

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: FLORIDA, Petitioner V. MARTIN LESLIE WELLS

CASE NO: 88-1835

PLACE: Washington, D.C.

DATE: December 4, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 FLORIDA, :

4 Petitioner :

5 v. :

No. 88-1835

6 MARTIN LESLIE WELLS :
7 -----x

8 Washington, D.C.

9 Monday, December 4, 1989

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 12:59 p.m.

13 APPEARANCES:

14 MICHAEL J. NEIMAND, ESQ., Miami, Florida; on behalf of the
15 Petitioner.

16 HUNTLEY JOHNSON, ESQ., Gainesville, Florida; on behalf of
17 the Respondent.

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1 areas where valuable personal property would attach.

2 In the case before the Court, the Florida
3 Supreme Court found that there was a good faith
4 impoundment, and that the inventory of the interior of the
5 car, as well as the inventory of the trunk, was lawful.
6 What the Florida Supreme Court found then, that the
7 opening of the -- the prying open of the locked suitcase
8 to inventory that, was unlawful and violative of the
9 principles announced in Bertine, because it held that
10 Bertine required standardized procedures listing the exact
11 nature and scope of an inventory search.

12 The state position in front of this Court is
13 that Bertine does not require such a detailed listing,
14 just that there be procedures, whether written or oral,
15 that all inventory -- all impounded cars are inventoried.
16 By requiring that all impounded cars are inventoried, this
17 will take away the evidentiary discretion that this Court
18 has so declared unconstitutional in its previous cases.

19 The evidentiary discretion would be taken away
20 because every car would then be subject to inventory. The
21 inventory would then be --

22 QUESTION: May I ask, in this case, where is the
23 inventory in the record? Is it in the record?

24 MR. NEIMAND: The actual inventory list?

25 QUESTION: No, it's not, Your Honor. The reason

1 it is not in the record is because of the history of this
2 case. The inventory initially was declared improper
3 because it -- the defendant was not given a reasonable
4 opportunity to do something other than have the car
5 impounded, in other words, to have someone drive it away
6 or to leave it on the street.

7 Florida is a Fourth Amendment state. By our
8 state constitution we have adopted --

9 QUESTION: But they did, they did make an
10 inventory sheet?

11 MR. NEIMAND: An inventory does in fact exist.

12 QUESTION: And -- but you didn't put it in the
13 record?

14 MR. NEIMAND: It was never in the record, no,
15 sir.

16 QUESTION: So we don't know whether they
17 inventoried the contents of the suitcase or not.

18 MR. NEIMAND: We do not know if it is on the
19 inventory sheet, no. We do not. And it was never brought
20 out below because that was never at issue below. The
21 original issue below was that it was an improper
22 impoundment, in the lower appellate court. In the Florida
23 Supreme Court, this Court had then issued the Bertine
24 opinion, which then said there need not be a reasonable
25 alternative to impoundment in order to make the inventory

1 proper. So at that point in time was the first time that
2 any court discussed the reasonableness of the inventory
3 itself. So therefore, at that point in time it was not
4 part of the record going up.

5 QUESTION: The defendant didn't rely on the,
6 opening the suitcase in the trial court?

7 MR. NEIMAND: Well, in the trial court the
8 theory was a consent theory. That the officer had asked
9 him may I look in the trunk, and --

10 QUESTION: You mean the state's theory was a
11 consent theory?

12 MR. NEIMAND: Right.

13 QUESTION: But did the, did the defendant in the
14 trial court argue that the search of the suitcase was
15 improper?

16 MR. NEIMAND: At all -- I really don't recall if
17 he explicitly raised that issue, at this point in time.

18 QUESTION: I am just wondering how the case got
19 here.

20 MR. NEIMAND: It -- I, that is how I will
21 explain how it got here, because when -- it was strictly
22 an order by the trial court saying the motion to suppress
23 is denied. After it was argued on a consent issue, as
24 well, I believe, the opening of the suitcase was improper.

25 QUESTION: Well, you say argued on a consent

1 issue, you mean the state took the position there was
2 consent.

3 MR. NEIMAND: That is right, Your Honor.

4 QUESTION: What position did the -- did the
5 defendant take?

6 MR. NEIMAND: I believe that he took the
7 position that it was an improper inventory search.

8 QUESTION: And yet, and in defending that claim,
9 the state did not put in the inventory.

10 MR. NEIMAND: No, because the state relied
11 strictly on the consent theory, and the court below, the
12 trial court below did not give any factual findings in his
13 order. He simply said denied. When it went up to the
14 lower appellate court, the appellate court found that the
15 consent was too broad, and they, on its own said there was
16 no probable cause.

17 And then on the inventory aspect, which the
18 state brought up at that point in time to try and defend,
19 indicated that under this Court's decision in Opperman and
20 our state court's decisions, then that was an improper
21 impoundment. It was only until it got to the Florida
22 Supreme Court that the actual issue of inventory was
23 brought up, because at that point in time this Court's
24 decision in Bertine had changed the law requiring a
25 reasonable alternative toward impoundment. And at that

1 point in time the Florida Supreme Court recognized that
2 that now bound it in its determination, and found that we
3 did not have to give a reasonable alternative. It was a
4 good faith impoundment based upon a DUI arrest. And that
5 at that point in time the court got involved in the
6 inventory question.

7 It went up from the lower appellate court to the
8 higher appellate court on a certified question within -- a
9 certified conflict rather, within Florida, on two -- two
10 separate -- decisions out of two separate circuits, on the
11 scope of the consent search, based upon this decision --
12 this Court's decision in United States v. Ross. While it
13 was pending because the Florida Supreme Court may, in
14 exercising its discretionary jurisdiction, heard the case
15 on the conflict, they also reached the other matters that
16 were before the court, and that was the impoundment and
17 the inventory.

18 QUESTION: Mr. Neimand, when did the search
19 occur?

20 MR. NEIMAND: The inventory search occurred
21 after the arrest, after the car was towed --

22 QUESTION: What year and what month?

23 MR. NEIMAND: It was -- the search occurred in
24 1985, prior to this Court's opinion in Bertine, right
25 around the Opperman era.

1 QUESTION: And at that time, as a legal
2 proposition, how much discretion did the police officer
3 have to open closed containers during the course of an
4 inventory search?

5 MR. NEIMAND: Under this -- under this Court's
6 ruling?

7 QUESTION: No, no, no, no. As a matter of local
8 law and procedure.

9 MR. NEIMAND: Under the procedure as the officer
10 stated, he was working under standard operating procedure
11 that he was to inventory a car upon impoundment from the
12 hood to the trunk. That is what he had testified to.

13 QUESTION: What does the testimony show the
14 policy was with regard to opening locked containers?

15 MR. NEIMAND: The -- there was no exact
16 testimony on that point. Once again, the reason there was
17 no exact testimony on that point is because that was not
18 at issue at the trial court level. This is a unique area
19 --

20 QUESTION: And there's no court finding below --

21 MR. NEIMAND: No finding at all, Your Honor.

22 QUESTION: -- on what the policy was. So we
23 simply don't know.

24 MR. NEIMAND: We do know --

25 QUESTION: Was there some discretion there to

1 open a locked container, or not, in your view?

2 MR. NEIMAND: In the state's view, there is no
3 discretion, because an inventory search within operating
4 procedures say you must inventory the vehicle. That
5 includes closed containers anywhere where personal
6 valuable property might be located.

7 QUESTION: Well, the concern, of course, is to
8 avoid pretextual searches for evidence. Here there was
9 some testimony that the officer conducting the search
10 suspected there had to be marijuana in the car, and the
11 opening of the suitcase was in an effort to locate it.

12 MR. NEIMAND: That is the testimony, Your Honor.
13 However, the inventory was done in good faith. The
14 article that he looked in was an article where personal
15 property was, or could have been, located. The
16 reasonableness of the search should not depend upon the
17 subjective motivation of the officer, but on the item that
18 is in fact searched. Whereas, if the officer opened the
19 hood of the car and looked into the air manifold, then
20 that would be unreasonable, and that would definitely show
21 that there was other motives. But I don't think we need
22 to look at the other motives to determine the
23 reasonableness of the search.

24 Obviously personal property would not have been
25 found in that scenario. However, in a scenario where they

1 had opened the hood to check to make sure the battery was
2 there, and upon closing the hood a piece of personal
3 property, a gun or something else, came out from under the
4 hood upon closing it down, would it then be reasonable to
5 look further into the hood of the car to determine if
6 there was other personal property involved. I think that
7 is what we have to look at to determine whether or not it
8 is a reasonable search, whether the motivation involved is
9 subjective or whether it is a reasonable standard.

10 I believe that the cases have always held that
11 there always might be a possibility that subjective
12 motivation will come into play, that there will be a dual
13 purpose that evidence of criminal activity might be
14 uncovered during the search. But the question really is,
15 is if it is a proper inventory search to begin with, does
16 the ultimate finding of contraband invalidate the
17 propriety, the original propriety of the inventory search.
18 The state, obviously, suggests that it does not, as long
19 as the state meets the standards that are required by this
20 Court.

21 QUESTION: Well, now, if the officer listed on
22 the inventory a locked suitcase, would the officer be in
23 violation of the applicable state inventory policy,
24 subject to discipline because he listed it that way on the
25 inventory?

1 MR. NEIMAND: I would suggest that he would be.
2 I would suggest a better policy would be to open that
3 suitcase, even if it means breaking that suitcase, to list
4 the property, and then put it in the property room. It
5 would be far much of a less of a burden upon the state in
6 terms of cost and energy to pay for a \$200 suitcase, than
7 to put a locked suitcase in a property room, and when it's
8 still in police custody something happens in that large
9 property room and we return to him an open suitcase with
10 contents totally missing.

11 QUESTION: That sounds like a very good rule,
12 but how do we know that was the rule that indeed was in
13 force here?

14 MR. NEIMAND: Well, we don't know. And I, the
15 state is --

16 QUESTION: Well, then, we can't possibly affirm
17 the case, or reverse the case.

18 MR. NEIMAND: Well, the state, what the state is
19 seeking is a reversal with a remand. We would like a
20 proper rule of law to be followed so that this can then be
21 remanded back to the trial court level for the appropriate
22 findings of fact.

23 QUESTION: And you assert that in order to
24 sustain the search it -- the lower court would have to
25 find what? That it was the policy at the time to open all

1 closed containers, or just those closed containers that
2 seemed likely to contain valuable personal property?

3 MR. NEIMAND: Well, I think under the inventory
4 doctrine, the only purpose in the inventory doctrine is
5 the protection of the property, personal valuable
6 property. To say you have to open up all containers,
7 regardless of whether they would in fact or could in fact
8 contain personal property, would be too broad in scope
9 under the inventory search doctrine. What the state is
10 saying is that it is to be those containers that
11 reasonably could contain personal property. To open other
12 containers would become just a general exploratory search,
13 because they would not fit under the criteria of inventory
14 searches.

15 QUESTION: Mr. Neimand, did the Supreme Court of
16 Florida in its opinion spend any time describing what the
17 rule was in this police department for inventory searches?

18 MR. NEIMAND: Yes, they did. It was to
19 inventory all articles and property in the vehicle. And
20 that is in the joint appendix as well as in the opinion
21 itself. And as the dissent in the Florida Supreme Court
22 said, that was no different than those standards that were
23 upheld by this Court in Bertine, which allowed going into
24 closed containers, because in that case the standard said
25 detailed inventory. True, in that case there was a

1 factual finding by the trial court saying what that meant,
2 and we don't have one here.

3 QUESTION: Well, do you question the accuracy of
4 the description in the opinion of the Supreme Court of
5 Florida of the department's inventory search policy?

6 MR. NEIMAND: Well, the accuracy of the
7 documentation I, we do not question. The accuracy of the
8 interpretation, obviously, we do in fact question.

9 QUESTION: But, the court decided that the
10 instructions were so and so, but they weren't detailed
11 enough. They should have expressly mentioned --

12 MR. NEIMAND: Well, that -- exactly.

13 QUESTION: So that's -- they're saying that's
14 what, that's what this Court's opinions require. And that
15 the, that the instructions were deficient because they
16 didn't really expressly deal with it.

17 MR. NEIMAND: And that is why we are here --

18 QUESTION: Exactly.

19 MR. NEIMAND: -- because obviously the state is
20 saying that that is not what this Court has meant by
21 Bertine standard procedures, and the standard procedures
22 that was meant for Bertine simply was that an inventory
23 must occur on all impounded vehicles. And that -- and
24 that inventory would go to all articles where valuable
25 personal property might be located.

1 QUESTION: You just said valuable personal
2 property. Earlier you said the policy was any kind of a
3 container that might reasonably be thought to contain
4 personal property.

5 MR. NEIMAND: Well, I think in terms of valuable
6 personal property, or personal property, that is my
7 subjective statement. I think personal property to the
8 individual is valuable.

9 QUESTION: Well then is it not reasonable to
10 assume that any closed container contains something?

11 MR. NEIMAND: It is most reasonable to assume
12 that, yes, sir.

13 QUESTION: So that every closed container would
14 reasonably be thought to contain some personal property.

15 MR. NEIMAND: Yes, sir.

16 QUESTION: So that would mean that -- does that
17 mean that the officer has discretion in every case to open
18 or not to open, or that he must open in every case?

19 MR. NEIMAND: Well, the discretion is there
20 subject to civil liability. But he doesn't have any
21 discretion over -- on the policy level.

22 QUESTION: I don't understand.

23 MR. NEIMAND: What I am saying is that --

24 QUESTION: There is a container in a vehicle,
25 and the officer finds it. Does he have discretion, under

1 your view in Florida, to open or not to open the
2 container?

3 MR. NEIMAND: No, he must open it to inventory
4 it.

5 QUESTION: But if you say that, how do you
6 reconcile that with the court's statement that the Florida
7 Highway Patrol "operates under no mandatory standardized
8 policy regarding closed containers"? You are saying there
9 is such a policy, and it is to open all containers.

10 MR. NEIMAND: That is right. We are saying that
11 because --

12 QUESTION: Should we take your word or the
13 court's word on this?

14 (Laughter.)

15 MR. NEIMAND: Well, I think what we -- what the
16 problem we have here is that the testimony of the officer
17 was never fleshed out. That is why what the state is
18 seeking is a rule of law to be properly applied upon a
19 remand, so that the Florida courts could then determine
20 whether or not that policy did in fact exist.

21 QUESTION: Well, the Florida court apparently
22 was referring to the Highway Patrol Policy Manual, Chapter
23 16?

24 MR. NEIMAND: Yes, ma'am.

25 QUESTION: Uh-huh. We have something on our

1 desks this afternoon, lodged, I guess, by your opponent?

2 MR. NEIMAND: Correct.

3 QUESTION: Indicating that it wasn't in effect
4 at that time.

5 MR. NEIMAND: Well, there is some question as to
6 the effective date of that, but that really has no bearing
7 on this case, because in the testimony of Trooper Adams at
8 the suppression hearing, there was no mention of the rules
9 and regulations. He testified that it was standard
10 operating procedures. And, in fact, the form that was
11 used, I believe in 1603, was in fact the one that was used
12 at that point in time. The rules and regulations which
13 were, came into effect shortly thereafter, merely codified
14 what the Florida Highway Patrol was doing to all
15 procedures during that period of time. It really has no
16 bearing.

17 QUESTION: And yet the court, as Justice Stevens
18 pointed out, found there was no firm policy.

19 MR. NEIMAND: Well, the court, again, was
20 looking at the written and not the oral, and the oral
21 statement by the officer was --

22 QUESTION: Do you think if they had looked at
23 the oral policy they would have found that it was firm and
24 sufficient?

25 MR. NEIMAND: Well, again, you know, this case

1 comes before this Court in a strange posture. And that
2 had never been fleshed out. And I would imagine that,
3 based upon the testimony, which said this was the standard
4 operating procedure, that we are to go from hood to trunk,
5 the Florida Supreme Court might well have gone the way
6 they have already. That is why we are really asking for
7 remand for factual findings, and we're asking for rule of
8 law to define what standard procedures are and what is a
9 reasonable scope of an inventory.

10 QUESTION: And your position is that you lose
11 unless it is their procedure to open every container?
12 Every container.

13 MR. NEIMAND: Right.

14 QUESTION: So you find a bottle of, it looks
15 like a bottle of Coca-Cola, you have to open it and make
16 sure it's Coca-Cola? Inventory one bottle of Coca-Cola
17 (now flat).

18 (Laughter.)

19 MR. NEIMAND: Well, I believe that's carrying --

20 QUESTION: Or a bottle of 1873, it looks like
21 wine, it is 1873 Chateauf du Pape. You have to pull
22 the cork on that.

23 MR. NEIMAND: I think I could clarify that, that
24 any --

25 QUESTION: Well, really --

1 MR. NEIMAND: -- closed, non-clear or an opaque
2 container, where you can't ascertain the contents of that.
3 And that is what we are really talking about. We have to
4 be able to ascertain that --

5 QUESTION: I thought you said earlier, too, that
6 it would be a container that would be likely to be, likely
7 to be expected to contain personal property?

8 MR. NEIMAND: Yes, exactly.

9 QUESTION: Every container is likely to contain
10 personal property, isn't it? That's what a container is
11 for, to contain.

12 MR. NEIMAND: Correct. And we are asking for a
13 very broad rule under the inventory search doctrine,
14 because how else are you going -- are the police going to
15 be able to say so --

16 QUESTION: I think that is a very strict rule.
17 I can't imagine that any police, police force in the -- I
18 hope no police force in the country, if they happen to
19 have to impound my car, are going to, you know, open the
20 valuable wine bottles that I have in there and destroy the
21 wine. I think --

22 MR. NEIMAND: Well, I think -- but I think
23 that's a different area, because they can ascertain simply
24 by looking at the wine bottle, that it is a sealed wine
25 bottle, and an 1850 label, and they are not going to

1 assume the liability to taste that wine.

2 QUESTION: So then they don't have to open every
3 container.

4 MR. NEIMAND: But that is not the type of
5 container we are talking about. We are talking about a
6 container that contains personal property, to catalogue.
7 All we want to do is catalogue the contents of the
8 container. You catalogue one notebook. Now, we don't
9 care what is in that notebook. One notebook. One can of
10 shaving cream. We don't physically remove all the shaving
11 cream to say this is in fact one used can of shaving
12 cream. But when you get to the ounce of cocaine, that is
13 when you are able to take the cocaine.

14 QUESTION: So you have to allow some discretion.
15 You are saying it is not an absolute requirement that you
16 look inside every container.

17 MR. NEIMAND: No, in that --

18 QUESTION: What is the limitation that you are
19 applying?

20 MR. NEIMAND: In that scenario, what I was
21 talking about is if you open up a briefcase, if you open
22 up a locked briefcase, and those are the three items you
23 find in that locked briefcase. You catalogue, you list,
24 you don't -- there is no need for the police to open up
25 that notebook and read what is in that notebook. There is

1 no need for them to empty that shaving cream.

2 QUESTION: Why? What is the criterion? When do
3 you say I don't have to open any further?

4 MR. NEIMAND: When there is no longer a fear of
5 losing personal property.

6 QUESTION: Well, I have seen notebooks, trial
7 notes for the lawyers or something like that, that are of
8 some importance to the lawyer. It may have 20 pages on a
9 yellow pad or something, and he wants not to lose those.
10 It could be very important to the person, certain pages
11 out of a notebook. If you are worried about -- why don't
12 you have to list the number of pages in the notebook, for
13 example?

14 MR. NEIMAND: Well, the state would have no
15 problem with listing the number of pages, but what I am
16 saying is you don't have to read --

17 QUESTION: But would they have to?

18 MR. NEIMAND: -- page by page. That is how,
19 that is going too far. That is not safeguarding the
20 property. That is reading the property, that is looking
21 for something in the property.

22 QUESTION: Why isn't it safeguarding if you just
23 list one locked briefcase and no key?

24 MR. NEIMAND: Because what occurs if you put
25 that briefcase in the property room in a large city, and

1 when six hours, eight hours later, the individual comes to
2 claim it, and someone had seen this real nice briefcase
3 and wanted to know what was inside of it, and it is no
4 longer one locked briefcase, but one open, empty
5 briefcase. And obviously the original inventory sheet
6 done by that same police department, given to the property
7 room, was one locked briefcase.

8 QUESTION: Well, what if it said one locked
9 briefcase containing three diamond rings, and they come in
10 later and the three diamond rings aren't there?

11 MR. NEIMAND: But how could they determine if
12 there were diamond rings if it was a locked suitcase?

13 QUESTION: Well, obviously under your
14 hypothesis, somebody broke into the suitcase and emptied
15 it.

16 MR. NEIMAND: That is right. But we wouldn't
17 have known that the diamond rings were there had we not
18 had the ability to open that suitcase to begin with. And
19 at that point in time, we would be subject to liability,
20 because it was still in our custody, because we put down
21 three diamond rings. He gets it back and there is
22 nothing. But it was all done in our custody, so yes, we
23 would be liable. But at least at that point in time we
24 know what we would be liable for. If we didn't do that,
25 and what --

1 QUESTION: Well, why aren't you liable, as you
2 put it, for returning one locked suitcase in the condition
3 in which you received it? What is the matter with that?

4 probable MR. NEIMAND: Because there is always the
5 ability to file a lawsuit in that scenario that when it
6 came back -- NEIMAND: No, no, not at all. What happened.

7 was, after QUESTION: Well, there is an ability to file a
8 lawsuit in any scenario. interior of the car under proper

9 inventory MR. NEIMAND: That is right, Your Honor, but we
10 are talking about the costs to the state when they take
11 property into safekeeping. And in terms of a lawsuit,
12 whether it is justifiable or not, it will cost the state a
13 lot more money in terms of manhours and legal fees to
14 defend such a lawsuit than it would be to simply open a
15 locked suitcase and -- were looking for more evidence of

16 criminal QUESTION: What prevented the officer from that
17 getting a search warrant to open the suitcase here? be used

18 for losing MR. NEIMAND: Nothing, Your Honor. But in this
19 scenario it was an inventory search. And he might well
20 should have done that, but he didn't, and we are here
21 simply on the inventory search doctrine. But that's a
22 specific factual question on this case.

23 QUESTION: Maybe probable cause prevented him
24 from getting a search warrant. Are you sure he had that
25 probable cause to -- hat he found, or filed an inventory or

1 MR. NEIMAND: Well, as the search went on I
2 believe he had probable cause. He had --

3 QUESTION: You mean after he found it he had
4 probable cause.

5 (Laughter.)

6 MR. NEIMAND: No, no, not at all. What happened
7 was, after the impoundment they found \$3,000 worth of
8 money. They searched the interior of the car under proper
9 inventory search. They found the marijuana cigarettes,
10 then, under Michigan v. Thomas or United States v. Ross,
11 they then had probable cause to look at other items that
12 might have contained the contraband that they found in the
13 ashtray. In fact --

14 QUESTION: Is there anything in the record to
15 indicate whether they were looking for more evidence of
16 criminal activity, or were they looking for evidence that
17 they wanted to inventory properly so they wouldn't be sued
18 for losing it?

19 MR. NEIMAND: Well, to be quite frank, the
20 officer, as he got further and further along in his
21 search, got hungrier and hungrier.

22 QUESTION: Right.

23 MR. NEIMAND: Yeah.

24 QUESTION: And there is no evidence at all that
25 he even wrote down what he found, or filed an inventory or

1 anything --

2 MR. NEIMAND: There is an inventory.

3 QUESTION: But we don't know what it says.

4 MR. NEIMAND: We don't know what it says.

5 QUESTION: Who has the burden of establishing
6 the state's practice with regard to inventories, to
7 justify an inventory search?

8 MR. NEIMAND: The state does. And --

9 QUESTION: And it failed to meet that burden in
10 this case, and you say you want to go back and try the
11 case over so you can meet it on the second time, is what
12 you are saying.

13 MR. NEIMAND: Well, not really. What we are
14 saying is that the Florida Supreme Court applied the wrong
15 rule of law in this case, and that is why we didn't meet
16 the burden.

17 QUESTION: I thought you said that the question
18 of closed containers was never an issue in the trial
19 court.

20 MR. NEIMAND: It was not in the trial court, but
21 it was in the Florida Supreme Court.

22 QUESTION: Well, I know, I know, but so you want
23 to, you want to -- you have never had a chance to prove
24 what the --

25 MR. NEIMAND: Policy was.

1 QUESTION: -- policy is.

2 MR. NEIMAND: That is correct. And that is why
3 we would like a bright line --

4 QUESTION: You want one, you want the first time
5 chance.

6 MR. NEIMAND: We would like to begin again, to
7 determine what the policy is.

8 QUESTION: Well, suppose there was nothing in
9 the briefcase at all.

10 MR. NEIMAND: We still could have opened it.

11 QUESTION: You what?

12 MR. NEIMAND: We still could have opened it.

13 QUESTION: As this case now stands, you want to
14 go back and put in evidence, and you don't have the
15 inventory.

16 MR. NEIMAND: We do have the inventory.

17 QUESTION: Where is it?

18 MR. NEIMAND: The officer has the inventory. It
19 was never at issue at the court below, so it was never
20 introduced into evidence by the prosecuting attorney.

21 QUESTION: And so you failed to put it in
22 evidence.

23 MR. NEIMAND: There was no need to put it into
24 evidence.

25 QUESTION: You, the government failed to put it

1 into evidence. Is that correct?

2 MR. NEIMAND: Correct.

3 QUESTION: And now you want to put it in
4 evidence.

5 MR. NEIMAND: We want to establish a policy,
6 yes.

7 QUESTION: And you want to use us for that
8 purpose.

9 MR. NEIMAND: No, we just want the proper
10 principle of law.

11 I would like to reserve the remaining time for
12 rebuttal. Thank you.

13 QUESTION: Very well, Mr. Neimand.

14 Mr. Johnson, we'll hear now from you.

15 ORAL ARGUMENT OF HUNTLEY JOHNSON

16 ON BEHALF OF THE RESPONDENT

17 MR. JOHNSON: Mr. Chief Justice, and may it
18 please the Court:

19 The issue here is much more basic than the State
20 of Florida would have us believe. The question is, is was
21 this an inventory procedure at all. And the answer is no.
22 And the answer is no is because there was no inventory
23 form, and a close study of the record will show that
24 indeed Trooper Adams did not have any idea what was in the
25 car.

1 And I would like to refer to two places in the
2 joint appendix to prove that up, if I could. At page 217
3 of the joint appendix, the trial counsel is questioning
4 Trooper Adams. Question: All right, did you look in the
5 trunk first? Now, this is his full answer: We opened the
6 trunk and that was it.

7 What was in the trunk?

8 Oil cans and a suitcase. That is the trooper
9 trying to recall what was in the trunk.

10 Question: What?

11 Answer: A couple of oil cans, an oil can, a can
12 of oil, or something like that, and a suitcase.

13 That is at the motion to suppress before the
14 trial judge in this case, and my opponent would have you
15 believe that the trial judge did not address the issue of
16 the inventory in this case.

17 Please look at page 221, in which the argument
18 is before the trial court, and the court says well, it
19 really would appear to me that the thrust of the defense
20 argument here is as contained in the motions, as contained
21 in his memorandum, statement of facts, and is indicated by
22 the line of questioning that he made of the witness, is
23 that the trooper's main interest was not inventorying, but
24 searching for contraband. Clearly it was addressed. The
25 first document in the joint appendix is the motion to

1 suppress in this case. It has got 70-something paragraphs
2 in it, and the thrust of it, it goes to several things,
3 but the inventory search is certainly one of them.

4 Question as to whether this was an inventory or
5 a search, on page 49 of the joint appendix, this is the
6 sworn deposition of Trooper Adams, which was admitted by
7 the trial judge as part of the record because of the fact
8 that he did not want us to go over, did not want trial
9 counsel to go over items that had already been covered in
10 the sworn depositions.

11 Question by trial counsel: Did you see any
12 empty beer cans or beer bottles in the car?

13 Answer: I can't recall any.

14 Well, you at some point did inventory the car.

15 Answer: I did.

16 And if you had --

17 But that has been awhile since I did that, and
18 if there was a beer can in there I can't remember if there
19 was or not. Okay. I --

20 QUESTION: Mr. Johnson --

21 MR. JOHNSON: Yes, Your Honor.

22 QUESTION: The Supreme Court of Florida, as I
23 read its opinion, discusses this under the head of an
24 inventory search, and they don't say there was no effort
25 to make an inventory search. They say that the manual did

1 not provide the proper instructions for making an
2 inventory search. I -- I don't think they accepted your,
3 the theory you are proposing now.

4 MR. JOHNSON: Your Honor, the Supreme Court of
5 Florida was unfortunately under a misguided set of
6 circumstances in that --

7 QUESTION: Well, just a minute.

8 MR. JOHNSON: Yes, Your Honor.

9 QUESTION: Be they misguided or not, do you
10 agree with me that they did not follow the theory that you
11 are now expounding, when they came to discuss the
12 inventory search in their opinion? You can answer that --

13 MR. JOHNSON: Yes, I do, Your Honor.

14 QUESTION: You agree with me?

15 MR. JOHNSON: Yes, I do, and I would like to
16 expand on that, if I could, sir.

17 The chief counsel for the Florida Highway Patrol
18 filed an amicus curiae in 1987 in which, this is after the
19 Fifth DCA, the lower appellate court in Florida had ruled
20 three to nothing in favor of the respondent in this case.
21 The amicus curiae was filed, in which they relied on
22 Chapter 16 of the Florida Highway Patrol Manual. Chapter
23 16 of the Florida Highway Patrol Manual was not in effect
24 at all on February 11, 1985, when Trooper Adams went into
25 the car of Mr. Wells, went into the trunk and into the

1 suitcase, the locked suitcase. The locked suitcase, which
2 should have had a higher expectation of privacy.

3 It wasn't in effect, and unfortunately the
4 supreme court was misled because of that. No one picked
5 it up along the way. None of the appellate lawyers, none
6 of the clerks, none of the court, in the supreme court,
7 but that issue never came up until it was interjected by
8 the counsel for the troopers. It was not in effect. So
9 what we have to look at, under Bertine and after -- under
10 the decision of Florida, and the cases before Bertine, is
11 was there any standard caretaking procedure that guided
12 this trooper in this case.

13 The testimony goes to that point on page 82 of
14 the joint appendix.

15 Question: Have you ever applied for a search
16 warrant?

17 Answer: No.

18 Can you think of a set of circumstances under
19 which you might apply for a search warrant when it
20 involves a vehicle?

21 Well, at this time I thought that would be
22 appropriate, a search warrant would be appropriate, but
23 based on what we had here, and it was part of the search,
24 I figured it was part of the search, and I didn't see
25 where it need be.

1 On page 83, Question: When did it first occur
2 to you that maybe a search warrant would be appropriate?

3 Answer: While I was doing the search. But like
4 I said, I felt like opening the suitcase would come under
5 the inventory search of the vehicle.

6 This trooper had no guidelines.

7 Question below that on page 83.

8 Even though it was locked and you had to use
9 knives to pry it open?

10 Answer: Well, I had to take my chances.

11 And the reason, Your Honors, that he had to take
12 his chances, is because he had no procedures to guide him
13 whatsoever. These -- this manual came into effect July 1,
14 1985, four-and-a-half months after this search took place.
15 Prior to that there was no written --

16 QUESTION: How do we know that?

17 MR. JOHNSON: Your Honor --

18 QUESTION: Because certainly the Supreme Court
19 of Florida indicated otherwise.

20 MR. JOHNSON: Your Honor, we have searched the
21 record thoroughly since, unfortunately, this last Thursday
22 night, that in a conversation --

23 QUESTION: Well --

24 MR. JOHNSON: Excuse me, Your Honor.

25 QUESTION: This thing isn't in the record at

1 all.

2 MR. JOHNSON: That is because last Thursday
3 night we noticed that in the record there has never been a
4 date as to when the Florida --

5 QUESTION: Well, you don't supplement the record
6 that way in this Court.

7 MR. JOHNSON: Your Honor, I knew that it was not
8 going to make us look good coming up here, but the point
9 was it is something we just discovered Thursday. We
10 wanted to put it before the Court in good faith. At no
11 point has any date ever appeared in any opinion, any
12 brief, as to when those formal rules went into effect.
13 And those are the rules that the Florida Supreme Court
14 unfortunately was relying on when they wrote the opinion,
15 both the --

16 QUESTION: Well then, you know -- certainly you
17 can't contend that the judgment of the Supreme Court of
18 Florida should be affirmed on this basis. If there are
19 questions like this, perhaps that is all the more reason
20 for a remand.

21 MR. JOHNSON: I think the case should be
22 remanded, to be candid, Your Honor. I think the Florida
23 Supreme Court was operating under absolutely the wrong
24 guidelines. But, if this Court wishes to reach to whether
25 the guidelines in this case were sufficient, I think the

1 record speaks aptly to that. But I agree that this case
2 should be remanded, Your Honor, and give the State of
3 Florida a chance to clear up the mess it has made by the
4 fact that it went off on something that was not in fact
5 the record that it should have been relying on when it
6 made this decision. So I do agree with that, sir.

7 Now --

8 QUESTION: Mr. Johnson, just in case we get to
9 the point, if -- what kind of guidelines do you think
10 would be sufficient? Suppose -- suppose Florida just had
11 guidelines which said open every container -- in making
12 the inventory search, open every container that appears
13 likely to contain valuable personal property. Would that
14 be enough to validate the search here?

15 MR. JOHNSON: That would be closer, but I don't
16 care for that personally, Your Honor. I think that is too
17 intrusive to go in in that fashion. I think it should be
18 simply inventory everything.

19 QUESTION: Period.

20 MR. JOHNSON: Period. Or --

21 QUESTION: Open all -- all containers.

22 MR. JOHNSON: Yes, sir. But I do agree there
23 should be a modicum of discretion. If, for example, a
24 state wishes to limit that which can be gone into under
25 these circumstances, in an inventory search, then I think

1 there still should be just some discretion with the
2 police. Because, if you have in your suitcase a ticking
3 clock that suggests to an officer that that may be a bomb,
4 then certainly I wouldn't want to preclude him from that
5 kind of discretion, Your Honor. I am not trying to
6 suggest a rule that becomes so firm and so inflexible, in
7 either direction, searching everything or searching a very
8 limited number of things --

9 QUESTION: So you agree there can be some
10 discretion as to whether --

11 MR. JOHNSON: I think that under special
12 exigencies, if you will, as were spoken about in --

13 QUESTION: Under special exigencies you can
14 decline to open.

15 MR. JOHNSON: No, under a special exigency you
16 could then open, because the special exigency would be a
17 legitimate danger to the police or to the citizenry by,
18 for example, the ticking bomb.

19 QUESTION: You think the only constitutional
20 role is you can never open containers? I thought we were
21 talking about an inventory --

22 MR. JOHNSON: No, sir.

23 QUESTION: -- rule that says you must always
24 open containers.

25 MR. JOHNSON: No. Either you make it that firm,

1 that you have to open them all, or, if you try, if some
2 law-making agency comes back and tries to draw a line
3 somewhere short of opening all containers, then, at that
4 point, sir, I am saying that some discretion should be
5 available to the police officer when there is a special
6 exigency as I just suggested -- a ticking bomb for
7 example.

8 QUESTION: And that would be discretion not to
9 open.

10 MR. JOHNSON: No, I think that would be -- well,
11 you would call the bomb squad at that point, if that is
12 what you mean.

13 QUESTION: Yeah. Well, I --

14 QUESTION: Mr. Johnson, do you think that there
15 is only one permissible rule that is constitutional for an
16 inventory search?

17 MR. JOHNSON: Meaning no discretion, Your Honor?

18 QUESTION: Well, meaning no -- perhaps no
19 discretion, or perhaps some discretion, but that one and
20 only one would comply with the Constitution. Is it
21 possible that a no-discretion rule would comply with it,
22 and also that a discretion to open up containers that
23 might contain personal property rule could comply with it?

24 MR. JOHNSON: I would think that under the
25 concept of federalism that that would be a possibility,

1 Your Honor. That the states could choose to handle it in
2 different ways, as long as it satisfied this Court that
3 the minimums of the Fourth Amendment had been adhered to,
4 sir.

5 QUESTION: But that is not consistent with the
6 Florida Supreme Court's opinion, is it, where it says the
7 police under Bertine must mandate either that all
8 containers will be opened or that no containers will be
9 opened.

10 MR. JOHNSON: No, it is not, Your Honor, and I
11 have great difficulty with their opinion. Obviously they
12 ruled in favor of the Respondent in this case, but we
13 don't necessarily think for the right reasons. The fact
14 that they said absolutely no discretion, I think is too
15 far, and I have tried to explain why by the fact that
16 there is, there are circumstances under which discretion
17 should be appropriate.

18 QUESTION: But your view of discretion has
19 nothing to do with whether they will find evidence of
20 criminal activity. It is discretion to avoid explosions
21 and things like that.

22 MR. JOHNSON: Well, the Opperman doctrine, yes,
23 sir, would be the situation we are suggesting, Your Honor.
24 And that, I think that the standards set down by Opperman
25 are good standards. And I think that those standards were

1 in effect on February 11, 1985 when Trooper Adams took his
2 chances and went into that suitcase.

3 And if we could speak to Trooper Adams' actions
4 that night, it's important to note that in the dissent of
5 the Supreme Court of Florida's opinion, they talk about
6 the fact that he was under the guidance of his superior
7 officers while he was in the field, that he was checking
8 back with them. That is true at the initial stop site.
9 At the initial stop site Trooper Adams asks his
10 supervisor, what do I do with the money, what do I do with
11 the car. Then the car goes off in one direction to the
12 impoundment site. The trooper and Mr. Wells go off to
13 jail.

14 And Trooper Adams, who, by the way, was only
15 working the 3:00 to 11:00 p.m. shift, at 1:30 a.m. he
16 shows up at the inventory site, at the impoundment center,
17 which has been described by Mr. Bryan in the deposition at
18 page 140 as a very secure facility. He wakes up Mr.
19 Bryan; there is also another security guard. They have
20 dogs, they have lights, they have fences. Wakes him up.
21 They go into the trunk of the car, get out the suitcase,
22 and at no time does Trooper Adams call back and ask for
23 any guidance from his superiors. At that point he is on
24 his own, and he is taking his chances.

25 And it's very important to get to the bad faith

1 here, to go to what Grover Bryan, the disinterested tow
2 truck operator, and what he testifies Trooper Adams says
3 when he gets to the inventory site.

4 On page 141 of the joint appendix, the question
5 by the trial counsel was, now, if you could, with as much
6 detail as you can recall, tell me what occurred between
7 you and Adams, what he said, what you said, and what you
8 all did as a result of the conversation?

9 Answer: Officer Adams said he wanted to
10 inventory the car good. He wanted to go through it real
11 good because he felt there was drugs in it.

12 That is before this car is let down out of the
13 sling of the tow truck. Because Grover Bryan testifies he
14 left the car hanging in the sling.

15 QUESTION: But that is not a violation of our --
16 of our rules. So, if you do have an inventory procedure,
17 the fact that the real reason you want to apply it is
18 because you think -- you think you can find evidence of
19 crime is not a violation, is it?

20 MR. JOHNSON: If there is bad faith and the sole
21 purpose is to investigate --

22 QUESTION: It's not bad faith. If I have a -- I
23 am compelled to inventory. Now, frankly, I think doing an
24 inventory is a terrible job as a cop, it is just more
25 paperwork and what not. The real reason I want to do this

1 one is because I know I am going to find drugs in that
2 car. That is a violation? I mean, you are going to have
3 to repeal human nature if you expect law enforcement
4 officers not to have that feeling.

5 MR. JOHNSON: Yes, Your Honor, that is a
6 violation under Bertine, as I read it, wherein the opinion
7 talks about --

8 QUESTION: I thought it was an objective test.

9 MR. JOHNSON: Bad faith or, and for the sole
10 purpose of investigating. In fact --

11 QUESTION: This is not the sole purpose of
12 investigating. He -- he had -- if he has an obligation to
13 do an inventory, he's doing that. But the real reason he
14 wants to do it, in his heart of hearts, is he thinks he is
15 going to find something bad. And that, that's what that
16 quote indicated.

17 MR. JOHNSON: Well, Justice --

18 QUESTION: The reason I want to inventory it is

19 --

20 MR. JOHNSON: Well, Justice Scalia, I would
21 suggest that if he had been inventorying at all, as has
22 been pointed out by the question from Justice Stevens, we
23 would have some list. Lafayette talks about an inventory
24 being the making of a list. I would respectfully suggest
25 we have no list, we have no recollection, and when a

1 trooper is under oath, if we want to talk about common
2 sense, Your Honor, he certainly would be looking at the
3 list that he had of the items when being asked the
4 questions about what was in the car. And he talks about
5 remembering an oil can, but he can't remember if there are
6 beer cans. There is no list; there has never been a list.
7 And to this day we have no list.

8 In this particular case the Respondent's
9 position is this was not a routine administrative
10 procedure. This was an investigation from the very
11 beginning.

12 At page 204 of the joint appendix, when Trooper
13 Adams stops -- well, what happens is he stops him for DUI,
14 stops Mr. Wells for DUI.

15 He gives him the roadside field sobriety tests,
16 and he says all right, I am going to take you down to the
17 station for the breathalyzer examination.

18 At that point Mr. Wells says could I get a
19 jacket out of my car, because of the fact that it is cold.

20 They go to Mr. Wells' car, and there is money on
21 the floorboard.

22 At that point, so as to guide as to whether we
23 are in an investigation or an inventory, at that point the
24 trooper is asked, on the bottom of 203, the last question,
25 okay, now you see the jacket, you see the money. What do

1 you do at that point?

2 At that point I asked him to step back from the
3 car. I investigated the vehicle myself. And --

4 Investigate. Can you clarify for the court what
5 that means?

6 In other words, I checked to see how much money
7 is there, how it is, you know, the money, what else is
8 there in the vehicle and such. That is about it.

9 And the next answer he talks about he was
10 looking for as far as any other contraband other than
11 money.

12 Right -- right from the very beginning, Trooper
13 Adams is looking for contraband. As soon as he gets to
14 the inventory site he makes it clear to the disinterested
15 tow truck drivers that he is looking for drugs. He never
16 makes a list. This trooper is in bad faith. We ask this
17 Court to send this case back to Florida so that Florida
18 can straighten out the mess that we caused by sending it
19 up here in the first place.

20 Thank you, Your Honors.

21 QUESTION: Mr. Johnson, could I ask you one
22 other question?

23 MR. JOHNSON: Yes, Your Honor.

24 QUESTION: I know you are not interested in
25 these points, but it is the reason we took the case, and

1 maybe we'll get to them.

2 Is discretion, which we have said is no good
3 with respect to inventory searches, is discretion the same
4 thing as judgment? That is to say, when I tell a trooper
5 that you must open any container -- you must open any
6 container that is likely to contain private property, that
7 doesn't give him any discretion. If it's likely to
8 contain it, he must open it. But it does put it in, you
9 know, he has to exercise some judgment in determining
10 whether it contains private property. And I would -- is
11 the judgment, does that invalidate the inventory procedure
12 as well?

13 MR. JOHNSON: I think the answer to that is no,
14 Your Honor. If the overall totality of the circumstances
15 is such that the conduct is reasonable of the officer,
16 then I think the answer to your question is no, Your
17 Honor.

18 QUESTION: Thank you, Mr. Johnson.

19 MR. JOHNSON: Thank you, Your Honor.

20 QUESTION: Mr. Neimand, do you have rebuttal?
21 You have three minutes remaining.

22 REBUTTAL ARGUMENT OF MICHAEL J. NEIMAND

23 ON BEHALF OF THE PETITIONER

24 MR. NEIMAND: Yes, Your Honor. First off, my
25 opponent has conceded that the Florida Supreme Court's

1 holding of -- interpretation of Bertine, is wrong. And he
2 agrees that there is no all or nothing standard.
3 Basically then, both parties agree that the Florida
4 Supreme Court applied the wrong law under the Fourth
5 Amendment, and therefore this case should be remanded to
6 the Florida Supreme Court for a determination of the issue
7 under the proper standard of the law.

8 QUESTION: Yes, but you can't stipulate that the
9 supreme court of --

10 MR. NEIMAND: No, I am not stipulating.

11 QUESTION: -- Florida was wrong. You can't --

12 MR. NEIMAND: I am not stipulating, Your Honor.

13 QUESTION: But, if we thought it was right, I
14 suppose we would affirm it.

15 MR. NEIMAND: I agree. I agree. But, I think
16 both parties here agree there is some sort of problem.

17 The other issue that I would like to bring out
18 is the subjective --

19 QUESTION: May I also suggest this, that it may
20 have been wrong in stating that there are only two kinds
21 of procedures that would be permissible. That doesn't
22 mean it was necessarily wrong in its outcome in the
23 particular case. That's a criticism of its opinion, not
24 necessarily of its holding. Because it does seem clear
25 from the opinion that there was no standardized procedure

1 whatsoever that was in effect.

2 MR. NEIMAND: Well, that is not necessarily
3 true, because in the joint appendix he also testified:
4 well, based on the regulations we go by, if I was going to
5 place him under arrest for DUI, I would have to tow the
6 car, regardless, and from there, upon towing it, we would
7 have to do an inventory search.

8 This is regardless of the standard. This is
9 what --

10 QUESTION: He would have to do an inventory
11 search. But there is nothing in there that says he either
12 had any duty to open containers or duty not to open them.
13 There is nothing in the procedures he described that told
14 him what to do when he confronted a closed container.

15 MR. NEIMAND: Except for the definition of what
16 an inventory search is. And that is what we are seeking
17 this Court from. The --

18 QUESTION: That is what the issue is.

19 MR. NEIMAND: The issue of subjective
20 motivation, subjective intent, was never raised below.
21 The Florida Supreme Court never ruled on that because they
22 found that the search, the scope of the search was
23 unwarranted. I don't think this Court is the proper
24 avenue to decide subjective motivation. I think that is
25 the question that best be left for another day when the

1 issue is presented.

2 Thank you.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

4 Neimand.

5 The case is submitted.

6 (Whereupon, at 1:47 p.m., the case in the above-
7 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 88-1835 - FLORIDA, Petitioner V. MARTIN LESLIE WELLS

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Leona M. May*
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