

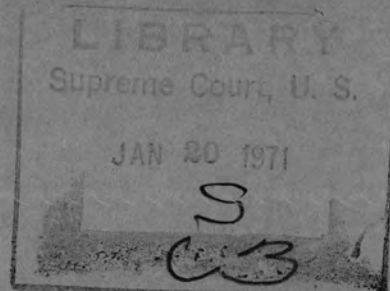
Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

----- X
EDWARD H. COOLIDGE, JR.,
Petitioner
vs.
STATE OF NEW HAMPSHIRE,
Respondent
----- X

Docket No. 323



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

EDWARD H. COOLIDGE, JR.,

Petitioner

vs

No. 323

STATE OF NEW HAMPSHIRE,

Respondent

The above-entitled matter came on for argument at
2:00 o'clock p.m. on Tuesday, January 12, 1971.

BEFORE:

WARREN E. BURGER, 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
THURGOOD MARSHALL, Associate Justice
HARRY M. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Petitioner

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On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 323: Coolidge against the State of New Hampshire. Counsel you may proceed whenever you are ready.

ORAL ARGUMENT BY ARCHIBALD COX, ESQ.

ON BEHALF OF PETITIONER

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

This is a first degree murder case here in forma pauperis on certiorari to the Supreme Court of New Hampshire.

Two constitutional questions are presented.

The first is whether a search warrant issued by the Attorney General of the State, upon the unsworn reports, oral reports of his subordinates while he is active charge of a criminal investigation and when he will actually himself, lead the prosecution, is a valid search warrant for the purposes of the Fourth and Fourteenth Amendments.

Of course we submit that it plainly is not.

The second question, which relates to an entirely different incident so that we may win on either grounds; the second question is whether a wife's acquiescence in the taking of her husband's personal belongings, would validate what otherwise is an otherwise unconstitutional search and seizure, in violation of the Fourth and Fourteenth Amendments, this being a state case.

1 These two questions are better understood if I
2 outline the salient points concerning the case.

3 On January 13, 1964, a young girl: Pamela Mason,
4 left her house in Manchester, New Hampshire on a babysitting
5 assignment. She disappeared; eight days later her body was
6 found by the side of the principal interstate Highway leading
7 south.

8 The state's theory later became that she had been
9 shot by a .22 caliber Mossberg rifle; also her throat had been
10 cut with a knife and that the body had been dumped there
11 about 9:00 o'clock or 9:30 perhaps that same evening when it
12 was covered by an unusually heavy snowstorm, and then after a
13 rainstorm eight days later, became visible.

14 This was a disappearance and crime which excited
15 enormous attention in Manchester and indeed, through the State
16 of New Hampshire. At the time the police broadcast appeals
17 for people to come forward with the names of anyone who was
18 out of the house that evening and eventually one of Petitioner's
19 neighbors reported to the police that he had been out of his
20 house that night. And they went to the house on January 28th,
21 the police; two of them, and questioned him about his where-
22 abouts. He gave an explanation which, unfortunately for him,
23 later turned out to be false.

24 He also showed the police some guns he had in the
25 house at that time and spoke to them very freely and they asked

1 him if he would be willing to go to Concord to the headquarters
2 of the State Police to take a lie detector test and he said
3 that he would, but since he was working as a bakery truck
4 driver, asked that it be on his day off: Sunday.

5 Then on Sunday, February 2nd, they did indeed to
6 up to the state police headquarters and he took the lie
7 detector test, which produced affirmative information of his
8 guilt. But, at that time he did admit that he had embezzled
9 a small sum of money from his employer.

10 When they went back to Manchester he was questioned
11 late into the night by the police and he was not actually
12 arrested in a formal sense until after midnight, but the trial
13 judge found that he would not be permitted to leave at any
14 time after they had returned from Concord.

15 The first search and seizure of which we complain
16 occurred on that day, February 2nd while Petitioner was in
17 custody at the Manchester police station. Two different
18 officers who had never been to his house before, went to his
19 house and with the acquiescence of his wife, Mrs. Coolidge,
20 obtained his guns and clothing and took them away.

21 Q Are these the same guns that the police had
22 seen before?

23 A These were the same guns that different
24 police had seen before and there is no indication that these
25 two men had any information about what had happened before.

1 Q Did the wife at this time know that her
2 husband was at least in the company of police and had been for
3 a considerable time?

4 A Yes, she did and I thought it would be con-
5 venient, Mr. Chief Justice, to -- I'm going to argue the
6 question about the Attorney General's warrant first, and I
7 thought it might be convenient if I refrained from stating the
8 facts about this search which took place chronologically first
9 until I come to what will be the second branch of my argument,
10 and then I will address myself to the specific questions that
11 you mentioned.

12 The second, as I say, Petitioner was held at the
13 police station. He was held overnight on this larceny charge
14 and then he was released on his own recognizance but he was
15 not a prisoner during the ensuing weeks.

16 The second search and seizure occurred some weeks
17 later on February 19, which is almost three weeks after the
18 first. Attorney General Maynard, who had taken active charge
19 of the investigation and prosecution, had called a conference
20 in his office in Concord for the purpose of reviewing the
21 evidence that had erstwhile been developed. There were
22 present: representatives of the Manchester police and the
23 state police and two assistant attorneys general.

24 Those officers presented to him what their in-
25 vestigation had revealed and presenting it, the trial judge

1 explicitly found to him in his capacity as the chief prosecu-
2 ting officer of the State of New Hampshire.

3 Q Mr. Cox, incidentally, is there a transcript
4 of what took place at that meeting in the AG's office?

5 A No; there was no record made of that and none
6 of what was said was under oath. And Police Chief McGranaghan
7 did testify during the trial on voir dire, concerning what
8 took place, but there was no record as as I say, it was not
9 under oath. This was just, I think quite genuinely some --
10 with the chief investigator and later prosecutor, what they
11 had been able to develop.

12 Then, at the end of that conference, after about
13 two hours, we know from Chief McGranaghan's description, he
14 asked for an arrest warrant and four search warrants against
15 the Petitioner, and the Attorney General, having a commission
16 as Justice of the Peace, took Chief McGranaghan's oath to the
17 complaint and then he, himself, issued the five warrants, none
18 of which we are concerned with here: the warrant for an old
19 Pontiac automobile --

20 Q Does the attorney general ordinarily have a
21 commission as Justice of the Peace in New Hampshire?

22 A I don't -- I know that Mr. Maynard did. I
23 suspect that others did. New Hampshire had an extraordinary
24 practice at this time. Chief McGranaghan testified that they
25 never went out of the police department to get a search warrant.

1 they just had the inspectors, captains, all commissioner
2 Justices of the Peace. He testified to this. And that is
3 not -- I don't want to overstate it. That is not the practice
4 today because the statute has been changed, but it was, as I
5 said, the practice at this time. This wasn't an odd happen-
6 stance, apparently.

7 That evening --

8 Q Mr. Cox, do I understand that that there is
9 no challenge to Mr. Coolidge's arrest here?

10 A I don't think it makes any difference here.
11 There was a challenge to Mr. Coolidge's arrest. It's very
12 clear in the headings to Petitioner's brief in the New Hampshire
13 Supreme Court that they challenged the arrest warrants on the
14 same grounds as the search warrants. It's one of the black
15 letterhead things, but as far as I can it does not make any
16 difference to our contention in this case.

17 Q Both facets of your argument, your entire
18 argument, of course in this case, depends upon the continuing
19 validity of the exclusionary rules, doesn't it?

20 A Oh, yes. I assume that and -- if I may.

21 That evening Petitioner was arrested in his house
22 pursuant to the arrest warrant and it was an hour and a half or
23 two hours later that the Pontiac car was towed to the police
24 station and it was searched the next day and then again a year
25 later.

1 The search is important without going into the
2 details, because in the course of vacuuming the car the police
3 came to tiny particles that were later examined under a
4 microscope which experts sought to associate with particles
5 that they said were substantially similar, taken from the
6 clothes of this unfortunate girl.

7 And the expert testimony was that there was some
8 extraordinarily high degree of probability that the body must
9 have been in the car. This, I would say, this evidence which
10 the court first refused to suppress on our motion before
11 trial, and which was admitted over our objection, pressed all
12 the way through the trial in that appeal, was not essential
13 to the prosecution of the case. It was not conceivably a case
14 where you could say that this was harmless error within this
15 court's rules.

16 Indeed, the Supreme Court of New Hampshire noted
17 three or four or five times the very dubious character of the
18 evidence against -- of the proof against the Petitioner in this
19 case. On 265 it says "the proof was not wholly free from
20 weakness." Then it speaks of how the limitations of time cast
21 doubt on the state's theory and how further doubts were cast
22 by certain other evidence; and how the ballistics evidence
23 blew up, to put it colloquially in the state's face during the
24 trial.

25 So that this, I think -- I'm simply emphasizing the

1 importance of this question.

2 Now, our first contention here is basically a very
3 simple one --

4 Q Well, does it make any difference to your
5 case whether the evidence obtained in this way was weak
6 evidence or strong evidence?

7 A No; I was simply negating any possibility
8 if the rule -- there was a case decided the same day in -- in
9 California. I can't think of the name of it now, that could
10 be applicable here. That is that it was harmless error.

11 I think that isn't true and I do emphasize that
12 this was a very close case on the trial so that this evidence
13 was important to the press, too.

14 Now, first my primary contention, as I say, is
15 that the admission of evidence obtained under the search
16 warrant, violated the Petitioner's constitutional rights
17 because the warrant which is issued by the chief prosecutor
18 instead of a neutral and detached magistrate.

19 And I need hardly remind the court that it has
20 said over and over again since Johnson against the United
21 States, Mr. Justice Jackson's opinion, that one of the indis-
22 pensable conditions to a valid warrant is that the inferences
23 from the facts which lead to the complaint are drawn by a
24 neutral and detached magistrate instead of being judged by the
25 officer engaged in the often competitive enterprise of ferreting

1 out a crime.

2 The closest case, unquestionably, is Mancusi
3 against De Forte, where the court dealt with a subpoena duces
4 tecum that had been issued by the district attorney in New
5 York and Justice Harlan, in writing the opinion, considered
6 whether the evidence would have been admissible if the sub-
7 poena could be treated as a search warrant. And he said no;
8 and there was no dissent on that point in the court, because
9 the district attorney was not a detached and neutral officer.

10 Now, the state replies that Attorney General
11 Maynard, before he signed the warrant, took off his black
12 prosecutorial hat and put on his white Justice of the Peace
13 hat. We think that that purely formal step did not, indeed,
14 could not confer on him a neutrality, a disinterestedness,
15 under these circumstances. He was, as I say, in active charge
16 of this prosecution. He was the man that the press had been
17 badgering for days.

18 Q He was the Attorney General of the State?

19 A Yes, but I would emphasize too, that he was
20 in active charge and he _____ through the prosecution of the
21 trial.

22 Q Did he prosecute the case?

23 A Yes; yes. He had promised a vigorous, ruth-
24 less investigation just four days before he signed the warrant,
25 and the banner headline was: "Maynard has suspect." He was

1 thoroughly wrapped up in the investigation and its success.
2 Now, I don't direct this, again, personally. As a matter of
3 fact, I know him and have a high regard for him, but it's
4 beyond any man's human capability to be neutral and detached
5 under those circumstances.

6 Q Well, do you challenge the existence of
7 probable cause for the warrant?

8 A We don't argue that; it has been argued in
9 the courts below. I'm prepared to assume that there was
10 probable cause here.

11 Q Would you say that the invalid warrant would
12 have prevented the police, who had probable cause, to search
13 the Pontiac, that the invalid warrant would have prevented
14 them from searching it if they had found it in motion on the
15 highway?

16 A Well, I would raise the question and do
17 raise the question of whether the police rely on the warrant,
18 and they do not assert any exigent circumstances, that that
19 matter is really not looked into in the court below. I would
20 suggest that under Giordenello against the United States the
21 shift in claim is not available here.

22 But I would go on, Mr. Justice White, and I was
23 about to do it, there would be three other grounds that the
24 state invokes here, apart from the one, because I do not --
25 and one is the line of cases beginning with Caryl against the

1 United States -- Caryll against the United States and ending
2 with the Court's opinion which you delivered in Chambers and
3 Moroney.

4 I say that those cases are entirely distinguish-
5 able. It's one thing for the police to stop a car in motion
6 on the highway when there is probable cause to believe that
7 the driver is either carrying contraband or fleeing the scene
8 of a crime. It's quite another argument to go to a man's
9 home and to search about in an automobile that's parked in his
10 driveway which is not in motion and is not about to be in
11 motion --

12 Q How do you -- on what basis do you say it's
13 not about to be in motion?

14 A Well, in this case it's because he was in the
15 custody of the Manchester police.

16 Q Well, I know, but I suppose other people in
17 his family had access --

18 A Well, what I meant was that there was no
19 evidence that it was about to be put in motion. There was no
20 indication of an exigent circumstance. I think the burden is
21 on the police if they are seeking to show that there is some
22 reason for not getting a warrant. This wasn't hard to do here,
23 where they had gotten a warrant that very day and had taken the
24 time to do it. But, I think the burden, generally speaking,
25 is on the police to show some exigency.

1 Now, if you got the car going, carrying contra-
2 band with somebody who was engaged in that you would have some
3 reason to think you should act quick. But I see no reason,
4 in all candor, and no way if you say --

5 Q Mr. Cox, when you stop the car on the high-
6 way after it's in motion why you could always immobilize it
7 and wait for a warrant.

8 A Well, yes; and of course that is what divided
9 the court in changing its mind. But at least there one was
10 able to say that, well, what's the difference between searching
11 it then and there and taking it down to the police station and
12 searching it later at the police station. I'm not making
13 anything turn on the fact that this car was not searched until
14 the next day, or until a year later. I make nothing of that.
15 I disclaim any evidence on that.

16 I make a great deal of the fact that this was not
17 incident to the arrest because the Petitioner had been
18 arrested an hour-and-a-half or two hours earlier and was in
19 custody at the time and I make a great deal of the fact that
20 if the car was not stopped under circumstances indicated, that
21 if you took time to get a warrant you might miss your chance
22 to stop it and search it.

23 Q But, the car itself was subject to one of
24 these search warrants.

25 A The car was described as a container of the

1 things that were in the trunk.

2 Q In the affidavit?

3 A Yes. It was not described as the object of
4 the search. Indeed, I think that it indicates that the police
5 weren't really interested in the car except as a container
6 of -- and I would suggest -- perhaps I can put the point by
7 oversimplifying it most dramatically -- I don't see the dif-
8 ference between searching for this object in a car parked in
9 a man's garage and saying that you don't have to get a warrant
10 to search for it if it's on a bench in the garage, or if it's
11 in an office in the house or in the bedroom. It's really just
12 as movable.

13 Q Now, Caryll raised that --

14 A No; Caryll involves stopping the car on the
15 highway when it was in motion and the contraband was being
16 carried, and the language in Caryll was very explicit on that
17 point. Chief Justice Taft, wasn't it, spoke of a right of
18 free passage except under these circumstances. He was talking
19 about people that are moving; things that are fleeing, as
20 Your Honor told it in Chambers and Monroney, not about some-
21 thing which is simply a container at the man's house.

22 And I press again: if what one is thinking of is
23 a small _____ what difference is there today between
24 saying it may disappear because it's in the glove compartment
25 in the car that is parked by a house or saying it may

1 disappear because it's on a bench in the barn or is in an
2 office in the building, where it could just as readily be put in
3 the car and carried away.

4 I submit that once Your Honors stepped over this
5 line the whole trend of the law of searches and seizures,
6 which encourages better police work and puts a disinterested
7 magistrate between the police and the citizen and would
8 virtually be gone, I submit. I don't -- I'm rather skeptical
9 of students who parade horrors to me but it does seem to me
10 that that would be true in this case.

11 Q Mr. Cox, did I understand you to concede that
12 had this application for a warrant been presented to a clas-
13 sically neutral magistrate there --

14 A I said that I didn't think I had to dispute
15 that part. And I would point out, Mr. Chief Justice, that
16 from Certified Lumber(?) through Augular, this Court has
17 consistently held that the fact that you might get a search
18 warrant the right way will not excuse a search and seizure
19 made without a warrant or upon an invalid one.

20 And the question here is clearly: if the police
21 could justify by saying, well we could have gotten the warrant
22 the right way; we couldn't have gotten a neutral man to sign
23 it; in the first place there was always a little bit of
24 uncertainty or speculation after the event, but in the second
25 place, the whole reason for the exclusionary rule would be

1 undermined because they would always come to court later and
2 defend it if they could. This was covered again in Mancusi
3 and De Forte and the opinion quotes similar language by
4 Justice Holmes in the Silverthorne Lumber case.

5 Q I'm not sure it was relevant; I couldn't
6 recall the context in which you had mentioned this, but I
7 recall now; it was in response to a question. You didn't
8 volunteer the point about the --

9 A -- yes, but I don't stress the point. I
10 don't want to conceal the fact that I don't stress it. We
11 don't volunteer that there was probable cause. I don't know
12 whether there was or not, but I'm not making any claim of
13 that.

14 Q I was not suggesting that it was relevant.

15 A Right.

16 Now, I think I should go on to the other and more
17 difficult, theoretically more difficult issue in the case,
18 which is the effect of the wife's consent to the taking of the
19 .22 caliber Mossberg rifle and some clothing from Petitioner's
20 closet; bedroom closet.

21 Very briefly, the facts are these: on that evening
22 of February 2nd, while he was being detained at the police
23 station --

24 Q Mr. Cox, before you go to February 2nd, may
25 I ask you about January 28th. Was Mrs. Coolidge present when

1 the police went out to the Coolidge home --

2 A She was; she was.

3 Q And do I get an intimation from the record
4 that the police asked questions and Mr. Coolidge showed him
5 guns and helped them inspect the car and agreed to take the
6 lie detector test at that time?

7 A He was entirely free and open in responding
8 and showing anything or responding to anything they asked.

9 Q Was she present, too, at all times?

10 A She was present. I would simply say that
11 the circumstances had changed so much by February 2nd when he
12 was being held in custody and that neither she nor the police
13 would be entitled to infer from his conduct then that he was
14 authorizing her to make up his mind for him later.

15 Q Well, this is my next question: if there is
16 anything from which a consent can be inferred on January 28th
17 is there anything in the record which would support an infer-
18 ence that it was withdrawn between January 28th and February
19 27

20 A There was nothing -- there is no evidence of
21 his saying anything to her which would cause her to draw a
22 different inference. As I suggest, there was a marked dif-
23 ference in the circumstances and his willingness to make that
24 decision at that time does not seem to me to properly authorize
25 her to infer that she could make the decision later.

1 May I speak briefly of the main points with
2 respect to the wife's consent. First I would emphasize that
3 there was a seizure and I think in the constitutional sense,
4 a search here. The State Court of New Hampshire said no. I
5 can illustrate the point best by putting another homely little
6 example.

7 Suppose that the FBI agent were to come to my
8 office in Langdell Hall and say there was a valuable manu-
9 script missing from the library of this Court and describe it,
10 saying they had some reason to think it was in Cambridge.
11 Assume further that I say, "Oh, that's curious, I have seen
12 something that looks very like that in my Brother Professor
13 Dawson's office down the hall. He keeps it in a bundle of
14 books in his library. Come on, I'll show it to you." Each
15 of us has a key that fits every other office and we can
16 occasionally go in to borrow books.

17 I take it if I had led the FBI into his office
18 and showed them that document at their request that everyone
19 would say that it was an unconstitutional search and seizure.

20 Q But you had no _____.

21 A - No; quite so. I'm fond of him but not
22 married --

23 But, that goes to the question, Justice Harlan,
24 which I think is the highlight, and that is whether the wife
25 was or was not authorized. I clearly would not be authorized.

1 But the point I was trying to make simply was that this
2 turns on the matter of the effect of the consent and not on
3 whether they had to hunt around and it took them an hour to
4 get rather than being taken there quicker.

5 Q Assuming her authority, do you claim she was
6 coerced?

7 A Well, we didn't present that in our petition,
8 because I didn't think I could get certiorari on that question.
9 It was found she was unusually nervous. It was found that
10 the police discouraged her mother from staying in the house.
11 It was found that she had been threatened by a captain of the
12 New Hampshire police that afternoon, and told that she could
13 go to jail if she withheld anything. She testified she felt
14 she had to.

15 I think the point is and the reason I stress this:
16 that in any case if you make a constitutional effect of a
17 wife's consent turn -- if you make the constitutionality of the
18 search and seizure turn on the wife's consent you are adverting
19 all kinds of overreaching and pressures in taking advantage of
20 ignorance on the part of the police.

21 Q Well, why isn't that adequate safeguard to
22 the voluntariness of the consent was -- you had a good case in
23 Amos, which you cite Amos; I guess you do.

24 A Yes, you do. You know, what happened months
25 afterwards is always hard to reconstruct. Voluntariness is a

1 matter of degree. That was just an element; I'm not --

2 The real point, I've stressed three facts here
3 and tried to do this in the few minutes available. First,
4 that these were Petitioner's own private belongings. I would
5 say that the wife's general custody and possession did not
6 extend to that.

7 Q But if there -- if the officers had seen if
8 in plain sight on the table in the room they could have taken
9 the gun?

10 A I -- we do not deny that.

11 Q Okay.

12 A Second; because at that point the officers
13 would have been engaged in pursuing their business with Mrs.
14 Coolidge, whereas at this point that would have been a --
15 At this stage they had followed her into the bed room, simply
16 seeking to make her the instrument of defeating her husband's
17 constitutional rights.

18 And the third point, I say, is that he was avail-
19 able and could have been asked. And I submit to you -- I
20 doubt that I have time to elaborate it, but I submit to you
21 that when you stop and think about it, the only consequence of
22 giving effect, legal effect to the wife's consent here would
23 be to enable the police to second-guess the chance that he
24 would disagree. And I submit that that is not consistent with
25 the spirit and the letter of the constitution.

1 So, we think on either ground the judgment below
2 should be reversed.

3 Q This may be effected somewhat, I suspect,
4 by the fact that she, sometime earlier, had witnesses her
5 husband's openness to have them see the guns and look around
6 the house --

7 A Yes, but I would submit to you, Mr. Chief
8 Justice, that his willingness to do that on one occasion --
9 what was it, many days before -- four days before; excuse me,
10 should not be taken as a surrender of the privilege of making
11 up his own mind on a later occasion when he said nothing. He
12 certainly didn't say to her then or when they got married:
13 "Dear wife, you have the authority to turn my most personal
14 possessions over to the police anytime you feel like it."

15 I don't think that was the effect of his conduct,
16 either. I submit that's the answer, Mr. Chief Justice.

17 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cox.
18 Mr. Kalinski.

19 ORAL ARGUMENT BY ALEXANDER J. KALINSKI, ESQ.

20 ON BEHALF OF RESPONDENT

21 MR. KALINSKI: Mr. Chief Justice and may it
22 please the Court:

23 The two issues, search and seizure issues which
24 have been raised here by the Petitioner, turn on the ad-
25 missibility of or rather suggest that the vehicle which

1 belonged to the Petitioner and certain vacuum sweepings taken
2 from it subsequently to the time it came into the custody of
3 the police or it came by unlawful means because of the
4 issuance of an invalid search warrent.

5 And secondly, that certain items of clothing,
6 particularly and the murder weapon, a weapon which was sub-
7 sequently testified to as being the weapon which fired the
8 fatal bullets, was obtained in derogation of his rights from
9 his wife at a time when he was not present.

10 Taking the first issue that the Petitioner wages,
11 we suggest that the Petitioner is stressing form rather than
12 substance. The basis of their contention is that the search
13 warrants were invalid because they were not issued by a neutral
14 and detached magistrate since the magistrate, so to speak, who
15 issued the warrants was the attorney general who was in
16 charge of the prosecution then and subsequently he tried this
17 case to the jury.

18 And the real issue, we say is: were the Petitioner's
19 constitutional rights affected by denying them in any way by
20 what actually happened here. Looking at the substance of what
21 happened, the trial court has specifically ruled that on the
22 basis of the following facts any magistrate, neutral and de-
23 tached magistrate would have found probable cause and would
24 have issued the search warrants under these circumstances.

25 Q But why have a search warrant at all, then?

1 A The police officers were very properly under
2 the circumstances, seeking a search warrant and I am simply
3 stating that to deny the substance of what happened here and
4 say the search warrants were illegally issued under these
5 circumstances, would be --

6 Q Are you telling us that the Attorney General
7 at that stage was a neutral --

8 Q You say he was neutral, in fact; I suppose?

9 A I say he was neutral in fact, Mr. --

10 Q The fact being what?

11 A On the basis of the facts which were
12 presented to him and which are as follows: that on the evening
13 of the murder the Petitioner was missing from his home from
14 5:00 to 11:00 p.m. The time of death was fixed at about 9:00
15 -- between 8:00 and 10:00 p.m. that evening. At the time of
16 death, rather at 9:30 p.m. that evening Petitioner admitted
17 and other witnesses testified to the fact that his vehicle,
18 his 1961 vehicle was on the highway opposite from where the
19 body of the victim was discovered eight days later, plus the
20 fact that he tried to obtain alibis for his whereabouts on the
21 evening of the 14th from other people; plus the fact that the
22 ballistics indicated that his weapon --

23 Q I would like to just warn you, Mr. Kalinski,
24 when you get through I'm still going to ask you to explain the
25 fact that after knowing only that, how did he become neutral?

1 And the longer you give me facts the more difficulty I,
2 personally, am going to have in finding that he's neutral
3 because he knows all of this.

4 A No; I don't think the evidence shows that he
5 knew all of this at that time. I think the purpose of the
6 conference was to acquaint the attorney general with --

7 Q Did he issue the arrest warrant?

8 A Yes; he issued the arrest warrant and the
9 four search warrants.

10 Q Well, after he issued the arrest warrant, did
11 he know more facts after that?

12 A No; at that time all the facts had been
13 presented to him, some of which he --

14 Q In this conference room what was the purpose
15 of that? To present evidence for a search warrant or to
16 sum up just how good a case he had against this man?

17 A For both reasons, Mr. Justice.

18 Q Well, did he participate in whether or not we
19 have got a good case against this man?

20 A The testimony of Chief McGranaghan was that
21 the conference was called for the purpose of presenting any-
22 thing that had been -- that was relevant to the case at that
23 time, but --

24 Q And that's what they were discussing; weren't
25 they?

1 A Yes; and also --

2 Q So, the attorney general was there during the
3 discussion.

4 A Yes, and also --

5 Q And then after the discussion -- was he
6 neutral at the beginning of the discussion?

7 A I would say he was neutral throughout the
8 whole thing because at this point, when all of this, according
9 to Chief McGranaghan, when this -- which he testified to, when
10 this was presented to him he did not have all of these facts
11 before him.

12 Q Well, wasn't he the prosecutor at that time?

13 A He was, under New Hampshire law the attorney
14 general was the chief prosecutor and in that capacity he has
15 control over any criminal case, particularly a murder case,
16 that comes to his attention.

17 Q And when did he -- well do you agree with me
18 that a prosecutor is not neutral? Do you agree with that?

19 A I can accept that to a point, Mr. Justice
20 Marshall, but not --

21 Q Well, what's the point?

22 A The point is that in this case there is a
23 distinguishing factor: the chief prosecutor also held a com-
24 mission here as a Justice of the Peace.

25 Q Well, suppose he had also been a judge under

1 New Hampshire law; could he have tried him?

2 A In effect, he was also the judge; yes, to a
3 certain extent. To the extent that he could issue a search
4 warrant lawfully under New Hampshire law.

5 Q But could he have been a judge and found him
6 guilty if the New Hampshire law was that way?

7 A New Hampshire was not --

8 Q Could he have investigated, prosecuted,
9 issued a warrant and convicted, just because Massachusetts
10 says that that's the law?

11 A I don't believe that that would be proper on
12 in any state and that was not the law in New Hampshire, but
13 it was the law that the Justice of the Peace could issue a
14 search warrant under proper circumstances.

15 Q Well, it didn't say an attorney general could?

16 A It did say that a Justice of the Peace could
17 do so and in fact, many Justices of the Peace --

18 Q I have one final question: is there anything
19 in the record which says that as of this moment, I, Joe Blow,
20 the Attorney General of New Hampshire, cease being prosecutor
21 and become magistrate? That's not in the record; is it?

22 A I don't quite follow the question. There is
23 nothing in the record of that nature. No --

24 Q I'm just trying to find out when he changed
25 his hat.

1 A When he signed the search warrants it was
2 perfectly proper for him to do so, we state, under these
3 circumstances.

4 Q That's all I want to know.

5 Q Did you say he was a Justice of the Peace?

6 A Yes, sir, Mr. Justice.

7 Q How was he a Justice of the Peace, by what
8 authority?

9 A By the authority of the constitution and laws
10 of the State of New Hampshire.

11 Q What does the constitution provide --

12 A He applies for a commission and it's issued to
13 him by the Governor and the Governor's council and he is sworn
14 after the commission is issued before two other Justices of
15 the Peace and the commission constitutes his warrant to act as
16 a Justice of the Peace.

17 Q How long has that been in the constitution of
18 New Hampshire?

19 A Since the initiation of the constitution; as
20 I understand it.

21 Q What date?

22 A bBack in 1700-something, Mr. Justice.

23 Q Since that date the constitution has provided
24 that the attorney general was a justice of the peace?

25 A Not the attorney general; anyone who

1 applies for a commission as a justice of the peace and is
2 issued a warrant, a commission, rather, by the Governor and
3 Council.

4 Q And he was issued a warrant?

5 A Yes; he was issued a commission.

6 Q What was the sentence in this case?

7 A Life imprisonment, Mr. Justice.

8 Q Why is it that the District Court's judgment
9 isn't in the record. At least I don't --

10 A I'm not sure that it is, but the ---

11 Q I notice at page 259 of the record you said
12 that the jury returned a verdict of guilty. Who does the
13 sentencing in New Hampshire; the jury or the judge?

14 A The trial judge does the sentencing.

15 Q And could the --

16 A In a capital case it's up to the jury to
17 recommend capital punishment or not. In this case they chose
18 not to recommend it.

19 Q But there has been sentencing.

20 A There has been a sentence of life imprisonment
21 by the trial justice.

22 Q I see. In other words, it would still be
23 life imprisonment unless the jury says: he's guilty; and we
24 impose death.

25 A That's correct, Your Honor.

1 Q I see.

2 Q Now that you have already been interrupted,
3 may I ask you if you know about how many justices of the
4 peace are there in New Hampshire?

5 A Yes. I was going to get to that. There are
6 quite a few justices of the peace, many of whom are not even
7 members of the bar.

8 Q Right.

9 A And this has been the -- incidentally, the
10 practice, as Mr. Cox pointed out, in the last session of the
11 legislature, the legislature changed the law and now a search
12 warrant can only be issued by a justice of a district or a
13 municipal court.

14 The prior practice of any justice of the peace
15 having authority to issue a search warrant or an arrest warrant,
16 has been changed.

17 Q About how many are there? I didn't get that
18 answer.

19 A Hundreds; literally hundreds --

20 Q Oh, I thought thousands; literally thousands.
21 aren't there?

22 A I wouldn't say there were thousands; I would
23 say --

24 Q The population of the state is about a half a
25 million?

1 A The population is about 700,000, and I can't
2 really answer your question definitely and say that there
3 are -- there may be thousands, but it is a great number.

4 Q I'm familiar only with a little area up
5 there, quite closely familiar with that, of 200 people, but I
6 am sure there are dozens of justices of the peace among those
7 few --

8 A Every -- practically every real estate broker,
9 every accountant, everyone in many offices in which legal --

10 Q Every lawyer?

11 A Every lawyer.

12 Q And most legal secretaries.

13 A Every legal secretary, practically are all
14 justices of the peace.

15 Q And most real estate agents.

16 A Yes, Your Honor.

17 Q And they all had at the time of this search,
18 they all had power to issue search warrants.

19 A Yes; that's right. There is no question about
20 that.

21 Q Up to the time the -- that it was changed,
22 was it customary for the attorney general to issue such
23 warrants?

24 A It has happened --

25 Q As a justice of the peace?

1 A Yes. It has happened in the past on many
2 occasions.

3 Q Has it ever been attacked before?

4 A It never has been raised before and in fact
5 amongst the police, which has changed substantially back in
6 -- around this time after this case, was for a police officer
7 to go to a fellow police officer who was a justice of the
8 peace and have a search warrant or an arrest warrant issued.

9 The practice in New Hampshire never was for police
10 officers to go to a magistrate -- hardly ever, to go to a
11 magistrate of the district court and have it issued.

12 Q Was the officer who made the affidavit here
13 for this warrant, did he happen to be a magistrate, too?

14 A I do not know the answer, Your Honor. He
15 probably was. He was the chief of police --

16 Q Would the -- would it have been any different
17 if, instead of bothering the attorney general, he had acted in
18 both capacities himself?

19 A Yes, because then he would be passing judgment
20 on himself --

21 Q Well, he could have done it the other way.
22 The attorney general could have made out the affidavit and he
23 could have issued the warrant.

24 A I think it --

25 Q If they are both JPs and they both have the

1 same information.

2 A Well, the point was the the attorney general
3 didn't have the information; the chief of police did.

4 I don't think there is anything further --

5 Q What articles were seized?

6 A Under the search warrants the only item of
7 evidence that was seized was the 1951 Pontiac and there is
8 some question about whether that was under the search warrant.

9 Q The automobile, you mean?

10 A The 19 -- the automobile of the Petitioner.
11 At the time they arrested him the automobile was seated in --
12 parked in his driveway and the police arrested him; took him
13 to the police station; called a tow truck and the tow truck
14 took an hour to an hour and a half to get there and the
15 vehicle was removed.

16 The search warrant authorized the executing
17 officer to search the vehicle, but it did not specifically
18 identify the vehicle as an item to be seized.

19 Q Wholly aside from the warrant under --

20 A Yes, I think on several independent grounds;
21 on probable cause alone, which I have outlined; on the seizure
22 incident, which was lawful arrest and I don't believe that the
23 arrest warrant was ever challenged here, but it may be --

24 Q Yes, but what about aside from that, did you
25 have any other grounds for seizing the vehicle under New

1 Hampshire law and impounding it as evidence or --

2 A Only that it was an instrumentality of the
3 crime.

4 Q Well, what if it is; can you seize -- are you
5 authorized to impound automobiles for that?

6 A Under the statute, as I recall it, the
7 RSA 595, one of the sections enumerates the items which may be
8 specifically seized and the fourth or fifth one is a general
9 one which states that anything connected to the crime for
10 which the Respondent was arrested. So, under that particular
11 category of the statute, I would answer your question: yes;
12 it would be something that could be seized since it was an
13 item of evidence pertaining directly to the crime for which he
14 was arrested.

15 Q You had just started telling me what articles
16 were seized in the controversy here. Would you mind --

17 A Under the search warrant the only possible
18 item would be the Petitioner's vehicle and the vacuum sweep-
19 ings which were obtained from it subsequently to its --

20 Q What?

21 A And the vacuum sweepings of certain minute
22 particles which were taken out of the vehicle after it was in
23 police custody.

24 Q Is that what's in controversy here?

25 A That's what's in controversy with respect to

1 the issuance of the search warrant.

2 Q What were those sweepings?

3 A The vacuum sweepings were examined by
4 experts and they were segregated under a microscope and also
5 similar items were taken from the clothing of the victim and
6 compared by the experts and on probabilities he testified that
7 the particular particles probably had a common source. This
8 was the sum and substance of the evidence on this point.

9 Q Were these particles fabrics from her
10 clothing?

11 A No; they were mostly plastics, paints, metal
12 and things of that nature.

13 Q What was the date of this conviction, Mr.
14 Kalinski?

15 A The date of the conviction was June of 1964,
16 the 17th, I believe it was. '65; excuse me, Your Honor.

17 Q Thank you.

18 A A year and a half after the crime took place.

19 To summarize the first point we simply contend
20 that on the substance of what happened here there was probable
21 cause; the trial court found that any neutral and detached
22 magistrate would have found probable cause and the way we read
23 the Aguilar case and the Giordenello and the other cases is
24 that all -- this is all that the constitution requires is that
25 on the basis of adequate facts presented to a magistrate who

1 was in fact, neutral and detached, these, the finding of
2 search warrants were issued.

3 Q How about the language of the cases. It
4 doesn't talk in terms of neutrality in fact.

5 A The next issue raised by the Petitioner, has
6 to do with certain items of clothing and the murder weapon
7 which was obtained by the police from the wife on the date of
8 February 2, 1964..

9 I would like to just go over the facts briefly
10 with respect to how this -- these items were obtained, be-
11 cause I think this is very crucial to sustain the -- to
12 explain, rather, the finding of the trial court that there,
13 in fact, was no search and seizure in this case with respect
14 to the murder weapon and the clothes.

15 As Mr. Cox pointed out, on January the 28th when
16 the police were conducting a very general investigation, not
17 knowing who they were looking for or even what they were look-
18 ing for in terms of a murder weapon, and based on the reports
19 only of a neighbor that this particular individual, the
20 Petitioner in this case, was not at home on that evening be-
21 tween 5:00 and 11:00 o'clock, they went to his home and asked
22 him about where he was that evening. During the course of
23 this visit he fully discussed his activities on that evening.
24 He took them out and showed them his car and he brought out
25 three weapons to show them. The police officers who were

1 there, looked at the three weapons and neither of the three
2 weapons was the murder weapon.

3 So, while they were there they asked him if he
4 would mind taking a lie detector test and he said no; that he
5 was a bakery truck driver and could not get off except on a
6 Sunday, so could it be on a Sunday. And they set a date for
7 the following Sunday, which was February the 2nd.

8 On February 2nd one of the officers that was
9 there, called him and he came down to the station voluntarily
10 they stayed at the station -- this was at 1:00 o'clock in the
11 afternoon and they stayed until about 3:00 to 3:30 talking
12 about whether he should take the test or not. And finally he
13 agreed to go with them to state police headquarters in Concord.

14 Before, or rather during the tests there, they
15 turned him over to Sergeant McBain at that time, of the state
16 police, who administered the lie detector test, which was
17 inconclusive, but in the course of administering the test the
18 Petitioner admitted a larceny of \$300 from his employer.

19 The police then took the Petitioner back to
20 Manchester and since he had been giving them conflicting
21 stories about where he was on that evening: that he was out
22 with a girl or that he was out with somebody else or that he
23 had gone to another town, they kept checking what he told them
24 and he stayed at the police station until 2:00 o'clock that
25 morning. And at about 9:00 that evening the sergeant came down

1 from Concord and talked to the Captain in charge of the police
2 station and he and another police officer -- not the first two
3 that were there on the 28th, went out to the Petitioner's
4 home to talk to the wife to verify one thing about the
5 larceny that he had told them, namely that he had bought a
6 washing machine, and secondly, to discuss with her his where-
7 abouts on the evening of the murder: January 13, 1964.

8 When they arrived there the mother-in-law, the
9 Petitioner's mother, was there and they started to talk to
10 the Petitioner's wife and the mother-in-law made some state-
11 ments and the testimony is that she left at their request.

12 After the mother-in-law left, the Petitioner's
13 wife discussed this with the two police officers who were
14 there; namely; about where the Petitioner had been on that
15 evening. They told her that they were conducting a general
16 investigation, an investigation into the crime, the murder and
17 that at this point also they had no knowledge of what weapons
18 he had shown to the other two officers. They had no knowledge
19 of what particular weapon they were looking for. They asked
20 her and told the Petitioner's wife that they were examining
21 "hand weapons."

22 She volunteered that he had some rifles and asked
23 if they would like to see them. They said yes. She went into
24 the bedroom and they followed her. Then she said, "I believe
25 I asked them if they wanted the guns." In other words, the

1 request for -- to take the guns did not initiate with the
2 police officers; it initiated with the Petitioner's wife.
3 And one of the policeofficers said, "no," and the other one
4 said "we might as well take them," which is consistent with
5 the finding of the court that they did not at that point know
6 what they were looking for.

7 As it turned out, later that evening and she
8 brought out not three, but four weapons, one ofwhich turned out
9 to be the murder weapon. Later that evening at the police
10 station the other policeofficer who had been down at the
11 ballistic laboratory, returned about close to midnight and
12 for the first time, at the time when they already had these
13 four weapons at the police station, they know that they are
14 looking for a .22 caliber Mossberg rifle. And he recognizes
15 that there's one on the bench at the police station.

16 The evidence was that the Petitioner saw his
17 clothes and his guns at the police station that evening and
18 in fact, the next morning, offered to sell one of the guns
19 to one of the police officers.

20 And, it's within this factual background that the
21 Petitioner raises the question of a search and seizure. The
22 trial court ruled and the New Hampshire Supreme Court upheld
23 the ruling that there was, under these facts and circumstances,
24 no search and no seizure. There was no quest; they did not
25 go throughout the house looking for anything. In fact, it was

1 only at the offer of the wife that they took the rifles with
2 them and under these circumstances the contention of the
3 Respondent here is that there was no search and seizure and
4 if that's the case, then there is no issue for this Court to
5 pass upon and the ruling of the court below should be upheld.

6 But, even assuming that there was a search or a
7 seizure, under the law it is the contention of the Respondent
8 here that a wife has the authority to consent to a voluntarily
9 consent to a search and seizure of her home that she has
10 lawful control and possession of. And I think --

11 Q So, technically you think the situation here
12 is as though the wife had taken the guns out of the closet and
13 taken them down to the police station --

14 A And handed them over.

15 Q "Here are my husband's guns." Now, she may
16 not have authority to do that, but you say that if the police
17 had taken them there nevertheless wouldn't have been any
18 search and seizure involved?

19 A That is correct, Your Honor, and the fact that
20 she also made a statement that evening which I haven't referred
21 to before, was -- it's in the evidence: "We have nothing to
22 hide," and the basis of that statement is obviously the events
23 that happened four days earlier when the two other police
24 officers were there and the Petitioner himself brought out
25 weapons and showed them the car and answered all their questions.

1 without any hesitation. There was no reason for her not to
2 believe otherwise but the fact that they did not have anything
3 to hide.

4 Q Had he been arrested at that time?

5 A He was not arrested until three weeks later.
6 He was not even a prime suspect in the case at that time,
7 because the police had nothing to go on at that point, other
8 than the fact that he was not home that evening. It was not
9 until several weeks later that the weapon that was tested
10 was obtained that evening and indicated that it was the murder
11 weapon; that indicated to the police that he was the perpe-
12 trator of this crime.

13 Q That's the weapon you say the wife gave to
14 them?

15 A Yes, Mr. Justice Black.

16 So that under those circumstances we say that
17 there was no search and seizure and there is no issue.

18 MR. CHIEF JUSTICE BURGER: Thank you. The case is
19 submitted.

20 Mr. Cox, you acted at the Court's request and by
21 appointment and thank you for your assistance to the Court and
22 of course, for your assistance to the Petitioner.

23 MR. COX: Thank you.

24 MR. CHIEF JUSTICE BURGER: The case is submitted.

25 (Whereupon, at 3:00 o'clock p.m. the argument in
the above-entitled matter was concluded)