In the

Supreme Court of the United States

LONNIE GOODING,

Petitioner,

v.

UNITED STATES

No. 72-6902

Washington, D.C.
February 25, 1974

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LONNIE GOODING, Petitioner	:	No. 72-6902
v.	:	
UNITED STATES	:	

Washington, D. C.

Monday, February 25, 1974

The above-entitled matter came on for argument at 1:39 o'clock p.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:

HERBERT A. ROSENTHAL, ESQ., 1129 Twentieth Street, N.W., Washington, D.C. 20036 Attorney for Petitioner
(Appointed by the Court)

ANDREW L. FREY, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-6902, Gooding against United States.

Mr. Rosenthal, you may proceed whenever you are ready.

ORAL ARGUMENT OF HERBERT A. ROSENTHAL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ROSENTHAL: Thank you.

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

The events in this case began three years ago this month. In early February of 1971, Metropolitan Police Officer Marion Green was told by a reliable informer that Lonnie Gooding, the Petitioner in this case, was selling narcotics from his home.

Mr. Green investigated and on February 9th, 1971, using this purportedly reliable informant, caused a controlled or supervised buy to be made and apparently the informer bought a small amount of narcotics.

Two days later, on February 11th, Officer Green having been satisfied that a violation of federal law was probably taking place, made application to the United States Magistrate for the District of Columbia for a search warrant. This application had been approved by an Assistant United States Attorney as an application under federal law for violations of the federal narcotic laws.

The Magistrate so found after reviewing the affidavit and issued a search warrant and he did direct that the search could be executed at any time of the day or night.

Officer Green and six to ten other metropolitan police officers on the evening of February 12, 1971 did enter Mr. Gooding's apartment and did find various narcotics and narcotic implements.

As a result thereof, Mr. Gooding was indicted for violation of federal narcotics laws and that is where we stand today.

The search here was a search for violations of the federal law by the members of the metropolitan police. At no time during the application for the search warrant or in the investigation is there any indication that a violation of metropolitan or of the District of Columbia Code was involved.

The entire search and the entire process was geared to searching out for violations of federal narcotics laws and probable cause having been shown, a search warrant, because of those alleged violations, was issued.

We filed a motion to suppress the evidence in the District Court and the District Court granted the motion on the basis that the federal narcotics search warrant procedure standard had to be modified by the District of Columbia Code for Reform Act Provisions in Title 23.

The Government appealed and the three judges of the Court of Appeals, although all voting to reverse, nonetheless all reached different opinions. Each judge determined that 21 U.S.C. 879(a) was the controlling standard because this was a search for violations of federal law.

Judge Wilkey, who wrote the majority opinion, indicated that if the magistrate had probable cause to believe that the narcotics could be found at any time of the day or night, then Section 879(a) authorized him to direct execution at any time of the day or night.

Judge Fahey interpreted the statute a little bit differently. Prior to the effective date of Section 879(a), narcotic searches had been governed by former 18 U.S.C. Section 1405. That law was well-settled. If the magistrate had probable cause to issue the basic warrant itself, he could authorize its service at any time of the day or night without any further findings.

Judge Fahey felt that Section 1405 was carried forward into Section 879(a), so all the magistrate had to find was probable cause for the warrant itself. If he made that finding, he could authorize nighttime service without anything more.

Judge Robinson, in effect, dissented in principle from his colleagues. He felt that the last seven words, Section 879(a)"and for its service at such time," meant

something. It meant that the magistrate had to be presented with, and had to find, some justification for nighttime search. The police had to offer some good reason why they needed to go into a person's home at night as opposed to going in the daytime.

He concluded that the police had to show some form of reasonable cause or exigent cimcumstances before they could be authorized to get a nighttime warrant. He felt that the statute itself was plain on its face as to that requirement, although it is true the statute does not spell out the particulars that one has to show. But then, on the other hand, neither does this Court's recently revised Rule 41 state what is reasonable cause shown for a nighttime search. So it is obviously within the competence of a court to make those findings.

Judge Robinson, however, even though the Government below had conceded that this warrant would not meet any particularized showing, nevertheless held that it satisfied his interpretation of Section 879(a) and he voted to sustain the warrant and to reverse the district judge.

We believe there are two basic issues to present here today. The first is, this Court must decide whether this search is governed by 21 U.S.C. 879(a) or whether it is governed by 23 D.C. Code Sections 521, 522 or 523.

Once that decision is made, the Court must

then determine whether the warrant meets the tests of the statute which it so selects. There are good reasons why either of the statutory procedures could be determined to be the one that was the dividing one.

For example, Section 879(a) is in the United States' Code. It is federal law. It concerns itself with violations of federal narcotics laws and indeed, here we have a search for violations of the federal narcotics laws.

Moreover, a United States Magistrate issued it. In effect, he was issuing a federal warrant in this case. The whole search has the aura of a federal search and that is one good reason, most likely, why each judge of the Court of Appeals below determined that 879(a) should be the controlling standard.

On the other hand, it may be that Title 23 of the D.C. Code, which became effective February 1, 1971, should be the controlling standard. The entire investigation, search warrant application and search was conducted solely by members of the District of Columbia police. There were no federal officers of any type in any way involved.

It is clear from reading chapter 5 of Title 23 of the D.C. Code that the provisions are broad enough to authorize the District of Columbia police to apply for and receive warrants issued for violations of federal law.

Moreover, Congress, when it passed this law,

thought it was passing a complete and comprehensive code of criminal procedure for the District of Columbia.

Now, obviously, since the District of Columbia police are only a local police force, it seems logical that any search warrants that they apply for under federal law should be governed by the provisions of then-recently-enacted Title 23.

The Government, however, suggests that this search should be governed by Title 33 Section 414 of the District of Columbia Code. That section is found in the District of Columbia's Uniform Narcotic Drug Act.

All three judges below rejected the argument that Section 414 could govern this search. For example, Judge Robinson indicated that the local provisions, that is, Title 33, extend only to searches based on suspected narcotics transgressions for the District's own drug laws.

Here, every warrant document indicates that the search was conducted for violations of the federal narcotics laws. No party to the search warrant application, its issuance or its execution, had any inkling that this search might be governed by Title 33 of the District of Columbia Code.

Now, the Government is seeking that this warrant be governed by Title 33 because there is a strong possibility that it was invalid for nighttime search. We believe that it

is highly improper, at this time, to transform the warrant from a federal warrant into a D.C. warrant, especially since the Government wants to do it to justify the search.

The Government has to stand or fall on the four corners of the warrant and every corner of that warrant is marked federal law, 26 U.S.C. Section 4704.

Moreover, the procedural regularities of the varying search warrant procedure codes must be adhered to and it is important that, in this respect, that the magistrate know under what search warrant provisions he is being asked to issue a warrant.

Once this Court determines which search warrant procedure this warrant should be tested by, the task then becomes determining does the warrant meet that test?

If the warrant is governed by Title 23 of the District of Columbia Code, the answer is clear, the warrant is invalid. The Government does not argue to the contrary and the warrant on its face shows that the requisite requirements of Title 23 were not met.

They are spelled out very specifically in the statute and there is no indication anywhere in the warrant paper that any of those circumstances existed.

QUESTION: Well, except, wasn't the Government claim here that this search was not conducted in the night-time?

MR. ROSENTHAL: Yes, the Government, for the first time in this entire case, is saying that 9:30 at night, some four hours after sunset, is not night.

QUESTION: So, to that extent, I suppose the Government would say that the conditions of 23 were complied with, wouldn't it?

MR. ROSENTHAL: Yes. We are not contesting that the warrant would be invalid for daytime search under 23.

QUESTION: Right.

MR. ROSENTHAL: Now, if the Court decides that Section 879(a) is the standard, then we also believe that the warrant is defective. We believe that the plain language of Section 879(a) requires some showing beyond basic probable cause for the warrant itself, to justify intrusion into a man's home at night.

Had Congress intended to carry forward the former Section 1405, it is obvious it would have carried it forward intact without changing it except expanding the types of drugs, narcotics and other substances to which it applied.

The Government failed to do this and Congress failed to do this. Instead, it issued a statute which on its face says there has to be something more for nighttime service.

QUESTION: Well, are you, in effect, reading into 879(a) the explicit provision of 522(c)(1), namely, the application must demonstrate that a) it cannot be executed

during the hours of daylight?

MR. ROSENTHAL: No, we're not -- we did advocate that to the Court of Appeals but it was, as we have indicated in the reply brief, we are not advancing that argument here. We are contending that 879(a) requires some additional showing and it may be enforcing it that Congress didn't spell it out like it did in the D.C. Code.

QUESTION: What additional showing?

MR. ROSENTHAL: An additional showing of why the police need to go into a man's home at night. Reasonable cause shown is the test this Court has set forth in Rule 41. Judge Robertson said --

QUESTION: Well, if you have to show why you have to go in at night, doesn't that imply that it can't be executed during the hours of daylight?

MR. ROSENTHAL: Well, that may be one reason why you can't do it. I mean, the standards in 521 are some of the obvious reasons why you need a nighttime search warrant as opposed to a daytime search warrant, but Congress didn't limit it, didn't say anything about what the standards would be, but those would certainly be reasonable standards. It is a reasonable test and we believe that there has to be some showing of exigency, some need.

QUESTION: Well, some showing of probable cause to believe grounds exist for the service in the nighttime.

MR. ROSENTHAL: That is correct.

QUESTION: That is the way you read 879(a).

MR. ROSENTHAL: That is correct.

Thus, we don't believe that 879(a) is ambiguous in the sense of not saying what Congress intended, that the only thing missing are the particulars, but that is not fatal because this Court always has to interpret what probable cause means under the Fourth Amendment or statutes authorizing search warrants and also under the Rule 41 you are going to have to interpret what reasonable cause shown means. Now --

QUESTION: I gather the search warrants under 414 may be issued either by the Superior Court or by United States Magistrate?

MR. ROSENTHAL: That is correct. They may be directed solely to District of Columbia police and violations --

QUESTION: And under 879 they may be obtained either from a District Court judge or a United States magistrate.

MR. ROSENTHAL: Right.

QUESTION: Although what it says is, if the judge -- does judge mean only District Court judge in 879(a)?

MR. ROSENTHAL: No, I believe, and I'd have to doublecheck, I believe there is a definition that means a state court judge, too.

QUESTION: Well, how about a Superior Court judge

in the District?

MR. ROSENTHAL: Well, if it does say state court judge, then I think it would have to include a District of Columbia Superior Court judge, too, because the District of Columbia is defined as a state in this Act.

It is the legislative history in this case that causes the ambiguity and we believe that since the statute is clear on its face, that it requires some additional showing. There is no need to resort to the legislative history.

Moreover, that legislative history doesn't supply any standards governing what justifies a nighttime search. Thus, it really adds nothing and, in fact, it just confuses the entire issue.

We also contend that this warrant does not satisfy Section 879(a) as we interpret that statute -- and here we differ from Judge Robinson.

First of all, in the Court of Appeals, the Government conceded that this warrant contains none of the particularities which might be required by an interpretation of 879(a) in which it is found that 879(a) requires more than former Section 1405.

The Government has not acknowledged that concession here but it certainly made it to the Court of Appeals.

Secondly, there is just no justification in this

record for a nighttime search. Speed is obviously not an issue. The controlled buy was made on February 9th --

QUESTION: Under 879, under the plain language of the statute which you rely on, don't you have to make the same showing for a daytime service as a nighttime service?

MR. ROSENTHAL: One could construe that grammatically. However, given this country's history and the common law's dislike of nighttime searches, I take it --

QUESTION: I know, but looking at the face of the statute, not the -- you said your approach is to the statute, not legislative history or something else.

MR. ROSENTHAL: I agree. When you look at that, it would say you would have to show something for daytime search, too, but we believe that since --

QUESTION: That isn't your approach?

MR. ROSENTHAL: No.

QUESTION: You are saying you must show something at night, other than what you would have to show for a daytime search?

QUESTION: Yes, because night is always the exception and under the common law, you couldn't serve search warrants at night.

MR. ROSENTHAL: I am just suggesting, then, you are departing from the plain language statute.

MR. ROSENTHAL: To that extent, yes.

In this case, the Government, the police officers had obviously no need for speed. They were in no rush but the controlled buy was made on February 9th, the warrant was applied for on February 11th and the search was conducted on February 12th. All these were same days -- all these were days of the week in the same week. There were no intervening weekends.

Or, Judge Robinson suggests that there is some evidence that Mr. Gooding was conducting a drug peddling operation. We believe that there is just insufficient evidence of that and we, of course, don't concede that is a justification to go in at night in any case.

We don't know the volume of narcotics Mr. Gooding was purportedly selling. We don't know from the warrant the volume of narcotics he had in his home at the time the informer went in to make the controlled buy.

QUESTION: Well, wouldn't that be a rather difficult thing for an informer or the officer making the affidavit to state in any case?

MR. ROSENTHAL: Well, the informant said Mr. Gooding was selling narcotics from his home and you could say, it seems to me the informant could say, based on his knowledge, he is selling a lot of narcotics or he is selling them only to close friends.

Secondly, the informant told the police officer

that the narcotics were kept in a green lady's handbag. It may be that the informer could have seen the volume of narcotics in that lady's green handbag.

I think he said it that way.

But I think the informer could have given some more particulars on the volume. I mean, if you are going to cut out a classification of people who aren't entitled to the protection from nighttime searches, making person who is in the supermarket sale of narcotics, I think you are going to have -- there has to be more shown and there is just -- that is just not indicated here.

QUESTION: That is is good armor of the statute, Mr. Rosenthal, if you draw on the common law concepts when lighting wasn't very good and streets were very dangerous, when there are lights in homes as readily as there are now, but the Congress did not draw the statute that way, apparently, so the Court of Appeals thought.

MR. ROSENTHAL: Well, one judge of the Court of Appeals thinks so. The majority did not. They said there is, in effect, no difference -- Congress has said there is no difference between day and night. However --

QUESTION: Then he went on to find that it was satisfied, didn't he?

MR. ROSENTHAL: Yes, he did and we think he erred there because there just weren't sufficient findings

below plus the fact the Government had conceded that this warrant did not have anything of a particularized nature justifying a nighttime search.

Finally, the Government is alleging -- is claiming here that, should the Petitioner prevail, nonetheless, the evidence should not be suppressed. We believe that Congress has established search warrant standards and if those standards are not enforced through the suppression mechanism, then the will of Congress is going to be frustrated.

Congressionally-created procedures are just as important as the Constitutional procedures and they must be enforced. Moreover, recently, the Calandra case, we believe that this Court reinforced the continuing validity of the Weeks Rule for suppression of evidence at trial that was unlawfully seized when it is being used against the person from whom it is seized and this is, precisely, our case.

We are not asking this Court to expand the exclusionary rule in any respect. We are just asking it to continue its enforcement, as it has in the past, to suppress the evidence, evidence which is unlawfully seized.

The fact that the magistrate may have misunderstood the law is not grounds, in our view, to create an exception to the exclusionary rule. In Aguilar and Spinelli, the magistrate misunderstood the law. The police came to

them in good faith and made an affidavit and the magistrate thought it was sufficient.

QUESTION: But those were both Constitutional violations, weren't they, Aguilar and Spinelli?

MR. ROSENTHAL: That is correct. We don't believe that you can make that distinction. For example, in Miller versus United States, the police made a noknock entry in violation of the U.S. Code statute. This Court held that the evidence must be suppressed because of the illegality of the entry.

So I don't think that there is any case that suggests that the fact that a statutory procedure is violated is worthy of less protection than when a constitutional procedure is violated. It appears that if the warrant is invalid either because it violates the Constitution or it violates some statutory requirement, then the search must be invalidated and the evidence must be suppressed.

Thus, we don't believe that this "good faith" argument should be granted because any time the magistrate makes a mistake of law, the Government is going to claim, well, everybody was in good faith. But that is not the case because if the magistrate makes the mistake, then the paper he is issuing is really just a piece of paper. It really isn't a warrant. It is invalid and the whole purpose of having a magistrate is to make sure that the police have

established probable cause and complied with all the statutory requisites before they enter a person's home.

Hence, for these reasons, we are asking the Court to reverse the judgment of the Court of Appeals.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Rosenthal.

Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

In this case, District of Columbia police officers executed a narcotics search warrant at 9:30 in the evening. In so doing, they were complying fully with the command of the magistrate in the warrant. The magistrate had, in issuing the warrant, expressly authorized its execution at any time of the day or night.

The application for the warrant recited facts which, it is not disputed, established probable cause with respect to an offense under Title 26 of the U.S. Code.

We submit, also, that it cannot seriously be disputed that the facts recited in the application for the warrant made out an offense under Title 33 of the District of Columbia Code.

The issue is whether evidence seized when this

warrant was executed in full compliance with its terms should be suppressed because the magistrate erred in authorizing execution at any time of the day or night.

Now, since the facts recited in the application for the warrant made out a violation both of the District of Columbia and of the United States Code, it is our view that the nighttime execution was proper, if it was proper under either local district law or under the applicable federal law.

We contend that it was lawful under both.

And we contend that the choice is not between the federal law and Title 23 of the District of Columbia Code, as I will argue that as simply a provision that is not and cannot be applicable to a narcotics search in the District of Columbia.

QUESTION: These were police officers, city police officers?

MR. FREY: Yes, they were and --

QUESTION: Well, how could the magistrate give them a federal warrant?

MR. FREY: Well, Section 138 of Title IV of the D.C. Code expressly authorizes them to do so and Justice Douglas' dissent from the denial of certiorari in the Thomas case, in which I believe you concurred, made that same conclusion, that the D.C. police officers are, to that extent,

federal agents with a duty to enforce federal as well as local law.

QUESTION: Is it your submission that Judge Gesell's holding, then, was not even a possible alternative in this case?

MR. FREY: Well, we submit that Title 23 simply is inapplicable. Obviously, if Title 23 is applicable, the warrant did not properly authorize nighttime execution. We submit the Title 23 cannot be applicable to a narcotics search.

QUESTION: Although Judge Gesell held that that was the applicable --

MR. FREY: Although Judge Gesell held that it was applicable to all searches by D.C. police officers, we submit that that manifestly cannot be so.

QUESTION: Well, what did you tell the magistrate? I am very worried about this going to a magistrate. Was the magistrate issuing a federal or a state warrant?

MR. FREY: He was issuing a search warrant.

QUESTION: Federal or state?

MR. FREY: Well, our contention is that it was a warrant authorizing the D.C. police officers to search Mr. Gooding's home and that you cannot characterize --

QUESTION: And if it was valid under one, it was good and if it was valid under the other -- is that

quite the way to do business?

MR. FREY: Well, I'm not sure, and, indeed, in view of the way this case has developed, I understand that it is now -- they are now, as a matter of course, reciting both the District of Columbia Code and the federal violation in the warrant applications.

But the cases have held that you need not --

QUESTION: In a state, like the State of Maryland, could the State of Maryland issue a search warrant for a violation of the federal code?

MR. FREY: I'm not clear whether -- you mean -- there is no question that a Maryland --

QUESTION: A state magistrate.

MR. FREY: A state judge may, under Rule 41 -- and I think under this provision of the U.S. Code, may issue a warrant to a federal officer.

QUESTION: No, no, this is a state officer.

MR. FREY: Well, in the case of Maryland, I think only a federal officer may apply. Now, that includes District of Columbia police.

QUESTION: Now, as I understand, it is the Government's position that you make it initially upon your state.

MR. FREY: Well, the statute --

QUESTION: Well, this state, I'm taking it, is a

state like Maryland and I have never heard of a state magistrate issuing a search warrant for a violation of a federal offense to a state officer. I have never heard of it. Now, I'm not saying it is not done.

MR. FREY: Well, I simply -- that analogy I don't think is applicable to our case, Mr. Justice Marshall, because we are dealing with a warrant that was issued by a federal magistrate to an officer who was, for these purposes, a federal and a local officer.

QUESTION: Is the magistrate in Washington a federal magistrate?

MR. FREY: I think he is in the United States Courthouse. I believe he is a federal appointee.

Now, he is, I think, under Section 143 of Title IV of the D.C. Code also authorized to issue local search warrants.

QUESTION: Yes, well, there is no way we can really find out. I guess it is unimportant.

MR. FREY: Our argument, Mr. Justice Marshall, is that on the face of the application for the search warrant, certain facts were recited which the magistrate found to be the case. Those facts make out a violation of the District of Columbia Code and make out a violation of the United States Code.

Since it has been held that you need not recite

any provision that is being violated in the warrant application and, indeed, the form in the Appendix to the Federal Rules of Criminal Procedure has no place to put down the provision that is violated and since it has been held that you can put down the wrong provision and the warrant is not invalidated, I fail to see why, if you put down another correct provision, that should preclude us from relying on the District of Columbia law.

QUESTION: Mr. Frey, I gather that your position at least is that 521 and 523 are inapplicable.

MR. FREY: Certainly.

QUESTION: But you don't claim that 414 is applicable, do you?

MR. FREY: We do claim that 414 --

QUESTION: Then you disagree with the Court of Appeals.

MR. FREY: We do disagree with the Court of Appeals.

QUESTION: Oh, I see. Well, the Court of Appeals held it inapplicable, not necessarily because it was resolving the conflict as I read it between 414 and 521, if it is a conflict, but rather because 414(c) arguably imposes an additional requirement that wasn't met here.

MR. FREY: Well --

QUESTION: Therefore, they go on to say, that

this requirement, we will proceed in the assumption that 414 would not validate the search warrants involved.

MR. FREY: We have argued in our brief that this requirement is clearly met on the face of the record because the requirement to examine on oath and to have affidavits or deposition of the witnesses requires two things.

One is that the magistrate personally take the oath of the Complainant, which was done here and the second is that the basis for the warrant application be reduced to writing, either in the form of an affidavit or in the form of a deposition.

QUESTION: Well, tell me, Mr. Frey, even if all this is right, ordinarily we don't review interpretations by the Court of Appeals, either of the District or of the United States Court of Appeals, of the meaning of District Code provisions, do we?

MR. FREY: Well, I think that would be true as to the --

QUESTION: Do we, ordinarily?

MR. FREY: No, you don't ordinarily.

QUESTION: Why should we in this case?

MR. FREY: Well, you would be deciding this case in a rather artificial context, I think, if you ignored the fact that you have to recognize the fact that the District of Columbia Code contains a provision for narcotics searches

which requires the magistrate to authorize such searches at any time of the day or night. You can't decide this case as though that provision does not exist. I am not saying that the officers in this case acted in reliance on that provision when they secured the warrant and I agree that ordinarily you would not take this case to determine the issue of whether they complied with the Title 33 procedural requirements, although I don't believe that issue was clearly argued to the Court of Appeals. I think it is clear that it was an unconsidered dictum because the considerations that they offer were not actually presented.

Now, with respect to Section --

QUESTION: We are going to get into the business of second-guessing, particularly under the new judicial structure of the interpretation of D.C. Code provisions by the Court of Appeals.

MR. FREY: Well, you are being asked to apply --

QUESTION: We are going to have a lot more work than we have now to do.

MR. FREY: Well, we contend that you should defer to the rulings of the local courts on questions of local law. You are here --

QUESTION: Except when you disagree with them.

QUESTION: No, the question here is whether the D.C. Code provision is applicable or the general federal

provision is applicable. That is one of the questions.

MR. FREY: That is one of the questions that was passed --

QUESTION: So it is not the construction of a D.C. Code provision as such.

MR. FREY: Well, there was a suggestion in Judge Fahey's opinion that the -- that we could not rely on Title 33. I don't think this was a holding of the Court. It was a passing comment.

QUESTION: I wonder if either the United States Court of Appeals or the District Court any more has the same authoritative mantle in construing the District of Columbia statutes since the Court Reorganization Act and the Enactment of the District of Columbia Court of Appeals.

MR. FREY: I think it would be the District of Columbia Court of Appeals. Now, in this case, we are dealing -- the Thomas case was an identical case on its facts, just about, to this case and the District of Columbia Court of Appeals there, without really considering whether Section 414 could be relied upon, held that you could not look to Title 23 of the District Code as providing the applicable standard and it looked to Title 21 of the United States Code and held that the nighttime authorization --

QUESTION: There you are. That is a determination, at least a decision which indicates a construction by the D.C.

Court of Appeals, not by the United States Court of Appeals, that 414 does not apply.

MR. FREY: Well, with all respect, Justice Brennan, I don't believe that was a holding by the D.C. Court of Appeals on the availability of 414. They simply were talking about the relative applicability of the Title 21 provision and the Title 23 provision without had presented to them the argument that we have presented to you.

Now, with respect to Section 879(a), the U.S. Code provision, unless there are any specific questions, I think the necessity of a special showing of exigent circumstances or the like for authorization of nighttime execution of a federal narcotics search warrant has been fully covered in our briefs and in the opinions of the two District of Columbia Court of Appeals.

With respect to Title 23, Judge Gesell held that all warrants issued to District of Columbia police were subject to the provisions of Title 23 of the D.C. Code regarding the necessity of a special showing for the authorization of nighttime execution.

Now, we think this position is beset with insurmountable difficulties. In the first place, in order to avoid the impact of Title 33, Petitioner has had to argue that this was a federal warrant application, that it was issued by a federal magistrate, that it was for a violation of federal

law and then he says, well, it was okay under federal law. Let's put that to one side and let's apply local law.

That is, he wants to say on the one hand, you can't apply Title 33 because this was a federal warrant and on the other hand, he wants to say you must apply Title 23 of the D.C. Code because these were District of Columbia police officers.

Now, we think he can't have it both ways.

Also, the alleged policy basis for his argument is completely undercut by the existence of Title 33. Let us assume for the moment that you don't consider properly before or you don't wish to decide our contention that this search was valid under Title 33.

Nevertheless, what kind of a policy do we have reflected in Title 23, which Judge Gesell found which says that all searches must be,nighttime searches must have especial justification, if the District of Columbia police need no special justification to make a local, nighttime narcotics search and to get a warrant for that purpose?

And if, under the federal law, no special justification is required, how can it be that the D.C. police, what policy is it that makes the D.C. police make especial justification for a nighttime warrant and to enforce federal law?

I think there simply is no rational basis for

interpreting Title 23 to impose such a requirement.

Now, I'd like to turn at this point, if I may, to the exclusionary rule argument.

Let us assume that the magistrate erred in directing the police to execute this warrant at any time of the day or night and that least five members of this Court are of the view that contrary to the conclusions of the three appellate courts that have previously considered this issue, the applicable statutes required the magistrate to elicit a special showing in support of the nighttime execution authorization that he conferred.

Does it necessarily follow that the evidence seized under this warrant should be excluded?

Petitioner contends that it does. He argues, in effect, that any irregularity in the issuance or execution of a search warrant, whether or not of constitutional dimensions, whether or not wilful or flagrant, whether or not done only after being expressly authorized by a neutral and detached magistrate, must lead to exclusion of the evidence obtained.

The primary reason he advances for this view is the necessity to avoid tainting the purity of our judicial process. Now, we contend that the application of the exclusionary rule in this case would represent an inappropriate extension of the rule to or beyond its

outermost limits and would seriously disserve the interests of justice and undermine the integrity of the criminal justice system.

In the first place, we are not dealing here with a constitutional violation. This is a case in which exclusion, if there is to be any, must come from an invocation of the court's supervisory power.

Now, in the McNabb case, which is, perhaps, the leading case on the question of supervisory powers, the Court described the occasion for the exercise of such powers for exclusion as follows -- and I am quoting from page 345 of Volume 318:

"Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded, cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law."

Now, we contend that this case does not come anywhere near that standard for the exercise of the court's supervisory power for exclusion.

Now, secondly, we point out that if there was error here, it was made in good faith. The police and the magistrate can hardly be accused of wilful disobedience of a clear statutory mandate when eight of the nine appellate judges who have thus far expressed their views on the question

uphold the propriety of the authorization of nighttime excution under facts such as these.

Therefore, the objective of deterrence of official misconduct cannot possibly be furthered by the application of an exclusionary rule in this case.

Finally, the error, if there was an error, was that of the magistrate and not that of the officers. The warrant application did not specifically request authorization for nighttime execution. It was the magistrate who directed that it be served at any time of the day or night.

QUESTION: But he had a whole full day.

MR. FREY: Excuse me?

QUESTION: You had a whole day to execute it and you didn't. You waited until the night. I would say that lets them out completely.

MR. FREY: Well, I think there is no suggestion here of any improper motive. We simply don't know, on this record, why they executed it at night. It may be that Mr. Gooding and the narcotics were only present in the apartment --

QUESTION: Well, I don't know that one way or the other, but I am saying that when you say that the officer has no responsibility at all, only the magistrate, I say that if the magistrate had been wrong in giving it the night, the officers could have corrected it and enforced it in the day.

That is all I am saying.

MR. FREY: Well, but I think, Justice Marshall, that it is unrealistic to suppose that when the police officer gets a command from the magistrate saying, "You are commanded forthwith to serve this warrant within ten days --"

QUESTION: I thought it said, day and night. He said, you serve it any time you want to serve it. That's what the magistrate said. And it is up to you to determine how you want to serve it and the police officers decided that they would rather serve it at night for some reason unknown to you or me.

MR. FREY: Well, let me say this, Justice Marshall. It is possible that the magistrate could authorize execution at any time of the day or night and that we would agree with you that a particular mode of night-time execution was illegal, not because it violated a statute, but because it was unreasonable and therefore in violation of the Fourth Amendment.

QUESTION: And as Justice Harland said, it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home.

MR. FREY: Well, of course, this brings us to the argument in the sense that in this particular case, on these facts, we are talking about a kind of search which this Court has, in October, 1972, determined would not be

considered a nighttime search.

I want to make my point. If they went in at 3:00 o'clock in the morning after waiting until they were sure everybody was asleep with no justification whatsoever for doing that, then, even though the warrant had authorized nighttime execution, we might have a question of an independent constitutional violation. But we are talking here about a request for suppression on the basis of the statute and on the basis of an error by the magistrate, I think that it has not heretofore been suggested that the error was that of the police officers and I don't see how, if the magistrate made a mistake about what the law was, in good faith, how we can suppose that there would be effective deterrence of police officers who, presumably, are far less sophisticated in their interpretation of a provision like the 21 U.S.C. 879 or even a magistrate. Now --

QUESTION: What was Weeks, Mr. Frey?

MR. FREY: Weeks was a constitutional --

QUESTION: It was?

MR. FREY: -- violation. Yes, indeed.

QUESTION: Was there a warrant?

MR. FREY: Was there a warrant in Weeks? I'm not sure that I can answer that. However, I would like to advert to the quote from Weeks which you had in your dissenting opinion in Calandra because I think that this

highlights the difference between this case and Weeks.

Weeks, the Court said, and I am looking at page 3 of the Calandra slip opinion and it is at page 394 of Volume 232 U.S., "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance of the prohibitions of the Constitution."

Now, we are not talking in this case about an open defiance, a manifest neglect, or a provision of the Constitution.

We are talking about, at most, a good faith mistake by the magistrate and I ask you, suppose that this --

QUESTION: And by the officer.

MR. FREY: Excuse me?

QUESTION: And by the officer.

MR. FREY: Well, presumably insofar as he --

QUESTION: Well, unless he thought that he was entitled to the warrant, I take it he wouldn't have made out the affidavit?

MR. FREY: I think he probably believed that he was entitled to the warrant.

QUESTION: Mistakenly, yes.

QUESTION: I have just looked at Weeks, Mr. Frey, and you're correct, there was no warrant. It was taken by an official of the United States without a warrant and in violation of the Fourth.

MR. FREY: We do believe that there is a policy that favors encouraging the police to go for a warrant and the Jones, Aguilar and Ventresca language which we have adverted to in our brief clearly shows that when the police go to the magistrate for a warrant, a search which otherwise might not be considered a probable cause search and therefore, a constitutional violation, will be considered a probable cause search, in a sense, to reward the police or, alternatively, at least not to punish them, not to hold them to as stringent standards when they have gone to the magistrate.

QUESTION: Well, it wouldn't change the probable cause. It might change, you suggest, the exclusionary rule.

MR. FREY: Well, the -- I think the language in Ventresca suggests that it will change the termination of probable cause.

Now, I think we get into a question that we don't have to face in this case, whether we have a good faith application that reasonably may have been believed to make up probable cause when the magistrate issues a warrant and is is subsequently determined the probable cause has not been made out, whether the application of the exclusionary rule is appropriate there. That is not this case because we are not dealing with a constitutional violation in this case.

Suppose that after the D.C. Court of Appeals and the D.C. Circuit had interpreted 879(a) as requiring no

special showing, we had had the same situation that arose in this case? And there probably are cases where there was nighttime authorization in a warrant and now the Supreme Court says, no, that is a mistake, 879(a) requires a special showing.

Can it seriously be contended that it will further the interests of justice that you will, in the language of Justice Brennan in Calandra, minimize the risk of seriously undermining popular trust in Government if you would allow a defendant to go free, would suppress the evidence against the defendant which was obtained in good faith reliance on decisions of responsible courts of appeals?

The Miller case, which my colleague has cited to you which, of course, is a noknock entry case, falls in a completely different category.

The issue there was not the validity of the warrant, but of the manner of its execution. The magistrate did not authorize the police in Miller to make a noknock entry.

What's more, I don't think that there was a contention of good faith in Miller. In Miller, they did something which was held to be unlawful, breaking down a door and going in. It is, I think, a clearly distinguishable situation from this.

QUESTION: Didn't the Court's opinion in the

Miller case say that a few more words before the break-in would have satisfied the statute?

MR. FREY: Well, I think that is right. In any event --

QUESTION: In other words, they had not disclosed purpose and authority and identity as completely as the Court thought the statute required.

MR. FREY: That's right.

Now, another important point that I want to make, I think Petitioner has misconceived the thrust of our argument on the exclusionary rule point in one significant respect. If the Court now announces a definitive rule of interpretation under 879(a) or a definitive rule applicable to the District of Columbia police, we agree that warrants thereafter procured in violation of the statute as construed by the Court would result in the seizure of excludable evidence.

At that point, of course, you could not make the defense that this is a good faith presentation of an application to a magistrate which they -- which was honestly believed to provide a basis for authorization of nighttime execution.

QUESTION: But no matter what the courts would say in this particular case, you are still going to get arguments before magistrates and subsequent opinions as to

whether there was or was not a proper showing of validity for a nighttime search, if the Court should adopt that proposition.

MR. FREY: That is true and I suppose there could be other circumstances in which we would advance the same argument, if they got a warrant. After all, the exclusionary rule is not required to control the conduct of magistrates. Magistrates are judicial officers. They are presumably under the control of the judicial branch and presumably there is some way to get magistrates to obey the law other than excluding evidence which the police see as pursuant to the directions of the magistrate.

Now, with the nighttime search argument, I raise the issue -- and we raised it in our brief -- because it has some importance beyond the confines of this immediate case, the definition of what is nighttime?

The Court has resolved that question with respect to searches under Rule 41. However, it is an open question, presumably, with respect to searches governed by the District of Columbia Code where there is no definition of nighttime or daytime and an --

QUESTION: Again, shouldn't we wait on the courts of the District of Columbia to tell us what they think their code means?

MR. FREY: Well, it is also presumably an open

question under the U.S. COde provision Section 879.

QUESTION: Only if 879(a) is interpreted as Petitioner is asking us to.

MR. FREY: Well, we are not asking you to reach out to the nighttime search issue if you resolve the 879(a) issue in our favor.

QUESTION: Well, do you want us to interpret 521, for example? It certainly explicitly refers to nighttime.

MR. FREY: Well, let me say this. If you hold that this was a nighttime search under 879(a), I think we would not wish to persist in our argument that it would not be a nighttime search under Title 23. So that doesn't become a problem.

QUESTION: You do want us to interpret the D.C. Code, don't you?

MR. FREY: Not at all.

QUESTION: Before the judges down there get a chance to interpret it?

MR. FREY: I simply suggested that we will withdraw the argument with respect to nighttime search under the D.C. Code, if you find that it was a nighttime search under the federal code.

If you find that it was not a nighttime search under the federal code, you don't have to reach it under the

D.C. Code.

However, I have no doubt that what you might say on the federal code issue would have some possible effect on the District of Columbia Court of Appeals.

QUESTION: I don't have any doubt, either.

MR. FREY: But that is an inevitable result of the role of this Court.

Now, I think one final point with respect to Section 879(a). We have indicated in our brief that the language of that statute when we look at it on its face appears to support the Petitioner's position.

Now, in asking him questions, obviously the Court was puzzled by what the standard was for the showing that would have to be made if some showing has to be made.

Now, presumably, in order to ascertain the standard for the showing, one has to go to legislative history, or at least that is one place one might look.

And when one looks at the legislative history, one finds that the kind of showing that Congress intended to be made in this case was no showing at all.

Now, that creates somewhat of a conundrum about relying on what Petitioner contends is the plain language of 879(a).

For all of these reasons, we submit that the decision of the Court of Appeals should be affirmed.

MR. CHIEF JUSTICE BURGER: Mr. Rosenthal, do you have anything further?

MR. ROSENTHAL: Yes, your Honor.

REBUTTAL ARGUMENT OF

HERBERT A. ROSENTHAL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ROSENTHAL: In this case, contrary to what Mr. Frey suggests, the magistrate was issuing a federal warrant for violations of federal law. When you look at the warrant in the original District Court record, it is a federal warrant.

When you look at the background materials that were presented to the magistrate, it is a federal warrant.

Indeed, the District of Columbia Court of Appeals, Mr. Justice Brennan, implicitly rejected the argument that Section 33414 of the D.C. Code would govern. The arguments that the Government has made in this case, both here and below, were also made in the Thomas case. That is, the warrant should be tested by Title 33 Section 414 of the D.C. Code.

That court elected not to do so and I don't believe it said specifically, but it certainly means that in this conflict situation, they held this to be, in effect, a federal warrant because they said Section 879(a) governs it.

We have the exact same situation here, D.C.

police getting a federal warrant. The District of Columbia Code said, okay, Section 879 governs. Our code, 3314, doesn't govern. I think that is kind of your state law interpretation that this Court ought to give great deference to in interpreting this warrant.

I think both the legislative history of Section 879(a) and recently-revised Rule 41 gives this Court no guidance as to what standards reasonable cause shown or probable cause for its service at such time means.

I don't think that means that argument could be used to say that this Court did not mean you had to make some showing for a nighttime search when you get the case asking for an interpretation of Rule 41.

Similarly, the fact that the legislative history of Section 879(a) does not give any indication of possible standards does not mean that Congress did not intend some additional showing for nighttime service to be required by the police and the magistrate.

Thank you.

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

Mr. Rosenthal, you have served on this case at the Court's request and by the Court's appointment.

MR. ROSENTHAL: Yes.

MR. CHIEF JUSTICE BURGER: On behalf of the

Court, I thank you for your assistance to Mr. Gooding and for your assistance to the Court.

MR. ROSENTHAL: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:31 o'clock p.m., the case was submitted.]