ORIGINAL

In the

Supreme Court of the United States

ALAN MACKEY, REGISTRAR OF MOTOR VEHICLES OF MASSACHUSETTS,	)	
APPELLANT,	)	
V.	)	
DONALD E. MONTRYM, ETC.,	)	No. 77-69
APPELLEES.	)	

Washington, D. C.
November 29, 1978

Pages 1 thru 63

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IN THE SUPREME COURT OF THE UNITED STATES

ALAN MACKEY, REGISTRAR OF MOTOR VEHICLES OF MASSACHUSETTS, Appellant,	:	
v.	:	No. 77-69
DONALD E. MONTRYM, ETC., Appellees.	:	

Wednesday, November 29, 1978
Washington, D.C.

The above-entitled matter came on for argument at 11:27 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MITCHELL J. SIKORA, JR., ESQ., Assistant Attorney General of Massachusetts, Department of the Attorney General, 2019 McCormack Building, One Ashburton Place, Boston, Massachusetts 02108; on behalf of the appellant.

ROBERT W. HAGOPIAN, ESQ., c/o Orion Research, Inc., 380 Putnam Avenue, Cambridge, Massachusetts; on behalf of the appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-69, Mackey against Montrym.

General Sikora, you may proceed whenever you're ready.

ORAL ARGUMENT OF MITCHELL J. SIKORA, JR., ESQ.,

ON BEHALF OF THE APPELLANT

QUESTION: Mr. Attorney General, before you begin, is this the only brief you've filed in this Court? This proof here?

MR. SIKORA: No, Your Honor.

QUESTION: Sir?

MR. SIKORA: No, sir.

QUESTION: Well, I don't have it. I'm talking about a jurisdictional statement. I'm not talking about that.

This jurisdictional statement, is this all? Did you ever file a printed one? This is just a proof here.

MR. SIKORA: I'm at a loss, Your Honor. Here is our jurisdictional statement, printed.

QUESTION: Is it? Is it just clipped at the top here?

MR. SIKORA: No, sir. It's a regular printed --

QUESTION: Fully bound?

MR. SIKORA: Yes, Your Honor.

QUESTION: Apparently it didn't reach some of us.

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QUESTION: Because I never did get page 17. 17A I don't have. Well, okay. We'll find one.

MR. SIKORA: I apologize to the Court.

I apologize, Mr. Justice Marshall. We will investigate the problem and supply the Court with --

QUESTION: We'll make inquiry also. But we do, perhaps, need that page which is missing from all the copies here.

QUESTION: It's an opinion of the court.

QUESTION: This isn't -- what we have here isn't the printed version.

QUESTION: It's printed.

QUESTION: It was filed way back in July. I would have supposed the printed version would have been here long before this.

MR. SIKORA: That's correct, we -- jurisdictional statement, I believe.

I'm nonplussed. I apologize.

MR. CHIEF JUSTICE BURGER: Very well. We'll pursue it, Mr. Sikora.

You may proceed.

MR. SIKORA: Thank you, Mr. Chief Justice.

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

This is a procedural due process case. It arises from a section 1983 class action challenge to the Massachusetts

w 5 implied consent highway safety law.

It comes to this Court on direct appeal from a decision of a three-judge district court holding that law unconstitutional on its face.

Implied consent laws, in force in all 50 states, typically provide that a person arrested on a charge of drunken driving must submit to a chemical or breath analysis test or else accept a temporary license suspension for his refusal of that test.

The general question presented today is whether the states must provide a driver with a hearing at which he can dispute the facts of his refusal prior to the suspension of his license.

After describing the operation of the Massachusetts law and the particular facts --

QUESTION: Is it a refusal to take the test?

MR. SIKORA: Yes, Your Honor.

QUESTION: It was my understanding from the record, though I realize I may be wrong, that the appellee in this case had actually requested the test himself.

MR. SIKORA: He requested it subsequent to refusing it, upon his arrival initially at the station.

QUESTION: He refused the first one, and about 15 minutes later asked for it. Wasn't that what the record shows?

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MR. SIKORA: Yes, Your Honor. 22 minutes later.

QUESTION: 22 minutes? But it was 50 minutes after the events.

MR. SIKORA: That's correct. 52 minutes after the accident, and 22 minutes after the arrival at the station.

The police did refuse it." His attorney in the interim had arrived at the station and had consulted with the driver, and apparently, there was a change of mind.

QUESTION: How much difference does 22 minutes make in the effectiveness of the test?

MR. SIKORA: It's hard to say, Your Honor. Some states have suggested that 30 minutes is a reasonable block of time from the arrival at the station house.

However, since that would vary according to the time it had taken to get to the station house from the scene of the accident, it's very difficult to say, at least with any scientific knowledge, what time span renders the test, in effect, inaccurate.

QUESTION: Well, what about any time span from the time of the accident? That -- how soon from the time of the accident must it be taken for it to be effective?

Do we know?

MR. SIKORA: I don't, Your HOnor. I don't. In this case it was 52 minutes from the approximate time of the accident.

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QUESTION: Didn't the second time -- the state refused to give him the test; is that right?

MR. SIKORA: That's correct.

QUESTION: Why?

MR. SIKORA: The police officers apparently made a judgment that the time span now, between the moment of arrest and the moment of request had become too long for an accurate reading.

That, at least, was their subjective judgment.

QUESTION: I thought that was what my brother Blackmun's question was, as to how long is it before a reading will not be any good.

MR. SIKORA: I don't think we can say with any scientific objectivity to the Court with any information from the record that we know of a precise time.

It does appear that the police in this case, in their judgment, made a judgment call that 52 minutes was too long.

QUESTION: So the final judgment in this case was 52 minutes after, the government said, we won't give you the test.

MR. SIKORA: 52 minutes after the accident the police refused the test.

QUESTION: Refused to test him, and as a result of that he lost his license.

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MR. SIKORA: They had originally offered it 30 minutes after the test, and he refused.

QUESTION: Does the record tell us whether the police will delay long enough to let the driver call an attorney and ask for advice?

MR. SIKORA: The record does not, Your Honor.

I would think again that there's an irreducible amount of police discretion. If an attorney arrived soon after an individual came to the station, chances might be better.

QUESTION: Would it be a refusal, for example, for a driver to say, I'd like to call my lawyer before I take the test. And then, say, take maybe 25 minutes talking to the lawyer on the phone, and then come back and say, yes, I'll take it, and the police officer say then, we'll it's too late now, you already refused?

Would that be a refusal or not?

MR. SIKORA: I would say that that hypothetical would not be a refusal. It would not be a refusal. I think -- it would be an accommodation.

QUESTION: It's pretty much what happened here, isn't it?

MR. SIKORA: No, he outright refused the test at first.

QUESTION: But if he'd just said, I don't want to do it until I talk to my lawyer, and then take 25 minutes to

get the legal advice.

MR. SIKORA: I see. I think the key factor is always going to be the length of time between the accident and the --

QUESTION: So if it takes 25 minutes to get legal advice, that's a refusal?

MR. SIKORA: I would think so.

QUESTION: Is it possible that as a medical matter, as a scientific matter, that it might make a difference not only in the lapse of time but whether he'd had a pint of bourbon or a quart of bourbon or only two ounces of bourbon.

Two ounces might reasonably -- the manifestations of two ounces might disappear fromthe bloodstream much more quickly than a pint or a quart.

MR. SIKORA: My instinct is to agree with that assessment your Honor.

The -- and perhaps that is his one more good reason for drawing hard and fine lines in this situation and perhaps having a time limit.

I must concede that the police here were operating without hard time limits, and that they made a subjective judgment about the driver's condition in refusing the test when he requested it after 52 minutes from the accident.

QUESTION: Is there anything in the record where the police explained this?

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MR. SIKORA: No, Your Honor.

QUESTION: Why they did not give him the second time? Nothing in the record on that. I couldn't find it.

MR. SIKORA: No, Your Honor. And that brings me, perhaps, to one of the pervasive features of this case. And the case would be very respectable as applied challenge to the statute because these facts show that the administration of the statute was not efficient.

However, the plaintiff has chosen, and has actually foregone opportunity to press an as-applied argument, and has chosen to attack the statute on its face, saying that in all situation, the statute is unconstitutional.

The performance of the police and the registrar here is not typical, we submit. The parties have washed out in a statement of the agreed facts, many of the particular equities of the case, and have decided to focus on the major issue of whether a hearing must invariably be prior rather than subsequent.

After describing the operation of the Massachusetts law and the particular facts of this case, we argue that the statute does satisfy due process under the Court's three measurements for a prior hearing.

Those are: the value of the private interest taken by the government -- here, a driver's license; the risk of a mistake in the taking of the interest without a prior hearing;

w 11 and the public purpose for which the government is acting.

The Massachusetts law requires the police officer arresting the person for driving under the influence to offer that person a chemical breath--a chemical or breath analysis test. The officer must inform the driver that the refusal of the test will result in a 90-day license suspension.

If the driver still refuses the test, the officer must immediately prepare a written report of refusal. This is possibly another factor in the police reluctance to give the driver a second chance if they do immediately perform that paperwork, they must at least throw it away or back up and do the paperwork again.

The police officer receiving the refusal must sign it under the penalty of perjury, and he must forward it to the registrar of motor vehicles immediately.

In turn, the registrar must impose the90-day suspension by immediate notice, directing the driver to surrender his license at the local registry office.

There is no discretion left in the joints of the statute. Each of these requirements is mandatory.

At the time of the surrender, the driver can request an immediate hearing to dispute his refusal of the test. That hearing will begin on the same day as surrender if at all possible.

In this particular case, Donald Montrym's car

w 12 collided with a motorcycle. About 15 minutes after the accident police arrived, arrested him, and charged him among other offenses with driving while intoxicated.

They accompanied him to the station house, and at that point we had the initial refusal, and an officer executed the report of the refusal.

Montrym claims that his refusal was not informed. He says that he was not informed of the suspension penalty and refused on that ground.

The remaining facts are undisputed. Police did execute the report. The registrar suspended Montrym. And subsequently a state trial court dismissed the drunken driving charge on the ground that the police had refused his subsequent request.

Montrym's attorney informed the main office of the registrar of the Court result. The registrar answered that the license had already been suspended and must be surrendered. Montrym did surrender the license, but for some reason did not request a surrender day hearing.

Instead, he took an administrative appeal from the suspension, but before the completion of the administrative process filed the present class action.

QUESTION: Well, what sort of administrative appeal did he take?

MR. SIKORA: Within 10 days from any action of the

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registrar, a driver may appeal for a de novo evidentiary hearing before a board of appeal presiding over the registrar's action. That board in turn will schedule a hearing.

Here, Montrym would have had a hearing several weeks into his suspension. One was scheduled when he brought this action.

QUESTION: Did he ask for that sort of a hearing?

MR. SIKORA: He did.

QUESTION: And is there any review of that board's findings?

MR. SIKORA: Yes, Your Honor. There's review by the state trial court of the administrative board of appeals.

QUESTION: Superior Court?

MR. SIKORA: Yes, sir.

QUESTION: And what was the board's decision onthe appeal?

MR. SIKORA: The board never reached it, Your Honor.

QUESTION: Because the -- this lawsuit was --

MR. SIKORA: That's correct.

QUESTION: Well, I don't mean to ask you an "iffy" question, but you said that he'd been acquitted for whatever reason of the drunken driving charge?

MR. SIKORA: Yes, sir.

QUESTION: Would that have resulted almost automatically in the administrative appeal resulting in the

restoration of his license?

MR. SIKORA: We think so.

More importantly, we think a same-day hearing would have had the same result. That is, if he had brought with him the court disposition or a certified copy of the court disposition to the surrender day hearing, a registry hearing officer would have immediately reinstated his --

QUESTION: So he preferred just to be a hero in the lawsuit, and knock out the statute lock, stock and barrel.

MR. SIKORA: I believe my -- I don't want to impute motives to my brother's reason for bringing the suit.

QUESTION: Perhaps we'll ask him.

QUESTION: Mr. Sikora, this may be irrelevant, but is there any period of time between actual formal suspension and the formal surrender of a license?

MR. SIKORA: There is, Your Honor.

QUESTION: So that a man could be driving with a license that has been suspended even though it's still in his possession?

MR. SIKORA: That's correct. Conceptually, the license is suspended at the time the registrar signs the notice of suspension and puts it in the mail. Typically, it will arrive within a day or two. The driver is literally informed that his license has been surrendered, and that he must bring the surrendered license to the registry.

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QUESTION: Mr . Sikora, I missed something. I'm just -- hate to acknowledge my -- haven't done it. But you said if he had had the one-day, same-day hearing, there may be appeal, and brought in the acquittal on the drunk driving charge, he would have gotten his license back?

Is that what he said?

MR. SIKORA: Yes, Your Honor.

QUESTION: Well, why wouldn't he still have had to give it up for 90 days for refusing to take the test? I don't quite understand that.

MR. SIKORA: Well, the finding of the state criminal trial court would have -- would have been binding upon the registrar, we think. And it is the kind of relatively simple --

QUESTION: In other words, the finding that he wasn't driving while intoxicated?

MR. SIKORA: No, Your Honor. That was a finding under a state statute; the trial judge dismissed the charge on the ground that he had been denied a chance for exculpatory evidence through the test.

QUESTION: Well, I still don't understand why he was denied -- they would refuse to let him take it. But he had still previously refused to take it himself. I don't understand why he still wasn't required to be suspended for 90 days.

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MR. SIKORA: I see. I think the answer is, Your Honor, that the refusal would have been vitiated by the state trial court's finding.

QUESTION: Well, how do we know that?

MR. SIKORA: Well, that is the law and custom in Massachusetts, if I may represent it, that this is --

QUESTION: The law and custom is that when there's an initial refusal, and then a request to take it and it's turned down, then that vitiates the initial refusal?

MR. SIKORA: No, Your Honor.

QUESTION: I didn't think that happened very often.

MR. SIKORA: No, Your Honor, if there is a finding by a state trial judge that the individual had been denied a fair chance to take the test, then his initial refusal washes out.

QUESTION: And there's a custom that that happens often enough so you can tell us there's a custom that that kind of finding is regularly honored by the hearing officer?

MR. SIKORA: Yes, Your Honor; by the registrar. So that if he had brought a copy of his court disposition to the same-day or surrender hearing, his license would have been reinstated.

QUESTION: And what precisely was the court disposition?

17 MR. SIKORA: The charge was dismissed on the ground that the driver had been denied his request to take an exculpatory breathalyzer test within 20 minutes after arrival at the station.

QUESTION: And what was the charge? Drunken driving?

MR. SIKORA: Yes, among several --

QUESTION: Driving to endanger?

MR. SIKORA: Yes.

Our --

QUESTION: Driving to endanger or under the influence?

MR. SIKORA: Yes, there was driving under the influence, driving to endanger, and driving without a license.

QUESTION: Well, let me just follow this up for a moment.

If what you're telling me correctly reflects the state practice, it means that a driver has a right when he comes to the station, refuse, wait 20 minutes, and say, now I'd like to take an exculpatory test. If they don't give it to him, he has a right -- they can't suspend his license.

That's what you're telling me is the custom, as I understand it.

MR. SIKORA: The custom, I think, Your Honor is that if a judge decides in the circumstances that a driver has been denied a fair test --

QUESTION: But he presumably is interpreting the

kw 18 law of your state when he's so deciding.

MR. SIKORA: Well, we don't have -- we don't have an absolute timespan incorporated into a statute, so that there is discretion provided in the trial judge's judgment.

The trial judge here receive evidence about this incident, and decided that the individual had --

QUESTION: But you're telling me that as a matter of Massachusetts' law on this record there was no refusal and that's why the statute is unconstitutional as applied in this case.

There was no refusal because there was a subsequent request for an exculpatory test which the police denied which vitiated the initial refusal.

So on this record there would not be a refusal as a matter of Massachusetts law?

MR. SIKORA: Well, I hesitate to say as a matter of Massachusetts law. As a matter of the trial judge's application --

QUESTION: But you told me that that is a consistent application; that we can be sure that the administrator would have recognized as the law.

MR. SIKORA: That's correct.

QUESTION: So the question of when a refusal takes place is not really just a yes or no question in all circumstances?

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MR. SIKORA: No, it's a very circumstantial question, Your Honor.

QUESTION: It's a question that's left entirely to the discretion of the police as a pre-suspension matter.

MR. SIKORA: Initially to the police and ultimately to a trial judge.

QUESTION: But in any event in this case it was held that there was no refusal.

MR. SIKORA: That's correct; that's correct.

QUESTION: Then why do we have a case at controversy here?

MR. SIKORA: Because instead of an as-applied attack on the statute, we have here an --

QUESTION: Well, any attack. If there was no refusal in this case by the respondent, that's been found by the Massachusetts court, why could he make any attack on the statute, on its face or as applied or anything else?

QUESTION: I suppose the answer is because the statute resulted in the denial of his license.

MR. SIKORA: As a practical matter, the -- because he forewent the same-day hearing, he did not get his license back and continued to be inconvenienced by the --

QUESTION: For how long?

MR. SIKORA: 28 days.

QUESTION: Is his statute -- is his license in the

kw 20 state of suspension still or not?

MR. SIKORA: No, no. It was returned at the outset of the lawsuit.

QUESTION: So that the question presented in your brief, whether a statute imposing a uniform, temporary suspension of a driver's license for his refusal to take a chemical or test or so on, violates the due process clause.

Well, a uniform suspension was not imposed in this case; a 90-day suspension was not in fact imposed.

MR. SIKORA: It was. It was, Your Honor.

QUESTION: In fact was it? Was his license suspended for 90 days?

MR. SIKORA: It was, by the registrar.

QUESTION: In fact, it wasn't. On net balance, it wasn't, was it? He got it back, you just told us in 28 days.

MR. SIKORA: Yes, as a result of this lawsuit.

QUESTION: As a result of a finding that he did not in fact refuse to take the test; isn't that correct, under the circumstances of this case? He did not refuse?

MR. SIKORA: No, I think that the federal district court viewed the statute almost initially as unconstitutional.

QUESTION: I'm just talking about the Massachusetts courts in this case.

MR. SIKORA: I see.

QUESTION: Did the registrar act in conformity with

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the district court's order or the Massachusetts court's order?

MR. SIKORA: The district court's order.

QUESTION: The district court ordered the reinstatement at the end -- so that he got it back in 28 days, is that it?

MR. SIKORA: Yes, Your Honor. It's part of a temporary restraining order in this case.

QUESTION: Right. Which was issued, I gather, on the filing of the complaint ex parte, or what?

MR. SIKORA: I think -- yes, issued shortly after the filing of the complaint. And the registrar, at our suggestion, assented to the return of the license.

QUESTION: Well, he was ordered to return it, wasn't he?

MR. SIKORA: Yes.

QUESTION: But the order of the court held the statute unconstitutional on its face?

MR. SIKORA: It did, Your Honor.

QUESTION: And that's what before us?

MR. SIKORA: That's correct.

QUESTION: It's your position that that's all that's before us; that's your position?

MR. SIKORA: That's correct.

The parties in the district court have analyzed this case under the three prior hearing criteria announced

kw 22 in Matthews v. Eldridge and applied in Dixon v. Love.

The first factor is the magnitude of the private interest. Since Bell v. Burson it has been settled that a person's interest in a driver's license requires some kind of hearing for its deprivation.

However, the timing and the thoroughness of the hearing vary according to the risk of error and the strength of the public purpose served by a license suspension.

In Dixon, the court concluded that the license interest was not so great as to require us to depart from the ordinary principle established by our decision that something less than an evidentiary hearing is sufficient prior to an adverse administrative action.

The court went on to weight the chance of error and the public interest served by the Illinois habitual offender law and decided that a subsequent hearing, typically one more than 20 days after suspension, was constitutionally sufficient for the usual driver in Illinois.

By contrast, the Massachusetts system affords a hearing opportunity often able to begin on the same day as the license surrender.

Even if one takes the pessimistic view of the driver's brief that a complete hearing opportunity will consume 7 to 10 days of the suspension time, the figure is drastically less than the post-suspension time permitted in Dixon.

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The second factor in the court's decisions has been the risk of an erroneous license suspension. The Massachusetts statute builds in a number of safeguards against this possibility.

An officer must offer the test and inform the driver of the 90-day suspension for its refusal in the presence of a witness. Upon refusal, he must immediately execute under penalties of perjury the report of refusal, which must in turn set out probable cause for the original arrest, the fact of the arrest, and the driver's refusal of the test.

In addition, the witnessing officer and the superior officer to whom he is accountable must endorse the report before its transmission to the registrar.

QUESTION: What was there about the appellee's conduct at the time ofthe accident that prompted the officers to say you should take the test?

MR. SIKORA: There were four symptoms, Your Honor. There was the odor of alchohol; the glassy eyes; slurred speech; and one, in particular, the final one, was that his footing was so shaky that he had to hold on to a street sign to maintain his balance.

QUESTION: Now does the statute require some kind of probable cause before the officer may require or suggest that he take the test?

MR. SIKORA: It does. The arrest, the underlying arrest, must be a valid arrest before the test is put tothe

kw 24 individual.

QUESTION: Yes, but -- must there be something in the way of a showing of probable cause to believe that he is under the influence, driving to endanger, something like that?

QUESTION: Either that or you couldn't arrest him.

MR. SIKORA: That's correct. The officer must set out the grounds of probable cause in his report of refusal to the registrar.

QUESTION: Well, what if he was just arrested for speeding and there was nothing about him that suggested one way or another on being drunk? Could they make him take the test then?

MR. SIKORA: Not properly, Your Honor.

QUESTION: There must be probable cause to believe he was under the influence?

MR. SIKORA: That's correct, sir.

QUESTION: But there must be a valid arrest for driving under the influence?

MR. SIKORA: That's correct, as a predicate for taking the test. And then this report of refusal, I think, is intended to assure that initially --

QUESTION: And the witness that's required, does he have to be a witness just to the refusal -- I guess he does -- to the refusal to take the test, or to the behavior at the time of the accident?

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MR. SIKORA: I think only to the refusal, Your Honor. I think most typically if police are patrolling in pairs, usually the partner becomes the witness.

However, the test is often not until they are back at the station house.

QUESTION: And the only offenses charged here were related to drinking, weren't they?

MR. SIKORA: That's correct.

QUESTION: And not connected with the accident. It was only --

MR. SIKORA: No, Your Honor. The only extraneous offense was the --

QUESTION: Because driving to endanger is not only an offense -- I know Massachusetts -- for driving while under the influence. You may drive to endanger in other circumstances.

MR. SIKORA: You can be sober and driving to endanger, yes, sir.

The driver has criticized the report of refusal as a mechanical checklist. But in particular, this narrative description of the grounds constituting probable cause we think guards against the kind of one-sided form affidavit that would be suspect.

And of course it again ties into an effort to prevent anerroneous taking.

QUESTION: So I gather really the state's argument

w 26 here is, certainly he's entitled to due process, and he gets it all, notably on probable cause in the first instance; and then he may take an administrative appeal and get a trial de novo. And meanwhile, his license may be suspended, but he's entitled to a complete hearing --

MR. SIKORA: That's correct.

QUESTION: -- within a reasonable period of time.

MR. SIKORA: That's correct.

QUESTION: Is that it?

MR. SIKORA: That's correct.

QUESTION: And that all adds up, you submit, to plenty of due process.

MR. SIKORA: Yes, in the circumstances, this is an adequate hearing.

If there is one crucial feature that makes our statute constitutional, I would submit it is the surrender hearing. And the surrender hearing, in particular, is a fairly thorough proceeding.

QUESTION: And how soon can he get that?

MR. SIKORA: The day of surrender typically.

QUESTION: And the notice of suspension tells him?

MR. SIKORA: What?

QUESTION: As to the day of surrender?

MR. SIKORA: That he must surrender his license forthwith.

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QUESTION: And to tell him what day?

MR. SIKORA: Forthwith.

QUESTION: Doesn't fix a day; just forthwith?

MR. SIKORA: He is supposed to sprint, I think, to the local registry office with the license.

QUESTION: I see. And where does he get the hearing?

MR. SIKORA: At the registry office. There are hearing -- altogether there are 35 --

QUESTION: But at least he has a chance there to tell his side of the story. But he can't get witnesses if it's going to take any time.

MR. SIKORA: The surrender hearing does permit him to be represented by counsel, to introduce evidence on any of the issues concerning refusal, and to cross-examine witnesses.

Furthermore, the surrender hearing will be continued if he requests it to be continued.

QUESTION: But his license will be suspended?

MR. SIKORA: In the meantime.

QUESTION: Yes.

MR. SIKORA: It is.

Now, my brother criticizes the surrender hearing because it is by nature a post-suspension hearing. But he concedes that typically -- and I believe he looks at the

kw 28 statute most pessimistically -- that typically it is a seven to ten day process.

And we submit that if you compare this time span with the time span in Dixon v. Love, which was at best 20 days, it compares very favorably.

QUESTION: Of course, the difference is, in Dixon v. Love you'd already had your judicial determinations that the man had violated the law several times.

MR. SIKORA: That's correct. That is the main distinction of Dixon v. Love. We think it's mitigated by these three factors: first, the relative speed and thoroughness of the surrender hearing. We think that it comes usually more quickly than seven to ten days.

Secondly, we have the same kind of public safety purpose at work in this case as we did in Dixon v. Love.

And finally, the magnitude of the deprivation, again, a seven to ten day deprivation as against a 20 or more day deprivation in Dixon v. Love.

QUESTION: Does the statute require that it be completed in seven to ten days?

I don't find the statutory description of the same-day hearing in here.

MR. SIKORA: It does not, Your Honor. It -- the statute simply requires that there be a hearing. It is stipulated by the parties that in administering the statute

kw 29 the registrar had set up this same-day process.

QUESTION: And the seven to ten days results from the fact that sometimes you have to allow time for the police officer to come in and tell the other side of the story, I suppose.

MR. SIKORA: That's correct.

This particular -- the surrender hearing is particularly suited to correct obvious mistakes. And we submit that this case was a paradigm example of an obvious mistake.

It is going to take a few extra days if there are serious issues about probable cause, and police must be cross-examined. But the process, the seven day to ten day process, is practically an adjudicatory process, an evidentiary process. It is not simply an opportunity for the driver to tell his side of the story or ask for a break.

QUESTION: Let me ask you a rather basic -- how would the state interest suffer if instead of this procedure they said -- it made a rule to show cause, so that if you show up in five days or six days, whatever, at the hearing officer's office, and unless you have good cause for saying there was no refusal or no probable cause, your license be suspended.

And then you had the same -- everything else exactly the same. How would the state interest suffer if you did it that way?

MR. SIKORA: We think that very few people would

30 take the test, and that everyone would seek the hearing.

When the statute was enforced, approximately one out of three people arrested for drunken driving still resisted the test and we think that that percentage would --

QUESTION: Why -- you mean they would refuse the test because of the fact they're going to keep their license for five days instead of having it suspended forthwith?

MR. SIKORA: No, I think they -- there's a reflexive reaction to the inculpatory nature of the test. If someone is marginally intoxicated and confronts the breathalyzer, I think there is a reflexive resistance to it and hope that in some way, with an intervening hearing, they will be able to ward off any kind of suspension.

QUESTION: But you say that you give them that hope now. YOu give them a hearing, except that the only difference is it's going to be suspended definitely for at least three or four days.

MR. SIKORA: That's right.

QUESTION: Why wouldn't it be equally definite as far as the 90-day suspension if you just say, well, we won't have the suspension take effect until the same-day hearing?

And most people, I suppose, don't have any real answer if they refuse, they refuse.

MR. SIKORA: I think it's the immediacy and the certainty of the suspension that have --

QUESTION: The difference between immediately and three days later?

MR. SIKORA: Well, hopefully three days later. But I think the typical driver is going to feel that if he can avoid the test for the time being, and its incriminating evidence, and come up with some kind of help before he shows up for a hearing, he will somehow be able to avoid drunken driving charges.

QUESTION: The hearing officer may be more lenient than the police officer, I suppose.

MR. SIKORA: Possibly. But it's the immediacy, its the fact that you are suspended immediately that we think is crucial.

I see my time is up.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well.

We'll not ask you to fragment your argument. We'll have you ready to go on at 1:00 o'clock.

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Hagopian, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT W. HAGOPIAN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. HAGOPIAN: Good afternoon, Your Honor; may it please the Court:

I would like initially to straighten out some of the facts in this case before proceeding with my argument.

First of all, Mr. Montrym was stopped at 8:30 p.m. on the evening in question, and he was brought to the police station at 8:45. At that time he refused the breathalyzer. His attorney showed up five or ten minutes later. And at 9:05 he alleges in his affidavit that he wanted to take the breathalyzer test, which was, at the most, 35 minutes fromthe time of the accident, and approximately 20 minutes from his initial refusal.

Now --

QUESTION: I calculated on the record as precisely 30 minutes, but it doesn't make all that much difference.

MR. HAGOPIAN: Yes, Your Honor.

But there was some talk about 52 minutes here when my brother was up here this morning, and I wanted to clarify that. That clearly is out of the question.

From the time of the accident -- not the time when

33 he was first asked about the breathalyzer test, there are statutes in other jurisdictions that hold up to 30 minutes from the time that the person is read his rights. And clearly Montrym was within that. Because at least according to the findings of fact by the district court judge, that's the first point that I wanted to clarify.

QUESTION: How is that before us, when you only are interested in on the face?

MR. HAGOPIAN: Well, I don't think it is, Your Honor. But I want to point out that this man --

QUESTION: Your case, you have withdrawn everything except on the face?

MR. HAGOPIAN: Oh, no, Your Honor. We still reserve as-applied. I mean, it's conceivable the statute --

QUESTION: Where did you reserve it?

MR. HAGOPIAN: Well, when we brought our original motion for summary judgment, I believe we asked the court to examine both questions, the issue of constitutionality on its face, because it was a class action, and as applied to Mr. Montrym.

There was a case last term that was handed down by this Court that held that if a man doesn't at least colorably assert a claim of innocence, the fact that his procedural due process rights are violated is not an independent claim. That was a per curiam opinion. ANd I don't know what the

implications of that opinion are.

But we want to clearly assert that Mr. Montrym was innocent. He is asserting a claim of innocence in this particular case. He was an innocent man, and that's what the due process clause --

QUESTION: You question the fact that the state refused to give him the test?

MR. HAGOPIAN: No.

QUESTION: You abandon that?

MR. HAGOPIAN: He was refused -- the state did --

QUESTION: Have you abandoned that point or not?

MR. HAGOPIAN: Well --

QUESTION: Did you abandon it in the lower court?

MR. HAGOPIAN: He initially --

QUESTION: Because the opinion in the lower court, the judgment says, the statute is unconstitutional on its face.

MR. HAGOPIAN: That's correct, Your Honor. As far as I'm concerned, Montrym's case is irrelevant to the -- at least on a facial attack, it is irrelevant, other than the fact that he asserts a claim of innocence.

Whether he was innocent or not is irrelevant.

QUESTION: Mr. Hagopian, unless I wholly misapprehend the issue in this case, this statute doesn't have anything to do with guilt or innocence, but merely about -- has to

w 35 do with whether or not he refused or didn't refuse to take a breathalyzer test.

MR. HAGOPIAN: That's correct, Your Honor.

QUESTION: Nothing about guilt or innocence.

MR. HAGOPIAN: That's correct.

QUESTION: Just that fact.

MR. HAGOPIAN: Well, when I say innocent, I didn't mean innocent of the substantive crime. I meant innocent of the fact that he didn't refuse.

QUESTION: Well, if he didn't refuse to take the test, then the statute is wholy inapplicable to him.

MR. HAGOPIAN: That's --

QUESTION: That's correct, is it not?

MR. HAGOPIAN: That's correct, yes it is.

QUESTION: Right.

MR. HAGOPIAN: Well, I'm not so -- excuse me, I take that back, Your Honor. No, that's not true. Because the police officer alleged -- when the police officer sent the report to the registry, that's what created the cause of action in this case. The police officer asserted that he refused to take the test. And --

QUESTION: Excuse me. That's the whole point of your attack, isn't it, that even if he did not refuse, if a police officer says he does, and he never gets a hearing on it, the statute causes him to lose his license?

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MR. HAGOPIAN: Correct, Your Honor.

QUESTION: That's why you say it's unconstitutional?

MR. HAGOPIAN: That's right.

QUESTION: This was decided on summary judgment?

MR. HAGOPIAN: Yes it was, Your Honor.

QUESTION: In your favor?

MR. HAGOPIAN: Yes.

QUESTION: So that all doubts as to facts had to be resolved in favor of the state, I take it. In other words, affidavits filed on your behalf had to be disbelieved?

MR. HAGOPIAN: That's correct, except to the extent that there was anagreed statement of fact that was filed by the parties, and that's in the appendix, and that's quite extensive.

QUESTION: Then those are the facts that we should go by.

MR. HAGOPIAN: Oh, yes, Your Honor.

QUESTION: But anything outside the agreed statement of facts is contained only in an affidavit submitted in support of your client we must treat as having been resolved adversely to your client.

MR. HAGOPIAN: That's correct, Your Honor. And I don't believe there were any at all of these affidavits outside of the agreed statement of fact. I don't believe there were any other affidavits. I think that's correct.

37 There were none.

So that the case was heard on an agreed statement of facts; at least the motion for summary judgment was.

QUESTION: Well, that's why we're curious as to why you referred to an affidavit.

MR. HAGOPIAN: Well, the affidavit was in the state court pleadings. You see, we've taken the state court --

QUESTION: Well, was that in the agreed statement of facts?

MR. HAGOPIAN: Oh, yes it was. We took the entire record fromthe state court pleadings, and we incorporated that into the agreed statement of facts. And so that is in the record to that extent.

QUESTION: Well, was it agreed in the sense that the state agreed that that's what transpired in the state court? Or --

MR. HAGOPIAN: No, it certainly was not.

QUESTION: The state didn't agree --

MR. HAGOPIAN: Well, they agreed that we had the record fromthe state court proceedings, and they agreed to the veracity instead of submitting certified copies. But there were affidavits in the pleadings inthe state courts, and I don't believe that they ever agreed to the truth of the allegations inthe affidavits.

But they certainly agreed to the fact that the

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affidavits were filed; the state court record, on the fact of the complaint in the state court, the judge said, breathalyzer refused by the police; see affidavit.

So I think there's a clear inference that the trial judge in the state court pleadings believed what was in the affidavits.

QUESTION: Is there any other statement of facts other than the one on page 28?

MR. HAGOPIAN: No, I don't --

QUESTION: Well, I don't see a word in there about breathalyzer.

MR. HAGOPIAN: That's correct, Your Honor. The agreed statement of facts is on page 28. There are several exhibits though that --

QUESTION: But you said it was all in the agreed statement of facts. And I don't see breathalyzer at all.

MR. HAGOPIAN: Well, Your Honor, if you look --

QUESTION: Where is it where it says what happened when he was arrested?

MR. HAGOPIAN: Well, if you will look at Exhibit B which is referred to in the agreed statement of facts, Exhibit B is on page 33, and that is the face of the complaint in the state court pleadings.

QUESTION: I see Exhibit A referred to in the statement of facts.

kw 39

MR. HAGOPIAN: Well, I'm sure Exhibit B is too, Your Honor. And --

QUESTION: Do you question as-applied or not?

MR. HAGOPIAN: Well, I think clearly the statute is unconstitutional as applied to Montrym's case.

QUESTION: You still maintain that?

MR. HAGOPIAN: Yes, I certainly do. I think it's unconstitutional on its face also.

QUESTION: You didn't abandon it in the lower courts?

MR. HAGOPIAN: No, absolutely not.

QUESTION: What do we do if we disagree withthe district court's conclusion that it's unconstitutional on its face, but think that you should have the right to assert your claim that it's unconstitutional as applied? Do we decide that here, or send it back?

MR. HAGOPIAN: Well, I think you'd have to decide the as-applied here. Well, it's a motion for summary judgment, so the worst that -- I mean conceivably you could say that the district court made a mistake on the issue of granting summary judgment and send it back. That would not preclude Mr. Montrym from going forward to trial, even as unconstitutional as applied to him.

QUESTION: You wouldn't then enjoin the state official s from applying the statute. You would just say they couldn't apply it to Montrym.

kw 40

MR. HAGOPIAN: Right. But I don't think that -- I don't think Montrym's case -- the district court that the finding of fact in Montrym's case wasjust typical of the class. And my brothers have not taken any appeal from that order certifying the class action. They don't seem to have ever challenged the fact that the district court judge held that Montrym's case was typical of the class.

QUESTION: What is the class?

MR. HAGOPIAN: The class comprises all those motorists in Massachusetts who have a driver's license who refused to take a breathalyzer test --

QUESTION: Where is it in this record?

MR. HAGOPIAN: It's in the opinion, Your Honor.

QUESTION: Well, it's 16(a), and it isn't at all what you say. It says, plaintiffs purports to represent a class consisting of those persons whose Massachusetts license to operate a motor vehicle has been suspended by the defendant or his predecessors or successors in office, prior to an opportunity for a hearing on such suspension. Pursuant to subsection -- this court determines it's a correct class.

MR. HAGOPIAN: Yes, Your Honor.

QUESTION: Now, I take it at the time you filed this action in district court, Montrym had already had an opportunity to have a hearing.

MR. HAGOPIAN: No. That's not correct. He was

kw 41 never given an opportunity.

QUESTION: I thought he went into the district court after he had had his opportunity for a hearing before the registrar's?

MR. HAGOPIAN: Yes, that's correct.

QUESTION: Then how can this be a class in this action?

MR. HAGOPIAN: Well, Your Honor, if the point is -- let me see if I can explain to you. Let me just give you briefly two minutes of procedure so you can understand what the problem is here.

When the police officer takes this report, he sends it to the registrar. The registrar automatically revokes his license, and that's what happened in Montrym's case.

Montrym surrendered his license, but he did not -- he insisted that -- he always maintained that the registrar could not -- that that suspension was illegal, because of the fact that he was not granted a hearing prior.

And that's what the class constitutes. All those people who the registrar sends a notice to, suspends their license without giving them that hearing first. And that's the central issue in this case.

He insists upon that hearing first. As it turned out, Your Honor, the registrar was well informed of the facts in this case. The attorney that represented Mr. Montrym

cw 42 in the district court, Mr. Harrison, whose with me here today, he sent the registrar, before the registrar ever sent the notice to Montrym, a copy of the district court's judgment.

And he said, Mr. Montrym never refused to take the breathalyzer. Here's the findings of fact inthe district court, when the district court in Massachusetts, criminal court, has ruled that Montrym did not refuse to take the breathalyzer test, you should not take his license, and I'm sending you this letter to avert his license revocation.

And the registrar just totally ignored that. And he says, as far as I'm concerned, I have no discretion under the statute. When I get this notice from the police department that says Montrym refuses, as far as I'm concerned I suspend the license and that's it. I don't -- not interested in anything else.

If you want to come in and talk to me afterwards, I'd be very happy to talk to you about it.

As it so happened, even after he suspended the license, I sent him a demand, and demanded the return of that license, and sent in the district court -- and I explained to him about the breathalyzer; so he well knew the facts even after that stage, but he refused to return that license.

QUESTION: You also appealed --

MR. HAGOPIAN: The only time he returned it was when the United States district court ordered him to, and then

kw 43 it took him seven days to return it after the date of the order.

QUESTION: You also appealed from the registrar to the state administrative --

MR. HAGOPIAN: That's right. That was on the initial decision to suspend his license. There was an appeal taken, but it would take 30 days before we could even get a hearing, and he worked around the clock to even get that, which would mean that one-third of the 90-day suspension period would be completely expired before he could even get a hearing on that issue.

QUESTION: Well, why didn't you file your action in the district court before you filed your notice of appeal to the state administrative agency?

MR. HAGOPIAN: I wasn't involved in the case.

QUESTION: Well, but your client is bound by acts of his previous attorney, before he was fortunate enough to find you.

MR. HAGOPIAN: Yes, I understand that, Your Honor. But the -- going through the board of appeals was an exercise in futility. I mean on the initial decision.

They have no discretion. They probably would have upheld the registrar anyway, because that's what the statute says. Whether they have the power to determine a constitutional challenge at that stage of the game is not clear under

kw 44 Massachusetts law.

QUESTION: You mean the law of Massachusetts says that if the state refuses to give a man a breathalyzer test, they can take his license away from him?

MR. HAGOPIAN: That's correct. That is correct, Your Honor. 90 days.

QUESTION: Well, that law does not say that.

MR. HAGOPIAN: It says that if the motorist --

QUESTION: Youdidn't hear what I said.

MR. HAGOPIAN: I stand corrected, Your Honor.

QUESTION: I said, if the state refuses to give him the test, he then loses his license.

MR. HAGOPIAN: No.

QUESTION: No, it didn't say that. Well, that's this case, isn't it?

MR. HAGOPIAN: No.

QUESTION: Isn't that this case?

MR. HAGOPIAN: No, Your Honor, that's not correct. The statute says if the motorist refuses to take the breathalyzer test, and if he has beenvalidly arrested, if there was probable cause for his arrest, and if in fact he refuses to take the breathalyzer -- they must prove all three elements, and they're complicated elements-- then if and only if the state has that right to take his license away.

QUESTION: I understand that the state court said

that this man was not -- did not violate the statute because it was the state and not him who refused.

MR. HAGOPIAN: I don't think that's true, Your Honor. What the state court held was, they dismissed the complaint.

QUESTION: Where is the state court's --

MR. HAGOPIAN: The only thing from the state court that's in the record, Your Honor, is in the appendix which is on page 33 --

QUESTION: Is there anything else in the record other than that?

MR. HAGOPIAN: Not in the state court record, no.

QUESTION: Is there anything in the record in this Court other than that?

MR. HAGOPIAN: No.

And by the way, Your Honor, that reference to Exhibit B is made on page 28 in the agreed statement of facts.

QUESTION: It says here, breathalyzer refused when requested within a ahalf-hour of arrest -- see affidavit and memorandum.

MR. HAGOPIAN: Yes.

QUESTION: Where is, quote, affidavit and memorandum, end quote?

MR. HAGOPIAN: The affidavit is on pages 38, 39 of the appendix.

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That's the affidavit that Montrym submitted to the district court.

QUESTION: And on the basis of that it was dismissed.

MR. HAGOPIAN: That's correct, Your Honor. I don't know what the judge --

QUESTION: Well, what are you doing now, if this -- he was dismissed, wasn't he?

MR. HAGOPIAN: That's right. But that -- that -- that decision isn't binding on the registrar.

QUESTION: I sure wish I knew what was here.

QUESTION: But if he had taken this copy of the dismissal and --

MR. HAGOPIAN: He did.

QUESTION: -- after that first hearing -- he did do that?

MR. HAGOPIAN: He --

QUESTION: To the first hearing that was available to him?

MR. HAGOPIAN: He said -- and it's stipulated inthe agreed statement of facts, Your Honor -- that the record in the district court proceedings was sent to the registrar before he revoked Mr. Montrym's license, and the registrar totally ignored it.

In fact, he wrote back -- when Mr. Harris sent

dkw 47 him a copy of the district court record, he wrote Mr. Harris back five days after he had, in fact, revoked Mr. Montrym's license. And that letter is on page 46 of the -- 48, page 48 of the appendix. In reference to your letter of June 2nd concerning the above named, this is to advise you that his license has already been suspended and said license must be returned to this office immediately.

The registrar's position is quite clear, Your Honor, in this case, that when he gets that letter from the police department saying that a motorist has refused to take the breathalyzer test, he has absolutely no discretion but to revoke the license upon receipt of that letter.

And that is the issue. The district court's finding is not binding on the registrar. The district court may have dismissed this case for a number of reasons. He happened to make those specific findings of fact. He may construe the statute different that the registrar.

There's no Massachusetts case law on this particular issue. He may construe the statute differently. He may disagree with the district court judge.

I don't know whether the district court judge was right or whether he was wrong on this case.

Now, I would like to point out too, Your Honor, this morning that notice of revocation that was sent to Mr. Montrym, which is a standard form by the registrar, says you

w 48

must cease operating your motor vehicle immediately. There is nothing in that notice, which is in the appendix, that advises the motorist that he has a right to an immediate hearing.

And I do concede that in the agreed statement that he can, as a practical matter, walk into the registrary and get an immediate hearing. But he's not notified of that in the notice that goes out to the motorist, and a copy of that notice is one page 45.

QUESTION: Your client had his own lawyer, then?

MR. HAGOPIAN: Pardon, Your Honor?

QUESTION: Your client had his own lawyer?

MR. HAGOPIAN: He knew -- he -- there's no lawyer --

QUESTION: So why does he need other notice? He's got a lawyer to tell him what the law is.

MR. HAGOPIAN: Well, I don't even know if his own counsel knew about that fact, Your HOnor. There's nothing in the registry regulations that publishes that you can get an immediate hearing.

As a practical matter, Mr. Harris sent a letter immediately to --

QUESTION: All right, then, you aren't required to know the law. I assume that that's the law in Massachusetts, that the lawyers are not required to know the law; then I agree with you.

MR. HAGOPIAN: Yeah, I don't.

QUESTION: That laymen are not required.

MR. HAGOPIAN: The right to an immediate hearing is not, Your Honor, part of the law. That's something by custom that the registry gives.

I know of no regulations, written regulations, that they've ever promulgated to that effect.

As a practical matter, if you've ever had any experience with the registry as an attorney, you would know that. I know that, and I knew it. But I don't know that all lawyers who live in the country know that.

QUESTION: But they're bound to, aren't they?

MR. HAGOPIAN: Are they bound to know that?

QUESTION: They are bound to know that.

MR. HAGOPIAN: Well, it's custom, Your Honor. I don't -- you know, I --

QUESTION: Unless we've changed that ancient axiom of the law.

QUESTION: If the law provided for notice, would that meet your complaint?

MR. HAGOPIAN: Well, it certainly would help -- no, I --

QUESTION: Wait a minute. Would it meet it, or do you want something else?

MR. HAGOPIAN: No. I want something else besides

akw 50 that.

QUESTION: What else do you want?

MR. HAGOPIAN: Well, I think they've got to give the hearing before they take the license.

QUESTION: Well, I understood you to say that by custom at least if one knew about the opportunity the registrar would allow him to appear and to state his side of the case.

MR. HAGOPIAN: But why should he lose his license first, Your Honor? That's the issue in the case.

QUESTION: Does he lose his license before the registrar acts?

MR. HAGOPIAN: That's right. That's the bottom line issue in this case.

QUESTION: I thought the registrar was the one who deprived him of his license?

MR. HAGOPIAN: He does. And I'm saying that he should have a hearing before the registrar takes that action.

What he can -- what the registrar should do, that he does in hundreds of other cases, Your Honor, pursuant to the statutory scheme in that--

QUESTION: I think you should wait a minute until the questions are asked.

MR. HAGOPIAN: I'm sorry, Your Honor.

QUESTION: Because his question was: Could the

dkw 51

registrar relieve him of his license immediately?

MR. HAGOPIAN: He does, in fact, take his license immediately.

QUESTION: When he refuses to take the test?

MR. HAGOPIAN: That's correct.

QUESTION: The registrar takes it?

MR. HAGOPIAN: As soon as he gets the --

QUESTION: How in the world can he do that? He's in an entirely different city, isn't he?

MR. HAGOPIAN: He sends a notice. As soon as he gets the notice --

QUESTION: Well, but I mean he can't do it until he gets the notice, can he?

MR. HAGOPIAN: That's right.

QUESTION: Well, that was the question.

MR. HAGOPIAN: Well, I'm sorry. I didn't understand it that way.

QUESTION: Well, why don't you wait and then get the question.

QUESTION: The registrar gets the notice.

MR. HAGOPIAN: Yes.

QUESTION: Then he's in a position to act unless the individual charged appears and gives some reasons why that shouldn't be done.

MR. HAGOPIAN: Well, by statute he's required to act,

w 52 Your Honor.

QUESTION: Well, I thought you said that custom accorded an individual a right to be heard before the registrar.

MR. HAGOPIAN: After the revocation. After the notice goes out. Then he, by custom, he can get an immediate hearing.

QUESTION: You know, Mr. Hagopian, I don't think you made it clear. There's a time interval between the revocation, which can be done by mail, and the turning in of the physical piece of paper --

MR. HAGOPIAN: That's correct.

QUESTION: -- which may be a few days later. It's the later date he gets the hearing.

MR. HAGOPIAN: That's right. And he can't drive in the meantime, either, Your Honor.

QUESTION: That's the heart of your case, and you're not making it all clear.

MR. HAGOPIAN: He cannot drive -- the minute he gets the notice he has to cease and desist. He then physically has to get that notice --

QUESTION: And you also -- areyou not contending that before he gets the notice he has absolutely no right to appear before the magistrate or whatever he's called?

MR. HAGOPIAN; That's right. The registrar.

53 That's correct, Your HOnor. Has absolutely no right.

And even if he does, which is what happened in Montrym's case through his attorney, the registrar didn't pay any attention to him. Because the registrar has no discretion under the statute.

QUESTION: Do I understand you that if you're arrested for a traffic violation, you can't immediately go before the magistrate? Immediately?

MR. HAGOPIAN: I'm not sure I understand that question. You mean before the registrar --

QUESTION: When you are arrested for a violation --

MR. HAGOPIAN: Right.

QUESTION: -- under the traffic code of Massachusetts --

MR. HAGOPIAN: Yes.

QUESTION: -- can't you go directly before a magistrate then and there, if one's available?

MR. HAGOPIAN: You mean for trial your HOnor on criminal charges?

QUESTION: Or to say how do you do to him. You said you can't even go to him.

MR. HAGOPIAN: You can't go to the registrar.

QUESTION: I said to the magistrate.

MR. HAGOPIAN: Yes.

QUESTION: He cango to the magistrate, can't he?

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MR. HAGOPIAN: He can go to a lower court, lower criminal court; that's correct, Your Honor.

But the issue of whether he takes the breathalyzer will not usually come up in that proceeding, in the criminal proceeding.

QUESTION: You're sure of that?

MR. HAGOPIAN: Yes.

QUESTION: How are you sure of that?

MR. HAGOPIAN: Because it's inadmissible. It's grounds for a mistrial. In fact, if the police introduced the fact that --

QUESTION: You mean if a magistrate says, I don't think this man is drunk, and turns him loose, he can't do that?

MR. HAGOPIAN: Yes.

QUESTION: He can do that?

MR. HAGOPIAN: Yes.

QUESTION: I thought so.

MR. HAGOPIAN: But the registrar will still revoke his license, even if he's found not guilty.

QUESTION: I'm not talking about that.

MR. HAGOPIAN: Yes, I understand that.

QUESTION: I'm talking about the first part, which you said he couldn't do.

MR. HAGOPIAN: Well, let me say in general, Your

55 Honor, the criminal proceedings do not come before the registry actions. This is an unusual case in that sense. Usually the criminal proceedings come after the registry revoked.

So this is a rare case to have a criminal proceedings before the registrar takes his action.

QUESTION: Mr. Hagopian, let me ask you a question: Would you challenge the constitutionality of the statute if it worked inthis way, if the police sent a notice and simultaneously sent it to the person arrested and also to the registrar, which said, in substance, on such and such a date, your license will be revoked. You may appear at that time to object if you wish to. If you don't, it will be automatically revoked.

Would you have any objection to that statute?

MR. HAGOPIAN: No. In fact, that's the procedure that's used --

QUESTION: All you're really talking about is the suspension -- the fact that there's an automatic suspension for the interval of time between the notice to the magistrate and the time that he can go in and demand a hearing. And you say that would be all right if there was a notice of what they proposed to do rather than the fact that it was already --

MR. HAGOPIAN: That's correct. And that's -- that procedure is in existence in Massachusetts by the registry

w 56 in several other statutes. And I've pointed that out in my brief.

He sends a 14-day notice, and he says, I intend to revoke your license in 14 days. If you object to it, you can come in and have a hearing before the 14 days. And that procedure is used in thousands of cases.

QUESTION: Well, he gives the grounds on which he proposes to revoke the license.

MR. HAGOPIAN: Oh, yes. Yes, he does. Yes, Your Honor.

QUESTION: And inthis case it would be because of your refusal to take a breathalyzer test on such and such a date.

MR. HAGOPIAN: Yes, yes.

QUESTION: But I thought also the hearing that you would require would be more than what the custom here would afford. You would want to be able to call any kind of a witness you wanted?

MR. HAGOPIAN: I don't take that position, Your Honor. I just think -- I don't even take the position you have to have a hearing before the registry instead of an opportunity to respond.

In some way, Your Honor --

QUESTION: Let me ask you: suppose you had all the hearings you wanted before the suspension. Just suppose

w 57 that.

MR. HAGOPIAN: Yes.

QUESTION: And the registrar says, now we've had all the hearings you want. And you say, yes, all the hearings. He says, I now find there is probable cause to suspend your license.

MR. HAGOPIAN: Yes.

QUESTION: And if you want a full hearing some other time, we'll give it to you.

MR. HAGOPIAN: Right.

QUESTION: That would satisfy you?

MR. HAGOPIAN: It certainly would.

QUESTION: So you don't take -- you don't think then just a -- just a police report furnishes probable cause to suspend the license even for a day?

MR. HAGOPIAN: That's correct, Your Honor. I think that's really the heart of the issue of the due process clause, is, that there must be some interaction with the citizen himself. You've got the dignity interest and the representative interest --

QUESTION: Well, when you say --

MR. HAGOPIAN: -- by the due process clause. And that's totally absent.

QUESTION: When you say, the opportunity to respond, you say you don't want an evidentiary hearing, but you want a

58 quote, opportunity to respond, close quote.

What would the opportunity to respond consist of?

MR. HAGOPIAN: Well, I don't think that-- this Court's ever resolved that.

QUESTION: What would the issue be?

QUESTION: Well, you're the one -- you're the one that --

MR. HAGOPIAN: Well, I certainly think he has the opportunity -- he should have the opportunity to file an affidavit to respond to the charges in writing. That's an absolute minimum.

QUESTION: I.e., and what would the issue be? That he did not refuse?

MR. HAGOPIAN: Right, exactly. And if he filed an affidavit -- exactly.

QUESTION: Just a minute. Would that be the only issue?

MR. HAGOPIAN: No. Because there are three other issues under the statute before the registry can revoke. He must show that there was probable cause for the initial arrest. He must show that there was a valid arrest. And that involves whether he was on a public way and a multitude of other factors.

QUESTION: I know. There would be three issues.

MR. HAGOPIAN: Yes. Three issues that Massachusetts

sets out as the basis for the revocation.

QUESTION: And those would bethe only issues.

MR. HAGOPIAN: That's correct.

QUESTION: And what if the registrar after hearing that he had contested all three of those by an affidavit saying the police were wrong on all three said, fine, you've had your opportunity to respond, your license is suspended.

No problem?

MR. HAGOPIAN: I --

QUESTION: You'd say no problem if there was probable for the -- is that your position?

MR. HAGOPIAN: Yes.

QUESTION: That's the most the state would have to find, isprobable cause?

MR. HAGOPIAN: They've got to find -- that there's at least prima facie evidence that the government has met the burden of proving --

QUESTION: Well, that's a little more than probable cause.

MR. HAGOPIAN: Well, I suppose it is, Your Honor.

QUESTION: Well, of course it is. Most probable cause determinations are ex parte.

MR. HAGOPIAN: Yes, yes. Well -- no.

QUESTION: Yes.

QUESTION: Yes.

60 QUESTION: Yes.

MR. HAGOPIAN: In criminal proceedings, Your Honor, that may be true; in a criminal proceeding. That issue of the search warrant as distinguished in Fuentes v. Shevin, and that's a criminal proceeding. And I also believe it was distinguished more recently in a case last term in which I think you took the majority opinion on. And -- or --

QUESTION: Well, I'm just suggesting to you that there are an awful lot of important probable cause determinations that involve loss of liberty that are made ex parte, and made only by one person in writing.

MR. HAGOPIAN: In a criminal sense, yes. In a civil sense, I know of no --

QUESTION: Well, are you saying --

MR. HAGOPIAN: -- case that this Court has ever held where an ex parte, there could be a deprivation of a property interest in a civil sense --

QUESTION: You can deprive a person of liberty but --

QUESTION: But not property?

QUESTION: -- not property, ex parte? That's a great -- that's a fine argument for that.

MR. HAGOPIAN: Not in a -- in a criminal sense, yes; in a civil sense, no. I know of no case that this Court has held, other than that there's an emergency doctrine where there could be an ex parte; and that's the issue: an ex parte

61 deprivation of property or liberty in a civil sense.

Leaving the criminal side of the law aside, in a civil sense I know of no case this Court has ever held, absent an emergency condition, that there could be an ex parte deprivation, even on an affidavit. I know of no case that this Court has ever held to that.

QUESTION: Well, hunting around a little, I'm sure I could find one.

MR. HAGOPIAN: Well, I know that there are a number of old cases -- I would just like to say one last thing, Your Honor. The state has absolutely no interest in immediately taking these drunks off the road, Your Honor.

Under the procedure in Massachusetts now, everybody who's drunk, 95 percent of them, they all go into the rehabilitative program after they are convicted. They're still on the road.

Why is it -- what justification is there for the state to take away that man's right to some hearing before the state -- the registry takes any action? If, in fact, after -- even if they're drunk, and they're all convicted, they're all on the road anyway, Your Honor. There is no legitimate state --

QUESTION: Not for 90 days if they've refused to take the breathalyzer test, under the present Massachusetts law.

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MR. HAGOPIAN: That's correct, Your Honor. But that's not the issue.

The issue is, is there any immediate reason to impose that 90-day sanction.

QUESTION: No, Massachusetts by enacting this legislation said, yes, there is; or else they wouldn't have enacted the legislation.

MR. HAGOPIAN: Well, I submit to you, Your Honor, that they've enacted it because they feel that instant punishment, the meting out of instant punishment --

QUESTION: Suspension of license.

MR. HAGOPIAN: -- is a deterrent for people to refuse to take the breathalyzer.

QUESTION: Precisely. So they thought there was a need for it, presumably, or they wouldn't have enacted the law.

QUESTION: That's what Judge Campbell said, wasn't it? If the purpose was to deter people from refusing to take the breathalyzer.

MR. HAGOPIAN: And I think that's foreign to our system of justice, and it always has been. I've never known -- why don't we do away with trials? And we can just say, well, we'll put you in jail before we give you a trial, and you can stay in there, and then you can have your trial.

QUESTION: Maybe we should --

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MR. HAGOPIAN: I don't think that deters crime. I don't think --

QUESTION: Maybe we should do away with oral argument.

MR. CHIEF JUSTICE BURUGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:31 o'clock, p.m., the case was submitted.]