# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-5786

TITLE FRANK M. MILLER, JR., Petitioner vs. PETER J. FENION, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL.

PLACE Washington, D. C.

DATE October 16, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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FRANK M. MILLER, JR., :

Petitioner :

vs. : No. 84-5786

PETER J. FENTON, :

SUPERINTENDENT, RAHWAY :

STATE PRISON, ET AL. :

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Washington, D. C.

Wednesday, October 16, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:01 o'clock p.m.

APPEARANCES:

PAUL MARTIN KLEIN, ESQ., East Orange, New Jersey; on behalf of the Petitioner.

MS. ANNE C. PASKOW, ESQ., Deputy Attorney General of New Jersey, Trenton, New Jersey; on behalf of Respondent.



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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Klein, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF PAUL MARTIN KLEIN, ESQ.

ON BEHALF OF THE PETITIONER

MR. KLEIN: Thank you.

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

We are faced today with two issues of great import. The first issue is whether the voluntariness of a confession is a question of fact to which this Court and lower federal courts must defer. And the second issue is whether the Petitioner's confession was involuntarily obtained by police practices which operated to overbear his will.

We submit that the Court of Appeals' use of the presumption of correctness deprived Petitioner of his statutory right to federal plenary judicial review, and if this Court affirms the decision below, it will displace the ultimate authority to decide the questions of constitutionality of confession from federal courts where Congress placed it and where this Court has consistently recognized it belongs.

With regard to this issue, it is crucial that we look to the nature of the voluntariness inquiry itself and to the nature of the federal courts' role in

constitutional adjudication.

We would first contend that the nature of the voluntariness inquiry itself makes it a mixed question not subject to the strictures of section 2254(d). The constitutionally required test is totality. This is an indivisible concept. It is not just a review of facts but the application of law to those facts, not just determine --

QUESTION: Well, how does it differ, Counsel, from the question of whether a guilty plea was voluntary in Marshall v. Lonberger or a finding that a particular venireman was biased in Patton v. Yount, and the competency question in Maggio?

MR. KLEIN: Yes, Your Honor, these were the decisions relied on by the Third Circuit, and I would say that the policy decisions there are totally different. If you look at what was decided in those cases --

QUESTION: What policy decisions are you talking about?

MR. KLEIN: Decisions -- what the courts were deciding there, what they were pleading --

QUESTION: What this Court was deciding.

MR. KLEIN: What this Court was deciding there were questions of credibility and demeanor which the

Court, the state courts were in a superior position or had a superior opportunity to review, to assess, to judge --

QUESTION: Well, why does the -- let's take Marshall v. Lonberger. Why does the question of whether a guilty plea was knowingly or intelligently made differ from the question of whether a confession was voluntarily given so far as credibility and everything else?

MR. KLEIN: When you are dealing with voluntariness of a confession and you have a defendant or a petitioner in front of you, you cannot deal with the assessment of credibility and demeanor at a closed, inherently secret and inherently coercive setting such as an interrogation. The Court in Marshall v. Lonberger was able to question the defendant there and was also able to look to state court records of things that were conducted in open court, with a court stenographer, with all the safeguards available to the individual.

You don't have that in an interrogation situation.

QUESTION: Well, so you say it depends on -- that the cases I have referred to depend on the fact that the witnesses were present before the judge who made the finding?

MR. KLEIN: That appears to be one of the factors involved. The other is the question involved. None of those cases dealt with the question of compulsory self-incrimination.

QUESTION: Well, but they dealt with other constitutional issues certainly. Why should compulsory self-incrimination be different from other constitutional issues?

MR. KLEIN: I think that Congress has recognized and this court has recognized that when you are dealing with voluntariness of a confession, you are dealing with -- excuse me, I lost myself for a second -- voluntariness of a confession, that state courts do not offer the proper institutional setting for final adjudication of federal rights, and that in the past and the potential is still there for state courts to defeat federal claims by failing to, as the Court said in Culombe, to draw the inferences that the historical facts compel.

QUESTION: Well, you -- you refer to our decision of Culombe v. Connecticut?

MR. KLEIN: Culombe --

QUESTION: Yes, how many people joined the opinion to which you are referring?

MR. KLEIN: In Culombe?

QUESTION: Is it Culombe v. Connecticut?

MR. KLEIN: I guess.

QUESTION: And how many Justices of the Court joined the opinion from which you are quoting?

MR. KLEIN: I thought it was three or four.

Certainly I think the concern of Congress has been that the state court, state courts are not insulated enough from local community sentiment, from the question of guilt and innocence itself, and that a further proceeding would be needed in this court to protect, to ultimately vindicate those rights.

Now, if you look at the problem here, if you look at what the state court had before it, it is the same thing that this Court has before it now. What it had on one hand were a set of pure historical facts, and on the other hand, undisputed rule of law. That law is whether under the totality of the circumstances petitioner's will had been overborne; was his confession compelled from him, and the state court took that undisputed rule of law, applied it to the facts, and reached the conclusion that the law in fact had not been violated.

This by definition is a mixed question, and what the Third Circuit did, we contend, was to abdicate its duty to this argument's question of law and fact.

What it did was classify as pure fact certain conclusions of the state court, and when we look at those conclusions, one of the conclusions was that the distress and ultimate collapse of petitioner after giving his confession was caused by realization of what he had done, and that when he confessed he was aware that he would be handled through the criminal justice system.

These we contend are not pure historical facts, but require application of law to the facts to reach that conclusion. That conclusion in itself is dispositive of the constitutional claim.

When you say that someone collapsed or was in distress because of a realization of what he had done, you are basically saying that his will had not -- his confession had not been compelled from him.

These are not the types of facts that Section 2254(d) was intended to encompass. I think what 2254(d) intended to encompass were findings of either pure historical fact, facts that this Court has defined as recitation of the external events and the credibility of their narrator, or inferences from those facts which can be made without reference to legal standard, without applying the standard of law to the facts in reaching a conclusion.

For example, if in this case petitioner had claimed that he had been starved or that he had no working knowledge of the English language, all you need do is go to the record and listen to defendant speaking, listen to petitioner speaking. The judge was able to observe petitioner in court. Petitioner did testify at a pretrial hearing, and you can infer from what happened that in fact he did have an understanding of the legal -- of the English language. The same with the allegation, if you raise it, that he had been starved. The police certainly offered him food, and you could determine this from the record and thus, these conclusions would have been dispositive of the ultimate claims. They were not mixed questions.

We would contend that to adopt the position of the Third Circuit is to thwart congressional intent to have federal courts serve as the ultimate vindicators of habeas petitioners' constitutional claims. We briefly mentioned the recent cases, and I do say that these cases, most of them recognized that when you are talking about mixed questions of law and fact, you're talking about a different situation.

And I still think that Congress and this Court has been very concerned with the setting that the petitioners are in when they are being interrogated.

And with this regard, when we refer to state of mind in the recent cases such as Patton and Maggio, Rushen v. Spain, you are talking about something different from the state of mind in a voluntariness case, voluntariness of confession. State of mind is really syncnymous with whether petitioner voluntarily gave the confession, and certainly state of mind cannot be determined other than by inference from what had happened, from the facts that you have, drawing inferences, getting at the truth is a very difficult situation in voluntariness cases.

I would also note that in the Third Circuit they referred to Miranda warnings as also causing some kind of doctrinal upheaval. We would submit that in this case or in all cases, Miranda warnings have not replaced the voluntariness test, the voluntariness standard. That is a prophylactic rule, and it is not designed to do away with the test involved in Hutto v. Ross. The Court -- there the petitioner had in fact been given his Miranda warnings and had counsel present, and these were just factors to assess in reaching the ultimate conclusion. The state of mind is just one part of the equation in a voluntariness of confession case.

QUESTION: Well, your suggestion is that the habeas court should just given independent -- draw its own view as to voluntariness, make its independent

determination.

MR. KLEIN: An independent determination of course deferring to the historical facts or the --

QUESTION: And be bound by the historical facts, if supported by the record.

MR. KLEIN: Yes.

QUESTION: Being bound -- and what about inferences from other fact, to other facts, of other facts from those facts, the same with those except as to voluntariness?

MR. KLEIN: No. When the -- and this is a difficult area to draw a line in -- I think when you have to resort to a legal standard, apply a legal standard to the facts to reach this conclusion or inference, then you are talking about a mixed question. Certainly there are facts there --

QUESTION: But there are other historical facts that you find by drawing inferences from other historical facts.

MR. KLEIN: Yes.

QUESTION: And those would be -- you are bound by those findings.

MR. KLEIN: Provided that they are done without reference to the legal standard, yes.

QUESTION: Yes.

Well, do you think that -- do you think would it be proper to say that great weight is to be accorded to the inferences which are drawn by the state courts?

MR. KLEIN: Yes, I would.

QUESTION: And in dubious cases, it is appropriate that the state court's determination should control?

MR. KLEIN: I think when we're talking about questions of credibility and demeanor.

QUESTION: No, I mean talking about the ultimate judgment.

MR. KLEIN: The -- excuse me?

QUESTION: About the ultimate conclusion about voluntariness.

MR. KLEIN: When those ultimate conclusions don't need an application of legal standards --

QUESTION: In doubtful cases the court should make its own -- make up its own mind and not defer, is that it?

MR. KLEIN: Yes, and in cases of this nature, the Court --

QUESTION: Of course, I'm reading from Justice Frankfurter, isn't it in Culombe?

MR. KLEIN: Culombe, yes.

QUESTION: You disagree with that, with what

he said.

MR. KLEIN: I did not disagree. Maybe I misunderstood you, but I didn't disagree with what he was saying.

QUESTION: Well, great weight should be accorded to the inferences which are drawn by the state courts. Now, he's talking about the inference of voluntariness or not, the state of mind. And in dubious cases, the state court's determination should control. I don't think your -- I think that's a little bit different from your position.

MR. KLEIN: Well, I didn't see it that way.

QUESTION: All right.

Well, if you accept it, I'm glad to know it.

QUESTION: Mr. Klein, many of the early cases holding that federal courts were free to disregard state court voluntariness findings seemed to be based on some kind of distrust of state court findings in general.

Do you think those conditions are appropriate today, or do you think this Court has backed away from that view of distrusting state court findings in general?

MR. KLEIN: I don't think that we have the same type of abuses that the early courts were dealing with here. I think the concern is the potential.

Certainly we still have situations coming up here, factual situations such as in Mincey. We have new standards being employed by police. Certainly the brutal tactics in --

QUESTION: Well, I suppose that a federal habeas court in any event could declare certain interrogation tactics improper as a matter of law or define that the voluntariness finding is not fairly supported by the record.

MR. KLEIN: Yes, it could.

QUESTION: And aren't those sufficient in the way of protections today?

MR. KLEIN: I do not think that the fair record support standard would be sufficient. I think Congress contemplated a broader review because of the rights being implicated here and the potential for state courts to defeat federal rights. I am not saying that you certainly don't get situations like Brown v. Mississippi with whippings, with blatant torture coming before this Court or --

QUESTION: Each of the cases that I mentioned to you earlier, Mr. Miller, involved a federal constitutional right, Patton v. Yount, Marshall v. Lonberger, Sumner v. Mata, and the Maggio case, and in each of those this Court said that the 2254 presumption

of correctness applied even though we were dealing with claims of federal constitutional rights.

Are you saying that voluntariness of a confession stands just by itself in this area?

MR. KLEIN: I think it is distinguishable, and I also think in those cases you indicated that you weren't talking about mixed questions.

QUESTION: But why should voluntariness of a confession be a "mixed question" when the bias of a juror, the suggestibility of a pretrial identification, a competency standard, when they apparently are not mixed questions?

MR. KLEIN: In all of those cases the Court is able to talk to the -- they have voir dire of the jury, jury members, they are able to assess by what they see in front of them, and in voluntariness of a confession case you have a completely different situation. You have a secret, inherently coercive setting where drawing the truth is a very difficult process --

QUESTION: But it still has to be done by hearing witnesses in open court, doesn't it?

MR. KLEIN: Your hearing witnesses in opening court doesn't deal with the credibility or demeanor or the situation of what went on at the interrogation proceeding. That is --

QUESTION: No, but that's the only -- unless you have some sort of a tape or a videotape, that's the best way we have of finding out what went on during the interrogation is examining the witnesses who were present.

MR. KLEIN: This is correct, but this Court is in no different a position than the lower courts. I think that in the other situations this Court found that the state courts had a superior opportunity to assess what was happening. They had the live witnesses before them. They could judge from looking, from the tone of the words. This Court --

QUESTION: But the state courts here had live witnesses before them, didn't they?

MR. KLEIN: They had live witnesses before them, but they weren't -- they didn't have the interrogation before them.

QUESTION: I guess I just don't follow your reasoning.

QUESTION: They had a tape of the interrogation.

MR. KLEIN: Excuse me?

QUESTION: They had a tape of the interrogation.

MR. KLEIN: They had a tape of the

interrogation. This does not make the interrogation any less secret. The interrogation, the police are still in control of the interrogation. It is not taken down by a support stenographer in a courtroom with all of the safeguards that are encompassed there.

QUESTION: One of the things that puzzles me about this case is what are we talking about when we talk about historical fact as opposed to the ultimate conclusion? I suppose one thing that we might be interested in in this case is the extent to which there was deception by the interrogating officer of the person being interrogated.

Did the state court make any finding one way or another on how much trickery and deception and falsehood there was in the interrogation?

MR. KLEIN: The state courts found that there -- while there was a promise of psychiatric help, that this in itself was not coercive enough to overbear his will, and it did not find that --

QUESTION: But it did find there was the promise. Was it implicit in that that it was a false promise?

MR. KLEIN: Not in the promise to help. The other promises the court -- the implied promises of nonincarceration the court rejected saying that there

was not an express promise that the petitioner would not go to jail.

The court did find that there was a promise of psychiatric help, but that this was something that the police officer couldn't promise the defendant.

QUESTION: What did the state court say about all the statements to the effect that I'm your brother and you can trust me and all that kind of stuff?

MR. KLEIN: They found that under the totality of the circumstances, applying the law to the facts as they saw it, that this did not overbear petitioner's will. They looked to --

QUESTION: But they didn't necessarily find that there was no falsehood or deception involved.

MR. KLEIN: No, they did not. They --

QUESTION: Well, did they find that there was some?

MR. KLEIN: They, they basically said that if what the police did was -- they did find that there were lies, that there were some deceptive practices, but that these practices did not operate to overbear petitioner's will, and I think in this regard, in my second point, I wanted to note that this Court has observed that illegal and unconstitutional practices get their first footing by silent approaches and slight deviations from the

accepted legal procedures, and I think this case is a perfect example of where those silent approaches and slight deviations can lead.

At the outset we did note that there was no question but that petitioner had received his warnings, and we are not contending that he didn't understand those warnings when they were given. What we are contending is that we have to look at what the interrogator did after the warnings were given, and I think it's clear that the entire thrust of the interrogation was to divert petitioner from the reality of the criminal justice system, to undermine any of the warnings that had been given previously, and to ultimately overbear petitioner's will.

The detective employed a series of lies, deceptions and promises during a constant psychological assault assuring petitioner over and over and over again that it was the detective's job to get him help, that petitioner was not a criminal, that he was not responsible for what had happened, and that he should receive help instead of punishment.

And I think if we look to exactly what --

QUESTION: Now, are these the findings, somebody's findings that you are just reading, or is that your version of the record?

MR. KLEIN: These are findings in the -- to the extent that they are clear on the tape as to what the detective said. In terms of its result, this is my argument.

I would contend that there was absolutely no balance involved in what the police officer did. Certainly if he had said my job is to get you help, and I'm here to make sure that you get help and I'm going to make sure that you get proper psychiatric evaluation, a comfortable cell and three square meals for the rest of your life, we wouldn't be here today because there would be a balance and you would be basically letting petitioner know where he stood.

The purpose of Miranda, one of the main purposes was to ensure that the petitioner knew that he was in an adversarial situation and that the police or the people conducting the interrogation were not necessarily acting in his best interests. And what's fascinating, what the police did here, they had this chicane all the way through, and it continued until the end. At the very end of the confession, right before petitioner collapsed, the police officer said I understand you'll be willing to sit down and talk with me and an assistant prosecutor and indicate to him that you have a problem so that you can get help. The

equation was throughout, problem and help, not crime and punishment.

What the interrogating agent did and what we contend he had absolutely no business doing was to invoke the spectre of a sentencing judge, and what he accomplished, we feel, was to undermine the effect of the Miranda warnings. The attorney general in her brief tries to separate each incident into a world of its own, and we contend that in this type of a situation you can't do it. It's like a mosaic, each little piece fits together and ultimately draws a picture as to what happened, and the same came be said with regard to the will of the petitioner here. Each little deception, each little promise acted like a weight that was placed upon him, and while one little weight might not have made a difference, by the time the interrogating agent was done placing these weights upon him, he succeeded in crushing him and taking away any option not to incriminate himself.

We contend that a legitimization of these skillful techniques basically serves to reward an interrogator who is clever enough or devious enough to avoid brutality and serves to undermine the entire spirit of Mirand.

We recognize that it is a legitimate object to

create an atmosphere where a defendant might bear witness to the truth, but you have to recognize that that atmosphere cannot be made so as to take the option away from petitioner.

I would like to reserve, unless there are any questions, reserve the rest of my time.

CHIEF JUSTICE BURGER: Ms. Paskow?

ORAL ARGUMENT OF MS. ANNE C. PASKOW, ESQ.

ON BEHALF OF RESPONDENT

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

Even under an independent review standard, Mr. Miller's 1973 confession to the brutal murder of 17 year old Deborah Margolin should be found voluntary, and so it was by both the New Jersey Supreme Court and the Third Circuit.

However, this Court need never reach that issue because as respondents submit, under 2254(d), deference should be accorded to the factual findings of the state court, including, as in this case, the factual finding concerning Miller's state of mind, that is, that his will was not overborne.

Since the factual findings by the state supreme court were fairly supported by the record, the Third Circuit properly paid deference to them, and

having also found that the state court applied the correct legal standard, properly concluded that the confession was voluntary.

QUESTION: General Paskow, what are the state court's findings on the question to which deception played a part in the whole confession?

MS. PASKOW: I believe that the state court found that he was not deceived into believing that Boyce was anything other than an investigating officer investigating a crime. I think that comes the closest to answering your question.

QUESTION: Really, it didn't seem to me they addressed -- it is a very difficult question the extent to which deception is appropriate in an examination like this, and I just don't know what the factual predicate on which the ultimate conclusion was based really was, whether they thought there was quite a bit of deception but it was perfectly proper, or they thought there really wasn't very much and it didn't have much effect on him. And I think one can read, read the transcript or listen to the tape and draw either conclusion.

MS. PASKOW: Perhaps that's so, but --

QUESTION: Does the state have a position on whether there was a significant amount of deception employed in the interrogation?

MS. PASKOW: We think there was very little deception.

QUESTION: You think all the talk about how he was really your brother and I'm trying to help you and all that, that that wasn't deceptive at all?

MS. PASKOW: No, sir.

QUESTION: You don't.

MS. PASKOW: No, Your Honor. We believe that that was done always in the context of him being a police officer, and whatever help would be available would be in the context of a criminal prosecution, and that was always understood by the defendant, as evidenced by several of his answers that we have cited and highlighted in our brief.

QUESTION: Let me take it one step further, if I may.

MS. PASKOW: Yes.

QUESTION: Supposing one disagreed with that and thought it was deceptive, that there was a misleading impression that the man was really not an adversary but was trying to help a person in need of psychiatric help.

Would that make it involuntary?

MS. PASKOW: No, sir, not in this case.

QUESTION: So you win on either approach to

the case.

MS. PASKOW: We think we do win this case. We think that this interrogation was proper because the bottom line being his will was not overborne, that he confessed because it was his own rational choice to confess and not because of any misstatements on the part of the police.

If one wants to characterize something as deception in this case, I would think they would have to be pebbles of deception as compared with boulders of overwhelming evidence that were presented, and I think the most compelling things that were shown to this defendant during the interrogation was that he -- a car identically matching his vehicle which was a very unique vehicle was seen at the Margolin farm immediately before she disappeared and was murdered, and her blood was found in his car.

QUESTION: And on his doorstep.

MS. PASKOW: I don't think there's anything more compelling --

QUESTION: And on his doorstep. And on his doorstep, too.

MS. PASKOW: Excuse me?

QUESTION: And on his doorstep. But that wasn't proved.

MS. PASKOW: That, that was never developed at trial. We don't know exactly where that statement comes from. It might be --

QUESTION: Do we know whether, do we assume it was made or it was not made, under the state court's findings of fact, or don't we know?

MS. PASKOW: That the statement was made?

QUESTION: That the interrogating officer incorrectly stated that blood had been found at the front of his house.

MS. PASKOW: We don't know whether he incorrectly stated it or correctly stated it. We know tha he stated it. We don't know whether or not it was correct --

QUESTION: And the state court didn't make a finding one way or the other as to whether it was correct or incorrect, or did it?

MS. PASKOW: I don't think it was a relevant fact for them to make in order to come to their --

QUESTION: You don't think if that was a false statement made to induce him to confess, that that wasn't even relevant?

MS. PASKOW: If it had been significant in the decision, they would have made a specific finding with respect to it.

I think that they took it in the context of the entire interrogation as to what happened there, and they might not have even identified it as a misstatement, if in fact it was.

And I'd like to emphasize again that really, the two compelling items that were demonstrated were the fact that her blood was found in his vehicle, and that his vehicle was seen at the farm immediately prior to the murder, and faced with that evidence, it was really very clear that this defendant had committed the murder, and he was aware of that. He tried to exculpate himself throughout the interrogation, and when he realized he couldn't, he decided he would confess to it.

In support of our position that the presumption of correctness was properly applied in this case, we would rely on the purpose of 2254(d) as evidenced by the legislative history, ther recent decisions of this Court as previously mentioned by Justice Rehnquist, and also Schneckloth, which --

QUESTION: Well, of course, there are precedents going the other way in connection with this specific question here of voluntariness of confessions, are there not, holding that it's a matter for review by the federal court without the presumption of correctness?

MS. PASKOW: There are cases going the other way. I would say the majority of them probably predate the 1966 amendment to the, to the habeas corpus statute, and for that, in that regard, they have to be somewhat discounted. I think the federal statute sets out what the standard is to be applied, and we have to look at the voluntariness cases in light thereof now.

QUESTION: Yes, but it is talking about facts.

MS. PASKOW: But I don't think there was the sensitivity to the distinction between --

QUESTION: Well, I know, but the statute itself says factual findings will be used.

MS. PASKOW: That's correct, and we would say that state of mind of a defendant is traditionally something that should be considered a fact.

QUESTION: Well, that isn't what some of the other cases say, some of the other cases.

MS. PASKOW: I think --

QUESTION: Some of the older cases. Or that isn't what that is about?

MS. PASKOW: I think you can read some of the older cases to say just about both sides of the question. I think --

QUESTION: Well, what about, what about, what

about Culombe?

MS. PASKOW: Culombe also has Justice Frankfurter's language that you quoted before that --

QUESTION: Well, I know, but what did he say about voluntariness, the inference of voluntariness?

He said it was a -- he didn't say it was a question of fact. He said it was something that the Court may review.

MS. PASKOW: I think, I think the way to really look at Culombe is more the totality of the circumstances themselves are, were inherently unconstitutional or involuntary, per se, that voluntariness in that case was looked at more as -- that the legal standard being applied was being -- that anything under those circumstances would have been involuntary regardless of the effect it would have on defendant's will.

QUESTION: What about Mincey v. Arizona where the Court said, the Court is under a duty to make an independent review of the record?

MS. PASKOW: Well, of course, that case didn't come up in a habeas context so that we don't have the 2254(d) presumption applying in that case, and I think that's a distinguishing feature.

Also, the facts in Mincey are equally

egregious, and I think if that had come up, that the duty of context --

QUESTION: Do you think that makes a difference on the characterization of whether it's a mixed question of fact and law, how it comes up? Don't you think that determination would be the same under either one of those?

MS. PASKOW: I think Mincey could very easily have been analyzed as being per se the tactics employed and per se unconstitutional without reaching --

QUESTION: But that isn't what the Court said.

MS. PASKOW: Well, I think the Court examined the totality of the circumstances there on an independent review, which of course would not occur in a habeas context. Again, state of mind of the defendant can still be characterized, as we do, as a factual element which deference should be paid to unless there is fair support for it.

So Mincey could very easily have been analyzed in that fashion, that there was not fair support for what the trial court, the Arizona courts had done in that case, or at the other extreme, it could have been analyzed as the tactics in and of themselves were so offensive to due process that you wouldn't even reach

the question of whether or not Mr. Mincey's will was overborne.

QUESTION: Ms. Paskow, Davis v. North Carolina was a habeas case, wasn't it?

MS. PASKOW: I'm sorry, I don't recall.

QUESTION: That's in 384 where we said that -- and it is a habeas case -- and there we said it is our duty in cases dealing with a question whether a confession was involuntarily given to examine the entire record and make an independent determination whether defendant's will had been overborne.

You're not familiar with that?

MS. PASKOW: Frankly, Your Honor, I can't say that I am, but if in fact it stands for the proposition that Your Honor has said, I would suggest that now we should come further from there and give effect to what Congress has said 2254(d) with respect to --

QUESTION: Well, that was a 1967 decision.

QUESTION: Well, I guess --

MS. PASKOW: Since that time we have had, we've had Patton v. Yount and we've had --

QUESTION: We've had some conflicting statements on it since then, haven't we?

MS. PASKOW: Yes, I believe we have, and I believe state of mind in the more recent cases has been

viewed as a factual element, more so than perhaps in the past, and properly so, and --

QUESTION: Well, I guess Davis was decided a few months before Section 2254 was signed into law, wasn't it?

MS. PASKOW: As I said, I'm not that familiar with the case to be able to answer the question. I will rely on Your Honor if you are saying that.

Going back to the purpose of --

QUESTION: I just note the case is cited four times in the blue brief.

MS. PASKOW: Going back to the purpose of 2254(d), and the 1966 amendments, we said -- we would say that the purpose of those amendments was to promote finality and federalism by limiting readjudication of state court fact findings, of which we characterize the state of mind, unless there was not a full and fair opportunity for hearing and the facts were not fairly supported by the record, and the remedial nature of these amendments suggests that they should be broadly construed by this Court.

The recent decisions of this Court, as we've mentioned, Patton v. Yount, Wainright v. Witt, Marshall v. Lonberger, suggest a progression with respect to how we are considering the state of mind findings and

support our position in this case, we believe. That is what the Third Circuit did. They characterized what the state of mind of the defendant, whether or not his will was overborne, as one of the state of mind factfindings along the lines of those, the recent decisions of this Court, and properly paid deference to what the state courts did.

Again, in Schneckloth where the voluntariness of the consent to search was in issue, this Court said that that's a factual question to be determined by the totality of the circumstances, and we would suggest that that statement was equally applicable here.

We do not believe that it is a mixed question of fact and law as Mr. Miller's counsel has suggested, that the umbrella term, voluntariness, as it has been loosely used in a number of decisions, describes both a legal standard to evaluate the confession and the factual question of whether the will has been overborne.

The first part, of course, is the legal, determining what the legal standard is to apply; the second part, the totality of the circumstances, whether his will was overborne, really describes a factual question.

The Third Circuit here we feel did not apply

the presumption to the state court's finding of voluntariness but rather applied the presumption to the findings involving the effect of the circumstances surrounding the interview on defendant's decision to confess.

We also would submit that this confession was not involuntary as a matter of law, that what went on here cannot be described as similar to the terror tactics such as torture, deprivation of food and water, threats of violence or mob action.

QUESTION: Do you condone the conduct of the officers in this interrogation in using what might be characterized as false information or suggestions?

MS. PASKOW: I do not condone the use of false information or suggestions. I don't know that that was done in this case. I don't think there were intentional falsehoods use in this case or intentional deceptions used in this case.

QUESTION: That's what interested me. You say you don't know whether it happened or not, and it seems to me that's quite an important factual predicate for analyzing the legal question. We don't know whether it -- you don't know whether it happened, the state court didn't tell us how much deception there was and whether it was significant, whether it tended to

motivate the confession, and yet we should defer to these factual findings that have never been made.

MS. PASKOW: Well, I think we do know that they've been --

QUESTION: We have the ultimate conclusion that it was a voluntay confession, but that could mean that they thought everything the interrogator said was deceptive and tricky and a lot of falsehood, but as a matter of law, that's perfectly all right, and I'm not sure that would be inconsistent with the cases. But I'm not sure you are saying we should be willing to go that far.

See, the law really is very, very unclear on the extent to which trickery and deception by the police is permissible, and one of the problems I have with this case is there are no factual findings that tell me what the trier of fact thinks with respect to the extent of deception that actually took place.

MS. PASKOW: Whether or not the trier of fact found that there actually was deception or whether or not the trier of fact found that the deception did not have the effect of overbearing will, I think the result is the same because the other fact that was found by the court here was that the will was not overborne.

QUESTION: I understand, but our -- the legal

issue as it comes to us is quite different, depending on what one thinks the findings of subsidiary facts were. That's all I'm suggesting, and I am suggesting you, you're not even prepared to tell us what you think the state court found with respect to the amount of deception, and understandably so because the record is so opaque.

MS. PASKOW: Well, even if we were to accept that deception was used in this case, I don't think it affects the bottom line of what the decision should be because the will was not overborne. Defendant's will was not overborne. His decision to confess was a prodsuct of his free will and rational mind.

That is I think one of the critical facts of the case, and I think that's probably --

QUESTION: Well, do you think the record can be interpreted to mean that he would have confessed had there been no deception at all? I dont think there's any such finding in the record. Maybe he would have. I don't know. It's a little hard to understand. It took him an hour and a half, or about an hour, I guess, to get him to confess.

MS. PASKOW: Fifty-eight minutes.

QUESTION: And he had to kind of pull it out of him from time to time. I don't know whether that

is --

MS. PASKOW: Well, no defendant is going to be eager to convey his involvement i a murder of this type, of course, but defendant at all times throughout this indicated his willingness to talk, and the officer testified at the voluntariness Miranda hearing that it was his feeling that defendant wanted to talk and just wanted to come out with what he had done to relieve himself of this.

Again, the offers to see that defendant receive psychological help and the sympathetic approach adopted by the detective we would say really focus on whether or not the will was overborne, and defendant in this case always understood that Boyce was a police officer acting as such.

Similarly, the most damaging evidence that was presented to this defendant in the course of the interrogation was the observations of his car at the farm before the murder and the blood stains on his vehicle, and this really was the linchpin leading him to confess in this case.

With respect to his demeanor during the interrogation, he was lucid, coherent, rational, he was cynical at times, independent and argumentative. He weighed the evidence. He was able to fabricate a story,

trying to exculpate himself, and when he realized that failed, he was not able to account for the time period in some of this compelling evidence, he confessed only then.

Thus we would say that even on a plenary review in this matter, it would demonstrate that the confession was voluntary. The briefness of the interview, the fact that this man was reasonably intelligent, he was advised of his rights, explicitly waived them in writing, he was not a novice to the criminal justice system. Just one month before, he was involved in a similar interrogation situation since he had been involved in another criminal event. He knew he could terminate this interrogation at any time, which is a critical safeguard. He consistently demonstrated his willingness to talk, and it was then not appropriate for the detective to try and persuade him to admit his guilt.

Again, any implied promise of psychological help was only in the context of an anticipated criminal prosecution, and it's -- defendant understood that as such.

So we would say that under the totality of the circumstances, his confession was a product of his free will and rational mind.

If the Court has no further questions, we will

rest.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Klein?

MR. KLEIN: No, Your Honor.

CHIEF JUSTICE BURGER: Thank you, Counsel.

The case is submitted.

(Whereupon, at 2:45 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-5786 - FRANK M. MILLER, JR., Petitioner vs. PETER J. FENTON, SUPERINTENDENT, RAYWAY STATE PRISON, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)