In the ORIGINAL

Supreme Court of the United States

UNITED STATES,	)	
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v.	)	NO. 80-1608
	)	
RAYMOND EUGENE JOHNSON	)	

Washington, D. C.

February 24, 1982

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ALDERSON REPORTING

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner,

v.

RAYMOND EUGENE JOHNSON

No. 80-1608

Washington, D. C.

Wednesday, February 24, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:14 o'clock a.m.

APPEARANCES:

ELLIOTT SCHULDER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner.

JOHN F. WALTER, ESQ., Los Angeles, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in United States against Johnson.

Mr. Schulder, you may proceed whenever you are ready.

ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SCHULDER: Thank you. Mr. Chief Justice, and may it please the Court, on April 17th, 1980, this Court held in Payton versus New York that absent exigent circumstances or consent, the Fourth Amendment requires law enforcement officers to obtain an arrest warrant before entering a suspect's home to arrest him on probable cause. Prior to Payton, on September 14th, 1978, the United States Court of Appeals for the Ninth Circuit had reached a similar conclusion in United States versus Prescott, holding that a warrantless entry into private premises to arrest a suspect violated the Fourth Amendment.

The question in this case is whether the Fourth Amendment rule announced in Payton and Prescott should be applied retroactively to suppress evidence obtained as a result of the warrantless arrest entries occurring before the dates of those decisions.

The facts of this case are as follows. In

March, 1977, the Postal Service misdelivered an envelope containing a United States Treasury check to a woman named Lena Kearney. Kearney and a friend decided to keep the check and try to cash it. The next day, Respondent and two other men met at Kearney's house to discuss possible ways of cashing the check. After making a telephone call, Respondent announced that he believed he had found someone who could help them cash the check.

Respondent and the other men then left Kearney's house with the check in their possession. Some time later, a Secret Service agent investigating this matter learned from Kearney and her friend about Respondent's involvement in the scheme to cash the check.

On May 5th, 1977, two federal agents went to Respondent's house to question him about his involvement in the scheme. Although they had probable cause for Respondent's arrest, the agents did not obtain an arrest warrant for Respondent before proceeding to his house. The agents approached the door and knocked on it, and when Respondent opened the door, the agents identified themselves, and Respondent invited them inside.

Once inside the house, the agents gave Respondent his Miranda warnings, and Respondent revealed his role in the scheme to cash the check. The agents

then informed Respondent that he was under arrest, and brought him to the police station, where he signed a written confession. Respondent was charged with aiding and abetting the obstruction of correspondence. Prior to trial, he moved to suppress his statements on the ground that they were the fruits of an unlawful arrest that was unsupported by probable cause. The district court denied the motion, and Respondent was convicted after a jury trial.

On appeal, the court of appeals, in December of 1978, initially affirmed Respondent's conviction. The court concluded that even though the agents were not armed with a warrant when they entered Respondent's house to arrest him, the agents' actions did not violate the Fourth Amendment, because they had probable cause to arrest Respondent prior to their entry.

Relying on the Ninth Circuit's decision in United States versus Prescott, Respondent petitioned for rehearing, arguing for the first time that the warrantless entry into his house violated the Fourth Amendment. The panel issued an amended opinion distinguishing this case from Prescott and holding that the agents' actions were permissible under the Fourth Amendment.

Following this Court's decision in Payton

versus New York, the court of appeals issued a third decision, this time reversing Respondent's conviction, relying on Payton, but without any discussion of retroactivity principles. The court held that the warrantless entry into the Respondent's house violated the Fourth Amendment, and that Respondent's statements should have been suppressed as the fruits of that illegality.

The government then petitioned for rehearing, arguing that the rule announced in Payton should not be applied retroactively. This was the first opportunity that the government had to address the retroactivity question before the court of appeals. In response to the government's arguments, the court of appeals revised its opinion to explain that its suppression ruling was based both on Payton and on its earlier decision in Prescott.

Although the arrest entry in this case occurred prior to either of those decisions, the court noted that it held in another case that Prescott would be given retroactive effect in this circuit to arrest entries that occurred prior to Prescott. Accordingly, the court applied the warrant requirement established in Payton and Prescott to the arrest entry in this case.

It is our position that the ruling of the

court of appeals is inconsistent with established principles governing the retroactivity of decisions that expand the scope of Fourth Amendment protections. In United States versus Peltier, this Court observed that in every case in which it considered the retroactivity of a decision announcing a new Fourth Amendment standard, the Court had concluded that the new standard would be applied prospectively only.

The Court's consistent refusal to give retroactive effect to these Fourth Amendment decisions stems from its reluctance to apply the exclusionary rule to suppress the fruits of law enforcement conduct that took place before the new standards were announced.

As the Court has stated on many occasions, the exclusionary rule is a judge-made rule primarily designed to deter law enforcement officers from violating the Fourth Amendment. The rule is not a personal right of the party aggrieved by the search or seizure, but rather it is intended to protect Fourth Amendment rights generally through its deterrent effect.

In addition, the application of the exclusionary rule, as the Court has noted many times, imposes heavy costs on society, by withholding relevant, probative evidence, with the result that the truthfinding function of the criminal trial is

impaired. Accordingly, the Court has refused to apply the exclusionary rule in a variety of different settings where the social costs were deemed to outweigh the deterrent benefits.

For example, the Court has held the exclusionary rule does not apply to suppress evidence in grand jury proceedings, that evidence seized illegally by state police is not subject to suppression in federal civil proceedings, and that illegally seized evidence, while inadmissible on the government's case in chief, may be used to impeach a defendant's testimony in a criminal trial.

The retroactivity cases present yet another setting in which the Court has concluded that the costs to society of suppressing reliable evidence outweigh the benefits of exclusion. As the Court made clear in Peltier, neither the deterrent purpose of the exclusionary rule nor the imperative of judicial integrity are served by suppressing evidence obtained by law enforcement officers in good faith compliance with then prevailing constitutional norms.

Thus, once a new Fourth Amendment standard is announced, the police will be guided by that standard, and if the premise behind the exclusionary rule is sound, they will be deterred from violating the new

standard by the threat of suppression. However, there is little or nothing to be gained by imposing the exclusionary sanction to police conduct that occurred before the new standard was established, since the police could not have known that their conduct transgressed constitutional limits.

Respondent does not appear to take issue with any of these general principles. His main argument here is that Payton and Prescott should not be applied retroactively because in Respondent's view those decisions did not establish a new Fourth Amendment rule. Of course, if a decision is based on existing principles, the retroactivity of that decision is a moot question, since any subsequent case would be governed by the same pre-existing principles. On the other hand, where a decision in the Fourth Amendment area overrules past precedent, even Respondent would agree that such a decision should not be applied retroactively.

The focus of the dispute in this case is whether decisions resolving previously unsettled Fourth Amendment questions are new, and thus under the test in Peltier are not to be applied retroactively.

There is no doubt, and Respondent concedes that the constitutionality of warrantless arrest entries was an open question in the Ninth Circuit prior to

Prescott, and in this Court prior to Payton. Indeed, in Payton the Court pointed out that the practice of making warrantless arrest entries was long-standing and widespread, and that most of the states that had taken a position on the question had approved the practice. Moreover, most of the state and federal court decisions cited in Payton as disapproving the practice of making warrantless arrest entries were issued after the entry into Respondent's house in May, 1977.

For many years, therefore, this Court was aware that warrantless arrest entries were standard police practice, yet it did not declare that practice to be unlawful until its decision in Payton.

In light of this background, we submit that Payton -- that before Payton was decided, law enforcement agencies throughout the country were justified in believing that warrantless arrest entries were constitutionally acceptable unless controlling lower courts within a particular jurisdiction had already held that such conduct was prohibited.

QUESTION: Well, Mr. Schulder, you say controlling lower courts within a particular jurisdiction. In this case we have the Court of Appeals for the Ninth Circuit. But how far do you break that down? Supposing the court of appeals had never spoken

on the issue, but there was an opinion in the Southern District of California that said it was all right, and in the Central District that said it wasn't. Does the California Highway Patrol have to do one thing north of Oceanside and another thing south?

MR. SCHULDER: Absolutely not, Your Honor. We would submit that the controlling federal court within a particular circuit would be the court of appeals for that circuit.

QUESTION: So that if there simply were a conflict in district court decisions, there would be no question of retroactivity one way or the other?

MR. SCHULDER: That's correct.

QUESTION: Why pick out the court of appeals as opposed to the district court?

MR. SCHULDER: Well, because the decision of one district judge is not binding on any other judge within a particular district, whereas the decision of the court of appeals is controlling within -- within the circuit.

QUESTION: What if he is the only judge in the district?

MR. SCHULDER: Well, if he is the only judge in -- well, presumably the government will have an opportunity to test the correctness of his decision on

appeal to the court of appeals.

QUESTION: And assume he is affirmed. Then when did the law first become binding on the officers in that district? The date of the affirmance, or the date of his first ruling? Can the law -- Can the FBI just ignore the district judge's ruling in that district even though it is later affirmed on appeal?

MR. SCHULDER: I would think that in that limited situation, they might be doing so to their own detriment.

QUESTION: Well, a court of appeals opinion can always be -- you can always petition for certiorari here from that opinion.

MR. SCHULDER: That's correct.

QUESTION: So why does the court of appeals opinion become a milestone if a district court opinion doesn't?

QUESTION: The only possible difference, I suggest, counsel, is that review here is in virtually every instance a matter of discretion by this Court, where a review by the court of appeals is mandatory, and I am not suggesting that is a significant difference.

MR. SCHULDER: That's correct.

QUESTION: Otherwise, is there any difference in the posture of the two cases?

MR. SCHULDER: Well, a decision of a district court would not be considered stare decisis in the same way that a court of appeals decision would be.

QUESTION: I believe you said it is not binding even on his fellow district judges.

MR. SCHULDER: That's correct.

QUESTION: Whereas a court of appeals opinion is binding on everyone in the circuit.

MR. SCHULDER: That's correct. The circuit judges on other panels, and on all district judges within the particular circuit.

QUESTION: They don't uniformly observe that, though, do they?

MR. SCHULDER: Perhaps not in certain cases, Your Honor.

QUESTION: That is what we call intra-circuit conflicts.

MR. SCHULDER: That's correct.

QUESTION: There are some districts in which the judges more or less informally adopt a sort of a stare decisis practice of their own, treating similar problems in the same way, to have uniform law within the district. If they had such a rule within the district here, would that make a difference, or would you still just ignore the district judge?

MR. SCHULDER: We believe that the agents would not be bound as a constitutional matter to adhere to decisions of the district court.

QUESTION: You would say this case would be decided differently if the Ninth Circuit were not so far behind in its backlog of cases, and this had gotten here before the Payton case got here. The reason this litigant loses is because his appellate process took so long. Isn't that right?

MR. SCHULDER: In a way, that -- that's true, but the Court has --

QUESTION: We have different rules of law, depending on the speed with which cases reach the Supreme Court.

MR. SCHULDER: Well, the Court has pointed out in a number of cases, Stovall, Desist, and others, that that is one of the consequences of the way our system operates. The focus of the retroactivity decisions is upon the time of the law enforcement practice involved, not on any subsequent point in the process.

QUESTION: It is only a consequence of the way the system operates if the judges are engaged in the business of lawmaking. If there was a rule that was uniformly applied to cases pending on direct appeal or something, it wouldn't work that way.

When you are arguing retroactivity here, it is not in the sense of the case -- you mean retroactivity not just for collateral attack purposes, but even on direct appeal, in direct appeal situations.

MR. SCHULDER: Well, that is absolutely correct. In fact, collateral attacks would be covered by Stone versus Powell generally.

QUESTION: Well, I suppose you can say that if Peltier had gotten here before Almeida-Sanchez, Peltier might have been the deciding case.

MR. SCHULDER: That's correct, and it's true of a number of other decisions where the Court has concluded that we look at the actual time at which the search or seizure or other law enforcement practice that's involved took place, rather that at any -- at any other point, because it is the time at which the law enforcement officers actually acted, at which they are charged with knowing or not knowing what the law was at a given -- at a given point in time.

Furthermore, the whole purpose underlying the exclusionary rule is the deterrent purpose, and if the agents at a given time have no way of knowing that their action is unlawful, no deterrent purpose or no significant deterrent purpose would be served by suppressing evidence as a result of search and seizure

that was later declared to be unlawful, especially since now that Payton and Prescott have been decided. There is a clear rule that law enforcement officers know they have to follow.

Respondent argues in this case that the decisions in Payton and Prescott were clearly foreshadowed by dicta in the decisions of this Court and the Ninth Circuit, and by the Court's so-called persistent avoidance of this issue, which in Respondent's view should have signalled to law enforcement agencies that the issue would eventually be decided adversely to the government. As we have pointed out in our briefs, we do not believe that the decisions in Payton and Prescott were clearly foreshadowed.

In any case, Respondent's test is the wrong one for deciding whether to apply the exclusionary rule to suppress evidence acquired during a search or seizure that occurred prior to the decision that established the practice in question to be unconstitutional.

To paraphrase Judge Wilkie's dissent in United States versus Ross in the District of Columbia court of appeals, the proper inquiry is not whether lawyers and judges would describe a new Fourth Amendment decision as having been clearly foreshadowed, but whether law enforcement agencies can properly be charged with having

had notice at the time of the search or seizure that the practice violated the Fourth Amendment.

In this very case, the court of appeals judges who initially affirmed Respondent's conviction in December, 1978, and upheld the warrantless entry into his house, apparently did not believe that the Fourth Amendment required a warrant. In fact, Respondent himself did not challenge the warrantless entry until after Prescott announced such a requirement.

In these circumstances, it would be peculiar, we suggest, to conclude that the arresting agents should have known of the need for a warrant some 16 months before Prescott announced that requirement and some three years before the Court in Payton announced the requirement.

In our view, Petitioner's argument here ignores the social costs of imposing the exclusionary rule in this context. The primary cost, of course, is the -- is that the search for truth at criminal trials is impaired by the exclusion of reliable evidence, with the result that guilty defendants may go free. Now that Payton and Prescott have established a clear rule for law enforcement officers, there is no reason for the Court to suppress evidence to accomplish that deterrent effect, because the agents now know that any searches,

any arrest entries that they conduct in the absence of exigent circumstances in the future may result in the suppression of evidence.

In a more general way, it is arguable that the retroactive application of decisions like Payton, which involve previously unsettled questions, may deter law enforcement officers from engaging in conduct that is not yet settled as being lawful. The result will be that officers will avoid not only illegal searches or seizures, but also perfectly legitimate law enforcement techniques. In fact, if, as Respondent argues, whenever an issue is unsettled, officers must conform their conduct to suggestions in dicta made from the bench by district judges, then the effectiveness of law enforcement officers will be measurably diminished.

QUESTION: Am I to understand that the officers of the federal government are familiar with all of the dicta from the bench in all of the district courts? You don't really mean that, do you?

MR. SCHULDER: Well, we don't make any such representation.

QUESTION: Well, you just said so.

MR. SCHULDER: Well, I was saying that Respondent suggests that they should be familiar with all -- not only familiar with dicta from the bench by

federal district judges, but that they should conform their practices to those -- those comments from the bench.

QUESTION: I just don't think dicta from district courts has anything to do with this case. That is all my point is.

MR. SCHULDER: I agree with you, Your Honor.

Whatever incremental deterrent benefit, that is, the deterrence of some unlawful conduct that might arise from suppression in this context hardly justifies the costs of such a policy, especially since the period of uncertainty as to any particular law enforcement practice will last only until that practice is challenged in court and its validity is judicially determined.

Of course, as I said earlier, once the courts hold that a particular practice is unconstitutional, then under our system of government, society must be willing to pay the price of both exclusion of evidence and -- and of reduced law enforcement. In fact, in the Court's decision in Payton, the Court noted that the state had made an argument that imposing a warrant requirement would impose burdens upon local prosecutors, but the Court said that because the Constitution required the police to obtain a warrant, whatever costs

there might be were irrelevant. Those costs had to give way.

QUESTION: Payton actually is one of two cases. There was the Riddick case that was with it. Why was it appropriate to decide them both? Why shouldn't we have picked one and let the other one -- what justification was there for reversing both convictions?

MR. SCHULDER: Well, the Court granted certiorari in both cases, and heard arguments in both cases.

QUESTION: But really, it is kind of unfair to the officers in the later of the two searches, I suppose, and there were a bunch of cases that we held for decision in those. I suppose we shouldn't have done that, either.

MR. SCHULDER: Well, we don't feel that -- apparently the Court has developed a practice of holding cases pending its decision in cases that it has accepted, but there is no requirement that the Court do so, and there is --

QUESTION: But at the time a Fourth Amendment issue comes to us for the first time with several cases, I would suppose the government's view is that we should decide just one of them, because there is really no

judicial purpose in treating all litigants alike.

MR. SCHULDER: That's correct.

Finally, Respondent argues that he should benefit from the rule announced in Payton and Prescott because his case was on direct review at the time those decisions were announced. However, as I mentioned earlier, because the exclusionary rule is not a personal right but is designed to prevent future Fourth Amendment violations, the critical juncture is the time of the search, not any --

QUESTION: Of course, Justice Harlan was definitely of that view, was he not?

MR. SCHULDER: Justice Harlan was of the opposite --

QUESTION: Anything on direct appeal was to be given the advantage.

MR. SCHULDER: That's correct.

QUESTION: And some others agreed with him.

MR. SCHULDER: I believe so, Your Honor.

QUESTION: And still do.

MR. SCHULDER: That may be. We feel in the Fourth Amendment context, though -- well, in Hankerson versus North Carolina, Justice Powell indicated in his concurring opinion that he agreed with Justice Harlan's view, but Hankerson was a case not involving the Fourth

Amendment. It was a case involving the retroactivity of Mulaney versus Wilbur, and the issue in that case went to the fairness of the trial.

It is our position that because the Court has said in numerous cases that the exclusionary rule should be limited and applied only in order to -- only in those cases where its application serves a deterrent benefit, that it simply should not be applied even to cases on direct review after the Court has announced a new Fourth Amendment principle.

Accordingly, we submit that the Court should adhere to its consistent practice of applying new Fourth Amendment decisions prospectively only. Because the arrest entry into Respondent's house occurred before both Payton and Prescott had held that the Fourth Amendment required a warrant for such entries, Respondent's post-arrest confessions should not be suppressed.

For these reasons, and for the reasons stated in our briefs, the judgment of the court of appeals should be reversed.

I would like to reserve my remaining time.

CHIEF JUSTICE BURGER: Mr. Walter?

ORAL ARGUMENT OF JOHN F. WALTER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. WALTER: Mr. Chief Justice, and may it please the Court, I agree basically with the recitation of the procedural history of this case made by government counsel, except in one major respect, and that is, as the Court is aware, this case has had a sored -- not a sored, but a troubled path through the Ninth Circuit Court of Appeals.

The first opinion of the Ninth Circuit Court of Appeals did something which I think is very important in this Court's analysis of the issue that is present before the Court, and that is, it made a de novo finding that there was probable cause for the arrest of my client. The -- It was clear in the trial court during the motion to suppress and also during the -- during the course of the trial, and the trial judge so found, that there was no probable cause for my client's arrest on the day that Agents Hemingway and Pickering went to the home to interrogate him.

The lack of probable cause was a determination made by the trial court based upon the testimony elicited, I believe, from -- it was Agent Pickering. Agent Pickering testified that it was his belief that at the time that they went to my client's home, that they did not have sufficient evidence to arrest my client. According to Agent Pickering, or Hemingway -- I can't

recall which agent -- the purpose of going to my client's home was to question him with respect to his involvement regarding this Treasury check.

However, it was further developed at the motion to suppress that the agents intended to arrest my client depending upon the degree of my client's statements at the time of the interview at his home.

That was a direct finding by the trial court. In the Ninth Circuit, the Ninth Circuit took the position that it was appropriate for them to undertake a de novo review and as a result of that de novo review, determined that there was probable cause for the arrest. What the Ninth Circuit failed to do is, they relied on facts that were developed during the course of the trial relating to a conversation that took place between my client on the telephone and supposedly the person who was trying to cash the check.

QUESTION: Mr. Walter --

MR. WALTER: Yes.

QUESTION: -- you are not attacking the court of appeals opinion, are you?

MR. WALTER: I am --

QUESTION: Or the judgment?

MR. WALTER: I am attacking the court of appeals opinion with respect to that portion where they

indicate or they hold that there was probable cause. There clearly wasn't probable cause in this case. It was a finding of the trial court that --

QUESTION: Do you want us to affirm it or not?

MR. WALTER: Yes. Yes, I do, Your Honor.

QUESTION: Well, why are you attacking it, then?

MR. WALTER: Well, I am attacking the finding of probable cause. I am not attacking the analysis of the Ninth Circuit with respect to the retroactivity question, but I think the fact that the agents didn't have probable cause when they went to the home is important in the Peltier test of the agents' knowledge in connection with whether or not the principles of Payton and Prescott should be applied retroactively in this case.

QUESTION: But if the case comes to us, it comes with a finding by the Court we are reviewing that there was probable cause.

MR. WALTER: That's correct, Your Honor, but I think it is -- the Ninth Circuit's finding is erroneous, because it is not supportable by the record. It was the trial court's finding based upon the motion to suppress that there was no probable cause.

QUESTION: Did you challenge the court of

appeals' finding at any time in the court of appeals?

MR. WALTER: In all candor, Your Honor, I can't -- I believe that I -- in one of the petitions for rehearing, I pointed out to the Ninth Circuit that their analysis of the probable cause issue was incorrect, because they were relying on facts developed during the trial and not facts developed in the motion to suppress.

QUESTION: At what stage was that in the court of appeals?

MR. WALTER: That was on -- I believe it was the first petition for rehearing when I requested the court to consider the case in light of Prescott.

QUESTION: And was that the one that was granted?

MR. WALTER: Yes, Your Honor, it was. I think they were all granted in terms of filing an amended opinion. Each time we went for a petition for rehearing, we got -- in that case they affirmed the trial court's decision but held -- and held that Prescott didn't apply because it wasn't a forcible entry. That was the first time on the petition for rehearing, and then the next time the court entered an order that they were going to withhold decision in the case until this Court's decision in Payton, and they allowed counsel, both government and myself, an

opportunity to object to that, and there was no objection by the -- by the government.

QUESTION: But the court of appeals has never directly addressed itself to your argument that there was no probable cause?

MR. WALTER: No, it has not. But I think it is important, Your Honors, in terms of analyzing the particular conduct of these law enforcement agents, these are not local law enforcement agents, these are highly trained Secret Service agents. If I understand the test in Peltier, and I am not -- I am not quite sure that I do -- I don't think many circuits understand the test in Peltier -- it has to do with the knowledge that is chargeable to the agents or properly chargeable to the agents or the actual knowledge of the agents.

I am not clear which of those approaches is really meant to be adopted by this Court, and I think that is one of the problems in this case, where the government relies on Judge Wilkie's dissent in Ross, and indicating that it is not for judges or lawyers to make a determination as to whether or not there is a principle that is clearly foreshadowed, or a decision that clearly foreshadows a principle, but whether or not the law enforcement officers had knowledge.

If that is the test for -- in connection with

the retroactivity, it seems to me that it opens a whole area of additional questions or inquiry in a motion to suppress. If it is the subjective intent of the searching officer at the time that he conducts the search, which is the knowledge requirement that is required by Peltier, then it seems to me defense counsel as well as the government is going to want to put on evidence as to the specific training, understanding, or knowledge of that particular officer.

QUESTION: Mr. Walter, let me try again. What issue is there before us other than the retroactivity?

MR. WALTER: That is the only issue, Your Honor.

QUESTION: Well, what is all of this you have been talking about?

MR. WALTER: Well, I think in terms of analyzing the retroactivity question, Your Honor, if we assume that Peltier applies in this case, we have to determine what the standards of Peltier are in terms of assessing the actual knowledge of the law enforcement officers or the knowledge that may be properly chargeable.

QUESTION: You just assume that it applies.

MR. WALTER: Yes, and if it does --

QUESTION: Well, that is the whole point it is

here. Once you assume that, the case is over.

MR. WALTER: No, Your Honor, I don't --

QUESTION: If we assume that it is retroactive, don't you automatically win?

MR. WALTER: Yes, Your Honor.

QUESTION: Well, why would we grant cert to assume that?

MR. WALTER: Your Honor, I believe that the analysis, the retroactivity question begins with an analysis of what knowledge is probably chargeable to the law enforcement officers at the time of the conduct in question, and in order to make that analysis, the government argues that the issue in this case is not whether this -- Payton or Prescott overruled any cases, but that it established or resolved a previously unsettled constitutional principle.

And the question that we have presented here is, what knowledge with respect to that new constitutional principle should have been chargeable to the law enforcement officer at the time that they went to my client's home in May of 1977, and I submit that if we accept the -- in analyzing the -- I believe it is appropriate to analyze the state of the law at the time of the conduct in question in the particular circuit, which happens to be the Ninth Circuit in Prescott, to

make a determination as to whether or not Prescott was clearly foreshadowed and therefore whether or not the law enforcement officers should have been properly charged with the knowledge that there was going to be a warrant requirement.

I think we have to also keep in mind that this particular case doesn't deal with a practice that had continuing administrative approval such as that in Almeida-Sanchez, or had received continuous judicial approval. This was a practice which had never received specific judicial approval. There were no regulations which permitted law enforcement officers to go into someone's home absent exigent circumstances for arresting, for purposes of an arrest.

This was a area that had been continuously and constantly expressly reserved by opinions of this Court and also opinions of the Ninth Circuit. The government argues that the Ninth Circuit opinions should not be chargeable to the law enforcement officers because they contain merely dicta.

QUESTION: You are speaking of the second opinion of the Ninth Circuit.

MR. WALTER: Well, I think there were a number of opinions, starting out with Boostamante, which reserved the question, and then there was the United

States-Phillips case.

QUESTION: What about this panel?

MR. WALTER: On, and this -- this particular panel. I was referring to existing law prior to -- prior to this panel's opinion. And I think it is also important that the case in 19 -- I believe it was 1976, United States versus Calhoun. In that case, the government lawyer in the Ninth Circuit conceded in front of the Ninth Circuit panel in that case that in that particular case, that if the court -- that an arrest warrant would have been necessary to arrest the particular defendant in that case, because the arrest took place in his home.

I think that the device --

QUESTION: Mr. Walter, doesn't -- doesn't the opinion in Payton itself outline the division of thinking that existed in this country about the requirement of the warrant, and doesn't it outline quite thoroughly in the majority opinion as well as the dissent why this was not a settled matter at all at the time Payton was decided?

MR. WALTER: Yes, I agree with Your Honor, except I think that the -- I think that is absolutely correct, but then the next step is whether or not the law enforcement officers should have known or could have

been properly charged with the outcome that a warrant was going to be required.

QUESTION: Well, do you think that it is appropriate policy for us to charge the average peace officer with the requirement of anticipating the rulings of this Court in matters of this kind that are unsettled?

MR. WALTER: Not the average peace officer, Your Honor, but here we are dealing with not the average California Highway Patrolman. We are dealing with a federal Secret Service agent.

QUESTION: And you think that the rules should differ depending upon the particular training and background of the particular police officer and how sophisticated that officer is --

MR. WALTER: Well --

QUESTION: -- as to whether a particular principle is retroactive or not?

MR. WALTER: No, I --

QUESTION: Is that a desirable approach?

MR. WALTER: I don't think so, Your Honor, because again, I think that would get into the subjective analysis of the knowledge of the particular law enforcement officer, but I think that you can have a -- the hypothetical law enforcement officer in the particular jurisdiction, and in this case it's the

Secret Service in the Ninth Circuit. For that matter, Your Honor, in the state of California, we had People versus Ramey, which was a California Supreme Court case, which was decided in 1976, which was not dicta, it was very clear that there was going to be an arrest warrant that was going to be required of law enforcement officers to effect an arrest inside the home absent exigent circumstances.

In the Central District, the Secret Service agents work very closely, as do the FBI and other -- the DEA agents work very closely with local law enforcement. More importantly, and I think there was a question --

QUESTION: How about the, say, the hypothetical court of appeals judge. Here you have a panel of the court of appeals on December 19th, 1978, that affirms this judgment. I mean, is it fair to say that a law enforcement officer should have anticipated the state of the law in the Ninth Circuit in 1978, when three judges of the court of appeals couldn't do it?

MR. WALTER: Well, Your Honor, I -- yes, I do, and I -- and I believe so because of the peculiar facts in this case, and that is, Judge Ferguson's decision, admittedly dicta, and it wasn't even a reported decision, in the district court three months prior to my

client's arrest, where he told the government that if you bring a case to me again where there is no arrest warrant, and you arrest someone in the home without exigent circumstances, I am going to suppress the evidence, because it is my belief that People versus Ramey and United States versus Dorman is the law.

QUESTION: How many judges are there on the -- were there in the Central District at that time?

MR. WALTER: I would say a dozen, Your Honor.

QUESTION: Do you think they all would have followed Judge Ferguson's ruling?

MR. WALTER: No, Your Honor, but I know for a fact that what happened as a result of Judge Ferguson's rule is that there was a memorandum that was generated in the United States Attorney's office which indicated that Judge Ferguson had so held, and that memorandum went out to define precisely what Judge Ferguson's ruling was, and suggested to at that time the chief of the Criminal Division that from now on we had better start having agents obtain arrest warrants if they are going to arrest someone in their home.

QUESTION: Are you suggesting then that it goes all the way down to the district court, and that if one district judge has so ruled, that is what the law is in the district?

MR. WALTER: No, Your Honor. I am not suggesting it is the law that is in the district, but if as a result of that district court judge's announcement, the government in the form of the United States Attorney's office takes the position that they are going to institute now a warrant requirement, then I think that it is incumbent upon the United States Attorney's office to disseminate that information to various law enforcement agencies that when you come to us for purposes of seeking a complaint or authority to arrest someone, that we are going to require arrest warrants, and I think that is what happened in this case.

This is not the situation, as the government would paint it, that there is a fast-moving series of events by these law enforcement officers who were fearful for their life. These agents, Pickering and Hemingway, they conducted a thorough investigation, and as the result of that investigation they went to the United States Attorney's office and sought approval for a complaint. They were in the sanctity of the United States Attorney's office when they had to make this momentous decision about whether or not they were going to require a warrant, or request a warrant. They did make that decision in favor of obtaining an arrest warrant for Dodd, who was the co-defendant in this case.

There is absolutely no reason to believe that there was any difference between Oscar Dodd and my client, Raymond Johnson, with respect to obtaining a warrant, and I think -- and I was precluded from exploring this at the trial court level, and I think the reason for that was is that the Assistant United States Attorney informed the Secret Service agents that there wasn't sufficient probable cause and that they had better go out and interview Mr. Johnson, and hopefully obtain some admissions from Mr. Johnson, so that then they could come back and they would have sufficient probable cause for an arrest warrant.

QUESTION: Mr. Walker -- oh, excuse me.

QUESTION: As a matter of administration of the U.S. Attorney's office, as a practical matter, since they know they might come with their cases before the same judge, just as a practical matter, wouldn't they try to be prepared to meet that judge's standards even if they didn't agree with them?

MR. WALTER: Yes, Your Honor, except that --

QUESTION: Why should that be binding on anybody else? I am not quite sure why you suggest that that has any significance in the whole scheme of things.

MR. WALTER: Well, again, I think it is significant in terms of the -- of the knowledge properly

chargeable to the law enforcement agents in connection with the retroactivity issue. The government argues basically good faith, or it is a law enforcement due process. Law enforcement officers must have notice of this particular requirement, which was to obtain an arrest warrant. I contend that based upon the -- what happened in the Ninth Circuit at this point in time, that the law enforcement officers did have notice, and I submit that if --

QUESTION: They had notice that that particular judge would react that particular way.

MR. WALTER: That's correct. The problem is is that you don't know which judge the case is going to be assigned to, so --

QUESTION: That's right. So it is something like the converse of the strength is the strength of the weakest link.

MR. WALTER: Well, Judge Ferguson -- although Judge Ferguson was the only one that I could find that articulated those views, I know that he had several -- I know he still does, has several of his fellow judges who -- at least two or three or four that come to mind, that had a great deal of respect for Judge Ferguson, and probably in a similar situation would have gone -- would have held in the same fashion as Judge Ferguson would

have.

QUESTION: Mr. Walter, I think it is way over 20 minutes down into your 30 minutes. I ask once again, and so help me I will never ask it again, are you going to get to Payton and Hankerson and the other cases that considered retroactivity --

MR. WALTER: Yes, well --

QUESTION: -- which is the point, the reason this case is here?

MR. WALTER: That's correct --

QUESTION: Are you going to get to it?

MR. WALTER: Yes, Your Honor. I will try. In terms of the retroactivity analysis in this case, I submit that it is not -- it wasn't necessary for the Ninth Circuit opinion to hold that Payton was retroactive. The case could have been decided on the basis that Prescott, which was the -- or, I'm sorry -- yes, Prescott, the Blake case applying Prescott retroactively in the Ninth Circuit.

QUESTION: But that case is not here.

MR. WALTER: Well, the government --

QUESTION: The case that's here is the opinion and judgment of the court of appeals in this case.

MR. WALTER: That's correct, Your Honor, and I --

QUESTION: And no other case.

MR. WALTER: -- and I believe that this Court can affirm the Ninth Circuit Court of Appeals judgment on the limited basis that Prescott applied retroactively in this case, the Johnson case, and it is not necessary to decide whether or not Payton applies retroactively, because that was clearly the law of the Ninth Circuit, at least in my view, at the time.

In conclusion, Your Honors, the government's position in terms of marginal deterrence and not resolving Fourth Amendment issues in favor of obtaining a warrant or its approach in terms of analyzing the state of the law suggest that the law enforcement can adopt a wait and see attitude or somehow they can be purposefully ignorant until a Ninth Circuit Court of Appeals decision or opinion of this Court is handed down which clearly settles a particular question.

I think that that is something that should not be condoned by this Court. I think that the law enforcement officers in the federal system are surrounded by very capable and competent lawyers, and those lawyers are under an obligation -- As indicated in the government's brief, the Department of Justice, after the Second Circuit decision, issued a policy memorandum advising law enforcement that they should now seek

arrest warrants.

I think that the law enforcement agencies, because they have access to counsel, should rely on counsel, counsel should be able to interpret the particular decisions and arrive at some form of action which will be consistent with what the law will be.

Thank you.

QUESTION: Mr. Walter, there is no finding here that the officers acted in bad faith. Is that right?

MR. WALTER: There is no finding by any court. That's correct.

QUESTION: Right.

MR. WALTER: Based upon the circumstances of what happened at the home, and how they entered, and the search that was -- that was conducted once they were inside the premises, and I truly believe it was a search -- the government calls it a security check -- they did search each room in the house, they did not go into closets or drawers -- also, the manner in which they waited, I think, is --

QUESTION: You are not suggesting that that amounts to bad faith, are you?

MR. WALTER: Yes, I am, Your Honor. They -- they observed my client and his wife in a car drive into

the driveway of their home. They purposely waited. If they were truly intent upon only interviewing my client with respect to what his involvement was, they could have met him as soon as he got out of the car. Instead, they surveilled him, watched he and his wife go into the house, and then after they were in the house the agents went to the door, using a fictitious name. My client came to the door. They had their guns drawn. They asked if they could go in, and he said, sure. The guns were -- The guns were drawn.

If they were truly worried -- and then they conducted the cursory search of the home, and to show you how much time had elapsed, there was evidence in the record that when one of the agents went into the bedroom, that my client's wife was -- was without clothing, and he requested that she dress and come out into the living room. It takes some period of time for that to happen.

So, I don't understand, and I do attribute bad faith to these agents, why they waited until they were in the house. I strongly suspect, and the government calls it speculation, and it probably is speculation, these agents knew that my client had a history of heroin addiction. I think what the agents were trying to do is obtain access into that house after allowing a

sufficient period of time to elapse from the time they got out of the car to get into the house, hoping that they could find him in possession of some contraband so they could use that and trade upon that in terms of the case that they had investigated against him. So, I do attribute bad faith to them.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further?

ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. SCHULDER: One or two brief points, Your Honor. I would like to address the question of the fact that this case is on direct review again, Mr. Justice Stevens. As a matter of purely exclusionary rule policy, leaving aside Article III considerations, the first litigant to establish the rule in a particular case shouldn't benefit either from the new rule, but as the Court established in Stovall versus Denno, sound policies of decision-making rooted in Article III require the Court to apply the new rule to that particular litigant.

So that in effect it was really Payton who got a windfall if we are looking at it simply from the exclusionary rule policy standpoint.

QUESTION: Let me test that with you for just a moment. You recall in his opinion in Desist, Justice Harlan draws a distinction between a court of law and a superlegislature, and if you treat the decisions of this Court as creating new law just out of whole cloth as a superlegislature could, then you can justify that in terms of policies of the exclusionary rule, but supposing in the second argument of the Payton case -- it didn't happen this way -- somebody had done some original historical research and found that the Framers of the Fourth Amendment, some unambiguous language that said, we don't intend to let anybody arrest anybody in his home without a warrant, so that at the time of the decision it was clear that the Court wasn't making some new rule of law like a superlegislature, but was announcing what had always been the law but had not been perceived to be before, and had been the law since the Constitution was first adopted. Would you still make the same argument?

All the other policy things are the same. The officer didn't know about it at the time he entered the home, and so forth.

MR. SCHULDER: Well, if no one else knew about this particular piece of history --

QUESTION: Right.

MR. SCHULDER: -- and everyone had relied on it through the years --

QUESTION: But the fact of the matter is that what the Court did is not make law. It merely discovered what the law had been since the Constitution was adopted. Would your argument be the same?

MR. SCHULDER: Yes, it would. Yes, it would.

Another point I would like to make just very briefly is that there are occasions, as in Payton, where the Court does take more than one --

QUESTION: Are you troubled at all when you make the same argument there, that different litigants whose cases are pending at the same time, only one of them gets the benefit of a rule of law that was part of our constitution ever since it was adopted? Does that bother you at all?

MR. SCHULDER: It doesn't bother me in the context of the exclusionary rule, where the social costs of exclusion are so great. I would also like to just address myself to the fact that the Court took both Payton and Riddick's cases up, and it sometimes does that --

QUESTION: Well, Mr. Schulder, there is a possibly real matter, the District of Columbia code involving civil rights, a whole provision was lost in

the revision, and years later, something like 30 years later, it was found, and this Court said it was the law all along. That is what I think Justice Stevens was talking about. There was no new law.

QUESTION: Going back to --

QUESTION: It was a statute that was lost.

QUESTION: Going back to the hypothetical suggestion, is there any evidence that from 1790 until the Weeks case, that anybody involved in drafting the Constitution or writing the Federalist Papers or anything else ever thought that a court had authority to exclude the evidence of a dead body, the victim of a murder, or pistols, or heroin, or what-not?

MR. SCHULDER: Not that I'm aware of, Your Honor. In fact, one of the points involved here is that we are talking about the exclusionary remedy here, whether the remedy should be applied, not whether the substantive right was or was not the law, however we may want to define that.

The Court will sometimes, as I was about to say in reference to Justice Stevens' earlier question about why the Court may take two cases or more, there may be certain instances where there are different factual settings in which the Court may want to examine a particular issue. For example, in Payton's case, I

believe Payton was not at home and Riddick was. I don't suggest that that is the reason the Court took both cases, but there are several -- there are occasions when the Court may want to examine a difficult question by -- by looking at different factual settings in which that issue may arise.

QUESTION: Wouldn't you agree, though, that there are -- maybe you would say it is outweighed by the costs and the interest of law enforcement, but isn't there at least an interest in treating identically situated litigants alike in a court of law? Isn't there some interest in doing that? Applying the same rule to two litigants from different parts of the country who have the same problem? Whatever happened to them happened at the same time in the federal system. Isn't there some interest in having them treated alike?

MR. SCHULDER: Well, but --

QUESTION: Some interest, sometimes called justice?

MR. SCHULDER: Well, but Article III would require the Court to treat one litigant one way and another litigant --

QUESTION: And the law enforcement policy of no deterrence and all would say, well, we can forget about the other fellow?

MR. SCHULDER: That's correct.

QUESTION: Yes.

QUESTION: Well, on several of the opinions announced this morning, isn't there an indication that for a significant period of time, litigants similarly situated in different circuits were treated differently until we resolved the conflicts with today's opinions in four or five of the cases decided this morning, announced this morning?

MR. SCHULDER: That's correct.

QUESTION: I suppose in all those cases in which the judgments are not final, they are subject to re-examination, so they could all be treated alike. After a judgment is final, the problem is a little different.

MR. SCHULDER: Well, I don't believe those cases involve the remedy of exclusion of reliable evidence in a criminal trial, Your Honor.

Thank you.

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

(Whereupon, at 11:08 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

UNITED STATES, vs. RAYMOND EUGENE JOHNSON No. 80-1608

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BY Sharon Ryan Connelly