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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1160

TITLE BERTOLD J. PEMBAUR, Petitioner V. CITY OF CINCINNATI, ET AL.

PLACE Washington, D. C.

DATE December 2, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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BERTOLD J. PEMBAUR, :

Petitioner, :

V. : No. 84-1160

CITY OF CINCINNATI, ET AL. :

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Washington, D.C.

Monday, December 2, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 o'clock a.m.

APPEARANCES:

ROBERT E. MANLEY, ESQ., Cincinnati, Ohio; on behalf of the petitioner.

ROGER E. FRIEDMANN, ESQ., Assistant Prosecuting Attorney; Hamilton County, Ohio, Cincinnati, Ohio; on behalf of the respondents.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Pembaur against Cincinnati.

Mr. Manley, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT E. MANLEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MANLEY: Mr. Chief Justice, and may it please the Court, to a certain extent this case can be characterized as the opposite of the Tuttle case which this Court decided several months ago. Here we do not have low level policemen going off on a frolic of their own to violate constitutional rights. We have the opposite.

We have patrolmen and deputy sheriffs who have grave reservations about the propriety of their chopping down a door in order to search a private doctor's office without a search warrant, armed only with an order to attach the bodies of people who may or may not be inside and who are not the owners of the premises.

Because of these grave reservations, they summoned for instructions from their superiors. Ultimately, their superiors referred the problem on up to the county prosecutor, who is an elected official, and who is --

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QUESTION: Would you classify him as a superior, Mr. Manley?

MR. MANLEY: Well, he is the policymaker in terms of legal matters for the county, because the statute under which --

QUESTION: Can he instruct the chief of police what to do?

MR. MANLEY: He can instruct county agencies what to do. The statute expressly gives him authority to instruct county agencies what to do.

QUESTION: But this is the city of Cincinnati.

MR. MANLEY: Well, the matter before this Court only involves the county of Hamilton.

QUESTION: The county, Hamilton County.

MR. MANLEY: The Hamilton County deputy sheriffs. The Sixth Circuit reversed the trial court with respect to the city of Cincinnati, so the only issue is whether or not Hamilton County has exposure for this unconstitutional invasion.

QUESTION: So if the prosecuting -- if the county attorney, if that is the term in Hamilton County, wants a particular item seized by the police, he can tell the chief of police, go out and seize that item, I think it is legal to do so?

MR. MANLEY: Well, in this particular --

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QUESTION: Can you answer the question more generally?

MR. MANLEY: Well, I don't know that he can do that to the chief of the Cincinnati police department. I think he can do it to the deputy -- the sheriff's department under the --

QUESTION: You mean he has line authority over him?

MR. MANLEY: No, the sheriff is elected, and his line authority, but we have a peculiar statute in Ohio.

QUESTION: I know. I suppose the prosecutor is certainly authorized to give them legal advice, but is he authorized to order the sheriff to go out and search a house?

MR. MANLEY: Well, as a matter of fact, the statute expressly gives them the authority to give instructions. It is Ohio Revised Code Section 309.08 and 9, and it gives him --

QUESTION: Where is that in -- are you referring to something before us?

MR. MANLEY: It is cited in our reply brief at Page 2.

QUESTION: Is it quoted?

MR. MANLEY: I am not certain whether it is

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quoted.

QUESTION: All right.

QUESTION: Page 2.

MR. MANLEY: It is also in the respondent's brief in Footnote 1 at Page 8 where it is set forth, the language is set forth. So that we are in a situation where the county prosecutor has been found by the Court of Appeals to be a policymaker, and under the procedure of referring questions -- the sheriff has a policy to refer questions of this sort to the prosecutor. It is referred to him, and he says go in and get them. He gives them instructions to go in and get them.

The deputies, when they get these instructions, tell Dr. Pembaur, Doctor, please open the door, because if you don't, we are going to have to break it down, because the prosecuting attorney told us to go in and get them. There was no doubt in the minds of the sheriffs or deputy sheriffs as shown on the record in this case that they were operating under instructions from the county prosecutor, who is a policymaker for Hamilton County in areas of his authority, and who is obligated under Ohio law to give instructions to county departments, including the sheriff's department, and he gave instructions. The instructions were followed, and as a consequence the

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door was chopped down, and the search was conducted without a search warrant.

QUESTION: Does the record tell us that the search was conducted by county sheriffs or city police?

MR. MANLEY: Well, it was a joint exercise. The sheriffs arrived. Later city police arrived. The sheriffs attempted to break the door down without success. This lasted for two hours. The sheriffs sat around for two hours waiting to act until they got the instructions from the county prosecutor. They put their shoulders to the door. It didn't budge, so the police took an ax and sledgehammer and broke it down. Then the sheriffs went in and conducted the search. I forget whether the policemen went in or not, but I believe they did. But the sheriffs were responsible for conducting the search. The police were there under a city policy to assist the sheriffs.

And in this situation, as I read Tuttle, a policy is the selection of alternative courses of action, and in this particular situation the prosecutor was apprised of the situation. He knew he could have -- had plenty of time to get a search warrant, because there was a two-hour interval between the arrival of the sheriffs and the time of the breakdown, during which time the doctor served the sheriffs tea from the

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window. It was not a --

QUESTION: Mr. Manley, let me go back just a moment to the thing we were questioning you about earlier. Did you say that the Court of Appeals found as a matter of Ohio law that the county attorney had line authority over the sheriff?

MR. MANLEY: No, I did not say that. The Court of Appeals did not address that particular question. The Court of Appeals did say the county prosecutor is a policymaking official in this area of activity, and did say that the constitutional rights of the doctor were in fact violated, but found that there was no policy in this particular case because of the failure to implement the county prosecutor's position more than once.

And here, I believe the Sixth Circuit has confused two lines of cases.

QUESTION: May I ask you a question before you proceed? The telephone call was received by the assistant county prosecutor. If there had been a policy, why would he have gone to the prosecutor himself?

MR. MANLEY: Well --

QUESTION: He certainly would have known if there had been a policy.

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MR. MANLEY: I believe, there again, as I read Monell and Owen, we have a county policy when the person who has the authority acts, and if he has the authority to take an action on behalf of the county, that thereby becomes policy.

QUESTION: Just once?

QUESTION: A single action --

MR. MANLEY: A single action.

QUESTION: A single action made on the spur of the moment in response to a telephone call relayed to him by one of his assistants?

MR. MANLEY: That is exactly what happened in Owen. That is exactly what happened in Fact Concerts.

QUESTION: That is not my reading or recollection of Owen.

MR. MANLEY: It was a single action. That was the only time they ever fired a city manager without due process.

QUESTION: What does the word "policy" mean?

MR. MANLEY: Well, I believe that it is defined in Tuttle as the selection from alternative courses of action, and here the county prosecutor had the option of getting a search warrant -- the county courthouse was five minutes away -- telling the deputy sheriffs to secure the area and wait for them to leave

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at the close of the business day if they were there, or having the deputy sheriffs go out to the homes of the individuals, which is where the capiases were adressed. You know, the record shows that the capias for Dr. Maulden was issued 20 days before the breakin. They had 20 days in which to --

QUESTION: What policy do you think the county attorney adopted here?

MR. MANLEY: The county attorney adopted -- did two things. First of all, he articulated what both he and the sheriff believed to be the long-standing policy of the county. Namely, you can break down a door to make an arrest, and that is based upon an Ohio statute which says you can break down a door to make an arrest. It is based upon a Sixth Circuit decision, I believe McKinney, which is cited in our brief.

But that Sixth Circuit decision refers to an arrest where there has been a warrant issued for arrest for a crime. This is a capias, a body attachment, an order that a notary public can issue in the state of Ohio without any kind of prior judicial review, and of course this Court in Steagald has clearly indicated what the county thought the policy was was --

QUESTION: You say he articulated a longstanding county policy. Does that suggest it had

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not been articulated before?

MR. MANLEY: Well, it had never been written down.

QUESTION: Why wouldn't it be a custom, then, if not a policy?

MR. MANLEY: The record shows that the sheriff and the deputy sheriffs testified that they had served capiases on third party --

QUESTION: Well, at the time it was quite constitutional to run searches this way, wasn't it?

MR. MANLEY: On a capias? I don't think so.

QUESTION: No, but I mean a search of a third party was not unconstitutional at that time.

MR. MANLEY: With a search warrant, but not without a search warrant. There is no case that I can find that says that you can use a capias --

QUESTION: What did Steagald hold?

MR. MANLEY: Steagald held that you cannot use an arrest warrant as a substitute, but we are not talking about an arrest warrant. We are talking about a capias, which is a different kind of breed of cat under Ohio law. It is not -- in the McKinney case the Sixth Circuit held that you have extraordinary circumstances because there has been a judicial determination that there is probable cause that a crime has been

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committed. You don't have any of that with respect to a capias. Any witness who doesn't appear is subject to being picked up as in -- after the manner of a forthwith subpoena, and that kind of an order can be even issued, as I say, by a notary public, without any kind of prior judicial determination that there is probable cause that there has been a crime committed. So that is an entirely different thing, and I know of no case that says you can use a capias as a substitute for a search warrant.

QUESTION: But in this case the Sixth Circuit held that its McKinney case, which I gather was based on a search warrant and not a capias, exonerated Waylan.

MR. MANLEY: That is correct, but you see, there, Mr. Justice Rehnquist, Waylan is subject to a good faith immunity defense, whereas Owen is -- under Owen the county is not. So that Waylan can be honestly mistaken, and be free of any liability, but the county does not have a good faith immunity defense, and so that -- but the McKinney case involved an arrest warrant, not a search warrant, but not a capias. There is no case that we have found where a capias has been used as a substitute for a search warrant.

QUESTION: Mr. Manley, they had to have some equipment to break in the door. I assume they had

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equipment to break in the door.

MR. MANLEY: Well, they -- having failed with their shoulders, a policeman went to a nearby firehouse and acquired an ax and a sledgehammer, again demonstrating --

QUESTION: Was that before he called the prosecutor?

MR. MANLEY: After he called the prosecutor, and so there would have been enough time at that period to have gotten a search warrant.

QUESTION: Mr. Manley, let me read you two sentences from the Court of Appeals opinion on 5A of the petition for writ of certiorari. You are probably familiar with the opinion. It is talking about Waylan's actions, and it says, "Waylan's actions therefore did not violate any clearly established constitutional right. In fact, his instructions to the officers accorded with the law as it stood in 1977."

Now, that sounds as though the Court of Appeals didn't agree with your distinction between capiases and search warrants.

MR. MANLEY: They didn't discuss that distinction. They just assumed --

QUESTION: But they said -- they announced that it was not --

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MR. MANLEY: That's right.

QUESTION: -- not forbidden by clearly established law.

MR. MANLEY: They announced that McKinney would justify this.

QUESTION: Let's assume that was the correct view of federal constitutional law.

MR. MANLEY: All right.

QUESTION: Then where do you go?

MR. MANLEY: Well, assuming that were the correct view of federal constitutional law, with which, of course, I don't agree, then that still makes the Sixth Circuit incorrect in its determination of the case for the following reason.

QUESTION: Well, if that were the case, at the time this search was made, at the time they knocked the door down, it was quite constitutional to do so on that assumption.

MR. MANLEY: But that does not excuse the county from liability.

QUESTION: Well, you argue that because of Owen, I take it.

MR. MANLEY: Of Owen.

QUESTION: Yes, but Owen wasn't a Fourth Amendment case.

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MR. MANLEY: That's correct.

QUESTION: It's a due process case. And I didn't -- let's assume that as a result of this search there was a criminal case brought against the doctor. Let's assume that.

MR. MANLEY: Well, there was.

QUESTION: Or against the owner of the office. Was there? Do you think the evidence that was seized would have been admissible?

MR. MANLEY: Well, as a matter of fact, in this particular search, nothing was seized, nothing was found.

QUESTION: Well, assume there had been, and it was relevant to the case. Do you think it would have been admissible?

MR. MANLEY: That didn't happen in this case.

QUESTION: Well, I know, but if it had happened, it seems to me it would be admissible even in spite of Steagald, because the Fourth Amendment cases like this are not retroactive.

MR. MANLEY: In this particular situation, I don't believe that there is anything revolutionary about the concept that you should not break down a door without a search warrant. Certainly in Steagald the Court made it clear that -- this Court made it clear

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that it was not pioneering.

QUESTION: Don't you agree that new decisions in Fourth Amendment law are not retroactive? At least for purposes of the exclusionary rule?

MR. MANLEY: For purposes of the exclusionary rule, but this is not -- that is in conflict with the policy enunciated in the -- by Congress in the Act of 1871. It defeats the deterrent purpose of the statute, which is to discourage people from using the color of law from violating constitutional rights.

QUESTION: I know, but it doesn't deter much if the municipal authorities thought they were acting in accordance with clearly established law at that time.

MR. MANLEY: Well, in other circuits the law was to the contrary. We cited those in our briefs. The Sixth Circuit was by far a minority viewpoint.

QUESTION: Now you are attacking the Sixth Circuit's view. Do you think that is essential for you to win?

MR. MANLEY: I do not think it is essential for us to win, because the purpose of the statute, of 1871 statute is to deter this kind of behavior on the part of people --

QUESTION: The purpose of the exclusionary rule is to deter, too. And yet Fourth Amendment

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decisions we have held are nonretroactive.

MR. MANLEY: I believe the compensatory aspects of 1983 are retroactive. I believe they are retroactive. And Owen is a situation where it was retroative, and Owen goes on to explain in great detail why it should be retroactive, and it refers by -- incorporates or quotes the case from Boston.

QUESTION: I would think your policy argument -- if you accept -- the best argument for your policy argument for a county policy is to accept the Sixth Circuit's statement that it was not contrary to law at the time, because you would think that the county officers would be carrying out procedures that the constitution permitted.

MR. MANLEY: Well, as a matter of fact --

QUESTION: And that is exactly what they testified to.

MR. MANLEY: That is exactly what the sheriff testified to, that he was of the opinion that this was permissble --

QUESTION: But if it were contrary to clearly established law at the time, I think you would have a tough time establishing a policy from a single act.

MR. MANLEY: Well, at that particular time it was the sheriff's belief and the county prosecutor's

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belief that this was a lawful course of action.

QUESTION: Right.

MR. MANLEY: There is no question about that. And the prosecutor was articulating what both he and the sheriff believed to have been the longstanding policy as incorporated in the statutes of Ohio and as reflected in the McKinney case.

QUESTION: You say they were just mistaken.

MR. MANLEY: I believe they were mistaken.

QUESTION: At least you say that.

MR. MANLEY: They were mistaken. That is correct. And so that we have a situation where we have a policymaker doing one of two things, either, A, articulating a longstanding practice or policy, what was believed to be the lawful course of action in his official capacity as the county prosecutor, or taking an act which constitutes policy.

In either event, he is shaping policy for the county, and that policy directly resulted in breaking down the door and the illegal search without a search warrant, and under these circumstances, we respectfully submit that the Sixth Circuit should be reversed, and that the county should be held accountable for the implementation of this policy in breaking down the door and searching the premises without a search warrant.

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QUESTION: Do you distinguish policy from practice?

MR. MANLEY: Well, that is why I started to say the Sixth Circuit, I think, got off on the wrong track, but if you are trying to prove policy by means of a longstanding practice or custom, I think you have to show more than one time, repeated occurrences, and maybe even as in Rizzo 20 cases is not enough.

But on the other hand, a policy doesn't have to be proven by circumstantial evidence. A policy can be proven by the statements or the writings or the actions of a policymaker.

QUESTION: A single act.

MR. MANLEY: A single act by a policymaker in my opinion.

QUESTION: If the single act were a resolution of the governing body instructing an officer, that would be one thing, but there is nothing like that here, is there?

MR. MANLEY: There is nothing like that here, but for this particular area of activity, the governing body has -- county commissioners would have no power to pass such a resolution. The only people that have the power to set policy in this area are either the county prosecutor or the county sheriff, and they work together

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as a team.

QUESTION: Well, leave off the governing body. A memorandum, interoffice memorandum saying this is what you shall do hereafter.

MR. MANLEY: Or a policy manual. But there is a state statute that says you may break down a door to effect an arrest, and then you get into an ambiguity, does that apply to capiases or not, so that certainly they were following, and they relied upon this state statute throughout the multiple appellate processes in various courts, so to that extent the statute was articulating a policy that applied in the county and was implemented by the county prosecutor.

QUESTION: Mr. Waylan, assume that the assistant prosecutor couldn't find the county prosecutor, and obviously you had exigent circumstances here. Would the assistant prosecutor have had the authority to do what he did after he had talked to the prosecutor?

MR. MANLEY: Happily, we don't have that situation, and I don't know what the assistant prosecutor would have done. I know that if I had been assistant prosecutor, I think I would have said, wait 15 minutes and I will come up with a search warrant, and I don't know whether the county prosecutor has a policy of

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leaving an assistant in charge if he is absent. Some organizations do. So I really don't know what facts in the record would make it possible to answer that question.

QUESTION: So there was no policy that would have guided the assistant prosecutor.

MR. MANLEY: Well, that is not correct. The assistant prosecutor could have looked at the Ohio statute, and if he had, he would have said, based upon the Ohio statute, break down the door. He could have discussed it with the county sheriff, who would have said, well, it is our policy to use force to effect an arrest, failing to make a distinction between a capias and an arrest warrant, so that if he had done that, it would not have fallen under the single act policy formation.

It would have fallen under the articulation of a longstanding policy as reflected in the Ohio Revised Code, and as reflected in the custom of the sheriff's department. So that far he could have gone, but I just -- what I am having difficulty with is whether or not, if those other things were not present, would he be able by a single act to be able to create a new policy, and I honestly don't know the answer to that question.

CHIEF JUSTICE BURGER: Mr. Friedmann.

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ORAL ARGUMENT OF ROGER E. FRIEDMANN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. FRIEDMANN: Mr. Chief Justice, and may it please the Court, on behalf of the respondent Hamilton County, Ohio, we would urge this Court to affirm the decision of the Sixth Circuit Court of Appeals, which found that the petitioner had suffered no constitutional deprivation because of a policy of Hamilton County, Ohio.

Before proceeding into the argument, I think it would be well to clarify several points that were raised on the petitioner's argument, especially with regard to some of the facts. The record before the Court does indicate that Deputy Webb testified that there had been other instances where the third party premises had been searched in effectuating an arrest warrant.

However, the record also reflects that Webb testified that he had never had to use force before because he had never been denied entry before. When he had the arrest warrant for someone, the person who owned the premises let him in the door.

Also, in response to a question from Justice Marshall, petitioner indicated that the police had talked to the prosecutor before they went to get the

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fire ax. That in fact is not correct. The police department, the Cincinnati police department never did talk to the prosecuting attorney in Hamilton County, Ohio.

It was a deputy sheriff who contacted his supervisor, who in turn connected the deputy sheriff to the prosecutor's office, and the deputy sheriff first talked to an assistant prosecuting attorney who went in and talked to the prosecuting attorney, and the message was relayed back to the deputy sheriff.

One other matter, and this is a minor matter, but on Page 3 in Footnote 4 of the petitioner's reply brief he indicates that the respondents have changed their argument from the Court of Appeals in that in the Court of Appeals we were not arguing that it was not a policy of Hamilton County which caused the deprivation.

I believe that the statement that is in the footnote in the petitioner's reply brief is actually taken out of context to the entire paragraph in our brief before the Court of Appeals, and we have not changed our position in this matter.

Petitioner would have this Court --

QUESTION: Do you agree that the prosecutor has line authority over the sheriff?

MR. FRIEDMANN: I certainly do not, Your

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Honor.

QUESTION: Footnote 8 of the petitioner's brief that counsel referred to, it says the prosecutor is also the legal advisor for all county officers. Is that the extent of his authority, do you think?

MR. FRIEDMANN: I believe it is, Your Honor. The statute clearly provides -- I think it is Section 309.09 of the Ohio Revised Code -- that the prosecutor by statute has the duty to render advice to other county officers when they request such legal advice. That is his duty as the prosecuting attorney with regard to those other county officers.

QUESTION: It may be he doesn't have line authority, but that doesn't necessarily mean that he couldn't and didn't set policy.

MR. FRIEDMANN: Your Honor, I believe that there probably are situations where the prosecuting attorney may set policy for certain items or certain areas. I don't believe, though, that this is a situation where the prosecuting attorney --

QUESTION: I suppose you defend the Court of Appeals statement that the prosecutor's advice was consistent with the existing constitutional law at that time.

MR. FRIEDMANN: I would agree with that, Your

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Honor.

QUESTION: If that is the case, do you have a very -- I suppose the county or the state could have a policy of monitoring searches more closely than the Constitution requires, but surely no rule of law forbade this particular invasion of these premises at that time.

MR. FRIEDMANN: As the prosecutor understood the law at that time, Your Honor, that is correct.

QUESTION: And you defend that view.

MR. FRIEDMANN: I would defend that view for his decision --

QUESTION: And now you wouldn't defend it today because of Steagald.

MR. FRIEDMANN: If the question were to arise today and I were the prosecuting attorney, I would say Steagald says I must get a search warrant.

QUESTION: Do you argue or if not, why not, do you argue that Steagald should not be applied retroactively?

MR. FRIEDMANN: I think that in those exclusionary cases and the search cases in criminal proceedings the Fourth Amendment decisions generally are not applied retroactively.

QUESTION: And so if there had been an

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evidentiary problem and the question of the application of the exclusionary rule, the rule wouldn't have applied.

MR. FRIEDMANN: I think that's correct, Your Honor.

QUESTION: But you -- do you concede or do you not concede that Steagald is retroactive in this case for these purposes?

MR. FRIEDMANN: In the sense that it provides a basis of potential constitutional remedy under 42 USC 1983.

QUESTION: Well, Steagald, if you assume it was a completely new rule of law, would not be retroactive for the deterrent purposes of the exclusionary rule, would it?

MR. FRIEDMANN: Under the criminal proceedings, I think that is correct, Your Honor.

QUESTION: You think that for 1983 purposes the county should nevertheless be liable even though at the time it was acting completely consistent with constitutional law?

MR. FRIEDMANN: Your Honor, I don't know that I would concede liability on the part of the county in that position.

QUESTION: If there is no constitutional

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wrong, then you don't have to worry about policy or anything else, because the action depends on the existence of a constitutional violation here.

MR. FRIEDMANN: That is correct, Your Honor. The District Court found that there was a constitutional deprivation, I think, in light of the Steagald decision.

QUESTION: Yes, and you didn't challenge that anywhere, did you?

MR. FRIEDMANN: Truthfully, no, we did not, Your Honor.

QUESTION: And you haven't yet.

MR. FRIEDMANN: That's correct.

QUESTION: I hope you would like to.

MR. FRIEDMANN: If we could.

Your Honor, in this action, the petitioner would have the Court impose a liability upon the county because of the actions it believes have been taken by the prosecuting attorney. The petitioner had this Court impose liability because, and only because, the prosecuting attorney gave legal advice to one of the deputy sheriffs, and as we have already said, which advice was proper at the time.

After this Court's decision in Oklahoma City versus Tuttle, I think if the county is going to be

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liable, the petitioner must show that there was an existing unconstitutional policy which caused a constitutional deprivation, and I don't believe that the petitioner has done that in this action.

QUESTION: May I ask you, on that score, supposing just before these phone calls took place, the sheriff and the prosecutor talked to one another and said, what will we do in this case, and instead of just saying, go ahead and break in, they had said, well, I think in cases like this we should break in, and then they went ahead and broke in, would it be a different case?

MR. FRIEDMANN: I don't think that it would be at that time, Your Honor.

QUESTION: Supposing they said, we should adopt a policy for cases like this, we should break in, and we should do it today. Would that be a different case?

MR. FRIEDMANN: I think at the time they could have adopted a policy, and I am speaking about --

QUESTION: Just the two of them together now.

MR. FRIEDMANN: I am speaking about the sheriff, though, adopting a policy.

QUESTION: The sheriff and the prosecutor talk it over together.

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MR. FRIEDMANN: It is not the obligation of the prosecutor to adopt that policy, because the prosecutor is not going to be the person faced with the responsibility or the duty or the authority to effectuate that capias or arrest warrant. That is not the prosecutor's function. His function is to give advice to the county sheriff.

QUESTION: Well, say his advice is, I think in cases like this you should break in, and he says, I agree, in cases like this we will break in. Would there be liability?

MR. FRIEDMANN: On the part of the county?

QUESTION: Yes.

MR. FRIEDMANN: I think when we are talking about the time frame that this occurred, in 1977 --

QUESTION: Correct.

MR. FRIEDMANN: -- if the prosecutor had said, my advice based upon what the Sixth Circuit Court of Appeals has said in the United States versus McKinney, if you have to use force to effectuate an arrest warrant on the third person -- premises of some third person to effectuate that arrest warrant --

QUESTION: This is not an arrest warrant, a capias.

MR. FRIEDMANN: Well, Your Honor, the courts

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have treated this capias here as the equivalent of an arrest warrant. The capias itself is an order from two judges of the Court of Common Pleas saying to the sheriff, go out and arrest these individuals and bring them before the Court. The word "arrest" is used in that capias.

QUESTION: Well, answer my question if you would. Supposing they said exactly what I gave to you, that the sheriff says to the prosecutor, what do you think we should do, and he says, I think in cases like this you should break in, the sheriff says, I agree, that is what I will tell the officers to do. Would that then be a policy that would be actionable?

MR. FRIEDMANN: I think it would have been a policy of the sheriff, but I don't think it would have been actionable at that time.

QUESTION: Would the county be responsible?

QUESTION: What do you mean, at that time? I would suppose Justice Stevens would ask you the same question. Suppose it was done today, after Steagald. The sheriff goes to the prosecutor and says, what should we do, and the prosecutor says, well, let's forget that Steagald case, let's just -- this is a policy we are going to go ahead with. What about that?

MR. FRIEDMANN: Your Honor, I think in that

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situation if the sheriff makes the policy decision to force that door without a search warrant knowing of the Steagald decision, I think that there could possibly be a policy of the county --

QUESTION: So it is a policy. So it is no less a policy in this case.

MR. FRIEDMANN: But that's not the facts that occurred in this case.

QUESTION: The only difference is, they didn't say, what will we do in cases like that? They said, what will we do in this case? That is the only difference.

MR. FRIEDMANN: But I think it is a big difference.

QUESTION: One is a policy, and one is not.

MR. FRIEDMANN: I think it is a big difference. This is the only evidence of that one incident where force ever had to have been used, where a search ever took place that was not permitted, and there is no evidence in the record to support otherwise.

QUESTION: Is it fair to say the issue in this case is whether a policymaking official can make policy?

MR. FRIEDMANN: I am not sure how to answer that, Your Honor.

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QUESTION: I take it from your answer that if this were the third occurrence, it might be a different situation.

MR. FRIEDMANN: If it were the third occurrence today, Your Honor, or the third occurrence back in 1977?

QUESTION: Answer both.

MR. FRIEDMANN: I think if it occurred today in light of Steagald, I think there clearly would have been a constitutional deprivation. If it had been the third occurrence back in 1977, I am not sure that that would have been a policy. It may have been a practice. It may have been a custom in the county that would have been supported by some evidence, and there may have been some basis to impose liability on the county in that situation, but those aren't the facts that came about in this case.

QUESTION: Well, then, the fact it is a first occurrence really isn't very relevant.

MR. FRIEDMANN: I think it is very relevant, Your Honor. If liability is to be imposed upon a custom or practice, if it is the first incident that is supported by any evidence, the only way that anyone in any authority is going to know of a customer practice is by repeated incidents of some type of activity, not by

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one incident, but the question that is before us is whether or not it is a policy, and I don't believe that it is a policy on the part of Hamilton County.

QUESTION: The sheriff says to the prosecutor, should we break in, is it lawful for me to break in, the prosecutor says, of course it is, that is what the law is.

MR. FRIEDMANN: Are you speaking of the present time, Your Honor, or again going back to 1977?

QUESTION: I don't think it makes any difference in view of the fact that you have never challenged the applicability of Steagald to these facts.

MR. FRIEDMANN: I think in light of Steagald, though, and knowing what Steagald says, I think the sheriff has some responsibility in that area also to know what the decisions of this Court, the Sixth Circuit, and the courts of Ohio have been as they relate to his execution of arrest warrants or search warrants, and I don't believe that he in his position would be acting as a reasonable man in not knowing the decision in the Steagald case.

As we said before, I don't believe that the prosecuting attorney was a policymaker in this particular case with regard to the search of the

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petitioner's premises. The capias was issued by two separate judges of the Court of Common Pleas.

QUESTION: Could it have been issued, as your opponent says, by a notary public?

MR. FRIEDMANN: I believe that there is provision in Ohio law for that situation, but that is not what occurred in this case. The two employees of the petitioner had been subpoenaed to appear before the grand jury. They failed to appear pursuant to the subpoenas that were served upon them. And the foreman of the grand jury went before two separate judges of the Court of Common Pleas advising the court that these witnesses were necessary and that the grand jury desired them to be present, and on that basis of that, two separate judges issued the capias for their arrest, to be brought before the court.

QUESTION: When you say two separate, you mean one for each of the witnesses?

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

QUESTION: You don't go to one judge, and then you go down the hall to another one.

MR. FRIEDMANN: As a matter of fact, Your Honor, it was before two separate judges. In Hamilton County there is a system whereby every month the presiding judge changes, and the presiding criminal

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judge is the judge who decides whether or not, if questions arise with regard to the grand jury, what is going to happen, and as it was, this occurred in two different months of the year, of the calendar year, and that is why there were two separate judges who had issued the capiases.

As we stated before, the prosecutor is not the policymaker in this area because he was required to give legal advice to the sheriff, not directions to the deputy sheriff. He had no authority to control the activities of the deputy sheriff, and it is even clearer that the prosecuting attorney could not control the activities of the Cincinnati city police department.

I believe that the rendering of legal advice --

QUESTION: Did you represent the city?

MR. FRIEDMANN: I did not, Your Honor. I represented Hamilton County.

QUESTION: Did the city have its own representation?

MR. FRIEDMANN: It did, Your Honor.

QUESTION: And it did not object to it being held liable?

MR. FRIEDMANN: I think it objected vehemently.

QUESTION: I know, but they didn't come here.

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MR. FRIEDMANN: Your Honor, as I understand the proceedings, the Court of Appeals reversed and remanded back to the District Court for further proceedings with regard to the city of Cincinnati. Why the city of Cincinnati decided not to seek a petition for writ of certiorari on its liability, I can't answer for the city.

QUESTION: They accepted -- their liability was finally determined in the Court of Appeals.

MR. FRIEDMANN: The Court of Appeals determined --

QUESTION: The fact of liability.

MR. FRIEDMANN: The Court of Appeals determined that there may be a policy of the city which was responsible for the constitutional deprivation.

QUESTION: I see.

MR. FRIEDMANN: And remanded the case to the District Court for that purpose.

QUESTION: The title of the case here is a little peculiar, isn't it, with the city of Cincinnati as the lead name on the down side?

MR. FRIEDMANN: Yes, Your Honor, and that is, I think, simply because that is the way that it was always characterized in all documents that have been filed since the initial complaint.

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QUESTION: Is the city a party here?

MR. FRIEDMANN: They are not, Your Honor, not before this Court.

QUESTION: Well, under our rules they might be classified as a respondent.

MR. FRIEDMANN: I think they may be, Your Honor. I think, though, that that is best left to the city to decide whether or not they want to be a respondent in this action. Again, the rendering of legal advice by the prosecuting attorney which the deputy sheriffs were not required to be filed and which was in accord with the law at that time should not be elevated to the position of an unconstitutional official policy for which Hamilton County --

QUESTION: Mr. Friedmann, can I ask you about the statute that you quote in Footnote 1 on Page 8 of your brief, "The duties of a prosecuting attorney," and then they refer to the fact that other members, the commissioners and so forth, "may require written opinions or instructions from him."

What significance do you attach to the word "instructions?"

MR. FRIEDMANN: I would view instructions as legal advice on how to handle certain matters that may come before those particular county officials.

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QUESTION: Would the manner in which one serves a capias be something with respect to which he could give instructions?

MR. FRIEDMANN: I think that could be a matter for which the sheriff could seek legal advice, and that in fact is what the sheriff's department did in this action.

QUESTION: But under the statute, could the sheriff have said, what are my instructions, do I or do I not use an ax to break down the door?

MR. FRIEDMANN: Your Honor, I don't view instructions in that manner.

QUESTION: I see.

MR. FRIEDMANN: As directory instructions. I think it would be considered in the same light as any other legal advice, that that is all it is, legal advice.

QUESTION: A recommendation.

MR. FRIEDMANN: If I as a lawyer give advice to my client, that client is certainly free to disregard that advice, and I think clearly the sheriff is in that same position here. He is not required to follow the advice of the county prosecuting attorney, nor certainly are his deputies.

I think the practical result of adopting the

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position of the petitioner in this case would be that the prosecuting attorneys or district attorneys or whatever in local government units will be somewhat concerned and reticent to give legal advice to their clients if the ultimate result is that the entity can be responsible and liable if there is some constitutional deprivation.

QUESTION: May I ask you one other question, because you called attention to Footnote 4 on the reply brief, and you indicated that your brief had been -- portions had been taken out of context, and they indicate, they quote from your brief saying there is a distinction. They seem to suggest that you drew a distinction between a policy of the county itself on the one hand and a policy of either the sheriff or the prosecutor on the other. Do you maintain that there is a difference, that the county prosecutor or the county sheriff could have a policy for which the county would not be responsible?

MR. FRIEDMANN: Your Honor, I believe that the county prosecutor could have a policy perhaps with regard to the operation of his office for which the county itself does not recognize him as the final repository of authority. In that situation he could have a policy that is not necessarily the policy of

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Hamilton County. Conversely, he could have a policy if he has the ultimate responsibility in that area where that is the policy of the county.

QUESTION: Supposing that the sheriff or the prosecutor or both collectively had a policy regarding service of capiases such as this. Would you question that as being county policy but were their policy?

MR. FRIEDMANN: If the prosecutor had it?

QUESTION: Say if the -- or say if the sheriff, after consulting with the prosecutor, concluded that it would be his policy to do exactly what they did here, if that were true, would that be county policy in your view?

MR. FRIEDMANN: The ultimate decision with regard to the execution of an arrest warrant that is directed to the sheriff, I believe, the ultimate responsibility lies with the sheriff to effectuate that warrant, and in that regard, unless there is a specific state statute that requires him to do something else, I think he would be the ultimate policymaker in that regard.

QUESTION: Thank you.

MR. FRIEDMANN: Your Honor, I think in cases such as this in which 42 USC 1983 is involved the Court should be seeking to achieve responsible governmental

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units where officers act sensibly and reasonably and conform their conduct to existing law while also protecting the rights of individuals.

In the present case we have a situation where all persons involved in the local governmental process acted sensibly and reasonably, with one exception, and I think that is the petitioner.

QUESTION: And were entitled to qualified immunity?

MR. FRIEDMANN: The governmental entity?

QUESTION: No, the individuals.

MR. FRIEDMANN: I clearly believe that the individuals were entitled to qualified immunity and the courts have so found below.

QUESTION: The prosecutor would probably do absolute immunity.

MR. FRIEDMANN: I would make the argument that the prosecutor is entitled to absolute immunity, being in that position, but definitely qualified immunity would be available. Again, everyone here acted sensibly and reasonably. Subpoenas were lawfully issued for employees to appear before the grand jury. Only on the failure of those witnesses to appear pursuant to the subpoena did the foreman of the grand jury go to the court to seek the capiases.

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Two separate courts issued the capiases, and the deputy sheriffs went to serve those capiases. The deputy sheriffs attempted service during normal business hours at the known business location of the employees who were named in the capias. When thwarted, they sought legal advice, and the prosecuting attorney gave that legal advice based upon the law of the time as he knew it to exist within the Sixth Circuit.

Petitioner, however, barracaded the door. It was only after the Cincinnati police arrived that the door was chopped down. He was convicted for obstructing official business. That conviction was upheld, and this Court denied a petition for writ of certicrari.

I think any responsible government official, even though he has immunity in this situation, is not going to be satisfied if he knows that some advice, legal advice that he has given might subject the governmental unit to liability.

For all the foregoing reasons, I think that the petitioner has failed to establish an unconstitutional policy on the part of Hamilton County which caused a constitutional deprivation for the petitioner, and I believe that the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Thank you.

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CHIEF JUSTICE BURGER: Do you have anything further, Mr. Manley?

ORAL ARGUMENT OF ROBERT E. MANLEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MANLEY: Mr. Chief Justice, and may it please the Court, I have a few matters. Initially, Mr. Justice Stevens raised a question of a dialogue between the sheriff and the prosecutor. I do not know whether or not that dialogue took place. I uncovered no evidence of it. But the functional equivalent of it took place in that after the event, the sheriff caused a complete investigation to be made, and the record in this case shows that the sheriff approved the advice that his people got from the county prosecutor, and indicated that what his people did was completely consistent with the policies of his office at that time, so that while we don't have the conversation that Mr. Justice Stevens suggested, we have the functional equivalent.

QUESTION: Did the Court of Appeals take note of that or not?

MR. MANLEY: I don't recall if they did.

QUESTION: They didn't, you say?

MR. MANLEY: I do not recall if they did.

I believe that the Act of 1871 was passed in

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light of the common law at that time, as this Court has suggested in Owen and certainly the Thayer case, which is cited in our reply brief, and Footnote 1 in Owen makes it abundantly clear that where you have governmental liability, the mere fact that the law is unclear at the time that the policy is made or implemented should not protect or shift the cost to the --

QUESTION: What if the law were clear but the other way?

MR. MANLEY: Well, if the law were clear but the other way -- well, the law --

QUESTION: Suppose under the existing law it was clear as a bell and everybody would agree that under that law this particular search was constitutional?

MR. MANLEY: Well, then we are in a situation where, as happened here, this Court then announces that what people may have thought -- what the police thought the law was was not the law, and the same principle enunciated in Thayer and Owen should apply in that situation for the same reason, that the burden should not be dumped on the innocent citizen, it should be shared by all the taxpayers who perpetrate the wrong.

For these reasons, if the Court please, we respectfully request the Sixth Circuit be reversed.

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

(Whereupon, at 11:56 o'clock a.m., the case in the above-entitled matter was submitted.)

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CERTIFICATION

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#84-1160 - BERTOLD J. PEMBAUR, Petitioner V. CITY OF CINCINNATI, ET AL.

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

BY Paul A. Richardson

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