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

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next this morning in Case 09-11556, Tolentino
5 v. New York.

6 Ms. Schwarz.

7 ORAL ARGUMENT OF KRISTINA SCHWARZ

8 ON BEHALF OF THE PETITIONER

9 MS. SCHWARZ: Mr. Chief Justice, and may it
10 please the Court:

11 The Court held in Delaware v. Prouse that,
12 in the absence of reasonable suspicion, it is an
13 unreasonable seizure under the Fourth Amendment for
14 police to stop a car for the purpose of checking the
15 motorist's driving credentials.

16 In Brown v. Texas, the Court similarly ruled
17 that police may not stop a person without reasonable
18 suspicion for the purpose of requiring the individual to
19 identify him or herself. These cases are grounded in
20 the principle that in this country we enjoy the right to
21 go about our business free from government interference
22 unless or until the police have just cause to detain us.

23 Petitioner's motion to suppress alleged that
24 the police acted exactly as they did in Prouse and
25 Brown. They stopped the car without justification,

1 elicited his name, and gained access to his DMV records,
2 which otherwise would not have been discovered. Instead
3 of suppressing the poisonous fruit of the illegal car
4 stop, the DMV records, the New York Court of Appeals
5 chose to create a new categorical rule that prevents
6 application of the exclusionary rule whenever the police
7 act in violation of Prouse.

8 JUSTICE SCALIA: Was -- was -- was the
9 poisonous fruit the DMV records, or was the poisonous
10 fruit the fact that this person who is contained in the
11 records was the one driving the car? Why wasn't that
12 the -- why wasn't that the fruit? I mean, the records
13 were there anyway. What -- what -- what new information
14 came from the stop was the fact that that is the person
15 who was driving the car. Why -- why didn't -- why
16 wasn't that what should have been suppressed?

17 MS. SCHWARZ: Well, Justice Scalia, that is
18 also a fruit of the poisonous tree. As --

19 JUSTICE SCALIA: I would agree with you on
20 that fruit. Did -- did you ask for that to be
21 suppressed?

22 MS. SCHWARZ: Yes, that was asked for in the
23 -- in the motion at the trial level. In addition --

24 JUSTICE SCALIA: But that's not what's
25 before us here, right?

1 MS. SCHWARZ: That's right, and that's
2 because the court below decided that -- in deciding the
3 case only addressed the DMV record, and -- and indicated
4 that the DMV records were not properly suppressible
5 fruit.

6 JUSTICE ALITO: Suppose that the --

7 MS. SCHWARZ: And that's the issue.

8 JUSTICE ALITO: Suppose that -- that you had
9 won at the trial level; the judge suppresses everything
10 and dismisses the indictment; and Mr. Tolentino walks
11 out of the courtroom and is observed by the officer that
12 conducted the stop in this case. The officer sees him
13 getting into a car and driving away, even though his
14 license is still suspended. Now, could -- could he be
15 arrested for that?

16 MS. SCHWARZ: Yes, Justice Alito, he could.

17 JUSTICE ALITO: Even though the officer
18 would have no reason to know that this particular person
19 has a suspended license were it not for the chain of
20 events that followed from the initial allegedly illegal
21 stop?

22 MS. SCHWARZ: Well, although that initial
23 stop provided the tainted information that he didn't
24 have a license, the subsequent re- offense would
25 certainly taint the -- the illegality of the first stop

1 and make the second offense properly --

2 JUSTICE ALITO: All right. Let me ask a
3 related question. Suppose that after you filed your
4 suppression motion the -- the State of New York became
5 nervous about this issue and they checked all the
6 surveillance cameras in the vicinity of the stop, and,
7 lo and behold, they found a tape showing Mr. Tolentino
8 driving the car shortly before the stop here. Could he
9 be prosecuted for illegal -- for driving without a
10 license, with a suspended license, using that evidence?

11 MS. SCHWARZ: Well, that -- I believe that
12 under those circumstances it would be entirely proper to
13 prosecute the case. With that, that would be evidence
14 that came from an independent source.

15 JUSTICE ALITO: Well, I mean, in light of
16 those two answers, it does seem to me that your real
17 problem here is not with the -- the DMV records. It's
18 with the police officer's observation after the stop
19 that Mr. Tolentino was driving the car.

20 MS. SCHWARZ: Well, Justice Alito, again,
21 all of -- there's lots of evidence that could be
22 properly the fruit of the poisonous tree. There was a
23 statement made here that the Petitioner said that he did
24 not have a New York State license, there's the
25 observations of the officer, and there's the DMV

1 records. They're all properly considered fruit, and in
2 this case the DMV records are of important evidentiary
3 significance.

4 JUSTICE GINSBURG: Is there -- is there any
5 case in this Court where what was suppressed was
6 information that was lawfully in the government's
7 possession, as opposed to evidence that was acquired
8 originally through the search? Here we have the DMV
9 records, they're public records. I don't know of any
10 decision of this Court that deals with suppression of
11 evidence that is already in the government's possession,
12 and if I'm wrong about that, you tell me.

13 MS. SCHWARZ: Yes. Yes, Justice Ginsburg, I
14 don't believe there has been precedent on that issue.
15 However, in the independent source doctrine cases, there
16 -- they've always required that the possession -- or
17 that they have knowledge of the information in order for
18 it to defeat the exclusionary rule application. So in
19 this case, although the government had the DMV records
20 -- well, first of all, law enforcement didn't have the
21 DMV records. It was only until the illegality and the
22 exploitation of that illegality that they acquired the
23 records from the Department of Motor Vehicles. So in
24 that sense it was clearly a fruit of the poisonous tree.

25 But even if you look at government as an

1 integrated whole, the prior possession of the -- the
2 records was meaningless, of no value to them, until the
3 illegality when it acquired its meaning.

4 JUSTICE GINSBURG: Suppose the police
5 following Mr. Tolentino had noted down his license
6 plate, and then got this information, not as a result of
7 his driver's license, but from the plate on the car?

8 MS. SCHWARZ: Well, Justice Ginsburg, the --
9 the -- the plates of the car would not indicate the --
10 the driver's license of the driver, and in this case Mr.
11 Tolentino --

12 JUSTICE GINSBURG: They might show him as
13 the owner of the car.

14 MS. SCHWARZ: The owner of the car. And I
15 believe in Respondent's brief they indicated that --
16 that some of the police computers will even show
17 descriptive features or maybe even a picture of the
18 driver. But in this case Mr. Tolentino was not the
19 registered owner of the vehicle, so that wouldn't have
20 provided them with cause to pull the car over.

21 JUSTICE KENNEDY: This -- this goes back to
22 a question Justice Alito asked in a probably more artful
23 way, but I'm not quite sure what's supposed to happen
24 under your view after this stop. They stop the person,
25 they get the information that he's driving under a

1 suspended license, and are they supposed to say, Oh, you
2 know, we shouldn't have stopped you; I'm sorry, have a
3 nice day, go ahead, and then he leaves? Is that what
4 goes on?

5 MS. SCHWARZ: No, Justice Kennedy, that's
6 not what would happen. The State would impound the car.
7 They would not allow a -- a person without a proper
8 license to get back in the car and -- and drive on.
9 That -- in order for the Petitioner to get the vehicle
10 back, he would -- if it was his vehicle --

11 JUSTICE KENNEDY: Well, why isn't impounding
12 the car the fruit of the illegal search?

13 MS. SCHWARZ: Because the -- the impoundment
14 statutes are based on a public safety interest, and so
15 it doesn't --

16 JUSTICE KENNEDY: But why doesn't the public
17 safety interest then permit us to use this evidence in
18 order to protect the public safety further by punishing
19 him for -- not driving? I don't see the difference.

20 MS. SCHWARZ: Because in order to do that,
21 it would be tantamount to sanctioning a -- a fishing
22 expedition in this case, Justice Kennedy, because it
23 would be allowing the police without reasonable
24 suspicion --

25 JUSTICE KENNEDY: Well, why wouldn't you say

1 the same thing about impounding the car?

2 MS. SCHWARZ: Because the -- the -- the
3 interests are different and because it's not a forever
4 removal of the Petitioner's right to get the car,
5 whoever the -- the rightful owner is. It's just making
6 sure that the Petitioner can't get back in the car and
7 continue driving. In order to get the vehicle back, at
8 least in New York State, the -- if it was the
9 Petitioner's, they would have to show proof that they
10 had a valid license; and if it wasn't his vehicle, then
11 the other -- the true owner would have to get -- provide
12 proper credentials to establish that they could take the
13 -- the vehicle into their possession; and also they
14 would have to have proof that the Petitioner himself had
15 cleared up his record or get some sort of a -- a release
16 from the court or from the district attorney's office.
17 So the whole purpose of that impoundment statute is for
18 public safety.

19 JUSTICE BREYER: I don't understand the
20 answer you gave to Justice Alito. Maybe I mixed it up.
21 The police stop the car without cause.

22 MS. SCHWARZ: Uh-huh.

23 JUSTICE BREYER: So illegal stop. And you
24 say as a result of the stop they found out all these
25 things in the records, that he had no license, right?

1 MS. SCHWARZ: Yes.

2 JUSTICE BREYER: So that shouldn't be
3 introduced into his trial for driving without a license.

4 MS. SCHWARZ: Yes.

5 JUSTICE BREYER: All right. Now the
6 question I had heard put was, suppose after they got
7 this information, they don't arrest him then, but he
8 gets into the car again and starts driving. You said
9 then they could arrest him?

10 MS. SCHWARZ: Well --

11 JUSTICE BREYER: Is that right? Why? Why
12 isn't -- why isn't that just as much the fruit of the
13 poisonous tree? They found out he doesn't have a
14 license by the record which came to them from an illegal
15 stop. I just don't understand it. Did I get you right
16 as to what you said?

17 MS. SCHWARZ: Justice Breyer, what I -- what
18 I meant to say is the attenuation doctrine would apply.
19 Now, if the person was -- got back in his car
20 immediately at that scene and started off driving, then
21 I'm not sure that the attenuation doctrine would --
22 would -- would kick in.

23 JUSTICE BREYER: So therefore they couldn't
24 arrest him. So what they do is they -- is that right?

25 MS. SCHWARZ: Well, yes, but --

1 JUSTICE BREYER: They see -- they see he --
2 they stopped him, they get the records, wrongly. They
3 see he has no license. He says: How did you know?
4 Because we just looked at your license. That was
5 illegal; good-bye, gets into the car and drives off, and
6 they can do nothing?

7 MS. SCHWARZ: Except I just have to remind
8 you that they -- they could --

9 JUSTICE BREYER: Is that right or not? Is
10 that right?

11 MS. SCHWARZ: -- impound the car.

12 JUSTICE BREYER: I -- how could they ---
13 they can impound the car.

14 MS. SCHWARZ: Impound the car.

15 JUSTICE BREYER: Because?

16 MS. SCHWARZ: So --

17 JUSTICE BREYER: Because?

18 MS. SCHWARZ: Because of the statutory
19 rights, the Court -- because they now know that he has
20 no license to drive, so either the car will -- if
21 there's another person who can properly take possession
22 of the vehicle, then that person can drive off with the
23 car. But the Petitioner himself, who doesn't have a
24 valid license, he can't get back in the car.

25 JUSTICE KAGAN: Ms. Schwarz, suppose --

1 MS. SCHWARZ: And --

2 JUSTICE KAGAN: I'm sorry.

3 MS. SCHWARZ: Well, I'm done.

4 JUSTICE KAGAN: Ms. Schwarz, suppose the
5 police arrest the guy, find out who he is, don't -- stop
6 the guy, find out who he is, don't arrest him, but then
7 now they know that this is the kind of guy who drives
8 without a license. And so they go to his house the next
9 day and they see him getting back in the car. Could
10 they arrest him then?

11 MS. SCHWARZ: Justice Kagan, I think the
12 answer would be yes, and the reason why is because if
13 they see him on a subsequent occasion and they're seeing
14 him re-offend, that would attenuate the taint of the
15 first --

16 JUSTICE KAGAN: So the re-offense -- the
17 re-offense just cuts off the original taint?

18 MS. SCHWARZ: I believe so, yes. I mean, it
19 would be attenuation analysis, but to me it would be
20 pretty clear-cut that that's how it would resolve.

21 CHIEF JUSTICE ROBERTS: So the only way that
22 the police can prevent an unlicensed driver from driving
23 in this situation is to take away his car? Impound the
24 car, as you say?

25 MS. SCHWARZ: Well --

1 CHIEF JUSTICE ROBERTS: Unless they want --
2 for any offense, you know, expired driver's license.
3 Expired last week. They can't just give the guy -- they
4 can't give the guy a ticket, right? All they can do is
5 take away his car?

6 Your answer to a number of the questions has
7 been that -- that have tried to address the issue of
8 what are they supposed to do, since they know they have
9 somebody who is violating the law, is that, well, they
10 can take away the car. And I just want to know if
11 that's the only permissible response by the police when
12 they know that the person driving has violated the law.

13 MS. SCHWARZ: If the -- if the stop was --

14 CHIEF JUSTICE ROBERTS: Totally illegal.

15 MS. SCHWARZ: -- Totally illegal --

16 CHIEF JUSTICE ROBERTS: Totally, yes.

17 MS. SCHWARZ: Then I don't think that -- if
18 there were -- I don't think that they could prosecute
19 that case. They could -- they couldn't charge him with
20 --

21 CHIEF JUSTICE ROBERTS: And the only way to
22 prevent him from reoffending immediately is to impound
23 the car? Because if he gets into the car and drives,
24 then -- or can the police arrest him right away?

25 MS. SCHWARZ: Well, again, that would be

1 attenuation analysis. But I think that the taint of the
2 initial illegality would make that a much more difficult
3 case. But in that situation, the police also could --
4 again, if there was another person who had authority to
5 take possession of the vehicle, that person could take
6 the vehicle, the registered owner or someone with
7 authority to do that. But the police would not be
8 powerless to see the defendant get back in the -- in the
9 car.

10 I mean, it would -- that would be --

11 CHIEF JUSTICE ROBERTS: Why not? Why
12 wouldn't they --

13 MS. SCHWARZ: Because of the impoundment
14 statutes.

15 CHIEF JUSTICE ROBERTS: Is that your answer,
16 then: They've got to impound the car every time or let
17 the guy just go?

18 MS. SCHWARZ: Well, they -- they could drive
19 the person home to his house or take him to the corner
20 or tell him not to drive until he cleared up his
21 license. They could do that.

22 CHIEF JUSTICE ROBERTS: They could tell him
23 not to drive until he clears up his license?

24 MS. SCHWARZ: I -- yes. I mean, that would
25 be another alternative.

1 But the scenario that you are talking about
2 would be highly unlikely, and it would be almost in bad
3 faith if the police stopped him illegally, found out
4 that he had the suspended license, and then let him get
5 back in right away. That wouldn't be the way that the
6 police would normally do that, unless there was a way to
7 properly maintain the safety of the road --

8 JUSTICE GINSBURG: How much time do they
9 have to wait? Justice Kagan brought up if the police go
10 to his home the next day. You've brought up attenuation
11 theory a number of times.

12 MS. SCHWARZ: Yes.

13 JUSTICE GINSBURG: You -- I think now you
14 have answered, he gets back into the car, drives it
15 away, they can do nothing because it's too close to when
16 they discovered his record of -- his suspended license.

17 How much of an interval must there be? What
18 do you mean by attenuation doctrine?

19 MS. SCHWARZ: Well, that would be --
20 attenuation would be evaluated on a case-by-case basis,
21 Justice Ginsburg, but I would think if, even an hour
22 later, if the Petitioner brazenly drove by those same
23 officers, you know, thumbing his nose at them, hi, that
24 would be -- attenuation analysis would apply at that
25 point.

1 JUSTICE KAGAN: Because you could say that
2 if he got back in the car right after the stop, if the
3 police for some reason did not impound the car and he
4 got back in the car, that's another offense, and so by
5 your theory, then they could properly arrest him and use
6 all of this knowledge in a prosecution?

7 MS. SCHWARZ: And a court very well -- very
8 well may agree with you on that. My only qualm with
9 that is that when the officers illegally find out that
10 he has a suspended license and then to let him get back
11 in and immediately arrest him, it's sort of in bad
12 faith.

13 JUSTICE BREYER: Well, what -- what is that
14 word, the "bad faith"? I take it your rule is identical
15 if when they wrongly stop the car, they look up the
16 records, the records say he has no license, and in
17 addition, he's wanted on 17 drug warrants and for 3
18 triple axe murders. Again, you can't do anything about
19 it?

20 MS. SCHWARZ: No. No, Justice Breyer.

21 JUSTICE BREYER: What? Can you? You cannot
22 do anything about it or you can?

23 MS. SCHWARZ: You can.

24 JUSTICE BREYER: What? How?

25 MS. SCHWARZ: Well, the -- the warrants are

1 entirely different --

2 JUSTICE BREYER: Why?

3 MS. SCHWARZ: -- because of the Ker-Frisbie
4 doctrine. The warrants for -- for other cases are a
5 method by which the court brings the body of the
6 defendant to court. And so there is --

7 JUSTICE BREYER: So if, in fact, a policeman
8 stops a person without cause and learns as a result of
9 that that there are many warrants outstanding against
10 him, he then can arrest the person, and -- but can he
11 introduce those warrants into court as evidence or
12 whatever if it's relevant?

13 MS. SCHWARZ: Absolutely, he can bring them
14 in. But the warrants are not evidentiary.

15 JUSTICE BREYER: Suppose the way that the
16 policeman stops the person and gets the information
17 illegally is he takes an axe and breaks into the house,
18 the policeman, and thereby -- what I'm showing -- I just
19 think this case has lots of implications, and I'm
20 looking for a rule here that's going to work in a lot of
21 different situations.

22 MS. SCHWARZ: Well, there's -- actually, I'm
23 sorry, Justice Breyer, I'm not sure I follow.

24 JUSTICE BREYER: Well, you say that if, in
25 fact, he learns that this man from the public records is

1 a triple axe murderer --

2 MS. SCHWARZ: Right.

3 JUSTICE BREYER: -- he can do nothing about
4 it, I said? And you said no, he can do something about
5 it. I just wanted to know the distinction.

6 MS. SCHWARZ: Okay. So there's different --
7 again, just to be clear, the warrant, the arrest
8 warrant, is not of evidentiary value, according to
9 the -- Davis. That's not something that would be
10 introduced in court. It's just a method for bringing
11 the defendant into court. And so in that case, they
12 would properly be allowed to arrest him. And if there
13 was --

14 JUSTICE BREYER: It happens to be a
15 description of the individual, not a warrant, he gets
16 from the public record which is read off to him when he
17 calls in, a description: A red tie. Can he use that
18 and introduce it into evidence?

19 I mean, is this case about -- what's it
20 about, driving? Or does it have broader implications?

21 I thought that the Court had held that any
22 public record at all is immune. Is that right? Immune
23 from the normal fruit of the poisonous tree rule.

24 MS. SCHWARZ: The New York Court of Appeals
25 rule categorically removes it, that's true.

1 JUSTICE BREYER: Yes, and I was testing
2 that. I want to know: Is that, in your opinion, a
3 correct rule in all cases?

4 MS. SCHWARZ: No. And in fact, one of
5 the --

6 JUSTICE BREYER: I mean, not an incorrect
7 rule, the opposite rule. No rule.

8 MS. SCHWARZ: Well, it's -- the problem with
9 that rule, the categorical rule, is that it will create
10 a fresh incentive for police officers to make these kind
11 of suspicionless stops, and so it will encourage police
12 to violate the Fourth Amendment, and not only --

13 JUSTICE SCALIA: Not -- not if you allow the
14 suppression of the policeman's identification of the
15 individual driving the car. I mean, that -- nobody's
16 contending that that can't be suppressed. So if you
17 can't bring in the policeman to say, yes, this fellow
18 Smith, whose record we have here, was the fellow driving
19 the car. Once that's out, what incentive is there to
20 make these suspicionless stops?

21 MS. SCHWARZ: Because --

22 JUSTICE SCALIA: What I'm saying is, you're
23 getting at it from the wrong end. What should have been
24 suppressed was the policeman's identification of the
25 person who was driving the car.

1 MS. SCHWARZ: Ah. Yes. And if -- and if
2 this case -- if this case -- we prevail, and this case
3 was returned to trial court, both of those issues would
4 be at play and would be litigated. The observations of
5 the defendant and the DMV records are both suppressible
6 fruit and both of them would be subject to suppression.

7 JUSTICE ALITO: But that's not the argument
8 you seem to be making. You want to suppress the
9 knowledge that the police derived from the stop that
10 Mr. Tolentino's license is suspended, and you would
11 allow an exception to that only if there was
12 attenuation. But why isn't the simpler solution to a
13 case like this that you can't suppress the knowledge of
14 matters that are in a government record, however you can
15 suppress observations by the police on the scene that
16 flow directly from the illegal stop?

17 MS. SCHWARZ: Well, again, our position is
18 that both of those items are properly suppressible. And
19 it's true in this circumstance that the observations
20 would probably subsume the need for the DMV records.
21 However, the observations may not be sufficient in
22 certain circumstances. And in those cases, it would be
23 more important -- it would be very important to have
24 both of the items suppressible, and there's no reason,
25 there's not --

1 JUSTICE GINSBURG: I thought there was some
2 rule about not being able to suppress a person's
3 identity? You've been asked a couple of times why are
4 you going after the DMV record; you should go after the
5 police identification of Joe Smith or whoever. I
6 thought there was some rule that says the identity of
7 the person is not suppressible. Am I wrong about that?

8 MS. SCHWARZ: That -- that is a restatement
9 of the Ker-Frisbie doctrine, that essentially says that
10 a person cannot suppress himself, his body, in order to
11 defeat the jurisdiction of the court.

12 JUSTICE KENNEDY: And so how does that fit
13 with your earlier answers that his identity here could
14 be suppressed? And then I'll ask a second question. If
15 you say that you can suppress his identity from
16 information they gained after the stop when they saw
17 him, why couldn't they say, well, we saw this man before
18 we stopped him?

19 MS. SCHWARZ: There's -- there's a
20 distinction between the identity and the elicitation of
21 his name, and the elicitation of his name which led to
22 the DMV records.

23 JUSTICE SCALIA: Well, it -- it gets you
24 nowhere to say John Smith. You have to say John Smith
25 was driving the car. It's the driving of the car that

1 you want suppressed. That's not the identity. I mean,
2 John Smith, fine, you can say John Smith, John Smith,
3 John Smith all you like at court. It's -- it's not
4 going to get a conviction.

5 But when you say John Smith was driving the
6 car, then you are eliciting testimony from the officer
7 concerning information he would not have had but for the
8 stop, that John Smith was driving the car, right?

9 MS. SCHWARZ: Well, this Court has always
10 defined evidentiary fruit as something that -- of
11 evidentiary value which the public authorities have
12 caused an arrested person to yield to them during an
13 illegal detention, and that's from the Davis case. And
14 the DMV records would fit that definition of evidentiary
15 fruit.

16 And in this case, because it is the classic
17 situation where there's sufficient causal connection
18 between the Fourth Amendment violation and the
19 subsequent discovery of the evidence to justify
20 suppression, there's no reason not to apply the
21 exclusionary rule here, and in fact, it meets all the
22 definition of the sort of case where there would be very
23 high level of deterrence as a result of applying the
24 exclusionary rule.

25 I see that I have 5 minutes. I would like

1 to reserve the rest of my time.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Ms. Schwarz.

4 Ms. Halligan.

5 ORAL ARGUMENT OF CAITLIN J. HALLIGAN
6 ON BEHALF OF THE RESPONDENT

7 MS. HALLIGAN: Mr. Chief Justice, and may it
8 please the Court:

9 I would like to start with your question,
10 Justice Breyer, about what the ruling below was and
11 what's at stake in this case. What the court of appeals
12 held was quite narrow. It said -- and I'm reading from
13 page 105a of the appendix: "We merely hold that a
14 defendant may not invoke the fruit of the poisonous tree
15 doctrine when the only link between improper police
16 activity and the disputed evidence is that the police
17 learned the defendant's name."

18 So the court of appeals is focusing on the
19 fact that all that was elicited here is the name of the
20 defendant, and that's appropriate. Asking a name is
21 fundamental to any encounter between police and
22 citizens, and that's because the officer --

23 JUSTICE SOTOMAYOR: You're suggesting that
24 it's okay for the police to walk up to any citizen,
25 anywhere, and say, you're under arrest until you give me

1 your name?

2 MS. HALLIGAN: Absolutely not, Your Honor.

3 JUSTICE SOTOMAYOR: Well, there's -- there's
4 been no doubt here that it was a stop without suspicion.
5 That's been presumed. So how is that different from
6 what I just asked you --

7 MS. HALLIGAN: Because --

8 JUSTICE SOTOMAYOR: That they took a person
9 randomly, detained them without any suspicion, and said
10 give me your name. Are you suggesting that that's okay?

11 MS. HALLIGAN: No, I'm not. The legality of
12 the stop here has not been adjudicated. We are
13 presuming that the police acted illegally.

14 JUSTICE SOTOMAYOR: I am presuming. I know
15 that there's counter-arguments to that.

16 MS. HALLIGAN: We are not at all challenging
17 this Court's decisions, certainly not Delaware v. Prouse
18 or any others, which hold that the police may not stop
19 someone without basis and may not certainly enforce the
20 sort of statute that was at issue in Hiibel without some
21 basis for asking for identification.

22 JUSTICE SOTOMAYOR: So isn't the eliciting
23 of the name as a result of an unlawful stop something
24 that could be suppressed?

25 MS. HALLIGAN: It should not be subject to

1 suppression, and that's a distinct question from whether
2 or not there was a constitutional violation that
3 occurred in the stop and the asking of the name.

4 JUSTICE SOTOMAYOR: The name is different
5 than the person, the body of the person, which has to do
6 with the Court's jurisdiction. But why isn't the name
7 any different than a wallet that's in somebody's pocket
8 or a shirt or a hat, whatever is on the person? Why is
9 a name not subject to suppression?

10 Let's go past what happens here, because I
11 understand the disconnect between the name, the DMV
12 record, and seeing the person driving. How we tie those
13 together are a different issue. But you made a bold
14 statement when you started. You said that the police
15 securing a name is never suppressible.

16 MS. HALLIGAN: Because it has a unique
17 status, as this Court recognized in Hiibel, in the
18 criminal justice system. Asking for a name is a routine
19 and accepted part of any stop because the officer needs
20 to know who he's dealing with. He faces an inordinate
21 risk, as this Court noted in Mims and most recently in
22 Arizona v. Gant, of being shot when he approaches a car.

23 JUSTICE GINSBURG: What's the difference
24 between stopping a car and stopping a person on the
25 street, as Justice Sotomayor asked? You can't stop

1 somebody on the street for no reason. The person looks
2 to you suspicious, so you stop the person and say: Tell
3 me your name. For a Terry stop, you have to have
4 reasonable suspicion. So why isn't it the same for
5 somebody who is driving a car?

6 MS. HALLIGAN: I think it is the same in
7 terms of what the Fourth Amendment requires, and
8 Delaware v. Prouse holds that. We're not taking issue
9 with that or asking this Court to retreat from that.

10 What we are saying is that where all that is
11 elicited is the name, it's not appropriate to apply the
12 exclusionary rule, which is a very distinct question.

13 JUSTICE KAGAN: So, Ms. Halligan, suppose --
14 you're suggesting there should be an exception for
15 knowledge of identity. Suppose there were a clearly
16 illegal search and the government is looking for a head
17 of some kind of criminal syndicate and knows this only
18 by an alias, all right; and -- and finds out as a result
19 of this illegal search -- pick your -- pick your alias,
20 you know, John Smith -- finds out, you know -- finds out
21 that this person whose house they're searching is John
22 Smith, is the head of this criminal syndicate.

23 Can the government then use that knowledge
24 of identity, knowledge that this person goes under this
25 alias, in order to build a case around this guy?

1 MS. HALLIGAN: In your hypothetical I'm not
2 sure whether there would be any Fifth Amendment issues
3 that would be at play, but --

4 JUSTICE KAGAN: No, they find out this
5 person's alias as the result of the illegal search, and
6 that allows them to build a substantial criminal case.

7 MS. HALLIGAN: If all that is obtained is
8 the name, then the exclusionary rule should not be
9 applied.

10 JUSTICE KAGAN: So there's a diary, and it
11 says: I am John Smith. That's Keyser Soze.

12 (Laughter.)

13 JUSTICE KAGAN: I am Keyser Soze. That
14 would not be suppressible?

15 MS. HALLIGAN: The diary itself, the
16 document would be suppressible. The knowledge that that
17 person is the -- is Keyser Soze would not be subject to
18 suppression, and knowledge should never be something
19 that is subject to suppression, in any event.

20 JUSTICE ALITO: Suppose that when -- when
21 the police stopped this particular car, they saw that
22 Mr. Tolentino was smoking marijuana or snorting cocaine
23 or drinking from a bottle of alcohol or he had somebody
24 tied up, bound and gagged on the back seat of the car.
25 Now, all of those things would clearly be the fruit --

1 all those observations would clearly be the fruit of the
2 allegedly illegal stop, right?

3 MS. HALLIGAN: That's correct, and --

4 JUSTICE ALITO: Even though they were in
5 plain view, they would all be suppressed, right?

6 MS. HALLIGAN: That's correct, Your Honor.

7 JUSTICE ALITO: But you're saying that the
8 observation that Mr. Tolentino is at the wheel of the
9 car, that is not suppressed?

10 MS. HALLIGAN: I would like to distinguish
11 between the observation of the person driving the car,
12 to the extent that you might have a case in which that
13 observation is made after the stop as opposed to before
14 the stop; that's a different and distinct question.
15 It's not presented in the case that's before the Court
16 right now -- from the question of whether the
17 exclusionary rule should be applied when only the name
18 is elicited.

19 The observations, it may be as -- as Justice
20 Ginsburg suggested that under *Crews*, because the
21 physiognomy of a person -- five justices determined
22 there the appearance is not something that's subject to
23 suppression, the police officer's observation that it
24 was in fact this individual who looks like this driving
25 the car would not be subject to suppression, either.

1 But that's not presented. All that is at issue here is
2 whether or not the elicitation of the name and the
3 records directly linked to that are subject to
4 suppression.

5 JUSTICE BREYER: He made a mistake and said:
6 I'm driving the car.

7 MS. HALLIGAN: Pardon?

8 JUSTICE BREYER: He made a mistake. He said
9 in court: I was driving the core -- car. He never
10 should have said it. All right, now once he said it,
11 now we know he's driving the car.

12 MS. HALLIGAN: Well --

13 JUSTICE BREYER: So now you're saying why
14 does this case even come up? Because once you have his
15 name, the second he said it in court you could go up
16 looking his -- you could go look at his -- his records
17 anyway; you could find all these -- the facts about him
18 which I guess could you bring in.

19 MS. HALLIGAN: Well, that's right, and
20 that's why part of why a name should not be --

21 JUSTICE BREYER: So this case shouldn't be a
22 special rule, it should just be a case of -- what is it
23 called? It's a doctrine, you would have found it
24 anyway; inevitable discovery.

25 MS. HALLIGAN: You could resolve the case on

1 the theory that by definition government records that
2 are previously held --

3 JUSTICE BREYER: But they're only inevitably
4 discovered if he makes a mistake of saying what his name
5 is. No, no, not that -- the mistake of saying: I was
6 driving the car. And then, as Justice Scalia pointed
7 out, maybe you could suppress that, so it would -- it
8 would --

9 MS. HALLIGAN: In this case the question of
10 any observations of the defendant is waived. It was
11 abandoned by operation of State law. You could have
12 another case in which that at issue.

13 JUSTICE BREYER: Wait. One --

14 JUSTICE SCALIA: I was going to ask that.
15 She said that --

16 JUSTICE BREYER: Why is --

17 JUSTICE SCALIA: -- your -- your friend said
18 that it was raised below. What -- what happened to it?

19 MS. HALLIGAN: What happened is this: In
20 the suppression motion initially, the defendant sought
21 to suppress a number of things, including the
22 observations of the police. The trial court judge did
23 not rule specifically on that aspect of the suppression
24 motion. The trial court judge said that there would be
25 a suppression hearing on the statement that the

1 defendant made, but there would not be a suppression
2 hearing with regard to the DMV records because DMV
3 records were not subject to suppression.

4 At that point the defendant pled guilty, and
5 so by operation of State law -- because first of all
6 there was not a ruling specifically on the question of
7 observations and the defendant failed to bring that to
8 the trial court judge's attention, and because the
9 guilty plea was taken, and you can only appeal when you
10 plead guilty on a suppression motion where there's a
11 final order, there's no final order on the observation.
12 That's out of the case, that would be our position.

13 You could have a subsequent case where that
14 question would be presented if, in fact, an officer does
15 not see a defendant until after he approaches the car,
16 and in that case he would have to determine whether or
17 not Crews and the five justices, which says the
18 physiognomy of the defendant is not subject to
19 suppression, controls and therefore allows the
20 observations to come in; but it's not presented here.

21 CHIEF JUSTICE ROBERTS: Do you -- is your
22 position that they can do anything in terms of the
23 search of a name? Could they punch it into Google or
24 something like that and find out a lot more than just
25 what they have in their own possession?

1 MS. HALLIGAN: I think that would be
2 correct, Your Honor, but here you have records that not
3 only are in the government's possession -- and this
4 Court never has suggested --

5 CHIEF JUSTICE ROBERTS: I know -- I know it
6 raises a different question, but you know, you keep
7 saying they're just -- or you know, you're just talking
8 about the name, but names are meaningless in the
9 abstract. It's not just that the officer wants to know
10 what to call him. It's what he wants to find out from
11 the name.

12 MS. HALLIGAN: The --

13 CHIEF JUSTICE ROBERTS: And these days
14 there's so many electronic databases, you can find out
15 an awful lot just, you know, with the punch of a few --
16 a few buttons.

17 MS. HALLIGAN: You could, and I think that
18 that's why if the Court was concerned about the
19 potential breadth of that holding, it could narrow it to
20 the use of the name to link to government records. In
21 the field, in particular, what an officer is going to
22 look for is records that suggest danger, so for example
23 what the officers have in New York State is they --

24 CHIEF JUSTICE ROBERTS: No, but it's not
25 limited to suggesting danger or whatever. It's -- it

1 can -- that may be what the officer on the scene is most
2 interested in, of course, but once you get the guy's
3 name you're interested in a lot of things.

4 MS. HALLIGAN: That's right, and that's
5 because you are in the process of conducting some sort
6 of investigation, and to suppress the knowledge of
7 someone's identity would -- would blink reality.

8 CHIEF JUSTICE ROBERTS: Well, they're not
9 suppressing the knowledge of somebody's identity. All
10 that -- what's being suppressed is the evidence of
11 criminal activity that you derive from that.

12 MS. HALLIGAN: I think it's very different
13 than when you have drugs in a car which could clearly be
14 subject to suppression. All that you have here, first
15 of all, that's elicited, is the name. The name itself
16 is not subject to suppression, nor did the defendant
17 seek to have it suppressed, as the court of appeals
18 observed. And so that should be the end of the inquiry.
19 If the antecedent piece of evidence is not subject to
20 suppression then there's no poison that can flow from
21 that to contaminate anything like the DMV record.

22 JUSTICE ALITO: Could I go back and --

23 JUSTICE KAGAN: I think that that's not
24 right, Ms. Halligan, because the search is the poisonous
25 tree. Now, it might be that the name can't be

1 suppressed, but it still might be that everything that's
2 discovered as a result of knowing the name, which would
3 never be discovered unless the search had taken place,
4 could be suppressible.

5 MS. HALLIGAN: Two points, Justice Kagan. I
6 believe, first of all, that if the name is not
7 suppressed and then something flows from the name, I
8 don't think that you can skip that step and then
9 suppress something that comes further down the road.
10 But, secondly, the fact that these records were already
11 in the government's possession is precisely what takes
12 this outside the scope of the fruits doctrine. The
13 fruits -- fruits doctrine has been held to apply
14 repeatedly in cases where the evidence is in some sense
15 the product of the illegal government activity. These
16 records are simply not the product of any government
17 activity.

18 JUSTICE KAGAN: Why does it --

19 JUSTICE ALITO: Could I go back and ask you
20 to -- to explain what -- how you -- you think the -- the
21 request for suppression of the police officer's
22 observation was waived? That was raised in the motion
23 to suppress, page 17A of the joint appendix.

24 MS. HALLIGAN: Yes, Your Honor.

25 JUSTICE ALITO: Now, the -- the New York

1 Supreme Court apparently didn't understand that that
2 issue was in the case and ruled only on suppression of
3 the records and tangible evidence, is that right, 78A?

4 MS. HALLIGAN: Yes.

5 JUSTICE ALITO: What is the -- what is Mr.
6 Tolentino supposed to do at that point to preserve the
7 issue of the suppression of a police officer's
8 observation?

9 MS. HALLIGAN: To preserve the issue, Mr.
10 Tolentino should have raised that fact to the judge,
11 should have pointed it out pursuant to CPLR 71070,
12 subsection (2). There's also case law explaining that
13 when that happens, that is the obligation of the
14 defendant and the defendant cannot raise the issue on
15 appeal if it's not brought to the attention of the trial
16 court judge at that point.

17 JUSTICE ALITO: The defendant raises an
18 issue before the trial judge, the trial judge ignores
19 that issue, misses the issue --

20 MS. HALLIGAN: And then the defendant pleads
21 guilty.

22 JUSTICE ALITO: -- and then the defendant
23 waives the issue unless the defendant says by the way,
24 you missed -- you failed to address one of the arguments
25 that I made?

1 MS. HALLIGAN: At the point at which the
2 defendant pleads guilty, that is correct, Your Honor.
3 The defendant pled guilty prior to seeking any ruling on
4 that, specifically, or any clarification. None of this
5 is -- is briefed before the Court, but the defendant
6 also did not raise the issue of the observations in the
7 brief to the intermediate State appellate court, the
8 State court of appeals or this Court. So it has been
9 deemed abandoned a long time ago. And in the oral
10 argument before the New York Court of Appeals, the
11 defendant seemed to concur in the fact that it had been
12 abandoned.

13 CHIEF JUSTICE ROBERTS: You -- you make the
14 point that these records are already in the government's
15 possession.

16 MS. HALLIGAN: Yes.

17 CHIEF JUSTICE ROBERTS: I mean, isn't that
18 true of everything that's available on any type of
19 database? Everything in Google or whatever the other
20 search engines are is in the government's possession in
21 the sense that they've got it; all they've got to do is
22 identify it in their search, and they've got it.

23 MS. HALLIGAN: Well, this is in the
24 government's possession in the literal sense of the
25 word, and in fact to correct something that was said

1 previously, although it's not in the record, the DMV
2 records, along with other records, such as arrest
3 warrants, are in fact in the NYPD's possession. They
4 use a database that the State police generate which they
5 download onto their server. So they have it in their
6 actual possession, which is different from --

7 CHIEF JUSTICE ROBERTS: Well, it can't make
8 a difference on whose server it is, does it?

9 MS. HALLIGAN: No, I'm simply saying that it
10 is in their possession.

11 CHIEF JUSTICE ROBERTS: It is information
12 that they can get if they have the correct way of
13 searching it, which is here by name.

14 MS. HALLIGAN: And -- and the fact that they
15 are drawn to the records because they have stopped this
16 individual and they have this name does not disqualify
17 them from using those records. This Court has cited
18 several times with approval to a case called Bynum in
19 the D.C. circuit in which there were prints that were
20 taken following an illegal detention, and those prints
21 were suppressed. The prosecution knew that the
22 defendant had committed the crime, because those prints
23 had been taken and matched, and the defendant -- or the
24 prosecution was allowed to use a set of prints that it
25 already had in its files on retrial.

1 The same thing happened in both Davis and
2 Hayes. In fact, in both of those cases, there were
3 convictions on remand, and the prosecution's attention
4 was drawn to the defendant only following some illegal
5 activity.

6 I would like to --

7 JUSTICE GINSBURG: May I ask you something
8 about the practice in New York? I mean, there is an
9 artificiality to this case because we are assuming that
10 the stop was unlawful.

11 MS. HALLIGAN: Yes, Your Honor.

12 JUSTICE GINSBURG: But the police said it
13 was lawful, because the radio was blasting so loud. Why
14 did this issue even -- the issue of "suppose it was
15 unlawful" even come up, instead of the city or the
16 county saying what the police stopped him for was a
17 traffic violation, was perfectly legal? Why get to the
18 constitutional question when the prosecutor brought into
19 play the argument that this was a lawful stop?

20 MS. HALLIGAN: The prosecutor made two
21 arguments on the -- in response to the suppression
22 motion. One was that the DMV records were not subject
23 to suppression as a category. The second was, as you
24 say, that the stop was legal. The trial court judge
25 ruled only on the first ground and did not hold a

1 hearing to adjudicate the facts of the stop, and so
2 that's why it comes to you in this posture.

3 JUSTICE ALITO: It does seem rather strange.
4 That would have been, like, a 10-minute hearing. Why
5 did you stop him? Well, he was playing the music too
6 loud. Defendant testifies, I wasn't playing my music
7 too loud. The trial judge says, Well, I believe you, or
8 I believe you, and that's the end of the matter. It
9 does seem really -- that's how things are done in trial
10 court in New York City? You jump to these big
11 constitutional issues and --

12 MS. HALLIGAN: I'm not sure that anyone
13 realized that this case would -- would eventually come
14 before this Court, but that is the way this particular
15 case.

16 JUSTICE KENNEDY: Of course we know it's too
17 loud. It's always too loud.

18 MS. HALLIGAN: There's actually a provision
19 of the New York City Administrative Code, Your Honor,
20 which is on point --

21 CHIEF JUSTICE ROBERTS: Are these things
22 public records? If I wanted to find out if you had
23 been, you know, stopped for driving without a license,
24 can I find that out?

25 MS. HALLIGAN: Frankly, I think that's a

1 difficult question, Your Honor. There are certain
2 entities to which driving records can be disclosed
3 pursuant to the Federal Driver's Privacy Protection Act,
4 and there are also certain restrictions. So I think the
5 answer to your question would depend on who was asking.
6 But they are certainly the administrative adjudications
7 that are made by a judge in traffic court, and in that
8 sense, they are every bit as valid a record as the
9 decision of any other court. There are simply certain
10 protections with respect to DMV records specifically.

11 JUSTICE KAGAN: Your government records
12 argument, is it limited to New York City records or does
13 it also apply to FBI records, to records of other cities
14 and states which, presumably, would be available on a
15 reciprocal basis?

16 MS. HALLIGAN: I think it would apply to
17 records available on a reciprocal basis, Your Honor.

18 I would like to touch on the --

19 JUSTICE SOTOMAYOR: Counsel, do you see no
20 difference between Crews and Bynum, in the typical case
21 where the evidence against the defendant is not
22 developed as a result of an illegal stop -- it exists
23 independent of that stop -- and one in which the stop
24 itself creates the ground for arrest? Don't you see a
25 difference between those two things?

1 MS. HALLIGAN: I guess I would say that what
2 creates the grounds for arrest here is the fact that the
3 individual was driving with a suspended license, and
4 no --

5 JUSTICE SOTOMAYOR: But there was no
6 suspicion of that when that person was stopped. The
7 suspicion to arrest arose not independent of the
8 illegality, but as part of it.

9 MS. HALLIGAN: But so, too, with Bynum. It
10 was the match of the prints that caused the prosecutor
11 to realize that this individual was guilty --

12 JUSTICE SOTOMAYOR: But all of the evidence
13 at trial really had nothing to do with the fingerprint.
14 It had to do with the victims and everyone else walking
15 in and saying, That's the guy who did lie to me.

16 MS. HALLIGAN: I believe in Bynum, Your
17 Honor, the prints were critical, and here the only
18 element --

19 JUSTICE SOTOMAYOR: In the arrest.

20 MS. HALLIGAN: No, in the adjudication
21 itself. The appellate decision -- may I finish my
22 answer? -- on remand in Bynum went back, suggests that
23 the ability to locate those prior prints in the FBI file
24 was essential to the conviction there.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Ms. Halligan.

2 MS. HALLIGAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Shah.

4 ORAL ARGUMENT OF PRATIK A. SHAH,
5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

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

8 Petitioner seeks to suppress official
9 records that were lawfully in the State's possession
10 before any Fourth Amendment violation occurred. That
11 unprecedented request should be rejected for three
12 reasons.

13 One, the DMV records were accessed merely
14 through use of Petitioner's name; two, those records
15 were produced and possessed by the State long before the
16 allegedly illegal stop at issue; and, three, deterrence
17 does not outweigh the costs, the substantial costs of
18 suppression under the circumstances present here.

19 JUSTICE SOTOMAYOR: Are you --

20 CHIEF JUSTICE ROBERTS: Is everything that
21 the government has access to through any database
22 considered in the government's possession?

23 MR. SHAH: No, I don't -- I don't think I
24 would go that far in terms of our government records
25 argument. I think it would have to be information --

1 CHIEF JUSTICE ROBERTS: Well, you said -- as
2 you phrased it, I thought it was in the government's
3 possession.

4 MR. SHAH: Right, effectively in the
5 government's possession I think would be the standard.
6 So here I think we're talking, not about Google, but I
7 think we're talking about governmental records.

8 CHIEF JUSTICE ROBERTS: Well, what's the
9 difference? In either case, they need some search term,
10 and then they will get the answers. I don't see why it
11 makes a difference.

12 MR. SHAH: I think for the governmental
13 records part of our argument, that rationale is an
14 independent rationale. The key part of it is that the
15 information was actually in the government's possession
16 before the Fourth Amendment violation occurred. I think
17 it's fairer to say that governmental records that are
18 produced and owned and possessed by the government
19 qualify. I think it's a harder argument to make that
20 something --

21 CHIEF JUSTICE ROBERTS: Well, what if -- I'm
22 sorry, go ahead.

23 MR. SHAH: That something might be -- that
24 something that could be found by using Google was
25 already in the government's possession before the

1 violation occurred.

2 CHIEF JUSTICE ROBERTS: Well, what if it's
3 in the -- the government of Colorado's possession, and
4 they have an arrangement with New York that they will
5 let them check their files to find out, you know,
6 whatever it is, nationwide or something? Does that --
7 your argument apply to that?

8 MR. SHAH: I think it could. I think it
9 would depend on the arrangement. If it's a fully
10 reciprocal arrangement that effectively allows the State
11 full access to those records, then I think it may be
12 tantamount to the State having effective possession.

13 JUSTICE KAGAN: How about private databases
14 that are going to be available to the government upon
15 request?

16 MR. SHAH: I think -- I think that's
17 stretching it a little bit further. That's a little bit
18 harder. Again, if it were the case that the State could
19 be said to have effectively have possession of those
20 records because, for example, a copy of them are sitting
21 on their servers or they have such full access that even
22 though they're prepared by a private database, the State
23 has paid for them, so they're effectively State records,
24 that may also fall within the scope. But those are
25 questions that are essentially pushing the boundary of

1 what's effectual --

2 JUSTICE BREYER: Why? The facts of this
3 case, I find confusing. Let's imagine the policeman
4 goes with a hatchet and breaks into somebody's house
5 illegally.

6 MR. SHAH: Okay.

7 JUSTICE BREYER: And there, he sees on the
8 desk the name is Dagwood. With other information, he
9 goes to a certain alley and starts shouting "Dagwood"
10 and people shower him with drugs. You have no doubt, if
11 that is the fruit of the poisonous tree, an out,
12 correct?

13 MR. SHAH: I think if I understand your --

14 JUSTICE BREYER: I mean, that's how they --
15 they knew the name, they got the evidence, they get to
16 the place. Without the name, they wouldn't have gotten
17 the drugs.

18 MR. SHAH: Right.

19 JUSTICE BREYER: Okay. Out, right?

20 MR. SHAH: If I understand the hypothetical,
21 they break into someone's house --

22 JUSTICE BREYER: Yes, illegally. Very
23 illegally.

24 MR. SHAH: Right, and they find --

25 JUSTICE BREYER: His name.

1 MR. SHAH: They find the defendant's name?

2 JUSTICE BREYER: Yes, correct.

3 MR. SHAH: Right. The defendant's name
4 itself is not suppressible under these --

5 JUSTICE BREYER: I just wondered if you were
6 going to also say in my example, which I could make more
7 realistic with more time, which you don't want to give
8 me, the -- but -- that he uses the name, and as a result
9 gets all kinds of evidence in the form of drugs, murder
10 victims, whatever you want. Have you any doubt that
11 that would be suppressible?

12 MR. SHAH: I think the government could have
13 an argument that the fruits would not be suppressible.

14 JUSTICE BREYER: They're not suppressible
15 simply because you get them through a name? You break
16 into a house, get a name; as a result of the name, you
17 know what criminal enterprise to go to; as a result of
18 that criminal enterprise going to, you get every
19 evidence under the sun, absolute direct connection. And
20 you say that's not suppressible?

21 MR. SHAH: A couple of responses, Your
22 Honor. There is, first, already extensive deterrent
23 value from --

24 JUSTICE BREYER: Okay, okay. I just wanted
25 to know the ultimate response.

1 MR. SHAH: Right.

2 JUSTICE BREYER: Now assume it's the
3 opposite response. If it's the opposite response, for
4 state of argument, how is it any different whether he's
5 showered with drugs or showered with government records?

6 MR. SHAH: Okay. So I think my -- my
7 response is that the fruits are not necessarily
8 suppressible in your -- in your hypothetical.

9 JUSTICE BREYER: I know. I wanted you to
10 assume the opposite. I got -- you win if my
11 hypothetical -- if it's not even drugs, it's not even
12 government records. But if it is drugs, why isn't it
13 government records? This won't hurt you very much,
14 because often there will be an alternative source, but
15 suppose there isn't. Why are government records
16 different from drugs?

17 MR. SHAH: Right. Because the government
18 already possesses those records. Those records were
19 within the government's possession before any Fourth
20 Amendment violation occurred. It would be depriving the
21 government of information it already had, and there is
22 no precedent within this Court's Fourth Amendment
23 jurisprudence that would --

24 JUSTICE ALITO: Suppose they -- they -- they
25 break into the house with an axe, and they find out the

1 name, they see this guy is Dagwood, and so they run that
2 through their -- their database, and they find this is
3 the guy we've been looking for, for the last 20 years.
4 He is responsible for all the drugs that come into this
5 country, he's committed numerous acts of terrorism, he's
6 a -- he's a serial killer, he's killed 50 people, we've
7 been chasing him forever, and so the -- the result would
8 be all that knowledge, that this is Dagwood is the fruit
9 of the poisonous tree and nothing can be done about
10 Dagwood?

11 MR. SHAH: No, no, Your Honor. I want to be
12 very clear. My response is that that is not subject to
13 suppression. And -- and -- and even my friend on the
14 other side conceded that if it were an -- an outstanding
15 arrest warrant such as in your hypothetical that would
16 lead to of the name, even if the name were a fruit of an
17 illegal stop or search, that that arrest warrant would
18 still provide a basis to arrest the defendant and
19 prosecute the defendant.

20 Now, it may be that other fruits that are
21 discovered in the home or statements taken from the
22 defendant in the home would be suppressed, but certainly
23 the prosecution could proceed under the Ker-Frisbie
24 Rule, and any preexisting evidence that this person was
25 an axe murderer or whatever else evidence that the

1 government had would certainly still be admissible in
2 the prosecution for whatever.

3 JUSTICE GINSBURG: You mentioned some --
4 before you finish, you -- you said a name is not
5 suppressible, and that's because this Court held -- we
6 started out by saying the observation of the person that
7 dropped out of this case, so we're talking only about
8 records, but the extraction of a name, you say that's
9 not suppressible, even though it was unlawfully
10 extracted because there were no reasonable suspicions
11 that this person did anything wrong?

12 MR. SHAH: Yes -- yes, Your Honor, we would
13 say that a name is different, that it's not
14 suppressible, and we would rely on the language this
15 Court used in Lopez-Mendoza, which says the respondent's
16 body or identity is never suppressible, even if it's
17 obtained as a result of an illegal search, seizure or
18 interrogation.

19 We think name is -- is part and parcel of a
20 defendant's identity, and that it has a special status
21 within -- within the criminal justice system.

22 JUSTICE KAGAN: Mr. Shah, how would you
23 think about this problem? Suppose the police start
24 stopping people and rather than asking for your name,
25 they take a blood sample, they prick your finger, and

1 then they take that blood and they look in their very
2 extensive DNA databases, and they discover, oh, this is
3 a guy who, you know, did these various terrible things,
4 and start building cases. Would that be all right?

5 MR. SHAH: Your Honor, I think other types
6 of biometric evidence that you suggest, for example, of
7 blood evidence, might well implicate competing
8 considerations that would dictate a different result.
9 And let me suggest a couple of the competing
10 considerations, why I think the Court doesn't need to
11 reach so far and say all sorts of biometric information
12 should be treated the same.

13 For -- for one -- for one thing, things like
14 a name or even a fingerprint, this Court has said is not
15 a separate Fourth Amendment event to acquire that. For
16 example, once someone is detained, it's not also a
17 search to ask for their name or to take a fingerprint.

18 However, in your example, pricking someone
19 with a needle to obtain their blood would be a separate
20 Fourth Amendment event, because that would be a separate
21 invasion of their -- of their bodily integrity, privacy,
22 and that might warrant different considerations, since
23 there are two violations there. There might be a need
24 for greater deterrent.

25 I think the other sort of consideration that

1 might be implicated in -- in that type of hypothetical
2 is that evidence unlike a name or fingerprint, DNA
3 evidence, for example, that you suggest, might provide
4 competing considerations in the sense that it could lead
5 to other types of information that not -- that may not
6 be relevant to the criminal justice system, medical
7 records, genetic information. It may pose a specter of
8 other competing considerations that might require a
9 different balance in the end.

10 I think it would be premature for this Court
11 to weigh in one way or another as to whether that would
12 be appropriate. I think we would need a record and we
13 would want time to -- to -- to -- we would want that to
14 play out and see -- and see what the consequences were.
15 So I don't think the Court has to go that far. I think
16 the Court can limit it, as in this case, to name,
17 fingerprints and other traditionally -- other
18 information traditionally used to identify a defendant.
19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr. Shah.

21 Ms. Schwarz, you have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF KRISTINA SCHWARZ

23 ON BEHALF OF THE PETITIONER

24 MS. SCHWARZ: I would first just like to
25 address Justice Breyer's concern about what the rule

1 should be, and -- excuse me. So long as there's
2 sufficient causal relationship between the Fourth
3 Amendment violation and the later discovery of evidence,
4 this Court has expressed continued allegiance to this
5 rule. So in this case the reason why the DMV records
6 are suppressible fruit is it fits that classic
7 definition.

8 Why are the observations suppressible when
9 the identity isn't? That's another issue that was
10 raised. The observations are -- again, they fit the
11 definition whereas the identity does -- does not fit
12 that. The Ker-Frisbie rule prevents a person himself
13 from being suppressible, but the elicitation of his name
14 is something entirely separate. So in other word, in
15 the Crews case a majority of the Court said that a -- a
16 person could not suppress their person or their face
17 from being in court; five of the justices said that; but
18 five justices said that the in-court identification
19 could under certain circumstances be suppressible. So
20 they drew a distinction between the person's body being
21 brought into court, which is not suppressible because of
22 the Ker-Frisbie rule, and then the evidentiary use of
23 the identity, the fact that the five of the justices
24 said that in certain circumstances not applicable in
25 that case, the in-court identification could be

1 suppressible shows the distinction. And that's the
2 distinction that has been -- is confusing about this
3 case, because the elicitation of his name is what led to
4 the DMV records. But even if this Court found that the
5 elicitation of the name was not sufficient or was
6 somehow related to Ker-Frisbie and could not be
7 suppressible, the DMV records directly flow from the
8 Fourth Amendment violation here, from the Prouse
9 violation. And so it really doesn't really matter.

10 Especially in light of the decision in Whren
11 to remove subjective motivations from the determinations
12 of constitutional reasonableness in car stops, it's
13 essential to enforce what remains of motorists' core
14 Fourth Amendment rights; and the Whren standards just
15 must be enforced; otherwise these core Fourth Amendment
16 values will be undermined and police will be left free
17 to stop people on the roads with no objective basis and
18 check their ID and status and do fishing expeditions
19 into this sea of data that will be linked to the police
20 computers; and this would violate Prouse and Brown and
21 Hiibel.

22 CHIEF JUSTICE ROBERTS: And I suppose would
23 subject the police officers to liability, though, right?
24 In civil actions?

25 MS. SCHWARZ: Well, again, this is a classic

1 case where there's a clear relationship, a causal
2 relationship, so this is the sort of case where this
3 Court has continued allegiance to application of the
4 exclusionary rule where the exclusionary rule is very
5 strong; and so why would the Court say that the second
6 sister of the exclusionary rule, in this circumstance
7 where there's sufficiently deliberate, that exclusion
8 would be meaningful and sufficiently culpable, that the
9 evidence would be -- that application of the rule would
10 be worth the cost? In this situation there's no reason
11 to abandon the exclusionary rule.

12 JUSTICE SOTOMAYOR: Counsel, are you
13 agreeing with your adversary that you abandoned and are
14 not entitled to raise the suppressibility of the
15 observation?

16 MS. SCHWARZ: No. Well --

17 JUSTICE SOTOMAYOR: And if you're not, in
18 what ways is it tied to the question presented about
19 identity, which is the issue you sought cert on?

20 MS. SCHWARZ: Right. I -- I have no qualms
21 in my adversary explaining that the question presented
22 was limited because of the procedure, of the way the
23 trial court's decision was made. However if this Court
24 remanded the case, the question of whether the
25 observations were suppressible would be very much at

1 play.

2 JUSTICE GINSBURG: Why? Because when he
3 entered a guilty plea, you reserved only the question
4 concerning the motor vehicle records; you didn't reserve
5 any other questions.

6 MS. SCHWARZ: Well, but at the suppression
7 hearing, the -- the court would be free to consider all
8 of the suppressible fruit, including the -- the
9 statement that was made and the observations and also
10 the DMV records.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case is submitted.

14 (Whereupon, at 12:04 p.m., the case in the
15 above-entitled matter was submitted.)

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