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WASHINGTON, D.C. 20540

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** No. 83-1625

**TITLE** UNITED STATES, Petitioner v. LYLE GERALD JOHNS, ET AL.

**PLACE** Washington, D. C.

**DATE** Wednesday, November 28, 1984

**PAGES** 1 - 60



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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES :  
Petitioner :  
v. : No. 83-1625  
LYLE GERALD JOHNS, ET AL. :  
-----x

Washington, D.C.

Wednesday, November 28, 1984

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

APPEARANCES:

ALAN I. HOROWITZ, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C.;  
on behalf of petitioner.  
WILLIAM G. WALKER, ESQ., Tucson, Arizona;  
on behalf of Respondents.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
ALAN I. HOROWITZ, ESQ., on behalf of the Petitioner	3
WILLIAM G. WALKER, ESQ., on behalf of the Respondents	27
ALAN I. HOROWITZ, ESQ., on behalf of Petitioner - rebuttal	59

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Horowitz, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.

ON BEHALF OF THE PETITIONER

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

This case is here on a writ of certiorari from the United States Court of Appeals for the Ninth Circuit. The question presented concerns the authority of police officers to open bales of marijuana wrapped in plastic bags and found in a vehicle. Specifically, the question is whether the lapse of time that occurred from the discovery of the packages to the time when core samples were taken from those packages, eliminated the officer's prior authority to open the packages without a warrant on the basis of probable cause.

The facts may be briefly stated as follows: at approximately 1:30 a.m. on August 4, 1981, Customs officers received a report of suspicious activity at a drag strip outside Tucson, Arizona. A car leaving the site was intercepted and its occupants were identified as Respondents Johns and Hearn. Pursuant to an ongoing investigation, Customs officials already had prior information linking Johns with Respondents Leon

1 and Duarge in an international drug smuggling  
2 operation.

3 Accordingly, a Customs officer then commenced  
4 surveillance at Leon's and Duarte's residences, which  
5 led him to follow their two pickup trucks as they headed  
6 east on Interstate Highway 10 in Arizona. Other  
7 officers were contacted, and ground and air surveillance  
8 was maintained on the trucks which drove about 100 miles  
9 east to a remote airstrip near Bowie, Arizona.

10 Shortly after the trucks arrived, the first of  
11 two small planes landed. The agents on the ground were  
12 situated too far away to see what transpired there, but  
13 they were told by their colleagues in the air that one  
14 of the trucks approached the plane. The first plane  
15 then departed, and a second plane landed and  
16 subsequently departed.

17 The officers then approached the trucks to  
18 investigate. When they got close to them, they smelled  
19 marijuana and saw approximately 40 square packages  
20 wrapped in plastic, exposed in the back of the trucks.

21 Five of the Respondents were arrested at the  
22 scene, and the trucks and the packages were transported  
23 back to a DEA warehouse in Tucson.

24 Sometime thereafter, three days later,  
25 according to the opinion of the Court of Appeals, core

1 samples were taken from some of the bales and sent to  
2 the laboratory for analysis. This analysis confirmed  
3 that they were in fact marijuana. No search warrant was  
4 obtained.

5 The District Court suppressed the contraband,  
6 finding that it was the fruit of a warrantless search  
7 that was prohibited by the then controlling Supreme  
8 Court authority in *Robbins v. California*. The  
9 government appealed, relying primarily on footnote 13 in  
10 *Arkansas v. Sanders* and contending that the telltale  
11 odor and the nature of the packaging of these bales made  
12 the contents sufficiently obvious that no warrant was  
13 required.

14 While the case was pending on appeal, this  
15 Court decided *United States v. Ross*, and the parties  
16 submitted supplemental memoranda to address the  
17 significance of that decision. The government claimed  
18 that *Ross* was dispositive. Respondents made two  
19 arguments. First, they claimed that *Ross* should not be  
20 applied retroactively, and second, they contended that  
21 *Ross* did not apply in this case because the probable  
22 cause focused on the packages themselves, not on the  
23 trucks.

24 The Court of Appeals rejected both of these  
25 arguments. However, it found for Respondents on a

1 ground not briefed by the parties. The Court ruled that  
2 a warrant was required to open the packages after the  
3 three-day delay, even though one would not have been  
4 required had the search been conducted immediately at  
5 the scene or immediately at the station house.

6 The Court denied the government's petition for  
7 rehearing and the government petition for certiorari.

8 Respondents make two arguments in this Court.  
9 First, they renew their claim that was rejected by the  
10 Court of Appeals. They claim that Ross does not apply  
11 here because the probable cause focused on the  
12 packages. Rather, they contend that this case is  
13 analogous to United States v. Chadwick and therefore  
14 that the police always needed a warrant to open the  
15 packages, even if they had been searched immediately at  
16 the scene of the seizure at the airstrip.

17 This contention is somewhat factbound. It was  
18 rejected by the Court of Appeals and is addressed in  
19 detail in our reply brief, and I do not plan to dwell on  
20 it at length in this Court. Let me just say briefly  
21 that the agents' observations here plainly gave them  
22 probable cause to search the trucks. They were not  
23 close enough to see anything specific that happened when  
24 the airplanes landed. What they did know was that  
25 persons involved, known to be involved in a drug

1 smuggling operation had driven two trucks and met two  
2 airplanes at an airstrip and apparently had received  
3 something from the airplanes. They had good reason to  
4 believe that contraband had been transferred to the  
5 trucks. They did not see any packages. They did not  
6 even know of the existence of any specific kind of  
7 packages until they approached the trucks.

8 When they did approach the trucks and saw the  
9 packages wrapped in plastic, naturally their attention  
10 focused on those packages. But that does not alter the  
11 fact that their suspicion from the beginning was focused  
12 on the trucks themselves, not on the packages.

13 This case in this respect is exactly like Foss  
14 and completely unlike Chadwick and Arkansas v. Sanders,  
15 cases in which the police had suspicion that was focused  
16 on particular packages or containers in those cases, and  
17 the relationship -- excuse me, they had a suspicion even  
18 before the packages were ever placed in a vehicle, and  
19 the fact that they were later placed in a vehicle before  
20 the seizure was quite coincidental to the nature of the  
21 suspicion.

22 I would also say that applying Ross in this  
23 case leads to the only sensible result here, that it  
24 would be quite unreasonable to have required the police  
25 to get a warrant at the scene when they -- in order to



1 take core samples or to open these bales that were  
2 reeking of marijuana at the time.

3 If there are no questions on that point, I  
4 will turn to Respondents' second contention, which is  
5 the focus of our petition. That is, assuming that Foss  
6 applies here and that the police could have searched the  
7 bales at the scene without a warrant, Respondents argue  
8 that the police nonetheless needed a warrant when they  
9 opened the packages at the station a few days later.  
10 This argument that this delay alone created a warrant  
11 requirement is completely foreclosed by prior decisions  
12 of this Court.

13 QUESTION: Mr. Horowitz, can I interrupt you  
14 on this, and we will get to this argument.

15 I am troubled by the state of the record in  
16 this case because you can't tell when the search took  
17 place. You cite in your brief some reference to the  
18 fact that search apparently -- I guess the bales were  
19 opened a day later, and there is apparently something  
20 that suggests that.

21 MR. HOROWITZ: Right.

22 QUESTION: In your surpetition, you suggest  
23 that the issue is can they serve several days later, and  
24 then in the briefs argue about it being three days  
25 later, and we really can't tell from the record when the

1 search takes place.

2 What I would like to ask you is who do you  
3 think has the -- I would think you would assume that if  
4 it took place a year later, it would be unreasonable, at  
5 some point in time maybe you can't search.

6 MR. HOROWITZ: I suppose so, but for different  
7 reasons, I think, but yes, at some point anyway.

8 QUESTION: But assuming there's a period of  
9 time at which there is a duty to go ahead and open the  
10 stuff without a warrant -- if you don't want to get a  
11 warrant, who has the burden of demonstrating that the  
12 delay was either too long or was not too long?

13 MR. HOROWITZ: Well, I am inclined to think  
14 that the Respondents have the burden. I mean, there is  
15 a search here, and it seems to be valid on its face.

16 QUESTION: Well, if you are right in that,  
17 doesn't that end the lawsuit, because they surely haven't  
18 proved it.

19 I mean, shouldn't they lose on that ground, if  
20 you -- it seems to me somebody has got to decide who has  
21 the burden, and why wouldn't that end the case.

22 MR. HOROWITZ: Well, I think that it would  
23 have -- when the Court of Appeals decided that it found  
24 the delay significant in this case --

25 QUESTION: But as you point out, nobody argued

1 it. So then --

2 MR. HOROWITZ: Right, nobody argued it, so it  
3 didn't really come up. I think what they probably  
4 should have done was sent the case back to the District  
5 Court for further findings on it. The Court of Appeals'  
6 view I take it was that the exact amount of the delay  
7 was not really significant, and perhaps even if it had  
8 been a day later, they still would have reached the same  
9 holding.

10 QUESTION: Is it pretty well conceded that  
11 there are bounds within which the search took place,  
12 that it was at least one day and not more than three  
13 days, or is it just totally unknown?

14 MR. HOROWITZ: Well, I think it is really  
15 totally unknown. There was nothing in the hearing that  
16 focused on it at all. The government has -- we have no,  
17 no reason to believe that it was sooner than one day,  
18 certainly. It does not appear that it was done  
19 immediately upon return to the station.

20 The other thing that is peculiar about this  
21 case is that this isn't -- the search that we are  
22 talking about is not -- was not really -- its purpose  
23 was not an evidentiary search in the way that usually  
24 comes up in these cases. The police were pretty sure  
25 what they had. They were smelling marijuana. They had

1 40 bales there. They were packages like marijuana is  
2 always packaged. So they didn't -- they weren't all  
3 that curious about what the contents were, and I think  
4 that was --

5 QUESTION: They just wanted to have it  
6 tested.

7 MR. HOROWITZ: Yes. So what happened was in  
8 preparation for further judicial proceedings they went  
9 ahead and had it tested. So they didn't have the same  
10 reason to go ahead and do it.

11 So it is certainly possible that they might  
12 not have done it until a couple of days later, it seems  
13 to me --

14 QUESTION: Is it your view that if they could  
15 have opened it at the time, on the scene, right after it  
16 was seized, that they could open it one hour later, one  
17 day later, two days later, ten days later?

18 MR. HOROWITZ: That is essentially our view.  
19 At some point you might start to run into other kinds of  
20 considerations such as their possessory interest in it.

21 QUESTION: In other words, you are saying that  
22 once the Court of Appeals conceded that it could have  
23 been opened right away, that was the end of the case.  
24 It could be opened any time thereafter.

25 MR. HOROWITZ: We think that the decisions of

1 this Court compel a conclusion.

2 I am not sure I really answered Justice  
3 Stevens' question about whether, the fact that we don't  
4 really know the state of the record on this is  
5 dispositive of the case. I mean, the government did  
6 petition for a hearing on this issue, and the Court of  
7 Appeals just did not seem concerned about exactly how  
8 long the delay was on it.

9 I think it is clear, it is fairly clear that  
10 they did not open the packages as soon as they could.

11 QUESTION: Well, I would think part of your  
12 answer to Justice Stevens' question would depend on  
13 whether you concede that there was an outer limit to the  
14 time in which the government was permitted to open these  
15 under the Fourth Amendment. You have intimated that  
16 perhaps there were other considerations of some sort  
17 that might prevent the government from opening the  
18 parcel a year later.

19 Are those Fourth Amendment considerations?

20 MR. HOROWITZ: Well, I --

21 QUESTION: I read your brief as conceding that  
22 because you said that this is the hypothetical warrant  
23 situation, and you surely have a duty to execute a  
24 warrant within some period of time. You can't just let  
25 it sit there for ten years.

1 MR. HOROWITZ: Well, the duty to execute a  
2 warrant within some time is either because it is  
3 specified on the face of the warrant, and usually it is  
4 because the information that gives probable cause may  
5 become stale at some time, which is not really the case  
6 here.

7 So I was really speaking generally there,  
8 Justice Rehnquist, and the particular facts here where  
9 you have, or what the agents had was forfeitable  
10 contraband that there was, that they had no right to  
11 return --

12 QUESTION: And they had probable cause to  
13 believe it was.

14 MR. HOROWITZ: Yes, they had probable cause to  
15 believe it was. There was no request for return. So I  
16 don't think it was any possessory interest that was  
17 implicated here, and there was no way that the probable  
18 cause is going to dissipate. I am not sure that there  
19 really was an outer limit.

20 I mean, I don't --

21 QUESTION: Do you think this, do you think  
22 this opening the package to make a test, is that a  
23 search? Is that something that --

24 MR. HOROWITZ: Well, we haven't really  
25 litigated that here. I guess there would be an argument

1 under Jacobsen that it was not a search at all. They  
2 weren't going to find out --

3 QUESTION: It was just a field test, wasn't  
4 it?

5 MR. HOROWITZ: It was a field test but I think  
6 they had to remove some --

7 QUESTION: It was just a test, it was just a  
8 chemical test that would make more sure of what

9 MR. HOROWITZ: That's my -- I mean, they had  
10 to open the packages in order to do that, so there is  
11 some sense in which there was a search of a container, a  
12 technical sense, but the actual test that they performed  
13 on it I don't think was a search.

14 QUESTION: I thought you were arguing the case  
15 on the hypothesis that there was no plain view, that you  
16 lost -- that therefore, that this container, even though  
17 it was not a great secret about what was in it, really  
18 legally was the same as if it was a locked briefcase.

19 MR. HOROWITZ: In this Court.

20 QUESTION: That's your position, yes?

21 MR. HOROWITZ: Yes. Well, we have not --

22 QUESTION: I am not suggesting that makes you  
23 wrong, but I mean, I think we have either got to decide  
24 it as a container case or as a bale of marijuana case.

25 MR. HOROWITZ: No, but as far as the question

1 of whether there was an outer limit on how long it could  
2 have taken to search, I think that is something that  
3 does depend on the nature of what they had. If there  
4 was a locked briefcase, I think it would be unreasonable  
5 not to search it for a month, just hold it for a month  
6 without turning it over. But in this case I am not sure  
7 it would be.

8 But given the way the Court of Appeals decided  
9 the case, I mean, we had this decision on the books.

10 QUESTION: But then, if it were a locked  
11 briefcase, who would have to prove it was or was not  
12 searched within the month? That's the question that  
13 interests me, and I don't see anybody addressing it.

14 MR. HOROWITZ: Well, I don't think that the  
15 length of time is really very important.

16 QUESTION: Well, but you just conceded it  
17 would be critical in the locked briefcase situation, if  
18 I understood you. You said that if they waited thirty  
19 days, the search would be unreasonable.

20 MR. HOROWITZ: Well, that's our view, but I  
21 think the Respondents' view and the Court of Appeals'  
22 view is that as soon as you get past the time when they  
23 could have gotten a warrant, the length of time doesn't  
24 matter, and a much shorter time is good enough to grant  
25 a suppression motion in this case. That is the legal



1 principle we have a problem with, and that is why we are  
2 petitioning here.

3 So from the perspective of the decision below,  
4 I don't think it matters at that point.

5 In our view, the contention that the delay  
6 here by itself created a warrant requirement is  
7 foreclosed by the prior decisions of this court. The  
8 Respondents did not dispute here at all that the police  
9 could have searched the trucks themselves even three  
10 days later. That principle is established by a long  
11 line of positions here, beginning with *Chambers v.*  
12 *Maroney*, continuing through *Texas v. White* and *Michigan*  
13 *v. Thomas*, and in fact, last term, in *Florida v. Meyers*,  
14 all nine Justices of this Court characterized that  
15 proposition as well settled.

16 What Respondents do argue here is that at some  
17 point during the time that the packages were at the  
18 stationhouse, a point that they define somewhat  
19 imprecisely as the time limit became practicable to get  
20 a warrant, the packages themselves became analytically  
21 distinct from the trucks on which they were found, and  
22 they could at that point no longer be searched without a  
23 warrant.

24 This argument is completely contrary to *Ross*  
25 on two separate points. First, the basis for the

1 decision in Ross is that the authority to conduct an  
2 automobile search extends to the entire automobile,  
3 including its contents, which includes the packages  
4 found inside. That is to say, the search of a package  
5 found in an automobile is part of the automobile search  
6 itself. It is not distinct at all. Just as the  
7 justification for the automobile search, that is to say,  
8 probable cause, continues to authorize a warrantless  
9 search of the vehicle after it has been impounded at the  
10 station, so does that justification authorize the search  
11 of a package at that time as part of that vehicle  
12 search.

13 Second, Ross clearly confirms that the  
14 validity of a warrantless automobile search does not  
15 depend on any special exigency. Indeed, if it did, the  
16 packages and the trucks in this case probably could not  
17 have been searched without a warrant even at the scene  
18 since the Respondents had been arrested and the trucks  
19 had been secured. Certainly if Respondents were correct  
20 on this point, the trucks and the packages could not  
21 have been searched once they had been taken to DEA  
22 headquarters, even if that search had been conducted  
23 quite promptly there.

24 These Courts' case from Chambers through  
25 Florida v. Meyers, however, make it clear that the

1 trucks in fact could have been searched at the  
2 stationhouse, even after some time had elapsed.

3 Thus, Respondents' contention --

4 QUESTION: Well, what if they -- what if they  
5 just drove the trucks to the stationhouse and let them  
6 sit? They have probable cause to believe that the  
7 packages in them are marijuana and they just let the  
8 trucks sit for a month, and then they finally get around  
9 to having to prepare for trial, so they want better  
10 proof, so they seize the -- they open the packages and  
11 test them?

12 MR. HOROWITZ: Well, I still think there is no  
13 Fourth Amendment violation there unless something is  
14 shown as to what problem there was in waiting a for a  
15 month, either that the probable cause should have  
16 dissipated or that the question that came up in the  
17 Segura case here, whether there was some interference  
18 with some right of the Defendant, possessory interest.  
19 I mean, here they didn't ask for these things back.  
20 They didn't have any right to get them back. They were  
21 contraband.

22 QUESTION: Well, I suppose the trucks were  
23 forfeitable, I suppose.

24 MR. HOROWITZ: The trucks were forfeitable,  
25 too, sure.

1 I think that is clear from the Court's  
2 decisions. The Court has said that even though the  
3 exigency has been removed at the stationhouse, the  
4 search is still allowed to be performed without a  
5 warrant, and at that point I don't think it matters  
6 whether it is eight hours or a day or even a month, at  
7 least as far as those principles go.

8 But the contention that the exigency here, the  
9 question of exigency, when it became practical to get a  
10 warrant, is sharply at odds with Ross. This case, as  
11 recognized in Ross and discussed in other automobile  
12 search cases in this Court, involves a recognized  
13 exception to the warrant requirement, an exception that  
14 is distinct from the exigent circumstances doctrine.  
15 When probable cause exists to search an automobile and  
16 its contents seized on the highway, the practicability  
17 of obtaining a warrant at some time after the seizure is  
18 not a relevant consideration.

19 Now, putting aside for the moment the  
20 dispositive precedent on this point, there is still no  
21 reason, no common sense reason why the delay should have  
22 any effect on the ability to conduct a warrantless  
23 search. As the Court explained in Ross, the scope of an  
24 automobile search is precisely the same as the scope of  
25 a search that could be authorized by a magistrate

1 through a search warrant. Reading from page 823 of  
2 Ross, the Court said the scope of a warrantless search  
3 based on probable cause is no narrower and no broader  
4 than the scope of a search authorized by a warrant  
5 supported by probable cause. Only the prior approval of  
6 the magistrate is waived. The search otherwise is as  
7 the magistrate could authorize.

8 QUESTION: What were you reading from there,  
9 Mr. Horowitz?

10 MR. HOROWITZ: This is Ross at page 823.

11 If the officers had obtained a search warrant  
12 for the trucks at the time that they seized them, there  
13 surely is no contention that the trucks and the packages  
14 could not have been searched later at the stationhouse,  
15 even three days later. There is no reason why there  
16 should be a different result here.

17 Certainly policy considerations lend no  
18 support to the Court of Appeals' holding. The decision  
19 below does not advance any privacy interest of the  
20 individual at all. The privacy intrusion to him is the  
21 same whether the packages are searched immediately or  
22 whether they are searched three days later. There is no  
23 expectation of privacy of the individual that is  
24 intruded by the warrantless search here. It cannot  
25 seriously be contended that the delay itself created an

1 expectation of privacy in the package that did not exist  
2 previously and that could not be invaded without  
3 obtaining a search warrant from a magistrate.

4 Under *Ross*, the placement of a package in an  
5 automobile sufficiently reduces his expectation of  
6 privacy that it may be searched on the basis of probable  
7 cause without a warrant. That expectation of privacy  
8 cannot magically reappear with the passage of some  
9 indefinite period of time while the package at all times  
10 remains in the custody of the police.

11 The practical effect of the rule imposed by  
12 the Court of Appeals is simply to induce the police to  
13 make an immediate search. That does not help the  
14 individual's privacy interest at all, but it does put an  
15 unnecessary strain on law enforcement resources with  
16 some potential cost to their other responsibilities.

17 Finally, the Court of Appeals' rule completely  
18 eviscerates this Court's effort in *Ross* to establish a  
19 bright line to guide officers in conducting automobile  
20 searches. Each case, under the Court of Appeals  
21 holding, where the search was not made at the scene,  
22 would result in litigation over when it became  
23 practicable to get a warrant, or alternatively, whether  
24 the delay was justified by "pressing law enforcement  
25 duties," a phrase like that used by Respondents.

1 QUESTION: I can see another line, the line  
2 being when you take it to the stationhouse, shouldn't  
3 you get it then? Shouldn't you search it when you get  
4 it to the stationhouse?

5 MR. HOROWITZ: Well, even the Respondents  
6 haven't contended that. They say that there could be a  
7 delay of a few hours.

8 QUESTION: Well, I'm not a Respondent. I'm  
9 asking the question.

10 MR. HOROWITZ: There could be a line drawn  
11 there. That's the line that the Court refused to draw  
12 in Chambers v. Maroney and the line of cases  
13 thereafter. There really isn't any reason why the  
14 packages should be treated differently than the car.  
15 The Court could have held in Chambers that the search  
16 had to be conducted at the scene, and once the car is  
17 taken to the stationhouse a warrant was required. It  
18 decided for good reasons there that there was no point  
19 in having such a rule.

20 QUESTION: Hasn't this Court said that once  
21 you take the vehicle, you can inventory it?

22 MR. HOROWITZ: Yes, it would inventory search  
23 it.

24 QUESTION: If you inventoried it at the  
25 station, you would have found this marijuana, wouldn't

1 you?

2 MR. HOROWITZ: If they had opened the  
3 packages?

4 QUESTION: Hmm?

5 MR. HOROWITZ: If they had opened the  
6 packages.

7 QUESTION: Yes, and they could have done that  
8 in less than three days. That's all I'm saying.

9 MR. HOROWITZ: Yes, they could have done that  
10 in less than three days.

11 QUESTION: May I ask, you have argued mainly  
12 there is no change in the privacy interest, but focusing  
13 on the possessory interest of the owner of the container  
14 for the moment, would there be -- would the case be any  
15 different, in your view if -- it is unlikely on these  
16 facts with this container -- but if the owner had said I  
17 want the package back just as soon as possible because  
18 it has got very important matter that I want to use?  
19 Could they still have continued to sit on it  
20 indefinitely?

21 MR. HOROWITZ: No, I don't think they could  
22 have? If he had asserted there was an important matter  
23 in there that he was entitled to, not that he needed the  
24 marijuana to distribute it, but something that was not  
25 forfeitable --



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QUESTION: Assume it was a locked briefcase.

MR. HOROWITZ: Yes, absolutely. At some -- at that point the police would have an obligation to conduct the search in some expeditious manner. I still think they could delay it for a few hours if they had other duties that they were forced to attend to, but at least there there is a reason, and there is some deprivation.

Now, I am not sure what the remedy would be.

QUESTION: So suppose that the search was -- seized -- a bunch of bales of cotton were seized and a couple weeks goes by, and the seizure of the bales was perfectly legitimate, and the owner says, well, look, I want to sell these bales, this is a good time of year to sell them. The government just can't hang on indefinitely in the face of a request like that unless they have got some reason to keep them, can they?

MR. HOROWITZ: Right. I completely agree. They are under an obligation there to find out whether there is in fact marijuana in there or whether it is just cotton.

QUESTION: But in this case I gather you agree that the officers had probable cause to believe it was marijuana, and in fact it was and was forfeitable. So under those circumstances you say there is no time limit

1 in any event.

2 MR. HOROWITZ: I can't conceive of anything in  
3 the facts of this case where the Defendants would be  
4 prejudiced at all by -- I mean, as a practical matter,  
5 the police are not going to keep these things around  
6 indefinitely. They have an interest in getting things  
7 moving. But I don't see what reason they would have to  
8 complain about it, even if the search had taken longer.  
9 It could have been longer.

10 It seems to me that there is simply no reason  
11 to inject uncertainty into what is at least at this  
12 point a fairly well settled area of the law. There is  
13 no problem here that requires correction. There is no  
14 interest here that requires a special rule to protect  
15 Fourth Amendment rights. The police have no incentive  
16 unnecessarily to delay opening the packages that are  
17 found in an automobile when they want to search them on  
18 the basis of probable cause. Even acting without any  
19 fear at all at the invocation of the exclusionary rule,  
20 the police's desire to advance the course of its  
21 investigation suggests that officers will search such  
22 packages as soon as practicable. Therefore, there is no  
23 need to create a rule to prevent officers from  
24 delaying.

25 Secondly, to the extent there is any delay --

1 and that is really illustrated in this case -- it does  
2 not really prejudice the owners of the packages in the  
3 absence of some other set of facts like the locked  
4 briefcase that we have been discussing.

5 I think it is important to emphasize here that  
6 even though the question in this case is whether the  
7 police needed to get a warrant or not, this is not  
8 really like the normal warrant case where there is a  
9 concern of protecting the individual's privacy.

10 Normally in a case where the court imposes a warrant  
11 requirement, the reason is to interpose the magistrate  
12 in between so that the police's own determination of  
13 probable cause is not a justification for search.

14 Therefore, in a case where the police turn out to be  
15 wrong, there is a real privacy intrusion in that  
16 something is searched for no reason.

17 But that is not the case here because even if  
18 the Court of Appeals is affirmed, the police are still  
19 entitled to conduct a warrantless search here. It does  
20 not protect against the danger that the police are going  
21 to misapprehend the nature of probable cause. The only  
22 thing that is gained by applying the Court of Appeals'  
23 rationale is that the police will be prevented from  
24 delaying, and as I said before, that delay does not hurt  
25 the Defendants, and there is no incentive for the police

1 to do it anyway.

2 I would like to reserve the remainder of my  
3 time.

4 CHIEF JUSTICE BURGER: Mr. Walker?

5 ORAL ARGUMENT OF WILLIAM G. WALKER, ESQ.

6 ON BEHALF OF RESPONDENTS

7 MR. WALKER: Mr. Chief Justice, and may it  
8 please the Court:

9 I think that there is a fundamental  
10 disagreement between counsel on the various sides as to  
11 what the issue in this case is. The government argues  
12 that the issue in this case is whether the government  
13 had probable cause to search the automobile at the  
14 scene. We disagree with that. We think that the issue  
15 was whether or not the government was involved in an  
16 automobile search at the scene or at any time.

17 QUESTION: Do you agree with the Court of  
18 Appeals that the packages could have been opened on the  
19 scene right at the time they were --

20 MR. WALKER: No, sir, we do not. Our position  
21 before the Court of Appeals and before this Court is  
22 that the record is devoid of any indication that there  
23 was ever an automobile search in this case. The focus  
24 of the police officers was solely and exclusively on the  
25 packages from the moment that they arrived on the scene

1 until the time that the core samples were taken later.  
2 There is not a scintilla of evidence before this Court  
3 that the police officers were ever concerned with the  
4 types of vehicles as vehicles.

5 QUESTION: Well, that ordinarily is a factual  
6 question, I suppose, you know, if the focus of the  
7 officers is a relevant fact. The Court of Appeals  
8 resolved the facts against you, or at least it resolved  
9 the legal issue against you.

10 Do you take issue with the Court of Appeals'  
11 statement of the facts or with their resolution of the  
12 legal issue?

13 MR. WALKER: I take issue with your  
14 conclusion, respectfully, that the Court of Appeals  
15 found that fact against us. If you go back to the  
16 District Court opinion, the District Court opinion found  
17 as a matter of fact that the police officers from some  
18 thirty feet saw a group of packages, that as they  
19 approached the packages, they knew that those were the  
20 types of packages that commonly were used to put  
21 marijuana in, they smelled marijuana coming from the  
22 packages.

23 They had been -- there had been other officers  
24 on the scene about an hour earlier who had looked in  
25 those vehicles, had smelled no marijuana, had seen no

1 packages. The officers concluded, and the testimony is  
2 unequivocal on this point, that the officers believed  
3 that the marijuana was only in the packages.

4 In fact, the government at the District Court  
5 level argued that there was no search because they knew  
6 that the marijuana was in the packages. The District  
7 Court found as a matter of fact that when they got to  
8 the vehicles, they "viewed the packages" that were --

9 QUESTION: The packages were in the vehicle.

10 MR. WALKER: Yes, sir, but the District Court  
11 found only that they viewed the packages, not that they  
12 did any search.

13 When it then went up to the Court of Appeals  
14 for the Ninth Circuit, the Court of Appeals for the  
15 Ninth Circuit found that they had probable cause to  
16 conduct an automobile search, not that they ever  
17 conducted an automobile search. So they never found  
18 that fact against us.

19 QUESTION: Let me see what, if I am confused  
20 about the facts.

21 How did these packages get into the truck from  
22 the, from wherever they came?

23 MR. WALKER: According to the evidence, what  
24 happened was the vehicles went down to an airstrip in  
25 Bowie, Arizona. They were spotted and surveilled by

1 police officers all the way from Tucson. When they  
2 got --

3 QUESTION: Then you don't agree with the  
4 government's version of the facts, that they came in  
5 this isolated airstrip at night and the packages were  
6 taken off the small airplane and put onto the truck.

7 Do you agree with that?

8 MR. WALKER: We agree with part of that. It  
9 was during the daylight hours, and what happened was the  
10 police were given a tip by a confidential informant in  
11 Tucson, which is approximately 100 miles from this site,  
12 and in fact, they had continuous surveillance of these  
13 two vehicles from the time that they left Tucson,  
14 Arizona earlier that morning until they got to the  
15 landing site and met with the airplanes. So it was  
16 not --

17 QUESTION: And you agree that the packages  
18 came off the airplane, do you?

19 MR. WALKER: Yes, Your Honor, we do.

20 QUESTION: And were put on --

21 MR. WALKER: Yes, Your Honor, we do.

22 Our point is --

23 QUESTION: You say that the police never made  
24 a vehicle search.

25 MR. WALKER: Yes, sir.

1 QUESTION: Well, you mean of -- I guess they  
2 never searched the parcels until several days after they  
3 were removed --

4 MR. WALKER: That is correct, Your Honor.

5 QUESTION: -- from the vehicle.

6 Where were the parcels seized?

7 MR. WALKER: That's a very important question  
8 to our theory of the case.

9 The vehicles were camper trucks, and what  
10 happened was --

11 QUESTION: Well, does it take a long time to  
12 answer the question?

13 MR. WALKER: No, sir.

14 QUESTION: Where were the parcels seized?  
15 Were they on the vehicles?

16 MR. WALKER: The parcels were in the pickup  
17 portion of the vehicles.

18 QUESTION: So they were seized on the  
19 vehicles

20 MR. WALKER: Yes, sir, they were. And --

21 QUESTION: Okay.

22 QUESTION: Were the vehicles themselves taken  
23 into custody, seized?

24 MR. WALKER: Yes, ma'am, the vehicles were  
25 driven to the stationhouse and --



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QUESTION: By the officers.

MR. WALKER: Yes.

QUESTION: The entire vehicle with the contents.

MR. WALKER: Yes, Your Honor, yes, Your Honor.

Our point is that what Ross says -- and I think we need to look at the language of this Court in Ross -- that if you are in the midst of an automobile search and you need to search packages to complete the automobile search, then it is justifiable to search the packages without a warrant.

Here is clearly what Justice Stevens said in the opinion in Ross. When a legitimate search is under way -- and we are talking about an automobile search -- nice distinctions between glove compartments, upholstered seats, trunks and wrapped packages must give way to the interest in the prompt and efficient completion of the task at hand, and the whole grounding of Ross, of this Court's opinion in Ross, is that if you are in the midst of an automobile search, it would defeat law enforcement purposes to say, well, you can search certain portions of the automobile but not all of it.

The situation is radically different, as it

1 was in Chadwick and Sanders, if the focus is on not the  
2 vehicle as a whole but rather, on a particular item  
3 which happens to be reposed in an automobile.

4 QUESTION: Well, you must agree, I would  
5 think, that frequently we do not consider a principle  
6 laid down as confined to the precise facts in which --  
7 in the case in which they were laid down. The Ross  
8 opinion announced a general principle, did it not, that  
9 deviated somewhat from prior holdings?

10 MR. WALKER: Yes, Your Honor.

11 QUESTION: It went beyond prior holdings.

12 MR. WALKER: Yes, Your Honor.

13 QUESTION: But if it happened to be a truck  
14 instead of a camper or a taxicab instead of a truck,  
15 that wouldn't make any difference, would it, in terms of  
16 the principles laid down?

17 MR. WALKER: No, sir.

18 I think the type of vehicle is important here  
19 only for one reason, and that is that the packages of  
20 marijuana were in a separate portion from the passenger  
21 compartment of the vehicle. If in fact the police  
22 officers had really been concerned with the vehicles in  
23 question, certainly they would have searched the whole  
24 vehicles. They didn't do that. In fact, there is not a  
25 scintilla of evidence in the record that they even went

1 into the passenger compartments where the people were  
2 located to search that at all.

3 The facts of this case are that the police  
4 officers, according to the District Court, from 30 feet  
5 away saw the packages, smelled the marijuana, knew in  
6 their own minds exactly where it was, got up to the  
7 vehicles, and take the vehicles to the stationhouse.  
8 They took the vehicles to the stationhouse, unloaded the  
9 packages --

10 QUESTION: Could they have opened up one of  
11 those packages at that point?

12 MR. WALKER: No, Your Honor.

13 QUESTION: Why not?

14 MR. WALKER: They could not have opened the  
15 packages because what the police were concerned about in  
16 this case and what they were involved in was not an  
17 automobile search, but rather, a search of packages, and  
18 in Chadwick where the --

19 QUESTION: Well, it was the packages that they  
20 took, right?

21 MR. WALKER: Yes, Your Honor.

22 QUESTION: Well, couldn't they have opened  
23 what they took?

24 MR. WALKER: I don't believe so, Your Honor,  
25 not without a warrant. The general rule is --

1 QUESTION: What's the rule at the point of  
2 arrest?

3 MR. WALKER: I'm sorry?

4 QUESTION: At the point of arrest they had  
5 what, hold them there, then go get a warrant?

6 MR. WALKER: Yes, sir.

7 QUESTION: I see.

8 MR. WALKER: If the packages had been --

9 QUESTION: May I ask --

10 QUESTION: They are just reeking of  
11 marijuana. They could -- just reeking, you can smell  
12 them that well?

13 MR. WALKER: Yes, sir.

14 QUESTION: You would still have to go get a  
15 warrant.

16 MR. WALKER: Yes, sir. According to this  
17 Court's dictates, that goes to the probable cause but  
18 not to vitiate the warrant requirement.

19 QUESTION: Mr. Walker, do you think the police  
20 could have -- if your client had requested the return of  
21 the bales, that the police would have to give back the  
22 marijuana in this case to them, ever?

23 MR. WALKER: No, ma'am, but I think what would  
24 have happened, as a matter of --

25 QUESTION: It was forfeitable, was it not?

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MR. WALKER: Yes, ma'am.

QUESTION: It was contraband.

MR. WALKER: Yes, ma'am.

QUESTION: And what possible interest did your clients have in the contents of those bales that --

MR. WALKER: It's --

QUESTION: -- that you think can be asserted?

MR. WALKER: It's not because of a possessory interest in counterfeit goods that we allow the exclusionary rule in this setting. Any time there is contraband you would have that argument, that since the person had no interest in it, therefore he can't assert his Fourth Amendment privilege.

The Court has --

QUESTION: What's wrong with that argument?

MR. WALKER: Well, I think that the thing that is wrong with that government is that the reason for the exclusionary rule is as a prophylactic effect, to prevent the police from engaging in illegal behavior, and the fact that it might not help in this case doesn't mean that the exclusionary rule wouldn't help in cases where we don't know what is in the packages.

QUESTION: But this Court, the Court of Appeals said it would have been perfectly legal and proper to have torn the packages open at the scene on

1 the bed of the truck or whatever you want to describe  
2 it, and take it out for testing.

3 MR. WALKER: Yes, sir, yes, sir.

4 QUESTION: Then there wouldn't have been any  
5 case, would there?

6 MR. WALKER: No, sir. That's what the Court  
7 of Appeals said.

8 QUESTION: What's the -- I will put to you the  
9 question that your friend rhetorically put, how you have  
10 been damaged by waiting a day or two.

11 MR. WALKER: Well, it is not the lapse of time  
12 that damages us, it is the fact that since this  
13 investigation was always an investigation of packages,  
14 people have a high expectation of privacy in packages,  
15 and this Court has frequently said, way back to the  
16 Jackson case where in the mail people had an expectation  
17 of privacy in packages, that people's expectation of  
18 packages is high.

19 QUESTION: Well, privacy expectations in the  
20 mail or in interstate commerce are quite different from  
21 being -- from packages unloaded from a small airplane at  
22 an isolated airstrip under the circumstances shown  
23 here.

24 MR. WALKER: Well, I disagree with Your Honor  
25 to the extent that I think this Court has consistently

1 found that regardless of the nature or type of package  
2 or the situation with packages, people have a high  
3 expectation of privacy with respect to packages.

4 QUESTION: What if it were in the back of the  
5 trunk of a car under Ross?

6 MR. WALKER: If the police are in the pursuit  
7 of an automobile search, then dispute a person's high  
8 expectation of privacy in the package, this Court has  
9 allowed the search, not because the expectation of  
10 privacy is lessened, but because of the fact that the  
11 police are engaged in an automobile search, the  
12 completion of which is dependent on being able to search  
13 everything in the automobile.

14 QUESTION: You say it must be completed right  
15 away on the scene.

16 MR. WALKER: Yes, Your Honor. What this Court  
17 said in Ross was if you are in the middle of an  
18 automobile search and all of a sudden you come across a  
19 package, you can't search the package, it frustrates the  
20 auto search. But there is no auto search in this case.

21 QUESTION: But then, do you really disagree  
22 with the Court of Appeals about the search on the  
23 scene?

24 MR. WALKER: We would support them as a backup  
25 position, but we disagree when they conclude that these

1 packages could have been searched on the scene.

2 QUESTION: Well, Mr. Walker, what -- what  
3 about a package that is wrapped as marijuana bales are  
4 typically wrapped, experienced officers know that, it  
5 looks like marijuana, it smells like marijuana, and in  
6 fact, it is marijuana? Now, what privacy interest do  
7 you have in it?

8 It isn't like an ordinary package that someone  
9 might expect to have a privacy interest in. I think  
10 your argument just fails to reckon with the facts of  
11 this case.

12 MR. WALKER: Well, I would respectfully  
13 disagree with Your Honor. I think that, first of all,  
14 this Court has long ago abolished the distinction  
15 between worthy and unworthy containers and has found  
16 that the nature of a container --

17 QUESTION: Has nothing to do with whether the  
18 container is worthy. If the container discloses in this  
19 case, by virtue of the smell and the appearance, its  
20 contents.

21 MR. WALKER: Well, that is really the plain  
22 view argument, and that is an argument which is not  
23 being urged upon this Court by the Petitioner. It was  
24 abandoned after the Court of Appeals argument, and in  
25 fact --



1 QUESTION: Could I ask you, what would the  
2 government have to do before it burnt these packages?

3 MR. WALKER: I'm sorry, Your Honor.

4 QUESTION: What would the government have to  
5 do before it confiscated these packages and burnt them?

6 MR. WALKER: Burnt them?

7 QUESTION: Burnt the marijuana, yes.

8 Let's just assume there was never a criminal  
9 prosecution filed against these people, they just wanted  
10 to get rid of the marijuana, they have probable cause to  
11 believe that's what it is, so they open it to make sure  
12 and burn it.

13 MR. WALKER: If they open it to make sure,  
14 tht's a search, and I think they would have to have a  
15 warrant for that.

16 QUESTION: Before they can burn it.

17 MR. WALKER: Before they opened it to see what  
18 was in it.

19 QUESTION: Well, you don't think they could  
20 just have burned it without opening it?

21 MR. WALKER: I don't know the answer to that  
22 question.

23 QUESTION: How about a forfeiture proceeding?  
24 Do you think it would be required before they did the  
25 burning?

1 MR. WALKER: I think it would be required  
2 before there was any physical intrusion into the  
3 package.

4 QUESTION: Do you still claim privacy?

5 MR. WALKER: Yes, Your Honor. What I am --

6 QUESTION: Why didn't they claim it?

7 MR. WALKER: Why didn't they claim it?

8 QUESTION: Why didn't they claim those bales?

9 MR. WALKER: Well, for the same reason that  
10 people that are involved in criminal activity never  
11 claim contraband, but that doesn't --

12 QUESTION: But you still have privacy in  
13 something you don't want to admit is yours?

14 MR. WALKER: I think it is -- I think this  
15 Court has recognized --

16 QUESTION: Well, then, you keep putting quotes  
17 on things. Would you put quotes on that privacy?

18 MR. WALKER: What I am suggesting to this  
19 Court is that you have for years and years recognized  
20 that people have a high expectation of privacy in  
21 containers, even though they may contain contraband. I  
22 don't think that is a novel concept.

23 QUESTION: Mr. Walker, what position did the  
24 Defendant in this case take at the trial court?

25 MR. WALKER: At the trial court the position

1 of the defendants were twofold, Your Honor, number one,  
2 that this was not a vehicle search and that there was a  
3 warrant needed for the packages for that reason, and  
4 number two, at the time that we were in the trial court,  
5 we were arguing Robbins, which was far different.

6 QUESTION: You were relying on Robbins.

7 MR. WALKER: Yes, Your Honor, we were.

8 QUESTION: That was a vehicle search case,  
9 wasn't it?

10 MR. WALKER: Yes, Your Honor.

11 QUESTION: Was that your position also in the  
12 Court of Appeals?

13 MR. WALKER: It was our position initially in  
14 the Court of Appeals, and then Ross came down while we  
15 were on appeal. So we then asked to submit additional  
16 briefs on the Ross issue and were permitted to do so.

17 QUESTION: Yes.

18 What change in the facts occurred between the  
19 time you relied on the automobile search case and the  
20 time you now rely on an entirely different theory?

21 MR. WALKER: What change in the facts in this  
22 case?

23 QUESTION: Yes.

24 MR. WALKER: Nothing, Your Honor.

25 It has been our position since the beginning

1 that a warrant was needed for this --

2 QUESTION: That there was no automobile  
3 search?

4 MR. WALKER: I'm sorry?

5 QUESTION: Was it your position from the  
6 beginning that there was no automobile search?

7 MR. WALKER: We didn't argue --

8 QUESTION: You relied on Robbins --

9 MR. WALKER: Yes.

10 QUESTION: And to rely on Robbins, you had to  
11 state, I assume, or argue that there was an automobile  
12 search.

13 MR. WALKER: Our argument initially was that  
14 there was no automobile search, but if there was one,  
15 then Robbins applied.

16 We didn't focus in on that issue to the extent  
17 that we have here before this court, obviously because  
18 at the time we thought Robbins was controlling. But we  
19 did not take an unequivocal position that this was an  
20 automobile search in Robbins.

21 QUESTION: I want to go back, if I may, to the  
22 question of whether there was an automobile search,  
23 which is you in effect making an alternate ground for  
24 affirmance by disagreeing with the Court of Appeals on  
25 that point.

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MR. WALKER: Yes, Your Honor.

QUESTION: And you say that it was not an automobile search in part because there was no evidence found anywhere except in these bales, and you have inferred from that that therefore the officers did not in fact search the rest of the camper. But how do we know that? The record doesn't show whether they looked at the rest of the camper or not?

MR. WALKER: Well, on page 139 of the trial record, on question by the prosecutor, the officer who was at the scene indicated that they did not do a search.

QUESTION: But even if they didn't, take it one step farther, the question as to whether Ross applies or not I suppose turns on whether there was probable cause to make a search of the vehicle, and could not one conclude that when you have loaded all this stuff into this vehicle and the vehicle is owned by the same group of people who own the contents, that there is probable cause that would justify a search of the entire vehicle?

MR. WALKER: I don't think there would be any more probable cause in this case than there was for the Court in Sanders?

QUESTION: Except there they had put it in a

1 taxicab. There is no reason to believe the taxicab  
2 operator is --

3 MR. WALKER: Well, the facts, as I remember  
4 them, in Sanders, Your Honor, were that there were two  
5 trips by the Defendant to the vehicle in Sanders. The  
6 first trip what he did was he took a bunch of personal  
7 luggage and put it in the automobile. He then went back  
8 and got the green briefcase and put it in the glove  
9 compartment.

10 So you could make the same argument in Sanders  
11 that the police officers had the right to search the  
12 passenger compartment because there was other luggage of  
13 the defendant there, and --

14 QUESTION: My memory may be faulty. Wasn't  
15 that a taxicab?

16 MR. WALKER: It was a taxicab, but --

17 QUESTION: Well, is there any reason to  
18 believe the cab company is in league with the people  
19 that were --

20 MR. WALKER: No, sir, but there was personal  
21 luggage of the defendant that was put in the taxicab.

22 QUESTION: Well, yes, but -- all right.

23 MR. WALKER: My point is simply that it is not  
24 whether you have probable cause to make an automobile  
25 search that should be dispositive, it is whether you are

1 engaged in one.

2 QUESTION: In other words, the subjective  
3 motive of the police officer making it rather than the  
4 objective facts that justify the action?

5 MR. WALKER: No, sir. It is the reason for  
6 the search, just as in a search incident to an arrest  
7 case. This Court has held that if you search an  
8 automobile incident to somebody's arrest, since the  
9 reason for that search is to allow the protection of the  
10 police officer, we say it is okay, but if you then  
11 search that same automobile, not because it is for the  
12 protection of the police officer incident to arrest, but  
13 later at the stationhouse, even though you could have  
14 done a search incident to arrest, we don't allow it.

15 QUESTION: Yes, but that is -- we are talking  
16 about Ross now, and the question is whether there is  
17 probable cause to make a vehicle search.

18 MR. WALKER: Yes, sir.

19 QUESTION: And your position is there was not  
20 probable cause to make a search of this camper.

21 MR. WALKER: No, sir. My position is that  
22 regardless of whether there was probable cause to  
23 conduct an automobile search, there was no automobile  
24 search in progress, and if I might quote, Your Honor,  
25 from your own language in Ross --

1                   QUESTION: My understanding -- they can finish  
2 the job they have already started.

3                   MR. WALKER: Yes, sir. You say in the course  
4 of a legitimate lawful search of an automobile, police  
5 are entitled to open containers.

6                   There is no automobile search going on here.  
7 Our position on that issue is very simple. The focus of  
8 this investigation, just as the focus of the police  
9 investigation in Chadwick and in Sanders, was reposed  
10 entirely on these containers. In fact, the government's  
11 argument before the District Court and the Court of  
12 Appeals was that their interest was so focused on the  
13 containers that there was no search because the  
14 marijuana was in plain view.

15                   QUESTION: Well, then, your point, I take it,  
16 is that even though these things were loaded on these  
17 trucks at the time the police saw them, the police would  
18 have had to get a warrant to search them right at that  
19 moment.

20                   MR. WALKER: Yes, Your Honor, that is our  
21 position. Our position is that the issue here is not a  
22 lapse of time; the issue here is whether there was an  
23 automobile search going on where they knew there was  
24 contraband but didn't know where it was, as in Ross,  
25 where they had heard that there was contraband and had



1 to search the whole vehicle to find it --

2 QUESTION: Well, then, your -- the success of  
3 your position would depend on later showing, I suppose,  
4 under your terms that the police wanted only to seize  
5 these particular bales, and that they would not have  
6 searched any other part of the truck.

7 MR. WALKER: And in fact, all of the evidence  
8 is undisputed that that is exactly what happened.

9 QUESTION: But you have to know at the -- you  
10 have to know that something later is going to happen at  
11 the time you decide whether to get a warrant or not. I  
12 suppose it is the subjective motivation of the police:  
13 are you going to search the whole truck or are you just  
14 going to seize the bale?

15 MR. WALKER: It is what the police are in the  
16 process of doing, if they are in the process of  
17 conducting an automobile search.

18 QUESTION: That really would work quite a  
19 twist in Ross, I think, because you are imputing,  
20 imputing kind of a motivation thing that certainly isn't  
21 in Ross.

22 MR. WALKER: Well, this Court has found  
23 consistently that when you are applying an exception to  
24 the warrant requirement, the exception should be  
25 narrowly construed.

1           QUESTION: Well, I don't think you will find  
2 that a majority of the Court agree that Ross should be  
3 narrowly construed at all. Ross defines an exception to  
4 the warrant requirements to be applied according to its  
5 terms, not narrowly.

6           MR. WALKER: Regardless of how you read Ross,  
7 though, Your Honor, Ross applies to situations where  
8 there is a legitimate automobile search in progress. I  
9 think that it would distort the meaning of Ross even in  
10 a liberal sense to say that any package that happens to  
11 be reposed in an automobile can be searched even if the  
12 police aren't engaged in an automobile search.

13           QUESTION: In this case, would it have been  
14 all right if the officer had said, "We are going to  
15 conduct a search of this vehicle"?

16           MR. WALKER: If he had said that and then they  
17 had been engaged in an automobile search, yes, Your  
18 Honor.

19           QUESTION: So the only thing wrong was they  
20 didn't make those --

21           MR. WALKER: Well, the only thing wrong with  
22 it was that the entire focus of this inquiry was on the  
23 packages.

24           QUESTION: Oh. Well, what are you searching  
25 the vehicle for other than the packages?

1 MR. WALKER: There was no search of the  
2 vehicle. There was never any search of the vehicles in  
3 this case.

4 QUESTION: Suppose there had been one package,  
5 and it was a big truck, and you didn't know whether it  
6 was in the back or in the front, and so you had to  
7 search the vehicle to find the package?

8 Under your provision there was a search of the  
9 vehicle in progress --

10 MR. WALKER: But if the focus --

11 QUESTION: And then you find the package.  
12 Could you open it? No.

13 MR. WALKER: That's not -- that's not the  
14 facts of this case.

15 QUESTION: Well, I know, but what if you did?

16 MR. WALKER: I think if you were in the  
17 process of making a vehicle search --

18 QUESTION: Only to -- only to find the  
19 package.

20 MR. WALKER: Then I think you are doing a  
21 vehicle search, but you are not doing a vehicle search  
22 here.

23 I think most of these arguments could have  
24 been made against the petitioner in Chadwick or in  
25 Sanders, and in Chadwick and Sanders, even though these

1 items were in vehicles, the Court said these are not  
2 vehicle search. These are package searches.

3 QUESTION: No, but there is still another  
4 distinction. It is not just that they are in a vehicle  
5 or you are making a vehicle search. There is a question  
6 of whether you have a right to make a vehicle search.  
7 There was no right to make a vehicle search in Sanders  
8 because the vehicle itself didn't -- there was no  
9 probable cause to believe anything would be found in the  
10 vehicle other than the package.

11 And your argument is it is not the right to  
12 make the search that is dispositive; it is whether the  
13 officers in fact engaged in the search, and there is  
14 language that tends to suggest that.

15 MR. WALKER: Well, I respectfully disagree  
16 with you, Justice Stevens, for this reason. In Sanders  
17 the facts clearly established that there was other  
18 luggage of the Defendant's that was in that vehicle.  
19 Now, that luggage could have been searched to find  
20 evidence of the crime, and yet it wasn't whether there  
21 was probable cause to search further that was important  
22 to this Court, it was whether or not in fact the focus  
23 of the inquiry was on the other things or whether it was  
24 exclusively on the green suitcase.

25 He came out with a whole bunch of luggage.

1 QUESTION: Well, would you not agree that at  
2 least analytically there is a possibility of a  
3 distinction between a right to make a vehicle search on  
4 the one hand, and the question of whether you are  
5 actually engaged in it on the other?

6 MR. WALKER: Absolutely, Your Honor, and I  
7 think that is what the government grounds its argument  
8 on.

9 QUESTION: And that's what the Court of  
10 Appeals based its holding on, tcc.

11 MR. WALKER: Yes, sir.

12 QUESTION: That there was probable cause to  
13 search the entire vehicle.

14 MR. WALKER: Yes, sir. That I think is wrong,  
15 because the whole reason to relax the rule for a package  
16 search when a package is in a vehicle is to allow police  
17 to complete their task of searching the vehicle. If  
18 they are not involved in a vehicle search, why then  
19 should the rule be relaxed to allow a package search  
20 without a warrant?

21 The facts in this case indicate that the  
22 police officers arrived there some five to ten minutes  
23 after the packages had been loaded onto the trucks, that  
24 in fact, what happened was the packages were taken out  
25 of the airplanes and were then loaded into the

1 vehicles.

2 Let's suppose that the police officers in this  
3 case had arrived five to ten minutes earlier, and when  
4 they got there the packages which happened to be sitting  
5 in the back of the pickup trucks had been sitting on the  
6 ground instead. At that point I think it would be clear  
7 lthat the government would not be able to argue that  
8 just because they had probable cause to search the  
9 automobiles they therefore could open the packages  
10 without a warrant.

11 And I suggest to the Court that it shouldn't  
12 make a difference that they get there five minutes later  
13 and that the bales and boxes of marijuana happened to be  
14 sitting in the back end of a camper truck.

15 QUESTION: But under the reascning of the  
16 automobile search exceptiuon, it makes all the  
17 difference in the world. If they are in an automobile,  
18 the traditional reasons for allowing search on probable  
19 cause without a warrant apply. If they are not in an  
20 autcmobile, they don't. That's the bright line that  
21 Ross drew, and it seems to me your argument is just  
22 tending to blur it.

23 MR. WALKER: My argument, if the Court please,  
24 is based on the plain reading of Ross which says that if  
25 you are in the process of an auto search you can do it,

1 but just the justification to do an automobile search  
2 doesn't do it for you.

3 I think it is analogous in a sense to the  
4 pretext arrest area, where if somebody is going 100  
5 miles an hour and a police officer stops the vehicle  
6 because he is going 100 miles an hour, and then you  
7 smell marijuana or you see marijuana in plain view, that  
8 arrest is okay. But if somebody is going 100 miles an  
9 hour and you stop them not for that reason but because  
10 you suspect them of being a drug dealer, and then you  
11 see marijuana in plain view, that is a pretext arrest,  
12 and it is no good.

13 In that situation the difference is not in  
14 what the police are allowed to do, because clearly in  
15 both cases they would be allowed to stop the driver. It  
16 is rather in what they were doing.

17 QUESTION: Mr. Walker, what if we disagree  
18 with you on your interpretation of Ross? Are you going  
19 to argue that the three days or four days or whatever it  
20 was makes a difference?

21 MR. WALKER: Yes, Your Honor, and that is our  
22 second argument. The second argument is that even if  
23 you assume that they could at the scene have searched  
24 these packages, that the three days later takes away the  
25 reason for allowing the search.

1           You have to understand that we have got a  
2 collision here between the principles that govern  
3 package searches and the principles that govern  
4 automobile searches.

5           QUESTION: What if the truck had just been  
6 kept in the yard at the police station for three days  
7 with the packages in it, and then it was opened and they  
8 were searched? Is that okay?

9           MR. WALKER: Yes, Your Honor, I think it is,  
10 and I think the cases that this Court --

11          QUESTION: What difference could it possibly  
12 make that the packages were removed and searched after  
13 three days?

14          MR. WALKER: The difference is that we have  
15 historically allowed automobile searches not only in  
16 situations where there are exigencies, but even days  
17 later, because historically people have a lesser  
18 expectation of privacy in their automobiles. They  
19 don't, however, have a lesser expectation of privacy in  
20 their packages, and once -- if you do an automobile  
21 search three days later, then in order to complete the  
22 automobile search and because we allow searches of  
23 automobiles, we would then allow the search of the  
24 packages. But if the packages are taken out of the  
25 automobile and stored in a place that is separate and



1 apart from the automobile, and there is no evidence in  
2 the record that there has ever been an automobile  
3 search, then in what realistic sense can you say that  
4 the opening of these packages is an automobile search?

5 QUESTION: In what sense can you say that the  
6 interests of your client suffer more in one case than  
7 the other?

8 MR. WALKER: Well, the interests of the client  
9 suffer only because the client has always had a high  
10 expectation of privacy in the package.

11 QUESTION: Legitimate expectation?

12 MR. WALKER: Yes, Your Honor.

13 QUESTION: In the bales of marijuana?

14 QUESTION: Society's standard, isn't it?

15 MR. WALKER: In Chadwick this Court found a  
16 high expectation of privacy in a trunk even though it  
17 had contraband in it, and in Sanders the Court found --

18 QUESTION: It had two locks on it and it was  
19 not in an automobile.

20 MR. WALKER: Well, but the expectation of  
21 privacy was the same.

22 QUESTION: Well, you don't bring the stuff in  
23 at Bowie rather than Tucson unless you want some privacy  
24 in it.

25 MR. WALKER: Yes, Your Honor.

1 (General laughter.)

2 MR. WALKER: And in fact, one of the  
3 Defendants testified in this case that he had a high  
4 expectation of privacy.

5 QUESTION: I suppose every criminal engaged in  
6 criminal activity hopes that he is going to have a lot  
7 of privacy.

8 MR. WALKER: I would like to answer a question  
9 that Justice Stevens posed of government's counsel. You  
10 asked who would the burden of proof be on with respect  
11 to the time period. And I would suggest that it would  
12 clearly be on the government, for this reason. We  
13 generally go by the standard that you must have a  
14 warrant in all cases unless we find an exception, and  
15 the exception must be proven by the government. The  
16 government bears the burden of proving each essential  
17 element of an exception, and if the government wants to  
18 prove that an exception was reasonable in this case, the  
19 government then has the responsibility of proving that  
20 the time period --

21 QUESTION: This is really an exception from an  
22 exception, in a way, because if they are within the  
23 automobile exception, which you of course disagree, then  
24 the question is whether they get out of it by waiting  
25 too long, and I wonder if you would disagree with the

1 Court of Appeals' formulation of the test they are  
2 applying of "soon thereafter." They don't say right  
3 away, they say soon thereafter.

4 MR. WALKER: Soon thereafter I think is  
5 consistent with this Court's dictate in Robbins where  
6 you yourself said soon thereafter, and I think what the  
7 Court found, the Court of Appeals found is there was  
8 nothing in the record to justify that it was soon  
9 thereafter, and the government has the burden of proving  
10 it is soon thereafter.

11 QUESTION: And you would agree that the record  
12 really does not tell us when they tested it.

13 MR. WALKER: I would agree with that, and for  
14 that reason I think this is a bad case for this Court to  
15 decide on certiorari, but if you are going to decide it,  
16 then I think what you have to do is to say the burden of  
17 proof is on the government to prove the exception, the  
18 exception as enunciated in Ross clearly says it has got  
19 to be soon thereafter, and there is no proof in this  
20 record that it was soon thereafter.

21 QUESTION: Yes, but the Court of Appeals,  
22 under the Court of Appeals' rationale, it wouldn't have  
23 made any difference how soon it was.

24 MR. WALKER: No, sir, I think the Court of  
25 Appeals said that if it had been done soon thereafter it

1 would have been okay.

2 CHIEF JUSTICE BURGER: Do you have anything  
3 further, Mr. Horowitz?

4 ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.

5 ON BEHALF OF PETITIONER - Rebuttal

6 MR. HOROWITZ: Let me just make a brief point  
7 about this question of whether the trucks were  
8 searched.

9 We agree with Justice Stevens that the crucial  
10 issue here is the probable cause to search the trucks,  
11 not the subjective motivation of the officers. But as a  
12 matter of fact here, I think the trucks were searched.  
13 It is just that these bales were sitting open in the  
14 back of the trucks. So it didn't have to be very  
15 extensive search. They came up to search the trucks,  
16 and right away they saw the packages there. It is  
17 exactly the same case as Ross. There is no reason to  
18 think in Ross that the police ripped the car apart after  
19 they found the paper bag. Once they found the package,  
20 they thought they found what they were looking for, and  
21 they didn't continue the search there.

22 I think it is irrelevant whether the trucks  
23 were searched later at the station, but there is no  
24 evidence -- we don't really know from the record whether  
25 they were or they weren't. The only evidence that I

1 found, actually, very obliquely suggests that they were  
2 in fact searched. That is at page 11 of the November 10  
3 transcript.

4 QUESTION: Do we know whether this truck was  
5 forfeited after the event or not?

6 MR. HOROWITZ: I assume that it was, but I  
7 don't know.

8 And finally, if the Court is disposed to  
9 accept this argument that Ross does not apply here at  
10 all, we would suggest that a warrantless search was  
11 nevertheless permissible under the theory of Footnote 13  
12 of Sanders.

13 Thank you.

14 CHIEF JUSTICE BURGER: Thank you, gentlemen.

15 The case is submitted.

16 We will resume at 1:00 o'clock in the next  
17 case.

18 (Whereupon, at 11:57 a.m., the case in the  
19 above-entitled matter was submitted.)  
20  
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25

CERTIFICATION

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# No. 83-1625- UNITED STATES , PETITIONER V. LYLE GERALD JOHNS, ET AL.

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BY Paul A. Richardson

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