

In the

# Supreme Court of the United States

MICHIGAN,

PETITIONER,

V.

GEORGE SUMMERS

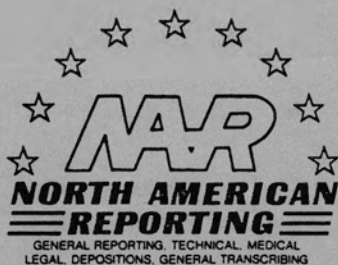
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No. 79-1794

Washington, D. C.  
February 25, 1981

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No. 79-1794  
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v. :  
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GEORGE SUMMERS :  
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Washington, D. C.  
Wednesday, February 25, 1981

The above-entitled matter came on for oral ar-  
gument before the Supreme Court of the United States  
at 1:15 o'clock p.m.

APPEARANCES:

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amicus curiae.
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Respondent.
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Civil Liberties Union as amicus curiae.

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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 Michigan v. Summers.

Mr. Baughman, you may proceed whenever you're ready.

ORAL ARGUMENT OF TIMOTHY A. BAUGHMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

I would like to take just a few moments to review the facts in this case. But before I do I would like to first state concisely the framework in which the State of Michigan views this case.

We view this as a warrants case involving an issue as to the scope of the search allowed under a warrant which is directed at premises involving an issue as to the authority given to the executing officers by the warrant itself to detain persons on or departing from the premises for a period of time reasonable and necessary to insure the full and faithful execution of that warrant.

Now, the facts are these. One October tenth at approximately 10:10 p.m. a team of Detroit police officers arrived at a residence in the City of Detroit to execute a search warrant for narcotics and narcotics paraphernalia. The affidavit in support of that warrant indicated that a purchase of heroin had been made inside that residence the



1 day previous from a black male known as George.

2 As the officers arrived to execute the warrant they  
3 observed respondent, George Summers, come out of the house  
4 and proceed down the front steps. They stopped him and asked  
5 him if he lived in the house. He answered affirmatively and  
6 was shown a copy of the search warrant and asked if he could  
7 get the officers inside the house. He responded that he had  
8 left his keys inside but could ring someone over the intercom.  
9 He did so and a person later known to be Dwight Calhoun  
10 answered the door by opening the inner door. He realized the  
11 officers' authority and purpose. He slammed that door shut  
12 and the door was then broken down by the police.

13 Mr. Summers was then brought inside the dwelling  
14 and taken into the living room. Once the premises were  
15 secured, and by that I mean, once Mr. Summers and the other  
16 seven persons who were present in the house at the time were  
17 gathered in the living room, one officer as part of his du-  
18 ties in executing the warrant went to the basement to search,  
19 and there he found heroin, in the basement.

20 Mr. Summers was then arrested for the possession  
21 of this heroin, the heroin found in the basement, and a search  
22 of his person incident to that arrest revealed heroin also  
23 in his jacket pocket. It was the heroin in his jacket pocket  
24 which ultimately formed the basis of the charge against him.  
25 He was bound over for trial on that charge but the charge was

1 dismissed by the trial judge. The Michigan Court of Appeals  
2 affirmed that dismissal, holding that the arrest for posses-  
3 sion of the heroin in the basement was without probable  
4 cause because the officers did not possess sufficient facts  
5 to sustain conviction on that charge. The Michigan Court of  
6 Appeals also rejected the argument that Mr. Summers could  
7 be searched under the authority of the warrant itself.  
8 The Michigan Supreme Court granted leave on those issues but  
9 decided the case on a different issue after this Court's  
10 decision in *Dunaway v. New York*, holding that the initial  
11 detention of Mr. Summers when he was brought from the porch  
12 inside the house was without probable cause and that being  
13 without probable cause it was unconstitutional. And this  
14 Court then granted certiorari.

15           It is our position, first, that the search of  
16 Mr. Summers was justifiable under the search warrant itself,  
17 that a search warrant for private premises allows a search  
18 of reasonable scope and intensity of persons present on the  
19 premises where the items particularized in the warrant might  
20 be found on the person. Now, it is true that the officers  
21 in this case --

22           QUESTION: This would go to anybody who was on the  
23 premises?

24           MR. BAUGHMAN: That's correct, anyone.

25           QUESTION: Under your theory, if there were, let us

1 say, six or eight men in the house and, as the officers en-  
2 tered, all of them rushed toward the door and wanted to get  
3 out, they could be stopped long enough, on your theory, to  
4 fulfill the purposes of the warrant?

5 MR. BAUGHMAN: That's correct. It would be -- in  
6 this case there in fact were eight persons on the premises,  
7 and under our first argument the search, that the people  
8 could be searched under the warrant itself, all those persons'  
9 pockets, their outer clothing, could be searched for the  
10 items named in the warrant, assuming, as in this case, that  
11 the items are of the type which could be concealed or found  
12 on the person. If there was typewriters or something like  
13 that, then they could not be searched, because it would not  
14 be reasonable to expect to find the items on the person.

15 The officers did not, of course, in this case  
16 search Mr. Summers on the basis of the warrant, but this  
17 Court has held that it is not necessary that the officers  
18 have the subjective legal justification which supports their  
19 action so long as we objectively, the law does support the  
20 action which was taken. And we submit that that is what  
21 happened in this case, that the search warrant does support  
22 the search of Mr. Summers.

23 QUESTION: You don't think it supports -- you don't  
24 think you could hold a person just because, if you find some-  
25 thing in the house, you could arrest the owner of the house?



1 MR. BAUGHMAN: It's first our position that without  
2 regard to whether they had found the heroin in the house  
3 they could --

4 QUESTION: That's another argument?

5 MR. BAUGHMAN: Yes, that they could have searched  
6 Mr. Summers simply as they could have searched a nightstand  
7 or a desk drawer because the heroin could be inside.

8 QUESTION: Right; right.

9 QUESTION: Going back to the hypothetical I gave you,  
10 which by coincidence happens to be the same number, is it  
11 your theory that if the eight people immediately wanted to  
12 dash out of the house, the officers would have no way of  
13 knowing which was the owner or who were the owners, and there-  
14 fore they could detain all of them long enough to consummate  
15 the execution of the warrant?

16 MR. BAUGHMAN: That's correct. And in fact, it  
17 would be our theory, as I will explain more fully in a moment,  
18 that even if a person were to say, I am not the owner, I am  
19 a visitor or I am a neighbor, that the officers would not have  
20 to rely on that declaration, but that they would nonetheless  
21 be allowed under the authority of the warrant to search all  
22 the persons present on the premises for the items named, in  
23 this case for heroin, if the items might be found on the  
24 person.

25 QUESTION: Mr. Baughman, is there a presumption

1 in Michigan that the owner of the house is responsible for  
2 what's in it?

3 MR. BAUGHMAN: No, there's not.

4 QUESTION: In thought that would be a solution to  
5 your problem.

6 MR. BAUGHMAN: Unfortunately, no, there's not. In  
7 fact, the Michigan Court of Appeals based its decision in  
8 part on the fact that under a peculiar Michigan law it's  
9 circumstantial evidence. Michigan holds -- however, there's  
10 some dispute as to this -- that you need to negative all  
11 theories consistent with innocence to support a conviction on  
12 circumstantial evidence. And therefore, ordinarily, when  
13 there is more than one occupant of the home, you can't con-  
14 vict anybody for possession of an item found in a common  
15 area.

16 QUESTION: Did you present this first theory that  
17 you are presenting to us, below?

18 MR. BAUGHMAN: Yes.

19 QUESTION: That was rejected?

20 MR. BAUGHMAN: That was rejected by the Michigan  
21 Court of Appeals, although the Michigan Supreme Court granted  
22 leave on that issue and in fact did not grant leave on the  
23 detention issue, which they ultimately decided the case on.  
24 They didn't reach the search warrant issue.

25 QUESTION: But the way the events happened, they

1 didn't search the men until after they had found something  
2 else in the house?

3 MR. BAUGHMAN: That's correct. They did not search  
4 them --

5 QUESTION: They ~~just~~ held them? Although  
6 you would ~~have~~ said, you ~~could~~ search ~~him~~  
7 immediately?

8 MR. BAUGHMAN: That's correct. We would take that  
9 position, although we will also argue alternatively that the  
10 Michigan Supreme Court was wrong in assuming this Court  
11 would reject the ground that he could be searched under the  
12 authority of the warrant. Then we will argue that he ~~nonethe-~~  
13 less could have been detained, and once the heroin was found  
14 in the basement they did have probable cause to arrest him,  
15 and discover the heroin in his pocket.

16 QUESTION: Mr. Baughman, on this first theory, is  
17 this just the theory you advance with respect to a home? You  
18 wouldn't make the same argument in a commercial establish-  
19 ment, would you?

20 MR. BAUGHMAN: No, we would not make the same argu-  
21 ment.

22 QUESTION: That's how you distinguish Ybarra, is it?

23 MR. BAUGHMAN: Yes. And let me turn quickly to  
24 Ybarra. In that case, of course, this Court held that a  
25 search warrant for Ybarra did not permit a search of the



1 patrons in the bar. We believe first, that this is distin-  
2 guishable in that Mr. Summers had a relationship to the pre-  
3 mises in this case, the premises to be searched, and that he  
4 was an occupant-owner of the premises; whereas the patrons  
5 in the Aurora Tap-Tavern in Ybarra had no nexus to the pre-  
6 mises at all.

7 Under a traditional scope and intensity analysis,  
8 a search warrant allows the search of places within the pre-  
9 mises where it's reasonable to believe that the items might  
10 be found. Of course you can't search for typewriters in desk  
11 drawers but you could search for packages of heroin in desk  
12 drawers.

13 We believe that Ybarra should be read for the pro-  
14 position that it is not reasonable to expect to find items  
15 named in a search warrant on patrons in a place of public  
16 accommodation, but we do contend that the showing of probable  
17 cause which was required to justify the intrusion into the  
18 private dwelling in this case should be viewed as compre-  
19 hending within its scope a search of persons on the premises  
20 who have a nexus to the premises --

21 QUESTION: Mr. Baughman, is there anything that  
22 would prevent you when you apply for the warrant to ask the  
23 magistrate to include in the scope of the area to be searched  
24 all persons found on the premises?

25 MR. BAUGHMAN: That's correct, sir. That could be

1 done, but --

2 QUESTION: It wasn't done here?

3 MR. BAUGHMAN: That was not done here. But our  
4 point is that a search warrant is an anticipatory authoriza-  
5 tion to search. For example, you would not have to state in  
6 the application for the search warrant or have detailed in  
7 the authorization that you wish to search all nightstands  
8 found in premises, or you would not have to detail that you  
9 wish to search all closets or all shelves. The warrant  
10 authorizes that by allowing a search of the premises.

11 Now, if persons may be searched under a warrant for  
12 premises because the items might be found on their person,  
13 as they might be found in desk drawers or nightstands --

14 QUESTION: Or in clothes in the closet.

15 MR. BAUGHMAN: Correct. -- then I don't believe that  
16 adding that language necessarily serves any purpose,  
17 although of course we'd be very happy --

18 QUESTION: Of course --

19 MR. BAUGHMAN: -- if the police had done that.

20 QUESTION: The magistrate would normally assume  
21 you'd search the nightstands. Would the magistrates in Michi-  
22 gan normally assume that everybody in the premises would also  
23 be searched?

24 MR. BAUGHMAN: No, I don't think they would assume  
25 that. I don't know if they would assume --

1 QUESTION: Isn't this really a question of constru-  
2 ing the warrant? Which would be kind of a matter of local  
3 practice, I would think.

4 MR. BAUGHMAN: Well, I think -- I think the Michigan  
5 Court of Appeals held that the particularity requirement pre-  
6 vented them from viewing a warrant for premises as including  
7 the persons on the premises within it, but they --

8 QUESTION: As a matter of the Fourth Amendment?

9 MR. BAUGHMAN: They said the particularity require-  
10 ment referred to *Marin v. United States*, so I think they were  
11 referring to the Fourth Amendment.

12 QUESTION: Well, now you've got me confused. But  
13 they didn't search him until after they found the dope?

14 MR. BAUGHMAN: That's correct.

15 QUESTION: So they didn't assume that this warrant  
16 authorized them to search him? Right?

17 MR. BAUGHMAN: No. That's correct. That is, the  
18 police, I think it's fair to say, did not search Mr. Summers  
19 on the basis of the warrant, but I think that search can  
20 nonetheless be justified on the basis of the warrant, because  
21 his person is a place within the premises where the items  
22 might be found.

23 QUESTION: But we're reviewing here the decision  
24 of the Supreme Court of Michigan, are we not? Because, since  
25 they took the case and decided it on a different ground than



1 the Michigan Court of Appeals.

2 MR. BAUGHMAN: That's correct. The Michigan Supreme  
3 Court granted leave on the search warrant issue but didn't  
4 reach it. I find their failure to reach it somewhat inex-  
5 plicable because I believe that an adverse decision on the  
6 detention issue, as they decided, doesn't necessarily end  
7 the case if in fact Mr. Summers can be searched on the  
8 authority of the warrant.

9 QUESTION: So, in effect, you would say, they neces-  
10 sarily rejected this position?

11 MR. BAUGHMAN: I think that could fairly be said,  
12 that it needed to be reached and wasn't. I can't really  
13 explain exactly why they didn't, but I don't believe, if this  
14 Court were to find or that court were to find that Mr. Summers  
15 could have been searched under the warrant, then their deci-  
16 sion on the detention issue did not end the case, or solve  
17 the case, and of course our cert. petition raised all three  
18 issues, which this Court granted. I believe the issue is  
19 properly here.

20 QUESTION: Well, it was rejected in the Court of  
21 Appeals, wasn't it?

22 MR. BAUGHMAN: It was rejected in the Court of  
23 Appeals, explicitly.

24 The nexus to the premises distinction, which I've  
25 just made as to why, as to how this case is distinguishable

1 from Ybarra, because Mr. Summers did have a nexus to the  
2 premises, is a sufficient, but we submit it to be not a nec-  
3 necessary distinction between the two cases, because we be-  
4 lieve that more importantly, as I mentioned earlier to  
5 Mr. Justice Stevens in answer to his question, is the fact  
6 that this was a private residence rather than a place of  
7 public accommodation. The difficulty with the relationship  
8 of the person to the premises or the nexus test is that in  
9 most cases the police will not have any idea of the rela-  
10 tionship of the people to the premises, and in fact people  
11 may lie about their relationship to the premises if questions  
12 are asked.

13 As Judge Campbell said in the Micheli case, which  
14 is cited in our brief, "When the stranger in the betting  
15 parlor solemnly announces that he is the family doctor, I  
16 would not require the police to believe him or inquire fur-  
17 ther before searching his bag."

18 Now, that case, of course, involved the search of  
19 personal effects rather than the person, but I believe the  
20 logic of the decision applies ~~also~~ to persons. If a  
21 person is to be searched under the authority of the warrant,  
22 a nexus test, we believe, is not an appropriate test to be  
23 required, that this Court should allow the search of the  
24 person on the premises simply because it is reasonable to  
25 believe that the items named in the warrant might be in

1 their pockets.

2           Particularly when a knock-and-announce requirement  
3 is considered, and Michigan has a knock-and-announce statute and  
4 case law which requires that the officers wait until a person  
5 in the room furthest from the door can get to the door to  
6 answer it. Particularly when those requirements are con-  
7 sidered, the authority to search persons on the premises  
8 makes sense.

9           I would hasten to add here that although I am  
10 pointing out that the fact that the warrant could be frus-  
11 trated is a justification for allowing a search of persons  
12 on the premises, it's not the sole one. We are asking this  
13 Court to allow a search of persons on private premises under  
14 the authority of the warrant simply because it's reasonable  
15 to believe that persons on the premises might have the items  
16 on their person. People are protected by --

17           QUESTION: And you added before that you have no  
18 way of knowing at the threshold who is the owner or who are  
19 the owners, and who may be customers, visitors, or neighbors.

20           MR. BAUGHMAN: That's correct. In this case --

21           QUESTION: How long a period do you have to resolve  
22 that dilemma?

23           MR. BAUGHMAN: It would be our position that the  
24 police do not have to resolve that dilemma. They may simply  
25 search all the persons on the premises, the outer clothing,



1 for the items named in the warrant. Because as Judge  
2 Campbell said, the police shouldn't be allowed necessarily  
3 to even believe what they're told, if they make inquiry,  
4 because they may be lied to. They shouldn't be required  
5 to inquire further or to believe the questions. They should  
6 simply be allowed to search, make a reasonable search for  
7 the items.

8 QUESTION: But if they search and find that the  
9 man's got a big packet of heroin in his pocket, do you mean  
10 they're not going to arrest him?

11 MR. BAUGHMAN: No, then these -- the person --

12 QUESTION: He would be arrested, then, in your --

13 MR. BAUGHMAN: He may be arrested for possessing  
14 the heroin; yes.

15 QUESTION: In your submission?

16 MR. BAUGHMAN: For example, in this case, if the  
17 officers had immediately searched Mr. Summers under the  
18 authority of the warrant rather than searching the basement  
19 first and finding heroin, and found the heroin in his pocket,  
20 he would have been arrested for possessing that heroin. The  
21 search warrant gave reason to believe that there was heroin  
22 on the premises and one place it was was in his pocket, and  
23 he would be arrested for possessing it.

24 QUESTION: But how would a person satisfy the  
25 officers on the ground at the time that he was neither the

1 owner nor had any connection with the premises if it turned  
2 out that he had no contraband on his person?

3 MR. BAUGHMAN: Well, if he had no contraband on his  
4 person I'd assume that he would not be arrested and there  
5 wouldn't be any need to --

6 QUESTION: But he would have been detained long  
7 enough to --

8 MR. BAUGHMAN: -- be searched.

9 QUESTION: Submit to the search.

10 MR. BAUGHMAN: That's correct, but in many occa-  
11 sions, I would imagine, a search warrant may be authorized  
12 for a particular place or a particular person where in fact  
13 there is no contraband and none will ever be found. A person  
14 will have submitted to the search and nothing will have been  
15 found and they will go on their way and there will be no  
16 arrest.

17 QUESTION: Yes, but I take it your second position  
18 is that even if they'd have searched him on the doorstep and  
19 found nothing on him, that you would have been authorized to  
20 hold him until the search of the house was over?

21 MR. BAUGHMAN: That's correct. And if --

22 QUESTION: Yes. On the grounds that if you find  
23 something in the house you will have reasonable cause to  
24 arrest him.

25 MR. BAUGHMAN: It's not our position that that's why

1 he can be held during the search to see if they might later  
2 arrest him.

3 QUESTION: What is it?

4 MR. BAUGHMAN: In order to assure the full and  
5 faithful execution of the warrant, that all the persons on  
6 the premises should be able to be detained during the execu-  
7 tion of the warrant. It avoids frustration in that the  
8 items could be picked up and hidden, and to protect the  
9 officers, while they execute the warrant, from people milling  
10 about or even from going outside and causing them some harm.

11 QUESTION: You mean, if they searched him right  
12 away, they could say that nevertheless you --

13 MR. BAUGHMAN: Wait here until we execute the warrant.  
14 Stay in the spot. You, officer, watch these eight people  
15 while we execute the search warrant, and then when we're done  
16 you can be released.

17 QUESTION: Well, a fellow says, I just want to go  
18 on my way. I'm going to get in my car and drive away.

19 MR. BAUGHMAN: I think, and I'll turn to the second  
20 argument now, that the police have the right to say, you can  
21 go on your way when we're done here, but in the meantime  
22 wait until we finish --

23 QUESTION: Only for safety reasons?

24 MR. BAUGHMAN: For safety reasons and --

25 QUESTION: Because you may be able to arrest him?



1 MR. BAUGHMAN: Well, I think because he may be able  
2 to frustrate the warrant. If -- let me turn to the second  
3 argument and assume, assume that this Court holds that a person  
4 cannot be searched under the authority of the warrant.

5 QUESTION: Or that he can.

6 MR. BAUGHMAN: Or that he can. And he has been  
7 and there's nothing found on his person. In this case, there  
8 were eight people on the premises, and since only Dwight  
9 Calhoun and Mr. Summers were charged, I'm assuming, I believe  
10 the record indicates that the other six were searched, after  
11 the heroin was found in the basement, that nothing was found  
12 on them, and they were allowed to go on their way. But they  
13 were detained.

14 QUESTION: Seems to me that you must reach the  
15 detention issue before you reach your warrant issue, because  
16 the defendant wouldn't have been on the premises if you  
17 hadn't detained him. He was outside when you met him.

18 MR. BAUGHMAN: That's correct, but --

19 QUESTION: You wouldn't say that the warrant gives  
20 you the right to search people out in front of the building?

21 MR. BAUGHMAN: No, but I think, I would argue --

22 QUESTION: Well, how did he get inside?

23 MR. BAUGHMAN: I would argue that the warrant gives  
24 -- if the warrant gives authority to search people on the  
25 premises, it also gives authority to search those who come out

1 of the premises under the very eyes of the officers as they  
2 approach. For example --

3 QUESTION: But that's -- so it's anybody who was in  
4 the premises at any time after the warrant is issued?

5 MR. BAUGHMAN: No, not necessarily. I think if a  
6 person were to approach the premises after the officers were  
7 already executing, that wouldn't necessarily give them  
8 grounds to search those persons. It's persons on or departing  
9 from.

10 QUESTION: What about a deliveryman leaving the  
11 premises? Does it make any difference?

12 MR. BAUGHMAN: Well, I would say --

13 QUESTION: I know, he said he was a resident,  
14 was he?

15 MR. BAUGHMAN: I would think that it wouldn't make  
16 a difference unless under a particular case it was clear to  
17 any reasonable man that this person could not have any  
18 connection with the premises at all. A man in a mailman's  
19 outfit is walking out with a pouch. I think they could not  
20 search him under the authority of the warrant, but if, as the  
21 officers approached to execute a search warrant, a suitcase  
22 came flying out the window, I would think that the fact that  
23 the suitcase is now outside the premises would not remove it  
24 from coverage of the warrant, because it had just been inside.  
25 If persons can be searched under the authority of the warrant,

1 the fact that they were observed to depart in the eyes of  
2 the officers as they approached shouldn't moot the question.  
3 The question remains, can they be searched under the authority  
4 of the warrant or can't they? We submit that they can.

5 But even if they can't, or if they have been and  
6 nothing found, we submit that in this case that respondent  
7 could be searched and that the heroin in his jacket pocket  
8 was nonetheless properly discovered because the warrant itself  
9 should be viewed as granting authority to the executing offi-  
10 cers to detain persons on or departing from the premises  
11 for a period of time which is reasonable and necessary to  
12 insure the full and faithful execution of the warrant. And  
13 we say that without regard to any individualized suspicion  
14 that any particular person on the premises is engaged in  
15 criminal activity.

16 QUESTION: Are you suggesting that the totality of  
17 the circumstances is sort of the rule that applies here?

18 MR. BAUGHMAN: What we're asking for is, rather  
19 than a necessarily a case-by-case analysis, is for this Court  
20 to recognize a generic class, if you will, of detentions for-  
21 feiting the seizure of the person which are reasonable,  
22 although there is not probable cause to arrest the person, or  
23 necessarily reasonable suspicion to believe that they're  
24 engaged in criminal activity.

25 Now, with Mr. Summers, he had said that he lived in



1 the home and had left his keys inside, and there having been  
2 a purchase of heroin made the day before, it could be argued  
3 that there was a reasonable suspicion that he was engaged in  
4 criminal activity. But as to the other six people in the  
5 house, perhaps you couldn't say that. But, nonetheless, we  
6 would argue that all those persons could be detained in the  
7 living room, as they were, for a period of time reasonable  
8 and necessary to allow the officers to fully execute, and  
9 safely execute the command of the court which ordered them  
10 to search the premises without regard to the --

11 QUESTION: Suppose on the mailman circumstance  
12 that you described, and assume that the house had been under  
13 surveillance for three or four hours and the surveilling  
14 officers who were there before the warrant was executed had  
15 reported to the senior official that the mailman had been in  
16 the house for three hours, then there might be some reason-  
17 able ground to think that the mailman was not engaged in the  
18 delivery of mail, would it not? And would you say they might  
19 be able to search him?

20 MR. BAUGHMAN: Yes, under those circumstances they  
21 would. I think the --

22 QUESTION: He might be delivering something other  
23 than mail?

24 MR. BAUGHMAN: That's correct. Our position is  
25 that the police should be able to detain anyone on or departing

1 from the premises for a period of time reasonable and neces-  
2 sary to insure the full and safe execution of the warrant.

3 In the circumstances that Your Honor has described, I think  
4 that would fit that test. It would be necessary to detain  
5 the mailman in order to fully and faithfully execute the  
6 warrant, although I think in that example also -- back to  
7 our first issue, the search warrant, that the mailman under  
8 those circumstances could probably be searched under the  
9 authority of the warrant if --

10 QUESTION: I think you ought to make a distinction  
11 between the mailman and the man in the mailman's uniform,  
12 because if he's a legitimate mailman and you arrest him,  
13 I think you're going to be in a little trouble.

14 MR. BAUGHMAN: I believe that's probably correct.  
15 I think that the example given was probably a courier acting  
16 as a mailman.

17 QUESTION: I assume that's what the Chief Justice  
18 meant was the man in the uniform.

19 MR. BAUGHMAN: Our position is, on this detention  
20 issue, that the Fourth Amendment contains two separate and  
21 independent clauses, a reasonableness clause and a warrant  
22 clause, and that the warrant clause is textually linked to  
23 the probable cause concept, but that arrests, seizures of  
24 the person, do not generally fall within the warrant clause  
25 and that even when they do, as in Payton v. New York,

1 the concern of the Court is not with the warrantless seizure  
2 of the person but with the warrantless entering into the  
3 dwelling to effectuate that arrest.

4 So we believe that seizures of the person should be  
5 reviewed for reasonableness and that detention of the persons  
6 on or departing from private premises when a search warrant  
7 is about to be executed is a class of reasonable detentions  
8 under the Fourth Amendment. We go through a number of cases  
9 from this Court in our brief, and this Court always expresses  
10 the test as striking a balance between the public in-  
11 terest and the individual's right to personal security free  
12 from the arbitrary interference by law enforcement officials.

13 And we believe that the teaching of those cases is  
14 that detentions are constitutional, if reasonable. And  
15 that reasonableness is a balancing between governmental  
16 interest and the individual's interest in personal liberty.  
17 The more severe the intrusion, the more information and the  
18 higher the governmental interest that's required to justify  
19 it. Arrest to hold someone to answer for a crime requires  
20 what we would call probable cause in the traditional sense,  
21 because as stated by Chief Justice Warren in the Terry case,  
22 an arrest is the initial stage in a criminal prosecution and  
23 it is inevitably accompanied by future interference with the  
24 individual's freedom of movement, whether or not trial and  
25 conviction ultimately follows. Detentions for custodial



1 interrogations, as this Court held in Dunaway, require tradi-  
2 tional probable cause because they are in many respects  
3 indistinguishable from an arrest to hold someone to answer  
4 for a crime.

5 Other classes of detentions, this Court has held,  
6 do not require probable cause in the traditional sense,  
7 Terry stops, certain sorts of border stops. And we submit  
8 that a search warrant itself should be viewed as authorizing  
9 a class of reasonable detentions, as I've said, those de-  
10 tentions which are reasonable and necessary for the full and  
11 safe execution of the warrant. That authority should be  
12 implied from the fact of the warrant itself.

13 The governmental interest in allowing this class  
14 of detentions, we believe, is a weighty one, insuring the  
15 full execution of the warrant, avoidance in many cases of  
16 frustration of the warrant -- since, as I've said, the police  
17 have to knock-and-announce. And even in this case, although  
18 Mr. Summers was coming out of the premises as the officers  
19 approached and we don't know what he had seen or hadn't seen,  
20 it is certainly not inconceivable that he saw the eight officers  
21 arriving, and put the item in his pocket and attempted to  
22 leave. And it's certainly not inconceivable that were he  
23 allowed to go about his business outside, that he might, as  
24 the Michigan Supreme Court dissenters noted, summon aid to  
25 interfere with the execution of the warrant or interfere with

1 it himself from the outside.

2 QUESTION: Mr. Baughman, did they search the other  
3 six?

4 MR. BAUGHMAN: They did after they found the heroin  
5 in the basement.

6 QUESTION: They searched those?

7 MR. BAUGHMAN: Yes. It would seem to me that a  
8 person outside the premises might be more dangerous than per-  
9 sons inside the premises, so I don't believe that the fact  
10 that Mr. Summers was coming out changes our position. Per-  
11 sons on or departing from the premises should be able to be  
12 detained to insure the full execution of the warrant and  
13 the faithful execution of a warrant. A magistrate has de-  
14 termined in this -- after all, in these cases, that there is  
15 probable cause to believe that items related to criminal ac-  
16 tivity may be found on the premises.

17 QUESTION: What is the Michigan law, or are there  
18 some limits under Michigan law as to whom you can arrest if  
19 you find heroin in his house?

20 MR. BAUGHMAN: There's some controversy as to that.  
21 The Michigan Court of Appeals held that you couldn't even ar-  
22 rest the owner because you wouldn't have sufficient facts to  
23 convict. We believe they applied the wrong standard, three  
24 justices in the Michigan Supreme Court.

25 QUESTION: But that's Michigan law, isn't it?

1 MR. BAUGHMAN: That's Michigan -- I believe that's  
2 an incorrect statement in this particular case also of  
3 Michigan law.

4 QUESTION: Of Michigan -- ? We haven't anything to  
5 do with that.

6 MR. BAUGHMAN: No, I believe that if this Court  
7 were to determine that Mr. Summers was properly detained ini-  
8 tially, then I think what this Court could do --

9 QUESTION: You mean that detaining him didn't vio-  
10 late the Fourth Amendment?

11 MR. BAUGHMAN: Didn't violate the Fourth Amendment,  
12 as the Michigan Supreme Court held, then the issue that would  
13 remain would be, could he be arrested validly on probable  
14 cause for the heroin found in the basement? And the Michigan  
15 Supreme Court --

16 QUESTION: Then could he be arrested, and then  
17 could he be searched?

18 MR. BAUGHMAN: Right. And the Michigan Supreme  
19 Court didn't reach that question because of their decision  
20 on the threshold question of the initial detention, which they  
21 decided on the basis of the Fourth Amendment.

22 QUESTION: But the dissenters did reach that ques-  
23 tion?

24 MR. BAUGHMAN: The dissenters did and would have  
25 found probable cause. We're confident that --



1 QUESTION: Even though the consenters conceded  
2 that under Michigan law something found in the basement of  
3 the house owned by somebody is not sufficient evidence to  
4 convict that somebody of possessing --

5 MR. BAUGHMAN: That's right. The "dis-on-  
6 senters pointed to law from this Court and from the Michigan  
7 Supreme Court in the past, which holds that an officer is --  
8 probable cause exists when a lay person, a person of reason-  
9 able caution and prudence would believe that a crime was  
10 being committed, not whether the officers have sufficient  
11 evidence to convict.

12 We believe the Michigan Court of Appeals erred in  
13 that and that if the Michigan Supreme Court reaches the  
14 question, we're confident they'll, they'll also reach that  
15 position. But they didn't reach it. And they didn't reach  
16 it because of this Court's decision in Dunaway v. New York.

17 QUESTION: Mr. Baughman, have you told us how long  
18 respondent was detained before he was searched?

19 MR. BAUGHMAN: The search began at 10:10 p.m.,  
20 approximately, the officers testified. And the return to  
21 the search warrant, which is in the Joint Appendix, is signed  
22 both by Mr. Summers -- pardon?

23 QUESTION: Is signed at what time?

24 MR. BAUGHMAN: It's signed at 11 o'clock. So, at  
25 the outside, the search took 50 minutes. And I would be

1 assuming that respondent -- I would assume that respondent  
2 was arrested sometime prior to that, after the heroin was  
3 discovered in the basement. At the outside, it's 50 minutes.

4 Thank you.

5 MR. CHIEF JUSTICE BURGER: Mr. Schulder.

6 ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,

7 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

8 MR. SCHULDER: Mr. Chief Justice, and may it please  
9 the Court:

10 In the brief time available to me I would like to  
11 address the aspect of this case that is of primary concern  
12 to the Federal Government.

13 We view this case and the decision of the Michigan  
14 Supreme Court as sweeping well beyond the context of the  
15 execution of a search warrant. The question here is whether  
16 the Michigan Supreme Court properly read this Court's decision  
17 in *Dunaway v. New York*, to hold that any detention of a sus-  
18 pect beyond a momentary stop for brief questioning is not  
19 permissible under the Fourth Amendment, regardless of its  
20 reasonbleness, unless the officer has probable cause to arrest  
21 the suspect on criminal charges.

22 We believe that this decision is inconsistent with  
23 this Court's basic approach in this area of Fourth Amendment  
24 law, and that it unjustifiably precludes law enforcement  
25 officers from engaging in appropriate and legitimate law

1 enforcement investigative activities.

2           In Dunaway the Court held that the detention of a  
3 suspect for custodial interrogation required probable cause  
4 for his arrest. We believe that that was undoubtedly a  
5 correct result. The detention process itself is an unstruc-  
6 tured and potentially open-ended one. Moreover, as Justice  
7 Stevens noted in his concurring opinion in Dunaway, the  
8 possibility of obtaining a confession may increase in direct  
9 proportion to the length of the detention. Most importantly,  
10 we submit, the police could prolong investigative stops in  
11 every case on the basis of reasonable suspicion, if they  
12 could simply justify the detention on the need for continued  
13 interrogation. Thus, as the Court held in Dunaway, to have  
14 allowed prolonged detention in that case simply on the justi-  
15 fication of custodial interrogation, would have permitted  
16 the police to go well beyond the narrow confines of the rea-  
17 sonable-suspicion-stop standard that the Court developed in  
18 Terry and its progeny.

19           However, as Mr. Justice White emphasized in his  
20 concurring opinion in Dunaway, there is room within the  
21 Fourth Amendment, and the Fourth Amendment's reasonableness  
22 standard, to accommodate certain exceptions to the normal  
23 rule of probable cause where flexibility is essential. Terry  
24 provides a case in point. The detention in Terry was momen-  
25 tary. It occurred as the officer observed Terry and his



1 companions parading around in front of a store and looking  
2 as if they were about to commit daylight armed robbery. The  
3 officer in that case approached, asked a question of the sus-  
4 pects, and when the suspects muttered a response he seized  
5 Terry, turned him around, patted the outside pockets of his  
6 coat, discovered a weapon. That detention, although it took  
7 only several seconds, the Court held was a seizure of the  
8 person under the Fourth Amendment. However, since the sei-  
9 zure was so different from the type of intrusion that accom-  
10 panies an arrest, the Court found that there was a narrow ex-  
11 ception to the probable cause requirement, and that reason-  
12 able suspicion alone was sufficient to justify the stop and  
13 the frisk of Terry.

14 Now, in subsequent cases, the Court has applied the  
15 Terry reasonable suspicion standard to stops of automobiles  
16 and in Brignoni-Ponce the Court noted that the stop in that  
17 case involved simply the asking of several questions. The  
18 Government had stated that the stops had taken usually no  
19 more than one minute. In Martinez-Fuerte, however, involving  
20 fixed checkpoint stops, the Government in its brief pointed  
21 out that the average length of detention at the San Clemente  
22 checkpoint was from three to five minutes. That was at the  
23 secondary area where the officers in their discretion were  
24 able to direct drivers over for further investigation. And  
25 that detention occurred without any requirement of reasonable

1 suspicion at all.

2           The Michigan Supreme Court in this case held that  
3 any detention for more than a brief or momentary period is  
4 per se unreasonable in the absence of probable cause without  
5 regard to the particular circumstances that may justify the  
6 detention. We believe that this approach is not only contrary  
7 to the Fourth Amendment's central notion of reasonableness,  
8 it's also unduly restrictive of legitimate law enforcement  
9 activities. There are numerous occasions when a suspect's  
10 responses to an officer's questions may intensify the offi-  
11 cer's suspicions and yet not necessarily provide probable  
12 cause to arrest.

13           In these situations the police may attempt to main-  
14 tain the status quo for a limited period in order to deter-  
15 mine whether to arrest or release the suspect. As we pointed  
16 out in our brief, we have given several examples, such as  
17 the situation where the police responding to a report of a  
18 burglary or robbery see a suspect near the scene of a crime,  
19 pick him up, and return him to the scene for possible iden-  
20 tification at a show-up. Similarly there is a situation in-  
21 volving a computer check where the police stop an automobile  
22 which they suspect reasonably, but have no probable cause to  
23 believe, is stolen. They then radio in to headquarters  
24 for a check to see whether in fact the automobile has been  
25 reported as stolen. Under the Michigan Supreme Court's decision

1 in this case these reasonable examples of good police work  
2 would not survive constitutional scrutiny.

3 We wish to stress that our position here will not  
4 leave the police in an unstructured situation where they may  
5 arbitrarily detain suspects for extended periods on no more  
6 than a whim. In the first place, the officer must have  
7 reasonable articulable suspicion that the individual is in-  
8 volved in criminal activity before he may stop the individual  
9 for brief inquiry. In order to detain the individual further  
10 after the individual has responded to the officer's questions  
11 the officer must have in mind a specific, independent avenue  
12 of investigation that requires the continued presence of the  
13 suspect, and that is reasonably likely to resolve the matter  
14 one way or the other, that is, whether to release or arrest  
15 the suspect within a relatively short time. The police may  
16 not detain a suspect on the basis of a vague hope that some-  
17 how evidence of his criminal conduct will materialize.

18 This case provides a good illustration of a situation --

19 QUESTION: Mr. Schulder, do you adopt the State's  
20 first position? I don't think you quite are adopting it?

21 MR. SCHULDER: We have not addressed the situation.

22 QUESTION: Well, specifically, could they detain  
23 someone leaving a house because they had a warrant to  
24 search the house, under your rationale you're now advancing?

25 MR. SCHULDER: Under our rationale, the police



1 would not be authorized to stop a person simply because he  
2 happens to be, and detain a person for the entire duration of  
3 the execution of the warrant, simply because he happens to be  
4 leaving the premises.

5 QUESTION: That would not constitute sufficient  
6 reasonable suspicion that he had some connection to criminal  
7 activity?

8 MR. SCHULDER: That's correct. If the police made  
9 inquiry and determined that the person lived on the premises  
10 or had some kind of ongoing connection with the premises --

11 QUESTION: Which they did here.

12 MR. SCHULDER: Oh. Certainly. I was about to say  
13 that the detention in this case fits perfectly within our  
14 theory, that is, as the respondent was leaving the house, the  
15 police stopped him, they ascertained that he lived on the  
16 premises, and they detained him there during the execution of  
17 the warrant.

18 We justify, in contrast to the State, the primary  
19 justification for the detention in our view -- and I'd like  
20 to address something that Justice White had mentioned earlier  
21 -- our primary, the way we view the case, the primary justifi-  
22 cation for detention here is to see whether or not the police  
23 would have sufficient evidence to arrest the respondent after  
24 the search was completed. We believe that --

25 QUESTION: Suppose there was clear Fourth Amendment

1 law to the effect that just because you discover heroin in a  
2 house doesn't mean you have probable cause to arrest anybody  
3 on the premises?

4 MR. SCHULDER: Well, we would still say that deten-  
5 tion of a person for the period, of a person connected with  
6 the premises for the period of ascertaining whether there was  
7 or was not drugs or other contraband sought in the warrant,  
8 would still be reasonable.

9 QUESTION: Why? If you -- suppose you found the  
10 heroin but you still couldn't arrest him?

11 MR. SCHULDER: Well, suppose you found the heroin  
12 and then you were able to discover that he in fact was con-  
13 nected to the heroin?

14 QUESTION: By asking?

15 MR. SCHULDER: By asking, by inquiring of the  
16 suspect; that's correct. That will certainly provide proper  
17 support --

18 QUESTION: I suppose your position is, though, that  
19 at least, if you found heroin in the house, you should be able  
20 to arrest, have probable cause to arrest the owner?

21 MR. SCHULDER: That's correct. We would agree with  
22 that submission.

23 QUESTION: Let me give you a slightly different  
24 hypothetical. You have a warrant to search a house owned by  
25 a named and described person for weapons thought to be on

1 the way to delivery to the IRA in Ireland. Would not the  
2 police be able to search every person in that house imme-  
3 diately on the Terry concept?

4 MR. SCHULDER: Well, we're not saying that the  
5 police would not be able to search people in the house if  
6 they have sufficient basis to believe that the people may  
7 have weapons on their persons.

8 QUESTION: I'm giving you the facts. Would a police  
9 policeman in his right mind not want to search every person  
10 in that house if they're there for the purpose of finding  
11 weapons that would --

12 MR. SCHULDER: I would agree that a policeman  
13 would properly --

14 QUESTION: For his own safety?

15 MR. SCHULDER: For his own safety; and the Fourth  
16 Amendment would not preclude him from taking that type of  
17 action.

18 QUESTION: Well, it might be different for the  
19 search for some other kind of a commodity.

20 MR. SCHULDER: That might be true. Thank you.

21 MR. CHIEF JUSTICE BURGER: Mr. Lorence.

22 ORAL ARGUMENT OF GERALD M. LORENCE, ESQ.,

23 ON BEHALF OF THE RESPONDENT

24 MR. LORENCE: Mr. Chief Justice, and may it please  
25 the Court:



1 I'd like to address the Court first  
2 on the detention matter. The search warrant was obtained for  
3 actions that took place the night before at this residence of  
4 the respondent. Under Michigan law an affiant or an infor-  
5 mant through an affiant, in this case it was the affiant  
6 police officer, went to a magistrate and presented what he  
7 swore to occurred the night before the alleged entry with  
8 the search warrant. Under Michigan law such actions must  
9 satisfy the examination of the magistrate, who is the issu-  
10 ing force for a search warrant.

11 In this particular case a search warrant was  
12 issued under the authority of a magistrate for the premises  
13 for the purposes of searching the premises only -- and that  
14 "only" is just my word -- to seize, secure, tabulate, make  
15 return according to law, of the following property and  
16 things. One, heroin; two, any other narcotic material and  
17 paraphernalia. Nothing more.

18 Now, if that examining magistrate was sufficiently  
19 convinced that a search warrant should be issued for persons  
20 or a person, that would have been done.

21 QUESTION: Is it frequent, frequent in Michigan  
22 that search warrants are issued to search people?

23 MR. LORENCE: Just like Ybarra, Your Honor.

24 QUESTION: What?

25 MR. LORENCE: Just like Ybarra.

1 QUESTION: Well, is this --

2 MR. LORENCE: Greg was the bartender. The search  
3 warrant specified the bartender, Greg, in the --

4 QUESTION: Well, usually if you've got probable cause  
5 to think somebody's got contraband on them you get an  
6 arrest warrant, don't you?

7 MR. LORENCE: Not if they want a search warrant.  
8 In this particular case they wanted a search warrant for the  
9 premises. If they have names of persons or a person with a  
10 sufficient description that satisfies the requirement of the  
11 magistrate, such search warrant -- and it's very common in  
12 Michigan and in Detroit, where this case originated, for the  
13 search warrant to specify not only the contraband to be  
14 seized and that the house be searched for such items, but  
15 also any person or persons.

16 QUESTION: Well, the Fourth Amendment says that  
17 the warrant should specify the places to be searched and  
18 the persons to be seized. Now, is that what you do in  
19 Michigan?

20 MR. LORENCE: Yes.

21 QUESTION: You specify the persons to be seized --

22 MR. LORENCE: Yes.

23 QUESTION: Or searched?

24 MR. LORENCE: Place to be seized, and -- place to  
25 be searched and a person to be seized.

1 QUESTION: Well, that's different.

2 QUESTION: Do you think there's a difference between  
3 a public place like a bar, the bar in Ybarra, and a private  
4 dwelling?

5 MR. LORENCE: Yes, I do, Your Honor. I think that  
6 a person, contrary to what's been said here, should have and  
7 does have greater rights in his residence, in a private place,  
8 than in a public place. Ybarra guarantees the Fourth Amend-  
9 ment rights to the patrons of that bar and the prosecutor  
10 -- or, it is the petitioner here, is asserting that a person  
11 in his own private dwelling, or in this particular place in  
12 this particular situation, outside the private dwelling, has  
13 less rights.

14 QUESTION: Well, is there anything to the notion  
15 that in a public bar or restaurant there is no assumption  
16 that any one of the individuals has any connection with or  
17 knowledge of the others, whereas in a private home, if you  
18 have eight people there, there is some possibly reasonable  
19 assumption that they have some connection with each other,  
20 or they wouldn't be gathered there?

21 MR. LORENCE: That may be so, but I think --

22 QUESTION: May be? Or is?

23 MR. LORENCE: -- the individual, wherever he is,  
24 has a right of privacy under the Fourth Amendment, and I  
25 don't think just the mere fact that somebody lives in a



1 house -- and that's the only information that the police  
2 officers had when they detained and seized the respondent in  
3 this case -- was sufficient probable cause, and it wasn't a  
4 reason to detain him, and wasn't a reason, wouldn't be a  
5 reason to search him.

6 QUESTION: Well, do you say there has to be pro-  
7 bable cause in the constitutional sense of the Fourth  
8 Amendment in order for any sort of detention to take place?

9 MR. LORENCE: Well, in this particular situation,  
10 after the search warrant was gotten, and they, the police  
11 officers -- and you're talking about seven police officers,  
12 a precinct narcotic unit, coming up the street, getting out  
13 of their vehicles, and stopping and detaining the respondent  
14 in this matter outside the premises. I think they had  
15 a right --

16 QUESTION: Knowing that he just came out of the  
17 house?

18 MR. LORENCE: Knowing that he just came out of the  
19 house.

20 QUESTION: No dispute about that?

21 MR. LORENCE: Well, that's what they said, that  
22 they saw him coming out of the house.

23 QUESTION: But on the premises in the sense that he  
24 is on the land to which that house is attached? On the door-  
25 step?

1 MR. LORENCE: Well, we --

2 QUESTION: Was he or wasn't he?

3 MR. LORENCE: Yes. We call it curtilage. I know  
4 this Court hasn't spoken of curtilage, probably, in 40 or 50  
5 years, but he was not inside the premises, he wasn't on  
6 the porch, he was on the sidewalk going to the street.  
7 Detroit is uncommon to many other places in terms of the way  
8 people live in housing structures. We have a predominance  
9 of single dwelling homes in our city as opposed to Washington  
10 or New York, where there are many apartment structures, and  
11 sometimes the buildings come right up to the sidewalk. Here  
12 we have a single dwelling home in a residential area, as a  
13 matter of fact, across the street from a school, and there is  
14 a porch that comes out of the house, then there are steps,  
15 and then there is a walk down to the common sidewalk that goes  
16 along the street and then some area between that sidewalk  
17 and the street.

18 Now, when the police officers came up and detained  
19 Mr. Summers, they had a right under Terry to do that. I be-  
20 lieve they do. And they had a right to give him a search,  
21 a pat-down, for a weapon. But they didn't do that. They did  
22 not feel that they were in any danger, and they did not feel  
23 that it warranted a search or a pat-down.

24 QUESTION: Well, do you say that the only thing that  
25 you can do on less than probable cause, then, is a pat-down

1 for weapons?

2 MR. LORENCE: Under the situation in this particular  
3 case, yes.

4 QUESTION: Well, generally? I mean, how about  
5 Martinez-Fuerte, Brignoni-Ponce, Pennsylvania v. Mimms?

6 MR. LORENCE: Well, I think under certain cases  
7 there are limited inquiry. I mean, this Court has spoken  
8 about, doesn't a police officer have a right to come up to  
9 an individual on the street and ask him a question? Now,  
10 the respondent here wasn't exactly on the street, but I do  
11 think that they had a right to come up and inquire. They  
12 made an inquiry. Do you live here? The respondent said, yes,  
13 I live here.

14 Now, I think that the police officers had a right  
15 for a brief momentary detention to inquire, to guarantee  
16 their safety, to find out, who is this man? Do you live  
17 here? At that particular point, I think that is legitimate  
18 police inquiry.

19 QUESTION: Well, how about the fact that he lives  
20 there and they have a warrant to search the place for drugs?  
21 Doesn't that permit further inquiry of him?

22 MR. LORENCE: But they didn't inquire anything.

23 QUESTION: Well, doesn't that permit further de-  
24 tention of him?

25 MR. LORENCE: I don't believe so. I think that



1 after that, that detention was a seizure and it was in vio-  
2 lation of his Fourth Amendment right. And I feel that under  
3 the circumstances that seizure took place the minute they  
4 turned him around, and they took him back onto the porch.

5 QUESTION: But would it make any difference, then,  
6 whether he lived there or not, under your theory?

7 MR. LORENCE: Whether or not this was an illegal  
8 detention?

9 QUESTION: Suppose he said that, I do not live  
10 here? You would say they could not detain him. And you would  
11 say the same thing when he answered that he could live there.

12 MR. LORENCE: Well, I don't believe that they would  
13 have any probable cause to detain him under the facts of this  
14 particular case, of the respondent. And in your particular  
15 situation I think they would have even less to detain him.  
16 I think the mere fact that they detained him was an intrusion  
17 on his expectation and right of privacy.

18 QUESTION: I'm merely saying that, as I understand  
19 your theory, it doesn't make any difference whether he said  
20 he lived there or that he did not live there.

21 MR. LORENCE: Unless they had anything further;  
22 unless they had probable cause to do what they did.

23 QUESTION: Well, so if their detention was to simply  
24 question and ask him whether he lived there, and the reply  
25 under your theory was bound to be unhelpful for the police

1 one way or the other. Why do you say they had a right to  
2 ask him whether he lived there or not?

3 MR. LORENCE: I said, yes. I think they could ask  
4 to have, the police had a right to ask him. If I understand  
5 your question, they asked him a question which I believe  
6 they legitimately had a right to ask.

7 QUESTION: But surely my brothers Blackmun and  
8 Rehnquist are correct, aren't they, in what their question  
9 suggests, that if you are correct, that it was violative of  
10 your client's constitutional rights, to seize him after he  
11 said, yes, he lived there? Certainly you would be correct if  
12 the answer had been, no, I don't live here.

13 MR. LORENCE: Correct.

14 QUESTION: In other words, it didn't make any dif-  
15 ference what the answer to the question was.

16 MR. LORENCE: That's correct. That's correct.

17 QUESTION: While the -- certainly the police were,  
18 as you can see, were free to ask the question, it was kind of  
19 a pointless question if whatever the answer was, they were  
20 powerless to do anything about it.

21 MR. LORENCE: Well, this Court has already respond-  
22 ed in terms of a situation like that.

23 QUESTION: Well, that's your submission. I under-  
24 stand that. That's the issue in this case.

25 MR. LORENCE: He could have said, goodbye. I don't

1 want to answer your questions, and walk off; at least, try to  
2 walk off.

3 QUESTION: If he says, I'm just an encyclopedia  
4 salesman, and was only in the house for a few minutes, do  
5 they have to believe him?

6 MR. LORENCE: I think that would be a -- I think  
7 that would be evasive and give the police room.

8 QUESTION: Well, he might-- let's assume he  
9 might be an encyclopedia salesman.

10 MR. LORENCE: At 10:10 p.m. on a dark night, coming  
11 out of this house? I have some question about that.

12 QUESTION: And yet you say that, when he said, no,  
13 I live here, it was a violation of his rights. But you sug-  
14 gest it would not have been if he'd said he didn't live there  
15 but was just a casual visitor, in your answer to the Chief  
16 Justice just now. How can that follow?

17 MR. LORENCE: I think that whether or not he  
18 responds either way, they have a right to ask that question  
19 and he has a right to answer any way he wants. I don't be-  
20 lieve that it gives any reason for the police to be sus-  
21 picious, to detain him, to take him back into the premises.

22 QUESTION: That's what I thought your position was.

23 QUESTION: Well, that's a meaningless charade,  
24 then. You say they have a right to ask him the question but  
25 regardless of what answer they get from him, they can do



1 nothing that they couldn't have done had they never asked  
2 the question in the first place.

3 QUESTION: That's your position?

4 QUESTION: What if he said, it's none of your busi-  
5 ness?

6 MR. LORENCE: I think he has a right to say that.

7 QUESTION: And that doesn't give the officers any  
8 extra reason? That's what you suggest? Right?

9 MR. LORENCE: Well, they have a search warrant for  
10 the premises. They didn't have a search warrant for him,  
11 they didn't even have any description in their search warrant  
12 that a person of the respondent's character and description  
13 was wanted.

14 QUESTION: Well, suppose the police have, are sud-  
15 denly told by a man who comes into the police station that  
16 he's just come from an address, and he knows that one of the  
17 undercover agents has been murdered in that house by somebody  
18 in that house. He doesn't know who did it, but he knows he's  
19 dead and somebody did it there. And they go to the -- and  
20 everybody agrees there's probable cause to go search the  
21 house, and they get a warrant to search the house, and as  
22 they approach here come six people out of the house. Can't  
23 they detain them until they've -- all they're trying to, see  
24 if there's a dead man in the house? You say, no, absolutely  
25 not.

1 MR. LORENCE: So I --

2 QUESTION: They have probable cause, everybody  
3 concedes that probable cause to believe that somebody in that  
4 house killed somebody and that the body's there.

5 MR. LORENCE: In this particular situation of the  
6 respondent, they didn't have any probable cause.

7 QUESTION: But how about my question?

8 MR. LORENCE: Well, I think if there is probable  
9 cause, that there is a reason to detain him, at least momen-  
10 tarily.

11 QUESTION: Each person? Each person until they  
12 find the body and then try to figure out who's responsible?  
13 Do they have to -- can't they hold them for a reasonable time  
14 to inquire, to see if they can find out which of the six  
15 people may be implicated? Or maybe they all are?

16 MR. LORENCE: I think that they have a right to  
17 make a Terry-type stop and investigation.

18 QUESTION: Then that's all? If the fellow, if --  
19 in my example, if six people exit from the house and they  
20 want to inquire, make some inquiries from them, and each of  
21 them says, none of your business, they must let them go?

22 MR. LORENCE: No, I think with the probable cause  
23 that you have indicated --

24 QUESTION: Well, assume probable cause as I -- the  
25 only facts I changed was change cocaine or drugs to a murder.

1 That's all.

2 MR. LORENCE: No, you indicated that there was  
3 probable cause.

4 QUESTION: Well, probable cause, I said there was a  
5 murder in the house and that somebody in the house was  
6 responsible for it.

7 QUESTION: What difference does it make whether  
8 it's heroin or a dead body, for these purposes, if that's the  
9 information?

10 MR. LORENCE: I think the detention in the case of  
11 the respondent with a search warrant in the hands of the  
12 police officers is different from the circumstance that has  
13 been given by Justice White. And I think that there isn't  
14 any probable cause in the case of the respondent in my case  
15 and there wasn't any reason to detain him, they didn't have  
16 any probable cause. Just the fact that he lived, he said  
17 that he lived in the premises. I think you have a situation  
18 where there is someone who indicates that someone was murdered  
19 in this house, where you do have probable cause. And I think  
20 you have a right to detain. There are certain --

21 QUESTION: What's the difference? In each case it's  
22 a felony, one a little more gruesome than the other, perhaps,  
23 and I'm not sure which is worse. But what's the difference?

24 MR. LORENCE: I think it comes down to the intru-  
25 sion on a person's right against an illegal, unreasonable



1 stop and --

2 QUESTION: You mean it's all right to intrude if  
3 maybe there's a dead body in there but it's not all right to  
4 intrude if there is a lot of heroin?

5 MR. LORENCE: I think that it comes down to any  
6 situation where somebody coming out of the premises, like in  
7 the particular case of the respondent, where they do not have  
8 probable cause in terms of the respondent or any person that  
9 comes out, that they do not have a right to detain any more  
10 than to make the inquiry of whether or not you live there or  
11 what your name is, or what's your address, or to secure that  
12 person in terms of any potential weapons, if the police  
13 officers think that they have weapons.

14 QUESTION: I've got a real problem. The police  
15 have a search warrant to search this house in this case?

16 MR. LORENCE: That's correct.

17 QUESTION: And they search the house and they found  
18 the heroin. Right? And this man said he lived in that house.  
19 What should the police then do? Say, would you mind waiting  
20 here until we get a warrant?

21 MR. LORENCE: Outside the house, Your Honor?

22 QUESTION: This very case. After they found the  
23 heroin, what should they have done insofar as this man was  
24 concerned? Turned him loose?

25 MR. LORENCE: I don't --

1 QUESTION: Say, bye-bye, or what?

2 MR. LORENCE: No, I don't think that they should  
3 have turned him loose.

4 QUESTION: Well, what should they have done?

5 MR. LORENCE: I think they should have gotten a  
6 warrant to search him. They did not have --

7 QUESTION: What should they do with him in the  
8 meantime? Turn him loose?

9 MR. LORENCE: Well, I don't see anything wrong  
10 with that. They knew where he lived, they had the ability to  
11 get his name and address.

12 QUESTION: They had his name and address then.

13 MR. LORENCE: All right, they --

14 QUESTION: What should they have done?

15 MR. LORENCE: Inside the house? I --

16 QUESTION: No, sir. My story is, after they found  
17 the heroin and they came out and looked at him and said,  
18 you're the one who said you lived in that house, right? At  
19 that stage, what should they have done?

20 MR. LORENCE: They should have advised him  
21 of his Miranda warnings, because a police officer said that  
22 he made an initial --

23 QUESTION: And could they have arrested him after  
24 the Miranda warnings?

25 MR. LORENCE: I don't think that they had probable

1 cause to arrest him.

2 QUESTION: Well, what should they do, let him go?

3 MR. LORENCE: I think that they had no other choice  
4 than to let him go.

5 QUESTION: But to let him go?

6 MR. LORENCE: Yes. Now, I'd like to go back,  
7 Your Honors, to --

8 QUESTION: Well, your final answer to Justice  
9 Marshall's question is that they simply have to let him go at  
10 that point?

11 QUESTION: Well, if you're correct, they wouldn't  
12 have had him, he wouldn't have been there.

13 MR. LORENCE: If I was correct, they wouldn't have  
14 taken him inside the premises.

15 QUESTION: He wouldn't have been there at the time  
16 they discovered narcotics in the basement.

17 MR. LORENCE: That's correct.

18 QUESTION: If you're correct.

19 MR. LORENCE: Right. Now, let's go back to the  
20 detention. The detention outside the premises involved taking  
21 of the respondent back onto the porch and using him as an  
22 instrument to gain entry into a premises. Now, we've been  
23 talking and the Solicitor General's been talking about  
24 duration, in terms of Dunaway. I think that there is duration  
25 here but I think there is something more grievous.



1 I think the fact that this precinct narcotic team  
2 armed with flak jackets, long guns, guns drawn, and a battering  
3 ram, coming up the walk, detaining the respondent --

4 QUESTION: Well, the narcotic trade uses those too,  
5 you know.

6 MR. LORENCE: Yes, but taking this civilian, not  
7 knowing who he is other than the fact that he resides in the  
8 house, I don't think under any rule justifies taking him to  
9 that front door, using him as an instrument to gain entry --

10 QUESTION: Yes, but it didn't work.

11 MR. LORENCE: But battering that door down, knowing  
12 as this Court has said many times what kind of actions and  
13 activities go inside a place where drugs are kept or sold,  
14 placed the respondent in a situation where he could have been  
15 the first one to catch a salvo of gunshots and been killed  
16 right on the spot. I think that --

17 QUESTION: That sometimes has happened to the offi-  
18 cers on the outside when they made the entry on the inside,  
19 hasn't it?

20 MR. LORENCE: That's correct, Your Honor, and police  
21 officers in their difficult task take --

22 QUESTION: That's the rationale of Chief Justice  
23 Warren in Terry, to try to make sure that at least the odds  
24 are leveled off between --

25 MR. LORENCE: And that's why Terry has become a

1 limited exception to the exclusionary rule. But here you have  
2 a man who has not taken on the responsibility and the dangerous  
3 responsibility that police officers take on, who is made a vol-  
4 unteer who is placed in front of that door. He presses that  
5 doorbell, yes, and the man that comes to the door sees that  
6 there are people on that porch, slams the door, the battering  
7 ram goes in, and Mr. Summers is kept right there, without a flak  
8 jacket, without any responsibility, to take care of himself.  
9 He's placed in a position where I can't think of anything that's  
10 more serious than this in terms of denying his personal liberties.

11 QUESTION: And for that reason we should reverse  
12 his conviction for heroin?

13 MR. LORENCE: I believe that the detention --

14 QUESTION: Isn't there something missing in between  
15 those two?

16 MR. LORENCE: I think the detention, the violations  
17 of his Fourth Amendment right were so severe outside the pre-  
18 mises that their taking him into the premises denied him --

19 QUESTION: Would your case be the same if they  
20 didn't -- if they had left him outside in the street sitting  
21 on a featherbed? Would your position be the same?

22 MR. LORENCE: If they had left him without any con-  
23 trols, without any threat, then he was left to go his way  
24 and to exercise his freedom of movement.

25 QUESTION: That's not what I said. I said, instead

1 of taking him to the front door, they had held him sitting on  
2 a featherbed on the porch.

3 MR. LORENCE: No, I think any --

4 QUESTION: Would you be making the same argument?

5 MR. LORENCE: Yes, the same argument.

6 QUESTION: Well, why -- oh, you think this just  
7 adds on?

8 MR. LORENCE: Yes, I do.

9 QUESTION: The fact that they used him at the door?

10 QUESTION: What if they'd simply asked him for the  
11 key, if he said he lived there?

12 MR. LORENCE: Well, if he had given them the key,  
13 I think they still could not have seized him, detained him,  
14 and taken him back into the premises.

15 QUESTION: That would obviate the necessity for  
16 his going back and himself ringing the doorbell and exposing  
17 himself to all this possible danger which you have just  
18 described.

19 MR. LORENCE: That's correct. They didn't do that.  
20 I think the detention, once they went onto the porch and took  
21 him onto the porch, I think that was the detention, the sei-  
22 zure, and the arrest.

23 QUESTION: What if they had asked him for the key  
24 and he'd said, I have it but I won't give it to you?

25 MR. LORENCE: I think he had a right to keep



1 the key. I don't think he had a duty to give them the key.  
2 I don't think he had a duty to help them open up the door.

3 QUESTION: Do you think that his refusal to give  
4 them the key would have given the police grounds for any  
5 additional inquiries or any additional detention?

6 MR. LORENCE: I think perhaps they could have in-  
7 quired but they didn't, in this particular matter, inquire  
8 beyond the fact about, if whether or not he lived in the  
9 premises, and whether or not he could open up the door.

10 I think each human being has an expectation of  
11 privacy which is guaranteed under the Fourth Amendment, and  
12 any kind of intrusion beyond the exceptions that have been  
13 carved out by this Court, like the border cases, like the  
14 Terry-type search, I think are a violation of the person's  
15 expectation of privacy, of his person. I think in this  
16 particular situation the respondent came out of his premises  
17 late at night. He had every expectation of privacy as he  
18 was coming down the steps of his home, and down the sidewalk,  
19 and when the officers detained him I think that violated his  
20 Fourth Amendment right to privacy.

21 I'm sorry, isn't the red light at --

22 MR. CHIEF JUSTICE BURGER: No, you have some re-  
23 maining time, until the red light goes on.

24 MR. LORENCE: All right, thank you, Your Honor.

25 I think the history of the Fourth Amendment being

1 a colonial response to the English practice, against general  
2 warrants, is a firm basis for this Court to continue the prac-  
3 tice of holding that the Fourth Amendment guarantees each  
4 individual a right to be secure in his person, his house,  
5 his papers, and effects, against unreasonable searches and  
6 seizures.

7 QUESTION: To continue the practice adopted in  
8 1961 in Mapp v. Ohio?

9 MR. LORENCE: Yes. I don't believe that this  
10 Court should carve out another exception in the Terry line,  
11 in the border cases.

12 QUESTION: Well, what do you think we were doing  
13 in Mapp v. Ohio? We were certainly rewriting something in  
14 the Constitution.

15 MR. LORENCE: But I don't think that it was de-  
16 priving a person of his guaranteed right to be free from any  
17 seizures or searches?

18 QUESTION: No. It was imposing a requirement on  
19 the states that hadn't previously been imposed on them.

20 QUESTION: We overruled Wolff v. Colorado and im-  
21 posed upon the states, presumably as part of the Constitution,  
22 the obligation to enforce an exclusionary rule. That's  
23 what Mapp v. Ohio did.

24 MR. LORENCE: Right. And I think that the Court  
25 should continue protecting an individual's Fourth Amendment

1 right and not expand the doctrine of Terry v. Ohio and the  
2 border cases, and expand upon those to create anything in  
3 terms of a good faith exception or a balancing  
4 test, because I believe that if police officers, in a situa-  
5 tion like the respondent's, who have a search warrant for the  
6 premises, detain and deprive a person of their right of  
7 privacy on the outside of the premises for which they have  
8 a search warrant, they could stop not only the mailman but  
9 a lady with a baby buggy, or a nine-year-old boy coming out  
10 of the premises, and take him back into a situation that  
11 would be dangerous and also search him. And I don't think  
12 that the search warrant for the premises under our law in  
13 the State of Michigan, permit a search beyond the bounds  
14 that are outlined in a search warrant. And in this particu-  
15 lar case the search warrant said, premises. It didn't say  
16 anything about persons coming out of the premises, and I  
17 think the police officers had a duty to let that person go  
18 after they inquired as to who he was and were sufficiently  
19 satisfied that that person wasn't a danger to them. They  
20 didn't search Mr. Summers for any weapons when he was stopped  
21 on the sidewalk, so they didn't feel the danger, as in Terry.

22 QUESTION: But you agree that the Supreme Court of  
23 Michigan decided this case on federal grounds only?

24 MR. LORENCE: Yes, I -- they decided on the deten-  
25 tion matter and they found that there was an illegal



1 detention and violation of the Fourth Amendment, and on that  
2 basis they made their decision. Thank you, Your Honors.

3 MR. CHIEF JUSTICE BURGER: Very well. Mr. Ennis.

4 ORAL ARGUMENT OF BRUCE J. ENNIS, JR., ESQ.,

5 ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

6 AS AMICUS CURIAE

7 MR. ENNIS: Mr. Chief Justice, and may it please  
8 the Court:

9 I greatly appreciate the Court's permission to ar-  
10 gue as amicus in this complex and important case. I will  
11 not address the merits. Rather, I will argue that there are  
12 both jurisdictional and policy grounds why the Court should  
13 not resolve the merits in the unique circumstances of this  
14 case, and should instead either dismiss the writ as improvi-  
15 dently granted or remand for clarification.

16 Briefly, as the trial court and the Court of Appeals  
17 both ruled, there are adequate and independent state law  
18 grounds that would support the same judgment and would re-  
19 quire exclusion of the evidence regardless of this Court's  
20 rulings on any of the federal questions presented by  
21 petitioner.

22 QUESTION: We have just heard from Michigan counsel  
23 that the Supreme Court of Michigan decision rested on  
24 federal grounds.

25 MR. ENNIS: That is entirely correct, Your Honor.

1 The decision of the Supreme Court of Michigan did rest on a  
2 federal ground.

3 QUESTION: And on no state ground?

4 MR. ENNIS: And on no state ground. That is cor-  
5 rect, Your Honor.

6 QUESTION: Well, since when do we dismiss in those  
7 circumstances?

8 MR. ENNIS: Your Honor, I think that the principle  
9 that emerges from all of this Court's cases on adequate and  
10 independent state law grounds is that this Court will not  
11 review a state court judgment unless the decision on the  
12 federal ground was necessary to that judgment and in this  
13 case, given the rulings of the trial court and the Court of  
14 Appeals which both reached the same judgment on state law  
15 grounds, it cannot be said that it was necessary.

16 QUESTION: But the highest court in the state has  
17 now certainly given some indication that it thought it was  
18 necessary.

19 MR. ENNIS: Well, Your Honor, the highest court in  
20 the state has not reached either of the state law grounds  
21 that the trial court and the Court of Appeals both relied  
22 upon.

23 QUESTION: Would it be reasonable or would it be  
24 unreasonable to infer from that that they thought they had  
25 to reach the federal grounds?

1 MR. ENNIS: Your Honor, I do not think that it  
2 would be reasonable to infer from that fact that --

3 QUESTION: Ordinarily, the states' highest courts,  
4 and particularly this one, in my observation, goes out of its  
5 way to avoid a remand, and put it on state grounds, if they  
6 can do it.

7 MR. ENNIS: Your Honor, I can't second guess the  
8 thinking behind the Michigan Supreme Court's majority opinion.  
9 I can say that the Court of Appeals in Michigan is a single  
10 court of appeals which has jurisdiction over the entire  
11 state. That court has ruled on state law grounds that the  
12 evidence in this case must be excluded.

13 QUESTION: Well, what do you do with Justice  
14 Williams' dissent at Appendix 27, where it says, after his  
15 name, "for reversal"? I would assume from that that he  
16 thought that if his principles were accepted by the majority  
17 of the Supreme Court of Michigan, the judgment of the Court  
18 of Appeals would have been reversed.

19 MR. ENNIS: Well, let me be candid, Your Honor.  
20 The case hinges on a Michigan case called People v. Davenport  
21 and it is true that the minority of the Michigan Supreme  
22 Court thought that the Court of Appeals and the trial court  
23 had misinterpreted that People v. Davenport case, but the  
24 majority did not go along with that view. They expressed no  
25 view whatsoever on the point.



1           It can be said, however, that in the majority of  
2 the Michigan Supreme Court was Mr. Justice Levin, who, while  
3 he was on the Court of Appeals, was the author of the People  
4 v. Davenport opinion. At the very least, at the very least,  
5 if there is some ambiguity about what the Michigan Supreme  
6 Court would rule on these state law grounds, it certainly  
7 cannot be said by this Court that Michigan law would author-  
8 ize the detention and search in the circumstances of this  
9 case.

10           Now, given what Mr. Justice Jackson said for the  
11 Court in Herb v. Pitcairn, that the Court from the time of  
12 its foundation has adhered to the principle that it will not  
13 review judgments of state courts that rest on adequate and  
14 independent state grounds if the same judgment would be ren-  
15 dered by the state courts after we corrected its views of  
16 federal laws --

17           QUESTION: Mr. Ennis, supposing we sent it back and  
18 the Michigan Supreme Court said, we don't care to decide the  
19 Michigan view, we think that federal law requires this re-  
20 sult. We decided the case on that ground, that's our opinion,  
21 and we're not going to say anything about state law. They  
22 can't make us say anything about state law. How can we tell  
23 them to decide it on state law grounds ?

24           MR. ENNIS: Your Honor, this Court cannot force the  
25 Michigan Supreme Court to decide the case on state law grounds.

1 QUESTION: So if we dismiss the writ as improvi-  
2 dently granted, its judgment will stand and it will stand on  
3 federal grounds.

4 MR. ENNIS: Your Honor, what could happen in that  
5 circumstance is it could go back to the Michigan Supreme  
6 Court and they could decide to decide the case on the state  
7 law grounds for which they originally granted leave to appeal.

8 QUESTION: If we find that this writ is improvi-  
9 dently granted, that would be the end of the line. It ~~would~~  
10 wouldn't go back to the Michigan Supreme Court. What do  
11 you --

12 MR. ENNIS: Well, that's why I suggested, Your  
13 Honor, that an alternative method of proceeding would be as  
14 this Court did in Krivda, to vacate and remand to the  
15 Supreme Court of Michigan for clarification.

16 QUESTION: But on your submission, Mr. Ennis,  
17 every case that comes to us from the highest court of a state  
18 placing it openly on federal grounds and on no state grounds  
19 would then lead us, if not require us, to remand to say,  
20 isn't there a state ground on which you can reach this  
21 result?

22 MR. ENNIS: Your Honor, I think not, because I'm  
23 not arguing for the purely speculative possibility that there  
24 might be a state law ground. This case is unique from all  
25 the previous cases I am aware of in this Court on adequate

1 state law ground issues in that both the trial court and the  
2 Court of Appeals did expressly rule on state law grounds, so  
3 it is not speculative to suggest that there might be a state  
4 law ground. In fact, there has been a ruling that there is.

5 QUESTION: Are those judgments before us?

6 MR. ENNIS: Pardon me, Your Honor?

7 QUESTION: Are those judgments before us?

8 MR. ENNIS: Which judgments, Your Honor?

9 QUESTION: The lower court judgments?

10 MR. ENNIS: No, they are not directly before the  
11 Court.

12 QUESTION: Doesn't that solve the problem? We can  
13 only pass on one.

14 MR. ENNIS: Your Honor, I think --

15 QUESTION: And the one that we have before us,  
16 would you agree that the court went out of its way to point  
17 out that they were ruling on federal and not state grounds?

18 MR. ENNIS: It is certainly true.

19 QUESTION: And if that's true, why send it back and  
20 say, is that what you were doing?

21 MR. ENNIS: Well, let me say this, Your Honor. Even  
22 if there would be no jurisdictional bar to this Court enter-  
23 taining the case, as I think there is, there is a very strong  
24 policy reason under Ashwander for this Court not to grant  
25 cert. in the circumstances of this case, because it may not



1 be necessary to resolve these very difficult and important  
2 federal constitutional questions in order for the same judg-  
3 ment to stand on state law grounds. In those circumstances  
4 I think it is at least appropriate to vacate and remand to  
5 the state court for clarification.

6 In that connection, let me point out something  
7 that is not mentioned in my amicus brief, and that is that  
8 Michigan has since 1919 adopted its own state exclusionary  
9 rule, immediately after Weeks, and in People v. Beavers --  
10 decided 393 Michigan 554 -- the Michigan Supreme Court ruled  
11 that they will apply their state exclusionary rule even in  
12 circumstances where the Fourth Amendment and the federal  
13 exclusionary rule do not require exclusion of the evidence.

14 QUESTION: But the Supreme Court of Michigan didn't  
15 do that here. And in Zucchini, which we decided two or three  
16 years ago, which came up in the Supreme Court of Ohio, we  
17 said that there may be adequate state grounds for it, but  
18 the Ohio Court placed it on federal grounds, and we will de-  
19 cide the federal question so that the state court will feel  
20 free to decide it under state law, knowing there is no federal  
21 impediment.

22 MR. ENNIS: That's correct, Your Honor. I think  
23 that's slightly different in that the question there is whe-  
24 ther the state court acted under what it believed to be the  
25 compulsion of overriding federal law. That is not the case

1 here. In fact, the case law in Michigan, if you will look  
2 into it, indicates that the Michigan courts apply under their  
3 own Fourth Amendment principles, give more protection to  
4 defendants than would probably be required by the Fourth  
5 Amendment, and they also apply a state exclusionary rule  
6 that excludes evidence that would not have to be excluded  
7 under the federal exclusionary rule. They are not acting  
8 under compulsion of federal law by being more protective of  
9 individual rights.

10 QUESTION: But why didn't they do it here?

11 MR. ENNIS: Your Honor, I don't know, and that's  
12 why I think, given the two lower court decisions so that it's  
13 not just speculative possibility that it could be done, it  
14 would certainly be consistent with Ashwander for this Court  
15 to vacate and remand for clarification.

16 QUESTION: Where does this suggestion of yours  
17 stop? Every time there's a decision rested, rested affirma-  
18 tively on a federal ground, what are we to do? Vacate and  
19 send back to a state court and say, now, look, maybe you  
20 could have rested this on a state ground and until you tell  
21 us you can't we're not going to deal with the federal question?  
22 Does it go that far?

23 MR. ENNIS: No, it does not go that far, Your Honor.  
24 Let me suggest some limiting principles. First, I would not  
25 suggest that the Court should vacate and remand whenever

1 there is simply a speculative possibility that a state law  
2 ground might be adequate and independent. I am only sug-  
3 gesting in the unique circumstances of this case where the  
4 trial court and the Court of Appeals have ruled that there  
5 is such a state law.

6 QUESTION: Have we had anything like this before,  
7 where it was suggested --

8 MR. ENNIS: Never before that I am aware of, Your  
9 Honor. I believe this case is unique, so far as I've been  
10 able to determine.

11 QUESTION: But as Justice Marshall suggested to  
12 you, is not the fact that two lower state courts decided on  
13 other grounds make it more apparent that the Supreme Court of  
14 Michigan went out of its way to put it on federal grounds and  
15 to reject the state grounds?

16 MR. ENNIS: Your Honor, I don't know. It may be  
17 that the Michigan Supreme Court decided simply to discuss  
18 these questions in chronological order, and the first issue  
19 that comes up is the legality of the detention. It may be  
20 that was the sole basis of why they addressed the detention  
21 issue rather than the subsequent state law issues that were  
22 found dispositive in the lower courts. I think in those cir-  
23 cumstances a remand would be appropriate.

24 QUESTION: You said you did not want to get into  
25 the facts, but let me put this hypothetical to you that I



1 put to your colleague. Suppose a warrant were to search  
2 for machine guns and hand grenades that were about to be  
3 sent to the IRA in Ireland, and they send a team of seven or  
4 eight officers out, adequately prepared for that. Then do  
5 you think they may not detain the man at the door?

6 MR. ENNIS: Well, Your Honor, I believe that the  
7 answer to that question can probably be resolved under  
8 existing law, under Terry v. Ohio. Obviously, as you are  
9 aware, Your Honor, Terry does permit a pat-down for weapons  
10 in circumstances where the police have reasonable suspicion  
11 to believe that a person might be armed and dangerous, even  
12 if they do not have probable cause to detain for a lengthy  
13 period of time or to arrest. The interesting point here is  
14 that the Michigan Supreme Court did not even consider whether  
15 Terry, existing law, would have authorized that kind of a  
16 search or the search involved in this case, because it went  
17 off on the quite different ground, under Dunaway, that there  
18 could be no detention whatsoever. That, I think, is an addi-  
19 tional reason why cert. should be dismissed as improvidently  
20 granted, if the Court decides to reach that question, since  
21 that particular question, the scope of Terry in the circum-  
22 stances of this case, has never been considered by the  
23 Michigan Supreme Court.

24 Again, I do appreciate the permission to argue as  
25 amicus. Thank you very much.

1 ORAL ARGUMENT OF TIMOTHY A. BAUGHMAN, ESQ.,

2 ON BEHALF OF THE PETITIONER -- REBUTTAL

3 MR. BAUGHMAN: If it please the Court, I'd just  
4 like to take a moment to again emphasize the distinction in  
5 our ground on the detention issue.

6 We see this, as I said, as a warrants case. We be-  
7 lieve that respondent, that persons on the premises or de-  
8 parting from the premises where a warrant is going to be  
9 executed may be detained while the warrant is executed re-  
10 gardless of any individualized, particularized, Terry-type  
11 suspicion that that person is engaged in criminal activity.  
12 There may have been such a suspicion as to Mr. Summers.

13 There probably was not such a suspicion as to the other six  
14 people in the house other than Mr. Calhoun. We submit that  
15 they could all be detained under the authority of the warrant.

16 QUESTION: There was a "George" named by the  
17 informant, by the affiant.

18 MR. BAUGHMAN: That's correct. Yes.

19 QUESTION: The warrant didn't authorize any search  
20 or seizure of George, did it?

21 MR. BAUGHMAN: No, it did not.

22 QUESTION: And was George ever found?

23 MR. BAUGHMAN: Well, there's -- the record does not  
24 indicate whether George Summers is the George or whether  
25 someone else is the George. The record does not state one

1 way or the other.

2 QUESTION: He's not involved now?

3 MR. BAUGHMAN: Well, it depends on whether George  
4 Summers is the George and we don't know that. We just --  
5 I can't say whether he is --

6 QUESTION: Well, you do know this is the only  
7 George of the search, don't you?

8 MR. BAUGHMAN: That's correct.

9 QUESTION: Well, people in that business don't  
10 usually give their right names.

11 MR. BAUGHMAN: That's correct.

12 QUESTION: But the warrant, in any event, didn't  
13 authorize any search or seizure of any person, George or  
14 anybody else?

15 MR. BAUGHMAN: No. Of course, it's our position  
16 that it authorized the search of -- of anyone, but not --  
17 didn't specifically name anybody.

18 QUESTION: Right.

19 MR. BAUGHMAN: That's correct. We believe  
20 that it is an error to view the permissible scope  
21 of Fourth Amendment detentions as only existing in a crimi-  
22 nal context somewhere between reasonable suspicion and  
23 probable cause. Reasonable detentions may occur without  
24 any particularized suspicion as to any individual, as this  
25 Court has held in border cases.



1           For example, in material witness cases. People can  
2 be held against their wills to be witnesses in cases. Those  
3 detentions are without probable cause and reasonable suspi-  
4 cion, or anything that those persons are involved in criminal  
5 activity, but they're reasonable under the Fourth Amendment.  
6 I believe they do fall under the Fourth Amendment because of  
7 the governmental interest involved.

8           We are submitting that there is a class of deten-  
9 tions here of persons on or departing from the premises that  
10 is reasonable, to insure the full and faithful execution of  
11 the warrant, without regard to individualized suspicion as to  
12 criminal activity by that person. And it's on that ground  
13 that we're asking this Court to hold that that detention,  
14 the detention of respondent when he was brought in the house,  
15 was constitutional. I thank you.

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

18           (Whereupon, at 2:38 o'clock p.m., the case in the  
19 above-entitled matter was submitted.)  
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CERTIFICATE

North American Reporting hereby certifies that the  
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MICHIGAN

V.

GEORGE SUMMERS

and that these pages constitute the original transcript of the  
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