No. 11-1318

In The Supreme Court of the United States

CECIL EDWARD ALFORD,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether two questions, posed to Petitioner in the jail booking room following his arrest, should be found to violate *Miranda v. Arizona*, 384 U.S. 436 (1966), under a should-have-known test despite:

(1) the demonstration herein that the jail-processing questions approved in controlling precedent, *i.e.*, *South Dakota v. Neville*, 459 U.S. 553 (1983) and *Pennsylvania v. Muniz*, 496 U.S. 582, 600-02 (1990) could not have passed Petitioner's test;

(2) Petitioner's express acceptance that the complained-of questions were shown to have been asked in a good faith effort to process Petitioner into jail; and

(3) a judicial determination (both in the trial and the appellate court(s)) that the questions asked were reasonably related to a legitimate administrative concern of the jail, *i.e.*, cataloging an arrestee's personal property.

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RESPONDENT'S BRIEF IN OPPOSITION

The State of Texas respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the Court of Criminal Appeals of Texas in this case, issued on February 8, 2012, reproduced in the appendix to the petition ("Pet. App.") at 1a-32a, and reported in *Alford v. State*, 358 S.W.3d 647 (Tex. Crim. App. 2012). The court of appeals opinion is reported in *Alford v. State*, 333 S.W.3d 358 (Tex.App. – Fort Worth 2010), *aff'd*, 358 S.W.3d 647 (Tex. Crim. App. 2012), reproduced in the appendix to the petition at 33a-38a.

STATEMENT OF THE CASE

As Petitioner states, "[t]he facts in this case are undisputed." Pet. at 24. One of the most significant of these undisputed facts is that Officer Christopher Ramirez asked Petitioner about the flash drive found in the patrol car in a good faith effort to process Petitioner into the jail.[1] *See* Pet. App. 6a-8a (trial court found officer's subjective intent was only to complete "normal processing"). Thus, it is undisputed that Officer Ramirez had no surreptitious design to

[1] Brief for Appellant Cecil Alford, *Alford v. State*, 358 S.W.3d 647 (Tex. Crim. App. 2012) (No. PD-0225-11, 2011 WL 2002251, at *12) ("Mr. Alford has not disputed, and does not now dispute, the trial court's implicit finding that Officer Ramirez acted in subjective good faith in asking the questions which he did.").

elicit an incriminating response from Petitioner when he asked Petitioner about the flash drive. *See* Pet. App. 30a-31a (discussing duty imposed on police by 37 TEX. ADMIN. CODE §§ 265.4(a)(11), 265.10 to "carefully record and store the inmate's property"); *see also* Pet. App. 42a-43a (police department procedure required officer to ask Petitioner if he owned flash drive).

While the facts of the booking procedure are not disputed. Respondent disputes three matters in Petitioner's characterization(s) of the case. First, the Petition significantly misstates the holding it challenges. The Petition identifies three approaches to reviewing routine booking questions: (1) the legitimate administrative function test; (2) the intent test; and (3) the should-have-known test. Pet. at 10-16. The Petition then asserts that the Texas Court of Criminal Appeals chose the legitimate administrative function test. Pet. at 7, 10. *But see* Pet. at 8 n.2 (acknowledging that court below did not address the intent test).

The court below certainly held that determining whether a purported booking question reasonably related to a legitimate administrative concern was the first step. Pet. App. 26a-27a. The court below, however, expressly did not decide whether considering the subjective intent of the questioner was a necessary second step:

> Appellant does not assert that Officer Ramirez actually intended to elicit incriminating admissions in questioning appellant. We, therefore, do not reach the question as to whether there is any limitation to the booking exception when an officer's actual intent was to elicit incriminating admissions through questions characterized by the officer as booking questions.

Pet. App. 28a n.27.

Respondent's second disagreement with the Petition is its claim that Petitioner's admission to owning the flash drive found in the backseat of a police patrol car under a baggie containing Ecstasy "provid[ed] the *only testimony directly linking petitioner* to the illegal drugs." Pet. at 5 (emphasis added). The fact that Petitioner's flash drive was found near the illegal drugs provided only a circumstantial inference that Petitioner was the source of the illegal drugs. The strength of this inference was on par with the inference of guilt from Petitioner's attempt to flee from the arresting officers. Pet. App. 3a-4a.

By far the most compelling evidence of Petitioner's guilt was the arresting officer's testimony that no one else could have left the drugs in the patrol car:

> At the beginning of his shift on January 29, 2009, Officer Ramirez of the Fort Worth Police Department inspected his patrol car and found no contraband in it.

* * *

> He confirmed that no one else had been in the patrol car since he had inspected it.

Pet. App. 3a & n.4; *see also* Pet. App. 80a-81a (prosecutor's jury argument emphasized why officer would search patrol car before allowing anyone to ride in backseat).

Finally, the Petition, like the decision below, states that Petitioner was not advised of his Fifth Amendment rights. Pet. at 4; Pet. App. 4a-5a. While Respondent certainly has never argued that the questions posed to Petitioner could be defended as Mirandized admissions,[2] there is some reason to believe that Petitioner was, in fact, given *Miranda* warnings. Pet. App. 46a ("No, sir. It wasn't until after [Mr. Alford] was already inside the vestibule [of the jail] and the Miranda, being searched that I asked him about the thumb drive."). It is difficult to imagine what else "after . . . the Miranda" could mean except that Petitioner was given *Miranda* warnings. While that matter is no support to Respondent on direct appeal, it could be litigated in a habeas proceeding.

THE CONFLICT IDENTIFIED BY PETITIONER

Respondent has never disputed there is a substantial conflict among the lower courts' treatment of

[2] *See generally Miranda v. Arizona*, 384 U.S. 436 (1966).

the booking exception. Nonetheless, Respondent has several disagreements with Petitioner's presentation of the conflicting authorities.

First, with regard to Petitioner's list of should-have-known cases, Pet. at 10-11, Petitioner cites several cases that apply the should-have-known test to questions that were found not to be booking questions. *Walton*, for example, involved follow-up questions related to claims by Mr. Walton that he had knowledge of a third party's criminal conduct. *State v. Walton*, 41 S.W.3d 75, 78-79 & 85 (Tenn.), *cert. denied*, 534 U.S. 948 (2001). In the same vein are *Ares v. State*, 937 A.2d 127, 131 (Del. 2007) ("asking whether Ares had any children is not within the 'routine booking question' exception to *Miranda*") (footnote omitted) and *Loving v. State*, 647 N.E.2d 1123, 1126 (Ind. 1995) (applying should-have-known test to non-booking questions, but not to the routine booking questions); *see also United States v. Pacheco-Lopez*, 531 F.3d 420, 424 (6th Cir. 2008) ("asking Lopez where he was from, how he had arrived at the house, and when he had arrived are questions 'reasonably likely to elicit an incriminating response,' thus mandating a *Miranda* warning"). These cases accord with Respondent's list of cases holding that even outside of the *Miranda* exceptions innocuous questions are not "interrogation." *See infra* at II.C.2.d.

Petitioner cites *Commonwealth v. White*, 663 N.E.2d 834 (Mass. 1996) as proof that Massachusetts has adopted the should-have-known approach. Pet. at

11. Respondent would note, however, that *Commonwealth v. Guy*, 803 N.E.2d 707 (Mass. 2004) held routine booking questions fall "outside of the scope of *Miranda*." *Guy*, 803 N.E.2d at 716 (question asking whether defendant had any injuries "was directed to the defendant's physical state at the time of booking, an important fact for the police, who had taken physical custody of the defendant and bore liability for his physical well-being, to record"). Since the question approved in *Guy* called for an answer that was highly likely to be incriminating, the Supreme Judicial Court of Massachusetts apparently adopted an approach similar to the legitimate administrative function test.

Franks v. State, 486 S.E.2d 594, 597 (Ga. 1997) adopts the legitimate administrative function test. *Franks* held that because asking Mr. Franks "how he had received the bandage on his arm" was not a routine booking question – as *Franks* narrowly defined that concept – it was not "automatically exempted from *Miranda*." *Franks*, 486 S.E.2d at 596-97.

State v. Bryant, 624 N.W.2d 865, 870 (Wis. Ct. App.), *review denied*, 634 N.W.2d 319 (Wis. 2001) (Table) is misidentified in the petition as a decision of the Wisconsin Supreme Court. Pet. at 11. The Wisconsin Supreme Court's actual pronouncements on the booking exception, while confusing, indicate the use of an intent test. *State v. Stevens*, 511 N.W.2d 591, 599 (Wis. 1994) ("the questions at issue may have been intended to elicit incriminating responses"), *cert. denied*, 515 U.S. 1102 (1995), *overruled on*

other grounds by Richards v. Wisconsin, 520 U.S. 385 (1997); *see also State v. Pugh*, 784 N.W.2d 183, 2010 WL 532964, at *2-4 (Wis. Ct. App. Feb. 17, 2010) (unpublished) (construing both *Bryant* and *Stevens* as applying an intent test), *review denied*, 791 N.W.2d 67 (Wis. July 21, 2010) (Table).

With regard to Petitioner's list of intent test cases, Pet. at 12-13, the cited Fourth Circuit case, *United States v. D'Anjou*, 16 F.3d 604, 608-09 (4th Cir.), *cert. denied*, 512 U.S. 1242 (1994) does not support Petitioner's categorization. Pet. at 13. Rather, *D'Anjou* declines to decide whether a should-have-known test applies because the issue was not raised by the evidence. Respondent believes the Fourth Circuit applies the legitimate administrative function test. *See United States v. Heath*, 191 F.3d 449, 1999 WL 734724, at *1 (4th Cir. Sept. 21, 1999) (*per curiam*; unpublished) ("[booking questions] do not fall within the scope of *Miranda.*") (citations and internal quotes omitted); *United States v. Johnson*, 48 F.3d 1217, 1995 WL 88947, at *3-4 (4th Cir. March 6, 1995) (unpublished). *But see United States v. Huzzey*, 151 F.3d 1031, 1998 WL 391515, at *1 (4th Cir. June 30, 1998) (*per curiam*; unpublished) ("[I]t is well settled that routine booking questions, such as asking a defendant's name, which are not intended to elicit incriminating responses do not amount to interrogation.").

United States v. Parra, 2 F.3d 1058, 1068 (10th Cir.), *cert. denied*, 510 U.S. 1026 (1993) is confusing, but appears to be a should-have-known case. *Id.* ("the

questioning was reasonably likely to elicit incriminating information relevant to establishing an essential element necessary for a conviction"). *But see United States v. Medrano*, 356 Fed.App'x 102, 106-07 (10th Cir. 2009) (unpublished) (booking question was not prompted by an improper motive as questioner already had the information; construing *Parra* as applying an intent test), *cert. denied*, 130 S.Ct. 3528 (2010).

United States v. Sweeting, 933 F.2d 962, 965 (11th Cir. 1991) appears to accept the framing by Mr. Sweeting that the questioner's intent is key. *See United States v. Brotemarkle*, 449 Fed.App'x 893, 896-97 (11th Cir. 2011) (unpublished). Other recent Eleventh Circuit precedent is unclear as to whether that circuit continues to use the intent test or has, *sub silentio*, adopted the legitimate administrative function test. *See, e.g., United States v. Doe*, 661 F.3d 550, 567 (11th Cir. 2011) (questions by pre-trial services related to name and birth date of identity theft arrestee were proper under booking exception), *cert. denied*, 132 S.Ct. 1648 (2012).

Allred v. State, 622 So.2d 984 (Fla. 1993) is rather vague, but it seems to adopt the legitimate administrative function test: "routine booking questions do not require *Miranda* warnings because they are not designed to lead to an incriminating response." *Allred*, 622 So.2d at 987 (footnote omitted); *see also Holland v. State*, 773 So.2d 1065, 1073 (Fla. 2000), *cert. denied*, 534 U.S. 834 (2001). *Allred* held, on the basis of the Florida Constitution, that asking a

drunk-driving arrestee "to recite, out of the ordinary sequence, the alphabet and numbers" was "interrogation." *Allred*, 622 So.2d at 987.

REASONS FOR DENYING THE WRIT

This Court's many (presumed) refusals to address the conflict described above must mean either (1) the Court is comfortable with the current state of the law or (2) the Court is waiting for a case that is ideally suited for review.[3]

Respondent will show that this case is not ideally suited for review and that the opinion below was correctly decided.

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[3] The relative rarity of the booking exception issue might explain the Court's reluctance to revisit it. For example, in Texas, despite a 2011 population of almost 26 million people, http://www.dshs.state.tx.us/chs/popdat/ST2011.shtm, the present case is the only appellate case squarely addressing a booking question issue since December 2010. Pet. App. 33a-38a. The only other Texas appeal that is arguably a booking case is *State v. Ortiz*, 346 S.W.3d 127 (Tex.App. – Amarillo 2011, pet. granted) (not a booking question where police found drugs at traffic stop and asked defendant what kind of drugs they were). According to FBI statistics available from the Office of Juvenile Justice and Delinquency Prevention (OJJDP), there were almost 1.2 million Texas arrests in 2009. http://www.ojjdp.gov/ojstatbb/ezaucr/asp/ucr_display.asp. Thus, the booking issue Petitioner presents is litigated in much less than one in a million arrests.

I. Petitioner's concession below, and the provisional holding below, make *Alford* a less than ideal candidate for review.

Alford is not an appropriate case for review because not all of the booking exception theories remain live issues in *Alford*. The intent-based approach was taken off the table when Petitioner conceded that the intent of the questioning officer was not to obtain incriminating information.

Because of Petitioner's concession, the court below did not address whether an officer's investigative intent can turn an otherwise proper booking question into "interrogation." Pet. App. 28a n.27. If there is interest in considering an intent-based booking exception test, this case presents no opportunity to apply an intent-based approach.

The *Alford* opinion represents one of the most thoughtful examinations of the booking exception in many years. The opinion highlights the split in authority relied upon by Petitioner and proposes a solution to the problem under the facts and limited issues presented. *Alford*'s focus on whether the question is reasonably related to a legitimate administrative concern of the jail has to be accepted as the central issue in a booking question analysis. Even if an additional – negligence or intent – step is required in those cases where the questioner's intent remains a live issue, much of the confusion among the lower courts could be resolved by embracing the *Alford* court's approach.

II. The *Alford* court correctly decided the limited issue presented.

Because of Petitioner's concession of the intent issue and the resulting provisional holding of the court below, Petitioner must show that only his proposed should-have-known test is proper. This he cannot do under established precedent. Petitioner's proposed test conflicts with the holdings in *Innis*, *Muniz*, and *Neville*. It also contradicts the purpose underlying the booking exception.

A. The two sets of questions approved in *Muniz* and the set of questions approved in *Neville* would not have passed Petitioner's proposed should-have-known test.

Petitioner urges the Court to hold that the booking exception excludes questions that are "objectively likely to elicit an incriminating response." Pet. at 20.[4] An "incriminating response" means any response –

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[4] Petitioner's actual proposed test as presented to this Court is phrased slightly differently. In contrast to most of the should-have-known cases cited in the Petition, Pet. at 10-12, Petitioner engrafts an "intended to or" onto his proposed should-have-known test. Pet. at 20. This amalgamation conflicts with *Innis*. *See* discussion *infra* at II.C.1.b. Moreover, given the fact(s) that: (1) virtually no criminal defendant would win under an intent test, who has not already won under a should-have-known test, and (2) Petitioner's concession of the intent issue below, Respondent will refer to Petitioner's proposed test as a should-have-known test.

whether inculpatory or exculpatory – that the *prosecution* may seek to introduce at trial. *Rhode Island v. Innis*, 446 U.S. 291, 301 n.5 (1980) (emphasis in the original).

Any attempt to retrofit Petitioner's proposed test onto the facts of *Muniz* and *Neville* proves Petitioner's test is irreconcilable with the holdings in those two cases. The three sets of questions approved in those two cases were not subjected to Petitioner's should-have-known test. And they would not have passed it.

1. *Innis*'s exemption for police words or actions "normally attendant to arrest and custody" was applied to questions in *Muniz* and *Neville*.

The precursor to *Muniz* and *Neville* is *Innis*'s categorical declaration that police words or actions "normally attendant to arrest and custody" are not "interrogation" under *Miranda*. This declaration was a part of *Innis*'s one sentence interrogation framework:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Innis, 446 U.S. at 301 (emphasis added, footnote omitted).

It was on the basis of *Innis*'s "normally attendant" exemption that *Neville* approved the questions at issue in a blood test request. *Neville*, 459 U.S. at 564 n.15.[5]

The *Muniz* majority opinion (in Part IV) upholds the sobriety and blood testing actions and questions on the basis of their being "necessarily 'attendant to' the police procedure." *Muniz*, 496 U.S. at 603-04. The "attendant to" justification utilized by the *Muniz* majority is the *Innis* "normally attendant" exemption filtered through *Neville*.

2. The set of questions approved in *Neville* would not have passed Petitioner's proposed should-have-known test.

Nothing about the *Neville* analysis can be harmonized with Petitioner's insistence that a should-have-known test must be applied to police questions which are normally attendant to arrest or custody. Following his arrest for drunk-driving, Mr. Neville was asked a question which any police officer should know is likely to produce an incriminating response.

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[5] Much of Petitioner's underlying argument relies upon the notion that *Innis*'s reference to police "words or actions" does not apply to "questions." *See* discussion *infra* at II.C.2. *Neville*'s application of *Innis*'s rule for "words or action" to a question is strong evidence that Petitioner's parsing of *Innis*'s "normally attendant" exemption is incorrect.

> [T]he officers then asked [Mr. Neville] to submit to a blood-alcohol test and warned him that he could lose his license if he refused. Respondent refused to take the test, stating "I'm too drunk. I won't pass the test." The officers again read the request to submit to a test, and then took respondent to the police station, where they read the request to submit a third time. Respondent continued to refuse to take the test, again saying he was too drunk to pass it.

Neville, 459 U.S. at 555-56 (footnote omitted).

As demonstrated by Mr. Neville's actual response, asking a drunk-driving arrestee if he will submit to alcohol testing is very likely to elicit either: (1) an outright admission of guilt, or (2) an inference of guilt *via* the arrestee's confusion. Moreover, there is an excellent chance that the arrestee's answer would be "no." Every prosecutor trying a drunk-driving case would introduce evidence of a defendant's refusal to submit to alcohol testing, if such evidence existed. Despite the high potential for eliciting an incriminating response, the *Neville* majority approved the alcohol test question because it was necessary:

> In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*. As we stated in *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980), police words or actions

> "normally attendant to arrest and custody" do not constitute interrogation. The police inquiry here is highly regulated by state law, and is presented in virtually the same words to all suspects. It is similar to a police request to submit to fingerprinting or photography. Respondent's choice of refusal thus enjoys no prophylactic *Miranda* protection outside the basic Fifth Amendment protection.

Neville, 459 U.S. at 564 n.15 (citation omitted).

3. The *Muniz* plurality approved seven questions that would not have passed Petitioner's proposed should-have-known test.

The approach adopted by the *Muniz* plurality accords with *Neville*. The plurality in *Muniz* addressed eight questions that were posed to a drunk-driving arrestee:

> Officer Hosterman first asked Muniz his name, address, height, weight, eye color, date of birth, and current age. He responded to each of these questions, *stumbling over his address and age*. The officer then asked Muniz, "Do you know what the date was of your sixth birthday?" After Muniz offered an inaudible reply, the officer repeated, "When you turned six years old, do you remember what the date was?" Muniz responded, "No, I don't."

Muniz, 496 U.S. at 586 (emphasis added).

As confirmed by the *Muniz* plurality, it is obvious that asking a drunk-driving arrestee a series of memory-taxing questions is quite likely to produce incriminating responses:

> Officer Hosterman asked Muniz his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. Both the delivery and *content of Muniz's answers were incriminating*.

Muniz, 496 U.S. at 590 (emphasis added).

Thus, if the *Muniz* plurality had employed Petitioner's should-have-known test, none of Mr. Muniz's answers would have been admissible. Indeed, Justice Marshall, in his dissent and concurrence, correctly pointed out the questions approved by the *Muniz* plurality would not pass a should-have-known test:

> [T]he police should have known that the seven booking questions – regarding Muniz's name, address, height, weight, eye color, date of birth, and age – were reasonably likely to elicit incriminating responses from a suspect whom the police believed to be intoxicated.

Muniz, 496 U.S. at 611 (Marshall, J., dissenting and concurring).

The many cases that have adopted a should-have-known limitation to the booking exception have, unknowingly, adopted Justice Marshall's approach in place of the *Muniz* plurality's actual holding. The

Muniz plurality did not dispute Justice Marshall's observation that the questions approved could not pass a should-have-known test – much less did the plurality actually use a should-have-known test.

The *Muniz* plurality's discussion (approving the seven proper booking questions) did not consider whether the questioner should have known that an incriminating response was likely. Indeed, the *Muniz* plurality seemed unconcerned that the expected incriminating content of Mr. Muniz's answers to the approved questions was identical to the incriminating content of the disapproved sixth birthday question:

> As the state court found, "Muniz's videotaped responses . . . certainly led the finder of fact to infer that his confusion and failure to speak clearly indicated a state of drunkenness that prohibited him from safely operating his vehicle."

Muniz, 496 U.S. at 590 (citation omitted).

Instead of Petitioner's should-have-known test, the questions concerning Mr. Muniz's "name, address, height, weight, eye color, date of birth, [and] current age" were approved because of *the nature of the questions*. That is, they were proper booking questions because they "*reasonably related to the police's administrative concerns.*" *Muniz*, 496 U.S. at 601-02 (emphasis added). In contrast, the "sixth birthday" question was disapproved *due to its nature*, *i.e.*, it was not a proper booking question. The date of Mr.

Muniz's sixth birthday was not a legitimate administrative concern of the jail, and the answer was inadmissible absent *Miranda* warnings.

Thus, far from being demanded by *Muniz*, Petitioner's should-have-known test is wholly incompatible with its holding(s).[6]

4. The *Muniz* majority approved a question that would not have passed Petitioner's proposed should-have-known test.

Muniz also addressed a second set of booking questions. The second set of questions was approved by an eight justice majority and involved a request for Mr. Muniz to submit to a breath test. *Muniz*, 496 U.S. at 604-05. The officer "questioned Muniz only as to whether he understood her instructions and wished to submit to the test." *Id.* at 605. Instead of the test that Petitioner insists *Muniz* demands, the *Muniz* majority upheld these questions in a somewhat confusing fashion:

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[6] If Petitioner contends that the questions approved in *Muniz* were somehow easier than the unapproved "sixth birthday" question, Respondent would note that the test for an incriminating response is simply a response that the prosecution would want to use at trial. Such a response is certainly to be expected when a series of memory-taxing questions is presented to a drunk-driving arrestee. *Muniz*, 496 U.S. at 611 (Marshall, J., dissenting and concurring); *see also Muniz*, 496 U.S. at 603 n.17 (suggesting that merely asking drunk-driving arrestee to count could amount to interrogation).

> These limited and focused inquiries were necessarily "attendant to" the legitimate police procedure, see *Neville*, *supra*, at 564, n. 15, 103 S.Ct., at 923, n. 15, and were not likely to be perceived as calling for any incriminating response.

Muniz, 496 U.S. at 605.

The first clause of this sentence accords perfectly with *Neville*. The "likely to be perceived" clause is a dubious statement of fact rather the creation of a new constitutional rule. Since (1) *Neville* is not faulted by the *Muniz* majority, and (2) the "likely to be perceived" appendage is not attached to the *Muniz* majority's first invocation of the "attendant to" exemption, *Muniz*, 496 U.S. at 603-04, there is no basis to surmise that *Neville* is being modified by this passage.

Moreover, as a matter of logic, the assertion that a request for alcohol testing made to a drunk-driving arrestee is "not likely to be perceived as calling for any incriminating response" is highly questionable. Since a refusal to be tested is very likely and the jury may infer guilt from a refusal, the chance of eliciting an incriminating response is quite high. *See* Nat'l Highway Safety Admin., U.S. Dep't of Transp., No. DOT HS 811 098, *Refusal of Intoxication Testing: A Report to Congress* at 5 (Sept. 2008) (in 2005, breath test refusal rates averaged 22.4 percent nationwide

and ran as high as 81 percent in New Hampshire).[7] There is also the very real possibility of an answer like the admissions of guilt actually made in both *Neville* and *Muniz*. *Muniz*, 496 U.S. at 604 ("Muniz then commented upon his state of inebriation."); *Neville*, 459 U.S. at 555 ("I'm too drunk. . . .").

B. Petitioner's position is contrary to the rationale of the booking exception.

Petitioner's call for engrafting a should-have-known test onto the booking exception is contrary to the rationale of the booking exception. The purpose of the booking exception is to allow police to fulfill their administrative obligations to run a jail without having to worry about *Miranda* issues.[8] *See Muniz*,

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[7] *See also* www.nhtsa.gov/staticfiles/planners/NoRefusalWeekend/docs/trends.doc ("Breath test refusals are a long-standing and persistent problem.").

[8] The administrative needs of the jail have justified radically more unpleasant impositions on an inmate than answering booking questions. *Florence v. Bd. of Chosen Freeholder*, ___ U.S. ___, 132 S.Ct. 1510 (2012) (holding that a jail could subject a person charged with failure to pay fines to a strip search in order to discover contraband).

In striking contrast to *Florence*, under Petitioner's proposed version of the booking exception, police could not ask an arrestee whether he had something in his pocket. While such a question would be likely to produce an incriminating response and would thus violate Petitioner's test, many courts have found such questions to be proper. *See United States ex rel. Williams v. McAdory*, 342 F.Supp.2d 765, 769 (N.D. Ill. 2004) (arrestee was properly "asked by the arresting officer if he had any weapons, knives, or needles on him"); *Gottlieb v. State*, No. C5-02-813,

(Continued on following page)

496 U.S. at 601-02 (approved questions "appear reasonably related to the police's administrative concerns"); *Innis*, 446 U.S. at 301 (police words or actions "normally attendant to arrest and custody" do not constitute interrogation); *see also Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983) (after arrestee has invoked right to counsel, "inquiries or statements, by either an accused or a police officer, *relating to routine incidents of the custodial relationship*, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*.") (emphasis added); *cf. O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348-53 (1987) (prisoners' rights are subject to need of prisons to maintain order and security). While the booking exception is supported by the unlikelihood of an incriminating response, that support is based upon the unlikelihood of such questions *as a class* to produce an incriminating response.

The booking exception is directly analogous to the Fourth Amendment's inventory search doctrine which recognizes the practical necessity of searching impounded vehicles. *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (inventory search of impounded

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2002 WL 31867849, at *2 (Minn. Ct. App. Dec. 24, 2002) (unpublished) (during booking, officer asked robbery arrestee what was in his pockets; Held: a proper booking question, "The booking procedure also includes inventorying the detainee's property. . . ."); *cf. Watson v. United States*, 43 A.3d 276, 2012 WL 1624072, at *6-9 (D.C. 2012) (officer's "what's that?" question to arrestee about bulge in sock was proper under public safety exception).

vehicles without probable cause, or consent, is justified to protect owner from theft, to protect police from claims of theft, and to prevent dangerous items from being stored on police property). Just as the inventory search doctrine gives police the authority required to run an impound lot, the booking exception gives police the authority needed to run a jail.

The rationale for the booking exception does not evaporate when police have reason to anticipate that a necessary question will produce an incriminating response. For example, in *Muniz*, the police surely had strong reasons to expect that a drunk-driving arrestee would struggle to recall the numerous facts necessary to book him into the jail. The fact that the police should have anticipated an incriminating response to the *Muniz*-approved questions did not prevent the application of the booking exception. Similarly, the rationale for an inventory search does not evaporate when police have reason to anticipate that an inventory search will discover incriminating physical evidence. *Bertine*, 479 U.S. at 372 ("[T]here was no showing that the police, who were following standardized [inventory search] procedures, acted in bad faith or for the sole purpose of investigation.").

Petitioner's scheme leads to a doctrine of no, or little, substance by divorcing the booking exception from its purpose. Petitioner's argument would make the entire booking exception doctrine a meaningless nullity. Petitioner's should-have-known test is the same test that would apply even had the booking doctrine never been adopted. *See* III.C.2.

Alternatively, even if Petitioner is correct that his proposed should-have-known test occupies a space between the general test for interrogation and a robust booking exception, Petitioner's test would still largely curtail the booking exception. Only in rare instances will a responsive answer to a booking question be: (1) something the prosecutor offers at trial, and (2) able to clear the should-have-known test.[9] Under Petitioner's proposed should-have-known test, the police will be held to have anticipated any responsive answer. Petitioner's replacement for the booking exception will devolve into an issue of whether, in light of the facts of the arrest, the responsive answer is something the prosecution would wish to introduce. Only when the usefulness of the responsive answer is somehow unrelated to the offense for which the defendant was arrested will a booking question satisfy Petitioner's proposed test. Thus, what *Innis*, *Neville* and *Muniz* gave, Petitioner seeks to take away.

Several courts that have adopted the should-have-known test have implicitly demonstrated the approach is unworkable. These courts have distorted the definition of "incriminating" in order to preserve a

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[9] Nonresponsive answers never violate *Miranda*. *United States v. Evans*, 581 F.3d 333, 343-44 (6th Cir. 2009); *United States v. Castro*, 723 F.2d 1527, 1530-31 (11th Cir. 1984); *see also Miranda*, 384 U.S. at 478 ("Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.").

semblance of the booking exception. *United States v. Reyes*, 225 F.3d 71, 76-77 (1st Cir. 2000) ("the requested information is so *clearly and directly linked to the suspected offense* that we would expect a reasonable officer to foresee that his questions might elicit an incriminating response") (emphasis added); *United States v. Brown*, 101 F.3d 1272, 1274 (8th Cir. 1996) ("Only if the government agent should reasonably be aware that the information sought, while merely for basic identification purposes in the usual case, is *directly relevant* to the substantive offense charged, will the question be subject to scrutiny," quoting *United States v. McLaughlin*, 777 F.2d 388, 391-92 (8th Cir. 1985) (emphasis added)); *see also Parra*, 2 F.3d at 1068 ("the questioning was reasonably likely to elicit incriminating information relevant to establishing *an essential element* necessary for a conviction. . . .") (emphasis added). This need to distort *Innis*'s definition of "incriminating" demonstrates that a should-have-known test leaves the booking exception but an empty shell. It also presents police with an extraordinary challenge. Police would have to filter millions of routine booking questions looking for a question that is "directly relevant" or that goes to an "essential element."

Finally, the test proposed by Petitioner runs afoul of the goal of having clear, uniform rules in the *Miranda* context. *See Berkemer v. McCarty*, 468 U.S. 420, 430 (1984) (one of the principal advantages of *Miranda* doctrine is "the clarity of that rule"). Instead of *Neville*'s and *Muniz*'s clear direction that the class

of questions *normally attendant to arrest and custody* of an arrestee are per se proper, Petitioner would force the police to analyze every booking question in light of the facts of the arrest. Petitioner's proposed rule would put the police through this gauntlet despite the fact that booking questions rarely produce incriminating evidence.

In sum, even if there is space between a robust booking exception and the general test for interrogation, such space would not justify the imposition of Petitioner's proposed test. This Court would not have discussed a booking exception in three separate cases if the exception was intended to have so little value.

C. Petitioner's underlying arguments are unsound.

Petitioner seems to rely on two main pillars to support his demand that booking questions pass a should-have-known test. First, Petitioner invokes a quotation of an amicus brief from a footnote in *Muniz* as allegedly imposing a should-have-known test. Pet. at 18-19. Second. Petitioner argues that outside of a *Miranda* exception even innocuous questions constitute "interrogation." Pet. at 9, 17, 21. Based upon that premise, Petitioner contends imposing a should-have-known test onto booking questions does not completely abolish the booking "exception" to *Miranda*.

1. The dicta in *Muniz*'s footnote 14 does not override the actual holdings in *Muniz* and, even in isolation, does not support Petitioner's call for the adoption of a should-have-known test.

The first main pillar of Petitioner's call for a weakened booking exception is *dicta* in *Muniz*. Pet. at 18-20. Specifically, Petitioner invokes the *Muniz* plurality's approving quotation of an amicus brief filed by the United States:

> As *amicus* United States explains, "[r]ecognizing a 'booking exception' to *Miranda* does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions."

Muniz, 496 U.S. at 602 n.14 (quoting Brief for United States as *Amicus Curiae* at 13) (citations omitted).

There can be little doubt that the quoted passage has been the main source of confusion in the lower courts. Pet. App. 15a-16a. This confusion flows from (1) lower courts elevating a footnote's approving quotation of an amicus brief above the actual holdings in *Muniz*, and (2) lower courts misconstruing what was meant by the phrase "designed to elicit." *See* Pet. App. 28a ("[*Muniz*] cannot reasonably be interpreted as

intending to negate, in a single footnote in the analysis, the exception it had set forth in that same analysis.").

As Respondent has shown above, (1) the *Muniz* plurality did not apply Petitioner's should-have-known test to the questions the *Muniz* plurality approved, and (2) the questions approved by the *Muniz* plurality could not have passed Petitioner's proposed test. Thus, attempting to decipher what "designed to elicit" in footnote 14 means is unnecessary. Nonetheless, Respondent will show footnote 14 does not support Petitioner's call for the adoption of a should-have-known test.

a. *Muniz* demonstrates that a question reasonably related to police administrative concerns is not designed to elicit an incriminating response.

Even if the actual holdings in *Muniz* did not foreclose Petitioner's invocation of footnote 14's "designed to elicit" language, that passage would still not aid Petitioner. The *Muniz* plurality was well aware of the predecessor of the test that Petitioner urges:

> [T]he [*Innis*] Court defined the phrase "functional equivalent" of express questioning to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police

> should know are reasonably likely to elicit an incriminating response from the suspect.

Muniz, 496 U.S. at 600-01.

The *Muniz* plurality, however, approved of a conspicuously different formulation when it used the phrase "designed to elicit." "Designed to elicit" focuses on the *nature of the question* asked rather than the answer the questioner should have anticipated.

The body of *Muniz* associated with footnote 14 shows that a question that appears to be reasonably related to a legitimate administrative function is not a question that is "designed to elicit" an incriminating response:

> We agree with *amicus* United States, however, that Muniz's answers to these first seven questions are nonetheless admissible because the questions fall within a "routine booking question" exception which exempts from *Miranda*'s coverage questions to secure the "'biographical data necessary to complete booking or pretrial services.'" Brief for United States as *Amicus Curiae* 12, quoting *United States v. Horton*, 873 F.2d 180, 181, n. 2 (CA8 1989). The state court found that the first seven questions were "requested for record-keeping purposes only," App. B16, and

> therefore *the questions appear reasonably related to the police's administrative concerns.*

Muniz, 496 U.S. at 601-02 (emphasis added).[10]

One could plausibly argue the Court's observation that the questions were "requested for recordkeeping purposes only" somehow suggests an intent-based test. Yet, if that were so, then one would expect the plurality to have been far more concerned by the facts that (1) one of the eight questions was clearly a sobriety test, and (2) the booking process was videotaped. The sixth birthday question strongly suggested the officer wanted evidence that Mr. Muniz was intoxicated. The police videotaping of the booking in *Muniz* suggests a similar intent. *See Muniz*, 496 U.S. at 611 (Marshall, J., dissenting and concurring) ("the very fact that, after a suspect has been arrested for driving under the influence, the Pennsylvania police regularly videotape the subsequent questioning strongly implies a purpose to the interrogation other than 'recordkeeping' "). Yet, neither of those facts was mentioned in the plurality's finding that the booking exception applied. In any event, this passage of *Muniz* is irreconcilable with a should-have-known test.

The actual amicus brief from which the *Muniz* plurality approvingly quotes confirms that "designed

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[10] In contrast to the text of footnote 14 and the explanation in the body of the *Muniz* plurality opinion, Petitioner arbitrarily transforms "designed to elicit" into "intended or objectively likely, to elicit an incriminating response." Pet. at 21.

to elicit" relates to the inherent nature of the question and has nothing to do with the facts known to the questioner or the questioner's intent:

> [*Miranda*] does not bar the police from asking routine processing questions while booking a suspect and using the suspect's an-answers against him if the answers turn out to be incriminating. . . . *Booking is not designed to elicit incriminating admissions*, and it is normally brief and non-coercive in nature.
>
> * * *
>
> The question about the date of respondent's sixth birthday was asked during booking, but it was not a routine booking question. Instead, it was a sobriety test.

Brief for the United States as *Amicus Curiae* Supporting Petitioner, *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638 (1990) (No. 89-213, 1989 WL 1127507, at *6-7) (emphasis added).

The amicus brief thus asserts that the booking process, *as a concept*, is "not designed to elicit incriminating admissions." *Id.* This proposition is radically different from Petitioner's assertion that each booking question must be scrutinized under a should-have-known test.

The distinction between (1) a should-have-known test and (2) whether a question was "designed to elicit" an incriminating response is also clearly set out by Justice Marshall: a booking "exception should

not extend to any booking question that the police should know is reasonably likely to elicit an incriminating response *regardless of whether the question is 'designed' to elicit an incriminating response.*" *Muniz*, 496 U.S. at 610-11 (Marshall, J., dissenting and concurring) (citation omitted; emphasis added). Thus, the meaning of the phrase "designed to elicit" is explained in (1) the body of the *Muniz* opinion, (2) Justice Marshall's dissent and concurrence, and (3) the amicus brief from which the "designed to elicit" quote originates. The plurality opinion and the amicus brief each demonstrate that questions which are reasonably related to legitimate police administrative concerns are, *by their nature*, not questions that are designed to elicit an incriminating response. Justice Marshall would read "designed to elicit" as looking beyond the apparent purpose of a question to the intent of the police. *Muniz*, 496 U.S. at 611 (Marshall, J., dissenting and concurring). Petitioner's assertion that footnote 14's "designed to elicit" formulation means the same thing as his much differently phrased should-have-known test is simply not plausible.

b. *Innis* unambiguously states that "designed to elicit" means intended to elicit.

Even if there was ambiguity in *Muniz* regarding what the phrase "designed to elicit" meant, *Innis* dispels that ambiguity. The concept of words or actions "designed to elicit an incriminating response" was discussed in footnotes seven and nine of *Innis*.

In footnote seven, the negligence, or should-have-known test, is clearly distinguished from situations where the "intent of the police" is to obtain an incriminating response. *Innis*, 446 U.S. at 301 n.7. Footnote seven explains that *where the police intend* to obtain an incriminating response by engaging in conduct designed to elicit an incriminating response, the actions of the police will rarely pass the should-have-known test. Footnote nine again explains that the police conduct at issue in *Innis* was not "*designed* to elicit a response," because there was no evidence that the police had such an intent. *Id.* at 303 n.9 (emphasis in original). Thus, *Innis* differentiated (1) negligent police conduct where they should have known they would obtain an incriminating response from (2) intentionally investigative conduct where police have a design to obtain incriminating evidence. In that light, even if *Muniz* had not clearly adopted an automatic exemption for legitimate booking questions, *Innis* shows that *Muniz*'s use of the "designed to elicit" formulation means only an intentional design to misuse booking procedures will invalidate the booking exemption.

It should be recalled again that Petitioner conceded the issue of the officer's intent and consequently the court below never addressed whether the officer's intent mattered.

2. Petitioner's contention that outside of the *Miranda* exceptions even innocuous questions are "interrogation" is both irrelevant and wrong.

Petitioner argues that outside of the *Miranda* exceptions all custodial questions are "interrogation." Pet. at 17.[1] Acceptance of Petitioner's argument need not lead to a conclusion that the should-have-known test must be superimposed onto the booking exception.

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[1] Indeed. Petitioner asserts that all eight of the questions addressed in the *Muniz* plurality opinion were held to be custodial interrogation, but nonetheless were exempted from *Miranda*'s coverage. Pet. at 9. To the contrary, the *Muniz* plurality expressly stated that any answers elicited during custodial interrogation would have been suppressed: "[A]ny verbal statements that were both testimonial in nature and elicited during custodial interrogation should have been suppressed." *Muniz*, 496 U.S. at 590. Thus, asking whether "interrogation" took place, or whether incriminating answers were likely, does not make sense inside of the booking exception. *See* 1 Charles Alan Wright et al., *Federal Practice and Procedure* § 75 (4th ed. 2008) ("the very definition of interrogation that the Court has adopted excludes from its coverage those [questions] normally attendant to arrest and custody") (internal quotes omitted; bracket in original).

Petitioner's whole approach of judging booking questions through the prism of "interrogation" is simply misguided. It is akin to a court asking whether the police should have anticipated the likelihood of an incriminating response when reviewing questions offered under the public safety doctrine of *New York v. Quarles*, 467 U.S. 649, 655-56 (1984). Just as "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination," *id.* at 657, so too does the need for police to run a jail.

There is no inconsistency in (1) accepting Petitioner's view that all custodial questions – except those normally attendant to arrest and custody – are "interrogation," and (2) rejecting Petitioner's call for subjecting booking questions to a should-have-known test.

Nonetheless, Respondent believes that Petitioner misreads *Innis*. *See Neville*, 459 U.S. at 564 n.15 (applying *Innis*'s discussion of police "words or conduct" to a question); *Jones v. United States*, 779 A.2d 277, 282-83 (D.C. 2001) ("Such a construction of the critical sentence in *Innis* may be plausible as a matter of syntax, but it has been rejected by numerous authorities, and we do not find it persuasive."). In making this argument, Respondent acknowledges that several of this Court's decisions have indicated questions are "interrogation." *See Oregon v. Elstad*, 470 U.S. 298, 317 (1985); *Muniz*, 496 U.S. at 600-01. These cases, however, have not addressed innocuous, non-investigative questions, *i.e.*, questions that could pass the test Petitioner proposes in place of a robust booking exception.

a. The definition of "interrogation" should not hinge upon a punctuation mark.

Outside of the *Miranda* exceptions, all police words or actions with an arrestee should be reviewed under *Innis*'s should-have-known test. *Innis*, 446 U.S. at 301. As shown in both *Neville* and *Muniz*, *Innis*'s

should-have-known test for police words or actions covers questions.

Alternatively, *Innis* showed that the mere absence of a question mark at the end of a sentence does not mean that the sentence cannot amount to "interrogation." The converse also obtains.

Just because a sentence is a question does not mean that the sentence must be classified as "interrogation." "Nothing in the Constitution, *Miranda*, or its progeny, requires the assignment of such importance to a mark of punctuation." *United States v. Abell*, 586 F.Supp. 1414, 1420 (D.C. Me. 1984); *see also United States v. Menichino*, 497 F.2d 935, 941 n.3 (5th Cir. 1974) (discussing – later adopted – ALI Model Code of Pre-Arraignment Procedure § 140.8(5) (1975), the word "questioning" is meant to cover investigative questioning and excludes non-investigatory questions).

Innis provides no definition of "express questioning." While Petitioner's view – that any question will amount to "express questioning" – is plausible, questioning in the context of "interrogation" could also be defined as "a judicial or official investigation." http://www.merriam-webster.com/dictionary/question.

b. Non-investigative questions do not create, or exploit, a coercive environment.

"Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984)). The purpose behind the *Miranda* rule is to "prevent[] government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987). That purpose is not furthered by prohibiting non-investigative questions. Even if this Court had never created a booking exception, asking a typical arrestee a question such as "What color are your eyes?," *see Muniz*, 496 U.S. at 590, does not implicate the pressures *Miranda* was designed to address.[12]

"'Interrogation,' as conceptualized in *Miranda*, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Innis*, 446 U.S. at 300. No such heightened compulsion exists

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[12] Of course, in *Muniz*, that question *was not* innocuous: it was posed to a drunk-driving arrestee and subjected him to a memory-taxing challenge. The booking exception was thus needed in *Muniz* to allow the police to run their jail. This need existed regardless of whether their booking question was likely to elicit an incriminating response.

when innocuous questions are posed to an arrestee. *See United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981) ("Many sorts of questions do not, by their very nature, involve the psychological intimidation that *Miranda* is designed to prevent."), *overruled on other grounds by United States v. Poole*, 794 F.2d 462, 465 (9th Cir. 1986).

In *Howes v. Fields*, ___ U.S. ___, 132 S.Ct. 1181 (2012), this Court discussed the kinds of "inherently compelling pressures" that *Miranda* was "designed to ward off." *Fields*, 132 S.Ct. at 1188-91. Those pressures – (1) the shock of arrest, (2) the longing for prompt release, and (3) the fear of reprisal or the hope for lenient treatment – have no relevance to innocuous, non-investigative questions.

An arrestee presented with an innocuous question from police would not hope that an answer would result in leniency. Further, innocuous conversation would dissipate the shock of arrest and reassure an arrestee that he was going to be treated decently. An arrestee engaged in a non-investigative conversation with police is in no more of a coercive atmosphere than an arrestee conversing with a person he believes is a fellow prisoner. *Perkins* found the "police dominated atmosphere" *Miranda* was designed to address was not present when an incarcerated person speaks with a fellow inmate. *Perkins*, 496 U.S. at 296.

c. Society should not be penalized for the unforeseeable consequences of police interactions with arrestees.

Police are not accountable for the unforeseen results of their words or actions:

> A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

Innis, 446 U.S. at 301-02.

If police ask a question with no reason to anticipate an incriminating response, they have done no interrogation and should not be held accountable for later unforeseen results. *See* 2 Wayne R. LaFave, et al., *Criminal Procedure* § 6.7(b) (3d ed. 2007) ("[P]erhaps the easiest [type] of [case] to deal with under *Innis*, is where an innocuous question is asked."); *see also Davis v. United States*, 512 U.S. 452, 458 (1994) ("we have held that a suspect who has invoked the right to counsel cannot be *questioned regarding any offense* unless an attorney is actually present") (emphasis added; footnote omitted).

d. Many courts have rejected Petitioner's contention that outside of the *Miranda* exceptions even innocuous questions are "interrogation."

Many courts have found that no interrogation took place when an arrestee was asked non-investigative questions that were outside of any *Miranda* exception. *See, e.g.*,

- *United States v. Chipps*, 410 F.3d 438, 445 (8th Cir. 2005) ("[a] question would constitute interrogation if it attempted to enhance [appellant's] guilt") (internal quotes omitted);
- *United States v. Briggs*, 273 F.3d 737, 741 (7th Cir. 2001) ("Only questions that are reasonably likely to elicit an incriminating response from the suspect are improper. . . . Lt. Story's follow-up question about Briggs's well-being did not relate to Briggs's crime, nor did it seem intended to elicit an incriminating response.") (internal quotes omitted);
- *United States v. Bogle*, 114 F.3d 1271, 1275 (D.C. Cir.) ("[O]nly questions that are reasonably likely to elicit incriminating information in the specific circumstances of the case constitute interrogation within the protections of *Miranda*." Held: questions about the murder of defendant's brother were not "interrogation."), *cert. denied*, 522 U.S. 938 (1997);

- *United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981) ("We admit that [*Innis*] appears to assume that direct questioning of a suspect in custody always constitutes interrogation. . . . However, we believe the reasoning supporting the Court's decision, indeed the very purpose behind *Miranda* itself, compels the conclusion that not every question posed in a custodial setting is equivalent to 'interrogation.' . . . A definition of interrogation that included any question posed by a police officer would be broader than that required to implement the policy of *Miranda* itself.");

- *United States v. Thomas*, 381 Fed.App'x 495, 502 (6th Cir.) (unpublished) ("[I]n this case, there was 'no express questioning' but a simple off-topic question following up on [Appellant's] conversation about timing issues, and nothing in the record shows that [the arresting officer] was trying to elicit an incriminating response. . . . Because [the arresting officer] was not attempting to elicit information from [Appellant], *his question* was not the 'functional equivalent' of express questioning within the meaning of *Innis*.") (emphasis added), *cert. denied*, 131 S.Ct. 807 (2010);

- *People v. Wader*, 854 P.2d 80, 93 (Cal. 1993) ("Not every question directed by an officer to a person in custody amounts to an 'interrogation' requiring *Miranda* warnings. . . . As Sergeant Hoops's testimony indicates, his inquiry regarding the whereabouts of

Hillhouse was designed to elicit information about Hillhouse, not defendant."), *cert. denied*, 512 U.S. 1253 (1994);

- *People v. Garcia*, 651 N.E.2d 100, 108 (Ill. 1995) ("Officer Neuberg's first question [during jail processing several hours after defendant confessed to killing her husband], 'Why are you shaking?' did not constitute custodial interrogation.");
- *Prioleau v. State*, 984 A.2d 851, 857 (Md. 2009) ("As to whether 'What's up, Maurice?' constituted actual interrogation, it is very well settled that not every question constitutes 'interrogation' of a suspect who is in custody when the question is asked."); and
- *State v. Tibiatowski*, 590 N.W.2d 305, 309 (Minn. 1999) ("In order to rise to the level of interrogation, the questioning, whether express or implied, must be '*reasonably likely* to elicit an *incriminating* response,'" quoting *Innis*, 446 U.S. at 301) (emphasis added).

CONCLUSION

For the foregoing reasons, Respondent respectfully opposes the Petition for a Writ of Certiorari.

Respectfully submitted,

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