

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: MICHIGAN DEPARTMENT OF STATE POLICE,
ET AL., Petitioners V. RICK SITZ, ET AL.

CASE NO: 88-1897

PLACE: Washington, D.C.

DATE: February 27, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHIGAN DEPARTMENT OF STATE :
POLICE, ET AL., :
Petitioners : No. 88-1897
v. :
RICK SITZ, ET AL. :
-----x

Washington, D.C.
Tuesday, February 27, 1990

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:12 a.m.

APPEARANCES:

THOMAS L. CASEY, ESQ., Assistant Solicitor General
of Michigan, Lansing, Michigan; on behalf of
the Petitioners.

STEPHEN L. NIGHTINGALE, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; as
amicus curiae, supporting Petitioners.

MARK GRANZOTTO, ESQ., Detroit Michigan; on behalf of
the Respondents.

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1 objective guidelines which limit the discretion of
2 officers in the field and limit the nature of the
3 intrusion.

4 The case today presents no new legal issues.
5 The only question is whether Michigan's temporary sobriety
6 checkpoints are like the roving patrols in Delaware v.
7 Prouse or, as we argue, are more like the fixed
8 checkpoints in Martinez-Fuerte in which no individualized
9 suspicion is required.

10 QUESTION: Mr. Casey, this action was brought as
11 a facial challenge of some kind to the program?

12 MR. CASEY: That's correct.

13 QUESTION: And the plaintiffs in the case are
14 simply citizens who drive in Michigan?

15 MR. CASEY: That's correct.

16 QUESTION: No one was a plaintiff named in the
17 case who had been stopped at a checkpoint?

18 MR. CASEY: The complaint was filed before any
19 sobriety checkpoints had been operated.

20 QUESTION: Do you think that the plaintiffs have
21 standing?

22 MR. CASEY: I believe they do. The case --

23 QUESTION: Why?

24 MR. CASEY: The case was brought under the
25 Michigan declaratory judgment action by the plaintiffs in

1 their capacity as licensed drivers in the State of
2 Michigan who allege that if sobriety checkpoints were
3 operated there was a very great likelihood that they would
4 be subject to the checkpoints. We agree. If the
5 checkpoints were operated, these individual plaintiffs
6 would be subjected to them.

7 We think there is a sufficient case or
8 controversy to confer standing in both the state courts
9 and in this Court, even without waiting for a particular
10 operation of the checkpoint.

11 QUESTION: Suppose the police department has a
12 policy of applying choke holds to people resisting arrest.
13 Would -- would any citizen have standing to challenge that
14 practice?

15 MR. CASEY: In that case, the --

16 QUESTION: On the theory that he might be
17 arrested and the choke hold applied to him.

18 MR. CASEY: The likelihood of any individual
19 citizen being subjected to that police tactic is not as
20 high as the likelihood that individual citizens in
21 Michigan will be subjected to sobriety checkpoints. So we
22 think our case -- the plaintiffs do have sufficient
23 standing to permit the Court to address this question as a
24 facial constitutional challenge without waiting for an
25 individual to be arrested and then tried as applied to

1 him.

2 QUESTION: Well, surely the state courts thought
3 that there was standing for purposes of a state action.

4 MR. CASEY: Yes, that's quite clear. There was
5 no challenge by us to --

6 QUESTION: And you're on -- you were on the
7 losing side?

8 MR. CASEY: That's correct.

9 QUESTION: So you're stuck with the judgment?

10 MR. CASEY: So far we are, yes, Your Honor.

11 (Laughter.)

12 MR. CASEY: There is no dispute as to the
13 operation of the Michigan checkpoints. They were intended
14 to promote the public health and safety by reducing the
15 appalling number of deaths and injuries and the staggering
16 economic costs caused by alcohol-related traffic crashes.
17 The committee which drafted the Michigan guidelines
18 observed that in 1984 in Michigan alone there were 800
19 deaths, more than 28,000 injuries and more than \$350
20 million in economic costs caused by alcohol-related
21 traffic crashes.

22 The sobriety checkpoints are intended to
23 increase the public's awareness of the nature and severity
24 of the problem of drunk driving. They are intended to
25 apprehend people who are driving drunk at the time and to

1 deter others from driving drunk in the future.

2 The sobriety checkpoints use neutral, objective
3 criteria which were carefully designed to minimize the
4 discretion of the officers in the field and to minimize
5 the extent of the intrusion. All oncoming traffic in the
6 selected location is alerted by way of an extensive series
7 of signs, flares, lights, traffic cones, officers with
8 reflective vests. Traffic is funneled into one lane of
9 traffic.

10 The drivers are stopped for between 20 and 30
11 seconds while a police officer approaches the driver,
12 identifies himself or herself, explains the nature of the
13 checkpoint and hands the driver an informational brochure
14 and a public opinion survey card which the driver is
15 requested to return.

16 If there are no visible signs of intoxication,
17 the driver is then free to go on his or her way. If the
18 officer observes articulable signs of intoxication, he may
19 direct the driver over to a safe area for further
20 investigation.

21 QUESTION: Well, when you're stopped by a police
22 officer, aren't you normally very nervous if you're
23 perfectly sober?

24 MR. CASEY: Not necessarily. Some people might
25 be nervous. Others might feel reassured by the fact that

1 this is going on.

2 In the Maryland study which our committee relied
3 on and examined very closely, public opinion survey cards
4 were returned by the drivers who went through the Maryland
5 survey, and I believe the figure was 87 percent of the
6 cards which were returned indicated that they were not
7 opposed to the checkpoints, and 90 percent of them felt
8 that there was some deterrent effect.

9 QUESTION: (Inaudible) the police have stopped
10 you.

11 MR. CASEY: Not necessarily. Some drivers may
12 feel that. We don't think that that's the determining
13 factor in whether these are constitutional, however.

14 There's a legitimate and very serious societal
15 problem here, and to some extent these are an intrusion on
16 the motoring public, to be sure, but we submit that they
17 were very carefully designed to be a very minimal
18 intrusion. And when you weigh that in the balance of the
19 serious nature of the problem, we submit they are
20 reasonable.

21 QUESTION: Does Michigan use any kind of
22 checkpoints for vehicle safety check requirements?

23 MR. CASEY: That type of checkpoint is
24 authorized by the same statute which authorizes sobriety
25 checkpoints, and my understanding is that such checkpoints

1 have been operated on occasion in the past but there is no
2 standard procedure. They're not operated very frequently.

3 ~~different~~ QUESTION: What if there were a situation in a
4 particular area, for example, in the City of Detroit, with
5 high crime and a great many shootings. ~~in assuring that~~
6 ~~drivers~~ Do you suppose that Michigan could set up a
7 pedestrian checkpoint and frisk people for weapons?

8 ~~safety eq~~ MR. CASEY: I doubt if they could frisk them.
9 You'd get into the case of Terry v. Ohio on when a police
10 officer can pat down a person on the street. ~~roads of deaths~~

11 ~~and tons~~ What we're saying here is that the checkpoints
12 are located at times and in places where there is a ~~laning~~
13 demonstrated history of alcohol-related crashes. All ~~tes.~~
14 accident statistics are fed into a computer, and the ~~Brown~~
15 checkpoints are placed in locations where there has been a
16 history of accidents or high arrest rate. ~~ighting whether a~~
17 ~~particular~~ In that instance, the same type of balancing of
18 test would apply. You would have to look to the nature of
19 the severity of the problem, the amount of the intrusion,
20 and does the police procedure reasonably -- have
21 reasonable effectiveness in addressing the problem.

22 ~~sufficient~~ QUESTION: Are the same standards applicable to
23 a vehicle safety inspection stop and a sobriety ~~he gravity~~
24 checkpoint, same balance? ~~undisputed by plaintiffs here.~~

25 ~~It's wide~~ MR. CASEY: I believe they are. ~~ere the state~~

1 QUESTION: Same legal standards, same rules?

2 MR. CASEY: Correct. The purpose is a little
3 different, but the Court has recognized in Delaware v.
4 Prouse, for example, that the state -- pardon me -- the
5 state has a very significant interest in assuring that
6 drivers are properly licensed and have proof of insurance
7 and registration and that vehicles have the required
8 safety equipment.

9 The nature of the problem here is even more
10 serious than that. We're talking about hundreds of deaths
11 and tens of thousands of injuries every year.

12 In Brown v. Texas, the Court applied a balancing
13 test and discussed several of the traffic-checking cases.
14 In all the parties below in state courts, we use the Brown
15 v. Texas articulation as the standard. There, the court
16 identified three factors which go into weighing whether a
17 particular procedure is reasonable or not: the gravity of
18 the public concern, the extent to which the seizure
19 advances the public interest and the severity of the
20 interference with individual liberty.

21 We believe that the record in our case is
22 sufficient to demonstrate that the checkpoints are
23 reasonable under all three of these factors. The gravity
24 of the public concern is undisputed by plaintiffs here.
25 It's widely recognized. The key point where the state

1 courts went wrong, we submit, is in its conclusion that
2 the checkpoints were not effective enough. The court in
3 Michigan said that we did not prove a sufficiently high
4 arrest rate, we did not prove long-term deterrent effects
5 from the operation of the checkpoints and we did not prove
6 that they were the most effective method the police could
7 use.

8 We submit that the state courts severely
9 distorted the appropriate balancing test when they held us
10 to that kind of impossible burden. We think that in this
11 context where you have a very serious public problem and
12 minimal intrusion, all that the -- all that needs to be
13 shown is reasonable effectiveness. Is there sufficient
14 basis for the state officials reasonably to conclude that
15 sobriety checkpoints would be reasonably effective in
16 addressing the drunk driving problem.

17 QUESTION: Is it agreed that that -- this is a
18 seizure?

19 MR. CASEY: Yes, it is.

20 QUESTION: And it's agreed that it may -- it --
21 and the argument's whether it can be done without any
22 articulable suspicion, isn't it?

23 MR. CASEY: That's correct.

24 In several cases the court has articulated
25 standards in dealing with the effectiveness of various

1 procedures. In Delaware v. Prouse --

2 QUESTION: Mr. Casey, when you say -- when you
3 say this is a seizure, you mean it's a -- it's -- it's
4 like an arrest or it's like a Terry stop?

5 MR. CASEY: It is less intrusive than a
6 traditional arrest. The cars are required to stop for a
7 period of 20 to 30 seconds at the checkpoint. All cars
8 coming through in a certain direction are required to
9 stop.

10 In Michigan our checkpoint guidelines are set up
11 so that cars can turn off before they enter the check
12 lane, and on the one checkpoint which was operated, I
13 believe the record shows that six cars either made U-
14 turns or turned off before they entered the checkpoint.

15 QUESTION: What is the purpose of that?

16 MR. CASEY: The checkpoint guidelines were
17 developed with every effort to minimize the intrusion, and
18 that I suspect was one element of the effort.

19 QUESTION: So, you want to let the drunks get
20 away?

21 MR. CASEY: It would be easy to design a more
22 effective checkpoint than we have, but to do that would
23 probably require a greater intrusion. The balance that
24 the Michigan officials chose was to give as much weight as
25 possible to minimizing the amount of intrusion.

1 QUESTION: Would the U-turn provide probable --
2 articulate suspicion for a stop?

3 MR. CASEY: Not by itself. If the U-turn was
4 done in a fashion that violated traffic laws or if there
5 was some erratic driving or some other articulable
6 suspicion, then the guidelines say that that would be
7 enough to pursue the driver. But just the mere fact of a
8 lawful U-turn would not be enough.

9 Under the Martinez-Fuerte case the court said
10 that all cars coming through the checkpoint could be
11 seized and the officers running the checkpoint could
12 direct some cars to another area for further investigation
13 without any reasonable suspicion.

14 Our checkpoint is even more protective of
15 individual rights than that. The officers do not ask any
16 questions. Drivers are not required to show
17 identification. There is really no communication from the
18 driver required at all unless there are some visible signs
19 of intoxication, at which point the car would be directed
20 to a safe area.

21 QUESTION: Is the driver required to roll the
22 window down?

23 MR. CASEY: He's not required to, no.

24 QUESTION: If he advised that he doesn't have
25 to?

1 MR. CASEY: No, he's not advised.

2 QUESTION: Because if he didn't, how would you
3 ever find him? You can't --

4 MR. CASEY: There are many ways a trained police
5 officer could take notice of articulable facts involving
6 intoxication: uncoordinated physical movements, eye
7 motion. Perhaps he's got some beer in the car with him.
8 There are many ways.

9 Our checkpoints require an officer, before they
10 have further suspicion, to have articulable signs of
11 intoxication. I believe the Constitution perhaps does not
12 require even that high a standard. In Martinez-Fuerte the
13 court said that some cars could be directed for further
14 inquiry without reasonable suspicion.

15 QUESTION: Does refusal to roll down the window
16 itself constitute part of the suspicion?

17 MR. CASEY: Not by itself, no.

18 QUESTION: Well, is it one of the factors?

19 MR. CASEY: It could be one of the factors. In
20 several cases -- in the Ortiz case, for example, this
21 court discussed the idea that a trained police officer can
22 observe behavior which might appear innocent to an
23 untrained person and from that behavior the trained
24 officer can make inferences and deductions which would
25 form a basis for reasonable suspicion. That's why it's so

1 hard to say that any one factor would or would not be the
2 deciding factor.

3 There are command officers on the scene who are
4 involved in the decision whether to send a driver off for
5 further investigation. It's not up to the individual
6 officer in the field, and it is structured by the
7 guidelines themselves.

8 QUESTION: Under the standard procedure is an
9 officer stationed in a place where he can follow someone
10 who makes a U-turn?

11 MR. CASEY: There are several police cars to be
12 stationed before and after the checkpoint, so a car could
13 turn and follow a car that made a lawful U-turn, yes.

14 The case we principally rely on, of course, is
15 the Martinez-Fuerte case. We think our checkpoints are
16 constitutionally indistinguishable from the checkpoints
17 there.

18 The goal is different here. It's to prevent
19 drunk driving and prevent the harms that drunk driving
20 cause --

21 QUESTION: Mr. Casey, in Martinez-Fuerte were
22 the motorists aware or generally advised of the location
23 of the checkpoint?

24 MR. CASEY: In that it was a fixed checkpoint
25 which was permanently based.

1 QUESTION: So, people would have reason to know
2 where it was.

3 MR. CASEY: Yes.

4 QUESTION: Now, I guess in Michigan that's not
5 the case. You wouldn't know as a motorist --

6 MR. CASEY: There is general --

7 QUESTION: -- where it would be set up?

8 MR. CASEY: There is general publicity given to
9 the general area. Let's say in Saginaw County there will
10 be one, and the press would be advised of that. But as to
11 the specific location on a specific street, no, that would
12 not be.

13 QUESTION: Does that make a difference in the
14 constitutional balance?

15 MR. CASEY: I don't believe it does. Martinez
16 did not have that aspect. That is really the only factual
17 difference.

18 We submit that while our checkpoints are in
19 operation, however, they operate the same as Martinez-
20 Fuerte.

21 Drivers are given sufficient notice. They are
22 not surprised. There are the signs for up to half a mile
23 in advance. There is the opportunity to turn off. There
24 is no basis for the trial court's finding that there would
25 be fear or surprise in the motorists.

1 QUESTION: Mr. Casey, you said general notice is
2 given. A -- a notice is given that a checkpoint will be
3 established somewhere in Saginaw County?

4 MR. CASEY: Yes. And --

5 QUESTION: What you're talking about says
6 several of what Bay Cities and several cities --

7 MR. CASEY: In the general area.

8 QUESTION: And -- but -- all -- all that's known
9 in advance is that it will be in Saginaw County?

10 MR. CASEY: Correct. If we did not have that,
11 it would greatly diminish the deterrent aspect. If every
12 driver knew where it was going to be, it would be easy to
13 avoid. So, again, we've tried to balance the
14 effectiveness against the intrusion.

15 I want to save a few minutes for rebuttal, but I
16 just want to emphasize that we're asserting that the
17 proper balance test here shows that this is a serious
18 problem. It is reasonably effective, and it is minimally
19 intrusive. Thank you.

20 QUESTION: Thank you, Mr. Casey.

21 Mr. Nightingale, we'll hear now from you.

22 ORAL ARGUMENT OF STEPHEN L. NIGHTINGALE

23 ON BEHALF OF UNITED STATES

24 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

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

1 and may it please the Court:

2 We join in Mr. Casey's analysis of the legal
3 principles that govern this case, but if the Court please,
4 I will focus first on those features of the problem of
5 drunk driving in this country that have made it so
6 resistant to traditional law enforcement techniques and on
7 some of the reasons why sobriety checkpoints have been
8 widely recognized as the important elements of effective
9 drunk driving programs.

10 Mr. Casey indicated there has been no dispute in
11 this case that the problem of drinking and driving is a
12 very serious one. It is important, nevertheless, to pause
13 for purposes of the Court's balancing test and to
14 appreciate just how grave that interest is.

15 If one were to prepare a list of the most
16 important and serious threats to public health and safety
17 in this country, drunk driving would have to be at or near
18 the top of the list.

19 In 1988, 47,000 people were killed in traffic
20 crashes in this country. Of the roughly 62,000 drivers
21 involved, 25 percent were intoxicated legally at the time
22 of the accident.

23 QUESTION: Mr. Nightingale, going back to
24 Justice O'Connor's question, is the problem any less
25 serious with regard to firearms?

1 MR. NIGHTINGALE: I believe that there were more
2 people killed in traffic crashes, Your Honor, than there
3 were in -- by firearms.

4 QUESTION: But only 25 percent of those are
5 alcohol related, I thought you said.

6 MR. NIGHTINGALE: Well, in -- 25 percent of the
7 drivers involved are legally intoxicated. In the case of
8 50 percent of the fatalities, alcohol is involved, and
9 that refers to --

10 QUESTION: How do guns compare? How do firearm
11 -- danger compare with that?

12 MR. NIGHTINGALE: I believe that the number of
13 murders in the country -- and this is a rough recollection
14 of something I read along the way -- is on the order of
15 20,000. It's a --

16 QUESTION: Pretty serious problem, too, isn't
17 it?

18 MR. NIGHTINGALE: Host of very serious problems.

19 QUESTION: How about drug traffic? I suppose
20 you would take the position that that's an equally serious
21 national problem.

22 MR. NIGHTINGALE: It's certainly a very serious
23 national problem, yes.

24 QUESTION: So, can the government set up stop-
25 and-frisk points for pedestrians in drug use areas of

1 cities?

2 MR. NIGHTINGALE: You Honor, a frisk is a much
3 more intrusive form of interference with 4th Amendment
4 interests than a traffic stop. A traffic stop is a well-
5 accepted form of intrusion. In the Martinez-Fuerte case
6 the Court noted that it was a well-established practice.
7 Its utility had been accepted as an incident of travel on
8 the roads, and it is a very, very minimal interference
9 with Fourth Amendment interests.

10 QUESTION: The government cannot insist that you
11 have a license to walk along the sidewalk, can it?

12 MR. NIGHTINGALE: No, Your Honor, I wouldn't
13 think so.

14 QUESTION: And it does have the right to insist
15 that you have a license to drive.

16 MR. NIGHTINGALE: That's true, driving is a very
17 highly regulated activity in this country, in keeping with
18 the risk that it presents to others on the road.

19 QUESTION: So it's not inconceivable that you
20 might have a traffic stop not just for intoxication, but
21 for drug use. Does this to seek to find out the drug use
22 as well, this program, or is it just alcohol?

23 MR. NIGHTINGALE: I believe that at least under
24 the Department of Transportation's guidelines, as a result
25 of recent regulation, that drug use and alcohol use are

1 treated the same.

2 QUESTION: Well, speaking of statistics, I think
3 there are more deaths by automobile accidents than in all
4 the wars of this country put together. This was spelled
5 out in an opinion of this Court which you haven't cited.

6 MR. NIGHTINGALE: Right -- yes, Your Honor, and
7 also in the concurring opinion that you wrote, I believe.

8 QUESTION: How do we decide how effective this
9 is? I suppose that goes into a reasonableness
10 calculation. How does the Court make that judgment? Are
11 we limited to the record in the trial court here, or what?

12 MR. NIGHTINGALE: I would think not, Justice
13 Scalia, in this sense: in a number of the Court's cases
14 you have had to assess, necessarily, the deterrent effect
15 of various programs.

16 In the Mackey v. Montran case, which involved
17 whether drivers could have their licenses suspended for
18 refusals to take breathalyzer or blood alcohol test, the
19 Court indicated that they had a significant deterrent
20 effect.

21 In the Burger case, there was discussion about
22 the deterrent value that would be lost if warrants were
23 required for the sorts of searches that were involved
24 there. And it is a common element of the Court's
25 decisions in this area, both to consider the deterrent

1 effect of programs and all other --

2 QUESTION: Yes, but have we done it in cases
3 when the trial court has reviewed evidence on the issue
4 and their record has been developed? Have we said, well,
5 that's just a starting point, we'll go off on our own and
6 figure out what evidence we can find on our own? I know
7 we've done it in cases of a facial attack and no evidence
8 at all on the trial record, but --

9 MR. NIGHTINGALE: Well, I think it's important
10 to focus on the sort of trial record that was developed
11 here. This is not a record that gauges the effect of this
12 particular program in action. This is a record that
13 focuses on the potential of the program.

14 QUESTION: Whatever the record was is what the
15 state put in in order to justify the program. They had an
16 ample opportunity to put everything in they wanted, didn't
17 they? Maybe you could have tried the case better, but you
18 didn't try this case.

19 MR. NIGHTINGALE: That's true, Your Honor -- not
20 necessarily true that I could have tried it better, but
21 it's certainly true the state had an opportunity to put in
22 the evidence.

23 The issue really is -- I think the approach the
24 Court must take in this area results from the generality
25 of the Court's holdings. I mean, were the Court to take

1 this situation -- were the Court to say that this presents
2 only an issue of fact, the effect of the Court's decision
3 would be limited to these two parties as of this time, and
4 the Court has never viewed its role in the Fourth
5 Amendment area as limited. So --

6 QUESTION: We never viewed our role as just
7 deciding the case or controversy that's brought to us for
8 decision, I suppose.

9 MR. NIGHTINGALE: Well, that's certainly true,
10 but I think in this case the question is whether there is
11 a reasonable basis for a conclusion on the part of the
12 state authorities that this is a potentially effective
13 means of reducing drinking and driving.

14 QUESTION: Is that all it takes, a reasonable
15 basis in order to make the weighing of whether this is a
16 reasonable intrusion of privacy or not?

17 Suppose I disagree with the state. Suppose I
18 think -- it seems to me, if you took these 17 law
19 enforcement officers, however many were used in this stop,
20 and just set them out on the roads to look for people
21 weaving, you would do a lot more good than having sit at
22 this traffic stop for a number of hours and -- what did
23 they pick up, 2 percent of the people that went through?

24 MR. NIGHTINGALE: In this case, Your Honor, two
25 people were --

1 QUESTION: Suppose I think that?

2 MR. NIGHTINGALE: I think that --

3 QUESTION: Do I have to say well, the
4 legislature might have thought otherwise? Why can't I
5 just say, in my view it is unreasonable to do it this way,
6 you should do it another way?

7 MR. NIGHTINGALE: Because the test is not that
8 searching at this stage, where the issue is the base of
9 the program against a background of a very minimal
10 intrusion on privacy and very, very constrained limits on
11 discretion. There are good reasons --

12 QUESTION: But it's still not clear to me what
13 we looked at -- how do we decide reasonableness?

14 MR. NIGHTINGALE: I believe that you look --

15 QUESTION: Are these statistics irrelevant?

16 MR. NIGHTINGALE: I believe that the statistics
17 demonstrate -- confirm what common sense suggests in this
18 area. In other words, one knows --

19 QUESTION: So we do look at the statistics?
20 They are relevant?

21 MR. NIGHTINGALE: I think you may look at them,
22 yes. These are legislative facts involved here, facts --
23 ordinarily, the Court reviews -- takes a measure of the
24 deterrence, and in this case we believe that you can look
25 at the statistics to educate common sense.

1 QUESTION: How long was the program in operation
2 before the suit was brought?

3 MR. NIGHTINGALE: There was one checkpoint
4 operated.

5 QUESTION: For how long?

6 MR. NIGHTINGALE: For about an hour. 126 cars
7 were stopped. One driver ran the checkpoint; one was
8 referred to the safe area -- two were referred to the same
9 area, one of whom was found to be intoxicated and was
10 arrested.

11 QUESTION: Then it was stopped because the Court
12 enjoined it?

13 MR. NIGHTINGALE: That's correct. The complaint
14 was filed before the first checkpoint was operated and
15 then the program was enjoined after only a single
16 checkpoint had been run.

17 QUESTION: Mr. Nightingale, I'll have to take
18 back what I said. You did cite Perez in a footnote.

19 MR. NIGHTINGALE: Now, why -- getting back to
20 Justice Scalia's question about why it would be reasonable
21 for the Court to put a program like this in place,
22 experience demonstrates that only between one in 200 and
23 one in 2,000 drunk drivers can be apprehended on an
24 average weekend night, and therefore it's been the focus
25 of efforts to improve on the situation in this area, to

1 achieve more visibility, to achieve a more impressive
2 reminder of the state's commitment to curbing drunk
3 driving.

4 Thank you very much.

5 QUESTION: Thank you, Mr. Nightingale.

6 Mr. Granzotto, we'll hear from you.

7 ORAL ARGUMENT OF MARK GRANZOTTO

8 ON BEHALF OF THE RESPONDENTS

9 MR. GRANZOTTO: Mr. Chief Justice, and may it
10 please the Court:

11 There are two reasons why the decision of the
12 Michigan Court of Appeals in this case should be affirmed.
13 The first is based on this Court's decision last term in
14 Von Raab, and also in the Court's decision in Skinner.

15 In that case -- in those two cases, this Court
16 indicated the situations under which the Court would refer
17 to the balancing test in determining whether a particular
18 Fourth Amendment intrusion was in fact unconstitutional.

19 In Von Raab and Skinner, this Court indicated
20 that where the particular type of intrusion serves law
21 enforcement needs -- or, excuse me -- serves governmental
22 needs beyond the normal need for law enforcement, then the
23 Court would refer to a balancing test.

24 This case presents, for the first time, I
25 believe, in this Court, a situation in which a

1 suspicionless, warrantless seizure is being conducted
2 solely for one purpose. And that is to enforce the
3 criminal laws.

4 Under the decisions of this Court's last term,
5 in Skinner and Von Raab, this Court need not even refer to
6 the balancing test, in light of the fact that there is no
7 dispute that the reason this particular seizure takes
8 place is to in fact enforce the criminal law.

9 QUESTION: How about Martinez-Fuerte?

10 MR. GRANZOTTO: Martinez-Fuerte -- Justice
11 Powell, in his decision in that case, in a footnote,
12 indicated that many of the seizures which take place in a
13 -- at the border search or at the border stops, resulted
14 in something which did not go to a formal charge.

15 But, in fact --

16 QUESTION: But it was -- it was enforcing the
17 criminal law, nonetheless?

18 MR. GRANZOTTO: That's correct. That's correct.
19 Martinez-Fuerte was of course a criminal case. But to go
20 back to Almeida-Sanchez, three years before
21 Martinez-Fuerte, Justice Powell, in his concurring opinion
22 in that case, indicated that only 3 percent of all cars
23 that were stopped -- or, excuse me -- of all persons who
24 were stopped for violations of -- of the border -- illegal
25 aliens, only 3 percent of those people were in fact

1 prosecuted.

2 Therefore, we have a situation which is just
3 like New York v. Burger in that, indeed, it's -- there's
4 an overwhelming noncriminal purpose to the stops which
5 took place in Martinez-Fuerte.

6 QUESTION: Well, to -- to say that they're --
7 end up not being prosecuted doesn't mean they weren't
8 being used to enforce the criminal law. That was the only
9 law on the books there was that was being enforced, wasn't
10 it?

11 MR. GRANZOTTO: But -- but it wasn't being
12 enforced through means of a prosecution was the point.

13 QUESTION: Well, why does that make any
14 difference?

15 MR. GRANZOTTO: Well, it makes a -- it would
16 make a difference --

17 QUESTION: I mean, did the cases you rely on,
18 last year, make that point?

19 MR. GRANZOTTO: Excuse me?

20 QUESTION: Did the cases you rely on that we
21 decided last year, Von Raab and the other --

22 MR. GRANZOTTO: Skinner.

23 QUESTION: -- Skinner case, make the point that
24 you're making?

25 MR. GRANZOTTO: Yes. They did, in fact.

1 Because in the Von Raab case, for example, there was no --
2 there was -- there was no chance of there ever being a
3 criminal prosecution in light of the fact that these --
4 the testing which took place in Von Raab couldn't be used
5 unless by the agreement of the person whose test was being
6 taken in a criminal proceeding.

7 QUESTION: Well, but, I thought the point you
8 were making was that Martinez-Fuerte was really not a
9 criminal case, because so few people were prosecuted under
10 it?

11 MR. GRANZOTTO: No, that's not what I'm saying.
12 This Court has decided in New York v. Burger that a -- a
13 particular type of scheme can have both -- both an
14 administrative nature and a criminal nature.

15 Martinez-Fuerte fit squarely within the
16 dichotomy which was drawn in this Court in New York v.
17 Burger, because, as Justice Powell indicated, only 3
18 percent of these cases actually result in prosecution.

19 QUESTION: Well, but that doesn't mean it's an
20 admitted -- an administrative scheme. It's not as if
21 there was some administrative procedure that was being
22 enforced in Martinez-Fuerte. It was just different levels
23 of the criminal process.

24 MR. GRANZOTTO: Well, I would -- in -- in
25 response to your original question, Mr. Chief Justice, I

1 would also indicate to the Court that this Court has
2 indicated since Martinez-Fuerte that there is -- there is
3 a -- a nexus to the border -- the border which allowed the
4 Court to make the decision in Martinez-Fuerte as it did.

5 And that's the case of Montoya de Hernandez.
6 Because, in that case, the Court indicated that the
7 decision in Martinez-Fuerte was, in fact, connected to
8 this -- this country's vested right to protect its
9 borders.

10 And in that sense, the whole concept of a
11 probable cause or reasonable suspicion requirement was
12 automatically out of the Martinez-Fuerte case to begin
13 with.

14 QUESTION: Mr. Granzotto, what -- what do you do
15 about truck checkpoints on -- which exist on many state
16 highways, requiring trucks to pull over to determine
17 whether they're overloaded and whether their safety
18 equipment is operational?

19 MR. GRANZOTTO: To some extent, those cases may
20 fell -- fall within the balancing test, even under this
21 Court's decision in Von Raab and Skinner, because they may
22 involve, in particular states certainly, noncriminal
23 prosecutions, or at least a situation in which there is
24 both an administrative aspect --

25 QUESTION: Well -- well, okay, I'll make up one.

1 It's criminal. If -- if -- if they catch your truck with
2 too much weight on it, you're going to be cited
3 criminally, or with unsafe brakes.

4 MR. GRANZOTTO: Well, there's another construct
5 to the Fourth Amendment which may come into play in the
6 situation of a truck and a weigh station, and that is the
7 heavily regulated industry concept which has been
8 developed by the Court and applied in a number of cases.

9 That may well take it outside --

10 QUESTION: Heavily regulated industry -- I don't
11 know. You need a driver's license and a truck driver's
12 license, just as you need a car driver's license for a
13 car.

14 MR. GRANZOTTO: But it is -- excuse me -- it is
15 regulated because of the weight of the vehicle. That's
16 why the weigh stations exist, to -- to impose certain
17 restrictions on -- on the weights --

18 QUESTION: It seems to me circular. Since --
19 since the weigh stations exist, it's a heavily regulated
20 industry, which justifies the weigh stations.

21 MR. GRANZOTTO: No. The heavily regulated
22 industry construct, which this Court has adopted, is based
23 on one -- one thing. And that is, a piece of legislation
24 or a number of pieces of legislation. The weigh stations
25 have nothing to do with whether it is in fact a heavily

1 regulated industry.

2 QUESTION: How long had this checkpoint --

3 QUESTION: Certainly, there are a great number
4 of regulations of automobiles, safety requirements and so
5 forth that are contained in statutes?

6 MR. GRANZOTTO: Yes. Indeed. And as I pointed
7 out in my brief, there are certain vehicle checks which
8 could exist in Michigan in response to Justice O'Connor's
9 question to -- to the petitioner's attorney.

10 These particular stops in Michigan have, in
11 fact, been decriminalized recently, as Colonel Hough
12 testified in his testimony at the trial in this case. In
13 that situation, as I've indicated in my brief, those types
14 of suspicionless, warrantless stops would be subject to
15 the balancing test, which this Court has developed.

16 QUESTION: How long had this checkpoint been in
17 operation before it was stopped by the court order?

18 MR. GRANZOTTO: This court case? Let me just
19 say I want to correct one thing. This -- this check lane
20 was stopped by stipulation of the parties after the first
21 time that it had been instituted in Michigan.

22 We actually brought this case prior to the
23 imposition of the first checkpoint to try to prevent it
24 from taking place at that time.

25 It had been in operation for an hour --

1 QUESTION: If -- if you sought to enjoin it
2 before it even was established, then how did you expect
3 the state to have any statistical evidence as to its
4 operation?

5 MR. GRANZOTTO: Justice Kennedy, this program --

6 QUESTION: The -- the sooner you bring it, the
7 -- the better off your suit is, because the state has no
8 statistics to back up what they're doing?

9 MR. GRANZOTTO: No. No, not at all.

10 This program was copied from a program which was
11 developed by the State of Maryland and the State Police of
12 Maryland. And copied very liberally, I would say, from
13 that program.

14 And the Maryland program had been in existence
15 for approximately four years. In addition, there was a
16 considerable amount of experience outside the United
17 States prior to the Maryland program, which analyzed these
18 -- the effectiveness of these sobriety roadblocks.

19 And that's the -- that is the type of evidence
20 which was presented in this case through Dr. Ross. Now
21 Dr. Ross, who has analyzed extensively the studies that
22 have been conducted worldwide on the -- on the subject of
23 sobriety roadblocks, testified in this case.

24 And what he testified to went directly to the
25 balancing test which the court applied in both the

1 Michigan Court of Appeals and --

2 QUESTION: So -- so it was improper, in your
3 view, for Michigan to even enact this statute and -- and
4 -- and to try to administer the roadblock on its own and
5 gather its own statistics?

6 MR. GRANZOTTO: That's correct.

7 QUESTION: Mr. Granzotto, would it have made a
8 difference if these weren't stops along the way, but if
9 these were -- suppose they set up at the -- at the
10 entrance to -- to Michigan highways? Checkpoints at which
11 they would check your car headlights before you were
12 allowed on it, the brakes and -- and the sobriety of the
13 driver?

14 Or suppose they do it at a toll booth on a state
15 -- on a state toll road? When you come up to the toll
16 booth they check your -- the safety of the car and the
17 safety of the driver, is that okay?

18 MR. GRANZOTTO: Well, my position is that, with
19 respect to a -- an investigation and attempting to find
20 criminal wrongdoing, that there is something fundamentally
21 different about that, and a stop for -- a for vehicle code
22 violation or -- or a toll booth.

23 QUESTION: Well, it's hard to separate the one
24 from the other. I mean, it's the same at the truck stops.
25 They're doing two things. If you are there in violation

1 of the law, you'll be penalized. But they want to get you
2 off the road, also. Isn't that the purpose of these
3 stops?

4 I mean you say it has a purely criminal purpose.
5 Well, it isn't just to -- to put you in jail for a
6 violation; it's to get you off the road because you're
7 drunk. Isn't that a separate --

8 MR. GRANZOTTO: But the purpose is achieved
9 through the enforcement of the criminal law.

10 QUESTION: Well, likewise, in the case I just
11 spoke about, when they're checking you to get on the road.
12 You -- you mean it would be okay if they check your brakes
13 and found the brakes were no good and said, you can't get
14 on the road, go in peace, and you go home?

15 MR. GRANZOTTO: No.

16 QUESTION: But if they arrest you for bad
17 brakes, then it becomes bad?

18 MR. GRANZOTTO: No. The first that you are
19 describing is something that would -- certainly, in
20 Michigan, in light of the decriminalization -- be subject
21 to the balancing test. The point -- the only point I
22 would raise in light of Von Raab and Skinner is that, if
23 -- if the purpose of the intrusion is to purely serve the
24 criminal law, then that -- that intrusion is
25 unconstitutional without even a resort to the balancing

1 test.

2 Let me go to the balancing test, which has been
3 talked about at length.

4 There -- there are three factors which were
5 analyzed in this case. The gravity of the public harm is
6 the first. And on that we have no dispute. We did not
7 bring this case to minimize the dangers associated with
8 drunk driving in this country.

9 What we attempted to prove and did, in fact,
10 prove to the satisfaction of the trial court in this case
11 was that sobriety roadblocks are just not an effective
12 means of addressing that serious societal problem.

13 We presented in this case the testimony of Dr.
14 Ross. Dr. Ross is a preeminent expert in the area of
15 deterring the drunk driver.

16 What Dr. Ross testified to on one point was
17 totally uncontradicted at trial. And that was that as a
18 means of actually arresting drunk drivers, sobriety
19 roadblocks are worthless.

20 Sobriety roadblocks do not achieve significant
21 numbers of arrests.

22 QUESTION: How did he define significant and how
23 did he define worthless?

24 MR. GRANZOTTO: It's not exactly defined, but
25 what Dr. Ross I believe was talking about when we was

1 talking about worthless is that you are taking, you are
2 removing a number of officers from a practice which does
3 have positive effect, and that is roving patrols. You are
4 taking officers away from that, that goal, and applying
5 them in a particular area to conduct these sobriety
6 roadblocks.

7 QUESTION: Well, so the -- the -- if the state
8 feels differently, if the state after evaluating its
9 enforcement proceedings feels that the roving patrols
10 don't do the job and that this checkpoint should at least
11 be given a try, they're not entitled to do that if some
12 expert takes the stand and says it -- it -- I think
13 differently.

14 MR. GRANZOTTO: No. I -- I --

15 QUESTION: Well, isn't that about what it
16 amounts to?

17 MR. GRANZOTTO: No, no, because, Mr. Chief
18 Justice, in this case the -- the witnesses called by the
19 state, their own witnesses --

20 QUESTION: Well, no, but I was talking
21 about --

22 MR. GRANZOTTO: -- acknowledged --

23 QUESTION: I was talking about Dr. Ross's
24 testimony. You summarized it, I thought, and he said
25 these were worthless because they didn't catch drunken

1 drivers.

2 MR. GRANZOTTO: That's correct.

3 QUESTION: Well -- and I take it you're relying
4 on that testimony because you feel it supports the finding
5 of the trial court. And my question to you is, is the
6 trial court on the basis of the testimony of someone like
7 Dr. Ross entitled to substitute its judgment for that of
8 the state as to which of these procedures work best?

9 MR. GRANZOTTO: What is important about this
10 case is that the witnesses who testified for the state in
11 this case, the -- Colonel Hough, who was the head of the
12 Michigan State Police, testified --

13 QUESTION: Well, are you ready to write off Dr.
14 Ross' testimony in that?

15 MR. GRANZOTTO: Absolutely not because Dr.
16 Ross's testimony was absolutely consistent with every
17 piece of evidence presented in this case.

18 QUESTION: Well, okay. But you began by
19 mentioning his testimony, so I presumed it was important
20 to you. But now you seem to suggest well, it doesn't make
21 any difference what he said because other witnesses said
22 the same thing.

23 MR. GRANZOTTO: It's -- it's cumulative because
24 Colonel Hough testified that the program was not being
25 developed to arrest drunk drivers, to actually remove them

1 from the road.

2 Lieutenant Fledseth testified to the same point.
3 These programs -- this program in Michigan is not
4 developed to remove drunk drivers from the road. It is
5 like the Maryland program which Lieutenant Cotton
6 testified to, because --

7 QUESTION: That's just to say that the purpose
8 is not to enforce the criminal law.

9 MR. GRANZOTTO: No. What -- it's clearly --

10 QUESTION: No, no?

11 MR. GRANZOTTO: No. It is -- it is still to
12 enforce the criminal law because they -- they do
13 result --

14 QUESTION: Even though they don't remove them
15 from the road?

16 MR. GRANZOTTO: They do result in arrests.
17 Approximately 1 percent or somewhat less than the cars
18 which drive through a sobriety roadblock will result in
19 arrest. Those people will be arrested. There will be
20 criminal prosecution resulting from that.

21 What everybody testified in this case
22 totally --

23 QUESTION: What if you were -- know from
24 listening to the radio or something that there's a
25 checkpoint at a very dangerous intersection that you

1 usually go through. You're going to have a few drinks, so
2 you just decide that you better not go -- you should take
3 another route. That would be sensible, wouldn't it?

4 MR. GRANZOTTO: Yes, it would be.

5 QUESTION: Don't you -- is there any evidence in
6 this case or could there be how many people were deterred
7 by -- by their knowledge of a checkpoint, deterred from
8 going -- from going through that particular dangerous
9 intersection?

10 MR. GRANZOTTO: No, there's no statistical
11 evidence of that. What Dr. Ross --

12 QUESTION: Well, is it -- is it -- is it sort of
13 a -- just an irrational thought that a lot of people who
14 might go through that -- that -- that intersection without
15 the checkpoint don't go through? Is that just irrational?

16 MR. GRANZOTTO: The hypothetical you've given me
17 -- the hypothetical you've given me is not the type of
18 deterrence that the State of Michigan is after in this
19 case. They are not looking for people who are
20 circumventing road blocks by going to -- by taking another
21 route.

22 They are attempting to justify this program on
23 the basis that it actually deters people from driving
24 after they have been drinking.

25 QUESTION: Well, it deters them from driving

1 through that particular dangerous intersection.

2 MR. GRANZOTTO: Well, that may be true, but
3 that --

4 QUESTION: They make them drive someplace else.

5 MR. GRANZOTTO: That is not the -- that is not
6 the type of deterrents which I think the -- the State of
7 Michigan is looking for in this case either. But, let
8 me --

9 QUESTION: Well, it is something we can't look
10 at or not in sustaining --

11 MR. GRANZOTTO: Well, that's an interesting
12 question in light of the factual record that's been made
13 in this case.

14 I would begin talking about the factual record
15 by telling you that I am not at all afraid and all about
16 -- all of the statistics in all of the studies that have
17 been cited in the briefs of the amicus curiae in this
18 case, the -- the statistics, the studies do not establish
19 that these sobriety roadblocks are effective.

20 Nonetheless --

21 QUESTION: Well, what do we mean by the word
22 "effective"?

23 MR. GRANZOTTO: They don't work.

24 QUESTION: Well, but that's a value judgment,
25 isn't it?

1 MR. GRANZOTTO: No.

2 QUESTION: What do you -- what do you mean when
3 you say they don't work?

4 MR. GRANZOTTO: They don't work because there
5 are two possibilities that these sobriety roadblocks can
6 serve. One is to actually physically remove drunk drivers
7 from the road.

8 Everybody who testified at the trial in this
9 case agreed. They don't work on that basis. We're not
10 even instituting them on that basis. That's what the
11 state police testified in this case.

12 QUESTION: They don't work in the sense that
13 they only arrest, what, 2 percent or something?

14 MR. GRANZOTTO: 1 percent or less of the people
15 going through these things.

16 QUESTION: Okay. Well, but compared to what?

17 MR. GRANZOTTO: Compared to what could occur if
18 the 15, 12, 17 officers who are dedicated to one spot were
19 allowed to do what they normally do, which is operate on
20 the basis of reasonable suspicion in a roving patrol.

21 QUESTION: But the state's argument here is that
22 that is even less effective.

23 MR. GRANZOTTO: The state can make all the
24 arguments it wants on that point, but it's first of all
25 contrary to the record, and second of all, not even

1 supported by any of the studies, I believe, that they've
2 cited in their --

3 QUESTION: So, the state, in order to determine
4 how to deploy its resources in solving this problem has to
5 come in with statistical surveys that satisfy a trial
6 court?

7 MR. GRANZOTTO: No. Because what -- what was
8 introduced in this case was an attack on the causal
9 relationship between number of arrests and the deterrent
10 value of the sobriety roadblocks.

11 What was established at the trial in this case,
12 what the trial court found was that there is a -- there is
13 a close relationship between the number of arrests and the
14 deterrent value.

15 We -- we have a situation where the state comes
16 into court acknowledging, although not before this Court,
17 I might add, since they've altered their position
18 dramatically before this Court, but they came into court
19 saying that these -- this program is not designed to
20 perfect arrests because it really won't be that effective
21 in perfecting arrests. But we want this -- we want this
22 program because it's going to deter.

23 We presented evidence in this case to
24 demonstrate that there is a close relationship, an
25 undeniable relationship between the power to arrest under

1 this program and the power to deter.

2 QUESTION: How many people did not drive who
3 were drunk because of that roadblock?

4 MR. GRANZOTTO: It's a question which I can't
5 answer.

6 QUESTION: I know you can't.

7 (Laughter.)

8 QUESTION: But how many do you say they need to
9 arrest, what percentage?

10 MR. GRANZOTTO: Would they need to arrest?

11 QUESTION: To be good, for you.

12 MR. GRANZOTTO: Again, it is a question which
13 never came up in this case.

14 QUESTION: Well, you're sure that this is wrong.
15 Now give me one that's right.

16 MR. GRANZOTTO: Give you one that's right?

17 QUESTION: You're sure that 1 percent is wrong.
18 Well, can you give me what percentage is right?

19 MR. GRANZOTTO: A percentage, first of all,
20 would be -- that would be right would be one in which the
21 number of arrests, for example, per manhour out on -- out
22 on a sobriety roadblock would be better than the number of
23 arrests that you get per manhour in a roving patrol.

24 QUESTION: Well, how arrests do you get per
25 man-hour do you get for dope in Detroit?

1 MR. GRANZOTTO: I'm afraid I can't answer that
2 question.

3 QUESTION: You certainly can't. You just pick
4 out one.

5 QUESTION: I wonder if it's so wasteful, if
6 these checkpoints are so wasteful why -- why there are
7 some 30 or so states in here defending these checkpoints.

8 MR. GRANZOTTO: I don't know.

9 QUESTION: They just -- they're all just misled.

10 MR. GRANZOTTO: No. What -- what is -- what is
11 involved in these checkpoints, and reading the amici
12 briefs that have been filed in this case, one point that
13 appears frequently and dramatically is visibility. These
14 are a very visible means of showing that something is
15 being done on the drunk driving problem.

16 In Michigan I would suggest to you, Justice
17 White, that this program was done despite the hesitancy of
18 the Michigan legislature. It was done at the request of
19 the Governor of the state of Michigan. And in my
20 estimation, it was done precisely because this -- this
21 type of law enforcement mechanism is visible.

22 It doesn't necessarily work, but it's visible.
23 It shows that somebody's attempting to do something about
24 the drug testing -- about the drunk driving problem.

25 QUESTION: Well, the states -- the states would

1 rather have -- these 30 states apparently would rather
2 have checkpoints than deploy their officers otherwise.

3 MR. GRANZOTTO: I would suggest to you that
4 the --

5 QUESTION: Well, wouldn't they?

6 MR. GRANZOTTO: -- principal --

7 QUESTION: Wouldn't they? Wouldn't they?

8 MR. GRANZOTTO: I would assume by their amicus
9 brief --

10 QUESTION: Yes.

11 MR. GRANZOTTO: -- that's been filed in this
12 case, but I would suggest to you that perhaps they are
13 more interested in the constitutional law that's going to
14 be developed if this court approves this type of sobriety
15 roadblock because we get into the question of whether
16 there can, in fact, be mass investigations of people.

17 And in that sense, Mr. Justice White, we may
18 have a situation where there is the -- the end result of
19 the court's decision in this case may be far more
20 important to the law enforcement people in this country
21 than any decision -- any indication, let me say, that
22 these sobriety roadblocks actually work in this country.

23 QUESTION: You want us to say this is
24 unconstitutional if there's a more effective way of
25 apprehending drug -- drunk drivers?

1 MR. GRANZOTTO: No.

2 QUESTION: That was precisely your answer to
3 Justice Marshall, it seemed to me.

4 MR. GRANZOTTO: No. It is not only -- let me
5 say it is not only that it is the less effective way, let
6 me say, than -- than roving patrols. That's not the only
7 point.

8 The fact is that these types of seizures will
9 result in a limited number of arrests, first of all.
10 They're not going to accomplish what they want to
11 accomplish.

12 It's not -- it just not going to serve the
13 purpose in comparison, I will grant you, in comparison to
14 what the police could be doing in other settings. But as
15 this court found in Delaware v. Prouse there is a sort of
16 marginal utility, if you will, to the -- a police
17 technique which has to be analyzed by this Court.

18 In Delaware versus Prouse, for example, the
19 court found that these types of stops which were at issue
20 in that case weren't going to result in a marginal
21 increase in the -- in the problem, the crime problem which
22 the police were attempting to combat in that situation.

23 The same is true in this case.

24 The third prong which I would like to address of
25 the Court's balancing test concerns the scope of the

1 intrusion, and on this point I think there's a couple of
2 misconceptions regarding the position which the State has
3 taken in this case.

4 The State attempts to justify this program on
5 the basis that this is a minimal intrusion for
6 approximately 30 to 60 seconds. In -- in fact, there are
7 a number of other factors related to the intrusion which
8 impact on -- on the analysis which this Court must apply
9 in the balancing test.

10 First of all, there is the -- the point which
11 has been made before with respect to the number of
12 innocent drivers passing through these checkpoints. At -
13 - at its best, these checkpoints allow 99 percent of the
14 cars to go through because these people are innocent of
15 any wrongdoing. In addition, there is another
16 disquieting, I believe, aspect to these sobriety
17 roadblocks which has come out in the evidence in this
18 case, and that is there is a significant number of what I
19 would call false positives which have been developed. In
20 other words, the program works that people will go through
21 a -- go through these sobriety roadblocks, be stopped
22 temporarily -- that is, the stop which the -- which the
23 State represents as being very short in duration.

24 In actuality, a number of people will be
25 diverted to another area where they will be further

1 investigated, including a number of tests.

2 What the evidence from other sobriety roadblocks
3 has indicated is that you have twice as great a
4 possibility of being diverted to these -- for this further
5 investigation and not being drunk than you have of being
6 drunk when you're diverted to these --

7 QUESTION: So -- so of those diverted, one-third
8 are found to be drunk and two-thirds are released?

9 MR. GRANZOTTO: That's correct, after further
10 investigation, obviously, and more -- obviously more
11 extensive investigation that's been -- that takes place.

12 There are -- as well, there is a point made by
13 the -- the State in this case with respect to the
14 discretion which is allotted the people who conduct these
15 patrols. The State argues that that discretion limits the
16 scope of the intrusion which is involved in the case.

17 We had testimony in this case from Inspector
18 Fladseth of the State Police who indicated that when a
19 person approaches this sobriety roadblock, that person can
20 be diverted for further investigation for any reason or
21 for no reason at all; therefore, the answer that was
22 supplied before with respect to failing to open the
23 window, if somebody could be diverted for further
24 investigation for failing to open the window, the answer
25 to that question is yes, they can be, because Inspector

1 Fladseth candidly acknowledged during the course of his
2 testimony that the officer who is -- who is confronting
3 the person driving up in the car can divert that person
4 for further investigation, more extensive investigation,
5 for any reason, or for no reason.

6 QUESTION: If -- if only 1 percent of drunk
7 driving is -- are arrested in this manner and one-third of
8 those diverted are found to be drunk, only 3 percent then
9 are diverted; is that about right?

10 MR. GRANZOTTO: That's correct.

11 I -- I am also concerned and -- about the scope
12 of the intrusion which can take place in these sobriety
13 roadblocks, because if this Court does in fact approve
14 sobriety roadblocks, the stop itself, there are a number
15 of necessary results which would obtain on the basis of
16 prior decisions of this Court, on the basis of
17 Pennsylvania v. Mimms and on the basis of Brown v. Texas.

18 There are a number of actions, conduct which the
19 police can take in this situation, undeniably, if this
20 Court does in fact approve sobriety roadblocks; that is,
21 the stop itself.

22 MR. GRANZOTTO: We brought this case not in
23 attempt -- not in an attempt to demonstrate that drunk
24 driving is not a serious societal problem in this country.
25 What we attempted to show in this case, what in fact the

1 trial court did adopt in this case, was that sobriety
2 roadblocks are not an effective means of combatting that
3 serious societal problem.

4 Under the balancing test, therefore, what we
5 have, I believe, is a serious problem. We have a -- an
6 intrusion which may be minimal in some respects, but it is
7 an intrusion which does not accomplish anything. And on
8 that basis we would ask that under -- under the Court's
9 balancing test as it's been adopted that these sobriety
10 roadblocks be found unconstitutional.

11 Thank you.

12 QUESTION: Thank you, Mr. Granzotto.

13 Mr. Casey, you have three minutes remaining.

14 REBUTTAL ARGUMENT OF THOMAS L. CASEY

15 ON BEHALF OF THE PETITIONERS

16 MR. CASEY: I have nothing further to add, Your
17 Honor.

18 QUESTION: Mr. Casey, excuse me. I do have a
19 question.

20 Do you agree with the statement that was just
21 made that these parties at the roadblock could be pulled
22 over for further investigation for any reason or for no
23 reason? Was that the way this was done?

24 MR. CASEY: No, I don't agree with that. The
25 testimony that he's referring to --

1 QUESTION: Because that -- that bears upon the
2 scope of intrusion. I had thought up to now that all
3 we're talking about the degree of intrusion is being
4 stopped. If what -- if that statement is true, the degree
5 of intrusion without articulable suspicion could be as
6 much as getting out of your car and having to walk a line
7 and do all the other tests that they perform.

8 MR. CASEY: That statement is not accurate.
9 One -- in one sentence in a deposition, one of the
10 deputies on a cross-examination said that there could be
11 reliance on any number of factors or perhaps no factor.

12 That's not what the law says. That's not what
13 this Court's cases say. That's not what our guidelines
14 say. That's not the law in Michigan. If a driver is
15 pulled over for further investigation for no reason
16 whatsoever, they would be able to challenge that on an
17 individual as-applied basis.

18 Under the guidelines and the way the Michigan
19 program is set up, drivers cannot be diverted for further
20 questioning unless there are visible, articulable signs of
21 intoxication.

22 QUESTION: That appears in the text of the
23 guidelines?

24 MR. CASEY: Yes.

25 CHIEF JUSTICE REHNQUIST: Now the case is

1 submitted.

2 (Whereupon, at 11:09 a.m., the case in the
3 above-entitled matter was submitted.)

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CERTIFICATION

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

No. 88-1897 - MICHIGAN DEPARTMENT OF STATE POLICE, ET AL., Petitioners

V. RICK SITZ, ET AL.

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