

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FLORIDA, Petitioner V. LUZ PIEDAD JIMENO AND
ENIO JIMENO

CASE NO: 90-622

PLACE: Washington, D.C.

DATE: March 25, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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FLORIDA, :

Petitioner :

v. : No. 90-622

LUZ PIEDAD JIMENO AND ENIO :

JIMENO :

-----X

Washington, D.C.

Monday, March 25, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:45 a.m.

APPEARANCES:

MICHAEL J. NEIMAND, ESQ., Assistant Attorney General of
Florida, Miami, Florida; on behalf of the Petitioner.

JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; as amicus
curiae, supporting the Petitioner.

JEFFREY S. WEINER, ESQ., Miami, Florida; on behalf of the
Respondents.

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1 PROCEEDINGS

2 (11:45 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 90-622, Florida against Luz Piedad Jimeno.

5 Mr. Neimand, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF MICHAEL J. NEIMAND

8 ON BEHALF OF THE PETITIONER

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

11 The respondents were lawfully stopped in Miami,
12 Florida for a traffic violation, and during that stop they
13 were advised that they were under suspicion for
14 transporting illegal narcotics in their automobile.
15 Thereafter they were asked for consent to search their
16 automobile for that narcotics. Pursuant to that request
17 the consent was granted and the officer went directly into
18 the passenger compartment and went to the brown paper bag,
19 which was a grocery bag, unrolled the paper bag and found
20 the cocaine in question.

21 The lower court found these facts. The lower
22 court also found that it could have been assumed by the
23 respondents that after they were advised that they were
24 looking for narcotics, that the officer would have gone
25 directly to the bag in question. The court found, though,

1 that it was bound by the Florida Supreme Court's prior
2 decision in State v. Wells that it did not allow -- that
3 consent did not allow the officer to open a container
4 within the passenger compartment. This court traveled
5 directly through the lower court, found again the same
6 findings of facts, and also found the same conclusion of
7 law. The Florida Supreme Court without argument affirmed
8 on the basis of State v. Wells. This Court then accepted
9 certiorari jurisdiction.

10 It is the state's contention in this case that
11 the scope of the -- of a consent is based upon the request
12 that is asked and the knowledge that the officer gets from
13 that. Therefore, in a situation such as this where they
14 are informed that they are looking for cocaine, or drugs,
15 as the case may be, they are further informed that they do
16 not have to consent if they do not wish. They were
17 further informed that if they did consent to the search
18 that during the course of the search that they could
19 choose at any time to terminate that search. And in this
20 case no actions were ever taken by the respondents to
21 terminate that search.

22 QUESTION: Mr. Neimand, what if the automobile
23 had contained a locked briefcase? How would you interpret
24 the consent then?

25 MR. NEIMAND: If that is a -- locked with a key,

1 then the, it probably would not be reasonable to assume
2 that the individual consented to have his property broken.
3 Under the theory of this Court of consent, the consent is
4 a voluntary nature to allow the citizenry to help police
5 ferret out crime, and it would not be reasonable, the
6 state submits, to assume --

7 QUESTION: May I ask then, are you agreeing that
8 the Wells case was correctly decided?

9 MR. NEIMAND: Only because the individual Wells
10 was not present at that time.

11 QUESTION: So you do agree Wells was correctly
12 decided?

13 MR. NEIMAND: Only on its facts.

14 QUESTION: But at least on its facts.

15 MR. NEIMAND: On its facts, yes. That's why we
16 did not --

17 QUESTION: And that's the only authority that
18 this -- the Florida court relied on in this case?

19 MR. NEIMAND: Correct.

20 QUESTION: When you answered Justice O'Connor
21 and you said that it's unreasonable to assume that there
22 would be consent to break the lock, did you mean that in
23 the technical sense of picking it or actually destroying
24 it? Suppose the police officer was a good lock picker and
25 he could just pick the lock?

1 MR. NEIMAND: I think that almost goes to the
2 same that if it was just clasp shut and you have a attache
3 case where you could just --

4 QUESTION: No. My hypothetical is this is a
5 good lock, but he's a good lock picker.

6 MR. NEIMAND: Well, if he doesn't destroy the
7 property. See, that's the key, the destruction of the
8 property. I don't think any reasonable person would
9 consent to have his property destructed. I think he would
10 be --

11 QUESTION: What about to simply have his lock
12 picked?

13 MR. NEIMAND: Well, he wouldn't consent to have
14 the lock picked, but it would not violate the
15 reasonableness because he had no property destruction.

16 QUESTION: I know, but it goes to what the scope
17 of his consent was.

18 MR. NEIMAND: The scope would be determined by
19 what he was asked to look for.

20 QUESTION: Well, where do you come out on the
21 question? Does he consent or does -- is the search lawful
22 or is it not lawful if there is a strong lock but the
23 office is able to pick it?

24 MR. NEIMAND: In terms of a reasonableness
25 approach, that would probably be unlawful as to the scope

1 of the search because there was a protection interest
2 involved and there would be somewhat of a destruction of
3 the property.

4 QUESTION: How about opening a woman's handbag?
5 It's a female driver who consents to letting the car be
6 searched. She has a handbag with her.

7 MR. NEIMAND: I don't think there's a problem
8 there, because it would not be locked. It would be no
9 different than a brown paper bag in this situation. You
10 would just open up the handbag and look in the handbag.
11 There would be no unreasonableness involved if you were
12 asking to search for a --

13 QUESTION: What about a man's wallet that's
14 still in his jacket pocket?

15 MR. NEIMAND: Again, I don't believe that would
16 be unreasonable if you're looking for a particular item.
17 Now, drugs probably would not be located in the wallet.

18 QUESTION: You mean by allowing -- when I
19 consent to have a policeman search my car, I am also
20 consenting to a personal search?

21 MR. NEIMAND: Well, it would not be a personal
22 search.

23 QUESTION: It wouldn't? I mean, he reaches in
24 and he grabs my wallet.

25 MR. NEIMAND: I would say that under the law

1 that in order to touch a person you have to have some sort
2 of reasonable suspicion. I misunderstood the question.
3 If the wallet were lying on the dashboard, similar to a
4 purse which would be lying on the --

5 QUESTION: I see.

6 MR. NEIMAND: -- seat of the car, then that
7 would be permissible.

8 QUESTION: Well, but you have already abandoned
9 in -- I think in your answer to Justice Kennedy and in
10 your current answer, the proposition that the only
11 determinant of the scope of the search is what you're
12 looking for. That once you -- once you tell the person in
13 the car what you're looking for, that determines the
14 scope. If you're looking for beads you can look in very
15 small containers. If you're looking for elephants you
16 can't.

17 MR. NEIMAND: No, the State has not abandoned
18 that. That is --

19 QUESTION: Well, but you're using something else
20 in telling me that you can't -- I mean, my, I am in the
21 car. My wallet is in the car, in my jacket. My jacket's
22 in the car. But you're saying the consent does not
23 reasonably extend to that, right?

24 MR. NEIMAND: I think you would have to ask --
25 because you're saying may I look into your car, you're not

1 saying may I search your person.

2 QUESTION: Oh, all right.

3 MR. NEIMAND: And that's the difference.

4 QUESTION: I see. And so --

5 MR. NEIMAND: And if I wanted to search a person
6 I would ask to consent to search the person.

7 QUESTION: Likewise, when you say may I look
8 into your car, I assume your answer to Justice Kennedy
9 implied, it does not say may I -- may I look into locked
10 trunks in your car, right? It doesn't --

11 MR. NEIMAND: I can extend to that based on the
12 factual circumstances of a particular case.

13 QUESTION: Your answer to him was you couldn't
14 pick the lock, right? You could not.

15 MR. NEIMAND: Again, what I would say, that it
16 would depend on the facts or circumstances. If I went to
17 the lock and I tried to open it, and I went with a lock
18 pick and the defendant or respondent will consent he was
19 there while I was doing that and there was no termination
20 of consent, or they basically assented to my conduct, then
21 that would be a further consent to --

22 QUESTION: Oh. Well, what happened with the
23 paper bag here? Was there any objection when --

24 MR. NEIMAND: No, sir.

25 QUESTION: Well, why don't you use that ground

1 here instead, I mean, you could say no matter what the
2 initial permission was, when there was no objection to
3 looking in the bag, I guess, was that permission to look
4 in the bag?

5 MR. NEIMAND: Well, under the terms here it was,
6 because they were told --

7 QUESTION: Or does that only work for trunks and
8 not for bags?

9 MR. NEIMAND: No. They were told in this case,
10 Your Honor, that you may at any time during our search
11 terminate the search on any item. So obviously in this
12 case, on these facts, that would have worked in that
13 situation as well. The fact of the matter is, though,
14 that the lower courts did not go that far. They said
15 that, simply that once you get the consent it goes to the
16 entire -- only the compartment and no containers within
17 that compartment.

18 And they applied a per se rule in that instance
19 that you could not go any further than looking into the
20 car. Their basic approach was that you could stick your
21 head in and look around for the narcotics, even though
22 they were --

23 QUESTION: Well, after they found the narcotics,
24 what use was there in looking in the rest of the car?

25 MR. NEIMAND: Well, there might have been more

1 narcotics in the car.

2 QUESTION: There might have been what?

3 MR. NEIMAND: At the time they located the
4 narcotics in the car, that gave them probable cause to see
5 if there was narcotics --

6 QUESTION: Yeah, but why did they have to look
7 for something else after they found narcotics?

8 MR. NEIMAND: But they didn't. In this case
9 they exactly went to the paper bag. And once they found
10 the paper bag, that was it, they were arrested. They did
11 no -- did not do any further search.

12 QUESTION: They didn't search any further?

13 MR. NEIMAND: No, sir.

14 QUESTION: Because they didn't need to, did
15 they?

16 MR. NEIMAND: In this case, because of the
17 facts, the respondents were under suspicion for
18 transporting that, those drugs in that paper bag. But
19 just because there was suspicion that that bag contained
20 drugs, they did not have to ask specifically to search
21 that drug, because the search itself, the consent to
22 search itself was valid and they kept within the scope of
23 that search.

24 QUESTION: Why was the search valid?

25 MR. NEIMAND: Because there was a valid consent.

1 Consent in this case is not at issue. The only person who
2 --

3 QUESTION: Well, but isn't it at issue to this
4 extent, the scope of the consent? I mean, I understand it
5 makes -- doesn't it make some difference what the
6 officer's question is? If he says, for example, may I
7 look in your back seat, and the driver says sure, does
8 that sure mean he may also open containers in the back
9 seat?

10 MR. NEIMAND: It can. A general consent can.
11 It depends really on the facts. A general consent may --

12 QUESTION: Well, what were the facts in this
13 case? What precisely did the officers say and what did
14 the driver respond?

15 MR. NEIMAND: The facts showed that this officer
16 overheard some conversations at a phone booth --

17 QUESTION: But -- I understand he has reason for
18 -- I just want to know what he said. What were the words
19 that gave rise --

20 MR. NEIMAND: He said may I search -- we believe
21 you are transporting narcotics. We are searching for --
22 may we search your car for illegal narcotics? And the
23 consent was yes, you may. And it was a very definite
24 request and a very definite answer of yes. There was no
25 hesitation. He was further told, once again, that he did

1 not have to consent, and if he did consent he could
2 terminate that consent at any time if he did not want
3 anyone to go into any part of --

4 QUESTION: Are these in the findings? Because
5 these facts aren't in that much detail in the briefs.

6 MR. NEIMAND: This is the fact that is found by
7 the lower court.

8 QUESTION: I see.

9 MR. NEIMAND: In the order of the trial court in
10 the special hearing, this --

11 QUESTION: And where was the paper bag?

12 MR. NEIMAND: The paper bag, I believe, was in
13 the, either in the back or the front seat on the floor.
14 Just rolled up, it wasn't sealed, stapled shut, or
15 anything in that nature. It was a --

16 QUESTION: But it was brown?

17 MR. NEIMAND: Yes. I did read Acevedo. It was
18 another brown paper bag. So that it was lying on the
19 floor in, basically in plain view. They did not have --
20 the officer did not have to go through any tearing of any
21 seats, going under any seat --

22 QUESTION: What if the top of the bag had been
23 glued together so they couldn't get in without tearing it?
24 Could they have torn it?

25 MR. NEIMAND: They probably could have, had they

1 not destroyed the bag. If it was not that strong of a
2 glue, or any type of a glue --

3 QUESTION: No, they had to -- just, I assume you
4 have to tear the bag to see what's inside it, and look
5 through the hole.

6 MR. NEIMAND: There should be no problem on
7 that. It's not really a destruction of property.

8 QUESTION: No problem which way?

9 MR. NEIMAND: To be able to do that, because
10 it's just a brown paper bag, easily purchased at any
11 grocery store with any kind of grocery items. It comes
12 along with it. It's not as if it's a suitcase --

13 QUESTION: But if it were a silk purse it would
14 be different?

15 MR. NEIMAND: I think there would be an
16 expectation, a reasonable expectation that the police
17 would not rip up your silk purse. You spent some good
18 money for that.

19 QUESTION: So the test isn't whether you have to
20 damage the item to look inside it, but whether you damage
21 it enough so it might bother the owner?

22 MR. NEIMAND: I believe so. I believe --

23 QUESTION: He doesn't have to stop and say do
24 you mind if I tear the bag and take a look inside?

25 MR. NEIMAND: It would help, obviously.

1 QUESTION: Well, sure it would help.

2 MR. NEIMAND: But I don't think they have to,
3 no.

4 QUESTION: A burlap bag is presumably somewhere
5 in between, right?

6 (Laughter.)

7 MR. NEIMAND: It could be. Then again, you
8 might be able to see right through the burlap bag. It
9 depends on how it has been handled.

10 QUESTION: But what if you can't?

11 MR. NEIMAND: If it's shut and -- I believe you
12 can. I believe it could be the nature of the item that
13 we're looking at. Again, we're talking about destruction
14 of personal property, and you're really not destroying
15 that personal property because it's just a paper bag or
16 it's just a burlap bag which you can refold over and close
17 up and go on your way.

18 QUESTION: It's my bag. I mean, what do you
19 care how valuable it is? It's my bag. What right do you
20 have to destroy it? I didn't give you any authority to
21 destroy my bag. I don't care how valueless it is. It's
22 mine.

23 MR. NEIMAND: But you consented for me to look
24 into it.

25 QUESTION: To search. I didn't consent to you

1 to destroy a single thing.

2 MR. NEIMAND: But it's not a total destruction.

3 QUESTION: Cheap or expensive, I gave no such
4 consent.

5 MR. NEIMAND: But it's not a total destruction.
6 It's merely an opening of the glue or the staples or the
7 rope that is tied around it. We're not talking about
8 total destruction of the property. We're talking about
9 simply being able to open that property.

10 QUESTION: So you at least wouldn't rip the bag?
11 You wouldn't rip the bag?

12 MR. NEIMAND: No. We would not attempt to
13 destroy the property whatsoever. We try to get into the
14 property as easily as possible without destroying your
15 personal property, because obviously you're not going --
16 an individual is not going to consent for the police to
17 destroy their personal property.

18 QUESTION: Mr. Neimand, it's your position that
19 no pressure at all was used against the bag?

20 MR. NEIMAND: In this case no pressure? No,
21 sir.

22 QUESTION: No threats or no anything?

23 MR. NEIMAND: No. The facts do not show that.

24 QUESTION: The man himself knew that he had
25 narcotics?

1 MR. NEIMAND: Yes, sir.

2 QUESTION: And he knew that this man was looking
3 for narcotics?

4 MR. NEIMAND: Yes, sir.

5 QUESTION: And that if the man found narcotics
6 he was going to jail?

7 MR. NEIMAND: Yes, sir.

8 QUESTION: Why did he say yes, look?

9 MR. NEIMAND: There is many reasons.

10 QUESTION: Sir?

11 MR. NEIMAND: There are many reasons. He might
12 be bluffing.

13 QUESTION: I'm listening.

14 MR. NEIMAND: He might be bluffing, he might
15 feel that --

16 QUESTION: He's bluffing?

17 (Laughter.)

18 MR. NEIMAND: That's right. He might say if I'm
19 cooperating they might not go that far. That's right.
20 Drug dealers are not very smart, because if they were they
21 wouldn't be getting caught. They might have been
22 counseled by their attorney that they can't go that far.

23 QUESTION: Well, let's not get into how many are
24 not caught.

25 MR. NEIMAND: There are many reasons why an

1 individual would consent.

2 QUESTION: We'll recess here until 1:00 p.m.

3 Thank you.

4 (Whereupon, at 12:00 noon, oral argument in the
5 above-entitled matter was recessed, to reconvene at 1:00
6 p.m., this same day.)
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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: Mr. Neimand, you may
4 proceed with your argument in Florida against Jimeno.

5 MR. NEIMAND: If there are no further questions
6 at this time, I wish the remaining time for rebuttal.
7 Thank you.

8 QUESTION: Very well. Mr. Roberts.

9 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

10 ON BEHALF OF THE UNITED STATES,

11 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

12 MR. ROBERTS: Thank you, Mr. Chief Justice, and
13 may it please the Court:

14 Respondent raises two objections to the
15 admissibility of the cocaine. The first focuses on the
16 officer, what he really knew as opposed to what he said in
17 asking for consent, and the second focuses on the
18 defendant, what he must have meant as opposed to what he
19 said in giving consent.

20 First the officer. Respondent argues that the
21 officer knew that what he was looking for was in the bag,
22 and that therefore he should have asked for consent to
23 search the bag. Respondent surmises that the officer
24 didn't do so because Jimeno probably would not have given
25 that consent. Well, that's probably right, but there's

1 nothing in the Fourth Amendment that requires the police
2 to disclose to a suspect everything they know about him
3 before asking for consent.

4 QUESTION: Did you say it's probably right that
5 if he had known he was asking to search the bag he would
6 have refused?

7 MR. ROBERTS: No. I said it was probably right
8 that if the officer asked for consent to search the bag,
9 the defendant probably would have refused.

10 QUESTION: I thought the position of the State
11 was that they did ask for consent to make a search that
12 necessarily included the bag?

13 MR. ROBERTS: That's exactly right, but those
14 are two very different things. If I -- the officer comes
15 up and asks for consent to search the car, you don't know
16 that he's on to you. You don't know that he knows about
17 the bag.

18 QUESTION: But do you know that he means to
19 search the bag?

20 MR. ROBERTS: In the exchange I am conducting an
21 investigation for narcotics, may I search your car, go
22 ahead, I have nothing to hide, reasonably conveys consent
23 to search containers in the car that might contain the
24 object of the search.

25 QUESTION: Do you think it means he intended to

1 give consent to search the bag or not?

2 MR. ROBERTS: He did not limit the consent he
3 gave.

4 QUESTION: Well, I understand, but what do you
5 think his actual intent was?

6 MR. ROBERTS: I think his intent was to give a
7 general consent to search the car.

8 QUESTION: No, do you -- what do you think his
9 actual intent was with respect to searching the bag?

10 MR. ROBERTS: I think, as the district court
11 found in this case, he could have assumed that the officer
12 intended to open the bag. Yes.

13 QUESTION: Okay, you don't ask --

14 MR. ROBERTS: I'll try again. I think he did,
15 in the consent he gave -- he recognized --

16 QUESTION: But that wasn't my question. My
17 question was what do you think his actual intent was with
18 respect to having the bag searched?

19 MR. ROBERTS: I think he hoped that the officer
20 would not search the bag, but that in giving a general
21 consent to search -- he may have harbored the hope that
22 the officer wouldn't search the bag, but he did not impose
23 that limitation on the general consent that he gave.

24 QUESTION: I understand that. But why do you
25 say then that you think if he asked if he could search the

1 bag he would have said no?

2 MR. ROBERTS: Because then Jimeno would have
3 realized that the officer was on to him, that he knew
4 about the bag, that he knew that the bag contained
5 narcotics. The officer --

6 QUESTION: But that seems to me to contradict
7 the finding of the district court that the defendant -- I
8 think the district court said could have assumed that the
9 intent -- the defendant could have assumed that the
10 officer would have searched the bag.

11 MR. ROBERTS: That's right. And in giving --

12 QUESTION: How does that square with your answer
13 that he, he would not have given the consent if it had
14 been asked for? I don't see how you square those.

15 MR. ROBERTS: Two different situations. I think
16 if you ask for consent to search the car and you give that
17 consent without limitation, you can assume that if the
18 officer does go ahead with the search and comes across the
19 paper bag that he will have understood your consent to
20 include opening the paper bag.

21 Now, in a different case, if you had gone ahead
22 and said can I search the paper bag on the floor of the
23 passenger side of the car, the defendant would probably
24 realize that the police were on to him at that point and
25 wouldn't have given that consent. That doesn't mean that

1 when he gives a general consent to search the car he is
2 not also conveying a consent to open closed containers
3 that are found within the car.

4 The respondent's position --

5 QUESTION: You don't necessarily say that that
6 includes purses as well, do you?

7 MR. ROBERTS: You mean if there were -- the
8 passengers remained in the car?

9 QUESTION: The question that Justice O'Connor
10 asked.

11 MR. ROBERTS: No, I don't, Your Honor. I think
12 it's --

13 QUESTION: You could draw a line between the
14 paper bag and a purse?

15 MR. ROBERTS: Oh, purse. I'm sorry. I thought
16 you said persons. I'm sorry.

17 QUESTION: A purse.

18 MR. ROBERTS: Oh. I think the general consent
19 would include a purse that was left in the car that was
20 closed --

21 QUESTION: It wasn't left in the car. It is
22 being clutched in the hands of the woman passenger.

23 MR. ROBERTS: Well, and if she is still in the
24 car, I would say no, it would not necessarily include
25 consent to search that, because that's more --

1 QUESTION: Okay. Right.

2 MR. ROBERTS: -- that's with her as opposed to
3 being in the car.

4 QUESTION: What if it's just lying next to her
5 on the seat?

6 MR. ROBERTS: Well, then I think the general
7 consent does include that, because it's not --

8 QUESTION: Oh, it depends on whether she is
9 holding it or it's next to her on the seat? My goodness.

10 MR. ROBERTS: Well, I think when it's holding
11 her, it's reasonably understood to be part of her person,
12 and a general consent to search the car does not include a
13 search of the person. But if it's just lying in the car,
14 then I think it's reasonably understood that general
15 consent would include that. Now, of course they don't
16 conduct a search of the car with people in it. They ask
17 the people to leave before undertaking the search.

18 QUESTION: But any container they leave in,
19 suitcase, briefcase, purse, general consent includes it?

20 MR. ROBERTS: Yes. Yes, Your Honor.

21 QUESTION: You think that's a realistic
22 assumption?

23 MR. ROBERTS: I think so, yes. Now, as Justice
24 Marshall asked this morning, why in the world, and
25 respondent renews this argument, would anyone give such a

1 consent if they knew that they were carrying drugs, and
2 there are many reasons. They do bluff. Go ahead, I have
3 nothing to hide.

4 QUESTION: Do you have a single case where a man
5 said you can search the car but you can't search that
6 paper bag, that brown paper bag?

7 MR. ROBERTS: No, I'm not aware of any case that
8 would be --

9 QUESTION: Well, why do you think it's proper to
10 say so?

11 MR. ROBERTS: Well, if he didn't want --

12 QUESTION: Is it a possibility?

13 MR. ROBERTS: It is a possibility that --

14 QUESTION: But it's not a probability?

15 MR. ROBERTS: No. If the defendant didn't want
16 the car searched he could have said no.

17 QUESTION: Have you any case where the man
18 refused to let you search the car at all? Why is it true
19 that every time you come up you say please, I'm looking
20 for dope, and the guy says it's right here? Does that go
21 for every case?

22 (Laughter.)

23 MR. ROBERTS: That's not what took place here,
24 of course. I think the --

25 QUESTION: That's not true for every case? My

1 answer -- my question is do you have one case where it
2 didn't happen?

3 MR. ROBERTS: Where the people refused consent?

4 QUESTION: Yes.

5 MR. ROBERTS: I am not aware of any immediately,
6 but I am sure that there could be a case. There is
7 nothing to prevent that from happening. The defendant
8 could have done it in this case, or he could have limited
9 the search, or, as I say, he could have refused the
10 consent altogether. Now, why would he consent? Because
11 they bluff. Go ahead, I have nothing to hide. The
12 officer, why bother, he obviously doesn't have anything to
13 hide.

14 QUESTION: Is your argument that an objective
15 test applies and that in these circumstances a reasonable
16 officer would assume that he had the right to search the
17 bag as well as the interior of the car? Is that your
18 submission?

19 MR. ROBERTS: Exactly. And under Illinois v.
20 Rodrigues --

21 QUESTION: I understand that submission. I
22 can't really square it with your answer that you could
23 have assumed that the -- if he had been asked he would not
24 have given his consent. I just can't square those.

25 MR. ROBERTS: Well, they're two different

1 situations. If you come up and the officer says can I
2 have your consent to search that brown paper bag on the
3 floor of the passenger side that you took out of the
4 apartment building an hour ago when we were watching you,
5 the defendant at that point knows he knows where it is,
6 he's going to find it. If he says can I search your car,
7 you don't know what he's searching for, you may hope he
8 doesn't search after you have evidenced your willingness
9 to go along with it, you may hope he doesn't find it. You
10 may hope your cohorts have hidden it better. Keep in mind
11 that there were two people in the car after Mr. Jimeno got
12 out and went around and talked to the officer. Maybe he
13 had hoped in the interim they would have hidden it better,
14 or maybe he was preparing a defense of lack of knowledge.
15 Maybe the --

16 QUESTION: So, it's really a different case
17 you're talking about when you say if he had asked to
18 search the bag he would not have given his consent?
19 You're talking about -- it becomes a different case
20 because by asking to search the bag you give him knowledge
21 that this defendant didn't have?

22 MR. ROBERTS: That's right. And there's nothing
23 in the Fourth Amendment that requires the police to show
24 all their cards before they ask an individual for consent.
25 That's contrary to this Court's teaching in cases such as

1 United States against Scott, which hold that objective
2 facts and not the officer's subjective motivations are
3 determinative for Fourth Amendment purposes.

4 Now, every court of appeal, every Federal court
5 of appeals to have considered facts similar to those
6 presented here has concluded, without dissent, that the
7 general consent to search the car includes consent to open
8 closed containers within the car, unclosed, unlocked
9 containers. The decision of the Florida Supreme Court is
10 to the contrary, and we think that that decision should be
11 reversed.

12 Now there are limitations on the search. It's
13 not a free-ranging consent. The limitations can come from
14 the request, I am searching for illegal aliens, may I
15 search your car. That would not be reasonably understood
16 to include opening the glove compartment.

17 QUESTION: Do you agree with Florida that on its
18 facts the Florida Supreme Court correctly, or I guess the
19 court of appeals, correctly decided Florida against Wells?

20 MR. ROBERTS: Yes, Your Honor, because that
21 involved a locked container. And while it's reasonable to
22 construe a general consent to cover opening closed
23 containers, we don't think it's reasonable to assume that
24 an individual would voluntarily consent to the destruction
25 of their property.

1 QUESTION: What if it could be opened, say an
2 ordinary briefcase but not locked, just closed and snapped
3 normally. What do you do with that case?

4 MR. ROBERTS: That's, we think, no different
5 than the rolled-up paper bag. And that, since it's
6 unlocked, can be opened. And we think -- the general
7 consent to search the car, if it didn't include closed
8 containers, would, as the Court pointed out in the opinion
9 in Ross, not a consent case, would be a fairly meaningless
10 right, because contraband, particularly narcotics, is not
11 strewn about the car. It is kept in containers. And
12 therefore when Jimeno, in response to the question I am
13 conducting a narcotics investigation, may I search your
14 car, sure, go ahead, I have nothing to hide, I think he
15 knew that that reasonably, the officer would understand
16 that to include consent to look in the closed containers.

17 Thank you, Your Honor.

18 QUESTION: Thank you, Mr. Roberts. Mr. Weiner,
19 we'll hear now from you.

20 ORAL ARGUMENT OF JEFFREY S. WEINER

21 ON BEHALF OF THE RESPONDENTS

22 MR. WEINER: Mr. Chief Justice, and may it
23 please the Court:

24 This case is about respecting privacy, being
25 faithful to the interpretation of the Fourth Amendment,

1 and at the same time not hampering law enforcement. In
2 1982 Justice Stevens, speaking for the Court in United
3 States against Ross, stated that we reaffirm the basic
4 rule of the Fourth Amendment jurisprudence stated by
5 Justice Stewart for a unanimous court in *Mensie v. Arizona*
6 citing *Katz*. Searches outside the judicial process are
7 per se unreasonable under the Fourth Amendment, subject to
8 only a few specifically established and well-delineated
9 exceptions. The only one applicable here is consent.

10 In discussing *Chadwick*, Justice Stevens noted
11 that this Court recognized that a person's expectation of
12 privacy in personal luggage is substantially greater than
13 in an automobile. Justice Marshall said a container, as
14 opposed to the car itself, does not reflect diminished
15 privacy interest.

16 Three courts below, the trial court, the
17 intermediate appellate court, and the Florida Supreme
18 Court all found that the respondent never consented to
19 allow Office Trujillo to search the closed brown paper
20 bag.

21 QUESTION: Well, counsel, it -- the Florida
22 Supreme Court appears to have established here some kind
23 of a per se rule when it said that consent to search a
24 vehicle does not extend to closed containers found inside.
25 It seems to take the view that it -- even under an

1 objective standard, that consent would never include
2 authority to open a bag.

3 MR. WEINER: I think that is a fair reading of
4 the supreme court's decision. I --

5 QUESTION: Do you think that's consistent with
6 this Court's cases?

7 MR. WEINER: Yes, Your Honor, I do, because I
8 don't believe that, although the Solicitor General urges
9 that an objective test be implemented, that that's the
10 case. The subjective intent --

11 QUESTION: I thought in U.S. v. Ross this Court
12 indicated that a lawful search of a car includes the right
13 to search containers within it.

14 MR. WEINER: That is precisely correct, Your
15 Honor, but that was a case in which there was probable
16 cause to believe that contraband was contained in the
17 vehicle.

18 QUESTION: Well, don't you think that consent is
19 the equivalent of probable cause? It gives the same
20 authority?

21 MR. WEINER: No, Your Honor, I do not.

22 QUESTION: No?

23 MR. WEINER: Consent is valid only to the extent
24 that the consent is given for. So when the Florida
25 Supreme Court says that consent to search the car does not

1 include consent to open packages, that is entirely
2 consistent with an objective and/or a subjective reading
3 of what the individual consenting believes.

4 QUESTION: It just seems to me that the court
5 went beyond any precedence of this Court in saying the
6 consent just can't include authority to open a bag.

7 MR. WEINER: I don't think the Florida Supreme
8 Court necessarily said that. I believe what the court
9 said and what, at least we submit to the Court, is that if
10 the police officer says may I search your car and the
11 contents thereof, then there is no problem. But when the
12 request is simply limited to searching the vehicle, it
13 cannot and should not be implied that that includes
14 personalty and other things that might be in the car.

15 QUESTION: Well, so you think a search of the
16 vehicle that is consented to, then, simply means to search
17 for things that might be spread over the seat or something
18 like that?

19 MR. WEINER: Not necessarily. Mr. Chief
20 Justice, there have been several cases in which searches
21 of vehicles included searches behind the seats, searches
22 under visors, under mats where evidence has been found,
23 and so it's quite an extensive search that is permitted by
24 a consent to search a car.

25 QUESTION: Although all that you can find, if

1 you go that far, even behind the seats, the visors, into
2 the seats, it's okay if you find loose powder, loose
3 cocaine powder. But if you find a packet that has
4 something in it that rather feels like cocaine powder, but
5 you don't know for sure, you can't open the packet?

6 MR. WEINER: Well, that's not necessarily so.
7 As I understand the law, if they are, if they have valid
8 consent to search the car, in the car they then come
9 across an object which by feel, by smell, by shape gives
10 them probable cause, then Ross would kick in and they
11 would have an absolute right to make a search incident to
12 an arrest without the necessity of a warrant, unless they
13 previously focused on the package, which would have been
14 the case here if they had probable cause.

15 QUESTION: I see. It's not a search of the
16 package to squeeze it and feel it? That does not
17 constitute a search of the package?

18 MR. WEINER: Under Arizona v. Hicks it is
19 arguable that that is a search. However --

20 QUESTION: But that was their mistake here, they
21 didn't feel the paper bag first. Had they just squeezed
22 the paper bag a couple of times, then it would have been
23 okay?

24 MR. WEINER: I think that's precisely correct,
25 and they could have -- when they had consent to search, if

1 he went to the paper bag -- my feeling is he still would
2 have had to say may I look in the bag, or may I look in
3 the containers. But once he had permission even to search
4 the car, he had a right to move the bag to do the search
5 of the car. If at that point he had probable cause, he
6 could go further.

7 Or as Justice O'Connor suggested in the Place
8 case, they could have brought in a drug dog to sniff the
9 car. There were many, many options available to the
10 police officer. He took none of them, except going
11 straight to the bag. And this --

12 QUESTION: I am trying to think what the
13 reasonable import of my expression is when I tell somebody
14 he can search the car for cocaine. I cannot imagine it
15 does not mean that he can look inside packages. Nobody
16 carries cocaine strewn about, powder loose on the floor.
17 It seems to me I'm reasonably saying if you can find a
18 package that contains it, go ahead.

19 MR. WEINER: Justice Scalia, there are many,
20 many cases at the trial and appellate levels in which
21 cocaine and other contraband is found under mats, in
22 glycine packages which are clearly visible, or the shape
23 or size or smell of which clearly leads to probable cause.
24 So this doesn't hamper law enforcement.

25 What it does is not only allows the police to

1 look into containers, but as you suggested, into wallets.
2 And when the magic word narcotics is used, it allows them
3 to go even further. It allows them to go inside a little
4 plastic sleeve that contains pictures, because narcotics
5 could be there. It allows them in a purse to go into a
6 little compact, a make-up compact.

7 QUESTION: That's assuming those are lying on
8 the seat rather than -- I mean, no one has suggested, I
9 don't believe, that the sort of consent given here would
10 authorize the search of the wallet contained in the jacket
11 of the driver when he got out of the car.

12 MR. WEINER: I thought the State pretty much
13 indicated that's what they had in mind. The Solicitor
14 General said no. But if anything is left in the car,
15 that's precisely what would be the case. And that is why
16 when someone says you can search the car, I don't think
17 it's reasonable to assume they mean you can search
18 everything.

19 And what we're suggesting is here, here, is why
20 should the trial court, why should the appellate courts,
21 why should anyone guess when all the officer has to say is
22 may I search the bag. May I search your wallet.

23 QUESTION: All your client had to say is, when
24 he reached for the bag, was hey wait a minute, I said you
25 could search the car, but not the bag. And that would

1 have stopped it right away, wouldn't it?

2 MR. WEINER: Well, it might have stopped it,
3 probably would have stopped it, but the burden shouldn't
4 be on a citizen to stop a police officer. Here we have
5 three individuals who were stopped, number one, for a
6 traffic violation. They had not yet been given the
7 citation.

8 Number two, although the officer said in the
9 testimony they were free to leave, they couldn't have left
10 while awaiting the issuance of the citation. And in
11 addition, the police officer said we believe you have
12 narcotics in the car, we want to search the car for
13 narcotics. Hardly a situation where a citizen would say
14 please don't look in that bag, stop the search. With all
15 due respect, Justice Scalia, I think it's unrealistic to
16 assume that a citizen is going to exercise their rights in
17 that fashion.

18 QUESTION: Well, but then that's just saying
19 that our consent law is wrong. That, you know, more
20 advice is required than was required in Schneckloth, for
21 example.

22 MR. WEINER: Well, I submit to the Court that
23 that, in this situation it would be entirely proper for
24 this Court to come down with a bright-line rule saying if
25 you want consent to search you must ask for consent to

1 search the items in question. What could be the harm?

2 QUESTION: But that's contrary to the thrust of
3 Schneckloth, and I think contrary to the thrust of Scott
4 against United States, too, where you're talking about an
5 objective standard, reasonable inferences to be drawn
6 from. Why not just leave it at that? Because your client
7 would lose this case, of course.

8 MR. WEINER: I don't think that it's contrary to
9 Schneckloth. It goes a little further than Schneckloth.
10 Schneckloth said totality of the circumstances. The fact
11 that an individual was not advised of his rights can be
12 considered as a factor. What we are suggesting is, even
13 among this Court I presume, most respectfully, that there
14 is a real question here, what does it mean when I say you
15 can search my car. Why guess? The easy way to deal with
16 it is to simply have the officer say what he wants to do.
17 It doesn't hamper law enforcement.

18 QUESTION: (Inaudible). If you're searching the
19 car and you see a holster, would you have a right to go in
20 and see if there was a gun in the holster?

21 MR. WEINER: Absolutely. Under Terry v. Ohio --

22 QUESTION: Second question. If you find a brown
23 paper bag, which every law enforcement officer in the
24 country knows usually has narcotics, would that give you a
25 right to open it?

1 MR. WEINER: No, sir.

2 QUESTION: Why not?

3 MR. WEINER: Because their character --

4 QUESTION: What's the difference between the
5 two?

6 MR. WEINER: The difference is that the intended
7 use of a holster could, is for a weapon, which in many
8 cases is a violation of the law if it's concealed. A
9 paper bag, much as in the case that Justice Scalia wrote,
10 Arizona v. Hicks regarding the stereo component, is not
11 inherently a suspicious item in spite of the fact that
12 there have been several cases in which brown paper bags
13 have contained contraband.

14 QUESTION: Have you ever seen a white bag?

15 MR. WEINER: No, sir. I have see some green
16 bags, but no brown bags -- or, excuse me, no white bags.
17 Instead of asking for consent to search the brown paper
18 bag here, he only asked to search the car itself.

19 What concerns me is that the State of Florida in
20 their brief, the Solicitor General in their brief, never
21 mentioned the fact that the officer stated in clear and
22 unquestioned terms at the motion to suppress that he
23 wanted one thing. He wanted in the bag. The minute
24 consent was given to search the car, he went to the
25 passenger door, opened it up, went right to the brown

1 paper bag, opened it up, and went in. Deception by the
2 officer in not asking for permission to search the brown
3 paper bag should not be condoned by this Court.

4 QUESTION: Why do you call that deception? He
5 told them he was looking for narcotics. He asked for
6 permission to search the car. Permission to search the
7 car would give him access to the bag.

8 MR. WEINER: It's deceptive because, as in
9 Chadwick, as in Arkansas v. Sanders, as in Oklahoma v.
10 Castleberry, all decided by this Court, this officer's
11 focus had been on the package, incidental to the car,
12 before it ever got to the car. That's what he was after,
13 that's all he wanted.

14 QUESTION: None of those cases say you must
15 identify with particularity something that could also be
16 covered by a more general consent.

17 MR. WEINER: That is true. However, those are
18 cases in which a warrant was required. So particularity
19 is necessarily required in applying for the warrant. In a
20 consent situation we have the exact antithesis. We have a
21 citizen giving up their Fourth Amendment rights.
22 Therefore, in order to give it up and exercise
23 intelligently their waiver or relinquishment of a right,
24 they should at least know what the officer is going for.
25 The standard shouldn't be less.

1 QUESTION: So you say this case should come out
2 the way you want even if the -- even if the officer had
3 said do you mind if I search packages in your car?
4 Because even then he would have been deceptive. He really
5 wasn't at all concerned about other packages. All he was
6 concerned about was the proverbial brown paper bag, right?

7 MR. WEINER: I think if he said that it would be
8 just fine. And then --

9 QUESTION: But not according to your -- to the
10 theory you're saying now. You're saying that that would
11 still be deceptive because he really wasn't interested in
12 all packages. He knew, or suspected there was something
13 in that brown paper bag.

14 MR. WEINER: Yes, sir, but packages would
15 include notification that he is going to any packages.

16 QUESTION: But that's --

17 MR. WEINER: Now --

18 QUESTION: That's what the argument is here.
19 That when you say search the car that includes
20 notification that it means search whatever packages are in
21 the car. I mean, that's just back to your first argument.
22 It's not an additional argument.

23 MR. WEINER: In the example you gave there is
24 one of two things that could happen. May I search all
25 packages? Yes. They go straight to the package in

1 question. If the package in question is the package in
2 this case, he would have to get a warrant under Chadwick
3 and Arkansas v. Sanders, which is good law according to
4 this Court as recently as in Ross and -- there's no
5 question. But that's not the only option.

6 The other options, as we discussed, is that they
7 have every right if, in searching the other packages, they
8 smell or feel something to go further and then possibly
9 parlay that into a search of a car based on Ross, based on
10 numerous other exigent circumstances which would allow the
11 search on the spot. So law enforcement gives up nothing
12 and loses nothing.

13 We submit that a genuine intelligent consent
14 should relate to the item to be searched, and not some
15 general, vague, overbroad statement that we'd like to look
16 in the car. Much the same as if somebody is walking down
17 the street and a police officer approaches them and says I
18 would like to search you, does that mean they can search
19 the briefcase or the purse or the knapsack or the fanny
20 pack or anything else on that person? I think not.

21 This case is a first party consent case.
22 Justice Blackmun, concurring in Ross, said it's important
23 for law enforcement officials and defendants that the
24 applicable rules be well established. We submit that an
25 appropriate rule would be that anytime a person manifests

1 their expectation of privacy by utilizing some layer or
2 form of concealment of the thing or place to be searched,
3 the officer must ask to search that item or place in order
4 to have a valid consent. It would certainly make life
5 easier for trial judges, as well as appellate court
6 judges, because no one would have to guess.

7 QUESTION: Well, any clear rule would, Mr.
8 Weiner. It seems to me the rule that the Government
9 contends for here would be equally clear. It's just that
10 the objective test, what are the normal expectations. I
11 don't think your rule gains in clarity. It may have some
12 other virtues, but it doesn't seem that your proposed rule
13 is any clearer than the Government's.

14 MR. WEINER: Well, the Government, as I recall,
15 had a rough time answering Justice Kennedy's question
16 whether if they had a lock pick expert to break in without
17 doing damage, whether that was okay. So they themselves
18 don't even know what the limits would be. The Solicitor
19 General suggests damage, but then in a footnote he seems
20 to indicate that if it's a damage to a paper bag because
21 of the tearing of tape it's okay. So in other words if
22 the bag doesn't rise to a level of importance or money,
23 like the silk bag that they were talking about, that's not
24 entitled to the same protection.

25 QUESTION: And you suggest that your rule would

1 present no such line-drawing problem?

2 MR. WEINER: I don't see any line-drawing
3 problems, because it's so direct and fair and honest. May
4 I search the bag? What could be easier?

5 QUESTION: Well, supposing you open up that bag
6 and find four bags inside it?

7 (Laughter.)

8 QUESTION: Then can you search those four bags?

9 MR. WEINER: I think that when permission is
10 granted to search a bag, it is implied that they can go
11 further and search whatever is in that bag. That is not a
12 problem under those circumstances.

13 QUESTION: Even though -- suppose there's a
14 wallet in the bag?

15 MR. WEINER: I don't see a problem. The consent
16 was given to search the bag and what is contained in that
17 personalty.

18 QUESTION: The why shouldn't the same thing,
19 when the consent is given to search the car, why shouldn't
20 they be able to search whatever is in the car?

21 MR. WEINER: Because the car --

22 QUESTION: The car is sort of a big bag.

23 (Laughter.)

24 MR. WEINER: But since it's called a car instead
25 of a bag, it seems to me that the person consenting is

1 consenting to search the car only. And it would be mere
2 speculation to assume that he or she meant searching the
3 bag was included.

4 QUESTION: What do you do with a room? Suppose,
5 suppose a police officer asks for -- I assume it follows
6 from your theory that if he gets consent to search the
7 room for drugs he can go in the room, but he can't open
8 any drawers or closets or anything?

9 MR. WEINER: I think that's exactly correct.
10 And I don't think that hampers law enforcement. Justice
11 Scalia, what we have had is a series of cases --

12 QUESTION: But that isn't the issue. I mean,
13 the issue is that what I mean when I say sure, search the
14 room. Is that what I mean, you can just walk in and look
15 around the walls but you can't --

16 MR. WEINER: No. It means you can go around and
17 you can look in the room, anything in plain view is
18 perfectly fine. As you suggested in Arizona v. Hicks,
19 anything is fine as long as you don't start going into
20 things. What is the burden that we're asking? Simply
21 that --

22 QUESTION: I said search the room, not look
23 around the room. I said search the room. When somebody
24 searches a room he pokes around, looks under things, opens
25 drawers, and so forth. And isn't it the same thing when

1 we say search a car?

2 MR. WEINER: I don't think so, because I think
3 that reasonable people can differ as to what the consent
4 is. If a police officer says may I search your home, I
5 don't think that necessarily means that the police can go
6 into every nook and cranny. And when it's narcotics no
7 papers are protected, nothing is protected, because
8 narcotics, as they are fond of saying, can be anywhere,
9 which is true. So nothing is protected.

10 QUESTION: Suppose he's in the room and says may
11 I search the room?

12 MR. WEINER: I still think he would have to
13 simply go one step further and say may I search the room
14 and the contents, whether it be a desk, a box, a purse, a
15 package. Why is that burden too great to ask of an
16 officer? Why isn't it reasonable to say, since this is
17 consent, this is not --

18 QUESTION: What do you do with the finding of
19 fact here that the driver could have assumed that, and
20 this is a finding of fact --

21 MR. WEINER: Yes, sir.

22 QUESTION: -- and I think also reasonable, that
23 the police would search the bag?

24 MR. WEINER: I'm not quite sure what to make of
25 that finding, because when the trial judge said he could

1 have assumed, I think that begs the question and supports
2 the position that we are suggesting, that nobody knows.
3 He could have assumed it, maybe he didn't assume it, he
4 might have assumed it. We don't know. She didn't know.
5 Nobody knows, but she knew he didn't give definite
6 consent.

7 The burden should always be on the Government to
8 justify the consent and its scope. It shouldn't be the
9 burden of the consenting individual to tell a police
10 officer to stop or not to look in the package.

11 QUESTION: Mr. Weiner, how does -- I confess
12 never having gotten a search warrant and never having been
13 a policeman or having a client served one. How does a
14 search warrant read? If you get a search warrant to
15 search, to search a home or to search a room, does it
16 specifically say that you're authorized to open drawers
17 and look in closets and so forth?

18 MR. WEINER: It doesn't need to say it. Here is
19 what has happened as far as --

20 QUESTION: Why doesn't it? I mean, it seems to
21 me that's maybe a good test of what the import of language
22 is. When you say you can search, does it mean you can
23 look in things?

24 MR. WEINER: I suggest it is not a good analogy
25 for this reason, sir. A compelled search is very, very

1 different from a consent search. It is the exact
2 opposite. A compelled search the individual cannot
3 resist, cannot do anything but sit there while the search
4 takes place.

5 QUESTION: Yes, but I'm just talking about the
6 language. I mean, a warrant is directed to the officer,
7 and the judge says something to the officer. If the judge
8 just says you shall search these premises --

9 MR. WEINER: Yes, sir.

10 QUESTION: -- and if that is alone enough to
11 mean to the officer that he can look in drawers, or if it
12 says you shall search this car, and that is enough to mean
13 to the officer that he shall look inside packages, I think
14 that that would be strong indication that it means the
15 same thing when a private party says it.

16 MR. WEINER: Well, with all due respect, sir, I
17 -- there are two things that happened in the cases
18 regarding search warrants. The first one is that police
19 officers routinely ask for permission to search a place
20 and don't narrow it as they are required to do.
21 Typically, however, the search warrant gives them
22 permission to search everywhere. Even though they may
23 have known that the contraband was located, for example,
24 in a bedroom, they will search and tear apart the entire
25 house.

1 So it's unreasonable, I suggest, sir, to assume
2 that a citizen would understand that giving consent to
3 search would be consent to do everything, to look in
4 everyplace. Narcotics knows no hiding places that are too
5 small. And I don't believe the citizen understands that
6 consent is automatically a free for all for the officer to
7 go anywhere he wants.

8 In addition, Justice Scalia, a search warrant
9 commanding an officer to go in and to look for narcotics
10 actually allows the tearing down of walls, in a car, the
11 going into tires. There are no limits. So certainly,
12 using your analogy, a citizen who says yes, you may look
13 isn't consenting to have his home or car torn to
14 smithereens because an officer feels narcotics might be
15 hidden somewhere. That's why I don't think we can draw
16 the analogy between a compelled search and a consent
17 search. Totally different.

18 The State of Florida has not demonstrated, we
19 submit, the need, the desire, the helpfulness to law
20 enforcement of allowing a general search to vitiate the
21 Fourth Amendment when the consent is not asked for as a
22 particular item. Society and civility must respect a
23 higher level of privacy than what the State of Florida and
24 the Solicitor General are suggesting.

25 If there are no questions, that will conclude my

1 argument. I thank you.

2 QUESTION: Thank you, Mr. Weiner. Mr. Neimand,
3 do you have rebuttal? You have 5 minutes remaining.

4 REBUTTAL ARGUMENT OF MICHAEL J. NEIMAND

5 ON BEHALF OF THE PETITIONER

6 MR. NEIMAND: Thank you.

7 The theory that my opponent is stressing today
8 has already been rejected by this Court in Horton v.
9 California, and this Court has held that the fact that an
10 officer is interested in an item of evidence and fully
11 expects to find it in the course of a search should not
12 invalidate its seizure if the search is confined in area
13 and duration by the terms of a warrant or valid exception
14 to the warrant requirement.

15 QUESTION: Well, what case is that, Mr. Neimand?

16 MR. NEIMAND: That's Horton v. California --

17 QUESTION: Horton? Thank you.

18 MR. NEIMAND: -- Your Honor, and that came out
19 just recently. And that is exactly what they're asking
20 you to recede from today, saying that if the officer knows
21 what he's looking for he has to tell the individual he
22 wants to search from.

23 QUESTION: May I ask a question that occurred to
24 me during your opponent's argument on the question whether
25 the consent to search the car gives authority that's

1 coextensive with Ross case probable cause or a warrant.
2 Because in those cases, as your opponent points out, there
3 is damage -- there can be, with probable cause, damage to
4 the car, or under a warrant.

5 MR. NEIMAND: Correct.

6 QUESTION: But you don't take that position with
7 respect to a consent search, am I right?

8 MR. NEIMAND: Correct. We say that we have the
9 same ability only in that we will not destroy personal
10 property.

11 QUESTION: But then you are conceding that the
12 search pursuant to consent to search a car is not
13 coextensive with the Ross search?

14 MR. NEIMAND: Not as complete as a Ross case.

15 QUESTION: Right.

16 MR. NEIMAND: Because we will not destruct the
17 personal property, because it would not be reasonable to
18 assume that.

19 QUESTION: What happens -- would he then be
20 required to say I want to search the car and that bag?

21 MR. NEIMAND: No, not at all.

22 QUESTION: Why not?

23 MR. NEIMAND: Because it's the same -- the
24 concept is the same. And that is if I want to --

25 QUESTION: Well, the concept is it's one thing

1 to search the car, and it's one thing to search the bag.
2 Now you said he said get the consent. Well, if he gets
3 the consent to search the car, what about the consent to
4 search the bag?

5 MR. NEIMAND: The bag is now part of the car.
6 It's the same concept that my opponent has conceded, that
7 if the consent to search the purse or the -- went to all
8 items within that purse. What is the difference between
9 the car and the items contained within the car, and the
10 items contained within the purse? In fact under the
11 scenario that my opponent is taking in the items contained
12 within the purse, he is saying that you could rifle
13 through a wallet and go through every single compartment,
14 and it indicates you might even be able to break or
15 destroy property.

16 QUESTION: What about my scenario? What about
17 my scenario?

18 MR. NEIMAND: It's the same. You have the
19 ability, because the bag is now part of the car. It's --
20 you open the door, you go in and you look around in the
21 car, and this was not just a may I look around. This was
22 a specific request to search.

23 QUESTION: At one time you see the bag was right
24 there by the seat, and now you say the bag you had to
25 search around for.

1 MR. NEIMAND: No. No, I'm not saying that.
2 QUESTION: There's no evidence in the record
3 that says you had to search for that bag.
4 MR. NEIMAND: No, I'm not saying you had to
5 search for the bag. I'm saying the bag is right there.
6 QUESTION: Right.
7 MR. NEIMAND: And he went right to the bag and
8 he opened it.
9 QUESTION: Well, why didn't he say to him I want
10 to search that car and I want to search that bag in
11 particular?
12 MR. NEIMAND: He could have, but under this
13 Court's previous holdings he did not have to.
14 QUESTION: It would have been clearer.
15 MR. NEIMAND: It would have been clearer, but it
16 wouldn't have -- it wasn't required under the
17 Constitution. And therefore he did not have to do that.
18 QUESTION: It would have been clearer?
19 MR. NEIMAND: Obviously. I would not stand here
20 and say it wouldn't have been clearer, but just because it
21 would be clearer, that doesn't mean that it has -- it's
22 authorized or required under the Constitution. And in
23 fact under this Court's previous case that I cited,
24 Horton, that is not required.
25 QUESTION: I think as close as we're going to

1 get is clearer.

2 MR. NEIMAND: That's as close as I will get,
3 Your Honor.

4 (Laughter.)

5 MR. NEIMAND: The interesting point here is what
6 was told the defendant, that he could stop the search at
7 any time. And under that type of language it's clear that
8 he had -- he knew when they went to the bag that he could
9 have stopped it. And the reason we do not have any cases
10 where there was a refused consent, because if there is a
11 refused consent the police will normally let the
12 individual go on his way, or the lower court, when they
13 suppress that evidence, it remains suppressed.

14 Because under this Court's holdings, when there
15 is an encounter and there is a request for consent and
16 there is no probable cause, when the individual says no,
17 this is in Royer and in Mendenhall and that line of cases,
18 then the police must leave the individual alone and walk
19 away. That's why we don't see any cases where there's a
20 refused consent situation. So --

21 QUESTION: But on the facts -- I can't -- maybe
22 I'm mixing it up with another case. But in this case
23 didn't they tell him that if he didn't consent they would
24 go get a warrant?

25 MR. NEIMAND: That was in the record.

1 QUESTION: So you think it's likely that if he
2 had refused consent he could have just left?

3 MR. NEIMAND: The finding, though, was that the
4 consent was voluntary and that was never challenged below.

5 QUESTION: But that's not an answer to my
6 question.

7 MR. NEIMAND: I'm -- there is no answer to that
8 question, because --

9 QUESTION: Well, the answer is pretty obvious.

10 MR. NEIMAND: Well, but unfortunately we do not
11 know because they never testified, and so we don't even
12 know in this case. But yes, that was in the record.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
14 Neimand.

15 The case is submitted.

16 (Whereupon, at 1:38 p.m., the case in the above-
17 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:

#90-622 - FLORIDA, Petitioner v. LUZ PIEDAD JIMENO AND ENIO JIMENO

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BY *Raymond H. Hester*
(REPORTER)

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