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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in 06-1082, Virginia v. Moore.

Mr. McCullough.

ORAL ARGUMENT OF STEPHEN B. McCULLOUGH

ON BEHALF OF THE PETITIONER

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

This Court has again and again held that an arrest is constitutionally reasonable if the officers have probable cause to believe a suspect has committed a crime. The Court has found that this standard represents the best compromise between the needs of the citizens and the duty of the government to combat crime. While the States are free to build additional procedures on this constitutional bedrock, when they do so these additional procedures are matters of State law. They do not change the constitutional standard.

The Court below erred in substituting this clear, established, uniform, time-tested standard for a standard that has none of those virtues.

First, it is undeniable that if State law can raise the constitutional bar, that it will lead to widespread differences on the exact same facts, on the

1 exact same crime, not only across State lines, but also  
2 within a particular jurisdiction.

3 CHIEF JUSTICE ROBERTS: Mr. McCullough --

4 JUSTICE GINSBURG: If this officer had  
5 complied with the State law, that is he had issued a  
6 summons, then you agree that the exclusionary rule would  
7 apply if he went ahead and searched.

8 MR. McCULLOUGH: That's correct. If he had  
9 issued a summons, Knowles would apply and the evidence  
10 would be excluded.

11 JUSTICE GINSBURG: So would you explain the  
12 logic to saying that when the police violate State law,  
13 then the evidence can come in; but when they comply with  
14 State law, it can't.

15 MR. McCULLOUGH: Your Honor, the rationale  
16 of Knowles was that the officer did not engage in any  
17 extended contact with the suspect and that there was no  
18 need to gather evidence.

19 But where from a constitutional sense there  
20 is a full-fledged arrest, then the particular rationale  
21 of Knowles doesn't apply; and I don't think the -- we're  
22 asking the Court to embrace violations of State law;  
23 we're asking the Court to recognize that when a State  
24 goes above and beyond what the Constitution requires,  
25 that the remedies for those violations should be left to

1 the States.

2 And Virginia has provided a number of those  
3 remedies; but here the officer did make a full custodial  
4 arrest.

5 JUSTICE BREYER: Did you -- excuse me,  
6 sorry, General.

7 JUSTICE STEVENS: Well, you say he made a  
8 custodial arrest. Did he search the defendant at the  
9 time of the arrest?

10 MR. McCULLOUGH: No. There was a  
11 miscommunication between the officers --

12 JUSTICE STEVENS: And did he search him at  
13 the place of the arrest?

14 MR. McCULLOUGH: No.

15 JUSTICE STEVENS: Well, how can this be  
16 incident to an arrest?

17 MR. McCULLOUGH: Your Honor, the fact of the  
18 arrest was uncontested, and the law doesn't require --

19 JUSTICE STEVENS: But the search is  
20 unrelated to the arrest, as I understand the facts.

21 MR. McCULLOUGH: No, Your Honor.

22 JUSTICE STEVENS: It took place later in a  
23 different place.

24 MR. McCULLOUGH: Justice Stevens, the search  
25 was related to the arrest. What happened at the scene

1 was the officer made a pat-down and assumed the other  
2 officer had conducted the search. When they got to the  
3 hotel, they realized there had been a mix-up. But he  
4 had not yet been taken to the station and booked and so  
5 the rationale supporting the search incident to the  
6 arrest is present.

7 JUSTICE STEVENS: Well, why is it present if  
8 he's not -- he searched when he wasn't arrested? I  
9 don't understand. Could they wait a week and do it?

10 MR. McCULLOUGH: The arrest did not cease at  
11 that point, Your Honor. In United States v. Edwards,  
12 the Court recognized that at times the search will not  
13 proceed immediately upon arrest.

14 JUSTICE STEVENS: It's an ongoing arrest, is  
15 it?

16 MR. McCULLOUGH: Well, it's an arrest --

17 JUSTICE STEVENS: Incident to an ongoing  
18 arrest? That's kind of a new concept.

19 MR. McCULLOUGH: It's an arrest until he is  
20 released or denied bail. But I would also add that the  
21 timing issue was simply not raised below. And so  
22 there's no reason at this juncture to raise an issue  
23 that the litigants chose not to --

24 JUSTICE SCALIA: Mr. McCullough, the  
25 proposition that you're arguing, does it apply at the

1 Federal level as well? Suppose -- suppose I think that  
2 my neighbor next door is growing marijuana and I have  
3 probable cause to believe that, all right?

4 So I go in and search his house; and sure  
5 enough, there is marijuana. And I bring it to the  
6 police's attention, and they eventually arrest him.

7 Is that lawful search?

8 MR. McCULLOUGH: If there is State action --

9 JUSTICE SCALIA: I'm a State actor, I guess.  
10 You know --

11 (Laughter.)

12 MR. McCULLOUGH: If you have State actors --

13 JUSTICE SCALIA: You know, a Supreme Court  
14 Justice should not be --

15 (Laughter.)

16 JUSTICE SCALIA: -- should not be living  
17 next door to somebody growing marijuana. It doesn't  
18 seem right.

19 MR. McCULLOUGH: That's not a smart  
20 neighbor.

21 (Laughter.)

22 MR. McCULLOUGH: If you have State action  
23 and you enter into someone's home, then the Constitution  
24 affords a heightened level of protection. But --

25 JUSTICE SCALIA: Don't dance around. Is it

1 -- is it rendered an unreasonable search by the fact  
2 that I'm not a law enforcement officer at all?

3 MR. McCULLOUGH: I don't think the fact  
4 of -- no. The fact that --

5 JUSTICE SCALIA: So any Federal employee can  
6 go crashing around conducting searches and seizures?

7 MR. McCULLOUGH: So long --

8 JUSTICE SCALIA: So long as he has probable  
9 cause?

10 MR. McCULLOUGH: That's correct.

11 JUSTICE SCALIA: That's fantastic.

12 (Laughter.)

13 JUSTICE SCALIA: Do you really think that?

14 MR. McCULLOUGH: I think if there is State  
15 action, it doesn't matter that you're wearing a badge or  
16 that you've gone through the police academy.

17 JUSTICE SCALIA: Or that you are an  
18 administrative law judge at the, you know, Bureau of  
19 Customs? It doesn't matter?

20 MR. McCULLOUGH: I think that's right. That  
21 if you have -- if the State --

22 JUSTICE SCALIA: What about a janitor?  
23 You're a janitor, a federally employed janitor.

24 MR. McCULLOUGH: Your Honor --

25 JUSTICE SCALIA: His neighbor is growing

1 marijuana, and he's just as offended as a Supreme Court  
2 Justice would be. Can he conduct a search?

3 MR. McCULLOUGH: I think if he's doing it on  
4 behalf of the State, the answer is yes.

5 JUSTICE SCALIA: Wow.

6 MR. McCULLOUGH: But in terms of the  
7 Federal-State distinction, Your Honor, I think what  
8 we're advocating for is the uniform standard that this  
9 Court has embraced before, that there should not be a  
10 difference between a Federal officer on a State facility  
11 who is authorized under the Assimilated Crimes Act to  
12 arrest for Virginia laws and a Virginia officer who is a  
13 hundred feet away with making an unconstitutional arrest  
14 under the holding below when --

15 JUSTICE GINSBURG: Would you agree that  
16 there was no probable cause to arrest, given the State  
17 statute?

18 MR. McCULLOUGH: Your Honor --

19 JUSTICE GINSBURG: You're talking about  
20 probable cause to believe that he committed an offense.

21 MR. McCULLOUGH: That's right.

22 JUSTICE GINSBURG: But was there probable  
23 cause to arrest?

24 MR. McCULLOUGH: Well, the State court found  
25 there was no -- none of the exceptions in the statute

1 applied. But when the Court has used the term "probable  
2 cause to arrest," it has never required a two-step  
3 analysis of, first, probable cause to believe a crime  
4 had been committed, and then probable cause to arrest.  
5 It's always been, in this Court's cases, a single  
6 inquiry: Has there been probable cause?

7 JUSTICE GINSBURG: Could he -- could this  
8 officer have gotten a warrant to arrest Moore? Could he  
9 -- is it -- oh, there's an offense going on under  
10 Virginia law, I'm going to check with -- call in to see  
11 if I can get a warrant. Could he have gotten a warrant?

12 MR. McCULLOUGH: Well, under the facts of  
13 this case he could have, but it would have caused a  
14 prolonged detention of the suspect.

15 JUSTICE GINSBURG: How could he -- how could  
16 he have gotten a warrant to arrest when it's  
17 a nonarrestable offense?

18 MR. McCULLOUGH: Well --

19 JUSTICE GINSBURG: He couldn't -- would a  
20 judge have told this police officer -- they have a  
21 call-in procedure, call the judge. You want to -- you  
22 need to issue a warrant to arrest him for driving with a  
23 suspended license, but that's not an arrestable offense.

24 MR. McCULLOUGH: Your Honor, it is an  
25 arrestable offense under certain circumstances. And so

1 the officer is left with each arrest to make a  
2 discretionary call.

3 JUSTICE GINSBURG: Did these officers think  
4 this -- those circumstances exist?

5 MR. McCULLOUGH: The officers did not --  
6 their only testimony was it was their prerogative. And  
7 unfortunately they did not then unpack that explanation  
8 to say why they thought one of the exceptions applied.

9 What the State argued below and the State  
10 court rejected was that he was alone in a car with this  
11 large angry dog. There was no passenger that he could  
12 switch places with, and so if they write him a summons,  
13 logically, what is he going to do? He doesn't live  
14 anywhere nearby. As soon as they leave the scene, he's  
15 going to get right back in his car and drive away.

16 Now the State court rejected that, but that  
17 illustrates the fact that under this statute the  
18 officers have to make discretionary calls as to when  
19 these exceptions apply. Is the defendant --

20 JUSTICE SCALIA: Maybe we could say that in  
21 this, in these unique circumstances, where the officers  
22 could not let the fellow drive off without a license, it  
23 was not unreasonable to arrest him, but in some other  
24 situation where they had no arrest authority it would  
25 be.

1 MR. McCULLOUGH: Your --

2 JUSTICE SCALIA: I mean, you know, let's  
3 assume that the stop was not based on some, some  
4 deficiency in his license or some deficiency in the  
5 car -- I don't know what else it could be -- like, he  
6 had been going too fast, okay? And it's just a  
7 misdemeanor. He was five miles over the speed limit.

8 Now, in that situation you couldn't say, as  
9 you've said here, gee, if they just let him go, he'd  
10 still be driving without a license; they had to arrest  
11 him; they had no choice. In that situation, he wouldn't  
12 necessarily be going above the speed limit. Would that  
13 be -- why couldn't you say it was reasonable here, but  
14 it wouldn't be reasonable there?

15 MR. McCULLOUGH: Well, what we're asking the  
16 Court to do is to let the States regulate this arrest  
17 authority.

18 JUSTICE SCALIA: If that's the argument  
19 you're making, then don't bring forward the argument  
20 that they couldn't let him go because he'd be in  
21 violation of the law. If you want us to make that  
22 narrow a holding, I guess we can. Is that what you want  
23 us to do?

24 MR. McCULLOUGH: All we're asking the Court  
25 to do is to affirm the probable cause standard that has

1 -- without any further balancing, that the balancing has  
2 occurred when --

3 JUSTICE SCALIA: No, you're asking us to  
4 balance. You're asking us to say, after all, in this  
5 case if they hadn't arrested he would have been  
6 violating the law as soon as they let him go.

7 MR. McCULLOUGH: No, I'm simply explain --  
8 what I was trying to so was to explain that as a matter  
9 of state law these officers have to make these  
10 discretionary calls. If that then becomes the  
11 constitutional standard, that instead of a simple  
12 probable cause finding you have to get into every  
13 discretionary call by the officer, that it -- it  
14 turns actually --

15 JUSTICE SCALIA: You say this was not  
16 unlawful under Virginia law, then, because of the factor  
17 you brought forth?

18 MR. McCULLOUGH: No, Your Honor. That was  
19 adversely litigated against us in the State court.

20 JUSTICE SCALIA: Well, I don't know what  
21 you're talking about a discretionary call. It wasn't a  
22 discretionary call. He couldn't arrest the person.

23 MR. McCULLOUGH: Well -- but the problem is,  
24 if the standard then becomes a two-step probable cause,  
25 where we have to figure out as a matter of

1 constitutional law whether the officer guessed right in  
2 terms of one of these exceptions, then every  
3 discretionary judgment in the field becomes the occasion  
4 for constitutional --

5 CHIEF JUSTICE ROBERTS: But suppose it works  
6 the other way. If Virginia has a law saying you can  
7 arrest anybody you want on our highways, but, you know,  
8 here's what the offenses are, the officers did not have  
9 probable cause to think a crime had been committed, but  
10 it was they had probable cause to arrest, I suppose  
11 under the Respondent's theory that would be all right.

12 MR. McCULLOUGH: It -- I mean, it certainly  
13 would flow from that. So I think, given the  
14 multitude --

15 JUSTICE STEVENS: Let me ask this question:  
16 You would argue it doesn't matter whether it violated  
17 State or Federal law; it's a question of Federal law on  
18 probable cause. But does the character of the crime for  
19 which the person is being arrested have any relevance to  
20 the question whether the search is reasonable? For  
21 example, supposing he is arrested for a tax offense;  
22 could you go ahead and search him incident to that  
23 arrest?

24 MR. McCULLOUGH: The search incident to  
25 arrest is a bright-line rule, Your Honor, that this

1 Court has promulgated in Robinson.

2 JUSTICE STEVENS: The answer is yes, they  
3 could search?

4 MR. McCULLOUGH: I'm sorry. Yes, the answer  
5 is yes, that if a crime has been committed the  
6 bright-line rule permits the officer to search the  
7 suspect for officer safety as well as --

8 JUSTICE STEVENS: Even though the rationale  
9 for the search incident to arrest doesn't apply?

10 MR. McCULLOUGH: What the -- yes, because  
11 what the Court said in Robinson was: We're not  
12 interested in delving into case-by-case litigation as to  
13 how dangerous this person was and how -- and whether  
14 there was a likelihood of evidence being found --

15 JUSTICE ALITO: Why would the rationale not  
16 apply in that situation? Are you accepting the  
17 proposition that anybody who's arrested for a tax  
18 offense is not a danger to the arresting officer?  
19 Haven't there been some pretty dangerous people arrested  
20 over the years for tax offenses?

21 (Laughter.)

22 MR. McCULLOUGH: I agree with that. I'm  
23 arguing that it's a bright-line rule and that if someone  
24 is arrested for a crime, tax or otherwise, it's not the  
25 nature of the crime --

1 JUSTICE SOUTER: No, but you're also  
2 arguing, as I understand it, that the -- that the  
3 search, even in the case of the tax arrest, does fall  
4 within the rationale of search incident to an arrest  
5 because one of those two rationales is officer safety.  
6 Isn't that your point?

7 MR. McCULLOUGH: Yes.

8 JUSTICE SOUTER: Okay. So you reject the  
9 premise of the question then? The premise of the  
10 question was that the search incident to the arrest in  
11 the tax case is outside the rationale of searches  
12 incident to an arrest; and your position is it's not  
13 outside it.

14 MR. McCULLOUGH: That's correct.

15 JUSTICE SOUTER: Okay.

16 MR. McCULLOUGH: This Court has crafted a  
17 bright-line rule -- it has not distinguished between  
18 types of offenses; it doesn't have to be a violent  
19 offense; it could be a white-collar offense -- that  
20 across the board there is virtue to having this  
21 bright-line rule that permits the officer to search  
22 incident to a lawful arrest. And in Robinson the Court  
23 noted that a lawful arrest is a -- that it met a  
24 constitutionally lawful arrest, one made with probable  
25 cause. This arrest was made with probable cause. The

1 search incident to the arrest was lawful.

2 I would ask the Court if I could keep my  
3 remaining time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 Mr. Dreeben?

6 ORAL ARGUMENT OF MICHAEL R. DREEBEN

7 ON BEHALF OF THE UNITED STATES,

8 AS AMICUS CURIAE,

9 SUPPORTING THE PETITIONER

10 MR. DREEBEN: Thank you, Mr. Chief Justice,  
11 and may it please the Court:

12 The States and the Federal Government may  
13 for a variety of reasons enact restrictions on officer  
14 authority that exceed the requirements of the Fourth  
15 Amendment as this Court has articulated them.

16 When such State law or Federal law  
17 extra-constitutional restrictions are violated, it is a  
18 matter for the government that enacted them to determine  
19 what remedy appropriately flows from that violation.

20 JUSTICE SCALIA: Does the person making the  
21 arrest at least have to have some arrest authority?

22 MR. DREEBEN: This Court has never --

23 JUSTICE SCALIA: Or will a janitor do the  
24 job? A janitor at the Justice Department becomes imbued  
25 with the mission of the Department and he goes around

1 arresting people or searching people.

2 MR. DREEBEN: Well, certainly,  
3 Justice Scalia, such an individual wouldn't have  
4 positive law authority to engage in an arrest.

5 JUSTICE SCALIA: Just as this person here  
6 didn't have positive law authority to engage in an  
7 arrest.

8 MR. DREEBEN: The question would then be  
9 whether that means that it's automatically a  
10 constitutional violation. I think in some situations  
11 even a governmental official can act in a private  
12 capacity by acting outside the boundaries of that  
13 individual's responsibility.

14 JUSTICE SCALIA: Yes, but he was purporting  
15 to act in an official capacity. And he did, indeed,  
16 give the marijuana to the officials at the Justice  
17 Department.

18 MR. DREEBEN: And if you assume that the  
19 Court would have two options. It could either  
20 federalize some sort of an amorphous requirement that  
21 there must be law enforcement authority in an official  
22 in order for that official to engage in Fourth Amendment  
23 activity, or it could hold that, what I think is the  
24 more reasonable approach, which is that the bedrock  
25 requirements of the Fourth Amendment protect against

1   arbitrariness, and the crucial one here is the existence  
2   of probable cause based on the facts to believe that the  
3   individual has violated a law.

4           If that criteria is met, it is not  
5   constitutionally unreasonable, absent where an  
6   extraordinary intrusion for the individual's liberty or  
7   privacy interests to be compromised. It may be the most  
8   flagrant violation of departmental regulations in the  
9   world, and in that case the department that has those  
10  regulations can take action, just as here Virginia says  
11  if you violate the arrestable offense rule under  
12  Virginia law, the consequence is not to exclude  
13  evidence. Virginia will not exclude evidence under its  
14  own State law for a violation of this provision.

15           But it does say under State law that a  
16  person can resist an unlawful arrest, The officer can be  
17  sued for engaging in an unlawful arrest under State law,  
18  and that the officer can be fired or disciplined. And  
19  those are the sanctions that the State has chosen to do.

20           Now, what the Virginia Supreme Court has  
21  done is come along and say, even though you do not  
22  intend this rule to trigger the exclusionary rule under  
23  Virginia law, you have no choice. As a matter of  
24  Federal constitutional law, if Virginia decides to  
25  exceed the constitutional minimum as this Court

1 announced in Atwater and place additional restrictions  
2 on the arrest authority, it must pay a constitutional  
3 price of having the evidence excluded if that rule is  
4 violated.

5 At the outset, it's clear that imposing such  
6 a Fourth Amendment rule would do nothing other than  
7 discourage the States from providing additional  
8 restrictions as a matter of their own State's law that  
9 may serve to protect citizen privacy interests above the  
10 floor that this Court has identified as required by the  
11 Fourth Amendment.

12 JUSTICE GINSBURG: If you're right,  
13 Mr. Dreeben, then the Court gave a false signal when it  
14 GVR'd in Lovelace, in the Lovelace case, the person who  
15 was drinking in public, it GVR'd in light of Knowles.

16 MR. DREEBEN: I don't know that it gave a  
17 false signal, Justice Ginsburg, but a GVR doesn't  
18 indicate this Court's disposition of the merits once all  
19 of the arguments are presented to it. And, admittedly,  
20 I think neither side is able to point to a case that  
21 squarely addressed and conclusively resolved the issue  
22 that's before this Court.

23 What the Court has done, I think, under  
24 related issues under Fourth Amendment law is announce  
25 pretty clearly that the fact that a State has either

1 renounced an interest in taking a particular law  
2 enforcement action that it could otherwise  
3 constitutionally take or positively prohibited a law  
4 enforcement action does not mean that the action is  
5 unconstitutional.

6           As long ago as the Cooper v. California  
7 case, the Court dealt with the situation where an  
8 officer was not authorized to undertake an inventory  
9 search, and the California courts treat it as a  
10 violation of their own law.

11           This Court said it was still a reasonable  
12 search under the Fourth Amendment; and unless  
13 Respondent -- excuse me, unless -- well, Respondent  
14 concludes that there should be a different Fourth  
15 Amendment rule for searches than procedures, Cooper  
16 stands for the proposition that a violation of State law  
17 does not ipso facto equate to a violation of the Federal  
18 Constitution.

19           JUSTICE KENNEDY: If we rule for Respondent  
20 in this case, would we have to reexamine the holding in  
21 California v. Greenwood?

22           MR. DREEBEN: Yes, Justice Kennedy.  
23 California v. Greenwood is the next case in the line  
24 where the Court recognized that California had made it  
25 illegal to conduct garbage searches. And you could make

1 the same argument that Respondent is making here today:  
2 That California had renounced any interest in conducting  
3 garbage searches, therefore there's nothing on the State  
4 side of the line to balance against the individual's  
5 invasion of privacy, and therefore the State should  
6 lose. And this Court held precisely the opposite in  
7 California v. Greenwood, finding that it was  
8 constitutionally reasonable to engage in the garbage  
9 search because there was no federally recognized  
10 expectation of privacy, even though the State had  
11 decided to go further and grant an additional layer of  
12 protection to its citizens.

13 JUSTICE GINSBURG: There could not have been  
14 a warrant -- a grant-- a judge could not have given a  
15 warrant for arrest on these charges.

16 MR. DREEBEN: I'm venturing a little bit  
17 outside of my expertise under State law, but I think  
18 that that's correct. Because State law provided that  
19 this was not an arrestable offense unless one of the  
20 exceptions to the offense existed.

21 And I should note that one of the offenses  
22 here -- excuse me -- one of the exceptions here is that  
23 a court of general jurisdiction could have entered an  
24 exemption from the arrestable offense rule and then  
25 officers within that jurisdiction would have been

1 constitutionally and under State law --

2 JUSTICE GINSBURG: How often and under what  
3 circumstances is that Virginia -- Virginia law rule? I  
4 mean, when does a general district court give permission  
5 for a custodial arrest in a certain class of cases?

6 MR. DREEBEN: I know that it has done it. I  
7 don't know that there are any restrictions on when it  
8 would do it. The point, I think, of giving the general  
9 courts the authority to do this is that these kinds of  
10 laws are not necessarily enacted, as Respondent posits,  
11 to be supplementary protection for privacy. They do not  
12 necessarily represent a judgment that law enforcement  
13 officers should never bring people in for minor traffic  
14 misdemeanors. They may represent a judgment that law  
15 enforcement officers should be out on the beat policing  
16 more important crimes and it's a waste of social  
17 resources and scarce police resources to have them  
18 bringing people downtown for these kinds of offenses.

19 In a particular jurisdiction, law  
20 enforcement may make a case that actually it's important  
21 enough to deter various traffic violations and to ensure  
22 that the individuals show up, that officers should have  
23 plenary authority to make arrests.

24 JUSTICE KENNEDY: I should know this, but do  
25 we defer to State law in determining the lawfulness of

1 the time before arraignment in the context of  
2 confessions, the McNabb-Mallory rule?

3 MR. DREEBEN: The McNabb-Mallory rule --

4 JUSTICE KENNEDY: Which is Federal.

5 MR. DREEBEN: -- is uniquely Federal. The  
6 closest analog -- and this may be what Your Honor has in  
7 mind -- is that in the County of Riverside case the  
8 Court set a 48-hour outside limit for when you have to  
9 bring an arrested individual before a magistrate for a  
10 probable cause hearing. Under Respondent's position --

11 JUSTICE KENNEDY: Well, was there any  
12 indication in that case that if the State had a shorter  
13 period, they would --

14 MR. DREEBEN: No, and that's precisely, I  
15 think, the point. All of the rules that this Court has  
16 announced under the Fourth Amendment, the search  
17 incident to arrest rule, which is triggered as a  
18 bright-line rule without regard to whether the specifics  
19 of the case support it, under Respondent's theory  
20 Virginia could overrule that by saying officers shall  
21 not conduct a search incident to arrest without a  
22 specific exigency in that case. States could overrule  
23 within their own jurisdictions the Federal rule that  
24 this Court announced in Riverside. It could say that  
25 individuals have to be brought before a magistrate

1 within 12 hours or they have to be released. And under  
2 Respondent's theory that you absorb State law into the  
3 reasonableness inquiry, this Court's Federal court  
4 decision would be overruled. And most directly here,  
5 Atwater would be overruled with respect to  
6 non-arrestable offenses if Respondent's position is  
7 correct that when the State has said that we don't want  
8 to undertake an arrest for a minor offense, therefore,  
9 there's no longer any State interest in undertaking the  
10 arrest.

11 The reality is that this Court has balanced  
12 as a matter of Fourth Amendment law what is  
13 constitutionally necessary as a uniform Federal matter  
14 to protect people against arbitrary law enforcement  
15 action, and it's drawn the line at probable cause. And  
16 as this Court said in Whren, absent rare circumstances  
17 when probable cause exists, a search or seizure is  
18 reasonable.

19 And the kind of rare circumstances that the  
20 Court gave the example of in Whren were heightened  
21 intrusions on individual privacy or liberties such as  
22 surgery to remove evidence or an unannounced entry into  
23 a home. We don't have anything like that here and the  
24 standard Federal rule should govern.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Dreeben.

2 Mr. Goldstein.

3 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

4 ON BEHALF OF THE RESPONDENT

5 MR. GOLDSTEIN: Mr. Chief Justice, and may  
6 it please the Court:

7 The notion that the proud men who framed the  
8 Constitution would believe it reasonable to go out and  
9 arrest someone for a non-arrestable offense and not only  
10 do that, but having committed that trespass at common  
11 law, to further search them, is I think an extreme  
12 proposition and one that they would not have accepted.

13 JUSTICE SCALIA: But you think they would  
14 accept arresting somebody for not wearing a seat belt?

15 MR. GOLDSTEIN: Your Honor, I do --

16 JUSTICE SCALIA: It seems to me we've  
17 crossed that bridge with Atwater.

18 MR. GOLDSTEIN: No, Your Honor, I disagree,  
19 for the reason that -- and there are obviously -- I'm  
20 not here to tell the Court what its own precedents mean.  
21 But Atwater makes quite clear that at common law this  
22 was something that was subject to legislative  
23 override, and that's what was reasonable at common law  
24 when the Constitution was framed. And that is,  
25 legislatures sometimes said that you could arrest and

1 sometimes said that you couldn't.

2 But two things were undisputable, I think,  
3 and that is when you did arrest illegally that was  
4 unreasonable --

5 JUSTICE BREYER: The particular illegal  
6 arrest here, to bring this down to earth a little bit,  
7 is I take it they arrested him because he had a  
8 suspended -- he was driving without a good license?

9 MR. GOLDSTEIN: Yes.

10 JUSTICE BREYER: Okay. So that Virginia law  
11 says if you stop somebody, arrest him -- if you stop  
12 somebody, you know he doesn't have a license to drive,  
13 you can arrest him if you think he's going to continue  
14 driving? Can't you?

15 MR. GOLDSTEIN: Yes.

16 JUSTICE BREYER: Okay. So the policemen  
17 here, according to you and I guess the Virginia court,  
18 made a misjudgment. He thought this guy might still  
19 drive somewhere or he might have thought it or a  
20 policeman in similar circumstances might have thought  
21 it.

22 So Virginia says if, in fact, policemen, you  
23 stop somebody for suspended -- for driving without a  
24 license, and you make a mistake, you arrest him, we  
25 don't think that's a big deal, because who knows if he's

1 going to continue to drive. We don't even suspend. We  
2 don't even suspend. We don't even suppress the  
3 evidence. That's Virginia.

4 So if Virginia isn't going to suppress the  
5 evidence because they think it's not a big deal to make,  
6 for the policeman to make a mistake as to whether a  
7 person who's driving without a license will keep driving  
8 once the policeman goes away, why do you think Thomas  
9 Jefferson and everybody else thought that that was such  
10 a big deal that the evidence had to be suppressed?

11 MR. GOLDSTEIN: For a few reasons. First,  
12 Virginia does take this quite seriously. The officer  
13 can be fired for violating the statute. That's no small  
14 thing.

15 The second is I wouldn't assume that  
16 Virginia believes and the Virginia legislature believed  
17 that the evidence would not be suppressed, because for  
18 reasons that I'll explain in a minute the Virginia  
19 legislature was triggering a long line of its court  
20 cases that say if you arrest someone for a  
21 non-arrestable offense, the Fourth Amendment is  
22 violated, and the application of the exclusionary rule  
23 has never been questioned in that context.

24 CHIEF JUSTICE ROBERTS: Well, I thought it's  
25 questioned in your footnote 13 in your brief. You seem

1 to suggest that the exclusionary rule is not at issue in  
2 this case.

3 MR. GOLDSTEIN: That's right. I don't  
4 question its application, but neither does Virginia,  
5 Your Honor.

6 CHIEF JUSTICE ROBERTS: So - so we should  
7 write an opinion saying we're not saying that it was  
8 correct to -- we're not saying that it was correct to  
9 exclude the evidence in this case?

10 MR. GOLDSTEIN: That's -- I think that  
11 that's right. That also happened in California v.  
12 Greenwood, you may recall, Mr. Chief Justice, where  
13 there was some discussion at oral argument about would  
14 we believe the exclusionary rule should be applied here.  
15 That question had not been preserved. That case is on  
16 remand in the California Supreme Court.

17 JUSTICE BREYER: What is the difference  
18 between this and Whren? That is, in Whren the arrest  
19 violated a D.C. regulation that says a plainclothes  
20 officer cannot approach a car except in immediate cases  
21 of immediate danger. And in Whren we said that isn't  
22 such a big deal and we don't think the Fourth Amendment  
23 turns on that kind of triviality.

24 All right. If it doesn't turn on that kind  
25 of arrest procedure triviality, is how we characterized

1 it there, how is this any any different?

2 MR. GOLDSTEIN: Whren is different in  
3 several different ways. The first is that that was a  
4 challenge to the stop, not the search incident to  
5 arrest. The claim was that the officers under a local  
6 D.C. Government regulation did not have the power to  
7 make a traffic stop because there was a local regulation  
8 that said if you're not in uniform and if you're not in  
9 a police car, a marked car, you shouldn't make those  
10 traffic stops.

11 So, it's different on a couple of different  
12 actions. The nature of the constitutional challenge,  
13 the nature of the law that's being evoked, the local  
14 regulation rather than legislation, I think, are the  
15 principal ones.

16 Here we're dealing with something quite  
17 fundamental, and I haven't gotten to this  
18 Court's precedents applying the common law rule that I  
19 described at the beginning, so if I could do and then  
20 compare Whren. Post -- define the common law, every  
21 since Weeks, which is the first case of this Court to  
22 recognize the search incident arrest exception, all the  
23 way through Di Re, Miller, Johnson, Ker, DeFillippo,  
24 those are five cases that confront the question in this  
25 case, I believe that genuinely confront it; is not

1 dictum, it is holding.

2 Those cases confront the question: Can you  
3 have a constitutional search incident to an illegal  
4 arrest? Illegal there not being unconstitutional, but a  
5 violation of State law.

6 JUSTICE ALITO: Well, why do you draw a  
7 distinction between something that's prohibited by a  
8 statute, something that's prohibited by a local ordinance  
9 or let's say it's a directive of the police department?  
10 And if it's -- if the arrest is contrary to any of those  
11 things, it's unlawful under State law, is it not?

12 MR. GOLDSTEIN: The court hasn't ever  
13 confronted that question. The places -- the line of  
14 cases that I described were one of two things, Positive  
15 State legislation enacted by the legislature or common  
16 law. It has never dealt with the locality question.  
17 Whren suggests that maybe a local police regulation is  
18 too variable. We would win under either rule.

19 The -- I think the core reason you would  
20 draw the line at legislation is because this -- the  
21 Fourth Amendment is not just an instrumental thing  
22 designed to do good. It is, as designed, to apply  
23 common law concepts of reasonableness, which was the  
24 foundation --

25 JUSTICE ALITO: I thought it was your

1 argument that if the arrest is unlawful under State law  
2 it's an unreasonable search, an unreasonable arrest  
3 under the Fourth Amendment?

4 MR. GOLDSTEIN: That's right. And your  
5 question, Justice Alito, is designed to test what I mean  
6 by unlawful in terms of what sources -- the State  
7 constitution, legislation, local police practices.

8 JUSTICE SCALIA: No. It's designed to test  
9 whether you really mean unlawful under State law.  
10 Either you don't mean it, because something that  
11 violates a municipal ordinance is unlawful under State  
12 law, and yet you would not apply your test. So you  
13 could express your test differently, unlawful under  
14 State statutory law.

15 MR. GOLDSTEIN: If I have conveyed that  
16 impression, I am sorry. I did not intend to. Our rule  
17 is that if it's unlawful. All I'm saying is the Court  
18 could conclude that local police regulations, for  
19 example, are too variable to -- and Whren calls them  
20 "trivialities," so we won't pick them up.

21 CHIEF JUSTICE ROBERTS: No, it says the laws  
22 of the 50 States are pretty variable on this question as  
23 well.

24 MR. GOLDSTEIN: As are the laws of whether  
25 it's a crime at all, as are under *Indianapolis v. Edmund*

1 and lots of other cases where the court --

2 CHIEF JUSTICE ROBERTS: Do we have to look  
3 at both of those varieties? Let's say the State has a  
4 rule that, yes, you can arrest people in a way that we  
5 would say you can't, but you don't have to have probable  
6 cause. You just have to -- they're just arrestable.

7 MR. GOLDSTEIN: No, as Justice Ginsburg  
8 suggests, you have to have probable cases to arrest.  
9 Cases like Berkemer, Seth --

10 CHIEF JUSTICE ROBERTS: -- is probable cause  
11 to arrest. The State has a law that says you can arrest  
12 in these circumstances whether or not you have probable  
13 cause to believe that a crime has been committed.

14 MR. GOLDSTEIN: I'm sorry. By that phrase I  
15 mean there is a constitutional component. Part of the  
16 constitutional floor is that you have to have sufficient  
17 cause. That's a guarantee of the Fourth Amendment.  
18 This Court's cases make clear you can't go below --

19 CHIEF JUSTICE ROBERTS: I thought you were  
20 telling us it has to be sufficient cause to arrest, not  
21 sufficient cause to believe that a crime has been  
22 committed.

23 MR. GOLDSTEIN: That is necessary but not a  
24 sufficient condition, Mr. Chief Justice. There's  
25 obviously a -- the constitutional floor includes the

1 element of the -- the degree of proof that's required by  
2 this Court precedents.

3 CHIEF JUSTICE ROBERTS: So it is, as your  
4 friends on the other side put it, you are advocating a  
5 two-step process. There has to be probable cause to  
6 arrest and there has to be probable cause to believe a  
7 crime has been committed?

8 MR. GOLDSTEIN: I view those as the same  
9 thing. We may be just having --

10 CHIEF JUSTICE ROBERTS: No, they're  
11 different here. They had probable cause to believe a  
12 crime has been committed, but you say they didn't have  
13 probable cause to arrest because State law makes it  
14 illegal.

15 MR. GOLDSTEIN: In that sense, absolutely.  
16 I just wanted to make sure I understood the terminology.  
17 That's correct.

18 But let me make quite clear that we are  
19 discussing in the first half hour and the second half  
20 hour I think two slightly different things. The first  
21 half hour focused on the constitutionality of the arrest  
22 vel non, which is at issue in Atwater, for example, and  
23 at issue -- not even in Whren, which is just a traffic  
24 stop.

25 I am focusing on the somewhat different

1 point. There is a line of cases that deals with the  
2 constitutionality of the search incident to arrest and  
3 it says because at common law you could not search  
4 someone pursuant to an arrest that was a trespass, the  
5 search itself is unconstitutional. So if at the time of  
6 the framing a Federal officer, a Federal marshal, at the  
7 time of the framing had the power to arrest them for  
8 State law offenses, as they still do under the OLC  
9 opinions.

10 If a Federal marshal had gone up to someone  
11 who's committing a completely trivial offense, Atwater  
12 recognizes there are offenses at common law that are not  
13 arrestable. That would be a trespass and to search the  
14 person incident to that arrest would have violated the  
15 Fourth Amendment, we believe. It would have been  
16 unreasonable. When Mapp applies the Fourth Amendment to  
17 the States, it would have been --

18 CHIEF JUSTICE ROBERTS: What if the State  
19 makes a trivial offense arrestable, as in Atwater?  
20 You're suggesting in that situation the common law rule  
21 we have doesn't apply. It's a trivial offense, but it's  
22 made arrestable and therefore it doesn't violate the  
23 Fourth Amendment to search incident to that arrest.

24 MR. GOLDSTEIN: That's right. At common law  
25 and under the Fourth Amendment, that's right. You look

1 to the positive source of authority, which is State law  
2 authority to arrest or a common law authority to arrest.  
3 That would not be unconstitutional. That -- that rule  
4 also make sense as a question of the structure of our  
5 democracy. Remember, it puts in the hands of the  
6 legislature, which can be held responsible for the  
7 decision to make a trivial offense --

8 CHIEF JUSTICE ROBERTS: Well, what if  
9 the legislature -- this was the hypothetical Mr. Dreeben  
10 posed. What if the legislature says yes, you can arrest  
11 for this offense but you cannot search incident to the  
12 arrest, because we think that's too much of an intrusion  
13 given the fact that it's a relatively trivial offense?  
14 In that case, would our doctrine saying under the Fourth  
15 Amendment you can search incident to a valid arrest be  
16 reversed preempted, preempted by the State law?

17 MR. GOLDSTEIN: No. There are times --

18 CHIEF JUSTICE ROBERTS: So the State can  
19 define the circumstances under which you can have an  
20 arrest, but the State can't define and limit the  
21 consequences of the arrest?

22 MR. GOLDSTEIN: That's right. That is --  
23 there are traditions that are rooted in the common law,  
24 that the search incident to arrest here was pursuant to  
25 a trespass at common law that was completely

1 unreasonable.

2 JUSTICE SOUTER: But isn't -- isn't the  
3 difficulty with that argument that we -- we have  
4 rejected the, in effect, the trespass rationale; and  
5 what you're telling us now, it seems to me, based on in  
6 effect trespass concepts, is that so far as the Fourth  
7 Amendment is concerned an arrest may constitutionally be  
8 made, but the officer following that arrest may not take  
9 the step of determining whether the individual arrested  
10 has on his person anything that can be used to hurt the  
11 officer like a knife or a gun?

12 And why should we draw what seems to  
13 me -- if we scrap, as we have done, the trespass  
14 analogy, why should we make what seems to me at least an  
15 irrational distinction of saying the Fourth Amendment  
16 says it's okay to arrest but it's not okay to protect  
17 yourself after you have arrested? Why should we accept  
18 such a rule?

19 MR. GOLDSTEIN: This is I think the hardest  
20 question for us, and so if I could have the time to give  
21 you a couple of answers. The first is remember your  
22 instrumental point is that the officer has the person,  
23 they need to protect themselves. We know that is not  
24 itself -- and I'm going to give you a couple of  
25 answers -- that is not itself to make the search

1 constitutional because everyone agrees that if the  
2 arrest was unconstitutional, then the search,  
3 notwithstanding the exigencies that exist under Chimel  
4 and like cases all the way back, exist. So it's not  
5 enough that the officer has to protect himself. The  
6 reason --

7 JUSTICE SOUTER: Right. But we're starting  
8 with a different premise.

9 MR. GOLDSTEIN: I --

10 JUSTICE SOUTER: We're starting with a  
11 constitutional premise.

12 MR. GOLDSTEIN: Yes. I understand this.  
13 Justice Souter, I understand. I was just trying to get  
14 to your -- what I think is the greatest sort of logical  
15 force: The officer need to protect himself.

16 Now, to get to the harder case, which is  
17 yours, and that is accept that the arrest is  
18 constitutional. We of course don't do that. We believe  
19 that there isn't a sufficient interest to make it  
20 reasonable, but you posit otherwise. The reason is  
21 given by Justice Powell's concurrence in Robinson, which  
22 is the fundamental search and seizure arrest case, and  
23 he says when the person is lawfully arrested they have  
24 engaged in conduct that they know can subject them to  
25 arrest, they have a reduced expectation of privacy. So

1 while it's the case that the governmental interest  
2 remains the same -- protect the officer, find the  
3 evidence -- the other side of the Fourth Amendment  
4 balance is fundamentally different, because when a  
5 person has engaged in conduct which they know does not  
6 subject them to arrest they do not have a reduced  
7 expectation of privacy.

8           This individual had every reason to believe  
9 dating back to the traditions of common law, to positive  
10 State law, that they would not be searched incident to  
11 arrest.

12           JUSTICE SOUTER: If that -- if that logic is  
13 sound and that logic depends on Justice Powell's use of  
14 the word unlawfully, then it seems to me the -- the only  
15 way to arrest an irrational system would to be conclude  
16 that, in fact, the arrest is not constitutionally  
17 lawful. Because on -- on your logic, you're still left  
18 with the problem that I raised; and a constitutional  
19 arrest in which the officer does not violate the Fourth  
20 Amendment by apprehending the person, and yet the  
21 officer is disabled from protecting himself, if we're  
22 going to have a sensible rule, we've either got to say  
23 the Fourth Amendment allows him to make the search  
24 incident and protect himself, or we've got to have a  
25 rule that says the Fourth Amendment doesn't allow him to

1 make the search -- make the arrest in the first place.  
2 Otherwise we've got a crazy system.

3 MR. GOLDSTEIN: Can I just correct one  
4 thing? And that is it does not depend on Justice  
5 Powell's use of the word unlawful. I believe to rule  
6 against us, Justice Souter, that you will have to  
7 overrule the line of cases from Di Re to DeFillipo.  
8 Those are on point. Now you may decide --

9 JUSTICE KENNEDY: Don't you think we have  
10 to, if not overrule, at least back away from the holding  
11 in California versus Greenwood?

12 MR. GOLDSTEIN: No, Justice Kennedy, and  
13 that's why I focused so much on searches incident to  
14 arrest. There are times when State law is incorporated  
15 into the Fourth Amendment, and everybody agrees that  
16 regulatory searches are; inventory searches are, there  
17 are times when it isn't. And California v Greenwood is  
18 not one and there's a logical reason for it. And that  
19 is that the premise of when you were deciding in a -- in  
20 a trash search, this Court's document looked at two  
21 things. The first is, is there a reasonable expectation  
22 of privacy, and if there is do we balance the interest?  
23 California v Greenwood says there was no reasonable  
24 expectation of privacy because that's evaluated as a  
25 societal matter. I'm focusing on a very narrow question

1 that doesn't disturb any other doctrines.

2 JUSTICE SCALIA: What about Cooper -- Cooper  
3 v California?

4 MR. GOLDSTEIN: I think Cooper v California  
5 is a very good case for us, because Cooper and all its  
6 progeny say that State law has to authorize and  
7 determine the validity of the inventory search. If you  
8 violate the State regulations on when you conduct an  
9 inventory search, you violated the Fourth Amendment.

10 JUSTICE BREYER: Can we go back for a  
11 second? Because, the reason I asked my question is I  
12 was thinking about this very differently, and I just  
13 want to have an answer, and I want your best thinking on  
14 this. My thought is that the answer to the question of  
15 whether it violates the Fourth Amendment when a State --  
16 when a person is arrested in violation of State law, the  
17 answer is: it depends. Sometimes yes, sometimes no.  
18 Obviously, if there is no probable cause or if there  
19 wasn't a crime at all, as just defined, the answer is  
20 yes; but then I look at Whren and it says if all that  
21 was at stake was a kind of arrest procedure State law,  
22 herein -- there embodied in a rule, the answer is no.  
23 So I look at this one. And this one it seems to me  
24 there is probable cause; it is a crime; moreover, it is  
25 a crime for which the State permits arrest where the

1 officer subjectively thinks he's likely to keep driving.  
2 So it seems to me that's maybe much more close to what  
3 we had in Whren.

4 Now I want you to say -- I want your  
5 comments on what I -- it's hypothetical, my statement,  
6 because I want to get your reaction to that point of  
7 view. I'm not saying I hold it. But I'm putting it  
8 forward so that I can get your reaction and argument.

9 MR. GOLDSTEIN: Well, I think it is a  
10 terribly difficult rule to administer when you try to  
11 decide, well if this is a law that sometimes allows  
12 arrest and sometimes does not. It is an infinitely more  
13 administrable rule on our side, where we say to the  
14 police officers, you have the power to arrest or not and  
15 that's what determines --

16 JUSTICE KENNEDY: I think it is much easier  
17 to administer, to have a uniform Federal standard,  
18 rather than whether or not an officer can arrest in one  
19 county for something and not in another county whether  
20 he has to have a badge or not. Those are the kind of  
21 trivialities we talked about in Whren.

22 MR. GOLDSTEIN: Well, Justice Kennedy,  
23 remember, we have one standard for an officer on the  
24 street, and that is, look -- do, if you're allowed to  
25 arrest, you can arrest, and that's what will determine

1 the constitutionality of the search incident to arrest.  
2 The Government posits two different standards that  
3 govern the officer's conduct: a Federal one and State  
4 one.

5 But let me also get to your point, Justice  
6 Kennedy, that you are worried that are all kinds of  
7 these State laws. There's -- you know, are you out of  
8 your jurisdiction, are you wearing a uniform? What we  
9 think that the common law was concerned with, and this  
10 line -- this Court's court line of cases from *Di Re* to  
11 *DeFillipo* is a more fundamental judgment. It's like the  
12 judgment whether it's a crime at all. The police power  
13 of the State is most fundamentally, is this a crime, can  
14 we arrest for it, someone for it, so that we will hold  
15 them? And those are the judgments: is it arrestable  
16 or not? And not these other little things that --

17 JUSTICE STEVENS: But under that analysis,  
18 it seems to you we rely on the citizen's expectation of  
19 privacy as the justification. And I think  
20 Justice Kennedy makes a rather strong response to that,  
21 because it's unrealistic to assume that a citizen in  
22 certain counties in Virginia had such an expectation but  
23 did not in other counties, because most citizens don't  
24 know the sophisticated aspects of the Virginia law.

25 MR. GOLDSTEIN: This is a very -- just as a

1 court note, there's no other State that has one of these  
2 statutes. Just in terms of your thinking about whether  
3 this is a common practice, we haven't been able to find  
4 any others, and even in Virginia, it's only to a small  
5 body of offenses. But even taking as a given --  
6 Justice Stevens, I think doctrinally, as Justice Powell  
7 says in Robinson, the notion is that people go out into  
8 the world and engage in conduct, and we expect them to  
9 know the law. Sometimes that's an unreasonable  
10 expectation, but it's the only premise that this Court  
11 --

12 CHIEF JUSTICE ROBERTS: Counsel, can I get  
13 back to your discussion of Cooper? In Cooper, you said  
14 that if it violates the State law for an inventory  
15 search, then you can't search incident to that. But  
16 that's because it is then not an inventory search. Here  
17 there's no doubt that this was an arrest, whether it  
18 complied with State law or not.

19 MR. GOLDSTEIN: Chief Justice Roberts, I do  
20 disagree. Post-Cooper, in South Dakota v. Opperman,  
21 even if the police officers label it an inventory search  
22 -- the person says, oh, we were just trying to keep  
23 track of everything, so nobody doubts they were really  
24 inventorying things -- the Court has said it's the --  
25 the practice is, the State practice is --

1 CHIEF JUSTICE ROBERTS: No, but just -- it  
2 gets to -- I mean, if you don't follow the State rules,  
3 it doesn't comply with the rules for an inventory  
4 search. But here you're saying if don't -- you're not  
5 saying if you don't follow the State rules, it's not an  
6 arrest. It's not a lawful arrest. But that's a  
7 different question than whether or not it is an arrest.  
8 Our precedents say if it's an arrest, you can search  
9 incident to the arrest.

10 MR. GOLDSTEIN: Mr. Chief Justice, I  
11 disagree. This Court has said many times, and indeed  
12 squarely held in Johnson, where the evidence was  
13 suppressed, that it has to be an arrest that is lawful  
14 under State law.

15 JUSTICE SCALIA: Mr. Goldstein, can I bring  
16 you back to Cooper v. California?

17 MR. GOLDSTEIN: Yes.

18 JUSTICE SCALIA: Which you say is a good  
19 case for you. I don't see how you can say that. This  
20 was a case of a car impounded. The State court had said  
21 that there was no authority to search the car, simply  
22 because it was impounded, and we said the question here  
23 is not whether the search was authorized by State law;  
24 the question is rather whether the search was a  
25 reasonable one under the Fourth Amendment.

1           Just as a search authorized by State law may  
2 be an unreasonable one under that amendment, so may a  
3 search not expressly authorized by State law be  
4 justified as a constitutional reasonable one. And you  
5 think that helps your case?

6           MR. GOLDSTEIN: Not -- I don't think that  
7 language is relevant for the following reason: What the  
8 Court said in Cooper was that the seizure of the car,  
9 which is analogous to the arrest here, right? They  
10 seized my client's person; they seized the car. The  
11 Court said because the seizure of the car was lawful  
12 under State law, then the search incident to was. And  
13 let me just read to you from Coolidge versus --

14           JUSTICE SCALIA: Even though the State law  
15 did not authorize it.

16           MR. GOLDSTEIN: The State law did not speak  
17 to it either way, but -- it didn't speak to it either  
18 way.

19           JUSTICE SCALIA: They were assume ing, in  
20 that passage, that the State law did not authorize it,  
21 or otherwise the passage makes no sense.

22           MR. GOLDSTEIN: Justice Scalia, I disagree.  
23 In any event, post-Cooper, South Dakota v. Opperman, as  
24 the conversation between the Chief Justice and I was  
25 just explaining, is perfectly clear that the inventory

1 search has to be authorized pursuant to State  
2 regulation. If after Cooper this is perfectly settled,  
3 there really isn't --

4 CHIEF JUSTICE ROBERTS: Counsel, if we  
5 assume, contrary to your footnote 13, that the  
6 exclusionary rule is implicated in this case, could you  
7 explain why, under the Federal Constitution, there  
8 should be imposed on the State an exclusionary rule for  
9 a violation of State law when State law does not impose  
10 an exclusionary rule for the violation of its law?

11 MR. GOLDSTEIN: Assuming the Court decides  
12 that the question was not waived because it wasn't  
13 briefed, the reason is that this Court's exclusionary  
14 rule precedents look to something else, and that is:  
15 Did the evidence follow directly from the  
16 unconstitutional conduct? And here it did.

17 CHIEF JUSTICE ROBERTS: Well, I guess the  
18 question would be: Why doesn't our jurisprudence on  
19 whether there's an arrest also look to something else,  
20 rather than whether it's permitted or violated under  
21 State law? In other words, the State doesn't -- the  
22 State law does not provide for the exclusionary rule,  
23 but we say the Fourth Amendment does.

24 Under -- this is not a valid arrest under  
25 State law, but your brothers say under the Fourth

1 Amendment it is because there's probable cause to  
2 believe a crime has been committed.

3 MR. GOLDSTEIN: Mr. Chief Justice, I think  
4 that illustrates the point I am willing to accept, and  
5 that is there are times that State law is relevant under  
6 this Court's doctrines; there are times it isn't. *Welsh*  
7 *v. Wisconsin*, for example, is another example where the  
8 Court looks squarely to the State law of whether and how  
9 serious the offense is. My point is that there is a  
10 very particular doctrine that is in play here that deals  
11 with searches incident to arrest.

12 JUSTICE ALITO: What if Virginia has a  
13 statute that said it's unlawful to arrest for a traffic  
14 violation, but that it is lawful under Virginia law for  
15 an officer to conduct a search incident to any arrest,  
16 whether it's lawful under Virginia law or not? Would we  
17 follow that latter Virginia law?

18 MR. GOLDSTEIN: I don't know. That is the  
19 true answer, because no State has such a law. It would  
20 depend, I think, on whether the arrest itself satisfied  
21 constitutional --

22 JUSTICE ALITO: What is the difference  
23 between that law and in effect what Virginia has in  
24 place? They say the arrest is unlawful, but they don't  
25 provide for the exclusion of evidence that's obtained as

1 a result of that arrest under Virginia law.

2 MR. GOLDSTEIN: The reason is I think the  
3 one -- that the Court has never looked to the State law  
4 remedies in *Di Re*, *Miller*, *Johnson*, *Ker*, and *DeFillippo*,  
5 and that it looks to what the common law would look to,  
6 which is: Is the arrest legal or not?

7 I also would repeat what I said to Justice  
8 Breyer, and that is I would not assume that Virginia  
9 believes that the exclusionary rule wouldn't apply  
10 because those precedents trigger the Fourth Amendment.

11 But, Justice Breyer, I do want to come back  
12 to your question about, okay, *Whren*. The important  
13 differences are: Remember *Whren* didn't just say that  
14 things about whether people can be arrested are  
15 trivialities. It's at the core of the Fourth Amendment.  
16 The Court would never say that arrest is a triviality.  
17 What it's talking about is what concerned  
18 Justice Kennedy, and that is the kind of rule in *Whren*,  
19 which is the guy had to be in a police uniform and  
20 driving around in a marked police cruiser, which could  
21 vary from jurisdiction to jurisdiction, the Court felt  
22 that was more of a triviality. This is a much more  
23 fundamental statement --

24 JUSTICE KENNEDY: And both arrests are  
25 illegal, but you're saying that there's a difference.

1 So your bright-line rule now seems to evaporate.

2 MR. GOLDSTEIN: Justice Kennedy, I don't --

3 JUSTICE KENNEDY: I mean I'm assuming that  
4 your answer to my question about the badge or the wrong  
5 county and so forth would not result in suppression.  
6 Correct me if I have misinterpreted your argument.

7 MR. GOLDSTEIN: We have proposed two  
8 alternative rules. Fundamentally, that's right. And  
9 that is --

10 JUSTICE KENNEDY: What's right?

11 MR. GOLDSTEIN: I'm sorry. You're right:  
12 On our core condition, the evidence would not be  
13 suppressed. The reason is that we think the most  
14 fundamental State judgment here is whether this offense  
15 is arrestable. Alternatively, the Court could apply a  
16 rule that just says State officers, if they're allowed  
17 to arrest lawfully, then that will generate a  
18 constitutional search incident to arrest. We would win  
19 under either either rule.

20 I think the core of our case is a much  
21 simpler rule that simply says if the State has decided  
22 this thing is not arrestable, it obviously doesn't have  
23 an interest in the arrest that would outweigh the  
24 individual's expectation of privacy -- remember search  
25 incident to arrest is an exigency. There is no --

1 JUSTICE KENNEDY: But then if you -- do you  
2 accept the proposition then, in some of these minor  
3 cases, the arrest might be valid, then you're whole  
4 argument about the Framers and the trespass and so forth  
5 is wrong.

6 MR. GOLDSTEIN: To -- that's correct. If we  
7 are going to follow the common law and the rule that is  
8 articulated, I think, in every single  
9 search-incident-to-arrest case, that it has to be a  
10 lawful arrest, that's right. It will take up all of  
11 State arrest law. I'm not trying to hide from that  
12 fact. But the Court has never had a problem with that.  
13 In all of those cases all through time, it has never had  
14 any problem with administerability or anything else with  
15 a rule that simply says to the police officer: If  
16 you're allowed to arrest him, arrest him; if you're not,  
17 you're not, and you can't search him constitutionally.  
18 That is --

19 CHIEF JUSTICE ROBERTS: I think your friend  
20 agreed that the cases didn't establish whether our  
21 references to probable cause meant to probable cause to  
22 arrest or probable cause to believe that a crime had  
23 been committed. You don't agree with that? Do you  
24 think that the cases foreclose their position?

25 MR. GOLDSTEIN: I do when it comes to the

1 search-incident-to-arrest cases. I think two things.  
2 This is my understanding of the Court's precedents. The  
3 Court has said if you have probable cause, you can  
4 arrest. In every case that it has said that, it has  
5 been lawful at State law to arrest -- to arrest. So the  
6 Court has confronted this question when it comes to the  
7 constitutionality of the arrest vel non.

8           There is a second line of cases that deals  
9 specifically with this search-incident-to-arrest  
10 doctrine, and in every one of those, it has both said it  
11 has to be a lawful arrest. And then in five separate  
12 cases, it has explained what it meant by a "lawful  
13 arrest." And it can't be dictum. The evidence in  
14 Johnson versus the United States was suppressed. It has  
15 to have been the holding of the court.

16           We think that that is a sensible rule for  
17 two reasons: It is what Framers meant. It cannot be  
18 the case that a Federal marshal, at the time of the  
19 framing, could go and just arrest somebody for a  
20 completely trivial offense -- that was a trespass -- and  
21 then search them. And, second, Justice Powell's  
22 concurrence in Robinson makes a lot of sense. But if  
23 you engage in constitutional --

24           JUSTICE ALITO: In Johnson, the search was  
25 illegal because they illegally entered the hotel room.

1 Isn't that right? So it didn't matter what happened  
2 after that point.

3 MR. GOLDSTEIN: That is not what the Court  
4 said. The Court was quite clear on this, Justice Alito.  
5 I just don't think there's two ways about it. It was  
6 quite on all five of these cases.

7 I'm not saying the Court couldn't have  
8 decided the case otherwise. That's true. I think the  
9 Court could have had a different rationale, but the  
10 point is it didn't. All of these cases cite each other.  
11 It's a uniform line of authority. It's not an accident.  
12 It's not --

13 JUSTICE KENNEDY: The Court simply said  
14 we're going to use our Federal supervisory power and  
15 incorporate the State law of arrest. If we don't have  
16 another body of law, we're going to do it. It didn't  
17 say it was required to by the Constitution. That's not  
18 the way I read Di Re.

19 MR. GOLDSTEIN: Well, then -- I don't know  
20 how you pronounce it either, but I do know that Johnson,  
21 Ker, and DeFillippo are cases that are against the  
22 State. They are not supervisory authority cases.

23 JUSTICE KENNEDY: Then you have three cases,  
24 not five.

25 MR. GOLDSTEIN: Well, I disagree.

1 JUSTICE BREYER: Putting cases aside for the  
2 moment --

3 MR. GOLDSTEIN: Yes.

4 JUSTICE BREYER: I mean if we reach this  
5 question, you must have lost on the first question. I  
6 mean you win -- if you win on the first question, you  
7 win.

8 If you -- all right. If you have lost on  
9 the first question, this is not an unreasonable search  
10 -- arrest, rather, under the Fourth Amendment.

11 And, moreover, it's not enough of a big  
12 deal, so the State makes it suppressible. Otherwise, a  
13 -- and so now we're talking about minor things under  
14 State law that is secondary at the least.

15 And there, when the policeman make a mistake  
16 about that, the reason we let him search is he might be  
17 hurt, the policeman. There's danger involved.

18 And so I don't see why at the moment that  
19 rationale wouldn't apply just as strongly with a reason  
20 for it being unlawful under State but not Federal law is  
21 a violation of one of these subsidiary rules whether he,  
22 you know, thought the guy was going to keep driving  
23 under the suspended license or, you know, might be risky  
24 or might not show up.

25 MR. GOLDSTEIN: May I? There is no claim of

1 good faith here which could be raised to a Fourth  
2 Amendment argument in a later case. There's absolutely  
3 no mistake. And we don't want to encourage officers to  
4 conduct illegal arrests and search people.

5 CHIEF JUSTICE ROBERTS: You can finish your  
6 answer.

7 MR. GOLDSTEIN: That's it.

8 CHIEF JUSTICE ROBERTS: All right. Thank  
9 you, Mr. Goldstein.

10 Mr. McCullough, you have four minutes  
11 remaining.

12 REBUTTAL ARGUMENT OF STEPHEN B. McCULLOUGH  
13 ON BEHALF OF PETITIONER

14 MR. McCULLOUGH: Thank you.

15 First, when counsel says that this is some  
16 kind of a unique Virginia statute, that's wrong. The  
17 brief filed by the ABA shows that all but nine States  
18 have enacted provisions that are similar, that involve  
19 restrictions on their officers' authority, and each of  
20 those has exceptions, and so on and so forth.

21 So it is not a unique situation. You have  
22 clear rules. Why would you trade them in for a morass?  
23 An arrest is constitutional if the officers have  
24 probable cause to believe a crime has been committed.

25 JUSTICE GINSBURG: Any crime at all?

1 MR. McCULLOUGH: I'm sorry?

2 JUSTICE GINSBURG: Any crime at all;  
3 jaywalking, for example?

4 MR. McCULLOUGH: That's -- that's correct.

5 JUSTICE SOUTER: We would never know about  
6 it if the -- if the misdemeanor, or jaywalking offense,  
7 was not committed in the officer's presence.

8 MR. McCULLOUGH: That's right. In the case  
9 --

10 JUSTICE SOUTER: That's not a problem for  
11 you here, but that is a limitation on what we have held.

12 MR. McCULLOUGH: That's correct. In  
13 Atwater, a jaywalking arrest is constitutionally  
14 permissible. Atwater did not reach the in-the-presence  
15 question, and it is not presented here because the  
16 offense occurred in the officer's presence. So --

17 JUSTICE SCALIA: Mr. McCullough, what is  
18 here, for some reason the Commonwealth did not cite  
19 Cooper v. California, which I can't understand unless  
20 you agree with your friend that it has been overruled by  
21 later cases.

22 MR. McCULLOUGH: No. I think -- we relied  
23 on Greenwood, and so I --

24 JUSTICE SCALIA: I understand. Why didn't  
25 you cite Cooper v. California?

1           MR. McCULLOUGH: I don't have an explanation  
2 for that. We certainly think it strongly -- as the  
3 United States points out in their brief, that it  
4 strongly supports our position.

5           And as the lower courts have noted when  
6 facing a similar argument, you've already held that when  
7 it comes to a search, that under Greenwood and Cooper,  
8 that State-law considerations aren't going to be what  
9 the constitutional inquiry turns on.

10           Why would you have this incongruity where  
11 that's true in Greenwood and Cooper with a search of a  
12 residence or an automobile but then you have a different  
13 rule when it comes to an arrest? The States have been  
14 handling this problem, but it's an issue of State law.

15           And the State here has never held, going  
16 back to 1924, that a violation of State law rises to the  
17 level of a constitutional arrest and -- or, excuse me --  
18 that -- let me restate that.

19           That a violation of State law warrants the  
20 exclusionary rule at the State level. So when the  
21 legislature enacted this, they contemplated that  
22 specific set of remedies.

23           So, at the end of the day, we just ask the  
24 Court to adhere to its jurisprudence; that the arrest is  
25 constitutional because it is made with probable cause.

1 There was a violation of state law, but it wasn't a  
2 constitutional problem.

3 And so we would ask the Court to reverse the  
4 judgment below.

5 JUSTICE GINSBURG: Mr. McCullough, there is  
6 one thing that I was curious about. It is this Virginia  
7 law that allows the custodial arrest pursuant to an  
8 order of a general district court.

9 MR. McCULLOUGH: Yes.

10 JUSTICE GINSBURG: When is that used?

11 MR. McCULLOUGH: That is used with some  
12 frequency, and we certainly saw an increase in the wake  
13 of the Moore decision. I can't go county by county and  
14 city by city, but it has common currency.

15 And one example is Portsmouth evidently,  
16 although it is not clear -- we have gotten conflicting  
17 answers. When Mr. Moore was arrested, there is no such  
18 order. But a few miles down the road the City of  
19 Virginia Beach does have such an order.

20 And this just shows the complexities the  
21 Court would be stepping in where, if Mr. Moore is  
22 arrested in Portsmouth for the exact same crime on the  
23 exact same facts, it is unconstitutional under Moore's  
24 rule.

25 But he goes a few miles down the road to the

1 City of Virginia Beach, and the arrest is perfectly  
2 constitutional because the district court has entered  
3 such an order. And it just doesn't make sense, as the  
4 Court noted in Whren, for constitutional provisions to  
5 be so variable.

6 JUSTICE GINSBURG: What would be the basis  
7 of a -- can a district court enter such an order just  
8 because it thinks it's a good idea? Are there any  
9 grounds in --

10 MR. McCULLOUGH: The statute -- I see my  
11 time has expired. The statute at issue, 46.2-936, does  
12 not really lay out particular criteria. So it is -- and  
13 the issue hasn't been litigated in the Virginia courts  
14 as to the criteria that's required. But it seems to be  
15 broad discretion by the general district judge.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 The case is submitted.

18 (Whereupon, at 11:05 a.m., the case in the  
19 above-entitled matter was submitted.)

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