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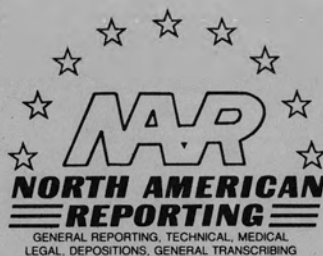
Supreme Court of the United States

GARY KEITH STEAGALD,)
)
 Petitioner,)
)
 v.) No. 79-6777
)
 UNITED STATES OF AMERICA,)
)
 Respondent.)

Washington, D.C.
January 14, 1981

Pages 1 through 53

ORIGINAL



1 IN THE SUPREME COURT OF THE UNITED STATES

2 ----- :
3 GARY KEITH STEAGALD, :

4 Petitioner, :

5 v. : No. 79-6777

6 UNITED STATES OF AMERICA, :

7 Respondent. :
8 ----- :

9 Washington, D.C.,

10 Wednesday, January 14, 1981

11 The above-entitled matter came on for oral argument
12 before the Supreme Court of the United States at
13 10:55 o'clock a.m.

14 APPEARANCES:

15 JOHN RICHARD YOUNG, ESQ., Martin & Young, Suite 504,
16 44 Broad Street, N.W., Atlanta, Georgia 30303;
on behalf of the Petitioner

17 ANDREW L. FREY, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C. 20530;
on behalf of the Respondent

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C O N T E N T S

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ORAL ARGUMENT OF

PAGE

JOHN RICHARD YOUNG, ESQ.,
on behalf of the Petitioner

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ANDREW L. FREY, ESQ.,
on behalf of the Respondent

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MILLERS FALLS
ERASE
COTTON CONTENT

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We'll hear arguments
3 next in Steagald v. the United States.

4 Mr. Young, I think you may proceed when you are
5 ready.

6 ORAL ARGUMENT OF JOHN RICHARD YOUNG, ESQ.,
7 ON BEHALF OF THE PETITIONER

8 MR. YOUNG: Mr. Chief Justice and may it please
9 the Court:

10 My name is Richard Young, I'm from Atlanta, Georgia,
11 and I've been appointed by this Court to represent the Peti-
12 tioner in this case. On January the 18th, 1978, under the
13 direction of the Federal Drug Enforcement Administration,
14 approximately 12 police officers armed with a variety of
15 shotguns, side arms and automatic weapons, spread-eagled the
16 Petitioner against his automobile in full view of a public
17 road and in front of his home. They detained him there, and
18 then proceeded to conduct a room to room search of his house.

19 QUESTION: Would it make any difference if there had
20 been only two officers?

21 MR. YOUNG: Your Honor, we -- when we're looking at
22 the degree of the intrusion, that is -- that's the point I'm
23 trying to make. I think it's important, when we're talking
24 about the privacy of the American citizen, and evaluating
25 the extent of a search, to recognize that this was an

1 extraordinary invasion of his privacy.

2 QUESTION: It was his house, is that fixed in the
3 record?

4 MR. YOUNG: Your Honor, I refer to it as his house
5 rather than calling it the premises in which he had a reason-
6 able expectation of privacy. The standing issue I will
7 address; however, we believe that the record supports the
8 finding, if the government is entitled to raise that issue
9 at this late date, that indeed he did have a reasonable expec-
10 tation of privacy in the home. I refer to it as his home
11 for shorthand.

12 The government took these actions without a search
13 warrant --

14 QUESTION: It is the entry into the home that
15 presents the issue in this case?

16 MR. YOUNG: Yes.

17 QUESTION: Not what happened outside the house.

18 MR. YOUNG: No sir, I'm just giving the factual
19 background which includes that.

20 QUESTION: Right.

21 MR. YOUNG: There was no search warrant and there
22 were no exigent circumstances excusing the absence of the
23 search warrant. Inside the house, the police found 45 pounds
24 of cocaine, which Petitioner moved to suppress on the grounds
25 that the warrantless search violated his Fourth Amendment

1 right to privacy.

2 QUESTION: How did they connect him with the 45
3 pounds of cocaine? The prosecution was what, for possession,
4 or --

5 MR. YOUNG: Possession and for conspiracy.

6 QUESTION: -- of that cocaine?

7 MR. YOUNG: Of that cocaine.

8 QUESTION: Well, how did they tie him to it?

9 MR. YOUNG: They did it, basically, Mr. Justice
10 Brennan, with a series of pre-search contacts which the
11 Petitioner had with the import company which had imported the
12 brass lamps from Colombia in which the cocaine was secreted.
13 That issue is really not before the Court, but the sufficiency
14 of the evidence --

15 QUESTION: I was curious, since the government's
16 position apparently is that he had no privacy in this home,
17 whatever, and therefore no standing.

18 MR. YOUNG: Yes sir, that's their position now; it
19 wasn't their position --

20 QUESTION: How did the government tie him then to
21 the stuff they found in the house?

22 MR. YOUNG: They did it with circumstantial evi-
23 dence, Your Honor, by -- and it would take quite some time to
24 elicit all the facts, but he --

25 QUESTION: Well, don't bother. I'll ask Mr. Frey.

1 MR. YOUNG: All right, sir. Thank you. The
2 motion was denied on the basis that the agents who conducted
3 this search had an arrest warrant for an individual by the
4 name of Ricky Lyons, who they had reason to believe was lo-
5 cated in Petitioner's home. This ruling was made on the
6 basis of the Fifth Circuit case of The United States v.
7 Cravero, which it held that an arrest warrant, even without
8 exigent circumstances was a specific exception to the Fourth
9 Amendment search warrant requirement, if the officers had a
10 reasonable belief that the subject of the warrant could be
11 found inside the premises.

12 I want to call the Court's attention to two other
13 specific facts before I move directly to the issue. The phone
14 call which was made by a Drug Enforcement Administration agent,
15 which assembled these 12 officers, was made at approximately
16 1 or 2 o'clock on the afternoon of January the 18th, prior
17 to the 5 o'clock search. The phone call was made from the
18 United States District Courthouse in Atlanta, Georgia, where
19 there were three full time magistrates on duty. The agent
20 testified at the suppression hearing that there was no, that
21 there was nothing that prevented him from obtaining a search
22 warrant.

23 Secondly, when this platoon of agents arrived at
24 this house--there were two houses situated more or less next
25 door -- both houses were approached, only one house was

1 ultimately searched -- when asked why they went down to the
2 second house, the agent at the suppression hearing stated,
3 "The purpose of going to the A-frame..." -- that's what the
4 other house was referred to in the record -- "...was the same
5 as going to the house at the top of the hill. We didn't know
6 which house the individuals might have been at."

7 QUESTION: Now, at that time, what was -- who was
8 the object of their interest in their pursuit?

9 MR. YOUNG: Allegedly -- well, no one was the object
10 of their pursuit. Allegedly, Ricky Lyons was the object of
11 their interest, although, as I will explain, we believe there
12 is substantial doubt on the record that in fact they were
13 going there after Ricky Lyons, or if there were going after --

14 QUESTION: They did have an arrest warrant?

15 MR. YOUNG: Yes sir. Well they didn't have it,
16 but under federal law, it's not necessary that they have it.
17 There was one existing, but they didn't have it in their
18 possession.

19 QUESTION: Well, one was outstanding then?

20 MR. YOUNG: Yes sir, there did exist an arrest
21 warrant for Ricky Lyons. It had been issued in July of 1977,
22 as a consequence of a July '77 indictment which alleged acts
23 that had occurred in 1973. It was a marijuana case.

24 QUESTION: And it's your position that in addition
25 to this arrest warrant for Ricky Lyons, and a reasonable

1 belief that Ricky Lyons was on the premises, they needed a
2 search warrant?

3 MR. YOUNG: In the absence of exigent circumstances?

4 QUESTION: Yes.

5 MR. YOUNG: Precisely my position.

6 QUESTION: All right, just what would one have told
7 one of the magistrates on duty in Atlanta, in order to obtain
8 the search warrant for -- going on the premises of your client
9 to arrest Ricky Lyons?

10 MR. YOUNG: He would have told the magistrate, first
11 under oath, that he had obtained information from a reliable
12 confidential informer, upon whom he had relied successfully
13 in the past, and that the information was credible, and that
14 the information consisted of this: the informant provided
15 the DEA agent with a phone number where he -- where the
16 informant said, Ricky Lyons and his partner, Jimmy, his
17 partner in the drug business, Jimmy, could be found within a
18 pertinent period of time. He told the agent that he knew
19 that because he heard, he talked to him on the phone, he
20 was given that phone number as to where Jimmy was, and he
21 overheard Ricky's voice in the background. The agents then,
22 of course, traced the address through the phone company, and
23 that's all the agent would have had to have told the magis-
24 trate, in order for that magistrate to make the determination
25 that Petitioner's right of privacy would have to yield to

1 the DEA's need to search for Ricky Lyons. However, the
2 magistrate never had that opportunity; the police made this
3 judgment on their own.

4 QUESTION: You concede that would have been enough,
5 had the search warrant been based on that --

6 MR. YOUNG: Had the search warrant been -- well,
7 for purposes of this appeal, it is assumed there was probable
8 cause or at least reasonable belief to belief that Lyons was
9 there.

10 QUESTION: Well there really isn't a great deal
11 that a law enforcement officer, who has an outstanding arrest
12 warrant and believes that the subject of the warrant is on
13 someone else's premises, can tell a magistrate if he's seeking
14 a search warrant of the premises in addition to the kind of
15 information that you're talking about, is there? He may not
16 know anything about the premises at all.

17 MR. YOUNG: That's true. However, it's our position
18 that the issue is not so much how much he would have to tell
19 the magistrate, but rather, the need of the magistrate to
20 stand between him and the privacy rights of the Petitioner in
21 the absence of exigent circumstances.

22 That's our position. And we contend, as Your Honor
23 has noted, that there must be a search warrant in this case,
24 and we -- or, in these circumstances. And we begin with a
25 notion that the Fourth Amendment contains two basic principles.

1 And one is, which apparently this case met for the purposes
2 of this appeal, that there is probable cause to believe that
3 the object or the person which the police are seeking is
4 contained in the place they want to search.

5 QUESTION: Now Mr. Young, did you say they did not
6 in fact have the arrest warrant on them?

7 MR. YOUNG: No sir. And in fact, nobody, none of
8 these agents had even ever seen --

9 QUESTION: No, but they were acting on the author-
10 ity of the arrest warrant, weren't they, when they made the
11 entry?

12 MR. YOUNG: They were, precisely; yes sir.

13 QUESTION: Does it make any difference whether they
14 had it in their pockets, or not?

15 MR. YOUNG: No sir, no. Not under federal law.

16 QUESTION: No sense spending time on that. Now,
17 you've referred to the exigent circumstances, Mr. Young.
18 Suppose, instead of having all these advance preparations,
19 they had been literally pursuing Lyons, and followed him on
20 foot and they saw him dart into this house, could they have
21 followed him?

22 MR. YOUNG: Certainly, Your Honor. Under *Warden*
23 *v. Hayden*, that's hot pursuit and this Court permits that.

24 QUESTION: After they got in the house, if they
25 saw marijuana or other contraband in plain view, could they

1 seize it?

2 MR. YOUNG: Yes sir, under Warden v. Hayden, they
3 could.

4 QUESTION: And it would be admissible?

5 MR. YOUNG: Yes sir. That is an exigent circum-
6 stance --

7 QUESTION: From his point of view, the occupant of
8 the house, whatever his right to be there may be, from his
9 point of view, why is it different whether the police got in
10 there by -- the agents got in there in hot pursuit, or got
11 in there in cold, deliberate steps?

12 MR. YOUNG: From his point of view, Your Honor, it
13 is that he has the right and the need, and this country has
14 the right and the need, for an individual's expectation of
15 privacy not to yield on the basis of the judgment of the
16 police, but on the basis of the judgment of a neutral and
17 detached magistrate. The reason that a magistrate is inter-
18 posed was most succinctly said by Mr. Justice Douglas in
19 McDonald v. United States, when he said "power is a heady
20 thing, and the police acting on their own cannot be trusted".
21 That is what is important, is that magistrate, in the absence
22 of an exigent circumstance such as hot pursuit, as you
23 indicated, must stand between the police and the citizen.

24 QUESTION: But from his point of view, I take it, you
25 concede that he'd be in a very different position from the

1 hot pursuit situation, he would have no basis for having the
2 evidence, the plain view evidence rejected?

3 MR. YOUNG: That's correct, Your Honor. Of course,
4 the determination of probable cause, and the need to invade
5 the citizen's privacy, Petitioner's privacy, must be made
6 prior to the search. And in this case, of course, it was made
7 only by the police. This --

8 QUESTION: Now by hypothesis, what do you, if I may
9 press this one on you, what should they have done: surrounded
10 the house, since they had adequate manpower, and sent one of
11 the agents down to get the warrant?

12 MR. YOUNG: No sir, when Agent Goodowens called to
13 assemble this raiding party, he should have taken five minutes
14 and gone next door and talked to the magistrate and gotten
15 a search warrant.

16 QUESTION: Well, would it have been adequate if --
17 he, having failed to do that and arriving at the house, could
18 they have secured the premises in the sense of surrounding it,
19 and then got the warrant?

20 MR. YOUNG: Certainly.

21 QUESTION: Would you say, that was the fallback
22 position they should have carried out --

23 MR. YOUNG: Yes sir.

24 QUESTION: -- not having --

25 MR. YOUNG: That's a fallback position they could

1 have carried out.

2 QUESTION: Assuming, as Mr. Justice Rehnquist
3 suggested, they had enough to present to the magistrate to
4 persuade him to issue the warrant, the search warrant?

5 MR. YOUNG: Correct.

6 QUESTION: The search warrant necessary to execute
7 the arrest warrant?

8 MR. YOUNG: The search warrant necessary to give
9 them the right to enter Petitioner's home in order to execute
10 that arrest warrant.

11 QUESTION: You know, I have to raise the point that,
12 I have been listening carefully but I have great difficulty
13 in putting all this together until I find out on what basis
14 you say that that's his home, emphasis his underscored.

15 MR. YOUNG: All right, sir.

16 QUESTION: It really was the Gaultney's place of
17 residence, wasn't it?

18 MR. YOUNG: No sir, it was leased by the Smiths, or
19 by Mr. Smith, who was the individual who was arrested as he
20 came into the house and arrived in a truck.

21 QUESTION: I think we'd all feel better if you'd
22 call it the home, rather than his, because that issue is
23 still --

24 MR. YOUNG: All right. Well, let me go ahead and
25 address the standing issue at this time, and insofar as it is

1 properly before this Court.

2 We believe that the standing issue is not before
3 this Court and would urge the Court not to take the govern-
4 ment's invitation to remand this case in order to determine
5 if Petitioner has a standing under the more recent case of
6 United States v. Salvucci. And our reason for this is that
7 Rakas v. Illinois was decided in December of 1978, which
8 clearly delineated the notion that standing is a function of
9 an expectation of privacy. Briefs in the Fifth Circuit in
10 this case, by the Appellant and the government were not filed
11 until 1979, so not only did the government have ample oppor-
12 tunity to ask the Fifth Circuit to remand or to -- remand for
13 standing or to decide the Petitioner didn't have standing.
14 But moreover, they could have raised it, of course, at the
15 trial level.

16 Salvucci raised his standing argument from the
17 very beginning, and of course Salvucci eventually overruled
18 the automatic standing requirement of Jones. The government
19 says that because we were all proceeding under Jones, that
20 this Court should reevaluate the case in light of Salvucci,
21 we say the government made a tactical decision. In the Fifth
22 Circuit, they had Rakas to stand on, and they could have
23 asked that the case be remanded; they didn't. We infer from
24 the record that they didn't, because they knew that they
25 had Cravero in their hip pocket.

1 QUESTION: Well, Mr. Young, I take it, whether or
2 not the government's omission to raise this below precludes
3 their being heard on it here, is at least in part, isn't it,
4 dependent upon whether or not this standing question is juris-
5 dictional?

6 MR. YOUNG: That may well be, Your Honor.

7 QUESTION: If it's in fact jurisdictional, and thus
8 I expect they may raise it here and say you can't do it
9 because you have no jurisdiction here, could that be it?

10 MR. YOUNG: That -- it could be.

11 QUESTION: Well now, what is it? What's the dis-
12 tinction between prudential and jurisdictional; as I noted,
13 Salvucci, you'll recall, refers to it as Fourth Amendment
14 standing --I don't know what that means.

15 MR. YOUNG: Well I'm not sure I know. I think that--

16 QUESTION: Perhaps no one does --

17 MR. YOUNG: I'm not -- I would be speculating, I
18 think it's very difficult to tell.

19 QUESTION: Do you think this is jurisdictional?

20 MR. YOUNG: Your Honor, I really haven't given
21 that -- I haven't evaluated that aspect of it. Our position
22 on standing is that it was simply, ~~as~~ it was waived by the
23 government below and it was waived on the basis of a tactical
24 decision.

25 QUESTION: Well, except that what I'm suggesting is,

1 they didn't raise it and they maybe deliberately didn't raise
2 it. But if it is jurisdictional, doesn't that mean we can't
3 hear them here, even though they deliberately did not raise
4 it below?

5 MR. YOUNG: I can't answer that, Your Honor.

6 I can't answer that. However, we also contend that from the
7 record, there are -- there is enough evidence to reasonably
8 infer an expectation of privacy under Salvucci, even under
9 the stricter standard of Salvucci, and we point to the
10 fact that the confidential informant stated that there were
11 four or five people staying there. We infer that that is
12 Gaultney and his wife, who, the record indicates, were stay-
13 ing in the front bedroom; Smith and his wife, who, the
14 record doesn't indicate where they were staying, but it indi-
15 cates that he had leased the place, and Steagald.

16 Second, Steagald was out front of the house in his
17 shirt sleeves on a wintry January afternoon, his sweater which
18 he knew exactly where it was, was found in the house. Third,
19 he had papers of his in the house, and fourth, --

20 QUESTION: Are those the checks, or something?

21 MR. YOUNG: Yes sir, two checks and an invoice.

22 QUESTION: Two checks.

23 MR. YOUNG: Two checks and an invoice. And fourth,
24 the automobile out front, we believe, might be reasonably
25 inferred to be his automobile inasmuch as the trial transcript--

1 QUESTION: Was he washing it or cleaning it?

2 MR. YOUNG: He was -- there was apparently something
3 wrong with the engine, Your Honor; they were looking at the
4 engine.

5 QUESTION: Oh.

6 MR. YOUNG: Inasmuch as the record indicates that
7 Steagald had an old, beat-up Volkswagen. Now any one of
8 these factors taken by itself is not going to give Petitioner
9 a reasonable expectation of privacy of his home, I don't
10 contend that. But these facts taken together, we believe,
11 give rise to that inference.

12 QUESTION: Mr. Young, on the -- I don't want you
13 to go into the facts in great detail, but you indicated
14 before that the proof of the substantive offense itself was
15 largely circumstantial. Was the -- Steagald's connection
16 with the place in which a lot of these things were found,
17 one of the circumstances on which the government relied to
18 establish guilt?

19 MR. YOUNG: The way that they -- I contended at
20 trial that his connection with the house was too tenuous
21 to even get to the jury, to withstand the judgment of acquittal
22 motion. The government argued, in response to that and to
23 the jury, once it got to the jury, that the fact that his
24 sweater was there, the fact that these papers were there, the
25 fact that his car was out front, these facts that I have just

1 elicited, to rely on alleging a reasonable expectation of
2 privacy, the government relied upon -- to place him connected
3 to that house --

4 QUESTION: And connected to the --

5 MR. YOUNG: Other than that -- sir?

6 QUESTION: And connected to the drugs?

7 MR. YOUNG: And connected to the drugs, yes sir.

8 QUESTION: Is that the way they connected him, with
9 evidence like that?

10 MR. YOUNG: That was part of the evidence, Your
11 Honor. There was a -- the Court has to understand that,
12 prior to this search, the -- there was evidence which the
13 government introduced that involved a number of contacts that
14 Steagald had, where the import company that it was proved had
15 moved the drugs from the airport to a warehouse, he rented the
16 warehouse, he set up an answering service for the import
17 company, all these type of circumstantial contacts with the
18 merchandise in which this cocaine was concealed. So the
19 government relied upon that, and then the government relied
20 upon the various evidentiary inferences to which it was
21 entitled from those four or five facts that I have just
22 mentioned, concerning his connection with the house in which
23 the cocaine was ultimately found.

24 So we say that -- that the Court should find --

25 QUESTION: So at least to that extent, I gather

1 there was a case or controversy between the government and
2 him in connection with the drugs themselves, wasn't there?

3 MR. YOUNG: Oh yes sir. The --

4 QUESTION: That they were his?

5 MR. YOUNG: Whether --

6 QUESTION: Does that bear on whether this is juris-
7 dictional or not?

8 MR. YOUNG: Your Honor, I simply have to apologize.
9 I have not given that any thought.

10 QUESTION: Well I know, but standing in a case
11 or controversy sense is what makes it jurisdictional,
12 isn't it?

13 MR. YOUNG: I believe so, yes, yes sir. Now the
14 government also --:

15 QUESTION: Also, I understand you to say that he
16 had privacy in one room in that house? Isn't that what I
17 understand you to be saying? You said somebody was sleeping
18 in one room --

19 MR. YOUNG: One bedroom, yes sir.

20 QUESTION: And he -- or do you say he had privacy
21 in the whole house?

22 MR. YOUNG: Well I say he had privacy in the whole
23 house because he --

24 QUESTION: How?

25 MR. YOUNG: -- because he was living there, Your

1 Honor.

2 QUESTION: Would that go for an apartment, too?

3 How about a rooming house with 18 rooms?

4 MR. YOUNG: No sir, I think that would be more --
5 the equivalent to a hotel.

6 QUESTION: I must have missed it. Where was the dope
7 found?

8 MR. YOUNG: It was found in the front -- well, it
9 was found in several places, but it was first found --

10 QUESTION: Well that's why they say it was his house.

11 MR. YOUNG: -- in the front bedroom.

12 QUESTION: I thought it was all found in his room.
13 It was not?

14 MR. YOUNG: No sir.

15 QUESTION: Was any found in his room?

16 MR. YOUNG: Well again, the record doesn't clearly
17 indicate which room was his.

18 QUESTION: So does that mean that all of them are
19 his?

20 MR. YOUNG: So we don't know which --

21 QUESTION: Or none of them are his? Does the
22 failure of the record to show that all of the house was his or
23 none of the house was his?

24 MR. YOUNG: We say on the basis of those -- those
25 facts I mentioned earlier, that he has a reasonable expectation

1 of privacy in the entire premises.

2 QUESTION: And the government says for that reason
3 he doesn't have any?

4 MR. YOUNG: Yes sir.

5 QUESTION: So what do we do, toss a coin?

6 MR. YOUNG: No sir, you find that the government
7 has waived it, at least that's what I urge the Court to do.
8 Now another issue that the government raises -- before I
9 get to the next issue the government has raised, let me say
10 that our position on the arrest warrant is this; that the
11 arrest warrant affords no protection, indeed in its issuance
12 it doesn't even take into consideration the expectation of
13 privacy of the third party -- consequently the arrest warrant
14 is simply not sufficient and it makes no difference whether
15 the search is for a person or a thing, since the intrusion
16 is the same. So we say that the government had to have a
17 search warrant.

18 Now the government also raises, again for the first
19 time in this Court, the argument that because Cravero --
20 United States v. Cravero -- was the law in the Fifth Circuit
21 at the time of this search -- that this Court should as I
22 understand their argument, adopt a good faith exception to
23 the exclusionary rule and hold that the agents in this case
24 were acting in good faith, in reliance upon Cravero. We
25 say in response to that, first, there is substantial doubt

1 from this record that the governments were in fact acting
2 in good faith. We believe that the government agents believed
3 that they were going to find 1500 pounds of marijuana in this
4 house and that was their first interest. And we point to
5 these facts in the record: the confidential informant had
6 said that there had been a drug deal in Florida recently con-
7 summated by Ricky Lyons and this individual named Jimmy,
8 that Jimmy had attempted to sell cocaine, a matter of days or
9 a week prior to the conversation that he had in early January
10 with the Drug Enforcement agent --

11 QUESTION: Is Jimmy the Petitioner?

12 MR. YOUNG: No sir, Jimmy is Ricky Lyons' partner.

13 QUESTION: I see.

14 MR. YOUNG: All right. When the confidential
15 informant first told the Drug Enforcement agent about the
16 attempt by Jimmy to sell him cocaine, the agent's first
17 response was not to find Ricky Lyons, was not to get that
18 information, but was to try to prevail upon the confidential
19 informant to set up a drug deal with Jimmy and have this
20 one go through. Second, that same agent testified at the
21 evidentiary hearing on the motion to suppress as to whether
22 or not it was his impression from the confidential informant
23 that the house where Ricky Lyons was, was a "stash house
24 for narcotics". He answered, I asked him that, if he knew
25 there was going to be any dope there, he says they always

1 had dope around. I said do you know if there's going to be
2 any there, he said well I don't know, but they deal in it,
3 they might have. And that's in Volume II of the suppression
4 hearing at page 47.

5 Moreover, Agent Goodowens testified -- who was one
6 of the Drug Enforcement Administration agents -- testified
7 that the confidential informant believed that there would be
8 drugs there, but that he didn't have it on what the agent
9 called hard information, in other words, the government agent
10 did not have sufficiently hard information to get a search
11 warrant for drugs, but they believed that drugs would be there.

12 Finally, a Gwinnett County police officer,
13 which is the county in Georgia where this house was located,
14 testified that one of the Drug Enforcement Administration
15 agents had told him when the agent first called him to
16 organize this raid, that he had information there might be
17 a quantity of marijuana in this house and he testified that
18 to the best of his recollection the agent told him 1500 pounds.

19 Finally, after the quick, first search of this
20 house, when the agent came back outside to report what he
21 had found to the other agents, he did not say, as they were
22 looking for this armed and dangerous Ricky Lyons, no luck,
23 Ricky Lyons isn't here. He said, I think I found some cocaine.
24 We believe, Your Honors, that there is substantial doubt in
25 the record that they were acting in good faith; indeed, we

1 believe there is a great likelihood that the agents in this
2 case did exactly what Cravero gives them an incentive to do,
3 and that is, they used an arrest warrant to circumvent the
4 search warrant requirements of the Fourth Amendment.

5 QUESTION: Mr. Young, ordinarily this Court does
6 not canvass volumes of records to determine motivation where
7 two courts have found something sufficient. You are not
8 challenging the sufficiency of the evidence, are you?

9 MR. YOUNG: No, Your Honor. No sir. Secondly,
10 on the good faith argument, in order to apply a good faith
11 exception here in this case the Court would have to avoid
12 reaching the actual issue it has taken certiorari on.
13 Article III, of course, would prevent this Court from finding
14 that a search warrant is necessary in these circumstances, but
15 it's not -- and will be necessary from now on, but it's not
16 necessary to apply the exclusionary rule in this case because
17 the government was acting in good faith. That would stand
18 as mere dictum. Therefore, an order to avoid applying the
19 exclusionary rule to Petitioner's case by adopting some sort
20 of a good faith exception to the exclusionary rule, the
21 Court would have to avoid the central issue in this case.
22 We urge the Court not to do that, the question has evaded
23 review for quite some time; it was characterized as a grave
24 constitutional issue as long ago as 1958 in *Jones v. United*
25 *States*, and the Cravero rule or its equivalent, is used by

1 a number of the Circuits -- it is not used by others, the
2 states are split on the use of it, as are the commentators.
3 But we believe the Court should address that issue.

4 QUESTION: Mr. Young, I notice in your brief --
5 actually -- that there's only one question for review?

6 MR. YOUNG: There's only one issue before this
7 Court that was taken on certiorari, yes sir.

8 QUESTION: Did we give a limited grant of cer-
9 tiorari? Or was that the only question you were --

10 MR. YOUNG: No, two questions were presented. The
11 second question was whether or not there was probable cause
12 to believe Ricky Lyons could be found in this house --

13 QUESTION: On that we did not grant certiorari?

14 MR. YOUNG: No sir. Cert was denied on that and
15 granted on this question.

16 QUESTION: On this single question?

17 MR. YOUNG: On that single issue, yes.

18 QUESTION: Thank you.

19 QUESTION: Mr. Young, may I ask you two questions?
20 First, is it correct that the reasonable belief standard of
21 the Fifth Circuit is the same as the probable cause standard?

22 MR. YOUNG: No, Your Honor. It is not. The
23 Cravero says that reasonable belief embodies the same standard
24 of reasonableness as probable cause, but simply gives the
25 police -- or permits the police to avoid a second trip to

1 the magistrate, in other words, having been there once to
2 get the arrest warrant.

3 QUESTION: Right, I read that. That to me, implies
4 that they had to have what would have been necessary to
5 convince the magistrate.

6 QUESTION: Yes.

7 QUESTION: Which would have been probable cause;
8 it wouldn't do any good to go to the magistrate with something
9 less than probable cause, because you wouldn't get the search
10 warrant.

11 MR. YOUNG: Well, but Your Honor, we say that
12 probable cause is -- goes hand in hand with one of two
13 things: a magistrate, or exigent circumstances. And in this
14 case, or in Cravero, since the Court permits a finding of
15 probable cause without exigent circumstances and without a
16 magistrate, that is why they have called it something of a
17 lesser standard, namely reasonable belief. It is also the
18 authority upon which Cravero relies, is really a strain of
19 authority from the previously discredited Rabinowitz decision
20 that also dealt in terms of a reasonable belief standard.
21 And we believe that reasonable belief is something less
22 than probable cause.

23 QUESTION: Well you'd make the same basic argument
24 even if it were the same, though, I take it, that there's
25 still a warrant required?

1 MR. YOUNG: Yes sir. I would.

2 QUESTION: On the basic argument, the government
3 says that the common law is against you, and I don't think
4 you respond to that; do you concede they correctly interpret
5 the common law?

6 MR. YOUNG: No, Your Honor. In fact, having read
7 several of the cases upon which the government relies, we
8 say that there are two significant errors in the government's
9 analysis of those cases. And the first is, that for example
10 in -- I think it's Semayne's Case, Lord Coke is addressing
11 a situation where the house which is entered is the defen-
12 dant's house himself, not a third party's house. Moreover,
13 in the Semayne's Case, Lord Coke is somewhat elaborating
14 upon the rationale for his decision in that case, which was
15 a civil case incidentally. And he gives an example in which
16 the type of arrest that occurred in this case would be per-
17 mitted, and it was a hot pursuit example. It's a straight
18 Warden v. Hayden, decided in 1967.

19 Finally of course, because of the reverence of
20 common law for the sanctity of the privacy of an individual's
21 home as opposed to the right of privacy in other situations,
22 we believe that the common law did not permit this type of
23 search and if -- but in any event, or at the very least, it
24 is unclear whether the common law did or not. Additionally,
25 the arrest rules of common law arose in the context of

1 usually civil damage suits or either false arrest or tres-
2 passing. And consequently, they are not -- even if they are
3 as the government says they are -- they are not directly
4 applicable to the situation we are dealing with. And the
5 officer's authority to enter was generally established in
6 cases where he was being sued and that was his defense, that
7 he had the authority to enter.

8 And finally, of course, as this Court noted just
9 last term, in *Payton v. New York*, this Court does not simply
10 freeze into constitutional law, law enforcement practices
11 that existed at the time the Fourth Amendment was enacted.
12 I'll reserve the remainder of my time for rebuttal, thank
13 you.

14 MR. CHIEF JUSTICE BURGER: I think you've used all
15 of your time, Mr. Young.

16 MR. YOUNG: Oh, I have?

17 MR. CHIEF JUSTICE BURGER: Mr. Frey.

18 ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

19 ON BEHALF OF THE RESPONDENT

20 MR. FREY: Mr. Chief Justice and may it please the
21 Court:

22 This case presents three distinct issues to the
23 Court: the first is whether Petitioner's legitimate expect-
24 tations of privacy were implicated by the entry into the
25 cabin so that he is entitled to raise the substantive Fourth

1 Amendment issue. The second is whether the Court should
2 decline to consider the substantive Fourth Amendment issue
3 in this case as a matter of exclusionary rule, and retro-
4 activity policy. And the third, if the Court reaches the issue,
5 is whether an arrest warrant plus reason to believe or prob-
6 able cause to believe the subject of the warrant is on the
7 premises suffices to justify an entry into third party pre-
8 mises to execute the arrest warrant.

9 With the Court's permission, I will treat these
10 issues in the order I have listed them. First, with respect
11 to what I hope Justice Rehnquist will give me the liberty of
12 calling the standing issue, this is essentially offered to
13 this Court as an alternative ground for affirmance. We do
14 not in fact suggest affirmance on this ground, although we
15 think the record would permit it, but, in light of what the
16 Court did in Combs and what the Court did last term in
17 Salvucci, and the fact that there was no focus on the issue
18 of Petitioner's expectation of privacy in the cabin, we
19 think fairness would justify giving him an opportunity to
20 demonstrate that on a remand. However --

21 QUESTION: Well why do you think we have to hear
22 you?

23 MR. FREY: Excuse me?

24 QUESTION: Why do you think we have to hear you on
25 the issue, since you never raised it before?

1 MR. FREY: Well, let me say first of all that we
2 do not contend that the issue is jurisdictional. This is not
3 standing in the constitutional case or controversy sense,
4 so we do not say that the Court is required to consider the
5 issue on that --

6 QUESTION: Well why should we, when you didn't raise
7 it below?

8 MR. FREY: Now, there are two separate questions:
9 one is, are we entitled to raise it in this Court; and the
10 second question is, if we are entitled to raise it, must the
11 Court consider it? Now, I'm not sure that the Court must
12 consider it, but I --

13 QUESTION: Well, you know we're not required to
14 consider it under our cases, don't you?

15 MR. FREY: Well, I am not -- I have found the cases
16 somewhat confusing, but I will --

17 QUESTION: Well, we've considered some, but we've
18 never, nobody's ever suggested we had to.

19 MR. FREY: Well, --

20 QUESTION: We never admit we do --

21 MR. FREY: Let me just cite the Court three cases
22 in which points which are pertinent to this are made, quite
23 briefly. In the New York Telephone Company case, 434 U.S. at
24 166, Note A, the Court said the prevailing party may defend
25 the judgment on any ground which the law and the record

1 permit, that would not expand the relief that has been granted.

2 QUESTION: But don't ordinarily, we qualify that,
3 provided he's raised it below?

4 MR. FREY: I was interested to find, in looking at
5 it, that it is not ordinarily so qualified.

6 QUESTION: But that falls considerably short of
7 saying that the Court has to consider --

8 MR. FREY: Well I'm now answering Justice Brennan's
9 question --

10 QUESTION: As to whether you're entitled to raise
11 it?

12 MR. FREY: Whether we're entitled to raise it.
13 In Dandridge against Williams, the Court said the prevailing
14 party may of course assert in a reviewing court, any ground
15 in support of his judgment, whether or not that ground was
16 relied upon or even considered by the trial court.

17 QUESTION: But Mr. Frey, you'd really get a differ-
18 ent judgment, wouldn't you, if you sent it back for further
19 hearing in the trial court; the Court of Appeals affirmed?

20 MR. FREY: Well that's all -- this would be a ground
21 for affirming the conviction and a denial of the suppression
22 motion.

23 QUESTION: I thought you said earlier that you
24 thought the proper disposition would be to send it back for
25 another hearing to give them an opportunity to establish --

1 MR. FREY: Well let me get to that in a second.
2 If I can just mention the third case, which is Bondholders
3 Committee against Commissioner, 315 U.S., and this is at 192,
4 the Court said that though Respondent apparently did not
5 urge this point before the Board or the Court below, it
6 may of course support the judgment here by any matter appear-
7 ing in the record.

8 Now, our position, Mr. Justice Stevens, is that this
9 record contains no evidence sufficient to support -- for the
10 Petitioner to carry his burden of demonstrating that he had
11 a legitimate expectation of privacy in the cabin. We're of
12 course not saying that he was a trespasser on the premises;
13 what we are saying is that he was outside at the time the
14 entry was made, there is no indication other than counsel's
15 surmise, nothing in the record that he lived in the cabin,
16 he was not the lessee --

17 QUESTION: Well what about the checks and the
18 sweater and those other things?

19 MR. FREY: Yes, there are indications, including
20 the cocaine, that he was present --

21 QUESTION: Is he right, that you used, or that the
22 government used those at the trial to connect him with the
23 cocaine?

24 MR. FREY: Yes, that evidence. But --

25 QUESTION: Well why isn't it -- if it's available to

1 the government to connect him with the cocaine in the cabin,
2 why isn't it also available to establish that he had a pri-
3 vacy at this cabin?

4 MR. FREY: This is an issue that has been raised,
5 we filed a petition last year in a case called Conway, which
6 was sent back after Rawlings and Salvucci were decided. An
7 individual may have possession of items that are found in a
8 premises or in a suitcase or in a place sufficient that he can
9 be criminally responsible if the item is contraband, without
10 having an expectation of privacy in the place where they are
11 located.

12 If you go into a public restaurant -- obviously --

13 QUESTION: Well I know but the sweater and the
14 checks and those things, they weren't contraband.

15 MR. FREY: Well I would say that on this --

16 QUESTION: As I understand it, the government used
17 them at trial to establish that the cocaine was his?

18 MR. FREY: As part of the evidence, there was --

19 QUESTION: I know, as part of it, but that was
20 the evidence you relied on?

21 MR. FREY: Yes, but we don't deny that Mr. Steagald
22 was ever in the cabin, or that he did not have some kind of
23 guest connection with the cabin.

24 QUESTION: I don't understand why you take the position
25 that these are not relevant to the determination of whether he

1 had a privacy interest. If you could use them to tie him
2 to the cocaine, why can't he use them to establish --

3 MR. FREY: Well I believe he could use this evidence
4 if there were a remand hearing. I'm not saying -- what I am
5 saying, however, is that he has the burden on this issue, of
6 coming forward -- which he did not do --

7 QUESTION: Well, are you also saying that we might
8 regard them as sufficient to establish that he had a privacy
9 interest?

10 MR. FREY: I believe, I would disagree with such a
11 holding by the Court.

12 QUESTION: But we might -- but we could.

13 MR. FREY: They are evidence that would be relevant.

14 QUESTION: We could. We could.

15 MR. FREY: Well, you could.

16 QUESTION: But Mr. Frey, you aren't abandoning the
17 point that it wasn't litigated, are you?

18 MR. FREY: No, it wasn't -- it was not litigated --

19 QUESTION: You're not abandoning that, are you?

20 MR. FREY: Well, we are charged with --

21 QUESTION: You raised it when you started your
22 argument.

23 MR. FREY: -- having failed to raise the point by
24 the Petitioner.

25 QUESTION: Oh, I see. Oh.

1 MR. FREY: And our response, first, is that it was
2 Petitioner's burden to come forward on this issue in the
3 District Court and he overlooks the fact that this was --
4 it's rather peculiar to charge us with waiving, when he
5 has failed to meet his burden of coming forward, or his
6 burden of --

7 QUESTION: Mr. Frey, you're spending a lot of time
8 on a point on which -- we granted cert on another point.

9 QUESTION: You didn't raise it in your brief in
10 opposition to the cert petition, either, so --

11 MR. FREY: We didn't, until -- we did not understand
12 the pertinent facts until we reviewed the record in connection
13 with preparing the brief on the merits. But I will be happy,
14 if the Court has no further questions on this point, to move
15 on to the second issue.

16 And although the second issue is not one on which
17 the Court granted certiorari, I believe it is one that the
18 Court must consider and if it determines the issue in our
19 favor it will not and should not reach the substantive Fourth
20 Amendment issue. Now Petitioner's argument essentially, is
21 that we are making some kind of general good faith argument
22 here, and that there is some doubt, at least in Petitioner's
23 mind, that the arresting officers were acting in subjective
24 good faith. I think he misapprehends our argument in this
25 case. He does not dispute and he can't, because certiorari

1 was denied on the second question presented in the petition,
2 that the agents' action was supported, they had the necessary
3 quantum of suspicion to believe that Ricky Lyons was in the
4 cabin, and under the decision of the Fifth Circuit in the
5 Cravero case -- and I might note, incidentally, that we
6 acquiesced when certiorari was sought in that case, because
7 we believed it presented a significant issue, and the Court
8 denied certiorari, subsequent to that time the law in the Fifth
9 Circuit on this point was about as settled as the law could be
10 unless this Court were to do something to unsettle it.

11 QUESTION: Actually, we cited Cravero in Dalia v.
12 United States, did we not?

13 MR. FREY: I'll take your word for it, I'm not
14 aware --

15 QUESTION: Page 258, --

16 MR. FREY: Now Petitioner does not dispute that
17 Payton itself, which our argument heavily relies on the fact
18 that Payton was decided -- he does not dispute that Payton
19 is a case that should not be applied retroactively to arrest
20 entries into the defendant's or suspect's own premises,
21 and I don't think I need to belabor the point, Payton clearly
22 altered the settled law of the Fifth Circuit on the Payton
23 issue and the opinion itself in Payton stated that the practice
24 that it was overturning was a longstanding and widespread
25 practice.

1 QUESTION: Mr. Frey, in this argument are you
2 essentially arguing that in the Payton case we should have
3 not applied the Payton rule to Payton?

4 MR. FREY: I will come to that point, because we
5 have tried to be careful not to argue that and I will explain
6 that point.

7 The complication in this case arises from the
8 fact that the substantive Fourth Amendment issue presented
9 here, while closely related to the issues presented in Payton,
10 nevertheless is not clearly controlled by it. That is, it
11 is still possible that the government could win this case
12 even though the state lost Payton.

13 Now, this fact, standing alone, does not justify
14 reaching the issue in the case of a search that took place
15 prior to the decision in Payton. To do that would be to
16 do the very thing that this Court criticized the Court of
17 Appeals for doing in the Bowen case. And the very thing that
18 this Court declined to do in Stovall and DeStefano and in
19 Payne -- that is, to consider in the context, having deter-
20 mined that a decision is not retroactive, to go on and con-
21 sider a ramification of that decision. That is not appro-
22 priate and the Court in Bowen, suggested that several reasons
23 why the practice would not be done, including the Court's
24 reluctance to decide constitutional issues unnecessarily.
25 Now, let me acknowledge that this case is different from

1 those other cases in one respect: in Bowen, if the govern-
2 ment had won Almeida-Sanchez, Bowen would have had no claim
3 whatsoever, his claim was a lesser included claim than had
4 been Almeida-Sanchez's claim -- the same is true of almost
5 all of those other cases, although with one exception that
6 I'll get to in a moment. Here it is possible that the state
7 could have won Payton, I believe, and that the courts could
8 nevertheless have concluded that Petitioner's position on the
9 issue of third party entries is sound. Now Petitioner's
10 argument in his reply brief is that -- and it's the point
11 that you were making about Payton -- that if the government
12 is simply making a good faith argument, then the Court will
13 never decide the issue that the police officers, and the Drug
14 Enforcement Administration agents and so on and the Fifth
15 Circuit, will continually be able to point to the Cravero
16 decision and the Court will continually, as he construes our
17 argument, be forced to say, although it's a matter of exclus-
18 ionary rule policy, we won't reach the substantive consti-
19 tutional issue.

20 QUESTION: Mr. Frey, so far this sounds like some-
21 thing out of St. Thomas Aquinas; perhaps it's our fault rather
22 than yours that it does, but we granted certiorari on a
23 particular question, and I would have expected to hear argu-
24 ment on that question, first.

25 MR. FREY: Well, I believe, though that as a matter

1 of logical precedence, Mr. Justice Rehnquist, I will argue
2 the other point now, if the Court prefers, but as a matter
3 of logical precedence, the question is whether -- it is a
4 preliminary question whether you should reach the question
5 on which you granted --

6 QUESTION: I'm one of the nine members of the Court,
7 so I certainly can't say the Court prefers it.

8 MR. FREY: Well, let me just make this point and
9 then I will move on to the substantive Fourth Amendment issue.

10 It is clear from Bowen, that if Payton is not retro-
11 active, you should not undertake to decide the issue on which
12 the Court granted this case. In Payton, the state made a good
13 faith argument and the Court implicitly, I suppose, re-
14 jected it, at least it did not advert to it in its opinion.

15 QUESTION: Well the one that it -- the question
16 you're arguing now is a constitutional question, isn't it?

17 MR. FREY: The question I am arguing now is a
18 jurisprudential question. I'm not sure that it's constitu-
19 tional.

20 QUESTION: What, about the exclusionary rule should
21 not apply in this case?

22 MR. FREY: Well this is -- yes, our argument is
23 an argument that, as the Court has explained the workings of
24 the exclusionary rule --

25 QUESTION: What if we found that one tougher than

1 the other one? I don't know why we couldn't reach the other
2 one.

3 MR. FREY: Well, what you said in Bowen was that,
4 and what you said in DeStefano and what you said in Payne
5 and what you said in Stovall is that you would not do it.

6 QUESTION: Well your time is certainly running fast.

7 MR. FREY: Well, I just wanted to be sure that Mr.
8 Justice Stevens understood my response to his point. It is
9 the very decision in Payton that changes the law. That is,
10 in Payton the Court was able to say we must reach the Fourth
11 Amendment issue, otherwise the police will constantly be
12 simply relying on the New York statutes and we'll never de-
13 cide the issue.

14 Here, because of the intervening decision in Payton,
15 Cravero is not a precedent that can any longer be relied upon
16 in post-Payton cases. And therefore, is a break in the fabric
17 of Fourth Amendment arrest entry law, and therefore, pre-
18 Payton searches -- claims like this should not be considered.

19 Now, I will move on at this point to the substantive
20 Fourth Amendment issue, even though we do believe it would not
21 be proper for the Court to reach it. We agree that it is a
22 close issue, that there is much logic to the Petitioner's
23 position. Nevertheless, we think there are significant con-
24 siderations that weigh in the other direction. The first
25 consideration is history. Now, I -- in its reply brief,

1 Petitioner did not dispute our historical argument, and I'm
2 sure the law clerks can do much better than I can in the
3 time available, in digging into these -- the esoteric of it.
4 If you will look at the passage of Coke that we cite, you
5 will see that the discussion is talking about any man's house,
6 or the house of any person, and is not, I think, contemplating
7 simply the house of the subject of the warrant. And Coke does
8 say, -- it's an authority that was greatly relied on by the
9 Court in Payton -- that, at least after indictment, and this
10 case was a warrant issued after indictment, the arrest
11 warrant does constitute authority to break into any man's
12 home.

13 QUESTION: May I ask a question? Assuming I owned
14 a home in Atlanta, you could use that warrant to break into
15 my house tonight?

16 MR. FREY: Excuse me?

17 QUESTION: Assuming I owned a home in Atlanta,
18 Georgia, --

19 MR. FREY: Yes.

20 QUESTION: -- could you use this very same warrant
21 and break into my house?

22 MR. FREY: If we had reason to believe that the
23 subject of the warrant was present in the house.

24 QUESTION: If the police said that, right?

25 MR. FREY: If the police had that reason to believe.

1 QUESTION: He had to have that --

2 MR. FREY: He had to have it, yes.

3 QUESTION: You could break into my house?

4 MR. FREY: Yes.

5 QUESTION: You could get hurt that way.

6 MR. FREY: Let me just, I'd like to pass on from
7 the history point.

8 QUESTION: Well let me ask you one question on
9 the history, because it really carries right down to date.
10 The quotation from Semayne that you have on page 38 of your
11 brief, says the house of anyone is not a castle or privilege,
12 but for himself, and shall not extend to protect any person
13 who flies to his house or the goods of any other which are
14 brought and conveyed into his house. Now does your -- would
15 your position apply also to going into getting a gun, say,
16 that the suspect --

17 MR. FREY: No. Well, --

18 QUESTION: Let's say you had a search warrant
19 for the gun in the owner's house, and also an arrest warrant
20 for the owner, and he takes his gun to the house but he's
21 not there; can you break in to get the gun?

22 MR. FREY: No, of course not. We're not relying on
23 Semayne's case for every possible implication that could
24 conceivably be dredged out.

25 QUESTION: Why not? And if you had the arrest --

1 if you had the search warrant and you have probable cause
2 to believe the gun is there, why doesn't the reasoning -- why
3 wouldn't your reasoning apply there?

4 MR. FREY: You mean, why wouldn't -- if Semayne's
5 case were the history -- Semayne's case.

6 QUESTION: Oh forget Semayne's case. Just should
7 there would be a distinction between the -- a search for a
8 person and search for property in terms of breaking into a
9 third party's house?

10 MR. FREY: That would be the substance of my argu-
11 ment as to whether they should or they shouldn't.

12 QUESTION: All right.

13 MR. FREY: And as to the role of history, of course,
14 there's much room for debate about what role history ought to
15 play in a decision of this sort, it seems to me there is a
16 limit beyond which the Fourth Amendment ought not to be
17 construed to bar practices that were clearly permissible in
18 common law, but this is a case which I concede is not as clear
19 as Watson was, let's say, on the history. Now laying this
20 point aside and considering the matter from the standpoint of
21 logic and policy, the argument is not all one-sided. Now, we
22 grant that there will be some cases in which a search warrant
23 requirement would be useful in interposing a magistrate and
24 preventing overzealous police officers from unreasonably
25 invading third party premises. But the issue must be placed

1 in context. Because we are talking about third party pre-
2 mises and not the residence of the individual named in the
3 warrant, we are dealing with a class of cases in which, by
4 definition, the connection of the suspect to the premises is
5 likely to be brief or transitory. Accordingly, a much higher
6 proportion of this class of cases will involve exigent cir-
7 cumstances or at least circumstances in which recourse to
8 the warrant procedure with the delays it often entails, will
9 render the information regarding the presence of the subject
10 on the premises stale. What I'm saying is that the benefits
11 that we may reasonably expect to reap from the imposition of
12 a search warrant requirement, are considerably diminished
13 as against those which could have been anticipated from the
14 decision in Payton.

15 With the weight on one side of the scale thus
16 diminished, it seems to us a questionable conclusion that an
17 arrest entry by officers armed with an arrest warrant and
18 possessing sufficient reason to believe the subject of the
19 warrant is on the premises, is unreasonable under the Fourth
20 Amendment unless they also possess a search warrant.

21 Now let me summarize the factors that favor con-
22 tinued adherence to the common law rule that an arrest warrant
23 suffices to enter any premises in which the suspect is reason-
24 ably believed to be located.

25 First, the arrest warrant means that the magistrate

1 has determined one of the elements required to be determined
2 by the warrant clause; that is, he has determined that there
3 is probable cause to seize the person named in the arrest
4 warrant. We concede of course that he has not determined that
5 the person named in the arrest warrant is on the premises to
6 which entry is to be made. And I think that the case is
7 weaker than Payton; that is, Payton's conclusion that an
8 arrest warrant sufficed to enter into the premises of the
9 individual named in the arrest warrant, rests on stronger
10 grounds because of the greater likelihood that the individual
11 will in fact be on his premises, and because of the fact that
12 there are no general warrant problems associated with treating
13 the arrest warrant as a power to enter into premises --

14 QUESTION: Well under a general warrant, it does
15 give them the right to go into any premises that he -- which
16 means any officer in Atlanta, assumes or has reasonable belief
17 that that man is in there -- he makes the decision as to the
18 house that will be searched, not the magistrate. I think --

19 MR. FREY: Well, --

20 QUESTION: -- I think that's the problem.

21 MR. FREY: -- he makes the original decision, but
22 of course, he must have this reason to believe, the decision
23 is subject to a post-entry judicial scrutiny in connection
24 either with a suppression hearing or a civil damages suit,
25 this is not simply the uncontrolled discretion of the officer.

1 Now, I understand, and I could hardly argue other-
2 wise, that all of the Court's warrant clause cases acknowledge
3 that there is a value in having the magistrate look at the
4 matter. What we are saying is that the class --

5 QUESTION: But the real injury comes in going into
6 the house.

7 MR. FREY: Well, most of the cases that are going
8 to happen where this -- where the subject of an arrest warrant
9 is on third party premises, his stay is going to be brief,
10 there will usually be exigent circumstances, the warrant
11 requirement will usually, I think, not apply. Now, of course
12 there are cases, and perhaps this is one --

13 QUESTION: But I don't read that anyplace in the
14 Fourth Amendment, that, you know, these things don't usually
15 happen.

16 MR. FREY: Well but what the Court is doing, I
17 think --

18 QUESTION: You still haven't -- you admit that the
19 official, the police official individually makes a decision
20 as to which house he's going to search?

21 MR. FREY: Individually or collectively.

22 QUESTION: Without any -- without any supervision
23 at all?

24 MR. FREY: Our position would be that the Consti-
25 tution does not require him to submit the question whether

1 the individual is in the house to the magistrate in advance
2 of entering the house. That is our position. Now as I
3 said, we're not saying that there is no value to having a
4 magistrate interpose; what we are saying is that you have
5 the factor of history which weighs more strongly on our side
6 in this case than it did in Payton, and you have the fact that
7 in this class of cases, after all what we're doing as a matter
8 of constitutional policy-making in the Fourth Amendment area,
9 is weighing the costs to legitimate societal interests and
10 law enforcement against the protection of equally signifi-
11 cant individual privacy interests.

12 And then in engaging in that balancing endeavor,
13 the Court has normally preferred a warrant and normally, I
14 think there have been substantial reasons. But our sugges-
15 tion is that in this area, the reasons are reduced; the bene-
16 fits that will be derived from a warrant requirement are
17 diminished.

18 QUESTION: Is it any part of your argument, Mr.
19 Frey, that it would be more difficult and in some cases,
20 impossible, to comply with the Fourth Amendment's requirement
21 that the premises to be searched have to be particularly
22 described?

23 MR. FREY: No. Because I think there are only two
24 situations --

25 QUESTION: Because if it's just a transitory

1 presence in a third party's house, there's no reason
2 that the officers would know -- be able to particularly describe
3 the premises to be searched.

4 MR. FREY: Well, but if in the normal situation,
5 if the officers learn that Ricky Lyons has just gone into
6 an apartment at such and such a place, and they go out there
7 with sirens --

8 QUESTION: That would be exigent circumstances.

9 MR. FREY: -- blasting, and that would probably be
10 exigent circumstances. If there are not, I mean the gravamen
11 of the argument here is that while they had a couple of days
12 to track things down, and presumably they therefore would be
13 able to --

14 QUESTION: Particularly describe the premises to
15 be searched.

16 MR. FREY: -- in non-exigent cases, to describe
17 the premises, yes. I don't think that that would be a problem.

18 But I do think that the points that Mr. Justice
19 White made in his dissent, in Payton, carried perhaps more force
20 although they were not persuasive to a majority of the Court
21 in Payton -- they are carrying more force here, because
22 of this difference in the balance. The intrusion that's
23 entailed in an arrest entry, while significant, is still very
24 much less substantial than the intrusion that is entailed
25 in an entry to seize books or records, to search for narcotics

1 or other kinds of things that would involve rummaging through
2 papers, desk drawers, and other customary repositories of
3 privacy.

4 QUESTION: You mean you don't generally look for
5 a person in a desk drawer?

6 MR. FREY: I would say not. And finally, I think
7 that Justice White expressed in his dissent in Payton, a
8 concern about the difficulty of having the police make this
9 very, often very subtle judgment about what constitutes
10 exigent circumstances, and he suggested that the common law
11 rule that he and those who joined with him, thought should be
12 retained, was an easier rule for the police to administer.

13 Now, that may not have been sufficiently persuasive
14 in the context of Payton, because after all, in Payton there
15 had not even been any determination that the individual who
16 the officers -- any magisterial determination that the indi-
17 vidual who the officers were seeking was in fact subject to
18 arrest. There hadn't been -- essentially no recourse to the
19 magistrate in Payton, those considerations were found un-
20 persuasive. But in this case, there has been both partial
21 recourse to the magistrate and the police --

22 QUESTION: But Mr. Frey, this case is complicated
23 because -- everybody's sort of -- relies with one another,
24 but say you had a total stranger third party, who didn't have
25 any connection whatsoever remote or otherwise with the criminal

1 conduct itself, and I take it your position is that -- that
2 that makes no difference in terms of the degree of the intrus-
3 ion. You could break down the doors and bust in, just to be
4 sure you catch the man who is there. There's no -- the
5 intrusion could be very, under your view, I'm not saying it
6 always would be, but there's no question of knocking on the
7 door and asking leave to go in, you say you have a right to
8 bust in?

9 MR. FREY: Well, I agree that the right is implied
10 as a right to go in --

11 QUESTION: Now it could be a serious intrusion,
12 I'm not saying that it always would be, but on the --

13 MR. FREY: I am not suggesting --

14 QUESTION: -- home of a totally innocent person?

15 MR. FREY: I understand that. Yes, I understand
16 that.

17 QUESTION: It could be --

18 QUESTION: It gives you no concern?

19 MR. FREY: Yes, it gives me concern. I mean, I
20 think we have indicated and acknowledged in our brief that
21 this is an area of concern, this is an area where there is some
22 potential for police abuse, this is an area where there is some
23 utility -- although I'm not sure how much -- in having them
24 go to the magistrate, but I think that a few instances of
25 improper police conduct could be avoided by a warrant

1 requirement. On the other hand, it puts the police in an
2 extremely difficult position, and we are suggesting that the
3 protections, the common law protections and the protections
4 of post-entry --

5 QUESTION: But Mr. Frey, in the absence of exigent
6 circumstances which is the case here, there was ample oppor-
7 tunity to get a search warrant, wasn't there?

8 MR. FREY: No, in this case, by the time they --

9 QUESTION: When they left, before they left the
10 courthouse they could have gotten it, could they not?

11 MR. FREY: Well, I --

12 QUESTION: There were three magistrates, as I
13 understand it, on duty at the time?

14 MR. FREY: I'm not sure whether they left from the
15 Atlanta courthouse --

16 QUESTION: Well I'm accepting your colleague's
17 suggestion that the assembly of the 12 officers who --

18 MR. FREY: In this case of course, they did not get
19 a search warrant because they thought that the arrest warrant was
20 sufficient and the testimony in the portion of the transcript
21 that we've appended to our brief shows that the agent says,
22 you know, a search warrant -- why I had an arrest warrant --

23 QUESTION: Well what about getting the search
24 warrant after they had the house pretty well under surveil-
25 lance and control?

1 QUESTION: Well in that connection, how far is
2 Buford, Georgia, from Atlanta; it's a number of miles, isn't
3 it?

4 MR. FREY: I think, I gather that it's some dis-
5 tance. I'm not sure of the answer to that. I think the
6 prospect of house arrest, of all the occupants of the house,
7 as a satisfactory alternative to entry is not a very appeal-
8 ing one. It seems to me that it exposes a lot of people to
9 more danger and arguably involves a greater imposition on
10 the people to surround the place with 12 officers while
11 somebody gets a warrant.

12 Now, I don't want to exaggerate the difficulty of
13 getting a warrant. As we indicated in our brief, at least
14 for the federal government with telephonic warrant procedures,
15 it is something that is not altogether infeasible. But still,
16 I do want to stress that the officers are left with some
17 very difficult legal judgments to make, are there exigent
18 circumstances in this particular case, or will my arrest
19 warrant do? Whose residence is this? Is this the residence
20 of the person subject of the arrest warrant, or is this the
21 residence of some third party?

22 QUESTION: On the other hand, Mr. Frey, the cost
23 really, it doesn't really affect the prosecution of the
24 person they are seeking. And the only thing that you lose is
25 the right to use evidence you just stumble across and happened

1 to be in the possession of this homeowner that you didn't
2 suspect a crime anyway.

3 MR. FREY: No, I think the cost -- I'm not thinking
4 of the cost in terms of the application of the exclusionary
5 rule so much as the --

6 QUESTION: Assuming a mistake is made, you know.

7 MR. FREY: -- cost in terms of the police having
8 clear guidelines as to how they ought to comport themselves
9 to comply with the Constitution, and also the cost of adding
10 to the warrant procedure a whole group of additional warrant
11 applications of much lesser utility which may, in some way,
12 dilute or diminish the seriousness of the warrant application
13 procedure itself. Thank you.

14 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
15 The case is submitted.

16 (Whereupon at 11:59 o'clock a.m. the matter
17 was submitted.)

CERTIFICATE

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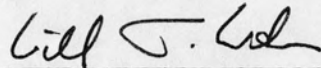
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GARY KEITH STEAGALD

v.

UNITED STATES OF AMERICA

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