In the

Supreme Court of the United States

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex,

Petitioner,

v.

DAVID L. RICE,

Respondent.

No. 74-1222

Washington, D. C.
February 24, 1976

Pages 1 thru 63

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex,

Petitioner,

v. No. 74-1222

DAVID L. RICE,

Respondent.

Washington, D. C.

Tuesday, February 24, 1976

The above-entitled matter came on for argument at 10:38 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

MELVIN KENT KAMMERLOHR, ESQ., Assistant Attorney General of Nebraska, 2119 State Capitol, Lincoln, Nebraska 68509, for the petitioner.

WILLIAM C. CUNNINGHAM, S.J., ESQ., 801 Ladera Lane, Santa Barbara, California 93108, for the respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 74-1222, Wolff against Rice.

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

ORAL ARGUMENT OF MELVIN KENT KAMMERLOHR

ON BEHALF OF PETITIONER

MR. KAMMERLOHR: Mr. Chief Justice, and may it please the Court: This is a case where the then Warden Wolff, of the Nebraska penitentiary -- he is no longer there -- is now a petitioner in this case. The case was brought by Mr. David Rice under 28 U.S.C. 2254 to primarily contest the admission at his trial of some dynamite, dynamite caps, tools, other paraphernalia, and also later some dynamite particles found in his clothing at the police station.

Briefly how this case arose, your Honors, on the early morning hours of August 17, 1970, the police station in Omaha, Nebraska received a 911 emergency call that a woman was screaming. It sounded like perhaps she was being raped, and a certain location was given. Two patrol cars were dispatched, a third patrol car heard the message and also went to the location, Ohio Street in Omaha, Nebraska. Upon entering the premises, Officer Larry Minard saw a suitcase on the floor which he moved slightly, and the suitcase exploded, killing Officer Minard, injuring two other policemen, demolishing the

house.

About five days later, on the 22nd of August 1970, the police had, during those five days, [illegible] working around the clock trying to get evidence, and so on, had learned from witnesses that the bomb had been planted by one Duane Peak, who was a member of the National Committee to Combat Fascism, which was also considered, or said to be in the case and referred to as an officer of the Black Panthers organization.

QUESTION: This situation that you are speaking of now doesn't form any of the predicate for the issuance of the search warrant, does it? You are just giving background at this point.

MR. KAMMERLOHR: Yes, I am just giving background.

QUESTION: But that was, you say, information in the possession of the police at that time.

MR. KAMMERLOHR: Yes, your Honor.

And also as a result of this information and prior building of records over a two-year period of newsletters put out by the National Committee to Combat Fascism, that they had advocated violence to police officers, including the killing of police officers, plus some other evidence they had gathered that perhaps one Edward Poindexter, who was a member of the National Committee, an officer, president, I believe, of the National Committee to Combat Fascism, and Duane Peak.

Arrest warrants were issued for those two members.

The police started on what they called a task force on the late afternoon of August 22, first went to the headquarters of the National Committee to Combat Fascism. They went through the headquarters looking for these two persons that they had an arrest warrant for and did not locate them. They then went to Poindexter's home, did not locate him there. They went to a cousin's home of Duane Peak, the cousins' names were Frank and Will Peak. And then they went to the home of David Rice, who is the respondent in this case.

QUESTION: And up to this point, what warrants, if any,did they have?

MR. KAMMERLOHR: Up to this point they had arrest warrants for Duane Peak and Edward Poindexter, your Honor.

QUESTION: And not for the respondent.

MR. KAMMERLOHR: That's correct.

QUESTION: And no search warrant up to this point.

MR. KAMMERLOHR: At this point.

I would like to point out that they did not -- I think the opinion in the United States Court of Appeals for the Eighth Circuit does a disservice to this case by comparing it to Lankford v. Gelston where some 300 nonrelated searches were made.

QUESTION: That was that Baltimore case?

MR. KAMMERLOHR: Yes, your Honor.

In this case there were only three searches made

before they arrived at the Rice premises, and even those were connected --

QUESTION: Did they search anything at the first two stops?

MR. KAMMERLOHR: They searched the premises at the headquarters. At the other two stops the record is not clear just what they did. They went there looking for them. I believe at the one place there was a police officer there already who assured them that neither one of the subjects were on the premises.

QUESTION: Just to pursue what Mr. Justice Stewart has mentioned, at that point the mission was to execute, to serve, an arrest warrant for two people who are not involved in this case.

MR. KAMMERLOHR: That's correct, Mr. Chief Justice.

They were all three members of the party, the National Committee to Combat Fascism, which had been previously connected in the case by the fact that Duane Peak was said to have planted the bomb for the National Committee to Combat Fascism.

QUESTION: Was said by whom?

MR. KAMMERLOHR: His sisters and Donald Peak, a brother, had given this information to the police.

QUESTION: Had that information been published, made public to the public generally? There was a newspaper, wasn't there?

MR. KAMMERLOHR: It was made public to the -- all the police officers were cognizant of this. Several witnesses had seen Duane Peak carrying a heavy suitcase and telling people, "Don't touch it," on the night before the bomb was planted.

QUESTION: And that was Peak.

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: Who was one of the two subjects of the arrest warrants.

MR. KAMMERLOHR: That's correct.

Upon arrival, late at night, maybe 9:30, 10 o'clock at night at David Rice's premises, the lights were on, a television set was playing, they could see through the door. The police knocked on the door and there was no response and at this time two of the police officers decided they should go back and see if they could get a search warrant. They left the other officers there to surround the house, and the two officers went back to the police headquarters and drafted an affidavit and found themselves a magistrate who -- incidentally, in Nebraska all magistrates are members of the Nebraska bar in good standing. They presented the affidavit to the magistrate who issued the search warrant for the premises describing the exact address of David Rice's premises and the things to be seized.

QUESTION: And what were they?

MR. KAMMERLOHR: Dynamite, dynamite caps, pliers, pincher-nose pliers, and those kind of --

QUESTION: All described in the search warrant?

The warrant's in the record, I suppose.

MR. KAMMERLOHR: It's in the appendix, your Honor.

QUESTION: We will find it.

MR. KAMMERLOHR: I believe it's on page 10 of the appendix.

QUESTION: Pliers aren't -- it's not quite so explicit as you indicated, as I read it. Dynamite and illegal weapons, also the devices which might be used to construct weapons or explosive devices which could be used to cause injury to persons or damage to property. Is that it?

MR. KAMMERLOHR: Yes, your Honor. It doesn't say pliers and the wire.

QUESTION: But genetically it does say what you have indicated.

MR. KAMMERLOHR: In any case, the two officers with the search warrant went back to the Rice premises and all of the officers entered the premises and found the evidence which is objected to in this case. It was all in plain sight upon entering the premises. They didn't have to overturn anything or open any drawers or anything of that nature.

The Federal district -- well, first, the Supreme Court of Nebraska --

QUESTION: One thing that worries me. They knew the police were there all this time, didn't they? Didn't the police first go and rap on the door?

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: They knew the police were there.

MR. KAMMERLOHR: There was no one there inside the premises.

QUESTION: And when they went back.

MR. KAMMERLOHR: There was still no one inside the premises, your Honor.

QUESTION: That's what I was trying to get straight.

QUESTION: Didn't they stake out the house?

MR. KAMMERLOHR: They staked out the house while they were gone.

QUESTION: And sent an officer to get the warrant that you just referred to on pages 10 and 11.

MR. KAMMERLOHR: Two officers to get the warrant. The rest stayed and staked out the house.

QUESTION: And the house was empty, as I understand it, at all relevant times, although there were lights on in the house and I think a television set was turned on.

MR. KAMMERLOHR: That is correct, your Honor.

QUESTION: But nobody in the house.

MR. KAMMERLOHR: No people in there.

Before the actual trial, the respondent moved for

suppression in the District Court of Douglas County, which is in Omaha. The District Court denied suppression of the evidence. The Supreme Court of Nebraska affirmed, finding that the affidavit for search warrant was sufficient. The Federal District Court in the 2254 case then found that the affidavit for search warrant was not sufficient. We then had later, after that order was first -- that order of several months previous to another order which the Federal District Court later issued finding that there were not any other grounds, either, authorizing legal entry into the premises.

The United States Court of Appeals affirmed and we then petitioned this Court and are here, and although I have a number of issues in my brief and in our petition for certriorari, I would like to primarily argue two main points which we would urge this Court to adopt. We would still like to rely, of course, on our other points in our case should those be denied.

QUESTION: Mr. Kammerlohr, before you proceed, may I ask you, do we have in the papers filed here a copy of the opinion of the Supreme Court of Nebraska?

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: Can you tell me where?

MR. KAMMERLOHR: No, your Honor, I am sorry. The Supreme Court of Nebraska opinion does not appear. The Federal opinion is all I have in there.

QUESTION: That's what I thought. I don't offhand even see the citation. Perhaps your colleague can find it.

MR. KAMMERLOHR: I have the 188 Nebraska 728.

QUESTION: Has it got -- 188 Nebraska 728.

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: Northwestern cite at 199 Northwestern 2d 480.

QUESTION: Thank you.

MR. KAMMERLOHR: As I alluded to in my brief, this Court of course is very familiar with the arguments against the exclusionary rule and for the exclusionary rule, and there has been dissatisfaction mentioned a number of times, so that I do not intend to go into all those various cases and try to tell this Court the same thing you are very familiar with and take up your time and the time of others here.

I do think I should mention just briefly why we do not feel that, number one, the exclusionary rule should apply when officers are acting under a search warrant. We would ask the Court to modify the exclusionary rule at the very least to that point.

The magistrate perhaps was the person who was wrong, if anyone were wrong, in issuing a search warrant in this case. I do not believe that we can blame -- or the purposes of the exclusionary rule would be served if the purposes are to deter unlawful action of police where they have tried to do

what's right, they have gone to a lawyer-magistrate and asked for a search warrant. I don't see how there can be any possibility of deterrence to future cases because it's the type of procedure we operate under, it's a preemptory type, there is no way of having an immediate hearing to see if the writ is any good. The police certainly wouldn't be in any position every time they get a search warrant to question its validity.

We encourage the use of search warrants , and I believe the imposition of the exclusionary rule would go more to discourage the use of search warrants than to encourage them.

So for those reasons and for the avowed purpose of the exclusionary rule, I would ask the Court to at least modify the exclusionary rule to that extent when officers are operating under a search warrant.

QUESTION: Generally, I suppose you would mean --

MR. KAMMERLOHR: Generally, I would ask when they are operating in good faith and think that they are following the law, that the exclusionary rule serves no purpose. And in that light generally I might also say I know we are all interested in seeing that we have the preservation of freedom and privacy in this country, but the exclusionary rule, as this Court well knows, does absolutely nothing to protect those who don't have any guilty evidence on their premises. If the police should suddenly take it into their heads to become

a police state or Nazi type state, the general public who doesn't have any guilty evidence on their premises would have absolutely no remedy under the exclusionary rule. They are just not protected.

The same is true when the police take it into their heads to harass gamblers or houses of prostitution, or anything else where they don't want the evidence to be used in court but they merely want to either gather the evidence to destroy it or they want to let them know that they are aware of their operations, the exclusionary rule does those people absolutely no good.

Now, we can't measure --

QUESTION: The Constitution itself wouldn't help them, would it?

MR. KAMMERLOHR: I believe it could --

QUESTION: At the time you are talking about.

MR. KAMMERLOHR: With the alternative remedies that have been suggested, I believe they could, your Honor. If we had --

QUESTION: If you say that police are going to knock down doors and all, that knocks down the whole Constitution, doesn't it?

MR. KAMMERLOHR: Unless we do provide a better remedy than the exclusionary rule.

QUESTION: We don't know that they have been

suggested necessarily as alternative remedies; they have been suggested as additional remedies, have they not? Maybe the exclusionary rule only serves to effectuate the fourth amendment in the context of a criminal trial. But other remedies are at least theoretically available to effectuate that constitutional provision in other contexts, i.e., civil lawsuits. The Bivens case you are familiar with, aren't you? And that's not an alternative to the exclusionary rule; it's an additional sanction, is it not?

MR. KAMMERLOHR: That's correct, your Honor. I believe that was probably a 1983 case, was it not?

QUESTION: It was not.

MR. KAMMERLOHR: Well, I believe anyway that there is a remedy under 42 1983.

QUESTION: But there might be a 1983. Bivens involved the Federal Government. That's the reason it wasn't 1983. But as against State agents there might be 1983 remedies. And these a not alternatives, they are additional remedies, are they not under the present state of the law.

MR. KAMMERLOHR: Under the present state of the law, but I am just saying that those writers like Dallin Oaks, Professor Oaks, and Mr. Chief Justice Burger, I believe, in the dissent on Bivens suggested that --

QUESTION: There was a dissent, wasn't there?

MR. KAMMERLOHR: -- if we should move away from the

exclusionary rule completely, we should have an alternative remedy.

QUESTION: We do have those remedies. There is considerable question about the efficacy and practical value, but they are now there, are they not?

MR. KAMMERLOHR: Yes, they are.

QUESTION: You are not suggesting or trying to invent anything that's not already there, are you?

MR. KAMMERLOHR: I'm not suggesting --

QUESTION: You are suggesting that we take away something, not that we add something, isn't that correct?

MR. KAMMERLOHR: Well, I'm suggesting --

QUESTION: From what's presently there to effectuate the --

MR. KAMMERLOHH: I am suggesting that the exclusionary rule doesn't do a thing for these certain classes that I was mentioning.

QUESTION: That's correct.

MR. KAMMERLOHR: I'm suggesting that we do add something.

QUESTION: They are already there. What would you add?

MR. KAMMERLOHR: I would make a requirement that before the exclusionary rule be completely abandoned by this Court in all cases, that the States must provide a tort remedy

with a minimum recovery for the person who is injured against the governmental subdivision who employs the police.

QUESTION: So what -- we should wait for, assuming that we might reconsider the exclusionary rule, we should not do so until a majority of the State legislatures had acted or a majority of the State courts had acted providing a specific tort remedy with a minimum amount of recovery? Is that your suggestion?

MR. KAMMERLOHR: I am suggesting that you could --

QUESTION: I don't understand that.

MR. KAMMERLOHR: -- that you could impose that in an opinion to make an incentive for legislatures to move ahead and do this.

QUESTION: You mean a conditional holding, where the State provides an alternative remedy, then Mapp v. Ohio is out.

MR. KAMMERLOHR: Yes, your Honor. I believe that could be done by this Court.

QUESTION: Wouldn't it be your guess that every State in the Union, including Alaska and Hawaii, probably have such a tort remedy right now?

MR. KAMMERLOHR: Not with any minimum recovery. I think that's the problem with most of them, the people are not materially injured very much in these cases, so they don't even bother to bring the tort remedy because they might get a few dollars back and it wouldn't be worth them --

QUESTION: You are suggesting there be a minimum recovery even -- what? First of all there has to be a finding of liability, doesn't there? And then normally recovery is keyed to the amount of damage. You are suggesting, what, punitive damages, that a State must create a cause of action and allow for minimum punitive damages before the exclusionary rule should be reconsidered, at least with respect to that State, is that your suggestion?

MR. KAMMERLOHR: It would be a form of those, your Honor, yes, punitive damages against --

QUESTION: .. Robinson-Patman, treble damages plus attorneys fees?

MR. KAMMERLOHR: Yes, your Honor.

Of course, I am not advocating that in this case as far as the search warrant. I think this Court should not impose the exclusionary rule in cases where, as I mentioned earlier, they are searching under a search warrant.

QUESTION: No matter how inadequate a warrant?

MR. KAMMERLOHR: That's correct. I don't believe that -- unless there is some showing of collusion or fraud or something like that, or the police actually lie in their affidavit, something of that nature, perjury.

QUESTION: That's providing the magistrate is a lawyer and disconnected from the police department entirely.

MR. KAMMERLOHR: Well, that's what they are in our

case. I don't know how many --

QUESTION: But that's the situation you are talking about.

MR. KAMMERLOHR: Yes, sir.

QUESTION: He has no connection with the police at all.

MR. KAMMERLOHR: He has no connection. He is supposed to be interposed between the police and the public. I believe that if someone were to be -- if some sort of a sanction were to be imposed, it ought to be imposed on the magistrate. We should do away with the absolute protection that the magistrate has in this type of case, which I believe is a court-made rule.

QUESTION: You are suggesting that a magistrate be what, criminally or civilly liable, for doing what?

MR. KAMMERLOHR: I am suggesting that a magistrate who is grossly negligent should have some sort of liability or else his employer should, and remove the absolute immunity the magistrates now enjoy.

QUESTION: That would cut across a good deal of judicial immunity, would it not?

MR. KAMMERLOHR: It would cut across some, yes, your Honor. I believe it would be fair --

QUESTION: We have recently had some there haven't we? Several cases.

MR. KAMMERLOHR: I believe it would be one possibility at least as an alternative rather than to say that we are trying to deter the police who cannot possibly understand all of the intricacies of the search and seizure law. Also, a lot of prosecutors don't understand the intricacies of the search and seizure law.

QUESTION: You said you were going to make two points on this. You have made one now. What is your second one? You have only about two or three minutes left.

MR. KAMMERLOHR: My time got away from me, your Honor.

The other part which I strongly urge this Court to adopt was the -- I believe I can refer to the easiest and the Court will know what I am talking about -- is Mr. Justice Powell's concurring opinion in Schneckloth v. Bustamonte that the Federal courts not consider search and seizure.

QUESTION: If we agree with you on that, we needn't consider the former.

MR. KAMMERLOHR: Pardon, your Honor?

QUESTION: If we agree with you on that, we needn't consider the argument we have just made about modification of the rule.

MR. KAMMERLOHR: You need to consider?

QUESTION: We wouldn't need to consider it.

MR. KAMMERLOHR: Oh, the one I just made. Well, I

think the two could work together in some cases. It is rather a fallback position, but I think --

QUESTION: Which is the fallback position according to you?

MR. KAMMERLOHR: The first argument.

I believe that the second argument is based on the violation of the 4th amendment is connected with a colorable claim of innocence plus an opportunity to be heard in a State court and to air these issues. Now, I can't conceive right off where the second issue would need to be, but there could be a possibility, I suppose, where the petitioner is claiming that the 4th amendment resulted in him being unjustly convicted because he was innocent and he had a valid opportunity to contest it and yet it was under a search warrant. And if we didn't adopt the first issue, then he would still be able to bring it up under the invalid search warrant, in those cases only, however, because nobody here wants an innocent man convicted. I believe that's a point that should be allowed to continue, I believe everybody would agree to that, in 2254 cases.

In summary, then, I would urge the Court -- or I would say that we agree wholeheartedly with the concurring opinion in Schneckloth and with Mr. Justice Stewart and Mr. Justice Harlan in the Kaufman case, in the dissent.

Thank you.

QUESTION: You haven't mentioned Mr. Peak who came back into the act and testified that he indeed was the fellow who carried --

MR. KAMMERLOHR: Peak testified on behalf of the State against Mr. Rice.

QUESTION: And said that they had arranged that he and the -- the respondent here had arranged this booby trap suitcase that killed the policeman that you have described earlier.

MR. KAMMERLOHR: Yes.

QUESTION: You are not making a harmless error argument.

MR. KAMMERLOHR: No, your Honor.

QUESTION: I take it that your argument concedes that the Eighth Circuit opinion is a proper one based on opinions of this Court.

MR. KAMMERLOHR: No, your Honor, I am not.

QUESTION: No, you make a point in your brief that it was a valid search.

MR. KAMMERLOHR: I make some other points in my brief which I haven't argued, which I think --

QUESTION: (Inaudible)

MR. KAMMERLOHR: The Eighth Circuit indicates --

QUESTION: The Eighth Circuit opinion is out of line with anything decided here.

MR. KAMMERLOHR: The Eighth Circuit was out of line in comparing the case with Lankford v. Gelston and also with saying that the police lost their exigent circumstances argument by going for a search warrant. It's trying to take one for the other, you know, a trade-off of some type, and they did leave a cordon around the empty house, and I don't see how they can say that we lost our exigent circumstances argument.

And, thirdly, I think the court misconstrued the Hayden case by saying that the police had to have probable cause to believe that the persons they were looking for were there at the very time they entered the premises, because in Warden v. Hayden, even though they knew the persons were in there, they did not have probable cause to open the washing machine lid where they found the weapon. Nevertheless, that was sustained.

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

Mr. Cunningham.

ORAL ARGUMENT OF WILLIAM C. CUNNINGHAM

ON BEHALF OF RESPONDENT

MR. CUNNINGHAM: Mr. Chief Justice, and may it please the Court: In the assignment of duties between counsel in our case, my colleague, J. Patrick Green, from Omaha, Nebraska, was to have presented the oral argument, and he has been incapacitated yesterday by a severe attack of influenza.

I propose to deal with three points in the argument for the court and be able to respond to questions from you, and in this order: First, we think it of primary importance to deal with the question added to the grant of the petition for certiorari on 30 June last year, to wit, whether the constitutional validity of the search and seizure performed by the Omaha police under the circumstances of this case is judicially cognizable under 28 U.S.C. 2254.

Almost in identical language, on that same day, June 30th, in Powell v. Stone, the court again added that question to the grant of certiorari and asked the parties involved both to brief and to argue those questions. So I propose to deal with that question first.

Secondly, I would like to deal with the need for Federal review at lower court level of Federal constitutional questions. And by the lower court level, I mean both the United States district courts and the circuit courts of appeal, with questions presented by State prisoners under 28 U.S.C. 2254 in seeking petitions for writs of habeas corpus.

Thirdly, I would like to present arguments regarding the standards that should be used by either State or Federal courts to determine the constitutional validity of the search in this case.

Addressing myself to the first question and transmitting any discussion of the facts which I think were brought out to

some extent by counsel for the petitioner, I could deal with those in questions if the Court so desires.

QUESTION: You think there are no significantly relevant facts that have been omitted.

MR. CUNNINGHAM: I think, your Honor, when we take the record in its totality, including and placing special stress on the careful hearings, evidentiary hearings, in the Federal District Court in Lincoln, Nebraska, before Judge Warren Urbom, all of which is before the Court, that we then have the total facts of the case. But absent those two evidentiary hearings in March and July of 1974 before Judge Urbom granted the writ of habeas corpus, I think the Court would have had, had it come on direct review, an inadequate record before it. So, as supplemented, then, by those evidentiary hearings --

QUESTION: They are all in the appendix, are they?

MR. CUNNINGHAM: They are, your Honor, the relevant portions of them.

Dealing, then, with the question of cognizability that the Court has asked us to brief and argue, we have to ask ourselves whether habeas corpus should be available. This was raised, of course, in the concurring opinion in Schneckloth v. Bustamonte, and there, when Justice Powell, writing the concurring opinion, cites in footnote 16 Professor Amsterdam on certain finality interests that we are to be concerned

with in attempting to limit Federal collateral review, Justice Powell realizes, of course, that Professor Amsterdam was talking about Federal collateral review for Federal prisoners and not State prisoners.

QUESTION: That was the Kaufman case.

MR. CUNNINGHAM: Right. And Professor Amsterdam was very careful, I think, to make the point that he did not think that those considerations need apply to State prisoners in seeking Federal collateral review of their claims based upon Federal constitutional violations.

The next year, in 1965, Professor Amsterdam wrote a considerably longer and exhaustive article, Criminal Prosecutions Effecting Federally Guaranteed Civil Rights, discussing removal there, and habeas corpus petitions to avoid State court action. And I understand him to argue from that Law Review article the need there is, especially in State court proceedings, for some sort of Federal monitoring at Federal district court and circuit court level of the application of Federal constitutional standards to fact situations.

QUESTION: This question could not have arisen before the decision in Mapp v. United States.

MR. CUNNINGHAM: No, your Honor.

QUESTION: Except in a Rochin type situation.

MR. CUNNINGHAM: Yes.

QUESTION: And Mapp was decided in 1961?

MR. CUNNINGHAM: 1961, your Honor.

QUESTION: And this question couldn't possibly have arisen until then. And the Mapp opinion -- I haven't reread it recently -- was four members of the Court joined it and the fifth, Justice Black, joined it only on the basis that it involved compulsory self-incrimination rather than purely 4th amendment.

MR. CUNNINGHAM: Yes, your Honor.

But I take it that ever since then --

QUESTION: It has been solid.

MR. CUNNINGHAM: -- it has been solid, and that the circuit courts have consistently applied it and the Federal district courts, and so has this Court.

QUESTION: This problem could not have arisen, and therefore, at the earliest goes back to the decision in Mapp v. United States.

MR. CUNNINGHAM: Indeed, your Honor. Yes, sir.

QUESTION: And then there was a conflict, I gather, in one of the circuits after Mapp as to whether or not this kind of a claim, 4th amendment type claim was available on Federal habeas corpus in reviewing a State conviction.

MR. CUNNINGHAM: Right, your Honor.

QUESTION: And that was never -- it was only rather implicitly resolved in this Court, wasn't it, because Kaufman involved a Federal review of a Federal conviction.

MR. CUNNINGHAM: 2255.

QUESTION: And it was not until, what case?

MR. CUNNINGHAM: We would say, your Honor, in this Court's treatment of Linkletter, this Court took from the Fifth Circuit in 1963 a habeas corpus case, and in 1965 this Court took jurisdiction in Linkletter v. Walker and decided the case on its merits. This Court could not have taken jurisdiction if there had not been jurisdiction in the courts below.

QUESTION: Although the question the Court dealt with in Linkletter was retroactivity --

MR. CUNNINGHAM: True enough.

QUESTION: -- retroactivity of Mapp.

MR. CUNNINGHAM: True. But it was a habeas corpus case.

QUESTION: So that was implicitly sub silentio, if you will, adopted this rule by this Court without any explanation or explication or maybe realization.

MR. CUNNINGHAM: But other district courts, the district courts of appeal, for example, in Thornton v. United States, the District Court of Columbia realized the distinction there was between a Federal prisoner seeking Federal review and a State prisoner and allowing, in the opinion in that court, State prisoners should have this device of reviewing a State conviction against them.

QUESTION: Mr. Cunningham, I suppose you could turn that argument around in view of all that we have said about comity and federalism in cases like Younger and O'Shea and say that even though it's perfectly proper to have a Federal collateral review of a Federal conviction within a unitary system, perhaps the same principle ought not to obtain where you are talking about a Federal system with a Federal court reviewing a State conviction.

MR. CUNNINGHAM: I know how sensitive the Court must be to questions of comity like that, and I read your opinion ?... for the Court in Huffman v. Pursue, seeing what I could get from it. And although I read two paragraphs and a very careful footnote, I still could be led to the conclusion that your Honor decided there, writing for the Court, allowed that if indeed there would be subsequent criminal prosecution, which at that time was threatened, that if a Federal constitutional claim was in question, that the proper time to review it would have been in collateral Federal habeas corpus review of a State court conviction later on, but not to stop the process before it began.

... So I have construed Huffman v. Pursue to say at least that.

QUESTION: Well, certainly one wouldn't necessarily treat all constitutional claims the same, I suppose. That is, perhaps right to counsel and that type of thing might be

treated differently than 4th amendment. All I am suggesting is that while certainly the argument you make that it is more important when a Federal court is reviewing a State conviction than when a Federal court reviews a Federal conviction, you can say just the opposite in view of the federalism consideration.

MR. CUNNINGHAM: True enough, but I would think that it's easy to understand that the State court's primary allegiance could be to the enforcement of their own criminal law. They stand responsible to do that and to review questions of State law and their own criminal statutes, and the imposition of them in matters that come before them, correctly or not. But that Federal courts are to remove from that, if we are to guarantee supremacy of the Federal law, are better circumstanced to look dispassionately upon a question that might involve an alleged violation of Federal constitutional standards.

QUESTION: That's a statement that's been made many times, including in opinions of this Court. You are in more or less good company. But doesn't that -- on what basis can one denigrate the State courts of this country in that way to say that they don't have the same kind of understanding of the Federal Constitution or that if they understand it, they are reluctant to follow where their understanding leads? That may once have been true in parts of the country a hundred years ago. It may have even been true more recently in other parts of the country, but what basis is there for making that kind of

an assumption?

MR. CUNNINGHAM: To make such a broad indictment, I think, your Honor, would be irresponsible. I do not want to believe that a single State court judge would set out maliciously to deprive anyone of a federally guaranteed constitutional right. And yet when I look, for example -- if this Court could refer to page 117, I believe, of the respondent's brief, we attempted to -- 119, excuse me -- at footnote 5, we attempted to take the record of the State Supreme Court in Nebraska in reviewing whether or not a warrant, search warrant, was sufficient in their State Supreme Court. And the Court will note there that on a number of occasions the warrant was sustained by the State Supreme Court, that certiorari was denied on direct review by this Court, and that on Federal collateral review, the Eighth Circuit Court of Appeals had found a warrant to be insufficient.

QUESTION: That doesn't necessarily mean that the Eighth Circuit was right and the Supreme Court of Nebraska wrong, does it?

MR. CUNNINGHAM: I couldn't argue that, your Honor. But, for example, from 1961, post Mapp, when I conducted that search of cases, I find only one time that the State Supreme Court of Nebraska held a warrant to be insufficient, and that was in 1975 in State v.Kallos where there was a lapse of nine months between the facts alleged to establish probable cause and

the issuance --

QUESTION: Isn't the relevant statistic the number of times the State trial courts have held warrants insufficient? Those are probably not appealed.

MR. CUNNINGHAM: That would be difficult to find, your Honor.

QUESTION: We are dealing with very sketchy information, is what I am suggesting, when you point to one Supreme Court opinion.

MR. CUNNINGHAM: True enough, but, for example, with minute specificity in this case we see what a State Supreme Court and State lower court did with a warrant so wanting in probable cause as to leave no doubt in the mind of four Federal court judges in very careful opinion and exhaustive, painstaking evidentiary hearings to find that there simply was no basis for the warrant. It was based, quite frankly, as the officer testified, upon his speculation. That's neither reasonable, good faith, nor probable cause.

QUESTION: Your footnote that you have just referred to establishes just one thing, and that is that the Eighth Circuit is a little more final than the Supreme Court of Nebraska because it's subsequent. Does it really establish anything else at all?

MR. CUNNINGHAM: It does, I think, your Honor, and that's the point before that I was making when I said that I

would want the facts in this case amplified by what carefully was led out in testimony, sworn testimony, affidavits, with an opportunity to cross-examine in the lower district court.

QUESTION: That suggests, I gather, Mr. Cunningham, that had there not been habeas remedy available in this case and the respondent here were limited to direct review in this Court, you are suggesting, I gather, that there would have been no record upon which we could properly have evaluated the merit of the 4th amendment claim.

MR. CUNNINGHAM: Indeed, and then if we are, your Honor, to take away Federal habeas corpus review under 2254 at the lower district court and circuit court level and to impose that duty upon an already burdened Supreme Court in terms of direct review, add to that an inadequate factual presentation or record --

QUESTION: Doesn't Nebraska have a motion to suppress proceeding where you could make the same sort of factual showing that was ultimately made before Judge Urbom?

MR. CUNNINGHAM: I believe indeed there was such a hearing in this case, and I believe that the officer, or the impartial magistrate, who issued the warrant then held the hearing.

QUESTION: But he was a municipal court judge in Douglas County. That wouldn't be the judge before whom the case was tried.

MR. CUNNINGHAM: I believe there was a preliminary hearing, and that he had occasion to review the warrnat he had issued.

QUESTION: Doesn't the defendant have a right to renew the claim in the district court of the district where he is being tried?

MR. CUNNINGHAM: Yes, your Honor, and I believe at all stages of the proceedings the lawyers who were then representing him urged that motion to suppress and unsuccessfully.

QUESTION: Why shouldn't they have had to make their factual showing at that time?

MR. CUNNINGHAM: I certainly, were I the State court judge, and knowing that some sort of direct review was possible, would want to have had a complete record. But I submit that the record was only completed for one reason or another, and I know not why really, when it came to the Federal district court and Judge Urbom began to ask questions like the questions that were answered very candidly at page 54, 55, and 56 of the respondent's brief.

QUESTION: But you admit that it could have been done in the State court.

MR. CUNNINGHAM: Yes, your Honor.

QUESTION: It seems to me, in a case from -- A Nebraska case would be a Nebraska action? I don't know

whether the situation has changed. One of the problems, as I recall it, that troubled us then was that too many States did not yet have adequate collateral proceedures. As I remember it, Nebraska adopted one three or four days before a case from Nebraska was to be argued here, and I don't know how it has functioned since. Apparently from what you tell us about this case, at least in this case it hasn't functioned too effectively.

MR. CUNNINGHAM: It seems not, your Honor.

QUESTION: Well, if there has been a suppression motion, though, in the State courts and the 4th amendment issue has been once presented in the State courts, a lot of States won't let you in their collateral proceedings just to take up an issue that has already been presented to its courts. Isn't that true in Nebraska?

MR. CUNNINGHAM: Your question again, your Honor? I am sorry.

QUESTION: Suppose a suppression motion has been made and the 4th amendment issue has been passed upon by a Nebraska trial court, the claim has been rejected, and that judgment was affirmed in the Nebraska Supreme Court. State collateral proceedings are not then available, I take it.

MR. CUNNINGHAM: No.

QUESTION: And for exhaustion purposes, it isn't necessary to attempt to --

MR. CUNNINGHAM: No, not under the decisions of this Court, the respondent had a right to go --

QUESTION: Directly to Federal habeas.

MR. CUNNINGHAM: Indeed.

QUESTION: Once the State court has dealt with the issue, that is enough for the Federal claim.

QUESTION: I gather, then, from what you just said, Mr. Cunningham, the prospect is that in Nebraska we are not likely, if we are the only Federal court to review the Federal constitutional qlaim, we are not likely ever to get a record adequate to do that.

MR. CUNNINGHAM: You certainly wouldn't have in this case, your Honor.

QUESTION: That just depends on how you look at the record that's made in the State court.

MR. CUNNINGHAM: I suppose one has to think about who conducted the hearings and the length of time, the remove there was from the emoted situation --

QUESTION: Congress has established some rule as to when on Federal collateral you have a hearing, and you have to find some, supposedly find some defect in the State procedure before you proceed with a Federal hearing. But if you do find those defects, that is the bench mark for when you have a Federal hearing, isn't it?

QUESTION: Mr. Cunningham, I misunderstood you. I

thought you said you could bring the exact same questions in the State court.

MR. CUNNINGHAM: I would take it by a motion to suppress you could.

QUESTION: You would do the exact same thing.

MR. CUNNINGHAM: If you could have an evidentiary hearing.

QUESTION: Well, could you?

MR. CUNNINGHAM: I suppose so, yes, your Honor.

QUESTION: And all of that would be in the record. We would have the exact same record we have got now.

MR. CUNNINGHAM: I am not sure of that, your Honor. And I cannot be because --

QUESTION: What would be the difference --

MR. CUNNINGHAM: What accounts for the testimony, then, that led to the issuance of the search warrant which the Court has in the Appendix at page 10 and the subsequent testimony of, first, Sergeant Pfeffer, and then Lieutenant --

QUESTION: Couldn't it all be done in the suppression hearing?

MR. CUNNINGHAM: It wasn't.

QUESTION: I didn't say wasn't; I said could it. Of course it could.

MR. CUNNINGHAM: The same questions might be asked if the --

QUESTION: Is there anything in this record that couldn't have been put in on a motion to suppress?

MR. CUNNINGHAM: Other than what I would say would be the candor of the officers who testified at the evidentiary hearing and said that it was based upon speculation. It appears in the search warrant, not upon speculation, but sworn testimony furnishing probable cause.

QUESTION: Wouldn't you have sworn testimony in the suppression hearing?

MR. CUNNINGHAM: Yes, your Honor, but reviewed by a State court not by a Federal court.

QUESTION: It would be reviewed by this Court.

MR. CUNNINGHAM: If you had an adequate record before you.

QUESTION: Well, I'm saying could you or could you not have an adequate record?

MR. CUNNINGHAM: If they gave candid answers, your Honor, yes.

QUESTION: Why do you assume the answers would be more or less candid before a United States district judge as compared with a State court judge of Nebraska? Doesn't this depend on the lawyer more than on the judicial officer?

MR. CUNNINGHAM: Perhaps to some extent, your Honor, and the thoroughness with which he conducts an examination, and yet I note that in answer to a question by Judge Urbom, the

officer who had before furnished the information which led to the issuance of the search warrant said, in answer to this question: Did you have any report from anyone that Duane Peak was then inside the Rice house or had been inside the Rice house that day? This is at page 54.

His answer: No, sir. The only thing we had was a speculation because it was a known house of that particular group and he was a member of that group and it was a place where he might possibly be.

That is so wanting in good faith, reasonableness, or probable cause that I think it took everyone by surprise at that hearing.

QUESTION: What you are really suggesting is that Judge Urbom's cross-examination was a little more effective than the defense counsel's cross-examination in the State courts.

MR. CUNNINGHAM: Precisely, your Honor.

QUESTION: But does that go to the system or to the subjective factors of the idiosyncrasies and talents of the lawyers?

MR. CUNNINGHAM: It may have been an accident of history or chance in this particular case, but nonetheless, upon questioning, that answer was elicited from this officer.

QUESTION: What page were you reading from?

MR. CUNNINGHAM: Page 54, your Honor.

QUESTION: Of your brief.

MR. CUNNINGHAM: Respondent's brief.

QUESTION: If that judge had been on the State court, everything would have been all right. Right?

MR. CUNNINGHAM: And if he elicited that question and that answer, your Honor.

QUESTION: It would have been all right. It depends on where the judge is.

QUESTION: Does it not also follow that if this hearing had had the same scope in the State proceeding, maybe the State Supreme Court would have decided the case the same way the Eighth Circuit did. We really don't know, do we?

MR. CUNNINGHAM: We don't. No, we would have to speculate on that, your Honor.

QUESTION: May I ask, Mr. Cunningham, going now only to the system, assuming the adequacy and everything else of the State proceeding, if the only Federal court -- the only Federal court -- to review the Federal constitutional claim is this Court, if that's the system, what bearing, if any, does the nature of our discretionary jurisdiction have on its adequacy as a system?

MR. CUNNINGHAM: I would, if sitting where you were, be terribly worried that I would have inadequate records before me, that already pressed by work I would be pressed by more work, that I might by a decision take up jurisdiction that

has been given by the Constitution to Congress, that I would have to make a break with four or five decisions passed down by this Court and relied upon by countless litigants, and that anything so cataclysmic changing the scope of habeas corpus could better be done by well-considered programmed legislation dealing with all those things. If Congress wants to change the scope of habeas corpus in the hearing in lower Federal courts that this Court, Congress, and the Constitution seem to guarantee and has up until this point, then it should be done by Congress.

QUESTION: The own articulated premise of your whole position, I take it, must be -- you tell me if that's not so -- that the case presented by this record where a man who has set a booby-trap with dynamite in a suitcase in pursuit of his own objectives, obviously criminal, if we believe this record, is to get off scot free and that that is an appropriate price to pay for mistakes in a warrant application or in the granting of that application by a judicial officer in Nebraska, that that's a reasonable and appropriate price to pay and that that's the only way that we can accomplish that result.

Is that a fair statement of what underlies your position?

MR. CUNNINGHAM: I would not say that. I would say in answer to that, you have touched upon the point raised initially in Justice Powell's concurring opinion in Schneckloth

which is is there a colorable claim of innocense? The State of Nebraska has said that no claim, much less colorable, had ever been made by the defendant, the respondent in this case, in any real way. That has been a matter of tremendous concern to him and to his lawyers.

Justice Powell, in the concurring opinion in Schneckloth says, at page 257, that guilt or innocence had never been part of the consideration, the proper consideration, in granting habeas corpus or not. And at page 115 and 116 of the respondent's brief, we discuss the repeated attempts, and especially in the fourth footnote at those pages, the repeated attempts by the defendant to claim his innocence. There is in the record before this Court a confession to that suitcase bombing by Duane Peak who later recanted his confession and then named David Rice and Edward Poindexter who happened to be the president and minister of information of the local Black Panther Party.

QUESTION: And he testified against them in the trial.

MR. CUNNINGHAM: And he at that time was under first degree murder charges and subsequent to the trial saying that no deal had been made was treated as a juvenile delinquent and has not been seen since.

QUESTION: He was 15 years old at that time, was he not?

MR. CUNNINGHAM: Correct, your Honor.

QUESTION: Now, taking the whole record, however, as it was accepted by the jury and in the trial court, is it not a fair statement that this man, to adopt Justice Cardozo's statement, is to go free because the constable blundered? Or is that not fair?

MR. CUNNINGHAM: I am familiar with that from People v. DeFore, your Honor, but I would say that the man is not to be imprisoned if the trial at which he was tried was wanting in Federal constitutional guarantees, if the trial was unfair. In July of 1974, the district court in Lincoln said that he must be retried or let go within 90 days. All of those mandates were stayed by the Eighth Circuit. The Eighth Circuit court affirmed. And so for 19 months the petition for habeas corpus has been granted and we know that this man has in the judgment of four Federal court judges been tried unfairly, that the issue then --

QUESTION: Unfairly by the standards that have existed up to this time on the exclusionary doctrine.

MR. CUNNINGHAM: Indeed, your Honor.

QUESTION: But if the fundamental proposition of the validity of the exclusionary doctrine is found and determined now not to be warranted by the Constitution, then the ball bounces the other way, doesn't it?

MR. CUNNINGHAM: Yes, your Honor, that's --

QUESTION: Or in the alternative, what the Attorney General described as one of his alternative positions, if that's an issue that cannot be raised in Federal habeas corpus at all, then a contrary result follows.

QUESTION: Mr. Cunningham, in line with the comments of the Chief Justice, is it your view that the exclusionary rule is compelled by the Constitution?

MR. CUNNINGHAM: It's judicially created, of course, your Honor, and it gives effect to the 4th amendment. I believe it's compelled.

QUESTION: You don't think the Congress could change it.

MR. CUNNINGHAM: If Congress is going to take it away procedurally by denying Federal habeas corpus, then I think that that's for Congress to do. But I think that for example when a court allows evidence to be placed before it that they know has been seized in contravention of the Constitution, that we approach something very much like Shelley v. Kraemer, that the State, if it be a State prosecution, is in some way in complicity in allowing illegal activity to become the basis for a prosecution.

QUESTION: I take it you disagree with what we said in Calandra with respect to the Constitutional status of the exclusionary rule.

MR. CUNNINGHAM: Yes, your Honor.

QUESTION: And it's your view that the Constitution requires that that rule be enforced wholly without regard to the circumstances however technical the violation of the 4th amendment may be.

MR. CUNNINGHAM: As a general proposition, yes. But even in the --

QUESTION: In any and all circumstances the Constitution requires that evidence illegally seized because of defective warrant or otherwise cannot be employed or admitted in the trial.

MR. CUNNINGHAM: I think that's the only realistic thing because --

QUESTION: Is there any basis in that in the history of our country prior to Mapp, any basis whatever?

MR. CUNNINGHAM: Unless it be Shelley v. Kraemer in which we do not want the court acting through its judicial arm --

QUESTION: Mr. Cunningham, there was another opinion in Calandra that suggested what you just stated is your --

QUESTION: Well, Mapp itself certainly suggested your answer. It couldn't have been decided the way it was unless it was constitutional, although prior to Mapp, as my brother Powell implied in his question, under the regime of Weeks v. United States it was always thought to be ministerial rule of evidence.

MR. CUNNINGHAM: But this Court has in no --

QUESTION: In Mapp it was made constitutional. It had to be or it could not have been imposed upon the States. It had to be something beyond this Court's supervisory power.

MR. CUNNINGHAM: And in the decisions in Katz began to --

QUESTION: Incidentally, doesn't the Safe Streets Act -- of course, it's congressional, but hasn't Congress enacted the exclusionary rule in the Safe Streets Act both as to violations of the Act by State officials as well as by Federal officials?

MR. CUNNINGHAM: I would think so.

QUESTION: Mr. Cunningham, if your rationale is the correct one, that is, the Shelley v. Kraemer approach, can you possibly justify a limitation on standing, have it only the defendant who can raise the issue? Wouldn't it be necessary under that rationale that the point be available to the defendant even though it was some third party's rights who are invaded by the search?

MR. CUNNINGHAM: Indeed, in this case, your Honor, the codefendant of David Rice has sought now unsuccessfully in the lower Federal district court before the same Judge Warren Urbom to raise the point about the unconstitutionality of the search. And Judge Urbom has held that he did not have the requisite standing to raise the issue over the introduction into evidence in a common trial against him of that evidence.

QUESTION: Even though that holding may be correct

under Alderman, it would be inconsistent with your analysis, I guess.

MR. CUNNINGHAM: Yes, your Honor.

QUESTION: One question, Mr. Cunningham. You suggested, I think, that the exclusionary rule had something to do with a fair trial, and I think that some of my colleagues implicitly accepted that suggestion that at least so long as the exclusionary rule existed, it had something to do with a fair trial. Do you really think so? I've never understood so. I always thought it had to do with quite a different constitutional value, i.e., enforcement of the protections of the 4th amendment which by their terms had nothing to do with the trial, fair or unfair, they have to do with unreasonable searches and seizures. And insofar as probative,relevant, material evidence is excluded from a trial, it leads to unfairness rather than fairness, doesn't it? Because anything that impairs the search for truth impairs the search for justice, and certainly any rule that excludes relevant, material, probative evidence impairs the fairness of a trial because it impairs the full disclosure that a trial is supposed to accomplish, doesn't it?

MR. CUNNINGHAM: Your Honor, I would not want to read the 4th amendment just by itself. I would want to include the 5th amendment as well, and say that the fairness of the hearing is going to be measured not just by whether or not there has been a technical 4th amendment violation, but whether or not

the whole trial, including the introduction into evidence, the opportunity to cross-examine the people who introduce the evidence, and all the procedural safeguards --

QUESTION: What part of the 5th amendment? The compulsory self-incrimination part of it?

MR. CUNNINGHAM: Or due process, your Honor.

QUESTION: Which?

MR. CUNNINGHAM: Both.

QUESTION: Certainly the Eighth Circuit didn't make any finding that there had been any independent 5th amendment violation.

MR. CUNNINGHAM: No, your Honor, just a straight violation of the 4th amendment.

QUESTION: Are you contending that they should have made such a finding?

MR. CUNNINGHAM: I think their opinion as it stands is perfectly adequate.

QUESTION: Just to go back, I thought the whole point of the Linkletter -- or at least a big part of the point of the Linkletter opinion was that the exclusionary rule didn't have anything to do with the fairness of the trial, and insofar as it did have anything to do with the fairness of the trial, the exclusionary rule impaired the fairness of the trial. Wasn't that the point of the Linkletter opinion in saying that the Mapp rule was thought to be retroactive?

MR. CUNNINGHAM: Yes, your Honor, but I cannot see that the introduction into evidence in any proceeding, State or Federal --

QUESTION: Of relevant, probative, material evidence, that would clearly be admissible except because of the way it was obtained by the prosecutor?

MR. CUNNINGHAM: Yes, because I regard, your Honor, the totality of the process, including the trial and subsequent appeals, all of them, whatever allowed, to be part and parcel of the whole process to determine guilt or innocence. Until that course be run, we do not know whether we have something that's relevant or irrelevant to that issue.

QUESTION: Mr. Cunningham, Mr. Justice Stewart has given voice to one view -- I won't undertake to say whether it's the majority view or not -- of the function of a trial, that is, a search for truth. But are you not by implication articulating the contrary view that a trial in a criminal case is a search for admissible truth -- admissible truth -- not truth in the abstract?

MR. CUNNINGHAM: Your Honor, I would want to say that any legal proceeding in its best aspects is precisely a search for truth.

QUESTION: Well, if you accept that, then accept then one of these two alternatives, then surely you must agree with Mr. Justice Stewart that the exclusionary rule frustrates

defeats the search for truth, as this case so richly demonstrates.

MR. CUNNINGHAM: If the subsequent hearings had not been held in this case and the Federal court had not had revealed to it the real circumstances that lay behind the issuance, the application for an issuance of the search warrant, we would have no check upon this whole procedure. And I cannot believe that the State --

QUESTION: A check then on procedure, not on substance. It is a check on procedure to see to it that the only evidence that comes in is evidence acquired in accordance with the Constitution as construed by this Court.

MR. CUNNINGHAM: Yes, your Honor.

QUESTION: So that as a result ultimately Justice Cardozo's prophecy came true that on some occasions the Federal courts have excluded the actual evidence of the body of a murder victim because of the way in which the police learned of the location of the concealed body. Is that not true?

MR. CUNNINGHAM: That has happened, your Honor, and I think the Eighth Circuit Court of Appeals faced that issue squarely at the end of their opinion when they said that, "We consider it necessary to point out that the record discloses a widespread search for the suspects Peak and Poindexter which evinced at least a negligent disregard by the Omaha police for constitutional rights of not only petitioner, but possibly other citizens as well. Such a police search is at least reminiscent

of police conduct condemned in Lankford v. Gelston.

QUESTION: What does that have to do with the core of this case?

MR. CUNNINGHAM: I think, your Honor, they said that though they found evidence, some evidence of guilt, the whole procedure, because of the introduction of this evidence on an invalid warrant invalidated the whole proceeding, and that in order to be fair, one has to go back and try the case without the introduction into evidence of this illegally seized evidence.

QUESTION: Of the dynamite and the caps and all that sort of thing.

MR. CUNNINGHAM: Yes, sir. It is entirely possible that that dynamite could have been planted.

QUESTION: How about the dynamite fragments in the cuffs of his pants, was that planted, too?

MR. CUNNINGHAM: It could have been, your Honor.

QUESTION: That's quite a different question whether it was illegally seized. I mean, there is no connection between the claim that it might have been planted and the claim that it was illegally seized.

MR. CUNNINGHAM: Corroboration was necessary for an admitted accomplice in the murder, Duane Peak, and corroboration was found in what later proved to be, according to the district court and the Circuit Court of Appeals, an illegal and unconstitutional search. But it furnished the

corroboration for the State court in affirming the conviction. Quite simply corroboration is needed for Duane Peak, and it came as a result of an illegal search.

QUESTION: Mr. Cunningham, I hesitate to detain you, but this is a very important case and you are very well prepared and are arguing it very well, indeed. I want to come back to a question I asked you as to whether Congress had authority to change the exclusionary rule, which you view as required by the Constitution.

If I understood your answer correctly, you said that Congress could change the habeas corpus jurisdiction of the Federal court. I myself don't think it's necessary to do that for this purpose, but put that aside, are you saying that Congress had no authority to modify in any respect or to revoke the exclusionary rule in the Federal courts?

MR. CUNNINGHAM: I believe, your Honor, I would have to say that they had the power to do that.

QUESTION: Why?

MR. CUNNINGHAM: Would they have to --

QUESTION: If it's a constitutional requirement.

MR. CUNNINGHAM: My question is, would they have to amend the Constitution to do it.

QUESTION: Well, Congress can amend the Constitution. You are saying there would have to be a constitutional amendment to change a judge-made rule that was not even

extended to the States until 1961.

MR. CUNNINGHAM: And this Court's decisions putting it as part and parcel of the 4th amendment.

QUESTION: And you find all of this in the language of the 4th amendment? Nowhere else, is it?

MR. CUNNINGHAM: No, your Honor.

QUESTION: Well, it's in Mapp v. Ohio.

MR. CUNNINGHAM: In other decisions of this Court and the extension of the right of privacy, too, under subsequent decisions.

QUESTION: It's in the opinion of four Justices at that time, but more than four since then have said it is not a constitutional requirement -- in Calandra, for example.

MR. CUNNINGHAM: Yes, your Honor.

QUESTION: Of course, if it is a constitutional requirement, I suppose it's really no different than the right of counsel which has developed over the years. That's also constitutionally compelled, isn't it?

MR. CUNNINGHAM: As well as other constitutional rights that were taken from the Bill of Rights -- the right to privacy, the right to freedom of association, things like that that the Court has seen and interpreted from the Constitution.

One final thing I would be --

QUESTION: Do any of those rights deprive the trial of facts in litigation, an opportunity to consider the most

relevant evidence on the issue of truth, which you say is the object of trial? Do any of these other -- which ones?

MR. CUNNINGHAM: Converstion. Both.

QUESTION: The right to counsel does not.

MR. CUNNINGHAM: I think in Katz, for example, when we said that the evidence might have been tremendously relevant but there was a rightful expectation of privacy and although there had not been a physical intrusion, that right of privacy was sufficiently broad to be protected by the introduction of admittedly relevant evidence. So, too, in this Court's decision in Rochin v. California. Everyone knew that he had illegally possessed morphine in his stomach. It was the way they went about getting it that shocked the conscience of the Court and led us to say that due process guarantees at least that kind of a proceeding free from that kind of taint --

QUESTION: Search for ---

MR. CUNNINGHAM: Beg pardon?

QUESTION: The search for truth is really not always the objective, the primary objective in litigation in our courts.

MR. CUNNINGHAM: Though it should be, your Honor. Though it should be.

QUESTION: Very often trials devote more time to trying the police than they do the defendant, is said by a number of people.

MR. CUNNINGHAM: An unfortunate distraction, but to leave them less than wholly cross-examined, I think, would be sort of remiss, too.

QUESTION: Mr. Cunningham, your reference to Rochin inevitably brings up the question of the Schmerber case where it did not shock the conscience of the court to put a needle in the man's veins and withdraw a sufficient amount of blood to determine the alcoholic intake of the man at that period.

Does that not suggest that even at the risk of oversimplification, that the same processes which brought new light on the Constitution, let us say, 20 years ago might bring new light on the Constitution today?

MR. CUNNINGHAM: Indeed. The Constitution, I think, must continue to grow and to be interpreted. I remember Justice Douglas in an answer in a colloquy over a paper called "Two Faces of Federalism" saying that he found it difficult to describe due process, but Justice Holmes had approached it one time in a letter, not in an opinion, in which he said if what happened generally makes you want to vomit, it's usually a deprivation of due process of law. But some have stronger stomachs than others.

QUESTION: Didn't Schmerber, the opinion in Schmerber reserve the situation of procedures which would want to make you vomit?

MR. CUNNINGHAM: Right. Exactly. And if medical

science has advanced to the point where we can take from a person unconscious a sample of blood and achieve some sort of evidence, then perhaps we had a tolerance for that at that time and may not later.

The only thing I would like to say, your Honor, and I know that we have had ample time here, is that if this Court sees fit either to cut down the extent of the writ of habeas corpus, the reach of it, and if they see fit or see fit to adopt new rules for search, reasonableness, good faith of the policeman, whatever it may be, if the Court does this, my client must not be penalized for taking the decisions that were the law at that time seriously, nor must the Eight Circuit Court of Appeals be penalized for taking the decisions of this Court seriously, because a proceeding has been conducted, and to now tell him at this stage of the game that he has pursued the wrong avenue --

QUESTION: We don't regard it as a penalty when we reverse another court, Mr. Cunningham. I am sure all judges welcome the ultimate justice.

MR. CUNNINGHAM: Yes, your Honor.

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

Mr. Kammerlohr, you have about six minutes left.

REBUTTAL ARGUMENT OF MELVIN KENT KAMMERLOHR

ON BEHALF OF RESPONDENT

MR. KAMMERLOHR: First I would like to point out that

even though counsel claims, and Mr. Rice makes some claims of innocence, what Mr. Justice Powell is talking about and Mr. Justice Black and Harlan and Stewart in the Bustamonte case and the Kaufman cases was a claim under the 4th amendment, we are talking about the 4th amendment, that if habeas corpus were allowed in the 4th amendment, it would reveal a colorable claim of innocence, then they should preserve it in those cases, but not a claim of innocence based on something not under the 4th amendment. I believe that's the suggestion of those opinions.

QUESTION: Mr. Justice Harlan advocated the claim of innocence position in Kaufman?

MR. KAMMERLOHR: No.

QUESTION: I don't think that's correct.

MR. KAMMERLOHR: I believe he didn't .. that. He didn't lend it to that at least.

QUESTION: I think he more than that (inaudible)

MR. KAMMERLOHR: I am just suggesting it means a claim of innocence under the 4th amendment, not a claim of innocence, say, for insufficient evidence that the jury has already ruled against them, which is what he is arguing here that maybe the jury was wrong. But that wouldn't be remedied any by a 4th amendment claim in habeas corpus.

Another point I would like to point out to the Court, the motion for suppression in this case was handled by the

State district court, not the magistrate who issued the search warrant. The magistrate issued the search warrant, then the case came to the trial court level, which is a jury trial level in Nebraska, and the motion was made in that trial court, the same court who later held the trial, same judge.

QUESTION: Under your Nebraska practice, the custom is to make the motion before trial.

MR. KAMMERLOHR: Yes, your Honor. Separate hearing.

QUESTION: Not at the time there is a proffer of the evidence.

MR. KAMMERLOHR: That's correct.

QUESTION: Although I suppose it could be done at the later time, too.

MR. KAMMERLOHR: We have a procedure for interlocutory appeal from the motion to suppress to the State Supreme Court, and then I believe it can still be, I'm not certain if it can still be brought up at the time of trial. I would certainly think so.

QUESTION: But the custom is to file the motion to suppress before the commencement of the trial.

MR. KAMMERLOHR: That's correct.

QUESTION: And that hearing is before the judge who is going to try the case?

MR. KAMMERLOHR: Yes, generally speaking.

QUESTION: Or at least one of the judges --

MR. KAMMERLOHR: It has to be one of our district court judges.

QUESTION: Mr. Kammerlohr, I think, as I recall a case in Nebraska, Nebraska adopted a counterpart of 2255 as its post conviction procedure, did it not?

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: Is that still the one?

MR. KAMMERLOHR: That's still the one we have.

QUESTION: And in this case could there have been a proceeding under that remedy after the Supreme Court affirmed the denial of motion to suppress?

MR. KAMMERLOHR: Not concerning the search warrant.

QUESTION: Not.

QUESTION: Because it had been considered on appeal or because the State doesn't have a counterpart of the rule of the Kaufman case. Does the State say we are not going to consider 4th amendment type claims on collateral?

MR. KAMMERLOHR: No, it would be because the Supreme Court of Nebraska had already decided the issue.

QUESTION: And your collateral remedy, State collateral remedy, is limited to new questions.

MR. KAMMERLOHR: New questions, which have not been before the court. Now, they might have brought up the search without the warrant in collateral proceedings. They did not.

QUESTION: What you are saying is the Supreme Court

decision on the issue was res judicata.

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: And that as a consequence of that, the collateral attack is barred on traditional grounds.

MR. KAMMERLOHR: I believe that's what would happen if someone brought back in the district court a collateral proceeding, the district judge would merely say this has all been decided by the State Supreme Court.

QUESTION: Generally in habeas corpus you don't have Federal habeas corpus, you don't have res judicata, nor in 2255 -- a 4th amendment claim might have been made in a Federal district court and considered by the United States Court of Appeals, nonetheless, unless I am mistaken, the remedy under section 2255 is available to reconsider that claim, is it not?

MR. KAMMERLOHR: Even though --

QUESTION: The Kaufman rule.

MR. KAMMERLOHR: Under the Kaufman case, if the identical question had been to this Court and ruled --

QUESTION: To a United States Court of Appeals where the conviction was affirmed. We are getting pretty far afield.

MR. KAMMERLOHR: I don't see how he could.

QUESTION: Tell me, what is the Nebraska rule if there had not been a motion to suppress it at the criminal trial? Could the defendant raise the issue in a collateral proceeding in the State court, the 4th amendment question?

MR. KAMMERLOHR: Yes, sir.

QUESTION: You say it's the fact that there was actually the question litigated that forecloses it.

MR. KAMMERLOHR: At least, Judge Urbom -- you are correct it was actually litigated. Now, the other question, the search without the search warrant which I brought up in the State Supreme Court was not litigated there because they held the search warrant was valid. But Judge Urbom said the fact that we briefed it in the State Supreme Court was sufficient exhaustion in Federal court, which I disagree with also.

QUESTION: Mr. Cunningham seemed to assume and was under the impression that the magistrate who issued the warrant was the same judicial officer who passed on the suppression motion. You say that is not correct.

MR. KAMMERLOHR: That's incorrect.

QUESTION: Well, in a complex matter like this, it seems --

MR. KAMMERLOHR: Another point that Mr. Cunningham brought up which highlights the bad part of having a Federal habeas corpus proceeding years later is that when the evidentiary hearing was held before Judge Urbom, it was some four years after the fact and the evidence is not clear at that time in the officer's mind. They had hundreds of cases probably since the time. And one Lieutenant Perry testified at that evidentiary hearing four years later that Donald Peak had told them before

they went to the Rice premises that the bomb was constructed there at the Rice premises and that Duane, his brother, had told him this.

Judge Urbom was doing the questioning, and he said, "How do you know this?"

He said, "I was present when Officer Foxall interrogated Donald Peak."

And Judge Urbom then looked on a sheet they have at the police station that shows who was present at the interrogation and Lieutenant Perry's name did not appear on there. Judge Urbom arrived at the conclusion that Lieutenant Perry was perjuring himself. And I think he put a lot of weight on this. And this is just one of the bad things that happen by -- I say Lieutenant Perry might have learned about it in a number of ways and forgot how he learned about it, and didn't necessarily perjure himself.

QUESTION: But you agree when there has been a suppression hearing in the State court and a record made and the motion to suppress denied, that a Federal habeas corpus court is not supposed to hold a hearing of its own unless, as the statute requires, it finds some defect in the State court proceeding.

MR. KAMMERLOHR: Yes, your Honor.

QUESTION: And what defect did Judge Urbom find in the State court's suppression hearing?

MR. KAMMERLOHR: He didn't --

QUESTION: He must have found something --

MR. KAMMERLOHR: He got into it on the search without a warrant issue, without a search warrant issue.

QUESTION: He shouldn't have held a hearing unless there was some --

MR. KAMMERLOHR: He didn't hold an evidentiary hearing on the search warrant issue. Once he found the search warrant was invalid, the affidavit for the search warrant was invalid, then he raised issues that nevertheless the police had a right to be on the premises. Then he held an evidentiary hearing on that question.

QUESTION: There had never been a hearing on that in the State court.

MR. KAMMERLOHR: No, your Honor. The Supreme Court never reached that.

QUESTION: So you are really not saying -- you really can't be saying that he was retreading ground that the State court had gone over because it had never gone over that ground.

MR. KAMMERLOHR: No, I am merely saying that it shows that the police officers' memories may get kind of dim after four years.

Thank you, your Honors.

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

Thank you, Mr. Kammerlohr.

The case is submitted.

(Whereupon, at 12 noon the oral argument in the above-entitled matter was concluded.)