OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-710

TITLE HARRY J. BERKEMER, SHERIFF OF FRANKLIN COUNTY, OHIO, Petitioner v. RICHARD N. McCARTY

PLACE Washington, D. C.

DATE April 18, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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HARRY J. BERKEMER, SHERIFF :

OF FRANKLIN COUNTY, OHIO, :

Petitioner :

v. : No. 83-710

RICHARD N. MC CARTY :

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Washington, D.C.

Wednesday, April 18, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:21 p.m.

APPEARANCES:

ALAN C. TRAVIS, ESQ., Assistant Prosecuting Attorney, Cclumbus, Ohio; on behalf of the Petitioner.

R. WILLIAM MEEKS, ESQ., Columbus, Ohio; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Travis, I think you may proceed whenever you're ready.

MR. TRAVIS: Thank you, Your Honor.

ORAL ARGUMENT OF ALAN C. TRAVIS, ESQ.

ON BEHALF OF THE PETITIONER

MR. TRAVIS: Mr. Chief Justice, and may it please the Court, I would like to restate the question presented before the Court in this case. I believe it can be restated in two parts. First of all, the first part of the question should be, in my judgment, whether routine highway traffic safety stops involve the type of custodial interrogation which was a concern of the Miranda court; that is, the routine, everyday, highway traffic stops. Second -- the second portion of our argument -- involves a question of whether there can be a reasoned application of the judicially crafted prophylactic rule of Miranda in the case of the impaired driver, a person charged with the offense of driving while impaired by alcohol or other chemical substances.

The salient facts, if I may recapitulate them briefly, indicate that the respondent in this case was observed driving on an interstate highway by a state Highway Patrol trooper on routine traffic safety patrol. He observed Mr. McCarty's car weaving back and

forth within his expected lane of travel, and followed him for some two miles.

After following him for two miles, he caused the car to be stopped, and asked Mr. McCarty to exit the vehicle. The trooper described Mr. McCarty as falling. He was unable to stand unaided, and in his later report indicated that he had to be "held up from falling." He attempted -- I'm sorry -- at that point -- and, by the way, each of these facts were entered before the Muncipal Court by way of stipulation between the parties, rather than an evidentiary hearing. At the point that he realized the man could not stand on his own two feet unaided, Trooper Williams concluded that he would charge Mr. McCarty with a traffic offense, and the parties stipulated at that point his freedom to leave the scene was terminated.

Trooper Williams then attempted to have Mr. McCarty perform certain field sobriety tests I think the Court will recognize are traditional tests of balancing, touching one's nose, walking a straight line, and so forth. But, as the alcohol influence report form shows -- and that's in the Appendix at page 2 of the Joint Appendix, that is -- Mr. McCarty was falling, and therefore the tests could not be completed.

The trooper noted that Mr. McCarty spoke with

very slurred speech -- he was very hard to understand -- and at this point, asked Mr. McCarty if he had been drinking. Mr. McCarty said he had had two beers and had smoked "several joints of marijuana a short time before." At that point, the trooper formally arrested Mr. McCarty, and under a state implied consent chemical test statute, transported him to a facility, which in this case was the Franklin County Ohio Jail for a chemical test of his blood alcohol content.

At that point, Mr. McCarty took the test and the intoxilyzer -- that the Court has heard quite a bit about in the last case -- the intoxilyzer indicated a zero blood alcohol content. At that point, Mr. McCarty presumably still not being able to function, was not released from the Franklin County Jail facility, and the officer began to fill out what is known as the Alcohol Influence Report Form. Again, that is in the Joint Appendix, both in its original state and, at the suggestion of the Clerk, in a typewritten facsimile for ease of reading.

The trooper filled out the report form which is a pro forma line item, fill-in-the-blanks form, if you will. It is a statement on the front page, as the Court will note, which recounts the date and time of the offense, the trooper's observations of the driving

offense that he had witnessed the man traveling for two miles and so forth, could not stand on his feet. It recounted his statements at the scene of the traffic offense -- excuse me -- to the effect that he had two beers and smoked several marijuana cigarettes. And then on the back of the form, as the Court will note, the trooper inquired of Mr. McCarty as to whether he knew what day it was, what date it was, what time it was, and the various responses are down there.

QUESTION: That's on -- those questions are asked at the scene?

MR. TRAVIS: No, sir. No, Your Honor. This is on the Alcohol Influence Report Form, which was filled out--

QUESTION: Yes. Right then and there, he asked him that.

MR. TRAVIS: No, not at the scene of the arrest, Your Honor.

QUESTION: No, but when he made out the report.

MR. TRAVIS: As he was making out the report, yes.

QUESTION: He asked him those questions.

MR. TRAVIS: He asked him those questions.

QUESTION: How long was that after that the arrest?

MR. TRAVIS: This was -- in terms of time, I can't say exactly, Justice Brennan. It was after he was transported from the highway to the breathalyzer test and immediately after he tested point zero.

QUESTION: And what's that mean -- point zero?

MR. TRAVIS: No blood alcohol in the intoxilyzer. In other words, when Mr. McCarty blew into the tube, the machine said this man has not been drinking alcohol. But obviously he was unable to stand on his feet. And -- I'm sorry, Your Honor.

QUESTION: Was the machine out of order?

MR. TRAVIS: No.

QUESTION: It might have been some other reason besides alcohol.

MR. TRAVIS: There may have been some other reason, and the reason given by --

QUESTION: The reason would be drugs, not alcohol.

MR. TRAVIS: That he had been smoking illicit drugs in this case, or could in any other case, for that matter --

QUESTION: What's this in his handwriting on the front of the form?

MR. TRAVIS: That's actually the reverse side of the Joint Appendix, Your Honor.

QUESTION: I'm looking at what you referred us to at page JA2.

MR. TRAVIS: It's page -- Joint Appendix, page 2. On the front of the form, Your Honor, is --

QUESTION: I'm really looking at the back.

MR. TRAVIS: I'm sorry.

QUESTION: Under his signature?

MR. TRAVIS: Yes. Under his handwriting specimen at the bottom, the Court will note that there is a bottom place noted "Remarks." The top portion of that is the police officer's or state Highway Patrol trooper's handwritten notes. "The defendant stated that he had smoked two joints," -- the trooper's spelling is somewhat inaccurate -- "at around 11:30 p.m." From there on, that is Mr. McCarty's handwritten statement.

QUESTION: And I can't decipher it. What's he say?

MR. TRAVIS: Well, I would invite the Court to observe that, yes.

He says, no -- and I will translate -- angel dust or PCP -- another controlled substance, that is, -- in the pot. Signed his name, Richard McCarty.

QUESTION: But he said he had smoked two --

MR. TRAVIS: He repeated what he had said at the scene of the traffic stop, Your Honor.

QUESTION: Plus this other.

MR. TRAVIS: Plus the other. And the other, I should add, was in response to the officer's request to write down that fact, because he apparently had said that during the filling out of the Alcohol Influence Report Form.

The parties stipulated -- and, of course, there's a record -- that no Miranda warnings or prophylactic advice were given at any time to Mr. McCarty either at the scene of the traffic stop or later after the implied consent test and the filling out of this -- what we call a line item pro forma Alcohol Influence Report Form.

As to the traffic stop, the first portion of what I restated as being the question before the Court, simply stated, in the petitioner's judgment, routine traffic highway safety stops are not the type of custodial interrogation that was envisioned by the Miranda court.

QUESTION: Well, I don't think the Sixth Circuit necessarily disagreed with you on that, did they?

MR. TRAVIS: I am not certain, Your Honor, what the Sixth Circuit panel decision indicated. If the Court will note --

QUESTION: Well, what was held inadmissible?

You might tell us that.

MR. TRAVIS: I am again not certain, Your Honor. As Judge Wellford indicates in dissent, he indicates that he is not certain what the majority has stated. And the majority itself, after recounting that procedurally Mr. McCarty had moved consistently through all courts, that all of his statements when in custody should be suppressed, stated: "We agree." They then went on --

QUESTION: But they said, did they not, the majority, and Judge Wellford agreed that the respondent was not in custody until he had been formally placed under arrest?

MR. TRAVIS: I don't know that they stated that, Justice O'Connor. I think that's what Judge Wellford indicates in his dissent was troubling him. He is not --

QUESTION: Well, that's certainly what it looks like. The Court didn't feel bound by the parties' stipulation on custody and determined that he wasn't.

MR. TRAVIS: Well, I --

QUESTION: Take a look at the penultimate paragraph of the majority's opinion on page A20 of the Petition for Certiorari. You may have it somewhere else. This is what Judge Martin and his colleague are

saying. "We believe that the facts of the present case require that Trooper Williams should have advised McCarty of his constitutional right. At the point that Trooper Williams took McCarty to the police station, his freedom of action was curtailed in a significant way. The failure to advise McCarty of his constitutional rights rendered at least some of his statements inadmissible."

Now, I grant you that's ambiguous, but it seems to me they're talking about statements made after he was really taken in the squad car.

MR. TRAVIS: The is the way I first read it, and I will confess to the Court, to be candid with the Court, I am still not certain what the said. We felt that it was important to litigate the issue before the Court because, No. 1, even if that is correct, they are still in conflict with the Fourth Circuit in Clay against Riddle.

QUESTION: I wonder if this is the correct reading, that all they held was that the statements made after he was taken into custody were inadmissible. Are you arguing here that the statements made after formal custody are admissible or not?

MR. TRAVIS: Yes. That is the second portion of our argument, and I will actually conclude very

briefly on the first portion by simply stating what I started out to say. I don't believe that is the type of custodial interrogation that is the routine, day-to-day, traffic safety stop on Miranda.

QUESTION: On the scene.

MR. TRAVIS: On the scene. And I'll conclude that portion right now.

QUESTION: But just before you do, I just wanted to mention, on A19 they also said we do not hold that the mere stopping of a motor vehicle triggers Miranda, because the police gather information on misdemeanor traffic offenses, primarily through on-the-scene questions. So isn't it quite clear that --

MR. TRAVIS: Well, yes, Justice Stevens. Again, when I first read the opinion, I had some difficulty with it. However, what the Court seemed to do down there was reject what the parties had stipulated. Throughout, the parties had stipulated a form of custodial status, and the question was whether this was the type of custodial status and the type of custody, that is, and the type of interrogation that the Miranda court was concered with.

What the majority below did, in our opinion, was reject a stipulation of historical fact, and thus not reach the issue that the parties were litigating.

That is why we have -- and I believe it is Footnote 3 -- that the parties had stipulated custody as the term is ordinarily considered, but the question is whether or not this is the type of custody that the Miranda court was concerned with.

QUESTION: May I ask you just one other question before you get into your main argument?

What's happened? Is the man -- has he served the sentence or --

MR. TRAVIS: No. There was a stay, Your Honor.

QUESTION: There was a stay.

MR. TRAVIS: There was a stay when he filed both in the state appellate process and then in federal habeas corpus.

QUESTION: And he entered a guilty plea, but it was kind of a conditional plea or some kind.

MR. TRAVIS: It was what we call a no contest plea, and under state law he specifically reserves pretrial rulings, the appealability. So he did not concede in the sense of the guilty plea.

QUESTION: Well, if the issue is only -- let's just assume the issue here is only the admissibility of the evidence made after formal custody had taken place. Then what is -- the only piece of evidence at issue is what he signed at the bottom, on the back side of the --

MR. TRAVIS: The repeat of the questions on the back side of the Alcohol Influence Report Form, Your Honor. Yes.

QUESTION: And that report was admitted into evidence?

MR. TRAVIS: Yes. As a matter of fact, it was a joint exhibit, part of the stipulation. As I said, the parties did not have an evidentiary hearing. It was Joint Exhibit 1 in the Franklin County Muncipal Court, the Traffic Court.

QUESTION: But the defendant had made other statements before formal arrest, and those, presumably under the Sixth Circuit opinion, would be admissible.

MR. TRAVIS: As Judge Wellford -- well, as the majority -- if I am incorrect in my concern about the panel decision and that the panel decision actually ruled that the statements made on the scene of the traffic stop were admissible, I would agree.

Secondly, Judge Wellford stated that he would hold, even if there were a full-blown custody at that scene, that any situation involving a routine traffic stop, he would admit those. He also indicated that the statements which the majority found objectionable, as not having been given following Miranda advice, should be considered harmless error because they were

repetiticus -- essentially repetitious -- excuse me.

QUESTION: Are you arguing harmless error here?

MR. TRAVIS: We have included that, althcught that is not the prime thrust of our argument, Your Hcnor.

QUESTION: Did you raise it below?

MR. TRAVIS: It was litigated in the sense -- not litigated, not raised by the party, the state -- but was decided, in my judgment, by the dissent specifically addressing it and implicit in the majority, the majority rejecting it. Therefore, I would say that it had been ruled upon and thus preserved.

The primary thrust of the second portion of our question presented to the Court this morning -- I will restate it just briefly here -- is whether there can be a reasoned application, a rational application of the judicially crafted prophylactic rule of Miranda in the case of an individual arrested for impaired driving.

And I would stress the term "impaired driving." We are talking not simply about drunken driving, but drunken and drug driving. In this instance, we suggest that there are unique reasons why the prohophylactic rule was not applicable in this case, in this type of case.

The simplest way I can present this positicn, I believe, is to ask the Court to compare -- or I will

compare, rather -- what would happen in any other instance where a detective, in the traditional sense of an investigation of a criminal act, had a person in custody -- we are talking now about custodial interrogation -- and he wishes to interrogate that person? One of the first things any conscientious detective will do is make a determination, factually, of the ability, the cognitive ability of this individual whom he wishes to question, the cognitive ability to be aware of his so-called Miranda advice, Miranda warnings, to have the cognitive ability to appreciate them, to fully understand them, and then, of course, under Johnson against Zerbst, for the later court hearing, whether there would be a knowing, intelligent, voluntary waiver of those rights.

The difficulty with the impaired driver and the uniqueness of this offense is that the very preliminary questions that any conscientious detective would ask are precluded if Miranda is applicable. The conscientious detective would inquire of the individual's age, educational background, their ability to read and write, and almost universally, I submit, whether the person had been drinking, whether the person had taken any drugs; if they've been drinking, when, how much, and so forth.

QUESTION: But this is before custodial arrest you're talking about?

MR. TRAVIS: No. I'm suggesting that if he wishes to interview the person, under the traditional situation of custodial interrogation -- I'm talking about a detective who wishes to interview an arrested person who is being held in the police station, who --

QUESTION: You're still on your hypothetical.

MR. TRAVIS: Yes. I'm speaking in the hypothetical sense that is a comparison to this case, that any such detective would, of necessity, if he's conscientious, make a determination of whether the person had the ability to appreciate, understand, and knowingly, intelligently, and voluntarily waive his Miranda rights.

That would include the very questions which Miranda would preclude in this case, in the case -- the unique case -- of the impaired driver; that is, have you been drinking? Hae you taken any drugs? Have you taken any medication? The attempt to learn whether he can cognitively understand and appreciate his rights.

That anomalous result, I think, counsels against extension of Miranda in this unique situation.

QUESTION: But if your logic is correct, your hypothetical detective could go into the cell block,

determine that the guy was drunk and therefore not capable of waiving his Miranda rights, and say well, why give them at all; since he can't appreciate them, it would just be counterproductive.

MR. TRAVIS: Are we talking about the hypothetical of some other offense, not the drunk driving or impaired driving?

QUESTION: No. But I mean, presumably, a person could get drunk in their cell block, even though they weren't charged with drunken driving.

MR. TRAVIS: That's true. But my point, Your Honor, is not whether or not Miranda advice can be given or cannot be given. I'm saying that at this point -- my hypothetical is that a conscientious detective would go into those questions, but in the case of the impaired driver, application of Miranda would preclude those preliminary questions. He could not ask the preliminary question, have you been drinking or taking drugs, to determine whether the man understood his rights, because they go immediately to the heart of the offense.

QUESTION: But if he hasn't taken -- if he hasn't made a custodial arrest, I don't see that the Sixth Circuit would prevent you from asking those questions.

MR. TRAVIS: If he did this, if he filled all

this information out at the scene. But I think one of the things that the state law does, and does -- I would assume, frankly, that it does so in virtually any state -- I think all states have an implied consent test -- is recognize that there is proof positive, or essentially proof positive, in a breathalyzer. One of the things that the Presidential Commission on Drunk Driving recommended was move the person into the process of testing, booking, and put the officer back on the street.

He could do a full-blown field investigation with this report form. He could sit there on an on-scence basis for an hour and a half and inquire. I don't think it's a practical --

QUESTION: Well, the officer typically makes preliminary inquiries in the Terry-type stop of anybody stopped for a traffic offense, to see whether there is any legitimate cause for concern that there is a DWI.

MR. TRAVIS: That's true, Your Honor.

QUESTION: They all do that. They fill out these forms later on at the station. Isn't that right?

MR. TRAVIS: That's correct, and that's --

QUESTION: And they have dual evidence. They have the on-the-scene questioning which apparently the Sixth Circuit doesn't find fault with either.

MR. TRAVIS: Well, I would agree with you, Justice O'Connor, but I would still have to say that -- and this may be begging the question, begging Your Honor's question -- but it would still seem to me that before there can be a rational application of the prophylactic rule of Miranda in this case, there must be some way that the officer can rationally determine these things, if there is going to be any questioning at all. And, as we --

QUESTION: Well, the officer has quite a bit of experience by the time he gets around to the station house questioning. He's observed the person who was stopped, he's made on-the-scene questions, he's transported him to the station. There's been a lot of going on. And by that time, you have some basis for knowing how impaired a person is.

MR. TRAVIS: Assuming that, as in this case, there was a statement made on the scene. If there were not this statement made on --

QUESTION: Well, there usually is. I mean the reality of the situation is, the scenario unfolds in the typical case, just like it did here. Isn't that right?

MR. TRAVIS: I can't tell you that in the typical case there are always statements and always admissions made on the scene of every traffic stop, and

I doubt seriously, Your Honor, that there are. I doubt seriously that every --

QUESTION: Well, not 100 percent, but this is a pretty typical situation.

MR. TRAVIS: It may be, but it is untypical, if you will, in the sense that there is no breathalzyer or indication of alcohol in this case. And in that instance, that --

QUESTION: Well, there isn't when there's drugs.

MR. TRAVIS: I'm sorry?

QUESTION: Usually, drugs don't show up on a breathalyzer.

MR. TRAVIS: They don't at all, to my knowledge, Your Honor. They don't, to my knowledge at all.

QUESTION: Mr. Travis, can I ask one question about your hypothetical, your concern about the man's ability to waive and all the rest. But why couldn't you just give the Miranda warning at the outset of this questioning anyway? I don't quite understand what the problem is.

MR. TRAVIS: Well, it certainly could be done. And, in candor, some other states do. The amicus brief -- and respondent has pointed out, there are various

court decisions in the state courts either saying yes or no, yea or nay. I still say, Your Honor, that --

QUESTION: I just don't see the harm in giving the Miranda warning.

MR. TRAVIS: Well, I don't see what value there is either. In the case of a person who can barely stand up --

QUESTION: Well, the simple rule is, normally you take somebody to the station, ask him questions, you start out giving the Miranda warnings, and we don't have to litigate these questions.

MR. TRAVIS: I would agree, Justice Stevens, in general. My concern is -- and what we have attempted to present in the second portion of our argument here -- is that in the case of a person impaired by either alcchol cr chemicals, and specifically this fact pattern, for example, if you -- and I'm moving a little bit farther along in the report form. When a person is in custody, they are entitled tc some reasonable degree of care. It would seem to me that, although not directly identically, words of booking, attendant to arrest, and so forth, this may very well be more in that line than it is in the line of interrogation.

For example, in this instance, Mr. McCarty exhibits what we would describe as rather bizarre

behavior. He was unable to stand. His speech was extraordinarily slurred. The officer, other than the fact -- and I am now in a hypothetical situation to the extent that other than he made some statement on the scene -- when he tests zero on the breathalyzer, there is an indication that there is something wrong with the man, but there is an indication it is not alcohol-induced. It could be virtually anything. It could be insulin shock. It could be a stroke. It could be a combination of the snyergistic effect of several drugs. Perhaps he was on a minor tranquilizer.

I'm suggesting that these line item pro forma inquiries are more in that nature, and not in the nature of the traditional interrogation, and that if the person is in that state, it is at best difficult to make any determination that they had a knowing, intelligent, awareness of their rights, even if they were given.

QUESTION: Why isn't the practical, sensible thing to do, to give the Miranda warning at the outset to a custodial situation, and then let the defendant later say he didn't understand it. How can we have policemen making diagnostic decisions on the ground?

MR. TRAVIS: It's not -- I'm sorry.

QUESTION: You're really putting the policeman up to making a diagnostic decision which really isn't

his business.

MR. TRAVIS: I don't know that I am suggesting that he have some medical diagnosis decision.

QUESTION: Well, diagnosing whether he can understand the Miranda warning. Why not give him the Miranda warning, and if he later wants to make the point that he didn't understand it, weight on that.

MR. TRAVIS: Well, it's certainly a possibility. But what we have suggested to the Court, and what I think that would do would be to throw the situation, if you will, back into the voluntariness question on the statement itself; that in almost any instance, certainly in Mr. McCarty's instance, there is question of whether or not he would have a voluntary statement in the traditional sense.

I think that's essentially what we're arguing before the Court this morning.

QUESTION: Well, of course, you certainly are interested in having it made clear here, if you possibly can have it mad clear, that on-the-spot precustody questioning doesn't require Miranda warnings.

MR. TRAVIS: That would be one portion.

QUESTION: I would expect that there will be argument on the other side that it does.

MR. TRAVIS: I'm certain there is, and --

QUESTION: So that's the major part of this ase.

MR. TRAVIS: I would say that that's a significant portion.

QUESTION: Didn't the Miranda opinion itself say that generally, these general questions on the scene were not covered by Miranda?

MR. TRAVIS: That portion of the quote from Miranda does indicate that. And yet, as respondent points out, there is additional language in there that is not totally clear as to whether it relates directly to the person who is the suspect in the case.

I would reserve the balance of my time for possible rebuttal. Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Meeks?

ORAL ARGUMENT OF R. WILLIAM MEEKS

ON BEHAIF OF THE RESPONDENT

MR. MEEKS: Mr. Chief Justice, and if it please the Court, if I might, I would like to begin by putting this case in a proper factual setting as it pertains to the Alcohol Influence Report Form that the Court has had the opportunity to review.

The Sixth Circuit's ruling basically does two things. It precludes the use of statements made by

Mr. McCarty while in custody at the Franklin County Jail. It permits into evidence statements made by Mr. McCarty prior to that, at his so-called on-the-scene setting.

Referring, if I might, the origin of this argument to the statements made in response to the Alcohol Influence Report Form --

QUESTION: You are very positive as to that? That they did permit him -- permit the earlier statements.

MR. MEEKS: They permitted the later statements to be -- they kept the later statements cut, Your Honor. They permitted the statements made at the scene tc come in.

QUESTION: And you can get that from a reading of the Sixth Circuit majority opinion?

MR. MEEKS: Yes, I do.

QUESTION: And you agree with that?

MR. MEEKS: No, I don't.

QUESTION: I didn't think you --

MR. MEEKS: I agree in part; then I disagree in part.

Our position is very simply this: that the Sixth Circuit's decision, as it pertains to the inadmissibility of the statements made during custodial

interrogation, should be affirmed. Our problem with the Sixth Circuit's decision is simply that their language would preclude any types of statements made at the scene.

Now, my concern, Your Honor, is that --

QUESTION: By preclude, you mean they would allow the admission into evidence of those statements made at the scene.

MR. MEEKS: That is correct.

QUESTION: Well, did you cross-appeal?

MR. MEEKS: No, sir, we did not.

QUESTION: I'm not sure you're entitled to press this. If you really read the Court of Appeals' opinion as permitting the evidence taken at the scene to be admitted, I'm not sure you're entitled to argue that it shouldn't -- those statements shouldn't -- that would really vary the judgment below. It wouldn't just be -- it wouldn't be an affirmance; it would be a partial reversal.

MR. MEEKS: With all due respect, Your Honor, we do not contest the judgment of the Sixth Circuit. The judgment of the Sixth Circuit reversed the trial court's ruling as it pertained to the in-custody statements.

QUESTION: It may be. It may be. But nevertheless, if we accepted your -- if we agreed with

you about on-the-scene questioning, the trial would be considerably different than it would be under the Sixth Circuit's opinion, as you read it even. There would be other evidence that would not be admitted.

MR. MEEKS: That part of the decision, however, Your Honor, only pertained to the in-custody statements. We do not feel the necessity of cross-petitioning because of the fact that that ruling was not part of the actual judgment. It was our understanding --

QUESTION: Well, it would certainly vary the consequence of the judgment considerably.

MR. MEEKS: Yes, but it wasn't part of the judgment.

QUESTION: The Court of Appeals did -- the majority of the Court of Appeals did say the writ of habeas corpus should issue and there had to be a retrial, didn't it?

MR. MEEKS: That's correct.

QUESTION: And you're simply saying that, for a somewhat different reason, the same judgment should be entered.

MR. MEEKS: The same judgment as it pertains to the in-custody statements should be affirmed.

QUESTION: Well, the judgment is that there be

a new trial.

MR. MEEKS: Correct.

QUESTION: And you're saying, for somewhat different reasons than the Court of Appeals said, there should be also be -- the same judgment should be entered as was entered by the Court of Appeals.

MR. MEEKS: Yes, sir.

QUESTION: But it would certainly have a different consequence on the trial, on what would happen at the retrial.

MR. MEEKS: Not necessarily, Your Honor.

QUESTION: Well, I would think that when the officer -- under the Sixth Circuit opinion, when the officer wanted to testify about the on-the-scene questioning, it would be admissible.

MR. MEEKS: The crucial thing --

QUESTION: And under your view, it would not be admissible.

MR. MEEKS: That's correct. But yet again, the point that we are making is it was not part of the judgment of the Sixth Circuit. Therefore, we did not feel it necessary to cross-petition.

In any event, back to my point that I was making concerning the Alcohol Influence Report Form, since it was the crucial part of this case -- that

report was prepared during custodial interrogation. And be no mistake about the Alcohol Influence Report Form. That is a document that is designed by law enforcement officers to elicit information that will be used to prosecute the suspect at trial. There is no other way to explain it. That's been the way it is in Ohio for years, and it will continue to be that way.

If the Court has had the opportunity to review the second page of that document, it is clear that what the officer is attempting to do while engaging in the custodial interrogation is to find out where that person was, how long he had been there, how much he had to drink. The question is posed: Are you under the influence of alcohol? How much have had you drink? Do you have any defects, physically, and so forth? All these things are designed to give the prosecution information that will be used to prosecute the suspect.

QUESTION: It can also be used for record purposes.

MR. MEEKS: Pardon me, Your Honor?

QUESTION: It can also be used for record purposes.

MR. MEEKS: There are parts of it that can be, at the beginning. Name, address, and so forth. The rest of it --

QUESTION: I know. Amount of drinks and all, that's used for.

MR. MEEKS: That may be the purpose, Your Honor --

QUESTION: I mean I don't think you have to go that far to win.

MR. MEEKS: That may be. But I'm saying in practical experience, that document is to prosecute.

QUESTION: I mean, it seems to me that if you make the point that part of it's used for that, that's enough. You don't have to say that all it is used for -- that is --

MR. MEEKS: I may stand corrected. There may be a small part that may not be. But by and large, it's all used solely for the purposes of prosecuting the suspect.

In this particular case, it is stipulated that my client was in custody at the time, that he was taken to jail, and that these comments made on the Alcohol Influence Report Form were made in custody.

QUESTION: Mr. Meeks, I think the Court of Appeals didn't really adopt your stipulation. At least that's what I understand your opponent contends. Your stipulation really would have placed him in Miranda purposes custody earlier than the time that the

custodial arrest is made.

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

QUESTION: And the Court of Appeals really rejected that.

MR. MEEKS: That's correct. They felt that they were not bound to follow that stipulation. I wouldn't say they rejected the stipulation, only that they did not feel bound by it.

QUESTION: Well, if you read their opinion, it seems to me logically that they did reject it, because if they had accepted it, they would have said -- moved the point at which evidence should be excluded back further in time.

MR. MEEKS: Perhaps so, Your Honor, but nevertheless, they found, without any hesitation, to my mind anyway, that at the time the Alcohol Influence Report Form was filled out, he was in custody.

QUESTION: And no one disputes that.

MR. MEEKS: At the jail.

QUESTION: That's the very end.

MR. MEEKS: That's correct. That's correct.

It seems, as far as respondent's position is concerned, that comments made at the jail, in custody, is a fairly cut and dried situation; that Miranda should be applied. There is no legitimate reason for Miranda

not to be applied to a custody situation. The petitioner has advanced a lot of different reasons, indicating that Miranda was not designed to attach to custodial interrogation involving traffic matters; yet, there is no real distinction as to why it shouldn't.

The petitioner takes the position that well, this is a traffic misdemeanor; it's not a felony. The point is, is that if we're going to be drawing distinctions between felonies and misdemeanors, some states have felonies, where other states have misdemeanors for identical conduct. If we're going to use a breakdown on the basis of felony-misdemeanor line, it would be totally unworkable.

Miranda itself focused on the nature of the interrogation, not upon the nature of the offense. And even though Miranda itself and the cases that were collected at the same time were certainly felony cases, there has been no language in any of those decisions designed to limit custodial interrogation to felony cases exclusively.

QUESTION: Now you said Miranda emphasized or focused on the kind of interrogation. Did it not focus very largely on the place of the interrogation?

MR. MEEKS: It did, Your Honor.

QUESTION: In the station house.

MR. MEEKS: It did. Station house interrogation. However, in cases subsequent to that, Chief Justice, there were cases involving custodial interrogation in Mr. Orozco's home. There was custodial interrogation of Mr. Mathis when he was doing time down in a state prison for something unrelated. Those things occurred in familiar environments, and it was not long --

QUESTION: That was still pretty close custody, though, wasn't it?

MR. MEEKS: It was custody, no question about it. And the Court so found.

However, the point is, is that when Mr. Carty went to the Franklin County Jail, there was no serious question about the fact that Mr. McCarty was just as much in custody as Mr. Miranda was or Mr. Westover was, or any of the other situations this Court addressed many years ago.

More to the second part of our argument in this case, we have suggested that the Sixth Circuit's language limiting the inadmissibility to the custodial statements made at the scene would be too limiting. We have made the suggestion and we have urged this Court to, in fact, adopt a ruling that would exclude from evidence statements made even at the scene. And we are aware of the language of Miranda that permits general

on-the-scene questioning, and this relates to part two of our position in this case.

We are asking this Court to adopt a ruling that would preclude law enforcement officers from engaging in custodial questioning if, in fact, custodial questioning occurs at the time that the motorist is stopped. And we have adopted a test that we think properly puts --

QUESTION: Mr. Meeks?

MR. MEEKS: Yes, Your Honor.

QUESTION: That would be something of an expansion of Miranda, would it not, to say that something short of full custodial arrest brings on Miranda? Are you familiar with our recent opinion in California against Beheler?

MR. MEEKS: Very much so.

QUESTION: Doesn't that say that the thing that triggers that Miranda is custodial arrest?

MR. MEEKS: No, sir. I think that that decision, if my reading of that decision is accurate, is formal arrest or the functional equivalent. And in this situation, functional equivalent would mean, in our opinion, when an officer stops a vehicle or car --

QUESTION: Well, that's a Terry stop. We've never held Miranda was applicable in Terry stops.

MR. MEEKS: I would disagree with that, Your Honor, respectfully, for this reason.

QUESTION: Where have we held that Miranda was applicable to a Terry stop?

MR. MEEKS: I don't suggest to you that Miranda is applicable to a Terry stop. I would disagree with you, Your Honor, if you are indicating that the stop, in our case -- McCarty -- was a Terry-type stop. We have submitted, I think the evidence is clear -- that this was a stop based upon probable cause, not reasonable suspicion.

QUESTION: Well, do you say that if a police officer has only reasonable suspicion and stops somebody, he doesn't have to give Miranda warnings, but if he has probable cause and stops him, he has to give them?

MR. MEEKS: If the probable cause --

QUESTION: That's standing the thing on its head.

MR. MEEKS: If the probable cause combines with custody. And a custody definition, as applied in Miranda, was custody or otherwise deprived of freedom in a significant way.

QUESTION: Well, a Terry stop puts a man in some kind of custody, doesn't it?

MR. MEEKS: Yes, sir.

QUESTION: Well, everybody --

MR. MEEKS: We are not suggesting that a Terry stop be the predicate for further interrogation in a custody setting. We are saying that when a person is deprived of his freedom, as a motorist is when they are stopped on the freeway, and when that officer then has probable cause -- the type of probable cause, frankly, that this Court required be utilized in taking somebody to the station house in Dunaway -- then at that point in time, that officer must give that driver his Miranda rights.

The reason is simple, Your Honor, as far as we're concerned. The general on-the-scene questioning is permitted, but it's no longer general on-the-scene questioning when that officer has probable cause to believe that that driver has committed the crime.

The generality aspect of --

QUESTION: That just is not a holding of our courts, and I think that argument just doesn't find support in any of our cases. It doesn't make any difference whether the officer has probable cause or reasonable suspicion. It's what the officer does, whether he places the person under formal arrest or its equivalent, and the deprivation of freedom in a

significant way language was rather cut back on in the recent California v. Beheler case. And the Court talked about formal arrest or its equivalent.

MR. MEEKS: Your Honor, I would submit to you, with all due respect, that a person driving a car, whose locomotion is stopped on a freeway, who is not permitted to leave and is going to be questioned by an officer --

QUESTION: That's a Terry stop. Just like somebody on the street. You stop him, and the officer stops him and won't permit him to leave, granted. That doesn't turn it into a custodial arrest requiring Miranda, and that's all you've got on the street with an automobile stop.

MR. MEEKS: Your Honor, with all due respect, when an officer, as in our case, observes erratic driving, that officer at that point has probable cause to believe a variety of traffic offenses has been committed. That's more, with all due respect, than reasonable suspicion.

QUESTION: You're just concerned with trying to get the Court to adopt some other rule to require an officer to make an arrest at a certain time, based on what he knows, but I don't think that question is before us.

QUESTION: Well, we've rejected it countless

times, the idea that if an officer has probable cause to arrest a person, the person will be deemed arrested, even though the officer doesn't make the arrest till later. But that simply has not been adopted by this Court.

MR. MEEKS: Your Honor, what we are suggesting is that we are in a position where, if a suspect is in the situation of either being in formal custody or its functional equivalent, and combined with that the arresting officer has probable cause to believe that that crime has been committed, at that point in time, if he wishes to interrogate -- only if he wishes to interrogate -- then Miranda warnings should be given. Those three criteria must be met.

QUESTION: Yes, but Mr. Meeks, in this very case, as I understand the sequence of events, the questioning on the scene took place before the officer decided to take him back to the station.

MR. MEEKS: As far as the stipulation in this case is concerned, Your Honor, the officer -- once he stopped the vehicle after he made the observations -- was satisfied that that man was going to jail.

QUESTION: But he didn't tell him, let's go to the station until after he had these initial questions, did he?

MR. MEEKS: He did not articulate that, no. But his freedom to leave the scene was terminated once his car was stopped and once the officer approached the vehicle and was able, then, to pursue his probable cause findings, beyond simply reckless driving, into potential drunk driving charge. And it's our position, frankly, Your Honor, that at that point we have the functional equivalent of being in custody.

QUESTION: Under your submission, it doesn't make any difference when the officer says, in substance, okay, let's go to the station?

MR. MEEKS: No, sir.

QUESTION: That doesn't enter into it.

MR. MEEKS: No, sir. The actual language isn't important, because what we're suggesting is an objective test. We are not here seeking a focus test or any other test that this Court has already repudiated for determining custody. Rather, we are looking at an objective standard -- when a reasonable person would feel that they are no longer free to leave the scene.

And we submit, Your Honor, --

QUESTION: Well, under that test, every time you're stopped -- as soon as you're stopped, your test triggers in, then.

MR. MEEKS: In most situations, I agree with

you. But that doesn't mean interrogation can follow.

QUESTION: How about this hypothetical?

QUESTION: You would say it cannot follow.

MR. MEEKS: The only time that interrogation --

QUESTION: Under your test, when the man is not free to leave is the triggering of the duty to impose -- to give Miranda warning. Every traffic stop must immediately be followed by Miranda warnings or else the questioning would be unadmissible.

MR. MEEKS: Well, Your Honor --

QUESTION: That's your submission, as I understand it.

MR. MEEKS: Not exclusively, no. The traffic stop based upon probable cause has to be coupled with the type of interrogation contemplated by Rhode Island v. Innis. In other words, if that officer merely wants to inquire on basic background information of that driver, no, sir; he doesn't have to give Miranda warnings. But if that officer wants to approach the driver of that car who he has stopped, and say I want to know where you've been, what time is it, how much have you had to drink, then those answers are reasonably likely to incriminate the person -- that's interrogation.

Excuse me.

QUESTION: My problem is a man who gets pulled

over for not having one tail light on. And he looks at him and he's as drunk as Kennedy Brown. When did the Miranda warning come up?

MR. MEEKS: If I -- there was a broken tail light, Your Honor. I lost the last of your question.

QUESTION: The broken tail light on the car.

MR. MEEKS: Yes, sir.

QUESTION: So he's pulled over. And before the officer asks him any question, he looks at him, and the guy is obviously drunk.

MR. MEEKS: Yes, sir?

QUESTION: When is the Miranda warning called for?

MR. MEEKS: At that point in time, there is no Miranda called for, because the man is not being interrogated.

QUESTION: Well, could he interrogate him without the Miranda warning?

MR. MEEKS: He could interrogate him without the Miranda warning.

QUESTION: Well, obviously, that's what I was talking about. Without the Miranda warning, even though he was obviously drunk?

MR. MEEKS: If the officer has probable cause to arrest that person, and he wants to engage in

questioning, it would be proper for him, prior to interrogating him, to give him Miranda warnings.

QUESTION: Well, suppose he asked him, are you drunk? Would that be out of bounds?

MR. MEEKS: That would be out of bounds because it would be an answer that's reasonably likely to be incriminating. It would be interrogation in our view, under the definition of Rhode Island v. Innis.

The officer's observations are all admissible. We don't contest that.

QUESTION: Well, I mean we don't know the officer's observations or what the officer thinks until the trial of the case, do we?

MR. MEEKS: Or a suppression hearing.

QUESTION: Well, that's the trial.

MR. MEEKS: Yes, sir.

QUESTION: So I don't know what the rest of this is all about.

MR. MEEKS: Well, Your Honor, frankly, what we're trying to establish is, so that there is some --

QUESTION: If you tell the officer the law is this, the officer will say one thing. If somebody else tells the officer, he'll say another thing.

MR. MEEKS: It's precisely that that we're trying to avoid. We are saying that when a motor

vehicle is stopped by a law enforcement officer based upon probable cause, and that officer wishes to engage in more than general on-the-scene interrogation, then they must precede that interrogation by giving Miranda warnings.

QUESTION: I misunderstood you. I thought you said before he said "any."

MR. MEEKS: Oh, no, sir.

QUESTION: You didn't mean that?

MR. MEEKS: Oh, no. If I misspoke, I apologize. That's not what I intended. But the purpose of all this, frankly, is to provide a situation where there will be an easily understandable rule, because if we don't have something like this, then what we're going to do is, in DWI cases, for instance, the officers will just merely get the people at the scene, interrogate them at the window, and just simply take the station house interrogation would be precluded, and move that t the car.

And what we are suggesting is, is that kind of situation that the officers would then engage in would be nothing more than a way of circumventing Miranda. And when an officer does that, they are still dealing with a person who clearly is in custody within an objective standard that any driver of a motor vehicle

would feel, had they been stopped on a freeway.

Concerning the matter of harmless error, I'd like to address that in the few remaining minutes that I have. Judge Wellford in his dissenting opinion and the court below indicated that he would not overturn the lower court ruling because he felt that the statements made at the scene were redundant with the statements made later at the station house.

We would submit that that is not the case; that when Mr. McCarty was questioned at the station house, he admitted the primary aspect of this entire case, the fundamental issue, that being that he was under the influence of alcohol. That admission was not made at the scene.

Moreover, at the station house it was clear that Mr. McCarty indicated to the officer that he had a limp, he had a bad back, which can explain, quite obviously, the problems he had walking. In addition to that, he had only slept for an hour the night before. All of those factors weigh against the harmless error aspect that is pursued by the petitioner in this case.

As far as we are concerned, Your Honor, the failure to raise that issue in the court below should preclude it here. Nevertheless, if that issue is reached, it's pretty much without question that there

was not harmless error in this case; that ample defense was available to Mr. McCarty and would certainly have been much more defensible had his inadmissible statements been kept out of the record, as the Sixth Circuit ruled they should have been.

Unless the Court has any further questions, that concludes my argument.

CHIEF JUSTICE BURGER: Anything further, counsel?

MR. TRAVIS: Only very briefly, Mr. Chief Justice.

ORAL ARGUMENT OF ALAN C. TRAVIS, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. TRAVIS: On the Sixth Circuit panel opinion, I would simply invite the Court's attention to the fact that the Court did order, that is, the Sixth Circuit did order the writ and a retrial. And I would submit to the Court that on retrial, without some clarification here, we would not know what to tell the state trial court was admissible or not admissible.

As to the felony-misdemeanor line, I think the Court will note that we have never pressed that. We have never pressed that in any of the -- in the petition or the brief, other than the general question of whether or not the Miranda doctrine should be applied in the

case of misdemeanor traffic offenses. We've never suggested that it's simply not applicable because it is, in fact, a misdemeanor.

And, last, although we, of course, differ on it, we would urge that if the Court does disagree with the second portion of our argument, that it was effectively ruled upon by the Sixth Circuit and that the doctrine of harmless error should be applicable.

Mr. McCarty's condition prior to the so-called Alcchol Influence Report Form as such, and if his handwriting is impaired, which is nontestimonial, I would submit would make any error in this case harmless beyond any reasonable doubt.

Thank you very much.

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

We'll hear arguments next in Roberts against the United States Jaycees.

(Whereupon, at 2:10 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:

83-710 - HARRY J. BERKEMER, SHERIFF OF FRANKLIN COUNTY, OHIO, Petitioner v. RICHARD N. McCARTY

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

BY _____

(REPORTER)