In the

Supreme Court of the United States

THEODORE PAYTON, and OBIE RIDDICK, Appellants, v. NEW YORK, Appellee.	)	Nos. 78-5420 and 78-5421 (Consolidated)

Washington, D.C.
March 26, 1979

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Washington, D. C.
Monday, March 26, 1979

The above-entitled matter came on for argument at 11:31 o'clock, a.m.

BEFORE:

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

APPEARANCES:

WILLIAM E. HELLERSTEIN, ESQ., The Legal Aid Society, 15 Park Row -- 18th Floor, New York, New York 10038, on behalf of the Appellants.

APPEARANCES (Cont'd):

PETER L. ZIMROTH, ESQ., Chief Assistant District Attorney, New York County, 155 Leonard Street, New York, New York 10013, on behalf of the Appellee.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-5420 and 78-5421, consolidated.

ORAL ARGUMENT OF WILLIAM E. HELLERSTEIN, ESQ.

ON BEHALF OF THE APPELLANTS

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

These cases are before the Court on appeal from the New York Court of Appeals, which by a vote of four to three sustained the former and present New York arrest statutes which allow arrest entries, even in the absence of non-exigent circumstances, into the home, and permit non-consentual and forcible entry for the purpose of arrest

The two cases before the Court present the statutes in two virtually comprehensive applications. In the Payton case, you have the forcible, and I would say extremely forcible, entry without a warrant, namely the breaking down of Mr. Payton's door with crowbars.

In the Riddick case, you have a non-consentual, but an entry with less force, and I would say not exactly force, namely the knocking on the door, the opening of the door by a three-year-old boy, the entry to arrest and the placing of the Defendant, who was in bed, under arrest.

The facts leading up to both of these cases -- In the Payton case, a homocide in the course of a robbery had been

committed on January 12, 1970, in a service station in Manhattan's Upper East Side. Investigation at the scene led, through the discussion of investigating officers with witnesses, to two days later the officer learning the name of Mr. Payton.

One of the informants or people who spoke with the officer, took the police on January 14th, two days after the crime, sometime in the afternoon took the officer to Payton's building in the Bronx and pointed out his apartment to him. That detective, Detective Malfer, the investigating detective, made no effort, at that time, to arrest the Defendant. Instead, he came back and the following morning in the company --

QUESTION: Would it make a difference to your position if he had made the arrest, made these steps right then and there?

MR. HELLERSTEIN: I think it would be a tougher case for us, Mr. Chief Justice. I think it would -- because then, in the course of that on-going situation, it might be arguable by the Prosecution that the circumstances were exigent, in the sense that in the very first moment that Detective Malfer learned where a suspected felon, for which he had a probable cause, lived, he might then have possibly consummated the arrest. But that's not what happened and I think that's --

QUESTION: Judge Wachler felt that way in the Court of Appeals?

MR. HELLERSTEIN: Judge Wachler was the only judge, Mr. Justice Rehnquist, who felt that way, who felt that this was

a continuous pursuit.

I would submit that the concept of continuous pursuit is still not exactly a pursuit in exigent circumstances.

I don't think you even have to agree with Judge Wachler on that. I think that the concept of continuous pursuit -- the Chief Justice' question -- if that were the case, it would make it a tougher case. I would not necessarily concede that the circumstances were still exigent, but that's not this case.

The fact of the Payton case is that, not having done that, the officer chose to wait until the following morning, some twelve or fourteen hours later, when accompanied by other officers, attempted to enter Payton's apartment, and not being able to do so, still took additional time to call for assistance by a call to the Emergency Services Division of the Police Department who came with crowbars and broke the apartment open -- the door of the apartment open. And Mr. Payton was not there. And, even though Mr. Payton was not there, the officers ransacked the apartment, searched in cupboards, drawers, closets, under a mattress, knowing he was not there.

Everything that was found was suppressed on consent by the District Attorney, because it was, of course, illegally seized in an unlawful search.

The one item of evidence that was not suppressed was a 30-caliber shell casing that was found, ostensibly in plain

view by Detective Malfer and which matched shell casings found at the scene of the crime.

The trial court and ultimately the Court of Appeals, by a four to three vote, sustained the admissibility of that shell casing on the ground that the officers were lawfully on the premises to consummate an arrest under New York's then Code of Criminal Procedures, Section 177 and 178; they could break and enter without a warrant.

The Riddick case, somewhat different, in the sense that the officers had probable cause to believe that Mr. Riddick had committed a robbery in 1971. They had probable cause at least two months before they went to his apartment. I should say they learned his address two months before they went to his apartment. They had probable cause a lot earlier.

The arrest in Riddick was extremely typical. No great hurry, despite what the prosecution would call a violent crime. They knew where Mr. Riddick was and waited two months. The prosecution concedes that there was nothing at all exigent about the Riddick case.

That brings before the Court the constitutionality of the statute. The Court of Appeals, by a majority vote, I think placed its emphasis on three concepts or items. The first, that an arrest entry is a much more substantial intrusion than an entry for the purpose of a search, for which this Court has required warrants, and that the history of the common law, with

respect to arrest entries, was extremely well settled and clear and supported the court's decision. The court also placed an emphasis on the existence of statutes similar to New York's in many states, and upon the proposal of the American Law Institute not recommending a warrant be obtained in this particular circumstance.

It is our submission that the court erred in all three respects.

QUESTION: Mr. Hellerstein, you said that of the three factors one of them was that the court's view that an arrest entry was more intrusive or less intrusive?

MR. HELLERSTEIN: Less intrusive.

I think the logical starting point for our argument must be the plurality opinion of this Court in Coolidge, where at that time four members of the Court expressed the view that a warrantless entry into a person's home to arrest was at odds with the warrant requirement of the Fourth Amendment -- per se requirement for searches.

QUESTION: When you use the term "entry," Mr.Hellerstein, supposing that in the Riddick case, for example, the police had come up the steps onto a porch and the door had been opened -- It hadn't been shut and then opened by a three year-old -- and simply on the steps they had seen Riddick in the house, in the room in bed, as he was. Would that be an entry?

MR. HELLERSTEIN: Yes, Mr. Justice Rehnquist, I believe

it would. It might be the most peaceable entry, but it would be entry. I think they would have had to obtain permission to cross the threshold and come into Mr. Riddick's room.

I think the views expressed in Coolidge, hopefully, will be able to support the conclusion of our argument.

I think if there is one interest that has predominated this Court's decisions, both in holding and in dicta, as I have read them, it is that the expectation of privacy within the home is the highest of its kind, that there is nothing more sanctified, in our constitutional system, historically and juridically, than that of privacy of the home is paramount. It is a place where people repair to enjoy in their utmost, their thoughts, personal feelings, family life.

Although in Katz the Court spoke of the Fourth Amendment protecting people, not places, I believe that was supplemental to the notion that the home is the place where the private interest is at its highest.

With that as background -- and I am not so sure that the Prosecution even disagrees with what I've said to that point -- the Court of Appeals, I think, erred grievously in about seven different respects, in concluding that an arrest entry was less substantial than one for purposes of a search.

When police enter private premises, that entry, first of all, affects everybody in the premises, if there is family, children. The manner of the entry is not designed to insure the

privacy of the people within, or to minimize the intrusion on their privacy.

I think we've pointed out in our briefs that actual manuals, by recognized experts in police conduct and practice, point out the nature of the way that entry should be made.

QUESTION: What again, if you have the door open and the people simply doing whatever they are doing in the front room with obviously no intent to conceal it, the windows are open, the door is open, anyone walking along the sidewalk can see it?

MR. HELLERSTEIN: I don't know how common that would be, Mr. Justice Rehnquist. If the problem is that people who open the door expose what is within to the open eye, they are responsible for minimizing their privacy. But that might be possible with respect to a search. But to arrest, entry is the key. It is the crossing of the premises.

Now, there may not be the kind of intrusion in that particular situation. That would be the most minimal. But there is nonetheless the intrusion. The police may still enter in the same way they would if they had to go to the door and knock it or break it down, with the force of four or five, perhaps. Both Riddick and Payton are exemplary cases of more than one officer going. They might still enter even though the door were open, fan out, conduct the protective sweep, which is recommended by the authorities and which I think is rather commonplace. And

that is a substantial intrusion.

It is a substantial intrusion because in conducting a fan-out or a protective sweep there is immediately open to view of the police whatever items, closely personal items , the occupants of the premises have. And I would say that even conducting a search incident to that arrest, it is nonetheless a search of a good deal of intensity.

The search for a person, in your hypothetical, Mr. Justice Rehnquist, if the suspect is not in the room that's open to view, and even though the entry is across a threshold, without the breaking of a door, but the suspect is in a back room -- or even in the Warden case, where the Court saw a search for a person that covered a multi-room house, that can be also an extensive search for a person.

QUESTION: Including a washing machine, in that case, wasn't it?

MR. HELLERSTEIN: I believe it was.

So, as a general proposition, I think the intrusion for purposes of arrest are not minimal and they are not less than for search. In fact, I would submit, that there are occasions when an entry for search can be far less intrusive.

In the two cases before the Court, I don't think you can conclude that there was a minimal intrusion of any kind. For these types of intrusions, we submit that a warrant should be required, that there is nothing in the interest of law enforcement

to preclude or to cut against requiring a warrant in these two situations.

The last decision that this Court dealt with this subject of warrants for arrest, of course, was the Watson case, and this Court predicated its decision, as I read it, for dispensing with the warrant, on several factors, the publicness of the arrest, to wit, the liberty interest was not so substantial. I think the Court of Appeals below in a majority pointed to that. But in this case -- or these cases -- you have what is the privacy interest as well.

It was a case in which Mr. Justice Powell said that there were times that logic must defer to history and experience. And because the history and experience of the common law, with respect to public arrests, was what it was in Watson, the Court felt that warrants should not be required for non-exigent -- for any public arrests.

I respectfully submit -- and I think we try at great length in our brief to establish that the common law with respect to entries into the home to arrest without a warrant was a bird of a different color.

In fact, I believe, the Court in an opinion by Mr. Justice Brennan, in Miller v. United States, pointed, first citing with approval Judge Prettyman's decision in Accarino v. United States, which held that you had to have a warrant to enter, but as a minimal proposition, pointed out the disarray among the

common law sources, with respect to entries without a warrant.

QUESTION: Wasn't the Miller case under a federal statute?

MR. HELLERSTEIN: The Miller case was under 3109, Title 18, Mr. Chief Justice, and it did involve the issue of knocking or announcing. But in the course of the Court's analysis as to the knock and announce statute, the common law sources with respect to the general proposition of entry without warrant was examined and pointed out to be in substantial disarray.

In that disarray, we believe it does not afford the Court the freedom, nor should it, to conclude that the Watson line of analysis would be appropriate. The disarray continued beyond the common law into the 19th Century, and a number of states passed statutes similar to ours, not requiring warrants.

Interestingly, once courts began to look at these statutes and these practices under Fourth Amendment principles, the predominant overwhelming weight of lower court judicial authority, state and federal, has been to require warrants in non-exigent circumstances.

The Second Circuit, in United States v. Reed, in a recent decision which the Court of Appeals just did not feel it should follow, so held. And the Courts of Appeals have predominated on that view.

The warrant requirement, in the context of entries for home arrests, will not impose any substantial legitimate burden

on law enforcement. If the circumstances are non-exigent, there is no reason for law officials, law enforcement officials, not to obtain a warrant. The basic concern of the Prosecution is that in such a circumstance the requirement to obtain a warrant will preclude catching dangerous criminals quickly.

I believe Mr. Justice White, in the Shemell opinion, you also expressed that concern. The fact of the matter is, as I believe a Task Force report which was cited in our brief with respect to the President's Commission on Law Enforcement and the Administration of Justice, establishes, that 50% of the arrests that are made throughout the country are made within two hours of the crime. Forty-five percent of the arrests, of the remaining 45, are made a day after the crime. That conclusion led the Government in its brief in Santana, for example, to say it could easily live with a requirement of two hours, plus, for a warrant. And in the Goverrment's brief in the Watson case, itself, it pointed out that the FBI, as a practice, obtains arrest warrants, whenever practicable, because it is in the interest of the Government to secure a warrant, and that the scrutiny as to probable cause, that the dangers of losing evidence because of suppression are minimized by obtaining a warrant.

We submit that the arguments presented by the Prosecution, that this nonetheless would be a burden on law enforcement, do not meet the actual test.

QUESTION: After a grand jury indictment, is a warrant

generally obtained in New York, or is it considered that the indictment is the equivalent of a warrant?

MR. HELLERSTEIN: There is, generally, as I understand it, a warrant obtained after the indictment. That's the only way, under present law in New York now. It looks like this, Mr. Justice Stewart. It is a document that says "warrant of arrest," "bench warrant" or "warrant." This is issued after an accusatory instrument. This would be the Supreme Court warrant on a felony case.

QUESTION: Is it after or simultaneous? If it is simultaneous, it is not after. Isn't it simultaneous when the indictment and that's issued at the same time?

MR. HELLERSTEIN: Yes, Mr. Justice Marshall.

QUESTION: An indictment or an information?

MR. HELLERSTEIN: Yes.

QUESTION: That's a so-called grand jury indictment or grand jury warrant or bench warrant.

MR. HELLERSTEIN: Prosecutor's information or complaint.

QUESTION: But a warrant is issued, in both cases, after charges are formally filed, either by grand jury or information?

MR. HELLERSTEIN: Yes.

QUESTION: And that's about the only time that in New York an arrest warrant is issued?

MR. HELLERSTEIN: Not necessarily. In the sense that I have been informed and it has been my experience that at times

police will go and get an arrest warrant occasionally, but they of course have to have an accusatory instrument, so they will go to the complaint room, say, in New York, Manhattan, and have a complaint drawn up. An attorney will accompany the police officer up to the bench, arraingment part, and get an arrest warrant, based on that accusatory instrument -- a piece of paper like that.

QUESTION: An affidavit, generally, is enough to support a warrant.

MR. HELLERSTEIN: Yes, but under New York law, it must be an accusatory instrument.

QUESTION: And what determines whether or not there will or will not be a warrant, in a non-grand jury or non-bench warrant situation?

MR.HELLERSTEIN: I think what determines that is really the judgment of the police.

QUESTION: What informs the policeman's judgment, anything?

MR. HELLERSTEIN: Departmental procedures. There are no particular guidelines. And it is rare, certainly in this context, for a warrant to be obtained on the basis -- I shouldn't say rare. It is not the practice, as I am informed.

QUESTION: But sometimes it is done?

MR. HELLERSTEIN: Yes, sometimes.

QUESTION: And this depends on the whim of the policeman?

MR. HELLERSTEIN: Yes, as I understand it.

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

Mr. Zimroth.

ORAL ARGUMENT OF PETER L. ZIMROTH, ESQ.,

ON BEHALF OF THE APPELLEE

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

The community, the societal interest that is at stake in this case -- in these cases -- is enormous. What we are talking about here is not simply gathering evidence, but bringing the Defendant to court, so that the civilizing processes of law can even be brought to bear on that case.

This is, I believe, one of the first requirements of any civilized society, the alternative to which is vigilante justice.

This fundamental interest, that is to have a court bring the processes of law to bear, has been recognized throughout history. And that is why the judgment has been made throughout history that it is better not to impose a lawyerized process before the arrest, and that's regardless of where the arrest takes place, but rather that it is better first to obtain custoday of the defendant and then to construct a system whereby the defendant is given all the processes he is due.

And it is a very elaborate system. The defendant must be brought to court immediately after arrest. His continued

custody is tested immediately. Eventually his guilt or innocence is tested. And, also, in this process, there is a review of the arrest process itself.

We are not here suggesting the Fourth Amendment says nothing about the arrest process. Of course, it says a lot about the arrest process.

QUESTION: And the question in this case is how much and what does it say?

MR. ZIMROTH: That's exactly right.

QUESTION: And what do you think it says?

MR. ZIMROTH: I think what it says is that you have to show probable cause to make the arrest, and also, although this Court has not stated this is a constitutional matter, nonetheless most states and common law history suggest that, if there is going to be a forceable entry, the courts will, after the defendant is in custory, determine whether or not the police made an attempt, a proper attempt, to avoid the necessity for the forceable entry, that is, by knocking and announcing their authority.

And if the police behave unlawfully very, very severe consequences attach to that.

QUESTION: The question is what is unlawful? isn't it? I mean that's the question in this case.

MR. ZIMROTH: That's right.

QUESTION: You concede there must be probable cause, and I gather you have just conceded that there is a duty to

minimize the forceability of the entry, and beyond that, nothing, for a person inside his own house?

MR. ZIMROTH: Well, I think that there might be special concerns in certain areas; that is, if it were a nighttime arrest, I think, it might be a special situation.

QUESTION: If it were at nighttime, what additionally would be required by the Constitution?

MR. ZIMROTH: It is conceivable, though no court has so held -- or this Court has not held -- It is conceivable in those circumstances this Court might impose a warrant requirement.

QUESTION: The Court would only hold that the Constitution imposes it?

MR. ZIMROTH: That's right. I am saying that is conceivable. All I was trying to suggest is that this case doesn't present that question of nighttime arrest.

I agree that is the question. The question in this case is, is a warrant required? All I am saying is that, by saying a warrant is not required, if the Court so holds, that that is not the same as saying the Fourth Amendment doesn't apply, that there are other protections that the Fourth Amendment imposes on this situation.

QUESTION: I.e., there has to be probable cause.

MR. ZIMROTH: That's right.

QUESTION: And there has to be minimization of the forcefulness?

MR. ZIMROTH: That's right, and very severe consequences, also. The exclusionary rule, for one, and court actions for another. And I am suggesting that this is a debate that Mr. Hellerstein and I are having that has been a debate throughout history, that is, exactly the same terms of the debate, that is, the privacy of the home, on the one hand, and on the other hand the tremendous public interest in bringing a suspected felon, about whom there is probable cause to believe that he has committed a felony, to justice.

And the judgment of history, which I think is relevant to the issue of whether or not the Constitution requires a warrant, has been uniform in this respect. No prior judicial screening has been required.

Mr. Hellerstein says that there is a big dispute at the common law, and I think he is making an understandable, but nonetheless an apparent error in that respect. And that is that there were disputes about what sort of showing a police officer had to make after the arrest. Some of the common law authorities said that all you had to do was show probable cause in order to relieve yourself of liability. Others said that you had to show that a felony was actually committed. And a few said that you had to show that the defendant was actually guilty.

QUESTION: When you said that there had to be an effort to minimize the use of force, are we to take that as meaning that you are drawing on the reasonableness, the term

"unreasonable" in the Fourth Amendment?

MR. ZIMROTH: Yes, I am, Your Honor.

QUESTION: Well, then, going to the midnight search -- 2:00 o'clock in the morning when presumably most people have their house closed, they are asleep, what do you say about breaking down the door then?

MR. ZIMROTH: I would have to say it would depend on the case, Your Honor.

QUESTION: No, just take that much. Exactly your circumstances -- midnight, 2:00 o'clock in the morning, the house dark, everyone asleep.

MR. ZIMROTH: I would have to say that in the circumstances of the Payton case that that would be reasonable entry, because --

QUESTION: Isn't there some case in which there was an observation made -- not by this Court but by, perhaps, one of the Courts of Appeals or State Supreme Courts, that that type of a breaking and entering might produce the deaths of some police officers.

MR. ZIMROTH: Which is why, I think, the balance is a little different in a nighttime entry than it is in the daytime entry.

I should say that the judgment that I am talking about about the reasonableness of entering without a warrant is not only uniform throughout history, but it is the judgment made in

most states today. There are thirty-six states that have statutes on this subject, and thirty of them --

QUESTION: So, if it is only in most states, how can it be uniform throughout history? Throughout history up until a certain point in time?

MR. ZIMROTH: Yes, up until relatively recently, until the Court's dicta in Coolidge. And what happened after Coolidge is that many courts, in effect, reserved on the issue. They said we assume, for the purposes of argument, that a warrant would be required but we find exigent circumstances. Not all courts say that, but in many of the ones cited by Mr. Hellerstein there is not --

QUESTION: Mr. Zimroth, when you talk about the necessity for a warrant or when your colleague is talking about a warrant, is it an arrest warrant that you are talking about?

MR. ZIMROTH: That's a basic ambiguity in this case.

QUESTION: Or is it not only an arrest warrant but a warrant to enter a house?

MR. ZIMROTH: Most of the courts, all but one, I think, that have held that there needed to be a warrant, say that there need to be only an arrest warrant. I think there is an ambiguity there and a difficulty. This Court has already said --

QUESTION: You say all but one. What about the one? Does the one say that the warrant also has to authorize the

entry?

MR. ZIMROTH: Yes, Your Honor.

QUESTION: And to get that kind of a warrant, must you show probable cause to believe the person is in the house?

MR. ZIMROTH: Yes.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock, noon, the Court recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Zimroth, you may continue.

ORAL ARGUMENT OF PETER L. ZIMROTH, ESQ.,

ON BEHALF OF APPELLEE (Resumed)

MR. ZIMROTH: Mr. Hellerstein blithely assumes that there would be no serious practical consequences if this Court imposes a warrant requirement.

The basic problem with a warrant requirement is that, in essence, it imposes a review mechanism on a situation that in the gross, in most cases or in many cases is very fluid and very volatile.

QUESTION: I didn't understand your friend to be suggesting that a warrant must be obtained in every case, just because time would permit it.

MR. ZIMROTH: Well, if I may say so, Your Honor, earlier this morning he criticized the police in the Payton case for not, in effect, getting a warrant after the building was pointed out to them. And I think if there were a warrant requirement there would be a pressure on them to get a warrant at that time.

You might ask, why didn't they get a warrant at that time, assuming that there had been a warrant requirement?

At that time, first of all, they did not know that the

Defendant was there. His building had been pointed out to them, but they also had information -- someone had told the police that the Defendant said he was going somewhere.

More important than that, they did not know what Mr. Payton looked like, and they did not have his correct name. Isn't it better for them to do what they, in fact, did do? They took this witness back to the station house. They talked to him for a considerable length of time. They got photo arrays. They got pictures, and the witness eventually pointed out Mr. Payton's photograph, later in the evening.

Now, it seems to me, that that is an illustration of what will happen if there is a warrant requirement. It will pressure the police to solidify their decisions before it is appropriate to do so.

The exigent circumstances exception that Mr. Hellerstein says will solve all these problems will not solve the problems. And the reason it won't solve the problems is because the exigent circumstance exception --

QUESTION: Just one question. After he finished talking to this man, did he then know who he wanted?

MR. ZIMROTH: They knew the correct name.

QUESTION: Well, couldn't they have gotten a warrant?

MR. ZIMROTH: They knew his address, but they did not know he was home.

QUESTION: Well, does a warrant say he is home?

MR. ZIMROTH: No, the warrant didn't say he was home, but the point is --

QUESTION: Does a warrant ever say he is home?

MR. ZIMROTH: No, but the point is --

QUESTION: What would stop him from getting a warrant?

MR. ZIMROTH: It wouldn't stop him from getting a warrant, but --

QUESTION: Would it inconvenience him to get it?

MR. ZIMROTH: Yes, it would. The way it would inconvenience them is that instead of doing further investigation they would have to divert their resources and go get a warrant.

QUESTION: How long does it take to get a warrant, in New York City, as if I don't know?

MR. ZIMROTH: Well, the federal authorities in the Campbell case estimated about six hours.

QUESTION: In New York City?

MR. ZIMROTH: Yes. In New York City, about six hours to get a warrant.

Now, it's not only a question --

QUESTION: Where is that?

MR. ZIMROTH: In the Southern District of New York, which includes Manhattan where this crime occurred.

QUESTION: Yes, I know where that is, but where is this figure that it takes six hours?

MR. ZIMROTH: In United States v. Campbell, the Second

Circuit case, where the District Court and the Court of Appeals accepted the testimony of, I think, it was an FBI Agent.

QUESTION: Aren't there Magistrate's courts right in the police area?

MR. ZIMROTH: No, sir, there are not.

QUESTION: Never?

MR. ZIMROTH: I don't know about never, but there were not in 1970 and --

QUESTION: Including Washington Heights?

MR. ZIMROTH: As far as I am aware, there are not. There weren't then and there aren't now.

It is sort of interesting. The assumption is that getting a warrant is a very easy affair. It is not an easy affair. You have to worry about -- first of all, you call the District Attorney and you review the case with him, because in New York, as in many other jurisdictions, you can't get a warrant until you actually initiate a criminal proceeding. So, you review the case with the Assistant District Attorney. You have to worry about typists. You have to worry about transportation. You have to worry about court stenographers. Six hours is a long time.

The other point is --

QUESTION: You said that was the evidence in some other case, under the federal system. This is your case under the state system.

MR. ZIMROTH: Well, there is no evidence here because there was no warrant requirement here. I would suggest it would take longer here than it would in --

QUESTION: But you don't know. There is nothing that shows any answer to my brother Marshall's question?

MR. ZIMROTH: No. I would say, though, that if you compare the federal system and the state system it raises another problem. And that is the problem of resources. We are talking about, in this case, imposing a warrant requirement not on the FBI or the DEA or the Assistant United States Attorney, but upon approximately more than 20,000 police departments throughout the United States.

QUESTION: It isn't just resources, Mr. Zimroth, is it? In the state where I come from there is a County Coconino, which has 20,000 square miles area. Massachusetts has an area of 9,000 square miles. Just the transporation problem in that size county is going to be very substantial, if the only magistrates, as they are, are located in the county seat.

MR. ZIMROTH: Absolutely, Your Honor. And the reason I mentioned the number of police departments is not only because it is a question of resources, but it's a question of different problems in different areas. We are dealing with fifty states and all these different police departments, some rural counties, some urban counties. Some have more resources, some have fewer resources. Some police departments have one member, and some

investigations may have only one person on it, and --

QUESTION: And some might not even have a judge. Why don't you go the whole hog while you are at it? Some counties might not even have a judge that could issue a warrant.

MR. ZIMROTH: I am not aware of that, but if it is true, then it is a very serious problem.

QUESTION: There are many counties in the United States that have no judge.

MR. ZIMROTH: Well, then it is a very serious problem in that respect. And the important thing is that we are standing here after the event.

QUESTION: What I am talking about is a place that has more than one judge who is available and you don't have to travel 86,000 miles.

MR. ZIMROTH: That's true, but it still takes a substantial period of time. And the more important factor than that, Your Honor, is that it seems to me unfair to judge a warrant requirement after everything has solidified. That's why the question about the indictments is not a fair question, because when an indictment is issued all the evidence has been gathered and it is presented to a body. We are talking about imposing a warrant requirement in the on-going investigative stages.

QUESTION: All those things are true about a search warrant, aren't they?

MR. ZIMROTH: They are true about the search warrant,

but there are several very important differences. The first is the difference of numbers. In New York County last year there were approximately 500 search warrants issued in New York County. There were 30,000 felony arrests in New York County.

QUESTION: All of them, or the majority of them, in people's homes?

MR. ZIMROTH: No, Your Honor, but the important point is that the police will not know in advance whether they are going to find a defendant in his home or not. Any time that the arrest is substantially after the commission of the crime, itself, the police -- the home is naturally a logical place to check. So it seems to me under a warrant requirement they will have to get that.

Mr. Hellerstein cites a study, which we also cite in our brief, which indicates that about half of the felony arrests are made more than two or three hours after the commission of the crime. So, we are talking about potentially a universe of 15,000 cases, not three or four hundred cases.

QUESTION: Could I ask you what your view of the law is with regard to this kind of situation. Say, the police have, as they now have, probable cause to arrest a man. They go to his home and ask if he is home. The person who answers the door says no, and the police don't believe him. Can they bust in and arrest him?

MR. ZIMROTH: Under the present law, yes, they can.

QUESTION: There is no requirement of probable cause to believe that he is in the home? They just don't know, but the first thing they want to do is pick up this man at such and such --

MR. ZIMROTH: No.

QUESTION: Well, in that situation, would the warrant requirement help or hurt. I suppose if they had the warrant, they could go right in?

MR. ZIMROTH: Well, in my judgment, the warrant would be valid, but the arrest would still be illegal, because, it seems to me, that regardless of warrant requirement, the police need probable cause to believe that the person is in his home -- or in a given location -- before they can bust in.

QUESTION: Are arrest warrants in New York limited to a place?

MR. ZIMROTH: No, they are not.

QUESTION: They are limited to a person.

MR. ZIMROTH: That's right, but --

QUESTION: And you can pick him up any place.

MR. ZIMROTH: If you pick him up in a dwelling, you need probable cause to believe he is in there. That's by statute in New York, and I also believe it is and should be as a matter of constitutional law; that is, the mere existence of the arrest warrant, without probable cause, does not justify going in to a residence.

QUESTION: Well, what you are concerned about, then, is not the probable cause to arrest showing, but the probable cause to believe he is inside the premises, which is not at issue in this case.

MR. ZIMROTH: No. I am concerned about composing the requirement in advance of an arrest warrant; that is, having the police have to, in all of these thousands of cases, go to a magistrate to have him review the probable cause to get an arrest warrant, in order for them to go into homes.

QUESTION: Let me pursue my example, under -- that I gave you before. How would the law differ, depending on how we decide this case? If they say he is not here, you are saying it really doesn't matter whether they have a warrant for him. If they say, "Yes, he's here," and then they say, "We would like to see him and place him under arrest," and he takes off out the back door, I presume you could chase him because it is exigent circumstance. You would do the same thing, whether you had a warrant or not, wouldn't you?

How does whether you have a warrant affect anything in this situation: You go to the door, you say, "I want to see so and so, because I want to place him under arrest"?

MR. ZIMROTH: What Mr. Hellerstein would say is that --

QUESTION: I am interested in what you would say.

MR. ZIMROTH: Yes, I know, but you asked me what kind of consequences the rule would have. If there were an arrest

warrant rule and the police had had some opportunity in advance to get an arrest warrant, I think Mr. Hellerstein would say that the fact of exigent circumstances arose at that time would not be sufficient, that they could have foreseen this possibility and they should have gotten --

QUESTION: But that's a question that would be answered by deciding what are exigent circumstances, and we might agree with him or disagree with him on that.

MR. ZIMROTH: And that is the difficult point here, Your Honor, that the police have to know in advance what a court, two, three, in this case, nine years --

QUESTION: Supposing we agreed with you that that would be an exisgent circumstance -- if they knocked on the door and said, "We want to arrest him," and if he flees at that moment, they could pursue him. If that's an exigent circumstance, then you don't have anything to worry about, I guess.

MR. ZIMROTH: Yes, you have something to worry about in that if the court -- In that particular case, I agree, we would win. But the arrest warrant --

QUESTION: You would also win if you knocked on the door and he says, "Yes, he's here," and he comes out and you arrest him.

MR. ZIMROTH: That's true.

QUESTION: So, either if he runs or he comes out you

win either way. Now, when do you lose?

MR. ZIMROTH: We lose because, if there is an arrest warrant requirement, the police in the course of their investigation will not know what is going to happen at the door -- those are only two possibilities of things that might happen at the door. Another thing that might happen at the door is that they might get information that the person they are looking for is not, in fact, guilty. If they had previously had to get an arrest warrant, presumably, they would end up having to arrest him. In other words, what I am saying is that in advance --

QUESTION: You say they must arrest him, even if they believe he is not guilty?

MR. ZIMROTH: No. Well, it depends on how strong the proof is. But an arrest warrant is a command.

QUESTION: I understand that, so is a search warrant. You mean to say every time you get a search warrant you must search, even though you find out that you are wrong?

MR. ZIMROTH: No, but the realities of the situation are that the police -- and I overstate it by saying that they know he is not guilty. They may have some doubts in their minds. Instead of allowing them to do further investigation, the arrest warrant requirement will pressure them, will be an additional pressure for them to make the arrest. The point is that any exigent circumstances exception is bound to be quite unclear. If you look at what's happening in the various states, that's

exactly what's happening. In some states, like in California, there is an exigent circumstances exception that is applied so strictly that the police wait literally ten minutes before they go in and make the arrest. Then the courts say they should have gotten a warrant. That's the People v. Ellers case, which we cite in our brief.

In other jurisdictions, the exigent circumstances exception really distorts what we ordinarily think of it -- the exception -- out of all proportion. And that also is a very unhealthy situation. It's an unhealthy situation because it doesn't give any guidance to the police, and it's an unhealthy situation because eventually those cases may influence the exigent circumstance exception in the search area, which would be very unfortunate.

I think that the basic point that I want to make here is that you can always think of situations and cases where you could say, well, the police should have time to get a warrant, or they didn't have time to get a warrant. But all of those are going to be situations in which we are sitting after the event judging what has already transpired, and not situations where the police have to engage in on-going investigations.

QUESTION: That's true of any arrest situation. You judge after the event whether there was probable cause. And, in fact, if you get the warrant first, you have a pretty good idea whether or not you have probable cause. It seems to me

there is more of an after the fact judgment when you don't have a warrant.

MR. ZIMROTH: But you don't require the police to -- in a sense -- in the midst of their investigation -- review the evidence before they make the arrest.

QUESTION: That's only if they want to make the arrest in a home?

MR. ZIMROTH: But they are not going to know in advance whether they are going to be in the home, so that the requirement is going to have more effect than simply arrests that are made in the home.

I think that it is these kinds of problems which are very difficult to get your hands on, because investigations are, by their nature, of an infinite variety. For this very reason, I think, that until Coolidge there had been a uniform judgment not to impose an arrest warrant requirement on the police. And the people who came to that conclusion were not people who were insensitive to the concerns of privacy in the home. They were the very same people who created the protections which later became the protections embodied in the Fourth Amendment.

I see I only have a few more minutes and I did want to -- a mention of Coolidge brings me really to the second point in the case, and that is until Coolidge was decided there was very little, if anything, which could have given the police, in the Payton case, any reason for going to get a warrant. There

was a state statute at the time which authorized them to enter without a warrant.

What conceivable purpose of the exclusionary rule would be served if now, nine years after that event, this Court excludes the evidence that they found upon entering? They were following the law, as they understood it. And the way they understood it is exactly the way almost every single -- everybody else --

QUESTION: They weren't following the law, as they understood it, when they searched the entire premises, were they?

MR. ZIMROTH: And they paid the price for that, Your Honor.

QUESTION: Yes, but you can't say they were following the law as they understood it.

MR. ZIMROTH: But we are not judging --

QUESTION: How did they pay the price? Did you put them in jail? Did you give the people damages?

MR. ZIMROTH: I should have said we paid the price. And it was a very substantial price, I should say. What was suppressed on the Prosecutor's concession before the hearing below were photographs of the Defendant in a ski mask, and that was the evidence at trial, that he went in with a ski mask.

And I should say, Mr. Justice Stevens, that I am not condoning the police conduct for searching. In fact, my office conceded the illegality --

QUESTION: Did you bring any action against the police who did it?

MR. ZIMROTH: No, sir.

QUESTION: You could have. There was nothing to stop you, was there, from bringing an action against the police, who broke down the door and the man wasn't there -- ?

MR. ZIMROTH: In terms of breaking down the door, there was absolutely nothing illegal about that, at the time. It was a generally accepted practice in most of the states. It had been based on a very long history. These police officers, with respect to the entry, were following what they thought was the law and which, if they had called up a district attorney or their supervisor, that person would have told them it's the law, too. And, in fact, if they had gone and tried to get a warrant, in all likelihood, the judge would have said, "What are you doing here? You don't need a warrant. The statute doesn't require a warrant. This is the accepted practice in most of the states. There is no substantial constitutional issue that is raised. What purpose of the exclusionary rule would be served?"

I think,myself, that the exclusionary rule would be demeaned in a sense if this evidence was suppressed, because you are, in effect, telling the police that it doesn't matter that they make an effort to follow the law of the state legislature, as they understand it, and as it is understood at that time.

If there are no questions, then I am finished.

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

REBUTTAL ORAL ARGUMENT OF WILLIAM E. HELLERSTEIN, ESQ.

ON BEHALF OF THE APPELLANTS

MR. HELLERSTEIN: Just a few things, if it please the Court:

Mr. Zimroth is simply wrong, I believe, when he tells you clear out that there is a probable cause requirement for believing that a person who is sought to be arrested in the home must be in the home. There is no such probable cause requirement that he is at that moment in the home.

Our statute simply requires a reasonable belief that he is at home. And if you know that the man works at night and you go to his home at 4:00 in the morning with a warrant or without a warrant, you know he is not going to be home. And that is what I think we are talking about.

QUESTION: Mr. Hellerstein, it apparently is the fact, concededly, that it is, in some situations, at least, New York does habitually provide for arrest warrants, i.e., grand jury warrants and bench warrants, if nothing else.

MR. HELLERSTEIN: Yes.

QUESTION: Let's assume a law enforcement officer is armed with a grand jury warrant -- somebody has been indicted in absentia.

First of all, does the warrant say he can enter his home only if he has probable cause to believe he is at home?

MR. HELLERSTEIN: He has to in the supporting affidavit --

QUESTION: Say what?

MR. HELLERSTEIN: Oh, no, he does not have to say he has probable cause to believe he is in the home.

QUESTION: What does the warrant say?

There is no need for a supporting affidavit, is there, if there is an indictment? If there is an indictment, that takes the place of an affidavit.

MR. HELLERSTEIN: Then the warrant simply states the address of the defendant.

QUESTION: His home address, usually?

MR. HELLERSTEIN: Yes. And that can be a warrant for any kind of an arrest, whether it's within the home or on the street.

QUESTION: Yes, but are there any additional provisions if he is at home?

MR. HELLERSTEIN: No.

QUESTION: Any additional requirements if he is at home? Does somebody have to show probable cause for the officer to have thought that the prospective arrestee was, in fact, at home?

MR. HELLERSTEIN: He must have reasonable belief.

He does not have to show that he has probable cause to believe he is at home at that moment. And if you know the man's address it is reasonable to infer that he will be home, and unless you have facts to the contrary, as I tried to indicate.

I think that's how the courts have dealt with that. There is a Ninth Circuit case, I think the Phillips case was decided by -- which I think is a rare case. I think the general cases, Dorman and some Arizona cases that have dealt with the issue say you do not have to have probable cause to believe that he is in his home at that moment.

I think one of the main concerns, in the area of entering premises, is when you are dealing with third-person premises, namely, that you have to have probable cause to believe the defendant is in somebody else's home.

QUESTION: Mr. Hellerstein, I think your colleague was asked a question, and I want to make sure I understand the correct situation.

Is it your contention that the warrant that should have been had here, but was not, should have been a search warrant, or an arrest warrant?

MR. HELLERSTEIN: An arrest warrant.

QUESTION: Should it have expressly authorized arrest in the home?

MR. HELLERSTEIN: I think it need not have. It simply should have been a warrant for arrest, as a predicate

for an arrest in the home. In other words, supporting papers.

QUESTION: And with that warrant, which needn't say anything about the home, I assume that at the time he gets the warrant, or even later, he need not have probable cause to believe that he is at home.

MR. HELLERSTEIN: That is my submission.

QUESTION: But you think that if he purports to enter the house, with or without force, without consent, does he need reasonable cause to believe or reasonable suspicion to believe that he is in the house?

MR. HELLERSTEIN: Reasonable cause to believe the defendant is at home when he is obtaining the warrant.

QUESTION: For that part of it, under the current law in those jurisdictions, including New York, I take it, where there isn't a need for a warrant, suppose there is probable cause for arrest and the officer goes to the house. He wants to arrest in the house. Is the law of New York that he must then have reasonable suspicion to believe that he is in the house?

MR. HELLERSTEIN: With respect to a warrantless arrest.

QUESTION: What is the current law in New York?

MR. HELLERSTEIN: It says that he must have reasonable belief that he is at home.

QUESTION: So on that particular aspect it won't --

in entering the house it won't make any difference whether it's with or without a warrant. In either case, he must have reasonable suspicion to believe he is in the house.

MR. HELLERSTEIN: Yes. Section 14015, Arrest Without a Warrant, "May enter premises in which he reasonably believes such person to be present."

QUESTION: Isn't that probable cause?

MR. HELLERSTEIN: I do not believe that is the same thing as probable cause to believe --

QUESTION: Well, whatever it is, the standard now for a warrantless arrest in the house, in terms of whether you think he is there or not, is the same standard as you would accept, even with a warrant requirement.

MR. HELLERSTEIN: Yes, Mr. Justice, that is the Statute 12080, which follows that, that has the same language.

QUESTION: So, your warrant requirement, then, that you are asking to be imposed here is more for verifying probable cause for arrest?

MR. HELLERSTEIN: Absolutely, that's crucial. The magistrate, not the officer should --

QUESTION: Not to protect the home.

MR. HELLERSTEIN: Oh, yes. The decision that there was probable cause to believe the man has committed a crime is a decision that is made upon a showing to a magistrate --

QUESTION: I know, but whether you get the warrant

or not isn't going to change at all the rule as to whether you can enter his house.

MR. HELLERSTEIN: Oh, yes, it will.

QUESTION: How will it do that?

MR. HELLERSTEIN: It will require a warrant.

QUESTION: I know, but the only thing the warrant will do that you want is to say there is probable cause to believe that this man has committed a crime.

MR. HELLERSTEIN: And that a magistrate makes that interpretation.

QUESTION: Probable cause to arrest.

MR. HELLERSTEIN: Yes, probable cause to arrest.

QUESTION: But you don't want to involve the warrant in anything about the house?

MR. HELLERSTEIN: No. I think that's covered.

QUESTION: Isn't the warrant an authority to arrest wherever found --

MR. HELLERSTEIN: Yes.

QUESTION: -- within the jurisdiction of the warrant?

MR. HELLERSTEIN: And a concern that the police won't know where the defendant is -- I am saying if they think they are going to go to his home --

QUESTION: The last place you will find him is at home. If he knows you've got his address, then it's the last place he is going to be.

MR. HELLERSTEIN: Not so in the Riddick case, Mr. Justice Marshall.

There are two other things that I wanted to dispel. The notion of this burden of time -- At least in urban areas, it is not correct that it takes six hours to get a warrant in New York County. We've cited in our reply brief one case where it was two hours for a search warrant.

Of course, there is nothing in the record on the time, but I simply submit that six hours is not an accurate statement.

Mr. Justice Rehnquist, with respect to rural areas, I also submit that perhaps the time in obtaining the warrant might be relevant to an assessment whether the warrant was required, but I think that would have to depend on the situation in that rural county.

I also don't know that this Court would hold that a magistrate, pure magistrate, ought to issue the warrant. Under Chadwick and City of Tampa, it might find something less. I don't know.

A third fact that Mr. Zimroth tells you is that once a warrant would be obtained the police officer would have no alternative, even though he now knew the fellow was innocent, but to execute that warrant. That simply is not the case. There is no reason he cannot countermand a warrant. Under the Federal Rules of Criminal Procedure, Rule 4(b)(4) or (5), the magistrate is authorized to cancel any unexecuted

warrant upon request.

QUESTION: How would that affect a City of New York problem?

MR. HELLERSTEIN: Well, I think the process would be the same. If an officer says that "Gee, the fellow I got the warrant for, I now know he is innocent. We don't have to arrest him." He can call his attorney and say, "We've made a mistake," and have the warrant vitiated.

QUESTION: Do you think there is any risk, Mr. Hellerstein, any risk that if 30,000 warrants must be obtained, if that was the figure, in some relatively small metropolitan areas -- small geographically -- that the value of the warrant will be depreciated by the fact that what the police will have to do, law enforcement will have to do, would be to set in motion some of the new electronic equipment, word processing machines, where you will get your warrant from the prosecutor to the magistrate, the issuing officer to the police officer, all transmitted by wires?

MR. HELLERSTEIN: Mr. Justice, first of all, I know New York has a lot of crime. I don't know that even 30,000 warrants in the context of this case would be an accurate figure.

QUESTION: I should think, it sounded low to me for a city like New York.

MR. HELLERSTEIN: With due respect, I would think it

might be high, insofar as we are talking about arrest within the home that are made on --

QUESTION: I am not talking about arrests. Home or not home is not the issue.

MR. HELLERSTEIN: We are only asking that the warrant requirement be imposed for arrest within the home because --

QUESTION: The issue in my hypothetical question is relating to arrests. And for the purpose of your case, you are narrowing it not just to the home but to an arrest in somebody's home, a dwelling, are you not?

MR. HELLERSTEIN: Arrest in a dwelling in non-exigent circumstances.

QUESTION: Mr. Hellerstein, I am both confused and disturbed now, in view of your answers to some of my colleagues' questions.

You are contending here that the Constitution requires an arrest warrant, and then you, as I understood it, say that if the law enforcement officer is armed with an arrest warrant, such as you say, in this case the Constitution requires, then he is authorized to arrest the person wherever he is found. You said that, didn't you?

MR. HELLERSTEIN: He can do that without a warrant, yes.

QUESTION: Does that give greater or lesser protection to the interest of homeowners? If he is armed with a warrant to

arrest an individual, can he then break into every house in the neighborhood looking for that individual, because it is a valid arrest wherever that person is, in fact, found, whatever the suspicion may be as to whether he is going to be there?

MR. HELLERSTEIN: Absolutely not. I am saying that the arrest -- Not at all am I suggesting that. That's Lankford v. Gelston in the Fourth Circuit, I believe.

I am saying with a warrant to arrest you must have probable cause to believe that he has committed a crime and a reasonable basis to believe he is in the presmises where you are going.

QUESTION: Yes, but you don't need to have that determined by a warrant, that he is in some premises.

MR. HELLERSTEIN: No, that's by statute.

QUESTION: No, no. We are not here to bother about New York statutes or the statutes of any other states. We don't have any business with those except if they may involve a federal question.

We are here as to what does the Federal Constitution require?

MR. HELLERSTEIN: It requires a determination of probable cause --

QUESTION: To arrest the person.

MR. HELLERSTEIN: To arrest the person --

QUESTION: Wherever found.

MR. HELLERSTEIN: Wherever found; but only if he is in his home is a warrant required. It does not require a warrant for the public way. If you know you are going --

QUESTION: But, obviously, when they get -- They won't know, at the time, whether the man is in his home or not in his home. Maybe he is out on the public street or some other public place. Maybe he is in somebody else's home. So what they do is get a warrant to arrest him. Right? Under your submission. Because the Constitution requires an arrest warrant.

MR. HELLERSTEIN: They must inform the magistrate that it is to be within the home.

QUESTION: Well, that's what I didn't get.

QUESTION: How can they know in advance that he will or will not be in his home?

MR. HELLERSTEIN: They can anticipate.

QUESTION: You just told me a while ago that it need not say in the warrant that they arrest in the home.

MR. HELLERSTEIN: It must say, in the supporting papers, that we are seeking a warrant --

QUESTION: I thought you just said a while ago that it did not require any showing in connection with getting the warrant that there was probable cause to believe that he was in the house.

QUESTION: That's what I thought you said, too.

QUESTION: You said exactly that.

MR. HELLERSTEIN: Then I must clarify that.

QUESTION: Let me test that by this hypothetical -- Not a hypothetical, a real question.

How many warrants would you just guess roughly have been issued and are outstanding and have not yet been executed in the City of New York, by all the policemen in New York?

MR. HELLERSTEIN: I have no idea.

QUESTION: Thousands, aren't there?

MR. HELLERSTEIN: Not arrest warrants. No, Mr. Chief Justice.

QUESTION: Yes. I think you will find that at any given time in any big city there are thousands of arrest warrants outstanding, and when a policeman has any doubt they have a system of checking in to see if there is an outstanding warrant on a person they have stopped for a traffic accident, or the policeman may have six outstanding warrants in his pocket for his particular precinct or district. They aren't issued with the view that, necessarily, they are going to be executed within 48 hours. They have a time limit, by law, but there are a great many unexecuted warrants floating around in police departments in this country, state warrants.

MR. HELLERSTEIN: I think those are essentially bench warrants which are issued for suspects. In New York City, the high statistic is not the unexecuted arrest warrant, it is the unexecuted bench warrant.

QUESTION: Which is an arrest warrant.

MR. HELLERSTEIN: Accusatory instrument.

But if the officer intends to make an arrest within the home, he must come before the magistrate, so stating, and that he must establish in his papers that he has probable cause to believe that the defendant has committed a crime, and that he has reasonable cause to believe that he is inside.

QUESTION: So that in a lot of circumstances then he will have to come back if he wants to -- I am sure there will be a lot of arrest warrants issued to arrest a man before they know where he is or where he lives or anything else. And if he has that kind of a warrant in his pocket that doesn't authorize an arrest in a home, and you say the warrant never needs to do that -- But if he doesn't know that there are underlying papers that establish some reason to believe that he is in some house, like his, he has got to go back to the magistrate and say, "I now believe this man is at home, and I just wanted to tell you that; you don't need to change the warrant, I just want to tell you that."

MR. HELLERSTEIN: I think he has to have -- There has to be a connection between going to the home --

QUESTION: Does the magistrate have to agree and decide that there is probable cause to believe that he is in the house?

QUESTION: Then, at that time?

MR. HELLERSTEIN: Probable cause, in the sense --

QUESTION: Reasonable suspicion.

MR. HELLERSTEIN: Reasonable belief, yes.

QUESTION: Does he then have to make a decision and evidence that somewhere?

MR. HELLERSTEIN: Under our present system --

QUESTION: I know, but what about the Federal Constituion? Does it require him to make some conclusion, or not?

MR. HELLERSTEIN: I think yes.

QUESTION: Where?

MR. HELLERSTEIN: I don't know in the Constitution, but I think that --

QUESTION: That's what you are arguing, the Constitution.

MR. HELLERSTEIN: He has to determine on the application before him.

QUESTION: When does he determine it? Does he put it in the warrant?

MR. HELLERSTEIN: It would depend on what the warrant would say.

QUESTION: All I want to know is what your submission is the Federal Constitution requires the magistrate to find with respect to whether or not the man is in the house.

MR. HELLERSTEIN: My submission is that it state that at the time the warrant was obtained there were two

things, probable cause for the crime and reasonable belief that he is at home.

QUESTION: Would it be sufficient if he just knows where his home is, the address of his home?

MR. HELLERSTEIN: Yes.

QUESTION: There is a John Smith and he lives at 2020 Main Street. Is that enough?

MR. HELLERSTEIN: Yes.

QUESTION: And then you say he can arrest him in public without that warrant?

MR. HELLERSTEIN: Yes, he can do that under Watson.

QUESTION: And he can arrest him in his home only with that warrant.

QUESTION: But you say the Federal Constitution requires, like the state law, that at the time he gets there there must be reasonable cause to believe that he is in the house.

MR. HELLERSTEIN: I am sorry if I've confused you, Mr. Justice. I thought that was what my adversary was saying.

I said the Federal Constitution requires only probable cause to believe commission of the crime, in order to enter the house. Not that it requires --

QUESTION: So the warrant thing really doesn't protect the house, then, it protects -- It really is a protection of him personally?

MR. HELLERSTEIN: It's a protection of the house,

insofar as the arrest is to be made there.

QUESTION: Protection of him if he is in his house.

MR. HELLERSTEIN: Yes.

QUESTION: I'll put it this way. You'll submit this on your brief -- You agree with the position you have stated in your brief?

MR. HELLERSTEIN: Yes.

QUESTION: Do you think a warrant is in any way infirm, if it does no more than give the name of the person to be arrested without any address, without any more?

MR. HELLERSTEIN: It would depend on what kind of a warrant.

QUESTION: An arrest warrant.

MR. HELLERSTEIN: I would say not necessarily.

QUESTION: Yes or no, under the Federal Constitution? That's all we are talking about.

MR. HELLERSTEIN: Under the Federal Constitution, I do not think -- I think there has to be a premises identified.

QUESTION: Premises of the person to be arrested?

MR. HELLERSTEIN: Yes.

QUESTION: Well, that's an extraordinary thing.

QUESTION: What if it says, "John Smith, address unknown"? And his address is unknown. And there is plenty of reason to -- probable cause to believe that John Smith committed a criminal offense.

MR. HELLERSTEIN: If this Court had held that the warrant is required, insofar as the probable cause to believe the commission of the crime, I think it would be sufficient, yes. And then the officers locating the premises could go in without warrant.

QUESTION: Help me, Mr. Hellerstein. I've never seen a warrant that said what you said, that this is a "warrant for the arrest of John Doe, and if you find him in his house you can arrest him there." I have never seen one like that.

MR. HELLERSTEIN: There are John Doe warrants.

QUESTION: I mean this is James Smith. This is, what's his name, Theordore Payton. "And if you find him at home you can arrest him at home."

I've never seen a warrant like that.

MR. HELLERSTEIN: Neither have I.

QUESTION: I thought you said the warrant had to say that they could arrest him at home.

MR. HELLERSTEIN: What I meant to say is that the warrant had to be obtained in order for there to be an arrest within the home.

QUESTION: But it doesn't have to say so in the warrant?

MR. HELLERSTEIN: No.

QUESTION: He can be arrested in a public place without a warrant. He can be arrested in his or somebody else's home only with a warrant.

MR. HELLERSTEIN: That is my submission.

QUESTION: This is probably repeating, but there seems to me there has been some misunderstanding.

In this very case, talking about Mr. Payton, as I understand the sequence of events, they learned his identity at one time, his name at another time, his address at another time.

If at the time before they knew his address, they knew his identity and had probable cause to believe he was responsible for the offense, and they got an arrest warrant for that person, without naming an address, they had then taken that warrant, later learned his address and broken down the door, as they did in this case. Would you concede they acted within the Constitution?

MR. HELLERSTEIN: If they had the arrest warrant.

QUESTION: Yes, but with no address on it.

MR. HELLERSTEIN: I would be reluctant to concede that, Mr. Justice Stevens, because I have had no experience with that context. I think that I might go so far as to say that, mainly because the warrant had been obtained by a magistrate who had made the determination that there was probable cause. And once that determination was made --

QUESTION: Do you think there may be a constitutional difference between a warrant that includes the man's address and one that does not? That's the divide.

MR. HELLERSTEIN: I don't think there is a difference.

QUESTION: Otherwise, you should concede that, because you have conceded, if I understand you correctly, that if the warrant includes his address that's all that's necessary. They don't know where he is. They get a warrant to arrest this man; they know where he lives; they go out and the first place they look is in his home and nobody answers the door so they break it down. You say that's all right. But it's not all right if they don't know his address before they get the warrant? Is that your position?

MR. HELLERSTEIN: No. I think that in terms of what the Constitution requires --

QUESTION: That's what we are talking about.

MR. HELLERSTEIN: -- in a warrant, it should have the man's address in it.

QUESTION: Well, you are saying then that there is a constitutional difference, depending on whether they get his address in the warrant, or not?

MR. HELLERSTEIN: I am not certain of that, though. I am not certain. I think the key thing --

QUESTION: If you take that position, you are really agreeing with Mr. Justice White, that you want some kind of constitutional protection on knowing whether he is in the house or not. And that would be more like a search warrant. And then you are going to say at the time you go in to get the warrant you

have to be able to predict whether he will be in the house at the time they get there.

MR. HELLERSTEIN: That's not what I am after. I am after the determination that a magistrate makes with respect to prior to going to the home. I don't know what the experience would be, or even the Constitution --

QUESTION: Well, if your big worry is having the magistrate's confirmation as to probable cause that this man committed a crime, I would think you would like to urge that just generally, that there just should be arrest warrants at any time, whenever you think there is any time to get them, and not just for the house. If the aim of this protection is -- If it isn't aimed at protecting the privacy of the home, but just probable cause with respect to the commission of the crime, that's the general applicability.

MR. HELLERSTEIN: After the Court's decision in Watson, I can't urge that, is what I am saying.

QUESTION: Well, you might be back, though, another day.

MR. HELLERSTEIN: I think it will be a while.

I believe that Watson says it is not required. What I am trying simply to say is that a warrant to enter the home is required beyond Watson. I am not seeking a warrant for arrest. I am seeking a warrant for an arrest within the home.

QUESTION: Let me see if I understand the net of your

argument. Is it this, that whenever there is an arrest it can be made without a warrant, only if they are arrested in a public place? If they are arrested anywhere else, they must have a warrant.

MR. HELLERSTEIN: No, Mr. Chief Justice, I think that states it far too broadly.

QUESTION: Well, pieces of your argument add up to that for me.

MR. HELLERSTEIN: I am simply saying that there can be no arrest within the home without a warrant.

QUESTION: How about his office?

MR. HELLERSTEIN: An office, depending on the nature of the office, and the extent --

QUESTION: Where does the Constitution help you there? That's what we are guided by.

MR. HELLERSTEIN: Just in the continuum of this Court's -- That's not this case. This Court has in other decisions afforded offices some protection under the Fourth Amendment, depending on what the expectations of privacy were, who had access to the office. I would be willing to concede that an office that was open to the public to do business was not in any way like the home.

QUESTION: Lawyer's office, private office?

MR. HELLERSTEIN: I think the interior of my office, where I might work alone, would have the same privacy of the

home, but not necessarily where I see clients and do business. That would be where I would draw the line.

MR. CHIEF JUSTICE BURGER: Some of the members of the Court would like to have an opportunity to examine those copies of the bench warrants or grand jury warrants. If your friend has no objection, would you leave them?

MR. HELLERSTEIN: I would be most happy to.

MR. CHIEF JUSTICE BURGER: If you will deposit them with the Clerk.

MR. HELLERSTEIN: I will.

MR. CHIEF JUSTICE BURGER: Thank you.

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:45 o'clock, p.m., the case was submitted.)