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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TERRY BRICE HORTON, Petitioner

V. CALIFORNIA

CASE NO: 88-7164

PLACE: Washington, D.C.

DATE: February 21, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY BRICE HORTON, :

Petitioner :

V. : No. 88-7164

CALIFORNIA :

-----x

Washington, D.C.

Wednesday, February 21, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

JULIANA DROUS, ESQ., San Francisco, California; appointed by this Court on behalf of the Petitioner.

MARTIN S. KAYE, ESQ., Supervising Deputy Attorney General of California, San Francisco, California; on behalf of the Respondent.

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1 fact, found the items that they were looking for, except
2 for the items in fact listed on the warrant.

3 In order to find that inadvertence is not
4 required in this situation, this Court would have to
5 overrule Marron v. U.S. The facts there are
6 indistinguishable from the facts here. In that case, the
7 police officers entered a business establishment with a
8 warrant. When they -- this was in prohibition times. One
9 of the items listed on the warrant was liquor. When they
10 went in the closet in which they believed the liquor might
11 be, they found ledgers and bills.

12 That court, seeing the issue which -- as simple
13 as it actually is -- said that the ledger and bills were
14 in fact not seized -- not listed in the warrant and,
15 therefore, not subject to seizure.

16 What the Attorney General of California asks
17 this Court to do is to create a new exception to the
18 warrant requirement. The carelessness exception, the --
19 Oh, my goodness, I forgot to get the warrant --
20 particularly describing the items to be seized.

21 What that would do, it would nullify the
22 particularity requirement of the warrant clause of the
23 Fourth Amendment. The Fourth Amendment is too important
24 to allow that to happen.

25 QUESTION: Now, what if the officers in

1 obtaining and seeking a search warrant lack probable cause
2 to list some items on the search warrant and the affidavit
3 and, therefore, they don't. Now they go into the premises
4 because they do list those for which they have probable
5 cause.

6 They go in and they see the items. They were
7 aware of those items but knew they didn't have probable
8 cause. Are those found now in plain view?

9 MS. DROUS: No, Your Honor.

10 QUESTION: No?

11 MS. DROUS: Not if the police officers intended
12 to search.

13 The purpose of the warrant requirement -- there
14 would be no -- police officers are required when they ask
15 for a search warrant to particularly describe the items
16 for which they intend to search. At that point, it's up
17 to the magistrate to make the decision. If the police
18 officers have no probable cause to search, they have no
19 business searching for those items.

20 QUESTION: Well, I have put to you the
21 possibility that there may be several items, some of which
22 they have probable cause to get a warrant to search, and
23 some they don't. They know they don't have probable cause
24 for everything so they don't list everything. But when
25 they go to the house, they find it.

1 MS. DROUS: Your Honor, if they find those items
2 because they searched for those items, the seizure would
3 be invalid.

4 QUESTION: Now, they find it because it's in
5 plain view when they enter pursuant to a valid search
6 warrant for other items.

7 MS. DROUS: If they find the items in plain view
8 and the seizure is inadvertent, yes, they may seize those
9 items.

10 QUESTION: But they knew they were there, likely
11 to be there, but they lacked probable cause to include
12 them in the warrant requirement.

13 MS. DROUS: The fact that you -- that you look
14 at, I believe, is -- for inadvertence, is whether or not
15 the police officers were in fact searching for them.

16 If they were searching for the items listed on
17 the warrant and came upon the items -- the other items
18 that they knew might be there, that's not a violation.

19 QUESTION: How do you -- how do you instruct
20 these police officers when you send them out? Let's --
21 let's -- you know, they -- they know the thing's "a", are
22 there, and -- and they have probable cause so that's in
23 the warrant. Thing "b" they suspect may be there.

24 So, when I send them out with their warrant,
25 what do I tell them? Don't -- don't look for "b" whatever

1 you do. How can you -- can you erase from your mind the
2 notion that "b" may be there? I mean, this is a weird
3 rule you're proposing for -- for -- the police have to act
4 in some realistic fashion. How can they possibly act that
5 way?

6 MS. DROUS: There's a difference in saying, we
7 believe that "b" might be there, but don't look for it.
8 There's a difference in that and saying, well, the warrant
9 doesn't authorize the search, but look for it anyway.

10 Of course -- and I understand what you're
11 saying --

12 QUESTION: I mean, you --

13 MS. DROUS: -- and you're quite right --

14 QUESTION: -- you can tell them, don't look in
15 any place where "a" wouldn't be just because you think
16 that "b" might be there. You can tell them that.

17 MS. DROUS: That's right.

18 QUESTION: But how can you tell them, while
19 you're looking for "a", for pete's sake, don't think "b"?
20 That's totally unrealistic. And yet -- and yet you say
21 that if they're thinking "b" while they're looking for
22 "a", it's bad.

23 MS. DROUS: If their intention in going into
24 that residence is to find "b", that's a violation. If --

25 QUESTION: I don't know. Their intention is to

1 execute the warrant which let's them look for "a".

2 MS. DROUS: That's correct.

3 QUESTION: They also know that "b" might be
4 there.

5 MS. DROUS: If they happen upon "b", it's a
6 valid seizure.

7 QUESTION: Well, --

8 MS. DROUS: In this -- in this case --

9 QUESTION: Happen upon it. I --

10 MS. DROUS: -- we have -- we have the testimony
11 of the police officer that in -- in fact, when they
12 entered the residence they intended to search for items
13 not listed on the warrant.

14 What would be the reason for getting a warrant
15 if the police officer -- what would be the reason for
16 police officers to particularly describe all the items to
17 be seized if they could search for items not listed on the
18 warrant?

19 QUESTION: The basic reason, I think, is to --
20 is to describe the scope of the search. If -- you know,
21 if -- if -- if you're looking for an elephant, you can't
22 look in drawers. So where's there an elephant on the
23 search warrant, searching through drawers is beyond the
24 proper scope of the search. Isn't that a good enough
25 reason?

1 MS. DROUS: There's also the possessory interest
2 which the Fourth Amendment protects, as this Court has
3 recognized in a number of cases. You -- Your Honor, you
4 yourself in Hicks v. Arizona stated that the seizure and
5 search -- that one interest of the Fourth Amendment is not
6 more important than the other.

7 In Place -- U.S. v. Place, this Court stated
8 that warrantless seizures are per se unreasonable. As a
9 matter of fact, in Coolidge itself Justice Stewart stated
10 that even if the finding of contraband, stolen goods, or
11 things dangerous in themselves are found without
12 inadvertence, they may be seized.

13 And that is implicitly a recognition that in
14 those three items there is no possessory interest. You
15 have no possessory interest in --

16 QUESTION: But nevertheless -- nevertheless,
17 officers cannot search even for contraband if -- which is
18 not listed on the -- on the -- on the warrant. They have
19 to be -- in order to seize them as a -- as a -- as a plain
20 view seizure, they have to be in a place where they're
21 legally entitled to be.

22 MS. DROUS: That's correct.

23 QUESTION: They cannot -- they cannot just
24 search generally for things -- for -- outside the area
25 where the items they're supposed to find and are listed

1 might be.

2 MS. DROUS: That's correct, Your Honor. In
3 order to enter the home, even if it's to search for
4 contraband or stolen items, the warrant must be obtained
5 to get into the home because that's the privacy interest.

6 There's a whole separate possessory interest
7 which is also protected.

8 QUESTION: Well, is there any indication in this
9 case that when the officers made this -- seized these
10 articles that are at issue that they were not in a place
11 where they were not entitled to be? Were they -- were
12 they in a place where they were entitled to be when they
13 made this seizure?

14 MS. DROUS: Your Honor, to answer that, the
15 Attorney General in his brief argues against listing.

16 QUESTION: Well, this --

17 MS. DROUS: I am -- I am answering your
18 question.

19 QUESTION: Well, how -- you're going to answer
20 it, are you?

21 MS. DROUS: Yes, I promise I will.

22 QUESTION: Like yes or no or --

23 MS. DROUS: It's not a yes or no. What it is
24 is -- whenever police officers, as the Attorney General
25 concedes in his brief, the more items that the police

1 officers intend to search for, the broader the search.
2 It's going to have to be. The more police officers you
3 bring in, the more invasion on the privacy.

4 We really don't know in this case if in fact the
5 search was broadened because the police officers were
6 looking for all of these other items that were not listed
7 in the warrant. You cannot say that on the facts that we
8 have.

9 QUESTION: Well, you can't say that they were --
10 that they exceeded the scope of the search either.

11 MS. DROUS: That's correct.

12 QUESTION: Well --

13 MS. DROUS: You can come to neither conclusion.

14 QUESTION: Well, but the -- the trial court
15 denied the motion to suppress and the court of appeals --
16 the court of appeals affirmed. Don't we have to assume
17 that they must have had some facts in mind when they made
18 those rulings?

19 MS. DROUS: Well, Your Honor, the initial motion
20 made after the preliminary hearing was granted by the
21 magistrate prior to binding Mr. Horton over for trial --
22 the district attorney then filed the motion in the
23 superior court to reinstate the evidence which was
24 granted. The court of appeals in California summarily
25 dismissed the argument saying that North v. California

1 does not follow the inadvertence requirement.

2 QUESTION: Well, but that's all within a
3 framework of people -- of the officer being lawfully in
4 the place -- having a lawful right to be in the place
5 where he was and seeing -- seeing something that was
6 subject to seizure.

7 QUESTION: Well, Your Honor, in this case the
8 facts don't support the conclusion that the officers were
9 simply in a place where they had a right to be and saw.
10 They were --

11 QUESTION: But --

12 MS. DROUS: -- looking for these things.

13 QUESTION: Well, but certainly the California
14 Court of Appeals, the California Trial Court, the Supreme
15 Court of California in deciding the North cases know this
16 debate about -- you know, is inadvertence a requirement.
17 Their findings, it seems to me, have to be looked at in
18 the framework of -- of that kind of debate in our Court.

19 They're not saying that the police can just go
20 and seize anywhere. They're talking about a place where
21 the police have a lawful right to be.

22 MS. DROUS: That's correct.

23 QUESTION: Don't you marvel at the fact that
24 after all of these cases and all this publicity these
25 thugs always leave stuff in plain view?

1 MS. DROUS: Yes, Your Honor. It amazes me how
2 often police enter a home and find all the drawers open,
3 all the doors open, and the boxes within the doors and
4 drawers open. It happens all the time, but that's --

5 QUESTION: That's the way it is.

6 MS. DROUS: That's the way it is.

7 QUESTION: Ms. Drous, could you tell me why --
8 why -- why would we -- we don't have an inadvertence
9 requirement for dispensing with a seizure warrant
10 elsewhere, do we? I mean, if the police suspect, have
11 probable cause to believe that somebody will be walking
12 down the street with contraband, with illegal drugs or
13 something of that sort, do --

14 MS. DROUS: That's correct.

15 QUESTION: Must they go get a seizure warrant
16 before they can come up and even though they lay in wait
17 fully expecting him to come, do they have to get a seizure
18 warrant?

19 MS. DROUS: You mean when an individual is
20 walking down the street?

21 QUESTION: Yes. They -- they -- they have very
22 reliable information from an informant that he'll be
23 walking down the street with cocaine. They lay and wait
24 for him and see the cocaine, go over and seize it. Is
25 that -- is that unlawful?

1 MS. DROUS: If -- if the police at that point
2 have probable cause for an arrest, the police officer may
3 arrest the person without a warrant --

4 QUESTION: Right.

5 MS. DROUS: -- and the search of the person
6 would then be pursuant to that arrest.

7 QUESTION: But -- even though they had full
8 knowledge and could have gotten a warrant for the seizure
9 you don't require advertence in that -- inadvertence in
10 that situation, do you?

11 MS. DROUS: Well, because there you have an
12 exigent circumstance. You have -- you have the legitimate
13 exception to the warrant of a search pursuant to an
14 arrest.

15 QUESTION: It isn't an exigent circumstance
16 because they could have gotten a warrant. Almost by
17 definition an exigent circumstance means you have no time
18 to get a warrant. Here they knew he was going to be there
19 with cocaine but they didn't get a warrant.

20 MS. DROUS: On the -- on the street?

21 QUESTION: Yeah. See, I can't see why you need
22 an inadvertent requirement in the context in this case and
23 don't require it on the street.

24 MS. DROUS: Because there you have the
25 difference of the rules relating to an arrest. And in --

1 in that case, if you have probable cause to make the
2 arrest on the street -- if you do not go into the home,
3 you do not need a warrant.

4 QUESTION: But once you have a warrant to enter
5 the home and your concern is with the possessory interest,
6 why isn't that met if the officers have probable cause to
7 seize the items?

8 MS. DROUS: This Court has consistently held
9 that probable cause alone will not support a warrantless
10 search and seizure.

11 QUESTION: It's not warrantless. They have a
12 warrant to enter the home. So, there is no additional
13 burden on the privacy interest at stake. What you're
14 concerned about is the possessory interest in these other
15 items. And why isn't that met by the probable cause that
16 the officers had?

17 MS. DROUS: What you have there, however, is a
18 warrantless seizure, and warrantless seizures are not
19 allowed.

20 QUESTION: Well, that -- that's not correct.
21 Warrantless seizures are allowed of objects within the
22 possession and the control of the arrestee, which is the
23 way I understand United States v. Marron. You said we're
24 going to have to overrule that case. The -- the objects
25 there were admissible into evidence and they were not

1 described in the warrant.

2 MS. DROUS: Well, Your Honor, that's the second
3 portion of United States v. Marron, which has -- is -- is
4 no longer the rule. That has been overruled by -- excuse
5 me -- in -- in Marron the first part of the case they --
6 this Court --

7 QUESTION: If -- if it's within control
8 according to the Chimel doctrine, it would have been
9 admissible, would it not?

10 MS. DROUS: Correct. And it clearly wasn't in
11 that case. In that -- that was during the time when the
12 police officers were allowed to search --

13 QUESTION: But --

14 MS. DROUS: -- the entire premises on -- from
15 which the person was arrested.

16 QUESTION: Yes, but -- but you --

17 QUESTION: Well, are you --

18 QUESTION: -- say that it must be within the
19 specifications of the warrant to be seized and I've just
20 given you one example where that is not so.

21 MS. DROUS: However, in this -- in this case Mr.
22 Horton was not present and none of the items were sized
23 from his person

24 QUESTION: Well, Ms. --

25 MS. DROUS: You always -- police officers are

1 always allowed to search a person pursuant to a lawful
2 arrest.

3 QUESTION: Ms. Drous, are you suggesting that if
4 a police officer is walking through a public park and sees
5 a piece of property that he thinks is either contraband or
6 there is probable cause to believe is evidence in making a
7 case against him, he needs to get a warrant to -- to seize
8 that?

9 MS. DROUS: Excuse me? If -- if -- if the
10 officer is --

11 QUESTION: If he's walking through a --

12 MS. DROUS: -- walking in a public park --

13 QUESTION: Yes.

14 MS. DROUS: -- and it's in plain view?

15 QUESTION: Yes.

16 MS. DROUS: No, he does not need a warrant in
17 that case. And in that --

18 QUESTION: Well, why -- why should it be any --
19 he's lawfully in the public park, he's seizing a piece of
20 property which he has probable cause to seize. Why should
21 it be any different? He's lawfully inside the home and he
22 sees a piece of property that there's probable cause to
23 seize?

24 MS. DROUS: There the police have -- have made
25 no illegal seizure -- no illegal search. In this case --

1 QUESTION: Well, what -- what's illegal about
2 this search?

3 MS. DROUS: The police officers -- let's go back
4 to the beginning. The police officers got a warrant.
5 They carelessly, as stated in the Attorney General's
6 brief, forgot to particularly list the items to be seized.
7 They entered the home irregardless of that fact with the
8 intention --

9 QUESTION: Why -- why don't you say regardless
10 rather than irregardless?

11 MS. DROUS: I'm sorry. They entered the home in
12 spite of the fact that it was not at -- with the intention
13 to search for these items even though they were not listed
14 in the warrant. The actions of the police officer were
15 illegal. They were not conducting a legal search at that
16 point.

17 QUESTION: Well, why does that make it illegal,
18 unless they intended to search in places where they were
19 not otherwise authorized to be by the warrant?

20 MS. DROUS: We don't know if in fact -- that
21 their search for these items not listed in the warrant
22 broadened the search.

23 QUESTION: Well, but you moved to suppress.
24 Isn't -- isn't the burden on you to show that the search
25 was illegal or the seizure was illegal?

1 MS. DROUS: Not when there's a warrantless
2 seizure.

3 QUESTION: You mean you can come into court and
4 say, I move to suppress and it's up to the government to
5 show why the evidence is admissible?

6 MS. DROUS: That's correct, Your Honor. At
7 least in California. I have not practiced in other
8 states. But in California if there is a warrantless
9 seizure, a warrantless search, the burden is on the
10 prosecution to show that in fact the search and seizure
11 were illegal.

12 QUESTION: Well, and -- and here the trial court
13 in the California -- the court of appeals were satisfied
14 the state had met that burden.

15 MS. DROUS: That's correct.

16 QUESTION: They must have thought the search was
17 alright.

18 MS. DROUS: That's correct. They did. They --
19 they --

20 QUESTION: Well, then you say it's illegal, but
21 you're fighting the factual determinations of the lower
22 court.

23 MS. DROUS: Well, that's a legal determination
24 also. It's a combination.

25 The courts have consistently held that the

1 police have no discretion to decide what is to be taken,
2 and abandoning the inadvertence requirement gives police
3 officers this discretion. There will be no need for them
4 to request permission from a magistrate to search for each
5 item for which they intend to search. This will this
6 nullify the warrant clause particularity requirement.

7 QUESTION: Ms. Drous, have we -- have we ever --
8 have we ever held that -- that the Constitution requires a
9 warrant for a seizure without a -- without a search?

10 MS. DROUS: Yes.

11 QUESTION: I know we have -- we have for an
12 arrest and we have for a search and seizure, but -- but
13 what -- what case says it just -- just --

14 MS. DROUS: In United States --

15 QUESTION: Where there's probable cause, I mean.
16 Where there's probable cause.

17 MS. DROUS: In United States v. Place, the
18 language is that a warrantless seizure is per se
19 unreasonable.

20 This Court cannot forget that there is also a
21 possessory interest. It is true that this Court has said
22 that the privacy interest is more important, but there
23 still remains the possessory interest which should be
24 protected.

25 QUESTION: So, it -- so, it follows then --

1 I'm -- I'm -- I don't know what the answer is. If -- if
2 the police have very reliable information that a stolen
3 car is going to be at a particular location, they cannot
4 just go to that location seeing the stolen car, seize it.
5 They -- they would have to get a -- get a seizure warrant.

6 MS. DROUS: Your Honor --

7 QUESTION: There's no search involved. It's
8 just a seizure.

9 MS. DROUS: Your Honor, in that case it would
10 depend where the car was to be located. It would also
11 depend --

12 QUESTION: It's going to be on the street.

13 MS. DROUS: Not -- not in the driveway of a
14 home?

15 QUESTION: No. Just on the street.

16 MS. DROUS: On the street, because of the
17 movability of automobiles, I think that that search --
18 that seizure would always be upheld. In each of the cases
19 that you bring there's -- there is an exigency there.

20 QUESTION: It's not an exigency that -- of the
21 sort that prevents a warrant from being obtained. They --
22 they knew the car was going to be there in plenty of time
23 to get a warrant.

24 See, I -- I suspect you don't need a warrant in
25 that situation and -- and I think our law may not require

1 anything other than probable cause when there is to be a
2 seizure though not a search. At -- at least, I don't know
3 a case that contradicts that.

4 MS. DROUS: In the case of automobiles, that's
5 correct. And if you say a stolen automobile, there you
6 have no possessory interest. A person has no possessory
7 interest in a stolen object.

8 QUESTION: Well, take Justice Scalia's example
9 but make it lawn furniture in the back yard or in plain --
10 in plain view of somebody's front lawn some furniture, and
11 an officer has probable cause to believe it's stolen, as
12 in this case. Do you think the officer could go on
13 without a warrant and just --

14 MS. DROUS: Your Honor, again, in that --

15 QUESTION: -- help himself to that furniture?

16 MS. DROUS: I'm sorry. Again, in that
17 situation, there is no possessory interest in stolen
18 objects. So there's no interest to protect there
19 whatsoever.

20 QUESTION: Well, there's -- there's probable
21 cause to believe there's no interest to protect, but it
22 hasn't been resolved by any judicial authority that that's
23 the fact.

24 You -- you agree with Justice Scalia? You just
25 walk on the premises and help yourself to --

1 MS. DROUS: No, I do not. Not in the lawn
2 furniture example on somebody's front lawn. I believe
3 that a warrant would be required in that situation.
4 Absolutely. On the front lawn.

5 QUESTION: Well, one of the items that -- that
6 was listed in the warrant was some Halloween masks,
7 weren't they?

8 MS. DROUS: That's correct. Which were not
9 found.

10 QUESTION: They were not found. But where would
11 you -- there's no indication, is there, that any of the
12 items that were seized here were found in a place that you
13 wouldn't look for a -- where you wouldn't look for a
14 Halloween mask, like on a shelf or in a -- you'd look
15 almost anywhere for a Halloween mask until you found one,
16 wouldn't you?

17 MS. DROUS: That's correct. And the items that
18 they were -- that were in fact listed on the warrant were
19 small rings. But, again, as I stated earlier, you cannot
20 be sure. When police officers go in with the intention to
21 search for items, a longer list of items than what -- than
22 what is on the warrant --

23 QUESTION: Well, you don't suggest they --

24 MS. DROUS: -- you do not know.

25 QUESTION: You don't suggest that they didn't

1 search for the Halloween mask, do you?

2 MS. DROUS: Oh, no. They probably did search
3 for the Halloween mask.

4 QUESTION: Well?

5 MS. DROUS: In fact, the police officer stated
6 as such.

7 QUESTION: Well and they -- and I suppose they
8 would look on shelves and anywhere a Halloween mask might
9 be.

10 MS. DROUS: That's correct. But the Halloween
11 masks were not listed in the search warrant.

12 Your Honor, what we -- what you're creating here
13 if -- if there's no inadvertence requirement, it allows
14 carelessness in obtaining a warrant. It's a carelessness
15 exception to the warrant requirement.

16 QUESTION: There would still be a desire on the
17 part of the police, I suppose, to have a warrant that
18 would properly enable them to describe the scope of their
19 search. And so I would think it would be in their
20 interest to describe still with particularity what it is
21 they think they have probable cause to find.

22 MS. DROUS: However, in this case in the closing
23 pages of the Attorney General's brief, he notes that the
24 police officers relied on the fact that California does
25 not follow the inadvertence requirement so they didn't

1 think that it was necessary to bother going back and
2 correcting the warrant before they entered the premises to
3 conduct the search.

4 There's a problem with that. There's a serious
5 problem, and it starts with carelessness and then you have
6 a deliberate bypass of the particularity requirements and
7 the search and seizure law. There will be no effect to
8 the particularity requirement if this sort of conduct is
9 permitted.

10 This case actually follows Leon. In Leon the --
11 this Court held that a good faith search and seizure, the
12 seizures that were obtained in a good faith search, will
13 not be suppressed. There this Court stated, that the
14 purpose of the exclusionary rule is not to deter
15 magistrates. In this case there is no error by a
16 magistrate. The error was simply that of the police
17 officers.

18 Furthermore, Leon also states that police
19 officers may not rely on facially deficient warrants and
20 describes a facially deficient warrant as one failing to
21 particularly describe the items to be seized. That's
22 exactly what we have here. If this Court is going to
23 follow the language of Leon, this Court cannot uphold this
24 search.

25 Finally, the only effective available way to

1 ensure that the warrant clause is taken seriously is to
2 enforce it by suppressing evidence when it is thought --
3 when the warrant clause is violated. Police should know
4 that the warrant clause is not a mere technicality which
5 can be avoided when inconvenient or carelessly forgotten.

6 QUESTION: Thank you, Ms. Drous.

7 Mr. Kaye.

8 ORAL ARGUMENT OF MARTIN S. KAYE

9 ON BEHALF OF THE RESPONDENT

10 MR. KAYE: Mr. Chief Justice, and may it please
11 the Court:

12 I would like to begin by citing to the Court the
13 Joint Appendix at page 29 where the officer who conducted
14 this search is asked, "When you searched the residence of
15 Mr. Horton were you looking for that jewelry, that stolen
16 property?" "Yes, I was." "In the course of that search,
17 did you come upon some weapons that you based -- that you
18 based your discussions with the victim on?"

19 The scope of the search has never been
20 challenged in this case. It was not challenged on appeal
21 and it is not challenged in this Court. It is only the
22 inadvertence requirement that is raised here.

23 Second of all, I'd like to correct something
24 that Justice White said.

25 QUESTION: I -- I meant to talk about the ring

1 rather than the mask.

2 MR. KAYE: Yes. The --

3 QUESTION: But the same -- the same result would
4 follow. You'd look for a ring almost everywhere.

5 MR. KAYE: Precisely. Precisely. When you have
6 something that small, obviously the scope of the search is
7 going to be quite intense. And all those other items were
8 listed in the affidavit through the police reports.

9 QUESTION: Yes. Got it.

10 QUESTION: Do we -- do we have a case expressly
11 which says that when you find what's in the warrant you
12 have to leave, or is that so obvious that we haven't said
13 it? I -- I take it that if you stay after you find the
14 listed items, then it can become a general search?

15 MR. KAYE: If you stay after you find --

16 QUESTION: Suppose you -- the police stay on the
17 premises after they've found all the listed items on --

18 MR. KAYE: Yes.

19 QUESTION: -- the warrant, I take -- it take it
20 then it's a general search.

21 MR. KAYE: That -- we would concede that once
22 the listed items are found the search much seize. There
23 is no more authority despite what the affidavit shows.

24 QUESTION: And there was no contention that that
25 happened here?

1 MR. KAYE: No. None.

2 QUESTION: That -- that principle would serve as
3 a deterrent to just leaving things off the warrant. In
4 other words, there -- there is an incentive to list
5 everything that you're interested in in the warrant
6 because if you don't and you find all the other things
7 before that one, you're going to have to leave the
8 premises.

9 MR. KAYE: Precisely, Your Honor. There's an
10 incentive to put everything in the warrant in order to
11 make sure -- ensure that the scope of the search --

12 QUESTION: Well, you put everything in the
13 warrant that you've got probable cause to --

14 MR. KAYE: Well, certainly.

15 QUESTION: -- think is on the premises.

16 MR. KAYE: Sure, I'm assuming probable cause.
17 To ensure that the scope of the search will be to the
18 greatest extent possible.

19 The purpose of the inadvertence requirement as
20 announced in Coolidge was to enforce two distinct purposes
21 of the warrant clause. To eliminate altogether searches
22 without probable cause and to limit the scope of searches
23 deemed necessary to the smallest extent possible.

24 Neither of those purposes was violated in this
25 case. The police obtained a valid warrant for three

1 rings, particularly described rings. They confined the
2 scope of their search to the area and time authorized by
3 the warrant. They had a lawful basis to be where they
4 could see the other property. There was no general search
5 in this case.

6 In fact, I would point out to the Court that the
7 facts show that there were a number of other firearms that
8 were found in the premises that were not seized because
9 they did not fit the description in the affidavit.

10 I think it's useful to examine Coolidge in its
11 historical context. At the time of Coolidge the Court was
12 deeply divided over two issues, the broad scope of
13 searches incident to arrest and the allowance of
14 searches -- of arrests in the home without a warrant.
15 Hence, the basis for -- hence, the basis for the citation
16 to Trupiano in Coolidge.

17 Neither of those concerns are present anymore.
18 In Chimel v. California the scope of searches was limited
19 to a small extent to the reaching area of the defendant,
20 and in Payton v. New York, the Court required a warrant
21 for an arrest in a home.

22 Therefore, there is no danger of the police
23 planning to arrest someone, waiting until he goes into his
24 home, and then permitting them to make a very broad search
25 without any warrant whatsoever.

1 In our view, the probable cause requirement
2 protects Petitioner's interest in the possession of these
3 items. Unlike an unlawful search, the rupture of privacy
4 cannot be repaired. But property can be restored to the
5 victim.

6 If the police are required to return for a
7 warrant, Petitioner's interest in possession would still
8 be interfered with to the same degree. Stationing an
9 officer to guard the property from loss or destruction
10 while the warrant is sought means that Petitioner would
11 still be deprived of possession or use of that item. And,
12 in fact, if stationing an officer there is required in
13 order to guard, then the privacy intrusion would be
14 extended. It seems an odd way to protect the Petitioner's
15 rights to extend the intrusion on his privacy.

16 In Texas v. Brown, the Court indicated some
17 concern with a pretext search. If that is the case, the
18 Court ought to meet it squarely rather than through use of
19 the inadvertence requirement.

20 The Coolidge requirement does not apply to
21 contraband, stolen property or items dangerous in
22 themselves. Therefore, many pretext searches are not even
23 included in the requirement. Second of all, if
24 inadvertence is to mean the lack of probable cause, then
25 an officer who obtains a warrant to search for evidence of

1 crime "a" purely as a pretext to look for evidence of
2 crime "b", would not be deterred because if there was no
3 probable cause for the evidence of crime "b", the seizure
4 would be inadvertent.

5 QUESTION: Well, is it permissible to search --
6 execute a search warrant for crime "a" if there is
7 probable cause for that if your real intent is to search
8 for evidence of crime -- is to -- is to look for evidence
9 of crime "b" that might be in plain view?

10 MR. KAYE: Well, the Court has never -- has
11 never discussed that --

12 QUESTION: Well, you seem to be conceding it.
13 That's a problem.

14 MR. KAYE: No, I'm not conceding it. To the
15 contrary. In Scott v. United States, the Court indicated
16 that the officers underlying intent and motivation is
17 irrelevant to the ascertainment of whether there was a
18 Fourth Amendment violation. That is to be measured by the
19 objective conduct and if -- the conduct in that case would
20 be objectively reasonable because they would have had a
21 search warrant in the first place.

22 The inadvertence requirement sweeps too broadly.
23 It would include searches as the present case in which
24 there is no hint of pretext. Here the police revealed all
25 the information they had to the magistrate.

1 QUESTION: You've used the term "pretext"
2 several times, Mr. Kaye. How would you define pretext?

3 MR. KAYE: The lower courts generally agree that
4 a pretext situation is where you are obtaining permission
5 to search or arrest for one crime when the underlying
6 motivation is to look for evidence of a second crime.

7 QUESTION: Well, you say underlying motivation.
8 That means that they're not really interested at all in
9 the first crime or that there are two motivations?

10 MR. KAYE: Well, that's not clear. If they're
11 not interested at all in the first crime, then that's a
12 different situation, granted. But that's a very difficult
13 thing to decide.

14 QUESTION: Well, I would think it would be very
15 difficult. Do you question officers about their
16 underlying intent and their secondary intent and that --

17 MR. KAYE: Precisely. It's -- the Court would
18 get into the thicket. As it put -- put it in Leon, the
19 Court is not inclined to get into an expedition into the
20 minds of police officers. The Court viewed it as a grave
21 and fruitless misallocation of resources.

22 And the Court -- if there was more than one
23 motivation, then the Court would be having to determine
24 which one was the dominant motivation. The courts are
25 simply not equipped to make such determinations.

1 The inadvertence rule punishes the police for
2 oversight or miscalculation of probable cause. The error
3 in this case is benign. It's not deliberate, it's not
4 pretextual.

5 The Court has said that the police do not have
6 to guess at their peril the precise moment when probable
7 cause exists. The inadvertence rule places the police in
8 just such peril. In this case, the police were properly
9 on the premises and they had probable cause for their
10 seizure. We would submit that under those circumstances
11 there simply is no basis to suppress the evidence.

12 QUESTION: Not that it matters, but what was the
13 value of those rings?

14 MR. KAYE: What was the value?

15 QUESTION: Yeah.

16 MR. KAYE: I don't know if the record reveals.
17 In terms of monetary value?

18 QUESTION: Was he ever tried for possession of
19 them?

20 MR. KAYE: No. He was not tried for possession
21 of stolen property. The rings were never found.

22 QUESTION: So, nothing was done about the
23 warrant? The property that the warrant covered, nothing
24 has been done about it at all?

25 MR. KAYE: Well, it was never discovered during

1 the search.

2 QUESTION: Thank you, Mr. Kaye.

3 Ms. Drous, do you have rebuttal? You have four
4 minutes remaining.

5 REBUTTAL ARGUMENT OF JULIANA DROUS
6 APPOINTED BY THIS COURT
7 ON BEHALF OF THE PETITIONER

8 MS. DROUS: Thank you.

9 First of all, Mr. Kaye starts reading from the
10 record at page 29. However, immediately before that, on
11 page 27, the question, "When you went to that residence,
12 what were you looking for?" Answer, "I was looking for
13 items that were from Mr. Wallaker during the robbery
14 itself. I was looking for items that would connect the
15 person at the home to associate with the robbery, things
16 used in the robbery to obtain the property, weapons, so
17 forth, clothing."

18 Clearly, we are not talking about here about
19 going into police intentions. We are going into what the
20 police actually did, the conduct of the police. In this
21 case it is very easy to ascertain in that the police
22 themselves testified as to what they did, that when they
23 went in, they searched for these other items.

24 Second of all, regarding the suggestion that the
25 remedy here of allowing the police to secure the premises

1 while the -- while they would go and get the proper
2 corrected warrant, that would not be a remedy in this
3 case.

4 Segura -- when you look at the facts in Segura
5 in which this Court allowed the securing of private
6 premises in order to obtain a warrant, that is -- also,
7 they don't say -- I don't believe the words were ever
8 used, but in fact, it's good faith. And that case the --
9 it was at a late hour, a magistrate was not available to
10 obtain a warrant. The implication is that the police were
11 worried about losing the evidence and that fairly somewhat
12 quick action had to be taken so they went and secured the
13 premises and then got a warrant.

14 That is good faith. Again, when you come to
15 this case, there is no good faith. What there is is
16 police negligence, police carelessness, and police
17 officers should not be allowed to an -- extend an
18 intrusion which was the result of their own mistake, their
19 own carelessness, their own deliberate disregard of the
20 warrant requirement of the Fourth Amendment.

21 Secondly, although we do not have the facts in
22 this case, it is correct that the inadvertence requirement
23 covers two situations. One where there is a warrant and
24 items are seized that are not listed in the warrant and,
25 second, where there is an arrest.

1 The difference between Payton -- Payton would
2 not cover the situation because in Payton you have an
3 arrest warrant allowing the entry into the home. What
4 Coolidge talks about -- I'm sorry, there's no -- what
5 Payton says is that you cannot enter a home without an
6 arrest warrant. The situation that --

7 QUESTION: Yeah, and you can't search within the
8 home with an arrest warrant.

9 MS. DROUS: That --

10 QUESTION: You can find the defendant and that's
11 it, isn't it?

12 MS. DROUS: Absolutely. That's -- that's
13 Payton. However, there is nothing in Payton to protect
14 individuals from police officers obtaining an arrest
15 warrant in order -- allowing them to go into the home to
16 arrest the individual and waiting for an opportune time
17 when they have a feeling that evidence might be there.
18 And that's where inadvertence is still necessary. In that
19 situation, in order to protect Fourth Amendment rights.

20 In this case, we do not have a simple oversight
21 or miscalculation of probable cause by the police. What
22 we have is out and out forgetfulness, carelessness in not
23 listing -- that -- that is the only explanation. In fact,
24 that's the explanation given in the court as to why the
25 items were not listed on the warrant, were not -- why the

1 affidavit did not request that the court include those
2 items in the warrant.

3 And what you do have here -- in fact, you do
4 have a general search if a general search is defined as
5 going in and searching for everything that the police want
6 to look for, and that is not allowed by the Fourth
7 Amendment.

8 The inadvertence requirement is necessary to
9 protect Fourth Amendment rights. I would submit it.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Drous.

11 The case is submitted.

12 (Whereupon, at 11:48 a.m., the case in the
13 above-entitled matter was submitted.)

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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:

#88-7164 - TERRY BRICE HORTON, Petitioner V. CALIFORNIA

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BY Alan Friedman

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