# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1520

TITLE RUSSELL ANDERSON, Petitioner V. ROBERT E. CREIGHTON, JR ET UX., ET AL.

PLACE Washington, D. C.

DATE February 23, 1987

PAGES 1 thru 55

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IN THE SUPREME COURT OF THE UNITED STATES

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RUSSELL ANDERSON,

Petitioner,

v. : No. 85-1520

ROBERT E. CREIGHTON, JR., ET UX., ET AL.

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Washington, D.C.

Monday, February 23, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JOHN PATRICK SHEEHY, ESQ., Minneapolis, Minnesota; pro hac vice on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-1520, Anderson against Creighton.

Mr. Pincus, you may proceed whenever you're ready.

ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PINCUS: Mr. Chief Justice, and may it please the Court:

In Harlow v. Fitzgerald, this Court held that government officials sued for constitutional violations are entitled to immunity as long as their conduct was objectively reasonable.

The case presents an important question regarding the application of Harlow, a question that has particularly significant implications for actions against law enforcement officers seeking damages for alleged violations of the Fourth Amendment.

The events at issue in this lawsuit relate to the investigation of a bank robbery that occurred in St. Paul, Minnesota, on November 11, 1983.

Petitioner Russell Anderson was a Special Agent with the Federal Bureau of Investigation, assigned to the Bureau's local field office. He investigated the

robbery by obtaining information from the tellers and other witnesses, and concluded that the robbery had been committed by Vadaain Dixon.

Agent Anderson was familiar with Dixon as a result of his investigations of previous bank robberies that Dixon had committed. He also knew that Dixon had escaped two days earlier from a halfway house in which he was confined prior to sentencing for some of those previous bank robberies.

Because of what he viewed as Dixon's propensity for violence, Agent Anderson determined that Dixon should be apprehended as soon as possible.

Agent Anderson and several of the local St. Paul police officers went to look for Dixon at the homes of his mother and his grandmother. Dixon was not found at either of those places.

Based upon information that Dixon's wife had been staying with respondents, who are his sister and brother-in-law, and that a car resembling respondent's car had been used in the bank robbery, the officers then went to respondents' home.

Respondents did not consent to a search of their home, but the officers nonetheless entered and searched the home to look for Vadaain Dixon.

The facts concerning the execution of that

search are in dispute, but Vadaain Dixon was not found.

Respondents subsequently commenced this action for damages against Agent Anderson and the St. Paul police officers, alleging that the warrantless entry in their home violated the Fourth Amendment.

Agent Anderson moved for summary judgment, and the District Court granted his motion, holding that the entry into the home was lawful because it was justified by probable cause and exigent circumstances.

The Court of Appeals vacated the District Court's judgment but found that factual disputes precluded a determination on summary judgment as to the constitutionality of Agent Anderson's conduct.

The Court of Appeals then turned to consider an issue that was not decided by the District Court, whether Agent Anderson was entitled to immunity under this Court's decision in Harlow v. Fitzgerald.

The Court held that Agent Anderson was not entitled to immunity, because the legal standard governing his conduct, the requirement of probable cause and exigent circumstances to execute the warrantless search, had been clearly established at the time of the challenged search.

And the Court of Appeals remanded the case for a trial concerning the merits of respondents' Fourth

Amendment claim.

Now let me stress at the outset the limited question that is before the Court in this case. We do not seek review of the portion of the Court of Appeals' judgment regarding the merits of respondents' Fourth Amendment claim.

And we do not seek a determination by this Court --

QUESTION: Mr. Pincus, would you repeat that last sentence again?

MR. PINCUS: Yes, sir, we do not seek a determination in this Court about whether or not the District Court properly granted summary judgment. We haven't sought -- we do not raise that issue in our cert petition.

And so the merits of the substantive question, whether Agent Anderson actually violated the Fourth Amendment, are not before the Court.

And we similarly do not seek a determination by the Court as to whether Agent Anderson is entitled to immunity on the facts of this particular case.

What we are seeking is review of the Court of Appeals' conclusion that Agent Anderson was not entitled to immunity simply because the legal standard was settled.

In our view, the Court of Appeals simply applied the wrong test in determining whether immunity was appropriate.

We think the question is not whether the legal standard is appropriate, but whether the particular officer -- a reasonable officer in Agent Anderson's position should have known that the conduct was unconstitutional.

The Court of Appeals did not even consider that question, and we think therefore improperly deprived Agent Anderson of his immunity defense.

Now the starting point in determining how Harlow should be applied in this context is the Court's decision in Harlow itself. And what --

QUESTION: Mr. Pincus, can I just interrupt you?

Do you think it's perfectly clear that the Court of Appeals said that he simply does not have an immunity defense, or he doesn't have one that can be decided on summary judgment?

QUESTION: Well, Justice Stevens, the way we read the Court of Appeals' opinion is that it simply disposed of the immunity issue altogether.

And I guess in the passage of the opinion that's reprinted on pages 16A and 17A of the petition

for certiorari states that Officer Anderscn has cited no persuasive reason why he could not reasonably have been aware of this clearly established law.

And we think that's a determination that the immunity issue is just out of the case.

QUESTION: Well, he hasn't done that at this stage of the proceedings. But I don't knew that that would have foreclosed him from making a further record.

Because as you point out, the District Court decided the case on the constitutional issue, said there was no probable cause and no exigent circumstances as a matter of law, and it didn't even reach the immunity issue.

So I'm not clear whether the record had been fully developed on the question of whether he was entitled to immunity or not.

QUESTION: (Inaudible) his submission is that even though the Court of Appeals may not have finally decided the immunity question, they applied the wrong standard in guiding the District Court as to how to decide.

MR. PINCUS: Well, Your Honor, we think they certainly did they. They certainly applied the wrong standard. And it does appear to us that --

QUESTION: They didn't apply the -- you don't

say that they were wrong in saying that the legal standard was clearly established, do you?

MR. PINCUS: No, Your Honor, but we think they were wrong in saying that was the end of the inquiry.

QUESTION: Well, I know. Well, you would be very happy if we said there's more to it than that, and the record isn't fully developed, and go back and -- you don't object to further proceedings?

MR. PINCUS: No, we in fact -- we submit that further proceedings are entirely appropriate.

QUESTION: So Justice Stevens' point, you'd be very happy if we just said that -- affirmed that there's more to it than that?

MR. PINCUS: Yes, Your Honor, we'd be very happy if the Court did in this case just what it did in Malley v. Briggs, which is to point out what the ultimate question is on immunity, and then remand the case to allow the District Court to decide whether or not that standard has been met on the facts of this case.

QUESTION: So you want the judgment affirmed with an explanation of what the nature of the proceedings should be?

MR. PINCUS: Well, Your Honor --

QUESTION: I mean, the judgment is correct.

MR. PINCUS: -- I guess we differ about what

the view of the judgment is. It seems to us that a fair reading of the opinion is that the immunity issue is out of the case entirely. It's not -- on the Court of Appeals' view of the immunity question, further proceedings in the District Court wouldn't have been required because the Court of Appeals thought that it was simply a question of whether the law was established or not.

And the Court said, the legal standard was established, so that's the end of immunity.

QUESTION: But if you -- if we wrote an opinion that said in determining whether he's entitled to qualified immunity, you've got to look at the facts as well as the legal standard, and therefore, the judgment is affirmed, you'd be happy with that?

MR. PINCUS: Well, Your Honor, as long as the Court -- I guess we just have a different --

QUESTION: Explains what has to be done on the remand.

MR. PINCUS: Yes, as long as what the Court of Appeals -- as long as a portion of that judgment doesn't take the issue out of the case.

If the Court reads the Court of Appeals judgment as leaving that question open, then we'd be perfectly happy with the judgment being affirmed. If

the Court -- on our reading of the opinion, that -- the judgment disposes of that issue, so we think that the judgment has to be vacated to allow the District Court to conduct those further proceedings.

QUESTION: Mr. Pincus, I understood your brief to request us to reverse the judgment because the Court applied an erroneous principle. How can we affirm it if we think the hollow standard was incorrectly framed?

MR. PINCUS: Well, Your Honor, I agree. Our position is that the Court of Appeals' judgment was wrong, and that it has to be either vacated or reversed.

Justice Stevens --

QUESTION: Well, reversed or remanded.

MR. PINCUS: Yes. Justice Stevens question, I think, posited that the Court of Appeals did not foreclose further proceedings on the immunity issue, and in that technical sense, I guess, its judgment would have left those proceedings open in the District Court.

But we think, in any event, the Court of Appeals was wrong, and what has to be set right is what the proper legal standard is to guide a court considering immunity questions in a Fourth Amendment context such as this case.

And we think that the resolution of that question turns upon the standard that this Court set

forth in Harlow, which is that a government official is entitled to immunity unless his conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known.

And in order to decide when a right is clearly established, we think it's necessary to look to the reasons that the Court adopted this immunity test in the first place.

And Harlow makes clear that there are two considerations that are involved. On the one side is the interest in permitting recovery for constitutional violations; and on the other side is the need to protect government officials from liability so they will not be reluctant to vigorously perform their duties.

QUESTION: If that's really what we meant in Harlow, we really should have put it differently then, shouldn't we?

I mean, that's a strange way to say that, clearly established constitutional rights of which he should have known.

If we meant what you're saying, wouldn't it have been better to say if he clearly violated clearly established constitutional rights?

The "clearly" part you're talking about is not the constitutional right, but whether what was done

constituted a violation.

MR. PINCUS: Well, we think that the queston here is whether on the facts of this case it was clearly established that respondents had a right not to -- for Officer Anderson not to conduct a warrantless search of their home.

So the right in this case doesn't turn just on the legal standard, it turns on how the legal standard interacted with the particular facts here.

But in any event, I think the Court -- although that particular phrase may have been less than clear, the Court in other places in Harlow specifically made clear that the question was whether the officer reasonably could have known that what he was going to do violated the Constitution.

In another portion of the opinion, for example, the Court said, where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate.

And it made clear that in that context, that -- that that's the context in which a government officer should be held liable, and only that context.

So Harlow, we think, makes it quite clear that the way the Court struck the balance between liability

and immunity was to say that only where an officer reasonably could have known that what he was about to do was unconstitutional should he be held liable in damages for that action.

QUESTION: Well, Mr. Pincus, what's wrong with Justice Scalia's formulation of the standard?

Harlow, of course, didn't come up in a Fourth Amendment context. All we had was a legal principle to be resolved. And Fourth Amendment search cases inevitably result in factual disputes.

And as I understand it, Justice Scalia asked, well, should the standard in Harlow then mean that conduct which clearly violates clearly established constitutional rights, that's the inquiry you have to make.

Is that right?

MR. PINCUS: Yes, yes. I think that's right, Justice O'Connor, and that's exactly what the Court said in Malley v. Briggs, where it was dealing with a Fourth Amendment situation.

And it said quite specifically that the inquiry was whether a reasonable, well trained officer, in the defendant's position, would have known that the affidavit failed to established probable cause.

And we think it's clear that what that

standard requires is to look at the particular facts of the case, and to decide whether a reasonable -- any reasonable officer in that situation would have known that it was unconstitutional to go ahead and do what the defendant actually did.

And only in that situation, if that inquiry is answered affirmatively, that any reasonable officer would have known that it was unconstitutional, then immunity fails and liability is permissible.

QUESTION: The ACLU brief suggests that under your test it would get us back to a subjective inquiry in every case.

Would you like to comment on that?

MR. PINCUS: Well, Your Honor, we don't think that a subjective inquiry will be necessary in every case.

First of all, in the warrant context, the relevant facts, of course, are what are in the affidavit. So there's no problem in the warrant context with subjective -- with the need for a subjective inquiry.

In the warrantless context, of course, the relevant facts are the facts that are known to the officers that conduct the search.

QUESTION: And objectively whether a

reasonable well trained officer would --

MR. PINCUS: Yes, Your Honor, it's a two-step process. First, the relevant pool of facts has to be ascertained. And then the question is, taking those facts, would any reasonable officer have known that the challenge -- that what the officer went ahead and did was unconstitutional.

So, although that initial inquiry, gathering the pool of relevant facts, does require some -- it is not a wholly legal inquiry, it requires some looking at the facts of a particular case.

QUESTION: But a particular defendant could not -- the government officer could not prevail simply by testifying that he subjectively thought there was probable cause.

MR. PINCUS: No, the Court's made clear that that's irrelevant under the Fourth Amendment, and we think it would be irrelevant here.

The only part of the inquiry that's subjective is simply gathering the pool of relevant facts. And those are then examined on an objective basis.

But even though that inquiry is necessary in some cases, we don't think it will be necessary in every case. First of all, it may be that an officer will file an affidavit, and there won't be a dispute about whether

or not he knew those facts.

Or it may be possible for a court to say, even if he knew all those facts, that still is not enough to entitle him to immunity.

QUESTION: Yes, but I don't see why you say it doesn't come up in the warrant context. It surely comes up in the warrant context just as well.

Let's assume that the facts on which the warrant was issued do not, in fact, establish probable cause. You'd still have to inquire whether it was close enough that the officer could reasonably have believed that they established --

MR. PINCUS: Yes, sir, and I was just -- I was responding to Justice O'Connor's question about whether a subjective -- something that wasn't on an objective piece of paper would be required.

In the warrant context, the pool of facts doesn't have to be obtained by either an affidavit from the officer or deposing the officer because it's the facts that are in the affidavit.

QUESTION: You still have to inquire into his subjective judgment. You're just saying you don't have to inquire into what facts he knew.

MR. PINCUS: Yes, and that second question, the question about whether his judgment is reasonable,

doesn't look to his judgment. It's a judgment about what a reasonable officer would have done, confronted with those facts.

And so that particular -- that phase of it will be easy for a court; it doesn't require any fact-finding.

QUESTION: There is a little bit of a romvoire situation when you're dealing with an area like the Fourth Amendment, that -- the legal standards are those of a reasonable person, and then you get to the question of, even though they didn't satisfy that, could they satisfy the objective belief or objective view of another reasonable man.

MR. PINCUS: Well, it's true, and the ACLU and respondents do make that point in their brief.

But we think, although both inquiries are denominated reasonableness tests, actually, they're quite different. And it's something that the Court has recognized in the Malley case, and also in Leon, where the Court, in both cases, the Court has recognized that although conduct can violate the Fourth Amendment, and thus be unreasonable in that sense, it may have been objectively reasonable for the officer to believe that that conduct was lawful, and therefore he would be entitled to immunity.

And we think that same distinction applies here.

The -- let me just say one more word about the difference betwen the two tests. The difference, I think, is that the -- the objective reasonable test in Harlow is not a general reasonableness inquiry, it's an inquiry that takes as its guide the established case law, and sees what the officer could have thought based on that.

Whereas the Fourth Amendment reasonableness inquiry, under the probable cause standard, for example, is a more general type of inquiry, directed toward what a prudent person would have thought.

QUESTION: Mr. Pincus, if on remand, the Court applying the proper standard concludes that on these facts the action was not reasonable, will you be back? Or is that a position you're willing to accept on the facts of this case?

MR. PINCUS: Well, Your Honor, obviously we think that Agent Anderson is entitled to immunity, and we think that under the proper standard, that's what the District Court and the Court of Appeals will hold.

It's hard to predict in advance exactly what might happen in the lower courts. If there's some error that we think this Court should review, we might well be

back.

But we think that at this stage what's important is to get right the legal standard that those courts have to apply in deciding immunity in this context, and then it will be necessary to see whether they in fact apply that standard correctly.

Let me just turn for one moment to the rule advanced by respondents, because we think it makes clear why the Harlow standard has to be interpreted in the manner for which we contend -- and in the manner that the Court applied it in the Malley case.

The rule that respondents support and that the Court of Appeals applied is that the existence of a settled legal standard just automatically eliminates all immunity for actions taken where that standard applies.

And we think it's clear that that would work quite a breathtaking reduction in the immunity availale to government officials.

For example, just taking law enforcement officers as a single example, settled Fourth Amendment standards govern a lot of routine law enforcement activities, such as searches, seizures, and investigatory stops.

And under the Court of Appeals rule, officers would never be entitled to immunity in connection with

any of those activities, and thus an officer would have no leeway for miscalculation in the performance of those duties.

Everytime he misjudged the requirements of the Fourth Amendment, even if it was a very close question, he would be required to answer in damages.

And we think holding officers to that standard is counter to the Court's repeated affirmation that Harlow allows ample room for mistaken judgments, and assures immunity for all but the plainly incompetent or those that knowingly violate the law.

QUESTION: Well, what do you do about the argument that, at least when you're dealing with a probable cause question, the slack is already built in? You don't have to be correct that there's criminal activity, or that it's the product of a crime; you just have to have probable cause to believe, which means a reasonable person would think it's there.

MR. PINCUS: Well, Your Honor, the problem with that argument is that the probable cause standard assumes that officers will be able to act up until the limit of where probable cause exists.

The reason that the standard is set low is because often at the initial stage of an investigation an officer can't have enough facts to know precisely

what's going on.

And what society has decided is that where the officer has facts that amount to probable cause, even if they're just barely probable cause, his action is legally correct.

And if he was required to be absolutely right in that judgment or answer in damages, an officer would obviously not -- would be quite reluctant to take action unless he was quite sure he was way over the boundary, because the alternative would be for him to be liable in damages for any misjudgment.

So we think the effect of that approach is necessarily going to be to make officers extremely reluctant to act unless they have something that is quite a lot more than probable cause, and to harm law enforcement activity as a result.

QUESTION: There isn't any real necessity, though, to equate admissibility of evidence, where the aim is to deter illegal action, and you wouldn't deter anything where an officer could reasonably have believed he was satisfying probable cause and immunity questions --

MR. PINCUS: Well, Justice White, the Court's immunity decisions rest on -- rest on the policy determination that without immunity vigorous law

enforcement will be chilled.

And so we think that that protection, that in fact a rule that requires officers to guess right every single time will be quite effective in deterring them because --

QUESTION: And officers are bound to do -- anytime they honestly think there's probable cause, they feel duty bound to act, I suppose? If they reasonably believe it.

MR. PINCUS: If it's appropriate in the particular situation. Obviously, there may well be situations where it's better -- where the investigation is ongoing, and they may want to continue surveillance and hope to get additional information for trial.

So they may not want to act right away. But if there is a danger, if in their judgment, it's the appropriate time to act, either to ensure that a defendant -- a suspect is captured, or to avoid harm to the public, then we think as long as they meet the -- reasonably believe they meet the constitutional standard, they should be able to act.

QUESTION: And you shouldn't -- you shouldn't make them liable for damages because?

MR. PINCUS: Because that will necessarily chill them and make them reluctant to act unless they

believe they have a margin for safety.

They won't act -- a reasonale officer in that situation might be reluctant to act where he thinks he has enough for probable cause. He might want to be very, very sure because he doesn't want to end up five years later paying a very large damage judgment.

QUESTION: But a good officer in the same position, he may have been stuck with damages the last time, but why wouldn't he act on the same facts or similar facts again, the same way?

MR. PINCUS: Well, Your Honor, an officer, we think, has an incentive to act according to the Constitution, just because that is the requirement of his office, A, and B, because the goal is to apprehend someone and convict them later.

So if he takes an action that violates the Constitution, the evidence may very well be suppressed later.

So that, and the possibility of damages, gives him we think a significant incentive to act properly.

The question is whether damages -- the threat of damages for any miscalculation will skew the incentive so much that he will not be willing to act just when he thinks that what he --

QUESTION: Mr. Pincus, if we go back to the

common law, wasn't the very purpose of the probable cause requirement to protect the officer from the danger of making mistakes, because we know he can't guess right every time?

And what the English common law developed was that if there's probable cause, then he has a defense to a claim for false arrest or something like that.

Why do we need a -- why shouldn't the same standard apply to our officers that apply to common law? It's the very same purpose for the rule.

Am I not right that at common law, if a magistrate arrested someone, he had a defense if he had probable cause? He didn't have to guess right everytime; he just had to have probable cause.

That was the reason for the probable cause requirement. What you're saying is, we ought to have a second layer to give our officers greater protection that officers had at common law.

MR. PINCUS: Well, Your Honor, I think that the Court has already made that determination in the Pierson v. Ray case quite well --

QUESTION: In a probable cause context?

MR. PINCUS: Well, in Malley v. Briggs, specifically, the Court said even where an officer applies for a warrant and the warrant does not -- is not

justified by probable cause, then the people who are arrested pursuant to the warrant later bring an action against the officer --

QUESTION: Of course, there you have the intervention of a neutral and detached magistrate in that situation; but here you don't.

MR. PINCUS: But the Court in Malley didn't rely on that rationale, and we think that the damages --

QUESTION: But you do agree that your view would give the law enforcement officers here an additional layer of protection over and above that which the probable cause determination originally gave them at common law?

MR. PINCUS: Well, Your Honor, I have to yield to you in my knowledge of what the common law does. But I think --

QUESTION: What do you suppose the purpose of the probable cause requirement was?

MR. PINCUS: Well, it also provides for -- it just protects the individual --

QUESTION: In the warrantless area, in the warrantless context?

MR. PINCUS: -- under the Fourth Amendment, it protects the individual's privacy and other interests against random intrusion by the state.

So it really is a buffer between the state and the individual. And here all we're saying --

QUESTION: But you're saying we should sacrifice that protection here, because the officer -- I mean, you're saying they should have a lesser degree of protection here than they had at common law.

MR. PINCUS: Well, Your Honor, there still is the legal standard -- remains untouched. The question just is, when an officer should be required to answer in damages for his conduct.

And we think that what -- the way Fourth Amendment jurisprudence has developed in this country is that the government is entitled to act as long as it has, for example, probable cause. And the question is whether we're going to skew the incentives so that in fact the government won't act in that situation, because the individual officers --

QUESTION: And the individual won't be protected in that situation. It's both sides of the same coin.

MR. PINCUS: Well, and we think that in Harlow --

QUESTION: You're in effect saying that they should have less -- the individuals have less protection than they had at common law, and the officer should have

greater leeway than they would have at common law.

MR. PINCUS: Well, Your Honor, the individual does not have less protection. The Fourth Amendment standard remains unchanged.

It's just that one remedy for that violation may not be available.

QUESTION: You mean, after the search has been conducted, he can say, I know it was unconstitutional, but I can't do anything about it. What kind of protection is that?

MR. PINCUS: Well, if he's a criminal defendant, he will be entitled to have a suppression hearing to raise that.

QUESTION: Yes, but I think we're more concerned with the people who are not criminal defendants, as is the case in this case.

These people weren't criminal defendants.

MR. PINCUS: Well, Your Honor, as I say, in Harlow and Malley, the Court has we think made that policy judgment and decided that independent and vigorous action by law enforcement officers require that they be entitled to act unless their conduct is -- unless they could reasonably know that their conduct is unconstitutional.

QUESTION: Well, maybe the common law standard

for probable cause was quite more lenient than the standard we've developed in cases that are principally derived in the context of whether evidence will be excluded at a criminal trial, where its a lot easier to be more parsimonious about what constitutes probable cause.

MR. PINCUS: Well, Your Honor, we think that that may well be true, where the judge is not faced with the question of whether a police officer is going to be answerable in damages for his conduct.

And we think that's another reason why here, there should be some more protection for the officer.

If there are no further questions, I'd like to reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pincus. We'll hear now from you, Mr. Sheehy.

ORAL ARGUMENT OF JOHN PATRICK SHEEHY, ESQ.,
PRO HAC VICE ON BEHALF OF THE RESPONDENT

MR. SHEEHY: Mr. Chief Justice Rehnquist, and may it please the Court:

I would like to address right up front here some of the questions you've been asking, and there's been a number of them.

But to come back to Justice Stevens' question concerning the probable cause requirement at common law,

I think it is an interesting point to note that the Malley decision was based on a standard that was appropriate in malicious prosecution, where there would be an immunity without probable cause.

But in a trespass case, or false arrest case, you could never have an immunity without probable cause.

That's my understanding of the common law, and it's derived mainly from the Pierson case, where they said you needed probable cause and good faith.

That leads me to a point that I'd like to make about the government's claim that our standard of immunity is somehow a breathtaking reduction in the immunity from what Harlow established.

I don't think it is at all. Because Harlow did two things. Harlow eliminated a lawsuit in a case where there was a novel constitutional right being asserted, or a new development.

And it established an immunity right up front in the case, where you could get summary judgment just based on the state of law, a purely legal question. And I think that's clearly what the Court held in that case.

And it also did one other thing: It eliminated the malice prong of the standard, which allowed a defendant to get summary judgment more easily

right on the merits, because there wouldn't be that factual question still existing that was always a fact-based question that precluded summary judgment when it came to malice.

So even accepting our standard, as we formulate it under Harlow, the government has still a broader defense because that malice has been eliminated.

And I don't think that the way we formulate the standard leads to such a drastic reduction as what --

QUESTION: You say then that immunity is applicable or available only when there's been a change in the law?

MR. SHEEHY: The -- yes, Your Honor, that would be our position, that it would be a new development or a novel application in the qualified immunity area dealing with the area outside the warrants.

QUESTION: Do you think that's reconcilable with Malley?

MR. SHEEHY: Yes, it is, Your Honor, and this is how it is reconcilable with Malley.

Malley, I believe, is a progeny as much of Leon as it is of Harlow. And in the Malley case, the officer got the warrant.

QUESTION: Well, but Malley was an action for damages, wasn't it? It was not an action to suppress?

MR. SHEEHY: That's true, Your Honor. But the distinction between the Malley case and this case is that the Fourth Amendment principles that apply, make it appropriate, that the officer should get immunity in a situation where he gets the warrant.

Because in doubtful cases, where the officer goes to get the warrant, the search should be upheld.

What we're asking the Court to do in this case is to apply the second part of that standard, and that is in doubtful cases where there is not a warrant, the search should fail.

QUESTION: But there was surely no doubt about the law in Malley. And yet we -- there was no new development in the law.

And yet we said there that qualified immunity would be available.

MR. SHEEHY: Yes, you did, Your Honor. And I would -- in my view of the immunity standard, Malley is consistent with it because he got the warrant.

And we believe that that represents a special circumstance in the Fourth Amendment.

I think that the Fourth Amendment is a much more unique area of the law. The Court has attempted to develop a standard that is a broad doctrine that cuts across every constitutional area.

And the Fourth Amendment presents unique concerns because it has unique rules. And one of the most unique rules here is that the search was presumptively illegal when Anderson conducted it --

QUESTION: (Inaudible) I take it that you say that the immunity should -- where the law is clearly established, and it's just an argument about the validity of the application of the Fourth Amendment, immunity just has to turn on what the ultimate decision is on whether there's been a violation of the Fourth Amendment.

MR. SHEEHY: In the Fourth Amendment context, yes, Your Honor.

QUESTION: Now that's so even if, say, the Fifth Circuit divides eight to seven and it comes up here and we divide five to four, and four Justices think there was no violation and five Justices do.

You say if the five decide, the Fourth Amendment is violated, and the officer then is liable in damages.

That is the end result of your argument, I take it.

MR. SHEEHY: Yes, it is, Your Honor. But I would like you to keep distinct in your mind the warrant context, especially.

Because there, the officer, if he has any doubt, or if there could be any doubt, the situation is supposed to be resolved against the officer and in favor of the constitutional right.

Certainly when a search is being conducted of a person's home, which is really the issue in this case, this case does not really address an arrest case or a stop case.

But I think that that's the appropriate result to come to. I can't really fathom what you have when you -- let's take the reasonable suspicion standard -- when you get below reasonable suspicion, all you have is suspicion.

And the Court has always said that that isn't enough to ever stop anybody. And I think that Justice, or Chief Justice --

QUESTION: Well, it's possible, I suppose, that the standard of reasonableness for a substantive Fourth Amendment violation could be a different standard than reasonableness for purposes of financial liability of the officer.

And that is pretty much what Malley v. Briggs indicates, I guess.

MR. SHEEHY: Yes, it does, Your Honor. But I think that the case should be limited to the warrant

context.

Because what you have in this situation, and I think it's a very telling point, is, is that if you scour the government's brief, and you scour its cert petition, you don't find any discussion of what the application of this standard, what impact it will have on constitutional rights.

And after all, our Constitution was enacted to protect rights much -- at least the Bill of Rights was -- much more than it was to empower the government to search. And by --

QUESTION: That's perfectly true so far as the Bill of Rights is concerned. But the Constitution as a whole empowers the government to govern, as well as giving individual rights.

And the idea is to find the proper balance; not to exalt one at the expense of the other.

MR. SHEEHY: Well, Your Honor, I believe, though, that when you look at the Fourth Amendment, that you should resolve it in favor of the right, that that has been traditionally what --

QUESTION: No matter what the arguments on each side are, you resolve it in favor of the claim of right?

MR. SHEEHY: Well, I would have to be

presented with a particular argument. Clearly in a case like Mitchell or Davis, those cases, they were given immunity, and they were not resolved in favor of the right.

So in those cases, no, we're not asking that there be damages in a case like that.

But we believe that the standards themselves allow for a lot of error on the part of an officer.

QUESTION: You mean the probable cause standard?

MR. SHEEHY: Yes. And especially since -- I think it's important to note that this Court has done a lot to make that standard easy to apply. They've eliminated the old two prong test in the informant context. They've made that a much more flexible standard.

And that has gone a long way to establish more immunity on the government, in effect, because it's lowered the standard -- not lowered the standard, but --

QUESTION: Well, we've still been deciding the standard primarily, and I'm sure we'll continue to be deciding it, primarily in cases that involve the exclusionary rule.

And I'm not sure that I'd draw quite the same line, if I knew that everytime I drew a line it was not

only going to determine whether evidence can be excluded in a criminal trial, but would also determine whether a police officer who proceeds on the basis of this much belief and information can be held civilly for damages.

And you're telling me that the two in the future are coextensive, and we ought to draw our line in the exclusionary context on that basis.

You might get a very stingier line from me, at least.

MR. SHEEHY: Justice Scalia, I think that is a valid concern. And I have two responses for that.

First of all, that simply because an officer violate a right does not mean that somebody is going to receive a huge damage award, and that there are ways to deal with that in the damages area, or in just settling the suit up front if they think there was a violation, or if there's a holding there was a violation.

You don't have to go through the rigors of litigation necessarily in all these suits.

Now the Justice Department, under the regulation I've cited in my brief, takes the position that we'll never settle a lawsuit unless there's a judgment, and that we'll defend to the last ditch attempt in all these cases.

Now, I think that dealing with it at the

damage end is one way to deal with your concern, and the other one is to reimburse the person.

If the executive thinks that one of their people made a good faith mistake in applying the standard, you can still preserve the right by being able to sue, like in trespass, for a nominal damage, or establish that you had the right, and they could reimburse the official.

They certainly provide them with good legal counsel. I learned that.

But in any event, we believe that by adopting the petitioner's proposed standard, this Court would inevitably do away with the rule that searches of doubtful legality conducted without a warrant should fail.

I can't see any way that that rule could survive this. It certainly would be the case that innocent people would not be entitled to the benefit of that rule.

QUESTION: (Inaudible) of conducting it, if the information that you get from it is excludable? I mean, surely, that's substantial protection, isn't it?

MR. SHEEHY: That's a good question, Justice Scalia. And I have a response for that right in the context of this case.

Here, there was absolutely no deterrent from Russell Anderson proceeding against that rule when he was searching for a fugitive. Because the fugitive would have no standing to suppress any evidence if he was in the home of a third party, and he couldn't suppress his body.

So in the context of the Steagald case, the only way you can give effect to the Steagald case is to make sure that innocent people have an adequate remedy.

And if you're going to say that the officer has a heavy burden in that circumstance, and if you're going to say that it's presumptively illegal, and if you're going to continue to say that a warrantless search will fail where -- if doubtful, where a warranted one wouldn't, you have to give them an effective remedy in there.

And I'd like to turn now to what I call the collapsing of the immunity standard in the defense on the merits.

The government --

QUESTION: Mr. Sheehy, before you do, I'm just curious -- it's of no consequence -- the robbery at the savings and loan was out on Grand Avenue, St. Paul, wasn't it?

MR. SHEEHY: Yes, it was.

QUESTION: Where are these homes located that are pertinent in the case?

MR. SHEEHY: Well, there's a map attached to Russell Anderson's affidavit in the Appendix, Your Honor. But they were --

QUESTION: Well, just generally, what part of town?

MR. SHEEHY: They were in the Selby Dale area and North of 94 there in St. Paul. There were within, I believe, a three to four mile radius of the bank.

Turning to what I call the collapsing of the immunity standard, is, is that the government makes the argument that Russell Anderson's position was, is that either he'd be charged with dereliction of duty if he didn't act, or he'd be mulcted in damages if he did.

That isn't the case, really. Because I think that over the years, as the Court has been applying these immunity standards, the defense on the liability and the immunity itself has kind of become confused in some sense.

Because if you take Pierson v. Ray, which is a case that would be, I think, one of the cases most directly applicable in this context, the Court there didn't really hold that he had immunity; they just said that in a 1983 action a police officer would have a

defense based on probable cause and good faith.

Well, as that became kind of intertwined in the stream of immunity law with the defamation cases and the absolute immunity cases and then the due process cases, the Court started to use the term, qualified immunity.

And I think the first case they used that in was Scheuer v. Rhodes, the Kent State killing case. And what they -- what they started to say was, they'd be entitled to immunity.

Well, there was never any, really, immunity for a officer searching at common law, as Justice Stevens was pointing out. He just had the defense based on probable cause.

And so as that has been picked up, it's kind of been wrapped in with the due process standards --

QUESTION: You say that Pierson v. Ray didn't actually say the officer would have immunity.

MR. SHEEHY: Right.

QUESTION: But it certainly said that he would not have to pay damages, didn't it?

MR. SHEEHY: Right, but on a defense on the merits. And Russell Anderson is in no worse of a position here, because under the Eighth Circuit's position, he has the right to go back to trial and prove

his justification.

QUESTION: But are you suggesting that Pierson v. Ray held only that if there was no constitutional violation, the officer would not have to pay damages?

MR. SHEEHY: That's right. That's how I read it.

QUESTION: That certainly is not the way I have read it. I'll certainly go back and reread it. I thought it stood for the proposition that even though there was a constitutional violation, an officer could not always be held if there was good faith and reasonable belief.

MR. SHEEHY: Well, that -- Your Honor, maybe I should be a bit more specific in response to your question.

In that case, there was a statute that was held unconstitutional. And so, very similar to the Mitchell context, where there was a constitutional violation, the officer did have a defense if he had probable cause to believe the statute, which later was declared to be unconstitutional, was violated, and he acted in good faith.

That is what the case held, so -- but in the context of my case, I believe the Pierson v. Ray rule would require probable cause.

QUESTION: And it's false -- in a false arrest case, you'd take the same position?

MR. SHEEHY: In a false arrest case, yes, that they would need probable cause for a defense. And it wouldn't --

QUESTION: And under -- is that the state law?

MR. SHEEHY: Is that the state law?

QUESTION: Yes, in the states, when somebody sues for false arrest, is that the normal rule of the states?

MR. SHEEHY: The common law, Your Honor, I believe, is that you had to prove your legal privilege. No throughout the development of --

QUESTION: Now what does that mean? You had to prove your legal privilege?

MR. SHEEHY: Well, if you had a privilege to arrest somebody, meaning that if you met the legal standard, then the arrest --

QUESTION: Well, do you think the officer was always liable at common law for false arrest and for damages if he didn't have probable cause?

MR. SHEEHY: Yes, I do, if probable cause was the standard being applied at the time.

QUESTION: Well, that's part of my question.

MR. SHEEHY: Okay. I don't -- I have done

some research on that, Your Honor. And I think that there -- under the old formulation they used to use the reasonable standard and the probable cause has been engrafted on that.

But I think it's interesting to note this: that in Butz v. Economou, there's a foot note in the case that says, the government was opposing the Bivens act, the Bivens case, because they were saying, well, the state law tort action gives you a good enough remedy, and that all the probable cause standard would do there is provide a defense to that action, so there should be a federal cause of action like we have here today.

And that was right in the Butts decision. I took a look at the briefs, and the government argued it there; they thought it was sufficient back then. But now they don't think it's sufficient to protect them, even when the standard is more flexible now under the Gates case.

In any case, I believe that this Court has reaffirmed, time and time again, its preference for warrants in these search cases.

The Leon decision gave real meaning to that preference, because when you turn to use a warrant, you are able to use the evidence.

And as I said, we only asked the Court to give meaning to the second part of that standard, that when there's a search of doubtful legality, without a warrant, it should fail.

QUESTION: But we've never addressed the question of whether, in the probable cause nonwarrant context, the Leon principle would extend to not requiring a suppression there.

MR. SHEEHY: No, the Court has not. But I believe this case is probably the closest to it that has reached the Court at this time, even though it is in the civil context, given what has been said in the Malley case, that the qualified immunity doctrine would be coextensive with the good faith exception and exclusionary rule.

QUESTION: Well, is it your understanding of Leon that if we were to apply Leon to a situation like this, then is the answer here that there would be no constitutional violation, or that there's immunity, or that there's not immunity?

MR. SHEEHY: Well, if they followed -- if the Court were to follow what was said in Malley, that would be my conclusion. I don't think it's necessary --

QUESTION: I gave you three choices. Which do you take?

MR. SHEEHY: Well, I don't think it's a necessary conclusion. But the Court has indicated in Malley --

QUESTION: That what is a necessary conclusion?

MR. SHEEHY: That if the Court were to apply the good faith exception in a warrantless context, it isn't a necessary conclusion that the officer would have to have qualified immunity.

It was not the holding of the Malley case, but it indicated that the Court was going to proceed in that fashion.

QUESTION: Mr. Sheehy, you -- it is the consequence of what you're proposing, however, that whenever we have before us a probable cause determination, even in an exclusionary context, the question we ought to ask ourselves is, was this action so far beyond what it was reasonable for the police officer to do that we'd be willing to hold the police officer personally liable in damages?

MR. SHEEHY: Yes, I believe that's incorporated right into the probable cause standard itself.

In any case, the Fourth Amendment is a unique area that has different rules than other areas; different rules that due process areas. And it has a

different history than the due process area that has developed much of the qualified immunity law.

The government simply has not addressed what impact it will have on these constitutional rights in its briefs anywhere. It does not even cite in its case -- in its briefs, the Steagald decision.

And I can't see how in this case, where it is based entirely on the Fourth Amendment, and our claim is that the standard will change the long established rules in the Fourth Amendment, that there's no discussion of it there.

They simply are not concerned with the constitutional rights. And their indifference, I think, to those rights is highlighted by a statement made in their cert petition, where they say that under the Court of Appeals standard, the petitioner's immunity will be defeated on nothing more than a showing he trespassed on a general principle of law.

Well, what really happened in this case is that he trespassed on more than an abstract principle of law; he trespassed on the Creighton's home. And --

QUESTION: That raises an interesting question here. You're asking us to draw a line between -- I mean, I wonder to what extent Harlow itself isn't contrary to the common law principles you're asking us

to embrace.

You're avoiding it by saying what we should do is draw a line between a constitutional principle and the application of that constitutional principle; right?

Now, what is the constitutional principle? That there shall be no unreasonable searches and seizures? I suppose at one level that's it.

Or that you cannot generally go into a dwelling place without a warrant? That's a little more specific. If you do it without a warrant, it's unreasonable.

And I suppose you can keep on reducing that principle to a more and more and more specific principle of law.

Now where is it that you think Harlow -- Harlow makes the cutoff, at what level? You see, I don't know how to apply the principle that you're asking us to apply, that it's only the general constitutional principle of law, not its application, that Harlow applies to.

MR. SHEEHY: Well, Your Honor, I call to mind your opinion in Halperin v. Kissinger. And in that case, the Court did not seem to be concerned with applying the reasonableness doctrine of the Fourth Amendment. There was no discussion about that even

being too general of a standard to apply.

It was a question in that case whether it could be applied. And I think that they came at immunity from just about every area, and that was one of them that was not attacked.

I think that these standards, probable cause and reasonable circumstances, are much easier to apply than what the government is making them out to be.

I think those standards are fairly low standards. And it isn't like they're exceedingly difficult to apply.

And furthermore, in this particular case, in the exigent circumstances case, Russell Anderson was not faced with being charged with dereliction of his duties or being mulcted with damages; he could have gone and got a warrant.

And he never even attempted to get a warrant. And that's one of the really ironic things in this case, is that he told Cerise Creighton, I don't need a damn warrant when I'm searching for a fugitive.

And under the objective facts of the case, and under the government's own standard, he was violating clearly established law that a reasonable police officer would have known of.

And he never even attempted to get a warrant.

QUESTION: (Inaudible) if he had gotten a warrant, your basic argument would be different about clearly applied law? That would just be an application.

MR. SHEEHY: If he had gotten a warrant, then we'd be in the Malley v. Briggs situation where --

QUESTION: I know, but your argument -- your argument certainly reaches warranted situations; that you determine immunity only based on whether the law is clearly established.

MR. SHEEHY: No, I believe that our argument is consistent with Fourth Amendment principles, which Malley is too. So we would also encompass the situation in Malley.

QUESTION: As long as the officer gets a warrant.

MR. SHEEHY: Yes. Under the principle that a doubtful search, conducted pursuant to a search warrant, will be --

QUESTION: Even though the warrant is held invalid because of lack of probable cause?

MR. SHEEHY: If it was a reasonable --

QUESTION: How do you now -- if it was a reasonable what?

MR. SHEEHY: If it was a reasonable error, if --

QUESTION: Reasonable error by the officer? A reasonable error by the magistrate? Or both?

MR. SHEEHY: Well, right under the standard in Malley v. Briggs is what I would apply, is, is that if no reasonable officer would have thought the warrant should issue, then I would say liability --

QUESTION: Well, that's the argument on the other side with respect to situations where there's no warrant.

MR. SHEEHY: But it's a fundamentally different situation, Your Honor, because there you've interposed the neutral, detached magistrate which is generally --

QUESTION: Whose made an error.

MR. SHEEHY: -- required by the Constitution.

QUESTION: Whose made an error. And it's decided here that there was no probable cause. Why not -- why isn't the officer liable?

MR. SHEEHY: Well, because he has taken advantage of that warrant requirement. And that's consistent with this Court's policies on promoting the use of search warrants.

QUESTION: But he made a mistake on probable cause by even asking the magistrate to get the warrant.

MR. SHEEHY: But it's a unique situation.

There is no way in that situation that you could come closer to having clearly established law than going and actually putting your piece of paper before the judge and asking them if it states probable cause.

It is like having a controlling precedent in a case.

QUESTION: But we said in Malley v. Briggs that the magistrate's determination -- some other people said, I should say -- doesn't conclude the issue, that if it was unreasonable to present the affidavit, then it's no good.

MR. SHEEHY: Yes. But I think that there has to be a difference in a situation where the officer goes and gets the warrant than when he doesn't go and get the warrant.

QUESTION: You don't think that Malley that involved an application of the law? You think Malley involved what you say should be the exclusive application of Harlow, that is, clearly established principle of law.

Malley was not an application case?

MR. SHEEHY: No --

QUESTION: My next question is, if Malley was an application case, what isn't an application case?

MR. SHEEHY: No, Malley is an application

case, undoubtedly. But I think that it can only -- it's consistent with Fourth Amendment principles.

I think that weighing in the balances is whether or not you're going to enforce these constitutional principles as they're written; whether or not they're going to be used, or be able to be established in practice.

And with Malley, it is completely consistent with all the doctrines of the Fourth Amendment to give that officer the benefit of the doubt, and not to hold him liable, because he went and got a warrant, and so --

QUESTION: It may be, but it's not consistent with the theory that you only apply Harlow at the theoretical stage and not at the application stage.

MR. SHEEHY: That's true.

QUESTION: That's may only point.

MR. SHEEHY: That is true. But as I said earlier, it's about as close as you can get to getting a precedent controlling the case.

In any case, I believe that government agents have been held liable for acts similar to what Russell Anderson did in this case, since the Middle Ages. At least Sir Matthew Hale would say that if you search for a fugitive in a third party's home, you'd be liable if he wasn't found there.

This isn't a startling new development in the law that the government makes it out to be.

I think that there's an old saying that a lawyer in my office uses that you can't put a shine on a tennis show, or you can't put a shine on a sneaker. And I think that's what the government's trying to do here today.

They're trying to actually have a wholesale lowering of these standards, rather than any immunity. Because under their doctrine, you're not going to have immunity. You're going to continue to be subject to the rigors of litigation.

And there's another old saying that he has, is that it doesn't take long to rip the bark off a rotten log. And I hope that's what the Court does here today with the government's arguments.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sheehy.

Mr. Pincus, you have three minutes left in which to further shine the sneaker.

(Laughter.)

MR. PINCUS: Well, Your Honor, unless the sneaker needs any further polish, I'll rest on our submission.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:58 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

85-1520 - RUSSELL ANDERSON, Petitioner V. ROBERT E. CREIGHTON, JR., ET UX., ET AL.

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BY Paul A. Richardson

(REPORTER)