OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1167

TITLE UNITED STATES, Petitioner v. BRADLEY THOMAS JACOBSEN AND DONNA MARIE JACOBSEN

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner

v. Case No. 82-1167

BRADLEY THOMAS JACOBSEN AND DONNA MARIE JACOBSEN

Washington, D.C.

Wednesday, December 7, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:48 a.m.

APPEARANCES:

DAVID S. STRAUSS, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MARK W. PETERSON, ESQ., Minneapolis, Minnesota; on behalf of the Respondents.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Strauss, I think you may proceed when you're ready.

ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. STRAUSS: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is whether law enforcement officers must obtain a search warrant before they conduct a chemical analysis of a substance that is lawfully in their possession to determine whether it is an illegal or controlled drug.

The facts of this case are typical of narcotics prosecutions. In May 1981 the employees of Federal Express, which is a private freight carrier, opened a cardboard package addressed to Respondents that had been given to Federal Express for shipment. Inside the package was a tube wrapped in gray tape. The Federal Express employees cut open the tube and removed from inside of it a transparent container that consisted of four plastic bags, one inside the other. Inside the innermost plastic bag was a white powder.

It is undisputed that the Federal Express employees undertook all these actions on their own without any governmental involvement whatever.

The Federal Express employees suspected that the white powder might be an illegal drug and --

QUESTION: Well, they didn't -- they didn't open the plastic bag.

MR. STRAUSS: They did not open the plastic bag, that's right.

QUESTION: Would the existence of the bag in that condition amount to, in your view, immediately apparent incriminating material to authorize a plain view seizure?

MR. STRAUSS: I think it's absolutely clear that at that point probable cause existed.

QUESTION: Why?

MR. STRAUSS: That's right. Because it was a white powder packaged --

QUESTION: Any white powder package like that, there's probable cause to believe that it's contraband?

MR. STRAUSS: Yes. I don't think people send baking soda or sugar or talcum powder through Federal Express wrapped in four plastic bags like that; or at least the probability of their doing so is small enough so this constitutes probable cause. In fact, if this didn't constitute probable cause, then you're in the paradoxical situation -- it's one of the oddities of the court of appeals opinion -- that the court apparently

thought that law enforcement officers were in the position that they couldn't do anything. They would simply have had to allow this shipment to go through. They couldn't seize it, they couldn't test it. According to the court of appeals, they would simply have had to walk away at this point.

QUESTION: Do you think the knowledge they had acquired at that time before the testing, just the observation, would have been sufficient to support the issuance of a warrant to search the house after they made the controlled delivery?

MR. STRAUSS: Yes, I think that's right, because there existed probable cause to --

QUESTION: I was asking the question. Is it -- would it support the warrant?

MR. STRAUSS: Yes.

QUESTION: And you think it would.

MR. STRAUSS: In my view it would, yes, because it would establish probable cause to believe that that was contraband, probably cocaine, and after delivery there would be probable cause to believe it was cocaine.

QUESTION: Is that -- there must be a lot of cases then supporting your view that any time you see a white powder in plastic bags, you have probable cause to

believe it's contraband. Are there a lot of cases like that?

MR. STRAUSS: Well, actually not just --

QUESTION: Does anybody ever get a warrant when they see white powder in a plastic bag, or do they just automatically open up the bag?

MR. STRAUSS: Well, they conduct a field test, that's right. And every other court that has looked at this situation has not had any difficulty with their conducting a field test, and the field test, of course --

QUESTION: Well, the field test is one thing, but getting in the bag -- getting in the bag is another. I take it your position wouldn't be any different if the bag had been not transparent but opaque. And yet you had -- suppose you had had private information, reliable private information that there was cocaine in that bag; namely, you had probable cause to believe there was cocaine in the bag, which is no different than the kind of probable cause you say existed here where it was transparent.

MR. STRAUSS: No. I think --

QUESTION: Could you then -- could you then open the bag?

MR. STRAUSS: I think it would make a difference if the bag were opaque.

QUESTION: Why? Why?

MR. STRAUSS: Because the Court said in Arkansas against Sanders that certain containers don't support a reasonable expectation of privacy because their contents is immediately --

QUESTION: Well, yeah, but what if you had probable cause to believe there was cocaine in that opaque bag?

MR. STRAUSS: Well, at least certain opaque containers. If, say, it were an attache case or something like that, probable cause, of course, is not --

QUESTION: Well, what about an opaque plastic bag, and you had probable cause to believe there was cocaine in it. Could you tear it open and field test it?

MR. STRAUSS: Well, the question would be whether under what the Court said in Arkansas against Sanders that container supported a reasonable expectation of privacy.

Now, an opaque plastic bag I think would be a borderline case. A transparent plastic bag is not a borderline case. A transparent plastic bag is the best example of a container that, to quote the Court's words in Arkansas against Sanders, "containers that by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from

their outward appearance."

There is no inference going on here. The contents were immediately apparent from the outside -- from the outward appearance because the container was transparent.

QUESTION: Well, that is -- it's just not the contents, but it's the fact they're wrapped up in a plastic bag and shipped by Federal Express.

MR. STRAUSS: That's right. But there's no question at all those things were lawfully apparent to the DEA agents when they arrived.

QUESTION: Ycu wouldn't say that if you have a search warrant for an apartment to hunt for some object and you run into a white powder sitting around in a glass somewhere that that's immediately seizable as cocaine, would you?

MR. STRAUSS: Oh, no, certainly not.

QUESTION: It may be somebody's ashes.

MR. STRAUSS: I think those containers are ordinarily opaque.

QUESTION: An urn.

MR. STRAUSS: In fact, the Court went on to say in Arkansas against Sanders, "Similarly, in some cases the contents of a package will be open to plain view, thus obviating the need for a warrant."

Now, the contents of this package were open to plain view, and that obviated the need for us to obtain a warrant to open the transparent container.

QUESTION: So you think the plain view exception just covers this case and that's the end of it.

MR. STRAUSS: Well, the plain view exception authorized the -- authorized the agents to take a few grains of cocaine.

QUESTION: To open the bag and take a few grains.

MR. STRAUSS: That's right. To open the bag and take a few grains.

QUESTION: That still leaves a question of the test.

MR. STRAUSS: That's right. That leaves the question of the test. And that, in our view, is the principal issue in the case.

Now, before I get to the merits of the test, I would like to say a word about why we considered this issue to be of considerable importance.

The chemical analyses of substances suspected of being narcotics are absolutely routine in narcotics prosecutions. They are undertaken in virtually hundreds, if not thousands, of cases a year. And to hold that every time a chemical analysis is undertaken

of a substance that the -- the possessor of which has not consented to the analysis in some way, that every time that occurs, a warrant must be obtained.

QUESTION: But you -- you -- you agree before the test should be administered that you at least ought to have probable cause to believe that it's contraband or not.

MR. STRAUSS: No, we don't need probable -- it's not a search within the meaning of the Fourth Amendment.

QUESTION: So -- so in my example when you're searching the apartment for a stolen piano, you see on the -- you see on a shelf a white powder in a glass, you can just take a pinch of it and test it, even though you have no reason to believe whatsoever that it's contraband.

MR. STRAUSS: I -- that -- that is our position, Justice White. I think that is the right view.

Now, let me say as I say that that -- that we don't think and we're not asking the Court to say that there is no circumstance at all --

QUESTION: Well, you are, though. You are, though. You're saying that it's not a search at all subject to the Fourth Amendment to field test any white powder that you find anywhere.

MR. STRAUSS: Well, that -- that is, we are not asking the Court to go so far as to say there couldn't be some circumstance in which someone could make it clear that they attach unusual privacy values to a substance. Maybe Justice Rehnquist's example is a good example. If it were clear that this was a --

QUESTION: An ashes urn?

MR. STRAUSS: An ashes urn, something which had unusual privacy attributes, we're not asking the Court to say that some such extraordinary case might not come along in which we would be required to have some quantum of suspicion. But this is clearly not that case. No one suggested that a white powder package like this in a transparent container shipped like this had the privacy attributes associated with someone's ashes in an urn. And --

QUESTION: Of course, you don't need to go that far in this case because you claim you had probable cause to believe that it was cocaine or was a drug.

MR. STRAUSS: Yes, yes. I -- well, I --

QUESTION: And at least in those cases you think you ought to be able to field test.

MR. STRAUSS: Oh, yes, certainly, a fortiori, if we have probable cause.

QUESTION: But how -- how much difference does

-- do the two alternate methods of analysis make, because your position is that every time you see white powder wrapped in several sacks in transit, you have probable cause to believe that it's contraband. So that there really isn't any independent determination or additional factual determination that you make once you have those facts before you.

MR. STRAUSS: Well, in this case and in a case similar to it we will have probable cause. There may be many instances in which we would have suspicion not amounting to probable cause. We might come across a substance like this in the course of a search incident to arrest or of a car search.

QUESTION: Well, maybe we ought to wait until we get a case like that.

MR. STRAUSS: Well, there is -- there was undoubtedly probable cause in this case. And if the Court's view is that we need probable cause to conduct this test, we are entitled to win this case.

But there are instances in which substances -- where you have only reasonable suspicion to believe that a substance is contraband, and to require warrants in those cases would, we think, not serve -- or to require probable cause in those cases would, we think, not serve the interests --

QUESTION: Mr. Strauss, may I ask a question about the record? Does the warrant application appear in the record, and if so, where, in the materials before us?

MR. STRAUSS: It's in the record. It's not in the -- it's not in the Joint Appendix.

QUESTION: Am I correct in assuming, because otherwise I have difficulty understanding the court of appeals, that the warrant application did not spell out the elements of probable cause other than the results of the field test?

MR. STRAUSS: Not quite, Justice Stevens. It did not -- it did not supply all of the details of the package.

QUESTION: So it's conceivable that the warrant application would not have been sufficient without including the -- it's conceivable. I'm not asking you to make an admission on that.

MR. STRAUSS: It is conceivable.

QUESTION: Yes.

MR. STRAUSS: It is no more than that. We don't think that's right.

QUESTION: Because if you had ample probable cause apart from the field test, I imagine you could protect yourself by filling out a warrant applicatcn

that did not rely on the field test.

MR. STRAUSS: Oh, yes. I mean we -- we presumably could have obtained a warrant to search the house without the field test, and then the search of the house --

QUESTION: And in that circumstance the field test really would just have served to protect the -- the owner of the powder from the risk that you were making a mistake.

MR. STRAUSS: That's exactly right. And that is often the function that these field tests serve. I mean very often that is true. Very often the investigation could go forward quite properly without the field test, and it is better --

QUESTION: But often it couldn't.

MR. STRAUSS: Sometimes it couldn't. Sometimes --

QUESTION: If there was just reasonable suspicion.

MR. STRAUSS: Sometimes the next action the officers would take would require more than reasonable suspicion. But very often, as in this case, the officers could have gone forward without it and search the house.

QUESTION: Let me take you back to the agents

who are searching the premises for the piano that Justice White suggested, and in the kitchen of the house they see a sugar bowl with sugar. Do you distinguish that from -- on the -- the basis that white substances in a sugar bowl in a kitchen of a private home are somewhat different from a white powdered substance encased in three or four plastic bags in interstate commerce?

MR. STRAUSS: Well, they are undoubtedly different, Mr. Chief Justice. And, for example, the sight of white sugar in a sugar bowl would not authorize an arrest of the persons in possession of the sugar bowl, because they wouldn't have probable cause to believe it was cocaine.

But I think that's a good example of why a field test simply does not invade significant expectations of privacy. I don't think any reasonable person would object if in the course of a search of his house the police officers took a pinch of sugar and exposed it to some chemicals to see if it was cocaine. I mean his house is being searched, after all, pursuant to a warrant, by hypothesis lawfully. And that additional --

QUESTION: Yeah, but you don't search a sugar bowl for a stolen piano.

MR. STRAUSS: No. Our argument is not that the warrant authorized the search of the sugar bowl. Our argument is that the testing of a few grains of sugar is not a search, because no reasonable person would think that his privacy had been additionally invaded by that action. After all, what will they discover? They will discover that what was in the sugar bowl was sugar, which is what it was labeled as from the beginning. They simply haven't invaded that person's privacy by learning that he keeps sugar in his sugar bowl.

QUESTION: Well, this -- this problem is -- becomes complicated because when it's discovered that it's just sugar, the householder doesn't complain; it's only when they discover that it's marijuana or hercin that the complaint begins.

MR. STRAUSS: That's exactly right, Mr. Chief Justice. This -- this is one of those investigative techniques that invades principally the privacy -- and I put "privacy" in quotation marks -- of guilty persons, of persons who are concealing contraband, who are trying to ship contraband.

QUESTION: I thought people were innocent until they were proved guilty.

MR. STRAUSS: Well, people are innocent until

they are proven guilty.

QUESTION: Yeah, but obviously you don't -- you don't pay any attention to that.

MR. STRAUSS: No, of course I pay attention to that, Mr. Justice Marshall. People are innocent until proven guilty. But I think there is a meaningful sense in which we can say that a person in possession who -- whom you and I would agree is in possession of contraband, is a guilty person. And it was only in that sense that I was using the term. No one is suggesting that consequences be visited on these people on the basis of a field test.

QUESTION: Mr. Strauss, may I ask one other question about the record? At the time the bags or the article was given to the DEA agent by the Federal Express was the white powder visible?

MR. STRAUSS: That is a matter of some dispute in the record, and I believe the district court did not --

QUESTION: He didn't resolve it.

MR. STRAUSS: -- Resolve it. Because he viewed it as immaterial, and I think he was right, Justice Stevens. There is no question that the DEA agent -- that the Federal Express employees summoned the DEA agents for the purpose of showing them the white

powder. And whether they showed it to them by taking it out of the bag and showing it to them in their hands or simply by saying it's over there in the bag, go take it out for yourselves, can't be a matter of constitutional significance.

QUESTION: Well, it could be if you followed Justice White's opinion in the Walther case.

MR. STRAUSS: Well, I -- I don't -- I don't think that's right. I think that is a -- that was a different situation where the -- the law enforcement agents came across the information -- the viewing of the film in that case -- not because a private person showed it to them or wanted to show it to them, but simply because the private person happened also to have done it.

Where you have a case in which the private person deliberately intends to reveal something to law enforcement officers, the precise way in which he reveals it I think is immaterial.

In Burdeau against McDowell, which is, of course, the fountainhead of the private search doctrine, the private party sent some documents to the government. Now, I'm sure they didn't send it to them in a way that the contents of every document was available -- was immediately apparent on plain view at a glance. I'm sure they sent it to them in a stack, and

the government agents had to leap over some documents. But there is no question in that case the government was entitled to look at all the documents.

QUESTION: Mr. Strauss, would it be your view that any time an officer comes in to lawful possession of an item which he has probable cause to believe is incriminating that the officer is entitled to subject that item to any scientific test? Or maybe it's a blood stain, maybe it's in this case cocaine. But any scientific test to determine its true composition?

MR. STRAUSS: Your hypothesis --

QUESTION: Without -- without a warrant to do that?

MR. STRAUSS: Your hypothesis was -- yes, it would be our view that he does, yes, that's right.

I think the best way to understand what a truly minimal intrusion a chemical analysis is is to use the court of appeals' own analogy, which was, of course, to the Walther case where the court held narrowly that the viewing of a film was a search subject to the warrant clause. Viewing a film belonging to another person or listening to another person's tape cassette, which is a similar activity, is vastly more intrusive than conducting a chemical analysis. A film or a tape can reveal a great deal about a person's interests or

tastes or thoughts or associations or political views or private life. And a chemical analysis does not reveal anything comparable, because people simply don't lock their secrets into the molecular structure of a substance in the way that they might place private thoughts on a tape, or private activities on a film, or private effects in a locked container.

And in this case, for example, if Respondents had not been implicated in a shipment of cocaine, a chemical analysis of that substance that the DEA agents -- the Federal Express people and the DEA agents found, might have revealed that the white powder wasn't sugar, which is what it first appeared to be, but was actually baking soda or talcum powder.

Now, it's just not the kind of invasion of privacy that reasonable people care about. And there is no basis for comparing that to the far more intrusive law enforcement measures that the Fourth Amendment properly regulates.

Now, as I understand Respondents' position, they don't squarely join issue with us on the question of whether the chemical analysis was a search within the meaning of the Fourth Amendment, and they instead seem to think that it was the steps leading up to the chemical analysis -- the opening of the plastic bag and

the extracting of a few grains of the substance -- that constituted a search.

QUESTION: Is it established it takes just a few grains?

MR. STRAUSS: Yes. There was testimony to that effect, Justice Blackmun. Less than a gram and a trace amount I believe were the descriptions the agent used.

As I said before, this was the opening of a transparent container which is the quintessential example of a container that can't support an expectation of privacy. The example the Court used in Arkansas against Sanders was a gun case, but however much a gun case reveals from the outside about its contents, a transparent container reveals much more. And if a gun case can't support a reasonable expectation of privacy, then, a fortiori, a transparent container cannot.

And the next thing they did was to extract a few grains. In our view this was simply de minimis, and therefore, not within the Fourth Amendment. But if it wasn't de minimis, there is no possible sense in which it was a search. It must have been at most a seizure. And the Court has said many times, twice last term alone, that a seizure can be justified on the basis of probable cause without a warrant. And as I said, it's

clear that the agents had probable cause here.

I'd like to save the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Peterson.

ORAL ARGUMENT OF MARK W. PETERSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. PETERSON: Thank you, Mr. Chief Justice, and may it please the Court:

I must confess that the Government and the Respondents view the issue in this case as being totally different. I submit to the Court that the issue in this case is not whether police officers are required tc get a search warrant every time they want to submit a suspected contraband substance to testing; and rather, the only issue which is involved in this case is whether police officers who lawfully come into possession of a -- of an item which was subjected to a prior private search may extend the scope of that search without obtaining a search warrant, assuming that no exceptic is present.

The result which we maintain and which was --

QUESTION: Do you concede -- do you concede, Mr. Peterson, that had the information that's described in this record been presented to a magistrate before

they did the testing, a warrant would properly issue for the opening of the bag and the testing of the contents?

MR. PETERSON: No, I do not concede that, Mr. Chief Justice. As indicated, the search warrant affidavit is not before this Court. It was before the Circuit Court of Appeals. And they specifically stated in their opinion that had it not been for the results of the field test, there would not have been a sufficient basis for a search warrant. And therefore, because that -- that particular finding has not been challenged here except by implication, I do not make that concession.

QUESTION: Well, do you think a warrant could have been issued without the testing, a warrant issued for the search of the house after they made a controlled delivery, on the information that is now available?

MR. PETERSON: If we assume that the narcotics agents viewed the same thing that the Federal Express people did and put in --

QUESTION: That's -- that's -- that's in -- that's this record, isn't it?

MR. PETERSON: They did view the same thing, but the -- I simply can't recall what was in the affidavit. But if we make those assumptions and if the case had been decided after Illinois v. Gates, I think it's a likely possibility that the warrant may have been

issued. But that simply is not before the Court at this --

QUESTION: You think we -- you think we -- as the case comes here there -- there's been a holding that there was no probable cause prior to the testing, and that's the way we should judge the case?

MR. PETERSON: That's -- that's correct, Mr. Justice White.

QUESTION: And the only way the Government then can win the case is by our holding that the -- that the testing is not a search at all subject to the Fourth Amendment.

MR. PETERSON: That is my view of this case.

QUESTION: This isn't quite fair to the Eighth Circuit. Wasn't their precise holding that there was no probable cause set forth in the application for a warrant? I mean they didn't hold that the facts could not have -- might not amount to probable cause if they'd been assembled and presented in a different warrant application.

MR. PETERSON: I'm sorry, Justice Stevens. That is accurate.

QUESTION: Well, what about -- but your position is that -- that there was no probable cause just from looking at this white powder in plastic bags.

MR. PETERSON: No. We have -- we have conceded, both in our brief and below, that the appearance of the white powder in the plastic baggies in the circumstances of this case provided reasonable grounds for a seizure, but that is a totally different question from the question which we submit --

QUESTION: Well, then, you -- you think they could have gotten a warrant then. They just -- from looking at the powder in these bags.

MR. PETERSON: In all likelihood, they could have gotten a warrant if they had seized it, presented the facts known to them at the time to a United States magistrate. There's little doubt in my mind that they would have obtained a warrant for the entry of the packages --

QUESTION: Well, then, you -- a valid warrant.

MR. PETERSON: Correct.

The point I was attempting to make earlier is that the result which we maintain in this case would not require search warrants for all chemical tests, the vast majority of them are valid for other reasons, usually because there's a prior Fourth Amendment justification for the testing itself. We are submitting that a search warrant is only necessary when the Government expands the scope of a prior private warrantless search.

Now, our position here is very simply stated: that being that the opening of the baggies, the withdrawing of the substances and the chemical testing does in fact constitute a search. There was no warrant present. Those items were discovered in a previously sealed and wrapped package which is clearly protected by the Fourth Amendment. Therefore, because there was no exception to the warrant requirement present, Walther and a litany of this Court's decisions require the holding that the search was invalid.

I would also submit to this Court that following Walther will further an important goal which has been identified at a number of this Court's recent Fourth Amendment decisions.

QUESTION: Which of the prevailing opinions in Walther do you suggest that we follow?

MR. PETERSON: Well, I'm suggesting that you follow Justice Stevens' opinion. I am not here arguing the -- the basis for the holding which Justice White would have reached in his concurring opinion. And I think that the items which were focused upon by the four dissenters in that case are not present in this case. In particular, the fact that one of the major points made in the dissenting opinion was the fact that the condition of the packages or the containers within which

were the films at the time the FBI was contacted to come and look at them was brought on by actions of the consignor of the packages themselves; in other words, sending it to a fictitious address, not picking it up for a lengthy period of time. The point being what was the recipient of the packages supposed to do except to try to find out who they belonged to. And we simply don't have that situation here.

The condition of the package at the time the DEA came upon it was due to circumstances which were entirely beyond the control of the Respondents.

QUESTION: Well, if they'd sent it in a better package, perhaps it wouldn't have broken open.

MR. PETERSON: That perhaps is correct, but I believe there is some evidence in the record -- and I confess I can't recall if it's in the Joint Appendix -- that the damaged package was due to the actions of Federal Express because it was punctured with a forklift or something like that. In any event, there were circumstances beyond their control.

The standard which I was mentioning before and which the Court has identified as important is a single familiar standard to guide the police who are out in the field making on-the-spot decisions, and they have to know what rule is going to control their behavior.

I would submit that by following Walther in this case, that standard will be not only reaffirmed but also be made clearer. It's very simple. After private parties have conducted a search of an item such as a package, the police can examine it to the same extent that the private parties did, but they can go no further if there is an expectation of privacy in that particular item without obtaining a search warrant.

It's simple, it's identifiable, and it's easily implemented; and we submit that it should be followed in this case.

QUESTION: Then how do you respond to your opponent's argument based on Burdeau against McDowell that this stack of papers were turned over to the -- to the Government, and they don't really know the extent to which the private party might have read all those papers?

MR. PETERSON: Well, the -- the simplistic response to your question, Justice Stevens, is that they should call the private party and find out. When you're dealing with private papers, of course, you do have -- you have another problem because of the possible Fifth Amendment implications of your activity.

But I would suggest that the prudent thing to do in that situation would be to since you have the item in your exclusive possession, dominion and control

anyway, there's no danger that you're going to lose any of it or the potential defendant is going to take it from you. You just go get a search warrant, particularly when search warrants are so easily obtainable.

QUESTION: In this case you say it's your position, I gather, Mr. Peterson, that the Government could search to the same extent that the FEA people had searched; so that would have left them at the most extreme point of the FEA's -- looking at a clear plastic bag with powder inside.

Now, do you concede at that point that they would have had probable cause to seize that as contraband?

MR. PETERSON: Yes. I can seize -- I concede, excuse me, Justice Rehnquist, that they had probable cause to seize it at that time, and that's exactly what they should have done and then gone to get a warrant which they got within a hour anyway.

QUESTION: So you think that although they had probable cause, since they did not have a warrant, the -- the seizure fails because that is the kind of seizure for which a warrant is required?

MR. PETERSON: No. The seizure does not fail. They clearly had the right and in fact the duty

to be in possession of that package. It was obviously suspicious to them. But they should have done nothing further with it until they got a warrant if they were going to physically enter the package further than the Federal Express people had entered it and then conduct a scientific examination; in fact, destroy some of the evidence in the process.

QUESTION: Sc they -- they could seize it under probable cause, but they couldn't further penetrate its nature, whatever you want to call it, its molecular structure without getting a warrant.

MR. PETERSON: That is our position.

QUESTION: Well, I think a separate point is they couldn't open the package either.

MR. PETERSON: The -- and I'm going to get hung up in words here -- they could open the -- the big package itself --

QUESTION: Well, I know, but could they open the plastic bag?

MR. PETERSON: It's -- it's my position that they should not have opened the plastic bags themselves because they had not been previously opened. They should have not gone inside the plastic bags, they shouldn't have taken anything out, and they shouldn't have subjected it to a chemical test.

QUESTION: But you would still be here even if the bag -- if one of the plastic bags had been opened and the -- they still couldn't have done anything but seize and then get a warrant tc do the test.

MR. PETERSON: That is my submission, Justice White.

QUESTION: Could they have applied for a warrant at that stage without opening the bag?

MR. PETERSON: Based upon the information that they had from Federal Express, based upon the appearance of the container --

QUESTION: The appearance of the container.

MR. PETERSON: -- They certainly could have. And as I think I -- I indicated before, they probably would have gotten one.

QUESTION: They would have gotten it.

QUESTION: In your brief -- I believe it was in your brief, Mr. Peterson; perhaps it was in the Eighth Circuit opinion -- the position is taken that this case is fairly unique and that most field tests simply wouldn't present this problem because they're bags that are seized from someone who is arrested as a result of a search.

But under your analysis I would think even though it's seized as a result of a search incident to

arrest, wouldn't you still need a warrant to conduct a field test?

MR. PETERSON: That is a question, Justice Rehnquist, which I think would probably be answered based upon this Court's decisions in New York v. Belton and United States v. Robinson.

In Robinson, as you will recall, the Court held that incident to a valid arrest you can search the entire person of the person arrested, and in that case the issue was whether you could search a rumpled -- rumpled up cigarette package containing cocaine.

In Belton the issue was the permissible scope of a search incident to a valid arrest in an automobile. You held that you could search the entire interior or the automobile, all the containers found within, and I believe the person as well. So if -- if that issue were to arise based on those two decisions primarily, the holding would probably be that no warrant would be required.

QUESTION: Well, Mr. Peterson, suppose -- suppose the Government has an informant -- has an undercover agent and he goes around and buys -- and is -- and buys some drugs off of a pusher. And he comes back and says I've just bought this drug, paid $100 for it, and so the Government goes and arrests the pusher,

and they indict him, and at the trial they offer the drug in evidence. And they put on an expert and say yes, this is really -- this is really a drug.

And the pusher gets up and says I've been talking to Mr. Peterson, and this evidence is not admissible because they didn't have a warrant to test the drug.

MR. PETERSON: Well, if Mr. Peterson were present, he would tell the pusher that you weren't listening to what I was saying, because --

(Laughter.)

-- Once you sold that heroin or whatever it was to the informant or cooperating individual or whatever, you relinquished your expectation of privacy in that package, you didn't care what he did with it, in fact, you probably never wanted to see it again; so you had no legitimate expectation of privacy, and you have no basis for claiming that your rights were violated by what he did with that package.

QUESTION: And I suppose the same rationale vaguely could apply to incident to arrest.

MR. PETERSON: It does because there -- and the other examples of field tests or chemical tests of contraband, which Justice Rehnquist referred to, and several of which I did set forth in my brief, there is a

prior Fourth Amendment justification for the search which is involved, whether it be a valid search warrant, a hand-to-hand buy or what have you. And, therefore, I think it's accurate to say that this situation just does not arise that frequently.

One thing that I think should be discussed here is the expectation of privacy which one has in packages, and is set forth in our brief as early as Ex parte Jackson, recently reaffirmed in Place. There is a legitimate expectation of privacy in sealed containers traveling via common carrier.

I would like to emphasize one thing regarding this case, that being that as stated in the opinion in the Walther decision, a person's expectation of privacy in a package which is shipped by a common carrier is established at the time that it is shipped, not at the time that it is searched by somebody, whether it be the FBI or someone else.

And I think it's worth noting that the Government has never challenged that language in Walther; they have never addressed our assertion that that is in fact the law. And assuming that this Court still accepts that position, it's clear that the search here was a search of a package, and therefore, under Chadwick and any number of other decisions, it was

illegal.

The Government also suggests that there was no expectation of privacy in this case because there's no expectation of privacy in the molecular structure of contraband. Once again, we're dealing with the expectation in the package itself, not what that package contains, and --

QUESTION: But you said there was probable cause to seize the package because of a belief that it had contraband. How much privacy interest is left in the package after -- because of just looking at it you can have probable cause to seize it for contraband?

MR. PETERSON: There may be very little privacy interest left, Justice Rehnquist. And in this case, as it turned out, perhaps the only privacy interest left was the molecular structure of the substance. But in another case there might be personal papers in the package, there might be other --

QUESTION: Well, but in -- in that case it might well be that there wouldn't be probable cause to seize the package or the papers because it wouldn't be at all evident that they were contraband. I don't believe the Government here takes the position that just because you can see into the -- see the outline of the contents that's probable cause to seize it. It has to

be something a good deal more suspicious than that.

MR. PETERSON: Well, it was my understanding that the Government stated every time you see white powder in plastic baggies, that's probable cause to believe it's contraband. And --

QUESTION: But they didn't say every time you see papers in a plastic sack it's cause to believe it's contraband.

MR. PETERSON: The only point I was making is that if you -- if you assume that the presence of such a plastic baggie in a package provides probable cause to seize that package, then whatever else is in there, if it is anything else, apparently you don't have an expectation of privacy in that either.

QUESTION: I didn't think the Government's submission was based just on the fact it was a baggie, but that you could see a white powder in a baggie, and that the combination was what gave you probable cause.

MR. PETERSON: Well, maybe that is the case. In any event, I disagree with the Government's contention that a plastic baggie containing powder or any transparent container of powder is so uniquely attributable to contraband that you can automatically seize it and search it.

But in this case, as I've stated before, I

have conceded the propriety of the seizure of the bag. It's what they did with the bag afterwards that I am concerned about.

QUESTION: Let me put --

MR. PETERSON: Excuse me.

QUESTION: Let me put this hypothetical to you. The carrier, Federal Express or whatever, comes on a package which by reason of its shape and its weight which is -- and its lack of heavier packaging because of the weight, they conclude there's something dubious about it because it's addressed to some people in Dublin, Ireland. And they call in the FBI, and they run it through an x-ray, and they see that it's a whole bunch of automatic pistols or machine guns or whatever, but it has been declared something else.

Is the taking of that x-ray a search in the same way you say the testing of the powder is a search?

MR. PETERSON: Well, it might be a search which is valid under the border search exception if it were going to --

QUESTION: This isn't incoming; this is outgoing. It hasn't left the continental limits of the United States yet.

MR. PETERSON: Okay. Assuming that the border search exception does not apply, I think the argument

can be made that clearly you have an expectation of privacy in that package. The question is whether due to the suspicious circumstances which you described, Mr. Chief Justice, there should be an exception allowing examination.

The argument can be made that that is in fact a search because it is a scientific entry of a place where you have a legitimate expectation of privacy, but due to essentially, I guess, the exigency of the situation and the suspicious circumstances, it may not be held to be a search.

I guess it's probably closer to the dog sniffing situation in United States v. Place, which although this Court held that that was not a search because there was no physical --

QUESTION: But dog sniffing is no intrusion. The dog is smelling what comes out of the package.

MR. PETERSON: That's correct, Justice Marshall. And although I don't believe that that was clearly explicated in that -- that opinion, that perhaps is the basis for it. There is no -- there was no physical entry of the suitcase which was sniffed, and it was in a public place, and certainly there was no destruction of any of the contents of the suitcase. So I don't think that supports the fact that there was no

search here.

I think it's been clearly recognized by this Court that although containers or packages are the items in which privacy expectation is recognized, the true principal privacy interest is in the contents themselves, as recognized in Chadwick.

Secondly, the Government has suggested that the Fourth Amendment does not apply to contraband or the molecular structure of contraband. They cite no cases in support of that proposition. I would submit that this Court's decision in United States v. Jeffers, which is cited in our brief, plus a number of other cases where there were an expectation of privacy -- in pornographic films, or drugs, or illegal phone calls, illegal coins, what have you -- has been found would support our position that the Government is simply incorrect.

I'd like to discuss the so-called plain view doctrine under the circumstances of this case, and my basic position is that it simply is irrelevant, and it does not apply for a number of reasons.

Number one, application of the plain view doctrine ignores the fact that the expectation of privacy of Respondents is based upon the condition of the package at the time it was sent and not afterwards.

But even setting that aside, the plain view doctrine applies to seizures. And as I've stated before, I've never challenged the seizure in this case. The police were in lawful possession of the package itself.

Now, at one point the Government in its brief calls the entry of the packages and the testing just another seizure in addition to the one which had already taken place. I would submit that that is just playing with semantics, and it just doesn't make any common sense.

The Government also cites the decision in United States v. Lisk, which is an opinion of Justice Stevens when he was a circuit court judge. There he stated, among other things, that a search involves an invasion of privacy; a seizure is a taking of property.

I would submit in this case that the package was seized when the DEA came into possession of it. Everything that happened after that was a search. The fact that what the DEA did to the package was a search is supported by Cardwell v. Lewis where the taking of paint scrapings was a search; Cupp v. Murphy where the taking of fingernail scrapings was a search --

QUESTION: Mr. Peterson, may I interrupt you?

If you emphasize that the slitting open the plastic bag and taking the trace out to test it is a

search rather than a seizure, would your case be precisely the same if the bag had had a tiny rip in it at the time this all happened?

MR. PETERSON: And the agents just dumped the powder out to test it?

QUESTION: Just took a little bit out of what was -- which they could get to without having to -- do you rely at all on the ripping -- on the puncturing? I think you do not, as I understand you.

MR. PETERSON: I guess my case might be a little bit more difficult, but I don't think it would be crucial had it happened that way.

The second reason that plain view does not apply in this case is that it's well established that in order for plain view to apply, there's got to be an antecedent Fourth Amendment justification for the police officers' presence. That clearly did not exist here. They weren't present to execute a warrant to make an arrest or anything else. They were only here to seize the package, and therefore, there was no prior justification.

The third element is that their discovery of the evidence must be inadvertent, as recently established again in Texas v. Brown. In other words, they can't have known in advance that they were going to

seize the item that they seize. Here they clearly did know about it beforehand, and they found exactly what they were looking for.

Therefore, we contend that plain view, which only applies to seizures anyway, simply does not apply in this case.

In conclusion, we -- we submit that this case is governed not only by Walther v. United States but other well-established and longstanding decisions recognizing the expectation of privacy in packages; and we would urge the Court to affirm the decision of the United States Court of Appeals in this case.

Thank you very much.

CHIEF JUSTICE BURGER: Very well. Do you have anything further, Mr. Strauss?

ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. STRAUSS: Mr. Chief Justice, just two points of clarification.

If the Court disagrees with our submission and concludes that this is in fact a search, it does not follow, as -- as has been suggested during my friend's argument, that -- it certainly does not follow that we have to obtain a warrant which, as I said, would be extraordinarily burdensome; and it doesn't even follow

that we have to have probable cause, because the privacy interests are so limited -- we think so limited they're not a search. But if the Court concludes otherwise, reasonable suspicion would surely be enough to justify this sort of limited invasion.

The second point is that when considering whether the chemical analysis is a search, it's important to remember that we're talking about substances that are already lawfully in the possession of the agents. That means they can hold it in their fingers, they can feel its texture, they can hold it up to the light, they can taste it, they can smell it. I suppose in this case they could even have used it the way cocaine users use it -- all without even conceivably violating any other Fourth Amendment interest.

And in light of that, it seems to make little sense to say that they couldn't take the more precise and obviously more desirable step of conducting a chemical analysis.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

We'll hear arguments next in Hudson against Palmer and the consolidated case.

(Whereupon, at 11:36 a.m., the case in the

above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

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