

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1027

TITLE ARIZONA, Petitioner V. JAMES THOMAS HICKS

PLACE Washington, D. C.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 ARIZONA, :
4 Petitioner :
5 v. : No. 85-1027
6 JAMES THOMAS HICKS :
7 -----x

8 Washington, D.C.

9 Monday, December 8, 1986

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:51 p.m.

13 APPEARANCES:

14 MRS. LINDA ANN AKERS, ESQ., Special Assistant

15 Attorney General of Arizona, Phoenix, Arizona;

16 on behalf of the Petitioner.

17 JOHN WILLIAM RCOD, ESQ., Phoenix, Arizona; on behalf

18 of the Respondent.
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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-1027, Arizona against Hicks.

Mrs. Akers, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. LINDA ANN AKERS, ESQ.,

ON BEHALF OF THE PETITIONER

MRS. AKERS: Thank you, Mr. Chief Justice, and
may it please the Court:

This case presents the question, can a police officer who reasonably suspects that an object in plain view is stolen make a closer inspection of that item to dispel or confirm his suspicion?

This question raises three issues. First of all, is a Fourth Amendment privacy interest implicated?

Secondly, is a Fourth Amendment possessory interest implicated?

And finally, if such a Fourth Amendment interest is implicated, either in the possessory aspect or in the privacy aspect, can an officer on reasonably, articulable suspicion, make a closer inspection of that particular item.

The State submits that there is no possessory interest. There is no privacy interest. And furthermore, if this Court finds such an interest, it is

1 so de minimus that an officer may on reasonable,
2 articulable suspicion make a closer inspection of that
3 item and confirm or dispel his suspicion.

4 Here Officer Nelson, on April 18, 1984,
5 entered an apartment, Mr. Hicks' apartment, to
6 investigate a shooting.

7 He entered the apartment to look for the
8 assailant, his weapon, and perhaps other injured
9 parties. They found guns, a mask, drug paraphernalia.
10 And Officer Nelson noticed, as he entered the apartment,
11 a stereo that appeared to him to be out of context with
12 the mean surroundings of the apartment. It was on
13 concrete block and board shelving. And it appeared to
14 him to be too expensive for the types of items, the
15 other items, that he saw in the apartment.

16 This raised a suspicion in his mind. He
17 suspected, having seen the other items that indicated
18 the instrumentalities of crime, that indicated to him
19 that a crime had been committed, that perhaps this
20 stereo was stolen.

21 He took the serial number of the stereo down.
22 He called it in to the identification bureau.

23 QUESTION: Where was the number?

24 MRS. AKERS: Your Honor, the record reflects
25 that he couldn't recall if it was underneath the stereo

1 or behind the stereo. It was not in plain view, so to
2 speak, in plain sight. It was not on the front of the
3 stereo.

4 QUESTION: He had to move it?

5 MRS. AKERS: He had to move the stereo in
6 order to ascertain the serial number; that's correct.

7 QUESTION: And if it was under it, he had to
8 turn it upside down?

9 MRS. AKERS: If it was under it, that is
10 correct, Your Honor, he did.

11 The government's position, however, is that
12 that is such a de minimus -- that inspection of a stereo
13 unit already in plain view is so de minimus so as not to
14 raise further privacy interests in the serial number in
15 that the only information that can be conveyed from that
16 serial number is whether or not the item is stolen.

17 And if it is stolen, then the legitimate
18 privacy interest that would come into play there is not
19 one that society is willing to recognize.

20 Officer Nelson called in the number. It was
21 reported to him to be stolen by a computer check. He
22 seized the stereo, the one that was reported to him to
23 have been stolen, and took it with him.

24 He went back to the police station, pulled the
25 robbery reports, ascertained that the other items that

1 he had seen there in plain view, that he had noted the
2 serial numbers on, were also stolen. An affidavit was
3 sworn out and a search warrant was executed.

4 QUESTION: Suppose the government sets up a
5 monster telescope across the street from my house and
6 looked through my window to do nothing else except get
7 the stereo number off of a stereo in my room.

8 Would that be all right?

9 MRS. AKERS: Your Honor, if the only
10 information that can be conveyed from that serial number
11 is whether or not the stereo or whatever the appliance
12 or item that has a serial number on it is stolen, then
13 in that respect, there is no legitimate expectation of
14 privacy, and the Fourth Amendment doesn't apply in that
15 respect.

16 So if you can ascertain it by aided sight, as
17 you have indicated here, I mean, I think you could also
18 draw an analogy if an officer had glasses on; needed
19 glasses to inspect the serial number.

20 Once he's legitimately where he has a right to
21 be -- and perhaps that is the threshold question that
22 your question raises here, is that --

23 QUESTION: I'm assuming that they have no
24 business being in my house. And if a telescope won't do
25 it, it's some fancy electronic technique that has

1 nothing to do with sight, but it reaches into my
2 apartment and derives the serial number of my stereo.
3 And you say that's -- that's okay, because that's not
4 very important information.

5 MRS. AKERS: In your hypothetical, the officer
6 does not have a right to make the observation that he
7 makes. He doesn't have a right to be where he can
8 observe that serial number.

9 QUESTION: That's right.

10 MRS. AKERS: In that case, then, we would say
11 that under the Fourth Amendment --

12 QUESTION: But why? You could say just as
13 much in that case: What's the big deal about a serial
14 number? It's not very important.

15 I mean, that's the argument you were running.
16 That the search here is okay because the serial number
17 is not important.

18 And what I'm suggesting is, it doesn't matter
19 whether it's important or not, does it, for purposes of
20 whether there's been a search?

21 MRS. AKERS: Okay, for the purposes of whether
22 or not a legitimate privacy interest has been invaded,
23 that is correct. Because the only information that can
24 be gotten from the serial number is whether or not that
25 item is stolen; and that is it.

1 QUESTION: You couldn't have gotten the search
2 warrant, though, could you? Suppose the officer hadn't
3 looked at the serial number, but he had these
4 suspicions; he went back to the magistrate and said, I
5 want a search warrant. These things don't look like
6 they belong there. I think they're stolen. Do you
7 think he'd have gotten a search warrant for it?

8 MRS. AKERS: Your Honor, under these
9 circumstances, the test is, in Texas v. Brown, of
10 whether the facts would warrant a man of reasonable
11 caution in the belief that these items are stolen.

12 On that basis, we are very close to probable
13 cause here, but I don't believe we had probable cause.

14 QUESTION: So you couldn't have gotten a
15 warrant to do what he did?

16 MRS. AKERS: That is correct, Your Honor.

17 QUESTION: And why not, if it isn't a search?

18 MRS. AKERS: I'm sorry, I --

19 QUESTION: Well, what the magistrate should
20 say is, you don't need one.

21 MRS. AKERS: To inspect the serial number,
22 that's correct.

23 QUESTION: Except you'd have to -- you'd say,
24 well, I have to reenter the house. So I want a warrant
25 because I want to get the serial number.

1 MRS. AKERS: You're saying, get a search
2 warrant to get the serial from the -- the -- whatever it
3 is that's stolen?

4 In that situation, Your Honor, it's the
5 State's position that he doesnot need a search warrant
6 to ascertain what he can ascertain when he is
7 legitimately and lawfully present.

8 QUESTION: Already in there.

9 MRS. AKERS: And that was the situation.

10 QUESTION: Mrs. Akers, to the extent that
11 you're arguing there's no reasonable expectation of
12 privacy in the number, I'm not sure that that argument
13 was made below, or that it's even encompassed in the
14 petition -- question on petition for certiorari. Where
15 it seemed to me the question presented was whether
16 police can seize the ID numbers in the course of
17 conducting a search, based on reasonable suspicion as
18 opposed to probable cause.

19 And it just seems to me maybe you're making
20 some arguments here that were neither raised below nor
21 fairly encompassed in the questions.

22 MRS. AKERS: Your Honor, it's the position of
23 the State that the Fourth Amendment application must be
24 decided first of all, because the Fourth Amendment is
25 what is involved here on a reasonable, articulable

1 suspicion case.

2 In this situation, in briefing that, you are
3 quite correct, it was not raised below. And we felt it
4 was encompassed within our question presented, because
5 if there's no Fourth Amendment applicability, then we
6 never really reach the reasonable, articulable suspicion
7 question.

8 QUESTION: Well, I thought the question as it
9 was presented to us just assumed the application of the
10 Fourth Amendment and assumed the existence of a search
11 and a seizure, and asked us to determine a much more
12 limited question under the plain view exception.

13 MRS. AKERS: In reviewing the cases, and
14 especially United States v. Jacobson, we could not reach
15 that determination, and felt it best to brief the issue.

16 In United States v. Jacobson, this Court found
17 that there was a legitimate expectation of privacy in
18 the information that could be gained from testing a
19 small amount of white powder to determine whether or not
20 it was cocaine; the only possible information that could
21 be conveyed through that test.

22 And in reading that case and comparing it to
23 the facts of this case, that is, in testing the serial
24 number, all that could be ascertained was whether or not
25 the stereo was stolen, under those circumstances we

1 could not conclude that there was a legitimate
2 expectation of privacy that society was willing to
3 recognize, ergo there was no Fourth Amendment
4 application.

5 QUESTION: Well, I just think that's a new
6 question, personally.

7 QUESTION: Why do you say that the only
8 information that could have been obtained by lifting up
9 an object and looking underneath is whether it was
10 stolen or not? Couldn't there have been a letter
11 underneath or something?

12 For example, in your other -- the Vin case we
13 had a year or two ago, you had to pick up a piece of
14 paper to read the number.

15 And do you think it's always true that when
16 you pick up a piece of paper or lift an object to look
17 underneath it, you'll never discover anything except
18 what's on the bottom of the object?

19 MRS. AKERS: Your Honor, all we are asking
20 this Court --

21 QUESTION: Suppose you hide your jewels under
22 your stereo, or something like that?

23 MRS. AKERS: All we are asking this Court to
24 hold is that a police officer may, on reasonable,
25 articulable suspicion, examine the exterior of an item

1 if something is revealed in plain view by --

2 QUESTION: But you need not merely examine the
3 exterior, but he must move the item in order to make
4 that examination. And I take it, when you move
5 something, you may reveal something hidden behind it.

6 MRS. AKERS: Your Honor, that's entirely
7 possible, and that would have to be assessed under the
8 set of criteria that would be available to the officer,
9 and if he may then examine that in plain view, if it's
10 contraband or what have you.

11 All we're asking this Court to hold is that we
12 may examine the exterior of an item to determine the
13 brand name or serial number of an item.

14 QUESTION: What do you mean, "to determine"?
15 You're asking us to evaluate the intrusiveness of a
16 search on the basis of what happens to be found, on the
17 basis of what is being looked for and what happens to be
18 found.

19 But it seems to me to be the point of Justice
20 Stevens' question that its intrusiveness does not
21 necessarily depend either upon what you're looking for
22 or on what you in fact find; it depends on what you
23 might find.

24 There might be a private letter under there,
25 or when you lift it up, there may be something else on

1 the top of the table.

2 Don't you have to consider that in deciding
3 how intrusive this activity is?

4 MRS. AKERS: I don't believe you do, Your
5 Honor, in the respect that you can -- if this Court
6 finds that you can examine the exterior of an item in
7 plain view for serial number or brand name, you do not
8 have to encompass, then -- for example, you mentioned a
9 letter. The State does not advocate the position that
10 you can read the letter that would be found under there,
11 or anything else.

12 If, perhaps, it was contraband, then it could
13 be seized. I'm not going to tell this Court that --
14 that if an officer sees contraband, he can't seize it.
15 But I believe that under these circumstances the
16 petitioner would submit that he may make that limited
17 inspection on reasonable, articulable suspicion.

18 QUESTION: Supposing that the exterior of the
19 stereo had a little notice on it, serial number on
20 warranty; warranty in desk drawer. Could he open the
21 desk drawer and pick out the warranty and get the serial
22 number?

23 MRS. AKERS: No, Your Honor, I don't believe
24 that he can. All that we're asking this Court to hold
25 is that you may look for the serial number or the brand

1 name, without dismantling, opening, unplugging, or any
2 other interference with whatever the object is in plain
3 view that would have the serial number on it, in this
4 case, a stereo.

5 QUESTION: Do you think unplugging would be
6 different, if they had to unplug to get at it, to turn
7 it over, for example; would that make it bad?

8 MRS. AKERS: Your Honor, I would defend the
9 unplugging of a stereo, but in this case, you do not
10 have to reach that far.

11 It's just the examination of the item for
12 serial number or brand name.

13 QUESTION: You do get into that kind of
14 question, though, once we accept what you want us to
15 accept here. That is, you have to decide, well, what if
16 you turn it over? What if you move the table it's on?
17 What if you unplug?

18 It's rather a nice, clear line to say that
19 plain view means plain view. You walk in there, you
20 don't disrupt anything, whatever you see you can use.

21 MRS. AKERS: The problem --

22 QUESTION: It has that great advantage,
23 doesn't it?

24 MRS. AKERS: The problem is that we come into
25 cases like this where we have reasonable, articulable

1 suspicion, which I believe is a standard that the Courts
2 can employ to protect the Fourth Amendment interests of
3 an individual, where the item itself is already in plain
4 view; it has already been subject to visibility by a
5 police officer, and that's unquestioned here.

6 It's conceded that the exigent circumstances
7 that brought the officer into the apartment was such
8 that the officer could look around him and observe the
9 items within the apartment. And those included, as I
10 said before, guns, masks, instrumentalities of crime.

11 There were incriminating objects already
12 present. And in the opinion of the officer, he believed
13 he had reasonable, articulable suspicion, as the record
14 reflects --

15 QUESTION: But if the serial number were on
16 the face of the instruments, so you didn't have to move
17 it at all, you wouldn't even need the articulable
18 suspicion, would you?

19 MRS. AKERS: No, Your Honor, you would not.

20 QUESTION: So you've got kind of an
21 intermediate class. If you have to move it a little
22 bit, it's not in plain view, but you have a new category
23 of permissible investigations.

24 QUESTION: And some serial numbers on some
25 products can't be found unless you take the product

1 apart.

2 MRS. AKERS: That's correct, Your Honor, and
3 we're not advocating that position. We're only
4 advocating --

5 QUESTION: Why not? Why not? It's only a
6 serial number.

7 QUESTION: And you're not sure about
8 unplugging?

9 MRS. AKERS: For the reason -- no, I am sure
10 about unplugging, and I would defend that to this
11 Court. But that's not this case.

12 And I would defend the -- the taking of the
13 serial number from the stereo, but the problems raised
14 by the opening of the stereo unit are the same as
15 Justice Stevens has alluded to here, which is, whatever
16 you find underneath may be an additional problem.

17 And what I'm suggesting to this Court is, the
18 police are in great need of flexible standards by which
19 they may respond to those things that they see in their
20 everyday investigations.

21 QUESTION: Well, Mrs. Akers, do you think the
22 trial court in this case found the officer acted just
23 out of curiosity?

24 MRS. AKERS: No, Your Honor --

25 QUESTION: The trial court's finding was

1 certainly not clear to me.

2 MRS. AKERS: The trial --

3 QUESTION: And it could be interpreted that
4 way.

5 MRS. AKERS: The trial court's finding, I
6 believe, was not clear; I agree with you in that
7 respect. But it seemed to be focussed on the
8 immediately apparent aspect, that is, that he could not
9 look at the object and immediately ascertain that it was
10 stolen.

11 And in light of that, the court held that you
12 did not meet -- he did not meet, the State did not meet
13 the third prong of the Coolidge test, which was the test
14 that the trial court employed.

15 But I submit to you that had -- the record is
16 replete with an indication by the officer that he
17 believed, he had reasonable, articulable suspicion, in
18 other words, that the object was stolen.

19 And I believe it's like a mixed question of
20 fact and law, in that respect, and that this Court may
21 review the record that is presented to you.

22 And in applying the law -- applying the law as
23 this Court finds it, may so find that there was
24 reasonable articulable suspicion on the record we have
25 presented to you, even though the trial court focussed

1 on the immediately apparent aspect of that stereo, and
2 how the officer viewed it under that particular test.

3 Even if this Court finds --

4 QUESTION: Let me ask one other question.

5 Would you draw a distinction if the item were not
6 thought to be stolen, but merely were conclusive
7 evidence of a crime? For example, say it was a gun, and
8 the serial number on the gun would prove that the
9 instrument was used to kill someone.

10 Would you apply the same test, or is your test
11 limited to contraband?

12 MRS. AKERS: No, Your Honor, I would apply the
13 same test to a situation such as you have described.

14 QUESTION: So in this case, if the stereo
15 might provide for some reason I can't hypothesize right
16 now, might provide evidence that the man who owned it at
17 that time also committed some other crime, you could
18 still investigate?

19 MRS. AKERS: If the examination of the stereo
20 for the serial would reveal such information, then I
21 would not make a distinction between an instrumentality,
22 fruit of a crime, or contraband.

23 QUESTION: Or evidence?

24 MRS. AKERS: Or evidence. If that information
25 -- and I agree with you, I can't think of an instance

1 where it would. Because the only information that is to
2 be garnered from this serial number is whether or not it
3 is listed in the computer banks, NCIC, the National
4 Computer --

5 QUESTION: No, but of course, the guns were
6 different. They also checked a lot of gun numbers, I
7 understand, and they might well have been evidence of a
8 crime, if -- you know, if you'd gotten a positive
9 response on one of those instead of on this one.

10 MRS. AKERS: Another item with --

11 QUESTION: With a different serial number.

12 MRS. AKERS: -- a different serial number
13 could indeed reveal that information, yes, Your Honor.

14 QUESTION: Suppose I'm walking down the street
15 with a stereo under my arm, could a police officer come
16 over to me and say, turn that stereo around, I want to
17 check the serial number on it?

18 MRS. AKERS: The ironic thing is, I believe,
19 under the status of the laws that exist, under Terry v.
20 Ohio, that an officer could stop you, that is seize your
21 person briefly and momentarily, to ascertain some
22 identification and explanation from you if he has
23 reasonable, articulable suspicion, or reason to suspect
24 that you and that stereo are evidence of some crime or
25 criminal activity.

1 So I think in that respect you can accost a
2 person on the street, which is a much greater intrusion,
3 and ask for its identification; but you cannot get the
4 identifying marks off of a stereo, which is an inanimate
5 object, and seemingly, a much lesser intrusion.

6 QUESTION: And your argument is that once the
7 police are lawfully in my apartment, that they ought to
8 be able to do the same thing to the stereo that they
9 would be able to do on the street, were I walking about
10 with it?

11 MRS. AKERS: Absolutely, Your Honor; once they
12 are lawfully present.

13 QUESTION: What if you had a search warrant to
14 search for something that could only be found in one
15 room, for example; you knew where it was, you wanted to
16 search the living room. You see through the door a
17 stereo that looks out of place.

18 You wouldn't think you could exceed the bounds
19 of your search warrant, do you, just on reasonable
20 suspicion?

21 MRS. AKERS: Your Honor, if in the course of
22 executing a search warrant, an officer has reasonable,
23 articulable suspicion to believe that something else he
24 may come across, and in this situation, Justice Stevens,
25 guns may come into play here, where I am aware of cases

1 where officers have executed drug search warrants and
2 found an arsenal, 70, 80 guns.

3 QUESTION: Sure.

4 MRS. AKERS: In that situation, I believe that
5 given the criminality that the officer may see --

6 QUESTION: Sure.

7 MRS. AKERS: -- he might be able to -- and he
8 could reasonably articulate it, that he should be able
9 to inspect those guns for the serial number, and
10 ascertain whether or not they are lawfully maintained or
11 possessed by the person who has -- wherever he's
12 executing the warrant.

13 It is the State's position that under United
14 States v. Jacobson, that the -- testing the white
15 powder, and the consuming of the white powder in the
16 test does not -- has been found by this Court to be a de
17 minimus intrusion on the possessory interest of the
18 person who owns the white powder.

19 And in so finding, this Court found that -- in
20 so finding this Court has concluded that there is no
21 legitimate expectation of privacy or possession in the
22 powder that is revealed by the tests.

23 So that, in this case, if we draw the direct
24 analogy that we have here, we do not advance -- or we do
25 not regress upon any Fourth Amendment protections, any

1 more than we've had under United States v. Jacobson.

2 QUESTION: Maybe I don't recall the opinion
3 that well, but I thought in that case we said there was
4 a virtual certainty there was heroin or cocaine or
5 something like that; just by looked at it in the bag.

6 MRS. AKERS: All the officer could tell was
7 that they had a white powder that someone was very
8 interested in keeping protected.k

9 QUESTION: Didn't we say the plain view test
10 was equated with virtual certainty that it was
11 contraband?

12 MRS. AKERS: In that case, it might well have
13 been, Your Honor, that the officer viewing the white
14 powder, and the circumstances in which the white powder
15 was encased, that is, the several boxes and the tube;
16 but they did not know conclusively that it was cocaine.

17 QUESTION: I take it that --

18 MRS. AKERS: Any more than in this case he
19 suspected that it was stolen.

20 QUESTION: Well, he had a much better reason
21 to -- there was a much greater degree of probability
22 that that was contraband than that the stereo was
23 contraband.

24 MRS. AKERS: I would disagree with Your Honor

25 --

1 QUESTION: You would disagree with that?

2 MRS. AKERS: -- in the respect that in this
3 case there were instrumentalities of crime that had been
4 found in this apartment, masks, guns --

5 QUESTION: But you've agreed that it wasn't
6 even probable cause here. And surely there was probable
7 cause in the Jacobson case.

8 MRS. AKERS: Your Honor, this Court found
9 probable cause, but I --

10 QUESTION: But you've admitted there's no
11 probable cause here, so there's a difference.

12 MRS. AKERS: That's true, but we're within a
13 gnat's eyelash of probable cause in this case.

14 QUESTION: Well, I take it, part of your
15 argument is that given reasonable suspicion, the only
16 way that an officer could ever check it out is either
17 then or never?

18 MRS. AKERS: That is true, Your Honor.

19 QUESTION: If he had to leave to get a
20 warrant, he could never get a warrant to get back into
21 the house, unless you said he can get a warrant on
22 reasonable suspicion.

23 In which event, you might as well let him
24 look at it in the first place.

25 MRS. AKERS: Correct, Your Honor.

1 QUESTION: Or except that I suppose if you
2 could get a warrant on reasonable suspicion, at least
3 you'd have the magistrate agreeing with him that there
4 was reasonable suspicion.

5 MRS. AKERS: But I believe this -- excuse me,
6 Your Honor.

7 QUESTION: Except that the magistrate would
8 never have seen the stereo in the apartment.

9 MRS. AKERS: I believe this will eventually be
10 subjected to judicial scrutiny in the respect that this
11 information can be challenged in a court of law in
12 determining the admissibility of whatever the evidence
13 is against the individual.

14 QUESTION: Mrs. Akers, the case that says, you
15 can search for cocaine, and it's okay, that sets a
16 precedent that anybody with cocaine in his possession
17 has no privacy.

18 If we in this case say that he can search a TV
19 set, then that means that he can search anybody's TV set
20 under any circumstances. And I'm sure you don't want to
21 go that far.

22 MRS. AKERS: Well, Your Honor, I believe that
23 the same interest in stolen property, it's the same
24 illegitimate interest in contraband or in stolen
25 property.

1 QUESTION: I'm not talking about the guilty
2 person. I'm talking about the innocent person.

3 MRS. AKERS: If, Your Honor --

4 QUESTION: Under that case, any innocent
5 person with powder in his room has a chance of being
6 searched, as of right now.

7 So if we rule fully with you, then anybody
8 with a TV set has a possibility that somebody's going to
9 search it for a serial number.

10 And you don't want to go that far, do you?

11 MRS. AKERS: Your Honor, I don't have any
12 problem with going that far, because I don't think the
13 interest in --

14 QUESTION: Well, I do. I have trouble -- I
15 have trouble with you searching my TV set.

16 MRS. AKERS: Your Honor, I believe that the
17 information that could be conveyed from the exterior,
18 and calling it a search -- I'm not conceding that it is
19 a search -- but the inspection of the television set I
20 don't believe reveals any information other than whether
21 or not the item is stolen; and that you have, and anyone
22 else has, no legitimate expectation of privacy in that
23 area.

24 QUESTION: Well, that validates every search.
25 If you find what you're looking for, it's a legal search.

1 MRS. AKERS: No, Your Honor --

2 QUESTION: (Inaudible) going on for years.

3 MRS. AKERS: I disagree with your conclusion
4 in the respect -- and petitioner would submit to this
5 Court that the examination of the exterior of an item in
6 plain view that reveals only the serial or the brand
7 name, which assists the officer in determining whether
8 or not it is stolen, is not an intrusion that --

9 QUESTION: (Inaudible) tell him it was stolen?

10 MRS. AKERS: Well, Your Honor, the only
11 hypothesis I can think of on that situation is if an
12 officer knew that a television had been stolen within,
13 say, the same apartment complex, and that he knew it was
14 a particular brand, perhaps an RCA; and by determining
15 the brand name, then that would focus it more on the
16 television as opposed to just any television set.

17 QUESTION: You want us to say that?

18 MRS. AKERS: Yes; a brand name or a serial
19 number.

20 QUESTION: Yes. That they can search for a
21 brand name?

22 MRS. AKERS: Or a serial number, that is
23 correct, Your Honor.

24 QUESTION: I'm not talking about serial
25 number. I'm talking about brand name. You want us to

1 go that far?

2 MRS. AKERS: Your Honor, I think --

3 QUESTION: You don't want to limit it to
4 serial number, which is what you have in this case. You
5 don't want to limit it to that. You want it to also go
6 to brand name.

7 MRS. AKERS: In this case, the Court doesn't
8 have to go that far. However, brand name is the same
9 kind of information that is encompassed within the
10 serial number.

11 In United States v. Place, this Court found
12 that the expectation of privacy in a dog sniff of a
13 suitcase on reasonable suspicion was appropriate under
14 the circumstances because officers were in need of a
15 flexible array of means to respond to suspected criminal
16 activity.

17 And in that regard, Your Honor, I believe that
18 this case can be controlled by the principles in United
19 States versus Place, and that this Court should reverse
20 the Court of Appeals' judgment finding that there was a
21 Fourth Amendment violation here.

22 I'd like reserve the remainder of my time for
23 rebuttal.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mrs.
25 Akers.

1 We'll hear now from you, Mr. Rood.

2 ORAL ARGUMENT OF JOHN WILLIAM ROOD, ESQ.,

3 ON BEHALF OF THE RESPONDENT

4 MR. ROOD: Thank you, Mr. Chief Justice, and
5 may it please the Court:

6 I think initially I want to say a couple of
7 things that came up in the first part of the argument.

8 As Justice O'Connor pointed out, it has never
9 been before argued, until the petition was granted here,
10 that this was not a search nor a seizure. That never
11 happened in the lower court. That was never argued in
12 the Arizona Court of Appeals.

13 So this is a new argument that the State has
14 attacked the judgment of the trial court on.

15 The other thing I'd like to bring to your
16 attention is the question about serial numbers, and the
17 State's position that all they want to be able to do is
18 see serial numbers.

19 I'm not sure serial numbers are strictly on
20 items for the purpose of determining whether they're
21 stolen or not stolen. Obviously, they have lot numbers
22 and all sorts of things. That may be true, but I'm not
23 sure that that's the case always.

24 QUESTION: The police apparently think they're
25 helpful.

1 MR. ROOD: Obviously, they think they're
2 helpful. Our position is, quite frankly, that this is
3 not a plain view case. That's been the position from
4 the beginning.

5 Obviously the stereo units -- and the Court
6 must be aware, under the facts of this case, we're not
7 just talking about one stereo. When the police came
8 into the apartment, Officer Nelson noted a stereo on the
9 living room wall. He apparently during his search for
10 guns noticed another stereo in the living -- excuse me,
11 in the bedroom.

12 When he decided to copy down all these stereo
13 numbers, not only the one Bang and Olufsen turntable was
14 copied from, but apparently, although the record isn't
15 clear what he had to do to get the other serial numbers,
16 he copied down a whole series of them.

17 And while he was phoning in the serial numbers
18 on the guns, he decided he might as well phone in these
19 other serial numbers.

20 The only thing that turned up on the computer
21 was this one piece of property.

22 At a later point, it was determined the rest
23 of the property was stolen.

24 Again, our position is that this is not a
25 plain view case. I note that Judge Myland, of the --

1 of the Maryland Court of Special Appeals some ten years
2 ago in a law review article in which they analyze the
3 Coolidge v. New Hampshire decision, said that those who
4 overapply the plain view doctrine to every situation
5 where there is -- where there is visual, open view have
6 not learned the lesson long since mastered by old hands
7 at the burlesque houses: you can't touch everything you
8 see.

9 Wherever a policeman's eye may go, his body
10 need not follow.

11 The thrust of the argument presented by the
12 State of Arizona is aimed at the reasonableness of
13 police conduct once they were legally inside Mr. Hicks'
14 apartment. They argue the serial numbers were in plain
15 view.

16 They weren't in plain view. The police
17 officer had to walk over and pick up the stereo unit,
18 turn it over, look at it.

19 QUESTION: What if he had to go up and get
20 real close? It was right on the top, but he couldn't --
21 he had to get awfully close to it to see it.

22 MR. ROOD: Obviously. I have -- although that
23 isn't the fact here, I have no problem with that
24 necessarily.

25 QUESTION: What if had to use a magnifying

1 glass to bring the number out a little bit?

2 MR. ROOD: I'm not sure that I have a lot of
3 problem with that either, although one of the problems
4 in this case, and that may be presented in that
5 situation, is, there is no connection between the reason
6 that the officer was in this apartment and the serial
7 numbers.

8 In other words, the reason --

9 QUESTION: Well, I noticed the Court of
10 Appeals went off on -- at least in part on the theory
11 that there had to be some nexus between the exigent
12 circumstances that gave them cause to enter and the
13 object they were examining in plain view.

14 Do you find any support in our cases for that
15 idea?

16 MR. ROOD: I think I do. I think both
17 Coolidge and Brown talk in terms of that.

18 I think that --

19 QUESTION: I hadn't thought there was a nexus
20 requirement at all, Mr. Rood.

21 MR. ROOD: Well, I'm not sure it's nexus, or
22 at least some --

23 QUESTION: I thought anything that an officer,
24 once he was lawfully on the premises, spotted in plain
25 view, and that it was immediately apparent was evidence

1 of a crime or contraband, was subject to seizure,
2 whether or not it was related to the reason for entry?

3 MR. ROOD: Well, that's true, if it's
4 contraband, or if it's immediately apparent that the
5 object has some incriminating nature whatever, it can be
6 seized.

7 The district courts in various cases have
8 talked in terms of, when you go in on a search warrant,
9 or for any other exception to the rule, and you find
10 something that can be reasonably connected to your
11 reason for being in there, you may -- you might seize
12 it.

13 An example might be one of the cases where
14 they're in on a search warrant for stolen property. The
15 police officer's aware certain property has been stolen
16 two nights before. He recognizes that property.

17 The fact of the matter is, they know these
18 people who reside in this place are dealing in stolen
19 property or hold stolen property. The belief is that
20 they should be able to seize items that they think are
21 stolen property. And I don't disagree with that
22 proposition at all.

23 QUESTION: Mr. Rood, any problem with the
24 officer seizing all of the guns?

25 MR. ROOD: I don't think so. It never came

1 up. The record in the case is unclear.

2 It's my understanding, nothing ever happened
3 as a result of the seizures of any of these guns.

4 QUESTION: Were the guns seized?

5 MR. ROOD: The guns were seized.

6 QUESTION: That was my recollection.

7 MR. ROOD: That's my understanding, yes.

8 QUESTION: Now, a bullet was fired through the
9 floor into the apartment below.

10 MR. ROOD: That's correct.

11 QUESTION: Which justified the search under
12 exigent circumstances.

13 MR. ROOD: That's correct.

14 QUESTION: Suppose there had been a shotgun
15 among the weapons there? Could that have been seized?

16 MR. ROOD: I'm not sure that it could. I'm
17 not sure that they could articulate a reason why it
18 should be seized unless it's a sawed off shotgun and
19 some sort of illegal-type weapon.

20 QUESTION: Well, suppose it were a sawed off
21 shotgun. It couldn't have fired through the floor.

22 MR. ROOD: Well, that's true. But under State
23 law, I believe, it would be contraband, illegal to have
24 sawed off shotguns. So it could be seized. It's like
25 contraband. It's like drugs or narcotics or whatever.

1 QUESTION: But in a State that permitted the
2 ownership of handguns, provided they were registered,
3 suppose there had been no shot fired through, but the
4 officers were there under some other exigent
5 circumstances.

6 Could they have looked at the serial numbers
7 on the handguns they saw?

8 MR. ROOD: Well, they certainly might have
9 looked at the serial numbers. In other words, if it was
10 in plain view to them. If they didn't have to go over
11 and turn it around and look at the stock or something,
12 it would be our position that if they saw it, they could
13 remember it, write it down, whatever.

14 But I don't believe it's our position that if
15 they walked over and picked up the gun and looked at it
16 and copied down the serial number, that that would be
17 permissible for some other reason.

18 QUESTION: So this case turns on whether or
19 not the stereo was turned over?

20 MR. ROOD: I think that's a crucial point of
21 this case, that they actually went up, picked it up, and
22 looked at the back of it.

23 QUESTION: Would the same be true of the -- I
24 think they were called a stocking mask, but suppose they
25 had been ski masks, and the store had reported the ski

1 masks had been stolen, could the officers have turned
2 the ski masks over?

3 MR. ROOD: Well, it would seem to me, that
4 would depend upon who they reported it to. Were there a
5 gross of ski masks there rather than just one?

6 QUESTION: Just one.

7 MR. ROOD: I don't think they could take it,
8 unless there was something else.

9 QUESTION: Couldn't turn it over?

10 MR. ROOD: Couldn't turn it over?

11 QUESTION: To see which store had sold it?

12 MR. ROOD: Well, if in the case, they were
13 attempting to look for guns, they might pick up the ski
14 mask and look under it.

15 QUESTION: Let me give you an easy one. He
16 walked around behind the television to see the serial
17 number. He didn't touch the television.

18 MR. ROOD: I -- I have no problem with that
19 unless -- well, I do have a problem with it.

20 The fact is, that they're not in there looking
21 for stolen property. They're in there looking to see if
22 anyone's hurt. They're looking to see if they can find
23 the weapon that was fired. That's the only reason
24 they're there.

25 QUESTION: And contraband?

1 MR. ROOD: And contraband, if it's -- if it's
2 in plain sight. But they can't just go about making a
3 general search. That's what the State would ask this
4 Court to allow them to do.

5 The fact of the matter is that the only real
6 basis for this search is, this is a low rent apartment
7 that a bullet has been fired through the floor in. And
8 a person living in a low rent apartment shouldn't be
9 able to own an expensive stereo.

10 And I think that is clear in the record that
11 the officer, on a hunch, knowing that stereos are
12 stolen, that this person shouldn't own one, decided to
13 search it. And that's what he did.

14 QUESTION: On that basis, you couldn't do a
15 Terry stop --

16 MR. ROOD: Well --

17 QUESTION: -- of somebody who is, I don't
18 know, wearing baggy pants, and obviously secondhand
19 clothes, walking down the street carrying a -- gee, I
20 don't know -- pick the most expensive piece of personal
21 property you can imagine, and this person is carrying it
22 on his shoulders, and you say --

23 MR. ROOD: Well, there --

24 QUESTION: -- one should not think that
25 somebody who dresses in shabby clothes can't own the

1 best stereo in the world. That's sort of silly, isn't
2 it?

3 MR. ROOD: Sure --

4 QUESTION: Isn't that a reasonable -- isn't
5 that a reasonable situation to raise a suspicion?

6 MR. ROOD: I don't think it is a reasonable
7 situation. In fact, the example that was given earlier
8 on about stopping a person in a -- in a Terry situation
9 to briefly detain them, if that person was wearing -- in
10 a poor neighborhood was wearing a gold watch, I take it
11 that Officer Nelson, in this case, would believe that
12 that's a reasonable suspicion for him to take that watch
13 off and look at it.

14 And that isn't a reasonable type of thing.

15 QUESTION: (Inaudible) stopping a rich man
16 who's carrying something that's thought stolen and
17 normally belongs to poor people?

18 MR. ROOD: Well, I think --

19 QUESTION: It's the disparity, isn't it?

20 MR. ROOD: -- both situations are bad.

21 QUESTION: You think both are bad?

22 MR. ROOD: Both are bad. I don't think that
23 there was a reasonable suspicion in this case. And I
24 think there has to be something more.

25 QUESTION: Does your case depend on my

1 agreeing with you that there has been, not just a search
2 here, but a seizure? Do I have to agree with you that
3 when you copy down the number of a stereo, you are
4 seizing that number?

5 I mean, he didn't actually rip off the label
6 and take it out with him or anything, right? All he did
7 was write it down?

8 MR. ROOD: Right.

9 QUESTION: And you contend that that's a
10 seizure, right?

11 MR. ROOD: Well, we never had to contend that
12 before, but yes. And I believe --

13 QUESTION: Suppose I don't agree with that?

14 MR. ROOD: Well, I think you have to get over
15 the threshold problem of the search.

16 QUESTION: The case would be the same if
17 there's just a search but no seizure?

18 MR. ROOD: Pardon me?

19 QUESTION: The case would be the same if it
20 was just an unlawful search with no seizure?

21 MR. ROOD: Well, I think the case would be the
22 same if there was a search here that was illegal, yes.

23 QUESTION: Because the fruit of the search, to
24 wit --

25 MR. ROOD: Right.

1 QUESTION: -- the knowledge of the serial
2 number, would be excluded?

3 MR. ROOD: That's correct.

4 QUESTION: That's a great relief, because it
5 doesn't look like a seizure to me.

6 MR. ROOD: Well, as I've said, the focus of
7 the case has never been the search or the seizure. It's
8 whether or not the object was in plain view, and there
9 was a sufficient reasonable basis to believe it was
10 stolen.

11 We don't believe that that has been shown
12 anywhere previously.

13 We'd just say that this Court has stated that
14 searches without warrants are, per se -- or are deemed
15 per se unreasonable, unless there are circumstances,
16 which this Court has delineated previously, that fit the
17 facts of the situation.

18 The State contends that the plain view
19 doctrine is simply an exemption to the warrant
20 requirement. They do that in their reply brief.

21 My understanding is that the plain view
22 doctrine, according to Coolidge, merely supplements the
23 prior justification for the original intrusion.

24 The State can't point out any exception to the
25 warrant requirement as it applies to stereos. They are

1 not inherently stolen property or contraband.

2 Even a --

3 QUESTION: Why couldn't you do it on the
4 street? Let's assume that I would think that a Terry
5 stop here would have been all right.

6 MR. ROOD: Okay.

7 QUESTION: Seeing somebody walking down the
8 street and obviously --

9 MR. ROOD: Well --/

10 QUESTION: Walking briskly. Somebody walking
11 briskly, pretty shabbily dressed, carrying, you know, a
12 very spiffy stereo. Do you think the policeman would be
13 able to stop him and say, excuse me there, young fellow,
14 where are you going with that?

15 MR. ROOD: He may, on less than probable
16 cause, if he has some basis, stop the person, briefly,
17 to determine who he is, where he's going. I have no
18 problem with that.

19 I have a problem with --

20 QUESTION: Could he -- could he ask for the
21 identification number of the stereo?

22 MR. ROOD: Well, he could ask. I take it he
23 could ask.

24 QUESTION: He could ask? If the fellow said,
25 no, he couldn't --

1 MR. ROOD: That would be our position, right.
2 He couldn't take it.

3 QUESTION: He could ask the person to turn the
4 stereo around, if the person said, sure. But he
5 couldn't require him to do that?

6 MR. ROOD: If it goes that far, yes. Because
7 it would be the position that he's being briefly
8 detained to check out where he's going, who he is.

9 And if he has nothing more, it wouldn't be --

10 QUESTION: (Inaudible) probable cause to
11 arrest?

12 MR. ROOD: That's correct. That would be our
13 -- our position.

14 As the -- unless you take the view that the
15 status of a person occupying an apartment gives a person
16 -- give police suspicion that they are involved in
17 criminal activity, in this case, there isn't even
18 reasonable suspicion. That would be petition --
19 respondent's position.

20 Petitioner attempts to argue many ancillary
21 issues, such as the facts -- the fact this is not a
22 search or a seizure, and that Mr. Hicks' had no privacy
23 interest in the stereo, and therefore the Fourth
24 Amendment does not apply.

25 In fact, the State's petition, as I said

1 earlier, states that this was a seizure.

2 To take the argument to its logical
3 conclusion, police -- when police are in someone's home
4 legitimately, they can begin a general rummaging about
5 the place to determine if there is stolen property, with
6 no relationship to the fact that they're in there on a
7 domestic violence call or an emergency call.

8 And all they have to say, at a later point in
9 court, that they were suspicious of the circumstances.

10 The other argument is that this search is
11 minimally intrusive. I'd point out to the Court that,
12 first of all, I believe there is a higher degree of
13 protection in a person's home than necessarily
14 elsewhere; that it certainly isn't minimally intrusive
15 for individuals to handle personal effects.

16 And it would be our position that it's not
17 reasonable.

18 What is, it seems to us, invidious here, is
19 that the major basis for the search is the
20 circumstances, and the circumstances presented at the
21 suppression hearing. Except for the fact that this was
22 a low-rent apartment, the officer wouldn't have had any
23 reasonable suspicion.

24 To have this mere suspicion as a basis for
25 search is contrary to the Fourth Amendment and beyond

1 any cases that have been decided by this Court.

2 The State, in actual fact, in the court below,
3 in the trial court, never argued anything other than the
4 fact that they believed that the Leon case should apply
5 to them.

6 In other words, in the trial court, that was
7 their large argument. When they appealed the case, that
8 was their argument, that no matter what, that this
9 officer had relied on a good faith belief that these
10 items were stolen, and therefore, the items should not
11 be suppressed.

12 In fact, I believe that Judge Livermore, in
13 his decision in the case, took care of that by saying --
14 well, first of all, that this wasn't a warrant case; the
15 other thing being, you can't present the fruits of an
16 illegal search, or as he put it, the police cannot
17 launder the fruits of their illegal search by having a
18 magistrate put some sort of stamp of approval on it.

19 Based on all that, we would ask that this
20 Court affirm the judgment of the Court of Appeals and
21 the trial court.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rood.

23 Mrs. Akers, do you have anything more? You
24 have three minutes remaining.

25 REBUTTAL ARGUMENT OF MRS. LINDA ANN AKERS, ESQ.,

1 ON BEHALF OF THE PETITIONER

2 MRS. AKERS: Thank you, Your Honor. Just
3 briefly.

4 In response to questions that the respondent
5 received, there are some eight circumstances that appear
6 in the record that would indicate the reasonable,
7 articulable suspicion that the officer had.

8 First of all, there were guns that they
9 found. A .45 caliber gun, a .25 caliber gun, and a .22
10 caliber rifle. Masks. The stereo was on a temporary
11 shelving, concrete block and wood.

12 The experience of the officer: He had 12
13 years of experience, and he knew that stereos were
14 frequently the subject of property crimes.

15 He had heard the name of one of the occupants
16 of the apartment as being an individual who was involved
17 in a criminal investigation.

18 There was a shooting, and indeed, an injury,
19 just shortly before the officer came into this
20 apartment; that is, more criminal activity.

21 And there was drug paraphernalia all around
22 the apartment.

23 I believe that under the Fourth Amendment, the
24 test is reasonableness, and that is the final test.

25 QUESTION: Mrs. Akers, what do you answer to

1 Mr. Rood's point that even if you can persuade us that
2 this is analogous to a Terry stop, all that you'd be
3 allowed to do on the basis of an articulable suspicion
4 in a Terry stop is ask for the individual's name, ask
5 him to identify himself and give an account of why he's
6 there or whatever?

7 That individual is entitled to say, none of
8 your business, right? At which point the officer would
9 have to either decide that he has enough probable cause
10 to arrest or let him go.

11 You couldn't ask somebody on a Terry search,
12 could you, to let me see the name of this fancy -- on
13 the label of the fancy jacket that you're wearing?

14 I mean, you could ask him. But if he said no,
15 the officer wouldn't have the ability to open the
16 jacket, would he?

17 MRS. AKERS: In a Terry stop, the individual
18 can be stopped under suspicion for identification and
19 information, or response to questions about the
20 suspected criminal activity.

21 QUESTION: Right, and what if he says, I don't
22 want to answer?

23 MRS. AKERS: And that is encompassed within
24 the serial number of the stereo unit, as opposed to -- I
25 mean, an inanimate object doesn't respond to questions,

1 so he wouldn't have the option, I guess, of not
2 responding.

3 QUESTION: Supposing he's carrying a stereo on
4 his shoulder. Could you stop him and demand that he
5 show you the identification number of the stereo?

6 MRS. AKERS: If he has reasonable, articulable
7 suspicion that there's criminal afoot, then he could
8 investigate that criminal activity, and if it involved a
9 stereo, he could.

10 QUESTION: And the individual says, no, I
11 won't turn it around. The serial number's on my
12 shoulder, I'm not going to show it to you.

13 MRS. AKERS: Then at that point --

14 QUESTION: What can the officer do then?

15 MRS. AKERS: Either arrest him, or decide that
16 the information that he had and the information that he
17 got from the suspect was such that he didn't feel that
18 it should be pursued further.

19 QUESTION: But to arrest him, he would need
20 probable cause, wouldn't he? Not just an articulable
21 suspicion?

22 MRS. AKERS: Yes, Your Honor, if he's refusing

23 --

24 QUESTION: So an articulable suspicion does
25 not get him the identification number?

1 MRS. AKERS: The articulable suspicion will
2 allow him to do the further investigation, which is to
3 stop the man and ask him the questions that you have
4 proposed.

5 QUESTION: And if he gets a "no", that's the
6 end of it?

7 MRS. AKERS: And if he gets a "no" or answers
8 that do not lead him to a logical conclusion, that he
9 can explain his presence at the suspected criminal
10 activity, the scene, wherever he is, then in that
11 circumstance, that could be considered by the officer in
12 making a determination as to whether to arrest or not.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mrs.
14 Akers.

15 The case is submitted.

16 (Whereupon, at 2:41 p.m., the case in the
17 above-entitled matter was submitted.)
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CERTIFICATION

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#85-1027 - ARIZONA, Petitioner V. JAMES THOMAS HICKS

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