

ORIGINAL

In the

Supreme Court of the United States

TERRY T. TORRES,

Appellant,

v.

COMMONWEALTH OF PUERTO RICO,

Appellee.

No. 77-1609

Pages 1 thru 40

Washington, D. C.
January 10, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY T. TORRES, :
Appellant, :
v. : No. 77-1609
COMMONWEALTH OF PUERTO RICO, :
Appellee. :
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Washington, D. C.
Wednesday, January 10, 1979

The above-entitled matter came on for argument at
11:42 o'clock, a.m.

BEFORE:

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

APPEARANCES:

JOSEPH REMCHO, Esq., Rosen, Remcho & Henderson,
155 Montgomery Street, #1502, San Francisco,
California 94104, on behalf of the Appellant.

ROBERTO ARMSTRONG, JR., Deputy Solicitor General,
P.O. Box 192, San Juan, Puerto Rico, 00902,
on behalf of the Appellee.

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on behalf of the Appellant

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Roberto Armstrong, Jr., Esq.
on behalf of the Appellee

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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. 77-1609, Terry T. Torres against Commonwealth of Puerto Rico.

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

ORAL ARGUMENT OF JOSEPH REMCHO, ESQ., ON BEHALF
OF THE APPELLANT

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

This case presents the question whether the Commonwealth of Puerto Rico may constitutionally enact and enforce the statute authorizing its police to conduct indiscriminate warrantless searches of the luggage, packages, bundles and bags, and persons arriving in Puerto Rico from the mainland United States.

QUESTION: By that you include the power to examine everything that comes in, just the way customs agents do it on the Mexican border or anywhere else? Is that what you embrace by "indiscriminate"?

MR. REMCHO: What I mean to embrace by "indiscriminate" is, as the Supreme Court of Puerto Rico found, the statute, Public Law 22, authorizes the individual police officer, not a customs official--the individual police officer.

QUESTION: Would it make any difference whether

it's a police officer or a customs official or what name you give the person?

MR. REMCHO: I think it makes a substantial difference. That goes to the whole question of whether Puerto Rico may, in the first place, set up any kind of a customs search.

QUESTION: That's what I am trying to get at.

MR. REMCHO: Well, let me get to that question directly and take up the others later.

The Commonwealth of Puerto Rico was created by the commonwealth compact, but nothing in that compact reserved to Puerto Rico the right in any fashion to set up its own border between the United States and Puerto Rico. In fact, with respect to customs 19 U. S. Code Section 1202(a) specifically includes Puerto Rico within the United States custom territory.

The commonwealth compact itself and the additional Puerto Rico Federal Relations Act includes a carefully considered set of regulations in the compact between the United States Congress and the Commonwealth of Puerto Rico with respect to how those two parties will relate to each other, and there is nothing in that compact which I find which explicitly or implicitly authorizes Puerto Rico to set up any kind of a border between itself and the United States.

QUESTION: You are limiting that, of course, to

travelers from the United States, aren't you?

MR. REMCHO: Well, that's correct; that's what the statute sets up. But that is what a border is all about, people coming from one place to the other, regardless of whether they are residents of Puerto Rico or the United States mainland.

The Commonwealth has taken the position with respect to the border not that they have the power to create anything like an international border. The position they took, below at least, was that they had the power to create a functional equivalent of a border. And I think that misconstrues this Court's cases with respect to what a functional equivalent of a border is.

As the Court held in Almeida-Sanchez, the functional equivalent of a border is basically the same thing as a border, only for practical necessary reasons that border has been moved. So that, for example, St. Louis is the functional equivalent of a United States border for a person arriving in the United States for the first, and the confluence of two or three roads right near the Mexican-United States border is the functional equivalent of a border, and that is the only practical place where U. S. customs officials can conduct their duties.

The fact here is, in going back to your initial question, is that the border search cases which allow even

certain exceptions, can set up a functional equivalent system and allow certain exceptions to normal search-and-stop procedures, where search is conducted by customs officials and persons authorized to do that. And that by its very nature limited the search.

QUESTION: Couldn't the United States put a policeman on the border between Mexico and the United States ---

MR. REMCHO: Absolutely.

QUESTION: There's no magic in the word "customs," is there?

MR. REMCHO: There's no magic in the word "customs." You can clearly put one there if there is in fact an international border.

QUESTION: There is. I am talking about the Mexican border right now.

MR. REMCHO: Absolutely.

QUESTION: We have customs agents. Could they change their title to policeman?

MR. REMCHO: Absolutely.

QUESTION: And do the same thing?

MR. REMCHO: Absolutely. But the analogy, I think, as to when you can put a policeman there and when you put someone else there applies more to what is sometimes used as inspection searches; that is, where the state of California may set up an inspection point for passing plant material

coming in from Arizona. In a situation like that--clearly, they cant set up and have never tried to set up police officers to search people coming from Arizona to California. But they have had a very limited scope of authority, covered by regulatory discretion, for health officials to examine matter coming in. And so there is a distinction in that vein between a police officer and a customs type official.

QUESTION: Let me ask something about the fact here. Is the appellant a United States citizen?

MR. REMCHO: He is a United States citizen. I am not sure if the record reflects that fact; in fact, it does not.

QUESTION: Where does he reside?

MR. REMCHO: He resides in the state of Florida.

QUESTION: Mr. Remcho, you are arguing the Fourth Amendment here, I take it. Does the Fourth Amendment pleno, so to speak, limit the authority of the Puerto Rican legislature?

MR. REMCHO: The Fourth Amendment, in my view, clearly limits the authority of the Puerto Rican legislature, that's correct. And I would say in any one of the four rationalia that we set forth in our brief.

QUESTION: Either because it is analogous to a state and the Fourth Amendment is incorporated by the Fourteenth?

MR. REMCHO: No, I think, Mr. Justice Rehnquist, I was persuaded by your dissent in Otero that, in passing the Thirteenth and Fourteenth Amendments, clearly a distinction was made between a state and something which is not a state, so I am not arguing that the Fourteenth Amendment, in and of itself, carries the Fourth Amendment into Puerto Rico in the traditional incorporation doctrine.

QUESTION: Well, you are on pretty thin ground if you are persuaded by my dissent in Otero, since you presumably have eight people versus one person.

MR. REMCHO: Well, I am persuaded only by the points that the Fourteenth Amendment does not apply directly in the same fashion as if Puerto Rico were a state. I am not saying that that is what does it. What I am saying is that I take it the majority meant in that case was that when Congress created this compact with the Commonwealth of Puerto Rico and said that all the constitutional provisions not inapplicable will apply, that the Fourth Amendment applies in that manner and through that way.

So that's how it applies as a state. Congress said it will apply as if it were a state. I don't believe the opinion in Otero says anything other than it applies just like the Fourteenth Amendment, not necessarily that it comes directly from this.

QUESTION: So the Fourth Amendment prohibits

unreasonable searches.

MR. REMCHO: That's correct.

QUESTION: Now, I take it, in times of emergency, a city or a particular area can declare a curfew that it couldn't declare at other times without violating the Fourth Amendment.

MR. REMCHO: That would depend very much on the facts of the situation, but I can see that's possible.

QUESTION: So supposing that the Puerto Rican legislature here that decided that there was--and I gather from the opinions of the three justices in the minority in the Supreme Court of Puerto Rico, that there was a real crime wave and a drug wave in Puerto Rico and that a great deal of it was the result of people coming into Puerto Rico from the United States--do you think it is wholly beyond reason to think that the Fourth Amendment would permit airport searches of luggage where you don't have homes involved, where you can perhaps stop all that traffic in one public area?

MR. REMCHO: I do think it's wholly unreasonable. I think that in the first place there are absolutely no facts offered by the government or in the legislative finding that there is a danger from these guns which supports anything other than a generalized statement that there is a danger. When I spoke of a curfew, I could see that a narrow situation when perhaps, you know, there's an earthquake in San

Francisco--you can impose a curfew. But to say that you could impose a curfew at any time because of an undifferentiated generalized concern about the crime problem is to just totally ignore the two centuries of Fourth Amendment jurisprudence.

QUESTION: You won on this issue; the Puerto Rican Supreme Court agreed with you.

MR. REMCHO: That's correct.

QUESTION: And as I read the brief of your colleague on the bottom side of this case, he doesn't dispute that decision.

MR. REMCHO: I read it the same way.

QUESTION: So there's no issue between you on the Fourth Amendment or on the ability to search--or on the border question.

MR. REMCHO: I think that's probably correct. If in fact this Court accepts the concession below, as I hope it will, I think that's correct.

QUESTION: But then he says that leaves only the issue which you want to argue about--that the failure of the Court below to give you relief because of the 4-to-3 rule, or the majority rule, the super majority rule.

MR. REMCHO: Well, if in fact he has conceded the Fourth Amendment issue, I don't care about the other issue, because that decides this issue.

QUESTION: Well, I know, but I would think you would because there's a judgment outstanding against you.

QUESTION: We agree with you, and apparently your colleague, about the Fourth Amendment issue. Then, since we don't have any such super majority rule here, we would simply reverse the judgment, wouldn't we?

MR. REMCHO: That's what I am asking.

QUESTION: Wouldn't it follow?

MR. REMCHO: Yes, it would; that's what we are asking.

QUESTION: We would have to hold that it is unconstitutional to have that super majority.

QUESTION: Why would we?

MR. REMCHO: We do we have to hold that it's unconstitutional--why would you have to hold that it's unconstitutional?

QUESTION: Is there not a judgment outstanding against you now?

MR. REMCHO: That's correct. We are in the same position in this Court as if we had lost 7-nothing below. We didn't lose 7-nothing below; we lost 4-3 to below, pursuant to that particular Puerto Rico constitutional provision. A judgment was entered against us. We made a timely appeal to this Court. The judgment upheld the validity of the conviction. What we are asking this Court to do is to reverse that

conviction, to say that the Fourth Amendment prohibits that search and judgment for the appellant has to be entered.

QUESTION: Well, do you suppose that this could be an adequate state ground on direct appeal, but nevertheless not bar federal habeus corpus? Other things are.

MR. REMCHO: I don't think it was decided on an adequate--the judgment ---

QUESTION: I know that the Court below refused to give you relief because a majority of the Court did not join in the opinion.

MR. REMCHO: That's correct.

QUESTION: Which is a characteristic of local law. Can we direct another judgment to be entered by that Court, unless we hold that that provision is unconstitutional?

MR. REMCHO: I think you can.

QUESTION: Perhaps a federal habeus corpus court can order release, because in that event there would be no necessity to declare anything unconstitutional.

MR. REMCHO: I think you can, and the reason is this: the government appealed at the time--two things; it appealed--excuse me, we appealed; the government contended at the time and continued to contend until recently that the Fourth Amendment judgment was wrong.

If this Court, which is the final arbiter of the Fourth Amendment, says to the Supreme Court of Puerto Rico

we tell you that ----

QUESTION: That you were quite right.

MR. REMCHO: And as soon as we tell the Court that, and declare that this statute is unconstitutional, they ----

QUESTION: Well, they have already declared it, but they say we have no power under our--under the Puerto Rican law to reverse this judgment--we just don't have that power.

MR. REMCHO: I understand that. They don't have the power if it is they who say that the statute is unconstitutional; if this Court says that the statute is unconstitutional, there is nothing in the Puerto Rico constitution which prohibits that Court from entering judgment in favor of appellant.

QUESTION: You say the Akron against Bryant point may well be an adequate state ground, but the decision on the merits of the Fourth Amendment question is not.

MR. REMCHO: No, I am not saying that the Akron versus Bryant may be an adequate state ground at all. I am saying that the decision in Akron is wrong--excuse me, that the decision below, upholding that judgment, while they thought the statute was not constitutional, is incorrect. I am saying you don't necessarily have to reach the issue of whether Akron is wrong, because I think you can just go back to the Puerto Rico Supreme Court with a declaration that that

statute is unconstitutional.

QUESTION: So you think the majority rule applies to declarations of unconstitutionality?

MR. REMCHO: That is what the statute--the constitutional provision says that that particular Court may not hold the statute unconstitutional without that super majority. If this Court holds it unconstitutional, that Court could certainly enter judgment.

QUESTION: Then it doesn't say that it may not satisfy judgments for reasons of unconstitutionality.

QUESTION: Couldn't the Court have reversed the judgment in this and not violated the statute?

MR. REMCHO: Not violated Public Law 22?

QUESTION: Yes.

MR. REMCHO: The Court's specific holding ---

QUESTION: Couldn't the Court by 4 to 3 say that this judgment must be reversed, period?

QUESTION: Without any reference to the Puerto Rico statute.

MR. REMCHO: I think there are two responses to that.

QUESTION: They didn't think so.

MR. REMCHO: Firstly, they didn't think so. The first thing is they clearly didn't think so, and they are the one who interprets what that constitutional provision

means.

QUESTION: And we are bound by that?

MR. REMCHO: Yes, under this Court's decision, for a narrow issue, you are bound by the Puerto Rico Supreme Court's interpretation of its own constitutional provision, unless that interpretation is inescapably wrong. And it certainly is not inescapably wrong.

Secondly, I think ---

QUESTION: But the thing that really bothers me is ---is Puerto Rico required to give you an appeal in a criminal case?

MR. REMCHO: Yes.

QUESTION: By what?

MR. REMCHO: By Puerto Rico criminal statutes, by rule ---

QUESTION: But not by our constitution.

MR. REMCHO: That's correct, no.

QUESTION: What's the case in controversy in this Court in light of the Puerto Rican position in this Court? What's the case in controversy over the Fourth Amendment?

MR. REMCHO: The controversy is ---

QUESTION: Over the Fourth Amendment---only over that question.

MR. REMCHO: I would say if the state now concedes that issue, there is no more controversy ---

QUESTION: Incidentally, Puerto Rico is not a state; it's a commonwealth.

MR. REMCHO: Thank you. There's no more controversy over that than there would be after a court entered a judgment or if any lawyer along the line gave up on that issue. If they give up on that issue, fine, let's remand-- if they have, let's remand it to the Puerto Rico Supreme Court for ---

QUESTION: They still couldn't enter the declaration unless one of the dissenters below now joined the 4 majority.

QUESTION: If we just remanded it then for reconsideration in light of this concession, that wouldn't change the result, if everybody stays for a year and they obey the rule, because the rule would still forbid them from declaring the statute unconstitutional.

MR. REMCHO: Let me put it differently.

CHIEF JUSTICE BURGER: Let's resume that at 1 o'clock.

[Whereupon, the Court recessed]

AFTERNOON SESSION

1:01 p.m.

CHIEF JUSTICE BURGER: You may continue, counsel.

ORAL ARGUMENT OF JOSEPH REMCHO, ESQ., ON BEHALF
OF THE APPELLANT (resumed)

MR. REMCHO: Mr. Chief Justice, and may it please the Court, I want to make a few comments about what was raised in the hearing before the lunch hour.

First, this Court is not bound by the concession of the government. In *Sibron versus New York*, for example, the Kings County prosecutor conceded that that statute had been violated, and this Court pointed out that concessions by the parties do not relieve it from what it called the obligation to perform the judicial function where matters of state constitutional--where federal constitutional rights in state courts are decided. And where this Court has already had the benefit of full briefing and argument on that Fourth Amendment claim, it seems to me that the concession of the government ought not to bind this Court.

QUESTION: Well, that might be true when the lower court happens to disagree, but it didn't.

MR. REMCHO: Well, the judgment of the lower court is still in ---

QUESTION: The only reason you lost in the lower court was because of the local rule about upsetting a statute.

MR. REMCHO: Well, if Puerto Rico had a rule which said that ---

QUESTION: Isn't that right? They agreed with you on the Fourth Amendment.

MR. REMCHO: They did; that's correct.

QUESTION: Four of them did.

MR. REMCHO: Four of them did. If Puerto Rico had a rule that there is no appeal allowed at all from a decision by a lower court, and the lower court had upheld the statute, this Court would have full authority to decide that statute. The fact that there is no appellate review at least--putting aside the question of whether it's required--at least would not be considered an independent state ground to uphold the judgment of the lower court. And what's happened is is that the Puerto Rico Supreme Court has taken Article 5, Section 4, and said that that renders it powerless in a sense to decide this appeal. And if that's true, it's no different than if we directly hear from the judgment of the superior court, which is the judgment in question.

QUESTION: But it has decided the appeal; it's affirmed that your client, as one of my colleagues pointed out before, has a judgment of conviction outstanding against him, so that whatever the voting rules are down there in San Juan, you lost.

MR. REMCHO: That's right, we lost, but we can

hardly be in a worse position than if we had no right to appeal at all.

QUESTION: Yes.

MR. REMCHO: I agree we lost, but that Court, in affirming the judgment, was saying no more than it was not going to rule on that appeal, even though it believed--the majority believed--that the statute was unconstitutional.

QUESTION: Well, did it not rule on the appeal?

MR. REMCHO: It affirmed the judgment, but on the grounds it was powerless to do otherwise, and that's no different than if there were no appeal at all.

QUESTION: Is that quite an accurate description of it? If we say that the local rule of what you call, I think, the super majority is a valid rule, does that not then end the case?

MR. REMCHO: No, it doesn't, because if that is a valid rule, the effect of upholding that rule is to leave a statute which the government of Puerto Rico itself concedes is not constitutional in full place and in full effect.

QUESTION: That's not an adequate state ground to decide the case on, this special majority rule.

MR. REMCHO: I think the adequate state ground thing is somewhat different. The adequate state ground in the classic sense is when there is a constitutional provision that gives more rights than the federal constitution allows. This

Court has said in the past that a local procedural rule, which this is, of the state cannot be used to foreclose a federal constitutional right.

QUESTION: What if it had happened that your Fourth Amendment issue hadn't been properly raised in the lower court and the Puerto Rican Supreme Court said we just won't rule on that because you didn't raise it, as our rules require, and so we affirm the judgment?

Now, if you came here, we would say--we would deny or dismiss because of inadequate state ground. But it wouldn't necessarily foreclose you from federal habeas.

MR. REMCHO: Well, the Court has in the past, with respect to procedural rules other than even-handed--procedural rules which interfere with the vindication of federal constitutional rights--have been struck down in the past by the Court.

QUESTION: This is not a procedural rule; there is a little bit of substance here. The order says "and considering the absence of the majority vote required by the constitution to annul said Act, the judgment is affirmed." That's not procedural--that's it.

MR. REMCHO: That's it for my client--he is facing three years in jail, I agree.

QUESTION: That's all we got, isn't it?

MR. REMCHO: That's right. With respect to ---

QUESTION: How can you call that procedural?

QUESTION: On the habeus corpus issue, under Stone against Powell, is habeus corpus available?

MR. REMCHO: I think that's an open question. Either it is not available, because it was a full and fair hearing in the Puerto Rico Supreme Court, or if there was not a full and fair hearing in the Puerto Rico Supreme Court, it seems to me we should prevail under due process. So I would say that habeus is only available if we have that full and fair hearing. If the Court says that ultimately it will not entertain a habeus corpus and if the Puerto Rico Supreme Court on remand says that it is still powerless to enter the judgment, then in fact this statute, Public Law 22, will remain on the books. The government thinks it's unconstitutional and hopefully some members of this Court think it's unconstitutional.

QUESTION: If the Supreme Court of Puerto Rico had said, if the constituent act said in so many words that the Supreme Court of Puerto Rico will not consider any United States constitutional claims in hearing an appeal from a conviction, I suppose then that the Supreme Court of Puerto Rico is not the highest court of a state in which a judgment can be had for purposes of considering those claims, then you would have to go back to the district court or superior court of Puerto Rico and say that was the court you are

appealing.

MR. REMCHO: Isn't the effect here the same?

QUESTION: I am inclined to think so, but I gather we are not of one mind on that.

QUESTION: But it would be very hard for the lower court to enter a judgment contrary to the Supreme Court of Puerto Rico, which has already affirmed the judgment.

MR. REMCHO: I agree. I think that would be extraordinarily ---

QUESTION: Difficult.

MR. REMCHO: Difficult, yes. And that's why I think, for reasons of judicial economy and also because this case has been fully briefed to the Court, that it ought to be guided by the government's concession that they don't even think this is constitutional when you decide the issue.

QUESTION: Are you suggesting: your client faces three years in jail because the judgment of conviction was affirmed; therefore we should completely ignore everything that was said on the Fourth Amendment issue by the Supreme Court of Puerto Rico, although properly tendered to them to decide, because they didn't decide it, and we should just review the judgment of conviction, and, you argue, set it aside on the grounds that the Fourth Amendment was indeed violated?

MR. REMCHO: Well, I think you can set the judgment

of conviction aside and declare the statute unconstitutional without ignoring what the Supreme Court of Puerto Rico has said.

QUESTION: But obviously everything that was said in your Supreme Court had no bearing on the judgment that was actually entered, that is, the affirming of the conviction.

MR. REMCHO: I am not sure that it had no bearing. It did not compel ---

QUESTION: Surely nothing that was said on the side of the four supported the affirmance of the conviction.

MR. REMCHO: That's correct.

QUESTION: What we would do we would reverse the judgment on the basis of the majority opinion.

QUESTION: That's what you are asking us to do.

QUESTION: It would be something for the books.

MR. REMCHO: Well, I would like to see it in the books. I would prefer you to put it otherwise and still reverse that judgment.

Let me reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Armstrong?

QUESTION: Are you going to get us out of this, Mr. Armstrong?

ORAL ARGUMENT OF ROBERTO ARMSTRONG, JR.,

ON BEHALF OF THE APPELLEE

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

I believe that the main issue before this Court is whether the appellant properly raised before the Supreme Court of Puerto Rico the issue that there was a conflict between federal law and the non-reversal of the conviction on account of the Puerto Rican constitutional section that binds only to decisions based on local rules. In this case, the four judges who have decided in favor of reversal--they have decided only on local grounds; they decided on Fourth Amendment and local Article 10 rights.

There is no question in my mind that under the Ohio versus Akron Park decision the more-than-simple-majority requirement for wiping out local statutes is reasonable. So as far as the local law is concerned, I believe that the decision is final and there is nothing more to argue on it, and nothing that can be brought to this Court. It was entirely a decision of the local court.

However, we recognize that there is a conflict opened here. It is a conflict between the Fourth Amendment right on which the four judges' decision is based; the federal basis of that decision is the one that probably opens a Supremacy Clause issue that, properly raised before the

Supreme Court of Puerto Rico, could give jurisdiction to this Court to adjudicate this case. In other words, the Supreme Court of Puerto Rico was never apprised of the existence of a Supremacy Clause conflict. In fact, I would add something here that we want to make clear: the appellate procedure in Puerto Rico gives appellant ten days after they enter judgment to file a motion for reconsideration.

We agree, we grant, that that was the first opportunity that appellant had to raise the federal issue, that was the first opportunity he had to raise the Supremacy Clause effect, or that constitutional provision that says that no local rules can be ruled constitutional except by the majority, by the absolute majority of the judges composing the Supreme Court.

We believe that there is a possibility of Supremacy Clause conflict because that obviously refers to local law cases, not to cases where, as in this one, the ruling is based on federal grounds besides the local grounds.

So I believe that in failing to timely raise the issue before the Supreme Court of Puerto Rico, appellant waived the right to bring the case here. Later, 121 days-- he had ten working days to file his motion for reconsideration--121 days after the appellant brief was sent here, the proposal already processed, they filed a motion for rehearing. There is something lurking in the background there

around the constitutional supremacy issue, final supremacy issue. They believe that these are cases, appeal cases, these Ohio cases--Slater versus Ohio, Reilly versus Ohio (366, I believe, U. S.)--they state that when that issue is to be raised, it shall be raised explicitly, with timeliness, and in a way that there will be no question that that issue has been raised. An implication of a federal issue is not enough to put the Supreme Court of Puerto Rico in a position to rule on whether or not the constitutional Article 5, Section 4, conflicts--insofar as this case--conflicts with the Fourth Amendment right of appellant in the matter of being free from unreasonable searches.

The Supreme Court of Puerto Rico never has said an opportunity ---

QUESTION: Excuse me, Mr. Armstrong, are you saying this: that within the ten days after this decision came down in the Supreme Court, he should have applied or should have made an allegation, petition for rehearing or whatever it may be, that as applied to a case where four thought the federal question, the constitutional question, should be decided in favor of the accused, that not therefore to reverse the judgment of conviction somehow violated some provision of the federal constitution, is that it?

MR. ARMSTRONG: Correct, your honor.

QUESTION: Now, what provision of the federal

constitution would you say he had to assert, had been violated by not reversing the conviction?

MR. ARMSTRONG: I would say that there is a federal ground for reversal.

QUESTION: What is it?

MR. ARMSTRONG: The federal ground was the problem of reasonableness of the search ---

QUESTION: I'm sorry, I didn't catch that.

MR. ARMSTRONG: The problem of reasonableness of the seizure, of the search where the evidence was seized. That was what the four judges found to be in conflict.

QUESTION: Well, I know, but I thought what you told me was that what he should have done was file a petition for rehearing.

MR. ARMSTRONG: Right.

QUESTION: And say they could not apply the state constitutional provision requiring five votes because this was a federal constitutional determination by four that the statute was unconstitutional.

MR. ARMSTRONG: On federal grounds.

QUESTION: On federal grounds---and, therefore, that they could not affirm the judgment of conviction under the Puerto Rican constitutional provision but had to reverse it.

What's the federal ground for that claim?

MR. ARMSTRONG: The Supremacy Clause.

QUESTION: The Supremacy Clause.

MR. ARMSTRONG: We considered that the judges were bound by the Supremacy Clause which says that they shall rule in the federal law notwithstanding any provision in the constitution or the laws of the state to the contrary. If the man had a 4-to-3 acquittal on federal grounds--on federal grounds that was enough for acquittal, but the point was that that issue was never raised--the Supreme Court of Puerto Rico never had an opportunity to decide on that issue. And that is why we believe that remand is not the proper remedy here. I believe that this is dismissal, because there is no federal issue properly raised; there is no federal question before this Court.

QUESTION: Therefore, you say, the appeal should be dismissed?

MR. ARMSTRONG: The appeal should be ---

QUESTION: The appeal to this Court should be dismissed.

MR. ARMSTRONG: Yes, the appeal to this Court should be dismissed, probably, as--there may be, of course, reasonable grounds for federal habeas, because we have got that 4-to-3 decision there.

But as far as this appeal, the Supreme Court of Puerto Rico has not passed on the question that is brought to this Court at this time.

So until the Court decides whether or not that absolute majority principle is binding in all cases and with all laws, whether federal or commonwealth, I believe the Supreme Court of Puerto Rico has not entered a decision with the federal question sufficiently substantial to come before this Court.

QUESTION: But, Mr. Armstrong, you don't doubt, do you that the Supreme Court of Puerto Rico has entered a judgment affirming the conviction.

MR. ARMSTRONG: No, that is a matter of record. The conviction judgment is entered for the reasons stated there, that the constitution of Puerto Rico impedes any other rule except that one.

QUESTION: The constitution of Puerto Rico required an affirmance in this case.

MR. ARMSTRONG: Requires an affirmance of the conviction, because they cannot decide that the statute is unconstitutional because only four judges out of eight voted for the unconstitutionality. They never had the opportunity to rule on the Supremacy Clause issue, because that was never brought to their attention.

QUESTION: What could have been done then?

MR. ARMSTRONG: Well, your honor, I really think, as in the case of Jackson-Powell ---

QUESTION: They seem to have a full quota here.

MR. ARMSTRONG: They say that the ---

QUESTION: They need to have an eight-member court to hear it.

MR. ARMSTRONG: In the Jackson versus Powell case it says that the ultimate goal of a criminal procedure is the finding of guilt or a decision on guilt. In this case there is no claim that the appellant is innocent.

QUESTION: I didn't have anything in my question that involved innocence, guilt, or anything else. Mine was --you said he should have filed some kind of petition for rehearing.

MR. ARMSTRONG: He had the right to file a petition for rehearing ten days after the ---

QUESTION: And then what could have been done by the seven people involved?

MR. ARMSTRONG: They could listen to the argument on federal supremacy.

QUESTION: What could they have done, said that the constitution was unconstitutional?

MR. ARMSTRONG: No, not necessarily.

QUESTION: Well, what could they have said?

MR. ARMSTRONG: They could have said that when the statute conflicts with federal law, the Puerto Rican constitutional rule does not apply; it only applies to unconstitutionality based ---

QUESTION: And therefore would the man be released?

MR. ARMSTRONG: He would be released in that case.

QUESTION: He would be released.

MR. ARMSTRONG: He would be released if they found that there was a conflict that eliminated the bar that is raised by this Puerto Rico constitutional provision against declaring a law unconstitutional except on a vote of five.

QUESTION: Well, they knew that they were dealing
x with a federal question.

MR. ARMSTRONG: They should have known, but the point was not specifically raised with them. They were looking at it from the local law standpoint.

QUESTION: But, Mr. Armstrong, you are saying that the defendant is in a worse position because three of the justices disagreed with him than he would have been if all seven justices disagreed with him.

MR. ARMSTRONG: What does that mean that ---

QUESTION: Well, if all seven justices had rejected his constitutional claim, the judgment would have been affirmed and the statute would have been upheld, and he certainly could have brought that claim here for independent decision by this Court on the federal constitutional question, could he not?

MR. ARMSTRONG: It would be the same situation again. The point is unless he raises the point in the state

or commonwealth highest court of appeal level, he cannot bring the point to this Court. We are dealing with the appellate process where you have exactly what the state provides. It's a matter of the state deciding what is going to be done for appellate review of criminal convictions. It is not a matter of right. We will, I believe, agree that whatever is done on appeal is a matter that depends on whether the state grants you an appeal. And the Puerto Rican appellate procedure includes that constitutional requirement that to declare unconstitutionality an absolute majority of the members composing the court must vote for unconstitutionality of the statute.

QUESTION: Supposing the Puerto Rican constitution went even further than it does now, and said that no court in Puerto Rico shall ever have a right to upset a conviction of a criminal defendant on a federal constitutional ground. Couldn't a defendant who asserted a federal constitutional ground that was not heard by any of the Puerto Rican courts for that reason nonetheless bring that case here?

MR. ARMSTRONG: Well, an absolute prohibition like that under certain circumstances might raise or compel some kind of appellate review, but it would be under the federal question not local law. Under local law he is not authorized to an appeal, but as a matter of federal law even if there were no longer--those circumstances, he may have a

direct question that he could bring to this Court.

QUESTION: Mr. Armstrong, you said that the Supreme Court did not consider the federal rights. I don't see anything in here but federal.

MR. ARMSTRONG: Nothing in the record shows that they considered the ---

QUESTION: No, I am talking about the opinion of the four judges and all their talk about it.

MR. ARMSTRONG: They talk about due process.

QUESTION: That's right, under the federal constitution. That's all they talked about. They knew that they were deciding a federal question.

MR. ARMSTRONG: They were deciding a federal question.

QUESTION: They decided a federal question.

MR. ARMSTRONG: No, they left undecided a federal question, because that federal question was not brought to their attention.

QUESTION: Mr. Armstrong, does Puerto Rico have a post-conviction procedure?

MR. ARMSTRONG: Post-conviction? The regular ---

QUESTION: Habeus corpus?

MR. ARMSTRONG: We have federal habeus corpus there in the ---

QUESTION: I know you do in the federal district

courts, but do you in the state courts have a comparable post-conviction proceeding?

MR. ARMSTRONG: All the proceedings that we have

QUESTION: But in the Puerto Rico courts is there a post-conviction proceeding?

MR. ARMSTRONG: There are several post-conviction procedures.

QUESTION: If we can't decide this case, may the appellant go to a Puerto Rico post-conviction proceeding?

MR. ARMSTRONG: I don't see why he cannot file a habeus corpus over there.

QUESTION: Well, that's a federal habeus corpus.

MR. ARMSTRONG: No, no, I mean a Puerto Rico habeus corpus.

QUESTION: A Puerto Rico habeus corpus.

MR. ARMSTRONG: He could then raise the federal question there, and under the state--the Puerto Rico code decide his federal right.

QUESTION: Mr. Armstrong, do you have some cases in this court, by any chance, with respect to this? Suppose, as in this case, there is a federal issue that does not emerge or does not appear until after the highest court of the state has decided the case, which is true here, I gather, and under the state procedure that new issue that has emerged

could be presented by a petition for rehearing to the highest court of the state.

Now, are there some cases here that say that before the loser can bring the case here, he must file a petition for rehearing? Are there some cases here in our Court that say that he has not presented the issue to the state court?

MR. ARMSTRONG: I know that at least in the Akron case, the Ohio case, they mention that the petition was not timely filed, and generally cases where they say that ---

QUESTION: In the Ohio case it was not timely filed?

MR. ARMSTRONG: It was not timely filed, I believe. And I have met several cases and I could raise that point, if counsel wishes.

QUESTION: Well, so what is the answer to my question? Must he present it to the state court on petition for rehearing?

MR. ARMSTRONG: If that is the first opportunity that he has of presenting the federal claim, he must present the petition for rehearing.

QUESTION: Of if he doesn't he may not come here, is that it?

MR. ARMSTRONG: He has not properly raised the federal question and he cannot come here because the question has not been decided, has not been put before the Court. There were several cases of the--let me see.

QUESTION: Well, that's all right; thank you very much.

CHIEF JUSTICE BURGER: Do you have anything further, counsel?

MR. REMCHO: Yes, if I may.

CHIEF JUSTICE BURGER: You have about three minutes.

REBUTTAL ORAL ARGUMENT OF JOSEPH REMCHO, ESQ.,

ON BEHALF OF THE APPELLANT

MR. REMCHO: Thank you. With respect to the timely raising of the petition, Rule 45(d) of the Rules of the Supreme Court of Puerto Rico says that if you file a petition beyond the ten-day period, then that will not be granted unless it will have no effect--will not be acted on unless it has no effect on the mandate. And, in fact, this late petition was acted on by the Supreme Court of Puerto Rico. They didn't say they were denying it as untimely. They met en banc and they acted on that late petition.

I am also not certain that there are any decisions

QUESTION: And denied it.

MR. REMCHO: And denied it, that's correct.

QUESTION: And you presented the claim that this constitutional provision was invalid under the federal constitution?

MR. REMCHO: That's correct. Now, we relied there

on the due process clause, and we pointed out ---

QUESTION: And your petition for rehearing is in the record here, or not?

MR. REMCHO: Yes, it is; it is reprinted in the motion to dismiss or affirm, Appendix A, at pages 384--they have the relevant sections, where it was raised on due process and also this number as to Powell grounds.

And, of course, that carries with it the Supremacy Clause grounds--for example, in Chapman versus California, the basis for decision there obviously is one of the supremacy of federal rights over local constitutional procedures, and the Court there did not even mention the Supremacy Clause, as it often does not mention it, because it's an underpinning of everything there is with respect to this Court's actions in ---

QUESTION: And the Supreme Court en banc simply denied the motion, is that it?

MR. REMCHO: That's correct.

QUESTION: And we don't know whether they denied it as out of time or ---

MR. REMCHO: We don't know that. We do know that there is an appeal procedure which suggests that the clerk should not file one which is out of time. And it may very well be that the Court directed the clerk to file this one, fully considered it and denied it at the time on the merits.

But I think the inference is that it was heard on the merits, heard en banc.

QUESTION: Why is that the inference?

MR. REMCHO: Because the section of 45(b), which suggests, which states that a petition for rehearing ought not to be filed if it is late by the clerk. There is a certain inconsistency ---

QUESTION: Is that rule in these papers?

MR. REMCHO: Yes, that's reprinted in the government's motion to dismiss or affirm at page 7..

QUESTION: I mean the rule itself?

MR. REMCHO: Yes.

QUESTION: Rule 45?

MR. REMCHO: Yes, it's reprinted.

QUESTION: At page what?

MR. REMCHO: Page 7 of the government's motion to dismiss or affirm.

QUESTION: Yes, thank you. Suppose they did deny it on the merits, do you want us to say that they were wrong in denying it?

MR. REMCHO: Sure.

QUESTION: You want us to agree with you in your petition for rehearing, and declare that provision of the Puerto Rican constitution is invalid under the federal constitution.

MR. REMCHO: That's correct.

QUESTION: Is that the least bit inconsistent with the Ohio case?

MR. REMCHO: I think that there is a certain inconsistency there, but the Ohio case is, first off, 48 years of due process ago.

QUESTION: And so you would really say that we should really upset the Ohio case?

MR. REMCHO: I don't think it's necessary, because Ohio had two things this case doesn't: first, it was a civil case; and, second, there was already intermediate full appellate review in the Ohio court. So that case can certainly be distinguished.

QUESTION: Well, several years ago this Court upheld a sixty percent majority requirement for bond approval in West Virginia.

MR. REMCHO: Well, I think that bond approval matters, and those sorts of civil matters, have historically been treated very, very differently for the enforcement of federal constitutional rights.

QUESTION: Mr. Remcho, I must say the provisions of this Rule 45 are rather Draconian. "Any motion for reconsideration must be filed within the aforementioned term of 10 working days." And then the last sentence: "The Clerk shall deny outright any petition for extension to file a motion for

reconsideration..."

MR. REMCHO: Well, I think there's a certain inconsistency between that and 45(d), which appears on page 7, which says: "Any motion for reconsideration filed out of the aforementioned terms shall be considered by the Court" only to the extent it doesn't affect the mandate.

And here, of course, the mandate had already been stated.

QUESTION: It would have affected the mandate somewhat.

QUESTION: Which the Court did deny.

MR. REMCHO: That's correct; it denied it, but ---

QUESTION: It said was so agreed by the Court, and and certified by the Chief Clerk.

MR. REMCHO: That's correct, but it allowed--the Court did allow its Clerk to file that petition for reconsideration. And it acted on it en banc, which suggested a very special consideration.

QUESTION: That's what it says.

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

[Whereupon, at 1:35 p.m., the case in the above-entitled matter was submitted.]

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