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IN THE SUPREME COURT OF THE UNITED STATES

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MISSOURI, :

Petitioner : No. 11-1425

v. :

TYLER G. MCNEELY :

- - - - - x

Washington, D.C.

Wednesday, January 9, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:14 a.m.

APPEARANCES:

JOHN N. KOESTER, JR., ESQ., Assistant Prosecuting Attorney, Jackson, Missouri; on behalf of Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

STEVEN R. SHAPIRO, ESQ., New York, New York; on behalf of Respondent.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case Number 11-1425, Missouri v. McNeely.

Mr. Koester.

ORAL ARGUMENT OF JOHN N. KOESTER, JR.

ON BEHALF OF THE PETITIONER

MR. KOESTER: Thank you.

Mr. Chief Justice, and may it please the Court:

In the course of a drunk driving investigation, quickly securing blood alcohol evidence with as little delay as possible is incredibly important --

JUSTICE SOTOMAYOR: How come it took so long for this State to figure out that it needed to do this without a warrant?

MR. KOESTER: Well --

JUSTICE SOTOMAYOR: The officer testified that he's been making drunk driving arrests for years --

MR. KOESTER: Yes, Your Honor.

JUSTICE SOTOMAYOR: -- and I think in only one circumstance did he need to do it without a warrant. So what made the need here eminently the sense of

1 impractical to get the warrant?

2 MR. KOESTER: Well, Your Honor, back in
3 2003, there was an appellate court case from Missouri
4 that dealt with the importance of the words --

5 JUSTICE SOTOMAYOR: No, I understand why he
6 decided to do it, to forego getting a warrant. Isn't
7 his testimony dispositive of this case? He had time to
8 get it.

9 MR. KOESTER: Your Honor, that -- that
10 ignores the fact that had he sought a warrant -- there's
11 no question that he would have been able to secure a
12 warrant. The issue was, it was going to take a
13 considerable amount of time.

14 JUSTICE SOTOMAYOR: But it took a
15 considerable amount of time for all the years he did it.

16 MR. KOESTER: That's true, Your Honor.

17 JUSTICE SOTOMAYOR: And -- and he didn't
18 testify to it causing a loss of any particular case.

19 MR. KOESTER: But in this particular case,
20 it was going to take 90 minutes to 2 hours to secure the
21 warrant. And during that period of time, the most
22 probative evidence was going to be dissipating, was
23 going --

24 JUSTICE GINSBURG: But he said -- he said in
25 the ten or so cases he had had in the past, I had -- I

1 encountered no difficulty getting a warrant in prior
2 cases. There was nothing that distinguished this case
3 on the facts from other cases on the facts.

4 MR. KOESTER: That's correct, Justice
5 Ginsburg, he never had a problem securing a warrant, but
6 there was a delay; and that's -- that's the difference.
7 We're -- we're looking at a delay, and quickly securing
8 blood alcohol evidence is important, because the
9 evidence is being lost at a significant rate with every
10 minute that passes.

11 JUSTICE SOTOMAYOR: What constitutional
12 right exists for a State to get the best evidence?

13 MR. KOESTER: Well, Justice Sotomayor, I
14 think that that is something that we should always
15 strive for, to be able to get the best possible evidence
16 in the case.

17 JUSTICE SOTOMAYOR: No, no, no. You, the
18 State, want to strive for that. But what in the Fourth
19 Amendment contemplates that that's a right the State
20 must have, that is has to get the very best evidence it
21 can?

22 MR. KOESTER: The -- the touchstone of any
23 Fourth Amendment analysis is the reasonableness of the
24 search. And it's reasonable --

25 JUSTICE SOTOMAYOR: So how can it be

1 reasonable to forego the Fourth Amendment in a procedure
2 as intrusive as a needle going into someone's body? I
3 say this because breathalyzers in my mind have a much
4 different intrusion level. They don't intrude into your
5 body. And I think almost all jurisdictions use
6 breathalyzers instead of blood tests. A small fraction
7 that actually use blood tests.

8 The ruling by us today is going to change
9 that and is going to -- if in your favor is going to
10 change that and is going to -- if in your favor, is
11 going to change that and put sort of a print, the
12 Court's print, on: Use the most intrusive way you can
13 to prove your case.

14 MR. KOESTER: And, Justice Sotomayor, I
15 would disagree with that. If the Court rules in our
16 favor, I think the end result will be more people will
17 agree to take the breathalyzer test. In this case the
18 arresting officer gave the defendant an option to take
19 the breathalyzer test and when he clearly told him he
20 was not going to take it, that's when he decided to take
21 him to the hospital in order to draw the blood.

22 JUSTICE SCALIA: Why don't you force him to
23 take the breathalyzer test, instead of forcing him to
24 have a needle shoved in his -- in his arm?

25 MR. KOESTER: For practical --

1 JUSTICE SCALIA: What is the difference
2 between the reliability or the acceptability by juries
3 of a breathalyzer test as opposed to a blood draw?

4 MR. KOESTER: Justice Scalia, both tests are
5 very reliable. We rely on the breathalyzer test on a
6 daily basis, but for practical reasons it's very
7 difficult to force a drunk driver to take a breath test.
8 The breathalyzer instruments, they measures deep lung
9 alveolar air.

10 And you have to take a very deep breath.
11 And one police officer told me it's sort of like you can
12 put a balloon in front of somebody's mouth, but you
13 can't make him blow it up. It's very difficult for
14 practical reasons to force someone to -- to blow into
15 the breathalyzer.

16 JUSTICE KENNEDY: If we are talking about
17 reasonableness, do you think it's relevant for us to
18 look to the rules and practices of other States?

19 MR. KOESTER: Justice Kennedy, as the
20 Respondent points out, there are 25 states that would be
21 opposed to -- to the warrantless blood draw at issue in
22 this case. And as I point out in the reply brief, 15 of
23 those States have joined amicus Delaware urging this
24 Court to reverse the decision of the Missouri Supreme
25 Court, and I think --

1 JUSTICE KENNEDY: But the fact that those
2 States do have a warrant requirement and from what we
3 can best tell make it work very well, including some
4 expedited procedures where you can get warrants within
5 minutes -- it takes usually the policemen, say, 20
6 minutes to get just to the hospital or the police
7 station anyway.

8 And if -- if we see that other States, a
9 significant amount of other States, number one, require
10 the warrant, number two, many of those have expedited
11 procedures, does that bear on our determination of
12 reasonableness?

13 MR. KOESTER: I don't believe it does,
14 Justice Kennedy. I think, as Virginia v. Moore plainly
15 teaches, individual State laws do not affect whether or
16 not this activity was reasonable under the Constitution.

17 JUSTICE KENNEDY: But we have always --
18 correct me if I'm wrong. I think that we have always
19 thought of Fourth Amendment reasonableness standards as
20 being a national standard. Suppose 40 states -- you
21 know, we can play the game. Suppose 40 states had
22 rules that you have warrants and many of them had
23 expedited procedures. That's still irrelevant? We
24 don't look at that at all?

25 MR. KOESTER: Your Honor, I think this

1 Court's decision in Sampson vs. California is
2 instructive. In that particular case, the Court
3 approved suspicion-less searches of parolees, and I
4 think a vast majority of States disapproved of that
5 particular law enforcement practice. But that does not
6 bear on the issue of whether or not that violates the
7 Fourth Amendment.

8 JUSTICE SCALIA: Of course we don't know why
9 they disapproved. And I guess your point is they may
10 well not have permitted it because they were under what
11 you would call the mistaken belief that it was
12 unconstitutional.

13 MR. KOESTER: I suppose that is a
14 possibility, Justice Scalia.

15 JUSTICE KENNEDY: Is there any showing that
16 conviction rate in those States is lower than in the
17 States where the practice is to take the test without
18 the warrant?

19 MR. KOESTER: Your Honor, I think amici
20 National District Attorneys Association cited a study.
21 I know the Respondent also cited a study that shows it
22 doesn't have any bearing. But I think it's -- it's
23 pretty clear that if you have concrete evidence of a
24 drunk driver's blood alcohol content, concrete evidence,
25 that gives you a far greater case, a far greater chance

1 of securing a conviction at trial.

2 JUSTICE SOTOMAYOR: So the new rule is we
3 have to strengthen -- the Fourth Amendment is going to
4 be suspended whenever the prosecution can't get the best
5 evidence to make its case out?

6 MR. KOESTER: No, Justice Sotomayor. I
7 think as long as a police officer has probable cause,
8 what we're saying is it's objectively --

9 JUSTICE GINSBURG: Probable cause is
10 not enough. If you have probable cause, then you can
11 get a warrant. But it was and I think still is the main
12 rule that if you can get a warrant, you must do that.
13 Probable cause is surely not enough. Then we'd never
14 need a warrant when there's probable cause.

15 MR. KOESTER: You are absolutely right,
16 Justice Ginsburg, probable cause is not enough. But
17 probable cause coupled with the indisputable fact that
18 alcohol is eliminated from the human body with every
19 minute that passes after a drunk driver is pulled
20 over --

21 JUSTICE KAGAN: Mr. Koester, suppose that,
22 instead of waiting 2 hours, there were procedures in
23 place in Missouri and, indeed, across the country where
24 it was possible to get a warrant in these circumstances
25 within 15 or 20 minutes. Would you still be saying that

1 there is a sufficient exigency to avoid the warrant
2 requirement?

3 MR. KOESTER: I think if a particular
4 jurisdiction had perfected the warrant process to the
5 point where they could routinely obtain search warrants
6 in 15 minutes, I think we would have a different
7 outcome. I think that would affect the analysis of the
8 case. But with all due respect to the hypothetical, I
9 think it is a time-consuming process to obtain search
10 warrants.

11 JUSTICE BREYER: So why can't you do that?
12 I mean, the only virtue I see in saying you have to go
13 get a warrant is the officer picks up the phone, there
14 is usually somebody on duty, a magistrate somewhere, he
15 phones him up and says: I have a drunk driver here;
16 he's wobbling, he can't cross the center line; and he
17 won't take a breathalyzer; I want to give him a test.

18 Now, you have a second judgment and the
19 officer has to talk to somebody, so he's a little more
20 careful. And that's a protection, not necessarily for
21 this person, but a protection for others who maybe
22 weren't wobbling.

23 All right. So I think that's the question
24 you're being asked. Why -- what's the problem with
25 doing that? Which adds a little bit of security that

1 this warrant really is -- this search is really
2 necessary.

3 MR. KOESTER: Justice Breyer, I think in
4 practical application it is going to be more of a
5 time-consuming process, though, to obtain the search --

6 JUSTICE BREYER: Why wouldn't it take --
7 let's see, how long did it take me to say that? It took
8 me about 30 seconds. So -- so even if you are a lot
9 more careful, why would it take more than, say,
10 3 minutes?

11 MR. KOESTER: To obtain a search warrant --

12 JUSTICE BREYER: Well, what you do is you
13 have a system, and you phone up and you do just what I
14 said. And this man or woman who is there is not a
15 policeman. The virtue of it is this man or woman is
16 trained to listen to policemen and others say things and
17 try to pin him down a little bit and make an independent
18 judgment. So -- so why would it take more than 5
19 minutes?

20 MR. KOESTER: Well, Justice Breyer, that's
21 why I drew the analogy between the telephonic search
22 warrants that were approved back in the 1970s. It
23 sounds like that would be an instantaneous procedure,
24 but some of the lower courts that have actually examined
25 the process, they came to the conclusion that it's still

1 a time consuming process --

2 JUSTICE SCALIA: Mr. Koester, in most
3 jurisdictions, unless I'm mistaken, the cop on the beat
4 cannot apply for and get a search warrant. He has to go
5 through a prosecuting attorney or someone in the
6 prosecutor's office first. So it's not just getting
7 hold of a judge. It's getting hold of the prosecutor
8 first and then getting hold of the judge if the
9 prosecutor approves it, right?

10 MR. KOESTER: That is absolutely correct.

11 JUSTICE SCALIA: Is that the case in
12 Missouri?

13 MR. KOESTER: That is the case in Missouri.
14 The prosecution attorney --

15 CHIEF JUSTICE ROBERTS: In some cases I
16 suppose the judges actually want to read the affidavit
17 and give it some thought. It's not going to be 3
18 minutes.

19 MR. KOESTER: That's exactly right,
20 Mr. Chief Justice. I think if we were to the point
21 where we were approving search warrants in 3 minutes, it
22 would essentially be a rubber stamp --

23 JUSTICE GINSBURG: But we do have -- we do
24 have, I think, an indication that there are
25 jurisdictions that do it inside of a half-hour.

1 MR. KOESTER: That may be true,
2 Justice Ginsburg.

3 JUSTICE SOTOMAYOR: So do you define
4 reasonableness --

5 JUSTICE KAGAN: You suggest that 15 or 20
6 would be a different case. I am wondering where you
7 would draw the bright line.

8 MR. KOESTER: That's a difficult question,
9 to draw a bright line for exactly when we would draw the
10 line where -- where the exigency would disappear.

11 JUSTICE SOTOMAYOR: So would the importance
12 of the search warrant suggest, as a constitutional
13 right, suggest that we should judge reasonableness by
14 the people who are the least efficient or by the people
15 who are the most reasonably efficient?

16 MR. KOESTER: Well, Justice Sotomayor --

17 JUSTICE SOTOMAYOR: Meaning people, police
18 jurisdictions.

19 MR. KOESTER: Of course, local law
20 enforcement practices are going to vary from
21 jurisdiction to jurisdiction.

22 JUSTICE SOTOMAYOR: Absolutely, but should
23 they -- should we permit them to vary in terms of
24 inefficiency or should we be encouraging them to vary
25 within a reasonable range?

1 MR. KOESTER: Well, I think prosecutors are
2 always going to strive to obtain search warrants as
3 efficiently as possible. But whether or not this was a
4 reasonable search does not depend upon local police
5 practices.

6 If there are no further questions, I would
7 like to reserve the balance of my time.

8 CHIEF JUSTICE ROBERTS: Members of the Court
9 have intruded on your rebuttal time, including me, so we
10 will give you a little extra.

11 MR. KOESTER: Thank you.

12 Ms. Saharsky.

13 ORAL ARGUMENT OF NICOLE A. SAHARSKY,
14 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE PETITIONER

16 MS. SAHARSKY: Mr. Chief Justice, and may it
17 please the Court:

18 Here the police are facing a destruction of
19 critical blood alcohol evidence. Every minute counts,
20 and it's reasonable for the officers to proceed without
21 a warrant.

22 I would like to pick up where some of the
23 Court's questions led off: This idea that we might live
24 in a world where warrants could be gotten so quickly
25 that there is not true exigency. First of all, that is

1 not state of the world now. There is substantial
2 variation from jurisdiction to jurisdiction, and we are
3 just not in a place where the time to get the warrant
4 everywhere is 15 minutes or less.

5 JUSTICE SCALIA: But I mean, once we say
6 that you don't need a warrant, you know, even if things
7 improve, the game's up, right? No?

8 MS. SAHARSKY: No, I don't think that that's
9 true at all. The police do not have --

10 JUSTICE SCALIA: You mean somebody can come
11 up 10 years from now and say, although you approved it
12 10 years ago without a warrant, things have changed, so
13 now you need a warrant?

14 MS. SAHARSKY: I think that if the world
15 changed so that every police officer had an iPad and
16 that judges were always on duty and that the warrants
17 could be gotten that quickly, you would consider that
18 and you would also consider the other sources of delay,
19 which are the time to get to the hospital, etcetera,
20 etcetera. But yes, I would --

21 JUSTICE SCALIA: But if that's the case,
22 then why shouldn't that determination be made case by
23 case?

24 MS. SAHARSKY: Because --

25 JUSTICE SCALIA: Case by case, whether in

1 fact it would have taken that long to get a warrant?
2 And if it -- if it would have taken too long, then it's
3 okay without a warrant. If it wouldn't have taken that
4 long, it's bad.

5 MS. SAHARSKY: The question --

6 JUSTICE SCALIA: Totality of the
7 circumstances test, right?

8 MS. SAHARSKY: Right, but the totality of
9 the circumstances are with respect to the destruction of
10 evidence and what the police are witnessing. They know
11 there is certain destruction of evidence and what they
12 are weighing that against is uncertainty about whether
13 there's time to get a warrant. They have no idea what
14 this person's blood alcohol content is. They have no
15 idea how fast it's decreasing. They might --

16 JUSTICE GINSBURG: Ms. Saharsky, what about
17 saying at least they should try, since a number of
18 jurisdictions can do this within a half hour, say,
19 initiate the process while you are going to the
20 hospital; when a half-hour is up you proceed; but at
21 least there has been an effort to get a warrant.

22 MS. SAHARSKY: I think there are legal
23 problems with that and practical problems with that.
24 The legal problems is that the Court has never suggested
25 that the police are both simultaneously in

1 require-a-warrant land and not in require-a-warrant
2 land.

3 JUSTICE KENNEDY: Well, we have -- I don't
4 want to, because you have multiple answers -- but on
5 that point, we do talk about exigent circumstances. If
6 we proceed as Justice Ginsburg's suggestion indicates,
7 then the fact that you can't get a warrant within
8 45 minutes is the exigent circumstance.

9 MS. SAHARSKY: Right. I mean, in all of the
10 destruction of evidence cases the Court has said:
11 There's destruction of evidence; we're not going to make
12 you wait until half of it is destroyed or three-fourths
13 of it is destroyed or something like. And that's the
14 rule really that Respondents want. Everyone --

15 JUSTICE KENNEDY: But Justice Ginsburg said
16 30 minutes.

17 MS. SAHARSKY: Right. And what I'm saying
18 is as a practical matter, I think it would be very
19 difficult to suspect that nationwide folks could get
20 warrants in those circumstances. You typically have one
21 police officer on the scene who is making the traffic
22 stop, asking the person questions, taking him through
23 the field sobriety test. That would have to be the
24 officer who would do the affidavit in support of the
25 search warrant because he's the one who's witnessing --

1 JUSTICE ALITO: Jurisdictions have an
2 incentive to get a warrant, I would think. Even if
3 they -- even if we were to say that they don't need one,
4 they certainly have a strong incentive to get warrants
5 because it insulates the search to a much greater degree
6 from later challenge at a suppression hearing. So why
7 shouldn't it depend on the practicalities in a
8 particular jurisdiction?

9 Not every jurisdiction has prosecutors and
10 judges who are staying up at, you know, 3:00 o'clock in
11 the morning on Sunday morning waiting for the phone to
12 ring or for -- to receive some sort of an electronic
13 message that there has been a stop and somebody wants
14 a -- wants a search warrant. Maybe, you know, big
15 jurisdictions can do that, but small ones can't.

16 So why -- but if you are in a big
17 jurisdiction that -- or one that feels that they can
18 afford that, then why should -- you know, why should the
19 Fourth Amendment permit the search to take place without
20 the warrant when it could have been obtained --

21 MS. SAHARSKY: Well, I mean, a couple of
22 responses. First of all, this Court makes nationwide
23 rules and the question is whether it's reasonable to do
24 what Missouri did here even if other jurisdictions would
25 choose to or could do it differently.

1 But second, you know, this idea with respect
2 to -- that it should matter based on the time to get a
3 warrant is something the Court has never done in its
4 Fourth Amendment exigency cases. And it may be the case
5 that a court looking backwards could say, well, we think
6 you had enough time to get a warrant.

7 But the police officer where he stands with
8 the person, he knows a few things. He knows one thing
9 for sure: That evidence is going to be lost, and it's
10 critical evidence. It's not just to get above .08, but
11 you have these laws that are enhanced with --

12 JUSTICE KENNEDY: I thought -- I thought
13 that we often said that you look at whether or not you
14 can get a warrant before you can break in so that the
15 drugs aren't flushed down the toilet and so forth. We
16 make that judgment all the time.

17 MS. SAHARSKY: Right.

18 JUSTICE KENNEDY: And if that showing is not
19 made, you must get a warrant.

20 MS. SAHARSKY: But the Court --

21 JUSTICE KENNEDY: So I think it's quite
22 incorrect to say that we -- we don't look at the time
23 factor.

24 MS. SAHARSKY: I think it matters as a
25 general --

1 JUSTICE KENNEDY: We look at it all the
2 time.

3 MS. SAHARSKY: I think it matters as a
4 general matter whether warrants take time to get and
5 whether evidence is lost. But the Court has never gone
6 jurisdiction to jurisdiction. It has never
7 second-guessed the police in the way that the Court is
8 suggesting today.

9 In Kentucky v. King, for example, an
10 exigency case, the Court said the police could have
11 proceeded a couple of different ways here; we are not
12 going to make them use the least restrictive way; we are
13 just going to ask whether what they did was reasonable.

14 JUSTICE KENNEDY: I agree that there is a
15 uniform standard. But -- and I don't know if you ever
16 did finish the answer to Justice Ginsburg, but she had
17 suggested that we have a uniform rule of exigent
18 circumstances. That -- her suggestion complies with
19 your objection.

20 MS. SAHARSKY: Well, if I am understanding
21 it correctly, I think our point is this, which is that
22 the police officers have to act reasonably in the
23 situation. And in a situation they know for sure the
24 evidence is going to be lost, they know that every
25 minute is critical. For example, Respondent here's

1 blood --

2 JUSTICE SOTOMAYOR: But there are so many
3 situations in which we require a warrant, nevertheless.
4 When there is drug dealing in a house, every time people
5 enter that house, it's almost a certainty that they're
6 going to use the drugs and that evidence is going to
7 disappear. You rely on hope -- on knowing that there's
8 likely to be telltale signs left over.

9 And that's the same thing you do in an
10 alcohol situation. You rely on the testimony of the
11 police officer, you rely on the implied consent
12 presumption. It's not as if this is destruction of all
13 evidence, and not like a fleeing situation where someone
14 gets away, you have nothing left. This is -- this is
15 vastly different.

16 MS. SAHARSKY: I mean, with respect, we
17 disagree. This evidence is critical, and the number
18 matters. I mean, it is the case that blood alcohol
19 evidence is the most important evidence. This Court has
20 recognized this in several cases -- Schmerber,
21 Skinner -- and since then the law has only changed to
22 make it more important. In 2005 you had --

23 JUSTICE GINSBURG: You mentioned Schmerber.
24 Why did the Court go through all of the -- why -- it
25 could have made it a much shorter opinion by simply

1 saying, yes, blood alcohol dissipates. But it didn't.
2 It pointed out that in that particular case there was a
3 delay to investigate the accident, the person had to be
4 taken to the hospital for care, so how much time
5 elapsed? I think it was 2 hours, wasn't it?

6 MS. SAHARSKY: The Court made a mention of 2
7 hours, but that was not a critical portion of its
8 analysis. We don't think that that mattered to
9 Schmerber because the Court said, first, there was clear
10 probable cause in that situation. Second of all --

11 JUSTICE GINSBURG: What was all the -- why
12 was it in the opinion?

13 MS. SAHARSKY: Well, it's one line in the
14 opinion. If you look at it, the Court says, we are told
15 the percentage of alcohol in the blood begins to
16 diminish shortly after drinking stops, the body
17 functions to eliminate it from the system. Particularly
18 in a case like this, time had to be taken to bring the
19 accused to a hospital and to investigate the scene --

20 JUSTICE GINSBURG: Yes. They didn't need to
21 say any of that.

22 MS. SAHARSKY: Well, they said particularly
23 it means there's an extra thing. But it doesn't mean
24 that the first thing wasn't enough. And what we say is
25 if there was some uncertainty in Schmerber, the

1 Court's --

2 JUSTICE SCALIA: That doesn't mean that it
3 was enough, either, right?

4 MS. SAHARSKY: Well, that gives me the
5 second part of my answer, which is the Court's cases
6 since Schmerber have relied on the destruction of this
7 evidence being enough for exigency.

8 And I would just point the Court to look at
9 Skinner, at South Dakota vs. Neville, at
10 Winston vs. Lee, and even in a footnote in
11 Kentucky vs. King. This Court has not said anything
12 about the person having to go to the hospital and
13 whether there was an investigation --

14 JUSTICE SCALIA: Counsel for Missouri tells
15 us, Ms. Saharsky, that the breathalyzer is just as good
16 and that in fact he expects that the consequence of our
17 ruling in his favor in this case will be that drunken
18 drivers will agree to the breathalyzer test.

19 But I don't know why it isn't adequate to
20 produce that result simply to put the drunk driver in
21 a -- in a paddy wagon and on the way to the hospital
22 say: You know, we're going to be in the hospital in
23 20 minutes; we're applying for a warrant; when we get
24 there, we're going to -- we're going to, you know, stick
25 a needle in your arm, unless, of course, you agree to

1 take the breathalyzer test. Why isn't that enough to --
2 to force them into the breathalyzer test, so that they
3 will blow up the balloon.

4 MS. SAHARSKY: Well, because in that
5 situation, I think they're willing to take their chances
6 that the evidence is going to dissipate below the .08
7 standard or below these higher enhanced penalties, .15,
8 and then be able to challenge it, as opposed to if they
9 gave the evidence that they potentially wouldn't be able
10 to challenge it.

11 But I think the point that comes --

12 JUSTICE KAGAN: Or maybe they're drunk.
13 But, but, but -- I mean, Justice Scalia raises a point,
14 which is you always have some delay. Unless you are
15 talking about sticking a needle in somebody roadside,
16 you have to take them to the hospital. So there's going
17 to be some amount of time which you're going to lose,
18 and why can't you use that amount of time, if you can,
19 to try to get a warrant?

20 MS. SAHARSKY: Well, I think there are two
21 answers. One, you typically as a practical matter have
22 one officer on the scene who's proceeding with this and
23 he's the one that would have to prepare the affidavit,
24 typically the one to consult with the prosecutor. He's
25 the one who's going to drive to the hospital.

1 Presumably, we don't want him texting during driving, et
2 cetera.

3 The second answer is a legal answer, which
4 is that the Court has been very hesitant to second-guess
5 the police in these circumstances and to say when the
6 police are in a fluid situation they have to, say, try
7 to get a second officer on the scene and maybe do the --

8 JUSTICE KENNEDY: Now, I think you should be
9 fair. He doesn't have to prepare a written affidavit in
10 a number of these States. It's a telephonic warrant.
11 You have to give us that.

12 MS. SAHARSKY: Well, even in some of the
13 telephonic -- telephonic warrant procedures, you still
14 have to have a written document. You just write it out
15 and then you read it to the judge and then actually a
16 record needs to be made of it. The case United States
17 v. Reid in the Fourth Circuit actually considered this
18 and said: You know, it sounds like it won't take that
19 long, but it turns out these procedures actually take a
20 while.

21 And it's not just the time to get a warrant.
22 It's the initial time that had been taken at the stop,
23 the investigation, the field sobriety test. Then
24 there's the time to get to the hospital. And, you know,
25 sometimes these people, these folks, get to the hospital

1 and they're not given first priority, so there's
2 sometimes some waiting at the hospital. So, a
3 significant --

4 JUSTICE SOTOMAYOR: So is it okay -- is it
5 okay to let police officers take the blood?

6 MS. SAHARSKY: Well, we think that's a
7 different question and one that the Court reserved in
8 Schmerber. The Court said there was medical personnel
9 in a medical setting taking the blood in that case.
10 That's the exact same thing that's happening here.

11 But it said if we had a different case, we'd
12 ask whether the -- the situation invited an unjustified
13 element of personal risk of infection and pain. So we
14 think the Court should get a case that has a record on
15 this and then it could make a determination as to
16 whether there is that risk.

17 JUSTICE SOTOMAYOR: Oh, I bet that if we
18 rule in your favor, we will.

19 MS. SAHARSKY: I'm not sure that that's
20 true. The reason that a few States have considered
21 having police officers get trained in this way is
22 basically out of necessity. It is just in rural
23 jurisdictions it's too far to get to the nearest
24 hospital.

25 But it's fair to say that police officers do

1 not want to be in this business of taking blood. It
2 diverts them from their other activities. It's, you
3 know, it's an extensive training process. So I'm not
4 sure that that's true, but it's not something the Court
5 has to decide --

6 JUSTICE SOTOMAYOR: Do you want to be in
7 those rural places and be stopped without an independent
8 magistrate approving a field officer taking blood from
9 you?

10 MS. SAHARSKY: Well, what I'm saying is that
11 there are only a few States that are doing it now, and I
12 think it is -- it should be -- the Court should wait
13 until it actually has a record to make that
14 determination. But, you know, there has been training
15 along those lines.

16 That's something, for example, that NHTSA at
17 the Department of Transportation has helped these States
18 investigate whether it's a real option, because the
19 police officers are very far away from, you know, the
20 nearest hospital and that it's -- it's all based on this
21 concern about destruction of evidence.

22 But just to get back to --

23 JUSTICE KAGAN: Going back to
24 Justice Scalia's question, if a person does take a
25 breathalyzer, is there ever a reason for a warrantless

1 blood test?

2 MS. SAHARSKY: Yes. As a general matter,
3 you would not need to obtain a blood test, you know,
4 practically, because the evidence is not the same, but,
5 you know, substantially as good. The blood test is a
6 little better in that you have a sample that sticks
7 around as opposed to one that is gone. You also get two
8 samples, so the defense can test it, and it is better
9 evidence with respect to whether it's susceptible to
10 challenge.

11 You also might have someone who consents to
12 a breath test, but because, as you pointed out, they're
13 so drunk they can't give a good sample, like they say
14 they'll provide a sample, but they really just can't.

15 And then there's another case that is not
16 the fact here, but something we would want the Court to
17 be careful about, which is driving under the influence
18 of drugs. Those do not show up on a breath test, but
19 the police officers might have very good reason to
20 believe that the person is under the influence, such
21 that they might take a breath test and get a zero
22 reading, but still want to take a warrantless blood
23 test.

24 So, all the Court needs to do to resolve
25 this case is say where this person refused a

1 breathalyzer -- actually, the exact same facts of
2 Schmerber -- it was -- it was reasonable for the police
3 to say, we know this evidence is going away, we know
4 it's going to be lost, maybe we can get a warrant
5 quickly, maybe we can't, we don't know what his blood
6 alcohol is, we don't know when it's going to dip below
7 .15, .08, let's just go ahead and proceed.

8 JUSTICE KAGAN: All this talk about, you
9 know, losing evidence every second, I mean, I suppose
10 the exact same thing could be said in other
11 alcohol-related crimes, public drunkenness, underage
12 drinking. You wouldn't be making the same arguments
13 there, would you? Or would you?

14 MS. SAHARSKY: No. I mean, the -- the
15 question you'd ask will be the same, which would be a
16 reasonableness balancing test, but I think the
17 government interest on the side of that balance would be
18 very different from the ones at issue here. You know,
19 the Court here has said that drunk driving is a serious
20 public safety problem. We're talking about one person
21 being killed every 51 minutes, despite everything we've
22 done in the last 3 decades.

23 JUSTICE KAGAN: So it's not just exigency
24 that you're -- you're saying that there should be a
25 weighing of the costs and benefits here.

1 MS. SAHARSKY: Yes. That's what the Court
2 did in Schmerber. It looked at the intrusiveness of the
3 blood test in this context and then it looked at the
4 government's need for the evidence. And the need for
5 the evidence in the cases you're positing we suspect the
6 Court would not think as strong as the evidence here.

7 But just to get back to some of the
8 questions the Court has had about the time to get
9 warrants, I mean, the evidence that the Court has before
10 it is that it would take at least an hour and a half to
11 2 hours to get a warrant here. That's in the Joint
12 Appendix, page 54. Even though the person said -- one
13 officer said he could get in touch with the prosecutor
14 and judge, he did not quantify how long it would take.
15 There's also an exhibit that the defense --

16 JUSTICE KENNEDY: Incidentally, it wasn't
17 clear to me: Is that 1 hour from the time of the --
18 pardon me -- 2 hours from the time of the stop or 2
19 hours from the time he put him in the back of the patrol
20 car? Do we know?

21 MS. SAHARSKY: It's not entirely clear, but
22 I think it's 2 hours total. There was also on page 70
23 of the Joint Appendix an exhibit that the defense put in
24 that make it look like one and a half hours to 2 hours
25 total. I also --

1 CHIEF JUSTICE ROBERTS: You can finish your
2 thought.

3 MS. SAHARSKY: There's one other piece of
4 data, which is a NHTSA study that's referred to in the
5 briefs, about where the court -- where folks in four
6 States where warrants were required tried to get them
7 quickly as possible.

8 They put the judges on staff, they tried to
9 do it electronically as much as possible, and still
10 there it was one and half to 2 hours. That's on page 37
11 of that study.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Shapiro.

15 ORAL ARGUMENT OF STEVEN R. SHAPIRO

16 ON BEHALF OF THE RESPONDENT

17 MR. SHAPIRO: Mr. Chief Justice, and may it
18 please the Court:

19 The issue in this case is whether the State
20 may stick a needle in the arm of everyone arrested on
21 suspicion of drunk driving without a warrant and without
22 consent. Missouri's answer to that question is yes,
23 even in routine DWI cases like this and regardless of
24 how quickly and easily a warrant could be obtained.

25 JUSTICE BREYER: I thought the question was

1 if -- if in fact the person won't agree to a
2 breathalyzer.

3 MR. SHAPIRO: The question is -- it's not
4 clear to me. Number one, Your Honor, there's nothing in
5 the record to suggest that the driver is always first
6 offered the opportunity, the choice of choosing a
7 breathalyzer as opposed to --

8 JUSTICE BREYER: Was your client was offered
9 the breathalyzer twice?

10 MR. SHAPIRO: This client was offered the
11 breathalyzer, Your Honor.

12 JUSTICE BREYER: How many times?

13 MR. SHAPIRO: And declined it twice, that's
14 correct, Your Honor.

15 But under Missouri's proposed rule, there is
16 no role at all for a neutral and detached magistrate.
17 The decision whether an individual can be required to
18 submit to a nonconsensual blood draw, often while
19 handcuffed and physically restrained as my client was --

20 JUSTICE BREYER: I mean, aside from all --
21 the thing, what it boils down to, at least in my mind,
22 is, is yes, of course it would be better to -- to have a
23 neutral person hear what the policeman has to say and to
24 act as a second judgment on that; it would make it less
25 likely that people who are really innocent in fact have

1 this happen to them and so forth.

2 But they're arguing that that's a -- that's
3 a considerable burden in many, but not all States. And
4 at some point -- and the addition in respect to the
5 second judgment, namely the magistrates that you get, is
6 not worth really what you're going to lose, which are
7 going to be people who are drunk driving around on roads
8 and -- and possibly killing people. We all know how
9 that side can be built up, too.

10 MR. SHAPIRO: Right.

11 JUSTICE BREYER: So at some point, I would
12 wish you would spend some time addressing that, that
13 practical argument.

14 MR. SHAPIRO: I'd be happy to answer that
15 question right now, Your Honor. I think there are two
16 responses. One is Missouri specific and case specific
17 and one is more generic, because I think it's important
18 to remember they are not asking simply to reverse the
19 suppression motion in this case on the grounds that the
20 facts of this case made it reasonable to do a
21 warrantless blood draw.

22 What Missouri and the United States are
23 urging is a categorical exemption to the warrant
24 requirement in all DWI cases nationwide. So we have to
25 think not only about --

1 JUSTICE SCALIA: Is this a lot of sound and
2 fury signifying nothing? I mean, what -- what advantage
3 do you think your client would -- would really get from
4 the warrant requirement other than the delay that that
5 would entail allowing his blood alcohol to reduce
6 itself?

7 Are the -- for some warrants, let's say a
8 warrant to go into a building where the police contend
9 there may be drugs, the policeman -- you know, the
10 magistrate will say, What evidence do you have that
11 there's drugs? Well, you know, two weeks ago we had
12 this informer, yesterday we saw this and so, you know,
13 all sorts of different factors.

14 In these DUI cases it's always going to be
15 the same thing. The policeman is going to say, well,
16 you know, his breath smelled of alcohol; we gave him the
17 walk a straight line and turn around test, he flunked
18 it; he couldn't touch his nose with his index finger.
19 What is the impartial magistrate possibly going to do
20 except to say, hey, you know, that's probable cause.

21 Are any of these warrants ever turned down?
22 Are they ever turned down in your experience?

23 MR. SHAPIRO: Your Honor, I do not know the
24 answer to that.

25 JUSTICE SCALIA: I bet you they're not.

1 MR. SHAPIRO: But I think it's also true,
2 Your Honor, that warrants in general are never turned
3 down, that the overwhelming percentage of warrant
4 requests in all criminal cases are granted -- are
5 granted by magistrates.

6 JUSTICE SCALIA: But in many of them there
7 is a lot of judgment that has to be brought to bear: Is
8 this a reliable informant, how long ago did he tell you,
9 and so forth. Whereas, in all of these cases it's going
10 to be the same thing: His breath smelled of alcohol, he
11 couldn't walk a straight line, and whatnot. And that's
12 the probable cause. And I don't see how the independent
13 magistrate is going to do you a whole lot of good,
14 except for the fact that it will delay the process.

15 MR. SHAPIRO: This Court's entire Fourth
16 Amendment jurisprudence, Your Honor, rests on the
17 proposition that the privacy safeguards of the Fourth
18 Amendment benefit by having a neutral and detached
19 magistrate review the evidence before the State does
20 something as intrusive as putting a needle in somebody's
21 arm.

22 And I could imagine a situation --

23 JUSTICE ALITO: What if the State has a
24 form; we have forms in the Joint Appendix. What if it
25 has a form for the officer to fill out? He checks

1 certain boxes, and then you send this electronically to
2 a magistrate, and if the right boxes are checked, the
3 magistrate will grant the warrant.

4 Is that -- do you think that is consistent
5 with the Fourth Amendment?

6 MR. SHAPIRO: Well, it's something very
7 close to what Missouri already has, Your Honor. In Cape
8 Girardeau County the prosecutor has prepared
9 standardized forms which the police officer then fills
10 out, presents to the prosecutor, the prosecutors sends
11 on to the magistrate and the magistrate decides whether
12 to grant the warrant. But I think that cuts in exactly
13 the opposite direction, which it shows that the process
14 of obtaining a warrant is not very elaborate and it need
15 it not be very timely.

16 And I can imagine, in answer to
17 Justice Scalia's questions, I can imagine circumstances
18 in which an officer might apply for a warrant in a
19 situation where they have not asked the driver, for
20 example, to go through the field sobriety test; said as
21 they -- as we stopped the driver on the road, he was
22 going 10 miles over the speed limit, I questioned him,
23 his speech was slurred, his eyes seemed bloodshot, I
24 want to do a blood test.

25 And the magistrate in that circumstance

1 might say, did you at least perform the field sobriety
2 test? Did you at least offer --

3 JUSTICE GINSBURG: What about that field
4 sobriety test? Suppose the person who is apprehended
5 and is suspected of being drunk says, I'm not going to
6 walk a straight line. I'm just going to sit here. You
7 can't make me do anything without a warrant.

8 Do you need -- if the defendant doesn't
9 consent, do you need a warrant to have the standard
10 sobriety test?

11 MR. SHAPIRO: Do you mean do you need a
12 warrant to have the field sobriety test?

13 JUSTICE GINSBURG: Yes.

14 MR. SHAPIRO: Is that the question, Justice
15 Ginsburg? I don't think you need a warrant to require
16 somebody to put his finger to his nose or to walk a
17 straight line or to stand on one foot. I would not say
18 that that is a search within the meaning of the Fourth
19 Amendment that triggers the warrant requirement.

20 But there is no doubt that putting a needle
21 in somebody's arm triggers a warrant requirement. And I
22 think there are really two --

23 CHIEF JUSTICE ROBERTS: What about a
24 breathalyzer, do you need a warrant for that?

25 MR. SHAPIRO: I think you probably do need a

1 warrant for a breathalyzer, Your Honor. But Missouri's
2 position is you not only don't need a warrant for a
3 breathalyzer, you don't need a warrant for a blood test.
4 And we don't -- this is not a breathalyzer case.

5 CHIEF JUSTICE ROBERTS: I know what
6 Missouri's position is, and I know it's not a
7 breathalyzer test. But if the logic of your position
8 leads to the requirement of a warrant for breathalyzer,
9 that would be pertinent in analyzing your position.

10 MR. SHAPIRO: I think, Your Honor, it -- I
11 would say that requiring somebody to produce, to breathe
12 into a machine for -- in order to gather evidence for
13 the State's prosecution is a state -- is a search that
14 should probably trigger the warrant requirement, but it
15 is certainly a less -- it is certainly less intrusive,
16 Your Honor, it is certainly less intrusive than -- than
17 the blood test --

18 JUSTICE SCALIA: It bears considerably on
19 the reasonableness, doesn't it? I don't know why you
20 want to bite off more than you can chew.

21 MR. SHAPIRO: Well, I certainly don't want
22 to bite -- I want to bite off --

23 JUSTICE SCALIA: It's a different case and
24 what is reasonable for sticking a needle in your arm is
25 not necessarily reasonable for asking you to blow up a

1 balloon.

2 MR. SHAPIRO: Your Honor, I certainly want
3 to bite off as little as I have to chew in this case,
4 but there are two salient facts because I think it is
5 important to focus on what is before the Court in this
6 case. And what is before the Court in this case is a
7 warrantless blood draw, and the two salient facts in my
8 mind are, one, as I said, case specific.

9 You have a state trooper here who has been
10 doing this for 17 and a half years. He testifies at the
11 suppression hearing that he has only been required to
12 seek a warrant fewer than ten times. Why is that? That
13 is because the overwhelming number of drivers, in fact,
14 give their consent. And in the ten cases over those
15 17 years where he had to seek a warrant, he testifies
16 that he never had any difficulty obtaining a warrant,
17 and there is certainly no indication that those warrants
18 in any way interfered with the State's ability to
19 prosecute those cases.

20 JUSTICE SOTOMAYOR: Mr. Shapiro, could you
21 tell me, and what I am deeply troubled about in your
22 argument, is you incant the totality of the
23 circumstances test. But what circumstances is the Court
24 actually looking at to determine whether forgoing the
25 warrant was necessary or not under that circumstance?

1 We know one. We know where a fatality has occurred or a
2 serious accident, because we -- presumably you have to
3 secure the scene and you have to take care of injured
4 people or have cars towed, whatever else it is.

5 But I'm not sure what other circumstances
6 under your theory would really justify a magistrate -- a
7 court below saying, you -- you know, it's okay, you can
8 get a warrant here. It can't be merely because it takes
9 too long to get the warrant because that shows
10 inefficiency. It was part of my question earlier.

11 MR. SHAPIRO: Yes, so that's exactly
12 correct, Your Honor. I think the Court got it right in
13 Schmerber. I think the question is: Are there special
14 facts that are extrinsic to the warrant process itself
15 and that are beyond the control of the police that
16 significantly impede the ability of the police even to
17 initiate the warrant process.

18 JUSTICE ALITO: Suppose you are in a rural
19 jurisdiction and it takes a long time to rouse a
20 prosecutor and a magistrate at 3:00 in the morning to
21 get the warrant. You would say, that's too bad,
22 everybody has -- the whole country has to operate like
23 New York City, you have to have somebody on duty all the
24 time.

25 MR. SHAPIRO: Well, Your Honor, Cape

1 Girardeau County is a rural county in southeastern
2 Missouri --

3 JUSTICE ALITO: But I'm asking you a
4 hypothetical question. I bet there are places like
5 that. I have encountered magistrate -- federal
6 magistrate judges who were unreceptive to receiving
7 warrant applications in the middle of the night, and
8 that is known to -- to exist. Suppose you have a
9 jurisdiction like that? Does that count as a
10 circumstance that would justify a warrantless taking of
11 blood?

12 MR. SHAPIRO: I would say no, Your Honor. I
13 don't think the State ought to be able to take advantage
14 of its own failure to modernize an expedited --

15 JUSTICE KENNEDY: Suppose the magistrate is
16 unavailable because he or she is ill?

17 MR. SHAPIRO: Then I think that's a
18 different situation, Your Honor. I think that --

19 JUSTICE KENNEDY: Would you agree that
20 that's an exigent circumstance which would allow a
21 warrantless blood sample?

22 MR. SHAPIRO: I think it might well if the
23 magistrate were unavailable and there were no
24 alternative magistrate.

25 But the second salient fact, Your Honor --

1 JUSTICE KAGAN: That's a separate question,
2 isn't it? I mean, one prong of your argument is you
3 need individualized circumstances, you can't have a per
4 se rule. And now this other set of questions about what
5 you get to count in the totality of the circumstances
6 test; is that right?

7 MR. SHAPIRO: That is correct,
8 Justice Kagan.

9 JUSTICE KAGAN: So one could disagree with
10 you and one could think, as Justice Alito and
11 Justice Kennedy suggested, you know, you do take into
12 account that it's the middle of the night in a rural
13 county and it's going to take two hours, but still
14 think, well, that's the analysis you had to go through.

15 MR. SHAPIRO: That is correct,
16 Justice Kagan. And the second fact I just wanted to
17 come back to, and this came up briefly during my
18 opponent's argument, is we know that there are half the
19 states in the country by our count, 26 states in the
20 country that by statute have prohibited warrantless
21 blood draws in routine DWI cases. They are listed on
22 page 31 of the red brief in Footnote 9.

23 Given that fact, in the face of that
24 reality, I don't think Missouri can plausibly claim that
25 a categorical rule that would then apply nationwide if

1 this Court were to announce it in the context of this
2 case that warrants are never required in routine DWI
3 cases, could satisfy the standard that this Court has
4 established, namely that the exception to the warrant
5 requirement that is being proposed serves law
6 enforcement needs so compelling that a warrantless
7 search is objectively reasonable in every case.

8 There is no evidence that I am aware of, in
9 response to Justice Kennedy's question, and there is
10 certainly no evidence in the record in this case or in
11 the briefs in this case that those 25 states that
12 prohibit warrantless blood draws in the circumstances
13 that my client confronted here have a lower conviction
14 rate, are less concerned --

15 JUSTICE BREYER: A lot of States have
16 varying degrees to which they want to enforce strict
17 rules against drunk driving. And a State -- that's
18 exactly the kind of thing that worries me on your side.
19 The -- you have a bunch of States that don't -- you
20 know, it's not easy to get hold of a magistrate in
21 15 minutes or so forth. And so what to do about that?

22 If you say, well, you don't have to because
23 you haven't got it provided, you give them every
24 incentive not to make the magistrate available. That's
25 cutting in your favor. On the other hand, it's pretty

1 tough to say that all these States have to have the best
2 possible magistrate available 24 hours a day so somebody
3 can call in ten instances a year because the guy won't
4 take the blood test -- won't take the breathalyzer.

5 That's where I am in a dilemma. So I'm
6 looking for an answer to that. And you don't have an
7 absolute rule or I don't see an absolute rule. Should
8 you say, look, here's what you have to do, it's better
9 to have a second opinion there, which is the
10 magistrate's?

11 And so on the way to the hospital, it's just
12 that's where we started, you have to phone and try to
13 get one, and if you don't have one by the time you're at
14 the hospital, tell them again: It's your last chance,
15 give us the breathalyzer or else. And if he says no,
16 then you take the blood test. Well, that's a solution,
17 or do you have a better solution? What's the solution
18 to the problem if you are willing to reject, which you
19 aren't, but hypothetically you might be, that there's
20 the absolute rule.

21 MR. SHAPIRO: Well, I would say several
22 things. First of all, Your Honor, I really do have no
23 reason to believe that there's any jurisdiction in the
24 country at this point that is not deeply concerned about
25 drunk driving, or recognizes that drunk driving is a

1 serious problem. That is certainly not our position.

2 Secondly, the reason I think that there is
3 no evidence that in the States that prohibit warrantless
4 blood draws in routine DWI cases like this have lower
5 conviction rates is, number one, in most cases, they can
6 obtain consent; number two, in cases where they can't
7 obtain consent, they have been able to obtain warrants
8 in a timely -- in a timely fashion. And number three,
9 even in the absence of warrants, all the facts that lead
10 to probable cause often create a very compelling case
11 for conviction in the absence of the blood alcohol --

12 JUSTICE BREYER: My question is what you
13 don't want to do and you don't have to, but if you think
14 of a second-best solution it might always be better than
15 what I think of as a second-best solution.

16 MR. SHAPIRO: I have enormous confidence in
17 you, Justice Breyer.

18 JUSTICE BREYER: I -- I want to know if you
19 want to say anything that would suggest -- we have a
20 number of them floating around -- and I just wonder if
21 you want to express any view on a second-best solution.

22 MR. SHAPIRO: Well, well -- well, our -- our
23 position, and I'm not sure whether you're classifying
24 this as our first position or something else -- our
25 position is that within the context of Schmerber, if

1 there are special facts external to the warrant
2 requirement, then you have to apply a totality of the
3 circumstances test, and you ought to apply a
4 reasonableness standard.

5 In the context of the delays that are
6 intrinsic to the warrant requirement, absent any
7 evidence that those intrinsic delays have interfered
8 with the ability of 25 States in the country to enforce
9 their drunk driving laws, this Court ought not to adopt
10 a categorical exception to the -- to the warrant
11 requirement.

12 And the risk of doing it, as you pointed
13 out, Justice Breyer, is then you create this odd
14 disincentive, which is the States that have the slowest
15 and most cumbersome warrant procedures are the States
16 that get a free pass and are able to override the Fourth
17 Amendment. That seems to me --

18 JUSTICE ALITO: That's not true, because
19 there's a great advantage to the prosecution in having a
20 search with a warrant as opposed to a warrantless search
21 in terms of suppression; isn't that correct?

22 MR. SHAPIRO: Well, there is some advantage
23 to having -- certainly, a search that is conducted
24 pursuant to a warrant is much less subject to
25 suppression than a search that is subject not pursuant

1 to a warrant. But -- but there is generally speaking in
2 these cases a probable cause that is derived from the
3 officer's observations on the scene and the defendant's
4 performance in the field sobriety test, that -- that,
5 you know, can support the warrant -- support -- support
6 the search.

7 But I think --

8 JUSTICE ALITO: Can I ask you this question?
9 How much blood has to be taken in order to test for
10 blood alcohol? What if medical technology advances
11 to -- I gather it's a -- it's a substantial amount. But
12 what if it advances to the point that you don't need any
13 more blood than you need now to test blood sugar, and
14 you just have a little machine that makes a tiny prick
15 in somebody's finger and you've got enough blood to do a
16 blood alcohol test. Does it change then?

17 MR. SHAPIRO: I don't -- excuse me -- I
18 don't think the Fourth Amendment rule turns on the
19 amount of blood that you take out of somebody's body. I
20 think the Fourth -- an important, maybe not the
21 important dividing line, an important dividing line for
22 Fourth Amendment purposes is puncturing the skin, and
23 the Court has recognized this in other circumstances.
24 And I think --

25 CHIEF JUSTICE ROBERTS: So does that mean --

1 the last footnote in the Solicitor General's brief talks
2 about some other methods, including a urine sample. Not
3 as accurate as blood, but it can help achieve the same
4 result. One of the things that I think affects the view
5 in this case is it's a pretty scary image of somebody
6 restrained, and, you know, a representative of the State
7 approaching them with a needle. But I take it you would
8 say you need a search warrant for a urine sample, too?

9 MR. SHAPIRO: This Court has said that, Your
10 Honor --

11 CHIEF JUSTICE ROBERTS: Yes.

12 MR. SHAPIRO: -- in a variety of
13 circumstances with drug testing cases, where they
14 weren't even law enforcement cases, they were special
15 needs cases. The Court --

16 CHIEF JUSTICE ROBERTS: What about -- what
17 about this device that you just sort of hold in front of
18 it, you don't have to blow up the balloon, you just hold
19 it in front of the individual and it measures to some
20 extent blood alcohol content, or at least whether the
21 individual's been drinking? Surely you don't need a
22 search warrant for that.

23 MR. SHAPIRO: I think that -- I think that's
24 probably -- I think that's probably correct, Your Honor.
25 You presumably do not need a search warrant, a search

1 warrant for that. And this Court held, first in
2 Schmerber and then reaffirmed in South
3 Dakota v. Neville, that there is no Fifth Amendment
4 issue in requiring the defendant to produce the evidence
5 that can then be used against you. So we know we're not
6 talking about a self-incrimination problem; we're
7 talking about a search and seizure problem.

8 And if the government were able to obtain
9 the evidence in a way that did not rise to the level of
10 a search, then the warrant requirement wouldn't apply.
11 But we are not there. We're not there.

12 And -- and the -- the warrant process
13 that -- that Missouri has described is -- is not as
14 complicated. There are many places now that, number
15 one, permit not only telephonic warrants but electronic
16 warrants, where officers are equipped in their patrol
17 cars with laptop computers. They can fill out these
18 pre-prepared forms in a matter of minutes -- e-mail them
19 to the --

20 CHIEF JUSTICE ROBERTS: You're in an odd --
21 odd position to be making -- it's an understandable
22 position -- your argument is these warrants are just
23 easy as -- as pie. You just send in this thing, the
24 judge does it in an instant, it doesn't take very long
25 at all. It seems to me that that diminishes the

1 protection of the Fourth Amendment to a far -- far
2 greater extent.

3 The idea is that the prosecuting attorney is
4 supposed to spend some time looking at this before
5 submitting it to the judge and the judge is supposed to
6 spend some time examining it. But the idea that you're
7 going to do these things in a half hour seems
8 unreasonable to me.

9 MR. SHAPIRO: But I don't think it's
10 unreasonable, Your Honor, and it's because we all
11 recognize that the evidence in these cases is relatively
12 routinized, and the procedures are relatively
13 standardized. But that does not mean there is not a
14 value to the warrant process, and to the second look by
15 a mutual detached magistrate. And the value of --

16 JUSTICE SOTOMAYOR: Mr. Shapiro, could you
17 go back to what in this conversation we sort of have
18 lost focus of, which is the question presented, and
19 which is the essence, I think, of your adversary's
20 arguments. I'm not sure you've really put forth -- the
21 essence of their argument is that you can forego the
22 warrants requirement when you know for a fact that
23 evidence is going to dissipate over time.

24 Basically, they're saying this process
25 undermines our right to get a warrant, because the

1 evidence is dissipating. We certainly have cases that
2 talk about destruction of evidence being a reason to
3 forego the warrant. What makes this case different from
4 those?

5 MR. SHAPIRO: I'd be happy to answer that
6 question, Justice Sotomayor, if I could just complete my
7 answer to the Chief Justice for one second.

8 JUSTICE SOTOMAYOR: Sure.

9 MR. SHAPIRO: And my answer would be that
10 even if there are boxes on a standardized form, there is
11 value to making sure that the prosecutor and the police
12 have checked off all the right boxes before they engage
13 in a process as intrusive as putting a needle in
14 somebody's arm.

15 Now, in answer to Justice Sotomayor's
16 question, I think -- I think there are multiple answers,
17 Your Honor. First, this Court has on two previous
18 occasions considered and rejected the notion that the
19 mere fact that alcohol dissipates over time is itself
20 sufficient to proceed without a warrant.

21 As Justice Ginsburg pointed out, in
22 *Schmerber*, the Court's discussion of what the Court
23 itself called special facts would have been unnecessary
24 if all the Court needed to say was that this natural
25 dissipation of alcohol in the blood automatically would

1 lead to --

2 JUSTICE KAGAN: Mr. Shapiro, Schmerber is an
3 odd case, because Justice Ginsburg are exactly right,
4 that they spend a lot of time talking about special
5 facts, and particularly so, but then you read the
6 opinion kind of backwards and forwards, and you can't
7 find the special facts.

8 MR. SHAPIRO: I think the special facts,
9 Your Honor, were the accident and the injuries at the
10 scene, which delayed the police for 2 hours before they
11 could even get to the hospital and initiate the process
12 of applying for a warrant, at a time when there were no
13 cell phones, there were no faxes, there were no
14 internets, and all warrant applications had to be
15 presented in person. That's a very different situation.

16 JUSTICE ALITO: Well, if they had sent more
17 police officers to the scene, they could have done
18 everything faster.

19 MR. SHAPIRO: Excuse me?

20 JUSTICE ALITO: If they had sent more police
21 officers to the scene of the accident, if they -- then
22 they could have done it faster.

23 MR. SHAPIRO: Perhaps.

24 JUSTICE ALITO: So what's the difference
25 between that practical limitation and the limitation

1 that exists in a world -- in a rural jurisdiction?

2 MR. SHAPIRO: Well, I think that practical
3 limitation, whether or not there were other officers on
4 the scene, right, or that could have been sent to the
5 scene, we're not asking for a rule in which this Court
6 would direct police officers how they -- they ought to
7 deploy their resources. If there are multiple police
8 officers on the scene, I don't think it's unreasonable
9 to say one can attend to the accident and the other one
10 can search -- can search for a warrant, and that becomes
11 part of the totality of the circumstances. But
12 Schmerber is not the only case, Your Honor.

13 In -- in *Welsh v. Wisconsin*, the Court
14 expressly said that the mere dissipation of alcohol in
15 the blood was not sufficient to justify a warrantless
16 entry into a defendant's home in order to arrest the
17 defendant on DWI charges. It's explicit holding, it's
18 not simply an inference that one has to draw from
19 Schmerber.

20 The second thing I would say in response to
21 your question, Justice Sotomayor, is -- is -- is
22 biology. And that it is true that alcohol dissipates
23 over time through natural body processes. But that's
24 only after the blood alcohol level has reached its peak,
25 and that is generally about half an hour after somebody

1 has had his last drink. So there is a period of time in
2 which the blood -- the body is continuing to absorb
3 alcohol and then -- and the blood alcohol level is
4 continuing to rise. Only at peak does it then start to
5 dissipate.

6 CHIEF JUSTICE ROBERTS: Well, I'm sorry,
7 what's the relevance of that?

8 MR. SHAPIRO: The relevance of that is that
9 it is not true that in every -- it won't be true in
10 every case, Mr. Chief Justice, that the State is losing
11 evidence with each passing moment.

12 CHIEF JUSTICE ROBERTS: But it depends upon
13 when the last -- if a person left the restaurant right
14 after they had a nightcap and then left, but if they
15 just had drinks before, I mean, the problem seems to be
16 there in either case.

17 MR. SHAPIRO: Well --

18 CHIEF JUSTICE ROBERTS: You don't know when
19 the person's last drink was.

20 MR. SHAPIRO: Well, you may or may not know,
21 depending on what the -- the person is willing to tell
22 you. All I'm saying is that in every case, in every
23 case, it's not the situation that from the moment you
24 stop the driver, his blood alcohol level is going down.
25 There will be some cases where it is going up.

1 JUSTICE BREYER: I am probably just -- but a
2 policeman has probable cause to believe that somebody
3 inside the house has drugs. He hears the toilet
4 flushing and he thinks they're flushing the drugs down
5 the drain.

6 MR. SHAPIRO: Right.

7 JUSTICE BREYER: He doesn't have to get a
8 warrant as long as he reasonably believes that the
9 evidence is disappearing. All right. Now, the
10 difference between your case here and that is
11 specifically what? Suppose we were just to refer to
12 those cases --

13 MR. SHAPIRO: Right.

14 JUSTICE BREYER: -- and say it's the same
15 thing.

16 MR. SHAPIRO: Because the process is a very
17 different process. In the typical drug case, which is
18 what this Court has considered when it has examined the
19 question of whether the destruction of evidence
20 qualifies as an exigent circumstance, that question has
21 almost always arisen in what I'll call a typical drug
22 case, *Richards v. Wisconsin*, *Kentucky v. King*. And in
23 those situations, what the Court is worried about is
24 that the suspect inside the house is going to flush the
25 drugs down the toilet.

1 JUSTICE GINSBURG: What you're saying is if
2 it's now or never --

3 MR. SHAPIRO: It is now or --

4 JUSTICE GINSBURG: -- where the other is a
5 slow process.

6 MR. SHAPIRO: It is now or never and not
7 only is it now or never, that -- but in most of those
8 cases, probably not all, but in most of the cases, the
9 State's case is going to disappear down the drain along
10 with the drugs and the ability to destroy the drugs lies
11 entirely within the control of the defendant. The
12 defendant gets to decide whether he's going to put the
13 drugs down the toilet or not and when he does, the
14 destruction is immediate and total.

15 In this situation, the process is gradual.
16 It takes hours. It can take hours, depending upon how
17 much alcohol is -- is in the system and it is outside
18 the control of the suspect. There is nothing that the
19 suspect can do to expedite the process of the
20 destruction of evidence.

21 JUSTICE KENNEDY: Well, we -- we know the
22 defense attorneys love it when there's a delay, because
23 then the retrograde analysis has more and more
24 contingencies that make it unreliable.

25 MR. SHAPIRO: That may be -- that may --

1 JUSTICE KENNEDY: I mean, you'd much rather
2 examine the State's expert if the sample was taken three
3 hours than if it were -- after the arrest than one. I
4 mean, that's a given.

5 MR. SHAPIRO: There is -- there is -- there
6 is no doubt, Justice Kennedy, first of all, the
7 retrograde extrapolation evidence, which is now being
8 considered in various courts around the country is
9 controversial. It's subject to cross-examination.
10 The -- the -- we haven't resolved whether -- whether the
11 state of that -- the state of that -- the state of that
12 evidence yet. But having said that --

13 JUSTICE SCALIA: I thought -- I thought you
14 would also distinguish the drug flush cases on -- on the
15 ground that violation of the integrity of your home is
16 somewhat less than violation of the integrity of your
17 body.

18 MR. SHAPIRO: Well, I think that that is
19 certainly -- that is certainly true -- that is certainly
20 true as well, Your Honor.

21 JUSTICE SCALIA: And that goes into the
22 reasonableness determination.

23 MR. SHAPIRO: Right. And there -- and there
24 is no doubt, I will not deny, the State's case will be
25 easier if it does not have to obtain a warrant, but this

1 case -- Court has recognized that many times in the
2 past. Criminal investigations are always easier if the
3 State does not have to comply with the warrant process.

4 JUSTICE GINSBURG: Mr. Shapiro, before your
5 time runs out, the case of the fingernail --

6 MR. SHAPIRO: Mm-hmm.

7 JUSTICE GINSBURG: -- scrapings has been
8 raised as saying well, that's -- somebody is going to
9 scrape your fingernails, that's as intrusive as a blood
10 test.

11 MR. SHAPIRO: Well, I would say three
12 things, Your Honor. I don't think it is as intrusive,
13 although even in Cupp v. Murphy, which is that case, the
14 Court described it as a serious but brief intrusion on
15 the cherished value of personal security. The Court
16 recognized that even the -- the fingernail scrape was --
17 was a serious Fourth Amendment issue.

18 Secondly, that evidence, unlike the blood
19 alcohol evidence, was under the control of the defendant
20 and in that case, on the facts of that case, much like
21 many of the Court's other exigent circumstances cases,
22 there was evidence that suggests that the defendant was
23 actively engaged in the process of degrading the
24 evidence at the time that the police stepped in and said
25 we're going to preserve what is left rather than allow

1 you to be the agent of your own destruction.

2 And as the Court said in *Kentucky v. King*,
3 it is a very different situation when you have the
4 defendant himself destroying evidence. Under those
5 circumstances, it may be reasonable for the Court to say
6 you can't simultaneously destroy evidence and then
7 protest that the destruction of the evidence -- evidence
8 has created the exigency that requires the State to act
9 without a warrant. But there is no agency in this case
10 on behalf of the defendant. The defendant has no
11 capacity.

12 And I come back to what I said before. It
13 is true, I think this question came -- came up earlier,
14 when Mr. Koester was being -- was being questioned.
15 Fourth Amendment standards are not determined by State
16 law. The Court has said that in *Virginia v. Moore*. We
17 all understand that. But in the determination of what
18 is reasonable under the Fourth Amendment, this Court has
19 often looked to State practices in response to
20 Justice Kennedy's question.

21 In *Tennessee v. Garner*, you have the Court
22 say half the States have abrogated the Common Law Rule
23 that would have allowed the police to shoot any fleeing
24 felon. In *Richards v. Wisconsin*, you have half the
25 States that not support an exception to the No Knock

1 Rule. Here we have half the States in the country that
2 would not have permitted what went on in this case.

3 Thank you very much.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. Koester, you have -- we'll give you
6 three minutes.

7 REBUTTAL ARGUMENT OF JOHN N. KOESTER, JR.,
8 ON BEHALF OF THE PETITIONER

9 MR. KOESTER: Thank you. Everyone agrees
10 that the closer a chemical test is taken to the time of
11 driving, the more reliable the evidence of intoxication
12 is, the more reliable the evidence of impairment is.

13 So under the Respondent's approach, it would
14 be mandated that we're going to allow the most reliable
15 evidence to dissipate and degrade over a period of time
16 in favor of admittedly less reliable evidence taken at a
17 later time. And I -- that's simply inconsistent with --
18 with Fourth Amendment jurisprudence and -- and other
19 destruction of evidence cases. I believe the
20 Respondent's proposed rule here is completely
21 impractical and unworkable.

22 If there are no further questions, I --

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 11:15 a.m., the case in the

1 above-entitled matter was submitted.)
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