

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1617
TITLE UNITED STATES, Petitioner
v.
PLACE RAYMOND J. PLACE
Washington, D. C.
DATE March 2, 1983
PAGES 1 thru 53



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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. 81-1617

6 RAYMOND J. PLACE :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, March 2, 1983

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 11:09 a.m.

13 APPEARANCES:

14 ALAN I. HOROWITZ, ESQ., Office of the Solicitor General,
15 Department of Justice, Washington, D.C.; on behalf of
16 the Petitioner.

17 JAMES D. CLARK, ESQ., Fort Lauderdale, Florida; on behalf
18 of the Respondent.

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

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in United States against Place.

4 Mr. Horowitz, I think you may proceed whenever
5 you are ready.

6 ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

7 ON BEHALF OF THE PETITIONER

8 MR. HOROWITZ: Thank you, Mr. Chief Justice,
9 and may it please the Court, the issue presented here
10 concerns the constitutionality of police conduct
11 undertaken to investigate suspicion of illegal activity
12 as it arises in a public place.

13 Specifically, when circumstances arise that
14 give police a reasonable suspicion that an individual is
15 carrying contraband in his suitcase, is it reasonable
16 within the meaning of the Fourth Amendment for the
17 police to detain that suitcase for a limited time in
18 order to conduct a specific limited course of
19 investigation to confirm or dispel their suspicion, in
20 this case, to arrange for a sniff by a
21 narcotics-detecting dog?

22 The Court of Appeals held, and Respondent
23 argues --

24 QUESTION: Mr. Horowitz, are you contesting
25 basically the issue relating to the seizure and

1 detention of the luggage as opposed to the subsequent
2 exposure to the dog sniff?

3 MR. HOROWITZ: Yes, there is no contention
4 here that the dog sniff itself was unconstitutional,
5 given --

6 QUESTION: So all we are dealing with is the
7 seizure and detention.

8 MR. HOROWITZ: Yes, the 90-minute period of
9 time during which the Respondent was dispossessed of his
10 luggage.

11 The Court of Appeals held, and Respondent
12 argues, that such conduct is unreasonable unless the
13 police have probable cause to believe that the suitcase
14 contains contraband, the same standard that would
15 justify arresting the individual.

16 The facts underlying this case can be
17 summarized as follows. Two Florida narcotics detectives
18 on duty at Miami Airport observed respondent behaving in
19 a manner characterized by the District Court as "odd, if
20 not bizarre." To the trained eyes of the agents, this
21 behavior seemed designed to detect surveillance, and
22 created a suspicion in their minds that Respondent was a
23 drug courier.

24 The officers also noted that Respondent had
25 purchased his ticket with cash, and that there were

1 certain discrepancies in the information on his baggage
2 tags.

3 They approached Respondent in the boarding
4 area, and had a brief conversation with him, but they
5 terminated that conversation to allow Respondent to
6 catch his flight to New York. The Florida detectives,
7 however, called ahead and communicated all of the
8 information they have obtained to DEA Agent Gerard
9 Whitmore, who was stationed at LaGuardia Airport.

10 Agent Whitmore and his partner watched
11 Respondent as he alighted from the flight in New York.
12 They also observed him engaged in a series of maneuvers
13 that appeared to them to be designed to detect and evade
14 surveillance, and that indicated to these officers as
15 well that Respondent likely was a drug courier.

16 After Respondent retrieved his bags from the
17 baggage claim, the agents approached him, identified
18 themselves, and informed him that he was suspected of
19 carrying narcotics. Respondent immediately stated that
20 he had recognized the agents as policemen, a remark he
21 had also made to the officers in Florida.

22 When asked whether the bags he was carrying
23 were his, Respondent said that they were, and then he
24 falsely stated that he had already been surrounded by a
25 gang of agents in Miami who searched both his person and

1 his bags.

2 Respondent subsequently refused a request by
3 the officers to consent to a search of his bags, and
4 then asked them whether he was under arrest. Agent
5 Whitmore informed him that he was free to leave, but
6 that his luggage would be kept and taken to a judge to
7 determine whether there was probable cause for the
8 issuance of a search warrant.

9 The agents explained to Respondent that they
10 would not open the luggage without a warrant, and that
11 they would return it to him if no warrant was issued.
12 Some further conversation ensued, in which Respondent
13 retracted his earlier admission of ownership of one of
14 the bags, and asked the officers whether some
15 arrangement could be made or whether something could be
16 fixed up so that he could still leave the airport with
17 his bags. Ultimately, Respondent stated that he had
18 pressing engagements and did not wish to remain with his
19 luggage, and the agents gave him a number for him to
20 contact them to arrange for the return of his luggage.

21 The agents then took the luggage to the
22 Customs mail handling facility at Kennedy Airport to
23 arrange for exposure to a drug-detecting dog.
24 Approximately 90 minutes after the luggage was taken
25 from Respondent, the dog reacted positively to one

1 suitcase. After a search warrant was obtained, the
2 suitcase was opened, and substantial quantities of
3 cocaine, marijuana, and LSD were found.

4 The District Court denied a motion to
5 suppress, finding that Agent Whitmore had reasonable
6 suspicion that Respondent's suitcase contained
7 contraband, and that this suspicion justified the
8 temporary detention of the luggage to arrange for the
9 dog sniff.

10 A divided Court of Appeals reversed. The
11 majority accepted the District Court's finding of
12 reasonable suspicion, but held that the detention of a
13 suitcase based on such suspicion could last no longer
14 than could a temporary detention of a person, and hence
15 the 90-minute detention here was unconstitutional in the
16 absence of probable cause.

17 QUESTION: I didn't get the point. How long
18 did they hold that baggage?

19 MR. HOROWITZ: It was 90 minutes from the time
20 they took the bag --

21 QUESTION: No, I mean afterwards, after they
22 took it.

23 MR. HOROWITZ: Well, afterwards, I imagine
24 they got a warrant --

25 QUESTION: Don't you know that it was over the

1 weekend?

2 MR. HOROWITZ: I imagine they held the bag
3 until the suppression hearing. Once they had probable
4 cause, they held it until they could get a warrant, and
5 then they got a warrant and opened it.

6 QUESTION: Didn't they hold it over the
7 weekend, before they got a warrant?

8 MR. HOROWITZ: Over the weekend, then -- and
9 beyond that, I would think.

10 QUESTION: Before they got the warrant.

11 MR. HOROWITZ: Before they got the warrant,
12 yes, they held it over the weekend.

13 QUESTION: They held it over the weekend.

14 MR. HOROWITZ: Right.

15 QUESTION: That is in the record.

16 MR. HOROWITZ: That is in the record. Also,
17 there is nothing in the record that suggests that
18 Respondent ever called them to find out about getting
19 his bag back, so there was nothing they could have done
20 with it anyway.

21 QUESTION: Mr. Horowitz, are you in a position
22 to say, what if the sniffing dogs at Kennedy at come up
23 negative, or whatever the expression is? How much time
24 in addition to the 90 minutes would have been required
25 to get the baggage back to the Respondent?

1 MR. HOROWITZ: Well, we can't know in this
2 case, because Respondent never -- in the course of his
3 conversation with them at the airport, he didn't seem
4 very concerned about getting his bag back. He never
5 gave them his address where he was going to be or told
6 them anything about how to return it to them. The only
7 thing that was left was that Respondent was going to
8 call them to arrange to get it back.

9 So, as I said to Justice Marshall, I'm not
10 sure how they could have returned it in this case.

11 QUESTION: Well, but is there some ordinary
12 practice after you take a person's bags to get it back
13 to them?

14 MR. HOROWITZ: The practice is to give it back
15 to them as expeditiously as possible. If they knew
16 where Respondent was, they would just have it delivered
17 to where he was. If he lived ten minutes from LaGuardia
18 Airport, it would be another ten minutes after --

19 QUESTION: Well, did they know where he was?

20 MR. HOROWITZ: No, they didn't know where he
21 was. He didn't tell them. I am sure since he knew
22 there was cocaine in the suitcase, his idea was to get
23 as far away as possible.

24 QUESTION: They didn't know. I mean,
25 eventually, they did know, though, didn't they?

1 MR. HOROWITZ: Eventually they arrested him,
2 yes.

3 QUESTION: That's what I thought.

4 (General laughter.)

5 QUESTION: Are you sure about that? Would
6 they make arrangements to deliver the luggage the way an
7 airline does if it has gone to Honolulu by mistake?

8 MR. HOROWITZ: There is not a published policy
9 on this. The DEA informs me that as a general rule,
10 they do deliver the luggage directly to the people, and
11 it might well be unreasonable for them not to. That is
12 not the situation here.

13 QUESTION: But that is not in the record in
14 any event.

15 MR. HOROWITZ: Well, the record says they told
16 him that they would return it to him. There is nothing
17 in the record that suggested they wouldn't have done
18 that.

19 QUESTION: Well, of course, time means
20 something. If they say, we'll return it to you in a
21 couple of days, really, it makes the 90-minute analysis
22 kind of fall apart. On the other hand, if they are in a
23 position to deliver it to him immediately after the dog
24 sniff, then perhaps your 90-minute time period is
25 justified.

1 MR. HOROWITZ: Well, first of all, if the
2 person is concerned about getting his baggage back
3 immediately, an innocent person, for example, might well
4 have gone with them and would have gotten it back
5 immediately after the 90 minutes, even --

6 QUESTION: Yes, but then your distinction
7 about --

8 QUESTION: Wasn't he innocent?

9 MR. HOROWITZ: Wasn't he innocent?

10 QUESTION: Yes. He hadn't been convicted yet,
11 had he?

12 MR. HOROWITZ: No, he hadn't been convicted
13 yet but he did have cocaine in his suitcase.

14 QUESTION: Your distinction then about the
15 difference between inconvenience in seizing luggage and
16 seizing the person kind of falls apart, if the only way
17 the person can get his luggage back is to go with his
18 luggage.

19 MR. HOROWITZ: No, that is not the only way he
20 can do it. That is the most expeditious way he can do
21 it. He has a choice, though. It is not like a Terry
22 stop. The point of a Terry stop is that he is not free
23 to leave. Here he is free to leave. He is also free to
24 go with his suitcase if he is concerned about it.

25 The other thing is, a person who doesn't want

1 to go with his suitcase but still is interested in
2 getting it back as quickly as possible would ask -- it
3 would obviously occur to him to ask the agents how he is
4 going to get it back, and to give them information that
5 would enable them to return it to him as quickly as
6 possible.

7 QUESTION: Is there any way of saying from the
8 record how long the detention of a bag that turned up
9 negative on the sniffing would have taken if the
10 government had had dogs at LaGuardia?

11 MR. HOROWITZ: If they had dogs stationed on a
12 permanent basis at LaGuardia?

13 QUESTION: Yes.

14 MR. HOROWITZ: It is hard to know.
15 Presumably, there wouldn't -- I guess the 35 minutes
16 involved in driving to Kennedy would not have been
17 needed. It is possible the dog would be busy at another
18 part of the airport. There is still -- I think, Justice
19 Rehnquist, that even if there were dogs at LaGuardia, I
20 would have to say that there might be a detention
21 necessary to some extent. They can't always have the
22 dog and the handler right at the gate where the airplane
23 arrives. I think the Martell case from the Ninth
24 Circuit, with this Court's holding involving the same
25 issue, is a case where the dog was at the same airport,

1 but there were still -- and in fact the dog was called
2 even before the suspects were approached, but there was
3 still some delay involved in actually arranging the
4 sniff.

5 QUESTION: Well, there is certainly going to
6 be some delay. It is just a question of how long.

7 MR. HOROWITZ: Yes. The question is whether
8 the delay here was reasonable --

9 QUESTION: Mr. Horowitz, could I follow up on
10 Justice Rehnquist's question? I guess we are dealing in
11 probabilities here, aren't we? You want the right to
12 take the luggage away based on reasonable suspicion,
13 which I suppose is a standard of maybe 30 or 40 percent
14 of the time you would be right. Doesn't that mean that
15 conversely, 60 or 70 percent of the time you might be
16 wrong, and you would have to return the luggage?

17 MR. HOROWITZ: I think in theory if the Court
18 approves of detention on a reasonable suspicion, that
19 there would be cases where --

20 QUESTION: Probably over half the cases,
21 because if you have more than 50 percent probability,
22 you would have probable cause, and you want to have a
23 lesser degree of probability to justify the seizures --

24 MR. HOROWITZ: That's true, but I think you
25 also have to keep in mind that this is an inconvenience

1 for the agents themselves, and that they are not going
2 to want to go through this --

3 QUESTION: No, but they do want to do it in a
4 significant number of cases in which they really are not
5 that sure they will find anything.

6 MR. HOROWITZ: Well, I think they will want to
7 do it only in cases where they have a really strong
8 suspicion.

9 QUESTION: Well, then probable cause should be
10 enough.

11 MR. HOROWITZ: Well, what is a strong
12 suspicion to --

13 QUESTION: I mean, they want to do it on less
14 than probable cause.

15 MR. HOROWITZ: I think there are cases where
16 the agents in their own mind, based on their experience,
17 may have a 75 to 80 percent probability, but they know
18 that they have not met the objective standard of
19 probable cause for going to a magistrate. I think it
20 has to be recognized there are going to be cases like
21 that, where to some extent the -- part of -- where they
22 can show a reasonable suspicion --

23 QUESTION: Yes, but you want the rule to cover
24 the agent who has only a 30 percent likelihood of
25 success.

1 MR. HOROWITZ: That's true. Well, I mean, I
2 have to agree that there are going to be cases -- I
3 mean, that is true even when you get a warrant on
4 probable cause. There are going to be cases where it
5 turns out that the search should not have been done.

6 QUESTION: But, as I say, we are dealing with
7 probability. If you have a probable cause standard,
8 why, then the likelihood of an unsuccessful search is
9 much less.

10 MR. HOROWITZ: Exactly, but the intrusion that
11 is involved in those cases is much greater, and
12 therefore here the probability should be lowered. That
13 only makes sense.

14 QUESTION: Is there any explanation in the
15 record, or do you have one, for the delay from Friday to
16 Monday?

17 MR. HOROWITZ: As I understand it, the
18 agents --

19 QUESTION: Aren't there magistrates on duty
20 over the weekend in the Southern District, if that is
21 where this was?

22 QUESTION: The Eastern District.

23 MR. HOROWITZ: The agents were informed by the
24 U.S. Attorney's Office in the Eastern District of New
25 York that no magistrate was available at that time until

1 Monday.

2 QUESTION: In some districts --

3 MR. HOROWITZ: Now, what they would have done
4 if Place had called and sought to get his luggage back
5 at that point, I'm not sure, but at least in this case,
6 since there wasn't anything else they could do with the
7 luggage anyway, it didn't seem unreasonable to wait
8 until Monday.

9 QUESTION: Is it not true that in some
10 districts there is 24-magistrate service, seven days a
11 week, if you know?

12 MR. HOROWITZ: I don't know for sure. I know
13 that magistrates are supposed to be on duty other than
14 from 9:00 to 5:00 during the week, but it may be that
15 there is a reluctance, that there is some scale as to
16 when they should be bothered at those times.

17 QUESTION: There is nothing in the record to
18 show why, though. The only thing in the record is that
19 they called the U.S. Attorney and he said, wait until
20 Monday.

21 MR. HOROWITZ: That's right.

22 QUESTION: That's all the record shows.

23 MR. HOROWITZ: That's correct.

24 I should say that at this time, they had
25 probable cause, though. I mean, at that point, we are

1 not dealing any more with the detention on the basis of
2 reasonable suspicion, but a detention on probable cause,
3 which is set forth in Chadwick, that they are entitled
4 to detain the luggage until they can get a warrant.

5 The constitutional provision involved here
6 protects individuals against unreasonable searches and
7 seizures. Now, it is quite clear that the probable
8 cause standard which is required for the issuance of
9 warrants is not a prerequisite to every search and
10 seizure. Reasonableness does not necessarily equal
11 probable cause.

12 I think the basic principles in this area are
13 fairly well settled. We know that a permanent seizure
14 or the arrest of a person can be conducted only on the
15 basis of probable cause. Similarly, the permanent
16 seizure of effects is generally justified by probable
17 cause. On the other hand, Terry and its progeny
18 recognize that a temporary investigative detention of a
19 person can be conducted on less than probable cause, on
20 a reasonable suspicion of criminal activity.

21 By the same token, as is demonstrated by Van
22 Leeuwen, a temporary detention of effects can also be
23 based on a reasonable suspicion.

24 QUESTION: Mr. Horowitz, presumably the
25 justification for the Terry type search and detention of

1 the person was the protection of the officers from the
2 use of weapons by the person detained. That
3 justification, of course, is not present with the
4 seizure and detention of luggage.

5 MR. HOROWITZ: I don't think that's really the
6 justification for the investigative stop in cases like
7 Terry, Brignoni-Ponce, and Michigan against Summers.
8 That was the justification for the frisk in Terry, for
9 the search, but of course the officer in Terry was not
10 in any danger until he actually approached the subject.
11 He could have turned around and walked around the
12 block. What was the justification for the approach in
13 these cases, and is, I think, well set forth by the
14 Court in Adams against Williams, is that an officer,
15 when he has a strong suspicion that a crime was about to
16 be committed, is not supposed to just turn his back and
17 walk away and sit idly by while it happens.

18 Michigan against Summers and Dunaway against
19 New York, however, state that there are time limits on
20 the detention of a person that can be based on
21 reasonable suspicion. At some point, when that
22 temporary detention becomes close to the intrusiveness
23 of an arrest, it must be justified by probable cause.

24 Now, the real issue in this case is whether
25 the Court of Appeals is correct in saying that the exact

1 same standard that applies to when a temporary detention
2 of a person becomes overextended, does that also apply
3 to the temporary detention of effects, even though the
4 intrusion onto a person's liberty is obviously much
5 less?

6 We submit that there cannot be this equality,
7 and that it must be that a detention of effects can be
8 extended for a longer period of time, for example, the
9 90 minutes involved in this case.

10 The Court has on many occasions stated the
11 basis on which the reasonableness of a police action is
12 to be determined. It is judged by balancing the
13 intrusion on the individual's Fourth Amendment interests
14 against its promotion of legitimate government concerns.

15 Now, in making that balancing here, I think
16 the strong government concerns involved are clear. The
17 government has a vital interest in alleviating the
18 narcotics problem in this country, and in detecting and
19 apprehending drug offenders. When officers reasonably
20 suspect an individual of transporting narcotics through
21 an airport, they obviously have a strong interest in
22 preventing him from escaping and placing those drugs
23 irretrievably into the chain of distribution.

24 That interest is much stronger in a case like
25 this one, where they know that if they can preserve the

1 status quo for a short time, they can either confirm
2 that suspicion or it will be dispelled. Thus, under the
3 rule established by the Court of Appeals, the officers
4 in this case were placed in the position of allowing a
5 person they strongly suspected of carrying drugs to
6 escape from right under their noses, while they are left
7 with the knowledge that if they had just had a little
8 bit more time to investigate, they could have developed
9 probable cause, arrested him, and seized the drugs.

10 Now, weighed against this strong government
11 interest is what we feel is a fairly limited intrusion
12 caused by the temporary detention involved here, and
13 that is simply the dispossession of Respondent's luggage
14 for the time required to complete the dog sniff.

15 At the outset, let me say that it has never
16 been contended that this is no intrusion at all. It is
17 an interference with the Respondent's possessory
18 interest in his suitcase for a limited period of time,
19 and it is a seizure that is covered by the Fourth
20 Amendment.

21 What is contended here is that this intrusion
22 is sufficiently small that it is justified by reasonable
23 suspicion of criminal activity, and does not require the
24 strictest standard of probable cause.

25 Now, to illuminate this point, it is useful to

1 examine the detention here in light of the intrusive
2 aspects associated with other police actions that
3 normally require probable cause. The biggest category
4 of these, of course, is investigative searches, which
5 usually can be conducted only on probable cause. Those,
6 of course, involve an invasion of privacy, which the
7 Court has many times recognized as the core of the
8 Fourth Amendment protection.

9 In this case, there was no search until a
10 warrant based on probable cause was obtained. There was
11 no invasion of privacy whatsoever.

12 The principle that the core protection of the
13 Fourth Amendment is privacy finds its expression in many
14 areas of Fourth Amendment law. For example, in the
15 warrant area, the Court has recognized that the
16 protections of a warrant are much more necessary in the
17 area of searches than they are in seizures. Warrantless
18 seizures from public places are generally recognized as
19 reasonable under the Fourth Amendment, as are
20 warrantless arrests.

21 Similarly, in Chadwick, a case where this
22 Court held that the police were not allowed to search a
23 footlocker in that case on the basis of probable cause
24 until they had obtained a warrant, the Court also stated
25 that it was clear that they were entitled to detain that

1 footlocker without a warrant while they were seeking the
2 issuance of the warrant.

3 And also, in the immigration area, the Court
4 has recognized that roving border patrols are empowered
5 to effect seizures of cars suspected of carrying aliens
6 on the basis of reasonable suspicion, but they are not
7 empowered to search those cars without probable cause.

8 QUESTION: Mr. Horowitz, would you think that
9 you would apply the same theory you are arguing should
10 be applied here to the seizure and detention of a
11 handbag or briefcase from a person?

12 MR. HOROWITZ: I would say yes. The short
13 answer is yes. I think the police are still entitled,
14 that there is still a much lesser intrusion involved in
15 the seizure of something like that.

16 QUESTION: Do you think that it might be a
17 sufficient intrusion that it obviously involves
18 detaining the person? For instance, if your keys and
19 money and all the means of getting away from the airport
20 are contained in your purse or briefcase, is that not in
21 effect a detention of the person?

22 MR. HOROWITZ: I don't think so, Justice
23 O'Connor, because as we said in our brief, we think it
24 would be unreasonable for the police to keep all of that
25 material. I mean, there is no reason why they can't

1 allow persons to take keys and their wallet or something
2 like that out of a pocketbook.

3 In this case, of course, you don't really have
4 anything like that, because the luggage was checked.

5 QUESTION: But your opponent contests the
6 government's assertion there, and says that the
7 government, if it is sequestering an effect for purposes
8 of later search, isn't going to allow unilateral access
9 to a bag to get something out of it.

10 MR. HOROWITZ: Well, they may not allow
11 private access in the sense of a person going behind a
12 locked door and taking whatever he wants out and
13 disappearing, but certainly a person could open the
14 suitcase, say, somewhere within the view of the
15 officers, but in a way that doesn't expose the other
16 contents of the suitcase.

17 QUESTION: Well, perhaps it is too short a
18 time for argument to explain how that might be done.
19 Your saying so doesn't convince me that it could be
20 done.

21 MR. HOROWITZ: Well, let me just say, if you
22 had a briefcase sitting on the desk, and you opened it
23 with the top towards me so that I couldn't see what was
24 in there, and took a couple things out and then closed
25 it again, I think the officers would be entitled to see

1 what you had taken out of the briefcase, but I don't see
2 why they would see what is in there.

3 QUESTION: Isn't your distinction between a
4 search and a seizure getting a little fuzzy right now?

5 MR. HOROWITZ: I don't think so, Justice
6 Stevens. I mean, we are talking about things that a
7 person --

8 QUESTION: Well, you do want to watch what is
9 taken out, though.

10 MR. HOROWITZ: Yes, we do want to watch what
11 is taken out.

12 QUESTION: You wouldn't let him go into the
13 men's room, say, all by himself with the suitcase and
14 perhaps dispose of its contents, or something like
15 that.

16 MR. HOROWITZ: I agree, but I don't consider
17 that a search of the suitcase. If the person says he
18 needs his car keys out of there, and he is asked to show
19 his keys, I just don't think that many persons would
20 consider that much of an intrusion on their personal
21 rights to have to show their car keys to agents. I
22 think most people would recognize that that is a
23 perfectly reasonable thing for the agents to do in these
24 circumstances, once they were going to detain the
25 suitcase.

1 This case similarly involves no detention of
2 the person. Dunaway and Summers say that even a
3 temporary detention can require probable cause if it
4 rises to a level of intrusiveness close to that
5 associated with an arrest. This case is clearly nothing
6 like an arrest at all, since the person is not
7 detained. Finally --

8 QUESTION: Let me ask you another question,
9 following up on Justice O'Connor's. Supposing you
10 didn't have many, many pounds, as you did in this case,
11 but you have a purse or a briefcase, and some
12 concentrated item. I don't know if any of these drugs
13 can be detected by small quantities. Small enough that
14 they might be concealed within a small glassine package
15 or something that might in turn be inside the wallet
16 where there is money.

17 Would you say that the agent could supervise
18 the withdrawal of the wallet from the purse to be sure
19 there is nothing inside the wallet?

20 MR. HOROWITZ: I think you would have to have
21 some reason to suspect that there were -- in the
22 wallet.

23 QUESTION: You have reasonable suspicion.
24 That is the basis -- that is why we got into the --

25 MR. HOROWITZ: Yes, I understand you have

1 reasonable suspicion that they are contained somewhere
2 in the briefcase, but I think it would be an
3 impossible --

4 QUESTION: Including possibly in the wallet.

5 MR. HOROWITZ: Including possibly in the
6 wallet, but I think you might need somewhat more focused
7 suspicion if he was going to ask for a search of the
8 wallet. I think he would be entitled to look at the
9 wallet certainly from the outside, which might give him
10 some indication of whether there was something else
11 concealed in there.

12 Again, the kind of suspicion that arises in
13 this case doesn't usually focus on wallets and
14 briefcases.

15 QUESTION: Well, supposing the suitcase has in
16 it a big paper bag, and the man says, I have some
17 private papers in this paper bag that I want to take out
18 of the suitcase, and you think, well, maybe that is
19 really the marijuana. What do you do in that case? Do
20 you let him take the paper bag, or do you examine the
21 papers?

22 MR. HOROWITZ: Well, I think the officer would
23 be entitled to say that I am not going to let you leave
24 with the paper bag unless you let me see to some extent
25 what is in it.

1 QUESTION: Then you have not solved Justice
2 O'Connor's predicament.

3 MR. HOROWITZ: Well, first of all, I mean, we
4 are talking about the general rule here. All of these
5 questions, I think, are directed at some exceptional
6 case where the person says he has some private matter,
7 and in this case, these suitcases that were actually
8 checked with the airline.

9 QUESTION: Well, can you really say that,
10 because most people put private personal possessions in
11 their luggage and handbags and briefcases. I think it
12 is rather a common problem, so you need to be aware of
13 it when you are trying to urge an expansion of a --

14 MR. HOROWITZ: Well, I certainly don't think
15 that people put the things that they can't do without
16 for an hour and a half in the luggage that they check
17 with the airlines. If they do, they are making a big
18 mistake, because they are likely, without any
19 intervention from DEA agents, to find that their luggage
20 has not arrived.

21 The case of hand luggage is a little
22 different. I think in that case it is much more
23 credible if a person claims that he has something that
24 he has to be able to take out, but I do think the agents
25 -- it is only reasonable to allow the agents to take

1 some precautions when they allow the person to remove
2 it.

3 Perhaps I should just save the rest of my time
4 for rebuttal.

5 CHIEF JUSTICE BURGER: Mr. Clark.

6 ORAL ARGUMENT OF JAMES D. CLARK, ESQ.,

7 ON BEHALF OF THE RESPONDENT

8 MR. CLARK: Mr. Chief Justice, and may it
9 please the Court, I had not planned to address myself to
10 specific factual issues or discussions. However, in
11 light of some of the questions from the Court, I would
12 like to speak to the resolution of some of the facts
13 that have been raised by the members of the Court.

14 For example, I think it was pointed out that
15 at Miami, when Mr. Place was initially detained by the
16 public safety officers there, he was detained and
17 certain information was acquired under the so-called
18 Drug Courier Profile. What was omitted was the fact
19 that in light of the investigation conducted by these
20 officers, their suspicions were quelled.

21 For example, in the case of Ballard from the
22 Fifth Circuit, where the Drug Courier Profile was
23 conveniently itemized, one of the things that these
24 officers look for is whether or not the ticket is issued
25 in the same name as the identification that is produced

1 by the detainee. In this particular instance, the name
2 coincided without exception.

3 Also, in the Ballard case it is pointed out
4 that one of the facts that they look for is whether or
5 not the luggage is hand-carried luggage, and whether or
6 not he is only carrying one bag.

7 QUESTION: Well, Mr. Clark, you say the
8 suspicions in the case of your client were quelled at
9 Miami. Then why did the Miami agents call ahead to
10 LaGuardia?

11 MR. CLARK: The reason they called ahead to
12 LaGuardia was, in the words of Judge Platt, the
13 presiding District Court judge, in his opinion, was why
14 Mr. Place made a mistake. As he was leaving to go and
15 board the plane, he turned to the officers and addressed
16 them and said, I knew that you were police, that you
17 were law enforcement authorities all the time.

18 Based on that, Detective McGavock, who was the
19 primary investigating officer, became suspicious, and
20 ran down and retrieved information from the name tags on
21 the two suitcases.

22 QUESTION: It isn't really accurate, then, to
23 say their suspicions were quelled, because they did call
24 ahead.

25 MR. CLARK: That's correct. But for that

1 particular comment, the officers did say on the record
2 that their suspicions were quelled, and that is why they
3 did not further detain him, but actually allowed him to
4 plane.

5 QUESTION: Well, I thought they discovered
6 that he had a false address on his luggage tags.

7 MR. CLARK: That is not correct, Your Honor.
8 I believe a specific reading of the record will
9 determine that the information that was relayed by
10 Detective McGavock to Agent Whitmore in New York made no
11 mention of this supposed disparity. As a matter of
12 fact, it is pointed out in the record --

13 QUESTION: But the disparity existed in fact.

14 MR. CLARK: The disparity existed in the fact
15 that there was a strikeover in the numerical sequence of
16 the numbers. The addresses were 1885 South Ocean
17 Boulevard, 1865 South Ocean Boulevard, which apparently
18 had some degree of raising Detective McGavock's
19 suspicions. That fact was not relayed to Gerry Whitmore
20 in New York.

21 QUESTION: But in any event, it didn't satisfy
22 the police in Miami.

23 MR. CLARK: That's correct. We do not dispute
24 that they called ahead and alerted DEA to Mr. Place's
25 imminent arrival on the airline flight.

1 The other thing that I would like to point out
2 is that although the officers had the two suitcases
3 subjected to a dog sniff approximately 90 minutes after
4 the bags were seized, they achieved a result of positive
5 on one bag and nothing on the other bag, and they took
6 no steps during the weekend to contact Mr. Place so he
7 could get back the bag that was not the subject of the
8 search warrant.

9 QUESTION: But I thought he hadn't given them
10 an address or a means whereby they could contact him.

11 MR. CLARK: They had his address. They had
12 discovered it through their own investigation. They
13 also had his telephone number. They also had his
14 credentials as being verified by his driver's license,
15 and his ticket coincided. It was certainly not
16 incumbent, at least at this point, on Mr. Place to seek
17 out his bags. We have already been pointed out that at
18 least 50 percent or more of these cases are not going to
19 turn out to be subjects of investigation, and yet there
20 are no steps, at least known to the government at this
21 point, as to how the DEA plans to get these bags back
22 into people's hands.

23 QUESTION: But the return of one bag and the
24 search of the other really wouldn't help your client
25 much in this case, would it?

1 MR. CLARK: Certainly not. But it just goes
2 to show that the government's position that a detention
3 of bags, and I might add, so far, it has been
4 approaching three years since the bag has been detained,
5 both bags, that is, that such a detention is not one
6 that is involving Fourth Amendment rights. They seem to
7 say that personalty, items of personalty should be
8 adjudged by some lesser standard.

9 And with that, I would like to turn from the
10 discussion of the facts and go to what we feel is the
11 thrust of our legal argument, and it is basically a
12 two-pronged argument. First, we ask that this Court not
13 expand the so-called Terry exception to the probable
14 cause warrant requirement, and second --

15 QUESTION: By stereotypes, you mean applying
16 the profile?

17 MR. CLARK: I am sorry?

18 QUESTION: You used the term stereotypes. Do
19 you mean by that --

20 MR. CLARK: The so-called Terry exception.

21 QUESTION: Oh, I thought you said stereotypes.

22 MR. CLARK: I am sorry, Your Honor. The
23 so-called Terry exception. We ask that this Court not
24 expand that exception to include these detentions that
25 are actually seizures of items of personalty, and we

1 would also ask the Court to reject the proposal of the
2 government in judging these types of seizures on an ad
3 hoc basis to determine whether or not they are
4 reasonable under the Fourth Amendment to the U.S.
5 Constitution.

6 The Respondent rejects --

7 QUESTION: Those are your two major
8 arguments?

9 MR. CLARK: Those are my two major arguments.

10 QUESTION: I take it that the Court of Appeals
11 just assumed that there was reasonable suspicion to make
12 any stop at all.

13 MR. CLARK: That is correct.

14 QUESTION: They did not decide that.

15 MR. CLARK: That is correct.

16 QUESTION: Now, do you submit here any
17 argument for affirmance based on the fact that there
18 wasn't even reasonable suspicion?

19 MR. CLARK: Your Honor, we concede that there
20 was reasonable suspicion to approach Mr. Place. We
21 attempted to raise --

22 QUESTION: Well, was there reasonable
23 suspicion to justify whatever a Terry stop is?

24 MR. CLARK: Well, quite frankly, we argued
25 this at the Second Circuit, and cross-petitioned to this

1 Court, and we did take the position that the suspicions
2 that were raised by the Drug Courier Profile were not
3 sufficient to warrant the initial approach.

4 QUESTION: You have filed a cross-petition
5 here?

6 MR. CLARK: It was denied, Your Honor.

7 QUESTION: Yes. So we judged the case on the
8 ground that --

9 MR. CLARK: That reasonable suspicion existed.

10 QUESTION: Well, the --

11 MR. CLARK: Perhaps.

12 QUESTION: -- the District Court -- I mean,
13 the Court of Appeals didn't decide that issue one way or
14 another. It just assumed it.

15 MR. CLARK: That is correct. Perhaps they
16 felt that the case could also be reversed on the
17 violation of the constitutional principles of
18 unreasonable search and seizure of the bags, and did not
19 want to reach the issue of the Drug Courier Profile
20 search, which they have reached on numerous occasions
21 due to the proximity of LaGuardia Airport, being located
22 in the Second Circuit.

23 The other thing that we would like to point
24 out is, we reject the government's position that
25 seizures of suitcases are less intrusive than seizures

1 of people, and I believe Justice O'Connor and Justice
2 Stevens have already raised the question as to what is a
3 person going to do, and the question also about the
4 facts of the wallet and whether there might be some
5 glassine item in it.

6 I would like to address that particular issue
7 that as to police conduct, I think we have some insight
8 into how law enforcement authorities are going to act in
9 situations where a person is, as Justice O'Connor
10 suggested, going to have to go into their briefcase to
11 retrieve their automobile keys. It is in the record in
12 this case that in Miami, Detective McGavock, while
13 watching Mr. Place open a hand-held bag that he had with
14 him, positioned himself so that he could view the
15 contents of that bag.

16 I think that it is not a supportable position
17 to think that law enforcement authorities are going to
18 allow persons who are being detained under the suspicion
19 that they are carrying narcotics to go into their bags
20 to retrieve keys or other items that they need at that
21 very moment.

22 As far as the proposition that seizures of
23 items of personalty are less intrusive than seizures of
24 persons, that cannot stand. First of all, in order to
25 detain, a term which I use because I have been more or

1 less led into it by the government -- detain, detain,
2 detain -- I prefer the term seize.

3 QUESTION: You are speaking of the person or
4 of the bag?

5 MR. CLARK: Of the bag. The reason you have
6 to seize a bag, and you cannot detain it, and the reason
7 why it is much more constitutionally offensive, is that
8 you cannot detain a bag without also detaining the owner
9 of the bag. The entire premise behind Terry was to
10 allow a brief detention and investigatory questions by
11 law enforcement authorities to determine the identity of
12 the suspect and to ask that suspect to explain his
13 presence in a particular area, to dispel the suspicions
14 that the officers might have.

15 QUESTION: And to pat him down.

16 MR. CLARK: Pardon me?

17 QUESTION: And to pat him down, if there was
18 some --

19 QUESTION: And to -- Terry was, pat him down.

20 MR. CLARK: That is correct.

21 QUESTION: In this very case, your client's
22 baggage was seized, and he went his way.

23 MR. CLARK: He certainly went his way, but the
24 point is that the detention of the bag is even more
25 intrusive because his bag did not go its way, and it is

1 only through the questioning of Mr. Place or someone in
2 his position that suspicions can be quelled as to a
3 bag. Therefore, you have to detain both.

4 QUESTION: You say that the government would
5 be in a better position here if it had not only detained
6 the bag and taken it to Kennedy, but insisted that your
7 client go with it. Is that your position?

8 MR. CLARK: My position would be that, first
9 of all, if they had insisted on that, they would have
10 arrested Mr. Place as well as the bag, and they admitted
11 -- the officers even admitted to Mr. Place that they did
12 not have even a reasonable enough suspicion to hold
13 him. They did feel that they had a reasonable suspicion
14 to hold the bags.

15 I do not think that they would be in a better
16 position. The only position that I can offer the
17 government to place them in a better situation in this
18 case would have been to have had a dog with them at the
19 time the bags and Mr. Place were seized. And the only
20 way I can justify that is not because the detention
21 becomes less offensive, but because if the dog had been
22 present, the dog could have smelled the bags at that
23 time and made the determination.

24 QUESTION: Certainly some minimal detention is
25 justified under Terry, is it not, if there was in fact

1 reasonable suspicion?

2 MR. CLARK: Some reasonable detention of the
3 bag?

4 QUESTION: Of the bag.

5 MR. CLARK: Your Honor --

6 QUESTION: I don't see how you can read Van
7 Leeuwen and conclude otherwise.

8 MR. CLARK: I can read Van Leeuwen and
9 conclude otherwise on several significant points.

10 QUESTION: What are they?

11 MR. CLARK: The significant points are that
12 first, in Van Leeuwen, the owner of the two parcels, the
13 defendant, voluntarily relinquished those bags into the
14 U.S. mail. These two suitcases were seized from the
15 immediate possession and control of Mr. Place.

16 QUESTION: But the Van Leeuwen court didn't
17 rely on that at all. It said that there had been a
18 detention that wouldn't have been justified under less
19 than reasonable suspicion.

20 MR. CLARK: The way I understand Van Leeuwen,
21 they said that at some point in time, even a seizure
22 such as the one in this case will become unreasonable,
23 but the reason that such a seizure in the Van Leeuwen
24 case was not considered unreasonable was because the
25 defendant had voluntarily relinquished the bags, and for

1 the period of time that they were detained, the
2 defendant in that case was probably not even aware that
3 a seizure was occurring, because until the addressee in
4 Van Leeuwen became aware that the parcels had not
5 arrived, and contacted Mr. Van Leeuwen, he probably was
6 going about his merry way, and his mobility was not
7 restrained, as it certainly was in this instance.

8 Also, in Van Leeuwen, the probable cause, the
9 factual determination of the facts that eventually led
10 to probable cause for the search of the two parcels, was
11 obtained through independent sources.

12 QUESTION: Well, but that may factually
13 distinguish Van Leeuwen, but the case does hold that a
14 parcel as opposed to a person may be subjected to some
15 sort of reasonable detention on a Terry type analysis,
16 and not requiring probable cause.

17 MR. CLARK: The case seems to suggest that,
18 but I would also point out that the case, by language
19 utilized in the case itself, limited the holding of that
20 case to the facts as presented by that case. We are
21 here today to determine whether or not this Court is
22 going to take the position that indeed bags, items of
23 personalty, can be detained on less than probable
24 cause.

25 We would suggest that they not be, because of

1 the fact that such detentions, if you want to call them
2 detentions, are more intrusive than detentions of
3 personalty.

4 Another reason that we say that such a
5 detention is more intrusive is that an item of
6 personalty by its very nature, you either have it or you
7 don't. There is no sliding scale of investigation that
8 can eventually allow this bag to leave the presence of
9 the officers until they want it to leave the presence of
10 the officers. You are either possessed of the bag or
11 you are dispossessed.

12 In a Terry situation involving a human being
13 that can verbalize and talk and quell suspicions, then
14 obviously the detention is allowable. But a bag should
15 be treated differently.

16 We would also suggest that in this same vein,
17 the suitcases were, if you will, arrested, were
18 arrested, and that we all know that when you arrest
19 something, a person, probable cause is required. The
20 police, the drug enforcement agents had custody and
21 control over these bags. As a matter of fact, on cross
22 examination, Detective Whitmore, when I posed to him the
23 question, "Detective Whitmore, when you seized these
24 bags," and when he responded with the answer, he said,
25 "You mean, when we took the bags." And I asked him if

1 he had a problem with me using the word "seize." And he
2 said, "Yes, I have a problem with you using the word
3 'seize,' because to me that means that we had taken
4 custody and control of these bags." I said, "Well, when
5 you took these bags, you had custody and control of
6 them, didn't you?" He said, "Yes." And I said, "When
7 you took these bags, you didn't give Mr. Place any
8 choice as to whether you were going to take them or not,
9 did you?" And he said, "No."

10 And I said, "Well, then, you seized them,
11 didn't you?" And he said, "Yes."

12 So, the bags were seized. They were
13 arrested. Probable cause is required. The suitcases
14 were immobilized. The suitcases became the focal point
15 of the investigation. The suitcases were moved from one
16 location to another.

17 QUESTION: You know, as we hear these cases,
18 Mr. Clark, we are all aware that we don't judge the
19 validity of a search by the fruits of a search.
20 Nevertheless, three or four times a week we sit here and
21 hear counsel making all the points that are made, and in
22 every case the only reason the case is here is because
23 heroin or opium or cocaine was discovered.

24 Now, it isn't your job, of course -- you are
25 the advocate here. It isn't your job to say how the

1 government should do it, but only how the government
2 can't do it. It is an almost intractable problem, isn't
3 it?

4 MR. CLARK: Your Honor, I believe -- I was
5 going to reserve for my closing statement a request that
6 prior to reaching a decision in this case, that the
7 members of this Court review the opinion that was
8 written in Coolidge versus New Hampshire. I was on the
9 airplane yesterday coming up here, and I had a companion
10 and was attempting for not the first time to explain
11 some of the nuances and intricacies of a Fourth
12 Amendment case, and I had an opportunity to review
13 Coolidge versus New Hampshire, and in so doing --

14 QUESTION: Is that the Court's opinion or the
15 opinion of the plurality? Which part of Coolidge?

16 MR. CLARK: Section 2, and as I recall --

17 QUESTION: Part of Section 2 is only a
18 plurality.

19 MR. CLARK: Yes, but anyway, at Section 2,
20 Page 454, Mr. Justice Bradley is quoted, and then Mr.
21 Justice Stewart, who wrote the opinion, adds some
22 language of his own, and in reading that particular
23 section, I handed it to my companion and I said, read
24 this. I said, this is why we are going to Washington
25 today, and this is why I hope the Supreme Court affirms

1 the decision of the Second Circuit Court of Appeals.

2 And I can presume that the Court is very
3 concerned about the governmental interests involved in
4 the narcotics trafficking problem today, but I don't
5 think that the governmental interest in narcotics and
6 the trafficking in narcotics is any more important than
7 the governmental interest in preventing murder or armed
8 robbery.

9 I think the governmental interests that are
10 intended to be balanced in determining whether or not
11 Fourth Amendment searches and seizures are reasonable
12 are the types of governmental interests that we have in
13 the Brignoni-Ponce case, involving border crossings by
14 immigrants or aliens.

15 QUESTION: Well, in murder cases and
16 kidnapping cases we don't have uniformly a search and
17 seizure problem, and almost uniformly and invariably we
18 have that problem in drug prosecutions.

19 MR. CLARK: I think that is probably all the
20 more reason that this Court should be very aware and
21 cognizant of the preservation of Fourth Amendment rights
22 which have been jealously guarded by this Court
23 throughout its history, most significantly in the
24 twentieth century, but certainly from the beginning of
25 the twentieth century, when the cases that are cited in

1 our brief as being the historical precedents for Fourth
2 Amendment rights -- I hate to see an erosion of those
3 rights merely directed at the prevention of narcotics
4 trafficking. I think that is a selective governmental
5 interest that will not preserve the integrity of the
6 Fourth Amendment as it presently stands before this
7 Court.

8 I would also like to point out to the Court
9 that the government apparently takes the position that
10 privacy denotes only an opportunity to be free from
11 visual inspection. In other words, the position that
12 because the bags were not searched, that is, opened,
13 until a warrant had been issued, the intrusion into Mr.
14 Place's privacy was protected, I think that is a rather
15 narrow view of what privacy is.

16 Privacy certainly has as one of what I
17 perceive to be three elements the visual inspection, but
18 it also has the right to be free from governmental --
19 unwarranted governmental interference, and the right to
20 personal security. Personal security and the right to
21 be free from interference were certainly not preserved
22 in this case.

23 I believe that in the cases of Chadwick and
24 Sanders, this dichotomy or actually trichotomy, three
25 elements of privacy, is recognized. In Chadwick and

1 Sanders, of course, we were dealing with items of
2 personalty again. Items of personalty were seized after
3 the officers had probable cause. They were not
4 searched, they were not visually inspected until after a
5 warrant had issued.

6 This Court accepted that proposition, and
7 noted that the contents of the bag were the primary
8 privacy interest of these two defendants, Sanders and
9 Chadwick, and that those particular privacy interests
10 were protected. I see implicitly in those decisions the
11 fact that this Court recognizes that there is more to
12 privacy than being protected from a visual inspection.

13 CHIEF JUSTICE BURGER: We will resume there at
14 1:00 o'clock, counsel.

15 MR. CLARK: Thank you, Your Honor.

16 (Whereupon, at 12:00 o'clock p.m., the Court
17 was recessed, to reconvene at 1:00 o'clock p.m. of the
18 same day.)

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1 AFTERNOON SESSION

2 CHIEF JUSTICE BURGER: Does Mr. Clark have any
3 time remaining?

4 THE CLERK: Five minutes and 30 seconds.

5 CHIEF JUSTICE BURGER: Very well.

6 ORAL ARGUMENT OF JAMES D. CLARK, ESQ.,
7 ON BEHALF OF THE RESPONDENT - CONTINUED

8 MR. CLARK: Thank you, Mr. Chief Justice, and
9 members of the Court, without being redundant, I do want
10 to just basically pick up where I began by stating that
11 I was pointing out to the Court what I feel to be
12 significant in that it is implicitly present in Arkansas
13 versus Sanders and the Chadwick cases, and that is, I
14 have divided the right to privacy into three elements as
15 opposed to the one which is proposed by the government.

16 It is the government's proposition that
17 privacy includes only protection from visual inspections
18 in these types of cases. I would also include among the
19 right of privacy the right of personal security and the
20 right to be free from unwarranted intrusions.

21 In the Chadwick case and in the Sanders case,
22 the items of personalty, the footlocker, baggage that
23 was seized, probable cause was in existence at the time
24 of the seizure, and that, to me, indicates that personal
25 security and freedom from unwarranted intrusions was

1 protected. Obviously, that was not the case in this
2 particular instance, because personal security and the
3 right to be free from intrusion was certainly not
4 afforded to Mr. Place.

5 I would also like to bring to the Court's
6 attention what I feel is not the status of the law with
7 regard to the reasonableness proposition that is being
8 urged by the government. They would have the Court base
9 all Fourth Amendment search and seizure questions on the
10 test of reasonableness, and I believe that they will
11 rely, as they have indicated in their brief and
12 especially in their reply brief, on Michigan versus
13 Summers, I do not believe that the reading of Michigan
14 versus Summers gives an ad hoc reasonableness test as
15 the standard for measuring Fourth Amendment search and
16 seizure questions.

17 And I look back and take the Michigan versus
18 Summers case, by balancing it against Dunaway, and in
19 writing the Summers case, Mr. Justice Stevens took pains
20 to point out that the seizure in that case was
21 distinguishable from that in Dunaway. Dunaway goes
22 directly to the point of rejecting the reasonableness
23 test, and in the Summers case, it was pointed out that
24 the distinguishing factors were that a warrant to search
25 the house where Mr. Summers was had previously been

1 issued establishing that there was probable cause to
2 search that particular house.

3 Also, it was pointed out that the detention of
4 Mr. Summers in the context and under the circumstances
5 of the factual situation was not the type of detention
6 that would lead to prolonged interrogation, as was the
7 case in Dunaway. So, I don't believe that Michigan
8 versus Summers stands for the general proposition that
9 reasonableness is a standard by which all Fourth
10 Amendment questions can be tested.

11 As a matter of fact, to do so, as pointed out
12 in the Dunaway case, would be to put in the hands of law
13 enforcement officers the first instance of determining
14 whether or not reasonableness existed.

15 In closing, I ask and urge this Court to
16 affirm the Second Circuit's decision, and I ask that
17 this Court utilize the issues which are raised by this
18 case to inform us all that Fourth Amendment rights will
19 not be diluted as proposed and put forth by the
20 government in this case.

21 Thank you.

22 CHIEF JUSTICE BURGER: Very well.

23 Do you have anything further, Mr. Horowitz?

24 ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

25 ON BEHALF OF THE PETITIONER - REBUTTAL

1 MR. HOROWITZ: A view brief points, Mr. Chief
2 Justice.

3 I think the Court has to consider the
4 implications of Respondent's argument that this
5 detention here can be effected only on the basis of
6 probable cause, keeping in mind Justice Stevens' comment
7 that we are dealing with probabilities here. On the
8 basis of probable cause, even sometimes probable cause
9 only in the judgment of an officer, and not approved by
10 a magistrate, police are entitled to search a person's
11 effects. They are entitled to search his home. They
12 are entitled to arrest him. They are entitled to
13 imprison him, even though in some of those cases,
14 because of the very nature of the probable cause
15 standard, we know that the suspicion is going to turn
16 out to be wrong.

17 Here, the intrusion is so much less that it
18 must be reasonable to allow the intrusion on the lesser
19 standard of reasonable suspicion, even though in some
20 cases this may permit a baggage detention where the
21 person turns out not to have contraband in his
22 suitcase.

23 I think to graphically illustrate the sort of
24 reasonable suspicion standard that we are talking about,
25 you might consider a case where the police have

1 reasonable suspicion to believe that some of, say, a
2 group of ten people have contraband in their suitcases,
3 and they know that three or four of them have heroin in
4 their suitcase, but the other six or seven do not. Is
5 it really reasonable for the police to allow all ten of
6 them to walk out of the airport, knowing that they are
7 allowing 40 pounds of heroin to go, or should they be
8 able to detain all ten suitcases for the hour and a half
9 necessary to bring a dog over to sniff them?

10 I would also say that it may be that in some
11 of these cases, there is going to be some slight
12 incremental intrusion that does not occur in the general
13 case just because of the detention, the cases that
14 Justice O'Connor and Justice Stevens were talking about,
15 where perhaps a person has to take some personal effects
16 out of his suitcase that he needs immediately.

17 I should say first that this is the typical
18 case, the one we have here, and none of these lower
19 court cases that are cited in the briefs -- there have
20 been many cases like this already. They all involve
21 luggage, and none of them involve cases where personal
22 effects had to be taken out, but even in those unusual
23 cases, I still think the detention is reasonable.

24 The additional intrusion of having to show
25 your keys or something like that to the officer is

1 really quite incremental, especially in the airport
2 context, where things like carry-on luggage and purses
3 have been already subjected to a search through an
4 ex-ray machine before you could get on the plane.

5 In an unusual case where there is a drastic
6 inconvenience to the person involved in a luggage
7 detention, that might be different, and the Court could
8 consider that case when it comes up.

9 I would also like to make a couple of factual
10 points. There was some discussion about why one of the
11 bags wasn't returned over the weekend. In fact, the
12 agents applied for a search warrant for both bags, so it
13 was certainly necessary for them to keep them both
14 during that time.

15 As far as why they didn't apply for a warrant
16 before the weekend, we don't necessarily say that that
17 was correct. They probably should have applied for it
18 over the weekend. But I don't think that has anything
19 to do with the issue presented in this case, which is
20 just the legality of the detention for the period
21 required to establish probable cause.

22 It might be, if for some reason the discovery
23 of the evidence was somehow a fruit of the additional
24 detention that took place over the weekend, that that
25 would be a different question. But it is not presented

1 here.

2 QUESTION: Do you think the issue of
3 reasonable suspicion is foreclosed?

4 MR. HOROWITZ: Well, ordinarily the Court is
5 entitled to affirm the judgment below on other grounds.
6 Briefly, it wouldn't do that in a case where the Court
7 of Appeals itself didn't reach that. I think it is open
8 on remand. I think the fact that the Court denied the
9 cross-petition in this case certainly suggests to the
10 parties that it wasn't going to consider that issue
11 here. It is still open in the Court of Appeals.

12 QUESTION: I suppose if there was not
13 reasonable suspicion, the search of the luggage might be
14 a fruit.

15 MR. HOROWITZ: Well, if there was not
16 reasonable suspicion, then they would not have been
17 entitled to detain the luggage.

18 QUESTION: Yes.

19 MR. HOROWITZ: I mean, we concede that they
20 had to have --

21 QUESTION: But they did. But they did, and
22 found the heroin. And the warrant would be --

23 MR. HOROWITZ: That's right. No, I agree.
24 The warrant would probably be a fruit.

25 CHIEF JUSTICE BURGER: Thank you, gentlemen.

1 The case is submitted.

2 (Whereupon, at 1:09 o'clock p.m., the case in
3 the above-entitled matter was submitted.)

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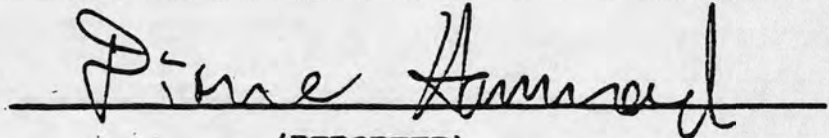
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CERTIFICATION

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