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IN THE SUPREME COURT OF THE UNITED STATES

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UTAH, :

Petitioner : No. 14-1373

v. :

EDWARD JOSEPH STRIEFF, JR. :

- - - - - x

Washington, D.C.

Monday, February 22, 2016

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

APPEARANCES:

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

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

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

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

2 (11:05 a.m.)

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

5 Mr. Green.

6 ORAL ARGUMENT OF TYLER R. GREEN

7 ON BEHALF OF THE PETITIONER

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

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

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

20 Extending the exclusionary rule --

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

23 MR. GREEN: Well, Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 And this Court's cases --

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

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

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

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

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

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

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

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

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

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

13 JUSTICE SOTOMAYOR: So isn't flagrancy --

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

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

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

25 JUSTICE KENNEDY: So it seems to me that the

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

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

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

1 intervening circumstance there was a commitment --

2 JUSTICE SOTOMAYOR: This is a non sequitur.

3 When you talk about an intervening circumstances --

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

5 something different than the actual stop. Another

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

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

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

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

10 block.

11 Those are intervening circumstances because

12 they are something outside of the stop. This location

13 of evidence was a direct product of the stop.

14 MR. GREEN: Well --

15 JUSTICE SOTOMAYOR: It would never have

16 happened except for the stop.

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

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

19 actually something else that happened here. That was

20 that prior finding of probable cause by a neutral and

21 detached magistrate on a crime completely unrelated to

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

23 sense, it does resemble --

24 JUSTICE SOTOMAYOR: Mr. -- you know

25 something? Finding the baggie of cocaine gives the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 (Laughter.)

4 MR. BASH: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 With respect to --

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

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

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

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

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

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

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

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

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

25 JUSTICE KAGAN: But does that mean that

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

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

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

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

1 officer is acting in good faith, and someone is found
2 with very serious evidence on them of drug trafficking
3 or a firearm. And it would make --

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

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

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

25 That person could have been one of two

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

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

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

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

24 Do you have -- are you saying Utah was
25 wrong? That the three-prong test that we have now is

1 fine? Would you change, in any respect, how we look at
2 these attenuations?

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

7 Mr. Chief Justice, can I --

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

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

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Ms. Watt.

19 ORAL ARGUMENT OF JOAN C. WATT

20 ON BEHALF OF THE RESPONDENT

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

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

25 It would create a powerful incentive for

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

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

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

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

17 MS. WATT: The statistics are important to
18 our argument, but not necessary. Because even without
19 the statistics, we know that officers make stops
20 precisely for that reason: To find the warrant. That's
21 why they're making the stop. They can target
22 communities. And so even if there's just a -- a very
23 minor amount of -- of warrants, they can still target
24 communities that may have a greater incidence of
25 warrants. And if this were the rule, there would be no

1 downside. Officers --

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

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

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

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

25 JUSTICE KENNEDY: Could -- could you -- is

1 it permissible to do a warrant check as part of a lawful
2 Terry stop?

3 MS. WATT: A lawful Terry stop?

4 JUSTICE KENNEDY: Yes.

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

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

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

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

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

1 flagrant. And -- and Dunaway tells us that we don't
2 need some overarching flagrancy, that that's enough.

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

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

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

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

22 MS. WATT: If you had --

23 CHIEF JUSTICE ROBERTS: And some of these
24 numbers -- obviously, you have, in particular
25 communities, high numbers, but some of them didn't

1 strike me -- I was surprised how low they were. 323,000
2 is a big number, but that's the entire State of Florida.

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

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

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

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

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

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

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

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

10 MS. WATT: That's right.

11 JUSTICE SOTOMAYOR: All right.

12 MS. WATT: Right.

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

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

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

21 JUSTICE SOTOMAYOR: Yes.

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

24 JUSTICE SOTOMAYOR: Without.

25 MS. WATT: Without, you cannot. You

1 cannot -- the officer cannot detain someone without
2 reasonable suspicion to run a warrants check.

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

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

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

13 MS. WATT: Yes.

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

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

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

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

24 JUSTICE ALITO: Well, in any circumstance.

25 MS. WATT: So -- so this case has not come

1 before the Court. We know that an arrest warrant is not
2 always an intervening circumstance. It wasn't one in
3 Taylor v. Alabama.

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

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

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

19 JUSTICE KENNEDY: Could you --

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

22 JUSTICE KENNEDY: Go ahead.

23 JUSTICE GINSBURG: You said you don't
24 question at all the arrest, and you don't question, once
25 there is an arrest, to pat down for drugs -- I mean, the

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

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

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

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

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

23 MS. WATT: Right.

24 JUSTICE ALITO: Okay. But -- so you're
25 asking for the suppression of the fruit of a lawful

1 search.

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

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

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

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

24 Second --

25 CHIEF JUSTICE ROBERTS: You're arguing

1 something that the State's conceded, right?

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

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

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

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

23 CHIEF JUSTICE ROBERTS: You -- you said that
24 the -- that the stop was made for the purpose of running
25 for the arrest warrants. I just don't know the basis

1 for that, other than your statistics that in certain
2 areas there are a high number of arrest warrants. In
3 many areas there aren't.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: No, I understand

1 that.

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

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

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

15 JUSTICE SOTOMAYOR: You're --

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

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

25 The other concern is if he thought --

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

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

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

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

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

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

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

22 MS. WATT: No.

23 JUSTICE SOTOMAYOR: Correct?

24 MS. WATT: Correct.

25 JUSTICE SOTOMAYOR: So the purpose, as I

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

6 MS. WATT: But that's --

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

13 MS. WATT: Find the warrant.

14 JUSTICE SOTOMAYOR: Exactly.

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

19 MS. WATT: It does happen.

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

25 MS. WATT: So --

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

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

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

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

1 But whatever -- we don't know what he said.
2 But then at some later point he ran a warrants check.
3 So how can we infer from that, that the whole point of
4 the stop was to run the warrants check?

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

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

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

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

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

16 MS. WATT: Right.

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

21 MS. WATT: Right. Right.

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

24 MS. WATT: Well, when an -- when an officer
25 makes a stop --

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

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

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

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

11 CHIEF JUSTICE ROBERTS: Okay.

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

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

24 JUSTICE GINSBURG: In -- in your brief you
25 took the position that -- that an event is intervening

1 only if it is unforeseeable.

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

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

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

24 The -- the rule that we are really asking
25 the Court to -- to adopt follows settled exclusionary

1 rule case law, and that is that -- that if there is the
2 bad stop, it's suppressed unless there is attenuation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MS. WATT: So --

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

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

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

18 MS. WATT: I -- I suppose --

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

21 MS. WATT: Yes.

22 (Laughter.)

23 MS. WATT: In those communities, then you're
24 going to see much less of this behavior, you know, much
25 less of the running of warrants checks in order to find

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

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

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

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

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

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

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

23 JUSTICE SOTOMAYOR: I'm very surprised that
24 Justice Alito doesn't know that most of these warrants
25 are automatic. If you don't pay your fine within a

1 certain amount of days, they're issued virtually
2 automatically.

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

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

8 MS. WATT: I'm sorry.

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

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

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

1 incentive for police officers to walk up to people on
2 the street and simply stop them.

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

6 CHIEF JUSTICE ROBERTS: Thank you, Ms. Watt.

7 Mr. Green, you have four minutes remaining.

8 REBUTTAL ARGUMENT OF TYLER R. GREEN

9 ON BEHALF OF THE PETITIONER

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

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

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

19 If you look at page --

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

25 MR. GREEN: He -- he runs them, Justice

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

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

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

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

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

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

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

22 We've cited four cases from four different
23 State courts in our reply brief, in footnote 1 of our
24 reply brief. That's Illinois, Missouri, New Jersey.
25 And Oregon, where the courts that have applied this rule

1 have undertaken the flagrancy inquiry and have, in fact,
2 suppressed evidence because the initial stop was
3 flagrant.

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

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

23 If there are no further questions.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Case is submitted.

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

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