

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 83-305

**TITLE** CALIFORNIA, Petitioner v. ALBERT WALTER TROMBETTA,  
ET AL.

**PLACE** Washington, D. C.

**DATE** April 18, 1984

**PAGES** 1 thru 52



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

2                                CHIEF JUSTICE BURGER: We will hear arguments  
3 next in California against Trombetta.

4                                Mr. Kirk, I think you may proceed whenever you  
5 are ready.

6                                ORAL ARGUMENT OF CHARLES R.B. KIRK, ESQ.,

7                                ON BEHALF OF THE PETITIONER

8                                MR. KIRK: Thank you, Your Honor.

9                                Mr. Chief Justice, and may it please the  
10 Court. Recently in South Dakota versus Neville this  
11 Court again decried the carnage caused by drunken  
12 drivers on our highways.

13                                Spurred on by increasing public awareness, and  
14 encouraged by the federal government, the states are  
15 stepping up law enforcement efforts to combat this  
16 national problem, and one of the most effective tools in  
17 law enforcement's arsenal is the breath alcohol test.  
18 Such tests are used in every state, the District of  
19 Columbia, and Puerto Rico.

20                                In California, which I am sure is typical,  
21 breath alcohol tests are used in two-thirds of all drunk  
22 driving arrests.

23                                Evidential breath test instruments provide a  
24 rapid, economical, and accurate means of immediately  
25 determining the suspect's blood alcohol content.



1 Because they are self-contained, automatic units, they  
2 can be easily and accurately operated by a field officer  
3 with minimal training. The ease and rapidity of  
4 operation allows the officer to complete the test  
5 quickly and return to the highway to do his job.

6 Immediate results also permit additional  
7 sample collection where an unexpectedly low result  
8 suggests intoxication by combination of alcohol and  
9 drugs. Breath testing is also the least intrusive of  
10 the options from the suspect's point of view. It does  
11 not involve bodily intrusion or invasion of privacy, and  
12 assures the shortest period of detention.

13 Breath testing is broadly accepted as valid.  
14 Self-contained devices avoid the possibility of human  
15 error or manipulation and allow subsequent checks upon  
16 the accuracy of the test system.

17 Now, this case is here on certiorari. After a  
18 California Court of Appeals held unconstitutional as a  
19 violation of federal due process use of an evidential  
20 breath test instrument unless that device preserves the  
21 breath sample actually tested for possible retesting by  
22 the defendant or alternatively a procedure is followed  
23 which collects an equivalent sample for the defendant's  
24 use.

25 In the context of this particular case, the

1 instrument at issue is an Intoxolizer, widely used on a  
2 national basis, and constituting 82 percent of the  
3 evidential breath test devices in California.

4 Now, I will first focus on the machine itself,  
5 and then I am going to outline why its use does not  
6 offend due process. The Intoxolizer does not save any  
7 sample for possible retesting. In use, the suspect  
8 blows through a tube leading into a chamber within the  
9 machine. When the device determines that the air deep  
10 in the lungs has been reached, the sample is momentarily  
11 held for analysis using infrared light, and the blood  
12 alcohol content is measured. Then the test sample is  
13 automatically pumped out of the machine, and the chamber  
14 is purged with clear air.

15 The purge cycle promotes test integrity by  
16 ensuring that no residual alcohol remains as a  
17 contaminant, that the instrument is starting from zero,  
18 and that no capricious event occurs to interfere with  
19 test accuracy. It is actually a diagnostic step which  
20 protects the defendant.

21 The machine must be purged to prepare it for  
22 another test on that same person or another individual.  
23 Thus the test sample purged to clear the machine is  
24 automatically destroyed as an integral part of the  
25 analytical process, and it is never collected or reduced

1 to a form which permits practical retention.

2 The decision of the Court of Appeal by its  
3 terms extends not only to the Intoxolizer but to all  
4 evidential breath test machines. The others approved  
5 for use in California also destroy the sample during the  
6 testing process. Hence the decision condemns as  
7 unconstitutional all California breath testing, and  
8 should such a rule be extended to the other states, will  
9 greatly impair the effort to control the drinking  
10 driver.

11 The great national concern over this  
12 disquieting prospect is reflected in the amici briefs  
13 which have been filed in support of the state of  
14 California.

15 QUESTION: Mr. Kirk, how widespread is the use  
16 of the Intoxolizer around the country?

17 MR. KIRK: As far as I know, Your Honor, it is  
18 used virtually from shore to shore. Obviously, each  
19 state is free to choose its own machines. The National  
20 Highway and Traffic Safety Administration has approved a  
21 great number. I know that the Intoxolizer is favored  
22 and used exclusively in a number of states.

23 Now, on what basis did the California court --

24 QUESTION: General Kirk, would you just help  
25 me out on one thing? I may have gotten the wrong

1 impression. I thought from the material at the  
2 beginning of your opponent's brief that there was  
3 another breath testing device that did conserve the  
4 sample, and that was permissible to use in California.  
5 Am I wrong on that?

6 MR. KIRK: Your Honor, that is talking about  
7 the indium tube device or actually the gas  
8 chromatograph, which analyzes an indium tube as part of  
9 the process. That is true, that exists, and that is  
10 approved in California.

11 QUESTION: I see.

12 QUESTION: But it isn't widely used --

13 MR. KIRK: No, Your Honor. In fact --

14 QUESTION: -- in California?

15 MR. KIRK: It is not widely used in  
16 California, and there is only one single county which  
17 has ever made any kind of continuous use, and that is  
18 the county of San Bernadino, which since 1973 has used  
19 it because of the difficulty of collecting breath  
20 samples in a widespread county.

21 Now, on what basis did the California court  
22 make such a wholesale condemnation in Trombetta,  
23 purportedly under the due process clause of the federal  
24 constitution as interpreted by the California Supreme  
25 Court? In People versus Hitch, that court looked to the



1 opinion in Brady versus Maryland and divined a  
2 constitutional principle requiring preservation of any  
3 evidence which might possibly be favorable to the  
4 accused.

5           Now, I say divined because that is exactly  
6 what the California Supreme Court did. The Hitch rule  
7 cannot be found in Brady versus Maryland or in any other  
8 decision of this Court nor can it be found anywhere in  
9 the Constitution. In a criminal case, the state must  
10 prove guilt beyond a reasonable doubt, but the  
11 Constitution does not require proof beyond all possible  
12 doubt and to an absolute certainty. The state need not  
13 negate all speculative possibilities, which seems to be  
14 the primary focus of respondents and their amici.

15           And the Trombetta decision itself imposes  
16 sample preservation to make proof of guilt an absolute  
17 certainty. The Hitch-Trombetta preservation requirement  
18 is predicated upon a claimed need to provide the  
19 defendant with any evidence which has a reasonable  
20 possibility of yielding results favorable to the defense  
21 or casting doubt upon the state's case. It was just  
22 that "might possibly" standard which this Court recently  
23 rejected in United States versus Valenzuela Vernow.

24           The Hitch-Trombetta standard is in fact no  
25 standard at all. As this Court observed in Killian

1    versus United States, almost everything is evidence of  
2    something, and in Valenzuela Vernow, possibilities of  
3    favorable evidence are limited only by the imaginations  
4    of counsel and judges.

5               This is especially true, I believe, with any  
6    analytical measuring or recording method. Ordinarily,  
7    the only prerequisite to the admission of scientific  
8    tests are proof of the expert's qualifications, accuracy  
9    of the equipment, and reliability of the method  
10   followed. It is not required that the results of  
11   accepted methods be infallible to be admissible,  
12   possibilities of error going to weight rather than to  
13   admissibility.

14              The Trombetta and Hitch cases depart from this  
15   rule applicable to physical testing and require as a  
16   matter of federal due process that there must be a  
17   secondary verification of the primary test before the  
18   primary test is admissible.

19              Now, the irony in this case is that there are  
20   few areas in which the defendant is so well protected.  
21   The Intoxolizer, as are all evidential breath test  
22   instruments in California, has been tested and approved  
23   by the National Highway and Traffic Safety  
24   Administration, a neutral federal agency. It has also  
25   been subjected to the rigid scrutiny, including

1 blood-breath correlation studies on live subjects by the  
2 California Department of Health, which is a neutral  
3 agency. It is not involved in law enforcement. It does  
4 not sell machines.

5           This is the neutral agency designated by cur  
6 legislature as having the expertise in this scientific  
7 field. And when an instrument is approved, it can only  
8 be used following regulated procedures. It is  
9 periodically checked for accuracy, and under these  
10 controls, the Department of Health has itself concluded  
11 that there is no possibility of undetected error.

12           Now, Brady cannot be the source of the  
13 Hitch-Trombetta preservation rule, since Brady is not a  
14 preservation case at all. It is a disclosure case.  
15 Brady requires the state to disclose exonerating  
16 material evidence to the defendant. It is based upon  
17 the notion of fair play inherent in our judicial  
18 system.

19           The form or continued physical existence of  
20 the evidence is irrelevant to the duty to disclose it.  
21 This case does not present a Brady violation at all. To  
22 violate the rule, there must be a suppression of  
23 evidence. The evidence must be favorable to the  
24 defense, and the evidence must be material.

25           Destruction in the ordinary course of an

1 analytical process is not suppression. This was not  
2 evidence favorable to the defense. The contrary is  
3 true. Nor would a preserved or separately collected  
4 sample yield material evidence, since reanalysis is  
5 itself subject to error and cannot be verified. Thus a  
6 discrepancy between the evidential breath test results  
7 and the results of referee analysis creates a conflict  
8 in the evidence which can be resolved but only by going  
9 back to the evidential breath test and rechecking its  
10 accuracy.

11           This can already be done without a preserved  
12 sample. Trombetta thus imposes a duty of preservation  
13 yielding at most inconclusive results, creating the  
14 circular route back to the starting point, which is the  
15 evidential breath test machine. Certainly the  
16 Constitution does not require such wasted effort. In  
17 any event, sample prevention was not necessary, and  
18 therefore not material in a constitutional sense to  
19 enable a probe of the accuracy of the test results since  
20 several suitable alternate methods were available for  
21 this purpose.

22           QUESTION: General Kirk, may I just ask this?  
23 Supposing you had taken a blood sample instead of the  
24 breath sample. Do you think the officer could have  
25 thrown it away without raising any questions?



1           MR. KIRK: Well, Your Honor, as a practical  
2 matter that has to be sent to a laboratory and analyzed  
3 there before it is of any value to us.

4           QUESTION: Supposing that was done, and after  
5 they got through they just threw it away, they just made  
6 a record of it. Would that raise any questions for  
7 you?

8           MR. KIRK: Well, I certainly think that it  
9 would expose the state to challenge as to the validity  
10 of the results. I think this is where we run into the  
11 kinds of attacks that the defense can make. I do not  
12 believe that due process requires that the defendant  
13 necessarily have an independent right to check  
14 everything. What I think it does is put a big hole in  
15 the state's case.

16           QUESTION: Just a matter of credibility --

17           MR. KIRK: Yes, Your Honor.

18           QUESTION: -- as to the weight of the  
19 evidence. Another question I wanted to ask you, since I  
20 have already interrupted you, if the two different  
21 procedures, one of which was that you could preserve the  
22 sample and the other of which, the one you actually  
23 used, were equally costly to the state, there is just no  
24 difference, you just chose -- you just elected to have  
25 the one that you are using rather than the other one,

1 would that present any problem?

2 MR. KIRK: Well, again, I don't think that due  
3 process requires us to resort to any particular  
4 procedure. Frankly, I think the state would be better  
5 off if we could cheaply and accurately preserve  
6 something, because we would blow all these attacks out  
7 of the water.

8 QUESTION: The question I am really getting up  
9 to is, why don't you do that?

10 MR. KIRK: Because we do not believe it is  
11 possible. We do not --

12 QUESTION: They do this in Colorado, don't  
13 they?

14 MR. KIRK: In Colorado, according to the  
15 statistics that I have cited to the Court in the Montoya  
16 case, there is an 80 percent error. Colorado, if it  
17 wishes, can corroborate something with a Ouija Board,  
18 but I don't think that the due process clause requires  
19 the state of California to adopt that procedure.

20 QUESTION: How long would blood remain in a  
21 static condition so that it could be tested and retested  
22 weeks later?

23 MR. KIRK: Under our regulations, Your Honor,  
24 it can be stored as long and is kept as long as one  
25 year.

1           QUESTION: Well, stored, but it must be  
2 refrigerated, must it not?

3           MR. KIRK: Yes, it has preservatives in it,  
4 and it is stored under refrigerated conditions, and it  
5 can be retested for up to one year accurately.

6           QUESTION: And then you have about five days  
7 of tests as to what the preservatives due to it.

8           MR. KIRK: That does happen, frankly.

9           QUESTION: Don't you? Yes.

10          MR. KIRK: Now, due process is the concept of  
11 fair play. In a trial, it means a reasonable  
12 opportunity to challenge the state's case, and it is  
13 violated only when the opportunity to challenge is so  
14 restricted as to make what should be a disciplined  
15 adversary contest into an ordeal in which the defendant  
16 plays only a passive role.

17          QUESTION: Is this your own idea, or are you  
18 quoting from something?

19          MR. KIRK: Well, I am slightly paraphrasing  
20 some decisions of this Court, Your Honor. It is not a  
21 direct quote. But proof of physical evidence -- and as  
22 a matter of fact that comes from that last paragraph of  
23 Augenblick, with slight changes, but proof by physical  
24 evidence and its preservation for that purpose have  
25 never been considered a basic requirement of due

1 process. Indeed, the vast majority of the evidence in  
2 any case is neither physical nor corroborated by it.

3 QUESTION: General, is there any procedure for  
4 keeping this air?

5 MR. KIRK: In the opinion of the state of  
6 California, no, Your Honor.

7 QUESTION: No evidence was produced in this  
8 case?

9 MR. KIRK: In this case there was some  
10 evidence, but there were no findings by the trial court  
11 to that effect, as contrasted with, for example, the  
12 State of Colorado case --

13 QUESTION: First of all, I would like to know  
14 how you catch it. Then I would like to know how you  
15 keep it.

16 MR. KIRK: Well, that's one of the --

17 QUESTION: There is nothing here in the record  
18 that will help me on that?

19 MR. KIRK: In the record, Your Honor, I  
20 believe there is some testimony from a defense expert,  
21 with which we would not agree by any means, suggesting  
22 that you could capture it with an indium tube or with  
23 silica gel. The indium tube does capture true air. The  
24 silica gel simply absorbs alcohol, does not capture true  
25 air.



1                   Now, we have indicated in our brief that as  
2 far as the Intoxolizer itself is concerned, the machine  
3 that we use, by choice, there is no device approved or  
4 available that you can attach to that machine to capture  
5 the air.

6                   QUESTION: Well, but you can capture the air  
7 with a different machine. That is what you told me, I  
8 understand.

9                   MR. KIRK: Yes, Your Honor. You could capture  
10 the air with a different machine, but then that means a  
11 different sample. And it is our position that you have  
12 an apple and an orange, and one is not the same fruit.

13                   For a proceeding to be fair, due process does  
14 not require anything more than a reasonable opportunity  
15 to challenge the state's evidence. This in turn depends  
16 in part upon the nature of the evidence actually  
17 presented. There is no doubt that preservation of a  
18 substance scientifically tested, if reliable  
19 preservation is both possible and practical, would be  
20 ideal.

21                   As I have said, it would make the state's job  
22 a lot easier by removing any possibility of doubt and  
23 giving us a stronger case, but frankly, we don't believe  
24 this practical or possible at the present time.

25                   QUESTION: And you also say it is not required

1 by the constitution.

2 MR. KIRK: Yes, because due process and fair  
3 trial does not require only one kind of procedure. As  
4 long as any alternative gives the defendant an  
5 opportunity to challenge the state's case, due process  
6 is satisfied. That some may consider one procedure  
7 preferable to another is not a constitutional dimension.

8 QUESTION: This sounds to me like a very  
9 amorphous concept you are talking about, a fair  
10 opportunity to challenge the state's case. I mean,  
11 supposing the state has four or five eye witnesses, and  
12 the defendant doesn't have any access to them at all.  
13 Now, is cross examination of the eye witnesses what you  
14 would call a fair opportunity to challenge?

15 MR. KIRK: That has been the traditional rule  
16 in this country, Your Honor.

17 QUESTION: I just don't see how a vague phrase  
18 like "a fair opportunity to challenge" moves the ball  
19 much in this rather particular situation, where we are  
20 talking about, I take it, whether Brady against Maryland  
21 should be extended.

22 MR. KIRK: Well, what we are talking about  
23 here is what process is due, what is fair.

24 QUESTION: But we don't have to start all over  
25 with the adoption of the Constitution in every case we

1 hear argued. I mean, we are focusing in the general  
2 area of Brady against Maryland, aren't we?

3 MR. KIRK: Certainly. I am not sure I  
4 understand the question.

5 QUESTION: Well, it is your case to argue.

6 MR. KIRK: When physical evidence is lost or  
7 destroyed, it is true that the defendant can no longer  
8 see it for himself, but neither can the jury, and the  
9 absence of the physical proof both diminishes the weight  
10 of the state's case and exposes it to doubts arising  
11 from the loss. With scientific tests, the defendant can  
12 still explore the competence of the expert,  
13 acceptability of the methodology, and adequacy of the  
14 equipment to challenge the test validity, and secure in  
15 the knowledge that the state cannot remove all  
16 possibility of doubt by presenting the physical evidence  
17 itself, the defendant has even greater latitude in  
18 creating reasonable doubt than perhaps existed before.

19 Now, there are additional protections with  
20 evidential breath test instruments like the  
21 Intoxolizer. In California, extensive studies are done  
22 by the Department of Health on each machine. These are  
23 matters of public record. A record is kept of all  
24 periodic calibration checks of the instrument in  
25 question. The defendant's own test record is preserved

1 recording the circumstances of the test. The instrument  
2 itself remains available for testing, and the instrument  
3 operator is available for cross examination.

4 QUESTION: Is each report in some way coated  
5 so that the identification number of the particular  
6 machine as well as the operator is part of the permanent  
7 record?

8 MR. KIRK: Yes, Your Honor. Yes, it is part  
9 of the permanent record. You can always tie the machine  
10 to the particular test.

11 This gives the defendant ample opportunity to  
12 probe the accuracy of the test. It is an acceptable  
13 alternative to sample preservation and assures a fair  
14 trial. But there is still a second alternative suitable  
15 for purposes of due process. Under California law, a  
16 suspect has a right to have his own sample collected,  
17 independently tested, and can use the results to  
18 challenge the state's case.

19 The availability of this alternative, which  
20 has existed for years, is also adequate for this  
21 purpose.

22 Now, Trombetta goes even farther than the  
23 Hitch case by requiring if not preservation, collection  
24 of an equivalent sample for use of the defendant. This  
25 goes beyond anything any court has required before.



1 This imposes an affirmative duty to collect something  
2 the police did not themselves use or need.

3 QUESTION: Are you sure that these machines  
4 are available to the public?

5 MR. KIRK: These machines can be commonly  
6 purchased by anyone, Your Honor. As a matter of fact, a  
7 number of private laboratories own them.

8 QUESTION: I thought it cost around \$2,200.

9 MR. KIRK: This particular machine costs  
10 \$4,000.

11 QUESTION: That's right.

12 MR. KIRK: Now, the average person obviously  
13 is not going to go out and buy one, but he has access to  
14 them through private laboratories and the courts permit  
15 him to have access to the particular machine that he was  
16 tested on.

17 QUESTION: The average person knows that?

18 MR. KIRK: I beg your pardon?

19 QUESTION: The average person knows that?

20 MR. KIRK: I would not hazard to guess that,  
21 Your Honor, at all, but as a matter of fact when he gets  
22 into court he will know that he can go and test that  
23 machine if he wishes.

24 QUESTION: General Kirk, can I ask you a  
25 question --

1                   MR. KIRK: Yes, sir.

2                   QUESTION: -- on that procedure? The  
3 California court, as I understand it, went beyond -- you  
4 just made this point -- went beyond the Hitch case in  
5 this case --

6                   MR. KIRK: Correct.

7                   QUESTION: -- and made its new ruling just  
8 prospective only, and it relied in part, at least the  
9 concurring judge did, on the failure to tell the  
10 arrested person that he had a choice between this  
11 procedure and the either blood or urine sample as  
12 opposed to a breath sample. To what extent does that  
13 requirement of advice underlie this decision? And is  
14 that a federal requirement or a state requirement in  
15 your view?

16                  MR. KIRK: In my view, that is a state  
17 requirement. The statute has existed for a number of  
18 years, and the cases in California interpreted this  
19 particular statute as giving the person an absolute  
20 right but not imposing on the officer a duty  
21 admonition. That is, at least until recent enactment of  
22 a new statute to attempt to combat Trombetta, was the  
23 case.

24                  Now, of course, the officer has an affirmative  
25 duty to do it.

1           QUESTION: Well, if that is the case, is it  
2 not possible that this judgment, at least insofar as the  
3 particular people before the court are concerned, rests  
4 on the state ground that they failed to give the advice  
5 required by state law?

6           MR. KIRK: Oh, no. On the contrary, Your  
7 Honor, the majority opinion has nothing to do with an  
8 admonition at all.

9           QUESTION: I see.

10          MR. KIRK: It strictly says that you must  
11 preserve a sample, and because you didn't in this case,  
12 that violates due process and the evidence must be  
13 excluded. It has nothing to do with an admonition.

14          QUESTION: I understand that is what the  
15 majority opinion says, but it is true that the officers  
16 did also violate state law in a way set forth in the  
17 concurring opinion.

18          MR. KIRK: No. No, Your Honor, that is  
19 incorrect. The officers did not violate state law.  
20 There was no requirement to admonish them under state  
21 law.

22          QUESTION: I see.

23          MR. KIRK: And I do not believe the concurring  
24 opinion says that. What the concurring opinion suggests  
25 is that a way to avoid the problem would be to admonish

1 the suspect and get a waiver.

2 QUESTION: I see.

3 MR. KIRK: This is what the concurring opinion  
4 does, but that was not the state of the law at the time,  
5 and the decision does not rest on that at all.

6 QUESTION: I see.

7 MR. KIRK: Now, the additional part of  
8 Trombetta, the collection part, casts the state in the  
9 role of an agent for the defense, and causes a serious  
10 distortion of the adversary process, and an incredible  
11 tension between competing interests and duties on the  
12 part of the officer. Now, we submit that Trombetta is  
13 wrong and should be reversed.

14 I would like to reserve my remaining time for  
15 rebuttal.

16 CHIEF JUSTICE BURGER: Very well.

17 Mr. DeMeo?

18 ORAL ARGUMENT OF JOHN F. DE MEO, ESQ.,

19 ON BEHALF OF THE RESPONDENTS

20 MR. DE MEO: Mr. Chief Justice, and may it  
21 please the Court, petitioner argues for a rule on the  
22 due process duty to preserve which in the final analysis  
23 would permit law enforcement to choose unilaterally  
24 methods of testing which in effect would use up or  
25 consume or discard or destroy the evidence which is

1 vital on the issue of the guilt or the innocence of an  
2 accused in the driving under the influence case.

3 QUESTION: Would you find it constitutionally  
4 objectionable if the officers were trained to take a  
5 blood test and -- take a blood test right on the scene?

6 MR. DE MEO: I would not, Your Honor. The law  
7 in California at least at this time in the case of the  
8 collection of blood does provide for the retention for a  
9 year, and provides that the defendant may have a sample  
10 for retesting so that would certainly give him the right  
11 to have a retest.

12 QUESTION: Do they now take blood tests right  
13 at the time of the arrest, out on the road?

14 MR. DE MEO: No, they do not, Your Honor. It  
15 requires someone who is properly trained to do that in  
16 the medical discipline. In the event that the  
17 government does utilize a device which does destroy the  
18 evidence, and if that evidence, the result of it is  
19 inculpatory, then California argues that it should be  
20 entitled to introduce that evidence on the issue of  
21 guilt of the defendant --

22 QUESTION: May I stop you right there?

23 MR. DE MEO: Yes.

24 QUESTION: Does the government destroy this  
25 evidence, "destroy?"



1                   MR. DE MEC: In effect, that's what happens,  
2 Your Honor.

3                   QUESTION: Well, why don't you say it? You  
4 said that they destroy it.

5                   MR. DE MEO: Yes, they --

6                   QUESTION: They don't do a thing. That is  
7 what you're complaining about, that they don't do  
8 something.

9                   MR. DE MEC: They don't preserve.

10                  QUESTION: You want to put an affirmative duty  
11 on them, not to stop them from doing something, but to  
12 make them do something. There is a considerable  
13 difference.

14                  MR. DE MEO: Your Honor, what I do want them  
15 to do is, when they embark upon the process of a  
16 collection of evidence which bears directly on the guilt  
17 or innocence of the accused, I want them then in that  
18 case to be sure that they preserve a sample of that  
19 evidence or its equivalent so that the defendant on the  
20 trial is not placed in the position where he must only  
21 be permitted to cross examine the machine that was used  
22 or a piece of paper where the results of the test are  
23 reported to cross examine as to whether or not it is  
24 connected up or not with this defendant, or perhaps  
25 there was an error, or whether or not in effect the

1 expert who is testifying may not have made an error in  
2 Calibrating the machine.

3 I think that for a fair trial for a defendant  
4 accused of this type of a crime, he must be armed with  
5 the same type of artillery as the prosecution has.  
6 Namely, he must be entitled to retest that evidence.  
7 Why should he have to rely on what the government  
8 says?

9 QUESTION: Well, there is one way he could do  
10 that if he wanted to spend \$4,000 to buy a machine and  
11 carry it in the car with him. I suppose that would do  
12 it, wouldn't it?

13 MR. DE MEO: Yes, Your Honor, I suppose that  
14 would. It would present a rather impractical approach,  
15 I would say, with all due respect.

16 QUESTION: Well, Mr. DeMeo --

17 MR. DE MEO: Yes.

18 QUESTION: -- why is it impractical for  
19 someone who has plenty of his own breath still on his  
20 body to preserve it for himself, if he wants to?

21 MR. DE MEO: Excellent, Your Honor.

22 QUESTION: People who are arrested for DWI  
23 often resort to their own requested blood samples or  
24 breath tests. You can do that independently.

25 MR. DE MEO: You can, Your Honor. The problem

1 with that is, and the problem with California Vehicle  
2 Code Section 13.354(B), which does say that a defendant  
3 who is arrested for driving under the influence may  
4 request a blood, breath, or urine test, the problem is  
5 that although we are all presumed to know the law, it is  
6 folly to assume that most people are aware of that  
7 right, and the other part of it is that when you are  
8 under the stress of an arrest, usually down at a  
9 jailhouse where you are incarcerated, it is difficult to  
10 arrange for an expert to come out to give you a test.  
11 There are a lot of problems that arise with that.

12 And certainly I would like to make this point,  
13 that government is in a superior position with its  
14 resources. I often hear the question asked, why does  
15 government have to do everything? But in this instance  
16 they have the resources to preserve, and the timeliness  
17 of the preservation of that sample is so important to  
18 its reliability subsequently that by the time that one  
19 might arrange for a criminalist to come out or a doctor  
20 to come out to the jailhouse for the person in distress  
21 to try to look through a telephone book and find  
22 someone, sometimes late at night, would present a  
23 difficult obstacle when, on the other hand, government  
24 has the means to do it and it is simple.

25 QUESTION: But the fact that the government

1 had the means to do it and it is simple certainly does  
2 not mean it is constitutionally required. I don't think  
3 any of our cases say that. I mean, you are talking  
4 about it would be nice for the government to do it.  
5 Perhaps it would. But that doesn't mean there is a  
6 constitutional requirement.

7 MR. DE MEO: Well, not nice, Your Honor. I  
8 say it is vital to the defense of the defendant in one  
9 of these cases to be entitled to --

10 QUESTION: Do you mean it is constitutional  
11 then?

12 MR. DE MEO: Yes, Your Honor.

13 QUESTION: I don't see why if it is vital --  
14 it may be vital in the sense that the defendant would be  
15 a good deal better off if the government did go to this  
16 extra expense, but that still doesn't make it a  
17 constitutional requirement. Is Brady the closest case  
18 you have to support here?

19 MR. DE MEO: From this Court, Your Honor?

20 QUESTION: Yes.

21 MR. DE MEO: No, I believe that the language  
22 in Agers would indicate that in defining materiality,  
23 that if the evidence might have affected the outcome of  
24 the trial, and --

25 QUESTION: But Agers is just talking about the

1 duty to turn over exculpatory evidence which is in  
2 existence.

3 MR. DE MEO: Yes.

4 QUESTION: It doesn't say anything about any  
5 duty to preserve, nor does Brady.

6 MR. DE MEO: Well, the problem is, Your Honor,  
7 that here there was no evidence to preserve. We don't  
8 know if it is exculpatory or not.

9 QUESTION: Then the answer is, you are not  
10 covered by Brady and you are not covered by Agers,  
11 because those cases dealt with when evidence was in  
12 existence.

13 MR. DE MEO: By the same token, Your Honor, if  
14 the evidence is destroyed, we don't know whether it  
15 would have been favorable except that in this case --

16 QUESTION: That doesn't answer the question of  
17 what is the holding of Agers, what is the holding of  
18 Brady. Both of them hold where the evidence is in  
19 existence, you must turn it over. You say here it  
20 wasn't in existence as if that automatically calls for  
21 some extension. That is simply a different fact  
22 situation. It wasn't confronted in Brady. It wasn't  
23 confronted in Agers.

24 MR. DE MEO: Your Honor, in this case the  
25 evidence was in existence, but by virtue of the method



1 that was used to test it, it left existence. It  
2 wasn't --

3 QUESTION: Let's test that. You blow into the  
4 machine.

5 MR. DE MEO: Yes.

6 QUESTION: And it registers numbers, right?  
7 By the time it registers the final number, where is the  
8 air?

9 MR. DE MEO: It is my understanding --

10 QUESTION: Where is the air?

11 MR. DE MEO: It is in the machine.

12 QUESTION: No, sir, it has gone out of the  
13 machine.

14 MR. DE MEO: It is my understanding, Your  
15 Honor --

16 QUESTION: Hasn't it?

17 MR. DE MEO: -- that this Intoxolizer requires  
18 the operator to push a purge button to purge it out, in  
19 the testimony of the people's expert.

20 QUESTION: Purge what is left out. But the  
21 air goes --

22 MR. DE MEO: Inside.

23 QUESTION: If the air doesn't go through, how  
24 are they going to test it?

25 MR. DE MEO: Your Honor, the evidence in the

1 case by the criminalist that was produced by the defense  
2 was that it would stay in the machine more than 20  
3 minutes if it was not purged out of the machine, so that  
4 they do have it captured and collected, and of course  
5 with the silica gel device which can be adapted to this  
6 machine, they can capture that and subsequently test it.

7 QUESTION: What kind of device?

8 MR. DE MEO: It is called a silica gel tube,  
9 Your Honor, that fits on the outboard side of the  
10 Intoxolizer, an adaptation. That is what they use in  
11 Colorado. Therefore it collects.

12 QUESTION: I am talking about California.

13 MR. DE MEO: Yes, sir.

14 QUESTION: So you want them to put that on the  
15 machine.

16 MR. DE MEO: Or I want them to use the indium  
17 proof crimper device to preserve, or I want them to use  
18 the equivalent, which 13.353.5 of the Vehicle Code now  
19 provides.

20 QUESTION: If they gave them a blood test, you  
21 wouldn't have any of these problems, would you?

22 MR. DE MEO: I wouldn't except that the --

23 QUESTION: You would not, would you?

24 MR. DE MEO: No, Your Honor, but you could ask  
25 for another test.

1                   QUESTION: So since he chose one, the state  
2 has to go and preserve the air that is gone or bring  
3 back the air that has gone.

4                   MR. DE MEO: Or take another substantially  
5 similar test, or its equivalent, Your Honor. That is  
6 the point.

7                   CHIEF JUSTICE BURGER: We will resume there at  
8 1:00 o'clock, counsel.

9                   MR. DE MEO: Thank you.

10                  (Whereupon, at 12:00 o'clock p.m., the Court  
11 was recessed, to reconvene at 1:00 o'clock p.m. of the  
12 same day.)

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1 machine away, and then waited two or three minutes, and  
2 then tested him again, and if necessary tested him on a  
3 third machine, and if they all agreed, would that meet  
4 your constitutional objections?

5 MR. DE MEO: It really would not, Your Honor,  
6 unless one of the methods of preservation gave the  
7 defense the material to test through its own criminalist  
8 or referee analysis. We think that he should have the  
9 opportunity of testing that evidence himself rather than  
10 merely accepting the --

11 QUESTION: Even if all of the machines agreed  
12 exactly?

13 MR. DE MEO: Even if all the machines agreed  
14 exactly, and in that regard, Your Honor, I might say  
15 that if the defendant is accorded this right, which is  
16 simple for law enforcement to do to preserve, that if it  
17 does agree through the defense criminalist analysis, I  
18 think it would have some beneficial effect on the  
19 problem of persons who drive under the influence and  
20 cause accidents, namely, that if they see that they have  
21 no way of contesting the case, that there would be less  
22 congestion of the courts, more pleas of guilty, and  
23 these cases would be out of the way. That is a possible  
24 incidental benefit to society as a result of permitting  
25 that test, but we know --



1           QUESTION: Do you think that even if this  
2 machine were wrong only once in a million times, the  
3 fact that it might be wrong only that seldom should  
4 nevertheless result in giving the defense the  
5 opportunity to ferret out that one in a million?

6           MR. DE MEO: Yes, Your Honor.

7           QUESTION: Because I don't see any claims by  
8 you or any evidence or any statistical presentation that  
9 would indicate how often these results might be  
10 erroneous.

11          MR. DE MEO: To answer your question, Your  
12 Honor, we feel that if any one person were convicted  
13 when if he had an opportunity to retest the evidence it  
14 would have been exculpatory, that the United States does  
15 not win in that kind of a situation, it loses. It is the  
16 same as the Iglio case, the same as the Moody case,  
17 where if there is false evidence that caused a  
18 conviction, it would fall within that ambit.

19          QUESTION: Is the machine that produces this  
20 evidence, makes this reading, will it be in the same  
21 condition when the trial occurs as it was when the test  
22 was taken?

23          MR. DE MEO: Not necessarily. It requires  
24 periodic maintenance. It requires calibration. There is  
25 evidence in one of the briefs that electromagnetic

1 interference can cause it to malfunction, but I think  
2 the basic problem with it is that it is non-specific for  
3 alcohol. This particular Intoxolizer machine used in  
4 these cases, as the record shows in an uncontradicted  
5 manner, that, and there have been no experts to counter  
6 the experts of the defendants, what it means in being  
7 non-specific is simply that other types of properties  
8 cause this instrument to register as alcohol.

9 For example, our own body metabolism has  
10 acetone. We have it in the blood, urine, and in the  
11 breath.

12 QUESTION: Is this in the record?

13 MR. DE MEO: Absolutely, Your Honor, in the  
14 testimony of Mr. Murray, our criminalist, and also in  
15 three affidavits filed in the traverse -- in the habeas  
16 corpus --

17 QUESTION: Is that what you call these  
18 witnesses, criminalists? Or criminologists? What do  
19 you call them?

20 MR. DE MEO: Criminalists, I believe they  
21 refer to themselves as, Your Honor. Experts.

22 QUESTION: Is that in the dictionary? I guess  
23 it must be.

24 MR. DE MEO: I think it is.

25 QUESTION: What are they experts in?

1 MR. DE MEO: In the analysis of body fluids,  
2 Your Honor, and in the machinery that was used in this  
3 case for the testing of alcoholic content in the blood.

4 QUESTION: You know, my problem is, you say  
5 that you want to preserve the evidence.

6 MR. DE MEO: Yes.

7 QUESTION: The evidence is in your client, his  
8 breath. Why couldn't he preserve his own breath?

9 MR. DE MEO: Well, because he doesn't have the  
10 instruments to do that at the time, and if it is not  
11 timely, it is not helpful.

12 QUESTION: Is he going to get the instruments  
13 later?

14 MR. DE MEO: Not unless he has the --

15 QUESTION: Well, what good is it if he doesn't  
16 have instruments?

17 MR. DE MEO: Well, that's why --

18 QUESTION: What good is it if he doesn't have  
19 instruments?

20 MR. DE MEO: From the standpoint of the  
21 constitutional attack we are making, it seems that it is  
22 so easy and simple and feasible for the government to  
23 preserve that for him, and that should be weighed in the  
24 context of whether it is a constitutional violation. It  
25 is stipulated to be simple to preserve.

1           QUESTION: It is because it is cheaper for the  
2 government to do it?

3           MR. DE MEO: It is easier, because they have  
4 the resources right there at hand. In fact, we had an  
5 instrument in California at the time approved by the  
6 Department of Public Health --

7           QUESTION: Was it there where this man was?

8           MR. DE MEO: I don't know the answer to that,  
9 Your Honor.

10          QUESTION: Don't you need to know?

11          MR. DE MEO: I do know --

12          QUESTION: I mean, you are now down to saying  
13 that the government can do it better than you can do  
14 it.

15          MR. DE MEO: It was available to the  
16 government.

17          QUESTION: Well, the government did. They  
18 made the test.

19          MR. DE MEO: Well, Your Honor --

20          QUESTION: You don't have to do -- then the  
21 government has to make another test. Right?

22          MR. DE MEO: To use an earnest effort to  
23 preserve.

24          QUESTION: And to preserve it and test it over  
25 and over again.

1 MR. DE MEO: Not over and over again, Your  
2 Honor.

3 QUESTION: How could they be sure it is  
4 right?

5 MR. DE MEO: Just to preserve it so that the  
6 defendant can check the government's efforts.

7 QUESTION: What provision in the constitution  
8 says that because the government can do it better than  
9 the defendant, the government must do it?

10 MR. DE MEO: Well, we are saying that the  
11 Fourteenth Amendment says that, Your Honor, and the  
12 reason we say that is because in these cases it seems  
13 that the superior ability and resources are important.

14 QUESTION: I for one -- I resent talking about  
15 the constitution as saying it seems. The constitution  
16 either does or it does not. Do you agree with me on  
17 that?

18 MR. DE MEO: I do, and we contend it does,  
19 Your Honor.

20 QUESTION: Well, let's give up the "seems."

21 MR. DE MEO: Yes, Your Honor. Very well.

22 QUESTION: Once the police have stopped the  
23 car with a suspicion that the driver is intoxicated and  
24 they have taken this breatholizer test once, can they  
25 use that machine again without -- can they test the next



1 drunken driver they meet and still preserve the material  
2 of the first one?

3 MR. DE MEO: If we are talking of the  
4 Intoxolizer, the one that was used in this instance --

5 QUESTION: Yes.

6 MR. DE MEO: -- from the standpoint of use at  
7 the jailhouse, the answer is that the only way they can  
8 preserve it on that machine is to apply what we call the  
9 silica gel adapter. California has not approved that  
10 yet, but Colorado has, and our record indicates that it  
11 is accurate to do it, it is easy to do it, and it can be  
12 done, and that the results --

13 QUESTION: Would that enable them -- My  
14 question is, again, would that enable them to use that  
15 same machine on the next drunken driver, and the next  
16 one, and the next one, that same machine?

17 MR. DE MEO: Oh, yes. Oh, yes. The  
18 Intoxolizer can be used over and over again.

19 QUESTION: Well, on that same evening, without  
20 discharging some of the materials?

21 MR. DE MEO: Oh, it must be purged first, of  
22 course. Yes. The breath that is within the machine  
23 must be purged out of it before the next person is  
24 tested.

25 QUESTION: How can they preserve it if they

1     purge it?

2                   MR. DE MEO:   Well, by adapting the machine to

3     a silicon gel tube that fits on the outboard side.

4                   QUESTION:   To in effect a different machine

5     from the one they are using now.

6                   MR. DE MEO:   A slight adaptation, Your Honor,

7     a very simple one, as the record would indicate.

8                   QUESTION:   Suppose this breath was preserved,

9     like you would like to have. What would you do with it?

10                  MR. DE MEC:   We would -- I was going to get to

11     that, and I am glad we are at that, Your Honor. There

12     is an instrument knows as a gas chromatograph

13     Intoximeter Mark 2 and Mark 4 model approved in

14     California for testing preserved breath. This

15     instrument is specific for ethanol. In other words, it

16     takes alcohol and measures only the alcohol content in

17     the blood, and --

18                  QUESTION:   How accurate is that machine,

19     though, otherwise?

20                  MR. DE MEO:   Very accurate.

21                  QUESTION:   How do you know?

22                  MR. DE MEO:   Our experts say it is the most

23     accurate machine there is for the testing of breath, and

24     even it has some deficiencies, but it is the most

25     accurate one. It is a different principle, the gas

1 chromatograph.

2 QUESTION: And so if it happened to test and  
3 it was inaccurate, as you say it can be, where would you  
4 be?

5 MR. DE MEO: Well, then we would be --

6 QUESTION: In a battle of experts.

7 MR. DE MEO: -- in a battle of experts and  
8 also --

9 QUESTION: And also of --

10 MR. DE MEO: -- demeanor.

11 QUESTION: -- of the jury or whoever is trying  
12 the case weighing the evidence.

13 MR. DE MEO: Yes, and the officer's testimony  
14 as to what the demeanor of the defendant was.

15 QUESTION: Of course, the officer examining,  
16 if he ever smells the fellow's breath, can hardly save  
17 the sample, and yet that evidence is freely admissible.

18 MR. DE MEO: Yes, it is, Your Honor.

19 QUESTION: Did he smell? Yes, he smelled.  
20 How do you know he smelled? Well, I just smelled him.

21 MR. DE MEO: Yes.

22 QUESTION: But I am awfully sorry I didn't  
23 save the sample.

24 MR. DE MEO: Um-hm.

25 QUESTION: May I ask another question about

1 the machine?

2 MR. DE MEO: Yes.

3 QUESTION: Does the -- I am not quite clear.  
4 Even though the sample itself was not saved, does the  
5 machine record in some way what the results of the test  
6 were?

7 MR. DE MEO: Yes, Your Honor. The Intoxclizer  
8 prints out on a card.

9 QUESTION: So we don't really have an issue  
10 that maybe the officer made a mistake, or contrived  
11 testimony. That problem isn't present here at all.

12 MR. DE MEO: No, not unless the card was put  
13 in someone else's file by error or mislabeled or  
14 misnumbered, which is always possible certainly.

15 QUESTION: So you do not challenge the fact  
16 that there is an accurate -- normally, at least, in the  
17 normal routine, there would be an accurate record made  
18 of what this device actually showed at the time the test  
19 was made?

20 MR. DE MEO: Yes, it would normally print that  
21 out on a card. That is the only thing that we have to  
22 cross examine besides the machine and the expert who  
23 comes in and testifies as to the result.

24 QUESTION: Is that fundamentally any different  
25 from an electrocardiogram after it comes out of the

1 machine?

2 MR. DE MEO: Probably not.

3 QUESTION: You can't go back and capture the

4 heartbeat.

5 MR. DE MEO: Yes, except there --

6 QUESTION: You have a paper recording of it.

7 MR. DE MEO: Yes, one is --

8 QUESTION: The question is, is this

9 fundamentally different from the cardiogram recording?

10 MR. DE MEO: Only scientifically, Your Honor.

11 The one machine is an infrared type instrument, and the

12 electrocardiogram, as I understand it, works on a

13 different principle, but there is a printout that would

14 be the same principle.

15 QUESTION: Mr. DeMeo, you are relying

16 primarily on the Brady case and the Agers case as the

17 source of this right that you assert for your client?

18 MR. DE MEO: And the California decisions,

19 Your Honor.

20 QUESTION: All right, but they presumably are

21 relying in turn on these federal cases as I understand

22 it.

23 MR. DE MEO: They seem to be.

24 QUESTION: And isn't it primarily the

25 non-disclosure of evidence known only to the prosecutor



1 that Brady and Agers say makes the trial unfair? Isn't  
2 that the focus really of those cases and what is behind  
3 them?

4 MR. DE MEO: It is, because there was  
5 something found to be in existence later --

6 QUESTION: It is the non-disclosure of  
7 something known only to the prosecutor. Now, here you  
8 have something that is known as much to the defense, the  
9 defendant, as to the prosecutor and the officers. You  
10 don't have a problem of non-disclosure of evidence known  
11 only to the prosecutor.

12 MR. DE MEO: How would that be different, Your  
13 Honor? Just to paraphrase that, how would that  
14 non-disclosure be different than just not having the  
15 evidence when you have the availability of it? You  
16 embarked on the process of collecting it, and you  
17 discarded it when it could be retained and could be  
18 useful to a defendant if it showed in fact through this  
19 other more precise machine that it was indeed a false  
20 positive. Perhaps there was some exposure to this  
21 individual who --

22 QUESTION: I suppose our cases haven't -- or  
23 the cases of this Court haven't gone so far as to say  
24 the constitution is violated if in some unforeseen  
25 fashion evidence might be lost.

1 MR. DE MEO: True. I think that the cases  
2 only require an earnest effort to preserve, and it is  
3 conceded in the cases below and in this record that --

4 QUESTION: Well, I don't think they even --  
5 well, go ahead.

6 MR. DE MEO: Excuse me. That there was no  
7 effort at all here to preserve even though --

8 QUESTION: What case from this Court requires  
9 an earnest effort to preserve?

10 MR. DE MEO: I believe Augenblick found an  
11 earnest effort to preserve tapes that were lost, and  
12 since there was proof by, I believe, eight witnesses who  
13 testified that they lost the tape of this interview by  
14 an investigator of a participant in a crime, that the  
15 government showed that they had made an earnest effort  
16 to preserve, and therefore the evidence --

17 QUESTION: But Augenblick was a ruling for the  
18 government, and the fact that it may say in this case  
19 there was an earnest effort to preserve doesn't mean  
20 that the Constitution would have been violated had there  
21 been no earnest effort to preserve.

22 MR. DE MEO: Well, it just seems to me, Your  
23 Honor, that when the very evidence itself is directly  
24 determinative of whether or not a person is guilty,  
25 namely, this test, and how high it was, because it gives

1 rise to a presumption of guilt if it is over .10 percent  
2 in California, that it is a small price to pay in terms  
3 of constitutional requirements to allow that defendant  
4 the same benefit, the same artillery that the government  
5 has to determine whether or not that test is or is not  
6 valid that the government took, and it just -- the  
7 principle is hard to articulate, because I think it is  
8 fundamental. I believe that when you take the bodily  
9 substance of an individual to use against him, that he  
10 at least ought to have the opportunity to check to  
11 determine if that testing done by the government was or  
12 was not accurate.

13 QUESTION: Well, he had that opportunity. He  
14 had that opportunity from the day he was arrested until  
15 the day he was convicted.

16 MR. DE MEO: Well, Your Honor --

17 QUESTION: Am I right?

18 MR. DE MEO: No, Your Honor. I am sorry. Let  
19 me explain why.

20 QUESTION: Well, who had the breath? The  
21 government or your client? Who had the breath?

22 MR. DE MEO: Well, at what point?

23 QUESTION: Who had the breath?

24 MR. DE MEO: They both had it at one point,  
25 Your Honor.

1 QUESTION: All right.

2 MR. DE MEO: Once in the machine and once in  
3 the body.

4 QUESTION: And then at the bitter end who had  
5 it? Your client.

6 MR. DE MEO: Well, he still had his breath  
7 certainly.

8 QUESTION: He still had breath.

9 MR. DE MEO: Surely.

10 QUESTION: All right.

11 MR. DE MEO: But let me explain, Your Honor,  
12 that if that test were taken on the day of the trial or  
13 a week later or five hours later, it would have no  
14 relevance or materiality because of the blood alcohol --

15 QUESTION: You wish it would.

16 MR. DE MEO: -- being metabolized. Yes, Your  
17 Honor.

18 QUESTION: You wish it would.

19 MR. DE MEO: Yes. It is being metabolized  
20 through the body, through the liver, the breathing, and  
21 the urine, and it is gone, and it is of no relevance  
22 after that point.

23 QUESTION: But it wasn't the government's  
24 fault that he breathed.

25 MR. DE MEO: How would he have preserved his

1     breath in jail?

2                 QUESTION:   Good question.

3                 MR. DE MEO:   How?

4                 QUESTION:   Good question.

5                 QUESTION:   The same way you want the

6     government to.

7                 QUESTION:   You are asking them to preserve

8     it.   You are asking the government to preserve it.

9                 MR. DE MEO:   Because they have the means to do

10    it.

11                QUESTION:   Well, the means was available to

12    him.

13                MR. DE MEO:   Well, Your Honor, he wouldn't be

14    allowed to borrow the government's machine.

15                QUESTION:   No, but he could buy it.

16                MR. DE MEO:   Well --

17                QUESTION:   Maybe he ought to carry a balloon

18    with him.

19                MR. DE MEO:   Pardon?

20                QUESTION:   Maybe he should carry a balloon

21    with him.

22                (General laughter.)

23                MR. DE MEO:   I would like to comment briefly

24    on what California has done in response to this case.

25    Section 13.353.5 of the Vehicle Code was adopted in



1 response to Trombetta, and the language of the  
2 legislature, "in order to provide a constitutional  
3 procedure for administering the breath test in light of  
4 the decision of the Court of Appeal in People v.  
5 Trombetta, it is necessary that this Act take effect  
6 immediately."

7           And what this Act does, when a person chooses  
8 the breath test over the blood or the urine test, law  
9 enforcement must tell him now, which was one of our  
10 points below, tell him now that there will be no breath  
11 preserved by this particular instrument that is being  
12 utilized, but that government will provide him free of  
13 cost a sample of his blood or his urine which he may  
14 subsequently have available to him to be tested by a  
15 referee or a criminalist or a toxicologist of his own  
16 choosing.

17           So that raises the question as to whether or  
18 not there is anything left for the Court to determine.  
19 In other words, would this be just a case of isolated --  
20 case that would only be isolated to the --

21           QUESTION: Mr. DeMeo, that statute raised the  
22 question in my mind as to what -- if that satisfied the  
23 holding in the Trombetta case, there is no obligation to  
24 preserve the sample.

25           MR. DE MEC: Well, there is.

1           QUESTION: It is just an obligation to give  
2 notice. That is what --

3           MR. DE MEC: Yes, that's correct. They could  
4 make a knowledgeable waiver or take the test, another  
5 test, so that --

6           QUESTION: Right, but if the California  
7 legislature correctly understood Trombetta, all that  
8 case holds is that you've got to give notice. That is  
9 why I asked your opponent earlier whether we really had  
10 a federal issue here.

11          MR. DE MEO: Yes.

12          QUESTION: And they say -- the California  
13 legislature apparently thought that solved the whole  
14 problem, didn't they?

15          MR. DE MEO: They did believe that, Your  
16 Honor. They said either we will give you the equivalent  
17 or you can waive it, one of the two. At least you are  
18 put on notice of that effect.

19               Thank you very much.

20          CHIEF JUSTICE BURGER: Very well.

21               Do you have anything further, counsel?

22          MR. KIRK: No, Your Honor, I don't, unless the  
23 Court has any further questions.

24          CHIEF JUSTICE BURGER: No, counsel, we do not.

25               Thank you, gentlemen. The case is submitted.

1                   (Whereupon, at 1:19 o'clock p.m., the case in  
2 the above-entitled matter was submitted.)

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## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#83-305 - CALIFORNIA, Petitioner v. ALBERT WALTER TROMBETTA, ET AL

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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