IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL YARBOROUGH, WARDEN :

Petitioner :

v. : No. 02-1684

MICHAEL ALVARADO. :

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Washington, D.C.

Monday, March 1, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:53 a.m.

APPEARANCES:

DEBORAH J. CHUANG, ESQ., Deputy Attorney General, Los Angeles, California; on behalf of the Petitioner.

JOHN P. ELWOOD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

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

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C O N T E N T S

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

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

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

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

MS. CHUANG: Yes, Your Honor.

QUESTION: Thank you.

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

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

law would define clearly established at such a high --

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

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

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

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

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

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

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

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

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

MS. CHUANG: Yes, Your Honor.

QUESTION: I thought --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. CHUANG: Yes.

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

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

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

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

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

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

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

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

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

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

QUESTION: Why -- why not? Why not?

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

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

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

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

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

-- that's what we know.

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

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

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

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

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

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

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

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

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

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

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

MS. CHUANG: Yes, Your Honor.

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

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

problem, isn't it?

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

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

(Laughter.)

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

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

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

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

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

QUESTION: Just as full-blown as the question.

QUESTION: I mean, not just yes or no.

(Laughter.)

MS. CHUANG: Yes, Your Honor.

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

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

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

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

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

MS. CHUANG: Yes, Your Honor.

QUESTION: All right.

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

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

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

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

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

QUESTION: This was at the suppression hearing.

MS. CHUANG: Yes, Your Honor.

QUESTION: Okay.

MS. CHUANG: And --

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

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

QUESTION: May I --

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

MS. CHUANG: I'm sorry?

QUESTION: Where did this fact or factoid come

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

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

QUESTION: It's not in any evidence.

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

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

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

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

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

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

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

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

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

experience to --

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

MS. CHUANG: Thank you.

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

ORAL ARGUMENT OF JOHN P. ELWOOD

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

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

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

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

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

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

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

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

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

MR. ELWOOD: I --

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

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

QUESTION: J.A. 49 --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Is that the point?

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

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

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

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

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

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

QUESTION: I want you to say it --

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

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

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

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

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

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

Now --

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

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

that you would need to do that.

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

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

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

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

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

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

(Laughter.)

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

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

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

QUESTION: But then isn't age relevant?

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

QUESTION: No.

MR. ELWOOD: -- voluntariness test.

QUESTION: Just relevant to the question whether he's in custody. That's the only thing we're asking about, not the Miranda warning.

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

QUESTION: And if it -- if it makes a difference of his age, why doesn't that make it relevant?

MR. ELWOOD: Because what we're talking about here is not just 6-year-olds. We have to have a rule that is workable for police officers with respect to 17-year-olds and people who are 17 years and 7 months and 18 years and 1 month. And when you -- when you can say with some certainty that a 6-year-old is going to be feeling more vulnerable, but you can't say with a lot of certainty that an average 16-year-old is going to be feeling more vulnerable than an average 18-year-old, and if so, by how much. So that, for example, they know that when they say --

QUESTION: But it's relevant by even a tiny, tiny bit if you've got a totality of the circumstances test. To say it isn't very much -- I don't see the difference between a 6-year-old, the 16-year-old, and the 18-year-old in your presentation.

MR. ELWOOD: Justice -- Justice Stevens, our

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

QUESTION: Thank you, Mr. Elwood.

Ms. Allen, we'll hear from you.

ORAL ARGUMENT OF TARA K. ALLEN

ON BEHALF OF THE RESPONDENT

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

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

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

MS. ALLEN: There was no evidentiary hearing in

the district court.

As far as --

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

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

QUESTION: Well --

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

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

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

QUESTION: Then --

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

QUESTION: Then what is the basis for the finding?

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

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

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

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

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

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

QUESTION: Okay.

MS. ALLEN: Secondarily --

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

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

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

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

And the last contention is my --

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

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

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

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

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

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

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

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

MS. ALLEN: Is it a plurality?

QUESTION: It was a plurality opinion.

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

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

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

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

It follows --

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

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

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

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

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

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

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

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

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

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

MS. ALLEN: That's correct.

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

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

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

MS. ALLEN: Usually --

(Laughter.)

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

MS. ALLEN: I -- I --

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. ALLEN: No, Your Honor.

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

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

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

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

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

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

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

MS. ALLEN: Yes.

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

MS. ALLEN: They --

QUESTION: It's right in the opinion.

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

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

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

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

them. I don't --

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

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

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

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

MS. ALLEN: What the State court held was

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

QUESTION: In -- in what respect?

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Yes, but not in this particular context.

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

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

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

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

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

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

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

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

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

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

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

MS. ALLEN: No, no.

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

MS. ALLEN: Yes, sure.

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

MS. ALLEN: And --

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

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

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

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

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

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

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

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

So unless the Court has any other questions.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Allen.

The case is submitted.

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