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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE

Respondent,

-against-

NO. 29

EHINMIAKHENA (DAVID),

Appellant.

265 East 161st Street
Bronx, New York
March 10, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official court Transcriber



1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is People v. Ehinmiakhena.

3 MS. SCHWARZ: Good morning, Your Honors.

4 CHIEF JUDGE WILSON: Good morning.

5 MS. SCHWARZ: Kristina Schwarz from the Legal Aid
6 Society for appellant, David Ehinmiakhena. We're going to
7 request three minutes for rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MS. SCHWARZ: This case is a straightforward,
10 routine, uncomplicated Fourth Amendment fruit case.

11 JUDGE SINGAS: Can I ask you, please, what your
12 remedy is? What - - - what relief are you seeking? Are
13 you seeking the dismissal of the accusatory instrument, are
14 you seeking remittal for a hearing? That, to me is not so
15 straightforward from your papers. I'm not sure what you're
16 asking for.

17 MS. SCHWARZ: We're - - - we're asking for
18 dismissal. In the alternative, we would allow the - - -
19 we'd - - - we'd be happy with the re - - - remittal for the
20 hearing.

21 JUDGE SINGAS: Okay. And what's your authority
22 for dismissal?

23 MS. SCHWARZ: Well, I mean, I will - - - I will
24 agree with you that we're - - - we're a little bit out on
25 the limb when we say that their response was not

1 sufficient. But their only response was boilerplate
2 language, and so based on that, it really seems like they
3 haven't established or really contradicted our version of
4 the - - - the vio - - - illegal violation and stop.

5 But the other authority would be the Burwell
6 relief. In this case, Mr. Ehinmiakhena pled guilty to a
7 traffic infraction. He - - -

8 JUDGE SINGAS: That he could still go to jail
9 for, right?

10 MS. SCHWARZ: Well, he's already paid the - - -
11 the fine, and that was ten years ago. He hasn't had any
12 issues with the law since then. So it seem - - - because
13 of the de minimis nature of the traffic infraction, we
14 would ask for dismissal.

15 JUDGE GARCIA: Counsel. Counsel, here. What
16 exactly are you asking to be suppressed?

17 MS. SCHWARZ: All of the observations that occur
18 after the stop, so.

19 JUDGE GARCIA: So what would they be here?

20 MS. SCHWARZ: So in this case, it would be the
21 defendant behind the wheel of the car, in the driver's
22 seat, key in the ignition, engine on, handing over his
23 driver's license, and any other - - -

24 JUDGE GARCIA: Why handing over his driver's
25 license?

1 MS. SCHWARZ: It's equally an observation of
2 culpable behavior. In this case one of the essential
3 elements - - -

4 JUDGE HALLIGAN: How - - - how is that - - -

5 JUDGE GARCIA: I'm sorry. Let me give you a
6 hypothetical. Let's say in this case, and it's not this -
7 - - your case, but in a different case. Instead of saying,
8 I saw him in the car with the keys in the ignition, they
9 put in the complaint that I reviewed toll data, and I saw
10 this car go through the toll plaza immediately before the
11 stop. I pulled him over and this was who was in the car.
12 What do you suppress there?

13 MS. SCHWARZ: Well, in - - - in - - - in that
14 case - - - maybe I don't quite understand your
15 hypothetical. But you're saying that they had a reason to
16 pull him over, that they - - -

17 JUDGE GARCIA: No.

18 MS. SCHWARZ: - - - ahead of time?

19 JUDGE GARCIA: They - - - in the complaint - - -
20 and what we're talking about here, right, is what they used
21 in the complaint. Right?

22 MS. SCHWARZ: Yes.

23 JUDGE GARCIA: So in the complaint, instead of I
24 saw him in the car with the keys in the ignition, motor
25 running. They say, I reviewed tape, I saw this car go

1 through a toll plaza, this license plate, this day, this
2 time. Five minutes later, I pull him over - - - or two
3 minutes later, and he hands me his license. Good or not
4 good?

5 MS. SCHWARZ: Well, I would still say that the
6 observations that - - -

7 JUDGE CANNATARO: But in that hypothetical, the
8 only observation - - - the observations are pre-stop.
9 Right? The only post-stop observation would be, I think,
10 consistent with your argument that, you know, taking the
11 license is also some sort of interrogation or search.

12 MS. SCHWARZ: Okay. I - - - I understand the
13 hypothetical. The pre-stop observations are not subject to
14 the exclusionary rule, so of course, they could come in.

15 JUDGE GARCIA: And so what would you seek to
16 suppress in my hypothetical?

17 MS. SCHWARZ: In your hypothetical, I would still
18 seek to suppress those - - - those observations of him
19 behind the wheel of the car, because those are the
20 strongest evidence - - -

21 JUDGE GARCIA: No, no, no. But they don't use
22 them. They don't use the observations behind the car.
23 They only use the toll data. The photo of this car going
24 through - - - you can't make out the defendant. But photo
25 of this car going through two minutes before the stop

1 occurs.

2 MS. SCHWARZ: The - - - the - - - those pre-stop
3 observations of the grainy traffic cam pictures are not as
4 strong of evidence as the evidence - - -

5 JUDGE GARCIA: They don't even use that evidence
6 that you're talking about. They don't use behind the
7 wheel, keys in the car.

8 MS. SCHWARZ: But then what I would think - - -

9 JUDGE GARCIA: All they use is license plate
10 reader, through the toll, two minutes. I'm right here.
11 I'm the cop. I see that car come by. I pull it over.
12 It's Joe Smith.

13 MS. SCHWARZ: Well, they - - - they - - - they
14 have to prove that he was the driver of the car. The
15 strongest evidence of that is those close range
16 observations.

17 JUDGE CANNATARO: But that's - - - that whether
18 or not they prove their case.

19 JUDGE GARCIA: Right.

20 JUDGE CANNATARO: But the question is, given that
21 all the operational observations were pre-stop, would you
22 be seeking to suppress anything here today in that case?

23 MS. SCHWARZ: So in your hypothetical there - - -

24 JUDGE GARCIA: Yes. In my hypothetical, yes.

25 MS. SCHWARZ: I - - - I would think that in order

1 for that to - - - to fly, they would have to stipulate that
2 they were not introducing any of the observations. That -
3 - - and that CPL 710.60 requires that - - -

4 JUDGE GARCIA: It's not in the complaint. They
5 don't have to stipulate to anything. It's not in the
6 complaint.

7 MS. SCHWARZ: Right.

8 JUDGE GARCIA: So they're not using them to get
9 what they need to get through this complaint, which, it
10 seems to me, is what this is about at the end of the day,
11 right? Because without the observations, your argument is
12 there's no support for the complaint. Right?

13 MS. SCHWARZ: Yes. But - - - but - - - but
14 suppressible fruit is evidence culpable - - - it's evidence
15 of culpability. And it's a broad definition. It's
16 anything that's - - -

17 JUDGE HALLIGAN: It - - - it seems to me - - -

18 MS. SCHWARZ: - - - gained through exploitation.

19 JUDGE HALLIGAN: It seems to me we have a couple
20 of different kinds of observations at issue here. Moving
21 away from the hypothetical for a minute.

22 One is the observation of the defendant behind
23 the wheel of the car, which may give rise to a finding that
24 he's operating it.

25 MS. SCHWARZ: Uh-huh.

1 JUDGE HALLIGAN: The second, I think, is the
2 handing over of the license. If we focus only on the
3 second, is your position that that specifically is
4 suppressible?

5 MS. SCHWARZ: I think all of the observations are
6 suppressible.

7 JUDGE HALLIGAN: I'm - - - I'm asking only about
8 the handing over of the license. My question really is how
9 is that distinct from ascertaining the defendant's
10 identity? Setting aside the other observations.

11 MS. SCHWARZ: So all of those observations of
12 behavior are - - -

13 JUDGE HALLIGAN: I'm just asking about the
14 handing over of the license.

15 MS. SCHWARZ: Okay. So the handing over is still
16 evidence of culpable behavior, so it's still suppressible
17 fruit.

18 JUDGE HALLIGAN: How is it different than
19 ascertaining identity?

20 MS. SCHWARZ: So the Tolentino case laid out the
21 - - - the rule, and it is actually a very clear rule to
22 understand. The evidence that they are calling identity
23 evidence that's immune from suppression, is evidence that's
24 based on jurisdiction. Who the person is. The person
25 before the court. It - - - the - - - the case variously

1 said it's pre-existing - - -

2 JUDGE HALLIGAN: So if the officer - - - if the
3 officer asked, what is your name?

4 MS. SCHWARZ: Uh-huh.

5 JUDGE HALLIGAN: Would that be suppressible?
6 That seems like that's identity.

7 MS. SCHWARZ: It would be suppressible because,
8 again, it's culpable conduct. All of the - - - the
9 identity evidence in Tolentino were - - - were pre-existing
10 records, things that flow with who you are. They're not
11 unique. That means they're - - - they're not tied to the -
12 - -

13 CHIEF JUDGE WILSON: Want to go back to - - -

14 MS. SCHWARZ: - - - time and place - - -

15 CHIEF JUDGE WILSON: I want to go back to where
16 Judge Singas started from, and approach it a little bit
17 differently. And maybe - - - maybe I'm just thinking about
18 this too simplistically. But it seems to me that if you -
19 - - the People say we're not conceding that this stop was
20 unlawful but even if you assume it was, and then they go
21 from there.

22 But isn't it the case that if they have a reason
23 to stop the car, asking the driver to hand over the license
24 is unquestionably lawful? And if they don't have a basis
25 to stop the car, then everything gets thrown out. Isn't it

1 that simple?

2 And if that's right, then why are we worrying
3 about whether this is identity or not? The real thing we
4 have to do is send it back so that we can determine whether
5 the stop is lawful or not. That's the way these normally
6 proceed.

7 MS. SCHWARZ: Yes. But what - - - I would agree
8 that that would solve it. But - - - but the point is that
9 the court below, when they issued their ruling, vastly
10 overstated the - - - the scope of the Tolentino rule. And
11 it - - - this court can make it clear that it is for a very
12 distinct and small subsection of evidence.

13 JUDGE CANNATARO: The court below said something,
14 in sum and substance, along the lines of identity is not
15 suppressible. And - - - and it didn't - - - I don't mean
16 to characterize your argument. But it didn't parse
17 identity the way you do, which is this sort of objective,
18 pre-existing status of who - - - who you are versus law
19 enforcement trying to figure out who you are.

20 MS. SCHWARZ: Culpable behavior.

21 JUDGE CANNATARO: Which - - - which you will call
22 culpable behavior.

23 MS. SCHWARZ: Which is what you did?

24 JUDGE CANNATARO: But - - - but correct me if I'm
25 wrong. Tolentino, does - - - you know, it - - - it has

1 some good rules in it, but it doesn't go that far. It
2 doesn't parse it out the way you're parsing it out.

3 MS. SCHWARZ: Well, I - - - I would just point to
4 that Tolentino does do - - - it does try to explain it and
5 gives multiple examples of what is identity. And they're
6 all information that's not tied to the time and place of
7 occurrence. They're - - - it's unique, and it comes with
8 the person who's in front of the court.

9 But the Tolentino court did provide a good
10 explanation of the distinction between the evidence
11 identifying an individual as a perpetrator of a crime: the
12 - - - what you did stuff, from the other jurisdictional
13 identity evidence: the who you are, when they were talking
14 about the Davis and the Hayes cases, the cases with the
15 fingerprints. And they were explaining why the
16 fingerprints in those cases that were elicited in order to
17 - - -

18 JUDGE RIVERA: What - - - what did the
19 prosecution rely on at the suppression hearing to establish
20 the legality of the stop in the first instance?

21 MS. SCHWARZ: They provide - - - it - - - it was
22 just boilerplate language. We don't know. There's no
23 evidence of what they did.

24 But I'd just like to go back to - - -

25 JUDGE RIVERA: So - - - so - - - excuse me?

1 MS. SCHWARZ: Oh.

2 JUDGE RIVERA: Should they get another
3 opportunity to present that evidence?

4 MS. SCHWARZ: Well, if a hearing had been ordered
5 that - - -

6 JUDGE RIVERA: They could have done that?

7 MS. SCHWARZ: - - - then they're claiming that
8 they had a reason. We don't know what it is. But at that
9 hearing they would provide that. And that - - - and that
10 was the basis of - - - because it was such boilerplate
11 language - - -

12 JUDGE RIVERA: In their response, they didn't set
13 out what - - - what are the grounds for why it was a lawful
14 stop?

15 MS. SCHWARZ: They - - - they - - - there's one
16 sentence.

17 JUDGE RIVERA: But they did dispute that it was
18 unlawful, correct?

19 MS. SCHWARZ: Right. They said it - - - it - - -
20 and this is what I mean by boilerplate language. In - - -
21 in their response, they said, "the People deny that the
22 defendant was illegally stopped, apprehended, and/or
23 arrested". And that's on page A-11 of the - - - of the - -
24 - of the appendix.

25 So very boilerplate. We don't know anything more

1 than that.

2 JUDGE RIVERA: Is it your position that's why the
3 suppression motion should have been granted, because they
4 did not establish the legality of the stop with that
5 response?

6 MS. SCHWARZ: We made arguments that - - - that
7 Gruden would permit the court to have granted summary
8 suppression.

9 JUDGE RIVERA: Okay.

10 MS. SCHWARZ: But in the alternative, a hearing.
11 But the court, vastly overreading Tolentino, denied the
12 hearing in its entirety.

13 I want to get back to that language from the
14 Tolentino court, because I think it will solve the - - -
15 the confusion. Because the court then says on page 387, at
16 the bottom of the page the court says, "The evidence
17 establishing defendants' identities as the perpetrators,
18 but not their identities in the sense relevant here".

19 And again, that was - - - they were
20 distinguishing with the fingerprints that had been taken
21 from the defendants so that they could investigate ongoing
22 crimes. And they were saying that - - - that those
23 fingerprint evidence was evidence to establish their
24 identities as the perpetrators.

25 JUDGE CANNATARO: Counsel, excuse me? Did you

1 say page 384?

2 JUDGE GARCIA: 87.

3 JUDGE RIVERA: 87.

4 MS. SCHWARZ: 387. Yeah. Yes.

5 JUDGE GARCIA: But the - - - the charge - - - one
6 of the charges, at least in that case, was aggravated
7 unlicensed operation of a motor vehicle, right?

8 MS. SCHWARZ: Yes.

9 JUDGE GARCIA: And how do they know that unless
10 he was the person driving?

11 MS. SCHWARZ: Right. There's two elements to the
12 crime in this case. One is that driving the vehicle, and
13 the other one is that their license was suspended.

14 JUDGE GARCIA: Right.

15 MS. SCHWARZ: The license suspension evidence
16 would be proved by - - -

17 JUDGE GARCIA: DMV.

18 MS. SCHWARZ: - - - the DMV records. Tolentino
19 not subject to suppression, but - - -

20 JUDGE GARCIA: But how, in Tolentino - - -

21 MS. SCHWARZ: - - - other evidence is - - -

22 JUDGE GARCIA: - - - did they prove that he was
23 unlicensed - - - aggravated unlicensed operation of a motor
24 vehicle?

25 MS. SCHWARZ: The DMV records alone introduced.

1 JUDGE GARCIA: But how did they know he was
2 driving?

3 MS. SCHWARZ: The - - - the identity in all cases
4 is that jurisdictional element. It's not needed to be
5 proved - - -

6 JUDGE RIVERA: Did defendant challenge - - - did
7 defendant challenge that - - - what I think Judge Garcia is
8 asking about - - - the connection of the dots between the
9 DMV record, says this person, Mr. X, right? Doesn't - - -
10 can't be on the road, license suspended. And the
11 connection to, oh, yes, the person behind this car is Mr.
12 X.

13 JUDGE GARCIA: Or handing the license.

14 MS. SCHWARZ: That goes back to Tolentino. The -
15 - - the - - - it's an uncontroversial, bedrock principle of
16 law - - -

17 JUDGE RIVERA: Let me - - - let me - - -

18 MS. SCHWARZ: - - - that identity is - - -

19 JUDGE RIVERA: Let me ask you this. Okay?

20 JUDGE GARCIA: No. But I'm sorry.

21 JUDGE RIVERA: Let me ask you - - -

22 JUDGE GARCIA: Can we just - - -

23 JUDGE RIVERA: Okay. Go ahead.

24 JUDGE GARCIA: - - - follow up on that? You say
25 that, but then you say you can't have the fact that he

1 hands the license out the window. Nothing from the stop
2 can come in. So what in Tolentino gave them the unlicensed
3 operation?

4 MS. SCHWARZ: In Tolentino?

5 JUDGE RIVERA: Right.

6 JUDGE GARCIA: If it wasn't, I pulled this person
7 over - - - and maybe I don't understand the facts of that
8 case. But they charged that defendant with aggravated
9 unlicensed operation of a motor vehicle. So how did they
10 prove the operation part of that?

11 MS. SCHWARZ: Are you talking about the case
12 here?

13 JUDGE GARCIA: Tolentino.

14 MS. SCHWARZ: The - - - the - - - well, that case
15 was never tried, so we don't know. But the - - - but the -
16 - - it was not the subject of the suppression motion in
17 that case. They never asked to suppress these
18 observations. This - - - they only asked to suppress the
19 DMV records in a - - - in a motion that was sort of a map
20 type motion, seeking the physical evidence, the DMV records
21 to be suppressed.

22 And that - - - and that was the subject of that
23 case. Now, ten years later, we have this new case where
24 they're not asking for the suppression of the DMV records,
25 which are not suppressible under Tolentino, but they're

1 asking for suppression of the observations, which are
2 clearly suppressible under Gethers, Rossi.

3 JUDGE SINGAS: Where do you see those
4 observations?

5 MS. SCHWARZ: Decades of - - -

6 JUDGE SINGAS: Where are those observations?
7 Because I'm looking at the complaint, there's nothing about
8 the officer saying he saw them hand the license on here.

9 MS. SCHWARZ: It's - - - it's at the - - - at the
10 front of the - - - at the very top of the complaint. The
11 complaint says that - - -

12 JUDGE HALLIGAN: Can you tell us what page of the
13 record?

14 MS. SCHWARZ: - - - they observed the defendant
15 operating a motor vehicle and then in parentheses - - -
16 this on page A-4, sorry. And in parentheses, it says the
17 "key was in the ignition, the engine was running, and the
18 defendant was behind the wheel".

19 JUDGE SINGAS: Was that pre-stop or post-stop?

20 MS. SCHWARZ: It's - - - it's post-stop. Those
21 are not the sort of observations that would be made by a
22 car that's whizzing past.

23 JUDGE CANNATARO: I'm sorry, Counsel. You
24 answered the question. I really want you to get to the
25 part of the complaint where they're talking about identity,

1 because everything you've been talking about so far has
2 been operation of the vehicle.

3 MS. SCHWARZ: Uh-huh.

4 JUDGE CANNATARO: So where - - - where does the -
5 - -

6 JUDGE SINGAS: Yeah. And handing over the
7 license part - - -

8 JUDGE CANNATARO: - - - complaint talk about the
9 identity part.

10 JUDGE SINGAS: Handing over of the license, I
11 don't see anywhere.

12 MS. SCHWARZ: There's no need to prove identity.
13 Think about in - - - in criminal cases across the - - - you
14 know, like, no - - - there's not - - - the people aren't
15 putting on evidence to prove who the person is because
16 that's the jurisdictional underpinning. That's the
17 jurisdictional underpinning of the case. It's a given.
18 It's - - - it's that uncontroversial law that - - -

19 JUDGE CANNATARO: So why doesn't it follow from
20 that, that taking a license - - - you know, the - - - the
21 defendant handed over the license. Why doesn't it follow
22 that that's just part of identity?

23 MS. SCHWARZ: Because it - - - it also
24 establishes culpable behavior. It is an observation - - -

25 JUDGE CANNATARO: What do you mean by that?

1 MS. SCHWARZ: - - - because it's - - -

2 JUDGE CANNATARO: I don't understand that.

3 MS. SCHWARZ: In a car that was just stopped,
4 where the police approached, and they're handing over a
5 driver's license. That's clear inferential evidence that
6 that person is the driver of the vehicle. And the only
7 element they need to prove here without the DMV records, is
8 operation or driving the vehicle. It's directly relevant
9 to establishing the - - - the fact-based element of the
10 crime.

11 So yes, it's highly inculpatory under the
12 circumstances of this case. And the - - - the district
13 attorney suggests maybe we could excise out all the other
14 evidence. But it's just inculpatory to - - - to have the -
15 - - the - - - at the arrest scene in the car, handing over
16 the driver's license, even if they don't mention that the
17 key was in the ignition - - -

18 JUDGE RIVERA: So - - - so - - -

19 MS. SCHWARZ: - - - the jury is going to infer.

20 JUDGE RIVERA: - - - you would - - - you would
21 then agree - - - I know it's not the posture of the case -
22 - - that if the officer - - - you said the car was whizzing
23 by. The car wasn't whizzing by. It was going by. And the
24 officer's driving also by. Looks over and sees that
25 driver.

1 You would agree that that is - - - and then stops
2 - - -

3 MS. SCHWARZ: They - - -

4 JUDGE RIVERA: - - - that pre-observation, oh,
5 yes, the defendant is the person I saw behind that wheel
6 before I stopped. You agree that they could testify to
7 that. Yes? Or that could come in?

8 MS. SCHWARZ: For sure. But the strongest
9 evidence of driving would come with - - - from those close
10 range observations that occurred after the car was stopped.

11 But - - - but for sure, if we won the suppression
12 hearing, they could proceed with the - - - I think the -
13 respondent mentioned some of the things, the pre-stop
14 observations, maybe traffic camera footage. But those
15 things are much weaker than that strong, direct, you know,
16 observations of the officer - - -

17 JUDGE RIVERA: You agree they could - - -

18 MS. SCHWARZ: - - - at the side of the car.

19 JUDGE RIVERA: You agree the prosecution could
20 attempt, nevertheless, to make out its case with that kind
21 of evidence - - -

22 MS. SCHWARZ: But they just wouldn't - - -

23 JUDGE RIVERA: - - - even if you think it's weak,
24 the prosecution may think under the circumstances, I don't
25 think it's weak. I think it works.



1 MS. SCHWARZ: Well, it - - - I think that's
2 ridiculous and - - -

3 JUDGE RIVERA: And what I - - - I would - - -
4 what - - -

5 MS. SCHWARZ: - - - strains credulity. Because -
6 - -

7 JUDGE RIVERA: A police officer is - - -

8 MS. SCHWARZ: Because in this case - - -

9 JUDGE RIVERA: - - - is stationed - - - excuse
10 me. Next to the car - - - let's say they're both stopped
11 at a red light. Looks over, looks at the person. Maybe
12 the person turns and looks at them. And then after they go
13 through the light, that's when they're stopped. That - - -
14 that's ridiculous to base the identification on that
15 observation?

16 MS. SCHWARZ: There are examples - - -

17 JUDGE RIVERA: Based on observation?

18 MS. SCHWARZ: For sure. And - - - and another
19 example I would give you. Like, if they were under
20 surveillance for a long time, maybe the pre-stop
21 observations would be enough - - -

22 JUDGE GARCIA: But Counsel, in - - -

23 MS. SCHWARZ: - - - but that's certainly not
24 typical, so.

25 JUDGE GARCIA: Counsel, I'm sorry.

1 MS. SCHWARZ: So - - -

2 JUDGE GARCIA: Counsel? Counsel?

3 MS. SCHWARZ: - - - I would just say in the
4 typical car stop case - - -

5 JUDGE GARCIA: Counsel? Counsel? Counsel, I'm
6 sorry. In that hypothetical, wouldn't you still say the
7 identity is suppressed? Not the identity, but the handing
8 over of the license in Judge Rivera's hypothetical?

9 MS. SCHWARZ: Yes.

10 JUDGE GARCIA: So it wouldn't matter that they
11 saw the person before the red light, right? It wouldn't
12 matter.

13 MS. SCHWARZ: The - - - the pre-stop observations
14 are not subject to - - -

15 JUDGE GARCIA: Right. But the - - - because
16 here's the argument they made in Tolentino, as the court
17 relates it, "The steps required to obtain DMV records
18 check, are the stop of the vehicle and the elicitation of
19 the driver's name or the driver's license number". So
20 you're correct.

21 They were seeking to suppress the DMV records,
22 but the hook they were using for that was you can't ask
23 them for their license. Right? That's the argument
24 they're making.

25 You illegally stopped the person in Tolentino.

1 You use the license and the ID. Handing over the license
2 to get the DMV records. So the DMV records had to be
3 suppressed. And we rejected that argument on the theory
4 that, if you read their argument, we weren't suppressing
5 handing over the license.

6 MS. SCHWARZ: Well, that's not exactly what
7 happened in Tolentino. In Tolentino, those observations
8 were not at play. They were not discussed. Defense
9 attorney didn't seek to suppress.

10 JUDGE GARCIA: This is a quote of the defendant's
11 argument in Tolentino. That, as a result, they stopped the
12 vehicle. They elicited the driver's name, and/or the
13 driver's license number. That's a quote from their
14 argument.

15 MS. SCHWARZ: Right. That's what happened. But
16 in Tolentino, they were then saying, and they got the
17 identity. And from the identity flowed the DMV records.

18 JUDGE GARCIA: But they wanted to suppress the
19 first step.

20 MS. SCHWARZ: No, they did not.

21 JUDGE GARCIA: Because it led to the DMV record.

22 MS. SCHWARZ: They should have done that, and
23 that's what the court - - -

24 JUDGE GARCIA: That's what I read that argument,
25 "as a result".

1 MS. SCHWARZ: - - - in the Supreme Court
2 suggested. They said, you - - - you're seeking to suppress
3 the wrong thing. You should have sought suppression of the
4 observations. Instead, you're only seeking suppression of
5 the DMV records. So that's why, here, in this case - - -

6 JUDGE CANNATARO: So this is you arguing - - -

7 MS. SCHWARZ: - - - the defense attorney got it
8 right.

9 JUDGE CANNATARO: - - - what the Supreme Court
10 was - - - what - - - I think it was Justice Scalia, was
11 saying that you should be arguing. Is that this appeal
12 right now?

13 MS. SCHWARZ: No. That's the Tolentino case. So
14 the - - - the point is, in Tolentino, which only created a
15 small carve-out for this identity evidence that's
16 jurisdictional, that's about the DMV, right? The pre-
17 existing records, the records that are not unique to the
18 case. So they're not dependent on what happened - - -
19 they're the who you are evidence - - - is not suppressible.

20 Everything else that establishes culpable
21 conduct, that evidence is subject to suppression.

22 JUDGE CANNATARO: Counsel, just so I could be
23 sure, can I ask you this question? If your adversary gets
24 up and as you, I think, intimidated a little while ago, says,
25 I'm not challenging suppression of behind the wheel; keys

1 in the ignition; engine running; those things - - - you
2 know, I choose not to challenge those on this bill. Do you
3 still have an argument in front of us?

4 MS. SCHWARZ: Yes.

5 JUDGE CANNATARO: And that is what?

6 MS. SCHWARZ: Okay. The first argument is that
7 that's not what they - - - that doesn't comport with the
8 record that was made below.

9 JUDGE CANNATARO: Okay. But let's say the, you
10 know, the universe changed, and now they're not challenging
11 any of that?

12 MS. SCHWARZ: So it doesn't comply with the
13 record below. And it also would have required them to
14 stipulate that they weren't seeking to introduce those
15 observations, which they didn't do. So - - - but then,
16 looking at the merits of this theory that they've floated
17 here in the - - - in the appeal to this court, the handing
18 over of the driver's license is still an observation that -
19 - - that - - - that establishes culpability.

20 So even if they say we don't want all these
21 others, but we do want the handing over, it's still an
22 observation that was a - - -

23 JUDGE CANNATARO: Well, I don't they're going to
24 say - - -

25 MS. SCHWARZ: - - - smaller subset of it - - -



1 JUDGE CANNATARO: - - - we want the handing over.

2 MS. SCHWARZ: - - - and that hearing's required.

3 JUDGE CANNATARO: I think they're going to say
4 that that can't be - - - that's not suppressible. We've
5 already held Tolentino, that that's not suppressible.
6 That's how I understand the argument anyway.

7 MS. SCHWARZ: Well, it - - - Tolentino made it
8 clear they were not seeking - - - that the evidence that
9 that rule pertained to was not about what happened, and the
10 handing over the driver's license doesn't fit into. It's a
11 wild overreading of Tolentino.

12 Tolentino was this small subset. It was like for
13 - - - for identity: who you are, your body, your name, and
14 evidence that flows from your body or name. Like, pre-
15 existing DMV records, maybe your Social Security number - -
16 -

17 JUDGE CANNATARO: Your name.

18 MS. SCHWARZ: - - - your name, things like that.
19 Not suppressible. But the constitutional protections of
20 the exclusionary rule applies to everything else, including
21 observations. And that's what Rossi says. That's what
22 Gethers says. That's what decades of Fourth Amendment
23 jurisprudence say.

24 And so we were seeking - - -

25 JUDGE RIVERA: Except their rule I don't know how



1 to helps the defendant unless they weren't the only person
2 in the car. Because the natural inference is going to be
3 that they were the driver. How else are you getting a
4 license?

5 MS. SCHWARZ: Right. That - - - and that's my
6 point. That - - - so their - - - it's obviously
7 inculpatory. And so they, if they want to introduce it, it
8 needs - - - they need to prove its constitutional
9 soundness. They - - - it's not insulated from
10 constitutional inquiries because they can say it's
11 identity-related when it doesn't fit into that narrow
12 jurisdictional who you are kind of evidence.

13 It's really a what you did. You handed over the
14 driver's license. It's suppressible fruit because it's
15 culpable conduct.

16 And you make a great point that it's highly
17 inculpatory in a driving case. And the - - - the thing is,
18 if - - - if their wild overreading of the - - - the - - -
19 the definition of identity evidence is - - - is expanded to
20 also include these observations, the upshot of that is that
21 there will be no constitutional protections for a vast - -
22 -

23 JUDGE RIVERA: What - - - what - - -

24 MS. SCHWARZ: - - - majority of traffic cases.

25 JUDGE RIVERA: - - - what public policy is

1 furthered by - - - by your rule?

2 MS. SCHWARZ: I'm sorry?

3 JUDGE RIVERA: What public policy is furthered by
4 your rule? Is it the concern about disincentivizing
5 unlawful stops or something else?

6 MS. SCHWARZ: Well, that - - - I - - - I would
7 just point out that we're just asking for application of
8 rules that already remain in effect. So we're asking that
9 - - - that suppression of - - - hearings continue.

10 JUDGE RIVERA: Oh, if this wasn't at issue in
11 Tolentino, you know, it may be an open question, but - - -
12 right? If you're saying - - - I - - - I thought your
13 response to many of the questions, and certainly I think in
14 response to Judge Garcia's questions, was no, no, no,
15 Tolentino didn't decide that because the defendant never
16 argued that. It wasn't an issue in Tolentino.

17 MS. SCHWARZ: Right. It just wasn't ripe.

18 JUDGE RIVERA: So doesn't that mean it's an open
19 question - - -

20 MS. SCHWARZ: The - - - the question - - -

21 JUDGE RIVERA: - - - at least in this court, as
22 to whether or not turning over a license is subject to the
23 exclusionary rule?

24 MS. SCHWARZ: Yes. It was not discussed in
25 Tolentino, but it is being discussed here, because defense

1 attorneys weren't - - -

2 JUDGE RIVERA: Because that's their position now?

3 MS. SCHWARZ: It's an issue now.

4 JUDGE RIVERA: That's their position now.

5 MS. SCHWARZ: And it wasn't at issue there.

6 JUDGE RIVERA: Uh-huh.

7 MS. SCHWARZ: But we know the answer to it
8 because Tolen - - - the Tolentino decision is very clear.
9 They're just creating a jurisdictional rule that you can't
10 - - - you can't hide who you are. And so you extend that
11 just slightly to, so if you can't hide who you are, you
12 can't hide your pre-existing driver DMV records, your
13 immigration records, all of the stuff that is inherent in
14 who you are. That's what Tolentino was about, period.

15 The idea that Tolentino also included
16 observations, is a wild misreading and a dangerous one,
17 because - - -

18 JUDGE RIVERA: But - - - but the only way you
19 know who you are is because of the stop - - -

20 MS. SCHWARZ: Identify.

21 JUDGE RIVERA: - - - and they were in the car.
22 Again, unless there are two people, the natural inference
23 is you're the driver, or at least two people.

24 MS. SCHWARZ: Those are the observations. That's
25 the - - - the - - - the distinction is the who you are, so

1 name, which is not suppressible. That it's - - - it brings
2 a person into the - - - who's in court in front of you.
3 Really has nothing to do with time and place of occurrence.
4 It's just the person in front of the court, and evidence
5 that flows from knowledge of the person who's in court. So
6 the DMV records, fingerprints that are not used for
7 investigative purposes.

8 JUDGE RIVERA: Well, subject to the exclusionary
9 rule is how the officer found out who you are?

10 MS. SCHWARZ: No.

11 JUDGE RIVERA: Is that what you mean?

12 MS. SCHWARZ: No. The - - - the other evidence.
13 If it's evidence of culpability, then subject to
14 suppression. So the - - - the - - - the - - - the - - -
15 the broad rule for suppression is that the fruits - - - it
16 includes all fruits of an illegal search or seizure,
17 evidence of culpability gained through exploitation of the
18 illegality.

19 So it's the evidence of culpability, and in this
20 case, handing over the driver's license.

21 JUDGE SINGAS: But you didn't make that argument
22 below about the handing over of the license, right? That
23 argument's not preserved, is it?

24 MS. SCHWARZ: It - - - it certainly is, because -
25 - -

1 JUDGE SINGAS: Where?

2 MS. SCHWARZ: - - - the - - - the - - - they
3 sought suppression of all of the post-stop observations,
4 which, of course, would include everything that happened
5 while he was seated in the driver's seat of the car, engine
6 running - - - that's what was in the complaint. All of the
7 - - -

8 JUDGE RIVERA: I thought your position was that
9 this is the first time they make this argument about the
10 license, however, is not subject to the exclusionary rule.
11 The turning over of the license and the information on the
12 license. I thought you were saying that's a - - - you know
13 - - -

14 MS. SCHWARZ: It was a - - - it was - - -

15 JUDGE RIVERA: - - - new - - - new - - - newly
16 crafted for this court?

17 MS. SCHWARZ: No. Well, the - - - no.

18 JUDGE RIVERA: You may not have used newly
19 crafted, but I thought your position was they did not - - -
20 that that's - - - the record doesn't support - - -

21 MS. SCHWARZ: I may have misspoke.

22 JUDGE RIVERA: - - - your argument now?

23 MS. SCHWARZ: The respondent below broadly argued
24 that post-stop observations are - - -

25 JUDGE RIVERA: No, I understand that. Yeah.

1 MS. SCHWARZ: - - - are not suppressible.

2 Here, in this court, they're now saying, oh, you
3 know, we agree post-stop observations generally can be
4 suppressible fruit.

5 JUDGE RIVERA: Right.

6 MS. SCHWARZ: We're only seeking this little
7 subsection.

8 JUDGE RIVERA: Right. So they're arguing this is
9 not - - - this doesn't fit the - - -

10 MS. SCHWARZ: And that doesn't - - -

11 JUDGE RIVERA: - - - that law? That rule?

12 MS. SCHWARZ: - - - that's not what they said.
13 And - - - and since they're now - - -

14 JUDGE RIVERA: So then, in response to Judge
15 Singas, how is it you preserve the argument if your
16 position now is they never raised that. How are you
17 responding to what they never raised?

18 MS. SCHWARZ: We - - - we've always - - - we've
19 always asked that the observations that were obtained after
20 the illegal arrest should be suppressed. Our position has
21 never changed. The answer is, conduct the hearing.

22 But their - - - their newness is they - - - they
23 - - - they say that they now were going to allow in all of
24 the - - - they weren't going to introduce the observations
25 except for this one little one. But this one little one -

1 - - it doesn't solve their problem. If they don't want to
2 have the hearing, they still have to have a hearing,
3 because that little observation of handing over the
4 driver's license is still culpable conduct, still subject
5 to suppression, still requires a hearing. It doesn't get
6 what they want.

7 JUDGE CANNATARO: So does that mean, if we agree
8 with your legal argument, that the remedy here would be to
9 remit it back to a - - - I don't think there's ever been a
10 determination whether this was a legal or an illegal stop,
11 right?

12 MS. SCHWARZ: Right.

13 JUDGE CANNATARO: So we - - - we don't - - - we
14 don't even have the baseline for determining whether
15 there's something to suppress here or not.

16 So would that be the remedy? Send it back and
17 figure out whether it's an illegal stop, and whether the
18 evidence should be suppressed.

19 MS. SCHWARZ: We're always going to ask for
20 dismissal. This is a ten-year-old case.

21 JUDGE CANNATARO: Okay.

22 MS. SCHWARZ: I can tell you my client really
23 doesn't want to come to court, but.

24 JUDGE CANNATARO: If we're not interested in
25 dismissal, that's an option available?

1 MS. SCHWARZ: Then remand would be the - - - the
2 - - - the alternative.

3 JUDGE RIVERA: Because we're setting up a rule
4 that will apply beyond you. I certainly appreciate your
5 client's situation, but - - -

6 MS. SCHWARZ: Yeah.

7 JUDGE RIVERA: - - - that - - - that they didn't
8 necessarily create the ten years, but nevertheless, we're
9 trying to set up a rule for other cases.

10 MS. SCHWARZ: Absolutely. And remand would be
11 the appropriate remedy here for sure.

12 JUDGE GARCIA: Counsel, what - - -

13 MS. SCHWARZ: We won't contest that.

14 JUDGE GARCIA: - - - what if the officer realizes
15 they had no basis to pull - - - make the stop, and they
16 have the license? What do they do?

17 MS. SCHWARZ: Well - - -

18 JUDGE GARCIA: Because you say handing over the
19 license, suppressed. So I can't use this. Here's your
20 license. Thank you. What happens? I give it back. I'm
21 the officer, I give the license back. I didn't have a
22 reason to stop you. I now know you're aggravated - - -
23 hypothetical. You're operating - - - you're guilty of
24 aggravated unlicensed operation of a motor vehicle. But
25 the only reason I know that is because you handed me your

1 license. I now realize I couldn't stop you. What do I do?

2 MS. SCHWARZ: But - - - okay. Well, in - - - in
3 the real world, that would never happen.

4 JUDGE GARCIA: Okay. But in my world, what
5 happens?

6 MS. SCHWARZ: But in your - - - in this
7 hypothetical, if - - - if it - - - it would be wise for the
8 hypothetical driver to call a friend to drive away.

9 JUDGE GARCIA: But what - - - say, he just drives
10 off?

11 MS. SCHWARZ: But if they didn't, if they drove
12 away, we'd get to be litigating attenuation.

13 JUDGE GARCIA: Oh. So how far? I have to let
14 him drive three miles? That's the rule?

15 JUDGE RIVERA: Just wait for a traffic infraction
16 and then pull them over?

17 MS. SCHWARZ: Well, here - - - here's an example.

18 JUDGE RIVERA: You didn't signal when you turned.

19 MS. SCHWARZ: In a small town like Andy
20 Griffith's Mayberry, North Carolina, where the - - - where
21 the sheriff knows everybody and knows who has a driving
22 record. That's not enough - - -

23 JUDGE GARCIA: But I think this is Manhattan.

24 MS. SCHWARZ: - - - to arrest one of his
25 citizens.

1 JUDGE GARCIA: Right?

2 MS. SCHWARZ: But if he does see that citizen in
3 the car driving, he's got - - -

4 JUDGE GARCIA: Yeah. But we're in Manhattan.

5 MS. SCHWARZ: - - - probable cause.

6 JUDGE GARCIA: Right? We're in Manhattan. And I
7 know this person is an aggravated, unlicensed operator of a
8 motor vehicle, and I have to let that person pull off the
9 shoulder of the road and go a certain amount of time until
10 perhaps they commit a traffic infraction, or maybe I have
11 someone the next day, like, follow them.

12 MS. SCHWARZ: I - - - I mean, that's going to be
13 - - - it's going to have to be litigated. But the identi -
14 - - the information gained through exploitation of
15 illegality - - -

16 JUDGE GARCIA: Because if it can - - -

17 MS. SCHWARZ: - - - can be used, but the question
18 is attenuation. And I - - - you know, I - - - I would
19 think if he stopped him immediately, it wouldn't - - -
20 wouldn't be - - -

21 JUDGE GARCIA: The difference - - -

22 MS. SCHWARZ: - - - enough.

23 JUDGE GARCIA: - - - seems to me, you know, in a
24 gun case. Like, you take the gun and it's contraband in
25 sight and then you can argue, you know, later you're not

1 going to let somebody drive off with a gun. But you're
2 letting someone go that you know is in the process of
3 committing a crime.

4 MS. SCHWARZ: Okay. That's why your hypothetical
5 is really unfair, because that's not going to happen, you
6 know. And like I said, phone a friend, park the car,
7 they're not going to do that.

8 JUDGE CANNATARO: But Counsel, it is going to
9 happen. If the crime is one where your identity is wrapped
10 up in the commission of the crime, such as aggravated
11 unlicensed operation of a motor vehicle, because you're the
12 person who has to have the suspended license. It's going
13 to happen all the time.

14 MS. SCHWARZ: No. But it is not an ongoing crime
15 like being an undocumented individual, you know, being
16 illegal reentry.

17 JUDGE GARCIA: Yeah.

18 MS. SCHWARZ: In those cases, it's more
19 problematic because that is an ongoing crime. This isn't
20 an ongoing crime.

21 JUDGE RIVERA: That's criminal behavior, what you
22 just described?

23 MS. SCHWARZ: I - - - I - - - it - - - I don't
24 know if it's criminal behavior - - -

25 JUDGE RIVERA: Okay.

1 MS. SCHWARZ: - - - but illegal reentry is an
2 ongoing crime. An ongoing status - - -

3 JUDGE RIVERA: Violation of the immigration laws.

4 MS. SCHWARZ: Thank you. Status.

5 JUDGE RIVERA: I don't know, but you say it's a
6 crime. Okay.

7 MS. SCHWARZ: And thank - - - thank you. I - - -
8 I - - - I didn't mean to say that.

9 JUDGE RIVERA: I understand.

10 MS. SCHWARZ: But - - - but in that case, it's -
11 - - it's ongoing. That's what an ongoing crime is. In
12 this situation, it's - - - it's based on ti - - - ti - - -
13 a particular time and place of an occurrence.

14 JUDGE RIVERA: Uh-huh.

15 MS. SCHWARZ: So you can't just say, like, in
16 Mayberry, North Carolina - - -

17 JUDGE RIVERA: But you can see the conundrum as a
18 pol - - -

19 MS. SCHWARZ: - - - you have drivers - - -

20 JUDGE RIVERA: Excuse - - - you can see the
21 conundrum as a policy matter, right?

22 MS. SCHWARZ: Well, no, I - - - I don't really
23 see it because - - -

24 JUDGE RIVERA: Letting someone get on the road
25 who, under the law, is not supposed to be on the road.

1 MS. SCHWARZ: But - - - but what's - - - but what
2 would happen here is he would be arrested. The case would
3 go into court, and maybe there'd - - -

4 JUDGE RIVERA: And then the - - -

5 MS. SCHWARZ: - - - be a suppression hearing to
6 determine.

7 JUDGE RIVERA: And maybe it's excluded, maybe
8 it's not, is your position?

9 MS. SCHWARZ: If it's - - - and - - - and - - -

10 JUDGE RIVERA: Just arrest them and - - - and
11 move forward with the law?

12 MS. SCHWARZ: Right. But - - - but that - - - I
13 don't think there's any policy. And - - - and if there is
14 a policy we want to issue here, the maintaining, the police
15 are not stopping people willy-nilly, but a - - - but making
16 stops that are constitutional is really what we're talking
17 about here.

18 And the - - - that brings me to the amici brief
19 that was prepared for this case - - -

20 CHIEF JUDGE WILSON: I think maybe I'll ask you
21 to save that for your rebuttal. We've gone quite a bit
22 over.

23 MR. YARNELL: May it please the court. Brent
24 Yarnell for the People.

25 I'd like to start with the evidence at issue

1 here. On page 813 of the record, we have the prosecution's
2 response to the defendant's motion papers. And the
3 prosecutor - - - prosecutor says that the only post-stop
4 testimony she is seeking to elicit from the officer is that
5 the defendant handed over his driver's license - - -

6 JUDGE HALLIGAN: So is that how you would - - -
7 you have to prove operation, right?

8 MR. YARNELL: You have to prove operation.

9 JUDGE HALLIGAN: And so is that - - - is that
10 what you would use to prove operation?

11 MR. YARNELL: Well, we don't know because the
12 case didn't go to trial - - -

13 JUDGE HALLIGAN: Okay.

14 MR. YARNELL: - - - so we don't know what - - -

15 JUDGE HALLIGAN: But - - - but if you are telling
16 us, I think, that the only evidence that you would seek to
17 rely on here is the handing over of the license, are you
18 saying you might seek to rely on the - - - the observations
19 that the defendant was sitting behind the wheel of a car?

20 MR. YARNELL: No. I mean, what we're saying is,
21 I think the best read of the record is the prosecutor made
22 a strategic decision - - -

23 JUDGE HALLIGAN: Okay.

24 MR. YARNELL: - - - based on the pre-stop
25 observations and the handing of - - -

1 JUDGE HALLIGAN: So - - - so if the only evidence
2 then is the handing over of the license, I take it that
3 that's what you would argue is sufficient to show that the
4 defendant was operating the car?

5 MR. YARNELL: Well, the fact that the operation
6 of the car, we would argue, would have to come from the
7 pre-stop observations of the officer before that.

8 JUDGE CANNATARO: Pre-stop?

9 JUDGE HALLIGAN: But you need to show that the
10 defendant is operating the car, not just the car's rolling
11 along, right?

12 MR. YARNELL: You need to show that defendant is
13 operating the car.

14 JUDGE HALLIGAN: Okay. I'm - - - I'm - - - the
15 reason I'm asking is I'm trying to understand how the
16 observation at issue, which is the handing over of the
17 license, isn't something that you would use to draw the
18 same inference that the other observations of the defendant
19 sitting behind the wheel would yield? Which is that, in
20 fact, it was the defendant driving the car.

21 Am I missing something?

22 MR. YARNELL: Well, I think if you have a case
23 where, say, it's a police officer on the street, seeing
24 officers, seeing cars drive by - - -

25 JUDGE HALLIGAN: That - - - that's what we have

1 here, is it?

2 MR. YARNELL: Well, we don't know, because the
3 case didn't go to trial.

4 JUDGE CANNATARO: Well, in this case is - - - is
5 it theoretically possible that the officer - - - you know,
6 we don't know because it never really got that far. But
7 the officer could say, I would assume, I observed the
8 defendant driving the car, sitting behind the wheel, car
9 was in motion, he was operating it. After I stopped him, I
10 asked him for his license, or I obtained his license, and
11 that's how I found out who he was.

12 So you have your pre-stop elements and your post-
13 stop elements of the crime. Is - - - is all of that
14 legally - - -

15 MR. YARNELL: Yes. Yes.

16 JUDGE CANNATARO: - - - possible?

17 MR. YARNELL: Yes. I mean, I think what
18 Tolentino says is that you are allowed to attach a name to
19 the person that you stopped. You are allowed to attach a
20 name to the subject of the law enforcement encounter.

21 JUDGE HALLIGAN: But - - - but if the - - - if -
22 - - if what you then look to do is to use evidence of
23 handing over, as evidence that it was the defendant driving
24 the car, then why are we in any different place than we are
25 with respect to observing the defendant driving - - -

1 sitting behind the wheel of the car?

2 MR. YARNELL: Well, as - - - as Tolentino says,
3 the identity of the person who is stopped is not a
4 suppressible fruit of an illegal stop.

5 JUDGE HALLIGAN: But that's distinct, isn't it?
6 I mean, isn't the question of the identity distinct from
7 the observation that the defendant handed over the license?
8 From which, as I think you heard in - - - in several
9 exchanges here, you know, a fact-finder might reasonably
10 infer from that fact that it was the defendant driving the
11 car?

12 MR. YARNELL: Well, I mean, the Supreme Court in
13 Hiibel said that a defendant's production of an
14 identification card is evidence of the defendant's
15 identity. It is - - -

16 JUDGE HALLIGAN: I'm asking you, though, could
17 you use it to prove a different fact, which is operation,
18 not identity?

19 MR. YARNELL: I - - - I don't - - - I'm not sure
20 that you could. I think you would have to use it to prove
21 the identity of the person you stopped. The - - - the fact
22 that the person you stopped had been operating a car would
23 have to come from pre-stop observations. And I think the
24 natural reading of the record here is the prosecutor made a
25 strategic decision that with only the identity evidence as

1 being the only post-stop evidence, she could prove
2 operation of the car from the pre-stop observations.

3 JUDGE CANNATARO: But when there's only one
4 person in the car and that's the person who you obtain the
5 license from, how do you extricate that from operation?

6 Who else could be operating the car?

7 MR. YARNELL: Well, I think what you would say is
8 that the - - - the pre-stop observations in that case
9 established that a person was driving the car, and the
10 post-stop observation simply attach a name to that person.
11 That is simply - - - means that, as Tolentino says, the
12 only evidence gleaned from the stop is the identity of the
13 person who was stopped.

14 JUDGE CANNATARO: So you don't need - - - to the
15 extent - - - are you saying that to the extent that you
16 need to prove operation as part of the crime, you don't
17 need any inference of operation that you get from obtaining
18 the license?

19 MR. YARNELL: Well, I mean, the only inference
20 would simply be that the name is attached to the person who
21 the officer - - -

22 JUDGE CANNATARO: No, that's identity. That's
23 like - - - that's something else Tolentino tells us.

24 MR. YARNELL: Well, I mean, I think what
25 Tolentino clearly envisioned is that suppression would

1 simply not apply in a case where the officer had seen the
2 defendant driving the car, learned his identity. I mean,
3 the facts of this case are identical to the facts in
4 Tolentino.

5 The facts in Tolentino are that the officers
6 learned defendant's name when he told them his name during
7 the stop, and then the officers used that information to
8 get the license. And Tolentino's reasoning was that the
9 reason that the license was not suppressible - - - the DMV
10 records, excuse me, was not suppressible is because the
11 name was not suppressible. I mean, the facts here are
12 indistinguishable.

13 And what we're here talking about is - - -

14 JUDGE HALLIGAN: Well, maybe the difference is
15 that there is an effort to suppress the observation of the
16 handing over of the license.

17 Do you - - - what's your position as to whether
18 the observation of the defendant sitting behind the wheel
19 of the car is suppressible?

20 MR. YARNELL: I mean, I think that you could make
21 an argument under Tolentino, that Tolentino equates the
22 person sitting behind the wheel as the driver - - -

23 JUDGE HALLIGAN: So is - - - is that your
24 position, that those observations are not suppressible, of
25 the defendant sitting behind the car - - - the wheel of a

1 car?

2 MR. YARNELL: I mean, I think you - - - you - - -
3 - - - I think that our position would be under - - - under
4 Tolentino and also under Young. Those are part of the
5 circumstances of the arrest, is part of who you stopped,
6 but we don't need that - - - that rule in this case because
7 that's not something that the office - - - that the
8 prosecutor was - - -

9 JUDGE HALLIGAN: So - - - so how is observing the
10 handing over of the license distinct from observing the
11 defendant sitting behind the wheel of the car?

12 MR. YARNELL: Because it - - -

13 JUDGE HALLIGAN: Not the records tied to it, but
14 the observation of the handing over?

15 MR. YARNELL: So sitting behind a wheel has
16 nothing to do with who you are. It's not your name. It's
17 not your date of birth. Production of a identification
18 card as Hiibel said, is equivalent to a statement
19 disclosing your identity.

20 JUDGE HALLIGAN: It's the - - - it's the
21 observation of the act, though, that I think you could
22 argue gives rise to the same inference as sitting behind
23 the wheel, which is you're the driver.

24 MR. YARNELL: Well, the observation of the - - -
25 of the act of handing over the license, is the observation

1 that establishes the identity of the individuals
2 apprehended. So what Tolentino says is it's the evidence
3 that establishes the identity, is the evidence that is not
4 suppressible. And you know, you could - - - you could
5 separate it out simply by tailoring the questions you're
6 going to ask to the police witness, and basically, asking
7 the police witness to testify that the defendant handed
8 over his license. And not having the police witness
9 testify that he was sitting behind the wheel with the keys
10 of the ignition. So it certainly is possible to separate
11 these things out in testimony.

12 You know, Tolentino and Strieff both turned on
13 the assumption that the officer in the field is permitted
14 to use his knowledge of the name of the person who was
15 stopped. And that is really critical, because I think what
16 is driving Tolentino is the recognition from Silverthorn
17 that evidence that is suppressible is evidence that police
18 officers are not allowed to use in the field.

19 And it is very important that the police officer
20 in the field be allowed to make use of his knowledge that
21 the name on the driver's license, the name on an arrest
22 warrant, is attached to the individual who is standing in
23 front of him.

24 JUDGE CANNATARO: But isn't this about how you
25 get the driver - - - the police officer doesn't know the

1 name on the driver's license until someone gives them the
2 name on, you know, the driver's license. And that - - -
3 that's the non-Tolentino wrinkle here. Because someone - -
4 - someone in Washington D.C. said you're arguing it the
5 wrong way, you should argue it this way instead. And now
6 we have that new argument.

7 We're not talking about their identity per se.
8 We're not talking about their name. We're not talking
9 about their driving record. All of which I agree with you,
10 Tolentino says you - - - you can't suppress that.

11 But how you've - - - how the police learn it is
12 different, isn't it?

13 MR. YARNELL: I would say no. I mean, Tolentino
14 does address that. I mean, I think Tolentino talks about
15 identity-related evidence being evidence that is used to
16 establish the identities of the individuals apprehended.

17 If you are - - - if you are suppressing the
18 evidence that the officer needs to know who this person is,
19 then you are preventing the officer from making use of the
20 knowledge of who that person is because the officer then
21 would be making use of suppressing suppressible evidence.

22 JUDGE CANNATARO: But the - - - the argument from
23 the other side would be, well, if the officer didn't have
24 any legal right to make that inquiry and elicit that
25 information, it doesn't matter that they need it. Of

1 course, you need it.

2 MR. YARNELL: Well, I mean, courts - - - and this
3 court in Tolentino decided based on INS v. Lopez-Mendoza,
4 that the individual identity is simply not a suppressible
5 fruit of an arrest.

6 JUDGE HALLIGAN: If - - - if there's - - - if
7 there were a determination, I understand there hasn't been.
8 If there were a determination that there was no basis for
9 the stop, and you wanted to proceed with the case, could
10 you argue that the handing over of the license is evidence
11 of operation?

12 MR. YARNELL: No. I mean, I don't think handing
13 over a license is evidence of operation. Handing over
14 license is quite different from driving a car - - -

15 JUDGE HALLIGAN: Because it doesn't show the
16 fact, or because it's - - - it's suppressible?

17 MR. YARNELL: Because it doesn't show the fact of
18 - - - of driving a car. I mean, the act of handing over a
19 license is not the same thing.

20 JUDGE TROUTMAN: But what about - - -

21 JUDGE RIVERA: It might lay the grounds for an
22 inference of such?

23 MR. YARNELL: I mean, it's possible that someone
24 - - - that a jury might infer that the person who handed
25 over the license - - -

1 JUDGE TROUTMAN: Because normally when the police
2 pull you over, they say license, registration, and
3 insurance card. And that's normally asked of the driver,
4 not a passenger.

5 MR. YARNELL: Right. But I think the mere fact
6 that - - - that - - - that an inference could be drawn does
7 not mean that the evidence is suppressible. I would point
8 - - -

9 JUDGE TROUTMAN: Do you agree that if you had no
10 right to stop in the first instance, anything that one
11 obtains thereafter, other than identity, is suppressible?

12 MR. YARNELL: Yes. I mean, this is a narrow - -
13 - this is a narrow exception for identity, which simply
14 reflects the fact - - -

15 JUDGE TROUTMAN: And you're saying, because a
16 driver's license is - - - is tied to identity, it's
17 permissible?

18 MR. YARNELL: It's how the officer learned the
19 defendant's identity.

20 And in a number of contexts, courts have treated
21 identity as different from other kinds of evidence. In
22 Hiibel the - - -

23 JUDGE RIVERA: If - - - if I understand, and
24 she'll correct me if I'm wrong on the rebuttal. If I'm
25 understanding their argument, their argument is, yes, you

1 can establish that the defendant is David - - - I'm sorry
2 if I mispronounce the name - - - Ehinmiakhena. You can
3 establish that David Ehinmiakhena has a suspended license,
4 whatever - - - whatever the violation was.

5 But you can't use the fact that you requested a
6 license from him after the stop, to let someone connect the
7 dots that he was driving that car at the time that - - -
8 that the officer stopped that vehicle?

9 If I'm understanding their argument, that's their
10 argument.

11 MR. YARNELL: Yeah. And what we've argued is
12 that the mere fact that defendant hands over his driver's
13 license after the stop is really not enough to prove his
14 guilt of driving a car.

15 JUDGE RIVERA: It allows for the inference.

16 MR. YARNELL: Well, I - - - I think it might lend
17 some support for the inference, but in Young, the fact that
18 the defendant had been - - -

19 JUDGE RIVERA: Are you saying the exclusionary
20 rule doesn't apply to evidence that might lead to the - - -
21 the - - - that might give you the basis for an inference of
22 criminality or criminal action?

23 MR. YARNELL: Yeah. I mean, I would point to
24 Young where the - - - the circumstances of the arrest were
25 - - - were deemed nonsuppressible. And the circumstances

1 of the rest were that the defendant had been stopped and
2 arrested in close spatial and temporal proximity to the
3 robbery that had occurred. So it did lend some support to
4 the inference.

5 Now, in this case, the mere fact that he handed
6 over the license, we would say, is not enough to support a
7 conviction for unlicensed driving.

8 JUDGE SINGAS: So is that the only observation
9 that you want to introduce? The fact of the handing over
10 of the license?

11 MR. YARNELL: Yes, that is all we proffered.

12 JUDGE SINGAS: Okay. And where did you limit
13 that in your papers?

14 MR. YARNELL: So this is page A-13 of the record.

15 JUDGE SINGAS: Yes.

16 MR. YARNELL: And this is our - - - our response
17 to the defendant's motion.

18 JUDGE SINGAS: Yes.

19 MR. YARNELL: And what the prosecutor says is,
20 "the observation", I'm quoting here. "The observations at
21 issue after the stop would only be the defendant handing
22 over his driver's license" - - -

23 JUDGE SINGAS: Yeah. But that last sentence
24 says, "under these circumstances, since the defendant's
25 identity is not suppressible, then neither is the

1 observation of the police leading to that fact".

2 So to me, that's an argument for suppression, not
3 an argument for limiting the observations.

4 MR. YARNELL: Well, what she's saying there is
5 that the observation is simply defendant handing over his
6 identity.

7 JUDGE CANNATARO: No other - - -

8 JUDGE SINGAS: What she's saying here is "that
9 the defendant's identity is not suppressible then neither
10 is the observation of the police leading to that fact".

11 So if we think that you didn't limit the evidence
12 in that manner, would a - - - would sending it back for a
13 hearing be appropriate, in your view?

14 MR. YARNELL: If we hadn't limited the - - - the
15 evidence, then I think, yes, you could - - - you could send
16 it back for a hearing. But the second argument there - - -
17 the second - - - the second sentence you're reading there,
18 is simply a legal argument for why the evidence described
19 in the first sentence is not suppressible.

20 And so the - - - the critical sentence for
21 describing the evidence at issue is that first evidence
22 where she says - - -

23 JUDGE CANNATARO: But there is another plausible
24 reading. I think you just heard it, right? That - - -
25 that's your interpretation of what that phrase means, but

1 they just say observations. They don't link up as
2 concretely as you do now, standing here, the observation
3 being the - - - only being the identity portion of the
4 observations.

5 MR. YARNELL: I don't agree. I mean, she - - -
6 the prosecutor says the observations at issue at the stop
7 would, quote, "only be the defendant handing over his
8 driver's license". So she uses that word "only", and that
9 does restrict the - - - the evidence that the prosecutor is
10 - - - is offering.

11 JUDGE CANNATARO: But - - -

12 MR. YARNELL: And - - - and - - - I'm sorry. I
13 thought there was another question.

14 JUDGE CANNATARO: No, no. It's fine.

15 JUDGE RIVERA: But - - - but are you saying that
16 that was not a limitation on what the prosecutor might want
17 to use to establish the lawful legality of the stop? Or am
18 I misunderstanding you?

19 MR. YARNELL: I mean, my read of the record is
20 the prosecutor made a strategic decision that she could
21 prove - - - she could prove the case based on the pre-stop
22 observations and the limited observation of defendant
23 handing over his driver's license. If she couldn't do
24 that, that means she would lose the case.

25 JUDGE RIVERA: So then we only have that pure

1 legal question before us?

2 MR. YARNELL: Yes, that is correct. And you
3 know, I would just say that, you know, I mean, I think that
4 the reason that - - - that this rule really is that
5 identity evidence is just simply treated differently from
6 other evidence. And there's really two reasons for that.
7 Part of it is that, as Hiibel observed, there's really
8 minimal deterrent benefits from suppressing identity,
9 because a person's mere identity in the usual case is - - -
10 is usually not incriminating.

11 And the second reason is that courts have noted
12 that there are unique costs to suppressing this kind of
13 evidence that don't apply to other kinds of evidence. So
14 the classic scenario is the Strieff scenario where you stop
15 somebody, you find out that that person is named on a
16 warrant for a terrible crime. If you're not allowed to
17 know that the name on the warrant is linked to the name of
18 the person standing right in front of you, then you can't
19 execute the arrest warrant.

20 JUDGE RIVERA: But is that your position that the
21 identity evidence, if it - - - if it - - - forget the
22 inference for one moment - - - establishes culpability as
23 direct evidence, that that is also not subject to the
24 exclusionary rule? I just want to be clear on - - - on
25 your view of the law.

1 MR. YARNELL: Well, so our view of the law is
2 that - - - is that what determines whether it's
3 suppressible or not is whether it is the kind of evidence
4 that is used routinely by officers in the field to
5 determine someone's identity. I mean, the - - - how
6 strongly it supports or does not support a culpable
7 inference in a particular case is not the basis for
8 determining whether something is suppressible or not. And
9 I think, you know, the reason that is - - - makes sense as
10 a rule is, like, first of all, we just don't look - - -
11 make case by case determinations about how inculpatory the
12 evidence is to determine how it - - - how - - - whether
13 it's suppressed.

14 And the other thing is, when we're deterring the
15 - - - looking at the deterrence benefit, we want to look at
16 how likely it is that the evidence is going to be
17 incriminating in a particular case. Will the officer who's
18 on the street, seeing a car, think that the mere identity
19 of the person he is stopping is likely to be incriminating?
20 Hiibel says no. That in the usual case, the person's mere
21 identity is not incriminating.

22 JUDGE CANNATARO: But you don't think that
23 calculus changes at all when you're talking about
24 unlicensed operation? I mean, this is not - - - I agree.
25 If this were a case where someone just, you know - - - I

1 don't know - - - stole a grocery bag from someone because
2 they put it down on the sidewalk for a second and ran away,
3 who they are doesn't really matter at all to making out the
4 crime.

5 But here, the crime is inextricably wrapped up in
6 who the person is and what their DMV record is.

7 MR. YARNELL: Well, I think there's two points
8 there. First of all, this is the unusual case where, you
9 know, the - - - where somebody's mere identity is related
10 to - - - is to the crime. But I think you measure the
11 deterrence benefits based on the normal case, not the
12 unusual outlier case.

13 And secondly, I - - -

14 JUDGE RIVERA: You mean it's unusual because
15 there might have been other pre-stop observations that
16 would have gone to the criminal conduct or the culpability,
17 or - - - is that what you mean?

18 MR. YARNELL: Well, what I mean is that in a
19 usual case, who you are as a person is irrelevant to
20 whether you are guilty of a crime. If you robbed somebody,
21 the fact that your name is John is irrelevant - - -

22 JUDGE RIVERA: Yes.

23 MR. YARNELL: - - - to whether you committed a
24 robbery.

25 JUDGE RIVERA: Well, that goes to Judge

1 Cannataro's point, that it's the nature of this crime.

2 MR. YARNELL: Right. And so in the - - - in the
3 usual case, merely learning somebody's identity is really
4 irrelevant to securing a conviction. And that is why
5 officers are not encouraged to execute stops merely to
6 learn their identities.

7 And as this court and other courts have said, you
8 know, the exclusionary rule is always a highly, highly
9 costly - - - it's a costly, costly remedy, and we only
10 apply it in circumstances where it has a deterrence benefit
11 that warrants the costs that are incurred when - - - when
12 we apply it.

13 And if this court has no further questions, we
14 ask that you affirm. Thank you.

15 CHIEF JUDGE WILSON: Thank you.

16 JUDGE HALLIGAN: Counsel, if - - - if you had
17 testimony of a pre-stop observation, the defendant was
18 driving the car, seems to me you can get the DMV records
19 themselves in under Tolentino. Can you get in the
20 officer's testimony that it was the defendant who handed
21 the officer the license, which yields the records?

22 MS. SCHWARZ: The - - - that testimony would
23 still be subject to a suppression hearing because it's
24 still observations that are - - -

25 JUDGE HALLIGAN: So - - - so if Tolentino says

1 the records are permissible, then how is it that you link
2 the identity of the defendant to the identity of the person
3 in the records? If that specific statement about the
4 defendant was the person who gave me that license is - - -
5 is not in.

6 MS. SCHWARZ: It goes back to the jurisdictional
7 rule. The identity is not something they need to
8 establish. It's innate in the jurisdiction of the court.

9 Think about it, in most of the - - -

10 JUDGE HALLIGAN: But - - - but the DMV - - -

11 MS. SCHWARZ: - - - criminal cases they don't - -
12 -

13 JUDGE HALLIGAN: - - - records, though - - - it
14 seems to me it's a fair reading of Tolentino that the DMV
15 records are not suppressible.

16 MS. SCHWARZ: Yes.

17 JUDGE HALLIGAN: Right? So what use are they if
18 you can't ascertain who - - - who they are tied to?

19 MS. SCHWARZ: So this is what Tolentino provides.
20 The DMV records come in. Also, the identity of the person
21 in court comes in. So we know that the person who's
22 sitting in court has - - - is linked to those DMV - - -

23 JUDGE HALLIGAN: So you can tie it up that way?

24 MS. SCHWARZ: That's coming in because of
25 Tolentino. The observation of the handing over is culpable

1 conduct. It - - - and it needs to be subject to a
2 suppression hearing.

3 JUDGE GARCIA: Because it's proving the act of
4 driving?

5 MS. SCHWARZ: Yes. Yes. And the idea that you
6 could somehow excise out that limited testimony from the
7 other parts of this very brief encounter are - - - it's not
8 - - - not - - - not possible.

9 And so this case is from 2016. Now it's very
10 common that police wear body cameras - - -

11 JUDGE RIVERA: What if there's more than one
12 person in the car, and the officer testifies I asked all of
13 them for their licenses. I ran all the licenses.

14 MS. SCHWARZ: Well - - -

15 JUDGE RIVERA: Does that establish that the
16 defendant is the driver? Could you bring that in if
17 there's more than one driver?

18 MS. SCHWARZ: The - - - the - - -

19 JUDGE RIVERA: If there's more than one driver?

20 MS. SCHWARZ: There's more than one driver?

21 JUDGE RIVERA: Yes. I'm sorry. More than one
22 person in the car. Excuse me.

23 MS. SCHWARZ: That would be - - -

24 JUDGE RIVERA: Unless you've got the learning
25 car, but they don't that anymore, anyhow.

1 MS. SCHWARZ: I think all of those observations
2 are what is the subject of the defense motion here.

3 JUDGE RIVERA: And the officer says I asked all
4 of them for licenses?

5 MS. SCHWARZ: Sure. And then that might be - - -
6 my - - - in that hypothetical, then that might be an issue
7 to be resolved by a finder of fact, you know, who - - - who
8 the driver was. But in - - - in a - - - in a typical case,
9 in this case - - -

10 JUDGE RIVERA: Draw an inference?

11 MS. SCHWARZ: Yes.

12 JUDGE GARCIA: Just to go back to what you say
13 Tolentino means. Person in the court is this person. They
14 have these motor vehicle records saying they have no
15 license. So why then can't they prove you're the person
16 who was driving other than by using the handing of license?

17 MS. SCHWARZ: So they - - - they don't need to
18 introduce that handing over information. It's - - - it's
19 not necessary - - -

20 JUDGE GARCIA: Right. So they're not going to.
21 Like, they say - - - let's say they're not going to.
22 They're going to use something else to show the person was
23 driving. But I can use I think you're saying, when I get
24 to court, you're Joe Smith, and Joe Smith had a suspended
25 license.

1 MS. SCHWARZ: Right. That - - - that aspect is
2 what's covered by Tolentino.

3 JUDGE GARCIA: And what - - -

4 MS. SCHWARZ: And everything else.

5 JUDGE GARCIA: - - - what can't you show then? I
6 mean, I'm not saying he handed me a driver's license. I'm
7 saying, here's a video of this car going through. And when
8 I stopped it, that's who was in the car.

9 MS. SCHWARZ: So if - - - you know, I - - - I
10 think that they could try to establish their case that way.
11 It's obviously weaker evidence than the - - - the officer's
12 close range observations identifying the person in the
13 driver's seat. But they could try to do that.

14 Those camera footage are - - - are very grainy.
15 You know, I think it's clearly weaker. So the idea that
16 the - - - that they would strategically choose not to just
17 have the suppression hearing and be able to introduce the
18 strongest evidence of culpability is - - - is not easy to
19 swallow. Why not? They - - - they've said all along that
20 the - - - the stop was - - - was legal. Do the hearing.
21 Get in the strongest evidence.

22 But it is a - - - you know, they're saying that
23 it was a strategy issue. They were going to go without
24 this. But it's a little disingenuous because they also
25 want to introduce this small observation, which is highly

1 inculpatory. So I think they want to have their cake and
2 eat it too, honestly.

3 The - - - the - - - what they - - - I want to get
4 back to like the - - - the - - -

5 JUDGE RIVERA: As a policy matter, how else do
6 you keep unlicensed drivers off the road?

7 MS. SCHWARZ: Well, th - - - I mean, all of these
8 stops should be constitutional.

9 JUDGE RIVERA: Someone's had a license revoked,
10 or - - -

11 MS. SCHWARZ: And there's no reason that an
12 officer who follows constitutional - - - has reasonable
13 suspicion, pulls over the car, then - - - you know, that's
14 the proper way to - - -

15 JUDGE RIVERA: Yeah. But then it's not an
16 unlawful stop. I'm not talking about that.

17 MS. SCHWARZ: Oh. So well, in an - - -

18 JUDGE RIVERA: Because the policy here is, I
19 thought you said, to disincentivize unlawful stops.

20 MS. SCHWARZ: Yes. Yes.

21 JUDGE RIVERA: Okay.

22 MS. SCHWARZ: So maybe I don't understand your
23 question. And it's - - -

24 JUDGE RIVERA: I'm just - - - I'm saying the
25 balance between that and someone who should not be on the

1 road, their license either suspended or revoked, doesn't
2 have one. But that wouldn't be this case because then
3 they're not turning over anything.

4 MS. SCHWARZ: The Constitution protects, you
5 know, all of - - - all New Yorkers, you know, from
6 unreasonable searches. The only way to get that driver off
7 the road is to pull them over for a legitimate reason. And
8 then it's - - - you know, a prosecutable case.

9 JUDGE RIVERA: Do you agree you might have a
10 legitimate reason after an unlawful stop? Let's say, in
11 the hypothetical you were given before, you let them go,
12 and then maybe you see a traffic infraction, then you could
13 stop them?

14 MS. SCHWARZ: Again, with a caveat that there may
15 be some attenuation question issues that can be litigated.

16 JUDGE RIVERA: Well, that's a credibility
17 question, though.

18 MS. SCHWARZ: But - - - but assuming - - -

19 JUDGE RIVERA: If the officer says they - - -
20 they didn't signal when they turned.

21 MS. SCHWARZ: Oh, yeah.

22 JUDGE RIVERA: I let them go, and then they got
23 to the red light and they didn't signal after it went
24 green.

25 MS. SCHWARZ: Absolutely. That - - - that - - -

1 because they would have that reasonable suspicion. And
2 then, you know, the - - - the - - - it flows from there.

3 So it's important, though, I just want to say.
4 Like, the respondent keeps talking about that it's a - - -
5 they want to introduce how he learned the name. That's not
6 necessary to the - - - you know, the proving the case. It
7 does not - - - it's - - - and - - - and in the - - - the
8 Young case, the court was very clear to say that in the
9 circumstances of that case, they would allow in the
10 testimony about how he was arrested. And he was arrested
11 in a totally different location, and you know, not near the
12 - - - the grocery store where the robbery occurred.

13 And so the court, in a weighing and balancing
14 consideration of the evidence, felt that that evidence was
15 atmospheric, told the story of how he was arrested, and
16 because it was not inculpatory - - - it just told the story
17 of how he was arrested - - - that's why they allowed it in.
18 And the - - - the Hiibel case that respondent speaks about,
19 also, it - - - it said they - - - that not all cases. It
20 said typical case.

21 Well, in this case because it's the incriminatory
22 behavior is involved with the handing over of the license
23 of the driving is the - - - the - - - the - - - the - - -
24 the culpable behavior here. It's just a different
25 situation.

1 So each case has to be evaluated separately.

2 CHIEF JUDGE WILSON: Thank you.

3 MS. SCHWARZ: So I wanted to just say one thing
4 too. That now we have - - - we have body camera footage.
5 And in those - - - with body cameras, they're - - - they're
6 being the subject of suppression hearings every day of the
7 week in criminal court. And they're granting those
8 motions.

9 And the - - - these observations that we're
10 seeking to be suppressed here are really the functional
11 equivalent of body cam footage showing the same behavior.
12 So there's really no distinction between the camera footage
13 of the body camera, with these observations. And so for
14 that reason, they - - - this - - - these observations are
15 equally suppressible fruit, and the court below should have
16 granted suppression.

17 Can I just speak to the - - -

18 CHIEF JUDGE WILSON: I think you've gone way over
19 your time. Thank you.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Ehinmiakhena (David), No. 29 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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