 MR. ELWOOD: But one of the reasonable under the
9 circumstances --

10 QUESTION: Is that the point?

11 MR. ELWOOD: It's not quite right, but it's
12 getting there.

13 QUESTION: No. And -- and then you say it so
14 it's right.

15 MR. ELWOOD: The point is that one -- one of the
16 important factors to determine when you're figuring out
17 what the totality of the circumstances is that you apply
18 the reasonable person test to is what police officers told
19 the person about his freedom to leave. And if you --

20 QUESTION: I understand all that. I'm trying to
21 get what your objection is to the standard. I'm not
22 talking about this case now. And is the right way to say
23 it that we don't apply a reasonable blind person test, we
24 apply a reasonable person test in the circumstances, and
25 one of the circumstances is that he's blind. Now, you

1 said, no, that isn't the right way. Then what is the
2 right way?

3 MR. ELWOOD: I -- I think that you can consider
4 -- I think we might be saying basically the same thing but
5 just slightly different --

6 QUESTION: I want you to say it --

7 MR. ELWOOD: I'm trying to get --

8 QUESTION: -- so that I understand what your
9 statement is.

10 MR. ELWOOD: Is that the -- is the -- is that
11 the person -- you can consider what the police officer
12 communicated to them, and when you're figuring out what
13 the police officer communicated to them, the police
14 officer doesn't get to, you know, pretend that a blind
15 person can see. They have to take into consideration that
16 when you hand them a written notice, they're not going to
17 see it, just as though -- just as if you whispered it to
18 them in a voice too low for them to hear. The basic point
19 is that you didn't communicate anything to them

20 And our objection to the Ninth Circuit's
21 standard is they're trying to make you view the entire
22 world through the viewpoint of a reasonable juvenile,
23 which means that we're not talking about whether or not
24 the person was unable to leave the room when they wanted
25 to because they couldn't reach the doorknob because they

1 were short. The point is that we're trying to infer
2 something about the way they view the entire world because
3 they're a juvenile. Because they're a juvenile, they're
4 more likely to be submissive to authority. Because
5 they're a juvenile, they're more likely to feel that --
6 that anything that the police officer says is a command.

7 And I think that it's very different to adopt a
8 whole different world view thing versus simply asking
9 police officers to take notice of things that are
10 objectively very plain or rather observable and very
11 plain, such as a blind person cannot see the warning that
12 you give him And I think that that is the basic
13 difference between what is permissible under the
14 reasonable person test, as it has always been applied, and
15 the Ninth Circuit's innovation of it.

16 Now --

17 QUESTION: On -- on your view of this case, is
18 it -- suppose we say, all right, reasonable person doesn't
19 mean 16. Could -- would a remand be appropriate to view
20 the totality of the circumstances and see if they add up
21 to in custody using the reasonable person standard?

22 MR. ELWOOD: Justice Ginsburg, I think that a
23 remand isn't necessary because I think that what the State
24 court of appeals did is approximately right, or at least
25 it's within the range of reason. So, no, I don't think

1 that you would need to do that.

2 Now, if I could get back to one -- one of the
3 questions that Justice Scalia asked, which was do we apply
4 the same standard for a 6-year-old. And although it may
5 seem kind of intuitively wrong, yes, we would apply the
6 same reasonable person standard that we would to anybody
7 else, with the point being that it's a very difficult
8 thing to require police officers not only to know that a
9 6-year-old is more vulnerable, but also to know exactly
10 where along the continuum of custody versus non-custody
11 that -- that puts them because they have to take
12 themselves out of their reasonable person mind-set that
13 they're used to applying and figure out how it applies
14 differently here.

15 And I think that it doesn't make a lot of sense
16 to develop this whole different kind of sideline to the
17 normal Miranda reasonable person test for 6-year-olds
18 because the very factors that would make them more likely
19 to view themselves to be in custody would also make them
20 less likely to be able to use these Miranda rules if they
21 were actually -- Miranda rights if they were given them
22 If -- if a -- if a 6-year-old is going to feel too
23 submissive to authority, it doesn't make a lot of sense to
24 apply a lower custody threshold if then he's not going to
25 be able to take advantage of it.

1 QUESTION: I really don't understand. If you
2 seem to agree that a 6-year-old would be more likely to
3 feel submissive to authority, is -- does it not follow
4 inexorably he, therefore, would reasonably feel he could
5 not leave when -- where an older person would?

6 MR. ELWOOD: Justice Stevens, our point is that
7 basically we don't require police officers to figure out
8 the mind-set of 16, 17 --

9 QUESTION: I wish you would tell me yes or no on
10 my question.

11 MR. ELWOOD: I -- I think the -- well, I've
12 already forgotten what it is.

13 (Laughter.)

14 MR. ELWOOD: But I think the point is --

15 QUESTION: Let me -- let me restate it. You --
16 you say that you -- the 6-year-old would feel more
17 submissive to -- to an officer. Does it not, therefore,
18 follow that he would be less likely to think he was free
19 to leave than an older person would?

20 MR. ELWOOD: I think if -- in generalities, yes,
21 that's true, but I also --

22 QUESTION: But then isn't age relevant?

23 MR. ELWOOD: No, it's not relevant because I
24 think Miranda -- we -- because it's a prophylactic rule,
25 it's a supplemental protection in addition to the --

1 QUESTION: No.

2 MR. ELWOOD: -- voluntariness test.

3 QUESTION: Just relevant to the question whether

4 he's in custody. That's the only thing we're asking

5 about, not the Miranda warning.

6 MR. ELWOOD: Right. And our point is that --

7 QUESTION: And if it -- if it makes a difference

8 of his age, why doesn't that make it relevant?

9 MR. ELWOOD: Because what we're talking about

10 here is not just 6-year-olds. We have to have a rule that

11 is workable for police officers with respect to 17-year-

12 olds and people who are 17 years and 7 months and 18 years

13 and 1 month. And when you -- when you can say with some

14 certainty that a 6-year-old is going to be feeling more

15 vulnerable, but you can't say with a lot of certainty that

16 an average 16-year-old is going to be feeling more

17 vulnerable than an average 18-year-old, and if so, by how

18 much. So that, for example, they know that when they

19 say --

20 QUESTION: But it's relevant by even a tiny,

21 tiny bit if you've got a totality of the circumstances

22 test. To say it isn't very much -- I don't see the

23 difference between a 6-year-old, the 16-year-old, and the

24 18-year-old in your presentation.

25 MR. ELWOOD: Justice -- Justice Stevens, our

1 point is that it's not relevant because the law says it's
2 not relevant, that the police officer -- all they're
3 accountable for is the way a reasonable person would view
4 the circumstances, and they shouldn't be required to
5 figure out -- get inside the head of a reasonable 16-
6 year-old, a reasonable 15-year-old. They just have to
7 apply one reasonable person standard to the circumstances
8 that are before them

9 QUESTION: Thank you, Mr. Elwood.

10 MS. Allen, we'll hear from you.

11 ORAL ARGUMENT OF TARA K. ALLEN

12 ON BEHALF OF THE RESPONDENT

13 MS. ALLEN: Mr. Chief Justice, and may it please
14 the Court:

15 I would first like to start by clearing up some
16 things about the record that the Court was asking about
17 earlier. As far as the parents' being refused permission
18 to attend the interview, that was a finding of fact made
19 in the Federal district court. It is contained in the
20 magistrate's report and recommendations in this case, and
21 it can be found at joint appendix 49 and also the
22 petitioner's brief, appendix B3.

23 QUESTION: Was that based on testimony presented
24 in the district court?

25 MS. ALLEN: There was no evidentiary hearing in

1 the district court.

2 As far as --

3 QUESTION: Then how -- how did the district
4 court know to make a finding?

5 MS. ALLEN: I believe they based it on the
6 petition for habeas. This contention --

7 QUESTION: Well --

8 MS. ALLEN: I'm sorry, Your Honor.

9 QUESTION: A written petition? And what -- what
10 was the basis for the district court's finding or the
11 magistrate's finding? There was no testimony?

12 MS. ALLEN: No, there was no evidentiary hearing
13 in the Federal court.

14 QUESTION: Then --

15 MS. ALLEN: And there was no testimony in the
16 State court either.

17 QUESTION: Then what is the basis for the
18 finding?

19 MS. ALLEN: At the motion to suppress in the
20 trial court, in the State court, the argument was, in both
21 the written motion to suppress and the oral argument in
22 front of the court, that the parents were refused
23 permission to attend the interview. The State never
24 objected to that. They never contested it. It was in the
25 briefs on direct appeal and it wasn't contested there.

1 The -- the first time it's been contested is now.

2 QUESTION: So -- so you're saying it was the
3 subject of evidence at one point, but in a different
4 proceeding, and -- and when the record of the different
5 proceeding was used here, no one objected to it.

6 MS. ALLEN: No one objected to it. And the
7 State has a right to object --

8 QUESTION: You're saying it was -- it was the
9 subject of allegation, not of evidence.

10 MS. ALLEN: Yes, certainly. And when a
11 magistrate files a report and recommendation, either party
12 can object to any facts that are not correct, and they
13 didn't do that in this case.

14 QUESTION: Okay.

15 MS. ALLEN: Secondly --

16 QUESTION: What's RT? It refers to RT 910 as
17 the cite.

18 MS. ALLEN: That was the reporter's transcript
19 from the motion to suppress at trial -- pretrial.

20 Secondly, there was some contention about
21 whether Detective Comstock was armed. That is also found
22 in the joint appendix, page 65, note 29, and it was in the
23 petition for writ of habeas corpus in the district court
24 as well, citing the -- Alvarado's interview, which is in
25 the joint appendix.

1 There was some contention about whether Mr.
2 Alvarado, Michael, was referred to as a suspect. That can
3 be found in the joint appendix, page 189. That was
4 argument of trial counsel during the motion to suppress.
5 It was not disputed at that point. It hasn't been
6 disputed until now. But I would assert that in addition
7 to that, even if he had not heard another officer refer to
8 him as a suspect, it was obvious by Detective Comstock's
9 word and deed to him during the interrogation that he --
10 he indeed was a suspect.

11 And the last contention is my --

12 QUESTION: Well, and your -- your argument is
13 that you think the fact that he thought he was a suspect
14 would make him less likely to feel he was free to leave?

15 MS. ALLEN: Yes. And this Court in California
16 v. Stansbury found that anytime that it's communicated to
17 a suspect by word or deed that he is a suspect, that that
18 goes into the totality of the circumstances of whether
19 that person would reasonably feel free to leave.

20 Secondly, I would like -- well, one more thing
21 on the facts. The fact that Michael said, can't somebody
22 come in here with me, is found at the joint appendix, page
23 185. That's also trial counsel's argument at the motion
24 to suppress that was not disputed until now.

25 But next I would like to -- to move to this idea

1 of this being a new context. Miranda is the son of
2 voluntariness and coercion. This Court found in 1948 in
3 Haley v. Ohio that juveniles in general are more
4 susceptible to police coercion than adults.

5 QUESTION: That -- that was not a Court opinion,
6 was it?

7 MS. ALLEN: I don't know, Mr. Chief Justice.

8 QUESTION: You're citing it and you don't know?

9 MS. ALLEN: Is it a plurality?

10 QUESTION: It was a plurality opinion.

11 MS. ALLEN: Plurality of this Court, yes, Your
12 Honor.

13 In that case, it recognized that juvenile status
14 be taken into consideration when determining the proper
15 procedural safeguards.

16 In Miranda in 1966, this Court found that those
17 procedural safeguards would be the Miranda warnings.

18 And then in In re Gault in 1965, the Court found
19 that the greatest care must be taken to assure a minor's
20 confession was voluntary not only in the sense that it was
21 coerced, but also that it's not a product of ignorance of
22 rights.

23 It follows --

24 QUESTION: What -- what good does -- does a
25 Miranda -- I mean, you know -- warning -- what -- what

1 good does it do if you -- if you recite it to a 6-year-
2 old? I mean, isn't it -- isn't it really a -- a warning
3 that is designed for a reasonable person, meaning a
4 reasonable adult? And so that the situation is as -- as
5 has been portrayed. It's just an objective thing that --
6 that the police are supposed to do.

7 MS. ALLEN: If you were to recite a Miranda
8 warning to a 6-year-old, in the waiver determination they
9 would decide whether that 6-year-old understood the waiver
10 of his rights, and the evidence would come in there as
11 well.

12 QUESTION: Oh, so -- so that even the giving of
13 a Miranda warning would not suffice.

14 MS. ALLEN: The giving of a Miranda warning
15 doesn't suffice. It severely cuts down the cases in which
16 you can contest coercion.

17 QUESTION: Well, coercion of what? I'm not
18 talking about coercion, whether the statement is -- is
19 coerced. They are not contesting that -- that you cannot
20 get in the age of the -- of the individual when it comes
21 to deciding whether the confession was voluntary or not.
22 They -- they agree that you can for that.

23 But just for the question of whether the person
24 was in custody and therefore has to be given a Miranda
25 warning. It seems to me strange to say that you take into

1 account for that purpose the age of the individual even
2 though you don't take it into account for the purpose of
3 whether he can understand -- can get any benefit out of
4 the Miranda warning at all. You recite a -- a Miranda
5 warning to a 6-year-old. It's not going to mean anything
6 to him

7 MS. ALLEN: However, if you cite a Miranda
8 warning to a 17-year-old, it may.

9 QUESTION: Well, counsel, the -- the person to
10 whom the warning is given must be found to have waived the
11 rights so warned and to have understood that a waiver was
12 being made. Isn't that true?

13 MS. ALLEN: That's correct.

14 QUESTION: So I -- I think that's the answer,
15 isn't it?

16 MS. ALLEN: That's correct, Your Honor.

17 QUESTION: So -- so that means you cannot
18 interrogate a 6-year-old, neither in custody nor out of
19 custody. Right? 6-year-olds just skip away. That can't
20 be right.

21 MS. ALLEN: Usually --

22 (Laughter.)

23 QUESTION: Isn't the question whether we're
24 going to --

25 MS. ALLEN: I -- I --

1 QUESTION: Isn't the question whether we're
2 going to treat them and prosecute them as adults?

3 MS. ALLEN: That's -- that's right.

4 QUESTION: And we don't -- we don't do that with
5 6-year-olds.

6 MS. ALLEN: And in most circumstances you're not
7 prosecuting 6-year-olds. You're -- you're prosecuting
8 teenagers.

9 QUESTION: What is the evidence or the
10 indication here that the State did not take account of the
11 fact that he was a juvenile, but having taken account of
12 it in the State proceedings, they just reached the
13 conclusion that it didn't in this case matter that much?
14 Now, why do we think that that isn't what happened?

15 MS. ALLEN: When you read the California State
16 opinion in this case, they don't mention Michael's age.
17 They don't mention anything about the fact that he was a
18 juvenile or how a reasonable juvenile would have assessed
19 the situation.

20 QUESTION: I can understand why they might not
21 -- they would mention things that did matter, but if they
22 thought it hadn't mattered here, why would we have
23 expected them to mention it?

24 MS. ALLEN: Is your question if they thought it
25 didn't matter?

1 QUESTION: Well, I mean, is our only indication
2 that they didn't take it into account the fact that they
3 didn't mention it? Because maybe they didn't mention it
4 because they thought it's only 6 months. It doesn't
5 matter that much. That would be a reason for not
6 mentioning it. Or maybe they didn't mention it because
7 the lawyers then didn't make that much of an issue of it.
8 I mean, there are a lot of reasons why, when I write an
9 opinion, I don't mention things. Usually it's because I
10 don't think it matters.

11 MS. ALLEN: Well, the objectively unreasonable
12 thing about what the California court did in this case was
13 they recited the correct test for custody, yet they
14 completely failed to imply it. When they were looking at
15 the totality of the circumstances, they spent their entire
16 time distinguishing a State case from this case and
17 finding that --

18 QUESTION: To -- to what extent do we require a
19 State court, when we're talking about the AEDPA rules, to
20 be absolutely accurate in following, say, precedent of
21 this Court? I mean, I -- I thought the rule was that it
22 was up to the other -- the other side to point out how
23 they had departed from it.

24 MS. ALLEN: As this Court has found, a totality
25 means a totality.

1 QUESTION: Well, then you say that in any --
2 every single Miranda case, a court must take into account
3 in its opinion every single circumstance that is mentioned
4 in the record?

5 MS. ALLEN: No, Your Honor.

6 QUESTION: Well, then what -- why do you say
7 totality?

8 MS. ALLEN: Most certainly they should discuss
9 the factors that make a difference, and in this case they
10 didn't. They didn't discuss any of the factors that made
11 a difference.

12 QUESTION: Well, why should they have said that
13 the age of a 17-and-a-half-year-old made a difference?

14 MS. ALLEN: It's more than the age in this case.
15 Not only is it a reasonable juvenile standard, but also
16 it's the enlisting of the parental authority to bring him
17 to the station, the refusing of permission for the parents
18 to attend the interview in front of him

19 QUESTION: Well, that's mentioned in the court's
20 opinion, that they brought him to the station house.

21 MS. ALLEN: When they're talking about the
22 facts, they take the facts from Detective Comstock's
23 interview where she says, I called the parents and had
24 them come down. She doesn't say anything about refusing
25 them permission.

1 QUESTION: That both Mr. and Mrs. Alvarado came
2 to the sheriff's station with their son.

3 MS. ALLEN: Yes.

4 QUESTION: Well, so then they did talk about
5 some of these circumstances. It's not correct to say they
6 mentioned none of them

7 MS. ALLEN: They --

8 QUESTION: It's right in the opinion.

9 MS. ALLEN: They didn't mention that they were
10 refused permission, and they didn't mention that Michael
11 was 17. I guess you can infer from the fact that she
12 called the parents that he was under the age of majority.

13 QUESTION: Well, maybe they didn't mention that
14 because it's not in the record. I -- I -- maybe they were
15 being a little more precise about what -- what should be
16 in their opinion than -- than we have been here today. I
17 mean --

18 MS. ALLEN: Well, part of the record were the --
19 the trial transcripts which included the motion to
20 suppress hearing, and -- and the briefs cited to that and
21 the motion itself. So it was in the record.

22 QUESTION: I -- I didn't -- well, I -- I'm not
23 sure that you're required -- or it's even proper to take
24 into account allegations that are made in -- in a motion
25 to suppress when there's been no evidentiary hearing on

1 them I don't --

2 MS. ALLEN: Well, where they're not disputed by
3 the prosecution and -- and the judge finds no contrary
4 finding and they're argued in all the briefs without the
5 respondent saying that that's not correct, it seems
6 reasonable that the court of appeal would -- would take
7 that as fact.

8 QUESTION: Why should it matter in the -- in the
9 -- why would a court say, oh, yes, I know that age could
10 be -- could be relevant, but this was a 17 and more --
11 more than 17-and-a-half-year-old, closer to 18 than 17? I
12 think in this case age was irrelevant. I mean, it seems
13 to me you have a rather bad case on the facts to press the
14 difference in age of somebody who's almost 18.

15 MS. ALLEN: I think even if Michael had been 18
16 and the court had no duty to apply a reasonable juvenile
17 standard, there are plenty of facts that point toward
18 custody in this case not only the parental involvement,
19 but the very fact that this interrogation took place in an
20 interrogation room at a police station.

21 QUESTION: That's the question I asked Mr.
22 Elwood and he -- his answer was a remand wouldn't be
23 appropriate because what the State court held was a -- was
24 reasonable.

25 MS. ALLEN: What the State court held was

1 objectively unreasonable because they -- they failed to
2 apply the clearly established Federal law from this Court,
3 which is Thompson v. Keohane. The recited it, but
4 completely failed to apply it in any meaningful way.

5 QUESTION: In -- in what respect?

6 MS. ALLEN: In the respect that that case says
7 you need to look at all of the circumstances surrounding
8 an interrogation, and once you add up those circumstances,
9 you decide whether a reasonable person would have felt
10 free to leave. That's a cumulative totality of the
11 circumstances test.

12 The California court did not look at the factors
13 together cumulatively. They took two factors to
14 distinguish this case, neither of which was proper: one,
15 that the police did not tell him affirmatively that he
16 could not leave until he told the truth, which would be a
17 finding of custody straight off. You would never even get
18 to the totality test. And two, that the tactics weren't
19 intense and aggressive enough to prove coercion.

20 And as this case said in Kaupp, interestingly,
21 just as you can't require the perversity of resisting
22 arrest to prove coercion, here you can't require the
23 perversity of -- of this being coercive to prove custody.
24 You can't use a -- say that the -- the police had to have
25 enlisted intense and aggressive tactics in order for this

1 to be custody. That's not even part of the custody
2 determination. There are things like location. Here it
3 was at a police station. Who initiated the contact. Here
4 it was initiated by the detective. Whether the defendant
5 voluntarily came. Here he was brought by his parents at
6 the behest of the detective. Whether he was informed that
7 he was not under arrest. Not only was he not informed of
8 that, he wasn't given anything to sign to say the
9 interview was voluntarily -- voluntary. The length of the
10 interview. He was interrogated for over 2 hours. The
11 familiarity of the surroundings. And this is where his
12 inexperience may go into a -- a circumstances test. He
13 had never been in a police station or an interrogation
14 room. And whether it was communicated to him that he was
15 a suspect, which it was certainly by Comstock --

16 QUESTION: You're -- you're not meeting their
17 argument, though. Their argument is it doesn't matter
18 that although voluntariness of the confession later on is
19 indeed a subjective inquiry, was it really voluntary on
20 the part of this person, custody or not, is not a
21 subjective inquiry. It is purely objective. Was this
22 person in custody or not in custody? And their argument
23 is that determination is to be made from the standpoint of
24 what a reasonable adult would -- would deduce from the
25 situation. It is objective. It has nothing to do with

1 the subjective feelings of the particular individual,
2 whether because he's too young or because he's -- he's
3 mentally not -- not competent or anything else. It is an
4 objective determination. Did the police have this person
5 in custody?

6 MS. ALLEN: That's correct, Your Honor.

7 QUESTION: Now, what is -- what is your response
8 to that?

9 MS. ALLEN: It is an objective determination,
10 and nobody is arguing that it should be subjective. The
11 petitioner is the one who has created this facade that
12 we're trying to turn an objective test into a subjective
13 test. We're not. The Ninth Circuit is not trying to do
14 that. No one is asking whether Michael Alvarado felt free
15 to leave. We're asking whether a reasonable person in his
16 position would have felt free to leave because of such
17 factors as his age and the parental involvement.

18 QUESTION: Well, every subjective inquiry uses
19 objective factors. I mean, you're -- you're not making it
20 non-subjective simply because you say whether it's a --
21 you know, an objective 17-and-a-half-year-old who had been
22 abused by his parents and who was, you know, off from
23 Sunday school or whatever and put in every factor in his
24 life and say, well, of course, you know. That -- that's
25 subjective. That's not an objective test at that point

1 when you're using all sorts of factors that -- that go to
2 what his thinking was. When -- when you use all of that,
3 you're using the subjective test.

4 MS. ALLEN: There's a fine line here. Because
5 the custody test asks how a reasonable person in the
6 suspect's position would have felt free to leave, it's
7 saying how would a reasonable person have felt, how they
8 would have felt free to leave. And that sounds
9 subjective, but you're using objective factors. And the
10 fact of juvenile status -- it's not subjective. It's not
11 a state of mind. It's a status. It's a class that this
12 Court has recognized from the beginning.

13 QUESTION: Yes, but not in this particular
14 context.

15 MS. ALLEN: In the context of custodial
16 interrogations and the Fifth Amendment and Fourteenth
17 Amendment. These are two sides of the same coin. Miranda
18 is concerned with exactly the context that this Court has
19 recognized.

20 QUESTION: But up -- up to now, it's been
21 concerned with respect to the custody inquiry to the
22 external circumstances of -- of the person. You know, how
23 would a reasonable person have reacted to these
24 circumstances? Now, you're -- you're saying we don't any
25 longer limit it to that. We look inside the person and

1 try to figure out on his background how we would react,
2 and that of course, is -- Justice Scalia says I think --
3 is -- is not a -- an objective standard.

4 MS. ALLEN: Mr. Chief Justice, I -- I
5 respectfully disagree. We're not asking what was in the
6 mind of the person. We're simply saying that this Court
7 and other courts in the land and the police need to
8 recognize what is obvious, that juveniles do not assess
9 their freedom to leave the same way as adults do.

10 QUESTION: Well, but you say juveniles, and
11 you're saying the 17-and-a-half-year-old will not assess
12 his freedom to leave in the same way an 18-year-old. That
13 just doesn't make any sense at all.

14 MS. ALLEN: This Court in its juvenile
15 jurisprudence has drawn lines with juveniles versus
16 adults. When things are close to the line, it's going to
17 be fuzzy, but to say what the petitioner is arguing, that
18 it never matters, that a 12-year-old would assess their
19 freedom to leave the same as a 35-year-old, it can't be
20 true.

21 QUESTION: Well, it certainly matters for
22 determining voluntariness of any statement. Was that ever
23 challenged at trial?

24 MS. ALLEN: No, it wasn't. The --

25 QUESTION: That's kind of odd, isn't it?

1 MS. ALLEN: It is. The main contentions at
2 trial were, one, that the Miranda wasn't read and he was
3 in custody, and two, that when he said, can't somebody be
4 in here with me, that that as a request for counsel.

5 QUESTION: But never an assertion that the
6 statements were involuntary.

7 MS. ALLEN: No, no.

8 QUESTION: And all of these things would be
9 relevant in the voluntariness inquiry, would they not?

10 MS. ALLEN: Yes, sure.

11 QUESTION: If juvenility must be taken into
12 account for the custody determination, how -- how is it
13 that it is not taken into account for the purpose of what
14 the nature of the warning has to be, assuming custody? I
15 mean, we have one Miranda warning that presumably I have
16 always thought is given to everybody from the 6-year-old
17 to the senior citizen.

18 MS. ALLEN: And --

19 QUESTION: Now, if -- if, indeed as you say,
20 relevant to this whole thing is -- is the age of the
21 person, we ought to have different Miranda warnings, an 8-
22 year-old Miranda warning, a 17-and-a-half-year-old Miranda
23 warning, and so forth.

24 MS. ALLEN: I have two things to say about that,
25 Justice Scalia. One is many States do employ a different

1 Miranda warning for juveniles in their statutes.
2 Secondly, this Court in Miranda, when putting down the
3 warning, I assume it applies to both juveniles and adults,
4 and ignoring the -- the juvenile status is basically
5 making it an adult standard. If you're applying an adult
6 standard to juveniles instead of providing for the
7 greatest care, you would actually be giving them less
8 protection to which they're entitled under the clearly
9 established Federal law.

10 QUESTION: And is it also not true that in many,
11 many cases, voluntariness may remain an issue, for
12 example, as in Oregon against Elstad. If there's a
13 preliminary question followed by Miranda warnings, you
14 first have to look at the voluntariness of the first
15 interrogation. So we haven't abandoned voluntariness as a
16 relevant issue in these cases.

17 MS. ALLEN: No, not at all, Your Honor.

18 QUESTION: Does that help your case or hurt your
19 case? I -- I -- I would think -- I thought that was the
20 argument of the other side, that you -- you can raise all
21 of this on the voluntariness point. You don't have to get
22 it in on the -- on the quite objective factor of whether
23 there is custody or not.

24 QUESTION: Sure you can, but voluntariness is
25 retrospective, and Miranda is prospective. So if you're

1 trying to protect people's rights from the beginning, it
2 should be taken into account at the beginning instead of
3 waiting until the end when it's too late essentially.
4 It's very hard to meet a voluntariness test when this
5 could be taken care of on the front end by police giving
6 people their 15-second Miranda warnings, particularly
7 juveniles who they know are going to assess their freedom
8 to leave differently than adults.

9 So unless the Court has any other questions.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Allen.

11 The case is submitted.

12 (Whereupon, at 11:45 a.m., the case in the
13 above-entitled matter was submitted.)

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