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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 10-680, Howes v. Fields.

5 Mr. Bursch.

6 ORAL ARGUMENT OF JOHN J. BURSCH

7 ON BEHALF OF THE PETITIONER

8 MR. BURSCH: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 This case raises two issues: The first is
11 whether the right against self-incrimination requires
12 that a prisoner always be Mirandized before being
13 interviewed in isolation about conduct that occurred
14 outside the prison. The second is an AEDPA question,
15 whether this Court in Mathis clearly established such a
16 per se rule. For three reasons, the answer to both
17 questions is no.

18 First, for nearly 50 years this Court has
19 declined to adopt any new per se rule that always
20 requires a Miranda warning, instead considering all the
21 circumstances. Lower court --

22 JUSTICE SOTOMAYOR: Don't you think being in
23 custody itself is a circumstance?

24 MR. BURSCH: Sure, it's a circumstance that
25 goes into the all-the-circumstances mix, but --

1 JUSTICE SOTOMAYOR: What's all this
2 "all-circumstances missed"? I thought that our case law
3 was fairly clear that all circumstances is a test for
4 voluntariness. I thought the issue has always been
5 under Miranda: Is the person free to go or not?

6 MR. BURSCH: That's correct. We agree that
7 the test --

8 JUSTICE SOTOMAYOR: So, since when have we
9 imported of the language of voluntariness into the
10 Miranda test? And should we be creating yet another
11 test?

12 MR. BURSCH: Justice Sotomayor, there are
13 two separate tests. And I go back just to last term in
14 the J.D.B. case.

15 JUSTICE SOTOMAYOR: So, go to the test of
16 freedom to leave.

17 MR. BURSCH: Yes. If --

18 JUSTICE SOTOMAYOR: You're taken from your
19 cell and locked into a room -- and let's change the
20 facts --

21 MR. BURSCH: Yes.

22 JUSTICE SOTOMAYOR: -- and locked in a room
23 and said: Talk to me; tell me. You have to tell me
24 what happened.

25 Is that person free to go.

1 MR. BURSCH: It would be much more
2 difficult, but the test would be whether a reasonable
3 person in the prisoner's position felt that they were
4 free to go back to their cell in accord with reasonable,
5 ordinary prison procedures. And that would be the test
6 that's consistent with J.D.B. and, I submit, with every
7 Miranda case that this Court has issued in the last 50
8 years.

9 JUSTICE SOTOMAYOR: All right. So, what
10 makes this case different? He's taken from a -- except
11 being told that he could leave. If he had been taken
12 from his cell, removed from the prison, his normal
13 setting, taken by armed guards to another building and,
14 with guards at the door, sat down and told talk to us
15 about this incident, why would he think he was free to
16 leave? There is one fact I'm taking out of it.

17 MR. BURSCH: Well, there --

18 JUSTICE SOTOMAYOR: Which is that he was
19 told he was free to go.

20 MR. BURSCH: Right. There are a number of
21 circumstances that kind of culminate in what I consider
22 to be the two most important. Some of the background
23 circumstances: He was in a room that was not locked.
24 It was a conference room, not an interrogation room with
25 a bright light. He was not shackled. He was not

1 threatened. He was not physically harmed in any way.
2 The two big ones are, one, that when he started to
3 become belligerent, the guards told him that if you
4 don't want to cooperate, then you'll have to go back to
5 your cell; you'll have to leave. And that's the exact
6 opposite of Miranda custody, where --

7 JUSTICE SOTOMAYOR: There -- as I see the
8 record, he claims twice he said, I don't want to talk to
9 you. And when he asked to leave at the end, it took
10 20 minutes, and they continued the questioning. Doesn't
11 that counter the rest of what you're saying?

12 MR. BURSCH: They are two factors that go
13 into the mix, and I'll discuss each one in turn. When
14 he says, I don't want to talk anymore, then he went on
15 and kept talking. And you have to consider, well, why
16 did he keep talking? Well, the record shows, I think a
17 fair reading of it anyway, that he was trying to explain
18 to the officers this timeline that he kept talking
19 about.

20 At the end, when it was a 20-minute delay,
21 there is no contention that that was anyhow inconsistent
22 with reasonable prison procedures. And the fact that it
23 could have been 20 minutes, it could have been 30
24 seconds, it could have been an hour, depending on
25 procedures, demonstrates why a per se rule doesn't make

1 sense. We should look at all the circumstances.

2 JUSTICE GINSBURG: Why is a per se rule
3 necessarily what is being argued here? For one thing,
4 he had no choice but to go with the police, right?

5 MR. BURSCH: That's correct.

6 JUSTICE GINSBURG: So, it's different from
7 some cases where the prisoner initiates the
8 conversation.

9 MR. BURSCH: That is a little bit different,
10 but the key facts here are, one, at the beginning, the
11 questioning officers say, you're free to stop this and
12 go back to your cell. Then in the middle, he gets
13 belligerent, and they say, if you don't want to
14 cooperate, you have to leave; you have to go back to
15 your cell. Which is, I submit, the opposite of Miranda
16 custody.

17 And then when he finally invokes his right
18 to go back to his cell, it's immediately honored with,
19 of course, the 20-minute delay due to prison procedures.
20 And so, from beginning to end, a reasonable person in
21 his position could have believed they were free to
22 return. And that's all that Miranda requires.

23 In fact, we have a trial court finding on
24 that, on three of them: One, that he was told he was
25 free to go; second, that he understood he was free to

1 go; and, third, that he was free to go. And that's all
2 I --

3 JUSTICE GINSBURG: And it doesn't make any
4 difference that they -- they took him from his cell, he
5 was under compulsion to leave with them and interrogated
6 during the hours when prisoners are ordinarily sleeping?

7 MR. BURSCH: Again, I would submit those are
8 all circumstances that should go into this
9 all-the-circumstances consideration. You know, there
10 were also other things that militated in favor of the
11 trial court findings, such as the explicit instruction
12 that he was free to leave; that he would have to go back
13 if he didn't cooperate; that they did honor his request
14 to leave, once made. So, these are all the things that
15 the court should look at.

16 And you can imagine a number of other
17 situations, maybe with facts different than these, where
18 a per se rule would be wholly inappropriate. You know,
19 what if they had invited him to come down and he had the
20 choice at the beginning? What if someone was stationed
21 outside the door and took him immediately as soon as he
22 said, I'm ready to go back? It just demonstrates that
23 this isn't the place for a per se rule; that we should
24 just follow the same Miranda test that has been applied
25 for 50 years, and that's all the circumstances.

1 JUSTICE KAGAN: General, when you say that,
2 I took sometimes your brief and the U.S. Government's
3 brief to be saying something more, which is that it's
4 not all the circumstances; it's all the circumstances
5 minus circumstances that are attendant upon normal
6 prison living.

7 So, are you still arguing that, or are you
8 really arguing an all-the-circumstances test?

9 MR. BURSCH: We're not taking quite that
10 strong a position. We're arguing all the circumstances.
11 And the analogy that I would draw is just like in the
12 J.D.B. case last term, that you would consider not only
13 the age of the suspect, but also the school environment.
14 So, I'm not saying the prison environment is taken out
15 of the equation; just that it's not dispositive in and
16 of itself, just like this Court held in Shatzer.

17 JUSTICE KAGAN: So, a court can still
18 think -- when it's doing an all-the-circumstances
19 inquiry, it can still factor in something like, you
20 know, it just -- it was going to take him an hour to get
21 back to his cell. That's still something that the court
22 can consider along with everything else. Is that right?

23 MR. BURSCH: Not only can, but should.
24 Absolutely.

25 And, you know, one of the benefits of having

1 a per se -- I'm sorry -- of having an
2 all-the-circumstances rule, rather than a per se rule,
3 is that it encourages truthful, voluntary confessions.
4 And this Court has repeatedly recognized that such
5 confessions are an unmitigated social good. That's
6 something that we want. And you can imagine, again,
7 that there are a variety of non-prison contexts where it
8 would certainly be easier to have a per se rule. You
9 could have done that in J.D.B.

10 You know, it's so coercive to take an
11 8-year-old child to the principal's office with an
12 officer and question him, that per se there's always
13 going to be some child version of the Miranda rule. But
14 we don't do that. Or if you had someone in the hospital
15 and they were in such a position that they were
16 physically unable to leave. We don't have a hospital
17 Miranda rule. There shouldn't be one in prisons,
18 either. We should just take all the circumstances into
19 account.

20 And I think really the lesson of Shatzer is
21 that we start, Justice Kagan, right where you did, that
22 just simply being in prison, being interrogated -- I'm
23 sorry -- being in jail alone is not enough. But it's
24 going to become one factor that we consider in this
25 larger test.

1 CHIEF JUSTICE ROBERTS: Well, which way do
2 you think that factor cuts?

3 MR. BURSCH: In this particular situation?

4 CHIEF JUSTICE ROBERTS: Yes.

5 MR. BURSCH: I think it cuts in our favor,
6 as the trial court found, and the courts should defer to
7 that for all the reasons I just stated: That he was not
8 threatened, not physically harmed; he was in a
9 conference room; door wasn't locked. Of course, the big
10 two: That when he got belligerent they told him, if you
11 don't want to cooperate, you have to leave. The exact
12 opposite of Miranda custody when you say, if you don't
13 cooperate, you will not be permitted to leave. And also
14 that when he made the request to go, it was honored
15 within the amount of time that they would have expected
16 per prison policy. So --

17 JUSTICE KENNEDY: Except when they say you
18 have to leave, one way to interpret that or to analyze
19 that might be to say: You're in custody no matter.

20 MR. BURSCH: Justice Kennedy, I don't think
21 that's the case because --

22 JUSTICE KENNEDY: And when you say you have
23 to leave, that's almost coercion -- coercive of them to
24 say, because he doesn't want to have to go back to the
25 cell.

1 MR. BURSCH: I don't think that's the case
2 because, under Shatzer, there's nothing Miranda
3 custodial about simply being in his cell.

4 JUSTICE KENNEDY: Right.

5 MR. BURSCH: And if he wants to stay away
6 from his cell, as it appears to here because he was
7 trying to explain himself, you know, that's one of those
8 factors that militates against a finding of --

9 JUSTICE KENNEDY: But I think it makes your
10 case weaker, not stronger, that statement.

11 MR. BURSCH: I think it makes it stronger,
12 because in the typical Miranda case you would say to
13 someone, if you don't cooperate, we are going to keep
14 you here as long as it takes. And here they were saying
15 just the opposite. And the message they sent was
16 consistent with the instructions they gave him at the
17 beginning -- if you tell us that you want to leave,
18 we'll honor that request -- and consistent with what
19 actually happened at the end. He said, I want to go
20 back, and they honored that request.

21 And I think one of the other factors that
22 you put in the mix here is that we were dealing with
23 outside officers, not inside prison officers. These
24 outside officers did not have the ability to impact his
25 day-to-day prison life the way someone inside the prison

1 would.

2 Now, one other point I want to make about in
3 and out of prison is this artificial line that the Sixth
4 Circuit drew to cabin its per se rule. They said that
5 if the conduct takes place outside the prison, per se
6 you get Miranda; if the conduct that they're questioning
7 talking about was inside the prison walls, we're not
8 going to do that. And the Sixth Circuit was forced to
9 make that policy decision because, otherwise, prison
10 administration becomes very difficult.

11 But under this Court's precedent and under
12 the Fifth Amendment itself, there is nothing that would
13 suggest that there should be a distinction in the
14 Miranda analysis as to the locus of the conduct that is
15 being questioned about.

16 And it's possible to have a very serious
17 in-prison crime, a murder of another inmate, and a very
18 nominal outside crime, petty theft, and, yet, the Sixth
19 Circuit would give pure Miranda protection to that petty
20 theft questioning and no protection at all to the person
21 who murdered someone inside the prison walls. And that
22 just demonstrates where the Sixth Circuit rule starts to
23 fall apart.

24 JUSTICE SOTOMAYOR: The Chief asked you, in
25 his question, which way does it cut? Meaning you seem

1 to be advocating a rule that says merely because he's in
2 prison is irrelevant, standing alone. I think your
3 adversary is saying you can't take out the fact that
4 this person's liberty is restrained from the equation.

5 So, going back to my hypothetical, if you're
6 forced to leave the prison, as this gentleman was, and
7 put in another room, what presumption should you start
8 with? Shouldn't the presumption be that if you're
9 forced to go to another place, that you are in custody?

10 MR. BURSCH: Well, Justice Sotomayor, I'm
11 going to start with the premise. We are not advocating
12 that the prison conditions fall out of the equation
13 entirely. They are simply part of the mix that you
14 consider, just like you would consider the school
15 environment or the hospital environment or a customs
16 environment.

17 With respect to being taken out to another
18 building, so long as a reasonable person in his position
19 would have felt free to go back, that's ultimately the
20 dispositive inquiry.

21 JUSTICE SOTOMAYOR: What -- what would make
22 someone who is forced to go somewhere think that they're
23 free to go back, absent being told?

24 MR. BURSCH: Right.

25 JUSTICE SOTOMAYOR: But let's -- what would

1 make any reasonable prisoner who can't move without an
2 escort believe that they're always free to go back?

3 MR. BURSCH: Well, there are --

4 JUSTICE SOTOMAYOR: Once they're forced to
5 go from point A to point B.

6 MR. BURSCH: Right. There are three factors
7 here, and I'll quibble just a little bit with the
8 assumption that he was somehow forced to go. It's true
9 they didn't ask him if he wanted to go, but there's also
10 no contention that he resisted going and they made him
11 go anyway. What he said is: "I didn't know where we
12 were going.... I felt like I was in a safe environment
13 so I didn't object."

14 And then once he got to the room -- here are
15 the three that I think are the most critical facts:
16 That he was told right at the beginning, just tell us;
17 we'll take you back to your cell when you want to do
18 that.

19 Second, when he got belligerent they said,
20 if you don't want to cooperate, you'll go back to your
21 cell. And, third, when he asked to go back to his cell,
22 that request was honored within the context of the
23 typical prison administration.

24 And it's very possible that in his everyday
25 prison life, he could be taken over next door for a

1 medical exam, he could be taken over next door for a
2 visitor if that was county policy. So, there's nothing
3 inherent about the walk into the next building that
4 means per se he has to be Mirandized. Again, it's just
5 one factor that should go into the mix, just like this
6 Court has always done in Miranda cases.

7 Unless the Court has any further questions,
8 I'll reserve the balance of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. BURSCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Ms. Anders.

12 ORAL ARGUMENT OF GINGER D. ANDERS

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

15 MS. ANDERS: Thank you, Mr. Chief Justice,
16 and may it please the Court:

17 The Sixth Circuit has imposed a per se rule
18 that whenever a prison inmate is isolated for
19 questioning about conduct that occurred outside the
20 prison, that inmate is in custody for Miranda purposes,
21 regardless of the circumstances of the interrogation.
22 But in the prison context, as in any other, the
23 traditional Miranda custody tests should apply, and the
24 question should be whether, in light of all of the
25 circumstances, a reasonable person in the suspect's

1 position would have felt free to terminate the interview
2 and leave.

3 That is so for three reasons: The first is
4 that the Court reaffirmed, in Maryland v. Shatzer, that
5 restraints on a suspect's freedom of movement are a
6 necessary but not sufficient condition for Miranda
7 custody. In other words, a reasonable suspect whose
8 freedom of movement is restrained may nonetheless feel
9 that he is free to terminate the questioning.

10 Second, there are, in fact, many situations
11 in which a reasonable inmate isolated for questioning
12 would feel free to terminate the interrogation despite
13 being subject to background prison restrictions.

14 And, third, the Sixth Circuit's per se rule
15 here requires Miranda warnings to be given in situations
16 in which the concerns about custodial interrogation that
17 drove Miranda are simply not present. That holding
18 impairs the important truth-seeking function of
19 investigations by requiring the suppression of voluntary
20 confessions made in noncustodial situations.

21 JUSTICE BREYER: Suppose the policeman had
22 said: I'm taking you away with me for 20 minutes,
23 period. Takes him away, puts him in a place, asks him
24 questions for 20 minutes. All right? Does he have to
25 Mirandize him?

1 MS. ANDERS: You have to look to the
2 totality of the circumstances in that --

3 JUSTICE BREYER: No, those are the totality.

4 MS. ANDERS: -- in that case.

5 JUSTICE BREYER: I just gave you the
6 totality.

7 MS. ANDERS: In that situation, the inmate
8 may not be in custody, because Shatzer established that
9 simply being in prison and subject to normal prison --

10 JUSTICE BREYER: No, no, no. I'm taking you
11 to a special room, and in this special room, I'm going
12 to ask you questions for 20 minutes.

13 MS. ANDERS: You would look to --

14 JUSTICE BREYER: There's no other
15 circumstance. That's it. Everything else is the same
16 as here, except he added those words. Now what?

17 MS. ANDERS: I think he may not be in
18 custody, because --

19 JUSTICE BREYER: Not in custody.

20 MS. ANDERS: -- again, you have to --

21 JUSTICE BREYER: He's only going to be there
22 for 20 minutes.

23 MS. ANDERS: You look to what the reasonable
24 inmate in that situation would feel --

25 JUSTICE BREYER: He would have thought he

1 could leave after 20 minutes.

2 MS. ANDERS: You would look to what the
3 reasonable inmate would feel, and in that situation, you
4 would look to his experience with the prison, you would
5 look to the circumstances of the questioning, whether
6 they are accusatorial, whether they are pleasant --

7 JUSTICE BREYER: Okay.

8 MS. ANDERS: -- the location of the room.

9 JUSTICE BREYER: Now, outside -- we walk
10 outside, there's a policeman in the street, and he says
11 to someone who's a suspect: Come with me; I'm taking
12 you to jail; I'm going to ask you questions for
13 20 minutes. He takes him to a barred room; he can't get
14 out for 20 minutes. He has to Mirandize him?

15 MS. ANDERS: You may have to in that
16 situation, Justice --

17 JUSTICE BREYER: What's the difference?

18 MS. ANDERS: The difference is that the
19 person who is on the street -- their baseline is that
20 they are -- they have complete free will, they have
21 freedom of movement. But when you look at the prison
22 situation, the ultimate question is whether the
23 reasonable inmate would feel free to terminate the
24 questioning, and one situation you look to in
25 determining that are the physical restraints on that

1 person. And when you look at the restraints, you have
2 to take into account the fact that the prisoner has a
3 baseline, which is that he has some restrictions on his
4 movement. That's what the Court said in Shatzer.

5 And so, when you look at the totality of the
6 circumstances, you consider the restraints and the
7 prisoner's baseline, but you also consider everything
8 else that happens during the questioning. And so, there
9 could be many situations in which the questioning will
10 go in a manner that tells the reasonable inmate that
11 he's free to leave. So, for instance, the most clear
12 example is when someone is actually told that they can
13 leave. But there could be many other examples as well.

14 JUSTICE KAGAN: Could I ask you a different
15 sort of question, Ms. Anders? Putting aside what the
16 Sixth Circuit did here, if you look back at the initial
17 State court opinion, do you read the State court -- do
18 you think the State court is fairly read, could the
19 Sixth Circuit have fairly read it, as establishing its
20 own per se rule, which was the per se rule we rejected
21 in Mathis? In other words, that the State supreme court
22 required some kind of nexus between the prison custody
23 and the interrogation?

24 MS. ANDERS: I think it's -- I think it's --
25 the State court opinions are somewhat unclear. There

1 are some statements that could be taken to be
2 inconsistent with Mathis, but immediately after those
3 statements, the State court said, well, it's not enough
4 alone for custody that someone is incarcerated on a
5 conviction that's unrelated to their questioning, and we
6 look to the fact that the inmate was told that he was
7 free to leave, and he actually felt free to leave.

8 So, I think the best reading of the State
9 courts' opinions is that they did go through the
10 totality of the circumstances, and they did conclude
11 that Respondent reasonably felt that he was free to
12 leave in this interview.

13 But, more importantly, I think the Sixth
14 Circuit went much further than that and imposed a per se
15 rule that says no matter what the questioners do, no
16 matter what a prisoner is told, no matter how free he
17 feels to leave, that person always has to be Mirandized.
18 And that extends Miranda way beyond its initial
19 concerns.

20 Voluntary confessions, this Court has
21 recognized, are an unmitigated good. So, any time
22 someone confesses voluntarily in a noncustodial
23 situation, the Sixth Circuit's rule, applied to prisons,
24 would say that that person 's confession has to be
25 suppressed, even though it was given in a situation that

1 doesn't implicate Miranda's concerns at all.

2 And I think the Sixth Circuit's rule really
3 arose from two assumptions. One was that isolation
4 alone is sufficient to create custody in all
5 circumstances. And that can't be the case, because we
6 know that an inmate can be told that he can leave, he
7 can be given an initial choice before he comes along for
8 questioning, he can be interrogated in isolation purely
9 because he's waiting to be treated in an infirmary.

10 There are any number of situations, I think, where an
11 inmate could be isolated for questioning, but he would
12 still feel free to leave.

13 And going to Justice Sotomayor's question
14 about whether someone in prison necessarily feels
15 coerced, I think that the Court in Shatzer established
16 that background restrictions incident to being
17 incarcerated are not in themselves sufficient to create
18 Miranda custody. So, in other words, they don't create
19 such a huge coercive impact that nobody would feel free
20 to terminate questioning.

21 So, I think accepting the proposition that
22 someone in prison is always coerced would lead to a per
23 se rule that says no matter how non-accusatorial, no
24 matter how noncoercive that situation is, that person
25 would always be in custody.

1 So --

2 JUSTICE SOTOMAYOR: Well, you're going back
3 to confusing coercion issues with custody issues, and I
4 don't know that you have really answered Justice
5 Breyer's question. Someone's picked off the street and
6 told you have to go into this room, and questions are
7 asked. Wouldn't we assume that that person is in
8 custody?

9 MS. ANDERS: I think in either situation,
10 you have to look to the totality of the circumstances.
11 And so, we know that restraints alone -- the restraints
12 of prison aren't enough alone. And so, when you
13 consider the restraints -- when you consider the fact
14 that a prisoner is told he has to go into a room, you
15 would look not only to that fact, but you'd also look to
16 everything that happens in the questioning.

17 But then when you go back to consider the
18 fact that the prisoner was told that he has to come to
19 the room, you would -- you would look to whether it's a
20 normal prison policy that prisoners always have to be
21 escorted places. And so, that would help the court
22 determine whether --

23 JUSTICE SOTOMAYOR: Well, but he didn't
24 choose to go to that room. He was placed in that room.
25 What makes him think that if -- if his jailers are

1 walking him somewhere, that he's free to leave?

2 MS. ANDERS: Well, I think two points: One
3 is that -- the fact that he is asked to -- the fact that
4 he is told he has to go to this room is not the only
5 circumstance of the interrogation. So, certainly, what
6 happens in the questioning can lead a reasonable
7 prisoner to believe that he's free to go, even though
8 he's been told he has to go to the questioning.

9 So, if he is told he can leave, if it
10 becomes clear from experience, if there's a prison
11 policy saying that inmates can always leave, if he sees
12 that he can summon the guards -- all of those
13 circumstances have to be taken into account in addition
14 to the fact that he was told initially that he has to go
15 with the guard. And the second thing --

16 JUSTICE GINSBURG: If he were out and the
17 police officer said, come along with us, he could say
18 no. But here he didn't -- he didn't have that choice.

19 MS. ANDERS: That's right. He didn't have
20 that initial choice. But once he got into the
21 questioning, I think this case is a good example of what
22 can happen where the inmate here was told that he could
23 end the questioning. And so, the ultimate question for
24 Miranda custody is whether the reasonable person would
25 feel free to terminate the interrogation.

1 And so, in considering all of the
2 circumstances, one circumstance would be that the inmate
3 was told he has to come to the questioning, but another
4 circumstance would be that he was then told once he got
5 there that he could end the questioning.

6 And so, there are -- there are other factors
7 like that that --

8 JUSTICE GINSBURG: Is it -- is the time
9 relevant, that this was done -- they took him away at
10 7:00 in the evening and kept him for 7 hours?

11 MS. ANDERS: I think that would be a
12 relevant factor here, too, as would the fact that the
13 door was partially open, that the -- the questioning was
14 not threatening, there were only two officers.

15 JUSTICE GINSBURG: Well, they -- that didn't
16 do him any good, because he couldn't get back to his
17 cell without being escorted there.

18 MS. ANDERS: That's correct. That -- that
19 is a -- that's a background restraint of incarceration,
20 and in looking at whether that particular restraint made
21 the inmate feel that he couldn't terminate the
22 questioning, you would look both to the fact that --
23 that, as he himself said, it's common sense that inmates
24 have to be escorted to and from places in the prison.
25 And also --

1 CHIEF JUSTICE ROBERTS: Counsel, I wonder
2 why you just agreed that the 7 hours would be a
3 pertinent circumstance. It strikes me that that would
4 be a pertinent circumstance on overall voluntariness,
5 perhaps, but once you're told you can leave whenever you
6 want, I don't see why it matters at all how long he's
7 kept there.

8 MS. ANDERS: I think that's exactly right,
9 that -- that, certainly --

10 CHIEF JUSTICE ROBERTS: So, it's not a
11 relevant circumstance on the custody question.

12 MS. ANDERS: It is a circumstance within the
13 totality of the circumstances here, but it -- it's --
14 any kind of effect that it had on making the inmate feel
15 that he couldn't terminate the question was entirely
16 offset by the fact that he was told that he could leave
17 multiple times.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Now Ms. Jacobs.

20 ORAL ARGUMENT OF ELIZABETH L. JACOBS

21 ON BEHALF OF THE RESPONDENT

22 MS. JACOBS: Mr. Chief Justice, and may it
23 please the Court:

24 I want to address the issue of whether
25 someone is free to leave. Recently, there have been

1 several cases, and Cervantes is one, and I can't
2 remember whether it was Alvarado -- Alvarado or J.D.B.,
3 where the courts have said that in a prison setting the
4 statement that you're free to leave has less
5 significance than if you're in a -- in the free world.

6 So, I would suggest that when you look at
7 this, that that particular issue, or that particular
8 statement, should not be given the same weight in prison
9 as out. And one of the reasons I suggest is because if
10 a prisoner is told he's free to leave and he's in
11 custody and we know he's in custody because he's in
12 prison, he really under these facts does not have the
13 capability of getting up and leaving.

14 JUSTICE SCALIA: Well, it certainly -- it
15 certainly doesn't mean he can leave the prison, right?

16 MS. JACOBS: Right.

17 JUSTICE SCALIA: That's clear, but -- but
18 isn't that the only difference? It, certainly, at a
19 minimum, means that he can leave this interrogation.

20 MS. JACOBS: Prisoners --

21 JUSTICE SCALIA: But what could it possibly
22 mean if it didn't mean you could leave this room where
23 you're now being questioned?

24 MS. JACOBS: Let me answer that question by
25 pointing out that in -- I think it's Georgison and

1 Cervantes, where there is a button, and the prisoner has
2 the ability to go and press the button and call his own
3 jailers.

4 In this case, the prisoner had to rely on
5 the sheriff's deputies that were interrogating in order
6 to effectuate his freedom. And, in fact, he's testified
7 that he said he wanted to -- that -- I think he said
8 that he didn't want to answer any questions, or he
9 wanted to leave, and we don't hear any more about it --
10 about that. Why not? Because at that point, no one
11 allowed him to leave because the officers hadn't gotten
12 the answers they wanted.

13 JUSTICE ALITO: What is the rule that you
14 want us to adopt?

15 MS. JACOBS: The rule I want you to adopt is
16 the rule in Mathis. And it seems that it has already
17 been adopted, but I think that based on what the --

18 JUSTICE ALITO: So, everybody in prison is
19 in custody --

20 MS. JACOBS: Right.

21 JUSTICE ALITO: -- at all times.

22 MS. JACOBS: What -- what Mathis --

23 JUSTICE ALITO: So, if you want to question
24 anybody in prison about anything --

25 MS. JACOBS: No.

1 JUSTICE ALITO: -- you have to give a
2 Miranda warning.

3 MS. JACOBS: And I don't think that's what
4 Mathis said. I think Mathis was very specific, that a
5 police officer coming from the outside to the inside to
6 talk about a crime occurring on the outside must be --
7 give a Miranda warning.

8 JUSTICE ALITO: What sense does that make?
9 Why is one more in custody depending on the subject that
10 the police want to question the person about?

11 MS. JACOBS: And in certain circumstances, I
12 agree with you, that in fact, this Court should hold
13 that when the correction officers are investigating a
14 crime within the prison, then -- and they remove the
15 prisoner and they isolate him, take him out of the
16 general population, that this Court should then hold
17 Miranda is applicable. But when it's voluntary --

18 JUSTICE ALITO: So, whenever they --
19 whenever a prisoner is isolated and questioned about a
20 crime, no matter where it occurs, a Miranda warning has
21 to be given?

22 MS. JACOBS: Yes.

23 JUSTICE ALITO: About a possible crime?

24 MS. JACOBS: Yes. I mean -- there doesn't
25 seem to me to be possible crimes. They always turn out

1 to be crimes.

2 JUSTICE KAGAN: Well, how is that consistent
3 with the totality of the circumstances test that we've
4 always insisted upon in Miranda cases?

5 MS. JACOBS: Well, Miranda -- not all the --
6 there are bright-line rules attached to Miranda, so that
7 Miranda itself is a bright-line rule. So, to state a
8 bright-line rule I don't think is outside the purview of
9 Miranda -- of Miranda law. And it's easier for the
10 officers to apply; it's easier for the courts to apply;
11 and there would be more consistency.

12 But, Justice Alito, I want to make sure that
13 you understand that I think if it's on-the-scene
14 questioning about a crime occurring on prison, that I
15 don't think you have to give Miranda rights; that if
16 it's voluntary, if the officer -- if the defendant comes
17 up to an officer and starts chatting away and starts
18 mentioning a crime, that's voluntary. And that's
19 consistent with Miranda. I don't think you really have
20 to break new ground --

21 JUSTICE ALITO: So, if a prisoner is stabbed
22 in the yard and there are 50 prisoners in the yard at
23 the time and the prison guards want to question
24 everybody to see what they saw, they all have to be
25 given Miranda warnings?

1 MS. JACOBS: Well, that's an interesting
2 fact situation, because some of those people are just
3 witnesses, and they are not necessarily suspects. And a
4 guard might be able to say: Well, the people that were
5 in this narrow area, they're possible suspects. They're
6 going to get --

7 JUSTICE KENNEDY: No, no. No, no, that's
8 not the way Miranda works. Miranda suppresses a
9 statement that is adverse to the person who was
10 questioned. And the police doesn't know when the
11 adverse statement's going to come. So, you're running
12 away from the hypothetical. It just doesn't work.

13 MS. JACOBS: I -- I'm sorry, but I had
14 thought that what Miranda also said is if -- if it's a
15 witness and you know -- you believe that it's a witness
16 and that you're not asking questions that are going to
17 incriminate them, that then you don't have to give
18 Miranda. Once the point it becomes -- thank you.

19 JUSTICE ALITO: Well --

20 MS. JACOBS: Once the point it becomes
21 incriminating, then you give the Miranda rights.

22 JUSTICE ALITO: If it's a witness in the
23 outside world, the witness is unlikely to be in custody.

24 MS. JACOBS: I understand, but I thought
25 your hypothetical had to do with being stabbed in the

1 yard.

2 JUSTICE ALITO: It does.

3 MS. JACOBS: Okay.

4 JUSTICE ALITO: So, these -- all these
5 people in your view are in custody, and they all are
6 being asked questions that may incriminate them --

7 MS. JACOBS: If they --

8 JUSTICE ALITO: -- and they don't have to be
9 given Miranda warnings unless they're suspects.

10 MS. JACOBS: If they are removed from the
11 general population, if they're taken by a corrections
12 officer to a cell where they're going to be
13 interrogated -- they are isolated; it's incommunicado;
14 they're being interrogated by officers; they know
15 they're officers -- that's a Miranda situation.

16 JUSTICE ALITO: And when will that not
17 occur? In my hypothetical of the stabbing in the yard,
18 you mean that you think the guards are going to say:
19 Okay, all you guys stay here; now we're all -- we're
20 going to question each of you individually with
21 everybody else, the 49 other prisoners present.

22 MS. JACOBS: I think it -- I think at that
23 point, they're going to put the people that were in the
24 yard back in their cells, and then they're going to take
25 them out.

1 JUSTICE ALITO: And then they'll be
2 isolated.

3 MS. JACOBS: Yes.

4 JUSTICE ALITO: So, they all will get
5 Miranda warnings.

6 MS. JACOBS: So, they will get Miranda.
7 You're -- you know. And I understand the Court's
8 concern that you might lose -- you might lose evidence,
9 but Miranda is going to protect us from false
10 confessions, which is even a greater cost to society
11 than -- than having to give the Miranda rights.

12 JUSTICE KAGAN: And where do you get this
13 focus on isolation from? I mean, it's never mentioned
14 in Mathis. You said let's go back to Mathis, but that's
15 not a part of Mathis, is it?

16 MS. JACOBS: It's -- well, I've got two
17 answers for that: One, it's -- it's the basis of
18 Miranda, that when you isolate someone, when you talk to
19 them incommunicado, that that's -- there are compelling
20 pressures that only Miranda rights will dispel, such as
21 -- and let me get -- answer one other question. Telling
22 someone that they've got the freedom to leave is not a
23 substitute for Miranda.

24 But now let me go back to Mathis. In
25 Mathis, the Court said he was in a cell. So, I draw

1 that -- the inference that he was isolated, that he's in
2 a cell, he's got agents with him, and that that's
3 isolation. He's not in a prison library --

4 JUSTICE GINSBURG: I thought that there was
5 no discussion of the "in custody" point in Mathis. It
6 was assumed that they were in custody, and the issue was
7 whether he could be questioned about a crime other than
8 the one for which he was being held.

9 MS. JACOBS: I read Mathis as to say that he
10 was in custody for the -- for the question of the crime.
11 The police officers came in; they have him in a cell;
12 it's a police-dominated atmosphere and that they're
13 questioning about a crime that occurred outside the
14 prison. To me, that's Miranda.

15 CHIEF JUSTICE ROBERTS: Well, Justice
16 Ginsburg is quite right. That -- that was not the issue
17 in Mathis. The argument in Mathis was: We're
18 questioning him about something else; so, we don't have
19 to give him Miranda warnings. And that's the question
20 that the Court decided. I don't think it had any
21 discussion about whether -- there was certainly not the
22 argument of whether he was in custody or not. The
23 argument was this is a different crime; so, we don't
24 have to give you Miranda.

25 And the Court rejected that. So how does

1 that clearly establish the law on which the court relied
2 in this case?

3 MS. JACOBS: In Mathis, because he was -- I
4 guess it was the lower court thought that because he was
5 not in custody on the crime with which they were going
6 to ask questions --

7 CHIEF JUSTICE ROBERTS: Right.

8 MS. JACOBS: -- that, therefore, you didn't
9 have to give him Miranda.

10 CHIEF JUSTICE ROBERTS: Right.

11 MS. JACOBS: But I think what the Supreme
12 Court was implying is that it doesn't matter what --
13 what you're in -- in prison for; you are in custody at
14 that point that you're in the cell with these officers.

15 CHIEF JUSTICE ROBERTS: Do you know where
16 exactly in Mathis? It's only --

17 MS. JACOBS: I'm saying --

18 CHIEF JUSTICE ROBERTS: -- about five pages
19 long. Can you show me where they have that discussion
20 about custody, as opposed to a discussion about what
21 crime is being discussed?

22 MS. JACOBS: What I'm saying is that it's
23 implied by Mathis.

24 CHIEF JUSTICE ROBERTS: Exactly.

25 MS. JACOBS: You can infer it from Mathis.

1 CHIEF JUSTICE ROBERTS: Exactly. It's
2 implied. Inferred. How --

3 MS. JACOBS: But that --

4 CHIEF JUSTICE ROBERTS: Is that clearly
5 established law?

6 MS. JACOBS: Yes. I think it is clearly
7 established law. It does not break any new ground for
8 us to apply it. It does not break any new ground. I
9 think Mathis is a very limited case. The holding
10 applies to police officers only, not to corrections
11 officers, and I think that it does stand for the
12 principle that if you're in custody, and they're talking
13 to you about --

14 JUSTICE KAGAN: Well, do you agree --

15 CHIEF JUSTICE ROBERTS: Do you agree that
16 this is not -- what you want to derive from Mathis is
17 not part of the holding of Mathis?

18 MS. JACOBS: I think it's a rational --
19 well, I think it's a rational extension.

20 CHIEF JUSTICE ROBERTS: It's an extension.

21 MS. JACOBS: But that doesn't necessarily
22 mean that it's new law. It's --

23 JUSTICE GINSBURG: I thought you were going
24 back to Miranda itself, which says in custody or
25 otherwise deprived of his freedom of action in any

1 significant way.

2 MS. JACOBS: Yes.

3 JUSTICE GINSBURG: So -- and I think you
4 repeated the phrase from -- from Miranda that what the
5 Court was aiming at was incommunicado interrogation of
6 an individual in a police-dominated atmosphere. The
7 question is whether the Court has modified what Miranda
8 said in -- in that regard.

9 MS. JACOBS: Which court? This Court or the
10 Sixth Circuit?

11 JUSTICE GINSBURG: This Court, this Court,
12 because this Court now seems to assume that it must be
13 in custody and not -- not otherwise deprived of action,
14 that being in custody is essential.

15 MS. JACOBS: I -- I read that as still being
16 the law, that there are the two clauses; one is you're
17 under arrest, and the other is your freedom of movement
18 is restricted such that a reasonable person would think
19 that you were not -- that you were not free to leave.

20 I'm sorry, Justice Ginsburg; have I answered
21 your question?

22 JUSTICE GINSBURG: Yes, I think you did.

23 CHIEF JUSTICE ROBERTS: I'm not sure you
24 answered mine from before.

25 MS. JACOBS: I'm sorry.

1 CHIEF JUSTICE ROBERTS: How do you think
2 that your argument or the decision of the court below
3 was implicit in or an extension of Mathis? Mathis says
4 you don't -- you're not free of Miranda just because
5 it's a different crime. How does that answer the issue
6 before the Sixth Circuit in this case?

7 MS. JACOBS: I think that when -- when the
8 Sixth Circuit is analyzing the State court decision,
9 they're looking at the State court decision, and that
10 decision says if there's no nexus between what you're
11 being questioned about and what you're in custody for,
12 then you don't have to give Miranda.

13 So, I think the Sixth Circuit found that to
14 be contrary to the language in Mathis.

15 CHIEF JUSTICE ROBERTS: Well, I thought what
16 we've been arguing about is not the nexus issue, but
17 instead whether, in light of the circumstances or under
18 an absolute rule, there's custody.

19 MS. JACOBS: I think we're arguing about two
20 things. I think the Court is going to have to decide
21 two things, and one is whether the Sixth Circuit's
22 decision about whether the State court's decision was
23 contrary to clearly established law. I think that's one
24 decision. And the other decision is whether there's
25 going to be this per se rule about whether if you're --

1 whether you're in custody or not and under what
2 circumstances there might be a per se rule.

3 CHIEF JUSTICE ROBERTS: And what is the
4 clearly established law set forth in our cases that
5 answers that latter question?

6 MS. JACOBS: Whether -- if there's a per se
7 rule? There is not a clearly established law. There
8 could be -- under a rational extension issue, but it's a
9 little more attenuated. But I don't think that I --
10 that there -- that the Respondent would lose on that
11 issue. He would still win because the Sixth Circuit's
12 decision is not wrong; the State court's decision was
13 contrary to the clearly established law of Mathis.

14 JUSTICE ALITO: Can I ask you this? Suppose
15 you have this situation: The police officers go to a
16 prison. The -- a prisoner is brought to an interview
17 room, and the police officers are there with the
18 prisoner in the interview room. And they say to him:
19 We're investigating allegations that you committed child
20 abuse. Now, you're free to leave if you want to, and
21 we'll see that you go back to your cell right away. He
22 says, no, no, I want to explain this; I welcome this
23 opportunity to speak to you.

24 Do they have to give him Miranda warnings.

25 MS. JACOBS: I think they do because I think

1 that telling him that he is free to go is not a
2 substitute for Miranda. It does not protect the Fifth
3 Amendment right, and I think we look to Dickerson, which
4 said that, even though section 3501 said that you had to
5 inform defendants of certain rights, it didn't cover all
6 of the Miranda rights. And they said you had to
7 cover -- it doesn't necessarily have to be in the same
8 language, but you have to cover those rights.

9 I think what the Petitioner wants you to
10 adopt is a -- is a rule that says telling someone
11 they're free to go is a substitute for Miranda. And it
12 isn't. It does not protect the Fifth Amendment right.

13 JUSTICE GINSBURG: Well, their question --
14 the question is, is the person entitled to Miranda
15 warnings? And the argument has been that they're not
16 entitled to Miranda warnings unless you're in custody.
17 They say: You want to have a per se rule for in
18 custody; that is, if you're taken out of your cell and
19 put in another place under police guard and questioned.

20 MS. JACOBS: That's correct. They've taken
21 him from his normal routine. They've exercised control
22 over him. They've moved him to another location where
23 -- I'm assuming from Justice Alito's hypothetical that
24 he's isolated from the general prison population. And
25 they're starting to tell him they're going to question

1 him about child sexual abuse charges. I don't see how
2 you can't --

3 JUSTICE ALITO: Well, they said: We'd like
4 to talk to you about it, but you don't have to talk to
5 us; you're free to go. And he says immediately: No,
6 no, there's a misunderstanding here; I want to explain
7 this; I am glad you came and asked me about this; I
8 don't want to go back to my cell.

9 And you say that's coercive.

10 MS. JACOBS: I'm -- I think you're now
11 describing him as being much nicer than I had assumed he
12 was the first time around. If the officer is not being
13 confrontational, I think maybe that's one thing that has
14 to be considered. I would think that you have to give
15 him Miranda rights.

16 Let me just go over a few issues that I
17 wanted to make sure got mentioned. The Sixth Circuit
18 decision -- I got kind of, I think, carried away in my
19 brief. The Sixth Circuit decision very clearly rests on
20 the contrary clause. On page 10a of the Petitioner's
21 appendix, they state what their -- they state what their
22 decision is going to be, that is, this is contrary to
23 clearly established Supreme Court law. Then they do
24 four more pages to page 14a in which they talk about why
25 the State court decision was contrary. And it's only

1 after they say that -- they give their reasoning; they
2 state their rule -- that they say: But if there's any
3 doubt, then let's look at Shatzer, which was not clearly
4 established law at the time of this case.

5 CHIEF JUSTICE ROBERTS: Can I -- since we're
6 talking about the Sixth Circuit decision, what it says
7 is -- this is on page 10a. "The central holding of
8 Mathis is that a Miranda warning is required whenever an
9 incarcerated individual is isolated from the general
10 prison population and interrogated, i.e., questioned in
11 a manner likely to lead self-incrimination about conduct
12 occurring outside of the prison." Is that correct --

13 MS. JACOBS: Yes.

14 CHIEF JUSTICE ROBERTS: -- description of
15 Mathis?

16 MS. JACOBS: Yes.

17 CHIEF JUSTICE ROBERTS: I thought Mathis
18 rejected the argument that it depends on whether the
19 crime is the one that you're in prison for or something
20 else.

21 MS. JACOBS: I'm sorry. I thought that that
22 was what you said at the end. I apologize. I think
23 that this Sixth Circuit decision makes it very clear
24 that they are talking about crimes occurring outside the
25 prison, that they've drawn that kind of dichotomy.

1 So --

2 CHIEF JUSTICE ROBERTS: Well -- the first
3 part, "a Miranda warning is required whenever an
4 incarcerated individual is isolated from the general
5 prison population" -- okay -- "and interrogated"; i.e.,
6 questioned in a manner or whatever. Now, does that
7 address all of the issues? Is that -- where in Mathis
8 is the discussion about whenever an incarcerated
9 individual is isolated from the general prison
10 population?

11 MS. JACOBS: I thought that it was between
12 10a, page 10a and page 14a.

13 CHIEF JUSTICE ROBERTS: No, no. Where in
14 Mathis?

15 MS. JACOBS: This was the question that we
16 talked about before --

17 CHIEF JUSTICE ROBERTS: Right.

18 MS. JACOBS: -- and what I'm saying is that
19 I believe that it's -- that they're implying that and
20 that we're inferring that and that it might not be a
21 clearly stated principle, that it's from outside the
22 prison, but that it certainly foreshadows -- that it's
23 -- that that rule is foreshadowed. So, it's not a new
24 rule, but --

25 CHIEF JUSTICE ROBERTS: If the argument were

1 Miranda was not required because this -- this concerns a
2 different crime than what you're in prison for here. I
3 understand the idea that -- under AEDPA, that Mathis is
4 clearly established law. The issue here, however, as
5 the Sixth Circuit put it, is a warning is required
6 whenever an incarcerated individual is isolated from the
7 general prison population. And I just don't see that
8 anywhere in Mathis.

9 MS. JACOBS: I again say that this is what
10 one infers from Mathis.

11 CHIEF JUSTICE ROBERTS: Okay.

12 MS. JACOBS: That's the general principle.

13 JUSTICE KENNEDY: And what you infer is the
14 rule that incarceration constitutes custody.

15 MS. JACOBS: No. Custody is when the
16 prisoner is isolated, incommunicado, outside the general
17 prison population, and he's being asked questions by a
18 law enforcement officer designed to -- that are designed
19 to incriminate him. I think it's the traditional --

20 JUSTICE KENNEDY: But that is --

21 MS. JACOBS: I think it's the
22 traditional Miranda --

23 JUSTICE KENNEDY: But that is Shatzer, and
24 Shatzer was careful to say we've never decided that
25 issue.

1 MS. JACOBS: I think what Shatzer was
2 saying -- and I know it's hard for me to tell you what
3 Shatzer was saying since you decided Shatzer. But I
4 think that Shatzer seems to be aimed at correction
5 officials, that whether correction officials -- I think
6 Shatzer is saying we never decided the whole issue. And
7 I think that Mathis decided --

8 JUSTICE KENNEDY: Well, it states in broader
9 terms. It says we've never decided whether
10 incarceration constitutes custody for Miranda purposes
11 and, indeed, have explicitly declined to address the
12 issue.

13 MS. JACOBS: But I think --

14 JUSTICE KENNEDY: It talks about Bradley,
15 which was definitely where the issue was.

16 MS. JACOBS: I think that Shatzer was
17 referring to the whole umbrella of -- of people that
18 would come into the prison, including people that would
19 be in the prison and want to talk to -- to prisoners.
20 So, I think Shatzer was talking about not just police
21 officers but correction officials. I think Mathis
22 clears up -- police officers, you come in, you're going
23 to talk about something else, you're going to
24 interrogate -- Miranda.

25 Shatzer finishes this line of cases by

1 saying it applies to -- it will apply to correction
2 officials as long as you take the gentleman out of the
3 general prison population and isolate him.

4 JUSTICE KAGAN: Ms. Jacobs, wouldn't it be
5 fair to say -- it seems to be me that Shatzer -- excuse
6 me. Mathis must have found that Mr. Mathis -- the Court
7 in Mathis must have found that Mr. Mathis was in
8 custody. That would be a fair inference for Mathis.

9 MS. JACOBS: Yes.

10 JUSTICE KAGAN: But we have no idea why the
11 Court thought that Mr. Mathis was in custody. That
12 wasn't at issue in the case. The Court doesn't talk
13 about any of the surrounding factual circumstances.
14 There might have been a thousand things we don't know
15 about that led everybody to assume that was -- led
16 everybody to assume that Mr. Mathis was in custody, not
17 the particular things that the Sixth Circuit mentioned.

18 MS. JACOBS: I think that Mathis does
19 mention factors that went into the decision about
20 whether he was in custody. They talk about him being in
21 a cell, not in the prison law library, you know, not in
22 the conference room, not in a visitor's room -- being in
23 a cell with the officers and he's being interrogated.

24 I think that they very clearly are saying
25 that this -- I think it establishes this principle that

1 Mathis -- that my case, that *Howes v. Fields* applies.

2 CHIEF JUSTICE ROBERTS: Isn't the best you
3 can say, not that Mathis found but perhaps that Mathis
4 apparently assumed that he was in custody, because there
5 is no discussion of it?

6 There's no discussion of the custody.

7 MS. JACOBS: I agree.

8 CHIEF JUSTICE ROBERTS: Yes, they give you a
9 factual recital. He was in his cell and all that.

10 MS. JACOBS: I just don't think -- I don't
11 doubt that they thought that Mathis was in custody,
12 which is why they were talking about *Miranda* to begin
13 with. He's in a cell.

14 JUSTICE KAGAN: But we don't know why they
15 thought Mathis was in custody. It just wasn't an issue
16 in the case. Everybody had assumed it.

17 MS. JACOBS: And it's not dicta. As far as
18 I can tell, it becomes part of the clearly established
19 law. It was a court --

20 CHIEF JUSTICE ROBERTS: What's dicta? Dicta
21 is something that's said that's not necessary to the
22 holding.

23 MS. JACOBS: Right.

24 CHIEF JUSTICE ROBERTS: We don't have
25 anything that's said about it here.

1 MS. JACOBS: But I -- my argument, Justice
2 Roberts, is that saying that he's in a cell and that
3 he's being questioned by officers, that that is -- and
4 he's being questioned about a crime, that that is
5 custody and that, from that, there is a principle.

6 I would just like to close by saying again
7 that I would ask you to reject the -- the Petitioner's
8 proposition that saying someone is free to leave is a
9 substitute for Miranda warnings, that my client was very
10 clearly in custody, that in fact -- and I think this is
11 an interesting part of this case -- in a sense, custody
12 had been transferred, that he really was no longer in
13 the custody of the jail but that he had been -- once he
14 went through the J door, was turned over to the
15 sheriff's deputies, and the other guards left, that
16 custody had then been transferred. So, I think he's
17 clearly in custody, and I think that's one of the things
18 that this Court must look for or include in a per se
19 rule, whether -- who is holding this man in custody?

20 Further, the fact that he was told that he
21 could leave is not significant on the facts of this
22 case. The fact that the officers -- and I think Justice
23 Kennedy made this point -- that the officers were
24 yelling at him. They're the ones that have control over
25 him. He does not have the control. The fact that he

1 was missing his medication shows that he did not think
2 that he had the power to change his situation.

3 JUSTICE GINSBURG: There's no indication
4 that he told -- that he told the --

5 MS. JACOBS: No, I agree there isn't.

6 JUSTICE GINSBURG: -- officers that he
7 needed medication.

8 MS. JACOBS: No, I agree that there isn't.
9 But I think that this is one of the things that -- that
10 was playing on his mind. And although I understand that
11 this is an objective test and not a subjective test, I
12 think that that lends credibility to his testimony at
13 the hearing. Harrington --

14 JUSTICE SOTOMAYOR: The Ohio court -- or the
15 -- I'm sorry. The court below had its own -- seemingly
16 had its own absolute rule --

17 MS. JACOBS: Yes.

18 JUSTICE SOTOMAYOR: -- that if you're told
19 you're free to go, that that breaks the chain of
20 custody, whatever that might mean. Assuming -- and the
21 Sixth Circuit said if you are removed from the prison
22 and questioned, you absolutely must be given warnings.
23 Is there a middle ground, and what would that middle
24 ground be? And what would be -- how would that middle
25 ground affect the outcome of this case?

1 MS. JACOBS: I don't believe that telling a
2 prisoner that he's free -- that he's free to leave is a
3 substitute for Miranda. I think you have to get back to
4 what Miranda was trying to protect. It's trying to
5 protect Fifth Amendment rights, and telling him he's
6 free to leave does not do that. So that that's not
7 enough, and that shouldn't be part of the equation, not
8 a significant part of the equation. Harrington --

9 CHIEF JUSTICE ROBERTS: Counsel, you -- you
10 mentioned several times, we were talking about Mathis,
11 that, you know, they mentioned he was in -- in a cell,
12 right? I've just been skimming it quickly. I don't see
13 where that's mentioned. Do you know offhand?

14 MS. JACOBS: No, I don't, but I really --
15 really did read this case.

16 CHIEF JUSTICE ROBERTS: And I --

17 MS. JACOBS: And I'm sure that it said he
18 was in a cell.

19 CHIEF JUSTICE ROBERTS: I did, too. And --
20 well, I'll look at it again. I'm sure --

21 MS. JACOBS: Please.

22 CHIEF JUSTICE ROBERTS: I'm sure it's there.
23 All I see is noting that he was in prison serving a
24 State sentence, but --

25 MS. JACOBS: But it doesn't -- it should be

1 talking about the officers, the agents in the cell with
2 him.

3 CHIEF JUSTICE ROBERTS: Okay. Let me --

4 MS. JACOBS: Just in -- as a final comment,
5 I just want to say Harrington v. Richter requires a
6 finding before a writ can issue of an extreme
7 malfunction in the justice system, that certainly where
8 a State court has decided a constitutional issue on a --
9 on a Supreme Court law and ignores Supreme Court law,
10 that we really do have an extreme malfunction of the
11 judicial system. This Court should affirm the decision
12 of the Sixth Circuit and send Mr. Fields back to Lenawee
13 County for a new trial.

14 If there are no other questions, I'll cede
15 the remainder of my time to the Court.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Bursch, you have 6 minutes remaining.

18 REBUTTAL ARGUMENT OF JOHN J. BURSCH

19 ON BEHALF OF THE PETITIONER

20 MR. BURSCH: I think the hypotheticals today
21 demonstrate how quickly the logic of the Sixth Circuit's
22 new per se rule falls apart when you test it with other
23 facts. Even in the Sixth Circuit's view, you would
24 already make exceptions to that new per se rule if it
25 was in-prison conduct or if it was prison guards as

1 opposed to outside guards. In response to questioning
2 today, Mr. Fields' counsel admits that there must be an
3 exception if you have a button that you can press to get
4 out, like in Mr. Ellison's situation, the First Circuit
5 case that Justice Souter wrote. She admitted that if
6 you're in a circle of proximity or not in a circle of
7 proximity, that that would make a difference. No per se
8 rule. That if the situation isn't confrontational, that
9 you need to have an exception for that, or if the
10 prisoner initiates questioning.

11 And you can imagine many other hypotheticals
12 that would similarly create exceptions to what is
13 supposedly a per se rule. And -- and ultimately what
14 this comes down to is Justice Alito's question: If he's
15 under no pressure at all, the prisoner welcomes the
16 questioning -- and I would submit that a fair reading of
17 the record here shows exactly that -- that even then it
18 would be required. And that is a particularly strange
19 rule when what we're talking about is not a
20 constitutional, mandated protection but a prophylaxis,
21 something that's supposed to protect a constitutional
22 right, and where the protection isn't necessary, nor
23 should there be a per se rule.

24 Counsel also concedes that there isn't
25 anything in Mathis that clearly establishes the rule

1 that the Sixth Circuit applied. Maybe it's an
2 extension; maybe it's implied. I think it's difficult
3 to find either one of those. So, at a bare minimum,
4 this requires reversal under the AEDPA standard.

5 I do want to emphasize that the Sixth
6 Circuit's per se test does have societal costs. It
7 impedes prison administration, and it eliminates
8 potential for voluntary truthful confessions that we all
9 want.

10 Finally, the test that we advocate for is
11 not our own per se test, that simply saying you're free
12 to leave is not the be-all, end-all, because it's
13 possible that officers could say you're free to leave,
14 while doing something else nonverbally that indicates
15 you are not free to leave. That's why the totality of
16 circumstances test makes the most sense.

17 And we urge you to go past the AEDPA
18 question and actually rule on the merits, because we
19 think that would be good guidance for the lower courts
20 and for law enforcement officials. And the test that we
21 would propose is that a Miranda warning is not required
22 when a reasonable person in the prisoner's position
23 would have felt free to go back to his cell in accord
24 with ordinary reasonable prison procedures. That's
25 exactly what happened here. We respectfully request

1 that you reverse.

2 Unless there are any further questions, I'll
3 cede my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 1:53 p.m., the case in the
7 above-entitled matter was submitted.)

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