

# TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of: )

CALIFORNIA, )

Petitioner, )

v. )

BILLY GREENWOOD AND DYANNE  
VAN HOUTEN )

No. 86-684

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WASHINGTON, D.C. 20543

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CALIFORNIA, :

Petitioner, :

V. :

No. 86-684

BILLY GREENWOOD AND DYANNE VAN HOUTEN :

-----X

Washington, D.C.

Monday, January 11, 1988

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 11:46 a.m.

APPEARANCES:

MICHAEL J. PEAR, ESQ., Deputy District Attorney of  
Orange, California, Santa Ana, California;  
on behalf of the Petitioner.

MICHAEL IAN GAREY, ESQ., Santa Ana, California,  
(Appointed by this Court);  
on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:46 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next in  
4 No. 86-684, California versus Billy Greenwood and Dyanne Van  
5 Houten.

6 Mr. Pear, you may proceed whenever you're ready.

7 ORAL ARGUMENT OF MICHAEL J. PEAR, ESQ.

8 ON BEHALF OF PETITIONER

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

11 This case is here on certiorari to the California  
12 Court of Appeals, Fourth Appellate District. In February 1984,  
13 the Laguna Beach Police Department received some tips over the  
14 telephone that the occupants of a specific residence located in  
15 the City of Laguna Beach were involved in drug trafficking.  
16 Based on that information, on April 6, 1984 and again on May  
17 4th, investigators of the Police Department contacted the  
18 regular municipal trash collector when the morning trash was  
19 collected at that residence.

20 The investigators requested of the trash collector  
21 that he go down the street, pick up the trashbags that were in  
22 front of the residents' garage, were located in the public  
23 street in front of the garage, that that trash collector on  
24 each instance not mingle or mix the bags with other trash in  
25 his truck and that he bring those bags down the block to the  
investigator, which he did.

1           The investigator in each of these two instances  
2 returned to the Police Department with those trashbags and  
3 examined the contents. On each occasion, items were found  
4 including drug residue and based on that, two separate search  
5 warrants were issued for that residence in Laguna Beach. The  
6 California Court of Appeals affirmed the Trial Court's  
7 dismissal of the drug possession for sale charges against the  
8 respondents that were based on drugs found in the house during  
9 the search warrants on the basis that the Fourth Amendment  
10 prohibits warrantless trash searches.

11           The State respectfully asks this Court to reverse, in  
12 accordance with an inconformity with the rulings of ten Federal  
13 Circuit Courts of Appeals, the First, the Second, the Third,  
14 the Fourth, the Fifth, the Sixth, the Seventh, the Eighth, the  
15 Ninth on a case from California, and the Eleventh, all of which  
16 have held that warrantless trash searches of discarded garbage  
17 placed in an area accessible to the public for collection is  
18 not protected by the Fourth Amendment.

19           Additionally, in the case before the Court, there is  
20 a factor that it was not the police who on site examined the  
21 trash but rather the trash collector at their request obtained  
22 the trash. It is our further position, the State's position in  
23 that circumstances that the trash collector is an agent of the  
24 police when he picks it up, but that the situation of trash  
25 voluntarily turned over to a third party, here the regulator  
trash collector, even where he's an agent or acting at the

1 request of the police bestows no reasonable or legitimate  
2 expectation of privacy on the homeowner, it is rather a case of  
3 misplaced trust.

4 QUESTION: Mr. Pear, in response, your opponent  
5 raises now a due process argument based on the California law  
6 here and constitution giving the owner of the trash some  
7 protected liberty interest in the trash, and certainly the law  
8 in the State of California is different than that of a good  
9 many States.

10 Now, do we need to address that due process question?

11 MR. PEAR: I don't believe so, Your Honor. First,  
12 that issue has never been raised below, nor cast upon by the  
13 California Court, either the trial court or the Court of  
14 Appeals, nor was it raised in opposition to the Petition for  
15 Hearing in the California Supreme Court, which was denied.

16 Additionally, California's exclusionary rule, which  
17 was adopted in 1955, is a rule of judicial creation, it's a  
18 judicial remedy rather than a constitutional right, and I would  
19 suggest to the Court that California's decision by  
20 Constitutional Amendment in 1982 to reduce what had become a  
21 very large increased broader protection under search and  
22 seizure to those confines of the Fourth Amendment does not rise  
23 to a Federal Constitutional issue.

24 Additionally, the respondent particularly Greenwood  
25 argues that this Court in deciding what a legitimate  
expectation of privacy is must look to the individual State

1 law, and the State suggests that that argument should be  
2 rejected. While clearly the State may require a higher or  
3 broader standard of protection than the Federal Constitution  
4 requires, the State in doing that would not be applying Fourth  
5 Amendment law, and I would submit that this Court would not be  
6 applying Fourth Amendment law if it took the State's  
7 interpretation of the Fourth Amendment and found itself bound  
8 by that in concluding what the Fourth Amendment is for the  
9 entire nation.

10 QUESTION: But that isn't the argument as I  
11 understood it. It's not the entire nation, but the argument as  
12 I understood it was that a State may define the reasonable  
13 expectations of privacy of its own citizens, and the California  
14 legislature says nobody should search garbage, or something  
15 like that. Would then could not one then make the argument  
16 that a California citizen, unlike the rest of the country, has  
17 an expectation of privacy in his garbage?

18 MR. PEAR: No. I would respond to that, Your Honor,  
19 that the State would be free to do that but they would be  
20 interpreting their constitution in imposing a broader  
21 protection than the more --

22 QUESTION: Say they didn't do it as a matter of  
23 constitutional. Let's say the legislature passed a statute  
24 says as a declaration of California policy, we think people  
25 ought to have a privacy interest in their garbage, and so we  
instruct our police officers not to search garbage. Could the

1 people in California develop a legitimate expectation of  
2 privacy based on such a Statute.

3 MR. PEAR: Under the State law, but I would submit  
4 that it would not be a legitimate expectation under the Fourth  
5 Amendment. In that event, the State would be instructing this  
6 Court what the Fourth Amendment prohibits or does not prohibit.  
7 In a situation which is not uncommon before this Court, where  
8 you have cases involving the same issue from two or three  
9 States at one time, you would end up, I would think, in the  
10 uncomfortable situation if you had a case from a State such as  
11 California.

12 QUESTION: Well, we say some things are obscene in  
13 California and not in other States. We follow local community  
14 standards in some areas. Why isn't privacy sort of like what  
15 offends people different views in different parts of the  
16 country.

17 MR. PEAR: I would think that community standards  
18 have been determined by this Court to be an appropriate method  
19 of dealing with area obscenity, but counsel cites no cases, and  
20 I think it would be inappropriate to say you would have a  
21 community standard of Fourth Amendment rights, or a community  
22 standard of Miranda rights, Fifth Amendment rights.

23 QUESTION: Well, I agree, but the question here is  
24 whether there's a reasonable expectation of privacy, and I'm  
25 just wondering if every American citizen must have the same  
expectation or is it possible that there could be different



1 expectations in different parts of the country. That's, as you  
2 say, it's a new question. I've never thought of it.

3 MR. PEAR: Well, taking this Court's analysis that a  
4 reasonable expectation of privacy involves a two part analysis,  
5 now the subjective expectation of citizens might vary from  
6 community to community, it might vary among the members of a  
7 single household. But as to what constitutes what this Court  
8 has termed a legitimate expectation of privacy determined by  
9 either the concepts of property law or the general principles  
10 that society recognizes, I would submit that has to be a  
11 national standard.

12 QUESTION: Most property concepts we turn to State  
13 law to define, and what could be more legitimate than a State  
14 Statute in terms of objective reasonableness of the standard?

15 MR. PEAR: I don't think the issue is objective  
16 reasonableness in determining under Fourth Amendment what is a  
17 legitimate expectation of privacy. The person may subjectively  
18 entertain that belief, but I don't believe under the Fourth  
19 Amendment that belief is reasonable.

20 QUESTION: What if most States began to adopt a  
21 provision like California's? Would our view of what's  
22 reasonable then change under the Fourth Amendment?

23 MR. PEAR: Your Honor, with regards to adopt what, a  
24 case? Because California's view is based on a 1971 4 to 3  
25 case. It's not a statute that says your garbage is protected  
even though you've thrown it away.

1 QUESTION: Well, the case interprets the California  
2 constitution and laws, presumably.

3 MR. PEAR: Certainly. But if many of the States had  
4 adopted such a view or adopted such a --

5 QUESTION: Would that then affect our view under the  
6 Fourth Amendment of what's reasonable as an expectation?

7 MR. PEAR: As the opinion by this Court in Rickus  
8 indicated, you don't just look to Fourth Amendment cases to  
9 decide what Fourth Amendment is. But I would concede that it  
10 would be suggested to the Court that society generally  
11 recognizes this type of expectation if most States entertained  
12 that view. Conversely, in the case at bar, most states and  
13 every Federal Circuit Court of Appeal that has considered the  
14 issue have concluded quite the opposite, that there is no  
15 reasonable expectation of privacy once you have relinquished  
16 possession, control, made that unequivocal by placing it in an  
17 area accessible to the public.

18 QUESTION: Should we apply the Katz analysis here, do  
19 you think, or should we look at it as a question of  
20 abandonment?

21 MR. PEAR: I believe those are not mutually  
22 exclusive, Your Honor. Certainly, I think the Katz analysis is  
23 the analysis to apply. But in looking at that, the concept of  
24 abandonment isn't irrelevant. The fact that in a property  
25 sense, the items are thrown away is a significant factor in  
deciding whether there is a legitimate expectation of privacy.

1 And I think the State contends that the Federal cases that  
2 we've cited to the Court, as well as the State cases, apply a  
3 Katz analysis, but in looking at the legitimacy of an  
4 expectation, look at what happens to that expectation with  
5 regards to something you've thrown away.

6 QUESTION: Do you think under the Fourth Amendment we  
7 still look at abandonment as a separate sort of test or  
8 approach?

9 MR. PEAR: I think it is part of the test. I don't  
10 think abandonment in a property sense is the start and end of  
11 the analysis under Katz. But I think under Katz, the property  
12 concept is something you take into consideration. And I submit  
13 when you do that, you come to the conclusion that the Courts  
14 that have considered the issue have come to. That is that you  
15 have abandoned a reasonable expectation of privacy in that  
16 which you have abandoned.

17 There's also a suggestion in both respondent's briefs  
18 that there is an element of harassment if the police are free  
19 without a warrant or without probable cause to conduct  
20 warrantless trash examinations. First, I think the record in  
21 the Court below does not sustain that claim. Before I get to  
22 those items of the transcript and record which I think negate  
23 any type of harassment, it's the State's position that where  
24 there's no expectation of privacy, thus an intrusion is not a  
25 Fourth Amendment implication, the fact that such an intrusion  
occurred more than once or twice or three times does not now

1 collectively add up to a Fourth Amendment violation.

2           If there is in some future case an establishment by  
3 an individual that he has been subject to some type of  
4 harassment but not a Fourth Amendment, he has an adequate civil  
5 remedy to prevent that. Further, I would suggest --

6           CHIEF JUSTICE REHNQUIST: We'll resume there at 1:00  
7 o'clock, Mr. Pear.

8           MR. PEAR: Thank you.

9           (Whereupon, at 12:00 p.m., the hearing was recessed  
10 for lunch, to reconvene on the same day, Monday, January 11,  
11 1988, at 1:00 p.m., in the same place.)

12           (Continued on the following page.)

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A F T E R N O O N   S E S S I O N

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Pear, you may proceed.

MR. PEAR: Mr. Chief Justice, and may it please the Court:

Furthermore, in answer to the fear that the respondents express that trash searches without a warrant would result or could result in harassment, I submit to the Court that the nature of trash examination itself provides inherent in it a limitation. The undesirability of the chore itself limits the number of times or circumstances under which police will make such an examination.

QUESTION: Not if they want the evidence badly enough.

QUESTION: It's probably considered bad duty, isn't it?

MR. PEAR: It's certainly not a volunteered-for duty, I'd assure you.

Also, with regard to the suggestion that the record shows that there were months of monitoring of the trash, I think that's based on a misreading of a portion of the Clerk's transcript referred to by respondents at page 112 and page 113. The question which confused the investigator was whether you had occasion to do this over this period of time, and I submit read in conjunction with two other areas of her testimony, it is clear that she understood the word, occasion, as could you

1 have or did you have the opportunity, as opposed to did she in  
2 fact make such examinations.

3 On page 84 of the Clerk's transcript, Investigator  
4 Strassner testified, it was only one or two weeks before April  
5 6th that she learned when trash was collected. Additionally,  
6 at page 122 of the Clerk's transcript, she indicates the total  
7 number of times of surveillance at the residence before the  
8 April 6th date was three to four times, and the Affidavit that  
9 is part of the Joint Appendix starting at page 37 shows that at  
10 least two of those surveillances were late at night, early  
11 morning, when it was surveillance for the purpose of --

12 QUESTION: Would it have made any difference whether  
13 it was one or 26 times?

14 MR. PEAR: I don't think so, Your Honor, as to the  
15 issue of Fourth Amendment.

16 Finally, with regard to the questions that have been  
17 asked this morning regarding looking at State law, I would  
18 invite the Court's attention to Oregon v. Haas at page 720, the  
19 material covered by footnote 4.

20 If there are no further questions, I've concluded.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pear.

22 We'll hear now from you, Mr. Garey.

23 ORAL ARGUMENT BY MICHAEL IAN GAREY, ESQ.

24 ON BEHALF OF RESPONDENTS

25 MR. GAREY: Mr. Chief Justice, and may it please the  
Court:

1           Preceding somewhat backwards from how I'd intended to  
2 proceed, I think I would like first if I may to answer Justice  
3 O'Connor's question about the appropriateness of arguing the  
4 due process claim in this Court. There are several different  
5 aspects of this which I think dictate that the issue should be  
6 addressed on its merits by this Court, not the least of which  
7 are the circumstances that were existing at the time this  
8 matter was argued in the Municipal Court, in the Superior Court  
9 and in the Court of Appeals.

10           In California for a period of over fifteen years,  
11 stare decisis had dictated that searches essentially identical  
12 to the one in this case were unlawful. Much of our discussion,  
13 virtually all of our discussion revolved around concepts of  
14 stare decisis and so there was no need at those Court levels,  
15 and I repeatedly stressed that at those Court levels, there is  
16 no need to get into a detailed analysis of the State law issue.

17           However, that is not the same thing as to say that  
18 the State law issue was waived. Indeed, the State law issue  
19 was raised in the Municipal Court, although tersely.

20           QUESTION: What do you conceive to be the State law  
21 issue, Mr. Garey?

22           MR. GAREY: All right. The State law issue, and I'll  
23 perhaps get into this a little deeper on the merits in a  
24 moment, but the State law issue itself is Article I, Section 13  
25 of the California Constitution provides for protection against  
unreasonable searches and seizures. Article I, Section 1

1 provides for a right of privacy which is described as  
2 inalienable.

3 QUESTION: And then the search and seizure provision  
4 of the California Constitution was interpreted in the State  
5 Supreme Court Krivda opinion, was it not?

6 MR. GAREY: That is correct. That is correct. And  
7 that's exactly what I mean by the State law issue.

8 QUESTION: But we have determined, have we not, that  
9 the decision rested at least partially on Federal grounds?

10 MR. GAREY: Oh, yes. Yes. The argument centered,  
11 and I think this is abundantly clear from the transcript, the  
12 argument in the Municipal Court centered around the fact that  
13 Krivda in its second opinion on remand had decided that the  
14 original decision was based on both State and Federal grounds.  
15 And I repeatedly emphasized that at the Municipal Court level.

16 QUESTION: And therefore be reviewable here under  
17 Michigan v. Long, would it not?

18 MR. GAREY: It would be reviewable here under  
19 Michigan v. Long to the extent that the Federal question is  
20 posed. That would be correct.

21 QUESTION: Well, if it's been decided that both  
22 Federal and State grounds support Krivda, certainly the Federal  
23 question is posed, is it not?

24 MR. GAREY: The Federal question is posed but it is  
25 not posed entirely by itself. And I think if I may go back  
just a little bit and explain what I mean by that because we



1 get into a number of problems with that. First of all, Krivda  
2 originally was decided before Michigan v. Long. I don't think  
3 that anybody has seriously contended it, and if they do, I'm  
4 prepared to address it but I don't think anybody has seriously  
5 contended that Krivda was not also decided upon independent  
6 State grounds. Indeed, this Court seems to have recognized  
7 that fact, at least the dissent of this Court seems to have  
8 recognized that fact in California v. Rooney quite recently.

9 I don't think that we need to get into an extended  
10 analysis of would the original Krivda opinion have survived a  
11 Michigan v. Long analysis. And I note that in a footnote,  
12 petitioner has sort of alluded to that problem, although not  
13 really briefed it in any detail. So the answer to the Court's  
14 question I believe is as simple as, yes, there is a Federal  
15 question posed in the sense that part of Krivda rested on  
16 Federal grounds.

17 There is an independent State ground clearly  
18 presented because Krivda in addition relied on its own  
19 independent State grounds.

20 QUESTION: Did you raise this point in your  
21 Memorandum In Opposition to the Petition for Certiorari?

22 MR. GAREY: I'm not sure, Your Honor.

23 QUESTION: If you didn't, there's language in our  
24 Tuttle opinion which would suggest that you have waived it.

25 MR. GAREY: Well, if I may proceed just a little bit,  
because --

1 QUESTION: Certainly.

2 MR. GAREY: Thank you very much.

3 The State law issue and the due process argument  
4 which I make in this Court was specifically, although again  
5 very tersely raised at the Superior Court level in the argument  
6 on the Section 995 Motion. That would be Reporter's transcript  
7 at page 16 where I pointed out that we are specifically not  
8 waiving Article I, Section 13, and that we are relying in part  
9 on the rationale that Article I, Section 28(d) which did away  
10 with the State's exclusionary rule, was violative of the  
11 principle in Mapp. That is the germ of the argument that I  
12 make at this point.

13 It was made tersely and I will concede that it was  
14 made very tersely because the state of the law in California at  
15 the time this matter was going through the municipal Court, the  
16 Superior Court and the Court of Appeals, was stare decisis.  
17 Either analysis you took, stare decisis came up at the same  
18 point. As far as raising this in opposition to the petition  
19 for certiorari, a Federal question at this point seems to me to  
20 be raised on two different fronts.

21 There is the Federal question that is posed to this  
22 Court relating to whether or not the trashcan search as  
23 indicated in this case or as based on the facts in this case  
24 violates the Fourth Amendment in the straight Fourth Amendment  
25 issue itself in the purest sense, and that is squarely  
presented to this Court. But there is another Federal question

1 I think that is raised as well.

2 The problem in California is not that the search  
3 under California law was lawful, because under California law  
4 the search was unlawful. The problem is by reason of the  
5 adoption of Article I, Section 28(d), California Courts are  
6 without power to cure or correct or remedy or deter, more  
7 appropriately, even an intentional and a willful violation of  
8 State Constitutional rights.

9 QUESTION: If we were to reverse this judgment here  
10 under the 1982 Amendment, the California Constitution provision  
11 on unreasonable seizure would be interpreted the same as we  
12 interpreted ours, would it not?

13 MR. GAREY: I'm sorry. Could the Court repeat the  
14 question.

15 QUESTION: Yes. Supposing we were to reverse here on  
16 Fourth Amendment grounds saying that search of trash does not  
17 require a warrant. Under your 1982 Amendment, wouldn't that  
18 also mean that the California cognizant provision was  
19 interpreted the same way?

20 MR. GAREY: No, actually it would not. And I would  
21 respectfully submit the real analysis that applied in that  
22 situation is that under California law, this search in this  
23 present case would be as illegal today as it was in say 1973 or  
24 1980, but the problem is that exactly, just exactly.

25 QUESTION: The evidence would come in anyway.

MR. GAREY: The evidence would come in.

1 QUESTION: And the conviction would stand.

2 MR. GAREY: That is also correct.

3 QUESTION: What about private suit, could there be a  
4 private suit against the person who conducted the search in  
5 violation of California law?

6 MR. GAREY: You mean like a civil damage suit?

7 QUESTION: Yes, a civil damage suit.

8 MR. GAREY: The problem with that is exactly I think  
9 it is addressed in Mapp originally. Although Mapp doesn't --

10 QUESTION: Oh, I understand you may not win it but  
11 the suit's available so we wouldn't have been making a dead  
12 letter of the California law.

13 MR. GAREY: But as a matter of what rule this Court  
14 ought adopt under these very historically unique circumstances  
15 and I will address --

16 QUESTION: But that's California's problem. I mean,  
17 at this point we're not talking about a Federal law anymore,  
18 we're talking about a California law. And if that is not -- we  
19 will not have voided it completely and if California thinks it  
20 needs more teeth, California can give it more teeth.

21 MR. GAREY: The problem is this. In adopting Mapp,  
22 this Court, even in view of the progeny of Mapp which has laid  
23 more and more stress on the deterrence rationale, even in view  
24 of that and perhaps even more because of that, the result so  
25 long as Mapp is viewed as good law and is constitutionally  
compelled through the due process clause, I think the question

1 that need be posed is that of whether or not California or any  
2 State for that matter may define a right as fundamental or as  
3 inalienable and refuse any effective remedy or any effective  
4 enforcement for it.

5 To say that there are civil suits possible is the  
6 same argument that was made in the interim period between Wolfe  
7 v. Colorado and Mapp v. Ohio. To the extent that Mapp is  
8 constitutionally compelled under the due process clause, the  
9 same analogy applies here. And it is one thing to say that it  
10 is a matter of California law, and indeed, it is a matter of  
11 California law determining the scope of the right of privacy as  
12 in California. But the question that it does not answer and  
13 does not even address the question of can California define  
14 that right as encompassing say a search like the one in the  
15 present case and yet have no effective means, have the Court  
16 completely stripped of its ability to use a deterrent effect,  
17 the analogy for Mapp in order to enforce its own constitutional  
18 provisions.

19 And the answer is that if the State is in fact  
20 legitimately even in view of the Federal due process clause  
21 stripped of that ability, then what's left? And by the  
22 analysis in Mapp, what is left is that just as in this case,  
23 the State, the police are entitled to intentionally and  
24 deliberately and willfully violate the State Constitution and  
25 the State Supreme Court is absolutely powerless to do anything  
about it.

1           If it were not that this raises the due process  
2 clause issue, then indeed the underpinnings of Mapp itself  
3 become questionable. This Court has historically not exercised  
4 a general supervisory power over State searches and seizures  
5 and so forth. The rationale behind Mapp is that it was  
6 compelled by the due process clause. That same due process  
7 clause I submit compels the conclusion that this Court use the  
8 due process clause to rule that California may not define a  
9 right as fundamental and inalienable and yet withhold the only  
10 thing that this Court has held for many many years at this  
11 point is an effect remedy or an effective deterrent. This case  
12 is in many many ways --

13           QUESTION: I'm not sure I follow this argument. Mapp  
14 involved the violation of a Federal Constitutional right.

15           MR. GAREY: Correct.

16           QUESTION: Correct. And we said that the State  
17 courts would have to enforce that violation of a Federal  
18 Constitutional right by the exclusionary rule?

19           MR. GAREY: Absolutely.

20           QUESTION: Now, you're saying that it follows from  
21 that that the State Courts also as a Federal Constitutional  
22 matter, must enforce the violation of any State Constitutional  
23 right by the exclusionary rule, and the Federal Courts have to  
24 do the same.

25           MR. GAREY: Essentially, yes, but with one qualifier.

          QUESTION: I don't see how the one follows from the

1 other.

2 MR. GAREY: Well, if I may. First, with one  
3 qualifier, the qualifier would be limiting it to essentially  
4 fundamental rights which the State has already or will find to  
5 be fundamental substantial Constitutional rights bearing on the  
6 right of privacy.

7 To the extent that Justice Scalia is questioning why  
8 is it that this follows from Mapp, it is not that the holding  
9 in Mapp which is indeed as the Justice just described it  
10 directed towards violation of Fourth Amendment Federal law and  
11 the Federal right of privacy, it is not that the holding  
12 directly applies. What I'm suggesting is the force, the  
13 dynamics behind Mapp and why it applies through the due process  
14 clause as opposed to through some non-existent supervisory  
15 power that this Court would have over the States in general  
16 applies to this situation equally. Because if you're saying  
17 that Mapp has to apply through the due process clause to  
18 enforce Fourth Amendment rights because that's the only way  
19 that you can insure that the State Police in essence will  
20 respect the Fourth Amendment right, what I'm saying is that  
21 that same due process command to use an exclusionary rule  
22 applies to make the State enforce its own law.

23 QUESTION: It is our business to enforce the Federal  
24 law. It's not our business to enforce the State law.

25 MR. GAREY: In general, perhaps not. However, as  
recognized by this Court in Hewitt v. Helms and also Vitek v.

1 Jones, there the due process clause recognizes rights that are  
2 created by Federal law and also those that are created under  
3 State law. And the question is whether or not the State law,  
4 the State Constitutional provisions create what is utilized and  
5 I'll use the phraseology that comes out of Vitek v. Jones,  
6 whether or not the State Constitutional provision has created a  
7 liberty interest in the citizen which the due process clause  
8 will prevent the State from arbitrarily taking away.

9 And that is why it applies through the due process  
10 clause in such a fashion very similarly to the way, not  
11 identically to the way but very very similarly to the way that  
12 Mapp v. Ohio compelled State obedience to the Fourth Amendment.

13 I think the way to underline why that is so necessary  
14 is that historical context of this very case. It has probably  
15 never happened, or at least to my knowledge, it has never  
16 happened in the history of this country since Mapp, that a  
17 State has developed a body of law which we will put under the  
18 general rubric of independent state grounds, that respects  
19 certain rights of privacy in its citizens, and thereafter have  
20 the State stripped of its ability to enforce that same right.,

21 If we need to see an example of why it is necessary  
22 that the due process clause be so applied, this case is exactly  
23 that case. Because for 15 or 16 years in California, Krivda  
24 held sway. It was stare decisis. So much was it stare decisis  
25 that at the appellate court level, the State conceded that it  
was stare decisis and that the Court of Appeals had no power to



1 rule otherwise, at least on the Fourth Amendment aspect of the  
2 stare decisis issue.

3 As soon as we have the advent of Article I, Section  
4 28(d) there is what can only be described as a willful and  
5 deliberate violation of State Constitutional privilege as  
6 defined in the Krivda cases. Can it be said that the due  
7 process clause will not protect those rights of privacy where  
8 the due process clause will in fact protect the question of  
9 whether or not for instance a mental health patient is going to  
10 be involuntarily transferred to another institution, which  
11 would be like Vitek v. Jones, for instance.

12 QUESTION: Well, counsel, in open field searches, for  
13 example, where State law might make a trespass to come on to  
14 the open field or the premises, that hasn't determined the  
15 Federal law on whether evidence should be suppressed in a  
16 prosecution, has it? We haven't enforced the State trespass  
17 laws?

18 MR. GAREY: Well, that is correct. On the other  
19 hand, it has never come to pass as far as I know. And the  
20 argument I make now indeed is a novel one, and I could not find  
21 a case where anybody had raised precisely the issue that is  
22 raised here. And I think that's not because it is not a valid  
23 argument. It's because historically it has never occurred, the  
24 circumstance that we have here.

25 And yes it is indeed true that this Court has made  
certain rulings on the question of open fields which are

1 inconsistent with the rulings in California, both prior and  
2 subsequent to this Court's holding, I might add.

3           The rule that I would suggest now would in fact  
4 operate I think and there is a concern on this subject, but it  
5 would in fact operate in such a way that if California as a  
6 matter of interpreting Article I, Section 13 and Article I,  
7 Section 1 says that an open field search is more restricted  
8 than this Court in its holdings has indicated then should this  
9 Court, should this Court impose on California the necessity of  
10 utilizing the exclusionary rule.

11           I think the answer to that really comes from turning  
12 the question only slightly, and I mean very slightly. And the  
13 question is should this Court allow any State to define a right  
14 privacy as being inalienable or fundamental and be able to  
15 effectively take it away by not enforcing it, and by allowing  
16 its state officers to deliberately violate the State  
17 Constitution.

18           QUESTION: Why isn't that up to the State of  
19 California?

20           MR. GAREY: Because the State of California at this  
21 point is powerless, and it is powerless by reason of Article I,  
22 Section 28(d). They've lost their exclusionary rule. Because  
23 they've lost their exclusionary rule, they have lost the right  
24 or the ability --

25           QUESTION: They lost it because the people of  
California took it away from them. It's not an accident.

1 MR. GAREY: I never suggested that it was an  
2 accident. The question is does it involve due process  
3 considerations.

4 QUESTION: Your argument is that the 1982 amendment  
5 is unconstitutional?

6 MR. GAREY: As applied to this case, yes. Not in  
7 general.

8 QUESTION: Or all cases like it?

9 MR. GAREY: All cases sufficiently like it where  
10 somebody couldn't come up with a good distinction, yes. There  
11 are a lot of different parts to Article I, Section 28(d). One  
12 of the arguments that was initially made to Article I, Section  
13 28(d) is that it violated the single subject rule. How aware  
14 the voters were of this specific provision and how it would  
15 work is a matter of some speculation. Certainly some of the  
16 literature surrounding Proposition 8 before it was passed would  
17 have put people on notice.

18 On the other hand, it was designated the Victims'  
19 Bill of Rights and it was not exactly designated, redefinition  
20 of Constitutional --

21 QUESTION: How aware do you think the voters of the  
22 United States were of the contents of the Fourteenth Amendment  
23 when they ratified it?

24 MR. GAREY: Probably relatively little.

25 QUESTION: So what does your argument bear on?

MR. GAREY: It is only an answer to the question of

1 the people of the State altered the rule.

2 QUESTION: Well, they did.

3 MR. GAREY: They did, and the net effect --

4 QUESTION: You answer the question when you say, yes.

5 MR. GAREY: Very well, then the answer is, yes, but  
6 the question then still remains is can any State, whether  
7 through its electorate, through its legislature or through its  
8 executive branch take away a right that the State has granted.

9 QUESTION: And then take it away?

10 MR. GAREY: Exactly, exactly. And I think I can  
11 focus this point fairly simply by pointing out this: had the  
12 people of the State of California done away with completely as  
13 in repealed Article I, Section 13 and Article I, Section 1,  
14 that would probably take the argument that I am dealing with  
15 now take it away completely and make it completely  
16 inapplicable. The problem is that they did not, and the  
17 problem is that what they did is, they left the right intact,  
18 the substantive right intact but took away any effective  
19 remedy. And that I think creates a due process issue where it  
20 might not otherwise be.

21 And it is analogous to the situation where the State  
22 has no obligation whatsoever to have say parole but it does  
23 have an obligation to satisfy Federal due process in how it  
24 deals with parole. And so I think that the analogy is very  
25 tight and it is very tight especially if one views the  
rationale behind Mapp v. Ohio.

1           QUESTION: But Mr. Garey, you're arguing mainly from  
2 procedural due process cases, Vitek v. Jones. I don't suppose  
3 you're arguing that the homeowner is entitled to a hearing  
4 before the garbage is searched are you?

5           MR. GAREY: No.

6           QUESTION: No.

7           MR. GAREY: I'm not. However, --

8           QUESTION: Why not. Wouldn't that satisfy me you're  
9 just talking about the due process clause here, and why  
10 wouldn't that be enough?

11          MR. GAREY: Well, I think as a practical matter, a  
12 hearing before the garbage is searched, is that the question?  
13 All right, I think that would defeat the purpose of any search  
14 whatsoever, and I might indicate too, that it is not our  
15 suggestion and it is not my argument, either as a matter of  
16 Fourth Amendment law or as a matter of State law, that a trash  
17 search is illegal in every case. It is illegal when there is  
18 no probable cause and there is no warrant or there is no  
19 exigent circumstance excusing the use of a warrant.

20          In this case the people eschewed at the trial court  
21 level any theory that they were going on probable cause or  
22 exigent circumstances, and so the question is squarely  
23 presented.

24          QUESTION: May I ask you, are there some California  
25 cases that say that the trash search is all right provided,  
sort of like an automobile search, you have to have probable

1 cause for it even though you don't have a warrant.

2 MR. GAREY: There is suggestion, and it's dicta, but  
3 there is suggestion in that, and indeed, that's a matter that  
4 the State Court can address itself to. And I suppose that in  
5 view of the political shift in California, there's always the  
6 question as to whether or not California will redefine the  
7 fundamental nature of privacy as it bears on cases like this  
8 one.

9 That is a State court function. The due process  
10 clause I think becomes involved only to the extent that they  
11 continue to recognize the right but withhold the remedy.

12 And I would, if I may, on the question of whether  
13 there's a distinction between substantive due process or  
14 procedural due process here, it is -- and I realize that in  
15 cases like Vitek v. Jones, what's really being discussed is the  
16 procedures by which the right is taken away. But the shift in  
17 emphasis in this Court since Mapp in terms of what is the  
18 rationale for Mapp v. Ohio, and why is it necessary, it has put  
19 it in the rubric of a procedural necessity. It is not an  
20 integral part necessarily of the Fourth Amendment but it is a  
21 procedural necessity, without it, there's no way of enforcing  
22 the Fourth Amendment. And so we're talking about procedure in  
23 both senses.

24 We're talking about the procedure by which the State  
25 takes away a right in the sense that it was used in Vitek v.  
Jones. We were also talking about the procedure by which the

1 State either enforces or by not enforcing takes away the right  
2 of privacy in this case, too.

3 And if there could be any question, can there be any  
4 question of the necessity for the deterrent effect of an  
5 exclusionary rule, I think the fact that we're here some many  
6 many years after the opinion in Krivda answers that fairly  
7 squarely.

8 In terms of, and I'll return just briefly to the  
9 question that Justice O'Connor did pose, which is the  
10 raisability of this issue, as I'd indicated, essentially this  
11 argument was raised in the Superior Court without objection by  
12 the State whatsoever. The State did not request in their brief  
13 that this Court not address the merits of this, although  
14 there's a passing reference to the timing of the raising of  
15 this issue. The passing reference is not entirely accurate  
16 factually as the record would indicate, if one looks at  
17 Reporter's transcript, page 16.

18 The issue is also purely one of law, and it is purely  
19 one of Federal law. And this Court clearly has the discretion  
20 under its own holding in Singleton v. Wolfe to entertain the  
21 merits of the issue. And I would urge the Court to do so,  
22 particularly since it presents a substantial issue of  
23 Constitutional principle.

24 Now, if I may address briefly the question of the  
25 trash search itself, and I address it here not just a question  
of State law as we've been discussing for the last several

1 minutes, but rather as either. Should it be included within  
2 the concept of a reasonable expectation of privacy. In part,  
3 the question I think can be posed why, as in why should this  
4 Court extend or apply -- which I think is perhaps a better term  
5 -- a reasonable expectation of privacy to opaque plastic  
6 trashbags placed out at the curbside for collection.

7           The issue breaks down in my mind at least to almost a  
8 why and a why not, and it is almost the latter aspect of it  
9 which seems to be the most important, or at least it's the most  
10 revealing. On the primary question of why, it is fairly clear,  
11 and I think even the dissent in Rooney recognized that many  
12 people put all sorts of things that reveal their lifestyle that  
13 are secrets that are private in their trash. If you lay it out  
14 on the sidewalk not in an opaque bag so that anybody passing by  
15 can see it, I suppose there's no reasonable expectation of  
16 privacy.

17           If it's put in an opaque container, especially under  
18 the circumstances involved in this case where it is to be  
19 picked up by the trash man, it is to be put in the trash truck  
20 and within seconds, and the record here I think demonstrates  
21 that, within seconds of it being picked up by the trashman,  
22 ordinarily the mixing part of the garbage truck would mix it in  
23 with all the other trash, and it would become essentially lost  
24 forever.

25           QUESTION: You don't have any dogs in California? I  
don't know, you people just don't suffer from many of the



1 problems that we suffer back in the east, apparently. We used  
2 to have dogs that used to get into those things.

3 MR. GAREY: We have dogs, and I suppose we have  
4 snoops and I suppose we have all sorts of private agencies that  
5 might interfere with somebody's otherwise reasonable  
6 expectation of privacy. I suppose --

7 QUESTION: So you're pretty risky to leave something  
8 out on your curb in an opaque bag whether there are dogs  
9 around, anyway.

10 MR. GAREY: It is an interesting fact that in this  
11 case, and really in any of the cases that I've read about  
12 including I think it's U.S. v. Terry where the DEA monitored  
13 somebody's trash off and on for a period of six months that at  
14 no time did the police in this case or the DEA in that case  
15 have to fight this horde of people that were standing around  
16 the man's trash in order to get at it.

17 To talk about the mere possibility that a dog may get  
18 at somebody's trash or that the next door neighbor might come  
19 over and get at somebody's trash it seems to me avoids what is  
20 the real question here. What is the ordinary reasonable  
21 expectation of any normal ordinary citizen. The fact that  
22 there might occur a private intrusion -- what I mean is a non-  
23 State action intrusion into the trash, whether it's by a dog or  
24 by a next door neighbor who wants to compile a dossier on their  
25 neighbor doesn't really answer the question.

This Court, for instance, in Jacobsen and Walters

1 drew a distinction between the private search and the State  
2 action type search that involves governmental intrusion. It  
3 seems to me that there would have been no occasion for this  
4 Court to have looked into the question of the scope of the  
5 governmental search in relation to the private search if it  
6 were not for the fact that the private search is not a Fourth  
7 Amendment issue, not because it's proper, not because it  
8 doesn't invade the reasonable expectation of privacy as to the  
9 householder, but because it involves no State action.

10 And that's exactly why if you have the fact of a  
11 private search that invades somebody's privacy to the extent  
12 that the person's privacy has been breached by the perhaps  
13 unreasonable but not governmental private search, the Court  
14 will recognize that breach, but only to that extent and only  
15 within that scope.

16 And I believe that it was Justice Scalia in your  
17 opinion in O'Connor v. Ortega where the Court defined the  
18 question of privacy not as a matter of absolute solitude but  
19 privacy. And so if you put your trash in opaque plastic bags  
20 out for collection reasonably knowing that what's going to  
21 happen is that it's going to be there for a half an hour, maybe  
22 an hour, the trash guy's going to come by, he's going to pick  
23 it up, put it in the trash truck, and the trash truck itself  
24 will chew up all the trash and stuff it in the back with  
25 everybody else's trash, the fact that there is some remote  
possibility that you don't have 100 percent certainty that your

1 trash will not be looked into by someone, would not seem to  
2 have a really significant impact on that reasonable  
3 expectation.

4 QUESTION: Well, what happens if an ordinary citizen  
5 comes by and picks up your trash? Can you stop him?

6 MR. GAREY: Can you stop him?

7 QUESTION: Yes.

8 MR. GAREY: It seems to me that it's probably an  
9 invasion of your privacy.

10 QUESTION: My question didn't say privacy on any part  
11 of it. It says could you stop him.

12 MR. GAREY: I think that would depend on the law in  
13 the State in particular as to --

14 QUESTION: Could you stop him in California?

15 MR. GAREY: I should think so.

16 QUESTION: On what basis?

17 MR. GAREY: On the basis that he's violating your  
18 right of privacy. Now, the question also, if I may, would seem  
19 to be could you stop him and how could you stop him.

20 CHIEF JUSTICE REHNQUIST: I think you've answered the  
21 question, Mr. Garey. Your time has expired.

22 We'll hear now from you, Mr. Pear, if you have any.  
23 You have 13 minutes remaining.

24 MR. PEAR: If the Court has any questions, I'll be  
25 glad to respond. Otherwise, the State's prepared to submit.

QUESTION: May I just ask one?

1           What is the answer to Justice Marshall's question?

2           MR. PEAR: On whether the person could be stopped?

3           QUESTION: As a matter of -- what's your view as a  
4 matter of California law?

5           MR. PEAR: Would have no lawful authority to stop the  
6 person.

7           QUESTION: He would not have any authority so that in  
8 California law, the neighbor can go in and look through the  
9 garbage?

10           MR. PEAR: That's correct. In the People v. Grey  
11 case that I cited I believe in opening brief involves where the  
12 trash collector himself looks.

13           CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pear.

14           The case is submitted.

15           (Whereupon, at 1:33 p.m., the case in the above-  
16 entitled matter was submitted.)

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REPORTER'S CERTIFICATE

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DOCKET NUMBER: 86-654  
CASE TITLE: CALIFORNIA V GREENWOOD ET AL.  
HEARING DATE: 1-11-88  
LOCATION: WASHINGTON, DC.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the *SUPREME COURT OF THE UNITED STATES* and that this is a true and accurate transcript of the case.

Date: 1-11-88

*Margaret Daly*  
\_\_\_\_\_  
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