June 23, 1981

Re: No. 80-148 - Robbins v. California

Dear Lewis:

I hope you will be agreeable to an insert along the following lines, somewhere in the revised concurring opinion.

The evolution of 4th Amendment jurisprudence has been a long and tortuous road on which courts have tended to give too little weight to the key term "unreasonable" in that amendment. That term has made "bright lines" in this field difficult to achieve; such a yardstick cannot be applied with the precision of the literal linear yardstick of 36 inches. Hence what has seemed unreasonable to some judges was perceived differently by others.

It tends to anticipate the standard criticism that we "zig and zag" on 4th Amendment search law.

Regards,

Justice Powell
My further pondering on this case relates to whether I can join with a concurring opinion or, join the judgment in this case recognizing that the blurred signals from the Court on 4th Amendment cases are by no means wholly removed by today's holdings in this case and State of New York v. Belton. A third course could be to dissent, reflecting these "second and third" thoughts.

We have been many years in evolving the confused state of search and seizure law. We cannot extricate ourselves in one stroke so long as we adhere to the Exclusionary Rule.

The urge for "bright line" rules relating to the 4th Amendment is at best illusory for the very language of that clause turns on the word "unreasonable." The 4th Amendment guarantees "against unreasonable searches and seizures" and this has resulted in case by case adjudication. The confusion in judicial utterances flows from the reality that a literally infinite variety of situations confront police and ultimately the courts. What seems "unreasonable" to some is perceived as reasonable to others. The increasing complexity and mobility of society, the enormous expansion of certain criminal activity - drug traffic in particular - brings a flood tide of cases into the courts.

Of course we place high value on our privacy but some privacy must yield, as today's holding in Belton suggests, if we are not to become impotent in control of crime.

The Court sought a "bright line" rule as to trunks and containers by relying on the double locking of the footlocker in Chadwick but some think we diluted that somewhat in Sanders. It is now suggested that the quality of the container or the nature of the sealing should control. Thus a supermarket shopping bag - not sealed in any way - would not require a search warrant if the
person carrying it was subject to a lawful arrest. This leaves open the status of a comparable bag closed with Scotch tape or staples - which is not uncommon. But these are artificial criteria and if we here cannot agree, how can the policeman on the beat function?

Returning to the present case, the record is cloudy on the nature of the "sealing." There was no lock as in Chadwick but only some form of wrapping with an opaque material. The Officer said he had "heard" that marijuana was sometimes transported that way - but he had never seen such packaging.

I am about prepared to support an "automobile exception" that leaves little room for confusion, i.e., that when an automobile is stopped on probable cause and there is some objective evidence of an offense - other than a minor traffic violation - and if the officer smells drugs, sees them, or sees drug paraphernalia or weapons, the car can be searched without a warrant from the inside of the tires to every place and part of the vehicle. Obviously a total "French Connection" search could not be conducted on the street. But under Opperman I think I would allow an inventory search at the police garage - assuming those in the car are taken in arrest status. Here we come to the practical matter raised by Chadwick: if the "container" and the ostensible owner are securely in custody, getting a warrant is no real burden - except perhaps in Wyoming, Idaho, Utah, et al. where it might well be many hours and many miles travel to secure a warrant.
As a "trade off" or balancing to make our complex system work, I think I am now ready to say that if I am stopped either on the street or in my car, even with my briefcase full of circulating opinions, and there is probable cause for my arrest, the police can open and run their hands through the briefcase to make sure there is no weapon - or contraband. If - like some - the briefcase has a combination lock, should that invoke Chadwick?

Probably yes, in which case the officer should take custody of the person (having first carried out a "Terry" patdown) and control of the locked briefcase and all proceed to the police cellblock. At that point, the Chadwick lock barrier becomes somewhat academic. Most people will consent to opening the container - especially if they are not carrying illegal material. I am now less concerned about an officer peering and feeling into the briefcase than I was previously. If no weapon or "suspicious" package is found the officer will close it. Even if he glanced at one of our circulating opinions, the risk of breaking our security is minimal. I don't like anyone reading my papers, but we must give up some things to protect higher values.

All the problems in this area flow, of course, from an across-the-board enforcement of the Exclusionary Rule. Without that "monster," our problems would evaporate at least. That is another, albeit related, subject. As I stated in my Bivens dissent, that Rule should be modified along the British lines but with a "tort claims" suit allowed against the government for damages. As Alan Barth wrote for the Post when I advanced this thesis 17-18 years
ago, judge and juries would be unlikely to give awards to hoodlums found with a packet of heroin as a result of an "illegal" search.

He grieved over that more than I can bring myself to grieve. But an innocent citizen might well recover and soon officers would be compelled to mend their ways to protect the public fisc - if for no better reason.

What I am pondering on is whether to use this occasion to raise, once again, the utter fallacy of the Exclusionary Rule and the distortion it has produced on the whole jurisprudence.
SUPREME COURT OF THE UNITED STATES
No. 80-148


On Writ of Certiorari to the Court of Appeal of California, First Appellate District.

[June —, 1981]

JUSTICE STEWART delivered the opinion of the Court.

I

On the early morning of January 5, 1975, California Highway Patrol officers stopped the petitioner's car—a 1966 Chevrolet station wagon—because he had been driving erratically. He got out of his vehicle and walked towards the patrol car. When one of the officers asked him for his driver's license and the station wagon's registration, he fumbled with his wallet. When the petitioner opened the car door to get out the registration, the officers smelled marihuana smoke. One of the officers patted the petitioner down, and discovered a vial of liquid. The officer then searched the passenger compartment of the car, and found marihuana as well as equipment for using it.

After putting the petitioner in the patrol car, the officers opened the tailgate of the station wagon, located a handle set flush in the deck, and lifted it up to uncover a recessed luggage compartment. In the compartment were a tote bag and two packages wrapped in green opaque plastic. The

1 A photograph was made of one of the packages, and it was later described as follows: “The package visible in the photograph is apparently wrapped or boxed in an opaque material covered by an outer wrapping of transparent, cello-
police unwrapped the packages; each one contained 15 pounds
of marijuana.

The petitioner was charged with various drug offenses, his
pretrial motion to suppress the evidence found when the
packages were unwrapped was denied, and a jury convicted
him. In an unpublished opinion, the California Court of
Appeal affirmed the judgment in all relevant respects. This
Court granted a writ of certiorari, vacated the Court of Ap­
peal's judgment, and remanded the case for further consid­
eration in light of Arkansas v. Sanders, 442 U. S. 753. 443
U. S. 903. On remand, the Court of Appeal again found the
warrantless opening of the packages constitutionally permiss­
able, since the trial court "could reasonably [have] conclu­
dude[d] that the contents of the packages could have been
inferred from their outward appearance, so that appellant
could not have held a reasonable expectation of privacy with
respect to the contents." 103 Cal. App. 3d 34, 40. Because
of continuing uncertainty as to whether closed containers
found during a lawful warrantless search of an automobile
may themselves be searched without a warrant, this Court
granted certiorari. — U. S. —.

II

The Fourth Amendment to the Constitution, which is made
applicable to the States through the Fourteenth Amendment,
establishes "[t]he right of the people to be secure in their
persons, houses, papers, and effects, against unreasonable
searches and seizures." This Court has held that a search
is per se unreasonable, and thus violates the Fourth Amend­

phase-type plastic. (The photograph is not in color, and the 'green'
plastic cannot be seen at all.) Both wrappings are sealed on the outside
with at least one strip of opaque tape. As thus wrapped and sealed, the
package roughly resembles an oversized, extra-long cigar box with slightly
rounded corners and edges. It bears no legend or other written indi­
supporting any inference concerning its contents." 103 Cal. App. 3d 34,
44 (Rattigan, J., dissenting).
ment, if the police making the search have not first secured from a neutral magistrate a warrant that satisfies the terms of the Warrant Clause of the Fourth Amendment. See, e.g., Katz v. United States, 389 U.S. 347, 357; Agnello v. United States, 269, U.S. 20, 33. Although the Court has identified some exceptions to this warrant requirement, the Court has emphasized that these exceptions are "few," "specifically established," and "well-delineated." Katz v. United States, supra, at 357.

Among these exceptions is the so-called "automobile exception." See Colorado v. Bannister, ___ U.S. ___. In Carroll v. United States, 267 U.S. 132, the Court held that a search warrant is unnecessary "where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." Chambers v. Maroney, 399 U.S. 42, 51. In recent years, we have twice been confronted with the suggestion that this "automobile exception" somehow justifies the warrantless search of a closed container found inside an automobile. Each time, the Court has refused to accept the suggestion.

In United States v. Chadwick, 433 U.S. 1, the Government argued in part that luggage is analogous to motor vehicles for Fourth Amendment purposes, and that the "automobile exception" should thus be extended to encompass closed pieces of luggage. The Court rejected the analogy and insisted that the exception is confined to the special and possibly unique circumstances which were the occasion of its genesis. First, the Court said that "[o]ur treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable." Id., at 12. While both cars and luggage may be "mobile," luggage itself may be brought and kept under the control of the police.

Second, the Court acknowledged that "inherent mobility" cannot alone justify the automobile exception, since the Court
has sometimes approved warrantless searches in which the automobile's mobility was irrelevant. See Cady v. Dombrowski, 413 U. S. 433, 441-442; South Dakota v. Opperman, 428 U. S. 364, 367. The automobile exception, the Court said, is thus also supported by "the diminished expectation of privacy which surrounds the automobile" and which arises from the facts that a car is used for transportation and not as a residence or a repository of personal effects, that a car's occupants and contents travel in plain view, and that automobiles are necessarily highly regulated by government. United States v. Chadwick, supra, at 12-13. No such diminished expectation of privacy characterizes luggage; on the contrary, luggage typically is a repository of personal effects, the contents of closed pieces of luggage are hidden from view, and luggage is not generally subject to state regulation.

In Arkansas v. Sanders, 442 U. S. 753, the State of Arkansas argued that the "automobile exception" should be extended to allow the warrantless search of everything found in an automobile during a lawful warrantless search of the vehicle itself. The Court rejected this argument for much the same reason it had rejected the Government's argument in Chadwick. Pointing out, first, that, "[o]nce police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken," the Court said, that there generally "is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." Id., at 763-764. Second, the Court saw no reason to believe that the privacy expectation in a closed piece of luggage taken from a car is necessarily less than the privacy expectation in closed pieces of luggage found elsewhere.

In the present case, the Court once again encounters the argument—made in the Government's brief amicus curiae—that the contents of a closed container carried in a vehicle are somehow not fully protected by the Fourth Amendment. But this argument is inconsistent with the Court's decisions.
In Chadwick and Sanders. Those cases made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else.

The respondent, however, proposes that the nature of a container may diminish the constitutional protection to which it otherwise would be entitled—that the Fourth Amendment protects only containers commonly used to transport "personal effects." By personal effects the respondent means property worn on or carried about the person or having some intimate relation to the person. In taking this position, the respondent relies on numerous opinions that have drawn a distinction between pieces of sturdy luggage, like suitcases, and flimsier containers, like cardboard boxes. Compare, e.g., United States v. Bennett, 631 F. 2d 1336 (CA8 1980) (leather tote bag); United States v. Miller, 608 F. 2d 1089 (CA5 1979) (plastic portfolio); United States v. Presler, 610 F. 2d 1206 (CA4 1979) (briefcase); United States v. Meier, 602 F. 2d 253 (CA10 1979) (backpack); United States v. Johnson, 582 F. 2d 147 (CA5 1979) (duffle bag); United States v. Stevie, 582 F. 2d 1175 (CA8 1978); with United States v. Mannino, 635 F. 2d 110 (CA2 1980) (plastic bag inside paper bag); United States v. Goshorn, 628 F. 2d 697 (CA1 1980) ("(two) plastic bags, further in three brown paper bags, further in two clear plastic bags"); United States v. Gooch, 603 F. 2d 122 (plastic bag); United States v. Mackey, 626 F. 2d 684 (CA9 1980) (paper bag); United States v. Neumann, 585 F. 2d 355 (CA8 1978) (cardboard box).

The respondent's argument cannot prevail for at least two reasons. First, it has no basis in the language or meaning of the Fourth Amendment. That Amendment protects people and their effects, and it protects these effects whether they are "personal" or "impersonal." The contents of Chadwick's footlocker and Sanders' suitcase were immune from a warrantless search because they had been placed within a closed, opaque container and because Chadwick and Sanders
had thereby reasonably "manifested an expectation that the contents would remain free from public examination." *United States v. Chadwick,* supra, at 11. Once placed within such a container, a diary and a dishpan are equally protected by the Fourth Amendment.

Second, even if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished. What one person may put into a suitcase, another may put into a paper bag. *United States v. Ross,* — F. 2d — (en banc). And as the disparate results in the decided cases indicate, no court, no constable, no citizen, can sensibly be asked to distinguish the relative "privacy interests" in a closed suitcase, briefcase, portfolio, duffle bag, or box.

The respondent protests that footnote 13 of the *Sanders* opinion says that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment." 442 U. S. 753, at 764–765. But the exceptions listed in the succeeding sentences of the footnote are the very model of exceptions which prove the rule: "Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant." The second of these exceptions obviously refers to items in a container that is not closed. The first exception is likewise little more than another variation of the "plain view" exception. Since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view. The same would be true, of course, if the container were transparent, or otherwise clearly revealed its contents. In short, the negative implication of footnote 13 of the *Sanders* opinion is that,
unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment.

The California Court of Appeal believed that the packages in the present case fell directly within the second exception described in this footnote, since "[a]ny experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana." 103 Cal. App. 3d 34, 40. The only evidence the Court cited to support this proposition was the testimony of one of the officers who arrested the petitioners. When asked whether there was anything about "these two plastic wrapped green blocks which attracted your attention," the officer replied, somewhat obscurely,

"A. I had previous knowledge of transportation of such blocks. Normally contraband is wrapped this way, merely hearsay. I had never seen them before.

"Q. You had heard contraband was packaged this way?

"A. Yes." Id., n. 2.

This vague testimony certainly did not establish that marijuana is ordinarily "packaged this way." Expectations of privacy are established by general social norms, and to fall within the second exception of the footnote in question a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer. If indeed a green plastic wrapping reliably indicates that a package could only contain marijuana, that fact was not shown by the evidence of record in this case. 2

2 As Judge Rattigan wrote in his dissenting opinion in the California Court of Appeal: "For all that I see, it could contain books, stationery, canned goods, or any number of other wholly innocuous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an unlabelled carton of emergency highway flares that I brought from a
Although the two bricks of marihuana were discovered during a lawful search of the petitioner's car, they were inside a closed, opaque container. We reaffirm today that such a container may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile. Since the respondent does not allege the presence of any circumstances that would constitute a valid exception to this general rule, it is clear that the opening of the closed containers without a search warrant violated the Fourth and Fourteenth Amendments. Accordingly, the judgment of the California Court of Appeal is reversed.

It is so ordered.
Dear Chief and Potter:

John's dissent puts into painful focus what will be perceived - correctly I fear - as the disarray of the Court in automobile search cases if the opinions presently circulated all come down. I acknowledge at the outset my own contribution.

There is much to be said for the view that both cases should be decided the same way. Potter has a Court in Belton for a full search of the interior of a car and everything in it, incident to a lawful arrest of an occupant. The opinion is written on the authority of our "arrest" cases. As John suggests, it does extend these cases somewhat to justify searching a suitcase on the back seat of an automobile. But we thought this was justified for two reasons: (i) occupants of an automobile do have control over the interior of the car, with time - in most cases - to conceal contraband or weapons before an arresting officer can bring a car to a halt; and (ii) a bright line obviously is desirable.

John says that we could, and should, treat Belton as an automobile search case. But the courts below in Belton did not find probable cause to search, although there may well have been a basis for so finding. I prefer to decide it here as Potter does on the "incident to arrest" basis.

In Belton, WJB, BRW and TM are dissenting both from the opinion and the judgment. But this leaves us with five votes for the opinion, plus JPS for the judgment. John would not "extend" the arrest analysis so far.

The status of Robbins is what concerns me. The Chief is not yet at rest, but he has indicated serious second thoughts with respect to both Potter's and my opinions. My concurring opinion records my view as to the applicable principle. I have thought that in a Fourth Amendment search case the underlying question is whether reasonable expectation of privacy exists.

But as Potter points out so forcefully, the need for a bright line in Robbins is as great as in Belton. I
agree with Potter to this extent, but I cannot accept a bright line that so severely restricts law enforcement. Nor am I entirely happy with my circulated opinion that leaves to law enforcement and the courts below a great deal of subjective latitude in making judgments as to which containers fall within my analysis.

In sum, I am now not entirely at rest in Robbins. If necessary to obtain a Court opinion, I would consider accepting a bright line application of the automobile exception substantially as stated by John.

I recognize, of course, that I have a problem with some of the language in my Sanders opinion. Yet, both Chadwick and Sanders can be distinguished fairly on the ground that neither was an "automobile search case". Probable cause had attached to the luggage itself in each of those cases before they were placed in the trunk of an automobile. Although I talked about the automobile exception (perhaps too much!), I distinguished between Chadwick and the Chambers.Carroll line of automobile search cases. But some of my Sanders language would have to be clarified or rejected, although I do not read famous footnote 13 as broadly as Potter does.

If the Chief should go with John, and I remain with my concurring opinion, Potter would have a judgment but there would be no Court opinion to afford guidance either to law enforcement or to the courts. If, however, the Chief and I both accepted the broader automobile search exception, there apparently would be a Court. Although neither WHR nor HAB has - as of yet - joined John, each of them - writing separately - would apply the automobile exception as broadly as John. See pages 5,6 of WHR's dissent and pp. 1 and 2 of Harry's little opinion.

If the Court went four with Potter and four with John (in separate opinions), and I remain "in the middle", there would be no bright line guidance in this area where every day there are hundreds of searches of automobiles.

For the foregoing reasons, I am deeply concerned about our institutional responsibility to provide clear guidance that neither threatens substantive rights nor handicaps law enforcement.

I would be happy to discuss this.

Sincerely,

The Chief Justice
Mr. Justice Stewart

1fp/ss
June 26, 1981

80-148 Robbins v. California

Dear Chief and Potter:

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For the foregoing reasons, I am deeply concerned about our institutional responsibility to provide clear guidance that neither threatens substantive rights nor handicaps law enforcement.

I would be happy to discuss this.

Sincerely,

The Chief Justice
Mr. Justice Stewart

1fp/as
To: Mr. Justice Powell  
From: Peter Byrne  
Re: No. 80-148, Robbins v. California  
Date: 06/26/81

I have a number of reactions to your draft of 6/26/81. Primarily, I think it an admirable memorandum of the exemplary dedication you have shown toward reaching a result in this case that will square sound principle and sound practice, even at the cost of eating crow on some of your prior language. Nonetheless, it will not do as a "frame" for your circulated concurring opinion.

As I read your thrust, you wish to acknowledge the claims of both PS and the dissenters that a "bright line" rule is necessary for effective police work and for practical protection of privacy. As written the concurrence goes on at some length about the dangers of bright lines rules, see pp 5 & 7-8. If you wish to change direction on the desirability of bright line rules that opinion may need major surgery. Second, I think you need not be apologetic about either Sanders or this case. As you recognize no approach in this area will give complete satisfaction, and both Sanders and this opinion do abide by the principles you have consistently articulated in the Fourth amendment area.

I suggest that you add something like the following to the existing draft, probably as a footnote to the end of the first full sentence on page 8:
June 27th

30-148 Robbins

Dear Chief,

Here is a revised draft of my opinion concerning in the judgment.

I have retained most of my circulated opinion, but have condensed some of it. The only new elements are additions in response to John's critical dissent and language at the end that leaves us open for reconsideration in the future.

My understanding is that you also will join the judgment. You reserved decision, properly, whether you would write separately or join me. We should get all of this to the printer early Monday, as time is running out.
MEMORANDUM TO THE CONFERENCE:

I have concluded to be simply shown as joining the judgment, without more. I have done several separate opinions, but looking at the whole picture I have decided none of them will add to the jurisprudence.

The clarification of the confusion on the 4th Amendment is overdue and cannot be accomplished in any one opinion. The Exclusionary Rule, as I observed in Bivens and other cases, is the albatross we must re-examine.

This case should be ready for Wednesday or Thursday, since all but Lewis' latest writing is in print.

Regards,

 /[Signature]

Wow! A change.

Please Saturday. In my hand letter to Potter.