ORIGINAL

In the

Supreme Court of the United States

STATE OF RHODE ISLAND,

PETITIONER,

V.

THOMAS J. INNIS,

RESPONDENT.

No. 78-1076

Washington, D. C.
October 30, 1979

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STATE OF RHODE ISLAND, Petitioner,	:	
v.	:	No. 78-1076
THOMAS J. INNIS, Respondent.	:	

Tuesday, October 30, 1979
Washington, D.C.

The above-entitled matter came on for argument at 10:30 o'clock a.m.

BEFORE:

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

APPEARANCES:

DENNIS J. ROBERTS II, ESQ., Attorney General, State of Rhode Island, Providence County Courthouse, Providence, Rhode Island 02903; on behalf of the petitioner.

JOHN A. MacFADYEN, III, ESQ., Assistant Public Defender, Appellate Division, Office of the Public Defender, 250 Benefit Street, Providence, Rhode Island 02903; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1076, Rhode Island against Innis.

Mr. Attorney General?

ORAL ARGUMENT OF DENNIS J. ROBERTS, II, ESQ.,

ON BEHALF OF THE PETITIONER

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

This matter is before the Court this morning on a petition for certiorari directed to the Rhode Island Supreme Court.

The respondent in this case, Thomas Innis, was found guilty of kidnapping, robbery and murder by a Superior Court, sitting with a jury, on November 12th, 1975.

During that trial, the Superior Court had denied a motion to suppress a shotgun that had been seized under the circumstances that give rise to this petition for certiorari.

The case began on midnight, or shortly after midnight, of January 16th, 1975. A cab driver named Aubin complained to the Providence Police Department that he'd been assaulted by a man carrying a sawed off shotgun. While he was in the police department giving a statement, he observed a photograph of the respondent, Thomas Innis, on a bulletin board in the police department, and spontaneously identified his assailant as Thomas Innis.

The police put out a bulletin for a search in the area of the city of Providence where the cab driver had dropped Innis off, the Mt. Pleasant area. At about 4:30 in the morning, a patrol officer on Chalkstone Avenue in the city of Providence saw Innis on a sidewalk and apprehended him, handcuffed him, and gave him his Miranda.

QUESTION: Previously, another cab driver had been shot and killed?

MR. ROBERTS: A cab driver had been shot and killed, Your Honor. The case which is before the Court this morning involves the shooting and killing of that cab driver, who at that time had not yet--the body had not yet been discovered.

The first patrol officer gave Innis his Miranda warnings for the first time. Within a few minutes after that, a Sergeant arrived and gave Miranda--gave Miranda warnings for the second time to Innis.

Within two or three minutes after that, the commanding--the night commander of the Providence Police Department at that time, Captain Leyden, arrived on the scene and gave Innis his Miranda warnings for the third time.

At that time, Innis asserted his right to have counsel, at which point Captain Leyden directed that all interrogation cease, that he be placed in a caged police car with three police officers, and taken to the central police station.

This was done. He was also specifically advised, I should point out, that the--the suspect not be interrogated on the way to the police station, and that there be no conversation, no questioning, directed to him.

QUESTION: You said he was placed in a caged police car with three police officers?

MR. ROBERTS: There were two police officers in the front seat, Your Honor--

QUESTION: And one in the caged--

MR. ROBERTS: --and one in the cage with Thomas Innis.

Along the way--they had gone approximately two minutes, and traveled approximately one-half mile to a mile--at that point the police officer on the passenger side of the front seat said to the police officer in the driver's seat, it would be a shame--and I'm giving the substance of what he said now; I'm not attempting to quote--it would be a shame if one of the retarded children who goes to the school for the handicapped in this neighborhood should find that gun and hurt himself.

At that point, Thomas Innis, to whom this had not been directed as an interrogatory, volunteered: Okay, take me back to the scene; I'm going to show you where the gun is.

Thomas Innis was taken back to the scene. Captain Leyden who was still there, removed him from the back seat of

the caged vehicle, and gave him for the fourth time his Miranda rights.

At that point, Thomas Innis said no, I would like to show you where the gun is. I'm concerned that some of the handicapped children at the school for the retarded in this neighborhood might get hurt.

Thereupon, he took the police officers into a field, and after a little bit of looking for it, they located the sawed off shotgun.

He was subsequently charged with the murder of John Mulvaney, the cab driver who had been missing at this point for three or four days. He was found guilty of kidnapping, robbery and murder.

The sole issue before the Court this morning is the question of suppression of the shotgun.

Now, in a 3-2 opinion, which reversed the conviction of the trial court, the majority of the Rhode Island Supreme Court relied heavily on the Brewer case, Brewer v. Williams.

Now, Brewer of course specifically failed to consider the Miranda doctrine, or the voluntariness of Williams' statement. Miranda played no part in Brewer, which strictly was a Sixth Amendment case.

And as the Court pointed out in Brewer, the key to invocation of Sixth Amendment rights must be, the commencement of some kind of judicial proceeding, as clearly existed in

Brewer.

He, of course, had been arrested; he had been arraigned; he was represented by two counsel; he was charged; he was on his way back to Des Moines for further proceedings. None of that is applicable in Innis.

QUESTION: Well, isn't the basic issue here, in the case before us, whether or not there was interrogation of Innis?

MR. ROBERTS: This is true, the question is whether there--

QUESTION: Isn't that really the question?

MR. ROBERTS: Well, I think there are several questions, Your Honor.

QUESTION: Well, if there was no interrogation, you win, don't you?

MR. ROBERTS: If there was no interrogation, I win. However--

QUESTION: And in Brewer, that was not an issue.

MR. ROBERTS: No, it wasn't; it was clearly interrogation involved.

QUESTION: And every court that examined the Brewer case described that so-called Christian burial speech as interrogation.

MR. ROBERTS: That is correct, Mr. Justice Stewart. In fact, Detective--

QUESTION: That was not an issue in the case.

MR. ROBERTS: Detective Captain Leeming conceded that his purpose was interrogation--

QUESTION: Right.

MR. ROBERTS: --in that case. So we--

QUESTION: Well, not only in this Court, but every court along the way; that had not been an issue.

MR. ROBERTS: That is true, Your Honor.

QUESTION: The issue in that case was whether or not there had been a waiver.

MR. ROBERTS: Well, waiver can become an issue in this case.

QUESTION: I know it can.

MR. ROBERTS: If the Court concludes that there was interrogation.

QUESTION: Yes, I know.

MR. ROBERTS: The State's position is, basically, there was no custodial interrogation. We don't dispute custody, but we do dispute interrogation.

QUESTION: Right.

MR. ROBERTS: If there had been by some action of the police--he had scrupulously observed the constitutional rights of the accused--if there had been some custodial interrogation, there was certainly knowing and voluntary waiver by Innis on two occasions: First, in the squad car,

and secondly, when he returned--

QUESTION: But you don't get to any question of waiver if there was no interrogation?

MR. ROBERTS: That is absolutely correct, Mr. Justice Stewart. That's absolutely correct.

The--and the question of interrogation, of course it seems to me, should turn on the question of intent to elicit an incriminating response. In other words, were these police officers intending to trick the man?

There is much argument in respondent's briefs in support of the conclusion that this was a skillful interrogative trick by a skillful police officer. It overlooks the fact that according to the record, Officer Gleckman, I believe it is, who was the officer who made the statement, had gone on the Providece Police Department in 19--November of 1973. These events transpired in January of 1975. He had been a patrol officer. He was not, as Captain Leeming was in Brewer for example, a skilled interrogator. The duration of the trip was, I think they said, two or three minutes, and a half-mile to one mile. There was apparently an off-handed remark made by one officer to another. There was no attempt here by a skilled interrogator to go after a known psychological weakness, if you will, of a man who was known to be an escaped mental patient and a religious fanatic.

All of the elements that applied to lead to the

conclusion that there was undoubtedly an interrogation in Brewer do not apply in Innis.

So it seems to me that in the Rhode Island Supreme Court's reliance, the majority's reliance, on Brewer, they're both doctrinally and factually way off base. And it seems to me that on that grounds alone, the decision of the majority in the Rhode Island Supreme Court cannot stand.

When you get into Miranda questions, the accepted standards of Miranda, the State submits, could lead to the mandate of a reversal. Because we don't have interrogation; we do have a waiver. And further, the application of a per se exclusionary rule, the extension of Wong Sun to the Miranda procedural safeguards under the Fifth Amendment, simply is not justified by the teachings of this Court, and is not justified by principle.

As we go through the steps, everything that could be found to support the respondent's position, and support the views of the Rhode Island Supreme Court, falls.

If there were interrogation, there would be a waiver. If there were an interrogation and there were no waiver, the exclusionary rule should not be automatically applied in this case, because the exclusionary rule should turn on the totality of circumstances in the case and the reliability of the evidence, and not upon a mere per se extension of Wong Sun, Fifth Amendment, and beyond Fifth

Amendment, into the exclusionary--into the prophylactic safeguards of Miranda.

So under all of these Miranda-type tests, the Supreme Court decision below cannot stand.

There is another interesting alternative, which is proposed, by Professor Granno--Professor Granno, in a criminal law review article, this past summer's issue of the Criminal Law Review, 17 American Criminal Law Review page 1: He discusses what he refers to there as the rationale approach to Miranda. He distinguishes that from what I've been discussing during the last few minutes, that is, the black letter approach, he called, to Miranda.

The rationale approach, as I read it, is essentially a voluntariness test of Miranda. And what it turns on--

QUESTION: Well, that would overturn Miranda, of course, wouldn't it?

MR. ROBERTS: Yes, it certainly would, Your Honor.

QUESTION: That's the overruling approach to Miranda?

[Laughter.]

MR. ROBERTS: I suspect that probably lurks around in the back of Professor Granno's mind somewhere, Your Honor.

QUESTION: And yours?

MR. ROBERTS: And mine? Well, Your Honor, from the point of view of prosecution, I feel--I feel that this Court

can appropriately reserve the decision below merely by consideration of Miranda standards.

On the other hand, if the Court wished to pursue something like Professor Granno is suggesting in his rationale approach, a voluntariness test, we certainly have no--we would have no objection to the Court proceeding on that ground.

I think it's a perfectly valid--perfectly valid grounds for decision, Mr. Justice White.

QUESTION: Now, you referred to the doctrinal and factual distictions, or lack of it, by the Rhode Island Supreme Court. If you take Innis out of the back seat of that car and put Brewer in it and have the Christian burial speech made by the two men in the front seat, you'd have this case all over again, wouldn't you?

MR. ROBERTS: I don't believe so, Your Honor.

QUESTION: This fellow had never been charged.

MR. ROBERTS: This man was not charged; we did not have the commencement of any criminal---

QUESTION: He was under arrest and in custody, wasn't he?

MR. ROBERTS: He was in custody, Mr. Chief Justice. But there had been no formal arraignment; there'd been no formal charge. He was being brought to the station. I'm not aware of any case which has extended back to the point of

custody the---

QUESTION: When we talk--Miranda deals with custodial interrogation, doesn't it?

MR. ROBERTS: That is correct, Mr. Chief Justice.

QUESTION: And Massiah deals with something quite different?

MR. ROBERTS: It certainly does; it certainly does.

QUESTION: What did--what violation was found in Brewer?

MR. ROBERTS: Violation of Sixth Amendment rights---

QUESTION: So, and Miranda is a Fifth Amendment case, isn't it?

MR. ROBERTS: Mr. Justice White, that's correct, yes, sir. It's a Fifth Amendment case, and as Professor--I think excellent language illustrating the purpose of Miranda is Professor Granno's article---

QUESTION: But you should be able to say at the outset that Brewer is irrelevant?

MR. ROBERTS: I believe that Brewer is irrelevant.

QUESTION: Because the Massiah approach isn't applicable here.

MR. ROBERTS: Correct, the---

QUESTION: There's been no charge.

MR. ROBERTS: No commencement of judicial proceedings, which is the key to the commencement of your Sixth Amendment

rights, under Massiah or under Brewer.

Now, there is some, I guess, scholarly debate about whether or not you should extend back to the point of custody the right to counsel under the Sixth Amendment.

QUESTION: But you still, even if Brewer is irrelevant.

MR. ROBERTS: Yes.

QUESTION: And Miranda isn't---

MR. ROBERTS: Miranda is not.

QUESTION: And neither is--hence, neither is the question of interrogation irrelevant?

MR. ROBERTS: Correct. Interrogation is at the very heart of Miranda, and it's the very heart of Innis, now, in the Innis case. We are facing a situation where Innis had overheard an observation made by policman A to policeman B.

It wasn't the Christian burial speechin the sense of a 160-mile drive with a Texas captain who prides himself on being a skillful interrogator, preying on the weakness, if you will, developing an inherent coercion on Williams who was in that car.

QUESTION: Well, you've said that, in response to questions from my colleagues, that the Brewer case was written, as I understand it was, to--on a Sixth Amendment basis, and what we have here is a Fifth Amendment question.

And yet is there an element of interrogation in

each? Or is interrogation only in the--only in this particular case? Did Brewer not involve any question of interrogation?

MR. ROBERTS: Oh, Brewer clearly, Mr. Justice Rehnquist, involved interrogation.

QUESTION: It did not involve an issue of interrogation.

MR. ROBERTS: It did not involve an issue of interrogation.

QUESTION: Everybody had agreed--

MR. ROBERTS: That's right.

QUESTION: --in the Brewer case that that was interrogation.

QUESTION: Wait a minute. There were some of us---

QUESTION: No, I'm talking about every Court. Every Court.

MR. ROBERTS: The court majority, Mr. Justice Blackmun.

QUESTION: Every court.

MR. ROBERTS: So--

QUESTION: Well, let's have that clear, because I think it bears on this case in a way.

Incidentally, you referred to the American Criminal Law issue. It's of interest to me that in that

same issue, there's another article taking the opposite side of the case.

MR. ROBERTS: Professor White--

QUESTION: Yes.

MR. ROBERTS: --would extend Your Honor the--he would make the case a Sixth Amendment case. I believe there's nothing in the doctrines taught by this Court, nor is there anything--any matter of principle which would call for that conclusion.

To extend Sixth Amendment rights back to the point of custody would, I think, be clearly detrimental public policy in the effect it would have on law enforcement to function at the scene of an investigation.

QUESTION: Well, if--although not contested--there was an--interrogation was one of the elements in the holding of Brewer, and you say the question of whether or not there was interrogation here is important in the Fifth Amendment context; then is the question of interrogation in the abstract involved both in the Fifth Amendment Miranda-type situation and in the Sixth Amendment Massiah-type situation?

MR. ROBERTS: Absolutely, Your Honor. The whole purpose of Miranda and its warnings is to reduce the pressure of custodial interrogation. Now, if there was interrogation here, then we'd have to move on to the question of was there waiver, or should the per se exclusionary rule

be applied.

But as I believe Mr. Justice Stewart pointed out a few moments ago, if there is no interrogation here, if the statements by patrolman A to patrolman B, "I hope none of the children at the school for the handicapped are injured," if that doesn't constitute improper custodial interrogation, then the respondent's whole position is lost.

The--the--there must be some finding that that did constitute interrogation. And while there's much argument about it, I would point out that the record in this case is not only silent on the inquisitorial intent behind that remark; in fact, the record goes the other way. The record suggests that this was just casual conversation, "I happened to say to him," or something like that.

QUESTION: He was just philosophizing; is that your suggestion?

MR. ROBERTS: No, Your Honor, it's--I'm not suggesting that. I'm suggesting that he was a patrol officer who patrolled that area, and would have five different concerns on his mind than would Detective Captain Leeming in Brewer, or Detective Captain Leyden, for that matter, here.

I think if Detective Captain Leyden had made a--had gotten into this kind of a dialogue, it might well have been with a whole different intent, and with a whole different constitutional meaning.

QUESTION: What is the difference if this officer wanted to find the gun---

MR. ROBERTS: This officer was---

QUESTION: Probably interested in where the gun was, wasn't he?

MR. ROBERTS: No, I don't believe so, Your Honor. I believe this officer was interested in discharging what he was ordered to do, and that is, take the man to the station without asking him any questions.

QUESTION: May I ask you a question about--

QUESTION: Well, why'd he do that?

MR. ROBERTS: He didn't ask him any questions, Mr. Justice Marshall.

QUESTION: Well, then after--he got him turned around though, didn't he? At the request of the man, didn't he?

MR. ROBERTS: The man volunteered. The man said, "Take me back; I'll show you the gun." He was then given his rights for the fourth time outside the police car.

QUESTION: But my point is, I don't know just how innocent that conversation was.

MR. ROBERTS: Well, ofcourse that is what respondent is attempting to provoke the Court to believe. The---

QUESTION: You know I have a great difficulty with deciding how much major intelligence the two-year-on-the-force

cop--policeman--has, and a ten-year. I have a lot of difficulty.

MR. ROBERTS: Well, the point--

QUESTION: I mean, I think a police officer who's had two years training with the FBI might be equal to a police in a country place that had never seen a city.

MR. ROBERTS: Well, the--

QUESTION: I just don't see the purpose of the--these very innocent people sitting up there in the front seat.

They were qualified police officers.

MR. ROBERTS: They're police officers; no question, Mr. Justice Marshall.

QUESTION: Qualified.

MR. ROBERTS: That's right.

QUESTION: Well, why try to make them unqualified?

MR. ROBERTS: I'm not trying to make them unqualified. I'm suggesting to mister--to the Court, Mr. Justice Marshall, that we have a situation that prevails here. where these men were instructed to do a specific thing. They're patrol officers, they're not detectives. I'm drawing a distinction that I believe exists here between--

QUESTION: Well, do you think it's the same as then discussing what happened in the World Series last night?

MR. ROBERTS: I think you have to have some kind

of evidence that it has inquisitorial intent. And that's totally absent here.

In fact, these people--

QUESTION: It wasn't totally absent: They were looking for a gun.

MR. ROBERTS: These men--

QUESTION: And they were discussing a gun.

MR. ROBERTS: They were in fact--they were in fact discussing a gun, Mr. Justice Marshall.

QUESTION: And they were discussing this gun.

MR. ROBERTS: His gun.

QUESTION: Yes.

MR. ROBERTS: They were discussing his gun.

QUESTION: Right.

MR. ROBERTS: That's what they said. They said it would be a shame if some small child, going to the school for the handicapped up the hill here--I think that's vastly different on the facts than the Christian burial speech, may it please Your Honor. Because it was not--as I say, it was not of a great duration; it was not on a long ride. The one--

QUESTION: Well, and most importantly, it was not directed to Innis.

MR. ROBERTS: It was not directed to Innis.

QUESTION: By contrast with the Christian burial speech.

MR. ROBERTS: Yes. Yes, exactly. That's true, Mr. Justice--

QUESTION: When you say it was not on a--when you say it was not on a long ride, how long a trip was it that these officers were instructed to make?

MR. ROBERTS: The testimony--well, the trip they were instructed to make was considerably longer than what eventually happened. They travelled a half-mile.

QUESTION: A half-mile?

MR. ROBERTS: A half-mile to a mile, the record suggests. And they were gone, there's reference to a couple of minutes, a few minutes.

QUESTION: And then they turned around and went back?

MR. ROBERTS: They turned around when the--when Innis volunteered to go back. They turned around, went back to the scene. The Captain then removed him from the--from the back seat of the squad car; once again gave him the Miranda warnings; and he replied, "No, I want to show you where the gun is. I know my rights, but I want to take you to where the gun is."

Which gets into point number two: If, in fact, that did constitute an interrogation, here is the second waiver of whatever rights may have accrued to him under Miranda.

QUESTION: Maybe he was counting on the fact that

you can't do ballistic tests on a sawed-off shotgun the way you can on a .38 caliber pistol; is that possible?

MR. ROBERTS: I don't know what the state of his knowledge was, Your Honor. But he certainly--

QUESTION: I mean, you've referred to the Christian burial speech of Brewer several times, and we have, too. In Brewer, wasn't it also a fact that beside--in addition to referring to a Christian burial, there was reference to the fact that if the child, who had been kidnapped, was still alive, it might not survive in that--

MR. ROBERTS: In that weather.

QUESTION: --climate? Now, wasn't the duty of the officer--all the officers in the Brewer car--the same with respect to trying to retrieve and recover that living child, if it was living, as the officers in this Innis automobile to recover that gun?

MR. ROBERTS: I submit, Your Honor, under what I would expect to be the ordinary standards of police work, they probably--their duty should be to carry out the directions of their superior officer. In the Innis case--I have no information at all about Brewer, obviously--in the Innis case the commanding officer had other policemen at the scene who were doing continuing investigative work. These three men were directed to take Innis to the central station.

QUESTION: General Roberts, following up on the

Chief Justice's point, the trial judge specifically said, we have three officers who are out at four in the morning or later, and have been prowling around searching for a weapon which they had reason to believe was there.

These very men, I understood, were charged with the responsibility for locating that weapon?

MR. ROBERTS: No, these three men had been--

QUESTION: That's what the trial judge said.

MR. ROBERTS: These three men had been at the scene.

QUESTION: Looking for the weapon.

MR. ROBERTS: Looking for the weapon; they had been.

QUESTION: And is it not a fact that the trial judge's decision was based on waiver. That's the reason the trial judge--he says in so many words that it was a waiver, clearly, on the basis of the evidence that I have heard, an intelligent waiver of his right to remain silent.

And he did not make any finding one way or another on the issue of interrogation, whereas the Supreme Court of Rhode Island did.

MR. ROBERTS: That's correct, Mr. Justice--

QUESTION: And you're in effect asking us to make a new finding of fact on the question of interrogation; is that right?

MR. ROBERTS: No. Well, no--

QUESTION: Well, who should make the finding of fact?

MR. ROBERTS: The issue of waiver was certainly paramount in the trial judge's decision.

QUESTION: It was the grounds of his decision.

MR. ROBERTS: Yes, yes.

QUESTION: Clearly stated.

MR. ROBERTS: He found a waiver to exist.

QUESTION: And he did not pass on a finding of interrogation.

MR. ROBERTS: Exactly; exactly. I don't believe that on the record before this Court that it constitutes making a new finding of fact to determine that--

QUESTION: Well, the Supreme Court of Rhode Island did decide the question, didn't it?

MR. ROBERTS: They--yes. They decided--

QUESTION: Would you characterize it as a question of fact or a question of law?

MR. ROBERTS: I believe they treated it essentially as a question of law. Because I felt--I believe that they were mandated--they believed that they were mandated by the Brewer case to conclude that this was an interrogation.

I believe that they automatically applied, if you will, the Christian burial speech, despite the numerous factual distinctions, and the fact it was a Sixth Amendment case.

They applied that--

QUESTION: Well, but that doesn't affect the interrogation issue, as I understood your answer to Justice Rehnquist.

MR. ROBERTS: Correct. Correct. No, I think the interrogation issue and the waiver issue do, clearly, stand as separate issues--

QUESTION: Right

MR. ROBERTS: --waiver being subsequent in my view to--

QUESTION: But I'm still interested in your answer, not your interpretation of the Supreme Court of Rhode Island. What is your position on whether the interrogation issue is a question of fact or a question of law?

MR. ROBERTS: I believe it's a question of law, as it is before this Court. I believe interrogation certainly could be a question of fact in the Superior Court. When the Supreme Court gets it and applies Brewer and says, Brewer--

QUESTION: And the rule of law would be that unless the remark is directed at the defendant, it's not interrogation. Would that be the rule you ask us to adopt?

MR. ROBERTS: I would ask you to adopt the rule that unless it's directed at the defendant, and unless it's interrogative in nature--it doesn't have to have a question makr at the end--

QUESTION: Well, obviously, Brewer establishes you don't need a question mark.

MR. ROBERTS: Correct.

QUESTION: But you would say that if--that even if it was intended to bring forth the response, if it was not directed at the defendant it would not be interrogation?

MR. ROBERTS: If it was intended to bring forth a response?

QUESTION: Yes.

MR. ROBERTS: And it was not directed--well, then I would think that you would have to find that in fact it was directed at the defendant.

QUESTION: What if the--what if the trier of fact were persuaded that the reasonable probability of the conversation were to bring out a response from the defendant? Would it be interrogation, regardless of what the subjective motivation of the defendant?

MR. ROBERTS: Yes, because then I think you would say that that was, in fact, directed at the defendant. It doesn't have to--I don't have to say, "Mr. Jones."

QUESTION: So you don't have to direct it in terms in which I'm speaking to you? It just has to be directed in the sense of intended, or likely, to bring out a statement--

MR. ROBERTS: In fact--

QUESTION: --by the--because that happened here,

didn't it?

MR. ROBERTS: No, that didn't happen here, Your Honor.

QUESTION: It didn't bring a--well--

MR. ROBERTS: It was not directed at him, and in fact, all the testimony--

QUESTION: The trial judge describes what the defendant does as his response to the statement.

MR. ROBERTS: But it was not directed at him in real or implied fashion, and I think all the record evidence--

QUESTION: Well, how do we know that?

MR. ROBERTS: Because there's absolutely no evidence in the record to support that conclusion.

QUESTION: Well, the Rhode Island Supreme Court thought there was.

MR. ROBERTS: The Rhode Island Supreme Court, if I may say so respectfully, I think misread Brewer in such a way that they felt the Christian burial speech holding in Brewer mandated a finding that anything which is said, which elicits a response, whether or not it's directed, intentionally or unintentionally, at the defendant, that that's going to be sufficient to call for invocation of Miranda.

QUESTION: We don't have any finding here on what the intent of the officer was, do we?

MR. ROBERTS: There is a--the Superior Court

finding, Your Honor is correct, goes to the question of waiver; it does not involve a finding of fact.

But I submit that all the record evidence on which the Rhode Island Court based its decision is on the--is assuming that as a matter of law Brewer mandates the conclusion that this is an interrogatory.

QUESTION: Well, of course, I suppose you could say that there was--or you could argue, at least--that even if there was sufficient interrogation in Brewer to make out an invasion of the right to counsel, it might not have, in Brewer, been an interrogation for the purposes of Miranda--a Miranda violation.

MR. ROBERTS: I'm troubled by that--

QUESTION: I mean, interrogation may not be interrogation in every possible context.

MR. ROBERTS: That's very interesting, and certainly is very likely true. I'm troubled by the fact that Detective Captain Leeming admits in Brewer that in fact his purpose was to interrogate.

QUESTION: Now, I take it you're--

QUESTION: That may be so, but--

QUESTION: Well, he may have admitted that a--if it had been a Miranda issue, he may have been--admitted a violation there. Which wouldn't necessarily mean that Miranda was violated here, even if there would have been a

Sixth Amendment violation.

QUESTION: That's right.

MR. ROBERTS: That's quite true.

QUESTION: In the Seminole Massiah case, there was a conversation in the front seat of a car between Massiah and his friend who was wired for sound. As I remember, that was not interrogation, as one might ordinarily characterize interrogation.

MR. ROBERTS: Except for the fact that the Federal Marshall was sitting a block away.

QUESTION: Oh, yes, I know that; Massiah's friend was an agent of the police.

MR. ROBERTS: That's right.

QUESTION: And Massiah doctring has nothing to do whatsoever with coercive circumstances.

MR. ROBERTS: That is correct, Mr. Justice Stewart.

QUESTION: Unlike Miranda.

MR. ROBERTS: That's correct.

QUESTION: But as I remember the facts in Massiah, it was not a Q and A sort of interrogation.

MR. ROBERTS: It was just a statement--a statement he made that was incriminating and overheard by the Marshall because the friend was in cooperation--.

QUESTION: Suppose, since we're psychoanalyzing these officers, would your position be that what took place

in the car, whatever it was, was the same as though, over the car radio from headquarters, came a message from the Captain or Inspector saying, "When you deliver Innis, when you're through with him, get some men out into that area and try to find that shotgun so that some of the children from the handicapped--handicapped children from the local school won't hurt themselves?"

MR. ROBERTS: I believe the intent and the constitutional meaning of both statements would be the same, yes. Yes, that's correct, Mr. Chief Justice.

With the Court's leave, I would like to reserve the rest of my time--

QUESTION: General Roberts, there's this difference, I suppose, that the suggestion the Chief Justice makes, it would have been new information to the police. But you're talking about here three police who had previously been searching for the gun and were familiar with the area. Which makes it a little different from the hypothesis.

MR. ROBERTS: The question, I believe, Mr. Justice Stevens, still goes back to the question of intent to interrogate.

MR. CHIEF JUSTICE BURGER: Mr. MacFadyen.

ORAL ARGUMENT OF JOHN A. MacFADYEN, III, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MacFADYEN: Mr. Chief Justice, and may it please

the Court:

This case raises questions regarding the legal effect of a request for counsel made by a suspect in custody.

Given the fact of this request, it also raises questions regarding the effect of what the respondent would term an emotionally evocative conversation which followed immediately upon the request.

Finally, it raises questions regarding the admissibility of tangible evidence that was seized as a result of admissions evoked from Innis in the police wagon.

Respondent contends that once he had unambiguously asked for an attorney, the police violated the Miranda mandate when they exerted further pressure on him to incriminate himself, even though this pressure did not take the form of a direct statement or a question.

As this pressure resulted in an incriminating statement, the violation could not be cured by an immediate subsequent rendition of the Miranda warnings, and a repetition of the inculpatory statement made previously.

Finally, the respondent would argue that where the police from the very first were seeking an item of tangible evidence, and they succeeded in locating it only by frustrating his exercise of his right to counsel, the tangible evidence, as well as the earlier admissions, should be suppressed from evidence.

The Attorney General for the State of Rhode Island has outlined the facts in this case. I would--I would simply like to illuminate several of those facts and perhaps mention a few that were overlooked.

First of all, it would appear clear from the record that Thomas Innis realized that the police officers were looking for the shotgun. At the time he received his second set of warnings, police officers were already searching the area for the gun. And at that point, Innis was apparently out of the patrol car that he had originally been placed in.

Secondly, there's some indication in the record through testimony by Officer Gleckman that he was instructed by his Captain not to interrogate or coerce Innis in any way en route to the police station.

There's no indication in the record that Innis, in fact, could hear what might be termed these reassuring instructions. In fact, the evidence indicates that at that time he was in fact inside the wagon with the closed--with the doors closed, and that he could not hear those instructions.

Also, the State has raised the point that Officer Gleckman was what I think the dissent in Innis termed a street cop, and therefore, putting it somewhat bluntly, that he wasn't smart enough to come up with this kind of a ploy.

I frankly can't presume that a street officer

doesn't have the creativity, even in the brief time allotted to him, to produce the kind of statements that he produced here, and moreover to produce them with an intent to gain information regarding an item of tangible evidence.

Finally, I think it is crucial to note in this case, and perhaps most crucial, that the record here does not purport to contain anything more than a synopsis of whatever happened in that police car. The police officers, when they took the stand in the mini-suppression hearing that was held in this case, simply were not asked precisely what they said. They simply summarized, in a sentence or two, the general tenor of their conversation.

The most we have are a few details, and those details, I would suggest, are purely emotionally evocative. Officer Gleckman apparently talked in terms of, "Gee, it would be too bad. Perhaps some one--a little girl, perhaps--would kill herself." Not merely injure herself, but kill herself. And a second officer provided what one might cynically term counterpoint to that saying, "Gee, that really is too bad. We really need to find the gun."

I'm not trying to suggest that the record in this case evokes visions of thumb screws. But what I am trying to suggest is that it is very hard to tell what happened in that car, but that the details that we do have--and one is forced to draw inferences from very few details--is that these comments were of a peculiarly evocative nature, and--

QUESTION: Well, Mr. MacFadyen, would it be fair to say that just as Miranda was propounded by the Court because it was so difficult to actually analyze the factual circumstances in which a prisoner claimed a confession was beaten out of him involuntarily, the Court felt a prophylactic rule was necessary, the Supreme Court of Rhode Island, which you now support, feels that now it's so difficult to decide whether Miranda warnings have been respected and Miranda assertions of--claims of Miranda rights have been respected by the police, that we need another tier of prophylactic rule in order to make sure that Miranda isn't violated?

MR. MacFADYEN: I'm certain that the Supreme Court of Rhode Island was concerned about its ability to essentially read Officer Gleckman's mind through the printed page, especially when that printed page is very short.

I don't believe, however, Mr. Justice Rehnquist, that they were adding an additional tier of prophylactic protections. I think instead they took a reading of the record, informed by their own experience in Rhode Island, based on a number of confession cases where there have been--where the Providence police have used psychological ploys to extract information. And they concluded, on the basis of the limited record before them, that first of all, this conversation was in their words "subtly compelling." They also used the words, it constituted psychological pressure.

I think secondly--

QUESTION: But is that wrong, under Miranda? Under Brewer it's clearly wrong if the man is in custody and has been arraigned, but is that wrong under Miranda?

MR. MacFADYEN: I believe it's clearly wrong under Miranda. I would suggest that Miranda was founded on a two-part predicate: First, that the suspect be in custody; and secondly, that the suspect be subjected to some further pressure.

It's clear even from the decisions of this Court that a simple question by a police officer to a suspect in custody will amount to interrogation. If, for instance, did the police officers in this case had said, "Thomas Innis, please, we're worried about the little kids, and could you possibly--of course, we won't hurt you--tell you where the shotgun is?" I think there'd be no doubt that this would fall within a technical definition of interrogation of Miranda.

And I have major trouble seeing the difference--

QUESTION: What holding are you relying on of this Court for that proposition?

MR. MacFADYEN: I think the Roscoe v. Texas involved a one or two sentence interrogation, and this Court found that to be interrogation.

QUESTION: Well, from what you say, I take it that if the arrested person, person in custody, was taken in, and

sat down, and the desk sergeant said, "The first thing I want to know is, give me your name and address," and the answer was, "Never mind my name and address, I want to confess; I killed so-and-so." That would be interrogation, an impermissible absent a waiver under Miranda and following a Miranda warning, I take it.

MR. MacFADYEN: No, Your Honor, I would not say that was interrogation on--

QUESTION: Well, I thought you had said something to the effect that as soon as they asked the question, or words to that effect, the interrogation began?

MR. MacFADYEN: The reason for saying no, I think, is really in two parts.

First of all, I think a distinction can be drawn between routine administrative questioning, where in general--

QUESTION: Procedural as distinguished from substantive questioning?

MR. MacFADYEN: Those words always trouble me, but perhaps that's fair.

But I think the point that should be drawn from your hypothetical is, in the situations where, in general, it is unlikely that the police or other law enforcement agencies are seeking to gain incriminating information, it is highly questionable as to whether Miranda applies.

I mean, I think in effect the Court has said much the same thing in the grand jury area, where they first

pronounce the rule that the Court--that society has a right to everyone's evidence; and they operate, and they say that the prosecution may operate on the presumption, when a witness goes before a grand jury, that that witness first of all will not be incriminating himself, and secondly, that the prosecutor in fact is not trying to incriminate that witness.

And that is the major reason for holding that they need not be given Miranda warnings, at least in certain circumstances.

So where you're talking about simple administrative processing, absent some showing that it in fact was some kind of a ploy to gain incriminating information, I think a strong argument could be mounted that that would not constitute interrogation within the meaning of Miranda, even though in fact in that case questions were asked of the suspect.

I think that, in regard to--the Attorney General has also mentioned here that the span of time is a very short one, indicating that somehow this means that the pressures on Innis were less. And he has contrasted this case with Brewer, where there was a ride of several hours duration.

QUESTION: Well, the Massiah rule has nothing whatsoever to do with pressure.

MR. MacFADYEN: I would agree with that, Your Honor.

QUESTION: Just nothing. Or custody, or coercive circumstances, or anything such as--similar to anything such

as that.

MR. MacFADYEN: I would use Brewer in this case simply as illustrative of another fact situation. I'm not trying to suggest that the legal rule in that case turns on the presence or absence of coercion.

But the Attorney General here has suggested that because--

QUESTION: But in Massiah was--what was the activity of the police or others that interfered with consultation with counsel?

MR. MacFADYEN: To the best of my understanding of the opinion, it was that he was in fact indicted, that--

QUESTION: And that he was out on bail.

MR. MacFADYEN: That he was out on bail.

QUESTION: And talking to a supposed friend.

MR. MacFADYEN: And instead of going through an attorney, just as a civil lawyer would always contact the lawyer on the other side rather than going directly to the client, they set him up. And certainly that did not involve coercion in any sense of the term. And it was a conversation between friends, one of whom proved to be false.

QUESTION: Not a very good friend.

MR. MacFADYEN: Or a good friend, depending on your point of view.

QUESTION: There seems to be general agreement among

members of the Court and your opponent and you that Brewer and Miranda and--are not the same cases at all. Brewer specifically said that it was not a Miranda holding. And yet the Supreme--we're concerned with the decision of the Supreme Court of Rhode Island that made a great deal of the similarities between this case and Brewer.

MR. MacFADYEN: Your Honor--

QUESTION: Which--and Brewer was not a Miranda case.

MR. MacFADYEN: Mr. Justice Rehnquist, I would suggest that the Supreme Court of Rhode Island simply used Brewer as an illustrative case. It clearly noted that Brewer was a Sixth Amendment case, and it was deciding Innis on Fifth Amendment grounds.

I would suggest, however, that there are certain aspects of Brewer that bear relevance to Innis, without attempting a one-to-one correspondence.

As Mr. Justice Powell noted in his concurrence in Brewer, that the fact of interrogation, and the fact of some degree of pressure in that interrogation was potentially crucial to the question of whether there had been a voluntary waiver in that case of the Sixth Amendment right to counsel.

It would seem to me that Brewer is useful to the decision of this case insofar as it discusses a factual problem concerning psychological pressure.

QUESTION: But if factual similarities to Brewer

can be relied on you, why can't factual dissimilarities, such as the totally different exposure of time, be relied on by your opponent?

MR. MacFADYEN: I think he can rely on those. As I was about to suggest, I think that the dissimilarities in time between Innis and Brewer are deceiving; that I would point out that in many decisions discussing the activities of police officers at the moment of arrest, this Court has very carefully recognized the extreme degree of stress that the police officers undergo; that street encounters are inherently dangerous things.

I would simply ask this Court to extend that to the suspect as well; that from the suspect's point of view, it is a highly stressful situation, and without trying to push this too far, I would suggest that the facts--that the events in Innis proceeded one-two-three, the whole sequence of events, from his request for counsel to his second admission to Captain Leyden was probably less than ten minutes.

I would say that things were happening so fast that if anything they aggravated the pressures in the situation, rather than minimized them.

QUESTION: Well, but, to follow up on what my brother Rehnquist has asked you, you would agree, would you not, that as far as the Court is concerned, the issue in Brewer v. Williams is whether or not there had been a waiver?

MR. MacFADYEN: Yes, Your Honor.

QUESTION: There was conceded, at least in the Courts--now some members of this Court disagree--but in the courts, every court that had considered Brewer v. Williams had conceded that there was a constitutional violation. And the question is: Had there been a waiver of that violation?

In this case, the preliminary, primary, first question is: Was there a violation at all? And those are two quite different questions.

MR. MacFADYEN: Absolutely.

QUESTION: And you would agree with that, wouldn't you?

MR. MacFADYEN: I would agree that the primary, and perhaps most crucial question here, is whether Innis' Miranda rights were violated initially.

QUESTION: Correct.

MR. MacFADYEN: That if they were not, that if he in fact, in that police car, spontaneously volunteered to lead the police to the shotgun, it is the end of the case.

QUESTION: Every court, in Brewer v. Williams, had held that Brewer's Massiah rights had been violated. The question is: Had he waived them?

MR. MacFADYEN: That's correct. In that--

QUESTION: Excuse me, just to pursue that point, that although all the courts resolved the interrogation issue

in the same way, that was an initial basic question that had to be put to one side before you reached the waiver issue. You first had to decide there was interrogation. And there was a powerful argument to the contrary that Mr. Justice Blackmun had made.

QUESTION: Right.

QUESTION: So although it's true that everybody, all the courts decided it, the fact that the interrogation issue in both cases is very similar makes the analysis in Brewer quite relevant here, it seems to me. Because you don't take the position, do you, that the interrogation--the question whether there's interrogation differs under the Sixth or the Fifth Amendments?

I mean, on the interrogation issue, it really doesn't matter whether it's a Massiah case or a Miranda case?

MR. MacFADYEN: No, I would agree that interrogation is interrogation, regardless of what the legal pigeonhole is.

QUESTION: Well, what if it were unknowing, such as in the original Massiah case? Then would any of the rationale of Miranda be applicable about coercive statements--coercive circumstances?

MR. MacFADYEN: I think that is a harder question.

QUESTION: If it were totally unknown to the interrogee that he was being interrogated.

MR. MacFADYEN: Mr. Justice Stewart, I think that's

a harder question, and I would answer it in this way: That while on the one hand, Miranda--I believe that the thrust of Miranda was to provide extraordinary protection, where a suspect is both in custody and subjected to some kind of pressure--

QUESTION: The further distress under which he is under--suffering.

But if he doesn't even know he is being interrogated, how is that stress relevant?

MR. MacFADYEN: But what I was going to add is, I think there is a second prong to Miranda, which comes into play where a suspect has invoked his rights. Where you're talking about the so-called second-stage protections of Miranda, you're talking about a requirement that the police scrupulously honor the invocation of the right.

And I would have a very difficult time understanding how police who surreptitiously seek to gain information from a suspect, while that suspect is totally unaware that they are in fact doing that, are in any sense of the English language, scrupulously honoring his rights.

And that requirement is part of Miranda as further explicated by Mosley.

QUESTION: What would you say in response to my hypothetical question to the Attorney General, that if the same words that were spoken here in the front seat of the car

had come over the car radio from headquarters of the police, no one in the car had uttered them, and then the--all of the events following that would be the same, what would you say?

MR. MacFADYEN: I would find it a very hard case. I think--

QUESTION: Even though the words are precisely the same?

MR. MacFADYEN: That they are precisely the same?

QUESTION: Yes.

MR. MacFADYEN: No, I don't think they're precisely the same.

QUESTION: No, my hypothesis was that over the car radio, exactly the same words which were uttered in the car on this record came over as a direction to the police in the car to find that gun to prevent injury to children. Then what would you say? Would you call that interrogation or suggestive psychological pressure?

MR. MacFADYEN: If the dispatcher was aware that Innis was in the car, I would say it's precisely the same case.

QUESTION: Well, let's assume he was not.

MR. MacFADYEN: Assuming he was not, I would see it as a different case, and that it would be very difficult to apply the Miranda rationale to it. I think the reasons for that is, that even taking an objective test for interrogation, which is the test that we argued for in this case, that

a dispatcher making that message could hardly be deemed to have felt it was likely that his comments would induce an incriminating response.

Now, if, for instance, the dispatcher had said--had essentially uttered a threat over the radio, if the dispatcher had said something to the effect that either you guys find that gun or else Innis is a dead man by the time he gets back to the station, I would still have difficulty analyzing that under Miranda, but I would suggest that in all probability any incrimination would be involuntary within the meaning of the Fifth Amendment.

As I think the general tenor of the arguments have indicated here, the really crucial problem is the content of this conversation. We suggest that absent an actual admission of intent by the police, the standard must be an objective one; that it's rarely easy--subjective intent is rarely an easy issue, and that the motivations of officers are usually complex, they're many faceted. And in fact, an officer testifying a year later might well not even know precisely why he uttered the comments he did.

I would merely, and requestfully, suggest the trial court shouldn't be required to guess whether a police officer's motivation, or his testimony as to those motivations, are accurate or merely convenient.

QUESTION: Do you agree that none of the police

officers purportedly, purported to direct their remarks to Innis, any of their remarks at issue here?

MR. MacFADYEN: None of them purported to do, but the record--

QUESTION: Innis no more than overheard?

MR. MacFADYEN: That is correct. But there is no further evidence about what they intended to do.

QUESTION: No, I just was--limited to that question, you agree that the record shows that--

MR. MacFADYEN: Yes, I think it's--

QUESTION: --Innis no more than overheard a conversation between the officers?

MR. MacFADYEN: --entirely clear on that point.

In attempting to resolve this question, and resolve the question of whether this interrogation was as a matter of fact subtly compelling, and by inference, therefore, intended to be compelling, I think that the Court should note that this is a case where the factual findings of a State court of last resort served to uphold the Federal right.

In those circumstances, I would respectfully suggest that, if not binding on this Court, they should be given extreme deference.

The bottom line of what I'm saying is, this Court should take this case as the Supreme Court decided it, and not create a different case on the facts; and then leading

the Court to a different conclusion.

If it is assumed that Thomas Innis was in fact subjected to psychological pressure, I think that the argument that a clear Miranda violation has occurred follows directly; that this simply is not a situation where they scrupulously honored his rights.

It is a situation where the record shows no more than warnings, followed by a request for counsel, followed by psychological pressure, followed by an admission. That satisfied neither the waiver standard, nor Miranda's per se rule.

QUESTION: You use the term "psychological pressure." Really, it has to be followed by interrogation, doesn't it?

Are you equating the terms?

MR. MacFADYEN: I'm equating the two.

QUESTION: All right. But it is critical to your case that there have been interrogation?

MR. MacFADYEN: Yes, but by--

QUESTION: Placed in custody--

MR. MacFADYEN: There was custody.

QUESTION: --and then add interrogation to custody.

MR. MacFADYEN: And by interrogation, I mean some further pressure.

QUESTION: Right.

MR. MacFADYEN: I think that as the Miranda Court

noted, much of modern police interrogative procedures are psychologically oriented. And I simply cannot believe that they are limited to questions.

QUESTION: And you think that whether or not there was interrogation is a question of law or a question of fact?

MR. MacFADYEN: I think the ultimate question of whether there was interrogation is a question of law, but oftentimes it will be determined by findings of fact.

QUESTION: But we don't have any findings here.

MR. MacFADYEN: I would suggest that the Supreme Court of Rhode Island made several very clear findings of fact.

QUESTION: Well, they rejected the contention that no interrogation occurred because the defendant was not addressed personally. In other words, they rejected, apparently, a contention that there be a per se rule that you must reject--but I don't find they made any findings of fact.

MR. MacFADYEN: I would suggest--

QUESTION: Nor did the trial court. He found waiver.

MR. MacFADYEN: I would suggest, Mr. Justice Stevens, that the Supreme Court of Rhode Island based its conclusion that this was interrogation within the meaning of Miranda on essentially two findings of fact, one of them made very

clearly; and that is, that objectively speaking, the comments in the car were compelling; that they concluded that it was psychological pressure, and therefore it was interrogation.

Implicit in that is an objective standard that the police should be held to intend the natural and probable consequences of their acts, in effect. We argued in the brief for an ultimately objective determination of intent, where intent is disputed on the record.

I believe my time's expired.

MR. CHIEF JUSTICE BURGER: That's your warning sign, counsel.

MR. MacFADYEN: My warning light.

MR. CHIEF JUSTICE BURGER: In case you have more, you have five minutes more. Four minutes, to be precise.

MR. MacFADYEN: Thank you, Mr. Chief Justice. I will attempt to be very rapid here.

If it is concluded that Thomas Innis was interrogated within the meaning of Miranda, it is our contention that both of his subsequent admissions must fall.

I think that, especially regarding the second admission, where the police claimed that Innis later waived his rights, we would simply argue that a fresh set of warnings only minutes after the violation occurred essentially cannot undo the harm already done.

In this instance, the record makes abundantly clear that Captain Leyden scrupulously honored the suspect's rights. The problem is that Officer Gleckman did not.

And effectively, that if a second rendition of Miranda warnings served to insulate from judicial censure a violation that took place minutes previously, there would be literally no incentive to obey the mandate of Miranda in the first instance.

QUESTION: Well, what the Supreme Court of the State thought was erroneously admitted into evidence here was the shotgun itself, plus testimony as to the circumstances of its discovery; is that correct?

MR. MacFADYEN: Well, and testimony regarding two incriminating admissions made by Innis.

QUESTION: Which were what?

MR. MacFADYEN: They were, in effect, two agreements to lead Innis to the shotgun.

QUESTION: Well, that's the circumstances under which it was discovered. That's what I intended by that. He didn't make any admissions with respect to his guilt of the underlying offense with which he was charged, did he?

MR. MacFADYEN: No; the record indicates no.

QUESTION: So it's the introduction of the shotgun, and the fact that he had led the officers to discover it?

MR. MacFADYEN: Yes, both his oral and actual physical conduct.

QUESTION: Is there any issue of inevitable discovery in this case?

MR. MacFADYEN: The State raised inevitable discovery on a petition for reargument that was denied on procedural grounds. The Supreme Court of Rhode Island never reached the issue on the merits.

QUESTION: Didn't discuss it?

MR. MacFADYEN: And I would suggest that at least on the present record, the issue is not capable of factual resolution, let alone legal resolution.

While it is clear that the shotgun was reasonably near by, it is unclear how, in effect, successfully it was concealed.

QUESTION: And how, in fact, was it concealed, and where?

MR. MacFADYEN: To the best of my knowledge, on a reading of the record, that it was concealed in some field under some rocks.

I don't know whether one would have to excavate the entire area to find it.

QUESTION: Even if the gun would inevitably have been discovered, that wouldn't answer the problem about the oral testimony linking the defendant to the gun?

MR. MacFADYEN: No, and in that regard, I would like to emphasize that it is really the oral testimony that we're

most concerned with. The shotgun itself is probative only insofar as it is linked to Thomas Innis.

And while the State has made an issue of--a brief issue of harmless error, I think it overlooks this signal point, that if the admissions were obtained in violation of Miranda, then the gun, in many respects, is virtually de minimus.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General, you have about three minutes if you have anything further.

REBUTTAL ARGUMENT OF DENNIS J. ROBERTS II, ESQ.,
ON BEHALF OF THE PETITIONER

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

Just a few points.

Essentially, my brother's argument rests in whole on the fact that Miranda precludes interrogation under stressful conditions, which he reads that of course, it seems to me, to be any observation made after the time of custody.

In other words, after the man has been in custody and once asserted his Miranda rights, it seems to me the argument is coming that he cannot thereafter waive those rights.

This is a point--there is no--in this record before this Court this morning, evidence of any kind of compulsion

or coercion in any real sense of that term, unless the mere fact of custody itself is sufficient coercion; and I submit that it's not.

On this question--

QUESTION: Well, that's--Miranda held that it was, didn't it?

MR. ROBERTS: Mere custody; I don't believe it did, Mr. Justice--

QUESTION: Yes, and then any interrogation of a person in custody.

MR. ROBERTS: Oh, yes, yes. I'm sorry, I didn't mean to be understood to say that that was not precluded by Miranda.

What I'm saying is, that where there's custody, and we have this whole idea of inherent compulsion which precludes waiver, that that's a--that that was never precluded by Miranda.

And when we do talk about the scrupulous observance of constitutional rights in this particular case, we do have to remember that the man was taken back to the scene, was taken out of the car in which he was sitting with the three officers, was spoken to again by Captain Leyden, and told Captain Leyden, "No, I want to take you to the gun because I don't want the children to be hurt." And then immediately he took them to the gun.

That's the second waiver away from whatever offense may have occurred. So it seems to me that that's overlooked, and not given sufficient attention by respondent.

Two transcript references, if I may, and it please the Court.

There was reference made in my brother's argument to the fact that there wasn't any testimony concerning what was really said in the police car. In fact, the opinion-- I should say the Appendix, at pages 43 through 45 contains what was said in the police car. Granted, it's not much, but that's all there was.

Once the--that's one of the State's positions, that if this little bit of observation, byplay, in the front seat of the automobile constitutes impermissible interrogation, it's taken Miranda way beyond its original facts.

The second point made by my brother is, the Rhode Island Supreme Court really didn't rely on the Brewer case in its decision. At page 6A of the opinion of the court, in the petition for writ of certiorari, the basis of the Rhode Island Supreme Court's distinction is set out. And I submit that any fair and reasonable reading of that basis of the opinion is to rest that court's decision on this Court's holding in Brewer v. Williams.

What we're dealing with here, may it please the

Court, is a situation where the respondent, it seems to me, respectfully, is attempting to extend the prophylactic safeguards of Miranda into a situation where it violates what members of this Court have referred to over the years as the strong public interest in convicting the guilty.

And it's respectfully submitted that the Court should not permit that result; that the decision of the Rhode Island Supreme Court should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:41 o'clock, a.m., the case in the above-entitled matter was submitted.]