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In the

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

DOMINGA SANTANA and
WILLIAM ALEJANDRO,

Respondents.

No. 75-19 L.V.

Washington, D.C.
April 27, 1976

Pages 1 thru 35

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Washington, D. C.,

Tuesday, April 27, 1976.

The above-entitled matter came on for argument at
11:42 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:

FRANK H. EASTERBROOK, ESQ., Office of the Solicitor
General, Department of Justice, Washington, D. C.;
on behalf of Petitioner.

DENNIS H. EISMAN, ESQ., Needleman, Needleman, Tabb &
Eisman, Ltd., 600 One East Penn Square Building,
Philadelphia, Pennsylvania 19107; on behalf of
Respondents.

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
Frank H. Easterbrook, Esq., on behalf of Petitioner	3
Dennis H. Eisman, Esq., on behalf of Respondents	26
Frank H. Easterbrook, Esq., on behalf of Petitioner - Rebuttal	34

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 75-19, United States v. Dominga Santana and William Alejandro.

Mr. Easterbrook, you may proceed.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF PETITIONER

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

This case presents the question whether police can make a warrantless arrest of a person who they have probable cause to believe has committed one crime only moments before and is still committing another crime when that arrest requires a brief entry into the vestibule of a house.

We submit that the answer to this question is that a warrant need not be obtained. Three independent arguments support our position. Two of these arguments assume *arguendo* that a warrant ordinarily must be obtained to make an arrest inside a house.

We argue first that a warrant need not be obtained when a crime is in progress and the entry can halt that crime. Second, we argue that a warrant need not be obtained --

QUESTION: Do you mean when it is in progress or when it is in progress and that fact is known or observed by the officers?

MR. EASTERBROOK: And when the officers have probable cause to believe that it is in progress.

QUESTION: If just in the abstract, without observation or without objective fact --

MR. EASTERBROOK: Unless it was known beforehand, and just simply turned out that it was in progress, the after the fact justification would not be sufficient.

Our second argument is that an entry should be permissible when it occurs within a few hours after a crime and during a time during which it might be supposed that evidence might be disposed of.

We submit that the case can be decided upon either of those two grounds without reaching the general issue of when a warrant must be obtained to enter a house to make an arrest.

QUESTION: Did you say that the second grounds was it supposed evidence might be destroyed? Isn't that always true?

MR. EASTERBROOK: Our general argument in that regard is that during several hours after a crime, it should be reasonable to enter a house to make an arrest and that the general justification for that is that evidence might be destroyed during those first few critical hours. Whether or not there is reason to believe that it would be destroyed in a particular case is, we submit, immaterial. The justification

of reasonableness extends to those cases as a class and is not dependent upon the facts of a particular case.

QUESTION: But is it dependent upon there being some likelihood that -- well, supposing you have a case in which the crime involves no other evidence other than just knowledge or reasonable cause to believe that a person, say, committed a murder, but there is no evidence -- does the evidence have any bearing on that? I don't quite follow you.

MR. EASTERBROOK: Well, it would be difficult to understand. There is often evidence that a murder has been committed and that evidence might dissipate. In the case of *Cupp v. Murphy*, of course, there were fingernail scrapings under the fingernails, that type of evidence that might dissipate. But our justification runs to crimes as a whole, based upon the fact that often there is evidence of crimes.

QUESTION: I see.

MR. EASTERBROOK: The problem of figuring out whether there is evidence in a particular case is, we submit, the best evidence against requiring the officers to figure out whether there is or isn't. It is such a problematic inquiry and it depends so much upon the facts of a particular case, that it would be very difficult to require officers or indeed to require courts to make that kind of determination before or after the fact in a particular case.

The third argument is that it is always reasonable to

enter a home to make an arrest, with or without a warrant.

QUESTION: Day or night? Is that your argument?

MR. EASTERBROOK: Historically, that has been so, Mr. Justice Stewart.

QUESTION: I just wondered what your argument was, what your position was.

MR. EASTERBROOK: Our position is that that still should be settled but it is, of course, not necessary to reach that question here because of the two independent grounds that I have begun to set out and, also because this arrest took place during the day. Our primary support of that is historical, as Mr. Justice Holmes wrote, "A page of history is worth a volume of logic." But I do not intend to discuss that point further, unless the Court has further questions about it.

QUESTION: I have just one. On both your second and your third justifications, probable cause that a crime has been committed by the particular suspect, also probable cause that he is within the house?

MR. EASTERBROOK: Yes.

QUESTION: Both are required?

MR. EASTERBROOK: Both are required. The facts of this case are not complicated.

A Philadelphia narcotics squad officer arranged to purchase heroin from Patricia McCafferty. McCafferty told him that she would go down to Mom Santana's for the dope. The

officer recorded the serial numbers of \$110 in ten and twenty-dollar bills and gave the bills to McCafferty. McCafferty visited Santana's house, spent a few moments inside and returned to the officer's car with heroin, but without the money. The officer gave a hand signal to other officers and McCafferty told him that "Mom Santana has the money." The other officers then drove in their van the short distance to Santana's house, intending to arrest her for her part in the crime and to recover the purchase money.

When a group of officers drew up in their van in front of Santana's house, they saw her standing on the threshold of her doorway with a brown paper bag in her hand. One of the officers recognized the person in the doorway as Santana. The officers left the van and ran up the walkway to the front-door of the house. There were approximately 15 feet between the curb and the doorway of the house, so it took but a moment to reach the threshold. Meanwhile, Santana had turned and retreated into the interior of her residence. One of the officers overtook her in the vestibule as she was leaving the vestibule for the living room of the house. Respondent Alejandro was in the living room.

When the officers overtook Santana, they jostled her and white packets, packets filled with white powder fell out of the bag to the ground in the vestibule. Santana ran from the living room, attempted to pick up the packets and attempted

to flee. Another officer subdued Alejandro and the arrest was completed in the vestibule.

QUESTION: Now, Mr. Easterbrook, you have referred throughout this recital of the facts to these people as officers. They were not federal officers, were they?

MR. EASTERBROOK: That is correct. They were officers --

QUESTION: They were all state officers?

MR. EASTERBROOK: Yes.

QUESTION: Does that make any difference? Because of *Elkins v. United States*, this was as though they were federal officers, is that it?

MR. EASTERBROOK: In our view, they must be judged as though they were federal officers.

QUESTION: Because of the *Elkins* case.

MR. EASTERBROOK: Because of *Elkins*, and I would add that *Elkins*, the companion case, *Rios*, at 364 U.S. 261, and most recently *Cady v. Umbrowski*, 413 U.S. 433 and 449.

QUESTION: So this is the same as though they were federal officers?

MR. EASTERBROOK: They must be treated as though they were federal officers from a constitutional point of view, and the only question is whether their actions comported with the Federal Constitution.

The packets in the bag were heroin. Santana was

asked to empty her pockets. The officers recovered from the search of Santana's pockets \$70 of the purchase money. The other \$40 of purchase money was never found. The officers also discovered on a table in the livingroom two large knives that could have been used as weapons.

QUESTION: When you say recovered the money, do you mean the identification was made by virtue of the serial numbers?

MR. EASTERBROOK: The serial numbers had been recorded, Your Honor. The serial numbers on the other money in Santana's pocket did not talley with the money that had been used for the purchase.

Respondents were indicted for possessing heroin with intent to distribute it. They moved to suppress the evidence seized incident to their arrest --

QUESTION: Was there any state prosecution?

MR. EASTERBROOK: They were originally also arrested by State authorities.

QUESTION: Oh, they were.

MR. EASTERBROOK: Initially.

QUESTION: That's what you just stated, the facts.

MR. EASTERBROOK: And they were charged by State authorities. Approximately a week after the arrest, the State charges were dismissed, so that there is no State prosecution now pending. They were dismissed technically without

prejudice, but the State authorities, I am informed, have no intention of prosecuting.

QUESTION: So we don't have an abate from them here --

MR. EASTERBROOK: There is none.

QUESTION: Whatever other problems we may have.

MR. EASTERBROOK: Although the oral opinion of the District Court is not entirely clear, the judge apparently concluded that the evidence would require to be suppressed because the arrest of Santana was made without a warrant. The court recognized that there was in his words, strong probable cause to arrest Santana, and in our words, absolute certainty to believe that she was at home.

Moreover, the judge stated that he did not want to criticize the officers for acting as they did under the extreme emergency posture of a case like this. Nevertheless, the judge concluded, they should have obtained a warrant to enter her vestibule to make the arrest.

We appealed. The Court of Appeals affirmed without opinion.

We begin from the premise that under United States against Watson decided by this Court on January 26 --

QUESTION: Excuse me, before you go on. Did the District Judge say something about there being no danger of destruction of the evidence or concealment of it?

MR. EASTERBROOK: The District Court concluded that

because they found \$70 in Respondent Santana's pockets, there was no reason to believe that evidence was to be destroyed. In our view, this is essentially a faux pas justification. The officers had no way of knowing whether they would find the evidence or not in Mom Santana's pockets. The fact that they did --

QUESTION: -- was the marked money?

MR. EASTERBROOK: Yes.

The fact that they did find it there was happenstance and was something that they could not have known at the time they were making the arrest.

Under United States against Watson, we believe, police are entitled to make an arrest without a warrant if they are where they have a right to be at the time they make the arrest. In Watson the police had a right to be in the public restaurant at noontime, and therefore had a right to make an arrest without a warrant.

There is no doubt that police, like other visitors, have the right to approach a house by using the front steps.

QUESTION: Excuse me, Mr. Easterbrook. I am a little confused. I am glancing now at the District Judge's oral colloquy which amounted to his opinion, I guess, did it not?

MR. EASTERBROOK: Yes.

QUESTION: On page 5 it indicates that not only was the marked money suppressed as evidence, but also some heroin.

MR. EASTERBROOK: Yes, it was, Your Honor.

QUESTION: Now, what heroin?

MR. EASTERBROOK: It was the heroin that was found in the bag that Respondent Santana was carrying at the time she was seen in her doorway. And that is the very heroin that she is charged with possession with intent to distribute. That is the focus of the indictment in this case.

QUESTION: Well, the heroin that was sold to McCafferty --

MR. EASTERBROOK: Was not suppressed, Your Honor.

QUESTION: It was not suppressed?

MR. EASTERBROOK: That is correct.

QUESTION: And wouldn't that have been evidence that Santana had heroin in her possession with intent to distribute or sell it?

MR. EASTERBROOK: It would also have been evidence.

QUESTION: And was it?

MR. EASTERBROOK: But that evidence is not involved in this case. She was charged with possession of the heroin that was found --

QUESTION: "She" being Santana?

MR. EASTERBROOK: That is correct.

QUESTION: The Respondent?

MR. EASTERBROOK: That is correct. The indictment is at page 5 of the separately-bound appendix.

QUESTION: Yes. And she was charged with possession of heroin for sale or distribution?

MR. EASTERBROOK: That is correct. And the heroin that was the subject matter of that indictment was the heroin that was in the bag at the time she was arrested.

QUESTION: Does that appear in the indictment?

MR. EASTERBROOK: It does not appear specifically. The indictment --

QUESTION: The indictment -- it could have been the heroin that was sold to McCafferty?

MR. EASTERBROOK: No, Your Honor; the --

QUESTION: There was no reason to suppress that, was there?

MR. EASTERBROOK: That is correct, there was no reason to suppress that, and it was not suppressed. The subject-matter of the indictment relates that she possessed 587 grains of heroin.

QUESTION: So you can tell by that quantity.

MR. EASTERBROOK: That is right. McCafferty was indicted with distributing 42 grains of heroin, that is in the paragraph immediately preceding.

QUESTION: Yes.

QUESTION: I am looking at 4(a) of the petition for writ here and I take it that all of the language appearing on 2(a) through 3(a) and 4(a) following the words, "The Court,"

is what the District Judge said.

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: By way of an opinion, and among other things, the presence of the money in Santana's pocket indicates that there was no basis to conclude that it was to be destroyed. That's the Judge's statement.

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: The predicate for his suppression.

MR. EASTERBROOK: That was part of his reason for suppressing the evidence.

QUESTION: Does he anywhere else, or is there any other explanation of why he thought it could not have been destroyed five minutes later if she had locked the door?

MR. EASTERBROOK: There is no other statement except that.

QUESTION: Or concealed?

MR. EASTERBROOK: None other, Your Honor, except the fact that it was in her pockets at the time of the arrest, which was approximately two or three minutes after the sale, and at that point, as I have pointed out, \$40 of the money was already gone; \$70 was recovered.

QUESTION: Thank you.

MR. EASTERBROOK: The problem here --

QUESTION: The District Judge did not make any reference to disposition of the heroin, at least that I

observed, or did he at some point?

MR. EASTERBROOK: He did on the last page of his oral opinion, on page 5(a), the second paragraph from the end. The Court believes that the heroin that supports Count 2 and 3 should be suppressed and not offered as evidence.

QUESTION: Well, should be suppressed -- that could have been put down the drain very quickly.

MR. EASTERBROOK: Oh, that is correct; he never makes any statement that there was, that the officers knew or did not know whether that was to be destroyed. I think it is implicit in his opinion that the officers did not know that it was soon to be destroyed.

We think the problem here is whether the police, who were entitled to approach Santana as she stood in her doorway, were required to stop, turn back and seek a warrant because Santana retreated from the threshold of her doorway to her vestibule. The consequences of a sudden stop would have been considerable. Respondents would have been afforded a respite of an hour or more while the warrant was being obtained. There would have been ample time then to destroy the heroin and the money which, having seen the officers coming --

QUESTION: Could it be fair to say the Judge said that before you moved the van, you should have gone and gotten the warrant?

MR. EASTERBROOK: I think that is another possible

interpretation. My understanding of the oral argument in the Court of Appeals is that at least one of the Judges of the Court of Appeals expressed that view, and if that is the correct view of this case, we submit that it is not because the officers were entitled to approach Santana as she stood in her doorway without a warrant, and Respondents do not seriously contest that, but if it is the correct view of the case, the arguments that we make here are unaffected. It was still true that the police believed that she was committing the crime of possession of heroin and it was still true that the arrest was quite prompt after she had committed the crime of distributing heroin to McCafferty, and I will now turn to our --

QUESTION: Just one small point. Is it correct that your theory is that they had probable cause to believe she was then committing the crime of possession of heroin --

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: -- as opposed to having just completed a sale --

MR. EASTERBROOK: We believe that they had probable cause to --

QUESTION: What is the evidence of that, that they had before they went up to the door?

MR. EASTERBROOK: We believe that it is reasonable for officers to believe that people who have just sold heroin from a house in an operation of this sort had not sold it all.

QUESTION: I see.

MR. EASTERBROOK: It is essentially a question of common experience.

The most general justification for the arrest in order to put a stop to the continuing crime was articulated by Mr. Justice Marshall in *Watson*. He wrote: "When law enforcement officers have probable cause to believe that an offense is taking place in their presence and that the suspect is at that moment in possession of the evidence, exigent circumstances exist. Delay could cause escape of the suspect or destruction of the evidence." That fits this case exactly.

The officers had probable cause to believe that Santana was engaged in the crime of possession of heroin with intent to distribute it, and that she possessed not only the heroin but the evidence of another crime, her previous sale of heroin to McCafferty. They were therefore entitled to make a prompt arrest even though that involved an entry into her vestibule.

QUESTION: Do you think it was necessary they had probable cause to believe that the heroin was on her person?

MR. EASTERBROOK: We don't believe so, Your Honor. They had probable cause to arrest her for that crime. There would be some difficulties in this case --

QUESTION: Well, let's assume they had probable cause to believe that she had heroin somewhere in the house but not

necessarily probable cause to believe she had it on her person. You would arrive at the same result?

MR. EASTERBROOK: We believe that they could make the arrest. There would, in our view --

QUESTION: And enter the vestibule?

MR. EASTERBROOK: And enter the vestibule. There would be difficulties if they then attempted to search the house for the heroin that they had probable cause to believe was there. We believe they would at that point be required to desist, and if the heroin was not within the reach of her or on her person, to obtain a warrant to search the house for the heroin that they had probable cause to believe was there.

QUESTION: Well, except its being on her person or in plain view, they would be required to get a warrant, would they not?

MR. EASTERBROOK: To search the house.

QUESTION: -- the status quo until someone came back with a warrant.

MR. EASTERBROOK: Unless they had reason to believe that there were other people in the house. For example --

QUESTION: Well, I am just assuming --

MR. EASTERBROOK: -- assuming that they had already arrested everyone in the house.

QUESTION: We will resume at one o'clock.

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Easterbrook.

MR. EASTERBROOK: I would like to expand upon my answers to two of Mr. Justice Stewart's questions.

You inquired, Mr. Justice Stewart, about the nature of the indictment in this case and the indictment is indeed, as I indicated, for the possession of the heroin that was in the bag. The United States Attorney informed me that that indictment was returned because Patricia McCafferty, whose testimony would have been perhaps necessary for proof of the sale to McCafferty had indicated that she was unwilling to testify against Santana, and therefore the decision was made to indict her for the possession with intent to distribute the heroin in the bag.

The second question had to do with whether our position was that you could make a warrantless arrest entry at night. Now, I indicated that our position was that. I should expand by saying that we believe that historically no warrant has been required and none should be required, but the reasonableness requirement of the Fourth Amendment applies in full force, and it could and usually would be unreasonable to make a nighttime entry if a daytime entry would do as well to make an arrest.

So that we do not want to leave the impression that nighttime entries are a preferable or indeed unquestioned way

of making such arrests; they are not. They are often unreasonable.

This case does not involve an entry to search for a suspect who may or may not be there. It does not involve a delayed arrest for a crime committed long ago. The officers had seen Santana in the doorway with their own eyes and they knew she had committed a crime there moments before and probably was still committing a crime.

QUESTION: How far away were they when they learned of the sale to McCafferty? How far away were they from Santana's house?

MR. EASTERBROOK: About a block and a half, Your Honor, and they returned that block and a half in a very brief time.

This immediate arrest not only put a halt to an ongoing crime, but it preserved the evidence of that crime and the crime that had just been committed in the sale to McCafferty, it prevented any possibility of flight, it produced maximum surprise, and by that token, maximum safety to the officers, because if the officers had been compelled to desist and effect a house arrest, their personal safety could have been in some danger if they later attempted to make the arrest once Respondents knew they were there and attempting to arrest them.

In many ways this case is similar to *Sure v. United*

States, which we discussed in our reply brief. Officers had possessed probable cause to believe that Sure was committing the crime of distributing distilled spirits and that he had some such spirits in his car. They followed Sure's car to his home and arrested him in his garage. The Court unanimously upheld that arrest. It observed that the passage of the car into the garage did not destroy the officers' right to follow and to arrest Mr. Sure, and so it is here.

Respondent's passage into her vestibule did not destroy the officers' right to arrest her for an ongoing crime.

QUESTION: Mr. Easterbrook, may I ask about the ongoing crime theory. You told me a little earlier that the reason they had probable cause to believe she was then committing a crime was that you assume that one who sells some heroin retains some in supply. Do you also assume that the retained heroin is on the person of the defendant, or merely on the premises?

MR. EASTERBROOK: We assume only that it is on the premises, Your Honor, and as I indicated in response to a question by the Chief Justice, it would be permissible to arrest that person. At that point if a search of the premises were necessary to discover the heroin, it would be appropriate to obtain a warrant to make the search of the premises for the heroin.

QUESTION: It would not only be appropriate but

necessary.

MR. EASTERBROOK: Necessary, yes. We do not argue that you can search the premises if the heroin is not on the person who is arrested.

QUESTION: I think you said before or indicated that the limit of the officers' conduct once they got in the house was (a) to search the persons of those arrested, and (b), to seize any contraband in plain view, and the third alternative would be to take them in custody and preserve the status quo while awaiting another officer who would go to secure a warrant?

MR. EASTERBROOK: Yes, Your Honor. The search would go no further than the permissible scope of the search under *Chanel v. California*, which included the person of the person arrested and the area within his reach at the time of arrest.

We do not believe, however, that the right to make the arrest of Santana depended necessarily on the fact that she was committing the crime of possession of heroin with intent to distribute. We submit that it is reasonable for officers to enter the house within a few hours after a crime, here the crime of the sale to Mc Cafferty, whether or not this justification is called fresh pursuit, it is based on an entirely practical understanding that the first few hours after a crime are critical, both to capture the suspect and to recover the evidence. It is a justification based on exigencies that

pertain to many cases. The decisions of the courts below by requiring officers to delay and invest one or more hours in obtaining a warrant would disable them from acting during this most critical time immediately after a crime had been committed. Once these first few hours have passed the need for haste is diminished, but at least during the first few hours it is reasonable for officers to act promptly to make the arrest.

The District Court disagreed with this argument because, it said, the police could not be sure that respondents would flee, could not be sure that respondents would destroy evidence, and so on. The problem with this approach, as I indicated earlier to you, Mr. Justice Stevens, is that there are many possible outcomes during the first few hours after a crime. They are in reality no more than predictions of probabilistic events. The police may know that some suspects will flee. They will know that some will arm themselves and attempt to defend themselves against arrest. They know that some suspects will destroy evidence. But with rare exceptions they cannot know which suspects those are.

QUESTION: Well, how did they -- did Santana know that she had been caught? She did not know it, did she?

MR. EASTERBROOK: Your Honor, Santana did not know until her arrest was made.

QUESTION: So, I mean, there was no danger of her destroying this loot --

MR. EASTERBROOK: We believe that there was a very real danger as soon as the arrest of McCafferty was made only a few blocks away. McCafferty -- the arrest of McCafferty could have been observed, and that in fact could have --

QUESTION: Was he arrested?

MR. EASTERBROOK: McCafferty was arrested immediately after the sale.

QUESTION: Publicly? I mean, people that go in and make purchases do not usually do it publicly, do they?

MR. EASTERBROOK: Your Honor, she was arrested in an automobile approximately a block and a half from Santana's house.

QUESTION: Well, let us put it this way: There is nothing in the record that shows that they did know?

MR. EASTERBROOK: That is right, there is nothing. And our argument is that there need --

QUESTION: And if she did know, I would submit that she would have come out the back door rather than the front door.

MR. EASTERBROOK: That is right -- oh, no, there is no --

QUESTION: What do you mean, "Oh, no"?

MR. EASTERBROOK: We are not arguing that she knew.

QUESTION: Oh.

MR. EASTERBROOK: We are arguing that the prompt

arrest prevented her from learning.

QUESTION: Yes, but if she did not know, how could she be about to destroy valuable --

MR. EASTERBROOK: We are not arguing, Your Honor, that she was about to destroy these --

QUESTION: Well, I thought you said that was the whole basis of going in?

MR. EASTERBROOK: Our argument is that officers might reasonably believe that some suspects will destroy evidence. We are not arguing that this was necessarily such a suspect.

QUESTION: Well, once they began walking up her driveway when she was standing in the door, what would be her probable reaction, since you are dealing in probabilities?

MR. EASTERBROOK: Her probable reaction, we think, is to attempt to destroy the evidence that she has and to attempt to flee if they were required to desist after they were walking up her driveway. But again, as we have argued, it is simply a question of probability and we think it was reasonable for the officers, in consideration of these probabilities, to continue on to make the arrest. Our argument rests on probabilities and it rests on an analysis of reasonableness that pertains to many cases other than this one.

If there are no questions, I will reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Mr. Eisman.

ORAL ARGUMENT OF DENNIS H. EISMAN, ESQ.,

ON BEHALF OF RESPONDENTS

MR. EISMAN. Mr. Chief Justice and may it please the Court: The issue before the Court today is in reality whether 200 years after the Declaration of Independence Americans can be secure in the knowledge that the police may not broach the sanctity of their homes, seize them or their loved ones, carry them away without a judicial finding of probable cause for their arrest, excepting the argument that in certain cases, exigent circumstances would require an arrest without a warrant.

QUESTION: What do you suggest as a hypothesis for the probabilities when the officers approached the door and she was standing in the open doorway, as it turns out with heroin either in her hands or on her person, with her own knowledge? The record shows that she had just engaged in a sale of narcotics.

MR. EISMAN: Well, what the record shows in the District Court, why the District Court, I believe, held this way, was that the police set in motion the fact of the discovery of the arrest by their own action in immediately going to the house and taking the option of immediately rushing up in plain clothes with guns drawn, rushing the house, when the Court felt below that it would have been just as easy and more constitutionally proper for them to have gone immediately to the place where, in Philadelphia, where the justices of the peace sit on a 24-hour basis, which was only a half an hour

away, gotten a warrant and returned, and not rushed the house with guns drawn, children sitting on the steps, in plain clothes, in this fashion. So I think the argument that once the police ran up to the house with their guns drawn, that the Defendant would have known that they were coming to arrest him would have destroyed evidence begs the issue that the District Court found was that they should not have acted in that fashion.

They said that they had the time, there were no exigent circumstances absent what the police themselves created here in this case. The exigent circumstances as pointed out by the Government in this case are all circumstances which were created by the Government's action and could have been negated by merely getting a warrant and returning to the house and making the arrest.

QUESTION: Suppose the lady had been on the front porch and had not identified the police as policemen as they approached, perhaps assuming that they were magazine salesmen or what-not. Could they have lawfully arrested her then and there?

MR. EISMAN: I think --

QUESTION: Given the knowledge that they had about the prior transaction a few minutes before?

MR. EISMAN: I think if she were out in the street or if it was an open porch not connected inside the clothes of

the house, as we might say, it might -- the case might fall into the area of the Watson decision. But in this case the record clearly shows that she was inside the doorway, and as a matter of face, one of the police officers testified, even in the vestibule, and I think one of the reasons this case is here today is to decide the issue different from Watson, not a person out in a public place but whether a person inside the home has the security that we submit the Fourth Amendment gives additional rise to the security of the home.

In this case there was absolutely, according to the findings of the District Court, no exigent circumstances. There was no information whatsoever that the Defendant was armed or dangerous. There was no degree of time necessary to get a warrant, as in the Miller case another circuit case where they knew it only took fifteen minutes to cut heroin and it would have taken them 45 minutes to get the warrant.

Here the District Court found that on the facts of this case, they had ample time to get a warrant. Thirdly, there was no information that the Defendant was in any way aware that the police was on her trail.

Finally, there is no evidence whatsoever in the record as it stood when the police rushed the house that there would be an effort to dispose of the money, which is the only real evidence that the police were talking about in this case, that they were going in to seize.

The Court below asked the specific question, on page 37 of the record, now, at the minute you left, what was your purpose of going to the house, what did you intend to do?

"Answer: I immediately intended to recover the marked money that was used in the transaction and arrest the defendant Dominga Santana."

Nothing in the record in this case that they had reason to believe that there were additional narcotics present in the house or that this Defendant in fact possessed them. As a matter of fact, the record in this case, interestingly reveals no direct information that it was this Defendant who made the sale.

The evidence presented in this case was that the police officer saw McCafferty go into the house with Alejandro and come out of the house shortly after. The police had never seen Mrs. Santana at all that day and when asked about the transaction, the only thing that McCafferty said was Mom has the money, not that Mom sold the dope, but that Mom had the money.

QUESTION: Well, how could Mom get the money if she did not sell the dope?

MR. EISMAN: Well, she was seen going into the house with the co-defendant, Mr. Alejandro, and coming out a short time after, and I think it would be just as logical to assume that the dope could have been sold by Alejandro and somehow

she saw the proceeds eventually go to Mrs. Santana, was told that the money would eventually go to her. But in this record and I am not arguing with the finding of the District Court on probable cause here, what I am saying is the record here is even a little unclear as to what knowledge the police had when they charged the house with their guns drawn in plain clothes, with children sitting on the step, saying, "Police."

Here, in addition to the issues raised by the Government on their appeal there was another issue that I do not think the court really thought it necessary to get to, but that was that the circumstances of this arrest, the failure to say we are here to arrest you, and merely running up with guns drawn into somebody's home, without stating the purpose for that entry, was in fact improper also.

The sanctity of a person's home is not only I believe guaranteed by the Constitution, but it's a tradition that goes back hundreds of years in England and our Anglo-Saxon heritage.

It is a problem not only that existed at the time of our Revolution and according to many writers was one of the fundamental reasons why in 1776 there was a Declaration of Independence, but in fact, exists today outside of our country in England. The history of the Fourth Amendment which I don't intend to dwell on at any great length --

QUESTION: What do you think the common law rule was

about making an arrest in a home without a warrant if there was probable cause?

MR. EISMAN: In England there was no requirement for a warrant to make an arrest, and I submit that is the reason why our Constitution was written, and our Fourth Amendment was written to the Constitution, was to distinguish between what was going on in England and the Colonies in those days and what was hoped for to be different in this country, because in England today, according to at least the press in London, there is before the House of Parliament a bill that gives the Internal, or Inland Revenue Service, as it is called in England, the right to go into somebody's home and search for any papers necessary to prove tax evasion and take away anything necessary and break the --

QUESTION: Without a warrant.

MR. EISMAN: General warrants -- with a warrant but not no warrant specifying to any general specific areas.

QUESTION: Does the warrant have to be supported by probable cause?

MR. EISMAN: No, it is a warrant that is obtained from a justice of the peace which according to the reports I have read has absolutely no knowledge of what the Inland Revenue Service might be interested in.

But the point I am making, this is a general warrant, type of warrant that was used in England and the Colonies before

the Declaration of Independence which led to the eventual finding that a Fourth Amendment to the Constitution was necessary.

If the Fourth Amendment does not protect us from intrusions into our home and protect us from the police determination as to whether or not they are going to arrest us by putting between the police and the citizen a judicial, disinterested determination, then what does the Fourth Amendment stand for? It has to stand for the fact that in America, citizens before they can be taken out of their house, whether it be day or night -- and I do not think, although it is a little more horrendous to be dragged from your home without a warrant at night than it is to be dragged from your home or have your sons or daughters dragged from your home in the daytime without a warrant -- at least if we know that before the police came to our house, absent exigent circumstance, that a judge had found probable cause, then I believe we would be finding what our forefathers in the Bill of Rights wanted for our country, that it be different from the systems in other countries and that we would have the protections of a judicial determination of probable cause.

In this case, there was absolutely no exigent circumstances found by the trial court, and no reason to go into the home and drag out Mrs. Santana in the fashion it was done.

This was a row house with people sitting, children sitting on the step, and the facts are that plainclothes-

policemen jumped out of the van, ran up with guns drawn, right into the house and grabbed the Defendant. It is a frightening aspect or specter to think of, even though when we consider that the crime involved is a crime that we consider serious.

QUESTION: Frightening to Mrs. Santana, do you mean?

MR. EISMAN: Frightening that it might happen to one of us, that the police may come to our house, run up with guns drawn in plain clothes, run through the doorway where we're standing in our vestibule and grab us. It is frightening to think that not only does, can this happen to someone as alleged like Mom Santana, but it could happen to anyone where the police are the ones making the determination.

QUESTION: Well, given exigent circumstances there is no doubt it can happen and properly happen.

MR. EISMAN: Well, I concur that where the person is armed and dangerous, where there is evidence that the person can destroy the evidence or might destroy the evidence or might flee, that that is a commonsense, logical exception to the warrant requirement. But here in this case, and I believe in the reason why this case is before this Court today is the determination of absence of those exigent circumstances.

Do we as American citizens have the protection of a judicial determination before we are seized? Normally before this time, most of the cases requiring warrants were just for the seizure of property, and I am the first to admit that

property rights are extremely important in our society. But rights to physical arrest, I believe, are a little more important and the seizure of our person goes even deeper than the seizure of our property and people should at least have the same rights to protection of a judicial determination before the seizure of their person that they have in the seizure of their property.

Thank you.

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

Do you have anything further, Mr. Easterbrook?

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF PETITIONER -- REBUTTAL

MR. EASTERBROOK: Counsel for respondent has indicated that a problem in this case is the failure of the officers to announce that they were officers and state their purpose and to demand entry. Now, I will deal with that just quite briefly.

It is not clear that the Constitution requires any announcement. *Kerr v. California* presented that question directly. Four Justices believed that it did, four Justices believed that it did not, and Justice Harlan expressed no view on that question.

Assuming the Constitution requires some sort of announcement, the pertinent analogue would be 18 U.S.C. 3109, which requires an announcement prior to the breaking of the

door of the house. Our reply brief devotes substantial space to this question and we have argued that walking in through an open door in the view of someone who knows that the officers are coming is not such a breaking that an announcement is required by section 3109, and, in addition, there was no chance here that any of the harms that that rule was intended to prevent could come about.

The rule was designed to prevent the exertion of force by officers, the breaking of doors when that kind of breaking could be avoided by consent. It was also designed to avoid unnecessary opportunities for violence. The householder in England had a right to protect himself against those who would break down his door and enter, and the rule of announcement by letting him know that the police were coming would prevent that sort of violence. But this case doesn't present either of those two rationales and we submit should not be covered by them.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:23 o'clock p.m., the above-entitled case was submitted.]

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