

ORIGINAL  
OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1835

TITLE CALIFORNIA, Petitioner V. PETER ROONEY

PLACE Washington, D. C.

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PAGES 1 thru 59



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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 CALIFORNIA, :  
4 Petitioner :  
5 v. : No. 85-1835  
6 PETER ROONEY :  
7 -----x

8 Washington, D.C.

9 Wednesday, March 25, 1987

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 12:59 p.m.

13 APPEARANCES:

14 ARNOLD T. GUMINSKI, ESQ., Deputy District Attorney  
15 of Los Angeles County, Los Angeles, California; on  
16 behalf of the Petitioner.

17 ARTHUR LEWIS, ESQ., Los Angeles, California; on  
18 behalf of the Respondent.

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on behalf of Petitioner	3
ARTHUR LEWIS, ESQ.	
on behalf of Respondent	32



1 MR. GUMINSKI: It would be underneath the  
2 apartments themselves.

3 QUESTION: You mean basement?

4 MR. GUMINSKI: Pardon me?

5 QUESTION: You mean basement?

6 MR. GUMINSKI: Basement, yes, Your HONor.

7 QUESTION: Well, why do you need  
8 subterranean? Who owned this trash receptacle?

9 MR. GUMINSKI: I do not know who is the  
10 specific owner of the trash receptacle. It was not  
11 expressly disclosed in the record. However --

12 QUESTION: Well, couldn't you have found out?  
13 Couldn't the police department have found out?

14 MR. GUMINSKI: It is possible that they could  
15 have found out, yes, Your Honor.

16 QUESTION: And let us know.

17 MR. GUMINSKI: It does not -- that fact is not  
18 disclosed in the record.

19 I should like to point out, however, that the  
20 question as to who technically was the owner of this  
21 apartment building and the garage, as we shall see, is  
22 not really a critical issue, if I may continue.

23 The officers went to the trash bin and  
24 proceeded to search it -- I use the term in its popular  
25 sense. And halfway down they located a brown paper

1 shopping bag which they removed.

2 It contain mail addressed to Mr. Rooney and  
3 evidences of bookmaking operations.

4 The question posed is whether Mr. Rooney's  
5 Fourth Amendment rights were violated by this  
6 examination of the contents of this trash bag.

7 Our position is that it was not, and for two  
8 different grounds.

9 The first ground is that Mr. Rooney had  
10 abandoned the trash when it was placed in the communal  
11 trash bin of this apartment building. That is, that  
12 trash ceased to be his or anyone's papers and effects  
13 within the meaning of the Fourth Amendment when it was  
14 deposited in the trash bin.

15 QUESTION: Mr. Guminski?

16 MR. GUMINSKI: Yes, Justice.

17 QUESTION: Is it true that under California  
18 law as articulated in the Krivda case, that there is a  
19 reasonable expectation of privacy in abandoned garbage  
20 in California?

21 MR. GUMINSKI: I think that it can be stated,  
22 yes, Your Honor. But I cannot say that that is an  
23 absolute statement because the California Supreme Court  
24 has not ruled on a situation such as that in the instant  
25 case.

1 QUESTION: But the indications are that  
2 California would recognize a reasonable expectation of  
3 privacy?

4 MR. GUMINSKI: Yes, Your Honor, and that was  
5 the holding in the instant case by the Court of Appeals.

6 QUESTION: I'm curious how that interfaces  
7 then with the inquiry we would make under the Fourth  
8 Amendment about whether a particular expectation of  
9 privacy is reasonable.

10 Do we -- do we have to look at all at  
11 California law? Or do we ignore that and make it purely  
12 a Federal inquiry --

13 MR. GUMINSKI: We submit --

14 QUESTION: -- on what's a reasonable  
15 expectation?

16 MR. GUMINSKI: Justice O'Connor, we submit  
17 that this Court must use a Federal, national standard.  
18 The question is whether an expectation of privacy is  
19 such that society is prepared to recognize it as  
20 reasonable, and the society in question is the nation as  
21 a whole.

22 If this Court were to determine the question  
23 of reasonableness by a particular state, one may not be  
24 speaking of the identical standard, because the state in  
25 question might impose a much higher standard than that

1 required by the Fourth Amendment.

2 QUESTION: California may in fact have a  
3 higher class of trash than other states, too.

4 MR. GUMINSKI: Yes, Your Honor. It apparently  
5 is valued that when garbage is put in it somehow emerges  
6 when taken out by a police officer with an aura of  
7 respectability.

8 And the two grounds that we have just stated  
9 are such that the second ground, that is, a reasonable  
10 expectation of privacy ground, is inferior or  
11 subordinate to the first ground.

12 Because there can be no Fourth Amendment  
13 rooted reasonable expectation of privacy with respect to  
14 items which have ceased to be papers and effects within  
15 the meaning of the Fourth Amendment.

16 This Court, in *Oliver v. United States*,  
17 confirmed the ruling in *Hester* that open fields are not  
18 embraced by the protection of the Fourth Amendment.

19 And one independent ground was that this was  
20 precluded by the explicit language of the Fourth  
21 Amendment.

22 And this Court proceeded to note that Katz'  
23 standard reasonable expectation of privacy standard --

24 QUESTION: You want us to extend the open  
25 fields doctrine to a basement?

1 MR. GUMINSKI: We are not speaking that it --  
2 the open fields doctrine extends to the basement, sir.

3 QUESTION: Well, what are you saying?

4 MR. GUMINSKI: We are saying that a basement,  
5 in the first place, is not within the curtilage or the  
6 house of Mr. Peter Rooney. That is clear from -- pardon  
7 me?

8 QUESTION: (Inaudible.)

9 MR. GUMINSKI: Well, because the record  
10 describes this apartment building as --

11 QUESTION: Does it say how many apartments are  
12 in it?

13 MR. GUMINSKI: How many --?

14 QUESTION: Apartments are in the building?

15 MR. GUMINSKI: It --

16 QUESTION: It doesn't say a thing about what  
17 was in that building.

18 MR. GUMINSKI: It described Mr. Rooney as  
19 being in apartment number eight, Your Honor.

20 QUESTION: Well, how many apartments are in  
21 the building?

22 MR. GUMINSKI: The affidavit and the search  
23 warrant itself did not state the precise number of  
24 apartments in the building.

25 QUESTION: Well, by the time of trial, did you

1 say -- is there anything in the trial --

2 MR. GUMINSKI: In the record it was stated  
3 before the magistrate that there were 28 units in the  
4 building. This was not challenged in the court below.

5 The Court of Appeal, in its opinion, in its  
6 published opinion --

7 QUESTION: Was it in the trial record, or was  
8 it in the magistrate's record?

9 MR. GUMINSKI: It is in the record on appeal.

10 QUESTION: It's in the record here?

11 MR. GUMINSKI: Yes, Your Honor.

12 QUESTION: I'll look again.

13 MR. GUMINSKI: Well, if I -- if Your Honor --

14 QUESTION: No, no, I'll find it.

15 MR. GUMINSKI: Thank you, Justice Marshall.

16 QUESTION: That's what I'm here for.

17 MR. GUMINSKI: It was mentioned that there  
18 were 28 units by the prosecutor. This was not  
19 challenged by the defense counsel.

20 QUESTION: (Inaudible.)

21 MR. GUMINSKI: There was a representation by --

22 QUESTION: Well, that is not testimony.

23 MR. GUMINSKI: It is not, Your Honor. But it  
24 was a representation made by the prosecuting attorney.  
25 It was not challenged. It was stated in the Court of

1 Appeals opinion without objection by respondent.

2 As a matter of fact, in the respondent's brief  
3 the apartment building is described as a 28-unit  
4 apartment building.

5 But certainly, the --

6 QUESTION: Mr. Guminski, while you're on the  
7 building, this was in a garage, was it not?

8 MR. GUMINSKI: Yes, Your Honor.

9 QUESTION: And do all the apartment owners  
10 have a -- is that part of their -- what they rented, the  
11 rented space in the garage?

12 MR. GUMINSKI: This could be inferred, yes,  
13 Your Honor.

14 QUESTION: So that basically the garbage was  
15 still on their premises?

16 MR. GUMINSKI: The garbage -- the trash bin  
17 was located within the subterranean garage.

18 QUESTION: Which was part of the respondent's  
19 premises.

20 MR. GUMINSKI: It was part --

21 QUESTION: Is the case the same as if the  
22 garbage was in his kitchen, is what I'm asking you?

23 MR. GUMINSKI: No, Your Honor, it is not,  
24 because clearly, if a trash container was in a kitchen  
25 of a person, whether or not there is a per se interest

1 in trash, that would be the protection of the Fourth  
2 Amendment as far as the interest in one's house would  
3 extend to one's kitchen --

4 QUESTION: But what about the garage?

5 MR. GUMINSKI: -- and would extend to the  
6 trash container.

7 QUESTION: Is the garage an open public area?

8 MR. GUMINSKI: This would be an area open to  
9 the -- accessible to the public.

10 QUESTION: Accessible, but just like the  
11 living room -- just like leaving the door unlocked, or  
12 is it --

13 MR. GUMINSKI: I infer from -- I infer that it  
14 being an open garage that it is common to all the  
15 apartment dwellers, as well as other people who might  
16 come in through the opening.

17 QUESTION: The record makes it clear that  
18 people who do not live or are not guests of the  
19 apartment have free access to the a garage?

20 MR. GUMINSKI: It does not expressly state so.

21 QUESTION: Do you think that might make a  
22 difference?

23 MR. GUMINSKI: It might. I do not think it  
24 could make --

25 QUESTION: There are some 28-unit buildings

1 that have a common area, and they're very careful to  
2 keep the garage doors locked, because they don't want  
3 thieves and the like to come into the place, even though  
4 the garage is temporarily in that area.

5 MR. GUMINSKI: Your Honor, it might become  
6 relevant, although it is hard to see offhand, with  
7 respect to someone else's interest, if there were some  
8 other person other than Peter Rooney who was involved.

9 But he was a tenant in this building. It was  
10 not part of his house or --

11 QUESTION: But did he have -- did he have a  
12 parking space in the garage?

13 MR. GUMINSKI: That can be inferred that he  
14 did. I do not know as a matter of fact. But it can be  
15 inferred he had only a right of access to this garage.  
16 That does not make it part of the curtilage of his home,  
17 within the meaning of the curtilage as defined by this  
18 Court, as recently as United States versus --

19 QUESTION: What case do you rely on for that  
20 proposition?

21 QUESTION: (Inaudible) garage?

22 MR. GUMINSKI: I do not know, Your Honor.

23 QUESTION: Where is the entrance to the  
24 garage? I'm just talking about the things that should  
25 be in the record that are not there.

1 MR. GUMINSKI: Your Honor --

2 QUESTION: For all I know, the record was  
3 closed to the public.

4 MR. GUMINSKI: If it was closed to the public

5 --

6 QUESTION: I didn't say if. I said it could  
7 be.

8 MR. GUMINSKI: It could be closed to --

9 QUESTION: Well, you've been could-being for  
10 the last 10 minutes. We can't decide cases on could be.

11 MR. GUMINSKI: Justice --

12 QUESTION: Is this -- where is it? Is it near  
13 the front door or the back door or what? Did he have a  
14 car? You don't know.

15 MR. GUMINSKI: This is not disclosed in the  
16 affidavit which was presented to the magistrate's --

17 QUESTION: Well, I don't know now and you  
18 don't know.

19 MR. GUMINSKI: However, I would submit --

20 QUESTION: Was it locked or unlocked?

21 MR. GUMINSKI: It does not expressly state  
22 so. It was described by the Court of Appeal as being  
23 accessible to the public.

24 I would submit, Justice Marshall, that this  
25 factor is not controlling, because the question is

1 whether Mr. Rooney's Fourth Amendment interests were not  
2 violated.

3 QUESTION: Whether it was locked or not, the  
4 question of whether it was locked, has nothing to do  
5 with whether or not he had an expectation of privacy; is  
6 that your position?

7 MR. GUMINSKI: I say -- well, there certainly  
8 -- we would submit it would not be, because he has no --  
9 would have no reasonable expectation of privacy as far  
10 as a common garage of an apartment building, whether --  
11 within -- that would be rooted in the Fourth Amendment.

12 QUESTION: Counsel, the opinion in the Court  
13 of Appeals in California describes this container as a  
14 communal. Does that suggest that all 28 of the  
15 apartments use the same disposal?

16 MR. GUMINSKI: That would suggest that to me,  
17 Justice Powell. But one has to -- this case really  
18 turns on the question of a document presented to the  
19 magistrate pursuant to a request for a search warrant.

20 And one must presume that the magistrate made  
21 inferences favorable to the issuance of the warrant  
22 which he did issue.

23 QUESTION: Does anybody challenge the use of  
24 the term "communal"?

25 MR. GUMINSKI: No, Your Honor. No one has

1 challenged, and it is so described in respondent's brief.

2 QUESTION: The container is described as 8 by  
3 5 by 4 feet.

4 MR. GUMINSKI: Yes.

5 QUESTION: Would a single individual have a  
6 garbage or trash disposal that size?

7 MR. GUMINSKI: That would be most likely, Your  
8 Honor, unless he generated a lot of trash, which is  
9 unlikely.

10 QUESTION: But isn't the whole record built on  
11 what is likely or not? My query is, we are deciding a  
12 constitutional issue on facts that you had a chance to  
13 put evidence in and didn't. And there was no problem in  
14 doing it.

15 MR. GUMINSKI: Your Honor, the case arose --

16 QUESTION: You want us to infer this.

17 MR. GUMINSKI: Justice Marshall, the case  
18 arose on a motion to quash a warrant on the ground that  
19 the legal insufficiency of the affidavit on its face --

20 QUESTION: You could have put on any testimony  
21 that was relevant.

22 MR. GUMINSKI: One could not put on relevant  
23 testimony at a suppression hearing if the court had  
24 denied -- had granted the motion to suppress.

25 QUESTION: Well, couldn't you have objected?

1     Couldn't you objected by saying that this is a communal  
2     place, and put on evidence to that effect?

3             MR. GUMINSKI: Well, the issue before the  
4     trial court was the legal sufficiency of the affidavit  
5     --

6             QUESTION: Well, could you have put the  
7     evidence in there?

8             MR. GUMINSKI: I do not see how procedurally  
9     it could have been possible because --

10            QUESTION: Did anyone dispute at this hearing  
11     that it was a communal trash bin?

12            MR. GUMINSKI: There has been no dispute at  
13     any hearing in the courts below, including the Court of  
14     Appeal.

15            QUESTION: But the issue isn't the validity of  
16     the warrant. The warrant was valid. The issue is the  
17     validity of the search of material that was not  
18     encompassed by the warrant.

19            MR. GUMINSKI: That is correct. We petition  
20     this Court for certiorari because the ruling of the  
21     court below that the communal trash bin search was  
22     invalid under the Fourth Amendment was something which  
23     we felt was erroneous, and it was a final order for  
24     purposes of seeking review in this Court because -- for  
25     evident reasons.

1           QUESTION: Mr. Guminski, these containers of  
2 this size are common in this area, as they must be in  
3 California.

4           Do you know, or does the record or the  
5 affidavit show, that -- how the trash got into the big  
6 -- the depository?

7           MR. GUMINSKI: Again, because we are dealing  
8 with the sufficiency of the affidavit on its face, which  
9 was the only thing presented --

10          QUESTION: So you don't know whether it came  
11 down there through a chute, or whether the tenants came  
12 down and threw it in, or anything of that kind?

13          MR. GUMINSKI: It does not appear expressly  
14 in the record, no.

15          QUESTION: You puzzle me by saying we're  
16 dealing with the sufficiency of the affidavit. We're  
17 not dealing with the sufficiency of the affidavit. The  
18 affidavit has nothing to do with this particular search.

19          MR. GUMINSKI: Well, I correct myself. The  
20 only information --

21          QUESTION: It took place before the affidavit  
22 was granted.

23          MR. GUMINSKI: The only evidentiary matter is  
24 that which is contained in the affidavit, that is  
25 correct, Your Honor.

1           The -- the position in Oliver was that the  
2 Fourth Amendment itself, by its explicit language,  
3 delimited the scope of its protection. And as -- and  
4 this is clearly justified by the language of the first  
5 clause of the Fourth Amendment, which does not say  
6 simply that the right of the people be secure against  
7 unreasonable searches and seizures shall not be  
8 violated; it provides that the right of the people to be  
9 secure in their persons, houses, papers and effects,  
10 against unreasonable searches and seizures shall not be  
11 violated.

12           This Court technically defines a search as  
13 being an infringement of a reasonable expectation of  
14 privacy.

15           If one were to make a substitutional  
16 definition of the term "search" and put it in the text  
17 of the first clause of the Fourth Amendment, it would  
18 then read: The right of the people to be secure in their  
19 persons, houses, papers and effects against unreasonable  
20 infringements of their reasonable expectations of  
21 privacy and unreasonable searches shall not be violated.

22           I think this highlights that the Fourth  
23 Amendment itself distinguishes between two classes of  
24 entities.

25           The first class of entities is what kind of

1 entity -- what kinds of entities are protected by the  
2 Fourth Amendment, and that is the houses -- the persons,  
3 the houses, the papers and effects of the people.

4 And the second class of entities are, what are  
5 those kind of activities which are being prohibited by  
6 the Fourth Amendment, and those are infringements of  
7 reasonable expectations of privacy with respect to the  
8 aforementioned interests.

9 So the question ultimately comes down to what  
10 kind of interests of Rooney were violated such as that  
11 he can urge the application of the exclusionary rule in  
12 this instant case.

13 Now, surely his person is not involved. There  
14 is no violation of his Fourth Amendment interest in his  
15 person as such.

16 The next classification is that of his house.  
17 And again, taking words as they appear, we submit that  
18 the underground garage of the apartment building to  
19 which he and presumably other tenants had access was not  
20 part of his house for Fourth Amendment purposes, nor  
21 part --

22 QUESTION: May I ask at that point, supposing  
23 this were a private home with an attached garage, and  
24 when they set the garage out to be picked up right  
25 inside the alley, but it was still within the garage,

1 but the garage door is left open.

2 Could the police search the can?

3 MR. GUMINSKI: This would be within the  
4 curtilage. No, sir, presumptively not, because it would  
5 be within the curtilage of an individual home dweller.

6 QUESTION: But an apartment dweller who  
7 handles the garbage in this way has no expectation of  
8 privacy.

9 If it were upstairs in a common area on the  
10 same floor where sometimes it might be dumped, but not  
11 on his apartment, would you again draw the line?

12 MR. GUMINSKI: He would not have a Fourth  
13 Amendment interest violated, according to our --

14 QUESTION: In other words, it has to be in an  
15 area with respect to which he has the sole right of  
16 possession; if it's in common with other tenants, it  
17 doesn't apply.

18 MR. GUMINSKI: Or it can meaningfully be said  
19 to be his curtilage. And we submit that the common  
20 underground --

21 QUESTION: The common areas of a multiple unit  
22 apartment dwelling don't have any curtilage, do they?

23 MR. GUMINSKI: Are not -- does not itself  
24 constitute a curtilage of any particular tenant.

25 QUESTION: How about if it's a coop?

1 MR. GUMINSKI: Here -- we would submit that it  
2 does not, either, Your Honor, although there may be  
3 title --

4 QUESTION: Even though they owned the common  
5 area?

6 MR. GUMINSKI: Yes, but a person may have  
7 title and share with many in access to a particular  
8 common area, but the question would be whether it would  
9 be in a meaningful sense, his house and his curtilage.

10 And you could have a coop with many, many  
11 residents, albeit all legal owners in general having  
12 common use of a common area.

13 QUESTION: Well, I guess you can have multiple  
14 owners of an individual dwelling as well. You wouldn't  
15 say that diminishes the expectation of privacy of the  
16 resident, would you?

17 MR. GUMINSKI: Well, of course, one is always,  
18 Justice O'Connor, coming to close questions of where one  
19 draws the line. And it may well come to a point where  
20 one will say that there may be multiple residents of a  
21 single dwelling yet to be considered a single dwelling  
22 residence, where, yes, a number of persons, such as  
23 members of one family, could be -- would have one  
24 curtilage --

25 QUESTION: Well, if you had a whole bunch of

1 unrelated persons in a multiple unit dwelling with many  
2 bedrooms, let's say a dormitory with a bunch of college  
3 students in it, you wouldn't say that one college  
4 student has a Fourth Amendment right with respect to the  
5 bedroom of another college student, would you?

6 MR. GUMINSKI: No, I would not, Your Honor.

7 QUESTION: So the multiple unit thing is quite  
8 a different situation.

9 MR. GUMINSKI: A multiple unit is a different  
10 situation. I was just trying to accommodate --

11 QUESTION: Just because people all live  
12 together doesn't mean that each one of them has a right  
13 of privacy in the entire area that they're living  
14 together in?

15 MR. GUMINSKI: No, it does not. No, it does  
16 not. I was just trying to acknowledge to Justice  
17 O'Connor that one does come to closer cases where  
18 decision making becomes more critical, but we do have  
19 this in this --

20 QUESTION: But the question in the multiple  
21 unit case is not whether one tenant has privacy rights  
22 in another tenant's private area, but rather, whether  
23 any of them have a privacy right in a common area from  
24 which the public is excluded?

25 And I take it you say no, they don't.

1 MR. GUMINSKI: Well, we are saying that they  
2 do not have a Fourth Amendment interest. It is not a  
3 part of their house within the meaning of the Fourth  
4 Amendment.

5 Now, they may have interests in containers or  
6 cars or effects, their effects, in that common area.

7 QUESTION: But if this garbage had been left,  
8 for example, in the front hall or the entrance hall of a  
9 large building, they would have -- they'd lose their  
10 privacy interests the same way --

11 MR. GUMINSKI: I would submit on that  
12 analysis, yes, Your Honor.

13 QUESTION: -- or on the -- in the garbage on  
14 the same floor they lived on. As soon as it gets out of  
15 their exclusive possession, would be your position?

16 MR. GUMINSKI: Yes, but if it is a common  
17 container, container open to the use of -- of everybody,  
18 there is no Fourth Amendment interest.

19 If a person, however, may have his own  
20 container in a garage, garages frequently have --  
21 apartment garages frequently have containers, storage  
22 containers.

23 QUESTION: So you said to me, in a home and a  
24 garage, they'd be protected if you left it in the  
25 garbage still in the garage. What about a two-flat, and

1 they share a garage? You'd say that's a common area, so  
2 there's no protection there.?

3 That's your distinction, as I understand it.

4 MR. GUMINSKI: That is an extremely, extremely  
5 close case, where I would say that one would be --

6 QUESTION: If two-flat isn't enough, what  
7 about three-flat, and as soon as we get to 28, have we  
8 crossed the constitutional line?

9 MR. GUMINSKI: I would say that one would feel  
10 compelled to say that when you have a two-unit --

11 QUESTION: That's different from a single unit.

12 MR. GUMINSKI: -- that's different from  
13 single, but there may be -- there may be a greater scope  
14 to reasonable expectation of privacy.

15 We are distinguishing between two issues,  
16 Justice Stevens. Before you can discuss whether a  
17 person has a reasonable expectation as to a house, you  
18 might say, you have to decide whether it's his house in  
19 a meaningful sense.

20 QUESTION: Well, let's do that here.

21 MR. GUMINSKI: Pardon me?

22 QUESTION: Let's do that right here. What is  
23 there in this record to show this man's relationship to  
24 the building?

25 MR. GUMINSKI: It does not show -- one can

1 infer that he is a tenant. He is described as being in  
2 apartment eight.

3 QUESTION: What does it show?

4 MR. GUMINSKI: He is -- it indicates that he  
5 is a tenant. He is indicated as being in apartment  
6 eight.

7 QUESTION: What does it show positively?

8 MR. GUMINSKI: It does not show expressly  
9 whether he is or is not a --

10 QUESTION: How does it show who used the  
11 garbage can? How many people used it?

12 MR. GUMINSKI: It does not expressly show how  
13 many people used it. However, as Justice Powell points  
14 out --

15 QUESTION: My whole point originally was, all  
16 these things you talk about are not in this record.

17 QUESTION: Well, if he weren't a tenant, I  
18 suppose his Fourth Amendment claim would be nonexistent,  
19 if he's simply a stranger to the building. And saying  
20 he's a tenant is putting him in the most favorable spot  
21 you would permit.

22 MR. GUMINSKI: That is true, Mr. Chief Justice.

23 QUESTION: Nobody's doing him any favors.

24 QUESTION: Was the judgment below in your  
25 favor?

1 MR. GUMINSKI: The judgment below sustained  
2 the search warrant on the ground that the affidavit had  
3 sufficient --

4 QUESTION: Well, did you -- did you want to  
5 introduce -- there's never been a trial, is that it?

6 MR. GUMINSKI: No, there has not been a trial.

7 QUESTION: And did you want to introduce  
8 anything you got out of the trash bag --

9 MR. GUMINSKI: The --

10 QUESTION: -- or just what you found in the  
11 search warrant?

12 MR. GUMINSKI: There would be an intention, if  
13 the ruling of the Court of Appeal were overturned, to  
14 introduce evidence pertaining to what was found in the  
15 trash bag.

16 QUESTION: But the -- the Court of Appeal --  
17 the Court of Appeal said that the warrant was valid  
18 based on other evidence?

19 MR. GUMINSKI: That matter in the affidavit --

20 QUESTION: So that everything you found under  
21 the search warrant is admissible.

22 MR. GUMINSKI: That is correct, Your Honor.  
23 But the ruling as far as the -- by the Court of Appeal  
24 is a ruling which forecloses the use of what was  
25 discovered as far as the trash bag; that would be the

1 rule of the case.

2 QUESTION: And you think you're really going  
3 to use that at this trial, or you think that you would  
4 really need to?

5 MR. GUMINSKI: Well, Your Honor, I think what  
6 we really want would be to hope to tend to overrule  
7 People v. Krivda, which was here before this Court in  
8 1972, and which was remanded then because there were  
9 independent state grounds.

10 I mean, I wish to answer candidly to your  
11 question, Justice; there is an intention to use it, of  
12 course.

13 But it is a vehicle of review.

14 QUESTION: Let me get back to Justice Stevens'  
15 private home. Instead of having the trash can in the  
16 garage, he puts it out on Monday morning out on the  
17 curb.

18 It's his trash can. There -- only his trash  
19 is in it.

20 MR. GUMINSKI: That is correct.

21 QUESTION: Is that --?

22 MR. GUMINSKI: According to our analysis, that  
23 when a person sets out a trash can, albeit that trash  
24 can is his effect, when he sets it out for collection,  
25 he is manifesting an unequivocal, unconditional intent

1 to part with this trash forever.

2 He is expressing a judgment that it no longer  
3 has any value for him, and therefore, we submit that it  
4 has ceased to be his papers and effects within the  
5 meaning of the Fourth Amendment.

6 QUESTION: That's true whether it's in --

7 MR. GUMINSKI: He no longer manifests a  
8 reasonable expectation of privacy.

9 QUESTION: But that's true whether it's in the  
10 garage or on the curb, isn't it?

11 MR. GUMINSKI: It makes no difference, that's  
12 correct.

13 QUESTION: And in both cases, it can or cannot  
14 be searched?

15 MR. GUMINSKI: Pardon me?

16 QUESTION: And in both cases, it can or cannot  
17 be searched?

18 MR. GUMINSKI: That is correct, Your Honor.

19 QUESTION: Which?

20 MR. GUMINSKI: Well, you are saying it --

21 QUESTION: Earlier you told me it could not be  
22 searched if it is in the garage.

23 MR. GUMINSKI: No, I am saying this, Justice  
24 Stevens. If, in either case, if somebody places trash  
25 in a communal trash bin of a --

1 QUESTION: No, no, we're talking now about a  
2 single home, following up Justice Blackmun's example.

3 MR. GUMINSKI: If somebody places a trash bin  
4 out for collection, it can be searched.

5 QUESTION: But if it's in the garage, it  
6 cannot?

7 MR. GUMINSKI: If it's in his garage, it  
8 cannot.

9 QUESTION: Even though the garage door is open?

10 MR. GUMINSKI: Even though it is open --

11 QUESTION: And you base that on a different  
12 intent to surrender any expectation of privacy between  
13 those two cases?

14 MR. GUMINSKI: The point is that the right of  
15 ownership to one's house and reasonable expectation of  
16 privacy with respect to the house encompasses his garage.

17 QUESTION: One case involves curtilage and the  
18 other case doesn't involve curtilage; that's the  
19 difference between the two, right?

20 MR. GUMINSKI: That is correct.

21 QUESTION: But there's no abandonment of title?

22 MR. GUMINSKI: There is no abandonment of  
23 title.

24 QUESTION: To the trash.

25 MR. GUMINSKI: But we are dealing with trash.

1 And the trash -- it seems to me that the fathers -- the  
2 founders of the Constitution and the Bill of Rights  
3 would have applauded Katz v. United States in  
4 considering that electronic surveillance, which was not  
5 anticipated by them would be covered by the Fourth  
6 Amendment, but that they would be somewhat scandalized  
7 to think that trash set out for collection or in the  
8 place of a communal trash bin remained --

9 QUESTION: What I'm trying to get at, a little  
10 while ago you said that there was abandonment of  
11 ownership of trash out on the curb.

12 MR. GUMINSKI: There was -- he abandoned --  
13 yes, he abandoned his --

14 QUESTION: Well, suppose his wife's diamond  
15 ring fell in it by mistake. She hasn't abandoned any  
16 claim to ownership, has she?

17 MR. GUMINSKI: Well, in terms of title, I  
18 suppose, no. But this is a -- this is a --

19 QUESTION: Well, you don't only suppose, you  
20 know, don't you?

21 MR. GUMINSKI: He would certainly go to  
22 retrieve, that is true, once he became aware. But for  
23 Fourth Amendment purposes, he is manifesting then and  
24 there and unconditional, unequivocal intent to part with  
25 the trash.

1           And I'm sure that the founders of the  
2 Constitution would not think that these were among the  
3 papers and effects as to which there could be a  
4 reasonable expectation --

5           QUESTION: You wouldn't prosecute somebody who  
6 picked up the diamond ring in the trash in collecting  
7 the garbage, or an apple core, for that matter, for  
8 larceny?

9           MR. GUMINSKI: No, I would not, Your Honor.

10          QUESTION: But supposing the neighbor picks it  
11 up in the full view of the owner who had thought it was  
12 lost and saw it? To whom would it belong?

13          MR. GUMINSKI: Well, you are speaking then of  
14 a question of --

15          QUESTION: The diamond ring?

16          MR. GUMINSKI: -- personal property, as far as  
17 lost or misplaced property.

18          QUESTION: If it's abandoned, as a matter of  
19 property law, the neighbor could claim it.

20          MR. GUMINSKI: Well, there are two different  
21 concepts.

22          QUESTION: I understand.

23          MR. GUMINSKI: One is mere property law, and  
24 the other --

25          QUESTION: You're saying, for Fourth Amendment

1 purposes it's abandoned.

2 MR. GUMINSKI: -- is what is abandonment for  
3 Fourth Amendment purposes.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
5 Guminski.

6 We'll hear now from you, Mr. Lewis.

7 ORAL ARGUMENT OF ARTHUR LEWIS, ESQ.,

8 ON BEHALF OF THE RESPONDENT

9 MR. LEWIS: Mr. Chief Justice, and may it  
10 please the Court:

11 I'd like to begin with a statement from this  
12 Court only a few weeks again in Arizona versus Hicks.

13 There's nothing new in the realization that  
14 the Constitution sometimes insulates the criminality of  
15 a few of us in order to protect the privacy of us all.

16 This case here is a search without a warrant  
17 where police intended to seize the property of the  
18 defendant. A warrant is required, except in certain  
19 well delineated cases such as automobile exceptions.

20 We talk in terms here not of abandonment. We  
21 have a curtilage problem.

22 One of the things we have to rely on in this  
23 particular matter is not only Oliver but even what this  
24 Court said in Dunn. We find no problem with what this  
25 Court has said.

1           If I might quote from Oliver, where the Court  
2 said: The rule of Hester that we reaffirm in Oliver  
3 today may be understood as providing that an individual  
4 may not legitimately demand privacy for activities  
5 conducted out of doors in fields, except in the area  
6 immediately surrounding the home.

7           And the Court went on to say that open fields  
8 do not provide the setting for those intimate activities  
9 intended to be sheltered from governmental interference.

10           And the Court went on to say that since open  
11 fields can be viewed by the public to see growing crops,  
12 in this case marijuana, fences or no trespassing signs  
13 do not generally bar the public from seeing or viewing  
14 these open fields.

15           Now, we can live with this --

16           QUESTION: As opposed to subterranean communal  
17 garages which are the site of intimate activities?3

18           MR. LEWIS: Correct. Because one of the  
19 intimate activities that we deal with in our everyday  
20 life in our homes is the accumulation of trash.

21           You've got to do something with your trash.  
22 You must dispose of it.

23           As his Honor just indicated, we put it out on  
24 a curb.

25           QUESTION: Right. And you would assert that

1 even trash out on a curb would retain the right of  
2 privacy?

3 MR. LEWIS: Yes, there is --

4 QUESTION: So you're not relying on the  
5 curtilage -- on the curtilage distinction?

6 MR. LEWIS: I do, from this standpoint. When  
7 we go from Oliver to Dunn, we find what this Court has  
8 indicated would be helpful. The Court didn't say it was  
9 a talisman. It's not a litmus test.

10 But the Court did point out in Dunn what would  
11 be helpful in determining what does or does not  
12 constitute the curtilage.

13 There were four items mentioned. And I submit  
14 one is, the proximity of the area claimed to the home.  
15 Now, in Dunn, the Court went on to say that 50 or 60  
16 yards was too far away. There were fences around it,  
17 barbed wire. In Oliver we had no trespassing signs.

18 QUESTION: (Inaudible) whether it was  
19 horizontal or vertical distance, did we?

20 MR. LEWIS: That's correct.

21 QUESTION: You might be in good shape if we  
22 just meant horizontal distance.

23 MR. LEWIS: That's correct, Your Honor,  
24 because the petitioners in their opening brief pointed  
25 out that Mr. Rooney lived in the northwest apartment,

1 and it was the southeast end of the building where the  
2 trash was.

3 What this confronts me with is the fact that  
4 we're now going to have First Amendment apartments and  
5 those without First Amendment rights, and First  
6 Amendment rights may rent for \$100 a month more if  
7 they're closer to the trash.

8 QUESTION: Why is that so extraordinary? I'll  
9 tell you something that makes it even worse than that.  
10 You have people who have Fourth Amendment garbage  
11 collectors and people who don't have Fourth Amendment  
12 garbage collectors.

13 Because some places we've lived, they would  
14 come into your yard, and open the gate, and take out  
15 your trash from inside your yard. And you could leave  
16 it fenced in until they came and collected it.

17 Other, more surly garbage collectors will not  
18 do that, and you have to leave it out at the curb. You  
19 cannot leave it within your curtilage.

20 Now, is there some denial of equal protection  
21 of the law, because you have different, you know,  
22 garbage collectors of varying amounts of goodwill.

23 MR. LEWIS: There is for one reason. I find  
24 one reason for that, Your Honor. Because if there is a  
25 reasonable expectation of privacy, it is people and not

1 places.

2 That's where we're drawing this distinction.  
3 That's why we're here. That's why we have this  
4 particula problem.

5 QUESTION: (Inaudible) inside of a house is  
6 not outside of the curtilage?

7 MR. LEWIS: Well, I would submit --

8 QUESTION: Well, why don't you say that inside  
9 a house is not, quote, an open field, end quote?

10 MR. LEWIS: I do say. Inside a house is not  
11 an open field.

12 QUESTION: Well, where are you getting all  
13 these other problems?

14 MR. LEWIS: Trash outside is still not an open  
15 field, if it's not in my backyard.

16 If it's under --

17 QUESTION: (Inaudible) open fields, is it?

18 MR. LEWIS: Trash inside his house is not an  
19 open field.

20 QUESTION: Well, this trash was inside a house.

21 MR. LEWIS: It is our position that the  
22 subterranean --

23 QUESTION: Well, why don't you stick to that?

24 MR. LEWIS: Well, I do now.

25 I submit we go even further.

1 QUESTION: Well, the Court of Appeals said  
2 that the trash bin was located in the apartment's  
3 garage, which was an area accessible to the public.

4 MR. LEWIS: Correct.

5 QUESTION: So when you say it's a house, you  
6 certainly don't mean it had the sort of privacy  
7 interests that you'd get inside the four walls of a  
8 house?

9 MR. LEWIS: I do make this distinction, Your  
10 Honor. There's a distinction between being open to the  
11 public and accessible to the public.

12 Now, in Dunn and Oliver, the officers were  
13 able to go onto the fields and see the contraband. In  
14 our particular instance, with all due deference to  
15 counsel, they were precluded from introducing evidence.

16 But if we take it in the light most favorable  
17 to them, we have an apartment dwelling in an urban area  
18 which, while the record doesn't show was fenced as in  
19 Dunn, the Court pointed out fencing wouldn't actually  
20 have to be required.

21 You have a situation where perhaps even the  
22 garage door is not gated shut. All you can have is  
23 people walking by and seeing this large trash bin.

24 What distinguishes Rooney and what gives him  
25 his right of privacy and the expectation thereof, is the

1 fact that he saw to it, however it was done, that it be  
2 at the bottom.

3 Obviously, if it's on the top --

4 QUESTION: If it had been at the top, we'd  
5 have a different case?

6 MR. LEWIS: Clearly, if it was on the top  
7 exposed to view, then perhaps, under the auto  
8 exceptions, where an officer might be deemed to have a  
9 right to go in and look at a vehicle, for whatever  
10 reason.

11 But one thing we haven't spoken of here is  
12 that this was a case where there was an anonymous phone  
13 call, and the first investigation that was done, other  
14 than to check Mr. Rooney's name and find out that some  
15 years before he had been arrested for this activity, was  
16 to search his trash.

17 Now, I submit, that is not what we are looking  
18 for in effective law enforcement.

19 QUESTION: Assume that this -- what was it? 8  
20 by 5 by 4 --

21 MR. LEWIS: Five feet high?

22 QUESTION: Right, this isn't put out on the  
23 curb for collection, right? I mean I assume that the  
24 garbage truck is one of those trucks that drives inside  
25 and lifts it up and it dumps into the truck

1 automatically?

2 MR. LEWIS: There was not testimony to  
3 indicate whether the maintenance people had to take that  
4 large trash truck and put it outside for the garbage  
5 man, or whether the truck came in.

6 I somehow doubt that the size of these garbage  
7 trucks would permit them to be driven into the  
8 subterranean garage.

9 QUESTION: Well, I somehow doubt that the size  
10 of this container would allow it to be carried outside  
11 the garage, too.

12 MR. LEWIS: If the container couldn't be  
13 carried outside the garage, I think certainly a truck  
14 couldn't come in.

15 QUESTION: Don't we have to assume that the  
16 Court of Appeals thought some of these things that are  
17 not in the record like whether the garbage truck came in  
18 or the container went out or whether the garage door was  
19 up or down made no difference? That it recited in its  
20 opinion the facts that it thought were controlling, and  
21 the facts it didn't recite would not have affected its  
22 determination?

23 MR. LEWIS: I have no quarrel with that.  
24 Because what the Court did was to point out that the  
25 people hadn't established that the property was

1 abandoned.

2 That was in the Court of Appeals' opinion,  
3 that the people had failed to establish that the  
4 property was abandoned.

5 They went one step further and pointed out  
6 that they weren't impressed with my particular argument  
7 that he had a heightened expectation of privacy because  
8 the trash barrel was within the curtilage; and went  
9 directly from there to the automobile exception.

10 Now, I don't object to law enforcement doing  
11 their job well. And I have no quarrel with policemen  
12 who want to search trash.

13 QUESTION: This case has everything in it.  
14 There's no element of Fourth Amendment law that isn't  
15 here. We're into the automobile exception now.

16 MR. LEWIS: We're in a garage where  
17 automobiles are kept.

18 Now, in the brief -- and that, of course, is  
19 what the Court of Appeals did. We're in the garage.  
20 The recital of the facts by the Court of Appeals  
21 reflects that the officers saw Mr. Rooney drive into the  
22 subterranean garage.

23 So I think we're safe in concluding that, one,  
24 he did own an automobile; and two, he did keep it in the  
25 garage.

1           When we go to Dunn, which I haven't gotten to,  
2 other than to discuss the proximity, we talk about  
3 whether the area is included within an enclosure, and in  
4 the footnotes Your Honors have indicated that the actual  
5 enclosure is only incidentally helpful to this Court in  
6 determining whether it is or isn't within the curtilage.

7           And if I might just read from the footnote  
8 where the Court said: We decline the government's  
9 invitation to adopt a bright line rule that the  
10 curtilage should extend no farther than the nearest  
11 fence surrounding a fenced house.

12           Going on: The primary focus is whether the  
13 area in question harbors those intimate activities  
14 associated with domestic life and the privacies of the  
15 home.

16           It appears to me that one's personal papers --  
17 and incidentally, while --

18           QUESTION: Mr. Lewis, supposing that this  
19 28-apartment building had all been inhabited by a rather  
20 wealthy person and his staff of servants, this clearly  
21 would be within the curtilage in that sense.

22           But do you think, nonetheless, inhabited by 28  
23 different people or different families, that when they  
24 have a communal area, that there isn't a point where the  
25 numbers mean you've lost privacy, even though it is not

1 open to the public, or even though it's within the  
2 curtilage?

3 MR. LEWIS: I don't believe it's the numbers  
4 that give rise to the loss of the privilege of  
5 curtilage. I think it's the nature of the activity that  
6 one is engaged in, and where one puts those personal,  
7 private papers one still does not want the world to see.

8 We all know what the Court said in *Krivda* as  
9 to why people may not want their neighbors reading their  
10 trash: dunning letters; subscriptions to communist  
11 literature at a time in our history when that was not a  
12 very favorable thing for one to do.

13 QUESTION: Well, you can take that kind of  
14 trash that you don't want people to -- and bury it over  
15 in the park. And that doesn't mean that you're free  
16 from having the police look over in the park.

17 MR. LEWIS: Well, that's what the petitioner  
18 suggested in their brief, that we could burn it, that we  
19 could shred it, that we could throw it down our garbage  
20 disposal, or we could eat it.

21 I don't believe they suggested the latter;  
22 that's my suggestion. I know not what else we might do.

23 One, in California, because of the smog  
24 situation, we can't burn it anymore, so we have a  
25 problem.

1           It was suggested that it be thrown into the  
2 fireplace. Some of us don't have fireplaces, and I  
3 don't believe the Fourth Amendment is only restricted to  
4 those of us who have a fireplace.

5           We can put it in the paper shredder. However,  
6 my experience indicates that government has time. And I  
7 have seen the results of paper shredders -- perhaps  
8 they're not very effective or good ones -- in which  
9 they're pasted the materials together and been able to  
10 read the documents.

11           We could eat it. But the government is  
12 patient there, too, because we've had those narcotics  
13 cases where the contraband has been swallowed, and the  
14 government merely waits.

15           So what I'm suggesting is, if we're going to  
16 say that we can do these things and hide it, what we're  
17 inviting is for the government to set up a screen  
18 outside our sewer and get our effluent as it comes out.

19           And I don't think this is where we're going.  
20 I don't think this is what we want.

21           I think what we're losing sight of here is,  
22 I'm not trying to restrict the police from inspecting  
23 garbage or trash when they think it's necessary.

24           Clearly, if it's on the top and it's exposed  
25 to view, you've given up any Fourth Amendment rights;

1 you should have done something else.

2 But I think Mr. Rooney, in putting it in the  
3 bottom half of his trash bin, doesn't exhibit a Fourth  
4 Amendment right, whether we know how he did that or not.

5 QUESTION: I really don't follow your  
6 argument. Your assumption seems to be that the  
7 principle of the Fourth Amendment is somehow that you  
8 ought to be able to keep things secret if you want to.

9 And I don't see that as a principle of the  
10 Fourth Amendment. The Fourth Amendment is just that  
11 there are certain areas of your life which are private.

12 Now it may well be that there are no ways to  
13 keep some things secret, like the disposal of a dead  
14 body. That doesn't mean that the Fourth Amendment isn't  
15 working, simply because there is no way you could  
16 dispose of it that the police wouldn't find it.

17 I don't understand.

18 MR. LEWIS: I have no quarrel with that.  
19 Because if you have a dead body in your home or  
20 apartment. And after a period of -- they can't get in  
21 if they don't know about it.

22 When the odor begins to make itself available  
23 to those on the outside, I don't think there's any  
24 problem in getting a warrant.

25 I submit that the warrant requirement is not

1 very difficult, and it's not very onerous.

2 QUESTION: But your point here was, gee, there  
3 ought to be some way to get rid of these things that the  
4 police wouldn't find it. That's not the principle of  
5 the Fourth Amendment at all.

6 What do you do -- speaking of curtilage, what  
7 do you do about the fenced in area around the apartment  
8 house? I assume if you think the subterranean garage is  
9 part of the curtilage, you would also say that the  
10 grounds around this 28-unit apartment house that were  
11 surrounded by a fence, that is also curtilage?

12 MR. LEWIS: I don't go that far.

13 QUESTION: Well, what's the difference between  
14 them?

15 MR. LEWIS: The difference is that you're not  
16 engaging in those intimate activities of life that one  
17 expects --

18 QUESTION: Well, what intimate activities of  
19 life go on in the garage?

20 MR. LEWIS: Well, this is where one is  
21 compelled -- some things do come to mind. But one is  
22 compelled, because of modern life, to live in an  
23 apartment building, and to dispose of one's trash.

24 And the accumulation of trash, as counsel so  
25 eloquently said, is the combustion of life. You have to

1 get rid of your trash, and it isn't necessarily --

2 QUESTION: Every nonapartment dweller has the  
3 same problem, and what we do is, we keep it in our house  
4 and put it out once a week, okay?

5 MR. LEWIS: Then the question is simply the  
6 expectation of privacy, the reasonable expectation of  
7 privacy that our trash will not be read by the neighbors  
8 or the police.

9 We can't control our neighbors, I understand  
10 that. And the definition that the people have suggested  
11 is that we lose our right to privacy when we're unable  
12 to exclude others, trespassers.

13 But I submit that I can't keep uninvited  
14 people out of my house. Trespassers may come in. I  
15 have been burglarized. But I haven't lost my Fourth  
16 Amendment right because of my inability to keep these  
17 people out of my home.

18 It's the manifestation of a reasonable  
19 expectation of privacy.

20 QUESTION: Well, what did the Court of Appeal  
21 here mean by saying that this area was accessible to the  
22 public?

23 MR. LEWIS: That someone passing by might be  
24 able to look into the subterranean garage and see this  
25 trash bin.

1           QUESTION: Well, ordinarily, the fact that a  
2 trash bin was located in an area accessible to the  
3 public. The ordinary -- that would just -- you would  
4 think that a member of the public going on there, going  
5 in that area, would not be trespassing.

6           MR. LEWIS: There's nothing in the record and  
7 I think counsel would agree that there's nothing in the  
8 record to indicate that it was open to the public.

9           QUESTION: It just doesn't sound like the  
10 courts below even relied on the curtilage notion.

11          QUESTION: It did -- it would have said,  
12 visible, if it meant what you said. It didn't say  
13 "visible". It said --

14          MR. LEWIS: I'm prepared to concede that the  
15 trash can, the trash bin, is visible.

16          QUESTION: Well, but what I'm saying is that  
17 if the Court of Appeals had meant to say what you say it  
18 meant to have said, it would have said that this was  
19 visible to the public.

20                 But they went much further. They said it was  
21 accessible to the public. That doesn't suggest just  
22 seeing. It suggests physically touching.

23          MR. LEWIS: I would submit that one could go  
24 into the subterranean garage, be he a policeman or some  
25 stranger, and touch the trash.

1           But I would submit that Mr. Rooney would have  
2 the right to eject someone who doesn't live there,  
3 belong there, or whatever else.

4           Mr. Rooney would always have the right to  
5 reclaim his trash. If Mr. Rooney were going to the  
6 trash bin to deposit it. And if the police in their  
7 infinite wisdom knew that one day he would have to get  
8 rid of his trash, and having no probable cause -- see,  
9 that's the thing that disturbs me.

10           There is no probable cause here. It's been  
11 conceded. It's been admitted. It would appear to me  
12 that there should be the requirement of some strong  
13 suspicion, and in the Court of Appeal they said, the  
14 automobile exception might apply, because trash is  
15 somewhat moveable, albeit not by the owner of the bin.  
16 The garbage truck man can come along and take it.

17           If there's any exigent circumstance --

18           QUESTION: Well, as I understand the  
19 California rule, they don't require a warrant. They  
20 just require probable cause, and then they can make a  
21 warrantless search that you could with a car.

22           MR. LEWIS: Correct. Correct. And I would  
23 only ask this Court to limit it to that. They don't  
24 need a warrant if they have probable cause and an  
25 exigent circumstance.

1                   That's all we're seeking here.

2                   QUESTION: Suppose the inhabitant of apartment  
3 28 whom your client doesn't know at all is down there in  
4 the garage, and he seeks this big crate of garbage over  
5 there, and he rummages around in it, and he picks up  
6 something that your client had thrown away down there?

7                   MR. LEWIS: Mr. Rooney has a problem. He has  
8 the same problem that any of us have.

9                   QUESTION: Well, would Mr. Rooney be able to  
10 get it back, do you think, if he hadn't -- it's not a  
11 diamond ring that was thrown away by mistake; it's a  
12 piece of trash.

13                   And Rooney says, you know, I'm sorry for  
14 throwing that out, I want it back. So he goes up to  
15 apartment 28 and he demands it back.

16                   Do you think he'd be entitled to get it back?

17                   MR. LEWIS: Whether he's able to get it back  
18 doesn't determine his right to have it. If it was a  
19 policeman who seized it, clearly he isn't going to get  
20 it from him if the policeman doesn't want to give it to  
21 him.

22                   QUESTION: No, I'm talking about whether it's  
23 realistically been abandoned when it's been put down  
24 there, and whether that place is a place in which he  
25 thinks he really has privacy in what he has deposited in

1 the garbage bin.

2 It seems to me, he doesn't. It seems to me he  
3 knows that anyone of the inhabitants of any of the other  
4 27 apartments can go down there and take out of that  
5 trash bin whatever they want to take out of it.

6 MR. LEWIS: If they take it out, he doesn't  
7 know about it, they turn it over to the police, it's the  
8 same problem we have with any third party who confronts  
9 the police with some illegally obtained items; it's not  
10 police conduct.

11 What we're looking for here, and what we're  
12 asking this Court and imploring it, really, because  
13 we're losing gradually so much of our Fourth Amendment  
14 rights under so many different theories. I would hate  
15 to see one more step be taken in that direction.

16 Mr. Rooney's trash is in that bin. If as he  
17 deposits it a neighbor or a policeman takes it out in  
18 his presence, I say that Mr. Rooney would have the right  
19 to say, no, that's my trash; I don't want you to have  
20 it.

21 If Mr. Rooney were to come down in the middle  
22 of the night hoping nobody sees it and put it in there  
23 and the police were to seize it, he may have lost that  
24 right.

25 But it's the governmental intrusion that we're

1 looking for. It has been suggested that when one puts  
2 one's trash out on the sidewalk, it's government we're  
3 turning it over to.

4 And I submit, no, we're turning it over to  
5 perhaps a government sanitation inspector, a government  
6 whatever else, but not a government policeman.

7 QUESTION: (Inaudible) feel the same way about  
8 the trash on the sidewalk, too?

9 MR. LEWIS: Yes.

10 QUESTION: You think if my neighbor comes  
11 around and takes something out of the trash can that I've  
12 laid down on the sidewalk, I can come up to him and say,  
13 hey, give that back to me, that's my trash.

14 MR. LEWIS: I think so, just as much as you  
15 can claim the ring. Certainly you'd have the right to  
16 claim a ring that you threw in there, or any other thing  
17 of value, and if you think that some of that stuff has  
18 value that you don't want it go to somebody --

19 QUESTION: I could prosecute them for theft of  
20 it?

21 MR. LEWIS: I'm not prepared -- if they  
22 refused to give it to you, I think you would have a  
23 cause of action; whether it would be in criminal law,  
24 I'm not prepared to say. Because, you know, there are  
25 certain other elements that come into play.

1 QUESTION: (Inaudible.)

2 MR. LEWIS: Yes.

3 QUESTION: Let's assume he owns it and he  
4 could get it back. But could he -- say he notices a  
5 neighbor, comes around and runs through his trash every  
6 week, and is reading pieces of paper. Could he have him  
7 stopped when the garbage pail is out on the curb in a  
8 public place?

9 MR. LEWIS: Well, I think one would have the  
10 right, in front of one's home or even in the  
11 subterranean garage, to keep one's trash from one's  
12 neighbors.

13 If you have a single family home, and your  
14 neighbor is coming, then I think it's incumbent upon you  
15 to --

16 QUESTION: Well, how far do you go? Suppose  
17 it gets on the garbage truck, and all of a sudden, there  
18 is a policeman pouring through that -- the top layer of  
19 garbage or trash that's just been put on the truck?

20 As soon as the trashman takes it, is his  
21 privacy interest gone?

22 MR. LEWIS: I say, no, Your Honor.

23 QUESTION: He can follow it right to the dump?

24 MR. LEWIS: I follow it to the dump until such  
25 time it has been mixed with a large conglomeration of

1 trash elsewhere and lost its identity.

2 I truly feel --

3 QUESTION: I guess you really have to say that.

4 MR. LEWIS: I beg your pardon?

5 QUESTION: I guess your theory just has to  
6 take you that far.

7 MR. LEWIS: Well, it happens to, and I think  
8 one of the things I did, counsel did, was to begin to  
9 talk to friends and acquaintances about, what do you  
10 think happens to your trash? Do you have any objection  
11 --

12 QUESTION: Well, really, the question is, do  
13 you think -- do you think that any person can have a  
14 reasonable expectation of privacy in the papers that  
15 the trashman picks up out of his trash can and dumps in  
16 his truck?

17 And if you think he is reasonable, you think  
18 the public is really of a mind to respect his right of  
19 privacy to a bunch of trash that's now in a trash truck,  
20 a garbage truck?

21 MR. LEWIS: Well, I think against government  
22 intrusion, yes. I think people do have a right to  
23 expect --

24 QUESTION: Well, it just so happens, that the  
25 trashman is a government employee.

1 MR. LEWIS: But he's not a policeman inclined  
2 to take this for whatever particular purpose. What I  
3 submit is, there are different levels of government.  
4 The government trashman is a government trashman. One  
5 expects the government trashman to take it out to the  
6 trash and dispose of it.

7 One of the things we pointed out in our brief  
8 as well is, that if this is -- we're not hamstringing  
9 the police by trying to prevent them from looking at  
10 trash.

11 If they have no probable cause to believe  
12 somebody's engaged in criminal conduct, it would be  
13 clear that they don't want to go through everybody's  
14 trash.

15 It's not one of those normal, routine,  
16 governmental or police functions. One of the things we  
17 attempted to do in our brief was to point out all of the  
18 objections that the petitioners had and the briefs of  
19 amici in here as to why they don't like what is  
20 occurring, that the police are being hamstrung.

21 I find it significant, even Ceraolo, which  
22 held that within the curtilage, he didn't take care to  
23 see that it couldn't be seen from a flying airplane. I  
24 thought that Mr. Rooney was perhaps prescient in moving  
25 his trash into an underground garage.

1 I suppose the next thing is whether he has to  
2 be careful of a low flying helicopter. But what he has  
3 done is to put it in an opaque paper bag and put it at  
4 the bottom of the bin. He's done --

5 QUESTION: You keep saying all the time, he  
6 put it in the bottom of the bin. How do you know that?  
7 He might have put it -- just thrown it in, and 20 other  
8 tenants came down and put things on top of it.

9 MR. LEWIS: Absolutely right. Since we don't  
10 know, I think we're bound by the fact that it wasn't  
11 visible to people passing by.

12 QUESTION: Would it make any difference if it  
13 were not in a brown paper bag?

14 MR. LEWIS: I don't think the color of course  
15 would do it, or whether it would be paper or plastic. I  
16 think as long as it's opaque --

17 QUESTION: Well, if it were not in a bag, what  
18 if he just threw the betting tickets in the container as  
19 he went by?

20 MR. LEWIS: Yes, if he threw them in the  
21 containers, and someone could -- a policeman come by,  
22 because if a neighbor came by and saw it, not much would  
23 happen unless the neighbor wanted to take it to the  
24 police, and if they did, then of course the police may  
25 use that.

1           If a policeman came by for whatever reason,  
2 perhaps he's in an area where he has a right to be, and  
3 he looks in the trash and he sees it, we have many cases  
4 like that. Clearly, yes, then he has a right to seize  
5 it.

6           But when all we know is that it's in a opaque  
7 bag and it's in the bottom of the trash, I don't see why  
8 we take his Fourth Amendment right away.

9           He has done something to indicate a desire for  
10 privacy.

11           QUESTION: Well, that doesn't -- that doesn't  
12 -- that indicates a desire for secrecy. But he does  
13 that when he creeps out into the park at night and tries  
14 to hide it under a bush in the park.

15           And a policeman can surely come around and  
16 take it from under the bush. The mere fact that he  
17 wants to keep it secret is not equivalent with a Fourth  
18 Amendment right.

19           MR. LEWIS: Well, that's correct. But what  
20 we're doing here is indicating not that we want to keep  
21 it secret -- if I used that term, then I apologize, and  
22 I should have said, he's evidenced an expectation of  
23 privacy in it.

24           He's not publishing it to the world, nor does  
25 he want it --

1 QUESTION: So has the fellow who hides it  
2 under the bush in the park?

3 MR. LEWIS: Because it's an open fields. And  
4 this Court has said, we're not going to extend the  
5 Fourth Amendment to the open fields.

6 QUESTION: He hides it under a bench on a  
7 cement street. I mean, you know, fields doesn't --

8 MR. LEWIS: That isn't a part of the curtilage  
9 where one would normally expect -- I say, no, he doesn't  
10 have it there.

11 QUESTION: But you're mixing up your two  
12 arguments now. The curtilage argument is quite  
13 separate. I mean, we were -- we were just talking about  
14 your general privacy in garbage argument, which is  
15 different from your curtilage argument?

16 MR. LEWIS: I can't extend the privacy  
17 argument to the placing of trash in a public park on or  
18 under a bench. I can't do that.

19 These are somewhat related, and I think that's  
20 why they've got to be considered. I objected to the  
21 petitioners trying to say that this is an abandonment  
22 case.

23 I submit it's a curtilage case as well. If we  
24 go through the rest of the items in Dunn, it's the  
25 nature of the use to which the area is put. And I

1 submit, household trash, storing it and taking it to the  
2 trash man, is that sort of activity.

3 Then of course this Court pointed out, the  
4 steps taken by the resident to protect the area from  
5 observations by people passing by.

6 And I submit that the size of the trash  
7 container, where it was, there's nothing in the record  
8 to indicate that what he put there was visible without  
9 it.

10 But I would close with this final statement  
11 that we find in Dunn. As Professor Amsterdam has  
12 observed, the question is not whether you or I must draw  
13 the blinds before we commit a crime. It is whether you  
14 and I must discipline ourselves to draw the blinds  
15 everytime we enter a room under pain of surveillance if  
16 we do not.

17 And that's the sort of thing I would hate to  
18 see the country come to. I had a number of other items.

19 Yes, the closing that I would like to leave  
20 you with was the objection by one of the amici to this  
21 Court was that if you couldn't decide it on the issue of  
22 abandonment and curtilage, that you ought to decide it  
23 on the basis of Leon, and that is, that there's a good  
24 faith belief on the part of the officer.

25 And that somewhat struck me as being a last

1 gasp sort of thing. Because in California, Krivda's  
2 been the law for some 15 years. And why policemen are  
3 still going through the trash is somewhat of a mystery.

4 I would point out to this Court that almost  
5 every year, ever since Krivda, we still have policeman  
6 taking the trash, getting the trash truck, and going  
7 through it.

8 This argument is fought all the time. There  
9 is obviously not a response to what it is that the  
10 courts are saying.

11 And I'm asking this Court to send another  
12 message, that if there is a reasonable expectation of  
13 privacy in one's items, that it has got to be respected.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15 Lewis.

16 The case is submitted.

17 (Whereupon, at 1:58 p.m., the case in the  
18 above-entitled matter was submitted.)

CERTIFICATION

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

#85-1835 - CALIFORNIA, Petitioner V. PETER ROONEY

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BY Paul A. Richardson

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