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IN THE SUPREME COURT OF THE UNITED STATES

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ILLINOIS, :

Petitioner :

v. : No. 02-1060

ROBERT S. LIDSTER :

- - - - -X

Washington, D. C.

Wednesday, November 5, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

GARY FEINERMAN, ESQ., Solicitor General of Illinois, Chicago, Illinois; on behalf of the Petitioner.

PATRICIA A. MILLETT, ESQ., Assistant Solicitor General, Department of Justice, Washington, D. C.; as amicus curiae, supporting the Petitioner.

DONALD J. RAMSELL, ESQ., Wheaton, Illinois; on behalf of the Respondent.

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1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in No. 20 - 02-1060, Illinois v. Robert S. Lidster.  
5 Mr. Feinerman.

6 ORAL ARGUMENT OF GARY FEINERMAN  
7 ON BEHALF OF THE PETITIONER

8 MR. FEINERMAN: Thank you, Mr. Chief Justice, and  
9 may it please the Court:

10 A Lombard informational checkpoint was designed  
11 to find witnesses to a specific known crime. The  
12 principal question here is whether the checkpoint is per  
13 se invalid under the Fourth Amendment or whether it's  
14 governed by the Brown balancing test. Now, the touchstone  
15 of the Fourth Amendment is reasonableness, which generally  
16 is measured by balancing the Government interest advanced  
17 by a seizure against the intrusion on the individual and  
18 this Court has held that road - roadway checkpoints,  
19 including those that serve a law enforcement purpose, are  
20 governed by the balancing factors set forth in Brown v.  
21 Texas.

22 Now, in Edmond, an exception was carved for a  
23 certain category of law enforcement checkpoints, those  
24 that are designed to advance the general interest in crime  
25 control. The Court held in Edmond that crime control

1 checkpoints are not subject to a balancing analysis, but  
2 rather are per se invalid. The Illinois Supreme Court in  
3 this case held that informational checkpoints, including  
4 the Lombard checkpoint here, fall within that general  
5 crime control exception. That was an error. Per se  
6 invalidity under the Fourth Amendment is very strong  
7 medicine and ought to be reserved for exceptional  
8 circumstances, and those circumstances -

9 QUESTION: Well, I suppose we'd have to decide  
10 here not only whether it was per se invalid, but whether  
11 it was reasonable under any other standard.

12 MR. FEINERMAN: That's correct, Justice O'Connor.

13 QUESTION: And let me ask you, is it often that  
14 roadblocks are set up just to get information like this?

15 MR. FEINERMAN: I - I would rely on the amicus  
16 briefs submitted by the Illinois Association of Chiefs of  
17 Police and the Major Cities Chiefs Association, and they -  
18 they have informed the Court that roadblocks are not used  
19 frequently, rather they are used judiciously in order to  
20 solve certain -

21 QUESTION: This was a little odd. It was a week  
22 later?

23 MR. FEINERMAN: It was a week later, but there  
24 was a very good reason why the checkpoint was set up at  
25 that particular place and at that particular time. There

1 was a fatal hit-and-run accident at about midnight on a  
2 Friday night. There were no witnesses, at least  
3 pedestrian witnesses, and the Lombard police reasonably  
4 concluded that, because people's driving habits, or at  
5 least some people's driving habits might be regular, that  
6 some of the drivers that were there on the night in  
7 question would also be driving the same route at the same  
8 time at the same place one week later, and we -

9           QUESTION: The - the - you - you said that they  
10 had to be used judiciously and that's a good word, but our  
11 - do our precedents in this area generally say, well, we  
12 defer to the good judgement of the police, they won't use  
13 them too often. The Illinois Supreme Court said, oh, if  
14 we allow this, we're going to have roadblocks every other  
15 - every day, every other street and in part that's  
16 hyperbole, but on the other hand, it does caution us that  
17 there should be some limiting principle and I just don't  
18 know if our precedents would support us in adopting your  
19 word, oh, if it's used judiciously.

20           MR. FEINERMAN: Well, it's used judiciously for a  
21 number of reasons. One are the resource limitations.  
22 These kinds of roadblocks are very resource-intensive.  
23 There's also the prudential limits that the police  
24 departments place upon themselves. They don't want to  
25 appear too intrusive to the public and this is a - a minor

1 inconvenience and the -

2 QUESTION: What if that isn't enough? What if  
3 they - they're squandering their resources? You have a  
4 dumb police chief who's - who's using most of his  
5 resources in fruitless roadblocks. What do we do then?

6 MR. FEINERMAN: Then the courts step in and apply  
7 the Brown reasonableness factors.

8 QUESTION: Well, what - that's what I'm asking.  
9 What makes this reasonable that wouldn't make other ones  
10 reasonable? What would be unreasonable? A - a general  
11 roadblock asking about general crime - you know, sir, have  
12 you seen any crime committed in the last 6 months,  
13 something like that? Would that be -

14 MR. FEINERMAN: That would be closer - that would  
15 be closer to the situation that was presented in Edmond,  
16 although it wouldn't - it wouldn't present one of the  
17 hallmarks of what we believe is a general crime control  
18 roadblock, which is that it's the goal of the police to  
19 incriminate the motorists as opposed to simply seek  
20 information.

21 QUESTION: No, it wouldn't - it wouldn't come  
22 within that, but you think that that would - would be  
23 invalid even though you would support these informational  
24 roadblocks in some circumstances?

25 MR. FEINERMAN: That - that question, of course,

1 isn't presented here, but I - I -

2 QUESTION: No kidding.

3 MR. FEINERMAN: - I understand, but our - I - I  
4 suppose we would say that such roadblocks should not be  
5 declared per se invalid under the Fourth Amendment, but  
6 rather they ought to be subject to the Brown balancing  
7 test.

8 QUESTION: You going to answer my question?  
9 Would that one be invalid or not?

10 MR. FEINERMAN: It would depend upon the  
11 circumstances. We could -

12 QUESTION: I gave you the circumstances. It's a  
13 general roadblock. They stop everybody who comes along  
14 simply for the purpose of asking, sir or madam, have you  
15 seen a crime committed within the last 6 months?

16 MR. FEINERMAN: I think there - there would be -  
17

18 QUESTION: What other circumstances do you need?  
19 Whether it's raining or not?

20 MR. FEINERMAN: No.

21 QUESTION: Okay. Now, can you give me -

22 MR. FEINERMAN: I can't -

23 QUESTION: - a yes or no? Is that good or bad?

24 MR. FEINERMAN: It's, in my most instances it  
25 would be bad, but -

1 QUESTION: Okay.

2 MR. FEINERMAN: - I - I don't know if we could  
3 foreclose the possibility that there might be some  
4 circumstances were such a roadblock would be reasonable.  
5 For example, let's assume that in - in some area of some  
6 city that there's just rapid lawlessness because of a  
7 blackout or whatever and there are hundreds of crimes  
8 committed and the police might want to canvass the  
9 neighborhood but nobody wants to be seen talking to a  
10 police officer. So in that instance perhaps a roadblock  
11 would be set up where the police would hand each motorist  
12 a piece of paper saying, you don't have to talk to me now  
13 but here's a number, and if you know of anything that had  
14 happened that was unlawful, please feel free to give us a  
15 call, we'll maintain our confidentiality.

16 QUESTION: Well, what - what about -

17 QUESTION: Mr. -

18 QUESTION: - a road - roadblock that you find in  
19 perhaps some smaller towns where the police just very  
20 briefly stop you and ask you to contribute to the police  
21 boys fund.

22 MR. FEINERMAN: I'm - I'm not sure that would be  
23 a - a crime control roadblock.

24 QUESTION: I don't think it is.

25 (Laughter.)



1           MR. FEINERMAN: That - that perhaps would be  
2 valid and now it would be a better practice, of course, if  
3 the police were to simply approach cars that were stopped  
4 at a stoplight or a stop sign or a tollbooth.

5           QUESTION: If you had that kind of a roadblock  
6 and one of the drivers just about ran into the policeman,  
7 do you think that the court - the courts would entertain  
8 the argument that, well, the initial stop was invalid,  
9 therefore running into the policeman - it cannot be  
10 grounds for the arrest? I - it's just a clumsy way of  
11 asking, I guess, whether - whether or not there is any  
12 kind of a causation break here, causation link problem.

13          MR. FEINERMAN: Yeah, we - that - that argument  
14 perhaps could be made below but it wasn't, and as this  
15 case comes to this Court, the assumption is that if - if  
16 the roadblock were invalid under the Fourth Amendment,  
17 then the subsequent arrest would be as well. Even though  
18 the - the - Mr. Lidster almost running into the police  
19 officer did provide cause, that question's not presented  
20 here.

21          QUESTION: Mr. Feinerman, may I go back to your  
22 own hypothetical of a moment ago in which this crime has  
23 been committed, people don't want to be seen talking to  
24 the police, so the police might set up a roadblock under  
25 those circumstances. What about the same situation in

1 which the police say - and I suppose it would be  
2 reasonable in your hypo that they need to talk to a lot  
3 more people than simply the ones who were driving in cars  
4 - on your reasoning, could the police, in effect, cordon  
5 off sidewalks so that any pedestrian coming down the  
6 sidewalk would have to pass through sort of a chute at the  
7 end and could not get through with stopping to talk to the  
8 police officer and answer questions in order to get  
9 through?

10 MR. FEINERMAN: No, Justice Souter, because  
11 pedestrians have greater Fourth Amendment rights than  
12 motorists.

13 QUESTION: Well, they - they - they do in the  
14 sense that we - we recognize certain rights to stop the  
15 motorist because of the regulated nature and the highly  
16 dangerous nature of the - of the driving enterprise. But  
17 here we're talking about stops which bear absolutely no  
18 relation to the regulation of motor vehicles. The only  
19 reason for the stop in the case that you're defending, and  
20 the only reason for the stop in my hypo is that there may  
21 be an opportunity to gather evidence from a citizen who  
22 won't come forward but would answer a question. So it  
23 seems to me that the difference between cars and  
24 pedestrians has nothing to do with the - the - the answer  
25 to my question. Am I wrong there?

1           MR. FEINERMAN: I believe so, Your Honor, with  
2 respect. It would be permissible with motorists. It  
3 wouldn't be permissible with pedestrians because motorists  
4 do not have the same expectation of freedom of movement  
5 that pedestrians do.

6           QUESTION: No, but the - no, but the  
7 justification for interfering with their freedom of  
8 movement is not the justification that's involved in this  
9 stop. You're not looking for impaired motorists. You're  
10 not checking licenses and registrations. You're simply  
11 stopping motorists because they might have seen a crime,  
12 and in the extension of your hypo I'm talking about the  
13 pedestrian who might have seen a crime or have some  
14 evidence of it. They're in exactly the same situation.  
15 If you can stop the cars, why can't you stop the  
16 pedestrians?

17           MR. FEINERMAN: Again, I - I just have to rely on  
18 my prior answer. It's because this Court has held that in  
19 certain - in certain situations, suspicionless roadway  
20 stops are permissible, or at least subject - potentially  
21 permissible and subject to the Brown balancing test.

22           QUESTION: Does one have a - in - is it - a  
23 greater sense of privacy walking down a main thoroughfare  
24 than being in a car? I understand the distinction between  
25 a home or an office, but you're out there on the street

1 and the police could make - could - the police could go to  
2 any particular pedestrian and say, could you tell me if  
3 you know anything about X crime that was committed in this  
4 neighborhood and the police could do that?

5 MR. FEINERMAN: That's correct. The police can  
6 walk up to any pedestrian and ask questions and that's not  
7 a seizure under the Fourth Amendment.

8 QUESTION: Can they make the pedestrian stop? I  
9 mean, I'm walking along, the police says, excuse me, sir,  
10 can I ask - I say, no, I'm too busy, and I keep walking.

11 MR. FEINERMAN: No.

12 QUESTION: Can they arrest me for keeping on  
13 walking?

14 MR. FEINERMAN: No. That's Brown v. Texas. The  
15 police cannot do that, but -

16 QUESTION: So why can they do it with a car? Is  
17 that what happened here? Suppose this car were in first  
18 gear as it cruised, you know, rolled up to the roadblock  
19 and the same thing happened, the policeman said, I want to  
20 ask you, you know, sir, I'd like to ask you a question.  
21 I'm sorry, I'm too busy, just keeps rolling on through.  
22 Would - would he have been arrested in this roadblock?

23 MR. FEINERMAN: If - if he's - if he rolled on  
24 through and - or - or if he stopped and said, I don't like  
25 - I don't want to -

1                   QUESTION: He didn't stop at all. He kept  
2 rolling at a very slow speed and he just told the  
3 policeman, I'm sorry, I'm too busy.

4                   MR. FEINERMAN: The - the record doesn't reflect  
5 whether any such instances happened and that would be a  
6 close -

7                   QUESTION: He'd be arrested, let's - he'd be  
8 arrested pretty -

9                   MR. FEINERMAN: Perhaps he would be arrested for  
10 not following -

11                   (Laughter.)

12                   MR. FEINERMAN: Perhaps he would be arrested for  
13 not following the police officer's -

14                   QUESTION: Well, now -

15                   MR. FEINERMAN: - instruction, but really the -

16                   QUESTION: Do - do you think he could do the same  
17 thing with a - with a pedestrian?

18                   MR. FEINERMAN: No, no. And that's Brown v.  
19 Texas. Pedestrians cannot be seized for this purpose and  
20 that this -

21                   QUESTION: Well, now, in the Edmonds case, the  
22 Court opinion said that under exigent circumstances there  
23 could be some kind of a - an appropriately tailored  
24 roadblock. Do you take the position that trying to find a  
25 witness was some kind of an exigent circumstance here?

1           MR. FEINERMAN: No. Our position is not that  
2 there are exigent circumstances. Our position is that  
3 this is not a general crime control roadblock. A crime -

4  
5           QUESTION: When you make your balance under  
6 Brown, do you - does the time that it takes to answer the  
7 officer's inquiry the relevant factor or the time you have  
8 to wait in line if there's a big - it's a crowded street,  
9 you know, they - you cause a traffic jam, you have to wait  
10 20 minutes?

11           MR. FEINERMAN: It's our position that it's only  
12 the time that - of the police-motorist encounter.

13           QUESTION: So that even if in fact the delay  
14 caused the - a bunch of people a half hour's delay, that  
15 would be irrelevant?

16           MR. FEINERMAN: In - in our - we - we - if - were  
17 that question presented, we would say that that's  
18 irrelevant because that's simply endemic. That's just a  
19 byproduct of driving.

20           QUESTION: It's a byproduct of the seizure of one  
21 person that you got to wait - wait in turn to be seized  
22 yourself.

23           MR. FEINERMAN: That's true, and - but what's -  
24 the reason why - the police don't want there to be a line.  
25 The police just want to talk to each motorist as they're

1 driving by.

2 QUESTION: No, but if - if you're on a busy  
3 street, as they were in - in - I forget which suburb of  
4 Chicago this was -

5 QUESTION: Lombard.

6 QUESTION: - in Lombard, you're gonna - you're  
7 gonna tie up traffic for a while.

8 MR. FEINERMAN: Yeah, I should mention - I should  
9 mention that Mr. Lidster at his trial, at page 47 of the  
10 transcript, testified that there were only three cars in  
11 front of him. So he was stopped really for - at most only  
12 a minute, which is permissible. But were there a case as  
13 in your hypothetical where a motorist were stopped for a  
14 half an hour, we would still say that that waiting time  
15 doesn't count because that's really more a function of the  
16 number of vehicles on the street and it's not really - it  
17 was not intended by the officer that there be this backup.

18 QUESTION: I - I suppose part of the  
19 reasonableness inquiry has to be what alternatives were  
20 available to achieve the same objective. And why couldn't  
21 the police just have had a big sign on the side of the  
22 road, one of those, you know, illuminated signs that they  
23 have now, which said, you know, please help us, looking  
24 for hit-and-run -

25 MR. FEINERMAN: It -

1           QUESTION: - last week, something like that. And  
2 then those people who are willing to cooperate could pull  
3 over and cooperate and those - those who want to have  
4 nothing to do with it can keep on moving.

5           MR. FEINERMAN: That would be possible, but this  
6 Court has said very clearly that a less restrictive means  
7 test is not to be applied under the second Brown factor.

8           QUESTION: I'm not applying the least - least  
9 restrictive means test, but surely one of the - one of the  
10 factors in determining whether this was reasonable is  
11 whether you could have done - achieved the same objective  
12 in - in some other manner.

13          MR. FEINERMAN: That's correct. That is a factor  
14 and - but these kinds of signs or billboards, it isn't  
15 like it just says, drink Budweiser or fly United Airlines,  
16 there's a lot of information on there, and if these cars  
17 are -

18          QUESTION: It might distract drivers if - if a  
19 big sign on the road - on the highway when you're supposed  
20 to be looking at the road. That might be a reason, but  
21 there's a - there's an aspect of this, you've repeated the  
22 police many times, and one of the worrisome things of this  
23 set-up is all you need is a crime, and in major  
24 metropolitan areas there are crimes, multiple crimes every  
25 day. Who makes the decision? The local police chief.



1 And then after some, you can get into court. It's - it's  
2 not like the law dictates this or even the State's  
3 Attorney General, but it's in every town, the local police  
4 chief that may have just a range of views about using  
5 roadblocks.

6 MR. FEINERMAN: That - that's what the Brown  
7 balancing test is there for. It's there to determine what  
8 kinds of stops are reasonable and which one aren't. Now,  
9 if there are some circumstances where we can imagine that  
10 we'd want to have this kind of informational checkpoint,  
11 then a - and that's really the principal question here.  
12 There ought not to be a per se rule, because there are  
13 some situations, and we submit that this is one of them,  
14 where it makes perfect sense for the police to set up a  
15 roadblock because the physical evidence recovered from the  
16 scene was not sufficient to identify the perpetrator, and  
17 the only witnesses to the crime were fellow motorists, and  
18 there was really only one way our - there wasn't only one  
19 way, but this was a very good way of getting at them. And  
20 if there are circumstances where we can imagine that we'd  
21 want to enable the police to solve crimes in this manner,  
22 then a per se rule is invalid. It ought to go through  
23 Brown balancing.

24 QUESTION: You - you mentioned that this is a  
25 good way to get at the people you want to get to. Is

1 there any indication that there - anything of value was  
2 obtained in the investigation of this crime in this  
3 particular roadblock, or do you have any information  
4 across the - from - from broader statistics across the  
5 nation about the effectiveness of doing this?

6 MR. FEINERMAN: I have no statistics from across  
7 the nation and I'd have to go outside the record to answer  
8 your question. The Lombard police asked the local news to  
9 actually cover the roadblock, which they did, and somebody  
10 who was watching the local news realized that a gentleman  
11 in her apartment complex had recently had damage to the  
12 right headlight of his F-150 and called -

13 QUESTION: If - if the police had - if the police  
14 had asked the local news to - to broadcast a 2-minute clip  
15 of a police officer saying, we're having trouble finding  
16 the perpetrator of this crime, please come forward,  
17 wouldn't that have gotten the same result?

18 MR. FEINERMAN: Well, we have to -

19 QUESTION: They wouldn't have done it, but I mean  
20 -

21 MR. FEINERMAN: They may not have done that. If  
22 - if there are no further -

23 QUESTION: - a roadblock is much more fun to  
24 cover.

25 (Laughter.)

1                   MR. FEINERMAN: Justice Scalia makes a good  
2 point, and I'd like to reserve the remainder of my time.

3                   QUESTION: Very well, Mr. Feinerman.

4                   MS. MILLETT, we'll hear from you.

5 ORAL ARGUMENT OF PATRICIA A. MILLETT  
6 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE  
7 SUPPORTING THE PETITIONER

8                   MS. MILLETT: Mr. Chief Justice, and may it  
9 please the Court:

10                   The reason a news story covering a - a hit-and-  
11 run fatality, as in this case, is not as effective for a  
12 number of reasons. First of all, statistically, the  
13 majority of Americans don't watch local news. More  
14 importantly, there is significant value as - as has long  
15 been recognized when police deal with pedestrians and  
16 approach them, seeking their assistance in solving crimes,  
17 there is significant value to having a police officer  
18 approach someone in a one-on-one manner in an effort to  
19 solve a crime.

20                   First of all, the - the approach impresses on  
21 people, who are otherwise very busy, the importance of the  
22 matter before them and that this may be worth devoting  
23 their time. The police officer's one-on-one approach can  
24 advise the person, in addition, that what you say might be  
25 significant even though you didn't see an accident.

1                   QUESTION: But can you stop the person? I mean,  
2 put it in a pedestrian context, do you think a police  
3 officer can insist that the person stop, stand there, and  
4 listen to his pitch?

5                   MS. MILLETT: No, absolutely not, Justice Scalia.  
6 There is a long - just there is a long historic  
7 distinction between cars and homes, there's a long  
8 historic distinction between cars and pedestrians, and the  
9 reason - as a practical matter, you have to have a very,  
10 very brief seizure here to protect the life and limb of  
11 the police officer while he tries to make this approach.  
12 That's not needed when you're approaching pedestrians.

13                  QUESTION: Why - why does the distinction -  
14 you've mentioned it and - and Mr. Feinerman mentioned it -  
15 why does the distinction between cars and pedestrians  
16 apply in a case in which the - the justification for  
17 making that distinction, regulation, a risk of impaired  
18 driving, does not apply?

19                  MS. MILLETT: What - what is relevant is what  
20 this Court has long recognized is - is the difference in  
21 your reasonable expectations of freedom of movement  
22 between people in cars and pedestrians on the sidewalk.

23                  QUESTION: No, but my expectation of freedom of  
24 movement in the car is that, yeah, the police can stop to  
25 - for a sobriety checkpoint and I'll assume they can -

1 they can stop to - to check my - my license and the  
2 registration of the car, but I also assume that they  
3 can't, you know, barring today, the result of today's  
4 case, I - I'm assuming that they - they can't stop me for  
5 - for other reasons, barring some really exigent  
6 circumstance. And if that expectation is reasonable, and  
7 I think it has been at least up until today, then I think  
8 my expectation is - is the same as the pedestrian's  
9 expectation, barring the - the regulatory authority of -  
10 of exercising the regulatory authority, which is not in -  
11 in issue here.

12 MS. MILLETT: Justice Souter, the essential  
13 command of the Fourth Amendment is reasonableness, and  
14 there's nothing in the Fourth Amendment that says stops  
15 for sobriety or stops to see if you have any aliens in  
16 your trunk are inherently reasonable and nothing else is.  
17 It's a balancing test, as this Court has long recognized,  
18 and an important part of that balance is the expectations  
19 that the individual brings to it, and the expectation of  
20 the individual behind the wheel is that there are a number  
21 of times that I will come into contact with police  
22 officers and I will need to stop, I'm highly regulated,  
23 I'm highly restricted, and I am engaged in a privilege of  
24 driving on the public roadways. Walking is not a  
25 privilege. Driving on the public roadways is and so the

1 question -

2 QUESTION: You're - you're saying that because  
3 they might have observed or - or observed evidence in the  
4 exercise of their privilege that that would be a  
5 regulatory basis for stopping them in the cars, whereas  
6 there wouldn't be any such basis for the pedestrian?

7 MS. MILLETT: The regulatory need for it is that  
8 there's - you have a very common police practice here, and  
9 one that we expect the police to do if a - a fatality has  
10 been committed is try to find witnesses who were there at  
11 the time. The only way that principle can work -

12 QUESTION: And - and we understand that when -  
13 when there's something pretty contemporaneous between the  
14 stopping and the - and the accident. That's what I had in  
15 mind with exigency. But do we - is - is it such a common  
16 practice that a week later or two weeks later -

17 MS. MILLETT: It is extremely common for these  
18 types of informational checkpoints. There's two different  
19 types of checkpoints. There is the one that's trying to  
20 catch the person right after the crime's been committed.

21 QUESTION: Yeah.

22 MS. MILLETT: But the witness checkpoints are  
23 quite routinely done, either 24 hours, or very routinely,  
24 a week after, because people are creatures of habit and  
25 they tend to drive the same roads at the same time of -

1 the same days, and so it's very common - a number - a  
2 number of Federal checkpoints have been done exactly like  
3 this. They've been done a week after a child's been  
4 abducted. In the Elizabeth Smart case, it was a week  
5 later. Federal checkpoints that I'm familiar with were  
6 done exactly - exactly a week later, and you try to go at  
7 the exact same time, because that is eminently sensible  
8 for police officers. If you want to look for the  
9 witnesses, you want to find people who are most likely to  
10 have been there at the same time.

11 QUESTION: Have they been successful? Is your  
12 knowledge of these things profound enough that you can say  
13 how successful they've been?

14 MS. MILLETT: I - I can't give you -

15 QUESTION: Do you know of any that have been  
16 successful?

17 MS. MILLETT: Yes, absolutely. The - the Park  
18 Police did one - the Federal Park Police did one here in  
19 the Washington, D.C. area a couple years ago that found  
20 four eyewitnesses to a hit-and-run fatality. But also,  
21 the ability to measure success here - we're not talking  
22 about immediately removing a drunk driver from the road or  
23 actually finding the alien - solving - you're successful  
24 if you defined you solved the crime, and solving a crime  
25 is not a linear project. It involves a lot of information

1 coming in from a different -

2 QUESTION: But you couldn't - you couldn't do  
3 this to try to get the perpetrator. That would clearly be  
4 Edmond, and there seems to be something odd about saying,  
5 police, you can't have a roadblock in a neighborhood where  
6 you think that it's likely the suspect is living, but you  
7 can if you say what you're looking for, it's not the  
8 suspect, but witnesses.

9 MS. MILLETT: Justice Ginsburg, I - two  
10 responses. First of all there are - Edmond leaves open  
11 that there are at least some circumstances when you can do  
12 this - maybe to approach is exigency - but where you can  
13 do these types of checkpoints to catch someone. The  
14 language there was a fleeing dangerous criminal who was  
15 going by particular routes, so it's not - that doesn't  
16 seem to be foreclosed in all circumstances. But the  
17 reason it makes a big differences for purposes of Fourth  
18 Amendment principles, there's actually three reasons why  
19 looking for witnesses is better and should be more  
20 consistent with the Fourth Amendment than what - the issue  
21 in Edmond. And that is, there - there's a difference  
22 between, just a practical difference, between police  
23 taking action, seizing people first and looking for a  
24 crime to go with them, which is what was going on in  
25 Edmond, or having a specific crime and looking to solve it



1 in the most sensible and reasonable manner that police  
2 officers do, and that is looking for witnesses.

3 QUESTION: Well, following Justice Ginsburg's  
4 question, which is the easier of the two cases? The one  
5 we have here or a hypothetical case in which they have a  
6 description of the hit-and-run driver and they stop  
7 everybody to look in the car to see if the driver meets  
8 the description? Which is the easier of the two cases to  
9 sustain?

10 MS. MILLETT: Assuming that this is not - it's  
11 not right after the crime that I have the description -

12 QUESTION: A week later, everything else the  
13 same.

14 MS. MILLETT: I think this Court's - I think both  
15 of them are different from Edmond, but I do think this  
16 Court's doctrines establish why the witness approach is -  
17 is more - is less intrusive on Fourth Amendment interests  
18 for - for three reasons. One is that there is a self-  
19 incrimination component, self-protection component to the  
20 Fourth Amendment and that has been very important in the  
21 drug testing cases. It was central to the resolution of  
22 the Ferguson decision and mentioned in camera -

23 QUESTION: I - I wonder if you'd answer Justice  
24 Kennedy's question. Which is the easier case?

25 MS. MILLETT: I - I'm -

1 QUESTION: You don't know?

2 MS. MILLETT: - oh, I'm sorry -

3 QUESTION: Pardon me?

4 MS. MILLETT: We would like to have them both  
5 sustained, quite frankly, and we don't think they're -  
6 they're exactly covered by Edmond -

7 QUESTION: Yes, yes, but which is more consistent  
8 - which is easier to say is consistent with the Fourth  
9 Amendment?

10 MS. MILLETT: There -

11 QUESTION: I would just - I'm mixed up with  
12 easier because I don't - which is - the two cases that he  
13 gave, in which do you think it's easier for you to win  
14 your argument?

15 MS. MILLETT: I - I think the witness one is  
16 easier for three reasons, and one is because the Fourth  
17 Amendment has this self-protection principle, which is not  
18 implicated when you're - you're looking for witnesses.  
19 The checkpoint does not -

20 QUESTION: In other words, this case is easier?

21 MS. MILLETT: Yes, yes, the witness checkpoint,  
22 the looking for information checkpoint.

23 QUESTION: All right. I got mixed up -

24 MS. MILLETT: I'm sorry if I'm not -

25 QUESTION: This case is easier?

1 MS. MILLETT: Yes. This case is easier, but -  
2 but there's - there's two other reasons besides the self-  
3 protection principle. One is, as a practical matter, one  
4 of the balancing tests - factors - in Brown v. Texas is  
5 the level of anxiety. When a police officer approaches  
6 you and says - even if it's permissible - I want to know  
7 if you're doing something wrong. Do you not have a  
8 driver's license? Are you drunk? That's - there's a  
9 little more anxiety there when a police - than when a  
10 police officer comes and says, I would like your help,  
11 someone was killed here.

12 QUESTION: And what's the third reason?

13 MS. MILLETT: And - and the third -

14 QUESTION: The Fourth Amendment is an anxiety  
15 thing? My goodness.

16 (Laughter.)

17 QUESTION: That is a factor but -

18 MS. MILLETT: It's all - it's all very - sorry.

19 QUESTION: - that - that cuts against you in this  
20 case, though, doesn't it? This was at midnight.

21 MS. MILLETT: No, no. Part of the Brown v. Texas  
22 balancing factors is - is of - one of the things that's  
23 been mentioned is the level of anxiety, and the reason  
24 that you don't have roving stops but you're allowed to  
25 have checkpoints is when you see other people being

1 stopped around you, even if they want to know if you're  
2 drunk -

3 QUESTION: I have a pending question about the -  
4 the third reason. I - what's the third reason?

5 MS. MILLETT: The third - thank you - the third  
6 reason is - is a - is a - there's a sort of a practical  
7 limitation on the use of these checkpoints when police are  
8 not allowed to use it to do their run-of-the-mill  
9 business. Their job is to find crimes and criminals.  
10 Edmond was a checkpoint to find crimes and criminals that  
11 we didn't know about, when instead all that's being done  
12 here is this is an adjunct to a - adapting to the roadway  
13 context the normal investigative processes of police  
14 officers. You - you don't have that abuse, and the same  
15 way -

16 QUESTION: So this is a built-in limitation on  
17 the frequency of its use?

18 MS. MILLETT: It is, and Justice Kennedy, you  
19 also asked about doctrinal limitations in this Court's  
20 cases, and in Atwater v. City of Lago Vista the exact same  
21 argument was made dealing with misdemeanor arrests. And  
22 this Court's decision there specifically relied upon the  
23 good sense and political accountability of police, for the  
24 same reason that we know police don't arrest for every  
25 crime and infraction that - vehicle code infraction that

1 they find. A lot of police chiefs are arrested and  
2 checkpoints are a great equalizer, especially these kind,  
3 because the location is dictated by where the crime  
4 occurred -

5 QUESTION: Arrested or elected? What - did you  
6 say arrested or elected? That a lot of police chiefs are  
7 -

8 MS. MILLETT: Oh, I hope I said elected.  
9 (Laughter.)

10 QUESTION: Okay. I thought you said arrested.

11 MS. MILLETT: Thank you, Mr. Chief Justice.

12 QUESTION: Thank you, Ms. Millett.

13 Mr. Ramsell, we'll hear from you.

14 ORAL ARGUMENT OF DONALD J. RAMSELL

15 ON BEHALF OF THE RESPONDENT

16 MR. RAMSELL: Mr. Chief Justice, and may it  
17 please the Court:

18 The mass, suspicionless seizure of innocent  
19 citizens for the purpose of investigating ordinary  
20 criminal wrongdoing without exigent circumstances is a  
21 violation of the Fourth Amendment, and Indianapolis v.  
22 Edmond is the controlling precedent.

23 QUESTION: Well, that sounds a little colorful,  
24 but - but in my own mind I'm thinking that this is asking  
25 people to help with crime investigation and to spend 10

1 seconds listening to the request. Now, it's - I was  
2 delayed 2 hours - not 2 hours, but like 2 minutes anyway,  
3 or 3 minutes, this morning coming in, for the last couple  
4 of days because they had some tree pruning equipment, all  
5 right? So maybe they could put that on the sidewalk and  
6 not delay me, but I don't mind. I did actually mind, but  
7 I mean -

8 (Laughter.)

9 QUESTION: - but - you see, it's not - what their  
10 argument is, and that's, at least for me, what I'd like  
11 you to address, is this is not much of a - of a demand on  
12 people to stop for 10 seconds when they're trying to find  
13 out somebody who killed someone and - and we just want you  
14 to listen for 10 seconds. Now, why - why is that such an  
15 unreasonable thing for the police to ask the public to do?  
16 Nobody has to take the flyer, they don't even have to  
17 help.

18 MR. RAMSELL: Well, Justice Breyer, by definition  
19 this is a seizure.

20 QUESTION: I - I don't care about the - I'm  
21 asking you - I understand - I'm asking you why it's  
22 unreasonable. That's the word in the Fourth Amendment and  
23 I tried to make it as - as reasonable-sounding as I could.  
24 Maybe somebody else could do better, but I want your  
25 response to my effort to make this sound very reasonable.

1 That's what I'm interested in, your response.

2 MR. RAMSELL: It remains unreasonable for a  
3 number of matters. It's the aggregate of the  
4 circumstances then by which other innocent persons could  
5 be seized. It's the fact that the gravity of the public  
6 concern in this particular event is far less than the  
7 reasonableness - reasonableness factors that have been  
8 used in Sitz. It's far less than the immigration factor  
9 that was found in Martinez v. Fuerte.

10 QUESTION: I don't really want to hear cases so  
11 much. I want to hear in common sense why this isn't a  
12 reasonable thing to do. I'm not saying you even have to  
13 convince me to win your case, I'm just saying that for -  
14 I'd like to know why, in ordinary, common-sense English,  
15 this isn't the most reasonable thing in the world? Now,  
16 I'm - I'm now overstating it so you'll be sure to give me  
17 an answer.

18 MR. RAMSELL: It's midnight. You're on a road  
19 where you do not expect to be confronted by a police  
20 officer. You're waiting in line for several minutes as  
21 various other cars are evidently being interrogated, some  
22 are being transferred to secondary staging areas. The  
23 anxiety builds and you arrive at the front of the  
24 roadblock to be questioned about where you were last week,  
25 personal indications, what have you seen? You feel

1 compelled to answer.

2 QUESTION: I didn't think that was the evidence.  
3 I thought they were given a flyer saying if you - read  
4 this and see if you observed anything that could help us  
5 find the hit-and-run driver.

6 MR. RAMSELL: Detective Vasil testified that they  
7 were stopped, given a flyer, but also asked if they had  
8 been in the area last week and if they had seen anything  
9 unusual. That second phase was relatively  
10 interrogational, although field interrogational.  
11 Nevertheless, it is somewhat intrusive on what are  
12 considered some of our privacy -

13 QUESTION: Well, suppose that there is a  
14 roadblock but the only purpose of the roadblock is the  
15 police are stopping people to see if they'll contribute to  
16 the police boys fund. The same thing - exactly the same  
17 thing happens with that roadblock has happened with your  
18 client. He comes up, almost hits the policeman, smells  
19 alcohol on his breath and so forth, he's charged with  
20 drunken driving and is convicted. Does he have a Fourth  
21 Amendment claim?

22 MR. RAMSELL: Well, Mr. Chief Justice, it would  
23 be a seizure, so the Fourth Amendment is implicated.  
24 However, applying the Edmond analysis, the programmatic  
25 purpose of that seizure not being in the investigation or



1 detection of crime, I would submit it would not be a  
2 violation of the Fourth Amendment.

3 QUESTION: So they can hold him up for 2 hours if  
4 they're collecting for the police boys fund but they can't  
5 hold him up for 10 or 15 seconds if they're trying to  
6 solve a crime?

7 QUESTION: That doesn't make any sense. Or hold  
8 him up for no reason at all, just for a lark. Hey, let's  
9 hold up a bunch of people.

10 (Laughter.)

11 QUESTION: You - you say that passes the Fourth  
12 Amendment test but if - but - but this very reasonable  
13 investigation does not. That can't be right.

14 MR. RAMSELL: I - I would submit, Justice Scalia,  
15 that if you were to stop a person and seize them for no  
16 reason whatsoever that that would not survive a Fourth  
17 Amendment analysis. Ten to 15 seconds to deliver some  
18 funds and put them in a can would certainly be reasonable  
19 for that beneficent, non-crime control purpose. Two hours  
20 would certainly exceed -

21 QUESTION: Are you saying it would be okay to  
22 have a roadblock to collect for the policemen's benevolent  
23 fund?

24 MR. RAMSELL: Compulsive collection would be  
25 questionable. That would seem to be a tax.

1 (Laughter.)

2 QUESTION: I think if we endorsed -

3 MR. RAMSELL: But we do -

4 QUESTION: - your view that they can stop for the  
5 chief just as a purpose, there's going to be massive  
6 change in the way these organizations raise money.

7 (Laughter.)

8 MR. RAMSELL: It - it is often difficult to say  
9 no when - when a fireman is seeking some funds. However,  
10 it is certainly not the detection or investigation of  
11 crime, and the analysis that would take place there would  
12 be different, and certainly 2 hours to put money in a can  
13 would suggest that the scope and duration of that stop was  
14 far beyond what was reasonable.

15 QUESTION: Maybe - maybe your response to Justice  
16 Breyer's question - I'm not sure that reasonableness for  
17 Fourth Amendment purposes is the same as reasonableness in  
18 general. Do you think it would be - in general, if you're  
19 not talking about the Fourth Amendment - an unreasonable  
20 thing for a policeman to knock on your door and say,  
21 excuse me, sir, we're investigating a crime, we really  
22 need your help, do you mind if I - I come in and ask you a  
23 couple of questions just to help us solve this crime? Do  
24 you think that's reasonable in - in - in a sense? I guess  
25 it is.

1           MR. RAMSELL: It is considered a voluntary  
2 encounter to the extent that if you choose to open the  
3 door and engage in that conversation the Fourth Amendment  
4 isn't even implicated there.

5           QUESTION: No, the person says, unreasonably says  
6 no, and the policeman comes in anyway.

7           MR. RAMSELL: That would be a violation of the  
8 Fourth Amendment.

9           QUESTION: Even though it isn't really the  
10 policeman that's being unreasonable in the general sense.  
11 It seems to me it's quite unreasonable for the homeowner  
12 to refuse to cooperate at all with the police in the - in  
13 the solving of a - let's assume it's a major crime. That  
14 seems to me unreasonable, but even so, the policeman is  
15 not allowed to come into the home.

16           MR. RAMSELL: That's correct, Your Honor, and  
17 there's the difference between the voluntary consensual  
18 encounter and what we have in this case was clearly  
19 involuntary. They even had an officer -

20           QUESTION: And so also here. It might be very  
21 unreasonable for the person not to want to cooperate, and  
22 it might be quite reasonable for the policeman to seek the  
23 cooperation, but that doesn't necessarily answer the  
24 Fourth Amendment question.

25           MR. RAMSELL: I would suggest that the fact that

1 an innocent motorist would feel that he or she was  
2 unreasonable by not cooperating suggests the compulsive  
3 aspects of this scenario, make it more of a violation of  
4 the Fourth Amendment, and more unreasonable to that  
5 extent. One -

6 QUESTION: Mr. Ramsell, did I understand your  
7 argument to be that if the crime had been a child  
8 abduction, that this kind of roadblock to try to get  
9 evidence would be permissible?

10 MR. RAMSELL: In - in a general sense, yes. Of  
11 course, there would be other factors involved, but child  
12 abductions generally fall within the exigent circumstance  
13 analysis. Clearly there would likely have to be further  
14 evaluation of the facts behind why they felt that -

15 QUESTION: Well, why if - if it's the danger  
16 involved and wanting to save a life that we hope is still  
17 in being, why isn't the same thing if you're trying to get  
18 evidence about a hit-and-run person who kills people on  
19 the highway?

20 MR. RAMSELL: Well, first off, the child  
21 abduction is a continuing crime, to the extent that the  
22 need for action in order to prevent the passable future or  
23 immediate harm to that child, makes that an exigent  
24 circumstance by itself.

25 QUESTION: So you think this would be different

1 if this was a serial hit-and-run killer, right? He does  
2 one a week. Then - then you think it'd be a different  
3 situation and maybe they could conduct the - the  
4 roadblock.

5 MR. RAMSELL: Well, as we had in Sitz with the  
6 imminent hazard of drunk drivers, if there were such a  
7 thing as a serial hit-and-run driver, the imminency, the  
8 exigency would be suggested within that hypothetical, and  
9 so I believe that it would be more reasonable under that  
10 circumstance, but what we -

11 QUESTION: And what about a rape murder that -  
12 you know that that's not just a hypothetical case?

13 MR. RAMSELL: That had recently occurred?

14 QUESTION: A rape murder recently occurred and  
15 the police set up a roadblock to get evidence.

16 MR. RAMSELL: Again, if there was - if it was  
17 very fresh, and the more fresh it is the more reasonable  
18 it tends to become under a simply an exigency analysis,  
19 the fresher the crime the more believability -

20 QUESTION: So would this - would this case have  
21 been different if it had been the next day rather than a  
22 week later?

23 MR. RAMSELL: If they had some independent  
24 evidence to suggest that the person was still in the area,  
25 that may have been a different set of facts. Commonwealth

1 v. Burns was an example of a informational roadblock where  
2 they had independent evidence to believe that the murderer  
3 was still in the area. I believe that was 2 days later.

4 QUESTION: So if you need a little - if you have  
5 a little evidence, then you can seek more. But if you had  
6 none, you can't try to get a lead by this technique?

7 MR. RAMSELL: Justice Ginsburg, I believe the  
8 exigency of the circumstances would certainly authorize  
9 more - a possible information roadblock under those  
10 circumstances.

11 QUESTION: Did this - is it the case that in this  
12 very situation we're talking about it led to information  
13 about the person responsible?

14 MR. RAMSELL: Justice O'Connor, my understanding  
15 is that the roadblock itself was entirely ineffective. It  
16 had zero effectiveness in seeking to obtain information  
17 regarding this event. In fact, I believe that we've just  
18 heard that it was the television which led to some  
19 information, which is a standard police practice, does not  
20 implicate the Fourth Amendment, does not require any  
21 seizure of innocent persons -

22 QUESTION: Yeah, but it requires a roadblock.

23 MR. RAMSELL: I believe that in the television  
24 context there's no roadblock at issue and no one's even  
25 compelled to watch the television -

1                   QUESTION: Well, but maybe television won't cover  
2 just a blurb put out by the police where they will cover a  
3 roadblock.

4                   MR. RAMSELL: That may or may not be true, Your  
5 Honor, but there are -

6                   QUESTION: Nothing duller than watching a wall of  
7 - of wanted posters, you know, and now, for our listeners,  
8 we're going to pan the wanted posters at the post office.  
9 I mean -

10                  MR. RAMSELL: That would -

11                  QUESTION: - that is not going to sell. Who's  
12 going to sponsor that?

13                  MR. RAMSELL: That would certainly be very boring  
14 to - to watch wanted posters, certainly if they were  
15 repetitious -

16                  QUESTION: But if - if they hired someone like  
17 Justice Scalia to go on the screen and describe it -

18                  (Laughter.)

19                  QUESTION: - big audience.

20                  QUESTION: Can I ask you a question about the  
21 facts of this case, please? The blue brief describes it  
22 as a - a roadblock - roadblock set up in the evening, and  
23 as I understand it the crime was at 12:15 a.m., which I  
24 interpret to be midnight. It was a midnight crime and I  
25 thought the roadblock was at midnight, and I wonder, how

1 long did it last? Was it started in the evening and  
2 lasted several hours or was it just -

3 MR. RAMSELL: To be frank, searching the record  
4 it's - it's relatively unclear. My understanding is 90  
5 minutes to 2 hours at most.

6 QUESTION: And it - it was though in the dark at  
7 - at night, not during the day?

8 MR. RAMSELL: Yes, it was at night.

9 QUESTION: And I also don't understand if they  
10 handed something to read, how could you read in the - at  
11 the - in the dark?

12 MR. RAMSELL: That would also be equally as  
13 difficult, Your Honor. I -

14 QUESTION: Does the record explain that they did  
15 hand something legible to the person or use a flashlight  
16 or what - what was the -

17 MR. RAMSELL: Logic would seem to dictate that by  
18 the time the person received the flyer and drove away they  
19 would again be away from the scene of the event before  
20 they even read the flyer, which also makes it somewhat  
21 ineffective in that regard.

22 QUESTION: But did they - were there something  
23 they were asked to read before they left or just left with  
24 them to drive away with? I just don't understand what  
25 happened, to tell you the truth.



1                   MR. RAMSELL: Well, to - to take - to take the 10  
2 to 15 seconds Detective Vasil describes as the duration of  
3 handing the flyer, asking two questions, and obtaining two  
4 answers, it would seem that reading the flyer would have  
5 had to have occurred sometime after the seizure.

6                   QUESTION: I see.

7                   QUESTION: There wasn't very much on the flyer,  
8 was there?

9                   MR. RAMSELL: Well, it did have some - it - it  
10 indicated the -

11                  QUESTION: We - we have it someplace, don't we?

12                  MR. RAMSELL: Yes. It is in the joint appendix  
13 and it's located on page 9 of the joint appendix, and  
14 there is - there is a great amount of detail that's in  
15 that flyer, certainly would suggest it would be difficult  
16 for one to read the entirety of it, understand the purpose  
17 for which they were even being stopped that evening, which  
18 is another point. There was no advance signs, unlike  
19 sobriety checkpoints, where as you're arriving, and even  
20 before you have contact with - with the police officers,  
21 there's a sign that says, warning, sobriety checkpoint  
22 ahead. At least you're putting - you're put on notice  
23 what it is that's taking place in front of you. Here,  
24 people are waiting in line having no idea what it is -

25                  QUESTION: Well, but that - that happens in a lot

1 of other contexts too. You can be driving on a highway,  
2 all of a sudden everything comes to a stop. What's the  
3 matter? Is it an accident? Are they having one-lane  
4 repair? And you just don't know, I mean, that's part of  
5 the condition of driving.

6 MR. RAMSELL: Well, certainly we have to expect  
7 that we'll be stopped more often than anyone would wish in  
8 that context, but it - it's quite different when you are -  
9 when there's six to twelve emergency vehicles there and  
10 as you get closer and closer you see this encounter taking  
11 place before you with every single motorist in front of  
12 you. That raises the anxiety of even the - the most  
13 innocent citizen, I would suggest.

14 QUESTION: Might I ask another question about the  
15 - the facts of the case? Reading the flyer, it's  
16 something you could have handed to a pedestrian too who  
17 might have been at the scene. Does the record show  
18 whether they did hand this flyer to pedestrians who might  
19 have been walking by at the same time the week after the  
20 accident?

21 MR. RAMSELL: Well, my understanding of this  
22 location, being familiar with the area, is that it's a  
23 major thoroughfare with -

24 QUESTION: Right. I know -

25 MR. RAMSELL: - multiple lanes. It would be

1 highly unlikely at midnight that any pedestrian would or  
2 should be walking on the shoulder of this high speed limit

3 -

4 QUESTION: Oh, there are no sidewalks there?

5 MR. RAMSELL: No. There are rarely sidewalks in  
6 our town, unfortunately.

7 QUESTION: Oh, okay.

8 QUESTION: Mr. Ramsell, there's something I'd  
9 like you to comment on. The - the Illinois Supreme Court  
10 was - was concerned about the - the effect of - of this  
11 practice, in effect, in opening the door to stops all the  
12 time. They said, you know, there are loads of crimes and  
13 if it's justified here it will be justified in other cases  
14 and so on, and there have been some questions from the  
15 bench to that effect.

16 One answer to that might be that under the law  
17 as it stands now the police can conduct sobriety  
18 checkpoints and we will assume that they can make license  
19 and registration checks and things like that. So the -  
20 the police already have an opportunity, to put it bluntly,  
21 to abuse their right to stop if they want to do it. Is  
22 there any indication that there is this kind of abuse  
23 going on, and hence, is there any reason to believe that  
24 the abuse would be greater if this practice passed muster  
25 than it is under the existing law?

1           MR. RAMSELL: Well, I believe that law  
2 enforcement is always appreciative of any techniques or  
3 tools that they're allowed to use for investigatory  
4 purposes.

5           QUESTION: But what - what do we know?  
6 Empirically, what we do know? What is - has there - has  
7 there been an indication of abuse? Is there a reason to  
8 believe that this invitation, this tool, would be abused  
9 more than the tools that they now have?

10          MR. RAMSELL: I would believe that it would be  
11 more - more likely for abuse if this Court were to suggest  
12 that these type of roadblocks were a valid investigative  
13 tool.

14          QUESTION: But why - why?

15          MR. RAMSELL: Because it would simply, number  
16 one, it is - it makes for great publicity for law  
17 enforcement to use these roadblocks. They feel that it's  
18 a -

19          QUESTION: Well, it makes for great publicity to  
20 - to have sobriety checkpoints. That's one reason why  
21 they have them

22          MR. RAMSELL: And - I agree, even though  
23 statistically roadblock sobriety checkpoints tend to be  
24 far less effective than saturation patrols. Most police  
25 chiefs comment that they don't get the type of publicity

1 they receive from a roadblock that they get from  
2 saturation patrols.

3 QUESTION: Is it true that -QUESTION: Suppose  
4 they had done the same thing they did here, the same  
5 thing, except that, in addition to giving them a flyer and  
6 asking them about what happened - were - you know, were  
7 you here a week before, they - it was also a check of  
8 driver registration?

9 MR. RAMSELL: I would suggest the programmatic  
10 purpose, the primary programmatic purpose employed in  
11 Edmond would still remain that this was for the purpose of  
12 crime detection and investigation, not for simply checking  
13 licenses. The same -

14 QUESTION: Well, they were actually checking  
15 licenses. I mean, they're - they're really doing it.

16 MR. RAMSELL: And I -

17 QUESTION: And they - they pick up some people  
18 who don't - don't have licenses, but while they're at it  
19 they kill two birds with one stone. And you say it would  
20 make it bad because its primary purpose was the other?

21 MR. RAMSELL: Justice Scalia, I would suggest the  
22 programmatic purpose, which would be a question of intent,  
23 would still remain that it was truly for the investigation  
24 of this particular crime and certainly the duration and  
25 the scope of the seizure would exceed the license check

1 when questions were being asked about whether you had been  
2 here last week, whether you had seen anything regarding a  
3 hit-and-run or any other crime. And that would seem to  
4 exceed even the suggested appropriateness of a roadblock  
5 for license checks in Prouse.

6 QUESTION: That - that incremental point of time  
7 - you're really playing with a - an inconsequential -  
8 inconsequential impingement upon the person's time.

9 QUESTION: Mr. Ramsell, do you know - going back  
10 to Justice Souter's question - whether in the aftermath of  
11 Sitz there have been an increase in sobriety checkpoints  
12 in this country?

13 MR. RAMSELL: I know that a - a far greater  
14 number have been reported since Sitz, but I cannot confess  
15 to knowing what the statistics or the record-keeping was  
16 prior to Sitz, but it has - it has now crept into the  
17 American psyche that roadblocks are a - a regular way of  
18 life.

19 QUESTION: But do - do they exist in Michigan  
20 anymore, these sobriety checkpoints?

21 MR. RAMSELL: No. When the - when the case was  
22 remanded to Michigan, Michigan found under their own State  
23 constitution that this - that a sobriety checkpoint still  
24 remained to be an unreasonable violation of the search and  
25 seizure clause of their own constitution, so they do not

1 have them

2 Now, in this case, what we have is we have a - a  
3 very stale event. In fact, the facts do not even suggest  
4 that the driver was perhaps even negligent in how the  
5 accident occurred. We have a - a bicyclist on a major  
6 thoroughfare at midnight in a place where it's highly  
7 unusual to - to find pedestrians in a dark area, and  
8 there's been no indication that the driver was at fault  
9 other than failing to remain at the scene of the accident.

10 QUESTION: That's pretty serious, isn't it,  
11 called hit-and-run?

12 MR. RAMSELL: It's hit-and-run as -

13 QUESTION: All right, so all that's at stake is  
14 that it was a hit-and-run and the guy's dead, all right.  
15 So - so now what has that to do with the reasonableness of  
16 this? I'm not - not asking you facetiously because I  
17 think maybe you think you want to tie it in and I just  
18 want you to do it.

19 MR. RAMSELL: Well, the consequences are very  
20 serious. However, hit-and-run would also fall within  
21 dinging the car in the grocery parking lot next to you and  
22 failing to remain at the scene. These are single events -

23

24 QUESTION: So you mean that it might be  
25 reasonable to do it for some serious crimes but not for

1 less serious?

2 MR. RAMSELL: I would suggest that it cannot be  
3 done for any crime except in exigent circumstances, which  
4 we do not have here. This is a stale event -

5 QUESTION: So even - even if it were, say, a  
6 carjacking, where there was a fatality, if it's stale it  
7 can't be done?

8 MR. RAMSELL: Yes, Your Honor. I would - I would  
9 respectfully say that, under the analysis in Edmonds,  
10 there is a lack of exigency. Edmonds suggests that, but  
11 for the emergency circumstances of an - an imminent  
12 terrorist attack, otherwise that would be considered a  
13 violation of the Fourth Amendment. This is a single  
14 accident. It - it does not fall within the magnitude of  
15 any of the previous issues that have been brought before  
16 the Court -

17 QUESTION: Now you seem - seem to be arguing the  
18 same thing that, other things being equal, if you lose on  
19 your other points you could only do it in a serious but  
20 not non-serious. Is that what you're - is that the point  
21 you're making? And if so, I want to know what the line  
22 is.

23 MR. RAMSELL: Well, the line is exigency, and  
24 exigency meaning there was no - there's an immediate  
25 hazard on the roadway, which was what seemed to justify



1 sobriety checkpoints in Sitz, that there would have been  
2 an effectiveness to removing then-hazardous drivers and  
3 preventing the potential for future injury to life and  
4 limb. This is a post-event, non-exigent roadblock. The  
5 facts, nevertheless, don't have the gravity of the public  
6 concern. In the Brown v. Texas -

7 QUESTION: Well, what if - what if you've got a -  
8 a license number and for - for a serious crime that was  
9 committed, say, an hour ago? Can - can you then conduct a  
10 - this sort of program?

11 MR. RAMSELL: I would submit yes, that you could  
12 under that circumstance. Number one, you could tailor the  
13 roadblock substantially less. You have the exigency  
14 because it is a fresh pursuit analysis. You certainly  
15 wouldn't need to pull over every car and question them if  
16 you had a license plate number to work from. And so it -  
17 it would certainly even be capable of being more  
18 sufficiently tailored so that those who are admittedly  
19 innocent are less likely to have their liberties  
20 interfered with.

21 QUESTION: Of course -

22 QUESTION: Well, what if you - what if you just  
23 had the information that it's - it's a black Ford SUV?

24 MR. RAMSELL: And it happened one hour ago?

25 QUESTION: Yeah.

1                   MR. RAMSELL: I believe under that set of  
2 circumstances the exigency would suggest there would be a  
3 potential for a reasonable checkpoint tailored in scope  
4 and duration with sufficient guidelines in place. In  
5 fact, in this particular checkpoint, we have virtually no  
6 guidelines in place. We have a field officer who  
7 testifies that what he did was to ask some questions.  
8 There's no indication as to why other persons were sent to  
9 secondary staging areas. We do not have any guidelines so  
10 that if a motorist had said, yes, I was here last week,  
11 and yes, I think I have some information, we have no  
12 guidelines for those field officers as to what to do and  
13 how to treat that motorist and how to detain that person.

14                   QUESTION: You know anybody's that's challenged  
15 these things who - for any reason other than the  
16 exclusionary rule? This case wouldn't be here except for  
17 the fact that your client during the stop was found to be  
18 driving under the influence. Had that not happened, don't  
19 you think there's zero chance that anyone would have cared  
20 enough, would have felt beset upon enough by the police to  
21 bring some action to stop this Gestapo-like activity?

22                   MR. RAMSELL: I do believe there are -

23                   QUESTION: I mean, it's - it's really just the  
24 exclusionary rule driving - driving this case.

25                   MR. RAMSELL: Respectfully, Your Honor, I do -

1 there - I do believe there are people who care and there  
2 are people who care about our right to be let alone, our  
3 right of free passage.

4 QUESTION: Well, if people in Lombard care about  
5 it, they can tell the police to stop doing it.

6 MR. RAMSELL: I certainly would hope that they  
7 would also exercise their right to let them know that they  
8 dislike these roadblocks as much as perhaps others in more  
9 intellectual pursuits, but -

10 QUESTION: Are there indications nationwide that  
11 the public makes objection to roadblocks, other than the  
12 person that's caught for drunk driving?

13 MR. RAMSELL: I would suggest that most - most  
14 persons are not pleased by roadblocks. I believe that  
15 most people feel that they do reflect on an invasion of  
16 their privacy and liberty.

17 QUESTION: I mean, is there evidence of that?

18 MR. RAMSELL: I - I cannot cite any polling  
19 that's been taken one way or the other that would really  
20 flesh that out. Here we have far less than the drug  
21 interdiction that was rejected in Edmond. We have a  
22 single accident. We have far less than the concern about  
23 protecting our national borders, as we had in Martinez v.  
24 Fuerte, and certainly not the imminency of the hazard that  
25 was found in Sitz. There's frankly no empirical or actual

1 data to even support that this roadblock will advance the  
2 interest, and by the fact that nothing was advanced in  
3 this particular event suggests that even in a balancing  
4 test we don't have the sufficiency, the gravity of the  
5 public concern, nor do we have any indication of any  
6 degree to which this seizure would advance the public  
7 interest. This is more akin to Prouse, where the Court  
8 found that the - the likelihood of finding an unlicensed  
9 motorist versus the likely numbers of persons that will be  
10 stopped was so substantial that data was insufficient.

11 QUESTION: Well, Prouse was random stops, though,  
12 wasn't it?

13 MR. RAMSELL: It was random stops. However, the  
14 effectiveness was mentioned as - as one of the factors,  
15 and there were certainly reasonable alternatives that were  
16 suggested that could have avoided the random stop  
17 scenario. And here we have admittedly innocent drivers as  
18 well with no escape route, so a person couldn't even avoid  
19 the - the compulsory stop and questioning.

20 I would also submit that this analysis, if - if  
21 found appropriate here, would equally allow for the stop  
22 of pedestrians at - on the sidewalk. It would allow the  
23 police to circle an office building and have the persons  
24 run through the - with the gamut of brief questioning  
25 before they were allowed to leave an office building. And

1 it would be very unmanageable and unworkable to find an  
2 appropriate balancing test, even though I would submit  
3 that one thing the Court needs to do is to, of course, let  
4 law enforcement know in advance what will be acceptable  
5 conduct on their part and that it would be inappropriate  
6 to allow for a case-by-case, fact-sensitive analysis based  
7 on the plethora of crimes that could potentially lead to  
8 it, the geographic area in a small rural town. The rural  
9 police chief may find roadblocks or - may find their most  
10 serious crime to be the stealing of a purse and therefore  
11 a roadblock of some form justifiable there, where that  
12 same roadblock in an urban setting would be found to be  
13 unreasonable and unjustifiable, and certainly those  
14 politically accountable officials that feel that their  
15 citizenry are more favorable to roadblocks may be  
16 encouraged to allow them to occur more often. Thank you.

17 QUESTION: Thank you, Mr. Ramsell.

18 Mr. Feinerman, you have 2 minutes remaining.

19 REBUTTAL ARGUMENT OF GARY FEINERMAN

20 ON BEHALF OF THE PETITIONER

21 MR. FEINERMAN: This Court in Edmond found that  
22 narcotics check - narcotics checkpoints are so obnoxious  
23 to core Fourth Amendment values that a per se rule of  
24 invalidity was justified and the principal question here  
25 is whether informational checkpoints present the same

1 Fourth Amendment dangers that general crime control  
2 checkpoints present, and the answer to that is no.

3           And in order to answer that, we - we have to  
4 figure out what the hallmarks are of a crime control  
5 checkpoint, and we suggest that there are at least two.  
6 The first is that it's the purpose of the checkpoint to  
7 incriminate the motorist as opposed to the situation in  
8 Lombard, which was simply the police asking for help, and  
9 that distinction makes a difference under the Fourth  
10 Amendment for several reasons. The first has to do with  
11 privacy. At a general crime control checkpoint, the  
12 police are trying to learn something about you, whether  
13 you've committed a wrongdoing, whereas at an informational  
14 checkpoint there's just asking for help, somebody died  
15 here last week, could you help us find the perpetrator.

16           There's also a difference in terms of jeopardy.  
17 At a general crime control checkpoint you may be  
18 interrogated, detained, arrested, prosecuted, and possibly  
19 jailed, whereas at an informational checkpoint, again,  
20 you're just being asked for help, and that's a critical  
21 distinction that this Court drew in Ferguson between the  
22 drug test that was invalidated in Ferguson and the drug  
23 testing programs that were upheld in Skinner, Acton, and  
24 Von Raab.

25           There's also an indignity element to a general

1 crime control checkpoint. You're being - it's - it's a  
2 bit of an indignity to be suspected as being a potential  
3 law-breaker, whereas in - in an informational checkpoint  
4 there's really no impingement on dignity, you're just,  
5 again, being treated as an ally of the police and being  
6 asked for help, and in fact, it's an act of responsible  
7 citizenship to provide help in that kind of situation.

8           The second distinction is that a general crime  
9 control checkpoint - the police are simply trolling for  
10 hitherto undiscovered crimes, whereas in an informational  
11 checkpoint, they're investigating a known, specific crime,  
12 and that's who makes a difference. There's a difference  
13 between - as Ms. Millett pointed out - there's a  
14 difference between knowing a crime and finding the  
15 criminal and then simply rounding up a bunch of potential  
16 criminals and trying to peg a crime on them. And that's  
17 important not only for the fact that we're uncomfortable  
18 with general - general surveillance, but also it's a  
19 traditional police function. When a crime happens, police  
20 ought to return to the scene of the crime and find  
21 witnesses. Thank you.

22           CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
23 Feinerman. The case is submitted. (Whereupon, at 11:03  
24 a.m., the case in the above-entitled matter was  
25 submitted.)