Supreme Court of the United States

October Term, 1968

In the Matter of:

THORNTON A. JENKINS,

Petitioner,

vs.

THE STATE OF DELAWARE,

Respondent

Docket No. 748

Place Washington, D. C.

Date March 5, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

****

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Thornton A. Jenkins,

Petitioner,

v. No. 748

The State of Delaware,

Respondent.

Washington, D. C.
Wednesday, March 5, 1969.

The above-entitled matter came on for argument at 10:10 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

HENRY N. HERNDON, JR., Esq.
701 Bank of Delaware Building
Wilmington, Delaware
(Counsel for Petitioner)

JAY H. CONNER, Esq.
Deputy Attorney General
Public Building
Wilmington, Delaware
(Counsel for Respondent)

0o0

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 748, Thornton A. Jenkins, Petitioner versus Delaware.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Herndon, you may proceed with your argument.

ORAL ARGUMENT OF HENRY N. HERNDON, JR., ESQ.

ON BEHALF OF PETITIONER

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

This is a murder case in which the defendant's conviction of first degree murder was reversed by the Delaware Supreme Court for a trial de novo. He was tried again after this Court's decision in Miranda and convicted of second degree murder.

The Delaware Supreme Court subsequently entered a judgment affirming that conviction and this Court granted certiorari to review that judgment.

Two issues are raised in this proceeding.

First, are the standards of Miranda applicable to all trials, including retrials commenced after the decision was announced.

Secondly, does the warrantless search of a suspect's home based solely upon the consent of the co-occupant violate the suspect's rights under the Fourth Amendment where he was

physically present and immediately available to give or withhold his consent and where the purpose of the search was to obtain evidence not against his cooccupant, but against the suspect himself.

The facts are not in dispute. Indeed, the statement of the case in the brief of the respondent is identical to that of the petitioner's brief.

In very summary form the facts are these. On the morning of March 17, 1965, officers of the Wilmington, Delaware, Police Department were called to investigate an apparent homicide. The victim was found in a junkyard.

Subsequent examination of the body by the Assistant Medical Examiner disclosed that the victim had died sometime the prior evening. The Petitioner and a companion had been observed on the street in the vicinity of that junkyard on that prior evening.

They had been apprehended and taken to the police station where they were questioned by a Sergeant Maloney and subsequently released. Sergeant Maloney's name will come again.

Between 9 and 10 o'clock on the morning of March the 17th, that is the day after the initial apprehension, Sergeant Maloney went with four other officers to the home of the petitioner, his purpose was to see if the petitioner and his companion of the prior evening were there.

The petitioner's lady friend, Miss Marshall, answered

the door and Sergeant Maloney indeed asked if Thornton Jenkins the petitioner was present.

The petitioner and his companion, his lady-friend and three other persons, being all of those present in the house, were apprehended at that time and taken to the Detective Division of the Police Station.

A big of geography might be of assistance here. It seems that all of the county and municipal functions in Newcastle County, Delaware, are taken care of in a single building called the Public Building which has at one end the city functions and at the other end its county functions.

The Police Station is located in the city end of the Public Building.

At the Police Station the Petitioner was placed in a so-called recording room located in the Detective Division. At 11 o'clock that morning he was charged with night prowling. At 11:40 that morning Sergeant Maloney, according to his testimony, advised the petitioner's lady-friend of, in his words, her rights and requested permission to search the house.

She told him that he could search the house which he then did discovering items of junk and clothing which were seized and later introduced into evidence at the trial. I will return when we come to the subject of the validity of this search to some more specific facts on that issue.

Later that same afternoon at 1:15 p.m. the petitioner

was formally charged with fourth degree burglary andmurder in the first degree.

Subsequently, at 7 p.m. an incriminating written statement was obtained from him. The purpose of this confession was, of course, to verify what the police officers had already concluded, namely that the petitioner was the person or at least one of them who had committed the homicide then under investigation.

Although the evidence is conflicting upon what warnings were given to the petitioner and when they were given regarding his Fifth Amendment rights -- the petitioner, for example, insists that he was not given any warnings until after he had signed the statement -- it is clear that he was not advised of his right to have counsel supplied to him in the event he wished and was unable to afford counsel.

Timely motions to suppress both the product of the search and the statement were filed both before and during the trials and were denied.

Petitioner's first trial began in January of 1966, and his more recent trial in October of '67. It was the Petitioner's second trial in October of '67 which poses the first issue raised here.

Following his initial conviction the Delaware Supreme Court reversed for several reasons, none of them relating to Petitioner's statement, and in so doing directed that although

the new trial was to be de novo the standards prescribed by Miranda were not to be applied.

Johnson held that Miranda would apply only to trials begun after that decision, namely, Miranda was announced. It was not specifically concerned with and did not expressly hold whether a retrial was among the trials in which Miranda was to be applicable.

For four major reasons we submit that the admissi-ilitybof a criminal defendants incriminating statement at a retrial should be measured by the same gage as any other defendant going to trial at the same tim.

Very briefly those reasons are these.

First, the purpose of the Miranda rule is to enhance the reliability of the fact-finding process at trial. Now that purpose could not be fully implemented if it were applicable only to some trials.

Here we think that the contrasting treatment in Stovall of the way Gilbert rules is enlightening. There, of course, the critical time was fixed as the time of the confrontation, the time when the identification took place.

Here the time was fixed at trial. Similarly in this Court's recent decision in Fuller versus Alaska, in announcing the applicability of the Lee versus Florida rule once again the time was fixed, not the time that the officers obtained the evidence in violation of Section 605 of the Federal Communication

Act, but at the time of trial.

And once again, however, no distinction is being made as to the types of trial.

But certainly it would seem that if the rule in Lee versus Florida as to which the Court said that it doesn't go to the enhancement of the fact-finding process of the trial, it is going to be applicable at trials subsequent to the time that decision was announced.

It would seem anomalous to not apply at least in the retrial context a rule which does go to the core of the fact-finding process.

Our second reason is this. In fixing the extent to which there may be full effectuation of the individual's Fifth Amendment rights to trial, the results of his prior in-custody interrogation may and frequently are determinative.

It is difficult if not impossible to distinguish between the exercise of those rights during an in-custody interrogation and during trial. To the extent they have been lost in the interrogation process they cannot be fully exercised at the trial.

The choice of whether or not to testify may then not be as a practical matter one which is open to the defendant.

The third reason is this. There is a seeming impairment of judicial integrity in sanctioning the simultaneous trial by different persons in adjoining courts by different

standards. And perhaps it is reading too much into Johnson, but it appears to have as one of its purposes, the implementation of the Miranda protections as soon as possible but at the same time minimizing any disruptive effect which would be caused by its application.

That there would be some disruption is apparent. Because Johnson would not exclude, or would exclude from evidence those confessions which were obtained either prior to the announcement of Miranda or indeed after it if they weren't in compliance with Miranda standards provided that no trial of any kind had been commenced by that date.

And fourth, there is an obvious point and perhaps too obvious that where Johnson uses the word trials that is exactly what was meant and no exclusion of all trials except a defendant's first appearance at the bar was intended.

Most of the decisions which are cited in all of the briefs including that of the Amicus, Attorney General of the State of New York, supporting the decision in accord with the decision of the Delaware Supreme Court in this case, fixed the critical word as cases, and what they have done with this word is sometimes very interesting.

For example, in the case of Boone versus State -- correction, State versus Branch, the North Carolina decision that the court there found that the word case was determinative and held that a case begins at the time of the in-custody

interrogation and I suggest that that gives a substantial warping to the Johnson decision.

I would like to make one or two brief comments upon the brief of the Amicus Curiae.

First the Amicus urges that the New York courts have relied upon the nonapplicability of Miranda in reversing subsequent cases. We would suggest that the cases were reversed because they had either been wrongly decided or for some other error committed during the course of trial.

Secondly, it is argued that Miranda should not and I am quoting, "be applied to past convictions merely because a retrial is ordered," which suggests that if a retrial is ordered there is no past conviction but only a future trial.

Finally, the Amicus contends that the primary aim of Miranda was to change the circumstances of interrogation. We would suggest that that simply is not, but that is one of the purposes but is not the primary purpose.

We turn now to the search and seizure question and there I think some additional facts may be of assistance. The Petitioner and his lady-friend, Leona Marshall, had lived together as man and wife for about three or four years prior to his arrest.

They had lived in the house where the petitioner was apprehended for a period of anywhere from, according to her testimony, two of those years to perhaps nine months according

to the landlords.

Between 9 and 10 o'clock on the morning of March 17th, some five officers of the Wilmington Police Department went to the Petitioner's home to apprehend the petitioner and his compansion of the prior evening.

Sergeant Maloney knocked on the front door. Miss Marshall, still dressed in a housecoat, answered the door. Sergeant Maloney asked for the Petitioner. The people in the house were then collected in one of the rooms, which I think Sergeant Maloney described as a dining room, where Miss Marshall observed Petitioner's companion being directed to lean against the wall and being padded down.

She was told to get some clothes on and testified that she was advised that the people in the house were going down town. They were taken to the Police Station.

All of those apprehended except for the Petitioner and his companion were seated on a bench immediately outside the Detective Division portion of the Police Station. The Petitioner was taken inside and placed in a so-called recording room which is a separate room within the larger confine of the Detective Division.

Sergeant Maloney thereafter sought Miss Marshall's permission to search the house. The record is clear that at that time Sergeant Maloney had Miss Marshall in custody. He knew that the Petitioner lived at the house to be searched. He

knew that the Petitioner was one of the two prime suspects in the homicide investigation then being conducted. He knew that the Petitioner was present in the recording room. He proposed to conduct a search to obtain evidence of the Petitioner's guilt of the homicide and he made no effort whatsoever to obtain the Petitioner's consent to the search.

For her part, Miss Marshall had a limited comprehension of what the search was all about and what her rights were. Basically she testified that she just didn't know what it was all about because the police didn't tell her.

She didn't know that she was not required to permit a search. She thought the police could search the property simply because they wanted to and I think it is, I should say too that she assumed that they could just get a search warrant by some process that she didn't understand but they could get one.

In any event, as a result she did permit the search for no reason really other than the police asked her to. This search, therefore, was without a warrant and was not conducted incident to a lawful arrest.

The sole basis for its legitimacy was the acquiescence of Miss Marshall, Petitioner's co-occupant in the request that the police for permission to search.

Q She was the at least the nominal lessee as I remember?

A The testimony of the landlord says as far as he was concerned she was the only tenant of the property. The Delaware Supreme Court in its first opinion so held. The evidence also discloses, Mr. Justice, that the rent money came from the Petitioner if that is significant.

Q Was the search point made in the second appeal?

A Yes, your Honor, it was. It was raised in both appeals.

Q In other words, the opinion doesn't deal with it on the second appeal?

A Yes, your Honor, it does. It points out that the Petitioner raises for the record the same issues at pages 101 and 102.

Q For record purposes?

A Record purposes. Both these points have been dealt with at the first trial and had been rejected in the first appeal by the Delaware Supreme Court.

Q I see. Okay.

A The acquiescence of Miss Marshall we suggest does not measure up to the requirements of the Fourth Amendment for two basic reasons.

First of all, her positive response to a request for permission of search was not made with any real comprehension of what her Fourth Amendment rights were.

And secondly, irrespective of whether Miss Marshall's

permission to search effectively waived her own rights, we submit that she could not waive the Petitioner's rights and even if it is assumed that a co-occupant simply because he is a co-occupant can waive another's Fourth Amendment protections the search here was nevertheless unreasonable where it was the Petitioner who was the prime murder suspect where it was him against whom evidence was being sought and where he was immediately available to give or withhold that consent.

Common to both reasons is the precept that a warrantless search is in violation of the Constitution unless it can be demonstrated as being within one of the well-defined exceptions to the general requirement that a search must rest upon a search warrant.

Necessity may justify a search in certain circumstances but absent necessity a warrantless search must be supported by a valid consent.

As to the first reasons, the insufficiency of Miss Marshall's consent.

Like the Fifth Amendment, the aim of the Fourth is in part certainly to avoid any compulsion upon the individual to incriminate himself. Evidence of a suspected crime whether from the suspect's own mouth or whether from his possessions or his home have the same result.

If a waiver of this right is to be relied upon then there is not appear to be any justification for surrounding

that right with a lesser degree of protection than is the case for the Fifth Amendment.

Thus, if a waiver is to be relied upon it must be established that Miss Marshall fully comprehended what her rights were before her consent to the search can be characterized as effective to support the search.

And the burden here of establishing that waiver is upon the State. In this case we submit that the burden has not been sustained.

As to the second reason, as far as Petitioner is aware, this Court has never up held the validity of a third party consent to a search -- let me state that another way.

As far as the Petitioner is aware this Court has never specifically held that a third party can effectively waive the Fourth Amendment rights of a defendant.

Once it is recognized that the Fourth Amendment protects people and not simply places or things and the rights of the individual are personal rights, then it is difficult to accept that those rights may be dismembered by one who has absolutely no interest in their protection.

Anything else such as the possession and control rule relied upon by the Delaware courts and many of the lower courts, lower Federal Courts necessarily involves an analysis of relative and competing property interest and makes them determinative of who can consent to the search.

The waiver, therefore, must be by the person whose rights are involved. Either he must waive it in person or through an agent, but in either case the waiver or authority to waive must be explicit and this we suggest is exactly what Stoner teaches.

I think we would all be shocked and reject out of hand the notion that a father could waive his son's right to a counsel in a trial and submit him on a plea of guilty to the court for sentencing.

And I don't think we could accept the wife's asserted waiver of the husband's Fifth Amendment rights. This situation we submit is really no different. In a narrow sense it is perhaps not essential for the disposition of this particular case that the third party consent issue be met head on. This search was unreasonable by any standard despite Miss Marshall's consent.

Avert once more the general rule that a search warrant is required except where necessity changes that circumstance. Absent a warrant the requirement of necessity in fact, even though the decision and the petitioner fully appreciates this, the decisions use the words reasonable and unreasonable.

If the requirement of necessity is not met then the warrant is required. Here there was no reason, no justification for not either seeking a warrant or seeking the Petitioner's consent and the failure to sought that consent in this particular

instance where he was immediately available to give or withhold it, all that Sergeant Maloney had to do was to open the door and ask him is what makes this search unreasonable.

Q Well, assuming that Miss Marshall's consent was valid and effective, if the police had entered the premises and had found things there connecting her with the crime and she had later been indicted, you wouldn't have any question about the use of that, would you, against her?

A Against her, no, I would not.

Q Precisely, what is the complaint here? Is it that the police were not in good faith seeking her consent to the search of the premises? As I understand it what you are dealing with here is living space. Was it a house or an apartment?

A It was an entire house, your Honor.

Q An entire house. And she was the tenant although the Petitioner paid the rent but she was the tenant and the police wanted to search the entire house. They searched the entire house and they came across the junk, did they?

A Yes, sir.

Q Was that in anything identifiable, or identified or identifiable as Petitioner's separate and private receptacle such as a locked suitcase?

A No, it was not, your Honor. We concede for purposes of this argument that both the junk and the jacket

which were the clothing were in commonly occupied areas.

Q All right. But what you are really saying if I correctly understand it is that apart from the question of validity of her consent, assuming that her consent was valid, that the police would then be, were then warranted in searching the premises but they were not warranted in using the fruits of that search against Petitioner. Is that it?

A That is correct.

Q An alternative would be to argue that the obtaining of her consent was not valid because she was not really the target of the search. You are not arguing that, are you?

A Well, I am arguing that. Yes, I am, your Honor.

Q Is there any authority for that?

A I am arguing that that is what makes the search unreasonable if the standard applicable and I concede to not knowing what the standard is. If the standard is some general and amorphous thing which we are just going to label reasonable I say that this search was unreasonable by virtue of the fact that in real terms the purpose of this search was to get evidence against the Petitioner, not against the consenter.

Q What you are advocating if I understand it is a very novel doctrine and that is that the consent has to be obtained not from the person having some sort of possessory or ownership rights, but from the person who is the target of a search. It is very difficult for me to relate your argument

to the conceptual standards in the field except in those terms that you are asking us to abandon the possessory ownership standard and the substitute for it a rule or to add to it maybe, a rule that the police always have to obtain a consent of the person who is the true target of the search before they can make a warrantless search.

A Mr. Justice Fortas, I wouldn't go that far and do not need to in this case. But I do say that where "A" is the target of the search and "A" does have a right to be and to have his things where those things are and where he is in this house where he lives, then in that context, I say that his consent is required.

Q Now there is nothing in our books to that effect, is there?

A There is not.

Q This will be new doctrine?

A That is correct.

Q What you say that the police were rightfully in the house.

A Yes, sir.

Q If her consent was valid for herself, you indicate the police are rightfully in the house?

A I think my answer was to the question if she was consented to a search then a search to obtain evidence against her was proper. But I will go further and say that if she

consented to their being in the house, then they are properly in the house.

Q Now, let us assume that while they are properly in the house they see some narcotics on the mantle piece and they say, "Whose narcotics are those?"

And she says, "They are my husband's."

And They say, "Well, may we take them?"

And she says, "No, they are not mine. They are his."

They are his effects. But they could still take them, couldn't they?

A I say no.

Q Well, you not only want new doctrine you want reversal of some old then?

A I think that is correct.

Q Yes.

A If there are no further questions, that concludes my argument.

MR. CHIEF JUSTICE WARREN: Mr. Conner.

ORAL ARGUMENT OF JAY H. CONNER, ESQ.

ON BEHALF OF RESPONDENT

MR. CONNER: Mr. Chief justice and may it please the Court.

The first question which we are here to argue is whether Miranda is applicable to retrial.

Now five Circuits and nine States differ with Delaware

We have got five that agree with us, five States. But out of those 14 forums that differ with Delaware only one decision and that is the California decision of People versus Doherty, has any more than a token discussion of this question.

The 13 other forums rely on the one word "trial" in this Court's decision in Johnson versus New Jersey.

Now we submit that the answer to this question does not lie in one little word used in one case. Now the Johnson decision is important. It is important for two reasons.

No. 1, all of the language gives guidance as to the answer to this question.

And, No. 2, Johnson is important because the decision that this Court reaches in this case shold be able to be reconciled with the Johnson decision.

Now, in addition to Johnson, I think we must apply logic, common sense and even look at some other cases which lead us to the answer.

Q Mr. Conners, suppose in this case -- it happened in '64?

A Mr. Justice, the date of the confession was March 17, '65, first trial January '66.

Q Well, suppose this man had been in the Federal Penitentiary and didn't get out until '67, and was tried in '67. Would the rule apply?

A Would the Johnson rule apply?

Q Yes, sir.

A Yes, it would and the State would be out of luck.

Q Well, now suppose at the end of his trial the judge had decided to give him a new trial. Would the rule have applied?

A Under that hypothetical, when was the first trial?

Q The first trial was in '65 and the judge granted a new trial in '67.

A The rule would not apply, sir.

Q What is the difference between those and this one?

A Well, there are several differences. I think this goes right to the heart of the whole question.

Q You know usually when you distinguish a case you sometimes the only thing you distinguish is the name. But in my hypothetical I still have the same name so you have to find something else to distinguish it from.

A It is our position that a retrial is not a new trial. It is merely a continuation or an extension of the first trial. That is why the trial really began back in '65 and not in '67 per your hypothetical.

I think another way to point this out would be to say if this Court started to write the decision in this case in March of 1969, and after working on it one week you tore it up

then you come back in April of '69 and start to write it again I think you would have to say that you began the work in March of '69 and not in April of '69.

Q So your point is this is the same trial?

A This is the same trial and it is part of the same case.

Q Is it a different judge, a different jury, different everything. But it is the same trial.

A It is an extension of the same trial; yes, sir. I might add that the only thing which is new about a new trial is possibly the jury and well the jury is new, possibly the judge might be new as well. But it certainly is not a new trial as far as the parties go.

The defense knows what the prosecution evidence is going to be, they know the basis of the admissibility of that evidence, they know what witnesses are going to testify, they know about the credibility of those witnesses, certainly a lot easier to cross-examine the second time than the first time.

They know how the judge is going to rule on the evidentiary questions. So a retrial is really not a new trial except for the fact that the jury treats it as a new trial. The jury hears it for the first time.

Now, since all these other forums place such heavy reliance on Johnson, I would like to just look a little bit at some of the other language in the Johnson decision.

First, there was language in the Johnson decision that Escobedo and Miranda should apply to cases commenced after those decisions were announced.

Both words are important here, 'cases commenced.' And New Jersey Supreme Court in Vigliano in discussing this they say a retrial after appellate reversal is not a new case but simply a continuance of the same case looking toward a final judgment of either acquittal or conviction.

I think this is what I just expressed in answer to Mr. Justice Marshall.

When a case commences it is my view that the case commences even before the previous trial. The Supreme Court of Maryland in Boone they put the commencing point at the previous trial and the North Carolina Supreme Court in Branch they put it at the interrogation in the police station.

I place the point of a case commencing at the first time the defendant is taken before a judicial officer to set bail, whether that be a United States Commissioner or Justice of the Peace or a Magistrate.

And the basis of that is that because this Court since its inception has always held that to have a case there has to be a controversy. To have a controversy there has to be two sides and the first point at which both sides are represented before some judicial authority would be when you take him before a Magistrate to set bail or for arraignment.

Now after the commencing we go through a preliminary hearing, all part of the same case. We go through a Grand Jury indictment, still part of the same case. Trial by petty jury, part of the same case.

Q Mr. Conner, I hate to stick to my point but it seems to me your Court said on page 56, "Accordingly, the opinion of the Court the Jenkins conviction of murder in the first degree must be reversed and the case remanded for a new trial." Not retrial.

A Well, that is language used in that decision; yes, sir, Mr. Justice Marshall, but when you look at really ---

Q It is not binding on you? This is the Supreme Court of Delaware, right?

A Yes, sir. But it goes to what is the definition of a new trial.

Q They did say new trial.

A They did say new trial.

Q All right.

A But as I have just pointed out there is a big and a great difference between a trial tried for the second time than a trial tried for the first time.

Now, there is some additional language in Johnson which is important and that language says future defendants will benefit fully from our standards governing in-custody interrogation. And they are talking about the Miranda and Escobedo

standards. Now certainly Defendant Jenkins who was arrested back in March of 1965 was not a new or future defendant in October 1967, when he was tried for the second time.

Now Johnson, in Johnson this Court also points out that the police shouldn't be punished for not following standards which were not standards at the time they acted and this Court differentiates from the map in Wolf Doctrine where the police did have the Wolf standards but didn't follow them.

So, if we consider that on a retrial the law enforcement and the prosecution cannot use the confession, this would really be to punish the police for acting in accordance with the set standards at the time they took the confession.

Now, I mentioned at the beginning that this decision should be reconcilable with the Johnson decision. Now, if this Court determines as my friend asks that Miranda is applicable to a retrial then this decision cannot be reconcilable with the Johnson decision, because it is not reconcilable with the language of case commenced.

Now, if the Court accepts our position, that it should not apply to a retrial, it is reconcilable with the language, case commence. It can also be reconcilable with the language trials begun by ruling that a retrial is merely an extension and not a new trial, it can differ with the Supreme Court of Delaware, or it could say by the language in Johnson, we intended this to mean a trial for the first time.

It can be reconciled, with Johnson. Now this Court has long been concerned about the administration of justice and this is obvious not only from Johnson but from many other decisions.

Many cases are going to be affected if it is ruled that Miranda is applicable to a retrial. The Amicus brief indicates that many New York cases will be affected. In Delaware this is the only case that I know that will be affected.

There may be one or two in the Federal habeas corpus system but I am not aware of them. But in this particular case, Jenkins, if this confession is out, we cannot prosecute. We don't have enough evidence.

And it is two years later, it is too late to go back and dig up or come up with some fresh evidence. Now counsel is probably saying well that is no exucse. The police should have done a thorough job the first time. This is an argument.

But realistically speaking in the last ten years, of course, there has been a great increase in crime, but there hasn't been a ratable increase in the number of men that man our police departments. So the police when they are investigating a crime they are forced to go and get enough evidence which will be legally admissible and which will be sufficient if legally admissible to obtain a conviction.

And then they have to get back out on the street and continue on other investigations. They don't have the manpower

and they don't have the time to put together a perfect case and it is too late now to go back and do it.

Q Is that really true that all the police are required to do is to go out and get the bare amount that they think is sufficient to sustain a conviction. Aren't they obligated under their oath to go out and get all the evidence that is available and even if it should cut both ways?

A Absolutely.

Q I didn't understand you to say that.

A I may have misinterpreted. I may have not communicated my remarks properly. Absolutely, this is the policeman's duty but realistically speaking they have to call off an investigation at some point. And when they feel that they have spent sufficient time and have sufficient evidence both ways, they have to call it off and go on to somebody else, Mr. Chief Justice.

They can't make a career out of one case. Practically it is just not possible.

Enough said I think about the Johnson case.

I might say and I mentioned the California case of People versus Doherty. Now In California they have a statute which read something like this, "The granting of a new trial places the parties in the same position as if no trial had been had."

This is very similar to the discussion which I just

had with Mr. Justice Marshall. And, of course, the California Courts are bound by this statute. And this is one explanation why they put a litle more discussion in about the Johnson case. As I pointed out I don't agree with the statute because the new trial doesn't really place the parties in the same position as if no trial had been had for the reasons that have been previously mentioned.

But it was also interesting to note that in the Doherty case in California, the California Supreme Court ruled that the marijuana had been properly admitted into evidence, and I feel that you can put the marijuana in the possession of somebody that the Court may have felt that this was enough evidence for them to get a conviction the second time without the confession.

Q Was the Doherty case in the California Supreme Court decided before or after this Court's decision in Stovall?

A Mr. Justice Stewart, I am not quite sure of the Doherty date.

Q I haven't read all of these cases in your footnotes 10, 11 and 12, but just a cursory glance at the dates of the cases would indicate to me and perhaps I am wrong, that is all I have done is glance at the date -- would indicate that perhaps more courts held Miranda to be applicable to a new trial before this Court's decision in Stovall than did so afterwards.

A Yes, sir, I think the dates do indicate that. People versus Doherty was in '67. I think Stovall came down in June of '67.

Q Also in '67 is my recollection.

A It is very possible that Doherty was actually argued and considered prior to June even though the written opinion did not come out before.

Q You don't remember whether the California Supreme Court discusses the Stovall case in its opinion? I think it antedated the Stovall case.

A That is my recollection also, sir.

My next point which I was going to discuss was the Stovall case. Of course, Stovall held that as far as the lineup rules are concerned the way Gilbert rules that it is the date of confrontation which is the critical date.

But there is some other language in the Stovall decision which I found interesting. And that language was, "We conclude that for these purposes no distinction is justified between convictions now final and convictions at various" -- and I emphasize various -- "stages of trial and direct review."

"Various stages of trial and direct review."

Now likewise in the confession area logic dictates that no distinction is justified between the defendant who confessed prior to June 13, 1966, was convicted, sentenced -- served his sentence -- and the defendant who also confessed

prior to June 13, 1966, was convicted but gets a new trial for reasons not related to the confession.

Secondly, logic dictates that the rules as far as rights of counsel does not differ as far as a retrial is concerned for identification cases and for confession cases.

Thirdly, and this may be reiterated and repetitious but it should be emphasized, the police and law enforcement should not be punished for something that wasn't the law at the time they acted.

Now this concludes my portion of the argument which I want to deal with Miranda applying to retrial. I would just like to go briefly with what time is left into a discussion of the principles that are involved in the search question or the search aspect of this case.

Before going in this perhaps the factual setting should be made clear.

Mr. Herndon alluded to the fact that they had lived together for some years as man and wife. Delaware does not recognize common-law marriages. It is true these people had lived together. But the landlord said and testified that he rented these premises solely to Leona Marshall so as far as he was concerned she was the tenant. He had never heard of Thornton Jenkins.

It should also be pointed out that Thornton Jenkins was arrested back in March 17th, 1965, and when this case came

to trial in January of '66, Leona Marshall was still residing as tenant at these same premises.

So there is no dispute as to who is the tenant and who has the property interest.

Our Supreme Court used the term, joint occupants.

Now, Mr. Herndon asked this Court to rule that in no case can a defendant be bound when a third party consents to the premise that the third party owns, were occupied, or has the possessing interest in the search.

Now if you carry this argument ---

Q Did he go that far?

A Yes, sir, that was my impression from listening to Mr. Herndon and reading the briefs.

But if you carry this position to the logical end or logical extreme, it can't work. Because I could commit a crime in a summer resort. I could go to a man whose house I think is vacant during the winter period and stash some of the stolen goods there.

A man comes down over the week-ends, consents to the police to search the house. They find the goods. Clearly, clearly, no violation here. Proper search.

Backtracking from the extreme a little bit, suppose Thornton Jenkins does not live day by day with Leona Marshall but only visits here. He goes to visit her with stolen goods, leaves some of the stolen goods there, a search is consented to.

Clearly again he has no right to claim that this search wasn't proper.

Q Let us just assume on your last example, that a thief leaves the stolen goods in the house of his girl friend but he just happens to leave it in a suitcase with his name on it and there it sits. And she consents to the police to come in and they say, "May we take that suitcase?"

She says, "Sure."

"May we look in it?"

She says, "Surely, it is not mine."

What kind of a result would there be then? Same result, do you think? That you are urging?

A I would differ there. If the goods were in plain view in her house as they were in this case, then they have the right to seize them.

Q Why? They are his.

A There is still no property of his being invaded.

Q The Fourth Amendment protects effects as well as houses. They are his effects.

They may be rightfully in the house. They may be rightfully in the house because of her consent but how can they seize his effects without his consent. He has got a property interest in the effects. They are not hers.

A This Court has long held that they could be seized.

Q On what basis?

Do you think the Harris case said you can seize things in plain sight in a house?

A Yes, sir.

Q Why can they do that? Why can they do that without a warrant? It isn't because of consent of somebody else, surely.

A If the search is proper and the search is reasonable, then anything in there can be seized. To go back to the search ---

Q Why is that? Why may you seize effects without a warrant when you can't search the house without a warrant or without consent?

A Because the Court has ruled that the search is the critical thing. The reasonableness of the search is what is the critical area.

Q I know that.

A And not the reasonableness of the seizure.

Q I know. You have said that before but I would like to know why it is reasonable to seize somebody's property t hat is protected by the Fourth Amendment without a warrant.

A Warrants don't go to seizure. Warrants only go to the right to search.

Q Now wait a minute. The warrants always give the rights to seize. What is the purpose of the search usually?

A To look for contraband or fruits of the crime.

Q To look for physical evidence?

A To look for tangible physical evidence.

Q To look for most of the time anyway, sometimes it is really to search the house. But do you suppose that if the -- do you think the Fourth Amendment provision about effects then is just irrelevant or redundancy?

A No, I don't go that far.

Q Well, you haven't told me then why a policeman searching a house ought to be able to seize somebody else's effects. Why can't he seize, if he has consent to come in a house and seize a suitcase of somebody else's, the example used a while ago, the suitcase has somebody else's name on it and he says, "Whose is this?"

And the house owner says, "That belongs to my boy-friend."

Why can't the police seize that suitcase?

A If the person that owns the effects has wanted to protect his privacy interest in these effects and goes to the trouble to let us say enclose them and prevent them and keep them out of the sight of the general public then that privacy interest should be respected.

But when he comes in somebody's house and lays his goods down in the open then he doesn't have much interest in the privacy of this property and I think that is the answer.

Q So you couldn't seize the suitcase but you could seize the clothes in the suitcase if the suitcase was lying open?

A Yes, sir.

Q If he had hid these things that they took so that they were not immediately visible, would you say they could have gone in and taken them out then or do you rest upon the fact that these things are right out in the open in the home?

A Mr. Chief Justice, in this case I am going to rest on the fact that these goods were all in the open.

Q We have to go a little farther than that, don't we? In determining what effect this will have on other cases and you say they were right out there in the open, but I suppose if the man takes things to his home and puts them in a room that that doesn't mean that even though theymight be observable in that room that doesn't mean that he has no more privacy in them sofar as the public is concerned, does it?

A Well, I think if he takes, Mr. Chief Justice, if he takes them to his own home then he is seeking more privacy.

Q Isn't this his home?

A Well, when a man chooses to live inaan extra-marital relationship with another woman he is giving away some of the privacy that he could have had by living in a marriage

relationship or living by himself so I think where he lives also goes to the question of privacy.

Q But it would have been all right if he would have put them in a suitcase?

A Our point would not be as strong if he placed these in a suitcase; yes, sir.

Now, I think we just about covered all the points but there has been no Supreme Court rulings on this. The Circuit Courts and one or two StatesCourts have held that a mistress or a joint tenant do have the authority in their own right to consent to a search of their premises and once they have this authority search is reasonable and the evidence seized can be used against anyone.

Again, we respectfully ask this Court to adhere to this theory, we ask this Court to determine that Miranda is not applicable to a retrial, to adhere under this factual situation that the search was reasonable and the seizure proper.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Herndon.

REBUTTAL ORAL ARGUMENT OF HENRY N. HERNDON, JR., ESQ.

ON BEHALF OF PETITIONER

MR. HERNDON: Mr. Chief Justice, if I may respond very briefly.

As to the Johnson argument, I think that the position of the State of Delaware points up the problem in using the

word case as the word of art rather than the word trial. The decisions in many States vary as to when a case or indeed trial begins. Some of the cases say that it begins with the interrogation of the defendant. Others at the time of a preliminary hearing, others at the time of indictment, others at the time of arraignment and plea, still others when a jury is called into the box for examination, and still others when the jury is sworn.

So that that problem has to be faced as well. It seems to us that the use of the word 'trial' is a clearly understood and well recognized word which provides a fine degree of definiteness and one that should be easily followed, despite the problems some courts have had with it.

It is suggested that this would punish the police for what they have done properly at the time they obtained the statement. This is necessarily the consequence of Johnson in any case where no trial of any type had been started unless, the critical word is case and unless case means the time that the statement was taken.

It was further pointed out that this punishes the police in that there was no anticipation of the problem and that it was too late to go out and get any other evidence.

I would simply like to advert to the Petitioner's motion to suppress in this case in December of '65 which included the ground and certainly warned the police at that

time some few months after the event and this is a quote, "The defendant was not adequately afforded the right to consult with legal counsel and legal counsel was not assigned to represent the defendant prior to the time his purported statement was obtained thereby depriving the defendant of his right to counsel."

So there was a warning at that time and if there was a problem and if there was further evidence that was the time to have gotten it.

As to the search issue, I think I was understood to make the representation or argument to the Court that in no case can a third party consent to a search vis a vis the defendant then I didn't state it well at all.

What I did say was that where the purpose of the search is to obtain evidence against a defendant then the consent of someone who simply has a proprietary interest in the property to be searched is not sufficient.

And that was my point.

I have some concern about the aversion so some of these in plain view cases. The obvious distinction there is we don't have a search and thereby the problem doesn't arise.

Q Well, then you would then contend that to take your adversary's hypothetical case that a robber who stashed away stolen goods in an empty house in a summer resort and left and that the owner of that house did not consent to a

search of the house because the object would be to get evidence against the robber so you would say that he could not give consent to the search, that anything found as a result of his consent to the search of his own house could not be used against the robber?

A I would have trouble with that, your Honor, and I would have trouble with it because I wonder whether or not the robber at that juncture had not in fact abandoned that by putting it in.

Q I understood you to say that somebody with a proprietary interest in a house could not give consent to a search if the purpose and object and target of the search was to get evidence against somebody else. Is that what you said?

A That is what I have said.

Q Well, that would cover the summer house case.

MR. CHIEF JUSTICE WARREN: Mr. Herndon, the Court understands that you were appointed by the Court below to represent this man as an indigent defendant and you have carried the case on through this Court and we consider that to be a real public service and we appreciate your having done that. as we appreciate the service of all lawyers in that respect.

Mr. Conner, of course, we appreciate the diligent manner in which you have represented the people of your State.

(Whereupon, at 11:05 a.m. the oral argument in the above-entitled matter was concluded and the Court recessed until 10 a.m. Monday, March 10, 1969.)