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IN THE SUPREME COURT OF THE UNITED STATES

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UTAH, :

Petitioner : No. 14-1373

v. :

EDWARD JOSEPH STRIEFF, JR. :

- - - - - x

Washington, D.C.

Monday, February 22, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

TYLER R. GREEN, ESQ., Solicitor General, Salt Lake City, Utah; on behalf of Petitioner.

JOHN F. BASH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

JOAN C. WATT, ESQ., Salt Lake City, Utah; on behalf of Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 14-1373, Utah v. Strieff.

Mr. Green.

ORAL ARGUMENT OF TYLER R. GREEN

ON BEHALF OF THE PETITIONER

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

Courts typically apply the exclusionary rule to suppress unlawfully-seized evidence. The question here is whether to suppress evidence lawfully seized in a search incident to a warrant arrest because the arresting officer found the warrant in a stop later judged to be unlawful.

Under this Court's attenuation analysis, such evidence is admissible when, as here, the predicate stop was not flagrant but resulted from an objectively reasonable miscalculation.

Extending the exclusionary rule --

JUSTICE SOTOMAYOR: Tell me what was objectively reasonable about it.

MR. GREEN: Well, Your Honor --

JUSTICE SOTOMAYOR: I mean, the police officer admits that the person he saw coming out of the

1 house in question wasn't doing anything. He didn't know  
2 that he lived there, he didn't know what he had done, if  
3 anything. He didn't even really know that there was  
4 drug dealing going on in the house. He was trying to  
5 figure that out. So what was objectively reasonable  
6 about stopping this man?

7 MR. GREEN: Justice Sotomayor, we've  
8 admitted that this was a miscalculation, but it was a  
9 close call. If the officer here had stopped the first  
10 person coming out of the house after receiving the tip,  
11 that would have been objectively unreasonable under this  
12 Court's case and decision in Alabama v. White.

13 But this person wasn't the first person he  
14 saw come out of the house. He had received the  
15 anonymous tip and then had proceeded to corroborate it  
16 through three hours of surveillance and observation over  
17 the course of the ensuing week. And all of the traffic  
18 he saw during those three hours was the same short-stay  
19 traffic that was reported in the tip.

20 Based on his training and experience, that  
21 activity was consistent with drug --

22 JUSTICE SOTOMAYOR: It would be interesting  
23 if he waited to see whether this was also a short-stay  
24 visitor.

25 MR. GREEN: I think he would have --

1 JUSTICE SOTOMAYOR: I don't see how this is  
2 any different than stopping the first person you see.

3 MR. GREEN: I think, Your Honor, as -- as  
4 we've admitted, I think if he had seen it and it were  
5 short stay, I think we may well beat the reasonable  
6 suspicion, and I think that's why the prosecutor here  
7 conceded that it wasn't.

8 But it was a close call based on everything  
9 that he had seen to that point. And in these  
10 circumstances, we think that's why -- where the  
11 predicate conduct was a result of -- of misconduct that  
12 was not --

13 JUSTICE SOTOMAYOR: What's going to stop  
14 police officers -- if we announce your rule, and your  
15 rule seems to be, once we have your name, if there's a  
16 warrant out on you, that's an attenuating circumstance  
17 under every circumstance. What stops us from becoming a  
18 police state and just having the police stand on the  
19 corner down here and stop every person, ask them for  
20 identification, put it through, and if a warrant comes  
21 up, searching them?

22 MR. GREEN: I think -- Justice Sotomayor, I  
23 think there are two answers to that question. First, I  
24 think that our rule -- an officer can never count, under  
25 our rule, on finding a warrant. So there is no

1 incentive for him to make that stop. If there's no  
2 warrant and the stop is lawful --

3 JUSTICE SOTOMAYOR: If you have a town like  
4 Ferguson, where 80 percent of the residents have  
5 minority traffic warrants out, there may be a very good  
6 incentive for just standing on the street corner in  
7 Ferguson and asking every citizen, give me your ID; let  
8 me see your name. And let me hope, because I have an 80  
9 percent chance that you're going to have a warrant.

10 MR. GREEN: I understand, Your Honor. And  
11 that's the second part of my answer, is that officers  
12 can't count -- under our rule, a warrant by itself is  
13 not sufficient. There still must be a separate inquiry  
14 into whether the predicate stop was flagrant, and an  
15 officer can't count in any particular stop on a judge  
16 later concluding that the stop --

17 JUSTICE KAGAN: But I assume, Mr. Green,  
18 that there are a variety of circumstances in which  
19 police officers would really like to talk to somebody  
20 and really like to search them but don't have reasonable  
21 suspicion. And I think that the question that  
22 Justice Sotomayor is asking is if you're policing a  
23 community where there is some significant percentage of  
24 people who have arrest warrants out on them, it really  
25 does increase your incentive to -- to make that stop on

1 the chance that there will be a warrant that will allow  
2 you to search and admit whatever evidence you gained in  
3 that search.

4 MR. GREEN: What -- Justice Kagan, I don't  
5 think so. I think, again, if the -- if the inquiry  
6 turns, as it does, on not only on finding a warrant, but  
7 then a determination of whether the stop was flagrant,  
8 the officer has no guarantee before he makes the stop  
9 that a judge will later conclude the stop was not.

10 JUSTICE KAGAN: Well, but this is an officer  
11 who -- you say this is a close call. So let's say that  
12 there are close calls. But you don't think you have  
13 reasonable suspicion, or you think you maybe do if you  
14 find a good judge out there, but -- but you -- there is  
15 a reason why you want to talk. So this is not a  
16 flagrant violation. This is not a dragnet search or  
17 something like that. But you -- if -- if -- I mean, it  
18 does change your incentives quite dramatically, it seems  
19 to me, if you're policing a community where there is  
20 some significant percentage of people who have arrest  
21 warrants.

22 MR. GREEN: Justice Kagan, I think, with  
23 respect, it doesn't. Officers know that the only  
24 surefire way -- the incentive is always to comply with  
25 the Fourth Amendment. That's the only way they can be

1 sure that the evidence they are gathering is later used  
2 in a prosecution.

3 JUSTICE KAGAN: That's the only way they can  
4 be absolutely sure. But -- but here, there's -- there's  
5 some chance that they're going to find the arrest  
6 warrant and then they're going to be able to admit the  
7 evidence that they're going to get, whereas before,  
8 there was none. And that some chance is not like a  
9 once-in-a-blue-moon kind of chance. In these very  
10 heavily-policed areas, it's -- I mean, I was staggered  
11 by the number of arrest warrants that are out on people.  
12 So it's, you know, a significant possibility that you're  
13 going to find an arrest warrant and be able to admit  
14 whatever drugs or guns or whatever it is you find.

15 MR. GREEN: Well, I think, Your Honor, in  
16 those circumstances, that's where the flagrancy inquiry  
17 actually does the work of deterrence. Because as this  
18 Court has explained, to be appropriate, suppression must  
19 yield appreciable deterrence. There may be some  
20 additional marginal deterrence that suppressing  
21 everything following an event like this would yield, but  
22 that's never been enough under this Court's precedence.

23 JUSTICE SOTOMAYOR: Don't you think it's  
24 enough of a deterrence to say to a police officer in  
25 this situation, you should have reasonable suspicion?

1 You know the Fourth Amendment requires it. So before  
2 you do an intrusive act demanding identification, you do  
3 what you're permitted to do, which is just to ask the  
4 person whether they'll talk to you. Don't you think  
5 that that would improve the relationship between the  
6 public and the police? Wouldn't that be the appropriate  
7 encouragement we would give, if we don't let police do  
8 these things in questionable situations?

9 MR. GREEN: Well, Your Honor, I think that's  
10 what the -- the existing rule on the exclusionary rule  
11 does. It encourages officers to comport with the Fourth  
12 Amendment. This applies to --

13 JUSTICE SOTOMAYOR: We're begrudging them  
14 now from doing that. We're saying if you have  
15 questionable probable cause, go ahead and do it because  
16 we're not going to make you take that extra step of just  
17 merely stopping someone and saying, will you talk to me,  
18 please.

19 MR. GREEN: No. I don't think so, Your  
20 Honor. I think, again, because there are two predicate  
21 steps that must be -- that must happen before this  
22 exception would apply. And the officer, before the  
23 stop, can't count on either one. That's why when --  
24 when we are talking about conduct here that is -- that  
25 is admittedly a violation of the Fourth Amendment, but

1 low culpability, that's where the -- the additional  
2 marginal deterrence that would come from suppression  
3 doesn't do its work.

4 And with respect to the particular type of  
5 intervening circumstance here, this is a -- a compelling  
6 intervening circumstance of the type that this Court  
7 identified in its -- in its holding in Johnson v.  
8 Louisiana. This --

9 JUSTICE GINSBURG: Mr. Green, you make a  
10 point that a person's name is not suppressible, and  
11 evidence derived from just knowing the name is not  
12 suppressible. If you're right about that, then the  
13 police could stop anyone and say, whether I have  
14 reasonable suspicion or not, I want to know your name --  
15 and that's not suppressible -- then does the warrant  
16 check, which you say is intervening circumstance. So it  
17 seems that your argument is -- is arming the police with  
18 asking every person what is your name and doing a  
19 warrant check.

20 MR. GREEN: Well, Your Honor, it is, of  
21 course, that's one of the purposes of a Terry stop, of  
22 an investigatory stop, is to try to find a person's  
23 name.

24 JUSTICE GINSBURG: I thought you needed  
25 reasonable suspicion.

1 MR. GREEN: That's correct. That's right.

2 JUSTICE GINSBURG: This is a case where  
3 you're telling us reasonable suspicion or not, the name,  
4 a person's name, is not suppressible.

5 MR. GREEN: That's right, Your Honor. But  
6 it is admittedly the but-for link between the initial  
7 predicate unlawful stop, and the later discovery of the  
8 warrant, and the arrest on the warrant, which is the  
9 intervening circumstance. That's why, Your Honor, we --  
10 we think this is -- this falls comfortably within this  
11 Court's prior attenuation jurisprudence. Just like  
12 the --

13 JUSTICE KAGAN: So what is an intervening  
14 circumstance, in your view? What is your test for what  
15 it is?

16 MR. GREEN: Your Honor, I -- we think under  
17 it's -- it's -- it flows naturally from this Court's  
18 teaching in Wong Sun. That is, it's any means  
19 sufficiently distinguishable from a predicate unlawful  
20 act, such that suppressing evidence seized after it  
21 would not yield appreciable deterrence.

22 And this Court's cases --

23 JUSTICE KAGAN: Okay. And your view is that  
24 we should look at the question of whether something is  
25 an intervening circumstance through the deterrence lens.

1 That makes a lot of sense. We look at everything  
2 through a deterrence lens with respect to the  
3 exclusionary rule. And that, you know, what we're  
4 supposed to say is this -- does this appreciably  
5 increase deterrence or not; is that correct?

6 MR. GREEN: That's the inquiry, Your Honor,  
7 yes.

8 JUSTICE KAGAN: And I -- so I guess, then,  
9 I'm back to my question. In a world in which finding  
10 somebody with an outstanding arrest warrant was an  
11 extremely low probability, you would be right. In a  
12 world in which it was an extremely high probability, you  
13 would be wrong.

14 Then it seems like, where is this on the  
15 spectrum? What do we know about that? It sure seems --  
16 I mean, again, I will come back to this. I was  
17 surprised beyond measure by how many people have arrest  
18 warrants outstanding, and particularly in the kind of  
19 areas in which these stops typically tend to take place.  
20 So that, it seems to me, you know, is a pretty strong  
21 argument for why this will increase deterrence.

22 MR. GREEN: Your Honor -- again, I think,  
23 Justice Kagan, the answer to that is the inquiry here in  
24 attenuation is not just is there an intervening  
25 circumstance. Under this Court's prior cases, there

1 still must be something else. And we think that  
2 something else, following from this Court's teaching in  
3 Brown, is a flagrancy inquiry: What level of  
4 culpability does this conduct display?

5 CHIEF JUSTICE ROBERTS: Well, Mr. Green --

6 JUSTICE KENNEDY: Do you think that  
7 something else includes a subjective component, whether  
8 there was a purpose to see if there was a warrant?

9 MR. GREEN: We don't, Your Honor. We think  
10 that that inquiry is inconsistent with the way this  
11 Court's Fourth Amendment jurisprudence has evolved.  
12 It's --

13 JUSTICE SOTOMAYOR: So isn't flagrancy --

14 JUSTICE KENNEDY: Is it that -- it's true  
15 that that would be a step maybe beyond our -- our -- our  
16 cases.

17 On the -- on the other hand, if the inquiry  
18 is one of flagrancy, then maybe that's necessary. And  
19 it may be particularly necessary here because under the  
20 line of questioning that Justice Kagan just concluded  
21 with you, it would seem odd for this Court to say the  
22 higher crime -- the more it's a high-crime area, the  
23 less basis you have to stop. That's very odd.

24 MR. GREEN: Well, I think, Your Honor --

25 JUSTICE KENNEDY: So it seems to me that the

1 subjective-purpose component might serve an important  
2 purpose here, so that a police officer can't just say,  
3 I'm going to see if there's a warrant for this fellow.  
4 I'm -- that's the reason I'm going to stop. That seems  
5 to me quite -- quite wrong.

6 MR. GREEN: Well, Justice Kennedy, I think  
7 the answer to that question is -- is that in the cases  
8 upon which Respondent relies, citing the -- the -- the  
9 subjective-purpose requirement, those have all been  
10 cases involving arrests without probable cause. And in  
11 those circumstances, the -- the factors and the facts  
12 that we think this Court discussed in those cases go to  
13 show the objective unreasonableness of those particular  
14 actions.

15 We think it's different in the context of a  
16 Terry stop, where this Court has repeatedly said courts  
17 can make the stop in order to investigate, in order to  
18 confirm or dispel suspicion. And that's particularly  
19 so, Your Honor, where -- with relation to the -- the  
20 two-part test that we think this -- that we think is  
21 appropriate here, where the intervening circumstance is  
22 a preexisting warrant based on probable cause, arising  
23 from facts completely unrelated to the stop. That type  
24 of intervening circumstance matches up precisely with  
25 what this Court found in *Johnson v. Louisiana*, where the

1 intervening circumstance there was a commitment --

2 JUSTICE SOTOMAYOR: This is a non sequitur.

3 When you talk about an intervening circumstances --

4 we've looked at it in the case law -- it's always been

5 something different than the actual stop. Another

6 police officer comes by and says, oh, I've been

7 searching for that guy. I know he has -- I -- I have

8 a -- an arrest warrant for him. A witness walks by on

9 another crime and says, he just robbed me down the

10 block.

11 Those are intervening circumstances because

12 they are something outside of the stop. This location

13 of evidence was a direct product of the stop.

14 MR. GREEN: Well --

15 JUSTICE SOTOMAYOR: It would never have

16 happened except for the stop.

17 MR. GREEN: Your Honor, we agree that there

18 is but-for cause here. But with respect, there was

19 actually something else that happened here. That was

20 that prior finding of probable cause by a neutral and

21 detached magistrate on a crime completely unrelated to

22 the facts at issue in this particular stop. So in that

23 sense, it does resemble --

24 JUSTICE SOTOMAYOR: Mr. -- you know

25 something? Finding the baggie of cocaine gives the

1 officer reasonable -- probable cause to arrest, but we  
2 don't let that cocaine come into evidence merely because  
3 it was a ground for the arrest. We look at how the  
4 evidence was secured before deciding whether it's  
5 suppressible or not.

6 And I don't see how this is any different  
7 than not letting someone be arrested -- or suppressing  
8 DNA evidence, fingerprint evidence that leads to other  
9 crimes. We've suppressed those things because they've  
10 been the product of an illegal stop.

11 MR. GREEN: Justice Sotomayor, we agree with  
12 you that if the bag of cocaine -- if an officer had  
13 found a bag of cocaine during an unlawful stop, that's  
14 the precise situation where the exclusionary rule would  
15 usually apply.

16 What's different here is that the search in  
17 which the -- in which the drugs and the other evidence  
18 was found occurred while the suspect was in lawful  
19 custody.

20 Respondent has admitted that the arrest  
21 warrant was lawful. And the arrest was therefore  
22 lawful. And under this Court's decision in Robinson,  
23 once the arrest is lawful, the search incident to it is  
24 lawful, and all the evidence gathered in any that -- in  
25 any search is lawfully seized.

1 JUSTICE GINSBURG: Mr. Green, you made a  
2 statement in reply brief that says, "The Fourth  
3 Amendment does not require officers to have reasonable  
4 suspicion before they check for warrants."

5 If you mean that, then any officer can say,  
6 what's your name, I'll check you for a warrant.

7 MR. GREEN: An officer could do that, Your  
8 Honor. That's certainly right. But what happened here  
9 is that the -- the -- of course that request came during  
10 the course of a stop that we've conceded was not  
11 supported by reasonable suspicion. And so the question  
12 is what happens --

13 JUSTICE GINSBURG: But you say they didn't  
14 need reasons for suspicion. I mean, as I read the  
15 sentence, it says the officer doesn't have to have  
16 reasonable suspicion. It can grab you, what's your  
17 name, and check for warrants, and that doesn't violent  
18 the Fourth Amendment.

19 MR. GREEN: Well, Justice Ginsburg, they  
20 don't have to have reasonable suspicion to check for  
21 warrants, but that's different from making the initial  
22 stop where, of course, they do need reasonable  
23 suspicion.

24 If there are no further questions, I'd like  
25 to reserve the remainder of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Bash.

3 ORAL ARGUMENT OF JOHN F. BASH  
4 FOR UNITED STATES, AS AMICUS CURIAE,  
5 SUPPORTING THE PETITIONER

6 MR. BASH: Mr. Chief Justice, and may it  
7 please the Court:

8 I'd like to start with the concern that  
9 Justice Sotomayor and Justice Kagan have both raised  
10 about these communities where there are a lot of  
11 outstanding warrants.

12 As a preface, there is a lot of communities  
13 where there is not a lot of outstanding warrants, and  
14 the rule that Respondent wants you to establish would  
15 exclude evidence of serious guilt and serious offenses  
16 nationwide.

17 But focusing on communities like Ferguson  
18 with a lot of outstanding warrants --

19 JUSTICE SOTOMAYOR: I'm sorry. I don't  
20 understand why. If there's an arrest warrant for  
21 someone, for whatever reason, you can arrest them. What  
22 you can't do is stop them illegally to effect an arrest.  
23 So it's not as if they're going to get away from  
24 whatever the underlying crime was. There's an arrest  
25 warrant, they're going to go back and serve their time

1 on whatever circumstance existed warranting that arrest,  
2 why are they getting away with anything?

3 MR. BASH: Well, what's being excluded is  
4 evidence of the crime that was --

5 JUSTICE SOTOMAYOR: Of another crime that  
6 the police would never have found. But we do that --

7 MR. BASH: Well -- well, they might have  
8 found it during a separate valid execution of -- a  
9 separate execution of the warrant without a preceding  
10 Terry stop, but the evidence found on a person, for  
11 example, a firearm, can be very serious crimes that are  
12 also of significant danger to these communities.

13 JUSTICE SOTOMAYOR: But that's true of all  
14 evidence we suppress. Now you're attacking our  
15 suppression jurisprudence.

16 We understand there's a cost to suppressing  
17 evidence. But we believe, as we've been taught by our  
18 precedents, that there is value in ensuring that the  
19 Fourth Amendment is respected.

20 MR. BASH: Of course. And the overarching  
21 inquiry always is weighing those very serious costs of  
22 excluding evidence of guilt against the deterrent value  
23 that you would get --

24 JUSTICE SOTOMAYOR: So what's our rule now?  
25 Now you don't need reasonable suspicion to stop someone.

1 You only need questionable reasonable suspicion to stop  
2 someone.

3 (Laughter.)

4 MR. BASH: Well --

5 JUSTICE SOTOMAYOR: And now -- so we've now  
6 lessened the standard -- the Terry stop standard, which  
7 is fairly intrusive to stop someone.

8 I -- I suspect, and I don't know whose brief  
9 it was, yours or your -- or Petitioner's, but someone  
10 said the public will stop this if they don't like police  
11 stopping you with no cause. I think the public may end  
12 up stopping things but in a way the police are not going  
13 to like.

14 MR. BASH: Well, Justice Sotomayor, we're  
15 not talking about all Terry cases. We're talking about  
16 a class of carry -- Terry cases where an intervening  
17 event of huge legal significance occurs.

18 It turns out that a neutral magistrate had  
19 already found probable cause to arrest this person. So  
20 we're certainly not talking about lowering the Terry  
21 standard in all cases --

22 JUSTICE SOTOMAYOR: No. But -- but we're  
23 not saying --

24 JUSTICE ALITO: You're not talking about the  
25 statistics, Mr. Bash. Could you do that?

1                   And then does the United States know the  
2 percentage of residents of the United States who have  
3 outstanding warrants?

4                   MR. BASH: We don't know globally. In the  
5 reply brief of the Petitioner in this case, he cited a  
6 study submitted to the Department of Justice in 2004  
7 that looked at two counties. I don't pretend they're  
8 representative, but it's a county in Minnesota and  
9 Maryland, and it was an extremely low number of warrants  
10 per person.

11                   And of course, using that number would take  
12 the assumption that every warrant is for a different  
13 person, which is probably not true. And it would assume  
14 that the population reflects the total number of people  
15 who could be subject to warrants, but of course, people  
16 pass through, people come in and out. So it's probably  
17 extremely low.

18                   I -- I do take Justice Kagan's point,  
19 though, that there are some communities where the  
20 warrants are high. I want to focus --

21                   JUSTICE ALITO: Yeah. And what -- what  
22 should we be concerned about there? What -- what would  
23 prevent the problem in -- in communities like that?

24                   MR. BASH: Well, it's -- it's important to  
25 know that Respondent's rule does nothing to solve the

1 problem that the -- the Department of Justice in its  
2 March report -- March 2015 report on Ferguson  
3 identified.

4           What was going on in Ferguson is that the  
5 municipal court, in conjunction with the police, were  
6 using arrest warrants as a revenue-raising measure.  
7 They were issuing warrants for very minor offenses and  
8 failure to appear, and then police officers on the scene  
9 had the incentive to arrest people to bring them in to  
10 pay the fine. Respondent's rule does nothing to solve  
11 that because everybody agrees the arrest is lawful.

12           The Department of Justice did not find, even  
13 in a community with as significant number of arrest  
14 warrants as Ferguson, that officers had an incentive to  
15 search, and that they were acting on an  
16 incentive-to-search-people incident. The incentive was  
17 to arrest and pay the fine.

18           With respect to --

19           JUSTICE KAGAN: But I guess -- I -- I take  
20 the point, Mr. Bash, but I guess I just don't  
21 understand. Of course, this is a nationwide rule that  
22 we would be setting. But most Terry stops do not happen  
23 in most neighborhoods. Most Terry stops happen in very  
24 high-crime neighborhoods -- appropriately, but where  
25 people have lots of arrest warrants.

1                   And -- and you might be right about the  
2                   specific Ferguson case, but I still have my question,  
3                   which is why doesn't that dramatically change the  
4                   incentives for police officers in deciding whether to  
5                   search somebody? If you know that there is a  
6                   significant possibility that somebody you stop is going  
7                   to have an arrest warrant, that's another reason to stop  
8                   them.

9                   MR. BASH: Justice Kagan, I don't think the  
10                  empirics show that the numbers are so great that even in  
11                  high-crime neighborhoods, at least outside of the  
12                  Ferguson circumstance where you have this odd  
13                  revenue-raising scheme, that the -- the chance of both  
14                  finding a warrant and then finding contraband in the  
15                  search ensuing to arrest is so high that it's  
16                  incentivizing officers to conduct illegal stops solely  
17                  for the purpose of finding a warrant.

18                  JUSTICE KENNEDY: So that was my point about  
19                  the importance or the likely importance of purpose in  
20                  this analysis.

21                  MR. BASH: And -- and I was actually just  
22                  going to turn to that, Justice Kennedy.

23                  I think when this Court has mentioned  
24                  flagrancy in cases, not only those cases listing the  
25                  Brown factors, but also classes like Leon and Herring,

1 what it has been concerned about in part is the notion  
2 that once you establish an attenuation principle, what I  
3 would say is a common-sense principle here that  
4 generally an arrest warrant should be a superseding  
5 cause of the discovery of the evidence, you might have  
6 an officer exploiting though rule precisely in order to  
7 get evidence in searches incident to arrests.

8           So I think the way you could think about  
9 flagrancy is: Did this officer have the purpose -- and  
10 it could be -- either be a purpose objectively  
11 understood from all of the facts or it could be a  
12 subjective purpose -- to exploit this attenuation  
13 exception precisely in order to search incident to  
14 arrest.

15           I don't think the facts here remotely get  
16 there. I -- I don't really think even Respondent has  
17 argued that. This was a legitimate investigation. The  
18 officer may have made a mistake about the quantum of  
19 suspicion necessary, but if you had a case where an  
20 officer truly, either objectively or subjectively, is  
21 going out, just pulling random people over because he  
22 now knows about this attenuation rule established in  
23 this case, I think that's the sort of flagrancy  
24 consideration in cases like Leon and Herring this Court  
25 has left as a safety valve.

1 JUSTICE KAGAN: But does that mean that  
2 we're going to have to, in every single case, explore  
3 the officer's subjective motivations? Because that  
4 sounds like the kind of inquiry that we've tried to stay  
5 away from in the past.

6 MR. BASH: Justice Kagan, Justice Kennedy  
7 suggested subjective motivations. And I think that has  
8 some support in the earlier attenuation cases, like  
9 Brown and Dunaway and Taylor, where it really did seem  
10 to be that the Court was inquiring about purpose. And  
11 it also has some support in doctrines like inevitable  
12 discovery, which does ask, you know, what were you going  
13 to do, in effect?

14 In more recent cases, the Court has moved  
15 towards an objective test. So I think the way the Court  
16 could formulate the flagrancy safety valve in this case  
17 is to say does this stop appear objectively designed to  
18 exploit the ability to search, incident to arrest on a  
19 warrant.

20 And it could look at all the circumstances.  
21 It could look at the fact that this wasn't incident to  
22 any legitimate investigation. It could look to the fact  
23 that the officer pulled over several people and searched  
24 them for warrants in the same incident. I think it  
25 could have that safety valve, which would have the

1 effect of preserving cases like this one, where an  
2 officer is acting in good faith, and someone is found  
3 with very serious evidence on them of drug trafficking  
4 or a firearm. And it would make --

5 JUSTICE SOTOMAYOR: Now, we've gotten to the  
6 point where we no longer have reasonable suspicion at  
7 all, because you keep defending this stop. And I keep  
8 going to back to he has an anonymous call; he does see a  
9 certain number of short-stay visits, but he stops  
10 someone who he doesn't know has been a short-stay visit,  
11 has not seen there before, knows nothing about this  
12 person, and is doing a complete intrusive stop -- not  
13 just a hey, will-you-talk-to-me stop, but a formal  
14 investigatory stop -- on nothing else.

15 MR. BASH: Justice Sotomayor, respectfully,  
16 I think this -- I think this was a close case and  
17 I'll -- I'll just lay out why. Maybe you'll disagree  
18 with that.

19 This is an officer with 18 years of  
20 experience and several years, or a couple years, in  
21 drug -- drug crimes. Got an anonymous tip that this was  
22 a drug house. Observed it intermittently for three  
23 hours and saw short-term traffic that was consistent in  
24 his experience and expertise with drug activity. And  
25 then someone walked out of the house.

1                   That person could have been one of two  
2 people. He could have been a short-term visitor, in  
3 which case, I think most people would agree, that there  
4 would be cause to stop. Or it could be a long-term  
5 resident of that house. And there's not too many houses  
6 that are involved in a long, ongoing drug trafficking or  
7 drug sales that the -- a long-term resident of that  
8 house wouldn't know about. I mean, this wasn't a pizza  
9 deliveryman. This was some --

10                   JUSTICE GINSBURG: Yes. But it's -- it's --  
11 it's a given that there was no reasonable suspicion.  
12 And you could argue whether it was. But for our  
13 purposes. There was no reasonable suspicion.

14                   MR. BASH: As the case comes to the Court,  
15 that is correct, Justice Ginsburg. My only point was  
16 this isn't the example, in my mind, of the safety valve  
17 flagrancy situation that I was discussing with  
18 Justice Kagan and Justice Kennedy.

19                   JUSTICE GINSBURG: Is that -- would you --  
20 the reason that this case comes to us is because the  
21 Utah Supreme Court says, no, this is three kings and  
22 flagrant; this is all very confusing. And courts are  
23 coming out all over the lot, so we want to come up with  
24 a simpler test.

25                   Do you have -- are you saying Utah was

1 wrong? That the three-prong test that we have now is  
2 fine? Would you change, in any respect, how we look at  
3 these attenuations?

4 MR. BASH: Well, I don't think the  
5 three-prong way is a bad way to look at it. The cases  
6 have actually used the three prongs to determine whether  
7 a defendant's confession is the product of free will.

8 Mr. Chief Justice, can I --

9 CHIEF JUSTICE ROBERTS: Finish your  
10 sentence, sir.

11 MR. BASH: We think it's a fine way to think  
12 about this case, in the sense of the Court could hold  
13 superseding legal authority by a neutral magistrate is  
14 an intervening event of significance for the attenuation  
15 analysis, and suppression would be appropriate only if  
16 the stop was flagrant, either objectively or  
17 subjectively understood.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Ms. Watt.

20 ORAL ARGUMENT OF JOAN C. WATT

21 ON BEHALF OF THE RESPONDENT

22 MS. WATT: Mr. Chief Justice, and may it  
23 please the Court:

24 Utah's proposed rule would open the door to  
25 abuse.

1           It would create a powerful incentive for  
2 police officer -- officers to detain citizens without  
3 concern for the Fourth Amendment, knowing that finding a  
4 warrant would wipe the slate clean and render the  
5 constitutional violation irrelevant. It would cut the  
6 heart out of Terry. It would create a new form of  
7 investigation. Officers would be stopping citizens and  
8 hunting for warrants.

9           It's already the practice in many  
10 communities, and if Utah's rule is adopted, it will  
11 become the norm.

12           It's unnecessary for this Court to take such  
13 a sweeping view as -- as Utah has.

14           JUSTICE ALITO: Well, would that be true if,  
15 let's say, one-half of 1 percent of the residents of  
16 South Salt Lake or Salt Lake City have outstanding  
17 warrants?

18           MS. WATT: The statistics are important to  
19 our argument, but not necessary. Because even without  
20 the statistics, we know that officers make stops  
21 precisely for that reason: To find the warrant. That's  
22 why they're making the stop. They can target  
23 communities. And so even if there's just a -- a very  
24 minor amount of -- of warrants, they can still target  
25 communities that may have a greater incidence of

1 warrants. And if this were the rule, there would be no  
2 downside. Officers --

3 JUSTICE ALITO: Well, that's true, there's a  
4 downside. If the officer makes an illegal stop, the  
5 officer exposes himself or herself to all sorts of  
6 consequences.

7 But you're saying that, let's -- if the --  
8 on the statistic that I gave you, if there's a 1 in 200  
9 chance that there's going to be an outstanding warrant,  
10 so the officer says well, you know, I don't have -- I  
11 have no reason to stop this person, but if I stop 200  
12 people today illegally, then I'm going to find one who  
13 has an outstanding warrant, you would say that that --  
14 that gives the officer the incentive to make those 199  
15 illegal stops.

16 MS. WATT: Well, it's still precisely why  
17 the officer would be doing it. He's writing the warrant  
18 check in this -- in this facts situation. We're talking  
19 about -- about a very narrow set of facts where we have  
20 an officer that detained someone, and as part of that  
21 detention, there is a warrants check. These -- these  
22 were not separate things. It was inherent in this stop.

23 And so, yes, if an officer is detaining  
24 someone under those circumstances and runs a warrants  
25 check, he's doing it precisely.

1 JUSTICE KENNEDY: Could -- could you -- is  
2 it permissible to do a warrant check as part of a lawful  
3 Terry stop?

4 MS. WATT: A lawful Terry stop?

5 JUSTICE KENNEDY: Yes.

6 MS. WATT: We -- in our brief, we referred  
7 to Rodriguez, and -- and this Court has certainly said  
8 that, at least in the context of -- of automobile stops,  
9 yes.

10 JUSTICE KENNEDY: Well, in -- in -- in this  
11 case, the State, as I understand it -- please correct me  
12 if I'm wrong -- has conceded that the stop was unlawful.  
13 It has not conceded that it was flagrantly unlawful;  
14 isn't -- isn't that correct?

15 MS. WATT: Well, that's right. That's  
16 right. And -- and so, what -- but what -- the position  
17 that the State has taken is --

18 JUSTICE KENNEDY: So we take the case as one  
19 in which there was no -- there was no flagrant conduct?

20 MS. WATT: The -- so the test under Brown  
21 for flagrancy really has two elements. One is whether  
22 it was done deliberately or purposefully. And we know  
23 from Dunaway and Taylor, and Brown itself that -- that  
24 unlawful conduct that is undertaken with the purpose or  
25 with the hope of finding something, with the hope that

1 something turns out -- up, is deliberate and is  
2 flagrant. And -- and Dunaway tells us that we don't  
3 need some overarching flagrancy, that that's enough.

4 And so the purpose is important. It's  
5 viewed from an objective standpoint. Here, we have an  
6 officer that told us his purpose. But objectively, we  
7 do look at purpose. We look at justification. That's  
8 how we know the limits of a Terry stop.

9 CHIEF JUSTICE ROBERTS: What -- what's the  
10 number? What percentage of people have to have warrants  
11 before you can imply that whenever an officer stops  
12 someone, it is to, you know, illegally search them  
13 because they're very likely to have an arrest warrant?

14 MS. WATT: Well, I think that the proper  
15 focus -- I mean, I -- I don't think breaking it down to  
16 numbers is the way to go. I think the proper focus is  
17 on deterrence. And we know deterrence is not just --

18 CHIEF JUSTICE ROBERTS: Well, I suppose  
19 that's related. I mean, your brief had a lot of numbers  
20 in it. And if only one out of a hundred people have  
21 arrest warrants, then I think you really couldn't imply  
22 that that was the purpose of the stop.

23 MS. WATT: If you had --

24 CHIEF JUSTICE ROBERTS: And some of these  
25 numbers -- obviously, you have, in particular

1 communities, high numbers, but some of them didn't  
2 strike me -- I was surprised how low they were. 323,000  
3 is a big number, but that's the entire State of Florida.

4 MS. WATT: So -- so the officers run  
5 warrants because -- warrants checks because they're  
6 likely to turn up warrants. With -- when they target  
7 certain --

8 CHIEF JUSTICE ROBERTS: Why is that? You  
9 mean every time a police officer pulls somebody over and  
10 runs a warrant check, it's because he thinks it's likely  
11 there's a warrant? Might it -- might it be to protect  
12 him when he walks up to the car? He'd like to know that  
13 the person is wanted for murder, right?

14 MS. WATT: So running the warrants check  
15 tells him that. That's -- when you run the warrants  
16 check, you're looking for a warrant. In this case,  
17 that's what that Officer Fackrell was doing. He wanted  
18 to try to find out something about Mr. Strieff, and so  
19 he ran the warrants check.

20 The -- these kinds of stops, it is --  
21 there --

22 CHIEF JUSTICE ROBERTS: But I guess -- I  
23 mean, you do require us to determine whether or not he  
24 ran the warrant check to ensure his safety in -- in this  
25 interaction, or as an investigative matter. I mean,

1 does that make a difference?

2 MS. WATT: In -- he -- it makes a difference  
3 in the sense that when there is a stop that is -- is  
4 made, that the warrants check is inherent in that stop.

5 So I guess my answer is no, it doesn't make  
6 a difference, because when warrants check is --

7 JUSTICE SOTOMAYOR: Why wouldn't it? Why  
8 wouldn't it? Now, look at our case, Rodriguez case. We  
9 assumed that the check there was to ensure the safety of  
10 the officer.

11 MS. WATT: That's right.

12 JUSTICE SOTOMAYOR: All right.

13 MS. WATT: Right.

14 JUSTICE SOTOMAYOR: If the stop here is  
15 purely investigatory, isn't that different? Can you  
16 have an investigatory stop based on no suspicion?

17 You were right when you said he stopped to  
18 check for the warrant. The question is Justice  
19 Kennedy's question, which is: Is that legitimate?

20 MS. WATT: Can -- can you have an  
21 investigative stop --

22 JUSTICE SOTOMAYOR: Yes.

23 MS. WATT: -- to check for a warrant without  
24 reasonable suspicion or with?

25 JUSTICE SOTOMAYOR: Without.

1 MS. WATT: Without, you cannot. You  
2 cannot -- the officer cannot detain someone without  
3 reasonable suspicion to run a warrants check.

4 JUSTICE ALITO: As I understand your  
5 position, you don't argue that the arrest was unlawful;  
6 is that right?

7 MS. WATT: We don't. We have never  
8 challenged.

9 JUSTICE ALITO: So the arrest was lawful.  
10 And when the officer is making the arrest, it's  
11 permissible for safety purposes for the officer to frisk  
12 the person who is being arrested. Do you agree with  
13 that?

14 MS. WATT: Yes.

15 JUSTICE ALITO: So it's a -- so it's a  
16 lawful search, correct.

17 MS. WATT: We've never challenged the  
18 search.

19 JUSTICE ALITO: Isn't it -- can you -- can  
20 you give me one other example of a situation in which  
21 this Court has held that the fruit of a lawful search  
22 must be suppressed?

23 MS. WATT: I don't have another case in this  
24 precise circumstance. Our position throughout --

25 JUSTICE ALITO: Well, in any circumstance.

1 MS. WATT: So -- so this case has not come  
2 before the Court. We know that an arrest warrant is not  
3 always an intervening circumstance. It wasn't one in  
4 Taylor v. Alabama.

5 And -- and even -- even Utah and the  
6 Solicitor General don't take the position that just  
7 the -- the arrest and the search incident to arrest are  
8 enough because they've conceded that dragnets -- that  
9 any evidence that's found in the dragnet is a fruit.  
10 And -- and so that --

11 JUSTICE ALITO: I'm just pointing it out  
12 that that's a curiosity, isn't it, to have a law -- to  
13 suppress the fruit of a lawful search? And maybe you  
14 need strong circumstances to justify such an unusual and  
15 unprecedented result.

16 MS. WATT: Well, our position is these are  
17 strong circumstances because part of deterrence -- the  
18 value of deterrence is found in the strength of the  
19 incentive to violate the Constitution.

20 JUSTICE KENNEDY: Could you --

21 JUSTICE GINSBURG: Well, I thought that --  
22 you said --

23 JUSTICE KENNEDY: Go ahead.

24 JUSTICE GINSBURG: You said you don't  
25 question at all the arrest, and you don't question, once

1 there is an arrest, to pat down for drugs -- I mean, the  
2 pat-down for guns. But are you saying that the arrest  
3 for the warrant that has -- is a -- a different crime  
4 doesn't permit you to search for evidence, it only  
5 permits the officer to protect himself by patting down  
6 for weapons? Is that --

7 MS. WATT: Well, our position is that  
8 anything that's found is the fruit of that, of that  
9 illegal detention, not of the arrest, because the --  
10 the arrest and -- and ultimate -- and subsequent search  
11 are -- are a fruit, but -- but they're not suppressible.  
12 They're not something that we have fought against  
13 because, again, we have the warrant and authorization.

14 JUSTICE ALITO: Well, if the individual is  
15 going to be arrested and put in jail, isn't it standard  
16 procedure and lawful procedure for the authorities to  
17 search that person thoroughly? They couldn't have a  
18 person bring drugs into -- into the jail or things that  
19 the person might use to hurt himself or other people?

20 MS. WATT: It would still be a fruit.

21 JUSTICE ALITO: So it would -- well, what  
22 does that mean? It's -- but it's not -- it -- that  
23 doesn't -- that's lawful conduct on their part, right?

24 MS. WATT: Right.

25 JUSTICE ALITO: Okay. But -- so you're

1 asking for the suppression of the fruit of a lawful  
2 search.

3 MS. WATT: What we're asking for is the  
4 suppression based on the unlawful detention that began  
5 the encounter. So -- so this encounter begins with the  
6 stop. The stop itself is -- is unlawful. The State has  
7 conceded that throughout.

8 So what's -- what's the problem with that  
9 stop? This is a stop -- the kind of stop that lawyer --  
10 or, I'm sorry -- that officers are faced with every day.  
11 It's a basic kind of stop. It -- what -- what do we  
12 know about Terry stops? The officers have to -- have to  
13 have a reasonable articulable suspicion.

14 Courts have -- tells us that it's really a  
15 two-step assessment. They have to, No. 1, look at the  
16 totality of the circumstances, and No. 2, they then have  
17 to look at whether there is an individualized suspicion,  
18 does this tie in with this defendant?

19 So in this case, what does the officer know?  
20 All he knows is that there's some short -- not terribly  
21 frequent, short-stay traffic at the house. He sees my  
22 client emerge from the house, knows nothing else. So  
23 even under the totality, a reasonably well-trained  
24 officer should have known this stop was not -- was bad.

25 Second --

1 CHIEF JUSTICE ROBERTS: You're arguing  
2 something that the State's conceded, right?

3 MS. WATT: Well, I think it's important  
4 because the State has taken the position that -- that  
5 this was just a fact or two shy of -- of what was  
6 needed. And being a fact or two shy of Terry leaves us  
7 with nothing. Terry is already a fairly-low standard,  
8 but it's a --

9 JUSTICE KENNEDY: But you still have to say  
10 that it's flagrant.

11 MS. WATT: Well, my position is -- is  
12 twofold; one, that -- that flagrancy has two aspects.  
13 One aspect is just the deliberate aspect. And that  
14 in -- in this type of a stop where -- where it's made  
15 for the purpose of -- of running a warrants check, if  
16 the -- the warrants check is inherent in the stop, that  
17 that's enough; but secondly, if we were going to --  
18 going to include a different definition, it would be  
19 that it was blatantly unconstitutional.

20 And so that's why I'm moving into the stop,  
21 to talk about what was the problem with this stop, what  
22 do we expect of our police officers, what do we need  
23 from our police officers?

24 CHIEF JUSTICE ROBERTS: You -- you said that  
25 the -- that the stop was made for the purpose of running

1 for the arrest warrants. I just don't know the basis  
2 for that, other than your statistics that in certain  
3 areas there are a high number of arrest warrants. In  
4 many areas there aren't.

5 I mean, how -- is it entirely empirical? Do  
6 we have to accept and generalize from your empirical  
7 evidence which -- that the purpose must be to execute or  
8 to check for arrest warrants?

9 MS. WATT: No, because what -- we know that  
10 that's precisely what -- what was done in this case,  
11 what is done in some other cases. In this case, we --  
12 we have an officer that makes a stop and immediately  
13 runs that warrants check. How does --

14 CHIEF JUSTICE ROBERTS: But he immediately  
15 runs the arrest -- warrants check when he makes the stop  
16 because he wants to know who he's dealing with. It  
17 would be -- it would be, I think, bad police work to not  
18 run the warrant check until after you've had an  
19 interaction with the person when the danger that you  
20 could have found out about might have been when it's too  
21 late to -- to act on it.

22 MS. WATT: The way he finds out who he's  
23 dealing with is if there's a warrant. The point is, he  
24 didn't have a reasonable suspicion to stop my client.  
25 And so --

1 CHIEF JUSTICE ROBERTS: No, I understand  
2 that.

3 JUSTICE SOTOMAYOR: In order to run the  
4 warrant --

5 CHIEF JUSTICE ROBERTS: You're implying --  
6 I'm still trying to get at how you decide what the  
7 purpose was. In your brief you say several times, oh,  
8 the purpose is to -- to run the warrants check. And I  
9 just want to know why that's -- why that's the case.

10 MS. WATT: Because it was immediate; it was  
11 inherent in what he did; because he stated that his  
12 purpose in -- in stopping my client was to find out  
13 about my -- find out about the house; and that it was  
14 normal for him to run a warrants check and normal for  
15 him to know -- want to know who he's dealing with so.

16 JUSTICE SOTOMAYOR: You're --

17 CHIEF JUSTICE ROBERTS: Let's say that the  
18 warrant check is something he does when he arrests  
19 people. I don't doubt that, but it doesn't prove that  
20 that was his purpose in -- in the stop.

21 MS. WATT: So the intended consequence of  
22 running a warrants check is to find a warrant, No. 1.  
23 And No. 2, our statistics show that -- that in -- in a  
24 sizable number -- it's -- officers are likely to find  
25 warrants.

1                   The other concern is if he thought --

2                   JUSTICE KENNEDY: You're asking us to say  
3 that, as a matter of law, you want us to hold that the  
4 purpose of this stop was to run the warrants check? I  
5 thought the purpose of the stop was to find out what was  
6 going -- what was going on in the house.

7                   MS. WATT: I -- I think that when -- when  
8 an --

9                   JUSTICE KENNEDY: The record just doesn't  
10 support the first proposition that I made.

11                  MS. WATT: When an officer detains someone  
12 as part of a fishing expedition in the hope that  
13 something will turn up, that is -- that is the purpose  
14 that is a problem.

15                  JUSTICE SOTOMAYOR: There was no suspicion  
16 here. He was -- your client wasn't frisked.

17                  MS. WATT: I'm sorry. Wasn't frisked?

18                  JUSTICE SOTOMAYOR: No. There was no  
19 activity that the officer is alleged to have seen that  
20 would put the officer in fear of any -- that this  
21 gentleman was violent or was going to turn on him or do  
22 anything else.

23                  MS. WATT: No.

24                  JUSTICE SOTOMAYOR: Correct?

25                  MS. WATT: Correct.

1 JUSTICE SOTOMAYOR: So the purpose, as I  
2 understand what you're trying to say is, he is now  
3 routinely checking every single person that he stops,  
4 whether with or without reasonable suspicion. There  
5 can't be any other reason other than he wants to find  
6 the warrant or not.

7 MS. WATT: But that's --

8 JUSTICE SOTOMAYOR: So part of the stop may  
9 be to investigate, but the other part of the stop is  
10 he's doing this routinely, with no reasonable suspicion,  
11 with no articulable fear of his -- for his own safety.  
12 He's demanding peoples' names, and he's running a  
13 warrant to do what? You're saying to find the warrant.

14 MS. WATT: Find the warrant.

15 JUSTICE SOTOMAYOR: Exactly.

16 CHIEF JUSTICE ROBERTS: How often are -- are  
17 cars -- people stopped driving, an officer walks up to  
18 the car and they're shot? Has that happened a fair  
19 amount of times?

20 MS. WATT: It does happen.

21 CHIEF JUSTICE ROBERTS: It does happen. So  
22 is there no other reason for checking to see if there  
23 are warrants out for that person before you walk up to  
24 the car? Or before you conduct an inquiry with a  
25 ticket?

1 MS. WATT: So --

2 CHIEF JUSTICE ROBERTS: It seems to me not  
3 wanting to get shot's a pretty good reason.

4 MS. WATT: But this presents a completely  
5 different scenario. This officer approached  
6 Mr. Strieff. He knew very little about him. You know,  
7 as a matter of deterrence, a reasonably well-trained  
8 officer would have known, should have known that there  
9 wasn't enough there. Because he didn't know anything  
10 about my client, there was no individualized suspicion.  
11 And --

12 JUSTICE ALITO: Well, we really don't know  
13 very much about exactly what happened here, which is  
14 unfortunate. But what the officer testified was that he  
15 didn't just grab this guy and say give me an ID and  
16 then -- and then run a warrants check. He did say that  
17 he -- he approached him and he said -- identified  
18 himself. He said he thought there might be drug  
19 activity going on in the house, and he asked him to  
20 tell -- he said, "I asked him to tell me what he was  
21 doing there."

22 Now, we don't even know what he -- unless  
23 I'm -- it's someplace else in this record, we don't even  
24 know what your client said. But he could have said,  
25 what am I doing there, yeah, I live there, or, my mother

1 lives there, or, my best friend lives there.

2 But whatever -- we don't know what he said.

3 But then at some later point he ran a warrants check.

4 So how can we infer from that, that the whole point of  
5 the stop was to run the warrants check?

6 MS. WATT: So -- so a really important part  
7 of the officer's testimony was that he didn't remember  
8 what that answer was. So if my client had said, I went  
9 in there because there's someone who's ill and I've been  
10 visiting for, you know, 20 minutes, or -- or, this is  
11 where my friend lives; that's why I was there, end of  
12 inquiry, and -- and the warrants check shouldn't have  
13 been run. A reasonably well-trained officer should  
14 know.

15 The -- the important part of this case is  
16 that if we're only looking at -- we're not just looking  
17 at deterring Officer Fackrell, we're looking at  
18 deterring future conduct by officers. And the -- the  
19 Terry limitation is something we want our officers to  
20 know. It's fairly straightforward. This is a fairly  
21 straightforward case that is going on every day in this  
22 country where officers are looking at houses, watching  
23 houses that maybe, might have drug trafficking going on.  
24 They're trying to establish probable cause. Case law is  
25 relatively clear about what you need to get probable

1 cause on a house.

2 It's also relatively clear about what you  
3 need to get individualized suspicion. We know from  
4 Cortez we need those two elements. We -- we also know  
5 from Ybarra that just being in proximity to other people  
6 is not enough. Being around -- even when the officers  
7 have probable cause to search or probable cause to  
8 arrest someone if you're standing right there, it's not  
9 enough.

10 So it should be clear to an officer that my  
11 client leaving a house that he doesn't even have  
12 probable cause on, that he's trying to find something  
13 out about --

14 JUSTICE SOTOMAYOR: Well, all he did was go  
15 from the house to a convenience store, not in a car but  
16 walking.

17 MS. WATT: Right.

18 JUSTICE SOTOMAYOR: He walks to a  
19 convenience store, he's stopped in the parking garage  
20 but without a car. And I go back to this is not coming  
21 up to a parked automobile and getting shot, correct?

22 MS. WATT: Right. Right.

23 CHIEF JUSTICE ROBERTS: Would your rule  
24 apply in that situation?

25 MS. WATT: Well, when an -- when an officer

1 makes a stop --

2 CHIEF JUSTICE ROBERTS: Would your rule  
3 apply in a situation where the officer approaches the  
4 car for a purpose that is later found to be insufficient  
5 under Terry? You would suppress whatever evidence is  
6 find -- found in that situation too, right?

7 MS. WATT: If the -- if the officer did not  
8 have a reasonable suspicion for the stop.

9 CHIEF JUSTICE ROBERTS: Okay. So it would  
10 apply in the stopping of the automobile situation.

11 MS. WATT: It would. But it's --

12 CHIEF JUSTICE ROBERTS: Okay.

13 MS. WATT: But again, in these cases, if  
14 there is a warrant, we haven't argued about the warrant  
15 itself. What we've -- our concern is the random stops.  
16 And our concern is not just for my client. It's for all  
17 of those innocent citizens that will -- that are walking  
18 around, that are stopped, that a warrants check is run  
19 and nothing comes up and then they're sent on their way.  
20 There's no oversight.

21 The -- the officer is encouraged to engage  
22 in -- in a catch-and-release type of approach with our  
23 citizenry. And Utah's rule would be something that --  
24 that would create that incentive.

25 JUSTICE GINSBURG: In -- in your brief you

1 took the position that -- that an event is intervening  
2 only if it is unforeseeable.

3 MS. WATT: Well, our position is that an  
4 intervening circumstance needs to be independent, and  
5 it -- it needs to be a break in the -- the causal chain.  
6 And that when -- when a warrant is run -- and it needs  
7 to be something that is not directly related to the  
8 officer's conduct.

9 And so because the warrants check is an  
10 inherent part of -- of the detention, it's not an  
11 intervening circumstance. And that's something that --  
12 that the Utah Supreme Court unanimously agreed with in  
13 the dissent in the Utah court of appeals as well, agreed  
14 that this is -- it's a natural and foreseeable  
15 consequence. It is the intended result. It -- it is  
16 not something that -- that is independent, that -- that  
17 comes as a surprise.

18 And that -- that's really consistent with  
19 this Court's case law in dealing with intervening  
20 circumstances. Spontaneous confessions are something  
21 that are independent; they -- they break the chain. We  
22 look at free will, and that's independent and breaks the  
23 chain. Witness testimony. But here there was no break.  
24 It was a direct result of the officer's conduct.

25 The -- the rule that we are really asking

1 the Court to -- to adopt follows settled exclusionary  
2 rule case law, and that is that -- that if there is the  
3 bad stop, it's suppressed unless there is attenuation.

4 And of course, if there hadn't been a  
5 warrant, if -- if the officer had just stopped my client  
6 and searched him, I don't think anyone's contesting that  
7 that would just simply be suppressed without  
8 attenuation.

9 And in this case there was -- there was no  
10 attenuation as well because all three of the factors  
11 that this Court has looked at work in favor of  
12 suppression. The temporal proximity works with us,  
13 obviously. It was -- it was contemporaneous. It was  
14 immediate. It was inherent.

15 It's not an intervening circumstance because  
16 it's not independent and it's not a break in the causal  
17 chain. And it was deliberate conduct on this officer's  
18 part that was blatantly unconstitutional.

19 CHIEF JUSTICE ROBERTS: You -- you disagree  
20 with Judge Friendly's analysis in the Friedman case?

21 MS. WATT: That -- in -- in what respect?

22 CHIEF JUSTICE ROBERTS: Well, with -- with  
23 his analysis. As -- as I understand, it took the  
24 position opposite to what you're arguing, and I just  
25 want to know if you have a basis for distinguishing that

1 precedent.

2 MS. WATT: I guess I don't, no.

3 So -- so our position is that that this  
4 falls squarely within the -- the Court's settled case  
5 law. We're asking that the Utah Supreme Court be upheld  
6 and --

7 JUSTICE ALITO: You agree that attenuation  
8 is based on -- on deterrence; that the attenuation  
9 determination is based on a calculation of the deterrent  
10 effect of the ruling.

11 MS. WATT: I do. I do. I -- I agree that  
12 the focus is on deterrence. And I think that in this  
13 circumstance, there's powerful deterrence to -- to adopt  
14 our position and to not follow Utah's position.

15 If -- if Utah's position is -- part of  
16 deterrence is looking at the incentive to violate the --  
17 the -- the Constitution, and looking forward to see --  
18 see what would happen with the rule.

19 And under Utah's rule, we -- there would be  
20 nothing to stop police officers from -- from stopping  
21 people on the street, articulating something. Terry  
22 doesn't take much. Most -- most officers can articulate  
23 some sort of justification, looking for the warrant, and  
24 then sending people on their way. So -- so we believe  
25 that deterrence would be very well served by adopting

1 our rule.

2 JUSTICE ALITO: And -- and your deterrence  
3 argument doesn't depend at all on statistics?

4 MS. WATT: With -- even without the  
5 statistics, our deterrence argument works because the  
6 point is a reasonably well-trained officer would --  
7 should know what the parameters of Terry are. This  
8 officer did not.

9 JUSTICE ALITO: So if one in a thousand  
10 people has an outstanding warrant, that's enough?

11 MS. WATT: So --

12 JUSTICE ALITO: That statistic would -- that  
13 statistic wouldn't upset your argument?

14 MS. WATT: It wouldn't upset my argument  
15 because we -- we run -- officers run warrants checks  
16 because they're likely to find them --

17 JUSTICE ALITO: One -- one in 10,000, would  
18 that upset your argument?

19 MS. WATT: I -- I suppose --

20 JUSTICE ALITO: I've got to get to a number  
21 where you're going to say --

22 MS. WATT: Yes.

23 (Laughter.)

24 MS. WATT: In those communities, then you're  
25 going to see much less of this behavior, you know, much

1 less of the running of warrants checks in order to find  
2 a warrant. It's going to self-correct. But for the  
3 most part, the -- I mean, and the flip side is there's  
4 then no reason not to run them if that's the rule. But  
5 for the most part, in -- in most communities, the -- the  
6 incentive there -- the other thing is, with Utah's rule,  
7 it could create an incentive to have even more warrants  
8 for even more minor infractions. This was a traffic  
9 matter. Many of these warrants in the cases down below  
10 are minor traffic matters. The -- it --

11 JUSTICE GINSBURG: But what was it? We  
12 know -- was it a -- a ticket? Do we know --

13 MS. WATT: It's not in the record.

14 JUSTICE GINSBURG: It's not in the record.

15 MS. WATT: Yeah. But -- but -- but it was  
16 referred to as a minor traffic --

17 JUSTICE ALITO: Do you think the judges in  
18 the traffic -- in the traffic courts are going to start  
19 issuing lots of warrants because they want to provide a  
20 basis for -- for randomly stopping people?

21 MS. WATT: My point is only that it -- it  
22 creates an incentive to not be as careful. It  
23 creates --

24 JUSTICE SOTOMAYOR: I'm very surprised that  
25 Justice Alito doesn't know that most of these warrants

1 are automatic. If you don't pay your fine within a  
2 certain amount of days, they're issued virtually  
3 automatically.

4 MS. WATT: Right. And that's exactly what  
5 this one was.

6 CHIEF JUSTICE ROBERTS: So it doesn't create  
7 an incentive of the kind you were arguing, you were  
8 worried about before.

9 MS. WATT: I'm sorry.

10 CHIEF JUSTICE ROBERTS: The warrants -- the  
11 warrants are automatic. You were suggesting that, oh,  
12 one thing that will happen is they'll be issuing all  
13 these warrants if they know they can get evidence from  
14 illegal stops. And because the warrants are automatic,  
15 they're not going to be issuing all these warrants, are  
16 they?

17 MS. WATT: They're automatic in certain  
18 circumstances, and those circumstances would increase.  
19 So they're automatic right now for no insurance or for  
20 speeding. They would increase. And -- and they'd be  
21 automatic for infractions. They'd -- and the other  
22 aspect is the databases and the incentive to keep those  
23 databases accurate and up-to-date.

24 It's our position that this absolutely plays  
25 into a deterrence, and that Utah's rule would have an

1 overwhelming impact that would create a powerful  
2 incentive for police officers to walk up to people on  
3 the street and simply stop them.

4 We're asking, unless there's further  
5 questions, that the Court affirm the -- the Utah Supreme  
6 Court. Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, Ms. Watt.  
8 Mr. Green, you have four minutes remaining.

9 REBUTTAL ARGUMENT OF TYLER R. GREEN

10 ON BEHALF OF THE PETITIONER

11 MR. GREEN: Thank you, Mr. Chief Justice.

12 If I could just make three brief points in  
13 response.

14 First, to the suggestion that officers make  
15 random stops in order to find a warrant to conduct  
16 searches of this type. There's actually no evidence of  
17 the -- in this record that that's what happened here, or  
18 that it happens more broadly. In fact, I think the  
19 opposite is true.

20 If you look at page --

21 JUSTICE SOTOMAYOR: It's routine practice  
22 to -- to run warrant checks. Every stop, legal or  
23 illegal, he says it's -- he runs warrants, on the street  
24 or in a car. Meaning, that's what the police officer  
25 testified to.

1                   MR. GREEN: He -- he runs them, Justice  
2 Sotomayor, for the purposes I think that have been  
3 discussed today, for safety rationales and other  
4 reasons. But there's no actual evidence that he runs --

5                   JUSTICE SOTOMAYOR: So we now have a new  
6 rule. We've taken running warrants for traffic stops  
7 that we've thought were legitimate because they had to  
8 do with highway safety. Now we're saying to police  
9 officers, run warrants on any name you get because all  
10 you have to do is wave the flag of safety.

11                   MR. GREEN: No, Your Honor. That's not what  
12 we're saying. We're saying that there is a safety  
13 rationale for the warrant check. But beyond that,  
14 there's also the important flagrancy safety valve that  
15 we've talked about here.

16                   And with respect to this particular warrant  
17 check on page 101 of the Appendix to our petition, there  
18 is actually a finding from the district court that the  
19 reason that this officer stopped this particular  
20 defendant was on suspicion of drug possession or  
21 distribution. It wasn't for something else. So that  
22 finding is here.

23                   And more broadly, this rule, as we've noted  
24 in our papers, is, in fact, the majority rule among the  
25 courts that have addressed this issue throughout the

1 country.

2 In the United States, and -- excuse me, in  
3 the Seventh Circuit, the case of United States v. Green  
4 was decided in 1997, almost 20 years ago. And that, of  
5 course, involves States with a large number of  
6 metropolitan areas, Chicago and Milwaukee and  
7 Indianapolis. And there's no evidence in this record or  
8 before this Court that these sort of random stops in  
9 order to check for warrants is happening in those  
10 jurisdictions. So I think the actual practice and the  
11 way it bears out, and has borne out in -- in areas where  
12 this has been adopted undermines that particular  
13 argument.

14 Second, Your Honor, with respect to the  
15 question of whether a subjective purpose should come in,  
16 responding to Justice Kennedy's question to this -- to  
17 this inquiry. I think if this Court were to do that, it  
18 would become an outlier of sorts in the case -- in this  
19 Court's Fourth Amendment jurisprudence. And I think,  
20 with respect, if -- if it remains an objective inquiry  
21 and consistent with the rest of this Court's cases, that  
22 objective inquiry will capture the flagrant cases.

23 We cited four cases from four different  
24 State courts in our reply brief, in footnote 1 of our  
25 reply brief. That's Illinois, Missouri, New Jersey.

1 And Oregon, where the courts that have applied this rule  
2 have undertaken the flagrancy inquiry and have, in fact,  
3 suppressed evidence because the initial stop was  
4 flagrant.

5 Finally, a third point, the -- as we've  
6 noted in our briefs, Your Honor, the -- the Respondent  
7 here has abandoned the Utah Supreme Court's rule that an  
8 intervening circumstance must, in fact, be something  
9 attributable to the defendant's own free will. We think  
10 that's appropriate based on that concession that it  
11 would -- that this Court should -- should reverse the  
12 judgment of the Utah Supreme Court, and leaves the  
13 question, of course, of what rule to adopt instead.

14 And we think, Your Honor, this -- this  
15 intervening circumstance here, this arrest on a  
16 preexisting warrant that arises from probable cause  
17 based on facts completely unrelated to the circumstances  
18 and the facts of this stop, is exactly like what  
19 happened in Johnson v. Louisiana, which is the case that  
20 this Court pointed to in Brown v. Illinois. Where --  
21 where it adopted and said the intervening circumstance  
22 is critical to the attenuation inquiry. It's a  
23 straightforward application of that particular test.

24 If there are no further questions.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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Case is submitted.

(Whereupon, at 12:05 p.m., the case in the  
above-entitled matter was submitted.)

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