

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TIMOTHY SCOTT, :

4 Petitioner :

5 v. : No. 05-1631

6 VICTOR HARRIS. :

7 - - - - - x

8 Washington, D.C.

9 Monday, February 26, 2007

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:48 a.m.

14 APPEARANCES:

15 PHILIP W. SAVRIN, ESQ., Atlanta, Ga.; on behalf of

16 Petitioner.

17 GREGORY G. GARRE, ESQ., Deputy Solicitor General,

18 Department of Justice, Washington, D.C.; for the

19 United States, as amicus curiae, supporting

20 Petitioner.

21 CRAIG T. JONES, ESQ., Atlanta, Ga.; on behalf of

22 Respondent.

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CHIEF JUSTICE ROBERTS: We'll hear argument next in case 05-1631, Scott versus Harris.

Mr. Savrin.

ORAL ARGUMENT OF PHILIP W. SAVRIN

ON BEHALF OF THE PETITIONER

MR. SAVRIN: Mr. Chief Justice, may it please the Court:

This case concerns whether a police officer could be held personally liable for using force to terminate a dangerous high-speed pursuit. The undisputed facts show that Deputy Scott did not violate the Fourth Amendment. Respondent had led the police officers on a nine-mile pursuit at exceptionally high speeds. As the videotapes that have been admitted into evidence show, Respondent was driving on narrow two-lane roads at night. He swerved across the double line to pass cars that were in his path, actually traveling in the wrong lane of travel. He ran through a number of red lights. He weaved through a shopping center and collided with Deputy Scott's vehicle.

Deputy Scott at that point had tried to block the exit from the shopping center, but Mr. Harris was successful in using his vehicle to escape. At that

1 point, he continued driving at exceptionally high
2 speeds.

3 JUSTICE STEVENS: Can I ask this question
4 about the shopping center? Wouldn't your case be
5 exactly the same if the shopping center incident had not
6 occurred?

7 MR. SAVRIN: It would, Your Honor.

8 JUSTICE STEVENS: So that we really don't
9 have to get distracted by the shopping center?

10 MR. SAVRIN: There is a -- yes, Your Honor.
11 There is a factual dispute as far as whether Deputy
12 Scott's vehicle collided with Mr. Harris' vehicle or
13 vice versa, but we do not believe that that is a
14 material dispute. We believe that the fact, the
15 undisputed facts, that Mr. Harris was driving at such
16 exceptionally high speeds -- and to put in context, 90
17 miles per hour, which is the average speed, and of
18 course is evidence of --

19 JUSTICE BREYER: I'm not sure why you
20 concede that. I mean, I looked at the tape and it
21 seemed to me it's one of the -- a case involving the
22 whole ball of wax. And I suspect my reaction to that
23 tape was in part affected by the fact that he went
24 through the shopping center, came out and crashed into
25 a police car, which is what Scott saw.

1 MR. SAVRIN: Well Scott -- yes, Your Honor, I
2 think that is part of the analysis.

3 JUSTICE BREYER: So how do I know whether,
4 which of these things is directly or not indirectly --
5 well, you go ahead. But I mean, are you -- am I not
6 supposed to look at the part which involves the shopping
7 center?

8 MR. SAVRIN: Absolutely, Your Honor. My
9 point was that, the point was that there was a
10 collision, not who caused the collision, whether the
11 deputy pulled into Mr. Harris' line of travel or
12 Mr. Harris pulled towards the deputy.

13 JUSTICE KENNEDY: Is the rule that you
14 propose that the policeman must balance the risk of harm
15 to others versus the risk of harm to the fleeing person?

16 MR. SAVRIN: Your Honor, what the -- yes,
17 essentially.

18 JUSTICE KENNEDY: Your brief says if the
19 officer reasonably believes that doing so, i.e.,
20 terminating the chase, would avoid a greater risk of
21 bodily injury or death.

22 MR. SAVRIN: Yes, Your Honor. And we
23 believe --

24 JUSTICE KENNEDY: Greater than what?
25 Greater than --

1 MR. SAVRIN: Greater than not taking action.
2 In other words, that the harm --

3 JUSTICE KENNEDY: Without reference to the
4 possible harm to the driver? I just want to know what
5 you're testing here.

6 MR. SAVRIN: I think that -- I think that is
7 one of the factors to be considered.

8 JUSTICE SCALIA: I don't know that I agree
9 with that. I mean, if this fellow driving at 90 miles
10 an hour is responsible for endangering people, you're
11 proposing a rule that says if there's a 50-percent
12 chance that he'll hurt some innocent person and a
13 50-percent chance that he'll get hurt if you try to stop
14 him, you shouldn't do anything. I don't agree with that.

15 MR. SAVRIN: Well, Your Honor --

16 JUSTICE SCALIA: I'd stop him. I mean, he's
17 the fellow that's causing the danger, endangerment,
18 isn't he?

19 MR. SAVRIN: Yes, Your Honor, I would agree
20 with that. And one thing I --

21 JUSTICE SCALIA: I think you're giving away
22 too much.

23 MR. SAVRIN: One thing I did want to point
24 out is that a speed of 90 miles per hour -- and of
25 course there's evidence in the record that the vehicles

1 were at times traveling over 100 miles an hour --

2 JUSTICE KENNEDY: I didn't mean to put words
3 in your mouth. It seems to me your test might be
4 whether there is a greater risk in stopping him or not
5 stopping him as to other people, without reference to
6 the risk to himself.

7 MR. SAVRIN: Yes, that's probably a better
8 articulation.

9 JUSTICE KENNEDY: Well, it's your brief. I
10 want you to --

11 MR. SAVRIN: I think that's a better
12 articulation of the appropriate test would be, the way --

13 JUSTICE STEVENS: Well, isn't the speed also
14 relevant to the likelihood that running into a
15 car at that speed would cause the death of the driver?

16 MR. SAVRIN: It would, Your Honor.

17 JUSTICE STEVENS: Isn't it a fairly high
18 probability that if you hit someone at that speed that
19 there will be something, either death or serious injury
20 as a result?

21 MR. SAVRIN: Your Honor, my answer to that
22 question would be that that's always going to be the
23 case whenever force is used to stop a vehicle at this
24 high rate of speed.

25 JUSTICE SCALIA: Well, I suppose there is

1 also a high probability where you're going 90 miles an
2 hour on a one-way road, crossing over the double yellow
3 line, with oncoming traffic, that you're going to hurt
4 somebody else.

5 MR. SAVRIN: Yes, Your Honor.

6 JUSTICE SCALIA: I mean, the more you
7 increase the speed the more likely he's going to be
8 hurt. But also the more likely if you let him go
9 somebody else is going to be hurt.

10 MR. SAVRIN: Yes, Your Honor. And to put it
11 in a more concrete perspective, 90 miles per hour is
12 mathematically equivalent to over 130 feet per second.

13 JUSTICE GINSBURG: But Mr. Savrin, there was
14 an episode in the parking lot when things came to a
15 temporary halt. If Scott had stopped pursuing Harris at
16 that point, maybe Harris would not -- maybe he would
17 have slowed down. If he was -- he was trying to flee
18 from the police, but if the police weren't after him
19 there is no indication that he would have been speeding.

20 MR. SAVRIN: Well, Your Honor, I would
21 disagree with that, that in fact --

22 CHIEF JUSTICE ROBERTS: Well, he was
23 speeding before the police knew about him, right?
24 That's the whole, where this all started.

25 MR. SAVRIN: The initial offense was

1 speeding, and Mr. Harris, instead of pulling over or
2 slowing down as would might be expected by a reasonable
3 person, sped up and continued to drive recklessly.

4 We would contend that it was Mr. Harris that
5 was in control of the force that the officers needed to
6 terminate the risk that he presented. At any time, any
7 time, Mr. Harris could have either slowed down his
8 vehicle or stopped, and he chose not to do that.

9 JUSTICE STEVENS: Well, do you contend that
10 an officer can always use deadly force to stop a
11 high-speed driver who's creating this kind of risk?

12 MR. SAVRIN: I think it depends on how you
13 define "deadly force." Of course, there can be different
14 --

15 JUSTICE STEVENS: Running into him with a
16 high probability that he'll get killed.

17 MR. SAVRIN: I think that, that would be the
18 case, as I indicated, whenever an officer uses force to
19 stop a vehicle at this speed. I think there is -- if it
20 is deadly force, and of course this Court has not
21 articulated a test of that particular question --

22 JUSTICE STEVENS: Wasn't that acknowledged
23 in the district court -- the trial court?

24 MR. SAVRIN: In this case?

25 JUSTICE STEVENS: Yes.

1 MR. SAVRIN: No, the district court found
2 that it did not need to resolve whether or not --

3 JUSTICE STEVENS: But the jury might find
4 that it was deadly force.

5 MR. SAVRIN: The Eleventh Circuit found that
6 the jury might conclude it was deadly force.

7 JUSTICE STEVENS: And do you contend that
8 a jury could not find that it was deadly force?

9 MR. SAVRIN: I believe, again, Your Honor, I
10 believe that it depends on how broad the test is. The
11 Model Penal Code test, which most of the circuit
12 courts --

13 JUSTICE STEVENS: Well, but is your -- is
14 it your view that a jury could not find on these facts
15 that there was deadly force?

16 MR. SAVRIN: I believe, yes, under, under
17 the test as articulated in some of the circuits, yes,
18 this would not be deadly force. Of course, what we're
19 saying is --

20 JUSTICE KENNEDY: I thought we have given --
21 I thought we have a test for deadly force in Garner and
22 it's whether or not there is -- it's more likely than
23 not, whether or not there is a serious risk that death
24 will ensue. That's the test, isn't it? Garner.

25 MR. SAVRIN: Your Honor, as I read the

1 Garner opinion, the Court did not need to reach a
2 definition of "deadly force" because shooting someone in
3 the back of the head is clearly going to be deadly
4 force. The circuit courts -- I can tell you that the
5 circuit courts in the wake of Garner have said that
6 Garner did not create a test and have created different
7 tests along the lines of the Model Penal Code to reach
8 that definition. But the point -- I was going to say a
9 point that I would like to make is that there are
10 degrees even within the continuum that might be within a
11 definition of "deadly force," such as using a vehicle to
12 make contact, blowing out the tires, using stop sticks,
13 using a firearm. Those have different degrees of
14 potential lethality, so even if they are all considered
15 deadly force there are decisions that an officer has to
16 make.

17 JUSTICE ALITO: What test, what test of
18 deadly force would not be met here?

19 MR. SAVRIN: A likelihood -- -

20 JUSTICE ALITO: Considering that it's a
21 summary judgment issue.

22 MR. SAVRIN: Yes, Your Honor. I would say
23 the Third Circuit decision in the Philadelphia
24 litigation case, where the officers dropped a bomb on a
25 building in order to gain access and ended up

1 killing 11 people. The court found that that was not
2 deadly force because the officers were trying to gain
3 access to the building and they reasonably believe that
4 they were able to do that without the loss of life. I
5 think that if that definition were applied to this case,
6 then I think that this would not be deadly force. But I
7 think --

8 JUSTICE BREYER: Finish that.

9 MR. SAVRIN: I'm sorry. I keep interrupting
10 you.

11 JUSTICE SCALIA: Excuse me. He reasonably
12 -- because Scott reasonably believed that he could bump
13 the car off the road at 90 miles an hour without risking
14 the driver's life? Is that why it's like the Third
15 Circuit case?

16 MR. SAVRIN: Your Honor, his intent was to
17 end the pursuit, not to cause an accident.

18 JUSTICE SCALIA: Well, but the Third Circuit
19 case you just described didn't talk about intent. It
20 talked about reasonable belief.

21 MR. SAVRIN: Well, let me cite another case
22 then, the Adams case from the Eleventh Circuit.

23 JUSTICE SOUTER: Before do you that, will
24 you go back to the Philadelphia case. Do you contend
25 that a jury could find that he reasonably believed that

1 he would not cause, that he would not raise a serious
2 risk of death or serious bodily harm by bumping the car
3 at 90 miles an hour?

4 MR. SAVRIN: Yes, Your Honor. And if I --

5 JUSTICE SOUTER: I don't understand that.
6 How could such a belief be reasonable? What am I
7 missing here?

8 MR. SAVRIN: Let me cite the Court to the
9 Eleventh Circuit's own reasoning in the Adams case. And
10 that case involves a misdemeanor where the officer
11 intentionally made contact with the vehicle several
12 times. The last contact caused the death of a
13 passenger. The Eleventh Circuit found that Garner did
14 not apply to that situation and further said that a
15 policeman's use of his vehicle is very different from a
16 policeman's use of his gun.

17 JUSTICE SOUTER: That doesn't answer my
18 question.

19 MR. SAVRIN: I'm sorry, Your Honor.

20 JUSTICE SOUTER: Why, why would it be
21 reasonable to believe that a car could be bumped at 90
22 miles an hour plus without raising a substantial risk of
23 death or serious bodily harm? How could such a belief
24 be reasonable?

25 MR. SAVRIN: Because there are vehicle

1 collisions every day, Your Honor, that do not end in
2 death or serious bodily harm.

3 JUSTICE SOUTER: Some people are lucky.
4 We're talking about creating a substantial risk. How
5 would it be reasonable to assume that one would not
6 create a substantial risk?

7 MR. SAVRIN: Your Honor, because Mr. Harris
8 could have regained control of his vehicle. The point
9 is that Mister -- that the Petitioner had limited
10 options based on the manner in which Mr. Harris was
11 driving. And even if this would be considered deadly
12 force, we do believe it would be justified under the
13 circumstances.

14 JUSTICE KENNEDY: Well, that's a different
15 issue and you may prevail on other arguments in the
16 case. But as to whether or not there's a likelihood or
17 a reasonable likelihood of serious injury, it seems to
18 me that's clearly a question for the jury. I mean, we
19 might argue about it up here, but that's a classic jury
20 question, isn't it?

21 MR. SAVRIN: I believe in the context of the
22 Fourth Amendment with the Graham factors and the question
23 of probable cause, that it's not the same as simply a
24 jury question. But I do concede that if it's not deadly
25 force it's very close to it. But I think the important

1 thing is that, whatever force Mister -- the Petitioner
2 used was limited by Mr. Harris' driving.

3 JUSTICE GINSBURG: Mr. Savrin, one technique
4 that Officer Scott asked permission to use was described
5 as a PIT technique that would be a life and limb-
6 sparing measure. One oddity about this case is that he
7 called and asked permission to use that less risky
8 method and yet when he determined that he couldn't do
9 that, given the speed of the vehicles, he didn't ask
10 permission to do what he did do, which was
11 life-endangering.

12 MR. SAVRIN: Your Honor, if I could respond
13 to that in two respects. First, it is not, it is not
14 the case that the PIT maneuver, as it's commonly called,
15 is safe. What it does is spin the car out, and if
16 Mr. Harris' vehicle had been spun out in this case it is
17 more likelihood that he would have lost control. In
18 other words, it causes the vehicle to lose control.

19 The second response I would have is that the
20 Petitioner did ask permission to do the PIT maneuver and
21 the permission that the supervisor gave, which was Mr.
22 Fenninger that's in the record undisputed, was to use
23 force up to deadly force. So Mr. --

24 JUSTICE GINSBURG: Where is that?

25 MR. SAVRIN: That's in Mark Fenninger's

1 deposition, and he is the supervisor that was ---

2 JUSTICE GINSBURG: And he said he gave
3 permission for more than the PIT procedure?

4 MR. SAVRIN: Yes, Your Honor. His testimony
5 was that he was giving, he believed he was giving
6 permission up to and including deadly force.

7 JUSTICE SOUTER: Well, the phrase used was
8 "take him out," wasn't it?

9 MR. SAVRIN: Yes. Yes, Your Honor.

10 JUSTICE STEVENS: Does the police officer
11 have any obligation in a situation like this to consider
12 other alternatives, and if so what other alternatives
13 might have been available to this officer?

14 MR. SAVRIN: Yes, Justice Stevens. I think
15 the officer had very limited options, two options at
16 that point: Either use force or let Mr. Harris go. And
17 I think it was a balancing of --

18 JUSTICE STEVENS: And even with letting him
19 go, isn't it possible they could get other roadblocks up
20 ahead or get other people involved in the attempt to
21 catch him?

22 MR. SAVRIN: Yes, there always are other
23 potentials. However, I would submit that a vehicle
24 traveling at 130 feet per second can do a lot of damage
25 in a very short period of time before the police

1 officers can figure out what route he's going to take.

2 JUSTICE STEVENS: Would that be true if there
3 was no traffic on the road at that particular time?

4 MR. SAVRIN: Deputy Scott took the action
5 that he did because there was a low likelihood of injury
6 to third parties other than Mr. Harris because there
7 was no one in his immediate path of travel.

8 JUSTICE STEVENS: Well, in that circumstance
9 why wouldn't he consider just discontinuing the chase?

10 MR. SAVRIN: Because there were -- the
11 videotape shows that Mr. Harris passed approximately 36
12 cars during this period of time. 12 seconds before the
13 contact was made, a vehicle was passed by Mr. Harris.
14 There was a high likelihood, in fact a probability, that
15 this chase was going to end in tragedy, and Deputy Scott
16 took the action that he could.

17 JUSTICE STEVENS: Would it have been that
18 likely if the officer discontinued the chase?

19 MR. SAVRIN: Whether he discontinued the
20 chase or not, Mr. Harris could still injure whoever
21 might be around the next corner, Your Honor.

22 If there are no further questions, I'd like
23 to save my time for rebuttal.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Savrin.

1 Mr. Garre.

2 ORAL ARGUMENT OF GREGORY G. GARRE.

3 FOR THE UNITED STATES, AS AMICUS CURIAE

4 SUPPORTING PETITIONER

5 MR. GARRE: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 When a suspect disobeys a lawful command to
8 stop, races off in a reckless attempt to elude the
9 police, and demonstrates a disregard for his own life
10 and the lives of others in his path, the police may use
11 force, including deadly force, to bring the suspect's
12 vehicle flight to a halt and protect the public safety.

13 CHIEF JUSTICE ROBERTS: Does it matter
14 exactly what the nature of the escape was? Are we
15 supposed to evaluate whether this was reckless enough?
16 Well, let's say the -- driver did not go off 90 miles an
17 hour. Let's say he obeyed the speed limit. He just
18 wasn't going to stop. Does that make it a different
19 case?

20 MR. GARRE: It does, Your Honor. The key
21 determination is whether the officer on the scene
22 reasonably determines that the vehicle poses a
23 substantial risk to other motorists or the police in his
24 way.

25 JUSTICE KENNEDY: I would think that would

1 apply to all high-speed chases; would you not agree?

2 MR. GARRE: I agree that it does, Justice
3 Kennedy. Here what you have is an individual who's
4 going at extraordinarily high speeds, 80 to 100 miles an
5 hour. An individual who has passed cars, crossed the
6 double, double line; there were numerous motors, motor
7 vehicles on the night. And an individual who has ran
8 red lights, an individual who when three police cars --

9 JUSTICE STEVENS: Yes. But that was while
10 he was being chased, right? Before he was being chased
11 he hadn't done any of this. He was going 72 miles an
12 hour in a 55-mile zone, isn't that right?

13 MR. GARRE: Well, that's true, Your Honor.
14 But as the Court said in the Sacramento versus Lewis
15 case, we don't blame police for the individual's
16 reckless flight in that context. We don't blame police
17 that Respondent made a decision to disobey --

18 JUSTICE STEVENS: No, but if you're thinking
19 of the likelihood of harm if you discontinued the
20 chase, is it not reasonable to assume he might go back
21 to going 72 miles an hour in a 55-mile zone?

22 MR. GARRE: Not on this record, Justice
23 Stevens, and in particular --

24 JUSTICE SCALIA: It would might also be
25 reasonable to assume that anyone who was chased by the

1 police will immediately speed up to 90 miles an hour.

2 MR. GARRE: That's exactly right, Justice
3 Scalia.

4 JUSTICE SCALIA: It doesn't seem to me a
5 very good rule to give to police forces: Anybody who's
6 going 72 miles an hour, let him go. Or at least if he
7 hits 90, let him go.

8 MR. GARRE: We agree, Justice Scalia. And
9 I think Justice Kennedy put it in Sacramento versus
10 Lewis, if there's a real danger --

11 JUSTICE STEVENS: It isn't a question.
12 There is a question of whether it justifies the use of
13 deadly force, to prevent this -- this situation.

14 MR. GARRE: The question in our mind,
15 Justice Stevens, is whether Deputy Scott reasonably
16 believed that Respondent posed a serious risk of injury
17 or death to other motor vehicles, bystanders or police
18 on the roadway that night.

19 JUSTICE BREYER: Why are these absolute? I
20 mean I looked at Garner and then I looked at Graham and
21 Graham which came later said that all claims that
22 officers have used excessive force, deadly or not,
23 should be analyzed under the Fourth Amendment and its
24 reasonableness standard. So I guess -- isn't that right,
25 isn't that the law?

1 MR. GARRE: We agree, Your Honor.

2 JUSTICE BREYER: All right, if that's the
3 law, then whether -- of course an automobile could,
4 could kill people. Of course it can. So could a lot of
5 things. But an automobile isn't a gun, and a chase on
6 the highway is not a chase through a back yard, though
7 both could end up with the person being chased dead.

8 So aren't we supposed to look at all the
9 circumstances, including the circumstance of what -- one
10 that interests me, one, is that the right standard?
11 Two, did Scott know that the reason he was chasing this
12 person was because he had violated a speed limit, or was
13 he ignorant of the reason why the individual was racing
14 away at 90 miles an hour, which is it, as far as the
15 record could show?

16 MR. GARRE: Justice Breyer, to answer the
17 second question first, Scott did not know that he was
18 initially in a chase.

19 JUSTICE BREYER: And a reasonable juror
20 could not conclude to the contrary?

21 MR. GARRE: Well, Scott, I believe, Scott's
22 testimony was that he did not know. What Scott knew,
23 and he was engaged in the chase, was this was an
24 individual who had crossed cars, crossed the double
25 yellow line. This was an individual who had ran red

1 lights. This was an individual, when three police squad
2 cars converged on him in the shopping center parking
3 lot, collided with them and ran off onto the highway,
4 reaching again speeds up to 90 miles an hour.

5 CHIEF JUSTICE ROBERTS: Is it reasonable for
6 him to suppose that there might be something more going
7 on if the guy is trying this hard to get away from a
8 speeding ticket? That perhaps he presents a danger to
9 the community for reasons quite apart from the driving?

10 MR. GARRE: Absolutely.

11 CHIEF JUSTICE ROBERTS: Is that a factor
12 that goes into the analysis?

13 MR. GARRE: It is, certainly, at a
14 commonsense level. Statistics show that most vehicles
15 who flee in this fashion, oftentimes there is alcohol or
16 drug abuse involved, oftentimes they are stolen
17 vehicles. We don't think --

18 JUSTICE STEVENS: What if they knew that he
19 had drugs in the car that he would dispose of if he had
20 got caught? Would that justify this using deadly force?

21 MR. GARRE: I'm not sure that it would,
22 Justice Scalia -- uh, Justice Stevens.

23 JUSTICE STEVENS: I'm rather clear it would
24 not, isn't it? Because that would be no more serious
25 than the crime in Garner, would it?

1 MR. GARRE: Well -- that's true. The key,
2 the key point about this case is the threat that
3 Respondent posed in that -- suspects who engage in
4 high-speed vehicle chases pose to the public, and that
5 is, that is fundamentally different than Garner for the
6 reason that you mentioned. Garner involved --

7 JUSTICE KENNEDY: But your position would be
8 the same even if Scott knew that the only reason they
9 were trying to stop him initially was the speeding
10 violation?

11 MR. GARRE: Yes. It doesn't matter why the
12 chase began. The point is that when Scott made the
13 decision to use force against Respondent, he reasonably
14 determined that Respondent posed a grave threat to other
15 motorists, the police and any bystanders who might come
16 in his way.

17 JUSTICE BREYER: Well, why wouldn't it
18 matter? I mean, other things being equal, suppose that
19 he'd known that all that happens, suppose he was two miles
20 beyond the speed limit. And Scott knew the whole thing
21 or Scott was the one who did it, and he sees maybe he is
22 a young kid who is frightened and he has his license
23 number and he could get him later. I mean, why wouldn't
24 it be nutty to -- to try to bump somebody off the road,
25 when all, that's all that's at stake?

1 MR. GARRE: Because, Your Honor, regardless
2 of the reason the chase began, at the moment that Deputy
3 Scott used the force, this car posed a serious risk to
4 everyone else on the road that night. Someone traveling
5 90 miles an hour, up to 90 miles an hour, on a two-lane
6 windy road with numerous cars passing during the course
7 of the chase, it was that threat that Deputy Scott acted
8 against when he used that force, and that was a
9 reasonable use of force. It's reasonable regardless of
10 whether this Court determines that it was deadly force
11 under the circumstances.

12 JUSTICE GINSBURG: How do you deal with the
13 Brower case? That it was a 193 -- 83 action against the
14 police for setting up a roadblock to catch a speeder.
15 And the Court said that the roadblock -- was enough to
16 give rise to a 1983 claim?

17 MR. GARRE: Justice Ginsburg, the holding in
18 that case was that the roadblock amounted to a seizure.
19 And we don't, no one disputes there was a seizure in
20 this case when Deputy Scott intentionally used force to
21 put Respondents off the road. So in that respect, Brower
22 doesn't speak to the question in this case, which is
23 whether or not that use of force was reasonable under
24 the circumstances.

25 Justice Kennedy in the Sacramento versus

1 Lewis case, in his concurring opinion, said that there
2 was a real danger of adopting a constitutional rule that
3 suspects are free to disobey lawful commands.

4 JUSTICE STEVENS: May I just make this one
5 point? Is it correct that the issue is whether it's
6 reasonable or is the issue whether a jury could find it
7 unreasonable?

8 MR. GARRE: Well, the -- ultimately to
9 determine whether this decision could be made at the
10 summary judgment stage you would have to consider
11 whether a jury could find it unreasonable. Here, on the
12 relevant undisputed facts, we submit as a matter of law,
13 Deputy Scott reasonably believed that this force was
14 necessary under the circumstances.

15 And the final point that I wanted to make
16 is back to Justice Kennedy's concurrence, is that
17 there is a real danger in adopting that kind of
18 constitutional rule, that it will encourage more
19 suspects to flee, and that will only increase the danger
20 to the public and to police and to motorists in these high
21 speed chases. We would urge this Court to reverse the
22 decision below. If there are no further questions --

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Garre.

25 Mr. Jones.

1 ORAL ARGUMENT OF CRAIG T. JONES,
2 ON BEHALF OF RESPONDENT

3 MR. JONES: Mr. Chief Justice, may it
4 please the Court:

5 I'd like to begin by responding to some of
6 the questions that were asked to Petitioner. First of
7 all, Officer Scott himself admitted in his testimony
8 that he knew at the time that he was using deadly force,
9 and he realized at the time that he was likely to cause
10 injury or -- death or serious injury to Mr. Harris.

11 CHIEF JUSTICE ROBERTS: Is there any doubt
12 that Mr. Harris was likely to cause death or serious
13 injury to the other cars on the highway that he was
14 passing?

15 MR. JONES: Mr. Harris was simply a -- an
16 unsafe driver. There is always a risk at driving in
17 excess of speed limit, driving in violation of traffic
18 laws. But that risk in and of itself is not --

19 CHIEF JUSTICE ROBERTS: We are not talking
20 about driving in violation of traffic laws. We are
21 talking about 90 miles an hour on a two-lane highway,
22 swerving past cars in the incoming traffic --

23 MR. JONES: Well, we're talking --

24 CHIEF JUSTICE ROBERTS: Hitting -- after
25 hitting Officer Scott's car and continuing on. That's a

1 little more than just unsafe.

2 MR. JONES: Well, those are not the facts
3 before the Court, Mr. Chief Justice. The facts are that
4 he was driving fast but he was under control. He only
5 crossed the center line to pass and when he passed, he
6 used his turn signal when he passed.

7 JUSTICE KENNEDY: He used the turning
8 signal. That's like the strangler who observes the no
9 smoking sign.

10 (Laughter.)

11 MR. JONES: When he turned into the -- when
12 he turned into the shopping center he wasn't weaving
13 through a parking lot. He was going through a private
14 access road in a shopping mall which was closed at 11
15 o'clock at night. And the collision, the impact
16 occurred when Officer Scott, who was going too fast to
17 make the turn into the shopping center, went up to the
18 next intersection, came around the other way to head my
19 client off at the pass. And then what happened was that
20 Mr. Harris took evasive action to avoid collision when
21 Mr. Harris -- excuse me when Officer Scott -- put
22 himself right in Mr. Harris' way.

23 JUSTICE ALITO: Mr. Jones, I looked at the
24 videotape of this. It seemed to me that he created a
25 tremendous risk to drivers on that road. Is that an

1 unreasonable way of looking at the -- at this tape?

2 MR. JONES: He created --

3 JUSTICE SCALIA: This is the scariest
4 chase I ever saw since "The French Connection."

5 (Laughter.)

6 JUSTICE SCALIA: It is frightening.

7 MR. JONES: I've seen -- I guess --

8 JUSTICE SCALIA: A frightening amount of
9 speed, and cars coming in the opposite direction, at
10 night, on a two-lane windy road --

11 MR. JONES: Well, as the court below found,
12 and as the tape indicates, Mr. Harris didn't run anybody
13 off the road. He didn't ram anybody. He didn't try to
14 ram anybody. He was just driving away.

15 JUSTICE SOUTER: The question is whether he
16 was creating a substantial risk doing that.

17 MR. JONES: He was creating --

18 JUSTICE SOUTER: And my, my question is how
19 could a jury find otherwise? Your answer up to this
20 point is that well, he used signal lights and his
21 reflexes were good, and they sure were. But the
22 question is whether he was creating a substantial risk
23 of death or serious bodily harm to others. And my
24 question is leaving -- assuming that his reflexes were
25 good and he knew how to use the signal lights, how could

1 a jury fail to find that he was creating such a risk?

2 MR. JONES: Well, the jury could certainly
3 find he's creating a risk. But with regard to the other
4 Garner factors that must be shown before deadly force
5 can be used, he had not committed a violent felony, a
6 crime involving the infliction or threat of infliction
7 --

8 JUSTICE SOUTER: Garner was not talking
9 about someone who at the time the deadly force was used
10 was himself creating a substantial risk of death or
11 serious bodily harm to others. That's what we are
12 dealing with here. And the reasonableness of the
13 officer's action depends upon whether, at the summary
14 judgment stage, a jury could reasonably find that, in
15 fact, he was not creating at that moment, a substantial
16 risk of serious bodily harm or death to others. And my
17 question is, how could a jury find anything else?

18 MR. JONES: Well, a jury could find that the
19 pursuit by the officer escalated the risk rather than
20 diminishing the risk to others. And that given a choice
21 between using deadly force to terminate a pursuit where
22 the officer himself has escalated the risk versus
23 backing off, letting the offender escape and then
24 perhaps arresting him an hour later at the house.

25 JUSTICE BREYER: Did Scott know that? Did

1 Scott -- do you have evidence to show that Scott knew
2 that the underlying offense was a speeding violation?

3 MR. JONES: We have evidence that it was
4 called out on the radio. "I'm pursuing somebody."
5 Whether Scott knew that, we don't know.

6 JUSTICE BREYER: And Scott has testified,
7 "I didn't know it."

8 MR. JONES: Scott says he did not know.

9 JUSTICE BREYER: Now, do you think you can
10 get to the jury on the question of whether he knew it?

11 MR. JONES: Scott's testimony --

12 JUSTICE BREYER: I'd like a yes or no
13 answer.

14 MR. JONES: The testimony --

15 JUSTICE BREYER: That doesn't sound like yes
16 or no.

17 MR. JONES: Well, I'm not certain I understand
18 the question.

19 JUSTICE BREYER: The question is, can you
20 get to the jury on the question of whether Scott knew
21 that the underlying offense was for speeding?

22 MR. JONES: Scott did not know that was the
23 underlying offense.

24 JUSTICE BREYER: All right. If Scott didn't
25 know it, I mean, my goodness, then I don't see the

1 relevance of whether it was speeding or not. And I was
2 with you when I read the -- the opinion of the court
3 below. Then I read the other brief, I was on the other
4 side. Then I've been shifting back and forth. Then I
5 look at that tape, and I have to say that when I looked
6 at the tape, my reaction was somewhat similar to Justice
7 Alito's. And so if it's doubtful and then you can't
8 even show that the person who did it knew that this was
9 for speeding rather than for murder, how can you get to
10 the jury?

11 MR. JONES: Well, there is certainly a
12 credibility issue as to whether Scott says he knew or
13 didn't know. I mean, certainly the call on the radio he
14 could have acquired. The thing is that --

15 JUSTICE KENNEDY: Well, as the Chief Justice
16 indicated through a question earlier, isn't it
17 reasonable for an officer to assume that it is -- he is
18 trying to escape because there is something more serious
19 than speeding at stake? I mean, that's the assumption I
20 would draw.

21 MR. JONES: That assumption would not be
22 based upon probability or based upon police training.
23 Officers in pursuit situations are trying to believe --

24 JUSTICE KENNEDY: You mean just as many
25 people take off in high-speed chases for speeding as for

1 serious crimes?

2 MR. JONES: The vast majority have committed
3 minor crimes. And it's not a rational decision to flee --

4 JUSTICE SOUTER: But at the moment Scott
5 came into this case, what difference does that make?
6 Why is that even relevant? Let's assume Scott knew that
7 this entire situation had eventuated out of an 18-mile-
8 in-excess-of-speed act by the individual. Assume that.

9 What Scott also knew at the point at which
10 he joined the chase was that this individual was driving
11 a car at 90 miles an hour. He was crossing yellow
12 lines, going through red lights, et cetera. At that
13 point, wasn't the only legally relevant data whether or
14 not Harris was creating the risk of death or bodily harm
15 to others?

16 MR. JONES: That's the issue. Was there an
17 immediate risk of death or serious bodily harm --

18 JUSTICE SOUTER: So you agree that whether
19 Scott knew or didn't know, that this whole scenario had
20 eventuated out of a speeding situation was irrelevant?

21 MR. JONES: It's not relevant. It's
22 relevant to that termination. Yes, the issue is, is
23 there an immediate risk. But one of the factors that is
24 significant is what is the severity of the underlying
25 crime. And if it is a crime of violence, then certainly

1 the officer is entitled to presume --

2 JUSTICE BREYER: That's exactly where I
3 started. And I wondered -- that's what I'm uncertain
4 about the standard for this. Because everyone -- you and
5 the others have been arguing as if the question is one about
6 rules surrounding the use of deadly force. But then
7 when I read what I read out to you, in Graham, it seemed
8 to me that Graham, which comes after Garner, says that's
9 not the standard. The standard is a standard of simple
10 reasonableness and Garner is simply an illustration of
11 that as applied to guns and a backyard chase, not as
12 applied to cars which threaten other people much more.

13 MR. JONES: Well, that's a good question.

14 JUSTICE BREYER: All right, but what is the
15 standard? Am I supposed to apply -- am I not supposed
16 to apply Graham?

17 MR. JONES: Well, whether you apply Garner
18 or Graham, the result is the same in this case. And let
19 me explain why. What Graham did is it expanded the
20 Garner rule that you can't use deadly force to stop a
21 fleeing suspect who is merely fleeing, expanded that to
22 include the entire range of use of force, deadly or
23 nondeadly.

24 And with regard to the factors that are to
25 be considered in determining whether the use of force is

1 reasonable under Graham, the balance with respect to a
2 fleeing suspect who is subjected to deadly force was
3 already drawn by Garner. Garner created a bright line
4 rule. Graham expanded that to an ad hoc balancing test
5 to be used in all use-of-force applications. But with
6 respect to deadly force and a fleeing suspect, Garner
7 still provides a bright line rule.

8 JUSTICE BREYER: So you're saying I cannot
9 do the following under the law, which would seem to me
10 contrary to common sense, to say there is a big
11 difference between a policeman shooting a person who is
12 running away and threatens no harm to others, and a
13 policeman using a gun -- using a car on a highway to try
14 to get a person to stop who is threatening others. I
15 have to treat those exactly as if they were the same
16 thing.

17 MR. JONES: Yes. And Garner, this Court's
18 decision in Garner and this Court's decision in Brower,
19 which was written by Justice Scalia for the Court,
20 basically equates flight in both cases. In the Brower
21 versus County of Inyo --

22 CHIEF JUSTICE ROBERTS: The Eleventh Circuit
23 gave the exact opposite answer in the Adams case, which
24 if you're looking at what the -- was clearly established
25 law from the point of view of the officer that provides

1 him guidance that the Garner case does not dictate a
2 result in the use of deadly force in a police chase
3 case involving an automobile.

4 MR. JONES: Well, the holding of the Adams
5 versus St. Lucie County case was that in 1985, an
6 incident which occurred six weeks after the Garner
7 decision and four years before the Brower decision,
8 there is no way the officers could have known at that
9 time that their act of ramming a police car to prevent
10 an escape of another fleeing vehicle would have been
11 considered deadly force in violation of the Fourth
12 Amendment. As the dissent pointed out in the, in the
13 Adams case, though, certainly as of the Court's decision
14 in 1993, this was now clearly established. You had
15 Brower saying that it's a seizure, and then you had this
16 Court saying that now the law was clearly established
17 where it wasn't before --

18 CHIEF JUSTICE ROBERTS: So when Officer
19 Scott was trying to figure out what the law is, he
20 should have relied on dissent in the case?

21 MR. JONES: Well, another case came about
22 later which held that as early as 1998 in another case
23 involving the same department, that it was clearly
24 established law. This is in the --

25 JUSTICE GINSBURG: Was there any case at the

1 time of the action in this case, any decision that said
2 ramming, ramming a car to end a chase violates the
3 Fourth Amendment?

4 MR. JONES: Brower versus County of Inyo
5 says --

6 JUSTICE GINSBURG: Brower was a roadblock
7 case.

8 MR. JONES: It was a roadblock which
9 produced a collision, a physical impact between
10 vehicles. And that was the -- that was the distinction
11 which Justice Scalia latched onto in that case, and said
12 that the mere fact that the person was fleeing by car in
13 Brower was no different than the burglar fleeing by foot
14 in Garner. Either one of them --

15 JUSTICE SCALIA: But the issue in the case
16 was quite simply whether there had been a seizure.
17 Isn't that the issue?

18 MR. JONES: That was the first holding. The
19 second holding was that the plaintiff had sufficiently
20 pled a cause of action for an unreasonable seizure. And
21 then it went back to the lower court to be considered
22 under the Garner analysis. And what I liked about your
23 decision -- excuse me, Mr. Chief Justice.

24 CHIEF JUSTICE ROBERTS: Go ahead. Finish
25 your --

1 MR. JONES: What I liked about your decision
2 in that case, Justice Scalia, was that you said that the
3 officer's culpability for using excessive force is not
4 diminished by the fact that the perpetrator chose to
5 continue running, whether it was the fleeing burglar in
6 Garner or the fleeing driver in Brower. Excuse me,
7 Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: If I could just get
9 back to an earlier point. You think what the officer
10 should have done in this case was to let Mr. Harris go?

11 MR. JONES: That was one option. He could
12 have continued the pursuit and simply decided not to mow
13 him off the road at 90 miles an hour, or he could have
14 stopped the pursuit and let him go which often happens in
15 many pursuits.

16 CHIEF JUSTICE ROBERTS: Even though he
17 doesn't know at that point that he will ever be able to
18 arrest him later. He doesn't know if it's a stolen car
19 or not.

20 MR. JONES: That's correct.

21 CHIEF JUSTICE ROBERTS: And he doesn't know
22 why he is being pursued, whether it's for mass murder or
23 terrorism or anything else.

24 MR. JONES: Well, that's correct. But in
25 the majority of cases -- and this is the only testimony

1 in this record, Your Honors. Our experts testified on a
2 study -- based on a study which was commissioned for him
3 by the Department of Justice, a study which has been
4 cited by some of the amicus briefs on both sides in this
5 case, Dr. Albert testified that 70 percent of the time,
6 when police back off pursuit, the perpetrator stops
7 running and they resume safe driving. And when the car
8 is stolen, most of the time --

9 CHIEF JUSTICE ROBERTS: Once they have
10 gotten away, I assume.

11 MR. JONES: Well, sometimes you have to let
12 them get away. Under Garner, it says, even if the guy
13 has just broken into somebody's house in the middle of
14 the night and committed a felony, if the choice is
15 letting them go or using deadly force when the factors
16 authorizing deadly force are not present, you have to
17 let him go.

18 JUSTICE SCALIA: Not if he is shooting his
19 way out of the house and endangering other people.

20 MR. JONES: That's correct.

21 JUSTICE SCALIA: I mean, that's the
22 distinctive factor here, of course. If he has taken the
23 jewelry and he's gone off into the night, if shooting at
24 him might endanger somebody else, or even kill him, you
25 have to let him go. I'm talking about a burglar who is,

1 you know, who is shooting as he leaves.

2 MR. JONES: You can shoot him. I'd be there
3 shooting him, too.

4 JUSTICE SCALIA: Of course you can shoot
5 him.

6 MR. JONES: Let me take that distinction and
7 apply it to the vehicle sense, Justice Scalia. What we
8 have to have to authorize deadly force in this context is
9 something more than just unsafe flight. You have got to
10 have someone who is behaving violently, who is menacing
11 people, trying to ram people.

12 JUSTICE KENNEDY: Can you tell me as of the
13 time he exited the parking lot, by that point, had he
14 committed any felonies?

15 MR. JONES: No. All he had done was taken
16 evasive action to avoid an officer who was coming back at
17 him.

18 JUSTICE KENNEDY: 90 miles an hour would not
19 be a felony, not a reckless driving?

20 MR. JONES: At this point it's 30 to 40, but
21 are you talking about the traffic pursuits he's committed
22 in the pursuit?

23 JUSTICE KENNEDY: Yes.

24 MR. JONES: No, none of those are felonies
25 under Georgia law.

1 JUSTICE KENNEDY: At no point did he commit
2 a felony?

3 MR. JONES: No, Your Honor. There's not even
4 a felony eluding in Georgia.

5 JUSTICE GINSBURG: But he certainly
6 committed a lot of misdemeanors.

7 JUSTICE KENNEDY: If he had intended to hit
8 the police officer, was it --

9 MR. JONES: If he had intended to hit the
10 police officer, and that fact was shown by any evidence,
11 so they could have charged with aggravated assault.
12 They didn't do that. They left traffic citations in his
13 hospital room. They never arrested him. They never
14 prosecuted him.

15 JUSTICE GINSBURG: The key point is that he
16 is endangering the lives and safety of others. Anyone
17 who has watched that tape has got to come to that
18 conclusion, looking at the road and the way that this
19 car was swerving, and the cars coming in the opposite
20 direction. This was a situation fraught with danger.

21 MR. JONES: Well, Justice Ginsburg, I hope I
22 don't have you on my jury if that's -- but what the
23 trial court found was that construing the facts in a
24 light most favorable to the plaintiff as a nonmoving
25 party, that reasonable jurors could find that this was

1 simply a person who was driving fast. This was not a
2 person who was driving assaultively. He wasn't driving
3 violently. He wasn't a threat to anyone that would
4 authorize the use of deadly force against him.

5 JUSTICE SCALIA: Is that a factual finding
6 of the, of the trial court here?

7 MR. JONES: That is a factual finding, yes.

8 JUSTICE SCALIA: Are we bound by that fact?

9 MR. JONES: We are bound by that for purposes
10 of this interlocutory appeal. This is an interlocutory
11 appeal under Mitchell v. Forsythe, and the Court is bound
12 by its own ruling to accept the facts as found by the
13 court below, and decide the narrow issue of law here which
14 is, one, is there a constitutional violation on these
15 facts. And two, was the law clearly established.

16 JUSTICE SCALIA: Even if having watched the
17 tape, there is no way that that factual finding can be
18 accurate?

19 MR. JONES: If you want to repeal Johnson v.
20 Jones and Mitchell v. Forsythe, then yes. This is the
21 Supreme Court. You can make that determination.

22 But based upon the prior rulings of this
23 Court, this Court is bound to accept the findings of
24 fact of the courts below, and then to determine solely
25 the legal issue on an interlocutory basis. The bottom

1 line issue here, Your Honors, is whether the fact that
2 someone is driving in violation of traffic laws, in and
3 of itself, can be justification for the use of deadly
4 force.

5 JUSTICE BREYER: I don't see how -- I mean,
6 you know, given our prior discussion here, I don't see
7 how that's the issue. Because you say we have to assume
8 that the defendant here didn't know that, in fact, all
9 that was at issue was a violation of the traffic law.

10 MR. JONES: Well, I'm not talking about the
11 underlying violation here. I'm talking about the
12 conduct observed by the officer who made the decision to
13 use deadly force.

14 JUSTICE BREYER: That conduct -- it could be
15 conduct -- you could say exactly your same question,
16 just as the Chief just said. I mean, I don't know how
17 to get around this. You could say the question was,
18 does a person who reasonably thinks he might be being
19 pursued for a murder --

20 MR. JONES: Well, this is the issue. This
21 is the issue. If what this person is doing is driving,
22 say driving unsafely, but they are not driving violently,
23 they are not driving aggressively, they are not menacing
24 anyone on the road. They are simply driving fast trying
25 to get away, that in and of itself, is that going to be

1 justification for the use of deadly force or is
2 something more going to be required?

3 JUSTICE ALITO: When someone is fleeing and
4 creating a grave danger, let's just assume that that's
5 the case, creating a very grave danger for other drivers
6 on the road, when in your view is it reasonable for the
7 police to use deadly force to stop that, as opposed to
8 breaking off the chase? What, what is the test?

9 MR. JONES: Well, under Garner the test is
10 they have to be threatening violence or inflicting
11 violence against someone. There have to be no other
12 alternatives other than deadly force available to effect
13 the apprehension. And assuming there is justification
14 for deadly force, then there is a duty to give a warning
15 where feasible before using deadly force. And the court
16 below felt that none of those three factors were met.

17 JUSTICE ALITO: How could you possibly give
18 a warning in this situation?

19 MR. JONES: It's academic in this case,
20 because the first two factors were not met. I mean,
21 it's our position that you don't worry about giving a
22 warning unless you have the right to use deadly force,
23 and if you don't get to that point then it's -- it's a
24 moot question.

25 JUSTICE GINSBURG: Why wasn't there warning

1 in that there were lights, there were sirens? Surely the
2 defendant knew that the police were trying to stop him.

3 MR. JONES: There was certainly warning that
4 he needed -- that he was expected to pull over. There
5 was no warning of any intent to use deadly force.

6 JUSTICE BREYER: What am I supposed to assume
7 factually? What am I supposed to assume? You said in
8 light of -- I mean, I looked at the tape and that tape
9 shows he is weaving on both sides of the lane, swerving
10 around automobiles that are coming in the opposite
11 direction with their lights on, goes through a red light
12 where there are several cars that are right there,
13 weaves around them, and there are cars coming the other
14 way, weaves back, goes down the road.

15 Now, what is it fact -- am I supposed to
16 pretend I haven't seen that? What am I supposed to
17 pretend here?

18 MR. JONES: Well, I didn't see that.

19 JUSTICE BREYER: You didn't see that?

20 MR. JONES: I --

21 JUSTICE BREYER: You didn't -- I thought
22 that -- you didn't see that?

23 MR. JONES: Well, the place where most people
24 use the word "weaving" to describe the motion of
25 Mr. Harris' car is when they are going through the, the

1 shopping center --

2 JUSTICE BREYER: No, no. I -- what I saw is
3 he is driving down one lane, what I mean by weaving, and
4 this lane goes with me in traffic. And there is some
5 cars in front of him, so he goes in the other lane where
6 the cars are now coming right directly at him. And then
7 before they hit him, he goes back to the first lane and
8 he does this while going through a red light, it seemed
9 to me.

10 Am I -- did I mis-see that? I'll go look at
11 it again if you --

12 MR. JONES: Those are -- feel free to look at
13 it again.

14 JUSTICE BREYER: Yes.

15 MR. JONES: But those are not the facts as is
16 found by the court below in this circumstance --

17 JUSTICE BREYER: Well that's, that's what I
18 wonder. If the court said that isn't what happened, and
19 I see with my eyes what is what happened, what am I
20 supposed to do?

21 MR. JONES: Well, I think you apply the law,
22 Your Honor.

23 JUSTICE SCALIA: Mister --

24 (Laughter.)

25 JUSTICE KENNEDY: Under, under -- under your

1 rule, what you're concerned with is the bumping, the use
2 of the force. Under your rule, if the police continue
3 the chase, but without using the, without trying to ram
4 him, and then there is an accident and innocent people
5 are killed, or injured, I assume that under the tort
6 laws of most States, the police could be liable?

7 MR. JONES: Well in theory perhaps they
8 could be if the officer was a joint proximate cause of
9 the accident, but in most States --

10 JUSTICE KENNEDY: Well, aren't they the
11 proximate cause if they continue the chase without
12 trying to terminate it?

13 MR. JONES: That's correct. If the officer
14 terminates the chase then he is never going to be liable
15 because number one he is acting prudently; he is going
16 based upon Department of Justice studies showing 70
17 percent --

18 JUSTICE KENNEDY: No. No. Well, I meant
19 terminate the chase by -- by -- by forcing him off the
20 road.

21 MR. JONES: Well, if he terminates the chase
22 using deadly force, then that creates a whole host of
23 other problems.

24 JUSTICE KENNEDY: But isn't there -- but
25 isn't that one way to assure that the police are not

1 liable, both from a moral standpoint and a legal
2 standpoint, for causing the injury of other people?

3 MR. JONES: Well, from a constitutional
4 standpoint the Fourth Amendment doesn't protect other
5 people. It protects those who are being seized. And
6 that's, that's the framework we are dealing with here
7 today.

8 JUSTICE KENNEDY: Well, you mean it's
9 irrelevant to our analysis to consider that he might
10 injure other people?

11 MR. JONES: The potential for danger to
12 others is certainly part of the justification for deadly
13 force, just as, if deadly force cannot be used without
14 endangering other people, then that certainly goes into
15 the matrix, too.

16 JUSTICE SCALIA: Mr. Jones, could I --

17 MR. JONES: Yes.

18 JUSTICE SCALIA: Could I ask whether the
19 portion of the opinion that you say establishes that he
20 was not endangering anybody is this portion? "The court
21 is mindful that traffic laws are designed to -- safely
22 -- and Harris acted in an unsafe manner. However, the
23 record reflects" -- is this the portion?

24 MR. JONES: Yes.

25 JUSTICE SCALIA: -- "that he maintained

1 control over his vehicle." Well, that doesn't prove
2 he's not endangering anybody. "Used his turn signals"
3 -- wonderful.

4 (Laughter.)

5 JUSTICE SCALIA: "And did not endanger any
6 particular motorist on the road." I think that's true.
7 In that scary chase he, he didn't come close to hitting
8 any particular car, but I don't think that's, that's a
9 finding that he was not endangering anybody. "Any
10 particular motorist," but he was endangering the public
11 at large.

12 MR. JONES: Well, this is my point is that
13 if, if the drive -- if the hazard caused by driving in
14 and of itself is the only threat here, does that rise to
15 a level of immanency and immediacy that justifies the
16 use of deadly force? If it does, then any officer who
17 perceives that someone is driving unsafely and that they
18 may cause an accident to someone who may or may not be
19 down the road if not stopped, would be justified in
20 using deadly force, to literally take out anyone who is
21 speeding.

22 JUSTICE SCALIA: It depends on how fast --
23 if depends on how fast the car is going, whether it's a
24 two-lane road or a four-lane divided highway. All those
25 factors come into, into account. And it doesn't seem to

1 me that we have to adopt a rule that will, that will
2 discourage police officers. There's, there's enough
3 disincentive to engage in this kind of activity in the
4 fact that the police officer may hurt himself. It's
5 pretty risky to conduct this kind of a maneuver, don't
6 you think? I wouldn't have done it if I was Scott.

7 MR. JONES: Well not that he rammed
8 somebody --

9 JUSTICE SCALIA: I would have let the guy go.

10 MR. JONES: Now what he, if he --

11 JUSTICE SCALIA: Driving 90 miles an hour
12 and comes up, approaches that car, if that car swerved.
13 Scott could have been killed, couldn't he?

14 MR. JONES: Absolutely. Or because he's
15 also --

16 JUSTICE SCALIA: So I don't think we need a
17 whole lot of disincentive to stop police officers from
18 engaging in this kind of frolicsome conduct.

19 MR. JONES: Well, not only that, Justice
20 Scalia. The officer had no control over what was going
21 to happen once he used deadly force, like the officer
22 who fired into the cab of a fleeing vehicle in *Barn v.*
23 *Cox*, once you disable the driver, the car keeps going.
24 And in this case, when you -- when you hit the vehicle
25 and knock a vehicle that has been in control and make it

1 out of control, then it's now an unguided missile that
2 could just as easily cross the center line and hit an
3 innocent person.

4 JUSTICE STEVENS: Let me just ask this
5 question. In trying to assess the likelihood of harm to
6 innocent people who would be hurt by this guy
7 driving so fast, is that, do we measure it by assuming
8 that the chase will continue? Or do we measure it by
9 assuming that the chase would be discontinued?

10 MR. JONES: The officer --

11 JUSTICE STEVENS: Just as we did in Garner.

12 MR. JONES: The officer has both options. I
13 mean Garner simply commands that he not use deadly force
14 if it's a choice between letting him go and using deadly
15 force. Now in the Sacramento v. Lewis case, it does say
16 that involves a different, a different type of claim and
17 a different standard. But in the Sacramento case it
18 does say that an officer in a pursuit has a duty to
19 always be weighing the risk of the continued pursuit
20 against the risk to the public. So there is an
21 independent duty there to act reasonably.

22 JUSTICE STEVENS: If it were -- clear that a
23 jury could find that there would be no unreasonable risk
24 to innocent motorists if they discontinued the chase --
25 assume that's a possible finding. If that were true,

1 would there be a duty to discontinue the chase?

2 MR. JONES: Not under the Fourth Amendment.
3 Now, the -- the only expert testimony in this record on
4 that subject says there is a 7 percent chance --

5 JUSTICE STEVENS: You're saying there is a
6 duty not to use deadly force.

7 MR. JONES: That's what Garner says; you
8 don't use deadly force. And that's what our claim is.

9 CHIEF JUSTICE ROBERTS: And aren't you
10 concerned that that creates an incentive in every case
11 for anyone who sees the blue lights behind them to
12 know that all they have to do is keep fleeing and the
13 police are going to have to give up eventually?

14 MR. JONES: Well, let me respond by reading
15 just a short portion from Garner that deals with that
16 point, Mr. Chief Justice. These, these same important
17 policy reasons were raised in Garner, that we don't want
18 to encourage disobedience of officers. We want to
19 discourage people from fleeing. And this is what the
20 Garner Court said --

21 CHIEF JUSTICE ROBERTS: Well, Garner --
22 Garner was the case involving shooting the guy in the
23 back, right?

24 MR. JONES: Yes. He might easily break into
25 someone else's house and perhaps end up killing them.

1 There was a vigorous dissent in Garner. But this is what
2 the majority said: "Without in any way disparaging the
3 importance of these goals we are not convinced that the
4 use of deadly force is a sufficiently productive means
5 of accomplishing them to justify the killing of
6 nonviolent suspects."

7 And if unsafe driving --

8 JUSTICE KENNEDY: But your, your answer to
9 Justice Stevens as I understand, was the police do not
10 have the duty to discontinue the chase? The obverse of
11 that is that the police may prolong the chase, i.e.,
12 prolong the injury to the public. I'm surprised at your
13 answer.

14 MR. JONES: Well, I think there is an
15 independent duty, it doesn't arise under the Fourth
16 Amendment, but there is an independent duty to do that.
17 But my concern is that under Garner, given a choice
18 between --

19 JUSTICE STEVENS: It would seem to me to be
20 perfectly clear that if there is going to be a, a risk of
21 deadly harm to innocent third parties, there would be a
22 duty to discontinue the chase rather than kill him. But
23 you don't seem to buy that.

24 MR. JONES: Well, experience shows that most
25 of the time when you discontinue a chase, the person who

1 is running discontinues driving unsafely. That is the --
2 that is experience. This officer's own policy says that
3 --

4 JUSTICE SCALIA: Did this study show what
5 future fleeing speeders would do?

6 I mean, I will accept that for, for the sake
7 of argument that -- in fact, it's probably true. I
8 would have guessed that, if the police stopped chasing,
9 you don't go 90 miles an hour anymore. But did this
10 study show what the effect of a rule that says stop
11 chasing when he hits 85, what the effect of that rule
12 would be on, on fleeing speeders or fleeing felons, or
13 fleeing anybody?

14 MR. JONES: Well, the rule simply says you
15 don't kill him just because he is driving unsafely. And
16 if, it simply says that if the choice is between killing
17 him and letting him go, you have to let him go if the
18 Garner factors aren't present. And we find nothing in
19 the law and no reason to create a new exception in the
20 law that says that Garner doesn't apply if you're
21 fleeing by vehicle.

22 Thank you. We ask that the court of appeals
23 be affirmed.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Jones.

1 Mr. Savrin, you have four minutes remaining.

2 REBUTTAL ARGUMENT OF PHILIP W. SAVRIN,
3 ON BEHALF OF PETITIONER

4 MR. SAVRIN: Thank you, Mr. Chief Justice.

5 Let me refocus for a moment that in order
6 for the officer to be denied qualified immunity in this
7 context, a jury would have to be able to find two things.
8 One, that no -- that there was no probable cause, and
9 second, that that was clearly established. And I think
10 that the discussion this morning, if nothing else, shows
11 that it's not clearly established.

12 As far as the Fourth Amendment is concerned,
13 I think the measure needs to be exactly as this Court
14 stated in Graham versus Connor, which is looking at the
15 facts from the standpoint of the officer on the scene,
16 because after all, he has to make split-second
17 decisions. He does not have the benefit of taking
18 depositions of Mr. Harris --

19 JUSTICE BREYER: What am I supposed to do?
20 I mean, I'll look again at the tape. I certainly will
21 do that. But suppose I look at the tape and I end up
22 with Chico Marx's old question in respect to the court
23 of appeals: Who do you believe, me or your own eyes?

24 MR. SAVRIN: Your Honor, I think the answer
25 to that question was provided in this decision in

1 Ornelas versus United States, a decision by this Court
2 in 1996 that came up in the context of a criminal, a
3 direct criminal appeal involving the question of
4 probable cause. And this Court set forth very clearly
5 that the historical facts are given deference. The
6 question of, a legal question about whether or not those
7 facts reasonably give rise to probable cause is an
8 independent de novo review.

9 JUSTICE SCALIA: Whether he is endangering
10 anybody is a historical fact, no? So what do you do
11 about that finding?

12 MR. SAVRIN: No, Your Honor, I don't believe
13 that is an historical fact.

14 JUSTICE SCALIA: Really?

15 MR. SAVRIN: The historical facts here are
16 whether Mr. Harris was driving excessively, whether he
17 was driving across the line, whether he was driving at
18 high rates of speed, whether there was anybody in his
19 path, whether he had collided with anyone. I think the
20 question about whether or not those facts give rise to
21 probable cause to believe that Harris was a threat of
22 serious physical harm is a legal issue, and I think the
23 court of appeals recognized that in this case when they
24 applied a different analysis and came out with a
25 different result to those same undisputed facts.

1 JUSTICE GINSBURG: What is the, the court
2 saying -- and this is on page 39a of the petition
3 appendix -- "when Harris was driving away from officers
4 and when there, when there were no other motorists or
5 pedestrians nearby, thus casting doubt on defendant's
6 assertion that at the time of the ramming, Harris posed
7 an immediate threat of harm to others."

8 This is a finding that there were no other
9 motorists or pedestrians nearby when the ramming
10 occurred.

11 MR. SAVRIN: And that is a fact that we
12 accept as true in the immediate vicinity. The tape
13 shows that there was a vehicle just 12 seconds before,
14 and I think that a reasonable officer at the time would
15 believe that that wasn't going to be the last vehicle on
16 that road.

17 JUSTICE SCALIA: I would hope he would wait
18 until there were no pedestrians or vehicles coming
19 before he, before he did the ramming.

20 MR. SAVRIN: Yes, Your Honor.

21 JUSTICE SCALIA: I assume he waited
22 precisely for that kind of a gap in the traffic?

23 MR. SAVRIN: Yes, Your Honor. Exactly. He
24 had limited options and I believe it was a no-win
25 scenario. And he took the best course that he

1 reasonably believed he could at the time. And --

2 CHIEF JUSTICE ROBERTS: Do you agree with
3 Mr. Jones' statement that none of Mr. Harris' conduct
4 rose to the level of a felony?

5 MR. SAVRIN: I would not, Your Honor. In
6 our brief we did list a number of felonies that
7 Mr. Harris, that we believe he committed. But I would
8 go back to Garner, and say that Garner says that an
9 armed suspect would have been a different case. And
10 Garner also says that some misdemeanors such as drunk
11 driving are more dangerous than some felonies such as
12 white collar crime. So I think the question should not
13 be whether it's a technical issue of crossing the line
14 from misdemeanor to felony, but the harm that is being
15 caused by the continued driving that's exactly what
16 occurred in this case.

17 And if I could respond to Justice Breyer's
18 question about what to do in terms of responding to
19 Mr. Marx's question, I think the Ornelas case says that
20 you would review it for clear error. And in this case
21 you would not owe deference to a finding of fact by the
22 lower court.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Mr. Savrin. The case is submitted.

25 [Whereupon, at 11:47 a.m., the case in the

1 above-entitled matter was submitted.]

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