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IN THE SUPREME COURT OF THE UNITED STATES

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MISSOURI, :

Petitioner : No. 11-1425

v. :

TYLER G. MCNEELY :

- - - - - x

Washington, D.C.

Wednesday, January 9, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:14 a.m.

APPEARANCES:

JOHN N. KOESTER, JR., ESQ., Assistant Prosecuting Attorney, Jackson, Missouri; on behalf of Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

STEVEN R. SHAPIRO, ESQ., New York, New York; on behalf of Respondent.

| | C O N T E N T S | |
|----|--------------------------------------|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | JOHN N. KOESTER, JR., ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | NICOLE A. SAHARSKY, ESQ. | |
| 7 | For United States, as amicus curiae, | 15 |
| 8 | supporting the Petitioner | |
| 9 | ORAL ARGUMENT OF | |
| 10 | STEVEN R. SHAPIRO, ESQ. | |
| 11 | On behalf of the Respondent | 32 |
| 12 | REBUTTAL ARGUMENT OF | |
| 13 | JOHN N. KOESTER, JR., ESQ. | |
| 14 | On behalf of the Petitioner | 61 |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 P R O C E E D I N G S

2 (10:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case Number 11-1425,
5 Missouri v. McNeely.

6 Mr. Koester.

7 ORAL ARGUMENT OF JOHN N. KOESTER, JR.,

8 ON BEHALF OF THE PETITIONER

9 MR. KOESTER: Thank you.

10 Mr. Chief Justice, and may it please the
11 Court:

12 In the course of a drunk driving
13 investigation, quickly securing blood alcohol evidence
14 with as little delay as possible is incredibly
15 important --

16 JUSTICE SOTOMAYOR: How come it took so long
17 for this State to figure out that it needed to do this
18 without a warrant?

19 MR. KOESTER: Well --

20 JUSTICE SOTOMAYOR: The officer testified
21 that he's been making drunk driving arrests for years --

22 MR. KOESTER: Yes, Your Honor.

23 JUSTICE SOTOMAYOR: -- and I think in only
24 one circumstance did he need to do it without a warrant.
25 So what made the need here eminent in the sense of

1 impractical to get the warrant?

2 MR. KOESTER: Well, Your Honor, back in
3 2003, there was a -- an appellate court case from
4 Missouri that dealt with the importance of the words --

5 JUSTICE SOTOMAYOR: No, I understand why he
6 decided to do it, to forego getting a warrant. Isn't
7 his testimony dispositive of this case? He had time to
8 get it.

9 MR. KOESTER: Your Honor, that -- that
10 ignores the fact that had he sought a warrant -- there's
11 no question that he would have been able to secure a
12 warrant. The issue was, it was going to take a
13 considerable amount of time.

14 JUSTICE SOTOMAYOR: But it took a
15 considerable amount of time for all the years he did it.

16 MR. KOESTER: That's true, Your Honor.

17 JUSTICE SOTOMAYOR: And -- and he didn't
18 testify to it -- it causing a loss of any particular
19 case.

20 MR. KOESTER: But in this particular case,
21 it was going to take 90 minutes to two hours to secure
22 the warrant. And during that period of time, the most
23 probative evidence was going to be dissipating, was
24 going to be lost.

25 JUSTICE GINSBURG: But he said -- he said in

1 the ten or so cases he had had in the past, I had -- I
2 encountered no difficulty getting a warrant in prior
3 cases. There was nothing that distinguished this case
4 on the facts from other cases on the facts.

5 MR. KOESTER: That's correct, Justice
6 Ginsburg, he never had a problem securing a warrant, but
7 there was a delay; and that's -- that's the difference.
8 We're -- we're looking at a delay, and quickly securing
9 blood alcohol evidence is important because the -- the
10 evidence is being lost at a significant rate with every
11 minute that passes.

12 JUSTICE SOTOMAYOR: What constitutional
13 right exists for a State to get the best evidence?

14 MR. KOESTER: Well, Justice Sotomayor, I
15 think that that is something that we should always
16 strive for, to be able to get the best possible evidence
17 in the case.

18 JUSTICE SOTOMAYOR: No, no, no. You, the
19 State, want to strive for that. But what in the Fourth
20 Amendment contemplates that that's a right the State
21 must have, that is has to get the very best evidence it
22 can?

23 MR. KOESTER: The -- the touchstone of any
24 Fourth Amendment analysis is the reasonableness of the
25 search. And it's reasonable --

1 JUSTICE SOTOMAYOR: So how can it be
2 reasonable to forego the Fourth Amendment in a procedure
3 as intrusive as a needle going into someone's body? I
4 say this because breathalyzers in my mind have a much
5 different intrusion level. They don't intrude into your
6 body. And I think almost all jurisdictions use
7 breathalyzers instead of blood tests. A small fraction
8 that actually use blood tests.

9 The ruling by us today is going to change
10 that and is going to -- if in your favor is going to
11 change that and is going to -- if in your favor, is
12 going to change that and put sort of a print, the
13 Court's print, on: Use the most intrusive way you can
14 to prove your case.

15 MR. KOESTER: And, Justice Sotomayor, I
16 would -- I would disagree with that. If the Court rules
17 in our favor, I think the end result will be more people
18 will agree to take the breathalyzer test. In this case,
19 the arresting officer gave the defendant an option to
20 take the breathalyzer test and when he clearly told him
21 he was not going to take it, that's when he decided to
22 take him to the hospital in order to draw the blood.

23 JUSTICE SCALIA: Why don't you force him to
24 take the breathalyzer test, instead of forcing him to
25 have a needle shoved in his -- in his arm?

1 MR. KOESTER: For practical --

2 JUSTICE SCALIA: What -- what is the
3 difference between the reliability or the acceptability
4 by juries of a breathalyzer test, as opposed to a blood
5 draw?

6 MR. KOESTER: Justice Scalia, both tests are
7 very reliable. We rely on the breathalyzer test on a
8 daily basis, but for practical reasons it's very
9 difficult to force a drunk driver to take a breath test.
10 The breathalyzer instruments, they measure deep lung
11 alveolar air.

12 And you have to take a very deep breath.
13 And one police officer told me it's sort of like you can
14 put a balloon in front of somebody's mouth, but you
15 can't make him blow it up. It's very difficult for
16 practical reasons to force someone to -- to blow into
17 the breathalyzer.

18 JUSTICE KENNEDY: If we are talking about
19 reasonableness, do you think it's relevant for us to
20 look to the rules and practices of other States?

21 MR. KOESTER: Justice Kennedy, as the
22 Respondent points out, there are 25 States that would be
23 opposed to -- to the warrantless blood draw at issue in
24 this case. And as I point out in the reply brief, 15 of
25 those States have joined amicus Delaware urging this

1 Court to reverse the decision of the Missouri Supreme
2 Court, but I think --

3 JUSTICE KENNEDY: But the fact that those
4 States do have a warrant requirement and from what we
5 can best tell make it work very well, including some
6 expedited procedures where you can get warrants within
7 minutes -- it takes usually the policemen, say, 20
8 minutes to get just to the hospital or the police
9 station anyway.

10 MR. KOESTER: And, Justice --

11 And if -- if we see that other States, a
12 significant amount of other States, number one, require
13 the warrant, number two, many of those have expedited
14 procedures, does that bear on our determination of
15 reasonableness?

16 MR. KOESTER: I don't believe it does,
17 Justice Kennedy. I think, as -- as Virginia v. Moore
18 plainly teaches, individual State laws do not affect
19 whether or not this activity was reasonable under the
20 Constitution.

21 JUSTICE KENNEDY: But we have -- have
22 always -- correct me if I'm wrong. I think that we have
23 always thought of Fourth Amendment reasonableness
24 standards as being a national standard. Suppose 40
25 States -- you know, we can play the game. Suppose 40

1 States had rules that you have warrants and many of them
2 had expedited procedures. That's still irrelevant? We
3 don't look at that at all?

4 MR. KOESTER: Your Honor, I think this
5 Court's decision in Sampson v. California is
6 instructive. In that particular case, the Court
7 approved suspicion-less searches of parolees, and I
8 think a vast majority of States disapproved of that
9 particular law enforcement practice. But that does not
10 bear on the issue of whether or not that violates the
11 Fourth Amendment.

12 JUSTICE SCALIA: Of course we don't know why
13 they disapproved. And I guess your point is they may
14 well not have permitted it because they were under what
15 you would call the mistaken belief that it was
16 unconstitutional.

17 MR. KOESTER: I suppose that is -- that is a
18 possibility, Justice Scalia.

19 JUSTICE KENNEDY: Is there any showing that
20 conviction rate in those States is lower than in the
21 States where the practice is -- is to take the test
22 without the warrant?

23 MR. KOESTER: Your Honor, I think amici
24 National District Attorneys Association cited a study.
25 I know the Respondent also cited a study that shows it

1 doesn't have any bearing. But I think it's -- it's
2 pretty clear that if you have concrete evidence of a
3 drunk driver's blood alcohol content, concrete evidence,
4 that gives you a far greater case, a far greater chance
5 of securing a conviction at trial.

6 JUSTICE SOTOMAYOR: So the new rule is we
7 have to strengthen -- the Fourth Amendment is going to
8 be suspended whenever the prosecution can't get the best
9 evidence to make its case out?

10 MR. KOESTER: No, Justice Sotomayor. I
11 think as long as a police officer has probable cause,
12 what -- what we're saying is it's objectively --

13 JUSTICE GINSBURG: Probable cause is
14 not enough. If you have probable cause, then you can
15 get a warrant. But it was and I think still is the main
16 rule that if you can get a warrant, you must do that.
17 Probable cause is surely not enough. Then we'd never
18 need a warrant when there's probable cause.

19 MR. KOESTER: You are absolutely right,
20 Justice Ginsburg, probable cause is not enough. But
21 probable cause coupled with the indisputable fact that
22 alcohol is eliminated from the human body with every
23 minute that passes after a drunk driver is pulled
24 over --

25 JUSTICE KAGAN: Mr. Koester, suppose that,

1 instead of waiting two hours, there were procedures in
2 place in Missouri and, indeed, across the country where
3 it was possible to get a warrant in these circumstances
4 within 15 or 20 minutes. Would you still be saying that
5 there is a sufficient exigency to avoid the warrant
6 requirement?

7 MR. KOESTER: I think if a particular
8 jurisdiction had perfected the warrant process to the
9 point where they could routinely obtain search warrants
10 in 15 minutes, I think we would have a different
11 outcome. I think that would affect the analysis of the
12 case. But with all due respect to the hypothetical, I
13 think it is a time-consuming process to obtain search
14 warrants.

15 JUSTICE BREYER: So why can't you do that?
16 I mean, the only virtue I see in saying you have to go
17 get a warrant is the officer picks up the phone, there
18 is usually somebody on duty, a magistrate somewhere, he
19 phones him up and says, I have a drunk driver here; he's
20 wobbling, he can't cross the center line; and he won't
21 take a breathalyzer; I want to give him a test.

22 Now, you have a second judgment and the
23 officer has to talk to somebody, so he's a little more
24 careful. And that's a protection, not necessarily for
25 this person, but a protection for others who maybe

1 weren't wobbling.

2 All right. So I think that's the question
3 you're being asked. Why -- what's the problem with
4 doing that? Which adds a little bit of security that
5 this warrant really is -- this search is really
6 necessary.

7 MR. KOESTER: Justice Breyer, I think in
8 practical application it is going to be more of a
9 time-consuming process, though, to obtain the search --

10 JUSTICE BREYER: Why wouldn't it take --
11 let's see, how long did it take me to say that? It took
12 me about 30 seconds. So -- so even if you are a lot
13 more careful, why would it take more than, say,
14 3 minutes?

15 MR. KOESTER: To obtain a search warrant --

16 JUSTICE BREYER: Well, what you do is you
17 have a system, and you phone up and you do just what I
18 said. And this man or woman who is there is not a
19 policeman. That's the virtue of it is this man or woman is
20 trained to listen to policemen and others say things and
21 try to pin him down a little bit and make an independent
22 judgment. So -- so why would it take more than 5
23 minutes?

24 MR. KOESTER: Well, Justice Breyer, that's
25 why I drew the analogy between the telephonic search

1 warrants that were approved back in the 1970s. It
2 sounds like that would be an instantaneous procedure,
3 but some of the lower courts that have actually examined
4 the process, they came to the conclusion that it's still
5 a time consuming process --

6 JUSTICE SCALIA: Mr. Koester, in most
7 jurisdictions, unless I'm mistaken, the cop on the beat
8 cannot apply for and get a search warrant. He has to go
9 through a prosecuting attorney or someone in the
10 prosecutor's office first. So it's not just getting
11 hold of a judge. It's getting hold of the prosecutor
12 first and then getting hold of the judge if the
13 prosecutor approves it, right?

14 MR. KOESTER: That is -- is absolutely
15 correct.

16 JUSTICE SCALIA: Is that the case in
17 Missouri?

18 MR. KOESTER: That is the case in Missouri.
19 The prosecution attorney --

20 CHIEF JUSTICE ROBERTS: In some cases I
21 suppose the judges actually want to read the affidavit
22 and give it some thought. It's not going to be 3
23 minutes.

24 MR. KOESTER: That's exactly right,
25 Mr. Chief Justice. I think if we were to the point

1 where we were approving search warrants in 3 minutes, it
2 would essentially be a rubber stamp --

3 JUSTICE GINSBURG: But we do have -- we do
4 have, I think, an indication that there are
5 jurisdictions that do it inside of a half-hour.

6 MR. KOESTER: That -- that may be true,
7 Justice Ginsburg.

8 JUSTICE SOTOMAYOR: So do you define
9 reasonableness --

10 JUSTICE KAGAN: You suggest that 15 or 20
11 would be a different case. I am wondering where you
12 would draw the bright line.

13 MR. KOESTER: That's a difficult question,
14 to draw a bright line for exactly when we would draw the
15 line where -- where the exigency would disappear.

16 JUSTICE SOTOMAYOR: So would the importance
17 of the search warrant suggest, as a constitutional
18 right, suggest that we should judge reasonableness by
19 the people who are the least efficient or by the people
20 who are the most reasonably efficient?

21 MR. KOESTER: Well, Justice Sotomayor --

22 JUSTICE SOTOMAYOR: Meaning people, police
23 jurisdictions.

24 MR. KOESTER: In -- of course, local law
25 enforcement practices are going to vary from

1 jurisdiction to jurisdiction.

2 JUSTICE SOTOMAYOR: Absolutely, but should
3 they -- should we permit them to vary in terms of
4 inefficiency or should we be encouraging them to vary
5 within a reasonable range?

6 MR. KOESTER: Well, I think prosecutors are
7 always going to strive to -- obtain search warrants as
8 efficiently as possible. But whether or not this was a
9 reasonable search does not depend upon local police
10 practices.

11 If there are no further questions, I would
12 like to reserve the balance of my time.

13 CHIEF JUSTICE ROBERTS: Members of the Court
14 have intruded on your rebuttal time, including me, so we
15 will give you a little extra.

16 MR. KOESTER: Thank you.

17 Ms. Saharsky.

18 ORAL ARGUMENT OF NICOLE A. SAHARSKY,
19 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
20 SUPPORTING THE PETITIONER

21 MS. SAHARSKY: Mr. Chief Justice, and may it
22 please the Court:

23 Here the police are facing a certain destruction of
24 critical blood alcohol evidence. Every minute counts,
25 and it's reasonable for the officers to proceed without

1 a warrant.

2 I would like to pick up where some of the
3 Court's questions led off: This idea that we might live
4 in a world where warrants could be gotten so quickly
5 that -- there is not true exigency. First of all, that
6 is not state of the world now. There is substantial
7 variation from jurisdiction to jurisdiction, and we are
8 just not in a place where the time to get the warrant
9 everywhere is 15 minutes or less.

10 JUSTICE SCALIA: But -- I mean, once we say
11 that you don't need a warrant -- you know, even if
12 things improve, the game's up, right? No?

13 MS. SAHARSKY: No, I don't think that that's
14 true at all. The police do not have --

15 JUSTICE SCALIA: You mean somebody can come
16 up 10 years from now and say, although you approved it
17 10 years ago without a warrant, things have changed, so
18 now you need a warrant?

19 MS. SAHARSKY: I think that if the world
20 changed so that every police officer had an iPad and
21 that judges were always on duty and that the warrants
22 could be gotten that quickly, you would consider that
23 and you would also consider the other sources of delay,
24 which are the time to get to the hospital, etcetera,
25 etcetera. But yes, I would --

1 JUSTICE SCALIA: But if that's the case,
2 then why shouldn't that determination be made case by
3 case?

4 MS. SAHARSKY: Because --

5 JUSTICE SCALIA: Case by case, whether in
6 fact it would have taken that long to get a warrant?
7 And if it -- if it would have taken too long, then it's
8 okay without a warrant. If it wouldn't have taken that
9 long, it's bad.

10 MS. SAHARSKY: The question --

11 JUSTICE SCALIA: Totality of the
12 circumstances test, right?

13 MS. SAHARSKY: Right, but the totality of
14 the circumstances are with respect to the destruction of
15 evidence and what the police are witnessing. They know
16 there is certain destruction of evidence and what they
17 are weighing that against is uncertainty about whether
18 there's time to get a warrant. They have no idea what
19 this person's blood alcohol content is. They have no
20 idea how fast it's decreasing. They might --

21 JUSTICE GINSBURG: Ms. Saharsky, what about
22 saying at least they should try, since a number of
23 jurisdictions can do this within a half hour, say,
24 initiate the process while you are going to the
25 hospital; when a half-hour is up you proceed; but at

1 least there has been an effort to get a warrant.

2 MS. SAHARSKY: I think there -- I think
3 there are legal problems with that and practical
4 problems with that. The legal problems is that the
5 Court has never suggested that the police are both
6 simultaneously in require-a-warrant land and not in
7 require-a-warrant land.

8 JUSTICE KENNEDY: Well, we have -- I don't
9 want to because you have multiple answers -- but on that
10 point, we do talk about exigent circumstances. If -- if
11 we proceed as Justice Ginsburg's suggestion indicates,
12 then the fact that you can't get a warrant within
13 45 minutes is the exigent circumstance.

14 MS. SAHARSKY: Right. I mean, in all of the
15 destruction of evidence cases the Court has said,
16 There's destruction of evidence; we're not going to make
17 you wait until half of it is destroyed or three-fourths
18 of it is destroyed or something like. And that's the
19 rule really that Respondents want. Everyone --

20 JUSTICE KENNEDY: But Justice Ginsburg said
21 30 minutes.

22 MS. SAHARSKY: Right. And what I'm saying
23 is as a practical matter, I think it would be very
24 difficult to -- to suspect that nationwide folks could
25 get warrants in those circumstances. You typically have

1 one police officer on the scene who is making the
2 traffic stop, asking the person questions, taking him
3 through the field sobriety test. That would have to be
4 the officer who would do the affidavit in support of the
5 search warrant because he's the one who's witnessing --

6 JUSTICE ALITO: Jurisdictions have an
7 incentive to get a warrant, I would think. Even if
8 they -- even if we were to say that they don't need one,
9 they certainly have a strong incentive to get warrants
10 because it insulates the search to a much greater degree
11 from later challenge -- at a suppression hearing. So
12 why shouldn't it depend on the practicalities in a
13 particular jurisdiction?

14 Not every jurisdiction has prosecutors and
15 judges who are staying up at -- you know, 3:00 o'clock
16 in the morning on Sunday morning waiting for the phone
17 to ring or for -- to receive some sort of an electronic
18 message that there has been a stop and somebody wants
19 a -- wants a search warrant. Maybe -- you know, big
20 jurisdictions can do that, but small ones can't.

21 So why -- but if you are in a big
22 jurisdiction that -- or one that feels that they can
23 afford that, then why should -- you know, why should the
24 Fourth Amendment permit the search to take place without
25 the warrant when it could have been obtained practically --

1 MS. SAHARSKY: Well, I mean, a couple of
2 responses. First of all, this Court makes nationwide
3 rules and the question is whether it's reasonable to do
4 what Missouri did here even if other jurisdictions would
5 choose to or could do it differently.

6 But second -- you know, this idea with respect
7 to -- that it should matter based on the time to get a
8 warrant is something the Court has never done in its
9 Fourth Amendment exigency cases. And it may be the case
10 that a court looking backwards could say, well, we think
11 you had enough time to get a warrant.

12 But the police officer where he stands with
13 the person, he knows a few things. He knows one thing
14 for sure: That evidence is going to be lost, and it's
15 critical evidence. It's not just to get above .08, but
16 you have these laws that are enhanced with --

17 JUSTICE KENNEDY: I thought -- I thought
18 that we often said that you look at whether or not you
19 can get a warrant before you can break in so that the
20 drugs aren't flushed down the toilet and so forth. We
21 make that judgment all the time.

22 MS. SAHARSKY: Right.

23 JUSTICE KENNEDY: And if that showing is not
24 made, you must get a warrant.

25 MS. SAHARSKY: But the Court --

1 JUSTICE KENNEDY: So I think it's quite
2 incorrect to say that we -- we don't look at the time
3 factor.

4 MS. SAHARSKY: I think it matters as a
5 general --

6 JUSTICE KENNEDY: We look at it all the
7 time.

8 MS. SAHARSKY: I think it matters as a
9 general matter whether warrants take time to get and
10 whether evidence is lost. But the Court has never gone
11 jurisdiction to jurisdiction. It has never
12 second-guessed the police in the way that the Court is
13 suggesting today.

14 In Kentucky v. King, for example, an
15 exigency case, the Court said the police could have
16 proceeded a couple of different ways here; we are not
17 going to make them use the least restrictive way; we are
18 just going to ask whether what they did was reasonable.

19 JUSTICE KENNEDY: I agree that there is a
20 uniform standard. But -- and I don't know if you ever
21 did finish the answer to Justice Ginsburg, but she --
22 she had suggested that we have a uniform rule of exigent
23 circumstances. That -- her suggestion complies with
24 your objection.

25 MS. SAHARSKY: Well, if I am understanding

1 it correctly, I think our point is this, which is that
2 the police officers have to act reasonably in the
3 situation. And in a situation they know for sure the
4 evidence is going to be lost, they know that every
5 minute is critical. For example, Respondent here's
6 blood --

7 JUSTICE SOTOMAYOR: But there are so many
8 situations in which we require a warrant, nevertheless.
9 When there is drug dealing in a house, every time people
10 enter that house, it's almost a certainty that they're
11 going to use the drugs and that evidence is going to
12 disappear. You rely on hope -- on knowing that there's
13 likely to be telltale signs left over.

14 And that's the same thing you do in an
15 alcohol situation. You rely on the testimony of the
16 police officer, you rely on the implied consent
17 presumption. It's not as if this is destruction of all
18 evidence, and -- and not like a fleeing situation where
19 someone gets away, you have nothing left. This is --
20 this is vastly different.

21 MS. SAHARSKY: I mean, with respect, we
22 disagree. This evidence is critical, and the number
23 matters. I mean, it is the case that blood alcohol
24 evidence is the most important evidence. This Court has
25 recognized this in several cases -- Schmerber,

1 Skinner -- and since then the law has only changed to
2 make it more important. In 2005 you had --

3 JUSTICE GINSBURG: You mentioned Schmerber.
4 Why did the Court go through all of the -- why -- it
5 could have made it a much shorter opinion by simply
6 saying, yes, blood alcohol dissipates. But it didn't.
7 It -- it pointed out that in that particular case there
8 was a delay to investigate the accident, the person had
9 to be taken to the hospital for care, so how much time
10 elapsed? I think it was two hours, wasn't it?

11 MS. SAHARSKY: The Court -- made a mention
12 of two hours, but that was not a critical portion of its
13 analysis. We don't think that that mattered to
14 Schmerber because the Court said, first, there was clear
15 probable cause in that situation. Second of all --

16 JUSTICE GINSBURG: What was all the -- why
17 was it in the opinion?

18 MS. SAHARSKY: Well, it's one line in the
19 opinion. If you look at it, the Court says, we are told
20 the percentage of alcohol in the blood begins to
21 diminish shortly after drinking stops, the body
22 functions to eliminate it from the system. Particularly
23 in a case like this, time had to be taken to bring the
24 accused to a hospital and to investigate the scene --

25 JUSTICE GINSBURG: Yes. They didn't need to

1 say any of that.

2 MS. SAHARSKY: Well, they said particularly
3 it means there's an extra thing. But it doesn't mean
4 that the first thing wasn't enough. And what we say is
5 if there was some uncertainty in Schmerber, the Court's
6 case --

7 JUSTICE SCALIA: That doesn't mean that it
8 was enough, either, right?

9 MS. SAHARSKY: Well, that gives me the
10 second part of my answer, which is the Court's cases
11 since Schmerber have relied on the destruction of this
12 evidence being enough for exigency.

13 And I would just point the Court to look at
14 Skinner, at South Dakota v. Neville, at Winston v. Lee,
15 and even in a footnote in Kentucky v. King. This Court
16 has not said anything about the person having to go to
17 the hospital and whether there was an investigation --

18 JUSTICE SCALIA: Counsel for Missouri tells
19 us, Ms. Saharsky, that the breathalyzer is just as good
20 and that in fact he expects that the consequence of our
21 ruling in his favor in this case will be that drunken
22 drivers will agree to the breathalyzer test.

23 But I don't know why it isn't adequate to
24 produce that result simply to put the drunken driver in
25 a -- in a paddy wagon and on the way to the hospital

1 say -- you know, we're going to be in the hospital in
2 20 minutes; we're applying for a warrant; when we get
3 there, we're going to -- we're going to -- you know,
4 stick a needle in your arm, unless, of course, you agree
5 to take the breathalyzer test. Why isn't that enough
6 to -- to force them into the breathalyzer test, so that
7 they will blow up the balloon.

8 MS. SAHARSKY: Well, because in that
9 situation, I think they're willing to take their chances
10 that the evidence is going to dissipate below the .08
11 standard or below these higher enhanced penalties, .15,
12 and then be able to challenge it, as opposed to if they
13 gave the evidence that they potentially wouldn't be able
14 to challenge it.

15 But I think the point that comes --

16 JUSTICE KAGAN: Or maybe they're drunk.

17 (Laughter.)

18 JUSTICE KAGAN: But, but, but -- I mean,
19 Justice Scalia raises a point, which is you always have
20 some delay. Unless you are talking about sticking a
21 needle in somebody roadside, you have to take them to
22 the hospital. So there's going to be some amount of
23 time which you're going to lose, and why can't you use
24 that amount of time, if you can, to try to get a
25 warrant?

1 MS. SAHARSKY: Well, I think there are two
2 answers. One, you typically as a practical matter have
3 one officer on the scene who's proceeding with this and
4 he's the one that would have to prepare the affidavit,
5 typically the one to consult with the prosecutor. He's
6 the one who's going to drive to the hospital.
7 Presumably, we don't want him texting during driving, et
8 cetera.

9 The second answer is a legal answer, which
10 is that the Court has been very hesitant to second-guess
11 the police in these circumstances and to say when the
12 police are in a fluid situation they have to, say, try
13 to get a second officer on the scene and maybe do the --

14 JUSTICE KENNEDY: Now, I think you should be
15 fair. He doesn't have to prepare a written affidavit in
16 a number of these States. It's a telephonic warrant.
17 You have to give us that.

18 MS. SAHARSKY: Well, even in some of the
19 telephonic -- telephonic warrant procedures, you still
20 have to have a written document. You just write it out
21 and then you read it to the judge and then actually a
22 record needs to be made of it. The case United States
23 v. Reid in the Fourth Circuit actually considered this
24 and said -- you know, it sounds like it won't take that
25 long, but it turns out these procedures actually take a

1 while.

2 And it's not just the time to get a warrant.
3 It's the initial time that had been taken at the stop,
4 the investigation, the field sobriety test. Then,
5 there's the time to get to the hospital. And -- you
6 know, sometimes these people, these folks, get to the
7 hospital and they're not given first priority, so
8 there's sometimes some waiting at the hospital. So a
9 significant --

10 JUSTICE SOTOMAYOR: So is it okay -- is it
11 okay to let police officers take the blood?

12 MS. SAHARSKY: Well, we think that's a
13 different question and one that the Court reserved in
14 Schmerber. The Court said there was medical personnel
15 in a medical setting taking the blood in that case.
16 That's the exact same thing that's happening here.

17 But it said if we had a different case, we'd
18 ask whether the -- the situation invited an unjustified
19 element of personal risk of infection and pain. So we
20 think the Court should get a case that has a record on
21 this and then it could make a determination as to
22 whether there is that risk.

23 JUSTICE SOTOMAYOR: Oh, I bet that if we
24 rule in your favor, we will.

25 MS. SAHARSKY: I'm not sure that that's

1 true. The reason that a few States have considered
2 having police officers get trained in this way is
3 basically out of necessity. It is just in rural
4 jurisdictions it's too far to get to the nearest
5 hospital.

6 But it's fair to say that police officers do
7 not want to be in this business of taking blood. It
8 diverts them from their other activities. It's -- you
9 know, it's an extensive training process. So I -- I'm
10 not sure that that's true, but it's not something the
11 Court has to decide --

12 JUSTICE SOTOMAYOR: Do you want to be in
13 those rural places and be stopped without an independent
14 magistrate approving a field officer taking blood from
15 you?

16 MS. SAHARSKY: Well, what I'm saying is that
17 there are only a few States that are doing it now, and I
18 think it is -- it should be -- the Court should wait
19 until it actually has a record to make that
20 determination. But -- you know, there has been training
21 along those lines.

22 That's something, for example, that NHTSA at
23 the Department of Transportation has helped these States
24 investigate whether it's a real option because the
25 police officers are very far away from -- you know, the

1 nearest hospital and that it's -- it's all based on this
2 concern about destruction of evidence.

3 But just to get back to --

4 JUSTICE KAGAN: Do you think going back to
5 Justice Scalia's question, if a person does take a
6 breathalyzer, is there ever a reason for a warrantless
7 blood test?

8 MS. SAHARSKY: Yes. As a general matter,
9 you would not need to obtain a blood test -- you know,
10 practically because the evidence is not the same, but --
11 you know, substantially as good. The blood test is a
12 little better in that you have a sample that sticks
13 around as opposed to one that is gone. You also get two
14 samples, so the defense can test it, and it is better
15 evidence with respect to whether it's susceptible to
16 challenge.

17 You also might have someone who consents to
18 a breath test, but because, as you pointed out, they're
19 so drunk they can't give a good sample, like they say
20 they'll provide a sample, but they really just can't.

21 And then there's another case that is not
22 the fact here, but something we would want the Court to
23 be careful about, which is driving under the influence
24 of drugs. Those do not show up on a breath test, but
25 the police officers might have very good reason to

1 believe that the person is under the influence, such
2 that they might take a breath test and get a zero
3 reading, but still want to take a warrantless blood
4 test.

5 So all the Court needs to do to resolve this
6 case is say where this person refused a breathalyzer --
7 actually, the exact same facts of Schmerber -- it was --
8 it was reasonable for the police to say, we know this
9 evidence is going away, we know it's going to be lost,
10 maybe we can get a warrant quickly, maybe we can't, we
11 don't know what his blood alcohol is, we don't know when
12 it's going to dip below .15, .08, let's just go ahead
13 and proceed.

14 JUSTICE KAGAN: All this talk about -- you
15 know, losing evidence every second, I mean, I suppose
16 the exact same thing could be said in other
17 alcohol-related crimes, public drunkenness, underage
18 drinking. You wouldn't be making the same arguments
19 there, would you? Or would you?

20 MS. SAHARSKY: No. I mean, the -- the
21 question you'd ask will be the same, which would be a
22 reasonableness balancing test, but I think the
23 government interest on the side of that balance would be
24 very different from the ones at issue here. You know,
25 the Court here has said that drunk driving is a serious

1 public safety problem. We're talking about one person
2 being killed every 51 minutes, despite everything we've
3 done in the last 3 decades.

4 JUSTICE KAGAN: So it's not just exigency
5 that you're -- you're saying that there should be a
6 weighing of the costs and benefits here.

7 MS. SAHARSKY: Yes. That's what the Court
8 did in Schmerber. It looked at the intrusiveness of the
9 blood test in this context and then it looked at the
10 government's need for the evidence. And the need for
11 the evidence in the cases you're positing we suspect the
12 Court would not think as strong as the evidence here.

13 But just to get back to some of the
14 questions the Court has had about the time to get
15 warrants, I mean, the evidence that the Court has before
16 it is that it would take at least an hour and a half to
17 two hours to get a warrant here. That's in the Joint
18 Appendix, page 54. Even though the person said -- one
19 officer said he could get in touch with the prosecutor
20 and judge, he did not quantify how long it would take.
21 There's also an exhibit that the defense --

22 JUSTICE KENNEDY: Incidentally, it wasn't
23 clear to me: Is that 1 hour from the time of the --
24 pardon me -- two hours from the time of the stop or two
25 hours from the time he put him in the back of the patrol

1 car? Do we know?

2 MS. SAHARSKY: It's not entirely clear, but
3 I think it's two hours total. There was also on page 70
4 of the Joint Appendix an exhibit that the defense put in
5 that make it look like one and a half hours to two hours
6 total. I also --

7 CHIEF JUSTICE ROBERTS: You can finish your
8 thought.

9 MS. SAHARSKY: There's one other piece of
10 data, which is a NHTSA study that's referred to in the
11 briefs, about where the court -- where folks in four
12 States where warrants were required tried to get them
13 quickly as possible.

14 They put the judges on staff, they tried to
15 do it electronically as much as possible, and still
16 there it was one and half to two hours. That's on page
17 37 of that study.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Shapiro.

21 ORAL ARGUMENT OF STEVEN R. SHAPIRO

22 ON BEHALF OF THE RESPONDENT

23 MR. SHAPIRO: Mr. Chief Justice, and may it
24 please the Court:

25 The issue in this case is whether the State

1 may stick a needle in the arm of everyone arrested on
2 suspicion of drunk driving without a warrant and without
3 consent. Missouri's answer to that question is yes,
4 even in routine DWI cases like this and regardless of
5 how quickly and easily a warrant could be obtained.

6 JUSTICE BREYER: I thought the question was
7 if -- if in fact the person won't agree to a
8 breathalyzer.

9 MR. SHAPIRO: The question is -- it's not
10 clear to me. Number one, Your Honor, there's nothing in
11 the record to suggest that the driver is always first
12 offered the opportunity, the choice of choosing a
13 breathalyzer as opposed to --

14 JUSTICE BREYER: Was your client was offered
15 the breathalyzer twice?

16 MR. SHAPIRO: This client was offered the
17 breathalyzer, Your Honor.

18 JUSTICE BREYER: How many times?

19 MR. SHAPIRO: And declined it twice, that's
20 correct, Your Honor.

21 But under Missouri's proposed rule, there is
22 no role at all for a neutral and detached magistrate.
23 The decision whether an individual can be required to
24 submit to a nonconsensual blood draw, often while
25 handcuffed and physically restrained as my client was --

1 JUSTICE BREYER: I mean, aside from all --
2 the thing, what it boils down to, at least in my mind,
3 is, is yes, of course it would be better to -- to have a
4 neutral person hear what the policeman has to say and to
5 act as a second judgment on that; it would make it less
6 likely that people who are really innocent, in fact,
7 have this happen to them and so forth.

8 But they're arguing that that's a -- that's
9 a considerable burden in many, but not all States. And
10 at some point -- and the addition in respect to the
11 second judgment, namely the magistrates that you get, is
12 not worth really what you're going to lose, which are
13 going to be people who are drunk driving around on roads
14 and -- and possibly killing people. We all know how
15 that side can be built up, too.

16 MR. SHAPIRO: Right.

17 JUSTICE BREYER: So at some point, I would
18 wish you would spend some time addressing that, that
19 practical argument.

20 MR. SHAPIRO: I'd be happy to answer that
21 question right now, Your Honor. I think there are two
22 responses. One is Missouri specific and case specific
23 and one is more generic because I think it's important
24 to remember they are not asking simply to reverse the
25 suppression motion in this case on the grounds that the

1 facts of this case made it reasonable to do a
2 warrantless blood draw.

3 What Missouri and the United States are
4 urging is a categorical exemption to the warrant
5 requirement in all DWI cases nationwide. So we have to
6 think not only about --

7 JUSTICE SCALIA: Is this a lot of sound and
8 fury signifying nothing? I mean, what -- what advantage
9 do you think your client would -- would really get from
10 the warrant requirement other than the delay that that
11 would entail allowing his blood alcohol to reduce
12 itself?

13 Are the -- for some warrants, let's say a
14 warrant to go into a building where the police contend
15 there may be drugs, the policeman will -- will you know,
16 the magistrate will say, What evidence do you have that
17 there's drugs? Well -- you know, two weeks ago we had
18 this informer, yesterday we saw this and so -- you know,
19 all sorts of different factors.

20 In these DWI cases it's always going to be
21 the same thing. The policeman is going to say, well --
22 you know, his breath smelled of alcohol; we gave him the
23 walk a straight line and turn around test, he flunked
24 it; he couldn't touch his nose with his index finger.
25 What is the impartial magistrate possibly going to do

1 except to say, hey -- you know, that's probable cause.

2 Are any of these warrants ever turned down?

3 Are they ever turned down in your experience?

4 MR. SHAPIRO: Your Honor, I do not know the
5 answer to that.

6 JUSTICE SCALIA: I bet you they're not.

7 MR. SHAPIRO: But I think it's also true,
8 Your Honor, that warrants in general are rarely turned
9 down, that the overwhelming percentage of warrant
10 requests in all criminal cases are granted -- are
11 granted by magistrates.

12 JUSTICE SCALIA: But in many of them there
13 is a lot of judgment that has to be brought to bear: Is
14 this a reliable informant, how long ago did he tell you,
15 and so forth. Whereas, in all of these cases it's going
16 to be the same thing: His breath smelled of alcohol, he
17 couldn't walk a straight line, and whatnot. And -- and
18 that's the probable cause. And I don't see how the
19 independent magistrate is going to do you a whole lot of
20 good, except for the fact that it will delay the
21 process.

22 MR. SHAPIRO: This Court's entire Fourth
23 Amendment jurisprudence, Your Honor, rests on the
24 proposition that the privacy safeguards of the Fourth
25 Amendment benefit by having a neutral and detached

1 magistrate review the evidence before the State does
2 something as intrusive as putting a needle in somebody's
3 arm.

4 And I could imagine a situation --

5 JUSTICE ALITO: What if the State has a
6 form; we have some forms in the Joint Appendix. What if it
7 has a form for the officer to fill out? He checks
8 certain boxes, and then you send this electronically to
9 a magistrate, and if the right boxes are checked, the
10 magistrate will grant the warrant.

11 Is that -- do you think that is consistent
12 with the Fourth Amendment?

13 MR. SHAPIRO: Well, it's something very
14 close to what Missouri already has, Your Honor. In Cape
15 Girardeau County the prosecutor has prepared
16 standardized forms which the police officer then fills
17 out, presents to the prosecutor, the prosecutors sends
18 on to the magistrate and the magistrate decides whether
19 to grant the warrant. But I think that cuts in exactly
20 the opposite direction, which it shows that the process
21 of obtaining a warrant is not very elaborate and it need
22 it not be very timely.

23 And I can imagine, in answer to
24 Justice Scalia's questions, I can imagine circumstances
25 in which an officer might apply for a warrant in a

1 situation where they have not asked the driver, for
2 example, to go through the field sobriety test; said as
3 they -- as we stopped the driver on the road, he was
4 going 10 miles over the speed limit, I questioned him,
5 his speech was slurred, his eyes seemed bloodshot, I
6 want to do a blood test.

7 And the magistrate in that circumstance
8 might say, did you at least perform the field sobriety
9 test? Did you at least offer --

10 JUSTICE GINSBURG: What about that field
11 sobriety test? Suppose the person who is apprehended
12 and is suspected of being drunk says, I'm not going to
13 walk a straight line. I'm going to just sit here. You
14 can't make me do anything without a warrant.

15 Do you need -- if the defendant doesn't
16 consent, do you need a warrant to -- to have the
17 standard sobriety test?

18 MR. SHAPIRO: Do you mean do you need a
19 warrant to have the field sobriety test?

20 JUSTICE GINSBURG: Yes.

21 MR. SHAPIRO: Is that the question, Justice
22 Ginsburg? I don't think you need a warrant to require
23 somebody to put his finger to his nose or to walk a
24 straight line or to stand on one foot. I would not say
25 that that is a search within the meaning of the Fourth

1 Amendment that triggers the warrant requirement.

2 But there is no doubt that putting a needle
3 in somebody's arm triggers a warrant requirement. And I
4 think there are really two --

5 CHIEF JUSTICE ROBERTS: What about a
6 breathalyzer, do you need a warrant for that?

7 MR. SHAPIRO: I think you probably do need a
8 warrant for a breathalyzer, Your Honor. But --
9 Missouri's position is you not only don't need a warrant
10 for a breathalyzer, you don't need a warrant for a blood
11 test. And we don't -- this is not a breathalyzer case.

12 CHIEF JUSTICE ROBERTS: I know what
13 Missouri's position is, and I know it's not a
14 breathalyzer test. But if the logic of your position
15 leads to the requirement of a warrant for breathalyzer,
16 that would be pertinent in analyzing your position.

17 MR. SHAPIRO: I think -- I think, Your
18 Honor, it -- I would say that requiring somebody to
19 produce, to breathe into a machine for -- in order to
20 gather evidence for the State's prosecution is a
21 state -- is a search that should probably trigger the
22 warrant requirement, but it is certainly a less -- it is
23 certainly less intrusive, Your Honor, it is certainly
24 less intrusive than -- than the blood test --

25 JUSTICE SCALIA: It bears considerably on

1 the reasonableness, doesn't it? I don't know why you
2 want to bite off more than you can chew.

3 MR. SHAPIRO: Well, I certainly don't want
4 to bite -- I want to bite off --

5 JUSTICE SCALIA: It's a different case and
6 what is reasonable for sticking a needle in your arm is
7 not necessarily reasonable for asking you to blow up a
8 balloon.

9 MR. SHAPIRO: Your Honor, I certainly want
10 to bite off as little as I have to chew in this case,
11 but -- but there are two salient facts because I think
12 it is important to focus on what is before the Court in
13 this case. And what is before the Court in this case is
14 a warrantless blood draw, and the two salient facts in
15 my mind are, one, as I said, case specific.

16 You have a State trooper here who has been
17 doing this for 17 and a half years. He testifies at the
18 suppression hearing that he has only been required to
19 seek a warrant fewer than ten times. Why is that? That
20 is because the overwhelming number of drivers, in fact,
21 give their consent. And in the ten cases over those
22 17 years where he had to seek a warrant, he testifies
23 that he never had any difficulty obtaining a warrant,
24 and there is certainly no indication that those warrants
25 in any way interfered with the State's ability to

1 prosecute those cases.

2 JUSTICE SOTOMAYOR: Mr. Shapiro, could you
3 tell me, and what I am deeply troubled about in your
4 argument, is you incant the totality of the
5 circumstances test. But what circumstances is the Court
6 actually looking at to determine whether forgoing the
7 warrant was necessary or not under that circumstance?
8 We know one. We know where a fatality has occurred or a
9 serious accident because we -- presumably you have to
10 secure the scene and you have to take care of injured
11 people or have cars towed, whatever else it is.

12 But I'm not sure what other circumstances
13 under your theory would really justify a magistrate -- a
14 court below saying, you -- you know, it's okay, you didn't
15 get a warrant here. It can't be merely because it takes
16 too long to get the warrant because that shows
17 inefficiency. It was part of my question earlier.

18 MR. SHAPIRO: Yes, so that's exactly
19 correct, Your Honor. I think the Court got it right in
20 Schmerber. I think the question is: Are there special
21 facts that are extrinsic to the warrant process itself
22 and that are beyond the control of the police that
23 significantly impede the ability of the police even to
24 initiate the warrant process.

25 JUSTICE ALITO: Suppose you are in a

1 rural -- in a rural jurisdiction and it takes a long
2 time to rouse a prosecutor and a magistrate at 3:00 in
3 the morning to get the warrant. You would say, that's
4 too bad, everybody has -- the whole country has to
5 operate like New York City, you have to have somebody on
6 duty all the time.

7 MR. SHAPIRO: Well, Your Honor, Cape
8 Girardeau County is a rural county in southeastern
9 Missouri --

10 JUSTICE ALITO: But I'm asking you a
11 hypothetical question. I -- I bet there are places like
12 that. I have encountered magistrate -- Federal
13 magistrate judges who were unreceptive to receiving
14 warrant applications in the middle of the night, and
15 that is known to -- to exist. Suppose you have a
16 jurisdiction like that? Does that count as a
17 circumstance that would justify a warrantless taking of
18 blood?

19 MR. SHAPIRO: I would say no, Your Honor. I
20 don't think the State ought to be able to take advantage
21 of its own failure to modernize an expedited --

22 JUSTICE KENNEDY: Suppose the magistrate is
23 unavailable because he or she is ill?

24 MR. SHAPIRO: Then I think that's a
25 different situation, Your Honor. I think that --

1 JUSTICE KENNEDY: Would you agree that
2 that's an exigent circumstance which would allow a
3 warrantless blood sample?

4 MR. SHAPIRO: I think it might well if the
5 magistrate were unavailable and there were no
6 alternative magistrate.

7 But the second salient fact, Your Honor --

8 JUSTICE KAGAN: Mr. Shapiro, that's a separate question,
9 isn't it? I mean, one prong of your argument is you
10 need individualized circumstances, you can't have a per
11 se rule. And now this other set of questions is about what
12 you get to count in the totality of the circumstances
13 test; is that right?

14 MR. SHAPIRO: That is correct,
15 Justice Kagan.

16 JUSTICE KAGAN: So one could disagree with
17 you and one could think, as Justice Alito and
18 Justice Kennedy suggested -- you know, you do take into
19 account that it's the middle of the night in a rural
20 county and it's going to take two hours, but still
21 think, well, that's the analysis you have to go through.

22 MR. SHAPIRO: That is correct,
23 Justice Kagan. And the second fact though I just wanted to
24 come back to, and this came up briefly during my
25 opponent's argument, is we know that there are half the

1 States in the country by our count, 26 States in the
2 country that by statute have prohibited warrantless
3 blood draws in routine DWI cases. They are listed on
4 page 31 of the red brief in Footnote 9.

5 Given that fact, in the face of that
6 reality, I don't think Missouri can plausibly claim that
7 a categorical rule that would then apply nationwide if
8 this Court were to announce it in the context of this
9 case, that warrants are never required in routine DWI
10 cases, could satisfy the standard that this Court has
11 established, namely that the exception to the warrant
12 requirement that is being proposed serves law
13 enforcement needs so compelling that a warrantless
14 search is objectively reasonable in every case.

15 There is no evidence that I am aware of, in
16 response to Justice Kennedy's question, and there is
17 certainly no evidence in the record in this case or in
18 the briefs in this case that those 25 States that
19 prohibit warrantless blood draws in the circumstances
20 that my client confronted here have a lower conviction
21 rate, are less concerned about drunk drivers --

22 JUSTICE BREYER: A lot of States have
23 varying degrees to which they want to enforce strict
24 rules against drunk driving. And a State -- that's
25 exactly the kind of thing that worries me on your side.

1 The -- you have a bunch of States that don't -- you
2 know, it's not easy to get hold of a magistrate in
3 15 minutes or so forth. And so what to do about that?

4 If you say, well, you don't have to because
5 you haven't got it provided, you give them every
6 incentive not to make the magistrate available. That's
7 cutting in your favor. On the other hand, it's pretty
8 tough to say that all these States have to have the best
9 possible magistrate available 24 hours a day so somebody
10 can call in ten instances a year because the guy won't
11 take the blood test -- won't take the breathalyzer.

12 And that's where I am in a dilemma. And so
13 I'm looking for an answer to that. And you don't have
14 an absolute rule or I don't see an absolute rule.
15 Should you say, look, here's what you have to do, it's
16 better to have a second opinion there, which is the
17 magistrate's?

18 And so on the way to the hospital, it's just
19 that's where we started, you have to phone and try to
20 get one, and if you don't have one by the time you're at
21 the hospital, tell them again: It's your last chance,
22 give us the breathalyzer or else. And he says no,
23 then you take the blood test. Is that the solution, or
24 do you have a better solution? What's the solution to
25 the problem if you are willing to reject, which you

1 aren't, but hypothetically you might be, that there's
2 the absolute rule.

3 MR. SHAPIRO: Well, I would say several
4 things. First of all, Your Honor, I really do have no
5 reason to believe that there's any jurisdiction in the
6 country at this point that is not deeply concerned about
7 drunk driving, or recognizes that drunk driving is a
8 serious problem. That is certainly not our position.

9 Secondly, the reason I think that there is
10 no evidence that in the States that prohibit warrantless
11 blood draws in routine DWI cases like this have lower
12 conviction rates is, number one, in most cases, they can
13 obtain consent; number two, in cases where they can't
14 obtain consent, they have been able to obtain warrants
15 in a timely -- in a timely fashion; and number three,
16 even in the absence of warrants, all the facts that lead
17 to probable cause often create a very compelling case
18 for conviction in the absence of the blood alcohol --

19 JUSTICE BREYER: My question is what you
20 don't want to do and you don't have to, but if you think
21 of a second-best solution it might always be better than
22 what I think of as a second-best solution.

23 MR. SHAPIRO: I have enormous confidence in
24 you, Justice Breyer.

25 JUSTICE BREYER: I -- I want to know if you

1 want to say anything that would suggest -- we have a
2 number of them floating around and -- and I just wonder
3 if you want to express any view on a second-best
4 solution.

5 MR. SHAPIRO: Well, well -- well, our -- our
6 position, and I'm not sure whether you're classifying
7 this as our first position or -- or something else --
8 our position is that within the context of Schmerber, if
9 there are special facts external to the warrant
10 requirement, then you have to apply a totality of the
11 circumstances test, and you ought to apply a
12 reasonableness standard.

13 In the context of the delays that are
14 intrinsic to the warrant requirement, absent and if any
15 evidence that those intrinsic delays have interfered
16 with the ability of 25 States in the country to enforce
17 their drunk driving laws, this Court ought not to adopt
18 a categorical exception to the -- to the warrant
19 requirement.

20 And the risk of doing it, as you pointed
21 out, Justice Breyer, is then you create this odd
22 disincentive, which is the States that have the most --
23 have the slowest and most cumbersome warrant procedures
24 are the States that get a free pass and are able to
25 override the Fourth Amendment. That seems to me --

1 JUSTICE ALITO: That's not true because
2 there's a great advantage to the prosecution in having a
3 search with a warrant as opposed to a warrantless search
4 in terms of suppression; isn't that correct?

5 MR. SHAPIRO: Well, there is some advantage
6 to having -- certainly, a search that is conducted
7 pursuant to a warrant is much less subject to
8 suppression than a search that is subject not pursuant
9 to a warrant. But -- but there is generally speaking in
10 these cases a probable cause that is derived from the
11 officer's observations on the scene and the defendant's
12 performance in the field sobriety test, that -- that --
13 you know, can support the warrant -- support -- support
14 the search.

15 But I think --

16 JUSTICE ALITO: Can I ask you this question?
17 How much blood has to be taken in order to test for
18 blood alcohol? What if medical technology advances
19 to -- I gather it's a -- it's a substantial amount. But
20 what if it advances to the point that you don't need any
21 more blood than you need now to test blood sugar, and
22 you just have a little machine that makes a tiny prick
23 in somebody's finger and you've got enough blood to do a
24 blood alcohol test. Does it change then?

25 MR. SHAPIRO: I don't -- excuse me -- I

1 don't think the Fourth Amendment rule turns on the
2 amount of blood that you take out of somebody's body. I
3 think the Fourth -- an important, maybe not the
4 important dividing line, an important dividing line for
5 Fourth Amendment purposes is puncturing the skin, and
6 the Court has recognized this in other circumstances.
7 And I think --

8 CHIEF JUSTICE ROBERTS: So does that mean --
9 the last footnote in the Solicitor General's brief talks
10 about some other methods, including a urine sample. Not
11 as accurate as blood, but it can help achieve the same
12 result. One of the things that I think affects the view
13 in this case is it's a pretty scary image of somebody
14 restrained, and -- you know, a representative of the
15 State approaching them with a needle. But I take it you
16 would say you need a search warrant for a urine sample,
17 too?

18 MR. SHAPIRO: This Court has said that, Your
19 Honor --

20 CHIEF JUSTICE ROBERTS: Yes.

21 MR. SHAPIRO: -- in a variety of
22 circumstances with drug testing cases, where they
23 weren't even law enforcement cases, they were special
24 needs cases. The Court --

25 CHIEF JUSTICE ROBERTS: What about -- what

1 about this device that you just sort of hold in front of
2 that you don't have to blow up the balloon, you just hold
3 it in front of the individual and it measures to some
4 extent blood alcohol content, or at least whether the
5 individual's been drinking? Surely you don't need a
6 search warrant for that.

7 MR. SHAPIRO: I think that -- I think that's
8 probably -- I think that's probably correct, Your Honor.
9 You presumably do not need a search warrant, a search
10 warrant for that. And this Court held, first in
11 Schmerber and then reaffirmed in South
12 Dakota v. Neville, that there is no Fifth Amendment
13 issue in requiring the defendant to produce the evidence
14 that can then be used against you. So we know we're not
15 talking about a self-incrimination problem; we're
16 talking about a search and seizure problem.

17 And if the government were able to obtain
18 the evidence in a way that did not rise to the level of
19 a search, then the warrant requirement wouldn't apply.
20 But we are not there. We're not there.

21 And -- and the -- the warrant process
22 that -- that Missouri has described is -- is not as
23 complicated. There are many places now that, number
24 one, permit not only telephonic warrants but electronic
25 warrants, where officers are equipped in their patrol

1 cars with laptop computers. They can fill out these
2 pre-prepared forms in a matter of minutes -- e-mail them
3 to the --

4 CHIEF JUSTICE ROBERTS: You're in an odd --
5 odd position to be making -- it's an understandable
6 position -- your argument is these warrants are just
7 easy as -- as pie. You just send in this thing, the
8 judge does it in an instant, it doesn't take very long
9 at all. It seems to me that that diminishes the
10 protection of the Fourth Amendment to a far -- far
11 greater extent.

12 The idea is that the prosecuting attorney is
13 supposed to spend some time looking at this before
14 submitting it to the judge and the judge is supposed to
15 spend some time examining it. But the idea that you're
16 going to do these things in a half hour seems
17 unreasonable to me.

18 MR. SHAPIRO: But I don't think it's
19 unreasonable, Your Honor, and it's because we all
20 recognize that the evidence in these cases is relatively
21 routinized, and the procedures are relatively
22 standardized. But that does not mean there is not a
23 value to the warrant process, and to the second look by
24 a mutual and detached magistrate. And the value of --

25 JUSTICE SOTOMAYOR: Mr. Shapiro, could you

1 go back to what in this conversation we sort of have
2 lost focus of, which is the question presented, and
3 which is the essence, I think, of your adversary's
4 arguments. I'm not sure you've really put forth -- the
5 essence of their argument is that you can forego the
6 warrant requirement when you know for a fact that
7 evidence is going to dissipate over time.

8 Basically, they're saying this process
9 undermines our right to get a warrant because the
10 evidence is dissipating. We certainly have cases that
11 talk about destruction of evidence being a reason to
12 forego the warrant. What makes this case different from
13 those?

14 MR. SHAPIRO: I'd be happy to answer that
15 question, Justice Sotomayor, if I could just complete my
16 answer to the Chief Justice for one second.

17 JUSTICE SOTOMAYOR: Sure.

18 MR. SHAPIRO: And my answer would be that
19 even if there are boxes on a standardized form, there is
20 value to making sure that the prosecutor and the police
21 have checked off all the right boxes before they engage
22 in a process as intrusive as putting a needle in
23 somebody's arm.

24 Now, in answer to Justice Sotomayor's
25 question, I think -- I think there are multiple answers,

1 Your Honor. First, this Court has on two
2 occasions considered and rejected the notion that the
3 mere fact that alcohol dissipates over time is itself
4 sufficient to proceed without a warrant.

5 As Justice Ginsburg pointed out, in
6 Schmerber, the Court's discussion of what the Court
7 itself called special facts would have been unnecessary
8 if all the Court needed to say was that this natural
9 dissipation of alcohol in the blood automatically would
10 lead to --

11 JUSTICE KAGAN: Mr. Shapiro, Schmerber is an
12 odd case because Justice Ginsburg and you are exactly right,
13 that they spend a lot of time talking about special
14 facts, and particularly so, but then you read the
15 opinion kind of backwards and forwards, and you can't
16 find the special facts.

17 MR. SHAPIRO: I think the special facts,
18 Your Honor, were the accident and the injuries at the
19 scene, which delayed the police for two hours before
20 they could even get to the hospital and initiate the
21 process of applying for a warrant, at a time when there
22 were no cell phones, there were no faxes, there were no
23 internets, and all warrant applications had to be
24 presented in person. That's a very, very different
25 situation.

1 JUSTICE ALITO: Well, if they had sent more
2 police officers to the scene, they could have done
3 everything faster.

4 MR. SHAPIRO: Excuse me?

5 JUSTICE ALITO: If they had sent more police
6 officers to the scene of the accident, if they -- then
7 they could have done it faster.

8 MR. SHAPIRO: Perhaps.

9 JUSTICE ALITO: So what's the difference
10 between that practical limitation and the limitation
11 that exists in a world -- in a rural jurisdiction?

12 MR. SHAPIRO: Well, I think that practical
13 limitation, whether or not there were other officers on
14 the scene, right, or that could have been sent to the
15 scene, we're not asking for a rule in which this Court
16 would direct police officers how they -- they ought to
17 deploy their resources. If there are multiple police
18 officers on the scene, I don't think it's unreasonable
19 to say one can attend to the accident and the other one
20 can search -- can search for a warrant, and that becomes
21 part of the totality of the circumstances. But
22 Schmerber is not the only case, Your Honor.

23 In -- in *Welsh v. Wisconsin*, the Court
24 expressly said that the mere dissipation of alcohol in
25 the blood was not sufficient to justify a warrantless

1 entry into a defendant's home in order to arrest the
2 defendant on DWI charges. It's explicit holding, it's
3 not simply an inference that one has to draw from
4 Schmerber.

5 The second thing I would say in response to
6 your question, Justice Sotomayor, is -- is -- is
7 biology. And that it is true that alcohol dissipates
8 over time through natural body processes. But that's
9 only after the blood alcohol level has reached its peak,
10 and that is generally about half an hour after somebody
11 has had his last drink. So there is a period of time in
12 which the blood -- the body is continuing to absorb
13 alcohol and then -- and the blood alcohol level is
14 continuing to rise. Only at peak does it then start to
15 dissipate.

16 CHIEF JUSTICE ROBERTS: Well, I'm sorry,
17 what's the relevance of that?

18 MR. SHAPIRO: The relevance of that is that
19 it is not true that in every -- it won't be true in
20 every case, Mr. Chief Justice, that the State is losing
21 evidence with each passing moment.

22 CHIEF JUSTICE ROBERTS: But it depends upon
23 when the last -- if a person left the restaurant right
24 after they had a nightcap and then left, but if they
25 just had drinks before, I mean, the problem seems to be

1 there in either case.

2 MR. SHAPIRO: Well --

3 CHIEF JUSTICE ROBERTS: You don't know when
4 the person's last drink was.

5 MR. SHAPIRO: Well, you may or may not know,
6 depending upon what the -- the person is willing to tell
7 you. All I'm saying is that in every case, in every
8 case, it's not the situation that from the moment you
9 stop the driver, his blood alcohol level is going down.
10 There will be some cases where it is going up.

11 JUSTICE BREYER: I am probably just -- but a
12 policeman has probable cause to believe that somebody
13 inside the house has drugs. He hears the toilet
14 flushing and he thinks they're flushing the drugs down
15 the drain.

16 MR. SHAPIRO: Right.

17 JUSTICE BREYER: He doesn't have to get a
18 warrant as long as he reasonably believes that the
19 evidence is disappearing. All right. Now, the
20 difference between your case here and that is
21 specifically what? Suppose we were just to refer to
22 those cases --

23 MR. SHAPIRO: Right.

24 JUSTICE BREYER: -- and say it's the same
25 thing.

1 MR. SHAPIRO: Because the process is a very
2 different process. In the typical drug case, which is
3 what this Court has considered when it has examined the
4 question of whether the destruction of evidence
5 qualifies as an exigent circumstance, that question has
6 almost always arisen in what I'll call a typical drug
7 case, *Richards v. Wisconsin*, *Kentucky v. King*. And in
8 those situations, what the Court is worried about is
9 that the suspect inside the house is going to flush the
10 drugs down the toilet.

11 JUSTICE GINSBURG: What you're saying is if
12 it's now or never --

13 MR. SHAPIRO: It is now or --

14 JUSTICE GINSBURG: -- where the other is a
15 slow process.

16 MR. SHAPIRO: It is now or never and not
17 only is it now or never, that -- but in most of those
18 cases, probably not all, but in most of the cases, the
19 State's case is going to disappear down the drain along
20 with the drugs and the ability to destroy the drugs lies
21 entirely within the control of the defendant. The
22 defendant gets to decide whether he's going to put the
23 drugs down the toilet or not and when he does, the
24 destruction is immediate and total.

25 In this situation, the process is gradual.

1 It takes hours. It can take hours, depending upon how
2 much alcohol is -- is in the system and it is outside
3 the control of the suspect. There is nothing that the
4 suspect can do to expedite the process of the
5 destruction of evidence.

6 JUSTICE KENNEDY: Well, we -- we know the
7 defense attorneys love it when there's a delay because
8 then the retrograde analysis has more and more
9 contingencies that make it unreliable.

10 MR. SHAPIRO: That may be -- that may --

11 JUSTICE KENNEDY: I mean, you'd much rather
12 examine the State's expert if the sample was taken three
13 hours than if it were -- after the arrest than one. I
14 mean, that's a given.

15 MR. SHAPIRO: There is -- there is -- there
16 is no doubt, Justice Kennedy, first of all, the
17 retrograde extrapolation evidence, which is now being
18 considered in various courts around the country is
19 controversial. It's subject to cross-examination. You
20 know -- the -- we haven't resolved whether -- whether
21 the state of that -- the state of that -- the state of
22 that evidence yet. But having said that --

23 JUSTICE SCALIA: I thought -- I thought you
24 would also distinguish the drug flush cases on -- on the
25 ground that violation of the integrity of your home is

1 somewhat less than violation of the integrity of your
2 body.

3 MR. SHAPIRO: Well, I think that that is
4 certainly -- that is certainly true -- that is certainly
5 true as well, Your Honor.

6 JUSTICE SCALIA: And that goes into the
7 reasonableness determination.

8 MR. SHAPIRO: Right. And there -- and there
9 is no doubt, I will not deny, the State's case will be
10 easier if it does not have to obtain a warrant, but this
11 case -- Court has recognized that many times in the
12 past. Criminal investigations are always easier if the
13 State does not have to comply with the warrant process.

14 JUSTICE GINSBURG: Mr. Shapiro, before your
15 time runs out, the case of the fingernail --

16 MR. SHAPIRO: Mm-hmm.

17 JUSTICE GINSBURG: -- scrapings has been
18 raised as saying well, that's -- somebody is going to
19 scrape your fingernails, that's as intrusive as a blood
20 test.

21 MR. SHAPIRO: Well, I would say three
22 things, Your Honor. I don't think it is as intrusive,
23 although even in Cupp v. Murphy, which is that case, the
24 Court described it as a serious, but brief intrusion on
25 the cherished value of personal security. The Court

1 recognized that even the -- the fingernail scrape was --
2 was a serious Fourth Amendment issue.

3 Secondly, that evidence, unlike the blood
4 alcohol evidence, was under the control of the defendant
5 and in that case, on the facts of that case, much like
6 many of the Court's other exigent circumstances cases,
7 there was evidence that suggests that the defendant was
8 actively engaged in the process of degrading the
9 evidence at the time that the police stepped in and said
10 we're going to preserve what is left rather than allow
11 you to be the agent of your own destruction.

12 And as the Court said in *Kentucky v. King*,
13 it is a very different situation when you have the
14 defendant himself destroying evidence. Under those
15 circumstances, it may be reasonable for the Court to say
16 you can't simultaneously destroy evidence and then
17 protest that the destruction of the evidence -- evidence
18 has created the exigency that requires the State to act
19 without a warrant. But there is no agency in this case
20 on behalf of the defendant. The defendant has no
21 capacity.

22 And I come back to what I said before. It
23 is true, I think this question came -- came up earlier,
24 when Mr. Koester was being -- was being questioned.
25 Fourth Amendment standards are not determined by State

1 law. The Court has said that in Virginia v. Moore. We
2 all understand that. But in the determination of what
3 is reasonable under the Fourth Amendment, this Court has
4 often looked to State practices in response to
5 Justice Kennedy's question.

6 In Tennessee v. Garner, you have the Court
7 say half the States have abrogated the Common Law Rule
8 that would have allowed the police to shoot any felon --
9 fleeing felon. In Richards v. Wisconsin, you have half
10 the States that did not support an exception to the No Knock
11 Rule. Here we have half the States in the country that
12 would not have permitted what went on in this case.

13 Thank you very much.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Koester, you have -- we'll give you
16 three minutes.

17 REBUTTAL ARGUMENT OF JOHN N. KOESTER, JR.,

18 ON BEHALF OF THE PETITIONER

19 MR. KOESTER: Thank you. Everyone agrees
20 that the closer a chemical test is taken to the time of
21 driving, the more reliable the evidence of intoxication
22 is, the more reliable the evidence of impairment is.

23 So under the Respondent's approach, it would
24 be mandated that we're going to allow the most reliable
25 evidence to dissipate and degrade over a period of time

1 in favor of admittedly less reliable evidence taken at a
2 later time. And I -- that's -- that's simply
3 inconsistent with -- with Fourth Amendment jurisprudence
4 and -- and other destruction of evidence cases. I
5 believe the Respondent's proposed rule here is
6 completely impractical and unworkable.

7 If there are no further questions, I --

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 11:15 a.m., the case in the
11 above-entitled matter was submitted.)

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| <p style="text-align: center;">A</p> <p>ability 40:25 41:23 47:16 57:20</p> <p>able 4:11 5:16 25:12 25:13 42:20 46:14 47:24 50:17</p> <p>above-entitled 1:11 62:11</p> <p>abrogated 61:7</p> <p>absence 46:16,18</p> <p>absent 47:14</p> <p>absolute 45:14,14 46:2</p> <p>absolutely 10:19 13:14 15:2</p> <p>absorb 55:12</p> <p>acceptability 7:3</p> <p>accident 23:8 41:9 53:18 54:6,19</p> <p>account 43:19</p> <p>accurate 49:11</p> <p>accused 23:24</p> <p>achieve 49:11</p> <p>act 22:2 34:5 60:18</p> <p>actively 60:8</p> <p>activities 28:8</p> <p>activity 8:19</p> <p>addition 34:10</p> <p>addressing 34:18</p> <p>adds 12:4</p> <p>adequate 24:23</p> <p>admittedly 62:1</p> <p>adopt 47:17</p> <p>advances 48:18,20</p> <p>advantage 35:8 42:20 48:2,5</p> <p>adversary's 52:3</p> <p>affect 8:18 11:11</p> <p>affidavit 13:21 19:4 26:4,15</p> <p>afford 19:23</p> <p>agency 60:19</p> <p>agent 60:11</p> <p>ago 16:17 35:17</p> | <p>36:14</p> <p>agree 6:18 21:19 24:22 25:4 33:7 43:1</p> <p>agrees 61:19</p> <p>ahead 30:12</p> <p>air 7:11</p> <p>alcohol 3:13 5:9 10:3,22 15:24 17:19 22:15,23 23:6,20 30:11 35:11,22 36:16 46:18 48:18,24 50:4 53:3,9 54:24 55:7,9,13,13 56:9 58:2 60:4</p> <p>alcohol-related 30:17</p> <p>Alito 19:6 37:5 41:25 42:10 43:17 48:1,16 54:1,5,9</p> <p>allow 43:2 60:10 61:24</p> <p>allowed 61:8</p> <p>allowing 35:11</p> <p>alternative 43:6</p> <p>alveolar 7:11</p> <p>Amendment 5:20,24 6:2 8:23 9:11 10:7 19:24 20:9 36:23 36:25 37:12 39:1 47:25 49:1,5 50:12 51:10 60:2,25 61:3 62:3</p> <p>amici 9:23</p> <p>amicus 1:19 2:7 7:25 15:19</p> <p>amount 4:13,15 8:12 25:22,24 48:19 49:2</p> <p>analogy 12:25</p> <p>analysis 5:24 11:11 23:13 43:21 58:8</p> <p>analyzing 39:16</p> | <p>announce 44:8</p> <p>answer 21:21 24:10 26:9,9 33:3 34:20 36:5 37:23 45:13 52:14,16,18,24</p> <p>answers 18:9 26:2 52:25</p> <p>anyway 8:9</p> <p>APPEARANCES 1:14</p> <p>appellate 4:3</p> <p>Appendix 31:18 32:4 37:6</p> <p>application 12:8</p> <p>applications 42:14 53:23</p> <p>apply 13:8 37:25 44:7 47:10,11 50:19</p> <p>applying 25:2 53:21</p> <p>apprehended 38:11</p> <p>approach 61:23</p> <p>approaching 49:15</p> <p>approved 9:7 13:1 16:16</p> <p>approves 13:13</p> <p>approving 14:1 28:14</p> <p>arguing 34:8</p> <p>argument 1:12 2:2,5 2:9,12 3:3,7 15:18 32:21 34:19 41:4 43:9,25 51:6 52:5 61:17</p> <p>arguments 30:18 52:4</p> <p>arisen 57:6</p> <p>arm 6:25 25:4 33:1 37:3 39:3 40:6 52:23</p> <p>arrest 55:1 58:13</p> <p>arrested 33:1</p> <p>arresting 6:19</p> <p>arrests 3:21</p> | <p>aside 34:1</p> <p>asked 12:3 38:1</p> <p>asking 19:2 34:24 40:7 42:10 54:15</p> <p>Assistant 1:15,17</p> <p>Association 9:24</p> <p>attend 54:19</p> <p>attorney 1:16 13:9 13:19 51:12</p> <p>attorneys 9:24 58:7</p> <p>automatically 53:9</p> <p>available 45:6,9</p> <p>avoid 11:5</p> <p>aware 44:15</p> <p>a.m 1:13 3:2 62:10</p> <hr/> <p style="text-align: center;">B</p> <p>back 4:2 13:1 29:3,4 31:13,25 43:24 52:1 60:22</p> <p>backwards 20:10 53:15</p> <p>bad 17:9 42:4</p> <p>balance 15:12 30:23</p> <p>balancing 30:22</p> <p>balloon 7:14 25:7 40:8 50:2</p> <p>based 20:7 29:1</p> <p>basically 28:3 52:8</p> <p>basis 7:8</p> <p>bear 8:14 9:10 36:13</p> <p>bearing 10:1</p> <p>bears 39:25</p> <p>beat 13:7</p> <p>begins 23:20</p> <p>behalf 1:16,21 2:4 2:11,14 3:8 15:19 32:22 60:20 61:18</p> <p>belief 9:15</p> <p>believe 8:16 30:1 46:5 56:12 62:5</p> <p>believes 56:18</p> <p>benefit 36:25</p> <p>benefits 31:6</p> | <p>best 5:13,16,21 8:5 10:8 45:8</p> <p>bet 27:23 36:6 42:11</p> <p>better 29:12,14 34:3 45:16,24 46:21</p> <p>beyond 41:22</p> <p>big 19:19,21</p> <p>biology 55:7</p> <p>bit 12:4,21</p> <p>bite 40:2,4,4,10</p> <p>blood 3:13 5:9 6:7,8 6:22 7:4,23 10:3 15:24 17:19 22:6 22:23 23:6,20 27:11,15 28:7,14 29:7,9,11 30:3,11 31:9 33:24 35:2,11 38:6 39:10,24 40:14 42:18 43:3 44:3,19 45:11,23 46:11,18 48:17,18 48:21,21,23,24 49:2,11 50:4 53:9 54:25 55:9,12,13 56:9 59:19 60:3</p> <p>bloodshot 38:5</p> <p>blow 7:15,16 25:7 40:7 50:2</p> <p>body 6:3,6 10:22 23:21 49:2 55:8,12 59:2</p> <p>boils 34:2</p> <p>boxes 37:8,9 52:19 52:21</p> <p>break 20:19</p> <p>breath 7:9,12 29:18 29:24 30:2 35:22 36:16</p> <p>breathalyzer 6:18 6:20,24 7:4,7,10 7:17 11:21 24:19 24:22 25:5,6 29:6 30:6 33:8,13,15,17 39:6,8,10,11,14</p> |
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| | | | | |
|---|--|--|---|--|
| <p>39:15 45:11,22 breathalyzers 6:4,7 breathe 39:19 Breyer 11:15 12:7 12:10,16,24 33:6 33:14,18 34:1,17 44:22 46:19,24,25 47:21 56:11,17,24 brief 7:24 44:4 49:9 59:24 briefly 43:24 briefs 32:11 44:18 bright 14:12,14 bring 23:23 brought 36:13 building 35:14 built 34:15 bunch 45:1 burden 34:9 business 28:7</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 California 9:5 call 9:15 45:10 57:6 called 53:7 capacity 60:21 Cape 37:14 42:7 car 32:1 care 23:9 41:10 careful 11:24 12:13 29:23 cars 41:11 51:1 case 3:4 4:3,7,19,20 5:3,17 6:14,18 7:24 9:6 10:4,9 11:12 13:16,18 14:11 17:1,2,3,5,5 20:9 21:15 22:23 23:7,23 24:6,21 26:22 27:15,17,20 29:21 30:6 32:25 34:22,25 35:1 39:11 40:5,10,13</p> | <p>40:13,15 44:9,14 44:17,18 46:17 49:13 52:12 53:12 54:22 55:20 56:1,7 56:8,20 57:2,7,19 59:9,11,15,23 60:5 60:5,19 61:12 62:9 62:10 cases 5:1,3,4 13:20 18:15 20:9 22:25 24:10 31:11 33:4 35:5,20 36:10,15 40:21 41:1 44:3,10 46:11,12,13 48:10 49:22,23,24 51:20 52:10 56:10,22 57:18,18 58:24 60:6 62:4 categorical 35:4 44:7 47:18 cause 10:11,13,14 10:17,18,20,21 23:15 36:1,18 46:17 48:10 56:12 causing 4:18 cell 53:22 center 11:20 certain 15:23 17:16 37:8 certainly 19:9 39:22 39:23,23 40:3,9,24 44:17 46:8 48:6 52:10 59:4,4,4 certainty 22:10 cetera 26:8 challenge 19:11 25:12,14 29:16 chance 10:4 45:21 chances 25:9 change 6:9,11,12 48:24 changed 16:17,20 23:1 charges 55:2</p> | <p>checked 37:9 52:21 checks 37:7 chemical 61:20 cherished 59:25 chew 40:2,10 Chief 3:3,10 13:20 13:25 15:13,21 32:7,19,23 39:5,12 49:8,20,25 51:4 52:16 55:16,20,22 56:3 61:14 62:8 choice 33:12 choose 20:5 choosing 33:12 Circuit 26:23 circumstance 3:24 18:13 38:7 41:7 42:17 43:2 57:5 circumstances 11:3 17:12,14 18:10,25 21:23 26:11 37:24 41:5,5,12 43:10,12 44:19 47:11 49:6 49:22 54:21 60:6 60:15 cited 9:24,25 City 42:5 claim 44:6 classifying 47:6 clear 10:2 23:14 31:23 32:2 33:10 clearly 6:20 client 33:14,16,25 35:9 44:20 close 37:14 closer 61:20 come 3:16 16:15 43:24 60:22 comes 25:15 Common 61:7 compelling 44:13 46:17 complete 52:15 completely 62:6</p> | <p>complicated 50:23 complies 21:23 comply 59:13 computers 51:1 concern 29:2 concerned 44:21 46:6 conclusion 13:4 concrete 10:2,3 conducted 48:6 confidence 46:23 confronted 44:20 consent 22:16 33:3 38:16 40:21 46:13 46:14 consents 29:17 consequence 24:20 consider 16:22,23 considerable 4:13 4:15 34:9 considerably 39:25 considered 26:23 28:1 53:2 57:3 58:18 consistent 37:11 Constitution 8:20 constitutional 5:12 14:17 consult 26:5 consuming 13:5 contemplates 5:20 contend 35:14 content 10:3 17:19 50:4 context 31:9 44:8 47:8,13 contingencies 58:9 continuing 55:12,14 control 41:22 57:21 58:3 60:4 controversial 58:19 conversation 52:1 conviction 9:20 10:5 44:20 46:12,18</p> | <p>cop 13:7 correct 5:5 8:22 13:15 33:20 41:19 43:14,22 48:4 50:8 correctly 22:1 costs 31:6 counsel 24:18 32:19 61:14 62:8 count 42:16 43:12 44:1 country 11:2 42:4 44:1,2 46:6 47:16 58:18 61:11 counts 15:24 county 37:15 42:8,8 43:20 couple 20:1 21:16 coupled 10:21 course 3:12 9:12 14:24 25:4 34:3 court 1:1,12 3:11 4:3 6:16 8:1,2 9:6 15:13,22 18:5,15 20:2,8,10,25 21:10 21:12,15 22:24 23:4,11,14,19 24:13,15 26:10 27:13,14,20 28:11 28:18 29:22 30:5 30:25 31:7,12,14 31:15 32:11,24 40:12,13 41:5,14 41:19 44:8,10 47:17 49:6,18,24 50:10 53:1,6,8 54:15,23 57:3,8 59:11,24,25 60:12 60:15 61:1,3,6 courts 13:3 58:18 Court's 6:13 9:5 16:3 24:5,10 36:22 53:6 60:6 create 46:17 47:21 created 60:18</p> |
|---|--|--|---|--|

| | | | | |
|--|---|--|--|---|
| <p>crimes 30:17 criminal 36:10 59:12 critical 15:24 20:15 22:5,22 23:12 cross 11:20 cross-examination 58:19 cumbersome 47:23 Cupp 59:23 curiae 1:19 2:7 15:19 cuts 37:19 cutting 45:7</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 daily 7:8 Dakota 24:14 50:12 data 32:10 day 45:9 dealing 22:9 dealt 4:4 decades 31:3 decide 28:11 57:22 decided 4:6 6:21 decides 37:18 decision 8:1 9:5 33:23 declined 33:19 decreasing 17:20 deep 7:10,12 deeply 41:3 46:6 defendant 6:19 38:15 50:13 55:2 57:21,22 60:4,7,14 60:20,20 defendant's 48:11 55:1 defense 29:14 31:21 32:4 58:7 define 14:8 degrade 61:25 degrading 60:8 degree 19:10</p> | <p>degrees 44:23 Delaware 7:25 delay 3:14 5:7,8 16:23 23:8 25:20 35:10 36:20 58:7 delayed 53:19 delays 47:13,15 deny 59:9 Department 1:18 28:23 depend 15:9 19:12 depending 56:6 58:1 depends 55:22 deploy 54:17 derived 48:10 described 50:22 59:24 despite 31:2 destroy 57:20 60:16 destroyed 18:17,18 destroying 60:14 destruction 15:23 17:14,16 18:15,16 22:17 24:11 29:2 52:11 57:4,24 58:5 60:11,17 62:4 detached 33:22 36:25 51:24 determination 8:14 17:2 27:21 28:20 59:7 61:2 determine 41:6 determined 60:25 device 50:1 difference 5:7 7:3 54:9 56:20 different 6:5 11:10 14:11 21:16 22:20 27:13,17 30:24 35:19 40:5 42:25 52:12 53:24 57:2 60:13 differently 20:5 difficult 7:9,15</p> | <p>14:13 18:24 difficulty 5:2 40:23 dilemma 45:12 diminish 23:21 diminishes 51:9 dip 30:12 direct 54:16 direction 37:20 disagree 6:16 22:22 43:16 disappear 14:15 22:12 57:19 disappearing 56:19 disapproved 9:8,13 discussion 53:6 disincentive 47:22 dispositive 4:7 dissipate 25:10 52:7 55:15 61:25 dissipates 23:6 53:3 55:7 dissipating 4:23 52:10 dissipation 53:9 54:24 distinguish 58:24 distinguished 5:3 District 9:24 diverts 28:8 dividing 49:4,4 document 26:20 doing 12:4 28:17 40:17 47:20 doubt 39:2 58:16 59:9 drain 56:15 57:19 draw 6:22 7:5,23 14:12,14,14 33:24 35:2 40:14 55:3 draws 44:3,19 46:11 drew 12:25 drink 55:11 56:4 drinking 23:21 30:18 50:5</p> | <p>drinks 55:25 drive 26:6 driver 7:9 10:23 11:19 24:24 33:11 38:1,3 56:9 drivers 24:22 40:20 44:21 driver's 10:3 driving 3:12,21 26:7 29:23 30:25 33:2 34:13 44:24 46:7,7 47:17 61:21 drug 22:9 49:22 57:2 57:6 58:24 drugs 20:20 22:11 29:24 35:15,17 56:13,14 57:10,20 57:20,23 drunk 3:12,21 7:9 10:3,23 11:19 25:16 29:19 30:25 33:2 34:13 38:12 44:21,24 46:7,7 47:17 drunken 24:21,24 drunkenness 30:17 due 11:12 DUI 35:20 duty 11:18 16:21 42:6 DWI 33:4 35:5 44:3 44:9 46:11 55:2 D.C 1:8,18</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 41:17 60:23 easier 59:10,12 easily 33:5 easy 45:2 51:7 efficient 14:19,20 efficiently 15:8 effort 18:1 either 24:8 56:1</p> | <p>elaborate 37:21 elapsed 23:10 electronic 19:17 50:24 electronically 32:15 37:8 element 27:19 eliminate 23:22 eliminated 10:22 eminent 3:25 encountered 5:2 42:12 encouraging 15:4 enforce 44:23 47:16 enforcement 9:9 14:25 44:13 49:23 engage 52:21 engaged 60:8 enhanced 20:16 25:11 enormous 46:23 entail 35:11 enter 22:10 entire 36:22 entirely 32:2 57:21 entry 55:1 equipped 50:25 ESQ 1:15,17,21 2:3 2:6,10,13 essence 52:3,5 essentially 14:2 established 44:11 et 26:7 etcetera 16:24,25 everybody 42:4 evidence 3:13 4:23 5:9,10,13,16,21 10:2,3,9 15:24 17:15,16 18:15,16 20:14,15 21:10 22:4,11,18,22,24 22:24 24:12 25:10 25:13 29:2,10,15 30:9,15 31:10,11</p> |
|--|---|--|--|---|

| | | | | |
|---|--|---|--|--|
| <p>31:12,15 35:16 37:1 39:20 44:15 44:17 46:10 47:15 50:13,18 51:20 52:7,10,11 55:21 56:19 57:4 58:5,17 58:22 60:3,4,7,9 60:14,16,17,17 61:21,22,25 62:1,4 exact 27:16 30:7,16 exactly 13:24 14:14 37:19 41:18 44:25 53:12 examine 58:12 examined 13:3 57:3 examining 51:15 example 21:14 22:5 28:22 38:2 exception 44:11 47:18 61:10 excuse 48:25 54:4 exemption 35:4 exhibit 31:21 32:4 exigency 11:5 14:15 16:5 20:9 21:15 24:12 31:4 60:18 exigent 18:10,13 21:22 43:2 57:5 60:6 exist 42:15 exists 5:13 54:11 expects 24:20 expedite 58:4 expedited 8:6,13 9:2 42:21 experience 36:3 expert 58:12 explicit 55:2 express 47:3 expressly 54:24 extensive 28:9 extent 50:4 51:11 external 47:9 extra 15:15 24:3</p> | <p>extrapolation 58:17 extrinsic 41:21 eyes 38:5 e-mail 51:2</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 44:5 facing 15:23 fact 4:10 8:3 10:21 17:6 18:12 24:20 29:22 33:7 34:6 36:20 40:20 43:7 43:23 44:5 52:6 53:3 factor 21:3 factors 35:19 facts 5:4,4 30:7 35:1 40:11,14 41:21 46:16 47:9 53:7,14 53:16,17 60:5 failure 42:21 fair 26:15 28:6 far 10:4,4 28:4,25 51:10,10 fashion 46:15 fast 17:20 faster 54:3,7 fatality 41:8 favor 6:10,11,17 24:21 27:24 45:7 62:1 faxes 53:22 Federal 42:12 feels 19:22 felon 61:8,9 fewer 40:19 field 19:3 27:4 28:14 38:2,8,10,19 48:12 Fifth 50:12 figure 3:17 fill 37:7 51:1 fills 37:16 find 53:16 finger 35:24 38:23</p> | <p>48:23 fingernail 59:15 60:1 fingernails 59:19 finish 21:21 32:7 first 3:4 13:10,12 16:5 20:2 23:14 24:4 27:7 33:11 46:4 47:7 50:10 53:1 58:16 fleeing 22:18 61:9 floating 47:2 fluid 26:12 flunked 35:23 flush 57:9 58:24 flushed 20:20 flushing 56:14,14 focus 40:12 52:2 folks 18:24 27:6 32:11 foot 38:24 footnote 24:15 44:4 49:9 force 6:23 7:9,16 25:6 forcing 6:24 forego 4:6 6:2 52:5 52:12 forgoing 41:6 form 37:6,7 52:19 forms 37:6,16 51:2 forth 20:20 34:7 36:15 45:3 52:4 forwards 53:15 four 32:11 Fourth 5:19,24 6:2 8:23 9:11 10:7 19:24 20:9 26:23 36:22,24 37:12 38:25 47:25 49:1,3 49:5 51:10 60:2,25 61:3 62:3 fraction 6:7 free 47:24</p> | <p>front 7:14 50:1,3 functions 23:22 further 15:11 62:7 fury 35:8</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 1:6 3:1 game 8:25 game's 16:12 Garner 61:6 gather 39:20 48:19 general 1:18 21:5,9 29:8 36:8 generally 48:9 55:10 General's 49:9 generic 34:23 getting 4:6 5:2 13:10 13:11,12 Ginsburg 4:25 5:6 10:13,20 14:3,7 17:21 18:20 21:21 23:3,16,25 38:10 38:20,22 53:5,12 57:11,14 59:14,17 Ginsburg's 18:11 Girardeau 37:15 42:8 give 11:21 13:22 15:15 26:17 29:19 40:21 45:5,22 61:15 given 27:7 44:5 58:14 gives 10:4 24:9 go 11:16 13:8 23:4 24:16 30:12 35:14 38:2 43:21 52:1 goes 59:6 going 4:12,21,23,24 6:3,9,10,10,11,12 6:21 10:7 12:8 13:22 14:25 15:7 17:24 18:16 20:14</p> | <p>21:17,18 22:4,11 22:11 25:1,3,3,10 25:22,23 26:6 29:4 30:9,9,12 34:12,13 35:20,21,25 36:15 36:19 38:4,12,13 43:20 51:16 52:7 56:9,10 57:9,19,22 59:18 60:10 61:24 good 24:19 29:11,19 29:25 36:20 gotten 16:4,22 government 30:23 50:17 government's 31:10 gradual 57:25 grant 37:10,19 granted 36:10,11 great 48:2 greater 10:4,4 19:10 51:11 ground 58:25 grounds 34:25 guess 9:13 guy 45:10</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 17:23 18:17 31:16 32:5,16 40:17 43:25 51:16 55:10 61:7,9,11 half-hour 14:5 17:25 hand 45:7 handcuffed 33:25 happen 34:7 happening 27:16 happy 34:20 52:14 hear 3:3 34:4 hearing 19:11 40:18 hears 56:13 held 50:10 help 49:11 helped 28:23 hesitant 26:10</p> |
|---|--|---|--|--|

| | | | | |
|---|---|---|--|--|
| <p>hey 36:1 higher 25:11 hold 13:11,11,12 45:2 50:1,2 holding 55:2 home 55:1 58:25 Honor 3:22 4:2,9,16 9:4,23 33:10,17,20 34:21 36:4,8,23 37:14 39:8,18,23 40:9 41:19 42:7,19 42:25 43:7 46:4 49:19 50:8 51:19 53:1,18 54:22 59:5 59:22 hope 22:12 hospital 6:22 8:8 16:24 17:25 23:9 23:24 24:17,25 25:1,22 26:6 27:5 27:7,8 28:5 29:1 45:18,21 53:20 hour 17:23 31:16,23 51:16 55:10 hours 4:21 11:1 23:10,12 31:17,24 31:25 32:3,5,5,16 43:20 45:9 53:19 58:1,1,13 house 22:9,10 56:13 57:9 human 10:22 hypothetical 11:12 42:11 hypothetically 46:1</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 16:3 17:18,20 20:6 51:12,15 ignores 4:10 ill 42:23 image 49:13 imagine 37:4,23,24 immediate 57:24</p> | <p>impairment 61:22 impartial 35:25 impede 41:23 implied 22:16 importance 4:4 14:16 important 3:15 5:9 22:24 23:2 34:23 40:12 49:3,4,4 impractical 4:1 62:6 improve 16:12 incant 41:4 incentive 19:7,9 45:6 Incidentally 31:22 including 8:5 15:14 49:10 inconsistent 62:3 incorrect 21:2 incredibly 3:14 independent 12:21 28:13 36:19 index 35:24 indicates 18:11 indication 14:4 40:24 indisputable 10:21 individual 8:18 33:23 50:3 individualized 43:10 individual's 50:5 inefficiency 15:4 41:17 infection 27:19 inference 55:3 influence 29:23 30:1 informant 36:14 informer 35:18 initial 27:3 initiate 17:24 41:24 53:20 injured 41:10 injuries 53:18 innocent 34:6</p> | <p>inside 14:5 56:13 57:9 instances 45:10 instant 51:8 instantaneous 13:2 instructive 9:6 instruments 7:10 insulates 19:10 integrity 58:25 59:1 interest 30:23 interfered 40:25 47:15 internets 53:23 intoxication 61:21 intrinsic 47:14,15 intrude 6:5 intruded 15:14 intrusion 6:5 59:24 intrusive 6:3,13 37:2 39:23,24 52:22 59:19,22 intrusiveness 31:8 investigate 23:8,24 28:24 investigation 3:13 24:17 27:4 investigations 59:12 invited 27:18 iPad 16:20 irrelevant 9:2 issue 4:12 7:23 9:10 30:24 32:25 50:13 60:2</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>Jackson 1:16 January 1:9 JOHN 1:15 2:3,13 3:7 61:17 joined 7:25 Joint 31:17 32:4 37:6 JR 1:15 2:3,13 3:7 61:17</p> | <p>judge 13:11,12 14:18 26:21 31:20 51:8,14,14 judges 13:21 16:21 19:15 32:14 42:13 judgment 11:22 12:22 20:21 34:5 34:11 36:13 juries 7:4 jurisdiction 11:8 15:1,1 16:7,7 19:13,14,22 21:11 21:11 42:1,16 46:5 54:11 jurisdictions 6:6 13:7 14:5,23 17:23 19:6,20 20:4 28:4 jurisprudence 36:23 62:3 justify 41:13 42:17 54:25</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan 10:25 14:10 25:16,18 29:4 30:14 31:4 43:8,15 43:16,23 53:11 Kennedy 7:18,21 8:3,17,21 9:19 18:8,20 20:17,23 21:1,6,19 26:14 31:22 42:22 43:1 43:18 58:6,11,16 Kennedy's 44:16 61:5 Kentucky 21:14 24:15 57:7 60:12 killed 31:2 killing 34:14 kind 44:25 53:15 King 21:14 24:15 57:7 60:12 Knock 61:10 know 8:25 9:12,25</p> | <p>16:11 17:15 19:15 19:19,23 20:6 21:20 22:3,4 24:23 25:1,3 26:24 27:6 28:9,20,25 29:9,11 30:8,9,11,11,15 30:24 32:1 34:14 35:15,17,18,22 36:1,4 39:12,13 40:1 41:8,8,14 43:18,25 45:2 46:25 48:13 49:14 50:14 52:6 56:3,5 58:6,20 knowing 22:12 known 42:15 knows 20:13,13 Koester 1:15 2:3,13 3:6,7,9,19,22 4:2,9 4:16,20 5:5,14,23 6:15 7:1,6,21 8:10 8:16 9:4,17,23 10:10,19,25 11:7 12:7,15,24 13:6,14 13:18,24 14:6,13 14:21,24 15:6,16 60:24 61:15,17,19</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>land 18:6,7 laptop 51:1 Laughter 25:17 law 9:9 14:24 23:1 44:12 49:23 61:1,7 laws 8:18 20:16 47:17 lead 46:16 53:10 leads 39:15 led 16:3 Lee 24:14 left 22:13,19 55:23 55:24 60:10 legal 18:3,4 26:9 let's 12:11 30:12</p> |
|---|---|---|--|--|

| | | | | | | |
|---|-----------------------------|--|--|--|-----------------------------|--|
| <p>35:13 level 6:5 50:18 55:9 55:13 56:9 lies 57:20 limit 38:4 limitation 54:10,10 54:13 line 11:20 14:12,14 14:15 23:18 35:23 36:17 38:13,24 49:4,4 lines 28:21 listed 44:3 listen 12:20 little 3:14 11:23 12:4 12:21 15:15 29:12 40:10 48:22 live 16:3 local 14:24 15:9 logic 39:14 long 3:16 10:11 12:11 17:6,7,9 26:25 31:20 36:14 41:16 42:1 51:8 56:18 look 7:20 9:3 20:18 21:2,6 23:19 24:13 32:5 45:15 51:23 looked 31:8,9 61:4 looking 5:8 20:10 41:6 45:13 51:13 lose 25:23 34:12 losing 30:15 55:20 loss 4:18 lost 4:24 5:10 20:14 21:10 22:4 30:9 52:2 lot 12:12 35:7 36:13 36:19 44:22 53:13 love 58:7 lower 9:20 13:3 44:20 46:11 lung 7:10</p> | <hr/> <p>M</p> <hr/> | <p>machine 39:19 48:22 magistrate 11:18 28:14 33:22 35:16 35:25 36:19 37:1,9 37:10,18,18 38:7 41:13 42:2,12,13 42:22 43:5,6 45:2 45:6,9 51:24 magistrates 34:11 36:11 magistrate's 45:17 main 10:15 majority 9:8 making 3:21 19:1 30:18 51:5 52:20 man 12:18,19 mandated 61:24 matter 1:11 18:23 20:7 21:9 26:2 29:8 51:2 62:11 mattered 23:13 matters 21:4,8 22:23 McNeely 1:6 3:5 mean 11:16 16:10 16:15 18:14 20:1 22:21,23 24:3,7 25:18 30:15,20 31:15 34:1 35:8 38:18 43:9 49:8 51:22 55:25 58:11 58:14 meaning 14:22 38:25 means 24:3 measure 7:10 measures 50:3 medical 27:14,15 48:18 Members 15:13 mention 23:11 mentioned 23:3</p> | <p>mere 53:3 54:24 merely 41:15 message 19:18 methods 49:10 middle 42:14 43:19 miles 38:4 mind 6:4 34:2 40:15 minute 5:11 10:23 15:24 22:5 minutes 4:21 8:7,8 11:4,10 12:14,23 13:23 14:1 16:9 18:13,21 25:2 31:2 45:3 51:2 61:16 Missouri 1:3,16 3:5 4:4 8:1 11:2 13:17 13:18 20:4 24:18 34:22 35:3 37:14 42:9 44:6 50:22 Missouri's 33:3,21 39:9,13 mistaken 9:15 13:7 Mm-hmm 59:16 modernize 42:21 moment 55:21 56:8 Moore 8:17 61:1 morning 3:4 19:16 19:16 42:3 motion 34:25 mouth 7:14 multiple 18:9 52:25 54:17 Murphy 59:23 mutual 51:24</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 1:15 2:1,1,3,13 3:1,7 61:17 national 8:24 9:24 nationwide 18:24 20:2 35:5 44:7 natural 53:8 55:8 nearest 28:4 29:1 necessarily 11:24</p> | <p>40:7 necessary 12:6 41:7 necessity 28:3 need 3:24,25 10:18 16:11,18 19:8 23:25 29:9 31:10 31:10 37:21 38:15 38:16,18,22 39:6,7 39:9,10 43:10 48:20,21 49:16 50:5,9 needed 3:17 53:8 needle 6:3,25 25:4 25:21 33:1 37:2 39:2 40:6 49:15 52:22 needs 26:22 30:5 44:13 49:24 neutral 33:22 34:4 36:25 never 5:6 10:17 18:5 20:8 21:10,11 40:23 44:9 57:12 57:16,17 nevertheless 22:8 Neville 24:14 50:12 new 1:21,21 10:6 42:5 NHTSA 28:22 32:10 NICOLE 1:17 2:6 15:18 night 42:14 43:19 nightcap 55:24 nonconsensual 33:24 nose 35:24 38:23 notion 53:2 number 3:4 8:12,13 17:22 22:22 26:16 33:10 40:20 46:12 46:13,15 47:2 50:23</p> | <hr/> <p>O</p> <hr/> | <p>O 2:1 3:1 objection 21:24 objectively 10:12 44:14 observations 48:11 obtain 11:9,13 12:9 12:15 15:7 29:9 46:13,14,14 50:17 59:10 obtained 19:25 33:5 obtaining 37:21 40:23 occasions 53:2 occurred 41:8 odd 47:21 51:4,5 53:12 offer 38:9 offered 33:12,14,16 office 13:10 officer 3:20 6:19 7:13 10:11 11:17 11:23 16:20 19:1,4 20:12 22:16 26:3 26:13 28:14 31:19 37:7,16,25 officers 15:25 22:2 27:11 28:2,6,25 29:25 50:25 54:2,6 54:13,16,18 officer's 48:11 Oh 27:23 okay 17:8 27:10,11 41:14 once 16:10 ones 19:20 30:24 operate 42:5 opinion 23:5,17,19 45:16 53:15 opponent's 43:25 opportunity 33:12 opposed 7:4,23 25:12 29:13 33:13 48:3</p> |
|---|-----------------------------|--|--|--|-----------------------------|--|

| | | | | |
|---|--|--|--|---|
| <p>opposite 37:20 option 6:19 28:24 oral 1:11 2:2,5,9 3:7 15:18 32:21 order 6:22 39:19 48:17 55:1 ought 42:20 47:11 47:17 54:16 outcome 11:11 outside 58:2 override 47:25 overwhelming 36:9 40:20 o'clock 19:15</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 paddy 24:25 page 2:2 31:18 32:3 32:16 44:4 pain 27:19 pardon 31:24 parolees 9:7 part 24:10 41:17 54:21 particular 4:18,20 9:6,9 11:7 19:13 23:7 particularly 23:22 24:2 53:14 pass 47:24 passes 5:11 10:23 passing 55:21 patrol 31:25 50:25 peak 55:9,14 penalties 25:11 people 6:17 14:19 14:19,22 22:9 27:6 34:6,13,14 41:11 percentage 23:20 36:9 perfected 11:8 perform 38:8 performance 48:12</p> | <p>period 4:22 55:11 61:25 permit 15:3 19:24 50:24 permitted 9:14 61:12 person 11:25 19:2 20:13 23:8 24:16 29:5 30:1,6 31:1 31:18 33:7 34:4 38:11 53:24 55:23 56:6 personal 27:19 59:25 personnel 27:14 person's 17:19 56:4 pertinent 39:16 Petitioner 1:4,16,20 2:4,8,14 3:8 15:20 61:18 phone 11:17 12:17 19:16 45:19 phones 11:19 53:22 physically 33:25 pick 16:2 picks 11:17 pie 51:7 piece 32:9 pin 12:21 place 11:2 16:8 19:24 places 28:13 42:11 50:23 plainly 8:18 plausibly 44:6 play 8:25 please 3:10 15:22 32:24 point 7:24 9:13 11:9 13:25 18:10 22:1 24:13 25:15,19 34:10,17 46:6 48:20 pointed 23:7 29:18</p> | <p>47:20 53:5 points 7:22 police 7:13 8:8 10:11 14:22 15:9 15:23 16:14,20 17:15 18:5 19:1 20:12 21:12,15 22:2,16 26:11,12 27:11 28:2,6,25 29:25 30:8 35:14 37:16 41:22,23 52:20 53:19 54:2,5 54:16,17 60:9 61:8 policeman 12:19 34:4 35:15,21 56:12 policemen 8:7 12:20 portion 23:12 positing 31:11 position 39:9,13,14 39:16 46:8 47:6,7 47:8 51:5,6 possibility 9:18 possible 3:14 5:16 11:3 15:8 32:13,15 45:9 possibly 34:14 35:25 potentially 25:13 practical 7:1,8,16 12:8 18:3,23 26:2 34:19 54:10,12 practicalities 19:12 practically 19:25 29:10 practice 9:9,21 practices 7:20 14:25 15:10 61:4 prepare 26:4,15 prepared 37:15 presented 52:2 53:24 presents 37:17 preserve 60:10</p> | <p>presumably 26:7 41:9 50:9 presumption 22:17 pretty 10:2 45:7 49:13 pre-prepared 51:2 prick 48:22 print 6:12,13 prior 5:2 priority 27:7 privacy 36:24 probable 10:11,13 10:14,17,18,20,21 23:15 36:1,18 46:17 48:10 56:12 probably 39:7,21 50:8,8 56:11 57:18 probative 4:23 problem 5:6 12:3 31:1 45:25 46:8 50:15,16 55:25 problems 18:3,4,4 procedure 6:2 13:2 procedures 8:6,14 9:2 11:1 26:19,25 47:23 51:21 proceed 15:25 17:25 18:11 30:13 53:4 proceeded 21:16 proceeding 26:3 process 11:8,13 12:9 13:4,5 17:24 28:9 36:21 37:20 41:21,24 50:21 51:23 52:8,22 53:21 57:1,2,15,25 58:4 59:13 60:8 processes 55:8 produce 24:24 39:19 50:13 prohibit 44:19 46:10 prohibited 44:2 prong 43:9 proposed 33:21</p> | <p>44:12 62:5 proposition 36:24 prosecute 41:1 prosecuting 1:15 13:9 51:12 prosecution 10:8 13:19 39:20 48:2 prosecutor 13:11,13 26:5 31:19 37:15 37:17 42:2 52:20 prosecutors 15:6 19:14 37:17 prosecutor's 13:10 protection 11:24,25 51:10 protest 60:17 prove 6:14 provide 29:20 provided 45:5 public 30:17 31:1 pulled 10:23 puncturing 49:5 purposes 49:5 pursuant 48:7,8 put 6:12 7:14 24:24 31:25 32:4,14 38:23 52:4 57:22 putting 37:2 39:2 52:22</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualifies 57:5 quantify 31:20 question 4:11 12:2 14:13 17:10 20:3 27:13 29:5 30:21 33:3,6,9 34:21 38:21 41:17,20 42:11 43:8 44:16 46:19 48:16 52:2 52:15,25 55:6 57:4 57:5 60:23 61:5 questioned 38:4 60:24</p> |
|---|--|--|--|---|

| | | | | |
|---|---|--|--|--|
| <p>questions 15:11 16:3 19:2 31:14 37:24 43:11 62:7 quickly 3:13 5:8 16:4,22 30:10 32:13 33:5 quite 21:1</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 1:21 2:10 3:1 32:21 raised 59:18 raises 25:19 range 15:5 rarely 36:8 rate 5:10 9:20 44:21 rates 46:12 reached 55:9 read 13:21 26:21 53:14 reading 30:3 reaffirmed 50:11 real 28:24 reality 44:6 really 12:5,5 18:19 29:20 34:6,12 35:9 39:4 41:13 46:4 52:4 reason 28:1 29:6,25 46:5,9 52:11 reasonable 5:25 6:2 8:19 15:5,9,25 20:3 21:18 30:8 35:1 40:6,7 44:14 60:15 61:3 reasonableness 5:24 7:19 8:15,23 14:9,18 30:22 40:1 47:12 59:7 reasonably 14:20 22:2 56:18 reasons 7:8,16 rebuttal 2:12 15:14 61:17</p> | <p>receive 19:17 receiving 42:13 recognize 51:20 recognized 22:25 49:6 59:11 60:1 recognizes 46:7 record 26:22 27:20 28:19 33:11 44:17 red 44:4 reduce 35:11 refer 56:21 referred 32:10 refused 30:6 regardless 33:4 Reid 26:23 reject 45:25 rejected 53:2 relatively 51:20,21 relevance 55:17,18 relevant 7:19 reliability 7:3 reliable 7:7 36:14 61:21,22,24 62:1 relied 24:11 rely 7:7 22:12,15,16 remember 34:24 reply 7:24 representative 49:14 requests 36:10 require 8:12 22:8 38:22 required 32:12 33:23 40:18 44:9 requirement 8:4 11:6 35:5,10 39:1 39:3,15,22 44:12 47:10,14,19 50:19 52:6 requires 60:18 require-a-warrant 18:6,7 requiring 39:18 50:13</p> | <p>reserve 15:12 reserved 27:13 resolve 30:5 resolved 58:20 resources 54:17 respect 11:12 17:14 20:6 22:21 29:15 34:10 Respondent 1:22 2:11 7:22 9:25 22:5 32:22 Respondents 18:19 Respondent's 61:23 62:5 response 44:16 55:5 61:4 responses 20:2 34:22 restaurant 55:23 restrained 33:25 49:14 restrictive 21:17 rests 36:23 result 6:17 24:24 49:12 retrograde 58:8,17 reverse 8:1 34:24 review 37:1 Richards 57:7 61:9 right 5:13,20 10:19 12:2 13:13,24 14:18 16:12 17:12 17:13 18:14,22 20:22 24:8 34:16 34:21 37:9 41:19 43:13 52:9,21 53:12 54:14 55:23 56:16,19,23 59:8 ring 19:17 rise 50:18 55:14 risk 27:19,22 47:20 road 38:3 roads 34:13 roadside 25:21</p> | <p>ROBERTS 3:3 13:20 15:13 32:7 32:19 39:5,12 49:8 49:20,25 51:4 55:16,22 56:3 61:14 62:8 role 33:22 rouse 42:2 routine 33:4 44:3,9 46:11 routinely 11:9 routinized 51:21 rubber 14:2 rule 10:6,16 18:19 21:22 27:24 33:21 43:11 44:7 45:14 45:14 46:2 49:1 54:15 61:7,11 62:5 rules 6:16 7:20 9:1 20:3 44:24 ruling 6:9 24:21 runs 59:15 rural 28:3,13 42:1,1 42:8 43:19 54:11</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 safeguards 36:24 safety 31:1 Saharsky 1:17 2:6 15:17,18,21 16:13 16:19 17:4,10,13 17:21 18:2,14,22 20:1,22,25 21:4,8 21:25 22:21 23:11 23:18 24:2,9,19 25:8 26:1,18 27:12 27:25 28:16 29:8 30:20 31:7 32:2,9 salient 40:11,14 43:7 sample 29:12,19,20 43:3 49:10,16 58:12</p> | <p>samples 29:14 Sampson 9:5 satisfy 44:10 saw 35:18 saying 10:12 11:4 11:16 17:22 18:22 23:6 28:16 31:5 41:14 52:8 56:7 57:11 59:18 says 11:19 23:19 38:12 45:22 Scalia 6:23 7:2,6 9:12,18 13:6,16 16:10,15 17:1,5,11 24:7,18 25:19 35:7 36:6,12 39:25 40:5 58:23 59:6 Scalia's 29:5 37:24 scary 49:13 scene 19:1 23:24 26:3,13 41:10 48:11 53:19 54:2,6 54:14,15,18 Schmerber 22:25 23:3,14 24:5,11 27:14 30:7 31:8 41:20 47:8 50:11 53:6,11 54:22 55:4 scrape 59:19 60:1 scrapings 59:17 se 43:11 search 5:25 11:9,13 12:5,9,15,25 13:8 14:1,17 15:7,9 19:5,10,19,24 38:25 39:21 44:14 48:3,3,6,8,14 49:16 50:6,9,9,16 50:19 54:20,20 searches 9:7 second 11:22 20:6 23:15 24:10 26:9 26:13 30:15 34:5 34:11 43:7,23</p> |
|---|---|--|--|--|

| | | | | |
|--|---|---|---|--|
| <p>45:16 51:23 52:16 55:5 Secondly 46:9 60:3 seconds 12:12 second-best 46:21 46:22 47:3 second-guess 26:10 second-guessed 21:12 secure 4:11,21 41:10 securing 3:13 5:6,8 10:5 security 12:4 59:25 see 8:11 11:16 12:11 36:18 45:14 seek 40:19,22 seizure 50:16 self-incrimination 50:15 send 37:8 51:7 sends 37:17 sense 3:25 sent 54:1,5,14 separate 43:8 serious 30:25 41:9 46:8 59:24 60:2 serves 44:12 set 43:11 setting 27:15 Shapiro 1:21 2:10 32:20,21,23 33:9 33:16,19 34:16,20 36:4,7,22 37:13 38:18,21 39:7,17 40:3,9 41:2,18 42:7,19,24 43:4,8 43:14,22 46:3,23 47:5 48:5,25 49:18 49:21 50:7 51:18 51:25 52:14,18 53:11,17 54:4,8,12 55:18 56:2,5,16,23 57:1,13,16 58:10</p> | <p>58:15 59:3,8,14,16 59:21 shoot 61:8 shorter 23:5 shortly 23:21 shoved 6:25 show 29:24 showing 9:19 20:23 shows 9:25 37:20 41:16 side 30:23 34:15 44:25 significant 5:10 8:12 27:9 significantly 41:23 signifying 35:8 signs 22:13 simply 23:5 24:24 34:24 55:3 62:2 simultaneously 18:6 60:16 sit 38:13 situation 22:3,3,15 22:18 23:15 25:9 26:12 27:18 37:4 38:1 42:25 53:25 56:8 57:25 60:13 situations 22:8 57:8 skin 49:5 Skinner 23:1 24:14 slow 57:15 slowest 47:23 slurred 38:5 small 6:7 19:20 smelled 35:22 36:16 sobriety 19:3 27:4 38:2,8,11,17,19 48:12 Solicitor 1:17 49:9 solution 45:23,24,24 46:21,22 47:4 somebody 11:18,23 16:15 19:18 25:21 38:23 39:18 42:5</p> | <p>45:9 49:13 55:10 56:12 59:18 somebody's 7:14 37:2 39:3 48:23 49:2 52:23 someone's 6:3 somewhat 59:1 sorry 55:16 sort 6:12 7:13 19:17 50:1 52:1 sorts 35:19 Sotomayor 3:16,20 3:23 4:5,14,17 5:12,14,18 6:1,15 10:6,10 14:8,16,21 14:22 15:2 22:7 27:10,23 28:12 41:2 51:25 52:15 52:17 55:6 Sotomayor's 52:24 sought 4:10 sound 35:7 sounds 13:2 26:24 sources 16:23 South 24:14 50:11 southeastern 42:8 speaking 48:9 special 41:20 47:9 49:23 53:7,13,16 53:17 specific 34:22,22 40:15 specifically 56:21 speech 38:5 speed 38:4 spend 34:18 51:13 51:15 53:13 staff 32:14 stamp 14:2 stand 38:24 standard 8:24 21:20 25:11 38:17 44:10 47:12 standardized 37:16</p> | <p>51:22 52:19 standards 8:24 60:25 stands 20:12 start 55:14 started 45:19 state 3:17 5:13,19 5:20 8:18 16:6 32:25 37:1,5 39:21 40:16 42:20 44:24 49:15 55:20 58:21 58:21,21 59:13 60:18,25 61:4 States 1:1,12,19 2:7 7:20,22,25 8:4,11 8:12,25 9:1,8,20 9:21 15:19 26:16 26:22 28:1,17,23 32:12 34:9 35:3 44:1,1,18,22 45:1 45:8 46:10 47:16 47:22,24 61:7,10 61:11 State's 39:20 40:25 57:19 58:12 59:9 station 8:9 statute 44:2 staying 19:15 stepped 60:9 STEVEN 1:21 2:10 32:21 stick 25:4 33:1 sticking 25:20 40:6 sticks 29:12 stop 19:2,18 27:3 31:24 56:9 stopped 28:13 38:3 stops 23:21 straight 35:23 36:17 38:13,24 strengthen 10:7 strict 44:23 strive 5:16,19 15:7 strong 19:9 31:12</p> | <p>study 9:24,25 32:10 32:17 subject 48:7,8 58:19 submit 33:24 submitted 62:9,11 submitting 51:14 substantial 16:6 48:19 substantially 29:11 sufficient 11:5 53:4 54:25 sugar 48:21 suggest 14:10,17,18 33:11 47:1 suggested 18:5 21:22 43:18 suggesting 21:13 suggestion 18:11 21:23 suggests 60:7 Sunday 19:16 support 19:4 48:13 48:13,13 61:10 supporting 1:19 2:8 15:20 suppose 8:24,25 9:17 10:25 13:21 30:15 38:11 41:25 42:15,22 56:21 supposed 51:13,14 suppression 19:11 34:25 40:18 48:4,8 Supreme 1:1,12 8:1 sure 20:14 22:3 27:25 28:10 41:12 47:6 52:4,17,20 surely 10:17 50:5 susceptible 29:15 suspect 18:24 31:11 57:9 58:3,4 suspected 38:12 suspended 10:8 suspicion 33:2 suspicion-less 9:7</p> |
|--|---|---|---|--|

| | | | | |
|--|---|--|--|--|
| <p>system 12:17 23:22 58:2</p> | <p>30:2,4,22 31:9 35:23 38:2,6,9,11 38:17,19 39:11,14 39:24 41:5 43:13 45:11,23 47:11 48:12,17,21,24 59:20 61:20</p> | <p>46:20,22 48:15 49:1,3,7,12 50:7,7 50:8 51:18 52:3,25 52:25 53:17 54:12 54:18 59:3,22 60:23</p> | <p>traffic 19:2 trained 12:20 28:2 training 28:9,20 Transportation 28:23 trial 10:5 tried 32:12,14 trigger 39:21 triggers 39:1,3 trooper 40:16 troubled 41:3 true 4:16 14:6 16:5 16:14 28:1,10 36:7 48:1 55:7,19,19 59:4,5 60:23 try 12:21 17:22 25:24 26:12 45:19 turn 35:23 turned 36:2,3,8 turns 26:25 49:1 twice 33:15,19 two 4:21 8:13 11:1 23:10,12 26:1 29:13 31:17,24,24 32:3,5,16 34:21 35:17 39:4 40:11 40:14 43:20 46:13 53:1,19 TYLER 1:6 typical 57:2,6 typically 18:25 26:2 26:5</p> | <p>51:5 understanding 21:25 uniform 21:20,22 United 1:1,12,19 2:7 15:19 26:22 35:3 unjustified 27:18 unnecessary 53:7 unreasonable 51:17 51:19 54:18 unreceptive 42:13 unreliable 58:9 unworkable 62:6 urging 7:25 35:4 urine 49:10,16 use 6:6,8,13 21:17 22:11 25:23 usually 8:7 11:18</p> |
| <hr/> | | | | |
| T | | | | |
| <p>T 2:1,1</p> | <p>testified 3:20 testifies 40:17,22 testify 4:18 testimony 4:7 22:15 testing 49:22 tests 6:7,8 7:6 texting 26:7 Thank 3:9 15:16 32:18,19 61:13,14 61:19 62:8 theory 41:13 thing 20:13 22:14 24:3,4 27:16 30:16 34:2 35:21 36:16 44:25 51:7 55:5 56:25 things 12:20 16:12 16:17 20:13 46:4 49:12 51:16 59:22 think 3:23 5:15 6:6 6:17 7:19 8:2,17 8:22 9:4,8,23 10:1 10:11,15 11:7,10 11:11,13 12:2,7 13:25 14:4 15:6 16:13,19 18:2,2,23 19:7 20:10 21:1,4 21:8 22:1 23:10,13 25:9,15 26:1,14 27:12,20 28:18 29:4 30:22 31:12 32:3 34:21,23 35:6 35:9 36:7 37:11,19 38:22 39:4,7,17,17 40:11 41:19,20 42:20,24,25 43:4 43:17,21 44:6 46:9</p> | <p>thinks 56:14 thought 8:23 13:22 20:17,17 32:8 33:6 58:23,23 three 46:15 58:12 59:21 61:16 three-fourths 18:17 time 4:7,13,15,22 13:5 15:12,14 16:8 16:24 17:18 20:7 20:11,21 21:2,7,9 22:9 23:9,23 25:23 25:24 27:2,3,5 31:14,23,24,25 34:18 42:2,6 45:20 51:13,15 52:7 53:3 53:13,21 55:8,11 59:15 60:9 61:20 61:25 62:2 timely 37:22 46:15 46:15 times 33:18 40:19 59:11 time-consuming 11:13 12:9 tiny 48:22 today 6:9 21:13 toilet 20:20 56:13 57:10,23 told 6:20 7:13 23:19 total 32:3,6 57:24 totality 17:11,13 41:4 43:12 47:10 54:21 touch 31:19 35:24 touchstone 5:23 tough 45:8 towed 41:11</p> | <p>traffic 19:2 trained 12:20 28:2 training 28:9,20 Transportation 28:23 trial 10:5 tried 32:12,14 trigger 39:21 triggers 39:1,3 trooper 40:16 troubled 41:3 true 4:16 14:6 16:5 16:14 28:1,10 36:7 48:1 55:7,19,19 59:4,5 60:23 try 12:21 17:22 25:24 26:12 45:19 turn 35:23 turned 36:2,3,8 turns 26:25 49:1 twice 33:15,19 two 4:21 8:13 11:1 23:10,12 26:1 29:13 31:17,24,24 32:3,5,16 34:21 35:17 39:4 40:11 40:14 43:20 46:13 53:1,19 TYLER 1:6 typical 57:2,6 typically 18:25 26:2 26:5</p> | <p>understanding 21:25 uniform 21:20,22 United 1:1,12,19 2:7 15:19 26:22 35:3 unjustified 27:18 unnecessary 53:7 unreasonable 51:17 51:19 54:18 unreceptive 42:13 unreliable 58:9 unworkable 62:6 urging 7:25 35:4 urine 49:10,16 use 6:6,8,13 21:17 22:11 25:23 usually 8:7 11:18</p> |
| <hr/> | | | | |
| V | | | | |
| <p>v 1:5 3:5 8:17 9:5 21:14 24:14,14,15 26:23 50:12 54:23 57:7,7 59:23 60:12 61:1,6,9 value 51:23,24 52:20 59:25 variation 16:7 variety 49:21 various 58:18 vary 14:25 15:3,4 varying 44:23 vast 9:8 vastly 22:20 view 47:3 49:12 violates 9:10 violation 58:25 59:1 Virginia 8:17 61:1 virtue 11:16 12:19</p> | <p>testified 3:20 testifies 40:17,22 testify 4:18 testimony 4:7 22:15 testing 49:22 tests 6:7,8 7:6 texting 26:7 Thank 3:9 15:16 32:18,19 61:13,14 61:19 62:8 theory 41:13 thing 20:13 22:14 24:3,4 27:16 30:16 34:2 35:21 36:16 44:25 51:7 55:5 56:25 things 12:20 16:12 16:17 20:13 46:4 49:12 51:16 59:22 think 3:23 5:15 6:6 6:17 7:19 8:2,17 8:22 9:4,8,23 10:1 10:11,15 11:7,10 11:11,13 12:2,7 13:25 14:4 15:6 16:13,19 18:2,2,23 19:7 20:10 21:1,4 21:8 22:1 23:10,13 25:9,15 26:1,14 27:12,20 28:18 29:4 30:22 31:12 32:3 34:21,23 35:6 35:9 36:7 37:11,19 38:22 39:4,7,17,17 40:11 41:19,20 42:20,24,25 43:4 43:17,21 44:6 46:9</p> | <p>thinks 56:14 thought 8:23 13:22 20:17,17 32:8 33:6 58:23,23 three 46:15 58:12 59:21 61:16 three-fourths 18:17 time 4:7,13,15,22 13:5 15:12,14 16:8 16:24 17:18 20:7 20:11,21 21:2,7,9 22:9 23:9,23 25:23 25:24 27:2,3,5 31:14,23,24,25 34:18 42:2,6 45:20 51:13,15 52:7 53:3 53:13,21 55:8,11 59:15 60:9 61:20 61:25 62:2 timely 37:22 46:15 46:15 times 33:18 40:19 59:11 time-consuming 11:13 12:9 tiny 48:22 today 6:9 21:13 toilet 20:20 56:13 57:10,23 told 6:20 7:13 23:19 total 32:3,6 57:24 totality 17:11,13 41:4 43:12 47:10 54:21 touch 31:19 35:24 touchstone 5:23 tough 45:8 towed 41:11</p> | <p>traffic 19:2 trained 12:20 28:2 training 28:9,20 Transportation 28:23 trial 10:5 tried 32:12,14 trigger 39:21 triggers 39:1,3 trooper 40:16 troubled 41:3 true 4:16 14:6 16:5 16:14 28:1,10 36:7 48:1 55:7,19,19 59:4,5 60:23 try 12:21 17:22 25:24 26:12 45:19 turn 35:23 turned 36:2,3,8 turns 26:25 49:1 twice 33:15,19 two 4:21 8:13 11:1 23:10,12 26:1 29:13 31:17,24,24 32:3,5,16 34:21 35:17 39:4 40:11 40:14 43:20 46:13 53:1,19 TYLER 1:6 typical 57:2,6 typically 18:25 26:2 26:5</p> | <p>understanding 21:25 uniform 21:20,22 United 1:1,12,19 2:7 15:19 26:22 35:3 unjustified 27:18 unnecessary 53:7 unreasonable 51:17 51:19 54:18 unreceptive 42:13 unreliable 58:9 unworkable 62:6 urging 7:25 35:4 urine 49:10,16 use 6:6,8,13 21:17 22:11 25:23 usually 8:7 11:18</p> |
| <hr/> | | | | |
| U | | | | |
| <p>unavailable 42:23 43:5 uncertainty 17:17 24:5 unconstitutional 9:16 underage 30:17 undermines 52:9 understand 4:5 61:2 understandable</p> | <p>testified 3:20 testifies 40:17,22 testify 4:18 testimony 4:7 22:15 testing 49:22 tests 6:7,8 7:6 texting 26:7 Thank 3:9 15:16 32:18,19 61:13,14 61:19 62:8 theory 41:13 thing 20:13 22:14 24:3,4 27:16 30:16 34:2 35:21 36:16 44:25 51:7 55:5 56:25 things 12:20 16:12 16:17 20:13 46:4 49:12 51:16 59:22 think 3:23 5:15 6:6 6:17 7:19 8:2,17 8:22 9:4,8,23 10:1 10:11,15 11:7,10 11:11,13 12:2,7 13:25 14:4 15:6 16:13,19 18:2,2,23 19:7 20:10 21:1,4 21:8 22:1 23:10,13 25:9,15 26:1,14 27:12,20 28:18 29:4 30:22 31:12 32:3 34:21,23 35:6 35:9 36:7 37:11,19 38:22 39:4,7,17,17 40:11 41:19,20 42:20,24,25 43:4 43:17,21 44:6 46:9</p> | <p>thinks 56:14 thought 8:23 13:22 20:17,17 32:8 33:6 58:23,23 three 46:15 58:12 59:21 61:16 three-fourths 18:17 time 4:7,13,15,22 13:5 15:12,14 16:8 16:24 17:18 20:7 20:11,21 21:2,7,9 22:9 23:9,23 25:23 25:24 27:2,3,5 31:14,23,24,25 34:18 42:2,6 45:20 51:13,15 52:7 53:3 53:13,21 55:8,11 59:15 60:9 61:20 61:25 62:2 timely 37:22 46:15 46:15 times 33:18 40:19 59:11 time-consuming 11:13 12:9 tiny 48:22 today 6:9 21:13 toilet 20:20 56:13 57:10,23 told 6:20 7:13 23:19 total 32:3,6 57:24 totality 17:11,13 41:4 43:12 47:10 54:21 touch 31:19 35:24 touchstone 5:23 tough 45:8 towed 41:11</p> | <p>traffic 19:2 trained 12:20 28:2 training 28:9,20 Transportation 28:23 trial 10:5 tried 32:12,14 trigger 39:21 triggers 39:1,3 trooper 40:16 troubled 41:3 true 4:16 14:6 16:5 16:14 28:1,10 36:7 48:1 55:7,19,19 59:4,5 60:23 try 12:21 17:22 25:24 26:12 45:19 turn 35:23 turned 36:2,3,8 turns 26:25 49:1 twice 33:15,19 two 4:21 8:13 11:1 23:10,12 26:1 29:13 31:17,24,24 32:3,5,16 34:21 35:17 39:4 40:11 40:14 43:20 46:13 53:1,19 TYLER 1:6 typical 57:2,6 typically 18:25 26:2 26:5</p> | <p>understanding 21:25 uniform 21:20,22 United 1:1,12,19 2:7 15:19 26:22 35:3 unjustified 27:18 unnecessary 53:7 unreasonable 51:17 51:19 54:18 unreceptive 42:13 unreliable 58:9 unworkable 62:6 urging 7:25 35:4 urine 49:10,16 use 6:6,8,13 21:17 22:11 25:23 usually 8:7 11:18</p> |
| <hr/> | | | | |
| W | | | | |
| <p>wagon 24:25 wait 18:17 28:18 waiting 11:1 19:16</p> | <p>testified 3:20 testifies 40:17,22 testify 4:18 testimony 4:7 22:15 testing 49:22 tests 6:7,8 7:6 texting 26:7 Thank 3:9 15:16 32:18,19 61:13,14 61:19 62:8 theory 41:13 thing 20:13 22:14 24:3,4 27:16 30:16 34:2 35:21 36:16 44:25 51:7 55:5 56:25 things 12:20 16:12 16:17 20:13 46:4 49:12 51:16 59:22 think 3:23 5:15 6:6 6:17 7:19 8:2,17 8:22 9:4,8,23 10:1 10:11,15 11:7,10 11:11,13 12:2,7 13:25 14:4 15:6 16:13,19 18:2,2,23 19:7 20:10 21:1,4 21:8 22:1 23:10,13 25:9,15 26:1,14 27:12,20 28:18 29:4 30:22 31:12 32:3 34:21,23 35:6 35:9 36:7 37:11,19 38:22 39:4,7,17,17 40:11 41:19,20 42:20,24,25 43:4 43:17,21 44:6 46:9</p> | <p>thinks 56:14 thought 8:23 13:22 20:17,17 32:8 33:6 58:23,23 three 46:15 58:12 59:21 61:16 three-fourths 18:17 time 4:7,13,15,22 13:5 15:12,14 16:8 16:24 17:18 20:7 20:11,21 21:2,7,9 22:9 23:9,23 25:23 25:24 27:2,3,5 31:14,23,24,25 34:18 42:2,6 45:20 51:13,15 52:7 53:3 53:13,21 55:8,11 59:15 60:9 61:20 61:25 62:2 timely 37:22 46:15 46:15 times 33:18 40:19 59:11 time-consuming 11:13 12:9 tiny 48:22 today 6:9 21:13 toilet 20:20 56:13 57:10,23 told 6:20 7:13 23:19 total 32:3,6 57:24 totality 17:11,13 41:4 43:12 47:10 54:21 touch 31:19 35:24 touchstone 5:23 tough 45:8 towed 41:11</p> | <p>traffic 19:2 trained 12:20 28:2 training 28:9,20 Transportation 28:23 trial 10:5 tried 32:12,14 trigger 39:21 triggers 39:1,3 trooper 40:16 troubled 41:3 true 4:16 14:6 16:5 16:14 28:1,10 36:7 48:1 55:7,19,19 59:4,5 60:23 try 12:21 17:22 25:24 26:12 45:19 turn 35:23 turned 36:2,3,8 turns 26:25 49:1 twice 33:15,19 two 4:21 8:13 11:1 23:10,12 26:1 29:13 31:17,24,24 32:3,5,16 34:21 35:17 39:4 40:11 40:14 43:20 46:13 53:1,19 TYLER 1:6 typical 57:2,6 typically 18:25 26:2 26:5</p> | <p>understanding 21:25 uniform 21:20,22 United 1:1,12,19 2:7 15:19 26:22 35:3 unjustified 27:18 unnecessary 53:7 unreasonable 51:17 51:19 54:18 unreceptive 42:13 unreliable 58:9 unworkable 62:6 urging 7:25 35:4 urine 49:10,16 use 6:6,8,13 21:17 22:11 25:23 usually 8:7 11:18</p> |

| | | | |
|--|---|--|-----------------------|
| <p>27:8 walk 35:23 36:17 38:13,23 want 5:19 11:21 13:21 18:9,19 26:7 28:7,12 29:22 30:3 38:6 40:2,3,4,9 44:23 46:20,25 47:1,3 wanted43:23 wants 19:18,19 warrantless 7:23 29:6 30:3 35:2 40:14 42:17 43:3 44:2,13,19 46:10 48:3 54:25 warrants 8:6 9:1 11:9,14 13:1 14:1 15:7 16:4,21 18:25 19:9 21:9 31:15 32:12 35:13 36:2,8 40:24 44:9 46:14 46:16 50:24,25 51:6 Washington 1:8,18 wasn't 23:10 24:4 31:22 way 6:13 21:12,17 24:25 28:2 40:25 45:18 50:18 ways 21:16 Wednesday 1:9 weeks 35:17 weighing 17:17 31:6 Welsh54:23 went 61:12 weren't 12:1 49:23 we'll 3:3 61:15 we're 5:8,8 10:12 18:16 25:1,2,3,3 31:1 50:14,15,20 54:15 60:10 61:24 we've 31:2 whatnot 36:17</p> | <p>willing 25:9 45:25 56:6 Winston 24:14 Wisconsin 54:23 57:7 61:9 wish34:18 witnessing 17:15 19:5 wobbling 11:20 12:1 woman 12:18,19 wonder47:2 wondering 14:11 words 4:4 work 8:5 world 16:4,6,19 54:11 worried57:8 worries 44:25 worth 34:12 wouldn't 12:10 17:8 25:13 30:18 50:19 write 26:20 written26:15,20 wrong 8:22</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year45:10 years 3:21 4:15 16:16,17 40:17,22 yesterday 35:18 York 1:21,21 42:5</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero 30:2</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>08 20:15 25:10 30:12</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 31:23 10 16:16,17 38:4</p> | <p>10:14 1:13 3:2 11-1425 1:4 3:4 11:15 62:10 15 2:7 7:24 11:4,10 14:10 16:9 25:11 30:12 45:3 17 40:17,22 1970s 13:1</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>20 8:7 11:4 14:10 25:2 2003 4:3 2005 23:2 2013 1:9 24 45:9 25 7:22 44:18 47:16 26 44:1</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 12:14 13:22 14:1 31:3 3:00 19:15 42:2 30 12:12 18:21 31 44:4 32 2:11 37 32:17</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>40 8:24,25 45 18:13</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 12:22 51 31:2 54 31:18</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>61 2:14</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>70 32:3</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9 1:9 44:4</p> | <p>90 4:21</p> |
|--|---|--|-----------------------|