In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v. No. 73-88

EUGENE H. EDWARDS and
WILLIAM T. LIVESAY,

Respondents.

Washington, D.C.
January 15, 1974

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UNITED STATES OF AMERICA, Petitioner,	:	
v.	:	No. 73-88
EUGENE H. EDWARDS and WILLIAM T. LIVESAY, Respondents.	:	

Washington, D. C.
Tuesday, January 15, 1974

The above-entitled matter came on for argument at 1:30 o'clock p.m.

BEFORE:

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

EDWARD R. KORMAN, Esq., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Petitioner.

THOMAS R. SMITH, Esq., 500 Provident Bank Building, 632 Vine Street, Cincinnati, Ohio; for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-88, United States against Edwards.

Mr. Korman, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWARD R. KORMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. That court reversed judgments of conviction entered by the United States District Court for the Southern District of Ohio, convicting Eugene H. Edwards and the late William T. Livesay, who died subsequent to the granting of the writ, of attempting to break into a United States post office in violation of 18 USC Section 2115.

The court of appeals held that certain scientific evidence, which established that paint chips which were found on the clothing of both of these gentlemen came from the same source as paint chips on the window of the post office where the attempted burglary had taken place and that this evidence was the fruit of the unlawful taking of the clothing of these two gentlemen some ten hours after their arrest on the morning following their arrest.

Although the court of appeals held that the arrest of Mr. Edwards was lawful--it did not in fact reach the issue as to Mr. Livesay--and that there was probable cause to take the clothing, it held that the taking was fatally defective because a warrant had not been obtained for the search and seizure of the clothing.

The issue presented here is whether the authority to search an individual without a warrant or an independent showing of probable cause, which arises by virtue of his lawful arrest, is somehow dissipated if it is not exercised "substantially contemporaneously with the arrest," not several hours--in this case approximately nine--after the administrative process and other mechanics of the arrest have come to a halt.

Since there is in this case a lingering issue as to the validity of the underlying arrest raised by implication in the brief that has been filed by the respondent and expressly by Mr. Edwards in a separate document which he has filed with this Court entitled "A Motion for Extension of Time for Filing a Writ of Certiorari," it is appropriate, I think, to begin the discussion of the facts in this case where it all began, on the evening of May 31, in the year 1970, in the city of--

Q Could you first tell me, Mr. Korman, how that issue is still alive?

MR. KORMAN: Presumably it has been raised as an alternative grounds for affirmance; although it was not raised as an issue in our petition for certiorari, nevertheless raised, as I understand it, in the opposing papers on certiorari. But, nevertheless, I think it would still be helpful to start this case where it began, in Lebanon, Ohio, around 10:45 in the evening, on May 31, 1970.

At this point, I would refer the Court to a map which is one page 1 of a supplemtntal appendix which we filed yesterday and which might be helpful if the Court had while I discuss the facts. In the event that it had not yet been distributed, I gave nine copies to the Clerk right now, and he might be able to distribute it.

I said yesterday we filed a supplemental appendix which contained a map of the area.

The map is a map of approximately two or three square blocks. And around 10:45 in the evening a tan Plymouth pulled up at South Sycamore Street, which is a block from the Lebanon post office, and parked at No. 124 South Sycamore Street. Three gentlemen emerged, took something out of the trunk of the vehicle and began walking towards the business district.

This scene was viewed by several people who were sitting on the porch or looking out of their windows. One of them called the police and told them that three strange

persons had been seen emerging from this tan Plymouth. This is generally a business district except for this brief, small residential area. And a bulletin went out that three suspicious persons had been observed leaving this tan automobile.

At that point in time, Patrolman Ashley was cruising on South Street,which is right around the corner towards the bottom of the map. He proceeded to examine the Plymouth, saw nothing particularly unusual about it, except that it had an out-of-county license plate. He then drove around--

Q Did you say out-of-town license plate?

MR. KORMAN: Out-of-county license plate. Apparently in Ohio the residents of each county get license plates with a particular letter on the license number to indicate the county in which the automobile is registered.

Seeing nothing particularly unusual other than this, Patrolman Ashley drove his car around, up South Sycamore Street north. He made then a right turn onto West Main Street, and then you see the alley on West Main Street. He drove down the alley into the driveway of the Lebanon Post Office; he then drove through the driveway and out to South Broadway.

As he got passed the post office, he turned north and he saw two individuals on the north boundary of the

Lebanon Post Office near the museum. It appeared to him that they were walking in a north-north easterly direction, that they had just come from that portion of the Post Office and being perhaps naturally suspicious--since this was 10:30 at night in a business district on a Sunday night which was not to his knowledge terribly crowded with people--he decided to follow them.

And so as they walked he drove behind them and they made a turn on West Main Street to begin walking towards South Sycamore and by the time Agent Ashley had gone to West Main Street, over the radio of his car he had heard that the burglar alarm had been sounded at the post office.

He thereupon stopped these two gentlemen, asked them to get into his car, which they did without drawing a revolver, and then he drove back to the post office, got out of the car. By that time other police officers had arrived on the scene. He examined the bank and the area right where he had seen these gentlemen emerge from, and discovered that in fact there had been an attempted burglary. There were burglar's tools, the screen had apparently been tampered with, and also he noticed paint chips near the area as well. And it was at that point that he told these gentlemen that they were under arrest, and they were taken into custody.

These two gentlemen were Mr. Edwards, who is a respondent here, and one Hundley, who was not convicted of

this crime because he jumped bail and ultimately pled guilty to bail jumping rather than any particular offense here.

At the time all of this was transpiring, the defendant Livesay was observed back on 118 Sycamore Street hopping over the back fence and hiding in the bushes at 118 South Sycamore Street. He had been observed by a Mr. Cruz who lived in the house and who had earlier was one of the neighbors who had observed the three gentlemen emerge from the tan Plymouth.

He then saw Mr. Livesay run towards the Plymouth and hide in the Plymouth, where Mr. Livesay was ultimately discovered by another patrolman who placed him under arrest and brought him to the scene of the crime.

After these gentlemen were placed in custody and taken into the station house--this is approximately now about 11:30 on a Sunday night--they were placed in custody, and the following morning the police, having noticed the paint chips near the window, the police went to a local department store called Kaufman's Department Store, and purchased new clothing for these gentlemen, went to the prison some time around 9:30 it the local jail, asked the two men to change into the clothing which had been purchased. The clothing that they were wearing had been taken from them. And, of course, the scientific analysis which followed clearly

established that the paint chips that were found in their clothing came from the same source as the paint chips from the window of the post office.

Prior to trial, a motion to suppress was made, and I note only for the purposes of information that the motion to suppress only dealt with the probable cause aspect and did not involve the issue that was ultimately raised in the court of appeals and decided by the court of appeals.

At trial the evidence was as I have described it: The observations of the patrolman, the neighbors in the surrounding area, and of course the testimony of two people who made the scientific analyses.

Q Did you tell us that Mr. Edwards had filed something personally here?

MR. KORMAN: Yes, we received a copy of the document, a petition or an application for an extension of time to--

Q When did it come in?

MR. KORMAN: It was several weeks ago. I have my copy here. It was handwritten. We received a copy of it.

I looked through the Court's file yesterday in the docket room, and I did not notice it among the papers there.

MR. CHIEF JUSTICE BURGER: The Clerk is checking on it right now.

Q As I understand from what you said, it is in

that document primarily that the claim is made that the arrest was invalid.

MR. KORMAN: That's correct.

The court of appeals in a rather exhaustive opinion rejected the argument that there was no probable cause for the arrest, held that the police officers acted as reasonable prudent men should have under the circumstanes.

However, it held that the seizure of the clothing some ten hours after the arrest was invalid. The court reasoned that since the arrest was not contemporaneous--the search was not contemporaneous with the arrest--it could not be justified as a "search incident to an arrest," and struck down the taking of the clothing because there was no warrant even though, as I indicated earlier, it found probable cause to justify the actual taking of the pants independent of the probable cause of the arrest.

We have filed a petition for certiorari not only because of the conflict among the circuits but the importance of the issue in both federal and state prosecutions; and indeed we have been advised by the Attorney General of Ohio that a predictable spate of habeas corpus litigation has already begun, that in the Southern District of Ohio alone two habeas corpus petitions have already been granted in Dean v. Gray and Carpenter v. Gray, and they are pending before the Sixth Circuit. And there is as yet another

petition for habeas corpus in a case called Hoskinson v. Gray, raising the same issue as involved in this case in the Sixth Circuit.

The principal error--

Q Before you leave the facts, there is one thing that is not clear to me, and I would like to ask you were these men asked to discard their old clothing and given new clothing as a matter of routine jail procedures or were they asked for their clothing for the purpose of making this search?

MR. KORMAN: That question was put to the police officer who was in charge and he started to answer what they do generally and then he stopped himself and he said, "Do you mean generally or what did we do in this case?"

Whereupon, they said, "Well, what did you do in this case?"

And he said that they took it the morning after apparently with the express purpose not in mind of holding it for inventory or exchanging it for jail clothing. Apparently they had no jail clothing since they had to go out and purchase this clothing. So that it was taken with the express purpose of conducting the analysis that was ultimately conducted.

Q That is your inference, is it, from the facts?

MR. KORMAN: That is correct.

Q That was my understanding, but I was not sure.

Q Do you think it would make a difference, Mr. Korman--would you have a different case if routinely they made anyone who was jailed changed into regular prison garb?

MR. KORMAN: I believe that we would, although there is a case in the Fifth Circuit called Britt v. the United States in which that had been done and the clothing I believe deposited and held for about three days afterwards, and the court of appeals said you could not take the clothing three days afterward even though it had already been taken from the defendants without a warrant.

It is our view, as I shall elaborate, that it is, as the Court observed in the Robinson case, it is a fact of the arrest which gives rise to the right to seize and take th4 clothing and that under those circumstance it does not matter and there is no reasonable basis to draw a distinction between takings which occur five minutes after the arrest or five hours after the arrest.

Q But you do not and think on this record you cannot seek to justify this search as an inventory search?

MR. KORMAN: No. No attempt was made to do that.

Q Of the kind that is routinely made in jails before a person is put in a cell and maybe sometimes thereafter if they had missed something.

MR. KORMAN: That is correct.

Q It is not that kind of a search?

MR. KORMAN: No, it is not.

Q The clothing was taken for the purpose of searching the clothing?

MR. KORMAN: That is correct.

Q For evidence of guilt.

MR. KORMAN: Right. An there was no other clothing in the prison. So apparently--

Q They went out and bought it specially.

MR. KORMAN: Exactly.

By the way, part of the reason for the delay of ten hours--it could have been reduced to about two hours--was that they decided to wait until morning to buy them a new pair of clothing before they actually made them undress in the prison and give up the clothing that they were wearing. So that this is a clear case in which the police officers acted reasonably under any definition of the term. And the conclusion of the court of appeals that they acted unreasonably is really based, we believe, in a mistaken reliance on cases involving search incident to an arrest, which involved the searches of homes and other similar areas where a defendant happened to be arrested in his house. And under those circumstances it was held that when you arrest someone in his house, you cannot go search the whole house because

of the fortuitous circumstance that you happen to have arrested him there. And, of course, in some instances the circumstance was not just fortuitous, but the police, knowing that they would be able to search a whole house if they happened to find a defendant there to arrest him would plan the arrest accordingly.

Q Do you think, Mr. Korman, your situation would be any different or would your position be any different if promptly on their arriving at the station they handed them substitute jailhouse clothes, took their regular clothes, put them in a sealed bag and gave them a receipt, and then put it in a locker and then the next morning went into the locker and got the clothes and sent them to the laboratory for the chemical analysis?

MR. KORMAN: I think it would be different. It should be different, but I am not sure that the Sixth Circuit would think so. They expressly rejected, for example, the holding of the court of appeals for the Second Circuit in which something precisely like that had been done; and six hours after the clothing had actually been taken from the defendants, the FBI picked up the clothing to conduct scientific samples, and the Second Circuit said that is perfectly all right. And in the opinion of the court of appeals, they appeared to reject even that reasoning of the Second Circuit.

Q In other words, the Second Circuit reasoned that they had the clothes already in custody and they did not need a warrant to get them?

MR. KORMAN; That is right. And that seems to make--

Q I suppose what you are saying in effect is that they had both the clothes and the people in custody here and they could take the clothes any time they wanted to.

MR. KORMAN: That is correct. Normally you want a warrant because you want to interpose a neutral and detached magistrate between the police and the initial intrusion upon the privacy of the individual.

Q In other words, if I understood your answer correctly, you would be making the same argument if the clothes had been taken away from them three weeks after their arrest?

MR. KORMAN: That is correct, provided they were still in jail and that the purpose of the search was not to harass them or in any way to--

Q And still in the same clothes. And you would say that was a search incident to a lawful arrest?

MR. KORMAN: That is correct, because we believe the word "incident," particularly as it was applied in the Robinson case, means by virtue of the fact of the arrest. That is, if you have his body in custody and in jail and he

is lawfully incarcerated, his privacy has been interfered with to that extent, we think you do not need a neutral and detached magistrate to decide whether you can search or not or take an article of his clothing from him.

Q So, you could have done it two years after his arrest, correct?

MR. KORMAN: Carrying that reasoning out, that would be correct. If he is still in jail, if they are acting reasonably--

Q And that would still be incident to his arrest?

MR. KORMAN: That is correct.

Q In your view.

MR. KORMAN: Incident caused by virtue of his arrest and custody. And, as a matter of fact, I believe Your Honor, in a case called Meinzer v. the United States rejected out of hand the notion that someone in jail at any time could complain about being searched or--

Q No, no, that was electronic overhearing in that case.

MR. KORMAN: That is true. It is factually distinguishable, but I was merely talking about the broad proposition that Your Honor--

Q That case did not involve the claim at all of a search incident to an arrest.

MR. KORMAN: I understand that. What I am saying is that the case involved simply searching someone who is lawfully in jail, and Your Honor rejected out of hand the notion that someone in jail over and above any claim by virtue of an arrest could even assert such a proposition.

We are not arguing, we are not going as far as that language would take us; we are not saying that someone in jail is totally at the mercy of the jailers with regard to what they can do with him. They couldn't strip search him, they could not harass him, and they could not undertake any other kind of search unless it was undertaken in good faith and reasonably motivated.

Q You would say arrest or continued custody carries with it the incidental right to search whether you have probable cause to search the clothing or not?

MR. KORMAN: That is correct, if you are looking for evidence of a crime or contraband.

Q If you are looking for evidence of a crime. But you do not have to have probable cause to believe in it.

MR. KORMAN: No. That is correct.

Q As long as you had probable cause to believe the man committed the crime to arrest him.

MR. KORMAN: That is correct, because that is what gives rise to your right to--

Q Would you search him if he is out on bail?

MR. KORMAN: No.

Q So, the difference is whether he has got bail money?

MR. KORMAN: Or whether he is a bailable risk. It is not so much the difference--of course, if he has the bond money--

Q What today is not a bailable risk?

MR. KORMAN: I think there are certain circumstances under which--

Q A robber is a bailable risk.

MR. KORMAN: That is correct.

Q If he had money for bail, you could not search him without a warrant.

MR. KORMAN: Not because he had the money for bail but because he was already free, and to search him again would involve an intrusion onto his privacy, which would be not incidental to anything.

Q And the difference is whether or not he has the bail money.

MR. KORMAN: The difference is that in one instance he is free, and to search him would involve an intrusion on his privacy.

Q And the difference between being free and not being free is m-o-n-e-y.

MR. KORMAN: In most instances, that is correct.

Q Mr. Korman, would you say that the search conducted in the jail of these people's clothes has to have a separate justification by way of reasonableness, even though it is not subject to the warrant requirement?

MR. KORMAN: That is correct. But when I say reasonableness, I do not mean probable cause. I mean reasonable in the sense that they are not simply strip searching them every hour for the purpose of harassing them.

Q Reasonable in the sense of the Fourth Amendment?

MR. KORMAN: Yes, but I think the word reasonable has a different definition when you are talking about stopping someone on the street for no reason and searching him and when he is already in jail and in custody and his privacy has been interfered with to that extent; it does not seem to me that you need now the neutral and detached magistrate that you would need, for example, if you wanted to search his house.

Q As I understood your answer, it is not reasonable--your use of the word reasonable is not in the Fourth Amendment sense, but it is in the Fifth and Fourteenth Amendment, due process sense, like Roachin v. California.

MR. KORMAN: It would be in that sense but also the Fourth Amendment's reasonableness. The word reasonable in the Fourth Amendment has not always been construed to

require a showing of probable cause for an intrusion on the privacy of an individual.

For example, in Terry v. Ohio the defendant was stopped and frisked. It was not said that you needed for that particular interference with his liberty, that you needed probable cause. And whit constitues a reasonable search, even under the Fourth Amendment, I agree they may overlap and really what I am probably getting to is a Fourth Amendment reasonableness.

Q Fourteenth--

MR. KORMAN: Fourteenth, I am sorry.

Q Fifth and Fourteenth.

MR. KORMAN: Fifth and Fourteenth Amendment--

Q Because you were talking about harassment and so on.

MR. KORMAN: Right. But I think to a certain extent they would overlap in that harassing him, searching him every hour, for example, for the purpose of harassing him would probably be a violation of both the Fourth and Fourteenth Amendments because that would be simply unreasonable conduct on the part of the jailers.

On the other hand, in this case for example, it could hardly be said, even under the Fourth Amendment, if probable cause is the standard and the court of appeals here found that there was probable cause in their opinion.

They said that we find there was probable cause. And they said that is still not enough.

Q But no warrant.

MR. KORMAN: That is correct, because there was no warrant.

Q Mr. Korman, in Cooper v. California and in Cady v. Dombrowski this Court held a search to be reasonable under the Fourth Amendment, even though there was no question of probable cause really applicable to that fact situation. Is your position here that that kind of test is applied or the kind of test Justice Stewart suggests of revolting the conscience, stomach pump type of thing?

MR. KORMAN: I think it would depend. As I said, I think it would be the kind of test Your Honor is suggesting but also I think the protections of the Fourteenth and Fifth Amendments overlap to a certain extent with the Fourth Amendment and that of course the kind of conduct that was involved in Roache and would clearly come under a Fourth Amendment standard; but, for example, the cases that Your Honor mentioned in Terry were cases which involved reasonableness in the sense that there was a legitimate law enforcement purpose combined with an intrusion which was something less than a full scale arrest and seizure of the individual. And that, it seems to me, is what we have here. Here he was already in custody, he was in jail.

Q Do you have probable cause too here?

MR. KORMAN: Yes, we do. And the court of appeals so found.

Q Should we purport to decide a case where there is not any probable cause but he is nevertheless searched in jail?

MR. KORMAN: No, it is not essential that the Court that here. But in making the argument, I think I would not want to concede that even if there was something less than probable cause here that the search--

Q Because at the time you searched him, you had probable cause, I take it, for the arrest--

MR. KORMAN: That is correct.

Q --namely, that you had cause to believe that he had committed this crime.

MR. KORMAN: That is correct.

Q And that by the time you searched him, you knew that they had crawled through a window.

MR. KORMAN: Correct. And Your Honor said need you decide it. I actually should have responded that I think you already have in the Robinson case where there was no reason on the part of the officer to believe that the defendent was armed or that there would be any evidence in crime in saying that we do not care what the officer thought, the Court said the right to search arises from the fact of the arrest; and

we are not going to look into whether the officer really had any reason to believe that he was going to find a gun in the cigarette pack.

Q But, nevertheless, this would be an a fortiori case if there was probable cause.

MR. KORMAN: That is correct.

Q The whole thrust of your argument in your brief at least, and I think now, is that this search was valid because it was a search incident to a valid arrest?

MR. KORMAN: That is correct.

Q If that is correct, I do not quite understand your answer to my Brother Marshall's question of a while ago that why would not search be equally valid if made of this man after he had been released on bail. He still had been arrested and would it not equally be a search incident to a valid arrest?

MR. KORMAN: No, because we are not simply--I would like to get away from the phrase "incident to." The reason that we say you do not need a warrant if he is in jail is because his freedom has already been restrained and he is in custody, and to go and look in his pockets or take his shirt does involve really a substantial additional intrusion.

On the other hand, if he is out on bail, then he is out free.

Q He had been in jail. He had been arrested.

MR. KORMAN: Yes, but the seizure now involves something more. He is free. It involves picking him up. It involves saying, "Take off your clothes." It is a substantial additional intrusion onto his privacy, which is not so if he is already locked up in jail.

Q Then maybe I do not understand your argument. I thought, as I said, that your argument was that this was incident to a valid arrest and that is the way you justified its validity.

MR. KORMAN: That is a catch phrase, and I am reminded of Mr. Justice Holmes' statement that it is one of the misfortunes of the law that ideas become insisted in phrases and thereifter for a long time cease to provoke further thought. Now, the notion--

Q Those were his words, but I just wanted your thoughts, what your justification is.

MR. KORMAN: I think the phrase "incident to an arrest" embodies certain value judgments. That is, you can search someone after he is arrested because you alredy have him in custody, already have a valid basis for his arrest, and you do not have to go to a neutral magistrate to go that one step further.

On the other hand, we would say if he is out free and he is walking in the streets and he has been released from bail, then stopping him all over again, detaining him

for however short a period of time and taking his clothing, that does involve a significant additional intrusion on his privacy.

Q Even though he had been validly arrested?

MR. KORMAN: Even though he had been validly arrested, because it is a different kind of intrusion onto his privacy. Here he is now free. He is free to do what he chooses as long as he reports to court when ordered, and to stop him, to place him under a temporary detention, simply involves a kind of additional intrusion which--

Q I guess then your argument in rather--and you tell me if I am wrong, I am trying to understand it--is that he is validly in prison, in custody and for that reason he can be searched; is that it?

MR. KORMAN: That is correct, because the search--

Q It is not incident to an arrest. It is because he is validly locked up; is that it?

MR. KORMAN: That is correct. And his freedom has been interfered with in that way.

Q And therefore the arrest is good so long as he is validly locked up; the search is valid, in your submission, even if it is five years after his initial locking up, correct?

MR. KORMAN: Hopefully in these times it would not last that long, but I would say that if you carried my

argument out to its more drily logical extreme, that is where it would lead you, yes.

Q Are you not addressing in this case what in effect is the first search. It seems to me there may be a difference between what sometimes is called an inventory search--a person is lawfully arrested, imprisoned and usually, as I understand it, he is then searched usually forthwith. Here, for reasons that have been indicated, he was not searched until the next morning and substitute clothes could be made available.

Once in inventory search had been completed and prison clothes had been provided, there would be no further occasion for that type of search, as I understand it, unless there was some reason to believe he had been the recipient of a weapon secreted into the jail or drugs or the like.

MR. KORMAN: That is correct.

Q Do you draw that distinction?

MR. KORMAN: Yes, I would. I would, Your Honor.

Q I suppose you would say a man who is in jail loses his Fifth Amendment rights also?

MR. KORMAN: Which Fifth Amendment rights are you referring--

Q Fifth.

MR. KORMAN: Which ones?

Q A man in jail.

MR. KORMAN: No, which Fifth Amendment rights?

Q Self-incrimination.

MR. KORMAN: No, I would not say that, only because it reflects totally different values than a Fourth Amendment right of privacy. The purpose of having a neutral and detached magistrate is to interpose a magistrate between the police and some substantial interference with the privacy interests of the individual. And if he is already in jail and his privacy interests have been interfered with in that way, we would take the position that looking into his pockets only involved a minimal additional intrusion which should not need a magistrate to authorize. On the other hand--

Q That would be true on the street then too.

MR. KORMAN: Pardon me?

Q That would be true on the street then, because it is only minimal.

MR. KORMAN: The Court has held, for example, that you can stop someone briefly on the street and search him without a warrant and less than a probable cause in Terry.

Q Empty his pockets?

MR. KORMAN: It depends on what the frisk reveals.

Q I say empty his pockets?

MR. KORMAN: Not yet. I could not answer that categorically. If he felt a hard object, for example, he

probably could stick his hand in his pocket--

Q You said not yet rather hopefully.

MR. KORMAN: No, no, I meant not yet in the sense that it was premature for the police officer to reach into his pockets immediately.

Q The First Amendment is gone too?

MR. KORMAN: No.

Q That involves rights of privacy.

MR. KORMAN: I think that to a certain extent when you are in jail, your freedom of association is interfered with, and to that extent you do not have the same rights--

Q You cannot write letters?

MR. KORMAN: No. I think the test is reasonableness there. The regulations which restrict your right of free speech in jail have to be based on some reasonable justification by the jailers.

Q All these rights become modified once a person becomes--

MR. KORMAN: Necessarily so, I think.

Q His right of association in prison is somewhat limited to jailers and fellow prisoners for one thing, is it not? But I would like to get away from the First and the Fifth Amendment here and get back to this case. I understood your response at an earlier point was resting on the recent Robinson case, that a custodial arrest--that is, an arrest

followed by custody, is what you were standing on to support the search and that was what we had just held a few weeks ago in Robinson.

MR. KORMAN: That is correct. Perhaps I went off in trying to give a policy justification for that holding, which is simply a statement of fact, and the policy justification for it I think was stated in Mr. Justice Powell's concurring opinion in Robinson, and that is essentially what I am urging here, that once he is lawfully in custody, it does not involve any additional substantial intrusion on his privacy to then search him without a warrant, as long as the police act reasonably.

MR. CHIEF JUSTICE BURGER: Mr. Smith?

ORAL ARGUMENT OF THOMAS R. SMITH, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Before getting into the argument itself, I would like to comment briefly on the facts as they were indicated by Mr. Korman.

I am afraid he exaggerated at least respect. First of all, there may have been the intimation that the respondent Edwards was one of the three individuals who left the suspicious tan automobile. There is absoltely nothing in the record which indicates that. At no time, by no person,

was he identified as one of the human beings who emerged from that automobile.

There is nothing in the recrod which in any way associates him with the now deceased respondent Livesay. Nor is there anything in the record which indicates, as I think Mr. Korman did, that when Officer Ashley first observed the respondent Edwards and the man Hundley with whom he was ultimately arrested, that he was suspicious of them. He in fact was not suspicious of them.

The record is replete with testimony that they acted in a completely normal an unsuspicious manner. When observed them for the first time, they were already on the sidewalk in front of rhe post office and at the north edge of the post office. From that point they walked one half block north and one half block west in a perfectly normal manner until such time as he received the radio transmission advising him that the post office alarm had been activated, whereupon he apprehended them, put them in his automobile, and took them back to the post office.

Q Do you not suppose that the officer was entitled to put the circumstances together, what he saw with his eyes and what he heard over the car radio?

MR. SMITH: Yes, he was; he certainly was. And that is exactly what he did.

Q And you say that did not add up to probable

cause to stop them and arrest them?

MR. SMITH: I do not at this time want to make a serious argument about probable cause. That was made in the district court, it was made in the court of appeals, it was made both places unsuccessfully. And I frankly do not hold out much hope of making that argument successfully here. It was for that reason that we did not talk extensively or at all about that in the brief. But those are facts that the Court ought to consider.

Q It is stated in the petition for certiorari that the question presented is whether whatt hapened here was an unreasonable search and seizure when there was--it states there was a lawful arrest--after he had been lawfully arrested. I do not have before me here your response to that petition, and maybe you did not make one. But if that is stated as the question, I wonder even if it is open to you to make the argument that the arrest was unlawful.

MR. SMITH: We did respond and, to my knowledge, we--I just do not know at this moment whether we affirmatively raised the probable cause issue in that response or not.

Q Or whether you accepted the question as framed by the government?

MR. SMITH: That is correct, Your Honor.

Q Could you not argue to sustain the judgment on that ground or not?

MR. SMITH: I am sorry, I do not understand, Mr. Justice White.

Q You are a respondent and the government comes here. Could you not argue any ground to sustain the judgment as long as you did not enlarge your rights given by the--

MR. SMITH: I would hope so, Your honor. And it is for that reason that to the extent that we can keep it open, I would like to keep open the issue--

Q But you do not want to waste your time arguing it?

MR. SMITH: That is correct.

Q What is this other paper, Mr. Smith, that was referred to earlier? I do not have a copy.

MR. SMITH: If it please the Court, I do not know either. I have never seen a copy of it.

Q Something that your client filed in longhand apparently.

Q You have not seen it either?

MR. SMITH: I have not, Your Honor. I became aware of its possible existence for the first time at lunch with Mr. Korman this afternoon. I had not heard about it or seen it prior to that time.

Q I gather it is on file here?

MR. CHIEF JUSTICE BURGER: The Clerk is checking it now.

MR. SMITH: What I would really like to talk about is whether or not there was a warrant requirement for the search in this case.

The existing authority in this Court, it seems to me, makes it very plain that a search without a warrant, whether that is a search of a person or of a place, is an exceptional search and may be justified only if the circumstances of that search bring it within one of the exceptions to the warrant requirement which have been previously established by this Court.

The Court said that in Beck. It said it in Katz. It said it in Terry. And as recently as May of 1973 it said that a warrantless search is an exceptional search in Schneckelroth and in Cup v. Murphy.

So, I think that the Court is historically on record as indicating that even in searches of persons, a warrantless search is the exceptional search, unless it comes within one of the existing categories of exception.

Plainly one of the existing categories of exception is a search incident to arrest. This Court has always, in talking about what is a search incident to arrest, required that some time relationship exist between the time of arrest and the time of search. And it has done that properly because of the reason for the exception. The Court has said that the reason you may search incident to arrest is to, one,

protect the officer from weapons and, two, ascertain the existence of and preserve the destruction of evidence, which may be used in a prosecution ultimately arising out of that arrest.

It seems to me that when either or both of those purposes of the exception no longer exists, then the exception ought no longer exist. So that if by the mere passage of time we have defeated the purpose of the search incident to arrest exception, then that exception no longer has application.

The question of a search for weapons was never involved in this case. This was plainly a search for evidence. And it is not a search to capture evidence. It is a search to ascertain whether or not the evidence ever existed. The passage of time, we submit, the minimum of nine or ten hours from the time of arrest until the time that the clothing was taken,defeats the purpose of taking the clothing so as to preserve evidence.

Q Would you think it would have been all right if it were done two hours later?

MR. SMITH: It depends what had happened in those two hours, if it please the Court. If the defendant had been placed in the jail cell by himself unattended during which time he may have taken whatever action he wanted to with respect to whatever evidence there may have been on his

person, I think it would make a difference. In the one court of appeals case, which involved a delay of six hours, the Court was very emphatic in indicating that during that entire period of time the defendant was physically in the company and in the custody of the arresting officers, so that there was no intervening opportunity for him to dispose of the evidence had he wanted to.

Q What is the case you are referring to?

MR. SMITH: I am sorry?

Q Florida case you are referring to in the Fifth Circuit.

MR. SMITH: I am not sure.

Q Not important.

MR. SMITH: I think that might be the Caruso case. But, at any rate, it was very important to the Court of Appeals in that case and it based its decision on the incident to arrest exception. It did not say that there was not a blanket dispensation from the requirement to obtain a warrant. It said in this case this search was in fact a search incident to arrest. And it was such because it was made during the arrest process, the incarceration process, the booking process, during all of which time the clothing of the defendant was under the constant observation of the arresting officers.

Q Would you think it would be reasonable to

assume that the arrested people here did not have any idea that some of these paint flakes, the evidence, was still attached to their clothing?

MR.SMITH: Yes, I would, Your Honor, and I think that argues against the incident to arrest exception. If defendant cannot be aware of the fact of the evidence on his person, as the police officers could not have been because of its micropscopic size--

Q Let us suppose that it had been impregnated in the fabric and perhaps in the cuffs of his pants, which would be a place where these things would lodge often, and he was shrewd enough to have taken his clothes, when he was not observed, shaken them all out, brushed them, turned down his pants cuffs, and scattered the paint flakes on the floor. Then in the morning they came in with a vacuum cleaner and took up all this material and found it that way. What would you think about that? Would they need a warrant to vacuum the floor?

MR. SMITH: No, Your Honor, because that is not a search of the person. It is not a search of his clothing. It is merely a vacuuming of the--

Q Search of his place of temporary habitation, is it not?

MR. SMITH: Your Honor, I think he has no privacy in that sense to his place of habitation.

Q Would that not be like the Abel search where he was arrested and searched in his own room in the hotel, and he had thrown stuff in the wastepaper basket, and the Court held that that was abandoned; so, he could no longer complain of its seizure and its use.

MR. SMITH: Yes, that would have application.

Q Would that not be the sort of situation the Chief Justice just presented?

MR. SMITH: Yes, but that is plainly, of course, not the case here. They took the clothes from his body solely for the purpose of submitting them to a laboratory examination. It was not a custodial search. It was not a custodial taking. It was not a taking in the normal processes of the Lebanon Police Department. It was a taking under circumstances which we submit plainly do not conform to the incident to arrest exception.

Q Let us change this hypothetical a little bit then. Instead of brushing his pants cuffs out, the officer had come in in the morning with a small hand vacuum cleaner and said, "Now, this is not going to hurt you any. But just stand still. I am going to vacuum your trousers." He vacuums him from the outside of the trousers without disrobing him or anything. Unreasonable search?

MR. SMITH: That makes it, I think, a much more difficult question. I think it indicates what Mr. Justice

Stewart has said, for instance, in Chimel. That whenever you draw a line, there are going to be cases on either side of that line which are really not substantially different. But it is nevertheless necessary to draw a line. I do not know what the answer would be in that particular case.

Q In this connection, let me ask the question of you that I asked of Mr. Korman. Suppose routinely at this jail they issued prison garb. Would you have a different case?

MR. SMITH: I think that our position would be the same. If the taking of the clothing of an arrested person is merely a custodial taking--that is, if it is taken only so that the inner workings of the police system can be better expedited, that you would nonetheless require a warrant in that case, for the reason that in our view of it, the mere fact of arrest does not deny to the person arrested his rights of property or his rights of privacy in his clothing. So that if--

Q If he were, instead of being in the jail just after arrest, if he were a convict in the state penitentiary, would a search warrant be necessary for the compulsory exchange of clothing and the examination of his pockets there?

MR. SMITH: That is again a different circumstance, because the fact that I would want to emphasize here is that

this was not a routine custodial taking. This was a taking for the specific purpose of making a search, and it was necessary for them to go out and purchase clothing so that substitute clothing could be had. I might indicate this. While it is not all absoltuely clear from the record, what they took from Edwards was a shirt, a sweater, trousers, and his shoes. What they replaced them with was a T-shirt and a pair of trousers. It is not a matter of record but it is a fact that he was in the jail for a week without a pair of shoes until his wife was able to obtain a pair and bring them to him.

Q Then I take it the point of distinction you are drawing, if I understood you correctly, was that this was taken for the purpose of making a search.

MR. SMITH: Yes.

Q And if that is so, then why is not the answer to my penitentiary inmates situation exactly the same?

MR. SMITH: It would be, if it were taken for the purpose of making a search, we submit that a warrant would be required, although plainly in those circumstances it is not taken for the purpose of making a search.

Q In pursuit of Mr. Justice Blackmun's question, suppose that making the search of his clothes, when he comes into the prison to be sure that he is not carrying narcotics or any other dangerous material, they must get a warrant when

he arrives at the prison?

MR. SMITH: No, Your Honor. That is--

Q An inventory search.

MR. SMITH: Yes, an inventory search.

Q Do you regard a search for narcotics as an inventory search?

MR. SMITH: Your Honor, I regard what is truly an inventory search, even though it may result in the location of or the finding of narcotics, as an inventory search to which historically the warrant requirement has no application.

Q Of course they take the objects from the clothes and they list them, package them, and I suppose in time return them.

MR. SMITH: That is correct, Your Honor.

Q That is the idea of an inventory search.

MR. SMITH: That is right. It is a safekeeping kind of taking.

Q No real motive to look for evidence in your traditional inventory search.

MR. SMITH: That is correct, Your Honor. And it is for that reason that we submit no warrant is required for that kind of search. There was, however, in this case a specific intent to search for evidence.

Q I am still having trouble with your posture here. Suppose the warden of the state penitentiary is aware

that there are narcotics in the prison and so he asks every inmate to change clothing. As I understand your position, you would require a search warrant?

MR. SMITH: No, I would not, Your Honor. I think there is just a completely separate set of circumstanced involved in searching men who are in a penitentiary who have already been convicted of a crime than there is in the removal of clothing from a person arrested on probable cause, very tenuous probable cause, for the purpose of ascertaining whether or not there is on his person evidence which may involve him in the matter for which he has been held or which he is being held on probable cause.

Q These labels we give are sometimes elusive and not thoroughly reliable. But routinely when a person goes into a prison, as distinguished from a jail where he is awaiting trial, he is convicted and goes into a prison. There are two things done to him. There is an inventory of everything he has which has been, if it is something not permitted, is put away. He is given a receipt for it. And then there is a prophylactic search which is to see if he has any contraband, weapons, narcotics, whatever.

Going back to this prophylactic search, if you will stay with my term to distinguish that from the inventory search, would you say they need a warrant to make the prophylactic search before he goes into Lorton Penitentiary,

for example?

MR. SMITH: No, Your Honor, I would not.

Q And if they find the narcotics, I suppose he is trouble of some kind, is he not?

MR. SMITH: I am sure he is.

Q You do not have that case here.

MR. SMITH: That is correct, Your Honor.

Q Even if they find the narcotics, using the term inventory search, he would still be in tro-ble.

MR. SMITH: He is in exactly the same kind of trouble, yes.

I would like to comment briefly, if I may, on the notion that somehow or other the mere fact of an arrest, the mere fact of a custodial arrest, somehow or other brings about a substantial diminution of the arrested person's Fourth Amendment rights.

It seems to anomalous that a circumstance, that is, an arrest, which plainly accentuates and puts into acute focus his Fifth and Sixth Amendment rights, his Fifth Amendment rights to the extent that the arresting officers must not only honor them but must in fact inform him as to what they are, that that same circumstance can act to diminish what would otherwise be his plainly available Fourth Amendment rights.

It seems to me a little bit like saying that if you

for some reason or other have a right to beat me about the head with a stick that you, by that reason, have the right to stamp upon my toe. And the reason that you have the right to stamp upon my toe is that that does not hurt as much as beating me about the head with the stick does.

I have never been able to understand the thrust of the lesser intrusion argument. It seems to me to be that kind of circumstance.

Q Is that not what we just held in Robinson though?

MR. SMITH: But that was plainly, Your Honor, a search incident to arrest. It was a face-to-face confrontation. The entire search in juestion at that time was conducted immediately at the scene of arrest. There was no time interval.

Q But the reason it could be coducted, I thought we said, was because they had the right to take the man into custody, and therefore they had a right to make this search.

MR. SMITH: That is correct, Your Honor. That, it seems to me, though, is completely different from this case. In my view, Robinson has little if anything to do with this case, because Robinson was plainly a search incident to arrest.

Q I agree with you. The facts are quite distinguishable. But what I was questioning was your

suggestion that there is some non sequitur about saying that when a man is arrested, his Fourth Amendment rights are diminished. Because certainly they are diminished for purposes of a search incident to that arrest.

MR. SMITH: That is correct, Your Honor.

Q What about Chambers v. Maroney?

MR. SMITH: How does that apply here, Your Honor?

Q I mean, what was the car search there?

MR. SMITH: The notion, of course, in Chambers was if it is reasonable to make a search at the place of arrest, it is not unreasonable to transport the automobile to the jailhouse and there make the search.

Q Would you say that it had been reasonable if they had searched his clothing for these paint scrapings right at the moment of his arrest?

MR. SMITH: It depends, Your Honor, when we say he was arrested. If in fact he was arrested at the time that Officer Ashley put him in his vehicle, it would have been totally unreasonable, because at that time all that Ashley knew was that he had seen Edwards on the sidewalk and that the alarm had gone off in the post office.

Q At any point in this process, would it have been reasonable to search his clothing for these paint scrapings without a warrant?

MR. SMITH: If the record were a little clearer as

to what the intent of the Lebanon Police Department was when they took Edwards to the jail, if there was something in the record which indicated at that timethat they had the intent at that time to search his clothing, then I think that plainly the search of the clothing, had they taken it immediately upon his arrival at the station so as to not expose him to any public embarrassment, would have been reasonable.

Q You mean had they noticed the scrapings on the sill before they took him to the stationhouse and at the stationhouse proceeded immediately on booking him to ask him to take his clothes off so that they could examined it and see if they could find scrapings, that that might be all right?

MR. SMITH: That would have been reasonable, Your Honor, yes.

Q Cutting things up pretty fine, but I guess that is a little--

MR. SMITH: I think not, Your Honor.

Q You are assuming the validity of the arrest for the purpose of answering this question.

MR. SMITH: Yes.

Q Why is it in the light of Robinson that you say it would not be permissible to search his clothes at the moment of the arrest?

MR. SMITH: It would have been unreasonable to make this kind of search. It would be unreasonable to take his clothing from him at the scene of arrest for the reason there was no reason to do so. There was no probable cause whatever. The arresting officer knew only that he had seen Edwards on the sidewalk at the post office and that the--

Q Why do you need any probable cause to search incident to an arrest?

MR. SMITH: Well--

Q There is nothing in the Robinson case that says that Robinson's clothes could have been taken off at the time he was arrested.

Q No, but there is a lot that says they could be searched, if you will forgive the digression.

MR. SMITH: The reason that I say that they could not have made this kind of search at the moment of Edwards' arrest was because that kind of search, even using the purely reasonable application that the government would urge, would have been patently unreasonable. There was simply not factual reason at the time of his arrest to take his clothing away from him.

Q But suppose--I am putting it to you again--before they had put him in the car, they had detected paint scrapings on the sill at the post office and at that time said, "Take your clothes off. We want to examine them to see if

there are any paint scrapings on your clothing."

MR. SMITH: I think that they could have done that unless we got into the Roshan problem of humiliation. But if they had taken him directly to the stationhouse, under those circumstances, under those facts, that his clothing could reasonably have been taken from him then.

Q What is there about the lapse of time, Mr. Smith, that alters this situation? That is, if they have the right to search him within a short time, reasonable time, after arriving at the stationhouse, what is it that enhances his right of privacy or whatever other factors you rely on, to raise a new barrier to the search?

MR. SMITH: It is exactly this. If the warrantless search is in fact an exception to the warrant requirement, the exception is rooted in the necessity or in the value to society generally of preserving evidence.

The evidence can only reasonably be preserved if the taking or if a search occurs at such a time when you can expect the evidence to be reasonably there. So that if it is reasonable to search immediately upon arrival at the stationhouse because the defendant has had no opportunity to disperse the evidence or to get rid of it or to destroy it, it becomes unreasonable to search ten hours later or five days later or five years later, as the government would insist, because he has had during all of that time ample opportunity

to dispose of the evidence. And applying the old law school maxim that where the reason for the rule ceases to exist, the rule ceases to exit, to this situation, we can say that where the reason for the exception ceases to exist, the exception ought to cease to exist.

Q One of the things you are relying on is that in that lapse of time he has had an opportunity to dispose of the evidence. But first we know now that he did not dispose of it and, second, it is somewhat difficult to dispose of evidence while you are confined in a cell, is it not?

MR. SMITH: Your Honor, had he been aware of the fact of the paint chips, he may well have taken his clothing and shaken them and thereby effectively--

Q Then my hypothetical would bring the fellow in with the vacuum cleaner in the morning and that would somewhat frustrate his effort to conceal the evidence, would it not?

MR. SMITH: It would totally frustrate it, but that is not a Fourth Amendment consideration. We are talking about the physical removal of a person's clothing who, in our view, retains a privacy and property right in that clothing without a warrant.

It plinly does not do law enforcement any good; it does not help the practical workings of law enforcement to

say in this circumstance you do not have to have a warrant. They were plainly in no rush to get the clothing. They waited until the next morning. They plainly had an opportunity to get a warrant. They in fact did get a warrant on the next day for the search of the automobile in which Livesay was arrested.

There is no reason, it seems to my, why at the same time they got that warrant they could not have got a warrant for the search of the clothing. None.

Q One reason already indicated by the record itself on time is that at 11:30 at night substitute clothing was not readily available, was not available until until the stores opened the following morning.

MR. SMITH: Your Honor, I think as a practical matter, if the Lebanon Police Department really wanted that clothing at the time of arrest, they would have fo~nd some way to get it and some way to obtain substitute clothing.

Q Including just taking his clothes and letting him be in the cell in his shorts--

MR. SMITH: No, Your Honor, I think they could plainly have found, if nothing else--I am speculating now--but, it seems to me, they could have found clothing among the members of the Lebanon Police Department with which to replace it.

Finally, if it please the Court, I think that the

requirements of law enforcement in this area are amply fulfilled by what this Court has done in Robinson with respect to the extent of the search that you may make incident to arrest. You may make a full field search incident to arrest. And the legitimate ends of law enforcement are adequately met by that. You may find whatever evidence is on the person. You may find whatever weapons may be on the person.

In Chimel the Court has adequately established the range of the search incident to arrest that you may make beyond the person, beyond the body of the person arrested. We submit that as this Court has said in Coolidge in talking about searches of automobiles and saying that the word automobile ought not be a talisman in the presence of which the Fourth Amendment fades away and disappears, that the word arrest likewise ought not be a talisman in the presence of which the Fourth Amendment fades away and disappears. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

Mr. Smith, you accepted appointment here from this Court and served as a volunteer counsel. On behalf of the Court, I thank you for your assistance not only to your client but your assistance to the Court.

MR.SMITH: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Did you have a factual

matter you wanted to raise?

MR. KORMAN: Yes. On page three of our brief there is a misstatement of fact. The second full paragraph says, "Later that evening"--that is, after the defendants were transported to the--

Q Page three now?

MR. KORMAN: Yes.

Q Let us get this before us.

MR. KORMAN: It says, "Later that evening"--meaning after the defendants were already transported to the jail--"an investigation by local police authorities revealed that an attempt had been made to enter the post office." That is not correct. The investigation was undertaken immediately upon Officer Ashley's arrival back at the post office with the two gentlemen and before the defendants were actually transported to jail.

And in the first full paragraph where we say, "Respondent Edwards was arrested with a companion as he walked away from the post office," Officer Ashley testified that he did not formally place them under arrest and so advised them until after he had determined to his satifaction that in fact an attempt had actually been made to break into the post office.

Q Would you give us the record reference for the--

MR. KORMAN: Yes. There are two record references,

at the appendix, pages nine to ten, and in the transcript of the suppression minutes at page 15. And it would be our position that the actual arrest took place after the officer had satisfied himself that in fact the post office window had actually been broken into and that when he had originally picked them up, it was simply a brief custodial detention.

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

[Whereupon, at 2:35 o'clock p.m., the case was submitted.]

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