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IN THE SUPREME COURT OF THE UNITED STATES

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J.D.B., :

Petitioner : No. 09-11121

v. :

NORTH CAROLINA :

- - - - - x

Washington, D.C.

Wednesday, March 23, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:14 a.m.

APPEARANCES:

BARBARA S. BLACKMAN, ESQ., Durham, North Carolina; on behalf of Petitioner.

ROY COOPER, ESQ., Attorney General, Raleigh, North Carolina; on behalf of Respondent.

ERIC J. FEIGIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	BARBARA S. BLACKMAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ROY COOPER, ESQ.	
7	On behalf of the Respondent	26
8	ORAL ARGUMENT OF	
9	ERIC J. FEIGIN, ESQ.	
10	On behalf of the United States, as	
11	amicus curiae, supporting Respondent	44
12	REBUTTAL ARGUMENT OF	
13	BARBARA S. BLACKMAN, ESQ.	
14	On behalf of the Petitioner	54
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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4
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P R O C E E D I N G S

(11:14 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 09-11121, J.D.B. v. North Carolina.

Ms. Blackman.

ORAL ARGUMENT OF BARBARA S. BLACKMAN

ON BEHALF OF THE PETITIONER

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

J.D.B. was only 13 years old when he was taken out of his middle school classroom and escorted to a closed door interrogation conducted by outside law enforcement regarding a matter that did not take place on school property. He was isolated from his family who had already demonstrated an interest in this investigation and sought to shield him from the police. He was not advised that he was free to leave or free not to answer questions until he had already incriminated himself.

The restrictions on J.D.B.'s freedom of movement which existed because of his youth were heightened by the manner in which this officer chose to conduct this interrogation and the expected deference to authority figures categorically characteristic of

1 children were taken advantage of by the manner in which
2 this officer chose to conduct the interrogation.

3 JUSTICE SCALIA: Ms. Blackman, I'm -- I'm --
4 I'm not clear on what you are proposing. Is there to be
5 one different Miranda requirement rule for all minors,
6 or is there to be one for, what, 20-year-olds,
7 19-year-olds, 18-year-olds, 17, 16? This one is 13, do
8 we calibrate it that finely --

9 MS. BLACKMAN: Justice --

10 JUSTICE SCALIA: -- or do we just say, you
11 know, what would a minor -- I don't know, a general
12 minor regard as restrictions upon his departure?

13 MS. BLACKMAN: Justice Scalia, what we are
14 proposing is that the test be a court may consider age
15 in determining whether a reasonable person in the
16 juvenile --

17 JUSTICE SCALIA: I understand that.

18 MS. BLACKMAN: So we are not --

19 JUSTICE SCALIA: So you mean 15, 14, 13,
20 13 1/2? Right?

21 MS. BLACKMAN: We did not suggest that it be
22 calibrated by age, although in State court jurisdictions
23 many of them are and are not finding that a difficult
24 test to perform.

25 JUSTICE SCALIA: It's not -- if not

1 calibrated by age, how is it to be calibrated?

2 MS. BLACKMAN: It is to be the exercise of
3 reasonable judgment by the judge taking into account
4 common sense --

5 JUSTICE SCALIA: Common sense?

6 MS. BLACKMAN: -- community experience is
7 one.

8 JUSTICE SCALIA: And -- and -- and how --
9 how is the law enforcement officer going into the
10 confrontation going to know whether a judge is going to
11 be applying a 15-year-old rule, a 13-year-old rule, or
12 whatever?

13 MS. BLACKMAN: Clearly in the jurisdiction
14 in which he practices he should be aware of the fact
15 that a court utilizes that type of --

16 JUSTICE SCALIA: Do you think that's clear?

17 MS. BLACKMAN: But we're not suggesting that
18 that be done. What a court is examining is --

19 JUSTICE KENNEDY: Why isn't this all
20 subsumed under the voluntariness rule?

21 MS. BLACKMAN: As this Court has frequently
22 recognized, the voluntariness inquiry is more difficult
23 for courts to perform than the Miranda custody one. And
24 you have also recognized that the court --

25 JUSTICE KENNEDY: Well, at least it's the

1 court performing it, not the interrogating officer, as
2 Justice Scalia's questions point out.

3 MS. BLACKMAN: The police officer plays a
4 role in the voluntariness, also. And the police officer
5 must be assessing whether the circumstances may be
6 giving rise to an involuntary confession. Age --

7 JUSTICE SCALIA: What about mental
8 deficiency, if -- if age should be one of the factors,
9 deciding whether the individual regarded himself as in
10 custody or not, why shouldn't mental deficiency be so as
11 well? Is there any -- any basis in principle for not --
12 I mean, once you do this, don't you, in effect, say that
13 it is a subjective inquiry whether the particular
14 individual regarded him or herself as being in custody;
15 isn't that the -- the basis of what you're arguing?

16 MS. BLACKMAN: No.

17 JUSTICE SCALIA: No? Why is age different
18 from mental deficiency, for example?

19 MS. BLACKMAN: Age is different because,
20 number one, it involves restrictions on freedom of
21 movement, so the circumstances of the interrogation are
22 going to be understood and interpreted differently by a
23 child than it would be by an adult.

24 Secondly, we're talking about cognitive
25 differences which exist between children and adults

1 which affects their perception and understanding.

2 JUSTICE SCALIA: You could say both of those
3 things about the mentally deficient. They may regard
4 themselves as -- as unfree to leave, and they have
5 cognitive deficiencies.

6 MS. BLACKMAN: As far as I know, there
7 hasn't been the recognition in the law that there is, as
8 to children, that proves such as the mentally
9 handicapped are unable to --

10 JUSTICE BREYER: Well, what about this test
11 which comes from three cases, the first being Berkemer,
12 the second Stansbury, and the third I'll tell you in a
13 second? It is that those -- what are -- in considering
14 a reasonable person for this purpose and avoiding
15 subjective states of mind, you would look at objective
16 circumstances, known to both the officer and the suspect
17 that are likely relevant to the way a person would
18 understand his situation. All right?

19 So both would be both mental illness and age
20 and -- I don't know, whether you speak English, and a
21 lot of other things would be relevant, provided they are
22 things that are relevant to how a person would
23 understand his situation and are known to both the
24 officer and the individual.

25 The third case, of course, is my dissent in

1 Alvarez.

2 (Laughter.)

3 JUSTICE BREYER: But nothing in the majority
4 conflicts with that, that I can see, except the holding.
5 I thought I lost the case, but apparently it's up again,
6 so I don't see why that isn't a perfectly good test.
7 But if you're not going to support it, then I've got no
8 support.

9 MS. BLACKMAN: Well, we're simply making the
10 point that there's not necessarily going to be a
11 floodgate opening. And we haven't seen that --

12 JUSTICE BREYER: No, no, but I mean what
13 Justice Scalia was really asking is, do you favor
14 something like this test that I read, which is open as
15 to circumstance? Anything could fit in that blank, as
16 long as both policemen and the -- and the individual
17 know it and it is relevant as to how he understands the
18 circumstance, whether he's likely free to go or not.

19 MS. BLACKMAN: Conceptually absolutely.

20 JUSTICE BREYER: Thank you. Yes, that's
21 right.

22 JUSTICE SCALIA: Even -- even if you said
23 no, you're pushing us there, because there's no basis
24 for treating a childhood any differently from these
25 other factors. So basically you're saying Justice

1 Breyer would call it objective circumstances. You know,
2 whether you're mentally deficient, I would call that the
3 subjective condition of the -- of the person being held
4 in custody. And I think, I don't think that's what we
5 meant by the phrase "objective circumstances."

6 But you want objective circumstances to
7 include the character of the person being held in
8 custody, whether he's mentally deficient, whether he's
9 schizophrenic, known to the police, you know, whatever
10 factors, right? Those are all objective circumstances?

11 MS. BLACKMAN: Your Honor, what we are
12 talking about are a complex of characteristics which are
13 unique to children, and that's what we are examining in
14 this case.

15 JUSTICE GINSBURG: Ms. Blackman, what is
16 complex about a juvenile investigator? That's what this
17 police officer was. So he's investigating a juvenile
18 for juvenile justice purposes, and I think there's
19 hardly anything more objective than that. This case has
20 child written all over it. It's investigator who deals
21 with children. The first proceedings is going to be a
22 juvenile proceeding.

23 How can you not take that into account,
24 whatever -- whatever these other factors may involve?
25 But here it seems to me so rampant because this police

1 officer dealt only with juveniles, and he investigated
2 juveniles.

3 MS. BLACKMAN: I agree completely. This
4 officer was assigned the case because it had already
5 been determined that a juvenile was involved. This is
6 the population that he deals with on a daily basis. He
7 certainly has a basis on which to assess how J.D.B.'s
8 youth was factoring into this interrogation.

9 JUSTICE KENNEDY: And then is it your point
10 that he has to do something more than the read the
11 standard Miranda warning? Suppose he read the standard
12 Miranda warning? End of case as far as you're
13 concerned?

14 MS. BLACKMAN: Obviously his age would
15 factor into whether there was a valid waiver. But, yes,
16 he has got to Mirandize or otherwise J.D.B. --

17 JUSTICE KENNEDY: Well, but doesn't it
18 follow from there that we have to have a -- we have to
19 change the warning?

20 MS. BLACKMAN: Not necessarily. I mean,
21 some children will not understand Miranda warnings, just
22 as some adults don't understand Miranda warnings. But
23 children are nonetheless -- have to be given the
24 opportunity to be told of their rights, so that they can
25 at least have the opportunity to make an informed

1 decision.

2 JUSTICE ALITO: Are you asking trial judges
3 to make -- to do something that is realistic? Do you
4 think -- let's take a hypothetical trial judge who,
5 let's say, is 60 years old and has an IQ of -- that's at
6 least an average IQ. And now you're asking this trial
7 judge to decide whether under particular circumstances,
8 let's say, a 14-year-old with an IQ of 85 would
9 appreciate under particular circumstances that he or she
10 was free to leave?

11 MS. BLACKMAN: Your Honor --

12 JUSTICE ALITO: You think a trial judge can
13 really do that?

14 MS. BLACKMAN: State courts have been
15 performing this analysis now for several decades, and
16 they haven't indicated that they have difficulty doing
17 so. And to the extent that your --

18 JUSTICE ALITO: They must have greater
19 imaginative powers then.

20 MS. BLACKMAN: What?

21 JUSTICE ALITO: They must have greater
22 imaginative powers than I think I would have under those
23 circumstances.

24 MS. BLACKMAN: Part of your question --

25 JUSTICE ALITO: When you take a particular

1 set of circumstances, and the judge would say, if I were
2 13, I would not understand that I could go. However, if
3 I were 15, I would understand I could go.

4 MS. BLACKMAN: Your Honor --

5 JUSTICE ALITO: Can you slice it like that?

6 MS. BLACKMAN: What we are talking about
7 here is relative youngness and relative oldness. I
8 mean, the empirical data demonstrates to us that the
9 older a child is to an adult, the more adult-like they
10 are. The younger, the farther away they are from that
11 adult standard --

12 JUSTICE SCALIA: We need empirical data for
13 that?

14 MS. BLACKMAN: Excuse me?

15 JUSTICE SCALIA: We need empirical data for
16 that?

17 MS. BLACKMAN: Empirical data does exist.

18 JUSTICE SCALIA: To show that --

19 MS. BLACKMAN: I'm simply pointing that out.

20 JUSTICE SCALIA: -- the closer to adulthood
21 a child is, the more like an adult he is?

22 (Laughter.)

23 MS. BLACKMAN: I'm simply pointing out that
24 the empirical data supports that. There are bases of
25 knowledge from which --

1 JUSTICE KAGAN: Do we need either
2 imaginative powers or empirical data to know that when a
3 13-year-old is brought into a room in his school, taken
4 out of class, four people are there, two are police
5 officers, one is assistant principal, threatened with
6 custody, that that person is not going to feel free to
7 take off and leave?

8 MS. BLACKMAN: We do not. I'm simply
9 pointing out that there is a basis of knowledge from
10 which courts as well as police officers can make the
11 required assessment. It is so clear in this case,
12 however --

13 JUSTICE ALITO: Well, sympathetic cases can
14 make bad law. So take the same set of facts and let's
15 hypothesize that this is a 15-year-old. Would the
16 15-year-old appreciate that he could go? Or make him
17 16. Or make him a street-wise 17-year-old.

18 MS. BLACKMAN: A judge should be able to
19 consider that, and under the clear circumstances of this
20 case, it is unlikely that a --

21 JUSTICE SCALIA: When the policeman sees
22 him, he's dressed in baggy jeans, you know, down around
23 his thighs, and when the judge sees him he's wearing a
24 Buster Brown jumper suit. You don't really think that
25 it's going to be equivalent?

1 MS. BLACKMAN: I'm not sure I understood the
2 question.

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: The whole point --

5 MS. BLACKMAN: Yes.

6 CHIEF JUSTICE ROBERTS: The whole point of
7 the Miranda rule, I thought, was to provide clear,
8 objective guidelines about what the police are supposed
9 to do. And it seems to me that one of the difficulties
10 with your rule, however clear it may seem in this case,
11 but it does have to apply more broadly, is that that's
12 off the table, and now they're not only going to have to
13 know, does this person understand it, but they're going
14 to have to know, it's not every one of these situations
15 that's going to be in school. They're going to have to
16 guess how old the person is.

17 And there are differences. Some
18 15-year-olds know a lot more than some 17-year-olds, and
19 so on. And -- and the facts that you're concerned about
20 all go into the voluntariness inquiry, which is still
21 pertinent after Miranda. Why don't we just put those
22 facts into that inquiry and say, look, we've got one
23 strict rule; everybody knows it, you hear it on TV all
24 the time, people are given Miranda warnings; that part
25 of it is done?

1 MS. BLACKMAN: It doesn't change the rule
2 itself. I mean, the rule itself remains: All objective
3 circumstances relevant to the custody determination must
4 be considered.

5 What it's doing is taking this out of the
6 reasonable adult standard, which by default is the only
7 one, then, that can be used, and so it's not going to be
8 muddying the waters in the sense that it is something
9 needed in order to promote accurate fact-finding.

10 CHIEF JUSTICE ROBERTS: Would it be -- is it
11 enough if the officers in this situation said, look,
12 you're free to leave, you know, whenever you want,
13 but -- and then goes on -- or do they have to think --
14 now, maybe -- maybe a 13-year-old really doesn't think
15 that's true, or maybe a 13-year-old really doesn't feel
16 that he can leave if he's got the vice principal there
17 and they want to talk.

18 MS. BLACKMAN: I mean, that is an objective
19 circumstance that occurs in the course of an
20 interrogation which is very weighty in determining if
21 custody occurs. Here --

22 CHIEF JUSTICE ROBERTS: I'm thinking it
23 would not even be enough if they told the 13-year-old,
24 look, you can leave, but I want to ask you some
25 questions. And the principal is there, and he thinks,

1 well, you know -- maybe the 13-year-old is thinking,
2 maybe I'm going to get in trouble if I leave.

3 MS. BLACKMAN: It involves all of the
4 circumstances which are arising during the course of
5 these interrogations, but certainly advising someone
6 that they are free to leave and advising them that they
7 are free not to answer questions is almost half of the
8 Miranda warning, and it is giving the child --

9 JUSTICE SCALIA: What if the parent tells
10 them not to leave? What if the parent says, you go and
11 talk to this police officer? If you did something
12 wrong, I want them to know about it; talk to the
13 officer.

14 MS. BLACKMAN: Whether that would factor in
15 depends, I think, upon whether they're acting as an
16 agent of the police, because what we're looking at is --

17 JUSTICE SCALIA: No, no. They're not an
18 agent; they're acting as a parent.

19 MS. BLACKMAN: Oh. What we're examining is
20 whether we've got a police-dominated environment and
21 coercion in the situation and circumstances under which
22 the child evaluates the --

23 JUSTICE SCALIA: Are you answering my
24 question?

25 MS. BLACKMAN: No, I'm not. Obviously, the

1 specific factors that occur in the course of any
2 interrogation will be considered, but our focus here is
3 upon what the police officer must do.

4 JUSTICE GINSBURG: Would be one relevant
5 factor that would be considered was that nobody called
6 the parents?

7 MS. BLACKMAN: It is relevant in this
8 situation, because -- by North Carolina law. Because a
9 custodial interrogation was occurring, there was a
10 requirement that a parent or guardian be present.

11 CHIEF JUSTICE ROBERTS: How is that relevant
12 to the Miranda inquiry? It might be relevant to the
13 voluntariness inquiry, but I don't see whether you call
14 the parents or not. Part of his Miranda -- your Miranda
15 right is not to have your parents called.

16 MS. BLACKMAN: What I understood the
17 question was: Was it relevant that a parent was not
18 contacted? In this particular situation, yes, because
19 that was going to create an independent basis on which
20 the statement wasn't going to be admitted, and is than
21 additional reason why --

22 CHIEF JUSTICE ROBERTS: Independent of what?

23 MS. BLACKMAN: Independent of Miranda.

24 CHIEF JUSTICE ROBERTS: Well, right. That's
25 my whole point.

1 MS. BLACKMAN: But that is an additional
2 reason why police officers need to be aware of what the
3 age is of a child that they are interrogating because of
4 independent obligations arising out of State statutes.

5 CHIEF JUSTICE ROBERTS: So is your answer to
6 Justice Ginsburg that, no, the fact that a parent was
7 not notified is not relevant to the Miranda question?
8 It may be relevant to the voluntariness question.

9 MS. BLACKMAN: No, I believe it remains
10 relevant to the Miranda question, because --

11 JUSTICE GINSBURG: The question really is if
12 he is in custody. And maybe there's something different
13 about being in the room with a juvenile police
14 investigator and the assistant principal and being in
15 that same room with your parents there.

16 MS. BLACKMAN: That is correct.

17 CHIEF JUSTICE ROBERTS: Oh, so it's not just
18 that they have to call the parent; they have to wait for
19 the parent to show up?

20 MS. BLACKMAN: Because of State statutory
21 requirements, here they were. Obviously, not every
22 State has that kind of requirement. In this particular
23 situation, there was a requirement of parental presence.

24 CHIEF JUSTICE ROBERTS: That's not -- that's
25 not pertinent to the Federal law question on the Miranda

1 warnings.

2 MS. BLACKMAN: I understand that, but I'm
3 just explaining that independent bases may arise for
4 which an officer has to be aware of the age. And given
5 that, we're not imposing additional burdens. These are
6 things that police officers have to be considering.

7 JUSTICE ALITO: What if the age of the
8 person being questioned is unclear?

9 MS. BLACKMAN: If the interrogation is
10 occurring under circumstances where the officer should
11 have known, then I think the burden remains with the
12 officer to consider this, and that could arise from --

13 JUSTICE ALITO: Suppose -- suppose the
14 person shows an ID and it shows the person is 19 years
15 old, and the officer looks at him and says, he looks
16 like a pretty young 19-year-old?

17 MS. BLACKMAN: If there is no way to verify
18 the information that the child is giving, then the
19 officer accepts the ID as being the age of the person he
20 is interrogating.

21 JUSTICE ALITO: What if -- I mean, under my
22 example, what if the child -- what if the person looks
23 like a minor but has an adult ID?

24 MS. BLACKMAN: I think that if --

25 JUSTICE ALITO: Does the officer have an

1 obligation to look behind that?

2 MS. BLACKMAN: Um --

3 JUSTICE ALITO: Or the other way around?

4 The person says, I'm 15, and the officer sees that this
5 person has a pretty heavy beard and --

6 MS. BLACKMAN: The officer has to proceed on
7 the basis of his observations. I mean, objective
8 circumstances are things that are readily apparent.
9 There can be circumstances which tell the officer that,
10 in fact, he is dealing with a child, either the setting,
11 the appearance, the contact of parents, and so on.

12 JUSTICE SCALIA: Is there a good faith --

13 MS. BLACKMAN: But if there -- if there is
14 no reasonable basis upon which the officer could discern
15 that this is a child, if he has no reason to know, then
16 the rule that we are asking to be put into effect would
17 not apply.

18 JUSTICE SCALIA: Does a good faith mistake
19 make it okay? If, you know, the officer, in good faith,
20 believes that it's not a minor and -- and proceeds
21 accordingly?

22 MS. BLACKMAN: Yes. I mean, what we would
23 be assessing is: Are the circumstances clear such that
24 the officer should have known? And if they simply could
25 not ascertain it, then the rule that we're asking for

1 would not apply.

2 JUSTICE GINSBURG: The way you phrase the
3 question, you say, may the trial -- whether trial courts
4 may consider the juvenile's age in Miranda to make the
5 in-custody Miranda determination.

6 Did you really mean "may," so it's
7 discretionary with each judge, whether a juvenile's age
8 is relevant to the in-custody analysis?

9 MS. BLACKMAN: No, it is must. As with any
10 objective circumstance, the court has to take it into
11 account, and we can't be relegating some to a
12 discretionary review and others to mandatory review.
13 So, yes, if a child is involved in the case, then a
14 court must take that into account --

15 JUSTICE SOTOMAYOR: So --

16 MS. BLACKMAN: -- in determining if there's
17 custody.

18 JUSTICE SOTOMAYOR: -- are you saying, going
19 back to the hypotheticals that some of my colleagues
20 posed, police officer comes across an individual, looks
21 older or looks younger, doesn't know, and just engages
22 that person and says come over here and let's talk for a
23 second. Is the officer required to ask the age?

24 MS. BLACKMAN: It's a simple enough matter,
25 but no. But I think if the person --

1 JUSTICE SOTOMAYOR: So if they're not
2 required --

3 MS. BLACKMAN: -- as a Terry stop, where
4 Miranda is not coming into play at all --

5 JUSTICE SOTOMAYOR: Perhaps not, but it's --
6 if it's outside a school, school corner. No reasonable
7 suspicion, just says come over here, kid. Is he
8 supposed to ask the age to see if he's 19 or 18 or 17?

9 MS. BLACKMAN: We're not in a custodial
10 interrogation setting, I think in your question, and so
11 Miranda is not coming into play at all, but I mean, this
12 is a matter --

13 JUSTICE SOTOMAYOR: It is, because it's a
14 stop with no reasonable suspicion. And the kid comes
15 over, and the officer stands him there and continues to
16 talk to him for half an hour.

17 MS. BLACKMAN: If there is a custodial -- if
18 we have restraint on freedom of movement which is rising
19 to the degree of a formal arrest, it's a simple enough
20 matter to ask.

21 JUSTICE SOTOMAYOR: So why don't we go back
22 to the test that Justice Breyer suggested, which would
23 answer many of the hypotheticals here, that the
24 objective fact is what is known to both?

25 MS. BLACKMAN: What is known to both.

1 JUSTICE SOTOMAYOR: That way you don't get
2 into what the 13-year-old is thinking inside himself or
3 not, because that then becomes subjective; you don't go
4 back to what others might think are special
5 characteristics or subjective characteristics. You go
6 to what's known, what's an objective factor known to
7 both.

8 MS. BLACKMAN: Yes. But I think that we
9 can't be encouraging willful blindness, either; and so,
10 you know, if an officer encounters someone at a facility
11 where only children would be, for example, like an
12 elementary school or a juvenile detention facility --

13 JUSTICE SOTOMAYOR: I think that's clear,
14 but that's different. I mean, you can tell the
15 difference between a 9-year-old, I think, and an adult
16 generally.

17 MS. BLACKMAN: Indeed.

18 JUSTICE SOTOMAYOR: And I'm hard pressed to
19 think that anyone would believe that if you took a
20 9-year-old out of his classroom and the assistant
21 principal walked him into a room and said these guys
22 want to talk to you, that that 9-year-old would think
23 he's free to leave.

24 MS. BLACKMAN: I agree.

25 JUSTICE SOTOMAYOR: Right. So objectively

1 that's a fact known to everyone, that it's a 9-year-old.

2 MS. BLACKMAN: Correct. Correct. I did --
3 there have been a lot of questions that sort of
4 presupposed that we are doing a subjective inquiry, and
5 I think nothing could be farther from the case. What we
6 are not doing --

7 JUSTICE KENNEDY: I guess part of my problem
8 is it's just in some respects hard to put the Miranda in
9 the context of a -- let's say a 13-year-old alone. It
10 may be that Miranda warnings, "You have a right to
11 remain silent, anything you say can be used against you"
12 -- might terrify the kid just to hear about it. I'm
13 just wondering how the Miranda warning works here
14 anyway. The school is in loco parentis, it has certain
15 -- it has obligations and privileges with respect to the
16 student.

17 MS. BLACKMAN: Well, Miranda is the only
18 procedure to date that anyone uses, and constitutionally
19 they are -- everyone is entitled to some advisement so
20 that they can make an informed choice. I mean, whether
21 there should be a more simplified or different Miranda
22 warning for children is an issue for another day, but we
23 can't simply say we're not going to do anything. We are
24 not going to tell these children that they don't have to
25 cooperate with the State in building a case against

1 themselves.

2 JUSTICE ALITO: Could I go back to an
3 earlier question? Is it your argument that age is the
4 only objective individual characteristic of the person
5 being questioned that must be taken into account, or are
6 there other objective characteristics of people being
7 questioned who -- that fall into the same category?

8 MS. BLACKMAN: I think that one's status as
9 an inmate, for example, can be characterized as
10 objective, and certainly that has been taken into
11 account because inmates share that same baseline
12 restriction on freedom of movement that children do, and
13 so this court in -- Shafter -- for example,
14 characterized it as what would the reasonable person in
15 the inmate's position have understood as to his freedom
16 of movement. So, yes, I mean, there can be other
17 objective circumstances individual to the person, but
18 we're still not answering a subjective --

19 JUSTICE ALITO: But what are they? I don't
20 want to use up your rebuttal time, but what -- what are
21 they in addition to age? For people who are not
22 institutionalized or in school or in an environment like
23 that? What falls into the same category as age?

24 MS. BLACKMAN: I think that's for other
25 litigants to press upon this Court upon proper records

1 with input from experts as to whether it relates to the
2 special susceptibilities of children, how cognitively
3 different they are which is affecting their perception
4 and judgment of what's going on about them, and those
5 are questions for another day.

6 If there are no other questions, I would
7 like to reserve my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 General Cooper.

10 ORAL ARGUMENT OF GEN. ROY COOPER

11 ON BEHALF OF THE RESPONDENT

12 MR. COOPER: Mr. Chief Justice, and may it
13 please the Court:

14 In determining custody for Miranda purposes,
15 this Court has considered only the external surrounding
16 circumstances of the question and not the attributes
17 that affect the mental processes of the person being
18 questioned. Age fundamentally changes the reasonable
19 person test, makes it complex, makes it more illogical,
20 with no logical stopping point for adding other
21 characteristics, as Justice Breyer --

22 JUSTICE BREYER: You would add none? No
23 others? No other characteristics?

24 MR. COOPER: This Court has not said --

25 JUSTICE BREYER: Well, I mean here.

1 MR. COOPER: Yes, Your Honor.

2 JUSTICE BREYER: There's a big sign jail
3 cell, the door is unlocked. When you want to leave,
4 leave. Is he in custody?

5 MR. COOPER: Well, Your Honor, I think you
6 have to look at the obvious circumstances.

7 JUSTICE BREYER: Is he in custody? It's a
8 jail cell, but a big sign, "Go ahead, leave, go when you
9 want." Is he free to leave?

10 MR. COOPER: I think he may be, Your Honor.

11 JUSTICE BREYER: Yeah, so do I.

12 MR. COOPER: If that's how you want --

13 JUSTICE BREYER: I'll just tell you one
14 other circumstance.

15 MR. COOPER: Yes.

16 JUSTICE BREYER: He only speaks Spanish.

17 MR. COOPER: Well, Your Honor, I think it
18 affects --

19 JUSTICE BREYER: Ukrainian is the only thing
20 he speaks. Now are you willing to take that into
21 account?

22 MR. COOPER: Your Honor, I am willing to
23 take that into account.

24 JUSTICE BREYER: Thank you. Now, I'll say
25 another fact. Exactly the same, except there are very

1 steep steps and he's in a wheelchair. Are you willing
2 to take that into account?

3 MR. COOPER: I am willing to take that into
4 account.

5 JUSTICE BREYER: Okay. Then why aren't you
6 willing to take into account an ambiguous situation as
7 was true in Alvarado, a tough situation where it's
8 pretty unclear; he was brought there by his parents and
9 there are all these things around that might suggest to
10 a 20-year-old, yeah, you could leave, but to a
11 12-year-old, "no." If the judge can take into account
12 whether he's in a wheelchair, whether he just speaks
13 Ukrainian, whether in fact a thing -- you have to swim
14 through a pool and he doesn't know how to swim -- I
15 mean, all kinds of things like that; why can't he take
16 into account in a proper situation before he thinks he's
17 in custody or not, things they both know including
18 whether he's 8 years old or 22?

19 MR. COOPER: Your Honor, because those are
20 obvious circumstances that everyone agrees --

21 JUSTICE BREYER: And it's obvious whether
22 he's 8-year-old or 22, too. I'll tell you that.

23 MR. COOPER: The problem is, Your Honor, you
24 have to think like an 8-year-old or think like a
25 15-year-old in order to determine the situation.

1 JUSTICE BREYER: Right. And you have to
2 think like a Ukrainian speaker or think like a -- a -- a
3 -- like a person who knows he's in a wheelchair before
4 you know he can't get up those steep steps.

5 MR. COOPER: I think the difference --

6 JUSTICE BREYER: What is exactly the -- the
7 difference?

8 MR. COOPER: The difference is with the
9 Ukrainian is that you look at whether the knowledge was
10 actually acquired. And if he speaks Ukrainian, then
11 everyone knows that the -- that the knowledge was not
12 acquired. People understand that someone who has a
13 seeing eye dog, if you take him out of the room, then
14 you have exerted coercion over the situation. I think
15 that's different from requiring the officer to get into
16 the mind of the reasonable 15-year-old or 16-year-old.

17 JUSTICE BREYER: I haven't said that. What
18 the opinion said, which unfortunately may mean nothing
19 unless it's promoted to the status of majority, is you
20 look to those factors that are relevant to, known to
21 both policeman and the suspect, and are known to be
22 relevant to the likelihood that a person -- a likely
23 person, not him -- that are known likely relevant to an
24 ordinary person's belief -- this kind of a person --
25 that he thinks he's free to go.

1 MR. COOPER: I think --

2 JUSTICE BREYER: That's all. What's wrong
3 with that?

4 MR. COOPER: I think that's right, Your
5 Honor, and age --

6 JUSTICE BREYER: Well, if it's right, then
7 you --

8 MR. COOPER: Well, no, age is an objective
9 fact, but what -- what they're asking us to do is to use
10 age in a way where you're having to figure out what a --
11 what that person would think. And they're using age as
12 an overgeneralization for compliance. There are lots of
13 groups that would be naturally more compliant. Mentally
14 challenged people, seniors in rest homes, there are all
15 kinds of people who would be more compliant, but
16 compliance doesn't necessarily equal coercion.

17 JUSTICE BREYER: You know the sentence I'm
18 referring to in my dissent, presumably? We hope. When
19 I have set forth the test which was not accepted.

20 JUSTICE SCALIA: Some people don't -- some
21 people don't read the sentence. He may not have read
22 it.

23 (Laughter.)

24 JUSTICE BREYER: I'm -- I live always in
25 hope.

1 MR. COOPER: I'm aware of it. It was a very
2 well worded dissent.

3 JUSTICE BREYER: Well, I mean, the thing
4 about known to both and relevant to a likely belief as
5 to whether he's in custody or not. Now, are you willing
6 to accept that as a proper statement of the law?

7 MR. COOPER: I'm willing to accept that,
8 Your Honor.

9 JUSTICE BREYER: Fine.

10 MR. COOPER: I am.

11 JUSTICE BREYER: Well, then, perfect.

12 MR. COOPER: But I don't think it includes
13 age in the way they want to use it in this particular
14 situation.

15 JUSTICE GINSBURG: What do you mean by use
16 it in this situation? This is a middle -- middle
17 school. This is an officer who deals only with
18 children. I can't imagine any setting where age isn't
19 more apparent than when dealing with an assistant
20 principal, a juvenile investigator, going -- deciding --
21 the juvenile investigator deciding the place where he
22 wants to conduct this is in a middle school. I mean,
23 just as a matter of common sense, how can you say that
24 we're going to have the same test for this 8-year-old as
25 we would for the 30-year-old?

1 MR. COOPER: Well, Your Honor, the officer
2 may not know the age, but if he does, in this situation
3 he did, and -- and if the officer is in a middle school,
4 there is still a problem with having to figure out what
5 his actions and how they -- what they are and how they
6 affect a juvenile of a particular age.

7 In the situation of the 8-year-old it may
8 seem intuitively wrong, but the issue is, is you have to
9 get into the mind of the 8-year-old, makes it very
10 difficult as a practical matter. The officer's going to
11 have voluntariness problems. If the officer would read
12 Miranda, the officer is going to have waiver problems.

13 Officers have, in those situations,
14 incentive to read Miranda, to get a parent. In -- in --
15 in this type of situation the officer went there, it --
16 it was a familiar location to this juvenile, it was a
17 situation where he knew three of the people in the room,
18 the officer asked him if he wanted to answer questions,
19 and he said yes, the interview was relatively short.

20 The juvenile left at the end of the
21 interview, which is -- which is relevant, and I think in
22 this situation if -- if you -- if you look at it
23 broadly, it's very difficult for officers to tell age
24 and to tell how age affects the situation.

25 JUSTICE SCALIA: He probably couldn't leave

1 the classroom, either, could he, the classroom where he
2 was studying?

3 MR. COOPER: Your Honor, he probably could
4 not.

5 JUSTICE SCALIA: So the -- the additional
6 coercive effect of not being able to leave probably
7 didn't make a whole lot of difference. He knew he was
8 stuck where his parents had put him, in the school. And
9 if the school sent him to a classroom, he had to be in
10 the classroom; and if the school sent him to a place
11 where he could, if he wished, voluntarily speak to the
12 police officers, he had to be there.

13 MR. COOPER: Well, I think that's right,
14 Your Honor. I think you look at the school setting and
15 I think you look at --

16 JUSTICE GINSBURG: And we look at what is
17 the normal school setting just like we looked at the
18 normal business settings, he's in class, all the
19 children are around him. This seventh grader was
20 marched by the school security officer, taken away from
21 his peers, from his class in -- put in a room with a
22 closed door with the assistant principal. That is not a
23 normal part of the school day. That's not where he is
24 required to be. This is --

25 MR. COOPER: Well, Your Honor, I think

1 feeling free to leave somewhere is not the entire test
2 for custody. There has to be a restraint on freedom to
3 the degree associated with the arrest, and I think
4 that's pretty clear from the Berkemer case --

5 JUSTICE KENNEDY: But you say associated
6 with a reasonable man, and when we construct the
7 reasonable man, you're asking me to think of a
8 25-year-old sitting in a seventh grade social -- social
9 studies class.

10 MR. COOPER: Well, Your Honor, I think a
11 reasonable --

12 JUSTICE KENNEDY: That's a little hard for
13 me to imagine.

14 MR. COOPER: Well, a -- a reasonable person
15 is one of ordinary reason and intelligence who knows
16 what custody looks like, essentially, and is informed by
17 45 years of case law. If you have someone who is very
18 young, but if you have someone without any other kind of
19 disability, the voluntariness test is there. It -- it
20 considers age significantly in determining whether a
21 statement --

22 JUSTICE SOTOMAYOR: Excuse me, haven't we
23 repeatedly said that it's going to be very difficult for
24 a defendant to show that his confession wasn't
25 involuntary if there was no Miranda violation? Isn't

1 the entire purpose of Miranda and its requirement
2 because there was a belief that it wasn't -- that
3 voluntariness wasn't enough -- was not good enough
4 because it was such a high bar, to secure the privilege
5 against self-incrimination?

6 MR. COOPER: Well, Your Honor, I agree with
7 that, but the voluntariness test was complex because you
8 did consider so many factors. So the Court lifted the
9 Miranda test out of the voluntariness test, made it an
10 objective test, a prophylactic one, clearly a different
11 test --

12 JUSTICE SOTOMAYOR: That doesn't answer my
13 question. If we've said if you're not in custody, it's
14 going to be nearly impossible for you to show that your
15 statement was involuntary, are you now accepting that
16 with respect to age a 9-year-old may not feel free to
17 leave as opposed to a 13 or 14-year-old, that somehow we
18 should instruct the courts that age really needs to be
19 stepped up in the voluntariness test?

20 MR. COOPER: Well, Your Honor, in -- in
21 voluntariness, you don't necessarily have to have
22 custody to prove that a statement is involuntary, and of
23 children who are particularly young, that will come into
24 play significantly. I think you don't have to get into
25 turning Miranda upside down in order --

1 JUSTICE SOTOMAYOR: So are you happy with
2 the rule that says, no, not in the objective Miranda
3 test, but, yes, age should be elevated as a prime
4 consideration in the voluntariness test?

5 MR. COOPER: Justice Sotomayor, I think it
6 is already a significant factor in the voluntariness
7 test, and I think particularly for young children, I
8 think you're going to see that continue to occur.

9 JUSTICE KAGAN: General Cooper, I'm not sure
10 how I understand or that I understand how this would be
11 turning Miranda upside down. Miranda is already an
12 incredibly complicated test about when those warnings
13 need to be given, all right. So there are all manner of
14 circumstances which go into the determination of whether
15 a person would feel free to learn -- leave, whether a
16 person would feel as though he were in custody, a
17 thousand things, how many people are in the room, how
18 long the interrogation is, where the interrogation is,
19 the particular circumstances of the interrogation.

20 So, this is not a bright line test, and all
21 that we would be doing here would be adding an
22 additional objective factor to an already multifaceted
23 inquiry.

24 MR. COOPER: Justice Kagan, admittedly
25 sometimes Miranda has gray areas, because you do look at

1 a combination of factors, but it's informed with 45
2 years of case law. And officers now have a pretty good
3 idea as to what combination of factors constitute
4 custody for Miranda purposes.

5 What age does is now we're going to have to
6 go back in and reassess all of those combination of
7 factors through the eyes of a 13, 14, 15-year-old,
8 16-year-old, it's going to be case law that's going to
9 take --

10 JUSTICE BREYER: Why? Why is that? We've
11 seen two cases that seem like blue moon, once in a blue
12 moon. Alvarado is a odd set of circumstances. And what
13 is the terrible thing, the awful thing that has to
14 happen if the officer isn't sure whether this individual
15 thinks he's in custody or not? Suppose the officer just
16 isn't sure. What terrible thing happens?

17 MR. COOPER: Well, Your Honor --

18 JUSTICE BREYER: What is the answer to that
19 question?

20 MR. COOPER: You over Mirandize. You
21 Mirandize when it's not necessary.

22 JUSTICE BREYER: Oh, well, you over
23 Mirandize. The terrible thing that happens is you have
24 to give them a Miranda warning.

25 Now -- now, that is the terrible thing.

1 Now -- now -- now, why is that a burden on the criminal
2 justice system that sometimes in ambiguous circumstances
3 or because this kid is very young, he might not
4 understand it quite as well, and the officer sees that,
5 the kid sees it, and so the officer has to give him a
6 Miranda warning.

7 MR. COOPER: Your Honor --

8 JUSTICE BREYER: Now, what happens to
9 destroy the criminal justice system? You can see from
10 my overstatement, I tend to suspect nothing, but you
11 tell me.

12 MR. COOPER: A lot. School resource
13 officers, there are thousands of them, they are -- they
14 are licensed, but police officers -- uniform police
15 officers who often counsel kids as well as protect the
16 school. Under the Petitioner's theory, a school
17 resource officer who is going to take a juvenile into a
18 room to talk about a stolen cell phone or bullying, the
19 first thing that he's got to say is you have the right
20 to remain silent.

21 Now, that, in my opinion, disrupts the
22 communication.

23 JUSTICE BREYER: Why not the first thing,
24 hey, kid, we're here talking, but you want to leave,
25 just open the door and leave. Go. Nobody's keeping you

1 here. Why isn't that the first thing, if he's really
2 free to go?

3 MR. COOPER: Well, he may not want him to
4 go, number one.

5 JUSTICE BREYER: Oh, oh, oh, I see, I see.
6 (Laughter.)

7 MR. COOPER: Well, you know, you want to
8 talk -- you want to talk to the kid. If you have a
9 traffic stop, you don't want to immediately tell the
10 15-year-old driver, you're free to leave, because he's
11 not. It's just like Berkemer.

12 JUSTICE BREYER: He's not free to leave?
13 Okay. Well, then, why not warn him?

14 MR. COOPER: Well, no, because that's a
15 Berkemer situation, a traffic stop. And it didn't --

16 JUSTICE GINSBURG: For search purposes, is
17 age consciousness required? Remember, a part of this is
18 the police officer then goes to the boy's home. The
19 police officer is trained to deal with juveniles. And
20 he says to the boy, you can't consent to the search
21 because you're a seventh-grader. I will have to get a
22 warrant. So please stay here until I get a warrant.

23 If he can't -- if he's not treated like an
24 adult for purposes of the search, if you get the
25 warrant, if the police need a warrant because they're

1 dealing with a seventh-grader, why should it be
2 different for in custody for Miranda purposes?

3 MR. COOPER: Well, Your Honor, I think when
4 you're dealing with voluntariness, when you're dealing
5 with consent to search, when you're dealing with waiver,
6 you're looking at the particular juvenile. You're
7 looking at all of the circumstances. The courts have
8 said that the Miranda test is different --

9 JUSTICE GINSBURG: I thought all the police
10 officer was looking at when he said "I have to get a
11 warrant" is that he's dealing with a seventh-grader, not
12 all the circumstances. Very simple: Age.

13 MR. COOPER: Well, it might --

14 JUSTICE GINSBURG: He's under the age of
15 consent.

16 MR. COOPER: It might have been, in this
17 circumstance, that he didn't own the house. It was the
18 grandmother who actually owned the house as to why he
19 needed --

20 JUSTICE GINSBURG: He can't consent to a
21 contract. He --

22 MR. COOPER: And, Your Honor, you are right.
23 There are other categorical prohibitions on age across
24 the board in our law, but here what we're doing is
25 asking officers to assess each situation based on the

1 particular age of a juvenile, which makes it all the
2 more difficult for the officer.

3 You know, say for example that you're at a
4 Terry stop and there are a number of juvenile-looking
5 people there. Let's say they're 15 to 19, but the
6 officer doesn't know it. He's at the Terry stop. He's
7 going to be faced with, potentially, Mirandizing some of
8 the people there and not -- not others. That's going to
9 put law enforcement in an untenable situation and make
10 it very complex for them as to when they read Miranda
11 and they don't. And I think in addition to --

12 JUSTICE KAGAN: Counsel, do you agree with
13 the solicitor general's view that a blind person should
14 be treated as a blind person for -- for these purposes?

15 MR. COOPER: I think I do, Your Honor,
16 because --

17 JUSTICE KAGAN: And a deaf person should be
18 treated as a deaf person for these purposes?

19 MR. COOPER: It's an obvious external
20 circumstance.

21 JUSTICE KAGAN: As is youth. As is youth,
22 an obvious external circumstance that this boy was 13
23 years old.

24 MR. COOPER: But you don't have to get into
25 the mind of the blind person or the deaf person. The

1 only issue is whether they have acquired the knowledge
2 in order to be able to put it into the --

3 JUSTICE KAGAN: You know, I don't agree with
4 that. You are trying to understand this situation as
5 the blind person would have seen it or as the deaf
6 person would have seen it or as the 13-year-old would
7 have seen it, and I don't understand why it's different.

8 MR. COOPER: Well, Your Honor, I think it's
9 different because it has to do with something that is
10 obvious. It is not necessarily obvious how a 13- or
11 14-year-old would view the situation. And just in
12 the -- the Alvarado opinion, the opinion says that
13 sometimes the permissible objective facts and
14 impermissible subjective opinions sometimes merge.

15 JUSTICE SCALIA: The blind person doesn't
16 have a different mind.

17 MR. COOPER: That's correct.

18 JUSTICE SCALIA: The deaf person doesn't
19 have a different mind. He just has less data, and it's
20 easy to take account of less data; easier to take
21 account of less data than it is to take account of how
22 different one's mind is because he's 16 instead of 13 or
23 whatever. That's the difference between the blind and
24 the deaf, isn't it?

25 MR. COOPER: I think you're absolutely --

1 absolutely right, and yes, too, Your Honor. I think
2 it's important to know that we have already started
3 going down the slippery slope in a number of states.
4 There have been 11 states, contrary to Petitioner's
5 brief, that are considering other characteristics in
6 Miranda, such as sophistication, such as education, such
7 as intelligence. That makes it so much more difficult.

8 And this Court has not hesitated -- it did
9 not hesitate in Alvarado; it did not hesitate in
10 Berkemer -- to correct lower courts, to say we've got to
11 make sure that Miranda is complete, that Miranda stays
12 clear and objective, and that we don't blur the lines.

13 JUSTICE ALITO: If the law goes down that
14 route, then one of the chief advantages of the Miranda
15 rule, which is that it's a relatively simple objective
16 test, is eliminated, and the law of Miranda begins to
17 resemble the law of voluntariness. And maybe at that
18 point, there is no longer a strong argument in favor of
19 Miranda, and the voluntariness test will be the sole
20 test.

21 MR. COOPER: We support Miranda, Your Honor.
22 We support Miranda in its current form. We think it's
23 appropriate, but I think clearly, by adding age into the
24 circumstance, it makes it more complicated.

25 Your Honor, I would -- Justices, I would

1 request that the North Carolina Supreme Court decision
2 be upheld.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Feigin.

5 ORAL ARGUMENT OF ERIC J. FEIGIN,

6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE RESPONDENT

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

10 There are three primary reasons why age
11 should not be a factor in the Miranda custody test. I
12 think the most important one is this: The only
13 statements that are going to be suppressed under
14 Petitioner's rule that wouldn't already be suppressed by
15 existing doctrine are statements that, first of all, the
16 prosecution has --

17 JUSTICE KENNEDY: I'm sorry. I just -- the
18 only statements that could be suppressed -- I just
19 didn't hear.

20 MR. FEIGIN: The only statements that are
21 going to be suppressed under Petitioner's rule that
22 would take age into account that aren't already going to
23 be suppressed under existing constitutional doctrines
24 are statements that, first of all, the prosecution has
25 carried its burden to prove are voluntary under a

1 voluntariness test that already takes age into account,
2 and second of all, are given under circumstances that
3 don't otherwise meet the definition of custody; that is,
4 formal arrest or its functional equivalent.

5 I think that's a relatively small and not a
6 particularly problematic category of statements, and I
7 don't think it's worth complicating the Miranda rule in
8 order to make sure that those statements are suppressed.

9 JUSTICE BREYER: Why? Maybe you can explain
10 this to me, too.

11 You have a blind person there. Everyone --
12 you don't know how blind. He's somewhat blind. A deaf
13 person. How hard of hearing? We're not sure. So the
14 policeman goes a little overboard. You are free to
15 leave, or shows it to him, or makes sure he gets it in.
16 Okay? Why is that so tough to do where you also have a
17 12-year-old? If he really is free to leave, just make
18 clear that he knows it.

19 MR. FEIGIN: Well, Your Honor, I think the
20 critical difference between blindness, deafness, and
21 other sensory disabilities and age is what Justice
22 Scalia said a few minutes ago, which is, in the case of
23 a blind or deaf person, you can try to figure out what
24 the circumstances surrounding the interrogation that are
25 observable to that person are, and then --

1 JUSTICE KAGAN: But that's all we're doing
2 with the young person. And in fact, most of us, many of
3 us, have a great deal more experience understanding the
4 world through the eyes of a young person or children,
5 perhaps, than understanding the eyes -- the world
6 through the eyes of a severely sensory deprived person.

7 We're asking the exact same thing in both
8 contexts: What is this person -- what is this -- what
9 do the objective circumstances appear to a person in
10 this situation?

11 MR. FEIGIN: Well, Your Honor, I don't think
12 you're doing the same thing, and I think it's easier to
13 put yourself in the mindset of a person with a sensory
14 deprivation than a person of a particular age, and let
15 me explain why.

16 For a person with a sensory deprivation,
17 like in Justice Breyer's example, the sign that someone
18 can't read, I think it's very common and easy for
19 officers and courts to figure out how they would react
20 to the situation if the sign simply weren't there.

21 With age, what you're asking perhaps a
22 45-year-old officer to do, in Justice Alito's example,
23 or a 60-year-old judge to do, is to put them into the
24 frame of mind of a person that they haven't been for 32
25 years or 45 years, and I don't think that's a very easy

1 inquiry to ask officers or courts to make.

2 I think this is really going to complicate
3 the Miranda rule by asking them, A, to do that, and, B,
4 because there are going to be many cases, unlike this
5 case, where it's not going to be apparent to the officer
6 what age the suspect is.

7 One thing that comes up fairly commonly in
8 many jurisdictions is that an officer will stop someone
9 on a -- do a traffic stop of someone on the road; the
10 person will claim not to have their ID, and it will turn
11 out the person is 14 and they will give the name and
12 birth date of an older sibling. And there is simply no
13 way for an officer in those circumstances to know what
14 the age of the suspect is.

15 JUSTICE GINSBURG: Limit it to when the age
16 is known. If we limit it to, this is an officer who not
17 only knows he's dealing with a seventh-grader but he
18 decides the venue for the questioning is going to be a
19 room in the school, that's -- it's not a mystery. It's
20 not a guess. He knows he's dealing with a
21 seventh-grader. He sets it up.

22 Are we to ignore what the investigating
23 officer knows? The investigating officer knows he's
24 dealing with a child.

25 MR. FEIGIN: Well, Your Honor, I think there

1 are sort of two parts to your question. Let me deal
2 first with the rule that would only apply when officers
3 know the identity, know the age of the suspect. I think
4 that rule would be easier to apply than the rule the
5 Petitioners are suggesting and would mitigate some of
6 the damage, but first of all it doesn't solve the
7 critical problem of asking officers who aren't
8 themselves 13 to think like someone who is 13; and
9 second of all, I think for reasons that I think were
10 apparent during the argument by my friend on the other
11 side, that rule might easily devolve into a "should have
12 known" test, and officers simply aren't going to be able
13 to deal with that.

14 JUSTICE SCALIA: The officer doesn't have to
15 think like a 13-year-old, he has to think the way a
16 60-year-old judge would think a 13-year-old thought,
17 right?

18 (Laughter.)

19 MR. FEIGIN: That's right, Your Honor, and
20 it may depend what -- which particular 60-year-old
21 judge --

22 JUSTICE BREYER: But that isn't -- to me,
23 anyway, that is not the question. I don't think anybody
24 is asking anybody to think like anything else. All it
25 is, when you face a younger child, and he is free to go,

1 and you mean he's free to go, you just sort of err a
2 little bit on the safe side and make sure he understands
3 it. That's all. Nobody has to think like anybody. All
4 they have to think is let's err somewhat on the safe
5 side. Now why is that tough?

6 MR. FEIGIN: Well, Your Honor, I think that
7 the main problem here is that it's going to create more
8 confusion for officers because it's another factor they
9 have to put into the test, and it's --

10 JUSTICE GINSBURG: What's the --

11 JUSTICE SCALIA: Why don't we require
12 Miranda always?

13 MR. FEIGIN: The courts --

14 JUSTICE SCALIA: Is there any harm in
15 requiring it always? It's always easy to do. Why don't
16 we require it all the time? Can you tell us why it
17 makes a difference?

18 MR. FEIGIN: I think it's very unrealistic
19 that every time an officer opens their mouth they have
20 to give Miranda warnings, and I think it would
21 fundamentally change the nature of police interactions
22 with the public. The Court -- and the other reason the
23 Court has never required it is that voluntary
24 statements, the Court made clear in two cases last term
25 again, Maryland v. Jasper, and Berkeley v. Thompkins,

1 are a good thing, and there -- voluntary confessions are
2 a good thing, they're very helpful for law enforcement.

3 JUSTICE KAGAN: Mr. Feigin --

4 MR. FEIGIN: And there's no reason to --

5 JUSTICE KAGAN: I'm sorry.

6 MR. FEIGIN: Please.

7 JUSTICE KAGAN: Do you think that a 00 a
8 person with Down's syndrome, that that should be taken
9 into account in this inquiry?

10 MR. FEIGIN: I'm not sure how that would be
11 taken into account, Your Honor. To the extent that
12 someone with Down's syndrome thinks differently from
13 someone who doesn't have Down's syndrome, I think that
14 would be very relevant to the voluntariness test but
15 would not be relevant to the custody test. Because it's
16 -- again it's going to be very difficult to ask an
17 officer to put themselves in the mindset of someone who
18 has Down's syndrome. I think the -- the third
19 problem --

20 JUSTICE SOTOMAYOR: So how is that different
21 than blindness or hearing? A person with Down's
22 syndrome, many -- some don't -- show characteristics
23 that they're not capable of comprehension, or not
24 capable of absorbing information.

25 MR. FEIGIN: Well, Your Honor --

1 JUSTICE SOTOMAYOR: They barely look at you,
2 they barely -- you know, there are characteristics that
3 show you a lack of absorption of information.

4 MR. FEIGIN: Your Honor, I may have
5 difficulty dealing with this particular hypothetical
6 because of my lack of knowledge of the particular
7 symptoms of Down's syndrome; but if you're dealing with
8 a suspect who simply can't absorb information about the
9 world, then that's going to be a sensory deprivation
10 that's going to be taken into account, because it's
11 going to subtract circumstances away that that suspect
12 can't perceive. But if you're asking about the mindset
13 of someone that has a particular sensory disability,
14 then no, I don't think that would be taken into account
15 because it's asking too much of officers to try to put
16 themselves in that mindset.

17 And the third problem, I think, with
18 factoring age into the custody test is that -- and as I
19 think Petitioners effectively conceded, it creates a
20 slippery slope problem. There really isn't a clear
21 distinction between age and other things such as mental
22 disorders or cultural background, that defendants also
23 argue change whether they believe that they've been
24 subject to a formal arrest or its functional equivalent.

25 JUSTICE SCALIA: We don't want Miranda

1 warnings to be given where they are unnecessary because
2 they are only necessary to prevent coercion, and where
3 there's no coercion, we want confessions, don't we? And
4 the Miranda warnings deter confessions.

5 MR. FEIGIN: That's right, Your Honor.

6 JUSTICE SCALIA: Isn't that the basic
7 reason?

8 MR. FEIGIN: That's right, Your Honor,
9 and --

10 JUSTICE SCALIA: So it's not cost-free to
11 require Miranda warnings.

12 MR. FEIGIN: That's right --

13 JUSTICE SCALIA: It's a good thing to have
14 the bad guys confess that they're bad guys, right?

15 MR. FEIGIN: That's right, Your Honor,
16 that's what I was trying to say earlier.

17 JUSTICE GINSBURG: Before you -- you are so
18 quick to answer that's right, isn't it so that the
19 manual that this very officer was given to use said
20 before you question a child, give Miranda warnings?

21 MR. FEIGIN: Yes, it did, Your Honor.

22 JUSTICE GINSBURG: Apparently the people who
23 train these juvenile officers think it's a good thing,
24 not a bad thing to give a Miranda warning.

25 MR. FEIGIN: Well, one reason they may think

1 it's a good thing and one reason I think the Court
2 doesn't need to accept Petitioner's rule here, is that
3 officers often will give Miranda warnings, for precisely
4 the reasons Justice Sotomayor was suggesting earlier,
5 which is that when officers do give Miranda warnings,
6 it's going to be -- and those Miranda -- the Miranda
7 procedures are all validly followed, there's not going
8 to be a real robust voluntariness inquiry because in
9 most cases where the Miranda procedures are followed,
10 the statements are going to be found to be voluntary
11 under the voluntariness test.

12 And if I could actually add answer an answer
13 to Justice Scalia's earlier question, Miranda isn't
14 simply concerned with coercion. The Court made very
15 clear in Oregon v. Mathiason that Miranda isn't
16 attempting capture every quote, unquote, "coercive
17 environment." What Miranda is directed at is a specific
18 environment -- thank you.

19 CHIEF JUSTICE ROBERTS: Finish your
20 sentence.

21 MR. FEIGIN: Specific environment, namely
22 custody, which is defined as a formal arrest or its
23 functional equivalent. Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Blackman, you have 3 minutes remaining.

1 REBUTTAL ARGUMENT OF BARBARA S. BLACKMAN
2 ON BEHALF OF THE PETITIONER

3 MS. BLACKMAN: I think what's very odd in
4 this case is that the only party that didn't consider
5 J.D.B.'s age was the courts. I mean, it was clearly
6 being taken into account by Officer DiCostanzo, and
7 J.D.B. was fully aware of his own age. And under
8 Thompson v. Keohane, what a reviewing court is supposed
9 to be doing is immersing itself in the actual
10 circumstances of the case; and without this
11 consideration of age, then the courts are examining
12 hypothetical, because -- hypothetical interrogations and
13 not the one that was actually occurring in the case.

14 Officers have to make judgments about every
15 objective circumstance that arises, and asking them to
16 make objective determinations on juvenile status is no
17 different and is not going to muddy the water. I think
18 as Justice Kagan pointed out, custody is a very
19 difficult issue. It's not subject to bright line rules.
20 But we can't be defining it in such a way where we are
21 requiring these children to be someone that they never
22 could be, and that is, reasonable adults.

23 If our goal here is to ensure reliability of
24 factfinding, reliability of statements, if we want to
25 reduce the coercion, to which our citizens are entitled,

1 then this rule needs to be put into play, and we ask
2 that the North Carolina Supreme Court decision be
3 reversed. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 The case is submitted.

6 (Whereupon, at 12:12 p.m., the case in the
7 above-entitled matter was submitted.)

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A				
able 13:18 33:6 42:2 48:12	adults 6:25 10:22 54:22	43:9	48:10 54:1	52:14,24
above-entitled 1:11 55:7	adult-like 12:9	Alvarez 8:1	arises 54:15	baggy 13:22
absolutely 8:19 42:25 43:1	advantage 4:1	ambiguous 28:6 38:2	arising 16:4 18:4	bar 35:4
absorb 51:8	advantages 43:14	amicus 1:21 2:11 44:6	arrest 22:19 34:3 45:4 51:24 53:22	BARBARA 1:15 2:3,13 3:7 54:1
absorbing 50:24	advised 3:18	analysis 11:15 21:8	ascertain 20:25	barely 51:1,2
absorption 51:3	advisement 24:19	answer 3:19 16:7 18:5 22:23 32:18 35:12 37:18 52:18 53:12,12	asked 32:18	based 40:25
accept 31:6,7 53:2	advising 16:5,6	answering 16:23 25:18	asking 8:13 11:2 11:6 20:16,25 30:9 34:7 40:25 46:7,21 47:3 48:7,24 51:12 51:15 54:15	baseline 25:11
accepted 30:19	affect 26:17 32:6	anybody 48:23 48:24 49:3	assess 10:7 40:25	bases 12:24 19:3
accepting 35:15	age 4:14,22 5:1 6:6,8,17,19 7:19 10:14 18:3 19:4,7,19 21:4 21:7,23 22:8 25:3,21,23 26:18 30:5,8,10 30:11 31:13,18 32:2,6,23,24 34:20 35:16,18 36:3 37:5 39:17 40:12,14,23 41:1 43:23 44:10,22 45:1 45:21 46:14,21 47:6,14,15 48:3 51:18,21 54:5,7 54:11	anyway 24:14 48:23	assessment 13:11	basic 52:6
accepts 19:19	agent 16:16,18	apparent 20:8 31:19 47:5 48:10	assigned 10:4	basically 8:25
account 5:3 9:23 21:11,14 25:5 25:11 27:21,23 28:2,4,6,11,16 42:20,21,21 44:22 45:1 50:9 50:11 51:10,14 54:6	ago 45:22	apparently 8:5 52:22	assistant 1:19 13:5 18:14 23:20 31:19 33:22	basis 6:11,15 8:23 10:6,7 13:9 17:19 20:7 20:14
accurate 15:9	agree 10:3 23:24 35:6 41:12 42:3	appear 46:9	associated 34:3 34:5	beard 20:5
acquired 29:10 29:12 42:1	agrees 28:20	appearance 20:11	attempting 53:16	begins 43:16
acting 16:15,18	ahead 27:8	APPEARANC... 1:14	Attorney 1:17	behalf 1:16,18 1:21 2:4,7,10 2:14 3:8 26:11 44:6 54:2
actions 32:5	ALITO 11:2,12 11:18,21,25 12:5 13:13 19:7 19:13,21,25 20:3 25:2,19 43:13	apply 14:11 20:17 21:1 48:2 48:4	attributes 26:16	belief 29:24 31:4 35:2
actual 54:9	Alito's 46:22	applying 5:11	authority 3:25	believe 18:9 23:19 51:23
add 26:22 53:12	Alvarado 28:7 37:12 42:12	appreciate 11:9 13:16	average 11:6	believes 20:20
adding 26:20 36:21 43:23		appropriate 43:23	avoiding 7:14	Berkeley 49:25
addition 25:21 41:11		areas 36:25	aware 5:14 18:2 19:4 31:1 54:7	Berkemer 7:11 34:4 39:11,15 43:10
additional 17:21 18:1 19:5 33:5 36:22		argue 51:23	awful 37:13	big 27:2,8
admitted 17:20		arguing 6:15	a.m 1:13 3:2	birth 47:12
admittedly 36:24		argument 1:12 2:2,5,8,12 3:4,7 25:3 26:10 43:18 44:5		bit 49:2
adult 6:23 12:9 12:11,21 15:6 19:23 23:15 39:24				Blackman 1:15 2:3,13 3:6,7,9 4:3,9,13,18,21 5:2,6,13,17,21 6:3,16,19 7:6 8:9,19 9:11,15 10:3,14,20 11:11,14,20,24 12:4,6,14,17 12:19,23 13:8 13:18 14:1,5
adulthood 12:20				

<p>15:1,18 16:3,14 16:19,25 17:7 17:16,23 18:1,9 18:16,20 19:2,9 19:17,24 20:2,6 20:13,22 21:9 21:16,24 22:3,9 22:17,25 23:8 23:17,24 24:2 24:17 25:8,24 53:25 54:1,3</p> <p>blank 8:15 blind 41:13,14,25 42:5,15,23 45:11,12,12,23 blindness 23:9 45:20 50:21 blue 37:11,11 blur 43:12 board 40:24 boy 39:20 41:22 boy's 39:18 Breyer 7:10 8:3 8:12,20 9:1 22:22 26:21,22 26:25 27:2,7,11 27:13,16,19,24 28:5,21 29:1,6 29:17 30:2,6,17 30:24 31:3,9,11 37:10,18,22 38:8,23 39:5,12 45:9 48:22 Breyer's 46:17 brief 43:5 bright 36:20 54:19 broadly 14:11 32:23 brought 13:3 28:8 Brown 13:24 building 24:25 bullying 38:18</p>	<p>burden 19:11 38:1 44:25 burdens 19:5 business 33:18 Buster 13:24</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 calibrate 4:8 calibrated 4:22 5:1,1 call 9:1,2 17:13 18:18 called 17:5,15 capable 50:23,24 capture 53:16 Carolina 1:6,15 1:18 3:5 17:8 44:1 55:2 carried 44:25 case 3:4 7:25 8:5 9:14,19 10:4,12 13:11,20 14:10 21:13 24:5,25 34:4,17 37:2,8 45:22 47:5 54:4 54:10,13 55:5,6 cases 7:11 13:13 37:11 47:4 49:24 53:9 categorical 40:23 categorically 3:25 category 25:7,23 45:6 cell 27:3,8 38:18 certain 24:14 certainly 10:7 16:5 25:10 challenged 30:14 change 10:19 15:1 49:21 51:23 changes 26:18</p>	<p>character 9:7 characteristic 3:25 25:4 characteristics 9:12 23:5,5 25:6 26:21,23 43:5 50:22 51:2 characterized 25:9,14 chief 3:3,9 14:4,6 15:10,22 17:11 17:22,24 18:5 18:17,24 26:8 26:12 43:14 44:3,8 53:19,24 55:4 child 6:23 9:20 12:9,21 16:8,22 18:3 19:18,22 20:10,15 21:13 47:24 48:25 52:20 childhood 8:24 children 4:1 6:25 7:8 9:13,21 10:21,23 23:11 24:22,24 25:12 26:2 31:18 33:19 35:23 36:7 46:4 54:21 choice 24:20 chose 3:23 4:2 circumstance 8:15,18 15:19 21:10 27:14 40:17 41:20,22 43:24 54:15 circumstances 6:5,21 7:16 9:1 9:5,6,10 11:7,9 11:23 12:1 13:19 15:3 16:4 16:21 19:10 20:8,9,23 25:17</p>	<p>26:16 27:6 28:20 36:14,19 37:12 38:2 40:7 40:12 45:2,24 46:9 47:13 51:11 54:10 citizens 54:25 claim 47:10 class 13:4 33:18 33:21 34:9 classroom 3:12 23:20 33:1,1,9 33:10 clear 4:4 5:16 13:11,19 14:7 14:10 20:23 23:13 34:4 43:12 45:18 49:24 51:20 53:15 clearly 5:13 35:10 43:23 54:5 closed 3:13 33:22 closer 12:20 coercion 16:21 29:14 30:16 52:2,3 53:14 54:25 coercive 33:6 53:16 cognitive 6:24 7:5 cognitively 26:2 colleagues 21:19 combination 37:1 37:3,6 come 21:22 22:7 35:23 comes 7:11 21:20 22:14 47:7 coming 22:4,11</p>	<p>common 5:4,5 31:23 46:18 commonly 47:7 communication 38:22 community 5:6 complete 43:11 completely 10:3 complex 9:12,16 26:19 35:7 41:10 compliance 30:12,16 compliant 30:13 30:15 complicate 47:2 complicated 36:12 43:24 complicating 45:7 comprehension 50:23 conceded 51:19 Conceptually 8:19 concerned 10:13 14:19 53:14 condition 9:3 conduct 3:24 4:2 31:22 conducted 3:13 confess 52:14 confession 6:6 34:24 confessions 50:1 52:3,4 conflicts 8:4 confrontation 5:10 confusion 49:8 consciousness 39:17 consent 39:20 40:5,15,20</p>
---	--	--	--	---

<p>consider 4:14 13:19 19:12 21:4 35:8 54:4 consideration 36:4 54:11 considered 15:4 17:2,5 26:15 considering 7:13 19:6 43:5 considers 34:20 constitute 37:3 constitutional 44:23 constitutionally 24:18 construct 34:6 contact 20:11 contacted 17:18 context 24:9 contexts 46:8 continue 36:8 continues 22:15 contract 40:21 contrary 43:4 Cooper 1:17 2:6 26:9,10,12,24 27:1,5,10,12 27:15,17,22 28:3,19,23 29:5 29:8 30:1,4,8 31:1,7,10,12 32:1 33:3,13,25 34:10,14 35:6 35:20 36:5,9,24 37:17,20 38:7 38:12 39:3,7,14 40:3,13,16,22 41:15,19,24 42:8,17,25 43:21 cooperate 24:25 corner 22:6 correct 18:16 24:2,2 42:17</p>	<p>43:10 cost-free 52:10 counsel 26:8 38:15 41:12 44:3 53:24 55:4 course 7:25 15:19 16:4 17:1 court 1:1,12 3:10 4:14,22 5:15,18 5:21,24 6:1 21:10,14 25:13 25:25 26:13,15 26:24 35:8 43:8 44:1,9 49:22,23 49:24 53:1,14 54:8 55:2 courts 5:23 11:14 13:10 21:3 35:18 40:7 43:10 46:19 47:1 49:13 54:5 54:11 create 17:19 49:7 creates 51:19 criminal 38:1,9 critical 45:20 48:7 cultural 51:22 curiae 1:21 2:11 44:6 current 43:22 custodial 17:9 22:9,17 custody 5:23 6:10,14 9:4,8 13:6 15:3,21 18:12 21:17 26:14 27:4,7 28:17 31:5 34:2 34:16 35:13,22 36:16 37:4,15 40:2 44:11 45:3 50:15 51:18</p>	<p>53:22 54:18</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 daily 10:6 damage 48:6 data 12:8,12,15 12:17,24 13:2 42:19,20,21 date 24:18 47:12 day 24:22 26:5 33:23 deaf 41:17,18,25 42:5,18,24 45:12,23 deafness 45:20 deal 39:19 46:3 48:1,13 dealing 20:10 31:19 40:1,4,4 40:5,11 47:17 47:20,24 51:5,7 deals 9:20 10:6 31:17 dealt 10:1 decades 11:15 decide 11:7 decides 47:18 deciding 6:9 31:20,21 decision 11:1 44:1 55:2 default 15:6 defendant 34:24 defendants 51:22 deference 3:24 deficiencies 7:5 deficiency 6:8,10 6:18 deficient 7:3 9:2 9:8 defined 53:22 defining 54:20 definition 45:3</p>	<p>degree 22:19 34:3 demonstrated 3:16 demonstrates 12:8 Department 1:20 departure 4:12 depend 48:20 depends 16:15 deprivation 46:14,16 51:9 deprived 46:6 destroy 38:9 detention 23:12 deter 52:4 determination 15:3 21:5 36:14 determinations 54:16 determine 28:25 determined 10:5 determining 4:15 15:20 21:16 26:14 34:20 devolve 48:11 DiCostanzo 54:6 difference 23:15 29:5,7,8 33:7 42:23 45:20 49:17 differences 6:25 14:17 different 4:5 6:17 6:19 18:12 23:14 24:21 26:3 29:15 35:10 40:2,8 42:7,9,16,19 42:22 50:20 54:17 differently 6:22 8:24 50:12 difficult 4:23</p>	<p>5:22 32:10,23 34:23 41:2 43:7 50:16 54:19 difficulties 14:9 difficulty 11:16 51:5 directed 53:17 disabilities 45:21 disability 34:19 51:13 discern 20:14 discretionary 21:7,12 disorders 51:22 disrupts 38:21 dissent 7:25 30:18 31:2 distinction 51:21 doctrine 44:15 doctrines 44:23 dog 29:13 doing 11:16 15:5 24:4,6 36:21 40:24 46:1,12 54:9 door 3:13 27:3 33:22 38:25 Down's 50:8,12 50:13,18,21 51:7 dressed 13:22 driver 39:10 Durham 1:15 D.C 1:8,20</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 25:3 52:16 53:4,13 easier 42:20 46:12 48:4 easily 48:11 easy 42:20 46:18 46:25 49:15 education 43:6</p>
--	---	---	--	---

effect 6:12 20:16 33:6	examining 5:18 9:13 16:19 54:11	9:10,24 17:1 29:20 35:8 37:1 37:3,7	form 43:22 formal 22:19 45:4 51:24 53:22	given 10:23 14:24 19:4 36:13 45:2 52:1 52:19
effectively 51:19	example 6:18 19:22 23:11 25:9,13 41:3 46:17,22	facts 13:14 14:19 14:22 42:13	forth 30:19 found 53:10 four 13:4	giving 6:6 16:8 19:18
either 13:1 20:10 23:9 33:1	Excuse 12:14 34:22	fact-finding 15:9 fairly 47:7	frame 46:24 free 3:18,18 8:18 11:10 13:6 15:12 16:6,7 23:23 27:9 29:25 34:1 35:16 36:15 39:2,10,12 45:14,17 48:25 49:1	go 8:18 12:2,3 13:16 14:20 16:10 22:21 23:3,5 25:2 27:8,8 29:25 36:14 37:6 38:25 39:2,4 48:25 49:1
elementary 23:12	exercise 5:2 exerted 29:14 exist 6:25 12:17 existed 3:22 existing 44:15,23 expected 3:24 experience 5:6 46:3	fall 25:7 falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21	freedom 3:21 6:20 22:18 25:12,15 34:2 frequently 5:21 friend 48:10 fully 54:7 functional 45:4 51:24 53:23 fundamentally 26:18 49:21	goal 54:23 goes 15:13 39:18 43:13 45:14 going 5:9,10,10 6:22 8:7,10 9:21 13:6,25 14:12,13,15,15 15:7 16:2 17:19 17:20 21:18 24:23,24 26:4 31:20,24 32:10 32:12 34:23 35:14 36:8 37:5 37:8,8 38:17 41:7,8 43:3 44:13,21,22 47:2,4,5,18 48:12 49:7 50:16 51:9,10 51:11 53:6,7,10 54:17
elevated 36:3 eliminated 43:16 empirical 12:8 12:12,15,17,24 13:2	enforce 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21	give 37:24 38:5 47:11 49:20 52:20,24 53:3,5	gray 36:25
encounters 23:10	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21	<hr/> G <hr/>	
encouraging 23:9	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21	G 3:1 GEN 26:10 general 1:17,20 4:11 26:9 36:9 generally 23:16 general's 41:13 Ginsburg 9:15 17:4 18:6,11 21:2 31:15 33:16 39:16 40:9,14,20 47:15 49:10 52:17,22	
enforcement 3:14 5:9 41:9 50:2	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21	good 8:6 20:12 20:18,19 35:3 37:2 50:1,2 52:13,23 53:1	
engages 21:21 English 7:20 ensure 54:23 entire 34:1 35:1 entitled 24:19 54:25 environment 16:20 25:22 53:17,18,21 equal 30:16 equivalent 13:25 45:4 51:24 53:23 ERIC 1:19 2:9 44:5 err 49:1,4 escorted 3:12 ESQ 1:15,17,19 2:3,6,9,13 essentially 34:16 evaluates 16:22 everybody 14:23 exact 46:7 exactly 27:25 29:6	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21	grade 34:8 grader 33:19 grandmother 40:18	
examining 5:18 9:13 16:19 54:11	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21	grandmother 40:18	
effectively 51:19	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21	gray 36:25	
either 13:1 20:10 23:9 33:1	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
elementary 23:12	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
elevated 36:3 eliminated 43:16 empirical 12:8 12:12,15,17,24 13:2	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
encounters 23:10	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
encouraging 23:9	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
enforcement 3:14 5:9 41:9 50:2	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
engages 21:21 English 7:20 ensure 54:23 entire 34:1 35:1 entitled 24:19 54:25 environment 16:20 25:22 53:17,18,21 equal 30:16 equivalent 13:25 45:4 51:24 53:23 ERIC 1:19 2:9 44:5 err 49:1,4 escorted 3:12 ESQ 1:15,17,19 2:3,6,9,13 essentially 34:16 evaluates 16:22 everybody 14:23 exact 46:7 exactly 27:25 29:6	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
examining 5:18 9:13 16:19 54:11	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
effectively 51:19	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
either 13:1 20:10 23:9 33:1	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
elementary 23:12	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
elevated 36:3 eliminated 43:16 empirical 12:8 12:12,15,17,24 13:2	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
encounters 23:10	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
encouraging 23:9	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
enforcement 3:14 5:9 41:9 50:2	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
engages 21:21 English 7:20 ensure 54:23 entire 34:1 35:1 entitled 24:19 54:25 environment 16:20 25:22 53:17,18,21 equal 30:16 equivalent 13:25 45:4 51:24 53:23 ERIC 1:19 2:9 44:5 err 49:1,4 escorted 3:12 ESQ 1:15,17,19 2:3,6,9,13 essentially 34:16 evaluates 16:22 everybody 14:23 exact 46:7 exactly 27:25 29:6	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
examining 5:18 9:13 16:19 54:11	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
effectively 51:19	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,8,20 45:19 46:11 47:25 48:19 49:6,13,18 50:3 50:4,6,10,25 51:4 52:5,8,12 52:15,21,25 53:21		
either 13:1 20:10 23:9 33:1	enforced 12:14 34:22	falls 25:23 familiar 32:16 family 3:15 far 7:6 10:12 farther 12:10 24:5 favor 8:13 43:18 Federal 18:25 feel 13:6 15:15 35:16 36:15,16 feeling 34:1 Feigin 1:19 2:9 44:4,5,		

<p>great 46:3 greater 11:18,21 groups 30:13 guardian 17:10 guess 14:16 24:7 47:20 guidelines 14:8 guys 23:21 52:14 52:14</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 16:7 22:16 handicapped 7:9 happen 37:14 happens 37:16 37:23 38:8 happy 36:1 hard 23:18 24:8 34:12 45:13 harm 49:14 hear 3:3 14:23 24:12 44:19 hearing 45:13 50:21 heavy 20:5 heightened 3:23 held 9:3,7 helpful 50:2 hesitate 43:9,9 hesitated 43:8 hey 38:24 high 35:4 holding 8:4 home 39:18 homes 30:14 Honor 9:11 11:11 12:4 27:1 27:5,10,17,22 28:19,23 30:5 31:8 32:1 33:3 33:14,25 34:10 35:6,20 37:17 38:7 40:3,22 41:15 42:8 43:1 43:21,25 45:19</p>	<p>46:11 47:25 48:19 49:6 50:11,25 51:4 52:5,8,15,21 hope 30:18,25 hour 22:16 house 40:17,18 hypothesize 13:15 hypothetical 11:4 51:5 54:12 54:12 hypotheticals 21:19 22:23</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>ID 19:14,19,23 47:10 idea 37:3 identity 48:3 ignore 47:22 illness 7:19 illogical 26:19 imaginative 11:19,22 13:2 imagine 31:18 34:13 immediately 39:9 immersing 54:9 impermissible 42:14 important 43:2 44:12 imposing 19:5 impossible 35:14 incentive 32:14 include 9:7 includes 31:12 including 28:17 incredibly 36:12 incriminated 3:19 independent 17:19,22,23</p>	<p>18:4 19:3 indicated 11:16 individual 6:9,14 7:24 8:16 21:20 25:4,17 37:14 information 19:18 50:24 51:3,8 informed 10:25 24:20 34:16 37:1 inmate 25:9 inmates 25:11 inmate's 25:15 input 26:1 inquiry 5:22 6:13 14:20,22 17:12 17:13 24:4 36:23 47:1 50:9 53:8 inside 23:2 institutionalized 25:22 instruct 35:18 intelligence 34:15 43:7 interactions 49:21 interest 3:16 interpreted 6:22 interrogating 6:1 18:3 19:20 interrogation 3:13,24 4:2 6:21 10:8 15:20 17:2,9 19:9 22:10 36:18,18 36:19 45:24 interrogations 16:5 54:12 interview 32:19 32:21 intuitively 32:8 investigated</p>	<p>10:1 investigating 9:17 47:22,23 investigation 3:17 investigator 9:16 9:20 18:14 31:20,21 involuntary 6:6 34:25 35:15,22 involve 9:24 involved 10:5 21:13 involves 6:20 16:3 in-custody 21:5,8 IQ 11:5,6,8 isolated 3:15 issue 24:22 32:8 42:1 54:19</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J 1:19 2:9 44:5 jail 27:2,8 Jasper 49:25 jeans 13:22 judge 5:3,10 11:4 11:7,12 12:1 13:18,23 21:7 28:11 46:23 48:16,21 judges 11:2 judgment 5:3 26:4 judgments 54:14 jumper 13:24 jurisdiction 5:13 jurisdictions 4:22 47:8 justice 1:20 3:3,9 4:3,9,10,13,17 4:19,25 5:5,8 5:16,19,25 6:2 6:7,17 7:2,10 8:3,12,13,20</p>	<p>8:22,25 9:15,18 10:9,17 11:2,12 11:18,21,25 12:5,12,15,18 12:20 13:1,13 13:21 14:4,6 15:10,22 16:9 16:17,23 17:4 17:11,22,24 18:5,6,11,17 18:24 19:7,13 19:21,25 20:3 20:12,18 21:2 21:15,18 22:1,5 22:13,21,22 23:1,13,18,25 24:7 25:2,19 26:8,12,21,22 26:25 27:2,7,11 27:13,16,19,24 28:5,21 29:1,6 29:17 30:2,6,17 30:20,24 31:3,9 31:11,15 32:25 33:5,16 34:5,12 34:22 35:12 36:1,5,9,24 37:10,18,22 38:2,8,9,23 39:5,12,16 40:9 40:14,20 41:12 41:17,21 42:3 42:15,18 43:13 44:3,8,17 45:9 45:21 46:1,17 46:22 47:15 48:14,22 49:10 49:11,14 50:3,5 50:7,20 51:1,25 52:6,10,13,17 52:22 53:4,13 53:19,24 54:18 55:4 Justices 43:25</p>
--	---	---	---	---

juvenile 4:16 9:16,17,18,22 10:5 18:13 23:12 31:20,21 32:6,16,20 38:17 40:6 41:1 52:23 54:16	42:3 43:2 45:12 47:13 48:3,3 51:2	licensed 38:14 lifted 35:8 likelihood 29:22 limit 47:15,16 line 36:20 54:19 lines 43:12 litigants 25:25 little 34:12 45:14 49:2	Maryland 49:25 Mathiason 53:15 matter 1:11 3:14 21:24 22:12,20 31:23 32:10 55:7 mean 4:19 6:12 8:12 10:20 12:8 15:2,18 19:21 20:7,22 21:6 22:11 23:14 24:20 25:16 26:25 28:15 29:18 31:3,15 31:22 49:1 54:5	24:8,10,13,17 24:21 26:14 32:12,14 34:25 35:1,9,25 36:2 36:11,11,25 37:4,24 38:6 40:2,8 41:10 43:6,11,11,14 43:16,19,21,22 44:11 45:7 47:3 49:12,20 51:25 52:4,11,20,24 53:3,5,6,6,9,13 53:15,17
J.D.B 1:3 3:4,11 3:21 10:7,16 54:5,7	knowledge 12:25 13:9 29:9,11 42:1 51:6 known 7:16,23 9:9 19:11 20:24 22:24,25 23:6,6 24:1 29:20,21 29:23 31:4 47:16 48:12 knows 14:23 29:3,11 34:15 45:18 47:17,20 47:23,23	long 8:16 36:18 longer 43:18 look 7:15 14:22 15:11,24 20:1 27:6 29:9,20 32:22 33:14,15 33:16 36:25 51:1 looked 33:17 looking 16:16 40:6,7,10 looks 19:15,15 19:22 21:20,21 34:16 lost 8:5 lot 7:21 14:18 24:3 33:7 38:12 lots 30:12 lower 43:10	29:18 31:3,15 31:22 49:1 54:5 meant 9:5 meet 45:3 mental 6:7,10,18 7:19 26:17 51:21 mentally 7:3,8 9:2,8 30:13 merge 42:14 middle 3:12 31:16,16,22 32:3 mind 7:15 29:16 32:9 41:25 42:16,19,22 46:24 mindset 46:13 50:17 51:12,16 minor 4:11,12 19:23 20:20 minors 4:5 minutes 45:22 53:25 Miranda 4:5 5:23 10:11,12 10:21,22 14:7 14:21,24 16:8 17:12,14,14,23 18:7,10,25 21:4 21:5 22:4,11	40:2,8 41:10 43:6,11,11,14 43:16,19,21,22 44:11 45:7 47:3 49:12,20 51:25 52:4,11,20,24 53:3,5,6,6,9,13 53:15,17 Mirandize 10:16 37:20,21,23 Mirandizing 41:7 mistake 20:18 mitigate 48:5 moon 37:11,12 mouth 49:19 movement 3:22 6:21 22:18 25:12,16 muddy 54:17 muddying 15:8 multifaceted 36:22 mystery 47:19
<hr/> K <hr/> Kagan 13:1 36:9 36:24 41:12,17 41:21 42:3 46:1 50:3,5,7 54:18 keeping 38:25 KENNEDY 5:19 5:25 10:9,17 24:7 34:5,12 44:17 Keohane 54:8 kid 22:7,14 24:12 38:3,5,24 39:8 kids 38:15 kind 18:22 29:24 34:18 kinds 28:15 30:15 knew 32:17 33:7 know 4:11,11 5:10 7:6,20 8:17 9:1,9 13:2 13:22 14:13,14 14:18 15:12 16:1,12 20:15 20:19 21:21 23:10 28:14,17 29:4 30:17 32:2 39:7 41:3,6	<hr/> L <hr/> lack 51:3,6 Laughter 8:2 12:22 14:3 30:23 39:6 48:18 law 3:13 5:9 7:7 13:14 17:8 18:25 31:6 34:17 37:2,8 40:24 41:9 43:13,16,17 50:2 learn 36:15 leave 3:18 7:4 11:10 13:7 15:12,16,24 16:2,6,10 23:23 27:3,4,8,9 28:10 32:25 33:6 34:1 35:17 36:15 38:24,25 39:10,12 45:15 45:17 left 32:20 let's 11:4,5,8 13:14 21:22 24:9 41:5 49:4	<hr/> M <hr/> main 49:7 majority 8:3 29:19 making 8:9 man 34:6,7 mandatory 21:12 manner 3:23 4:1 36:13 manual 52:19 March 1:9 marched 33:20	31:22 49:1 54:5 meant 9:5 meet 45:3 mental 6:7,10,18 7:19 26:17 51:21 mentally 7:3,8 9:2,8 30:13 merge 42:14 middle 3:12 31:16,16,22 32:3 mind 7:15 29:16 32:9 41:25 42:16,19,22 46:24 mindset 46:13 50:17 51:12,16 minor 4:11,12 19:23 20:20 minors 4:5 minutes 45:22 53:25 Miranda 4:5 5:23 10:11,12 10:21,22 14:7 14:21,24 16:8 17:12,14,14,23 18:7,10,25 21:4 21:5 22:4,11	53:15,17 Mirandize 10:16 37:20,21,23 Mirandizing 41:7 mistake 20:18 mitigate 48:5 moon 37:11,12 mouth 49:19 movement 3:22 6:21 22:18 25:12,16 muddy 54:17 muddying 15:8 multifaceted 36:22 mystery 47:19
			<hr/> N <hr/> N 2:1,1 3:1 name 47:11 naturally 30:13 nature 49:21 nearly 35:14 necessarily 8:10 10:20 30:16 35:21 42:10 necessary 37:21 52:2 need 12:12,15 13:1 18:2 36:13 39:25 53:2 needed 15:9	

<p>40:19 needs 35:18 55:1 never 49:23 54:21 Nobody's 38:25 normal 33:17,18 33:23 North 1:6,15,17 3:4 17:8 44:1 55:2 notified 18:7 number 6:20 39:4 41:4 43:3</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objective 7:15 9:1,5,6,10,19 14:8 15:2,18 20:7 21:10 22:24 23:6 25:4 25:6,10,17 30:8 35:10 36:2,22 42:13 43:12,15 46:9 54:15,16 objectively 23:25 obligation 20:1 obligations 18:4 24:15 observable 45:25 observations 20:7 obvious 27:6 28:20,21 41:19 41:22 42:10,10 Obviously 10:14 16:25 18:21 occur 17:1 36:8 occurring 17:9 19:10 54:13 occurs 15:19,21 odd 37:12 54:3 officer 3:23 4:2 5:9 6:1,3,4 7:16</p>	<p>7:24 9:17 10:1 10:4 16:11,13 17:3 19:4,10,12 19:15,19,25 20:4,6,9,14,19 20:24 21:20,23 22:15 23:10 29:15 31:17 32:1,3,11,12 32:15,18 33:20 37:14,15 38:4,5 38:17 39:18,19 40:10 41:2,6 46:22 47:5,8,13 47:16,23,23 48:14 49:19 50:17 52:19 54:6 officers 13:5,10 15:11 18:2 19:6 32:13,23 33:12 37:2 38:13,14 38:15 40:25 46:19 47:1 48:2 48:7,12 49:8 51:15 52:23 53:3,5 54:14 officer's 32:10 oh 16:19 18:17 37:22 39:5,5,5 okay 20:19 28:5 39:13 45:16 old 3:11 11:5 14:16 19:15 28:18 41:23 older 12:9 21:21 47:12 oldness 12:7 once 6:12 37:11 one's 25:8 42:22 open 8:14 38:25 opening 8:11 opens 49:19 opinion 29:18</p>	<p>38:21 42:12,12 opinions 42:14 opportunity 10:24,25 opposed 35:17 oral 1:11 2:2,5,8 3:7 26:10 44:5 order 15:9 28:25 35:25 42:2 45:8 ordinary 29:24 34:15 Oregon 53:15 outside 3:13 22:6 overboard 45:14 overgeneraliza... 30:12 overstatement 38:10 owned 40:18</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 PAGE 2:2 parent 16:9,10 16:18 17:10,17 18:6,18,19 32:14 parental 18:23 parentis 24:14 parents 17:6,14 17:15 18:15 20:11 28:8 33:8 part 11:24 14:24 17:14 24:7 33:23 39:17 particular 6:13 11:7,9,25 17:18 18:22 31:13 32:6 36:19 40:6 41:1 46:14 48:20 51:5,6,13 particularly 35:23 36:7 45:6 parts 48:1 party 54:4</p>	<p>peers 33:21 people 13:4 14:24 25:6,21 29:12 30:14,15 30:20,21 32:17 36:17 41:5,8 52:22 perceive 51:12 perception 7:1 26:3 perfect 31:11 perfectly 8:6 perform 4:24 5:23 performing 6:1 11:15 permissible 42:13 person 4:15 7:14 7:17,22 9:3,7 13:6 14:13,16 19:8,14,14,19 19:22 20:4,5 21:22,25 25:4 25:14,17 26:17 26:19 29:3,22 29:23,24 30:11 34:14 36:15,16 41:13,14,17,18 41:25,25 42:5,6 42:15,18 45:11 45:13,23,25 46:2,4,6,8,9,13 46:14,16,24 47:10,11 50:8 50:21 person's 29:24 pertinent 14:21 18:25 Petitioner 1:4,16 2:4,14 3:8 54:2 Petitioners 48:5 51:19 Petitioner's</p>	<p>38:16 43:4 44:14,21 53:2 phone 38:18 phrase 9:5 21:2 place 3:14 31:21 33:10 play 22:4,11 35:24 55:1 plays 6:3 please 3:10 26:13 39:22 44:9 50:6 point 6:2 8:10 10:9 14:4,6 17:25 26:20 43:18 pointed 54:18 pointing 12:19 12:23 13:9 police 3:17 6:3,4 9:9,17,25 13:4 13:10 14:8 16:11,16 17:3 18:2,13 19:6 21:20 33:12 38:14,14 39:18 39:19,25 40:9 49:21 policeman 13:21 29:21 45:14 policemen 8:16 police-dominat... 16:20 pool 28:14 population 10:6 posed 21:20 position 25:15 potentially 41:7 powers 11:19,22 13:2 practical 32:10 practices 5:14 precisely 53:3 presence 18:23</p>
--	--	--	---	---

<p>present 17:10 press 25:25 pressed 23:18 presumably 30:18 presupposed 24:4 pretty 19:16 20:5 28:8 34:4 37:2 prevent 52:2 primary 44:10 prime 36:3 principal 13:5 15:16,25 18:14 23:21 31:20 33:22 principle 6:11 privilege 35:4 privileges 24:15 probably 32:25 33:3,6 problem 24:7 28:23 32:4 48:7 49:7 50:19 51:17,20 problematic 45:6 problems 32:11 32:12 procedure 24:18 procedures 53:7 53:9 proceed 20:6 proceeding 9:22 proceedings 9:21 proceeds 20:20 processes 26:17 prohibitions 40:23 promote 15:9 promoted 29:19 proper 25:25 28:16 31:6 property 3:15 prophylactic</p>	<p>35:10 proposing 4:4,14 prosecution 44:16,24 protect 38:15 prove 35:22 44:25 proves 7:8 provide 14:7 provided 7:21 public 49:22 purpose 7:14 35:1 purposes 9:18 26:14 37:4 39:16,24 40:2 41:14,18 pushing 8:23 put 14:21 20:16 24:8 33:8,21 41:9 42:2 46:13 46:23 49:9 50:17 51:15 55:1 p.m 55:6</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question 11:24 14:2 16:24 17:17 18:7,8,10 18:11,25 21:3 22:10 25:3 26:16 35:13 37:19 48:1,23 52:20 53:13 questioned 19:8 25:5,7 26:18 questioning 47:18 questions 3:19 6:2 15:25 16:7 24:3 26:5,6 32:18 quick 52:18 quite 38:4</p>	<p>quote 53:16</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 Raleigh 1:17 rampant 9:25 react 46:19 read 8:14 10:10 10:11 30:21,21 32:11,14 41:10 46:18 readily 20:8 real 53:8 realistic 11:3 really 8:13 11:13 13:24 15:14,15 18:11 21:6 35:18 39:1 45:17 47:2 51:20 reason 17:21 18:2 20:15 34:15 49:22 50:4 52:7,25 53:1 reasonable 4:15 5:3 7:14 15:6 20:14 22:6,14 25:14 26:18 29:16 34:6,7,11 34:14 54:22 reasons 44:10 48:9 53:4 reassess 37:6 rebuttal 2:12 25:20 54:1 recognition 7:7 recognized 5:22 5:24 records 25:25 reduce 54:25 referring 30:18 regard 4:12 7:3 regarded 6:9,14 regarding 3:14</p>	<p>relates 26:1 relative 12:7,7 relatively 32:19 43:15 45:5 relegating 21:11 relevant 7:17,21 7:22 8:17 15:3 17:4,7,11,12 17:17 18:7,8,10 21:8 29:20,22 29:23 31:4 32:21 50:14,15 reliability 54:23 54:24 remain 24:11 38:20 remaining 53:25 remains 15:2 18:9 19:11 Remember 39:17 repeatedly 34:23 request 44:1 require 49:11,16 52:11 required 13:11 21:23 22:2 33:24 39:17 49:23 requirement 4:5 17:10 18:22,23 35:1 requirements 18:21 requiring 29:15 49:15 54:21 resemble 43:17 reserve 26:7 resource 38:12 38:17 respect 24:15 35:16 respects 24:8 Respondent 1:18</p>	<p>1:22 2:7,11 26:11 44:7 rest 30:14 restraint 22:18 34:2 restriction 25:12 restrictions 3:21 4:12 6:20 reversed 55:3 review 21:12,12 reviewing 54:8 right 4:20 7:18 8:21 9:10 17:15 17:24 23:25 24:10 29:1 30:4 30:6 33:13 36:13 38:19 40:22 43:1 48:17,19 52:5,8 52:12,14,15,18 rights 10:24 rise 6:6 rising 22:18 road 47:9 ROBERTS 3:3 14:4,6 15:10,22 17:11,22,24 18:5,17,24 26:8 44:3 53:19,24 55:4 robust 53:8 role 6:4 room 13:3 18:13 18:15 23:21 29:13 32:17 33:21 36:17 38:18 47:19 route 43:14 ROY 1:17 2:6 26:10 rule 4:5 5:11,11 5:20 14:7,10,23 15:1,2 20:16,25 36:2 43:15</p>
--	--	---	--	---

<p>44:14,21 45:7 47:3 48:2,4,4 48:11 53:2 55:1 rules 54:19</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>s 1:15 2:1,3,13 3:1,7,21 10:7 54:1,5 safe 49:2,4 saying 8:25 21:18 says 16:10 19:15 20:4 21:22 22:7 36:2 39:20 42:12 Scalia 4:3,10,13 4:17,19,25 5:5 5:8,16 6:7,17 7:2 8:13,22 12:12,15,18,20 13:21 16:9,17 16:23 20:12,18 30:20 32:25 33:5 42:15,18 45:22 48:14 49:11,14 51:25 52:6,10,13 Scalia's 6:2 53:13 schizophrenic 9:9 school 3:12,15 13:3 14:15 22:6 22:6 23:12 24:14 25:22 31:17,22 32:3 33:8,9,10,14 33:17,20,23 38:12,16,16 47:19 search 39:16,20 39:24 40:5 second 7:12,13 21:23 45:2 48:9</p>	<p>Secondly 6:24 secure 35:4 security 33:20 see 8:4,6 17:13 22:8 36:8 38:9 39:5,5 seeing 29:13 seen 8:11 37:11 42:5,6,7 sees 13:21,23 20:4 38:4,5 self-incriminat... 35:5 seniors 30:14 sense 5:4,5 15:8 31:23 sensory 45:21 46:6,13,16 51:9 51:13 sent 33:9,10 sentence 30:17 30:21 53:20 set 12:1 13:14 30:19 37:12 sets 47:21 setting 20:10 22:10 31:18 33:14,17 settings 33:18 seventh 33:19 34:8 seventh-grader 39:21 40:1,11 47:17,21 severely 46:6 Shafter 25:13 share 25:11 shield 3:17 short 32:19 show 12:18 18:19 34:24 35:14 50:22 51:3 shows 19:14,14 45:15</p>	<p>sibling 47:12 side 48:11 49:2,5 sign 27:2,8 46:17 46:20 significant 36:6 significantly 34:20 35:24 silent 24:11 38:20 simple 21:24 22:19 40:12 43:15 simplified 24:21 simply 8:9 12:19 12:23 13:8 20:24 24:23 46:20 47:12 48:12 51:8 53:14 sitting 34:8 situation 7:18,23 15:11 16:21 17:8,18 18:23 28:6,7,16,25 29:14 31:14,16 32:2,7,15,17 32:22,24 39:15 40:25 41:9 42:4 42:11 46:10,20 situations 14:14 32:13 slice 12:5 slippery 43:3 51:20 slope 43:3 51:20 small 45:5 social 34:8,8 sole 43:19 solicitor 1:19 41:13 solve 48:6 somewhat 45:12 49:4 sophistication</p>	<p>43:6 sorry 44:17 50:5 sort 24:3 48:1 49:1 Sotomayor 21:15 21:18 22:1,5,13 22:21 23:1,13 23:18,25 34:22 35:12 36:1,5 50:20 51:1 53:4 sought 3:17 Spanish 27:16 speak 7:20 33:11 speaker 29:2 speaks 27:16,20 28:12 29:10 special 23:4 26:2 specific 17:1 53:17,21 standard 10:11 10:11 12:11 15:6 stands 22:15 Stansbury 7:12 started 43:2 State 4:22 11:14 18:4,20,22 24:25 statement 17:20 31:6 34:21 35:15,22 statements 44:13,15,18,20 44:24 45:6,8 49:24 53:10 54:24 states 1:1,12,21 2:10 7:15 43:3 43:4 44:6 status 25:8 29:19 54:16 statutes 18:4 statutory 18:20 stay 39:22</p>	<p>stays 43:11 steep 28:1 29:4 stepped 35:19 steps 28:1 29:4 stolen 38:18 stop 22:3,14 39:9 39:15 41:4,6 47:8,9 stopping 26:20 street-wise 13:17 strict 14:23 strong 43:18 stuck 33:8 student 24:16 studies 34:9 studying 33:2 subject 51:24 54:19 subjective 6:13 7:15 9:3 23:3,5 24:4 25:18 42:14 submitted 55:5,7 subsumed 5:20 subtract 51:11 suggest 4:21 28:9 suggested 22:22 suggesting 5:17 48:5 53:4 suit 13:24 support 8:7,8 43:21,22 supporting 1:22 2:11 44:7 supports 12:24 suppose 10:11 19:13,13 37:15 supposed 14:8 22:8 54:8 suppressed 44:13,14,18,21 44:23 45:8</p>
---	--	---	--	---

Supreme 1:1,12 44:1 55:2	talking 6:24 9:12 12:6 38:24	think 5:16 9:4,4 9:18 11:4,12,22	44:10	25:15
sure 14:1 36:9 37:14,16 43:11 45:8,13,15 49:2 50:10	tell 7:12 20:9 23:14 24:24 27:13 28:22 32:23,24 38:11 39:9 49:16	13:24 15:13,14 16:15 19:11,24 21:25 22:10 23:4,8,13,15 23:19,22 24:5 25:8,24 27:5,10 27:17 28:24,24 29:2,2,5,14 30:1,4,11 31:12 32:21 33:13,14 33:15,25 34:3,7 34:10 35:24 36:5,7,8 40:3 41:11,15 42:8 42:25 43:1,22 43:23 44:12 45:5,7,19 46:11 46:12,18,25 47:2,25 48:3,8 48:9,9,15,15 48:16,23,24 49:3,4,6,18,20 50:7,13,18 51:14,17,19 52:23,25 53:1 54:3,17	time 14:24 25:20 26:7 49:16,19	unfortunately 29:18
surrounding 26:15 45:24	tells 16:9	third 7:12,25 50:18 51:17	told 10:24 15:23	unfree 7:4
susceptibilities 26:2	tend 38:10	Thompkins 49:25	tough 28:7 45:16 49:5	uniform 38:14
suspect 7:16 29:21 38:10 47:6,14 48:3 51:8,11	term 49:24	Thompson 54:8	traffic 39:9,15 47:9	unique 9:13
suspicion 22:7 22:14	terrible 37:13,16 37:23,25	thought 8:5 14:7 40:9 48:16	train 52:23	United 1:1,12,21 2:10 44:6
swim 28:13,14	terrify 24:12	thousand 36:17	trained 39:19	unlocked 27:3
sympathetic 13:13	Terry 22:3 41:4 41:6	thousands 38:13	treated 39:23 41:14,18	unnecessary 52:1
symptoms 51:7	test 4:14,24 7:10 8:6,14 22:22 26:19 30:19 31:24 34:1,19 35:7,9,9,10,11 35:19 36:3,4,7 36:12,20 40:8 43:16,19,20 44:11 45:1 48:12 49:9 50:14,15 51:18 53:11	threatened 13:5	treating 8:24	unquote 53:16
syndrome 50:8 50:12,13,18,22 51:7	thank 8:20 26:8 27:24 44:3 53:18,23,24 55:3,4	three 7:11 32:17	trial 11:2,4,6,12 21:3,3	unrealistic 49:18
system 38:2,9	theory 38:16		trouble 16:2	untenable 41:9
<hr/> T <hr/>	things 13:23		true 15:15 28:7	upheld 44:2
T 2:1,1	thing 27:19 28:13 31:3 37:13,13 37:16,23,25 38:19,23 39:1 46:7,12 47:7 50:1,2 52:13,23 52:24 53:1		try 45:23 51:15	upside 35:25 36:11
table 14:12	thinks 15:25 28:16 29:25 37:15 50:12		trying 42:4 52:16	use 25:20 30:9 31:13,15 52:19
take 3:14 9:23 11:4,25 13:7,14 21:10,14 27:20 27:23 28:2,3,6 28:11,15 29:13 37:9 38:17 42:20,20,21 44:22	Thompson 54:8		turn 47:10	uses 24:18
taken 3:12 4:1 13:3 25:5,10 33:20 50:8,11 51:10,14 54:6	thought 8:5 14:7 40:9 48:16		turning 35:25 36:11	utilizes 5:15
takes 45:1	thousand 36:17		TV 14:23	<hr/> V <hr/>
talk 15:17 16:11 16:12 21:22 22:16 23:22 38:18 39:8,8	things 7:3,21,22 19:6 20:8 28:9 28:15,17 36:17 51:21		two 13:4 37:11 48:1 49:24	v 1:5 3:4 49:25 49:25 53:15 54:8
			type 5:15 32:15	valid 10:15
			<hr/> U <hr/>	validly 53:7
			Ukrainian 27:19 28:13 29:2,9,10	venue 47:18
			Um 20:2	verify 19:17
			unable 7:9	vice 15:16
			unclear 19:8 28:8	view 41:13 42:11
			understand 4:17 7:18,23 10:21 10:22 12:2,3 14:13 19:2 29:12 36:10,10 38:4 42:4,7	violation 34:25
			understanding 7:1 46:3,5	voluntarily 33:11
			understands 8:17 49:2	voluntariness 5:20,22 6:4 14:20 17:13 18:8 32:11 34:19 35:3,7,9 35:19,21 36:4,6 40:4 43:17,19 45:1 50:14 53:8 53:11
			understood 6:22 14:1 17:16	voluntary 44:25 49:23 50:1

53:10	we're 5:17 6:24 8:9 16:16,19 19:5 20:25 22:9 24:23 25:18 31:24 37:5 38:24 40:24 45:13 46:1,7	<hr/> 0 <hr/> 00 50:7 09-11121 1:4 3:4	41:5 19-year-old 19:16 19-year-olds 4:7	23:20,22 24:1 35:16
<hr/> W <hr/> wait 18:18 waiver 10:15 32:12 40:5 walked 23:21 want 9:6 15:12 15:17,24 16:12 23:22 25:20 27:3,9,12 31:13 38:24 39:3,7,8 39:9 51:25 52:3 54:24 wanted 32:18 wants 31:22 warn 39:13 warning 10:11,12 10:19 16:8 24:13,22 37:24 38:6 52:24 warnings 10:21 10:22 14:24 19:1 24:10 36:12 49:20 52:1,4,11,20 53:3,5 warrant 39:22,22 39:25,25 40:11 Washington 1:8 1:20 wasn't 17:20 34:24 35:2,3 water 54:17 waters 15:8 way 7:17 19:17 20:3 21:2 23:1 30:10 31:13 47:13 48:15 54:20 wearing 13:23 Wednesday 1:9 weighty 15:20 went 32:15 weren't 46:20	we've 14:22 16:20 35:13 37:10 43:10 wheelchair 28:1 28:12 29:3 willful 23:9 willing 27:20,22 28:1,3,6 31:5,7 wished 33:11 wondering 24:13 worded 31:2 works 24:13 world 46:4,5 51:9 worth 45:7 wouldn't 44:14 written 9:20 wrong 16:12 30:2 32:8	<hr/> 1 <hr/> 1/2 4:20 11 43:4 11:14 1:13 3:2 12-year-old 28:11 45:17 12:12 55:6 13 3:11 4:7,19,20 12:2 35:17 37:7 41:22 42:10,22 48:8,8 13-year-old 5:11 13:3 15:14,15 15:23 16:1 23:2 24:9 42:6 48:15 48:16 14 4:19 37:7 47:11 14-year-old 11:8 35:17 42:11 15 4:19 12:3 20:4 41:5 15-year-old 5:11 13:15,16 28:25 29:16 37:7 39:10 15-year-olds 14:18 16 4:7 13:17 42:22 16-year-old 29:16 37:8 17 4:7 22:8 17-year-old 13:17 17-year-olds 14:18 18 22:8 18-year-olds 4:7 19 19:14 22:8	<hr/> 2 <hr/> 2 28:22,22 20-year-old 28:10 20-year-olds 4:6 2011 1:9 22 28:18 23 1:9 25-year-old 34:8 26 2:7	
	<hr/> X <hr/> x 1:2,7	<hr/> 3 <hr/> 3 2:4 53:25 30-year-old 31:25 32 46:24	<hr/> 3 <hr/> 3 2:4 53:25 30-year-old 31:25 32 46:24	
	<hr/> Y <hr/> yeah 27:11 28:10 years 3:11 11:5 19:14 28:18 34:17 37:2 41:23 46:25,25 young 19:16 34:18 35:23 36:7 38:3 46:2 46:4 younger 12:10 21:21 48:25 youngness 12:7 youth 3:22 10:8 41:21,21	<hr/> 4 <hr/> 44 2:11 45 34:17 37:1 46:25 45-year-old 46:22	<hr/> 4 <hr/> 44 2:11 45 34:17 37:1 46:25 45-year-old 46:22	
		<hr/> 5 <hr/> 54 2:14	<hr/> 5 <hr/> 54 2:14	
		<hr/> 6 <hr/> 60 11:5 60-year-old 46:23 48:16,20	<hr/> 6 <hr/> 60 11:5 60-year-old 46:23 48:16,20	
		<hr/> 8 <hr/> 8 28:18 8-year-old 28:22 28:24 31:24 32:7,9 85 11:8	<hr/> 8 <hr/> 8 28:18 8-year-old 28:22 28:24 31:24 32:7,9 85 11:8	
		<hr/> 9 <hr/> 9-year-old 23:15	<hr/> 9 <hr/> 9-year-old 23:15	