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In the

Supreme Court of the United States

RUFUS JUNIOR MIMCEY,
PETITIONER,
V.
STATE OF ARIZONA,
RESPONDENT.

No. 77-5353

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February 21, 1978

Pages 1 thru 42

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IN THE SUPREME COURT OF THE UNITED STATES

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RUFUS JUNIOR MINCEY, :
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Petitioner, :
 :
v. : No. 77-5353
 :
STATE OF ARIZONA, :
 :
Respondent. :
- - - - - X

Washington, D. C.

Tuesday, February 21, 1978

The above-entitled matter came on for argument at
1:20 o'clock, p.m.

BEFORE:

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

APPEARANCES:

RICHARD OSERAN, ESQ., 111 S. Church Avenue, Suite 102,
Tucson, Arizona 85701, for the Petitioner.

GALEN H. WILKES, ESQ., Assistant Attorney General of
Arizona, Phoenix, Arizona, for the Respondent.

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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 77-5353, Mincey against Arizona.

Mr. Oseran.

ORAL ARGUMENT OF RICHARD OSERAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

I am Richard Oseran, here on behalf of the Petitioner Rufus Mincey.

This case concerns the trial court's admission and Arizona Supreme Court's affirmation of what the Petitioner contends to be unlawfully seized evidence and an inadmissible statement.

The first question before this Court is whether there is a compelling need to permit a warrantless general search at the scene of certain suspected crimes, specifically a possible homicide or a crime involving a serious bodily injury, where there is no exigency and there is ample time to obtain a warrant without frustrating the purpose of the search.

The second questions concerns whether a statement made by the Petitioner in the intensive care unit of a hospital, in violation of Miranda, was involuntary or untrustworthy. And, if neither, whether his testimony at trial was perjurious, to render his statement inadmissible for any purpose.

QUESTION: If we rule for you on your first point, the Arizona scene of murder exception, wouldn't that more or less moot out the second point, or at least make whatever we said on that an advisory opinion, since, as I understand it, the hospital conversations were used only in the murder trial?

MR. OSERAN: No, Your Honor. One of the counts was a sale, and if you rule for me on the first question, the unlawful search under the Fourth Amendment, that would suppress narcotics that were seized, but there doesn't have to be narcotics for the crime of offer to sell or sale to have been committed. Therefore, the second question would still be at issue in the second trial on that charge.

QUESTION: Are you positive about this? I share Justice Rehnquist's feeling that the voluntariness issue bore only on the assault and murder counts.

MR. OSERAN: Well, Your Honor, there were three -- the statement was used in three different instances to impeach the Petitioner. It affected his credibility before the jury, and his credibility is intertwined between all the counts as to what their opinion is as to his truthfulness. And in at least one of those instances it involved a direct comment on his silence which again goes to his credibility which was a factor that may well have been before the jury in its decision.

QUESTION: Would you agree that all we should review here were questions that are properly raised in the drug

conviction, and that we should not review questions that relate only to the murder conviction which was remanded by --

MR. OSERAN: I would agree with that, but I think the question of the voluntariness of the statements is part of the drug conviction.

I will initially confine the facts and argument to the first question. On October 28, 1974, nine undercover disguised police officers and the county attorney forced entry into the Petitioner's residence by means of a ruse. The armed plainclothes officer, the first one in, ran straight back to the bedroom where the Petitioner was and where his girl friend lay sleeping. Gunfire erupted immediately, leaving four people seriously wounded, the Petitioner, the girl friend, the disguised officer and one occupant of the apartment that was struck by a bullet that came out from the wall of the bedroom.

The entire incident transpired and was completed within a matter of seconds of entry. The scene was secured. There was no search or no seizure at that time. The wounded were transported to the hospital and investigating officers arrived and conducted a search that lasted for four days, without the benefit of warrant, and they seized between two and three hundred items.

The Fourth Amendment proscribes warrantless searches. This Court has continually held that warrantless searches are, per se, unreasonable. Necessity compels certain exceptions, but

there was no necessity here. Immediate search was not imperative. The residence had been secured prior to the commencement of the exhaustive search and the purpose of the search would not have been frustrated by the officers attempting to obtain a warrant.

QUESTION: You say, then, even though they stayed only ten minutes and only tried to ascertain whether the person was, in fact, dead, and looked immediately around the body, it still would have required a warrant?

MR. OSERAN: I don't think that what was seen in -- if they were lawfully there and we contend that they weren't, but that's not before this Court -- If they are lawfully at a certain place, what they can see in plain view, I think, would not be pursuant to search and those items would be admissible into evidence.

QUESTION: You've got a case where the search extended over a period of four days, as I understand it.

MR. OSERAN: That's correct.

QUESTION: It seems to me that the Court could conceivably rule in your favor on the duration of the search and nonetheless conclude that the officers were lawfully on the property in the very first instance following probable cause.

MR. OSERAN: But there were no narcotics in plain view. The narcotics were the result of a much more intrusive

search that went into drawers and cabinets and pockets of clothing not on the Petitioner at the time.

QUESTION: Let me see if I have this clear. You say there -- Did I understand you to say there is no challenge now to the evidence that was -- to any evidence that was secured on the day of this gun battle?

MR. OSERAN: That there is no challenge, at this point in time, before this Court, but there may well be a challenge when we go back to trial on whether or not the entry was lawful. But, assuming for purposes of argument here that the entry was lawful, then what was seen in plain view which would not be the result of the search would be admissible. It was the more intrusive search that I am directing my argument toward. There was no reasonable or rational basis, although the Respondent contends otherwise, that a search was needed for the detection or the solution of the crime or the protection of the public.

The rationale of the suspected crime scene emergency, if it is viable here, then it is viable at the scene of all crimes and the principles of personal security, personal privacy and private property, as well as personal liberty, would be sacrificed along with the Fourth Amendment.

After the shooting, the wounded were removed to the hospital, as was the Petitioner. Upon arrival at the hospital, he was depressed near to the point of coma. He was breathing insufficiently and he was partially paralyzed. Three hours

later, Detective Hust of the Tucson Police Department went to the intensive care unit of the hospital to interrogate him. Petitioner testified he was asleep at the time. The detective didn't recall, but he found him in a condition with an inter-tracheal tube in his mouth, going down his throat into his lungs to aid in his breathing. This is used for critical patients, rather than just a face mask with oxygen. He also had a tube up through his nose, down his throat into his stomach, to prevent the aspiration of vomit so he wouldn't choke to death. Obviously, he was not able to speak in this condition. Virtually, there were tubes and needles running in and out of every orifice in his body.

The interrogation began at about 8:15 in the evening and continued until 11:20. Appendixed to our brief are the six pages of responses made by the Petitioner which certainly suggest that it was laborious and slow-going. After some small talk --

QUESTION: How does that bear on whether it is voluntary or --

MR. OSERAN: I think the duration of the interrogation under the circumstances and with the other factors that I intend to present to the Court, have a bearing on voluntariness, yes, Your Honor.

QUESTION: I take it that these notations in the margin on the statements which he wrote out in the hospital are

all endorsements by the nurses. The first one that I have before me, for example, states, "I was present during this interview and he gave all voluntarily," signed Elizabeth Graham, R.N., presumably a registered nurse at the hospital.

MR. OSERAN: She was the nurse on duty, Your Honor. She authorized the interrogation. She encouraged the Petitioner to cooperate. However, she did not read what he had written. She did not know that he was requesting that the interrogation be ceased or that he wanted an attorney present. There are other notations on the responses on this hospital paper in the margins. There was testimony at the trial, by the officer, that he made those notations the following morning. However, on Sunday, preparing to come before this Court, I went back and decided I needed a larger copy of these statements and went to my file and at that time discovered that these renderings of the officer, that he indicated he put on two days later, did not exist on the copies of the statement that I had. I received the copies from the prosecutor. Pursuant to an Arizona rule, these statements are also part of the record and I believe it would be appropriate for the Court to request that record concerning these statements, containing these statements. It is the disclosure provided by the prosecutor to me and I provide him with disclosure. It is a permanent part of the record. And that would indicate that, perhaps, there was some altered evidence or a misstatement by the officer. I would receive

this fifteen days after the arraignment, which would indicate that at that point in time there were no renderings by the officer on the statement.

QUESTION: Is this his writing in the middle?

MR. OSERAN: On what page, sir?

QUESTION: Any of them, 3, 4.

MR. OSERAN: Yes, it is his writing, Your Honor.

QUESTION: What did he have a table, or something, there?

MR. OSERAN: He was immobilized --

QUESTION: What kind of intensive care unit do you have out there? Is it like an office or something?

MR. OSERAN: The officer came to interrogate him, realized -- obviously, the officer wasn't prepared. The hospital was kind enough to provide the officer with hospital paper for the interrogation. How he was able to write I am not sure and I think, just because of the minimum amount of it, it would have to have been a great hardship to him.

QUESTION: Pretty clear writing, isn't it?

MR. OSERAN: It is legible writing, Your Honor, but --

QUESTION: Much more legible than the prosecuting attorney.

MR. OSERAN: It is more legible than mine, as well, Your Honor, but I don't think how legible it is is any indication of whether it was psychologically coerced or not.

QUESTION: Well, it has something to do with the description you gave of his being in a near coma.

MR. OSERAN: That was the description given by the doctor in the testimony at the time of the trial.

QUESTION: Do you suggest that a man in a near coma could have printed out this very clear printing, all this?

MR. OSERAN: I would imagine he could have succumbed and passed away after he printed this. If he prints in a normal handwriting, I realize --

QUESTION: Well, I was asking you at the time. You can assume he died an hour later, if you wanted to, but at the time he wrote these answers you don't suggest he was in a coma.

MR. OSERAN: No, Your Honor. He was in a coma or a near coma at the time he was admitted into the hospital three hours previously. He had been administered some drugs, and so forth. At that point, his condition was still critical and he was in the intensive care unit, but I am sure it had stabilized.

QUESTION: These are all very definitive responses, are they not?

MR. OSERAN: They are, Your Honor, but of course they are only definitive in light of the questions that were asked him and there was no --

QUESTION: That's all they needed to be, isn't it?

MR. OSERAN: Sir?

QUESTION: That's all they needed to be, is responsive

to the questions.

MR. OSERAN: Exactly, Your Honor, but we don't really know what the questions were and the responses only have meaning in light of what the questions may or may not have been. The officer didn't memorialize the questions he asked for seven days, and at that point in time he held the responses in his hand and it sort of was like filling in the blanks, so they may or may not be definitive. You can only tell if you know what the questions were. In fact, at the time of the hearing on this matter, he was given just the responses and asked, "You, officer, you fill in the questions," and he couldn't do it. He couldn't do it without that which he had prepared utilizing the responses.

The officer, after some small talk, advised the Petitioner that he had killed a police officer. He then read him his rights. The Petitioner described some threats and intimidations that were made to him after the shooting on the scene and then invoked his Fifth and Sixth Amendment rights.

The Fifth Amendment prohibits the compelled testimony of the accused to be used for any purpose. The statement of the Petitioner made in the intensive care unit of the hospital was involuntary and untrustworthy for the following reasons. He was in critical condition, he was in unbearable pain and he advised the officer of that. He made six attempts to invoke his Fifth and Sixth Amendment rights and it was clear to him, as it

would be to any man that the questioning was not going to cease and an attorney was not going to be provided for him. Eight times he told the officer how confused and uncertain he was. He had been administered NARCAN, which we learn from the Respondent's brief causes acute withdrawals in an addict, which he was. He was prompted by his nurse to cooperate, as I spoke about a moment ago. He had no prior experience with the police or other judicial officers. Aside from his own injuries, he was in shock because he had learned he was charged with murder and that he, in fact, had murdered a police officer, and his girl friend was seriously wounded in the encounter. He was accused by the interrogator of lying. The interrogator untruthfully told him that others were making statements inconsistent with his. He was exhausted, but the interrogation did not cease, except when he appeared physically unable to go on. The interrogator then would leave and return. The Petitioner didn't even know that it was the same person coming back over and over again. His will was overborne. The statements were the result of the coercive atmosphere he found himself in. They were involuntary and untrustworthy.

As I mentioned a moment ago, his responses only have meaning in light of the questions that were asked. The questions were not reconstructed for seven days.

The Respondent contends that it knows this was a violation of Miranda and that the statement was voluntary,

trustworthy and admissible for impeachment. But a statement made in violation of Miranda would only be admissible for a limited purpose, if, in fact, it was elicited on direct examination, and if it was perjurious. There was no perjury here and the prosecutor should not be allowed to make that implication. At most there was some ambiguity. Of the three responses that the prosecutor sought to impeach, two were elicited by him on cross-examination. In one, which can be found in the Appendix at page 88, was a comment on his silence. The questioning on cross-examination by the prosecutor was: "You didn't tell the Officer Hust at that time that the officer shot you first, did you, Mr. Mincey?" His response: "He didn't ask me." The impeaching question, then: "He did ask you at one point in there if you had anything else to add, didn't he?" This is the question, if we can believe the officer's construction of what he had asked. The answer: "Yes, sir, I think my answer at that time was I couldn't say anything without seeing a lawyer first." In fact, what the question and answer had been on page 4A of the Appendix to Petitioner's brief and pages 40 and 41 of the Respondent's brief: "Is there anything else you want to tell us?" Answer: "If it is possible to get a lawyer now, we can finish the talk." He also was attempted to be impeached by a statement as to whether or not he knew it was a bust at the time of the incident. In his statement, he had referred to it as a "bust," but this is after he had been

told by the officer that it was a bust. It was also after the time when he said, "Which one was the police officer? Was he the one in cowboy boots?" Who, in fact, was the deceased officer.

There was another statement elicited by me on direct examination, regarding whether or not the man running towards the bedroom had a gun in his hand. He was impeached on cross-examination with, "I can't say for sure. Maybe the guy had a gun."

QUESTION: But his answer at the trial to your question was what? Just affirmative or negative?

MR. OSERAN: That he saw a gun in the man's hand that was running towards him.

QUESTION: That he did?

MR. OSERAN: But it was obvious that he would have known the man had a gun because that's the man that shot him. There was, at least, some slight ambiguity --

QUESTION: That doesn't mean he would have seen the gun.

MR. OSERAN: He indicated that he had seen --
Correct, Your Honor --

QUESTION: At the trial, in answer to your question, he said he had seen the gun in the man's hand.

MR. OSERAN: Right, but in his statement --

QUESTION: He said he didn't know.

MR. OSERAN: What they used to impeach him with was a statement that he "didn't know whether the man that came into the bedroom had a gun." Well, obviously, he knew the deceased officer had a gun because at that time he knew he had been shot.

There was no reason for not obtaining a warrant. The evidence admitted against the Petitioner was seized unlawfully, and the judgment of the Arizona Supreme Court should be reversed. The statements of the Petitioner made in the intensive care unit were involuntary, untrustworthy. It was obvious to the Petitioner that his rights would not be complied with by the officer and his statements were the result of his overborne will. They were not inconsistent with his testimony at trial and should not have been admitted for any purpose. And that decision of the Arizona Supreme Court in that regard should be reversed as well.

QUESTION: Mr. Oseran, where, precisely, in the bathroom, were the heroin and drug paraphernalia found?

MR. OSERAN: Different places. I believe, to the best of my recollection, a bottle -- whether it was opaque or not, I don't recall -- was on the commode, which would not have been in plain view to anybody that did not go into the bathroom. Nobody went into the bathroom until the apartment had been secured, until the investigating officers arrived. They discovered it when they conducted their search.

QUESTION: Why wouldn't it be in plain view? Behind

a door or something?

MR. OSERAN: The commode was around the corner.

QUESTION: Anything in plain view there at all?

MR. OSERAN: There were bullet holes. There was evidence of -- There was no narcotics evidence in plain view, no, sir.

QUESTION: Are you saying there was nothing in the way of evidentiary material in plain view?

MR. OSERAN: Concerned with the case that we are involved with today, that's correct, sir.

I would like to reserve my remaining time, Your Honor.

QUESTION: Incidentally, do you know how many States have the murder scene exception?

MR. OSERAN: Well, it has been utilized -- they've called it the murder scene exception in about five or six, perhaps seven States, but in most of these cases, all citing one or two cases, Stevens in Alaska or Chapman in Maine, they have really had exigencies and they have said the officers had a lawful right to be there and what was seen in plain view -- Only in one or two cases, did they really allow an intrusive search. And in those cases, we would submit they were in error.

MR. CHIEF JUSTICE BURGER: Mr. Wilkes.

ORAL ARGUMENT OF GALEN H. WILKES, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Court:

Today, I would like to divide my argument up into two segments.

The first argument I would like to deal with is the issue of the search. And to begin with, I think it is extremely important to look at some of the facts that were present there at the apartment back on October 28, 1974.

The officers, to begin with, were lawfully inside the Petitioner's apartment. One of their number, Mr. Hedricks, had just been into the apartment and had observed heroin in the apartment. The Petitioner had shown him heroin and offered to sell it to him. The officer, Officer Hedricks, said that he wanted to purchase the heroin and that he was going to go outside to his money man to get the money and come back and purchase the heroin. Officer Hedricks left the apartment, walked out to the parking lot, saw Detective Schwartz -- all this time what had been transpiring in the apartment had been broadcast to the other police officers -- he was telling them, "I've seen the heroin. I've run the test." And the detective who was in charge, Lieutenant Fuller, said, "Everybody meet up here at Apartment 211 for this raid." So they went back up to the apartment. Officer Hedricks knocked on the apartment. His friend, Detective Schwartz, was standing to his left. The door was opened by Hodgman. As the door was opened, Hedricks said something with the word "police" in it. The door was opened, he

started in. Hodgman pushed the door shut and Hedricks burst on in. Schwartz had his shoulder in the door. There was testimony that he, at that time, said, "Police," "Police Officers," something of this nature, and then Schwartz and Lieutenant Fuller who was behind him got into the apartment. By this time, Officer Hedricks was into the bedroom where the shooting took place. At about the time that the shooting does take place, Lieutenant Fuller looks up into the hallway of this small apartment. This is not a real large apartment here we are talking about. This is just a small, one-bedroom apartment. He looks up in the hallway, to the left would be the bathroom and to the right would be the bedroom, and he sees Ferguson there in the hallway. He goes up to Ferguson, puts him up against the door, up against the wall. About this time, the bullets start to fly and from the bedroom the shots begin, and within a matter of seconds the shooting is all over with. When the shooting is over with, Detective Hedricks comes out of the bedroom and falls down, goes down in the hallway, says, "I'm down," something of this nature. The other policemen go into the bedroom, two of them go in and they see the Petitioner behind the bed. Then the other agents he has called, that is Homicide is called and the area is secured.

Now, this is what faced Officer Reyna when he came to the apartment back that time in October. He came into a bullet-ridden apartment. There were bullet holes in the wall. There

was blood on the floor. There was broken glass from the egetere door that was in the living room. It was on the floor. There was junk on the floor. There was some blood on the wall. You had wounded people. You had Officer Hedricks who was being removed. You had Charles Ferguson who had been shot in the head and he was laying in the hallway, and his blood was there. You had a wounded girl who was in the bedroom closet. She was in there. She had been shot at least twice. The police officer testified in the forearm and in the hip. I believe the doctor later testified at trial that she had an injury in the area of her colon. So you had all these seriously injured people there, including the Petitioner here.

So without a search warrant and pursuant to the policy that was followed by the Tucson Police Department, Officer Reyna, eight minutes after the shooting took place, began an immediate investigation of the premises, a search of the premises, to determine what had happened there.

The State recognizes that this Court has held on many occasions that you've got to get a search warrant before you can go in and have a search, that it is unreasonable if you don't. But this Court has also recognized that there are exceptions, such as border searches, stop and frisks, exigent circumstances with fleeing autos, items that are in plain view.

What I am asking you to do here today is to make the Arizona murder scene exception another exception to the Fourth

Amendment which requires the obtaining of a search warrant prior to conducting a search.

QUESTION: Or at sometime. Have you gotten a search warrant for that place yet?

MR. WILKES: No, Your Honor, we haven't.

QUESTION: And that's the exception you want.

MR. WILKES: Yes, Your Honor.

QUESTION: That you don't need a search warrant at all.

MR. WILKES: That's correct, Your Honor.

QUESTION: That's what you want.

MR. WILKES: And I think several questions come to mind here. The first question, I think, and probably the most important is: Why don't we need to get a search warrant? Why is it necessary to have this search here? Why was it necessary for Officer Reyna to begin an immediate search of this apartment, without getting a search warrant?

I think the first answer to this is the fact that this was a murder scene. He came in there and some of the blood was still wet when he got in there. It was important --

QUESTION: What did they find in the search that affected the murder scene?

MR. WILKES: That affected the murder scene? Okay, the found bullets --

QUESTION: They found them the first night.

What did they find five nights later that applied to

the murder?

MR. WILKES: Okay. On the 28th, the second day, they did dig a bullet out of the wall.

QUESTION: What did they find the first day?

MR. WILKES: That's where you found the narcotics, you found the bullets, you took the gun --

QUESTION: How long after the shooting was the narcotics found?

MR. WILKES: I can't give you an exact timing. It was in that first timeframe. The first time that Officer Reyna was there prior to going home on the evening of the 28th.

So it was really necessary for them to get in there to start this search.

QUESTION: You make it sound like this was awfully complicated and quite an affair. But let's make it simple. A man calls up and says, "I have just shot my wife, come and arrest me." And the police come and they come in and they arrest him. I take it you suggest that right then and there -- the wife is lying there dead just like he said -- the police may then undertake a complete search of the household.

MR. WILKES: Yes, Your Honor, that's what I am saying.

QUESTION: Why doesn't Chimel bar that?

MR. WILKES: Chimel -- there is a problem there.

QUESTION: What do you mean there is a problem?

Are you having a problem with Chimel?

MR. WILKES: Well, it was a problem when I read this and did this, Your Honor.

First of all, I think this can be approached two ways. First of all, I think we can say this isn't a Chimel case. This isn't a case where you are coming in and going to arrest a man for, you know, breaking into a coin shop here.

QUESTION: You are arresting him for murder, and you say you can make as broad a search as you want, not four days only.

MR. WILKES: Yes. For one thing here, you don't know -- Lieutenant Reyna here didn't know what he was facing. He had this blood, you know, it was still important to determine the time of death here. When you have this blood here it is important to get into this and do it right away.

Another case we had a problem with in Arizona was State v. Skinner. In that particular case, -- it was also a murder case -- it wasn't decided on the murder scene exception, but when the police officers came to the liquor store, they found a cigarette and the cigarette was partially burnt and they used the cigarette at trial to help establish when the shooting had, in fact, occurred here. And you don't know when you get on a scene, when you come in and you find a dead body here, what else is there that might dissipate, what might disappear. And this is one of the reasons why I think you need to be able to have this thorough examination.

QUESTION: Well, the officer could stay there until they got a search warrant.

MR. WILKES: At this point, Your Honor, I don't think Officer Reyna had enough information to get a search warrant.

QUESTION: Oh, Mr. Wilkes, you described quite a situation and say there wasn't probable cause? Are you serious about that?

MR. WILKES: When he walked in the door, yes. I don't think a police officer, at that point in time, would feel comfortable calling up and getting a search warrant. He is going to want to do more investigation to see what more is going on.

QUESTION: You mean with the bodies and the blood and the bullets there is not probable cause? Are you serious?

MR. WILKES: I took the time -- I called the various police agencies around Arizona and this was the answer that I got, that they would want to do more investigation before they went and got a search warrant.

QUESTION: Well, that's right, because they wouldn't want ever to get a search warrant. That's your submission, so naturally they wouldn't.

MR. WILKES: At least as far as when you are dealing here with this special, unique situation of a --

QUESTION: They want to completely investigate everything without ever getting a search warrant. That's your submission and, naturally, that's what the police want.

MR. WILKES: That's correct.

QUESTION: Aren't you contradicting yourself to a certain extent when you say, on the one hand, that it should be judged as an exigent circumstance. Things are happening so fast that at least in order to find out who's dead and who's alive and evidence in plain view, once you have reasonable cause to think it was a homicide you've got a right to enter the premises, but then you say you don't think the police would have probable cause to get a warrant.

MR. WILKES: What I am saying here, Your Honor, is that they would want to do more. They would want to get a better foundation, other than when Officer Renya came in and he sees this on the floor, the bullets, bodies, this sort of thing, that he is not going to want to get a --

QUESTION: What does that have to do with getting the warrant, as the questions are suggested to you? It is pretty well known by now that there has been a lot of carnage here, isn't it?

MR. WILKES: Yes, Your Honor.

QUESTION: You wouldn't have any difficulty sitting down and in fifteen minutes writing out the description that you have given us in fifteen minutes, would you?

MR. WILKES: No.

QUESTION: And if you did that, if you put down in writing what you have just told us in fifteen minutes, would you

have any difficulty getting the warrant?

VOICE: Five to 4:00.

VOICE: In Arizona you can call up and get a warrant.

QUESTION: Would you answer my question. Would you have any difficulty getting a warrant on what you have just told us?

MR. WILKES: You might not, Your Honor. You may be able to get one, yes. But, what I would also answer is this --

QUESTION: Well, how many bodies would you need?

MR. WILKES: Probably one would be sufficient, Your Honor.

QUESTION: That's what you had here.

MR. WILKES: You had one body and you had three other people seriously injured.

Another reason here is the fact that -- Let me start all over again here. It is our position, too, that granted you have got a problem here, but if you could go in and you could make that initial walk-through of the apartment, or you come in there and you can see what's on the floor. If that initial intrusion is okay, then it is our position that you shouldn't have to be required to get one later on. As long as the initial intrusion is correct here, then it shouldn't be necessary to, somewhere down the line, decide well, now that maybe I've got two bodies here or maybe I've found this much more, maybe I should get one. It seems like if you can go ahead and make the

initial search here, the fact that you don't get one later on shouldn't vitiate the whole search here.

QUESTION: Are you familiar with the Chadwick case which was decided in the last preceding term?

MR. WILKES: Yes, Your Honor.

QUESTION: Well, wasn't all of the evidence, once the bodies had been removed, wasn't all the evidence capable of being made absolutely secure by the presence of a couple of officers, just as we held in Chadwick that the exclusive possession of the agents, Federal agents, was sufficient barrier to a search without a warrant?

MR. WILKES: I would answer you this way, Your Honor. If you agree that you can lock up, say, the apartment, keep people from going in and out.

QUESTION: Lock it up and put two policemen in there.

MR. WILKES: You are intruding upon Petitioner's rights here. You are intruding by doing that. You are preventing him from going in or out. It seems like you are just one degree further in intrusion if you allow the officers to go around and to make this search. I would submit --

QUESTION: What I was addressing myself to was making it secure just long enough to get that warrant.

MR. WILKES: Yes, you could do this, but we are arguing that you need not to in this particular situation here.

QUESTION: Because of the somewhat unique, or unique

Arizona law?

MR. WILKES: Right.

Another thing, Your Honor, is the fact that at this point in time the defendant's expectation of privacy has really been diminished, just about to nil, because he really doesn't have that much to lose. Here you've got a man who has shot a police officer five times, or shot somebody in his house five times. He's got to anticipate that somebody's going to come in there to investigate what all this shooting is about. He can't expect that people aren't going to do anything. He has to expect that someone is going to come in here and try to determine why and what has happened here. So he really doesn't have that much expectation of privacy.

Second of all, when you've got a situation here where you have the initial intrusion, which I believe, is lawful, any further intrusion, that is the walking through here, the picking up of the bullets, whatever, this other intrusion is going to be minor, that is, it is not going to be that increased by allowing the officers to go through there and not get a warrant.

QUESTION: Was there probable cause to arrest any of these people, in your opinion, at the time that Officer Reyna arrived on the scene?

MR. WILKES: Yes, there probable was. Well, at least -- are you talking about the drugs?

QUESTION: Well, I am trying to reflect a little bit

on your response to the Chief Justice about securing the premises. I take it simply securing the premises and letting all of the people who had been on the premises go would not have sufficed for purposes of adequate law enforcement.

MR. WILKES: No, it would not, because you had these people there that had taken place in that drug sale here. You also had a situation where a police officer walked into a bedroom and he comes out shot, and you go in there and you find a gun underneath the Petitioner and you find another lady in there who is wounded. So I think you would at least have probable cause to arrest the Petitioner who you would find with an empty gun under his body there.

QUESTION: Well, the entry, the original entry was for the purpose, I suppose, of making drug arrests, wasn't it?

MR. WILKES: Yes, it was.

QUESTION: And we don't have before us now whether or not there was probable cause to make that entry for that purpose, but certainly I assume the officers thought so.

MR. WILKES: Right. Well, I think that it is clear that they did have probable cause to get in there to make that arrest.

QUESTION: Well, that's not an issue before us now.

MR. WILKES: Another theory that I would like to present to the Court, and I think another important reason for allowing the officers to make this search, to make this walk

around in the apartment was the fact of the humanitarian aspect of it here. And I think it is very applicable here, because had they not walked through this apartment, they may not have found this Deborah Johnson who was laying in the closet in the bedroom with a couple of bullets in her. She could have bled to death there. She may not have been able to call out for help, or whatever. So I think it was extremely important that they were able to go through there, to walk through this apartment.

QUESTION: Of course, that argument doesn't justify four days and opening dresser drawers and all that sort of thing, does it?

MR. WILKES: Well, my argument again -- and I don't mean to beat a dead horse here -- is the fact that if the initial walk through was okay --

QUESTION: Then it follows that they can open drawers and go through briefcases and all that. Why does that follow?

MR. WILKES: In this particular situation. First of all, after the defendant -- after you come in there, you've found all these bullets on the floor, you found the dead police officer, these other wounded people, the expectation of privacy of the defendant is just about nil.

QUESTION: What sort of situations does Arizona apply this exception in? Supposing someone came into my home and I went downstairs, there was some kind of a ruckus and I shot him

and killed him. And then I called the police and the police were suspicious that I had murdered him. Would that be enough to justify searching the whole house?

MR. WILKES: Under our rule, yes, Your Honor, it would.

QUESTION: For an indefinite period. Supposing I said it was self-defense, is it a murder scene exception or a killing scene exception? Whenever anybody is killed is it --

MR. WILKES: I think it is a homicide, and I think in that case, that would be. Because you would say it was an accident --

QUESTION: An accidental death would do it, too. . .
Homicide.

MR. WILKES: A homicide, so long as it is a homicide.

QUESTION: Well, how do you know if it is a homicide?
Is an accidental death a homicide?

MR. WILKES: I wouldn't think so, no.

QUESTION: Well, what if the man says it is an accidental death? How do the police know whether they can search or not?

MR. WILKES: Well, you've got to give them -- If they come into a situation like the one we have here today --

QUESTION: Yours is easy, but you know we are trying to find out what the rule you are asking us to adopt is. You walk into a house and somebody is dead on the floor and another

person says, "I shot him by mistake." Can the police search the house?

MR. WILKES: Yes, I think so. The way our courts would interpret it, yes, you could. That's the way the court in --

QUESTION: Then does it apply to accidental death?

MR. WILKES: Yes.

QUESTION: It's not the murder scene exception it's an accidental death, homicide, murder, manslaughter.

MR. WILKES: Well, as long as there has been a death, homicide, yes.

QUESTION: Suppose the man is seriously injured and you carry him to the hospital. You just stay right there and a week later he dies, then it becomes a homicide, then? Does it?

MR. WILKES: Arizona's guideline is if it begins within a reasonable length of time. If it looks like he may die, our courts would say yes, because they say --

QUESTION: Oh, he doesn't even have to be dead now.

MR. WILKES: No.

QUESTION: What is the scope of the searching authority? Suppose he has a 20-room mansion, do you search the whole mansion?

MR. WILKES: As long as it is going to trying to determine the circumstances surrounding the death, yes.

QUESTION: Was all of the search devoted to the murder issue, or was some of it narcotics?

MR. WILKES: I am sorry, Your Honor.

QUESTION: There were two crimes involved, narcotics and murder. Much of the search concerned the narcotics transaction, did it not? Does the murder scene exception justify the search for evidence of the narcotics transaction?

MR. WILKES: I think the narcotics and the murder here was all connected together. I think the narcotics were related to the homicide because it went to the motive of the shooting itself. And for that reason I would say that they were so intertwined here that the fact they found and got this heroin was okay because it was tied up with the shooting because it was a drug bust that they were there for originally.

X QUESTION: If Officer Headrick had survived, would this exception apply?

MR. WILKES: Yes, Your Honor, because if there is a likelihood and it looks like the person may die, this would apply. Our court said that they don't want to limit it to situations where the person is saved by miraculous medical skills of the physicians.

QUESTION: On the scope issue, would your doctrine permit searching the bureau drawers or in the tea cups in the cabinet or in the locked wall safe, or a briefcase?

MR. WILKES: As long as it's related to determining

the circumstances of the shooting, I think that you could.

When you look at --

QUESTION: They say, "Well, we just might find some evidence in this locked briefcase."

MR. WILKES: I think it would be based on the test of reasonableness. If it looked like it was going to be related --

QUESTION: Well, there is a body on the floor and somebody says, "Yes, I shot her." So you search the basement or --

MR. WILKES: In one of the murder scene exception cases, is the case in Chapman, where they searched the basement garage where -- the lady had been found in the house, was taken away along with the defendant and they came back later on and an officer had recalled that he had seen some fecal matter on some clothes that were in, I think, the corner of one of the rooms. And there was also some mud. And they followed this, kind of in a trial, like, down to the basement garage and they looked into a trash can and found a Four-Roses bottle --

QUESTION: Let me just ask you, what if the body is in the living room and there -- the bedroom door is shut. There is no suggestion, whatsoever, to anybody that you might find something in the bedroom. Might an officer enter the bedroom?

MR. WILKES: I think so, yes, Your Honor, because --

QUESTION: Then it isn't a question of whether there is some indication that you will find something. You are just running an investigatory search.

MR. WILKES: I was trying to answer the searching the briefcase. I don't think you are going to find, say, a wounded person in there but you could find a wounded person in a closet, like we did here, and so --

QUESTION: You are not suggesting that under the Arizona rule they could not search the briefcase, are you? They could, couldn't they?

MR. WILKES: As long as it is related to determining --

QUESTION: As long as it is a thorough investigative search at the murder scene. And that's what Arizona has said is quite permissible without a warrant, isn't that right?

MR. WILKES: Yes, sir.

QUESTION: Don't know what they are going to find in the briefcase until they open it.

MR. WILKES: That's right.

QUESTION: Do I understand you, if the police come in and find someone injured -- it need not be a death -- does the murder exception apply?

MR. WILKES: As long as it is a serious injury, with the likelihood of death, that is the way the court --

QUESTION: Who makes that judgment?

MR. WILKES: I think that the --

QUESTION: The injured person survives.

MR. WILKES: I think if the police officers come into a situation and say, like in this case, the man has two bullet holes in his back, why --

QUESTION: Suppose he is lying on the floor with a broken arm?

MR. WILKES: I don't think it would apply because I don't think there is a likelihood that he is going to die from this broken arm. Granted, it could happen, but I don't think that is the case.

QUESTION: The officer has to assess the seriousness of the injury, is that it?

MR. WILKES: Yes, he does, and determine it on the spot there, and I think that --

QUESTION: He makes the judgment this person is probably going to die, then he may make this search without -- warrantless search?

MR. WILKES: Yes, Your Honor.

QUESTION: Mr. Attorney General, I have another easy one. You come in the room and there is a man shot, bleeding and could be dying, and he is holding in his hand two keys, one is to a locker and one is to a briefcase. He can go to the airport, take out the briefcase and look in the briefcase.

MR. WILKES: I wouldn't think so, Your Honor.

QUESTION: Why not?

MR. WILKES: I think that you are going -- I think that might be a little too far afield and maybe --

QUESTION: Why?

MR. WILKES: Maybe if it was, say, a drug case and that's where the drugs were and the reason he was getting shot was somebody was coming to, you know, buy some drugs --

QUESTION: Well, all of us have determined the police officer makes the judgment and if he finds some contraband that makes it legal. If he doesn't find it, he is sorry. Is that the way it applies?

MR. WILKES: I think what the court is saying is --

QUESTION: He says, "Oops, I made a mistake."

MR. WILKES: -- saying is whether or not this -- have we got a problem of hindsighting. Isn't that what the court is saying here?

QUESTION: Didn't you tell us before that this is a search of the premises, not an automobile a block away or an airport a mile away? Only the premises where the homicide or probable homicide is discovered.

MR. WILKES: Yes, Your Honor.

QUESTION: Murder scene, I believe, is what the Arizona Supreme Court is saying.

MR. WILKES: I think one of the advantages, or aspects of this rule which I think maybe is important because

I think it indicates that it doesn't violate the basic reason for having the Fourth Amendment, is the fact that you are not going to have general searches here because you are going to have this officer who is going to come on there and he is going to have these four guidelines, which the Arizona Supreme Court has set down here. And if it doesn't fall within one of these guidelines here, he is not going to be able to get his evidence in that he wants. The same thing is, he's going to have to make the search relative to the crime.

QUESTION: One other question occurred to me. Supposing that the defendant had been killed and the officer had not, would the exception apply?

MR. WILKES: I would think it would, yes, Your Honor.

I think that with these prerequisites here that you are not going to have this fishing expedition because your search is going to be limited to the circumstances of the death here. And where you've got these four prerequisites set down by the court, I think this is something that the police officer on the beat will be able to follow. This is something where he can tell whether he's got 1, 2, 3 and 4.

QUESTION: You don't need to tell us what they are, but where are those four?

MR. WILKES: They are set out in the Supreme Court's decision by Justice Gordon, under this particular argument.

QUESTION: Usually, it is not a police officer, it is a trained detective, isn't it?

MR. WILKES: Right.

It can be or it may not be. It just depends on, -- you know, if you are in a small town you may not have a real sophisticated officer.

Again, I want to emphasize here the fact that where you've got police officers that are lawfully on the scene and something like this occurs, the expectation of privacy that the defendant has here is extremely limited. There is very little there, because you have a dead body here, the officers are there lawfully on the scene, and the fact that they walk through, or whatever they do, the intrusion against the Petitioner's rights are going to be extremely limited.

Finally, we submit that this is a reasonable test and one just built on common sense. Reyna just should have been allowed when he came into that apartment to have gone through with the search the way he did, that he should have been allowed to start marking the evidence where he found it so when he was going to reconstruct the crime he would know where the telephone was or where the chair was, or where the bullets were, so he could plot the trajectory of the shells, or so he could prepare what had happened when they went to trial. This is really something that's built on common sense, to allow a police officer to conduct an immediate search here,

when he gets onto a murder scene.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Oseran.

REBUTTAL ORAL ARGUMENT OF RICHARD OSERAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. OSERAN: Briefly, Your Honor.

QUESTION: Your brother didn't talk about the self-incriminating statements at the hospital. I guess we can rely on his brief for that.

MR. OSERAN: He did mention a case, State v. Skinner; if it is appropriate for me to go into that case, it involved more than he represented that it did. It also involved, in response to your earlier questions, Mr. Justice Blackmun and Mr. Justice Rehnquist, Skinner allows impeaching material to be used as substantive evidence. So that material would have come in substantively which would have affected his credibility as to all counts, in that they were all tried together at the same time.

Additionally, it should be noted that the officer did not die, and there was not a dead body in the apartment. He was removed even before the investigating officers arrived.

QUESTION: There were quite a number of people who might well have been near death's door, don't you agree?

MR. OSERAN: Yes, sir, I certainly do.

QUESTION: They always notify homicide, whether

somebody dies or not.

MR. OSERAN: That's correct, Your Honor. He expired at the hospital. And any four people could have died.

QUESTION: The so-called murder exception applies whether or not there is actual death.

MR. OSERAN: That's what the Arizona Supreme Court held. In fact, if I may --

QUESTION: Held in this case, or some other?

MR. OSERAN: Held in this case.

There are five conditions, not four conditions, and they are set out at page 11 of the Petitioner's brief.

QUESTION: Mr. Oseran, have you made any attempt to discern for yourself how much of the evidence actually admitted at trial could have come in under search incident to arrest, plain view, without the benefit of this murder scene exception?

MR. OSERAN: I can recall what evidence was admitted and what evidence would be admitted again at re-trial on the murders.

QUESTION: Do you have any idea of what percentage we are talking about?

MR. OSERAN: Well, there were 300 items seized and there were only, perhaps, less than 30 or 40 items that were admitted at the trial anyway. So, right away, we are talking about a reduced percentage of all the items that were seized.

Additionally, I feel obligated to note that -- although I don't believe it is a particular issue here -- one person, the man next to the police officer who initially made the entry, heard the officer say, "Police," or something like that. "He always spoke in a low voice." This was the man next to him. There was testimony from everybody that was inside the apartment and nobody testified, in fact, they all testified that they did not hear any announcement of his authority or purpose.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:15 o'clock, p.m., the case in the above-entitled matter was submitted.)

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