In the

Supreme Court of the United States

HAROLD J. CARDWELL, WARDEN,

Petitioner

vs

ARTHUR BEN LEWIS

No. 72-1603

C.T.

Washington, D. C.
March 18, 1974

Pages 1 thru 61

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ARTHUR BEN LEWIS

Washington, D. C.

Monday, March 18, 1974

The above-entitled matter came on for argument at 11:46 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LEO J. CONWAY, Assistant Attorney General of Ohio, Columbus, Ohio 43215 For the Petitioners

ANDREW L. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530
As Amicus Curiae

BRUCE A. CAMPBELL, ESQ., Campbell, Schwarzwalder and Sanford, 40 West Gay Street, Columbus, Ohio 43215
for the Respondent Appointed by this Court

C O N T E N T S

C O N T E N T S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1603, Cardwell versus Lewis.

Mr. Conway, you may proceed when you are ready.

ORAL ARGUMENT OF LEO J. CONWAY, ESQ.,

ON BEHALF OF PETITIONERS

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

We seek the review of the decision of the United States Court of Appeals for the Sixth Circuit which affirmed the judgment of the United States District Court for the Southern District of Ohio, Eastern Division, issuing a writ of habeas corpus effecting Respondent's release from the custody of the Ohio authorities pursuant to his having been convicted of the crime of murder in the first degree.

The basis for the finding, that even though the arresting officers had reasonable grounds to believe that the evidence seized was and had, in fact, been used in the commission of the crime itself, that they had had an ample opportunity to procure a warrant for the seizure of this automobile and, therefore, that the seizure of the automobile was per se unreasonable.

I should like, if I may, to describe the conditions leading up to the seizure of the automobile.

On July 19, 1967, a man by the name of Paul

Radcliff, who was a Certified Public Accountant, was brutally murdered. Now, prior to his murder, he had been requested over the telephone to come to the City of Delaware, Ohio to seek or to give an interview pursuant to his future employment as a CPA for this company.

At that same time, this anonymous caller, who described himself as being an officer of the IBEX Company, asked Mr. Radcliff if he would stop on the way in at a factory building which had been abandoned to look over the factory building to determine whether the company might use it in future expansion.

As he got out of his automobile at approximately quarter to 9:00 on the morning of July 19th, he was greeted by three blasts from the shotgun which immediately took his life. His body then was dragged over an embankment. His car was shoved over an embankment and later on, because of the fortunate and inadvertent, really, inspection of the river by a game warden, the car was found. The police were informed and after the police had been informed, they went out and found the body.

Now, immediately, of course, an investigation took place and a neighbor across the street had heard three shots but had thought nothing about it because in this area on numerouse occasions, the kids were hunting, shooting off guns and it was rather common. But shortly afterwards, she heard

the screech of times and gravel being thrown up on the fenders or underneath the fenders of the car and she went to the front door and she did, she observed a gold automobile which she describes as a 1967 or 1968 Oldsmobile accelerating towards Columbus.

Now, in the investigation that followed, the Delaware County authorities discovered that Arthur Ben Lewis, the Respondent herein, owned such an automobile. They also learned that, in the process of their investigation, that he had looked at this building himself and was thoroughly familiar with it because he thought he might procure this building for the purpose of setting up a club.

They also knew that he went by this building every day of his summer occupancy practically because he had two swimming pools in the near vicinity.

They then found out that he had also been attempting to sell his -- one of his businesses -- of which he had many, to some people who had employed Radcliff as an auditor to inspect the books of the company to determine whether, in fact, the company was sound.

A telephone call made to these people a half-hour after the murder took place, after the shots had been fired which we assume was the time that the murder took place, the lady whose husband was buying the business received the call again, from an individual saying that he was Paul Radcliff,

that he had examined the books of the company, that he was going out of town for a few days and that the company was very sound and he recommended that the purchase go through.

Now, based upon all of these -- all of this knowledge on the part of the officers, an arrest warrant was procured for his arrest on the 20th of October, 1967.

It goes without saying that at the time, although -- had they known that they were going to arrest him on this particular day, that it may have been said that they could have gotten a search warrant but -- for the automobile, which they knew, by that time they had -- it had been used or they had every reason to believe it had been used in pushing his car over the embankment and which had been damaged on the front end because there were paint, yellow or gold paint flecks on the back of the car that had been pushed over the embankment.

QUESTION: Who issued the arrest warrant, Mr. Conway?

MR. CONWAY: The arrest warrant was issued by the justice in Delaware County, Ohio wherein the crime was committed.

QUESTION: And that was serveable anywhere in the state, wasn't it?

MR. CONWAY: That's right. The arrest warrant was serveable anywhere in the State of Ohio. But --

QUESTION: The same judge could have issued the search warrant?

MR. CONWAY: I beg your pardon?

QUESTION: The same judge had authority to issue a search warrant?

MR. CONWAY: The same judge had authority to issue a search warrant, your Honor, but only for those things that they wanted to search in the County of Delaware.

In other words, in Ohio, a search warrant only may be served in the county wherein it was issued.

QUESTION: It was served, you say, by what, now a common pleas judge?

The warrant was not issued by a --

MR. CONWAY: By a municipal judge.

QUESTION: By a municipal judge.

MR. CONWAY: That's right. That's right, your Honor, but it wouldn't have made any difference because had a common pleas judge of Delaware County issued a search warrant, it would have been invalid in Franklin County, where the car ultimately was seized.

QUESTION: Right.

QUESTION: Well, did I understand that at the time the arrest warrant was obtained, the authorities, at least some of the authorities, already knew that there was something involving the gold automobile?

MR. CONWAY: That is right, your Honor.

QUESTION: Did they know -- had they found the automobile had been pushed over the embankment?

MR. CONWAY: Oh, that was found on the day of the crime, your Honor. The automobile that was initially pushed over, that was the Paul Radcliff's automobile --

QUESTION: Yes.

MR. CONWAY: -- which had attempted to be concealed, had the gold paint scrapings on the back bottom of it. That was found on the day of the murder itself.

QUESTION: And to get a warrant, to search the -- seize and search the gold automobile, to whom would the authorities have to apply to get that warrant?

MR. CONWAY: Well, they would have had to apply to a Justice in the county wherein they knew the automobile was.

QUESTION: And what county was that?

MR. CONWAY: Ultimately, the car was seized in Franklin County and --

QUESTION: Is that adjoining Delaware?

MR. CONWAY: Immediately adjoining Delaware County.

QUESTION: Is there any reason why at the same time they went to a municipal judge to get the arrest warrant in Delaware they did not go to a municipal judge in

Franklin to get a search warrant?

MR. CONWAY: Yes, there is, your Honor, because they didn't know where the automobile was.

Now, in the State of Ohio, and I think this is generally true -- as a matter of fact, it is required by the Constitution.

QUESTION: Well, when did they find out where the automobile was?

MR. CONWAY: At 5:00 o'clock on the afternoon of the -- well, 5:00 or 5:30, the record is not exactly clear, but it was on the late afternoon of the 20th day of October.

QUESTION: Following the arrest?

MR. CONWAY: Following the arrest.

QUESTION: And was the arrest the same day the arrest warrant was obtained?

MR. CONWAY: That is right. That is right.

QUESTION: And how did they find out?

MR. CONWAY: Well, at the time that he was arrested, Mr. Lewis took a ticket out of his pocket. Now, there is some argument as to exactly what happened, but --

QUESTION: A parking ticket?

MR. CONWAY: A parking ticket.

QUESTION: For a parking lot?

MR. CONWAY: That is right, your Honor.

And the parking lot was two doors from the office

of the Attorney General wherein the arrest was made and he said, "Here is my parking ticket."

Now, there is really no substantial difference as to the discovery of parking tickets because at the time he pulled this out, he says that he gave it to his lawyer and says, "You take my car and take it to my family."

The officers say that he said, "Here, here is the ticket and you take my car and take care of it."

This is one of the debatable things and -- but the significant part is that they did not know where the automobile was until they saw the parking ticket and until he, himself, indicated the location.

QUESTION: Is there any reason once they got the parking ticket, whatever version is the correct one, once they discovered where the automobile was, any reason they didn't then go to a municipal judge in Jackson County and get a search warrant?

MR. CONWAY: I think there was a very good reason, your Honor. As a matter of fact, they knew that Mr. Lewis had had the front end of his car fixed, attempting to conceal the fact that it was involved in a crime. They also knew, and he said, "I want this car taken to my family."

Now, if they had not seized it right then and it had been turned over to his family, they probably would have never seen the automobile again, which they definitely wanted

very badly as evidence in the murder trial.

QUESTION: How far was the judge from the Attorney General's office?

MR. CONWAY: Well, I would say within a half a mile, your Honor. The municipal court is well within a half a mile of the Attorney General's office where this happened.

QUESTION: And there was a judge available?

MR. CONWAY: I am sure there would have been a judge available. But had they gone and gotten the search warrant and had not done what they did and that car had been driven away it would have done them no good.--

QUESTION: They couldn't stop the car from being driven away?

MR. CONWAY: Well, certainly they can, your Honor. They could have put policemen over around and on top of that automobile and, of course, it is our contention, then, that had they so done, then they would have deprived this man of the possession of his car and the State of --

QUESTION: For about 15 minutes.

MR. CONWAY: That is right.

QUESTION: And he could have sued for that, I guess.

MR. CONWAY: I guess he could have. I guess he could have.

QUESTION: That would be horrible, wouldn't it?

MR. CONWAY: Well --

QUESTION: Would you say that would constitute a seizure of the car at that time? If they put four policemen, hypothetically.

MR. CONWAY: It is my contention, your Honor, Mr. Chief Justice, that had they put a policeman on the car at that time in order to get seizure, that they, in effect, would have been seizing it right then.

QUESTION: Who had the parking ticket?

MR. CONWAY: You mean at the time that the car was seized?

QUESTION: Yes.

MR. CONWAY: Well, it had been turned over by the attorney to the arresting officers.

QUESTION: The police had it.

MR. CONWAY: And they then --

QUESTION: I take it the keys were in the car. Is that it?

MR. CONWAY: There is also some difference in that. It is contended that he also turned the keys over.

QUESTION: To the police?

MR. CONWAY: To the police at the same time he turned the parking lot ticket over and as a matter of fact, that is actually --

QUESTION: Now, if that were true, who was going to drive it away? Well, answer it --

MR. CHIEF JUSTICE BURGER: We'll resume there after lunch.

[Thereupon, a recess was taken for luncheon from 12:00 o'clock noon to 1:01 o'clock p.m.]

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Conway.

MR. CONWAY: Thank you, Mr. Chief Justice, and may it please the Court:

Just prior to the break, I was was asked a question, I believe, who could have driven the car away when the keys were in the possession of the officers?

Of course, there are more than one set of keys to many cars and it is our contention that the family of the individual, Mr. Lewis could have as easily gone in and taken the keys. They would have had keys. They could have driven the car away as well by using those keys as the keys that the police may have had.

QUESTION: Without the parking ticket?

MR. CONWAY: Not without the parking ticket. But I am assuming, of course, that the keys and the parking ticket went together, regardless.

QUESTION: I thought you said the police had the parking ticket.

MR. CONWAY: The police did have the parking ticket. Of course, that is our point, Mr. Justice Marshall, that the police having had the parking ticket placed them in the same position as to take the car -- as it would had they put an officer on the car to guard it.

As an example, I think that the court of appeals and the district court in this case based their entire decision on the Coolidge case that was decided by this Court and which they indicated was on all fours with Coolidge, but as a matter of fact, there was no similarity between the facts in this case and Coblidge, except that they indicated that they knew that they wanted -- the officers in this case wanted the car prior to the time the arrest was made, the same as that in Coolidge but the difference was in Coolidge and in this case, that in Coolidge, the officers knew where the car was. They knew its description. All they had to do, as the Court indicated, was to get a valid search warrant to go get the car.

In our case, the officers, at the time that they made the arrest, did not know where the car was and the only way that they could have gotten a search warrant and seized the car prior thereto, would have, perhaps, thwarted their entire investigation and this Court definitely has indicated that that was not necessary in the Hoffa case, in Hoffa v. United States. The fact of the matter is that at

the time that, the first time that the police knew where the car was, was right when the arrest took place or immediately thereafter.

Now, again, stressing the Ohio law, in Ohio, there is no search warrant provided for an automobile. A search warrant may only be issued for a home or place and an automobile, I think, would fit under the term "effects," as used in the Constitution and if they want an effect, they want to seize or search an effect, they must, with specificity, indicate where that effect is before they can get a search warrant to search for it and as a matter of fact, since this is not a part of the record, but that is the way it is done today, even though the police have searched, have seized an automobile in Columbus, Ohio and it is in the police pound, they get a search warrant, actually, to search it and the place, of course, the location, is the police pound.

So they, in effect, are serving the search warrant upon themselves.

The other aspect, of course, of Coolidge that the Court indicated or disagreed with insofar as argument was concerned, is that there was no exigency and, of course, that gets us back to the point that anybody in the family could have removed the automobile and hence, deprive the state of the use of that automobile as evidence.

Now, we attempted, in the court below, to indicate or to base this search upon a valid arrest. There isn't any question in this case as to the validity of the arrest. The district judge, as a matter of fact, made a footnote indicating that the arrest warrant was not good in that it did not follow the federal requirements for arrest warrants. But certainly, in the State of Ohio, that arrest warrant was perfectly valid and in the State of Ohio, all the arresting officer must do, or the man making the affidavit for the search warrant, is to indicate that AB killed CD and that he has reasonable grounds to believe that he did and that is exactly what the search warrant provided. It is not required under Ohio law that he indicate how and where and who said and whathaveyou, like, as a matter of fact, is required in a search warrant.

Now, at the time that Mr. Lewis, having been arrested, pulled the parking ticket out of his pocket and said, "This is the parking ticket to my car," the police certainly had a right, in our opinion, to seize that parking ticket because they knew it was a parking ticket for the vehicle that they wanted as an instrumentality or as evidence in the crime and, therefore, they, having had taken this parking ticket validly, they had a right, a continuing right, to exercise jurisdiction over the automobile.

Incidently, this was -- this automobile was

parked on a private parking lot and there was no reason that once that the police knew where the automobile was, that they could have gone next door and taken some paint off of the automobile in itself. It was in a public place. It was in plain view.

QUESTION: Was the lot open to the public? Was it a typical parking lot you just drive into and pay to park?

MR. CONWAY: That's right, your Honor.

QUESTION: Would that not have been equivalent to a seizure if they had taken part of the car?

MR. CONWAY: I do not believe so, your Honor.

QUESTION: Even a small part like the paint.

MR. CONWAY: They would have been seizing something in plain view, is our position. Now, the court below disagreed with that theory because they said that they had to go down a couple of layers in order to do the real comparison, which I agree with. I mean, they did have to go below the seeable part of the paint on the car in order to make the chemical analysis to determine whether or not the same paint or the same type of paint was comparable to the other but, nevertheless, I believe that, assuming for the sake of argument that they had marred the car, they might have actually been liable in the court action for the scratching of the automobile but that did not in any way prevent them from taking what they believed to be valid evidence to use in

the murder itself.

When the motion to suppress was filed in this case, in the trial court, the only precedent that the trial court had at that time, recent precedent, was, of course, Cooper and Preston and the Preston case, certainly, was very dissimilar to the case in our situation for the simple reason that this Court held in Preston that the reason for which the car was seized had nothing whatsoever to do with the crime for which the defendant had been arrested but, certainly, in this case, there was every reason to believe that this was evidence of the crime itself and the police wanted it.

Now, the trial judge relied strictly on Cooper in making its determination on the motion to suppress that the car was validly seized. The Court said -- in Cooper, the Supreme Court observed that the car in that case was seized and impounded because of and in connection with the crime for which Cooper was arrested.

In this case, the car was seized, impounded and searched because of the crime for which the defendant was arrested and then the Court went on to say that it found that, and, incidently, the Court in that case, did hold that they believed that the seizure of the parking ticket was, in effect, constructive seizure of the automobile, but the Court said further that this, in its opinion, rendered the seizure to have been, in all respects, reasonable.

The Supreme Court of Ohio, likewise, found the search to be reasonable and I believe by the time it got to the Supreme Court of Ohio, this Court had decided Chambers v. Maroney, which gave impetus, I believe, to the decision in Cooper.

Therefore, it was held that if these officers had a right to take that car initially as evidence in the crime on the parking lot, that they had a right, therefore, to take it to the police impounding area and do such searches as necessary.

Now, at no time did they ever enter the inside of the car for any evidence that was subsequently disposed of in this case.

I should like to reserve a few minutes for rebuttal.

QUESTION: Just a moment, Mr. Conway. This case comes to us on federal habeas.

MR. CONWAY: Yes, sir.

QUESTION: And I take it from your brief, you are not questioning the integrity of Kaufman against the United States?

MR. CONWAY: No, your Honor, I'm not.

MR. CHIEF JUSTICE BURGER: Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

AS AMICUS CURIAE

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

The issue in this case is whether the Fourth Amendment was violated by the warrantless seizure of Respondent's car and the removal of a small paint sample from it, which was subsequently introduced in evidence against him at his murder trial.

Now, we have briefed this case and are arguing this case on the premise that there was, indeed, opportunity for the police to get a warrant and that there was no emergency or other justification for their not doing it in this case.

We are advancing the contention that they were not required to get a warrant to do what they did in this case.

Now, we are dealing here, as in almost every case in which the issues focuses, on the warrant requirement with police action that can't be deemed unreasonable in the normal sense of the word since, if it were unreasonable in that sense, no warrant could issue to authorize the action that they did.

So, was it unreasonable here for the Ohio law enforcement officers, knowing the facts that my colleague

has just recited to you, to believe that Respondent's automobile should be seized and examined for evidence that they had every expectation of finding and that would be highly probative at his anticipated murder trial? Obviously not.

Similarly, was it unreasonable of them to remove a paint sample from Respondent's car to compare it with the foreign paint found on the car of the deceased? Surely, a failure to pursue such a line of inquiry would have been not just unreasonable, but grounds for dismissal for gross incompetence.

So why, since Respondent was constitutionally protected only from an unreasonable search or seizure, are we here today?

It is because this Court has determined that in many circumstances the kind of reasonableness that I have been talking about is not enough, that there is an over-riding policy favoring antecedent judicial determinations of reasonableness in the issuance of warrants authorizing searches and seizures before certain kinds of police intrusions into the affairs of a citizen will be countenanced.

Now, in many cases this policy has been expressed in terms of a per se rule of presumptive unreasonableness of warrantless seizures accompanied, however, by a collection of exceptions, each of which has its own rationale but which,

taken together, leave a substantial area of uncertainty today, 185 years after the adoption of the Fourth Amendment about when a warrant is required.

We suggest that there is a sound, underlying rationale that runs through the Court's efforts in this area but that meaningful understanding of the unifying principle is beclouded by thinking in terms of a per se warrant requirement with a, what I might call a "Procrustean Hotel" of exceptions.

This approach tends to lead the Court into the inquiry whether there was a reasonable opportunity to get a warrant, rather than whether the search should be considered reasonable, although, as the Court stated in Cooper against California, the latter is the constitutionally relevant standard.

Now, to identify this unifying rationale, we must ask why would the Court ever call a concededly reasonable search unreasonable because of the absence of a warrant?

It can only be because there are some circumstances in which it is simply not tolerable for the police to act without a prior evaluation of their reasons by a neutral and detached magistrate.

So we urge the Court today to adopt a functional analysis of the warrant requirement. The per se rule which says that a search is unreasonable without a warrant, makes sense

when we are talking about searches of houses, as was eloquently stated in the Johnson and the McDonald cases. It makes sense when we are talking about intercepting conversation or intercepting mail, where substantial privacy expectations are being defeated.

This point was emphasized in Katz. Does it make sense, however, in the case of the automobile?

Now, I suggest that it is more than just a freakish coincidence that this Court has never, insofar as I am aware, struck down a warrantless, probable cause search of an automobile with the sole exception of the Coolidge case and in Coolidge, there was a critical extra ingredient, the intrusion onto Mr. Coolidge's private property.

Now, the reason for this goes back to the real values that underlie the Fourth Amendment protections which were stated by Justice Brennan in Warden against Hayden, page 304 of 387 U.S. he said, "The premise that property interests control the right of the Government to search and seize has been discredited. We recognize that the principle object of the Fourth Amendment is the protection of privacy rather than property and have increasingly discarded fictional and procedural barriers rested on property considerations."

Accordingly, we submit that whether a search or seizure without a warrant should be held per se unreasonable,

depends on a determination of whether the privacy interests at stake are of such magnitude that the interposition of a neutral and detached magistrate should be required to make the probable cause determination.

Now, in approaching this analysis, I think the principle distinction that we would draw is the distinction between searches and seizures. While, like the Admiral in H.M.S. Pinafore, I am not sure that I am prepared to say never, I find it hard to imagine a situation in which a seizure, as such, should require a warrant if it is otherwise reasonable as distinct from a search because when we are talking about a seizure, we are talking about an invasion of the individual's property interests only.

A search, on the other hand, does involve, almost by definition, some kind of intrusion into its privacy interests.

In the area of searches, therefore, I think the Court ought to weigh what privacy interests are at stake, are these privacy interests such that, in determining whether the search was reasonable under the First Clause of the Fourth Amendment, the Court will impose the warrant requirement.

Now, the per se approach, I think, leads to some --

QUESTION: Mr. Frey?

MR. FREY: Yes?

QUESTION: You are talking in terms of privacy,

but the Court, in Cox, did say that the Fourth Amendment can't be translated into a general constitutional right to privacy, didn't it?

MR. FREY: Well, but it recognized also in Katz that property interests, too, are protected by the Fourth Amendment. I am not -- my argument is really addressed to the case as here, where the infringement is on property interests of the citizen. My suggestion is that, while those property interests are protected by the Fourth Amendment, they are protected by the reasonableness requirement and they ought not -- they don't need the additional protection of the per se warrant rule which this Court has spoken about but has frequently declined to apply in cases where it clearly seemed improper to deem a search unreasonable because there was no warrant.

QUESTION: I understood your privacy argument to be directed to distinguishing this case from Coolidge, where, in order to take the car in the Coolidge case, they had to invade, at least, the privacy of a man's home and dwelling and garage and here it was a public parking lot and no privacy, no expectation of that kind of privacy.

MR. FREY: That is true, although I think our argument -- that consideration is a consideration which distinguishes Coolidge from this case in two respects; in Coolidge, they intruded onto a private property and in

Coolidge they went into the body of his car to remove dust and sweepings from the floor of the car.

What I am suggesting, however, is a general approach to this problem which has come up so many times and where it is difficult to perceive a unifying thread of analysis and I am suggesting that what really motivates the court ordinarily is that they see, in some instances, the kind of intrusion into privacy as in Katz, which the court is simply not prepared to allow the police to do, just on the basis of their own reasons for doing so, even if those reasons are subsequently found to have been sufficient.

Now, in the -- in our brief we discuss the White case, which the Sixth Circuit decided some months after they decided Cardwell. Now, in the White case, the Defendant had been arrested for passing counterfeit currency and they located his car which presumably -- if, in fact, the reasons that they had to believe that he had used it to transport counterfeit currency were valid, would be subject to forfeiture.

They went into the glove compartment of his car and they found their other conterfeit currency which was introduced in evidence against him at his trial.

Now, the Court of Appeals, instead of looking at what it was that the police were doing and looking at what the privacy interests of the citizen were that were at stake,

as they did not do in the Cardwell case, either, the Court of Appeals said, well, they went in for some purpose other than looking for evidence of a crime, so it is all right for him to do the very same act.

Now, I would suggest that, for instance, in Cady against Dombrowski, where a somewhat similar rationale was utilized, that had they known that the gun, or believed reasonably that the gun was used in a murder, that should not detract from the right which this Court recognized them to have to go into the car without a warrant in order to seize the gun. If it does, I think it inverts the -- what seems to me to make sense or to be reasonable in the sense that the term was used in the Fourth Amendment.

Now, I'd like to address a comment briefly to the Almeida-Sanchez case and to Justice Powell's concurring opinion in that case because there there was a question of whether a search on less than probable cause might be deemed nevertheless reasonable and I think there it was the absence of probable cause which made it necessary to seek a warrant as a means, in effect, of reinforcing a reasonableness in the normal, ordinary sense of the word for the police to make this intrusion on citizens driving along the road near the border.

Had there been probable cause, I don't think the per se warrant requirement would have been necessary or

properly applicable.

Now, we also mention in our brief some of the historical factors that are in the background and I think these are some of the same factors that Justice Douglas discussed in his dissenting opinion in Matlock, although we read them to have a different impact on this case.

Now, we recognize the Court is not bound strictly by the understanding of the framers in drafting the Fourth Amendment. In some sense, the Constitution is a living instrument and we are not suggesting that it should be narrowly constrained to 18th century circumstances.

However, we think that it is clear that the concern was with the kind of invasion of privacy that is entailed in going into a dwelling, that the general warrant concern was with going into the man's house and we think that the statute of 1815, which was cited in the Carroll case and which is one illustration of early congressional understanding of the restriction on searches and seizures, is very significant.

This was the statute which permitted Customs searches, not just at the border, but any place within the Customs district and it made a distinction between going into a house and searching a vehicle or vessel or beast.

In the latter case, not only did it provide that a search could be made on mere suspicion, as distinct from the

warrant requirement for searching in a house, but it had a provisio which Chief Justice Taft did not quote in the Carroll opinion, but which we think is significant. It is quoted at page 27 of our brief and it says, "Provided always the necessity of a search warrant arising under this Act shall in no case be considered as applicable to any carriage, wagon, cart, sleigh, vessel, boat or other vehicle of whatever form of construction employed as a medium of transportation or to packages on any animal or animals or carried by man or on foot."

Now, that statute was signed into law by the father of the Fourth Amendment, James Madison and I think it sheds some significant light on the understanding of the framers with regard to the Fourth Amendment.

So, to sum up, we suggest that in this case, the seizure of the car and the removal of a piece of paint from the car, constituted seizures and not searches and that the Court should recognize, as we think sound analysis compels, that a seizure does not ordinarily, barring some exceptional circumstances not present here, have to require the antecedent justification of a warrant in order to be reasonable but, rather, its reasonableness can be assessed on the basis of what the police officers knew, what justification they had for going and doing what they did. And in this case, we submit that they had every justification .

If there are no questions --

MR. CHIEF JUSTICE BURGER: Very well, Mr. Frey.

Mr. Campbell.

ORAL ARGUMENT OF BRUCE A. CAMPBELL, ESQ.,

ON BEHALF OF RESPONDENTS

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

As I read the briefs of the Petitioner in this case and of the Solicitor General, and as I listen to the oral arguments of my brothers, Mr. Frey and Mr. Conway, I am struck repeatedly by the aptness of the observation of Mr. Justice Frankfurter in his dissent in Rabinowitz, and I paraphrase to some extent here that where one comes out on a case depends very much on where one goes in and that it makes all the difference in the world whether one approaches the Fourth Amendment as a safeguard against recurrent abuses or merely as a provision dealing with a formality.

It would seem to me that both the Petitioner and the amicus in this case seem to take as granted that it is somehow automatically desireable that as many areas as possible be excised from Fourth Amendment protection and that police action, wherever possible, be taken out from under the coverage of that Amendment and they do that in this case without devoting in their briefs or in their oral argument a single word as to why there was, under the facts of this

case, a specific burden upon law enforcement, a specific risk to be taken by the procuring of a warrant in this case and they also do this, it seems to me, without stopping to consider the potentiality for executive abuse that in inherent in the positions which they urge.

Respondent, of course, approaches this case from the perspective of the very fundamental nature of the Fourth Amendment.

I would like, before I begin, to clear up, I think, some factual difficulties that have arisen from oral argument. Mr. Conway, I think, has supplied some details of the murder itself, which are at least speculative in the record and I think that there are some other inaccuracies that should be corrected.

First of all, it is claimed that the witness at the -- near the murder scene who saw the departing automobile, claimed it to have been a gold '67 or '68 Oldsmobile. In fact, she said that it was a tan or beige car, that it was of a make similar to her own Corvair but she was not aware of what specific brand of car it was.

Secondly, with regard to the phone call that was received by the wife of the person who was purchasing the business, Mr. Smith, who had hired the decedent, Mr. Radcliff, to examine the books, the record of the case will disclose

that the caller, whoever that caller may have been, did not specifically say, "I have examined the books of Graham's Auto Parts,"which was the name of the business that the defendant was attempting to sell to Mr. Smith. It merely said, that witness at the trial, merely claimed that the caller said "I have examined the books and they are in A-1 shape."

Now, it is also a fact in the record that the accountant was the general accountant for Mr. Smith, not just the accountant for the specific purpose of this particular transaction so I think that the state has inferred more than it should from that telephone call.

One final matter. It has been suggested that the person searching the car on the day after it was seized did not intrude upon the interior of that car.

In fact, he did. He opened the trunk of that car and looked in and observed a nearly new tire and he testified about this at trial.

Now, the reason that that has not been emphasized in this appeal, or throughout the course of this case, is that there was other testimony concerning the tires, whereas the only testimony concerning the paint came as a result of the taking of the paint from the automobile at the time of the search.

It seems to me that we have here, essentially,

two distinct characterizations of the case. The State of Ohio says that this was a case in which almost all of the traditional exceptions to the warrant requirement were present.

They claim consent. They claim that there was incidency to the arrest. They claim that there was an urgency of circumstance that necessitated a warrantless seizure .

The Solicitor General takes quite a different view. He says he explicitly denies that there were exigent circumstances here and he tacitly seems to concede that there was no consent and no incidency to the arrest. But, he argues, that one has less than a full-fledged Fourth Amendment interest in his automobile and that the scraping of the paint in this case was not a seizure as such.

With respect to probable cause, there seems also to be a disagreement. The Solicitor General asserts unquestionably that there was probable cause, although he does not explain this at any point.

The State of Ohio seems to be in doubt in its own conclusion -- page 35 of its brief -- it states that "While the authorities in our case had information relating to the car prior to the seizure, there is no indication that such information amounted to probable cause to obtain a warrant.

I propose to examine in turn, first, the more traditional exceptions to the warrant requirement that are

raised primarily by the state, specifically, consent, search incident and exigent circumstances and then move to what I perceive to be the more novel exception which the state indirectly, and the Solicitor General, more specifically, has asked this Court to countenance.

With respect to the issue of consent in this case, I would first point out to the Court that that issue is, at best, clouded upon the record. There are essentially two versions of what happened on October the 10th, 1967, which was the day when the Defendant was asked to come to the office of the Attorney General. He appeared. He was questioned throughout the day, despite the fact that the officers already at that time had an arrest warrant for first degree murder for him. A tape recording was made of that interrogation session and I'll refer to that later.

The Respondent says that at that time the -- that he attempted only to turn over the keys and the claim check of his automobile to his attorney, Mr. Scott, and this is verified by his two attorneys, Mr. Tingley, who is the first attorney, and Mr. Scott as well.

Mr. Tingley testified in the motion to suppress hearing prior to the trial and Mr. Scott testified in the evidentiary hearing in the district court.

Now, the investigating officials here claim that what happened was that the Defendant made a request that his

car be kept for "safekeeping" but Sergeant Lavery himself conceded that this request was made to"no one in particular." That may be found on page 58(a) of the Appendix and he seems -- that is, Sergeant Lavery seems also to be at least confused as to when exactly this occurred. At a pretrial motion to suppress, he thought that it was probably before the Defendant's counsel had arrived at the office of the Attorney General.

Subsequently, at the evidentiary hearing, he seemed to be sure that it was after Counsel had arrived.

Now, the district court examined, at some length, I think, all of the facts surrounding this alleged consent and determined that even if it took these facts in the light most favorable to the state, which it was not required to do, even under that construction, there was not sufficient consent to allow the taking of the automobile here.

The state court did not find consent, either.

The trial court rested its decision on a search incident theory.

The Ohio Supreme Court went off on what could only be described as an instrumentality of the crime theory, interestingly enough, never even citing Warden versus Hayden, which had been decided some two years prior to that.

The burden of proving consent here was clearly on the state, as this Court has said repeatedly, and most

recently in the Schneckloth decision and in the Matlock decision.

It seems to me that to imply a full waiver of Fourth Amendment constitutional rights from what, at most, could be characterized as an expression of concern about one's property, would be the ultimate paradox. If it is a desireable goal to foster citizen cooperation with law investigation -- and Mr. Lewis, in this case, was most cooperative, it hardly seems to be in furtherance of that goal to allow sweeping interpretations to be made of a simple request of the nature of the one here.

Now, perhaps one --

QUESTION: Mr. Campbell?

MR. CAMPBELL: Yes?

QUESTION: Do you understand here, in this argument, in this Court, that either Mr. Conway or Mr. Frey are relying on consent? Is there a theory that this is a valid seizure?

MR. CAMPBELL: Well, your Honor, in the brief for the State of Ohio, consent is raised at least in the way that the state presents its case and consent is raised in another way by the Solicitor General. He proposes that though there may not have been enough consent here for a seizure of the automobile, there was somehow enough consent that the automobile could be taken into custody and then searched.

QUESTION: I may have, perhaps, missed it or misunderstood it. I didn't understand that there was any reliance on consent as such in this.

MR. CAMPBELL: I think the case of the --

QUESTION: The holding is against them in both of the federal courts.

MR. CAMPBELL: Yes, it is, your Honor.

QUESTION: I didn't understand that that was being attacked.

MR. CAMPBELL: I think in the case of the Solicitor General's brief that it is something of an argument in passing, but he does raise the possibility that there may have been sufficient consent here to merit a taking into custody, and then he argues from that that what followed was not really a search at all and that it was justified very much in the line that this Court justified Cooper.

I submit that this is pure sophistry, that consent to search is certainly no different than consent to take into custody.

Now, with respect to the incidence to arrest, the Petitioner here proposes a nexus between the arrest and car seizure based, not upon the physical proximity of the Defendant and his automobile, but rather upon his possession at the moment of arrest, of a parking lot claim check for the car and, perhaps, the keys. I should point out that there is

a dispute in the record as to whether Mr. Lewis had the keys at the time of the arrest or not. Mr. Lewis says that he did. Other witnesses said that only the claim check was, apparently, turned over and it may have been a parking lot where the keys were kept at the parking lot.

QUESTION: Would it make any difference to our questions here, do you think?

MR. CAMPBELL: None, your Honor, from my point of view.

In effect, I think the Petitioner is urging a doctrine of constructive possession whereby what one has on his possession is a part of or a means of access to some other object, will allow the state, then, to seize that other object no matter where it may be.

I believe this to be an absurd extension of the search incidency doctrine and that it is founded upon no prior case law. It would seem to me that, as the district court held, that incidency in this case must be judged upon pre-Shimmel standards, that Rabinowitz is probably the controlling case, but even in Rabinowitz, the Court held that -- held only that a tiny office in which the defendant was arrested and which was under his immediate and complete control, would be searched.

The Preston case, which, again, was decided before the facts of this case occurred, involved an

automobile on the street and in that case the Court said that once an accused is under arrest and in custody, then a search made at another place without a warrant is simply not incident to the arrest.

QUESTION: Mr. Campbell, how about the -- maybe there have been cases of this kind, I don't have any in mind, let's assume a constitutionally valid arrest and a -- therefore, if a search incident thereto was a constitutionally valid search, assume further that in the process of that search, there was found in the pocket of the arrestee, a key with a number on it to a locker down in the Union Station. Do the police have to get a search warrant to search the locker or may they simply use the key and go down to the Union Station and open up the locker? Are there any cases of that kind?

MR. CAMPBELL: I am not aware of any, your Honor.

QUESTION: I am not, either.

MR. CAMPBELL: I believe that that case would be precisely the same as this case.

QUESTION: It would be very close, analytically, wouldn't it?

MR. CAMPBELL: I would think so.

QUESTION: And why, if the police had the key, perfectly lawfully, as by the hypothesis of my hypothetical

question, they do, why can't they simply use the key?

MR. CAMPBELL: Because the key does not subsume the identity of the object to which it admits one.

I might have, in my possession, the combination to a safe. I do not believe that that means that that safe, if it can be located, can be opened merely because I have a list of numbers in my pocket. There is nothing about the key in the example that you pose that takes over the identity of the object that is later searched and seized.

QUESTION: Let me give you a slight variation of Justice Stewart's hypothetical. Instead of a key to a locker at a train station or an airport or some such place, they found a pawnshop ticket dated two days before the time of the interview and the pawnshop ticket showed that a pistol had been pawned and the police were involved with trying to check out pistols and ballistics tests. Do you think the police with that pawnshop ticket could go to the pawnshop without a warrant, or would they have to have a warrant to go and get that gun to test it for ballistics?

MR. CAMPBELL: I believe that they would have to have a warrant, your Honor, under the same rationale.

QUESTION: You have really got to take that position or abandon your own, don't you?

MR. CAMPBELL: Yes. And I do take that position.

QUESTION: Well, I take it if you didn't take

that position, you'd have some difficulty distinguishing, in this very case, if he had a key ring and on that ring were not only the keys to the car, but the keys to his house, that if they can use the key to the car, I take it, that if you agreed to that, you would have also to agree -- would you? -- that they could also use the key to the house?

MR. CAMPBELL: I would think that if the Court were to hold that the seizure of the car was tantamount of the seizure of the car itself, then the logical extension of that would be that the seizure of the house key was, indeed, the seizure of the house.

QUESTION: The Court has made some distinctions between automobiles and homes, has it not?

MR. CAMPBELL: It has, your Honor.

QUESTION: But not between keys.

MR. CAMPBELL: No.

QUESTION: Mr. Campbell, was I to understand the position -- if he had driven that car and left it outside the Attorney General's office, parked in the lot, could the state have chipped a piece of that paint off and tested it?

MR. CAMPBELL: At the parking lot, your Honor?

QUESTION: No, sir, in the street, right in front of the Attorney General's office.

MR. CAMPBELL: Your Honor, I would make no distinction in this case between the parking on a commercial

parking lot and the parking in any area that is legally designated for the parking of an automobile. I don't think that this case turns upon the private nature of the parking lot.

QUESTION: Well, the private nature of the car?

MR. CAMPBELL: Yes, your Honor, as long as that car --

QUESTION: But this was the bumper.

They didn't go -- assuming they didn't go in the car at all -- assuming they didn't have a key, all they knew was, this was the car and they wanted to get a piece of that paint off of the front of it so they knocked a piece of the paint off. What's wrong with that?

MR. CAMPBELL: The thing that is wrong with that, your Honor, is that, in my view, it is a seizure and as such, it should have been justified by a warrant if, indeed, there was time to get a warrant.

QUESTION: Well, that would go for things in plain view.

MR. CAMPBELL: No, your Honor. I do not --

QUESTION: Well, suppose laying on the front of the bumper was a can of paint? Could they seize that?

MR. CAMPBELL: Quite possibly, yes.

QUESTION: But once you touch the bumper, you get in trouble.

MR. CAMPBELL: Well, the can of paint, I take it, would not be an integral part of the car itself and not --

QUESTION: As I understand it, the Solicitor General's position is that the car is no question of going into or violating anything, to just chip a piece of paint off of the outside of the car.

MR. CAMPBELL: That seems to be his position. I disagreed with that position.

QUESTION: Well, I was wondering if you would take it a little further? Suppose you go up to the man's house and you chip a piece of paint off the outside door. Will you need a search warrant?

MR. CAMPBELL: Absolutely, your Honor.

QUESTION: Why?

MR. CAMPBELL: Because it is an integral part of that house. It is not something in plain view.

QUESTION: Well, there is no search involved, is there?

MR. CAMPBELL: There is at the point after the seizure. Once the paint is seized, it is then examined and that becomes the search.

QUESTION: Oh, yes.

MR. CAMPBELL: I do not believe that any of the cases cited by the Petitioner are helpful here.

Chambers versus Moroni merely said that where the

antecedent seizure at the site of the arrest would validate a search, it is not unreasonable to move the car to a safe place. But here, unlike Chambers, we did not have a vehicle stopped on the open road. We had no need to divert manpower from the arrest function to the search function and here the search, in any event, was not completed as was the search in Chambers versus Moroni as soon as it was reasonably practical.

Neither are the Robinson and Gustafson cases recently decided by this Court helpful here because in those cases, the Court dealt with a very direct, physical relationship between the one arrested and the object on his person.

The Defendant in this case was at some considerable distance from his car at the time of arrest. He had been out of his car for at least seven hours by the time of the arrest. He had no means of getting to it and during the day he was held in close confinement.

QUESTION: After they got the keys and the ticket to the parking lot, so that they -- the police -- had access, they had then placed four policemen over on the parking lot with orders to the parking lot attendant not to permit anyone to take that car away and informing the attendant that they were there to enforce that direction, then, meanwhile, had proceded to try to get a warrant. Would you think a seizure would have occurred when they put the

guard on the car?

MR. CAMPBELL: Your Honor, first let me say that I do not believe that was required in this case, but if it had been, I do not believe that that would have constituted a full seizure of the car. I realize that there is a problem there and it is a problem which the Court wrestled with in Chambers versus Moroni. But it seems to me that the Court should examine, perhaps, the possibility that that lesser intrusion may solve some very difficult search problems in this area. I am aware that guard-posting is a theory that this Court has not generally countenanced, although I think recently, in the Dombrowski -- Cady versus Dombrowski case, there was some suggestion that perhaps what might be reasonable in a metropolitan jurisdiction where the magistrate is readily available and there are other police officers on the scene, might not be reasonable in a rural setting.

Here, I think we had a very good case for guard posting, if it were necessary, but as I say, it was not necessary in this case. The car was effectively mobilized. This, I think, brings me to the --

QUESTION: Well, to make that analysis, if I may interrupt you a moment more, to make that analysis that you have just made, you must confront the situation that while the four policemen were standing guard on the car on this restriction on its movement, some member of the family

or some other person came to the parking lot with a set of keys, made claim to the car and sought to take it away, in which case, obviously, the only purpose of having the police guard there would be to prevent it.

With that confrontation, would you have a seizure?

MR. CAMPBELL: No, your Honor, I do not believe --

QUESTION: If the police refused to let the man's wife take the car away, let us say, or his lawyer?

MR. CAMPBELL: I believe that it is possible to distinguish that kind of temporary keeping for a reasonable time while a warrant is sought from a seizure itself and I believe that that kind of distinction might be helpful in another case but I don't believe that it was the reality of this case and necessary here.

Petitioner has also claimed exigency of circumstance or urgency here, necessitating the warrantless seizure of this automobile. He rests his claim, I think, on three assumptions. First of all, that the investigators did not know where the car was. Second, that confederates may have absconded with the car and, finally, that probable cause, if it existed at all, did not come into being until the moment of arrest.

I'd like to take each one of these claims in turn, if I may. As to the whereabouts of the car, there is

absolutely no indication in the record of this case that the state did not know, at many times throughout this investigation, where the car was. In fact, they had very specific knowledge about the car and had seen the car 78 days prior to October the 10th.

They went to the Defendant's place of business. They asked him where his car was. It was in the parking lot. He pointed it out to them. They had an opportunity to note its color and did, in fact, at that moment, begin to consider him as a suspect because the color of the car matched the one that they already were looking for.

Now, it seems to me that any doubt that the Court might have about the specificity of the information which the state had, by the time of October the 10th, concerning the Defendant, his car, his home, his general whereabouts, his businesses, his financial conditions, can easily be dispelled by reading in the bill of exceptions the transcription of the interrogation section which took place on October the 10th.

You will remember that I pointed out to the Court that a tape recording was made, unknown to the Defendant, of that interrogation session. In the trial of the case, the state attempted to first introduce this transcript into the record. This was objected to an the objection was sustained, but then the trial judge allowed one of the state's witnesses,

Mr. Mann, to read verbatim, into the record, the record of that transcription of the interrogation session and that may be found on page 485 to 568 of the bill of exceptions.

Throughout that interrogation session, it is clear that they had very specific knowledge about where Mr. Lewis had been, who he had talked to, where his car was, where his home was.

QUESTION: Mr. Campbell, did Mr. Lewis live in Franklin County?

MR. CAMPBELL: Your Honor, it is not clear to me whether his home was in Franklin County or Delaware County. He moved between the two frequently.

QUESTION: The record just doesn't show.

MR. CAMPBELL: If it does -- I'm sorry, I don't know for sure. There is talk in the record that I just told you about as to where -- there is a dialog between the investigator and Mr. Lewis about his home, but I do not believe it says where it is located.

QUESTION: He lives in Columbus.

MR. CAMPBELL: As an aside, I would point out to the Court that the record of that interrogation is instructive in its own right of why -- as the Court has said from time to time -- zealous officers engaged in the enterprise of ferreting out crime should not be allowed to make ad hoc judgments about probable cause matters. That was

a brutal interrogation session, not in a physical sense, but in a mental sense. During the course of that interrogation, the state repeatedly tried to get the Defendant to take a lie detector test, although, at the very first instance, the Defendant said that he would not even consider it without talking to counsel.

At another place in the record of that interrogation, the interrogator attempts to help Mr. Lewis fabricate a non-premeditated version of the facts of this killing in order that he might not have to charge him with first degree murder, not telling him that a first degree murder warrant was already in existence.

Now, with respect to the assumption that there was a confederate in this crime, I should point out that there is no testimony in the record that shows that there ever was an accomplice, that the state ever believed that there was an accomplice, that the Defendant's family was in any way in league with the Defendant or would have removed the car. And as to Mr. Scott, the attorney, it seems to me that once Mr. Scott turned over the claim check and perhaps the keys to the police, that at that point in time he indicated that he was not going to run a foot race with the investigators down to the car and he indicated that he was not going to take the car.

He had no reason to believe that that car would

be taken out of the jurisdiction.

Now, the final assumption, I think, deals with the question of probable cause.

Now, the state claims here that there may not have been probable cause up to October the 10th to get a search warrant for the automobile but then, it seems to claim that somehow during the day, something developed that made the probable cause argument and made the seizure possible but the only fact that they suggested that has emerged during that interrogation on October the 10th was the fact that the Defendant gave a slightly different version of why he had had his car repaired than he did when he had it repaired.

Now, there is no showing by the Petitioner why this tiny fact, added to the others that the police had somehow became the sine qua non of probable cause.

QUESTION: Mr. Lewis was there in the office of this special branch of the Attorney General's office most of the day, wasn't he?

MR. CAMPBELL: He was there from 10:00 o'clock in the morning until arrested at 5:30, with the exception of a brief period when he left in the company of the officers and went to home and, with his own consent, they searched his house.

QUESTION: That was back in Delaware County, over in Delaware County, which is a contiguous county?

MR. CAMPBELL: Well, your Honor, I still don't know precisely whether the house was in Delaware County or Franklin County.

QUESTION: I see, but in any event, for six or seven hours, is there anything that we know as to what occurred during that long period of time?

MR. CAMPBELL: Well, your Honor, other than the transcript that we have of that interrogation, no. Or do I understand your question correctly?

QUESTION: Well, now, what -- do we have a transcript of what occurred there for that whole period from 10:00 a.m. until 5:30 p.m., with the exception of the period that he went back to his house?

MR. CAMPBELL: We have what the state has claimed to be an accurate transcript of the questioning that took place , starting about 10:30 until about 3:00 o'clock in the afternoon, when -- or 3:30 in the afternoon when Mr. Lewis finally said that "I want a lawyer," and at that point, questioning apparently was broken off and that is the end of the transcript.

QUESTION: And you are just starting to tell us now that nothing -- nothing emerged from that interrogation and that discussion that was any different with the exception of one minor change in his version of something. Is that it?

MR. CAMPBELL: Yes, that is the only thing that emerged during that. And it is interesting to point out that that emerged quite early in the record of that interrogation, probably early in the morning, so that they had at least the afternoon to obtain a warrant.

Back, if I may, to the question raised by the Amicus in this case. He would seem to argue to this Court that somehow, an individual's privacy interest in his automobile, at least when it is not parked at home, is not of sufficient intensity to necessitate full indication of the Fourth Amendment.

I would first examine the assumption that he makes that individuals do not expect, in an automobile, the same kind of security interests that they do in other objects of their life. Certainly, there is no basis in the Fourth Amendment to differentiate between an automobile and other effects. The Solicitor General cites no empirical data suggesting that Americans do not expect a privacy interest in their automobiles and the only case law which he cites is a 52-year-old Michigan case dealing with a car that was found upon a fairgrounds.

I submit that the assumption that in 1974 we do not expect the same privacy interest with respect to our automobiles that we do with respect to other accoutrements of our life is simply unfounded. It might be -- or it might

have been, a valid assumption in a more pastoral age when people led a self-contained existence on their own homestead, but today, if anything, the automobile, for better or worse, has become the very focus of modern society. A man's home, very often, is a series of rented apartments, motel rooms, even in a growing number of cases, the vehicle itself and to a very high proportion of our citizens, it seems to me that an automobile may well be a person's most tangible domain.

QUESTION: Mr. Campbell, I suppose you would concede that a number of cases that this Court had, CArroll and Chambers and Cady, have said that a car is quite different for Fourth Amendment purposes than a man's home.

MR. CAMPBELL: I do, your Honor.

QUESTION: That doesn't, I realize, answer the question you are addressing yourself to, whether conceding that difference, it still has Fourth Amendment protection.

MR. CAMPBELL: Your HOnor, I think the difference is that, whether you start at the outset and say, "Automobiles are to be set apart," under the Fourth Amendment, or whether you say that they are included under Fourth Amendment coverage but the way in which we deal with them may have to be different, based on their mobility.

QUESTION: Well, would you say a motorcycle is tantamount to a car for purposes of your argument?

MR. CAMPBELL: Yes, I would.

QUESTION: How about a bicycle?

MR. CAMPBELL: Yes.

I would submit that the observations that I have made about automobiles are not merely abstract generalization but relate specifically to this case because there is evidence in the trial record to the effect that Mr. Lewis, because he had three businesses and taught, virtually lived in his automobile and that may be found in the bill of exceptions page 889. I submit that the --

QUESTION: That would be an interesting analogy if this were a search inside the automobile, but this is not quite that. The Government makes a good deal of that and I think Mr. Conway does, too, that there is no entry into the automobile.

MR. CAMPBELL: Well, your HOnor, there was --

QUESTION: If you are analogizing it to a dwelling that was --

MR. CAMPBELL: There was --

QUESTION: -- there was no entry into it. It was simply scraping something off the bumper or the front fender, wasn't it?

MR. CAMPBELL: No, I would take the position that scraping is an entry into the automobile and also, I would --

QUESTION: Well, he didn't live -- he may have

lived in his automobile, but he didn't live sitting up on the bumper, that's the point.

MR. CAMPBELL: I grant you that, sir. I submit --

QUESTION: What sort of clothing did you find in the car?

MR. CAMPBELL: I beg your pardon, your Honor?

QUESTION: They didn't find any clothing in the car. Did they find a toothbrush in there?

MR. CAMPBELL: No, your Honor.

QUESTION: Well, where do you get this living in the car business?

MR. CAMPBELL: Well --

QUESTION: You pulled that right out of the sky, didn't you?

MR. CAMPBELL: No, your Honor, I don't think so. He specifically -- I think his exact words in the transcript were that he lived in his automobile a lot and by that he meant that he was constantly going from one occupation to another and he spent a great deal of time in his automobile.

I submit that the only logical and adaptable concept of the Fourth Amendment is that it be held to protect one's sphere of existence, whatever that may , in an individual case, may be. I think this is precisely the approach that the Court has taken. In Terry, the Court pointed to the fact that the inestimable right of personal

security belongs as much to the citizens on the street as to the homeowner closeted in his study to dispose of his secret affairs and I think that the Katz case is yet another example where this Court has dealt, not with a proprietary interest, but in an interest in one's sphere of existence.

It is true Lewis did seek privacy in his automobile, as evidenced by the fact that he put his car into a commercial parking lot to make it safe from the vulnerability of public areas. He did not abandon his car in the way that the defendant did in Cady versus Dumbrowski.

But even if you grant the Amicus the assumption that there is somehow some inherent inferiority in an automobile, the result which he projects from that, it seems to me, is mystifying. He suggests that, since we have declared automobiles to be second class effects under the Fourth Amendment, that all we have to do is give them a part of the Fourth Amendment and he arbitrarily picks, I think, the first part, the reasonableness clause and he proposes to substitute a policeman's ad hoc judgment for the second, the warrant requirement.

He seems to see this as a way of balancing interests, but yet he never once points to the interest, the police interest, that needs to be balanced.

Respondent would submit that there is no need for, and much mischeif to be expected from , this kind of

concept.

It seems to me that if there is to be a choice, or if there is a choice between prospective and retrospective judicial determinations for probable cause, it should be made in favor of prospective, probable cause determinations, not only because the Constitution dictates it, but because good sense does as well. I would suggest that --

QUESTION: I don't quite understand what you mean by "prospective" and "retrospective" probable cause.

MR. CAMPBELL: Well, I am speaking of going to a magistrate in the first instance and securing a warrant as opposed to going ahead, making the search and then later, in court, justifying the probable cause.

QUESTION: I see.

QUESTION: Mr. Campbell, may I ask you a very different question before you sit down?

MR. CAMPBELL: Yes, your Honor.

QUESTION: There is no question in this case, is there, that the Fourth Amendment issue that you have been arguing was considered at every stage of the state court proceedings?

MR. CAMPBELL: There is no question of that, your HOnor.

QUESTION: And those proceedings included the trial court and the intermediate appellate court and the

Supreme Court of Ohio?

MR. CAMPBELL: That is correct, your Honor.

QUESTION: And a single federal district judge set all that aside.

MR. CAMPBELL: He has, on the basis, your Honor, that those courts improperly applied --

QUESTION: I understand.

MR. CAMPBELL: -- the constitutional principles involved.

QUESTION: I understand what his basis is.

MR. CAMPBELL: In conclusion, I would say that I do not suggest here/that the positions urged by the state and by the Solicitor General invite last rites for the Fourth Amendment. But they do, as excursions from the general thrust of that basic guarantee, always do, heighten the potential for abuse of a citizen by his government.

In some instances, that risk may be worth the taking but here it was not necessary and it is not worth the taking and I would urge deferments of the decisions below.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Campbell.

Do you have anything further, Mr. Frey?

You have about four minutes left.

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.

MR. FREY: Thank you, Mr. Chief Justice.

First of all, a couple of factual matters with respect to the question of when they knew that the car was parked on the lot and at page 61(a) of the Appendix, there is testimony by the witness that they did not know during the day that the car was parked on that particular lot.

QUESTION: Are you going to suggest when they did?

MR. FREY: I think they learned it at the time that the arrest took place and they obtained the claim check for that parking lot.

QUESTION: They could have asked.

MR. FREY: They could have asked.

QUESTION: At 10:00 o'clock.

MR. FREY: They could have asked at 10:00 o'clock, yes. Also, apparently it was stipulated by Mr. Scott, Lewis' attorney that the testimony of Clyde Mann was supported by the full transcript of the taped proceedings which he had been furnished by the prosecutor.

Now, the consent argument which was discussed -- our argument on the consent issue is that the district court never resolved the question of whether Mr. Lewis consented to the seizure of his automobile because the district court held that it was not relevant, since he did not consent to the search and the district court found that the taking of the paint samples was a search and in our brief, I think at page 20, we make the point that if the Court finds that the

taking of the paint samples was not a search, then assuming even that the Court held that a warrant would be required for the seizure, there appears to be a factual issue left unresolved by the district court here as to whether there was consent to the seizure as distinct from the search.

QUESTION: Well, was Mr. Campbell correct that there was no finding in any --

MR. FREY: No consent.

QUESTION: -- in any of the Ohio courts, none of the three Ohio courts found this consent.

MR. FREY: I believe that is right.

Now, we suggest that taking the paint chip from the car without a seizure would not have required a warrant. When we say this, we are not saying that the Fourth Amendment does not apply to automobiles or that the Fourth Amendment does not apply to the taking of paint chips. We are saying that the warrant requirement that the Court has adopted as attached to the reasonableness standard of the Fourth Amendment is what doesn't apply here.

Now, we have not picked arbitrarily between two clauses of the Fourth Amendment and said, well, he should have the benefit of the reasonableness clause, but not the benefit of the warrant clause.

The warrant clause, by its terms, is not applicable here. The warrant clause only becomes

applicable if the Court presumes the search to be unreasonable without a warrant. He, of course, is always entitled to the reasonableness protection, assuming that the nature of the action is either a search or a seizure under the Fourth Amendment.

I am advised by one of my colleagues with reference to Justice Stewart's question about the key to the locker that there is a case before the Court now on petition for certiorari from the Fifth Circuit, United States against Grille, in which a key was taken from the petitioner upon his being jailed and police learned of a duffel bag which the key fit from a confererate who indicated that it contained evidence of a cocaine importation conspiracy. They went to the duffel bag and they opened it up and found the evidence and the Fifth Circuit held that they were not required to obtain a warrant in that situation. Now, we have not yet responded to that certiorari petition, but I think in the pawn shop illustration, there would be a lesser policy of privacy if he turned his gun over to the pawn shop, I don't see that there is the kind of interest there that would require more than a finding of reasonableness of police action in going to the pawn shop and seizing the gun.

I see my time is up. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Case submitted at 2:19 o'clock p.m.]