ORAL ARGUMENT – 10/17/01
00-1256
IN THE MATTER OF R.J.H.

STEWART: The state has presented two grounds in its petition for review. One, the first grounds relating to the legal principle involved in this case; and the second ground relates to the factual analysis that was done in this case by the CA. The sole issue in this case was the voluntariness under the federal due process clause of 9 custodial statements, oral statements made by the juvenile respondent several days after he had given an _____ written statement which was ruled inadmissible by the TC for the police officers failure to comply with the family code.

The statements in this case arose from an investigation into a burglary. The juvenile respondent was riding in a car with his adult cousin. The adult cousin was driving.

ENOCH: I'm having a hard time understanding your position. Is it that since federal due process requirements were met or rather federal due process wasn't violated in the subsequent statements, therefore, these statements don't stem from the first confession?

STEWART: My position is, under the totality of the circumstances, the subsequent statements were voluntary under a correct federal due process analysis. And that the prior statement did not play a role in the subsequent statement.

ENOCH: Okay. That's what's confusing. Your position is, if we find the subsequent statements are not violative of federal due process, then as a matter of law they don't stem from an impermissible confession under the family code?

STEWART: I somewhat agree with that. It's not necessarily that they stem from. And this was the problem in the CA's opinion. They are placing way too much reliance on the fact of the previous statement and that they are looking to see was there a connection from the statement to the subsequent statement. And what the law is in this instance is that may become a factor in your totality of circumstances analysis. It is not the due process analysis. It is not determinative or even controlling of the voluntariness question. The fact of the first statement, which is inadmissible, may be a factor in your totality of circumstances analysis.

ENOCH: And that's a federal due process concept?

STEWART: That's correct.

ENOCH: But the court could conclude that there's no federal due process violation here. Now the family code, however, says that the subsequent statements if they stem from the first statement are also inadmissible. And that's not a due process argument. That's just a statutory argument. So your point is, that the stem from somehow is a function of whether or not these

subsequent statements satisfy federal due process?

STEWART: And the family code says if you have an illegally obtained statement, you can't use it an adjudication hearing. And what we're trying to determine were these oral statements illegally obtained somehow. And did that prior inadmissible statement play a role in getting the subsequent oral statement.

ENOCH: So really the family code is meaningless because...

STEWART: Exactly. And the CA has said in the Griffin case, which is the seminal case here, that legislative bent(?) as defined in the family code as to how we're a little more protective of juvenile offenders than we are adult offenders, but the court states specifically in Griffin, a legislative bent(?) does not define the parameters of a federal due process analysis. The family code has no role in the federal due process voluntary analysis in this case. And that is one of the errors in the CA's opinion in discussing this legal principle. They have incorporated into a federal due process analysis the family code, and even cite to another one of their cases, which was a parental notification case that has nothing to do with the federal due process voluntary analysis.

BAKER: So then is the conclusion the totality of the circumstances standard of review must because of Griffin exclude the family code as a factor?

STEWART: Yes. And there is absolutely no decision in the CA based on the family code in this case. They do recognize that this is strictly a federal due process voluntariness issue. And then after that they sort of escape that legal principle, that what you look for is whether the statements were given as an act of free will, that they were voluntary.

BAKER: Well then can you make an argument that the second set of statements can't be used by using as Justice Enoch suggested, the family code scheme as your sole argument on a state basis that you can't use that statement in the adjudication here? You're saying that under Griffin you can't use the family code as a factor to determine the outcome of the federal due process review of the second set of statements. My question is, can you forget about federal due process and say we have a system of juvenile punishment, etc., and the family code requires this to be done for a confession to be valid and usable in court, and if you don't do that it's not admissible. And if the second set of statements arises out of an invalid confession under the family code, that's not usable either. Are you saying you cannot make that argument purely as a state law argument?

STEWART: Well state law is not a state law issue here. This is just a federal law issue is my first response.

BAKER: So your answer is, because in this case the only assertion is federal due process violation is not a preserved argument?

STEWART: Correct. Secondly, the family code even says a noncustodial statement can be used. And this is what we have in the second set of statements - noncustodial.

BAKER: It can say that, but it can also say that if you don't follow this process of mirandarizing before a magistrate what he says is no good whether it's oral or written.

STEWART: And that's what happened on the written statement. They didn't follow that process. That's correct. But beyond that, the family code plays no role in this analysis in this case. And that is one of the errors in the CA's analysis is that they incorporated the family code into their federal due process analysis as part of the standard. And it is not. It does not define...

JEFFERSON: What was the motion to suppress then?

STEWART: I do not recall that. As I recall, the argument was of course on the written statement that they had to take him before a magistrate and they didn't take him to a juvenile processing center. That the subsequent statements were then tainted by that. Not that there wasn't a family code violation. That there were family code violation as to the oral statements. It's just that they were somehow a result of, a fruit of the...

JEFFERSON: Well stem from. Can you give an example of when under your reasoning a latter statement would stem from a prohibitive statement because he wasn't taken before a magistrate?

STEWART: The only case I've actually found were under this cat out of the bag theory, where a statement has stemmed from a prior, is an Alabama case. I've mentioned in my brief. And the defendant said, well I already gave a statement to the police chief. I might as well give you another one. That is where stem from. Every other instance in which the cat out of the bag theory has been applied has been rejected. Even if the defendant has mentioned his previous statement.

I want to review my statement before I fill in the details and make you another one. In US v. Bayer, the 1947 SC case that used this phrase 'cat out of the bag', there that defendant said, I want to see my first statement before I give you another one. And the court there even rejected it.

O'NEILL: Do we have to get into that? In looking at the statute that everyone seems to be concerned about, subsection (b), says, this section do not preclude the admission of a statement made by the child if the statement does not stem from interrogation. I think that's where we are focusing on here. But it says, or, without regard to whether it stems from if the statement is voluntary.

STEWART: And that's what I was responding earlier. If the statement is noncustodial and voluntary it comes in.

O'NEILL: Whether or not it stems from.

STEWART: I think that is a factor if it does stem from. We don't even have established evidence that this one stemmed from. And even if it did, that would just be a factor.

O'NEILL: The way this is worded it says whether or not it stemmed from. So we don't - it strikes me that we don't need to look at so much and argue over whether it stemmed from or didn't stem from, because the statute says regardless of the stemmed from analysis, if its voluntary it's admissible.

STEWART: I would wholly agree with that.

O'NEILL: Under the plain meaning of the statute?

STEWART: Yes. The focus is under the federal due process analysis is voluntariness.

O'NEILL: And your using the federal due process voluntariness analysis to conclude it was voluntary under this exception to the stem prong of statutory requirement?

STEWART: They challenged it as involuntary under a federal due process analysis. Not necessarily under that on direct appeal. So that was nonissue.

The bottom line is is it voluntary? It doesn't matter if it stemmed from. If it's still voluntary, if there was no course of conduct, then it's still comes in.

O'NEILL: The statute appears to be worded that way as well.

STEWART: I agree. Yes. And I think that's one of the problems with the CA's opinion. They got totally focused on this cat out of the bag theory, which is basically a dead principle. And it's not even an actual valid legal principle. It was a statement in a 1947 case, that once a defendant has confessed, well he's let the cat out of the bag. It's not a legal principle. But the CA got attached to this idea that the two statements were connected, or the first statement and the subsequent statements were connected, and they couldn't get past that. And that sort of determined their due process voluntariness analysis, and that is an incorrect principle to be following. It is not a determinative factor.

One thing I want to say about the CA's opinion, again is they say official coercive conduct is irrelevant in this analysis. And that is patently false under the US SC precedent. That is the central issue in this analysis. So as Justice Patterson notes in her dissent in this case, they have created a new standard for evaluating a federal due process voluntariness issue in this case. Which is contrary to precedent, not only from the US SC, but also the CA and other CA's in this state.

Secondly, I want to address the actual factual analysis that was done in this case. The CA recognized they needed to do a totality of the circumstances test. And ostensibly that's what they did. They misstated evidence in this case. They ignored relevant factors and they ignored evidence on the few factors that they did address in this case.

And I just want to touch on a few things. One is the undeniable connection that the CA found before the first and second statements. And we sort of already addressed that. But I just want to point out that there is no evidence in this record that the initial written statement had a psychological impact on the respondent to speak again. And that is the cat out of the bag thing. That is the stem from issue in this case.

Both Griffin and Rodriguez say if there is evidence from the defendant that he wouldn't have given a statement but for the first one, then that issue, the stem from issue is raised. There was no evidence from the respondent in this case.

Secondly, the court focused on their second factor - the respondent's juvenile status. That is the extent of that analysis under that factor, that he was a minor. That is hugely misleading in this case.

The US SC has said youth is a factor in this analysis. And I agree with that. Respondent claims that I'm saying the court should not consider juvenile status in the analysis. And that is completely false. Absolutely. It is a factor. But what the courts have said is age and experience are relevant factors, not just juvenile status. That is way too limited for what's going on in this case. This juvenile was 16 years old. One year shy of being an adult. He had a 2-year old child. He was a drop out in the 8th grade. He was found riding in a stolen car with a lap full of stolen property, smoking marijuana and drinking beer with his adult cousin. He was already on probation for a criminal offense. None of that is discussed in the CA's opinion under the juvenile status. His age and his experience which is extremely relevant in this case needs to be considered and it was not in this case.

The third factor the court considered was the defendant's belief that his prior written statement would be used against him. Again, since the respondent did not testify, there is no evidence as to what he thought. None whatsoever.

In respondent's brief to this court, he denies the accuracy of the interrogating officer's impressions that the respondent thought nothing would happen to him if he made a statement. That is an inappropriate response in an appellate brief. If there were evidence for him to deny the accuracy of that, then they should have put it on at the hearing.

HECHT: Well the trial judge thought it was not credible.

STEWART: The trial judge thought that they were not credible. They said when they initially took him for questioning, they said he was just detained. They didn't think he was a suspect.

They didn't think he was in custody. And she didn't think from either of the two officers that testified that that was credible. That he was in custody when they initially questioned him.

HECHT: Once you think a witness is lying, you don't have to believe anything else they say.

STEWART: That's right. But apparently she did believe him. Because she then rules that the later statements are not a result of custodial interrogation and are admissible. And these officers were the only officers testifying, the only persons offering evidence on these issues. So as far as the custody issue in the initial detention, she didn't believe them that the respondent was not in custody. But she obviously based on her ruling did believe later that he was credible.

HANKINSON: Her findings during the hearing indicate that she said that he was not, which brings to the court the whole credibility of that particular witness in question. Her question about his credibility was not limited to just what happened when the young man was first brought into custody. Now I don't read it as narrowly as you do.

STEWART: As I recall it, it is more as the whole question of his credibility on the custody issue. And she later finds that he makes his oral statements 4 days later from his home calling the police officer that those are noncustodial and admissible. She obviously finds him credible on the evidence that's presented.

HANKINSON: Ordinarily, a TC's decision on the matter to exclude or admit this type of evidence is review for abuse of discretion. Should the CA have reviewed for abuse of discretion? There is some mention in the briefing about a de novo review because the facts are undisputed. I was a little bit confused by that in light of the credibility issues that were at play. How should this decision have been reviewed by the CA?

STEWART: I initially was confused as well. And I initially advocated in the CA that this should be more of an abuse of discretion standard because there was that credibility issue. On further study of it, I came to the conclusion that the de novo standard applied. I'm still going back and forth on that. The CA used a de novo standard. I said in my brief, I think that is proper.

HANKINSON: Why is it proper?

STEWART: Because what we have is undisputed facts in that they did not present anything contrary to what the state presented. So the judge obviously had to believe the officer or not. I mean she would have ruled them inadmissible, all the statements...

HANKINSON: But again, that's why I have some difficulty in fact conducting a de novo review since those kind of determinations have to be made when you're doing a totality of the circumstances analysis. Is there really any authority for doing a de novo review? And it seems to me it makes a difference, because then we're looking at having - if we're doing de novo review we

are going to have to make our own credibility determinations in terms of doing a totality of the circumstances evaluation.

STEWART: Except you really don't have to make a credibility determination. And I think one case that is real important on this part is a case that just came out from the CCA on June 27, Contrerras(?). It too was a juvenile case. And the question was, was the juvenile taken without unnecessary delay to a juvenile processing office? The CCA reviewed the CA's answer on that de novo. Several police officers testified and they...

HANKINSON: We've got to review the TC's decision. Isn't that what's being reviewed here?

STEWART: Actually what we're reviewing now is the CA's decision that they reversed the TC's decision that the oral statements were voluntary.

HANKINSON: And we've got to determine if that was correct or not. But in doing that we have to look at the way that the CA evaluated what the TC did. And that depends on whether or not they use a de novo standard or whether an abuse of discretion standard applies.

STEWART: And they did use a de novo standard. What you need to do in evaluating the CA's opinion is look at the very, very limited amount of evidence that they discussed in their opinion. They do not even begin to engage in a totality of circumstances analysis even though they purported to do that. There is significant amounts of evidence that is left out.

HANKINSON: Do you have any case law for using the de novo standard of review in reviewing a TC's decision to admit or exclude evidence after having made a totality of the circumstances analysis?

STEWART: Yes.

HANKINSON: Isn't that typically abuse of discretion?

STEWART: Typically it has been, but in Guzman several years ago, the CCA turned that all upside down. And I think we're all still struggling with really what are some of these proper standards. And you're seeing it in different areas. Initially it was thought maybe just in the 4th amendment arena, and of course the court extended it in Contreras(?) to the unnecessary delay question. I think I have seen it in an identification question. So cases are coming out.

HANKINSON: It seems to me it would be very difficult for appellate courts to do de novo review in those circumstances since these are evidentiary matters and the credibility of witnesses is in fact one of the issues that has to be considered as part of any of these types of determinations.

STEWART: I think why you are not making credibility determinations in this case is that this was the only evidence. It was not disputed. Even though she didn't think he was credible on

the custody issue, his evidence is not undisputed. So you don't have conflicting testimony that you have to decide which is credible, which is true, which formed the basis of the trial judge's opinion.

HANKINSON: My point is is that in doing the analysis of the totality of the circumstances there's a heavy evidentiary component to it. And because of that, there are credibility determinations that typically have to be made under those circumstances, and if that's the case then it seems to me it makes it pretty difficult for an appellate court to conduct a de novo review.

STEWART: I think what you do, you would defer to the trial judge who found these statements are voluntary, they are admissible, noncustodial.

HANKINSON: But if you do de novo review you don't defer to the TC at all.

STEWART: That's true.

BAKER: Does your argument that because the evidence in this record is uncontroverted, you don't have to make a credibility analysis including its premise, the unspoken statement, that because it's uncontroverted it must be true?

STEWART: Not necessarily.

BAKER: But the next part that you say is therefore, we don't have a credibility issue.

STEWART: I think that's what the trial judge was saying here - it was uncontroverted, but she didn't think it was.

BAKER: I'm talking about the rule that you propose on why we can answer these questions.

STEWART: On a de novo review what you're going to do is look at what facts are in the record. I don't think you have to make any credibility determinations on these facts. Just look at what was presented and do the facts support a voluntariness resolution. You don't have to really evaluate the reliability or truthfulness of any of the evidence in this case.

BAKER: In other words, because it's de novo, we just take what the record says and we make no presumption it's true. It's just there. And it adds up to what under that theory?

STEWART: In the recent case in the CCA in Contreras they took what was there and said that adds up to unnecessary delay. It's okay. There's a recent case called Ross, where there was only one witness who testified on probable cause. It was a police officer. And the court said there was probable cause. So on reviewing it, the CCA said, well that was the only witness, that was the only evidence. If it added up to, without making any determinations of whether it was true or false, if that evidence added up to probable cause, then that ruling will stand. So you look at that was the only

witness that testified, and so if believed if that was probable cause, then that ruling stands. And so you have to look at it that way. You don't decide if it's true. You just look at the evidence and go, this is the only evidence we have and if it's believed does it equal voluntariness. End of question. You do not have to evaluate yourself.

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RESPONDENT

ROBERTSON: Let me first address some of the initial questions from your honors about the statutory scheme. I believe this case can be resolved solely as a matter of statutory law under the Family Code. There is an exclusionary rule...

OWEN: What was your challenge in the CA? Was it statutory or federal due process?

ROBERTSON: They were both elements in the brief. There's a footnote in the opinion where Justice Jones says, we think it obvious, he's challenging under the due process clause. But I've never waived the 54.03(e) exclusion argument that was included in the suppression at trial. And there's been kind of a conflation of statutory and constitutional arguments. What happened was that the Griffin case leads you in to a due process analysis when you're talking about the causal connection between two statements: one statutory; and one later. In analyzing the _____ between the two, we got led into the due process, and the CA picked it up as saying it's only a constitutional plan. But in my brief to your court...

OWEN: I want to know what you specifically said in the CA? Did you say in the CA that this case turns on the statute?

ROBERTSON: Yes. Both grounds are preserved. 54.03(e) is an independent exclusionary rule that we can use to sort this out.

When due process first came to be applied to juveniles in the Gault case in 1967, the court said, the greatest care must be taken to make sure that a juvenile confession when made without the presence of counsel is not only not coerced but also not the product of fright, fancy or ignorance of rights. And the ignorance of the rights part of that phrase is really what this case is about. The legislature took that admonishment saying there is extra caution needed and created the family code protections that were circumvented in this case by the arresting officers.

51.09(5) is the requirement that before a written statement be taken from a juvenile that he first be taken to a magistrate for required warnings. That never happened. Then he is to be - if he chooses to give the statement, after the statement is made, the statute requires that he go back to a magistrate out of the presence of the interrogating officers or prosecuting attorney and out of the presence of anybody with a firearm and then the magistrate ensures that he wants to sign it, and he signs in the presence of the magistrate.

Then there's another statement. The magistrate is supposed to prepare the statement that says he believes the child voluntarily and knowingly waived his rights before making the statement. That whole determination never occurred in this case, because the child was basically subjected to adult procedures. He was taken to a detective's office in handcuffs, and they got a written statement out of him. Later he is released.

ENOCH: We're focusing on the second statement.

ROBERTSON: I agree. The second statement, however, and the reason we're here is because the second statement is inextricably connected to the first statement because _____ officer's testimony when he's describing these oral statements he says the juvenile called me and every statement was a request to "May I change my original statement?" As a revision of the original statement and it's inextricably connected and therefore it does stem from custodial interrogation.

PHILLIPS: But is stem from necessary under 51.09(b)(2)?

ROBERTSON: It says this section does not include statement if the statement does not stem from interrogation of this child. Well then it does say if the statement is voluntary. So then we are going to a voluntariness inquiry. But the legislature has also said that to be voluntary you have to have had at least in the custodial interrogation context, this education from the magistrate.

HECHT: But you don't have to have it in a noncustodial context. So it comes down to whether this was custodial or not.

ROBERTSON: I would say that except that it's not like the normal noncustodial situation where an oral omission where an oral omission comes out in the beginning of a criminal inquiry and then the cats out of the bag. It leads to a written statement. Here we have illegal custodial interrogation that lets the cat out of the bag, and then later he calls back to change it. So custody happens on the tail-end and I think that's very significant. It's a very unusual fact pattern. No one ever does this: call their interrogator back to make a change.

The respondent's position is that the connection is so strong custody is not significant because he never gets the miranda waivers due a child under the family code.

HECHT: If his second statement was voluntary it doesn't matter.

ROBERTSON: Well voluntary I believe is not the practical common sense notion here. It's a legal determination. Voluntary means you have voluntarily decided to waive your rights after being aprised of them. And since that never happened and there's no intervening miranda, there is still a _____ of rights.

JEFFERSON: How many times do you have to mirandize somebody once they've already - I mean if it was already given to him in the presence of his father during the first custodial

situation? Are you saying that the miranda could be given again every time he calls repeatedly after you know 4 days and a week later?

ROBERTSON: It's improper to export that miranda from a custodial situation when the legislature says that's not proper, when the interrogating officer is ruled not credible in whole by the TC. There is a tape recording made of that interview that was destroyed...

JEFFERSON: At this stage we're not saying that that original statement should have been admitted into evidence. I don't think that's what the argument is about. Everything is going on the latter statements. When you read the statute literally it says that if it's voluntary it's okay if it's noncustodial. Why shouldn't we just stop at the reading of the statute?

ROBERTSON: Because there's a long history of Texas case law where this statute is very strictly construed. Cases like Komer(?)...

JEFFERSON: But I'm talking about the strict construction...

ROBERTSON: I think strict means make the statute meaningful in its protections. And if the police are allowed to get a clean statement from someone by first completely ignoring the code, then an end run has been done around the protection.

O'NEILL: But it would be different if the officer had called him to followup on the illegal statement. But here the juvenile voluntarily initiated the phone call. And so under your analysis for that to be proper, the officer would have had to have said stop, we've got to go before a magistrate and I've got to give you miranda warnings just to simply correct something you said in the statement.

ROBERTSON: I do think so. Because this whole investigation is essentially botched as soon as he gets this written confession from the child...

O'NEILL: But the reason for requiring then another layer when he calls into correct, the rationale behind that is because somehow there is coercion or there's no voluntariness. And we sort of catch ourselves coming and going.

ROBERTSON: Well the cat out of the bag cases all talk about a first statement and if there is a subsequent carrier of waiver, the taint will not carryover to taint the second statement. That's true in Oregon v. _____, and Bayer and Griffin.

OWEN: Let's talk about the taint. The taint is statutory not federal. Is that correct? The only reason that you are complaining about the original miranda warning is that it didn't meet state statutory requirements? It clearly met federal due process requirements.

ROBERTSON: I think the due process test for the second statement is totality...

OWEN: On the first miranda warning.

ROBERTSON: Well those are excluded by the TC, and I don't believe...

OWEN: I'm just asking under federal law, absent the Texas statute.

ROBERTSON: For an adult yes.

OWEN: But is there any US SC law that says a Miranda warning against a juvenile has to be in front of a magistrate?

ROBERTSON: I started out with Walt because that's the US SC case that talks about the kind of protections needed for juveniles in a confession environment when there's no counsel present. And they say the greatest care that...

OWEN: I'm not talking about the confession. I'm talking about the miranda warning.

ROBERTSON: I think this relates to miranda warning. What the SC said in Walt was you have to make sure confession is voluntary, not only in the sense that it was not coerced, but in the sense that it is not the product of ignorance of rights. And every state has said that juveniles need something more than what adults need. And so if we simply say, well we exclude everything that happened in that first statement but we'll export his miranda rights and say he really did know his rights when he said something later, then we basically never educated this juvenile as to his rights when the first interrogation is custodial.

RODRIGUEZ: I want to focus on ignorance of rights. Because didn't this juvenile make the subsequent decision not to allow the officer into his home? Aren't we to impute that he had some knowledge of what his rights were?

ROBERTSON: I think if you read the record, there is a lot of speculation by the officer about the juvenile's motives. I don't know about that particular thing, how sophisticated you think he is because he doesn't let the officer in his home. But the only source of all of the information, the existence of the phone calls, the juvenile's attitude, comes from the officer that the TC did rule not credible in whole. And I think that's a perfectly valid aspect of the due process totality of the circumstances test. That's a fact that's in the trial record.

Either we have these protections for juveniles where they get this education, or we don't. And if we do, he should have had his and he didn't. So he is still ignorant of his rights. I think everything else would be speculation.

In RCS v. State, the court states the question is whether the second statement view in the totality of the circumstances is free from the coercive influences which render the first inadmissible. In applying this amorphous standard it must be _____ in mind that the term coercive

influences does not imply the presence of coercion in the normal sense. The term is clearly broad enough to include the presence of circumstances such as the failure to give the required warnings.

So I don't think the state is correct in asserting that this situation was not coercive in a sense that would allow the taint to carry over particular when there is no intervening miranda warning.

O'NEILL: Do you believe that the CA erred in just considering the juvenile status of the accused as opposed to the age and experience?

ROBERTSON: I think that if the state wanted this juvenile to be considered an adult, they could have certified the juvenile as an adult and subjection to adult procedures. Instead we're here before you because he's still a juvenile.

O'NEILL: But short of that in reviewing the totality of the circumstances - isn't that the piece of the totality, the age and experience separate and apart from whether you certify them as an adult?

ROBERTSON: I think the CA selected the elements that they considered to carry the case, which were for them the causal connection between the two statements and the _____ of evidence the state used to prove voluntariness. And that I believe is in reference to the credibility determination. All this speculation about this juvenile's mental abilities and knowledge of rights comes again from the same officer who wasn't particularly concerned with preserving this juvenile's rights and giving him fair play. That's how I read what they did when they looked at juvenile status. I think they gave him the benefit of his juvenile status.

I think it all comes down to whether or not voluntary is looked at in a very strict sense. Namely you can only give a voluntary statement if you've previously been apprized of your rights and since juveniles have these special procedures, the absence of those means that he still is technically ignorant of his rights.

I also would stress that the cat in the bag cases all fail when there's a subsequent cure of their miranda warnings. And if the TC's ruling is deferred to whereby all the statements were excluded in the first custodial interrogation those waivers are also excluded. So there's no cure to miranda warnings. So while the cat out of the bag is of limited value or a disfavored theory of due process and voluntariness, it's still alive in this particular context.

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REBUTTAL

STEWART: On the independent state ground, I was looking over at my notes from the hearing on the motion to suppress. They raised family code 51.095, about not taking the child before the magistrate. They raised 52.02, not taking him to the designated juvenile processing office. And

then they argue that the latter statements are fruit of the poisonous tree. I do not have in my notes that 54.03 was ever raised in the TC. Therefore, it would be waived.

Secondly, on the posity of evidence on the voluntariness issue, that is not based on Corporal Elder's impressions alone. The state had significant evidence on that issue. Initially that the prior statement was voluntary. It was only inadmissible because it didn't comply with the family code. It was voluntary. He had been at home for at least 4 days before respondent started calling Corporal Elder to change his statement.

O'NEILL: What do you say about counsel's argument that we should consider voluntariness as it's been sort of outlined in the family code? In other words, we're not going to consider something voluntary unless there's been proper miranda warnings and hearing before a magistrate. Only then can it be considered truly voluntary.

STEWART: I refer you back to Griffin where the CCA said Family code doesn't define voluntariness for federal due process. And that was part of the issue in Griffin that in the family code we take greater protections over juveniles than we do adults. And that might be how we do it on a state law question, but this is a federal question and the family code does not define the federal issue.

ENOCH: And it's a federal question because the state law in question wasn't preserved in the CA?

STEWART: Correct. And also on 54.03, again it's an exclusionary rule. So you have t determine that the oral statements were illegally obtained and then you would apply it to exclude it. So I think he's kind of putting the cart before the horse. We have to determine were the oral statements illegally obtained, were they involuntary. And then you would say under 54.03, we don't use it.

ENOCH: If the state law claim applied, if the family code applied, could a juvenile walk in to a police station and confess to a crime, and that confession be admissible in evidence?

STEWART: I think so.

ENOCH: Not before a magistrate. Not in writing. That could be?

STEWART: Not in custody. Total voluntary statement. Walked in on his own accord, not in custody, can make that statement. Yes.

OWEN: Do you think the miranda warning that was given while he was in custody met federal due process requirements for juveniles?

STEWART: Yes, I do. There is no special miranda _____ for juveniles. What the SC

looks at is we look his youth, and how all the factors play into that. In a situation where we have an adult, if all the factors were the same and you had an adult and a juvenile, you would look at the juvenile and look at his youth and maybe give him a little more protection than the adult. But the miranda warnings are the same. The only thing that was wrong with that written statement is they hadn't taken him before a magistrate.

OWEN: It's a state law question.

STEWART: Exactly. Back to the evidence on the voluntariness. He was not in custody. He was in his home. He called Det. Elder several times, not just once, several times. He also, in conjunction with these statements, I want to change my statement to exonerate my adult cousin. He also said, I want to help you find some of the stolen property that we took. The CA never even addresses how those statements work into this whole equation. There are these other statements out there that are not even addressed. But his made on his own. I know where some stolen property is. I'm going to help you find it. And that goes to your comment Justice Rodriguez about Elder coming to his home and respecting his wishes not to come in. He had called Elder and said, I'll help you find this ring. It was of great value to one of the victims. And he said you come to my house. And he said, Okay I'll take it. No questions asked. And when Corporal Elder got there he said I don't want you coming in. So he was very respectful of the respondent's rights. But respondent also clearly was aware of his rights.