

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CURT MESSERSCHMIDT, ET AL., :

4 Petitioners : No. 10-704

5 v. :

6 BRENDA MILLENDER, AS EXECUTOR OF :

7 THE ESTATE OF AUGUSTA MILLENDER, :

8 DECEASED, ET AL. :

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10 Washington, D.C.

11 Monday, December 5, 2011

12

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 11:08 a.m.

16 APPEARANCES:

17 TIMOTHY T. COATES, ESQ., Los Angeles, California; for

18 Petitioners.

19 SRI SRINIVASAN, ESQ., Principal Deputy Solicitor

20 General, Department of Justice, Washington, D.C.; for

21 United States, as amicus curiae, in support of

22 Petitioners.

23 PAUL R.Q. WOLFSON, ESQ., Washington, D.C.; for

24 Respondents.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	TIMOTHY T. COATES, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	SRI SRINIVASAN, ESQ.	
7	On behalf of the United States,	20
8	as amicus curiae, in support of the	
9	Petitioners	
10	ORAL ARGUMENT OF	
11	PAUL R.Q. WOLFSON, ESQ.	
12	On behalf of the Respondents	31
13	REBUTTAL ARGUMENT OF	
14	TIMOTHY T. COATES, ESQ.	
15	On behalf of the Petitioners	61
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
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20
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24
25

P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 10-704, Messerschmidt v. Millender.

Mr. Coates.

ORAL ARGUMENT OF TIMOTHY T. COATES

ON BEHALF OF THE PETITIONERS

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

In *Malley v. Briggs* and *United States v. Leon*, this Court set forth a very high standard for denying qualified immunity in the civil context or suppressing evidence in the criminal context under circumstances where a police officer has procured a warrant that is subsequently determined to be invalid.

Specifically, the Court held that the initial magistrate's determination is -- is entitled to great deference, and that you'll go behind that only in cases where the officer falsified information or omitted exculpatory information, where the affidavit was bare-bones, or there was some indication that the judicial officer did not perform the function, and then a catch-all provision, where the warrant was so lacking in indicia of probable cause that no reasonable officer

1 could even submit it for a magistrate's determination.
2 And specifically in Malley, the Court said it had to be
3 the actions of an officer that was plainly incompetent
4 or knowingly violating the law.

5 This case arises from a Ninth Circuit
6 decision that we submit does not apply the Court's
7 standards, under circumstances where the officer
8 submitted, far from a bare-bones affidavit, but a highly
9 detailed, factual affidavit that we submit provided
10 probable cause for the search or at least, under the
11 Court's qualified immunity jurisprudence, a reasonable
12 officer could believe that the warrant had probable
13 cause.

14 CHIEF JUSTICE ROBERTS: There -- I suppose
15 one new feature of the case is the fact that these
16 officers submitted the affidavit to their superiors, who
17 were -- were attorneys.

18 MR. COATES: Correct. There --

19 CHIEF JUSTICE ROBERTS: Have we -- have we
20 addressed that in a prior case?

21 MR. COATES: I don't know that the Court --
22 the Court has -- in, I believe, the exclusion context I
23 think I have seen it. I can't recall the case, but I
24 believe it has, and the circuit courts certainly have
25 talked about that as an indicia of good faith, the

1 officer being willing to submit his work to someone else
2 to review it. So --

3 JUSTICE SCALIA: But it isn't good faith
4 here; that's the problem, that we don't have a good
5 faith test. We -- we have a test that goes beyond good
6 faith. Even if the officer is in good faith, according
7 to the test we've set forth, if he's so stupid that --
8 that he -- he executes a warrant that no reasonable
9 officer could think was correct, he's -- he's in the
10 pot, right?

11 MR. COATES: Well, that -- that's the test
12 that the Court has set out. But it's a high test,
13 plainly incompetent or knowingly violating the law. And
14 I think what these are additional factual circumstances
15 that show at least the officer is trying to be careful,
16 that this isn't something that's been -- been tossed
17 off.

18 JUSTICE SOTOMAYOR: Counsel, I thought in
19 the Leon case that, in fact, just like the claim in this
20 case, that the affidavit was submitted to supervisors,
21 and the Court created the Leon test in spite of that.
22 So, to say do we have a case on point, Leon itself is on
23 point. We created the test in the face of supervisors'
24 review. You're not actually, are you, arguing a
25 Nuremberg defense now?

1 MR. COATES: No. I'm just saying that --

2 JUSTICE SOTOMAYOR: That -- that simply
3 because supervisors decide, that it's okay, that that --

4 MR. COATES: No.

5 JUSTICE SOTOMAYOR: -- exculpates someone
6 from responsibility?

7 MR. COATES: Certainly not. And as I say,
8 this comes up in the qualified immunity context
9 repeatedly among the circuit courts. They've recognized
10 it as a -- as a factor. But it's not dispositive, not
11 by any mean. I agree with -- I agree with that, Your
12 Honor.

13 JUSTICE SOTOMAYOR: All right. Then let's
14 go to the other two ways that I think you're asking us
15 to overrule our precedent. The first is the using
16 subjective information that a police officer knows but
17 hasn't disclosed in the warrant. I'm having a little
18 bit of difficulty understanding how an entire warrant
19 regime that presumes that the magistrate has all
20 pertinent information -- and that's why you would be let
21 off the hook -- how you can excuse a police officer when
22 he doesn't place that information in front of the
23 magistrate.

24 MR. COATES: The way that has generally come
25 up has not been in the validity of the warrant for

1 purposes of the Fourth Amendment, but in terms of
2 qualified immunity for the officer or exclusion of the
3 evidence under -- or not -- or nonsuppression, rather,
4 under the good faith exception. And it's whether the
5 officer, in light of the totality of the circumstances,
6 might not have recognized that the warrant was deficient
7 if the warrant otherwise isn't -- isn't bare-bones.

8 And I think we -- Leon itself in footnote 23
9 incorporates the Harlow standard of totality of
10 circumstances.

11 JUSTICE SOTOMAYOR: Tell me how, this case,
12 the bare-bone affidavit was sufficient? All it says is
13 that this defendant is a member of a gang, but when the
14 police officer is questioned, he's asked whether this
15 crime at issue had any connection to his gang
16 relationship, and the answer was no. So, how is the
17 request in the warrant to search for all gang-related
18 indicia anything more than the general warrant that our
19 Founding Fathers in part passed the Fourth Amendment
20 against?

21 MR. COATES: Oh, I mean, this is not per se
22 a gang crime --

23 JUSTICE SOTOMAYOR: This is almost like --

24 MR. COATES: Without -- without a doubt,
25 it's not a -- what we consider a gangland crime, one

1 gang member against the other. It's a domestic assault
2 by a gang member on his girlfriend with a sawed-off
3 shotgun in public, right after police officers that were
4 there to protect her had left. So, it's not
5 gang-related in that sense. But I don't think that the
6 gang membership is irrelevant to the investigation in
7 this case. You know, as we note, and I think it's
8 fairly recognized, gang members have means to procure
9 and use weapons beyond that of ordinary people.

10 JUSTICE GINSBURG: So, if you have a gang
11 member and the crime has absolutely nothing to do with
12 gang membership -- that I think is the case here; it's a
13 domestic assault -- as long as you're a gang member,
14 then every warrant can say search for all gang-related
15 information? That's essentially your position, isn't
16 it?

17 MR. COATES: No, it isn't, because it's
18 always a fact-specific inquiry. The Court's made that
19 clear in *Illinois v. Gates* and for qualified immunity in
20 *Anderson v. Creighton*. We're --

21 JUSTICE GINSBURG: But you -- you said this
22 is domestic assault. There is no gang activity involved
23 in that assault, right?

24 MR. COATES: Well, the gentleman is using a
25 sawed-off shotgun, which is a weapon associated with --

1 with gangs. I don't think it's a stretch for an officer
2 to think that there might be some connection to the
3 manner in which he procured that weapon, might hide that
4 weapon --

5 JUSTICE GINSBURG: So, anyone who has a
6 weapon and is a member of a gang then can be -- there
7 can be a search for any and all weapons and material
8 related to weapons?

9 MR. COATES: Well, it depends on the
10 circumstances of the crime that you are investigating.
11 Here we have an assault, we have a domestic assault with
12 indications that the gentleman intends to continue it.
13 And, indeed, that's why the warrant is for all weapons,
14 because it would make little sense to say you can go and
15 you can find a sawed-off shotgun --

16 JUSTICE GINSBURG: I'm -- I'm on to the part
17 about all gang-related activity, when the crime has
18 nothing to do with the -- with the gang. Let's -- let's
19 stick to that. Then guns is another issue. But this
20 said warrant to search for any and all gang-related
21 items?

22 MR. COATES: Correct, Your Honor. But the
23 point is that's to be used to possibly tie Mr. Bowen to
24 any weapon that was found. It's identification
25 information. If they found, for example, the sawed-off

1 shotgun there and his gang colors with his gang moniker,
2 that would certainly help to tie him to that shotgun.

3 JUSTICE GINSBURG: But they didn't need to
4 tie him to the shotgun. They had photographs of him
5 with the shotgun.

6 MR. COATES: They have some evidence, but
7 you don't have to stop just because you have some
8 evidence. I mean, you're entitled to build your case as
9 strong as you --

10 JUSTICE GINSBURG: What -- what do you need
11 more than here he is with his gun? The defendant
12 himself and his gun? I mean, what --

13 MR. COATES: Well, if you found the actual
14 shotgun there wrapped in his -- in his gang -- gang
15 colors with his gang moniker, I mean, it would make an
16 even stronger case. And I also note, say you find a
17 .45-caliber pistol wrapped in his gang colors with his
18 gang monikers. I don't --

19 JUSTICE SOTOMAYOR: What do we do with the
20 officer's testimony when he said -- "Did you have any
21 reason to believe there were any more weapons in the
22 house?" He said, "No." What -- when an officer says
23 that, why would then he think that he has complete
24 license to go and ask for a warrant that's looking for
25 more guns, when there's only evidence of him possessing

1 one?

2 MR. COATES: Because, again, the nature of
3 gang membership is that gangs --

4 JUSTICE SOTOMAYOR: So, you're answering --
5 you're answering Justice Ginsburg by saying that any
6 time a gang member commits any crime, the police are
7 entitled to seek a warrant that permits the search for
8 anything they have in their home that relates to their
9 gang membership and to -- to guns?

10 MR. COATES: No, because I think it depends.
11 Here we have a crime that definitely involves a gun,
12 involves an illegal gun --

13 JUSTICE SOTOMAYOR: That did not involve --
14 by the officer's admission and your own, that wasn't
15 gang-related.

16 MR. COATES: The assault, correct.

17 JUSTICE SOTOMAYOR: The assault --

18 MR. COATES: But the manner in which he
19 procures the weapon, might dispose of the weapon, and
20 nature of the weapon itself --

21 JUSTICE SOTOMAYOR: But wait a minute. That
22 has nothing to do with the gang, unless you're saying
23 that you had proof that the gang did something illegally
24 in helping him procure the weapon. What information did
25 you have to suggest that?

1 MR. COATES: Again, the nature of a
2 sawed-off shotgun; it's an illegal weapon in and of
3 itself.

4 JUSTICE SOTOMAYOR: Counsel --

5 CHIEF JUSTICE ROBERTS: Whose house -- whose
6 house was this?

7 MR. COATES: Augusta Millender's house, Ms.
8 Millender's home.

9 CHIEF JUSTICE ROBERTS: So, it was not the
10 defendant's house?

11 MR. COATES: Correct. No, he was a foster
12 son who had come back to stay.

13 JUSTICE BREYER: To what --

14 JUSTICE KAGAN: Mr. Coates -- I'm sorry.

15 JUSTICE BREYER: To what extent are we
16 supposed to take things that aren't in the affidavit or
17 the warrant itself as relevant? I mean, the one thing
18 that bothers me as I read the affidavit, it doesn't say
19 someone else is living in the house. At least I didn't
20 see that.

21 And then the statement that Justice
22 Sotomayor said, well, that's later on in a deposition.
23 So -- so, if I were the magistrate sitting there and I
24 read the -- the affidavit, I might think I did have
25 cause, at least it's close maybe, but -- to allow them

1 to search for all the guns in the house. I might think
2 they all belonged to him. And, anyway, I might think he
3 thought that this could be used to -- other guns could
4 be used to go after her again.

5 But when I read he says, oh, I had no cause
6 at all for thinking that -- why isn't that the end of
7 it, if we're supposed to take that into account?

8 MR. COATES: Well, I mean, again, I think,
9 as he sets forth his experience as a gang officer and
10 the manner in which gangs dispose of, procure weapons --

11 JUSTICE BREYER: But he didn't say much
12 about the gang.

13 MR. COATES: No.

14 JUSTICE BREYER: I'm asking you a specific
15 question. I mean, if I were supposed to take into
16 account his statement, I had no reason -- to paraphrase
17 it a little -- for thinking that any of these guns,
18 other guns, were going to be used for any purpose that's
19 illegal -- if he'd said that afterwards, if I take that
20 into account, I say, why isn't that the end of the case?
21 He had no cause to ask for the other guns, period. Now,
22 that was --

23 MR. COATES: Well --

24 JUSTICE BREYER: -- the question, I think
25 roughly, that you were being asked, and I would like to

1 hear the answer. I thought the answer would be: I
2 don't have the right to take it into account. Now, do I
3 or don't I?

4 MR. COATES: Well, I mean, it's an -- it's
5 an objective standard. It's what a reasonable officer
6 would do with the facts before him.

7 JUSTICE BREYER: Wait. Before him?

8 MR. COATES: Yes.

9 JUSTICE BREYER: Or before the -- is -- do I
10 look at the affidavits and the warrant, or do I also
11 look at things that are in neither of those documents
12 but were in the officer's head?

13 MR. COATES: For purposes of determining the
14 Fourth Amendment validity of the warrant, the Court has
15 said you -- you look at the warrant. Under the
16 qualified immunity test and in the criminal suppression
17 context of good faith, you can go outside that and look
18 at the totality of what the officer knew and, if in
19 light of what he knew, whether he could have believed it
20 was so.

21 JUSTICE BREYER: All right. So, if I look
22 at whether he was in good faith, if he has any training
23 at all, I would guess that if he thought that there is
24 no -- I don't remember the exact words -- no reason, no
25 reason to believe there would be any weapons in the

1 house, no reason to believe there would be any handguns
2 in the house, and then I say, I want a warrant to search
3 for handguns in the house, it looks like you're asking
4 for a warrant to search for that for which you have no
5 reason to believe it's there. Now, that I would have
6 thought was not good faith. That was contrary to the
7 Fourth Amendment. Why isn't it?

8 MR. COATES: Because you -- you still have,
9 under 1524(a)(3) of the California Penal Code, the --
10 the ability to search for items that might be used with
11 the intent to commit another crime. And I think if this
12 was --

13 JUSTICE BREYER: Even though you can search
14 a person's house -- why don't I search the person's
15 house for an atomic bomb? And I say: Why are you doing
16 that? He says: I have no reason to believe it's there.
17 But that is a constitutional search?

18 MR. COATES: Well, again, I think -- going
19 back here in terms of -- stepping back from good faith
20 as opposed to probable cause, I don't think it's
21 irrelevant that this guy is a gang member. I don't
22 think it's unusual to think that, while you might know
23 specifically whether there's a handgun or not --

24 JUSTICE SCALIA: Excuse me. Why are you
25 going back to good faith? I mean, that's --

1 MR. COATES: Well --

2 JUSTICE SCALIA: -- that's what I think is
3 the problem with this case. If it's a good faith test,
4 you come out with one result. But the test we've
5 expressed is not good faith. This -- this police
6 officer could have been in the best of faith, but if
7 he's a very bad police officer, he's in the soup, right?

8 MR. COATES: Yes.

9 JUSTICE SCALIA: We don't have a good faith
10 test for this purpose.

11 MR. COATES: Sure. But a -- but the
12 standard is plainly incompetent or knowingly violating
13 the law, and I think -- again, there's enough detail in
14 there that I don't think it is illogical to say there's
15 some connection between gang membership and the
16 possibility or even the fair probability that there are
17 other weapons in a residence.

18 CHIEF JUSTICE ROBERTS: Of course --

19 JUSTICE SCALIA: So, whenever -- I'm sorry.

20 CHIEF JUSTICE ROBERTS: I was just going to
21 say, of course you're making the case somewhat harder
22 for yourself because the issue here is whether it was
23 reasonable for him to say let me check and see what my
24 superiors think about this and then, after that review,
25 for him to say let's see what the magistrate thinks

1 about this, right?

2 MR. COATES: Correct. It's a -- it's a
3 further step back, because it's whether it's even
4 reasonable for him to ask the magistrate for a
5 determination --

6 JUSTICE BREYER: What cause is there to
7 think -- what cause is there to think that the gang guns
8 will be used to commit a crime?

9 MR. COATES: This is a gentleman who had
10 just perpetrated an assault with a sawed-off shotgun.
11 He didn't make -- specify, in terms of his threat, that
12 he would confine any further attack to a sawed-off
13 shotgun. I just don't think it's a stretch of logic for
14 an officer to believe that if he found a .45-caliber
15 pistol there wrapped in gang colors that he should be
16 able to seize it to prevent a future attack.

17 JUSTICE SCALIA: But the -- the warrant
18 didn't just authorize, you know, firearms wrapped in
19 gang colors. It allowed him to search for any evidence
20 of gang membership, right?

21 MR. COATES: Correct.

22 JUSTICE SCALIA: But what possible purpose
23 could that serve?

24 MR. COATES: Again, because the evidence of
25 gang -- indicia of gang membership could be used to tie

1 him to things in the residence that you might find,
2 absolutely. I mean, it's an identifying characteristic
3 of Mr. Bowen.

4 JUSTICE SCALIA: If they were wrapped in it,
5 yes. But we know he's a gang member.

6 MR. COATES: Sure.

7 JUSTICE SCALIA: So, all that the finding of
8 gang membership decals or whatever they wear -- all that
9 would show is, indeed, this guy was a gang member.

10 MR. COATES: And present --

11 JUSTICE SCALIA: And even then --

12 MR. COATES: Well -- excuse me, Your Honor.
13 And present in that particular premises, it might show
14 ownership or control, might show access to the weapons.
15 It's not irrelevant to that.

16 JUSTICE SCALIA: But they -- they knew he
17 was in that premise. I mean, that -- I really don't
18 understand how you can possibly search for indicia of
19 gang membership. When you know the man's a gang member,
20 so what?

21 MR. COATES: Well, again, Your Honor, it
22 ties him closer -- it shows him there at their property.
23 If we see a photograph --

24 JUSTICE SOTOMAYOR: But tell me something.
25 There's 10 people in this house. There's 10 people in

1 this house, and as I understand it from the questioning,
2 they also knew other gang members were there. So, even
3 if they found gang colors, did they tell the -- the
4 magistrate that -- what would that prove when there's
5 multiple members in the house?

6 MR. COATES: Well, you could find, again,
7 gang -- indicia of gang membership as to him
8 individually with his moniker.

9 JUSTICE SOTOMAYOR: Well, but it's not
10 limited to that.

11 MR. COATES: Well, correct. And he's also a
12 member of several gangs. So, you could find unique
13 colors for one of his gangs and not for the others.

14 JUSTICE SOTOMAYOR: What does that have to
15 do with anything other than a general search --

16 MR. COATES: Because, again, it's evidence
17 that could --

18 JUSTICE SOTOMAYOR: -- a general search in
19 the hope of finding evidence of other crimes?

20 MR. COATES: No, because it --

21 JUSTICE SOTOMAYOR: That's what it sounds
22 like.

23 MR. COATES: No, because it would tie him to
24 anything found in that residence. Again, if you found a
25 .45 caliber pistol --

1 JUSTICE GINSBURG: What about the provision
2 for any photographs that depict evidence of criminal
3 activity? That seems to me as general as you can get.
4 Photographs depicting evidence of criminal activity.

5 MR. COATES: That actually is in the section
6 that deals with indicia of gang membership. It has been
7 carved out by Respondents here for the first time as a
8 separate category. I note it was not argued down below
9 that way; it was not viewed at the district court that
10 way; it was not viewed by the circuit judges that way.

11 And I do have to say that we're sitting here
12 looking at 11 judges and, like, 6 attorneys have looked
13 at this, and they've never brought that out separately.
14 And now we're saying that should have jumped out to the
15 officers separately. I think we cite case law saying
16 that you should interpret that within the context of the
17 entire provision, which is the indicia of gang
18 membership provision.

19 And if I may, I'd like to reserve the
20 balance of my time for rebuttal.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Srinivasan.

23 ORAL ARGUMENT OF SRI SRINIVASAN

24 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

25 IN SUPPORT OF THE PETITIONERS

1 MR. SRINIVASAN: Thank you,
2 Mr. Chief Justice, and may it please the Court:

3 When an officer follows the favored practice
4 under the Fourth Amendment of obtaining a warrant from a
5 neutral magistrate before conducting a search, the
6 officer in all but the most narrow circumstances can
7 rely on the magistrate's independent determination of
8 probable cause, without fear --

9 JUSTICE KAGAN: Mr. Srinivasan, there are
10 two categories of materials here. One is the search for
11 other guns. The other is the search for anything
12 relating to gang membership. If we think that those two
13 categories present different questions, if we think that
14 one is more beyond the bounds than another, that the
15 officer might have qualified immunity for, let's say,
16 the guns but not the evidence of gang membership, what
17 would happen in this case at that point?

18 MR. SRINIVASAN: Well, I think one of the
19 questions that would arise is whether the one as to
20 which you thought there was a problem would expand the
21 scope in a meaningful way, because if -- let's take Your
22 Honor's hypothesis that there's less of a reason to be
23 concerned about the firearms-related aspects of the
24 warrant than the gang-related parts of the warrant; then
25 the question would arise whether you would have a Fourth

1 Amendment violation in the first place, because if the
2 gang-related parts of the warrant didn't expand the
3 scope of the search in such a way that would implicate
4 independent privacy interests, there wouldn't be a
5 Fourth Amendment problem with that aspect of the
6 warrant. And, therefore, there -- you wouldn't have a
7 qualified immunity issue for sure.

8 JUSTICE SCALIA: And what does that depend
9 on, whether you would look for the indicia of gang
10 memberships in places where you wouldn't look for guns;
11 is that it?

12 MR. SRINIVASAN: That's right. You look --
13 you look at the two aspects of the warrant, and you ask
14 whether the second one, which is hypothesized to be the
15 problematic one, would allow you to search in places or
16 search with more intensity than the first --

17 JUSTICE SCALIA: Well, if you're looking for
18 photographs that show gang membership, I guess you could
19 look through photograph albums. You wouldn't really
20 look there for guns, would you?

21 MR. SRINIVASAN: Well, but -- no. I think
22 the relevant language is at page 52 of the Joint
23 Appendix. That's what sets forth the two paragraphs at
24 issue. And the first paragraph, which Justice Kagan
25 supposes doesn't raise a problem -- and I'll engage that

1 assumption -- it provides not only for searches of all
2 firearms, but it provides, and we think legitimately,
3 for searches of any receipts or paperwork showing the
4 purchase, ownership, or possession of the handguns being
5 sought. And so, if -- and paperwork certainly includes
6 photographs, because if you find photographs of an
7 individual carrying a particular firearm, that's good
8 evidence. And so, photographic evidence is within the
9 scope of the first paragraph, not just the second. And
10 so, it does raise the question of whether the second
11 paragraph increases the scope.

12 The other point I'd raise in this respect is
13 that, in the second paragraph itself, the anchor
14 sentence in some respects in the second paragraph is the
15 second sentence, which discusses not gang-related
16 indicia in particular but articles of personal property
17 tending to establish the identity of persons in control
18 of the premise or premises, writ large. And note -- and
19 that provision has not been seen to have a -- have a
20 problem associated with it thus far. The district court
21 thought it was okay. The court of appeals, at page 27a
22 of the petition appendix, seemed to assume it was okay.
23 And that's understandable because there are a legion of
24 cases that support those sorts of provisions --

25 JUSTICE ALITO: There's something --

1 MR. SRINIVASAN: -- including the Ewing case
2 cited by the majority below.

3 JUSTICE ALITO: There's something very
4 strange about the rule that we are applying here. A
5 warrant was issued by a judge of the superior court;
6 isn't that right?

7 MR. SRINIVASAN: Yes, I believe so.

8 JUSTICE ALITO: And we're -- so, that judge,
9 who is a lawyer and was appointed as a judge and
10 presumably has some familiarity with the Fourth
11 Amendment, found that there was probable cause to search
12 for all of these things. And now we're asking whether a
13 reasonable police officer who is not a lawyer and
14 certainly is not a judge should have been able to see
15 that this call that was made by a judge was not only
16 wrong but so wrong that it -- you couldn't reasonably
17 think that the judge might be correct. Is there some
18 way to phrase this -- if this rule is to be retained in
19 any form, is there some way to phrase it so that it is
20 narrowed appropriately?

21 MR. SRINIVASAN: Well, I -- I think the
22 Court has attempted to do that in Malley and Leon
23 itself, because it has made clear that in the main, in
24 all but the most narrow circumstances, where a
25 magistrate does find the existence of probable cause,

1 the court need not engage in any searching inquiry to
2 determine that qualified immunity is appropriate --

3 JUSTICE SCALIA: But the most narrow
4 circumstance is defined as a circumstance in which no
5 reasonable police officer could have thought the warrant
6 was correct. Why don't we adopt a good --

7 MR. SRINIVASAN: Well --

8 JUSTICE SCALIA: -- a good faith test for
9 this as we do in other -- in other --

10 MR. SRINIVASAN: Well, I think in some
11 sense, Justice Scalia, you have two -- in response to
12 the two parts of your question. First of all, in
13 defining what is objectively unreasonable in this
14 situation, the Court has used some pretty strong
15 language. In Malley, it spoke in terms of a magistrate
16 who's grossly incompetent. And in Leon, it spoke of --

17 JUSTICE SCALIA: A policeman. Policeman.

18 MR. SRINIVASAN: No, it was speaking of a
19 magistrate actually, and not the officers. Because the
20 point is that in order to find that officers are liable
21 in this situation, the officers would have to be so sure
22 that probable cause is lacking that only a grossly
23 incompetent magistrate could sign off on the probable
24 cause assessment. So, it used gross incompetence with
25 respect to the magistrate, which illustrates the degree

1 to which the standard is heightened in this context.

2 And in terms of whether good faith
3 principles come into play in the qualified immunity
4 context, what the Court said in Malley is that the same
5 standard for objective -- of reasonableness that governs
6 in the good faith context for suppression purposes also
7 governs in the qualified immunity context under 1983.

8 And so, I think there is room to import into the
9 qualified immunity context these principles of good
10 faith, like, for example, Mr. Chief Justice, the
11 question of whether the officers in question asked
12 superiors for their assessment of whether there's
13 probable cause.

14 And in Sheppard, which was a suppression
15 case, but in Sheppard, at page 9 -- 8 and 9 of the
16 opinion, the Court specifically made reference to the
17 fact that the officer in that case had asked for a
18 probable cause assessment --

19 JUSTICE SCALIA: Well, I don't like this
20 mishmash. Look, it's either good faith or it's --
21 however good his faith was, however well he showed his
22 good faith by checking with his superiors or what not,
23 if he made -- if he made an incompetent decision, it's
24 incompetent. And we should not mix the two, it seems to
25 me.

1 MR. SRINIVASAN: Well, that -- I mean,
2 certainly I don't want to urge any -- anything upon the
3 Court that would tend to water down the standard in the
4 suppression context, but the only point I'd add to this,
5 Justice Scalia, is that when you're looking at it from
6 the perspective of a reasonable officer who's trying to
7 assess whether he should go forward and ask for
8 assessment of probable cause from the magistrate, one
9 consideration that seems natural to take into account is
10 what actions the officer has taken, not just the quantum
11 of proof that the officer has put in the affidavit but
12 what actions has he taken. Has he asked for a -- has he
13 asked his supervisor --

14 JUSTICE SCALIA: That would be wonderful if
15 the test was, was this -- did this officer know that
16 this was a bad affidavit and was acting in bad faith in
17 executing it? If that was the test, then indeed the
18 fact that he had checked with his superiors and all of
19 that good stuff would -- would have some relevance.

20 MR. SRINIVASAN: The test as outlined by the
21 Court in Malley is whether it's objectively reasonable
22 for the officer to rely on the magistrate's assessment
23 of probable cause.

24 JUSTICE KAGAN: Mr. Srinivasan --

25 JUSTICE GINSBURG: I though the test was "so

1 lacking in indicia of probable cause as to render
2 official belief in its existence unreasonable."

3 MR. SRINIVASAN: It -- the Court did say
4 that, Your Honor, and the Court put the formulation in a
5 number of respects in Malley itself. It said, "We hold
6 that the" -- this is at page 344: "We hold that the
7 same standard of objective reasonableness that we
8 applied in the context of a suppression hearing in Leon
9 defines the qualified immunity accorded an officer whose
10 request for a warrant allegedly caused an
11 unconstitutional arrest."

12 And I think that's where the Court then goes
13 on and articulates what Your Honor just quoted. But
14 then the Court later says: "In Leon" -- and this is at
15 page -- this is at page 345: "In Leon, we stated that
16 'our objective faith' -- 'good faith inquiry is confined
17 to the objectively ascertainable question of whether a
18 reasonably well-trained officer would have known that
19 the search was illegal despite the magistrate's
20 authorization.' The analogous question in this case,"
21 and it goes on to speak about the analogous question.

22 JUSTICE KAGAN: I guess the question,
23 Mr. Srinivasan, is, do you think that the current test,
24 that the test as currently formulated, is sufficiently
25 protective of police officers? Or do you think that we

1 need to change the test in order to give police officers
2 the protection they need?

3 MR. SRINIVASAN: We think if the current
4 test is applied properly, it's sufficiently protective.
5 And really the question is how it's applied. And in
6 this case it was applied in -- in a way that I think is
7 not sufficiently protective of police officers.

8 JUSTICE SCALIA: Of course, you could say
9 that about any test, you know? If you apply it
10 protectively, it will protect.

11 MR. SRINIVASAN: You could --

12 JUSTICE SCALIA: And if you don't apply it
13 protectively, it won't protect.

14 CHIEF JUSTICE ROBERTS: Did you --

15 JUSTICE SCALIA: I'd like a test that, you
16 know, that protects when it ought to and doesn't protect
17 when it ought not.

18 CHIEF JUSTICE ROBERTS: Did you say apply
19 protectively or correctly?

20 MR. SRINIVASAN: Applied -- well, I meant to
21 say applied correctly.

22 CHIEF JUSTICE ROBERTS: Okay.

23 MR. SRINIVASAN: If applied correctly -- I
24 apologize if I misspoke. If applied correctly, it
25 should sufficiently protect --

1 JUSTICE KENNEDY: In the background of this
2 case is -- is this question: A suspect has a weapon.
3 He flees. As a general rule, do you think that warrants
4 can say that when they search the home or the place
5 where this person is likely to be, they can seize all
6 weapons? Just as a general rule?

7 MR. SRINIVASAN: No -- not necessarily as a
8 general rule, Justice Kennedy. It has to be
9 context-specific. And here you had a lot more than
10 that. You had an individual who had perpetrated an
11 attempted murder, who was a known member of a violent
12 gang, who had -- who had perpetrated physical assaults
13 against this victim before, and who had directly
14 threatened the victim that he would murder her if she
15 ever went to the police and that he was going to kill
16 her.

17 JUSTICE SOTOMAYOR: You keep adding facts
18 that weren't --

19 JUSTICE KENNEDY: So -- so, the test is
20 whether or not he is likely to commit another crime?

21 MR. SRINIVASAN: Well, that's the test
22 that --

23 JUSTICE KENNEDY: I mean, that's -- I
24 thought the Petitioner said -- I didn't have the time to
25 interrupt -- that under California law, they can search

1 for anything where he's likely to commit another crime.

2 MR. SRINIVASAN: Yes, this is a very
3 important point, Justice Kennedy. At page 48 of the
4 joint appendix, the language of the relevant California
5 statute is set forth. The California provision is
6 section 1524(a)(3) of the California Penal Code, and it
7 authorizes a search for and seizure of items where
8 they're possessed by a person with the intent to use
9 them as a means of committing a public offense. And
10 that's the provision that was invoked this very warrant.
11 And these -- and that --

12 CHIEF JUSTICE ROBERTS: Finish your
13 sentence.

14 MR. SRINIVASAN: Just the one sentence.
15 That provision is by no means an outlier. It's in
16 Federal Rule of Criminal Procedure 41(c)(3), and it's in
17 the Model Penal Code of Pre-Arrestment Procedure at
18 section 210.3, subsection (1)(c).

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Wolfson.

22 ORAL ARGUMENT OF PAUL R.Q. WOLFSON

23 ON BEHALF OF THE RESPONDENTS

24 MR. WOLFSON: Thank you, Mr. Chief Justice,
25 and may it please the Court:

1 In *Malley v. Briggs*, this Court ruled that
2 police officers do not have immunity for seeking a
3 search warrant when the warrant application is so
4 lacking in indicia of probable cause as to render
5 official belief in its existence unreasonable. That --

6 CHIEF JUSTICE ROBERTS: Well, *Malley*
7 involved a search warrant based solely on a wiretap in
8 which an unknown individual discussed drug use at a
9 party. That was all. It seems to me there's a lot more
10 information here.

11 MR. WOLFSON: Well, in -- *Malley* involved a
12 mistake as to who the person under suspicion was who was
13 mentioned in the -- in the wiretap. But the argument
14 was made in *Malley* that is exactly the argument that is
15 made here, which is that the police -- it -- one wants
16 to encourage the police to seek warrants from the
17 magistrates, and it would be -- and it would be -- it
18 would be undesirable if the police were not given
19 effectively absolute immunity when they seek a warrant
20 from a magistrate, except, of course, when they -- when
21 they lie, which is a separate question.

22 CHIEF JUSTICE ROBERTS: Here you had a
23 police officer who assembled information he had,
24 truthful information, in the affidavit, submitted it to
25 his superiors, who were lawyers. Then it was submitted

1 to the magistrate, who was a judge. And what you have
2 to say, it seems to me, is that a reasonably competent
3 officer -- not objective good faith or anything like
4 that -- a reasonable -- reasonably competent officer
5 would say: You know, I know the lawyers in the office
6 said this was okay and I know the judge said it was
7 okay, but I know more than them; I know not only that
8 it's not okay, but it's so clearly not okay that I
9 shouldn't have qualified immunity.

10 That seems to me a pretty heavy burden to
11 put on -- put on the cop on the beat.

12 MR. WOLFSON: Mr. Chief Justice, I don't
13 think -- I don't think there is any question that in the
14 great majority of cases, officers who seek warrants from
15 magistrates will be immune. And the Court made clear in
16 Malley that it does happen that officers make mistakes,
17 good faith mistakes, as to whether a particular set of
18 facts amounts to probable cause, and in that context
19 when there is a good faith mistake, the officers will
20 have immunity.

21 But the Court also stressed that officers
22 must minimize the risk of Fourth Amendment violations by
23 exercising reasonable professional judgment in applying
24 for search warrants. And so, the Court ruled that an
25 officer will not be immune if a "reasonably well-trained

1 officer," which is the term the Court used, would not
2 have believed that the -- that the warrant affidavit
3 established probable cause. Now --

4 JUSTICE ALITO: Now, is it the case here
5 that a reasonably well-trained officer would not --
6 would understand that this warrant was defective in
7 authorizing a search for guns other than the shotgun in
8 question, when a provision of the California Penal Code
9 says that a search warrant may be issued to seize items
10 intended for use in committing a crime?

11 MR. WOLFSON: A reasonable -- that a
12 reasonable well-trained officer would not have sought
13 the search warrant. I don't think the California Penal
14 Code provision really adds anything to the rest of the
15 case, because it says that you may seek items that are
16 intended to be used in a crime, but you still have to
17 know -- you still have to have probable cause to believe
18 that there are such items. And so, the cases --

19 JUSTICE ALITO: Well, you have your client
20 who has discharged a sawed-off shotgun at his former
21 girlfriend in an attempt to kill her. And he -- he is
22 known to be a member of a violent gang, and he has
23 threatened to kill her. And so, a reasonable police
24 officer would -- could not think, well, he might have
25 some other guns, and he -- and there would be an intent

1 to use those in the commission of the crime that he has
2 threatened to commit.

3 MR. WOLFSON: Well, Mr. Bowen is not our
4 client, Justice Alito. Our clients are --

5 JUSTICE ALITO: I'm sorry. Excuse me. Mr.
6 Bowen --

7 MR. WOLFSON: No, but this is -- but this is
8 an important point. Our clients are the innocent family
9 that lives in the house where--

10 JUSTICE ALITO: Well, that was just -- that
11 was a misstatement on my part.

12 MR. WOLFSON: No, I understand, but -- but I
13 want to --

14 JUSTICE ALITO: They could not think that
15 about Mr. Bowen?

16 MR. WOLFSON: But I want to make the point
17 that not only do the police have to have probable cause
18 to believe that there is such an item, they also have to
19 have probable cause to believe that it will be found in
20 the place that they propose to search. I mean, probable
21 cause --

22 JUSTICE ALITO: But the -- all right. It
23 was found that there was probable cause to believe that
24 he was living in these premises; isn't that correct?
25 And you're not contesting that.

1 MR. WOLFSON: Well, we are contesting that.
2 We're contesting their --

3 JUSTICE ALITO: You're not -- it's not an
4 issue before us.

5 MR. WOLFSON: It's not an issue here. The
6 Ninth Circuit decided the case on the assumption that
7 there was probable cause to believe that Mr. Bowen would
8 be found --

9 JUSTICE ALITO: Well, on the assumption that
10 he was living in those premises, then what is wrong with
11 a reasonable officer thinking he's tried to kill her in
12 the past using one gun; he's a member of a gang; he is
13 very likely to have -- to possess or have access to
14 other guns; those other guns may be found in the home
15 where we believe he is living, and he is intending to
16 use them to carry out the threat that he has promised,
17 the threat that he has made?

18 MR. WOLFSON: There are several -- I think
19 there are several problems with that. The first problem
20 is the police don't have probable cause to believe that
21 he has another gun, and they don't -- and they certainly
22 don't have probable cause to believe that any other such
23 gun would be found at the Millenders' house, and I --
24 the Millenders' house where innocent people live.

25 Now -- and it's not just -- and it's not

1 just that no other such gun would be found at the
2 Millenders', and the Millenders themselves have right to
3 possess handguns for lawful purposes of self-defense.
4 So, it's possible -- of course, it is possible to
5 speculate about the things that the police might --

6 JUSTICE KENNEDY: Well, just suppose they're
7 searching the suspect's own house.

8 MR. WOLFSON: Right.

9 JUSTICE KENNEDY: And there's -- he's used a
10 specific gun, a 12-gauge Remington shotgun, and they've
11 -- and they're looking for that. And these facts are
12 the same. He may continue to elude the police; he may
13 attack again. And they -- and they're searching the
14 house, his own house. They see the one gun. They see a
15 second gun. They cannot take the gun, the second gun?

16 MR. WOLFSON: No, I would not -- I would not
17 say that, Justice Kennedy, because I think that --

18 JUSTICE KENNEDY: On what basis do you say
19 they can take the second gun?

20 MR. WOLFSON: Because if the police are in a
21 place where -- lawfully in a place pursuant to a
22 properly, narrowly drawn warrant, and they -- and they
23 see something in plain view, under this Court's plain
24 view doctrine as articulated in *Horton v. California*,
25 and there is probable cause to see something there to

1 associate with criminal activity, yes, the police can --
2 can seize that.

3 But it -- but it's -- there's a big
4 difference between thinking about what the police can do
5 if they enter someplace lawfully and how they can
6 react --

7 JUSTICE BREYER: Yes, but what's the
8 difference between what you just said and the situation
9 here? You say, if he sees the gun next to the bed, for
10 example, or in the closet, and he's in the house looking
11 for the sawed-off shotgun, he could seize it. He can't
12 unless he has probable cause to think it might be used
13 for a crime.

14 MR. WOLFSON: If --

15 JUSTICE BREYER: And so, how did that
16 change? How did that change suddenly because he
17 happened to see in the house something in the closet,
18 and nothing else changed? Why now suddenly can he take
19 it?

20 MR. WOLFSON: I think the assumption, as I
21 understood, behind Justice Kennedy's question was, if
22 the police see something -- happen to see something in
23 the house that is probable cause of a crime --

24 JUSTICE BREYER: No, but your argument is
25 there was no probable cause for thinking that the guns

1 in the house, if there were other guns, would be used
2 for a crime. Now, your opponent, your brother there,
3 said when I suggested that: Oh, no, that's wrong; there
4 is probable cause to think that any guns in the house
5 would be used for a crime. He hasn't killed the girl
6 yet, and one gun's as good as another. And he might
7 well take one of those other guns and kill her. So,
8 there's probable cause to believe that the guns that are
9 in the house, or at least one could reasonably think so,
10 would be used for a crime. That was his response.

11 Then, as to whether they're likely to be in
12 the house, well, we know this: We know he has a
13 sawed-off shotgun, and we know he is a member of a gang,
14 which is defined as a group of people engaged in
15 definable criminal activity, creating an atmosphere of
16 fear and intimidation.

17 So, well, people like that have guns. And
18 when -- where they live, there may well be other guns.
19 So, it is reasonable for me to think there are other
20 guns in the house and reasonable for me to think that
21 other guns in the house would be used for killing this
22 girl if he can get to her. Okay, that's the argument.

23 Now, what's the response?

24 MR. WOLFSON: Well --

25 JUSTICE BREYER: And you don't have to --

1 you have to show more than that there's no probable
2 cause. You have to show it wasn't reasonable to think
3 that there was probable cause.

4 MR. WOLFSON: Because the police did not
5 have probable cause to believe there was any other gun,
6 and they certainly --

7 JUSTICE BREYER: He's a member of a gang
8 which often has guns, and this expert knows that members
9 of gangs have guns. And the definition of "gang"
10 suggests they're likely to have guns, whether it's
11 illegal to have them or not illegal.

12 MR. WOLFSON: But it --

13 JUSTICE BREYER: That's how he knows that.
14 That's how he knows.

15 MR. WOLFSON: But it doesn't -- excuse me.
16 It doesn't necessarily follow that there is probable
17 cause to believe that he has an arsenal of weapons with
18 him at an innocent third-party's house.

19 JUSTICE SCALIA: And the warrant authorized
20 the search for and seizure of all guns, not just the
21 guns belonging to Bowen. And in --

22 MR. WOLFSON: That is correct.

23 JUSTICE SCALIA: -- in fact, they seized
24 some of the Millenders' guns, didn't they?

25 MR. WOLFSON: That is correct. The

1 police --

2 JUSTICE SCALIA: And why is it -- if there's
3 probable cause to believe that he has other guns, is
4 there also probable cause to believe that any gun found
5 in the house will belong to him? I think not.

6 MR. WOLFSON: I would say not, Your Honor,
7 but I --

8 CHIEF JUSTICE ROBERTS: We've been
9 talking -- we've been talking about this for some time
10 as if we're reviewing the adequacy of the warrant.
11 We're not. We're reviewing the reasonableness of these
12 officers' determination that there was probable cause.

13 Do you think it is at all pertinent in
14 addressing that question that the officers submitted the
15 affidavit to support the warrant to Deputy District
16 Attorney Jane Wilson, who reviewed it and signed off on
17 it?

18 MR. WOLFSON: I -- I think it can't be
19 dispositive, Your Honor.

20 CHIEF JUSTICE ROBERTS: I didn't ask if it's
21 dispositive. Is it relevant in any way?

22 MR. WOLFSON: It could be -- it could be
23 relevant, but I would say it's -- it doesn't -- it
24 doesn't make the case in this case, for a few reasons.
25 First of all, generally speaking, of course, if you

1 can't rely on the magistrate as a -- you know, as a
2 blanket rule that you're not immune, it's hard to
3 understand why the fact that the deputy district
4 attorney signed off on it would have essentially the
5 same effect that the Court rejected in Malley, when it
6 said, you know, there will be a limited set of
7 circumstances where even if -- even if a magistrate
8 issues a warrant, the officer will be liable.

9 So, I don't think that -- I mean, the
10 district attorney and the -- and the superior are on the
11 same crime-fighting team as the -- as the -- as
12 Detective Messerschmidt in this case.

13 Also, we really -- we have no information
14 about what transpired in these conversations with the
15 deputy district attorney. We don't know whether the
16 D.A. said to Detective Messerschmidt: Oh, you know,
17 you're good; this is totally fine. Or whether she said:
18 You know, you're pushing the envelope here, but we might
19 just find a magistrate who will go along with it, so --
20 you know, so, see what you can get.

21 And the other point is, of course, relying
22 on your superiors and on the D.A. is a double-edged
23 sword in many cases, because that -- in fact, that can
24 establish or go a long way towards establishing Monell
25 liability, if you establish that there's a pattern of

1 superiors and of deputy district attorneys --

2 CHIEF JUSTICE ROBERTS: Do you want -- do
3 you want to encourage officers, when they're applying
4 for search warrants, to have them reviewed by the deputy
5 district attorney or not?

6 MR. WOLFSON: Certainly, we want them to --
7 to encourage that, Mr. Chief Justice. But the point is,
8 in Malley, this Court made clear that, ultimately, a
9 reasonably -- a reasonably well-trained officer must
10 make a judgment himself as to whether the course of
11 conduct that he proposes to undertake could reasonably
12 be thought to be within the law.

13 JUSTICE SCALIA: Ultimately, it's the
14 officer who goes into the Millenders' house, seizes
15 their arms, rifles through their drawers. It's -- it's
16 the officer that does that?

17 MR. WOLFSON: Well, the officers who are the
18 Petitioners in this case are the officers who actually
19 applied for the search warrant and who actually drafted
20 the search warrant for the magistrate to -- to sign.
21 Now, they then were present at the search. I think
22 there is a --

23 JUSTICE SCALIA: Oh, I didn't understand
24 that.

25 MR. WOLFSON: Yes.

1 JUSTICE SCALIA: They -- they did not
2 execute the warrant?

3 MR. WOLFSON: They were -- they were -- they
4 were part of the executing team, yes. They were --
5 there were --

6 CHIEF JUSTICE ROBERTS: Did they enter the
7 residence?

8 MR. WOLFSON: They entered the residence,
9 yes. There were other officers who I think it would be
10 fair to say kind of more -- undertook the more concrete
11 search of the -- you know, of the house from top to
12 bottom. I think there is a different question about
13 when a line officer relies on his lead officer's
14 instructions. And that was actually discussed by the
15 Ninth Circuit in -- in the Groh case, which later came
16 up to -- came up to this Court.

17 But I think the -- the standard that the
18 Court set forth in Malley, the objective reasonableness
19 standard, is really -- it's consistent with this Court's
20 qualified immunity case law --

21 JUSTICE BREYER: If that is the -- we're
22 using a purely objective standard, another fact that I
23 just want your reaction on is where he says, "I told you
24 never to call the cops on me." Now, he has tried to
25 throw her out of the window or something. He -- he's

1 shot at her. He's trying to kill her in five different
2 ways, and he's shouting: I'm going to kill you and I
3 told you never to call the cops on me.

4 When I first read that I thought, well,
5 maybe he has some -- maybe this is explained in part not
6 just domestic, but he has something to hide. He's
7 afraid she's going to tell the police something. Now --
8 now, could a person reasonably read those words and
9 think he has something to hide here? His -- and there's
10 something going on, and it's not just domestic?

11 Where does that lead us if we --

12 MR. WOLFSON: I don't --

13 JUSTICE BREYER: Can we read it that way?
14 And if we do read it that way, where does that lead you?

15 MR. WOLFSON: Well, the Petitioners have
16 never suggested that reading before. And, indeed, the
17 Petitioners have -- indeed, Detective Messerschmidt
18 testified at his deposition: No, I didn't have any
19 reason to believe that the crime was gang-related.

20 I mean, one of the curious things about
21 the -- the argument that the Petitioners are now making,
22 which is that you can go outside the warrant and import
23 into it the fact that he was a felon -- one of the
24 curious things about that is that the -- is that the
25 officers told the magistrate this is a violent crime, no

1 question; he is a gang member -- not in support of
2 probable cause, but in support of night service. They
3 told the magistrate that they had reviewed all the
4 various government databases, specifically including
5 police databases, but did not tell the magistrate that
6 he had any criminal record at all.

7 JUSTICE GINSBURG: Mr. Wolfson --

8 MR. WOLFSON: But that's so --

9 JUSTICE GINSBURG: Mr. Wolfson, if --
10 suppose they had had a warrant to search just for the
11 sawed-off shotgun. You conceded that when they go into
12 the house and they're looking all over, they could look
13 in cabinets and drawers for the -- to find pieces of the
14 shotgun. They come across other guns, they can at least
15 secure -- take those guns for their own safety. There
16 are other people in the house, and somebody might use
17 them.

18 So, what's -- what's the difference in the
19 scope of the search if they have a warrant just to look
20 for the sawed-off shotgun or if they have a warrant that
21 covers any guns?

22 MR. WOLFSON: Well, a couple of responses.
23 First of all, I think this Court's decisions in Groh and
24 other courts made clear that when you're evaluating
25 whether -- whether the Respondents were harmed by this

1 violation of their constitutional rights, you have to
2 look at the warrant that was actually applied for and
3 executed, not -- you don't -- you don't compare it to a
4 hypothetical warrant that the police might have gotten
5 if they had applied for a properly limited warrant.

6 CHIEF JUSTICE ROBERTS: To cite Groh -- in
7 Groh, the warrant did not identify the items to be
8 seized at all.

9 MR. WOLFSON: That is correct. But the
10 argument was made in Groh -- was, well, there really was
11 no harm because surely the officers had probable cause,
12 and if they had done their work right, that there was I
13 think no question that they would have gotten a warrant,
14 and the --

15 CHIEF JUSTICE ROBERTS: Your answer -- and,
16 again, it seems to me we keep separating these two
17 inquiries. It's not whether the warrant showed adequate
18 probable cause; it's whether or not the officers were
19 reasonable in believing that it did.

20 MR. WOLFSON: I understand --

21 CHIEF JUSTICE ROBERTS: And to cite Groh,
22 a -- no reasonable officer could think that a warrant
23 that doesn't say anything at all about what's to be
24 seized complied with the Fourth Amendment.

25 MR. WOLFSON: But the argument was made in

1 Groh that essentially this was sort of no harm, no foul,
2 because surely a reasonable police officer could have
3 obtained a valid warrant. And I was -- I was sort of
4 analogizing that to the question that Justice Ginsburg
5 made. I don't think that really is a question of
6 qualified immunity at all. I think that may be a
7 question of damages as to whether you could think, oh,
8 well, perhaps the police might have gotten a valid
9 warrant and so forth. But -- so, I think, sure, it's
10 possible to imagine that the police could have gotten a
11 valid, narrow warrant limited to -- limited to search
12 for the sawed-off shotgun, and -- and certainly not the
13 gang-related activity, but they didn't. And one has
14 to -- one has to measure the harm that the -- that the
15 Millenders suffered by execution of this --

16 JUSTICE SOTOMAYOR: So, what happens --

17 MR. WOLFSON: -- invalid warrant.

18 JUSTICE SOTOMAYOR: -- below on that
19 question? Following up on --

20 MR. WOLFSON: Right.

21 JUSTICE SOTOMAYOR: -- the same question
22 that Justice Kagan asked your brethren, which is how
23 about we find that it was reasonable to ask for the guns
24 but not for the gang-related materials? What does that
25 do to your claim, and do you disagree with the manner in

1 which he described what the inquiry would be below or
2 before us now?

3 MR. WOLFSON: Right. We do disagree. We
4 would submit that the -- that it's still -- it's still
5 invalid. But this is an issue that the courts of
6 appeals have wrestled with under what is called the
7 severance doctrine, which mostly is applied in
8 exclusionary rule cases, not in qualified immunity
9 cases.

10 This Court has actually never explicitly
11 endorsed the severance doctrine, and that is the
12 question -- suppose you have a warrant that is sort of
13 half valid and half valid or maybe half arguably valid
14 but half totally -- you know, totally invalid. What do
15 you do then? And the -- I think at a minimum the record
16 would not permit this Court to -- to resolve that
17 because we don't know from the record before us sort of
18 what part of the search was conducted under what part of
19 the -- of the warrant. But --

20 JUSTICE ALITO: What's to the gang
21 paraphernalia? Why couldn't an officer reasonably
22 believe that there was a probable cause to seize that --
23 to search for and seize that, because it would link Mr.
24 Bowen with this residence where they hoped to find the
25 shotgun? And you dispute the fact that he is -- that he

1 is associated with that residence.

2 MR. WOLFSON: Right. So, Justice Alito,
3 there certainly are circumstances in which it is
4 legitimate to seek for information that links a
5 particular person to a particular location for purposes
6 of establishing criminal liability. The -- you know,
7 there are many cases, for example, where the police come
8 across a meth lab or something like that. And, of
9 course, in that situation the police have a legitimate
10 reason to -- to want to know who is present, whose
11 fingerprints are all over the place, because that would
12 tend to establish that the person is -- is in unlawful
13 possession of methamphetamine.

14 JUSTICE ALITO: And why couldn't a
15 reasonable officer think that that would be the case
16 here?

17 MR. WOLFSON: For -- for a few reasons.
18 First of all, the 120th Street address, the Millenders'
19 house, is totally irrelevant to the actual crime under
20 investigation, which took -- someplace else. I mean,
21 it's just a happenstance that the -- that the police are
22 searching -- searching this place. It's not the place.
23 This is not a tavern or a still or --

24 JUSTICE ALITO: No, well, if they have
25 probable cause to believe that the sawed-off shotgun is

1 there -- let's suppose they find the sawed-off shotgun.
2 Then there's going to be an issue at trial: Was it his
3 sawed-off shotgun? And anything that links him to that
4 residence is valuable evidence.

5 MR. WOLFSON: But the gang-related indicia
6 part of the warrant is, first of all, much, much broader
7 than that; and, secondly, the Petitioners have never
8 argued until this Court that that was the purpose of the
9 gang-related indicia part of the warrant. I mean, the
10 Petitioners argued that the gang-related indicia part of
11 the warrant is intended to establish his -- his gang
12 membership. And -- because, for example, there might be
13 a -- an increase in penalty if something is a
14 gang-related crime. Even while --

15 JUSTICE ALITO: I thought this was a test of
16 what they could -- what a reasonable officer could have
17 believed, not what they in particular believed.

18 MR. WOLFSON: Well, that's correct, but I
19 think, you know, that does not mean that one can engage
20 essentially in a completely post-hoc rationalization of
21 what the objective search by the -- to be accomplished
22 by the warrant is. I mean, the warrant application
23 itself says this is a spousal assault that the police
24 are investigating. There's no suggestion that it's a
25 gang-related crime in any way.

1 JUSTICE KAGAN: Mr. Wolfson, it seems that
2 many of the arguments on both sides are very
3 fact-dependent in nature, that you're asking what
4 inferences can be drawn reasonably from certain facts,
5 from a particularly violent incident, from the use of a
6 sawed-off shotgun, from the fact that this was not his
7 home, from the fact that he was a gang member.

8 And yet, the cases that you cite to us as
9 suggesting what a reasonable police officer should know
10 really are not cases that involve these facts at all.
11 They're cases that state very broad general propositions
12 about Fourth Amendment law. So, how can you get from
13 those cases to what you're saying a particular police
14 officer in a particular set of circumstances ought to
15 know?

16 MR. WOLFSON: Well, of course, this Court
17 has never required that, for qualified immunity
18 purposes, that the case -- there be another case exactly
19 on point. And --

20 JUSTICE KAGAN: No. But there seems to be a
21 very large gap between what this police officer has to
22 think about and the cases that you cite.

23 MR. WOLFSON: Respectfully, Justice Kagan, I
24 don't think I agree, and I think that it's -- it's
25 useful to look at two related but somewhat different

1 lines of cases, particularly in the Ninth Circuit but,
2 actually, you know, all across the board in the courts
3 of appeals.

4 The first line of cases says if the police
5 have reason or have probable cause to look for a
6 specific object or specific -- even a specific kind of
7 object, that doesn't give them probable cause to look
8 for the whole generic class of objects that are somewhat
9 similar.

10 The leading case on this in the Ninth
11 Circuit is the Spilotro decision, but there are many
12 cases coming both before and after that stand for that
13 proposition. The -- the principle has been applied in
14 many contexts. For example, if you think that somebody
15 is committing fraud for years 1998 and 1999 and there
16 are billing records, you can't -- you don't have
17 probable cause to look for fraud, you know, for the
18 entire records, billing records from 1950 to the
19 present. If you think that -- if you see somebody run
20 over somebody else in a green Nissan Sentra, you don't
21 have probable cause to search for all vehicles including
22 a red Ford -- a red Ford Explorer.

23 This is really that principle in the context
24 of firearms. And it -- and Detective Messerschmidt had
25 the information that the case involved a black sawed-off

1 shotgun with a pistol grip. Now, there certainly are
2 cases --

3 JUSTICE ALITO: Well, to come back to a
4 question that was asked before --

5 MR. WOLFSON: Yes.

6 JUSTICE ALITO: -- suppose they were
7 issuing -- suppose the warrant just sought this --
8 the -- that particular weapon. They execute it, and
9 they come to a room in this house, and it's got Mr.
10 Bowen's name on it, and inside there's a gun cabinet,
11 and there are -- there are a whole -- there's a whole
12 array of guns, legal -- let's say he legally possesses
13 them. There's a -- there's a -- there are assault
14 rifles. There are pistols. And it's known that he's
15 threatened to kill his girlfriend. You say -- would the
16 police be able to seize those?

17 MR. WOLFSON: Yes, I think there are many
18 things the police can do. First of all, an assault
19 rifle is illegal. So, that per se is contraband --

20 JUSTICE ALITO: All right. All sorts of
21 legal weapons --

22 MR. WOLFSON: Right. Okay. And --

23 JUSTICE ALITO: -- that could be used.
24 Could they -- could they seize those?

25 MR. WOLFSON: Well, the police -- if -- and

1 so, one question is, do the police know that Mr. Bowen
2 is a felon? And here I think that is relevant, because
3 they are dealing with what not what is in the affidavit
4 but to on-the-spot judgments. So, if the police --

5 JUSTICE ALITO: Let's --

6 MR. WOLFSON: So -- okay.

7 JUSTICE ALITO: -- I'm hypothesizing --

8 MR. WOLFSON: Right.

9 JUSTICE ALITO: -- he has a license for all
10 of these.

11 MR. WOLFSON: Right. So, I think there
12 are --

13 JUSTICE ALITO: He's not a felon.

14 MR. WOLFSON: So, I think if the police have
15 probable cause, in light of the circumstances that they
16 actually encounter at the house, that the guns --

17 JUSTICE ALITO: The circumstances are
18 exactly the circumstances here --

19 MR. WOLFSON: That the --

20 JUSTICE ALITO: -- except for the two things
21 that I changed. It's his room, and it's his gun
22 cabinet.

23 MR. WOLFSON: The police may be able to
24 secure all of those weapons, certainly so that they pose
25 no danger to anybody else. And if Mr. Bowen is arrested

1 and then, if -- if he is to be released on bail or on
2 pretrial release, it's a very common condition that he
3 not have access to any weapons. The police -- it may be
4 required that he deposit those weapons with somebody
5 else who, you know, is a proper custodian --

6 JUSTICE ALITO: Well, let's say they don't
7 find him. He's still at large. They have to leave the
8 weapons there.

9 MR. WOLFSON: I don't think they --
10 necessarily have to leave the weapons there.

11 JUSTICE ALITO: When they leave. Why? On
12 what ground could they seize them?

13 MR. WOLFSON: If there is no -- well, if
14 he's not -- if he's not there, then it's not clear to me
15 that he has a Fourth Amendment standing to challenge
16 anything.

17 JUSTICE ALITO: It's his room. It's his
18 room.

19 MR. WOLFSON: It's his room. But if he's --
20 I mean, but if he's --- if they really believe that the
21 police -- that he is there, that it is his house, there
22 is no reason to believe that his possession of any of
23 these weapons is illegal, there are -- the police can do
24 things to secure them.

25 JUSTICE KENNEDY: I'm putting in my notes

1 that you're not answering the hypothetical.

2 MR. WOLFSON: Right.

3 (Laughter.)

4 MR. WOLFSON: I think there -- I'm not sure.
5 I don't think the police can say these weapons are just
6 ours, we're going to take them, we can seize them
7 without -- without probable -- without more probable
8 cause.

9 JUSTICE ALITO: They can't say, and we're
10 going to take them under -- we're going to take them so
11 that he can't use those to kill his girlfriend which is
12 what he has threatened to do? They just have to leave
13 them there --

14 MR. WOLFSON: No --

15 JUSTICE ALITO: -- and if he happens to come
16 back and -- and get those weapons, and he kills her,
17 well, that's just too bad?

18 MR. WOLFSON: But if the police -- the
19 police have -- if the police have probable cause to
20 believe that he -- on the spot that he will use that
21 weapons, yes, they can seize them under that provision
22 of the California Penal Code, but that does not mean
23 they have probable cause when they apply for the -- the
24 warrant, to think that those weapons either will
25 exist --

1 JUSTICE ALITO: You really -- you really are
2 not answering my question.

3 MR. WOLFSON: I --

4 JUSTICE ALITO: My question is: Everything
5 is exactly the same except that it's his room and he's
6 not a felon and he possesses them legally and there they
7 are, and they see them.

8 MR. WOLFSON: I think --

9 JUSTICE ALITO: And your answer is they can
10 take them. In which case, my question is, why wouldn't
11 they have probable cause to search for those in the
12 first place? Or they can't take them, in which case I
13 say, well, what about the possibility that he will come
14 back, get those weapons, and carry out his threat using
15 those weapons?

16 MR. WOLFSON: They can -- they may be able
17 to take them, but that does not mean that they knew that
18 they existed in the first place or that they would be at
19 the Millenders' house. That's -- that I think is the
20 fundamental difference.

21 JUSTICE GINSBURG: What happened here when
22 they -- when they -- they did seize weapons that
23 belonged to the plaintiff, Mrs. Millender. They -- they
24 took them because they thought they were the
25 defendant's? But -- not that -- they thought they were

1 Bowen's?

2 MR. WOLFSON: It's not clear, Justice
3 Ginsburg. They took them under the authority of the
4 warrant. They did not provide an explanation as to
5 specifically why they were -- why the gun was seized,
6 but the gun was seized. And this -- I think this really
7 the -- this point, that they went into the Millenders'
8 house, searched the house from top to bottom, and seized
9 the Millenders' -- Mrs. Millender's lawfully owned
10 weapon really shows that this case is in the heartland
11 of what the Fourth Amendment is concerned about. I
12 mean, this is exactly the kind of case that the Framers
13 were concerned about when they abolished the
14 general warrant. This is the sort of case --

15 CHIEF JUSTICE ROBERTS: Counsel, do you --
16 do you contend that anything in the affidavit was false?

17 MR. WOLFSON: Yes. False or at least --

18 CHIEF JUSTICE ROBERTS: What --

19 MR. WOLFSON: -- or at least misleading.

20 CHIEF JUSTICE ROBERTS: What was that?

21 MR. WOLFSON: I think the -- the -- the
22 proposition that Bowen, quote, unquote, "resided" at the
23 120th Street address and that that -- and that that
24 conclusion was drawn from, among other things, Detective
25 Messerschmidt's search of government databases was

1 material misleading, because he didn't reside there. He
2 may have been staying -- hiding out there, and the
3 search of the government databases which are actually --
4 the results are actually reprinted --

5 CHIEF JUSTICE ROBERTS: Where did the --

6 MR. WOLFSON: Sorry.

7 CHIEF JUSTICE ROBERTS: -- may have been --
8 may have staying there?

9 MR. WOLFSON: That is what Shelly Kelly told
10 Detective Messerschmidt, which is, if I am not
11 mistaking --

12 CHIEF JUSTICE ROBERTS: And you say it was
13 materially false that they said he resides there, and
14 what he knew is that he may have been staying there?

15 MR. WOLFSON: He may have been hiding out
16 there. When -- especially when you combine that with
17 all the other information that Detective Messerschmidt
18 actually obtained from the printouts of the databases
19 which are in the JA, which in fact say that he hadn't
20 been at the 120th Street address for several months and
21 that his most recent address was 97th Street, where he
22 lived with -- where he stayed with, at least sometimes,
23 Shelly Kelly and gave it out as his address. So,
24 that -- that is in the respects why we think that this
25 is materially misleading.

1 Of course, we were not allowed to appeal
2 that determination, so that really only half of the case
3 in that respect was before the court of appeals and is
4 before this Court.

5 Thank you very much.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Coates, you have 2 minutes remaining.

8 REBUTTAL ARGUMENT OF TIMOTHY R. COATES

9 ON BEHALF OF THE PETITIONERS

10 MR. COATES: With respect to the -- the
11 hypothetical that Justice Alito postulated in terms of
12 finding other weapons there, and Respondents' counsel to
13 say, well, we might go on the plain view doctrine, I
14 think these are circumstances in which we note that you
15 want to encourage officers, when they can, not to -- not
16 rely on exceptions to the warrant requirement. And
17 here, if anything, the officers in an abundance of
18 caution attempted to get a warrant, contemplating those
19 precise circumstances. I don't think they should incur
20 liability for -- for going to that extra step and that
21 extra precaution. And, again, a step back from whether
22 there's actually probable cause, but whether a
23 reasonable officer could even believe that might be the
24 case for purposes of sending it to a magistrate.

25 And I think, under those circumstances, you

1 want to encourage officers to seek a magistrate's
2 determination and not try and rely on on-the-scene
3 exceptions to the warrant requirement to try and justify
4 seizing weapons under those circumstances.

5 With respect to Justice Scalia's concern
6 about the probable cause to seize all guns as opposed to
7 guns belonging to Bowen -- and I think the notion is
8 that Bowen, being a resident and that being established
9 for purposes of this contention at this point, still
10 down at district court, but it was assumed for purposes
11 of the Ninth Circuit that he was a resident, that as a
12 resident, that he would have access to that firearm.

13 And I think that this was bolstered by the
14 fact -- again, his status as a gang member. We cite the
15 Chicago Housing Authority v. Rose case, which talks
16 about the manner in which gang members often store and
17 use weapons at family members' homes. I mean, it's an
18 unfortunate part of the -- of the gang culture. So,
19 it's not unreasonable for an officer to think there
20 might be probable cause at the very least to seize any
21 weapon found there, even if ultimately facts developed
22 that it is in fact not Bowen's weapon.

23 And this also goes to the indicia of gang
24 membership and why it's reasonable even to ask, because
25 that may be one of the means by which we could tie a

1 particular weapon to Bowen depending upon what's found
2 during the search.

3 This is a very high standard as established
4 by this Court, which is essentially plainly incompetent
5 or knowingly violating the law. And this is an officer
6 that has not hidden the ball with respect to what
7 transpired between Bowen and Kelly. He submitted it to
8 his superiors to look at; he submitted it to an
9 attorney. And while that's not dispositive, I think
10 those are objective facts that a reasonable officer
11 could say, I've done this, this, and this; there's no
12 reason for me to believe that I'm violating the law in
13 sending it to a magistrate.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel,
15 counsel.

16 The case is submitted.

17 (Whereupon, at 12:09 p.m., the case in the
18 above-entitled matter was submitted.)

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A				
ability 15:10	7:12 12:16,18	11:5 57:1 58:2	37:24	12:7
able 17:16 24:14	12:24 27:11,16	anybody 55:25	articulates	authority 59:3
54:16 55:23	32:24 34:2	anyway 13:2	28:13	62:15
58:16	41:15 55:3	apologize 29:24	ascertainable	authorization
abolished 59:13	59:16	appeal 61:1	28:17	28:20
above-entitled	affidavits 14:10	appeals 23:21	asked 7:14	authorize 17:18
1:13 63:18	afraid 45:7	49:6 53:3 61:3	13:25 26:11,17	authorized
absolute 32:19	agree 6:11,11	APPEARAN...	27:12,13 48:22	40:19
absolutely 8:11	52:24	1:16	54:4	authorizes 31:7
18:2	AL 1:3,8	appendix 22:23	asking 6:14	authorizing
abundance	albums 22:19	23:22 31:4	13:14 15:3	34:7
61:17	Alito 23:25 24:3	application 32:3	24:12 52:3	a.m 1:15 3:3
access 18:14	24:8 34:4,19	51:22	aspect 22:5	
36:13 56:3	35:4,5,10,14	applied 28:8	aspects 21:23	B
62:12	35:22 36:3,9	29:4,5,6,20,21	22:13	back 12:12
accomplished	49:20 50:2,14	29:23,24 43:19	assault 8:1,13	15:19,19,25
51:21	50:24 51:15	47:2,5 49:7	8:22,23 9:11	17:3 54:3
accorded 28:9	54:3,6,20,23	53:13	9:11 11:16,17	57:16 58:14
account 13:7,16	55:5,7,9,13,17	apply 4:6 29:9	17:10 51:23	61:21
13:20 14:2	55:20 56:6,11	29:12,18 57:23	54:13,18	background
27:9	56:17 57:9,15	applying 24:4	assaults 30:12	30:1
acting 27:16	58:1,4,9 61:11	33:23 43:3	assembled 32:23	bad 16:7 27:16
actions 4:3	allegedly 28:10	appointed 24:9	assess 27:7	27:16 57:17
27:10,12	allow 12:25	appropriate	assessment	bail 56:1
activity 8:22	22:15	25:2	25:24 26:12,18	balance 20:20
9:17 20:3,4	allowed 17:19	appropriately	27:8,22	ball 63:6
38:1 39:15	61:1	24:20	associate 38:1	bare-bone 7:12
48:13	Amendment 7:1	arguably 49:13	associated 8:25	bare-bones 3:22
actual 10:13	7:19 14:14	argued 20:8	23:20 50:1	4:8 7:7
50:19	15:7 21:4 22:1	51:8,10	assume 23:22	based 32:7
add 27:4	22:5 24:11	arguing 5:24	assumed 62:10	basis 37:18
adding 30:17	33:22 47:24	argument 1:14	assumption 23:1	beat 33:11
additional 5:14	52:12 56:15	2:2,5,10,13 3:4	36:6,9 38:20	bed 38:9
address 50:18	59:11	3:7 20:23	atmosphere	behalf 2:4,7,12
59:23 60:20,21	amicus 1:21 2:8	31:22 32:13,14	39:15	2:15 3:8 20:24
60:23	20:24	38:24 39:22	atomic 15:15	31:23 61:9
addressed 4:20	amounts 33:18	45:21 47:10,25	attack 17:12,16	belief 28:2 32:5
addressing	analogizing 48:4	61:8	37:13	believe 4:12,22
41:14	analogous 28:20	arguments 52:2	attempt 34:21	4:24 10:21
adds 34:14	28:21	arises 4:5	attempted 24:22	14:25 15:1,5
adequacy 41:10	anchor 23:13	arms 43:15	30:11 61:18	15:16 17:14
adequate 47:17	Anderson 8:20	array 54:12	attorney 41:16	24:7 34:17
admission 11:14	Angeles 1:17	arrest 28:11	42:4,10,15	35:18,19,23
adopt 25:6	answer 7:16	arrested 55:25	43:5 63:9	36:7,15,20,22
affidavit 3:21	14:1,1 47:15	arsenal 40:17	attorneys 4:17	39:8 40:5,17
4:8,9,16 5:20	58:9	articles 23:16	20:12 43:1	41:3,4 45:19
	answering 11:4	articulated	Augusta 1:7	49:22 50:25

56:20,22 57:20 61:23 63:12 believed 14:19 34:2 51:17,17 believing 47:19 belong 41:5 belonged 13:2 58:23 belonging 40:21 62:7 best 16:6 beyond 5:5 8:9 21:14 big 38:3 billing 53:16,18 bit 6:18 black 53:25 blanket 42:2 board 53:2 bolstered 62:13 bomb 15:15 bothers 12:18 bottom 44:12 59:8 bounds 21:14 Bowen 9:23 18:3 35:3,6,15 36:7 40:21 49:24 55:1,25 59:22 62:7,8 63:1,7 Bowen's 54:10 59:1 62:22 BRENDA 1:6 brethren 48:22 BREYER 12:13 12:15 13:11,14 13:24 14:7,9 14:21 15:13 17:6 38:7,15 38:24 39:25 40:7,13 44:21 45:13 Briggs 3:11 32:1 broad 52:11 broader 51:6 brother 39:2 brought 20:13	build 10:8 burden 33:10 <hr/> C c 2:1 3:2 31:18 cabinet 54:10 55:22 cabinets 46:13 caliber 19:25 California 1:17 15:9 30:25 31:4,5,6 34:8 34:13 37:24 57:22 call 24:15 44:24 45:3 called 49:6 careful 5:15 carry 36:16 58:14 carrying 23:7 carved 20:7 case 3:5 4:5,15 4:20,23 5:19 5:20,22 7:11 8:7,12 10:8,16 13:20 16:3,21 20:15 21:17 24:1 26:15,17 28:20 29:6 30:2 34:4,15 36:6 41:24,24 42:12 43:18 44:15,20 50:15 52:18,18 53:10 53:25 58:10,12 59:10,12,14 61:2,24 62:15 63:16,17 cases 3:20 23:24 33:14 34:18 42:23 49:8,9 50:7 52:8,10 52:11,13,22 53:1,4,12 54:2 catch-all 3:24 categories 21:10	21:13 category 20:8 cause 3:25 4:10 4:13 12:25 13:5,21 15:20 17:6,7 21:8 24:11,25 25:22 25:24 26:13,18 27:8,23 28:1 32:4 33:18 34:3,17 35:17 35:19,21,23 36:7,20,22 37:25 38:12,23 38:25 39:4,8 40:2,3,5,17 41:3,4,12 46:2 47:11,18 49:22 50:25 53:5,7 53:17,21 55:15 57:8,19,23 58:11 61:22 62:6,20 caused 28:10 caution 61:18 certain 52:4 certainly 4:24 6:7 10:2 23:5 24:14 27:2 36:21 40:6 43:6 48:12 50:3 54:1 55:24 challenge 56:15 change 29:1 38:16,16 changed 38:18 55:21 characteristic 18:2 check 16:23 checked 27:18 checking 26:22 Chicago 62:15 Chief 3:4,9 4:14 4:19 12:5,9 16:18,20 20:21	21:2 26:10 29:14,18,22 31:12,20,24 32:6,22 33:12 41:8,20 43:2,7 44:6 47:6,15 47:21 59:15,18 59:20 60:5,7 60:12 61:6 63:14 circuit 4:5,24 6:9 20:10 36:6 44:15 53:1,11 62:11 circumstance 25:4,4 circumstances 3:15 4:7 5:14 7:5,10 9:10 21:6 24:24 42:7 50:3 52:14 55:15,17 55:18 61:14,19 61:25 62:4 cite 20:15 47:6 47:21 52:8,22 62:14 cited 24:2 civil 3:13 claim 5:19 48:25 class 53:8 clear 8:19 24:23 33:15 43:8 46:24 56:14 59:2 clearly 33:8 client 34:19 35:4 clients 35:4,8 close 12:25 closer 18:22 closet 38:10,17 Coates 1:17 2:3 2:14 3:6,7,9 4:18,21 5:11 6:1,4,7,24 7:21 7:24 8:17,24 9:9,22 10:6,13	11:2,10,16,18 12:1,7,11,14 13:8,13,23 14:4,8,13 15:8 15:18 16:1,8 16:11 17:2,9 17:21,24 18:6 18:10,12,21 19:6,11,16,20 19:23 20:5 61:7,8,10 Code 15:9 31:6 31:17 34:8,14 57:22 colors 10:1,15 10:17 17:15,19 19:3,13 combine 60:16 come 6:24 12:12 16:4 26:3 46:14 50:7 54:3,9 57:15 58:13 comes 6:8 coming 53:12 commission 35:1 commit 15:11 17:8 30:20 31:1 35:2 commits 11:6 committing 31:9 34:10 53:15 common 56:2 compare 47:3 competent 33:2 33:4 complete 10:23 completely 51:20 complied 47:24 conceded 46:11 concern 62:5 concerned 21:23 59:11,13 conclusion 59:24
---	--	---	---	--

<p>43:3,7 61:15 62:1 endorsed 49:11 engage 22:25 25:1 51:19 engaged 39:14 enter 38:5 44:6 entered 44:8 entire 6:18 20:17 53:18 entitled 3:18 10:8 11:7 envelope 42:18 especially 60:16 ESQ 1:17,19,23 2:3,6,11,14 essentially 8:15 42:4 48:1 51:20 63:4 establish 23:17 42:24,25 50:12 51:11 established 34:3 62:8 63:3 establishing 42:24 50:6 ESTATE 1:7 ET 1:3,8 evaluating 46:24 evidence 3:14 7:3 10:6,8,25 17:19,24 19:16 19:19 20:2,4 21:16 23:8,8 51:4 Ewing 24:1 exact 14:24 exactly 32:14 52:18 55:18 58:5 59:12 example 9:25 26:10 38:10 50:7 51:12 53:14 exception 7:4 exceptions</p>	<p>61:16 62:3 exclusion 4:22 7:2 exclusionary 49:8 exculpates 6:5 exculpatory 3:21 excuse 6:21 15:24 18:12 35:5 40:15 execute 44:2 54:8 executed 47:3 executes 5:8 executing 27:17 44:4 execution 48:15 EXECUTOR 1:6 exercising 33:23 exist 57:25 existed 58:18 existence 24:25 28:2 32:5 expand 21:20 22:2 experience 13:9 expert 40:8 explained 45:5 explanation 59:4 explicitly 49:10 Explorer 53:22 expressed 16:5 extent 12:15 extra 61:20,21</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 5:23 fact 4:15 5:19 26:17 27:18 40:23 42:3,23 44:22 45:23 49:25 52:6,7 60:19 62:14,22 factor 6:10</p>	<p>facts 14:6 30:17 33:18 37:11 52:4,10 62:21 63:10 factual 4:9 5:14 fact-dependent 52:3 fact-specific 8:18 fair 16:16 44:10 fairly 8:8 faith 4:25 5:3,5 5:6,6 7:4 14:17 14:22 15:6,19 15:25 16:3,5,6 16:9 25:8 26:2 26:6,10,20,21 26:22 27:16 28:16,16 33:3 33:17,19 false 59:16,17 60:13 falsified 3:20 familiarity 24:10 family 35:8 62:17 far 4:8 23:20 Fathers 7:19 favored 21:3 fear 21:8 39:16 feature 4:15 Federal 31:16 felon 45:23 55:2 55:13 58:6 find 9:15 10:16 18:1 19:6,12 23:6 24:25 25:20 42:19 46:13 48:23 49:24 51:1 56:7 finding 18:7 19:19 61:12 fine 42:17 fingerprints 50:11</p>	<p>Finish 31:12 firearm 23:7 62:12 firearms 17:18 23:2 53:24 firearms-relat... 21:23 first 6:15 20:7 22:1,16,24 23:9 25:12 36:19 41:25 45:4 46:23 50:18 51:6 53:4 54:18 58:12,18 five 45:1 flees 30:3 follow 40:16 Following 48:19 follows 21:3 footnote 7:8 Ford 53:22,22 form 24:19 former 34:20 formulated 28:24 formulation 28:4 forth 3:12 5:7 13:9 22:23 31:5 44:18 48:9 forward 27:7 foster 12:11 foul 48:1 found 9:24,25 10:13 17:14 19:3,24,24 24:11 35:19,23 36:8,14,23 37:1 41:4 62:21 63:1 Founding 7:19 Fourth 7:1,19 14:14 15:7 21:4,25 22:5 24:10 33:22</p>	<p>47:24 52:12 56:15 59:11 Framers 59:12 fraud 53:15,17 front 6:22 function 3:23 fundamental 58:20 further 17:3,12 future 17:16</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:2 gang 7:13,15,22 8:1,2,6,8,10,12 8:13,22 9:6,18 10:1,1,14,14 10:15,17,18 11:3,6,9,22,23 13:9,12 15:21 16:15 17:7,15 17:19,20,25,25 18:5,8,9,19,19 19:2,3,7,7 20:6 20:17 21:12,16 22:9,18 30:12 34:22 36:12 39:13 40:7,9 46:1 49:20 51:11 52:7 62:14,16,18,23 gland 7:25 gangs 9:1 11:3 13:10 19:12,13 40:9 gang-related 7:17 8:5,14 9:17,20 11:15 21:24 22:2 23:15 45:19 48:13,24 51:5 51:9,10,14,25 gap 52:21 Gates 8:19 general 1:20 7:18 19:15,18 20:3 30:3,6,8</p>
---	--	---	---	---

<p>52:11 59:14 generally 6:24 41:25 generic 53:8 gentleman 8:24 9:12 17:9 Ginsburg 8:10 8:21 9:5,16 10:3,10 11:5 20:1 27:25 46:7,9 48:4 58:21 59:3 girl 39:5,22 girlfriend 8:2 34:21 54:15 57:11 give 29:1 53:7 given 32:18 go 3:19 6:14 9:14 10:24 13:4 14:17 27:7 42:19,24 45:22 46:11 61:13 goes 5:5 28:12 28:21 43:14 62:23 going 13:18 15:18,25 16:20 30:15 45:2,7 45:10 51:2 57:6,10,10 61:20 good 4:25 5:3,4 5:5,6 7:4 14:17 14:22 15:6,19 15:25 16:3,5,9 23:7 25:6,8 26:2,6,9,20,21 26:22 27:19 28:16 33:3,17 33:19 39:6 42:17 gotten 47:4,13 48:8,10 government 46:4 59:25</p>	<p>60:3 governs 26:5,7 great 3:19 33:14 green 53:20 grip 54:1 Groh 44:15 46:23 47:6,7 47:10,21 48:1 gross 25:24 grossly 25:16,22 ground 56:12 group 39:14 guess 14:23 22:18 28:22 gun 10:11,12 11:11,12 36:12 36:21,23 37:1 37:10,14,15,15 37:15,19 38:9 40:5 41:4 54:10 55:21 59:5,6 guns 9:19 10:25 11:9 13:1,3,17 13:18,21 17:7 21:11,16 22:10 22:20 34:7,25 36:14,14 38:25 39:1,4,7,8,17 39:18,20,21 40:8,9,10,20 40:21,24 41:3 46:14,15,21 48:23 54:12 55:16 62:6,7 gun's 39:6 guy 15:21 18:9</p> <hr/> <p style="text-align: center;">H</p> <p>half 49:13,13,13 49:14 61:2 handgun 15:23 handguns 15:1,3 23:4 37:3 happen 21:17 33:16 38:22 happened 38:17</p>	<p>58:21 happens 48:16 57:15 happenstance 50:21 hard 42:2 harder 16:21 Harlow 7:9 harm 47:11 48:1 48:14 harmed 46:25 head 14:12 hear 3:4 14:1 hearing 28:8 heartland 59:10 heavy 33:10 heightened 26:1 held 3:17 help 10:2 helping 11:24 hidden 63:6 hide 9:3 45:6,9 hiding 60:2,15 high 3:12 5:12 63:3 highly 4:8 hold 28:5,6 home 11:8 12:8 30:4 36:14 52:7 homes 62:17 Honor 6:12 9:22 18:12,21 28:4 28:13 41:6,19 Honor's 21:22 hook 6:21 hope 19:19 hoped 49:24 Horton 37:24 house 10:22 12:5,6,7,10,19 13:1 15:1,2,3 15:14,15 18:25 19:1,5 35:9 36:23,24 37:7 37:14,14 38:10 38:17,23 39:1</p>	<p>39:4,9,12,20 39:21 40:18 41:5 43:14 44:11 46:12,16 50:19 54:9 55:16 56:21 58:19 59:8,8 Housing 62:15 hypothesis 21:22 hypothesized 22:14 hypothesizing 55:7 hypothetical 47:4 57:1 61:11</p> <hr/> <p style="text-align: center;">I</p> <p>identification 9:24 identify 47:7 identifying 18:2 identity 23:17 illegal 11:12 12:2 13:19 28:19 40:11,11 54:19 56:23 illegally 11:23 Illinois 8:19 illogical 16:14 illustrates 25:25 imagine 48:10 immune 33:15 33:25 42:2 immunity 3:13 4:11 6:8 7:2 8:19 14:16 21:15 22:7 25:2 26:3,7,9 28:9 32:2,19 33:9,20 44:20 48:6 49:8 52:17 implicate 22:3 import 26:8 45:22</p>	<p>important 31:3 35:8 incident 52:5 includes 23:5 including 24:1 46:4 53:21 incompetence 25:24 incompetent 4:3 5:13 16:12 25:16,23 26:23 26:24 63:4 incorporates 7:9 increase 51:13 increases 23:11 incur 61:19 independent 21:7 22:4 indication 3:22 indications 9:12 indicia 3:25 4:25 7:18 17:25 18:18 19:7 20:6,17 22:9 23:16 28:1 32:4 51:5,9,10 62:23 individual 23:7 30:10 32:8 individually 19:8 inferences 52:4 information 3:20,21 6:16 6:20,22 8:15 9:25 11:24 32:10,23,24 42:13 50:4 53:25 60:17 initial 3:18 innocent 35:8 36:24 40:18 inquiries 47:17 inquiry 8:18 25:1 28:16 49:1 inside 54:10</p>
---	---	---	---	---

<p>instructions 44:14 intended 34:10 34:16 51:11 intending 36:15 intends 9:12 intensity 22:16 intent 15:11 31:8 34:25 interests 22:4 interpret 20:16 interrupt 30:25 intimidation 39:16 invalid 3:16 48:17 49:5,14 investigating 9:10 51:24 investigation 8:6 50:20 invoked 31:10 involve 11:13 52:10 involved 8:22 32:7,11 53:25 involves 11:11 11:12 irrelevant 8:6 15:21 18:15 50:19 issue 7:15 9:19 16:22 22:7,24 36:4,5 49:5 51:2 issued 24:5 34:9 issues 42:8 issuing 54:7 item 35:18 items 9:21 15:10 31:7 34:9,15 34:18 47:7</p> <hr/> <p style="text-align: center;">J</p> <p>JA 60:19 Jane 41:16 joint 22:22 31:4 judge 24:5,8,9</p>	<p>24:14,15,17 33:1,6 judges 20:10,12 judgment 33:23 43:10 judgments 55:4 judicial 3:23 jumped 20:14 jurisprudence 4:11 Justice 1:20 3:4 3:9 4:14,19 5:3 5:18 6:2,5,13 7:11,23 8:10 8:21 9:5,16 10:3,10,19 11:4,5,13,17 11:21 12:4,5,9 12:13,14,15,21 13:11,14,24 14:7,9,21 15:13,24 16:2 16:9,18,19,20 17:6,17,22 18:4,7,11,16 18:24 19:9,14 19:18,21 20:1 20:21 21:2,9 22:8,17,24 23:25 24:3,8 25:3,8,11,17 26:10,19 27:5 27:14,24,25 28:22 29:8,12 29:14,15,18,22 30:1,8,17,19 30:23 31:3,12 31:20,24 32:6 32:22 33:12 34:4,19 35:4,5 35:10,14,22 36:3,9 37:6,9 37:17,18 38:7 38:15,21,24 39:25 40:7,13 40:19,23 41:2 41:8,20 43:2,7</p>	<p>43:13,23 44:1 44:6,21 45:13 46:7,9 47:6,15 47:21 48:4,16 48:18,21,22 49:20 50:2,14 50:24 51:15 52:1,20,23 54:3,6,20,23 55:5,7,9,13,17 55:20 56:6,11 56:17,25 57:9 57:15 58:1,4,9 58:21 59:2,15 59:18,20 60:5 60:7,12 61:6 61:11 62:5 63:14 justify 62:3</p> <hr/> <p style="text-align: center;">K</p> <p>k 39:20 Kagan 12:14 21:9 22:24 27:24 28:22 48:22 52:1,20 52:23 keep 30:17 47:16 Kelly 60:9,23 63:7 Kennedy 30:1,8 30:19,23 31:3 37:6,9,17,18 56:25 Kennedy's 38:21 kill 30:15 34:21 34:23 36:11 39:7 45:1,2 54:15 57:11 killed 39:5 killing 39:21 kills 57:16 kind 44:10 53:6 59:12 knew 14:18,19</p>	<p>18:16 19:2 58:17 60:14 know 4:21 8:7 15:22 17:18 18:5,19 27:15 29:9,16 33:5,5 33:6,7,7 34:17 39:12,12,13 42:1,6,15,16 42:18,20 44:11 49:14,17 50:6 50:10 51:19 52:9,15 53:2 53:17 55:1 56:5 knowingly 4:4 5:13 16:12 63:5 known 28:18 30:11 34:22 54:14 knows 6:16 40:8 40:13,14</p> <hr/> <p style="text-align: center;">L</p> <p>lab 50:8 lacking 3:24 25:22 28:1 32:4 language 22:22 25:15 31:4 large 23:18 52:21 56:7 Laughter 57:3 law 4:4 5:13 16:13 20:15 30:25 43:12 44:20 52:12 63:5,12 lawful 37:3 lawfully 37:21 38:5 59:9 lawyer 24:9,13 lawyers 32:25 33:5 lead 44:13 45:11 45:14</p>	<p>leading 53:10 leave 56:7,10,11 57:12 left 8:4 legal 54:12,21 legally 54:12 58:6 legion 23:23 legitimate 50:4 50:9 legitimately 23:2 Leon 3:12 5:19 5:21,22 7:8 24:22 25:16 28:8,14,15 let's 6:13 9:18 9:18 16:25 21:15,21 51:1 54:12 55:5 56:6 liability 42:25 50:6 61:20 liable 25:20 42:8 license 10:24 55:9 lie 32:21 light 7:5 14:19 55:15 limited 19:10 42:6 47:5 48:11,11 line 44:13 53:4 lines 53:1 link 49:23 links 50:4 51:3 little 6:17 9:14 13:17 live 36:24 39:18 lived 60:22 lives 35:9 living 12:19 35:24 36:10,15 location 50:5 logic 17:13 long 8:13 42:24 look 14:10,11,15</p>
---	---	--	---	---

<p>14:17,21 22:9 22:10,12,13,19 22:20 26:20 46:12,19 47:2 52:25 53:5,7 53:17 63:8 looked 20:12 looking 10:24 20:12 22:17 27:5 37:11 38:10 46:12 looks 15:3 Los 1:17 lot 30:9 32:9</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>magistrate 6:19 6:23 12:23 16:25 17:4 19:4 21:5 24:25 25:15,19 25:23,25 27:8 32:20 33:1 42:1,7,19 43:20 45:25 46:3,5 61:24 63:13 magistrates 32:17 33:15 magistrate's 3:18 4:1 21:7 27:22 28:19 62:1 main 24:23 majority 24:2 33:14 making 16:21 45:21 Malley 3:11 4:2 24:22 25:15 26:4 27:21 28:5 32:1,6,11 32:14 33:16 42:5 43:8 44:18 manner 9:3 11:18 13:10</p>	<p>48:25 62:16 man's 18:19 material 9:7 60:1 materially 60:13 60:25 materials 21:10 48:24 matter 1:13 63:18 mean 6:11 7:21 10:8,12,15 12:17 13:8,15 14:4 15:25 18:2,17 27:1 30:23 35:20 42:9 45:20 50:20 51:9,19 51:22 56:20 57:22 58:17 59:12 62:17 meaningful 21:21 means 8:8 31:9 31:15 62:25 meant 29:20 measure 48:14 member 7:13 8:1,2,11,13 9:6 11:6 15:21 18:5,9,19 19:12 30:11 34:22 36:12 39:13 40:7 46:1 52:7 62:14 members 8:8 19:2,5 40:8 62:16,17 membership 8:6 8:12 11:3,9 16:15 17:20,25 18:8,19 19:7 20:6,18 21:12 21:16 22:18 51:12 62:24 memberships</p>	<p>22:10 mentioned 32:13 Messerschmidt 1:3 3:5 42:12 42:16 45:17 53:24 60:10,17 Messerschmid... 59:25 meth 50:8 methampheta... 50:13 Millender 1:6,7 3:5 58:23 Millenders 36:23,24 37:2 37:2 40:24 43:14 48:15 50:18 58:19 59:7,9 Millender's 12:7 12:8 59:9 minimize 33:22 minimum 49:15 minute 11:21 minutes 61:7 mishmash 26:20 misleading 59:19 60:1,25 misspoke 29:24 misstatement 35:11 mistake 32:12 33:19 mistakes 33:16 33:17 mistaking 60:11 mix 26:24 Model 31:17 Monday 1:11 Monell 42:24 moniker 10:1,15 19:8 monikers 10:18 months 60:20 multiple 19:5 murder 30:11</p>	<p>30:14</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:2 name 54:10 narrow 21:6 24:24 25:3 48:11 narrowed 24:20 narrowly 37:22 natural 27:9 nature 11:2,20 12:1 52:3 necessarily 30:7 40:16 56:10 need 10:3,10 25:1 29:1,2 neither 14:11 neutral 21:5 never 20:13 44:24 45:3,16 49:10 51:7 52:17 new 4:15 night 46:2 Ninth 4:5 36:6 44:15 53:1,10 62:11 Nissan 53:20 nonsuppression 7:3 note 8:7 10:16 20:8 23:18 61:14 notes 56:25 notion 62:7 number 28:5 Nuremberg 5:25</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:2 object 53:6,7 objective 14:5 26:5 28:7,16 33:3 44:18,22 51:21 63:10</p>	<p>objectively 25:13 27:21 28:17 objects 53:8 obtained 48:3 60:18 obtaining 21:4 offense 31:9 office 33:5 officer 3:15,20 3:23,25 4:3,7 4:12 5:1,6,9,15 6:16,21 7:2,5 7:14 9:1 10:22 13:9 14:5,18 16:6,7 17:14 21:3,6,15 24:13 25:5 26:17 27:6,10 27:11,15,22 28:9,18 32:23 33:3,4,25 34:1 34:5,12,24 36:11 42:8 43:9,14,16 44:13 47:22 48:2 49:21 50:15 51:16 52:9,14,21 61:23 62:19 63:5,10 officers 4:16 8:3 20:15 25:19,20 25:21 26:11 28:25 29:1,7 32:2 33:14,16 33:19,21 41:12 41:14 43:3,17 43:18 44:9 45:25 47:11,18 61:15,17 62:1 officer's 10:20 11:14 14:12 44:13 official 28:2 32:5 oh 7:21 13:5</p>
---	--	---	---	---

<p>39:3 42:16 43:23 48:7 okay 6:3 23:21 23:22 29:22 33:6,7,8,8 39:22 54:22 55:6 omitted 3:20 on-the-scene 62:2 on-the-spot 55:4 opinion 26:16 opponent 39:2 opposed 15:20 62:6 oral 1:13 2:2,5 2:10 3:7 20:23 31:22 order 25:20 29:1 ordinary 8:9 ought 29:16,17 52:14 outlier 31:15 outlined 27:20 outside 14:17 45:22 overrule 6:15 owned 59:9 ownership 18:14 23:4</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:2 page 2:2 22:22 23:21 26:15 28:6,15,15 31:3 paperwork 23:3 23:5 paragraph 22:24 23:9,11 23:13,14 paragraphs 22:23 paraphernalia 49:21 paraphrase</p>	<p>13:16 part 7:19 9:16 35:11 44:4 45:5 49:18,18 51:6,9,10 62:18 particular 18:13 23:7,16 33:17 50:5,5 51:17 52:13,14 54:8 63:1 particularly 52:5 53:1 parts 21:24 22:2 25:12 party 32:9 passed 7:19 pattern 42:25 PAUL 1:23 2:11 31:22 Penal 15:9 31:6 31:17 34:8,13 57:22 penalty 51:13 people 8:9 18:25 18:25 36:24 39:14,17 46:16 perform 3:23 period 13:21 permit 49:16 permits 11:7 perpetrated 17:10 30:10,12 person 30:5 31:8 32:12 45:8 50:5,12 personal 23:16 persons 23:17 person's 15:14 15:14 perspective 27:6 pertinent 6:20 41:13 petition 23:22 Petitioner 30:24 Petitioners 1:4 1:18,22 2:4,9</p>	<p>2:15 3:8 20:25 43:18 45:15,17 45:21 51:7,10 61:9 photograph 18:23 22:19 photographic 23:8 photographs 10:4 20:2,4 22:18 23:6,6 phrase 24:18,19 physical 30:12 pieces 46:13 pistol 10:17 17:15 19:25 54:1 pistols 54:14 place 6:22 22:1 30:4 35:20 37:21,21 50:11 50:22,22 58:12 58:18 places 22:10,15 plain 37:23,23 61:13 plainly 4:3 5:13 16:12 63:4 plaintiff 58:23 play 26:3 please 3:10 21:2 31:25 point 5:22,23 9:23 21:17 23:12 25:20 27:4 31:3 35:8 35:16 42:21 43:7 52:19 59:7 62:9 police 3:15 6:16 6:21 7:14 8:3 11:6 16:5,7 24:13 25:5 28:25 29:1,7 30:15 32:2,15 32:16,18,23 34:23 35:17</p>	<p>36:20 37:5,12 37:20 38:1,4 38:22 40:4 41:1 45:7 46:5 47:4 48:2,8,10 50:7,9,21 51:23 52:9,13 52:21 53:4 54:16,18,25 55:1,4,14,23 56:3,21,23 57:5,18,19,19 policeman 25:17 25:17 pose 55:24 position 8:15 possess 36:13 37:3 possessed 31:8 possesses 54:12 58:6 possessing 10:25 possession 23:4 50:13 56:22 possibility 16:16 58:13 possible 17:22 37:4,4 48:10 possibly 9:23 18:18 postulated 61:11 post-hoc 51:20 pot 5:10 practice 21:3 precaution 61:21 precedent 6:15 precise 61:19 premise 18:17 23:18 premises 18:13 23:18 35:24 36:10 present 18:10,13 21:13 43:21 50:10 53:19</p>	<p>presumably 24:10 presumes 6:19 pretrial 56:2 pretty 25:14 33:10 prevent 17:16 Pre-Arraignm... 31:17 Principal 1:19 principle 53:13 53:23 principles 26:3 26:9 printouts 60:18 prior 4:20 privacy 22:4 probability 16:16 probable 3:25 4:10,12 15:20 21:8 24:11,25 25:22,23 26:13 26:18 27:8,23 28:1 32:4 33:18 34:3,17 35:17,19,20,23 36:7,20,22 37:25 38:12,23 38:25 39:4,8 40:1,3,5,16 41:3,4,12 46:2 47:11,18 49:22 50:25 53:5,7 53:17,21 55:15 57:7,7,19,23 58:11 61:22 62:6,20 problem 5:4 16:3 21:20 22:5,25 23:20 36:19 problematic 22:15 problems 36:19 Procedure 31:16,17</p>
--	---	---	--	---

<p>procure 8:8 11:24 13:10 procured 3:15 9:3 procures 11:19 professional 33:23 promised 36:16 proof 11:23 27:11 proper 56:5 properly 29:4 37:22 47:5 property 18:22 23:16 propose 35:20 proposes 43:11 proposition 53:13 59:22 propositions 52:11 protect 8:4 29:10,13,16,25 protection 29:2 protective 28:25 29:4,7 protectively 29:10,13,19 protects 29:16 prove 19:4 provide 59:4 provided 4:9 provides 23:1,2 provision 3:24 20:1,17,18 23:19 31:5,10 31:15 34:8,14 57:21 provisions 23:24 public 8:3 31:9 purchase 23:4 purely 44:22 purpose 13:18 16:10 17:22 51:8 purposes 7:1 14:13 26:6</p>	<p>37:3 50:5 52:18 61:24 62:9,10 pursuant 37:21 pushing 42:18 put 27:11 28:4 33:11,11 putting 56:25 p.m 63:17</p> <hr/> <p style="text-align: center;">Q</p> <p>qualified 3:13 4:11 6:8 7:2 8:19 14:16 21:15 22:7 25:2 26:3,7,9 28:9 33:9 44:20 48:6 49:8 52:17 quantum 27:10 question 13:15 13:24 21:25 23:10 25:12 26:11,11 28:17 28:20,21,22 29:5 30:2 32:21 33:13 34:8 38:21 41:14 44:12 46:1 47:13 48:4,5,7,19,21 49:12 54:4 55:1 58:2,4,10 questioned 7:14 questioning 19:1 questions 21:13 21:19 quote 59:22 quoted 28:13</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:2 61:8 raise 22:25 23:10,12 rationalization 51:20</p>	<p>react 38:6 reaction 44:23 read 12:18,24 13:5 45:4,8,13 45:14 reading 45:16 really 18:17 22:19 29:5 34:14 42:13 44:19 47:10 48:5 52:10 53:23 56:20 58:1,1 59:6,10 61:2 reason 10:21 13:16 14:24,25 15:1,5,16 21:22 45:19 50:10 53:5 56:22 63:12 reasonable 3:25 4:11 5:8 14:5 16:23 17:4 24:13 25:5 27:6,21 33:4 33:23 34:11,12 34:23 36:11 39:19,20 40:2 47:19,22 48:2 48:23 50:15 51:16 52:9 61:23 62:24 63:10 reasonableness 26:5 28:7 41:11 44:18 reasonably 24:16 28:18 33:2,4,25 34:5 39:9 43:9,9,11 45:8 49:21 52:4 reasons 41:24 50:17 rebuttal 2:13 20:20 61:8 recall 4:23</p>	<p>receipts 23:3 recognized 6:9 7:6 8:8 record 46:6 49:15,17 records 53:16 53:18,18 red 53:22,22 reference 26:16 regime 6:19 rejected 42:5 related 9:8 52:25 relates 11:8 relating 21:12 relationship 7:16 release 56:2 released 56:1 relevance 27:19 relevant 12:17 22:22 31:4 41:21,23 55:2 relies 44:13 rely 21:7 27:22 42:1 61:16 62:2 relying 42:21 remaining 61:7 remember 14:24 Remington 37:10 render 28:1 32:4 repeatedly 6:9 reprinted 60:4 request 7:17 28:10 required 52:17 56:4 requirement 61:16 62:3 reserve 20:19 reside 60:1 resided 59:22 residence 16:17 18:1 19:24</p>	<p>44:7,8 49:24 50:1 51:4 resident 62:8,11 62:12 resides 60:13 resolve 49:16 respect 23:12 25:25 61:3,10 62:5 63:6 Respectfully 52:23 respects 23:14 28:5 60:24 Respondents 1:24 2:12 20:7 31:23 46:25 61:12 response 25:11 39:10,23 responses 46:22 responsibility 6:6 rest 34:14 result 16:4 results 60:4 retained 24:18 review 5:2,24 16:24 reviewed 41:16 43:4 46:3 reviewing 41:10 41:11 rifle 54:19 rifles 43:15 54:14 right 5:10 6:13 8:3,23 14:2,21 16:7 17:1,20 22:12 24:6 35:22 37:2,8 47:12 48:20 49:3 50:2 54:20,22 55:8 55:11 57:2 rights 47:1 risk 33:22 ROBERTS 3:4</p>
---	--	---	--	---

<p>4:14,19 12:5,9 16:18,20 20:21 29:14,18,22 31:12,20 32:6 32:22 41:8,20 43:2 44:6 47:6 47:15,21 59:15 59:18,20 60:5 60:7,12 61:6 63:14 room 26:8 54:9 55:21 56:17,18 56:19 58:5 Rose 62:15 roughly 13:25 rule 24:4,18 30:3,6,8 31:16 42:2 49:8 ruled 32:1 33:24 run 53:19 R.Q 1:23 2:11 31:22</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:2 safety 46:15 sawed-off 8:2,25 9:15,25 12:2 17:10,12 34:20 38:11 39:13 46:11,20 48:12 50:25 51:1,3 52:6 53:25 saying 6:1 11:5 11:22 20:14,15 52:13 says 7:12 10:22 13:5 15:16 28:14 34:9,15 44:23 51:23 53:4 Scalia 5:3 15:24 16:2,9,19 17:17,22 18:4 18:7,11,16 22:8,17 25:3,8 25:11,17 26:19</p>	<p>27:5,14 29:8 29:12,15 40:19 40:23 41:2 43:13,23 44:1 Scalia's 62:5 scope 21:21 22:3 23:9,11 46:19 se 7:21 54:19 search 4:10 7:17 8:14 9:7,20 11:7 13:1 15:2 15:4,10,13,14 15:17 17:19 18:18 19:15,18 21:5,10,11 22:3,15,16 24:11 28:19 30:4,25 31:7 32:3,7 33:24 34:7,9,13 35:20 40:20 43:4,19,20,21 44:11 46:10,19 48:11 49:18,23 51:21 53:21 58:11 59:25 60:3 63:2 searched 59:8 searches 23:1,3 searching 25:1 37:7,13 50:22 50:22 second 22:14 23:9,10,13,14 23:15 37:15,15 37:19 secondly 51:7 section 20:5 31:6,18 secure 46:15 55:24 56:24 see 12:20 16:23 16:25 18:23 24:14 37:14,14 37:23,25 38:17 38:22,22 42:20 53:19 58:7</p>	<p>seek 11:7 32:16 32:19 33:14 34:15 50:4 62:1 seeking 32:2 seen 4:23 23:19 sees 38:9 seize 17:16 30:5 34:9 38:2,11 49:22,23 54:16 54:24 56:12 57:6,21 58:22 62:6,20 seized 40:23 47:8,24 59:5,6 59:8 seizes 43:14 seizing 62:4 seizure 31:7 40:20 self-defense 37:3 sending 61:24 63:13 sense 8:5 9:14 25:11 sentence 23:14 23:15 31:13,14 Sentra 53:20 separate 20:8 32:21 separately 20:13 20:15 separating 47:16 serve 17:23 service 46:2 set 3:12 5:7,12 31:5 33:17 42:6 44:18 52:14 sets 13:9 22:23 severance 49:7 49:11 Shelly 60:9,23 Sheppard 26:14 26:15</p>	<p>shot 45:1 shotgun 8:3,25 9:15 10:1,2,4,5 10:14 12:2 17:10,13 34:7 34:20 37:10 38:11 39:13 46:11,14,20 48:12 49:25 50:25 51:1,3 52:6 54:1 shouting 45:2 show 5:15 18:9 18:13,14 22:18 40:1,2 showed 26:21 47:17 showing 23:3 shows 18:22 59:10 sides 52:2 sign 25:23 43:20 signed 41:16 42:4 similar 53:9 simply 6:2 sitting 12:23 20:11 situation 25:14 25:21 38:8 50:9 solely 32:7 Solicitor 1:19 somebody 46:16 53:14,19,20 56:4 someplace 38:5 50:20 somewhat 16:21 52:25 53:8 son 12:12 sorry 12:14 16:19 35:5 60:6 sort 48:1,3 49:12,17 59:14 sorts 23:24</p>	<p>54:20 Sotomayor 5:18 6:2,5,13 7:11 7:23 10:19 11:4,13,17,21 12:4,22 18:24 19:9,14,18,21 30:17 48:16,18 48:21 sought 23:5 34:12 54:7 sounds 19:21 soup 16:7 speak 28:21 speaking 25:18 41:25 specific 13:14 37:10 53:6,6,6 specifically 3:17 4:2 15:23 26:16 46:4 59:5 specify 17:11 speculate 37:5 Spilotro 53:11 spite 5:21 spoke 25:15,16 spot 57:20 spousal 51:23 SRI 1:19 2:6 20:23 Srinivasan 1:19 2:6 20:22,23 21:1,9,18 22:12,21 24:1 24:7,21 25:7 25:10,18 27:1 27:20,24 28:3 28:23 29:3,11 29:20,23 30:7 30:21 31:2,14 stand 53:12 standard 3:13 7:9 14:5 16:12 26:1,5 27:3 28:7 44:17,19 44:22 63:3</p>
--	--	--	--	---

<p>standards 4:7 standing 56:15 state 52:11 stated 28:15 statement 12:21 13:16 States 1:1,14,21 2:7 3:12 20:24 status 62:14 statute 31:5 stay 12:12 stayed 60:22 staying 60:2,8 60:14 step 17:3 61:20 61:21 stepping 15:19 stick 9:19 stop 10:7 store 62:16 strange 24:4 Street 50:18 59:23 60:20,21 stressed 33:21 stretch 9:1 17:13 strong 10:9 25:14 stronger 10:16 stuff 27:19 stupid 5:7 subjective 6:16 submit 4:1,6,9 5:1 49:4 submitted 4:8 4:16 5:20 32:24,25 41:14 63:7,8,16,18 subsection 31:18 subsequently 3:16 suddenly 38:16 38:18 suffered 48:15 sufficient 7:12 sufficiently</p>	<p>28:24 29:4,7 29:25 suggest 11:25 suggested 39:3 45:16 suggesting 52:9 suggestion 51:24 suggests 40:10 superior 24:5 42:10 superiors 4:16 16:24 26:12,22 27:18 32:25 42:22 43:1 63:8 supervisor 27:13 supervisors 5:20 5:23 6:3 support 1:21 2:8 20:25 23:24 41:15 46:1,2 suppose 4:14 37:6 46:10 49:12 51:1 54:6,7 supposed 12:16 13:7,15 supposes 22:25 suppressing 3:14 suppression 14:16 26:6,14 27:4 28:8 Supreme 1:1,14 sure 16:11 18:6 22:7 25:21 48:9 57:4 surely 47:11 48:2 suspect 30:2 suspect's 37:7 suspicion 32:12 sword 42:23</p> <hr/> <p style="text-align: center;">T</p> <hr/>	<p>T 1:17 2:1,1,3 2:14 3:7 take 12:16 13:7 13:15,19 14:2 21:21 27:9 37:15,19 38:18 39:7 46:15 57:6,10,10 58:10,12,17 taken 27:10,12 talked 4:25 talking 41:9,9 talks 62:15 tavern 50:23 team 42:11 44:4 tell 7:11 18:24 19:3 45:7 46:5 tend 27:3 50:12 tending 23:17 term 34:1 terms 7:1 15:19 17:11 25:15 26:2 61:11 test 5:5,5,7,11 5:12,21,23 14:16 16:3,4 16:10 25:8 27:15,17,20,25 28:23,24 29:1 29:4,9,15 30:19,21 51:15 testified 45:18 testimony 10:20 Thank 20:21 21:1 31:19,20 31:24 61:5,6 63:14 thin 39:20 thing 12:17 things 12:16 14:11 18:1 24:12 37:5 45:20,24 54:18 55:20 56:24 59:24 think 4:23 5:9 5:14 6:14 7:8</p>	<p>8:5,7,12 9:1,2 10:23 11:10 12:24 13:1,2,8 13:24 15:11,18 15:20,22,22 16:2,13,14,24 17:7,7,13 20:15 21:12,13 21:18 22:21 23:2 24:17,21 25:10 26:8 28:12,23,25 29:3,6 30:3 33:13,13 34:13 34:24 35:14 36:18 37:17 38:12,20 39:4 39:9,19 40:2 41:5,13,18 42:9 43:21 44:9,12,17 45:9 46:23 47:13,22 48:5 48:6,7,9 49:15 50:15 51:19 52:22,24,24 53:14,19 54:17 55:2,11,14 56:9 57:4,5,24 58:8,19 59:6 59:21 60:24 61:14,19,25 62:7,13,19 63:9 thinking 13:6,17 36:11 38:4,25 thinks 16:25 third-party's 40:18 thought 5:18 13:3 14:1,23 15:6 21:20 23:21 25:5 30:24 43:12 45:4 51:15 58:24,25 threat 17:11</p>	<p>36:16,17 58:14 threatened 30:14 34:23 35:2 54:15 57:12 throw 44:25 tie 9:23 10:2,4 17:25 19:23 62:25 ties 18:22 time 11:6 20:7 20:20 30:24 41:9 TIMOTHY 1:17 2:3,14 3:7 61:8 told 44:23 45:3 45:25 46:3 60:9 top 44:11 59:8 tossed 5:16 totality 7:5,9 14:18 totally 42:17 49:14,14 50:19 training 14:22 transpired 42:14 63:7 trial 51:2 tried 36:11 44:24 truthful 32:24 try 62:2,3 trying 5:15 27:6 45:1 two 6:14 21:10 21:12 22:13,23 25:11,12 26:24 47:16 52:25 55:20</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 43:8 43:13 62:21 unconstitutio... 28:11 understand</p>
--	--	--	--	---

18:18 19:1 34:6 35:12 42:3 43:23 47:20 understandable 23:23 understanding 6:18 understood 38:21 undertake 43:11 undertook 44:10 undesirable 32:18 unfortunate 62:18 unique 19:12 United 1:1,14,21 2:7 3:11 20:24 unknown 32:8 unlawful 50:12 unquote 59:22 unreasonable 25:13 28:2 32:5 62:19 unusual 15:22 urge 27:2 use 8:9 31:8 32:8 34:10 35:1 36:16 46:16 52:5 57:11,20 62:17 useful 52:25	view 37:23,24 61:13 viewed 20:9,10 violating 4:4 5:13 16:12 63:5,12 violation 22:1 47:1 violations 33:22 violent 30:11 34:22 45:25 52:5	warrants 30:3 32:16 33:14,24 43:4 Washington 1:10,20,23 wasn't 11:14 40:2 water 27:3 way 6:24 20:9 20:10,10 21:21 22:3 24:18,19 29:6 41:21 42:24 45:13,14 51:25 ways 6:14 45:2 weapon 8:25 9:3 9:4,6,24 11:19 11:19,20,24 12:2 30:2 54:8 59:10 62:21,22 63:1 weapons 8:9 9:7 9:8,13 10:21 13:10 14:25 16:17 18:14 30:6 40:17 54:21 55:24 56:3,4,8,10,23 57:5,16,21,24 58:14,15,22 61:12 62:4,17 wear 18:8 well-trained 28:18 33:25 34:5,12 43:9 went 30:15 59:7 weren't 30:18 We'll 3:4 we're 8:20 13:7 20:11,14 24:8 24:12 36:2 41:10,11,11 44:21 57:6,9 57:10 we've 5:7 16:4 41:8,9 willing 5:1	Wilson 41:16 window 44:25 wiretap 32:7,13 Wolfson 1:23 2:11 31:21,22 31:24 32:11 33:12 34:11 35:3,7,12,16 36:1,5,18 37:8 37:16,20 38:14 38:20 39:24 40:4,12,15,22 40:25 41:6,18 41:22 43:6,17 43:25 44:3,8 45:12,15 46:7 46:8,9,22 47:9 47:20,25 48:17 48:20 49:3 50:2,17 51:5 51:18 52:1,16 52:23 54:5,17 54:22,25 55:6 55:8,11,14,19 55:23 56:9,13 56:19 57:2,4 57:14,18 58:3 58:8,16 59:2 59:17,19,21 60:6,9,15 wonderful 27:14 words 14:24 45:8 work 5:1 47:12 wouldn't 22:4,6 22:10,19 58:10 wrapped 10:14 10:17 17:15,18 18:4 wrestled 49:6 writ 23:18 wrong 24:16,16 36:10 39:3	<hr/> Y <hr/> years 53:15 <hr/> 1 <hr/> 1 31:18 10 18:25,25 10-704 1:4 3:5 11 20:12 11:08 1:15 3:3 12-gauge 37:10 12:09 63:17 120th 50:18 59:23 60:20 1524(a)(3) 15:9 31:6 1950 53:18 1983 26:7 1998 53:15 1999 53:15 <hr/> 2 <hr/> 2 61:7 20 2:7 2011 1:11 210.3 31:18 23 7:8 27a 23:21 <hr/> 3 <hr/> 3 2:4 31 2:12 344 28:6 345 28:15 <hr/> 4 <hr/> 41(c)(3) 31:16 45 19:25 45-caliber 10:17 17:14 48 31:3 <hr/> 5 <hr/> 5 1:11 52 22:22 <hr/> 6 <hr/> 6 20:12 61 2:15
<hr/> V <hr/> v 1:5 3:5,11,12 8:19,20 32:1 37:24 62:15 valid 48:3,8,11 49:13,13,13 validity 6:25 14:14 valuable 51:4 various 46:4 vehicles 53:21 victim 30:13,14	<hr/> W <hr/> wait 11:21 14:7 want 15:2 27:2 35:13,16 43:2 43:3,6 44:23 50:10 61:15 62:1 wants 32:15 warrant 3:16,24 4:12 5:8 6:17 6:18,25 7:6,7 7:17,18 8:14 9:13,20 10:24 11:7 12:17 14:10,14,15 15:2,4 17:17 21:4,24,24 22:2,6,13 24:5 25:5 28:10 31:10 32:3,3,7 32:19 34:2,6,9 34:13 37:22 40:19 41:10,15 42:8 43:19,20 44:2 45:22 46:10,19,20 47:2,4,5,7,13 47:17,22 48:3 48:9,11,17 49:12,19 51:6 51:9,11,22,22 54:7 57:24 59:4,14 61:16 61:18 62:3	<hr/> X <hr/> x 1:2,9		

<hr/> 8 <hr/> 8 26:15 <hr/> 9 <hr/> 9 26:15,15 97th 60:21				
---	--	--	--	--