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ARGUMENT OF:

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Erwin N. Griswold, Solicitor General of
the U. S., on behalf of Petitioner

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Craig G. Davis, Esq., on behalf
of the Respondent

15

REBUTTAL:

Erwin N. Griswold, Solicitor General

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

UNITED STATES OF AMERICA,)	
)	
Petitioner)	
)	
vs)	No. 403
)	
GERRITT JOHANNES VAN LEEUWEN,)	
)	
Respondent)	
)	

The above-entitled matter came on for argument at 11:16 o'clock a.m., Wednesday, February 25, 1970.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

- ERWIN N. GRISWOLD, Solicitor General
of the United States
Department of Justice,
Washington, D. C.

- CRAIG G. DAVIS, ESQ.
402 B.N.B. Building
Bellingham, Washington 98225
Attorney for Respondent

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: Number 403, the United
3 States against Van Leeuwen.

4 Mr. Solicitor General you may proceed whenever you
5 are ready.

6 ORAL ARGUMENT BY ERWIN N. GRISWOLD, SOLICITOR
7 GENERAL OF THE U. S. ON BEHALF OF PETITIONER

8 MR. GRISWOLD: May it please the Court: This is a
9 criminal case here on certiorari from the United States Court
10 of Appeals for the Ninth Circuit. It involves an interesting and
11 novel question under the Fourth Amendment with respect to
12 search and seizure.

13 The underlying facts in this case occurred on March
14 28th and 29th, 1968. On that day, not quite two years ago,
15 at 1:30 p.m., at the United States Post Office at Mt. Vernon
16 in the State of Washington, the Respondent appeared and de-
17 posited for mailing, two heavy packages, 12 pounds each. It
18 is relevant that the Post Office in Mt. Vernon, Washington is
19 in the western part of the State of Washington, and about 60
20 miles south of the Canadian border.

21 One of these packages was addressed to a post office
22 box in Van Nuys, California, and the other to a post office
23 box in Nashville, Tennessee. Both bore a return address in a
24 neighboring town, adjacent to Mt. Vernon. Postage was paid at
25 the air mail rate and the packages were registered and insured.

1 each one for \$10,000, a total of \$20,000 for the two and in
2 response to a request from the post office clerk, it was de-
3 clared that they contained coins or a coin collection.

4 The post office clerk was suspicious and he immediately
5 advised an officer of the Mt. Vernon police who happened to
6 be in the lobby, of his suspicions, and Captain Belgard of the
7 Mt. Vernon police observed the car departing and noticed that
8 it had British Columbia license plates. The package was then
9 examined and the police captain and the post office clerk were
10 both aware of the fact that the address given on the package
11 was of a nearby junior college, of quarters which had been
12 unoccupied for several weeks.

13 Q That was the addressee or the return address?

14 A The return address.

15 Captain Belgard then, perhaps somewhat surprisingly,
16 telephoned the Canadian Royal Mounted Police and not the U. S.
17 Customs or the F.B.I., but he telephoned the Canadian police in
18 Vancouver and it was the Canadian police who put in a call to
19 Mr. O'Hearn, the Customs Officer-in-Charge at Seattle,
20 Washington.

21 And the details, so far as they were know, were thus
22 transmitted to Mr. O'Hearn in Seattle.

23 By this time it was about 3:00 o'clock in the afternoon
24 and Mr. O'Hearn then put in a telephone call to the Customs
25 Office in Van Nuys in California and he was advised that the

1 addressee of the package being sent there was under investiga-
2 tion for dealing in illegal coins. By the time he had com-
3 pleted that call it was beyond the closing time in Nashville,
4 which I believe is three hours in advance of Seattle; it may
5 be two. And Mr. O'Hearn then delayed until the following
6 morning in calling to Nashville; the morning of the 29th.

7 He got similar information from the Customs Officer
8 in Nashville. I believe he had to do that through Mobile, as
9 a matter of fact, since the headquarters was in Mobile.

10 Mr. O'Hearn then prepared the affidavit for a search
11 warrant which appears on page 5 of the record and, of course,
12 the preparation of that took time, both for composition and for
13 typing. It was then presented to the United States Commissioner
14 in Seattle and that, of course, took time to find the Commis-
15 sioner free from other responsibilities and to give him time
16 for consideration.

17 At 4:00 o'clock in the afternoon of the following day,
18 March 9th the Commissioner issued a search warrant in Seattle.
19 Now, Seattle is some 60 miles south of Mt. Vernon and Mr.
20 O'Hearn took the search warrant to Mt. Vernon and there served
21 it at 6:30 p.m. on March 29th, which is about 29 hours after
22 the events first began when the package was deposited in the
23 post office in Mt. Vernon. And the problem arises because the
24 package was held in Mt. Vernon and was not forwarded at once
25 through usual United States Post Office channels.

1 When the warrant was served, the packages were found
2 to contain several hundred gold coins. The packages were
3 resealed, sent on to the addressee; they were refused by the
4 addressees and were returned to the Post Office in Mt. Vernon.

5 Now, other evidence at the trial shows that the
6 Respondent had, in fact, imported these coins. There was a
7 motion to suppress the evidence of the gold coins which was
8 denied by the District Court. The Respondent was convicted of
9 a violation of the customs laws in having imported the coins
10 without the proper declaration and an appeal was taken to the
11 Court of Appeals before the Ninth Circuit.

12 Now, that court held that the evidence should have
13 been suppressed on the grounds that the delay in holding the
14 coins in Mt. Vernon for 29 hours was unreasonable and a
15 violation of the Fourth Amendment. And that is the sole issue
16 which is now before the Court on the Government's petition
17 for certiorari.

18 Before going further, let me simply recall the simple
19 words of the Fourth Amendment: "The right of the people to be
20 secure in their persons, houses, papers and effects against
21 unreasonable searches and seizures shall not be violated and
22 no warrant shall issue but upon probable cause supported by
23 oath or affirmation and particularly describing the place to
24 be searched and the persons or things to be seized."

25 Now, here of course, a warrant was received on

1 probable cause and supported by oath or affirmation and
2 particularly describing the place to be searched and the per-
3 sons or things to be seized. This is not a case of search
4 without a warrant. Here there was a search with a warrant.

5 The problem arises because the police officers were
6 careful. They took the time to be sure they had the proper
7 facts, and because the post office employee cooperated in that
8 process, by holding the package at Mt. Vernon, Washington.

9 Now, it could, of course, be said that once the
10 package was in the custody of the post office it should have
11 been sent on and somehow or other the officers could have
12 followed it and kept track of it and before it was actually
13 delivered at the respective destinations these various in-
14 quiries could have been made.

15 The logistic and manpower problems involved in that,
16 the number of people required in at least three or four dif-
17 ferent locations or such; it seems to me to make that approach
18 not a reasonable requirement under all circumstances.

19 Now, there is an aspect of this case which seems to
20 me to be of very considerable importance. Last June this
21 Court decided the Chimel case, and curiously enough, also in-
22 volving coins. I don't know whether coins have become a
23 special target in this area. And in the Chimel case some of
24 the prior decisions of the Court with respect to the extent to
25 which a search without a warrant may be made incident to an

1 arrest, were sharply cut down.

2 And there is a consequence of the Chimel case which
3 I assume is going to have to be presented in later cases.
4 That is the extent to which granting that the police cannot
5 conduct an extensive search and seizure in the premises in-
6 cident to an arrest. To what extent can the police officers
7 impose a still stand on the situation: lock the door, keep
8 people from entering and leaving, prevent people inside the
9 premises from destroying evidence while they go through the
10 necessary process, obviously requiring under current condi-
11 tions, several hours of preparing a warrant -- an affidavit
12 for a search warrant under -- in many cases this will require
13 not merely the police officer, but participation by the lawyer
14 and the Assistant United States Attorney or appropriate state
15 officer, typing, finding a magistrate, submitting it to him
16 and giving him an opportunity to consider it and then upon
17 its issuance, the opportunity to search.

18 And, unless there is some opportunity to impose a
19 still stand -- not to seize, but simply to hold things in the
20 statue quo. The evidence in many of these cases will be
21 destroyed and the opportunity to make an effective search will
22 evaporate.

23 Now, that is not this case; this has nothing to do
24 with a search incident to an arrest. This is a situation, how-
25 ever where post office employees in association with other

1 governmental officers, did preserve the situation and the
2 statue quo by not sending on the package in the normal pro-
3 cesses of the U. S. Mail.

4 I would point out, too, in the consideration of this
5 matter, as turning on the reasonableness of their action, that
6 there was no communication involved here; there is no letter.
7 There is no transmission of intelligence. This was simply
8 goods; simply gold coins. The delay of 29 hours in the de-
9 livery of a package is not unprecedented and there is nothing
10 to indicate that it was a matter of any seriousness to anyone
11 involved.

12 Now, it's curious, though I suppose, explainable be-
13 cause of the development of -- the recent development of
14 cases like Chimel that it's curious that it's almost impossible
15 to find any indication in the decisions in this Court or
16 elsewhere of the extent to which the police may take steps to
17 preserve the status quo while warrants are being obtained.

18 Back a generation ago in Taylor against the United
19 States, this Court pointed out that a short period of watching
20 "during the time required to secure a search warrant, could
21 have prevented the possibility of any change in the premises,
22 from which Government agents had smelled the odor of whiskey."

23 And in the Trupiano case in 334 U.S., the Court,
24 striking down a search without a warrant, noted that a warrant
25 could have been obtained without the risk of removal, since

1 one of the agents, and I quote: "Was on hand at all times to
2 report and guard against such a move."

3 Now, there were no issues in those cases as to the
4 validity of a restraint which might have been imposed while
5 the warrant was being obtained, but the Court in those cases
6 seemed to feel that such a restraint would have been not only
7 natural and understandable, but justifiable.

8 Q You could have gotten a warrant and seized the
9 package on the other end of the shipment, I suppose.

10 A Yes, Mr. Justice. I mentioned that in stating the
11 facts, but the problems of tracing and keeping track of and
12 the number of people involved and frankly, I don't know whether
13 a warrant issued by a United States Commissioner in Seattle
14 is valid in Van Nuys, California, or in Nashville, Tennessee;
15 whether it might not have had to be presented to a Commissioner
16 in those places. None of the charges against this warrant, not
17 now pressed, I believe, is that it was based on hearsay and
18 on facts not within the knowledge of the affiant, will, of
19 course be far more extreme as you got two officers in Califor-
20 nia and in Nashville, Tennessee. It would have involved a
21 great many more people and our position is that the limited
22 delay in this case, not six months; not a week, 29 hours, not
23 much more than overnight, was not unreasonable under the cir-
24 cumstances, particularly when it was the consequence of the
25 fact that the officers were trying to do their duty carefully

1 and thoughtfully; were seeking to obtain a search warrant;
2 were trying to discover the facts so that if there was no
3 basis for a warrant it would not be obtained and our view is
4 that to impose a requirement that you must send the things on
5 and then try to catch them before they are delivered would be
6 too technical, would require too much expenditure of manpower,
7 too much risk of loss, when the suspected material is in the
8 custody of the United States, and rightly so.

9 This period seems to us to have been a reasonable
10 one.

11 Q I suppose it doesn't weaken your position any
12 that the articles were, in and of themselves, contraband?
13 That is, they were articles that were unlawfully in the posses-
14 sion of the mailer, having been smuggled across the line.

15 A Well, Mr. Justice, I have thought about that
16 argument and I'm not sure that I can say that gold coins as
17 such are contraband. I suppose that any United States citizen
18 who has a collection of gold coins can legally transmit them
19 by mail to somebody else. To a dealer --

20 Q Across the line from Canada?

21 A Here we have only the suspicion that these have
22 come across from Canada. We have grounds for believing that
23 they had come across from Canada, but they were, in fact, de-
24 posited in a United States Post Office 60 miles within the
25 United States.

1 Q But if you were sustained here; your position
2 is sustained, what happens to the coins? Are they forfeited?

3 A I believe they would be forfeited under the
4 customs laws, Mr. Justice, Mr. Chief Justice.

5 Q Is it illegal to possess gold coins now, quite
6 apart from the customs laws?

7 A Well, Mr. Justice, I understand that there are
8 exceptions to the gold statutes and regulations under which
9 coins bona fide held for collection purposes are perfectly
10 legal; indeed, I see them advertised in the papers and I think
11 that for \$95 you can now buy a \$20 gold piece which --

12 Q I thought there was a time, almost a generation
13 ago when everybody was required to turn in all these gold
14 coins and thereafter it was illegal to possess them.

15 A Yes, Mr. Justice, but there was an exception
16 of bona fide collectors items, whether they --

17 Q Well, I'm happy to hear that, because I was
18 disturbed the other day when I found a \$5 gold piece in my
19 safety deposit box and I wasn't sure what to do. It was given
20 to me when I was ten years old.

21 A Well, that raises all kinds of questions about
22 self-incrimination that I don't think we need to go into here.

23 In some ways the case which seems to me to be the
24 closest is the Terry case. Terry against Ohio decided two
25 years ago. I think I would like, before referring to the

1 Terry case, however, to make reference to Mr. Justice White's
2 dissenting opinion in the Chimel case. Because he did there
3 deal more extensively than I have been able to find anyplace
4 else with what I regard as the underlying problem here.

5 It's true that he was using it as an argument that
6 the search without a warrant should be valid and he was in the
7 minority on that and we are not contending here that a search
8 without a warrant is valid. But on page 774 of Justice White's
9 dissent, he said: "When there must almost always be a strong
10 possibility that confederates of the arrested man will, in the
11 meanwhile, remove the items for which the police have probable
12 cause for search."

13 And on page 775 he says: "However, had the police
14 simply arrested petitioner and taken him off to the station-
15 house and later returned with a warrant it seems very likely
16 that the petitioner's wife, who, in view of petitioner's
17 generally garrulous nature, must have known of the robbery,
18 could have removed the coins."

19 Now, our position is that -- our contention, our
20 suggestion is that that argument not having prevailed, never-
21 theless remains open this question which I call "The oppor-
22 tunity to impose the still stand." Now, just how that can be
23 done, what manpower would be involved, what force can properly
24 be used, remains to be seen, but we contend here that in a
25 different situation where the goods are already in the custody

1 of the United States, having been confined to the -- confided
2 to the United States Mail, that it is appropriate for the
3 officers of the government to preserve the status quo while
4 the warrant is being carefully and thoughtfully obtained.

5 Now, I would like to refer to the Terry case itself,
6 because that is a case which goes into these questions of un-
7 reasonable search and seizure, the meaning of an unreasonable
8 where we do not have an arrest or a seizure involved.

9 In the Terry case you will remember the problem was
10 of the power of the police to take action short of an arrest by
11 way of what is popularly known as "stop and frisk," by way of
12 patting a man's clothes to see whether he was armed and on
13 finding a hard object, reaching in and removing it. And in
14 that opinion Chief Justice Warren discussed at some length the
15 difference between the cause required to obtain a search
16 warrant which would be probable -- or an arrest warrant it
17 would be in that case -- probable cause to believe that a crime
18 has been committed and the cause which was required for a
19 police officer to take this interlocutory step.

20 And it really comes down to this: whether there was
21 probable cause for suspicion with respect to the commission of
22 a crime and the safety of the police officers.

23 I won't take the time to quote from that opinion,
24 particularly on pages 21 to 24, only by way of analogy, but by
25 considerable analogy there discussion of this shorter

1 step, this step short of an arrest or a seizure, and we feel
2 that there is substantial support in the Terry case for the
3 proposition that the steps taken here and the only steps
4 against which plaintiffs made is the holding of the package
5 for 29 hours and it would have had to be held for a substantial
6 portion of that, at the very best, that that was not unreason-
7 able.

8 Q Mr. Solicitor, I gather the justification in
9 Terry that was emphasized was the safety of the officer;
10 wasn't it?

11 A Yes, Mr. Justice.

12 Q Do we have anything comparable to that in this
13 situation?

14 A No; there is no question of safety here, but
15 it is suggested that the only duty of a post office clerk is
16 to send the package on forthwith and I suggest that if, on
17 handling the package in the process of putting it in the mail
18 bag he hears a ticking, that he may find, quite reasonably,
19 that he has some duty other than sending --

20 Q Well, what I'm getting at is: I wonder if the
21 result reached in Terry would have been reached if that factor
22 of the safety of the officer was not involved.

23 A I think perhaps not. I'm not suggesting that
24 Terry is a precise analogy. I am suggesting that it is an
25 application of a determination of what is reasonable conduct

1 under the circumstances and our suggestion is that in this
2 case, not involving a communication and nothing about the
3 First Amendment, simply goods in transit that could delay them
4 for a day in the process of being careful, in seeking a search
5 warrant and then seeking the search warrant through the judg-
6 ment of an independent magistrate is not such unreasonable
7 conduct as to violate the Fourth Amendment.

8 Q But isn't the analogy to Terry more with the
9 stop, rather than the search?

10 A Well, yes, Mr. Justice; I suppose it is with
11 the stop and the search, although --

12 Q Because, safety or not he could still stop them
13 -- could still stop the --

14 A Yes. Of course, the stop is only for seconds.

15 Q Well, but for long enough, perhaps to ask him
16 a question.

17 A Long enough to ask him a question and we have
18 a somewhat longer time here.

19 MR. CHIEF JUSTICE BURGER: Mr. Davis.

20 ORAL ARGUMENT BY CRAIG G. DAVIS, ESQ.

21 ON BEHALF OF THE RESPONDENT

22 MR. DAVIS: May it please the Court, and Mr. Chief
23 Justice: I find this argument most interesting as presented;
24 I wish I could concur wholeheartedly. Were I to concur this
25 case would be moot and I would seek to have it dismissed.

1 But I submit that is not the case.

2 I will try and hit the points as we go along very
3 carefully. First of all, let me point out, with tongue in
4 cheek, as did Judge Chambers of the Court of Appeals, that I,
5 too, am not too much dismayed by the delay of my mail, because
6 oftentimes it is delayed longer than 29 hours.

7 But, he held and concurring opinion that this was
8 done without judicial authority here and the delay was inten-
9 tional.

10 Now, I submit there is a distinction between the
11 intentional delay of one's mail, protected by the Fourth Amend-
12 ment and the delay of one's mail which is unintentional.

13 Let us review the facts of this very carefully. Time
14 is of the essence in this case. First let me point out that
15 Vancouver, British Columbia is but 60 miles from Mt. Vernon.
16 I know; I traveled this distance to be here with you today.
17 I know that it takes but one hour, with maybe a few minutes at
18 customs to come across. WE know that one must declare items
19 at the border. We do know that these packages were 9 and 11
20 pounds, respectively and we see that the Petitioner's name, or
21 rather the Respondent's name is Gerritt Johannes Van Leeuwen.
22 I ask you to look at that name: G. J. Van Leeuwen, and he used
23 as a nom de plume as a return address: G. J. Williams.

24 I have found no law, no case authority and I am aw-
25 fully ignorant but I find nothing to tell me that I cannot use

1 nom de plume in sending out a package. He issues an address
2 that is proper, but I submit that I can use your return ad-
3 dress if I so wish and have my mail returned there. I know of
4 no law saying I cannot use your own home address --

5 Q But will it disturb you very much that law
6 enforcement officers take a -- have certain reactions to that
7 when they see it? Do you suggest that it does not give some
8 justification for their wondering why?

9 A Sir, if it were brought to the law enforcement
10 officer's attention by yourself of my using your return ad-
11 dress, I would say: yes, it should be in their hands, but
12 otherwise I would say it is not their business. They have no
13 reason to be inquiring.

14 Furthermore, if we have a situation where, as we have
15 here, that a man declares them to be coins, and I would suggest
16 that Mr. Justice Stewart should not mail that coin through the
17 mail, because it may be smuggled. He hasn't checked it out
18 yet. Because, if it were, he may be in the same position
19 that Van Leeuwen is.

20 The coins are legal here in the United States as
21 numismatic items. This man declares this package to contain
22 coins. He did not lie. He did not go so far as to declare
23 them to be gold coins. He did not declare them to be brought
24 across the border.

25 And testimony at the trial, interestingly enough,

1 showed that the package had been sitting on the console of
2 the car right between the two passengers. Now, mind you he's
3 mailing these at 1:30. Here we are in a small post office,
4 a first class post office, a focal gathering point for all of
5 Skagit County and he's mailing two packages registered mail.

6 Now, what's so unusual about registered mail? If
7 you had an item so valuable certainly you would register it,
8 because the maximum insured value is \$200 unless you declare
9 otherwise. Wouldn't you insure your coin collection? Cer-
10 tainly any one of us would.

11 But, the postal clerk is suspicious; the return
12 address is not one that occupied. How he happens to know this,
13 probably because it's a small community, probably because this
14 is a student housing center for the junior college there.
15 This may be how he knew.

16 Q Well, are you now addressing your arguments to
17 the lack of cause to be concerned about any of this?

18 A I am addressing my remarks, sir, not only to the
19 lack of probable cause, because I am attacking this on two
20 bases: one, the affidavit being insufficient and two, the
21 detention of the packages for 29 hours, either one of which, I
22 submit, would be more than sufficient to confirm the Court of
23 Appeals.

24 Q Well, this Court, on a number of occasions, and
25 many other courts, similarly, have said that in probable cause

1 you add up the total of a great many often insignificant
2 things to reach your conclusion. Now, when he added the coins
3 to the false return address to the fact that the fellow had a
4 Canadian license, do you think that began to mount up toward
5 what the court suit talked about in terms of the total probable
6 cause?

7 A Oh, very definitely; very definitely. I would
8 look askance at any law officer who had these facts and who
9 would not seek to entertain further doubts and would not seek
10 to resolve this. I would question his integrity.

11 No; these are all very pertinent, their accumulative
12 snowball effect, but I submit that the snowball bound the
13 Government; and here's why:

14 These facts were known: 1:30 he mails it. These
15 facts were known to Captain Belgard who, in turn, calls the
16 RCMP in Vancouver because they had a recent burglary of a coin
17 shop up there. He just checked. RCMP in turn, does a quick
18 cursory investigation, calls Customs Officer O'Hearn in
19 Seattle, the Chief Agent in charge. This by 2:30.

20 He relates the following facts to Customs Officer
21 O'Hearn:

22 (1) two packages; (2) gold coins; (3) suspicious
23 address; (4) fictitious addressee; (5) registered mail; (6)
24 return addressees.

25 O'Hearn, being the superlative agent that he is,

1 immediately gets on the phone and he calls Van Nuys,
2 California and ascertains that one of these addressees is a
3 suspected trafficker in illegally-obtained gold coins. How
4 can a man work faster? I take my hat off to him. And I sub-
5 mit, at this time he had probable cause to get a search
6 warrant.

7 Q What time; how many hours? Five hours?

8 A Five hours, no, sir; he was faster than that.

9 Q Two hours?

10 A One hour and five minutes.

11 Q One hour and five minutes. You find nothing
12 wrong as of that time?

13 A I find nothing wrong; in fact I find it to be
14 very commendable.

15 Q And it took a little time to type that affidavit
16 up; didn't it?

17 A Twenty-four hours later it did.

18 Q It does take time to type an affidavit?

19 A It does, sir.

20 Q And to be checked, et cetera. So, how many
21 hours would you think would be maximum in this case?

22 A Considering the fact that the affidavit was
23 applied for at approximately 2:30 p.m. the following day, I
24 think the affidavit should have been applied for on the day
25 that the packages were mailed, considering that Mt. Vernon is

1 60 miles from Seattle, a drive of one hour on a super-freeway,
2 I think it could have been done then, and it should have
3 been --

4 Q How many hours is that; five hours?

5 A No, sir; 2:30 we have the facts; at 2:35
6 O'Hearn is verifying that one of the addressees is suspected of
7 trafficking in gold coins. His office -- he would have to
8 call, and he did call, the Attorney General's office and one
9 of the Assistant AG's made out this affidavit. I know; he is
10 my classmate.

11 Q Well, you are complaining about approximately
12 24 hours?

13 A I am complaining about the additional 24 hours
14 very definitely, sir, because there that's sloppy police work.

15 Q And how did that injure your client?

16 A How did it injure my client? He spent one year
17 in prison.

18 Q Other than that?

19 A Other than that? The Fourth Amendment affects--

20 Q How did it affect his constitutional rights?

21 A It affected his constitutional rights in that
22 this Court, way long ago in ex parte Jackson, held that the
23 first class mails are protected by the Fourth Amendment and
24 have the same rights as those positions within our own private
25 homes and those rights are inviolate.

1 Q Well, suppose at the end of the 29 hours it
2 was decided not to do anything and they had shipped it? Would
3 your man have been injured?

4 A Then I shouldn't be here, sir.

5 Q He wouldn't be injured at all; would he?

6 A That's right.

7 Q What are you complaining about, the seizure
8 and the opening of it, or the timing of the 29 hours?

9 A I am complaining about the timing; I am com-
10 plaining very vehemently about the timing. A mail watch could
11 have been put on those packages. They knew the addressee.
12 Telephone communications being what they are, they could have
13 quickly gotten that same information which, I submit, in-
14 cidentally is a sideline. It is hearsay on hearsay. But
15 they could have gotten that same information down and the same
16 type of affidavit could have been written up in California and
17 again in --

18 Q Well, for the record, wouldn't you agree that
19 at times, even registered mail is lost?

20 A Lost; yes, and this is what Judge Chambers re-
21 ferred to, "that sometimes my mail goes astray." But, I sub-
22 mit that this was not lost. The Government has admitted that
23 they detained it.

24 Q I didn't say that, but I said, "If they had
25 shipped it, and relied on catching him at the other end, they

1 might not have been able to catch it.

2 A They had two packages, sir. They surely would
3 have caught one; even our post office isn't that inefficient.

4 Q Mr. Davis, when you said that you thought that
5 the officers had done a good job in getting this information
6 altogether in an hour and five minutes, are you conceding that
7 at that point there was probable cause to get the warrant?

8 A I am saying at that point there was probable
9 cause.

10 Q There was?

11 A There was.

12 Q Well, now, what about your argument that this
13 warrant is not supported by probable cause?

14 A I am not saying, as I understand it, that it is
15 not supported by probable cause. I am saying that according to
16 the guidelines laid down in Ventresca, that affidavit is
17 hearsay based on hearsay and does not meet the requirements of
18 the --

19 Q I see; the attack is on the form of the
20 affidavit.

21 A That is correct, sir. I am not saying they do
22 not have probable cause. If they had the proper source infor-
23 mation related which they did not do.

24 Now, here we have these packages, supposedly on their
25 way. First class mail, according to the United States Postal

1 Code must be, when it is maile half an hour before the next
2 outgoing shipment, it must be included in that shipment. Here
3 we have two packages which are fortuitously, and I submit,
4 with malice aforethought, set aside to await a search warrant.
5 Here are two packages that should have been going on their
6 way and the only other thing that Officer O'Hearn has learned
7 the following morning is that Van Leeuwen admitted to a
8 Canadian Mounty that he had mailed those packages and secondly,
9 that the second addressee was a suspected trafficker in gold
10 coins; cumulative evidence. That is all; cumulative. It
11 adds but a snowflake to the snowball.

12 Now, what happens next? The search warrant was
13 issued and if you look very carefully at the search warrant,
14 at the affidavit on page 5 you will note that the affiant has
15 information through United States Customs channels. It doesn't
16 tell us where. Each and every one of these facts are set
17 forth.

18 Frankly, I was amazed that I was not upheld at the
19 trial level, but I was not. And the Court of Appeals didn't
20 even reach this issue, so I must submit it again for this
21 Court's consideration.

22 But, let's assume for the sake of argument that this
23 affidavit is a good one. Let's assume that it is not subject
24 to attack. Let us assume that it meets the requirements of
25 Ventresca. Then, I submit to you that you are saying to me

1 that postal regulations and postal statutes don't mean a
2 thing.

3 A statute of the United States Government when it
4 applies to the Government has no meaning. When applied to a
5 private citizen they certainly clamp down on us. And yet,
6 statutory law itself says that "the mails shall not be de-
7 tained by any individual whatsoever." And yet these mails
8 were detained. It tells who may give information from them,
9 and yet -- and that would be the postal clerk through a post
10 office inspector.

11 But, look in the interim here. We have these packages
12 going to Captain Belgard -- to a fireman, yet and I haven't
13 figured that one out yet.

14 And last, but not least, to Customs Officer O'Hearn.
15 Where is the Postal Inspector who is given the information?
16 If he had done so, then I wouldn't be here, but he didn't.
17 There is no postal inspector involved yet. Where do we draw
18 the --

19 Q Do you they keep a postal inspector at this
20 station?

21 A They do, sir.

22 Q Permanently?

23 A I don't know about permanently, but I know
24 there was one involved, because he did sign and witness the
25 return on the search warrant.

1 Why it is that the Government waited so long, I
2 honestly do not know. Perhaps it was seeking more evidence
3 than it had, but I submit to you that this is the beginning
4 -- this case could be the wedge -- and let us not have a
5 wedge.

6 MR. CHIEF JUSTICE BURGER: I think we will stop at
7 the wedge and take lunch, counsel.

8 (Whereupon, at 12:00 o'clock p.m. the argument in
9 the above-entitled matter was recessed to commence again at
10 12:30 o'clock p.m. this day)

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1 (After the recess the argument was resumed)

2 MR. CHIEF JUSTICE BURGER: Mr. Davis, you may
3 continue.

4 MR. DAVIS: If the Court please, the wedge I had for
5 lunch was not the one I was instructing the Court on, I hope.
6 The wedge I am thinking of is a specter of preventive deten-
7 tion. That specter arises in this case.

8 If the Government is allowed to detain property
9 safeguarded under our constitution for 29 hours then it is but
10 a short step to the preventive detention of individuals. And
11 I hope --

12 Q We can always take care of that; can't we?

13 A I leave it in your able hands, sir. I'm sure
14 it will be taken care of in this case, too.

15 But the thing that does trouble me more than anything
16 else is that we have a situation where a man does mail some-
17 thing first class mail, by definition first class mail, and
18 the issue was raised that there is no delay of printed or
19 written matter. This is true, but I ask of what relevance is
20 it? After all, yesterday I had the pleasure of viewing the
21 Hope Diamond which was sent by registered mail and surely there
22 would have been some question asked if it hadn't made it to
23 its destination.

24 But then we hit a few other items that intrigue me.
25 The Chimel case was brought up and this dealt, as I recall it,

1 with the stop and frisk of an individual. Granted, this whole
2 thing is at a standstill for a moment, but for a moment. And
3 it was dealing with something inherently dangerous, and that
4 is that the man had something that could prove dangerous to
5 the officer investigating him.

6 Q The case you are referring to is Terry.

7 A Terry. I beg your pardon, sir. Thank you.

8 But this is a case where the post office employees
9 and others maintained the status quo and I would submit to you
10 that the postal authorities have no such authority. I have
11 cited several statutes in the appendix to my brief. I will
12 ask the Court to review these carefully, because they deal
13 with this particular issue. What can the post office do?

14 I have no qualms whatsoever with the Government's
15 argument as to the detention of personal property for a short
16 period of time needed to get a search warrant. But, I submit
17 that the short period of time of 29 hours, 24 hours after the
18 facts necessary to get a search warrant issued, this is short?
19 I cannot buy that argument.

20 Q Suppose no magistrate is available before 29
21 hours?

22 A If no magistrate were available for 29 hours,
23 and this could be shown, then I think that there we have
24 mitigating circumstances, but I still would not like to say,
25 categorically that this is reasonable, because always there

1 is a judge available, if not a Commissioner. And in this
2 case there was a Commissioner available, not only in Seattle,
3 but in Bellingham. There are three judges there in Seattle,
4 any one of whom could have issued this.

5 Q Or he could have come to this Court, too.

6 A And this Court, I am sure, would have issued a
7 warrant on the facts that they knew at 2:35.

8 Q That's as soon as you give us the jurisdiction.

9 A That I cannot --

10 Q Well, I have great problems with the number of
11 hours as being your only complaint.

12 A This is not my only complaint, sir.

13 Q You say that they could have gotten a warrant
14 in two or three hours?

15 A That is correct.

16 Q Well, then, what is your complaint?

17 A My complaint is that they didn't do it in two
18 or three hours, but they did it in 25 to 27 hours.

19 Q But that's all, just the point of 26 hours?

20 A That is correct, sir.

21 Q And that didn't affect the property; the gold
22 is still the same thing; nothing happened to that.

23 A If I may analogize --

24 Q Nothing happened to the place where it was to
25 go because it was sent back; wasn't delivered.

1 A First, no one knew that this was gold.

2 Secondly, we hit a problem here in that --

3 Q Well, I'm saying that -- what damage was done to
4 him or his property?

5 A The damage that was done to him was that
6 guarantee of our constitution by the Fourth Amendment which
7 applies to any man legally in this country, being a foreign
8 national as this man was, a British subject, or not. And when
9 the constitution tells me that I am to advise my client that
10 his rights are protected and his papers and his personal
11 effects are protected against an illegal seizure and that this
12 also applies to the mail --

13 Q Does the Fourth Amendment require that it be
14 obtained in less than 29 hours?

15 A I don't know that the Fourth Amendment speaks
16 on this particular issue. I would submit that it is a matter
17 of reasonableness, sir.

18 And the question arises: where do reasonable men
19 differ? On the matter of a few hours we can differ. But when
20 we all have before us the facts necessary to issue a search
21 warrant on the same day that the packages are mailed, and we
22 dilly-dally for an additional 24 hours then I submit that this
23 is unreasonable and it's merely a matter of where do we get
24 reasonableness?

25 Q You concede, and I understand that there was

1 reasonable cause, probable cause for the issuance of a warrant
2 on the previous day?

3 A I do, sir.

4 Q And, implicitly, as I gather, would have no
5 complaint if the warrant had been issued and the packages had
6 been seized under that warrant on that day?

7 A That is correct.

8 Q Well, then I particularly have the same diffi-
9 culty as my brother Marshall has. In other words, on the
10 previous day it was clear that there was reasonable cause to
11 detain those packages?

12 A Sir, the problem arises --

13 Q But you concede this, as I understand it.

14 A True, but the problem arises this way: this is
15 an analogy into the Fourth Amendment. We are talking about
16 mail. But, if the Court should find that an additional 24
17 hours before the issuance of the search warrant is perfectly
18 proper, then can't we analogize this to all of the situations
19 covered by the Fourth Amendment?

20 Therefore, when the police have reason to believe
21 that I have heroin stashed in my home and I am not there, it
22 having been just delivered in, but still under my control,
23 being in my house and they surround my house and they have the
24 facts necessary in four hours, they can keep me out of my home
25 for an additional 24 hours while they are gathering one

1 additional fact that isn't even pertinent? That's what would
2 happen if that logic and reasoning were followed to the end.

3 And I submit this is not proper under the Fourth
4 Amendment.

5 Q The only analogy that I can see between that
6 case and this case is if the heroin is in a package at the
7 post office.

8 A If the heroin were in a package at the post
9 office they have no right, whatsoever, to open it, and that
10 happened in one case where -- once where a package did open.
11 In fact, two cases --

12 Q You mean that you can't open a package of
13 heroin if you get a search warrant?

14 A Oh, no, sir; you certainly can open it if you
15 have a search warrant.

16 Q That's this case. They did get a search warrant.

17 A They got a search warrant, but when did they
18 get that search warrant? To do so, sir, they had to violate
19 three different statutes and several regulations. The statutes
20 are as follows:

21 (1) The mail must go out in the next outgoing ship-
22 ment.

23 Q Well, do I have a right of action every time my
24 mail is held up for an hour?

25 A I wish you did, sir.

1 Q I hope it's for damages, too.

2 A It would be nice if it were, but in this
3 particular instance there is none for damages.

4 Q It just is not true.

5 A That's true. But there, I submit to you, sir,
6 that this is an untentional holding up. If you knew that
7 your mail were intentionally being delayed and such would be
8 the outcome of this case, were the Court of Appeals overturned,
9 then your mail, my mail and every man's mail may be detained
10 for a total of 29 hours, at least, until they investigate to
11 see: "Shall we send it on or shall we not?"

12 Q Well, Mr. Davis, I suspect there is a possi-
13 bility of a decision being written against you and not reach
14 any of those things you are now talking about.

15 A I'll take your word for it, sir. I see a
16 specter there that bothers me, though. It troubles me deeply
17 to know that in this day of communication where we are con-
18 stantly supplying the police with more and accurate means of
19 obtaining information that we turn around and give them the
20 same leeway that they perhaps had a century ago when it isn't
21 necessary. It is no longer necessary, nor is it accountable.

22 Now, they could have gotten a warrant to search the
23 packages at the other end; certainly they could. Now, after
24 all, if the mail is delayed en route without a purposeful
25 detention it would, in our knowledge, take them two or three

1 days to get back East or to California, for that matter. They
2 knew the addressee. Certainly they had time to pick up these
3 packages at that time. Why didn't they do so? Doesn't this
4 open up the possibility of shopping for a magistrate who will
5 issue a search warrant? Are we going to allow this?

6 I would submit that it is not allowable.

7 Now, one issue that was brought up by the Solicitor
8 General, he said that it is not being pressed, is hearsay.
9 I am pressing hearsay to the fullest extent possible. This
10 affidavit, careful analysis shows is based on hearsay. It
11 violates every rule laid down in this Court in Ventresca, and
12 in Jones as analyzed by Justice Douglas. It doesn't meet
13 these requirements.

14 But, I must assume, arguendo that it does meet them
15 and then we get to the detention.

16 Now, another thing was the suspicion that these coins
17 came across from Canada. Well, if they came from within the
18 United States we wouldn't be here, because there is no law
19 that says you cannot have coins, gold coins as collector's
20 items in the United States. In fact, since this case first
21 came about our laws have grown greatly less strict as to the
22 handling and having of gold coins.

23 Now, we do not contend that the search without a
24 warrant is valid. This is true. The Government does not con-
25 tend this, but yet what do we have? We have, essentially, a

1 seizure without a warrant; a seizure not for the few hours
2 which the Government says is necessary to obtain a search
3 warrant, but a seizure for many hours after we have the facts.
4 Now, is this plausible? Is it reasonable? Can reasonable men
5 even differ on this point?

6 But now we have one further argument and that is:
7 where the goods are already in the custody of the United States
8 it is okay to preserve the status quo while a warrant is being
9 obtained. And I would ask you why such an argument? Why is
10 it reasonable?

11 These packages are placed with the United States
12 Post Office in a form of trust. Our mail system, our whole
13 system of communications in the United States would breakdown
14 without that trust and I submit that there's been a violation
15 of statutory law laid down by the Congress and of regulations
16 put down by the Postmaster General. And I know that I, as a
17 taxpayer, if I violate a title of the Taxes or any of the
18 regulations, I stand a chance to be here on the regulations
19 but on a title it's questionable.

20 I will normally be knocked down and yet here we are
21 saying, in effect, that you, the Government, can do this. And
22 your hands will not be slapped. But let a private individual
23 do so and you will have a \$5,000 fine or five years in jail.

24 And I ask you, aren't we all men equal under the con-
25 stitution of the United States? Foreigner or a citizen.

1 Q Would you be making the same argument if the
2 coins were seized without any delay at all, if the coins were
3 seized with a good search warrant?

4 A I would not be making this argument today.

5 Q Well, what's the difference?

6 A The difference is the amount of time in which
7 it is done. For reasonable cause --

8 Q I know, but the postal regulations and the laws
9 remain the same and here's the Government seizing the mail.

10 A This is correct, but we have here the issue:
11 We must detain while we obtain a search warrant, and I submit
12 that it's already in the Government's hands and they have a --

13 Q When would these packages have reached their
14 destination?

15 A It takes air mail, from my brief, to reach this
16 city, possibly three days and these were sent airmail, so I
17 would imagine three days to reach Mobile, Alabama.

18 Q And if the Government just hadn't seized them
19 at the point of origin, but it seized them at their destination
20 they would have had their warrant by then and they would then
21 met with the same result as here?

22 A That's correct, but the question is: do we
23 begin at the beginning or at the end? And I submit that the
24 Government began in the wrong fashion in this case. That's the
25 whole problem. I don't fault the Government for the work done.

1 I fault them for the way in which they did it.

2 This man is guilty. Justice was done. He did a year
3 in prison. He is on parole now. I have no qualms about his
4 having been in. I know he was guilty; he has admitted it.
5 But I submit that the law now must be kept straightened out, as
6 the Court of Appeals has so found.

7 Thank you.

8 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Davis.

9 REBUTTAL ARGUMENT BY ERWIN N. GRISWOLD,

10 SOLICITOR GENERAL, ON BEHALF OF RESPONDENT

11 MR. GRISWOLD: I have just two points that I would
12 like to make. Mr. Davis has referred to the statute which
13 requires the mail, as he has said, to be forwarded promptly.
14 Actually, the statute is printed at the bottom of page 2 of
15 the appendix to his brief, SECTION 710 of Title 39 of the
16 United States Code, and it reads: "Letters brought for mailing
17 to a post office, and so forth, shall be sent on" -- and this
18 was not a letter. I don't regard this of any great importance,
19 but I do not think there was any violation of that statute in
20 this case.

21 And the other point I would like to make is --

22 Q Is there a penalty for failure to do that?

23 A No; it's an internal housekeeping part of the
24 post office statute, a direction to postal employees. There
25 are other statutory provisions which make it a crime with

1 penalties attached to interfere with the mails, but I under-
2 stand them to be directed to outsiders, to persons who ob-
3 struct the mails in one way or another, and not to postal
4 employees.

5 Now, the other point that I would like to make is
6 simply this: it would seem that Mr. Davis's real complaint is
7 that the warrant was not obtained on March 28th, rather than
8 on March 29th. I think it could be that a warrant could have
9 been obtained on March 28th and I don't think I would have too
10 much difficulty in seeking to defend it here if it had been.

11 I would point out that the information then available
12 related to only one of the packages, which might have been
13 enough to establish a crime, but not enough to seize the other
14 package. What I would hope would be that the Court would leave
15 a little leeway here, and not to set up a rule which would
16 mean that the instant you really now have enough, you must then
17 and there go and get it, because the lines are not easy to
18 draw here. They are hard to draw long after the events in the
19 calm deliberation of this court. They are much harder to draw
20 for the individual officer on the scene that has to decide
21 whether, "what if I go in now, will it be found that I didn't
22 have enough?"

23 Here the officer was careful. He did no harm in the
24 process of being careful. And it seems to me he ought to be
25 commended for having done a fine work and that the delay which

1 was involved was reasonable and should not be held to in-
2 validate the seizure in this case.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor
4 General. The case is submitted.

5 (Whereupon, at 12:50 o'clock p.m. the argument in the
6 above-entitled matter was concluded)

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