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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 03-5554, Larry D. Hiibel v. the Sixth Judicial District Court of Nevada.

Mr. Dolan. Am I pronouncing your client's name correctly?

ORAL ARGUMENT OF ROBERT E. DOLAN

ON BEHALF OF THE PETITIONER

MR. DOLAN: Your Honor, it's Hiibel.

QUESTION: Hiibel. Very well.

MR. DOLAN: Thank you, Mr. Chief Justice. May it please the Court:

I'm here today to respectfully ask this honorable Court to find that the search and seizure of my client was illegal and unreasonable and, in the process, to reverse my client's conviction.

Petitioner Hiibel was arrested and convicted of a crime simply because he did not identify himself or provide identity.

QUESTION: Could the officer have just said, show me your driver's license?

MR. DOLAN: We don't believe so, Your Honor.

QUESTION: Why?

MR. DOLAN: This was not a traffic stop. This

1 was a -- an interaction between a pedestrian and a law
2 enforcement officer, wherein the officer --

3 QUESTION: But there was evidence -- was it not
4 clear that he had been driving and he got out of his
5 vehicle? At the time the officer saw him, he was out.

6 MR. DOLAN: No, Your Honor. There was never a
7 finding of fact on that issue. In fact, the issue before
8 the trier of fact in the justice of the peace court there
9 in Winnemucca was whether or not the -- the charge of
10 resisting and delaying the officer occurred.

11 QUESTION: What was the factual situation? He
12 -- he was certainly right next to a truck, wasn't he?

13 MR. DOLAN: Yes. When Deputy Dove arrived at
14 the scene, Mr. Hiibel was standing at the passenger side
15 of the car. His daughter was in the cab of the truck by
16 the -- the steering wheel. And when Deputy Dove arrived
17 on the scene, he began the police-citizen encounter with
18 Mr. Hiibel. They approached each other. Deputy Dove
19 said, I heard that there was some kind of a fight. Mr.
20 Hiibel said, I don't know anything about that. Deputy
21 Dove then proceeded to ask approximately 11 times for Mr.
22 Hiibel to provide identification. Let me see ID. Let me
23 see ID.

24 QUESTION: But you don't think he could have
25 asked for his driver's license?

1 MR. DOLAN: No, Your Honor. I don't believe
2 that there was any reasonable basis for that question at
3 that time.

4 QUESTION: Well, because the officer had been
5 told that in a truck -- in that truck somebody was hitting
6 somebody.

7 MR. DOLAN: Well, we believe that the deputy
8 certainly had the right to ask for identity and -- and we
9 think equally so Mr. Hiibel was free not to respond.

10 QUESTION: I see. What -- what do you think the
11 purpose of our -- of our Terry -- of our Terry decision
12 is? I mean, it says that when an officer sees somebody in
13 suspicious circumstances, he can stop that person and
14 inquire to satisfy himself that nothing -- nothing
15 underhanded is going on. Now, what -- what kind of
16 questions can he ask that -- that must be answered? Any
17 at all?

18 MR. DOLAN: The --

19 QUESTION: He -- he can't even ask the name you
20 say.

21 MR. DOLAN: Well, Your Honor --

22 QUESTION: Can he ask what -- what are you doing
23 here if he sees somebody hanging around a jewelry store at
24 2:00 a.m. and -- and so he -- he conducts a Terry stop?
25 What -- what can he ask the fellow? What are you doing

1 here? I mean, if he can't give his name, surely he
2 doesn't have to tell the officer what he's doing here.

3 MR. DOLAN: Well, we -- we certainly believe
4 that under the Fifth Amendment a person has no obligation
5 to respond to -- to that officer. The -- the citizen
6 never knows whether or not the encounter is a consensual
7 encounter where he certainly has no obligation to speak or
8 do anything. He -- in fact, he can freely terminate the
9 encounter at any time.

10 Now, there is, under Your Honor's question, a
11 Terry stop. Certainly the citizen doesn't know that. The
12 officer does presumably, and if that Terry stop was to
13 evolve into a probable cause circumstance --

14 QUESTION: No, it hasn't. It hasn't evolved.
15 It was just a Terry stop.

16 MR. DOLAN: Just a Terry stop.

17 QUESTION: And you say --

18 MR. DOLAN: The officer is allowed to make --

19 QUESTION: He's allowed to ask questions, but he
20 shouldn't expect answers.

21 MR. DOLAN: We certainly don't believe that the
22 government can criminalize the non-response which the
23 statute in this case does, Your Honor.

24 QUESTION: Well, in a Terry stop, when the
25 officer is attempting to make a patdown, can the person

1 resist it?

2 MR. DOLAN: Not lawfully. I believe that the
3 Court certainly allows, if there is independent basis to
4 conclude that the officer -- that the subject is armed,
5 the officer is lawful in using force to apply a patdown
6 search. And if a person resisted that, then that would be
7 a basis for a criminal prosecution.

8 QUESTION: You take the position, as I
9 understand your brief, that the purposes of criminal
10 investigation simply do not extend to asking for the names
11 of witnesses, as -- as I understand you. Suppose there's
12 a -- a bank robbery and -- and there's a fatal shooting
13 and the robbers run out of the bank. The police come a
14 few minutes later. Can they ask -- can they require the
15 witnesses to give their names? Can there -- could there
16 be a State statute, properly drawn in that circumstance,
17 which would require the witnesses to give their names?

18 MR. DOLAN: We don't believe so, Your Honor. We
19 believe that the relation to the State that free citizens
20 have prevent the State from imposing obligations,
21 affirmative obligations, to terminate the citizen-police
22 encounter.

23 QUESTION: Is your -- is your -- your negative
24 answer to my question premised on the Fifth Amendment or
25 some privacy concept?

1 MR. DOLAN: The -- yes, Your Honor. The -- the
2 privacy concept that the Fourth Amendment addresses
3 certainly allows a person to be free from an illegal
4 search. We believe that when the Government is attempting
5 to extract data from a person without probable cause, it
6 is improper.

7 QUESTION: But identity is somehow different.
8 It's kind of a neutral fact. Under your view, it wouldn't
9 be possible to have some national identification card
10 requirement then.

11 MR. DOLAN: Your Honor, the -- the name is not
12 neutral, certainly in this domestic battery Terry stop,
13 because the name itself --

14 QUESTION: Well, I think one's -- one's name
15 probably is just a neutral fact. It's not incriminating
16 one way or the other.

17 MR. DOLAN: Your Honor, there are numerous
18 instances where one's name is not a neutral fact. In the
19 facts of this case, the underlying purpose of the criminal
20 investigation was to determine if a domestic battery had
21 occurred.

22 QUESTION: But there would be no problem in --
23 in checking the license on the vehicle and then seeing --
24 and then the officer could ask are you whoever is the
25 owner of the car.

1 MR. DOLAN: Yes, Your Honor. Certainly there
2 are numerous investigative tools available to the police,
3 including running the license plate. In fact, Deputy
4 Dove --

5 QUESTION: Well, he does that.

6 QUESTION: You -- you --

7 QUESTION: He does that and the person is --

8 QUESTION: You can ask -- you can ask if he's
9 the owner of the car, the registered owner of the car, but
10 you can't ask him his name?

11 MR. DOLAN: Well, we certainly believe that had
12 that been the facts in the case and Mr. Hiibel chose not
13 to respond, there would not be a basis that's proper under
14 the law for a criminal prosecution in that regard, Your
15 Honor.

16 QUESTION: Yes, but I thought -- no. You were
17 going to say something.

18 QUESTION: That's all right. Go ahead.

19 QUESTION: I -- I thought your position was that
20 if it had been sufficiently apparent that Mr. Hiibel was
21 associated with the truck, that he owned it, had been
22 driving it or something like that, that under those
23 circumstances, the -- the police could have -- could have
24 exercised the State's regulatory power over motor vehicles
25 and said, show me your driver's license or show me your

1 registration. Is that correct?

2 MR. DOLAN: We believe that -- that that is the
3 law, Your Honor.

4 QUESTION: All right.

5 MR. DOLAN: But this was not the case.

6 QUESTION: And you're saying the reason they
7 couldn't do any of those things here, in the sense of
8 demanding compliance, is that there wasn't a sufficient
9 connection shown between the -- the -- Mr. Hiibel and the
10 truck. Is that what it boils down to?

11 MR. DOLAN: Nor was it relevant at trial, Your
12 Honor.

13 QUESTION: Oh, okay. But I mean, we're talking
14 about the scene. And at the scene, you're saying there
15 just wasn't a predicate for forcing him to answer those
16 questions.

17 Now --

18 MR. DOLAN: That is correct, Your Honor. And it
19 was -- it was not a fact that was deemed relevant by the
20 State at the time or the defense.

21 QUESTION: Since -- and since there was not, I
22 take it your general position is that they can ask him
23 anything. He does not have to say anything in response to
24 any question they ask. Period.

25 MR. DOLAN: That is --

1 QUESTION: Isn't that it?

2 MR. DOLAN: Yes, Your Honor.

3 QUESTION: Could they have -- could they --

4 QUESTION: And that sort of assumes that there's
5 no responsibility on the part of citizens. I mean, but we
6 impose all sorts of responsibilities on citizens in
7 connection with the -- the determination of criminal
8 activity. I mean, harboring a felon is -- is a crime.
9 It's -- it's unlawful to give a false response to a -- to
10 inquiry by a Federal investigative officer. Why isn't it
11 a perfectly reasonable responsibility of a citizen, when
12 he's a witness to the -- to a crime, to have to give his
13 name so that he may call -- be called upon to testify?
14 Why isn't that a minimal -- a minimal citizen's
15 responsibility and likewise in these circumstances? I
16 cannot imagine that any responsible citizen would have --
17 would have objected to giving the name. And if -- if I --
18 if one feels that way about it, why is it a violation of
19 the Constitution to -- to have citizens do what every
20 responsible citizen, it seems to me, would do?

21 MR. DOLAN: Your Honor, the imposition of an
22 affirmative duty to avoid criminal sanction when you are
23 otherwise innocent of any crime is an improper tipping of
24 balance in favor of the State at the expense of some
25 very --

1 QUESTION: It's not in favor of the State.

2 It's --

3 QUESTION: What's your best case for that
4 proposition?

5 MR. DOLAN: Your Honor, the numerous anonymous
6 activities that this Court finds to be important to the
7 maintenance of a free society engaging --

8 QUESTION: NAACP v. Alabama, but that was a
9 suspect class, membership lists. What -- what else do you
10 have?

11 MR. DOLAN: Your Honor, also the Watchtower line
12 of cases, religious solicitation, religious door-to-door
13 activity.

14 QUESTION: That was a burden on speech.

15 MR. DOLAN: That is correct, Your Honor. I'm
16 addressing circumstances where a citizen also is left at
17 the mercy of the discretion of an officer. No citizen can
18 safely have a voluntary interaction with an officer
19 without risking arrest because there was no obligation in
20 the law for the officer to say, as a result of you telling
21 me that you have a red car, I now determine that
22 reasonable suspicion exists.

23 QUESTION: What about giving this man, who
24 appeared to be under the influence of alcohol, a
25 breathalyzer test? Nothing different. It's just as a

1 basis for a Terry stop. He's now out of the car. The
2 officer thinks Mr. Hiibel could be a menace on the road
3 and so says, I'm giving you a breathalyzer test. Could he
4 say -- could he resist that?

5 MR. DOLAN: We -- we don't believe that there
6 was reasonable suspicion at all that he was the operator
7 of the car and there would have been no lawful basis for
8 the --

9 QUESTION: Well, the -- there's a passenger
10 sitting on the passenger seat, and he's gotten out and
11 he's on the driver's side. Right?

12 MR. DOLAN: No, Your Honor. In fact, Mr. Hiibel
13 was standing at the passenger side door and the --

14 QUESTION: And the -- there was somebody in that
15 seat.

16 MR. DOLAN: No, Your Honor. There --

17 QUESTION: Where -- where was the daughter?

18 MR. DOLAN: The daughter was -- when the officer
19 arrived behind the wheel. She eventually slid over to the
20 passenger side when she was -- towards the end of the
21 encounter, she exited and then was thrown to the ground
22 and arrested. But --

23 QUESTION: Could -- could she have been asked
24 the name? Could she have been asked her father's name?

25 MR. DOLAN: Certainly. I believe available to

1 Deputy Dove at the time was to do what he was there to do,
2 and that was to investigate to see if a domestic battery
3 had occurred. I don't believe the issue before the Court
4 is whether or not Deputy Dove engaged in the best or worst
5 police activity. I believe the issue before this Court --
6 and with respect to Justice Kennedy's question, homeless
7 people do not have the appropriate residences, permanent
8 residences, and accordingly would be unable to provide
9 their identification.

10 QUESTION: Yes, but have -- have our Terry cases
11 suggested that the whole point of a stop and a search,
12 based on reasonable suspicion, is to make identification?

13 MR. DOLAN: No, Your Honor.

14 QUESTION: No?

15 MR. DOLAN: In -- no, Your Honor. I believe
16 that certainly the concurring opinion of Justice White in
17 Terry itself clearly stated that he was of the opinion
18 that a person is not obliged to respond to --

19 QUESTION: Well, that was a concurring opinion.

20 Do you think that a person stopped on reasonable
21 suspicion can be compelled to give a fingerprint?

22 MR. DOLAN: That is a qualitatively different
23 invasion of one's privacy. But unless --

24 QUESTION: Well, yes or no.

25 MR. DOLAN: Well, as a --

1 QUESTION: No?

2 MR. DOLAN: -- general rule, no. There may be
3 some exceptions. This Court has addressed the possible
4 exceptions like being -- the officer knows that a
5 murder/rape has occurred, fingerprints, bloody
6 fingerprints, were found at the scene, there was
7 independent facts to tie the person to that scene. And
8 the purpose of -- of a fingerprint would be to confirm or
9 dispel that officer's specific concern about the possible
10 criminality of that one person, and the Court has
11 indicated that that may be appropriate. But that's a very
12 -- that's -- was limited to those facts.

13 This was a misdemeanor.

14 QUESTION: So the -- the officer who approaches
15 somebody in a perfectly valid Terry stop, a really
16 suspicious looking character, he puts several questions to
17 him and the guy says, I'm -- I'm -- you know, I ain't
18 talking, the officer just has to turn on his heel and
19 leave the suspicious character to go about his suspicious
20 business.

21 MR. DOLAN: Your Honor --

22 QUESTION: He can't -- he can't say, come along
23 with me. You know, we'll find out who you are and why
24 you're here. He can't do that.

25 MR. DOLAN: We believe the law under Wardlow,

1 Your Honor, requires that unless the police officer is
2 able to escalate his basis of knowledge to probable cause
3 after a reasonable period of time of inquiry --

4 QUESTION: Why isn't the -- maybe you and I
5 differ on -- on what the -- what the course of a
6 responsible citizen is. I would think the course of a
7 responsible citizen would be to answer the question what
8 you're doing here and what your name is. And if he
9 doesn't answer that, I would -- I would say that that make
10 -- may cause the situation to rise to the level of
11 probable cause.

12 MR. DOLAN: We -- we --

13 QUESTION: He's hanging around a jewelry store.
14 It's late at night. He won't say who he is. He wouldn't
15 -- won't say what he's doing there. I would -- I would
16 drag him in.

17 MR. DOLAN: Well, the -- the person could be
18 purchasing jewelry for his paramour and -- and he does not
19 want his wife to know.

20 QUESTION: It's possible but unlikely.

21 (Laughter.)

22 QUESTION: But isn't there another answer?

23 QUESTION: Suppose --

24 QUESTION: Isn't there another answer?

25 QUESTION: -- suppose there is probable cause to

1 arrest and an arrest is made. Could the State then
2 require that the person answer as to his identity just so
3 that the officer can confirm that he's got the right
4 person?

5 MR. DOLAN: Again, I believe even in a post-
6 probable cause booking procedure, a person has the right
7 to remain silent if they view from their perspective --
8 and I believe this is what the test is. Rhode Island v.
9 Innis would -- would suggest that.

10 QUESTION: Now, is that a Fifth Amendment
11 privilege that you're --

12 MR. DOLAN: Yes.

13 QUESTION: -- indicating here?

14 MR. DOLAN: Yes, Your Honor, because one's
15 name --

16 QUESTION: Well, it -- it seems to me that that
17 is such a -- a minor detail, in light of what the police
18 can get in any event with fingerprints and so forth, that
19 the Fifth Amendment should just say that that's not
20 testimonial.

21 MR. DOLAN: Well, the -- the Fifth --

22 QUESTION: I mean, you're not probing the
23 perception, the memory, the cognition of the witness.
24 You're just determining an extrinsic fact.

25 MR. DOLAN: Your Honor, the -- the name is in

1 fact testimonial because it is an assertion of fact, and
2 one can lie about one's name, and accordingly, I think --
3 believe the test of what's testimonial or not is met.

4 It's also incriminating because if an officer
5 determines that probable cause exists that a domestic
6 battery has occurred, that officer must arrest that
7 person.

8 QUESTION: May I ask you this question that
9 really follows up on Justice Scalia's question? Would you
10 also argue that the refusal to give the name could not be
11 counted as an additional fact to establish probable cause?

12 MR. DOLAN: Yes, Justice Stevens. We believe
13 that a certain -- any --

14 QUESTION: So you're not just relying on the
15 fact that the refusal is itself a crime in this case.

16 MR. DOLAN: That -- that -- I'm --

17 QUESTION: You could again then say you could
18 not even take it into account for determining whether
19 there's enough evidence to -- to take him to the station.

20 MR. DOLAN: The -- the exercise of a
21 constitutional right can never increase one's level of --

22 QUESTION: Yes, but suppose he --

23 QUESTION: What -- what about -- what about,
24 say, the murder scene exception we talked about in that
25 Arizona case where an officer hears a shot fired, comes

1 into the house, there are eight or nine people in the
2 house. Obviously, there's a dead body in the middle of
3 the floor. Can he ask everybody else for their names?

4 MR. DOLAN: Well, we certainly believe the
5 officer can ask.

6 QUESTION: And are they obligated to respond?

7 MR. DOLAN: I don't believe so, Your Honor, and
8 I believe that the imposition of a criminal sanction for
9 silence is --

10 QUESTION: Well, how are we ever -- how are we
11 going to solve a murder case if that's the law?

12 MR. DOLAN: Well, after -- post probable cause,
13 the law is a person is warned. They are informed of their
14 right to remain silent. They are also informed of other
15 constitutional rights.

16 QUESTION: No, no, no. The Chief Justice's
17 hypothetical is like my bank hypothetical. It said --
18 we're just talking about witnesses now.

19 MR. DOLAN: Well, I don't -- I certainly think
20 that the State's case about the lawfulness of an arrest
21 and a conviction is -- is weaker for seizing a witness who
22 exercises their right to remain silent.

23 QUESTION: But there are situations where the
24 State can -- that we -- well, Byers is one where we've
25 already said the name can be requested. People are

1 required, when there's a registration for the draft, to
2 give their names which -- and that can't be made into a
3 consensual situation in exchange for some benefit. So
4 we've treated names -- the question of name differently,
5 and there are many situations in which you are required to
6 give the name.

7 MR. DOLAN: Well, Your Honor, as regards the
8 Byers case, that statute spoke of a regulatory scheme in
9 which the -- the identity, which was required to be given,
10 was not to a member of law enforcement. It was to the
11 owner of a vehicle. The Nevada statute in question
12 specifically contemplates that the dialogue occurs within
13 a criminal investigation in a Terry stop, which was
14 different from Byers certainly, and also the intent of the
15 statute in Byers was just to ensure that civil liabilities
16 would be satisfied.

17 QUESTION: Well, in terms of the State's need to
18 know this information, how do you distinguish it from
19 requiring people to register, give their name for the
20 draft?

21 MR. DOLAN: In this case, Your Honor, the -- the
22 name is testimonial and incriminating because of the
23 dynamic of the Nevada statute in question.

24 QUESTION: Well, you should just plead the Fifth
25 Amendment, say, I -- I refuse to answer on the ground that

1 it might incriminate me. That -- was that -- was that
2 what was done here? I didn't realize you're -- you're
3 making a -- a Fifth Amendment incrimination claim. Is
4 that --

5 MR. DOLAN: We are, Your Honor.

6 QUESTION: -- is that part of your --

7 QUESTION: I -- I can go back for a second --

8 MR. DOLAN: Yes, Your Honor, we are.

9 QUESTION: So that -- that assumes that he was
10 guilty and -- and had he not been -- had he not been
11 guilty of the beating, then he -- then -- then you would
12 acknowledge that he would have had to answer. It's only
13 the person who's guilty of the beating who would have a
14 right not to answer.

15 MR. DOLAN: One of the interests that the Fifth
16 Amendment is designed to protect is to protect people who
17 place -- find themselves in ambiguous circumstances
18 where --

19 QUESTION: No. I think --

20 MR. DOLAN: -- their silence or their admission
21 could --

22 QUESTION: Please answer the -- the question yes
23 or no. Are you saying that only the -- the person who had
24 been beating the woman in the truck and therefore
25 disclosure of his name would incriminate him, only that

1 person has the right not to answer? Or are you saying
2 anybody who was asked had the right not to answer?

3 MR. DOLAN: Indeed -- indeed, everyone who was
4 asked.

5 QUESTION: Under the Fifth Amendment --

6 QUESTION: So you're not pleading the Fifth
7 Amendment then. I -- that's -- that's what I thought you
8 were arguing and that has nothing to do with the Fifth
9 Amendment.

10 MR. DOLAN: Well, the -- the -- from the
11 perspective of petitioner Hiibel, when Deputy Dove said to
12 him, I -- I hear that there was a fight here, and then
13 Deputy Dove started making inquiry of him, I think it was
14 reasonable for petitioner Hiibel to realize that at this
15 time he was facing the cruel trilemma, which this Court
16 speaks of, and in fact had --

17 QUESTION: Okay, but if -- if at that point I
18 had walked down the street and the cop had turned to me
19 and said who are you, I wouldn't have had a Fifth
20 Amendment right to refuse, would I?

21 MR. DOLAN: If there was an imposition of
22 criminal sanction for the failure to respond --

23 QUESTION: No, no, no, no. I mean, you're
24 putting the cart before the horse. So far as the Fifth
25 Amendment is concerned, whether the cop asked me, whether

1 there's a statute that says you -- you ought to give your
2 name to the police, would I have had a Fifth Amendment
3 right to refuse?

4 MR. DOLAN: If it's not the Fifth Amendment
5 right to refuse, it's your right to be let alone which
6 is --

7 QUESTION: All right. There might be a Fourth
8 Amendment --

9 QUESTION: -- based upon other constitutional
10 principles.

11 QUESTION: The only thing Justice Scalia and I
12 are trying to get at is we thought you were saying at one
13 point that everyone has a Fifth Amendment to refuse to
14 identify himself under all circumstances, and that -- that
15 -- is that your position?

16 MR. DOLAN: Your Honor, I -- the question is
17 only affirmative as regards the Fifth Amendment if the
18 State was to criminalize your silence in respect to that
19 question.

20 QUESTION: Did the Supreme Court of Nevada pass
21 -- did you raise a Fifth Amendment question in the -- in
22 the Supreme Court of Nevada?

23 MR. DOLAN: We -- we did, Your Honor.

24 QUESTION: And did the court pass on it?

25 MR. DOLAN: The court rejected the motion for

1 rehearing on that issue, Your Honor.

2 QUESTION: Had you -- had you raised it before
3 the motion for rehearing?

4 MR. DOLAN: Yes. Your Honor, it was raised at
5 the trial level through the citation at the trial -- I was
6 the trial attorney -- to Berkemer v. McCarty. We -- I
7 appealed to the justice -- excuse me. I appealed to the
8 Sixth Judicial District Court where both the State and the
9 defendant specifically briefed the Fifth Amendment issues
10 and argued the Fifth Amendment issues.

11 QUESTION: But -- but your answer that if -- if
12 the law requires that you give your name, then -- then
13 that makes everybody have a Fifth Amendment privilege is
14 just -- is just not right. That's just circular. I -- I
15 would agree that there may -- there likely is no Fifth
16 Amendment privilege for witnesses or I would -- I would
17 state that. You might not agree.

18 As to people that are suspect of a crime, even
19 if they're innocent, if you're -- if you're right that the
20 name is protected, then I think the privilege -- that the
21 privilege applies because even if they're innocent, it
22 might be a link in the chain of evidence necessary to
23 convict. That's the -- that's the test.

24 But the question, it -- it seems to me, is
25 whether a name itself -- a name itself is -- is -- has

1 such intrinsic testimonial consequences as opposed to
2 neutral regulatory consequences that it should be within
3 the Fifth Amendment. That, it seems to me, the issue.

4 MR. DOLAN: Yes, Your Honor. I believe that's
5 where the Court will -- will turn on that question.

6 But also with respect to the Fourth Amendment
7 inquiry, a name is such that a person has a legitimate
8 expectation in the privacy in that name, otherwise the
9 government certainly then could require name tags and
10 perhaps color codes.

11 QUESTION: But the question of whether or not is
12 that privacy is diminished when they're witnesses to a
13 crime when they're present at a crime scene, and that's
14 certainly much different from saying that all citizens
15 have to give their name anytime a police officer asks them
16 for any reason. That's a completely different case.

17 MR. DOLAN: Yes, Your Honor.

18 QUESTION: I'm not -- I'm not even sure that the
19 driver of the truck would have a Fifth Amendment right. I
20 don't know how your name incriminates you. Your name may
21 help to -- to catch you, but I don't know that that
22 incriminates you. By giving you -- by giving him your
23 name, you are what? Proving that you did something wrong?
24 I -- I don't see how it incriminates you.

25 MR. DOLAN: If -- if at a traffic stop a request

1 for a name is made by an officer to the person that the
2 officer knows was driving the vehicle, I believe the
3 implied consent rule would -- would allow for the properly
4 imposed government sanction in that -- in that --

5 QUESTION: The Supreme Court of Nevada in its
6 concluding sentence of the majority says it follows that
7 N.R.S. such and such is good law consistent with the
8 Fourth Amendment. And I don't see in the majority opinion
9 any reference to the Fifth Amendment. Now, you say you
10 raised it on rehearing?

11 MR. DOLAN: Yes, Your Honor.

12 QUESTION: And the -- the order of the Supreme
13 Court of Nevada is simply the petition for rehearing is
14 denied.

15 MR. DOLAN: The --

16 QUESTION: So I'm -- I'm not sure at all you
17 raised it sufficiently before the supreme court.

18 MR. DOLAN: Your Honor, the issue was also
19 briefed in the opening brief before the Nevada Supreme
20 Court. The -- the Nevada Supreme Court just chose not to
21 address it in their opinion.

22 QUESTION: You -- you did raise it then in your
23 briefs.

24 MR. DOLAN: Yes, Your Honor, it did.

25 Your Honor, I'd like to reserve the remainder of

1 my time.

2 QUESTION: Very well, Mr. Dolan.

3 Mr. Hafen, we'll hear from you.

4 ORAL ARGUMENT OF CONRAD HAFEN

5 ON BEHALF OF THE RESPONDENTS

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

8 There are three reasons why compelling a
9 lawfully detained person to identify himself is reasonable
10 under the Fourth Amendment. It is a minimal intrusion.
11 It advances officer safety, and it promotes effective law
12 enforcement in the prevention and detection of crime.
13 Furthermore, it does not violate the Fifth Amendment
14 privilege against self-incrimination because identifying
15 yourself is a neutral act.

16 QUESTION: Now, that -- that goes beyond Byers.
17 My -- my -- the hard part of this case for me is that
18 Byers which, it seems to me, a much easier case, was so
19 difficult for the Court. You had a fragmented Court. You
20 didn't have an opinion for the majority of the Court. And
21 this, it does seem to me, goes one step beyond Byers with
22 reference to the Fifth Amendment.

23 MR. HAFEN: Well, in regard --

24 QUESTION: And -- and Byers didn't take the
25 position that you just take, that it's -- that it's not

1 testimonial. It seems to me that's a plausible enough
2 argument, but I -- I can't get that out of Byers.

3 MR. HAFEN: Well, Your Honor, in regard to
4 Byers, it was a plurality opinion, but there was also a
5 strong concurrence by Justice Harlan. And in that
6 particular case, they talk about stating a name and
7 address as being a neutral act, and in the same context,
8 they talked about it in regard to a testimonial situation.
9 They talk about it's a testimonial situation or a non-
10 testimonial situation when a person is stopped, the mere
11 stopping of the car, but in the same context, they also
12 say stating your name and your address is a neutral act.

13 QUESTION: Well, I'll -- I'll look at it again,
14 but it seems to me even the Harlan opinion was in the
15 context of what we might call the regulatory zone of -- of
16 automobile -- automobile regulation and control.

17 MR. HAFEN: They did talk about that, Your
18 Honor, but in the same context, they also describe or they
19 -- they address it in the criminal context. The plurality
20 opinion addresses it in the criminal context, and Justice
21 Harlan also addresses it in the plurality -- or --

22 QUESTION: The plurality opinion said that
23 noting a name -- notes that a name, quote, identifies but
24 does not by itself implicate anyone in criminal conduct --

25 MR. HAFEN: That's correct.

1 QUESTION: -- which is the same point.

2 MR. HAFEN: That's correct, Your Honor. That --
3 that goes to the incriminating part of it, but when they
4 talk about the neutral act, we're interpreting that to go
5 to the testimonial part of it.

6 And this Court traditionally treats names
7 differently.

8 QUESTION: You said name and address. What else
9 would be under your neutral category? Could a telephone
10 number, e-mail address? How much fits in that neutral
11 category that citizens can be required to answer?

12 MR. HAFEN: Your Honor, the statute in Nevada
13 doesn't go that far. It simply says compelling -- the --
14 the identification or to identify one's self. So under
15 the Nevada statute, those type of identifiers --

16 QUESTION: But I'm asking you what fits -- what
17 fits within this neutral -- you -- you say that there are
18 certain things you can ask a person that they can be
19 required to respond to because they're not incriminating
20 and they're not a violation of privacy. They're just
21 neutral. So I'm just trying to get a handle on if we say
22 name is neutral, what else are we implicating.

23 MR. HAFEN: You could certainly make the
24 argument that those other things that you suggested, Your
25 Honor, are neutral. However, going back to the Fourth

1 Amendment, they really don't serve the purpose of officer
2 safety. It's the name that you need so that you can
3 discover who this person is, what their background is --

4 QUESTION: I -- I don't follow that really
5 because I can understand the Terry stop. You have to pat
6 down immediately because the officer is at risk that the
7 person will be armed. But by the time they do the
8 computer check, the harm -- I mean, that doesn't arrest
9 the situation. It doesn't protect. How is the officer
10 protected in that interval between when the person says I
11 won't give you my name -- I mean, it had to -- it has to
12 take some time to do a check, doesn't it?

13 MR. HAFEN: Well, Your Honor, going outside the
14 record, based on my experience as a prosecutor, that
15 information can be received in just a -- a matter of
16 minutes. And so while the officer is waiting for that
17 information, he can certainly take the posture of
18 protecting himself.

19 However, after receiving that information and
20 obtaining the criminal history on this person -- perhaps
21 he has a -- a history of battery on police officers -- he
22 can then escalate protection. He either calls for backup
23 or perhaps unholsters his -- his revolver. He has a
24 number of things that he can do after he gets that
25 information. And so it is critical.

1 QUESTION: Does that -- does not information
2 convert reasonable suspicion into probable cause?

3 MR. HAFEN: Well --

4 QUESTION: Suppose he finds he's a real bad guy.
5 Does it now become probable cause?

6 MR. HAFEN: That certainly adds into the
7 equation, Your Honor, but that in and of itself wouldn't
8 convert into probable cause. The officer would have to
9 look at the totality of the circumstances and on review
10 of --

11 QUESTION: Well, the totality of the
12 circumstances are in -- in the beginning he has reasonable
13 suspicion but not probable cause. The one thing he
14 learns, in addition to that, is this is a bad guy. Is it
15 now probable cause?

16 MR. HAFEN: Well, again, I -- I don't believe so
17 because there would be other factors that would -- would
18 have to be taken into consideration.

19 QUESTION: But I've already given you all the
20 factors. What other factors are there? The total of the
21 factors that exist are there's only reasonable suspicion.
22 We add one more fact: he's a bad guy. Does that make it
23 probable cause?

24 MR. HAFEN: No.

25 QUESTION: Why not? Why not? He has a record.

1 QUESTION: Well, it might if he's a bad guy with
2 a particular -- with a particular pattern. It was a
3 jewelry store and he said he's a bad guy because he robbed
4 a lot of jewelry stores under these same circumstances. I
5 mean, you could play with hypotheticals, it seems to me.

6 QUESTION: He has robbed this same jewelry store
7 10 previous times.

8 (Laughter.)

9 QUESTION: Don't you think that would elevate it
10 to probable cause?

11 MR. HAFEN: Under your hypothetical, yes.

12 QUESTION: Yes, but the likelihood of -- the
13 likelihood of getting that precise information is quite
14 remote, I think, in most of these cases.

15 MR. HAFEN: That's -- that's correct.

16 QUESTION: What about Berkemer?

17 MR. HAFEN: Excuse me?

18 QUESTION: I -- I've read the -- the brief here.
19 It's a case called Berkemer v. McCarty referred to on page
20 13. There must be some obvious answer I'm missing.
21 They're talking about a Terry stop and they say -- the --
22 the Court says this. You can ask him questions, but the
23 detainee is not obliged to respond and then a bunch of
24 others. So if he's not obliged to respond, he's not
25 obliged to respond. Now, what do we do about that case?

1 MR. HAFEN: Well, Your Honor, two responses.
2 First of all, I believe that reference in Berkemer is --
3 is dicta by the Court. The real holding in Berkemer was a
4 Miranda issue.

5 Second, this Court has never specifically
6 addressed this question.

7 QUESTION: All right. So what you're saying is
8 that there's a lot. You know, they have like two pages
9 here of different judges, Harlan, White, Berkemer, Davis,
10 and each time the Court said, but they're not obliged to
11 respond.

12 Now -- now, I -- what I thought -- I guess I'm
13 approaching this case quite differently, but I thought
14 we're not talking about national ID cards. What we're
15 talking about are Terry stops. And a Terry stop is a
16 derogation from the ordinary situation where you can walk
17 along and do what you want. So if we're derogating from
18 the person's ordinary freedom, what the Court did in
19 carving out exception was to create a condition. You can
20 ask, but he doesn't have to answer.

21 Now, the virtue of that is simple. Anyone can
22 understand it and it doesn't get us into all these
23 problems that were raised previously whether those
24 problems are right, wrong, or indifferent. So if I read
25 three Supreme Court cases and it all says that, I think

1 maybe there's some burden in saying on your part why we
2 shouldn't just follow what it says.

3 MR. HAFEN: Well, in subsequent opinions that
4 were cited by the petitioner, they discuss the -- either a
5 dissent or a concurring, and in those particular
6 references, the Justice does say unsolved crimes,
7 questions to unsolved crimes, or as Justice White said --

8 QUESTION: Then why complicate the matter? That
9 is, you've already said a name doesn't normally
10 incriminate you, but it could. Suppose his name is Killer
11 Magee. I don't know.

12 (Laughter.)

13 QUESTION: I mean, it's possible. And then I
14 guess you could have other questions, you know, that don't
15 normally incriminate you. Are you hungry? Would you like
16 to sit down? But -- so -- so why get into this
17 complicated thing of saying whether a question normally
18 isn't or normally is or sometimes or sometimes? Why don't
19 we just follow what the Court said?

20 MR. HAFEN: Because again, Your Honor, I don't
21 believe in this particular issue where it's a stop and
22 identify statute, that the Court has specifically
23 addressed that.

24 QUESTION: I thought your answer --

25 QUESTION: And there's another answer that --

1 QUESTION: -- is because the Court said it in
2 dictum. Right?

3 MR. HAFEN: That -- that's correct.

4 QUESTION: What case are you referring to when
5 we said it in dictum?

6 MR. HAFEN: In Berkemer v. McCarty.

7 QUESTION: But even there, we did not say it was
8 a Fifth Amendment violation.

9 QUESTION: Right.

10 QUESTION: A Fifth Amendment privilege, and
11 that's what you're -- you're here to argue. You're here
12 to say that this is just not covered by the Fifth
13 Amendment and it is not testimonial. It's a neutral fact.

14 QUESTION: I -- I agree with you about that.
15 I'm talking about a Terry stop and I'm simply --

16 QUESTION: Which is a Fourth Amendment issue.

17 QUESTION: That's right.

18 QUESTION: We have both issues here, do we not?

19 QUESTION: Right, right, right.

20 QUESTION: Fourth Amendment and Fifth Amendment?
21 Even if it doesn't violate the Fifth Amendment, we're
22 still going to have to answer the Fourth Amendment
23 question I guess.

24 MR. HAFEN: That's correct, Your Honor, and
25 that's when the Court would engage in a balancing test.

1 And the Court traditionally has balanced --

2 QUESTION: But we have not expressly said that
3 Nevada can require identification, or any other State. We
4 haven't said that in a holding.

5 MR. HAFEN: That's correct.

6 QUESTION: And the language is --

7 QUESTION: Nor -- nor have we said otherwise.

8 MR. HAFEN: That's correct.

9 QUESTION: It is correct? I'm sorry. Not in a
10 holding, but I mean, there are about four cases where they
11 say, of course -- and of course, it's that. Now, I grant
12 you that dicta, which of course this is, is -- varies in
13 its strength and so forth, but if we have a repeated
14 series of cases that say it, doesn't there have to be a
15 pretty good reason for departing from it? And that's what
16 I'm listening for: a pretty good reason.

17 QUESTION: Well, do all those cases that you're
18 referring to hypothesize the existence of reasonable
19 suspicion or are some of them just confrontation without
20 reasonable suspicion?

21 MR. HAFEN: Well, are you -- in regard to
22 Berkemer?

23 QUESTION: Yes.

24 MR. HAFEN: In regard to Berkemer, again that
25 went back to a Miranda issue, whether an individual --

1 whether an officer would have to read Miranda to a --
2 during a traffic stop. And --

3 QUESTION: But he says this while discussing
4 Terry stops. That they said this while discussing Terry
5 stops. Is that so in respect to Berkemer? I'm just
6 reading the brief. The -- the language I quoted was while
7 discussing Terry stops.

8 MR. HAFEN: That -- that's correct. The Court
9 ultimately decided that a traffic stop was akin to a Terry
10 stop. But the Court also addressed it in the situation of
11 a Fifth Amendment issue under a -- a Miranda concept.

12 QUESTION: Well, I --

13 QUESTION: Could you -- could you explain to us
14 why you think the Nevada Supreme Court didn't mention the
15 Fifth Amendment in its opinion?

16 MR. HAFEN: Your Honor, I -- I don't know. I am
17 of the opinion that the -- the opinion simply addresses
18 the Fourth Amendment issue. Why they didn't address the
19 -- the Fifth Amendment I don't know. Those -- those
20 issues were certainly presented to that court.

21 QUESTION: Because they're quite different, and
22 certainly the Fifth Amendment issue is important and
23 perhaps even harder than the other issue.

24 MR. HAFEN: To -- to some extent, Your Honor.
25 But again, our position is that it is not testimonial and

1 it's not incriminating. It's simply --

2 QUESTION: But it -- but it is the -- the odd
3 thing about this case is that the inquiry is made and it's
4 significant only in the context of a criminal
5 investigation. That's the only time the statute applies,
6 when you've got a Terry stop.

7 MR. HAFEN: That -- that's correct. And in
8 regard to the Fourth Amendment, again it gets back to this
9 balancing issue. This Court is going to have to balance
10 the -- any apparent personal security interests of Mr.
11 Hiibel against the important legitimate interests that the
12 government has in this case. And again, it gets back to
13 officer safety. It gets back to the prevention and
14 detection of crime. And again --

15 QUESTION: Well, I understand all the arguments
16 on the Fourth Amendment, but for me the more difficult
17 issue, frankly, is the Fifth Amendment. And it's really
18 strange that they didn't -- they didn't discuss it at all
19 and it is strange that -- we're all concerned about
20 identification cards and national and all this sort of
21 stuff. But this case is very, very narrow. It's just a
22 case where somebody gets stopped. He doesn't realize
23 there's a statute on the books that said, if you don't
24 answer, you can go to jail or get -- get arrested. The
25 funny thing about it is there are no warnings required

1 here.

2 MR. HAFEN: Well, in this particular case, the
3 deputy did warn him. In fact, the evidence is clear in
4 the joint appendix on page 4 that the finding of fact by
5 the justice court was that Deputy Dove did tell Mr. Hiibel
6 if you don't give me identification, I'm going to have to
7 arrest you.

8 QUESTION: Yes.

9 MR. HAFEN: And so in this particular case, he
10 was placed on notice --

11 QUESTION: Of course, the statute -- but the
12 statute didn't require that.

13 MR. HAFEN: That -- that's correct. The statute
14 does say, shall identify yourself.

15 QUESTION: Well, ignorance of the law is
16 generally no excuse, is it?

17 MR. HAFEN: That's correct. That's correct.

18 QUESTION: Well, I agree that the Fifth
19 Amendment is -- is the hard -- harder question in this
20 case, especially given the convoluted opinions in Byers.
21 It does seem to me that because the statute really focuses
22 on what we might call Terry stops, that you have a class
23 of persons who are within the zone of the commission of a
24 crime, and so the Fifth Amendment becomes -- it becomes
25 slightly more of a suspect class. I don't know how that

1 could take care of the witness hypothetical. But this
2 person was certainly under suspicion of -- of criminal
3 activity.

4 MR. HAFEN: Well, to some extent, but going back
5 to the videotape that -- that the Court has, after Deputy
6 Dove asked the -- or informed Mr. Hiibel, I'm here because
7 of a fight between the two of you, he indicates, I know
8 nothing about that. So that may very well take him
9 somewhat out of the class of a suspect now to a potential
10 witness. At that time, Deputy Dove, based on that
11 response, doesn't know now, well, is this the man that was
12 reported hitting the woman in the truck or did that person
13 leave and this is simply another passenger in the truck.
14 So viewed objectively, he has every right or -- to -- to
15 ask the question and because it wouldn't constitute a
16 Fifth Amendment violation in that context if Mr. Hiibel
17 truly was a witness, then he would be obligated to answer
18 the question.

19 QUESTION: What -- what's the closest case you
20 have for us? The Nevada court doesn't address this issue.
21 What's the closest case you have for us to show that this
22 is not a Fifth Amendment violation?

23 MR. HAFEN: It would be Byers, and we rely upon
24 Byers. And again, granted, it's a plurality decision but
25 with a strong concurrence by Justice Harlan.

1 QUESTION: I -- I thought your -- you were
2 saying earlier that your strongest reason would be that he
3 had already, in effect, taken himself out of Fifth
4 Amendment protection by saying I know nothing about that.

5 MR. HAFEN: In -- in that context, yes, because
6 now he, according to Deputy Dove, viewed objectively, is
7 potentially a -- a witness.

8 QUESTION: Yes, but then your rationale for the
9 arrest should be that you're a potential witness, and for
10 that reason, we have a right to -- we have a right to
11 apprehend the witness to make him testify to the crime.
12 You don't need the -- the Terry stop rationale for that.
13 If you think he's a witness to a crime, the Terry stop is
14 really irrelevant.

15 MR. HAFEN: Well, but the reasonable suspicion
16 was formed prior to meeting with -- with Mr. Hiibel. So
17 he had every -- at least he had the reasonable suspicion
18 for initially detaining.

19 QUESTION: From the standpoint of the Fifth
20 Amendment, what rule do you want us to adopt? When can
21 the police require persons to give their identity in your
22 view under the Fifth Amendment constitutionally?

23 MR. HAFEN: During -- first of all, you have to
24 make sure that there's reasonable suspicion to detain the
25 person and at that point then when the officer asks the

1 person for identification or what his name is, then if the
2 person doesn't respond, then the person can be arrested.

3 QUESTION: What about our witness hypothetical
4 where -- the Chief Justice's hypothetical of -- of the
5 murder with five people standing there and my hypothetical
6 -- you don't -- you don't think the police can demand
7 identification at that point from witnesses?

8 MR. HAFEN: Oh, they -- they certainly could
9 demand at that point.

10 QUESTION: What -- could they be criminalized if
11 they fail to give the answer?

12 MR. HAFEN: Well, it depends if at that time
13 there's reasonable suspicion to believe that one of those
14 individuals may have committed a crime.

15 QUESTION: Oh, so then you're abandoning the
16 witness rationale.

17 QUESTION: Well, but the statute doesn't apply
18 to pure witness. That's the point. This -- this statute
19 does not apply to the -- to the witness of the bank
20 robbery who's not suspected of doing the robbery.

21 MR. HAFEN: Well, again, it's -- it's going to
22 depend on the -- the search -- the situation.

23 QUESTION: No. The -- the hypothetical
24 situation is purely a witness. They've been standing in
25 line at the counter. He saw somebody rob the bank. But

1 he's not suspected at all. All -- our hypothetical -- you
2 could make him give his name because you want his
3 testimony at the trial. But that's not a -- that's not
4 this statute.

5 MR. HAFEN: Right. The statute is specifically
6 tied into reasonable suspicion and whether that person may
7 have committed a crime. I agree, yes.

8 QUESTION: Well, it would be rather odd that you
9 could ask innocent people to give their name and not --
10 and not a person under criminal suspicion.

11 MR. HAFEN: Well, again, let -- let me back up.

12 QUESTION: Do you think that maybe when he's
13 invoking the Fifth Amendment, he has to invoke the Fifth
14 Amendment?

15 MR. HAFEN: Yes.

16 QUESTION: Do you think maybe -- if he just
17 can't say I won't answer -- he can be arrested if he just
18 says I won't answer, but if he says I won't answer on the
19 ground that it might tend to incriminate me, then the
20 policeman would probably have probable cause. Wouldn't
21 he?

22 (Laughter.)

23 QUESTION: But it seems to me sort of -- you
24 know, sort of sneaky to invoke the Fifth Amendment without
25 invoking the Fifth Amendment. He -- he didn't -- that

1 wasn't the reason he gave for not answering. I thought
2 people usually invoke the Fifth Amendment. They say, I
3 refuse to answer that question -- you know, they have
4 their lawyer next to them -- on the ground that it might
5 tend to incriminate me.

6 MR. HAFEN: Well, they do --

7 QUESTION: Can they -- can they just say I don't
8 want to answer that question?

9 MR. HAFEN: I don't believe so. I think that's
10 a very vague response, and I think they'd have to
11 specifically invoke the Fifth Amendment. And as --
12 Justice Scalia, as you pointed out, typically when they do
13 that, they do that in the context of maybe a grand jury
14 hearing or -- or a criminal trial.

15 And so, again, the State's position in -- in
16 regard to this particular case is that as it relates to
17 the Fifth Amendment, is the name itself is a neutral act.
18 It simply doesn't implicate an individual in any criminal
19 conduct. It doesn't say in this particular case in regard
20 to Mr. Hiibel, that he struck the woman. It doesn't even
21 imply that he may have been driving the car. It doesn't
22 go to any --

23 QUESTION: May -- may I interrupt? How do you
24 distinguish this so-called neutral fact from a billion
25 other neutral facts which have evidentiary significance in

1 a criminal trial? It's a neutral fact that I'm wearing a
2 pinstripe suit, but if the evidence was that the bank
3 robber was wearing a pinstripe suit, this -- this would be
4 relevant evidence and it might tip the scale in -- in
5 proof. It's neutral.

6 MR. HAFEN: Well, that would certainly go to the
7 Wade and the Gilbert cases that talk about voice analysis,
8 lineup --

9 QUESTION: But this is -- this is --

10 QUESTION: Thank you. Thank you, Mr. Hafen.

11 MR. HAFEN: Thank you.

12 QUESTION: Mr. Srinivasan, we'll hear from you.

13 ORAL ARGUMENT OF SRI SRINIVASAN

14 ON BEHALF OF THE UNITED STATES

15 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

16 MR. SRINIVASAN: Thank you, Mr. Chief Justice,
17 and may it please the Court:

18 A person detained, based on reasonable suspicion
19 of crime, may be required to provide his name to officers
20 because that requirement contributes significantly to the
21 ability of law enforcement officers to ensure their own
22 safety and that of the public while imposing only a
23 minimal burden on an individual's protected interests in
24 privacy.

25 The question under the Fourth Amendment would be

1 whether an otherwise --

2 QUESTION: Would you -- may I just interrupt
3 there? How does it help the officer's safety if -- he's
4 made the patdown. He finds he is or not armed. If he's
5 armed, of course, he arrests him. He's not armed. And he
6 -- now, how does it help the officer's safety at this
7 point to find out whether he should just let him go away
8 or he should call a station and ask -- do something when
9 he knows his name?

10 MR. SRINIVASAN: Justice Stevens, it's true that
11 a patdown authority provides a measure of protection for
12 an officers, and it's -- it's an important one, but the
13 authority to determine a person's name and thereby run a
14 background check is a highly significant, complementary
15 measure.

16 QUESTION: Do officers always pat down before
17 they ask questions? I've had officers ask me questions
18 often without telling me to spread my legs, put my arms up
19 against the wall, and they -- they frisk me.

20 MR. SRINIVASAN: No. And -- and --

21 QUESTION: We certainly wouldn't want to
22 encourage that kind of activity, would we?

23 (Laughter.)

24 MR. SRINIVASAN: No, and a patdown authority is
25 conditioned --

1 QUESTION: I think the Terry case does encourage
2 that kind of activity. If you have reasonable suspicion,
3 that's the first thing you do is -- is pat them down.

4 MR. SRINIVASAN: Well, the authority to conduct
5 a patdown search, first of all, is conditioned on there
6 being reason -- a reasonable basis for believing that the
7 person is armed and dangerous. And so obtaining a
8 person's name --

9 QUESTION: And my question is once he finds he's
10 not armed, why is his officer -- why is his safety
11 implicated by not deciding to let him go instead of
12 calling the station and detaining him further?

13 MR. SRINIVASAN: Because a patdown isn't
14 foolproof. The -- the officer might be assaulted in a
15 physical assault rather than through the use of arms --

16 QUESTION: Well, and a patdown would not --

17 MR. SRINIVASAN: -- and in addition --

18 QUESTION: A patdown would not occur unless he
19 had reason to believe the person was armed, which in most
20 cases he will not have. And he -- if he finds out that
21 the guy he's confronting with is, you know, Machine Gun
22 Harry, he's going to have a -- a different approach to
23 that individual. I don't see how there's any question
24 that it -- it can help the -- the officer's safety unless
25 you expect the officer always to pat down people, which

1 they -- they can't do unless they have reason to believe
2 that the person is armed --

3 MR. SRINIVASAN: That's --

4 QUESTION: -- which usually they don't I assume.

5 MR. SRINIVASAN: That's right, Justice Scalia.
6 The first response to Justice Stevens' question is that
7 the patdown authority is conditioned on there being a
8 reasonable basis for believing that the person is armed
9 and dangerous.

10 QUESTION: There has to be a reasonable
11 suspicion, but there doesn't have to be reasonable
12 suspicion that he's armed.

13 MR. SRINIVASAN: There has --

14 QUESTION: That's not part of the inquiry.

15 MR. SRINIVASAN: There has to be a reasonable
16 basis for believing that the person is armed and dangerous
17 before the authority to conduct a patdown frisk kicks in.
18 And what the -- what the authority to determine a person's
19 name and thereby determine their criminal history does is
20 to afford the officer with information that may lead him
21 to believe that he's dealing with a dangerous individual.

22 QUESTION: Well, is it your position they should
23 get the answer to the identity question before they pat
24 him down?

25 MR. SRINIVASAN: No. I don't think it's a --

1 it's a question of sequence.

2 QUESTION: Which comes first in your view in the
3 normal police procedure where there is reasonable
4 suspicion under Terry?

5 MR. SRINIVASAN: Well, it would -- first of all,
6 it would depend on whether there's a reasonable basis for
7 believing that the person is armed and dangerous because
8 if there is not that reasonable basis, the authority
9 doesn't have the authority to conduct a patdown at all.

10 QUESTION: All right, but on your reasoning that
11 he can ask for the -- for the name for reasons of safety
12 -- and that's why it should be allowed without anything
13 more -- why doesn't exactly that same reason support an
14 authority to -- to patdown even in the absence of any
15 reason to believe that the person may be armed and
16 dangerous? It would contribute to officer safety.

17 MR. SRINIVASAN: No, it would, but the -- the
18 reason why the Fourth Amendment requires a showing a
19 reasonable basis to believe that they're armed and
20 dangerous before conducting a patdown is because, as the
21 Court described the patdown in Terry, it represents a
22 severe intrusion on the person's personal security. And
23 that's not the case for the question, what is your name.
24 That doesn't represent any sort of physical intrusion on
25 the person whatsoever.

1 QUESTION: So -- so your argument really boils
2 down to the -- I mean, the -- the crucial part of your
3 argument is -- is the -- is the relatively -- relative
4 insignificance of the intrusion.

5 MR. SRINIVASAN: That's --

6 QUESTION: But for that, we'd be in the same
7 boat with name and patdown.

8 MR. SRINIVASAN: Well, that's critical to
9 explaining why in all cases the officer should have an
10 authority to compel the person to disclose his name.

11 QUESTION: The insignificance of the intrusion.

12 MR. SRINIVASAN: That's correct.

13 QUESTION: Now, I thought -- I thought under
14 Terry we've held that a police officer may detain someone
15 briefly without probable cause on a reasonable suspicion
16 the person has committed or is about to commit a crime and
17 during that process may ask all kinds of questions of the
18 person, although, as far as I can find out, this Court has
19 said the person does not have to respond to the questions.

20 MR. SRINIVASAN: What you're pointing to,
21 Justice O'Connor, I believe is the dictum that was
22 discussed early in Berkemer v. -- in Berkemer v. McCarty.
23 And that, first of all, is dictum, but not only is it
24 dictum, it's ambiguous dictum because the language that
25 the Court used was that the officer is entitled to ask a

1 moderate number of questions, first, to determine the
2 person's identity and, second, to obtain information with
3 which to confirm or dispel the officer's suspicions. And
4 then the Court goes on to say that, of course, the
5 detainee is not required to respond. It's unclear whether
6 that statement concerning that the detainee is not
7 required to respond relates to the initial basis for
8 asking questions which is determinative of his identity.

9 QUESTION: But we've just never said that the
10 officer may require the identification. That's what this
11 case asks us to determine.

12 MR. SRINIVASAN: That's right, Justice O'Connor,
13 but the Court specifically left the -- the question open,
14 at least on two occasions, both in Brown v. Texas and in
15 Kolender v. Lawson. So I don't think the Court is in any
16 way inhibited by its precedents.

17 QUESTION: And the right to do a patdown is
18 something you do after the officer has made the initial
19 decision to detain and ask some questions presumably.

20 MR. SRINIVASAN: That's right. That's right.
21 It comes after the officer has made a determination to
22 detain. That's correct.

23 The issue under the Fifth Amendment I think is
24 -- is --

25 QUESTION: Can we go back to -- would you go

1 back to the Fourth because I -- I suppose the -- the
2 officer can ask, you know, and he doesn't get an answer,
3 so he pats him down. What's wrong with that?

4 MR. SRINIVASAN: Well, if he has a reason to
5 believe --

6 QUESTION: I mean, it's very, very unlikely I
7 would think, unless you have some evidence to the
8 contrary, that the officer who's in a Terry stop
9 situation. Are there -- a lot of instances where they
10 look -- he said what's your name and then the person --
11 and by the way, you have to answer or you're going to be
12 in more trouble so therefore the person gives him his real
13 name, which happens to turn out to be one of the worst
14 criminals in the country, and then he pats him down. I
15 grant you that could happen.

16 But contrast that with a situation where you
17 take Berkemer literally, and now you say if he doesn't
18 answer, sure you can pat him down.

19 What's wrong -- I -- I don't see it. I'm back
20 to my point which you heard me ask, and I -- I'd really
21 like an answer in terms of -- I mean, Berkemer cites Davis
22 and Davis refers to the settled principle -- settled --
23 that you can't -- you can ask what you want, but they
24 don't have to answer. Okay? So there are a lot of
25 circumstances where it may be national ID cards or

1 whatever, which are not Terry stop situations. But why
2 should we retreat from that dictum?

3 Now, I hear your answer about the -- about the
4 danger and I think that's an important point. But I -- I
5 sort of canceled that by thinking not answering would also
6 give the policeman a justification for the patdown. And
7 -- and now, if that's right, what other reason is there
8 for retreating from the rather strong dictum?

9 MR. SRINIVASAN: No, but Justice Breyer, I don't
10 think the patdown eliminates the danger. The patdown is
11 important in addressing the possibility that the person
12 might use arms that are on their person against the
13 officer, but it does -- it in no way eliminates the danger
14 to the officer. And that's why --

15 QUESTION: And -- and you don't believe that the
16 failure to give a name gives the officer reason to believe
17 that the person is armed, do you? I mean, simply because
18 he refuses to give you a name, do you have justification
19 to do a patdown?

20 MR. SRINIVASAN: No. We're not -- we're not
21 taking that position and the courts --

22 QUESTION: No, I wouldn't think so. I -- I know
23 a lot of people that might not want to give their names --

24 QUESTION: Well, it would be pretty odd to say
25 that you can force a person to give his name in order to

1 protect the policeman, but the far lesser restriction of
2 just taking it into account as evidence you can't do.
3 That would be an unusual position. I mean, taking it into
4 account is a factor suggesting danger, you can't do, but
5 of course you can require him to answer under penalty of a
6 crime.

7 MR. SRINIVASAN: Well, I think --

8 QUESTION: So, I mean, everybody is in a false
9 position here because you're -- you're being put in a
10 slightly false position.

11 MR. SRINIVASAN: I don't know that it's a false
12 position.

13 QUESTION: All right. Yes, all right. I'll --
14 I'll take your answer. Danger. Is there anything else?

15 MR. SRINIVASAN: Well, it's not only danger to
16 the officer's safety, but it also could provide crucial
17 information for the officer to -- to assess the
18 individual's conduct because if the officer learns that
19 the person has previously been convicted of a crime that
20 fits the pattern that he observed in deciding to detain
21 the person, then that could go a long ways towards
22 officer's determination that there's probable cause for an
23 arrest. And of course, that would be crucial in -- in
24 terms of public safety because it could prevent commission
25 of an imminent offense or the ongoing commission of a

1 continuing offense.

2 QUESTION: Then why -- why do you stop at the
3 name? Answers to any questions would have that effect.

4 MR. SRINIVASAN: No, that's true. And -- and as
5 -- from the perspective of the Fourth Amendment, I'm not
6 sure that there's a limitation related to answers to
7 questions. I think the limitation would arise under the
8 Fifth Amendment, and what the Fifth --

9 QUESTION: So -- so far as the -- so far as
10 Terry and the Fourth Amendment are concerned, I'm -- I'm
11 not sure I understand you. Are you saying that there is
12 an obligation to answer all questions, not just names?

13 MR. SRINIVASAN: No. I -- no. The Court hasn't
14 specifically spoken to that question, but we don't
15 challenge the dictum --

16 QUESTION: No, but I -- I thought -- is that --
17 is that the position that you're taking?

18 MR. SRINIVASAN: No. We don't take the -- we
19 don't take that position because we don't challenge the
20 dictum in Berkemer and other cases insofar as --

21 QUESTION: Okay. Then why do you stop -- why do
22 you stop at the name? Is it again the -- the minimal
23 intrusion, that that is a more minimal intrusion than
24 other information?

25 MR. SRINIVASAN: That's correct.

1 QUESTION: Thank you, Mr. Srinivasan.

2 Mr. Dolan, you have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF ROBERT E. DOLAN

4 ON BEHALF OF THE PETITIONER

5 MR. DOLAN: Thank you, Mr. Chief Justice.

6 Within the -- within the Fourth Amendment
7 balancing construct, we believe that the government's
8 argument that officer safety is served by requiring a
9 person to utter their name is a false assumption. Truly
10 if the officer is stopping Machine Gun Harry and he says,
11 oh, I'm John Smith, and -- and if you follow the
12 government's position, then the officer at that time can
13 relax his guard, thereby increasing the -- the possibility
14 of danger. So we think that as the Court engages in the
15 analysis of what is appropriate under the balancing --

16 QUESTION: Well, you're -- you're saying people
17 can disobey the law to make it ineffective. That's not
18 usually an argument we accept.

19 MR. DOLAN: I'm saying that the -- what -- the
20 government's argument is based upon the assumption that
21 everyone will tell the truth during a Terry stop, and I
22 don't believe that corresponds with common sense,
23 especially if Machine Gun Harry is there. He doesn't want
24 to be identified and it's in his interest to say my name
25 is Tom Smith. And if you follow the government's

1 conclusion -- rather, it's position, then the officer then
2 relaxes his guard, doesn't take appropriate steps. We
3 believe that officers must protect themselves but do so in
4 a way that is consistent with the Constitution.

5 When the Court established the Terry rule, it
6 created an exception to the previous rule was that
7 seizures could only occur on probable cause, which was a
8 greater evidentiary standard. And the Court was very
9 careful to suggest that there was a limited right, not a
10 general exploratory search, that now we will be involved
11 when -- excuse me -- because a name, the government
12 suggests, will be the key to unlock data that is endless,
13 given the modern age of technology, that the government
14 can learn about that person.

15 It is a general exploratory search which the
16 government ultimately is asking this Court to approve of.
17 And then privacy is a -- a nice principle to talk about as
18 a part of history. Going forward, it will not be part of
19 American citizens' natural relationship by right that they
20 can count on. There are related freedoms that this Court
21 also looks to in the balancing.

22 QUESTION: Well, but if there's reasonable
23 suspicion to believe the person is committing a crime, it
24 doesn't shock me that they'd use the identification
25 mechanisms to check it out. I mean, we're -- we're on the

1 assumption that the person has been stopped on the basis
2 of reasonable suspicion --

3 MR. DOLAN: And -- and --

4 QUESTION: -- of committing a crime.

5 MR. DOLAN: I would agree, Your Honor.

6 QUESTION: So why not let them check in the
7 computer records to see if this is the worst prior
8 offender they've ever had?

9 MR. DOLAN: Well -- well, with respect to the
10 Terry stop itself, it is for investigation related to
11 whether or not a crime may occur or is about to occur.
12 And the officer has available to them tools to inquire.
13 They can temporarily detain the person to see if there are
14 witnesses around who could identify the person as having
15 engaged in criminal conduct and the like.

16 But the -- the notion that a person has to
17 affirmatively provide a ticket to terminate that Terry
18 encounter really tips the balance too much in favor of the
19 State and risks a lot of benefits to our society that
20 accrue through freely being able to move, to be let alone,
21 to engage in protected activity without being subjected to
22 the accosting that one is subjected to during a Terry
23 stop.

24 Suspicious behavior is not easily or usefully
25 quantified, so this Court has found. And because what is

1 suspicious to an officer --

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dolan.

3 The case is submitted.

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

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