

In the

ORIGINAL

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ALBERT ROSS, JR.

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NO. 80-2209

Washington, D. C.

Monday, March 1, 1982

Pages 1 thru 61

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :
4 Petitioner, :
5 v. : No. 80-2209
6 ALBERT ROSS, JR. :
7 - - - - - :

8 Washington, D.C.
9 Monday, March 1, 1982

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:02 o'clock a.m.

13 APPEARANCES:

14 ANDREW L. FREY, ESQ., Office of the Solicitor General,
15 Department of Justice, Washington, D.C.; on behalf of
16 the Petitioner.

17 WILLIAM J. GARBER, ESQ., Washington, D.C.; on behalf of
18 the Respondent.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

ANDREW L. FREY, ESQ., on behalf of the Petitioner	3
WILLIAM J. GARBER, ESQ., on behalf of the Respondent	26
ANDREW L. FREY, ESQ., on behalf of the Petitioner - rebuttal	53

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6
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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first today in the case of the United States against Ross.

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

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,
ON BEHALF OF THE PETITIONER

MR. FREY: Thank you, Mr. Chief Justice, and may it please the Court, this case is here on a writ of certiorari for the United States Court of Appeals for the District of Columbia Circuit, which reversed Respondent's conviction on the ground that certain evidence should have been suppressed. The evidence was heroin found in a paper bag seized on probable cause from the trunk of Respondent's automobile and searched without a warrant.

So the issue in this case is whether police officers who possess probable cause to search a paper bag found during the lawful search of an automobile must procure a search warrant before examining the contents of that bag.

I think this divides itself into two sub-issues, first, in general, whether a paper bag is a container of the kind to which the warrant requirement

1 applies, and secondly, assuming that it is outside an
2 automobile, whether the requirement applies when it is
3 discovered in the course of a probable cause search of
4 an automobile.

5 I don't usually employ visual aids in my
6 arguments before this Court, but I think in this case it
7 is important not to stick solely to abstractions, so I
8 do have a paper bag which resembles, although it is not
9 the actual bag that was involved in this case. Now,
10 what this case is about is whether the Fourth Amendment
11 requires officers who needed no warrant to arrest
12 Respondent, no warrant to carefully examine the
13 passenger compartment and glove compartment of his car,
14 and to unlock and search its trunk, to stop their search
15 upon coming across a paper bag like this, which they
16 have probable cause to believe contains heroin, to carry
17 the bag carefully to the courthouse, to spend several
18 hours preparing and presenting a warrant application to
19 a magistrate before they may open the top of the bag and
20 look inside.

21 QUESTION: Mr. Frey, can I ask a question
22 about the visual aid?

23 MR. FREY: Yes.

24 QUESTION: Is that bag stapled together?

25 MR. FREY: No, it is not.

1 QUESTION: Would it make any difference in
2 your argument?

3 MR. FREY: Well, I am sure that I would
4 contend for the same result, for a number of reasons
5 which I will get to, but it is potentially a relevant
6 consideration, because the steps that may have been
7 taken to preserve an interest of privacy have some
8 bearing, in my view, on the application of the warrant
9 requirement. I think stapling a paper bag together
10 would clearly be insufficient to activate the
11 requirements.

12 Now, I would like to make some preliminary
13 observations --

14 QUESTION: What could you do with it?

15 MR. FREY: Excuse me?

16 QUESTION: What could be done with it if
17 stapling is not enough?

18 MR. FREY: With a paper bag?

19 QUESTION: Yes.

20 MR. FREY: Well, I am not sure that anything
21 could be done with a paper bag that would be sufficient
22 to --

23 QUESTION: Well, that is really your position,
24 isn't it?

25 MR. FREY: Well, that is -- that is our

1 position, but in order for us to prevail in this case,
2 it is not necessary for the Court to decide the
3 exceptional case in which a paper bag were stapled,
4 taped, marked "Private contents, do not open," and so
5 on. We would still argue that the paper bag is such an
6 unsuitable container to maintain substantial privacy
7 interests that the costs of the warrant requirement are
8 not justified, but that would present an exceptional
9 case, and I think that what is before the Court today
10 must be judged in terms of the general class of cases
11 involving searches of containers that ordinarily are not
12 used as a repository for highly private or personal
13 effects.

14 Now, I wanted to make a couple of preliminary
15 observations, and the first is that search and seizure
16 issues generally have two facets. The first is the
17 substantive inquiry into the amount and quality of the
18 justification the police must possess before they may
19 conduct a search, and the second is the procedural
20 inquiry into whether a warrant should be required as a
21 precondition to the search.

22 Now, without denegrating the importance of the
23 warrant in appropriate cases, I submit that the
24 substantive requirement in cases like this, probable
25 cause, is the far more important protection in

1 safeguarding basic Fourth Amendment values. In this
2 case, it is conceded that the substantive requirements
3 were satisfied by the existence of probable cause, so
4 the only question is whether the additional procedural
5 prophylaxis of the warrant requirement is appropriate in
6 this context.

7 QUESTION: Mr. Frey, could I ask you, just
8 while you are -- so I can keep it in mind while you go
9 along, suppose what they were hunting for was, say, a
10 waffle iron, a stolen waffle iron, or something else
11 that couldn't go in the paper bag. You might have
12 probable cause to search the car for the waffle iron,
13 but if you got to the paper bag, you wouldn't be
14 searching it, would you?

15 MR. FREY: No, and I want to make --

16 QUESTION: All right. That's what I --

17 MR. FREY: I want to make a point completely
18 clear in this. We are not saying that a paper bag, as
19 modest as it is, has no privacy interests, or that
20 police can look in paper bags any time they feel like
21 it, randomly, or without justification.

22 QUESTION: But you have to have probable cause
23 to look for what can go in a paper bag.

24 MR. FREY: The scope of your search is
25 determined by what you are looking for. In this case it

1 was reasonable to look for heroin in a paper bag.

2 Now, the second preliminary point I wanted to
3 make is that the question here is not whether the
4 lawfulness of the search will be subject to judicial
5 review, but simply the timing of that review. That is,
6 will it occur by a magistrate before the search or will
7 it occur in some other forum after the search, a
8 suppression hearing or a Bivens action.

9 Also, without wanting to belabor the point, I
10 do want to remind the Court that it is really beyond
11 serious dispute that neither the language nor the
12 history of the Fourth Amendment directly supports the
13 imposition of a warrant requirement in a case like
14 this. The warrant requirement is rather a judicially
15 created one designed to implement the reasonableness
16 requirement of the first clause of the Fourth Amendment.

17 I say this not as a criticism of the judicial
18 imposition of a warrant requirement, because I believe
19 that the Court has correctly perceived that it is
20 ordinarily unreasonable to permit certain kinds of
21 searches to proceed solely on the basis of the judgment
22 of a police officer.

23 What I hope to persuade the Court today is
24 that any inquiry into the wisdom of ruling certain
25 classes of searches unreasonable per se in the absence

1 of a warrant depends on a consideration of the extent to
2 which the warrant requirement serves the basic purposes
3 of the Fourth Amendment in the particular context. This
4 requires weighing the benefits that may be derived from
5 the warrant requirement against the costs that are
6 associated with the procedure, and the analysis that we
7 espouse for assessing the value of the warrant procedure
8 is precisely that employed by the Court for determining
9 the procedures required to satisfy due process in
10 procedural due process cases.

11 I would like to quote briefly from the opinion
12 of Mathews against Eldridge. It is at Page 20 of our
13 brief. The Court said that you should consider, "First,
14 the private interest that will be affected by the
15 official action; second, the risk of an erroneous
16 deprivation of such interest through the procedures
17 used, and the probable value, if any, of additional or
18 substitute procedural safeguards; and finally, the
19 government's interest, including the function involved
20 and the fiscal or administrative burden that the
21 additional or substitute procedural requirement would
22 entail."

23 So, let me turn first to a consideration of
24 the benefits that might be realized from the warrant
25 procedure as applied to containers such as Respondent's

1 paper bag or Mr. Robbins' plastic wrapped parcel. Now,
2 the decisions of this Court have essentially identified
3 three types of benefits associated with the warrant
4 procedure. One important benefit in some contexts is
5 that the warrant limits the scope of the search by
6 particularizing the area to be searched and the items to
7 be seized. In the case of container searches, this
8 benefit is essentially absent, because the item has
9 already been seized, the area of the search is quite
10 clear, and in the case of a paper bag, there is no
11 practical way to limit the scope of the search inside
12 the paper bag.

13 QUESTION: Well, Mr. Frey, that does assume
14 that you could hold the bag.

15 MR. FREY: Yes, it is a --

16 QUESTION: You can seize the bag.

17 MR. FREY: You could not have a meaningful
18 warrant requirement if you didn't first allow a seizure
19 of the item. I mean, the Court has recognized that a
20 seizure is permitted on probable cause. It is only the
21 search that --

22 QUESTION: In what did we recognize that? In
23 an automobile search?

24 MR. FREY: That was recognized in Chadwick,
25 and in Sanders.

1 QUESTION: That we can -- you can hold the --
2 hold the item you want to search until you get the
3 warrant?

4 MR. FREY: Yes. I don't think that that is
5 seriously controverted.

6 QUESTION: Yes.

7 QUESTION: Mr. Frey, on the Sanders case, is
8 it your position that we have to address the question of
9 whether Sanders was retroactive in this case?

10 MR. FREY: No, we have not raised that issue.
11 That issue was in the case. It was disposed of
12 adversely to us by the court of appeals. I believe the
13 court of appeals' decision was incorrect, but we have
14 not presented the issue in our petition for certiorari,
15 and it is not before the Court.

16 QUESTION: And yet last week the Solicitor
17 General in another case was taking the position that we
18 should address the retroactivity question.

19 MR. FREY: Well, I don't denigrate the
20 importance of the retroactivity question. It is just
21 that in selecting this -- this case had another
22 important issue. We try generally to select the issues
23 that are important and that it is useful for the Court
24 to consider. It is going to decide the retroactivity
25 issue in the Johnson case.

1 QUESTION: Do you think that the Sanders case
2 is applicable here --

3 MR. FREY: I don't think the --

4 QUESTION: -- and would have to be --

5 MR. FREY: I don't believe that Sanders
6 governs this case.

7 QUESTION: And why not?

8 MR. FREY: Because of the difference between
9 luggage and insubstantial containers of the type we are
10 arguing about here.

11 QUESTION: And do you take the position that
12 we should deal then and adopt some rule based on the
13 worthiness of the container? Do you think that is
14 desirable?

15 MR. FREY: Well, I wouldn't use that
16 particular rhetoric in describing it, but I do think
17 that it is desirable, and I hope to show in my
18 argument --

19 QUESTION: Is that more desirable than
20 addressing ourselves to whether any article contained in
21 an automobile when you have probable cause for the
22 search can be searched?

23 MR. FREY: Well, that -- that would be an
24 alternative line of analysis that three Justices have
25 employed in dissent in line with Sanders.

1 QUESTION: Is that a better approach than to
2 examine the worthiness of the container, in your opinion?

3 MR. FREY: Well, in my -- as I analyze the
4 case, I think it is logically prior to decide whether
5 the container is a kind that is generally entitled to
6 the warrant protection before deciding whether the fact
7 that it is found in the course of an automobile search
8 justifies a warrantless search, and I think the reason
9 why I take that position is because in my view the
10 outcome of the automobile search issue might very well
11 depend on the outcome of the other issue.

12 If the Court's conclusion were that only a
13 small category of containers, to wit, luggage, attache
14 cases, containers inevitably associated with an
15 expectation of privacy, have the protection of the
16 warrant clause if they are found on a sidewalk or a park
17 bench or a restaurant table or some place like that,
18 then that seems to me that it would affect the analysis
19 of the automobile search issue, because it could be
20 argued that those items have substantially greater
21 privacy protection than the automobile itself, and there
22 would -- against that framework, there would be some
23 logical basis for refusing to apply the automobile
24 search exception.

25 QUESTION: Well, given the fact that you have

1 an automobile search exception, and that you can reached
2 closed containers even in a locked glove compartment of
3 a car, is there a logical distinction then between that
4 and a closed container in a trunk?

5 MR. FREY: No, but I take it the rule as to
6 searching that closed container would be the same
7 whether it was located in the glove compartment or the
8 trunk. I must say that -- that Justices Blackmun and --

9 QUESTION: Do you think Belton allows
10 currently that you could search the article in the
11 locked glove compartment and --

12 MR. FREY: Well, I view Belton as presenting a
13 completely different issue, because the search there is
14 not justified by probable cause. That is not the
15 substantive justification for the search, and therefore
16 I don't think that it necessarily sheds light on the
17 appropriate rule when you are not dealing with a search
18 incident but an investigative search which must be
19 justified by some quantum of particular suspicion --

20 QUESTION: Mr. Frey, wasn't he under arrest
21 and handcuffed before the bag was opened?

22 MR. FREY: Well, he was placed under arrest,
23 and I think --

24 QUESTION: And handcuffed.

25 MR. FREY: Yes, but we are not arguing that

1 this is --

2 QUESTION: Well, I haven't finished my
3 question.

4 MR. FREY: Yes.

5 QUESTION: Couldn't he just have taken him and
6 the bag along?

7 MR. FREY: Absolutely.

8 QUESTION: And you wouldn't have any Fourth
9 Amendment problem, right?

10 MR. FREY: That's correct.

11 QUESTION: Aren't you really making a Fourth
12 Amendment problem out of what is not a Fourth Amendment
13 problem?

14 MR. FREY: I don't -- I don't believe so. I
15 think you would have --

16 QUESTION: And you take him and you can go --
17 when you book him, you can go in that bag, can't you?

18 MR. FREY: After we have a warrant, under the
19 court of appeals --

20 QUESTION: Oh, no. You arrest him. Don't you
21 take along what he has with him?

22 MR. FREY: Well, if you have --

23 QUESTION: Don't you?

24 MR. FREY: At least if you have probable cause
25 to seize it, you do.

1 QUESTION: If you have probable cause to
2 arrest, don't you have probable cause to take with the
3 arrested person whatever he has on him?

4 MR. FREY: Yes, but this was found in the
5 locked trunk of an automobile --

6 QUESTION: Of his car.

7 MR. FREY: But not within the --

8 QUESTION: Wouldn't you normally take it along
9 to inventory the car?

10 MR. FREY: Well, that -- that varies from
11 place to place, and I don't know --

12 QUESTION: Well, isn't that the normal
13 procedure? Why did you have to open it there? You had
14 enough to lock him up.

15 MR. FREY: Well, I think there are good
16 reasons for opening it there, but --

17 QUESTION: What are they?

18 MR. FREY: All right. I was going to get to
19 this a little later, because of the way my analysis was
20 structured, but I think even if you look at it in terms
21 of the Fourt Amendment interests of the suspect, there
22 are reasons for preferring an on the spot probable cause
23 search to taking it and getting a warrant.

24 QUESTION: Well, there was nothing in there
25 that would hurt him, that would hurt anybody.

1 MR. FREY: Excuse me?

2 QUESTION: There was no gun or knife or

3 anything.

4 MR. FREY: No, no, we are not -- we are not

5 attempting to justify --

6 QUESTION: And it wasn't then in the

7 possession of the arrested person, was it?

8 MR. FREY: But let me ask you -- I don't mean

9 to ask you a question, but let me hypothesize that in

10 this case the informant was mistaken, and that the bag

11 in fact contained no heroin --

12 QUESTION: Or that you had the wrong car.

13 MR. FREY: Or that we had the wrong car.

14 QUESTION: All he had to do was open up the

15 bag and show you there was nothing in there.

16 MR. FREY: Well, this -- this is what the

17 court said in --

18 QUESTION: I don't -- I don't presume that an

19 average narc agent is interested in protecting the

20 innocent.

21 MR. FREY: Well, I am not sure how to respond

22 to that point, but I --

23 QUESTION: Well, I mean, I don't think that

24 your argument that the government was -- that is not the

25 argument the government has. The argument is the

1 government wanted to find out if the man was violating
2 the law. Isn't that what their agent was trying to find
3 out?

4 MR. FREY: Well, of course.

5 QUESTION: He wasn't trying to find out
6 whether he was innocent.

7 MR. FREY: The question before the Court is
8 the appropriateness of having a prophylactic procedure
9 of a warrant application before the officer can look
10 into that paper bag and see whether the man was
11 violating the law or not, and I would like to say --

12 QUESTION: But under mine he can look in there
13 without a warrant.

14 MR. FREY: Excuse me?

15 QUESTION: I thought that my hypothesis was
16 that he could be arrested, he was arrested, he could be
17 taken with the bag to the place where he was to be
18 incarcerated, and they would have searched it, and
19 searched him, legally, and there would be no Fourth
20 Amendment problem.

21 MR. FREY: Well, there --

22 QUESTION: The Fourth Amendment problem came
23 because you searched him before you booked him.

24 MR. FREY: Well, I don't -- I don't believe
25 that is right. If there were an inventory search

1 procedure, there are two things. One is, it is not
2 clear that it would apply to containers found in an
3 automobile. That is a disputed and unsettled issue.
4 And the second thing is that it's not clear that you
5 couldn't conduct the inventory on the spot. We are not
6 relying on an inventory rationale in this case. The
7 question is whether an investigative search can be
8 undertaken on probable cause.

9 But I do want to make the point, you say he
10 can just consent to their looking in the bag if he is
11 innocent, and that is what the Court suggested in the
12 footnote in Sanders, and it has been suggested
13 elsewhere, but if you were the chief of police or the
14 United States attorney, and you were instructing your
15 agents on what to do in an important case when they had
16 seized a container that they believed, let's say, had 20
17 pounds of cocaine in it, whether or not to accept the
18 consent, I think you would be most hesitant before
19 telling them to accept a consent, because if it does
20 have the cocaine in it, you can be sure that in 95
21 percent of those cases you are going to have a
22 suppression hearing in which the defendant will be
23 claiming that he didn't consent, you will be taking a
24 risk that the district court will agree with that
25 finding.

1 QUESTION: Did you have a suppression hearing
2 here?

3 MR. FREY: We sure did.

4 QUESTION: Well, what are you complaining
5 about?

6 MR. FREY: I am complaining about the risk of
7 losing the evidence, and I am saying that I --

8 QUESTION: Well, who's got the evidence?

9 MR. FREY: I don't mean losing it physically,
10 I mean losing its use in court as evidence in a criminal
11 case.

12 QUESTION: Is there a difference, Mr. Frey, in
13 the application of this problem where something is
14 seized in a large city like Washington, where you've got
15 dozens of judges around with magisterial powers, and
16 seizing it in -- seizing exactly the same kind of
17 material and making an arrest on probable cause out in
18 Wyoming or Utah or Colorado?

19 MR. FREY: Well, there is a difference, but I
20 -- I have to say that in applying the cost benefit
21 analysis, the difference in cost between two to four
22 hours of a couple of officers being off the street
23 getting a warrant and possibly eight hours or longer is
24 not all that great. In my view, in either case the
25 costs of a warrant requirement are substantial.

1 Now, if you are searching a house, I don't
2 question for a moment that they are justified, but we
3 are talking about searching a paper bag, and so while I
4 agree with you that there is some difference, I don't
5 think that difference is material to the proper
6 disposition of this case.

7 QUESTION: I take it that the basic point you
8 are making is that if you can search the interior of the
9 car, taking everything, anything and everything you find
10 in what we call the interior of the car, there isn't a
11 logical reason why that should not be extended and
12 enlarged.

13 MR. FREY: That is an important -- that is
14 part of our argument, or in a sense the lynchpin of our
15 argument in terms of looking at precedent, which is that
16 the Court has -- in the past, the results that the Court
17 has reached have been dependent on the Court's
18 evaluation of the magnitude of the expectation of
19 privacy in the area that is to be searched. In
20 automobiles, as the Court explained in Chadwick, in
21 contrasting automobiles to luggage, the privacy interest
22 is significantly less in automobiles than in luggage,
23 and that is why the Court held that a warrant is
24 required for luggage and not for automobiles.

25 So, it does seem to me that the question

1 before you can impose a warrant requirement on
2 containers is whether there is any substantial basis for
3 saying that a container is more private than the locked
4 glove compartment of a car or the trunk of a car.

5 QUESTION: Are there problems being created in
6 the application of the rules that we are discussing here
7 by the change in the structure of automobiles, that is,
8 the hatchbacks, the newer types of cars where they do
9 not have a trunk which is distinct from the rest of the
10 interior?

11 MR. FREY: Well, I think that would be
12 relevant in search incident cases, but I don't think it
13 is relevant in investigative search cases, because the
14 Court's rules clearly allow a full search of all
15 portions of the car, so whether you had a hatchback, a
16 station wagon, or a conventional sedan with a closed
17 trunk, the rule still is that you don't need a warrant.

18 QUESTION: Well, under Belton -- under Belton,
19 what is the limit of the search?

20 MR. FREY: In Belton, the limit of the search
21 is the area within the reach of the arrested individual
22 at the time of his arrest, which was the passenger
23 compartment of the car.

24 QUESTION: That means the interior of the car
25 as distinguished from the locked trunk that is in --

1 MR. FREY: Yes.

2 QUESTION: -- the rear of the back seat.

3 MR. FREY: I agree. But I --

4 QUESTION: Is that a problem, in terms of
5 definitions, the change in structure of cars? If not in
6 this case, it conceivably would be in some other cases,
7 would it not?

8 MR. FREY: Well, I am not sure that I can
9 think of a case. As I say, I think it is relevant in
10 terms of the permissible scope of search incident to
11 arrest, but if we are talking about an investigative
12 search on probable cause, and whether a warrant is
13 required, after all, for a search incident you don't
14 need probable cause. That is one of the reasons the
15 warrant requirement has nothing to do with search
16 incident to arrest.

17 In any event, let me get back briefly to the
18 benefits of the warrant procedure, because I think it is
19 very important for the Court to have in mind the limited
20 extent to which those benefits apply to searches of
21 insubstantial or low privacy containers. In addition to
22 the particularity benefit there is also the notice
23 benefit. That is, the warrant provides notice to the
24 person whose property is being searched that the search
25 has been judicially authorized.

1 Again, in the case of the container search,
2 the search on the spot is the only one that the
3 defendant is likely to observe. Otherwise, he is going
4 to be locked away in a cell, and the search won't even
5 take place in his presence, and the notice function is a
6 pretty insubstantial function in the context of
7 container searches.

8 Now, there is a third function, and it is, I
9 think, the most important one, and the only one that is
10 relevant here, and that is that when the warrant
11 procedure is working properly, it will guard against
12 unjustified searches by overzealous police officers who
13 mistakenly believe they possess probable cause. The
14 value of this benefit, I submit, is inescapably tied to
15 the privacy interest that is generally associated with
16 the thing or the place to be searched.

17 In those areas where society attaches high
18 privacy value, the home or office, mail, telephone
19 communications, the damage to Fourth Amendment interests
20 caused by an unjustified search are high, and
21 accordingly the prophylaxis of the warrant procedure, if
22 it succeeds in preventing even a few unjustified
23 searches, is well worth its cost.

24 But, I repeat, the value of the warrant
25 requirement here is solely a product of the costs

1 associated with the unjustified search which is going to
2 be prevented. If the search is of an area that is
3 unlikely to contain anything very private, the costs of
4 a mistake in the search are dramatically reduced.

5 For example, in Robbins, if the officer had
6 been mistaken in believing that the parcel contained
7 marijuana bricks, and instead had found that it
8 contained highway flares, as one judge suggested it
9 looked like, the costs of the officer seeing the highway
10 flares in terms of an invasion on Robbins' personal
11 privacy would have been relatively slight.

12 This is also true in cases involving, for
13 instance, burlap bags full of marijuana, which might
14 turn out to contain straw if the officer is mistaken,
15 and generally in cases of containers, grocery bags and
16 other things that don't ordinarily contain highly
17 private items.

18 Now, against these very limited benefits when
19 we are talking about container searches, we have to
20 weigh the costs in terms of two respects. One is the
21 governmental resources consumed in the warrant
22 procedure, and again, I -- it is very easy to pooh-pooh,
23 as the ACLU has done in its amicus brief, the costs of
24 the warrant procedure as though they were a moderate
25 convenience, like having a remote control to turn on and

1 off your television set, but it is hardly a matter of
2 that nature. It is a matter of taking working law
3 enforcement officers away from their other duties for a
4 substantial period of time while they get a warrant, and
5 I think it is the duty of this Court not to require
6 those kinds of procedures unless it is satisfied that
7 some substantial protection of Fourth Amendment
8 interests is going to be derived from it.

9 The second is the point that I have already
10 discussed with Justice Marshall, which is even the
11 interests of the innocent suspect are not well guarded
12 by this rule, because that individual may be subject to
13 a custodial arrest lasting some hours before the
14 magistrate decides there is not probable cause and
15 orders him released, and I suspect that, to use the
16 greater intrusion, lesser intrusion analogy, most people
17 would vastly prefer an immediate search if you are
18 dealing with a low privacy container than they would the
19 alternative of arrest, seizure, warrant procedure, and
20 so on.

21 Now, in view of the time, I think I will sit
22 down now if there are no further questions and reserve
23 the rest of my time for rebuttal.

24 CHIEF JUSTICE BURGER: Mr. Garber.

25 ORAL ARGUMENT OF WILLIAM J. GARBER, ESQ.,

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ON BEHALF OF THE RESPONDENT

MR. GARBER: Mr. Chief Justice, and may it please the Court, on behalf of the Respondent, our position is succinctly that the circuit court was correct in invalidating the search in this case, and that the circuit court's opinion has been reinforced by this Court's judgment in Robbins versus California.

QUESTION: Suppose, Mr. Garber, that when they actually opened and tested this container, this brown paper bag, and found that it was just powdered sugar and nothing else, or some other innocuous subject, or substance, how much damage has the -- have the privacy interests of the person been impinged? How serious would that be, if they have made a mistake?

MR. GARBER: I would answer it this way, Mr. Chief Justice. If that had occurred, and it didn't occur in this case, because actually the substance was not even field tested until after Ross had been arrested, after the vehicle had been taken to the police headquarters, and after the police officer had opened the trunk, removed the -- the items, and taken them to the mobile crime lab.

In the transcript at the trial of this case, the officer testified that it wasn't until after he got to the mobile crime lab that the field test of one of

1 the packages was actually conducted, but the point is
2 that Ross in this case was initially arrested on a
3 weapons charge. After the car was stopped, and the
4 interior of the vehicle was seized, a gun was found in
5 the glove compartment. It was at that point that he was
6 placed under arrest, and he was handcuffed, and he was
7 securely in police custody.

8 So, in this particular case, even if the
9 substance had turned out to be an innocuous substance,
10 Ross still would have been in custody by virtue of the
11 finding of the weapon in the glove compartment.

12 QUESTION: At what point do you say the Fourth
13 Amendment was violated, when they opened the trunk or
14 when they opened the bag?

15 MR. GARBER: I would contend, Your Honor, that
16 the Fourth Amendment was violated when they opened the
17 bag, if we are going to consistently apply Chadwick and
18 Sanders and Ross. The reason is this. When the police
19 officers had received the information from the
20 informant, the only thing they knew was that Ross had
21 been engaged allegedly in the sale of narcotics from the
22 trunk of his car. The police had no information that a
23 particular container such as a suitcase, or a briefcase,
24 or a paper bag, was involved. So, when they proceeded
25 to the location of the arrest, and stopped the car, they

1 -- they intended to search that vehicle to see if it had
2 contraband.

3 Now, after Ross had been removed and the --
4 and the gun was found and he was handcuffed, the police
5 opened the trunk of the vehicle. They didn't see
6 contraband in plain view. They had to open a container
7 in order to determine whether or not the fruits of the
8 search were actually in the trunk of the car.

9 QUESTION: Let me go back to my question. Was
10 the Fourth Amendment violated in your view when they
11 opened the trunk?

12 MR. GARBER: When they opened the trunk, not
13 at that point, because we would have to concede, and of
14 course the main thrust of our argument is that at that
15 point there may have been exigent circumstances for
16 conducting a search of the vehicle on the scene, but
17 that once they had opened the trunk, and after Ross had
18 been in custody, and they observed -- they didn't
19 observe contraband in plain view, at that point the
20 exigencies were gone. They may have had a probable
21 cause to believe that the contraband was contained
22 either in the pouch or in the paper bag, but they
23 wouldn't have known that unless they actually conducted
24 a search.

25 QUESTION: Mr. Garber, can I go back a second?

1 MR. GARBER: Yes.

2 QUESTION: What is it, again, in your view,
3 that justified opening the trunk? You said exigent
4 circumstances?

5 MR. GARBER: Well, at that point they had, as
6 the court found, probable cause to believe that Ross had
7 violated the law and there was contraband in the car.

8 QUESTION: Now, that is enough in your view to
9 open the trunk?

10 MR. GARBER: Under the -- as I understand the
11 cases that have been decided by this Court, yes, because
12 they -- and that was the -- that goes as far back as
13 Carroll.

14 QUESTION: Supposing there had been a blanket
15 over everything in the trunk. Would they have been
16 authorized to pick up the top of the blanket and look
17 underneath?

18 MR. GARBER: Now we get into what constitutes
19 and what does not constitute a container. The position
20 of the Respondent and the position we have taken in the
21 brief is this, that once the Respondent has been taken
22 into custody, and once the movable object has been
23 reduced to exclusive police custody, and once the police
24 officers find that the fruits of their search certainly
25 aren't in plain view, then at that point the exigencies

1 of the situation cease.

2 QUESTION: Didn't that all happen before they
3 opened the trunk?

4 MR. GARBER: Well, they were still looking for
5 contraband. They were still looking for contraband.

6 QUESTION: Well, they were still looking when
7 they opened the paper bag, but I don't understand, very
8 frankly, why in -- under your analysis it is all right
9 to open the trunk, but it is not all right to probe
10 around in the trunk and open bags and things.

11 MR. GARBER: Because, as we stated in our
12 brief, and as we -- as we attempt to argue here, the
13 violation of the Fourth Amendment occurs at a point
14 where the exigent circumstances cease, and the exigent
15 circumstances ceased at the point where Ross was in
16 custody, the vehicle was in custody, and the officers
17 did not find the fruits of the contraband until they
18 were able to open the container on the scene.

19 Now, at that point, we submit that both the
20 vehicle and its contents should have been removed, and a
21 warrant applied for.

22 Now, the government takes the position that
23 there is a cost involved in obtaining a warrant. If we
24 look at the facts of this case, the police officers
25 removed the vehicle from the scene, took it to police

1 headquarters. The police officer testified that after
2 he had arrived at the police headquarters, he went up,
3 he went back, got two other police officers, they came
4 down, they opened the trunk, they removed the pouch, and
5 they removed the paper bag. They were taken to mobile
6 crime for an analysis. He said he was there for two
7 hours. He testified that after he completed all of the
8 forms and the paper work in this case, it was in the
9 early morning hours of the following day that he left.

10 So in this -- under the facts of this case, we
11 have the police officer engaged in a five-hour period of
12 processing this particular arrest. There was ample
13 opportunity to prepare a warrant application in this
14 case.

15 QUESTION: Mr. Garber, would you agree that
16 had the paper bag been located on the back seat of the
17 vehicle, the police could have opened it and examined
18 the contents?

19 MR. GARBER: Under Belton -- under Belton,
20 this Court has held that the interior of the vehicle
21 could be searched --

22 QUESTION: Right, and it -- okay.

23 MR. GARBER: -- and that would be a search
24 incident to an arrest.

25 QUESTION: And if it had been in the locked

1 glove compartment, the police could have opened the bag
2 and examined the content.

3 MR. GARBER: Correct.

4 QUESTION: All right, and just because there
5 is some little partition between the back seat and the
6 trunk, there should be a different rule. Is that it?

7 MR. GARBER: Yes, because the area of the
8 trunk is an area which was removed from the area which
9 is considered incident to an arrest. Now, of course, I
10 am not here to reargue Belton, because we -- the facts
11 in Belton and the facts in this case are different, but
12 I do say that there is a distinction between the
13 interior of the vehicle and the trunk of the vehicle as
14 far as police officers being permitted to invade that
15 area once an arrest has taken place, and there is no
16 danger that evidence is going to be destroyed, or that
17 the arrested person can grab a weapon.

18 QUESTION: But as the Chief Justice has
19 pointed out in some of his questions, with today's motor
20 vehicle design, there isn't much of a difference in many
21 instances, is there?

22 MR. GARBER: Well, there may not be, but
23 Robbins, we must remember, was a station wagon, where
24 the tailgate was lifted, and under the tailgate was a
25 luggage compartment, and --

1 QUESTION: Do you rely on Robbins, Mr. Garber?

2 MR. GARBER: Oh, yes. I think that Robbins --

3 QUESTION: Do you think this judgment can be
4 reversed without overruling Robbins?

5 MR. GARBER: Oh, I think that if this judgment
6 is reversed, it would certainly be inconsistent with
7 Robbins, because --

8 QUESTION: Well, is your answer to me yes?

9 MR. GARBER: The answer is yes.

10 QUESTION: We would have to overrule Robbins?

11 MR. GARBER: I would think the Court would
12 have to, for this reason, that in the Robbins case, as
13 in this case, there was an arrest after the police
14 officers had probable cause to believe that contraband
15 was contained in the car. In Robbins, that probable
16 cause didn't arise until after the officer smelled the
17 odor of marijuana emanating from the passenger
18 compartment, and it was at that point that a search of
19 the car was conducted.

20 Now, in this particular case, the only
21 difference between Robbins and Ross is that the police
22 acted on the basis of an informant's tip, but Robbins
23 started out as an automobile search, and Ross was an
24 automobile search, but the point of departure came where
25 the police in Robbins seized the plastic bag, and the

1 police in Ross seized a paper bag.

2 I don't think we have to get into a worthy or
3 an unworthy container rule, because if we apply the
4 exigent circumstance doctrine in all of these cases,
5 then all we have to determine is at what point the
6 exigencies ceased, and at the point where the exigencies
7 ceased, then the warrant requirement comes into play.

8 QUESTION: Well, do you regard the so-called
9 automobile exception, whatever it may consist of, as
10 simply a branch of exigent circumstances?

11 MR. GARBER: The automobile exception has been
12 held by this Court to be an exception, to be an
13 exception, starting with Carroll. But if we look at
14 Carroll, in Carroll there was no -- there was no cause
15 to arrest the occupants in that case, because the
16 offense, transporting liquor, was a misdemeanor, and it
17 had to have been committed within the presence of the
18 officers.

19 So, the exigencies were in searching the
20 vehicle to see whether or not contraband was in the
21 car. In this particular case, Ross had been arrested.
22 He wasn't going anywhere. The vehicle had been released
23 into police custody, and even Carroll states that if
24 there -- if it is practical to get a warrant, even in
25 the case of an automobile, one must be obtained.

1 QUESTION: Well, that isn't the rule that we
2 follow, is it?

3 MR. GARBER: Not since Chambers, and I think
4 one of the problems in this whole area is Chambers,
5 when Chambers permits a search of a vehicle to take
6 place at a location other than where the initial arrest
7 occurred, and perhaps it is Chambers, as we have
8 indicated, that really needs to be reconsidered.

9 QUESTION: Well, maybe it is Robbins.

10 MR. GARBER: Well, of course, I am aware of
11 Your Honors' position in these matters. The Court can
12 really take two roads. The Court --

13 QUESTION: What you mean is, you are aware of
14 the majority's position, isn't it?

15 MR. GARBER: Yes. Well --

16 QUESTION: I would have thought, Mr. Garber,
17 that your position would be that as soon as there was
18 any effort to open the trunk, as distinguished from the
19 interior of the car, whatever the interior of the car
20 really is, that that is when the Fourth Amendment
21 violation began.

22 MR. GARBER: But the intrusion went beyond
23 that, Your Honor.

24 QUESTION: Well --

25 MR. GARBER: The intrusion went into the

1 container itself.

2 QUESTION: That might well be so, but the
3 question is, when was the first instant when the Fourth
4 Amendment was violated, in your view?

5 MR. GARBER: When the police opened the bag,
6 because in Robbins, for example, the police opened the
7 tailgate, and also lifted up the luggage --

8 QUESTION: And you equate that to opening the
9 trunk?

10 MR. GARBER: Oh, yes. I would think --
11 because we are talking about automobile design. I don't
12 think these cases should turn on the design of a
13 vehicle. I don't think that is the issue. Nor should
14 the case turn on the configuration or the worthiness of
15 the particular container.

16 QUESTION: Well, you say the design is
17 irrelevant. You suggest that. But then how do you --
18 what are the limits on the interior as the Court applied
19 it in the Belton case?

20 MR. GARBER: The limits of the interior would
21 be that area which had been occupied by either the
22 driver or the passenger, because it was in that area
23 that weapons could be concealed and evidence could be
24 hidden, so we are talking about the passenger
25 compartment of the vehicle as opposed to the trunk or

1 storage area, and again, we get into automobile design.
2 I don't think design is relevant. We are talking now
3 about area within the arrestee's control, and in Belton,
4 of course, the decision was that the -- actually the
5 passenger area of the car was the area that could be
6 permissibly -- permissibly searched.

7 But the problem with the automobile exception
8 as it has now evolved is the -- well, it started out
9 with an inherent mobility factor, and that -- then it
10 evolved into a diminished expectation of privacy, and
11 then state and governmental regulation. We submit that
12 the inherently -- inherent mobility factor is really the
13 only true and genuine factor that should play a part in
14 these cases, because, let's face it, an automobile is a
15 very expensive piece of personal property. Next to a
16 house, it is the most expensive investment an individual
17 can make, and to say that merely because you own a car,
18 that once you get in that car your expectation of
19 privacy diminishes, I don't think that that is
20 compatible with the real world as we know it.

21 The automobile today is much different than
22 the automobile of 30, 40, 50 years ago.

23 QUESTION: Well, certainly your expectation of
24 privacy when you are driving down a public street with
25 no shades on the windows of present-day cars is not as

1 great in a car as when you are sitting in your house.

2 MR. GARBER: That may be true.

3 QUESTION: People can look in the windows.

4 MR. GARBER: That's true, but there are areas
5 of that vehicle where that expectation of privacy can be
6 manifested, and it is those areas that we are talking
7 about. In other words, if an individual places, say, a
8 briefcase or a paper bag or some other container in the
9 trunk of a vehicle, as opposed to the interior, I think
10 that manifests an expectation of privacy.

11 QUESTION: Well, it is true also that if a
12 person places an envelop in his inside pocket of his
13 coat as he walks down the street, that manifests an
14 expectation of privacy, and yet a search incident to
15 arrest, you can search the entire person.

16 MR. GARBER: Yes, but this isn't a search
17 incident to an arrest case.

18 QUESTION: Well, but certainly the same
19 general factors should govern.

20 MR. GARBER: Well, I don't think so, because
21 search incident to arrest is entirely different from the
22 automobile search that we are talking about here. When
23 you have a search incident to an arrest, you are
24 attempting either to seize evidence immediately
25 associated with the person or means by which the

1 individual can escape, and therefore this Court and
2 other courts have permitted a search not only of the
3 person, a full-blown search of the person, but also of
4 the immediate area.

5 But in this particular case, in the Ross case,
6 as in the Robbins case, this wasn't a search incident to
7 an arrest, because the arrest had been effected, and
8 when -- once again I stress this inherent mobility
9 factor. If -- if this factor is applied in these types
10 of cases, we don't have to worry about paper bags and
11 cardboard boxes and shaving kits. We only have to look
12 at whether or not the exigencies permitted the scope of
13 the intrusion at the particular time, and if that is
14 removed, then any search conducted without a warrant is
15 -- is unreasonable.

16 Now, I still don't understand the government's
17 argument as to the costs involved in obtaining a
18 warrant. We are talking about, in this type of case,
19 essentially a one or two-page affidavit, an affidavit
20 that could have been prepared within the time period
21 that the processing in this case occurred, an affidavit
22 that could have been taken to the magistrate either that
23 evening or the following day, or even telephoned in.

24 QUESTION: Is the magistrate housed in the
25 same building?

1 MR. GARBER: The magistrates, of course, their
2 offices were in the -- in the courthouse, but they do --
3 they are available at home, and I do know that, from
4 talking to the magistrates, that one of the procedures
5 is the ability to record the oral affidavit as it is
6 given over the phone, and then to reduce that to writing
7 later. So, even assuming it is midnight or 2:00 o'clock
8 in the morning, the magistrate on duty could take the
9 oral affidavit, and could give the authorization to
10 conduct the search under the amendment to the rule, and
11 it is that technology which I think undercuts the
12 government's argument.

13 QUESTION: Do you think there is no difference
14 between the practical problems, if you are talking about
15 Washington, D. C., or out in the prairies and the
16 mountains in the west and other parts of the country --

17 MR. GARBER: Oh, I think --

18 QUESTION: -- where you might be 100 or 200
19 miles from the nearest magistrate?

20 MR. GARBER: Oh, I think there is a
21 difference, because assuming you have a single law
22 enforcement officer who is covering 90 square miles of
23 territory in a vehicle, and he encounters a situation
24 such as Robbins, for example, and it is going to take
25 maybe -- maybe 45 minutes or an hour before he gets

1 backup, the exigencies of that situation may permit a
2 result which is different from this case.

3 That is why the exigent circumstances factor
4 has a plasticity and a flexibility which allows it to be
5 applied nationwide. So, of course, problems of law
6 enforcement are much different in sparsely populated
7 areas than they are in large metropolitan areas. In
8 this case, we had three police officers on the scene.
9 They were there within ten minutes of the call. They
10 took the vehicle back to the police headquarters within
11 -- within minutes.

12 And to further undercut the government's
13 argument, the following day, as the record of this case
14 will show, when the complaint was filed with the
15 magistrate, that complaint contained a statement of
16 facts, a probable cause statement of facts which was
17 really tantamount to a warrant affidavit, so there was
18 no reason in this case why a warrant could not have been
19 obtained, any more than there was a reason in Robbins
20 for not obtaining a warrant.

21 We submit that Robbins is good law, that the
22 -- that the plurality of opinion in the case is good
23 because it -- it upholds the -- the philosophical and
24 the considerations of the Fourth Amendment. It places
25 the - the judicial branch of the government before the

1 executive, and of course the more you whittle away on
2 the warrant requirements, the more danger you have of --
3 of one branch actually encroaching on the powers of the
4 other.

5 So, we submit that the warrant requirement has
6 a real function, and that this business about the
7 warrant in the case of a dwelling sets the perimeter of
8 the search, that's not the -- that's not the point. The
9 point is that it places a natural and detached
10 magistrate between the citizen and the police officer.
11 And look at the savings. If there had been an affidavit
12 in support of a search warrant in this case, we probably
13 wouldn't be here, because the reviewing court could look
14 at the face of the affidavit and determine whether or
15 not the affidavit established probable cause.

16 I could recite that affidavit to this Court
17 within five minutes, as to what was needed. The
18 affidavit in the first paragraph could have obtained the
19 informant information which would have satisfied the
20 Aguillar and Spinelli. The observations of the police
21 officer which corroborated the fact that the car was
22 there and the defendant matched the description given by
23 the informant would have been the second paragraph, and
24 the third paragraph would have recited that after the
25 defendant had been arrested, the police officers

1 observed two containers in the trunk compartment of the
2 car, and they had probable cause to believe that they
3 contained narcotics.

4 These containers could have been seized. The
5 magistrate or the judge could have given his
6 authorization, and they could have been opened, and
7 instead of having a evidentiary hearing in which a
8 police officer, counsel, and the court were involved,
9 say, in hours of testimony -- in this case there were
10 109 pages of transcript on this motion to suppress. If
11 there had been a warrant, the judge would have been able
12 to pass upon the legality of the search by looking at
13 the affidavit, unless you can show that the affidavit
14 could be attacked, as in Franks versus Delaware, but you
15 would have to prove at that point that the police
16 officer deliberately lied.

17 QUESTION: When an arrest is made on the
18 street on probable cause, and there is no dispute about
19 the probable cause, what is the scope of the arrest
20 which -- the search which can be made incident to that
21 arrest?

22 MR. GARBBER: Well, certainly the -- the
23 individual can be searched.

24 QUESTION: How about his billfold. They will
25 take his billfold out, out of his pocket. Can they look

1 in the billfold?

2 MR. GARBER: Oh, I think they can under the --
3 under the Robinson case --

4 QUESTION: Suppose -- suppose he has got a
5 bunch of letters in his pocket, in envelopes, and
6 perhaps not in envelopes. Can they look at all those
7 things?

8 MR. GARBER: As a search incident to an
9 arrest, and as I understand this Court's decision -- the
10 decisions on the matter, once a person is in custody, he
11 is subject to a thorough search. I think Robinson
12 decided that for a traffic arrest.

13 QUESTION: Can they take his shoes off and see
14 if there is anything in the way of either weapons or
15 drugs concealed in the shoes?

16 MR. GARBER: Oh, I think they do. I think
17 they do. But we are not dealing with a search --

18 QUESTION: There is a pretty big invasion of
19 privacy there, isn't there?

20 MR. GARBER: There is an invasion of privacy,
21 certainly, but it is one of the -- it is one of the
22 exceptions to the warrant requirement, and that is the
23 search incident to arrest, and of course in Belton that
24 certainly was really an extreme view. As we see it, in
25 Belton, to permit, as this Court did, this complete

1 thorough search of the passenger interior of the vehicle
2 went far beyond anything which -- which Your Honor has
3 suggested.

4 QUESTION: Do you think -- do you think
5 Robbins would -- would say that you could search any
6 kind of a container an arrestee has with him wherever he
7 is arrested?

8 MR. GARBER: On his person?

9 QUESTION: Well, a suitcase. He is carrying a
10 suitcase with him when he is arrested. Can the suitcase
11 be searched on the spot incident to arrest?

12 MR. GARBER: All right. I think it would
13 depend on whether or not at that point the -- the
14 probable cause, like in Sanders and Chadwick, was
15 directed more toward the --

16 QUESTION: Well, incident to arrest doesn't
17 depend on probable cause.

18 MR. GARBER: If you are going to --

19 QUESTION: And Robbins didn't go on probable
20 cause. It went on incident to arrest.

21 MR. GARBER: That's correct.

22 QUESTION: Now, suppose instead of being
23 arrested in your car and where you had a suitcase in the
24 passenger compartment, you are arrested on the street
25 carrying a suitcase.

1 MR. GARBER: If you -- if you apply Belton, I
2 would think that this Court would hold that --

3 QUESTION: Well, I know. I am just asking
4 you, what do you think the state of the law is now,
5 after Belton and Robbins, in my example. You are
6 arrested on the street with a -- carrying a locked
7 suitcase. Can the suitcase be searched on the spot
8 incident to the arrest?

9 MR. GARBER: I would think under -- under the
10 rationale of Belton that it would be, because it is a
11 search incident to an arrest.

12 QUESTION: Yes, and what do you think the
13 state of the law is if you -- whether or not you can
14 search it on the spot, you take the arrestee to the
15 police station, and you are going to incarcerate him?
16 What do you do with the trunk -- What do you do with his
17 locked suitcase?

18 MR. GARBER: Under those circumstances, the
19 exigencies have passed, because he has been taken into
20 custody. He has been separated from his suitcase.

21 QUESTION: So if you want to look in the
22 suitcase, you have to get a warrant, in your --

23 MR. GARBER: You have to get a warrant.

24 QUESTION: You cannot inventory it.

25 MR. GARBER: If you suspect that it contains

1 fruits of crime --

2 QUESTION: No, you just -- you are just going
3 to lock him up and keep his suitcase. You are going to
4 put the suitcase in the property room.

5 MR. GARBER: I would think you would have to
6 have a warrant under those circumstances.

7 QUESTION: Even to inventory it?

8 MR. GARBER: Oh, certainly. I don't think --

9 QUESTION: Do you think --

10 MR. GARBER: I don't think --

11 QUESTION: Do you think that is -- do you
12 think that is what the law is now?

13 MR. GARBER: I don't think it would be
14 permissible to inventory the suitcase under those
15 circumstances, no.

16 QUESTION: Do you think that is what the law
17 is now?

18 MR. GARBER: It is my feeling it is, yes.

19 QUESTION: Yes.

20 MR. GARBER: But as I say, if we get back to
21 the exigent circumstances as being the only -- the only
22 exception in this particular area, I think it is going
23 to clear away a lot of the uncertainty that exists in
24 this whole field.

25 QUESTION: Well, when would there be exigent

1 circumstances in your submission, in a case like this?

2 MR. GARBER: All right, the police -- the
3 police have --

4 QUESTION: If you are going to arrest a man,
5 you are going to arrest the man, you can always --

6 MR. GARBER: Right.

7 QUESTION: When -- why would you ever be
8 permitted to look into that paper bag, or in --

9 MR. GARBER: If the person, say, was carrying
10 the paper bag and was lawfully arrested, as in Belton,
11 if the paper bag were inside the -- inside the passenger
12 compartment --

13 QUESTION: But if it is in -- but there would
14 never be exigent circumstances if you find it in the
15 trunk? Is that it?

16 MR. GARBER: Not under the -- not under these
17 circumstances, no, because once --

18 QUESTION: Well, would there ever -- can you
19 imagine any?

20 MR. GARBER: Yes, I could imagine them in the
21 case of -- in the case of Carroll, and those types of
22 cases, where the police officers at the -- at that point
23 could not have detained the vehicle. The vehicle could
24 have been taken away. In the case where they would have
25 no cause to arrest the occupants.

1 QUESTION: Oh, but they could take the bag.
2 They could take the bag. They just couldn't look in it.

3 MR. GARBER: That's correct.

4 QUESTION: Well, would there ever be exigent
5 circumstances where you could look in the bag?

6 MR. GARBER: If it's a search incident to an
7 arrest.

8 QUESTION: But not otherwise?

9 MR. GARBER: Not otherwise. That would be our
10 -- That is our position, and that is the position that
11 we have advocated.

12 QUESTION: So your nationwide -- your
13 nationwide exigent circumstances rule is a rule that
14 says don't look in paper bags without a warrant.

15 MR. GARBER: No, it says don't look in those
16 articles or containers which have been immobilized,
17 which are in the custody of the police, where there is
18 no danger of these articles being lost or destroyed, and
19 there is ample opportunity to secure judicial approval.
20 At that point, you need the warrant, because the
21 exigencies no longer exist.

22 QUESTION: Would you apply that if a bag like
23 the one your friend has presented, in being taken by the
24 officer, he concludes that there is a pistol in there,
25 he can feel it just by taking the bag, its weight and

1 its configuration? Can he open the bag and take the
2 pistol out?

3 MR. GARBER: Well --

4 QUESTION: Or, since, as you suggest, he has
5 it securely in his possession, he must take it down to
6 the courthouse and get a magistrate or someone to issue
7 a warrant?

8 MR. GARBER: Well, then we are getting into
9 the area as to whether or not the outward configuration
10 of the item itself reveals its contents. We don't have
11 that in this case.

12 QUESTION: Well, the outward configuration
13 doesn't reveal the content here until the policeman --

14 MR. GARBER: Well, he seized it.

15 QUESTION: -- feels it with his hands.

16 MR. GARBER: He seized it, and at that point,
17 if he seizes it and he realizes that it is a weapon, he
18 realizes that it is a weapon, I think we have a
19 different situation, because the -- the configuration of
20 the --

21 QUESTION: But the weapon can't -- can't be
22 used against him if he has got it in his possession and
23 hands it to one of his fellow officers.

24 MR. GARBER: No, but by the same token --

25 QUESTION: Whatever is in the bag, he isn't

1 going to hand it back to the arrested person, is he?

2 MR. GARBER: Oh, certainly not. Certainly
3 not. But --

4 QUESTION: So on your theory, he doesn't need
5 to open it to be sure that it is a gun, because he can
6 wait until he gets downtown and gets a warrant.

7 MR. GARBER: Well, that is one -- that is one
8 answer, sir.

9 QUESTION: Well, which -- which can he do?

10 MR. GARBER: Well --

11 QUESTION: Must he have a warrant before he
12 opens the bag to see if it is really a gun instead of a
13 monkey wrench?

14 MR. GARBER: Well, if he is an experienced
15 police officer, and he can ascertain by the weight and
16 the feel of the bag that there is a weapon in there --

17 QUESTION: Or a monkey wrench?

18 MR. GARBER: If he is in doubt, then I think
19 he needs a warrant. As I say, all of these -- we are
20 dealing here with relative factors, where the facts in
21 each case is different, but arguing the facts of this
22 particular case, I don't see any distinction between
23 this case and Robinson at all, and in Robbins, where the
24 tailgate was opened and the luggage compartment was
25 opened, all of that was sanctioned by the Court. It was

1 only when they opened the container itself that the
2 Court felt they needed a warrant. In this case, when
3 they opened the paper bag, that was the point when --

4 CHIEF JUSTICE BURGER: Your time has expired
5 now.

6 MR. GARBER: Thank you.

7 CHIEF JUSTICE BURGER: Mr. Frey.

8 ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

9 ON BEHALF OF THE PETITIONER - REBUTTAL

10 MR. FREY: Justice Stevens asked my colleague
11 about lifting up a blanket that might be covering some
12 items in the back of the car, and I think this touches
13 upon the point which, as far as I am aware, is the only
14 substantive argument of policy advanced for requiring
15 warrants for searching insubstantial containers, and
16 that is the bright line test, argument.

17 Now, we submit that the bright line argument
18 that if you require a warrant for all containers
19 officers will know what they have to do is faulty for a
20 number of reasons. The first reason is that your power
21 is only to prohibit unreasonable searches and seizures
22 under the Fourth Amendment, and there is a limit to the
23 extent to which you can characterize reasonable searches
24 as unreasonable for purposes of applying a bright line
25 test.

1 But in any event, it is illusory to suppose
2 that you will have a bright line test by the all
3 container rule suggested in the Robbins plurality, and
4 in the opinion of the court of appeals below, since
5 there is enormous room for confusion, as your question
6 pointed out, over what constitutes a container.

7 QUESTION: So you want us to overrule Robbins?

8 MR. FREY: Well, that is certainly one of the
9 things that we would like you to do, and I believe that
10 is open, and I do disagree, the government does disagree
11 with the views expressed in the plurality opinion in
12 Robbins. We do agree with Justice Powell's analytical
13 framework, although not with his actual application of
14 his analysis to the facts of Robbins.

15 QUESTION: Mr. Frey, may I ask this question
16 about your bright line point insofar as it is relevant
17 to a choice between the two submissions that the
18 government makes? One is that there are two kinds of
19 containers, private and non-private, and your second
20 submission is that once you can get into the car, you
21 can search everything within the car that might contain
22 the contraband for which you are searching. Which of
23 the two submissions would be better from a law
24 enforcement standpoint in terms of simplicity of the
25 rule?

1 MR. FREY: That -- that was the point that I
2 was coming to. Our position is, of course, that if you
3 do need a bright line, then in the context of an
4 automobile it is unquestionable that the bright line is
5 -- is supplied by the rule that you may search
6 containers within an automobile instead of trying to
7 decide whether something is a container or is not. As
8 we pointed out in our brief, there is a First Circuit
9 case that held a rolled up raincoat from which a
10 walkie-talkie fell out when it was unrolled was a
11 container. Pockets of clothing, pillow cases stuffed
12 with stolen goods, shopping bags open at the top but not
13 revealing to plain view all of their contents. All you
14 are going to do is shift the area of uncertainty. You
15 are not going to relieve any uncertainty, and in fact,
16 the post-Chadwick experience in dealing with the
17 expectation of privacy analysis has shown very little
18 confusion on the part of the courts between discerning
19 what kinds of containers have high privacy attributes
20 and require the additional prophylaxis of a warrant
21 requirement to protect privacy interests and what kinds
22 of containers don't.

23 Now, I wanted to make a point briefly about
24 telephonic warrants, because that was raised.
25 Telephonic warrants are to be used only in extraordinary

1 circumstances. The policy of the Department of Justice
2 and I think the policy under the rule is that it is only
3 to be used in cases where there is something on the
4 verge of exigent circumstances. It is normally
5 designed, in fact, for the Wyoming kind of case, where
6 the magistrate may be several hundred miles away. You
7 are still required to write out in full your warrant
8 application, and then read it over the phone for the
9 magistrate. The time savings from a telephonic warrant
10 which, as I say, would never be used in a case like
11 this, are in fact very slight.

12 Now, I think that my colleague has been put in
13 a position of essentially arguing for overruling the
14 automobile search exception, because I think he
15 implicitly acknowledges that it makes no sense to say
16 that automobiles can be searched as a matter of
17 expectation of privacy analysis without a warrant, but
18 containers cannot be searched, and I think it is quite
19 clear from the recent decisions of this Court, and
20 Chadwick says so explicitly, that the automobile search
21 exception is not based on exigency that occurs at the
22 time the item is searched.

23 QUESTION: Are you suggesting that there is no
24 greater invasion of legitimate privacy to go into the
25 trunk and open everything in the trunk than to go into

1 the interior of the car, however that is defined, and
2 open everything in the interior of the car? No
3 difference in privacy --

4 MR. FREY: No, I think there may be some
5 difference, but I think it is clearly settled that
6 whatever that difference is, it is not dispositive of
7 the right of the officers to make a warrantless probable
8 cause search of the trunk. I think there is -- I mean,
9 I think a glove compartment is probably a relatively
10 private area compared to many kinds of containers that
11 may be searched which may be governed by the decision in
12 this case.

13 QUESTION: May I ask you another question, Mr.
14 Frey? You don't contend there is no privacy interest in
15 a paper bag, do you?

16 MR. FREY: That's correct.

17 QUESTION: In other words, say you had an
18 airport case, and you had enough of a suspicion to stop
19 a person and ask him a question or two. It wouldn't
20 follow that you could say, open up your paper bag and
21 let me look in it, would it?

22 MR. FREY: It would not follow, no.

23 QUESTION: Yes, because there is some privacy
24 even in the paper bag.

25 MR. FREY: We are not saying that the police

1 could go to some location where there happened to be a
2 number of paper bags in the luggage room and start just
3 looking through them. That is not the point. The point
4 is that the substantive requirement of focused
5 reasonable suspicion in these cases amounting to
6 probable cause to believe that there is evidence of a
7 crime is the critical protection of the privacy
8 interests that the Fourth Amendment supplies, and in
9 this context it is an ample protection, and the
10 protection of the warrant clause is very, very slight in
11 this context.

12 QUESTION: Mr. Frey, if -- you say then that
13 the -- that you should get a different result where the
14 container is in a car than if you find it somewhere
15 else, say in a -- say you know a person has checked a
16 container in a checkroom, and you have probable cause to
17 believe it contains contraband.

18 MR. FREY: No, our -- our principal submission
19 is that the result should be the same, that probable
20 cause suffices to justify searching --

21 QUESTION: Whether it is found in a car or
22 wherever it is found?

23 MR. FREY: Whether it is found in a car or
24 wherever it is found.

25 QUESTION: And the theory is just the -- is

1 this lowered expectation of privacy?

2 MR. FREY: Well, I wouldn't say just the lower
3 expectation of privacy.

4 QUESTION: I know. Yes.

5 MR. FREY: That is the lifeblood of the
6 warrant requirement in the first place.

7 QUESTION: Do you now draw the -- say that the
8 paper bag is in the checkroom along with a locked
9 suitcase, and you have probable cause to search them
10 both. You would still have a different rule for --

11 MR. FREY: Absolutely, because this Court has
12 recognized that the suitcase is inevitably associated
13 with expectation of privacy, that its traditional --

14 QUESTION: You accept those -- you accept
15 those holdings as right, or are you just accepting
16 them --

17 MR. FREY: Well, we haven't been invited to
18 overrule them, but I accept -- The analysis that
19 underlies those holdings seems to be legitimate,
20 although one might be --

21 QUESTION: What did we invite -- What did we
22 invite the parties to address in this case?

23 MR. FREY: Whether Robbins should be
24 reconsidered.

25 QUESTION: Which would -- which would -- What

1 do you think that question involves?

2 MR. FREY: I think that question involves -- I
3 think there is a difference between a paper bag and a
4 wrapped and sealed container, and I think that
5 difference was dispositive, at least to Justice Powell's
6 vote in Robbins. We are hoping that --

7 QUESTION: So you don't think if we overturn
8 Robbins we are overturning the rule that you can't
9 search a locked suitcase in the back end of a trunk?

10 MR. FREY: Not at all. Not at all. Not at
11 all. But --

12 QUESTION: Maybe we posed the wrong question.

13 MR. FREY: Well, we would -- I would be
14 prepared to argue if the Court wanted to reconsider
15 Chadwick and Sanders, but I don't think -- I want to
16 stress that Chadwick and Sanders focused on the question
17 of whether suitcases and luggage are the kinds of items
18 that require the protection of the warrant procedure,
19 and it looked in that to the customary uses of the
20 items, their structural integrity, and the value that
21 society attached to them, and it made a conclusion which
22 I think is the Court's job to make, yea or nay, that
23 these have sufficient privacy attributes that a warrant
24 requirement was appropriate.

25 QUESTION: Just suppose for a moment -- do you

1 draw a line between a locked trunk and an open trunk,
2 and an unlocked trunk?

3 MR. FREY: I do for purposes of search
4 incident to arrest.

5 QUESTION: In this case you would?

6 MR. FREY: No, in this case we are not
7 suggesting that a warrantless search of either would be
8 appropriate.

9 QUESTION: But I thought you said you could
10 search the bag but you couldn't search the locked
11 trunk. My point was, could you search an unlocked
12 trunk, if it was closed?

13 MR. FREY: Not under -- not under Sanders,
14 no. Thank you.

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

17 (Whereupon, at 11:12 o'clock a.m., the case in
18 the above-entitled matter was submitted.)

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CERTIFICATION

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UNITED STATES, vs. ALBERT ROSS, JR. #80-2209

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