

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	PHILIP W. SAVRIN, ESQ.,	
4	On behalf of Petitioner	3
5	ORAL ARGUMENT OF	
6	GREGORY G. GARRE, ESQ.,	
7	On behalf of the United States, as amicus	
8	curiae, supporting Respondent	18
9	CRAIG T. JONES, ESQ.,	
10	On behalf of Respondent	26
11	REBUTTAL ARGUMENT OF	
12	PHILIP W. SAVRIN, ESQ.	
13	On behalf of Petitioner	53
14		
15		
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
19
20
21
22
23
24
25

P R O C E E D I N G S

[10:48 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 05-1631, Scott versus Harris.

Mr. Savrin.

ORAL ARGUMENT OF PHILIP W. SAVRIN

ON BEHALF OF THE PETITIONER

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

This case concerns whether a police officer could be held personally liable for using force to terminate a dangerous high-speed pursuit. The undisputed facts show that Deputy Scott did not violate the Fourth Amendment. Respondent had led the police officers on a nine-mile pursuit at exceptionally high speeds. As the videotapes that have been admitted in evidence show, Respondent was driving on narrow two-lane roads at night. He swerved across the double line to pass cars that were in his path, actually traveling in the wrong lane of travel. He ran through a number of red lights. He weaved through a shopping center and collided with Deputy Scott's vehicle.

Deputy Scott at that point had tried to block the exit from the shopping center, but Mr. Harris was successful in using his vehicle to escape. At that

1 point, he continued driving at exceptionally high
2 speeds.

3 JUSTICE STEVENS: Can I ask this question
4 about the shopping center. Wouldn't your case be
5 exactly the same if the shopping center incident had not
6 occurred?

7 MR. SAVRIN: It would, Your Honor.

8 JUSTICE STEVENS: So that we really don't
9 have to get distracted by the shopping center?

10 MR. SAVRIN: There is a -- yes, Your Honor.
11 There is a factual dispute as far as whether Deputy
12 Scott's vehicle collided with Mr. Harris' vehicle or
13 vice versa, but we do not believe that that is a
14 material dispute. We believe that the fact, the
15 undisputed fact, that Mr. Harris was driving at such
16 exceptionally high rate of speeds -- and to put in
17 context, 90 miles per hour, which is the average speed,
18 and of course --

19 JUSTICE BREYER: I'm not sure why you
20 concede that. I mean, I looked at the case and it
21 seemed to me it's a case involving the whole ball of
22 wax. And I suspect my reaction to that tape was in part
23 affected by the fact that he went through the shopping
24 center, came out and crashed into a police car, which is
25 what Scott saw.

1 MR. SAVRIN: But Scott -- yes, Your Honor, I
2 think that is part of the analysis.

3 JUSTICE BREYER: So how do I know whether,
4 which of these things is directly or not indirectly --
5 well, you go ahead. But I mean, are you -- am I not
6 supposed to look at the part which involves the shopping
7 center?

8 MR. SAVRIN: Absolutely, Your Honor. My
9 point was that, the point was that there was a
10 collision, not who caused the collision, whether the
11 deputy pulled into Mr. Harris' line of travel or
12 Mr. Harris pulled towards the deputy.

13 JUSTICE KENNEDY: Is the rule that you
14 propose that the policeman must balance the risk of harm
15 to others versus the risk of harm to the fleeing person?

16 MR. SAVRIN: Your Honor -- yes, essentially.

17 JUSTICE KENNEDY: Your brief says that the
18 officer reasonably believes that doing so, i.e.,
19 terminating the chase, would avoid a greater risk of
20 bodily injury or death.

21 MR. SAVRIN: Yes, Your Honor. And we
22 believe --

23 JUSTICE KENNEDY: Greater than what?
24 Greater than --

25 MR. SAVRIN: Greater than not taking action.

1 In other words, that the harm --

2 JUSTICE KENNEDY: Without reference to the
3 possible harm to the driver? I just want to know what
4 you're testing.

5 MR. SAVRIN: I think that -- I think that is
6 one of the factors to be considered.

7 JUSTICE SCALIA: I don't know that I agree
8 with that. I mean, if this fellow driving 90 miles an
9 hour is responsible for endangering people, you're
10 proposing a rule that says if there's a 50 percent
11 chance that he'll hurt some innocent person and a 50
12 percent chance that he'll get hurt if you try to stop
13 him, you shouldn't do anything. I don't agree with
14 that.

15 MR. SAVRIN: Well, Your Honor --

16 JUSTICE SCALIA: I'd stop him. I mean, he's
17 the fellow that's causing the danger, endangerment,
18 isn't he?

19 MR. SAVRIN: Yes, Your Honor, I would agree
20 with that.

21 JUSTICE SCALIA: I think you're giving away
22 too much.

23 MR. SAVRIN: One thing I did want to point
24 out is that a speed of 90 miles per hour -- and of
25 course there's evidence in the record that the vehicles

1 were at times traveling over 100 miles an hour --

2 JUSTICE KENNEDY: I didn't mean to put words
3 in your mouth. It seems to me your test might be
4 whether there is a greater risk in stopping him or not
5 stopping him as to other people, without reference to
6 the risk to himself.

7 MR. SAVRIN: Yes, that's probably a better
8 articulation.

9 JUSTICE KENNEDY: Well, it's your brief. I
10 want you to --

11 MR. SAVRIN: I think that's a better
12 articulation of what the appropriate test would be, the
13 way --

14 JUSTICE STEVENS: Well, isn't the speed also
15 relevant to the likelihood that -- that running into a
16 car at that speed would cause the death of a driver?

17 MR. SAVRIN: It would, Your Honor.

18 JUSTICE STEVENS: Isn't it a fair high
19 probability that if you hit someone at that speed that
20 there will be something, either death or serious injury
21 as a result?

22 MR. SAVRIN: Your Honor, my answer to that
23 question would be that that's always going to be the
24 case whenever force is used to stop a vehicle at this
25 high rate of speed.

1 JUSTICE SCALIA: Well, I suppose there is
2 also a high probability where you're going 90 miles an
3 hour on a one-way road, crossing over the double yellow
4 line, with oncoming traffic, that you're going to hurt
5 somebody else.

6 MR. SAVRIN: Yes, Your Honor.

7 JUSTICE SCALIA: I mean, the more you
8 increase the speed the more likely he's going to be
9 hurt. But also the more likely if you let him go
10 somebody else is going to be hurt.

11 MR. SAVRIN: Yes, Your Honor. And to put it
12 in a more complete perspective, 90 miles an hour is
13 mathematically equivalent to over 130 feet per second.

14 JUSTICE GINSBURG: But Mr. Savrin, there was
15 an episode in the parking lot where things came to a
16 temporary halt. If Scott had stopped pursuing Harris at
17 that point, maybe Harris would not -- maybe he would
18 have slowed down. If he was -- he was trying to flee
19 from the police, but if the police weren't after him
20 there is no indication that he would have been speeding.

21 MR. SAVRIN: Well, Your Honor, I would
22 disagree with that, that in fact --

23 CHIEF JUSTICE ROBERTS: Well, he was
24 speeding before the police knew about him, right?
25 That's the whole, where this all started.

1 MR. SAVRIN: The initial offense was
2 speeding, and Mr. Harris, instead of pulling over or
3 slowing down as would might be expected by a reasonable
4 person, sped up and continued to drive recklessly.

5 We would contend that it was Mr. Harris that
6 was in control of the force that the officers need to
7 terminate, the risk that he presented. At any time, any
8 time, Mr. Harris could have either slowed down his
9 vehicle or stopped, and he chose not to do that.

10 JUSTICE STEVENS: Well, do you contend that
11 an officer can always use deadly force to stop a
12 high-speed driver who's creating this kind of a risk?

13 MR. SAVRIN: I think it depends on how you
14 define deadly force. Of course, there can be different
15 --

16 JUSTICE STEVENS: Running into him with a
17 high probability that he'll get killed.

18 MR. SAVRIN: I think that, that would be the
19 case, as I indicated, whenever an officer uses force to
20 stop a vehicle at this speed. I think there is -- if it
21 is deadly force, and of course this Court has not
22 articulated a test of that particular question --

23 JUSTICE STEVENS: Wasn't that acknowledged
24 in the district court, in the trial court?

25 MR. SAVRIN: In this case?

1 JUSTICE STEVENS: Yes.

2 MR. SAVRIN: No, the district court found
3 that it did not need to resolve whether or not -- -

4 JUSTICE STEVENS: But the jury might find
5 that it was deadly force.

6 MR. SAVRIN: The Eleventh Circuit found that
7 the jury might conclude it was deadly force.

8 JUSTICE STEVENS: And do you conclude that
9 the jury could not find that it was deadly force?

10 MR. SAVRIN: I believe, again, Your Honor, I
11 believe that it depends on how broad the test is. The
12 Model Penal Code test, which most of the circuit
13 courts --

14 JUSTICE STEVENS: Well, but is your -- is
15 it your view that a jury could not find on these facts
16 that there was deadly force?

17 MR. SAVRIN: I believe, yes, under, under
18 the test as articulated in some of the circuits, yes,
19 this would not be deadly force. Of course, what we're
20 saying is --

21 JUSTICE KENNEDY: I thought we had a test
22 for deadly force in Garner and it's whether or not there
23 is -- it's more likely than not, whether or not there is
24 a serious risk that death will ensue. That's the test,
25 Garner.

1 MR. SAVRIN: Your Honor, as I read the
2 Garner opinion, the court did not need to reach a
3 definition of deadly force because shooting someone in
4 the back of the head is clearly going to be deadly
5 force. The circuit courts -- I can tell you that the
6 circuit courts in the wake of Garner have said that
7 Garner did not create a test and have created different
8 tests along the lines of the Model Penal Code to reach
9 that definition. But the point -- I was going to say a
10 point that I would like to make is that there are
11 degrees even within the continuum that might be within a
12 definition of deadly force, such as using a vehicle to
13 make contact, blowing out the tires, using stop sticks,
14 using a firearm. Those have different degrees of
15 potential lethality, so even if they are all considered
16 deadly force there are decisions that an officer has to
17 make.

18 JUSTICE ALITO: What test, what of deadly
19 force would not be met here?

20 MR. SAVRIN: A likelihood -- -

21 JUSTICE ALITO: Considering that it's a
22 summary judgment issue.

23 MR. SAVRIN: Yes, Your Honor. I would say
24 that the Third Circuit decision in the Philadelphia
25 litigation case, where the officers dropped a bomb on a

1 building in order to gain access and they ended up
2 killing 11 people. The Court found that that was not
3 deadly force because the officers were trying to gain
4 access to the building and they reasonably believe that
5 they were able to do that without the loss of life. I
6 think that if that definition were applied to this case,
7 then I think that this would not be deadly force. But I
8 think --

9 JUSTICE SCALIA: Finish that.

10 MR. SAVRIN: I'm sorry. I keep interrupting
11 you.

12 JUSTICE SCALIA: Excuse me. He reasonably
13 -- because Scott reasonably believed that he could bump
14 the car off the road at 90 miles an hour without risking
15 the driver's life? Is that why it's like the Third
16 Circuit case?

17 MR. SAVRIN: Your Honor, his intent was to
18 end the pursuit, not to cause an accident.

19 JUSTICE SCALIA: Well, but the Third Circuit
20 case you just described didn't talk about intent. It
21 talked about reasonable belief.

22 MR. SAVRIN: Well, let me cite another case
23 then, the Adams case from the Eleventh Circuit.

24 JUSTICE SOUTER: Before do you that, will
25 you go back to the Philadelphia case. Do you contend

1 that a jury could find that he reasonably believed that
2 he would not cause, that he would not raise a serious
3 risk of death or serious bodily harm by bumping the car
4 at 90 miles an hour?

5 MR. SAVRIN: Yes, Your Honor. And if I --

6 JUSTICE SOUTER: I don't understand that.

7 How could such a belief be reasonable? What am I
8 missing here?

9 MR. SAVRIN: Let me cite the Court to the
10 Eleventh Circuit's own reasoning in the Adams case. And
11 that case involves a misdemeanor where the officer
12 intentionally made contact with the vehicle several
13 times. The last contact caused the death of a
14 passenger. The Eleventh Circuit found that Garner did
15 not apply to that situation and further said that a
16 policeman's use of his vehicle is very different from a
17 policeman's use of his gun.

18 JUSTICE SOUTER: That doesn't answer my
19 question.

20 MR. SAVRIN: I'm sorry, Your Honor.

21 JUSTICE SOUTER: Why, why would it be
22 reasonable to believe that a car could be bumped at 90
23 miles an hour plus without raising a substantial risk of
24 death or serious bodily harm? How could such a belief
25 be reasonable?

1 MR. SAVRIN: Because there are vehicle
2 collisions every day, Your Honor, that do not end in
3 death or serious bodily harm.

4 JUSTICE SOUTER: Some people are lucky.
5 We're talking about creating a substantial risk. How
6 would it be reasonable to assume that one would not
7 create a substantial risk?

8 MR. SAVRIN: Your Honor, because Mr. Harris
9 could have regained control of his vehicle. The point
10 is that Mister -- that the Petitioner had limited
11 options based on the manner in which Mr. Harris was
12 driving. Even if this would be considered deadly force,
13 we do believe it would be justified under the
14 circumstances.

15 JUSTICE KENNEDY: Well, that's a different
16 issue and you may prevail on other arguments in the
17 case. But as to whether or not there's a likelihood or
18 a reasonable likelihood of serious injury, it seems to
19 me that's clearly a question for the jury. I mean, we
20 might argue about it up here, but that's classic jury
21 question, isn't it?

22 MR. SAVRIN: I believe in the context of the
23 Fourth Amendment and the Graham factors and the question
24 of probable cause, that it's not the same as simply a
25 jury question. But I do concede that if it's not deadly

1 force it's very close to it. But I think the important
2 thing is that, whatever force Mister -- the Petitioner
3 used was limited by Mr. Harris' driving.

4 JUSTICE GINSBURG: Mr. Savrin, one technique
5 that Officer Scott asked permission to use was described
6 as a PIT technique that would be a life and limb-
7 sparing measure. One oddity about this case is that he
8 called and asked permission to use that less risky
9 method and yet when he determined that he couldn't do
10 that, given the speed of the vehicles, he didn't ask
11 permission to do what he did do, which was
12 life-endangering.

13 MR. SAVRIN: Your Honor, if I could respond
14 to that in two respects. First, it is not, it is not
15 the case that the PIT maneuver, as it's commonly called,
16 is safe. What it does is spin the car out, and if
17 Mr. Harris' vehicle had been spun out in this case it is
18 more likelihood that he would have lost control. In
19 other words, it causes the vehicle to lose control.

20 The second response I would have is that the
21 Petitioner did ask permission to do the PIT maneuver and
22 the permission that the supervisor gave, which was Mr.
23 Faninger that's in the record undisputed, was to use
24 force up to deadly force. So Mr. --

25 JUSTICE GINSBURG: Where is that?

1 MR. SAVRIN: That's in Mark Faninger's
2 deposition, and he is the supervisor that was ---

3 JUSTICE GINSBURG: And he said he gave
4 permission for more than PIT procedure?

5 MR. SAVRIN: Yes, Your Honor. His testimony
6 was that he was giving, he believes he was giving
7 permission up to and including deadly force.

8 JUSTICE SOUTER: Well, the phrase used was
9 "take him out," wasn't it?

10 MR. SAVRIN: Yes. Yes, Your Honor.

11 JUSTICE STEVENS: Does a police officer have
12 any obligation in a situation like this to consider
13 other alternatives, and if so what other alternatives
14 might have been available to this officer?

15 MR. SAVRIN: Yes, Justice Stevens. I think
16 the officer had very limited options, two options at
17 that point: Either use force or let Mr. Harris go. And
18 I think it was a balancing of --

19 JUSTICE STEVENS: And even with letting him
20 go, isn't it possible they could get other roadblocks up
21 ahead or get other people involved in the attempt to
22 catch him?

23 MR. SAVRIN: Yes, there always are other
24 potentials. However, I would submit that a vehicle
25 traveling at 130 feet per second can do a lot of damage

1 in a very short period of time before the police
2 officers can figure out what route he's going to take.

3 JUSTICE STEVENS: Isn't it true that there's
4 no traffic on the road at that particular time?

5 MR. SAVRIN: Deputy Scott took the action
6 that he did because there was a low likelihood of injury
7 to third parties other than to Mr. Harris because there
8 was no one in his immediate path of travel.

9 JUSTICE STEVENS: Well, in that circumstance
10 why wouldn't he just consider discontinuing the chase?

11 MR. SAVRIN: Because there were -- the
12 videotape shows that Mr. Harris passed approximately 36
13 cars during this period of time. 12 seconds before the
14 contact was made, a vehicle was passed by Mr. Harris.
15 There was a high likelihood, in fact a probability, that
16 this case was going to end in tragedy, and Deputy Scott
17 took the action that he could.

18 JUSTICE STEVENS: Would that have been
19 likely if the officer had discontinued the chase?

20 MR. SAVRIN: Whether he discontinued the
21 chase or not, Mr. Harris could still injure whoever
22 might be around the next corner, Your Honor.

23 If there are no further questions, I'd like
24 to save my time for rebuttal.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Savrin.

2 Mr. Garre?

3 ORAL ARGUMENT OF GREGORY G. GARRE.

4 FOR THE UNITED STATES, AS AMICUS CURIAE

5 SUPPORTING PETITIONER

6 MR. GARRE: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 When a suspect disobeys a lawful command to
9 stop, races off in a reckless attempt to elude the
10 police, and demonstrates a disregard for his own life
11 and the lives of others in his path, the police may use
12 force, including deadly force, to bring the suspect's
13 vehicle flight to a halt and protect the public safety.

14 CHIEF JUSTICE ROBERTS: Does it matter
15 exactly what the nature of the escape was? Are we
16 supposed to evaluate whether this was reckless enough?
17 Well, let's say the driver did not go off 90 miles an
18 hour. Let's say he obeyed the speed limit. He just
19 wasn't going to stop. Does that make it a different
20 case?

21 MR. GARRE: It does, Your Honor. The key
22 determination is whether the officer on the scene
23 reasonably determines that the vehicle poses a
24 substantial risk to other motorists or the police in his
25 way.

1 JUSTICE KENNEDY: I would think that would
2 apply to all high-speed cases; would you not agree?

3 MR. GARRE: I agree that it does, Justice
4 Kennedy. Here what you have is an individual who's
5 going extraordinarily high speeds, 80 to 100 miles an
6 hour. An individual who has passed cars, crossed the
7 double, double line; there were numerous motors, motor
8 vehicles on the night. And an individual who has ran
9 red lights, an individual who when three police cars --

10 JUSTICE STEVENS: Yes. But that was while
11 he was being chased, right? Before being chased he
12 hadn't done any of this. He was going 72 miles an hour
13 in a 55-mile zone, isn't that right.

14 MR. GARRE: Well, that's true, Your Honor.
15 But as the Court said in the Sacramento versus Lewis
16 case, we don't blame police for the individual's
17 reckless flight in that context. We don't blame police
18 that Respondent made a decision to just --

19 JUSTICE STEVENS: No but if you're thinking
20 of the likelihood of harm if they discontinued the
21 chase, is it not reasonable to assume he might go back
22 to going 72 miles an hour in a 55-mile zone?

23 MR. GARRE: Not on this record, Justice
24 Stevens. In this particular --

25 JUSTICE SC ALIA: It would might also be

1 reasonable to assume that anyone who was chased by the
2 police will immediately speed up to 90 miles an hour.

3 MR. GARRE: That's exactly right, Justice Sc
4 alia.

5 JUSTICE SC ALIA: It doesn't seem to me a
6 very good rule to give to police forces: Anybody who's
7 going 72 miles an hour, let him go. Or at least if he
8 hits 90, let him go.

9 MR. GARRE: We agree, Justice Scalia. As
10 Justice Kennedy put it Sacramento versus Lewis, if
11 there's a real danger --

12 JUSTICE STEVENS: There isn't a question.
13 There is a question of whether it justifies the use of
14 deadly force, to prevent this -- this situation.

15 MR. GARRE: The question in our mind,
16 Justice Stevens, is whether Deputy Scott reasonably
17 believed that Respondent posed a serious risk of injury
18 or death to other motor vehicles, bystanders or police
19 on the roadway that night.

20 JUSTICE BREYER: Why are these absolute? I
21 mean I looked at Garner and then I looked at Graham and
22 Graham which came later said that all claims that
23 officers have used excessive force, deadly or not,
24 should be analyzed under the Fourth Amendment and its
25 reasonableness standard. So I guess-- isn't that right,

1 isn't that the law?

2 MR. GARRE: We agree, Your Honor.

3 JUSTICE BREYER: All right, if that's the
4 law, then whether -- of course an automobile could,
5 could kill people. Of course it can. So can a lot of
6 things. But an automobile isn't a gun, and a chase on
7 the highway is not a chase through a back yard, though
8 both could end up with the person being chased dead.

9 So aren't we supposed to look at all the
10 circumstances, including the circumstance of what -- one
11 that interests me, one, is that the right standard?
12 Two, did Scott know that the reason he was chasing this
13 person was because he had violated a speed limit, or was
14 he ignorant of the reason why the individual was racing
15 away at 90 miles an hour, which is as far as the record
16 could show?

17 MR. GARRE: Justice Breyer, to answer the
18 second question first, Scott did not know that he was
19 initially in a chase.

20 JUSTICE BREYER: And a reasonable juror
21 could not conclude to the contrary?

22 MR. GARRE: Well, Scott, I believe, Scott's
23 testimony was that he did not know. What Scott knew,
24 and he was engaged in the chase, was this is an
25 individual who had crossed cars, crossed the double

1 yellow line. This was an individual who had ran red
2 lights. This was an individual, when three police squad
3 cars converged on him in the shopping center parking
4 lot, collided with them and ran off into the highway,
5 reaching again speeds up to 90 miles an hour.

6 CHIEF JUSTICE ROBERTS: Is it reasonable for
7 him to suppose that there might be something more going
8 on if the guy is trying this hard to get away from a
9 speeding ticket? That presents he presents a danger to
10 the community quite apart from the driving?

11 MR. GARRE: Absolutely.

12 CHIEF JUSTICE ROBERTS: Is that a factor
13 that goes into the analysis?

14 MR. GARRE: It is, certainly, at a
15 commonsense level. Statistic show that most vehicles
16 who flee in this fashion, oftentimes there is alcohol or
17 drug abuse involved, oftentimes they are stolen
18 vehicles. We don't think --

19 JUSTICE STEVENS: What if they knew there
20 were drugs in the car that he would dispose of if he had
21 got caught. Would that justify this using deadly force?

22 MR. GARRE: I'm not sure that it would,
23 Justice Scalia -- uh, Justice Stevens.

24 JUSTICE STEVENS: I'm rather clear it would
25 not, isn't it? Because that would be no more serious

1 than the crime in Garner, would it?

2 MR. GARRE: Well -- that's true. The key,
3 the key point about this case is the threat that
4 Respondent posed in the -- suspects who engage in high
5 speed vehicle chases pose to the public, and that is,
6 that is fundamentally different from Garner for the
7 reason that you mentioned. Garner involved --

8 JUSTICE KENNEDY: But your position would be
9 the same even if Scott knew that the only reason they
10 were trying to stop him initially was the speeding
11 violation?

12 MR. GARRE: Yes. It doesn't matter why the
13 chase began. The point is that when Scott made the
14 decision to use force against Respondent, he reasonably
15 determined that Respondent posed a grave threat to other
16 motorists, the police and any bystanders who might come
17 in his way.

18 JUSTICE BREYER: Why, why wouldn't it
19 matter? I mean, other things being equal, suppose that
20 he known that all that happens, suppose he was two miles
21 beyond the speed limit. And Scott knew the whole thing
22 or Scott was the one who did it, and he says maybe he is
23 a young kid who is frightened and he has his license
24 number and he could get him later. I mean, why wouldn't
25 it be nutty to -- to try to bump somebody off the road,

1 when all, that's all that's at stake?

2 MR. GARRE: Because, Your Honor, regardless
3 of the reason the chase began, at the moment that Deputy
4 Scott used the force, this car posed a serious risk to
5 everyone else on the road that night. Someone traveling
6 90 miles an hour, up to 90 miles an hour, on a two-lane
7 windy road with numerous cars passing during this course
8 of the chase, it was that threat that Deputy Scott acted
9 against when he used that force, and that was a
10 reasonable use of force. It's reasonable regardless of
11 whether or not this Court determines --

12 JUSTICE GINSBURG: How do you deal with the
13 Brower case? That it was a 193 -- 83 action against the
14 police for setting up a roadblock to catch a speeder.
15 And the Court said that the roadblock was enough to give
16 rise to a 1983 claim?

17 MR. GARRE: Justice Ginsburg, the holding in
18 that case was that a roadblock amounted to a seizure.
19 And we don't, no one disputes there was a seizure in
20 this case when Deputy Scott intentionally used force to
21 put Respondents off the road. So in respect, Brower
22 doesn't speak to the question in this case, which is
23 whether or not that use of force was reasonable under
24 the circumstances.

25 Justice Kennedy in the Sacramento versus

1 Lewis case, in his concurring opinion, say that there
2 was a real danger of adopting a constitutional rule that
3 suspects are free to disobey lawful commands.

4 JUSTICE STEVENS: May I just make this one
5 point? Is it correct that the issue is whether it's
6 reasonable or is the issue whether a jury could find it
7 unreasonable?

8 MR. GARRE: Well, the -- ultimately to
9 determine whether this decision could be made at the
10 summary judgment stage you would have to consider
11 whether a jury could find it unreasonable. Here, on the
12 relevant undisputed facts, we submit as a matter of law,
13 Deputy Scott reasonably believed that this force was
14 necessary under the circumstances.

15 And the final point that I wanted to make,
16 going back to Justice Kennedy's concurrence, is that
17 there is a real danger in adopting that kind of
18 constitutional rule, that it will encourage more
19 suspects to flee, and will only increase the danger to
20 the public and to police and to motorists in these high
21 speed chases. I would urge this Court to reverse the
22 decision below. If there are no further questions --

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Garre.

25 Mr. Jones.

1 ORAL ARGUMENT OF CRAIG T. JONES,
2 ON BEHALF OF RESPONDENT

3 MR. JONES: Mr. Chief Justice, and may it
4 please the Court.

5 I'd like to begin by responding to some of
6 the questions that were asked of Petitioner. First of
7 all, Officer Scott himself admitted in his testimony
8 that he knew at the time that he was using deadly force,
9 and he realized at the time that he was likely to cause
10 injury or -- death or serious injury to Mr. Harris.

11 CHIEF JUSTICE ROBERTS: Is there any doubt
12 that Mr. Harris was likely to cause death or serious
13 injury to the other cars on the highway that he was
14 passing?

15 MR. JONES: Mr. Harris was simply a -- an
16 unsafe driver. There is always a risk at driving in
17 excess of speed limit, driving in violation of traffic
18 laws. But that risk in and of itself is not --

19 CHIEF JUSTICE ROBERTS: We are not talking
20 about driving in violation of traffic laws. We talking
21 about 90 miles an hour on a two-lane highway, swerving
22 past cars in the incoming traffic --

23 MR. JONES: Well, we're talking --

24 CHIEF JUSTICE ROBERTS: Hitting -- after
25 hitting Officer Scott's car and continuing on. That's a

1 little more than just unsafe.

2 MR. JONES: Well, those are not the facts
3 before the Court, Mr. Chief Justice. The facts are that
4 he was driving fast but he was under control. He only
5 crossed the center line to pass and when he passed, he
6 used his turn signal when he passed.

7 JUSTICE KENNEDY: He used the turning
8 signal. That's like the strangler who observes the no
9 smoking sign.

10 (Laughter.)

11 MR. JONES: When he turned into the -- when
12 he turned into the shopping center he wasn't weaving
13 through a parking lot. He was going through a private
14 access road in a shopping mall which was closed at 11
15 o'clock at night. And the collision, the impact
16 occurred when Officer Scott, who was going too fast to
17 make the turn into the shopping center, went up to the
18 next intersection, came around the other way to head my
19 client off at the pass. And then what happened was that
20 Mr. Harris took evasive action to avoid collision when
21 Mr. Harris -- excuse me when Officer Scott -- put
22 himself right in Mr. Harris' way.

23 JUSTICE ALITO: Mr. Jones, I looked at the
24 videotape on this. It seemed to me that he created a
25 tremendous risk of drivers on that road. Is that an

1 unreasonable way of looking at the -- at this tape?

2 JUSTICE SCALIA: He created the scariest
3 chase I ever saw since "The French Connection."

4 (Laughter.)

5 JUSTICE SCALIA: It is frightening.

6 MR. JONES: As a --

7 JUSTICE SCALIA: A frightening amount of
8 speed, and cars coming in the opposite direction, at
9 night, on a two-lane windy road --

10 MR. JONES: Well, as the Court below found,
11 and as the tape indicates, Mr. Harris didn't run anybody
12 off the road. He didn't ram anybody. He didn't try to
13 ram anybody. He was just driving away.

14 JUSTICE SOUTER: The question was whether he
15 was creating a substantial risk doing that.

16 MR. JONES: He was creating --

17 JUSTICE SOUTER: And my, my question is how
18 could a jury find otherwise? Your answer up to this
19 point is that well, he used signal lights and his
20 reflexes were good, and they sure were. But the
21 question is whether he was creating a substantial risk
22 of death or serious bodily harm to others. And my
23 question is leaving -- assuming that his reflexes were
24 good and he knew how to use the signal lights, how could
25 the jury fail to find that he was creating such a risk?

1 MR. JONES: Well, the jury could certainly
2 find he's creating a risk. But with regard to the other
3 Garner factors that must be shown before deadly force
4 can be used, he had not committed a violent felony, a
5 crime involving the infliction or threat of infliction
6 --

7 JUSTICE SOUTER: Garner was not talking
8 about someone who at the time the deadly force was used
9 was himself creating a substantial risk of death or
10 serious bodily harm to others. That's what we are
11 dealing with here. And the reasonableness of the
12 officer's action depends on whether, at the summary
13 judgment stage, a jury can reasonably find that, in
14 fact, he was not creating at that moment, a substantial
15 risk of serious bodily harm or death to others. And my
16 question is, how could a jury find anything else?

17 MR. JONES: Well, a jury could find that the
18 pursuit by the officer escalated the risk rather than
19 diminishing the risk to others. And that given a choice
20 between using deadly force to terminate a pursuit where
21 the officer himself had escalated the risk versus
22 backing off, letting the offender escape and then
23 perhaps arresting him an hour later at the house.

24 JUSTICE BREYER: Did Scott, know that? Did
25 Scott -- Do you have evidence to show that Scott knew

1 that the underlying offense was a speeding violation?

2 MR. JONES: We have evidence that it was
3 called out on the radio. "I'm pursuing somebody."
4 Whether Scott knew we don't know.

5 JUSTICE BREYER: And Scott has testified he
6 didn't know it.

7 MR. JONES: Scott has testified he --

8 JUSTICE BREYER: Now, do you think you can
9 get to the jury on the question of whether he knew it.

10 MR. JONES: Scott --

11 JUSTICE BREYER: I'd like a yes or no
12 answer.

13 MR. JONES: The testimony --

14 JUSTICE BREYER: That doesn't sound like yes
15 or no.

16 MR. JONES: I'm not certain I understand the
17 question.

18 JUSTICE BREYER: The question is, can you
19 get to the jury on the question of whether Scott knew
20 that the underlying offense was for speeding?

21 MR. JONES: Scott did not know that was it.

22 JUSTICE BREYER: All right. If Scott didn't
23 know it, I mean, my goodness, then I don't see the
24 relevance of whether it was speeding or not. And I was
25 with you when I read the -- the opinion of the court

1 below. And I read the other brief. I was on the other
2 side. Then I've been shifting back and forth. Then I
3 look at that tape, and I have to say that when I looked
4 at the tape, my reaction was somewhat similar to Justice
5 Alito's. And so if it's doubtful and then you can't
6 even show that the person who did it knew that this was
7 for speeding rather than for murder, how can you get to
8 the jury?

9 MR. JONES: Well, there is certainly a
10 credibility issue as to whether Scott says he knew or
11 didn't know. I mean, certainly the call on the radio he
12 could have acquired. The thing is that --

13 JUSTICE KENNEDY: Well, as the Chief Justice
14 indicated through a question earlier, isn't it
15 reasonable for an officer to assume that it is -- he is
16 trying to escape because there is something more serious
17 than speeding at stake? I mean, that's the assumption I
18 would draw.

19 MR. JONES: That assumption would not be
20 based upon probability or based upon police training.
21 Officers in pursuit situations are trying to believe --

22 JUSTICE KENNEDY: You mean just as many
23 people take off in high speed chases for speeding as for
24 serious crimes?

25 MR. JONES: The vast majority have committed

1 minor crimes. And it's not a rational --

2 JUSTICE SOUTER: But at the moment Scott

3 came into this case, what difference does that make?

4 Why is that even relevant? Let's assume Scott knew that

5 this entire situation had eventuated out of an 18 mile

6 in excess of speed act by the individual. Assume that.

7 What Scott also knew at the point at which

8 he joined the chase was that this individual was driving

9 a car at 90 miles an hour. He was crossing yellow

10 lines, going through red lights, et cetera. At that

11 point, wasn't the only legally relevant data whether or

12 not Harris was creating the risk of death or bodily harm

13 to others?

14 MR. JONES: That's the issue. Was there an

15 immediate risk of death or serious bodily harm --

16 JUSTICE SOUTER: So you agree that whether

17 Scott knew or didn't know, that this whole scenario had

18 eventuated out of a speeding situation was irrelevant?

19 MR. JONES: It's not relevant. It's

20 relevant to that termination. Yeah, the issue is, is

21 there an immediate risk. But one of the factors that is

22 significant is what is the severity of the underlying

23 crime. And if it is a crime of violence, then certainly

24 the officer is entitled to presume --

25 JUSTICE BREYER: That's exactly where I

1 started. And I wondered -- that's what I'm uncertain
2 about the standard for this. Because as you and the
3 others have been arguing, if the question is one about
4 rules surrounding the use of deadly force. But then
5 when I read what I read out to you, in Graham, it seemed
6 to me that Graham, which comes after Garner, says that's
7 not the standard. Graham is a standard of simple
8 reasonableness and Garner is simply an illustration of
9 that as applied to guns and a backyard chase, not as
10 applied to cars which threaten other people much more.

11 MR. JONES: Well, that's a good question.

12 JUSTICE BREYER: Well, what is the standard?
13 Am I supposed to apply -- am I not supposed to apply
14 Graham?

15 MR. JONES: Well, whether you apply Garner
16 or Graham, the result is the same in this case. And let
17 me explain why. What Graham did is it expanded the
18 Garner rule, which you can't use deadly force to stop a
19 fleeing suspect who is merely fleeing, expanded that to
20 include the entire range of use of force, deadly or
21 nondeadly.

22 And with regard to the factors that are to
23 be considered in determining whether the use of force is
24 reasonable under Graham, the balance with respect to a
25 fleeing suspect who is subjected to deadly force was

1 already drawn by Garner. Garner created a bright light
2 rule. Graham extended that to an ad hoc balancing test
3 with all use of force applications. But with respect to
4 deadly force and a fleeing suspect, Garner still
5 provides a bright line rule.

6 JUSTICE BREYER: So you're saying I cannot
7 do the following under the law, which would seem to be
8 contrary to common sense, to say there is a big
9 difference between a policeman shooting a person who is
10 running away and threatens no harm to others, and a
11 policeman using a gun -- using a car on a highway to try
12 to get a person to stop who is threatening others. I
13 have to treat those exactly as if they were the same
14 thing.

15 MR. JONES: Yes. And Garner, this Court's
16 decision in Garner and this Court's decision in Brower,
17 which was written by Justice Scalia, basically to quote
18 Brower in both cases. In the Brower versus County of
19 Inyo --

20 CHIEF JUSTICE ROBERTS: The Eleventh Circuit
21 gave the exact opposite answer in the Adams case, which
22 if you're looking at what the -- was clearly established
23 law from the point of view of the officer that provides
24 him guidance that the Garner case does not dictate a
25 result in the use of deadly force in the police chase

1 case involving an automobile.

2 MR. JONES: Well, the holding of the Adams
3 versus St. Lucie County case was that in 1985, an
4 incident which occurred six weeks after the Garner
5 decision and four years before the Brower decision,
6 there is no way the officers could have known at that
7 time that their act of ramming a police car to prevent
8 an escape of another fleeing vehicle would have been
9 considered deadly force in violation of the Fourth
10 Amendment. As the dissent pointed out in the, in the
11 Adams case, though, certainly as of the Court's decision
12 in 1993, this was now clearly established. You had
13 Brower saying that it's a seizure, and then you had this
14 Court saying that now the law was clearly established
15 where it wasn't before --

16 CHIEF JUSTICE ROBERTS: So when Officer
17 Scott was trying to figure out what the law was, he
18 should have relied on the dissent in the case?

19 MR. JONES: Well, another case came about
20 later which held that as early as 1998 in another case
21 involving the same department, that there was clearly
22 established law.

23 JUSTICE GINSBURG: Was there any case at the
24 time of the action in this case, any decision that said
25 ramming, ramming a car to end a chase violates the

1 Fourth Amendment?

2 MR. JONES: Brower versus County of Inyo
3 says --

4 JUSTICE GINSBURG: Brower was a roadblock
5 case.

6 MR. JONES: It was a roadblock which
7 produced a collision, a physical impact between
8 vehicles. And that was the -- that was the distinction
9 which Justice Scalia latched onto in that case, and said
10 that the mere fact that the person was fleeing by car in
11 Brower was no different than the burglar fleeing by foot
12 in Garner. Either one of them --

13 JUSTICE SCALIA: But the issue in the case
14 was quite simply whether there had been a seizure.
15 Isn't that the issue?

16 MR. JONES: That was the first holding. The
17 second holding was that the Plaintiff had sufficiently
18 claimed a cause of action on the seizure. And then it
19 went back to the lower court to be considered under the
20 Garner analysis. And what I liked about your decision
21 -- excuse me, Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: Go ahead. Finish
23 your --

24 MR. JONES: What I liked about your decision
25 in that case, Justice Scalia, was that you said that the

1 officer's culpability for using excessive force is not
2 diminished by the fact that perpetrator chose to
3 continue running, whether it was the fleeing burglar in
4 Garner or the fleeing driver in Brower. Excuse me,
5 Mr. Chief Justice.

6 CHIEF JUSTICE ROBERTS: If I could just get
7 back to an earlier point. You think what the officer
8 should have done in this case was to let Mr. Harris go.

9 MR. JONES: That was one option. He could
10 have continued the pursuit and simply decided not to mow
11 him off the road at 90 miles an hour, or he could have
12 stopped a pursuit and let him go which often happens in
13 many pursuits.

14 CHIEF JUSTICE ROBERTS: Even though he
15 doesn't know at that point that he will ever be able to
16 arrest him later. He doesn't know if it's a stolen car
17 or not.

18 MR. JONES: That's correct.

19 CHIEF JUSTICE ROBERTS: And he doesn't know
20 why he is being pursued, whether it's for mass murder or
21 terrorism or anything else.

22 MR. JONES: Well, that's correct. But in
23 the majority of cases -- and this is the only testimony
24 in this record, Your Honors. Our experts testified on a
25 study -- based on a study which was commissioned for him

1 by the Department of Justice, a study which has been
2 cited by some of the amicus briefs on both sides in this
3 case, Dr. Albert testified that 70 percent of the time,
4 when police back off pursuit, the perpetrator stops
5 running and they resume safe driving. And when the car
6 is stolen, most of the time --

7 CHIEF JUSTICE ROBERTS: Once they have
8 gotten away, I assume.

9 MR. JONES: Well, sometimes you have to let
10 them get away. In Garner, it says, even if the guy has
11 just broken into somebody's house in the middle of the
12 night and committed a felony, if the choice is letting
13 them go or using deadly force when the factors
14 authorizing deadly force are not present, you have to
15 let him go.

16 JUSTICE SCALIA: Not if he is shooting his
17 way out of the house and endangering other people.

18 MR. JONES: That's correct.

19 JUSTICE SCALIA: I mean, that's a factor
20 here, of course. If he has taken the jewelry and he's
21 gone off into the night, if shooting at him might
22 endanger somebody else, or even kill him, you have to
23 let him go. I'm talking about a burglar who is, you
24 know, who is shooting as he leaves.

25 MR. JONES: You can shoot him. I'd be there

1 shooting him, too.

2 JUSTICE SCALIA: Of course you can shoot
3 him.

4 MR. JONES: Let me take that distinction and
5 apply it to the vehicle, Justice Scalia. What we have
6 to have to authorize deadly force in this context is
7 something more than just unsafe flight. You've got to
8 have someone who is behaving violently, who is menacing
9 people, trying to ram people.

10 JUSTICE KENNEDY: Can you tell me as of the
11 time he exited the parking lot, by that point, had he
12 committed any felonies?

13 MR. JONES: No. All he had done was taken
14 evasive action to avoid an officer who --

15 JUSTICE KENNEDY: 90 miles an hour would not
16 be a felony, not a reckless driving?

17 MR. JONES: Are you talking about the
18 traffic pursuit?

19 JUSTICE KENNEDY: Yes.

20 MR. JONES: No, none of those are felonies
21 under Georgia law.

22 JUSTICE KENNEDY: At no point did he commit
23 a felony?

24 MR. JONES: No, Your Honor. It's not even a
25 felony in Georgia.

1 JUSTICE GINSBURG: But he certainly
2 committed a lot of --

3 JUSTICE KENNEDY: If he had intended to hit
4 the police officer, was it --

5 MR. JONES: If he had intended to hit the
6 police officer, if that was shown by the evidence, so
7 they could have charged with aggravated assault. They
8 didn't do that. They left traffic citations in his
9 hospital room. They never arrested him. They never
10 prosecuted him.

11 JUSTICE GINSBURG: The key point is that he
12 is endangering the lives and safety of others. Anyone
13 who has watched that tape has got to come to that
14 conclusion, looking at the road and the way that this
15 car was swerving, and the cars coming in the opposite
16 direction. This was a situation fraught with danger.

17 MR. JONES: Well, Justice Ginsburg, I hope I
18 don't have you on my jury if that's -- but what the
19 trial court found was that construing the facts in a
20 light most favorable to the Plaintiff as a nonmoving
21 party, that reasonable jurors can find that this was
22 simply a person who was driving fast. This was not a
23 person who was driving assaultively. He wasn't driving
24 violently. He wasn't a threat to anyone that would
25 authorize the use of deadly force against him.

1 JUSTICE SCALIA: Is that a factual finding
2 of the, of the trial court here?

3 MR. JONES: That is a factual finding.

4 JUSTICE SCALIA: Are we bound by that fact?

5 MR. JONES: We are bound by that. This is
6 an interlocutory appeal, this an interlocutory appeal
7 under Mitchell v. Forsythe, and the Court is bound by
8 its own ruling to accept the facts as found by the court
9 below, and decide the narrow issue of law here which is,
10 one, is there a constitutional violation on these facts.
11 And two, was the law clearly established.

12 JUSTICE SCALIA: Even if having watched the
13 tape, there is no way that, that factual finding can be
14 accurate?

15 MR. JONES: If you want to repeal Johnson v.
16 Jones and Mitchell v. Forsythe, then yes. This is the
17 Supreme Court. You can make that determination.

18 But based upon the prior rulings of this
19 Court, this Court is bound to accept the findings of
20 fact of the courts below, and then to determine solely
21 the legal issue on an interlocutory basis. The bottom
22 line issue here, Your Honors, is whether the fact that
23 someone is driving in violation of traffic laws in and
24 of itself can be justification for the use of deadly
25 force.

1 JUSTICE BREYER: I don't see how -- I mean,
2 you know, given our prior discussion here, I don't see
3 how that's the issue. Because you say we have to assume
4 that the Defendant here didn't know that, in fact, all
5 that was at issue was a violation of the traffic law.

6 MR. JONES: Well, I'm not talking about the
7 underlying violation here. I'm talking about the
8 conduct observed by the officer who made the decision to
9 use deadly force.

10 JUSTICE BREYER: That conduct -- it could be
11 conduct -- you could say exactly your same question,
12 just as the Chief just said. I mean, I don't know how
13 to get around this. You could say the question was,
14 does a person who reasonably thinks he might be being
15 pursued for a murder --

16 MR. JONES: This is the issue. This is the
17 issue. If what this person is doing is driving, say
18 driving unsafely, but they are not driving violently,
19 they are not driving aggressively, they are not menacing
20 anyone on the road. They are simply driving fast trying
21 to get away, that in and of itself, is that going to be
22 justification for the use of deadly force or is
23 something more going to be required?

24 JUSTICE ALITO: When someone is fleeing and
25 creating a grave danger, let's just assume that that's

1 the case, creating a very danger for other drivers on
2 the road, when in your view is it reasonable for the
3 police to use deadly force to stop that, as opposed to
4 breaking off the chase? What, what is the test.

5 MR. JONES: Well, under Garner the test is
6 they have to be threatening violence or inflicting
7 violence against someone. There have to be no other
8 alternatives other than deadly force available to effect
9 the apprehension. And assuming there is justification
10 for deadly force, then there is a duty to give a warning
11 where feasible before using deadly force. And the court
12 below felt none of those three factors --

13 JUSTICE ALITO: How could you possibly give
14 a warning in this situation?

15 MR. JONES: It's academic in this case,
16 because the first two factors were not met. I mean,
17 it's our position that you don't worry about giving a
18 warning unless you have the right to use deadly force,
19 and if you don't get to that point then it's -- it's a
20 moot question.

21 JUSTICE GINSBURG: Why wasn't there warning?
22 There were lights, there were sirens. Surely the
23 defendant knew that the police were trying to stop him.

24 MR. JONES: There was certainly warning that
25 he needed -- that he was expected to pull over. There

1 was no warning of any intent to use deadly force.

2 JUSTICE BREYER: What am I -- you said
3 factually. What am I supposed to assume? You said in
4 light of -- I mean, I looked at the tape and that tape
5 shows he is weaving on both sides of the lane, swerving
6 around automobiles that are coming in the opposite
7 direction with their lights on, goes through a red light
8 where there are several cars that are right there,
9 weaves around them, and there are cars coming the other
10 way, weaves back, goes down the road.

11 Now, what in fact -- am I supposed to
12 pretend I haven't seen that? What am I supposed to
13 pretend to here?

14 MR. JONES: Well, I didn't see that.

15 JUSTICE BREYER: You didn't see that?

16 MR. JONES: I --

17 JUSTICE BREYER: You didn't -- I thought
18 that -- you didn't see that?

19 MR. JONES: Well, the point is most people
20 use the word weaving to describe the motion of
21 Mr. Harris's car is when they are going through the, the
22 shopping center --

23 JUSTICE BREYER: No, no. I -- what I saw is
24 he is driving down one lane, what I mean by weaving, and
25 this lane goes with me in traffic. And there is some

1 cars in front of him, so he goes in the other lane where
2 the cars are now coming right directly at him. And then
3 before they hit him, he goes back to the first lane and
4 he does this while going through a red light, it seemed
5 to me.

6 Am I -- did I mis-see that? I'll go look at
7 it again if you --

8 MR. JONES: The -- feel free to look at it
9 again.

10 JUSTICE BREYER: Yeah.

11 MR. JONES: But those are not the facts that
12 were found by the court below in this --

13 JUSTICE BREYER: Well that's, that's what I
14 wonder. If the court says that isn't what happened, and
15 I see with my eyes that is what happened, what am I
16 supposed to do?

17 MR. JONES: Well, I think you apply the law,
18 Your Honor.

19 JUSTICE KENNEDY: The district --

20 (Laughter.)

21 JUSTICE KENNEDY: Under, under -- under your
22 rule, what you're concerned with is the bumping, the use
23 of the force. Under your rule, if the police continue
24 the chase without using the, without trying to ram him,
25 and then there is an accident and innocent people are

1 killed, or injured, I assume that under the tort laws of
2 most states, the police could be liable.

3 MR. JONES: Well in theory perhaps they
4 could be if the officer was a joint proximate cause of
5 the accident, but in most states --

6 JUSTICE KENNEDY: Well, aren't they the
7 proximate cause if they continue the chase without
8 trying to terminate it?

9 MR. JONES: That's correct. If the officer
10 terminates the chase then he is never going to be liable
11 because number one he is acting prudently; he is going
12 based upon Department of Justice studies showing 70
13 percent --

14 JUSTICE KENNEDY: No. No. Well, I meant
15 terminate the chase by -- by -- by forcing him off the
16 road.

17 MR. JONES: Well, if he terminates the chase
18 using deadly force, that that creates a whole host of
19 other problems.

20 JUSTICE KENNEDY: But isn't there -- but
21 isn't that one way to assure that the police are not
22 liable, both from a moral standpoint and a legal
23 standpoint, for causing the injury of other people?

24 MR. JONES: Now from a constitutional
25 standpoint the Fourth Amendment doesn't protect other

1 people. It protects those who have been seized. And
2 that's, that's the framework we are dealing with here
3 today.

4 JUSTICE KENNEDY: Well, you mean it's
5 irrelevant to our analysis to consider that he might
6 injure other people?

7 MR. JONES: The potential for danger to
8 others is certainly part of the justification for deadly
9 force, just as, if deadly force cannot be used
10 endangering other people, then that certainly goes into
11 the matrix, too.

12 JUSTICE SCALIA: Mr. Jones, could I --

13 MR. JONES: Yeah.

14 JUSTICE SCALIA: Could I ask whether the
15 portion of the opinion that you say establishes that he
16 was not endangering anybody is this portion? The court
17 is mindful that traffic laws are designed to -- safely
18 -- and Harris acted in an unsafe manner. However, the
19 record reflects" -- - is this the portion?

20 MR. JONES: Yes.

21 JUSTICE SCALIA: -- "that he maintained
22 control over his vehicle." Well, that doesn't prove
23 he's not endangering anybody. "Used his turn signals"
24 -- wonderful.

25 (Laughter.)

1 JUSTICE SCALIA: "And did not endanger any
2 particular motorist on the road." I think that's true.
3 In that scary chase he, he didn't come close to hitting
4 any particular car, but I don't think that's, that's a
5 finding that he was not endangering anybody. "Any
6 particular motorist," but he was endangering the public
7 at large.

8 MR. JONES: Well, this is my point is that
9 if, if the drive --if the hazard caused by driving in
10 and of itself is the only threat here, does that rise to
11 a level of imminency and immediacy that justifies the
12 use of deadly force? If it does, then any officer who
13 perceives that someone is driving unsafely and that they
14 may cause an accident to someone who may or may not be
15 down the road if not stopped, would be justified in
16 using deadly force, to literally take out anyone who is
17 speeding.

18 JUSTICE SCALIA: It depends on how fast --
19 if depends on how fast the car is going, whether it's a
20 two-lane road or four-lane divided highway. All those
21 factors come into, into account. And it doesn't seem to
22 me that we have to adopt a rule that will, that will
23 discourage police officers. There's, there's enough
24 disincentive to engage in this kind of activity in the
25 fact that the police officer may hurt himself. It's

1 pretty risky to conduct this kind of a maneuver, don't
2 you think? I wouldn't have done it if I was Scott.

3 MR. JONES: Well that's --

4 JUSTICE SCALIA: I would have let the guy
5 go.

6 MR. JONES: Now what he, if he --

7 JUSTICE SCALIA: Driving 90 miles an hour
8 and comes up, approaches that car, that car swerved.
9 Scott could have been killed, couldn't he?

10 MR. JONES: Absolutely. Or because he's
11 also --

12 JUSTICE SCALIA: So I don't think we need a
13 whole lot of disincentive to stop police officers in
14 engaging in frolicsome conduct.

15 MR. JONES: Well, not only that, Justice
16 Scalia. The officer had no control over what was going
17 to happen once he used deadly force, like the officer
18 who fired into the cab of a flying vehicle in *Barn v*
19 *Cox*, once you disable the driver the car keeps going.
20 And in this case, when you -- when you hit the vehicle
21 and knock a vehicle that has been in control and make it
22 out of control, then it's now an unguided missile that
23 could just as easily cross the center line and hit an
24 innocent person.

25 JUSTICE STEVENS: Let me just ask this

1 question. In trying to assess the likelihood of harm to
2 innocent people who would be hurt by this by this guy
3 driving so fast, is that, do we measure it by assuming
4 that the chase will continue? Or do we measure it by
5 assuming that the chase would be discontinued?

6 MR. JONES: The officer --

7 JUSTICE STEVENS: Just as we did in Garner?

8 MR. JONES: The officer has both options. I
9 mean Garner simply commands that he not use deadly force
10 if it's a choice between letting him go and using deadly
11 force. Now in the Sacramento v Lewis case, it does say
12 that involves a different, a different type of claim and
13 a different standard. But in the Sacramento case it
14 does say that an officer in a pursuit has a duty to
15 always be weighing the risk of the continued pursuit
16 against the risk to the public. So there is an
17 independent duty there to act reasonably.

18 JUSTICE STEVENS: If it were -- clear that a
19 jury could find that there would be no unreasonable risk
20 to innocent motorists if they discontinued the chase --
21 assume that's a possible finding. If that were true,
22 would there be a duty to discontinue the chase?

23 MR. JONES: Not under the Fourth Amendment.
24 Now, the -- the only expert testimony in this record on
25 that subject says there is a 7 percent chance --

1 JUSTICE STEVENS: You're saying there is a
2 duty not to use deadly force.

3 MR. JONES: That's what Garner says, if you
4 don't use deadly force. And that's what our claim is.

5 CHIEF JUSTICE ROBERTS: And aren't you
6 concerned that that creates an incentive in every case
7 for anyone who, that sees the blue lights behind them to
8 know that all they have to do is keep fleeing and the
9 police are going to have to give up eventually?

10 MR. JONES: Well, let me respond by reading
11 a portion of Garner that deals with that point,
12 Mr. Chief Justice. These, these same important policy
13 reasons were raised in Garner, that we don't want to
14 encourage disobedience of issues. We want to discourage
15 people from fleeing. And this is what the Garner Court
16 said --

17 CHIEF JUSTICE ROBERTS: Well, Garner --
18 Garner was the case involving shooting the guy in the
19 back, right?

20 MR. JONES: Yes. He might easily break into
21 someone else's house and perhaps end up killing them.
22 This was a vigorous dissent in Garner. But this is what
23 the majority said: "Without in any way disparaging the
24 importance of these goals we are not convinced that the
25 use of deadly force is a sufficiently productive means

1 of accomplishing them to justify the killing of
2 nonviolent suspects."

3 And if unsafe driving --

4 JUSTICE KENNEDY: But your, your answer to
5 Justice Stevens as I understand it was the police not
6 have the duty to discontinue the chase? The obverse of
7 that is that the police may prolong the chase, i.e.,
8 prolong the injury to the public. I'm surprised at your
9 answer.

10 MR. JONES: Well, I think there is an
11 independent duty, it doesn't rise under the Fourth
12 Amendment, but there is an independent duty to do that.
13 But my concern is that under Garner, given a choice
14 between --

15 JUSTICE STEVENS: It is certainly the case
16 that if there is going to be a, a risk of deadly harm to
17 innocent third parties, there would be a duty to
18 discontinue the chase rather kill him. But you don't
19 seem to buy that.

20 MR. JONES: Well, experience shows most of
21 the time when you discontinue a chase, the person who is
22 running discontinues driving unsafely. That is the --
23 that is experience. This officer's own policy says that
24 --

25 JUSTICE SCALIA: Did this study show what

1 future fleeing speeders would do?

2 I mean, I will accept that for, for the sake
3 of argument that -- in fact, it's probably true. I
4 would have guessed that, if the police stopped chasing,
5 you don't go 90 miles an hour anymore. But did this
6 study show what the effect of a rule that says stop
7 chasing when he hits 85, what the effect of that rule
8 would be on, on fleeing speeders or fleeing felons, or
9 fleeing anybody?

10 MR. JONES: Well, the rule simply says you
11 don't kill him just because he is driving unsafely. And
12 if, it simply says that if the choice is between killing
13 him and letting him go, you have to let him go if the
14 Garner factors aren't present. And we find nothing in
15 the law and no reason to create a new exception in the
16 law that says that Garner doesn't apply if you're
17 fleeing by vehicle.

18 Thank you. We ask that the Court of Appeals
19 be affirmed.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Jones.
22 Mr. Savrin, you have four minutes remaining.

23 REBUTTAL ARGUMENT OF PHILIP W. SAVRIN,
24 ON BEHALF OF PETITIONER

25 MR. SAVRIN: Thank you, Mr. Chief Justice.

1 Let me refocus for a moment that in order
2 for the officer to be denied qualified immunity in this
3 context a jury would have to be able to find two things.
4 One, that no -- that there was no probable cause, and
5 second, that that was clearly established. And I think
6 that the discussion this morning if nothing else shows
7 that it's not clearly established.

8 As far as the Fourth Amendment is concerned,
9 I think the measure needs to be exactly as this Court
10 stated in *Graham versus Connor*, which is looking at the
11 facts from the standpoint of the officer on the scene,
12 because after all, he has to make split-second
13 decisions. He does not have the benefit of taking
14 depositions of Mr. Harris --

15 JUSTICE BREYER: What am I supposed to do?
16 I mean, I'll look again at the tape. I certainly will
17 do that. But suppose I look at the tape and I end up
18 with Chico Marx's old question with respect to the Court
19 of Appeals: Who do you believe, me or your own eyes?

20 MR. SAVRIN: Your Honor, I think the answer
21 to that question was provided in this decision in
22 *Ornelas versus United States*, a decision by this Court
23 in 1996 that came up in the context of a criminal, a
24 direct criminal appeal involving the question of
25 probable cause. And this Court set forth very clearly

1 that the historical facts are given deference. The
2 question of, a legal question about whether those facts
3 reasonably give rise to probable cause is an independent
4 de novo review.

5 JUSTICE SCALIA: Whether he is endangering
6 anybody is a historical fact, no? So what do you do
7 about that finding?

8 MR. SAVRIN: I don't believe that is
9 historical fact.

10 JUSTICE SCALIA: It is.

11 MR. SAVRIN: The historical facts here are
12 whether Mr. Harris was driving excessively, whether he
13 was driving across the line, whether he was driving at
14 high rates of speed, whether there was anybody in his
15 path, whether he had collided with anyone. I think the
16 question about whether or not those facts give rise to
17 probable cause to believe that Harris was a threat of
18 serious physical harm is a legal issue, and I think the
19 Court of Appeals recognized that in this case when they
20 applied a different analysis or came out with a
21 different result to those same undisputed facts.

22 JUSTICE GINSBURG: What is the, the court
23 saying -- and this is on page 39 A of the petition
24 appendix -- when Harris was driving away from officers
25 and when there, when there were no other motorists or

1 pedestrians nearby, thus casting doubt on defendant's
2 assertion that at the time of the ramming, Harris posed
3 an immediate threat of harm to others.

4 This is a finding that there were no other
5 motorists or pedestrians nearby when the ramming
6 occurred.

7 MR. SAVRIN: And that is a fact that we
8 accept as true in the immediate vicinity. The tape
9 shows that there was a vehicle just 12 seconds before,
10 and I think that a reasonable officer at the time would
11 believe that that wasn't going to be the last vehicle on
12 that road.

13 JUSTICE SCALIA: I would hope he would wait
14 until there were no pedestrians or vehicles coming
15 before he, before he did the ramming.

16 MR. SAVRIN: Yes, Your Honor.

17 JUSTICE SCALIA: I assume he waited
18 precisely for that kind of a gap in the traffic?

19 MR. SAVRIN: Yes, Your Honor. Exactly. He
20 had limited options and I believe it was a no-win
21 scenario. And he took the best course that he
22 reasonably believed he could at the time. And --

23 CHIEF JUSTICE ROBERTS: Do you agree with
24 Mr. Jones' statement that none of Mr. Harris' conduct
25 rose to the level of a felony?

1 MR. SAVRIN: I would not, Your Honor. In
2 our brief we did list a number of felonies that
3 Mr. Harris, that we believe he committed. But I would
4 go back to Garner, and Garner says that an armed suspect
5 would have been a different case. And Garner also says
6 that some misdemeanors such as drunk driving are more
7 dangerous than some felonies such as white collar crime.
8 So I think the question should not be whether it's a
9 technical issue of crossing the line from misdemeanor to
10 felony, but the harm that is being caused by the
11 continued driving that's exactly what occurred in this
12 case.

13 And if I could respond to Justice Breyer's
14 question about what to do in terms of responding to
15 Mr. Marx's question, I think the Ornelas case says that
16 you would review it for clear error. And in this case
17 you would not owe deference of a finding of fact by the
18 lower court.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Savrin. The case is submitted.

21 [Whereupon, at 11:47 a.m., the case in the
22 above-titled matter was submitted.]

23

24

25

A				
able 12:5 37:15 54:3	aggressively 42:19	1:14	43:9 50:3,5	2:4,7,10,13 3:7 26:2 53:24
above-entitled 1:11	agree 6:7,13,19 19:2,3 20:9 21:2 32:16 56:23	appendix 55:24	assumption 31:17,19	behaving 39:8
above-titled 57:22	ahead 5:5 16:21 36:22	applications 34:3	assure 46:21	belief 12:21 13:7 13:24
absolute 20:20	Albert 38:3	applied 12:6 33:9,10 55:20	Atlanta 1:15,21	believe 4:13,14 5:22 10:10,11 10:17 12:4 13:22 14:13,22 21:22 31:21 54:19 55:8,17 56:11,20 57:3
Absolutely 5:8 22:11 49:10	alcohol 22:16	apply 13:15 19:2 33:13,13,15 39:5 45:17 53:16	attempt 16:21 18:9	believed 12:13 13:1 20:17 25:13 56:22
abuse 22:17	alia 19:25 20:4,5	apprehension 43:9	authorize 39:6 40:25	believes 5:18 16:6
academic 43:15	ALITO 11:18 11:21 27:23 42:24 43:13	approaches 49:8	authorizing 38:14	benefit 54:13
accept 41:8,19 53:2 56:8	Alito's 31:5	appropriate 7:12	automobile 21:4 21:6 35:1	best 56:21
access 12:1,4 27:14	alternatives 16:13,13 43:8	approximately 17:12	automobiles 44:6	better 7:7,11
accident 12:18 45:25 46:5 48:14	Amendment 3:14 14:23 20:24 35:10 36:1 46:25 50:23 52:12 54:8	argue 14:20	available 16:14 43:8	beyond 23:21
accomplishing 52:1	amicus 1:19 2:7 18:4 38:2	arguing 33:3	average 4:17	big 34:8
account 48:21	amount 28:7	argument 1:12 2:2,5,11 3:3,6 18:3 26:1 53:3 53:23	avoid 5:19 27:20 39:14	blame 19:16,17
accurate 41:14	amounted 24:18	arguments 14:16	a.m 1:13 3:2 57:21	block 3:24
acknowledged 9:23	analysis 5:2 22:13 36:20 47:5 55:20	armed 57:4	back 11:4 12:25 19:21 21:7 25:16 31:2 36:19 37:7 38:4 44:10 45:3 51:19 57:4	blowing 11:13
acted 24:8 47:18	analyzed 20:24	arrest 37:16	backing 29:22	blue 51:7
acting 46:11	answer 7:22 13:18 21:17 28:18 30:12 34:21 52:4,9 54:20	arrested 40:9	backyard 33:9	bodily 5:20 13:3 13:24 14:3 28:22 29:10,15 32:12,15
action 5:25 17:5 17:17 24:13 27:20 29:12 35:24 36:18 39:14	anybody 20:6 28:11,12,13 47:16,23 48:5 53:9 55:6,14	arresting 29:23	balance 5:14 33:24	bottom 41:21
activity 48:24	apart 22:10	articulated 9:22 10:18	balancing 16:18 34:2	bound 41:4,5,7 41:19
ad 34:2	appeal 41:6,6 54:24	articulation 7:8 7:12	ball 4:21	break 51:20
Adams 12:23 13:10 34:21 35:2,11	Appeals 53:18 54:19 55:19	asked 15:5,8 26:6	Barn 49:18	breaking 43:4
admitted 3:16 26:7	APPEARAN...	assault 40:7	based 14:11 31:20,20 37:25 41:18 46:12	Breyer 4:19 5:3 20:20 21:3,17 21:20 23:18 29:24 30:5,8 30:11,14,18,22 32:25 33:12 34:6 42:1,10 44:2,15,17,23 45:10,13 54:15
adopt 48:22		assaultively 40:23	basically 34:17	Breyer's 57:13
adopting 25:2 25:17		assertion 56:2	basis 41:21	brief 5:17 7:9
affirmed 53:19		assess 50:1	began 23:13 24:3	
aggravated 40:7		assume 14:6 19:21 20:1 31:15 32:4,6 38:8 42:3,25 44:3 46:1 50:21 56:17	behalf 1:15,21	
		assuming 28:23		

<p>31:1 57:2 briefs 38:2 bright 34:1,5 bring 18:12 broad 10:11 broken 38:11 Brower 24:13 24:21 34:16,18 34:18 35:5,13 36:2,4,11 37:4 building 12:1,4 bump 12:13 23:25 bumped 13:22 bumping 13:3 45:22 burglar 36:11 37:3 38:23 buy 52:19 bystanders 20:18 23:16</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 cab 49:18 call 31:11 called 15:8,15 30:3 car 4:24 7:16 12:14 13:3,22 15:16 22:20 24:4 26:25 32:9 34:11 35:7,25 36:10 37:16 38:5 40:15 44:21 48:4,19 49:8,8 49:19 cars 3:19 17:13 19:6,9 21:25 22:3 24:7 26:13,22 28:8 33:10 40:15 44:8,9 45:1,2 case 3:4,10 4:4 4:20,21 7:24 9:19,25 11:25</p>	<p>12:6,16,20,22 12:23,25 13:10 13:11 14:17 15:7,15,17 17:16 18:20 19:16 23:3 24:13,18,20,22 25:1 32:3 33:16 34:21,24 35:1,3,11,18 35:19,20,23,24 36:5,9,13,25 37:8 38:3 43:1 43:15 49:20 50:11,13 51:6 51:18 52:15 55:19 57:5,12 57:15,16,20,21 cases 19:2 34:18 37:23 casting 56:1 catch 16:22 24:14 caught 22:21 cause 7:16 12:18 13:2 14:24 26:9,12 36:18 46:4,7 48:14 54:4,25 55:3 55:17 caused 5:10 13:13 48:9 57:10 causes 15:19 causing 6:17 46:23 center 3:21,24 4:4,5,9,24 5:7 22:3 27:5,12 27:17 44:22 49:23 certain 30:16 certainly 22:14 29:1 31:9,11 32:23 35:11 40:1 43:24 47:8,10 52:15</p>	<p>54:16 cetera 32:10 chance 6:11,12 50:25 charged 40:7 chase 5:19 17:10 17:19,21 19:21 21:6,7,19,24 23:13 24:3,8 28:3 32:8 33:9 34:25 35:25 43:4 45:24 46:7,10,15,17 48:3 50:4,5,20 50:22 52:6,7 52:18,21 chased 19:11,11 20:1 21:8 chases 23:5 25:21 31:23 chasing 21:12 53:4,7 Chico 54:18 Chief 3:3,8 8:23 17:25 18:6,14 22:6,12 25:23 26:3,11,19,24 27:3 31:13 34:20 35:16 36:21,22 37:5 37:6,14,19 38:7 42:12 51:5,12,17 53:20,25 56:23 57:19 choice 29:19 38:12 50:10 52:13 53:12 chose 9:9 37:2 circuit 10:6,12 11:5,6,24 12:16,19,23 13:14 34:20 circuits 10:18 Circuit's 13:10 circumstance 17:9 21:10</p>	<p>circumstances 14:14 21:10 24:24 25:14 citations 40:8 cite 12:22 13:9 cited 38:2 claim 24:16 50:12 51:4 claimed 36:18 claims 20:22 classic 14:20 clear 22:24 50:18 57:16 clearly 11:4 14:19 34:22 35:12,14,21 41:11 54:5,7 54:25 client 27:19 close 15:1 48:3 closed 27:14 Code 10:12 11:8 collar 57:7 collided 3:22 4:12 22:4 55:15 collision 5:10,10 27:15,20 36:7 collisions 14:2 come 23:16 40:13 48:3,21 comes 33:6 49:8 coming 28:8 40:15 44:6,9 45:2 56:14 command 18:8 commands 25:3 50:9 commissioned 37:25 commit 39:22 committed 29:4 31:25 38:12 39:12 40:2 57:3 common 34:8 commonly</p>	<p>15:15 commonsense 22:15 community 22:10 complete 8:12 concede 4:20 14:25 concern 52:13 concerned 45:22 51:6 54:8 concerns 3:10 conclude 10:7,8 21:21 conclusion 40:14 concurrence 25:16 concurring 25:1 conduct 42:8,10 42:11 49:1,14 56:24 Connection 28:3 Connor 54:10 consider 16:12 17:10 25:10 47:5 considered 6:6 11:15 14:12 33:23 35:9 36:19 Considering 11:21 constitutional 25:2,18 41:10 46:24 construing 40:19 contact 11:13 13:12,13 17:14 contend 9:5,10 12:25 context 4:17 14:22 19:17 39:6 54:3,23 continue 37:3 45:23 46:7</p>
--	--	---	---	---

50:4 continued 4:1 9:4 37:10 50:15 57:11 continuing 26:25 continuum 11:11 contrary 21:21 34:8 control 9:6 14:9 15:18,19 27:4 47:22 49:16,21 49:22 converged 22:3 convinced 51:24 corner 17:22 correct 25:5 37:18,22 38:18 46:9 County 34:18 35:3 36:2 course 4:18 6:25 9:14,21 10:19 21:4,5 24:7 38:20 39:2 56:21 court 1:1,12 3:9 9:21,24,24 10:2 11:2 12:2 13:9 18:7 19:15 24:11,15 25:21 26:4 27:3 28:10 30:25 35:14 36:19 40:19 41:2,7,8,17,19 41:19 43:11 45:12,14 47:16 51:15 53:18 54:9,18,22,25 55:19,22 57:18 courts 10:13 11:5,6 41:20 Court's 34:15 34:16 35:11 Cox 49:19	CRAIG 1:21 2:9 26:1 crashed 4:24 create 11:7 14:7 53:15 created 11:7 27:24 28:2 34:1 creates 46:18 51:6 creating 9:12 14:5 28:15,16 28:21,25 29:2 29:9,14 32:12 42:25 43:1 credibility 31:10 crime 23:1 29:5 32:23,23 57:7 crimes 31:24 32:1 criminal 54:23 54:24 cross 49:23 crossed 19:6 21:25,25 27:5 crossing 8:3 32:9 57:9 culpability 37:1 curiae 1:19 2:8 18:4 <hr/> D <hr/> D 3:1 damage 16:25 danger 6:17 20:11 22:9 25:2,17,19 40:16 42:25 43:1 47:7 dangerous 3:12 57:7 data 32:11 day 14:2 de 55:4 dead 21:8 deadly 9:11,14 9:21 10:5,7,9	10:16,19,22 11:3,4,12,16 11:18 12:3,7 14:12,25 15:24 16:7 18:12 20:14,23 22:21 26:8 29:3,8,20 33:4,18,20,25 34:4,25 35:9 38:13,14 39:6 40:25 41:24 42:9,22 43:3,8 43:10,11,18 44:1 46:18 47:8,9 48:12 48:16 49:17 50:9,10 51:2,4 51:25 52:16 deal 24:12 dealing 29:11 47:2 deals 51:11 death 5:20 7:16 7:20 10:24 13:3,13,24 14:3 20:18 26:10,12 28:22 29:9,15 32:12 32:15 decide 41:9 decided 37:10 decision 11:24 19:18 23:14 25:9,22 34:16 34:16 35:5,5 35:11,24 36:20 36:24 42:8 54:21,22 decisions 11:16 54:13 defendant 42:4 43:23 defendant's 56:1 deference 55:1 57:17 define 9:14	definition 11:3,9 11:12 12:6 degrees 11:11 11:14 demonstrates 18:10 denied 54:2 department 1:18 35:21 38:1 46:12 depends 9:13 10:11 29:12 48:18,19 deposition 16:2 depositions 54:14 deputy 1:17 3:13,22,23 4:11 5:11,12 17:5,16 20:16 24:3,8,20 25:13 describe 44:20 described 12:20 15:5 designed 47:17 determination 18:22 41:17 determine 25:9 41:20 determined 15:9 23:15 determines 18:23 24:11 determining 33:23 dictate 34:24 difference 32:3 34:9 different 9:14 11:7,14 13:16 14:15 18:19 23:6 36:11 50:12,12,13 55:20,21 57:5 diminished 37:2 diminishing	29:19 direct 54:24 direction 28:8 40:16 44:7 directly 5:4 45:2 disable 49:19 disagree 8:22 discontinue 50:22 52:6,18 52:21 discontinued 17:19,20 19:20 50:5,20 discontinues 52:22 discontinuing 17:10 discourage 48:23 51:14 discussion 42:2 54:6 disincentive 48:24 49:13 disobedience 51:14 disobey 25:3 disobeys 18:8 disparaging 51:23 dispose 22:20 dispute 4:11,14 disputes 24:19 disregard 18:10 dissent 35:10,18 51:22 distinction 36:8 39:4 distracted 4:9 district 9:24 10:2 45:19 divided 48:20 doing 5:18 28:15 42:17 double 3:18 8:3 19:7,7 21:25 doubt 26:11 56:1
---	--	--	--	---

<p>doubtful 31:5 Dr 38:3 draw 31:18 drawn 34:1 drive 9:4 48:9 driver 6:3 7:16 9:12 18:17 26:16 37:4 49:19 drivers 27:25 43:1 driver's 12:15 driving 3:17 4:1 4:15 6:8 14:12 15:3 22:10 26:16,17,20 27:4 28:13 32:8 38:5 39:16 40:22,23 40:23 41:23 42:17,18,18,19 42:20 44:24 48:9,13 49:7 50:3 52:3,22 53:11 55:12,13 55:13,24 57:6 57:11 dropped 11:25 drug 22:17 drugs 22:20 drunk 57:6 duty 43:10 50:14,17,22 51:2 52:6,11 52:12,17 D.C 1:8,18</p> <hr/> <p style="text-align: center;">E</p> <p>E 2:1 3:1,1 earlier 31:14 37:7 early 35:20 easily 49:23 51:20 effect 43:8 53:6 53:7 either 7:20 9:8</p>	<p>16:17 36:12 Eleventh 10:6 12:23 13:10,14 34:20 else's 51:21 elude 18:9 encourage 25:18 51:14 endanger 38:22 48:1 endangering 6:9 38:17 40:12 47:10,16,23 48:5,6 55:5 endangerment 6:17 ended 12:1 engage 23:4 48:24 engaged 21:24 engaging 49:14 ensue 10:24 entire 32:5 33:20 entitled 32:24 episode 8:15 equal 23:19 equivalent 8:13 error 57:16 escalated 29:18 29:21 escape 3:25 18:15 29:22 31:16 35:8 ESQ 1:15,17,21 2:3,6,9,12 essentially 5:16 established 34:22 35:12,14 35:22 41:11 54:5,7 establishes 47:15 et 32:10 evaluate 18:16 evasive 27:20 39:14</p>	<p>eventually 51:9 eventuated 32:5 32:18 evidence 3:17 6:25 29:25 30:2 40:6 exact 34:21 exactly 4:5 18:15 20:3 32:25 34:13 42:11 54:9 56:19 57:11 exception 53:15 exceptionally 3:15 4:1,16 excess 26:17 32:6 excessive 20:23 37:1 excessively 55:12 excuse 12:12 27:21 36:21 37:4 exit 3:24 exited 39:11 expanded 33:17 33:19 expected 9:3 43:25 experience 52:20,23 expert 50:24 experts 37:24 explain 33:17 extended 34:2 extraordinarily 19:5 eyes 45:15 54:19</p> <hr/> <p style="text-align: center;">F</p> <p>fact 4:14,15,23 8:22 17:15 29:14 36:10 37:2 41:4,20 41:22 42:4 44:11 48:25</p>	<p>53:3 55:6,9 56:7 57:17 factor 22:12 38:19 factors 6:6 14:23 29:3 32:21 33:22 38:13 43:12,16 48:21 53:14 facts 3:13 10:15 25:12 27:2,3 40:19 41:8,10 45:11 54:11 55:1,2,11,16 55:21 factual 4:11 41:1,3,13 factually 44:3 fail 28:25 fair 7:18 Faninger 15:23 Faninger's 16:1 far 4:11 21:15 54:8 fashion 22:16 fast 27:4,16 40:22 42:20 48:18,19 50:3 favorable 40:20 feasible 43:11 February 1:9 feel 45:8 feet 8:13 16:25 fellow 6:8,17 felonies 39:12 39:20 57:2,7 felons 53:8 felony 29:4 38:12 39:16,23 39:25 56:25 57:10 felt 43:12 figure 17:2 35:17 final 25:15 find 10:4,9,15 13:1 25:6,11</p>	<p>28:18,25 29:2 29:13,16,17 40:21 50:19 53:14 54:3 finding 41:1,3 41:13 48:5 50:21 55:7 56:4 57:17 findings 41:19 Finish 12:9 36:22 firearm 11:14 fired 49:18 first 15:14 21:18 26:6 36:16 43:16 45:3 flee 8:18 22:16 25:19 fleeing 5:15 33:19,19,25 34:4 35:8 36:10,11 37:3 37:4 42:24 51:8,15 53:1,8 53:8,9,17 flight 18:13 19:17 39:7 flying 49:18 following 34:7 foot 36:11 force 3:11 7:24 9:6,11,14,19 9:21 10:5,7,9 10:16,19,22 11:3,5,12,16 11:19 12:3,7 14:12 15:1,2 15:24,24 16:7 16:17 18:12,12 20:14,23 22:21 23:14 24:4,9 24:10,20,23 25:13 26:8 29:3,8,20 33:4 33:18,20,23,25 34:3,4,25 35:9 37:1 38:13,14</p>
---	--	--	---	--

<p>39:6 40:25 41:25 42:9,22 43:3,8,10,11 43:18 44:1 45:23 46:18 47:9,9 48:12 48:16 49:17 50:9,11 51:2,4 51:25 forces 20:6 forcing 46:15 Forsythe 41:7 41:16 forth 31:2 54:25 found 10:2,6 12:2 13:14 28:10 40:19 41:8 45:12 four 35:5 53:22 Fourth 3:14 14:23 20:24 35:9 36:1 46:25 50:23 52:11 54:8 four-lane 48:20 framework 47:2 fraught 40:16 free 25:3 45:8 French 28:3 frightened 23:23 frightening 28:5 28:7 frollicsome 49:14 front 45:1 fundamentally 23:6 further 13:15 17:23 25:22 future 53:1</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 1:17 2:6 3:1 18:3 Ga 1:15,21 gain 12:1,3</p>	<p>gap 56:18 Garner 10:22,25 11:2,6,7 13:14 20:21 23:1,6,7 29:3,7 33:6,8 33:15,18 34:1 34:1,4,15,16 34:24 35:4 36:12,20 37:4 38:10 43:5 50:7,9 51:3,11 51:13,15,17,18 51:22 52:13 53:14,16 57:4 57:4,5 Garre 1:17 2:6 18:2,3,6,21 19:3,14,23 20:3,9,15 21:2 21:17,22 22:11 22:14,22 23:2 23:12 24:2,17 25:8,24 General 1:17 Georgia 39:21 39:25 Ginsburg 8:14 15:4,25 16:3 24:12,17 35:23 36:4 40:1,11 40:17 43:21 55:22 give 20:6 24:15 43:10,13 51:9 55:3,16 given 15:10 29:19 42:2 52:13 55:1 giving 6:21 16:6 16:6 43:17 go 5:5 8:9 12:25 16:17,20 18:17 19:21 20:7,8 36:22 37:8,12 38:13,15,23 45:6 49:5 50:10 53:5,13</p>	<p>53:13 57:4 goals 51:24 goes 22:13 44:7 44:10,25 45:1 45:3 47:10 going 7:23 8:2,4 8:8,10 11:4,9 17:2,16 18:19 19:5,12,22 20:7 22:7 25:16 27:13,16 32:10 42:21,23 44:21 45:4 46:10,11 48:19 49:16,19 51:9 52:16 56:11 good 20:6 28:20 28:24 33:11 goodness 30:23 gotten 38:8 Graham 14:23 20:21,22 33:5 33:6,7,14,16 33:17,24 34:2 54:10 grave 23:15 42:25 greater 5:19,23 5:24,25 7:4 GREGORY 1:17 2:6 18:3 guess 20:25 guessed 53:4 guidance 34:24 gun 13:17 21:6 34:11 guns 33:9 guy 22:8 38:10 49:4 50:2 51:18</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>halt 8:16 18:13 happen 49:17 happened 27:19 45:14,15 happens 23:20</p>	<p>37:12 hard 22:8 harm 5:14,15 6:1,3 13:3,24 14:3 19:20 28:22 29:10,15 32:12,15 34:10 50:1 52:16 55:18 56:3 57:10 Harris 1:6 3:4 3:24 4:12,15 5:11,12 8:16 8:17 9:2,5,8 14:8,11 15:3 15:17 16:17 17:7,12,14,21 26:10,12,15 27:20,21,22 28:11 32:12 37:8 47:18 54:14 55:12,17 55:24 56:2,24 57:3 Harris's 44:21 hazard 48:9 head 11:4 27:18 hear 3:3 held 3:11 35:20 he'll 6:11,12 9:17 high 3:15 4:1,16 7:18,25 8:2 9:17 17:15 19:5 23:4 25:20 31:23 55:14 highway 21:7 22:4 26:13,21 34:11 48:20 high-speed 3:12 9:12 19:2 historical 55:1,6 55:9,11 hit 7:19 40:3,5 45:3 49:20,23 hits 20:8 53:7</p>	<p>hitting 26:24,25 48:3 hoc 34:2 holding 24:17 35:2 36:16,17 Honor 4:7,10 5:1,8,16,21 6:15,19 7:17 7:22 8:6,11,21 10:10 11:1,23 12:17 13:5,20 14:2,8 15:13 16:5,10 17:22 18:21 19:14 21:2 24:2 39:24 45:18 54:20 56:16,19 57:1 Honors 37:24 41:22 hope 40:17 56:13 hospital 40:9 host 46:18 hour 4:17 6:9,24 7:1 8:3,12 12:14 13:4,23 18:18 19:6,12 19:22 20:2,7 21:15 22:5 24:6,6 26:21 29:23 32:9 37:11 39:15 49:7 53:5 house 29:23 38:11,17 51:21 hurt 6:11,12 8:4 8:9,10 48:25 50:2</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>ignorant 21:14 illustration 33:8 immediacy 48:11 immediate 17:8 32:15,21 56:3</p>
---	---	---	--	--

<p>56:8 immediately 20:2 imminency 48:11 immunity 54:2 impact 27:15 36:7 importance 51:24 important 15:1 51:12 incentive 51:6 incident 4:5 35:4 include 33:20 including 16:7 18:12 21:10 incoming 26:22 increase 8:8 25:19 independent 50:17 52:11,12 55:3 indicated 9:19 31:14 indicates 28:11 indication 8:20 indirectly 5:4 individual 19:4 19:6,8,9 21:14 21:25 22:1,2 32:6,8 individual's 19:16 inflicting 43:6 infliction 29:5,5 initial 9:1 initially 21:19 23:10 injure 17:21 47:6 injured 46:1 injury 5:20 7:20 14:18 17:6 20:17 26:10,10 26:13 46:23</p>	<p>52:8 innocent 6:11 45:25 49:24 50:2,20 52:17 intended 40:3,5 intent 12:17,20 44:1 intentionally 13:12 24:20 interests 21:11 interlocutory 41:6,6,21 interrupting 12:10 intersection 27:18 involved 16:21 22:17 23:7 involves 5:6 13:11 50:12 involving 4:21 29:5 35:1,21 51:18 54:24 Inyo 34:19 36:2 irrelevant 32:18 47:5 issue 11:22 14:16 25:5,6 31:10 32:14,20 36:13,15 41:9 41:21,22 42:3 42:5,16,17 55:18 57:9 issues 51:14 i.e 5:18 52:7</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jewelry 38:20 Johnson 41:15 joined 32:8 joint 46:4 Jones 1:21 2:9 25:25 26:1,3 26:15,23 27:2 27:11,23 28:6 28:10,16 29:1 29:17 30:2,7</p>	<p>30:10,13,16,21 31:9,19,25 32:14,19 33:11 33:15 34:15 35:2,19 36:2,6 36:16,24 37:9 37:18,22 38:9 38:18,25 39:4 39:13,17,20,24 40:5,17 41:3,5 41:15,16 42:6 42:16 43:5,15 43:24 44:14,16 44:19 45:8,11 45:17 46:3,9 46:17,24 47:7 47:12,13,20 48:8 49:3,6,10 49:15 50:6,8 50:23 51:3,10 51:20 52:10,20 53:10,21 56:24 judgment 11:22 25:10 29:13 juror 21:20 jurors 40:21 jury 10:4,7,9,15 13:1 14:19,20 14:25 25:6,11 28:18,25 29:1 29:13,16,17 30:9,19 31:8 40:18 50:19 54:3 Justice 1:18 3:3 3:8 4:3,8,19 5:3,13,17,23 6:2,7,16,21 7:2 7:9,14,18 8:1,7 8:14,23 9:10 9:16,23 10:1,4 10:8,14,21 11:18,21 12:9 12:12,19,24 13:6,18,21 14:4,15 15:4 15:25 16:3,8</p>	<p>16:11,15,19 17:3,9,18,25 18:6,14 19:1,3 19:10,19,23,25 20:3,5,9,10,12 20:16,20 21:3 21:17,20 22:6 22:12,19,23,23 22:24 23:8,18 24:12,17,25 25:4,16,23 26:3,11,19,24 27:3,7,23 28:2 28:5,7,14,17 29:7,24 30:5,8 30:11,14,18,22 31:4,13,13,22 32:2,16,25 33:12 34:6,17 34:20 35:16,23 36:4,9,13,21 36:22,25 37:5 37:6,14,19 38:1,7,16,19 39:2,5,10,15 39:19,22 40:1 40:3,11,17 41:1,4,12 42:1 42:10,24 43:13 43:21 44:2,15 44:17,23 45:10 45:13,19,21 46:6,12,14,20 47:4,12,14,21 48:1,18 49:4,7 49:12,15,25 50:7,18 51:1,5 51:12,17 52:4 52:5,15,25 53:20,25 54:15 55:5,10,22 56:13,17,23 57:13,19 justification 41:24 42:22 43:9 47:8 justified 14:13</p>	<p>48:15 justifies 20:13 48:11 justify 22:21 52:1</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>keep 12:10 51:8 keeps 49:19 Kennedy 5:13 5:17,23 6:2 7:2 7:9 10:21 14:15 19:1,4 20:10 23:8 24:25 27:7 31:13,22 39:10 39:15,19,22 40:3 45:19,21 46:6,14,20 47:4 52:4 Kennedy's 25:16 key 18:21 23:2,3 40:11 kid 23:23 kill 21:5 38:22 52:18 53:11 killed 9:17 46:1 49:9 killing 12:2 51:21 52:1 53:12 kind 9:12 25:17 48:24 49:1 56:18 knew 8:24 21:23 22:19 23:9,21 26:8 28:24 29:25 30:4,9 30:19 31:6,10 32:4,7,17 43:23 knock 49:21 know 5:3 6:3,7 21:12,18,23 29:24 30:4,6 30:21,23 31:11</p>
--	--	--	--	--

32:17 37:15,16 37:19 38:24 42:2,4,12 51:8 known 23:20 35:6	life-endangeri... 15:12 light 34:1 40:20 44:4,7 45:4 lights 3:21 19:9 22:2 28:19,24 32:10 43:22 44:7 51:7 liked 36:20,24 likelihood 7:15 11:20 14:17,18 15:18 17:6,15 19:20 50:1 limb 15:6 limit 18:18 21:13 23:21 26:17 limited 14:10 15:3 16:16 56:20 line 3:18 5:11 8:4 19:7 22:1 27:5 34:5 41:22 49:23 55:13 57:9 lines 11:8 32:10 list 57:2 literally 48:16 litigation 11:25 little 27:1 lives 18:11 40:12 look 5:6 21:9 31:3 45:6,8 54:16,17 looked 4:20 20:21,21 27:23 31:3 44:4 looking 28:1 34:22 40:14 54:10 lose 15:19 loss 12:5 lost 15:18 lot 8:15 16:25 21:5 22:4 27:13 39:11 40:2 49:13	low 17:6 lower 36:19 57:18 Lucie 35:3 lucky 14:4	M maintained 47:21 majority 31:25 37:23 51:23 mall 27:14 maneuver 15:15 15:21 49:1 manner 14:11 47:18 Mark 16:1 Marx's 54:18 57:15 mass 37:20 material 4:14 mathematically 8:13 matrix 47:11 matter 1:11 18:14 23:12,19 25:12 57:22 mean 4:20 5:5 6:8,16 7:2 8:7 14:19 20:21 23:19,24 30:23 31:11,17,22 38:19 42:1,12 43:16 44:4,24 47:4 50:9 53:2 54:16 means 51:25 meant 46:14 measure 15:7 50:3,4 54:9 menacing 39:8 42:19 mentioned 23:7 mere 36:10 merely 33:19 met 11:19 43:16 method 15:9	middle 38:11 mile 32:5 miles 4:17 6:8 6:24 7:1 8:2,12 12:14 13:4,23 18:17 19:5,12 19:22 20:2,7 21:15 22:5 23:20 24:6,6 26:21 32:9 37:11 39:15 49:7 53:5 mind 20:15 mindful 47:17 minor 32:1 minutes 53:22 misdelegant 13:11 misdelegant 57:9 misdelegantors 57:6 missile 49:22 missing 13:8 Mister 14:10 15:2 mis-see 45:6 Mitchell 41:7,16 Model 10:12 11:8 moment 24:3 29:14 32:2 54:1 Monday 1:9 moot 43:20 moral 46:22 morning 54:6 motion 44:20 motor 19:7 20:18 motorist 48:2,6 motorists 18:24 23:16 25:20 50:20 55:25 56:5 motors 19:7 mouth 7:3	mow 37:10 murder 31:7 37:20 42:15
L lane 3:20 44:5 44:24,25 45:1 45:3 large 48:7 latched 36:9 Laughter 27:10 28:4 45:20 47:25 law 21:1,4 25:12 34:7,23 35:14 35:17,22 39:21 41:9,11 42:5 45:17 53:15,16 lawful 18:8 25:3 laws 26:18,20 41:23 46:1 47:17 leaves 38:24 leaving 28:23 led 3:14 left 40:8 legal 41:21 46:22 55:2,18 legally 32:11 lethality 11:15 letting 16:19 29:22 38:12 50:10 53:13 let's 18:17,18 32:4 42:25 level 22:15 48:11 56:25 Lewis 19:15 20:10 25:1 50:11 liable 3:11 46:2 46:10,22 license 23:23 life 12:5,15 15:6 18:10	N N 2:1,1 3:1 narrow 3:17 41:9 nature 18:15 nearby 56:1,5 necessary 25:14 need 9:6 10:3 11:2 49:12 needed 43:25 needs 54:9 never 40:9,9 46:10 new 53:15 night 3:18 19:8 20:19 24:5 27:15 28:9 38:12,21 nine-mile 3:15 nondeadly 33:21 nonmoving 40:20 nonviolent 52:2 novo 55:4 no-win 56:20 number 3:20 23:24 46:11 57:2 numerous 19:7 24:7 nutty 23:25				
	O O 2:1 3:1 obeyed 18:18 obligation 16:12 observed 42:8 observes 27:8 obverse 52:6 occurred 4:6 27:16 35:4 56:6 57:11 oddity 15:7				

<p>offender 29:22 offense 9:1 30:1 30:20 officer 3:10 5:18 9:11,19 11:16 13:11 15:5 16:11,14,16 17:19 18:22 26:7,25 27:16 27:21 29:18,21 31:15 32:24 34:23 35:16 37:7 39:14 40:4,6 42:8 46:4,9 48:12 48:25 49:16,17 50:6,8,14 54:2 54:11 56:10 officers 3:15 9:6 11:25 12:3 17:2 20:23 31:21 35:6 48:23 49:13 55:24 officer's 29:12 37:1 52:23 oftentimes 22:16,17 old 54:18 once 38:7 49:17 49:19 oncoming 8:4 one-way 8:3 opinion 11:2 25:1 30:25 47:15 opposed 43:3 opposite 28:8 34:21 40:15 44:6 option 37:9 options 14:11 16:16,16 50:8 56:20 oral 1:11 2:2,5 3:6 18:3 26:1 order 12:1 54:1</p>	<p>Ornelas 54:22 57:15 owe 57:17 o'clock 27:15</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 55:23 parking 8:15 22:3 27:13 39:11 part 4:22 5:2,6 47:8 particular 9:22 17:4 19:24 48:2,4,6 parties 17:7 52:17 party 40:21 pass 3:19 27:5 27:19 passed 17:12,14 19:6 27:5,6 passenger 13:14 passing 24:7 26:14 path 3:19 17:8 18:11 55:15 pedestrians 56:1 56:5,14 Penal 10:12 11:8 people 6:9 7:5 12:2 14:4 16:21 21:5 31:23 33:10 38:17 39:9,9 44:19 45:25 46:23 47:1,6 47:10 50:2 51:15 perceives 48:13 percent 6:10,12 38:3 46:13 50:25 period 17:1,13 permission 15:5 15:8,11,21,22</p>	<p>16:4,7 perpetrator 37:2 38:4 person 5:15 6:11 9:4 21:8,13 31:6 34:9,12 36:10 40:22,23 42:14,17 49:24 52:21 personally 3:11 perspective 8:12 petition 55:23 Petitioner 1:4 1:16,20 2:4,13 3:7 14:10 15:2 15:21 18:5 26:6 53:24 Philadelphia 11:24 12:25 PHILIP 1:15 2:3,12 3:6 53:23 phrase 16:8 physical 36:7 55:18 PIT 15:6,15,21 16:4 Plaintiff 36:17 40:20 please 3:9 18:7 26:4 plus 13:23 point 3:23 4:1 5:9,9 6:23 8:17 11:9,10 14:9 16:17 23:3,13 25:5,15 28:19 32:7,11 34:23 37:7,15 39:11 39:22 40:11 43:19 44:19 48:8 51:11 pointed 35:10 police 3:10,14 4:24 8:19,19 8:24 16:11 17:1 18:10,11</p>	<p>18:24 19:9,16 19:17 20:2,6 20:18 22:2 23:16 24:14 25:20 31:20 34:25 35:7 38:4 40:4,6 43:3,23 45:23 46:2,21 48:23 48:25 49:13 51:9 52:5,7 53:4 policeman 5:14 34:9,11 policeman's 13:16,17 policy 51:12 52:23 portion 47:15,16 47:19 51:11 pose 23:5 posed 20:17 23:4,15 24:4 56:2 poses 18:23 position 23:8 43:17 possible 6:3 16:20 50:21 possibly 43:13 potential 11:15 47:7 potentials 16:24 precisely 56:18 present 38:14 53:14 presented 9:7 presents 22:9,9 presume 32:24 pretend 44:12 44:13 pretty 49:1 prevail 14:16 prevent 20:14 35:7 prior 41:18 42:2 private 27:13</p>	<p>probability 7:19 8:2 9:17 17:15 31:20 probable 14:24 54:4,25 55:3 55:17 probably 7:7 53:3 problems 46:19 procedure 16:4 produced 36:7 productive 51:25 prolong 52:7,8 propose 5:14 proposing 6:10 prosecuted 40:10 protect 18:13 46:25 protects 47:1 prove 47:22 provided 54:21 provides 34:5,23 proximate 46:4 46:7 prudently 46:11 public 18:13 23:5 25:20 48:6 50:16 52:8 pull 43:25 pulled 5:11,12 pulling 9:2 pursued 37:20 42:15 pursuing 8:16 30:3 pursuit 3:12,15 12:18 29:18,20 31:21 37:10,12 38:4 39:18 50:14,15 pursuits 37:13 put 4:16 7:2 8:11 20:10 24:21 27:21</p>
--	---	---	---	--

<p style="text-align: center;">Q</p> <p>qualified 54:2 question 4:3 7:23 9:22 13:19 14:19,21 14:23,25 20:12 20:13,15 21:18 24:22 28:14,17 28:21,23 29:16 30:9,17,18,19 31:14 33:3,11 42:11,13 43:20 50:1 54:18,21 54:24 55:2,2 55:16 57:8,14 57:15 questions 17:23 25:22 26:6 quite 22:10 36:14 quote 34:17</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 races 18:9 racing 21:14 radio 30:3 31:11 raise 13:2 raised 51:13 raising 13:23 ram 28:12,13 39:9 45:24 ramming 35:7 35:25,25 56:2 56:5,15 ran 3:20 19:8 22:1,4 range 33:20 rate 4:16 7:25 rates 55:14 rational 32:1 reach 11:2,8 reaching 22:5 reaction 4:22 31:4 read 11:1 30:25 31:1 33:5,5</p>	<p>reading 51:10 real 20:11 25:2 25:17 realized 26:9 really 4:8 reason 21:12,14 23:7,9 24:3 53:15 reasonable 9:3 12:21 13:7,22 13:25 14:6,18 19:21 20:1 21:20 22:6 24:10,10,23 25:6 31:15 33:24 40:21 43:2 56:10 reasonableness 20:25 29:11 33:8 reasonably 5:18 12:4,12,13 13:1 18:23 20:16 23:14 25:13 29:13 42:14 50:17 55:3 56:22 reasoning 13:10 reasons 51:13 rebuttal 2:11 17:24 53:23 reckless 18:9,16 19:17 39:16 recklessly 9:4 recognized 55:19 record 6:25 15:23 19:23 21:15 37:24 47:19 50:24 red 3:21 19:9 22:1 32:10 44:7 45:4 reference 6:2 7:5 reflects 47:19 reflexes 28:20</p>	<p>28:23 refocus 54:1 regained 14:9 regard 29:2 33:22 regardless 24:2 24:10 relevance 30:24 relevant 7:15 25:12 32:4,11 32:19,20 relied 35:18 remaining 53:22 repeal 41:15 required 42:23 resolve 10:3 respect 24:21 33:24 34:3 54:18 respects 15:14 respond 15:13 51:10 57:13 Respondent 1:22 2:8,10 3:14,17 19:18 20:17 23:4,14 23:15 26:2 Respondents 24:21 responding 26:5 57:14 response 15:20 responsible 6:9 result 7:21 33:16 34:25 55:21 resume 38:5 reverse 25:21 review 55:4 57:16 right 8:24 19:11 19:13 20:3,25 21:3,11 27:22 30:22 43:18 44:8 45:2 51:19 rise 24:16 48:10</p>	<p>52:11 55:3,16 risk 5:14,15,19 7:4,6 9:7,12 10:24 13:3,23 14:5,7 18:24 20:17 24:4 26:16,18 27:25 28:15,21,25 29:2,9,15,18 29:19,21 32:12 32:15,21 50:15 50:16,19 52:16 risking 12:14 risky 15:8 49:1 road 8:3 12:14 17:4 23:25 24:5,7,21 27:14,25 28:9 28:12 37:11 40:14 42:20 43:2 44:10 46:16 48:2,15 48:20 56:12 roadblock 24:14 24:15,18 36:4 36:6 roadblocks 16:20 roads 3:18 roadway 20:19 ROBERTS 3:3 8:23 17:25 18:14 22:6,12 25:23 26:11,19 26:24 34:20 35:16 36:22 37:6,14,19 38:7 51:5,17 53:20 56:23 57:19 room 40:9 rose 56:25 route 17:2 rule 5:13 6:10 20:6 25:2,18 33:18 34:2,5 45:22,23 48:22</p>	<p>53:6,7,10 rules 33:4 ruling 41:8 rulings 41:18 run 28:11 running 7:15 9:16 34:10 37:3 38:5 52:22</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 Sacramento 19:15 20:10 24:25 50:11,13 safe 15:16 38:5 safely 47:17 safety 18:13 40:12 sake 53:2 save 17:24 Savrin 1:15 2:3 2:12 3:5,6,8 4:7,10 5:1,8,16 5:21,25 6:5,15 6:19,23 7:7,11 7:17,22 8:6,11 8:14,21 9:1,13 9:18,25 10:2,6 10:10,17 11:1 11:20,23 12:10 12:17,22 13:5 13:9,20 14:1,8 14:22 15:4,13 16:1,5,10,15 16:23 17:5,11 17:20 18:1 53:22,23,25 54:20 55:8,11 56:7,16,19 57:1,20 saw 4:25 28:3 44:23 saying 10:20 34:6 35:13,14 51:1 55:23 says 5:17 6:10</p>
--	--	--	---	--

<p>23:22 31:10 33:6 36:3 38:10 45:14 50:25 51:3 52:23 53:6,10 53:12,16 57:4 57:5,15 Sc 19:25 20:3,5 Scalia 6:7,16,21 8:1,7 12:9,12 12:19 20:9 22:23 28:2,5,7 34:17 36:9,13 36:25 38:16,19 39:2,5 41:1,4 41:12 47:12,14 47:21 48:1,18 49:4,7,12,16 52:25 55:5,10 56:13,17 scariest 28:2 scary 48:3 scenario 32:17 56:21 scene 18:22 54:11 Scott 1:3 3:4,13 3:23 4:25 5:1 8:16 12:13 15:5 17:5,16 20:16 21:12,18 21:22,23 23:9 23:13,21,22 24:4,8,20 25:13 26:7 27:16,21 29:24 29:25,25 30:4 30:5,7,10,19 30:21,22 31:10 32:2,4,7,17 35:17 49:2,9 Scott's 3:22 4:12 21:22 26:25 second 8:13 15:20 16:25 21:18 36:17 54:5</p>	<p>seconds 17:13 56:9 see 30:23 42:1,2 44:14,15,18 45:15 seen 44:12 sees 51:7 seized 47:1 seizure 24:18,19 35:13 36:14,18 sense 34:8 serious 7:20 10:24 13:2,3 13:24 14:3,18 20:17 22:25 24:4 26:10,12 28:22 29:10,15 31:16,24 32:15 55:18 set 54:25 setting 24:14 severity 32:22 shifting 31:2 shoot 38:25 39:2 shooting 11:3 34:9 38:16,21 38:24 39:1 51:18 shopping 3:21 3:24 4:4,5,9,23 5:6 22:3 27:12 27:14,17 44:22 short 17:1 show 3:13,17 21:16 22:15 29:25 31:6 52:25 53:6 showing 46:12 shown 29:3 40:6 shows 17:12 44:5 52:20 54:6 56:9 side 31:2 sides 38:2 44:5 sign 27:9 signal 27:6,8 28:19,24</p>	<p>signals 47:23 significant 32:22 similar 31:4 simple 33:7 simply 14:24 26:15 33:8 36:14 37:10 40:22 42:20 50:9 53:10,12 sirens 43:22 situation 13:15 16:12 20:14 32:5,18 40:16 43:14 situations 31:21 six 35:4 slowed 8:18 9:8 slowing 9:3 smoking 27:9 solely 41:20 Solicitor 1:17 somebody 8:5 8:10 23:25 30:3 38:22 somebody's 38:11 somewhat 31:4 sorry 12:10 13:20 sound 30:14 SOUTER 12:24 13:6,18,21 14:4 16:8 28:14,17 29:7 32:2,16 sparing 15:7 speak 24:22 sped 9:4 speed 4:17 6:24 7:14,16,19,25 8:8 9:20 15:10 18:18 20:2 21:13 23:5,21 25:21 26:17 28:8 31:23 32:6 55:14</p>	<p>speeder 24:14 speeders 53:1,8 speeding 8:20 8:24 9:2 22:9 23:10 30:1,20 30:24 31:7,17 31:23 32:18 48:17 speeds 3:16 4:2 4:16 19:5 22:5 spin 15:16 split-second 54:12 spun 15:17 squad 22:2 St 35:3 stage 25:10 29:13 stake 24:1 31:17 standard 20:25 21:11 33:2,7,7 33:12 50:13 standpoint 46:22,23,25 54:11 started 8:25 33:1 stated 54:10 statement 56:24 states 1:1,12,19 2:7 18:4 46:2,5 54:22 Statistic 22:15 Stevens 4:3,8 7:14,18 9:10 9:16,23 10:1,4 10:8,14 16:11 16:15,19 17:3 17:9,18 19:10 19:19,24 20:12 20:16 22:19,23 22:24 25:4 49:25 50:7,18 51:1 52:5,15 sticks 11:13 stolen 22:17 37:16 38:6</p>	<p>stop 6:12,16 7:24 9:11,20 11:13 18:9,19 23:10 33:18 34:12 43:3,23 49:13 53:6 stopped 8:16 9:9 37:12 48:15 53:4 stopping 7:4,5 stops 38:4 strangler 27:8 studies 46:12 study 37:25,25 38:1 52:25 53:6 subject 50:25 subjected 33:25 submit 16:24 25:12 submitted 57:20 57:22 substantial 13:23 14:5,7 18:24 28:15,21 29:9,14 successful 3:25 sufficiently 36:17 51:25 summary 11:22 25:10 29:12 supervisor 15:22 16:2 supporting 1:19 2:8 18:5 suppose 8:1 22:7 23:19,20 54:17 supposed 5:6 18:16 21:9 33:13,13 44:3 44:11,12 45:16 54:15 Supreme 1:1,12 41:17 sure 4:19 22:22 28:20 Surely 43:22</p>
---	---	---	---	---

<p>surprised 52:8 surrounding 33:4 suspect 4:22 18:8 33:19,25 34:4 57:4 suspects 23:4 25:3,19 52:2 suspect's 18:12 swerved 3:18 49:8 swerving 26:21 40:15 44:5</p> <hr/> <p style="text-align: center;">T</p> <p>T 1:21 2:1,1,9 26:1 take 16:9 17:2 31:23 39:4 48:16 taken 38:20 39:13 talk 12:20 talked 12:21 talking 14:5 26:19,20,23 29:7 38:23 39:17 42:6,7 tape 4:22 28:1 28:11 31:3,4 40:13 41:13 44:4,4 54:16 54:17 56:8 technical 57:9 technique 15:4,6 tell 11:5 39:10 temporary 8:16 terminate 3:12 9:7 29:20 46:8 46:15 terminates 46:10,17 terminating 5:19 termination 32:20 terms 57:14</p>	<p>terrorism 37:21 test 7:3,12 9:22 10:11,12,18,21 10:24 11:7,18 34:2 43:4,5 testified 30:5,7 37:24 38:3 testimony 16:5 21:23 26:7 30:13 37:23 50:24 testing 6:4 tests 11:8 Thank 17:25 18:6 25:23 53:18,20,25 57:19 theory 46:3 thing 6:23 15:2 23:21 31:12 34:14 things 5:4 8:15 21:6 23:19 54:3 think 5:2 6:5,5 6:21 7:11 9:13 9:18,20 12:6,7 12:8 15:1 16:15,18 19:1 22:18 30:8 37:7 45:17 48:2,4 49:2,12 52:10 54:5,9 54:20 55:15,18 56:10 57:8,15 thinking 19:19 thinks 42:14 third 11:24 12:15,19 17:7 52:17 thought 10:21 44:17 threat 23:3,15 24:8 29:5 40:24 48:10 55:17 56:3 threaten 33:10</p>	<p>threatening 34:12 43:6 threatens 34:10 three 19:9 22:2 43:12 ticket 22:9 time 9:7,8 17:1,4 17:13,24 26:8 26:9 29:8 35:7 35:24 38:3,6 39:11 52:21 56:2,10,22 times 7:1 13:13 TIMOTHY 1:3 tires 11:13 today 47:3 tort 46:1 traffic 8:4 17:4 26:17,20,22 39:18 40:8 41:23 42:5 44:25 47:17 56:18 tragedy 17:16 training 31:20 travel 3:20 5:11 17:8 traveling 3:19 7:1 16:25 24:5 treat 34:13 tremendous 27:25 trial 9:24 40:19 41:2 tried 3:23 true 17:3 19:14 23:2 48:2 50:21 53:3 56:8 try 6:12 23:25 28:12 34:11 trying 8:18 12:3 22:8 23:10 31:16,21 35:17 39:9 42:20 43:23 45:24 46:8 50:1</p>	<p>turn 27:6,17 47:23 turned 27:11,12 turning 27:7 two 15:14 16:16 21:12 23:20 41:11 43:16 54:3 two-lane 3:17 24:6 26:21 28:9 48:20 type 50:12</p> <hr/> <p style="text-align: center;">U</p> <p>uh 22:23 ultimately 25:8 uncertain 33:1 underlying 30:1 30:20 32:22 42:7 understand 13:6 30:16 52:5 undisputed 3:13 4:15 15:23 25:12 55:21 unguided 49:22 United 1:1,12,19 2:7 18:4 54:22 unreasonable 25:7,11 28:1 50:19 unsafe 26:16 27:1 39:7 47:18 52:3 unsafely 42:18 48:13 52:22 53:11 urge 25:21 use 9:11 13:16 13:17 15:5,8 15:23 16:17 18:11 20:13 23:14 24:10,23 28:24 33:4,18 33:20,23 34:3 34:25 40:25 41:24 42:9,22</p>	<p>43:3,18 44:1 44:20 45:22 48:12 50:9 51:2,4,25 uses 9:19</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5 41:7,15,16 49:18 50:11 vast 31:25 vehicle 3:22,25 4:12,12 7:24 9:9,20 11:12 13:12,16 14:1 14:9 15:17,19 16:24 17:14 18:13,23 23:5 35:8 39:5 47:22 49:18,20 49:21 53:17 56:9,11 vehicles 6:25 15:10 19:8 20:18 22:15,18 36:8 56:14 versa 4:13 versus 3:4 5:15 19:15 20:10 24:25 29:21 34:18 35:3 36:2 54:10,22 vice 4:13 vicinity 56:8 VICTOR 1:6 videotape 17:12 27:24 videotapes 3:16 view 10:15 34:23 43:2 vigorous 51:22 violate 3:13 violated 21:13 violates 35:25 violation 23:11 26:17,20 30:1 35:9 41:10,23 42:5,7</p>
--	---	--	--	--

<p>violence 32:23 43:6,7 violent 29:4 violently 39:8 40:24 42:18</p> <hr/> <p style="text-align: center;">W</p> <p>W 1:15 2:3,12 3:6 53:23 wait 56:13 waited 56:17 wake 11:6 want 6:3,23 7:10 41:15 51:13,14 wanted 25:15 warning 43:10 43:14,18,21,24 44:1 Washington 1:8 1:18 wasn't 9:23 16:9 18:19 27:12 32:11 35:15 40:23,24 43:21 56:11 watched 40:13 41:12 wax 4:22 way 7:13 18:25 23:17 27:18,22 28:1 35:6 38:17 40:14 41:13 44:10 46:21 51:23 weaved 3:21 weaves 44:9,10 weaving 27:12 44:5,20,24 weeks 35:4 weighing 50:15 went 4:23 27:17 36:19 weren't 8:19 We'll 3:3 we're 10:19 14:5 26:23 white 57:7</p>	<p>windy 24:7 28:9 wonder 45:14 wondered 33:1 wonderful 47:24 word 44:20 words 6:1 7:2 15:19 worry 43:17 wouldn't 4:4 17:10 23:18,24 49:2 written 34:17 wrong 3:20</p> <hr/> <p style="text-align: center;">X</p> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <p>yard 21:7 Yeah 32:20 45:10 47:13 years 35:5 yellow 8:3 22:1 32:9 young 23:23</p> <hr/> <p style="text-align: center;">Z</p> <p>zone 19:13,22</p> <hr/> <p style="text-align: center;">0</p> <p>05-1631 1:5 3:4</p> <hr/> <p style="text-align: center;">1</p> <p>10:48 1:13 3:2 100 7:1 19:5 11 12:2 27:14 11:47 57:21 12 17:13 56:9 130 8:13 16:25 18 2:8 32:5 193 24:13 1983 24:16 1985 35:3 1993 35:12 1996 54:23 1998 35:20</p> <hr/> <p style="text-align: center;">2</p>	<p>2007 1:9 26 1:9 2:10</p> <hr/> <p style="text-align: center;">3</p> <p>3 2:4 36 17:12 39 55:23</p> <hr/> <p style="text-align: center;">5</p> <p>50 6:10,11 53 2:13 55-mile 19:13,22</p> <hr/> <p style="text-align: center;">7</p> <p>7 50:25 70 38:3 46:12 72 19:12,22 20:7</p> <hr/> <p style="text-align: center;">8</p> <p>80 19:5 83 24:13 85 53:7</p> <hr/> <p style="text-align: center;">9</p> <p>90 4:17 6:8,24 8:2,12 12:14 13:4,22 18:17 20:2,8 21:15 22:5 24:6,6 26:21 32:9 37:11 39:15 49:7 53:5</p>		
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