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IN THE SUPREME COURT OF THE UNITED STATES

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GERALD DEVENPECK, ET AL., :

Petitioners :

v. : No. 03-710

JEROME ANTHONY ALFORD. :

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Washington, D.C.  
Monday, November 8, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

MAUREEN A. HART, ESQ., Senior Assistant Attorney General, Olympia, Washington; on behalf of the Petitioners.

JAMES B. COMEY, ESQ., Deputy Attorney General, Office of Deputy Attorney General, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

R. STUART PHILLIPS, ESQ., Poulsbo, Washington; on behalf of the Respondent.

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

2 (10:01 a.m.)

3 JUSTICE STEVENS: We'll hear argument in No. 03-  
4 710, Devenpeck against Alford.

5 Ms. Hart.

6 ORAL ARGUMENT OF MAUREEN A. HART

7 ON BEHALF OF THE PETITIONERS

8 MS. HART: Justice Stevens, and may it please  
9 the Court:

10 The Ninth Circuit invalidated Mr. Alford's  
11 arrest and held the arresting officers in this case  
12 personally liable for damages based on the closely related  
13 offense doctrine. The doctrine is contrary to fundamental  
14 Fourth Amendment principles that probable cause is an  
15 objective inquiry based on all of the facts and  
16 circumstances known to the officer at arrest.

17 In contrast, the closely related offense  
18 doctrine is a subject of inquiry that limits probable  
19 cause only to those facts and circumstances closely  
20 related to the offense that the arresting officer  
21 announces at arrest. Under the doctrine, then if two  
22 officers observe precisely the same facts and  
23 circumstances and arrest the suspect, the arrest in one  
24 case can be valid and in the other invalid based only on  
25 the officer's subjective legal evaluation --

1 JUSTICE O'CONNOR: Ms. Hart, is there any  
2 requirement in Washington or generally that an officer  
3 state the grounds for the arrest to the person being  
4 arrested at the time?

5 MS. HART: Justice O'Connor, there's no  
6 constitutional requirement and there is no requirement in  
7 -- in Washington that that be done. A number of States do  
8 require that it be done statutorily and many of those  
9 States also --

10 JUSTICE O'CONNOR: We're dealing here with a  
11 case from the State of Washington, and you assert there is  
12 no such requirement in Washington.

13 MS. HART: There is not.

14 JUSTICE O'CONNOR: But in this case when the  
15 respondent was arrested, he was informed by the officer  
16 that the arrest was for making a tape recording of the  
17 conversation?

18 MS. HART: That is correct.

19 JUSTICE O'CONNOR: And it turns out -- do you  
20 concede that that was, in fact, not a lawful grounds for  
21 arrest?

22 MS. HART: That -- at this point, the question  
23 of the --

24 JUSTICE O'CONNOR: Do you concede that --

25 MS. HART: Your Honor --

1 JUSTICE O'CONNOR: -- that in the State of  
2 Washington, that it is perfectly lawful to record the  
3 conversation with the police?

4 MS. HART: This -- the facts of this particular  
5 case have not been before a -- a court in Washington, Your  
6 Honor.

7 JUSTICE O'CONNOR: But I'm asking you. What is  
8 your view? Is it lawful or not for an individual to  
9 record, tape record, the conversation with a policeman on  
10 the occasion of a stop?

11 MS. HART: Your Honor, I believe in this case  
12 there would be probable cause for an officer to believe it  
13 was and therefore effect an arrest. I don't believe that  
14 the -- the question has been answered in Washington, and I  
15 believe there are good grounds to argue that it would be  
16 permissible and that, indeed, unlike the decision in State  
17 v. Flora, there were distinguishing circumstances here,  
18 including the absence of passers-by on the scene.

19 JUSTICE O'CONNOR: Well, do we decide this case  
20 on the understanding that it was lawful to make the  
21 recording? Is that the basis in which we decide this  
22 case?

23 MS. HART: No, Your Honor. We have not raised  
24 the Privacy Act as an issue before this Court.

25 JUSTICE KENNEDY: Well, for argument --

1 JUSTICE O'CONNOR: Now, Washington also has an  
2 anti-stacking policy, does it?

3 MS. HART: The State Patrol does, Your Honor,  
4 yes.

5 JUSTICE O'CONNOR: Is -- is that just a rule of  
6 the patrolmen in the State?

7 MS. HART: It --

8 JUSTICE O'CONNOR: They won't arrest someone for  
9 several charges?

10 MS. HART: It's an agency policy and troopers  
11 with the Washington State Patrol are trained to it.

12 JUSTICE SOUTER: Well, is it an agency policy  
13 that the State endorses, and if so, why -- why do you  
14 endorse or adopt the policy?

15 MS. HART: Well, Your Honor, I believe that --  
16 that stacking charges really is -- there are good reasons  
17 to endorse the policy. One is that it's not a  
18 particular --

19 JUSTICE SCALIA: Not -- not stacking charges you  
20 mean.

21 MS. HART: I'm sorry. Not stacking charges,  
22 Your Honor, is -- is an -- a sound policy for a number of  
23 reasons. First, it's not a particularly effective or  
24 efficient use of law enforcement resources, but perhaps  
25 more importantly, it can have significant negative

1 consequences for people who are subject to arrest in terms  
2 of their ability -- the amount of bail, their ability to  
3 post bail, and to secure a pre-trial release.

4 JUSTICE SOUTER: Well, is that -- I mean, is  
5 that the -- the real basis for the policy, that we -- that  
6 Washington does not want to make it difficult for -- for  
7 arrestees to raise bail?

8 MS. HART: Your Honor, I can't tell you  
9 precisely what the Washington State Patrol's thinking is  
10 on it. My impression is that, in part, they believe that  
11 -- that the appropriate law enforcement response is -- is  
12 to determine whether there's probable cause and to arrest  
13 and leave the sorting out of the charges to be pressed  
14 actually by the State to the prosecuting attorney.

15 JUSTICE SOUTER: What do you make of the  
16 argument that unless the cause of the arrest is, number  
17 one, stated and, number two, a -- a cause that a defendant  
18 can rely on, that in any case like this in which the  
19 stated grounds of the arrest turn out to be -- we will  
20 assume, turn out to be inadequate, the police will always,  
21 particularly in traffic cases, be able to come up with  
22 something later on to justify the arrest? What -- what do  
23 you make of that argument?

24 MS. HART: Well, I -- I think what I would make  
25 of it, Justice Souter, is that provided that there's

1 probable cause for arrest, that the fact that there may be  
2 a basis to -- to stop a number of -- of motorists is not  
3 -- is not relevant. And in part, I believe that, for  
4 example, this Court's decision in Whren indicates that so  
5 long as there is probable cause for arrest, the reason for  
6 the --

7 JUSTICE SOUTER: But that was for an -- an  
8 arrest in which, so far as we can tell, the -- the stated  
9 grounds for the arrest were those for which there was  
10 probable cause.

11 And I think one of the concerns underlying the  
12 argument that I asked you to comment on is that if the --  
13 if the police, in effect, have -- have discretion ad lib  
14 afterwards to come up with new grounds for the arrest,  
15 there's -- there's going to be a kind of a basic corrosion  
16 in the integrity of the arrest process and in the  
17 confidence of people to believe that the police are really  
18 acting in good faith when they make an arrest.

19 MS. HART: Well, Your Honor, the -- if there is  
20 probable cause for arrest, that is the concern of the  
21 Fourth Amendment, and I -- I don't believe that the -- the  
22 concern -- I don't know that there's any empirical  
23 evidence that the concern that you are expressing has been  
24 borne out.

25 JUSTICE SOUTER: That -- that may be -- that may



1 be the -- the best response. And I take it, so far as you  
2 know, there -- there are no studies that have gone into  
3 this on an empirical basis. Is that correct, so far as  
4 you know?

5 MS. HART: Not as -- as far as I know, Your  
6 Honor. But I would also suggest to you that the notion  
7 that an officer would effect an arrest without any basis  
8 for the arrest on a hope that a prosecuting attorney can  
9 come up with a basis for the arrest --

10 JUSTICE SOUTER: No. The -- the argument is  
11 that he thinks he does have a ground. It turns out that  
12 he's wrong. Unless he is very unimaginative, he'll find  
13 another one. It's not that he arrests saying I have no  
14 basis to arrest this person, but I'll think of something  
15 later. It's -- it's the -- the problem is, I think -- or  
16 the argument, I think, is directed to a case like this.

17 MS. HART: Well, and -- and Your Honor, I -- I  
18 do believe that the concern of the Fourth Amendment, which  
19 is the only constitutional provision at issue in this  
20 case, is that there in fact be a reasonable basis for  
21 arrest and that subsequently or promptly subsequently or  
22 prior to arrest be tested by a neutral magistrate. And  
23 that's the only concern.

24 JUSTICE SCALIA: Ms. Hart, I'm -- I'm not sure  
25 what you mean by -- that there has to be probable cause

1 for arrest. Do you mean objectively, or do you mean on  
2 the basis of the facts known to the arresting officer? I  
3 mean, let's -- let's assume an officer stops a car for a  
4 broken taillight, and it turns out the car doesn't have a  
5 broken taillight. All right? So that basis is wrong.  
6 However, the car also has an expired inspection sticker,  
7 which the officer didn't know about. Was there a probable  
8 cause for arrest, as you're using the term here?

9 MS. HART: If there was probable cause based on  
10 the -- if there was reason based on the objective facts  
11 and circumstances --

12 JUSTICE SCALIA: And it doesn't matter whether  
13 he knew those facts and circumstances.

14 MS. HART: -- that -- known to the officer at  
15 arrest.

16 JUSTICE SCALIA: Oh, so it has to be known.

17 MS. HART: Yes.

18 JUSTICE SCALIA: So in my example, the arrest  
19 would be invalid because at the time of the arrest, he  
20 didn't know about the sticker.

21 MS. HART: Absent the circumstances at arrest  
22 giving rise to a reasonable basis to believe that a crime  
23 had been committed, there would not be probable cause.

24 JUSTICE SCALIA: So you're saying it's the facts  
25 known to the officer --

1 MS. HART: Precisely.

2 JUSTICE SCALIA: -- that have to establish the  
3 probable --

4 JUSTICE GINSBURG: That's --

5 JUSTICE SCALIA: Once -- once you establish that  
6 limitation, are you willing to accept the horrible that --  
7 that Justice Souter proposed to you? Is it -- is it,  
8 indeed, so easy to -- to gin up some other cause for  
9 arrest when you used a mistaken cause? I don't know that  
10 it's all that easy.

11 MS. HART: It is not and -- and -- it is not.  
12 And that was the -- the reason why I indicated in response  
13 to Justice Souter's question that I do believe that it is  
14 not all that easy. And I -- I believe that one of the  
15 foremost commentators in this area has termed that notion  
16 fanciful for the reason that it is -- it is stopping on a  
17 hope and a prayer that something will provide  
18 justification for that later --

19 JUSTICE GINSBURG: That was LaFave. You cited  
20 LaFave in your brief for that proposition.

21 MS. HART: Yes.

22 JUSTICE GINSBURG: You -- you made the point, in  
23 answer to Justice O'Connor, that a police officer in  
24 Washington is not required to divulge on the spot the  
25 reason for the arrest. What is the point at which the

1     arrestee under Washington law is entitled to know the  
2     cause of the arrest?

3             MS. HART:  At charging, Your Honor, there --  
4     there -- the -- the individual who has been arrested, as a  
5     matter of the Sixth Amendment, would be entitled to know  
6     the charges against him or her, and the officer is  
7     required, in a warrantless arrest, to appear before a  
8     neutral magistrate and have the probable cause for the  
9     arrest tested --

10            JUSTICE GINSBURG:  Is it -- is it at the  
11     arraignment or the -- at the earlier booking in the police  
12     station?

13            MS. HART:  I'm sorry.  I'm not following your  
14     question.

15            JUSTICE GINSBURG:  Is it -- is it -- is the time  
16     when the arrestee must told you are being arrested for X  
17     reason, is that when the arrestee appears before the  
18     magistrate or is it earlier when he's brought into the  
19     police station and he's booked?  The arrest is booked.  At  
20     which point?

21            MS. HART:  Neither, Justice Ginsburg.  The  
22     arrestee would be entitled constitutionally to know the  
23     charge against him or her when criminal -- a criminal  
24     prosecution is commenced by charging.  For the most part,  
25     that is done in Washington by an information or a charge

1 filed by a prosecuting attorney.

2 JUSTICE STEVENS: You mean he could be held  
3 until a charge is filed without being told why he's being  
4 held?

5 MS. HART: Justice Stevens --

6 JUSTICE STEVENS: So that could be a week or 2.

7 MS. HART: But it would be -- he would be held  
8 in that case following a determination by a neutral  
9 magistrate that there are grounds to hold him. And at  
10 that point --

11 JUSTICE SCALIA: Would the magistrate keep those  
12 grounds secret?

13 MS. HART: They would not be secret, Your Honor,  
14 no.

15 JUSTICE SCALIA: Well, wouldn't the magistrate  
16 tell him why he's being held?

17 MS. HART: The magistrate would tell the -- the  
18 arrestee why he's being held, provided the arrestee is  
19 present for that particular procedure.

20 JUSTICE STEVENS: And how soon is he entitled to  
21 appear before the magistrate?

22 MS. HART: I'm sorry?

23 JUSTICE STEVENS: How soon after his physical  
24 arrest does he have a right to appear before the  
25 magistrate?

1 MS. HART: My -- my recollection under  
2 Washington's law would be -- 72 hours is the time for the  
3 charge.

4 JUSTICE STEVENS: So for 72 hours, he could be  
5 held incommunicado without knowing why he was arrested.

6 MS. HART: But -- but for that period, the  
7 arresting officer would have had to -- during the 48-hour  
8 period at the outset, that this Court discussed in  
9 Riverside, the probable cause for the arrest would be  
10 tested by a neutral magistrate.

11 JUSTICE GINSBURG: You also said that you  
12 thought this case is distinguishable on the legitimacy of  
13 taping the conversation with the police officer on the  
14 highway. Why -- why do you think this is distinguishable  
15 from the Washington Intermediate Appellate Court decision  
16 that the -- that the -- that Alford wanted to show to the  
17 police officer?

18 MS. HART: Well, first of all, again, Justice  
19 Ginsburg, the Privacy Act issue is not one that we have  
20 raised before this Court. But -- but the reason that I  
21 would suggest it is distinguishable is that in a  
22 subsequent case considered by the Washington State Supreme  
23 Court called State v. Clark, the court look at Flora, the  
24 Intermediate Appellate Court case, and -- and termed it as  
25 a case that said you do not have a private conversation

1 when it is open to passers-by. And in Flora, there was  
2 another individual present at the scene and who was, in  
3 fact, subsequently arrested for interfering with the  
4 arrest in the Flora case. So there is, all I'm  
5 suggesting, at least some grounds for distinguishing the  
6 Flora case for that reason.

7 JUSTICE GINSBURG: Do you know if there's been  
8 any instruction in the State of Washington to police  
9 following that Flora decision about taping -- about  
10 arresting people for taping conversations with police  
11 officers?

12 MS. HART: I do believe there has, Your Honor.  
13 It's not a matter of record, however, in the -- against  
14 arresting for that reason.

15 JUSTICE GINSBURG: The flashing headlights which  
16 was -- there was a citation. There was an arrest for the  
17 tape recording and a citation for the flashing headlights.  
18 Could there have been a -- an arrest for the flashing  
19 headlights, or is that a lesser category of offense that's  
20 not an arrestable offense?

21 MS. HART: Under Washington law, the flashing  
22 headlights, the wig-wag lights, in and of themselves would  
23 not be an arrestable offense. It would be a citable  
24 offense. The impersonating offense involved in this case  
25 would be arrestable, and the wig-wag headlights would play

1 a part in that, however.

2 JUSTICE GINSBURG: But he was never -- never  
3 charged with the impersonating an officer, only with the  
4 flashing headlights. Is that right?

5 MS. HART: That's correct.

6 JUSTICE BREYER: The -- the case, as far as I'm  
7 thinking of it at the moment, comes down to everybody is  
8 agreeing -- well, no. It's -- you go ahead because you  
9 want to reserve that probably.

10 MS. HART: Thank you, Your Honor.

11 JUSTICE STEVENS: Mr. Comey.

12 ORAL ARGUMENT OF JAMES B. COMEY

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

15 MR. COMEY: Justice Stevens, and may it please  
16 the Court:

17 The validity of a police action under the Fourth  
18 Amendment turns upon an objective assessment of the facts  
19 viewed through the prism --

20 JUSTICE SOUTER: Do the facts, on your view,  
21 have to be known to the officer?

22 MR. COMEY: Yes, Your Honor.

23 JUSTICE SOUTER: Is -- is there -- and correct  
24 me if I'm wrong. In -- in cases in which we're inquiring  
25 into probable cause for a warrantless search, we give the



1 government credit for any fact known to any officer, don't  
2 we?

3 MR. COMEY: Yes, Your Honor.

4 JUSTICE SOUTER: Why wouldn't we have the same  
5 rule? Why shouldn't we have the same rule with respect to  
6 facts known to any officer when one officer makes an  
7 arrest?

8 MR. COMEY: I suspect, Your Honor, that the  
9 Government would urge such a rule if it were at issue in  
10 case.

11 JUSTICE SOUTER: But it's not urging it here.

12 MR. COMEY: Well, I don't see it at -- at issue  
13 in this case, Your Honor.

14 JUSTICE SOUTER: I don't think it is. I just  
15 want to know where we're going.

16 MR. COMEY: That's -- that's correct, Your  
17 Honor.

18 The -- the Government's position, as with the  
19 State of Washington's position, is that the -- the  
20 analysis is simply did the facts known to the officer,  
21 viewed through the prism of an objectively reasonable  
22 officer, establish probable cause. And that to make an  
23 evaluation of the arrest turn upon the officer's  
24 subjective assessment of those facts -- in other words,  
25 the working of his brain, the crunching of those facts

1 that results in the spitting out of a legal conclusion --  
2 is contrary to this Court's precedent and guts the  
3 objective reasonable test, and would make, instead, the  
4 validity of a Fourth Amendment action turn upon whether  
5 the officer is particularly smart, whether he's new,  
6 whether he's nervous, whether he says nothing at all or  
7 whether he decides to say, you're under arrest for  
8 everything listed in the Washington code book. Under  
9 those circumstances, the results would be different.

10 The -- the concern that Your Honor raised about  
11 police officers engaging in a post hoc rationalization I  
12 respectfully suggest is not a concern that is rooted in  
13 reality because the facts continue to drive the analysis.  
14 Whether or not a police officer is right at the arrest  
15 scene in invoking a particular statute, if that turns out  
16 to be incorrect, it is still the facts that were known to  
17 him that must support probable cause for some other  
18 offense.

19 JUSTICE SOUTER: So far as you know, there --  
20 there are no empirical studies looking into this  
21 particular horrible?

22 MR. COMEY: No, I'm not aware of any, Your  
23 Honor.

24 I also suggest that if this were the concern  
25 that the Ninth Circuit were looking to address by the

1 closely related offense doctrine, the remedy sweeps far  
2 too broadly in both directions. It punishes officers who  
3 at the scene engage in remarkable good faith conduct. I  
4 mean, these two police officers I think are what the  
5 public would hope these police officers were, looking at a  
6 code book at the roadside, calling a prosecutor late at  
7 night, trying to get it right. They are punished under  
8 this doctrine.

9 Those that are rewarded are those who are smart  
10 enough, perhaps a veteran, perhaps someone who has read  
11 the Ninth Circuit's cases, to stay completely silent, to  
12 say nothing at all, knowing that he's going to be fine.  
13 He needs to engage in no --

14 JUSTICE O'CONNOR: Mr. Comey, I think you rely,  
15 in part at least, on this Court's case in Whren --

16 MR. COMEY: Yes, Your Honor.

17 JUSTICE O'CONNOR: -- for the result for which  
18 you argue. But in Whren, the stated reason for the stop,  
19 traffic enforcement, was lawful, and we didn't have to  
20 look any further. In this case, the stated reason I think  
21 we assume, at least according to the trial judge's  
22 instruction to the jury, was unlawful. Does that impair  
23 the reliance on Whren?

24 MR. COMEY: I don't believe it does, Your Honor.  
25 I believe that what Whren teaches is that the subjective

1 working of the police officer's mind, his motives, his  
2 intentions, his legal assessments, as in other cases, his  
3 legal assessment with respect to the extent of a consent  
4 to search, or the reason he's boarding a boat, is  
5 irrelevant, that that's for courts to do. What matters is  
6 what came into an officer's brain, not what came out as a  
7 result of his working on it. Because, as I said, that  
8 would make law enforcement far from unevenhanded. It  
9 would make it depend upon who the officer was at the  
10 roadside on any given night. And those similarly situated  
11 would be treated very, very differently, depending upon  
12 what an officer chose to say. And as I said, silence in a  
13 -- in a jurisdiction that's governed by the closely  
14 related offense doctrine is the best course.

15 JUSTICE SOUTER: But if -- if we had gone the  
16 other way in Whren, we would still have the problem that  
17 we have in this case, wouldn't we? Regardless of -- of  
18 how an arrest would be justified, the issue here is are  
19 the grounds of justification limited to the reason and in  
20 most cases the stated reason for the arrest. So we'd have  
21 this problem even if Whren had -- had come out otherwise,  
22 wouldn't we?

23 MR. COMEY: I think we would still be discussing  
24 whether the subjective functioning of an officer's mind is  
25 relevant for Fourth Amendment purposes, which turns upon

1 whether the action was reasonable in the case of an  
2 arrest --

3 JUSTICE SOUTER: But the question here is the  
4 scope of the Fourth Amendment inquiry. Can it take in  
5 probable cause for reasons other than the reason for the  
6 arrest or the stated reason for the arrest? Can it  
7 consider other offenses, and we'd have that regardless of  
8 -- of Whren, wouldn't we?

9 MR. COMEY: I think we would, Your Honor, to the  
10 extent that Whren is about motives and this case is about  
11 something very closely related, still the inner working of  
12 an officer's mind, what legal conclusion he draws from  
13 facts.

14 JUSTICE GINSBURG: Why is it subjective? I  
15 mean, in -- in Whren, the question was finding a hidden  
16 motive as distinguished from the motive that was written  
17 out. Here, there's nothing subjective about what the  
18 officer charged this person with on the spot. He told  
19 him. There wasn't anything hidden in his mind. He said,  
20 I'm arresting you for X reason, for tape recording. And  
21 then they had a whole colloquy. So what the -- what the  
22 arrest was for is as objective as it can be.

23 MR. COMEY: I would suggest, Your Honor, that  
24 his speaking, his invocation of a particular code section  
25 is an objective manifestation of an essentially subjective

1 process. And that's illustrated by imagining three stops  
2 on that road that night, three Mr. Alfords, exact same  
3 facts. In one, the officer is engaged in the process that  
4 he engaged in here. In the other two, the officer chooses  
5 in the first to say nothing, and in the third, to say --  
6 hold up the code book and say what you did is in here.  
7 Everything in here applies to you, wise guy. Now get in  
8 the car.

9 In those two other circumstances, complete  
10 silence and the table of contents approach, we wouldn't be  
11 here. These officers would not have been in litigation  
12 for 4 years. That to me demonstrates that it is  
13 essentially subjective because it is driven not by the  
14 facts, what the defendant did, but by the nature of the  
15 police officer. Is he clever? Has he gone to law school  
16 at night?

17 JUSTICE STEVENS: But, of course, even in those  
18 examples, there could be a difference in what the police  
19 officer had actually observed. He might not have seen the  
20 safety sticker or the taillight or whatever it is. So you  
21 do have some inquiry into the mental processes of the  
22 officer in every case.

23 MR. COMEY: Yes, Your Honor. And -- and if --  
24 perhaps my distinction is -- is too homely, but I would  
25 say that's about what comes into his mind, into the brain,

1 his senses. Did he see this taillight? Did he see the  
2 sticker? Not what comes out of his mouth as a result of  
3 the functioning of that brain, his legal brain. The legal  
4 work is for the courts looking at an arrest that's been  
5 challenged through the prism of an objectively reasonable  
6 officer. It does not depend, else Fourth Amendment  
7 seizures would be not reasonable, but would vary depending  
8 upon the skills of an individual officer from roadside to  
9 roadside. And that is utterly inconsistent with this  
10 Court's precedent and would, in fact, gut the objective  
11 reasonableness test.

12 The Ninth Circuit's rule would lead to  
13 dramatically uneven law enforcement. It would, indeed,  
14 lead to either stacking or silence, and there's plenty of  
15 good reason why an officer or a Federal agent, who are not  
16 required to say anything at arrest, might want to inform a  
17 defendant of a basis for his arrest and might want to  
18 uphold other bases for an arrest, to protect a witness,  
19 for example. To drive police officers to the extremes is  
20 not in the public interest.

21 JUSTICE GINSBURG: You -- you predicted that  
22 this would be in practice very bad. There are some  
23 jurisdictions that have the closely related test, are  
24 there not?

25 MR. COMEY: Yes, Your Honor. The Ninth Circuit.

1 JUSTICE GINSBURG: But the -- outside the Ninth  
2 Circuit.

3 MR. COMEY: Yes, Your Honor. I believe the  
4 Seventh Circuit as well and the First Circuit.

5 JUSTICE GINSBURG: Do we know whether these  
6 horribles have occurred there, that the police are booking  
7 for everything?

8 MR. COMEY: I do not, Your Honor. I -- I know  
9 with Federal agents, Federal agents say nothing. They're  
10 required to say nothing. They simply bring a defendant in  
11 on a warrantless arrest, cuff him, leave him in the  
12 cellblock, and then the assistant U.S. attorneys take the  
13 matter before a magistrate.

14 So there is -- and that's one of the things that  
15 demonstrates the unworkability of this test because there  
16 are plenty of jurisdictions, thousands of Federal agents,  
17 who are under no obligation to say anything. And so it's  
18 hard to see how this test, even to the extent there were a  
19 concern about the evil or perceived evil of post hoc  
20 rationalization, which I suggest there isn't, this -- how  
21 this test would be applied --

22 JUSTICE KENNEDY: In -- in the Federal system,  
23 is the arrest based on what the officer knew and -- and  
24 see -- and saw at the time?

25 MR. COMEY: Yes, Your Honor. His perceptions,



1 the -- the facts known to the arresting officers.

2 JUSTICE KENNEDY: Suppose he had asked for a gun  
3 permit and he sees the gun permit, and he said, well, it's  
4 -- that's okay. You've got the permit, but I'm going to  
5 arrest you for reckless driving. Then he finds out the  
6 driving charge is no good. It can't stand. But then they  
7 look at his wallet more carefully and they see the permit  
8 is expired. What -- what rule then? At the police  
9 station, they -- they see the permit is expired. In other  
10 words, they find out a fact after -- after they arrested  
11 him.

12 MR. COMEY: Well, I -- I would suspect that any  
13 statements made or seizures made pursuant to the arrest,  
14 which was made on facts known to the officers, that did  
15 not include what was in his wallet would be in jeopardy.  
16 That -- you still might be able to prosecute him, but  
17 you'd have to work awful hard to save anything you got as  
18 a result of that arrest.

19 JUSTICE KENNEDY: So you would confine the rule  
20 to what the officer has seen at the time of the arrest.

21 MR. COMEY: Facts known to the officers,  
22 including facts known to officers with whom he or she is  
23 working.

24 Thank you, Your Honor.

25 JUSTICE STEVENS: Thank you, Mr. Comey.

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Mr. Phillips.

ORAL ARGUMENT OF R. STUART PHILLIPS

ON BEHALF OF THE RESPONDENT

MR. PHILLIPS: Justice Stevens, may it please the Court:

In essence, the closely related offense doctrine enforces the reasonableness clause by precluding officers from arresting someone for non-criminal conduct. At its core, that's what this is about. Mr. Alford was arrested for conduct that was not --

JUSTICE O'CONNOR: Well, I thought at its core it was about this rule that the Ninth Circuit adopted about closely related offenses. I thought at its core that's what we were concerned with.

MR. PHILLIPS: Well, Your Honor, the closely related offense doctrine itself is -- it's in five circuits -- six depending on how you count the cases. But it's designed to -- to look at two things: number one, whether the arrest itself is reasonable; and number two, from a qualified immunity standpoint, whether -- essentially it's a no harm/no foul rule. If the conduct for which the person was arrested is criminal, but the officer merely has a mistake in terminology -- he calls it driving while license suspended instead of reckless driving -- then it actually salvages the arrest for law

1 enforcement.

2 JUSTICE O'CONNOR: Well, what if the arresting  
3 officer just doesn't give a reason for the arrest, just  
4 makes the arrest, and it turns out, at the end of the day,  
5 that indeed there were objective facts that would have  
6 justified an arrest. It wasn't what the officer had in  
7 mind but he didn't say anything. What result then?

8 MR. PHILLIPS: Your Honor, that -- that  
9 implicates several other rights. Number one, it is --  
10 while an officer could, in some jurisdictions, effectuate  
11 a warrantless arrest without stating a basis therefor --

12 JUSTICE O'CONNOR: Well, could -- could an  
13 arrest made under the circumstances I described be valid?

14 MR. PHILLIPS: I hate to say this, Your Honor,  
15 but it depends because at some point, for example, when  
16 the person is brought before the magistrate for the  
17 probable cause determination, they're not operating in a  
18 vacuum. There will have to be --

19 JUSTICE O'CONNOR: No. At that time, there  
20 does. But we're talking about at the time of arrest. And  
21 it -- it just -- if the closely related offense doctrine  
22 has the effect of punishing an officer for explaining to  
23 the suspect a reason for the arrest, why is that a good  
24 doctrine? I mean, if the officer could say nothing and  
25 could end up, at the end of the day, having a valid

1 arrest, I just think the closely related doctrine doesn't  
2 serve a very good purpose.

3 MR. PHILLIPS: Your Honor, the -- in this case,  
4 of course, that's -- that's not the -- that's not this  
5 case because the officer was very clear. He said exactly  
6 what it was for, and then he -- when he booked him,  
7 Officer Haner even booked him for illegal recording. So  
8 in this case, we're -- we're not presented with a vacuum.

9 But even in an instance where the officer did  
10 not state at the instant of the arrest why he was  
11 arresting the person, one of the benefits of this doctrine  
12 is that it would allow for an objective review of the  
13 facts in order to determine --

14 JUSTICE O'CONNOR: Well, if the objective review  
15 shows that there were, indeed, facts that would have  
16 justified an arrest, then what's wrong with allowing that  
17 to proceed?

18 MR. PHILLIPS: Your Honor, the -- the danger of  
19 that is that allowing this, as -- as I termed it, a  
20 general right of arrest with -- with no articulated basis  
21 at any point up until charging runs contrary to some of  
22 the basic principles --

23 JUSTICE KENNEDY: Okay. What's -- what's  
24 happening here is in order to avoid the down side of your  
25 test -- as Justice O'Connor puts it, her point is that if

1 we adopt your rule, there's going to be an incentive not  
2 to state the reason. Now, in order to avoid that -- you  
3 haven't really squarely confronted it -- I think you're  
4 suggesting that there has to be an additional rule that  
5 the police officer must say why he's arrested, and -- and  
6 the authorities just don't establish that. Now, if you  
7 want us to go on and make up that rule, I suppose we could  
8 make up that rule.

9 MR. PHILLIPS: I'll be very happy if you --

10 JUSTICE KENNEDY: And I'm -- I'm sure you'd be  
11 delighted. But that's not the case we're confronted with.  
12 And if the choice is between making up a new rule to make  
13 your test work or rejecting your test, it seems to me that  
14 the -- that the latter might be the preferred course.

15 MR. PHILLIPS: Well, Your Honor, to sort of  
16 piggyback on what Justice Souter and what Justice Ginsburg  
17 had commented on, there's no empirical evidence to suggest  
18 that there is or would be a movement by police officers  
19 towards silence. There is simply nothing out there that  
20 says that police officers have in the past in the six  
21 jurisdictions, the six circuits that use this. There's no  
22 evidence that they have remained silent in an effort to --

23 JUSTICE SCALIA: Must -- must be very stupid  
24 police officers. I mean, it's -- it's just obvious what  
25 -- what you have to do to make a valid arrest. If you say

1 nothing, any -- any basis that you could have had for the  
2 arrest will -- will be used. Whereas, if you -- if you  
3 mention something, you better be able to substantiate that  
4 particular cause or a closely related crime. Police  
5 officers aren't any dumber than the rest of us. I can't  
6 believe that -- that that wouldn't be the -- the  
7 consequence of -- of the rule you're asking us to adopt.

8 MR. PHILLIPS: Your Honor --

9 JUSTICE SCALIA: To put it this way, it seems to  
10 me the burden should be on you to -- to tell us why a  
11 police -- police officers are so stupid that they -- that  
12 they go around and -- and continue to give reasons when  
13 that's -- when that's going to make it more difficult for  
14 them to sustain the arrest and subject them to -- to  
15 personal liability.

16 MR. PHILLIPS: Well, for the most part, Justice  
17 Scalia, it does not come back to haunt the officers  
18 because the vast majority of arrests are lawful. The vast  
19 majority of officers have probable cause for the thing  
20 that they arrest the person for, and they arrest him for  
21 criminal conduct.

22 JUSTICE GINSBURG: But if they're told in this  
23 case that they're subject to 1983 liability out of their  
24 own pockets if they get it wrong, then it seems to me they  
25 would pursue the safe course and say nothing.

1           I mean, you did say at one point in your brief  
2   that when a warrantless arrest is effected, the officer  
3   must inform the arrestee of the officer's authority and  
4   cause of arrest. But that's not true on the spot as a  
5   matter of Washington law or constitutional law, is it?

6           MR. PHILLIPS: The issue of -- of the  
7   constitutionality of that has never been ruled on by this  
8   Court. There are --

9           JUSTICE GINSBURG: Well, you're not urging that  
10   the Constitution requires the officer on the spot to state  
11   the cause of the arrest, or are you?

12          MR. PHILLIPS: Personally, Your Honor, I think  
13   that that would -- that would certainly comport more with  
14   the common law that was extant at the time the  
15   Constitution was --

16          JUSTICE SOUTER: Well, regardless if it --  
17   whether it comports with the common law, I don't see why  
18   the rule that you are urging, closely related, is going to  
19   make a dime's worth of difference unless ultimately we  
20   hold that there is an obligation to state the cause at the  
21   time of the arrest.

22          MR. PHILLIPS: Because, Your Honor, even if the  
23   -- even if the cause of the arrest is not stated at the  
24   time of the arrest, the person must be booked for  
25   something. There's a -- a report that's generated. In

1 this instance --

2 JUSTICE SOUTER: Okay. The booking occurs after  
3 arrest, and I thought what we were concerned with in this  
4 case was the validity of the arrest, not the booking.

5 MR. PHILLIPS: Correct, Your Honor.

6 JUSTICE SOUTER: Okay. Now, if -- if the -- if  
7 the -- if it is the validity of arrest, which -- which is  
8 in issue, I don't see why your rule is going to make any  
9 difference in the long run unless we go the further step  
10 and say, in order to make this work, i.e., enforce Fourth  
11 Amendment values, at the time of the arrest the cause has  
12 got to be stated. Am -- am I missing something?

13 MR. PHILLIPS: Well, Your Honor, I would  
14 analogize it to the -- the arrest rule. Whether someone  
15 is or is not under arrest from a Fourth Amendment  
16 standpoint is based on an objective test, and it is viewed  
17 after the fact.

18 JUSTICE SOUTER: Well, based on an objective  
19 test, we'll get absolutely nowhere. The person who is  
20 arrested is not in a position to be making objective or  
21 subjective assessments, by and large. He probably knows  
22 what he's being arrested for because it's obvious, but  
23 then we have cases like this, which are the only ones that  
24 are going to be litigated, and he may not know.

25 The -- the fact still, it seems to me, is



1 obvious. If we go your way, we're going to have to go the  
2 further step of requiring the cause to be stated. Isn't  
3 that, as a matter of common sense, true?

4 MR. PHILLIPS: It would certainly make it  
5 easier, but it's not necessary.

6 JUSTICE SOUTER: All right. I'll be candid with  
7 you. I think it is necessary.

8 But the -- I guess the -- what I'm getting at in  
9 all of this is you're asking us to take steps to solve a  
10 problem, and I don't think you've demonstrated what the  
11 problem is. We keep coming back, as we have several  
12 times, to the lack of empirical studies. Have we got  
13 something to worry about in -- in enforcing Fourth  
14 Amendment values that we can only guard against if we go  
15 your way?

16 MR. PHILLIPS: Well, Your Honor, I would say  
17 that the fact that there are six circuits that have  
18 adopted this policy shows that this is -- that this is a  
19 problem that occurs nationwide.

20 JUSTICE SOUTER: Then what is the -- yes, but  
21 what's the justification for doing it? What is the  
22 practical problem that we are concerned with?

23 MR. PHILLIPS: The practical problem is that  
24 people are being arrested for conduct that is, at its  
25 base, not criminal.

1 JUSTICE SCALIA: But they should have been  
2 arrested. I mean, so long as they should have been  
3 arrested, who cares? In this case, I mean, it'll -- it'll  
4 be ultimately be tried by a jury I -- I guess, but your --  
5 your client pulls up behind another car with wig-wag  
6 lights flashing, like a police car. Right? He has a  
7 police scanner on the seat next to him. He has handcuffs.  
8 He has tinted glass in front of the license plate -- of  
9 his license plate, so it can't be -- can't be read. It  
10 seems to me there was obvious probable cause to -- to  
11 arrest this fellow for impersonating a police officer.  
12 And I would have hoped he would have been arrested so he  
13 wouldn't go around and -- and pull up behind another car.

14 What is the problem?

15 MR. PHILLIPS: Well, Your Honor --

16 JUSTICE SCALIA: It seems to me he should have  
17 been arrested, and the -- and the mere fact that the  
18 police officer gave the wrong reason for arresting him  
19 doesn't make me feel very bad about the arrest at all.  
20 I'm glad he was arrested.

21 MR. PHILLIPS: I'm going to disagree on two  
22 points. First, at the trial court, the State did not  
23 argue that he could have been arrested for other crimes.  
24 The jury was never instructed on the elements of these  
25 supposed other crimes. And we pointed that out in the

1 appeal in the reply brief.

2 JUSTICE STEVENS: Yes, but did you object to the  
3 instructions in the trial court?

4 MR. PHILLIPS: No, Your Honor, because the --

5 JUSTICE STEVENS: One of the problems I have  
6 with the case, very frankly, is that the jury has already  
7 ruled against your client on the qualified immunity issue  
8 carrying out instructions given by the judge that were not  
9 objected to by your client.

10 MR. PHILLIPS: That's correct, Your Honor, but  
11 the only instructions that were given regarding --  
12 regarding what they needed to find to find a violation  
13 were the Privacy Act instructions.

14 JUSTICE STEVENS: But whose fault is that?

15 MR. PHILLIPS: Well, Your Honor, I think if the  
16 State wanted them to -- qualified immunity is an  
17 affirmative defense. If they wanted the State to find --  
18 if they wanted the jury to find there was impersonation,  
19 they should have requested an instruction on that because  
20 impersonation in Washington requires more than simply  
21 taking an action that creates an impression that you're an  
22 officer. It also -- under first degree, there has to be  
23 specific intent to defraud someone, and here the only  
24 thing he did, he gave them a flashlight and helped them  
25 jack up their car.

1           On the issue of the wig-wag headlights, the  
2 transcript shows that the officer spent a minute or 2, by  
3 his own estimation, on the scene behind Mr. Alford's car,  
4 saw no wig-wag headlights.

5           And as for the scanner, the -- the transcript,  
6 page 246 -- he admitted at trial it was actually a ham  
7 radio, not a portable police scanner.

8           JUSTICE GINSBURG: But I thought that the reason  
9 that the police went after your client after he left the  
10 vehicle that was disabled was because the officers at that  
11 point suspected that he might be impersonating a police  
12 officer. That's what the people in the -- the disabled  
13 vehicle told the officer. They said he had flashing  
14 headlights. We thought he was a police officer. And --  
15 and wasn't the original following of your client triggered  
16 by the suspicion that he might be impersonating a police  
17 officer?

18           MR. PHILLIPS: Yes, Your Honor, and that -- that  
19 -- we have not argued that there was not suspicion  
20 sufficient to -- to have a stop to do investigation.  
21 However, under the Washington statute, there was not  
22 evidence sufficient to show probable cause that there was  
23 an actual crime --

24           JUSTICE KENNEDY: Under Washington law, is it  
25 lawful for your client to have headlights -- wig-wag

1 lights?

2 MR. PHILLIPS: No, Your Honor. It is a traffic  
3 violation. That is a non-arrestable offense, and that was  
4 admitted at court and also here today.

5 JUSTICE O'CONNOR: Was your client ever found  
6 guilty of any offense at all?

7 MR. PHILLIPS: No, Your Honor. Even the traffic  
8 infraction was dismissed by the judge.

9 JUSTICE KENNEDY: But it's unlawful to have wig-  
10 wag lights, and I take it it's an arrestable offense to  
11 impersonate a police officer.

12 MR. PHILLIPS: Yes, Your Honor, but that --

13 JUSTICE KENNEDY: So that would -- that would  
14 certainly be probable cause to arrest just based on the  
15 wig-wag, plus the fact he lied to the police in -- in  
16 instructing them the button to push or didn't tell them  
17 what button to push to make them go.

18 MR. PHILLIPS: No, Your Honor. The obstruction  
19 charge also under Washington law -- under the case law  
20 interpreting the statute, there has to not only be the --  
21 the hindrance or obstruction. There has to be specific  
22 intent, and there has to be obstruction in fact. And in  
23 this case, both of the officers testified that they --  
24 that he pushed every button they asked him to. He opened  
25 the hood for them. He let them look at the -- the flasher

1 unit. He showed them the manual. They both say that they  
2 saw this button that after the arrest they pushed -- one  
3 of them pushed. However, there's obviously no obstruction  
4 in fact if -- one of them actually said at trial that he  
5 didn't ask him to push the button because he wanted to see  
6 whether he would push it or not. So there's no -- again,  
7 there's no facts to support a finding of probable cause  
8 even on the obstruction because the officers were  
9 essentially just letting him hang himself.

10 JUSTICE SCALIA: Well, that -- that isn't the  
11 issue before us here. I -- I assume that for purposes of  
12 the question on which we granted certiorari, we have to  
13 assume, or else the whole thing doesn't make any sense and  
14 it's all -- it's all arguing about nothing -- we have to  
15 assume that there was probable cause on some other ground  
16 than the ground which he stated or anything closely  
17 related to the ground which -- which the officer stated.  
18 Isn't that -- isn't that the -- the manner in which this  
19 case gets to us?

20 MR. PHILLIPS: Your Honor, we raised the issue  
21 at the Ninth Circuit that there had been no evidence put  
22 forward on the other crimes. And we pointed out that even  
23 the deputy prosecuting attorney -- and in fact, even in  
24 closing argument, when they addressed the -- the wig-wag  
25 headlights, et cetera, they stated specifically that that

1 information went to what they called his intent to  
2 unlawfully record.

3 JUSTICE SCALIA: But -- but that's not the  
4 ground on which the Ninth Circuit decided it. The Ninth  
5 Circuit never had to reach the question of whether there  
6 was probable cause on these other grounds --

7 MR. PHILLIPS: Correct, Your Honor.

8 JUSTICE SCALIA: -- because it found, even if  
9 there was these other grounds, they're not closely related  
10 to the illegal taping.

11 So I suppose you're telling us that if we find  
12 that we do not like the closely related rule, that it's  
13 not part of -- of United States constitutional law, what  
14 we should do is remand to the Ninth Circuit so that they  
15 could determine whether there was probable cause on the  
16 other grounds.

17 MR. PHILLIPS: That's exactly right, Your Honor.

18 And in -- in looking at this -- this probable  
19 cause determination and the reasonableness requirement of  
20 the Fourth Amendment, the qualified immunity, of course,  
21 was a doctrine that was advanced by the Court to address  
22 specific problems. None of those problems are impacted in  
23 any way by the closely related offense, this subset of  
24 qualified immunity cases.

25 JUSTICE STEVENS: May I ask one other question

1 about the proceedings in the trial court?

2 MR. PHILLIPS: Yes, sir.

3 JUSTICE STEVENS: Was there a motion for summary  
4 judgment by the defendants claiming, as a matter of law,  
5 they should be entitled to qualified --

6 MR. PHILLIPS: Yes, sir.

7 JUSTICE STEVENS: And that was overruled.

8 MR. PHILLIPS: That was denied, yes.

9 JUSTICE STEVENS: And then there was a jury  
10 trial and the jury disagreed with it and, in effect, said  
11 there -- there was basis for qualified immunity.

12 MR. PHILLIPS: Yes. Yes, Justice Stevens. And  
13 the -- in reviewing the transcript and in reviewing the --  
14 the instructions and the ruling on the summary judgment  
15 motion, the reason that Senior Judge Bryan did not rule on  
16 the qualified immunity was twofold.

17 One, at the time of the summary judgment motion,  
18 one of the officers was -- well, was lying about having  
19 contacted the prosecutor prior to making the arrest, and  
20 he noted in his order that there was a factual dispute.  
21 So summary judgment wasn't appropriate.

22 And second, Judge Bryan indicated that  
23 essentially there was a problem created by the Saucier  
24 opinion because he felt that it was somehow possible that  
25 there could have been an arrest effectuated without



1 probable cause, but that there was a reasonable mistake on  
2 the part of the officers. So this did not proceed to the  
3 jury on the -- on this closely related offense doctrine.  
4 It didn't proceed on there were these other crimes for  
5 which probable cause existed, but on this broad standard  
6 of good faith and reasonable mistake.

7 JUSTICE STEVENS: What is your understanding of  
8 the reason for the jury's verdict on this issue?

9 MR. PHILLIPS: I almost hate to say it, Your  
10 Honor, but I believe it was a lack of sympathy. That --  
11 that is my -- much like with Justice Scalia, I believe  
12 they -- they looked at the -- the circumstances and even  
13 though there was not probable cause to have arrested him,  
14 they came to the conclusion we don't like Mr. Alford.  
15 We're not going to find for him.

16 JUSTICE STEVENS: May I ask one other question  
17 then too?

18 JUSTICE SCALIA: That's not my reason. I don't  
19 even know the man. I'm just --

20 (Laughter.)

21 JUSTICE STEVENS: In -- in your view is the  
22 closely related doctrine a -- a matter of closely related  
23 as a matter of law between two different offenses or is it  
24 a matter of -- are the facts relevant? For example, could  
25 one argue that these offenses were factually related

1 pretty closely because they grew out of the same central  
2 group of facts?

3 MR. PHILLIPS: In our brief, Your Honor, I often  
4 used the phrase same conduct test because in amalgamating  
5 the six different circuits, that appeared to be the most  
6 consistent test and the one that's most consistent with  
7 the objective standard and with the reasonableness  
8 standard, that if -- and I, again, go to the no harm/no  
9 foul. If you're engaging in conduct that would have and  
10 should have led to your arrest, if it's the same conduct  
11 for which you were arrested and it's simply misnamed, then  
12 there essentially is no harm of constitutional magnitude.  
13 But otherwise --

14 JUSTICE GINSBURG: Well, then you have a very  
15 narrow view of closely related. It comes down to misnomer  
16 cases. It's one thing to say -- what the officers told  
17 the DA, although after they arrested him -- didn't they  
18 describe the whole episode from when they saw Alford pull  
19 up behind the disabled vehicle? They described that and  
20 they mentioned the flashing lights. They described the  
21 whole episode up till the point where they -- the officers  
22 apprehended him and saw the equipment and then noticed --  
23 they told the DA everything, and he said, yes, you have  
24 probable cause.

25 MR. PHILLIPS: They did describe the entire

1 episode to him, Justice Ginsburg.

2 JUSTICE GINSBURG: So why couldn't it be related  
3 in time and space rather than legally related?

4 MR. PHILLIPS: Well, I'm not urging something as  
5 narrow as -- as a semi-Blockburger test. But here you  
6 have essentially two discrete conducts that were being  
7 examined by the officers: number one, the actions  
8 surrounding the headlights; and number two, the actions  
9 surrounding the taping. And the trial -- I mean, it was  
10 very clear that the two were treated as discrete incidents  
11 by the police. At the moment Devenpeck saw the tape  
12 recorder -- and he testified at trial. When I saw the  
13 recorder in the record mode and saw that it was moving,  
14 that's what he stated to him constituted probable cause  
15 for the arrest. The moment he saw that tape recorder and  
16 saw the play and record buttons were pushed, he informed  
17 Mr. Alford, you're under arrest for making an illegal tape  
18 recording.

19 So when looking at whether something is -- is  
20 sufficiently related or not, obviously there's going to  
21 have to be more than a modicum of logic that's used, but  
22 objectively this separates rather nicely into two discrete  
23 incidents for the analysis.

24 JUSTICE BREYER: Why -- why is it exactly that a  
25 policeman who comes on a difficult scene, gun in one

1 pocket, the guy has a knife in another, and he throws a  
2 punch? Now, the policeman might make a mistake about  
3 that. He -- he thought he threw a punch, but he made a  
4 mistake. Now -- now, why is a policeman less likely to  
5 make that kind of a mistake than make a mistake about what  
6 crime to label it?

7 MR. PHILLIPS: Well, Your Honor, we're not  
8 concerned so much -- this doctrine is not concerned so  
9 much with what to label the crime.

10 JUSTICE BREYER: No, no. You said -- you -- you  
11 say everybody agrees in this case that if the policeman  
12 had reasonable cause objectively to arrest the person for  
13 A, but he arrested him for B instead, there are some  
14 circumstances in which that's okay. And on their view,  
15 it's -- as long as -- it was always okay, really, as long  
16 as objectively there was reasonable cause. On your view,  
17 you're going to add a little thing. You're going to add,  
18 and by the way, it's not okay unless that conduct that he  
19 looked at was in fact illegal. So you say -- because  
20 policemen could make mistakes about labels, but they're  
21 not likely to make mistakes about throwing a punch. So I  
22 just wondered why not. I mean, they got the wrong guy for  
23 throwing the punch. You know, so -- so what? Why is that  
24 so -- that -- that supposedly in your view is some  
25 terrible constitutional harm, but if he just mislabels it,

1 it's not a terrible constitutional harm. And I'm just  
2 puzzled as to where that distinction comes from and why.

3 MR. PHILLIPS: Well, Your Honor, the distinction  
4 in -- in this particular case and the distinctions in the  
5 -- in the cases that run the gamut around the circuits  
6 generally show one thing that we --

7 JUSTICE BREYER: -- that the circuits all agree  
8 with you. Now, my only problem is it's hard for me to see  
9 why they all agree with you.

10 (Laughter.)

11 JUSTICE BREYER: And -- and that's where I'm  
12 sort of stuck.

13 MR. PHILLIPS: Your Honor, if we start with  
14 first principles, and the first principle that underlies  
15 this case is there is, from the framing area -- era, a  
16 general mistrust of warrantless arrests. From that, we  
17 step to the reasonableness clause. From the  
18 reasonableness clause, we then step to this judicially  
19 created qualified immunity, which subsumed the good faith  
20 analysis. So what we find is we're stepping further and  
21 further away from the original principle.

22 And the -- on the original principles, he was  
23 arrested without a warrant. Wrong. Under the  
24 Constitution we have reasonableness. Okay. He's  
25 arrested. Was it a reasonable arrest? The court has said

1 we generally say that if an arrest has probable cause,  
2 then it's reasonable unless there are these exigent  
3 circumstances, excessive force, et cetera. Then under  
4 qualified immunity, it's even a step more attenuated, that  
5 even though there might not have been probable cause, if  
6 there was arguable probable cause, then there would be a  
7 violation, but no one is going to be liable for it.

8 JUSTICE STEVENS: Yes, but Mr. Phillips, let me  
9 go back first principles. You are complaining about an  
10 arrest which you admit was valid. Do you not -- do -- do  
11 you not that the arrest was supported by probable cause  
12 and therefore was a valid arrest?

13 MR. PHILLIPS: In this instance, Your Honor?

14 JUSTICE STEVENS: Yes.

15 MR. PHILLIPS: Certainly not.

16 JUSTICE STEVENS: Oh, I misunderstood. I  
17 thought we were just talking about qualified immunity.

18 But you challenge the arrest itself even though  
19 you admit there was probable cause for the arrest?

20 MR. PHILLIPS: No, Your Honor, because we don't  
21 feel that there was probable cause for the arrest.

22 JUSTICE SCALIA: We don't that challenge that  
23 here, though. I asked you that question earlier, and I  
24 thought you agreed that for purposes of our deciding this  
25 case, we -- we will assume, though you do not concede the

1 point, that there was probable cause on one of the other  
2 grounds.

3 MR. PHILLIPS: That in order to address the  
4 Ninth Circuit's holding --

5 JUSTICE SCALIA: Exactly, exactly.

6 JUSTICE STEVENS: And -- and there's no need for  
7 the Ninth Circuit's rule unless there was probable cause  
8 because if there was no probable cause, you win on that  
9 ground. You don't have to get into this closely related  
10 offense doctrine. Is that correct?

11 MR. PHILLIPS: If there was probable cause --

12 JUSTICE STEVENS: No. If there was no probable  
13 cause.

14 MR. PHILLIPS: Oh, correct. If there was no  
15 probable cause for --

16 JUSTICE STEVENS: Then you win without this  
17 fancy doctrine.

18 MR. PHILLIPS: That's -- that is correct, Your  
19 Honor, and that was --

20 JUSTICE STEVENS: This -- this doctrine only  
21 comes into play and is only required in cases involving a  
22 valid arrest and a -- a mistake by the officer in  
23 identifying the wrong cause for the arrest. So it's an  
24 extension of the qualified -- it's a -- it's a -- an  
25 application of the qualified immunity doctrine to say you

1 are not protected even though you acted lawfully.

2 MR. PHILLIPS: Well, because it actually -- to  
3 turn it back around, you're not protected because you did  
4 not act lawfully. You did not act lawfully because --

5 JUSTICE STEVENS: No, but if you say the arrest  
6 was valid, he did act lawfully although we didn't realize  
7 the reason why he did.

8 MR. PHILLIPS: Your Honor, the cases that have  
9 examined this doctrine have -- have looked at it as sort  
10 of straddling the Fourth Amendment and the qualified  
11 immunity analysis.

12 JUSTICE SOUTER: But -- but don't you reconcile  
13 the -- the problem of the straddle by saying that unless  
14 the probable cause, which we will assume existed, is for a  
15 closely related offense, the whole arrest was invalid?  
16 Isn't that your position?

17 MR. PHILLIPS: Correct. Unreasonable.

18 JUSTICE SOUTER: Okay.

19 Now, let me ask you -- you one other question.  
20 You -- you started out in getting down to first principles  
21 with disfavor of warrantless arrests. Would your position  
22 be different if the officer had somehow gotten an arrest  
23 warrant on the spot for illegal taping? Wouldn't you be  
24 making the same argument?

25 MR. PHILLIPS: Certainly, Your Honor, and there



1 we would --

2 JUSTICE SOUTER: So it has nothing to do,  
3 essentially, with warrantless or nonwarrantless arrests.

4 MR. PHILLIPS: Well, in this case it does, but  
5 had there been a warrant --

6 JUSTICE SOUTER: Well, in this -- yes, but on  
7 your theory, that is -- that is incidental. That is not  
8 essential. If he had had an arrest warrant for illegal  
9 taping, you'd be making the same argument.

10 MR. PHILLIPS: That there was no probable cause  
11 for the arrest.

12 JUSTICE SOUTER: That's -- that's right.

13 MR. PHILLIPS: Correct, Your Honor.

14 JUSTICE SOUTER: Yes.

15 MR. PHILLIPS: And I think that that -- of  
16 course, that -- as we point out in our brief, there's  
17 support for that, that historically the warrant must show  
18 the reason that someone is being arrested. So as we  
19 pointed out, there's this -- an odd --

20 JUSTICE O'CONNOR: Well, you don't have any case  
21 law to cite to us for that. That gets us into a whole new  
22 doctrine.

23 MR. PHILLIPS: Well, Your Honor, I think one of  
24 the most fundamental principles that we can look at on  
25 showing the reason why you're being arrested is the great

1 writ of habeas corpus where, in order to hold someone,  
2 they must show why he is being held.

3 JUSTICE GINSBURG: But you've already conceded  
4 that it -- Washington law doesn't require the officer on  
5 the spot to say why he's making the arrest and that  
6 there's no decision of this Court or any court that I know  
7 that said the Constitution requires the officer on the  
8 spot to give a reason.

9 MR. PHILLIPS: That's correct, Your Honor. So  
10 what we have posited and what the Ninth Circuit -- what  
11 they did in the Gasho case, for example, is after the fact  
12 you can look at the actions that were taken by the  
13 officers, the booking sheet, et cetera, to give you some  
14 objectively verifiable evidence of the cause for the  
15 arrest. And really what it's looking at is there needs to  
16 be a nexus between conduct and arrest, and --

17 JUSTICE STEVENS: Thank you, Mr. Phillips.

18 Ms. Hart, you have 5 -- 5 minutes.

19 REBUTTAL ARGUMENT OF MAUREEN A. HART

20 ON BEHALF OF THE PETITIONERS

21 MS. HART: I think I'd only like to make one  
22 point, Your Honors, and that is that the Fourth Amendment  
23 does not make the validity of arrest a game that the  
24 government loses even when there's probable cause for  
25 arrest, but the closely related offense doctrine does.

1 And for that reason, it should be rejected and we  
2 respectfully ask the Court to reverse the decision of the  
3 Ninth Circuit.

4 JUSTICE STEVENS: Thank you, Ms. Hart.

5 The case is submitted.

6 (Whereupon, at 10:58 a.m., the case in the  
7 above-entitled matter was submitted.)

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