

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

CAPTION: PENNSYLVANIA, Petitioner V. INCENCIO MUNIZ

CASE NO: 89-213

PLACE: Washington, D.C.

DATE: February 27, 1990

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ORAL ARGUMENT OF

PAGE

J. MICHAEL EAKIN, ESQ.

On behalf of the Petitioner

3

RICHARD F. MAFFETT, JR., ESQ.

On behalf of the Respondent

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REBUTTAL ARGUMENT OF

J. MICHAEL EAKIN, ESQ.

On behalf of the Petitioner

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1 tests. They first at this point ask him to try to  
2 calculate the date of his sixth birthday. They ask him to  
3 walk a line, nine steps. They ask him to balance himself  
4 on one leg while counting to 30, and they conduct the  
5 horizontal gaze nystagmus test which measures the effect  
6 of alcohol on the function of the eye.

7 QUESTION: Mr. Eakin, may I ask you, are these  
8 regular -- is this the routine that's followed with  
9 everyone?

10 MR. EAKIN: Yes, sir.

11 QUESTION: Is it pursuant to regulation, or is  
12 it just this particular police department that does this?

13 MR. EAKIN: Well, this is the county, which  
14 encompasses probably State Police, several military  
15 installations and 20-odd local departments. The county  
16 agents do it, and they always do it the same. The latter  
17 three of the field tests are what are called the standard  
18 field sobriety tests. They're the ones that are  
19 recommended by the National Highway Traffic Safety --

20 QUESTION: You said they always do it the same  
21 just by custom, not by -- no written regulation requires  
22 this procedure?

23 MR. EAKIN: No, sir, not by law or regulation.

24 QUESTION: What would happen if a -- if an  
25 individual said I won't do it?

1 MR. EAKIN: Well, the law, we feel, would allow  
2 the police to compel them to do it, but practically  
3 speaking there is no way you can compel a person to walk a  
4 line and get any useful information.

5 QUESTION: Does he -- does he -- does he violate  
6 any law if he says I will not recite the alphabet or I  
7 will not tell you my sixth birthday?

8 MR. EAKIN: No, sir. What happens is that the  
9 videotape which is available would indicate the  
10 circumstances of the refusal, and so the refusal may come  
11 into evidence.

12 QUESTION: Right.

13 MR. EAKIN: But there's no penalty, excepting  
14 the breath test, which is the -- the stage of the process  
15 that follows these sobriety tests is the breath test. The  
16 individual is advised that under Pennsylvania law there is  
17 an implied consent. You have the breath test here. If  
18 you refuse to take it, you will lose your license for an  
19 additional year's time, regardless of the conviction or  
20 lack of conviction on the underlying drunk driving case.

21 In this case, Mr. Muniz made several statements  
22 while that was being explained to him, as is required by  
23 Pennsylvania law. He refused the test eventually. At  
24 that point he was taken again to another table. He was  
25 given his warnings under the Miranda decision, and then

1 for the first time was asked specific questions aimed at  
2 his drinking, where he was drinking, what he had to drink,  
3 where he was coming from.

4 The test in this case or the issue that is to be  
5 resolved, we submit, is the distinction between those  
6 latter questions, which are clearly aimed at gaining  
7 testimonial evidence from the accused, and everything that  
8 went before, which was gained or aimed at gaining physical  
9 evidence, demonstrable evidence.

10 QUESTION: Well, now one of -- one of the  
11 questions asked at the processing stage was, I believe,  
12 what was the date of your sixth birthday.

13 MR. EAKIN: Yes, that's correct.

14 QUESTION: Now, is that some kind of a routine  
15 question that's asked whenever the police think someone  
16 might have been drinking?

17 MR. EAKIN: It was asked routinely in Cumberland  
18 County at the time. Since the decision by the Superior  
19 Court it has not been asked, but it was at that time. It  
20 is asked at the conclusion of the routine booking  
21 questions and immediately before the horizontal gaze  
22 nystagmus test.

23 QUESTION: Well, wouldn't the -- the information  
24 given in the response be relevant on the question of  
25 whether the person had been drinking or not?

1 MR. EAKIN: Yes. We submit it would be, just as  
2 the --

3 QUESTION: So it could be testimonial?

4 MR. EAKIN: No, no, ma'am, I don't believe  
5 it -- it -- it would be testimonial. It is another  
6 sobriety test. It is not aimed at determining the truth  
7 of the answer, the date of his sixth birthday.

8 What it's aimed at --

9 QUESTION: But whether he responds accurately or  
10 not is relevant?

11 MR. EAKIN: That's correct.

12 QUESTION: And you would propose to offer it and  
13 use that against him?

14 MR. EAKIN: Yes, Your Honor, that's correct. We  
15 would use it to show the physiological effect that alcohol  
16 has had on that man's brain, not to elicit the contents of  
17 his mind. The brain controls the tongue --

18 QUESTION: Why isn't that a form of  
19 interrogation?

20 MR. EAKIN: Because the goal is not to achieve  
21 testimonial evidence. It is not to achieve --

22 QUESTION: Well, it certainly is to get evidence  
23 to use against the person to establish whether they've  
24 been drinking or not.

25 MR. EAKIN: That's correct, just as walking the

1 line --

2 QUESTION: It's quite unlike asking the person  
3 for an address and a driver's license.

4 MR. EAKIN: That's correct, but it is also  
5 unlike asking him how much did you have to drink.

6 What it is designed to show is that alcohol has  
7 affected this man's brain to the point that he cannot do  
8 basic calculations.

9 QUESTION: Well, would he have a right to refuse  
10 to answer that question? He says I refuse to answer that  
11 question.

12 MR. EAKIN: I suggest he probably would, just as  
13 he can refuse to answer any question.

14 QUESTION: Well, could you then put in evidence  
15 the fact that he refused to do the birthday calculation?

16 MR. EAKIN: We would submit you can, because it  
17 is not aimed at testimonial --

18 QUESTION: Well, so then he doesn't have the  
19 right to -- to -- to refuse to decline on Fifth Amendment  
20 grounds, at least.

21 MR. EAKIN: What he has -- he has no right to be  
22 warned of the consequences of refusal.

23 QUESTION: No, he has -- under your view he has  
24 no self-incrimination right not to answer that question,  
25 because if you say that he does then you can't introduce

1 his refusal into evidence.

2 MR. EAKIN: As a practical -- perhaps I'm  
3 speaking more as a practical matter than anything else,  
4 because to -- to compel someone in that circumstance  
5 is -- is practically impossible without intervention --

6 QUESTION: No. The question is a simple one,  
7 whether or not he has a Fifth Amendment right to decline  
8 to answer the question.

9 MR. EAKIN: We would suggest he does not have a  
10 Fifth Amendment right not to answer the question.

11 QUESTION: Just as he doesn't, I suppose, in  
12 your view, to refuse to walk a line?

13 MR. EAKIN: Yes, sir.

14 QUESTION: Although neither one can actually be  
15 compelled in a police station.

16 MR. EAKIN: Right. We have the right to compel  
17 but, practically speaking, no ability to compel.

18 QUESTION: Is there any challenge in this case  
19 to -- I -- I guess there is -- to the introducing the  
20 videotape of the physical tests?

21 MR. EAKIN: In this case, the Pennsylvania  
22 Supreme -- Superior Court merely suppressed the audio  
23 portion. In subsequent cases of theirs, they have said  
24 that it would be unfair to force the defendant to choose  
25 between a video without audio and, therefore, have

1 suppressed the entire --

2 QUESTION: Well, how about in this case, in this  
3 case?

4 MR. EAKIN: In this case it was merely the audio  
5 that was suppressed.

6 QUESTION: Well, in -- in -- so the --  
7 the -- the demonstration that he couldn't walk a straight  
8 line, that shows what the effect of alcohol is on his  
9 physical coordination, I suppose?

10 MR. EAKIN: Well, to a degree it does. In this  
11 specific case, his explanations as to why he could not  
12 walk the line were certainly relevant. If we have the  
13 right to ask him to walk the line, I suggest his responses  
14 to that request or that demand are just as relevant as the  
15 actual walking of the line itself, and there shouldn't be  
16 a distinction between his oral refusal to do this test --

17 QUESTION: What about this eye test? Who -- you  
18 can't see that on video, can you?

19 MR. EAKIN: You can, yes. We've had experts who  
20 testify. The camera zooms in such that the face of the  
21 accused --

22 QUESTION: And is that what happened in this  
23 case?

24 MR. EAKIN: Yes. Yes, Your Honor, and it shows  
25 the eye --

1 QUESTION: And what does that show?

2 MR. EAKIN: It shows the eye tracking a  
3 stimulus, which in this case was a pencil, from side to  
4 side slowly --

5 QUESTION: And is that supposed to show that he  
6 was drinking?

7 MR. EAKIN: Yes, sir.

8 QUESTION: Had been drinking?

9 MR. EAKIN: Yes, sir.

10 QUESTION: So it shows -- shows the alcohol, the  
11 effect of alcohol on his eye movement?

12 MR. EAKIN: That's correct.

13 QUESTION: Just like you -- you say the -- the  
14 birthday question shows the effect of alcohol on his mind?

15 MR. EAKIN: That's correct. It is -- the  
16 question is not aimed at getting the truthful -- what  
17 is -- how old were you in such and such a year. It's  
18 aimed to show that the mind is affected, not the contents  
19 of the mind but the brain being affected by alcohol.

20 The brain does a lot of things. It controls  
21 your feet when you walk the line. It controls your tongue  
22 when you go to talk. That's why slurred speech is one of  
23 the classic indicia that -- that defense counsel say,  
24 well, he didn't have slurred speech when -- when the  
25 policeman doesn't hear it. It's that classic. But it's

1 because the brain is affected by alcohol, not the tongue  
2 itself.

3 QUESTION: May I just ask this question?  
4 You -- you did have in this case the fact he refused to  
5 take the -- the one test. You can use the eye movements,  
6 and you can use the staggering down the line. Do you  
7 really need the rest of the evidence? It seems to me --  
8 it almost sounds cumulative to me here that what we're  
9 fighting about.

10 MR. EAKIN: It may be, Your Honor, but the goal  
11 of the testing is to establish a routine that gives the  
12 best possible evidence to the finder of fact, and the  
13 three standard tests developed by the Highway Safety  
14 Council are ones that have statistically been shown to  
15 correlate to a very high degree to persons over the legal  
16 limit.

17 QUESTION: May I ask this question, too: if the  
18 issue were not whether the man was intoxicated, but say it  
19 was in a different kind of criminal proceeding and the  
20 issue were whether he was mentally competent to stand  
21 trial, or mentally competent to receive the death penalty,  
22 or something like that, would you say you could perform  
23 these tests without giving him warning?

24 MR. EAKIN: I think that would have to be on a  
25 case by case basis.

1           QUESTION: Why? Isn't it the same issue? I  
2 mean, the question is whether the privilege against self-  
3 incrimination protects him from making these verbal  
4 statements. I don't know why the nature of the proceeding  
5 should matter.

6           MR. EAKIN: The case I think of is the Estelle  
7 case, where the psychiatrist in that case was using the  
8 substance of what was related to him rather than forming  
9 conclusions without regard to the substance of it.

10           If here we are to introduce, for the truth of  
11 what is said, his response, that's different, and I think  
12 in the mental health cases and insanity defenses that --

13           QUESTION: Sometimes that's true, but you could  
14 also have a case where you just want to find out how his  
15 mind works when he's asked to recite the alphabet and when  
16 he's asked about his sixth birthday and that sort of  
17 thing, I would think. I don't know.

18           MR. EAKIN: I think in those cases, Your Honor,  
19 it would be proper, because again, it's not testimonial in  
20 nature, it's demonstrative in nature.

21           QUESTION: Suppose -- suppose the issue is  
22 whether or not -- or one of the issues in the case is  
23 whether or not he can speak Spanish, and the police  
24 officers start talking to him in Spanish to see if he  
25 responds. Can they ask him, do you speak Spanish?

1 MR. EAKIN: In that case, I believe it would be  
2 proper because you're not asking for a specific fact in  
3 his mind, but merely a --

4 QUESTION: And his answer, in your view, is not  
5 used to incriminate him, based on his knowledge?

6 MR. EAKIN: It would be to incriminate him, but  
7 not because of the contents of his mind, just as in the  
8 Dionisio case, where --

9 QUESTION: How do you know Spanish? Do you  
10 learn it in your arm? No, of course you learn it in your  
11 mind, don't you?

12 MR. EAKIN: The ability to speak Spanish  
13 certainly is contained in the mind, but if the court, as  
14 you have, have allowed us to take voice exemplars, or to  
15 speak at a line-up, the language in which you speak is  
16 equally as nonintrusive.

17 QUESTION: Suppose this defendant is very  
18 nervous, and he -- what he does is, he takes his existing  
19 age and he subtracts six, and then he takes that number  
20 and subtracts it from today's date, and he comes out wrong  
21 either because he doesn't quite do it right, or because he  
22 misses a month. He uses years and he has a late birthday.  
23 Still admissible in evidence?

24 MR. EAKIN: I'd suggest it's admissible, but  
25 certainly the weight of it is something that is always --

1 QUESTION: Would he have to get onto the stand  
2 to explain how he did it and why he made the mistake?

3 MR. EAKIN: The same as he can get on the stand  
4 to explain why he didn't walk the line properly or balance  
5 properly, or anything else, he can get on to explain  
6 why --

7 QUESTION: Well, it seems to me it's  
8 qualitatively different, because you're asking him to  
9 perform a mental feat that requires verbal articulation,  
10 and that's what the Fifth Amendment is designed to protect  
11 against.

12 MR. EAKIN: Well, the cases have clearly stated  
13 that if the purpose is to get the contents of the mind,  
14 that's one thing, but the processes of the brain in being  
15 able to do basic math or recite the alphabet or things  
16 that are not in and of themselves indicative of the  
17 contents of the mind of an individual relative to what  
18 they're looking for, that is different and ought to be  
19 maintained as different. The mere fact that it is an oral  
20 manifestation rather than a physical should not matter.  
21 We don't have them walk the line --

22 QUESTION: That's because the Fifth Amendment is  
23 concerned with testimonial communication. That's why  
24 we're concerned and that's why there might be a  
25 difference.

1 MR. EAKIN: There might be a --

2 QUESTION: Don't you think the question is one  
3 that the police would reasonably expect would result in an  
4 incriminating response under these circumstances?

5 MR. EAKIN: Only in the same level as they would  
6 expect it --

7 QUESTION: There was every indication this  
8 person had been drinking. There were lots of indications  
9 he'd been drinking -- staggering around and slurred speech  
10 and what have you -- so they knew when they asked that  
11 birthday question it was likely to give an incriminating  
12 response.

13 MR. EAKIN: Just as they knew when he would walk  
14 the line he was likely to incriminate himself in that  
15 manner, but not in a testimonial sense.

16 QUESTION: But that's not an interrogation.

17 MR. EAKIN: It's not an interrogation --

18 QUESTION: And this is.

19 MR. EAKIN: It's not because it's not  
20 testimonial; it is physical. It is demonstrative. But  
21 the inability to count to six is, I suggest, the same as  
22 the inability to walk six steps.

23 The function affected is the brain. We're not  
24 asking him to disclose any information about it. The fact  
25 that he is more likely to say something incriminating or

1 not should not inhibit the police in gathering physical  
2 evidence, which I suggest this is, just as much as walking  
3 the line is.

4 QUESTION: Was he asked to recite the alphabet?

5 MR. EAKIN: No, not in this case. Again, this  
6 case was after the Bruder case in Pennsylvania which at  
7 the time said that was improper because the contents of  
8 the alphabet were testimony, which I suggest they're not.

9 QUESTION: Mr. Eakin, there is this difference  
10 between this case and the other nontestimonial cases that  
11 you talk about. It seems to me you're quite correct that  
12 the content of his mind is not the object of the  
13 enterprise. It's not the end that is sought. But it is  
14 the means, and in these other cases -- that is, because of  
15 the current content of his mind you know that he's drunk.

16 You don't want to introduce the content of his  
17 mind, but the means of showing that he's drunk is finding  
18 out the current content of his mind. Wouldn't you  
19 acknowledge that difference, and that that's quite  
20 different from walking a line or being compelled to give a  
21 handwriting exemplar or a voice sample or anything like  
22 that?

23 MR. EAKIN: No, I don't --

24 QUESTION: You don't acknowledge that? Weren't  
25 you trying to find out the content of his mind? In his

1 mind, did he know what his sixth birthday was?

2 MR. EAKIN: No, sir. We're trying to show that  
3 his physiological ability to calculate was affected, but  
4 not --

5 QUESTION: How do you show it? How do you show  
6 it? You show it by asking the content of his mind, and  
7 the content of his mind proves that his mind's not working  
8 right.

9 QUESTION: Isn't that the same -- isn't that the  
10 same when he can't walk the line?

11 MR. EAKIN: I'd suggest it is the same.

12 QUESTION: Doesn't it come from the brain?

13 MR. EAKIN: It all comes from the brain, and  
14 what we're trying to show is not how old he was, what year  
15 he was six -- that's the content of the mind -- but it's  
16 the inability to arrive at that conclusion, which is a  
17 process of the brain, that is affected by alcohol.

18 The judgment driving down the road is impaired  
19 by the alcohol, and you cannot determine is this your  
20 street or not? Is this a place I can make a U-turn or  
21 not? It's not introduced to show what the street is,  
22 proper or improper. It's to show that the function is  
23 impaired.

24 QUESTION: I don't consider walking a line the  
25 content of the mind. That may be a function of the brain,

1 but when we talk about the content of the mind you mean  
2 ideas, you mean concepts. That's what the Fifth Amendment  
3 is about.

4 MR. EAKIN: That's correct. Facts.

5 QUESTION: This is the only kind of a situation  
6 I know of in which you are -- to be sure, you don't want  
7 the content for its own sake, but you do want the content  
8 of the mind as a means of showing something else, and that  
9 differs from all these other testimonial situations, it  
10 seems to me, or nontestimonial situations.

11 MR. EAKIN: Well, I certainly respect that  
12 distinction if you see one, Your Honor, but I --

13 QUESTION: You can give me another case where we  
14 have used the content of the mind in the sense of ideas.

15 MR. EAKIN: Again, I fall back, as Justice White  
16 says, that taking nine steps physically, taking nine steps  
17 mentally, neither discloses facts that that individual  
18 knows.

19 If we'd have asked him, as we did after rights,  
20 were you drinking, that's a fact in his mind. That is his  
21 ability -- if he slurs his words in answering, that is not  
22 testimonial. It's relevant, but it's not testimonial.  
23 It's not the contents of his mind. It's not the extortion  
24 of information from him; it's the extortion of his ability  
25 to think, not what he thinks.

1           QUESTION: That's his ability to move his lips.  
2 You give him a paper to read. It has nothing to do with  
3 any ideas in his mind. You give him a paper to read, and  
4 he can't move his lips. It's physical, just as the way he  
5 can't move his feet.

6           But in order to find that he can't think  
7 correctly, you must know what the content of his mind is,  
8 what idea he has in there, so you ask him this question.  
9 Now, maybe it's okay, but it's different from all of the  
10 other testimonial cases that I know of.

11           MR. EAKIN: Well, it is different in that sense,  
12 I agree, but I would suggest that the mere fact that the  
13 test is an oral one rather than a physical one, strictly  
14 physical, is not the basis for the Court's distinction  
15 between testimonial and demonstrative evidence -- it never  
16 has been, I'd suggest never should be. The fact that no  
17 fact is disclosed here is significant. The purpose for  
18 this information is not to show the date of his sixth  
19 birthday.

20           The Superior Court in this case felt that the  
21 routine questions were certainly all right. We had the  
22 right to ask the individual to submit to a routine  
23 sobriety test of a physical nature. They said, however,  
24 at some point during the latter, Mr. Muniz' responses  
25 became communicative in nature and therefore Miranda came

1 in the side door and should have been given to him at the  
2 outset.

3 I think the record is clear that these were  
4 spontaneous remarks made in response to his instructions.  
5 They were honest, they were on videotape, they were not  
6 coercive, and the fact that he merely said something in  
7 response that is incriminating in itself does not mean  
8 that --

9 QUESTION: Didn't they explain the test to him?  
10 They explained the breathalyzer test?

11 MR. EAKIN: They explained every test to him,  
12 and his responses --

13 QUESTION: And they say, do you understand?

14 MR. EAKIN: That's correct.

15 QUESTION: And he says no, I don't understand,  
16 and they have a big long talk about it?

17 MR. EAKIN: Yes, sir.

18 QUESTION: Now, you say that that is all just  
19 spontaneous?

20 MR. EAKIN: Well, it is not the result of  
21 interrogation, even if it is his testimony.

22 QUESTION: Well, it says, do you understand?

23 MR. EAKIN: That's correct.

24 QUESTION: Well, isn't that interrogation?

25 MR. EAKIN: Well, I suppose it's -- if it is

1     interrogation, it is certainly fairer interrogation than  
2     having the test run and then having him complain that he  
3     did not understand and that's why he didn't do it,  
4     particularly in this case, where Spanish is in fact the  
5     gentleman's first language, English his second language.  
6     It's certainly reasonable for the police to ask him, do  
7     you understand, just as they do when they give him --

8             QUESTION: That may be. That may be, but the  
9     question is about the statements he made in response.

10            MR. EAKIN: No, it is not aimed at gaining  
11     testimonial evidence, again.

12            QUESTION: But it was testimonial evidence.

13            MR. EAKIN: Well, the result -- if it is --

14            QUESTION: Wasn't it?

15            MR. EAKIN: If he expressed confusion --

16            QUESTION: Wasn't it -- the result testimonial?

17            MR. EAKIN: The result was testimonial. But the  
18     -- it is not interrogation because it's not designed to  
19     get that. Nor is it reasonably likely to get that.

20            The mere fact that intoxicated people might be  
21     more inclined to spill the beans on themselves than a  
22     sober person doesn't give them a greater or a different  
23     rule. It doesn't cause the police to have to be giving  
24     them different warnings or -- or rights than they give the  
25     sober person.

1           If the burglar with a distinctive limp is made  
2 to walk the line for witnesses, and the drunk is made to  
3 walk the line for all of us on videotape, I'd suggest the  
4 standard is the same.

5           And just because the drunk is more likely to say  
6 something incriminating during his processing is not --

7           QUESTION: What words do they use when they ask  
8 them to walk the line? Do they say, will you do it? Or,  
9 please walk the line? What do they say? What are the  
10 words?

11           MR. EAKIN: It's -- well, they ask them to come  
12 to the end, and say, I'm going to indicate to you now how  
13 I want you to do this. Please stand there until I show  
14 you. And then the officer demonstrates, with three or  
15 four steps, how he wants to do it.

16           Mr. Muniz, in this case, kept talking during the  
17 instructions.

18           QUESTION: He kept saying the reason I can't is  
19 because I've had too much to drink?

20           MR. EAKIN: No, he didn't say that.

21           (Laughter.)

22           MR. EAKIN: He said that at roadside.

23           (Laughter.)

24           MR. EAKIN: But in this case, he indicated that  
25 he couldn't do it. He could do it at his home, but he

1     couldn't do it here. He couldn't take the test now, the  
2     breath test, but he'd be happy to take it in a couple of  
3     hours.

4                     (Laughter.)

5             MR. EAKIN: He said many things that were  
6     certainly incriminating. But they weren't the response  
7     asked for by the police, and I'd suggest it caused the  
8     police to forego gathering legitimate physical evidence  
9     because it's a drunk and he might say something --

10            QUESTION: Well, you don't need to forego the  
11     physical evidence. The question is, whether the --  
12     whether the statements are admissible, as well as the  
13     physical evidence.

14            MR. EAKIN: That's correct. But, again, if  
15     someone confesses during the gathering of legitimate  
16     testimonial -- or legitimate demonstrative evidence, I  
17     suggest there's no purpose served by excluding that  
18     confession or incriminating statement any more than if it  
19     was during a lineup and he blurts out, during a search  
20     warrant and he blurts it out or routine sobriety testing  
21     and he blurts it out.

22            I suggest --

23            QUESTION: What is the -- how much damage do you  
24     suppose that would -- would be done to the program if you  
25     had to give Miranda warnings as soon as you got him to --

1 to the station house?

2 MR. EAKIN: I think the damage is shown by the  
3 Thompson case in Pennsylvania, one of the superior court's  
4 line of cases, where they did, in response to the decision  
5 in this case, give Miranda warnings at the outset. The  
6 accused then became, in the words of the court, obscene  
7 and belligerent when he refused to cooperate with these  
8 physical tests, because they had just told him he had the  
9 right to remain silent and have a lawyer present. And he  
10 didn't want to do that without his lawyer present.

11 He became obscene and belligerent and the court  
12 ended up suppressing the entire tape.

13 QUESTION: Well, is that -- that -- is -- is  
14 that all -- is that -- you just have that one instance, or  
15 is there -- is there some --

16 MR. EAKIN: That's one instance that's found its  
17 way to the appellate courts. I suggest to you, where --  
18 where you tell them you have the right to remain silent  
19 and have a lawyer present, you suspect them of being  
20 intoxicated in the first place. To -- to expect that to  
21 do anything but confuse the individual is -- is just not  
22 realistic.

23 It serves no purpose. It protects no one. It  
24 does hamper the gathering of legitimate physical evidence.  
25 And I think would be a totally intolerable rule, given the

1 desire we all have --

2 QUESTION: Is the -- is the -- is the experience  
3 -- is it the experience in your state that -- that  
4 successful prosecution of drunk driving cases is really  
5 difficult -- very difficult?

6 MR. EAKIN: Not with the booking cases. We have  
7 more than tripled our prosecution rate in conjunction with  
8 these centers. Police are more likely to cooperate in  
9 bringing the person in. The citizenry accepts it. The  
10 case is on videotape. And that's a two-edged sword  
11 sometimes, but -- but it's there. And I think the  
12 truth-finding process is served by it.

13 QUESTION: How much relies upon the  
14 breathalyzer?

15 MR. EAKIN: Pennsylvania has a per se rule if  
16 the test is over a .10. So if we have the test, that  
17 often resolves the case. Not always, but often. In this  
18 case we had no test, and everything else becomes the crux  
19 of the case.

20 QUESTION: But it was found to be effective?

21 MR. EAKIN: Oh, yes. Yes, sir.

22 Unless there are other questions, I'll reserve  
23 the remaining time.

24 QUESTION: Very well, Mr. Eakin.

25 Mr. Maffett, we'll hear from you.

1 ORAL ARGUMENT OF RICHARD F. MAFFETT, JR.

2 ON BEHALF OF THE RESPONDENT

3 MR. MAFFETT: Mr. Chief Justice, may it please  
4 the Court:

5 A distinction must be drawn in this case because  
6 of the crime involved. Driving under the influence is a  
7 unique offense in the sense that the state of the mind of  
8 the defendant is actually an element of the offense. The  
9 Commonwealth must prove for a conviction driving under the  
10 influence of alcohol to a degree that makes the person  
11 incapable of safe driving.

12 "Under the influence of alcohol" is defined by  
13 the Pennsylvania courts as to include any mental or  
14 physical condition as a result of drinking that either  
15 makes the person unfit to drive or substantially impairs  
16 judgment, clearness of intellect or normal faculties  
17 essential for safe driving.

18 And Pennsylvania courts have defined  
19 "substantial impairment" to be diminution or enfeeblement  
20 in ability to exercise judgment, to deliberate or to react  
21 prudently to changed circumstances.

22 QUESTION: How do you define "testimonial"?

23 MR. MAFFETT: I would define "testimonial" as  
24 anything that would disclose the contents of someone's  
25 mind either directly -- either a direct confession or the

1 inferences -- inferences from the words themselves.

2 QUESTION: Well, how about asking the person the  
3 name and address?

4 MR. MAFFETT: Well, in some circumstances the  
5 name and address may not be testimonial. It may be  
6 considered -- I would submit it would be testimonial  
7 because it discloses the contents of the mind. Sometimes  
8 it would not be interrogation because it would be found to  
9 be incident to normal arrest and custody.

10 However, in the drunk driving situation where  
11 practically anything can disclose the contents of the mind  
12 and can be expected to produce an incriminating response  
13 that -- that then even asking the name and address without  
14 being -- without giving the Miranda warnings would be  
15 considered interrogation.

16 QUESTION: So you think here every single  
17 question that was put to this -- to your client was  
18 interrogation, and Miranda warnings were required before  
19 even asking the name and address?

20 MR. MAFFETT: Especially under the facts of this  
21 case, Your Honor, because not only had the police officer  
22 obtained this information at roadside, but the booking  
23 officer had obtained this information before they went on  
24 videotape.

25 QUESTION: Well, but you would take the position

1 that it was required at roadside as well, that nothing  
2 could be asked --

3 MR. MAFFETT: Well, at roadside --

4 QUESTION: -- before giving Miranda warning.

5 MR. MAFFETT: At roadside he would not yet be in  
6 custody, and the very first thing the officer normally  
7 does as he begins his investigation would be your name,  
8 address, driver's license --

9 QUESTION: He stopped him, didn't he?

10 MR. MAFFETT: Excuse me?

11 QUESTION: He stopped him, didn't he?

12 MR. MAFFETT: The man was at the side of the  
13 road, and the police officer stopped, and then he pulled  
14 off and the officer stopped him.

15 QUESTION: So they stopped him?

16 MR. MAFFETT: Yes.

17 QUESTION: Well, what about if after he stopped  
18 they asked him to walk a line?

19 MR. MAFFETT: If he has not yet been arrested,  
20 he wouldn't be in custody, and this Court's decision in  
21 Berkemer would control and --

22 QUESTION: Supposing he was in custody or he had  
23 been arrested and they then ask him to walk a line?

24 MR. MAFFETT: Is that permissible?

25 QUESTION: Yes. Is the result of walking the

1 line admissible if he has not previously been given  
2 Miranda warnings?

3 MR. MAFFETT: That's not the issue in this case,  
4 Your Honor.

5 QUESTION: It may not be, but I'm very  
6 interested in your answer to the question.

7 MR. MAFFETT: I think -- I think that under some  
8 circumstances that could also be testimonial; if, for  
9 example, it discloses the man's inability to follow  
10 instructions. And one of the key parts of the -- of the  
11 coordination tests, according to the National Highway  
12 Traffic Safety Administration instructions, is one of the  
13 key scoring points is can this man follow directions. So  
14 that if his walking the straight line, if he can't do that  
15 because he can't follow the directions or he can't  
16 remember the test, that, yes, that can be testimonial,  
17 also.

18 QUESTION: Because it discloses what you refer  
19 to as the contents of his mind?

20 MR. MAFFETT: Yes. It discloses his inability  
21 to reason. It discloses his inability to remember, his  
22 intellect.

23 QUESTION: Do you -- do you regard that as a  
24 satisfactorily precise phrase, disclosing the contents of  
25 one's mind?

1 MR. MAFFETT: Well, not exactly, and it's --  
2 it's hard to come up with a precise phrase because the  
3 other cases don't deal exactly with this issue. The only  
4 issue that I can see close is the insanity situation.  
5 Most other cases, how -- whether or not I can reason  
6 doesn't really come into whether or not the crime can be  
7 proven.

8 QUESTION: How about the voice exemplar cases  
9 and the handwriting sample cases? Why do they not  
10 disclose the contents of one's mind?

11 MR. MAFFETT: In those cases, the person who is  
12 giving the sample is not trying to communicate anything to  
13 the person he's giving the sample to, nor are the -- are  
14 the law enforcement authorities attempting to get  
15 communication. They simply want the physical aspect, the  
16 normal sound of the voice, the normal way the handwriting  
17 is written so that there's no communication.

18 QUESTION: But it does take brain activity to  
19 produce that.

20 MR. MAFFETT: It takes some brain activity. I  
21 think in past decisions of this Court, the Court has found  
22 it to be so minimal as to be not considered because it's  
23 no conscious thought, and there's no -- although there's  
24 brain activity, there's no intention to communicate.  
25 There's --

1 QUESTION: Well, there's certainly an intention  
2 to convey an idea. Is that what you mean by an intention  
3 to convey --

4 MR. MAFFETT: Convey. Yes, I'm sorry. There's  
5 no intention to convey an idea, and the times that samples  
6 like this have been allowed has always been a situation  
7 where it was for identity, not for elements of the crime.

8 QUESTION: Well, what if -- what if -- what if  
9 you ask me to give a writing sample, and I write "the  
10 quick brown fox jumped over the lazy dog"? Now I'm there  
11 communicating an idea, am I not?

12 MR. MAFFETT: That's right, and I do not think  
13 that, under my understanding of this Court's past  
14 decisions, that that would not be permissible because that  
15 discloses rather than you giving me a sentence, "the quick  
16 brown fox jumps over the log" to write, and I write what  
17 you tell me to write. If you pick what you write and you  
18 decide how to spell it and what you pick, then that does  
19 disclose the mental thought process.

20 QUESTION: So the handwriting sample cases  
21 depend upon whether or not the defendant is told what to  
22 write, which is all right, or said write anything you  
23 want, which is not all right?

24 MR. MAFFETT: I would submit that's correct.  
25 Both United States v. Wade and Dionisio and Gilbert all

1 involve situations where the person who gave the sample  
2 was given something and said write this, speak this.

3 QUESTION: So would it be all right here to ask  
4 the defendant to recite the alphabet?

5 MR. MAFFETT: It would not because it would  
6 involve his intellectual capacity to put the letters  
7 together, to remember what comes after B.

8 QUESTION: No. It's just like being given a  
9 sentence to write.

10 MR. MAFFETT: Except that if he forgets how to  
11 write the sentence, he can look on the paper and see it to  
12 write it.

13 In fact, there's a case, United States v.  
14 Campbell, which is the court of appeals -- it's not this  
15 circuit -- which where the individual had to spell the  
16 exemplar, where the exemplar was dictated to them but they  
17 had to pick the spelling, that that was found to be  
18 testimonial because the person conveyed the contents of  
19 his thought process, this is how I spell -- how I spell  
20 the word.

21 And so similarly, if you are asked to recite the  
22 ABCs, again that's not this case, but if you're asked to  
23 recite the ABCs and you have to pick what comes after D  
24 and how many letters are there, that that discloses  
25 exactly what the Fifth Amendment was intended to protect.

1           QUESTION: May I -- may I question that, Mr.  
2 Maffett? It seems to me when you talk about the contents  
3 of the mind, you can think of it as a warehouse, the  
4 contents of which are all sorts of information, data,  
5 facts and the like. And there's a separate question is  
6 how well the machinery in the warehouse is working, and  
7 that is, does it, if you're asked to recite the alphabet  
8 and all the rest of it, how is the mind functioning, how  
9 is the nervous system functioning.

10           Why is that different from Justice White's  
11 example asking him to walk? That tells you how the  
12 nervous system functions. It doesn't reveal any of the  
13 material that's stored in the warehouse. I think contents  
14 of the mind means something's stored there, not how it  
15 works.

16           MR. MAFFETT: The -- but the function of the  
17 mind is an element of -- of this offense, and by asking  
18 the man to --

19           QUESTION: Well, sure, but it might be a  
20 function of -- but I don't know how that advances the  
21 argument.

22           MR. MAFFETT: Well, but by asking the man to  
23 calculate the date of his sixth birthday, unlike walking  
24 the straight line, he then is disclosing information that  
25 incriminates him from his mouth, from his thought process

1 as opposed to his --

2 QUESTION: Well, it's from his mind but he's  
3 showing how his mind works. It works in a way that the  
4 law says is an element of the crime.

5 MR. MAFFETT: That's correct, and I would argue  
6 that that is protected by the Fifth Amendment. This Court  
7 in Estelle v. Smith, in that case the psychiatrist took  
8 what the man said to him and -- and decided that that  
9 man's mind worked in such a way that he was dangerous to  
10 society and deserved the death penalty, and this --

11 QUESTION: That conclusion rested in part on how  
12 the mind worked and in part on the facts that were  
13 revealed during the discussion with the psychiatrist.  
14 Both aspects were there.

15 MR. MAFFETT: Yes. Well, this case to a certain  
16 extent has the -- has the same thing because the -- the  
17 inability to calculate the sixth birthday or to get your  
18 age right reveals how Mr. Muniz's mind worked, I would  
19 submit, in similar fashion.

20 QUESTION: Well, on that basis I -- I would  
21 suppose that if you ask him what's his -- what's your age  
22 and he answers and he slurs, you could use -- you could  
23 use the information he gave you, how old you are, but you  
24 couldn't show on videotape or have the -- have the audio  
25 part showing that he slurred because that shows how he's

1 speaking, how his mind is letting his tongue work.

2 MR. MAFFETT: I would agree, Your Honor, and  
3 part of the problem is that sometimes you have a  
4 combination of testimonial --

5 QUESTION: So you could get a voice exemplar  
6 except that it couldn't include a slurring?

7 MR. MAFFETT: Well, part of the problem  
8 particularly in a situation where the intoxication is the  
9 crime, you get a situation where you have a mixture of  
10 physical and testimonial in the same thing. You have a  
11 mixture of the physical part of the -- the control of the  
12 tongue with the thoughts of the mind, and it's -- it's  
13 something that, I would submit to the Court, you can't cut  
14 the line. You can't exclude the testimonial part.

15 QUESTION: So the slurring is inadmissible, in  
16 your view? The fact that he talks in a slurred manner is  
17 inadmissible without Miranda warnings?

18 MR. MAFFETT: I would submit that it is, Your  
19 Honor.

20 QUESTION: And -- and --

21 MR. MAFFETT: Again, that's not the situation  
22 here, but --

23 QUESTION: For the same reason that walking --  
24 that an ability to walk a line would be inadmissible in  
25 your view?

1 MR. MAFFETT: Well, again, inability to walk a  
2 line -- the problem becomes that there are both physical  
3 and testimonial aspects. There are the aspects that show  
4 the diminished ability to reason. And there are aspects  
5 that show diminished ability to walk.

6 QUESTION: But let's just take the typical  
7 situation where he's told to walk a line, shown how, and  
8 in the view of the police, doesn't succeed. And you say  
9 you have a -- a video and audio of that?

10 MR. MAFFETT: That's --

11 QUESTION: Is that admissible, in your view, how  
12 -- how he walked that line? Is that admissible?

13 MR. MAFFETT: Is -- is his inability to do it,  
14 that he doesn't follow the --

15 QUESTION: Well, use the video.

16 MR. MAFFETT: -- does it perfect, but falls off  
17 the line.

18 QUESTION: You're doing -- he's -- the police  
19 simply say you didn't walk a straight line. And the video  
20 confirms that he didn't walk a straight line.

21 MR. MAFFETT: That would be much closer to  
22 strictly physical, and so, would be -- would be permitted.  
23 Because that's -- that's more towards the exemplar  
24 situation, where you are looking at a person's normal  
25 gait, normal voice.

1 QUESTION: It's not -- I mean, it's physical,  
2 but a mind is a physical thing. The reason he doesn't  
3 walk the line is not because there's something wrong with  
4 his foot, it's because it's something wrong with his mind.

5 MR. MAFFETT: That -- that's true. However, if  
6 he's walking the line, it primarily would show his  
7 inability to control his physical features. It depends --

8 QUESTION: It means the inability of his mind.  
9 It shows how his mind is working.

10 MR. MAFFETT: That -- that's correct.

11 QUESTION: But you -- you -- you wouldn't limit  
12 your -- your -- you know, the Constitution, just to  
13 mention it, does -- does say that -- that what we're  
14 talking about here is compelling a person in a criminal  
15 case to be a witness against himself. To be a witness.

16 Don't you think that -- that sort of focuses on  
17 -- on ideas, on the conveying of not -- not, you know,  
18 whether your mind can control your foot or not, but  
19 thoughts and ideas? Witnesses do?

20 MR. MAFFETT: Yes and -- and ideas are involved  
21 in this case. Again, this case doesn't involve -- we  
22 didn't challenge the physical coordination tests. We're  
23 -- we're -- we merely challenged the responses that Mr.  
24 Muniz made, as far as walking the straight line and the  
25 one-leg stand. We didn't make any challenge to those

1 items.

2 QUESTION: Yeah, but you're now saying that  
3 might have been a mistake. I mean, you're carrying your  
4 position to the point that -- that even where what he says  
5 does not disclose thoughts in his mind, but even if it  
6 just discloses whether his mind can control anything, that  
7 that might -- might be bad.

8 MR. MAFFETT: I think that you -- you'd have to  
9 go on a case-by-case basis. If it would --

10 QUESTION: I'm sure.

11 MR. MAFFETT: Well, if -- because, if it's --  
12 you get the combination of the physical and testimonial  
13 and unless -- if I think of a specific instance, then I  
14 can say, well, I -- I believe this to be physical or  
15 testimonial.

16 But the -- the ideas -- the -- when Mr. Muniz  
17 tries to walk a straight line, or when Mr. Muniz tried to  
18 answer these questions, he was trying to convey the idea  
19 to the booking center personnel, I'm not drunk. I'm --  
20 I'm all right. I didn't commit a crime.

21 That's the idea he's trying to convey.

22 The Commonwealth, in trying to -- to show these  
23 things, is trying to convey the -- the impression he is  
24 drunk, he has committed a crime. So that there is an  
25 idea, even in the -- even when he tries to walk the

1 straight like, he -- he's trying to communicate, I'm okay.  
2 I -- I haven't had too much to drink.

3 QUESTION: And I -- I don't know that that's  
4 right.

5 MR. MAFFETT: Well --

6 QUESTION: I mean, I guess in the same way you  
7 can say when you give a voice exemplar, you're trying to  
8 communicate my voice sounds like this. I mean, in that  
9 sense, everything's a communication of -- of something in  
10 your mind.

11 MR. MAFFETT: But with the voice -- with the  
12 voice exemplar, again, the individual is merely asked to  
13 -- to repeat a -- a phrase or a sentence, or whatever it  
14 is.

15 QUESTION: Communicating my voice sounds like  
16 this as much as your client would be communicating, you  
17 know, I can control my feet.

18 MR. MAFFETT: Well, the exemplar cases have  
19 always been for the identity of the person, rather than  
20 the -- the elements of the crime itself.

21 QUESTION: Why should that make any difference,  
22 when we're talking about the availability of the privilege  
23 against self-incrimination?

24 MR. MAFFETT: Because identification is not --  
25 the -- the physical identification -- as Justice Scalia

1 said, the Fifth Amendment -- the Fifth Amendment protects  
2 the person from being a witness against themselves.

3 Identification doesn't make -- doesn't normally  
4 make that person a witness against himself.

5 QUESTION: Well, but that's because the cases  
6 have said identification in this sense is not testimonial.  
7 Not that it's not an element of the -- not that it's not  
8 helpful in getting the person convicted.

9 MR. MAFFETT: But -- but if you identify me,  
10 that doesn't help you to convict me. It helps you to  
11 convict me in the sense that you may know who the suspect  
12 is. But the police -- the law enforcement authorities  
13 still must take and develop their evidence on their own  
14 and make their case, as opposed to having me participate  
15 in making their case.

16 QUESTION: Well, but if -- if we know that a  
17 person with a certain kind of handwriting forged this  
18 check, and it turns out that you have -- required by the  
19 grand jury to give a handwriting example, or have that  
20 kind of handwriting, that is very obviously a link in the  
21 prosecution's case against you.

22 MR. MAFFETT: It --

23 QUESTION: So that if -- if it were testimonial,  
24 you would surely have a right to object.

25 MR. MAFFETT: It -- it is a link in the case,

1 but -- but it's not the case. It -- it, again, may  
2 provide the identity of the individual. It would have to  
3 --

4 QUESTION: You -- you say the difference in it  
5 is whether it's just a link in the case as opposed to the  
6 case?

7 MR. MAFFETT: Well -- and a person's identity is  
8 always a link in the case, because even if you have really  
9 strong proof, if you don't have the -- who the -- if you  
10 can't prove who it was, you don't have a case. But you  
11 don't have -- but identity doesn't help prove the elements  
12 of the crime.

13 For -- for example, this Court, in, I believe,  
14 California v. Byers, said that an individual had to stop  
15 -- had to stop after he had an accident and stay there.  
16 And he was -- by staying there, he was divulging his  
17 identity.

18 But that this -- it didn't help the Commonwealth  
19 prove their case, because they still had to prove that he  
20 had committed some criminal violation. There were other  
21 parts to the opinion, I -- I agree, but that's my  
22 understanding of the difference between identity and --  
23 and actually helping convict yourself.

24 The -- there can be no question that calculating  
25 the sixth birthday or the other things that Mr. Muniz was

1 asked to do, again, show either his ability to recall or  
2 reason or his inability to do that, and his clearness of  
3 intellect, judgment and mental state.

4 The fact that -- that he didn't direct -- in  
5 other words, that the Commonwealth didn't want to use his  
6 -- the date of his sixth birthday for the actual proof of  
7 when the date of his sixth birthday is, is of no moment,  
8 as this Court decided in *Estelle v. Smith*.

9 The impressions, inferences, from what was said  
10 can be -- can be just as protected and just as testimonial  
11 as -- as the direct words.

12 The -- it cannot be argued in this case that any  
13 of Mr. Muniz' responses were voluntary. The Superior  
14 Court found, as a matter of fact, both that the utterances  
15 were clearly compelled, and that none of them were  
16 voluntary. And furthermore, where a defendant is in  
17 custody and he hasn't been given his Miranda warnings,  
18 there is a presumption of compulsion.

19 QUESTION: You really -- you really think that  
20 there was a finding that these were actually compelled, or  
21 just that there was -- it was equivalent to in --  
22 in-custody interrogation that would demand Miranda  
23 warnings?

24 MR. MAFFETT: There was a finding that his --

25 QUESTION: All of -- all the -- all the -- all

1 that would needed to have happened, as I understand it,  
2 was that the Miranda warnings should have been given  
3 first?

4 MR. MAFFETT: That -- that's right, Your Honor.  
5 And perhaps I misspoke. There was a finding that his --  
6 his comments were not -- were prompted. In other words,  
7 they were either in response to direct questions or  
8 conduct on the part of the booking officer, not so much  
9 that they were compelled in that sense.

10 But this Court has in the past held that where a  
11 defendant is questioned in custody and without Miranda  
12 warnings, that he -- that there is that presumption of  
13 compulsion.

14 This can -- again, these -- the -- the  
15 occurrences in this case can't be argued to be tantamount  
16 to merely attendant -- normally attendant to arrest and  
17 custody, because it goes far beyond what normally happens,  
18 and what this Court has found to be attendant to arrest  
19 and custody.

20 This is a situation far beyond fingerprinting or  
21 photographing or a blood or a breath test. This was an  
22 investigative process. The -- the booking center process  
23 itself is designed to gather evidence.

24 You have a situation where not only is the  
25 defendant separated from the public, he's separated from

1 the rest of the police department. Only drunk driving  
2 suspects are taken to these booking centers.

3 The defendant is not asked, would you like to  
4 take some coordination tests? He has said, now -- now,  
5 we're going to give you some tests. Would you come over  
6 here?

7 There are lines painted on the floor. It is  
8 well lit. The videotape and breath machines are in place.  
9 He is given these physical sobriety tests as part of the  
10 investigation. He's -- the petitioner, in their brief,  
11 said that, as far as the implied consent law, that that  
12 was somehow to be fair to the defendant, to make sure that  
13 he understood.

14 But Pennsylvania law currently is that for a  
15 valid test or a valid refusal to be admitted into  
16 evidence, they don't need to show that the defendant  
17 understood what he was told about the implied consent law.  
18 Or that his choice in either taking the test or not taking  
19 the test was knowing and voluntary.

20 They merely have to show that they told -- that  
21 it was a legitimate arrest. They asked him to take the  
22 test. And that they told him what the consequences would  
23 be if he refused.

24 QUESTION: Did you object to introducing what  
25 happened at the roadside?

1 MR. MAFFETT: No, I did not, Your Honor.

2 QUESTION: So, anything that -- any of the tests  
3 there were admissable?

4 MR. MAFFETT: That -- that's correct. Because  
5 he was not arrested until he was placed in the police car  
6 and -- and actually placed under arrest.

7 A case that can be analogized to this case was  
8 -- was the court of appeals case of United States v.  
9 Hinckley. It involved the assassination of -- or  
10 attempted assassination of President Reagan.

11 Now the FBI took Mr. Hinckley in for about 20 or  
12 25 minutes, asked him questions concerning where his  
13 parents lived, his address, did he have girlfriends, where  
14 did he work, how far had he gone in school, those sorts of  
15 things. It was nothing even as overt as this case,  
16 because it didn't have directly to do with the elements of  
17 the offense that he was charged with.

18 But the court found that since the agents were  
19 aware that there was a likelihood that there would be an  
20 insanity defense, the responses were inadmissible, because  
21 it was reasonably likely to -- or the -- the FBI was aware  
22 that there questions were reasonably likely to lead to an  
23 incriminating response.

24 And that's the -- exactly the situation in this  
25 case, or it's pretty close. Because you have the officer

1 at roadside who has testified that he observes odor of  
2 alcohol, bloodshot eyes, poor coordination, trouble  
3 producing license and registration.

4 In fact, he told him to stay at the side of the  
5 road until he sobered up.

6 According to the officer, practically every  
7 contact at the side of the road produced some sort of an  
8 incriminating response. And from that point on, law  
9 enforcement certainly should have known that -- that  
10 whatever they asked Mr. Muniz was likely to illicit an  
11 incriminating response.

12 And then, more of the same at the booking  
13 center. He -- he can't even give them his address. He  
14 has to look at his wallet. He gets his age wrong. This  
15 is all before the sixth birthday question.

16 Is it reasonably likely to expect that a -- that  
17 a drunk driving suspect on being asked to perform these  
18 field sobriety tests, when he can't do them, will provide  
19 some sort of an explanation which will end up being  
20 incriminating?

21 If the procedure in this case is not construed  
22 by this Court to be interrogation, I would argue that the  
23 privilege against self-incrimination would be  
24 substantially eroded.

25 You can't expect a defendant who is upset by the

1 arrest itself, without counsel, he does not know of his  
2 right not to have the conversation, to make a choice based  
3 on the consequences of these seemingly innocent questions  
4 and instructions.

5 Because the questions, on their face, to the  
6 defendant, are -- are statistical, and may be -- may seem  
7 to him to be to ensure he understood, without being told  
8 that he has a right to remain silent, or that whatever he  
9 says might be used against him, he has no way to know that  
10 he doesn't have to answer and that his responses may be  
11 used later at trial to convict him.

12 QUESTION: (Inaudible) statements during the  
13 testing, the so-called voluntary statements during the  
14 testing? He -- could he have possibly have thought that  
15 he had to say those things?

16 MR. MAFFETT: Well, I think most of the  
17 statements during the testing were -- again, he was trying  
18 to show, to communicate that he was not intoxicated,  
19 because he said things like, "I can't walk this way even  
20 when I'm at home," or "I can't walk this way even when I'm  
21 at work," or "I can't" -- "My legs are not so good." So  
22 there were things that he was trying to explain why he  
23 couldn't do the tests that they asked him to do.

24 In fact, on the video --

25 QUESTION: The audio of all of that was

1 excluded, wasn't it?

2 MR. MAFFETT: Yes, it was. Yes.

3 At one point on the video he even said -- he was  
4 told, well, we'll read you your Miranda warnings later,  
5 and he said something to the effect of, "I know you people  
6 are pretty fair about it."

7 I mean, he was relying on them to be fair with him  
8 in their investigation. He had no idea that what they  
9 were doing was gathering evidence, from what he said, to  
10 convict him. And this would not, if you --

11 QUESTION: Well, he didn't think that the tests  
12 he was given had some bearing on whether he would be held?

13 MR. MAFFETT: He may have, but as far as his  
14 words, I can't tell you. He wouldn't know without being  
15 told that -- and especially his statement, "I know you  
16 people will be pretty fair about it" is an illustration  
17 that he thought that something else was going on, other  
18 than getting evidence.

19 QUESTION: Well, it could just as well have  
20 meant he thought the police would not distort the results,  
21 they would be even-handed, not that they weren't doing  
22 anything to build a case against him.

23 MR. MAFFETT: I suppose that's another fair  
24 inference.

25 This -- if the Court were to sustain the

1 Pennsylvania Superior Court it would not appreciably  
2 affect the way these booking procedures are done. The  
3 defendant can still be asked his name and his address and  
4 any other biographical information that they need, but if  
5 they don't read him his rights, they just can't use that  
6 part in evidence, and I would argue that as far as whether  
7 or not it would make any difference if you did read the  
8 man his rights at the beginning, that in fact it would  
9 not.

10 It's been my practice in Cumberland County since  
11 the time of this decision that now, in fact, they do read  
12 him his rights as soon as the man comes to the police  
13 station and again, just from my practice, it doesn't make  
14 any -- hasn't made any difference on whether the people  
15 say something or not.

16 QUESTION: Is Cumberland County just to the west  
17 of Dauphin County? You say you practice in Cumberland  
18 County, but your office I see is in Harrisburg.

19 MR. MAFFETT: They're very close. They're  
20 within -- across the river is Cumberland County from  
21 Dauphin.

22 Lastly, the advantage of Miranda has always been  
23 its clarity -- it's bright line. The police, the  
24 prosecutors, the lower courts, know what must be done for  
25 questioning and under what circumstances statements are

1       admissible.

2                   If you make an exception to the facts for this  
3 case, it's going to lead to a lot of litigation. The end  
4 result would be an elaborate set of rules and exceptions  
5 and distinctions, and nobody -- not the police, not the  
6 prosecutors, not the courts -- are going to know with any  
7 certainty as to any particular situation whether or not  
8 the interrogation is permissible.

9                   If you allow the kind of conduct or questioning  
10 or the process that occurred here, you put a premium on  
11 the police devising these indirect interrogation methods,  
12 these tricky things of the sixth birthday question and  
13 other similar indirect questions.

14                   Because the -- what happened at the booking  
15 center is actually -- if -- it actually incriminated and  
16 was just as deadly to Mr. Muniz as if he'd have been  
17 asked, "are you drunk," if for all intents and purposes  
18 his responses said, "I am drunk."

19                   And I would argue that because the utterances  
20 disclosed the contents of his mind, his reasoning ability,  
21 that they were testimonial and protected by the Fifth  
22 Amendment, and since he was subject to interrogation  
23 without Miranda warnings, that the audio portion of the  
24 videotape was correctly ruled inadmissible.

25                   If there are no other questions, I'll sit down.

1 QUESTION: Thank you, Mr. Maffett.

2 Mr. Eakin, you have two minutes remaining.

3 REBUTTAL ARGUMENT OF J. MICHAEL EAKIN

4 ON BEHALF OF THE PETITIONER

5 MR. EAKIN: Thank you. May it please the Court:

6 I would suggest that what the Court's being  
7 asked to do by Mr. Maffett is to extend Miranda to cover  
8 situations of custodial sobriety testing that it's not  
9 designed for, and that instead of the contrary, trying to  
10 devise a set of rights that an intoxicated suspect will  
11 understand that tells him he has a right to remain silent  
12 except you've got to do these tests, would be completely  
13 unworkable.

14 Because the tests are designed to get physical,  
15 demonstrative evidence and that's all they're designed to  
16 get, I suggest that the present law covers that and covers  
17 it quite clearly, and Miranda warnings should not be  
18 extended to apply to this situation.

19 Unless the Court has other questions, I'll  
20 forego the rest of my time.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Eakin.

22 The case is submitted.

23 (Whereupon, at 12:08 p.m., the case in the  
24 above-entitled matter was submitted.)

25

CERTIFICATION

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

*No. 89-213 - PENNSYLVANIA, Petitioner V. INOCENCIO MUNIZ*

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BY *Leona M. May*  
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