ORIGINAL

In the

# Supreme Court of the United States

FRANK JOHNSON,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

No. 69-5035



Washington, D. C.
January 10, 1972

Pages 1 thru 29



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STATE OF LOUISIANA,

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Monday, January 10, 1972.

The above-entitled matter came on for argument at 10:07 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RICHARD A. BUCKLEY, ESQ., 4038 Chenna Drive, Houston, Texas 77025, for the Appellant.

MRS. LOUISE KORNS, Assistant District Attorney for the Parish of Orleans, Criminal Courts Building, 2700 Tulane Avenue, New Orleans, Louisiana 70119, for the Appellee.

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first today in No. 5035, Frank Johnson against Louisiana.

Mr. Buckley, you may proceed when you're ready.

ORAL ARGUMENT OF RICHARD A. BUCKLEY, ESQ.,

ON BEHALF OF THE APPELLANT

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

This case is an appeal from the Louisiana Supreme Court decision which confirmed appellant's conviction and sentence for the crime of armed robbery.

The two important issues considered by the Louisiana Supreme Court and before this Court on review are:

First, whether the seizure of appellant resulting from a warrantless nighttime entry into his home violated the Fourth Amendment prohibition against unreasonable searches and seizures.

And secondly, whether the Louisiana jury system, which extends the rule of unanimity to some defendants but denied it to appellant, amounts to a denial of equal protection. And also whether a non-unanimous verdict is constitutionally permissible in light of the due process requirement that guilt be established beyond a reasonable doubt.

The relevant facts, the most important facts of this

case are as follows:

Before daybreak the appellant, a young black citizen, was seized from his bed by six New Orleans detectives, all who were armed with shotguns, who had entered Frank Johnson's home without a warrant. After a complete search of the home, and an additional interrogation, Frank Johnson was booked for the crime of armed robbery.

Three days later appellant was part of a general lineup, that is, a number of armed robbery suspects were put in the lineup and viewed by a number of armed robbery victims.

The person who had been robbed four weeks prior to appellant's arrest identified Frank Johnson. This person, however, was not the one for which the anpellant had been arrested and booked. The lineup identification was subsequently used at the trial.

Pretrial hearings were held wherein appellant challenged his arrest and his detention during the lineup.

Appellant was tried for the crime of armed robbery, which, since 1966 in Louisiana, is a crime punishable from 5 to 99 years, without the benefit of pardon or parole.

The primary evidence against the appellant was the eyewitness identification of the victim. The jury verdict was 9 for guilty, and 3 for not guilty, which, in Louisiana, constitutes conviction.

Appellant was subsequently sentenced to 35 years at

hard labor at Angola, Louisiana, where he has served four of those 35 years.

In their brief, Louisiana states its policy of never obtaining warrants in cases of this nature. This policy is in direct conflict with this Court's consistent position that police must, whenever possible, obtain judicial approval of searches and seizures.

Applying either the warrant test or even the reasonable search test, the facts of this case requires a finding of unreasonable search and an unlawful seizure.

At the pretrial hearing the police testified that there was no reason why they did not secure warrants. Nor did the State show any emergency, such as hot pursuit, to justify the warrantless nighttime intrusion into appellant's home.

Inconvenience to the police. The only reason behind Louisiana's policy of not securing warrants was firmly rejected by this Court in Johnson vs. Louisiana, and has been adhered to since.

It is precisely this type of case which shows the necessity to require the police to adhere to the Fourth Amendment warrant requirement.

Based upon information the police possessed at the time of arrest, it is doubtful whether an arrest warrant could have been secured, because the police in this instance did not know the date or the place of the alleged offense.

On the basis of this questionable information, the police made their own determination of probable cause, they made their own determination that they didn't need a warrant, and, further, that they could enter a home at night; even in light of the Louisiana requirement that a special warrant is needed for nighttime searches.

Q Well, Mr. Buckley,assuming there was probable cause, is there some case in this Court that holds that there is a constitutional requirement for a warrant in connection with an arrest as distinguished from a search?

MR. BUCKLEY: There is no case directly on point, Mr. Justice White. However, underlying in the thrust of all the cases which have alluded to the exceptions to the requirement, by implication this Court is indicating that a warrant is required prior to entering a home.

Q Even for the purpose of arrest?

MR. BUCKLEY: Even for -- not so much the arrest, Your Honor, as it is the entry into the home. Once the police officers went there and made the entry, they are conducting a search; it's no longer --

Q But you wouldn't be --

MR. BUCKLEY: -- pursuant to arrest.

Q But you wouldn't be making the same argument if he had been arrested on the street, assuming probable cause?

MR. BUCKLEY: Then we would examine the probable

cause.

In every instance, Your Honor, probable cause is necessary, --

Q Oh, yes.

MR. BUCKLEY: -- either to make an arrest or conduct a search. There is an additional requirement when one enters a home, and that is a warrant unless there is an emergency, which is the exception to the warrant.

And in this case also the police officers testified that they planned not only to seize appellant in his home, but to search the entire home for evidence; and, in fact, they did.

These certainly are not reasons to avoid obtaining a warrant, but, as has been said in this Court before, in Agnello vs. United States, they are clearly compelling reasons why the police should seek a magistrate and attempt to convince him whether a warrant is authorized.

Some additional factors peculiar to this case, which shows the danger of police probable cause, is that appellant was never tried for the alleged offense which formed the alleged basis of the police probable cause. And the probable cause for the arrest of appellant was not reviewed by any court until weeks after his arrest.

Q What evidence seized or found at the home at the time of the arrest was admitted in evidence against him?

MR. BUCKLEY: It was himself, the evidence was used

against himself while he was detained, Your Honor, and he was identified at the lineup, it was a lineup photo.

Q What tangible evidence other than his own body? Any others?

MR. BUCKLEY: Other than his person being placed in a lineup, he would never have been charged for the crime for which he was convicted, Your Honor. It was that lineup and the victim making identification; the evidence used from that lineup was the major evidence at the trial. Once he was identified, in fact that was the trial, Your Honor, as has been held in this Court before.

Q But they didn't seize any guns or --

MR. BUCKLEY: They went there looking for a gun, but --

Q -- anything like that? No?

MR. BUCKLEY: -- there was no seizure of a gun.

However, to pick up your point, Your Honor, and which Mr. Justice White indicated, there is no doubt that a warrant would have been necessary to have seized the gun. It is our position that seizure of a person is a greater intrusion than to go there to search and seize tangible evidence similar to that of a gun.

Q Well, what you're saying is that a man, a person can never be arrested at his home without a warrant; that's what it adds up to, isn't it?

MR. BUCKLEY: Except in those emergencies which this Court has found as an exception; for example, hot pursuit. Or if he's committing a crime inside the house, and which the police have knowledge of it, and the crime is being committed in their presence at that time. For example, if he's committing an assault on another police officer or firing at the police.

But, other than that, it is true that there is no entry into the home without a warrant.

In regard to the jury issue, appellant asserts that the divided jury verdict was in violation of the equal protection provision of the Fourteenth Amendment.

The Louisiana jury system is unique in that it permits three types of jury verdicts: in capital cases, a jury of 12, in which all 12 must concur to render a verdict; in offenses similar to appellant's, those necessarily punishable by hard labor, there is a jury of 12, in which only 9 have to concur to render a verdict; and then in cases which may be punishable by hard labor, the jury is composed of 5, again all 5 of which must concur in order to render a verdict.

So we have greater offenses and lesser offenses in which the unanimity rule is required; but not in appellant's case, which are very serious felonies.

Louisiana's only reason for this difference is to reduce cost and expedite matters and is not a rational basis to extend the significant benefits of unanimity to some

defendants and to deny it to appellant's class. There is no compelling State interest to which they can withhold the unanimity benefit to appellant and extend it to others.

An example of the prejudicial effect is that in capital crime an individual can be paroled within ten and a half years after sentence, whereas in armed robbery an individual can get up to 99 years. Appellant received 35 years, with no chance of parole or pardon. And they are in the same penitentiary.

The unanimity requirement performs a significant role in protecting minority groups from discriminatory application in criminal law by the majority. This of course assumes that members of the minority defendant group are represented on the jury.

For the past 100 years this Court has rendered numerous decisions to assure that members of appellant's race are not entirely excluded from the jury panel. A divided jury verdict may accomplish, in a subtle, indirect manner, what this Court has ruled cannot be done directly; and that is excluding members of appellant's race from the jury.

There were three black male jurors on appellant's jury, but the record does not reflect which jurors voted not guilty.

For various reasons in a capital case the majority jurors may persuade the majority to return a verdict of guilty without capital punishment, or guilty of a lesser

included crime. This can be accomplished because of the unanimity rule in a capital case in Louisiana, which requires the majority jurors to take consideration of the minority's viewpoint.

However, this is precluded in the case in which appellant was tried, wherein the majority can reject and not consider the minority viewpoint.

Take, for example, in view of the harsh penalty involved in this crime of armed robbery in Louisiana, the same minority in appellant's case may have been prepared and capable to persuade the minority to return a verdict of a lesser crime, say, for example, simple robbery, especially in view of the facts of this case.

But, as was true in this case, the divided jury verdict will result in 97 percent of the trials in precluding the considerations and viewpoints of the minority jurors.

Divided jury verdicts permit the elimination of the central jury functions which this Court stressed and underscored in Williams vs. Florida. The exclusion of any juror's participation, and the verdict produces results contrary to those stated in Williams.

For instance, the divided verdict is a split rather than a shared responsibility of that verdict by the community. It may prevent rather than promote group deliberation. In this case the jury was out for less than 20 minutes; suggesting a

verdict on the first ballot.

And instead of having actual community participation in the verdict, the 9 out of 12 verdict may in fact represent a pretrial, predeliberation prejudice of the majority.

Q Mr. Buckley, is there anything in this record to indicate the identity of the three jurors who did not join in the verdict of conviction, that is, their occupation, their race, or anything else?

MR. BUCKLEY: There is nothing, Your Honor, --

Q Any voir dire in the record?

MR. BUCKLEY: -- I checked the official ballots subsequent to the last argument, and there is no indication made on that, Your Honor.

Also, by excluding the viewpoint of three minority jurors, it is very doubtful whether this verdict represents a common-sense judgment of the jury panel, the 12 jurors.

Furthermore, appellant's conviction by a divided jury is a denial of the due process requirement that the State prove defendant's guilt beyond a reasonable doubt. The purposes for the reasonable-doubt standard make little sense without the unanimity rule.

For example, instead of requiring a high degree of proof, majority verdicts allow guilty verdicts when three jurors have not been persuaded at all. This suggests strongly that there is a possibility that the reasonable-doubt standard wasn't

even applied. And rather than preserving community respect and confidence in the criminal law, the majority verdict leaves people in doubt whether innocent persons are and may be convicted. Especially that part of the community when the defendant is black and the three unconvinced jurors are also black.

Substitution of a different standard, for example, clear and convincing proof with the unanimity requirement would probably produce more certainty and fairness than the use of a reasonable-doubt standard where 25 percent of the jury remains unconvinced as to defendant's guilt.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Buckley.

Mrs. Korns.

ORAL ARGUMENT OF MRS. LOUISE KORNS,

ON BEHALF OF THE APPELLEE

MRS. KORNS: Mr. Chief Justice, and may it please the Court:

The issue for decision -- two issues for decision before this Court today clearly are whether Louisiana is going to be allowed to keep its 9-out-of-12 jury and its right to arrest a man in the home on probable cause without a warrant.

Q You refer to that as a right, do you?

MRS. KORNS: Well, we have a statutory right, Mr. Justice Stewart, under Louisiana Code of Criminal Procedure

Article, the police have the right to make an arrest upon probable cause. It's sort of like the Federal statutes, only it's a broad statute. Instead of like the Federal statute saying narcotics agents can make arrests without, we have -- as set out in our brief, we have various Articles of the Criminal Code, the Louisiana Criminal Code, saying that police officers may arrest for a crime when reasonable cause exists to believe that a crime has been committed, is being committed, and so forth.

And then another Article right after that says that an arrest may be made any time, any place; and the third Article says -- these are all set out in the second part of our brief where we discuss this, on page 21 of our brief --

Q Yes.

MRS. KORNS: -- that the police may enter any dwelling to make an arrest if, first, they announce their authority and purpose, and then if they're denied entry they may break the doors.

In our brief, Louisiana took the position, and takes the position that both -- that our jury is all right under the Sixth Amendment and that our statutory laws permitting arrest in the home without warrant are valid under the Fourth Amendment.

However, in the alternative, in this oral argument, I'd like to advance this further alternative argument: that if

this Court should hold that a 9-to-12 jury is not permissible under the Sixth Amendment, and arrest in a home without warrant is not valid under the Fourth Amendment, that, nevertheless, both of these actions are valid under the due process clause of the Fourteenth Amendment, and that the State should be permitted to follow them even though the Federal Government cannot.

And I say this for this reason: I realize that in making this argument I have to ask the Court to -- not really to overrule, but to modify in these two areas its holding that it has gradually been developing during these past years as it selectively incorporated various guarantees of the Bill of Rights into the Fourteenth Amendment.

Along with it, this Court, I think, has also, up until the present time, fairly much held that once -- that although -- it has never held -- a majority of this Court has never held that the Bill of Rights was automatically incorporated in the Fourteenth Amendment; however, I think that the majority of this Court has increasingly been holding that once this Court finds that a guarantee in the Bill of Rights applies to the States through the Fourteenth Amendment, then every facet, every constitutional standard of the -- the constitutional standards applying against the State Governments and the Federal Government are the same; I believe I'm right there.

Now, I was very much impressed, in restudying this case for reargument, with Mr. Justice Fortas' concurring opinion in Duncan, and that's why I say, although our primary position is that a non-unanimous jury is permissible under the Sixth Amendment because of everything we set out in our brief, the unanimity principle being deleted, the fact that 4 of the Original 13 States had majority verdicts, the fact that many common-law jurisdictions with juries presently have majority verdicts, such as Scotland, England went to it in 1967, and so forth. So our first position is that a majority-verdict jury is valid under the Sixth Amendment.

In the alternative we say that if this Court should hold that it is not -- was not the intent of the Framers, that the Federal Court use jurors which returned less-than-unanimous verdict, we, nevertheless, alternatively take the position that there is nothing in the majority verdict that violates the due process clause of the Fourteenth Amendment; and we ask this Court, as Mr. Justice Fortas very, very intelligently pointed out in his concurring opinion in Duncan, a jury trial is not a principle of justice, like self-incrimination and a First Amendment right, it's rather a system of procedure.

And he pointed out that he thought that if this Court insisted that the States and the Federal Government be, with down to every single detail, identical, that we would have rigidity, conformism, that we would -- it would go against our

principle of Federalism, that it would prevent us from being able to try out one thing in one jurisdiction and another thing in another jurisdiction, and he thought that this would have a very adverse effect on our whole principle of Federalism. And I think Mr. Justice, the late Mr. Justice Harlan pointed out in his dissenting opinion in Williams this very same thing. He said that he thought that this Court should reexamine the whole principle of incorporation, because he said if it didn't, that he thought there was going to be a leveling and rigid process that was going to set in, making all the 50 States, with their different problems -- and this is -- I am going to make the same argument in our Fourth Amendment argument about arrest without warrant.

For instance, think of the State police. In Orleans Parish alone, the police make a thousand arrests a week. They are the peace-keepers. Unlike the federal police agents, such as the FBI and the narcotics agents, and these special agents who have very limited areas, who don't cruise the city in police cars, who don't have to pick up runaway children, that's one thing. But peace-keeping police, like we have in Orleans Parish, why, I had a case in the Court of Appeals last year where they made this same argument about a warrant being needed, when the case involved a mother telling the police that her child was a runaway, and she had good reason to believe that her child was staying at X child's house.

So the police went there and knocked on the door and asked for the child in question, and when the little girl of the house -- there were no adults in the house -- said the girl in question, the runaway girl wasn't there, the police went in and picked her up. The argument was made that they should have gone to the police station and spent two days swearing out a warrant.

And this is just one of the many examples of what I mean, the difference between a State Police, which has the problem of keeping the peace, and the federal agents which have an entirely different role, a highly specialized role, where they probably have time to go and swear out a warrant, because the man they're pursuing is maybe a bank robber who is crossing State lines, or something like that.

But -- so, in this reargument before this Court, there again I think that history shows that an arrest within a house without a warrant, way back to the Seventeenth Century in England, in Semayne's Case, on probable cause -- on probable cause the police have always been able historically to go into a home and make an arrest.

Q Are you familiar with this Court's decision in Warden v. Hayden, for instance?

MRS. KORNS: Yes, Your Honor, I am.

Q Well, why do you think the Court spent so much time carving out an exception --

MRS. KORNS: Well, they --

Q -- in that case to the, what they said was the general rule that you cannot make an arrest in the house without a warrant?

MRS. KORNS: Well, I gather from reading this Court's opinion in Coolidge v. New Hampshire this summer, I know that that's a majority opinion, without passing on the question, pointed out that -- I think, Mr. Justice Stewart, you wrote the opinion -- wherein you thought that to allow a warrantless entry into a home would conflict with the Fourth Amendment.

But my answer to that is --

Q No, I was asking you about Warden v. Hayden, --

MRS. KORNS: I am familiar with that.

Q -- which involved an arrest.

MRS. KORNS: Right. Yes.

The Court, of course, never squarely said it did carve out the exigent circumstances. That's right.

Q It carved out an exception to a rule, and that would have been rather a pointless exercise if there weren't any such rule. Wouldn't that be true?

MRS. KORNS: I would like to point out to Your Honor, though, that -- now, if you're going to take the position that the Fourth Amendment requires a warrant to seize a person in the home, I see no difference between that and seizing a person on the street. Because the injury to a person,

when you go into a house -- for instance, a seizure of a person is completely different from rifling through drawers and desk drawers and so forth for things. You go to the door, like here in this case, and it wasn't at night, it was at daybreak, it was at 6:15 to 6:30 in the morning. Now, I get up at 6:00 and lots of people get up at 6:00; this was not in the middle of the night.

The police went to the door, knocked on the door, Mrs. Johnson came, they announced they were the New Orleans police, and their authority, and their purpose. They had come to arrest Frank Johnson. He could have come forward to the door, as he was legally bound to do, and surrendered himself. The police never would have had to put a toe in the door. But he hid under the bed.

Now, the only -- all you have to do when you go into a house to look for a person that you reasonably believe is there, you don't have to go through all the desk drawers and everything; you look under the bed if he's hiding, in all the closets, just open the doors, they can't be very far back. And where else can they get?

That's not like tearing everything up to pieces and so forth.

Not only that, as I say, I think the deprivation of liberty is not the picking up of the person from their home, if you're going to look at it -- if you're going to need a

warrant, then why don't you need a warrant to pick up a person on the street? You're going to take them to jail and hold them until their lawyer can come see about it. And --

Q Well, why don't you?

MRS. KORNS: Sir?

Q As long as you have the Fourth and Fourteenth Amendment?

MRS. KORNS: That's what I say. As I see it, why should you -- why should you split them up? You either have to say that you have to have a warrant for every arrest, or you don't have to have a warrant for arrest; but not to split it up in the house and outside the house, as I see it.

Now, it's apparent from Mr. Buckley's argument that he hasn't been in Orleans Parish in the past few years, because, right now -- ever since we argued this case last March, I have been taking an interest in jury trials, in the racial composition in jury trials, and trying to figure out how they split; and there's absolutely no pattern to them.

In the first place, they're at least five point -- they average 5.4 Negroes on every 12-man jury in Orleans Parish now. Of course they run up to 8 in some juries, and down to 3 or 4 on others; but there's about 5 or 6, an average of 5.5 Negroes on every jury, so they can well take care of themselves if they need three votes, if they think it.

There's case after case where the victim is black,

the accused is black, there're six black jurors and six whites, and they vote 10 to 2. Six blacks, "guilty ad charged"; four whites, "guilty as charged"; two whites, "not guilty".

I mean this is just random. Of course another time you'll find another way. But there is absolutely no -- nothing to show that the blacks have to protect themselves, that they need a unanimous verdict to protect themselves, because they are well able to protect themselves right now; and generally they don't vote in a racist way.

Q Well, in any event, there's nothing in the record in this case --

MRS. KORNS: Nothing! Absolutely!

Q -- on the subject, one way or the other, is there?

MRS. KORNS: Nothing, absolutely! And from indications of what I've studied in other cases, I would very much doubt that the three jurors voting not -- who hadn't joined the guilty vote, doesn't mean that they thought they were not guilty, as my brief points out, if they had sat there long enough there's a 95 percent chance they would have reached unanimity.

But experience shows that they were probably a mixture of black and white, those three. They might have been all white, even, or they might, of course, have been black; but there's no definite pattern.

Not only that, I think Your Honors must have read in Time Magazine about how in the Black Panther trial in Orleans Parish last July there were ten blacks, two whites: unanimous, not guilty.

Huey Newton got a hung jury in Oakland, and when the jury came in, he said, "Ah, this proves that having one Negro on a jury insures me a fair trial." But who hung the jury up? A white woman. A white woman hung the jury, not the sole black woman on the jury.

Q Well, let's get back to this case.

MRS. KORNS: Yes, Your Honor. It was just because Mr. Duckley was arguing this point that I brought this out.

Q Well, I fail to see where it has any place in the case at all.

MRS. KORNS: Well, I agree with you. I agree with you. I agree with you.

It was just in answer to appellant's arguments that I wanted to point out that I didn't think the fact that --

Q May I go back to one other point: Has a warrant ever been issued for Johnson?

MRS. KORNS: No, sir.

Q Not until this day?

MRS. KORNS: No. Well, I frankly admit, I know from experience the police never swear out an arrest warrant in Orleans Parish, unless the person is a fugitive, and they can't

immediately arrest him, and so they swear out the warrant to send to another parish or to send to another State. But never, in a case like this, do the police -- they always rely on Louisiana's Code of Criminal Procedure, Article 213. And they just never think of swearing out a warrant, because they have this statutory authority to arrest without a warrant.

So, are there any questions the Court would like to ask me further, then?

I'll rest. Thank you, Your Honors.

Q Mrs. Korns.

MRS. KORNS: Yes, Your Honor?

Q What was the rule of common law at the time of the adoption of our Constitution with respect to the need for a warrant for arrest?

MRS. KORNS: The rule at common law was, as I see it, Mr. Justice Rehnquist, under Semayne's Case in England, that there was no need for a warrant at all to enter a house. At common law there never has been a need, if -- there has to be probable cause, of course.

But in Semayne's Case, they state very clearly that there is no need to -- that an arrest can be made in a home with or without a warrant, based on probable cause. And all the English commentators point out that the rule that a man's home is his castle, there's an exception to this rule which exists in the case of arrest; that no man can -- that no man's

house is a castle against the King.

So, actually, --

Q Well, it might have been just exactly that rule of common law that the Fourth Amendment was adopted to overrule, isn't that correct?

MRS. KORNS: I don't believe so, Mr. Justice Stewart. I believe the Fourth Amendment was adopted to overrule the Writs of Assistance and the general warrants --

Q The general warrants --

MRS. KORNS: -- which were completely different from this. Now, general warrants and writs of assistance were issued by the King; the writs of assistance -- a writ of assistance was given by the King to one of his favorites, to run for the life of the King; it was a document enabling him to arrest whomever, at his whim, he wanted to. There didn't have to be any probable cause, there didn't have to be anything.

So how can you possibly liken Louisiana's Code -- Louisiana's statute permitting arrest based on reasonable cause to a writ of assistance, which was a blanket writ in which no cause at all had to exist?

Q Well, I don't think anybody has likened that. Except, perhaps, you.

[Laughter.]

MRS. KORNS: No, but that's what I say.

It couldn't be that.

But that's why, you ask me if possibly the Fourth Amendment was drawn up to prevent the rule, the common-law rule then existing, from being in existence in England; and I think -- my answer is absolutely no. I think it was directed at the writs of assistance, which were in derogation of the common law. And that the Fourth Amendment was meant to insure that the common law existed in this country, and that general warrants in derogation of the common law, and arrests and imprisonments without cause could not exist.

Q Is there anything in the Louisiana law that would prevent the police from putting out a house-to-house search to cover a whole neighborhood?

On the suspicion that somebody in that neighborhood committed a crime?

MRS. KORNS: Well, Mr. Justice Marshall, the Code Article says that they can only go to a house where they have reasonable cause to believe the person to be. So --

Q They have reasonable cause to believe that the guy's in this square block.

MRS. KORNS: I don't think they could go into a house then. They have to have reasonable cause --

Q Well, how would they test it under Louisiana law as to how much information this officer had?

MRS. KORNS: Well, they would have to test it the same way they test any unreasonable search, it's by a motion to

suppress.

Q Well, you couldn't motion to suppress the body?

MRS. KORNS: Well, in other words, you mean if the man was illegally arrested and no evidence was seized; that I don't know how you would test it. How do you test any -- how do you test anything --

Q How would you test the right of the policeman to come into his home at dawn?

MRS. KORNS: Well, of course, we take -- we took the position that -- the accused did not raise this point in the District Court; he raised it for the first time on appeal --

Q Well, could he have raised it in the District Court? I asked the question: How?

MRS. KORNS: Yes. Well, he raised -- in the Supreme Court he argued that he wanted to suppress his pretrial identification.

Q Well, how could he have raised it?

MRS. KORNS: By a motion to suppress.

However, I -- we take the position that no court has ever held that a pretrial identification is something subject to a motion to suppress.

Q My point is, how can he test the validity of the policeman's information that he had probable cause to go in his home and arrest him?

MRS. KORNS: Unless he files a motion to -- unless he

-- some property has been seized, or he could have --

Q Well, there's no way he can protect his --

MRS. KORNS: -- argued --

Q -- there's no way under the Louisiana law --

MRS. KORNS: He could file a writ of habeas corpus, I imagine. But generally, you see, the reason I'm puzzled by this, Mr. Justice --

Q You imagine; but, you see, this -- to me this is a fundamental right; to come and pick me up, not only in the middle of the night or at dawn, but at any time.

MRS. KORNS: Well, he can -- now that I'm thinking of it, he can ask for a preliminary hearing immediately. He can ask to be brought before a magistrate and have a preliminary hearing immediately, in which the State has to show probable cause to hold him.

Q Yes, right.

MRS. KORNS: That's -- I'm sorry -- that's what he can do, certainly.

So, if the Court would not have further questions, then, thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Korns.

Mr. Buckley, do you have anything further?

REBUTTAL ARGUMENT OF RICHARD A. BUCKLEY, ESQ.,

ON BEHALF OF THE APPELLANT

MR. BUCKLEY: I just want to comment on one thing.

Mr. Justice Marshall, it is that we got into this case two weeks subsequent to the arrest, and we did proceed by way of habeas corpus up and down the Louisiana Supreme Court, and in each instance it was denied; each time referring to the authority of the police under that arrest statute.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Buckley.

Thank you, Mrs. Korns.

The case is submitted.

[Whereupon, at 10:43 a.m., the case was submitted.]

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