

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-5298

TITLE ANDRES SEGURA AND LUZ MARINA COLON, Petitioners
v. UNITED STATES

PLACE Washington, D. C.

DATE November 9, 1983

PAGES 1 thru 52



ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -x
3 ANDRES SEGURA AND LUZ MARINA :
4 COLON, :
5 Petitioners :
6 v. :
7 UNITED STATES :
8 - - - - -x
9 Washington, D.C.
10 Wednesday, November 9, 1983
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:00 a.m.
14 APPEARANCES:
15 PETER J. FABRICANT, ESQ., New York, N.Y.; on behalf of
16 the Petitioner.
17 ANDREW L. FREY, ESQ., Office of the Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the Respondent.
20 - - -
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

ORAL ARGUMENT OF

PAGE

PETER J. FABRICANT, ESQ.

on behalf of the Petitioner

3

ANDREW L. FREY, ESQ.,

on behalf of the Respondent

23

PETER J. FABRICANT, ESQ.

on behalf of the Petitioner -- rebuttal

47

- - -

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

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Segura against the United States.

4 Mr. Fabricant.

5 ORAL ARGUMENT OF PETER J. FABRICANT, ESQ.,

6 ON BEHALF OF PETITIONER

7 MR. FABRICANT: Mr. Chief Justice, and may it
8 please the Court:

9 On February 12, 1981 law enforcement officials
10 forceably entered the home of the Petitioners. At the
11 time of the entry the police had no search warrant or
12 arrest warrant nor the consent of any of the occupants.

13 No exigent circumstances existed which could
14 justify the actions of the police. The only excuse for
15 the entry was the belief by the police that contraband
16 was concealed within the dwelling.

17 Having once violated the privacy of the home
18 the police removed all of the occupants and remained
19 there by themselves for a continuous period of some 19
20 hours. Thereafter the police obtained a search warrant
21 based on knowledge they possessed many hours before the
22 entry and occupation, and upon execution of the warrant
23 contraband was discovered secreted within the premises.

24 The question before this Court is whether that
25 contraband should be suppressed. We respectfully submit

1 that the unlawful entry into, seizure and 19 hour
2 continuous occupation of the Petitioners' home
3 constituted a seizure under the Fourth Amendment not
4 only of the home but of its contents.

5 Since the actions of the police constituted a
6 seizure of the contraband before the search warrant was
7 ever obtained any doctrine of attenuation under the
8 exclusionary rule would not apply in this case, and in
9 fact the purposes of the exclusionary rule would be
10 achieved by its application here.

11 The facts are not in doubt. On February 12,
12 1981 in New York City at about 5:30 in the afternoon the
13 police observed what appeared to them to be a drug
14 transaction on the streets of Queens, New York.

15 At 6:30, an hour later, they telephoned the
16 United States Attorneys' Office for the Eastern District
17 of New York to make inquiries about perhaps arresting
18 the Petitioners and getting a search warrant to search
19 their apartment in Queens, New York. They were told by
20 an Assistant United States Attorney at 6:30 in the
21 evening that the magistrate was not around, and he
22 suggested or directed the police to go to the premises,
23 the apartment building, to arrest the Petitioners if
24 they saw them and to secure the premises from the
25 outside.

1 The Assistant United States Attorney further
2 directed the agents not to enter the apartment unless
3 exigent circumstances should occur.

4 QUESTION: Where did all of this take place?
5 On Long Island?

6 MR. FABRICANT: It occurred in Queens, New
7 York, part of New York City.

8 QUESTION: Only one magistrate up there?

9 MR. FABRICANT: No. In the Eastern District
10 of New York there are 14 District Court judges and 4
11 magistrates. There is always a District Court judge
12 that is on emergency duty and available to sign warrants
13 at any time, and there is also one of the four
14 magistrates is also on emergency duty so as to sign
15 warrants.

16 QUESTION: What day of the week was February
17 12?

18 MR. FABRICANT: It was not a holiday. It was
19 in the middle of the week. It was not a Friday or a
20 holiday, Your Honor, or the weekend.

21 QUESTION: Do you feel that had the magistrate
22 known of the 18 or 19 hour occupancy of the home that
23 his action would have been any different?

24 MR. FABRICANT: When he finally signed the
25 warrant the next day? Perhaps not. I think under

1 Franks v. Delaware he might be able to remove whatever
2 taint there might be.

3 I mention in my brief the fact, Justice
4 Blackmun, that the agents did not 19 hours later when
5 they applied for the warrant did not say in their
6 affidavit that they had entered the premises. I say
7 that as an example of the egregious conduct of the
8 police.

9 QUESTION: Counsel, I suppose you would
10 concede that there was probable cause for the issuance
11 of a warrant on the afternoon that you described where
12 the police saw the delivery of this parcel to the two
13 other people.

14 MR. FABRICANT: Well, a warrant was eventually
15 signed and it was based on the information that the
16 police had before they entered the apartment.

17 QUESTION: You concede that was probable
18 cause.

19 MR. FABRICANT: Yes, as has been so held by
20 the District Court and the Court of Appeals.

21 QUESTION: Yes.

22 MR. FABRICANT: But I believe, Justice Powell,
23 that it is the neutral and detached magistrate who in
24 the first instance must make the determination of
25 probable cause. I think one of the main problems in

1 this case is that the police, sure, they had a great
2 deal of suspicion that there was contraband in the
3 apartment, but the Constitution and really all of the
4 cases of this Court dealing with dwellings say that
5 absent exigent circumstances the police must get a
6 warrant before they cross the threshold of the
7 premises.

8 QUESTION: Well, Mr. Fabricant, there is
9 certainly some of our cases dealing with say a suitcase
10 or whatever it was in Arkansas v. Sanders and the
11 footlocker in Chadwick that say even though the police
12 may not inspect a container without a warrant they can
13 detain it while they are getting a warrant. Now why is
14 this case any different from those?

15 MR. FABRICANT: It is different because it is
16 in a home where one has the highest expectation of
17 privacy. In Arkansas v. Sanders and in United States v.
18 Chadwick -- Well, Chadwick dealt with a footlocker that
19 I believe was being put into an automobile and Arkansas
20 v. Sanders dealt with a suitcase which was in an
21 automobile or being carried around by somebody outside.

22 The difference is I believe twofold. First of
23 all, the actions of the police in Arkansas v. Sanders
24 and United States v. Chadwick in the seizure might be
25 considered as reasonable because under the circumstances

1 the mobility of the suitcase and the footlocker would
2 mean that if they went to get a warrant the automobiles
3 and the suitcases with the possible contraband in them
4 would not be around any more.

5 The other difference is that in Sanders and
6 Chadwick the police were at a place and in a position
7 where they had an absolute right to be. They were not
8 in somebody's house. They were out in the public.

9 QUESTION: Mr. Fabricant, in your view could
10 the police have secured the house from the outside for
11 19 hours while they got the warrant not letting anybody
12 in or out?

13 MR. FABRICANT: Yes. That would have been
14 much more reasonable.

15 QUESTION: And in your view would have been
16 acceptable. How about if the police had made the
17 illegal entry into the house but then had withdrawn
18 immediately thereafter and then 19 hours later gotten
19 the warrant?

20 MR. FABRICANT: That would be a closer
21 question. I think that since --

22 QUESTION: Well, valid or invalid?

23 MR. FABRICANT: It would be a closer question
24 as to -- Well, it would be invalid because I think that
25 --

1 QUESTION: The subsequent warrant in your
2 view.

3 MR. FABRICANT: The subsequent warrant would
4 still be invalid because I think what the Fourth
5 Amendment seeks to protect more than anything else is
6 the physical entry into the home, but it would be a
7 different situation.

8 QUESTION: What if the initial entry then had
9 been on exigent circumstances and valid, let's say, in
10 hot pursuit of someone or something and then 19 hours
11 expired before the warrant?

12 MR. FABRICANT: That would be -- And they
13 stayed outside?

14 QUESTION: Inside, but a legal entry.

15 MR. FABRICANT: Well, that would -- They would
16 be in a place where they had a right to be. That would
17 be the difference. Their entry would have been legal.
18 Their remaining there after the exigency has terminated
19 would be a violation of the privacy of the home, but at
20 least their initial entry would have been all right.

21 QUESTION: Right, and the subsequent warrant
22 valid?

23 MR. FABRICANT: And the subsequent warrant
24 might very well have been valid. It is my argument may
25 it please the Court that even should this Court find

1 that an initial illegal entry and then withdrawal and
2 the waiting outside does not constitute a seizure of the
3 later discovered contraband.

4 I submit that the entry and the remaining
5 inside once even any feeling of exigency has been
6 dissipated equals a continuous deprivation of the rights
7 of the Petitioners.

8 QUESTION: At the time of the entry and/or
9 shortly thereafter do you think the officers could have
10 taken the parcels and removed them from the apartment
11 and secured them and then left the apartment and then
12 ultimately opened them at the time they got the
13 warrant?

14 MR. FABRICANT: Absolutely not. I think
15 United States v. Johnson -- Johnson v. United States,
16 McDonald v. United States this Court has said you cannot
17 unless you have emergency or exigent circumstances go
18 into a house without a warrant. In, for example,
19 Johnson v. United States the police smelled opium in
20 hotel room, the odor of opium, and they went in there
21 and grabbed the opium.

22 In McDonald v. United States they heard slot
23 machines or some sound of gambling devices and they went
24 in and seized the gambling devices. I do not think the
25 opening or not opening of a parcel is relevant when the

1 police are in somebody's home where they have no right
2 to be to seize the parcel.

3 QUESTION: Under your theory when the police
4 are outside would they prevent people from going in?

5 MR. FABRICANT: I believe that they could. It
6 would be --

7 QUESTION: On what ground?

8 MR. FABRICANT: If they acted reasonably it
9 would be --

10 QUESTION: On what ground?

11 MR. FABRICANT: On the grounds that they are
12 securing the premises. They are not entering the
13 premises. They are securing the premises from the
14 outside and they do not want people to go in and disturb
15 what might be in there.

16 They would have more of a reasonable right to
17 do that. The result would be the same. They are
18 staying outside or going inside, but if they stay
19 outside then the privacy of the home has not been
20 violated

21 QUESTION: I am having great difficulty with
22 what is the difference. They stay in there that means
23 you cannot come in or go out.

24 MR. FABRICANT: That is right.

25 QUESTION: If they are outside you cannot come

1 in or go out. What is the difference?

2 MR. FABRICANT: There is no difference in that
3 respect.

4 QUESTION: You said there was a difference.

5 MR. FABRICANT: No. There is no difference in
6 the movement of people in and out of the apartment, but
7 there is a difference concerning your invasion of
8 privacy of what is inside your dwelling.

9 QUESTION: There is a difference I submit by
10 people moving in and out because moving in and out can
11 carry in and out.

12 MR. FABRICANT: Correct.

13 QUESTION: So there is a difference.

14 QUESTION: Well, don't you have to say that
15 the warrant is the product of the illegal entry?

16 MR. FABRICANT: No, I do not believe, Justice
17 White, that you have to say that in this case.

18 QUESTION: Why not?

19 MR. FABRICANT: I don't think that the warrant
20 and the discovery of the contraband is secondary
21 evidence.

22 QUESTION: The only thing that was admitted
23 was the materials that were found after the warrant was
24 issued.

25 MR. FABRICANT: That is correct.

1 QUESTION: The warrant rested on independent
2 grounds did it not?

3 MR. FABRICANT: That is correct. It rested on
4 the knowledge that the police had before they entered
5 the apartment.

6 QUESTION: Why doesn't it indicate -- Suppose
7 there had never been any warrant issued and no search
8 under a warrant. The officers just went into the
9 apartment illegally and seized what they saw in plain
10 sight and then left.

11 That would be held inadmissible --

12 MR. FABRICANT: That is absolutely -- and
13 was.

14 QUESTION: Just like it was in this case.

15 MR. FABRICANT: That is correct.

16 QUESTION: So why isn't that a sufficient
17 remedy for the illegal entry just render inadmissible
18 what they seized prior to the warrant?

19 MR. FABRICANT: Well, I think that depends on
20 your definition of seizure. It is my contention that
21 the illegal entry coupled with the 19 hour occupation
22 equals a seizure not only of what they saw in open view
23 but of what they suspected was there but had not yet
24 discovered.

25 QUESTION: So you think that it is a product

1 because if they had not been there the evidence might
2 have been destroyed or it might have gone somewhere
3 else.

4 MR. FABRICANT: Well, it might have been
5 destroyed. It might have gone somewhere else.

6 QUESTION: Put that is the only way you think
7 the occupation of that house taints the later seizure?

8 MR. FABRICANT: No, that is not the only
9 reason.

10 QUESTION: What is it?

11 MR. FABRICANT: The reason is that to allow
12 the entry without a search warrant I think you are
13 assuming that because the police feel --

14 QUESTION: Nobody is allowing it.

15 MR. FABRICANT: What is that?

16 QUESTION: Nobody is allowing it.

17 MR. FABRICANT: Well, by not suppressing --

18 QUESTION: The court here held it was an
19 illegal entry.

20 MR. FABRICANT: Well, nobody is denying that.

21 But by allowing the fruits of the illegal
22 entry even that which was in an attache case and which
23 was not open until a valid warrant appeared is I think
24 dissipating the warrant requirement of the Fourth
25 Amendment.

1 QUESTION: Do you want your argument to be
2 understood, counsel, as meaning that the government may
3 never gain any advantage out of an illegal entry?

4 MR. FABRICANT: Into a home?

5 QUESTION: Into a home is what we are talking
6 about here.

7 MR. FABRICANT: Yes. I think a home more than
8 anything else, more than a car, more than anything
9 else. This Court has consistently said that the highest
10 degree of privacy was --

11 QUESTION: My question was intended to put it
12 on the first part of the question that the government
13 may never profit or secure any advantage toward a
14 prosecution if it flows from an illegal entry of a
15 home.

16 MR. FABRICANT: Yes.

17 QUESTION: The advantage that was secured in
18 this case with respect to the seizures made after the
19 warrant was issued was just that the evidence was still
20 there and it might not have been if they had not been in
21 the home.

22 MR. FABRICANT: Well, it probably would have
23 still been there even if they had secured the premises.

24 QUESTION: What kind of advantage then did the
25 government get by the illegal entry?

1 MR. FABRICANT: They do not really get an
2 advantage. The people get a disadvantage and their
3 right of privacy in a home has been violated.
4 There is no reason for the police to do what
5 they did here. There have been a number of cases
6 involving what some commentators call the impoundment of
7 homes but not that many cases, and I believe that the
8 reason that there have not been that many cases is that
9 it is black letter law that absent exigent circumstances
10 the police cannot go into your home.

11 QUESTION: Is it your position that the police
12 could have got a warrant on the information they had
13 before they entered the home?

14 MR. FABRICANT: They had five hours to do so.
15 Yes, I believe they do. They certainly had the
16 opportunity to do so. They had the time.

17 QUESTION: I know it was an opportunity and
18 there may always be time. Was the information which the
19 police had if it had been presented to a magistrate or
20 other judicial officer sufficient to get a valid
21 warrant? You concede that.

22 MR. FABRICANT: Yes, it was because they
23 presented that same information 19 hours after the
24 illegal entry.

25 QUESTION: Well, they had the advantage of

1 knowing some things that they did not know 19 hours
2 before.
3 MR. FABRICANT: But they did not put them in
4 their affidavit for the warrant. They only put in their
5 affidavit what they knew at the time that they
6 determined in their own mind that they had probable
7 cause. They did not put in their affidavit that they
8 entered the apartment and saw some other contraband in
9 open view which would even have given them more probable
10 cause.
11 So I think it is clear that they could have
12 gotten a warrant before they entered.
13 QUESTION: They were taking some risk I
14 suppose that a warrant might not have issued.
15 MR. FABRICANT: Well, if that is so then they
16 are not supposed to go in.
17 QUESTION: Well, you never know in advance
18 whether a warrant is going to issue do you?
19 MR. FABRICANT: I think the point of the
20 Fourth Amendment particularly the warrant clause as
21 applied to homes is that it is not a determination to be
22 made in the first instance by law enforcement officers,
23 by police. The question of probable cause in the very
24 first instance is to be made by a magistrate.
25 QUESTION: But that is all pretty well

1 settled. No one as I understand it is arguing that the
2 entry into the home was legal or was justified without a
3 warrant.

4 The question is what consequences should be
5 attached to the illegal entry.

6 MR. FABRICANT: That is correct. I think the
7 consequences obviously -- I have said so in my brief.
8 The consequences should be the suppression of all the
9 evidence.

10 QUESTION: Well, the evidence they found
11 pursuant to their illegal entry was suppressed.

12 MR. FABRICANT: All the evidence they
13 discovered was.

14 QUESTION: Sure. Isn't that a sufficient
15 deterrent to unlawful conduct because if an officer
16 enters a home illegally and discovers something it
17 cannot be used? Isn't that enough of a deterrent
18 without also arguing that evidence obtained under the
19 warrant which was not obtained by virtue of any illegal
20 discovery should also be invalidated?

21 MR. FABRICANT: No, I do not think it is
22 enough of a deterrent to deter the police from illegal
23 entry in homes because in a great deal of situations
24 contraband is not on kitchen tables. It is not on
25 desks. It is secreted.

1 The mere penalty of depriving the government
2 of the use of those objects which were seen in open view
3 upon the illegal entry of the police would not in my
4 opinion be enough of a deterrent.

5 QUESTION: Do you understand the government to
6 argue that the entry was actually legal?

7 MR. FABRICANT: Well, they admit that it is
8 not an issue but then they do argue that it is legal.

9 QUESTION: Because if you can stay on the
10 premises to prevent the destruction of evidence you
11 should be able to enter the -- If you stay on the
12 premises legally to prevent the destruction of evidence
13 why shouldn't you be able to enter the premises legally
14 in the first place to prevent the destruction of
15 evidence?

16 MR. FABRICANT: Because the --

17 QUESTION: Isn't that the logical end of the
18 government's position?

19 MR. FABRICANT: Well, it is the end of their
20 position, but I do not agree with it. There is a --

21 QUESTION: Well, I know you do not agree, but
22 if you lose this case wouldn't that be the necessary
23 result that the entry is legal in the first place?

24 MR. FABRICANT: That would be the result if
25 the convictions were affirmed, and I submit that the

1 warrant clause would almost disappear. The police would
2 always in the future secure premises from the inside,
3 and that is what the Constitution is designed to protect
4 --

5 QUESTION: How can that --

6 QUESTION: The consequence that Justice White
7 just suggested to you, though, is essentially the same,
8 is it not, if there had been a hot pursuit and the
9 peopled entered the house and the police followed them
10 in the hot pursuit context. No warrant there is there?

11 MR. FABRICANT: But that is a clearly defined
12 exception to the warrant requirement, the hot pursuit.

13 QUESTION: You said there is no exception as
14 of now at least that allows the police to occupy a
15 premises to preserve the status quo with respect to
16 evidence.

17 MR. FABRICANT: Not from the inside. From the
18 outside, yes, but once they cross the threshold and are
19 on the inside then they are there in this particular
20 case for 19 hours having removed all the occupants and
21 are there alone to use their discretion for the 19
22 hours. The potential for mischief of their being there
23 for the 19 hours is something which I would hope that
24 this Court would consider, the potential for mischief.

25 I am not saying that the agent in this case

1 peeked or --

2 QUESTION: Counsel.

3 MR. FABRICANT: Yes, Your Honor.

4 QUESTION: You emphasize the 19 hours.

5 Suppose it had been half an hour.

6 MR. FABRICANT: It would have still been a
7 violation, but it would have been less of a violation.
8 Perhaps this Court --

9 QUESTION: Would it have changed the outcome
10 of the case in your opinion?

11 MR. FABRICANT: You mean at the trial level?

12 QUESTION: At the level you are arguing here
13 today. You have emphasized 19 hours. Of course, that
14 is more egregious, but in terms of the principle
15 involved does it make any difference whether it was a
16 half hour or 15 minutes or 19 hours?

17 MR. FABRICANT: No, but this Court might feel,
18 for example, because of the easily disposable nature of
19 narcotics which was the contraband in this case that the
20 police should be able to secure a premises from the
21 inside. But if that is so I would hope that this Court
22 would say that can only be done for the absolute minimum
23 amount of time necessary to secure a search warrant.

24 QUESTION: I would think your position would
25 have to be though that entry for five minutes is

1 illegal.

2 MR. FABRICANT: That is my position.

3 QUESTION: You would be here if it were only
4 five minutes wouldn't you?

5 MR. FABRICANT: I would be here --

6 QUESTION: If it was only five minutes you
7 would still be here wouldn't you?

8 MR. FABRICANT: I would still be here, but I
9 think I would have less of a potent argument.

10 QUESTION: Why?

11 MR. FABRICANT: Because this Court in recent
12 years has not automatically applied the exclusionary
13 rule. It has applied the rule when its purposes would
14 be best achieved.

15 A five minute entry, running in, securing and
16 running out although it involves a crossing of the
17 threshold is a lot different than a 19 hour continuous
18 occupation.

19 QUESTION: You might not apply the
20 exclusionary rule, but I am not sure it would change the
21 Fourth Amendment rationale very much. I mean whether
22 the entry was legal.

23 MR. FABRICANT: No, it does not -- The entry
24 is still illegal, but when they have been there
25 particularly longer than the time necessary to get a

1 warrant and they --

2 QUESTION: It is either legal or it is illegal
3 in both instances whether it is nine hours or five
4 minutes.

5 MR. FABRICANT: That is correct, but it is
6 more egregious the longer they are there.

7 May it please the Court, I would like to
8 reserve my remaining time for rebuttal.

9 Thank you.

10 CHIEF JUSTICE BURGER: Very well.

11 Mr. Frey.

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

13 ON BEHALF OF RESPONDENT

14 MR. FREY: Mr. Chief Justice, and may it
15 please the Court:

16 Let me start by just listing some basic things
17 about this case that are not disputed to put it in
18 context. First, the officers lawfully acquired probable
19 cause to arrest both Petitioners and to believe that
20 there was a substantial quantity of cocaine in their
21 apartment.

22 Second, the officers did not immediately
23 conduct a warrantless search of the apartment on the
24 basis of this information. Rather, they consulted with
25 an Assistant United States Attorney and then staked out

1 the apartment for the purpose of apprehending
2 Petitioners and preventing possible destruction of the
3 evidence.

4 Third, the officers lawfully arrested the
5 Petitioner Segura when he arrived at the apartment at 11
6 p.m. Fourth, the officers then entered the apartment
7 because they believed that such action was necessary to
8 prevent destruction of evidence.

9 In fact, the Court of Appeals held and we do
10 not dispute here they had an insufficient basis for
11 concluding that there were exigent circumstances
12 justifying a warrantless entry and, therefore, their
13 entry did violate the Fourth Amendment.

14 Fifth, when the officers entered they
15 conducted only a limited security search and not a full
16 evidentiary search. Some evidence was found at the time
17 of this limited security search, and that has been
18 suppressed, but nothing seen during this initial search
19 contributed in any way to the issuance of the warrant.

20 Sixth, the occupants of the apartment
21 including Petitioner Colon were arrested and removed
22 from the premises. Seventh, subsequently 19 hours later
23 a valid warrant issued and the search under its
24 authority uncovered the evidence at issue in this case.

25 Now I think it is black letter law. I do not

1 understand anybody to really dispute it although I am
2 not sure that the exclusionary rule does not operate on
3 Fourth Amendment violations in the abstract.

4 Rather, it calls for the suppression of
5 evidence that is sufficiently connected to or produced
6 by a Fourth Amendment violation. Now in this case the
7 evidence was discovered and seized during the execution
8 of a valid and untainted search warrant issued by a
9 judicial officer on a showing of lawfully acquired
10 probable cause.

11 Now the events surrounding this transaction
12 also did include an unlawful entry into the premises
13 where the evidence was ultimately found, but the Second
14 Circuit concluded and we submit to this Court that there
15 was no sufficient connection between the illegality and
16 the acquisition of the evidence.

17 Two theories have been advanced to get around
18 the simplicity and I think compelling nature of our
19 position. The first is Petitioners' theory that there
20 was somehow an unlawful seizure of this evidence in the
21 course of the illegal entry and that this made it
22 primary evidence not subject to any fruits analysis and,
23 therefore, not requiring a connection between the
24 illegality and the discovery of the evidence.

25 The second is the theory of the District Court

1 that there was a causal connection. That is, there was
2 a hypothetical causal connection because had the illegal
3 entry not occurred the occupants of the apartment might
4 have destroyed the evidence.

5 Now I want to discuss both these theories
6 because I do not think they stand up. But in order to
7 make the case simpler I would like to start with looking
8 at the situation in which the house was empty because I
9 think that would make our position clear in its pristine
10 form.

11 If the officers enter an empty house it is
12 still a violation of the Fourth Amendment if they do not
13 have a warrant or exigent circumstances.

14 QUESTION: You confess a place of business is
15 distinguished from a residence, a home.

16 MR. FREY: Well, with a place of business
17 there would be a question as to what the zone of privacy
18 or private areas are, but they would require a warrant
19 or exigent circumstances in private areas of a place of
20 business as a home. I mean, I think the Court has held
21 that. I do not think that is an issue here.

22 The point is that they would illegally enter
23 the home then some time later the warrant would issue.
24 They would conduct their search. They would find the
25 evidence. I do not see any conceivable way in those

1 circumstances in which it can be said that the evidence
2 is a fruit of the unlawful entry.

3 So unless the Court is going to totally
4 abandon the notion that there does have to be a
5 connection between the illegality and the evidence that
6 is sought to be admitted at trial at least in the empty
7 house situation --

8 QUESTION: The connection according to the
9 other side is that they stayed there. I think his
10 argument would be if they had gone out and left the
11 place and then gone 19 hours for the warrant they would
12 not have the same complaint. But somehow they say the
13 fact that they stayed there in the house for 19 hours
14 negated the whole thing.

15 Incidentally, did they get overtime for that
16 19 hours?

17 (Laughter)

18 MR. FREY: I do not know. I do not think the
19 record reflects.

20 Let me address the 19 hour point because -- I
21 do not defend the police staying inside the apartment
22 after the premises were secured. I believe that that is
23 not a justifiable or reasonable action because it is not
24 necessary, and it does seem to me that that is a
25 continuing search while they are in there.

1 The whole point of why they cannot enter
2 without a warrant is that that entry constitutes a
3 search, not a seizure but a search of the premises. So
4 I do not defend their staying in.

5 In my opinion once they had removed the
6 occupants of the apartment they should have gone outside
7 and waited outside the door.

8 QUESTION: Under your rule what is the
9 incentive for them to leave?

10 MR. FREY: Well, anything --

11 QUESTION: It is desirable as you conceded it
12 that they should not stay. Now what is their incentive
13 to get out?

14 MR. FREY: Well, one would be civil liability
15 if the Court made it clear that they were not permitted
16 to stay inside once the premises were secured. The
17 point that I want to make about the 19 hours because I
18 think it is critical to this case is that it is
19 perfectly obvious that if they stayed inside or outside
20 during the 19 hours that cannot possibly have any
21 connection with the discovery of the evidence under the
22 warrant.

23 As long as they were entitled to secure the
24 premises from the outside which I do not understand my
25 opponent to dispute, it is just an illegality hanging in

1 the air. It is still the same thing.

2 QUESTION: Well, you think there is a
3 qualitative difference between seizing a home from the
4 inside without a warrant and seizing it from the
5 outside?

6 MR. FREY: Well, I do not think the difference
7 resides in seizure doctrine. First of all, the concept
8 of seizure that my colleague has come up with has no
9 background in this Court's decisions, the notion that
10 when you impound a house and prevent people from going
11 in that constitutes a seizure of every item of the
12 house's contents --

13 QUESTION: Well, you do not ordinarily seize
14 real property do you?

15 MR. FREY: No. I mean there may be an
16 abstract or theoretical sense in which there is --

17 QUESTION: But if you could do it I suppose
18 there would be a seizure involved if you secured it from
19 the outside.

20 MR. FREY: There would be. I think the point
21 that I am making is in part but to the extent you are
22 going to say that there is a seizure of the house that
23 seizure is permissible if done from the outside while
24 you are procuring a warrant in order to prevent people
25 from entering and removing evidence.

1 QUESTION: Even if it is labeled seizure?

2 MR. FREY: Even if it is labeled seizure. A
3 seizure --

4 QUESTION: Mr. Frey, the Fourth Amendment does
5 not just use the term "seizure". It uses the term
6 "unreasonable seizure".

7 MR. FREY: Unreasonable --

8 QUESTION: Is it not at least theoretically
9 possible that one could say that the seizure when you
10 are outside is reasonable but when you are inside it is
11 unreasonable?

12 MR. FREY: Well, I think what --

13 QUESTION: At least that is conceptually
14 possible to say that.

15 MR. FREY: I could conceive of somebody saying
16 it, yes, and I --

17 QUESTION: I think you have almost admitted it
18 because you said you thought they ought to go outside.

19 MR. FREY: I think that when they enter the
20 house without exigent circumstances they are committing
21 a Fourth Amendment violation.

22 QUESTION: Right.

23 MR. FREY: In my opinion the Fourth Amendment
24 violation they are committing is illegal search --

25 QUESTION: But you said you thought they ought

1 to get out as soon they could and why unless you think
2 one condition is more reasonable than the other?

3 MR. FREY: Not with respect to seizure. I do
4 not think you could label it any more unreasonable
5 seizure. The problem is that while they are sitting in
6 the house they may be going to the refrigerator and
7 getting a beer, looking around, seeing things that were
8 not evident to them during their initial entry, and of
9 course if they see things during this 19 hours that they
10 are there that is evidence of a crime then under the
11 Second Circuit's rule they would not be able to use
12 that.

13 So they do have some incentive to get out, and
14 from the standpoint of furthering their investigative
15 goals in the case they have virtually no incentive to
16 stay in because the purpose was to secure the premises.
17 Once that purpose is accomplished you can equally well
18 secure the premises by posting -

19 QUESTION: Well, I think they have an
20 incentive to stay in in February in New York.

21 (Laughter)

22 MR. FREY: I assume the corridors of this
23 apartment building were also heated.

24 QUESTION: Do not bet on it.

25 (Laughter)

1 QUESTION: Mr. Frey, I take it although the
2 issue is not here but I take it from your brief or
3 somewhere that if the officers had known in advance what
4 they learned after they entered here as to who was on
5 the premises you would say that they could have entered
6 legally.

7 MR. FREY: Well, I do not think actually --

8 QUESTION: If they had known that there were
9 people on the premises and they had probable cause to
10 believe that there are easily disposable narcotics on
11 the premises, could they make a legal entry for the
12 purpose of removing the people?

13 MR. FREY: That would be -- If they in
14 addition had sufficient reason to believe there was a
15 danger of destruction of the narcotics they could make
16 an entry for the purpose of preventing the destruction
17 of the evidence.

18 QUESTION: In which event although the entry
19 was legal if they stayed too long it would become
20 illegal.

21 MR. FREY: Equally whether the legal --
22 Whether the initial entry was legal or illegal does not
23 relate to whether it is illegal for them to continue
24 staying here, but I think this whole 19 hour business is
25 a complete red herring in this case. I mean, it has

1 never been suggested, and I do not understand how it
2 could be what relationship the 19 hours has to the
3 discovery of the evidence. It is though they took
4 Segura down to the station house and beat a confession
5 out of him.

6 It would be shocking and improper but it would
7 not have anything to do with the discovery of the
8 evidence.

9 QUESTION: The affidavit as I understand it
10 was not only based on facts that were in the hands of
11 the police before the entry but was actually turned in
12 earlier wasn't it?

13 MR. FREY: No.

14 QUESTION: Was the affidavit turned in later?

15 MR. FREY: After the entry.

16 QUESTION: When was it executed?

17 MR. FREY: What the record shows is that they
18 entered at 11 o'clock at night. They arrested the
19 people. The next morning they went in to the U.S.
20 Attorney's Office.

21 There was a discussion with the AUSA in which
22 the agent in charge related the facts for the purposes
23 of preparation of a search warrant affidavit. Most of
24 the day was then taken up with the process of booking
25 and the initial appearance of the suspects, appointment

1 of counsel, bail, all of those matters.

2 So I do not think the 19 hours is as bad as it
3 sounds. I do not have a problem with the 19 hours. I
4 do have a problem with staying in the apartment for
5 whatever period of time is --

6 QUESTION: Well, you also have a problem that
7 you really have not met yet of saying that the illegal
8 entry tainted the later search under the warrant because
9 it did keep the people who were found to be on the
10 premises from destroying the evidence.

11 MR. FREY: Well, let me turn to --

12 QUESTION: You still have to get to that.

13 MR. FREY: Yes. My colleague has not really
14 relied on that theory, but I will turn from the seizure
15 theory which seems to me quite untenable for the moment
16 to this more traditional fruits kind of inquiry that you
17 are suggesting which is that the possibility that the
18 evidence would have been destroyed before they got a
19 warrant suggests that the evidence found under the
20 warrant should be treated as a fruit if I understand
21 your question.

22 Now I have several responses to that, and this
23 is a little bit like the flip side of the inevitable
24 discovery cases where what you are dealing with is a
25 hypothetical independent source. The evidence was

1 actually found during an illegal search, but the
2 government can hypothesize that it would have been
3 discovered in any event.

4 Here the shoe is on the other foot, and it is
5 the defendant who is hypothesizing that the evidence
6 would have been destroyed had the entry not been made.
7 Now there are a couple of problems with that.

8 First is that the destruction of evidence is a
9 crime. The purpose of the Fourth Amendment is not to
10 aid offenders in the destruction of evidence to prevent
11 the uncovering of their acts, and I do not believe as a
12 matter of exclusionary rule policy that it would be
13 appropriate to treat the possibility of destruction of
14 evidence where that is the sole hypothetical nexus
15 between the illegality and the discovery of the evidence
16 as a causal connection which bridges the gap and
17 transmits the taint to the discovery of the evidence.

18 QUESTION: What about removing it? Is that
19 illegal too?

20 MR. FREY: It is illegal I think to remove or
21 destroy for purposes of evading --

22 QUESTION: You think it would have been a
23 crime for somebody to pick up the briefcase and walk off
24 and go to somebody else's house with it?

25 MR. FREY: I do not think it would be a crime

1 if it were not for the purpose of removing evidence from
2 -- In any event the entry did not prevent them from
3 removing the evidence. They were not going to be able
4 to remove any evidence in any event -- prevented them
5 from destroying the evidence.

6 QUESTION: I do not know.

7 MR. FREY: Well, they were staking out the
8 place from the outside. If Colon who was in the
9 apartment had left they could have arrested her. They
10 had probable cause to do so.

11 QUESTION: Did they have probable cause to
12 arrest anybody they found in there that came out of the
13 building?

14 MR. FREY: Not necessarily. That would depend
15 on the facts. Anybody in the apartment?

16 QUESTION: Do you think they could have
17 searched anybody who came out of the apartment? They
18 might not have been able to detain them.

19 MR. FREY: Well, in Rawlings v. Kentucky the
20 Court adverted to but did not decide the question, and
21 in Michigan v. Summers I think the Court suggested that
22 they could require people not to leave unless they would
23 agree to subject themselves to a search.

24 The question is what is reasonable under the
25 circumstances given the officers' possession of probable

1 cause. Let's not forget in all of this that at all
2 times they had probable cause to believe that there was
3 a half kilogram of cocaine.

4 QUESTION: Do we have a case -- There are so
5 many Fourth Amendment cases. Do we have a case that
6 says that officers may secure a house until they get a
7 warrant?

8 MR. FREY: Mincey v. Arizona.

9 QUESTION: We applied it at least if not
10 stated it in the search case last June, the name of
11 which eludes me now other than Mincey where the customs
12 agents found and then they had a controlled delivery.
13 Is that Mincey?

14 MR. FREY: Oh, Illinois v. Sandreyas.

15 I think the question in these circumstances is
16 what is reasonable during the time when the officers are
17 procuring a warrant in terms of immobilizing the
18 premises, and there are a lot of interesting questions.
19 I do not think this Court has by any means explored all
20 of the ramifications of this issue, but I do think that
21 there is another feature of allowing the potential
22 destruction of the evidence to be used as establishing a
23 causal connection which is noteworthy and which the
24 Court of Appeals noted.

25 That is the adherent contradiction or irony in

1 saying that on the one hand the entry was illegal
2 because there was no sufficient danger of destruction of
3 the evidence, yet on the other hand the discovery of the
4 evidence was a fruit of the illegal entry because it
5 would have been destroyed had the officers not entered.
6 Now the result of this approach is to penalize the
7 officers for being right about the dangers of
8 evidentiary destruction.

9 QUESTION: Isn't there another problem here?
10 Wouldn't your result possibly depend on the length of
11 time involved and how your opponent in effect says you
12 take the same position with five minutes and 19 hours?
13 I take it you might not take the same position if it was
14 30 days say because even though it might not be
15 deliberately destroyed just in the ordinary course of
16 events a cleaning person might come in and throw
17 something away. Conditions change over a long period of
18 time.

19 Maybe I should ask you. Would you take the
20 same position in 30 days?

21 MR. FREY: Well, I am not sure that the fact
22 that an illegal entry has been made would be the
23 critical question. I mean, I think there is because the
24 standard of reasonableness governs Fourth Amendment
25 inquiries there is a question about the length of time

1 that it is reasonable to impound property or to exercise
2 dominion over somebody's home, and it would depend on
3 the purposes, what the officers were doing during that
4 time, what their purposes were, what they in fact --

5 QUESTION: What if this was a home out in the
6 country somewhere and they just moved in for 30 days
7 just waiting and for some reason there was --

8 MR. FREY: There would probably be -- Just
9 compensation clause might be applicable to that.

10 QUESTION: But you don't think that would have
11 any impact at all on this issue no matter how long a
12 period of time involved?

13 MR. FREY: Well, I am reluctant to say that it
14 wouldn't. Certainly if the causal connection between
15 the entry and the discovery of the evidence is, for
16 instance, not due to any crime but due to the cleaning
17 woman throwing it out or something like that then you do
18 not have the same problem of using this rationale of
19 kind of subverting the Fourth Amendment into a purpose
20 that is not its purpose.

21 QUESTION: Well, 30 days would be
22 "unreasonable" wouldn't you say?

23 MR. FREY: I would say ordinarily 30 days
24 would be --

25 QUESTION: Because I mean, for example, if the

1 agents stayed in that apartment for 30 days that would
2 be an unreasonable amount of food.

3 (Laughter)

4 MR. FREY: Well, it would be unreasonable.
5 Whether the Fourth Amendment is the right way to analyze
6 it I am not certain, and I point out that the 19 hours
7 is not a problem in this particular case because the two
8 people who were entitled to access to the apartment were
9 both subject to the arrest, and they were both in jail.

10 QUESTION: They were both arrested.

11 MR. FREY: They were both arrested. While the
12 arrest of Colon would be invalid under Payton v. New
13 York because it entailed a search of her home in
14 entering the premises, the actual seizure of her person
15 is not illegal because a warrant is not required under
16 Watson. So I do not think the magistrate if he were
17 applying the exclusionary rule at an initial appearance
18 would be justified in releasing her simply because the
19 arrest had been accompanied by an unlawful search of her
20 house.

21 The remedy for the unlawful search of her
22 house is to exclude any evidence discovered in the
23 course of that unlawful search. Now if I can come back
24 to the seizure theory for a moment.

25 I have a little difficulty dealing with it

1 because it strikes me that my opponent's argument is
2 something of an ipse dixit, and I do not know how to get
3 an analytical handle on it. The assertion that the
4 primary evidence-secondary evidence distinction is
5 relevant here which is an attempt to find some kind of
6 pigeon hole in Fourth Amendment analysis that he can fit
7 his case into seems to me completely out of place.

8 The whole concept of distinguishing between
9 primary and secondary evidence is derived in the course
10 of a search which reveals some evidence immediately and
11 which leads to other evidence. Now I can give you an
12 example in the case of a seizure to show that it is
13 misplaced here.

14 Let us suppose that somebody leaves his
15 property at a hotel check room and goes out of town for
16 two days and the police without probable cause seize his
17 briefcase but they do not open it and then before the
18 fellow returns to town they acquire probable cause, go
19 to the magistrate, get a warrant and search the suitcase.

20 I do not see any difficulty at all with
21 applying a fruits analysis with asking the question
22 whether the fact that they had seized it and had it in
23 their possession rather than having it left at the hotel
24 check room contributed to the discovery of the
25 evidence.

1 QUESTION: You went a little too fast for me
2 to catch the basis for the issuance of the warrant.

3 MR. FREY: Some after-acquired information
4 which gives probable cause. After they seize it an
5 informant calls up and says John Doe has left his
6 briefcase full of --

7 QUESTION: Red briefcase that was put in
8 locker 16 contains narcotics or some such thing?

9 MR. FREY: Yes and assuming there is probable
10 cause and they got a warrant. My point is just that
11 this notion that if it is somehow seized then it
12 automatically is primary evidence and you just do not
13 have to apply a fruits analysis is quite mistaken.

14 One of the consequences of this notion is that
15 the minute the police stick their nose inside the house
16 and seize it they have committed a violation which is
17 treated the same way as if they went through the house,
18 opened every desk drawer, removed every paper and item
19 of property, loaded it into a van and took it off all
20 without a warrant.

21 QUESTION: Mr. Frey, would your hypothetical
22 produce the same answer if the telephone call from the
23 informant was after the owner of the briefcase went to
24 the check room and said I want my briefcase?

25 MR. FREY: No. Then you would apply a fruits

1 analysis and you would determine that it was -- But my
2 point is --

3 QUESTION: So that in this case if they could
4 prove that ten hours later the cleaning woman would have
5 come and cleaned out the apartment, not to destroy
6 evidence but she does not like these little bags around
7 or something like that. Then they would win.

8 MR. FREY: Except for the fact that they could
9 have kept the cleaning woman out from outside.

10 QUESTION: I see. If, however, she had a key
11 to the back door or something like that then you would
12 lose.

13 MR. FREY: One can imagine --

14 QUESTION: I do not know what all this trouble
15 is about. I never heard any cleaning women around these
16 shooting galleries.

17 MR. FREY: This is not a shooting gallery.
18 This is a high-class, large scale cocaine distribution
19 operation. I mean, these people have \$50,000 in cash.
20 That is one of the items in evidence in issue here. He
21 had just distributed a half a kilo of cocaine. He had
22 three pounds more in his apartment.

23 QUESTION: Well, there was no cleaning people
24 involved in this case.

25 MR. FREY: No cleaning people involved in this

1 case.

2 QUESTION: I do not recall from the findings
3 of the District Court or the District Court's
4 observations but was there any treatment of whether this
5 was a place of business or home or residence by the
6 District judge?

7 MR. FREY: I think it is treated as a
8 residence.

9 QUESTION: Treated it, but was there any
10 analysis directed?

11 MR. FREY: I do not recall that there was any,
12 and I would not ask the Court to rest its decision in
13 this case on the notion that this is a place of business
14 because I believe even as a place of business it has
15 protection from the warrant clause.

16 QUESTION: The same degree?

17 MR. FREY: Well, it would not necessarily be
18 the same. We are not here to dispute whether the entry
19 into the premises without a warrant was lawful. That is
20 a given of this case that it was not lawful.

21 The reason we discuss that issue in our brief

22 --

23 QUESTION: The reason it was unlawful is that
24 they actually were mistaken about exigent
25 circumstances.

1 MR. FREY: That is what the Court of Appeals
2 said that there were not exigent circumstances --

3 QUESTION: You have not brought that up.

4 MR. FREY: Huh?

5 QUESTION: You have not challenged that.

6 MR. FREY: We have not challenged that. I
7 think the Court of Appeals made one mistake in its
8 analysis which we did not mention in our brief which is
9 that when they went and knocked on the door and Colon
10 opened the door they then knew before they had committed
11 any Fourth Amendment violation that the apartment was
12 occupied.

13 The Court of Appeals' finding of no exigent
14 circumstances did not rest solely on that but rested
15 also on the lack of sufficient probability if they had
16 just arrested Segura and taken him away that the
17 occupants would have destroyed the evidence.

18 QUESTION: But you are not defending the
19 result below on the grounds that the entry in the first
20 place was legal?

21 MR. FREY: No. I was saying the only reason
22 we discussed that point in our brief is because my
23 opponent tries to make much of the fact that this is a
24 flagrant or egregious violation of the Fourth
25 Amendment.

1 I want to get to the point about if we are
2 going to worry about deterrents in the air should we
3 just abandon the Court's normal principles of requiring
4 a nexus between the evidence and the illegality because
5 something that has concerned some courts a rule that
6 would allow the use of evidence in a case like this may
7 unduly encourage the police to engage in Fourth
8 Amendment violations.

9 There are several things to be said about
10 that. The first is that this is a situation which does
11 not inherently -- The rule for which we contend does not
12 inherently lend itself to encouraging flagrant
13 violations of the Fourth Amendment because the more
14 clear it is to the police that there are no exigent
15 circumstances the less they have to gain by entering the
16 premises rather than waiting for the warrant which they
17 fully believe they have probable cause to get and will
18 get.

19 When they enter the premises they can only
20 have the benefit of evidence that is held not to be a
21 fruit of the entry so under the holding of the Court of
22 Appeals in this case and as I think Justice O'Connor
23 pointed out earlier they still run the substantial risk
24 that evidence that is found during the original unlawful
25 entry if it is unlawful will be suppressed.

1 In addition, the problem of flagrant
2 violations is an area where civil liability is a
3 meaningful remedy. That is, the risk of encouraging
4 flagrant violations is attenuated or offset by the fact
5 that if it is flagrant there is potential civil
6 liability.

7 Now I think that is all I have unless the
8 Court has any further questions.

9 Thank you.

10 CHIEF JUSTICE BURGER: Mr. Fabricant, do you
11 have anything further?

12 MR. FABRICANT: Yes, I do.

13 CHIEF JUSTICE BURGER: You have five minutes
14 remaining.

15 ORAL ARGUMENT OF PETER J. FABRICANT, ESQ.,

16 ON BEHALF OF PETITIONERS -- REBUTTAL

17 MR. FABRICANT: Mr. Chief Justice, and may it
18 please the Court:

19 In response to the Chief Justice's question
20 about whether this was a residence the evidence
21 presented at the District Court was that the police had
22 been surveilling and trailing these two people for about
23 a month. As a matter of fact, one police officer, an
24 undercover officer, assisted in moving these people from
25 one apartment in Queens to another.

1 It is clear and the court below, the District
2 Court, assumed correctly that it was a residence. There
3 is a qualitative difference between seizing the
4 apartment from the outside and seizing it --

5 QUESTION: Do you think it would make a
6 difference if it were a place of business?

7 MR. FABRICANT: Yes. I think this Court has
8 always said that the highest expectation of privacy is
9 in a home more so than an automobile or I would even say
10 a business although you certainly do have a high
11 expectation of privacy in your office.

12 QUESTION: Then what about --

13 MR. FABRICANT: But not so much as the home.

14 QUESTION: Then what about a home which is
15 used as a place of business with the home if it could be
16 shown merely a front, a cover and it is really a place
17 for distributing narcotics?

18 MR. FABRICANT: I would think that if that
19 could be shown by the prosecution then your expectation
20 of privacy might be lessened at least somewhat. We do
21 not have that situation here.

22 There was no evidence or it was not propounded
23 to the District Court or the Court of Appeals that this
24 was a place of business disguised as a home.

25 QUESTION: Are you saying that there is no

1 expectation, no legitimate expectation of privacy in the
2 conduct of criminal affairs, criminal activity?

3 MR. FABRICANT: Well, the decisions of this
4 Court dealing with the Constitution do not just deal
5 with criminals. They deal with all of us.

6 Certainly we want to be able to have the
7 police catch criminals and seize evidence.

8 QUESTION: Well, but you spoke of it in terms
9 of the expectation of privacy which is the way the
10 courts have spoken of it. It is the subjective feeling
11 of the occupant of the home that he or she or all of
12 them are going to be secure.

13 What I am trying to get from you is you seem
14 to concede that there is less an expectation, a
15 legitimate expectation of privacy if it is a place of
16 business.

17 MR. FABRICANT: Perhaps because home is
18 mentioned in the Fourth Amendment. Place of business is
19 not. It would be perhaps a slighter less degree of
20 expectation of privacy. I do not think it would be much
21 less. It is just that this Court has always stressed
22 that the home has the highest degree of expectation;
23 therefore, perhaps an office has a slightly less
24 degree.

25 Certainly even a criminal committing crimes in

1 his or her home has an expectation of privacy that the
2 police will not violate the privacy of the home even
3 though they are committing crimes. I think the framers
4 in effect weighed that, and this Court has said that the
5 man has a right to retreat into his own home and there
6 be free from unreasonable governmental intrusion.

7 Unfortunately Fourth Amendment search and
8 seizure cases that get to this Court always seem to deal
9 with criminals.

10 (Laughter)

11 MR. FABRICANT: But it seems to me I would not
12 like it if the police using their own discretion came
13 into my apartment in New York and stayed 19 hours
14 because they believed I had contraband and then
15 continued to search and not search depending on what a
16 magistrate does the next day. That would affect my
17 rights as not a criminal.

18 The difference between seizing from the
19 outside and securing from the outside and doing what the
20 police did here is not a difference in result. The
21 result would have been the same, the securing of the
22 evidence, but I think on the outside would have been
23 reasonable.

24 I would equate the going inside rather than
25 securing it from the outside as opening the trunk in

1 Chadwick before they got the warrant or opening the
2 suitcase in Arkansas v. Sanders before they got the
3 warrant. Even though the house might be considered
4 seized even from the outside that would be perhaps a
5 reasonable seizure.

6 QUESTION: Suppose the officers stayed 19
7 hours and then left and the next day a warrant was
8 issued on independent grounds, on grounds that were not
9 tainted and they went and discovered what they
10 discovered here. Would you still argue that the
11 officers had committed such a grossly illegal act that
12 the authorities should never be able to search the
13 house?

14 MR. FABRICANT: I would still argue it, but I
15 think my argument would carry less weight because in
16 that situation there would at least be a break in the
17 continuous seizure.

18 QUESTION: I know, but in terms of the
19 connection between the entry and the discovery under the
20 warrant --

21 MR. FABRICANT: I would argue the same, Your
22 Honor..

23 QUESTION: I know, but you would have to.

24 MR. FABRICANT: I would --

25 QUESTION: Do you think your argument is any

1 weaker or any stronger now than if it were the next
2 day? Do you think the break makes any reason?

3 MR. FABRICANT: Only in the respect that --

4 QUESTION: Suppose that you would have to lose
5 the case if it were the next day. Wouldn't you think
6 you should lose this one? No, right.

7 MR. FABRICANT: No, right.

8 CHIEF JUSTICE BURGER: Thank you, gentlemen.

9 The case is submitted.

10 (Whereupon, at 11:00 a.m., the case in the
11 above-entitled matter was submitted.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

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

#82-5298 - ANDRES SEGURA AND LUZ MARINA COLON, Petitioners v.

UNITED STATES

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

Pine Amos

(REPORTER)

83 NOV 16 P4:02

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE