OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CARL THOMPSON, Petitioner v.

PATRICK KEOHANE, WARDEN, ET AL.

CASE NO: No. 94-6615

PLACE: Washington, D.C.

DATE: Wednesday, October 11, 1995

PAGES: 1-49

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IN THE SUPREME COURT OF THE UNITED STATES

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CARL THOMPSON, :

Petitioner :

v. : No. 94-6615

PATRICK KEOHANE, WARDEN, :

ET AL. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, October 11, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

JULIE R. O'SULLIVAN, ESQ., Washington, D.C.; on behalf of the Petitioner.

CYNTHIA M. HORA, ESQ., Assistant Attorney General of Alaska, Anchorage, Alaska; on behalf of the Respondents.

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PROCEEDINGS

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 94-6615, Thompson v. Keohane.

Spectators are admonished to be quiet until you get out of the courtroom. The Court remains in session.

You may proceed when you're ready, Ms. O'Sullivan.

ORAL ARGUMENT OF JULIE B. O'SULLIVAN

ON BEHALF OF THE PETITIONER

MS. O'SULLIVAN: Thank you, Your Honor, and may it please the Court:

The Alaska trial court rejected petitioner's challenge for the admission of his confession under Miranda v. Arizona, holding that petitioner was not in custody for Miranda purposes and therefore was not entitled to warnings prior to the interrogation that led to his confession.

Petitioner was convicted, exhausted his State remedy, sought a writ of habeas corpus in the United States District Court for the District of Alaska, and was denied relief.

On appeal, the Ninth Circuit affirmed, holding that the State trial court's conclusion that petitioner was not in custody constituted a finding of fact entitled

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to a presumption of correctness under section 2254(d) of title 28 of the United States Code. It is that ruling that we challenge here.

In a case where all the historical facts are conceded, the application of the objective Miranda custody standard to these facts constitutes a mixed question that should be reviewed de novo under this Court's decision in Miller v. Fenton.

The Miller decision controls here. If one examines the process by which a custody determination is made. This is a statute we're construing, and the plain language of the statute requires on its face that the presumption of correctness only apply to issues of fact.

Now, in construing --

QUESTION: The actual statutory language is factual issues, is it not?

MS. O'SULLIVAN: Yes, Your Honor. I apologize.

In construing what constitutes a factual issue for purposes of section 2254(d), the Court has looked to the traditional distinction drawn between issues of fact, law, and mixed questions in Townsend v. Sain, a decision from which Congress drew the presumption codified in section 2254(d).

Based on a series of cases, the Court has applied the section 2254(d) presumption to questions of

historical facts. In Justice White's words, who did what to whom and when?

QUESTION: Are you suggesting it hasn't gone beyond that?

MS. O'SULLIVAN: Yes, Your Honor, I --

QUESTION: How about cases like Maggio and Rushen, Patton v. Yount? Surely they're -- just more than strictly historical fact is involved there, isn't it?

MS. O'SULLIVAN: Your Honor, I do not believe so. Those cases, the jury bias, competency, and intent cases, constitute cases that look nominally like mixed questions but essentially the Court, in reducing what constitutes the legal standard in that case, has reduced them to questions of historical fact concerning the state of mind of a particular actor.

In such circumstances, Your Honor, there is no real mixed question for purposes of section 2254(d). Once one has applied the section 2254(d) presumption to the historical facts as found by the district courts, there is no second step. There is no need to apply the legal standard to those facts. There is no legal component to the mixed question.

QUESTION: What about -- what about an issue that turns on a reasonable person standard? Does that of necessity amount to some kind of mixed question?

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MS. O'SULLIVAN: Yes, Your Honor. It's our contention that the first step in the process, the determination of historical facts, would be accorded a section 2254(d) presumption of correctness.

The second --

QUESTION: Well, in the negligence context, do we treat it really as a question of fact for a jury?

MS. O'SULLIVAN: Your Honor, I believe in the negligence context the question of whether -- how a reasonable person acted really is a mixed question, and it asks for legal determination --

QUESTION: But we don't treat it that way, do we?

MS. O'SULLIVAN: No, that's correct, Your Honor. It is generally given to the jury to decide. However, as this Court held last term in Gouden, a jury is not only confined to factfinding. There are often situations when the jury is required to make legal determinations, to apply the law to facts, and the considerations that prevail in according a mixed question to a jury as opposed to a judge in a negligence situation are different than the kinds of considerations that one must consider in allocating between the trial judge and the appellate judge in a certain circumstance.

QUESTION: Well, instrumentally, Ms. O'Sullivan,

supposing one were to draft a statute to deal with this kind of subject directly rather than the general aim, what is gained when all we're talking about what would a reasonable person think by pulling all the powers of the Federal courts to make that final determination?

I mean, there's nothing peculiarly Federal about the determination of what is a reasonable person. State courts make that sort of determination every day, as Justice O'Connor has suggested.

MS. O'SULLIVAN: Yes, Your Honor, they make that determination with respect to negligence and other State law issues. They're not making that determination with respect to a very important threshold issue regarding Federal constitutional procedures.

QUESTION: Well, Federal constitutional procedures? You're saying Miranda is constitutional?

MS. O'SULLIVAN: Your Honor, I'm saying that Miranda is necessary to safeguard an essential Fifth Amendment trial right, as the Court found in Withrow. While the Miranda standard may itself not be constitutional, it is at least quasi constitutional because of its relationship to the Fifth Amendment trial rights.

QUESTION: Well, what does quasi-constitutional mean?

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MS. O'SULLIVAN: Your Honor --

QUESTION: Maybe you should ask us.

(Laughter.)

MS. O'SULLIVAN: Your Honor, I think that -- the Court has said the Miranda right in terms of its constitutional, quasi constitutional status, clearly distinguishes it from the negligence situation.

QUESTION: Is there something unusual about the mixed fact law question involving a reasonable person standard?

In the run-of-the-mill mixed fact and law question that goes to a jury, the judge instructs the jury on the content of the law. In reasonable-person kind of cases, the judge doesn't. The judge simply says, you know, would a reasonable person feel this way, and in effect the practice, I think throughout the United States, is that the reasonable person is for the jury to determine. There is -- it's a case in which the jury gives the content to the law.

Does that argue for -- I know you would still have the argument saying, well, it should still be a Federal reasonable person, and therefore Federal courts ought to review, but that does put the reasonable person kind of mixed law or fact question in sort of a different status from the usual mixed question, doesn't it?

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MS. O'SULLIVAN: Yes, Your Honor, in a negligence State court case. When they're called upon to say what is a reasonable man, they're not looking at who's the average Joe Blow. They're looking at what should the rule of law be in these circumstances given the --

QUESTION: Well, they're doing it, but do judges tell them that? The judge simply says, is it reasonable or not, and you're the judge as to what is reasonable.

MS. O'SULLIVAN: Well --

QUESTION: So they figure out what the reasonable as distinct from the average person does.

MS. O'SULLIVAN: Their object is to figure out, given community standards, what is reasonable in the circumstance. In the current --

QUESTION: So that would be a -- at least that would be one reason for holding this to be an unreviewable question of fact classifying it as such, not being there isn't an element of law there, but because that element of law is really left to the jury to supply the content of.

And then you would come back, I take it, to your second argument and say, if you're going to keep control of Miranda, you've got to make sure that this jury construct is at least a Federal one, and so you -- for that reason, you -- the Federal court still ought to review it, but there would be an argument for saying no

judicial review, wouldn't there?

MS. O'SULLIVAN: Your Honor, I would disagree with that, respectfully.

What the jury is applying in a negligence situation is community standards. What a Federal judge in a Miranda context is required to apply in assessing reasonableness in a certain circumstance are the Fifth Amendment values underlying Miranda. That is something that he or she is particularly well qualified to do.

QUESTION: Well, what Fifth Amendment values are involved in determining whether or not a reasonable person would have thought he was free to leave?

MS. O'SULLIVAN: Your Honor, what the Court has looked to in Berkemer, Mathis, and a number of other cases cited in our brief, is whether the circumstances constitute a sufficient threat to a defendant's or a suspect's free exercise of their Fifth Amendment rights so as to require that Miranda warnings be provided --

QUESTION: Well, but not -- I don't believe that's an accurate statement of our definitions of custody, which is admittedly only a prong of the Miranda test, but it simply is a reasonable -- would a reasonable person have felt free to leave the site of the interrogation?

MS. O'SULLIVAN: My point, Your Honor, is in

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interpreting what a reasonable person would think, the Court is essentially saying what -- in looking at the values underlying Miranda that I've stated and determining what the rules should be, given those values, it's not simply looking to a factual determination of whether he was handcuffed to a table.

QUESTION: I think you're wrong, Ms. O'Sullivan -- you certainly can disagree with me -- in suggesting that all of our cases say that some kind of supersophisticated inquiry based on Fifth Amendment value -- I can certainly think of cases which have simply repeated the phrase, did the defendant feel free to leave, would a person in the defendant's position have felt free to leave, without going through all the other mumbo-jumbo.

MS. O'SULLIVAN: Your Honor, there are cases where the Court was much more terse in its explanation for its holding such as, perhaps, Mathiason and Beheler, but there are definitely cases, Your Honor, such as Berkemer being the prime example, where the Court said, we're not going to rely on talismanic recitation of the definition of Miranda custody. We're going to look beyond that to see whether the concerns implicated -- or the concerns that drove the Miranda court are implicated in a given context.

QUESTION: But Berkemer was decided considerably

before the case a couple of years ago that said the test is that of a reasonable person, that one of California, from California.

MS. O'SULLIVAN: The Stansbury case, Your Honor.

QUESTION: Yes, that's right.

MS. O'SULLIVAN: The Stansbury case, though, made clear, Your Honor, that that case was designed -- in that case the Court felt that it was simply reiterating a rule that it felt that everybody would have known by now, and that its preceding cases had established a reasonable person standard from the beginning, so I believe, Your Honor, that the reasonable person standard certainly was in place at least by the point of Berkemer.

Justice Souter, my second response to your suggestion is this, is that when we're looking at the policies that determine whether something should be -- whether a mixed question should be allocated, say, to what is primarily denominated as a factfinder or to an appellate court, we can talk about those policies, but I submit that that determination has already been made by Congress and this Court.

This Court has made very clear that mixed questions that added, in Townsend's words, the application of law to fact or the determination of the legal significance of the facts as found, is a question that is

reserved for plenary review in Federal court. That determination has been made.

QUESTION: In all cases, or only in some cases? For example, in FELA cases the reasonable --

MS. O'SULLIVAN: In habeas cases, Your Honor, under 2254(d) and 2254 generally.

QUESTION: I take it you recognize that in some cases reasonableness is for the trier, whether judge or jury, the subject is clearly erroneous, but in other cases, reasonableness requires policing by an appellate forum.

MS. O'SULLIVAN: That's correct, Your Honor.

QUESTION: And the standard by which we can distinguish the one from the other is that in the second category what is the need for special policing? Is there some way we can tell well, we can tolerate a lot of inconsistency, even, with different juries coming out differently on reasonable --

MS. O'SULLIVAN: Mm-hmm.

QUESTION: -- but why can't we tolerate the same uncertainty about in custody, so one group would find not in custody, another part would find in custody, they're both reasonable, so appellate court would leave them alone? What's the difference?

MS. O'SULLIVAN: Your Honor, in the negligence

context again you're asking the community to decide, looking backward, whether certain conduct should be sanctioned, whether somebody should be made liable for that conduct based on community standards.

We're not asking that those standards be imposed Nationwide. A jury in Illinois -- we're encouraging a jury in Illinois to apply a different standard than a jury in Maine.

By contrast, in this situation, what we have is, we have a Federal quasi-constitutional standard. We are asking courts to not only define what that standard means by applying the standard in the context of each particular case, but we're also asking the appellate court to define a uniform, at least consistent body of law regarding the meaning of that standard. It's particularly important because in this context, just as in the Fourth Amendment context, we're asking law enforcement to conform their conduct to those rules.

QUESTION: Well, are you suggesting, Ms. O'Sullivan, that a finder of fact or determiner of this question, say, in New York City, would reach the exact same conclusion that a determiner of this fact in Alaska?

I mean, how about -- you know, don't fence me in. Maybe people in the West may be less likely to feel

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free to leave, or be more likely to free to leave than people in New York or Los Angeles. Is it, indeed, a case in which the factual -- given the facts in a particular case, courts all over the United States must reach the same result?

MS. O'SULLIVAN: I think that's why the Court adopted an objective standard for custody, Your Honor.

If the Court were inclined to treat this as a question of fact that could differ with the jurisdiction with the suspect's particular susceptibility or the police's particular conduct, it could have easily have applied this objective test.

QUESTION: No, not the suspect's -- not the peculiar character of the suspect at all, but just what reasonable people in a community might feel about actions concerning an interrogation. Maybe a person in Alaska might have felt free to leave under these circumstances, and a person in New York might not have.

MS. O'SULLIVAN: Your Honor, the difficulty with having that kind of disparity would be twofold. First of all, it would result in a disparity among defendants depending on whether they were arrested in California or New York, and the extent of protection afforded to them by Miranda, which should not be countenanced.

Second --

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QUESTION: Well, I don't know that that's right, Ms. O'Sullivan, because if the reasonable person tests says, did I feel -- did a reasonable person feel free to leave, maybe people in New York just react differently than people in Alaska to the same set of circumstances.

QUESTION: Of course, you might have a New Yorker arrested in Alaska.

(Laughter.)

MS. O'SULLIVAN: And then where would we be.

QUESTION: But I suppose your answer might -- would this be a possible answer, that even if in fact there are different, geographically differing standards of feelings of freedom to leave, whether the feeling is sufficient enough for Miranda purposes is still a Federal question, so you would still want a Federal court in Alaska or California or Boston or wherever it might be ultimately to pass on the appropriateness of the satisfaction of the Federal standard even if people feel differently about leaving in various parts of the country?

MS. O'SULLIVAN: That's correct, Your Honor --

QUESTION: If that is correct, then maybe -- finish if you want. You were going to add something.

MS. O'SULLIVAN: I was going to add that I think that that's -- that basically yes, we want a uniform rule regarding what Miranda stands for in various parts of the

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country in part because police officers in various parts of the country don't necessarily -- certainly Federal agents shouldn't have to conform their conduct to the peculiar circumstances of, say, New Jersey.

QUESTION: But Ms. O'Sullivan, haven't you -- that's a point you can't go back to. We're dealing with a reasonable person, a totality of the circumstances standard.

MS. O'SULLIVAN: Mm-hmm.

QUESTION: What you've just said sounds like the police, the primary addressee should be the police officer, the police officer should have clear marching instructions, when do I have to give Miranda, when do I don't, but now we have to make that determination after the fact.

MS. O'SULLIVAN: Your Honor, it's often difficult in the totality of the circumstances test to give clear guidance. However, this is one situation where, to the extent the courts are able to come up with that guidance, it must be uniform guidance across the country, is my point.

I recognize that it's a totality of the circumstance test, but by applying the standard in various contexts, the courts of appeals, and this Court, provide guidance for police officers.

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QUESTION: I don't --

QUESTION: Well -- no, go ahead.

QUESTION: What's actually bothering me very much -- you're touching on it, and I don't know how this would come out, but I think you're quite right, facts are normally historically based, but not totally.

If I look at that cloth up there, I don't know if that's damask or not. I've never known what damask meant. It's solely a question of applying a label to that cloth, and I guess we'd call in a cloth expert but not a lawyer, so sometimes we don't call in lawyers to apply words in statutes to historical situations.

MS. O'SULLIVAN: That's correct, Your Honor.

QUESTION: And when we don't, we still call them factual matters.

And so, I take it, here, the question really is, applying these words in this statute, in custody, to a given historical set of facts, are we calling upon legal skills, in which case it's a legal matter --

MS. O'SULLIVAN: Yes.

QUESTION: -- or are we calling upon psychiatric skills, ordinary person skills, in which case it's still a factual matter, and when I say that to myself -- and you seem to agree with that.

MS. O'SULLIVAN: Mm-hmm.

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QUESTION: Then I'm forced to the answer, it all depends. It depends on the case. Sometimes in a case what's really at issue is the law in applying this word, in custody. Sometimes, because everybody agrees what we'd say is ordinary people, but given Miranda, blah, blah, blah, how does it apply, that's -- and very often it doesn't call for legal skills. It applies for perfectly ordinary human skills.

So if we both think that, what am I to do?

MS. O'SULLIVAN: Well, Your Honor, in -- I think the statute -- as I've tried to point out before, I think the statute decides it for you. I mean, I don't think the Court --

QUESTION: But all right, if you look at the statute, to add that, it says, factual matters are to go to the factfinder. Fine, and I'd say very often, for the reasons that the chief just articulated, very often all that we're interested in here is whether an ordinary human being, whether he's a judge or not, would say that a reasonable person would feel confined, an answer that may vary from Alaska to Hawaii.

But sometimes we're interested in uniquely legal aspects of it, how those words fit, so how did it decide here?

MS. O'SULLIVAN: Your Honor, I think the

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decision has been made for the Court how to deal with that particular circumstance. I think the Court's precedents make clear that when you have the application of a legal standard to the facts, it's actually a legal standard not a --

QUESTION: You always have. You always --

MS. O'SULLIVAN: Yes, Your Honor.

QUESTION: One case where that isn't so is where the legal standard happened to be competency to stand trial, because there the label, competency, is normally, but not 100 percent, a matter of psychiatric interpretation, so we'd call in psychiatrists, like the damask expert, not lawyers, but sometimes you'd want to call in lawyers, even there.

I'm not saying -- I mean, I'm saying I'm genuinely puzzled by this problem, and therefore I'd appreciate help.

MS. O'SULLIVAN: I think in the custody context, Your Honor, it's not -- it's not -- obviously the Court's cases say, it just is not always easy, but to the extent you can make it easy, the courts have done so.

QUESTION: If we made it easy here you'd say, normally, the words in custody don't call for legal interpretations. Normally, they call for human judgments about how people reasonably behave.

MS. O'SULLIVAN: Your Honor, I would disagree with you completely on that question, because the question of whether somebody, whether a reasonable person, whether a reasonable person would have believed under the circumstance, is simply not a historical question of fact. It's not --

QUESTION: No, it's not, but it's applying a label to a set of --

MS. O'SULLIVAN: Right.

QUESTION: -- historical facts and activity in which nonlawyers like -- engage every day of the week, and when nonlawyers do engage in it, we call that a factual question, too.

MS. O'SULLIVAN: Yes.

QUESTION: And now that's -- that's at that point that I need help.

MS. O'SULLIVAN: Well, it's my belief, Your Honor, that when you're resolving a reasonable-person test in the Miranda context, in most cases what you're doing is looking back to Miranda and you're saying, does this make sense in the circumstances? What should the law be?

You're applying a legal judgment based on -- primarily on Fifth Amendment values, not based on factual circumstances.

QUESTION: Ms. O'Sullivan, would the same go

for, say, the bus search cases? Would we engage in the same reasoning under the test that Justice O'Connor announced in the Bostick case, also would a reasonable person feel free to leave? Is that also the kind of question that under 2254 would get de novo review?

MS. O'SULLIVAN: Your Honor, in the Fourth Amendment context I think Stone v. Powell would prevent the Court reaching the treatment of these issues for purposes of section --

QUESTION: How about let's put it on direct review?

MS. O'SULLIVAN: Yes, Your Honor. We contend, obviously, that -- the treatment of the issue should be the same under -- on habeas review.

In the Fourth Amendment context, Your Honor, the Court has consistently treated the question of whether someone has been seized for Fourth Amendment purposes, the question whether there was reasonable suspicion for that seizure, the question whether that seizure, the permissible estoppel -- sorry, the permissible extent of the Terry estoppel has been exceeded, has treated all those questions de novo.

I think in that circumstance the Court recognized that this is fundamentally a legal judgment that we're being required to make, and moreover it's a

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legal judgment that should warrant final determination by appellate courts for two reasons.

First, you want to ensure that the judgment is correct, that -- you've got a developing standard. The standard develops, its attains these meaning, these general standards as to what constitutes custody, don't tell the police this is a situation where we have custody and that isn't.

They only attain their meaning by application, and in the Fourth Amendment context, the allocation of final responsibility to appellate courts is important, because it allows the court to control the development of this standard to ensure that the standard is consistent with its Fourth Amendment values and with concerns that drive the Courts in the Fourth Amendment.

And the second --

QUESTION: Ms. O'Sullivan, would you explain to me again how you distinguish what seem to me a lot of cases where we've held that things that you would consider to be legal determinations or factual determinations such as competency to waive postconviction relief --

MS. O'SULLIVAN: Mm-hmm.

QUESTION: How come that is --

MS. O'SULLIVAN: Your Honor --

QUESTION: -- treated differently from what you

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urge us to do here?

MS. O'SULLIVAN: Your Honor, in those circumstances -- here in this context what you have is a two-part inquiry. The trial court will determine the historical facts surrounding the interrogation. It will then apply the Miranda custody standard to those facts.

The first step in the inquiry is subject to 2254(d)'s presumption. When one applies the legal standard to those facts, there is a legal standard to be applied. We're making a legal value judgment.

QUESTION: But that's the case in all of these things. Competency to waive postconviction relief, they're going to be facts.

MS. O'SULLIVAN: Your --

QUESTION: You know, the person was banging his head against the cell wall or he wasn't banging his head against the cell wall.

MS. O'SULLIVAN: Your Honor --

QUESTION: You know, he thought he was Napoleon or he didn't think he was Napoleon. These are all going to be issues -- they're always going to issues of fact in --

MS. O'SULLIVAN: They're going to be issues of fact, but, Your Honor, the critical inquiry, there is nothing but a question of fact. The Court's definition of

what constitutes jury bias, the legal standard collapses into nothing more than a question of subjective fact. What was in this person's state of mind?

In that circumstance, there is no legal standard to be applied to section 2254(d)'s presumption as applied to that determinative fact --

QUESTION: You could say the same thing here. Did the person -- you know, would a reasonable person feel free to leave?

MS. O'SULLIVAN: Your Honor, in the custody cases, the Court has refused to reduce Miranda custody to a question of fact, to a subjective inquiry into a particular person's state of mind, or to a question of historical fact. The Court has refused to adopt bright line rules as to when one factual circumstance exists or doesn't exist. Rather, the Court has required a reasonable person inquiry on the totality of the circumstances. That is the quintessential legal inquiry.

I'm sorry, Justice Breyer.

QUESTION: No, I was just -- you just fell off the wagon a little bit, because the other thing that's factual, I take it, is the application of the label to the historical facts under circumstances where that application calls for nonlegal skills.

MS. O'SULLIVAN: Where the --

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QUESTION: You're following that, right? It's a little technical I just said.

MS. O'SULLIVAN: Yes. I think we're having the same discussion that we had --

QUESTION: That's what I think is at issue here.

MS. O'SULLIVAN: Yes.

QUESTION: And the reason that you said that here it calls for legal skills rather than nonlegal skills, the question of how reasonable people might feel, is basically --

MS. O'SULLIVAN: That it is ultimately a value judgment made in light of the Fifth Amendment.

QUESTION: You would say all objective standards are -- you're saying all of the cases where we treat them as facts, the standard is a subjective one, a purely subjective one?

MS. O'SULLIVAN: Yes, Your Honor.

QUESTION: And where the standard --

MS. O'SULLIVAN: Although I don't think every subjective test necessarily needs to be a factual inquiry. In cases where you have a hybrid inquiry, like Miller, that's a voluntariness inquiry, the Court has treated that as a question of law.

If I may reserve the balance of my time, Your Honor --

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QUESTION: Very well, Ms. O'Sullivan.

Ms. Hora, we'll hear from you.

ORAL ARGUMENT OF CYNTHIA M. HORA

ON BEHALF OF THE RESPONDENTS

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

An Alaska State trial judge found the petitioner, Carl Thompson, was not in custody for Miranda purposes when he voluntarily appeared at the Fairbanks trooper station and voluntary answered questions posed by two Alaska State troopers.

The Ninth Circuit accorded the State court's determination on the custody issue the presumption of correctness, and concluded that it found fair support in the record.

Three sound policy reasons support the Ninth Circuit's decision to accord the presumption of correctness to the Miranda custody determination. First, the custody determination is extremely fact-bound, so the trial court is in the better position to decide the issue.

QUESTION: Well, it's always fact-bound, but the difficulty of resolution is going to vary.

I mean, sometimes, let's say when the only issue was, was the defendant walking in and out of the interrogation room giving press interviews in the

meantime, that's a simple question of fact, and if that's what the issue of custody turns on, then you really can say there wasn't any legal issue in this determination, it was just a purely factual one.

But then you have cases like this in which it may be very, very close, and at that point it's hard to articulate a set of facts which determines the answer, and at that point there's kind of a point at which the instinctive legal judgment has to be what finally resolves the issue.

So that in a case like this, the factual element -- the difficulty of the factual element, in fact, is not great, but the difficulty of the legal element great, so in a case like this, isn't it fair to say, well, this isn't the kind of fact-bound case that we say we don't want to be wasting legal time on or need to waste legal time on?

MS. HORA: This is the type of application of law to the facts that we don't want to be wasting appellate --

QUESTION: Well, then you are --

MS. HORA: -- time on.

QUESTION: -- in effect saying that the Miranda standard is going to vary by virtue of a fact determination without review.

MS. HORA: No, I don't think --

QUESTION: I mean, we -- you're in effect, I think, saying we want Miranda juries to have the same kind of policy, the same kind of policy autonomy that we want automobile negligence juries to have, and we don't want that, do we?

MS. HORA: No, but I'm not suggesting that the State court's findings are unreviewable at any level. They are still reviewable at the standard level.

QUESTION: Well, the Miranda question, the question of in custody, isn't ordinarily submitted to a jury anyway, is it? Isn't it determined in a preliminary motion by the judge?

MS. HORA: It is determined by a judge, but that -- the fact that it's determined by a judge doesn't take it out of the -- or doesn't change the factual nature of it.

The fact that a defendant may waive his constitutional right to a jury trial and proceed to a bench trial, and a judge may make the ultimate determination of guilt, that determination is entitled to no less deference than a jury verdict would be simply because a judge had made it.

I would submit that a lot of the factors involved in the Miranda custody determination, it involves

the demeanor of the witnesses who testify in front of the trial judge, and it -- and that demeanor and inflection and the tone of voice and the various factual findings, and it's the weight and the reasonable inferences that one draws from that evidence and those facts that really have a very factual nature, and are very dependent on the demeanor and credibility of the witnesses, something that you can't find from a written decision by a trial court.

A trial court may he able to articulate particular facts that the trial judge relied upon in making the custody determination, but those decisions often don't reflect exactly how much weight that trial judge gave to each of those types of -- each of those types of facts.

QUESTION: And accept that argument, that this is a classic fact determination in which we defer to the first instance decisionmaker, whether judge or jury, then the Alaska court of appeals did something extra that it didn't need to do, isn't that so, because the Alaska court of second instance did give this de novo review, did it not --

MS. HORA: I think it's unclear --

QUESTION: -- in the custody determi --

MS. HORA: -- from the court of appeals opinion exactly what standard of review it did apply. It did not

refer to any standard of review. It did make clear in subsequent cases, though, that in Alaska it will apply the clearly erroneous or deferential standard of review to trial court determinations of custody.

QUESTION: Oh, so you say that the Alaska court -- so nobody has ever given this -- nobody would ever give this de novo review, not at the State appellate level, and --

MS. HORA: Not the factual determination. The determination of whether or not the legal standard was --

QUESTION: Well, the answer to the question, was this person in custody, I had thought, but you're correcting me that I was wrong, that at least inside the State the first appellate review is de novo.

MS. HORA: At the time Thompson's case was decided it was unclear. It is now clearly erroneous, and that is --

QUESTION: So what you're arguing, then, is that they should never be -- there never need be a de novo review, that the first instance decisionmaker decides the question, anybody else it's a clearly erroneous --

MS. HORA: That's correct. I would be -- I'm basically arguing for the same standard and deference that you would accord a trial court -- I mean, excuse me, a trial jury's determination.

QUESTION: Why should it matter what the State does with it? I mean, all of these policy considerations are very interesting, but we're dealing with a Federal statute, and it seems to me it's just a matter of what the terms in the Federal statute mean.

MS. HORA: Perhaps there's some confusion about --

QUESTION: The State may, for purposes of its internal appeals, choose to treat the matter differently from what the Federal statute requires us to consider them as, isn't that right?

MS. HORA: That is correct. However, as I stated before, the fact that this factual issue, or application of the Miranda custody definition to the facts of a particular case, can be treated as a factual issue and subject to the presumption of correctness, the legal standard, or the legal principles underlying Miranda and the definition of what Miranda custody is and what factors are relevant or irrelevant, can still be ascertained by a Federal court or by an appellate court in the State of Alaska, and that is because you're dealing with the governing standard.

The -- on habeas review, the Thompson court, the Ninth Circuit, could have said the Alaska State trial court judge did not apply the correct legal standard.

What -- he relied on erroneous factors, he didn't consider all of the facts, or he -- in which would be a, there was no fair support in the record, arguably.

There are ways that you can achieve that uniformity and that appellate review and that Federal review of what Miranda intends to protect without reviewing every single, you know, factual application.

QUESTION: Okay, but there's a different problem which I don't think you do touch on in your catalog, and that is the problem that arises from the fact that what is a sufficient sense of freedom to leave, which is the consideration that drives the application of Miranda, is difficult to articulate, and it cannot be articulated -- it isn't articulated simply by saying, well, it's what a reasonable person would feel.

That just passes the buck to whoever is going to determine what the reasonable person does feel, and in those -- in instances like that, where it is very difficult to articulate the standard, ultimately the only way you can show what it means is by pointing to examples that you yourself supply and says -- and you say, this is it, and that isn't. In this case, the person was free to leave. In that case, it wasn't.

And when you have standards that require that kind of nuance, if you will, it seems to me that the body

that is setting the law has got to keep control of the ultimate application, which it doesn't do on a clearly erroneous standard, because otherwise it's not going to be able to tell people what the standard is, and isn't that a reason for saying that this is a mixed question that the Court really does have to review, and therefore, under the statute, should be construed as subject to review?

MS. HORA: The terms, freedom to leave, I don't think have that uniquely legal dimension that the, say, the voluntariness inquiry has.

QUESTION: Well, why not? Why is freedom to leave somehow less subtle than true willingness to speak?

MS. HORA: Well, for one reason, we're dealing with a different right. We're dealing with a nonfundamental right in Miranda.

QUESTION: Well, we're -- in Miranda we're talking about how do you guarantee the constitutional value rule as opposed to an absolute first instance constitutional value rule, but we're still talking about standards of voluntariness, and I don't know why the issue of voluntariness is somehow less subtle in the Miranda context than it is in the confession or the admission context. Maybe it is, but I don't understand why.

MS. HORA: Well, it is in the sense that it does not have the same constitutional stature as voluntariness

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does.

QUESTION: No, no, we're talking about the -- we're saying there is a subtlety of fact here, how much is enough, and I thought you were -- maybe I misunderstood you.

I thought you were saying, well, it's easier to say how much is enough in Miranda than it is to say how much is enough on voluntariness of confession, and how much is enough doesn't matter whether it's a primary constitutional rule or a secondary constitutional rule, the concept, how much is enough, how free is free, is the same. Why is it more subtle in the confession context than it is in the Miranda context?

MS. HORA: I would go back to the interest we are trying to protect. We are not only looking at -- I think if you look at Miller v. Fenton, the decision whether to affix the particular label to an issue doesn't depend solely on whether we classify -- whether we think an issue is more legal or more factual in nature. We also look to policy considerations, and I think the policy considerations here, when you're looking at a nonfundamental right involving -- which is basically a definition that is clearly one that is a reasonable person standard --

QUESTION: Well, do we have that much freedom

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under the statute?

QUESTION: Yes, why do we look to policy con -- I mean, it's all very interesting, these policy -- we have a statute that says that a determination after a hearing on the merits of a factual issue shall be given effect by the Federal court, on the merits of a factual issue.

That's a statute passed after a decision of ours in which we said, by issues of fact we mean to refer to what are termed basic, primary, or historical facts, facts in the sense of a recital of external events and the credibility of the narrators.

That's an opinion by Justice Frankfurter that was on the books when this statute was enacted. Why shouldn't we just take the statute to be incorporating a term of art that we have defined in our opinions?

MS. HORA: But subsequently the Court has made clear -- for example, in Wainwright v. Witte -- that there are a lot of questions that can be -- to which the fixed, or, excuse me, the mixed question of law and fact can be -- that label can be attached and yet you're going to treat it as a factual issue in the habeas context under the statute.

I point, for -- the Wainwright v. Witte is an example. I mean, this Court said, it's clear here that what the trial judge is doing is applying the legal

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standard, the legal standard of jury bias, the Witherspoon-Adams standard, you know, to the question of jury bias here, and because it's a predominantly factual inquiry, and because it is one --

QUESTION: It's totally factual, as your colleague points out. It is a factual determination of whether the juror was biased or not.

MS. HORA: And the position of the State of Alaska is, the question of Miranda custody is, like jury bias, a factual question that --

QUESTION: No. It's whether a reasonable -- whatever this individual felt, would a reasonable person in this individual's position have felt free to leave. That's -- it's not a factual question, it's a judgment, bringing in, or bringing down the reasonable person.

MS. HORA: But that in and of itself is a judgment, and it's a judgment that we entrust to reasonable laypersons every day in courtrooms cross the Nation.

In fact, the jury in Mr. Thompson's case --

QUESTION: That may well be, but I'm working with this statute. I'm working with a statute that says, an issue of fact, and we base a lot of issues of fact in our opinion on --

QUESTION: I mean, Frankfurter wasn't exhaustive

in his list. I mean, there are dozens of cases where experts in trials decide factual matters about whether it's a patent or whether it's a this, or whether it's carbon monoxide, or whatever it is, and that kind of a case is what's presented here. That doesn't mean you're right, but --

QUESTION: Well, he wrote many years before this statute was adopted.

MS. HORA: That is correct. It's also, I think if we look at the jury bias decision, there were decisions by this Court which refer to jury bias as a mixed question and nevertheless, after the enactment of 2254(d), this Court has subsequently, when called upon to address the issue in the habeas context, treats it as a factual issue.

QUESTION: When was this statute passed?

MS. HORA: It was passed in 1966, the same year Miranda was decided.

QUESTION: The opinion I read from was in 1963.

MS. HORA: Yes.

QUESTION: But even if I -- even if we assume that there are some cases in which the Court does have -- there's some play in the joints here, and there are some cases that are very close to call, we still come back to the problem of differentiating the -- even the factual issue, or articulating a factual issue of what is

voluntariness in one context and what is voluntariness in another which would make it very difficult, it seems to me, to distinguish this case from the voluntary confession case.

MS. HORA: But this Court has often treated the issue of voluntariness differently than the Miranda --

QUESTION: Well, tell me why -- tell me why, assuming we have the opportunity to do it, and I'm not at all sure that we have, but if we have the opportunity to do it, tell me why we should treat it differently here. Why is the one inquiry more subtle than the other?

MS. HORA: Because I think in terms -- under Miller v. Fenton, the Court considers policy determinations in affixing that label. There are policy considerations here, and decisions by this Court which have held that Miranda is not the equivalent of voluntariness --

QUESTION: Well, yes, but that --

MS. HORA: -- and shouldn't be treated as such.

QUESTION: I'm not sure that that gets you where you want to go, because that is simply, it seems to me, a premise for the argument that this Court better keep control, or Federal courts better keep control, of just where to draw that line.

MS. HORA: The Federal courts can keep control

of the definition of Miranda, the legal standard, by determining whether or not State courts apply the correct legal standard, and defining what the standard is. They do not need to keep --

QUESTION: Yes, but we start -- the premise of my question was that it's very difficult to define the standard in so many words because it's very difficult to describe the degree of voluntariness upon which it depends, and if we're going to have merely clearly erroneous review, that's going to leave an extremely large area of factual discretion in the State courts, and I -- my suggestion was that, assuming we have a choice, that we probably better not leave that great degree of discretion because if we do, we basically have lost control of Miranda, and it's going to be -- it's going to vary significantly from State to State.

MS. HORA: I would submit that you would not lose control of Miranda. You still decide guiding legal principles in that.

QUESTION: Well, I think --

MS. HORA: What you're dealing with here is --

QUESTION: I think we're just not engaging in the same argument, because I'm starting with the premise that it is very difficult, if not impossible, to articulate those premises without from time to time

picking a few examples out and saying, this is it, that isn't, and you in effect are saying no, you don't have to go through that, you can state it enough, and I think maybe that's -- our disagreement is maybe unbridgeable there. I'm saying we can only do it one way, and you are saying, oh, you could do it another way. Isn't that where you and I are disagreeing here?

MS. HORA: I believe so.

QUESTION: Yes.

MS. HORA: I --

QUESTION: It seems to me, counsel, that when you were suggesting that fundamental constitutional rights are subject to de novo review in the courts, or some plenary review, that there was an implicit admission, or an implicit premise that control by the courts is better maintained that way, and that it is more important to have control, and it seems to me that that is what Justice Souter is suggesting should apply in Miranda cases, even if we don't classify that as a fundamental right.

MS. HORA: I would -- I don't think it rises to the same level of voluntariness, or some of the other issues that the Court treats de novo --

QUESTION: Or ineffective assistance of counsel is another one where there would be de novo review, is that right?

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MS. HORA: That's correct.

QUESTION: So there are some things that trigger de novo review -- voluntariness, ineffective assistance of counsel -- other things that don't, and you're saying Miranda falls on the side with jury bias and not on the side with voluntariness or ineffective assistance.

Why, if the object is that Miranda is not just some words that are spoken sometimes but words that must be spoken at a certain time, doesn't the Federal court need to have control over what that time is?

MS. HORA: The Federal court, though, can do that by articulating the standard. The Federal courts, by having fact-bound decisions --

QUESTION: Well, what is the standard, other than in-custody? Who fleshes out what in-custody means by saying, certain circumstances are not in-custody, certain circumstances are, and how can the Court do that job without passing -- getting a body of cases that it can review and then narrowing the range of choice that the police will have?

MS. HORA: The Court has already done that in Miranda cases in terms of defining what factors are relevant and what factors are irrelevant to the custody determination.

If you have a plethora of decisions simply

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setting out facts and saying, yes, this is custody, no, this isn't, it's not going to be particularly helpful to the trial courts because you know, the myriad of factual situations in the Miranda context is varied, and it's -- what weight to give particular facts is going to depend on the particularly facts of the case, which is very dependant on the demeanor and the credibility of the witnesses.

For example, in this case, Mr. Thompson was told I think seven or eight times that he was not under arrest. If that fact appears in a decision, how helpful is that going to be to another trial judge in Boston, or Florida, or wherever, in determining whether or not a person, you know, taken into custody in their jurisdiction was under -- or was entitled to Miranda warnings or not, if they were advised two times that they were not under arrest and they were free to leave?

I mean, it's very hard to discern principles from just application of the facts. You can set out the general factors in the test, in the definition, in clarifying and honing the definition, but you don't achieve that uniformity or those clarification of guiding principles in that in fact-bound de novo review. I mean, this is a fact-bound determination, and you won't achieve that uniformity.

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QUESTION: I thought that was the way the law generally builds its -- it says, this case law's on that side, and that case law's on the other side, and we get enough of the cases, then we can state some broader guiding principle. I thought that's the traditional way that our system operates, and certainly in common law interpretation, even in the interpretation of statutes.

MS. HORA: In terms of this type of determination, in terms of the Miranda custody determination, these very fact-bound determinations, this Court in Cooter & Gell v. Hartmarx Corporation, you know, said, fact-bound determinations are simply not, you know, will not achieve uniformity through appellate review, de novo or otherwise.

I mean, certain fact-bound determinations, there's going to be some variance simply because, you know, in very, very close cases, whether it tips in favor of custody or not in custody for Miranda purposes, a lot of that is going to turn on the demeanor and credibility of the witnesses that the appellate court just doesn't have access to on the record.

QUESTION: Then why don't we go back and reconsider the question whether the voluntariness of the confession should be subject to review without deference?

MS. HORA: Well, you don't --

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QUESTION: We got that wrong, didn't we, on your explanation, because there's no -- as I understand it, there's no reason we can't state the legal rule clearly and leave it to the other courts to apply. We got it wrong, didn't we?

MS. HORA: You need not decide that.

QUESTION: No, but I mean, if we're going to be consistent, if we're going to take a step here, we ought to know what direction we're going in, and I think we're going in the direction of saying we were wrong about confessions.

MS. HORA: You can take the step that I'm asking you to take without overruling Miller v. Fenton.

QUESTION: Well, we don't have to say anything about it, but we're going to set Miller & Fenton up to be overruled, aren't we?

MS. HORA: Not necessarily.

QUESTION: Why?

MS. HORA: You have the case of Withrow v. Williams, which talks about the habeas context and Miranda claims, and this Court determined that Miranda is -- you know, is a prophylactic rule, but the prophylactic nature of the rule is not on all fours with Mapp, and so we're not going to bar those claims from Federal review entirely.

But the Court also recognized that they're not on the same footing as voluntariness claims, so what you've done, you've put Miranda --

QUESTION: Yes, but why is that a distinction -- why is that a distinction under the statute?

MS. HORA: Well, what you've done here is put Miranda --

QUESTION: No, but why is that a distinction under the statute? The statute doesn't say anything about first level constitutional claims, second level constitutional claims. We don't have that kind of policy freedom under the statute.

MS. HORA: Under Miller v. Fenton, the Court said that a lot of these determinations of what should be deemed a factual issue under the statute do involve policy considerations, and this policy --

QUESTION: Well, they probably involve the kind of policy considerations that I was talking about a moment ago, that you can't keep control of a statute, or the standard, for example, if you don't review it with an absence of deference, but do you think Miller & Fenton was saying we've got a free hand to decide what issues of fact are merely important enough?

MS. HORA: I think you have the discretion to determine what is a factual issue, and in determining --

or in affixing the factual issue label, you can look at various policy considerations.

What you did in Withrow v. Williams is, you put Miranda sort of in a middle ground.

QUESTION: Okay. May I -- would it be fair, then, to summarize by saying that although the kind of analysis may be the same in each case, Miranda and confession, that that is -- we'll simply say candidly that is not what determines it, and what determines it is the importance of the constitutional issue and its character as a -- we'll call it a first tier constitutional issue, as opposed to a second tier constitutional issue. That is the basis on which we would distinguish them, in your view.

MS. HORA: Yes. That's what Miller v. Fenton said. It said that you don't look at an issue and basically determine -- decide what label to affix by deciding this is a more legal issue, or a more factual issue, and that you can also look at policy considerations --

QUESTION: So we would -- we --

MS. HORA: -- that that often determines the scope of review.

QUESTION: Okay.

MS. HORA: And this Court has put Miranda in the

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middle of Fourth Amendment claims involving search and seizure, involuntariness claims involving the Fourteenth Amendment, and all you need to do is take one little step to say, we're going to take a middle ground, which is appropriately reflected by the presumption of correctness, and accord that presumption of correctness to the trial court's finding of fact.

QUESTION: There's a good statement, actually, in an opinion I think that Norris wrote. I don't know if you saw it in McConney, where he describes it in this way, trying to apply this label.

He says the reason it's a legal question in part is because its resolution requires us to consider abstract legal doctrines to weigh underlying policy considerations and to balance competing legal interests.

Now, in deciding whether a person is in custody, are the activities I just read quite frequently involved?

MS. HORA: I don't think the last two are frequently involved.

What is primarily involved is an application of a reasonable person standard to a set of facts which juries and laypeople are able to do, and we accord very great deference to those determinations, and to suggest that Judge Hodges, because he put on a black robe and sat in a different place in the courtroom, somehow lost his

ability to do that, which is simply -- you know, I mean, is to give -- not giving Judge Hodges much credit in terms of applying, you know, what 12 ordinary citizens of Alaska did.

So I think it's basically -- it's applying a definition to a set of facts. It doesn't involve a lot of legal principles, in that except to the fact -- except to the extent that the judge looks at the factors which this Court has told it to look at, and it doesn't look at the factors this Court says is irrelevant.

If there's no further questions, thank you very much.

QUESTION: Thank you, Ms. Hora.

Ms. O'Sullivan, you have 2 minutes remaining.

MS. O'SULLIVAN: Your Honor, unless the Court has any further questions, respondent has nothing -- petitioner has nothing further.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

MS. O'SULLIVAN: Thank you.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)

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CASE NO. : 94-6615

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BY Ann Riani Federico

(REPORTER)