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NHAM

IN THE SUPREME COURT OF THE UNITED STATES

██████████ TERM 1969

LEE ARTHUR HESTER,)
)
 Petitioner)
)
 vs) No. 82
)
 STATE OF ILLINOIS,)
)
 Respondent)
)

Washington, D. C.
November 18, 1969

The above-entitled matter came on for argument at
1:21 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
 HUGO L. BLACK, Associate Justice
 WILLIAM O. DOUGLAS, Associate Justice
 JOHN M. HARLAN, Associate Justice
 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice

APPEARANCES:

MARSHALL KAPLAN, ESQ.
 188 West Randolph Street
 Chicago, Illinois 60601
 Counsel for Petitioner

JOEL M. FLAUM, Assistant
 Attorney General of Illinois
 Chicago, Illinois
 Counsel for Respondents

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P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: Number 82. Hester
3 against Illinois.

4 Mr. Kaplan, you may proceed.

5 ORAL ARGUMENT BY MARSHALL KAPLAN, ESQ.

6 ON BEHALF OF PETITIONER

7 MR. KAPLAN: Mr. Chief Justice, and may it please
8 the Court: This case is before this Court to review the
9 murder conviction of a 14-year-old elementary school Negro
10 boy on the South Side of Chicago.

11 The confession that he gave primarily being respon-
12 sible for his subsequent conviction in the Criminal Court of
13 Cook County, Illinois and his subsequent incarceration for
14 55 years in the Illinois State Penitentiary.

15 On April 20, 1961 at 4:00 in the afternoon the body
16 of a school teacher in the Lewis-Champlin Elementary School on
17 the South Side of Chicago, Illinois, was found. She was dead.
18 She had been stabbed numerous times and it appeared that he
19 had been sexually molested.

20 Sixteen hours after her body was found Lee Arthur
21 Hester was removed from his schoolroom at the Lewis-Champlin
22 School which would put it at approximately 8:00 o'clock a.m.
23 From 8:00 o'clock a.m. on April 21st, a Friday, 1961, to the
24 minute I stand before you, Lee Arthur Hester has been in-
25 carcerated. Most of the time has been in the Illinois State

1 Penitentiary; part of the time in the Cook County Jail and
2 some of the time in the Audy Home (the Juvenile Detention
3 Home) in Chicago, Illinois.

4 The school where Lee Arthur Hester attended had
5 approximately 2600 students attending in double shifts;
6 Hester going from 8:00 to 12:00 in the morning; another group
7 going from 12:00 to approximately 3:00 or 4:00 o'clock in the
8 afternoon.

9 On the same grounds of this school was a high school
10 called the Englewood High School, just separated a little
11 distance away through a courtyard field. And that had 2,000
12 students, approximately and then there was a continuation
13 school, a school in Chicago which houses and teaches older
14 students who drop out of school, who because of state law are
15 required to attend school until a certain age: 16 or 17 years
16 of age.

17 Two police officers came to Hester's room shortly
18 before 8:00 o'clock a.m. in the company of a gym teacher, who
19 had stated to the officers that she had seen Hester in the
20 hall some time the day before. And I believe she said she saw
21 him running.

22 The officers rummaged through the records of the
23 teacher that -- in whose room Hester was a student and the
24 teacher came into the room; they told her they wanted to see
25 Lee Arthur. She told this to Lee Arthur. She sent him out of

1 the room; they kept him a couple of minutes; they sent him
2 back. And the teacher said when she testified to this -- or
3 he testified to this: "What do they want from you, Lee Arthur?"
4 He said, "They think I killed Mrs. Kane" and the whole room
5 started to laugh.

6 From that moment until a confession was signed,
7 sometime between 8:15 and 8:30 in the evening of Friday --
8 that day was Friday -- April 21, 1961, Lee Arthur Hester was
9 in the continuous unbroken custody of at least seven police
10 officers in the Chicago Police Department, who kept Hester
11 from about 8:00 in the morning until about 8:45 a.m.,
12 questioning him. Those two officers: Sheldon R. Teller and
13 another officer by the name of Anton Prunkle, who then turned
14 Hester over to another officer by the name of Follis and the
15 principal's office, who kept him for approximately 15 minutes.
16 He then turned Hester over to two other officers, Robert
17 Perkins and an officer by the name of Harold Thomas, who then
18 took Hester to a police station in the neighborhood; they
19 switched automobiles and then took him to the Audy Home, the
20 Juvenile Detention Home.

21 Hester was searched at the Juvenile Detention Home;
22 all of his clothing was removed and from his pockets, all of
23 his belongings removed, including -- and I beg Your Honors
24 to consider what was removed from the pockets -- marbles.

25 Now, at this time Hester was 14 years, five days of

1 age. His IQ was either 75 or 82 and the reason that it is
2 "either," is that there are a couple of tests included in the
3 record and admitted in evidence and one shows he was 75 and
4 the other that his IQ was 82.

5 He was one of eight children of a ghetto family.
6 His reading rate was approximately that of a second-grader in
7 grammar school; in fact, slightly lower, according to the
8 school records. His mathematics ability was graded at approxi-
9 mately third grade. His school records indicate from psycho-
10 logical testing that his maximum -- his maximum emotional
11 growth was nine years of age, or as the records show, 4.7 --
12 excuse me -- 4-A grammar school; In a grammar school usually a
13 child of normal progression in school, reaches the fourth grade
14 when he is nine years old.

15 In my petition for writ of certiorari I had an error
16 I believe on Page 6. I am not sure. I say that the -- I
17 made a mistake and said that the maximum emotional growth was
18 11 years old. Mr. Justice Underwood, who wrote the majority
19 opinion for the Illinois Supreme Court, showed that the
20 Defendant had a maximum emotional growth or mentality. "We
21 find that he had the mentality of an 11-year-old, ergo, he
22 was qualified to give a confession."

23 Anyway, not to interrupt the chronology of what
24 happened, at approximately 4:00 in the afternoon, Hester
25 having been detained from 10:30 in the morning until 4:00 in

1 the afternoon, Lee Arthur Hester was interrogated by four large
2 police officers. Now, Hester was five-feet, one-and-a-half
3 inches tall, I believe; 111 and a half pounds.

4 Hester could barely read; Hester could barely com-
5 pute; Hester could barely understand; Hester was not insane,
6 and we admit it. Not once in the entire day that he was kept
7 in custody or interrogated, was he permitted to see his mother
8 and he repeatedly requested: "I want to see my mama." Not once
9 was he permitted to see a probation officer; not once was he
10 permitted to see his father or lawyer or anyone standing in
11 loco parentis to him; not one.

12 Every single witness who testified for the prosecu-
13 tion testified that "we did not warn him that he need not make
14 a statement; that we did not warn him that anything he said
15 could be used against him; we did not warn him that he was
16 entitled to counsel and we did not warn him that if he couldn't
17 afford counsel we would give him counsel."

18 I know that those are the four requirements in
19 Miranda versus Arizona. Now, our basic point today, Your
20 Honors is that in three ways this confession must fall:

21 The first way, that basically, specifically and
22 unequivocally, you cannot take a confession from a person al-
23 most illiterate. Now, then, he is 14 years old you must
24 couple that with "what we know, we cannot forget as lawyers what
25 we know as men." I think Justice Frankfurter once said that

1 and I think it was in Culombe versus Connecticut. We can't
2 forget that the 14-year-old in the ghetto who can barely read
3 has no experience with life.

4 We cannot forget that the 14-year-old in the custody
5 of approximately 7 police officers is no match for these
6 police officers. When you couple that with the fact that
7 these four police officers walked into a room at 4:00 o'clock
8 in the afternoon and testified -- it's in the record -- and
9 my associate who is sitting at that table, asked him: "What
10 did you say to Lee Arthur when you walked in?" "We introduced
11 ourselves." "And how long did you stay?" "Five minutes."
12 And after five minutes, after they told him to get it off his
13 chest the words came tumbling out. He confessed. This in-
14 terrogation then resumed with two officers leaving and the two
15 Negro officers staying, the defendant testifying that they
16 told me that the white officers were going to throw my head
17 through a wall unless I told them what they wanted to hear.

18 They showed him innumerable pictures, he testified
19 to, and from these pictures he told them what happened. And
20 then they called in the other two officers who had left and
21 went through this whole business again. Finally, they took
22 him down and got him a pair of shoes and then at approximately
23 5:30 an Assistant State's Attorney called and testified that
24 he went through the whole business with Lee Arthur; went
25 through what happened, then finally, at 6:45 o'clock in the

1 evening a written confession was commenced in the presence of
2 an Assistant State's Attorney, a Sergeant Keating from the
3 Chicago Police Department and a Donald Flannery, a Court
4 Reporter. Subsequently this was transcribed and at approxi-
5 mately 8:15 to 8:30 in the evening Lee Arthur Hester signed a
6 confession.

7 Now, it is the contention of the defendant that under
8 conventional principles of due process, forgetting the retro-
9 activity or lack thereof, of Miranda and Escobedo, that you
10 cannot take the confession of a 14-year-old of the type that
11 I have described, after incommunicado holding of him, failing
12 to give him even the barest rudiments of representation or
13 having anybody stand in loco parentis to him.

14 Number two: Forgetting about conventional principles
15 of due process, it is a violation of due process not to take
16 the statement -- excuse me, it is a violation of due process
17 to take a statement without making some equalization in the
18 procedure used in making the statement between a juvenile and
19 an adult and may I point it out;

20 In a golf game we give a handicap; for a bowling
21 tournament we give pins; to a less-capable bowler, as opposed
22 to a bowler who is more capable. In a horse race we add
23 weights to the faster horse. I say even if you were to anoint
24 Lee Arthur Hester with the finest of oils and place him in a
25 room with a swimming pool and velvet walls, you cannot take a

1 confession from Lee Arthur Hester without providing him some
2 rudiments of due process.

3 First, that in order to assure him that the confes-
4 sion is voluntary, when you take it in a setting of an incom-
5 municado holding; when you take it in the presence of only
6 police officers, without any protection whatsoever, a bell
7 must ring, a light must go on and the greatest conceivable
8 care must be given so that the confession is voluntary.

9 Third, and our brief asks the Court to abolish the
10 taking of juvenile confessions because there is no possible way
11 at least Lee Arthur Hester can be adequately advised of his
12 rights. Advising Lee Arthur Hester of his rights is like
13 advising a deaf man of his rights. He may --

14 Q The rule you are asking us for there you say is
15 an absolute prohibition against taking the confession of a
16 juvenile, no matter what the circumstances?

17 A In my brief, Your Honor, I will be very candid
18 with you: I asked you to make a rule like that. I think it's
19 the only workable rule with the juvenile. However, this case
20 can be decided under the narrowest, the narrowest of principles.
21 To be candid, yes I did ask to make that rule.

22 And that this case can be examined, we must look at
23 what kind of individual is Lee Arthur Hester.

24 Q Well, what about the 18-year-old who is a genius
25 and a senior in college? Same rule?

1 A We have a problem and I'd be frank to admit,
2 Your Honor, I don't know how to resolve it.

3 Q Well, you do have a problem with all general
4 rules like that; don't you?

5 A Your Honor, we have a problem --

6 Q Why don't you stick to the case you are at?
7 Of the 14-year-old with nine years of mentality; why don't
8 you stick to that?

9 A Yes, Your Honor.

10 Now, going back to the basic facts in this case, and
11 conventional due process rules, this case can be resolved by
12 placing this case within the purport and the ambit of all of
13 those cases that this Court has decided, from Brown versus
14 Mississippi up to and including Miranda versus Arizona.

15 And although Johnson versus New Jersey may not --
16 does not require Miranda to be applied to pre-Miranda cases,
17 nevertheless, the fact that a man was held incommunicado; that
18 he was never advised of his rights; that he has a mentality of
19 an eight-year-old; that we have a 14-year-old person, chrono-
20 logically 14 with the mind of an eight-year-old.

21 We really, in effect, have nothing more than an
22 eight-year-old being interrogated by police officers with whom
23 he could not possibly cope.

24 Not only that, Lee Arthur Hester failed in school
25 six times. He "flunked," in the vernacular of the street. He

1 even flunked in kindergarten. Records concerning this were
2 introduced in evidence, not objected to by the State. A
3 psychologist testified completely to his school records.

4 Mr. Justice Schaefer of the Supreme Court of
5 Illinois dissented in this case and really succinctly laid out
6 what the State failed to do in this case. Mr. Justice Schaefer
7 said that he would reverse this conviction; he would suppress
8 this confession because the State failed to sustain its burden
9 of proof to show that the confession was voluntary.

10 Two police officers on the motion to suppress
11 evidence: one who was present at the first oral statement at
12 shortly after 4:00 and a Court Reporter was all the State
13 called for the motion to suppress. That's all they called to
14 arrest him.

15 Now, this is the first case that I ever tried;
16 young counsel who should have been given more courtesy and
17 more leniency and the judge should have extended himself much
18 more in -- to a 14-year-old defendant than he ever would be
19 required to do if he had an adult defendant.

20 So, we asked the Court prior to the hearing commen-
21 cing, to exclude witnesses. We noticed all the police officers
22 sitting in the court. The judge said, "I'm only going to ex-
23 clude witness on direct; I do not exclude rebuttal witnesses."

24 So, all of the witnesses except the two I mentioned,
25 were called as rebuttal witnesses. And I think we made the

1 motion to exclude at least three times. The rebuttal witnesses
2 sat in the courtroom and heard what all of the other rebuttal
3 witnesses had to say and purely by the court exercising its
4 discretion in not excluding rebuttal witnesses, permitted just
5 two witnesses neither of whom were present at both confess-
6 ions; one officer was present at the -- and the Court Reporter
7 transcribed the confession and it was enough to force us to
8 go forward. Maybe we shouldn't have gone forward; we should
9 have rested at that time.

10 Now, the burden of proving a confession voluntary,
11 I don't believe that this Court has really ever stated who has
12 the burden of proving the confession voluntary. Mr. Justice
13 White, in Jackson v. Denno, set forth rather succinctly the
14 procedure that must be followed in a motion to suppress the
15 confession; but who has the burden?

16 Under Illinois law and in the line of cases which
17 Mr. Justice Schaefer cites in his dissent, there was no doubt
18 that in Illinois law the state has the burden of proving the
19 confession voluntary. All the state put on was police
20 officers and a court reporter and we have the age-old problem
21 that existed in this Court up to Miranda versus Arizona of the
22 state puts on the police and the defendant puts on the defense;
23 the jury heard the facts; the jury made its conclusion and the
24 jury ruled.

25 It's impossible when all you have is a 14-year-old

1 with an eight-year-old mind and its impossible to do other
2 than put him and say, "Lee Arthur, tell us what happened that
3 day." You just can't do anything else. The police get on and
4 say, "We treated him fine." But they admit that they checked
5 him all day; they even admit that he was in the Audy Home,
6 which is a stone's throw, a walk, a long toss from the hallway
7 of the Audy Home over to at least three sitting juvenile court
8 judges. Not once; not once in this entire morning is Lee
9 Arthur taken from the moment of his arrest until the moment
10 of his arraignment, his indictment by a grand jury two weeks
11 later, not once did he see an examining magistrate: not once.

12 Now once did he see a lawyer until Monday morning
13 when my associate and I were permitted to see him in a barred
14 room which was guarded outside.

15 Not once was he permitted to see his mother, so that
16 when you examine the mentality of the defendant; his ability
17 to withstand pressure; the fact that he was held incommunicado;
18 the fact that he was never taken before a magistrate; the
19 fact that he could not possibly cope with his captives: the
20 fact that when you take a confession from a boy like this it's
21 like taking the proverbial candy from a baby.

22 Now, in this age of enlightenment, in this progress
23 we're making in the criminal law, can anyone logically say
24 that it would have been improper or it would have hindered the
25 administration of justice to take this boy of 14 before a

1 magistrate? This boy who was probably, from my searches, I
2 can't find anybody younger; probably the youngest defendant
3 in the history of the United States Supreme Court.

4 I don't think there has ever been case before this
5 Court where the mentality was any lower and those cases where
6 it was just as bad.

7 Q How old was Gallegos?

8 A Gallegos was 14; Haley was 15. And in my brief
9 I place great stress on Haley and I place great stress on
10 Gallegos.

11 Gallegos confessed within two minutes after his
12 apprehension and was kept in a juvenile detention for some
13 four or five days and then made a written confession -- in
14 fact I think more than one written confession.

15 Haley was 15; a senior in high school -- 15 years,
16 8 months -- a senior in high school who was questioned for
17 five hours. In both those cases there was no question of
18 brutality. Haley, a senior in high school at age 15 was at
19 least, I think, two years ahead of what the usual high school
20 student would be at that time.

21 And this Court said in Haley and this Court said in
22 Gallegos that we must be extremely careful when we take con-
23 fessions from juveniles. The Court pointed out that they are
24 not a match; they never can be for a wise and experienced
25 police officer.

1 Q You have a juvenile court system in Illinois,
2 don't you?

3 A Yes, we have a juvenile court system.

4 Q Was there any stage of this proceeding where
5 it was possible this young man was going to go before the
6 juvenile court?

7 A Oh, yes; but they got around that real good in
8 this case. In the record I filed, Mr. Justice Harlan, in this
9 case, I include the juvenile court proceedings in this case.

10 Saturday morning, the day after Hester's confession,
11 Saturday morning a petition for delinquency was filed in the
12 Cook County Juvenile Court which is a branch of the Circuit
13 Court of Cook County. That petition still sits today undis-
14 posed.

15 Q Filed by whom?

16 A Filed by the --under the auspices of the State
17 Attorney of Cook County. And our statute at that time it
18 stated that the juvenile court could relinquish its jurisdic-
19 tion through the Criminal Court of Cook County, which it never
20 did, because we have two old Illinois Supreme Court cases
21 which say that a juvenile court is a court of inferior jurid-
22 iction and a Criminal Court is a court of superior jurisdic-
23 tion and therefore the section of the statute permitting the
24 juvenile court to waive its jurisdiction has no application in
25 this case.

1 Hester was interrogated in the juvenile court. He
2 was interrogated in the office of the State's Attorney in a
3 cubicle existing in the juvenile court.

4 Everthing in this case started out as a juvenile
5 case. A confession was taken in the juvenile court, even
6 though we have a statute in Illinois which I cite in my brief,
7 which precludes the admission of any kind of a confession
8 taken under the auspices of Family Court Act.

9 I desire to save some time for rebuttal and if you
10 don't have any questions I would like to do that.

11 MR. CHIEF JUSTICE BURGER: Very well. Thank you.

12 Mr. Flaum.

13 ORAL ARGUMENT BY JOEL M. FLAUM, ASSISTANT ATTORNEY
14 GENERAL OF ILLINOIS, ON BEHALF OF RESPONDENTS

15 MR. FLAUM: Mr. Chief Justice and may it please the
16 Court: You have before you a case where the proof of guilt,
17 we suggest, is overwhelming. That statement we make in con-
18 sideration even if the confession were to be set to one side.

19 Q Well, Justice Schaefer said the opposite.

20 A Yes, he did, Your Honor. Yes, he did and we
21 feel that the majority in the opinion as reflected by Mr.
22 Chief Justice Underwood -- now Chief Justice Underwood -- is
23 that they felt the scientific evidence was so overwhelming that
24 it is on that we base our --

25 The difficulty, at first in rebuttal, is that counsel

1 for the Respondent finds it very difficult to recognize this
2 case in fact, as presented by the Petitioner.

3 But before I make any reference to that let me just
4 say that the Petitioners raise a host of points in this pet-
5 ition for certiori in brief. We feel that only one is of a
6 constitutional dimension. That is the one he has chosen to
7 argue this morning. He put aside those others and we'll
8 address ourselves to the confession.

9 In 1961 the Petitioner, Hester was 14 years old.
10 He was in the 5th grade; he was not given Miranda warnings
11 before he confessed after five minutes of interrogation.
12 Those confessions were voluntarily given, we suggest and his
13 conviction should be sustained.

14 Q What year was this?

15 A '61, Your Honor.

16 Q Pre-Miranda.

17 A Pre-Miranda. April, '61 is the date of the
18 commission of the crime and the conviction is October of '61.

19 Q When did he first see his mother?

20 A He saw his mother at 10:00 a.m. the following
21 morning. The statement made by counsel --

22 Q When did he first have a lawyer?

23 1 A He had him on Monday morning, Your Honor; 48
24 hours later.

25 Q Forty-eight hours later.

1 A And he was not informed of his right to have
2 counsel.

3 Q I'm wondering when did they give this boy his
4 mother or somebody --

5 A At 10:00 a.m. the next day.

6 Q After the --

7 A After the confession.

8 Q And prior to the time he was picked up and prior
9 -- and up to the time that he made the confession and it was
10 written down, he saw nobody that was friendly?

11 A That is correct, Your Honor.

12 Q And obviously there was a reason for depriving
13 him of that; wasn't there?

14 A Your Honor, we suggest that this is the
15 situation: In 1961 -- what the prosecuting authorities of
16 Cook County had, by the way of case law to rely upon --

17 Q They had mothers.

18 A I understand.

19 Q And they knew this was a juvenile and they
20 knew it was a 14-year-old, stuttering, I guess; wasn't he?

21 A Your Honor, here is where we take strong
22 exception, if I may. There is no aspect to this case; there
23 is a record --

24 Q Well, what grade was he in?

25 A He was in the 5th grade, Your Honor.

1 Q At the age of 14. Something was wrong.

2 A Well, Your Honor, the test that Hester underwent,
3 as does anybody in 1961, and hopefully it's different today,
4 are structured for white urban colored people. (?) Hester
5 can be best judged by his dialogue with the police and the
6 trial transcript here.

7 I suggest he is not a retiring youth; he is an
8 aggressive youth. That's what the records indicate --

9 Q But he was 14 years old?

10 A He was 14, Your Honor.

11 Q And you deprived him of his family until after
12 you got a confession.

13 A Well, Your Honor, if I may, the circumstances
14 to that confession -- of how quickly that was obtained.
15 There wasn't --

16 Q And seven policemen around?

17 A There were not.

18 Q Nine?

19 A No.

20 Q How many were there?

21 A Hester was confronted at 8:00 a.m. in this
22 room by two policemen. After being questioned and interviewed
23 for 45 minutes on the school balcony by two policemen he was
24 taken into the principal's office or a sub-office. In that
25 sub-office no interrogation went on. There was no admission

1 of guilt during the 45-minute interview and Hester said,
2 "As fast as they asked me questions I gave it back to them."
3 That's your incompetent, shy, retiring 14-year-old shown by
4 counsel.

5 Q But he might be a stupid one, too.

6 A Your Honor, I don't think the record will
7 reflect --

8 Q Well, when did you bring the four police in?

9 A I will come to that. The next period, Your
10 Honor. He stayed in that room for 15 minutes with one police
11 officer. The two bring him to a Sergeant Follis and he re-
12 mains there where nothing is done. Two policemen transport
13 him to the Audy Juvenile Detention Home.

14 At that time he was left there for six hours; from
15 10 to four in custody but not in direct police custody. He
16 is never under the supervision.

17 Q When was his mother notified he was arrested?

18 A Your Honor, the record there has a problem.
19 The mother testified that two officers came at 1:30 that
20 afternoon. In other words, within a few hours after his
21 apprehension.

22 Q Four hours.

23 A Yes, Your Honor, it would be about four hours.
24 The police officers testify that actually they came a half
25 hour to 45 minutes later: 2:30 to 3:00.

1 Because, and Justice Schaefer points this out in his
2 dissent, because of objections by both sides the actual
3 testimony of what occurred with these officers; what they said
4 to the mother and what the mother said to them, was never in
5 this record. And I must be candid about that.

6 The majority of the Illinois Supreme Court conclude
7 that if the officers went to his house at 1:30, within four
8 hours after his arrest and before any confession was obtained,
9 they went to inform her. But the record is not clear on the
10 exact language used and so I don't want to make representations.
11 I'll rely only on our State Supreme Court and that's the view
12 we take, that they went to inform her in the early afternoon.

13 Now, he's left alone from 10:00 to 4:00. When I
14 say "left alone," of course he was in the custody of the Audy
15 Home, but he is not interrogated in any way. He's given a
16 medical examination and lunch.

17 At 4:00 o'clock two officers come --

18 Q Why four?

19 A Why four o'clock?

20 Q Why four officers for a five-foot -- how tall
21 was he? What does he need four for. Is there anything in the
22 record to show that they needed for?

23 A Why they had four officers at the scene?

24 There is nothing to indicate why there were four. Two were
25 from homicide; two -- I don't recall the exact area or identify

1 to --

2 Q There was nobody in the room but the four and
3 this boy?

4 A Well, at 4:00 o'clock they come. Four officers
5 confront this boy, Your Honor.

6 Q All by himself?

7 A All by himself; for five minutes. And then two
8 of the four officers leave. Two of the officers revealed to
9 Hester that certain lab tests were conducted in that inter-
10 view from 10:00 a.m. to 4:00 p.m. period. And they showed
11 results connecting him with the crime.

12 Two officers leave, and as counsel says, one of the
13 officers said, "Get it off your chest." It was in a five-
14 minute period -- that's -- all I have described occurred in a
15 five-minute period.

16 Hester starts to make a statement. It is, admittedly
17 exculpatory; he calls it an accident. And if I can just make
18 one passing mention to the kind of individual we suggest Hester
19 is and how he should be viewed.

20 Hester later -- he continued to talk to the officers
21 for approximately 45 minutes -- at five o'clock, given the
22 medical examination and left alone. So we have within five-
23 minutes of the initial contact officers, a confession; 45
24 minutes approximately of explanation and then he is left alone
25 until the Assistant State's Attorney comes, which is quite

1 often the practice in homicide cases in Cook County; an
2 assistant takes the formal confession.

3 When that confession was taken corrections were made
4 by Hester. This is the kind of corrections, for example, he
5 made: Hester would suggest where he had said, "I kicked
6 certain books going into the book room," which was the scene
7 of the murder, and changed them to "I tripped over them." I
8 think the reflections shown by the corrections in the con-
9 fession which are contained, of course, in the record, belie
10 the fact that we have the kind of individual suggested by the
11 Petitioner in his statement of facts.

12 The early 45-minute interview in the school produced
13 absolutely no admissions by Hester. And he made the statement
14 "As fast as they could ask me I could answer the questions."

15 This case, we suggest is not Haley. And Haley, Your
16 Honor, is what the State of Illinois had to rely on in 1961.
17 In Haley you have questioning of a 15-year-old in the dead of
18 night; the questioning takes five hours; there is a detention
19 in the jail; not a juvenile home; there is relay questioning
20 which were totally absent, Your Honor, in Hester.

21 There is a suggestion of brutality, because the
22 mother testified as to seeing certain evidence of blood and
23 bruises and I believe the majority opinion suggested that there
24 is a discounting of the police testimony in that case.

25 In Haley, too, you have custody in the middle of the

1 same school day; his interrogation and the words admitting
2 guilt came out within five minutes; there was a 45-minute
3 period -- an interview period preceding the arrest; he was
4 detained in a juvenile home and left alone and was interviewed
5 by two officers; no relay.

6 Q Was there any effort made to take this case to
7 Federal habeus?

8 A No, Your Honor, this case is --

9 Q I know this is on direct appeal; I realize
10 that -- direct review.

11 A No, I don't believe so.

12 Q As I listen to the arguments on both sides it's
13 the kind of an argument where you're asking us -- where we are
14 being asked to reassess the facts. I have not heard yet from
15 anybody the assertion of any principle of law that we have
16 laid down so far that was misapplied in the judgment that the
17 State Court made on this confession.

18 A No, Your Honor. We suggest that there has been
19 no misapplication of law. We feel that the law that applies
20 and the totality of circumstances test.

21 In 1962 this Court in Gallego said, "There is no
22 guide for the cases such as these, unless it's totality."
23 It is that test which we ask this Court to apply and make
24 firm the Illinois Supreme Court in its application of totality.
25 We feel that there is nothing inherently coercive about the

1 period of custody of the five-minutes from 4:00 to 4:05 when
2 the words came out.

3 In Haley and Gallegos there is a suggestion of an
4 ominous cast to the detention. We suggest that is not here.
5 It cannot be fairly said about this case.

6 We contend that when viewing this in the totality of
7 circumstances test the crucial period of custody was only five
8 minutes. The comparisons with Haley and Gallegos therefore
9 must -- the question is, indeed, unless you elevate to a
10 constitutional status the claim that any question of any type
11 is impermissible, could a Petitioner succeed in casting doubt
12 about the validity of the statements made by him during the
13 interview.

14 As to the age and the condition of the suspect, we
15 feel that the Petitioner,--while admittedly having -- when
16 reading the record reflects not an individual whose will was
17 overborne and within a five-minutes period of his questioning.

18 We suggest that calling for a per se ruling in
19 this case, which may be supported by some of the dictum in
20 Gallegos, would do great harm to the administration of criminal
21 justice. We feel that

22 We feel that if Hester's case came up today, which
23 it would not come up in the same posture because of Miranda,
24 that the Miranda warnings, together with a strict applicatio-
25 of the totality test, causeno new rule, per se, to be

1 established.

2 We feel for this case totality is the only test;
3 that totality when reviewed in the facts and in the light of
4 this case, finds this case not wanting or full of the inherent
5 coercion found in the Haley and Gallegos tests.

6 Q Did Justice Schaefer dissent on any grounds
7 except the admissibility of the confession?

8 A He did not; Your Honor. At no point did he
9 challenge the -- anything other than the admissibility of the
10 confession.

11 I suggest that the lower courts which have had
12 occasion to apply the totality rule for juveniles have not
13 found it an impossible test. Admittedly it is a heavier
14 burden; admittedly the circumstances surrounding it must be
15 found to be -- if its possibly, more closely scrutinized than
16 an adult case. And we feel that that kind of scrutiny took
17 place in this case; that the period of questioning being short,
18 the lack of inherent coercion; the fact that in 1961 the
19 prosecution authorities had Haley to rely on; Haynes was to
20 come; Gallegos was to come; that they acted properly; that
21 their actions are those of professional officers seeking to
22 solve a crime, admittedly. But in no way overbore the will of
23 a 14-year-old who was reluctant to confess.

24 Your Honor, the testimony of all police officers in
25 this case was un rebutted. We suggest that there was a finding

1 even by Justice Schaefer's dissent of no criticism of the
2 action of the officers, only speaking of the failure to a
3 proof beyond the preponderance.

4 I would conclude with this, unless the Court has
5 other questions. That society has always paid -- and this is
6 a quote from Justice Harlan's "Stiff Price for Law and Order,"
7 "peaceful interrogation is not one of the dark moments of the
8 law." We feel that the application and the calling for the
9 per se rule, number one: is totally unwarranted by the
10 Petitioner; that the facts that he alleges are not those re-
11 flected in the record and those reflected in the record do not
12 call for this case to fall under the totality.

13 Thank you.

14 MR. CHIEF JUSTICE BURGER: Mr. Kaplan, you have about
15 six minutes.

16 REBUTTAL ARGUMENT BY MARSHALL KAPLAN, ESQ.

17 ON BEHALF OF PETITIONER

18 MR. KAPLAN: Thank you. I had intended to say
19 something else, but Mr. Justice Harlan raised a point and per-
20 haps Mr. Bolton didn't say enough about the law. There is no

21 There is no doubt -- there is no doubt that what
22 it's 1961 pre-Miranda or 1969 post-Miranda, there is no doubt
23 that our premise that you cannot take a confession from a
24 boy like this. This case must be, as this Court has always
25 said in a confession case, to look to the entire record. The

1 fact that the record is so old in this case, the Court asks
2 that this case be considered on the entire record and after
3 counsel and I prepared stipulations for record designations
4 to prepare the appendix in this case, the Clerk notified us
5 that there would be no appendix. It was too long.

6 A review of each factor about this boy, when coupling
7 that with the fact that it took seven, eight, nine, ten
8 different individuals, seven policemen, a State's Attorney,
9 the head of the juvenile detention home; when you couple that
10 with the inability of the defendant; when you add to that
11 Haley versus Ohio and Gallegos versus Colorado, it's just
12 impossible to say that under conventional principles of due
13 process, just because fortuitously it happens to be 1961 in-
14 stead of 1969, that the police department didn't know that they
15 should take the confession from a 14-year-old, almost
16 imbecile.

17 If a police department in an urban center like
18 Chicago, with a population of 3 and 1/2 million; a county of
19 6 million in Cook, doesn't it know that you can't question a
20 14-year-old nincompoop without this Court telling them they
21 can't, they they don't deserve to be a police department.

22 Well, I concede that there are cases that this Court
23 has decided that may fairly have apprised prosecuting authori-
24 ties and police authorities of what the law was after the case
25 was decided, but conventional due process -- looking at

1 Culombe versus Connecticut, although there was physical
2 brutality there. Haley versus Ohio; Gallegos versus Colorado;
3 Fikes versus Alabama, Blackburn versus Alabama; every single
4 case talks about psychological coercion.

5 Now, Lee Arthur Hester can't take the punishment
6 that some big, tall, strapping fellow who's street-wise, as
7 we say and sometimes I hear in the Courthouse, that he's got
8 the "smarts." Here is a 14-year-old, living in a community
9 where he sees almost only black people; his primary association
10 with white people is in a school. Here is a boy that knows no
11 possible association at all with police, per se, where he's
12 put in a room and he's interrogated by four officers. One
13 officer could have done the job.

14 Q Counsel, are you going to tell us at some point
15 whether there is any legal question other than the confession
16 -- the involuntariness of the confession?

17 A Well, I have other points in the brief. The
18 search and seizure was improper. There was no reason to take
19 all his clothes and leave him naked, except with a smock on
20 him, which is similar to Molinsky versus New York. There was
21 no reason that they couldn't have gone before a magistrate.
22 They could have even gotten a warrant. The boy is in school;
23 they could have watched him. They took all of his clothes;
24 they hustled his clothes to a crime lab which took three or
25 four weeks analyzing the clothes and in the course of a

1 conversation with him, told him that all the evidence shows
2 that it's your blood; a hair of the lady is on your jacket;

3 Q If the arrest was -- if the detention in the
4 first instance was lawful, do you contend there was anything
5 wrong with their sending his clothes to the laboratory for
6 analysis?

7 A I do; yes; in this case.

8 Q On what grounds?

9 A They could have gotten a warrant. I know what
10 the general rule is, Your Honor, that the general rule, that
11 in a lawful arrest you are entitled to make a reasonable
12 search. I realize that. But to go to the magistrate in this
13 case would destroy the subsequent examination and interrogation
14 of this boy, because once he is before a magistrate a detailed
15 inquiry of whether this is the guy; a detailed inquiry would
16 have been made.

17 And lastly, Your Honor, that when you take this case
18 and the total absolute inability to cope with his captives,
19 plus the fact that this is an innocent boy sitting in the
20 penitentiary; that an offer of proof as to a truth serum test
21 was made and that he passed a truth serum test; that he denied
22 unequivocally that he had any knowledge of how the woman had
23 met her demise.

24 I say that when a judge in chambers is presented with
25 testimony like that, although I can't find any basis in the law

1 to admit a truth serum test into evidence, that once he knows
2 that a boy has passed a truth serum test some inquiry has to
3 be made as to whether or not the right guy is on trial. You
4 just can't bury your head in the sand and say, well, the law
5 doesn't allow the truth serum test to be admissible in evidence

6 Q Are you suggesting that if the state had taken
7 such a test and that he had contrary results, that it would
8 have been inadmissible against him?

9 A No, I don't. It would not have been admissible
10 not under Illinois law. All I'm saying is that you had to
11 live with this case. My associates and I, under the law of
12 1961 couldn't get a dime to hire competent people to come to
13 the state or people from our own state to testify as experts.
14 We spent \$12,000 trying an appeal to this case so we could
15 bring in a blood expert, a pathologist, a handwriting expert.

16 MR. CHIEF JUSTICE BURGER: Your time is up, Mr.
17 Kaplan.

18 MR. KAPLAN: Thank you very much, sir.

19 MR. CHIEF JUSTICE BURGER: We thank you for your
20 submission. Thank you, gentlemen. The case is submitted.

21 (Whereupon, at 2:10 o'clock p.m. the argument in
22 the above-entitled matter was concluded)