OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ROBERT EDWARD STANSBURY, Petitioner v. CALIFORNIA

CASE NO: No. 93-5770

PLACE: Washington, D.C.

DATE: Wednesday, March 30, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT EDWARD STANSBURY, :

Petitioner :

v. : No. 93-5770

CALIFORNIA :

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Washington, D.C.

Wednesday, March 30, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

ROBERT M. WESTBERG, ESQ., San Francisco, California; on behalf of the Petitioner.

AILEEN BUNNEY, ESQ., Deputy Attorney General of California, San Francisco, California; on behalf of the Respondent.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-5770, Robert Edward Stansbury v. California.

Mr. Westberg.

ORAL ARGUMENT OF ROBERT M. WESTBERG

ON BEHALF OF THE PETITIONER

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

The petitioner in this case was convicted of the rape and murder of a 10-year-old girl and has been sentenced to death. The question in this Court -- the question in this Court is whether Miranda applies to statements that he made during questioning in jail, without Miranda warnings, and before he had been formally arrested.

The statements were not by any means a confession of guilt, but were incriminating. The single issue here is whether the petitioner was in custody at the time of the statements. There was an evidentiary hearing in the trial court and it has been reproduced in the appendix. Petitioner did not testify at that evidentiary hearing, only the police did.

The State at that time had the burden of proving

at the hearing that the petitioner was not in custody in order to show the admissibility of the statements. The trial court excluded, under Miranda, part of the statements, but only the part that was said after suspicion had focused in the policeman's mind on the petitioner.

The trial court found that this happened at the time that the petitioner described an automobile he had borrowed on the night of the murder as a turquoise car. The trial court made no findings of fact in this case at all, other than as to the particular point in the questioning that the suspicion switched to the petitioner, and the California supreme court affirmed.

That court said that the trial court's finding as to the point when suspicion focused on the petitioner was supported by the evidence, and the court pointed out testimony of the police officers that until that point they would have let the petitioner go, had he requested.

I will try to cover three points this morning: first, very briefly, the facts that we think are material to the custody issue; second, to discuss this Court's decisions, especially the reasoning of the decisions, that show that the State courts used the wrong analysis of the issue and also the factual elements that we think support a conclusion that petitioner was in custody, and third to

demonstrate that the respondent's approach is unworkable and has largely been rejected by this Court.

The material facts are quite simple. The victim in the case, a Robyn Jackson, disappeared from a neighborhood playground. Her body was found a very few hours later. A witness saw a car from which the body was thrown. He described it as turquoise.

The police were told that Robyn had planned to meet an ice-cream truck driver with whom she had been friendly. The police found two ice-cream drivers who had been in the neighborhood on the day of the murder -- now, we're on the day after the murder -- and they determined to interview or question these men. The petitioner was one of them.

Eight police officers, or sheriff's deputies, went to the home of the first driver, not petitioner, and they were told that he was not at home, but they went in anyway and searched from room to room and found him hiding under a bed.

QUESTION: Mr. Stansbury, the question on which we granted certiorari is whether a trial court can determine that a criminal defendant is not in custody for Miranda purposes on the basis of the police officer's subjective intent that they didn't consider the defendant a suspect.

MR. WESTBERG: That is correct.

QUESTION: We don't ordinarily go into extensive review of facts.

MR. WESTBERG: The extensive -- I'm not going into an extensive review of the facts, Mr. Chief Justice, but the issue as to what caused the suspicion to focus on the defendant was, of course, the principal issue in the court below. The question for this Court is whether that is the correct standard on which to determine custody.

In the case of the petitioner, four police officers went to the petitioner's home. They arrived about 11:00 at night. They had guns drawn out of the holsters, in their hands, and they knocked at the petitioner's door.

They told him that they wanted him to come to the police station, and I can refer to the -- in the appendix, there's a very brief description of what was said to the petitioner at that time, and the significance of this, Mr. Chief Justice, is that the test that this Court has applied for determining whether there's custody for the purpose of Miranda is whether a reasonable person, in the standpoint of the defendant, believes that he has a choice, and the facts that I am relating to you are the facts from which we would conclude that a reasonable person would not believe that he had a choice.

QUESTION: Well, speaking for myself, I think you're probably right about the standard that we have enunciated, but again speaking for myself, I didn't think the supreme court of California had departed in any material way from it.

MR. WESTBERG: I believe the supreme court of California stated the issue at the beginning as whether a reasonable person would believe himself in custody, but in fact, the analysis that that court made of the facts were focused almost entirely upon what was in the policeman's mind.

They talked a great deal about facts that a reasonable person, in the petitioner's mind -- reasonable person in the petitioner's standpoint would know nothing about. For example, why did they take him to the jail instead of to the police station?

They talked about difficulties getting into the police station. They talked about the nature of the information that was available to the police before they had gone to pick him up.

In other words, the California supreme court, although it mouthed the standard of a reasonable person, actually decided the case on the basis of the findings that had been made by the trial court, and they found only that the trial court's conclusion as to when suspicion

shifted to the petitioner was supported by the evidence, and that until that point the police officers would have been willing to let him go.

At the trial, all of his statements came in through the point that he described the car. These were used as substantive evidence of his guilt, and the jury was instructed that if they believed that he'd made false statements to the police, that could be considered as evidence of consciousness of guilt.

I don't think that there is any real dispute between the parties to the case that the lower courts applied the wrong standard. The issue of the focus of the suspicion, the extent to which the police officers may have suspicion of guilt -- it's a test which may have come from the Escobedo case -- has been rejected by this Court all the way back as far as the Beckwith decision in 425 U.S., and it was made explicit in Berkemer. Berkemer has said specifically that the strength or content of the Government's suspicion is not material to the issue of custody.

Now, it's very important --

QUESTION: So you're acknowledging, then, that the answer to the question presented is no?

MR. WESTBERG: The question presented, may a trial court determine custody on the basis of the

suspicion in the policeman's mind, the answer is no.

QUESTION: So there is no dispute about the correct answer to the question presented, and the only question is what we do from there on?

MR. WESTBERG: I think that's correct.

In choosing the correct standard, I think it's important that the Court be aware that we are not asking to expand Miranda in any way, or expand the rights of criminal defendants generally beyond what this Court has already laid out in cases such as Berkemer and Beheler and Miranda itself.

Berkemer and Beheler apply an objective standard. The only relevant inquiry in deciding custody is whether a reasonable person in the position of the suspect would have understood his situation, not whether there's a formal arrest, and not whether the police think he's in custody.

The police specifically rejected arguments that the undisclosed intentions of the police are relevant, because as a matter of logic, the police suspicions have nothing whatsoever to do with the concerns that moved the Court in Miranda, which were that the compulsive effect of in-custody interrogation is inherently coercive, and as a matter of policy, the Court also in Berkemer thought it was not a good idea to have minitrials on the subject of

what is in the police officer's mind, which would be decided primarily on self-serving testimony.

The principal difference between our position and the State's, given that the wrong standard was used, is that the State would look at each of the factors in this case on what I might call a divide and conquer approach. That is, they pick up one fact, look at it, say this fact alone does not mean custody, put it aside, and never think about it again.

QUESTION: Well, why isn't the appropriate thing if the wrong standard was used, for us to say that's -- the rest of it should be redone by the California court and not by us?

MR. WESTBERG: Both the parties in the case believe that this Court can determine custody on the basis of the record. I should point out that --

QUESTION: But why should Court make the determination --

MR. WESTBERG: This Court need not --

QUESTION: -- that ordinarily would be made by the California court?

MR. WESTBERG: I don't think this Court need make the determination. Both parties have said to the Court that they believe that the Court can determine custody on this record.

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However, I should point out that the burden of proof being on the State to prove no custody, the issue really is whether, on the facts that are in the record, the Court could say, as a matter of law, that there was no custody.

If the Court cannot say that, then the Court could either determine there was custody, or remand it back to the State courts to make that determination.

QUESTION: If there was custody, then what follows from that? What would be the bottom line? Suppose --

MR. WESTBERG: If there were custody, the bottom line would be that it would go back to the State for a determination, presumably, of harmless error. The California supreme court did not address prejudice from this point, because it found there was no error. It affirmed the finding that if there had been custody it did not -- the custody did not attach at the time of these statements, so it let the statements in, and it explicitly declined to consider the prejudice question, and I think it would -- so there is an open harmless error question.

QUESTION: Do you say that for Miranda purposes it is irrelevant whether the investigation has focused on the suspect, or are you just contending that in making that determination we must use objective evidence only?

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MR. WESTBERG: The focus is material if it somehow conveyed to the individual and it therefore influences what he thinks are his rights. Clearly, if the police have focused on him to the point, and have told him, and he knows that he would not be free to leave, then that of course is --

QUESTION: So it's a correct and relevant inquiry to ask whether or not the investigation has focused on the subject --

MR. WESTBERG: I think --

QUESTION: -- provided you use only objective indicia to make that determination?

MR. WESTBERG: I wouldn't put it that way, Justice Kennedy. I would say that the issue to be looked at is what was said to the suspect, what moved him, what was available for his knowledge in deciding -- or to a person who was in his position, in deciding whether or not he was free to leave.

QUESTION: Well, whether or not the investigation was focusing on him would have some bearing on his conclusion, would it not?

MR. WESTBERG: It could have, if it were conveyed to him in some fashion, but it would not necessarily be conveyed to him, and in this case, there was nothing conveyed to him on the issue of suspicion, and

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the trial court didn't find that there was anything.

The trial court looked solely at what was in the policeman's mind which was not communicated to the suspect, and on the facts of the case, the policeman was aware that they were looking for a turquoise car.

The suspect mentioned a turquoise car when asked, what car did you have available to you? At that moment, according to the trial court, suspicion switched in the policeman's mind, but it was nothing that was said to the suspect that changed his position in any way.

Our position that there was custody here is based upon the cumulative effect upon a reasonable person in the suspect's position of these factors: that he was questioned in an 8 X 10 foot room inside the jail at Pomona. It's a classic case of an incommunicado, police-dominated atmosphere that Miranda was talking about.

He had been picked up at his home late at night, not on the street, not in a car, not in an airport -- this is not like one of these drug courier cases. He was confronted with officers with drawn guns, in any condition an intimidating show of force.

There were four officers in two cars, much more fire power than needed just to give an invitation, the State's argument that they were only asking for him -- his voluntary cooperation. It's just -- it was an

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overwhelming situation.

The closest factual situation that we have found in this case is this Court's decision in Dunaway v. New York, which was cited in the brief. Dunaway, of course, is a Fourth Amendment case, but it was not as coercive as this case because there were no drawn guns. He was taken --

QUESTION: If our standard is supposed to be how would a reasonable person perceive -- would a reasonable person feel himself in custody, then we don't take into account at all that this is a person who is in fact -- who in fact committed the crime?

MR. WESTBERG: That is correct.

QUESTION: So we keep the --

MR. WESTBERG: You would assume it's a reasonable innocent person.

QUESTION: Right. It would be just as though the police had picked up the roommate of the defendant -- of the petitioner for questioning. Would we perceive that person being taken to the police station, being put in a locked place, as being in custody?

MR. WESTBERG: You take that person as coming to his door and seeing four police officers with guns in their hands saying -- and this is what they said. The actual words used were not in the record, unfortunately,

but they said they told him that he was possibly a witness to a homicide, and would he come to the Pomona Police Department, and if he didn't have transportation, they would provide it.

QUESTION: There was one part of that scenario that was confusing to me. Perhaps you can clarify it. It was said that the police had their guns drawn but they weren't visible. How can you have drawn guns that aren't visible?

MR. WESTBERG: There was no finding they were not visible. These were 45-caliber pistols. The police were in 10 feet of the defendant. They all had their guns in their hands.

One of the officers said he didn't draw his gun because he then described -- he then defined the word "draw" to mean pointing at somebody. He said he had his gun in his hand, pointed at the ground.

They did not put their guns away until after the petitioner came out of his trailer, and there's a snippet of testimony on that point that I think is very significant, because they were asked, "Was there a point in which you put your guns back in the holsters," and the officer said -- and this is at page 57 of the Joint Appendix. He said, "I put my gun away. The other officers did, too. Mr. Stansbury was very cooperative."

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I don't -- the inference, clearly, is that he saw the guns. The petitioner did not testify, however, so there is no testimony that he actually saw the guns. The question, I think, for the Court, is whether he could have seen the guns, and if a reasonable person could have seen the guns, then whether Mr. Stansbury actually saw them or not is not the issue, because the question for the Court is to examine the police conduct and examine whether the police conduct was such that it would persuade a reasonable person in the defendant's position that he was not free to make a choice.

At the time of his interrogation, he was totally in the control of the police, whether or not they would have released him if he had asked to be let go. The fact is, he didn't ask to be let go, and they didn't release him, and in fact after he described the car, he was given a Miranda warning, and when he said he thought he needed a lawyer, then he was arrested.

Looking at the situation from the standpoint of somebody in the suspect's position, this case -- there's simply no comparison between this case and the facts in Mathiason or Beheler, on which the State principally relies. Both those cases involved questioning at a police station. One was a State patrol office -- Mathiason -- one was a police station.

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None of the cases involved questioning in the jail. In both the cases the individual had been told specifically that he was not under arrest and was not in custody. In the Mathiason case, in fact, the policeman had gone by his house, left his card, asked him to call him, the individual called, he came down voluntarily to the State patrol office.

Our case is simply -- there's simply no comparison.

Now, I have to say that we don't have anything to offer to the Court by way of a bright line approach to custody. If custody is going to depend upon the reasonable perception of somebody who was situated as was the individual in the case, there simply isn't any way to have a bright line test.

As the Court pointed out in the Chesternut case, which has to do with Fourth Amendment seizure, which incidentally the test for Fourth Amendment seizure is worded almost exactly the way this Court has worded the test for custody -- that is, whether a reasonable person would feel free to leave -- the Court describes the test as necessarily imprecise.

QUESTION: Mr. Westberg, I'm looking through the pages of the appendix that contain the opinion of the supreme court of California, and on page 471, the first

sentence in the first full paragraph is -- it's this volume II of the Joint Appendix.

MR. WESTBERG: I have it, Mr. Chief Justice.

QUESTION: It says, custody "occurs if the suspect is physically deprived of his freedom of action in any way or is led to believe, as a reasonable person, that he is so deprived."

MR. WESTBERG: That is correct. The Court says that.

QUESTION: And then again on page 476, they announce the same thing. It's the perception of a reasonable person. Ordinarily we defer to State courts' findings of fact if they've adopted the proper test, and it seems to me that's considerable evidence that the supreme court of California was adopting exactly the test that you say should govern.

MR. WESTBERG: My answer to that, Mr. Chief Justice, is that although the court made that statement on page 471, the bulk of the discussion by the court of the issue is whether there was substantial evidence to support the finding of the trial judge about suspicion in the policeman's mind focusing on the petitioner, and the court deals at great length with that point.

The court does not find -- the court -- and the California supreme court does not make findings of fact.

There was only one finding of fact -- there was only one fact-finder here, and that was the trial court, and there was only one finding of fact by the trial court, and that was when suspicion focused in the policeman's mind.

QUESTION: Well, but presumably the trial court may have made implied findings when it declined to suppress what it did suppress of the statements.

MR. WESTBERG: The trial court actually did suppress part of the statements, so you cannot draw a conclusion that the court made a finding -- I would say that the court made a finding that the petitioner was in custody at the end of the interview, because it suppressed what he said after he had described the car, and yet the physical surroundings, the fact that the defendant was in jail, had not changed, so we have a bizarre situation where the court has found custody, but found that it attached at a particular point in time, based on its view of when the policeman's mind registered a certain level of suspicion.

QUESTION: Well, you don't contend there's anything impossible about a person not being in custody at the outset of the interrogation and being in custody later on. You acknowledged earlier that at least where the investigator's suspicions are conveyed -- are conveyed to the individual, that is a very relevant factor of whether

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custody exists or not.

So it could be that in the course of the interview their questioning becomes more and more accusatory, more and more adversary --

MR. WESTBERG: Absolutely right.

QUESTION: At this point custody attaches. Isn't that right?

MR. WESTBERG: I agree with that.

QUESTION: Okay.

MR. WESTBERG: There's no question about that. there is, however, no evidence in this record as to any change in what was communicated to the defendant. The record is -- one of the problems with the case is that the record is somewhat faulty, and that puts us back to the question of who had the burden of proving the issue of custody.

There is one case, the Berkemer case, which we've referred to, which suggests that for purposes of custody, you apply a slightly different test than you would apply for purposes of seizure under the Fourth Amendment, and that Berkemer was of course a traffic stop case, and the Court said that it was not enough in a traffic stop that a defendant feel he may not be free to leave.

He may have been -- the test for seizure being

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whether the defendant feels he's free to leave, that is not enough for custody, because there must in addition be a restraint of a nature that is associated with a formal arrest.

In this case, we've met the condition of Berkemer. We have a situation where I think a person who's in an 8 X 10 foot room in the jail clearly is unable to leave, at least without the help of the police. He wasn't told that he was entitled to any help from the police.

QUESTION: Was the room locked?

MR. WESTBERG: That's a very -- there's no evidence as to whether the room was locked. The supreme court of California thought the room was locked, and said the room was locked in its opinion. The evidence on the question is that one of the police officers was asked if it was locked and said he couldn't remember whether it was locked. Petitioner did not testify.

If this Court thinks it's important as to whether the room was locked -- of course, the jail was locked. He went in through the sally port of the jail -- rolling cages come behind the car, he went through several steel doors, all with locks. Whether the Court thinks its important that this room was locked, then I would say that the State hasn't met it's burden of proof, because --

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QUESTION: Well, I would assume --

MR. WESTBERG: -- they did not -- because one of the questions --

QUESTION: -- if the door is locked there's a --

MR. WESTBERG: -- the State would have to put on --

QUESTION: -- greater probability he's in custody than if it isn't locked.

MR. WESTBERG: It was inside the jail, however. It was not just a police department office. It was inside the jail.

QUESTION: But the question whether the door was locked was raised in a question and not -- and the evidence is unclear on what the answer is.

MR. WESTBERG: The officer was asked, was the door locked, and said, "I don't remember."

QUESTION: What is clear is that the exit --

MR. WESTBERG: It was very clear --

QUESTION: -- from the jail was locked.

MR. WESTBERG: It was very clear that he could not have left the premises without keys being provided. Now -- because it was inside the jail.

All of the doors in the jail are opened only by keys, and there was no question that he was completely

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within the control of the police.

QUESTION: Of course, that's the case for the police who are there, too, or if I went to visit, I couldn't get out with out a key. It doesn't mean I'm in custody, necessarily, does it?

MR. WESTBERG: That is true --

QUESTION: It just means that they chose to interrogate him there, and nobody who's in there, even if he's a policeman, even if he's the warden, can get out without somebody opening the door.

MR. WESTBERG: Well, I think the question, Justice Scalia, would be whether the reasonable policeman would think that he's in custody because be has to ask for a key, and I don't think he would.

This man was not a policeman. He had been brought down there at 11:00 at night from his home.

I would like to reserve the rest of my time, Mr. Chief Justice.

QUESTION: Very well, Mr. Stansbury --

MR. WESTBERG: Westberg.

QUESTION: Ms. Bunney.

ORAL ARGUMENT OF AILEEN BUNNEY

ON BEHALF OF THE RESPONDENT

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

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The issue here is custody. As enunciated in Berkemer v. McCarty, custody is determined from the perspective of the reasonable person.

QUESTION: So you really concede the legal issue in the case, that we must use the objective standard?

MS. BUNNEY: We agree that you must use an objective standard.

QUESTION: So all we're talking about here is whether or not under the objective standard the California supreme court was correct in reaching its finding.

MS. BUNNEY: We also ask the Court to uphold the California court's finding that petitioner was not in custody.

We believe that an analysis of whether an individual is in custody should begin with the initial encounter between the police and the citizen. Here, we have State court findings, factual findings that petitioner consented to the officer's request to accompany him to the police station.

The California supreme court held that Stansbury "was invited, not commanded" to come to the police --

QUESTION: What do we do with the part of the California decision that says the trial court's determination that suspicion focused on defendant only when he mentioned the turquoise car is supported by

substantial evidence?

That was -- do we -- I think you're asking us essentially to delete what -- moreover, this decision, that is, the trial court concluded that when the defendant was brought to the station he was not the focus of suspicion, and he question presented was whether that was -- whether what was in the police officer's mind was a determinant of whether defendant was in custody.

But you're answering -- both sides agree that the answer to the question presented is no.

MS. BUNNEY: Excuse me, Your Honor, that's not correct. We --

QUESTION: The question presented is, may a trial court determine that a criminal defendant is not in custody on the basis of police officers' subjective, undisclosed conclusion that they did not consider defendant a suspect.

MS. BUNNEY: Your Honor, the part that makes the difference is undisclosed. In this case, it was not undisclosed.

QUESTION: But the question is undisclosed. The question presented is, if the criminal -- may a trial court determine that a defendant is in custody on the basis of a -- the subjective view of the police officer, undisclosed. You're answering a different question.

How do you answer the question, subjective and undisclosed conclusion that they do not consider the defendant a suspect?

MS. BUNNEY: No --

QUESTION: You're answer to the question presented is no --

MS. BUNNEY: No, Your Honor --

QUESTION: -- and so both sides agree that the question presented should be answered no, and then what do we do, having answered the question presented, no.

MS. BUNNEY: We also disagree with the question presented. As I will go into the specifics of this case, the subjective intent was disclosed to the defendant.

We agree you use a reasonable standard, the reasonable person standard, an objective standard. To that we do agree, Your Honor.

The California supreme court's factual finding --

QUESTION: Would -- yes, we need to get into that. Would you agree that there are numerous statements in the California supreme court opinion that are relevant only to show the subjective intent of the officers?

MS. BUNNEY: There are some statements in the California supreme court's opinion which do relate to subjective intent.

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QUESTION: Yes. I found 11.

MS. BUNNEY: Yes, Your Honor.

QUESTION: And the trial court likewise seemed to find the subjective intent of the officers quite important. Is there a -- I suppose we could send this back to the State courts --

MS. BUNNEY: Your Honor --

QUESTION: -- to directly focus their attention.

MS. BUNNEY: Your Honor, we believe that the standard employed by the California supreme court was essentially correct.

The first part of the inquiry relates to how Stansbury got to the police station. The California supreme court made a factual finding that he was invited, not commanded, to come to the police station for an interview.

Petitioner relies on this Court's opinion on Dunaway v. New York, but in Dunaway, the State court found "this case does not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of the police."

This Court declined to reconsider these State court findings. Here you have the exact opposite State court finding, and as this Court held in Schneckloth v. Bustamonte, the issue of consent is a factual question.

Thus, petitioner's attempt to resurrect his argument that a show of force compelled his acquiescence must be rejected.

Petitioner can prevail only if there is no consent as a matter of law. On this record petitioner cannot show the absence of consent.

Similarly, the State courts found that petition consented to transportation by the police, and if I may, Your Honor, just briefly in response to Justice Ginsburg's earlier question about the guns, because he consented, the guns are not relevant, but I will state that the State supreme court found there was no evidence he saw the guns, and Officer Lee, the only officer who spoke with petitioner, specifically testified that he took the gun out but hid it behind his leg. That's how the gun could be out, but not seen. He hid it behind his leg.

QUESTION: I don't see why it's irrelevant that the guns were drawn simply because a finding may have been made that at that point he was going voluntarily. I mean, one of the issues before us is whether -- or the issue before us is whether at some time in the course of this interrogation the totality of facts added up in such a way that the reasonable suspect would have said to himself, I haven't got any choice but to be here.

And even assuming that he was going voluntarily

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when he left the house, or the trailer, if in fact he was aware of drawn guns, that is one of the things that he's going to bear in mind, or may bear in mind 30 minutes later, when he says to himself, am I really free to leave here?

MS. BUNNEY: First, Your Honor, with response to the guns, again, it's our position that the court found that defendant didn't see the guns. The guns are only relevant if he sees them.

Second of all, the issue with respect of how he gets to the police station is really one of consent. He either consents to go or he doesn't consent, and once and consents, and once he's there, then the factual inferences as to the earlier are drawn in favor of consent.

QUESTION: Well, I thought you were making the point that all of these earlier facts which he was pointing to in effect once they re resolved at an earlier stage against him are thereafter rendered totally irrelevant for whatever -- even if they arguably have a bearing on his feelings at a later stage. Is that your position?

MS. BUNNEY: It is our position, Your Honor, because --

QUESTION: Well, I mean, he doesn't acquire amnesia at the point at which he gets into the car, or the

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point at which he enters the police station, and isn't he entitled to consider the cumulative effect of all the facts?

He may, for example, have gone voluntarily, despite guns which he saw, if he saw them, or despite being driven by the police, but at some point 15 or 20 minutes later, he may say, wait a minute, I may have thought that I was doing this voluntarily, but I understand what's going on now.

They had guns, they took me, they brought me into jail, they locked the door, I'm in this room, and so on, and I am no longer free to go.

Isn't that a fair process of inference for a person in his position to engage in?

MS. BUNNEY: The Court can look to the totality of the circumstances, but where --

QUESTION: That really was my only point. The circumstance is not rendered irrelevant for its bearing at a later stage, simply because at an earlier stage a court says, I've considered that circumstance, and I do not find that at this earlier stage he's in custody. You agree with that?

MS. BUNNEY: The importance of it is that the facts are resolved in favor of consent, so that that fact becomes, at most, less significant.

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QUESTION: May I just be sure I understand what -- your point about the guns were that the California court found that the guns were not seen? Is that from page 472 that you're basing that?

QUESTION: One was not seen because it was behind the leg. The other one, it doesn't really say whether it was seen or not seen. It just says that it was drawn but not pointed.

MS. BUNNEY: What I'm basing it on, Your Honor, is a page 476 of the Joint Appendix, in which the Court said there is no evidence defendant saw the guns.

QUESTION: Well, but that's not quite the equivalent of finding that he did not see them.

MS. BUNNEY: Well, we believe it is equivalent to finding that.

QUESTION: And the finding on consent is the statement, defendant was very cooperative and agreed to come in to the Pomona Police Department for an interview?

MS. BUNNEY: The basis is the California supreme court's finding that he was invited, that he was invited, not commanded to come to the police department.

QUESTION: And the fact that he accepted the invitation means it was truly voluntarily.

MS. BUNNEY: Yes, that it was voluntary, and similarly, the State courts found that petition consented

to transportation by the police. As held by the California supreme court, the police "solicited his voluntary cooperation, asked if he wanted to drive himself to the station, and conducted him there under no restraint.

QUESTION: What makes it an invitation? If the police are polite, and they say, would you please accompany us to the station, is that an invitation?

MS. BUNNEY: It's not necessarily that they're polite, although -- it's -- in this case, what the police said is, you're a possible witness to a homicide, and we have homicide investigators who'd like to talk to you, will you come along with us? That's what makes it consensual, is what was conveyed to him, as well as his response.

QUESTION: If someone says, will you come along with us, and points a gun, or has a gun visible, that would convey a different impression to a reasonable mind, would it not, than if somebody is in plain clothes and says --

MS. BUNNEY: Well, this officer was in plain clothes, and the gun -- at least the officer that he spoke to, the gun was not visible.

QUESTION: Well, that -- again, we don't know whether it was visible. We know it was drawn.

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MS. BUNNEY: And Officer Lee testified that he deliberately hid the gun.

QUESTION: One -- and how many officers --

MS. BUNNEY: There were four officers, Your Honor, but the one officer who talked to him was the one officer who testified on that point.

QUESTION: It's just hard for me to understand how a gun is in a person's hand -- the other officer said, the gun was not drawn but in his hand, not pointed, but if a gun is in your hand, it seems to me it's got to be visible. Is that wrong?

MS. BUNNEY: No, Your Honor, because in this case Officer Lee specifically testified, as a narcotics officer, I hide my gun behind my leg.

QUESTION: But the other officer testified -- I'm reading at the top of page 476. The other officer who testified said, his gun was not drawn, but in his hand, so it was in his hand.

MS. BUNNEY: It was in his hand, that's correct, Your Honor, but not displayed.

QUESTION: What time of day did this take place?

MS. BUNNEY: This was 11:00 at night, Your Honor.

As far as the transportation, returning to the transportation, petitioner sat in the front seat of an

unmarked car, and he was not handcuffed.

QUESTION: Were there officers in the back seat?

MS. BUNNEY: There was one officer in the back seat.

He went only four or five blocks to the police station. As the State courts found, he voluntarily accompanied them to the police station.

When they arrived at the police station, they escorted Stansbury through the only entrance to the police station from the police parking lot, which took them into the jail portion of the station.

Once inside, Officer Lee asked a local officer where to take Stansbury for an interview, and took Stansbury where the officer directed them. The interview room was a room with a table and three or four chairs.

Nothing in the police officer's conduct or the room itself converted the consensual encounter into the functional equivalent of arrest. The issue then becomes whether the interview itself custodial interrogation.

QUESTION: May I go back a moment to the offer to let him drive himself? Does the record indicate whether an officer would have accompanied him in his car had he elected to drive himself?

MS. BUNNEY: The record does not reflect that, Your Honor.

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QUESTION: Either way?

MS. BUNNEY: Either way.

The standard employed by the California supreme court is substantially correct. The California courts look to four standards: first, the site of the interrogation, second, whether the investigation had focused on the subject, three, whether the objective indicia of arrest were present, and four, the length and form of questioning. We address each of these considerations.

First, the site of the interrogation. While the interrogation there took place at the police station, petitioner went there voluntarily. As this Court held in California v. Beheler and Oregon v. Mathiason, questioning at the station house is not determinative of custody. Miranda doesn't draw a line at the station house door.

While petitioner argues that --

QUESTION: You do agree that it's a little more difficult that it wasn't in just the station house that you can enter and exit, but that it was that he was in the jail portion where you have to get through several barriers, and you couldn't do it on your own.

MS. BUNNEY: In this case --

QUESTION: That's something of a weighing factor that would be in a reasonable mind. One of the things

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that would be in a reasonable mind is gee, I can't get out.

MS. BUNNEY: And that's -- petitioner argues that he was in custody because he needed assistance to leave the police station, but police stations are routinely locked facilities, secured facilities. Citizens normally need assistance or directions to leave --

QUESTION: Does it make any difference that it was in the jail part as distinguished from the part where the public comes in and out of the police station?

MS. BUNNEY: The only difference is that the police station is part of the jail facility, so there's -- in this case it doesn't, because citizens do need assistance to get out of the police station, with the possible exception of a public lobby.

QUESTION: Wasn't there something about, one of these police officers was from a different district and didn't know -- he only knew how to come in through the jail way?

MS. BUNNEY: That's right --

QUESTION: There was a way to get into that police station that you could get out of, too, without a key, but that was not the part that he was in.

MS. BUNNEY: That doesn't mean that the person -- that -- each entrance to this police station

required entrance through a secured doorway, with the exception of the public lobby. Now, whether the doorway is locked both ways or not, that's not part of the record.

Certainly, in the jail you would need assistance to get out. In order to get into the other part of the police station, it was also a secured facility. Whether -- what's not clear from the record is whether you could get out.

Basically, if you accept petitioner's argument, Oregon v. Mathiason and California v. Beheler are no longer viable, because under petitioner's view, every station house interrogation would be custodial.

Now, the second factor is whether the investigation focused on the subject. Petitioner's argument is that that factor is irrelevant, but petitioner paints with too broad a brush. While the focus of an investigation may be --

QUESTION: I thought he said that it is relevant provided it is objectively communicated to the defendant --

MS. BUNNEY: And that --

QUESTION: -- or the suspect, and there are at least 11 different parts of the California supreme court opinion, beginning at page 471, where the supreme court talks about what Johnson was thinking about, and you

concede that is irrelevant, do you not?

MS. BUNNEY: To the extent it wasn't disclosed to the defendant.

QUESTION: Of course -- to the extent it was not disclosed.

MS. BUNNEY: But --

QUESTION: So I think the Chief Justice is quite correct that the California supreme court enunciated the correct legal standard.

The problem I have is that at 11 different points it engages in a discussion of matters that are quite irrelevant to that standard, and I'm not quite --

QUESTION: Well, I hope you don't concede it's irrelevant. Do you concede it's irrelevant? It can't be conveyed if it doesn't exist, can it? How can you convey that he is the focus of the investigation, if in fact he is not the focus of the investigation? It is not a sufficient condition, but it is a necessary condition, isn't it, and that makes it relevant, it seems to me.

QUESTION: Why don't you first answer Justice Kennedy's question, and then Justice Scalia?

(Laughter.)

MS. BUNNEY: Thank you, Your Honor.

Your Honor, in this case, what was communicated to the defendant on two different occasions was that he

was a witness. That's what makes relevant the police officer's knowledge as to what was going on -- his investigative leads.

Because if -- a reasonable person under the circumstances, if you tell him that he's a witness and he may have information helpful to the police in a murder investigation, he's going to be aware that the police officers have leads.

In response to Justice Scalia's question, it becomes relevant under these circumstances.

QUESTION: It what?

MS. BUNNEY: In -- where the information is somehow conveyed to the defendant, either by word or action, then the focus is relevant.

QUESTION: Yes, but I find it not at all surprising that the California supreme court talks about whether subjectively these investigating officers thought that this person was a target of the investigation. If they subjectively did not even think it, then how could they have conveyed a fact that did not exist?

MS. BUNNEY: That's -- that's our point, Your Honor, that --

QUESTION: So it's perfectly proper for the California court to talk about the subjective intentions.

QUESTION: What is it in the record that shows

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that Johnson's subjective intentions and his focus of the investigation were communicated to the defendant after the interview had begun?

MS. BUNNEY: At the beginning of the interview --

QUESTION: After the -- yes, go ahead.

MS. BUNNEY: At the beginning of the interview, Johnson told Stansbury that he was a witness only. During the course --

QUESTION: Was this at the beginning of the interview, or when he was at the house?

MS. BUNNEY: Both Officer Lee at the house and Lieutenant Johnson at the beginning of the interview --

QUESTION: Johnson at the station.

MS. BUNNEY: -- told Stansbury that he was a witness. Officer Lee happened to phrase it that you were a possible witness to a homicide. Lieutenant Johnston says, told him that you were a possible witness to the abduction of a young child. Both officers told him at two different points in time.

What else during the course of the interview is the nature of the questioning, which is another factor that we should address, which is, where he's not the focus of the investigation, the nature of the questioning is not accusatory. That's another way that the police convey to

a defendant, or a citizen, whether or not he's the focus of suspicion. So the second factor, which I've already addressed, and the fourth, which I will, do tie together, because those are communicated to the defendant.

QUESTION: Can you be a witness and a suspect at the same time?

MS. BUNNEY: Well -- yes, Your Honor, because obviously you're a witness -- if you commit the crime, you witness what happened, so I don't think that you couldn't be both. In this case, there's nothing which indicates that he was treated anything other than as a witness.

QUESTION: Going to the question whether the officers would have in fact have had to have thought he was a suspect in order to communicate that idea to them, is it not true that there are many police interrogations in which the police in the course of questioning suggest facts that are not in fact what they know?

MS. BUNNEY: That's --

QUESTION: That happens.

MS. BUNNEY: That happens, yes, Your Honor, that is true, but normally what happens in those circumstances, you're still talking about accusatory types of questioning.

In Florida v. Bostick, this Court held that the reasonable person standard necessarily presupposes an

innocent person. The nonthreatening nature of a police request here suggests that the reasonable, innocent person would be willing to answer questions pertaining to a serious crime to which he may have information.

The third factor is the objective indicia of arrest, and that's also, again, an objective factor relied on by the California supreme court.

Petitioner was never told he was under arrest. He was never handcuffed, he was never booked prior to questioning, and he was never told that he wasn't free to leave.

The last factor is the length and form of questioning, which again ties back to the second factor. The interview here lasted only 20 to 30 minutes. Its brevity argues in favor of the absence of custody.

As to the form of the questioning, only one officer interviewed Stansbury. The interview was largely narrative on petitioner's part. Stansbury was never confronted with evidence of his guilt. The interview was in no way accusatory.

Miranda itself acknowledges the role of accusatory questioning on custody: "The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe."

This environment was singularly lacking here because the police told Stansbury he was a witness, and questioned him in a manner consistent with that characterization. Stansbury never hesitated in his responses, never asked to leave, never expressed any desire to stop the interview, even temporarily.

In Berkemer v. McCarty, this Court held that the defendant "failed to demonstrate that at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest."

Here, also, petitioner has failed to demonstrate that he was subjected to restraint equivalent to formal arrest.

In conclusion, petitioner was never in custody. He voluntarily agreed to go to the station, he voluntarily agreed to the police transportation, he was escorted to an interview room with a table and chairs, he was told that he was a potential witness to the abduction of a young child.

The questioning was neutral, nonaccusatory, the answers largely narrative. Petitioner answered readily and without hesitation. Petitioner never indicated that he wanted to withdraw his consent.

The record in this case fully supports the State

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court's findings, and we ask the Court to so find.

Thank you.

QUESTION: Thank you, Ms. Bunney.

Mr. Westberg, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF ROBERT M. WESTBERG

ON BEHALF OF THE PETITIONER

MR. WESTBERG: Mr. Chief Justice, Justice Stevens, the Supreme Court said at page 471 that focus was one of the most important factors, and they listed the focus of the degree of suspicion. After it made the general statement about the reasonable person standard, it's obvious that they looked at focus as one of the most important, and it was in fact key to the trial judge.

Your Honors, the argument that there was a disclosure to this petitioner that he was only a witness is not supported by the record. He was told that he was a witness, and at one time that he was possibly a witness, but he was never told that he was only a witness.

In fact, the record doesn't even show what was actually said to him, and that may be the most important thing that would influence a reasonable person, but unfortunately this record simply has a description of the police officers, of what they said, and there are only four pages in the record that bear on this -- pages 36 and 37 --

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QUESTION: Well, isn't the burden on someone who seeks to exclude testimony to make a case?

MR. WESTBERG: Under People v. Sam, California has allocated that burden to the State to demonstrate the admissibility of the testimony, and in fact, in People v. Sam, California supreme court cited in the brief, the respondent does not disagree, Mr. Chief Justice, that the burden of proof was on the State in this proceeding. We made that point in our opening brief. They have not said that --

QUESTION: On the -- on burden of proof --

MR. WESTBERG: To show that he was not in custody.

QUESTION: As a matter of Federal constitutional --

MR. WESTBERG: Not as a matter of Federal constitutional --

QUESTION: As a matter of California law.

MR. WESTBERG: California law, I think --

QUESTION: And of course, we wouldn't review any finding of that sort.

MR. WESTBERG: Certainly not. This Court I think would leave it to the States to allocate the burden of proof.

QUESTION: -- under a mistaken view that the

Federal law required it.

MR. WESTBERG: That it was required by this Court, or unless they did it in a way that this Court thought deprived constitutional rights, but in this case they've allocated it to the State.

There was nothing said to him -- there's nothing -- no evidence of what was said to him in the interview room, as well as no evidence of what was said to him at the trailer, except for the four pages in the Joint Appendix, 36 and 37, and 56 and 57, that contains the description of the words that were expressed.

We certainly don't argue that Mathiason or Beheler should be overruled. It's not our view at all, and those cases are totally different. In both of those cases the police made clear what the status of the citizen was.

One characterization of the State's argument is that it's up to the citizen to make clear what his status is, so when you come to the door and there are people with guns in their hands, you are supposed to say, am I under arrest, do I have a choice, and I think that's just a totally -- it's a dangerous proposition as well as a totally unreasonable proposition, but in both Mathiason and Beheler the police said, you are not under arrest, and in fact in both cases they completely had the choice.

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The argument that there was nothing threatening here when he made his agreement to transportation to go to the police station, the answer to that is, there were four officers on his porch at 11:00 at night with guns, and what would a reasonable person do?

The point as to the brevity of the questioning, it was -- the record showed it was 20 to 30 minutes. That might show lack of custody if they let him go at the end of 20 to 30 minutes. In this case, they arrested him at the end of the 20 or 30 minutes.

We think that it cannot be said that he was not in custody, and that therefore this Court's choice under its own precedents would be either to find that he was in custody, which I think is indicated from Berkemer, because he was (a) in the jail and (b) he was in a situation where a reasonable person would think he couldn't leave. Now, that's tantamount to a formal arrest, but --

QUESTION: And we can take judicial notice that a lot of questions can be asked in the span of 20 or 30 minutes.

MR. WESTBERG: I would agree.

(Laughter.)

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Westberg.

MR. WESTBERG: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)

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ROBERT EDWARD STANSBURY, Petitioner v. CALIFORNIA

CASE NO.: 93-5770

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BY Ann Mari Federico

(REPORTER)