In the

Supreme Court of the United States

PETER C. ANDRESEN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

No. 74-1646

Washington, D. C.
February 25, 1976

Pages 1 thru 68

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STATE OF MARYLAND,

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Washington, D. C.,

Wednesday, February 25, 1976.

The above-entitled matter came on for argument at 11:08 o'clock, 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 PAUL STEVENS, Associate Justice

APPEARANCES:

PETER C. ANDRESEN, ESQ., 3514 Plyers Mill Road, Kensington, Maryland 20795; pro se.

JOHN F. OSTER, ESQ., Deputy Attorney General of Maryland, One South Calvert Building, Baltimore, Maryland 21202; on behalf of the Respondent.

A. RAYMOND RANDOLPH, JR., ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Peter C. Andresen, Esq., pro se for the Petitioner	3
Jon F. Oster, Esq., for the Respondent	28
A. Raymond Randolph, Jr., Esq., for the United States as amicus curiae	52
REBUTTAL ARGUMENT OF:	
Peter C. Andresen, Esq., pro se for the Petitioner	64

[Afternoon Session - pg. 36]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-1646, Andresen against Maryland.

Mr. Andresen, you may proceed whenever you're ready.

ORAL ARGUMENT OF PETER C. ANDRESEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ANDRESEN: Good morning, Mr. Chief Justice, and may it please the Court.

MR. CHIEF JUSTICE BURGER: Good morning.

MR. ANDRESEN: Initially, Your Honors, I would like to set the scene involved in the search and its fruits which are complained of in this petition.

There existed between Petitioner and a local bank a dispute as to application of payments which were forwarded to the bank to extinguish a particular lien, which encompassed several properties in a subdivision in Montgomery County.

It was the basis of this dispute that provided the hearsay evidence and information upon which the affidavits of the police officers were based, which was used to obtain the search warrant to search the Petitioner's offices.

Now, the dispute arose because the indebted party, for whose benefit the payments were being forwarded to the bank, was the debtor on two separate debts, one of which was a lien debt, the other of which was a personal debt. And although the checks and their accompanying letters and releases,

which were mailed to the bank in each instance or forwarded by messenger, stipulated that the money was to be applied to a particular debt, the bank instead was applying the money to the personal rather than the secured debt.

Now, this came to light later in a civil case involving the same subject matter, which it was held that the bank was erroneously doing so, and in fact the lien complained of had been extinguished some months prior to the acts complained of which led to the search.

However, this was the scene upon which the information was related to the investigators who swore to the affidavit contained in the warrant upon which the circuit court judge issued and found probable cause and issued the search warrant.

Now, the warrants -- there were two in number -- called for the search of Petitioner's law offices and also another office which was occupied jointly by Petitioner for storage of his files and with some corporate offices, of which the involvement is not completely clear but that Petitioner did have some involvement.

There were two separate warrants, based upon the same affidavits -- or the majority of the affidavits were the same; I think one of the affidavits had some additional information -- that was, the search of the corporate offices, had some additional information to establish that Petitioner's legal files were mainted in storage and that some of his

employees did work in part of that office.

Now, the law office itself -- picture, if you will, a reception room with a secretary and other chairs and one desk, a large office-type room which was entered into through the reception room contained several file cabinets along one wall, completely lining one wall, other file cabinets, approximately five to seven desks with their contents, piles of papers on each of these desks, a conference room, and two lawyers' offices in which there were bookcases containing papers, credenzas with papers, desks completely -- average legal office; papers strewn everywhere and contained in every desk drawer.

The auxiliary office, which contained even more files, and title files, was occupied in part by Petitioner and his law clerk and used for reference to these files when preparing title abstracts, information because Petitioner was a title attorney, and heavily engaged in not only real property practice but handling transfers of real estate in Montgomery County.

Petitioner had handled, at the time of the search, according to his files, over 5,000 property cases since he had conceived his practice, all of which files were maintained in these two locations.

Now, some of the files were very voluminous, some of the transfers were dependent on prior transfers and there-

fore the files were not so voluminous. But the files comprised so much space that even though Petitioner's office was a 1200 or 1400-foot category, and in the neighborhood of five to seven employees besides himself, that he had to have additional space in order to store the balance of the records.

That is the scene upon which the officers entered with the warrant.

The affidavits contained in the warrants contained mostly interviews with individuals and the results of these interviews. And in Part 2 of the petition, Petitioner complains that because there were no direct observations or personal knowledge as to the things sought in the affidavit, that it was necessary for the affidavits to spell out reasons why the hearsay evidence was reliable.

We maintain that there was no such information contained in the affidavit, that the information was sought and obtained from individuals who were involved with the Petitioner in the dispute which I earlier recited to the Court. As a matter of fact, one of the investigators, at page 36 of the brief, says that he knew at the time of the affidavit that the bank officer had told him that he had received the payments complained of but had in fact applied them to another debt.

QUESTION: You're referring to page 36 of your brief?

MR. ANDRESEN: Yes, sir.

QUESTION: And, Mr. Andresen, where is the affidavit briefed in these papers, in one of these appendices?

MR. ANDRESEN: In the appendix, yes, sir.

QUESTION: Appendix to the petition?

MR. ANDRESEN: Right. Second appendix.

QUESTION: The appendix to the petition for certiorari or to the --

MR. ANDRESEN: Yes, sir -- no, to the brief on the merits. Beginning at -- the Application and the Affidavit begins at page A.97, which is one of the first pages --

QUESTION: A.97.

MR. ANDRESEN: Right.

QUESTION: I have it. Thank you.

MR. ANDRESEN: It's a very lengthy application, going on for several pages.

But the important thing that we intend to point out at this part of the argument is that the information was not fully set out to the issuing judge; in other words, he was only presented with the disputed information on the side of the dispute that the officers chose to side. And that this information was unreliable.

QUESTION: Well, are you suggesting that an application for a warrant must contain a balanced presentation of the facts?

MR. ANDRESEN: I think it must present all the facts, Your Honor. Instead of withholding facts which are pertinent to the issues, such as these officers did, as they admitted under cross-examination.

QUESTION: Well, that's -- I wasn't directing it to withholding of facts. But it's your view that it must present both sides of the question.

MR. ANDRESEN: If it's important to the issues, yes, sir.

And again the Court of Special Appeals felt that it was not necessary to provide information as to why the sources were reliable, because they were thought to be disinterested citizens. However, as I stated, they could hardly be considered disinterested citizens when they were deeply involved in the complained-of problem, and that the allegations were later proven to be false or erroneous.

Next I'd like to turn to the warrant itself, which appears at page -- beginning at page A.94.

On page A.95 is set forth the descriptive phrase of the things sought to be seized. And, if I may, it begins, towards the end of the first paragraph, saying "the following items pertaining to" a particular piece of property.

Then the warrant sets forth virtually every type, that is, general category, of paper or document in existence in anyone's files or papers that could possibly relate to any

particular source: memoranda, settlement statements, memoranda, correspondence, disbursement memoranda, et cetara, et cetera, et cetera.

And all books, records, documents, papers, memoranda and correspondence, showing or tending to show a fraudulent intent, and/or knowledge as to elements of a certain crime of false pretenses.

And then the final sentence is "together with other fruits, instrumentalities and evidence of crime at this time unknown."

QUESTION: The word "time" is supposed to be in there; it isn't in my copy on page A.96. Mine just says "at this unknown".

MR. ANDRESEN: Yes, sir; the word "time" should appear. That's a typographical error.

Now, it's maintained by petitioner that the general language as to the types of papers sought was as general as the warrant struck down by this Court in Stanford vs. Texas.

In Stanford, Mr. Justice Stewart, speaking for the Court, used the terms, when referring to books and papers that contain ideas or thoughts expressed, that they must be described with, I quote, "the most scrupulous exactitude."

Now, we maintain that the description as set out was very similar to that used in Stanford --

QUESTION: In Stanford, you had some First Amendment

implications, though, didn't you?

MR. ANDRESEN: Yes, sir.

QUESTION: Wasn't that a book store search?

MR. ANDRESEN: Yes, sir, Your Honor. There were several books seized in that particular search.

In the language, and also the language used in the warrant set out in the Vonder Ahe vs. Howland case, which is set out in the brief, by the warrant struck down as being general.

When referring to papers, it's not sufficient to just describe every kind of paper. When we say letters, books, memoranda, it is not particular nature as to the item sought to be seized. And then especially when you add the language of other evidence of crime "at this time unknown". This means that the officers were empowered by this warrant to use their judgment, to make legal conclusions, arrive at decisions as to what should be seized and what should not be seized. Especially when they even had the authority to seize evidence of crimes that they didn't even know about at the time that they entered the premises.

And one must also look at the extent of the search. In Stanford, the search comprised approximately five hours. In the instant case, there were two offices being searched simultaneously, and comprised approximately five to six hours.

QUESTION: Two different lawyers' offices, or two

offices in this suite of offices?

MR. ANDRESEN: No, sir. One whole suite of offices, plus at another location there was a small office that was containing an overflow of files, where --

QUESTION: Also belonging to this petitioner?

MR. ANDRESEN: Right, sir.

QUESTION: In the same community?

MR. ANDRESEN: Just a couple of blocks away.

QUESTION: A couple of blocks away. Thank you.

MR. ANDRESEN: Now, in Stanford, the officers carried away approximately 2,000 books and pamphlets. Now, in Petitioner's case, the papers were never counted. Nobody ever, in the record, expressed how many papers were seized. We come upon a lot of different expressions as to the description of the amount of papers seized.

That's because Petitioner feels they were many more than could be readily counted.

Now, at one point, the prosecuting attorney stated -- at page 372 of the transcript of motions -- that the papers comprised three file cabinet drawers full that were seized. In other words, the officers, in carrying away boxes, the type of cartons you get in the grocery market with them, carried away papers that when they got back to the office with them they filled up three file cabinet drawers.

I measured one of the file cabinet drawers. It was

28 inches deep. I also measured a stack of papers, and I found 240 pages in each inch of papers: so the 28 inches in the file cabinet drawer would handle between 6 and 7 thousand papers; and three drawers, then, would be in excess of 20,000 papers which were carried away.

Most of these papers were enclosed in large files, which were anumerated as to what the file contained.

Therefore, we contend under that part of our argument the warrant for general allowed the searchers to do too much, and therefore should have been struck down.

That's under Part II B of the argument.

Quoting from Coolidge v. New Hampshire in the brief, it was stated by this Court that the "distinct objective is that the searches deemed necessary should be as limited as possible."

And that's the purpose of the particularity of description, which is required.

Now, the day following the search of the premises, Petitioner was arrested in front of his office, charged with four counts of false pretenses, which were basically as to subject matter contained in the affidavit for the warrant.

He was incarcerated and released on bond, and approximately two weeks later, after a thorough study of all the papers seized, he was indicted by the Grand Jury of Montomgery County on approximately 50 other counts, all of

which were,subjectwise, extracted from the seized papers.

Now, at the time of the hearing on the motion to suppress the evidence seized, as pointed out in Part II A of the argument, even though the warrants were discussed in great detail and passed around, and, as a matter of fact, the hearing held comprised approximately a day and a half of argument and testimony, they were never -- the warrants were never actually formally introduced.

And, as I pointed out in II A, although a technicality, we feel that the non-introduction of the warrants is a technicality under our laws of evidence that cannot be dispensed with; or at least some reason be shown why they were not introduced.

QUESTION: Is that -- that is the rule of Maryland law, is it, that whenever anything that's been seized under a warrant is introduced in evidence, the warrant itself also has to be introduced in evidence?

MR. ANDRESEN: Yes, sir, or an explanation be made as to why the warrant is not available.

QUESTION: And that's true even if there's no objection to the introduction of the --

MR. ANDRESEN: Yes, sir, Your Honor.

QUESTION: Uh-hunh.

MR. ANDRESEN: And I believe in Sumner this Court referred to a very similar case in North Carolina, where --

QUESTION: What's the reason, if you know, for that requirement of Maryland law? The jury wouldn't pass on the sufficiency of the warrant.

MR. ANDRESEN: It just, I believe, is basic -- it goes back to basic, best-evidence rule, that if you intend to prove that a certain document exists and that it was used and the auspice of it were a part of the proceeding, that it's necessary to introduce that article into evidence, or explain why it cannot be produced.

QUESTION: Does the State quarrel with the language of the warrant that you've set out in your own appendix? I mean, is there any dispute about it?

MR. ANDRESEN: The State does not quarrel with the theory of law that I've just exposed, Your Honor. They feel that the non-introduction was overcome by certain things, which are set out in the Court of Special Appeals' opinion.

Now, following that, at the suppression hearing, the trial court required the State to establish a nexus under Warden v. Hayden; that is, a connection between the articles, the individual papers seized, and the crimes or the intent or the *mens rea* behind the crimes.

Now, at this point, the State went back into a huddle, stayed overnight, and completely went through the papers; disregarded approximately 75 percent of them as pertaining to other indictments which they were not pressing at that time.

Of the balance, because of the necessity of opening the file and looking at each paper, rather than establishing the connection of the complete file and why the officer seized it, went through the papers and eliminated the majority of what was left. So that when they got through, they had only a handful, which could easily be held in one hand -- again I do not know the count. But only a handful of papers, on which the trial court did not suppress.

Now, at this point it's important to point out the argument in Part II B which refers to the motives -- excuse me, II D, I've already referred to II B. The motives of the prosecutor as espoused by Warden v. Hayden.

At page 34 of Petitioner's brief, the language in Warden v. Hayden, referring to mere evidence, states, and I so quote:

That "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required."

Now, at this point, I think it's evident, from the facts, as to what the prosecutor's motives were at this particular point.

He used the facts, as espoused in the search warrant, to obtain the warrant, search the premises; waited two weeks of sifting through the materials seized, not even knowing, as is

obvious from the testimony of the investigators involved, what the papers were; then using these as a basis to obtain 50 additional indictments based on the information in the papers seized.

Then, consolidated the original bill of information with one of the indictments, which contained about 17 counts, for trial at the same time. And then, at the time of the trial, even though he failed to establish a prima facie case throughout the entire case and the judge, the trial judge, refused to allow admission at that time, was able to admit this evidence under the proving allegations in the testimony which applied to the additional indictments which in fact were obtained under the search. In other words, the indictments could not have been obtained had the search not been performed, and the extent of the search been so general that they could seize all the papers involved with all these other indictments.

We, therefore, say that under Warden v. Hayden an examination of the prosecutor's motives should have caused the non-introduction of this evidence.

QUESTION: You think the basic defect that you claim was not cured by the extent to which the trial court suppressed evidence?

MR. AMBROSINI: No, sir; I don't think the evidence, even though not suppressed, could have ever been introduced, had it not --

QUESTION: That handful of papers that were left over, --

MR. ANDRESEN: That's right, sir.

QUESTION: -- that was left over, that you talk about, you say was tainted evidence?

MR. ANDRESEN: Yes, sir.

QUESTION: Because --?

MR. ANDRESEN: Because -- I'm not referring to each and every --

QUESTION: Because it had been obtained by --

MR. ANDRESEN: It had been obtained under the search --

QUESTION: -- under a general warrant.

MR. ANDRESEN: And used to -- not only a general warrant, which is part of the argument, but the papers were used to obtain indictments. In other words, they had nothing to do with the subject matter of the search, but they were obtained because of mens rea. In other words, that the prosecutor maintained that these papers showed a criminal intent prior to the time that these acts were committed, and therefore, even though they were from years past, that the criminal intent maintained was maintained by petitioner at the time he committed the acts which were the subject of the warrant.

Then, while obtaining the information, because it had to do with the mens rea, he then went and obtained 50 additional

indictments for the crimes which he said were part of the criminal scheme.

And then at the time of trial -- I know it's difficult to follow this -- at the time of trial, when he is attempting to prove the initial counts or the causation of the probable cause to search the premises, he could never get this information introduced, because the trial judge never felt that a prima facie case was established under the evidentiary rule.

So that the only way he could get them into evidence was through the major part of his case, referring to those particular indictments.

And my argument is that his motives are so obvious, to load the jury with evidence of papers of various and multitudes of crimes and numbers of counts, in order to obtain a conviction, --

QUESTION: Yes, but the trial was on the original counts, wasn't it?

MR. ANDRESEN: Plus a consolidated indictment, which contained 17 of the later obtained counts. In other words, it was a 21-count --

QUESTION: But you think that indictment that it was consolidated with contained 17 counts?

MR. ANDRESEN: Yes, sir.

QUESTION: Now, were any of those counts obtained, do you claim, --

MR. ANDRESEN: All of them.

QUESTION: -- based on the evidence that was seized?

MR. ANDRESEN: All of them. All 17 of the additional counts.

QUESTION: Well, was -- how about the evidence, that handful of papers, that handful of papers?

MR. ANDRESEN: Well, still it was a healthy handful.

QUESTION: All right, a healthy handful of papers. But to which counts did the trial court say they were relevant?

MR. ANDRESEN: It said they were relevant to the criminal scheme of intent.

QUESTION: So that would have been true whether the case was -- whether there had been a consolidation of another indictment or not?

MR. ANDRESEN: They never would have been able to have been introduced, --

QUESTION: Why not?

MR. ANDRESEN: -- had there not. Because the trial --

QUESTION: Let's assume it was just tried on the original four.

MR. ANDRESEN: The prosecutor attempted over and over to have them introduced, but under an evidentiary rule in Maryland, McEwan v. State, you cannot introduce evidence of other crimes of criminal intent until you first establish a prima facie case on the major part of your case.

And the trial judge ruled over and over that this prima facie case had never been established. And only when the prosecutor turned to the proofs of the additional indictments was he able to get the evidence in.

That's what the maintenance is.

Turning now to the last part of the second section, the second question, II C, which has to do with the nature of the crime that it was complained of, which is a completed act, and even that the issuing judge found that it was a -- it was being committed at the time, and we complain that it could not have been committed, because, under the facts, why, if there was such a crime, it would have been complete months before and that the information used was stale, as well.

Then, turning to the time of the suppression hearing, the --

MR. CHIEF JUSTICE BURGER: You have until 11:54.

MR. ANDRESEN: Oh, thank you very much.

It was objected, at the time of the suppression hearing, that under the Hill v. Philpott case, that Petitioner's privileges under the Fifth Amendment applied to the business and personal papers which were seized, and therefore, as set forth in our argument, Section A, the papers, even if the warrant were held to be reasonable, could not be introduced over Petitioner's objection because they would violate his Fifth Amendment rights against self-incrimination.

Now, at the time that these articles were in fact introduced at trial, Petitioner continued to object, and he was finally reminded by the trial court that it was not necessary to continue to object, that the record would show that the objection was sustaining against all the articles seized.

QUESTION: What was the compulsion involved in this evidence, with respect to your argument about the Fifth Amendment?

MR. ANDRESEN: Well, this comes down to the distinction between the cases as to how you define compulsion.

Now, Black says --

QUESTION: You concede, of course, that there must be some -- that the defendant must be compelled to incriminate himself?

MR. ANDRESEN: That's right. Definitely.

QUESTION: Now, what was the compulsion exerted in this case?

MR. ANDRESEN: Well, the compulsion was the taking of the papers from him. Now, --

QUESTION: Well, if somebody else did that, the defendant was not --

QUESTION: That's under Blank.

MR. ANDRESEN: That's the ruling of the Blank case, that one -- if the searchers do all the work, then the defendant does not have to hand over the papers, that he's not

compelled to do anything.

QUESTION: Well, do you disagree with --

MR. ANDRESEN: We say that's wrong, yes, sir.

QUESTION: Well, what cases have you got for that? That indicate it's wrong.

MR. ANDRESEN: We've got --

QUESTION: You've got a Court of Appeals case.

MR. ANDRESEN: Yes, sir.

QUESTION: What else? Do you have any cases in this Court?

MR. ANDRESEN: No, there are no cases, at least upon my examination of all cases.

QUESTION: Well, tell me what compulsion there is, then.

MR. ANDRESEN: I -- we feel that --

QUESTION: Okay, if you were writing on a clean slate, tell me what compulsion was -- what was the defendant compelled to do himself?

MR. ANDRESEN: That's a question as to what the Framers of the Constitution meant when they said that he shall not be compelled to give evidence which would tend to incriminate him.

QUESTION: Well, that kind of an argument would mean -- would go for any kind of evidence, wouldn't it? You could never --

MR. ANDRESEN: Well, it's obvious that if somebody is tortured, they are compelled to testify; but it's less obvious --

QUESTION: Well, let's assume the searchers in this case had not only seized papers but had seized -- just assume that a gun was relevant to the case, just assume that. They seized papers and a gun. Now, would you say that the defendant was compelled to -- and contrary to the Fifth Amendment, to incriminate himself by not only the papers but by the gun?

MR. ANDRESEN: No, not the gun, because --

QUESTION: Well, you would be compelled to furnish it, wouldn't you?

MR. ANDRESEN: However, he's not testifying by the gun on that --

QUESTION: Well, how is he testifying with the papers?

MR. ANDRESEN: We feel that Boyd and other cases, Bellis and other cases, Couch, have set forth that one's personal papers are protected, and that taking evidence from one's papers is the same as from his own mouth.

QUESTION: What if, instead of the gun, Mr. Andresen, the things taken were papers, namely, obviously and admittedly forged promissory notes and mortgage papers -- just assume that they were later established to be forged papers, forged by the person from whom they were seized. Now, they are papers, as distinguished from guns, but you say that there is a compul-

sion, that that's compelled testimony?

MR. ANDRESEN: Well, I contend, mainly, Your Honor, that we need an examination of the papers first to decide whether or not it is compelled testimony. If there are thoughts and ideas expressed, in the opinion of the trial court or the appellate court or whoever --

QUESTION: Well, then, let's change. Instead of forged promissory notes or mortgages, counterfeit money.

MR. ANDRESEN: Well, counterfeit money, I don't think is a --

QUESTION: Well, that's paper; I'm thinking of counterfeit paper money.

MR. ANDRESEN: -- could be a thought -- I mean, I think that that is more of an object, such as a gun or something of that nature.

QUESTION: Well, isn't a promissory note an object? Assume it was written in the hand, forged by the hand of the person from whom it was seized.

MR. ANDRESEN: Well, the question is, does it contain his thoughts and ideas.

If we look at the paper -- all I'm asking is that the trial court look at the paper, when the objection is interposed, to say that this paper is not a private thought, is not communicative or testimonial in nature, and therefore your Fifth Amendment privilege is not protected.

QUESTION: You're suggesting, I suppose, that if what was seized was a diary written in the handwriting of the Petitioner, which was self-incriminating, that that would constitute -- the introduction 6 that would constitute a violation of the Fifth and Fourteenth Amendments, and it at least was incumbent upon the trial judge to look and see if this material was bad or --

MR. ANDRESEN: That's our only request, that they look at it, instead of what the trial court did and the appellate court did, and say, "We don't care what the paper was, the search was reasonable, and therefore there's no compulsion attached, they can take anything they please, be it diary, be it personal, be it business, no matter what it is, because the search was reasonable."

QUESTION: Well, does the court have to be concerned about what it is until it is offered and received in evidence?

MR. ANDRESEN: No, sir. But at these times it was offered and received in evidence, the objection was interposed, continuously, again and again, that the papers --

QUESTION: What standard does the trial court apply when it looks at it, if it were required to do that the way you suggest?

MR. ANDRESEN: Well, it must be a factual standard, and that would have to be set out by cases dealing with the papers.

Now, obviously, the --

QUESTION: Well, what would you focus on? I mean, your response to Justice White's question indicated that you didn't certainly contend that there was any physical compulsion here. What should the trial court look at?

MR. ANDRESEN: I think it is as much physical -- I didn't mean to say that. I think it is as much physical compulsion attached in a forced seizure of one's papers from his premises, be it under warrant or not, that there is under being forced to testify.

QUESTION: Well, but the compulsion is not on the defendant.

MR. ANDRESEN: He is not performing, but my explanation of compulsion is that it's the force, and that's what Black and Ballentine say it is; that it's the force which makes you move, or the force which makes you do, which may be unavoidable.

QUESTION: But this warrent, this seizure didn't make the defendant do anything.

QUESTION: It made you stand aside and permit them to search.

MR. ANDRESEN: It made me stand aside and let them search, and I objected over and over again to the search.

QUESTION: So, if you hadn't been there, would there have been compulsion?

MR. ANDRESEN: There still would have been a break-in of my doors and a taking of my files.

QUESTION: Mr. Andresen, --

MR. ANDRESEN: That's the force compelling me to give up the papers -- excuse me, sir.

QUESTION: Have you finished, Mr. Justice White?

QUESTION: I yield the floor.

QUESTION: Thank you.

I was going to ask Mr. Andresen whether, if Petitioner's telephone had been tapped pursuant to a warrant, by order of court, --

MR. ANDRESEN: I don't know that.

QUESTION: -- you would feel the compulsion were equal or less or non-existent?

MR. ANDRESEN: Well, that's a question that's been forwarded by the federal government as to tapping of phones, and I really -- I think that's why the rules as to authorizing such search warrants are getting stricter and stricter. That be question is as to the conversations between people, and I don't know the answer to that. I was able, in my own mind, due to the shortness of time I had to answer the federal brief, which I just received, feel that because I was talking about papers, I did not really research that. I can't really answer that.

Again, --

MR. CHIEF JUSTICE BURGER: If you want to reserve any time for rebuttal, you're now into your last five minutes.

MR. ANDRESEN: All right, sir. I'll reserve this time then.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Oster.

ORAL ARGUMENT OF JON F. OSTER, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Before I get into the statement of the case and the facts, because the facts are so important in this type of case, I would like to refer to the Solicitor General's Appendix, which gives you an example of the type of exhibits which were seized from Mr. Andresen's office. And if you will -- if the Court has that, if you will look at page 7, it's very faint, but if you will find it, you will find a settlement statement for buyer, property Lot 7, Block T, Section 10, Potomac Woods; it's dated July 9, 1970. It's Clark-King Construction Company, Inc., to --

QUESTION: What color is that one?

QUESTION: Yellow.

MR. OSTER: It's the yellow.

QUESTION: And on what page?

MR. OSTER: It's page 7, Mr. Justice Stewart.

QUESTION: I see.

QUESTION: Mine doesn't have any page numbers.

QUESTION: Yes, very faint, at the top.

MR. OSTER: It's very faint.

Now that you're attuned to the small print, if you will also turn to page 12 and hold page 12, you will see also a settlement statement there for seller. And if you will look closely, you will see that both pertain to Lot 7, Block T, Section 10, Potomac Woods; the seller and the purchaser are the same; the date is the same; and the case number is the same. Case No. 70-307.

Now, if you'll look at the columns, you'll notice in the debit column on the first one on page 7, it's 48,000, and then you'll notice on the credit on page 12 it's 48,000. But after that there's a great variance.

You'll note, for instance, that the buyer's copy makes no reference to the payment of any prior liens or mortgages. And you will note, in fact, that the buyer's copy shows that the first mortgage is $38,000; whereas, if you look on page 12, you will note that the seller received notice that the first mortgage was $35,000. He also received notice that the trust to the State National Bank in the amount of $1,000 was paid off. The estate to -- the Lumsden trust, in the amount of $1,333, had been paid off. The fourth trust to F. O. Day, $2,000, had been

paid off. Federline Trust had been paid off.

As a matter of fact, if you will look at the totals for the two settlement sheets, you will see that the first settlement sheet on page 7 is $50,487.61; and you will see that the total for page 12 is $50,746.06.

Now, those same exhibits in the Petitioner's handwriting are also on pages 65 and 66 of the Solicitor General's Appendix. They're in handwriting, and you will see that there is a different settlement statement for the buyer that's identical to the one on page 7, and on page 66 you'll see the handwriting for the seller's settlement statement, and again the seller's statement does not correspond with the buyer's.

QUESTION: A difference of about three -- less than three hundred dollars?

MR. OSTER: That's right, Your Honor.

But the information, I think more significantly, was that the seller was being made aware that certain liens, prior liens were being paid off; the buyer had no notice whatsoever. But the information, of course, received by the buyer was that all liens had to be paid off. As a matter of fact, under the terms of the first mortgage from the Equitable Life Insurance Company, they would never provide a first mortgage unless they were assured that all prior liens had been paid off.

QUESTION: May I ask, for what issue in the case is

this all relevant?

MR. OSTER: This eventually has to do with the nature of the records that were seized. If we get into the question as to whether or not these were testimonial or communicative, or whether these were business records, I wanted the Court to be aware of the nature of the records.

I thought it was good to have the records in your -- in your context before I presented the case.

QUESTION: You say these are --

MR. OSTER: These are representative --

QUESTION: -- personal business records?

MR. OSTER: Yes, Your Honor, and I think these are -- these are representative of the records which were seized in this particular case.

QUESTION: Kept in the regular course of business.

MR. OSTER: Yes, Your Honor.

Now, if I may proceed, I only have about five minutes, I'll try and get into the basic statement of the case, and then after lunch I'll return to the facts which set up the probable cause for the application for the search warrant.

The Petitioner, Mr. Andresen, is an attorney at law in Montgomery County, specializing in real estate. He was suspended from active practice by the Court of Appeals of Maryland on June 9th, 1975.

On November 1st, 1972, an information was filed

against him, charging him with four counts of false pretenses.

On November 16, 1972, he was indicted by the Montgomery County Grand Jury on 17 additional charges. The indictment and the information were consolidated for trial.

The Petitioner's case was removed upon his motion to Frederick County for trial. There had been a lot of publicity in the newspapers in the Washington Metropolitan Area.

He elected a jury trial, which was presided over by Judge Samuel W. Barrick of the Circuit Court for Frederick County, and this trial lasted over one week; it began on May 21st, 1973.

Before the trial, however, on April 11th and April 12th in 1973, a two-day hearing was conducted on the Petitioner's motion to suppress the evidence seized from his law office. As a result of that hearing, the State was left with 17 items of evidence, of which it chose to introduce five exhibits into evidence. And those five exhibits are the exhibits which are listed in the Solicitor General's Appendix.

I should point out here, so that there isn't any confusion, that the search -- there were two searches conducted on October 31st: one, of the Petitioner's law office, located at 3700 Decatur Avenue; and the other located at his corporate offices. He had a number of corporations, among them Mount Vernon Development Corporation and Kensington Corporation.

And this -- these records -- the location of these

corporations was about five blocks away: 3514 Plyers Mill Road. Both searches commenced at the same time. And 52 items or exhibits were seized from the corporate offices, at 3514 Plyers Mill Road; only one of them was eventually introduced. All the rest were either suppressed or they were returned by the State.

I think, however, pretty clearly under the Bellis case, which Mr. Justice Marshall wrote, that these were corporate offices and were not dealing with the same constitutional problems.

The Petitioner was convicted of three counts --

QUESTION: But, if I understand you, that relates to only one exhibit that actually got into evidence?

MR. OSTER: That's right, Your Honor, and that's the first three exhibits, B, C and D, on the first three pages of the Solicitor General's Appendix.

QUESTION: And, again, how many exhibits were admitted in evidence as a result of all these searches?

MR. OSTER: They are the exhibits which are listed in the Table of Contents, and there are a few handwriting exemplars which have not been included, but they are basically 2, 3, 4 -- 10A was -- While 10A was introduced, it had to do with a charge concerning the misrepresentation of the Stamp Tax that was due to Montgomery County, and that was withdrawn; so that is really not relevant.

QUESTION: But, in Exhibit 2, for example, is made up, I see, of thirteen lettered subsections.

MR. OSTER: That's right. That was a file. That was one file, and this was the contents of the file.

QUESTION: On that one real estate transaction, Clark-King to Holtzclaw?

MR. OSTER: On that one, Clark-King -- yes. That was their purchase, and that relates to the settlement sheets that I brought to the attention of the Court when I started.

The Petitioner was convicted of three counts of fraudulent misappropriation by a fiduciary in contravention of Article 27, Section 132 of the Code of Maryland, and five counts of false pretenses.

He received eight concurrent two-year sentences. After appealing to the Court of Special Appeals of Maryland, that Court reversed the Petitioner's convictions on four of the five counts of false pretenses, because the necessary element of the offense, the intent to defraud, had not been alleged in the indictment.

The Court of Special Appeals rendered its decision on January 10th, 1975; cert was denied by the Court of Appeals of Maryland on March 31st, 1975; and thereafter this Court granted cert.

As the case comes to this Court, the Petitioner seeks reversal of conviction on one count of false pretenses, relating

to Lot 13 T in Section 10 of Potomac Woods. This is a development in Montgomery County. And all of the charges flow out of Section 10 of Potomac Woods. And three counts of misappropriation of funds by a fiduciary relating to Mr. and Mrs. Richard Pollitt, Mr. and Mrs. Seth Warfirld, and Mr. and Mrs. Robert Holtzclaw, who purchased Lots 12S, 25R and 7T, respectively, in Section 10 of Potomac Woods.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock, Mr. Oster.

MR. OSTER: Thank you.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

- - -

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Oster, you may resume.

ORAL ARGUMENT OF JON F. OSTER, ESQ.,

ON BEHALF OF THE RESPONDENT - Resumed

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

I was simply finishing up a statement of the case.

The evidence seized from Mr. Andresen's law office pertains only to the false-pretense charge relating to Lot 13T, and the misappropriation of funds by a fiduciary charge relating to the purchase of Lot 7T by the Holtzclaws.

Furthermore, most of the items of evidence relating to Lot 7T which were seized from the Petitioner's law office are duplicates of evidence from other sources, which were introduced at his trial through other witnesses. So this means that there could be the possible application of the concurrent-sentence doctrine, if the Court wished to apply it, because only two of the possible charges --

QUESTION: How many is that? How many?

QUESTION: Right.

MR. OSTER: Out of the four -- out of four, two relate to independent testimony and independent exhibits of evidence totally unrelated to --

QUESTION: Are they counterparts of those exhibits?

MR. OSTER: The counterpart relates to one of the charges, the Holtzclaws; fraudulent misappropriation. That was Lot 7T and that was the example, the two settlement sheets that I showed you. But that -- they also introduced identical exhibits through the Holtzclaws themselves.

QUESTION: So you say that any -- any of the arguments that are presented relate only to certain counts?

MR. OSTER: That's right.

QUESTION: And other counts on which there were given concurrent sentences don't have this flaw in them?

MR. OSTER: The other counts relate to --

QUESTION: If it has a flaw.

MR. OSTER: Yes, if it is a flaw. The other counts relate to fraudulent misappropriation charges, and the evidence and the testimony there are totally unrelated to the search-and-seizure of the evidence --

QUESTION: Were those counts independently affirmed in the State Court?

MR. OSTER: Yes, they were.

QUESTION: Well, let me see if I get this clearly in mind. The Holtzclaw documents --

MR. OSTER: Yes.

QUESTION: -- are those to which you addressed our attention before lunch, are they not?

MR. OSTER: Yes, Mr. Justice Brennan.

QUESTION: And what you're telling me now is that -- telling us now is that the counterparts of these, those in the possession of the Holtzclaws, --

MR. OSTER: Yes.

QUESTION: -- were introduced in evidence through the Holtzclaws?

MR. OSTER: Yes.

QUESTION: And thus you didn't -- were these also, those seized were also introduced in evidence?

MR. OSTER: Well, I think if you look at the bottom of page 7 you will see that a copy of this document was also introduced as part of State's Exhibit 29 from Robert Holtzclaw's records; Transcript 131.

QUESTION: Oh, yes.

MR. OSTER: And if you look at page --

QUESTION: It's an identical copy, is it?

MR. OSTER: Yes.

QUESTION: But now, how about these separate counts? I take it you say that there were -- that the evidence on certain counts didn't include any of this material that --

MR. OSTER: That's correct.

QUESTION: -- that was seized from the office.

MR. OSTER: That's correct. The material that was seized from the office applied principally to the false pretense

counts against Lot 13T.

QUESTION: Well now, principally, let's get -- give me a count that the evidence on which didn't rest at all, --

MR. OSTER: All right, sir, --

QUESTION: -- that was completely unrelated to any --

MR. OSTER: The counts relating to the Pollitts and the count relating to the Warfields.

QUESTION: And the evidence to prove those counts didn't include any of the evidence --

MR. OSTER: That is correct.

QUESTION: -- seized fromthe offices.

MR. OSTER: That is correct. That evidence was introduced by the Pollitts and the Warfields themselves. They testified and they introduced their documents.

QUESTION: And the convictions on those counts are among those that were affirmed by the Court of Appeals.

MR. OSTER: Yes.

QUESTION: Right.

QUESTION: But that doesn't -- that doesn't bar our --

MR. OSTER: No, it doesn't. No. I think it was in Benton vs. Maryland that it certainly doesn't bar your consideration of the substantive issue here.

QUESTION: Did you point this out in your response to the petition?

MR. OSTER: No, I did not, Your Honor. I overlooked it.

However, it is very clear that it is at the option of the Supreme Court as to whether or not you wish to apply this doctrine.

I think that I'm going to have to go somewhat into the factual background which led to the search-and-seizure of this, because the Petitioner has rested so much of his testimony as to the issues of probable cause on the background of it, and I feel it would be helpful to the Court.

In early 1972, the Washington Post did some exposé articles on real estate settlements in the metropolitan area. There was some evidence that there had been abuse in the Montgomery County and Prince George's County area, and the State's Attorney's offices of those two counties set up a bi-county fraud unit. As initially set up, it consisted of three people: Mr. Moyer, Mr. Lawrence and a Mrs. Nalls.

Mrs. Nalls started working in the record office of Montgomery County and among the persons that she --

QUESTION: When you say the record office, would that be the county recorder in that instance?

MR. OSTER: That's right, the county record office. And they were looking at some of these real estate transactions.

The Pollitts, who were one of the charges here, the

fraudulent misappropriation charge, were going to sell their house in July of 1972, and discovered that there were several liens on the property which had never been released. Of course, they had been led to understand, by the Petitioner, who handled their real estate settlement, that all the liens had been released, and of course they would not have received their first mortgage if the liens had not been released.

A complaint was given to the State's Attorney's office and to the Bi-County Fraud Unit, and they did start investigating both the Pollitts and the Warfields and the Holtzclaws, because there were basic deeds of trust which covered all of this Section 10 of Potomac Woods. So that they did have some evidence that there were deeds of trust outstanding, and that they had not been released. These deeds of trust would be a basic financing situation, where a financial institution would loan $37,000 to a builder and the builder would give a deed of trust which covered a great many lots, and of course, as a lot was sold, you would pay a portion of the lot off.

QUESTION: Did the deed of trust provide for partial releases?

MR. OSTER: Yes, it did. All of them.

Now, as the background of this, in 1967, Clark-King, who was a builder and who was using the Petitioner exclusively as his real estate attorney, for handling settlements, was having difficulty paying off his contractors.

The Petitioner agreed with Clark-King -- this is the name of the company, it's Mr. Clark -- to maintain a running account whereby he would ostensibly lay out money for Clark-King so that a free and clear title could be delivered.

Clark testified at the Petitioner's trial that he thought this was a lending arrangement under which the Petitioner would be repaid once sales improved.

Clark thought that the debt secured by the deeds of trust on the various lots were being paid off so that good titles were being delivered at the time of settlement. The deeds of trust and other encumbrances were listed on the seller's settlement sheet, as I've already illustrated to you. However, the evidence at the trial indicated that the encumbrances were frequently not being released.

There were two deeds of trust covering Lot 13T. That's the false pretenses charge, the principal one against the Petitioner.

As security on a note for $31,000, Clark-King executed a deed of trust to State National Bank on a number of Potomac Woods lots, including Lot 13T. This deed of trust was recorded on August 2nd, 1968; as security on another note in the amount of $24,000, Clark-King executed a deed of trust to author Dale Ramsden in the amount of $24,000 on a number of Potomac Woods lots. This deed of trust also included Lot 13T. So there were two deeds of trust. Actually there was a third

one as well.

Excuse me, there were two on 13T; two deeds of trust.

The second deed of trust was recorded on October 9th, 1968.

Mr. Andresen, the Petitioner, was the trustee on the deed of trust to the State National Bank and was personally responsible for signing any releases for individual lots.

QUESTION: Well, does this treatment you're giving us now go to the question of whether this is a business record, routinely and ordinarily kept?

MR. OSTER: No, it does not. I thought, if the Court is interested, I will go to that, Your Honor, but I thought since the --

QUESTION: Well, I'm not sure, with the limited time you have, what the purpose of this discussion is.

MR. OSTER: I realize that. The Solicitor General will discuss the Fifth Amendment, and I will get to that; but I was concerned about the probable cause arguments that had been registered by the Petitioner and that is why I was going into it.

QUESTION: Well, both courts below have passed on that, haven't they?

MR. OSTER: Yes, they have.

I will move into the business records, if it is the wish of the Court.

QUESTION: Well, the remaining Fourth Amendment argument, though, was that it was just a shotgun warrant.

MR. OSTER: Well, there were a number of issues that --

QUESTION: Whether it's probable cause or not, that it was just far too broad; just a general warrant. Wasn't that part of the argument?

MR. OSTER: That was one of the arguments, that it was a general warrant, because of the language attached to --

QUESTION: What have you got to say about that? Briefly.

MR. OSTER: Well, I would say, first, that the Court of Special Appeals pointed to the great particularity, and I think if you look in the record you will see the great particularity that's recited in the warrant. And I don't think that you can attach any significance to those last three or four words, that were on the -- I think it's page --

QUESTION: Six.

MR. OSTER: -- page ninety --

QUESTION: Are you suggesting that --

MR. OSTER: -- ninety-six: "together with other fruits, instrumentalities and evidence of crime at this time unknown". "Time" is --

QUESTION: Are you saying that any of the evidence that was not suppressed was specifically listed?

MR. OSTER: I'm saying that all of the evidence --

all of the evidence related to either Lot 13T or it related to the Holtzclaws' lot, which was 7T; and the Holtzclaws' lot was secured by a deed of trust which also secured 13T. So there was a relationship.

QUESTION: And none of this fell in the "catch-all" clause at the end of the warrant.

MR. OSTER: No.

QUESTION: Is that your position?

MR. OSTER: No. There are two wherefore clauses in the application for warrant, and in the second application -- in the second wherefore clause they specifically refer to the State National Bank deed of trust. And that deed of trust covered both Lot 13T and the Holtzclaws' lot, which was 7T.

QUESTION: So your answer is that perhaps all of the evidence, or at least the evidence that was introduced at trial, all of that was specifically listed on the warrant?

MR. OSTER: Yes. My --

QUESTION: None of it was --

MR. OSTER: There was no rummaging or searching --

QUESTION: -- picked up pursuant to a general clause?

MR. OSTER: There was no rummaging or searching. The proceeding on the motion to suppress took two days. There was -- it took about two and a half -- it started at 10:30 in the Petitioner's office, but they waited another half hour for the --

QUESTION: Well, was any of it -- were any of the documents suppressed suppressed for the reason that they were not specified on the warrant?

MR. OSTER: They were -- many documents were returned by the State's Attorney. Other documents were suppressed by the court because there was no nexus.

QUESTION: So your answer is -- to my question, is what?

MR. OSTER: Well, my answer to your question is that the search -- and I -- that the search was conducted --

QUESTION: Your answer is that none of them -- none of them were suppressed because they weren't listed with specificity on the warrant?

MR. OSTER: No -- the only reason for suppression was that there was no nexus, or that they were irrelevant. But, as far as the specificity is concerned, I think in the record ofthe suppression hearing, --

QUESTION: Well, put it the other way around: Did the warrant specify those that were suppressed?

MR. OSTER: Did the warrant specify?

QUESTION: Yes.

MR. OSTER: No, I do not think it did. I -- the warrant was very, very carefully drawn. The warrant was extremely carefully drawn, and they were looking primarily --

QUESTION: I'm not sure about that answer. Did the

warrant list any of the documents that were suppressed? I thought you indicated to me that the warrant listed all that were suppressed, --

MR. OSTER: There was --

QUESTION: -- it was just that there was no nexus between them and the crime.

MR. OSTER: There was a return on the warrant, with 29 items, and they are listed on the return. Of those items, 11 items were either suppressed by the court or they were returned by the State, leaving 17 items. And out of those 17 items, the State elected to introduce five. And those five items are listed in the Appendix of the Solicitor General's brief.

QUESTION: In other words, they are all specifically identified in the warrant; is that what you're telling us?

MR. OSTER: Well, to the extent that they --

QUESTION: Specifically identified in the application.

MR. OSTER: Mr. Chief Justice, to the extent that they relate to Lot 137 or to the extent that they relate --

QUESTION: That's what I mean by --

MR. OSTER: -- to the deed of trust of the State National Bank, --

QUESTION: That's what I mean by specific.

MR. OSTER: -- they are specifically identified.

QUESTION: Mr. Oster, may I get something straight? I'm a little bit confused.

In answer to Justice White, if I understood you correctly, you said that some documents were suppressed because they had no nexus.

MR. OSTER: Yes, Your Honor.

QUESTION: Nexus with what?

MR. OSTER: They had no nexus with Lot 13T or --

QUESTION: Well, then, would it not also be true they did not have a nexus with the particular descriptions in the warrant, and therefore probably were seized pursuant to the "catch-all" clause in the warrant?

MR. OSTER: Well, there's testimony in the suppression proceedings, in which they go into great detail as to how they were trying to identify the material. They went into a law office and they found files, a lot of files on tables, some files -- there's testimony that the filing system was something that the investigators were not familiar with, there was one comment it was helter-skelter. Some files related to sections --

QUESTION: Does that indicate those documents were seized pursuant to the "catch-all" clause rather than pursuant to this specific description?

MR. OSTER: No. No, in the cross-examination of the investigators, the attorney for the Petitioner went into that

in great detail, and they emphasized that they were trying to relate it to -- they knew -- they knew about three deeds of trust, and they also knew about Lot 13T, which is set out in the affidavit. And everything that they were attempting to seize related to those items.

Now, they did make mistakes, as they were pulling certain files. But they had to make some kind of a cursory search of certain files. For instance, they knew that most of the lots they were concerned with, that they knew there were deeds of trust that had not been released, were in Section 10 of Potomac Woods.

QUESTION: Mr. Oster, can you show me what the judge said when he suppressed them?

MR. OSTER: What he said?

QUESTION: Yes.

MR. OSTER: I cannot -- I do not think that I can --

QUESTION: Of course, you've got me befuddled, I don't know what he said. How will I find out why the judge suppressed certain documents?

MR. OSTER: If I had the time -- I can certainly find them for you, Your Honor, in the proceedings --

QUESTION: Is it in the record?

MR. OSTER: It is in the proceedings. There is a [sic] 450-word transcript, 375 pages of which relate to the motion to suppress.

QUESTION: And neither one of you thought it was important enough to pick it out.

MR. OSTER: Well, I --

QUESTION: That's all right. We'll find it. We'll go through the pages.

MR. OSTER: I regret that and I --

QUESTION: We have time enough. If you don't, we do.

QUESTION: But you didn't bring the case here.

MR. OSTER: I did not bring the case, Mr. Chief Justice.

QUESTION: No. But let me be sure. You have said to us, if I understood you correctly, that all of the five exhibits admitted were identified in the warrant and were not taken pursuant to the "catch-all" clause at the end.

MR. OSTER: That's right. They were papers relating to Lot 137, or they were papers that related to the deeds of trust; and both of which are set forth in the application to the warrant.

QUESTION: But your position would be, even if you took 500 documents erroneously, but didn't have them go into evidence, it's irrelevant to this case now?

MR. OSTER: Well, I think under the factual circumstances that when you go into a law office it's got to be expected that you're not going to be able to readily identify

something right away. They tried --

QUESTION: Why don't you just answer the Chief Justice, "yes"?

MR. OSTER: Yes.

QUESTION: That the 500 are irrelevant. We don't care about the things that were not admitted, at least speaking for myself, that's not in the case; it's what was admitted that we're concerned about.

QUESTION: Well, I take it you're also saying that where there were mistakes made, it was not -- at least testimony at the suppression hearing indicated -- that it was not in reliance on the "catch-all" clause, but in mistakes as to the meaning of the more specific language of the warrant.

MR. OSTER: That's right. And the State recognized, and the State at the suppression -- at the suppression proceeding, the State returned a lot of documents voluntarily. The real reason for the length of the suppression hearing is that they went through every document. They would go through -- they would go into a file and take each document, one by one, and the judge would rule.

I only have a few minutes more, and I'll just take a minute to refer to the Fifth Amendment.

The State feels that, under Couch and under the Blank case, that these are business records. I would point out that this was not a subpoena, this was a valid search-and-seizure.

And that we believe that the nature of the records are such that they are not testimonial or communicative. Those terms don't seem to be --

QUESTION: Well, let's assume they were. Are you, as the State, in trouble?

MR. OSTER: I don't know that this Court has said that if they are testimonial and communicative they are barred.

QUESTION: Well, where is the compulsion?

QUESTION: You left it open.

QUESTION: Where is the compulsion?

MR. OSTER: Well, I would say the compulsion applies when there is a subpoena. And the Petitioner is required to come and identify the documents himself.

I don't think that there is any compulsion when there is a valid search-and-seizure. And the search-and-seizure is, you know, is conducted in accordance with the mandates of the Fourth Amendment.

Thank you.

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

Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

The United States is here to argue the question arising

under the Fifth Amendment privilege. It is our position that a defendant has no Fifth Amendment privilege to bar the admission into evidence of items seized, in this case business records, from him, so long as the items were seized in compliance with the Fourth Amendment.

For the purpose of my argument, I'll assume the Fourth Amendment has not been violated in this case.

The Petitioner suggested in his oral argument that documents, papers, books, ledgers are accorded and should be accorded special treatment. That is, that when such items are seized, apparently the trial courts review them to see if they contain ideas. And, Petitioner contends, that if they do contain ideas, then he can properly invoke his Fifth Amendment privilege to bar their introduction.

Presumably, Petitioner is referring to only his ideas. It would seem incredible that a book found on a -- in a bomber's apartment, that said how to make bombs, which contains ideas, would fall under his rule.

But, in any event, what Petitioner is contending now really sounds more like a First Amendment claim than a claim under the Fifth Amendment.

Why the fact that a document contains ideas implicates the Fifth Amendment is hardly clear, and it's hardly clear where the Court would go, where the path would lead, if the Court adopted such a doctrine.

Would it mean, for example, that it would -- you could seize a robber's mask, but not the note that he showed to the teller, or the schematic drawing that he made of the bank prior to the robbery. Or that you could take the typewriter from the kidnapper's apartment, but not the half-completed ransom note that's contained in it. Or, indeed, even closer to a case decided by this Court, that you could not seize a coded message on a piece of graph paper, which is what was seized in the Abel case, and introduced into evidence and upheld by this Court.

Presumably, most telephone calls, one likes to think, contain ideas; and yet this Court has upheld, under proper circumstances in compliance with the Fourth Amendment, the seizure of such calls.

As far as Petitioner's case is concerned, it's doubly difficult to see why the Fifth Amendment is involved. Certainly Petitioner was not compelled to take the stand in this case; in fact, he did not. He was not compelled to write. He was not required to speak. He was not forced to admit anything in this case.

As a matter of fact, the documents that are contained in our Appendix, in the bright yellow volume, were all documents that Petitioner created himself; or that someone in his employment created, presumably for him.

Petitioner seems to contend that because he was the

source of evidence that served to incriminate him, and he was compelled to be the source because he had to subject himself to a search, that therefore his Fifth Amendment privilege bars the introduction of the evidence obtained.

The Court has rejected just such an argument in the Schmerber case, and it rejected it again, I think, in Dionisio and in the Marron case only a few terms ago.

The test in every case must be testimonial --

QUESTION: Leaving the documents question open, though. Right?

MR. RANDOLPH: In Marron there were documents -- they were handwriting exemplars, and the -- I don't think the Court has ever directly faced the documents question in this --

QUESTION: I thought there was a -- at least one case here, where the question was explicitly left open.

QUESTION: Schmerber.

MR. RANDOLPH: Well, I don't know whether it's accurate to say the question was left open. What Schmerber said --

QUESTION: Not Schmerber, Warden v. Hayden.

MR. RANDOLPH: Warden v. Hayden. What Warden v. Hayden said is we do not have to decide that issue here. I don't think that applies --

QUESTION: But those cases, whichever one came last cited the former, and, at least they were tied together,

so the reservation is there on documents.

But I don't know that the reservation relates to whether there's compulsion or not.

MR. RANDOLPH: Well, the question of whether there is compulsion, on the one hand, and the question of whether the document seized is testimonial on the other, seem to me not to relate to one another. It's not very much different than saying in the month of May more babies are born in Denmark, and also in the month of May more storks fly over Denmark; therefore the conclusion is obvious, is it not, that storks bring babies.

No, it's not obvious. Just because there's compulsion, if you define it as having to stand aside while the police search, and just because a document is testimonial, does not mean that the Fifth Amendment privilege is in any way implicated.

The case --

QUESTION: Well, there are cases, there are some old cases in the Court that say that if the Fourth Amendment is violated, so is the Fifth.

QUESTION: Boyd said that.

MR. RANDOLPH: Yes, Boyd said that. And I think --

QUESTION: Oh, there are some other, a whole line of cases said that. And the only way the Fifth could have been violated is if there is some element of compulsion in a search

warrant.

MR. RANDOLPH: I think the Court is --

QUESTION: Isn't that so? Isn't that so?

QUESTION: That's true.

MR. RANDOLPH: I think that's true, yes. But I think the Court has moved away from that. Mapp vs. Ohio? agree it was only four justices, and Justice Black expressed that view in his concurring opinion in Mapp.

But in Mapp vs. Ohio, the Court rested the exclusionary rule, it seems, on the Fourth Amendment. I think Colandra? makes it even clearer that it rests on the Fourth Amendment, not the Fifth.

When Mapp was decided, the Fifth Amendment was not made applicable to the States. It wasn't done so until Malloy v. Hogan, I think, two years later.

QUESTION: Wasn't it Gilbert v. California that left this question open?

MR. RANDOLPH: It's Warden v. Hayden.

QUESTION: Well, I've just read Warden v. Hayden. I'm sending now for Gilbert. I thought -- that's the one I had in mind, I think.

However, you go ahead.

MR. RANDOLPH: Now, there's been some talk about the analogy here to a subpoena duces tecum, and the cases that the Court has decided under that.

Petitioner seems to argue that simply because a document may be -- that he may invoke his privilege to bar production of the document pursuant to a subpoena, therefore it follows that the document cannot be had pursuant to a search. And he assumes that he could have barred the production of these documents in this case by, if they had been sought by a subpoena duces tecum.

But we'll assume the premise. But the conclusion that he reaches from that doesn't follow. Because he has failed to take into account the reason why the Fifth Amendment is implicated, when a subpoena duces tecum is issued to an accused or to a suspect in a case.

The Court said, in United States v. White, it repeated again in Couch, said it again in Bellis recently, that the Fifth Amendment privilege is designed to prevent the use of legal process, quote, "to force an accused to produce and authenicate any personal documents or effects that might incriminate him.

As far as the subpoena is concerned, the Court has not drawn a distinction between documents on the one hand or effects on the other. The Fourth Amendment certainly doesn't draw such a distinction. It talks of persons, homes, papers and effects. All the items are on an equal plane.

So if Petitioner's argument were accepted, arguably it may mean that since the government may not be able to

subpoena even tangible items, like a gun or the bag in which weapons were carried, therefore it could not validly search for such items.

And I think the history of this Court's decisions under the Fourth Amendment is enouch to refute that contention.

But that brings me to what I think is the critical point -- what the government thinks is the critical point in this case. That is, when a subpoena duces tecum is issued to an accused, it forces him to respond. When a search warrant is issued, there's no such compulsion to respond.

In the forced response from a subpoena duces tecum, the Court has found implicit testimony; that is, that the item demanded is the item produced.

If you look at a subpoena -- and in the Federal Rules they are set out -- the subpoena says, "You are hereby commanded", that sounds very much like compulsion; and the command is directed to the person that receives the subpoena.

There is similar language in a search warrant: "You are hereby commanded". But the command goes not to the person who is subject to the search, it goes to the person, the officer of the law who executes it.

As far as the person subject to the search is concerned, his only -- the only restraint on him is to stand aside, to let the search proceed. He's compelled to do anthing. Although that's rather an ambiguous phrase.

But in those cirumstances it seems odd, as an initial matter, that the Fifth Amendment would be violated by telling someone to stand aside, that you are thereby compelling him to be a witness against himself.

Now, Petitioner argues, and Boyd itself seems to say, that -- and I think what is left after this, and I'll address Boyd in a moment, the dictum in Boyd, is really a generalized claim of privacy, that we -- well, Petitioner ought to be allowed to invoke his Fifth Amendment privilege because, after all, his privacy would be invaded.

We think, properly understood, privacy is not involved in this case at all. At least as far as the Fifth Amendment is concerned.

The rule, the general rule, I think the Court has referred to it as the ancient rule, is just the opposite. In a criminal case, the public has the right to every man's evidence, whether that evidence is private, so long as it's related to the question before the court or before the jury.

The rule applies to newsmen, the Court so held in Branzburg v. Hayes; it even applies to the President of the United States.

The Framers of the Constitution, if they designed the Fifth Amendment to protect privacy, committed an incredible blunder, because if they designed it to protect the privacy of the citizens of this country, they left out all the innocent

people here, who could never claim the Fifth Amendment, or that they would be incriminated by producing a document.

I think what I have just said has been repeated by the Court recently in a footnote in Nobles, in the Nobles case, footnote 7 specifically, where the Court quotes Mr. Justice White concurring in Maness v. Murray, I think it was, where Mr. Justice White said: The purpose of the relevant part of the Fifth Amendment is to prevent self-incrimination, not to protect private information.

Now, as far as Boyd is concerned, there is dictum, to be sure, that seems to point the other way. The Court could find no difference between, on the one hand, a search for evidence and compelling a man to incriminate himself.

But the premises on which Boyd rested, we think, are undercut, and have been undercut for quite some time in this Court.

First of all, one premise -- there are four basic premises for that statement in Boyd. The first is that a search-and-seizure of mere evidence is not permitted. Warden v. Hayden overruled that doctrine.

The second is that a subpoena duces tecum, which was the fact situation of Boyd, is the equivalent of the search-and-seizure; since Oklahoma Press Publishing Company v. Walling, the Court has not followed that doctrine. They are not equated.

The third resting point of Boyd is one I've already mentioned: that evidence seized in violation of the Fourth Amendment violates the Fifth Amendment privilege if introduced. An exclusionary rule.

I think the decisions of this Court, from Mapp vs. Ohio on, recognize the exclusionary rule rests, if on a constitutional basis, on the Fourth Amendment only.

And, finally, the final point of Boyd is that compelling a person, the final premise of Boyd is that compelling a person to be the source of incriminating evidence violates his Fifth Amendment privilege.

That was rejected in Schmerber, which involved the taking of a blood sample from an individual under compulsion. It was rejected in Wade, which involved a line-up. It was rejected, I think, in Dionisio, which involved the voice exemplar. And it was rejected in Marron.

So there are four basic pillars to the foundation of Boyd:

One, the search-and-seizure of mere evidence;

Two, the subpoena is equal to a search;

Three, evidence seized in violation of the Fourth violates the Fifth, the exclusionary rule; and

Four, compelling a person to be the source of incriminating evidence violates his Fifth Amendment privilege.

Not a single one of those doctrines stands any more.

We think, therefore, that what was only dictum in just a few lines in the Boyd opinion is no longer good law, and should not be followed.

Thank you.

QUESTION: Does that mean that -- well, perhaps I was just thinking out loud. As I recollect, Mr. Justice Black concurring in the opinion in Mapp v. Ohio was based upon those doctrines of the Boyd case.

MR. RANDOLPH: He was -- well, his concurring opinion in Mapp vs. Ohio is -- would not -- if it were accepted, would not affect my argument. Because his concurring opinion was that if evidence taken in violation of the Fourth Amendment is introduced, it violates the Fifth.

The premise of his argument is that it violates -- that the evidence has been taken in violation of the Fourth, and of course I'm assuming that --

QUESTION: But the premise would also have to be that there was compulsion? And it had to be.

MR. RANDOLPH: Well, of course. The Fifth Amendment says that it's compelled to be a witness against himself.

But, as I said, I don't think the Court has accepted that.

QUESTION: And, as you pointed out, a number of expressions since then within the Court have gone the other way?

MR. RANDOLPH: Yes, sir. And your dissenting

opinion in the Bivens case, I think, details this development.

Thank you.

Oh, I'm sorry. I've been asked, since I have a few minutes, to answer Justice Marshall's question, where in the transcript, the page reference -- the transcript of the suppressionhearings, the page references are page 162 --

QUESTION: That's the transcript, not the Appendix?

MR. RANDOLPH: The transcript of the suppression.

QUESTION: Page 162?

MR. RANDOLPH: 162, yes.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Andresen.

REBUTTAL ARGUMENT OF PETER C. ANDRESEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ANDRESEN: The principles of Boyd, I don't agree have been rejected by Schmerber and Gilbert. As a matter of fact, both cases recited maintain the board rule. Gilbert used the language as relating to a handwriting exemplar, that in contrast to the content of what is written, like the voice or body itself, is only an identifying characteristic.

And Schmerber, in the same rationale. Mapp did not reject the Fifth Amendment holdings -- I don't have the definite citation in front of me.

The question is, is whether we're talking about the content, the testimony, or the communication from it, or

whether it's as to what's written there itself.

And Bellis -- Boyd has been reiterated by the words of Justice Marshall. And quoting from Boyd, it's long been established that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony.

QUESTION: Was there a search warrant in the Boyd case?

MR. ANDRESEN: The Boyd case was a subpoena, Your Honor.

QUESTION: Subpoena.

MR. ANDRESEN: It was a bill of lading that was seized, which was held to be testimonial.

And going on further from Boyd and Couch and Hill vs. Philpott, the words in Bellis continue to say: the privilege applies to the business records of the sole proprietor or sole practitioner as well as to the personal documents containing more intimate information about the individual's private life.

Now, the character of the papers was never raised or decided below. This is being raised by both the State and the federal government for the first time here.

The Fifth Amendment contention was rejected solely on the basis of the Blank case. And the Fifth Amendment

contentions at the time of the trial were rejected solely because of the reasonableness of the search warrant.

The question is -- now going through the Appendix, I certainly disagree as to most of the contentions of both the State and the federal government as to the items here. Beginning on page 44 through 60 are all handwritten items, which were established to be in Petitioner's handwriting, and which the Court of Special Appeals, as I pointed out in the brief, thought were among the most important items.

QUESTION: But your position fundamentally is that, even if you comply with the Fourth Amendment, you have a perfectly good warrant, and even though the search is a reasonable one you nevertheless violate the Fifth Amendment if you -- if the search warrant is aimed at papers?

MR. ANDRESEN: If the papers are of the type which is protected by the Fifth Amendment, yes, sir.

QUESTION: Well, what type is that?

MR. ANDRESEN: Testimonial and communicative papers.

QUESTION: Well, how can a draft of a settlement statement come within that definition?

MR. ANDRESEN: Oh, very importantly. As a matter of fact, this was the sole amount of the evidence, the fact that the draft and the finished copy were different.

QUESTION: Well, the fact that it's incriminating, though, is that the test? If it's incriminating, it's covered?

MR. ANDRESEN: The tests were that these thoughts expressed on this paper were never expressed to anybody else. That these were kept by the Petitioner -- as a matter of fact, some of these papers were taken from my desk; and these notations were never in finalized form, but were the thoughts in working out the figures which were used to incriminate. The fact that it changed and that items were deleted at the time of settlement was the whole crux in the mens rea argument as to the self -- the self-incriminating acts.

QUESTION: Well, then, you say that --

MR. ANDRESEN: They totaled up to more, and then they were reduced to take care -- to be taken care of in the proceeds.

In other words, the liens exceeded the sale price.

QUESTION: Well, but then that simply makes your definition of documents co-extensive with the notion of incrimination. You don't need to show any more about documents, other than they incriminate you.

MR. ANDRESEN: You need to show that it's your own self creation being put down on the paper, or something that you're maintaining for your own personal ideas.

QUESTION: And a draft of a settlement statement has the same standing as a personal diary?

MR. ANDRESEN: Yes, sir.

Now, the important thing, to reiterate, is that these

questions were never considered as to the Fifth Amendment, and the court relied solely on the Blank case.

Now, as to the compulsion question -- just incidentally, it was never established as to these corporate offices. As a matter of fact, the testimony, as pointed out in the brief, showed otherwise: that the investigators, plus the affidavit and the search warrant, both showed that they were my files maintained as an auxiliary. That in both Vonder Ahe, in the concurring dissenting opinion, and in Shaffer, in the dissenting opinion, as pointed out, just how much compulsion is involved in a search; and Hill vs. Philpott also does that.

QUESTION: Mr. Andresen, do you agree with your colleague from the State that the conviction on some of these counts did not rest at all on any of the evidence that was introduced, and which you challenge?

MR. ANDRESEN: Not at all, sir. I could point to specific items.

QUESTION: No, no. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 1:41 o'clock, p.m., the case in the above-entitled matter was submitted.]