

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-850

TITLE UNITED STATES, Petitioner v. JAMES CONNORS KARO, ET AL

PLACE Washington, D. C.

DATE April 25, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

v. : No. 83-850

JAMES CONNORS KARO, ET AL. :

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Washington, D.C.

Wednesday, April 25, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:59 o'clock a.m.

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the petitioner.

CHARLES LOUIS ROBERTS, ESQ., El Paso, Texas; on behalf
of the respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in United States against Karc.

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

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Thank you, Mr. Chief Justice, and may it please the Court, this case is here on writ of certiorari to the United States Court of Appeals for the Tenth Circuit. It gives the Court the opportunity to revisit some issues that it considered last year in connection with the use of a very important law enforcement technique, the keeper.

Now, the case began when DEA agents investigating drug manufacturing activities in Albuquerque, New Mexico, through a course of investigation discovered that a gentleman named Carl Muehlenweg was acting as a front to acquire chemicals for certain illicit drug manufacturing operations, and they searched Muehlenweg's premises, and Muehlenweg agreed to cooperate with them in further investigations.

And some time thereafter he advised them that certain individuals had through him placed an order for

1 50 gallons of ether to be used in the process of
2 extracting cocaine from clothing. The agents with the
3 consent of Mr. Muehlenweg and pursuant to a court order
4 which was later held to be invalid secreted in the
5 bottom of one of the containers or actually manufactured
6 a duplicate container of ether and secreted a beeper,
7 transmitter in the bottom of the container.

8 This was picked up by respondent Karo, who was
9 followed by visual and beeper surveillance to his
10 house. Later that day the signal was no longer coming
11 from the area of Karo's house, but the container or the
12 beeper signal, at least, was located at respondent
13 Horton's house, and the agents identified the general
14 vicinity with the beeper and then walked by the outside
15 of Horton's house and were able to smell the ether
16 emanating from somewhere on the property.

17 QUESTION: Let me back you up a moment, Mr.
18 Frey. When the device, the beeper, as you call it, was
19 placed in the drum, was it placed with the consent of
20 the owner of that drum?

21 MR. FREY: It was placed with the consent of
22 the owner at that time, although of course it was known
23 that it was going to be delivered to other persons in
24 the future, but at the time there was consent. In any
25 event, whether or not there was consent I don't think

1 would be material here, because the invasion of the drum
2 at that time did not invade any property interest or any
3 privacy interest of any of the respondents, at that
4 time. But there was in fact consent.

5 QUESTION: Mr. Frey, supposing you carried
6 that to a more extreme situation. Supposing the
7 government is very anxious to monitor the movements of a
8 very suspected big criminal and they simply go to the
9 men's clothing store where he shops and with the
10 agreement of the salesperson have a beeper put in
11 whatever tie he buys.

12 Now, obviously that is a more extreme
13 situation than this, but is the logic much different?

14 MR. FREY: No, I don't think the logic would
15 be much different. The issue in this case, and the
16 Court of Appeals didn't suggest that there was any
17 Fourth Amendment violation in the installation by
18 itself. It was only the subsequent delivery of the
19 container that contained the transmitter, which in their
20 view gave rise to a Fourth Amendment problem.

21 In our view, it is the monitoring of that
22 transmitter that gives rise to a Fourth Amendment issue,
23 and not the mere silent presence of it.

24 QUESTION: Not the installation.

25 MR. FREY: I don't see how without the

1 monitoring you have either a search or a seizure that is
2 regulated by the Fourth Amendment. You acquire no
3 information from merely installing a dead or silent
4 beeper. It is of no value to you whatsoever.

5 So, in fact, suppose that the men's clothing
6 store on its own had sewn this in their customer's tie
7 and then had called up the FBI and said, we put a beeper
8 in the tie. He has come and picked it up. If you want
9 to follow him around, use the beeper. Please feel
10 free.

11 In my view, that would pose exactly the same
12 Fourth Amendment question, and therefore I don't think
13 it's the installation, even though that would have been
14 a private installation of the beeper. I think it's the
15 monitoring which may or may not constitute a search
16 under the Fourth Amendment.

17 QUESTION: Does that mean, Mr. Frey, that it
18 would also be precisely the same issue if after he
19 purchased the tie the government installed the beeper?

20 MR. FREY: Well, it might be necessary at that
21 point for them to seize his property or search his
22 property.

23 QUESTION: Well, he checked his coat in a
24 cloakroom somewhere, and they stuck the beeper in the
25 coat while it was in the cloakroom. Would that be

1 precisely the same issue we have today, or would it be a
2 different one?

3 MR. FREY: I think that would be essentially
4 the same issue. That is our principal reliance on this
5 point about the installation. It is not that there was
6 consent to the original installation, because that only,
7 that addresses the question whether the original
8 installation was itself a search or a seizure.

9 If we wanted to install a transponder in
10 somebody's aircraft and we had to open the door of the
11 aircraft, climb in, and fiddle around with the radio
12 equipment, that would be a search of the interior of the
13 aircraft which would be regulated by the Fourth .
14 Amendment. If we had consent, it would be a valid
15 search.

16 But the real question in this case is whether
17 we acquire information or seize property at some point.

18 QUESTION: I am just trying to isolate the
19 issue. In your view, the only issue is whether it is
20 okay to listen to the beeper. The manner of
21 installation, unless there is something --

22 MR. FREY: Well, I don't see how the -- unless
23 the installation is itself a search or seizure that
24 might violate the Fourth Amendment rights of the
25 individual, then I fail to understand --

1 QUESTION: Supposing they put a microphone on
2 the tie. That would also not raise a Fourth Amendment
3 question until they listened to it.

4 MR. FREY: Not until they listened to it. Not
5 if they didn't listen to it. Nothing would be a fruit
6 of that action. I mean, we are talking about
7 suppressing evidence here. There has to be a fruit.
8 There can only be a fruit of this kind of technology if
9 you listen to it or take advantage of the signal. So I
10 don't -- I see that issue as a red herring and not the
11 real problem of substance, if there is one in this
12 case.

13 I wanted to just follow the course of the
14 investigation a little further, because I think it is
15 typical of these drug manufacturing cases and useful for
16 the Court to appreciate it. After it was at Horton's
17 house, which was the second premises, it was then -- a
18 couple of days later they walked by. They no longer
19 smelled ether.

20 They then used the beeper to determine that it
21 had been moved at or near the premises of Horton's
22 father, and later that day the signal was no longer
23 coming from that vicinity, and the beeper was then
24 traced to a set of storage lockers in Albuquerque, which
25 I gather are walk-in type storage lockers that people

1 can rent for long periods of time.

2 The particular locker in which the ether was
3 located was identified by smell by the agents walking
4 and then by a conversation with the manager of the
5 storage locker which ascertained that Horton and perhaps
6 Harley had -- were the renters of this particular
7 locker.

8 The agents then obtained a court order to
9 install an entry tone alarm in the door of this locker
10 which would warn them when the door of the locker was
11 opened, and they did install such an alarm, but it
12 malfunctioned, and about a week later they got a call
13 from the manager of the storage lockers who said, by the
14 way, these fellows have taken the stuff out of the
15 storage locker.

16 So again using the beeper, they tracked the
17 container to another group of storage lockers, again
18 identified the particular locker by smell and by
19 interviewing the manager of the locker. This time they
20 placed -- they rented a locker which I guess was
21 opposite from the one that the respondents were using
22 and put a TV monitor on there focused on the door of the
23 storage locker containing the ether, and the ether sat
24 there for about three and a half months at this point,
25 and then respondent Rhodes, who is the only one of the

1 defendants not to prevail in the Court of Appeals,
2 arrived at the locker in Horton's pickup truck, emptied
3 out the contents of the locker, drove to the vicinity of
4 his residence, picked up some other things, and then
5 went to Taos, New Mexico, which I think is about 150
6 miles away, followed by visual and beeper surveillance,
7 to the ultimate destination.

8 The agents then surveilled this destination.
9 In this case they used the beeper in the course of their
10 surveillance actually to determine that the containers
11 were inside the residence in Taos, and during their
12 surveillance they saw at one point that all the windows
13 were open, although it was a very cold and windy day,
14 and they knew from that that the ether was actually
15 being put to use.

16 They then procured a conventional search
17 warrant from the District Court, executed a search, and
18 seized cocaine, marijuana, laboratory equipment, and
19 other items.

20 Now, the District Court found that the
21 original order that had been sought to authorize the
22 beeper surveillance was invalid because it had falsely
23 represented that Muehlenweg, the informant, was a target
24 of the investigation, and that without the false
25 representations, the warrant failed to show probable

1 cause, and the court held that probable cause and a
2 warrant is required for the use of beeper surveillance.

3 The government appealed to the Court of
4 Appeals. We did not challenge the ruling on the
5 validity of the warrant, but rather we took the position
6 which we take today that no warrant is necessary for the
7 use of this particular kind of beeper surveillance.

8 The Court of Appeals generally affirmed the
9 decision of the District Court, and it found both that
10 the installation and delivery of the beeper container
11 itself violated the rights of the transferree to be free
12 from unreasonable searches without a warrant, and that
13 the monitoring of the signals emitted by the beeper is
14 itself a search if it happens at the time of the
15 monitoring that the beeper-laden container has been
16 taken into private premises that would not be subject to
17 a conventional search without a warrant based on
18 probable cause.

19 Now, I wanted to say a few words about what
20 beepers are and their utility in law enforcement, and I
21 thought for the -- I know the Court was very curious
22 during the Knotts argument, so I had the DA supply me
23 with a beeper just so that you can see what it looks
24 like. It is -- I understand that it is installed --
25 these are batteries. This is the transmitter. And it

1 is packed in styrofoam in this way and put in the false
2 bottom of a container, as in this case.

3 This is not the beeper that was used in this
4 case, but it is similar. It is actually a little
5 smaller, I am told, than the one used in this case.

6 QUESTION: Mr. Frey, was the beeper actually
7 put in evidence in the case?

8 MR. FREY: I'm not sure that it was, and I
9 don't rely on any conclusions. It is just to satisfy
10 the curiosity that I thought the Court exhibited during
11 the Knotts argument.

12 All right. This is an FM radio transmitter.
13 It emits a signal that allows the beeper to be located
14 by the use of appropriately designed receiving
15 equipment. Now, this equipment cannot pinpoint very
16 precisely the location of the signal coming from the
17 beeper unless you get quite close.

18 There are basically two kinds of uses for
19 beepers. One is attaching them to vehicles to follow
20 the vehicles, aircraft, or so on, on the highway, and
21 the second is implanting them in containers, as in this
22 case, as in the Knotts case. There it is usually done
23 in drug investigations, but it could be used with
24 explosives or containers of firearms that are suspected
25 to be exported or other kinds of containers that would

1 not be likely to be opened and have the beeper revealed
2 prematurely.

3 The essential purpose of the beeper is to
4 facilitate the process of surveillance of the movement
5 of cars, chemicals, or other containers that are
6 suspected to be involved in illicit activities.
7 Basically it is a substitute for the human eye in
8 following these movements, but it is tremendously
9 valuable both in enabling a surveillance to be conducted
10 effectively with limited personnel resources and in
11 generally reducing the danger that the surveillance will
12 be detected by the suspects.

13 QUESTION: In this respect, Mr. Frey, when you
14 say it is really just a substitute for the human eye,
15 could this can be taken out of a house and put in a car
16 in a manner that could not have been visually detected
17 from the sky or from --

18 MR. FREY: Well, I suspect it could, and I do
19 plan to get to that when I talk about the question of
20 whether this case is like or unlike Knotts, but I
21 think --

22 QUESTION: So that you would say that we
23 should judge the case as though this beeper had been put
24 in -- a little tiny beeper had been put into something
25 that could go into somebody's pocket.

1 MR. FREY: Well, I am not sure that you should
2 do that, although I think at the end of the conceptual
3 analysis I probably would say that, but here we are
4 dealing with a five-gallon container of ether that --

5 QUESTION: But it is something that somebody
6 could put in or take out of a house without your knowing
7 it, without your being able to see it.

8 MR. FREY: It would be possible for them to do
9 that. We would be able to see that they were leaving
10 the house. We might not be able to --

11 QUESTION: But you wouldn't know whether the
12 can was in the car or not.

13 MR. FREY: Well, I will --

14 QUESTION: All right.

15 QUESTION: Except by the beeper.

16 MR. FREY: Yes.

17 QUESTION: Mr. Frey, on this particular point,
18 I assume that considerable time was made in preparing
19 for this whole thing by the government.

20 MR. FREY: Yes.

21 QUESTION: Right? Well, why couldn't they
22 some time in that period of time have gotten a warrant?

23 MR. FREY: Well, they could have, and they
24 did, and the warrant happened to be no good in this
25 case. I think that our concern, as I hope to explain

1 somewhat later, is not that in this case they couldn't
2 have gotten a warrant. I mean, they could have gotten a
3 warrant in this case. The problem that fouled them up
4 in this case was that they were concerned about the
5 safety and the secrecy of the informant's status, and
6 they chose what turned out to be an ill-advised means of
7 attempting to protect against the ultimate disclosure.

8 QUESTION: You mean they couldn't trust a
9 federal judge?

10 MR. FREY: Well, I think their concern, and I
11 think this is a concern which this Court has not
12 visited, and maybe one day a case will arise about what
13 the appropriate procedures are for protecting the
14 identity of a confidential informant where at some point
15 down the road there is likely to be disclosure to
16 defendants in the event a criminal case comes, for
17 instance, of the contents of an affidavit for a search
18 warrant.

19 Now, I think that probably the procedure that
20 should have been used here was to make an accurate
21 description in the search warrant and file it under
22 seal, but at some point down the road you can be sure
23 that the defendants would have demanded the right to see
24 it.

25 Now, in this particular case, of course,

1 Muehlenweg's identity as an informant was disclosed at
2 the suppression hearing, but there is a concern. I
3 don't think that the action of the agent and the
4 assistant U.S. Attorney was outrageous in this case,
5 even if in retrospect we can say it was ill-advised, but
6 the real concern about requiring us to get a warrant is
7 not so much that we can't do it, although I don't think
8 it performs a very useful function, as I will get to
9 later, but that there are classes of cases in which the
10 use of the beeper is very important but we don't have
11 probable cause, but only a reasonable suspicion of
12 criminal activity.

13 So that if you are -- the holding that a
14 warrant is required is a holding that beeper
15 surveillance cannot be employed on the basis of
16 reasonable suspicion of criminal activity, I think that
17 is our practical concern.

18 QUESTION: Mr. Frey, I am still a little
19 confused about the argument. Now, to install a beeper in
20 someone's property without consent as you had here to
21 enter that property to install it does not in your
22 opinion give rise to any Fourth Amendment concerns --

23 MR. FREY: No, of course it does.

24 QUESTION: -- of need for a warrant?

25 MR. FREY: No, of course it does, and that was

1 -- I thought -- I tried to make that point in response
2 to Justice Stevens. If we had to enter somebody's
3 property to instal the warrant, that entry would be a
4 search -- I mean, to instal the beeper, and that search
5 would require a warrant.

6 QUESTION: And there was an entry in someone's
7 property here, but you had consent at the time?

8 MR. FREY: Well, that's correct, yes.

9 QUESTION: That is your position?

10 MR. FREY: It was not any of the respondents'
11 property at the time it was entered.

12 QUESTION: But you would think that someone
13 could -- that you could install with consent of the
14 storekeeper a beeper in clothing that is to be sold to
15 someone else, and that that initial consent would
16 suffice thereafter?

17 MR. FREY: I don't think the action would be a
18 search or a seizure that is regulated by the Fourth
19 Amendment, and I don't think it would have any
20 evidentiary fruits unless the beeper were listened to,
21 but I certainly agree that if we have to go into
22 somebody's private property for purposes of installing a
23 beeper, as in the Dalia case where an entry had to be
24 made for purposes of installing the bug, that, of
25 course, is a search, and unless there is a warrant that

1 authorizes it, it would be invalid.

2 I just wanted to make the point before I get
3 back to Justice White's question, which I do want to
4 address, that this case is typical in demonstrating the
5 value of the beeper in illicit drug manufacturing
6 investigations, because people involved in such
7 activities often proceed very cautiously with various
8 kinds of countersurveillance activities, which include,
9 as in this case, moving the containers to seven
10 different locations and delaying their actual --
11 actually putting them to their illicit use for a period
12 of four and a half months.

13 Now, effective investigation and apprehension
14 in this case would have been as a practical matter
15 impossible even though as a theoretical matter if we
16 were willing to assign 100 agents to the task for a
17 period of four and a half months we could have done it,
18 but with the beeper, a handful of agents who can also do
19 other things at the same time are able to conduct an
20 effective investigation which led to the discovery of a
21 serious crime.

22 Now, I would like to get to the question about
23 whether this is or is not any different from Knotts,
24 because our position is that this case is not
25 analytically different from Knotts, and that what

1 happened here was not a search.

2 Now, the point essentially that we want to
3 make is that Knotts established that to use the beeper
4 to ascertain the location to which a container has been
5 taken over the public roads is not a search at all
6 regulated by the Fourth Amendment. Well, in this case,
7 the beeper was used for that purpose. That is, the
8 information that we got that was relevant to this
9 investigation had to do with the movement from place to
10 place on the public highways.

11 Now, Justice White points out that it is
12 possible that some kind of shell game could be attempted
13 to be played by the suspects --

14 QUESTION: Well, Knotts might get you into the
15 first -- might warrant your tracking the --

16 MR. FREY: We track it to the first house.

17 QUESTION: -- to the first house, but from
18 there on --

19 MR. FREY: And then if we don't have a beeper
20 we station an agent outside the first house.

21 QUESTION: Yes.

22 MR. FREY: And the agent, incidentally, knows
23 as much as the beeper tells us about the presence of the
24 containers on or in the property.

25 QUESTION: He knows that the can is in that

1 house.

2 MR. FREY: Or in the vicinity. Keep in mind
3 that in this --

4 QUESTION: He knows validly or he is entitled
5 to know that it is either in the house or close by.

6 MR. FREY: He is entitled to know that, and he
7 is entitled to watch the house. And if a truck leaves
8 that he thinks has the containers, he is entitled to
9 follow it to its next destination.

10 QUESTION: Yes, but he doesn't know that --

11 MR. FREY: Well, that is all right.

12 QUESTION: Any automobile that leaves, he
13 doesn't know whether the can is in it or not.

14 MR. FREY: He may not know without the beeper,
15 but he can follow or agents can follow every one of them
16 until finally one of them arrives at the laboratory site
17 where by other observations they are able to determine
18 that there is probable cause to conduct a conventional
19 search and to secure a warrant.

20 So, even in these cases, agents stationed
21 outside each of these properties waiting until somebody
22 leaves who might be carrying ten five-gallon cans of
23 ether or one five-gallon can of ether -- it could be
24 accomplished by a visual surveillance.

25 Now, another point that I wanted to make is --

1 QUESTION: Well, Mr. Frey, let me cut you off
2 there if I may. Don't we have to assume that sometimes
3 a beeper is going to be more effective than visual
4 surveillance? That is the whole point.

5 MR. FREY: Oh, absolutely, and I --

6 QUESTION: That if you didn't have a beeper,
7 they would drive a lot of cars in and out, and you
8 wouldn't know which one the can is in.

9 MR. FREY: No, but you see, the argument that
10 is being made to which I am responding is not quite a
11 conceptual argument. I mean, I begin by saying we trace
12 the beeper container to the first premises. We station
13 agents outside. When the truck loaded with these
14 containers goes to the next premises, we follow it, and
15 so on and so forth.

16 Now, Justice White says, well, maybe we wcn't
17 be able to tell what is in the truck. The truck may be
18 a closed truck. It may be in the trunk of a car.

19 QUESTION: And there may be 35 trucks that
20 pull in and out before you know which one you want to
21 follow.

22 MR. FREY: There may be. There may be, but
23 conceptually nothing has changed. That is, we are still
24 using the beeper to follow vehicles on the open highway,
25 and what the Court said in Knotts is the fact that --

1 QUESTION: But you know which one to follow,
2 which you wouldn't know visually. So you have got to
3 assume you are doing something useful here.

4 MR. FREY: Oh, of course we are doing
5 something -- we are doing something terribly useful, but
6 the point that I am making here is that what Knotts said
7 was the fact that we are more efficient, even a great
8 deal more efficient in doing what we could otherwise do
9 through surveillance of the public streets and highways
10 does not affect the Fourth Amendment inquiry as to
11 whether you have a search.

12 QUESTION: There was a reference a few minutes
13 ago, Mr. Frey, to the fact that if you put hundreds of
14 agents on it, if you had hundreds of agents, which in
15 theory and probably in practice you could do if it was a
16 big enough drug operation, you could follow every one of
17 the 35 cars 24 hours a day.

18 MR. FREY: In theory we could do that.

19 QUESTION: That doesn't get you into the
20 second house, Mr. Frey.

21 MR. FREY: But what -- but we are not --

22 QUESTION: Suppose you follow six trucks and
23 they go to different houses. You put an agent outside
24 of each one, and using the beeper, you find out that it
25 is in one house, although you could never -- visually

1 you could never tell that it was in that house, and then
2 you call off all the dogs on all the other houses and
3 you concentrate on that house. You then know something
4 that is in that house you wouldn't know without the
5 beeper and couldn't have known.

6 MR. FREY: Well, it is possible that that is
7 true. Whether that changes it from the fact that the
8 beeper is being used to track the movements on the
9 highway, I am not certain, but I wanted -- my time is
10 running short. I wanted to make a point.

11 The fact that it is in the house which was so
12 critical to respondents' argument to the Court of
13 Appeals analysis first of all overlooks the fact that we
14 don't know that it was in the first three houses at
15 all. There is no evidence in the record.

16 The only house or even storage locker that we
17 learned it was in by use of the beeper was the ultimate
18 destination in Taos, and as to that, that piece of
19 information as to whether it was in or out of the house
20 was wholly immaterial to the probable cause showing and
21 the warrant which was based on informant's information
22 that that was the location, the open windows, and the
23 fact that the ether had been taken there.

24 Now, in your example we don't ever have to
25 train the beeper on the house to find out what is in the

1 house, because each time a car leaves we can follow that
2 car, check with the beeper whether the container is in
3 that car. Now, we may be searching that car, something
4 for which we ordinarily don't need a warrant, or we may
5 not be searching that car.

6 QUESTION: If you have probable cause.

7 MR. FREY: If we have probable cause. For a
8 conventional search. And I did hope to talk some about
9 the point which is much more important in the real
10 world, which is what the regime of regulation would be
11 if you held that this was a search, because what is
12 important to us is the ability to use this technique in
13 circumstances where a chemical company calls us up and
14 says we have a very suspicious purchase of ether or
15 chlcrofrm or some chemical precursor from somebody we
16 don't know and we are suspicious.

17 This is probably not probable cause that would
18 be enough to justify us getting a warrant to search the
19 house of the person if we followed them to that place
20 where they took the container, yet it is enough to
21 warrant an investigation, and in Adams against Williams
22 the Court said the policeman shouldn't just shrug his
23 shoulders and go away, that the only effective means of
24 investigation in this circumstance, the most effective
25 means is the use of the beeper.

1 It has a very limited intrusion, if any, on
2 people's privacy, and it seems to me when you balance
3 that intrusion against the value to law enforcement, a
4 Terry kind of standard is quite appropriate, and I just
5 would refer to Justice Brennan's concurring opinion in
6 Jacobson where he made precisely that point. There was
7 some concern about not having any Fourth Amendment
8 regulation, but he suggested that you could allay those
9 concerns by having a regime of regulation that requires
10 reasonable suspicion before a technique of limited
11 intrusiveness can be used, and that would accomplish in
12 the real world the purposes that we need.

13 I would like to reserve my remaining time for
14 rebuttal.

15 CHIEF JUSTICE BURGER: Very well.

16 Mr. Roberts.

17 ORAL ARGUMENT OF CHARLES LOUIS ROBERTS, ESQ.,

18 ON BEHALF OF THE RESPONDENTS

19 MR. ROBERTS: Mr. Chief Justice, and may it
20 please the Court, at the oral argument in this Court's
21 prior beeper case of United States versus Knotts,
22 Justice C'Connr asked Alexander Frey of the Solicitor
23 General's office whether a beeper which pinpointed an
24 object in a barrel inside the premises was a search. He
25 said at that time that that was a different case and a

1 lot stronger case for it being a search.

2 Justice O'Connor then pursued her line of
3 questioning to ask if the beeper pinpointed an object
4 within the bedroom of a house, would that be a search.
5 Mr. Frey said yes. He didn't say yes. He said, that
6 could be a search. And that is the case that we have
7 before us today.

8 In Knotts, the government took pains to point
9 out and this Court took equal care to note that this was
10 a very limited use of the beeper that they were using in
11 Knotts. It was not a 24-hour surveillance of any
12 citizen. It did not go into any protected area, into
13 any home. That does not --

14 QUESTION: Well, but don't you agree that
15 under Knotts, under the theory of Knotts, you could
16 legally know that the -- at least that the object you
17 were tracking had arrived at a particular house, the
18 first house? If you could have seen the object going
19 into the house, you would know it was there, and until
20 it left, you would know it was there, whether you had a
21 beeper or not.

22 MR. ROBERTS: Unless the installation was
23 unlawful.

24 QUESTION: Yes, I understand.

25 MR. ROBERTS: If the installation was lawful,

1 you could see it.

2 QUESTION: Yes.

3 MR. ROBERTS: I don't believe that that is the
4 case in this particular instance. I have looked at the
5 record just briefly on Page 54 of the joint appendix,
6 and if one looks at that, it doesn't say whether they
7 saw the cans being taken inside.

8 QUESTION: No, but could they have?

9 MR. ROBERTS: It is perhaps possible, perhaps
10 possible not, because they seem to be following a car
11 which they find out later did not have the cans in it,
12 and then later discover --

13 QUESTION: That is just human error, though,
14 isn't it? That was just human error.

15 MR. ROBERTS: Yes. Beepers don't make those
16 kind of errors.

17 QUESTION: Yes, but if you could have -- you
18 possibly could have seen, if you had been following the
19 right car visually, you possibly could have seen the can
20 arrive at the first house, but from there on it is
21 another question.

22 MR. ROBERTS: Yes, but I think that even as --
23 like I said, the record here, we are not -- it is not
24 clear whether they saw it arrive at the first house.
25 They saw it park in front and then leave, and then they

1 are following the car, and later with the beeper say,
2 they must have taken it off, and it is at this address.

3 QUESTION: Let me try a hypothetical on you,
4 Mr. Roberts. Suppose when the ether company called the
5 police, the agents, and the police went and developed,
6 just as they did here, they arranged with the supplier
7 of the ether to have one of the agents, an undercover
8 agent be put on the payroll of the ether company, and
9 then had him go to these purchasers and persuade them,
10 assume that he persuaded them to take him in as a
11 partner in this enterprise, and he would see to it that
12 they got all of the ether and whatever else that they
13 wanted, but meanwhile he is an undercover agent. He is
14 in the house. He is somewhat more animated than -- he
15 is a very animated beeper, isn't he? The beeper makes
16 -- transmits some sounds, but this fellow can transmit a
17 good deal more.

18 MR. ROBERTS: Yes.

19 QUESTION: What do you say about that
20 invasion? That is quite an invasion of privacy, isn't
21 it?

22 MR. ROBERTS: Yes, and in fact --

23 QUESTION: Put a man right in your operation.

24 MR. ROBERTS: That is true, but as Mr. Frey
25 said in the oral argument in Knotts, one can suspect a

1 disloyal agent or a disloyal friend, and one is held to
2 suspect that, but one does not suspect a disloyal can or
3 a disloyal wristwatch or whatever. There is just no
4 knowledge. If one exposes his activities to an
5 undercover agent, he does so willingly. None of these
6 respondents --

7 QUESTION: That potential for suspicion is
8 certainly there, but that is a human judgment to be made
9 by the people in this enterprise, but now the undercover
10 man is in the operation parttime, in and out, and by
11 walkie-talkie and other means he is communicating with
12 the agents all the time, and he is not suspected. He is
13 in the house. He is telling them everything about their
14 private affairs. Unconstitutional? Illegal?

15 MR. ROBERTS: No, Your Honor. I believe the
16 cases say that if anybody invites any person into one's
17 house, that that is legal.

18 QUESTION: Even though he in effect is a
19 concealed beeper himself?

20 MR. ROBERTS: Yes, Your Honor, but it is just
21 the fact that there is no -- that there just really
22 isn't a reasonable expectation of privacy, and I think
23 the government will admit this, or did it in Knotts,
24 that one would think that every object that one has is
25 working for the government. At least that expectation

1 doesn't exist now in the citizens of the United States.
2 It may later.

3 QUESTION: If I were you, I wouldn't operate
4 on the theory that there is not an electronic device
5 that can tell when a beeper is around.

6 MR. ROBERTS: There perhaps could be those
7 devices one day and whatever.

8 QUESTION: No, it is in existence now.

9 MR. ROBERTS: But in briefly stating the
10 position of the respondents --

11 QUESTION: Mr. Roberts, I gather that the
12 information that this type of beeper gave was only a
13 general signal that described the general vicinity of
14 the beeper, maybe inside, maybe outside the house. I
15 take it it was not the kind of instrument that could
16 identify specific locations within the house or whether
17 the package was opened or closed or anything of that
18 kind.

19 MR. ROBERTS: Justice O'Connor, that is not in
20 the record. In other words, the capabilities of the
21 beeper was not discussed at any point. We don't know
22 whether they could have or could not have by using two
23 monitors and triangulating, whatever. We don't know.

24 QUESTION: Well, didn't they use it at the
25 final house to identify where the beeper -- that the

1 beeper was actually in that house?

2 MR. ROBERTS: They, at that particular moment
3 when they want the search warrant, they get very
4 specific. It is at that house. Yes, Your Honor.

5 QUESTION: Because of the beeper.

6 MR. ROBERTS: Because of the beeper.

7 QUESTION: They were close enough.

8 MR. ROBERTS: The government in this case went
9 under the policy of United States Attorney's Office in
10 the district of New Mexico to obtain a judicial
11 warrant. The government in this case treated this as a
12 search. They went and got a warrant, and if they had
13 not lied in the warrant, we probably wouldn't be here
14 today, but instead of being embarrassed, they are here
15 asking for a new exception to the Fourth Amendment.

16 In trying to avoid the Fourth, they make four
17 basic arguments. First, that beeper transmissions, even
18 within protected areas, are not searches. Secondly,
19 that a reduced expectation of privacy, that there is
20 somehow a reduced expectation of privacy in containers
21 and areas they enter. Third, that a new exception to
22 the Fourth Amendment should be created that would
23 require only reasonable suspicion. And fourth, that
24 even if probable cause is required, a warrant should not
25 be required.

1 Now, in dealing with the fact that it is not a
2 search, I think it is very important to distinguish
3 between limited capability and limited information, and
4 limited intrusiveness and limited information. They
5 actually put a government device inside your container.
6 They actually put a government device inside your home.
7 The intrusion is serious.

8 Now, the information that that beeper can
9 convey is limited, but that is not the same thing.

10 QUESTION: Do you think it is the same as
11 Irving against California in that sense, do you?

12 MR. ROBERTS: I am not that familiar with
13 Irving, Your Honor.

14 QUESTION: That is where police actually
15 placed the electronic equipment in the home.

16 MR. ROBERTS: By surreptitious methods?

17 QUESTION: Yes.

18 MR. ROBERTS: Yes. I think it would be that
19 way, but --

20 QUESTION: They didn't send it in by an
21 inanimate object like the can here. They sent people in
22 to attach these things.

23 MR. ROBERTS: Yes.

24 QUESTION: So you think it is the same either
25 way.

1 MR. ROBERTS: Yes, and I don't think that
2 anything has turned -- any search has turned on the
3 limited information gathered. In other words, if we
4 send a deaf and blind constable in to search, I believe
5 the Fourth Amendment fully applies, even though he is
6 capable of learning very little. The limited
7 information is what they really have, not limited
8 intrusiveness.

9 And there is also the limited capability,
10 which I said is not in the record. The Tenth Circuit
11 found that beeper transmissions did give law enforcement
12 information that they never would have gotten even if
13 they had had that hypothetical army of surveillance
14 agents they continue to refer to.

15 It also has all of the earmarks of --

16 QUESTION: Was the Tenth Circuit specific in
17 that regard, Mr. Roberts, as to what information they
18 would have found through the beeper that they couldn't
19 have found through the hypothetical agents?

20 MR. ROBERTS: I don't believe that they were
21 specific and except the fact that they said that several
22 times that the beeper was lost and would never have been
23 found again save for the beeper.

24 QUESTION: You mean the can was lost?

25 MR. ROBERTS: The can was lost four or five

1 times, and when the can is lost and they are going all
2 over the city of Albuquerque, and as this Court must
3 realize, this invades five or six homes, depending on
4 how someone looks at it, for over five months.

5 QUESTION: Of course, the can was lost in
6 Knotts, too, for a period of time during the trip from
7 St. Paul over to Wisconsin.

8 MR. ROBERTS: I think that was a momentary
9 loss, and there were attempts to make visual
10 surveillance at the same time. In this case, it was
11 lost for days.

12 QUESTION: What's the difference between a
13 loss of six hours and a loss of six days, as a matter of
14 constitutional law?

15 MR. ROBERTS: I think constitutionally that
16 when you get into that large of loss, you are absolutely
17 relying on the beeper. The government could plausibly
18 argue that if we had gone a little faster down the road,
19 we would have found the same things and seen the same,
20 and that it may be just helping us a little bit. In
21 this case, an agent standing there knowing that the
22 beeper isn't where he saw it was last looks over the
23 city of Albuquerque and he is not -- his senses aren't
24 being enhanced by the beeper. He has no idea. His
25 senses tell him nothing. The beeper tells him exactly

1 where it is.

2 But also in dealing with the issue that agents
3 could have seen all of these things as one has already
4 been pointed out today, there is a possibility of
5 vehicles leaving places, leaving places, leaving
6 places. Even with an infinite army of agents out there
7 surveilling, it is entirely possible that it could be
8 missed, and secondly, there is a situation of where
9 there wouldn't be probable cause at the end of it. You
10 would have 400 possible locations of the beeper, and you
11 would have to say to a judge there is a 100 in 400
12 chance that it is in this place.

13 Now, I don't believe that equates with
14 probable cause, so the beeper --

15 QUESTION: I don't think the government is
16 arguing that just that kind of surveillance would form
17 probable cause. I think they figure, as I understand
18 it, they would have to have an agent probably at every
19 one of those 400 destinations to see if there were added
20 reasons to support probable cause, because if having the
21 container in your possession is probable cause to search
22 or to arrest, then they could have simply picked up the
23 guy or had a search warrant issued for him when he got
24 the can in the first place.

25 QUESTION: I think that that is true, but I

1 think that the amount of possible locations the beeper
2 is at would severely diminish any probable cause that
3 was attempted to -- that they might attempt to get
4 later. But also in the hypothetical visual surveillance
5 army type situation, it is what I would probably like to
6 characterize as a plain view possibility exception, that
7 if an agent, a government agent ever saw some item of
8 yours, then he could -- in his mind it would be the same
9 as if he were following.

10 If he gained that information later by some
11 illegal method, he could say, well, we could have gotten
12 it by a legal method by detailing our imaginary
13 surveillance agent which would follow that through the
14 years, months, or whatever it has to be. I just don't
15 believe that that is a valid argument.

16 Also, the government argues that there is a
17 reduced expectation in these items. I have found that
18 at Note 10 of their reply brief. And I find that there
19 is a real problem there, because I can't tell what
20 reduced expectation they are talking about. They allude
21 to the automobile exception, but they seem to be
22 applying it to persons, homes, and containers.

23 In a way, what they do -- they seem to be
24 saying is, is because these containers that travel along
25 the road, that they are running the highway into the

1 home, and now anybody in the home or who has traveled
2 along the road or whatever has a reduced expectation of
3 privacy, so that they could continue to search once it
4 is within the home.

5 QUESTION: Mr. Roberts, I am not sure that is
6 their argument. Maybe I don't understand it correctly,
7 but one could say there is a lesser expectation of
8 privacy in a ten-gallon can of ether, which I don't
9 suppose is going to be kept in your bedroom, for
10 example, because it doesn't smell too good. I imagine
11 it is normally going to be found in factory type
12 locations and that sort of thing. Isn't that part of
13 what they are suggesting? It is a little different than
14 a beeper on a necktie, I would think, at least
15 arguably.

16 MR. ROBERTS: It is only a five-gallon drum of
17 ether --

18 QUESTION: I am sorry, five-gallon rather than
19 ten.

20 MR. ROBERTS: -- Justice Stevens, and this can
21 be --

22 QUESTION: It was part of a 50-gallon
23 shipment.

24 MR. ROBERTS: -- carried in a truck or a car
25 or put in a locker or put in the garage or whatever.

1 QUESTION: There were ten of those cans, and
2 they could see them in the cars when they went to the
3 first house, and they could see them on some of the
4 later movements until they finally put them in boxes,
5 and they couldn't tell, they couldn't tell whether there
6 was a can, except by the beeper, they didn't know that
7 that automobile had that particular can in it.

8 MR. ROBERTS: Yes, and also we presented
9 evidence at the suppression hearing that ether is a very
10 common chemical. It is a chemical that is used in
11 varying amounts as a solvent, to synthesize hormones, to
12 make vitamins, perfumes, silicone, oils, preparation of
13 high quality film. In fact the professor that we called
14 to testify testified that 50 gallons was not a large
15 amount for a small manufacturing or a small perfume --

16 QUESTION: But those are all industrial uses.
17 They are not -- It is not used around the house to
18 make --

19 MR. ROBERTS: It is used in photography, Your
20 Honor.

21 QUESTION: Pardon me?

22 MR. ROBERTS: It is used in photography, Your
23 Honor.

24 QUESTION: I see.

25 QUESTION: How often would a photographer use

1 ten five-gallon cans of ether?

2 MR. ROBERTS: I think not very often.

3 QUESTION: How long would that supply last
4 him? A couple of years, wouldn't it?

5 MR. ROBERTS: I don't think it would be very
6 often, Your Honor, but --

7 QUESTION: Did your record show the total
8 amount of ether coming into Albuquerque or the area in a
9 year or in a month?

10 MR. ROBERTS: No, but the professor in
11 question said just simply for his classes and the
12 various things they did at school they often ordered it
13 by the tank car, which is a substantial amount more than
14 50 gallons. As a solvent, things come, you know, in
15 large quantities, but it is not illegal to own ether.
16 It is not contraband. It is not even a precursor
17 chemical.

18 QUESTION: It has to be labeled in transport,
19 though, does it not, because of its volatility?

20 MR. ROBERTS: Because of its flammability,
21 Your Honor. I think that it does. But it is not a
22 precursor chemical. It is not --

23 QUESTION: What do you mean by precursor
24 chemical? I am certain you have heard the expression
25 used. I wasn't aware it had a real precise definition.

1 MR. ROBERTS: Yes, it is -- a precursor
2 chemical is something out of which a contraband
3 substance can be made, like methamphetamines or
4 whatever. They are listed -- some of them are
5 prohibited even from private people or persons to own.
6 Ether is not one of those.

7 QUESTION: It is not something out of which
8 you make illegal drugs?

9 MR. ROBERTS: No. It probably could be used
10 in a million illegal or legal ways when you are using it
11 as a solvent. In this case, it was used to wash cocaine
12 out of clothing that had been imported into the United
13 States.

14 In arguing that there should be a new
15 exception to the Fourth Amendment, the government
16 doesn't really seem to give us a basis for saying why
17 there should be a new exception except that there are so
18 many exceptions and perhaps we should have another. It
19 does not fit in any category that the government sets
20 forth. It is not an investigatory stop. It is not a
21 border search. It is not an automobile search. And it
22 has several problems with it that don't fit in those
23 kind of cases that cause it not to fit.

24 First of all, there is no time limitation.
25 The beeper can be extended and stay there for ever and

1 ever. It is not brief, like in place having a dog sniff
2 you for a certain amount of time. This dog, if you can
3 compare it to a dog, is inside the can, and is sniffing
4 all the time, for five months.

5 Also, there is no exigent circumstances.
6 Every one of these other cases talk about the fact that
7 someone needs a warrant but can't get one because of
8 some problem, or that there is some immediate need to
9 get a warrant and they can't get it, and so the exigent
10 circumstances allows them to go without a warrant on
11 reasonable suspicion.

12 QUESTION: Does this record show what kind of
13 fabric the ether was applied to to extract the drug?

14 MR. ROBERTS: It was --

15 QUESTION: You said clothing.

16 MR. ROBERTS: -- clothing, is all that
17 appears.

18 QUESTION: Men's suits, or --

19 MR. ROBERTS: In other words, I think that --

20 QUESTION: -- hosiery, or what?

21 MR. ROBERTS: No, I think that this was
22 heavier clothing. It was a scheme of some local young
23 men in Albuquerque, some college students or whatever,
24 to import some clothing from Colombia that was saturated
25 in cocaine, and to wash it out and to sell it, and that

1 was simply what happened.

2 QUESTION: Mr. Roberts, there are several
3 respondents in this case, and at least one of the briefs
4 indicated that Mr. Muehlenweg was acting as the agent
5 for respondents Karo, Horton, and Harley. I assume then
6 that there is a question of consent as to them. If he
7 was their agent for the purchase of the ether, why
8 wasn't he their agent for purposes of consenting to the
9 installation?

10 MR. ROBERTS: I believe that one could make
11 the point that he could consent to the installation but
12 he cannot consent to the beeper remaining inside the
13 drum when he hands it over to other people.

14 QUESTION: Well, if he was their agent, at
15 least for purposes of Mr. Karo, Horton, and Harley, why
16 aren't they bound by their agent's consent?

17 MR. ROBERTS: I would just have to answer,
18 Justice O'Connor, that if one bought a house from
19 somebody else, somebody could not leave a bug in it,
20 even if that person was one's real estate agent. I
21 don't believe that one person can consent to the future
22 violations of over five months of all sorts of
23 individuals. And I just don't believe he had that
24 power.

25 QUESTION: Well, the brief made a blanket

1 assertion that he was their agent, so I just wondered
2 why that isn't that binding. And as to the other
3 respondents, they had no property interest to be
4 protected, did they?

5 MR. ROBERTS: At that time, until the beeper
6 intruded upon their private areas. Now, I still would
7 make the point that --

8 QUESTION: Well, does the record show what
9 property Roth, Steele, and Rhodes had that would have
10 been involved?

11 MR. ROBERTS: Yes, Your Honor. If I may
12 approach them, Roth was in the Taos house. He had been
13 there for seven or eight days, which the beeper was used
14 to find that house. That appears on Page 57 and 58 of
15 the record. He was sick. He had come up to ski, and
16 had stayed there several days, and had his own bedroom.

17 Rhodes, there is a question of whether it
18 entered his house on Madison Street. Furthermore, he
19 had the access to one of the storage lockers with a key
20 where the beeper was monitored inside, and third, he was
21 at the Taos home one night while the beeper was being
22 monitored, and then left.

23 QUESTION: Someone else's home?

24 MR. ROBERTS: Yes, but he was a guest.

25 QUESTION: Well, I'm not sure that qualifies

1 for protection, those descriptions.

2 MR. ROBERTS: Well, an overnight guest I
3 believe does have some protection, but Horton and Harley
4 have probably -- they have an interest in the drum
5 itself. It goes into their houses and their families'
6 houses. They are the ones who rent the lockers that it
7 goes into. And they are the ones who along with Steele
8 rent the Meadowwind Taos residence where they lived for
9 three months before the arrival of the ether and the
10 start of the search.

11 QUESTION: These were college students?

12 MR. ROBERTS: A few of them were. There was
13 even a medical chemistry student who was --

14 QUESTION: And they all lived up at Taos for
15 three months?

16 MR. ROBERTS: Three of them did. Albuquerque
17 -- Taos being a little to the north of Albuquerque.

18 QUESTION: A hundred miles to the north.

19 MR. ROBERTS: Yes.

20 QUESTION: That is a good way up there.
21 Didn't they use an alias for one of the locker rentals?

22 MR. ROBERTS: Yes, there was an alias on that
23 rental.

24 QUESTION: Does the record show the dollar
25 figure on these ten cans of ether?

1 MR. ROBERTS: It cost \$3,000 to buy them.

2 QUESTION: So that is not a college prank
3 operation, is it?

4 MR. ROBERTS: I wasn't menticing -- It is a
5 serious offense, Chief Justice Burger. I was just
6 trying to explain --

7 QUESTION: I didn't intend to reflect on your
8 argument in the slightest. What I am suggesting is that
9 this is not a small time operation.

10 MR. ROBERTS: It took \$3,000.

11 QUESTION: Just one component used over a
12 short period of time is \$3,000, with all the expensive
13 precautions taken to cover it. That is a highly
14 organized enterprise, isn't it?

15 MR. ROBERTS: I believe it was organized.
16 There were leaks, because that is why Muehlenweg got in,
17 and whatever, and like that, but also there is one point
18 that I have forgotten to raise here as to why it is a
19 search, and that simply is that it does everything a
20 police search would do. If a police wants to find an
21 item in your home, he goes in and finds it. The beeper
22 tells him it is in your home, the exact same
23 information.

24 In fact, in some cases the beeper probably
25 tells more than a policeman inside the drum, because if

1 a policeman was inside the drum and got out in one of
2 these storage lockers, he wouldn't know anything except
3 he was in a storage locker somewhere, but the beeper can
4 tell the agents outside where it is, and it tells them
5 that. It searches for the can of ether, finds it,
6 identifies it, and then follows it.

7 In a brief comment on the supervisory powers,
8 I would simply point out that this is a case where a
9 U.S. Attorney and a DEA agent purposely lied to get this
10 warrant. If there is any indication -- to a district
11 judge. If there is any --

12 QUESTION: Is that any worse than using an
13 alias?

14 MR. ROBERTS: Your Honor, they were probably
15 no worse than what the defendants did, that is for sure,
16 but there are sanctions to be applied against defendants
17 and there are, of course, sanctions to be applied
18 against these individuals. None of these individuals to
19 my knowledge has been disciplined. The U.S. Attorney
20 left to run for office after two and a half years of
21 practice. There was no action taken except the
22 suppression.

23 QUESTION: Well, one adverse result was the
24 fact that the warrant that was obtained is void.

25 MR. ROBERTS: That is one adverse result. But

1 if the evidence is not suppressed, it surely is not
2 going to harm the government that much.

3 Also, I would point out in a few seconds here
4 that a dead beeper is still an intrusion. If a police
5 officer comes into your house blindfolded, and with
6 things over his ears, ready at any moment to go into
7 action, that is an intrusion. If they put a beeper in
8 your house or they put a beeper in your vehicle or they
9 put a beeper in a container where you have an
10 expectation of privacy -- excuse me for adding vehicle
11 -- it would seem that that is an intrusion.

12 It is a chilling factor to know that the
13 government just on its own discretion can place beepers
14 anywhere and activate them at the turn of a switch, to
15 follow any object, any vehicle, any thing, and as
16 militarization increases, they can probably do it. The
17 one you saw today may be the size of a pencil tomorrow,
18 and down to this level (indicating) the next day, and
19 this Court really needs to consider about allowing that
20 sort of surveillance without any judicial information
21 protection which would be afforded by a Fourth Amendment
22 warrant and probable cause requirement.

23 The Congress won't know how many times this is
24 happening. The government will know. The courts will
25 not know. Only a few guilty criminal defendants will be

1 able to even challenge the fact that they have been
2 followed and monitored, because they will probably be the
3 only ones who will ever know, and in some cases they
4 might not even know. It may not be reasonable to
5 disclose it.

6 QUESTION: Now, counsel, I take it you are at
7 the point that we should explore some other areas
8 carefully. Suppose you have a terrorist activity,
9 something like the one we have read about in London in
10 the last few days. Certainly every human being has a
11 right not to be shot at by the police. We would all
12 agree on that.

13 MR. ROBERTS: Yes.

14 QUESTION: Do you think when the person
15 engages in terrorist activities, plainly illegal
16 activities on which no one would disagree, that he has
17 given up his right not to be shot at by the police? He
18 has given up his otherwise constitutionally guaranteed
19 rights.

20 MR. ROBERTS: He may have given up some
21 rights, Chief Justice, but I think this Court in Mincey
22 said that even a homicide doesn't forfeit the reasonable
23 expectation of privacy in the very home where the
24 policeman was shot in a heroic deal, and that is the
25 finding of that Court, that you cannot already assume

1 that the man is guilty before you have even gathered the
2 evidence, and that was a specific holding of this Court
3 in Mincey, and I believe that should be the holding.

4 QUESTION: But some of these terrorist things
5 that we read about, individual cases, there is only one
6 person in the house, and he goes from window to window
7 shooting people and killing them, a number of them, one
8 in the morning paper, no problem about identifying the
9 wrongdoer there, nor is the nature of his -- the gravity
10 of his wrongdoing. Do you think he has given up some of
11 his constitutional rights not to be shot at?

12 MR. ROBERTS: Because of exigent
13 circumstances, Your Honor, I think a lesser standard
14 would follow.

15 CHIEF JUSTICE BURGER: Very well.

16 Do you have anything further, Mr. Frey?

17 MR. FREY: A couple of things, Mr. Chief
18 Justice.

19 CHIEF JUSTICE BURGER: You have three minutes
20 remaining.

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

22 ON BEHALF OF THE PETITIONER - REBUTTAL

23 MR. FREY: Thank you.

24 First, I wanted to point out that this case is
25 not at all like the questioning that we had during the

1 Knotts argument involving the use of a beeper to monitor
2 the movement within a house from place to place or the
3 opening. There is no indication in this case, no
4 evidence that the beeper was used for that purpose.
5 There is no interest in using it for that purpose. We
6 would be, in fact, perfectly happy if you suppressed all
7 of the evidence about whether it was inside any one of
8 these houses. That is not evidence that is material or
9 used.

10 QUESTION: Why wasn't it used to get the
11 search warrant in the final house?

12 MR. FREY: Well, it was not material to the
13 search warrant, because they knew -- they had
14 information from Muehlenweg that there was a cocaine
15 manufacturing operation going on in Taos. They had
16 followed the ether to the house, and they saw the
17 windows open, which told them that the ether was inside
18 being used. So it was wholly superfluous, the
19 particular fix, and that raises the question about
20 respondents Roth and Steele.

21 The only claim that they could have is with
22 respect to the use at the Taos residence, which was
23 immaterial to the procurement of the warrant and the
24 seizure of the evidence.

25 With respect to the first three premises to

1 the vicinity of which it was taken, there is no evidence
2 that it went into Karo's house or Horton's house or
3 Horton's father's house. In fact, I rather doubt that
4 50 gallons of ether, which is highly explosive, not to
5 mention the effect of the fumes, would be taken inside.
6 We don't know that.

7 QUESTION: Mr. Frey, in your view, what
8 difference does it make whether it went in the house or
9 not?

10 MR. FREY: We don't think it makes a
11 difference legally in this case, but the whole lynchpin
12 of their argument is that we are searching their house,
13 that what is happening in this case is exactly the same
14 as if we sent a police officer inside to walk around the
15 house trying to find the ether.

16 QUESTION: And the lynchpin of your argument
17 is, there is no search no matter where it goes.

18 MR. FREY: Well, I have two separate
19 arguments.

20 QUESTION: I mean, one of your arguments.

21 MR. FREY: The second argument, which is also
22 quite important to us, is that even if there is a
23 search, it is a limited intrusion in its nature,
24 revealing only the single fact which ordinarily at least
25 would be visible by observation, and therefore that a

1 reasonable suspicion standard is sufficient. I mean,
2 that is quite important to us.

3 I might point out that a warrant -- it is very
4 peculiar. They say we are searching their home, yet
5 they must concede that a warrant could not particularly
6 describe the place to be searched. All we could have is
7 what is in effect a writ of assistance allowing us to
8 use this particular search technique, whatever home this
9 may be taken to.

10 With respect to Justice White's question
11 during my opening argument, there was one point that I
12 wanted to make with respect to this shell game or
13 concealed departure, and that is that there is no
14 evidence in this record that there was in fact any
15 movement of this that would not have been visible to
16 surveilling agents.

17 QUESTION: I thought it was perfectly plain
18 that there was evidence in the record. When they put
19 the cans in the box.

20 MR. FREY: I was looking for that. I could
21 not find it. When the cans were removed from the second
22 storage locker and taken up to Taos, the affidavit
23 simply says that they were -- they saw the cans being
24 removed on the videotape.

25 QUESTION: Well, I think you will find that

1 somewhere, 56, 57, 58, you will find that a truck
2 departed with some boxes, and they didn't see any cans,
3 but the beeper told them that the boxes had the cans in
4 them.

5 MR. FREY: Well, I found -- when this came up
6 before I was looking for it and I couldn't --

7 QUESTION: Well, the record will speak for
8 itself.

9 MR. FREY: -- find the reference.

10 CHIEF JUSTICE BURGER: We will resume at 1:00
11 o'clock with the next case.

12 (Whereupon, at 12:00 o'clock p.m., the case in
13 the above-entitled matter was submitted.)
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83-850 - UNITED STATES, Petitioner v. JAMES CONNORS KARO, ET AL.

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