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IN THE SUPREME COURT OF THE UNITED STATES

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MARCUS THORNTON, :

Petitioner :

v. : No. 03-5165

UNITED STATES. :

- - - - -X

Washington, D.C.

Wednesday, March 31, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

FRANK W. DUNHAM, JR., ESQ., Federal Public Defender for the Eastern District of Virginia, Alexandria, Virginia; on behalf of the Petitioner.

GREGORY G. GARRE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 03-5165, Marcus Thornton v. the United States.

Mr. Dunham.

ORAL ARGUMENT OF FRANK W. DUNHAM, JR.

ON BEHALF OF THE PETITIONER

MR. DUNHAM: Mr. Chief Justice, and may it please the Court:

The central issue in this case is whether the Government, having failed to prove that the police initiated contact with Petitioner Thornton while he was an occupant of his automobile and having failed to prove that when Mr. Thornton was arrested, that he was even within reaching distance of his automobile, may rely on New York v. Belton to justify a warrantless, suspicionless search of Mr. Thornton's automobile incident to arrest.

Now, it's the Government's burden --

QUESTION: Well, now, Belton did involve a car search after the suspects had left the car and were under arrest. They weren't in a position to reach into the car.

MR. DUNHAM: They were within reaching distance of the vehicle, Justice O'Connor.

QUESTION: And arrested.

MR. DUNHAM: They -- they were standing by the

1 side of the car at the -- at the moment of arrest.

2 QUESTION: Right, but then they were disabled by  
3 the arrest. They couldn't reach into the car, and after  
4 that, the search occurred, and we -- we said, okay, that  
5 you could search if -- for a recent occupant of the  
6 vehicle. I just -- I think the reasons articulated in  
7 Belton weren't all that clear, but it may cover this case.

8 MR. DUNHAM: Well, Your Honor, I -- I believe  
9 that when you focus on the word recent, it's not a very  
10 bright line test unless you flesh it out and give it some  
11 definition. I believe I was a recent occupant of my  
12 automobile this morning. Somebody could say I was  
13 recently in that, but that wouldn't mean that they could  
14 go search it.

15 Well, the facts show --

16 QUESTION: Do we know from the facts here?

17 MR. DUNHAM: -- a lot less -- the facts here  
18 show a lot less time, but recent doesn't give the kind of  
19 clear bright line that Belton said it was trying to draw  
20 because it -- it's open to a lot of interpretation.

21 Our --

22 QUESTION: How about moments?

23 QUESTION: You conceded -- the Fourth Circuit  
24 said that it was conceded in the -- that he was in close  
25 proximity to his vehicle when Officer Nichols approached

1 him, and the record does conclusively show that Officer  
2 Nichols observed Thornton park and exit his automobile and  
3 then approached Thornton within moments. You don't  
4 dispute any of that I take it.

5 MR. DUNHAM: No. Those -- those are the facts  
6 of the case, Your Honor.

7 But moments again -- is he -- is he 5 yards, 10  
8 yards, 15 yards away from the vehicle? We -- I think we  
9 need to go back to what Belton was all about. Belton said  
10 that it concerns the proper -- quoting at page 459 of the  
11 Belton opinion, it says the proper scope of a search of  
12 the interior of an automobile, incident to a lawful  
13 custodian -- custodial arrest of its occupants. And the  
14 Belton rule itself says, quote, at page 460, when a  
15 policeman has made a lawful arrest of the occupants of an  
16 automobile, he may, as a contemporaneous incident of that  
17 arrest, search the passenger compartment of that  
18 automobile.

19 Belton was focusing on that highly dangerous  
20 situation when a police officer initiates contact with and  
21 approaches a -- an occupied vehicle. As this Court  
22 recognized in *Pennsylvania v. Mimms*, that may be the most  
23 highly dangerous situation an officer faces.

24 QUESTION: But there was no search until the --  
25 Belton was -- wasn't he in -- in the patrol car by the

1 time they started the search?

2 MR. DUNHAM: So was Mr. Thornton, Your Honor,  
3 and I --

4 QUESTION: But -- so I -- that's what I don't --  
5 it's quite different from search into -- incident to  
6 arrest. The -- the area around the defendant, the  
7 defendant may still grab a gun. But the one thing we know  
8 is that when the defendant -- when the suspect is sitting  
9 in the patrol car with handcuffs on, there isn't any  
10 danger that the police faces when they're doing the  
11 search. When they arrested him, yes, but not when they  
12 search -- do the search.

13 MR. DUNHAM: I would agree with that 100  
14 percent, Your Honor, but the converse of that position is  
15 that in order to do the search, the -- that he's allowed  
16 to do under the Fourth Amendment, that -- that right to  
17 search fixes at the moment he effects the custodial  
18 arrest. You don't want to -- or it's not reasonable to  
19 require the officer to conduct that search with the  
20 suspect at his elbow.

21 So while I would agree with Your Honor as a --  
22 as a very practical matter, there is no danger to the  
23 officer in the situation where the man is arrested,  
24 stuffed in the back of the squad car, and then we go  
25 search, that's kind of a fiction. But on the other hand,

1 it may be a kind of a reasonable fiction because  
2 otherwise, the converse is, if the officer is going to  
3 search the car, he's got to do it with Mr. Thornton or Mr.  
4 Belton standing right beside him. And that's why --

5 QUESTION: So you don't object to the search  
6 taking place when there's no danger to the officer, but  
7 you say in order to do that non-dangerous search, the  
8 officer has to put himself in danger when he makes the  
9 arrest.

10 MR. DUNHAM: That's -- that's right. I -- and I  
11 -- and I believe, Your Honor, that's why -- this case is  
12 really presenting a situation where we're dealing with the  
13 harm to the Fourth Amendment instead of really dealing  
14 with potential danger to the officer. Modern police  
15 practices are going to have a Mr. Belton or a Mr. Thornton  
16 in the back of the squad car at the time these searches  
17 incident to the arrest under Belton or whether you're  
18 operating --

19 QUESTION: Was there -- were there reasonable  
20 grounds here, do you concede that, for the Terry pat-down  
21 of petitioner?

22 MR. DUNHAM: Your Honor, there may or may not --

23 QUESTION: Is that contested?

24 MR. DUNHAM: The -- that ground, that exception  
25 to the warrant requirement was not advanced by the

1 Government below.

2 QUESTION: All right. I mean, there was a Terry  
3 stop. There was a pat-down. Narcotics were found. He  
4 was arrested. Right? Subsequently the search.

5 MR. DUNHAM: That's correct. We --

6 QUESTION: Of the vehicle.

7 MR. DUNHAM: We have not --

8 QUESTION: Now, had -- had the officer not made  
9 an immediate search of the vehicle, presumably the police  
10 would have to have taken precautions to safeguard the car  
11 and make an inventory search of it. So they're going to  
12 find the stuff anyway, aren't they?

13 MR. DUNHAM: Well, Your Honor, the -- the Fourth  
14 Circuit did not address --

15 QUESTION: Isn't that right?

16 MR. DUNHAM: Well, not necessarily, Your Honor.  
17 We're not conceding that particularly in this case. We're  
18 not saying that there -- this case involves a car that was  
19 parked in a -- in a shopping mall parking lot. And the  
20 only motor vehicle violation didn't authorize a towing of  
21 the vehicle. So that the -- the -- there is an inadequate  
22 record below with regard to whether or not there would  
23 have been an inevitable towing and inventory of this car.

24 QUESTION: Well, it seems to me that Justice  
25 O'Connor's questions are -- are getting to your comment



1 that Belton is a -- is a fiction. And maybe it's not a  
2 fiction. Maybe the officer, at the time he conducts the  
3 search, is not in immediate danger, but if he left the  
4 vehicle without conducting the search, a confederate can  
5 come by. There could be somebody with another key. A  
6 passer-by can come and get the gun if the car isn't  
7 locked, and there's going to be an inventory search  
8 anywhere -- anyway. So Belton, rather than being a  
9 fiction, makes a good deal of sense in terms of safety,  
10 maybe not safety at the time the officer is making the  
11 very search. Maybe that's somewhat fictional.

12 MR. DUNHAM: You could make the same argument  
13 with regard to the house in Chimel, that we limit the  
14 search to the area within reaching distance in the room  
15 that the man is in. We don't let him go into the kitchen  
16 or the bedroom. But there could be accomplices there.  
17 There could be guns there.

18 QUESTION: Houses are -- houses are stationary  
19 and cars are not. So we have to draw the line there.

20 MR. DUNHAM: Well, it -- the -- if the -- the  
21 justification in Belton for allowing the vehicle search  
22 says it's not a departure from Chimel, and it limits the  
23 search to an area within the reaching distance. It's  
24 based on a generalization, Your Honor, that everything  
25 within the narrow passenger compartment of the vehicle is

1 within reach of an occupant. Now, when a man is no longer  
2 an occupant and has become a pedestrian and is walking on  
3 the street, that generalization that he can reach  
4 everything in the narrow passenger compartment of an  
5 automobile no longer makes any sense.

6 QUESTION: Well, then -- then Belton should have  
7 been -- if you're right, Belton should have -- not have  
8 been decided the way it was.

9 MR. DUNHAM: Your Honor, Belton was decided  
10 absolutely correctly I believe. The -- the -- Roger  
11 Belton was approached by the officer while he was an  
12 occupant of the vehicle. The officer asked him to step  
13 out of the car. I do not believe that we want to have our  
14 search incident to arrest doctrine turn on whether the  
15 officer decides to have him step out before he places him  
16 under arrest or arrest him, sit him in the -- sitting in  
17 the vehicle. Five other --

18 QUESTION: Well, suppose this -- this officer  
19 lets Mr. Thornton go to the shopping mall but is standing  
20 guard next to the car and Mr. Thornton then comes back,  
21 enters the car and just as he enters, the police officer  
22 says, you're arrested. Then he could do --

23 MR. DUNHAM: In my view he would not be able to  
24 do a Belton search. He would be able to a Chimel search.  
25 He'd be able to arrest the individual under Chimel, which

1 is still the -- the law in this Court, and he would be  
2 able to conduct a search of anything within Mr. Thornton's  
3 reaching distance at the time.

4 QUESTION: So if --

5 QUESTION: So if the car were -- the car door  
6 were unlocked and his reach would have been long enough to  
7 get inside the -- the car if the door were open, he could  
8 search into the car?

9 MR. DUNHAM: If -- if the -- if the car was --  
10 if he could -- he could search for anything within  
11 reaching distance of the person he's arresting.

12 QUESTION: What about the answer to my question?

13 MR. DUNHAM: If he could reach into the car, he  
14 could -- he could get anything within the man's reach.

15 QUESTION: Why is that reasonable? Why doesn't  
16 he tell him, look it, move off, get -- get 10 yards away  
17 from the car, get 20 yards away, however? I -- I mean,  
18 you -- you don't really suggest that there is a necessity  
19 to conduct a Belton search in order to protect the  
20 officer. All he has to do is say, get away from the car.

21 MR. DUNHAM: Well, I -- I agree with Your Honor  
22 that if he hasn't arrested the man and he has an  
23 opportunity to let the man move away from the car before  
24 he conducts the arrest, he's certainly acting as a prudent  
25 officer in protecting his own safety. I would agree with

1 that.

2 QUESTION: It seems to me --

3 QUESTION: Belton must then rest on some kind of  
4 bright line administrative consideration because you're  
5 attacking Belton in various ways which are logical. But  
6 our problem I think in this case is to decide whether the  
7 particular limit that you propose makes sense, and that's  
8 where I'm having a problem because what you say is that  
9 the -- the line to be drawn around Belton is not just a  
10 line of -- in time and space, which I could understand.  
11 But you want to say it depends on whether the policeman  
12 initiated conduct with the individual before he exited the  
13 car. And that seems to me that you're trying to  
14 distinguish between the case where the policeman notices a  
15 wanted suspect driving, pulls over to the side. The  
16 police -- the -- the suspect takes off and runs over to a  
17 fence. Now, that would be okay. That's Belton.

18 But the car stops before the policeman  
19 recognizes him. The driver gets out and then the  
20 policeman recognizes him, and then he takes off for the  
21 fence and it's exactly the same. That you would say is  
22 not Belton.

23 Now -- now, that line that you're drawing there  
24 to me -- I -- I don't understand it at all in terms of the  
25 Belton rationale or administrative. It would make it more

1 complicated and it wouldn't achieve that much. It seems  
2 -- in other words, I want you to explain why that line is  
3 a rational way of limiting Belton.

4 MR. DUNHAM: I would suggest, Your Honor, that  
5 the man who exits the vehicle and runs to the fence, 15,  
6 20, 30 yards from the vehicle, whether he did it because  
7 the police pulled up behind him and turned the flashers on  
8 or whether the policeman surprised him as he was coming  
9 out of the car, neither one of those searches are good  
10 under Belton because the man -- it's -- it's no longer  
11 appropriate in my judgment to rely --

12 QUESTION: That's not what the question  
13 presented says. It says, when the arrestee was not in the  
14 car when the police initiated contact with him.

15 MR. DUNHAM: I understand.

16 QUESTION: So what I thought you were advocating  
17 is if the policeman was not in the car when the police  
18 initiated contact with him, unless he's within reaching  
19 distance, which he isn't -- if he's not in the car when  
20 the police initiated contact with him, then don't apply  
21 Belton.

22 MR. DUNHAM: That's -- that's correct, Your  
23 Honor.

24 QUESTION: And that was the line that I was  
25 having trouble figuring out a justification for.

1           MR. DUNHAM: That -- that's correct, Your Honor,  
2 and if I might respond.

3           The -- our -- our test under Belton has two  
4 prongs to it. One is that he's in the car when the police  
5 initiate contact with him. The second is that he's  
6 arrested within reaching distance of the car. So your  
7 hypothetical that the man runs to the fence --

8           QUESTION: You're saying that Belton never  
9 applies as within reaching -- if he's outside reaching  
10 distance of the car.

11          MR. DUNHAM: If he's -- if he's outside reaching  
12 distance, it doesn't make any sense --

13          QUESTION: Okay. That's -- that's one possible  
14 rule. That would -- that would invalidate what is  
15 ordinary police practice in almost every place, which is  
16 that they remove him, he's outside the police -- I take it  
17 it would.

18          MR. DUNHAM: Well, it's the moment --

19          QUESTION: Can the policeman make him stay  
20 within reaching distance? Wait. Don't -- don't get any  
21 further than that. I want you to stay right there.

22          MR. DUNHAM: The policeman can arrest him and  
23 take control of him. So I would argue yes, he can make  
24 him stay within reaching distance.

25          The -- the justification for the Belton search

1 is to protect the officer. It's not reasonable to think  
2 that he's going to effect his arrest at a point that  
3 increases the danger to himself just so that he can make a  
4 search.

5 QUESTION: Okay. I mean, I understand the  
6 argument, and it's been made many times and there's a lot  
7 of logic to it. But it's been pretty consistently  
8 rejected. So -- but I got it. At least I understand it  
9 and -- and maybe it will be accepted or not.

10 But let's put that one aside, the reaching  
11 distance point. Do you want to defend the other  
12 distinction your making, which I take it is even if you  
13 lose on reaching distance, still Belton does not apply if  
14 the initial contact was made between the police and the --  
15 and the suspect outside the car?

16 MR. DUNHAM: We -- that is --

17 QUESTION: You want to give up on that one.

18 MR. DUNHAM: No.

19 QUESTION: Or you want to defend it?

20 MR. DUNHAM: No, no.

21 QUESTION: Then defend it.

22 MR. DUNHAM: Our -- the initiation of contact we  
23 believe is a -- is a very reasonable test, and we believe  
24 it's called for by the Belton case itself. When you read  
25 -- when you read Belton, it says it is a narrow -- narrow

1 -- class of problematic recurring cases, and then it gives  
2 seven cases as examples of cases that fall within its  
3 class. And in every single one of those cases, with the  
4 possible -- a marginal exception of one, the police are  
5 initiating contact with the man while he is an occupant of  
6 a vehicle. We --

7           QUESTION: And that escalates the danger of the  
8 situation. I mean, why -- what sensible regime would say,  
9 police officer, don't take the precaution of waiting to  
10 make the arrest till the person stops and gets out of the  
11 car? That way, police officer, you won't be in danger of  
12 the man grasping for a gun.

13           Or suppose it's a case where the police want to  
14 follow that car and not signal because they want to find  
15 out where the crack house is that he's going to. So if  
16 they signal, they make initial contact, they give away the  
17 whole -- the whole thing. They will not find the  
18 destination they're looking for.

19           To -- to say that Belton is okay but -- in those  
20 situations the -- the police would not have the  
21 possibility of within moments after the suspect exits the  
22 car arresting him and then doing a car search. It just  
23 doesn't seem to make any sense.

24           MR. DUNHAM: Well, Your Honor, if you -- if you  
25 think about it, that most -- the most dangerous situation



1 for the police officer is when he initiates contact with  
2 the person while he's an -- an occupant in an -- of an  
3 automobile, but has not yet gotten up to the point where  
4 he can get him out and make an arrest. It's during that  
5 interval between the time that the officer initiates  
6 contact with the vehicle and the time when he actually  
7 makes a custodial arrest that the danger to the officer is  
8 at its greatest point.

9 QUESTION: Well, that's what -- why I asked  
10 doesn't it make sense to say we're not going to initiate  
11 contact while he's in the vehicle, but the minute he gets  
12 out, we will arrest him.

13 MR. DUNHAM: Because in most cases, Your Honor,  
14 the officer doesn't have a choice. You look at the case  
15 in New York v. Belton, I mean, he -- the officer was a --  
16 was a State trooper pulling the man over on the highway.  
17 The -- when -- when you -- and that's going to be the case  
18 most of the time. You're going to have a -- a State  
19 trooper or somebody with lights on top of their car that  
20 are pulling somebody over, and they don't really have a  
21 choice. Or you've got undercover agents watching for the  
22 drug transaction to occur and then before the dealers  
23 drive off, they want to rush the car and make the arrest  
24 of the occupants. It -- the -- the officer frequently has  
25 no choice.

1                   And I like to think of it as when you turn on  
2 the light to pull the man over, you turn on Belton.  
3 Belton comes on when you turn on the red light to signal  
4 the man over.

5                   And what does it do for the officer? It  
6 immediately defines, for purposes of a bright line rule,  
7 who is an occupant. It not only defines who is an  
8 occupant, it defines who can become a recent occupant.

9                   QUESTION: Why -- why don't we save ourselves a  
10 lot of trouble and say that in almost all of these cases,  
11 the police have an interest in what happens to the  
12 vehicle, they're going to take it away anyway, so they  
13 might as well do the inventory search right away?

14                  MR. DUNHAM: Well, the -- the Court has come  
15 close to entirely extinguishing -- extinguishing any  
16 Fourth Amendment protection in a vehicle, and that kind of  
17 a decision would give it the final death knell. There  
18 would be no privacy left.

19                  QUESTION: But, I mean, does it make a lot of  
20 sense if in most cases, which I -- which I assume to be so  
21 -- I may be wrong. In most cases, especially when the car  
22 is on a -- on a street or in -- in a -- in a parking lot  
23 -- it's not at the residence -- they're going to have to  
24 tow that car and -- and check it. They probably should  
25 make sure it's locked before they leave so that nothing

1 will be taken from the car, et cetera.

2 MR. DUNHAM: What you end up with, Your Honor,  
3 is when you combine that view with the Court's decisions  
4 in Atwater and Whren, you end up with the police stopping  
5 somebody in -- in a parking lot, maybe a short distance  
6 away in a store because they've got a dead inspection  
7 sticker. But it's a pretext because the officer wants to  
8 search the car.

9 QUESTION: Well, no, my case -- my case says  
10 there's been an arrest.

11 MR. DUNHAM: Well, but the -- the Court's  
12 decisions allow the arrest to be made on a minor traffic  
13 violation that doesn't carry anything more than a \$200  
14 fine on a pretext because the officer wants to search the  
15 car. He then -- he makes the arrest on the -- on that  
16 under -- under Wren and Atwater. He then has the right to  
17 go search the entire vehicle.

18 QUESTION: Well, my point -- my point is I  
19 assume it happens anyway. Now, empirically I may be  
20 wrong. Then that's a different case.

21 QUESTION: Well, it is clear, is it not -- I --  
22 if I remember Belton, it is clear that the Belton rule  
23 applies to any arrest. It does not necessarily have to be  
24 an arrest in which they will impound the car. You could  
25 be caught for speeding. That's what they stopped him for

1 in Belton. They were speeding. And so I think Justice  
2 Kennedy's hypothetical is not the facts of Belton.

3 MR. DUNHAM: The -- the fact is that -- that  
4 Belton is an arrest. It doesn't require a towing or  
5 inventorying of the car. It is a -- a classic search  
6 incident to arrest.

7 QUESTION: And it not only allows search of the  
8 vehicle but of every container in the vehicle. So  
9 everybody who's caught speeding has his vehicle --  
10 everything in that vehicle is subject to search.

11 MR. DUNHAM: If they're -- if they are arrested,  
12 Justice Stevens. Many times --

13 QUESTION: Correct.

14 MR. DUNHAM: -- people are just issued a  
15 citation. But if they're -- if they're stopped, even for  
16 a bad traffic signal or not wearing a seat belt, they can  
17 be subjected to a custodial arrest and have their entire  
18 vehicle searched. And I think that's why it's -- in  
19 drawing the lines here with respect to Belton, recognizing  
20 that the -- that the arrestee is usually in the back of  
21 the squad car, and we're not here talking about officer  
22 safety issues -- that we try to remain -- retain some  
23 semblance of the Fourth Amendment with regard to  
24 automobiles.

25 QUESTION: The arrestee here, though, wasn't --

1 wasn't in the back of the car, the back of the police car.

2 MR. DUNHAM: Mr. Thornton was placed in the back  
3 of the police car before the search occurred, Your Honor.  
4 He was arrested --

5 QUESTION: Oh, after -- after he was arrested  
6 you mean.

7 MR. DUNHAM: Arrested, but before the search,  
8 Your Honor. And that's Justice Ginsburg's point. Where  
9 is the danger to the officer when the arrestee is in the  
10 back of the squad car? And that is a fiction and it is a  
11 fiction that courts accept, that if the squad car drives  
12 off with the man and takes him back to the station house,  
13 then the right to search is gone, but as long as it's a  
14 contemporaneous part of an unfolding scene --

15 QUESTION: Who -- who --

16 QUESTION: Unless the police have a practice of  
17 trying to safeguard the vehicle since it -- it could be  
18 claimed later by the person arrested, I had the Hope  
19 diamond in the back seat and you people hauled me off to  
20 jail, now you pay me for the Hope diamond. So, obviously,  
21 they want to inventory it. And I suppose virtually every  
22 police department has regular provisions to safeguard  
23 vehicles in those circumstances and do inventory searches.  
24 Don't they?

25 MR. DUNHAM: I -- I assume most good police

1 departments do, but in this --

2 QUESTION: So I don't see how we're furthered in  
3 our concerns by your approach.

4 MR. DUNHAM: Well, in this particular case, Your  
5 Honor, those inventory concerns were -- were not addressed  
6 in -- in the factual record. We believe we would win on  
7 the issue of inevitable discovery. The Fourth Circuit  
8 didn't address it.

9 And moreover, you -- frequently you're going to  
10 have an occupant arrested but that doesn't mean the  
11 vehicle is going to get towed.

12 QUESTION: Why -- why instead of complicating it  
13 -- take Belton as a given. Sorry. Were you finished?

14 MR. DUNHAM: I -- I was just going to finish,  
15 Your Honor, by saying that the -- that -- that you might  
16 just arrest one occupant and you might let the other  
17 occupants go on. So you can't necessarily say that the  
18 vehicle is always going to be towed and is always going to  
19 be inventoried.

20 QUESTION: I mean, would it -- do you think it  
21 would work -- or why wouldn't work -- to try to control  
22 Belton by imposing limits on what's reasonable time and  
23 reasonable space so that you keep it really to a -- an  
24 arrest that took place really when he was just within the  
25 car and not too far away unless it's his fault because he

1 took off?

2 All right. Now, you'd do that through a common  
3 law approach. The lower courts would make their decisions  
4 and occasionally we could review one to say it went too  
5 far one way or the other. That, it seems, is a -- is a  
6 procedure for imposing limits on Belton that -- that might  
7 work. Why wouldn't it?

8 MR. DUNHAM: Well, Your Honor, as long as  
9 they're -- they're more definite than words like recent or  
10 close proximity --

11 QUESTION: No, no. You'd have to -- you can't  
12 get -- unfortunately, language is what it is, and -- and  
13 sometimes efforts to make it clearer make matters worse.  
14 So one way to control, in the presence of vague language,  
15 is through example.

16 MR. DUNHAM: And I -- that's what I thought the  
17 Court did in Belton was give examples. And if you follow  
18 the examples that were given in Belton, you don't approve  
19 the search that occurred with regard to Mr. Thornton,  
20 because if you're trying to draw a bright line, which is  
21 what you were trying to do in Belton, you have -- some  
22 things fall on one side of that line and some things fall  
23 on the other. And we would -- we would submit that once a  
24 person, on his own without any prompting from the police,  
25 becomes a pedestrian, he's no longer an occupant of a

1 vehicle.

2 QUESTION: How long after he got out of the car  
3 did the arrest take place?

4 MR. DUNHAM: Moments.

5 QUESTION: What are moments?

6 MR. DUNHAM: Well, the -- it seems like the  
7 entire time I've been standing here is moments because my  
8 life is going in front of my eyes.

9 (Laughter.)

10 QUESTION: All right, and how far --

11 MR. DUNHAM: But in -- in any event, we would  
12 argue that the -- that the search here was outside of  
13 Belton and we would also argue that you have a perfectly  
14 good 35-year-old precedent in Chimel. If Belton doesn't  
15 apply and you're on the other side of the Belton line,  
16 then you go to Chimel, and Chimel tells you what to do.  
17 Chimel wasn't limited to houses. It is the rule that the  
18 police use every single day when they effect a custodial  
19 arrest. No new rules. No new guidance. Just if Belton  
20 doesn't apply, go to Chimel.

21 I'd like to save the rest of my time for  
22 rebuttal please.

23 QUESTION: Very well, Mr. Dunham.

24 Mr. Garre, we'll hear from you.

25 ORAL ARGUMENT OF GREGORY G. GARRE



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ON BEHALF OF THE RESPONDENT

MR. GARRE: Thank you, Mr. Chief Justice, and  
may it please the Court:

The sole contention advanced by petitioner on  
appeal was that the search of his car was not lawful under  
the rule of New York v. Belton because Officer Nichols did  
not succeed in initiating contact with him while he was  
still inside his car. The court of appeals correctly  
rejected that contention.

To begin with, petitioner's initiation of  
contact rule has no foundation in the rationale of Belton.  
It is the fact of the arrest and not the reason that the  
person exited the car that gives rise to the justification  
for the Belton search.

The custodial arrest is an extremely dangerous  
and volatile encounter for the officer in the field, and  
that's particularly true in the case of the arrest of a  
recent occupant of a vehicle. In Belton, this Court drew  
the generalization that when the recent occupant of a  
vehicle is arrested, that the inside of the vehicle is  
always within the area in which that occupant might try to  
-- try to lunge in order to get a weapon to effect his  
escape or to grab evidence to conceal it or destroy it in  
the car.

Now, the application of that generalization --

1                   QUESTION: May I just point out that the  
2 question presented in Belton defined it as an occupant of  
3 the vehicle?

4                   MR. GARRE: That's correct, Justice Stevens, but  
5 the Court did use the term recent occupant at page 460 of  
6 its decision.

7                   QUESTION: It also used occupant several times  
8 in the opinion.

9                   MR. GARRE: That's true, and -- and in  
10 describing the category of --

11                   QUESTION: And -- and the examples that it gave,  
12 as your opponent indicated, all were -- except one  
13 possible exception, all were occupants, weren't they, in  
14 -- in the cases that Justice Stewart --

15                   MR. GARRE: No, Justice Stevens. I -- I  
16 actually don't think that that's correct. I think the  
17 Frick case, which is discussed, listed with the cases  
18 discussed at page 459 of the decision, involved the  
19 situation where the police came upon the person in a  
20 parking lot, and in that situation -- which was one of the  
21 cases that the Court identified as the disarray in the  
22 case law that existed before Belton. And that's a  
23 critical point for the Court to understand in weighing the  
24 -- the petitioner's reaching distance argument here.

25                   This Court knows what the world is like in a

1 reaching distance regime under Chimel and the important  
2 context in which the recent occupant of a car is arrested.  
3 As the Court mentioned in -- in Belton, it's a world in  
4 which there's disarray and confusion in the case law, more  
5 litigation and more confusion for the officer in the  
6 field. The Court noted on page 460 of its decision in  
7 Belton that that kind of confusion was not helpful to the  
8 police who need clear rules for the scope of their  
9 authority in this context.

10 QUESTION: Yes, but if you emphasize the clarity  
11 -- and that's what Justice Stewart did. He drafted what  
12 he thought was a very clear rule. If you limit it to  
13 occupants, isn't that equally clear as the rule you  
14 propose?

15 MR. GARRE: It's -- it's artificial, Justice  
16 Stevens, and it's --

17 QUESTION: Well, I agree it's artificial, but is  
18 it not equally clear?

19 MR. GARRE: That is a clear --

20 QUESTION: In fact, is it not more clear?  
21 Because I don't know when you stop being a recent  
22 occupant.

23 MR. GARRE: Well, with respect, we think it's an  
24 artificial rule, and -- and if I could --

25 QUESTION: It is an artificial rule. We all

1 agree with that, but what we're -- what we're looking for  
2 is a clear artificial rule. That's the purpose of Belton.

3 MR. GARRE: No. I -- I think a rule which --  
4 which takes into account the justifications --

5 QUESTION: Because the reason it's artificial is  
6 it explains that normally Chimel would control, and he  
7 said we want a special rule for -- for arrests of  
8 occupants of cars. And that's what they did. And we --  
9 and they made it so you can search the entire vehicle.  
10 That's the other important part of Belton.

11 MR. GARRE: But -- but it --

12 QUESTION: And the entire -- all -- all  
13 containers in the vehicle I mean.

14 MR. GARRE: If I could respond in this way.  
15 First, the vast majority of arrests that take place in the  
16 Belton context, including in this case, including in  
17 Belton itself, take place after the person is already  
18 outside of the car.

19 QUESTION: Yes, but the contact with the police  
20 is when they're occupants.

21 MR. GARRE: Well, that's true. And -- and let  
22 me talk, if I could, about the artificiality of that rule  
23 and why we think it's not a rule that the Court should  
24 adopt.

25 QUESTION: Well, I'm trying to get an answer to

1 this question. I agree it's artificial. It's described  
2 in Belton as artificial. But the search in Belton was for  
3 the clearest rule available, and my suggestion to you is  
4 the rule of Belton, as -- as described in Belton itself  
5 applying to occupants of the cars at the time of contact,  
6 is clearer than a rule defined by recent occupant because  
7 what is a recent occupant.

8 MR. GARRE: Well, let me answer both questions.  
9 I -- I don't think that that is going to be a clearer rule  
10 than the rule that we're asking for in this case.

11 And -- and to respond to your second question as  
12 to what is a recent occupant, in our view it's someone  
13 who's just occupied the car. It's -- it's the person in  
14 the vast majority of cases in which this question has  
15 arisen. In this case it was clear that Officer Nichols  
16 met petitioner moments after he exited the car, and that's  
17 going to be the situation in which this question has  
18 arisen and it can arise in a number of ways.

19 In Michigan v. Long, the police --

20 QUESTION: But would your rule apply to someone  
21 who was out of the car for 5 minutes?

22 MR. GARRE: Well, the -- the recency test that  
23 the Court -- that we think the adopted or described in  
24 Belton is one that's tethered to the proximity of the  
25 automobile. And there are going to be line-drawing

1 problems at the outer --

2 QUESTION: Well, I'm trying to understand what  
3 your definition of recent is.

4 MR. GARRE: It's -- it's someone -- it's the  
5 person who has gotten out of the car and who's in the same  
6 proximity to the car that he would have occupied if he had  
7 been ordered out.

8 QUESTION: But is -- in other words, geography  
9 is part of the time dimension of recency.

10 MR. GARRE: Well, and it is in a typical Belton  
11 case. If I could give the Court an example. The Federal  
12 Law Enforcement Training Center trains its officers that  
13 they should stop their police car within two to four  
14 lengths of the vehicle that they're stopping and to pull  
15 the person out of the car prior to the arrest. ` And this  
16 is -- this is the way officers are trained to bring them  
17 back because of the inordinate risks that officers face in  
18 that situation.

19 In this case, Officer Nichols intended to pull  
20 petitioner over. That's at page 16 of the J.A., but he  
21 didn't succeed in doing so because the petitioner pulled  
22 into a parking lot. And that's not an uncommon practice  
23 that -- that suspects do if they -- if they feel or sense  
24 that they're under surveillance by the police. And he got  
25 out of his car, and the record shows at page 11 of the

1 J.A. that Officer Nichols got out at the same time and met  
2 him within moments. This is -- this case we think has the  
3 hallmarks of the classic Belton encounter.

4           Officer Nichols patted him down, found drugs on  
5 his person, and at that moment, placed him under arrest.  
6 The -- the pat-down was a consensual search. That's --  
7 that's indicated at page 19 of the joint appendix, and at  
8 the moment that he placed petitioner under arrest who,  
9 after all, was a convicted felon who just had drugs on his  
10 person and who had a loaded semi-automatic gun --

11           QUESTION: Why -- why does that matter? We  
12 don't know that. The police don't know that. That  
13 doesn't figure into any calculus. Most people who get out  
14 of cars are not convicted felons bearing drugs.

15           MR. GARRE: That's absolutely correct, Justice  
16 Souter, and that's an important aspect of the  
17 generalization that the Court drew in Belton and -- and  
18 that underlies the search incident to arrest cases which  
19 is --

20           QUESTION: No, but the -- the point of Justice  
21 Stevens' question is why should we go beyond -- strictly  
22 why should we go beyond the generalization in Belton? And  
23 the reason certainly cannot be that this particular guy  
24 had a record and had drugs.

25           MR. GARRE: My -- my point, Justice Souter, was

1 that the officer safety justification for Belton is going  
2 to be squarely implicated regardless of the reason that  
3 the person got -- got out of the car.

4 QUESTION: No, but it seems to me that you get  
5 into -- into deeper water if you say that because the --  
6 to me the incoherence of Belton is that it -- it purports  
7 to be an application of Chimel with a bright line, but at  
8 the point at which the actual search is made, any danger  
9 to the officer is over. And so if -- if you're going to  
10 try to justify a -- a more flexible approach to Belton on  
11 grounds of the safety justification in Belton, I -- I  
12 think you're -- you're out over your head.

13 And -- and the force of Justice Stevens'  
14 question to me is this. Belton is not coherent with  
15 Chimel. Belton does not stand up as an analysis of  
16 anything other than we're going to have a simple bright  
17 line rule for cars and stop all of this litigation. But  
18 if Belton gave a bright line rule for cars, why is there a  
19 justification for making it less bright by going beyond  
20 the specific kinds of facts in Belton itself? That's the  
21 force of the question.

22 MR. GARRE: Sure. And -- and we don't think  
23 it's going to be any less bright in the most common  
24 situation in which this question has arisen where police  
25 come upon the person right as he's -- as he's exiting his



1 car.

2 Michigan v. Long is another example. That case  
3 was decided two terms after Belton. And in that case this  
4 Court indicated in dictum that Belton would apply in the  
5 situation where the police come upon the person after he's  
6 outside of the car.

7 QUESTION: But is -- is your criterion then  
8 going to be a time criterion, the recency of his exit from  
9 the car?

10 MR. GARRE: It's -- it's going to have both --  
11 and the court of appeals emphasized it in this case at  
12 page 74 --

13 QUESTION: Well, is it time or is it space?

14 MR. GARRE: It's both space and time and it's  
15 going to encompass a situation where the person has just  
16 gotten out of the car --

17 QUESTION: So if -- if I get out of my car and I  
18 run as fast as I can run for 15 seconds, and I get across  
19 the parking lot, that is very recent in time. Can -- can  
20 you search my car then?

21 MR. GARRE: Well, under the position that  
22 petitioner advances --

23 QUESTION: No. I want your position. We want a  
24 bright line rule. If -- if I -- if I'm a sprinter and I  
25 get across the parking lot and it's 15 seconds, can they

1 search the car?

2 MR. GARRE: Justice Souter, as in the case of  
3 any Fourth Amendment case, there -- there are going to be  
4 situations at the margin. I think if -- if the person is  
5 racing away from the --

6 QUESTION: No, but bright line rules are -- are  
7 there to -- to avoid marginal problems. What -- what's  
8 the answer to my -- my question?

9 MR. GARRE: If the hypothetical is the person  
10 sees the police officer and races away from the car, the  
11 police officer arrests the person in the vicinity of the  
12 car, then no, I don't think it matters if he got 15 feet  
13 or 20 feet or 30 feet. If he gets a block away, then  
14 sure, it might matter. These are cases at the outer  
15 extreme or margin and aren't implicated by the commonly  
16 recurring fact pattern in which this case arises where the  
17 police meet the person in the same spot that he would have  
18 been if he had been ordered out of the car.

19 And -- and let me talk about the problems with  
20 line-drawing that the Court is going --

21 QUESTION: What if he -- what if he didn't see  
22 the police officer? He drives into the parking lot, gets  
23 out of his car, locks the car. He's 5 feet away and --  
24 and the police say, that's the guy I saw speeding on Main  
25 Street 10 minutes ago. What's -- what's the answer there?

1 MR. GARRE: Well --

2 QUESTION: He's -- he is in the spot he would  
3 have been if the police had arrested him or had  
4 apprehended him in the car and told him to get out. Can  
5 they search?

6 MR. GARRE: Of course, there's something absent  
7 there which is the positive linkage. The police don't  
8 know that that person has just gotten out of the car.  
9 That -- that case is a lot like the Frick case that the  
10 Court noted in Belton as one of the cases that it was  
11 trying to deal with when it came up.

12 QUESTION: But if they see him -- if --

13 MR. GARRE: I think the police --

14 QUESTION: -- if they see him get out of the  
15 car, can they then search in my hypo?

16 MR. GARRE: I -- I think in that situation where  
17 the person was arrested right by the car, we think that  
18 Belton probably would apply. But that's not the fact  
19 pattern initiated here.

20 If -- if I could just talk about the line-  
21 drawing problems that the Court is going to invite if it  
22 adopts petitioner's initiation of contact rule.

23 The -- the petitioner said today that -- that  
24 the rule the Court ought to adopt if the light is on, then  
25 Belton is -- is on. Well -- well, that's going to create

1 line-drawing problems. To take an example close to home,  
2 the -- the police officers in the District of Columbia  
3 often drive around with white flashing lights on. Now,  
4 I'm not sure how the existence of those white flashing  
5 lights would come into play under petitioner's initiation  
6 of contact rule.

7           Take the case that the Court had before it this  
8 fall, *Arizona v. Gant*, which was a case that presented the  
9 same issue, but the Court vacated and remanded it in light  
10 of the Arizona Supreme Court's decision which rejected the  
11 initiation of contact rule. In that case, the officer  
12 came upon the suspect and he shined a flight -- shined a  
13 flashlight into the car which the suspect was still inside  
14 the car. The suspect got out of the car. The officer met  
15 him moments later, and yet the court of appeals in that  
16 case said that the police officer hadn't sufficiently  
17 initiated contact with the suspect while he was still in  
18 the car.

19           QUESTION: The Arizona Court of Appeal.

20           MR. GARRE: The Arizona Court of Appeals held in  
21 that case. That's correct, Mr. Chief Justice.

22           And -- and in describing that, the Court listed  
23 the number of different factors that would have to go into  
24 the calculus both from the standpoint of the officer on  
25 the scene and from a court later reviewing that

1 determination as to whether the officer initiated contact.  
2 He'd have to take into account the lighting in the  
3 situation, how far the officer was the car when he -- away  
4 from the car when he shined the flashlight into it,  
5 whether the person saw the flashlight, whether the person  
6 thought it was a police officer shining the flashlight or  
7 someone else, whether the person was aware that there was  
8 a police --

9 QUESTION: Well, you said a little while ago  
10 there are cases on the fringe. Of course, you can always  
11 find one or two cases that present these difficult  
12 problems.

13 But are -- are you really contending that the  
14 rule of initiating contact is less bright than the rule  
15 you're proposing?

16 MR. GARRE: Yes, we are. If -- if the Court  
17 focuses --

18 QUESTION: What if, for example, the -- the  
19 officer saw a person speeding, he pulls into a gas  
20 station, he gets out, goes to the men's room and comes  
21 back out. Can he be -- can you search his car?

22 MR. GARRE: If -- of course, that's -- that's  
23 not the fact pattern here.

24 QUESTION: No. I'm just not -- I'm just  
25 wondering --

1           MR. GARRE: Yes, I think he probably would be  
2 able --

3           QUESTION: I'm wondering about the integrity of  
4 your statement that there's a real bright line rule there.  
5 And what do you do with my case?

6           MR. GARRE: In -- in that case where the  
7 person --

8           QUESTION: He's -- this -- the officer saw him  
9 speeding but he didn't turn the light on. He followed  
10 him. The guy goes into a gas station, goes to the men's  
11 room, comes out 2 minutes later. Can you search his car?

12          MR. GARRE: If the person comes out and is right  
13 next to the car in the place he would have been when he  
14 had been ordered out, yes, we think that -- that Belton  
15 would apply in that situation.

16          But -- but the rule that we're asking the Court  
17 to adopt here is that on this fact pattern, which as the  
18 court of appeals we think correctly recognized has  
19 temporal and spatial limits, where the police see the  
20 person exit the car, confront him moments later, the  
21 application of the bright line rule in Belton shouldn't  
22 depend on the fortuity of whether the police initiate  
23 contact with that person beforehand. And that's  
24 particularly true in a case like this where Officer  
25 Nichols intended to pull the car over and -- and yet

1 didn't do so because the suspect did what suspects  
2 sometimes do, which is to pull over and get out in order  
3 to try to blend in.

4           The -- now, going back to the officer safety  
5 rationale, we think that is a justification for Belton and  
6 that it is implicated in this situation and that the  
7 initiation of contact rule would implicate officer safety  
8 in a number of ways.

9           One is the surveillance situation that was  
10 mentioned during petitioner's argument and that the court  
11 of appeals mentioned in this case. In -- in some cases,  
12 officers are engaged in surveillance activities and maybe  
13 determine that it's undesirable and unsafe to make contact  
14 with a suspect while he's still inside the car and so take  
15 the prudent step of waiting for the suspect to step out of  
16 the car before confronting him. The -- the case out of  
17 Virginia, the Glasco case that's discussed in the brief,  
18 is an example of that.

19           There's -- there's also the -- the possibility,  
20 which is recognized in the case law, that an initiation of  
21 the contact rule would have the effect of increasing the  
22 volatility of Belton encounters by creating a dynamic in  
23 which suspects had an incentive to race out of the car  
24 before police could -- could initiate contact.

25           QUESTION: If the -- if the suspect is

1 handcuffed and is in the police cruiser, is there any  
2 danger to the officer at that point that can't be equally  
3 avoided by simply having an inventory search later?

4 MR. GARRE: There is danger, Justice Kennedy. I  
5 mean, first of all, on -- on the handcuff --

6 QUESTION: Assume a single occupant.

7 MR. GARRE: Right. There is danger. And we --  
8 we -- and it's true in -- in a stop and arrest like this  
9 case where there's a lone officer and a person who he  
10 arrests. And the -- the deeply ingrained practice in this  
11 country is for the officer to put the -- the suspect,  
12 arrestee, in the squad car and then go back and search the  
13 car. And -- and we cite cases on page 38 of our brief  
14 where -- where suspects have escaped from handcuffs and  
15 gotten out. And -- and that danger is remote, but we  
16 think that it's still real as long as the suspect is at  
17 the scene of the arrest. All of the courts of appeals  
18 that we're aware of that -- that have considered this  
19 question and Professor LaFave who's -- who's recognized  
20 and have concluded that Belton applies when the person is  
21 handcuffed in the back seat of the squad car.

22 And of course, Justice Brennan in his dissent in  
23 Belton recognized --

24 QUESTION: I know it applies, but it's just not  
25 clear to me why an inventory search can never be, which --



1 I have only one factual question here.

2 Was this car locked before the police officer  
3 searched it? Did he need the key or do -- do we know?

4 MR. GARRE: The -- I believe the answer to that  
5 is -- is no because the record doesn't -- what the record  
6 shows -- and this is on page 50 of the J.A. I think -- is  
7 that the officer arrested petitioner, put him in the car  
8 and then went back and searched the car. There's nothing  
9 in the record that suggests that the officer needed keys.

10 But -- but on the inventory search question,  
11 although it may be true in some cases that the inventory  
12 search inevitably would have led to the discovery of the  
13 contraband, in that sense the privacy interests of the  
14 person from a Belton search at the time are -- are further  
15 diminished.

16 The inventory search I don't think is an answer  
17 to the officer's safety concerns and justification for  
18 Belton, which are real as long as the person is still at  
19 the scene of the arrest. There is the remote risk that  
20 the person can escape and try to get back into the car.  
21 There's also the risk, as -- as you mentioned I think,  
22 that there could be confederates in the area who might try  
23 to get into the car, either for a weapon or to get drugs  
24 out of the car or other contraband out of the car.  
25 Officers in -- in the Belton stop, it's not uncommon for

1 them to -- to have the person out of the car, to secure  
2 him, and then it's only at that point that they -- that  
3 they feel safe to go back to make sure that there's no one  
4 else in the car who could be hidden in the car or other  
5 things in the car.

6           So I -- so we don't think that the inventory  
7 search is an answer to the very real concerns that the  
8 officers face in conducting the Belton search and that  
9 provide the rationale for the Belton search.

10           I wanted to just go back briefly to the Court's  
11 decision in Michigan v. Long. And although it is dictum  
12 in that case on the application of -- of Belton, we do  
13 think that it's -- it's persuasive dictum. In that case  
14 the police officers saw a car swerve off the road, and  
15 they -- they came around back to investigate. The  
16 petitioner -- or -- or the suspect in that case, the  
17 individual who was driving the car, was already outside of  
18 the car when the police came back. And -- and the Court  
19 in that case made quite clear in dictum that if the -- if  
20 the suspect in that case had been arrested, that the  
21 search of his car would have been perfectly lawful under  
22 Belton. And we think that that was -- that is a  
23 persuasive and a correct understanding of Belton.

24           If I could -- I wanted to make clear too that we  
25 think that this case does bear the -- the hallmarks of a

1 classic Belton encounter. The only difference is -- is  
2 that Officer Nichols did not succeed in initiating contact  
3 before the suspect got -- got out of the car, but Officer  
4 --

5 QUESTION: Would he have to at least see the  
6 suspect in the car or would it be all right under the rule  
7 you're proposing where the police that come upon the scene  
8 just after the suspect exits from the car?

9 MR. GARRE: Well, we think that the -- the most  
10 important thing for the Court to hold in this case -- that  
11 we would ask the Court to hold in this case is in the  
12 commonly recurring situation where police see the person  
13 exit the car and confront him moments later in the same  
14 vicinity that he might have occupied if he had been  
15 ordered out of the car, that it doesn't make a difference  
16 for the purposes of applying Belton as to whether or not  
17 the police succeeded in initiating contact or succeeded in  
18 initiating contact in a sufficient way.

19 There may be -- there are going to be other  
20 cases that arise, and -- and we don't think that this is  
21 an area in which the Court should try to establish a rule  
22 which is tethered to a particular distance or -- or a  
23 particular amount of time. These are -- this is an  
24 extremely dangerous encounter for police. This is an area  
25 in which police need to make judgments. This Court

1 recognized in the Lago Vista case --

2 QUESTION: It seems to me your argument is that  
3 we don't want a bright line rule. We want a -- a facts  
4 and circumstances rule and take everything into account,  
5 which is sort of -- Justice Scalia often speaks of those  
6 rules with some disparaging terms.

7 (Laughter.)

8 MR. GARRE: No. That -- that's not what we're  
9 asking for, and I'm sorry if I -- if I misled the Court.  
10 We're asking the Court to apply the generalization that it  
11 adopted in Belton.

12 The -- the reaching distance rule that  
13 petitioner has alternatively asked for would just  
14 eviscerate Belton and put courts and police officers back  
15 in the situation that they occupied before Belton in  
16 trying to apply Chimel in -- in the recurring and  
17 dangerous context of an automobile stop. The Court  
18 recognized in Belton on page 59 of its decision that that  
19 -- the Chimel analysis had -- had provided to be -- shown  
20 to be unworkable in this context and -- and had created  
21 litigation for the courts and uncertainty for the police  
22 officers. So we're asking the Court to -- to stick to  
23 that bright line.

24 QUESTION: Justice Stewart wrote both Chimel and  
25 Belton, did he not?

1                   MR. GARRE: That's absolutely correct, Mr. Chief  
2 Justice.

3                   On the handcuffing in the squad car, I -- I did  
4 want to make clear on that point that that argument was  
5 not raised by petitioner below, and -- and the court of  
6 appeals noted that at page 74, note 2 of the joint  
7 appendix. It's not pressed by petitioner in this Court.  
8 I think petitioner's reply brief makes that clear on page  
9 16.

10                  QUESTION: What do the police departments  
11 normally tell the policemen? What do they say? They say,  
12 when you arrest a person who just got out of a car, you  
13 can search the car?

14                  MR. GARRE: In terms of -- of -- I -- I can tell  
15 you what the practice is at the Federal Law Enforcement  
16 Training Center. And -- and that practice is you -- is --  
17 is to take the -- the person outside of the car,  
18 ordinarily away from the car back towards the police --

19                  QUESTION: No. I'm not -- I'm not asking the  
20 practice. I'm asking-- the virtue of Belton is supposed  
21 to be it's simple. Explain it to a policeman. So I want  
22 to know how do they explain it. I thought perhaps they  
23 explain it by saying, policeman, if you arrest a person  
24 who's just got out of a car, you can search the car.

25                  MR. GARRE: That's -- that's correct, Justice

1 Breyer.

2 QUESTION: All right. Then if that's -- then  
3 there has to be some kind of limit on just got out of.

4 MR. GARRE: And -- and if it's --

5 QUESTION: So -- so inevitably we're in the  
6 business of trying to say what's just got out of. Is it a  
7 minute? Is it 2 minutes? Is it 5 minutes? There's no  
8 way to avoid that, is there?

9 MR. GARRE: No. There's not at the outer  
10 margins, but -- but the Court --

11 QUESTION: All right. So what in your opinion  
12 is the outer margin?

13 MR. GARRE: Well, let me -- let me say  
14 affirmatively that this case we think places a proper  
15 temporal --

16 QUESTION: This is well within it.

17 MR. GARRE: -- and spatial limits on it where  
18 it's clear that the person --

19 QUESTION: And you'd say certainly a day is too  
20 long I imagine.

21 MR. GARRE: Of course.

22 QUESTION: Yes.

23 MR. GARRE: That's correct.

24 I think if the Court were to hold in this case  
25 that Belton applies in this situation where the police

1 confront the person just after he gets out of the car,  
2 that is going to provide a guidance to the police  
3 officers. And that's going to tell them they don't need  
4 to undertake this additional fact-specific analysis as to  
5 whether the person got out of the car of their own  
6 volition or an initiation of contact.

7 QUESTION: Then perhaps we could use words like  
8 just got out of.

9 MR. GARRE: Or within moments. And -- and I  
10 think --

11 QUESTION: Seconds?

12 MR. GARRE: Seconds would be fine. But -- but  
13 no.

14 QUESTION: And what about in this --

15 MR. GARRE: I don't --

16 QUESTION: -- what about in this -- this is a  
17 serious question. What about if he's just about to get  
18 into it?

19 MR. GARRE: Well, and -- and that's -- that's a  
20 different fact pattern that has arisen. We think Belton  
21 would apply in that situation, and police we think have  
22 reasonably concluded that and courts have reasonably  
23 concluded that.

24 But -- but that's not the question here. And  
25 the most important question for the Court to answer, which

1 is the situation where the police do see the person get  
2 out of the car and do confront him moments later.

3           The -- the States -- a number of States have  
4 filed an amicus brief in this case supporting the  
5 Government's position and -- and urging against adoption  
6 of an initiation of contact rule. And -- and we do think  
7 it's significant that each of the States and jurisdictions  
8 that have adopted the initiation of contact rule, States  
9 like Florida and -- and Illinois and Michigan, have signed  
10 that brief and urged the Court to reject the initiation of  
11 contact rule. We think that that rule is unworkable.  
12 It's shown to be unworkable in cases like *Gant v. Arizona*.

13           There are other cases in which added wrinkles  
14 have been applied to the rule. There's a Florida case,  
15 which is not discussed in the briefs, but it is publicly  
16 reported. It's *Kavallierakis v. State*, 790 S.2d 1201. In  
17 that case, the courts in Florida, applying the initiation  
18 of contact rule, concluded that in order to trigger  
19 *Belton*, the contact had to be of a confrontational nature  
20 and not of a friendly nature, so that in that case, the  
21 courts reversed a conviction for possession of drugs found  
22 in a car because the police officer met the person with a  
23 greeting while he was getting out of the car as opposed to  
24 a confrontational signal such as a -- as a siren or a  
25 light. Now, that -- that seems like an extreme



1 application of that rule, but it's nevertheless indicative  
2 of -- of the variations in the line-drawing that can arise  
3 and that have arisen.

4 In this case we think that the court of appeals  
5 properly held that Belton apply. The record conclusively  
6 shows that petitioner was a recent occupant of the car and  
7 the search was contemporaneous with the -- the arrest, and  
8 we would ask the Court to affirm the judgment of the court  
9 of appeals.

10 QUESTION: Thank you, Mr. Garre.

11 Mr. Dunham, you have 4 minutes remaining.

12 REBUTTAL ARGUMENT OF FRANK W. DUNHAM, JR.

13 ON BEHALF OF THE PETITIONER

14 MR. DUNHAM: I have four brief points, Your  
15 Honor, that I'd like to make, if I could.

16 The first is that the State court opinion in  
17 Michigan v. Long, People v. -- People v. Long, shows that  
18 the car there was being chased by the police. They just  
19 weren't observing him drive by at a high rate of speed and  
20 crash into a ditch. They were in a high-speed chase, and  
21 it's reasonable to infer that they had their lights on and  
22 therefore had initiated contact.

23 Furthermore, the State court opinion in People  
24 v. Long shows that Long was in the vehicle when the  
25 officers got out of their car, after he had crashed into

1 the ditch, and began to approach the vehicle. Then Long  
2 exited his vehicle and walked towards the officers. So I  
3 don't think it's -- it's fair to say that there was no  
4 initiation of contact by the officers with Long in the  
5 Long case and that the footnote in the Long opinion  
6 referencing to Belton is no expansion or further  
7 brightening of the Belton rule.

8           Second, I want to point out that the Frick case,  
9 which is the one possible exception that I think Justice  
10 Stevens referred to when he was talking about the cases  
11 that Belton points to as defining its class -- the man is  
12 either getting into or getting out of his vehicle. He has  
13 not -- he has not achieved the status of pedestrian. Most  
14 people -- I think you could still consider someone who was  
15 in the act of either getting in or getting out -- you  
16 could call that person an occupant.

17           Third, if you -- the Fourth Circuit did not  
18 adopt Mr. Garre's place where he would have occupied if he  
19 had been arrested test. We call -- that's the  
20 Government's might have test. But Mr. Garre would add  
21 that to what the Fourth Circuit rule and would have him --  
22 and -- and would add a limit that, oh, as long as he's  
23 arrested where he might have been if he might have been  
24 arrested, if we'd stopped him when he was getting out of  
25 his car. It seems to me that that is an unworkable rule

1 and it just adds further confusion to the situation. Yet,  
2 it's necessary, necessary because it's the only way you  
3 avoid reversing Chimel.

4 Now, the -- the other point I want to make is  
5 Justice O'Connor I think made a good point about the  
6 inventory search. Why can't we draw Belton narrowly  
7 because in 90 percent of the cases, we're going to have an  
8 inventory search anyway? And why can't we maintain some  
9 semblance of Fourth Amendment protection in automobiles?

10 And finally, with regard to the handcuffs point,  
11 Mr. Garre's point that people sometimes get out of their  
12 handcuffs, I'd simply like to say if we indulge in the  
13 presumption that suspects are going to get out of their  
14 handcuffs, there's simply no search incident to arrest  
15 rule that we can fashion that doesn't just have us  
16 searching everywhere on God's green earth.

17 QUESTION: May I ask you a question --

18 MR. DUNHAM: Yes.

19 QUESTION: -- if your time is up? In your  
20 experience, does an inventory search include the right to  
21 search containers in the -- in the car? Belton, of  
22 course, gives the -- the Government the big advantage.  
23 You can search every container in the car.

24 MR. DUNHAM: I believe an inventory search does  
25 not allow you to search opaque containers within the car.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dunham.  
2 The case is submitted.  
3 (Whereupon, at 12:00 p.m., the case in the  
4 above-entitled matter was submitted.)  
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