In the

Supreme Court of the United States

KENNETH F. FARE, ETC.,	)	
	)	
Petitioner,	)	
	)	
VS	)	No. 78-334
	)	
MICHAEL C.,	)	
	)	
Respondent.	)	

Washington, D. C.
February 27, 1979

Pages 1 thru 56

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IN THE SUPREME COURT OF THE UNITED STATES

KENNETH F. FARE, ETC., Petitioner,	
v.	No. 78-334
MICHAEL C., Respondent.	

Washington, D. C.

Tuesday, February 27, 1979

The above-entitled matter came on for argument at 1:02 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MARK ALAN HART, ESQ., Deputy Attorney General of California, 800 Tishman Building, 3580 Wilshire Boulevard, Los Angeles, California 90010; on behalf of the Petitioner.

ALBERT J. MENASTER, Public Defender's Office, 524 North Spring Street, Los Angeles, California 90012; on behalf of the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Kenneth F. Fare v. Michael C.

Mr. Hart, you may proceed whenever you are ready.

ORAL ARGUMENT OF MARK ALAN HART, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HART: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court: I am Mark Alan Hart, Deputy Attorney General of the State of California, appearing as counsel for the petitioner.

Miranda v. Arizona opened a new chapter in the law of confessions, a chapter that began with precise rules to guide law enforcement in the conducting of a custodial interrogation, that has over the years been read with some different and expanded interpretations.

In the case at bar, the California Supreme Court has applied the strict Miranda rules with one addition, that a juvenile who requests his probation officer per se invokes his Fifth Amendment right to be silent, no less than if he asks for an attorney, and that his statements must be suppressed without regard to whether or not they were in fact involuntary. The operative facts are brief.

On the evening of January 19, 1976, Robert and Helen Yeager were on their way to their home in the San Fernando Valley section of Los Angeles. Unbeknownst to them,

respondent and two of his friends were following in a pickup truck being driven by respondent. They were looking for someone to rob, they were looking for money, and they had a gun.

The Yeagers arrived home. The respondent and his friends approached the house, approached Mr. Yeager and during the course of an attempted robbery one of the other minors shot Mr. Yeager and killed him.

The respondent was apprehended and brought into the police station for questioning. He was 16 years old at the time of the offense and he had had prior experience with the juvenile court system, including serving some time in a youth camp.

He was given the standard Miranda admonition. He was told that he had a right to remain silent and was told that anything he said could and wouldbe used against him in a court of law, that he had a right to an attorney, that if he could not afford one, one would be appointed for him without his expense, and that he had a right to have the attorney present during all stages of interrogation.

He was asked if he understood his rights and if he wanted to talk to the officers. He indicated that he did and that he might talk. But when asked if he would give up his right to an attorney present, he responded, "Can I have my probation officer here?" To this, the officers replied,

well, no, we can't call your probation officer right now, but you have a right to an attorney. And respondent's response was, well, how do I know you guys won't pull no police officer in and tell me he is an attorney. And to this the respondent was readmonished as to the standard Miranda rights. He was told you can have an attorney, you don't have to talk to us at all if you don't want to; if you want to talk to us without an attorney present, you can talk to us; if you don't want to, you don't have to, that is your right, do you understand that right.

The respondent indicated that he did understand that right. And when asked if he would talk to them without an attorney present, the respondent replied, "Yeah, I want to talk to you."

Later during the interview, the respondent confessed to having participated in the offense. Juvenile court proceedings were instituted, the respondent's confession was admitted into evidence, and several other things were established during the proceedings, including the fact that the respondent had been on probation, that his probation officer had counselled him as to some family problems, but that the probation officer under California law was a peace officer and that respondent was told this.

The trial court made a finding of voluntariness. The respondent was declared a ward of the court for having

committed a murder. In reversing the judgment, the California Supreme Court has taken the Miranda exclusionary rule and applied the language dealing with requests for legal counsel one step further. They have applied it to probation officers by statute, peace officers in California.

It is petitioner's position that the instant confession was obtained after a fully informed waiver of Fifth Amendment rights, including the right to legal counsel, that the admonitions, both admonitions given to respondent in statements before and after each indicate a knowing and intelligent waiver, and that the statements were properly admitted.

The respondent's request to see his probation officer was at most an ambiguity at the waiver stage, and it was clarified by the further admonition and the additional waiver obtained that respondent had a clear desire to speak.

The petitioners suggest to this Court the following rule or the following approach to this kind of situation, that when interrogating officers are faced with an ambiguous response to a Miranda advisement, they should be permitted to clarify the statement with further questioning in order to determine whether or not in fact the suspect is expressing an unwillingness to speak or merely making an informational request.

If upon asking those clarification questions it is

clear the suspect is not invoking his Firth Amendment right as is the case here, then police should be permitted to begin an interrogation.

There are several things in the instant case that the petition submits give this Court an indication of the voluntariness of respondent's statement, and that we submit is the only permissible go under the Fifth Amendment, whether the statement was voluntary, not obtained by overriding the suspect's free will and based on an informed waiver of rights.

Number one, respondent nowhere alleges that it was an uninformed waiver or that he did not understand his right to an attorney or anything about the Miranda rights were unclear to him.

QUESTION: Well, you don't suggest, do you, Mr. Hart, that if there had been no Miranda warning, a finding of voluntariness would save the case under Miranda?

MR. HART: Well, Mr. Justice Rehnquist, respectfully while that issue need not be reached in this case, we would suggest that the Miranda warnings are not necessarily applicable to juvenile proceedings. This Court has noted and the respondent has conceded in his brief on the meirts that this Court has never specifically applied the precise Miranda exclusionary rule to juvenile court.

QUESTION: What if this were an adult proceeding?

MR. HART: In an adult proceeding, the Miranda rule

is presently the law of the land and the Miranda admonitions would, of course, apply. They are perhaps --

QUESTION: He wasn't in the juvenile court when he made these answers, was he?

MR. HART: Yes, he was.

QUESTION: I thought he was with the police.

MR. HART: When he made the questions and answered the police, he was arrested as a juvenile suspect. He was --

QUESTION: But was it the same place that arrested the other suspects?

MR. HART: Yes, it was, Your Honor.

QUESTION: So what is the difference about Miranda applying if it is the same office?

MR. HART: The difference is this: Juvenile proceedings, while adversary in nature, are interested in some different societal goals that the adult criminal --

QUESTION: Well, couldn't they have beaten the confession out of him?

MR. HART: Certainly not.

QUESTION: Why certainly not?

MR. HART: Because the Firth Amendment prohibits it.

QUESTION: It is different with a junveile, isn't it?

MR. HART: Correct.

QUESTION: The Firth Amendment doesn't apply to a

juvenile then?

MR. HART: The Firth Amendment applies to juveniles. This Court said so in In re Gault.

QUESTION: I thought so.

MR. HART: We would concede that the Firth Amendment applies to juveniles.

QUESTION: That is what I thought.

MR. HART: However, we take the following position, by analogy to McKeiver v. Pennsylvania: What applies to juveniles is the essentials of fairness within the due process clause, not necessarily all of the procedural formalities that would apply in an adult court, because juvenile proceedings, although adversary in nature, are instituted on behalf of the minor. The concern of the court is to find what the best disposition is for the minor. As such --

QUESTION: Is that a state matter?

MR. HART: Well, that was --

QUESTION: Is that a state matter?

MR. HART: Juvenile proceedings in California and I believe in most states are instituted on behalf of the minor. This Court --

QUESTION: The question as to what type of procedure is used for a juvenile is first of all state matter, and this is the State Supreme Court which passed on that.

MR. HART: Yes.

QUESTION: Doesn't that preclude us?

MR. HART: Not necessarily.

QUESTION: On that one point?

MR. HART: Not necessarily, Your Honor. If the Court looks at the proceedings in California as adversary in nature but not strictly criminal, then based on In re Gault and McKeiver v. Pennsylvania, what the Court wants to apply to juveniles is the essentials of fairness.

Now, if we can have a voluntary statement that is the product of an informed knowledgeable waiver, but there has been a technical Miranda defect, that doesn't necessarily violate the Fifth Amendment's prescription against compelled confessions, particularly the case where we are concerned with -- where we are dealing with a system that isn't strictly criminal, where we are instituting proceedings on the minor's behalf and we are looking for the best disposition for the minor.

In that case, artificial barriers to the truth seeking process should be eliminated. We submit that the strict Miranda exclusionary rule is at times an artificial barrier. This case is a perfect example. The California Supreme Court says per se a juvenile who asks for his probation officer is invoking his Fifth Amendment right and we don't need to consider whether the statement was in fact voluntary, if there is that statement it must be suppressed.

I submit that is an artificial barrier to volunariness and it results in an otherwise permissible confession under the traditional Fifth Amendment view, the pre-Miranda view, being excluded. There is no basis for that kind of application in this case in the juvenile court.

Of course, in this case our position is that the minor was fully Mirandized, was given the standard Miranda warnings, and there is no basis for extending Miranda beyond that.

QUESTION: So you day the strict Miranda rule, as you put it, should not be applied to juveniles because they are not exposed to the criminal punishment, is that your --

MR. HART: What we say is we shouldn't have artificial barriers to truth seeking --

QUESTION: I was putting the question in that way.

MR. HART: Our position is that while they are in a sense subject to custody, there are other societal values at stake that do not necessarily exist in the adult system. The disposition in California is supposed to be on the minor's behalf, and the gravity of the offense doesn't necessarily determine what the ultimate disposition of the minor would be.

Now, if a technical Miranda defect bars the court from reaching the true decision as to what is best for the minor, we submit that is wrong and we submit that it isn't justified by the Firth Amendment. All we need provide the

minors under McKeiver and Gault --

QUESTION: Mr. Hart.

MR. HART: Yes, Your Honor?

QUESTION: Is it not correct that what you are arguing is that even if he had asked for a lawyer, that Miranda should not have applied?

MR. HART: Well --

QUESTION: That there is still the same technical obstacle --

MR. HART: Certainly if he conditioned his willingness to talk on the presence of a lawyer --

QUESTION: Everything is exactly the same in the transcript except he says I want a lawyer instead of I want a probation officer, you still say Mirdanda should not apply because it is a juvenile?

MR. HART: I submit that a strict Miranda exclusionary rule should not apply.

QUESTION: In other words --

MR. HART: If he says can I have my lawyer present and they say yes you can, and then he says I want him before you question me, certainly that is an invocation. But if he says can I have my lawyer present and they say yes you can, and he says, well, I will go ahead and talk to you anyway, that is not an invocation. But we submit that the strict exclusionary rule which excludes otherwise voluntary statements

because the suspect has uttered magic words.

QUESTION: Well, suppose he says I want my lawyer present now and they say, well, we're sorry we can't reach him right now, do you mind going ahead with the questioning, and he says, okay, if you can't get him I will go ahead with the questioning.

MR. HART: We submit that is permissible.

QUESTION: That would be permissible?

MR. HART: That's permissible.

QUESTION: Would it be with an adult under the Miranda case?

MR. HART: Our position is it should be.

QUESTION: Well, maybe it should be, but accepting the Miranda case, would it be?

MR. HART: All right. Accepting the Miranda case, I think that it would still be a permissible type of questioning. Under Miranda, certainly the suspect, if he asks for a lawyer and wants him present during the interrogation, the interrogation has to cease, but --

QUESTION: Doesn't the Miranda opinion say if he asks for a lawyer, interrogation must cease until he gets the lawyer?

MR. HART: There is language to that effect, but it isn't necessary to the disposition --

QUESTION: Well, there is a lot of language that

isn't necessary to the decision in Miranda cases.

MR. HART: We would offer the following example: There is a case in California upon which this case was built, People v. Randall, which held that any indication which reasonably appears inconsistent with the present willingness to discuss the case freely is an invocation of the right. In Randall, the suspect was arrested and Mirandized and asked to call his attorney. He called his attorney and spoke to his attorney, told his attorney the situation, and the attorney did not advise him to remain silent. After that, the suspect I believe was re-Mirandized and agreed to talk to officers. Now, there is an indication of where the suspect clearly wanted his --

QUESTION: Is that a new word in law enforcement jargon? Mirandized, is that it?

MR. HART: Excuse the colloquial. He was admonished per the Miranda opinion as to what his rights were under the Fifth Amendment.

QUESTION: You certainly did save a lot of wind by saying Miranda.

(Laughter)

MR. HART: In any case, the suspect in Randall -- and by the way, that confession was excluded by the California Supreme Court -- but we submit that it was voluntary under Fifth Amendment standards.

QUESTION: Well, that is not the Miranda test.

MR. HART: That's true. That's true, and to that extent the Miranda test is a departure from the laudable goals of the Fifth Amendment and the goals that I think this Court was attempting to pursue in the Miranda opinion --

QUESTION: But it is a step and it has been taken.

MR. HART: That's true, and certainly the decision in this case doesn't turn on whether or not there was a technical Miranda defect, because as far as the admonitions required in the Miranda opinion, those were complied with in this case. Beyond that, there were a number of other considerations, voluntariness --

QUESTION: Did I understand you to say that there is a case in California where a lawyer told a guy under the Miranda ruling don't talk?

MR. HART: No.

QUESTION: The lawyer told him to go ahead and talk, didn't he?

MR. HART: No, he didn't say one thing or another.

QUESTION: He didn't tell him not to talk, did he?

MR. HART: Right.

QUESTION: Well, what happens to all of that has been made that you don't let him talk to the lawyer because the lawyer will automatically tell him to shut up? What happens to all of that theory we argue here every day?

MR. HART: Well, I think --

QUESTION: I guess it is gone, isn't it?

MR. HART: -- the presence of a lawyer during interrogation is not necessarily so that the lawyer --

QUESTION: At least there is one case that says so.

MR. HART: But there may be occasions when it would be to the suspect's advantage to talk, particulary if he had a good alibi and a lawyer --

QUESTION: Wasn't that long before Miranda?

MR. HART: Certainly.

QUESTION: I believe Mr. Justice Jackson said any lawyer worth his salt is going to tell the client not to talk until he, the lawyer, knows in private what he is going to say.

MR. HART: Well, we submit, Your Honor, that there might be indications where a lawyer would not make that statement to his client.

QUESTION: Perhaps after he had had the private conversation.

MR. HART: But along those lines, Your Honor, returning to this case, certainly a probation officer is not going to be in the same position. As a matter of fact, as California's Justice Mosk noted in his concurring opinion in this case, the probation officer as a peace officer probably is under an obligation to counsel his charge to cooperate fully

with law enforcement officials. This probation --

QUESTION: How do we expect this respondent here to know about that obligation of the probation officer? You wouldn't, would you?

MR. HART: Number one, Your Honor, the record indicates that the respondent was aware of the fact that his probation officer was a peace officer; number two, the record indicates and the trial court made a finding that this respondent had prior experience with the juvenile court system, presumably had an attorney at that prior experience, and understood what he was waiving; number three, the respondent nowhere alleges in any of his briefs that he didn't understand what an attorney was or what an attorney can do for him or that he thought his probation officer could perform the functions of legal counsel; but, number four, there is no justification for the per se rule adopted by the California Supreme Court below. It cannot be said that any juvenile who asks for the presence of his probation officer is invoking the legal counsel language of Miranda.

And it is interesting: The California Supreme Court in the opinion below distinguished or attempted to distinguish this kind of request from a request, say, for a clergyman or a football coach, and said that since the probation officer is someone who has a legally recognized relationship with the minor, requests for a probation officer

would be reasonably interpreted as a request for counsel within the meaning of Miranda.

The petitioner submits that that conclusion does not follow from their analysis. A clergyman, for example, also in California has a legally recognized relationship with a particular penitent, and there is a --

QUESTION: A clergyman would surely be bound by confidence with respect to anything imparted to him, whereas the probation officer would be in a contrary position, would he not? He would be bound to report this to the court from which he --

MR. HART: Exactly. In fact, by statute in California, the probation officer investigates allegations against minors, brings the sources of those investigations to the District Attorney or to the local prosecuting authority. At the time this instan case began in the juvenile court, the probation officer by statute actually filed the petition alleging that the minor was a ward of the court and had committed a certain offense.

QUESTION: Would you hazard a guess -- you don't have to if you don't want to -- as to what the Supreme Court of California might have done if the probation officer had indeed come in response to a call and privately advised the respondent to tell everything, and then it came to the California Supreme Court in that posture?

MR. HART: Okay. Two responses to that without making a guess --

QUESTION: Would it not be the State of California advising the man to surrender his rights?

MR. HART: It would be, certainly. First of all, under California law --

QUESTION: By certainly, doyou mean that is probably what the Supreme Court of California would decide?

MR. HART: Well, I am not sure what they would decide. I would say first under --

QUESTION: It is a dangerous guess anyway, isn't it?

MR. HART: Let me inform the Court of a premise for my guess. First, under California law, the probation officer would have to advise the minor of his constitutional rights himself, as a peace officer. Number two, again referring to Justice Mosk's opinion, he speculates as to just that problem and talks about the Mutt and Jeff situation that this Court referred to in Miranda, where you have a friendly peace officer and an adversary peace officer working at odds with each other, and he says the case is going to come to us and surely when it does, I don't know what we are going to do with it.

Now, with that premise in mind, my guess would be that the California Supreme Court would find that by statute the probation officer is a peace officer and that in that

kind of situation the advice the minor received from the probation officer was not the advice of counsel and did not comply with the requirements of Miranda and that it would be just what the Court suggested, that it would be a peace officer or the State of California advising the minor to cooperate. That is the problem.

QUESTION: Another aspect of it, he was suspicious that the person the police might bring in might not in fact be a lawyer.

MR. HART: That's true.

QUESTION: If the probation officer had assured him that this third party was in fact a lawyer, perhaps he wouldn't have had that concern, because presumably he trusted his probation officer.

MR. HART: Well, that is a possibility, except I think the fact that he was readmonished after he made that suspicion and told that he didn't have to talk at all, that was his right.

QUESTION: Why do you suppose he asked for a probation officer? What do you suppose motivated it?

MR. HART: Personally, Your Honor, I think it was just an informational question.

QUESTION: To follow this statement, I don't think I could trust whoever you would bring in, but isn't it fair to infer that he thought he could trust his --

MR. HART: Well, there is some indication in the record, Your Honor, that he had been told by the probation officer to contact the probation officer whenever he had law enforcement contact, and certainly any offense that he might have committed would have potentially been a violation of the conditions of his probation, and the probation officer would have wanted to know about it, so that perhaps is the reason, although I really can't speculate.

QUESTION: I thought you felt he trusted the probation officer.

MR. HART: I think there is some indication he trusted the probation officer, and I think that the trust would have been misplaced if he dealt with -- if he wanted the probation officer to act as counsel.

QUESTION: He might have wanted the probation officer to tell him whether there was a counsel --

MR. HART: True.

QUESTION: -- or whether the counsel was a phony.

MR. HART: Petitioner doesn't suggest that looking at all of the minor's statements, the totality of the circumstances and his prior experience with the law enforcement officials, that the trier of fact could not have found based on the totality of his circumstances that this minor was invoking his right to silence. But the rule is in California that any minor who asks for his probation officer per se

invokes his right to silence under Miranda, but if he asks for any other confidente, a clergyman or a football coach, the court will look at the totality of the circumstances.

The Fifth Amendment in Miranda does not justify that kind of approach. Moreover --

QUESTION: The question was, as you say, just a request for information, can I have my probation officer here.

MR. HART: And he was told he couldn't.

QUESTION: And that formally at least was not a request, it was just a -- to have the probation officer there was just a request for information, can I.

MR. HART: That is correct, Mr. Justice Stewart.

QUESTION: But you have no quarrel with the Supreme Court's equating that with a request for the probation officer, do you?

MR. HART: Well, if it was a request --

QUESTION: "I would like to have my probation officer here."

MR. HART: He certainly didn't condition his willingness to talk on the presence of the probation officer.

QUESTION: But you don't quarrel with their equating that with "I request that my probation officer be here"?

MR. HART: Well, we do quarrel with it. We quarreled with it below. We claimed that it was --

QUESTION: Do you here?

MR. HART: And we do here, too, we don't believe that --

QUESTION: So you think there should perhaps be one rule if he just says can I have my probation officer here and another rule "I request that my probation officer be here"?

MR. HART: Not unless --

QUESTION: Then why do you quarrel with it?

MR. HART: Well, we quarrel with it because --

QUESTION: If you think they are two different cases. I mean if you think they are not two different cases, then --

MR. HART: If he says can I have my probation officer here and I am conditioning my acceptance to speak on the presence of the probation officer, that is one thing. Other than that, there isn't any distinction, and we wouldn't quarrel with it.

QUESTION: Do you think this fellow in this posture would be inclined to have all these nuances that a lawyer or a law student might put in?

MR. HART: Perhaps not, nor would an adult criminal offender necessarily have all of the nuances.

QUESTION: Mr. Attorney General, in order -- he says can I have my probation officer here -- well, I can't get hold of your probation officer right now, you have the right

to have an attorney, and then he says how do I know you guys won't pull no police officer in and tell me he is an attorney. He tells you why he wants a probation officer there, to make sure you don't pull a phony on him. He says so right here, doesn't he?

MR. HART: Then in that case, Mr. Justice Marshall --

QUESTION: Doesn't he say it right in the next sentence?

MR. HART: That's correct, and we submit that --

QUESTION: That is what he was talking about.

MR. HART: -- it is further waiver and agreement to talk is all the more voluntary because he --

QUESTION: No, because he says --

MR. HART: -- that is understood.

QUESTION: -- we will get you a probation officer.

MR. HART: Our position is --

QUESTION: Didn't you say that, that he would get it?

MR. HART: He was told that he could not have the probation officer.

QUESTION: "But I am not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later." So he gave him a little idea that -- they dangled it in front of him, didn't they?

MR. HART: Following that, Mr. Justice Marshall, he

was told, look, you don't have to talk to us at all if you don't want to.

QUESTION: Sure, they are constantly doing what Miranda says don't do.

MR. HART: At most, that was an ambiguous statement which the police sought to clarify. The interrogation, the process of interrogation had not begun at that point. The police were seeking to clarify whether this minor was invoking his right of silence.

QUESTION: Question: Will you talk to us without an attorney present?

MR. HART: Yes.

QUESTION: There is nothing ambiguous about that, is there?

MR. HART: The question is not ambiguous.

QUESTION: That's right, because they had led him up to it. They told him they would get his probation officer later on.

MR. HART: And they told him he didn't have to talk right then at all.

QUESTION: After they told him they would get the probation officer.

MR. HART: Right.

QUESTION: After.

MR. HART: I submit the minor fully understood and

the trial court found that he fully understood that he didn't have to talk to them then if he didn't want to without the presence of the probation officer, and he agreed to talk to them at that time and the trial court found that that was a complete waiver.

We submit that the laudable goals of this Court in Miranda protecting against compelled confessions and insuring that a suspect who waives his Fifth Amendment rights is fully informed as to what he is doing, those goals were fulfilled in the instant case. This confession was absolutely voluntary and there is no justification for the per se rule that any minor who asks for his probation officer is asking for counsel within the meaning of Miranda.

We will reserve the balance of our time for rebuttal. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Menaster.

ORAL ARGUMENT OF ALBERT J. MENASTER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MENASTER: Mr. Chief Justice, and may it please the Court: I am Albert Menaster, Public Defender's Office, County of Los Angeles, for the minor, Michael C., the respondent in this Court.

I would like to start out by telling this Court about another youngster, this one named Joseph. Joseph said,

"I want to be an adult. Treat me like an adult. Use the Miranda rules that apply to adults. Use every rule that applies to adults. Please, in every way I want to be an adult. I don't want to be protected. I don't want things done on my behalf. I want to be treated just like an adult." And Joseph prosecuted his case through every layer of court and one day reached this Court, and this Court decided Joseph's case by saying you don't get to be an adult, Joseph, you don't get your jury trial, and the case was McKeiver v. Pennsylvania.

This Court said in McKeiver that there was something different about juveniles, something that is not the same as to an adult, and that difference justified denying Joseph a right every adult in this country has, and that is the right to a jury.

Michael comes to this Court, and on his behalf I read briefs by the petitioner and I have trouble with those briefs. I can't find the word "minor" in those briefs. I keep hearing about defendants and suspects and what the rules ought to be, and it is all very interesting, and --

QUESTION: Well, what difference does it make whether the use the term or not, counsel?

MR. MENASTER: Well, the difference is that beyond not using the term, petitioner never focuses --

QUESTION: We all know he is a monir, there is no

dispute about that.

MR. MENASTER: Well, the problem is that the petitioner fails to argue the application of the Miranda rules to juveniles. They go off on their theory of ambiguity and their theories of totality of circumstances always focusing on the suspect, never addressing the reality that a juvenile is involved in this case.

Now, the importance -- I am glad the Court asked the question -- the importance is that the Supreme Court of California has recognized that when a juvenile is involved, a 16 year old, as in this case, a 14 year old, a 10 year old -- is a 10 year old going to hire an attorney? Oh, I call up Mr. Bailey, I would like to have him as my attorney. That is not realistic. That does not take into account the reality of minority.

QUESTION: What if he had asked, "Can I have my Teddy Bear"?

MR. MENASTER: Well, I guess it depends on whether it is a live Teddy Bear. But I think the --

QUESTION: Why should it? He is a juvenile by definition. Let's say this is a 9 year old juvenile.

MR. MENASTER: The answer is that the request for a Teddy Bear would be one of the totality of circumstances that the court should take into account in ascertaining whether or not that youngster was really voluntarily waiving his rights

or not.

QUESTION: A request, in other words, is the equivalent of saying I refuse to answer relying upon my right under the Fifth and Fourteenth Amendments?

MR. MENASTER: Well, not a Teddy Bear request. That would be one of the totality factors. As to requests for a probation officer, that is quite different.

QUESTION: The California Supreme Court has held that a request by a juvenile to have his probation officer, or more accurately in this case a request of whether he could have his probation officer here was the equivalent of saying I refuse to answer your questions based upon my rights under the Fifth and Fourteenth Amendments.

MR. MENASTER: That's correct, and that --

QUESTION: Per se.

MR. MENASTER: Yes.

QUESTION: Not just one of the circumstances in the totality.

MR. MENASTER: Right, and the reason for that decision, the California Supreme Court is very careful to note and distinguish, they distinguish music teachers, clergymen, and if they thought of it they would have distinguished Teddy Bears, I guarantee you.

QUESTION: And dentists, I suppose, and doctors and --

MR. MENASTER: Yes. I think that the line that the Supreme Court is drawing is a very clear --

QUESTION: Older brothers and sisters?

MR. MENASTER: Older brothers and sisters. Parents, however, would be different because the California Supreme Court, in People v. Burton, held --

QUESTION: Suppose he had asked for a prosecutor?

MR. MENASTER: Well, if he had got this prosecutor, he would be in trouble. But I think if he had asked for a prosecutor, he would not be invoking what Miranda talks about in --

QUESTION: Well, what is the difference between a prosecutor and a probation officer?

MR. MENASTER: A big difference, a world of difference. And I would like to take issue with the statement of counsel --

QUESTION: Well, they are both cleared by the same people.

MR. MENASTER: It is not true. It is not true.

QUESTION: Of course, you are paid by the same people, too, aren't you?

MR. MENASTER: Yes, we are all paid by the same people, and that is the people.

QUESTION: One point that I am interested in right now is why is a probation officer singled out as the only

person? Suppose the guy had said I would like to talk to the magistrate or I would like to talk to a judge or I would like to talk to a professor of law? Why the probation officer?

MR. MENASTER: Well, a professor of law would be an attorney. If you want an attorney, that is Miranda. There is --

QUESTION: There are some professors of law that are members of the bar of this court.

MR. MENASTER: Well, the California Supreme Court answered that question by very carefully delineating what it was about the probation officer that made a request for that person amount to a Miranda vocation.

QUESTION: That was only Judge Mosk's opinion, wasn't it?

MR. MENASTER: No, no. I am talking about the majority opinion, pages 476 and 477. The court recited --

QUESTION: Well, give me your idea on it.

MR. MENASTER: I would be glad to, and it happens to match up with the California Supreme Court's idea. The probation officer in California plays a unique role. The probation officer has a statutory duty on behalf of the minor "to act in the interests of the minor." It is clearly a parens patriae attempt on the part of California to take away from parents who failed and give control to a probation officer who

becomes a substitute parent in every sense of the parens patriae concept, and it is that fact that --

QUESTION: Takes the place of the parents.

MR. MENASTER: Yes. It is that distinctive feature of the probation officer in California in this case that made the California Supreme Court draw that line.

QUESTION: So this case wouldn't be a precedent for any place but California?

MR. MENASTER: Well, I agree with that. The fact that it has only happened three years ago in California, the statute --

QUESTION: Do you agree with that or not?

MR. MENASTER: It cannot be more than precedent in California. In fact, it is only dicta to California because the statute as to the role of the probation officer has changed since this case.

QUESTION: Was your client an orphan?

MR. MENASTER: I don't believe so. I don't think it is in the record. I think there were parents.

QUESTION: Did he have a mother and a father?

MR. MENASTER: Yes.

QUESTION: Then why is there any equation of an loco parentis, if there were true parents?

MR. MENASTER: When the juvenile court takes control over a minor in California -- and I can't speak for the rest

of the country -- the juvenile court makes a specific finding and the Court can find those findings in Welfare and Institutions Code sections in California, section 726 through 731, removing the care, custody and control of the minor from the parents and placing it in the probation officer, and the court tells the minor that the probation officer is now going to be in charge of you, and sometimes that means removal from the home. Sometimes it doesn't. But that probation officer is in charge.

QUESTION: Well, did it in this case? Are there such papers in this record?

MR. MENASTER: It is clear that the minor was on probation.

QUESTION: Are there such papers in this record?

MR. MENASTER: Your Honor, it is clear that the minor was on probation, and 726 through 731 of the code requires that you can't be put on probation unless that finding were made, so that had to be true in this case.

QUESTION: It has to be?

MR. MENASTER: It has to be true, the findings had to be made for the minor to be placed on probation.

QUESTION: I can see how California can do all of that, but we have great difficulty in assuming things.

MR. MENASTER: Well, again, the code sections that I have referred to clearly delineate the required findings that

a court must make in order to place a minor on probation.

QUESTION: Well, when was this done in this case?

MR. MENASTER: Well, I don't think the record is clear as to that. All we know is that he wasn't --

QUESTION: Now, what am I supposed to understand? You don't even know when?

MR. MENASTER: Your Honor, it is not in the record.

QUESTION: You don't know where, when or why.

MR. MENASTER: Your Honor, it is not in the record and --

QUESTION: Is that right?

MR. MENASTER: Yes, it is. However, the minor was on probation. That is uncontested in this case, and he can't be on probation unless one of those findings was made. He had to be removed from the care, custody and control of his parents, and the probation officer had to be a substitute parent or he couldn't be on probation. That is required in the State of California and the reading of the code sections that I have mentioned will clarify that.

I would like to indicate that the petitioner in this case has managed in his summary of facts to leave out what I think is a critical fact. It is interesting because it is not left out in the briefs. It was left out in oral argument, and that is this probation officer was not some artificial probation officer that the minor simply inquired of because

he couldn't think of anything else to do. This probation officer had told Michael, when you get arrested you call me up, you demand that you be allowed to call me. And he was asked, oddly, by the district attorney, he was asked why he said that, what reasons were there, and the answer was, so I could advise Michael of his rights and make sure he understood his rights.

The request for the probation officer in this case wasn't an academic request. He was complying with an order of his probation officer.

QUESTION: Do you suggest that this record does not show that he was advised of his rights by an officer of California?

MR. MENASTER: The record does show an advisement by police officers in California of a number of Michael's rights. I think that it is --

QUESTION: You say a number, do you exclude from that the crucial rights that we are here talking about?

MR. MENASTER: There is no question that a complete Miranda advisement was given in this case. I am not arguing that. Of course, an advisement from the police doesn't mean an understanding on the part of the recipient of that advice.

QUESTION: Are you going to apply that generally or just to this juvenile?

MR. MENASTER: Well, there is no question that this

Court has said over and over again that it must be a knowing, intelligent and voluntary waiver of the suspect, not of the police. The police understand the rights perfectly well. It is the waiver that has to be voluntary and knowing and intelligent.

QUESTION: On your theory, there isn't much use in giving the warning, it is just rhetoric.

MR. MENASTER: No, it is not rhetoric. The facts of this case clearly show that Michael was given advisement of his rights and in response to that he did not say yes, I would like to give up my rights. He asked some questions about it. He showed his fear. He showed that he wasn't sure what he was getting into. I think the record is clear on that point, and therefore in this case what Michael was doing was asking for help to get a further understanding of what he was getting into so he wouldn't get tricked, which is exactly what he said to the police, and a page later they say, well, we don't always play fair, do we, certainly not something that is going to make Michael feel confident.

QUESTION: Well, what do you do with, okay, will you talk to us without an attorney; answer, yes?

MR. MENASTER: Well, eventually -- well, Michael says a lot of things in this record. At one point he said, yeah, I want to talk to you. He also says I want my probation officer. He also says I don't know -- how do I know you

won't bring in a police officer and tell me he is an attorney. Initially, when he was first --

QUESTION: In the end he says yeah.

MR. MENASTER: Well, I don't think that is the end. After he says yeah, there are three -- there are three occasions after that before he makes an admission, where he says no in response to the question do you want to talk to us. He finally only talks after being threatened and promised and crying, breaking down in this case. I suggest that there are no fewer than eight indications of Michael's intention in this record, one of which is an unequivocal waiver. But the other seven aren't. In fact, several of those are unequivocal assertions of the Fifth Amendment.

QUESTION: Well, do you take the position that the state could have done one of two things, could have given him a probation officer or a lawyer?

MR. MENASTER: Well, the police --

QUESTION: Or did he have to get the probation officer or nothing?

MR. MENASTER: Well, I think that they could have given him a lawyer. However, I think in light of his statement, he wouldn't have trusted that lawyer very much.

QUESTION: Would that have been all right?

MR. MENASTER: I don't think that would have complied with the spirit of Miranda. I think they had to bring

his probation officer out.

QUESTION: So the lawyer wouldn't have been satisfactory?

MR. MENASTER: Well, if the lawyer talked with the minor and --

QUESTION: What are you going to do with Miranda now? Miranda said a lawyer.

MR. MENASTER: Yes.

QUESTION: And you want to substitute probation officer for the lawyer and rewrite Miranda?

MR. MENASTER: No, I don't want to rewrite Miranda.

QUESTION: Please don't.

(Laughter)

MR. MENASTER: I vote not to rewrite Miranda. However, Miranda has never been applied to a juvenile, and that is the point I made at the outset. If we are going to say that only if a juvenile uses certain words, attorney, words that adults would use, does the Fifth Amendment become invoked, then we are ignoring the reality that Michael wasn't an adult. He was a juvenile. Juveniles aren't expected -- I don't expect juveniles to ask for attorneys, let alone understand the rights sufficiently to be able to assert them, and therefore this Court has to decide one of two things, either we ignore the fact that Michael is a juvenile and require him to comply with adult standards, in which case I

guess you have to give us a jury because that is only fair, either a minor is an adult or he is not.

QUESTION: Well, the state would be free to put him in the gas chamber, kill him, too, on conviction --

MR. MENASTER: That's right.

QUESTION: -- as an adult.

MR. MENASTER: That's right. Fair is fair. Either we get the rights or we don't. Either Miranda applies differently to juveniles or it doesn't.

QUESTION: Well, doesn't Miranda say that the police must advise him of his right to an attorney, not that they can't question him only if he raises it on his own motion, so to speak?

MR. MENASTER: Yes.

QUESTION: So it isn't a question of the juvenile having to think up a right to an attorney, the police have to tell him.

MR. MENASTER: Yes, but the reality -- it is not a question of the minor understanding that he has the right to an attorney. Some ten year old is going to get on the phone and call up an attorney and say I hire you? That is just not realistic. Who is going to get the attorney?

QUESTION: Well, Michael wasn't a ten year old, was he?

MR. MENASTER: He was a 16 year old who was on

probation and afraid the police were going to trick him, and they sure did, didn't they?

QUESTION: I don't think they did.

MR. MENASTER: Well, they told him he was going to be better off. He is sitting in custody in California right now and he doesn't think he got the best end of that deal. The person who fired the gun is still on the streets, but that is another point.

The point is that the fact of the matter of advising the minor as an attorney doesn't satisfy the requirement. The youngster doesn't know how to get an attorney. We don't expect 16 year olds, 10 year olds to know attorneys off the top of their heads, let alone even know about public defender systems.

QUESTION: Well, how does a 22 year old necessarily know how to get an attorney?

MR. MENASTER: Well, we draw lines somewhere, I admit, and I think that the rules of -- the system in California drawing a line at 18 between juveniles and adults is a recognition that with majority comes maturity and certain requirements we assume are going to be applicable to a person who is an adult. To a person who is a juvenile, it is unrealistic, as the Supreme Court of California said in Burton, it is unrealistic to expect that a youngster is going to ask for an attorney and be able to get one. He is going to get

his parents to get him an attorney or, as in this case, a probation officer, as was suggested earlier, and assure that the attorney that is brought in is a bona fide attorney and not a sham. I think that is quite clear from this record.

I would like to stress one further point, and that is we have heard over and over again about how this probation officer was a peace officer. The California Supreme Court expressly relied on the California statute, welfare and institutes code section 280, which says that the probation officer's required to act in the interests of the minor. That is statutory duty that is mandated by the California code section, was construed by the court in California as the reason why a request for a probation officer in this case invoked Miranda.

I want to disagree with something else the petitioner said. The petitioner says, "Any request by a minor for any probation officer invokes Miranda per se." According to the California Supreme Court, that is not true. It is clear from the California Supreme Court's language. They were saying that Michael's request in California for a probation officer in this case -- remember the background, the probation officer advising the minor to call him so he could advise him of his rights and help him understand the rights, obviously helping insure the trustworthiness, to make sure that an attorney was reliable and not a sham artist. That was what

the California Supreme Court relied on.

QUESTION: What would you say, counsel, if the probation officer had come, had a private conversation with the young man for a half hour or an hour, then came in and said I have adivsed my client, my patient, whatever they call them, my charge to tell you the whole story, I think in the long run that is going to be the best thing for him, and then he told the whole story? What would you say about that?

MR. MENASTER: Well, let me point out that this Court doesn't have to reach that issue, but I would like to answer it.

QUESTION: We ask a lot of hypothetical questions.

MR. MENASTER: I would be glad to answer it. I think that a statement made under those circumstances would not be admissible because the minor asking for the probation officer is asking for that person prescribed by the court to act on his behalf. He thinks he is getting somebody acting on his behalf. If the probation officer comes in and plays the role of prosecutor, becomes an agent of the prosecution, it is just like a sham attorney.

QUESTION: Do you think a lawyer who advises his client to tell the truth and throw himself on the mercy of the court is acting like a prosecutor in every case?

MR. MENASTER: No. And I think the difference is that the attorney has a duty on behalf of the younster. If a

probation officer fulfills that duty on behalf of the youngster and the result is that the minor should make a statement, that is one thing. But if he acts as a prosecutor and enhances the prosecution to get a statement from the minor when the minor doesn't really want to make a statement, then he is contradicting that role, then he has been duped, then he has the equivalent of a sham attorney that Michael was so worried about.

QUESTION: Mr. Menaster, a moment ago I thought you said that the California Supreme Court's decision turned on the facts of this case. Perhaps I misunderstood you. I want to ask you about the language on page 25 of the petition for writ of certiorari where they say, "Here, however, we face conduct which regardless of considerations of capacity, coercion or voluntariness per se invokes the privilege against self incrimination, thus our question turns not on whether the defendant had the ability, capacity or willingness to give a knowledgeable waiver, and hence whether he acted voluntarily, but whether when he called for his probation officer he exercised his Fifth Amendment privilege." That sounds to me like a perceiver, not under this particular facts, this particular case.

MR. MENASTER: Well, I don't agree. The first word in that sentence is the crucial word and it is the word "here." The California Supreme Court discussed the dynamic of this

relationship, the extraordinary unique facts involving this case, and fashioned a rule that I submit is a very narrow rule. Now, I would be glad to have this Court or the California Supreme Court fashion a real broad rule, but all that the California Supreme Court did -- and if you read the opinion over and over again, they say, Michael's request in this case was for his probation officer, invoked his right. They repeatedly use that phrase.

QUESTION: You have emphasized that under the California statute the probation officer must act in loco parentis in every situation. Suppose you had a 16 year old, not on probation, no prior criminal record, in the same posture and who said I want to talk to my father first, and my mother, and his father and mother are brought in, they spend an hour talking alone -- and I am sure you can find many cases on record precisely to this effect -- and then they come out and the father says we have decided to tell Joseph to tell everything, we think that is in his best interest, and then he tells everything.

MR. MENASTER: Well, the critical question is exactly whole role the parents played. There is a case in California involving --

QUESTION: Well, they played the role that I just described.

MR. MENASTER: There is a case in California

involving an attorney who talks to a suspect because the police ask him to, and the police say, listen, if you get this suspect over here to make a statement, we will let your client out. The attorney says, oh, good, and he goes in and gets him to make a statement.

QUESTION: That is another case.

MR. MENASTER: No. But the point is --

QUESTION: Would you address my question.

MR. MENASTER: The point is that the role the parents play is the critical question. If the parents advise a minor of his rights, assist him in understanding his rights, in other words assist -- what Miranda is trying to get at, that understanding and waiver of rights, there is nothing wrong with it. The parents act on behalf of the police to get a statement out of the minor analogous to the attorney example I just gave, then it is not a valid waiver because he has been duped. That is the critical difference.

QUESTION: Mr. Menaster, suppose, a very simple case, a hypothetical, suppose the probation officer had dropped dead, he couldn't question him, right?

MR. MENASTER: Right.

QUESTION: You couldn't question him.

MR. MENASTER: Right.

QUESTION: Where in the world can you get support for that?

MR. MENASTER: Well, it is just a hypothetical. It seems to me that the logic of what the significance of the minor's request is what we are focusing on. And if the minor shows that he doesn't trust the probation officer, he is not sure he is going to get the advice and the cooperation that he needs to really make a waiver, that what else happens doesn't matter. That minor has asserted his rights under the Fifth Amendment.

QUESTION: So you can't -- nothing he says can be used against him.

MR. MENASTER: That's right.

QUESTION: Forever.

MR. MENASTER: Well, perhaps in the next crime, I don't know.

QUESTION: Oh, no, the probation officer is still dead.

MR. MENASTER: Well, he is going to get another one eventually, I suppose.

QUESTION: He could go out and commit three more crimes. He isn't goingto be convicted of anything in your book until the probation officer was reincarnated.

MR. MENASTER: The same rule would be true, of course, if the defendant said I want Mr. Belli as my attorney, in fact Mr. Belli was his attorney and Mr. Belli dropped dead. If he keeps asking for his attorney, the police can't

say, well, he is dead therefore we get to question you. I think that is a clear violation of Miranda. That is the same question.

QUESTION: Well, I don't see how you can put a probation officer and a lawyer in the same category.

MR. MENASTER: I don't.

QUESTION: They are two different animals.

MR. MENASTER: The Supreme Court of California has held --

QUESTION: The California Supreme Court -- well, is a probation officer a member of the bar?

MR. MENASTER: No. Well, some are but I presume that this one wasn't.

QUESTION: Well, there is a difference between members of the bar and lawyers.

MR. MENASTER: Right.

QUESTION: Do you recognize that difference?

MR. MENASTER: Yes.

QUESTION: All right. Is he a lawyer?

MR. MENASTER: I assume not.

QUESTION: All right.

MR. MENASTER: But neither is a parent, and the California Supreme Court has said that if a youngster --

QUESTION: I am not interested in any question from you. You please answer my question. Please answer it and

don't ask me another one.

MR. MENASTER: I wasn't asking a question.

QUESTION: I don't get paid to answer your questions.

MR. MENASTER: Well, I hope I get paid to answer them. My answer is that the same would be true if a youngster asks for his parents instead of for an attorney. If a youngster shows in a way that a youngster would that that youngster wants help in understanding his rights, that is an invocation of the Fifth Amendment. It is not fair to juveniles, it misses the point of McKeiver to say that the youngster can only assert his rights by using an adult formulation. The reality is that youngsters are young persons, and young persons ask for things in a different way. It would be like making up a special word, a long word that had to be said and the youngsters couldn't say the word. The youngster knows that he has a right to an attorney, but he also knows that he can't hire an attorney. That is what he has to have a parent or probation officer for. He knows that if they bring in an attorney, he has never heard of him, he doesn't know whether he is going to be tricked or not. In fact, the police are threatening this monir, I think it is quite clear that Michael was terrified of the police. He wants someone to give him a guarantee that that attorney is on the up and up, and that is why he is asking for his probation officer in this particular case.

I would like to turn to another point which I think has not been stressed nearly sufficiently in this case, and that is that beyond the technical Miranda issue in this case there is a further issue, an issue not referred to at all in petitioner's opening argument, and that is that independent of the Miranda grounds there is a second issue here concerning the voluntariness of the confession apart from the request for the probation officer. Michael repeatedly is asked -- in fact, he is asked within half a page of his supposed waiver, "Do you want to tell us about the murder? Answer: No." The petitioner says that is ambiguous.

I have been trying to figure out how that cuuld possibly be ambiguous, and I still can't figure it out. Perhaps petitioner will tell us. Three or four pages later he is asked, "Do you want to tell us what happened?" He says, "No." Three or four pages after that, they say, "Do you want to tell us what happened?" He says, "I can't."

Finally, after ten pages of exchange in which Michael makes no admission, no confession of any kind, it wouldn't be usable or worth a whit in any proceeding, before he makes any kind of statement, the police finally say, "Okay. That's it, somebody is going to come out of this pretty good and the one who tells us what happened is the one who is not going to get hassled." There is then a pause in the recording and during that pause, as described by both trial counsel

and the trial court, that is characterized as crying. So Michael is threatened, he cries, he breaks down, and then he immediately makes the statement that forms the basis for his confession.

Now, I find it hard to believe that that is not an involuntary statement, forgetting Miranda, but just on the standard voluntariness of totality of circumstances test. It seems to me that the petitioner has not dealt with that problem and the petitioner needs to.

Let me go back then to the critical issue that I think applies to this case. This Court has to decide whether juveniles are going to be treated like juveniles when it comes to jury trials, perhaps bail. But when it comes to Miranda, we are going to make juveniles be adults and use adult words in order to invoke a right when they clearly are terrified, they are being threatened, they are asking for help -- I find it amazing that petitioner characterizes this as simply an informational inquiry.

I suppose the theory is that Michael would like to come before this Court -- to go to the police station and say well, I have an academic question, I am writing kind of a thesis on constitutional rights, could you just tell me what you think the Supreme Court will decide on whether I have the right to a probation officer or not. I think that that is an incredible reading of this record, an unbelievable reading

of this record. And I think that a fair reading of this record is that Michael wanted help because he wanted to make sure he wasn't going to be tricked. In fact, he got tricked, I contend.

The point is that Michael ought to be treated as a juvenile because he was a juvenile at the time of this case. He was treated as a juvenile and it is artificial and unrealistic to expect that only a request in adult terms is sufficient to satisfy what Miranda was talking about when it was talking about protections.

Incidentally, I would like to disagree with the petitioner on one further point, and that is I think Miranda applies to juveniles. We have yet a further extension by petitioner in this case. The petitioner wants this Court to treat juveniles like juveniles when it comes to jury trials but don't treat them like adults even if they ask for attorneys, a request which would invoke Miranda in any adult case. It is an incredible position, a position not mentioned in the briefs incidentally, and one which I think this Court should summarily reject.

This Court has to decide in this case how to apply Miranda to juveniles. This is not an extension of Miranda. It is an application of Miranda. This Court will choose either to apply Miranda in such a way as to make it artificial and require juveniles to be adults when they are not required

anywhere else to be adults or it will recognize the realities of a juvenile situation, and it will conclude that where a juvenile shows that that juvenile wants help, that it is not fair, it is a violation of the Fifth Amendment for the police to continue to interrogate him.

I would like to close with just two thoughts. First of all, the incredible argument by petitioner that there was an unequivocal waiver in this case. Once Michael says yes, sandwiched in between all of these no's, and what about being tricked and all of that sort of thing, reminds me of a Wizard of Id cartoon where the king says to the lawyer, "Your client confessed." And the lawyer says, "How do I know it was voluntary?" And the king says, "Because, look, there is your client's signature right there underneath the blood stains."

It seems to me that in this situation Michael made an unequivocal waiver, but he did everything else he could possibly think of to say he didn't want to waive. He showed fear, he showed anxiety, he asserted his rights under the old involuntariness test, and I submit that Michael clearly asserted his rights sufficiently to invoke the Fifth Amendment, apart from any Miranda consideration.

I think that the bottom line of this case is that the petitioner in this case is arguing that because of the technical nature of Miranda, we have to be very cautious in

analyzing what kinds of things we are going to technicall invoke.

It reminds me of a quotation from Justice Wisdom who said that if police efficiency were the only important thing, then the rack would be all right. There are things more important than police efficiency, and they happen to be listed in the Bill of Rights. I charge this Court with deciding whether juveniles are juveniles, whether Miranda applies to juveniles and recognizes the reality of juveniles, or whether this Court will hide its head in the sand and pretend juveniles are adults, deny them rights when that argument is made, but deny them rights when they assert what are juvenile rights in the same context, and I would ask the Court to carefully consider the decision in this case for the impact it will have on probation systems, on juvenile systems throughout this Nation.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, counsel?

ORAL ARGUMENT OF MARK ALAN HART, ESQ.,

ON BEHALF OF THE PETITIONER--REBUTTAL

MR. HART: The problem with the magic words approach adopted by the California Supreme Court that a request for a probation officer is per se a Fifth Amendment invocation is that it does not necessarily bear any relationship to the

Fifth Amendment. We submit that this approach of attempting to determine or predict the subjective intent of any minor who asks for his probation officer takes away the traditional role of the tier of fact to determine if in a given instance a minor is making a voluntary statement.

The critical factor in Miranda was whether a suspect wanted to speak. This Court found that a request for an attorney is reasonably an indication that a suspect doesn't want to speak. There is no basis for the same reasonable -- the same conclusion and the same per se rule with respect to probation officers. This Court noted that in In re Gault when the State of Arizona attempted to argue that they didn't have to provide the minor with counsel because the probation officer could provide him all of the services of the attorney and this Court rejected that. It noted that probation officers in the Arizona scheme were also peace officers and that they initiate proceedings involving the minor and they could not provide the same assistance.

If a probation officer cannot fulfill the traditional goals of legal counsel, then a rule which says any minor per se invokes his Fifth Amendment right by asking for his probation officer bears no relation to the goals of the Miranda court and bears no relation to the Fifth Amendment.

I would like to talk just briefly about the other contention of respondent, but indications in the record apart

from the request for the probation officer indicate that the minor was invoking his rights.

The respondent isolates all of those statements from the context of the record, and I think we have discussed it pretty well in our briefs. For example, the first one that respondent mentioned, where he was asked about the murder and he says no. What he said was, "No, I don't know anything about it." Now, it seems to me that in the course of any interrogation or any conversation, there are going to be times when there is a hestiation, there are going to be times when a suspect may deny participation in an offense, but each one of those is not a separate invocation of the Fifth Amendment. It is something for the trier of fact to look at.

The trier of fact in this case, and the California Court of Appeals and the California Supreme Court all found that none of those were indications of the Fifth Amendment invocation. The sole issue in this case is whether the request for the probation officer was such an indication. We submit that it was not. We submit that the standard with respect to juveniles should be voluntariness based on the totality of the circumstances, a standard employed by the trial court in the instant case, and we would submit the matter, if there are no more questions from the bench.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:00 o'clock p.m., the case in the above-entitled matter was submitted.)

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