

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: 89-1690

CASE NO: CALIFORNIA, Petitioner V.

CHARLES STEVEN ACEVEDO

PLACE: Washington, D.C.

DATE: January 8, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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CALIFORNIA, :

Petitioner :

V. : No. 89-1690

CHARLES STEVEN ACEVEDO :

— — — — — X

Washington, D.C.

Tuesday, January 8, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

ROBERT M. FOSTER, ESQ., Supervising Deputy Attorney
General

of California, San Diego, California; on behalf of
the Petitioner.

FRED W. ANDERSON, ESQ., Santa Ana, California; on behalf
of
the Respondent.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 89-1690, California v. Charles
5 Steven Acevedo.

6 Mr. Foster.

7 ORAL ARGUMENT OF ROBERT M. FOSTER

8 ON BEHALF OF THE PETITIONER

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

11 This case is here on the State of California's
12 Petition for Certiorari to the California Court of
13 Appeals, Fourth Appellate District, Division 3.
14 California contends that the lower appellate court erred
15 when it ordered the illegal drugs found in the trunk of
16 Mr. Acevedo's car suppressed, because the officers had too
17 much probable cause. That is, they had particularized
18 probable cause as to the paper bag containing the drugs,
19 rather than unparticularized probable cause to the entire
20 vehicle. The State contends that when Mr. Acevedo
21 voluntarily and intentionally placed the bag into the
22 trunk of the car, it attained the same degree of mobility
23 as the car, and by being in the car, it was subject to the
24 lesser expectation of privacy that surrounds a vehicle and
25 its contents.

1 What I'd like to do this morning is briefly go
2 through the facts with you, and then explain why we
3 believe this Court's decisions in Carroll, Ross, and
4 Carney should be held to control in this case. We believe
5 this Court should rule that the decisions in Chadwick and
6 Sanders have been limited by the subsequent decisions of
7 this Court.

8 The facts are not in any dispute in this case.
9 Back in 1987 Federal drug agents in Hawaii intercepted a
10 shipment of drugs bound for the mainland, nine bags --
11 nine kilo bags of marijuana. They contacted the Santa Ana
12 police department, allowed the drugs to proceed to the
13 Federal Express office, and the local police officers
14 arranged a controlled delivery. They followed the drugs
15 back to Mr. Daza's apartment. After a few minutes Mr.
16 Daza came out and threw away the outer wrapping material
17 and the inner wrapping material, so it was clear to the
18 officers that he was manipulating the contents, the drugs.

19 And at that point they did what we want officers
20 to do under those circumstances, they went to get a search
21 warrant. While the officer was gone -- one of the
22 officers was gone getting the search warrant, co-defendant
23 St. Gregory exited, I'm sorry, St. George exited with a
24 knapsack. The officer stopped him and discovered a pound
25 and half of marijuana in his knapsack.

1 Shortly thereafter Mr. Acevedo arrived, carrying
2 nothing. He entered the apartment. About 10 minutes
3 later he came out carrying a bag, a paper bag. The bag
4 appeared to be -- the bag appeared to be full. He got in
5 -- he walked to his vehicle, placed it in the trunk of his
6 vehicle, and drove off. The officers had a -- had a
7 marked car stop him nearby. The trunk was opened, the bag
8 was opened, and they found approximately a pound, I'm
9 sorry, a half a pound of marijuana. Shortly thereafter
10 the search warrant for the apartment arrived.

11 QUESTION: Mr. Foster --

12 MR. FOSTER: Your Honor.

13 QUESTION: Would, would those facts as you have
14 described them give rise to probable cause sufficient to
15 have arrested the individual?

16 MR. FOSTER: I believe so, Your Honor. I
17 believe --

18 QUESTION: And could the sack then have been
19 searched as a search incident to the arrest or an
20 inventory search?

21 MR. FOSTER: Yes, Your Honor. I believe either
22 as a -- as a search incident to the arrest -- and as we
23 point out in the brief, Your Honor, I think there's
24 another way that it could have been searched, which is
25 once he placed it into the vehicle, voluntarily and

1 intentionally taking advantage of the mobility of the car,
2 when he takes advantage of that aspect of the vehicle he
3 has to take at the same time the limitations that come
4 with it. The limitations that come with it, this Court
5 has clearly marked in Ross, Carroll, and Carney, which is
6 a lesser expectation of privacy, because of the mobility
7 of the vehicle. So at that point the officers would
8 probably --

9 QUESTION: That's a little bit of a weak
10 argument. When you put something in the trunk of a car
11 you don't really expect the world to be looking in and
12 seeing what's there, do you?

13 MR. FOSTER: I don't think you expect the world
14 to be looking in, but I think as this Court held in Ross,
15 Your Honor, that whatever subjective expectation of
16 privacy you have does not survive when the officers have
17 probable cause to believe there are drugs in the vehicle.
18 I am sure when Mr. Ross in that case placed the bag of
19 drugs and the pouch of money into the trunk he had the
20 same subjective expectation as Mr. Acevedo.

21 In that sense the cases are very parallel,
22 because both Mr. Ross and Mr. Acevedo placed bags of drugs
23 into the trunk of their vehicles. And in Ross this Court
24 held that that subjective expectation of privacy was not
25 objectively reasonable. It did not survive in the face of

1 probable cause.

2 I think the point is that he -- that it was a
3 voluntary and intentional act in his part in putting the
4 bag into the vehicle. And because of that he was seeking
5 to exploit the mobility of the vehicle.

6 QUESTION: But, Mr. Foster, was it any different
7 than the voluntary intentional act in Arkansas against
8 Sanders?

9 MR. FOSTER: No, Your Honor, but the difference
10 --

11 QUESTION: So you basically want us to overrule
12 Arkansas against Sanders?

13 MR. FOSTER: I want you to extremely limit
14 Arkansas v. Sanders, yes, Your Honor. I understand that
15 there's an institutional bias to saying the word overrule.
16 And I think Arkansas v. Sanders would have validity as to
17 luggage outside of the vehicle, but the main point --

18 QUESTION: Isn't it correct that in his separate
19 opinion in that case that Chief Justice Burger made the
20 very distinction that you're challenging here?

21 MR. FOSTER: Yes, Your Honor. That is correct.

22 QUESTION: So you're basically challenging his
23 analysis of the Fourth Amendment.

24 MR. FOSTER: No, I thought I was supporting the
25 Chief Justice's analysis --

1 QUESTION: I'm talking about Chief Justice
2 Burger.

3 MR. FOSTER: Oh, I'm sorry. Yes, I am
4 challenging --

5 QUESTION: He's the source of the particular
6 distinction that is at issue here.

7 MR. FOSTER: Yes, Your Honor. And if you notice
8 in Justice Burger's opinion there, he keeps talking about
9 the relationship between the bag and the vehicle as being
10 merely coincidental. And I don't think that's an accurate
11 analysis, with all due respect to the Chief Justice,
12 because it perceives the relationship as a fortuity, and
13 it was not a fortuity. It was an intentional, voluntary
14 act. He sought to exploit the mobility of the vehicle,
15 both in Chadwick and in Sanders. And I think when you
16 take the vehicle, when you reach out to use that aspect of
17 it, you take what comes with that mobility. And that,
18 after Ross and after --

19 QUESTION: Yeah, but you don't have any mobility
20 anymore after the vehicle has been stopped and you have
21 got the container. Why is it any different than if you
22 stopped him before he got in the vehicle?

23 MR. FOSTER: Because since Chadwick and Sanders
24 this Court has decided Johns, Michigan v. Thomas, and
25 Florida v. Meyers, and you have said you don't judge

1 mobility later on. You judge mobility at the moment of
2 seizure. Justice Burger's analysis was you judge -- once
3 you had seized the item, the mobility, the necessity, the
4 mobility did not have any more effect. And this Court has
5 said no, you judge it at the moment of seizure but you can
6 do the search later on. And I think what has happened is
7 this Court's evolving approach to automobile searches has
8 taken away the underpinnings of that.

9 QUESTION: Well, you rely heavily on Ross, and I
10 wonder if there's a single word in the Ross opinion that
11 casts doubt on Arkansas against Sanders.

12 MR. FOSTER: No, but I didn't think you needed
13 to reach that issue to decide Ross, Your Honor. And
14 indeed the footnote in place --

15 QUESTION: The reason you didn't have to reach
16 it is because of this distinction.

17 MR. FOSTER: To resolve it in Ross, no, you did
18 not, Your Honor. This case squarely presents the issue.
19 And I think that if -- you know, that Mr. Ross and Mr. --

20 QUESTION: As did Arkansas against Sanders.

21 MR. FOSTER: Yes, Your Honor, that is correct.
22 And I am asking you to go back and reexamine those cases
23 in light of Ross and Carney and your more recent
24 pronouncements in the area. And I think that the -- as we
25 spoke in that discussion, the underpinnings of Chadwick

1 and Sanders have been eaten away by this Court's
2 subsequent decisions. As we talked about in answering
3 your question, Chadwick and Sanders look at the search of
4 the bag, or the search of the closed container at the
5 point of the actual search, whereas this Court made it
6 clear in Ross that you look at it, the mobility, at the
7 moment of seizure.

8 Because if you look at it the other way the Ross
9 holding would not stand, Your Honor, because as you well
10 recall, they searched the bag in the field, found it, took
11 it to the police station and then opened it again without
12 a warrant. So that if the approach in Chadwick was
13 correct, Ross and Chadwick are in conflict, because Ross
14 made it clear that you look to the mobility at the moment
15 of seizure.

16 Additionally, Chadwick assumed that whatever
17 subjective expectation of privacy existed in that closed
18 container, that it continued ad in -- forever. However, I
19 think this Court has made clear in Ross that that --

20 QUESTION: No, not forever. Until you got a
21 warrant.

22 MR. FOSTER: Until you got a warrant. Yes, Your
23 Honor. Which can be forever in some outlying
24 jurisdictions.

25 (Laughter.)

1 MR. FOSTER: But Chadwick assumed that that
2 expectation continued, and in Ross I thought this Court
3 made it clear that whatever that subjective expectation of
4 privacy was, it did not survive in the face of probable
5 cause by the officers to believe there was contraband in
6 the vehicle. In this case there was probable cause to
7 believe there was contraband in the bag.

8 QUESTION: If we accept your rationale --

9 MR. FOSTER: Yes, Your Honor.

10 QUESTION: -- isn't the next logical step really
11 to say that the warrant requirement is limited only to
12 houses and structures?

13 MR. FOSTER: No, Your Honor, I don't think
14 that's necessarily true. I think it's fairly clear that
15 we're dealing here with a very special area, that is,
16 given the mobility of the automobile and its ability to
17 rapidly move out of the jurisdiction. I don't see that
18 that -- that the logic of our position would be expandable
19 any further than a movable vehicle: a boat, a plane, an
20 automobile. But to take it any further than that --

21 QUESTION: Or any movable object that a person
22 is carrying with him and that's --

23 MR. FOSTER: No, no. We do not seek that at
24 all, and I don't think the logic of a decision --

25 QUESTION: Well, but if it's subject to his

1 control and there's a probable cause for the arrest.

2 MR. FOSTER: Well, certainly you to an extent
3 have already done that with Schimmel, Your Honor. In the
4 search incident to arrest you can open any closed
5 container --

6 QUESTION: Well, that's what I want to know.
7 What's left? What's left of the doctrine?

8 MR. FOSTER: I think a number of things are
9 left, Your Honor. For example, in the Chadwick-Sanders
10 situation where the closed container comes off of the
11 train, the Amtrak coming from San Diego to Boston. In
12 that situation, had the defendants gone one way and a
13 porter with a trunk gone the other way, and the arrest was
14 made at that time so that the closed container was not in
15 the immediate dominion and control, the area of arm's
16 reach of the defendants, you had a closed container with
17 probable cause, you still are going to need a warrant for
18 that. So I think we're asking for a much narrower rule,
19 you know, and -- this Court has struggled for over 65
20 years with searches of vehicles.

21 In Ross you gave us a bright line that went two-
22 thirds of the way, and we're asking you to draw the line
23 the rest of the way so that the officers in the field --

24 QUESTION: So that we'll have no worries the
25 next 65 years?

1 MR. FOSTER: I would hope not, Your Honor.

2 (Laughter.)

3 QUESTION: Mr. Foster --

4 MR. FOSTER: Your Honor.

5 QUESTION: You said in your example involving
6 the porter carrying the closed container that you need a
7 warrant for that. A warrant to do what? To stop the
8 porter and detain the bag or to search the bag?

9 MR. FOSTER: To search the bag, Your Honor. I
10 think that even accepting our position today, the warrant
11 would still apply to those -- to that closed container.

12 QUESTION: All right, then why, by a parity of
13 reasoning, shouldn't you say that in this case that you
14 could seize the bag from the trunk of the car without a
15 warrant, but you should have to get the warrant in order
16 to go into the bag? Why aren't the -- why aren't the two
17 situations parallel?

18 MR. FOSTER: Oh, I think there's a critical
19 difference, Your Honor. The difference is the bag in this
20 case had been placed into a vehicle and the vehicle had
21 begun to leave with it.

22 QUESTION: No, but once you -- once you have
23 taken the bag the vehicle is not leaving with the bag, so
24 that the mobility argument is just as beside the point
25 there as it is in the porter case once you have taken the

1 bag from the porter.

2 MR. FOSTER: But your -- with all due respect,
3 Your Honor, that's the analysis that was in Chadwick and
4 Sanders, and I think that the more recent decisions of
5 this Court say you look at the mobility at the moment you
6 seize it. At the moment you seize the bag from the porter
7 it has very limited mobility. At the moment you seize the
8 bag in the trunk of the car it has the same mobility as
9 the vehicle, as any other closed container.

10 QUESTION: How does it have it after you have
11 seized it?

12 MR. FOSTER: It does not, Your Honor, but you
13 look, after Johns, Thomas, Texas v. White, at mobility at
14 the point of seizure.

15 QUESTION: If -- but by --

16 MR. FOSTER: The Court, this Court has held
17 that, given the fact that you have probable cause at the
18 moment of seizure, since you can seize it it is of no
19 Fourth Amendment consequence whether you search it
20 immediately or search it later on. You know, in Johns, of
21 course, which was a case at the border, they waited 3 days
22 before they seized it -- before they searched it. This
23 Court upheld that search since there was probable cause
24 and mobility at the moment of seizure. And I think that's
25 the point, to answer Justice Souter's --

1 QUESTION: But by the same token there is just
2 as much mobility in the case of the porter.

3 MR. FOSTER: No, Your Honor.

4 QUESTION: If you don't -- if you don't seize
5 the bag, the porter is going to take it away.

6 MR. FOSTER: At a slow pace, not the same as a
7 vehicle --

8 QUESTION: You mean he's going to walk slow
9 enough so that you can get the warrant before he gets to
10 the train?

11 (Laughter.)

12 MR. FOSTER: No, no, no.

13 QUESTION: No, I mean that, that bag is going to
14 disappear. And if the porter's -- if the car is mobile,
15 the porter is mobile. If one isn't, the other isn't. But
16 I'm having trouble seeing this moment of seizure
17 distinction as between the porter and the car.

18 MR. FOSTER: I think, though, that the answer,
19 Your Honor, goes back to the original holding in Carroll,
20 which is that the mobility of the car is such that it can
21 be rapidly moved outside of the jurisdiction. An
22 individual simply carrying the bag or pushing it is not
23 mobile to that degree.

24 QUESTION: But doesn't that simply throw you
25 back on kind of a black letter precedent argument, cars

1 are different from porters? I mean, hasn't your argument
2 really sort of, sort of dropped the principle and just
3 said look, we're going to have a separate rule for cars
4 because it's just more difficult to draw these lines with
5 cars than it is with porters?

6 MR. FOSTER: Well, I think that in a sense this
7 Court made the first step of that analysis in Carroll by
8 saying cars are different --

9 QUESTION: (Inaudible.)

10 MR. FOSTER: I beg your pardon, Your Honor?

11 QUESTION: And ever since.

12 MR. FOSTER: Yes, Your Honor. And ever since
13 you have made that distinction. And I think as -- as you
14 and the Chief Justice have pointed out in a number of your
15 dissents, given the mobility of the vehicle, given the
16 mobility of what has been placed into it --

17 QUESTION: Is there really very much at stake in
18 this case? Justice O'Connor asked you that if there was
19 probable cause to believe that there was marijuana in this
20 bag and it was in the car, you could arrest the driver of
21 the car.

22 MR. FOSTER: Well, I thought the question was --

23 QUESTION: I'll ask you the question.

24 MR. FOSTER: Yes, Your Honor.

25 QUESTION: There was probable cause to arrest,

1 wasn't there?

2 MR. FOSTER: I believe so, Your Honor.

3 QUESTION: Well, if the officer had taken the
4 course of arresting the person, they could have carried
5 out a search incident to arrest, because it is a car, and
6 searched everywhere in the car, including the bag.

7 MR. FOSTER: But the bag was in the --

8 QUESTION: Isn't that right or not?

9 MR. FOSTER: I don't believe that the search
10 incident cases that this Court has handled -- Belton
11 talked about the driver, you could search --

12 QUESTION: What if it's a bag in the -- in the
13 back seat?

14 MR. FOSTER: Yes. Under Belton, then you could,
15 Your Honor. But this --

16 QUESTION: But not in the, not in the trunk?

17 MR. FOSTER: No. This Court limited Belton
18 specifically to exclude the trunk.

19 QUESTION: How about an inventory search of the
20 vehicle?

21 MR. FOSTER: Well, Your Honor, as we pointed out
22 in argument 2 in the brief, yes, because once the bag went
23 into the car, once the car began moving, it was very clear
24 that Mr. Acevedo was transporting drugs. And as far -- my
25 research indicates both the Federal statute and every

1 State has a statute making that a crime.

2 QUESTION: Well, so your answer basically to
3 Justice White and to me is, on the facts of this case, the
4 individual could have been arrested and the bag could have
5 been searched --

6 MR. FOSTER: Yes, Your Honor.

7 QUESTION: -- under different doctrines.

8 MR. FOSTER: Under a number of different
9 doctrines.

10 QUESTION: And -- so a police officer really
11 needn't be -- law enforcement needn't be very much impeded
12 by the ruling in this case because the officer could have
13 just have handled it differently.

14 MR. FOSTER: Well, he could have, Your Honor,
15 but I think this case presents the issue that arose in
16 Castlebury and arises again, and arises in the field every
17 day. While the facts here may be fairly straightforward,
18 if the principle, the underlying principle that caused the
19 court of appeals of California to invalidate the search
20 bedevils officers in the field. For example, in Ross, if
21 the informant had told the officers Mr. Ross keeps the
22 drugs in the trunk of his car, and in a pouch in the trunk
23 and scattered through the trunk, well, then you have a
24 situation where you have particularized probable cause as
25 to the bag, and unparticularized probable cause as to the

1 whole vehicle. And I think that's the kind of situation
2 where you are asking the officers to begin making
3 differentiations as to whether they are particularized or
4 unparticularized probable causes, and not --

5 QUESTION: I don't think that's right. If they
6 have unparticularized probable cause as to the whole
7 vehicle, Ross is perfectly clear you can search the whole
8 vehicle.

9 MR. FOSTER: But what if -- but in a situation,
10 Your Honor, where he has said it's in a bag in the trunk,
11 and additionally, elsewhere. It seems --

12 QUESTION: Well, additionally elsewhere, if
13 that's enough probable cause, you can search elsewhere.

14 MR. FOSTER: That's right. But when you get to
15 the bag, Your Honor, then you'd have to make the analysis
16 of whether you needed a warrant, because your information,
17 as in this case, points to this -- specifically to the
18 bag. And I think that's the kind of problem that we --
19 that we're asking --

20 QUESTION: And the worst that, even under --
21 apart from the rationales that Justice O'Connor and
22 Justice White developed, the rationale of Place also
23 protects the officer. He can always just hang onto the
24 bag until he gets a warrant.

25 MR. FOSTER: Well, certainly --

1 QUESTION: Isn't that what Place indicates
2 rather clearly?

3 MR. FOSTER: He certainly, they certainly would
4 have acted properly in holding the bag in this case and
5 getting the warrant. But what we're saying is you didn't
6 need to get the warrant in the first place. That by being
7 in the vehicle with the mobility far in excess of a porter
8 or simply carrying it, that that high degree of mobility
9 causes this situation to be significantly different.

10 QUESTION: What about a person with a suitcase
11 that you figure has drugs in it about to get on a subway?
12 Can you search the suitcase then?

13 MR. FOSTER: Hum.

14 QUESTION: Under your view.

15 MR. FOSTER: Given --

16 QUESTION: You can obviously detain it. There's
17 no doubt about that.

18 MR. FOSTER: Given the mobility of the subway, I
19 would think yes, Your Honor. I think when you're dealing
20 with a rapidly moving mode of transportation --

21 QUESTION: Well, that's never going to get you
22 out of the jurisdiction. I suppose it would in New York,
23 it easily could.

24 MR. FOSTER: I believe so, Your Honor. And it
25 would. And I think that they're talking about is to

1 rapidly move away from the officers who are there trying
2 to effect the arrest, and move out of the jurisdiction.
3 Indeed, if I am not mistaken, on the metro here in D.C.
4 you can end up outside of the jurisdiction. So I think
5 it's the same problem.

6 I think it's the degree, and there are cases
7 talking about airplanes, boats. I think in the discussion
8 in Carney one of you came up with a hypothetical of the
9 houseboat on the river, the same kind of mobility.

10 QUESTION: Well, Mr. Foster --

11 MR. FOSTER: Your Honor.

12 QUESTION: It's easy, I suppose, to say that
13 whenever there is probable cause, why do you have to wait
14 for a warrant. But at least in this case the existence of
15 probable cause is challenged, isn't it?

16 MR. FOSTER: Yes, Your Honor.

17 QUESTION: And, of course you're the petitioner,
18 but the respondent says there is no probable cause and
19 that the court of appeals was dead wrong.

20 MR. FOSTER: I think the court of appeals was
21 dead right, Your Honor.

22 QUESTION: Well, I know, but here it is, and
23 that's the reason why you go to magistrates, to find out
24 whether --

25 MR. FOSTER: Well, but even if you go to

1 magistrates, Your Honor --

2 QUESTION: -- there is probable cause or not.

3 MR. FOSTER: Your Honor, I think that begs a
4 question, with all due respect, because even if you go to
5 magistrate and get a search warrant you have defendants
6 challenging the validity of the search warrant. I mean,
7 the fact that a defendant may challenge it doesn't resolve
8 the issue of whether or not there is or is not.

9 QUESTION: I know, but challenging the --
10 challenging the warrant is a different matter than the --
11 just challenging the -- at least you have the assurance --
12 at least you have the assurance that the issue has been
13 presented to a magistrate.

14 MR. FOSTER: Well, my experience with criminal
15 defense attorneys, with all due respect, Your Honor, is
16 that they'll challenge anything. It's like Justice
17 Rehnquist talked about hounds attacking foxes. I don't
18 think that -- that that should be the basis of a decision
19 from this Court. I think the --

20 QUESTION: Well, on that basis, why, we should
21 never even fool around with warrants.

22 MR. FOSTER: Well, no, I think it works the
23 other way, Your Honor. If you take that point of view you
24 would require a warrant for everything.

25 QUESTION: I know, but your -- if you take your

1 point of view you could just forget warrants.

2 MR. FOSTER: No, not at all, Your Honor.

3 QUESTION: Well --

4 MR. FOSTER: But what we're saying is --

5 QUESTION: What good does it ever do then, in
6 your point of view?

7 MR. FOSTER: Well, I think the question is, in a
8 situation such as this where there is probable cause,
9 where it is particularized --

10 QUESTION: How do you know there is?

11 MR. FOSTER: How do I know there is? The
12 California court of appeal ruled there is, and I think the
13 facts abundantly show there is. I mean, they knew for a
14 fact there was marijuana in the apartment. When Mr. St.
15 George came out he was carrying part of the marijuana. It
16 was clear that Mr. Daza was manipulating the marijuana
17 because he had thrown away the inner and outer wrappings
18 of it. And then Mr. Acevedo goes in carrying nothing and
19 comes out carrying a paper bag that appears to be full.
20 It seems to me that the reasonable conclusion to draw from
21 that is they are breaking up the load of marijuana, and
22 it's starting to be distributed. I think there's abundant
23 probable cause.

24 And I think given that, then the question
25 becomes what conduct we want from the officers. And it's

1 clear these officers were trying to comply with the law.
2 They had left to get the search warrant at the time for
3 the apartment. It was only the fortuity of Mr. Acevedo
4 showing up at 10 minutes after 12 as opposed to 40 minutes
5 after 12 that brought this situation about. You know, the
6 Fourth Amendment talks about reasonable conduct on the
7 part of the officers, and I think it was under these
8 facts. They were trying to get the warrant at the time
9 Mr. Acevedo appeared.

10 The problem, of course, remains, and this Court
11 had talked about it in Ross, about the convenience factor.
12 That what do you do with the vehicle, and what do you do
13 with the individual if we're going to require a warrant
14 for the container? Well, if the container -- if you have
15 probable cause to believe that the container contains
16 drugs, you have then suspicion that the individual has
17 been possessing and/or transporting drugs. You are still
18 going to end up then, if you require a warrant, holding
19 the defendant and the passengers and holding the vehicle
20 until you have obtained the warrant and learned what is
21 inside of the bag. So you don't gain anything in terms of
22 the convenience that this Court was concerned with in
23 Ross.

24 If you give -- the analogy might be to the
25 Payton case that this Court talked about, that when Mr. -

1 - you need a search warrant, you need an arrest warrant or
2 a search warrant to arrest an individual in his home.
3 Where that individual goes outside of the home and goes
4 elsewhere, you don't need the warrant. I think that's the
5 same situation here. Where the individual has a closed
6 container, you would need a warrant to search that closed
7 container. But when he voluntarily and intentionally
8 places it into the vehicle, he places it in there to a
9 different zone, a zone of mobility, a zone of a lesser
10 expectation of privacy. And given that rapid mobility on
11 the part of the vehicle, you should be able to search it
12 without a warrant, since there is probable cause.

13 The question remains under those circumstances
14 what Fourth Amendment value is served by requiring a
15 warrant. As this Court talked about in Carroll, the first
16 United States Congress, the Congress that wrote the Fourth
17 Amendment and sent the document out for ratification by
18 the States, made a distinction. And in dealing with the
19 search of effects in an individual's home, in the home you
20 needed a search warrant. But they -- that came out of the
21 problem with the Writs of Assistance under the British.
22 But the -- one of the very first bills they passed was a
23 customs and tonnage revenue raising document, and in that
24 they allowed for searches in homes only with the warrant,
25 but they allowed for warrantless searches based on

1 probable cause of vessels and vehicles. The point being
2 that the search of effects outside of the home in a
3 movable vehicle has always been treated differently, even
4 by those founding fathers who wrote the Fourth Amendment.

5 Unless the Court has any further questions, I'd
6 like to reserve the remaining time for rebuttal.

7 QUESTION: Very well, Mr. Foster.

8 Mr. Anderson, we'll hear now from you.

9 ORAL ARGUMENT OF FRED W. ANDERSON

10 ON BEHALF OF THE RESPONDENT

11 MR. ANDERSON: Mr. Chief Justice, and may it
12 please the Court:

13 This case is not the search -- this case is the
14 search of a container, not the search of a vehicle. The
15 Fourth Amendment proscribes all unreasonable searches and
16 seizures, and it is a cardinal principle that searches
17 conducted outside the judicial process without prior
18 approval by a judge or magistrate are per se unreasonable
19 under the Fourth Amendment, subject to only a few
20 specifically established and well delineated exceptions.
21 This case is not an exception.

22 Carroll v. United States is a recognized
23 exception. It is recognized and affirmed most recently in
24 Ross, and it is well established. There is no need to
25 overrule Ross. Ross explains Carroll. Carroll and Ross

1 state the exceptions, or state the exception. If there is
2 probable cause to search a vehicle, you can search and
3 seize everything in it, including the containers.

4 This is the search of a package not incident to
5 an arrest. The package was -- a package placed in a
6 vehicle does not lose any privacy protection of the Fourth
7 Amendment just because it's placed in a vehicle. What we
8 have to look at when determining probable cause is what do
9 we have probable cause in? We have in this case probable
10 cause in a bag. Now I'm not conceding that there is
11 probable cause. But for the purpose of the argument, if
12 there is probable cause in the bag, that's the only thing
13 there is probable cause in. If the bag is placed in the
14 vehicle, the vehicle doesn't somehow gain an element of
15 probable cause.

16 QUESTION: If the bag hadn't been put in the
17 trunk, but he just entered the car with the bag, if there
18 is probable cause, such as we are assuming, the -- there
19 could have been an arrest.

20 MR. ANDERSON: Absolutely.

21 QUESTION: And if the bag were found in the back
22 seat, it could be searched?

23 MR. ANDERSON: Under Belton that's correct.

24 QUESTION: Under Belton.

25 MR. ANDERSON: Under Schimmel, under --

1 QUESTION: So you're suggesting we should
2 continue to recognize a rational difference between having
3 the bag in the trunk and having a bag in the back seat?

4 MR. ANDERSON: I'm not sure that -- I'm not sure
5 there's a difference.

6 QUESTION: And the difference, I suppose, is in
7 the degree of the expectation of privacy, is that it?

8 MR. ANDERSON: No, that's not what I would base
9 it on. You have -- it's the item that you have the
10 probable cause in. If the bag was in the trunk and you
11 had probable cause to believe that the vehicle contained
12 contraband, then you can search the bag, the contents of
13 the vehicle under Ross.

14 QUESTION: If you make an arrest?

15 MR. ANDERSON: No. Without an arrest.

16 QUESTION: No? Okay.

17 MR. ANDERSON: Well, under Ross --

18 QUESTION: But if you just have probable cause
19 to believe what, you can't search?

20 MR. ANDERSON: If you have -- if your probable
21 cause just exists in the package, in the container --

22 QUESTION: Yes.

23 MR. ANDERSON: -- then, by placing -- just the
24 mere fact of placing this container in the vehicle doesn't
25 give you probable cause to search the whole vehicle,

1 because what the AG would have you believe is that you
2 placed this container with probable cause in the trunk,
3 somehow this probable cause seeps throughout the whole
4 car, and now you can search the whole car.

5 QUESTION: Well, on these facts there was
6 undoubtedly probable cause to arrest the individual, to
7 make a search incident to arrest, to impound the vehicle,
8 and to make an inventory search.

9 MR. ANDERSON: I disagree with the first part.
10 There wasn't probable cause to arrest. But in order --

11 QUESTION: Well, let's assume there was.

12 MR. ANDERSON: All right.

13 QUESTION: Then what's more intrusive, to have
14 the police arrest the individual and make the search that
15 way, or to have the police open the bag without an arrest?

16 MR. ANDERSON: Certainly in answer to your
17 question it is more intrusive to open the bag without the
18 arrest. However --

19 QUESTION: That's more intrusive, to open the
20 bag and not arrest the individual? That's more intrusive
21 in your opinion?

22 MR. ANDERSON: Yes, I believe it is.

23 QUESTION: More intrusive than placing someone
24 under arrest and conducting a search?

25 MR. ANDERSON: I'm sorry. Yes, I see what you

1 mean. No, no, Your Honor. Certainly it would be more
2 intrusive just to -- to take the person into custody. In
3 this case, though, that's not what we have. Mr. Acevedo
4 was not arrested and searched incident to arrest, as in
5 Schimmel or as in Belton. All they did is they went to
6 the vehicle --

7 QUESTION: Well, the point is that if you accept
8 that there was probable cause to believe this individual
9 emerged from the apartment carrying a bag of marijuana,
10 then there was probable cause to have arrested him.

11 MR. ANDERSON: That's true. That's correct.

12 QUESTION: Mr. Anderson, if I understand the
13 principle you're arguing for, if a policeman just knows,
14 or suspects generally, has probable cause to believe that
15 there is marijuana somewhere in the car, he can open the
16 bag?

17 MR. ANDERSON: That's correct. That's --

18 QUESTION: But if he's more certain than that,
19 he not only knows it's somewhere in the car, he suspects
20 it's precisely in this bag, then he can't open the bag?
21 Doesn't that strike you as very strange?

22 MR. ANDERSON: No, Your Honor, because you need
23 to know -- you need to know when the probable cause is
24 determined and where the item that is sought to be
25 searched is. If he receives information, for example in

1 Ross, if the information was that bandit has contraband in
2 a zippered pouch, or in that case a brown paper bag, in
3 the trunk of his vehicle, then you have specific probable
4 cause to believe that that bag in the trunk of his vehicle
5 contains contraband. When you pop the trunk of that
6 vehicle you're looking for the brown paper bag, and
7 nothing more. Therefore you can seize it under the
8 Court's --

9 QUESTION: But you can't search it?

10 MR. ANDERSON: But you cannot search it.

11 QUESTION: But if all you knew is, or the only
12 information you have is that there is this car and
13 somewhere in the car there is contraband, then you can
14 open it, even though your reason for opening it is much
15 less certain than the reasoning in the former case? That
16 just seems to me, just upside down. The more certain the
17 policeman is that the contraband is in precisely this
18 container, the less able he is to open the container?
19 That doesn't make any sense to me.

20 MR. ANDERSON: What you want to determine is
21 what you're looking for. Are you looking for a car with
22 contraband in it, or are you looking for a package with
23 contraband in it?

24 QUESTION: I'm looking for contraband.

25 MR. ANDERSON: That's fine. But where is the

1 contraband?

2 QUESTION: And you're telling me that if I know
3 it's in this package I can't open the package. But if I
4 just think it's somewhere in the car, then I can open the
5 package. It makes no sense.

6 MR. ANDERSON: I think it does, Your Honor.
7 I'll respectfully disagree with you, because I believe
8 that if you know exactly where the contraband is, then you
9 may seize whatever it's in and get a warrant to search it.
10 However, if that contraband -- and it doesn't matter
11 whether that contraband is in an auto or not. However, if
12 you believe that the container of the contraband is a
13 vehicle, the Court has allowed under Carroll and later
14 under Ross -- this exceptions the Fourth Amendment, the
15 exception being if you have contraband in a vehicle, then
16 you can search without a warrant. You can search the
17 vehicle and all of its contents, including the containers.
18 Now that -- the petitioner wants a bright line. That's a
19 bright line.

20 QUESTION: Mr. Anderson, I don't think it's
21 useful to refer to the automobile as a container, as if it
22 were like a trunk or a bag. I think our cases have
23 treated the automobile not as a container, but as
24 something almost sui generis.

25 MR. ANDERSON: Yes, I would agree. I would

1 agree that the automobile is a unique situation. But as
2 Mr. Justice Kennedy pointed out, if the Court allows the
3 search of -- under these circumstances, basically the
4 Fourth Amendment is gone as far as it relates to
5 automobiles.

6 QUESTION: The Fourth Amendment isn't gone. We
7 would have interpreted the Fourth Amendment not to require
8 a warrant, but to require only probable cause.

9 MR. ANDERSON: But you have to have probable
10 cause to search anyway. You can't search without probable
11 cause.

12 QUESTION: Because of the Fourth Amendment.

13 MR. ANDERSON: Right.

14 QUESTION: Under your position I take it that it
15 wouldn't make any difference whether the bag, the unopened
16 bag was in the trunk or in the back seat on the facts of
17 this case, because -- as long as the probable cause
18 relates specifically to the bag?

19 MR. ANDERSON: The problem with that is the
20 Belton case, of course.

21 QUESTION: I know, but -- there's no arrest.
22 And a lot of times, I suppose, a driver of the car, you
23 may not have any real probable cause to arrest that
24 person. You just know that there's -- you just have
25 probable cause to believe that there is contraband in that

1 car and it's being transported in that car. And under
2 Ross you can search anywhere, as long as you haven't got
3 some specific notion about where it is in the car.

4 MR. ANDERSON: That's my understanding of Ross.

5 QUESTION: But on your theory, I take it, it
6 doesn't make any -- if there's probable cause to believe
7 it's in a paper bag, and you find the paper bag in the
8 back seat, you can't open it.

9 MR. ANDERSON: That's how I interpret Ross.

10 QUESTION: Yes.

11 QUESTION: The distinction that the police
12 officer is going to have to have in mind, under your
13 theory, I suppose, is whether somebody told him marijuana
14 is being taken away in this car. In that case, he can
15 search the whole car, including all the containers. But
16 if somebody said a bag of marijuana is being taken away in
17 this car, then, then he can't search anything, neither the
18 car nor the bag. All he can do is impound the car.
19 That's --

20 MR. ANDERSON: That's correct, because he's got

21 --

22 QUESTION: That's the distinction that you want
23 police officers to be --

24 MR. ANDERSON: Absolutely, because --

25 QUESTION: -- to have to worry about, whether

1 they said --

2 MR. ANDERSON: Because the informant in your
3 example said, said Mr. Police Officer, this person has a
4 brown paper bag with a Lucky Store symbol on the side of
5 it that's wrapped up at the top, and he's placed this
6 either in the trunk, in the back seat, or someplace in his
7 vehicle, and I know it's there because I just saw it there
8 10 minutes ago. Now, the officer's attention is directed
9 towards that vehicle. It is not directed -- I mean,
10 excuse me, that paper bag. It is not directed towards the
11 vehicle. That paper bag is what's important to the
12 officer, wherever it is. It could be in a house, it could
13 be --

14 QUESTION: It would seem to me to make a lot of
15 sense to say that if that's the information he has, he
16 can't search the whole car. The only thing he can search
17 is the bag. Whereas if the information he has is more
18 general, it's somewhere in the car, he can search the
19 whole car. But that's not the position you're saying.
20 You're saying that if he has the specific information
21 about the bag, he can search neither the bag nor the car.

22 MR. ANDERSON: He can -- he needs a warrant for
23 the bag. He may search the car until he finds the bag,
24 under the cases that end in Place.

25 QUESTION: In that example that Justice Scalia

1 gave, suppose there were four Lucky Store bags?

2 (Laughter.)

3 MR. ANDERSON: All right. If there are four
4 bags, all identical, and he can't tell which --

5 QUESTION: And they're all in the back seat.

6 MR. ANDERSON: And they're all in the back seat,
7 he can certainly take possession of all four of them and
8 get a warrant. I know that there is dope in one of these
9 bags, to the magistrate --

10 QUESTION: Oh, and -- but now there is no
11 specific bag that he is focused on. I thought that, I
12 thought your rationale was that if there's a specific bag,
13 he can't search it, but that if it's general, he can?

14 MR. ANDERSON: If there is a specific bag, he
15 cannot search it. If it's general, that's correct.

16 QUESTION: All right. So, in my hypothetical
17 there are four bags. He's not sure which one it is. He
18 doesn't know what to do.

19 MR. ANDERSON: Well, you have described them as
20 all four being identical, all four being Lucky bags.
21 Certainly he has a basis to --

22 QUESTION: He knows that only one of them has
23 marijuana.

24 MR. ANDERSON: He has a basis to seize all four
25 and get a search warrant. A judge would issue a warrant

1 for the search of all four bags --

2 QUESTION: Well, I think, I think under your
3 rationale that he can search, and that's the problem. The
4 problem is that the more generalized his privacy in the
5 car, the greater the officer's right is to search, which
6 is why Mr. Justice Scalia says the whole rationale seems
7 upside down.

8 MR. ANDERSON: I understand the argument, and I
9 don't agree with it, because this Court has held that if
10 you look at the car and you've got probable cause to
11 believe the car contains contraband, you can search it.
12 But this Court has also held, under Chadwick and Sanders
13 and the cases that follow it, that if you have probable
14 cause to believe a footlocker, a suitcase, or a paper bag,
15 and Ross says there is no difference between a paper bag
16 and a Louis Vuitton briefcase, that you've got to get a
17 warrant. And the mere contact, as in Chadwick, the mere
18 contact with the footlocker with the car is incidental.

19 Now, in this case I would submit to you that why
20 wouldn't the officers just sit there and wait? They see
21 the person coming out with a paper bag, they have
22 reasonable basis to believe that it contains contraband.
23 Well, let's follow him and let's wait until it gets in the
24 car. By golly, it's in the car, we can search it. He
25 gets to his house. He walks into his house. Are we now

1 going to let him search the house without a warrant? As
2 you pointed out in your last question to the Attorney
3 General, where do we draw the line in this? And if he
4 walks in the house, are we now going to let them search
5 the whole house, or are we just going to let them search
6 the front room where the bag is?

7 And the answer is you've got to draw the line
8 somewhere. The line has been drawn. The cases are clear.

9 QUESTION: We've crossed that line when we made
10 the exception for automobiles. I mean, the manipulation
11 that you just described can occur with anything. You see
12 somebody leaving the house. You have reason to believe
13 that the person may have contraband on him, you don't know
14 in what particular container it is. You could say the
15 same thing. The police, instead of running and getting a
16 warrant, could wait until he got into the car, and then,
17 and then search the car. That would be perfectly lawful
18 without a warrant, right, so long as they don't know what
19 container it's in?

20 MR. ANDERSON: Well --

21 QUESTION: So -- I mean, once we've made that
22 decision that cars are different, that manipulation is
23 inevitable.

24 MR. ANDERSON: The problem is that -- well,
25 first of all, I don't agree with Carroll or Ross, but --

1 QUESTION: Oh, well, there --

2 (Laughter.)

3 MR. ANDERSON: But --

4 QUESTION: Or with Congress.

5 (Laughter.)

6 MR. ANDERSON: In this particular case what you
7 have is the center of attention focused on a package. As
8 I mentioned, the first thing I said was this is not the
9 search of a vehicle. This is the search of a package that
10 happened to be placed in a vehicle. And that's the
11 distinction that I see that the cases make, and I see this
12 case -- that distinction made in Ross. And Ross goes to
13 a, to the -- to the vehicle as a container, and you have
14 probable cause to that, as to that vehicle being a
15 container.

16 Now we're going to give an exception, we're
17 going to follow Carroll. We're going to allow you police
18 officers to search the car because of its unique
19 character, because it's so mobile, and because we have
20 pervasive governmental interests in regulating vehicles.
21 We're going to allow this exception to the Fourth
22 Amendment to search this container which you know
23 contains, or have probable cause to believe contains,
24 contraband. But it does not say, Carroll does not say,
25 Ross does not say you can search any package that's placed

1 in a vehicle if you have probable cause to believe that
2 package first contains some contraband.

3 And what I'm submitting to you is to adopt the
4 petitioner's view would be to adopt the view that if you
5 place contraband in a container in a vehicle, that that
6 contraband somehow seeps throughout the entire vehicle,
7 and infects the whole vehicle such that you can search it.
8 Well, if that's the case, then what if you take a suitcase
9 or a paper bag with contraband onto the subway? Well then
10 can you search the whole subway, the whole car? Can you
11 search the whole train? Can you search the bus? Can you
12 search the airplane? Just because you have probable cause
13 to believe a container, a paper bag, whatever it is.

14 Now, you could argue that okay, this is Mr.
15 Acevedo's car. Unfortunately there is no evidence in the
16 record that it is in fact Mr. Acevedo's car. But what if
17 it was somebody else's car he gets in? Can you then
18 search this other person's car because Acevedo got in with
19 a paper bag containing dope in it? No. Of course not.
20 But yet if -- and then if Acevedo gets in a taxicab --

21 QUESTION: That's not what we're talking about.
22 We're just talking about -- I mean, I agree with all of
23 that. That seems to me perfectly reasonable. But can you
24 search the bag? That's all we're talking about, not the
25 whole car.

1 MR. ANDERSON: Without a warrant, no, you
2 cannot. Because the bag is -- the bag -- in Ross they
3 have held -- this Court has held that the paper bag is no
4 different from the luggage, and the luggage, you have
5 stated that you expect a degree of privacy in there. You
6 must have a warrant to search that.

7 The -- there's a request for the -- for a bright
8 line to be drawn to guide police officers, and I would
9 submit to this Court there is a bright line. It's called
10 the Fourth Amendment. If you want to search something,
11 get a warrant. Well, we've drawn an exception to that
12 bright line. We've said well, if it's a vehicle, under
13 certain circumstances you may search. If you have
14 probable cause to believe the vehicle contains contraband,
15 then you can search the vehicle and every container in it
16 under Carroll and under Ross.

17 However, the third situation, we get to a
18 package. And I would submit to you if you've got a
19 package, you've got probable cause, see rule number 1:
20 get a warrant. Just because a package is placed in a
21 vehicle doesn't mean that it loses its identity or its
22 private -- privacy. If this Court reverses the lower
23 court it will create an entirely new line of exceptions to
24 the Fourth Amendment, examples of which I pointed out
25 earlier.

1 The other point that I would like to address
2 just briefly is the point on probable cause. First of
3 all, the court of appeals makes one error in their
4 analysis of the facts, and that is that the probable --

5 QUESTION: You didn't cross-petition for
6 certiorari in this case, did you, Mr. Anderson?

7 MR. ANDERSON: No, I didn't.

8 QUESTION: And you didn't raise this point in
9 your brief in opposition to certiorari?

10 MR. ANDERSON: No, I don't believe I did in
11 opposition to certiorari. However, I believe that the
12 Court can review this under -- as a plain error under Rule
13 24.1. The probable cause is deficient firstly because
14 what the court of appeals says is that they have got a bag
15 that is similar in size to the nine bags that were found
16 to be in the cooler. But that just isn't borne out by the
17 facts. In fact the nine bags each weighed 2 pounds.
18 Acevedo's bag containing marijuana weighed between a
19 quarter and a half pound. The Attorney General alludes to
20 a footnote -- in his first footnote to the reply brief,
21 but there is nothing in the record to support that.

22 Now, the other problem with probable cause is
23 that the Attorney General points out that you have to look
24 at the totality of the circumstances. I don't argue with
25 that. However, in his totality you have the police

1 officer that stops Acevedo and searches his vehicle. He
2 assumes that he knows about St. George, and that's not in
3 the record either. We have no information in the record
4 that the officer that searched Acevedo's bag knew anything
5 about the results of the search of St. George. In fact we
6 have no information in the record which even indicates
7 that the officer that searched Acevedo's bag knew anything
8 about St. George even leaving the apartment, let alone
9 what was in St. George's knapsack.

10 So the record is really deficient, and my
11 example in the brief I believe sets forth the facts as
12 they are on this record. And that is that you have an
13 individual who walks into a house. I will concede that
14 there is -- that there's no question that we know that
15 there is marijuana in the, in the apartment. He walks in
16 there empty-handed, he walks out 10 minutes later with a
17 brown paper bag that appears to be full. The officer
18 described it as similar to a lunch bag.

19 And on the basis of that, I would think that
20 it's deficient in probable cause. I think that there may
21 be a suspicion, as in Place, and the officer could have
22 stopped and run some kind of a cursory Terry-type
23 situation investigation, but nothing more than that.

24 There's been a lot of talk about mobility of the
25 vehicle, but again, if you view this as the search of a

1 package and not the search of a vehicle, then you don't
2 even need to get into the mobility of the vehicle.

3 Furthermore, Justice O'Connor mentioned couldn't
4 he be searched as incident to arrest? Yes, he could, but
5 he wasn't in this case. He wasn't placed under arrest.
6 He wasn't searched incident to the arrest. However, a
7 search incident to an arrest when he was in the vehicle
8 would not cover what was in the trunk, because under
9 Belton you can search what's in the car, but you can't get
10 into the trunk.

11 Now, the other thing as to an inventory search,
12 yes, if they had arrested him, hauled his car in, and
13 searched it on an inventory search, yes, they could have
14 gotten there. But again, they didn't do it in this case,
15 nor did they arrest him for transportation of marijuana.

16 In summary, I urge this Court to affirm the
17 lower court's decision on either of two bases: that there
18 was no probable cause for any type of search, or secondly,
19 that this is the search of a package and not the search of
20 a vehicle.

21 Thank you.

22 QUESTION: Thank you, Mr. Anderson.

23 Mr. Foster, do you have rebuttal? You have 5
24 minutes remaining.

25 REBUTTAL ARGUMENT OF ROBERT M. FOSTER

1 ON BEHALF OF THE PETITIONER

2 MR. FOSTER: Yes, Your Honor. I'll try and use
3 not all of that time.

4 Justice Scalia, you're absolutely correct. The
5 situation is upside down. We've set up a situation where
6 if the officer -- if the officers have too much --

7 QUESTION: I knew you would agree with me.

8 (Laughter.)

9 MR. FOSTER: And I thought you were agreeing
10 with me, Your Honor.

11 (Laughter.)

12 MR. FOSTER: I think you're correct. You say to
13 officers, when you go out to get probable cause, go out
14 and do your investigation, do what you can to get the
15 criminal, but don't get too much probable cause, because
16 if you get too much probable cause you're going to need to
17 get a warrant. And I think the whole --

18 QUESTION: No, I don't think that's quite right,
19 is it? It isn't too much probable cause. It's what the
20 probable cause focuses on.

21 MR. FOSTER: That's right. But if in Ross, for
22 example --

23 QUESTION: If it was generally focussed on the
24 vehicle you would normally have to get -- you'd get a
25 warrant to search the entire vehicle.

1 MR. FOSTER: But the signal you send to the
2 officer is -- in Ross, when they got the information that
3 Ross had contraband in the vehicle, the signal you send to
4 the officers is don't ask where, because if you ask where
5 and you get an answer --

6 QUESTION: Well, you're not -- who is the
7 officer going to be asking?

8 MR. FOSTER: The confidential or reliable
9 informant in Ross, Your Honor, was the example I was
10 using.

11 QUESTION: You don't think the officer would
12 want to know as precise as he could what he -- where he --
13 the contraband is?

14 MR. FOSTER: No, if you leave Chadwick and
15 Sanders in effect, because then you're saying to the
16 officers if you know too much you're going to have to go
17 through the rigmarole of getting a warrant.

18 QUESTION: You're going to have to get a warrant
19 before you open private luggage.

20 MR. FOSTER: Yes, that's right. And I don't
21 think that --

22 QUESTION: And we should not encourage that?

23 MR. FOSTER: I think you want to encourage
24 officers to do their utmost to fully investigate --

25 QUESTION: To be able to open luggage without

1 getting warrants?

2 MR. FOSTER: If they have probable cause. Yes,
3 Your Honor, I think that's within the goal of the Fourth
4 Amendment, because you still have the requirement of
5 probable cause.

6 Counsel seems to try and broaden my argument
7 into if you've got probable cause to search the bag, you
8 can search the whole vehicle, and as Justice Scalia
9 pointed out, that's not what we're arguing. We're arguing
10 here today that if you have probable cause as to the bag,
11 because the bag is in a vehicle, you should be able to
12 search the bag. We did not make any argument as to the -
13 - expanding any rule of law to therefore encompass the
14 vehicle. There are other rules of law coming into play
15 there.

16 Justice White, one point I wanted to make in
17 response to your question about couldn't they have gotten
18 an inventory search here. That's also true in Ross, Your
19 Honor. The -- having found the gun in the trunk of Mr.
20 Ross' car, the officers could have arrested him and
21 searched the entire vehicle as an inventory search. So
22 that that -- the fact that that avenue of analysis existed
23 in Ross did not preclude this Court in Ross from reaching
24 the issue, and I would hope it would not preclude the
25 Court in this case from reaching the issue.

1 In summary, we believe your decisions in Carney,
2 Ross --

3 QUESTION: I dissented in Ross.

4 MR. FOSTER: I beg your pardon.

5 QUESTION: I dissented in Ross.

6 MR. FOSTER: Yes, Your Honor, you did, but the
7 -- the other members of the Court didn't.

8 QUESTION: That's the rule.

9 (Laughter.)

10 MR. FOSTER: At any rate, Your Honor, this case
11 --

12 QUESTION: You would like it not to be, though?

13 MR. FOSTER: I would hope that the Chief
14 Justice's position in Chadwick and Sanders in the dissent,
15 along with Justice Blackmun, would become the majority
16 rule. We would urge you to reverse the decision of the
17 California court of appeal. Thank you, Your Honors.

18 QUESTION: Mr. Foster.

19 MR. FOSTER: Yes, Your Honor.

20 QUESTION: Not that it has anything to do with
21 this case, but do they ever use white or purple bags? Are
22 they always brown?

23 (Laughter.)

24 QUESTION: You've had a lot of experience. You
25 ought to know.

1 MR. FOSTER: I have always seen it to be the
2 ubiquitous brown paper bag, Your Honor. Occasionally, and
3 for some reason the drug dealers in California seem to be
4 this year favoring U-Haul boxes. But I -- I cannot tell
5 you the why or the reason.

6 (Laughter.)

7 MR. FOSTER: Thank you, Your Honors.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Foster.

9 The case is submitted.

10 (Whereupon, at 10:55 a.m., the case in the
11 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:

NO. 89-1690 - CALIFORNIA, Petitioner V. CHARLES STEVEN ACEVEDO

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BY *Raymond H. Hartel*
(REPORTER)

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