ORIGINAL

# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1453

TITLE SOUTH DAKOTA,
v. Petitioner
MASON HENRY NEVILLE

PLACE Washington, D. C.

DATE December 8, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF SOUTH DAKOTA, :

Petitioner :

v. : No. 81-1453

MASON HENRY NEVILLE :

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Washington, D.C.

Wednesday, December 8, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:33 o'clock a.m.

APPEARANCES:

MARK V. MEIERHENRY, Esq., Attorney General of the State of South Dakota, Pierre, South Dakota; on behalf of the Petitioner

DAVID R. GIENAPP, Esq., Madison, South Dakota; on behalf of the Respondent

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Attorney General, I think you may proceed when you are ready.

ORAL ARGUMENT OF MARK V. MEIERHENRY, ESQ.

ON BEHALF OF THE PETITIONER

MR. MEIERHENRY: Mr. Chief Justice, may it please the Court:

This case comes from the state of South Dakota, and it was on a writ of certiorari granted in May of this year to review a case involving the refusal by an individual in the state of South Dakota to submit to a blood test. The facts are very brief but important to this issue, and I will go through them quickly.

About 9 o'clock in the evening of the 19th of July, 1980, the defendant was stopped by law enforcement officers in the city of Madison, South Dakota. He was stopped for the reason that he failed to stop at a stop sign, and when he was pulled over, he was asked two questions: number one, to get out of the car, and number two, for his driver's license.

As he got out of the automobile, he staggered, fell against the car to, at least in the opinion of the officer, get his balance. He also smelled of alcohol, the odor of alcohol. When asked for his driver's license, he said: I'm not going to lie to you, I don't

have one, I lost it because of a prior DWI -- which is driving while intoxicated, our statute in South Dakota.

After he failed a series of sobriety tests, he was taken down to the station. He was advised of his Miranda warnings and he was advised of the South Dakota implied consent statute and asked if he would take a blood test, and he refused. He was read the implied consent statute a second time, he refused a second time, and on the third occasion, he again was read the implied consent statute and he refused. That was at the police station.

The defendant made a motion to suppress his statements, his refusal to take this blood test, and the trial court did suppress the refusal and any related evidence, basically on three grounds: number one, that the statute of South Dakota was unconstitutional; number two, that it was not relevant evidence; and number three, that Mr. Neville had not been advised that if he refused to take the test, that fact of refusal would be used against him.

And I will point out to the Court that this law changed in South Dakota. It was passed, became effective July 1, 1980. This occurrence was some 19 days after the passage of that statute. And that statute in part reads: "If a person refuses to submit to

chemical analysis of his blood, urine, breath or other bodily substance as provided in other subsections, such refusal may be admissible into evidence at the trial."

This Court granted the state's request to look at this issue, whether this statute that I have just read to you -- which allows the fact of the refusal to take a test to determine blood alcohol content of a motorist to be admitted into evidence at the subsequent trial of the motorist for driving while under the influence of alcohol -- violates the Fifth Amendment privilege against self-incrimination.

QUESTION: But the statute doesn't require that he be informed specifically that it may be admitted in evidence.

MR. MEIERHENRY: No, it does not.

QUESTION: As the New York statute does.

MR. MEIERHENRY: No, it does not.

QUESTION: Does it require that he be advised that it could be used with respect to the revocation or reissuance of his driver's license?

MR. MEIERHENRY: Yes. If you look in the appendix on page 9, there is a card that is given to each police officer that is a part of the statute and explains their rights. It does inform them if they do not take the test they may lose their license for up to

a year.

QUESTION: Why do you think the legislature drew a distinction between the two? Oversight?

MR. MEIERHENRY: Perhaps. I guess I would point out that the reason this individual was not advised of the fact that his refusal could be used against him is explained by the police officer in the appendix, which is the cards from Pierre, which is the state capitol and where these things are mailed out of, had not updated the new card. I might inform the Court now that each individual, if this is found constitutional, and are, in fact, being advised that the refusal could be used against them. So that portion of the case, because of this 19 days, the bureaucracy did not set into operation quick enough, is the only reason that this individual was not so advised.

QUESTION: But Mr. Attorney General, does that mean that the failure to give him this advice would make the evidence inadmissible no matter how we ruled?

MR. MEIERHENRY: No, I don't believe it would, and it would be our position that it would not make it so inadmissible. It might be something that the state court would consider, but I don't believe it does.

QUESTION: But the trial judge ruled it would, didn't he?

MR. MEIERHENRY: Yes, but that issue has been remanded back to the trial court. The only thing that the South Dakota Supreme Court decided was that the statute itself was unconstitutional because it violated the Fifth Amendment to the United States Constitution.

QUESTION: Well, what will happen if the trial judge on the remand says, well, maybe the statute is constitutional, but the evidence is still inadmissible because of this reason? Then would you have another appeal to the South Dakota Supreme Court?

MR. MEIERHENRY: No, I think not because that goes more to the matter of -- he also ruled as to relevancy, which could change from judge to judge.

QUESTION: Right.

MR. MEIERHENRY: But this Court can decide the issue of whether it violates the Fifth Amendment.

QUESTION: But that won't determine whether it is admissible or not.

MR. MEIERHENRY: It will under South Dakota law because I think these other matters will fall into place after that, if it is admissible and not in violation of the Fifth Amendment.

QUESTION: No, but I mean it is still conceivable, at least, that the trial judge will say this evidence is inadmissible for two reasons that the

United States has no business telling me how to decide: one, that it is not relevant, and two, you didn't give the advice you are supposed to give under the statute.

MR. MEIERHENRY: I think the relevancy issue, first of all, can be decided because the legislature, in the first place, said it's relevant. This was on a motion to suppress, I might point out.

QUESTION: Right.

MR. MEIERHENRY: There has been no trial. Number one, our legislature has said in the statute it is relevant, so I think that issue is a matter of evidentiary law in our state; the trial judge was just erroneous, he is wrong on that issue. And I think that had that issue been covered or approached by our South Dakota Supreme Court, the trial judge may have been overruled on that point, and I would have to say to the Court we are speculating at that point. But on that point I think it is clearly relevant, mainly because the legislature says it is, plus some evidentiary reasons.

QUESTION: May I ask one other question on the procedure. They also sent back, as I remember it, the question with the admissibility of his statement -- I'm too drunk to take the test -- or he said something like that, as I understand.

MR. MEIERHENRY: Yes.

QUESTION: And the trial judge may well rule one way or the other on that issue. Say he says again that that statement is inadmissible. Would you be able to ask for review of that in the state Supreme Court?

MR. MEIERHENRY: I guess -- yes.

QUESTION: It seems to me much more probative than the test itself.

MR. MEIERHENRY: The answer, quickly, is yes, we could. What the state wants is the results of the test. Not before this Court are the statements. That has not, again, been reached by the South Dakota Supreme Court. But --

QUESTION: But is it not possible -- the reason I ask these questions is I want to be sure we have a final judgment here. Is it not possible that on a second appeal on that issue to the state Supreme Court, they might decide that the evidence is inadmissible for one of the other two reasons, relevance or failure to give advice? I just wonder if we know we have something we must decide here.

MR. MEIERHENRY: Well, I think you must decide it because, if you will look at the lower court, the South Dakota Supreme Court case in a footnote, they are obviously going to follow this Court in the sense that as arbitrator of the Fifth Amendment, plus I don't

believe they ever considered the relevancy issue. If they did, they would have to rule, and they did, that this statute is unconstitutional on the basis of relevancy, and I don't see how relevancy --

QUESTION: No, no, no, I understand that. But they did also say that it was unconstitutional under your state's constitution as well as the federal, too, as I remember.

MR. MEIERHENRY: That's correct. But I believe if you will look at a footnote, I believe it is footnote -- not the famous footnote 9 in Schmerber, but I think it is also footnote 9 in the Northwestern citation, that they have in effect indicated that the Fifth Amendment, as pointed out by this Court, although our amendment to our state constitution has a little different wording, that they would take the same interpretation and it is not more expansive than found here.

QUESTION: Well, if this evidence is inadmissible under the Fifth Amendment and the case goes back on that basis and there is an acquittal, you are through.

MR. MEIERHENRY: That is correct. If this Court should hold that the fact of refusal --

QUESTION: Well, if we said there wasn't a

final judgment and didn't review the case, then the evidence is inadmissible and you could never get review if there is an acquittal.

MR. MEIERHENRY: That's true. And in most regards these --

QUESTION: Well, it isn't quite true because there could be another appeal. If you appeal on the question of whether "I'm too drunk to testify," that issue, you will be back in the South Dakota Supreme Court again where it might bring up all these issues.

QUESTION: That is a state case. That is a state issue.

QUESTION: Well, that is this case.

MR. MEIERHENRY: I guess we can't go forward in state court unless the Fifth Amendment -- the primary issue is the Fifth Amendment, and as this Court knows, we have two appellate circuits of the federal system, states on either side of the issue. Our statute that talks about the refusal, we feel, is within the Fifth Amendment. The evidence we are searching for, which is the evidence that disappears -- the minute the individual is arrested and taken into custody, it begins to disappear, it's evidence that will disappear --

QUESTION: Mr. Attorney General, you have got a man that staggers around, he can't walk straight, he

is falling all over the lot, and he says "I can't take the test because I'm drunk." What do you need the test for?

MR. MEIERHENRY: Well, I think the test --

QUESTION: Isn't that enough to convince any jury that he is drunk?

MR. MEIERHENRY: We are not submitting at this point that we could get his comments in.

QUESTION: I know that, but I'm just saying factually then you wouldn't have had all this trouble, would you?

MR. MEIERHENRY: No, but we believe that our South Dakota Legislature in passing this statute that allows the fact of refusal to be put into evidence had a number of things in mind: first of all, to remove, or to rather allow the jury to know all the facts, number one.

QUESTION: Like killing a gnat with a sledge hammer.

MR. MEIERHENRY: Well, I think it's important that when we look at the trial of cases, I mean the day-to-day functioning of our lowest courts that try these matters, that we take certain things into account. First of all, this is a subject that is well known by the population. We even have lawyers that have some reputation writing books on the best seller list

about driving while intoxicated. So it is something people know about.

I doubt if you can take 12 citizens in the state of South Dakota, put them in the jury room, and they aren't aware that there is blood tests and should be in cases. So it is important, number one, that those of us that enforce the law can show the jury that we have done it adequately and properly. On the back of every South Dakota driver's license this implied consent law is written.

The individual in the jury room can pull out his driver's license and know there should be a blood test and that there is a duty and a requirement to take it. And we should be able to indicate to the jury first of all we have followed the proper procedures, we allowed this individual or at least offered the blood test to them, and if they did not avail themselves of it, fine. We should also be able to put that in.

So it is relevant to show, first of all, that we have followed the statutes of the state of South Dakota in the handling of a defendant. Secondly, it does show consciousness of guilt, and I would like to refer to the federal system, and it is part of the progeny of Gilbert v. California, the Fisher case and the Enge case, but I thought it interesting to see what

would a federal district judge do when he reads and finds out that, number one, handwriting samples are admissible, and so he issues an order -- and this is not pleading evidence, a handwriting sample, obviously -- he orders the defendant to give the court or the prosecution a sample of his handwriting and he fails to do so.

QUESTION: He can be compelled in an open court, can he not?

MR. MEIERHENRY: He can, Your Honor, and U.S. v. Askew upheld that out of the Tenth Circuit and this Court denied cert. Well, what is even more interesting is what happens to that right of refusal. Here is the suggested pattern federal jury instructions, out of Divett and Blackmar, and I'm paraphrasing a little bit, but here is what the judge would tell the jury in a federal case: There is evidence that the defendant after his arrest refused to furnish a sample of his handwriting. It was a lawful order and not in violation of the defendant's privilege against self-incrimination. Refusal to obey the order is not sufficient to show guilt. You may, however, consider the defendant's refusal and may give it such weight as you think it is entitled to as tending to prove consciousness of guilt.

That is what would happen in the federal system, not a violation of the Fifth Amendment, the handwriting, and an inference of guilt or at least tending to prove consciousness of guilt. Now, Divett and Blackmar is not the Supreme Court, obviously, but it is the suggested pattern jury instructions that we all use and has not been found by any court to be improper.

So here South Dakota tried to fashion a remedy, and all the Court is aware of the reason for these implied consent laws, and we are another state, don't want to hold our citizens down and forcefully take this blood sample. We don't want that in the state of South Dakota.

But we have made some conditions. One of the conditions not discussed here is that if you refuse to take your blood test, you lose your license for one year. That is also common. But we have got another hooker in South Dakota, and it is if you don't take the test, you automatically lose your license for a year, but if you plead guilty before the separate hearing on the refusal, the civil hearing on the refusal, then we won't take your driver's license away. So in a way, even though you refuse, if you plead guilty, admit your guilt, which is some kind of compulsion, you aren't going to lose your license for a year. Obviously, that

is usually to the defendant's advantage and it hasn't been --

QUESTION: Doesn't anyone argue that that burdens your federal right to a jury trial?

MR. MEIERHENRY: No, because I think only those defendants -- we have discussed that before. Probably the only time we would see it is on the third offense. It is a felony. If an individual took an opportunity on his second offense to do so, he may go in and attack in the federal system his plea on the second offense, trying to throw that out so it isn't a felony, because the third offense is a felony. That is the only reason I could ever see you would see it in the federal courts, is an attempt to play the system against itself and say "I was compelled."

So if you look at the handwriting sample, which some of the justices of this Court in various decisions have said is a real physical evidence, if you can compel in the federal system someone to take a handwriting sample, you can compel them to take a blood test.

QUESTION: It's easier, I suppose, to compel a breathalyzer test or a blood test than it is a handwriting test because you can't tie a man down and force him to give a handwriting example, can you, but

you can tie him down and take a blood test or a breathalyzer test.

MR. MEIERHENRY: Your Honor, I think there are some other things that are involved, too. Handwriting is hand writing, and in the Askew case it took 19 months for the federal judge to get a sample. Maybe he learned to write left-handed in the meantime or something. But I think the fact is it is pleading evidence and it is scientifically acceptable.

We know when we talk about a 1.5 blood count in courts, and the jury, perhaps, knows what the issue is, what we are talking about. It is probably the best evidence there is. It protects Mr. Gienapp's client as much as it helps the state in determining what is his blood count. If Mr. Mason -- or Mr. Neville, I mean, who is experienced in this area, would have come out with a .05, he probably would have never faced the charges. So it is an independent test that is reliable and valuable, whereas otherwise you are left with oral testimony: staggering, slurred speech.

So we believe that the South Dakota statutory scheme, which is similar to most, is constitutional, and the refusal that we are arguing here today is not that his words can go in -- "I'm too drunk, I can't pass the test;" it is simply that another witness, maybe it's the

nurse -- ours is required to be taken by medical people -- that a nurse, medical technician or the officer observed the defendant refused to take the test. And then the jury knows why.

Those of us that have defended and prosecuted these cases, you must realize -- just as was pointed out in this Court when you approved the instruction of possession of recently stolen property -- there are certain things in life that this Court can recognize and know goes into criminal cases or into the affairs of life, and one of them is in a driving while intoxicated case, the jury expects a blood test. They are waiting to see the blood test.

And the state, if it puts in its refusal, it settles the issue. There is no blood test because none was taken. It isn't that it was a bad test and the state didn't want to put it in and is in some way trying to push guilt onto this person. On the other hand, it isn't as if something was done improperly and the court didn't allow it. It isn't the defendant through some lawyer's trick keeping this from us so that we don't know what the blood test is. It is simply a physical and real fact that no blood test exists, and that is as real and physical as handwriting or any of the other factors that we can put into evidence.

So it is in a way the type of real evidence that under our system that the jury expects to see and should see. They should be told the whole facts because, otherwise, what happens? And this Court has read the record and all of us are familiar. The officer is told: forget these facts; testify truthfully about everything, but leave this out. You can testify as to the individual's slurred speech, you can testify to all these matters, but when you get down to the station house and the defendant exercises his statutory power to refuse, even though our legislature said to be a driver in South Dakota you have to agree to take this blood test, that is a requirement on our citizens, but we are going to give you the power to refuse -- not the right to refuse -- I think that's a misnomer in all the cases -- the power to refuse, and he exercises that power, we are going to inform the fellow citizens on the jury why there is no blood test, why they haven't gotten what most of us expect in a criminal case.

QUESTION: Mr. Attorney General, I know in this case you are not arguing about the conversation "I'm too drunk" because that has not been determined yet, but it seems to me that in order to put in the fact of refusal, just as a matter of evidentiary, you couldn't ask for the conclusion, did he refuse.

Wouldn't you have to ask what did the officer say to him and what did he say? So wouldn't you necessarily have to consider whether the conversation that took place was admissible?

MR. MEIERHENRY: I think that all of us would look at this Court's decision in this case and try to determine how much of the words we can put in. I think you would expect this type of record to come out:

Question: "Was he given a blood test?"

"No, he wasn't."

"Did you offer him one?"

"Yes, I did."

"Well, why didn't he take the blood test?"

"I read him the implied consent clauses --"

QUESTION: I object on the grounds it calls for a conclusion.

MR. MEIERHENRY: Well, I was going to get to it, and I would say by his words and actions he indicated he refused.

QUESTION: And I made the objection right now.

MR. MEIERHENRY: Because it is going to be different --

QUESTION: It seems to me -- I'm not suggesting it's right or wrong, but it does seem to me just as a normal evidentiary matter, that's the way you

put this kind of conclusion into evidence, by putting in the conversation that took place. I'm really not quite sure why you are afraid to argue that you have a right to do that.

MR. MEIERHENRY: I guess the state believes we do have a right to do it. I guess in the limiting nature of the question presented and ruled upon in the lower court, we feel, I guess, it would be dicta in this case to do so. But we believe we should be able to put those comments in.

QUESTION: But it seems to me that you can't really answer the ultimate question whether you can put in the refusal unless the trial lawyer knows how he is going to go about doing it.

MR. MEIERHENRY: Well, we submit that first of all, the evidence itself is constitutional. It would appear that Schmerber has said it is constitutional.

QUESTION: What do you mean when you say evidence is constitutional?

MR. MEIERHENRY: We are saying that the blood, were it taken from the individual over his objection, could be offered at trial.

QUESTION: Well, are you saying really that there is nothing in the Fifth Amendment or Sixth Amendment or whatever it is that would prevent it from

being offered at trial?

MR. MEIERHENRY: That is what we would say, that the base evidence that we are seeking here, and the state prefers to have rather than a refusal, is a blood test. We can draw the blood, we can give it to another witness, and the results of those tests can be testified to. That is the base evidence.

QUESTION: We can't say that here so far as the South Dakota courts are concerned. All we can say is that there is nothing in the Fifth Amendment that prevents them from being used by the South Dakota courts.

MR. MEIERHENRY: That is correct. And I believe every state jurisdiction has used the Fifth Amendment to the United States Constitution, the Schmerber case and so forth and made all kinds of different interpretations of what the Fifth Amendment says, and only this Court can do that as to the Fifth Amendment to the U.S. Constitution.

Our court has indicated that it will follow the lead of the South Dakota Supreme Court on what the Fifth Amendment means, obviously, and secondary, that our state constitution, although they used slightly different words, will follow the Fifth Amendment precept under the United States Constitution.

QUESTION: But are you in effect arguing that

since the court has held that it is appropriate for the state to compel, to compel the extraction of blood, a fortiori if the blood is admissible, the refusal to do it is admissible?

MR. MEIERHENRY: I believe it follows. I believe the only thing that makes this unusual is legislatures, some legislatures have given the individual the power to refuse, the power not to have their body invaded; but then they have also put the duty to take the consequences, which are not in violation of the Fifth Amendment. The consequences are not as extreme as what would be allowed under the United States Constitution of taking it by force.

So we feel that it is logical to say that the fact it doesn't exist is through no fault of the state's, is not the state's fault. This individual exercised his power by statute not to have the test taken, and that should be brought to the fact finder. I can't imagine a state or federal judge trying one of these cases not listening to why there wasn't a blood test. He may say, well, I'm going to hear it and then if it's irrelevant I will strike it out, as all of us are familiar that court trials do. I can't believe anyone trying to find the facts of this issue would not expect to know why there wasn't a blood test: Why hasn't

the state done its job; where is this blood test?

That is to our disadvantage, obviously, and we wouldn't want to put it in if it wouldn't help us, obviously. But the public has a right to know -- or the jury, I should say, the jury has a right to know what are the facts of this case as long as it doesn't violate the Fifth Amendment, and it does not, in our opinion, because -- obviously we can take the handwriting example. To me it is a perfect example of why the refusal, that fact, should be put in. It goes to the indication of intoxication.

We can testify as to slurred speech, not necessarily, depending on the Fifth Amendment and the Miranda warning, what was said; but the manner in which an individual talked is something the officer can comment on, that he staggered. All these things are observations that have to be testified to.

And when we come to the test, we are saying it is in the same regard. Had he done what state law requires, there would be a test. We wouldn't have to worry about the refusal or any of his comments. Had he done what he agreed to do when he got his South Dakota driver's license or operate a motor vehicle in our state, he would have consented to the blood test. But he exercised his power not to do so.

It seems very reasonable under the United States Constitution that a state attempting to give its citizens or any visitors the power to refuse this bodily intrusion are then more limited in their evidentiary presentation to a jury than if they said, we don't care, we don't care, we're going to hold them down, we're going to hire big officers and we're going to find large nurses and we're going to take the blood tests, and then we're going to put in the evidence of how the individual struggled and swore and punched someone, then we have a felony, perhaps, assaulting an officer.

This is not reasonable. This is not what the Fifth Amendment should do when a state is attempting to have, through a power that it has been issued, a reasonable way in which to get evidence which is allowed under the Fifth Amendment.

We would ask that this Court reverse the judgment, and I would keep my time for rebuttal.

CHIEF JUSTICE BURGER: I think we will resume there and have your argument at 1 o'clock, counsel.

[Whereupon, at 12:00 p.m. the Court was recessed, to reconvene at 1:00 p.m. the same day.]

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Gienapp, I think you may proceed when you are ready.

ORAL ARGUMENT OF DAVID R. GIENAPP, ESQ.

ON BEHALF OF THE RESPONDENT

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

As the Attorney General has indicated, the issue in this particular case presented to this Court is the constitutionality of a South Dakota statute allowing into evidence an individual's refusal to take a blood alcohol test. This refusal is committed pursuant to a South Dakota statute that was in existence long before this statute.

Since 1960 South Dakota has statutorily allowed an individual to refuse to take a blood alcohol test, not without some certain civil penalties, but allowed that permission. In 1980 this statute was passed by the South Dakota legislature allowing evidence of that refusal into evidence at the trial for the DWI, which is the South Dakota vernacular, I guess, for driving while intoxicated, the formal charge in South Dakota.

QUESTION: Mr. Gienapp, was that 1980 amendment that you just spoke about in response to a

decision of the Supreme Court?

MR. GIENAPP: It was perhaps a year and a half later after a decision of the South Dakota Supreme Court that held that such a refusal was not admissible without a statute, basically. I believe that case is cited in the briefs, and I believe it is State v. Oswald.

QUESTION: Then was the South Dakota Supreme Court conceding, at least sub silentio, that there was no constitutional issue involved, if they were inviting the legislature to pass a statute?

MR. GIENAPP: No, I don't believe they really invited the legislature --

QUESTION: Well, they said in the absence of a statute, you said.

MR. GIENAPP: Well, I don't know if they specifically said in the absence of a statute. That is an interpretation that was given to it when the statute presently in existence was presented --

QUESTION: Was this your interpretation of it? I thought that is what you said.

MR. GIENAPP: No, Your Honor. My interpretation is that they merely said point blank it's not admissible, not referring to the constitutional issue or otherwise. There was a subsequent case where they inferred that there was not a constitutional issue,

which they specifically overruled in their decision in State v. Neville.

Referring briefly to the Attorney General's comments on the background of this case, the motion to suppress was made and granted on three separate and distinct grounds, one of them being the constitutional issue, one of them being the relevancy issue, and one of them being the issue that the arresting officer did not comply with the statutory procedure under South Dakota law prior to asking for the blood alcohol test, a statute which is a situation that is precedent to taking that particular test.

The appeal was made to the South Dakota Supreme Court only on the constitutional grounds. The other two grounds granted at the trial court level remain and stand today. The Attorney General indicated that the statute is relevant and that a ruling that it was irrelevant under the statute by the trial judge -- I don't agree with that particular comment because the statute as it is worded is discretionary with the trial judge. It does not say it is admissible, it does not say it shall be admissible; it says it may be admissible. The trial judge in this particular case ruled that it was not admissible on the grounds that it was irrelevant and immaterial to that particular factual

situation.

The issue as it is presented to this Court is solely on the constitutionality and solely on the Fifth Amendment aspect of the case. It is Petitioner's -- Respondent's position that this particular statute is unconstitutional, is violative of the Fifth Amendment for the reasons set forth in Schmerber v. California and for the logic that follows those particular reasons.

QUESTION: Do you think we have jurisdiction here?

MR. GIENAPP: I question jurisdiction, Your Honor, in my reply to the writ for certiorari. I question whether there is jurisdiction.

QUESTION: Because of lack of finality?

MR. GIENAPP: Yes, Your Honor.

QUESTION: And that is because why?

MR. GIENAPP: Because of two other grounds that the matter has already been suppressed on at the trial court level in this particular case.

QUESTION: Well, that is not finality, is it? Is it an independent state ground of some kind?

MR. GIENAPP: No, these are -- Yes, these are independent state grounds, although they have not been rule on per se by the South Dakota Supreme Court.

QUESTION: Well, are you suggesting that if

the state prevails on the constitutional issue in this Court, nevertheless your courts may reaffirm the setting aside of the conviction on one of the other two grounds?

MR. GIENAPP: Yes, Your Honor.

QUESTION: Or on state constitutional grounds?

MR. GIENAPP: That would be a possibility also.

QUESTION: It is curious that in the earlier case that you referred to, that they made no reference to any state constitutional issue.

MR. GIENAPP: No, they did not, not in State v. Oswald, and I don't believe in State v. Maher did they either.

QUESTION: If you were to prevail on that basis, the state would really be at quite a disadvantage, wouldn't it, because the Supreme Court of South Dakota opinion in this case seems to speak only in terms of the federal constitution. And if that decision were unreviewable, you would be in kind of the same situation as the state of California was in the case of California against Stewart. If it goes back to the trial court on the basis of the Supreme Court of South Dakota's opinion, the state simply can't use the evidence and it will never have a chance to have the federal question reviewed.

MR. GIENAPP: They would have the chance to

have the federal question reviewed in a different case where there was not the error in following statutory procedures in advising someone of the implied consent right, or --

QUESTION: Not in this case.

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

But could I follow up one further comment, Justice Rehnquist. The South Dakota decision, though, did decide it on both the state and the federal constitution.

QUESTION: But isn't there a suggestion in the opinion that that court views the two as coterminous?

MR. GIENAPP: Their history has been such that they do not.

QUESTION: I was merely going to add that if he is acquitted, however, the issue cannot be reviewed.

MR. GIENAPP: That's correct, Your Honor. If he is convicted, it would be likewise; the issue would not be reviewed because I, obviously, would not raise it if it were not introduced at the trial court level.

QUESTION: But if we dismissed this case for lack of jurisdiction and the case went back, the evidence would be inadmissible, but not only for the constitutional reason but for irrelevancy or --

MR. GIENAPP: That is correct, and also --

QUESTION: So even if we reversed, even if we reversed the constitutional ruling, the evidence in the trial court wouldn't be admissible.

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

QUESTION: Because of the other two grounds?

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

QUESTION: Did the trial judge explain why he thought it was irrelevant, and if he didn't, do you have any suggestion as to support that ruling?

MR. GIENAPP: The trial court did not explain why it was irrelevant, Your Honor, at least that I can recall, and it is not in the record. My explanation might very possibly be that the South Dakota statute that we are referring to, of course, is discretionary, as I have defined. It says may be admissible. South Dakota has an evidentiary rule much like the federal rule which says that evidence should not be admitted unless its probative value exceeds its prejudicial effect, or vice-versa. That would be one of the reasons that I could see for a trial judge making such a decision.

QUESTION: Irrelevancy was hardly the correct label for that if that was the basis of the ruling.

MR. GIENAPP: Could be.

QUESTION: Can these other two grounds ever

get to the Supreme Court of South Dakota for exclusion?

MR. GIENAPP: Not in this particular case, no. They did not raise those on the intermediate appeal, that is correct.

QUESTION: And if the case is tried as an acquittal, the state cannot appeal.

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

QUESTION: Well, if they didn't raise those grounds on their appeal, then aren't they the law of the case?

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

QUESTION: I didn't realize that. So this evidence can never go in.

QUESTION: In any event, no matter what.

QUESTION: So that it is purely an advisory opinion.

MR. GIENAPP: That is my interpretation of it, and I feel that I raised that to some extent. I haven't raised it in my briefs here, but I raised it.

QUESTION: It isn't a question of finality; it is a question of an independent state ground, really.

MR. GIENAPP: It is a question of finality as to the Fifth Amendment ruling within the state.

QUESTION: Well, that is final enough, but it makes the ruling irrelevant in this case. However you

decide this ground will make no difference in the trial.

MR. GIENAPP: That is my interpretation of what has taken place up to this time, Your Honor. In the petition -- or in the South Dakota Supreme Court, the South Dakota Supreme Court made the general statement that other issues raised, we don't need to reach or we deem to be without merit.

QUESTION: Well, but that wouldn't answer it. If they raised them. I want to be sure that I understand your representation to the Court. You are telling us that the state did not seek to reverse those two rulings, the error in relying on the irrelevance that the trial judge said, and the fact that no advice was given.

MR. GIENAPP: That is my recollection, Your Honor. The --

QUESTION: Well, that is quite important, as Justice Stevens says.

MR. GIENAPP: The petition for intermediate appeal --

QUESTION: Because if they raised it, the Supreme Court wouldn't have had to reach them because they had another reason for reversing.

QUESTION: Then we would just decide this case and remand it to the court.

MR. GIENAPP: The petition for intermediate appeal, sir -- I don't have the case, or the page number off the top of my head -- is embodied in the appendix for petition for a writ of certiorari, and that would specify the entire reasons for the appeal in this particular case.

QUESTION: You say that is in the appendix?

MR. GIENAPP: Yes. It's on page A-33 of the -- excuse me -- of the petition for a writ of certiorari.

QUESTION: Well, if this case resolves itself down to whether or not the trial judge abused his discretion under the state statute, do you think that is the kind of a case this Court would review under any circumstances, an abuse of discretion, even if it was the grossest kind of abuse of discretion?

MR. GIENAPP: I guess -- Let me correct myself in looking at this petition for intermediate appeal. The petition says the appeal is from the entire order, a portion which declares it unconstitutional. So the reference is to the entire order, but the other portions of the order were basically affirmed by the South Dakota Supreme Court.

QUESTION: Well, didn't the South Dakota Supreme Court say in that regard that it affirmed the order of the circuit court suppressing the admission of

refusal evidence and that it need not address the other issues raised on appeal, or deemed them to be without merit. It didn't say.

MR. GIENAPP: Or deemed them to be without merit. Yes, that is correct.

QUESTION: Here at A-35 it says two questions are presented. This is in the petition for intermediate appeal. One is the constitutionality of the statute, but secondly, whether or not the defendant's statement made after having been advised of Miranda rights and after having waived those rights would in any case be admissible regardless of the constitutionality of the statute.

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

QUESTION: Doesn't that subsume the admissibility of the statements on other grounds?

MR. GIENAPP: That basically does not include, first of all, the third ground, which relates to the statutory requirements.

QUESTION: Why doesn't it? It just says are there any other reasons with respect to a disability.

QUESTION: No. I think isn't a fair reading of that second question that it refers to the "I'm too drunk" comment, which they then did reverse on and remand for a hearing?

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

QUESTION: It doesn't refer to the question of whether it was inadmissible because of irrelevance.

MR. GIENAPP: And those were the only two issues briefed, basically, in the South Dakota Supreme Court, that particular situation.

QUESTION: And it is correct, is it not, that the state Supreme Court treated both of those issues in its opinion?

MR. GIENAPP: Yes.

QUESTION: The "I'm too drunk" comment and the constitutionality question.

MR. GIENAPP: They remanded the propriety of the statement for further trial court proceedings within the confines of Miranda.

QUESTION: Counsel, before you go on, I think your brief expressly agrees that the issue before us was stated correctly in the Attorney General's brief, and that, of course, was only the constitutional question.

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

QUESTION: Of course, agreement can't confer jurisdiction on us, but I'm wondering now what is your position. In other words, what do you urge us to do?

MR. GIENAPP: Basically, Your Honor, I have no problem with the Court deciding the issue. I did raise

the issue in my reply to the petition for writ of certiorari. I did raise it at that particular level. I did not raise it in this brief. I guess I am placed in a position where I am representing an individual client technically in this particular case. Regardless, in my opinion, regardless of whether this Court reaches the issue or not, it is not going to be introduced against my individual client.

I hope that is some type of answer to your question.

QUESTION: Let me see if I understand that. That this evidence, if we reverse and send it back as a new trial, that this evidence is not going to be admitted in evidence. And why?

MR. GIENAPP: Because of the other two grounds found at the trial court level for the non-admissibility of this particular --

QUESTION: And irrelevancy was one of them.

MR. GIENAPP: Right.

QUESTION: Well, suppose it is a different trial judge, who might think that this was quite relevant?

MR. GIENAPP: Then I get into the res judicata rule of the case situation. I would argue that --

QUESTION: There hasn't been any trial here,

yet.

MR. GIENAPP: No.

QUESTION: It is only on appeal from denial -- or grant of a motion to suppress.

MR. GIENAPP: That's correct, Your Honor. And also I feel that the third issue is so obvious under South Dakota law that no new judge is going to decide contrary to that because there is a South Dakota statute that says these specific rights should be given, and as the Attorney General indicated, the new cards weren't out yet, subsequent to July 1st.

QUESTION: What you are really saying is you would be happy to have us give you an advisory opinion on it.

MR. GIENAPP: That would be a correct assumption.

QUESTION: Is it an advisory opinion when that is the only question that brings you two gentlemen here?

MR. GIENAPP: Well, you know, I followed through on the appeal with good faith and obviously feel that it is an issue that there is --

QUESTION: Well, you didn't ask for an appeal.

MR. GIENAPP: That's correct.

QUESTION: No, but after it was here, after it was granted, you conceded that the constitutional issue

posed by the state was here.

MR. GIENAPP: I briefed only what the state briefed in their particular brief. I believe I --

QUESTION: And we aren't bound by what either of you say, of course.

MR. GIENAPP: I believe I did raise a question on that regard in my reply to the petition for writ of certiorari.

QUESTION: And so you thought when we granted the cert, that issue had been resolved by our grant.

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

QUESTION: He thought we knew what we were doing.

[Laughter.]

MR. GIENAPP: That, I guess, would be a proper summation of my feelings in that regard.

[Laughter.]

QUESTION: Very tactful, counsel.

MR. GIENAPP: I feel, though, going to the constitutional issue, and it is Respondent's position that Schmerber, that this is clearly communicative or testimonial under the dictates of Schmerber. Schmerber specifically states that blood test results were admissible only because it was neither petitioner's testimony nor evidence relating to some communicative

act or writing by the petitioner.

Here we have, through statutory authority, basically a situation where the state has passed a statute allowing a compelled testimonial response into evidence. Under the procedures in South Dakota in arrests such as this, under the way things happen in a DWI case such as this and the way it happened in this particular case, this individual is advised of these rights, erroneously here, but advised of these rights, and at the conclusion of these rights, after he is in custody, he is compelled to give a testimonial response. This statute now seeks to introduce into evidence at a criminal trial this very compelled testimonial response.

I feel that it is clearly communicative and testimonial. I do not follow and cannot see the state's argument that it is real or physical, because it falls exactly within the wording, the outlines, the statements in Schmerber v. California. The Fifth Amendment privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. When you are told that you have to give me a response, you have to tell me, that I want you to tell me --

QUESTION: Well, is that really what the

statute says?

QUESTION: That the defendant must or the accused DWI guy when he gets out of the car must speak up and say something? Or just that if he doesn't agree to take the test, which I take it would require some sort of consent, the fact of his failure to agree can be admitted in evidence?

MR. GIENAPP: Under the facts of this particular case, you are talking testimonial, and as this Court has indicated, testimonial can be other than actual word of mouth; it can be a nod of the head, a nod of the head "no" or this type thing. Under South Dakota law --

QUESTION: But he wasn't compelled to shake his head, certainly.

MR. GIENAPP: He was basically requested by the law enforcement officer to give him a response. That response was communicative, that response was testimonial.

QUESTION: Yes, but he certainly wasn't compelled. He was free just to stand mute, I suppose.

MR. GIENAPP: He wasn't within the implied consent right told that. But to follow that particular question one step further, the Attorney General's position, which I don't necessarily concur with, that

just the refusal, the fact of refusal is admissible, under South Dakota law and under decisions of the South Dakota Supreme Court, muteness is considered a refusal.

QUESTION: Muteness?

MR. GIENAPP: Muteness.

QUESTION: To stand mute.

MR. GIENAPP: To stand mute.

QUESTION: To refuse to speak.

MR. GIENAPP: Yes. To refuse to speak is considered a refusal. To state "I don't want to take that test until I have had the opportunity to talk to an attorney," under South Dakota law is considered to be a refusal.

QUESTION: Let me clarify that. If he doesn't shake his head one way or the other, doesn't utter a word, stands mute in the literal sense, do you say that South Dakota law makes that testimonial?

MR. GIENAPP: South Dakota law states that that is a refusal. And under the Attorney General's position, that just the fact of a refusal is what should be introduced, if a person stood mute, that would be introduced as a refusal.

QUESTION: And you say that is testimonial.

MR. GIENAPP: I don't necessarily say the muteness is testimonial. I say in this particular

factual situation, where there is an actual verbal response, it is testimonial; but it is still a compelled response. The muteness is basically compelled because he has got to do something, either answer or remain mute, and it is going to be used against him. And it is basically going into the private mind of the individual.

QUESTION: I don't understand why you say this is a compelled refusal. As I understand it, the statute gives him a privilege to refuse, doesn't it?

MR. GIENAPP: It is --

QUESTION: Well, does it?

MR. GIENAPP: If I said compelled --

QUESTION: Does it? Doesn't it?

MR. GIENAPP: Yes.

QUESTION: Well, then how is it compelled?

MR. GIENAPP: If I said and used the words "compelled refusal," I was erroneous. I should have said "compelled response" or "compelled testimony." He didn't have to refuse, but whatever he said was compelled because he was being told at that particular time. If he had acquiesced to the blood test and said, "yes, I'll take the blood test, I'm too drunk, I'll never pass it, but I'll take it," I guess I would consider that also --

QUESTION: But he could under Schmerber be

compelled to give the blood sample, could he not?

MR. GIENAPP: That's correct.

QUESTION: They could have strapped him down and just gone ahead and taken it, as long as they had appropriate medical procedures.

MR. GIENAPP: That's correct.

QUESTION: And what the State was after was the blood sample, was it not? The State wasn't after a refusal. They are not interested in the refusal. They didn't want to have evidence -- they wanted the blood test so they could make a test to determine whether or not he was intoxicated.

MR. GIENAPP: I think that would be a proper assumption.

QUESTION: Then I have difficulty understanding how you can argue there is any compelled refusal.

MR. GIENAPP: It is compelled, the testimonial -- as I indicated, it is not compelled refusal, it is compelled communicative or testimonial response. It would be no different than a situation without the benefits of Miranda where your fingerprints are being taken, which is obviously a legitimate police function, and the police officer says, "Do you really want these fingerprints taken?" and you make the testimonial

response, "No, I don't because they are probably going to show up on the gun," that basically by the inquisition is compelled and it is testimonial under Schmerber and it would not be admissible. It would be what, basically in the footnote of Schmerber in that situation, the testimonial byproduct that was discussed there.

QUESTION: Counsel, I have a problem. You ask him to take a blood test and he stands mute, says nothing. Can't you put that in evidence?

MR. GIENAPP: As a defense?

QUESTION: Either side. Put in evidence the fact that he was asked to take a blood test and he just stood mute and said nothing. Nothing to stop you from putting that in.

MR. GIENAPP: No, that could be put into evidence.

QUESTION: That's what I thought.

MR. GIENAPP: Yes, that could be put into evidence. But what I am stating is that the representation by the Attorney General that all they wanted was the refusal into evidence, the fact of a refusal, the fact of the refusal could mean many things. I feel, as I believe Justice Stevens referred to this morning, that the constitutional issue is

there. If it is violative of the Fifth Amendment, then and in that situation it is not admissible whether it is just called a refusal or the actual words are used.

If it is not violative of the Fifth Amendment, then I think the actual words would be as admissible as the fact of just a refusal because the South Dakota statute does not say that the fact of refusal should be admitted; the South Dakota statute merely says the refusal may be admitted.

QUESTION: Well, counsel, if it isn't compelled, how can it violate the Fifth Amendment?

MR. GIENAPP: It is my position it is compelled. The individual does not have to give any testimonial or communicative response --

QUESTION: He is not required to take the test and he is not required to answer, is he?

MR. GIENAPP: That's correct. He is not required to take the test and he is not required -- He has the option, but it is a compelled option by the very inquisition, and the results of that option are testimonial or communicative.

QUESTION: Including standing mute and saying nothing and refusing to submit.

MR. GIENAPP: That's correct. But you have a situation where the rights used state that what do you

want to do, do you wish to take this test? And you are not going to find a situation where someone stands mute that often, because it is an actual questioning, it is an actual interrogation compelling this particular response. And the basic rights and problems that the Fifth Amendment seeks to protect and the dangers in this type of situation are indicative in this case. Not that there was any abuse, but you have a situation where he was advised of these rights three times.

Can law enforcement officers then continue to advise and get the refusal that is most susceptible to what they would like to introduce at trial? Under this statute they could. And here we have a situation where the compelled response was not given only once but three times. There is a constitutional right to refuse, but there is not a constitutional right for the state to create a statute which compels an individual to give testimonial or communicative statements.

If the state's argument that it is circumstantial evidence of guilt, if that argument is carried to its logical extreme, then theoretically the Fifth Amendment would no longer protect any communication that could also be characterized as circumstantial evidence of a state of mind; and I submit that virtually any testimonial or communicative

statement can be interpreted and argued as being circumstantial evidence of a state of mind.

The General also argues that this is necessary to bring so juries know what went on. I submit that the only reason they want it is to show through compelled testimonial response an inference of guilt.

QUESTION: Well, that is what most cases are about. Isn't the prosecution trying to show some sort of inference of guilt?

MR. GIENAPP: That's correct, although they have stated here that their main concern is so that there is not any question that the individual was not given the opportunity to take a test --

QUESTION: But anyone who has tried one of those cases knows that if you don't put in the test, the defense lawyer is going to get up and that is going to be his big pitch to the jury: why didn't the state make a test?

MR. GIENAPP: I don't feel that it is proper, and I never have -- and I have tried a number of these -- argued, when the refusal wasn't admitted, argued why wasn't there a refusal. I don't feel that is proper argument because I think that it is totally improper argument by a defense counsel.

QUESTION: Well, do you think that other

defense counsel adhere to your high standards in that regard?

[Laughter.]

MR. GIENAPP: There would be some question amongst other defense counsel as to whether or not I have high standards.

[Laughter.]

CHIEF JUSTICE BURGER: Your time has expired.

MR. GIENAPP: Thank you.

QUESTION: Could I just ask you. Your petition, your motion to suppress was based solely on constitutional grounds, I take it.

MR. GIENAPP: That's correct.

QUESTION: Did you make the motion?

MR. GIENAPP: Yes, Your Honor.

QUESTION: And the further grounds that the procedures utilized by the arresting officer in advising the defendant of his potential rights were violative of the Fourth, Fifth and Sixth Amendment rights.

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

QUESTION: Now, do you think the trial court's ruling -- and you submitted the findings of fact, the proposed findings of fact, and he adopted them, I take it.

MR. GIENAPP: Yes, Your Honor.

QUESTION: And signed them. And on page 829 at Roman numeral III, is that based on a state statute or is that a holding that failure to advise of the right to -- failure to advise that the refusal could be used against him and failure to advise of his right to counsel, are those constitutional rulings?

MR. GIENAPP: That would be a constitutional ruling. That particular statement is not --

QUESTION: That's not based on the state statute or the state law.

MR. GIENAPP: Well, the failure to advise that the refusal could be used against him was a violation of state law, yes.

QUESTION: Well, arguably it could be a violation of the Federal Constitution. That is what you said it was. That is what your motion was.

MR. GIENAPP: That's correct, Your Honor. But the order --

QUESTION: Because this doesn't refer to the statute.

QUESTION: I suppose, whether it is federal or state ground, it is still the law of the case, which we have no power to review unless it has been raised --

QUESTION: It sure is.

MR. GIENAPP: And I believe on page A-32,

then, the actual three items in the order are listed there.

QUESTION: Well, isn't it strange; it really is strange that the state would appeal one ground for excluding the evidence but it would make absolutely no difference in the disposition of the case.

MR. GIENAPP: The state, I believe, was, of course, interested in the broader --

QUESTION: I know, but it wouldn't make any difference in this case.

MR. GIENAPP: That's correct, Your Honor, that's my opinion.

QUESTION: It's very strange.

CHIEF JUSTICE BURGER: Mr. Attorney General?

ORAL ARGUMENT OF MARK V. MEIERHENRY, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. MEIERHENRY: Well, we respectfully disagree with our colleague here. If you will look at page 4 of our brief, you will see the statute that is 19-13-28.1.

QUESTION: Right.

MR. MEIERHENRY: That says, notwithstanding another provision, such refusal -- it says that if someone violates 32-23-10, such refusal is admissible into evidence. But it all hangs upon whether or not

10.1 is constitutional. If it is not constitutional, then this is a nullity because we can't use the fruits of an unconstitutional statute to admit it.

I disagree with Mr. Gienapp. The relevancy issue falls, and he says the right, and I would point out to the Court --

QUESTION: Yes, but will this evidence ever be admissible?

MR. MEIERHENRY: Yes, it will.

QUESTION: Let's assume that we reverse this judgment and say it is quite constitutional to introduce the evidence, at least as far as the Fifth Amendment is concerned, it is constitutional, it is not forbidden. How can you ever get the evidence in in the light of these rulings in the trial court?

MR. MEIERHENRY: Very clearly, because then the statute 19-13-28.1 says that the refusal evidence is admissible without regard to relevancy, without regard to what Mr. Gienapp misintends. He refers back to the fact that you have to be advised that if you don't take the test, you could lose your license for a year. Our legislature nor no court has ever said you have to be advised that your refusal will be used against you. That has not been -- I disagree with Mr. Gienapp on that point.

The state's position is that if --

QUESTION: Well, here is a ruling that the failure to advise him excludes the evidence.

MR. MEIERHENRY: It is the state's position that should this Court find that this is constitutional, the trial judge does not have the discretion and would subsequently reverse his ruling. His ruling is based first of all that it is unconstitutional. Since it is unconstitutional, then he would have to have an advising of rights, and besides that, he says, since this is unconstitutional --

QUESTION: It is irrelevant.

MR. MEIERHENRY: -- it is irrelevant. What we are contending to this Court is that we need a final judgment here. To argue otherwise as if any trial judge in our state always held that it is irrelevant and it is also unconstitutional, we would never get the issue presented to anyone.

QUESTION: Well, you could always appeal that to the Supreme Court of South Dakota, making it clear that you appeal both points, and perhaps you have.

MR. MEIERHENRY: Well, we think it is clear -- it was remanded back on a Miranda issue. Obviously, why would they remand it back if it were irrevelant.

QUESTION: They remanded it back for

voluntariness.

MR. MEIERHENRY: Yes.

QUESTION: The voluntariness of the "I'm too drunk" statement.

MR. MEIERHENRY: Yes, but that goes to relevancy. Why would they remand it if it was irrelevant?

QUESTION: If it is irrelevant, there was no need to.

MR. MEIERHENRY: Why would we go through the trauma of going through --

QUESTION: There is no ruling that the "I'm too drunk" statement was irrelevant. And there really couldn't be, either.

MR. MEIERHENRY: But that only occurred in the response, the refusal. No. And of course, we have adopted basically the Federal Rules of Evidence and --

QUESTION: But your Supreme Court drew a distinction between the refusal and the "I'm too drunk" statement. They sent one back and they disposed of the other.

MR. MEIERHENRY: Because they interpreted this Court's ruling under Schmerber to be it was unconstitutional, just as the trial judge did. If that is the case, Your Honor, then it also makes a nullity

our subsequent statute that says it is admissible. Mr. Gienapp used --

QUESTION: Clearly it is not admissible in a case where it's totally irrelevant. It wouldn't be admissible in a child custody case, for example.

[Laughter.]

MR. MEIERHENRY: That is perhaps true, Your Honor.

QUESTION: But if it went back to the trial court in your state, and the judge enters and makes findings and conclusions in which he just says it is irrelevant, period, then that is subject to review by the higher courts in the State on an abuse of discretion basis, is it not?

MR. MEIERHENRY: That's correct.

QUESTION: But would we have any authority to review an abuse of discretion issue here?

MR. MEIERHENRY: No, I don't -- obviously not. It would not involve any federal question or constitutional issue on the part of the state.

Thank you.

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

[Whereupon, at 1:37 p.m. the case in the above-entitled matter was submitted.]

# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

SOUTH DAKOTA, Petitioner v. MASON HENRY NELVILLE No. 81-1453

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and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____

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