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SUPREME COURT, U.S.  
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# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1586

TITLE EDWARD MALLEY AND RHODE ISLAND, Petitioners V.  
JAMES R. BRIGGS AND LOUISA BRIGGS

PLACE Washington, D. C.

DATE November 13, 1985

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(202) 628-9300  
20 F STREET, N.W.  
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IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD HALLEY AND RHODE :  
ISLAND, :  
Petitioners :  
v. : No. 84-1586  
JAMES R. BRIGGS AND :  
LOUISA BRIGGS :  
-----x

Washington, D.C.  
Wednesday, November 13, 1985

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:02 o'clock a.m.

APPEARANCES:

ANN M. SHEADEL, ESQ., Louisville, Ky.;  
on behalf of Petitioners.

LEONARD DECOF, ESQ., Providence, R.I.;  
on behalf of Respondents.

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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 Edward Malley against Briggs. Ms.  
4 Sheadel, you may proceed whenever you're ready.

5                    ORAL ARGUMENT OF ANN M. SHEADEL, ESQ.

6                    ON BEHALF OF THE PETITIONERS

7                    MR. SHEADEL: Thank you, Mr. Chief Justice,  
8 and may it please the Court:

9                    Today this Court is faced with the question of  
10 the extent of a police officer's civil liability for  
11 damages resulting from an arrest made pursuant to a  
12 warrant which the police officer sought and obtained  
13 from a neutral and detached magistrate. Specifically,  
14 can a police officer who applied for and obtained an  
15 arrest warrant face civil liability for damages on the  
16 theory that he should have known that the facts recited  
17 in the affidavit submitted to the magistrate were  
18 insufficient to establish probable cause?

19                   CHIEF JUSTICE BURGER: Ms. Sheadel, may I  
20 interrupt you just for a moment to announce that Justice  
21 Brennan will be delayed in arriving, but will  
22 participate in all the cases.

23                   MS. SHEADEL: We ask this Court to find that a  
24 police officer cannot be amenable to suit in such a  
25 situation, but rather that he is in fact immune from



1 liability. In this context, the police officer's  
2 actions should be protected from suit for the same  
3 reasons, the same policy concerns, that have been  
4 enunciated by this Court in its decisions regarding  
5 immunity and where to draw the line between immune  
6 actions and non-immune actions.

7 In deciding where to draw such a line, the  
8 Court has recognized that the answer must be found in a  
9 balance between the evils inevitable in either  
10 alternative, recognizing that in any balance drawn not  
11 all interests can be protected.

12 In such a balance, the Court has recognized  
13 that on the one hand it is trying to vindicate  
14 constitutional rights, while on the other hand it is  
15 trying to protect officials who are required to exercise  
16 discretion in fulfilling their duties.

17 In determining the extent of any such  
18 immunity, the Court has considered two factors. The  
19 first factor considered by the Court has been the  
20 function performed by the official in question and the  
21 historical extent of the immunity that's been granted to  
22 that function.

23 The second consideration has been the policies  
24 that exist in applying that immunity to the action at  
25 question. In applying this standard to this case, the

1 function that we're examining is the function of a  
2 police officer in applying to a magistrate for an arrest  
3 warrant, and the question then becomes should this  
4 function receive a full exemption from liability.

5 We believe that this function should receive a  
6 full exemption from liability. Our primary argument  
7 about the functional analysis of the police officer  
8 applying to a magistrate for an arrest warrant is that  
9 the function that the police officer is performing is  
10 very similar to the function of a prosecuting attorney  
11 in placing information before a grand jury and asking  
12 the grand jury to find that probable cause exists and to  
13 indict.

14 QUESTION: Ms. Sheadel, do you concede that  
15 the facts that were available here were not sufficient  
16 to justify the issuance of a warrant?

17 MS. SHEADEL: We would not concede that there  
18 was absence of probable cause in this case, Your Honor.  
19 But we do not believe that whether or not this Court  
20 believes that probable cause existed would be  
21 determinative in the case.

22 QUESTION: Well, if you would assume for a  
23 moment that the facts were insufficient to amount to  
24 probable cause and if the warrant had issued and  
25 evidence obtained as a result of it, would the evidence

1 be excludable in your view under the Leon case at  
2 trial?

3 MS. SHEADEL: Using the Leon case, it's  
4 possible the evidence could be excluded. Again, the  
5 Leon factors are such that it would require a very  
6 specific analysis of the situation in this case.

7 QUESTION: Why should a different rule apply  
8 than in insulating the officer from any damage liability  
9 than the rule that would be applied for exclusion of  
10 evidence under Leon? Why shouldn't these two track each  
11 other?

12 MS. SHEADEL: We don't believe that this Court  
13 has ever said that the two rules are synonymous. In  
14 fact, in its analysis it appears that the Court has  
15 considered some different factors. If in fact the rules  
16 were going to be synonymous, it would appear to us that  
17 it would question a magistrate's immunity from civil  
18 liability because the magistrate is involved in the  
19 decision to issue the search warrant or the arrest  
20 warrant. And if we were tracking the exclusionary rule,  
21 it would seem that, since the magistrate made a decision  
22 that shouldn't have been made, then it would require  
23 some kind of analysis of the magisterial exemption from  
24 liability. We believe that --

25 QUESTION: But in Leon was there not some

1 indication that perhaps deterrence is a valid objective  
2 of the police officer's reliance on the warrant is  
3 objectively unreasonable?

4 MS. SHEADEL: Yes, I believe that was  
5 indicated in Leon. In the civil liability aspect, the  
6 Court has looked at the question of deterrence of one of  
7 the factors considered in whether or not immunity should  
8 be applied.

9 Instead of using the word "deterrence," I  
10 think more often the Court will look at if there are  
11 adequate safeguards other than civil liability or if  
12 there are things the Court might call alternative  
13 remedies. That has been a policy consideration of the  
14 Court in its civil liability analysis.

15 What the Court has looked at whenever it has  
16 granted immunity to an official within the judicial  
17 process in deciding whether or not there are these  
18 alternatives available, the Court has considered such  
19 things as being within the judicial process and the  
20 checks and balances that are inherent in that process.

21 QUESTION: Well, if you were right on that  
22 immunity it wouldn't make any difference what the  
23 objectives were, would it? I mean, Leon would be  
24 irrelevant.

25 MS. SHEADEL: That's right.



1 QUESTION: As far as your absolute immunity  
2 argument is concerned.

3 MS. SHEADEL: As far as the absolute immunity  
4 is concerned.

5 QUESTION: But your qualified immunity  
6 argument would certainly implicate that.

7 MS. SHEADEL: Yes.

8 QUESTION: May I just ask this question.  
9 Didn't the trial judge, the state trial judge, find  
10 there was probable cause?

11 MS. SHEADEL: There was no finding made on  
12 probable cause, Your Honor, at all at the trial level.

13 QUESTION: What did the appellate court in the  
14 State of Rhode Island find?

15 MS. SHEADEL: The case went before the First  
16 Circuit Court of Appeals and the First --

17 QUESTION: Directly from the state trial?

18 MS. SHEADEL: It was not a state trial. It  
19 was a trial in the federal district court, Your Honor.

20 QUESTION: Federal district court.

21 MS. SHEADEL: Yes. And then it went to the  
22 First Circuit Court of Appeals. The First Circuit made  
23 one statement in its opinion that probable cause was  
24 lacking, but it did not elucidate on that or go into any  
25 detail on why it made that decision.

1 QUESTION: But the state trial judge actually  
2 approved the issuance of the complaint, didn't he?

3 MS. SHEADEL: Oh, yes, the arrest warrant was  
4 approved by the state judge, yes, Your Honor.

5 QUESTION: And didn't the face of the warrant  
6 disclose the substance of the wiretap evidence?

7 MS. SHEADEL: Yes, it did. It disclosed  
8 everything that had been recorded on the wiretap log.

9 QUESTION: And the state judge then commanded  
10 the arrest of the defendants, didn't he?

11 MS. SHEADEL: Yes, he did, Your Honor.

12 QUESTION: The First Circuit said that your  
13 client should have qualified immunity, is that right?

14 MS. SHEADEL: Yes, Your Honor.

15 It is our position that, using the Court's  
16 analysis that the Court has traditionally used for  
17 absolute immunity, that in fact for the function that  
18 we're talking about this Court should look to an  
19 absolute immunity standard. We feel very strongly that  
20 the function performed by the police officer in this  
21 occasion was the function performed by the prosecuting  
22 attorney in asking the grand jury to indict. That  
23 function has historically been granted absolute immunity  
24 and has been recognized by the courts.

25 We believe that these functions are very

1 similar for several reasons. First, both the  
2 prosecuting attorney and the police officer are required  
3 to use a discretionary judgment based on their evidence  
4 in their possession on where they're going to take this  
5 case at this point.

6 The prosecuting attorney decides to go to the  
7 grand jury and ask the grand jury to decide if probable  
8 cause exists. The police officer decides to go to the  
9 magistrate and ask the magistrate whether probable cause  
10 for arrest exists. Both of these decisions put the  
11 question into the judicial proceeding, in two ways.

12 The first way is by putting that actual  
13 determination of probable cause into the judicial  
14 proceeding, asking a neutral and detached body in the  
15 judicial process to make that decision, the magistrate  
16 of course being the neutral and detached body that the  
17 police officer is seeking review from and the grand jury  
18 being the neutral and detached body that the prosecuting  
19 attorney is seeking review from.

20 The second way that it's brought into the  
21 criminal proceedings is that if the grand jury decides  
22 to indict and if the magistrate decides to issue the  
23 warrant, criminal prosecution has begun and criminal  
24 proceedings have begun, with all of the checks and  
25 balances, all of the protections inherent in those

1 criminal proceedings.

2           Therefore, we believe that this function of  
3 the police officer and the function of the prosecuting  
4 attorney are so similar that the immunity granted to a  
5 prosecuting attorney for the function that he performs  
6 should also be applied to the police officer in this  
7 situation.

8           We believe that the Court's policy reasons for  
9 applying immunity also apply in this case. In deciding  
10 whether or not to apply immunity, the Court has  
11 considered several policy factors, and we believe those  
12 policy factors can be summarized in three areas.

13           One area, the first area, is whether or not  
14 the action occurred within judicial proceedings. The  
15 second is whether or not the action taken is likely to  
16 result in retaliatory lawsuits. And the third is  
17 whether or not there are sufficient safeguards to  
18 establish the accountability of the official.

19           The Court's policy concerns first center  
20 around whether or not the action occurs within the  
21 judicial proceedings. In every case when the Court has  
22 granted any kind of absolute immunity, it has always  
23 been within the judicial process, except of course for  
24 that instance in which the President of the United  
25 States was granted immunity because of his very special



1 and unique function in our system of government. But in  
2 every other case, absolute immunity has been granted  
3 because of an action that has occurred within the  
4 judicial process.

5 The Court has stated that it is very concerned  
6 to make sure that the integrity of the judicial process  
7 is insulated from lawsuit, that the actors in the  
8 judicial process should be free to act on their own  
9 convictions without fear of damages liability. The  
10 Court has encouraged and has stated the need for  
11 principled and fearless decisionmaking, wanting the  
12 official in question to put energy and effort into the  
13 duties of his office rather than diverting them to fight  
14 off lawsuits that may be filed.

15 The Court has felt that these interests are  
16 especially involved in the proper administration of  
17 justice and that there is a need to avoid the adverse  
18 effect in the functioning of the criminal justice system  
19 that less than this immunity would in fact allow.

20 We believe, of course, that this is inherent  
21 in the situation in this case because, as we have said,  
22 this instance, this action, is part of the judicial  
23 proceeding, the question and the issuance of the warrant  
24 being an integral part of the judicial process and any  
25 criminal proceedings that would --

1                   QUESTION: Let me ask you a sort of a  
2 hypothetical question about the extent of your  
3 position. You take a position that even were it might  
4 have been objectively unreasonable for the officer to  
5 apply for a warrant, that nevertheless he should be  
6 absolutely immune from civil liability, if I understand  
7 you correctly.

8                   MS. SHEADEL: That would be the full extent of  
9 the absolute immunity argument, yes, Your Honor.

10                  QUESTION: That is your position, even  
11 assuming it's objectively unreasonable. We had a case  
12 on the certiorari list in which the claim was made that  
13 the officer went in to the magistrate and the magistrate  
14 in effect rubber stamped the application for a warrant.  
15 He said: I've seen you many, many times before, officer  
16 whatever your name is, and I know you're reliable; I  
17 don't even have to read the application because I know  
18 you're always going to -- you're not going to come in  
19 with an insufficient basis.

20                  Would you say that if the record disclosed  
21 that kind of procedure that nevertheless the officer  
22 should be immune if he came in with a plainly  
23 insufficient warrant application? And if so, why?

24                  MS. SHEADEL: We believe that the Court's  
25 analysis in civil liability would in fact give the

1 officer in your hypothetical situation absolute  
2 immunity, for the same reasons that it has given the  
3 magistrate absolute immunity for that kind of function,  
4 or the same reason that it has given the prosecuting  
5 attorney absolute immunity.

6 The Court has not distinguished in those  
7 situations where a magistrate or a prosecuting attorney  
8 has done something that would be considered objectively  
9 unreasonable.

10 QUESTION: What if there are falsehoods in the  
11 application for a warrant? Same immunity?

12 MS. SHEADEL: That's a question that we have  
13 not asked the Court to directly address in this case,  
14 since it is not raised. However, we understand that  
15 there would be concerns about this.

16 Again, looking at the traditional analysis,  
17 falsehoods would be absolutely immune. We recognize  
18 that there are concerns with police officers that might  
19 not exist with prosecuting attorneys or judges about  
20 these falsehoods. But again, looking at the traditional  
21 analysis we would say that in the traditional analysis  
22 the police officer should be immune.

23 If this Court did feel there were policy  
24 concerns because the police officer in fact is dealing  
25 with people in the community on a much more day to day

1 basis than prosecutors or judges or had some other  
2 policy concern for that, we feel that that issue would  
3 not be addressed by this case and would not have to in  
4 fact be addressed by the Court to define the immunity  
5 situation in this case.

6 QUESTION: See, if I understand your position,  
7 you would give, you recognize that in Leon some of this  
8 evidence may be subject to the exclusionary rule, and  
9 you would give the guilty defendant greater protection  
10 by excluding the evidence than you will the innocent  
11 victim of this kind of police error, if I understand  
12 your position, by not equating the Leon test to this  
13 situation.

14 QUESTION: We would make a certain distinction  
15 between search warrants and arrest warrants. But  
16 obviously, if a person is arrested and there were  
17 evidence that were found, the exclusionary rule might  
18 come into play. But the liability on civil damages has  
19 always been seen as being different than the  
20 exclusionary rule.

21 The judge who issues the warrant, for example,  
22 may have been objectively unreasonable in the  
23 hypothetical that you just gave. A judge who does not  
24 review the affidavit, but rubber stamps, could be seen  
25 to be objectively unreasonable. But that has not



1 changed this Court's analysis in deciding that that  
2 judge should in fact have absolute immunity.

3 I think our system is based on the assumption  
4 that more often than not magistrates are going to be  
5 doing their job. I think we have to base any rule that  
6 we come up with on the assumption that we have  
7 conscientious individuals, actors in the judicial  
8 process, that are in fact doing the job that they have  
9 been appointed or elected to do.

10 QUESTION: And from that I take it that you  
11 would say that if the magistrate fails to do his duty  
12 that failure can never be attributed to the police  
13 officer?

14 MS. SHEADEL: That is exactly our position,  
15 that it is the magistrate's responsibility here to  
16 review the application for the arrest warrant.

17 QUESTION: Go ahead.

18 MS. SHEADEL: If the magistrate in fact does  
19 not do his job correctly or is objectively unreasonable,  
20 we would say that that is something that is not the  
21 police officer's fault. The same reasons for insulating  
22 that magistrate, even though he may be objectively  
23 unreasonable, are the reasons for insulating other actors  
24 within the judicial phase of the proceedings, including  
25 we believe in this instance the police officer.

1 QUESTION: What alternative -- I'm sorry.

2 QUESTION: Ms. Sheadel, Justice Stevens asked  
3 you if a guilty defendant would fare better than the  
4 innocent defendant under your test. I take it any  
5 defendant, any criminal defendant suing, no matter what  
6 the fate of the evidence in his trial, would lose in a  
7 suit against the police officer under you test?

8 MS. SHEADEL: Yes, would lose for civil  
9 damages.

10 QUESTION: Yes.

11 MS. SHEADEL: What this Court has recognized  
12 in its policy considerations for alternatives that are  
13 available, the Court has recognized that civil damages  
14 are not always available for a wrong that is done. And  
15 when it has looked at alternative safeguards, it has  
16 said that it is looking not for an alternative that is  
17 functionally synonymous with civil damages, but looking  
18 to see what safeguards are inherent in the system.

19 One of those safeguards inherent in the system  
20 is in fact that you are part of the judicial system.  
21 That is very important in analyzing what kind of  
22 safeguards or remedies are available to the individuals  
23 in question.

24 We believe that the safeguards in this  
25 situation are the same safeguards that exist for a

1 prosecuting attorney who may be objectively unreasonable  
2 in his presentation to the grand jury.

3 QUESTION: Counsel, if we go that far is there  
4 anybody in the state side of the judicial process that  
5 is not immune, absolutely immune? You're starting with  
6 the judge. You're down to the policeman. Is there  
7 anybody that you could get?

8 MS. SHEADEL: Well, i should clarify that  
9 we're not asking for absolute immunity for every action  
10 that a police officer would take, but only for an action  
11 that we feel is so intimately involved in the process.

12 QUESTION: Well, I thought you based your  
13 argument that he has the same immunity as the  
14 prosecutor.

15 MS. SHEADEL: Yes, Your Honor.

16 QUESTION: Which is the same immunity that a  
17 judge has.

18 MS. SHEADEL: Yes, Your Honor.

19 QUESTION: So that the policeman has the same  
20 immunity as the judge has. And my question is, is there  
21 anybody in the process that doesn't have absolute  
22 immunity?

23 MS. SHEADEL: None that I can think of right  
24 now, because the Court has recognized absolute immunity  
25 for judges, prosecutors, grand jurors, witnesses. And

1 for this very limited function we're saying that the  
2 police officer's function is so a part of these  
3 proceedings that it should be granted the same kind of  
4 immunity.

5 QUESTION: Well, are you saying that the  
6 immunity of the policeman here is the derivative  
7 immunity from the judicial immunity of the magistrate?  
8 He derives it because he's executing an order of a  
9 judicial officer?

10 MS. SHEADEL: It could be seen as derivative,  
11 although we would prefer to call it the quasi-judicial  
12 immunity, the phrase that this Court has used whenever  
13 it has extended immunity within a judicial proceeding,  
14 saying that the immunity is considered to be  
15 quasi-judicial because it is of such a nature within  
16 the --

17 QUESTION: Is that any different from a  
18 derivative immunity? He derives it from the judicial  
19 function.

20 MS. SHEADEL: That's correct, Your Honor. He  
21 does in fact take it from the fact that he is part  
22 of --

23 QUESTION: So it isn't an independent immunity  
24 of a policeman as such. It's an immunity of a judicial  
25 officer which is conferred upon the police officer



1 because the police officer is doing what the judicial  
2 officer has told him to do; is that not correct?

3 MS. SHEADEL: Yes, Your Honor, we would say  
4 that that is correct. And beyond that, the police  
5 officer is doing what is constitutionally required and  
6 what this Court has directed it to do by going to the  
7 magistrate for the magistrate's review.

8 QUESTION: Does your argument rest on the  
9 assumption that in filling out the application for a  
10 warrant that the police officer was just doing what the  
11 magistrate told him to do?

12 MS. SHEADEL: No, Your Honor. That's why I  
13 was continuing to say that I believe that the police  
14 officer in filling out the affidavit is doing what this  
15 Court has directed it to do. If he has any question  
16 about probable cause or if he's within circumstances in  
17 which he --

18 QUESTION: Has this Court ever directed him to  
19 do what was objectively unreasonable?

20 MS. SHEADEL: No, Your Honor.

21 QUESTION: Perhaps false and deliberately  
22 misleading the magistrate, to be immune for that kind of  
23 thing?

24 MS. SHEADEL: Well, of course the Court has  
25 never directed anyone within the judicial process to be

1 unreasonable or objectively unreasonable or false. The  
2 Court obviously is directing people to act in what the  
3 Court defines as constitutional as required in the  
4 system.

5 But that directive never changes the analysis  
6 of whether or not the individual who's within the system  
7 is immune. The prosecutor, the judge, the witness may  
8 in fact act objectively unreasonable. But the Court has  
9 decided that the policy considerations of being part of  
10 the judicial proceeding are so important that the  
11 officer, the actor within that proceeding, will be given  
12 absolute immunity.

13 QUESTION: Let me try a hypothetical on you.  
14 Suppose the affidavit for the warrant recites that it's  
15 a warrant to search the premises of 36 Jackson Street  
16 and the secretary for the magistrate, not the police  
17 officer, the secretary for the magistrate makes a  
18 typographical error and puts in 38 Jackson Street. A  
19 different officer executes the warrant from the one who  
20 applied for it, as is often the case in a large police  
21 department.

22 And they go and search 38 Jackson Street,  
23 which is a perfectly innocent citizen. Would the police  
24 officer have immunity for the magistrate's mistake?

25 MS. SHEADEL: The police officer who executes

1 the warrant, Your Honor? We would take the position  
2 that the police officer was acting, even not in an  
3 absolute immunity context, but in an objectively  
4 reasonable manner. It certainly is objectively  
5 reasonable to believe that the warrant that has been  
6 issued by the magistrate is valid.

7 When you have a typographical error that the  
8 police officer had no input in at all, it would seem to  
9 be a classic case where the police officer was acting in  
10 an objectively reasonable manner.

11 QUESTION: So that's a case that would be  
12 protected adequately by the qualified immunity doctrine,  
13 wouldn't it?

14 MS. SHEADEL: Yes. I would emphasize that,  
15 that we do see some policy differences between a warrant  
16 for an arrest and a warrant for a search. The policy  
17 considerations that the Court has identified for  
18 considering whether or not absolute immunity should  
19 apply don't seem to apply to the same extent to an  
20 application for a search warrant.

21 Primarily, our feeling is that, because the  
22 search warrant does not put the issue into the judicial  
23 proceedings in the same way as an application for an  
24 arrest warrant would, the same kind of protection that  
25 the Court has looked for in its immunity analysis may

1 nct be present.

2 We don't believe that issue needs to be  
3 decided by the Court in order to decide this case, but  
4 we do realize that there might be some different kind of  
5 policy concerns in an application for an arrest warrant  
6 -- I mean, for a search warrant, that do not exist in an  
7 application for an arrest warrant.

8 The second policy consideration that the Court  
9 has identified is whether the official's actions are  
10 likely to result in retaliatory lawsuits. This is  
11 important to the Court, especially within the judicial  
12 process, because the Court feels that within the  
13 judicial process there are cases that arouse the most  
14 intense feelings in the litigants and these feelings are  
15 not easily capped by a judicial decree or decision. The  
16 power of the state is being exercised in the courtroom --  
17 or in the judicial process, and the Court has recognized  
18 that it is natural that there will be resentment, that  
19 there will be intense emotions involved in whatever  
20 decision is made.

21 And because of that, because of that intense  
22 emotion, there is the possibility of scores of lawsuits  
23 or at least lawsuits with a great deal of frequency.  
24 The Court is concerned about this because, of course, it  
25 does not wish the judicial officer or the actor in the



1 judicial process to spend enormous amounts of time  
2 defending suits instead of doing the official's judicial  
3 acts.

4 Fear of retaliatory lawsuits we believe is  
5 just as clear in an instance of --

6 QUESTION: Is it not true that all of the  
7 retaliatory lawsuits in this category of litigation are  
8 by people who are innocent of any criminal wrongdoing?  
9 By hypothesis, they're people that there was no probable  
10 cause to arrest them or to search them?

11 MS. SHEADL: Whether or not there was  
12 probable cause may not have ever been decided. If, for  
13 example, an individual is arrested and the prosecuting  
14 attorney decides in his discretion that he's not going  
15 to pursue the case to the grand jury for different  
16 reasons -- he may find trouble finding witnesses or he  
17 may decide that prosecutorial economy would require that  
18 they just don't have time to focus on this kind of case,  
19 or whatever the discretionary decision is -- no decision  
20 has been made on the fact that probable cause did not  
21 exist.

22 We believe there is always the possibility  
23 that any time someone is arrested, but the procedure is  
24 not --

25 QUESTION: Well, let me put it this way. At

1 least these are people who are presumptively innocent,  
2 whereas in the prisoner category they're all people who  
3 have been convicted of crimes, in the exclusionary rule  
4 cases they're all people who were probably going to be  
5 found guilty if the evidence is not excluded. These  
6 plaintiffs are all people who are presumptively innocent  
7 of any wrongdoing.

8 MS. SHEADEL: Right, and I would say that the  
9 same would be true for a prosecutor that gets an  
10 indictment from a grand jury and then the case never  
11 proceeds any further or the person is ultimately  
12 exonerated in some way. Certainly that concern is the  
13 same concern that you've expressed for the police  
14 officer, because it could be that someone says, I've  
15 been innocent but I've been wronged. The Court has  
16 still looked at the policy considerations to decide  
17 whether or not immunity should in fact apply in this  
18 situation.

19 If Your Honor please, I would like to reserve  
20 the rest of my time for rebuttal.

21 CHIEF JUSTICE BURGER: Mr. Decof.

22 ORAL ARGUMENT OF LEONARD DECOF, ESO.,

23 ON BEHALF OF RESPONDENTS

24 MR. DECOF: Mr. Chief Justice and may it  
25 please the Court:

1           Petitioner is asking this Court to do a small  
2 thing, to eviscerate the Fourth Amendment to the  
3 Constitution of the United States. This hallowed  
4 tribunal is the last place I would assay the mildest  
5 sarcasm or the most inferential humor, but the portent  
6 of Petitioners' proposition is so ominous that I fear I  
7 don't have the tools to combat it adequately.

8           QUESTION: What would you say about the  
9 hypothetical I put to your friend on the magistrate's  
10 making a mistake, either he or his secretary, and puts  
11 in 38 Jackson Street instead of 36, and then another  
12 officer, knowing nothing of the facts, goes and searches  
13 the wrong place?

14           MR. DECOF: Under the proposition --

15           QUESTION: Liable?

16           MR. DECOF: Under the proposition advanced by  
17 the Petitioners, there would be immunity, there would be  
18 absolute immunity.

19           QUESTION: Do you agree? Do you agree with  
20 that?

21           MR. DECOF: No, Your Honor, I dispute that.  
22 What I say is what the Petitioners --

23           QUESTION: But then are you not holding the  
24 policeman responsible for the magistrate's, for the  
25 judge's mistake?

1 MR. DECOF: If the Court please, I believe in  
2 that situation under the Harlow objective doctrine,  
3 objective test, the police would not be held  
4 responsible. That test --

5 QUESTION: Qualified immunity?

6 MR. DECOF: Yes, Your Honor. That test leaves  
7 ample room for this kind of error.

8 QUESTION: He'd have to defend the action.  
9 Qualified immunity simply requires him to defend the  
10 action.

11 MR. DECOF: Again, the purpose for Harlow  
12 adopting the objective act was to promote summary  
13 judgment -- the objective standard, was to promote  
14 summary judgment. For that reason, Harlow discarded the  
15 old subjective test.

16 I believe the amicus brief filed by 27 of the  
17 Attorneys General, led by the Attorney General of  
18 Minnesota, opted for another subjective test, whether or  
19 not there was falsity. Harlow has said, and with great  
20 force, that looking into someone's mind, finding out  
21 their subjective knowledge, will lead to an endless  
22 chain of relevant evidence, while an objective test will  
23 force the summary judgment and would be a greater  
24 protection for the police, if the Court please.

25 The Petitioners is between a rock and a hard



1 place. The Petitioner must either say the police are  
2 totally immune, which eviscerates the Fourth Amendment  
3 because everything that the police do could be  
4 categorized as part of the judicial function if you  
5 follow the argument to its logical conclusion --

6 QUESTION: Well, isn't the argument limited to  
7 the case of executing a warrant issued by a judicial  
8 officer?

9 MR. DECOF: No, if the Court please, it is  
10 not, because in the instant case here this warrant was  
11 not executed by the officer who was sued. The officer  
12 who was sued applied for the warrant. The facts haven't  
13 been gone into and I would like to advert to them  
14 because they're important.

15 The defendant, Officer Malley, applied for the  
16 warrant to a -- not a trial judge, but a district court  
17 judge, a judge at the lowest level of the state court  
18 system, and presented an affidavit based on a  
19 court-authorized wiretap.

20 QUESTION: Well, are you suggesting there's a  
21 difference between lower and higher judicial officers  
22 with respect to immunity?

23 MR. DECOF: No, I'm not, Your Honor. There's  
24 no question in this case the officer who issued the  
25 warrant was immune. The point I am making is that the

1 duties of the policeman are not simply to drop anything  
2 and everything on the magistrate's desk and he is shorn  
3 or insulated of all responsibility or liability. There  
4 are two parallel duties here, the duties of the police  
5 and the duties of the magistrate.

6 The magistrate acted unlawfully. There's no  
7 question about that.

8 QUESTION: May I just interrupt there. You  
9 agree the magistrate had the same information that the  
10 police officer had?

11 MR. DECOF: Yes, Your Honor. And both acted  
12 unlawfully.

13 QUESTION: And you didn't sue him because --

14 MR. DECOF: He's immune.

15 QUESTION: -- of judicial immunity?

16 MR. DECOF: Yes, Your Honor. And the point --  
17 I'm making is both committed unlawful acts in violation  
18 of the constitution. The magistrate is immune. Two  
19 wrongs don't make a right. It makes no sense to say  
20 that the magistrate's unlawful act should immunize the  
21 policeman in his unlawful act.

22 QUESTION: Mr. Decof, do you think that the  
23 question of whether there was probable cause here has  
24 been fully resolved and is not an issue now?

25 MR. DECOF: I think it's not at issue in this

1 case, Your Honor, because the First Circuit Court of  
2 Appeals indicated that from its face the warrant  
3 exhibited that there was no probable cause.

4 QUESTION: Is the absence of probable cause  
5 sufficient to defeat the Harlow test for qualified  
6 immunity? I mean, in a lot of situations, such as we  
7 were dealing with in Leon, we contemplated a situation  
8 where the actions of the law enforcement officer could  
9 be objectively reasonable and still not -- still wrong  
10 legally.

11 MR. DECOF: Yes, Your Honor.

12 QUESTION: But here I take it either if  
13 there's probable cause everyone is off the hook and if  
14 there isn't probable cause, even if it may be kind of a  
15 close case, then the police officer is liable?

16 MR. DECOF: No, Your Honor. Again we go to  
17 the reasonable police officer standard adopted by  
18 Harlow, in the Harlow opinion, and I believe that allows  
19 ample room for error, whether it's an honest error or  
20 whatever, if the warrant or the affidavit on its face  
21 patently exhibits that, given all the best inferences,  
22 there is no probable cause, then I think there would be  
23 a liability.

24 QUESTION: Did the First Circuit say only that  
25 there was no probable cause, or also that whatever the

1 standard is no reasonable person could have thought  
2 there was probable cause?

3 MR. DECOF: The First Circuit applied the  
4 Harlow test, Your Honor, and said that there was no  
5 probable cause here. We could possibly move for a  
6 directed verdict for the plaintiff if we retried this  
7 case, but it wouldn't happen in all cases. We're saying  
8 at least that the question of whether or not it was a  
9 reasonable -- first of all, whether or not the action of  
10 the police was objectively reasonable will be determined  
11 on motion for summary judgment.

12 That doesn't necessarily foreclose it. If the  
13 motion for summary judgment fails, then there can be a  
14 court hearing at which a factual determination will be  
15 made.

16 QUESTION: Mr. Decof, can I pursue this  
17 question just a little bit to see if I understand you.  
18 For purposes of the exclusionary rule, in the Leon case  
19 the Court referred to a reliance by a police officer on  
20 a warrant if it's in good faith and objectively  
21 reasonable.

22 MR. DECOF: Yes, Your Honor.

23 QUESTION: Now, is that necessarily always the  
24 same as a determination of whether or not probable cause  
25 exists? Can't you have an objectively reasonable



1 reliance on something that does not establish in fact  
2 legal probable cause?

3 MR. DECOF: I think there has to be an  
4 allegation, allegations which if taken in the light most  
5 favorable to the affiant would establish probable  
6 cause. It's a violation of the mandate of the Fourth  
7 Amendment to issue a warrant without probable cause.

8 QUESTION: Mr. Decof, the Court of Appeals was  
9 quite clearly in agreement with what Justice O'Connor  
10 said. They said in so many words, we emphasize that  
11 liability does not attach simply because there's a later  
12 determination of no probable cause.

13 MR. DECOF: Yes, Your Honor.

14 QUESTION: They're two different standards.

15 MR. DECOF: Yes, Your Honor.

16 QUESTION: I thought you were --

17 MR. DECOF: No, I don't disagree with that.

18 QUESTION: They said there'd be liability only  
19 if the officer really should have known.

20 MR. DECOF: Yes, Your Honor, and I say that  
21 would be a question to determine.

22 QUESTION: You think the Harlow test and the  
23 Leon test are roughly the same?

24 MR. DECOF: I think that Leon has followed  
25 along with the teaching of Harlow, yes, I do, Your

1 Honor.

2 QUESTION: May I continue to interrupt you?

3 MR. DECOF: Yes, sir.

4 QUESTION: You would agree that the officer at  
5 most acted only negligently, wouldn't you?

6 MR. DECOF: Yes, Your Honor.

7 QUESTION: In other words, he faithfully  
8 recorded in the affidavit the essential facts from the  
9 wiretap. That placed the Briggs at parties at which  
10 marijuana was being consumed.

11 MR. DECOF: He acted constitutionally  
12 negligently, is what our claim was, Your Honor, yes.

13 QUESTION: Well, yes, but --

14 MR. DECOF: We didn't claim there was malice  
15 or anything of that kind.

16 QUESTION: When we get to the constitutional  
17 part, all that he -- he made a mistake in judgment,  
18 basically, didn't he?

19 MR. DECOF: Yes, Your Honor.

20 QUESTION: He didn't fabricate any facts.

21 MR. DECOF: No, he didn't.

22 QUESTION: He reported all the facts he had to  
23 the magistrate?

24 MR. DECOF: Yes, Your Honor.

25 QUESTION: Right. Thank you.

1 MR. DECOF: Yes.

2 QUESTION: Well, and the jury or judge may  
3 conclude that at trial.

4 MR. DECOF: Yes, they may, Your Honor, that's  
5 so. All we're saying is that there is enough here that  
6 under the Harlow test we can't apply absolute immunity  
7 and say that there is no way that this case can possibly  
8 proceed to trial. We want a hearing to see whether or  
9 not there was negligence and whether that negligence was  
10 culpable so as to justify a verdict.

11 If the Court please, if the police are  
12 immunized -- and I submit that this would immunize the  
13 police -- for example, in this --

14 QUESTION: The district court dismissed the  
15 case because he thought the magistrate's action just  
16 insulated, automatically insulated, the police officer,  
17 isn't that right?

18 MR. DECOF: Yes, Your Honor. The district  
19 court had --

20 QUESTION: But under the Court of Appeals'  
21 opinion they remanded it for trial. But I take it that  
22 the district judge could still say -- could still  
23 dismiss the case on the ground that, well, I have looked  
24 at the affidavit and there is no way that the officer  
25 could have been found to be unreasonable.

1 MR. DECOF: The district court --

2 QUESTION: He could still dismiss it under the  
3 Harlow standard.

4 MR. DECOF: Yes, Your Honor, he could  
5 conceivably say that there was no issue of triable fact  
6 to go before a jury.

7 QUESTION: Exactly.

8 MR. DECOF: Yes. And that is the position  
9 that the First Circuit has left us in.

10 QUESTION: Yes.

11 MR. DECOF: When the district court dismissed  
12 this action, he did it on the basis of old First Circuit  
13 cases. And subsequent to his dismissing the action, the  
14 First Circuit came down with another case which followed  
15 Harlow, and we moved, we reopened and brought this to  
16 the judge's attention, and he still adhered to his  
17 original decision based on the discussion I've just had  
18 with Mr. Justice White.

19 If -- I'd like to stress the fact again, if  
20 the Court please, the police on the basis of one  
21 statement from an unknown informant which came over a  
22 wiretap, to wit, "I couldn't believe I saw Jimmy" --  
23 this was not an informant, excuse me; an unknown person  
24 -- to wit, "I couldn't believe I saw Jimmy Briggs  
25 toking"; obtained a warrant, had Mr. Briggs and his



1 wife, two prominent members of the community, arrested  
2 at quarter of 6:00 in the morning in their home.

3 There couldn't be a more dramatic illustration  
4 of the problems or of the sacrosanct nature of the  
5 protections of the Fourth Amendment than this. It stirs  
6 up memories or specters of jackboots.

7 QUESTION: Would it have been any different on  
8 the hypothetical I gave you with a mistake in the  
9 address?

10 MR. DECOF: If the Court please, if there had  
11 been a mistake in the address, under the qualified  
12 immunity rule of Harlow, the police either at filing of  
13 affidavits to this effect on the motion for summary  
14 judgment would probably get a summary judgment, or at  
15 the very least, if the matter went to trial on the facts  
16 they would be found to be not responsible.

17 QUESTION: The injury to the person, to have  
18 your home raided --

19 MR. DECOF: I understand, Your Honor.

20 QUESTION: -- by the police is a very bad  
21 business for any citizen, of course.

22 MR. DECOF: Yes, Your Honor.

23 QUESTION: But the situation with the  
24 typographical error, is that any different than the  
25 situation here?

1 MR. DECOF: I think so, Your Honor,  
2 because --

3 QUESTION: How?

4 MR. DECOF: -- we don't take the obverse of  
5 the coin from the Attorney General of Rhode Island and  
6 say that there should be absolute liability. The police  
7 are not insurers for their mistakes. What we're saying  
8 is that a reasonable man test should be applied, and if  
9 a reasonable -- in my opinion, on Your Honor's  
10 hypothesis, this would have been a reasonable mistake  
11 made.

12 It's very different from a policeman looking  
13 at a warrant which says, go down and arrest everybody  
14 wearing a red tie. There obviously is no probable  
15 cause. So that's why all of the protections that are  
16 necessary for the police are there. They are geared  
17 into the Harlow rule, the objective standard.

18 If the Court please, my colleague urges that  
19 the police function is prosecutorial. This Court has  
20 always used the functional analysis and has held judges  
21 and prosecutors and legislators in the legislative  
22 function to be immune. In Imbler this Court held that  
23 the prosecutor was immune, but left open the question of  
24 whether this immunity attached by virtue of the nature  
25 of the office or by nature of the function.

1           Later on in Mitchell, I think -- although the  
2 Court did refer to other cases which had not extended  
3 immunity to every phase,, later on Mitchell this Court  
4 decided that the Attorney General of the United States  
5 was not immune in everything he did, that it had to be  
6 connected with the judicial function.

7           And the reason for this, as Mr. Justice White  
8 has so eloquently stated, is the protection of the  
9 judicial process. That's what we're talking about here,  
10 the protection of the judicial process. It's for the  
11 purpose of protecting the judicial process that the  
12 prosecuting attorney is given immunity. He must be free  
13 to act.

14           And this protects defendants as well as the  
15 public. It protects the public because he's not  
16 fettered in bringing actions. It protects defendants  
17 because he doesn't have to fear being sued civilly and  
18 thus refrain from dismissing an action once trial has  
19 started.

20           And it also protects the defendant in giving  
21 freedom to the reviewing judge, who might even  
22 subconsciously react knowing that if he turned the case  
23 over the prosecuting attorney could be immune from  
24 suit.

25           QUESTION: Do you think the police officer who

1 gets the warrant should then go to another lawyer and  
2 say, I want to be sure before I execute this warrant?

3 MR. DECOF: No, Your Honor.

4 QUESTION: I want to be sure that it's a valid  
5 warrant; will you look at the application and then look  
6 at the warrant and see if I'm protected.

7 MR. DECOF: No, Your Honor. All we urge the  
8 Court is that the Harlow rule, which is a sensible rule  
9 and says that the police officer should do what any  
10 reasonably trained police officer would do, be  
11 followed. This doesn't include going to a lawyer.

12 But the converse of that, if we insulate or  
13 immunize the police, they won't have any standards that  
14 they have to comply with at all. We might as well just  
15 not train them. Anybody could be a policeman and go out  
16 getting warrants and arresting people, because there is  
17 no compulsion for them to comply with the mandates of  
18 the Fourth Amendment.

19 QUESTION: Well, isn't the very purpose of the  
20 magistrate the judicial officer's intervention?

21 MR. DECOF: Yes, Your Honor.

22 QUESTION: To correct the mistakes of the  
23 police?

24 MR. DECOF: Yes, Your Honor. And this is why  
25 I say it's a circular or syllogistic argument for the

1 Attorney General to say first this Court in its wisdom  
2 has fostered application to a magistrate to protect the  
3 individual who will be arrested; at the same time, how  
4 can that application to the magistrate, which is -- in  
5 fact in this case was required; it's not a voluntary  
6 action -- how can that serve to insulate the policeman  
7 from liability from an unlawful act?

8 It's a circular argument, because when the  
9 policeman does what he's required to do and goes to the  
10 magistrate, he is insulated.

11 QUESTION: What's unlawful about the  
12 magistrate -- about the policeman submitting to the  
13 magistrate a set of facts for the magistrate's  
14 judgment?

15 MR. DECOF: If the set of facts -- he must act  
16 reasonably in submitting this set of facts. He can't --  
17 just issue complaints willy-nilly. He can't decide he  
18 is going to get out arrest warrants for 100 people who  
19 are going to be gathered in an auditorium because there  
20 might be some drug peddlers. And that would be an  
21 unlawful action.

22 It's not unlawful for him to submit an  
23 affidavit and a complaint to a magistrate so long as his  
24 action is objectively reasonable. That is, there is  
25 reasonable belief that -- reason to believe that there



1 is probable cause.

2 QUESTION: Why isn't it objectively reasonable  
3 to think that if there isn't probable cause the  
4 magistrate will surely tell me?

5 MR. DECOF: Because, if the Court please --

6 QUESTION: And if the magistrate issues the  
7 warrant, he has told me that my conduct is very  
8 reasonable?

9 MR. DECOF: Then we relieve the police of all  
10 responsibility and make them nothing but messengers and,  
11 as I said, anybody --

12 QUESTION: Well, only -- but it certainly  
13 doesn't go any farther than when he applies for a  
14 warrant?

15 MR. DECOF: If the Court please, he then has a  
16 very simple way to escape liability and to conduct his  
17 business, and with the best of --

18 QUESTION: Well, it isn't simple at all if  
19 magistrates do their job, which you say that, obviously  
20 say, that they usually are.

21 MR. DECOF: Yes. If the Court please, in this  
22 case 22 warrants were presented to the magistrate at the  
23 same time, but we haven't argued the fact that he didn't  
24 do his job. This Court has said we assume them to do  
25 their job, although sometimes there are abuses. There

1 are rubber stamp situations. There are situations where  
2 under the press of time a great many magistrates -- a  
3 great many complaints fall on the magistrate's desk,  
4 where he knows the police officer, knows him to be  
5 responsible.

6 But what I'm urging is that it creates a  
7 dangerous condition, a police state condition, where the  
8 police, even for the best of motives, for expediency,  
9 for saving of time, would not pause to consider. And  
10 this Court said --

11 QUESTION: Well, you're just making the police  
12 pay for, the policeman pay for an incompetent  
13 magistrate.

14 MR. DECOF: No, if the Court please, the  
15 policeman is not paying for an incompetent magistrate  
16 unless you accept --

17 QUESTION: You would hold him, you would make  
18 him pay.

19 MR. DECOF: No, if the Court please. He is  
20 only paying for his own negligence, his own Constitution  
21 negligence.

22 QUESTION: Well, I know, but if the magistrate  
23 had done his job he would be off the hook.

24 MR. DECOF: But if the Court please, it isn't  
25 the magistrate -- the magistrate is a governing factor,

1 of course, and the purpose that the magistrate is there  
2 and he should be sought to is to protect the  
3 individual. And as Imbler said, if there's no case  
4 against the police, there is no case.

5 In this situation, there are two separate  
6 actors. The magistrate is acting and the police is  
7 acting, and I don't know how we can obscure the fact or  
8 avoid the fact that the policeman has a set of standards  
9 to go by.

10 QUESTION: Of course there might be a plus to  
11 this from the state's argument, because it would  
12 encourage police to go to magistrates to get a warrant,  
13 rather than making arrests without a warrant.

14 MR. DECOF: Yes, but again this Court has  
15 spoken to that and also encouraged it. But in this  
16 case, it was required. One of the peculiar facts of  
17 this case is that the facts in this case are the same as  
18 if the police had arrested without a warrant or with a  
19 warrant from the procedure, because whether he is  
20 arrested with a warrant or without a warrant there has  
21 to be a criminal indictment followed either by a grand  
22 jury or a prosecutorial information. So the  
23 procedure --

24 QUESTION: Mr. Decof, we're not giving you  
25 much of a chance to make your argument coherently,

1 but --

2 MR. DECOF: I welcome Your Honor's questions.

3 QUESTION: -- I'll ask you one more question  
4 and then try to keep quiet.

5 Would you turn to page 8 of your brief,  
6 please. This is the first full paragraph, I guess the  
7 second sentence: "Under the Harlow standard, a police  
8 officer will be shielded by good faith immunity unless  
9 his actions are so flagrant that it can be said that no  
10 reasonable police officer would have acted in the same  
11 way."

12 It's your position in this case that the  
13 officer acted flagrantly?

14 MR. DECOF: Yes, Your Honor.

15 QUESTION: It is?

16 MR. DECOF: Our position is that this warrant  
17 was so patently without probable cause on its face that  
18 any reasonable police officer would have known so. We  
19 go further, if the Court -- the complete wiretap is not  
20 part of the evidence, but the only pertinent part is the  
21 one statement, "I couldn't believe I saw Jimmy Briggs  
22 toking."

23 The police procedure, the transcript will  
24 show, is to mark something as incriminating or not  
25 incriminating. And we believe that the negligence went

1 all the way back to marking this, this portion of the  
2 wiretap as incriminating, this and nothing more.

3 QUESTION: Well, that standard is the standard  
4 that you think the district judge will be entitled to  
5 follow at trial.

6 MR. DECOF: That's correct, Your Honor.

7 QUESTION: If he didn't think it was a  
8 flagrant enough error, he's going to dismiss your case.

9 MR. DECOF: Exactly, Your Honor, yes, sir.

10 QUESTION: You give me great problems. You  
11 admit that this was insufficient for a warrant, and yet  
12 the magistrate gave it. And now you say the magistrate  
13 is not responsible.

14 MR. DECOF: Yes, Your Honor.

15 QUESTION: The officer is.

16 MR. DECOF: Yes, Your Honor.

17 QUESTION: The officer is responsible.

18 MR. DECOF: Yes, Your Honor.

19 QUESTION: So that if the officer has say four  
20 points to make to show probable cause and he puts down  
21 three and a half points, he is liable to civil action  
22 per se?

23 MR. DECOF: He's liable, but he --

24 QUESTION: That's your position?

25 MR. DECOF: He's liable to action. He may not



1 be found to have been constitutionally negligent. All  
2 I'm saying is that he should not have absolute  
3 immunity.

4 QUESTION: All because he left out one point?

5 MR. DECOF: I'm sorry?

6 QUESTION: He left out half of one point.

7 MR. DECOF: Yes, Your Honor.

8 QUESTION: And so he can be brought up and  
9 carried through court on that?

10 MR. DECOF: Yes, Your Honor.

11 QUESTION: And why does he have to present it  
12 to the magistrate?

13 MR. DECOF: The reason --

14 QUESTION: The reason is so that the  
15 magistrate can determine whether it's sufficient, is  
16 that correct?

17 MR. DECOF: Yes, Your Honor. It's an added  
18 protection for the person who is going to be charged.

19 QUESTION: But he has to satisfy the  
20 magistrate?

21 MR. DECOF: Yes, Your Honor. Yes, Your  
22 Honor.

23 QUESTION: So he is at his peril if the  
24 magistrate goes wrong?

25 MR. DECOF: The point --

1 QUESTION: He and the magistrate have made an  
2 equal mistake.

3 MR. DECOF: Yes, Your Honor.

4 QUESTION: Right?

5 MR. DECOF: Yes, Your Honor.

6 QUESTION: So he's responsible?

7 MR. DECOF: Well, what I'm saying is, again,  
8 if there are two joint tortfeasors, you don't solve the  
9 problem if one is unavailable by letting the other one  
10 go. If there are two persons who have acted  
11 independently, each performing his own separate duties  
12 and separate functions --

13 QUESTION: I'm not interested in torts.

14 MR. DECOF: I'm sorry, Your Honor?

15 QUESTION: I'm not interested in torts.

16 MR. DECOF: Well, in this situation there are-  
17 two separate wrongs that have been done. The magistrate  
18 is held immune because of the law. There is no other  
19 alternative for the injured party but to go to the  
20 police officer. I believe that it logically follows  
21 that, because there have been two wrongs, because the  
22 magistrate has done a wrong, that his wrong should allow  
23 the policeman to be freed of liability for his wrong.  
24 And I would follow this, Your Honor, by stating that  
25 again all we're saying is that there should be an

1 opportunity to have this matter heard before a judge,  
2 and if he decides that there should not be dismissal,  
3 then that it go before a jury to determine whether or  
4 not actually the police officer is culpable.

5 QUESTION: Mr. Decof, you also made a claim, I  
6 believe, below that the Petitioner acted maliciously and  
7 in bad faith, is that right?

8 MR. DECOF: Yes, but we didn't pursue that.  
9 The only --

10 QUESTION: And you don't intend to when it  
11 goes back? That's out?

12 MR. DECOF: That's correct, Your Honor, that's  
13 correct.

14 QUESTION: Thank you.

15 MR. DECOF: The only good faith that we'd be  
16 talking about is the objective standard of good faith  
17 that has been announced in Harlow.

18 If the Court please, in Briscoe, I think that  
19 Briscoe gives us an answer to the Petitioners' claim  
20 that the police functions here are judicial. In Briscoe  
21 a policeman was given absolute immunity because he was a  
22 witness.

23 Now, if he had immunity by virtue of his  
24 investigative functions or the functions we're talking  
25 about here, it wouldn't have been necessary to recite

1 that the reason he was given absolute immunity was  
2 because he was a witness. And again, that is part of  
3 the purpose for which the immunity or the functions  
4 analysis has been used. That is, protection of the  
5 fairness of the system, protection of the judicial  
6 process. The judicial team is the judge, the  
7 prosecutor, and the witnesses.

8 Now, the Petitioner wants this to be expanded  
9 to a situation where the police will be held as part of  
10 the judicial team. And I must take issue with my  
11 colleague's statement that this is only one small part  
12 of the police duties. I think the police duties -- the  
13 issue we're talking about is pervasive. And if you said  
14 that investigating the case and having that  
15 investigation culminate in application for a warrant is  
16 part of the judicial function or the judicial process,  
17 then most of what a policeman does will be immune,  
18 because the investigation begins with the arrest and the  
19 arrest begins with statements from other people, or may  
20 not. And again, we open the door wide and we have a  
21 police state.

22 If the Court please, at common law, our court  
23 has stated time and time again, there was no absolute  
24 immunity for police, and I cannot accept my colleague's  
25 statement that this is limited to one small instance.

1 As I said, once you say that either by application for a  
2 warrant the police are insulated or that the police in  
3 doing this are performing a prosecutorial or judicial  
4 function, then you open up the door wide to virtually  
5 everything that a policeman does.

6 QUESTION: Well, if the reasoning for  
7 reversing the First Circuit here would be that the  
8 police officer simply submitted it for the magistrate's  
9 judgment and it was reasonable for him to execute  
10 something that had been approved by the magistrate, that  
11 reasoning wouldn't apply at all to police making arrests  
12 or making searches without warrants?

13 MR. DECOF: Well, I think, Your Honor, with  
14 due respect, that that would beg the question, because  
15 you're saying that the reasonableness of the police --  
16 again, in this case we're not talking about the  
17 policeman who executed it; we're talking about the  
18 policeman who applied.

19 But what I say is that the evil of accepting  
20 the insulation theory is that you open the door wide,  
21 and if you're going to insulate the policeman by virtue  
22 of the magistrate's issuing the warrant then it will  
23 insulate the applying officer, it will insulate the  
24 executing officer, and there will just be no holds  
25 barred.



1 QUESTION: Well, only in the warrant process.

2 MR. DECOF: Yes, Your Honor, in the warrant  
3 process. I submit this is one of the most important and  
4 one of the most critical functions that the police  
5 perform.

6 Thank you.

7 CHIEF JUSTICE BURGER: Do you have anything  
8 further, Ms. Sheadel?

9 REBUTTAL ARGUMENT OF ANN M. SHEADEL, ESQ.,

10 ON BEHALF OF PETITIONERS

11 MS. SHEADEL: Yes, thank you, Mr. Chief  
12 Justice.

13 We believe that this Court's policy  
14 considerations that it has enunciated in support of  
15 applying immunity apply in this case to support not only  
16 absolute immunity, but qualified immunity as well. We  
17 believe that under the Harlow objectively reasonable  
18 standard qualified immunity should be applied in this  
19 situation to state that a police officer who applies to  
20 a magistrate for a warrant is per se reasonable if the  
21 only allegation is that the police officer should have  
22 known that the facts recited in his affidavit were  
23 insufficient to establish probable cause.

24 We believe that the Court's policy  
25 considerations mandate this result and that the First

1 Circuit standard is unworkable. The First Circuit  
2 standard, being that the police officer should be liable  
3 for civil damages if he should have known that the facts  
4 recited in his affidavit were insufficient to establish  
5 probable cause, will in fact require the reviewing court  
6 to examine each case to decide, first of all, if  
7 probable cause did in fact exist; and second of all, if  
8 it did not exist, whether a police officer should have  
9 known that it did not exist.

10 We believe that the Court's policy  
11 considerations looking at being part of the judicial  
12 proceeding, encouraging and wanting the police officer  
13 to apply to the magistrate for an arrest warrant, the  
14 policy considerations of looking at the safeguards that  
15 are part of this procedure, all go toward accepting the  
16 rule that applying to a magistrate for an arrest warrant  
17 is in fact per se reasonable.

18 We do not believe that this standard will  
19 eviscerate the Fourth Amendment. We do believe that  
20 this standard will effectuate the policies of this Court  
21 in encouraging police officers to apply to magistrates  
22 for warrants.

23 Therefore, in conclusion, we urge this Court  
24 to rule that a police officer who applies to a  
25 magistrate for an arrest warrant cannot be held liable

1 for civil damages if the only allegation is that he  
2 should have known that the facts recited in his  
3 affidavit were not sufficient to establish probable  
4 cause for arrest.

5 CHIEF JUSTICE BURGER: Thank you, counsel.

6 The case is submitted.

7 (Whereupon, at 11:01 a.m., oral argument in  
8 the above-entitled case was submitted.)

9 \* \* \*

CERTIFICATION.

Anderson Reporting Company, Inc., hereby certifies that the  
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Supreme Court of The United States in the Matter of:  
#84-1586 - EDWARD MALLEY AND RHODE ISLAND, Petitioners V.  
JAMES R. BRIGGS AND LOUISA BRIGGS

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and that these attached pages constitutes the original  
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BY Paul A. Richardson

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