

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-419

TITLE TEXAS, Petitioner v. CLIFFORD JAMES BROWN

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments
next in Texas against Brown.

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

ORAL ARGUMENT OF C. CHRIS MARSHALL, ESQ.,
ON BEHALF OF THE PETITIONER

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

This case is before the Court on a writ of
ceritorari directed to the Court of Criminal Appeals of
Texas.

In 1979 respondent Clifford James Brown was
charged with a second degree felony offense under state
law of possession of a controlled substance. This
charge stemmed from an incident in which respondent was
found in possession of a tied-off balloon containing
heroin.

Respondent moved to suppress the heroin on the
grounds that it was the product of an illegal
warrantless seizure, and after an evidentiary hearing in
the trial court, the motion to suppress was denied.
Respondent then entered a plea of nolo contendere to the
charge, reserving under state procedures his right to
appeal the seizure question; and he was sentenced to

1 four years' imprisonment.

2 On appeal a three-judge panel of the Court of
3 Criminal Appeals of Texas reversed the conviction,
4 holding that this warrantless seizure of the knotted
5 balloon violated the plain view doctrine as announced in
6 Coolidge v. New Hampshire.

7 The theory below was that for the contraband
8 nature of that balloon to have been "immediately
9 apparent" to the officer as required by Coolidge, the
10 officer had to know what was inside the balloon. And in
11 the opinion of the Court of Criminal Appeals, because
12 this balloon was opaque, the officer obviously could not
13 see inside the balloon and could not have known what was
14 inside. Therefore, they found the seizure to be
15 improper.

16 The State of Texas filed a motion for
17 rehearing or a request for rehearing, but that motion
18 for leave to file was denied by the en banc court, three
19 of those nine judges filing a written dissent to that.
20 It was the belief of these dissenters that probable
21 cause, not knowledge, was the standard to which the
22 seizing officer was held, and that when proper regard
23 was given to the inferences that this experienced
24 officer was able to draw when he saw the balloon,
25 probable cause was evident, and the seizure was proper.

1 To amplify on the facts of the seizure, on
2 June 18th, 1979, Fort Worth police officer Tom Maples
3 and other members of the Patrol Division had set up a
4 roadblock-type of driver's license check. They were
5 checking, stopping each vehicle that came through this
6 roadblock, checking the drivers for driver's licenses
7 and checking the vehicles for expired inspection
8 stickers or registration and license plate violations.

9 They were not checking the drivers for
10 outstanding warrants. They were not looking for any
11 particular individual. They did not have any members of
12 the narcotics detail with them.

13 It happened to be Officer Maples who stopped
14 respondent's vehicle when he came through this
15 checkpoint. When Officer Maples asked the respondent to
16 exhibit a driver's license, the respondent reached in
17 his right front pants pocket, fumbled around in that
18 pocket long enough to alarm the officer, and caused him
19 to shine his flashlight into the car, this incident
20 having occurred around 11:00 to 11:15 at night, and when
21 the respondent withdrew his hand from that pants pocket,
22 the officer could see him holding two items. Between
23 his thumb and index finger he was holding a folded
24 dollar bill, but between his two middle fingers where
25 I've placed this box, he was holding a small, green,

1 knotted, opaque, tied-off balloon. The officer
2 described it as being tied about a half inch from the
3 end, and when mashed down it was approximately one-eighth
4 of an inch thick.

5 The officer then saw the respondent drop this
6 balloon alongside his leg onto the car seat. The
7 respondent reached over and opened the glove box of the
8 vehicle, presumably still trying to find the driver's
9 license. The light in that box came on, and inside
10 there the officer could see several items. He saw what
11 he described as a lot of loose white powder, a bag of
12 balloons apparently just as they had come from the
13 store, several small, empty plastic vials.

14 The officer, having been experienced in this
15 sort of thing, formed the conclusion that there was some
16 sort of narcotic substance in that green balloon he had
17 first seen, so he asked the respondent to step from the
18 car and move to the rear of the vehicle, which
19 respondent did closing the door behind him.

20 The officer could then see inside the vehicle
21 still, saw the green balloon on the car seat where the
22 respondent dropped it, and he reached in and picked up
23 the balloon, noticing at that time that it contained
24 some sort of powdery substance inside.

25 The record also shows that this officer was a

1 five-year veteran of the police department. He had
2 taken part in several arrests where such balloons had
3 been seized and found to contain narcotics. He had made
4 one such arrest himself in the previous year in which
5 eight or nine such balloons had been recovered. He had
6 talked with his fellow officers about the fact that
7 narcotics were often packaged this way. He had talked
8 with drug users about the use of milk sugar, which is
9 apparently what this loose powder was. He knew from his
10 experience what those empty plastic vials could have
11 been put to.

12 And it was based on this, the circumstances of
13 seeing this balloon and his experience with the
14 narcotics trade, that caused him to believe the balloon
15 contained narcotics, caused him to seize it, and caused
16 him then to place respondent under arrest for
17 possession of a controlled substance.

18 QUESTION: Now, what did you say was observed
19 in the glove compartment?

20 MR. MARSHALL: Three classes of items, Your
21 Honor. Several empty plastic vials -- I'm not sure if
22 that's pill bottles or test tube type of vials -- a bag
23 of balloons, apparently a bag just as they had come from
24 the store -- these balloons were empty -- and he also
25 saw the balloons, empty plastic vials and loose white

1 powder.

2 Now, at that time in the record the officer
3 didn't further describe this powder, but after the
4 arrest he conducted an inventory of the vehicle, found a
5 bottle of milk sugar in the back seat, and given the
6 record, it appears that milk sugar was also what this
7 loose white powder was. There's no evidence in the
8 record that this additional powder was itself a
9 controlled substance.

10 QUESTION: Any firearms discovered?

11 MR. MARSHALL: No, Your Honor. There was some
12 marijuana also found in the back seat, but no firearms.

13 QUESTION: Well, Mr. Marshall, could I ask
14 you, when was the decision in the Court of Criminal
15 Appeals?

16 MR. MARSHALL: It was in the spring of 1981.
17 The panel decision was on March 31st. We filed a motion
18 for leave to file for rehearing, which under local
19 practice is accompanied by the motion itself. That was
20 denied on July 1st, 1981.

21 QUESTION: Did you -- had Bolton been
22 announced at that time?

23 MR. MARSHALL: My recollection is that it may
24 have been announced on the very same day, on July 1st.

25 QUESTION: Well, what do you make of this

1 statement in the -- in the Court of Appeals -- in the
2 Court of Appeals opinion: "We do not here question
3 either the validity of the officer's initial stop of
4 appellant's vehicle as part of a license check nor the
5 propriety of the arrest, since appellant failed to
6 produce a driver's license."

7 MR. MARSHALL: I believe what they were
8 talking about there is what I would refer to in a moment
9 as the so-called prior lawful intrusion aspect of the
10 plain view doctrine.

11 QUESTION: I know, but they say they do not --
12 they apparently say he was legally arrested.

13 MR. MARSHALL: Yes, Your Honor. I --

14 QUESTION: Well, if he was legally -- if he
15 was legally arrested at the time, what kind of a search
16 of the vehicle would have been authorized under Bolton?

17 MR. MARSHALL: Well, certainly under New York
18 v. Belton, a search of the entire --

19 QUESTION: Or Belton, yes.

20 MR. MARSHALL: -- The entire passenger
21 compartment.

22 QUESTION: Including -- including the balloons.

23 MR. MARSHALL: Yes, Your Honor, I think that's
24 right.

25 QUESTION: Well, do we -- isn't that the end

1 of the case if he was legally arrested?

2 MR. MARSHALL: Well, I believe the facts
3 didn't develop that way, at least the way the testimony
4 was developed.

5 QUESTION: Well, the case comes here to us
6 with the Texas court having said he was legally arrested.

7 MR. MARSHALL: Well, what I'm trying to say is
8 that the officer's testimony was -- and, of course,
9 there is always that dispute about when the formal
10 arrest occurred -- was that he did not place the
11 respondent under arrest.

12 QUESTION: You don't have to find facts. The
13 Court of Appeals found the facts.

14 MR. MARSHALL: I realize that. I'm just
15 saying that I -- as I understood what they were saying
16 is that -- and from the record -- the arrest was not
17 thought to have occurred until after the balloon had
18 been seized.

19 QUESTION: Well, then, I suppose -- how would
20 you explain their setting aside the conviction if they
21 had found he was legally arrested?

22 QUESTION: Because they thought at that time
23 that the search of the balloon was invalid, even if he
24 was legally arrested.

25 MR. MARSHALL: Well, another thing, if I could

1 clarify this, this respondent has --

2 QUESTION: Because Belton came down on the
3 same day.

4 MR. MARSHALL: -- This respondent has never
5 raised, nor did the Court of Criminal Appeals address
6 the actual search inside the balloon but merely the
7 seizure of it, which I believe took place when the
8 officer reached inside the car and when he determined
9 that there was some powder in the balloon. According to
10 the officer's testimony, the arrest only occurred I
11 suppose seconds later when he now had decided, the
12 officer had decided this must contain some sort of
13 narcotics in it, and told the respondent he was under
14 arrest for possession of a controlled substance.

15 QUESTION: I wonder -- excuse me.

16 QUESTION: Were there two different arrests or
17 an arrest for two different offenses, one a traffic
18 offense and the other for the drug offense?

19 MR. MARSHALL: The officer did testify that he
20 issued a ticket for no operator's license, the
21 respondent never having produced one. And it wasn't
22 developed in the record whether he considered that to be
23 the basis of a custodial arrest. That wouldn't --

24 QUESTION: Is there any doubt as to which
25 arrest the Texas Court of Appeals was talking about in

1 its opinion when it says we don't doubt the validity of
2 the arrest? Are they talking about the drug arrest?

3 QUESTION: Well, they're saying --

4 MR. MARSHALL: That is certainly what I
5 thought, Your Honor.

6 QUESTION: They refer -- they refer to the
7 fact that we do not question the propriety of the arrest
8 since appellant failed to produce a driver's license.

9 QUESTION: That sounds like it's a traffic
10 arrest.

11 MR. MARSHALL: Well, as I say, I know they
12 said that, and I think they also were saying when they
13 don't question the stop that they were assuming under
14 Delaware v. Prouse, the initial stop of the vehicle was
15 proper.

16 The case was litigated by the defense at the
17 trial court level on whether the seizure of the balloon
18 was valid under the plain view doctrine.

19 QUESTION: Is failure to produce a driver's
20 license ever an occasion for a custodial arrest?

21 MR. MARSHALL: Under our state law it would be
22 possible to make a custodial arrest for that. I don't
23 think it would normally be the practice by any means,
24 but it certainly would be possible.

25 QUESTION: Okay. Thank you.

1 MR. MARSHALL: Yes.

2 QUESTION: Now, you referred to the panel
3 having considered it and then another step in there.
4 Was Belton called to the attention of the court at the
5 time reconsideration or rehearing was sought?

6 MR. MARSHALL: No, Your Honor, it wouldn't
7 have been, because as I said, my recollection is Belton
8 was decided either on the same day or one day after the
9 Court of Criminal Appeals --

10 QUESTION: Yes, but I thought you said there
11 was some effort after that to get reconsideration by the
12 Court of Appeals.

13 MR. MARSHALL: Yes, Your Honor. I filed a
14 state's motion for rehearing, but at the time I filed
15 that Belton had not been decided.

16 QUESTION: I see.

17 MR. MARSHALL: When they declined to hear the
18 case, under state procedures we had no ability to make a
19 second motion for rehearing. And again, as I say, the
20 Court of Criminal Appeals decided this under the plain
21 view doctrine. And in fact, one of the points I had
22 wanted to make later is that given a slightly different
23 timing, a slightly different approach by the Court of
24 Criminal Appeals, perhaps this seizure could have been
25 justified under Belton, even under Ross, or perhaps

1 under South Dakota v. Opperman as an inventory of the
2 vehicle, which probably was going to have taken place.

3 We think that underscores the anomalous nature
4 of this decision and shows what a disadvantage law
5 enforcement officers are put to in the State of Texas
6 because of the view of the plain view doctrine
7 established by the Court of Criminal Appeals.

8 QUESTION: Ordinarily isn't an inventory
9 process something that occurs after the vehicle and the
10 person have been taken to the police headquarters? You
11 don't make inventory -- inventories out on the street,
12 do you?

13 MR. MARSHALL: There is some testimony about
14 this in our record indicating that Fort Worth officers
15 make an initial quick inventory and fill out what they
16 called a record sheet.

17 QUESTION: Well, that's after -- that's after
18 you've got some business to do it.

19 MR. MARSHALL: Yes.

20 QUESTION: Like having made an arrest, which
21 requires probable cause.

22 MR. MARSHALL: Yes.

23 QUESTION: Mr. Attorney General, if I can go
24 back a little, do I understand your position to be that
25 this man was stopped and the officer asked him for a

1 license, and he reached in his pocket and said I don't
2 have a license but I've got an illegal drug and a dollar
3 bill?

4 MR. MARSHALL: That is what he brought out of
5 his pocket, Your Honor. And I suppose --

6 QUESTION: I just wanted to be sure I
7 understood you.

8 MR. MARSHALL: I suppose it's an equal
9 inference from the record whether he was trying to get
10 the balloon out of his pocket because he was afraid the
11 officer might come across it, or if it was just sheer
12 bad luck on his part that it became wedged in his hand
13 when he may have legitimately been looking for a
14 license. Perhaps he thought this dollar bill was his
15 license, and the balloon just accidentally on his part
16 became wedged between his fingers.

17 QUESTION: You mean he was going to bribe the
18 officer with a dollar?

19 (Laughter.)

20 MR. MARSHALL: No, Your Honor. I'm saying I
21 think perhaps since it was described as a folded dollar
22 bill, he might have felt that in his pocket and thought
23 that was a driver's license he was about to drag out of
24 his pocket and not a folded dollar bill.

25 QUESTION: Well, according to you he never did

1 have a driver's license.

2 MR. MARSHALL: No, Your Honor, he never
3 produced one.

4 QUESTION: So he wasn't reaching for a
5 driver's license.

6 MR. MARSHALL: Assuming he was consciously
7 aware that he didn't have one, I think that would be
8 true. I don't know.

9 QUESTION: I would think people are
10 consciously aware of what they have and what they don't
11 have in their pockets.

12 MR. MARSHALL: Well, I would think most of the
13 time, but I can't read the mind of this respondent.

14 QUESTION: May I ask you a question about your
15 theory of the plain view doctrine? Let's take the case
16 away from the automobile because it raises Belton and
17 all these other questions. Say this happened in an
18 airport, and the man had been asked to show his ticket.
19 He reached in his pocket, and he pulled out by -- say
20 inadvertently a balloon just like this and he at the
21 same time had his luggage going through the detector,
22 and they say exactly what they saw here. It would be
23 your view that they could just seize the balloon?

24 MR. MARSHALL: Yes, Your Honor, that's right.

25 QUESTION: And is that because the person

1 seeing the balloon has probable cause to believe its
2 contents are contraband?

3 MR. MARSHALL: Yes, Your Honor. The issue we
4 see in this case gives this --

5 QUESTION: All right. Let me take you one
6 step further. Say they saw all that, and then he put it
7 back in the suitcase and then carried it down the way
8 toward the plane. You now know that within the suitcase
9 -- you have probable cause to believe within the
10 suitcase there's this contraband. Would you have the
11 power to seize the suitcase and open it because it's in
12 plain view.

13 MR. MARSHALL: Your Honor, I think they would
14 have the power to seize the suitcase. Our position is
15 that this phrase in Coolidge v. New Hampshire about the
16 contraband nature of the item being immediately apparent
17 means probable cause. And so in your example I think
18 they could seize the suitcase.

19 QUESTION: Well, here did they also open the
20 balloon?

21 MR. MARSHALL: At some point they certainly
22 did analyze --

23 QUESTION: Without a warrant.

24 MR. MARSHALL: Yes, Your Honor, as far as I
25 know.

1 QUESTION: Then why couldn't you open the
2 suitcase?

3 MR. MARSHALL: The only reason I hesitate
4 there is because of the -- this Court's so-called
5 container cases -- Chadwick and Sanders.

6 QUESTION: Well, that's exactly the point of
7 my question. Why isn't the balloon a container?

8 MR. MARSHALL: Your Honor, it may be. I'm not
9 positive. It may be. But again, I want to emphasize
10 the only question the respondent has ever brought up is
11 the seizure of the balloon --

12 QUESTION: I understand.

13 MR. MARSHALL: -- Not the opening of it.
14 That's -- it's a very narrow case in that sense. He
15 never brought that issue up. In fact, the trial court --

16 QUESTION: Well, is it your position that a
17 law enforcement officer may seize a container whenever
18 the container is in plain view and he has probable cause
19 to believe the container has contraband within it?

20 MR. MARSHALL: Yes, sir. That would be our --

21 QUESTION: That's your position.

22 MR. MARSHALL: Yes, sir. As I say, Coolidge
23 v. New Hampshire talks about immediately apparent
24 contraband seizable evidence. And the problem we see
25 with the Court of Criminal Appeals opinion is that they

1 said Officer Maples had to know what was inside. We
2 think the standard was probable cause.

3 I don't think there's any issue here on the
4 so-called prior intrusion or the inadvertent discovery.
5 And the only clarification and correction there we seek
6 is that "immediately apparent" means "probable cause."
7 We think that is supported by many of this Court's
8 cases, although obviously never exactly answered.

9 Warden v. Hayden speaks in terms of probable
10 cause to seize an item. Colorado v. Bannister, a pro
11 curiam opinion only one term ago, talked about seizing
12 items in an automobile because the officer when he saw
13 these lug nuts and wrenches in the car recognized them
14 as meeting the description of property that was stolen
15 and which he had just received a broadcast about. This
16 Court said because he had probable cause to seize them,
17 he could do so without a warrant. We think that's
18 exactly the situation here.

19 Again, I take no position, and I personally
20 obviously don't know what the answer would be if this
21 were a matter of going inside the balloon. But we don't
22 even know for sure in this record --

23 QUESTION: Well, without regard to Belton, if
24 there was probable cause, as your Court of Criminal
25 Appeals said, and the propriety of the arrest, that was

1 on probable cause, could they not have -- couldn't the
2 officers have seized the balloon without regard to what
3 its contents were?

4 MR. MARSHALL: Well, I think they would have
5 had to have had probable cause to think it was in fact
6 seizable. I think Belton, had it applied, had the Court
7 of Criminal Appeals thought the arrest had already
8 occurred, would have allowed the officers to search the
9 vehicle, presumably to retain any item --

10 QUESTION: Well, I -- I -- I -- I just wonder
11 without regard to Belton. If there was probable cause
12 for arrest in these circumstances would there not have
13 been -- would not the seizure of the balloon have been
14 proper as incident to the arrest?

15 MR. MARSHALL: Well, I suppose that brings up
16 kind of an interesting problem again as was alluded to
17 earlier: what did the Court of Criminal Appeals mean by
18 the arrest. If they thought it related to the no
19 operator's license violation, again, that might have
20 gotten them in the car, but presumably they would have
21 had probable cause to seize it. If they thought it was
22 probable cause to arrest for a drug violation, then we
23 have the curious result that although they had probable
24 cause to arrest, the Court of Criminal Appeals thought
25 they didn't have probable cause to seize.

1 Again, I can see all the questions.

2 QUESTION: But the search was made when he was

3 at the back of the car.

4 MR. MARSHALL: The seizure of the balloon was,

5 yes, Your Honor. Again, I --

6 QUESTION: He moved to the back of the car.

7 MR. MARSHALL: Yes. Yes, sir.

8 QUESTION: So there was nothing in that car

9 that he could have touched.

10 MR. MARSHALL: No. In fact, the officer was

11 clear that he didn't fear for his safety or the

12 destruction of those items.

13 QUESTION: Nothing that man could do in the

14 back of the car.

15 MR. MARSHALL: I wouldn't think so.

16 QUESTION: Well, it's my understanding that in

17 Texas anybody with a balloon is subject to arrest.

18 MR. MARSHALL: No, Your Honor. Another

19 problem we see --

20 QUESTION: Well, what else do you have to have

21 in addition to the balloon?

22 MR. MARSHALL: Well, we think you have to have

23 probable cause, and it's --

24 QUESTION: Like what?

25 MR. MARSHALL: Pardon me?

1 QUESTION: Like what?

2 MR. MARSHALL: Well, in this case the unusual
3 nature in which this balloon was brought out of his
4 pocket and, in our view, discreetly or surreptitiously
5 dropped along his pants leg onto the car set; the
6 distinctive knotted nature of this balloon which the
7 officer said he associated with narcotics; and then what
8 we think are obvious narcotics packaging items in the
9 glove box -- the milk sugar, the powder, the plastic
10 vials, the bag of balloons.

11 And we think, as Chief Justice Burger's
12 opinion in U.S. v. Cortez made clear, probable cause to
13 detain, to seize has to be evaluated based on all the
14 circumstances which the officer sees, and including the
15 experience he has and the inferences he can draw based
16 on that.

17 QUESTION: Well, I don't -- the experience he
18 has in balloons?

19 MR. MARSHALL: Well, that is one thing, Your
20 Honor. The record is replete with testimony of what he
21 associated with balloons, and yet the Court of Criminal
22 Appeals would give it no legal weight. It's not even
23 mentioned in their opinion. We think that standing by
24 itself is error under Cortez.

25 QUESTION: I'm not interested in that. I'm

1 just interested in if I happen to be in Texas and I have
2 a balloon and I'm driving, I'm subject to arrest.

3 MR. MARSHALL: No, Your Honor. I don't think
4 on the facts that you've stated that would be true.
5 Again, we say it's all the circumstances. I would
6 think, for example, an individual all by himself, one
7 balloon, probably inflated --

8 QUESTION: Well, he was all by himself, wasn't
9 he?

10 MR. MARSHALL: Well, all by himself in terms
11 of another person, but not all by himself in terms of
12 narcotics packaging paraphernalia in the glove box.

13 We're not saying that this is a case where a
14 police officer goes up to a children's birthday party
15 and starts arresting every child with a balloon in his
16 hand. But this is an unusual balloon -- knotted a
17 half-inch from its tip, all this material in the glove
18 box.

19 QUESTION: Let me ask you, have you ever
20 knotted a toy balloon?

21 MR. MARSHALL: I have. I don't --

22 QUESTION: Well, I thought so. You didn't
23 consider yourself violating the law, did you?

24 MR. MARSHALL: No, sir. I haven't have heroin
25 inside those balloons either.

1 QUESTION: I know.

2 MR. MARSHALL: And I didn't have all the other
3 items in the glove box. I didn't try to drop it
4 alongside my pants leg when the officer was asking me
5 for a license. I realize in some sense this is almost a
6 humorous case because at least in our view --

7 QUESTION: It's humorous four years? It's
8 humorous?

9 MR. MARSHALL: Humorous on the facts of this
10 seizure, that it seems, in our view, which we hope will
11 prevail but which, of course, is a matter for the Court
12 to decide, that this was so clearly probable cause; and
13 yet, the Court of Criminal Appeals said the officer had
14 to know what was inside the balloon, says nothing about
15 the officer's testimony concerning his experience with
16 this very type of balloon, everything else. It just
17 seems to us to be clear error. It seems to me that they
18 have held the officer to a higher standard under the
19 plain view doctrine than any decisions of this Court
20 seem to indicate.

21 QUESTION: I just wonder if this is really a
22 plain view case. You're not relying on the balloon
23 itself giving you an adequate basis; you're relying on
24 these other circumstances -- what's in the glove
25 compartment and all that. And you say all of those

1 facts add up to probable cause to arrest him.

2 MR. MARSHALL: Yes.

3 QUESTION: And then you say -- but you're
4 really not saying that there was an item all by itself
5 in plain view that was subject to seizure.

6 MR. MARSHALL: Well, I suppose this balloon in
7 context is an item that's subject to seizure. I almost
8 hate to raise it because it again brings up another
9 question that's not exactly raised here, but that would
10 this Court's again container cases, Chadwick and Sanders.

11 QUESTION: Well, that's -- that's exactly
12 what's troubling me. It seems to me that your argument
13 -- it -- it's -- would be the same case if we had a
14 briefcase in an airport and a lot of extraneous facts
15 that give you probable cause to believe the briefcase
16 has something, some counterfeit money in it. Your view
17 is that that's a plain view case.

18 MR. MARSHALL: Your Honor, I believe that's
19 true.

20 QUESTION: Even though you can't see the
21 counterfeit money, and here you can't see the substance.

22 MR. MARSHALL: To the extent --

23 QUESTION: You don't want us to analyze it as
24 a container case.

25 MR. MARSHALL: The reason I don't want it

1 analyzed as a container case or don't think it should be
2 is because the container cases, Chadwick and Sanders and
3 at least whatever dicta is left in Robbins, are ones
4 dealing with the entry inside the container, not the
5 seizure of it. Because as I understand those cases, all
6 proceed on the assumption that the seizure of that
7 container would have been permissible on probable cause.

8 QUESTION: Well, but -- but do you concede
9 that it was wrong to take a look inside the balloon here?

10 MR. MARSHALL: No, I don't. I don't --

11 QUESTION: Well, then --

12 MR. MARSHALL: -- Concede that. It's just not
13 raised. It never has been raised by the defendant. The
14 record doesn't even indicate for sure, for certain when
15 the balloon was opened. I know in my brief I said when
16 the police chemist opened it, and after reading that
17 over I realized that was an unconscious assumption on my
18 part.

19 The record is clear that Officer Maples did
20 not open it on the scene, but beyond that, neither side
21 developed when it was opened. And therefore, it's the
22 mere seizure of this balloon is what's at issue here.

23 QUESTION: And under your view, the plain view
24 doctrine applies whenever a container which is in plain
25 view is -- probably contains contraband.

1 MR. MARSHALL: As far as the mere seizure of
2 the container is concerned, I believe that would be our
3 position.

4 QUESTION: That's just surplussage, isn't it
5 really? You don't mean to just rely on plain view, if
6 that's your thesis. You just say any time you've got
7 probable cause to believe a container has contraband in
8 it, you can hold it, seize it and hold it at least long
9 enough to get a warrant.

10 MR. MARSHALL: Well, I know this Court has --

11 QUESTION: That's all you really need to say.
12 You don't need to talk about plain view, do you?

13 MR. MARSHALL: Well, I know there is even to
14 me some indication in this Court's cases whether plain
15 view is an independent basis, or if Your Honor's
16 suggestion would completely cover the waterfront, so to
17 speak.

18 QUESTION: Well, doesn't Belton take care of
19 that?

20 MR. MARSHALL: Again, had this case been
21 litigated differently, the facts turned out slightly
22 differently, had the Court of Criminal Appeals
23 approached it from a different manner, it possibly on
24 these precise facts could have been held -- could have
25 been decided as a search incident to arrest where the --

1 you search the interior of the vehicle when you arrest
2 the occupants.

3 QUESTION: Do you think Belton applies --
4 let's suppose that I stop a -- well, in Texas an officer
5 stops a person for speeding and gives him a ticket. And
6 -- and he says well, I've stopped you and I'm giving you
7 a ticket, and now I'm going to search the car and all of
8 the containers in it. Do you think Belton permits that?

9 MR. MARSHALL: Well, not Belton. I believe
10 Belton would be limited to the passenger compartment.

11 QUESTION: Well, that's what I mean. I mean
12 would just giving a ticket for speeding justify the
13 search of the entire passenger compartment and any
14 containers in it?

15 MR. MARSHALL: The way Belton sits right now I
16 would say so, assuming a custodial arrest were made for
17 the speeding and it's transported to the station.

18 QUESTION: Well, I didn't say a custodial
19 arrest. I just said they gave him a ticket.

20 MR. MARSHALL: Well, I'm sorry then, Justice
21 White.

22 QUESTION: Well, they stopped him, and they
23 said you just wait here; I'm going to give you a ticket,
24 and also I'm going to search your interior of your car.

25 MR. MARSHALL: Then I don't think merely

1 giving a ticket would authorize a Belton type of search
2 of the vehicle. I certainly don't. It would have to be
3 a custodial arrest and not just --

4 QUESTION: Would you call that giving him a
5 ticket an arrest?

6 MR. MARSHALL: I don't believe so, at least
7 not in the sense --

8 QUESTION: All right. The Texas Court of
9 Criminal Appeals called whatever happened here with
10 respect to the driver's license an arrest.

11 MR. MARSHALL: Apparently so.

12 QUESTION: Well, certainly if you're giving
13 somebody a ticket there's some -- there's some element
14 of seizure, isn't there? You don't let a person simply
15 drive away when the officer goes up and says look, I'm
16 going to write a ticket for you.

17 MR. MARSHALL: Yes, Your Honor. That --

18 QUESTION: You're not free to drive away.

19 MR. MARSHALL: That, of course, is why I was
20 hesitating. I know there is something in the nature of
21 a seizure. Whether it's the type of arrest that invokes
22 Belton is what I'm not sure of.

23 If I could, I'd like to reserve the remainder
24 of my time.

25 QUESTION: Mr. Marshall, you didn't mention, I

1 believe, the independent state ground issue in your
2 discussion.

3 MR. MARSHALL: Very well. Let me mention that
4 very briefly as opposed to on rebuttal.

5 The defense has conceded that probable cause
6 is a standard, but instead says, or to get around that
7 says this was decided on state law grounds. The problem
8 I see with that position is that the Court of Criminal
9 Appeals at the outset cited to and quoted from Coolidge
10 as the controlling authority under the plain view
11 doctrine. It did not cite to state law anywhere in its
12 discussion of the merits, and we think under Oregon v.
13 Hass, Delaware v. Prouse, and most recently Oregon v.
14 Kennedy, the citation to this Court's decision in the
15 absence of citation to state law clearly showed that
16 this was not really based on state law grounds. Whether
17 it could have been, which is what the respondent
18 actually says, I don't know, but in this case it simply
19 was not based on state law.

20 QUESTION: Would Texas law be any different
21 than the federal law in this case?

22 MR. MARSHALL: I am not aware of any decision
23 of the Court of Criminal Appeals that has ever announced
24 any special state law plain view doctrine. So as far as
25 I know, the answer to that would be no, Your Honor.

1 If I could reserve.

2 CHIEF JUSTICE BURGER: Yes.

3 Mr. Butcher.

4 ORAL ARGUMENT OF ALLAN K. BUTCHER, ESQ.,

5 ON BEHALF OF THE RESPONDENT

6 MR. BUTCHER: Mr. Chief Justice, may it please
7 the Court:

8 There are two aspects to the respondent's
9 position that we'd like to review. The first is the one
10 that Mr. Marshall just left off on, and that is it is
11 respectfully suggested that this case is not ripe and
12 should be sent back to the Texas Court of Criminal
13 Appeals for clarification as to exactly what was the
14 basis of their decision. Was it in fact Article I,
15 Section 9 of the Texas constitution, or was it in fact
16 the Fourth Amendment to the United States Constitution?

17 Secondly, the respondent would state that if
18 the Court does reach the search issue, an analysis of
19 the case shows it to be consistent with the federal
20 rules in the cases dealing with the plain view seizures.

21 Looking at the first issue, that is, the
22 independent state grounds, respondent would say that
23 this is not a Fourth Amendment case. It's interesting
24 to note that in the opinion of the court below the only
25 mention of the Fourth Amendment is where the court

1 reprints the respondent's motion to suppress. The
2 motion to suppress cites as a basis the Fourth Amendment
3 to the United States and Article I, Section 9 of the
4 constitution. Those two are juxtaposed. They are next
5 to one another in the respondent's motion. Other than
6 that, the words "Fourth Amendment" or "United States
7 Constitution" do not appear in the brief.

8 QUESTION: Mr. Butcher, can you cite any Texas
9 case that's treated Article I, Section 9 of the Texas
10 constitution any differently than the Fourth Amendment?

11 QUESTION: Yes, ma'am, I can. In the case of
12 Escamillia v. the State, a 1977 case, it involved a
13 burglary in which a blood test was involved. The
14 defendant in that cause filed a motion to suppress and
15 based it on the amendments four, five of the United
16 States Constitution and Article I, Section 9 of the
17 Texas constitution.

18 The analysis of the Texas Court of Criminal
19 Appeals was that under this Court's ruling, the Fifth
20 Amendment privilege did not extend to the blood test.
21 Further, under Schmurber v. California, the defendant,
22 given those circumstances, there was no Fourth Amendment
23 requirement that a search warrant be obtained prior to
24 getting the blood test. The court held that although
25 the Fourth Amendment may not require it, Article I,

1 Section 9 did.

2 QUESTION: Is that case cited in your brief?

3 MR. BUTCHER: No, sir, it's not. It's found
4 at 556 Southwest Second 796.

5 QUESTION: Would you repeat that, please?

6 MR. BUTCHER: 556 Southwest Second 796.

7 QUESTION: Are you aware of Crowell v. State,
8 a Texas Criminal Court of Appeals case which stated that
9 Article I, Section 9 of the constitution of Texas and
10 the Fourth Amendment to the federal Constitution are in
11 all material respects the same?

12 MR. BUTCHER: No, ma'am, I'm not familiar with
13 that.

14 It's interesting that at least one judge of
15 the Texas Court of Criminal Appeals does now share that
16 view, though. In an opinion that was handed down in
17 1982, just last year, granted it's a dissenting opinion
18 in Synder v. the State, Judge Tiegg, Marvin Tiegg, wrote
19 that he felt that Texas and the Texas constitution
20 affords individuals more protection than does the Fourth
21 Amendment.

22 QUESTION: I guess he didn't persuade his
23 colleagues, though.

24 MR. BUTCHER: No, he didn't. He goes on to
25 say, however, that his construction -- well, this is a

1 direct quote -- "This construction is in keeping with
2 the traditions of individuality, privacy and personal
3 liberty which have marked the history of our state."

4 So at least one justice -- judge is thinking
5 along those lines. Also, Judge Roberts, who, of course,
6 recently retired, has noted several times in opinions
7 the use of Article I, Section 9, but he has never
8 suggested that it's a different standard or really
9 expounded on it as Justice Tiegg or Judge Tiegg did.

10 QUESTION: Mr. Butcher, would it be fair to
11 say that the opinion of those judges -- Judge McCormick,
12 Dowley, Davis -- dissenting from the en banc hearing
13 proposition treated the opinion of the Court of Appeals,
14 of the panel as a federal constitutional case? They
15 seemed to cite principally cases from this Court.

16 MR. BUTCHER: I don't think so, sir, and the
17 reason I don't think so is that Coolidge is cited.
18 Coolidge is the only federal case that's cited in that
19 opinion. And then they go on to show four Texas cases
20 that have built upon --

21 QUESTION: Well, I'm not asking you about how
22 you would interpret the Court of Appeals panel opinion.
23 I'm asking you how you would characterize the dissenting
24 opinion's treatment of the Court of Appeals panel
25 opinion.

1 MR. BUTCHER: Well, it's certainly not clear,
2 just as I would suggest the entire opinion is not clear
3 as to what is the basis. It could have been Article --
4 the Fourth Amendment to the United States Constitution.
5 It could just as easily have been Article I, Section 9,
6 because the citing of Coolidge can be viewed as merely a
7 jumping off point. In other words, it's well recognized
8 that states can develop their own standards for searches
9 and seizures so long as they don't fall below the
10 minimum standards provided by the Fourth Amendment.

11 Those minimum standards, it might be imagined,
12 are set out in Coolidge, and using Coolidge as a
13 starting place, they then build a Texas standard, and
14 shown in the cases that are cited: Duncan, Howard,
15 DeLoa and so forth.

16 It's not clear --

17 QUESTION: And it would be very easy for the
18 Court of Appeals to make it clear.

19 MR. BUTCHER: Yes, it would. In fact, that's
20 exactly what the respondent asks: send the thing -- send
21 the case back to the Court of Criminal Appeals and ask
22 them what was the basis. To do otherwise we think is --
23 invites -- invites basically an advisory opinion on the
24 part of this Court. If this Court hands down a decision
25 and decides against the respondent, it will go back to

1 the Texas Court of Criminal Appeals.

2 QUESTION: Well, would you -- assume the Court
3 agreed with you that it ought to go back for that
4 purpose, but I suppose you would object to saying to
5 reconsider also in the light of Belton.

6 MR. BUTCHER: No, I wouldn't, because this is
7 not a Belton case. The --

8 QUESTION: Well, I know, but assume the --
9 that's only because you say that the arrest they were
10 referring to was a traffic arrest.

11 MR. BUTCHER: No, it's not a traffic arrest,
12 Your Honor. The arrest was not a traffic arrest. The
13 stop was a traffic stop, but the arrest was the arrest
14 on controlled substance. If the Court --

15 QUESTION: Well, I'm just asking -- referring
16 to this passage in the Court of Appeals opinion, just
17 saying we do not question the propriety of the arrest
18 since appellant failed to produce a driver's license.

19 MR. BUTCHER: Well, the --

20 QUESTION: If there was an arrest -- if there
21 was an arrest that is valid under state law, then it
22 certainly wouldn't violate the federal Constitution if
23 they searched the passenger compartment of the car.

24 MR. BUTCHER: That's true, if there was a
25 valid arrest that preceded that. But --

1 QUESTION: Well --

2 MR. BUTCHER: -- A look at the record shows

3 that that is not the case.

4 QUESTION: Well, I'm -- I'm just -- if you --

5 if you suggest we ought to send it back to find out what

6 the basis of their judgment was, if they decided that it

7 was a federal ground, they would have to also -- I would

8 like to know what they meant by the arrest.

9 MR. BUTCHER: Well, the record -- I

10 understand, and I have no good answer for you.

11 QUESTION: All right.

12 QUESTION: Mr. Butcher, doesn't the appendix

13 show that they took him out of the car, took him around

14 the back of the car, "read him his Miranda rights and

15 arrested him?"

16 MR. BUTCHER: Yes, sir.

17 QUESTION: Do you give people Miranda rights

18 on traffic violations?

19 MR. BUTCHER: Generally not.

20 QUESTION: Well, then don't you assume that he

21 was arrested on the major charge --

22 MR. BUTCHER: You don't even --

23 QUESTION: -- At that stage?

24 MR. BUTCHER: Your Honor, you don't even have

25 to assume that. That's explicit in the record.

1 QUESTION: That's what I thought.

2 MR. BUTCHER: On page 28, for example, Officer
3 Maples testified -- the question by Mr. Bankston: "Then
4 the arrest of Clifford James Brown that night was based
5 on your suspicion the balloon contained a controlled
6 substance, is that correct?" "Yes, sir. That's
7 correct."

8 In fact, not only is it on page 28, but you'll
9 also find it explicitly stated that the arrest was based
10 on seeing the balloon, at pages 28, 31, 25 and 27. The
11 arrest was for the -- when he saw the balloon.

12 QUESTION: Mr. Butcher, did the respondent
13 challenge below the opening and inspection of the
14 contents of the balloon?

15 MR. BUTCHER: No, ma'am, they didn't.

16 QUESTION: Just the seizure of the balloon.

17 MR. BUTCHER: That's correct. As far as we
18 know -- Mr. Carter and I were both trial counsel -- as
19 far as we know, the balloon was not opened until it got
20 to the crime lab where it was analyzed by the chemist.

21 QUESTION: And the seizure technically
22 occurred prior to the arrest, according to the record,
23 is that right?

24 MR. BUTCHER: Well, perhaps at the same time
25 as.

1 QUESTION: That's your position? Same time as.

2 MR. BUTCHER: He saw the balloon. The balloon
3 -- when he -- the balloon fell as he exited the car. He
4 reached in, picked up the balloon, and the arrest was
5 made at that time.

6 QUESTION: How do you explain the language in
7 the Texas court's opinion that Justice White called your
8 attention to and your opponent's attention: the arrest
9 is not questioned since appellant failed to produce a
10 driver's license. As a matter of Texas law does the
11 failure to produce a driver's license relevant to the
12 question of whether they could be arrested for having a
13 balloon?

14 MR. BUTCHER: Well, it's conceivable. Under
15 Texas law, of course, a custodial arrest can result from
16 a failure to produce a valid driver's license. As a
17 matter of practice, of course, usually only a warning or
18 a ticket at most is given. I don't think that that note
19 in the opinion squares with the evidence in this case.

20 QUESTION: Well, are they saying that even
21 though the officer should not have seized the balloon
22 and could not rely on that to support the arrest,
23 nevertheless, a custodial arrest was permissible because
24 he didn't have a driver's license? Is that what they're
25 saying?

1 QUESTION: And hence you could -- you could
2 search the car.

3 QUESTION: And then you could go ahead and do
4 everything. Assuming that this is -- that in Texas --
5 you're telling us as a matter of Texas law they can make
6 a custodial arrest for not having a driver's license.

7 MR. BUTCHER: That's correct. But the problem
8 again comes back to the point that the arrest was based
9 on the -- on the sight of the balloon, and there was no
10 -- my memory is that there was no --

11 QUESTION: But they could have arrested him --

12 MR. BUTCHER: Could have but didn't.

13 QUESTION: Well, but that --

14 MR. BUTCHER: And they could have given him a
15 ticket.

16 QUESTION: But if there's a legal basis for
17 the arrest, even if the officer acted for the wrong
18 reason, I suppose that would not invalidate the arrest,
19 would it? I mean if in fact he didn't have the driver's
20 license, he's subject to arrest, I guess.

21 MR. BUTCHER: That is correct.

22 Looking at the independent state grounds, I
23 would reiterate that it's just not clear as to what the
24 basis of the court's opinion. There are instances where
25 the Texas constitution and Texas law holds the

1 government activity to a higher standard than the
2 federal rules. There are a number of places in the
3 Texas constitution that provide more protection, broader
4 protections than do federal law or Constitution. For
5 example, right by trial by jury under the Sixth
6 Amendment, of course, is available to anyone charged
7 with a criminal activity so long as it's not of a minor
8 matter, that is, involving six months or less
9 incarceration. In Texas under the constitution you've
10 got an absolute right to a trial by jury in any criminal
11 matter. So if you've got an overtime parking ticket in
12 Texas, you can have a jury trial on it.

13 The use of oral confessions in the Fifth
14 Amendment is much more restricted under Article 3822 of
15 the Texas Code of Criminal Procedure.

16 There are a number of instances where Texas
17 has chosen to have broader protections, and we don't
18 know that this is not the case here.

19 QUESTION: The last instance you mentioned --
20 I think it was about oral confessions -- you referred to
21 a Texas statutory provision.

22 MR. BUTCHER: Yes, sir.

23 QUESTION: I suppose that would be apparent if
24 the court were relying on a statutory provision. They
25 would at least cite the statute.

1 MR. BUTCHER: Well, in our brief we have cited
2 a statute, Article 1.06 of the Texas Code of Criminal
3 Procedure is -- is a prohibition against unreasonable
4 searches and seizures. We did not raise that in our
5 motion to suppress, and it was not raised at trial. And
6 under Texas law, of course, any appeal, any argument has
7 got to comport with what was done at the trial level.

8 I included that just to show that there was
9 machinery there provided by the Texas legislature
10 dealing with exactly that.

11 QUESTION: Perhaps in your next case you can
12 raise that.

13 MR. BUTCHER: In my next case I'm certainly
14 going to include that.

15 QUESTION: The heart of your case, though, is
16 challenging the notion that viewing this tied off
17 balloon gave probable cause to believe anything except
18 that it was a tied off balloon; because if it did give
19 probable cause to believe there was narcotics in the
20 balloon, why, he could have been arrested, and then the
21 balloon could have been searched on the spot.

22 MR. BUTCHER: Well, we --

23 QUESTION: Isn't that right?

24 MR. BUTCHER: Well, it's true if it gave rise
25 to probable cause.

1 QUESTION: That's what I mean, yeah. That's
2 the heart of your case.

3 MR. BUTCHER: Yes. But we would argue that
4 even if you do apply the idea of probable cause to these
5 facts, you still have got an impermissible search.

6 QUESTION: Why? Why?

7 MR. BUTCHER: The reason is that in the record
8 you don't have specific articulated rationales as to why
9 this officer thought he had evidence of a crime before
10 him. He, under Coolidge --

11 QUESTION: Well, that's just saying that he
12 didn't have probable cause.

13 MR. BUTCHER: He could have had probable
14 cause. He may have had probable cause, but he didn't
15 say it. It's not in the record. In other words, what
16 I'm saying is --

17 QUESTION: Well, do you say that's a -- do you
18 say that that violates the federal -- the Fourth
19 Amendment if there was actual probable cause there but
20 the officer didn't know it?

21 MR. BUTCHER: I'm saying that the Court --

22 QUESTION: I don't know. You don't find any
23 cases like that around, do you?

24 MR. BUTCHER: No. But what I am saying is
25 that in order for the Court to hand down a decision and

1 make an intelligent judgment on whether or not there was
2 probable cause, there has got to be evidence as to the
3 probable cause. There has got to be evidence that that
4 officer knew something. His specialized education,
5 training, experience and so forth alerted him to the
6 fact that an otherwise innocent object, this party
7 balloon --

8 QUESTION: Well, he said he did. He said he
9 thought so based on his experience.

10 MR. BUTCHER: Well, that's -- I think a close
11 reading of the record doesn't really show that.

12 QUESTION: Well, do you think all of our cases
13 saying that there was probable cause are based on
14 testimony in the trial record that an officer said yes,
15 I saw this thing, and I immediately thought it should be
16 seized because there was reasonable grounds to think --
17 a lot of probable cause holdings of this and other
18 courts are just common sense statements by judges that
19 if an officer saw this, he'd certainly have basis to
20 seize or search.

21 MR. BUTCHER: I understand, sir.

22 QUESTION: And he did say here at the top of
23 page 31 in answer to the question, "So he was arrested
24 on the suspicion that the green balloon that you found
25 on him contained a controlled substance, some type of

1 controlled substance?" "Yes."

2 Now, how much more would you think he would
3 have to articulate his reasons? And he -- he had
4 already testified that he had prior experience seeing
5 narcotics carried in just this way.

6 MR. BUTCHER: Well, I believe, Your Honor,
7 that his experience is not clear; and that's really the
8 key issue. If he said I know that in that locale it is
9 common for heroin to be carried in balloons, there would
10 be no question.

11 QUESTION: Well, he said it in all but the
12 words you've just said it now.

13 MR. BUTCHER: Well, the Court of Criminal
14 Appeals, the Texas Court of Criminal Appeals looked at
15 what he recited and found it insufficient. He didn't
16 really articulate. He didn't show that he had special
17 -- the specialized knowledge, the wherewithal to know
18 that, as I said before, an innocent party balloon was in
19 fact evidence of crime.

20 QUESTION: What about the things that he
21 observed, the officer observed in the glove department
22 -- the typical utensils of the narcotics trade?
23 Everything but a syringe.

24 MR. BUTCHER: But they were --

25 QUESTION: Isn't that so?

1 MR. BUTCHER: Yes. That would certainly
2 arouse suspicion.

3 QUESTION: Well, can't he add these things up,
4 add two and three and four and come to a conclusion?
5 And he said this was an active medium drug area.

6 MR. BUTCHER: Yes, he did. That is correct.

7 QUESTION: Well, what more -- what more does
8 he need?

9 MR. BUTCHER: He needs to specify it. He
10 needs to lay it out. He has to inform the court as to
11 what is the rational basis for his decision.

12 QUESTION: What did the trial court find?

13 MR. BUTCHER: The trial court found that the
14 object was -- they upheld the --

15 QUESTION: Well, I know they upheld, but did
16 they say there was probable cause?

17 MR. BUTCHER: Well, that's implicit. They
18 just overruled our motion to suppress.

19 QUESTION: And you said there wasn't probable
20 cause to believe that the --

21 MR. BUTCHER: There wasn't probable cause
22 demonstrated in that courtroom that day. That's what
23 I'm saying.

24 QUESTION: Mr. Butcher, getting back to this
25 question of not raising the point of opening the

1 balloon, is it still true in Texas that you have to
2 write out your exceptions during the trial?

3 MR. BUTCHER: Write out exceptions to the
4 charge?

5 QUESTION: No, sir. To the evidence.

6 MR. BUTCHER: No, sir. That's not necessary.

7 QUESTION: But you do have to make exceptions?

8 MR. BUTCHER: You do have -- well, you do have
9 to have an objection. The objection has got to be --

10 QUESTION: Did you?

11 MR. BUTCHER: Yes, sir, we did. We did object.

12 QUESTION: And you just left it there? You
13 didn't raise it on appeal?

14 MR. BUTCHER: Excuse me.

15 QUESTION: You didn't raise it on appeal.

16 MR. BUTCHER: Well, I'm sorry. I
17 misunderstood you. We objected to the search. We did
18 not object to the opening of the balloon.

19 QUESTION: Because if there was probable cause
20 to believe the balloon had heroin in it, the show was
21 over.

22 MR. BUTCHER: That's correct.

23 QUESTION: Because he could have been arrested
24 right then.

25 MR. BUTCHER: That's correct. But --

1 QUESTION: He doesn't have to know in an
2 absolute sense that it is heroin, does he?

3 MR. BUTCHER: No, he doesn't. And that's --

4 QUESTION: He's not a chemist.

5 MR. BUTCHER: No, he doesn't. And that's
6 where we take exception with the state. We agree that
7 probable cause is a proper standard. It's interesting
8 to note that the State -- the Court of Criminal Appeals
9 subsequent to Brown -- in fact, in Boyd v. the State, a
10 September 1981 case -- looked at this question of what
11 does "know" mean when they say the officer must know
12 he's got evidence of a crime before him. In that case
13 it involved the police officer observing that defendant
14 exchanging a tinfoil bindle, a tinfoil packet for
15 money. To a layman the exchange of a tinfoil packet for
16 money would be a routine matter, certainly not evidence
17 of a crime. That, however, was not the evidence.

18 In that case the officer testified he was
19 aware that in that locale heroin normally is kept in
20 tinfoil bindles. Thus, the court held that the
21 officer's specialized knowledge gave meaning and a basis
22 for his conclusion that he had evidence of a crime
23 before him. That search was upheld, the conviction was
24 upheld, and Brown was cited with approval.

25 So they don't mean absolute certainty. They

1 mean that he has to have knowledge that otherwise
2 innocent items are in fact evidence of a crime.

3 This case is very narrow, in my view. The
4 holding of the court below just says that -- just takes
5 the Texas standard, which they develop there, requiring
6 the officer to articulate why he knew he had evidence of
7 a crime before him and extends that to opaque party
8 balloons -- otherwise innocent items.

9 There's no doubt that an officer walking down
10 the street and seeing a handgun on the seat of a parked
11 car immediately knows he has evidence of crime before
12 him. But if it's an innocent item, something that not
13 on its face is contraband, inherently dangerous, et
14 cetera, then the officer has got to say why.

15 QUESTION: Why does an officer know in the
16 case of a handgun that's placed on the car -- is there a
17 law against carrying handguns in Texas?

18 MR. BUTCHER: Yes, sir, there is. It's
19 illegal to have a handgun in your automobile in Texas.
20 So as soon as he saw it, he knew it. But if he sees a
21 party balloon, just as if he sees a brown translucent
22 bottle, as in one of the cases noted here, just as if he
23 sees a photographic negative on the table. The case
24 Nicholas v. the State cited by the court involved an
25 officer making an arrest of an individual who is wanted

1 in another city. The officers walk in. There is some
2 negatives on the table. They pick them up, have to hold
3 them to the light. Once they hold them to the light
4 they see that it shows that defendant engaged in sexual
5 activity with a child. A criminal proceeding results
6 from that.

7 Was the negative evidence of a crime? Yes, it
8 was. Was the officer lawfully where he was? Yes. Did
9 he inadvertently come across it? Yes. But did he know
10 that the negative was evidence of a crime? No, he
11 didn't until he picked it up, held it to the light and
12 saw it.

13 QUESTION: So the Texas Court of Criminal
14 Appeals held that that negative was not seizable?

15 MR. BUTCHER: That's correct.

16 QUESTION: Although if it had been a print in
17 the same place, it would have been seizable.

18 MR. BUTCHER: That's right. Because it was
19 not immediately apparent to him.

20 QUESTION: I see what you mean about the Texas
21 Court of Criminal Appeals having a different doctrine
22 than the federal Constitution.

23 QUESTION: How do you distinguish? You
24 described this little process of the tinfoil package
25 that the officer said he was accustomed to seeing as the

1 mode of delivering drugs. How is that essentially
2 different from this case where he said he had had
3 experience, prior experience with drugs, granulated
4 substances inside of a toy balloon?

5 MR. BUTCHER: Well, I --

6 QUESTION: Why isn't the balloon just like the
7 tinfoil package?

8 MR. BUTCHER: It would be if the officer had
9 said that. In other words, the officer doesn't clearly
10 state that he knows that heroin is kept in balloons or
11 that any controlled substance is kept in balloons. He
12 says that he made an arrest the year before involving a
13 balloon and heroin --

14 QUESTION: Well, then, what did he mean --
15 I'll read that question to you again. Question: "So he
16 was arrested on the suspicion that the green balloon
17 that you found contained a controlled substance, some
18 type of controlled substance?" "Yes, sir."

19 How could he say it more plainly than that?

20 MR. BUTCHER: But he didn't give any rational
21 basis for why he believed there was a controlled
22 substance in there.

23 QUESTION: Well, let me ask you this. Suppose
24 at -- suppose at the suppression hearing the officer
25 testified exactly like this, and the judge said well, I

1 don't think you've really spelled out this -- why you
2 thought that was -- so the prosecutor says well, I'll
3 call an experienced officer and have him testify. And
4 the officer says a hundred thousand times he's -- he
5 gives all the explanation anyone could possibly give
6 which would indicate that at the time in fact there was
7 probable cause to seize the balloon.

8 Now, would you say that it would violate the
9 Fourth Amendment for that also to have seized it without
10 being able to testify to anything?

11 MR. BUTCHER: Well, I recognize I'm going
12 counter to the -- to the -- to the opinions, but it
13 would seem to me that the officer -- the officer making
14 the stop, he's the one who has to recognize that he's
15 got probable cause in front of him. After the fact or
16 new information and so forth I don't think ought to
17 reach back to justify the seizure. If the officer at
18 the time of the incident --

19 QUESTION: Do you -- do you -- do you have --
20 do you have cases to that effect?

21 MR. BUTCHER: No, sir.

22 QUESTION: You've got cases on the other side,
23 don't you?

24 MR. BUTCHER: Yes.

25 QUESTION: In this Court.

1 MR. BUTCHER: Yes.

2 QUESTION: How does the Texas court treat that
3 problem? Do they consider it significant as to whether
4 the officer himself had knowledge? I mean maybe we
5 don't require it, but maybe as a matter of Texas law
6 they do. Or you're not arguing that?

7 MR. BUTCHER: I don't know. I don't know of
8 any Texas cases on that point.

9 QUESTION: You don't think it was enough in
10 this case that the fellow who examined the -- who did
11 the forensic examination, he said how many drug analyses
12 have you done? He says thousands. "And do you find
13 it's common or uncommon to discover that there's
14 controlled substances quite frequently housed or
15 contained in balloons such as this?" "Yes. It's quite
16 common."

17 MR. BUTCHER: Yes, but that testimony was from
18 Frank Shiller, the chemist.

19 QUESTION: I understand.

20 MR. BUTCHER: It still would bother my sense
21 of justice if --

22 QUESTION: Yes. All right.

23 MR. BUTCHER: -- You will --

24 QUESTION: Okay.

25 MR. BUTCHER: -- That the officer doing the

1 act did not have the probable cause, and we shouldn't
2 bootstrap it with somebody else's knowledge.

3 QUESTION: Does it trouble your sense of
4 justice or your sense of procedure?

5 MR. BUTCHER: I think it troubles my sense of
6 justice. Well, it's a close call. It's a close call.

7 QUESTION: Let me ask you another question
8 about your Texas procedure. The opinion ends referring
9 to the negative case and the brown bottle case, I guess
10 it was. Were those -- those are both Texas cases.

11 MR. BUTCHER: Yes.

12 QUESTION: Were they decided -- do you know
13 whether they were decided on Fourth Amendment or Texas
14 grounds?

15 MR. BUTCHER: It's not clear. They cite
16 Coolidge as a jumping off point, but -- and that's the
17 thing, I think, that needs to be kept in mind. Coolidge
18 started -- Coolidge is 1971, as I recall. The first
19 application of it in Texas was Nicholas, and that's a
20 1973 case, and that is the photographic negative case.
21 Then it expands to 1977 with the Duncan case which is
22 the bottle, the brown bottle, et cetera.

23 And you don't find any other federal cases
24 cited. You will always find Coolidge, then Nicholas,
25 then Duncan, then Howard, now Brown.

1 I think this is a narrow holding, and it
2 really carries forward a line of cases that I just
3 recited, and just applies the holdings of those cases --
4 Duncan, Howard, et al., to a specialized set of
5 circumstances; that is, green balloons in this case.

6 There is a red balloon case, DeLoa v. the
7 State, a 1977 one, where again the officer making an
8 arrest found a red balloon on the window sill. He
9 seized it. It was in fact heroin. That was ruled
10 inadmissible, again because the officer failed to
11 articulate a rational basis for his arriving at the
12 conclusion that he had evidence of a crime before him.

13 So this is not the first balloon case. This
14 is the second balloon case. You've got a red one in '77
15 and then one now.

16 QUESTION: This isn't also a case. You said
17 there weren't any cases that were decided on the ground
18 that the officer was unable to articulate the reasons
19 for the arrest. Now you're saying that's such a case.

20 MR. BUTCHER: Oh, no. No. I'm sorry. I did
21 not communicate effectively. There are cases -- in
22 fact, all of those -- Duncan, Howard, DeLoa, and
23 Nicholas are all examples -- well, Nicholas would not,
24 but the others are examples. For example, seeing the --

25 QUESTION: Examples of what?

1 MR. BUTCHER: Examples of incidents where you
2 had an innocent item there that did in fact contain a
3 controlled substance, but the officer was unable to
4 articulate a rational basis for arriving at the
5 conclusion that he had --

6 QUESTION: Well, then, is it -- are you
7 arguing -- I sometimes have difficulty being sure what
8 you're arguing -- but are you arguing that there is a
9 set of Texas cases that sets aside searches on the
10 ground that even if there might have been in an
11 objective sense probable cause, it was nevertheless bad
12 because the officer could not testify to facts that
13 prompted him to do -- to make the seizure?

14 MR. BUTCHER: Yes. Now, again --

15 QUESTION: Now, that may be a different rule
16 than we apply.

17 QUESTION: Well, those three cases you say,
18 though, didn't say -- didn't say that objectively there
19 might have been probable cause, but the officer just
20 didn't articulate it.

21 MR. BUTCHER: That's correct.

22 Thank you.

23 CHIEF JUSTICE BURGER: Very well.

24 Do you have anything further, Mr. Marshall?

25 ORAL ARGUMENT OF C. CHRIS MARSHALL, ESQ.,

1 ON BEHALF OF THE PETITIONER -- REBUTTAL

2 MR. MARSHALL: Yes, Mr. Chief Justice, if I
3 have time to make just a couple of points.

4 First, I think respondent is attributing to
5 the state court a finding it didn't make; that is,
6 something about articulating the basis for probable
7 cause. My recollection is that *Simpson v. State*, which
8 is cited in Judge McCormick's dissent below, will make
9 clear that Texas has always looked to the objective
10 facts, not to the officer's subjective state of mind to
11 look to probable cause.

12 I'd also say that I believe it's true, as
13 Justice White says, that this case could be decided in
14 the State's favor without mentioning the plain view
15 doctrine, because cases such as *Chadwick*, *Sanders*, and
16 *G.M. Leasing* seem to indicate that the mere seizure of
17 an item can be based on probable cause as opposed to
18 what might need to be shown for the search of it.

19 QUESTION: Well, you can arrest a person on
20 probable cause.

21 MR. MARSHALL: Certainly. Under *U.S. v.*
22 *Watson*, you can arrest on probable cause. However, this
23 could be seen as a plain view case in the sense that the
24 officer did view these items in the car without having
25 to make any search, any rummaging of the car; and to

1 that extent it can be seen as a plain view case, though
2 again as Justice Stevens suggests, that could be said of
3 most -- said to be true of most any plain view case.

4 The point we want to make is that we don't
5 believe the plain view doctrine, which is what the Texas
6 court relied on, should be a restriction on the state's
7 activities, on the police officer's authority. We
8 believe that probable cause is a standard, and that's
9 what should have been applied here.

10 QUESTION: Mr. Marshall, as a general
11 proposition do you take the view that the Texas Article
12 I, Section 9 protection is co-extensive with the Fourth
13 Amendment? He cited just one case, I think, the
14 Schmurber problem, where it seemed to be different.

15 MR. MARSHALL: I was going to say something
16 about that. I believe, although I don't have the case
17 with me because it hadn't been cited before, that
18 shephardizing Escamillia would show that it has now been
19 overruled because of a recent amendment to the Texas
20 search warrant statute in Chapter 18 of our Code of
21 Criminal Procedure. And I think that decision there was
22 based not on state constitutional law, but on the
23 specific search warrant statute we had. And I think in
24 general our Article I, Section 9 is co-extensive with
25 the Fourth Amendment. I know Article I, Section 10 has

1 recently, a month ago, been held to be co-extensive with
2 the Fifth Amendment. That was in a case called Ex parte
3 Shorthaus just published at 640 Southwest Second 924.
4 And I am not aware of any case where under state
5 constitutional law we have found any special state law
6 plain view doctrine or any state law unusual or peculiar
7 notion of probable cause.

8 And again on this state law ground question, I
9 think it is very clear that every state case the Court
10 of Criminal Appeals cited here -- Nicholas, Duncan,
11 DeLoa -- each one of those the Court will find expressly
12 relies on Coolidge. In fact, in Howard v. State the
13 panel opinion in that case says, "Following the
14 teachings" of Coolidge.

15 We'd ask this Court to reverse the judgment
16 and render judgment in favor of the State of Texas.

17 CHIEF JUSTICE BURGER: Thank you, gentlemen.

18 The case is submitted.

19 We will hear arguments next in Kush against
20 Rutledge.

21 (Whereupon, at 2:02 p.m., the case in the
22 above-entitled matter was submitted.)

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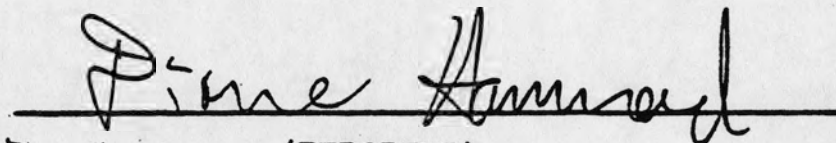
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Texas, Petitioner v. Clifford James Brown - NO. 81-419

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BY

A handwritten signature in cursive script, appearing to read "P. H. Hammond", is written over a horizontal line.

(REPORTER)