1   IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - x

3 VIRGINIA,   :

4   Petitioner   :

5   v.   : No. 06-1082

6 DAVID LEE MOORE.   :

7 - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Monday, January 14, 2008

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11   The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:03 a.m.

14 APPEARANCES:

15 STEPHEN B. McCULLOUGH, ESQ., Deputy State Solicitor

16   General, Richmond, Va; on behalf of the Petitioner.

17 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

18   Department of Justice, Washington, D.C.; on behalf of

19   the United States, as amicus curiae, supporting the

20   Petitioner.

21 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf

22   of the Respondent.

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C O N T E N T S

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

2   (10:03 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first today in 06-1082, Virginia v. Moore.

5   Mr. McCullough.

6   ORAL ARGUMENT OF STEPHEN B. McCULLOUGH

7   ON BEHALF OF THE PETITIONER

8   MR. McCULLOUGH: Mr. Chief Justice, and may

9   it please the Court:

10   This Court has again and again held that an

11   arrest is constitutionally reasonable if the officers

12   have probable cause to believe a suspect has committed a

13   crime. The Court has found that this standard

14   represents the best compromise between the needs of the

15   citizens and the duty of the government to combat crime.

16   While the States are free to build additional procedures

17   on this constitutional bedrock, when they do so these

18   additional procedures are matters of State law. They do

19   not change the constitutional standard.

20   The court below erred in substituting this

21   clear, established, uniform, time-tested standard for a

22   standard that has none of those virtues.

23   First, it is undeniable that if State law

24   can raise the constitutional bar, that it will lead to

25   widespread differences on the exact same facts, on the

1 exact same crime, not only across State lines, but also

2 within a particular jurisdiction.

3   CHIEF JUSTICE ROBERTS: Mr. McCullough --

4   JUSTICE GINSBURG: If this officer had

5 complied with the State law, that is he had issued a

6 summons, then you agree that the exclusionary rule would

7 apply if he went ahead and searched.

8   MR. McCULLOUGH: That's correct. If he had

9 issued a summons, Knowles would apply and the evidence

10 would be excluded.

11   JUSTICE GINSBURG: So would you explain the

12 logic to saying that when the police violate State law,

13 then the evidence can come in; but when they comply with

14 State law, it can't.

15   MR. McCULLOUGH: Your Honor, the rationale

16 of Knowles was that the officer did not engage in any

17 extended contact with the suspect and that there was no

18 need to gather evidence.

19   But where from a constitutional sense there

20 is a full-fledged arrest, then the particular rationale

21 of Knowles doesn't apply; and I don't think the -- we're

22 asking the Court to embrace violations of State law;

23 we're asking the Court to recognize that when a State

24 goes above and beyond what the Constitution requires,

25 that the remedies for those violations should be left to

1   the States.

2   And Virginia has provided a number of those

3   remedies; but here the officer did make a full custodial

4   arrest.

5   JUSTICE SCALIA: Does this apply --

6   JUSTICE STEVENS: Let me ask you -- I'm sorry

7   -- well, you say he made a custodial arrest. Did he

8   search the defendant at the time of the arrest?

9   MR. McCULLOUGH: No. There was a

10   miscommunication between the officers --

11   JUSTICE STEVENS: And did he search him at

12   the place of the arrest?

13   MR. McCULLOUGH: No.

14   JUSTICE STEVENS: Well, how can this be

15   incident to an arrest?

16   MR. McCULLOUGH: Your Honor, the fact of the

17   arrest was uncontested, and the law doesn't require --

18   JUSTICE STEVENS: The search was unrelated

19   to the arrest, as I understand the facts.

20   MR. McCULLOUGH: No, Your Honor.

21   JUSTICE STEVENS: It took place later in a

22   different place.

23   MR. McCULLOUGH: Justice Stevens, the search

24   was related to the arrest. What happened at the scene

25   was the officer made a pat-down and assumed the other

1   officer had conducted the search. When they got to the

2   hotel, they realized there had been a mix-up. But he

3   had not yet been taken to the station and booked and so

4   the rationale supporting the search incident to the

5   arrest is present.

6   JUSTICE STEVENS: Well, why is it present if

7   he's not -- he searched when he wasn't arrested? I

8   don't understand. Could they wait a week and do it?

9   MR. McCULLOUGH: The arrest did not cease at

10 that point, Your Honor. In United States v. Edwards,

11 the Court recognized that at times the search will not

12 proceed immediately upon arrest.

13   JUSTICE STEVENS: This is an ongoing arrest,

14 is it?

15   MR. McCULLOUGH: Well, it's an arrest --

16   JUSTICE STEVENS: So an ongoing arrest?

17 That's kind of a new concept.

18   MR. McCULLOUGH: It's an arrest until he is

19 released or denied bail. But I would also add that the

20 timing issue was simply not raised below. And so

21 there's no reason at this juncture to raise an issue

22 that the litigants chose not to --

23   JUSTICE SCALIA: Mr. McCullough, the

24 proposition that you're arguing, does it apply at the

25 Federal level as well? Suppose -- suppose I think that

1   my neighbor next door is growing marijuana and I have

2   probable cause to believe that, all right?

3   So I go in and search his house; and sure

4   enough, there is marijuana. And I bring it to the

5   police's attention, and they eventually arrest him.

6   Is that a lawful search?

7   MR. McCULLOUGH: If there is State action --

8   JUSTICE SCALIA: I'm a State actor, I guess.

9   You know --

10   (Laughter.)

11   MR. McCULLOUGH: If you have State actors --

12   JUSTICE SCALIA: You know, a Supreme Court

13   Justice should not be --

14   (Laughter.)

15   JUSTICE SCALIA: -- should not be living

16   next door to somebody growing marijuana. It doesn't

17   seem right.

18   MR. McCULLOUGH: That's not a smart

19   neighbor.

20   (Laughter.)

21   MR. McCULLOUGH: If you have State action

22   and you enter into someone's home, then the Constitution

23   affords a heightened level of protection. But --

24   JUSTICE SCALIA: Don't dance around. Is it

25   -- is it rendered an unreasonable search by the fact

1   that I'm not a law enforcement officer at all?

2   MR. McCULLOUGH: I don't think the fact

3   of -- no. The fact that --

4   JUSTICE SCALIA: So any Federal employee can

5   go crashing around conducting searches and seizures?

6   MR. McCULLOUGH: So long as there is --

7   JUSTICE SCALIA: So long as he has probable

8   cause?

9   MR. McCULLOUGH: That's correct.

10   JUSTICE SCALIA: That's fantastic.

11   (Laughter.)

12   JUSTICE SCALIA: You really think that?

13   MR. McCULLOUGH: I think if there is State

14 action, it doesn't matter that you're wearing a badge or

15 that you've gone through the police academy.

16   JUSTICE SCALIA: Or that you are an

17 administrative law judge at the, you know, Bureau of

18 Customs? It doesn't matter?

19   MR. McCULLOUGH: I think that's right. That

20 if you have -- if the State --

21   JUSTICE SCALIA: What about a janitor?

22 You're a janitor, a federally employed janitor.

23   MR. McCULLOUGH: Your Honor --

24   JUSTICE SCALIA: His neighbor is growing

25 marijuana, and he's just as offended as a Supreme Court

1   Justice would be. Can he conduct a search?

2   MR. McCULLOUGH: I think if he's doing it on

3   behalf of the State, the answer is yes.

4   JUSTICE SCALIA: Wow.

5   MR. McCULLOUGH: But in terms of the

6   Federal-State distinction, Your Honor, I think what

7   we're advocating for is the uniform standard that this

8   Court has embraced before, that there should not be a

9   difference between a Federal officer on a State facility

10   who is authorized under the Assimilated Crimes Act to

11   arrest for Virginia laws and a Virginia officer who is a

12   hundred feet away with making an unconstitutional arrest

13   under the holding below when --

14   JUSTICE GINSBURG: Would you agree that

15   there was no probable cause to arrest, given the State

16   statute?

17   MR. McCULLOUGH: Your Honor --

18   JUSTICE GINSBURG: You're talking about

19   probable cause to believe that he committed an offense.

20   MR. McCULLOUGH: That's right.

21   JUSTICE GINSBURG: But was there probable

22   cause to arrest?

23   MR. McCULLOUGH: Well, the State court found

24   there was no -- none of the exceptions in the statute

25   applied. But when the Court has used the term "probable

1   cause to arrest," it has never required a two-step

2   analysis of, first, probable cause to believe a crime

3   had been committed, and then probable cause to arrest.

4   It's always been -- in this Court's cases -- a single

5   inquiry: Has there been probable cause?

6   JUSTICE GINSBURG: Could he -- could this

7   officer have gotten a warrant to arrest Moore? Could he

8   -- is it -- oh, there's an offense going on under

9   Virginia law, I'm going to check with -- call in to see

10   if I can get a warrant. Could he have gotten a warrant?

11   MR. McCULLOUGH: Well, under the facts of

12   this case he could have, but it would have caused a

13   prolonged detention of the suspect.

14   JUSTICE GINSBURG: How could he -- how could

15   he have gotten a warrant to arrest when it's

16   a non-arrestable offense?

17   MR. McCULLOUGH: Well -- he coudn't --

18   JUSTICE GINSBURG: I mean, would it -- would

19   a judge -- suppose this police officer -- they have a

20   call-in procedure, call the judge. You want to -- me to

21   issue a warrant to arrest him for driving with a

22   suspended license, but that's not an arrestable offense.

23   MR. McCULLOUGH: Your Honor, it is an

24   arrestable offense under certain circumstances. And so

25   the officer is left with each arrest to make a

1   discretionary call.

2   JUSTICE GINSBURG: Did these officers think

3   that those circumstances exist?

4   MR. McCULLOUGH: The officers did not --

5   their only testimony was it was their prerogative. And

6   unfortunately they did not then unpack that explanation

7   to say why they thought one of the exceptions applied.

8   What the State argued below and the State

9   court rejected was that he was alone in a car with this

10   large, angry dog. There was no passenger that he could

11   switch places with, and so if they write him a summons,

12   logically, what is he going to do? He doesn't live

13   anywhere nearby. As soon as they leave the scene, he's

14   going to get right back in his car and drive away.

15   Now the State court rejected that, but that

16   illustrates the fact that under this statute the

17   officers have to make discretionary calls as to when

18   these exceptions apply. Is the defendant --

19   JUSTICE SCALIA: Maybe we could say that in

20   this, in these unique circumstances, where the officers

21   could not let the fellow drive off without a license, it

22   was not unreasonable to arrest him, but in some other

23   situation where they had no arrest authority it would

24   be.

25   MR. McCULLOUGH: Your --

1   JUSTICE SCALIA: I mean, you know, let's

2   assume that the stop was not based on some, some

3   deficiency in his license or some deficiency in the

4   car -- I don't know what else it could be -- like, he

5   had been going too fast, okay? And it's just a

6   misdemeanor. He was five miles over the speed limit.

7   Now, in that situation you couldn't say, as

8   you've said here, gee, if they just let him go, he'd

9   still be driving without a license; they had to arrest

10 him; they had no choice. In that situation, he wouldn't

11 necessarily be going above the speed limit. Would that

12 be -- why couldn't you say it was reasonable here, but

13 it wouldn't be reasonable there?

14   MR. McCULLOUGH: Well, what we're asking the

15 Court to do is to let the States regulate this arrest

16 authority.

17   JUSTICE SCALIA: If that's the argument

18 you're making, then don't bring forward the argument

19 that they couldn't let him go because he'd be in

20 violation of the law. If you want us to make that

21 narrow a holding, I guess we can. Is that what you want

22 us to do?

23   MR. McCULLOUGH: All we're asking the Court

24 to do is to affirm the probable cause standard that has

25 -- without any further balancing, that the balancing has

1   occurred when --

2   JUSTICE SCALIA: No, you're asking us to

3   balance. You're asking us to say, after all, in this

4   case if they hadn't arrested he would have been

5   violating the law as soon as they let him go.

6   MR. McCULLOUGH: No, I'm simply explaining

7   -- what I was trying to do was to explain that as a

8   matter of State law these officers have to make these

9   discretionary calls. If that then becomes the

10   constitutional standard, that instead of a simple

11   probable cause finding you have to get into every

12   discretionary call by the officer, that it -- it

13   turns every --

14   JUSTICE SCALIA: You say this was not

15   unlawful under Virginia law, then, because of the factor

16   you brought forth?

17   MR. McCULLOUGH: No, Your Honor. That was

18   adversely litigated against us in the State court.

19   JUSTICE SCALIA: Well, I don't know what

20   you're talking about a discretionary call. It wasn't a

21   discretionary call. He couldn't arrest the person.

22   MR. McCULLOUGH: Well -- but the problem is,

23   if the standard then becomes a two-step probable cause,

24   where we have to figure out as a matter of

25   constitutional law whether the officer guessed right in

1   terms of one of these exceptions, then every

2   discretionary judgment in the field becomes the occasion

3   for constitutional review.

4   CHIEF JUSTICE ROBERTS: But suppose it works

5   the other way. If Virginia has a law saying you can

6   arrest anybody you want on our highways, but, you know,

7   here's what the offenses are, the officers did not have

8   probable cause to think a crime had been committed, but

9   it was they had probable cause to arrest, I suppose

10   under the Respondent's theory that would be all right.

11   MR. McCULLOUGH: It -- I mean, it certainly

12   would flow from that. So I think, given the

13   multitude --

14   JUSTICE STEVENS: May I ask this question:

15   You would argue it doesn't matter whether it violated

16   State or Federal law; it's a question of Federal law on

17   probable cause. But does the character of the crime for

18   which the person is being arrested have any relevance to

19   the question whether the search is reasonable? For

20   example, supposing he is arrested for a tax offense;

21   could you go ahead and search him incident to that

22   arrest?

23   MR. McCULLOUGH: The search incident to

24   arrest is a bright-line rule, Your Honor, that this

25   Court has promulgated in Robinson.

1   JUSTICE STEVENS: The answer is yes, they

2   could search?

3   MR. McCULLOUGH: I'm sorry. Yes, the answer

4   is yes, that if a crime has been committed the

5   bright-line rule permits the officer to search the

6   suspect for officer safety as well as --

7   JUSTICE STEVENS: Even though the rationale

8   for the search incident to arrest doesn't apply?

9   MR. McCULLOUGH: What the -- yes, because

10   what the Court said in Robinson was: We're not

11   interested in delving into case-by-case litigation as to

12   how dangerous this person was and how -- and whether

13   there was a likelihood of evidence being found --

14   JUSTICE ALITO: Why would the rationale not

15   apply in that situation? Are you accepting the

16   proposition that anybody who's arrested for a tax

17   offense is not a danger to the arresting officer?

18   Haven't there been some pretty dangerous people arrested

19   over the years for tax offenses?

20   (Laughter.)

21   MR. McCULLOUGH: I agree with that. I'm

22   arguing that it's a bright-line rule and that if someone

23   is arrested for a crime, tax or otherwise, it's not the

24   nature of the crime --

25   JUSTICE SOUTER: No, but you're also

15

1   arguing, as I understand it, that the -- that the

2   search, even in the case of the tax arrest, does fall

3   within the rationale of search incident to an arrest

4   because one of those two rationales is officer safety.

5   Isn't that your point?

6   MR. McCULLOUGH: Yes.

7   JUSTICE SOUTER: Okay. So you reject the

8   premise of the question then? The premise of the

9   question was that the search incident to the arrest in

10   the tax case is outside the rationale of searches

11   incident to an arrest; and your position is it's not

12   outside it.

13   MR. McCULLOUGH: That's correct.

14   JUSTICE SOUTER: Okay.

15   MR. McCULLOUGH: This Court has crafted a

16   bright-line rule -- it has not distinguished between

17   types of offenses; it doesn't have to be a violent

18   offense; it could be a white-collar offense -- that

19   across the board there is virtue to having this

20   bright-line rule that permits the officer to search

21   incident to a lawful arrest. And in Robinson the Court

22   noted that a lawful arrest is a -- that it met a

23   constitutionally lawful arrest, one made with probable

24   cause. This arrest was made with probable cause. The

25   search incident to the arrest was lawful.

1   I would ask the Court if I could keep my

2   remaining time.

3   CHIEF JUSTICE ROBERTS: Thank you, counsel.

4   Mr. Dreeben.

5   ORAL ARGUMENT OF MICHAEL R. DREEBEN

6   ON BEHALF OF THE UNITED STATES,

7   AS AMICUS CURIAE,

8   SUPPORTING THE PETITIONER

9   MR. DREEBEN: Thank you, Mr. Chief Justice,

10   and may it please the Court:

11   The States and the Federal Government may

12   for a variety of reasons enact restrictions on officer

13   authority that exceed the requirements of the Fourth

14   Amendment as this Court has articulated them.

15   When such State law or Federal law

16   extra-constitutional restrictions are violated, it is a

17   matter for the government that enacted them to determine

18   what remedy appropriately flows from that violation.

19   JUSTICE SCALIA: Does the person making the

20   arrest at least have to have some arrest authority?

21   MR. DREEBEN: This Court has never --

22   JUSTICE SCALIA: Or will a janitor do the

23   job? A janitor at the Justice Department who becomes

24   imbued with the mission of the Department and he goes

25   around arresting people or searching people.

1   MR. DREEBEN: Well, certainly,

2   Justice Scalia, such an individual wouldn't have

3   positive law authority to engage in an arrest.

4   JUSTICE SCALIA: Just as this person here

5   didn't have positive law authority to engage in an

6   arrest.

7   MR. DREEBEN: The question would then be

8   whether that means that it's automatically a

9   constitutional violation. I think in some situations

10   even a governmental official can act in a private

11   capacity by acting outside the boundaries of that

12   individual's responsibility.

13   JUSTICE SCALIA: Yes, but he was purporting

14   to act in an official capacity. And he did, indeed,

15   give the marijuana to the officials at the Justice

16   Department.

17   MR. DREEBEN: Then if you assume that, the

18   Court would have two options. It could either

19   federalize some sort of an amorphous requirement that

20   there must be law enforcement authority in an official

21   in order for that official to engage in Fourth Amendment

22   activity, or it could hold that -- what I think is the

23   more reasonable approach -- which is that the bedrock

24   requirements of the Fourth Amendment protect against

25   arbitrariness, and the crucial one here is the existence

1 of probable cause based on the facts to believe that the

2 individual has violated a law.

3   If that criteria is met, it is not

4 constitutionally unreasonable, absent where an

5 extraordinary intrusion for the individual's liberty or

6 privacy interests to be compromised. It may be the most

7 flagrant violation of departmental regulations in the

8 world, and in that case the department that has those

9 regulations can take action, just as here Virginia says

10 if you violate the arrestable offense rule under

11 Virginia law, the consequence is not to exclude

12 evidence. Virginia will not exclude evidence under its

13 own State law for a violation of this provision.

14   But it does say under State law that a

15 person can resist an unlawful arrest, the officer can be

16 sued for engaging in an unlawful arrest under State law,

17 and that the officer can be fired or disciplined. And

18 those are the sanctions that the State has chosen to do.

19   Now, what the Virginia Supreme Court has

20 done is come along and say, even though you do not

21 intend this rule to trigger the exclusionary rule under

22 Virginia law, you have no choice. As a matter of

23 Federal constitutional law, if Virginia decides to

24 exceed the constitutional minimum as this Court

25 announced in Atwater and place additional restrictions

1   on the arrest authority, it must pay a constitutional

2   price of having the evidence excluded if that rule is

3   violated.

4   At the outset, it's clear that imposing such

5   a Fourth Amendment rule would do nothing other than

6   discourage the States from providing additional

7   restrictions as a matter of their own State's law that

8   may serve to protect citizen privacy interests above the

9   floor that this Court has identified as required by the

10   Fourth Amendment.

11   JUSTICE GINSBURG: If you're right,

12   Mr. Dreeben, then the Court gave a false signal when it

13   GVR'd in Lovelace, in the Lovelace case, the person who

14   was drinking in public, it GVR'd in light of Knowles.

15   MR. DREEBEN: I don't know that it gave a

16   false signal, Justice Ginsburg, but a GVR doesn't

17   indicate this Court's disposition of the merits once all

18   of the arguments are presented to it. And, admittedly,

19   I think neither side is able to point to a case that

20   squarely addressed and conclusively resolved the issue

21   that's before this Court.

22   What the Court has done, I think, under

23   related issues under Fourth Amendment law is announce

24   pretty clearly that the fact that a State has either

25   renounced an interest in taking a particular law

1 enforcement action that it could otherwise

2 constitutionally take or positively prohibited a law

3 enforcement action does not mean that the action is

4 unconstitutional.

5   As long ago as the Cooper v. California

6 case, the Court dealt with the situation where an

7 officer was not authorized to undertake an inventory

8 search, and the California courts treat it as a

9 violation of their own law.

10   This Court said it was still a reasonable

11 search under the Fourth Amendment; and unless

12 Respondent -- excuse me, unless -- well, Respondent

13 concludes that there should be a different Fourth

14 Amendment rule for searches than procedures, Cooper

15 stands for the proposition that a violation of State law

16 does not ipso facto equate to a violation of the Federal

17 Constitution.

18   JUSTICE KENNEDY: If we rule for Respondent

19 in this case, would we have to reexamine the holding in

20 California v. Greenwood?

21   MR. DREEBEN: Yes, Justice Kennedy.

22 California v. Greenwood is the next case in the line

23 where the Court recognized that California had made it

24 illegal to conduct garbage searches. And you could make

25 the same argument that Respondent is making here today:

1   That California had renounced any interest in conducting

2   garbage searches, therefore there's nothing on the State

3   side of the line to balance against the individual's

4   invasion of privacy, and therefore the State should

5   lose. And this Court held precisely the opposite in

6   California v. Greenwood, finding that it was

7   constitutionally reasonable to engage in the garbage

8   search because there was no federally recognized

9   expectation of privacy, even though the State had

10 decided to go further and grant an additional layer of

11 protection to its citizens.

12   JUSTICE GINSBURG: There could not have been

13 a warrant -- a grant -- a judge could not have given a

14 warrant for arrest on these charges.

15   MR. DREEBEN: I'm venturing a little bit

16 outside of my expertise under State law, but I think

17 that that's correct. Because State law provided that

18 this was not an arrestable offense unless one of the

19 exceptions to the offense existed.

20   And I should note that one of the offenses

21 here -- excuse me -- one of the exceptions here is that

22 a court of general jurisdiction could have entered an

23 exemption from the arrestable offense rule and then

24 officers within that jurisdiction would have been

25 constitutionally and under State law --

1   JUSTICE GINSBURG: How often and under what

2   circumstances is that Virginia -- Virginia law rule? I

3   mean, when does a general district court give permission

4   for a custodial arrest in a certain class of cases?

5   MR. DREEBEN: I know that it has done it. I

6   don't know that there are any restrictions on when it

7   would do it. The point, I think, of giving the general

8   courts the authority to do this is that these kinds of

9   laws are not necessarily enacted, as Respondent posits,

10   to be supplementary protection for privacy. They do not

11   necessarily represent a judgment that law enforcement

12   officers should never bring people in for minor traffic

13   misdemeanors. They may represent a judgment that law

14   enforcement officers should be out on the beat policing

15   more important crimes and it's a waste of social

16   resources and scarce police resources to have them

17   bringing people downtown for these kinds of offenses.

18   In a particular jurisdiction, law

19   enforcement may make a case that actually it's important

20   enough to deter various traffic violations and to ensure

21   that the individuals show up, that officers should have

22   plenary authority to make arrests.

23   JUSTICE KENNEDY: I should know this, but do

24   we defer to State law in determining the lawfulness of

25   the time before arraignment in the context of

1   confessions, the McNabb-Mallory rule?

2   MR. DREEBEN: The McNabb-Mallory rule --

3   JUSTICE KENNEDY: Which is Federal.

4   MR. DREEBEN: -- is uniquely Federal. The

5   closest analog -- and this may be what Your Honor has in

6   mind -- is that in the County of Riverside case the

7   Court set a 48-hour outside limit for when you have to

8   bring an arrested individual before a magistrate for a

9   probable cause hearing. Under Respondent's position --

10   JUSTICE KENNEDY: Well, was there any

11   indication in that case that if the State had a shorter

12   period, we would --

13   MR. DREEBEN: No, and that's precisely, I

14   think, the point. All of the rules that this Court has

15   announced under the Fourth Amendment, the

16   search-incident-to-arrest rule, which is triggered as a

17   bright-line rule without regard to whether the specifics

18   of the case support it, under Respondent's theory

19   Virginia could overrule that by saying officers shall

20   not conduct a search incident to arrest without a

21   specific exigency in that case. States could overrule

22   within their own jurisdictions the Federal rule that

23   this Court announced in Riverside. It could say that

24   individuals have to be brought before a magistrate

25   within 12 hours or they have to be released. And under

24

1 Respondent's theory that you absorb State law into the

2 reasonableness inquiry, this Court's Federal court

3 decision would be overruled. And most directly here,

4 Atwater would be overruled with respect to

5 non-arrestable offenses if Respondent's position is

6 correct that when the State has said that we don't want

7 to undertake an arrest for a minor offense, therefore,

8 there's no longer any State interest in undertaking the

9 arrest.

10   The reality is that this Court has balanced

11 as a matter of Fourth Amendment law what is

12 constitutionally necessary as a uniform Federal matter

13 to protect people against arbitrary law enforcement

14 action, and it's drawn the line at probable cause. And

15 as this Court said in Whren, absent rare circumstances

16 when probable cause exists, a search or seizure is

17 reasonable.

18   And the kind of rare circumstances that the

19 Court gave the example of in Whren were heightened

20 intrusions on individual privacy or liberties such as

21 surgery to remove evidence or an unannounced entry into

22 a home. We don't have anything like that here and the

23 standard Federal rule should govern.

24   CHIEF JUSTICE ROBERTS: Thank you, Mr.

25 Dreeben.

1   Mr. Goldstein.

2   ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

3   ON BEHALF OF THE RESPONDENT

4   MR. GOLDSTEIN: Mr. Chief Justice, and may

5   it please the Court:

6   The notion that the proud men who framed the

7   Constitution would believe it reasonable to go out and

8   arrest someone for a non-arrestable offense and not only

9   do that, but having committed that trespass at common

10   law, to further search them, is I think an extreme

11   proposition and one that they would not have accepted.

12   JUSTICE SCALIA: But you think they would

13   accept arresting somebody for not wearing a seat belt?

14   MR. GOLDSTEIN: Your Honor, I do --

15   JUSTICE SCALIA: It seems to me we've

16   crossed that bridge with Atwater.

17   MR. GOLDSTEIN: No, Your Honor, I disagree,

18   for the reason that -- and there are obviously -- I'm

19   not here to tell the Court what its own precedents mean.

20   But Atwater made quite clear that at common law this

21   was something that was subject to legislative

22   override, and that's what was reasonable at common law

23   when the Constitution was framed. And that is,

24   legislatures sometimes said that you could arrest and

25   sometimes said that you couldn't.

1   But two things were undisputable, I think,

2   and that is when you did arrest illegally that was

3   unreasonable --

4   JUSTICE BREYER: It's a particular illegal

5   arrest here, to bring this down to earth a little bit,

6   is I take it they arrested him because he had a

7   suspended -- he was driving without a good license?

8   MR. GOLDSTEIN: Yes.

9   JUSTICE BREYER: Okay. So Virginia law

10   says if you stop somebody, arrest him -- if you stop

11   somebody, you know he doesn't have a license to drive,

12   you can arrest him if you think he's going to continue

13   driving. Can't you?

14   MR. GOLDSTEIN: Yes.

15   JUSTICE BREYER: Okay. So the policemen

16   here, according to you and I guess the Virginia court,

17   made a misjudgment. He thought this guy might still

18   drive somewhere or he might have thought it or a

19   policeman in similar circumstances might have thought

20   it.

21   So Virginia says if, in fact, policemen, you

22   stop somebody for suspended -- for driving without a

23   license, and you make a mistake, you arrest him, we

24   don't think that's a big deal, because who knows if he's

25   going to continue to drive. We don't even suspend. We

1   don't even suspend. We don't even suppress the

2   evidence. That's Virginia.

3   So, if Virginia isn't going to suppress the

4   evidence because they think it's not a big deal to make,

5   for the policeman to make a mistake as to whether a

6   person who's driving without a license will keep driving

7   once the policeman goes away, why do you think Thomas

8   Jefferson and everybody else thought that that was such

9   a big deal that the evidence had to be suppressed?

10   MR. GOLDSTEIN: For a few reasons. First,

11   Virginia does take this quite seriously. The officer

12   can be fired for violating the statute. That's no small

13   thing.

14   The second is I wouldn't assume that

15   Virginia Legislature believes and the Virginia

16   Legislature believed that the evidence would not be

17   suppressed, because for reasons that I'll explain in a

18   minute the Virginia Legislature was triggering a long

19   line of this Court's cases that say if you arrest someone

20   for a non-arrestable offense, the Fourth Amendment is

21   violated, and the application of the exclusionary rule

22   has never been questioned in that context.

23   CHIEF JUSTICE ROBERTS: Well, I thought it's

24   questioned in your footnote 13 in your brief. You seem

25   to suggest that the exclusionary rule is not at issue in

1   this case.

2   MR. GOLDSTEIN: That's right. I don't

3   question its application, but neither does Virginia,

4   Your Honor.

5   CHIEF JUSTICE ROBERTS: So -- so we should

6   write an opinion saying we're not saying that it was

7   correct to -- we're not saying that it was correct to

8   exclude the evidence in this case?

9   MR. GOLDSTEIN: That's -- I think that

10   that's right. That also happened in California v.

11   Brendlin, you may recall, Mr. Chief Justice, where

12   there was some discussion at oral argument about would

13   we believe the exclusionary rule should be applied here.

14   That question had not been preserved. That case is on

15   remand in the California Supreme Court.

16   JUSTICE BREYER: What is the difference

17   between this and Whren? That is, in Whren the arrest

18   violated a D.C. regulation that says a plainclothes

19   officer cannot approach a car except in immediate cases

20   of immediate danger. And in Whren we said that isn't

21   such a big deal and we don't think the Fourth Amendment

22   turns on that kind of triviality.

23   All right. If it doesn't turn on that kind

24   of arrest procedure triviality, is how we characterized

25   it there, how is this any different?

1   MR. GOLDSTEIN: Whren is different in

2   several different ways. The first is that that was a

3   challenge to the stop, not the search incident to

4   arrest. The claim was that the officers under a local

5   D.C. Government regulation did not have the power to

6   make a traffic stop because there was a local regulation

7   that said if you're not in uniform and if you're not in

8   a police car, a marked car, you shouldn't make those

9   traffic stops.

10   So, it's different on a couple of different

11   axes. The nature of the constitutional challenge,

12   the nature of the law that's being evoked, the local

13   regulation rather than legislation, I think, are the

14   principal ones.

15   Here we're dealing with something quite

16   fundamental, and I haven't gotten to this

17   Court's precedents applying the common law rule that I

18   described at the beginning, so if I could do and then

19   compare Whren. Post -- applying the common law, ever

20   since Weeks, which is the first case of this Court to

21   recognize the search-incident-to-arrest exception, all

22   the way through Di Re, Miller, Johnson, Ker, DeFillippo,

23   those are five cases that confront the question in this

24   case. I believe they genuinely confront it; it is not

25   dictum, it is holding.

1   Those cases confront the question: Can you

2   have a constitutional search incident to an illegal

3   arrest? Illegal there not being unconstitutional, but a

4   violation of State law.

5   JUSTICE ALITO: Well, why do you draw a

6   distinction between something that's prohibited by a

7   statute, something that's prohibited by a local ordnance

8   or let's say it's a directive of the police department?

9   And if it's -- if the arrest is contrary to any of those

10   things, it's unlawful under State law, is it not?

11   MR. GOLDSTEIN: The Court hasn't ever

12   confronted that question. The places -- the line of

13   cases that I described were one of two things, positive

14   State legislation enacted by the legislature or common

15   law. It has never dealt with the locality question.

16   Whren suggests that maybe a local police regulation is

17   too variable. We would win under either rule.

18   The -- I think the core reason you would

19   draw the line at legislation is because this -- the

20   Fourth Amendment is not just an instrumental thing

21   designed to do good. It is, as designed, to apply

22   common law concepts of reasonableness, which was the

23   foundation --

24   JUSTICE ALITO: I thought it was your

25   argument that if the arrest is unlawful under State law

1   it's an unreasonable search, an unreasonable arrest

2   under the Fourth Amendment?

3   MR. GOLDSTEIN: That's right. And your

4   question, Justice Alito, I take it, is designed to test

5   what I mean by "unlawful" in terms of what sources --

6   the State constitution, legislation, local police

7   practices.

8   JUSTICE SCALIA: No. It's designed to test

9   whether you really mean unlawful under State law.

10 You don't mean it, because something that

11 violates a municipal ordnance is unlawful under State

12 law, and yet you would not apply your test. So you

13 could express your test differently, unlawful under

14 State statutory law.

15   MR. GOLDSTEIN: If I have conveyed that

16 impression, I am sorry. I did not intend to. Our rule

17 is that if it's unlawful. All I'm saying is the Court

18 could conclude that local police regulations, for

19 example, are too variable to -- and Whren called them

20 "trivialities," so we won't pick them up.

21   CHIEF JUSTICE ROBERTS: No, but the laws

22 of the 50 States are pretty variable on this question as

23 well.

24   MR. GOLDSTEIN: As are the laws of whether

25 it's a crime at all, as are under Indianapolis v. Edmond

1   and lots of other cases where the Court --

2   CHIEF JUSTICE ROBERTS: Do we have to look

3   at both of those varieties? Let's say the State has a

4   rule that, yes, you can arrest people in a way that we

5   would say you can't, but you don't have to have probable

6   cause. You just have to -- they're just arrestable.

7   MR. GOLDSTEIN: No, as Justice Ginsburg

8   suggests, you have to have probable cases to arrest.

9   Cases like Berkemer, Seth --

10   CHIEF JUSTICE ROBERTS: -- is probable cause

11   to arrest. The State has a law that says you can arrest

12   in these circumstances whether or not you have probable

13   cause to believe that a crime has been committed.

14   MR. GOLDSTEIN: I'm sorry. By that phrase I

15   mean there is a constitutional component. Part of the

16   constitutional floor is that you have to have sufficient

17   cause. That's a guarantee of the Fourth Amendment.

18   This Court's cases make clear you can't go below --

19   CHIEF JUSTICE ROBERTS: I thought you were

20   telling us it has to be sufficient cause to arrest, not

21   sufficient cause to believe that a crime has been

22   committed.

23   MR. GOLDSTEIN: That is necessary but not a

24   sufficient condition, Mr. Chief Justice. There's

25   obviously a -- the constitutional floor includes the

1   element of the -- the degree of proof that's required by

2   this Court's precedents.

3   CHIEF JUSTICE ROBERTS: So it is, as your

4   friends on the other side put it, you are advocating a

5   two-step process. There has to be probable cause to

6   arrest and there has to be probable cause to believe a

7   crime has been committed?

8   MR. GOLDSTEIN: I view those as the same

9   thing. We may be just having --

10   CHIEF JUSTICE ROBERTS: No, they're

11   different here. They had probable cause to believe a

12   crime has been committed, but you say they didn't have

13   probable cause to arrest because State law makes it

14   illegal.

15   MR. GOLDSTEIN: In that sense, absolutely.

16   I just wanted to make sure I understood the terminology.

17   That's correct.

18   But let me make quite clear that we are

19   discussing in the first half hour and the second half

20   hour I think two slightly different things. The first

21   half hour focused on the constitutionality of the arrest

22   vel non, which is at issue in Atwater, for example, and

23   at issue -- not even in Whren, which is just a traffic

24   stop.

25   I am focusing on the somewhat different

 1   point. There is a line of cases that deals with the

 2   constitutionality of the search incident to arrest and

 3   it says because at common law you could not search

 4   someone pursuant to an arrest that was a trespass, the

 5   search itself is unconstitutional. So if at the time of

 6   the framing a Federal officer, a Federal marshal, at the

 7   time of the framing had the power to arrest them for

 8   State law offenses -- as they still do under the OLC

 9   opinions -- if a Federal marshal had gone up to someone

10   who's committing a completely trivial offense, Atwater

11   recognizes there are offenses at common law that were not

12   arrestable. That would be a trespass and to search the

13   person incident to that arrest would have violated the

14   Fourth Amendment, we believe. It would have been

15   unreasonable. When Mapp applies the Fourth Amendment to

16   the States, it would have been --

17   CHIEF JUSTICE ROBERTS: What if the State

18   makes a trivial offense arrestable, as in Atwater?

19   You're suggesting in that situation the common law rule

20   we held doesn't apply. It's a trivial offense, but it's

21   made arrestable and therefore it doesn't violate the

22   Fourth Amendment to search incident to that arrest.

23   MR. GOLDSTEIN: That's right. At common law

24   and under the Fourth Amendment, that's right. You look

25   to the positive source of authority, which is State law

1   authority to arrest or a common law authority to arrest.

2   That would not be unconstitutional. That -- that rule

3   also make sense as a question of the structure of our

4   democracy. Remember, it puts in the hands of the

5   legislature, which can be held responsible for the

6   decision to make a trivial offense --

7   CHIEF JUSTICE ROBERTS: Well, what if

8   the legislature -- this was the hypothetical Mr. Dreeben

9   posed. What if the legislature says yes, you can arrest

10   for this offense but you cannot search incident to the

11   arrest, because we think that's too much of an intrusion

12   given the fact that it's a relatively trivial offense?

13   In that case, would our doctrine saying under the Fourth

14   Amendment you can search incident to a valid arrest be

15   reverse preempted, preempted by the State law?

16   MR. GOLDSTEIN: No. There are times --

17   CHIEF JUSTICE ROBERTS: So the State can

18   define the circumstances under which you can have an

19   arrest, but the State can't define and limit the

20   consequences of an arrest?

21   MR. GOLDSTEIN: That's right. That is --

22   there are traditions that are rooted in the common law,

23   that the search incident to arrest here was pursuant to

24   a trespass at common law that was completely

25   unreasonable.

1   JUSTICE SOUTER: But isn't -- isn't the

2   difficulty with that argument that we -- we have

3   rejected the, in effect, the trespass rationale; and

4   what you're telling us now, it seems to me, based on in

5   effect trespass concepts, is that so far as the Fourth

6   Amendment is concerned an arrest may constitutionally be

7   made, but the officer following that arrest may not take

8   the step of determining whether the individual arrested

9   has on his person anything that can be used to hurt the

10 officer like a knife or a gun?

11   And why should we draw what seems to

12 me -- if we scrap, as we have done, the trespass

13 analogy -- why should we make what seems to me at least an

14 irrational distinction of saying the Fourth Amendment

15 says it's okay to arrest but it's not okay to protect

16 yourself after you have arrested? Why should we accept

17 such a rule?

18   MR. GOLDSTEIN: This is I think the hardest

19 question for us, and so if I could have the time to give

20 you a couple of answers. The first is remember your

21 instrumental point is that the officer has the person,

22 they need to protect themselves. We know that is not

23 itself -- and I'm going to give you a couple of

24 answers -- that is not itself to make the search

25 constitutional because everyone agrees that if the

1   arrest was unconstitutional, then the search,

2   notwithstanding the exigencies that exist under Chimel

3   and like cases all the way back to Weeks, exist. So it's not

4   enough that the officer has to protect himself. The

5   reason --

6   JUSTICE SOUTER: Right. But we're starting

7   with a different premise.

8   MR. GOLDSTEIN: I --

9   JUSTICE SOUTER: We're starting with a

10   constitutional premise.

11   MR. GOLDSTEIN: I understand. Justice

12   Souter, I understand. I was just trying to get

13   to your -- what I think is the greatest sort of logical

14   force: The officer need to protect himself.

15   Now, to get to the harder case, which is

16   yours, and that is accept that the arrest is

17   constitutional. We of course don't do that. We believe

18   that there isn't a sufficient interest to make it

19   reasonable, but you posit otherwise. The reason is

20   given by Justice Powell's concurrence in Robinson, which

21   is the fundamental search-incident-to-arrest case, and

22   he says when the person is lawfully arrested they have

23   engaged in conduct that they know can subject them to

24   arrest, they have a reduced expectation of privacy. So

25   while it's the case that the governmental interest

1   remains the same -- protect the officer, find the

2   evidence -- the other side of the Fourth Amendment

3   balance is fundamentally different, because when a

4   person has engaged in conduct which they know does not

5   subject them to arrest they do not have a reduced

6   expectation of privacy.

7   This individual had every reason to believe

8   dating back to the traditions of common law, to positive

9   State law, that they would not be searched incident to

10   arrest.

11   JUSTICE SOUTER: If that -- if that logic is

12   sound and that logic depends on Justice Powell's use of

13   the word "unlawfully," then it seems to me the -- the only

14   way to avoid an irrational system would to be conclude

15   that, in fact, the arrest is not constitutionally

16   lawful. Because on -- on your logic, you're still left

17   with the problem that I raised; and a constitutional

18   arrest in which the officer does not violate the Fourth

19   Amendment by apprehending the person, and yet the

20   officer is disabled from protecting himself, if we're

21   going to have a sensible rule, we've either got to say

22   the Fourth Amendment allows him to make the search

23   incident and protect himself, or we've got to have a

24   rule that says the Fourth Amendment doesn't allow him to

25   make the search -- make the arrest in the first place.

1 Otherwise we've got a crazy system.

2   MR. GOLDSTEIN: Can I just correct one

3 thing? And that is it does not depend on Justice

4 Powell's use of the word "unlawful." I believe to rule

5 against us, Justice Souter, that you will have to

6 overrule the line of cases from Di Re to DeFillippo.

7 Those are on point. Now you may decide --

8   JUSTICE KENNEDY: Don't you think we have

9 to, if not overrule, at least back away from the holding

10 in California versus Greenwood?

11   MR. GOLDSTEIN: No, Justice Kennedy, and

12 that's why I focused so much on searches incident to

13 arrest. There are times when State law is incorporated

14 into the Fourth Amendment, and everybody agrees that

15 regulatory searches are; inventory searches are, there

16 are times when it isn't. And California versus

17 Greenwood is not one and there's a logical reason for

18 it. And that is that the premise of when you were

19 deciding in a -- in a trash search, this Court's

20 doctrines look to two things. The first is, is there a

21 reasonable expectation of privacy, and if there is, we

22 balance the interest. California versus Greenwood says

23 there was no reasonable expectation of privacy because

24 that's evaluated as a societal matter. I'm focusing on

25 a very narrow question that doesn't disturb any other

1   doctrines. It does --

2   JUSTICE SCALIA: What about Cooper -- Cooper

3   versus California?

4   MR. GOLDSTEIN: I think Cooper versus

5   California is a very good case for us, because Cooper

6   and all of its progeny say that State law has to

7   authorize and determine the validity of the inventory

8   search. If you violate the State regulations on when

9   you conduct an inventory search, you violated the Fourth

10   Amendment.

11   JUSTICE BREYER: Can we go back for a

12   second? Because, the reason I asked my question is I

13   was thinking about this very differently, and I just

14   want to have an answer, and I want your best thinking on

15   this. My thought is that the answer to the question of

16   whether it violates the Fourth Amendment when a State --

17   when a person is arrested in violation of State law, the

18   answer is, it depends. Sometimes yes, sometimes no.

19   Obviously, if there is no probable cause or if there

20   wasn't a crime at all, as defined, the answer is

21   yes; but then I look at Whren and it says if all that

22   was at stake was a kind of arrest procedure State law,

23   herein -- there embodied in a rule, the answer is no.

24   So I look at this one. And this one it seems to me

25   there is probable cause; it is a crime; moreover, it is

1   a crime for which the State permits arrest where the

2   officer subjectively thinks he's likely to keep driving.

3   So it seems to me maybe that's much more close to what

4   we had in Whren.

5   Now I want you to say -- I want your

6   comments on what I -- it's hypothetical, my statement,

7   because I want to get your reaction to that point of

8   view. I'm not saying I hold it. But I'm putting it

9   forward so that I can get your reaction and argument.

10   MR. GOLDSTEIN: Well, I think it is a

11   terribly difficult rule to administer when you try to

12   decide, well if this is a law that sometimes allows

13   arrest and sometimes does not. It is an infinitely more

14   administrable rule on our side, where we say to the

15   police officers, you have the power to arrest or not and

16   that's what determines --

17   JUSTICE KENNEDY: I think it is much easier

18   to administer, to have a uniform Federal standard,

19   rather than whether or not an officer can arrest in one

20   county for some things and not in another county whether

21   he has to have a badge or not. Those are the kind of

22   trivialities we talked about in Whren.

23   MR. GOLDSTEIN: Well, Justice Kennedy,

24   remember, we have one standard for an officer on the

25   street, and that is, look -- do, if you're allowed to

42

1   arrest, you can arrest, and that's what will determine

2   the constitutionality of the search incident to arrest.

3   The Government posits two different standards that

4   govern the officer's conduct: A Federal one and State

5   one.

6   But let me also get to your point, Justice

7   Kennedy, that you are worried that are all kinds of

8   these State laws. There's -- you know, are you out of

9   your jurisdiction, are you wearing a uniform? What we

10   think that the common law was concerned with, and this

11   line -- this Court's line of cases from Di Re through

12   DeFillippo is a much more fundamental judgment. It's

13   like the judgment whether it's a crime at all. The

14   police power of the State is most fundamentally, is

15   this a crime, can we arrest for it, someone for it, so

16   that we will hold them? And those are the judgments:

17   Is it arrestable or not? Not these other little things

18   that --

19   JUSTICE STEVENS: But Mr. Goldstein --

20   analysis, it seemed to me you relied on the citizen's

21   expectation of privacy as the justification. And I think

22   Justice Kennedy makes a rather strong response to that,

23   because it's unrealistic to assume that a citizen in

24   certain counties in Virginia had such an expectation but

25   did not in other counties, because most citizens don't

1   know the sophisticated aspects of the Virginia law.

2   MR. GOLDSTEIN: Sure. Let me talk about

3   that statute for just a second and then answer the

4   broader question. This is a very -- just so the Court

5   knows, there's no other State that has one of these

6   statutes. Just in terms of your thinking about whether

7   this is a common practice, we haven't been able to find

8   any others, and even in Virginia, it's only to a small

9   body of offenses. But even taking as a given -- Justice

10   Stevens, I think doctrinally, as Justice Powell says in

11   Robinson, the notion is that people go out into the world

12   and engage in conduct, and we expect them to know the law.

13   Sometimes that's an unreasonable expectation, but it's

14   the only premise that this Court --

15   CHIEF JUSTICE ROBERTS: Counsel, can I get

16   back to your discussion of Cooper? In Cooper, you said

17   that if it violates the State law for an inventory

18   search, then you can't search incident to that. But

19   that's because it is then not an inventory search. Here

20   there's no doubt that this was an arrest, whether it

21   complied with State law or not.

22   MR. GOLDSTEIN: Chief Justice Roberts, I do

23   disagree. Post-Cooper, into South Dakota v. Opperman,

24   even if the police officers label it an inventory search

25   -- the car comes and says, oh, we were just trying to

1   keep track of everything, so nobody doubts they were

2   really inventory things -- the Court has said it's the

3   -- the practice is, the State practice is --

4   CHIEF JUSTICE ROBERTS: It just -- it

5   gets to -- I mean, if you don't follow the State rules,

6   it doesn't comply with the rules for an inventory

7   search. But here you're saying if you don't -- you're

8   not saying if you don't follow the State rules, it's

9   not an arrest. It's not a lawful arrest. But that's a

10   different question than whether or not it is an arrest.

11   Our precedents say if it's an arrest, you can search

12   incident to the arrest.

13   MR. GOLDSTEIN: Mr. Chief Justice, I

14   disagree. This Court has said many times, and indeed

15   squarely held in Johnson, where the evidence was

16   suppressed, that it has to be an arrest that is lawful

17   under State law.

18   JUSTICE SCALIA: Mr. Goldstein, can I bring

19   you back to Cooper v. California?

20   MR. GOLDSTEIN: Yes.

21   JUSTICE SCALIA: Which you say is a good

22   case for you. I don't see how you can say that. This

23   was a case of a car impounded. The State court had said

24   that there was no authority to search the car, simply

25   because it was impounded, and we said the question here

1   is not whether the search was authorized by State law;

2   the question is rather whether the search was a

3   reasonable one under the Fourth Amendment.

4   Just as a search authorized by State law may

5   be an unreasonable one under that amendment, so may a

6   search not expressly authorized by State law be

7   justified as a constitutional reasonable one. And you

8   think that helps your case?

9   MR. GOLDSTEIN: Not -- I don't think that

10   language is relevant for the following reason: What the

11   Court said in Cooper was that the seizure of the car,

12   which is analogous to the arrest here, right? They

13   seized my client's person; they seized the car. The

14   Court said because the seizure of the car was lawful

15   under State law, then the search incident to was. And

16   let me just read to you from Coolidge versus --

17   JUSTICE SCALIA: Even though the State law

18   did not authorize it.

19   MR. GOLDSTEIN: The State law did not speak

20   to it either way, but -- it didn't speak to it either

21   way.

22   JUSTICE SCALIA: They were assuming, in

23   that passage, that the State law did not authorize it,

24   or otherwise the passage makes no sense.

25   MR. GOLDSTEIN: Justice Scalia, I disagree.

1   In any event, post-Cooper, South Dakota v. Opperman, as

2   the conversation between the Chief Justice and I was

3   just explaining, is perfectly clear that the inventory

4   search has to be authorized pursuant to State

5   regulation. If after Cooper this is perfectly settled,

6   there really isn't --

7   CHIEF JUSTICE ROBERTS: Counsel, if we

8   assume, contrary to your footnote 13, that the

9   exclusionary rule is implicated in this case, could you

10   explain why, under the Federal Constitution, there

11   should be imposed on the State an exclusionary rule for

12   a violation of State law when State law does not impose

13   an exclusionary rule for the violation of its law?

14   MR. GOLDSTEIN: Assuming the Court decides

15   that the question was not waived because it wasn't

16   briefed, the reason is that this Court's exclusionary

17   rule precedents look to something else, and that is:

18   Did the evidence follow directly from the

19   unconstitutional conduct? And here it did.

20   CHIEF JUSTICE ROBERTS: Well, I guess the

21   question would be: Why doesn't our jurisprudence on

22   whether there's an arrest also look to something else,

23   rather than whether it's permitted or violated under

24   State law? In other words, the State doesn't -- the

25   State law does not provide for the exclusionary rule,

1   but we say the Fourth Amendment does.

2   Under -- this is not a valid arrest under

3   State law, but your brothers say under the Fourth

4   Amendment it is because there's probable cause to

5   believe a crime has been committed.

6   MR. GOLDSTEIN: Mr. Chief Justice, I think

7   that illustrates a point I am willing to accept, and

8   that is there are times that State law is relevant under

9   this Court's doctrines; there are times it isn't. Welsh

10   v. Wisconsin, for example, is another example where the

11   Court looks squarely to the State law of whether and how

12   serious the offense is. My point is that there is a

13   very particular doctrine that is in play here that deals

14   with searches incident to arrest.

15   JUSTICE ALITO: What if Virginia passed a

16   statute that said it's unlawful to arrest for a traffic

17   violation, but that it is lawful under Virginia law for

18   an officer to conduct a search incident to any arrest,

19   whether it's lawful under Virginia law or not? Would we

20   follow that latter Virginia law?

21   MR. GOLDSTEIN: I don't know is the

22   true answer, because no State has such a law. It would

23   depend, I think, on whether the arrest itself satisfied

24   constitutional --

25   JUSTICE ALITO: What is the difference

1 between that law and in effect what Virginia has in

2 place? They say the arrest is unlawful, but they don't

3 provide for the exclusion of evidence that's obtained as

4 a result of that arrest under Virginia law.

5   MR. GOLDSTEIN: The reason is I think the

6 one that the Court has never looked to the State law

7 remedies in Di Re, Miller, Johnson, Ker, and DeFillippo,

8 and that it looks to what the common law would look to,

9 which is: Is the arrest legal or not?

10   I also would repeat what I said to Justice

11 Breyer, and that is I would not assume that Virginia

12 believes that the exclusionary rule wouldn't apply

13 because those precedents trigger the Fourth Amendment.

14   But, Justice Breyer, I do want to come back

15 to your question about, okay, Whren. The important

16 differences are: Remember Whren didn't just say that

17 things about whether people can be arrested are

18 trivialities. It's at the core of the Fourth Amendment.

19 The Court would never say that arrest is a triviality.

20 What it's talking about is what concerned

21 Justice Kennedy, and that is the kind of rule in Whren,

22 which is the guy had to be in a police uniform and

23 driving around in a marked police cruiser, which could

24 vary from jurisdiction to jurisdiction. The Court

25 thought that was more of a triviality. This is a much

1   more fundamental statement --

2   JUSTICE KENNEDY: And both arrests are

3   illegal, but you say that there's a difference.

4   So your bright-line rule now seems to evaporate.

5   MR. GOLDSTEIN: Justice Kennedy, I don't --

6   JUSTICE KENNEDY: I mean I'm assuming that

7   your answer to my question about the badge or the wrong

8   county and so forth would not result in suppression.

9   Correct me if I have misinterpreted your argument.

10   MR. GOLDSTEIN: We have proposed two

11   alternative rules. Fundamentally, that's right. And

12   that is --

13   JUSTICE KENNEDY: What's right?

14   MR. GOLDSTEIN: I'm sorry. You're right:

15   On our core position, the evidence would not be

16   suppressed. The reason is that we think the most

17   fundamental State judgment here is whether this offense

18   is arrestable. Alternatively, the Court could apply a

19   rule that just says State officers, if they're allowed

20   to arrest lawfully, then that will generate a

21   constitutional search incident to arrest. We would win

22   under either rule.

23   I think the core of our case is a much

24   simpler rule that simply says if the State has decided

25   this thing is not arrestable, it obviously doesn't have

1   an interest in the arrest that would outweigh the

2   individual's expectation of privacy. Remember search

3   incident to arrest is an exigency. There is no --

4   JUSTICE KENNEDY: But then if you -- if you

5   accept the proposition that in some of these minor

6   cases the arrest might be valid, then your whole

7   argument about the Framers and the trespass and so forth

8   is wrong.

9   MR. GOLDSTEIN: To -- that's correct. If we

10 are going to follow the common law and the rule that is

11 articulated, I think, in every single

12 search-incident-to-arrest case, that it has to be a

13 lawful arrest, that's right. It will pick up all of

14 State arrest law. I'm not trying to hide from that

15 fact. But the Court has never had a problem with that.

16 In all of those cases all through time, it has never had

17 any problem with administerability or anything else with

18 a rule that simply says to the police officer: If

19 you're allowed to arrest him, arrest him; if you're not,

20 you're not, and you can't search him constitutionally.

21 That is --

22   CHIEF JUSTICE ROBERTS: I think your friend

23 agreed that the cases didn't establish whether our

24 references to probable cause meant to probable cause to

25 arrest or probable cause to believe that a crime had

1 been committed. You don't agree with that? Do you

2 think that the cases foreclose their position?

3   MR. GOLDSTEIN: I do when it comes to the

4 search-incident-to-arrest cases. I think two things.

5 This is my understanding of the Court's precedents. The

6 Court has said if you have probable cause, you can

7 arrest. In every case that it has said that, it has

8 been lawful at State law to arrest -- to arrest. So the

9 Court hasn't confronted this question when it comes to

10 the constitutionality of the arrest vel non.

11   There is a second line of cases that deals

12 specifically with this search-incident-to-arrest

13 doctrine, and in every one of those, it has both said it

14 has to be a lawful arrest. And then in five separate

15 cases, it has explained what it meant by a "lawful

16 arrest." And it can't be dictum. The evidence in

17 Johnson versus the United States was suppressed. It has

18 to have been the holding of the Court.

19   We think that that is a sensible rule for

20 two reasons: It is what the Framers meant. It cannot

21 be the case that a Federal marshal, at the time of the

22 framing, could go and just arrest somebody for a

23 completely trivial offense -- that was a trespass -- and

24 then search them. And, second, Justice Powell's

25 concurrence in Robinson makes a lot of sense. That if

1   you engage in conduct --

2   JUSTICE ALITO: In Johnson, the search was

3   illegal because they illegally entered the hotel room.

4   Isn't that right? So it didn't matter what happened

5   after that point.

6   MR. GOLDSTEIN: That is not what the Court

7   said. The Court was quite clear on this, Justice Alito.

8   I just don't think there's two ways about it. It was

9   quite clear on all five of these cases.

10   I'm not saying the Court couldn't have

11   decided the case otherwise. That's true. I think the

12   Court could have had a different rationale, but the

13   point is it didn't. All of these cases cite each other.

14   It's a uniform line of authority. It's not an accident.

15   It's not --

16   JUSTICE KENNEDY: The Court simply said

17   we're going to use our Federal supervisory power and

18   incorporate the State law of arrest; we don't have

19   another body of law, we're going to do it. It didn't

20   say it was required to by the Constitution. That's not

21   the way I read Di Re.

22   MR. GOLDSTEIN: Well, then -- I don't know

23   how you pronounce it either, but I do know that Johnson,

24   Ker, and DeFillippo are cases that are against the

25   State. They are not supervisory authority cases.

1   JUSTICE KENNEDY: Then you have three cases,

2   not five.

3   MR. GOLDSTEIN: Well, I disagree, Justice

4   Kennedy, about Di Re and Miller, but I'll take three.

5   The point is they have not --

6   JUSTICE BREYER: Putting cases aside for the

7   moment --

8   MR. GOLDSTEIN: Yes.

9   JUSTICE BREYER: I mean if we reach this

10   question, you must have lost on the first question. I

11   mean you win -- if you win on the first question, you

12   win.

13   If you -- all right. If you have lost on

14   the first question, this is not an unreasonable search

15   -- arrest, rather, under the Fourth Amendment.

16   And, moreover, it's not enough of a big

17   deal, so the State makes it suppressible. Otherwise, a

18   -- never will raise it. And so now we're talking about

19   minor things under State law that is secondary at the

20   least.

21   And there, when the policeman make a mistake

22   about that, the reason we let him search is he might be

23   hurt, the policeman. There's danger involved.

24   And so I don't see why at the moment that

25   rationale wouldn't apply just as strongly where the reason

1   for it being unlawful under State but not Federal law is

2   a violation of one of these subsidiary rules whether he,

3   you know, thought the guy was going to keep driving

4   under the suspended license or might be risky or, you

5   know, might not show up.

6   MR. GOLDSTEIN: May I? There is no claim of

7   good faith here which could be raised, as a defense to a

8   Fourth Amendment argument in a later case. There's

9   absolutely no mistake. And we don't want to encourage

10   officers to conduct illegal arrests and search people.

11   CHIEF JUSTICE ROBERTS: You can finish your

12   answer.

13   MR. GOLDSTEIN: I think I got it, Mr. Chief

14   Justice. Thank you.

15   CHIEF JUSTICE ROBERTS: All right. Thank

16   you, Mr. Goldstein.

17   Mr. McCullough, you have four minutes

18   remaining.

19   REBUTTAL ARGUMENT OF STEPHEN B. McCULLOUGH

20   ON BEHALF OF THE PETITIONER

21   MR. McCULLOUGH: Thank you.

22   First, when counsel says that this is some

23   kind of a unique Virginia statute, that's wrong. The

24   brief filed by the ABA shows that all but nine States

25   have enacted provisions that are similar, that involve

1   restrictions on their officers' authority, and each of

2   those has exceptions, and so on and so forth.

3   So it is not a unique situation. You have

4   clear rules. Why would you trade them in for a morass?

5   An arrest is constitutional if the officers have

6   probable cause to believe a crime has been committed.

7   JUSTICE GINSBURG: Any crime at all?

8   MR. McCULLOUGH: I'm sorry?

9   JUSTICE GINSBURG: Any crime at all;

10   jaywalking, for example?

11   MR. McCULLOUGH: That's -- that's correct.

12   JUSTICE SOUTER: We would never know held

13   that if the -- if the misdemeanor, or jaywalking offense,

14   was not committed in the officer's presence.

15   MR. McCULLOUGH: That's right. In the case

16   --

17   JUSTICE SOUTER: That's not a problem for

18   you here, but that is a limitation on what we have held.

19   MR. McCULLOUGH: That's correct. In

20   Atwater, a jaywalking arrest is constitutionally

21   permissible. Atwater did not reach the in-the-presence

22   question, and it is not presented here because the

23   offense occurred in the officer's presence. So --

24   JUSTICE SCALIA: Mr. McCullough, what is

25   here, for some reason the Commonwealth did not cite

1 Cooper v. California, which I can't understand unless

2 you agree with your friend that it has been overruled by

3 later cases.

4   MR. McCULLOUGH: No. I think -- we relied

5 on Greenwood, and so I --

6   JUSTICE SCALIA: I understand. Why didn't

7 you cite Cooper v. California?

8   MR. McCULLOUGH: I don't have an explanation

9 for that. We certainly think it strongly -- as the

10 United States points out in their brief -- that it

11 strongly supports our position.

12   And as the lower courts have noted when

13 facing a similar argument, you've already held that when

14 it comes to a search, that under Greenwood and Cooper,

15 that State-law considerations aren't going to be what

16 the constitutional inquiry turns on.

17   Why would you have this incongruity where

18 that's true in Greenwood and Cooper with a search of a

19 residence or an automobile but then you have a different

20 rule when it comes to an arrest? The States have been

21 handling this problem, but it's an issue of State law.

22   And the State here has never held, going

23 back to 1924, that a violation of State law rises to the

24 level of a constitutional arrest and -- or, excuse me --

25 that -- let me restate that.

1   That a violation of State law warrants the

2   exclusionary rule at the State level. So when the

3   legislature enacted this, they contemplated a specific

4   set of remedies.

5   So, at the end of the day, we just ask the

6   Court to adhere to its jurisprudence; that the arrest is

7   constitutional because it is made with probable cause.

8   There was a violation of State law, but it wasn't a

9   constitutional problem.

10   And so we would ask the Court to reverse the

11   judgment below.

12   JUSTICE GINSBURG: Mr. McCullough, there is

13   one thing that I was curious about. Is this Virginia

14   law that allows the custodial arrest pursuant to an

15   order of a general district court?

16   MR. McCULLOUGH: Yes.

17   JUSTICE GINSBURG: When is that used?

18   MR. McCULLOUGH: That is used with some

19   frequency, and we certainly saw an increase in the wake

20   of the Moore decision. I can't go county by county and

21   city by city, but it has common currency.

22   And one example is Portsmouth evidently --

23   although it is not clear, we have gotten conflicting

24   answers -- where Mr. Moore was arrested, there is no such

25   order. But a few miles down the road the City of

1   Virginia Beach does have such an order.

2   And this just shows the complexities the

3   Court would be stepping in where, if Mr. Moore is

4   arrested in Portsmouth for the exact same crime on the

5   exact same facts, it is unconstitutional under Moore's

6   rule.

7   But he goes a few miles down the road to the

8   City of Virginia Beach, and the arrest is perfectly

9   constitutional because the district court has entered

10   such an order. And it just doesn't make sense, as the

11   Court noted in Whren, for constitutional provisions to

12   be so variable.

13   JUSTICE GINSBURG: What would be the basis

14   of a -- can a district court enter such an order just

15   because it thinks it's a good idea? Are there any

16   grounds in --

17   MR. McCULLOUGH: The statute -- I see my

18   time has expired. The statute at issue, 46.2-936, does

19   not really lay out particular criteria. So it is -- and

20   the issue hasn't been litigated in the Virginia courts

21   as to the criteria that's required. But it seems to be

22   broad discretion by the general district judge.

23   CHIEF JUSTICE ROBERTS: Thank you, counsel.

24   The case is submitted.

25   (Whereupon, at 11:05 a.m., the case in the

1   above-entitled matter was submitted.)

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