In the

Supreme Court of the United States

UNITED STATES,

Petitioner

v.

WILLIE ROBINSON, JR.

Respondent

No. 72-936

Washington, D. C.,

October 9, 1973

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UNITED STATES, Petitioner,	:	
v.	:	No. 72-936
WILLIE ROBINSON, JR., Respondent.	:	

Washington, D. C.,

Tuesday, October 9, 1973.

The above-entitled matter came on for argument at 10:50 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., 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:

ALLAN A. TUTTLE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Petitioner.

JOSEPH V. GARTLAN, JR., ESQ., 1801 K Street, N. W., Washington, D. C. 20006; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-936, United States against Robinson.

Mr. Tuttle, whenever you're ready.

ORAL ARGUMENT OF ALLAN A. TUTTLE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case, as the Court is aware, presents questions quite similar to those raised in Gustafson vs. State of Florida, which you've just heard.

There are also differences, which I hope to point out in the course of my argument.

But basically we are concerned here with the scope of a permissible search for weapons incident to a lawful custodial arrest. And the arrest here occurred in April 1968, when Officer Richard Jenks of the Metropolitan Police Department, here in the District, arrested the respondent Robinson for the crime of driving after revocation of his operator's permit and for obtaining a permit by misrepresentation.

In the course of a search of Robinson incident to that arrest, Officer Jenks discovered heroin, and that heroin became the basis of a prosecution for unlawful possession of heroin.

He was convicted of that offense in August of 1969 and an appeal was taken to the Court of Appeals.

The procedural history here is a little involved. The Court of Appeals, a panel of the Court of Appeals reversed respondent's conviction on the ground that the seizure had been illegal.

However, the case was then heard en banc by the entire Court of Appeals, and they remanded the case to the District Court for an evidentiary hearing on the scope of the search incident to the April 23rd arrest.

Then, after the evidentiary hearing, the en banc Court again heard the case, and this time, by a vote of 5 to 4, held that Officer Jenks' search had exceeded the scope of a permissible weapons search incident to this arrest.

Now, the facts of the search can be briefly summarized.

The arrest here occurred on April 23rd of 1968. A few days prior to that time Officer Jenks had stopped the respondent Robinson in a routine traffic check. He noticed a discrepancy between the birth dates on the respondent's temporary operator's permit and the birth date on his draft card.

QUESTION: What do you mean by a routine traffic check?

MR. TUTTLE: I mean a stop where the officer will

bring a car to the curb that he observes, for any reason that leads him to wish to check whether or not the driver is duly licensed and the car is properly registered.

QUESTION: What was the reason in this instance?

MR. TUTTLE: The record does not reveal any particular reason in this case.

QUESTION: Are you suggesting that, as I drive home, an officer can insist that I pull over to the curb where he can ask to look at my license?

MR. TUTTLE: Absolutely. Yes.

I do believe that --

QUESTION: Well, you said "routine". Do you mean "routine" or "random"?

MR. TUTTLE: Well, I mean it was routine in that it is a practice of the Metropolitan Police Department to do this, this kind of stop, on a random basis. It is random, but it's also routine, in that it's not unusual. That's what I meant.

I may say --

QUESTION: Have you ever experienced this in Washington?

MR. TUTTLE: Such a stop?

QUESTION: Yes.

MR. TUTTLE: I have been -- I have been stopped, but --

QUESTION: Did you ever have that happen to you?

MR. TUTTLE: In that particular circumstance? No, I haven't.

QUESTION: Neither have I, in seventeen years.

MR.TUTTLE: Well, I may say that --

QUESTION: I wonder how "routine" it is.

MR. TUTTLE: -- this is not a question before the Court, unless the Court wishes to make it a question. The --

QUESTION: Well, I thought you were relying on the fact that this was something called a routine traffic -- in support of your --

MR. TUTTLE: I'm relying -- I'm relying, in the last analysis, on the fact that this was a concededly lawful arrest. Now, perhaps Your Honor is confused between the dates, and I was trying to make a distinction between the date of April 19th, when this stop occurred and the license check was made, because no arrest was made at that time. And it was only later, after the officer had checked those dates which -- where he saw the discrepancy, through the traffic records and discovered, by checking those dates, that Robinson's regular operator's permit had been previously revoked.

But going back to the original stop, that was never questioned throughout this trial. There was a question in the initial trial of this case, when Robinson had a different

trial counsel, where he suggested that perhaps the scope of the routine traffic check was excessive, that it was permissible, and under the Minsey? case in the District it has been held permissible, to make these stops. But he suggested that having received the temporary operator's permit, he had no right to look at the draft card.

Now, that argument did not prevail in the District Court and has not been advanced since that time. And I think for the purposes of this Court we have to assume, as the Court of Appeals did, and as has every court which has considered the matter, that this routine traffic check was permissible and lawful.

QUESTION: But whether it was or not, I gather there's no challenge to the arrest here, is there?

MR. TUTTLE: There is no challenge to the arrest here in this Court. I want to come to a question which is bruted in the brief a little bit about the question of whether this second arrest might have been a pretext for a narcotics search. And, with the Court's permission, I'll come to that in the course of my exposition.

QUESTION: All right.

MR. TUTTLE: After it had been determined that there had been this revocation of Robinson's regular operator's permit, the next day, after he made that determination in the traffic records, Officer Jenks saw Robinson again driving,

not far from here, on Eighth and C Streets, Northeast [sic], and pulled the respondent over in order to arrest him for the crime of driving after revocation of his temporary operator's permit.

Now, the respondent got out of the car and walked toward the police officer. The police officer then asked Robinson for his operator's permit, the temporary operator's permit which he had previously seen. And, upon receiving it, informed Robinson that he was under arrest for driving after revocation of his regular operator's permit and for obtaining his temporary permit by misrepresentation.

Now, at that point, as required by the standing orders of the Metropolitan Police Department, he proceeded to search Robinson. In this case they were standing face to face outside the automobiles. And Officer Jenks placed his hands on the respondent's chest, his left hand -- his right hand on respondent's left breast. Almost immediately he felt an object inside the pocket of the car coat that Robinson was wearing. He felt an object in the left breast pocket.

Now, the record shows that Officer Jenks didn't know what that object was. He couldn't tell its size or he couldn't tell whether it was hard or whether it was soft.

Officer Jenks then reached into the pocket and pulled the package out. And the package was a crumpled-up package of cigarettes. Officer Jenks at that point, the record shows,

knew that the package did not contain cigarettes, because of its crumpled condition, and he didn't know what it did contain.

He opened it up and he found the heroin, which is the subject of this prosecution.

Now, in light of some of the questions asked in the previous argument, I think I should state that the record indicates that Officer Jenks was not in any imminent sense of danger, did not feel in any imminent sense of danger. He had a substantial weight advantage over the respondent, and wasn't in any particular fear in conducting this arrest; nor did he have any specific purpose in mind when he conducted the arrest.

What he said was, when asked, "I just searched him, I didn't think about what I was looking for, I just searched him."

He did say that he recognized that the rules which required the search were designed for his own safety and were designed to uncover any weapons which might have been used to harm him.

Now, if I may mention one or two preliminary matters. First of all, unlike Gustafson, the government here does not advance any evidentiary basis for this search. We predicate the search entirely on the right to search for weapons. We believe that he had all the evidence he needed when he had the temporary operator's permit.

Now, going to an argument I mentioned a moment --

QUESTION: His right to search for weapons but incident to a lawful arrest.

MR. TUTTLE: Oh, of course. I -- the arrest was conceded by the Court of Appeals to be lawful when they remanded it. They didn't remand it to determine the lawfulness of the arrest, they remanded it because the original record didn't show enough facts about the scope of the search.

Now, the search here, or the arrest here was not a pretext for a narcotics search.

QUESTION: Now, Mr. Tuttle, I thought your argument -- and maybe it's what you said -- was that if there is a valid arrest of a person, then the law, the settled law is that there is, there can be a, constitutionally a valid complete search of his person. The rationale for that being that he might have weapons or that there might be destructible evidence. But whatever the rationale, the law, the constitutional law is that there can be a complete search of his person, isn't that your argument?

MR. TUTTLE: It's conceivable, it's conceivable to me that there might be a search which would exceed the scope of a permissible search for weapons.

If I see a folded piece -- not a folded, but a piece of paper in a person's pocket, which might be a written confession of a crime, if I were conducting an evidentiary

search, I might want to look at it. If I were conducting a weapons search --

QUESTION: How about a sealed envelope?

MR. TUTTLE: Well, I'd have to develop the hypothetical a little bit. If it were solid or had any kind of solidity to it --

QUESTION: No, it's just a sealed envelope.

MR. TUTTLE: -- so that it might contain a razor blade or some such thing, then I would say it would be a permissible weapons search.

But, as I say, it is conceivable. And that's why I say that I don't go quite as far as you suggest, Mr. Justice, because it's conceivable that an evidentiary search might, in certain circumstances, be of a broader scope than a permissible weapons search.

QUESTION: Or a border search, looking in body cavities and whatnot. We're not talking about that.

MR. TUTTLE: Well, of course we're not. Because that would raise the Roachin? kind of problem, --

QUESTION: Right.

MR. TUTTLE: -- and that would be beyond the scope of a permissible weapons search.

QUESTION: Right.

MR. TUTTLE: Our basic position is that it's not only where there is an arrest that we feel that a complete

search for weapons is permissible, but it is where there is a custodial arrest.

It's important to realize that in this case we're not dealing with a minor traffic offense. The crime of driving after revocation of your operator's permit is a statutory offense, defined by Congress. It carries a minimum of thirty days in jail and a maximum of a year.

QUESTION: What's the distinction between arrest and custodial arrest?

MR. TUTTLE: Well, I would -- I would not want to argue that when a police officer stops a car to issue a summons that that was not an arrest. There is, after all, a restriction on the person's movement. And yet we concede, and it is the practice here in the District, where there is an issuance of a summons, not to conduct the full custody field search that is required in the case of custodial arrest.

That's why I want to make the distinction, that the regulations of the Police Department require that this individual be taken into custody, require him to be taken down to the station house for booking. And also the regulations of the Police Department require that whenever such an arrest is made, a so-called custody arrest, that a full field search be made of the individual for anything that he might have on him, be it evidence or be it weapons.

QUESTION: Could he be handcuffed?

MR. TUTTLE: Excuse me?

QUESTION: Could they handcuff him?

MR. TUTTLE: He didn't -- could he or did he?

QUESTION: Could he?

MR. TUTTLE: He could, but, Your Honor, I think that that --

QUESTION: Would the officer be pretty safe then?

MR. TUTTLE: Well, Officer -- the Court is probably aware that last month Officer Pomraining in the Police Force in Arlington was shot and killed by a man that he handcuffed.

I think that handcuffing --

QUESTION: I'm also aware of a prisoner that was shot and killed while handcuffed and shackled. What's that got to do with my point?

MR. TUTTLE: It has to do, Mr. Justice, with the point, I believe, that handcuffing is not an adequate protection for police officers conducting custodial arrests.

And I just cite that as a single recent example.

QUESTION: Well, I ask you what I asked in the other case: Once he had this crumpled package of cigarettes in his hand, I understand you're not relying on the evidentiary search; am I right?

MR. TUTTLE: That's correct.

QUESTION: Well, once he had this possible weapons in his hand, how could the prisoner use that weapon?

MR. TUTTLE: He could not use that particular weapon. But I believe that the search of that container, which could have contained a weapon, was wholly justified, for a number of reasons.

First of all, every search which is conducted by any officer is different, and everything an officer sees tells him something about how far he has to go to be safe in conducting the search.

And I think an examination of a closed container on a person is part of the -- helps the officer to know, by looking at it, whether or not he's dealing with a dangerous person. If there is nothing dangerous in that container, he would return it, presumably. If there is, he may feel the need to go further.

QUESTION: Would that go for a wallet?

MR. TUTTLE: It might. If the officer felt --

QUESTION: Well, is there anything on the man's possession, in his possession, that is safe from search and seizure; anything?

MR. TUTTLE: Anything that could contain a weapon subject, or that could possibly --

QUESTION: That would include a handkerchief.

MR. TUTTLE: -- subject the officer to injury.

QUESTION: Wouldn't that include a handkerchief?

MR. TUTTLE: I -- if it were folded, possibly.

QUESTION: So nothing is safe.

MR. TUTTLE: Well, there are a number of reasons why --

QUESTION: I'm just trying to have something of mine that would be safe; that's all I'm trying to do.

MR. TUTTLE: Well, it's all safe. Nothing happens to it. Presumably, if it's an innocent object, a key case with nothing but keys in it, it would be returned to you.

QUESTION: Oh, then it depends on what you find in it. That what's found in it justifies the search. You're not --

MR. TUTTLE: Absolutely not.

QUESTION: I'm sure you're not.

MR. TUTTLE: I'm saying --

QUESTION: Excuse me there. Suppose you find in that carton a razor with a small holder, so that it could be used as a weapon, and --

MR. TUTTLE: It would -- it could certainly be introduced in evidence against the person, for carrying a concealed weapon.

QUESTION: And would it suggest to the officer, as I think Mr. Justice White brought out in the prior case, that the man had a razor in a holder that could be used as a weapon, he might have some other weapons on him that would justify a more extensive search?

MR. TUTTLE: That was the point, Mr. Chief Justice, I was trying to make by suggesting that the search of these containers gives the officer information about the kind of possible dangers he may be facing.

I also think that the suggestion that Mr. Justice Marshall makes would create substantial custodial problems for the police. In order to be safe, they would have to remove anything that was a closed container from the person arrested, and somehow try and handle that while they were handling the individual subject to arrest.

QUESTION: Mr. Tuttle, wouldn't the proposition put to you by Mr. Justice Stewart earlier and put to counsel in the preceding case by Mr. Justice Brennan, that is, that where you have a valid arrest you may have a full field search without further inquiry, solve a lot of the kind of parsing of factual situations and at least offer a certain simplicity of administration of a full field search?

MR. TUTTLE: Well, we do -- we do think that such a rule, of course, would be understandable and managable by police officers attempting to deal with situations on the street, and that a rule which required an officer, in every instance, to determine that a search has an evidentiary purpose or has a weapons purpose, is perhaps going to be confusing for police officers.

In fact, the record supports your point, Mr. Justice.

There was testimony from an Officer Donaldson, a police instructor, who testified that time is of the essence in conducting a custodial arrest. And that if an officer had to stop and think "now I'm searching for this; now I'm searching for that", that he wouldn't be able to react in a manner that would enable him to conduct a safe and speedy arrest.

It's also true that if we do adopt the kind of distinctions that the respondent is urging here, we are going to be faced with a whole new set of problems in litigation. We'll be litigating in every instance, whether a particular kind of crime is one that's likely to produce evidence, and even where it's conceded that the crime, as evidenced -- I believe one of the Justices mentioned the possibility of an arrest for stealing a television or some such thing. That we'll be litigating whether or not evidence of a particular size and consistency was likely to have resulted from a given kind of crime.

And I think that to require officers to try and make these judgments every time they impose a custodial arrest in a street situation would be an unmanagable problem, and would also, as I have indicated, create a whole new set of litigation problems for this Court.

QUESTION: Well, that's what I thought your argument was, and that's the reason I didn't really quite understand your question to one of the -- your answer to one of the

questions from the bench that it might make a difference whether a razor blade were found or were not found in a cigarette case. I thought --

MR. TUTTLE: No, I never --

QUESTION: -- you were basing your argument --

MR. TUTTLE: -- would make any difference where it was found --

QUESTION: I thought your argument was that when there's a valid custodial arrest, there can be a full field search, period.

Isn't that your argument?

MR. TUTTLE: That's -- that is our basic argument, but --

QUESTION: That's what I thought.

MR. TUTTLE: -- but we do concede that searches could be excessive.

QUESTION: Well, since --

MR. TUTTLE: And searches are justified, in our view searches are justified by the reason which gives rise to the right to make the search. And --

QUESTION: What more reason do you need under your theory than a valid arrest?

MR. TUTTLE: If it is, as in this case, a search for weapons, then the reasonable possibility of finding weapons would indicate the -- would indicate the reasonable extent

of the search.

QUESTION: But you apparently want to litigate the specific facts of every arrest, when there's a search for weapons.

MR. TUTTLE: Well, I recognize, Mr. Justice White, that there are two possible -- there's more than one real ground upon which the Court could sustain the search here. If the Court is prepared to hold that, as Mr. Justice Rehnquist has suggested, that a valid arrest ends the inquiry, then there would not be -- then we would solve certain problems --

QUESTION: That has ended it up to now, hasn't it?

QUESTION: That's been the law up to now, hasn't it?

MR. TUTTLE: It has been the law since the Weeks case, that's as far back as I was able to trace it.

QUESTION: Right. And until this case in the Court of Appeals.

QUESTION: That's fairly long.

MR. TUTTLE: This is the first case that I know of where a challenge has been made and made successfully in the court below, that there ought to be limitations on the scope of a search incident to an arrest.

QUESTION: Well, it's the decision of the court below that's the aberration, certainly, not the Weeks case.

MR. TUTTLE: Absolutely. And I would call the Court's

attention to the decision in the Worthy case, which was a decision of the Court of Appeals, in which the Chief Justice sat on the panel, where the court below, a panel of the court below rejected an attempt to impose limitations on a search incident to a vagrancy arrest there.

And I think it's very significant that the dissent in that case was written by Judge Wright, who wrote the majority opinion below. And in the dissent, in 1969, Judge Wright was prepared to say that there was no law supporting his view that a search for an arrest for vagrancy was impermissible.

In 1972 he has the majority of the court with him. But it's unquestionably true, Mr. Justice Rehnquist, that this is a new idea.

QUESTION: Do you think the question in any way turned on the fact that the arrest there was for vagrancy?

MR. TUTTLE: The question -- where?

QUESTION: You recall in -- in Preston, --

MR. TUTTLE: Yes.

QUESTION: -- you remember, we held invalid an automobile search.

MR. TUTTLE: Yes.

QUESTION: And that search, while not at the scene, as I recall it -- I don't know about that --

MR. TUTTLE: It was back at the police station.

QUESTION: -- but, nevertheless, the original arrest was for vagrancy.

MR. TUTTLE: And the Court held that there was no reason to think that evidence would be found in the car that would relate --

QUESTION: Well, I just wondered, do you think that Preston in any way rested on the fact that the arrest there was for vagrancy?

MR. TUTTLE: I think it did. But there there was the question of a search -- there there was the question of an evidentiary search, and that no evidence would be found.

QUESTION: But the Court held there that it was not a search incident to an arrest, the same as Stoner v. California. It was simply not a search incident to an arrest.

MR. TUTTLE: Well, but under --

QUESTION: That question doesn't --

MR. TUTTLE: -- Chamber v. Moroney, if we were to take the case forward today, the Court -- there's a question whether the Court would come out the same way. But if they did come out the same way as they did in Preston, it would be because there was no reason to believe that evidence of vagrancy would be found in the search of an automobile.

QUESTION: Well, wouldn't the time factor enter into it also, that they didn't search the car in Preston until either several hours, or some substantial time after the

original arrest?

MR. TUTTLE: Yes, which made it not incident to the arrest.

QUESTION: So that it wasn't incidental to the arrest in Preston.

MR. TUTTLE: Yes. But I'm saying that perhaps that analysis of Preston is affected by the Court's decision in Chambers, which would have allowed a search a few hours later at a different place, where there's a valid reason to search.

Whereas in Preston, since it was a vagrancy arrest, there was no valid reason to search.

I'd like to make one final point about Mr. -- relating to Mr. Justice Marshall's suggestion about keeping the object away from the person. And that is that this Court has never made such a suggestion before, and, indeed, has, I think, held the opposite, in one case that comes to mind.

Your Honors will recall, we've been discussing this morning the Peters case. Well, in Peters, Officer Laskey was conducting a weapons search and he patted Peters down, and he felt an object which, under Terry, he had a right to remove; namely, a hard object, which could have been a weapon. He removed it.

But what is significant for the purposes of our present argument is that what he found was a closed opaque plastic envelope. And of course he then opened it, and

discovered not a weapon but burglary tools.

And at that time no one questioned that, having taken that object away from Peters, Officer Laskey should simply have held it at a distance. It was considered reasonable for him to look at it at that time.

I suggest the same analysis applies here, that it was reasonable for the officer to look inside this package, once he had it out of -- in his hands and out of the reach of Robinson.

QUESTION: And what could he have found in there that would have endangered him?

MR. TUTTLE: Well, Your Honor, we --

QUESTION: You said it was folded up like this, right? Folded up like this.

MR. TUTTLE: Yes, a crumpled-up package. Your Honor, --

QUESTION: So it wasn't a razor blade, was it?

MR. TUTTLE: That was in it?

QUESTION: Yes. It couldn't have been, I mean.

MR. TUTTLE: It perhaps could have been.

QUESTION: A collapsible razor blade.

MR. TUTTLE: Your Honor, we attempted to develop a record on the question of what kinds of things might be found in a small container in the hearing on remand, and an officer, or rather a clandestine weapons expert, a Mr.

Newhouser, --

QUESTION: Got on the stand with things taped all over his body.

MR. TUTTLE: He had approximately 25 weapons that were -- had the possibility of subjecting somebody to injury.

QUESTION: He had a letter bomb on him?

MR. TUTTLE: He did not have a letter bomb on him.

QUESTION: Well, how did he forget that?

MR. TUTTLE: He -- he could have, but, as a matter of fact, he didn't have such an item on him. He testified that many of these weapons were small enough to fit inside a cigarette package, and, in fact, one of them I think was carried in a cigarette package.

And I think it's significant that he testified that only a really thorough-going search, which would have included going under his belt, going in the waistline, and turning out and examining all pockets --

QUESTION: But my point is --

MR. TUTTLE: -- would have revealed the weapons.

QUESTION: But granting that he had the right to take the package out, the crumpled-up thing, why did he have to open it? That's my only point.

MR. TUTTLE: I've suggested --

QUESTION: Other than to search for evidence.

MR. TUTTLE: I've suggested several considerations.

One is to assure himself that there was nothing like a weapon inside it. I've suggested that if he couldn't do --

QUESTION: Would he have given it back to him if there was nothing in it?

MR. TUTTLE: Yes, he would have. And if he couldn't, he'd be subjected to all kinds of difficulties of custodial obligations attaching to it. And I've suggested that in the Peters case the Court has suggested that that is a perfectly permissible practice.

Now, I'd like to point out one fact that is argued -- an argument which is made by respondent's counsel. He argues that this expert's evidence shows really the opposite of what we argue that it shows. He argues that it shows that a pat-down is adequate.

And I suggest that the confusion there arises from a confusion as to what a frisk really is. And a search of the record indicates that in this case Mr. Gartlan quoted some language from Terry to the police officer -- or, excuse me, the weapons expert, which involved a thorough search of the body, in the groin, in the testicles, and it goes on to describe that search.

Now, that -- the expert there testified that that was not a frisk, and it was not his view of a frisk. And I've attempted to demonstrate in the brief that that language was never intended to be a definition of a frisk.

And I think that if the Court reads the record with that in mind, and with the fact in mind that the expert did testify that it would be required in order to conduct a really thorough search, that the officer go into the pockets, that it's quite clear from the record that a Terry type frisk would be inadequate to reveal all the weapons that could be hidden.

Now, there is a second point that we raise in the brief, relating to the question that if the Court finds that reaching into the pocket did infringe Robinson's Fourth Amendment rights, it would have been a minimal violation at most. And we suggest that the deterrent purpose of the exclusionary rule would not be well served by excluding evidence which is the result of a policeman's protective search.

But I don't believe that I have to go into that at this point because I believe -- first of all, my time is about to expire; and secondly I believe that this search was thoroughly reasonable, and that the conviction ought to be sustained on that ground.

Thank you.

QUESTION: That last reference to your argument is, in effect, asking us to overrule Weeks v. United States, isn't it?

MR. TUTTLE: It would ask you to modify it, yes.

Because it -- we don't ask you to --

QUESTION: That was decided in 1914, was it not?

MR. TUTTLE: We -- if the Court reached that point, it would not be that we would be asking for the total abolition of the exclusionary rule, but for a consideration of the extent of deviation from normal behavior.

QUESTION: Yes, but Weeks established the exclusionary rule, as such, in the Federal Courts.

MR. TUTTLE: And there's no question that every case, including up through, I think, a recent example is Davis, indicates that the Court has never adopted such a rule. That's quite true.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gartlan.

ORAL ARGUMENT OF JOSEPH V. GARTLAN, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

As we understand the Government's position in this case, it basically takes three things.

First of all, that there is nothing in the Terry case, the Sibron case, or the Peters case, which limits the scope of a post-arrest search; and that the United States Court of Appeals for the District of Columbia confused two distinct sets of principles applicable to Fourth Amendment searches by disregarding the significance of a lawful arrest.

The second theme of the Government's argument is that the Metropolitan Police Department of the District of Columbia's instruction to its police officers, with respect to the extent of a search in this case, this type of case, is a reasonable type of instruction and approach, that a Terry type frisk is not adequate protection in the instance of a full custody arrest.

And, finally, the attack upon the exclusionary rule and the request that it be modified in cases of this type.

It seems to us clear, addressing myself to the first point, that in Terry this Court rejected a notion advanced by the State of Ohio that the Fourth Amendment doesn't even come into play as a limitation upon police conduct if the officer stops short of something called a technical arrest or a full-blown search.

And this Court went further to say that the sounder course of analysis, in Fourth Amendment cases, is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in the light of all of the exigencies of the case, a central element in the analysis of reasonableness.

Then in Peters we had a case where, for the purposes of constitutional analysis, an arrest had taken place when Officer Laskey apprehended Peters in the hallway of his

apartment.

And this Court said, with respect to the pat-down type of search that was conducted by Officer Laskey, that this was reasonably limited in its scope to its evidentiary and protective purposes and was not an unrestrained and thorough-going examination of the arrestee and his personal effects.

Now, the Government has pointed out in this case Mr. Justice Harlan's observation of that language in the Terry decision. Mr. Justice Harlan said that's all it was, an observation, and that the Court was -- and in other words, the Court was not saying, in Terry, that a protective search incident to a lawful arrest is limited to a frisk.

But this Court, in Chimel, shortly after Terry, said, as to its decision in Peters, and I quote: "We sustained the search in Peters, however, only because its scope had been reasonably limited by the need to seize weapons and to prevent the destruction of evidence. We emphasize", again quoting from this Court's decision, "that the arresting officer did not engage in an unrestrained and thorough-going examination of Peters and his personal effects."

So it seems to me that in -- certainly in Peters, this case was -- this Court was taking the scope limitation principles applied truly enough in a different context in Terry, and making an application of them in a new context, a post-arrest situation.

And in Sibron, the third case in the trilogy, while there the Court found that -- this Court found there was no probable cause for the arrest, and that the circumstances were therefore the equivalent of the stop-and-frisk situation confronting the officer in Terry, in its opinion it assumed arguendo that would, even though -- if the circumstances of apprehension and fear had been present in the Sibron case as they had been in Terry, thus making it, for the purposes of protection of a police officer, the equivalent of a post-arrest situation, then the search into Sibron's pockets was going too far, under those circumstances.

QUESTION: Are you reading the Terry case type of search as a limitation, as defining the outer boundaries of the kind of a search which can be made after a lawful arrest?

MR. GARTLAN: I am reading it as an articulation of principles, Mr. Chief Justice, that apply to all intrusions, and since a search incident to a lawful arrest is an intrusion, yes.

And I think that the language in Terry is rather explicit in that regard.

QUESTION: Peters, if I remember correctly -- tell me if I'm wrong -- the Peters case did involve a lawful arrest, did it not? The Court found --

MR. GARTLAN: The Court found that it did, yes.

QUESTION: The Court here found that there was probable cause to arrest.

MR. GARTLAN: Yes.

QUESTION: And that that search, therefore, was, by definition, incident to a lawful arrest.

MR. GARTLAN: That's correct. But they did, this Court did take pains to note that Officer Laskey's search in Terry, even though incident to a lawful arrest, was --

QUESTION: In Terry or in Peters?

MR. GARTLAN: I'm sorry. In Peters.

QUESTION: That's what I thought.

MR. GARTLAN: -- was not thorough-going and unrestrained and was limited to the purposes for which it could be made, which justified it in its inception.

This Court said in Terry: This Court has held in the past -- and that is why I think the decision in the United States Court of Appeals for this Circuit was not an aberration -- this Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. Citing authorities.

The scope of the search must be, quote, "strictly tied to and justified by the circumstances which rendered its initiation permissible," quoting authorities that go all the way back to the Agnello case.

This, the decision of our Court of Appeals was not an aberration if Terry was not an aberration. Because what Terry was was an articulation of scope limitation principles applicable to these kinds of intrusions, and our case presented the first opportunity to apply those limitation principles to a post-custody arrest explicitly.

QUESTION: But if you rely on that --

MR. GARTLAN: I think it was done implicitly in the Terry-Sibron-Peters trilogy.

QUESTION: But, you make this argument without regard to what the offense was for which the petitioner was arrested. The respondent, rather.

MR. GARTLAN: Yes. I think there are scope limitation principles even where a search is justified by an evidentiary purpose.

QUESTION: In other words, there's no significance here that the arrest was connected only with an alleged traffic offense.

MR. GARTLAN: Yes, there is. In our case, in terms of the reasonableness of the arrest, by all means, because --

QUESTION: No, no. Assuming -- assuming all that --

MR. GARTLAN: You mean the reasonableness of the search.

QUESTION: Assuming that we're -- you mean it does, the scope of the search, assuming a valid arrest, may be

one thing if the arrest is for a minor traffic offense, and something else if it's for an armed robbery?

MR. GARTLAN: Yes, sir. Yes, Mr. Justice Brennan. For this reason: An arrest for an armed robbery clearly would justify an evidentiary search of the person for the fruits or the instruments or the instrumentalities or evidence of that crime. And to the extent that those might reasonably be expected to be found upon the person of the arrestee, given the circumstances at the time and execution of the arrest, certainly he could be searched for that purpose.

QUESTION: Why could you search in a crumpled cigarette package?

MR. GARTLAN: Why could you not?

QUESTION: No, I just ask you: could you search in a crumpled cigarette package?

MR. GARTLAN: In an arrest of a sufficient --

QUESTION: In the case of the armed robbery.

MR. GARTLAN: Of armed robbery?

QUESTION: Yes.

MR. GARTLAN: Yes. In my view.

QUESTION: If you're relying on Terry, as you say, to support the judgment of the Court of Appeals, that would be dicta, I take it, since in Terry there was no lawful arrest.

MR. GARTLAN: As I -- I haven't looked up recently the technical, law dictionary definition of "dicta".

Yes, it was dicta in that the facts of the Terry case, Mr. Justice Rehnquist, did not involve the precise facts of this case.

But I think this Court was teaching the Federal judiciary system in Terry the scope limitation principles applicable, as it said, explicitly to all intrusions, without limitation.

QUESTION: Well, one can teach by dicta as well as by holding.

MR. GARTLAN: That's correct. And I think that our Court of Appeals in the District of Columbia was not guilty of an aberration, it listened to that teaching in this decision.

QUESTION: And the Peters case is really on all fours with your case, isn't it? Constitutionally. Because there there was a valid arrest.

MR. GARTLAN: Yes, sir.

Well, but factually, in Peters, Mr. Justice, there was a justification, because of the circumstances, for a search evidentiary in nature, and we don't have that -- evidentiary in purpose.

QUESTION: That was a prowler in a Bronx apartment, --

MR. GARTLAN: Yes, sir.

QUESTION: -- as I remember the case; was it not?

MR. GARTLAN: Yes. And we don't have that in this case.

QUESTION: This was cited as a weapons search in Peters.

MR. GARTLAN: No, the Court in Peters, Mr. Justice White, said that that search was properly limited to its evidentiary and protective purposes.

QUESTION: And protective purposes.

MR. GARTLAN: Yes, sir.

QUESTION: So, in the example a while ago, you said you might be able to search in a cigarette package, in case of arrest, for some purposes but not for others.

Now, if you arrest a man in his house for stealing television sets, and there's a crumpled cigarette package in his pocket, you would say you couldn't search for that, the package, in that case?

MR. GARTLAN: Examine its contents incident to the arrest for the theft of the television set?

I wouldn't think so. And I don't think that this is much --

QUESTION: So it really would depend, in each case, on what the arrest was for, and what kind of evidence there might be of a particular kind of crime?

MR. GARTLAN: I would not want to get that particular-

ized. I would say, obviously, when the arrest is for a crime for which there is no evidence, as with the situation in Willie -- with Willie Robinson, there can be no evidentiary justification for the search.

Where there is an arrest for a crime where an experienced police officer may reasonably expect to find fruits, instrumentalities or evidence of that crime, not something he imagines may have happened, but of that crime for which the arrest is being made, on the person of the defendant, then he may go into his pockets. He is not restrained.

And if it were for the crime of stealing money, I would think if he discovered a cigarette package in a pocket, he could examine that for that purpose.

QUESTION: Well, let's see, dealing with our case, the Robinson case, your submission is that a search with an evidentiary purpose could not, could not be permissible in the circumstances?

MR. GARTLAN: The Government stipulates that in this case.

QUESTION: Yes. Well now, does that go so far as to suggest that it was wrong even to go into Robinson's pocket for the crumpled-up cigarette package? Or is it wrong only to open the package?

MR. GARTLAN: I think, in the light of the record in

this case, it was wrong to go into that pocket.

On cross-examination, at the remand hearing, Sergeant Donaldson was asked by me whether, if Officer Jenks at the scene had in fact been conducting a frisk, instead of what he termed a full search, and had encountered what Officer Jenks had encountered when he placed his hand on Robinson's left breast pocket, namely a package that was -- that gave when it was squeezed, had no sharp edges, didn't appear to be of appreciable size, or of mass, what should he have done.

And Officer Donaldson, who instructs Metropolitan Police officers in search techniques, said he should have gone on; he shouldn't have even gone into the pocket. Now, that's in the record of this case, and that's what --

QUESTION: May I ask this, then, Mr. Gartlan. This is not your case. Take the previous case. Suppose what Mr. Robinson had in his pocket was the stiff box of cigarettes, rather than the crumpled package. In that circumstance, would the officer have been justified in going into his pocket?

MR. GARTLAN: If I may answer the question, Mr. Justice Brennan, by coming really, I think, to what the heart of this case is, as far as the reasonableness of search, of this search, it's the balancing job placed upon courts, which this Court did when it first, when it articulated the scope limitation principles. It, -- by articulating those

principles, this Court did not set out a definite limit for every kind of search.

The world of the streets of the District of Columbia is not the fictional world of Ian Fleming. Our streets are not populated by James Bond type characters, or like Mr. Newhouser, who customarily walk about the streets with 25 lethal weapons taped or secreted upon their person. One can imagine that a James Bond character would secrete in a stiff cigarette package a potentially lethal weapon.

But I just don't think, in the light of the street experience of police officers, that they get apprehensive of danger to themselves, even in a close proximity custodial situation, because they feel, what their experience and common everyday knowledge tells them, is a cigarette package.

QUESTION: So your answer to me, then, is it wouldn't make any difference to your case --

MR. GARTLAN: That's correct.

QUESTION: -- if it had been a box rather than the crumpled package?

MR. GARTLAN: It would not. Not because that's a division line that this Court is going to recognize henceforth, but it's one that police officers do, as a practical matter.

QUESTION: Mr. Gartlan, do you concede that a pat-down always may be made in a custodial arrest?

MR. GARTLAN: Yes, sir, I do. That was the common ground of the plurality and the dissenters in the decision of the United States Court of Appeals. It is a position not as extreme as one taken in an amicus brief in this case, which contends that not even a Terry type frisk may be made unless there is that apprehension of danger, which the officer in Terry experienced.

I would agree that the necessity for protection of the police officer in the full custody situation, whether he's frightened or not, in the light of common experience, is serious enough to warrant at least the Terry type frisk as an initial search following where it will, with reasonably aroused suspicions on the part of the police officer.

Now, the second theme to the Government argument is, and I'm not going to dwell on this too much, in view of the Court's questions, because I think basically we have covered it: Counsel has referred to Metropolitan Police Department's standing orders, and Metropolitan Police Department's regulations, with respect to the scope of the search of a person incident to an arrest.

There simply is no standing order. There simply is no regulation.

What this record refers to is the practice of the Metropolitan Police, as revealed through the testimony of Sergeant Donaldson, as to the manner in which it instructs

its police officers.

And it's true that Sergeant Donaldson did say that in a custodial arrest situation we require a full search.

But where that particular bit of law grew up, and how it came to be escalated to the status of a standing order, this record is totally silent.

QUESTION: But suppose they teach all the policemen to do that, what's the real difference, then, Mr. Gartlan, between whether it's a standing order or a standing practice?

MR. GARTLAN: Because I think that if there were a -- I think this, Mr. Chief Justice: the difference is that when he was explored, when his testimony was explored on cross-examination, Sergeant Donaldson came out as a much more sanguine individual about the circumstances of an arrest than the instructions he gave would make him to rookie policemen.

We have to keep in mind that a warrantless search -- that what this instruction contemplates is a warrantless search, to begin with, and this Court has consistently held that that being an exception to the Fourth Amendment prohibition against such searches must come within a -- places upon those who would come within it the burden of meeting the zealously drawn outlines of the exception.

QUESTION: Well, you're not questioning that a search is permitted incidental to a lawful arrest, are you?

MR. GARTLAN: No. No, Mr. Chief Justice, we're

not. We are saying --

QUESTION: Do you regard that as an exception to some rule? Is that the way you frame it?

MR. GARTLAN: Yes. As this Court has on a number of occasions framed the search incident to arrest, has described it as an exception to the prohibition of the Fourth Amendment.

And I --

QUESTION: It's a warrantless arrest, to be sure, but it's -- no question about its standing and its being recognized, is there?

MR. GARTLAN: No, there is not, Mr. Chief Justice. And what this case is all about is whether or not there should be some limitation on the scope of that search.

QUESTION: But Chimel put a limitation upon the geographic scope of such a search.

MR. GARTLAN: Exactly.

QUESTION: Only. It only dealt with the geographic scope, did it not, really? And your submission today is that there ought to be a limitation upon the scope of the intensity of the search within that geographic area?

MR. GARTLAN: Exactly.

Now, I do think that I have to devote some of my time in argument to the question of the exclusionary rule. Because even if, in the light of the record of this case,

this Court should find that the search of Willie Robinson exceeded permissible limits, there is still another hurdle that we must overcome to assure his continued liberty.

The Government urges that this search of Mr. Robinson was, at most, a minimal violation of his rights, that it was neither wilful nor flagrant, and that the exclusionary rule justified, as a deterrent to illegal searches and seizures, is a demonstrable failure, and considering the substantiality of this violation this evidence, even though illegally seized, should be admitted.

I need not remind this Court of its constant -- the necessity for its constant vigilance with respect to intrusions on personal liberties.

As long ago as 1886 it held, in Boyd vs. United States, that illegitimate and unconstitutional practices get their first footing in that way; namely, by silent approaches and slight deviations from legal modes of procedure.

It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon.

If we are to be left to the good faith of police officers, this Court has already dealt with that situation, because in Terry it said: Simply good faith on the part of the arresting officer is not enough. If subjective good faith alone were the test, the protections of the Fourth

Amendment would evaporate and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police.

I think that it can be fairly said that the Government stretches a point when it says in its brief that what Mr. Justice Powell has described in the Schneclof? case as the most searching empirical study of the efficacy of the exclusionary rule, when the Government suggested it, is a failure.

Professor Oakes, the author of that article, does argue that it is a failure, but he says that the empirical data falls short of establishing that the rule does not discourage illegal search.

But, deterence is by no means the only justification for the rule.

Sixty years ago, as Mr. Justice Stewart pointed out, in Weeks, this Court took care to define the issue in these Fourth Amendment cases in this way: The question is the right of a court in a criminal prosecution to retain, for the purposes of evidence, the papers of the accused, seized in his house, without his authority, and without a warrant for his arrest and none for the search of his premises.

This Court then held, in that case, that if a trial court had such a right, the protection of the Fourth Amendment is of no value, and might as well be stricken from

the Constitution.

Six years later, Mr. Justice Holmes said: If that were to be the case, the Fourth Amendment would be reduced to a mere form of words.

For almost sixty years this Court has not departed from this essential core of Weeks. And over those decades, it has thundered to every court in the Federal system, and since 1961 to the States: You have no right, courts, to obtain, and you shall not keep and use against an accused the ill-gotten gains of searches which violate the Fourth Amendment.

This, the Weeks Court said, is one of those great principles established by years of endeavor and suffering, and it must not be given up lightly, even in a case where constitutional liberty and the violation of constitutional right are separated by the fabric line of a coat pocket.

This Court is urged to analogize to those cases in which less than perfect Miranda warnings have not resulted in the exclusion of admissions or confessions.

I respectfully submit that that analogy limps rather badly.

The Constitution does not require Miranda warnings, but it does require a warrant from a migistrate to permit a search, unless the exigencies of the case demand otherwise. The exigencies being an arrest.

The Fifth Amendment right is not violated, absent Miranda warnings, until the incriminating statement is used in the trial against the defendant, to make him a witness against himself.

QUESTION: Well, Mr. Gartlan, if the Constitution doesn't require Miranda warnings, how do you explain the Miranda decision?

MR. GARTLAN: The Miranda decision, I explain, Mr. Justice Rehnquist, as a tool to insure the voluntariness and informed making of incriminating statements before they are used against the defendant.

The Fifth Amendment plainly does not say that a person has to be warned, but this Court has held that unless informed of his rights, the incriminating statement may not be used against him.

But the Fourth Amendment situation is a totally different thing. The --

QUESTION: But the Constitution doesn't say a warrant shall issue for every search.

It just says warrants shall not issue except on probable cause.

MR. GARTLAN: That's correct. By a magistrate. But it is all-inclusive with respect to that requirement.

But the Fourth Amendment --

QUESTION: It doesn't say when warrants have to

issue.

MR. GARTLAN: Pardon?

QUESTION: It doesn't say when warrants have to issue.

MR. GARTLAN: I didn't mean to imply that it did.

QUESTION: I thought you said that it did, that the Constitution said warrants have to issue.

MR. GARTLAN: Before a search can be made, unless the search --

QUESTION: That isn't what the Constitution says.

MR. GARTLAN: Pardon?

QUESTION: That isn't what the Constitution says.

MR. GARTLAN: The courts have carved out the exception to the Constitution, no doubt. But the Fourth Amendment right is violated when this literally a trespass is committed. And that is why the Miranda argument, I don't think provides an adequate guide for the Court in this case.

What we seek here, in sum, is a limit to the scope of a protective search to what is reasonably necessary for protection. We ask for a rule which, as this record shows, is reasonable and compatible with the -- in the light of the street experience of police officers, and can be simply stated: Officer, where there are no fruits, instrumentalities or evidence of crime to be gained by a search, limit yourself to a thorough feeling of the defendant's outer clothing. And

if you feel anything you think may be a weapon, follow the lead of the suspicion until your suspicion lifts. Take away from the defendant any package, purse, or other container which might contain a weapon, but do not intrude upon his person or effects any further than is necessary to protect yourself.

QUESTION: If the arrest had been made here, Mr. Gartlan, explicitly for driving while under the influence of some intoxicating substance, would all of your arguments be the same? What effect do you think that would have on your case? Let's put it that way.

MR. GARTLAN: I think that is a crime for which there may be corroborating evidence. Obviously, you don't prove a crime of driving under the influence, except by blood tests or breath tests. But the presence of alcohol in a flask might well be corroborating evidence to support the charge.

QUESTION: Or heroin or marijuana. The same?

MR. GARTLAN: That's correct. But while I'm not an expert in the matter, I think that the discernible odor of -- at least on the breath of an arrestee in a drunk driving case is different, at least.

QUESTION: But here the evidence -- there was some indication that there was no odor of liquor, and therefore the officer was --

MR. GARTLAN: In this case, Your Honor?

QUESTION: Yes. Did that arise, or am I confused with the preceding case?

MR. GARTLAN: No, this case, Mr. Chief Justice Burger, the arrest was solely because Officer Jenks had checked the Metropolitan Police traffic records and knew that Robinson --

QUESTION: Yes.

MR. GARTLAN: -- had had his permit lifted and had obtained a new one under false pretenses. And he stopped him, after having ascertained that, three or four days later. To make the arrest for specifically that charge. There was no improper driving, or any other indication.

And so we say to this police officer: Do not intrude upon the person of the arrestee or his effects any further than is necessary to protect yourself.

This is part of the law, that an officer --

QUESTION: Mr. Gartlan, I am clear that you do concede the validity of the arrest; right?

MR. GARTLAN: Yes.

QUESTION: That's what I thought.

MR. GARTLAN: This is part of the law, and you are sworn to uphold the rights that you are committed to defend.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Tuttle, you have just

two minutes left.

REBUTTAL ARGUMENT OF ALLAN A. TUTTLE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TUTTLE: I'll try and cover a few very brief points.

The first, with respect to Mr. Justice Stewart's comments on Chimel, or the Chimel case.

I believe that that opinion itself makes it very clear that a search incident to an arrest --

QUESTION: You have that same problem, don't you. Is it "Ki-mel", "Shimel","Shi-mel"?

[Laughter.]

MR. TUTTLE: I wish the Court would tell me!

QUESTION: What we were told here one day is that it was "Ki-mel" by someone who said he knew "Ki-mel".

MR. TUTTLE: Maybe individual?

[Laughter.]

MR. TUTTLE: That case itself makes clear that a search of the person is permissible, and there's language to that effect also in Mr. Justice White's dissent.

Secondly, on the comment that Mr. Donaldson was a sanguine dindividual about searches, I would call the Court's attention to page 101 of the Appendix, when he is asked whether a Terry search is adequate in a Terry situation, and he says: "My opinion would be that before I would put anyone beside

me in a cruiser I would like to be able to search him completely, but we can't."

I don't think he even feels safe in the Terry situation, according to that record.

QUESTION: Well, in the Terry situation, you don't put him beside you in a cruiser; that's just a breach to the order.

MR. TUTTLE: It's commonplace in ticketing to do that, Mr. Justice. When you're issuing a speeding ticket, usually the individual sits in the cruiser next to you.

QUESTION: Oh, I thought you meant to take him down to jail.

MR. TUTTLE: No, I don't; no.

QUESTION: Oh. Yes.

MR. TUTTLE: And that's what he was referring to, I assume.

QUESTION: I see.

MR. TUTTLE: Now, there's also the point about the concession that a search of a cigarette package would be permissible in the case of an armed robbery.

I would call the Court's attention to the decision in Schmerber and also the decision of the Court of Appeals in New York in Shegalez?, both of which articulate the basis of an evidentiary search as being that which is found in plain view during a weapons search.

In other words, that a weapons -- that the justification for search at all may be a search for weapons. And I find it strange that there is a concession that you can do anything you want to an individual where there's some conceivable notion that there might be a weapon, but that you're terribly restricted when the idea is protecting yourself from possible dangerous weapons.

Thank you.

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

[Whereupon, at 11:49 o'clock, a.m., the case in the above-entitled matter was submitted to the Court.]