TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
MICHAEL F. MURRAY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-995
	)	
UNITED STATES;	)	
	)	
and	)	
	)	
JAMES D. CARTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-1016
	)	
UNITED STATES.	)	

Pages: 1 through 47

Place: Washington, D.C.

Date: December 8, 1987

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MICHAEL F. MURRAY,

Petitioner,

v.

UNITED STATES; : No. 86-995

and

JAMES D. CARTER,

Petitioner,

v.

UNITED STATES : No. 86-1016

Washington, D.C.

Tuesday, December 8, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

A. RAYMOND RANDOLPH, ESQ., Washington, D.C.; on behalf of the Petitioners.

ROY T. ENGLERT, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 86-995, Murray against the United States, consolidated with 86-1016, Carter against the United States.

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

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, ESQ.

ON BEHALF OF PETITIONERS

MR. RANDOLPH: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the United States Court of Appeals for the 1st Circuit. The Court granted certiorari to consider a question whether evidence uncovered during a warrantless search in violation of the Fourth Amendment may nevertheless be admitted to evidence on the basis of the inevitable discovery exception to the exclusionary rule.

The following pattern of events gives rise to this question. In this case, the events took place on a Wednesday afternoon in Boston in April 1983.

Officers violated the Fourth Amendment, which is assumed in this case, by entering premises without a warrant. During the illegal search that ensues, they discover evidence. They prepare an affidavit for a search warrant. The affidavit omits the fact that the earlier entry and what they found. The

warrant issues and the officers remove the evidence.

Our position in this case is that whatever the officers find during their illegal entry, whatever they discover, has to be excluded. Under the Court's decision in Segura, whatever they find later during the warrant search comes in and may be admitted.

The Government contends that nothing should be excluded from evidence, despite the unlawful search, and that is what the Court of Appeals held in this case. The facts shall summarize as follows:

By noon on April 6th, the Wednesday, as I said, in 1983, a joint FBI/DEA investigation was on-going involving a total of about fifteen agents. Before 1 p.m. that day, the agents began keeping a warehouse in South Boston under surveillance. They had concluded by that time, and even earlier, that it contained marijuana.

The building was located on the corner of First and D Streets. It had two garage doors facing First Street and a black steel door facing D Street, the only entrances to the warehouse.

About 1:45, agents saw a white truck and a green camper pull up, go into the warehouse. A few minutes later, the vehicles left, they were followed by some of the agents on the scene, and later stopped; one on the Massachusetts Turnpike, another in Dorchester, both of the vehicles contained

marijuana.

In the mean time, many of the agents, at least seven, had assembled at a parking lot about one mile from the warehouse. The Pier Restaurant parking lot. With them was the Assistant United States Attorney. The two agents who were in charge of this investigation and a DEA agent named Keaney, an FBI agent named Cleary, were there.

They saw a green camper pull into the parking lot, arrested its occupant, only to find they had arrested an electrician from New Hampshire. They looked through the vehicle and there was no marijuana.

Petitioners then drove into the parking lot in another vehicle, a blue van, with ladders on top. They, too, were arrested. The agents looked through their vehicle. Again, no marijuana.

Several minutes later, most of the agents, except the two agents in charge, Keaney and Cleary, left the parking lot. They headed for the warehouse and converged there, met there with several other agents, three at least, who were already there, as I said, keeping the warehouse under surveillance.

After walking around the warehouse and announcing, according to Agent Kennedy, "DEA/FBI, Open Up", one of the agents took a tire iron from his car, broke open the side steel door and entered. The immediate entry into the warehouse was through a small office. They proceeded through the office into

a large bay. Four vehicles were there. One of the vehicles, a camper, a Scottsdale camper, had twenty-five bales of marijuana in it.

The agents looked under the vehicles, inside vehicles, went around the warehouse, found no one, but also discovered in the course of their tour approximately 270 bales of marijuana strewn around the floor in the far left of the warehouse.

After they were in the warehouse, the two agents at the parking lot drove up. They also took a tour of the building and one agent, who was outside, an Agent Newton, and had been posted there for security, was allowed to come in and he went inside.

I'd like to freeze the frame right there. Stop the action. Because I think what you see, at least so far, is a search, an illegal search, that is at the heart, the core, of the Fourth Amendment. It's in Boston. Agents break down the door of a warehouse. They're searching for smuggled goods. They're accompanied by a court officer. All of that is very familiar American history because that is exactly what the writs of assistance allowed, and James Otis, of course, gave his argument more than 200 years ago, which, according to some people, including John Adams, lit the spark of the American Revolution to stop that and that's why we have the Fourth Amendment.

The Government's argument in this case is very similar to the Attorney General of England's argument. They couldn't get a warrant because if we did, the goods would be removed, and I've set out the Attorney General of England's argument 200 years ago as precisely the same.

The fact that the agents had probable cause in this case is also of no moment. In case after case in this century and in this Court, many of which are cited on pages 32 and 33 of our brief, the Court has held "although the agents had probable cause, they still have to get a warrant and the fact that they possess it without going to the Magistrate is of no moment. The magistrate is to interpose his judgment or her judgment between the police and the citizens. More than that, the warrant confines the ensuing search because it has to be specific."

What else happened? There was a seizure at that moment. The marijuana that those agents found in that warehouse was seized. There are several reasons for that, and this was not an issue in the District Court of the Court of Appeals. The Government has raised it in this Court and I'll confront it.

1. Seizure is defined as interference, meaningful interference, with possessory interest. We had ten agents go into a warehouse, break the door down, and then surround the warehouse, as I'll get to in a moment.

Their purpose, according to the Government, was to prevent the removal or destruction of evidence. That is interference. More than that, a statute which I did not cite in the brief but have informed the Government makes it clear that once the agents find contraband, they possess it. It's the property of the United States. It's in the custody of the Attorney General of the United States, and they must seize it, with or without court order.

QUESTION: Mr. Randolph, I don't understand what you're saying. Let's assume a case where agents believe that there is contraband in a warehouse, they surround the warehouse in order to prevent it from leaving while one of them goes to secure a warrant. Have they already effected a seizure, a warrantless seizure?

MR. RANDOLPH: Under Segura, what they have done at most is engaged in a reasonable seizure of the property, and also under Mincey, --

QUESTION: Have we ever said that that's a seizure? Just surrounding -- you're saying it's a seizure but a reasonable one because --

MR. RANDOLPH: I think Segura so held, Justice Scalia, and I think it was that basis on which the Court said "therefore, there's no difference between securing the property from the outside and going in and staying there nineteen hours".

But our proposition is there was a search here, and that that search violated the warrant clause because they broke the door down, and once they got in there, then our position is that the evidence that they find has to be suppressed for three reasons, which I'll get into.

Number 1. If it's not, then all the incentive is there to conduct a warrantless search before you get a warrant. They had nothing to lose.

Number 2. The purpose of the warrant was to confine the search. If anything they discover, whether by pulling drawers open or looking, is suppressed, then the search is confined.

Number 3. And I use the Government's argument and this Court's in Segura, when the Government Attorney was asked what is there, what incentive do agents have when they go on premises to leave, and the Government said the incentive is to suppress what they find when they're inside, and if they stay longer, they probably will find something more. So, that gets them out.

QUESTION: The Court didn't addressed the problem we have here, did it, as to whether the stuff that was seen prior to the securing of the premises should be suppressed?

MR. RANDOLPH: The Court said in the opinion that is not before it, I want to be precise about this, "however, because the Court of Appeals suppressed that evidence and the

Government did not cross petition, however, Chief Justice Burger and Justice O'Connor in a separate portion of the opinion relied upon the suppression of the evidence found during the warrantless entry as the reason why the decision in that case would not undermine the exclusionary rule."

As I said, that was only one part of the opinion.

QUESTION: Well, Mr. Randolph, the Courts below didn't really address the question of whether the -- what the officers saw after their illegal entry, influenced the decision to get the warrant, did they?

MR. RANDOLPH: That's correct. They did not.

QUESTION: And, so, really, the question we have to decide is if, in fact, what the officers saw on their illegal entry did not influence, if it did not influence their subsequent decision to get the warrant, must the evidence be excluded.

MR. RANDOLPH: Well, we are getting into the realm of intent, and I would like to address the question this way:

The Government has made the argument in this Court that the officers were contemplating. What they were contemplating before they broke the door down was getting a search warrant, and that's a new fact, I think, in this case. It was never proposed as a finding by the Government and there is testimony which we quoted in the reply brief that the agents that were in charge of this investigation --

QUESTION: Well, that wasn't addressed below, and I think we need to deal with it first in the abstract. If the proof is there and the trial court finds.

MR. RANDOLPH: Right. That's what I'm getting to.

Now, the question is what rule of law does that embody. That means if the agents had decided to get a warrant before they went in and violated it under the Government's theory, then all the evidence comes in.

I think that kind of a law, kind of a rule, under the Fourth Amendment, completely destroys the warrant clause, and here's why.

First of all, any knowledgeable officer, if the Court so holds, as he's breaking into premises, will suddenly have an on-rush of contemplation, a desire to get a warrant, as he's walking in without one.

The purpose of the warrant clause is when officers have a desire to search and it was inevitable this warehouse was going to be searched. The question was, was it going to be searched legally or was it going to be searched illegally. And the purpose of the warrant clause is to make sure, and the purpose of the exclusionary rule is to make sure, that there's compliance with the Fourth Amendment.

So, if you have a rule, number one, that says whenever you're contemplating and you've already decided to get a warrant, then if you go in without one and violate the Fourth

Amendment, there's no consequence, then that seems to me to be completely contrary to the Fourth Amendment.

QUESTION: I don't think that's the extent of the rule that is suggested. It's a question of if the officers, in fact, had probable cause to get a warrant, and if what they see after the illegal entry does not affect their decision to seek a warrant, then must the evidence be excluded.

MR. RANDOLPH: But, then, we're getting into, I think, Justice O'Connor, a land of make-believe. Let me explain why.

One would have to suppose that an agent, as the agent is going into the premises, not knowing for sure what's in there, has the following thoughts going through their mind. I am going to get a warrant and I'm going to carry out that decision no matter what I find in that building, and if I go inside that building and I find nothing, it's completely empty, nevertheless I'm carrying out that decision. I'm going to get to a magistrate, I'm going to swear I have probable cause to believe that whatever I was looking for is there, and I'm going to go back and search it, even though I'm not going to find it. It has to influence.

QUESTION: Well, I don't follow that scenario at all. The question only arises if, in fact, they get a warrant and go back and try to seize evidence that's offered at trial.

MR. RANDOLPH: And the consequence of that, of

allowing that evidence in is that there's no deterrent anymore because what incentive is there for an officer who knows that in an hour or two hours, you can go get a warrant or maybe his colleagues are up at the magistrate, why wait. They're intending to get a warrant. We might as well go in right now, and if the -- suppose the magistrate doesn't issue the warrant in that situation, regardless of the officer's intent, then what have they lost? All that shows is they never had probable cause and couldn't have gotten a warrant and shouldn't be in there anyway.

More than that, if it's the intent to get a warrant that controls in this case, then they go in, the search is unlimited. It's not controlled by what the magistrate says you can search for. The limiting of the warrant. So, I think it destroys every root and branch, everything that warrants were designed to do, if this is allowed.

I'd like to turn to the Government --

QUESTION: Mr. Randolph, just for the record, we didn't hold in Segura that surrounding the warehouse or even going into the warehouse and being there would constitute a seizure.

MR. RANDOLPH: Assumed arguendo.

QUESTION: Assumed arguendo.

MR. RANDOLPH: I'm sorry.

QUESTION: Big difference, and we found that even if

it had been, it would have been reasonable. Yes.

MR. RANDOLPH: I've gotten ahead of myself. The agents, after they're inside, there's a conference, and they decide -- the conference is to go to get a warrant at the courthouse which is a short distance away, and two of them depart and eight hours later, about 10:40 in the evening, a magistrate signs the warrant.

The agents then, who were still at the warehouse guarding it, immediately go back in. They don't even know what the terms of the warrant are. They receive a telephone call and that's admitted, the prosecutor so stipulated. About a half hour later, the warrant arrives and they carry off within the next twenty-four hours the goods that they found.

The Government in this case, in addition to the notion of inevitable discovery, is now saying that there is no -- that there is an independent source. There's no connection between the illegal search and the evidence that was sought to be introduced at trial and was, in fact, introduced.

I've already addressed one of their arguments, one of the reasons is well, it really wasn't seized until the warrant arrived, and I think there's nothing to that. The other argument is, look, if they hadn't searched the warehouse illegally, even if they hadn't done that, they would have searched it legally.

That argument, I think, is fallacious. One can say

that in every case this Court has ever decided, suppressing evidence when the police have probable cause and didn't get a warrant. The fact is there's only two ways to search. One is with a warrant and one is without. One is legally and one is illegally. And you cannot base a decision on the following that, well, even if we didn't do it illegally, we would have done it legally, which is essentially what the Government's argument revolves down to, and it's -- I'm reminded of this when I was coming here this morning, it's like the warehouse door had a big stop sign on it, and it said "Stop, Fourth Amendment", and the police go through it anyway.

And, then, when that's found out, they said, wait a minute now, we can do this legally, watch, and they come out and this time they stop at the door and get a warrant and go through and duplicate what they did before.

Now, that argument wouldn't persuade, I don't think, many police officers, and I hope that the argument will not persuade this Court because that is essentially what the Government's arguing.

I want to sum up and reserve the balance of my time by saying three things. I think the Government here has come close, awfully close, to confessing error in this case. They say if the agents intended to get a warrant from the start, then this would be a different -- if they did not intend to get a warrant from the start, there's no indication of that, this

would be a different case. They didn't intend it.

The Government says if the marijuana was seized upon the illegal entry, then maybe it should be suppressed. It was seized. The Government says if the search was confirmatory, then maybe the evidence should be suppressed. The search was confirmatory.

QUESTION: What does confirmatory mean, Mr. Randolph? Have we ever used it in any of our cases?

MR. RANDOLPH: You have never used it, Your Honor, and what it means in this situation is simply that the agents confirmed their suspicions. They only suspected marijuana was there before. They got inside, they confirmed two things actually. They confirmed that there was no one there, and they also confirmed that the evidence that they were seeking was, in fact, on the premises that they had broken into.

QUESTION: Well, is the fact that the search was confirmatory, is that a vice other than the vices you've already averted to in your argument?

MR. RANDOLPH: It's part and parcel of my argument, Chief Justice, and -- but the Government, I'm saying the Government has gone off and said if the agents had a confirmatory intent or a purpose, then we would agree that the evidence should be suppressed. I'm just responding to the Government's argument.

QUESTION: I think they say that only for their first

argument. I think the inevitable discovery argument would continue to be valid regardless.

MR. RANDOLPH: I'm not sure where all the pieces of the puzzle fit, and I thought that was in the -- maybe it was in the independent source argument. I may be wrong about that.

I'd like to reserve the balance of my time.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Randolph.

Mr. Englert, we'll hear from you now.

ORAL ARGUMENT OF ROY T. ENGLERT, JR., ESQ.

ON BEHALF OF RESPONDENT

MR. ENGLERT: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to try to make clear at the outset exactly what the Government's position is in this case. When evidence is seized pursuant to a valid untainted warrant, we submit that the fact that there has been a prior illegal search does not require the suppression of any of the evidence seized pursuant to the warrant, unless there is a causal connection between the illegal search and the seizure of the evidence pursuant to the warrant.

Now, Mr. Randolph disputes our position that there's no causal connection in this case, but it's also important to understand before getting into the merits of that question that Mr. Randolph contends that this evidence, all the evidence seen during the assumed illegal search, must be suppressed whether

or not there was any causal connection. If the Petitioners are right, then there's no need to get into the question of causal connection.

So, the first question I'd like to address is whether they are right. The Government's position, as I stated it a moment ago, is with one qualification exactly what this Court held three years ago in Segura v. United States. The one necessary qualification, which has already received some discussion this morning, is that the Court was addressing only part of the evidence seized pursuant to the warrant in Segura. Only the evidence that had been present but not seen during the unlawful entry was at issue in Segura.

The 2nd Circuit had suppressed all of the evidence that was seen during the unlawful entry. The Government had not cross petitioned on that issue. I would note for the record, however, that we were very careful in our brief in Segura in Footnote 21 to state that our position was that that evidence should not have been suppressed either, even though we did not cross petition on it.

Footnote 21 of our brief stated that the independent source and the inevitable discovery documents should apply to the previously-seen evidence just as to the previously-unseen evidence. And when Mr. Fry, in his argument in this Court, discussed the distinction between seen and unseen evidence, he was quite careful to say that that was a distinction the Court

of Appeals had drawn, not necessarily a distinction the Government was making.

QUESTION: But is it not correct that the Chief Justice in his opinion said that one reason that there will be a deterrent against this kind of activity is that the -- whatever evidence they discover as a direct result of the entry will be suppressed?

MR. ENGLERT: No, Your Honor. He said it may. May be suppressed.

QUESTION: Yes. May be.

MR. ENGLERT: I think that's an important distinction.

QUESTION: You don't think he meant that it would automatically be suppressed?

MR. ENGLERT: We do not.

QUESTION: I see.

MR. ENGLERT: I believe the sentence continues, "as it was by the Court of Appeals in this case", and that's a sentence very similar to the sentence you can find in the text of our brief in Segura, a sentence off of which Footnote 21 hangs, saying that we were not endorsing that view.

QUESTION: What is the deterrent then if it won't be suppressed? If you say it may. Of course, anything might be suppressed. I don't understand his reasoning there if he isn't assuming that it would be suppressed on the facts of that case.

MR. ENGLERT: Your Honor, he was, of course, assuming that, but that was one of several deterrents that the Chief Justice discussed.

QUESTION: And the other is that he might sue the police officers.

MR. ENGLERT: Civil liability was one of the deterrents. Administrative sanctions were another deterrent that he discussed. Another deterrent, which I believe was not --

QUESTION: You can rely on those here, too, I suppose.

MR. ENGLERT: Yes, Your Honor. We certainly do rely on those.

QUESTION: What kind of sanction would you say would be appropriate for the officer who fills out the application for a warrant and doesn't tell the magistrate that they've already searched the place?

MR. ENGLERT: No sanction whatsoever, Your Honor, because that doesn't bear on the determination that the magistrate makes, which is whether probable cause exists. We think that that is commendable police practice, to avoid taint in the warrant when there's a question of taint, and to put before the magistrate only the evidence that is known to be untainted, so that the magistrate can make the probable cause determination.

QUESTION: Is it clear that the Chief Justice's "may" is gone if we agree with you in this case? I mean, there would still be a possibility of such suppression to the extent that the fact that they saw certain contraband would cast doubt on whether they had an intent to get a warrant in the first place.

MR. ENGLERT: Absolutely correct, Your Honor.

QUESTION: So, --

QUESTION: Yes, but if that happened, then you'd suppress everything.

MR. ENGLERT: That is --

QUESTION: He's assuming there are cases in which you draw a distinction between the two. I don't think you can posit a case where you do draw a distinction between the two. Between the seen and the unseen evidence.

MR. ENGLERT: No, Your Honor. You're quite correct.

QUESTION: So that your view is quite different from the Chief Justice's view because he said there may be cases where you must draw a distinction.

MR. ENGLERT: Our view is quite different from that suggestion. Yes, Your Honor.

There are additional deterrents in cases such as this. There is an exclusionary deterrent, which is it is the Government that must convince the finder of fact that the decision to obtain a warrant was, indeed, independent of what was seen and learned during the prior assumably unlawful entry.

QUESTION: Was there that in this case?

MR. ENGLERT: There was no finding in so many words because, as Mr. Randolph said a moment ago, this issue was not raised in the lower court. The argument that no warrant would have been sought but for what the agents saw during the warrantless entry is one the Petitioners are making for the very first time in this Court. It was not made in the District Court. It was not made in the Court of Appeals. The argument was not framed in those terms.

QUESTION: Well, let's assume that the agents wouldn't have gotten a warrant if they hadn't performed an illegal search before --

MR. ENGLERT: Suppress everything.

QUESTION: Suppress everything.

MR. ENGLERT: Suppress everything that bears that causal relationship to the unlawful search. We concede that that should be suppressed. We advocate that should be suppressed.

QUESTION: Who has the burden of proof on the issue of determining whether there was a causal connection?

MR. ENGLERT: It's the Government's burden of proof, Your Honor.

QUESTION: And, so, if there's no finding, there is a failure of proof on your part?

MR. ENGLERT: No. There's only a failure of proof on

an issue that was uncontested.

QUESTION: Don't you have the burden of introducing the issue, too? I mean, if he raises the point, then you have the burden of proof, but you don't have the burden of going forward? Is that your thought?

MR. ENGLERT: We certainly have the burden of showing a lack of causal relation.

QUESTION: And there's no such finding --

MR. ENGLERT: Lack of causal relation was at issue in the lower courts, but the only contested aspect of that issue in the lower courts was whether the acquisition of the warrant -- well, in fact, I'm not sure there was any contested aspect of that in the lower courts.

The argument that was made in the lower courts, which is repeated here today, is that it doesn't matter if there's a causal relationship. Everything that's seen has to be suppressed. It's for that reason that the Court of Appeals could state with such confidence that there was no causal relationship in this case because nobody was contending otherwise. The contention was you don't need a causal relationship.

Now, on this question of whether you do need a causal relationship, there is a difference between Segura and this case. Segura involved previously-unseen evidence. This case involves previously-seen evidence. According to Petitioners,

that makes all the difference in the world. They say that everything has to be suppressed if it was seen.

That argument has been presented to five Federal Courts of Appeals in the three years since Segura was decided. All five have rejected that argument and have admitted previously-seen evidence in the absence of a causal relationship. The 1st, 2nd, 4th, 7th and 9th Circuits.

The 2nd Circuit, in reaching that conclusion, overruled its own prior Segura decision to the extent that it requires suppression of previously-seen evidence in the absence of a causal relationship.

There are, of course, courts that have ruled against the Government in cases that have some similarity to this. In particular, in cases in which the evidence was physically seized during the entry and the argument was only, well, we would have gotten a warrant if we hadn't done that. But no court has drawn the distinction between previously-seen and previously-unseen evidence in the way that Petitioners would draw it and said there is no need for a causal relationship in the case of previously-seen evidence.

We think the 1st, 2nd, 4th, 7th and 9th Circuits have reached the right result and have analyzed the issue in the proper way.

The exclusionary rule is designed to prevent the Government from benefiting from violations of the Constitution.

That is why the Chief Justice said in Nix v. Williams, the exclusionary rule was meant to put the Government in the same position it would have occupied if no illegality had occurred, not to put the Government in a worst position than if no illegally had occurred.

In a case where evidence is seen during an unlawful entry and is later seized pursuant to a valid warrant, it is only if there is a causal relationship between those two events that application of the exclusionary rule would put the Government in the same rather than a worse position.

The exclusionary rule was meant to prevent the Government from exploiting illegalities, not to punish the Government, and to punish society by the exclusion of probative evidence in every case in which there is an illegality, whether exploited or not. That's the lesson of Wong Sun and Segura itself.

QUESTION: And you say we don't have findings by either the lower courts as to whether there was or was not a causal connection between the things that were seen, so to speak, and the things that were unseen?

MR. ENGLERT: Your Honor, the -- we think that the findings of the lower court are absolutely sufficient to negate any possibility of a causal connection in this case.

QUESTION: Can you refer specifically to findings that the Court of Appeals made findings?

MR. ENGLERT: Well, obviously, the Court of Appeals does not make findings, but the Court of Appeals did observe --

QUESTION: I've observed them to make findings.

MR. ENGLERT: Well, Your Honor, on page 28A of the Appendix to the Petition, the Court said: "This is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued, as there was no causal link whatever between the illegal entry and the discovery of the challenged evidence. We find no error in the Court's refusal to suppress."

We think that that is an absolutely-correct reading of the record, given the findings by the District Court. One finding by the District Court --

QUESTION: How about the findings of the District Court? Can you point to something --

MR. ENGLERT: Yes, Your Honor.

QUESTION: -- specific in those findings?

MR. ENGLERT: Page 42A in the middle of Paragraph U, the Court finds that "in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly-critical evidence, the agents made a forced entry of the building".

That is a finding directly contrary to Petitioner's suggestion that the reason they entered was to search for

marijuana. That point was argued in the District Court, that they were looking for marijuana when they went inside. The District Court found otherwise.

The District Court went on to find that the warrant was not vissiated by the prior illegal search which is also a finding on the absence of causal relation.

This is a warehouse that had been under surveillance for about an hour and a half before the warrantless entry occurred. At the time the warrantless entry occurred, two vehicles that had been seen coming out of the warehouse at 2:05 p.m. had been stopped and found to be full of marijuana.

As Mr. Randolph said in his argument, there was already a suspicion even before the stopping of those vehicles that this warehouse was a distribution point for large quantities of marijuana.

What Petitioners are suggesting, even though they didn't suggest it in the lower courts, is that this Court must assume that that warehouse would have been left alone if no warrantless entry had been made. That would be a plausible scenario perhaps in either of two circumstances.

It would be a plausible scenario if, contrary to the District Court's findings, the officers had gone into the warehouse with the purpose to search for marijuana. If it had been a confirmatory search in the sense that the decision whether to get a warrant was contingent on what they found in

the warehouse, then there would be a causal relationship.

There's another scenario that might make the Petitioner's argument plausible. If, when they went in, they had used that opportunity to physically seize the evidence in the warehouse, then, of course, it would be plausible that they didn't at that time have an intent to come back.

For example, in Footnote 12 of their reply brief, the Petitioners cite some cases in which agents made exigent circumstance entries on the premise, seized evidence, and didn't come back later with a warrant to get it again.

Well, of course, if the evidence has already been seized, that negates any inference that there was already an intent to go get a warrant. But that's not this case. This is a case in which no physical seizure of the evidence took place while the agents were in the warehouse.

QUESTION: Mr. Englert, would you make a comment on the hypothetical that Mr. Randolph raises? Lots of times, I suppose, it's possible that you have probable cause to find something and when you make the search, you don't actually find it. There's a difference between certainty and probable cause.

What is your view about the scenario that would have taken place if they went into a place like this and found -- did not find what they expected to find?

MR. ENGLERT: Your Honor, I have two answers to that.

The first answer is that they would have come back

with their sweepers, with their fingerprint people. They would have looked for marijuana residue. They would have looked for fingerprints. They would have looked for small items of the sort that would not be uncovered during the security sweep that took place.

QUESTION: Well, what if they were looking for, say, a stolen vehicle rather than marijuana, so that they knew it was either there or it isn't there? When they get in, they just don't find it. Do you think they would then come back anyway?

MR. ENGLERT: Your Honor, it's certainly possible to imagine hypotheticals different from this one in which they would not have come back, but, of course, in Segura, --

QUESTION: Presumably, since probable cause is a great deal less than certainty, there must be a very large number of cases in which there is probable cause, but, yet, the search is unsuccessful.

Now, these are not just remote possibilities. It must happen very frequently.

MR. ENGLERT: Of course, this case didn't involve a search for evidence. There may be circumstances in which certain exigent circumstances --

QUESTION: They're searching for a large weapon or explosives or something like that, and you don't find it, is it not true that they probably would not go get a warrant in that

case?

MR. ENGLERT: There certainly may be some such cases, Your Honor, yes, but, again in Segura, --

QUESTION: And if there is such a case, then is it not true that it cannot be said that the application for the warrant was inevitable because they wouldn't have gotten the warrant unless they found what they were looking for?

MR. ENGLERT: That argument could have been made in Segura. If that argument is correct, Segura should have been decided the other way.

QUESTION: Well, Segura should have been decided the other way. No doubt about that.

QUESTION: Well, do you concede that their state of mind after they entered is at all relevant? I should have thought the proposition is whether, at the time they entered, they had an intent to get a warrant and whether a warrant at that point would have been obtained, assuming the entry had never occurred.

Does it make any difference to your case whether, after they entered, they would not get a warrant because they know that there is nothing there? I don't see how that has anything to do with whether the entry caused a later warrant or not.

MR. ENGLERT: I agree, Your Honor. That's why we distinguish between confirmatory searches in which the purpose

is to decide whether to go get a warrant, in which going and getting a warrant is at the time of entry contingent on what is found inside because of the officer's state of mind, and other kinds of searches that may happen to confirm what is found inside.

QUESTION: You are right that it doesn't bear on the causation issue. But I just submit to you that you are trying to come in under what is known as the inevitable discovery issue and the inevitable discovery means, it seems to me, that there must have been an inevitable probability that you could go ahead and get the warrant. But you're saying you wouldn't if you didn't find anything.

MR. ENGLERT: Your Honor, we are here under both independent source and --

QUESTION: Now, you're arguing independent source then.

MR. ENGLERT: Well, we think it's essentially the same argument. Your Honor may differ.

QUESTION: But you don't think inevitable discovery requirement means that it has to be inevitable?

MR. ENGLERT: We do think that inevitable discovery argument means it has to be inevitable, yes. But inevitable at the time of entry, not inevitable contingent on some hypothetical future event that did not, in fact, occur.

QUESTION: Why isn't -- I suppose if there had never

been an illegal entry in the first place, but then a valid warrant issues and they go into the -- or even if they say a warrant was issued to discover some other kind of evidence and they go in the warehouse and in plain view is some marijuana.

Now, why isn't this a plain view seizure in this case?

MR. ENGLERT: Well, that, of course, depends on the legality of the initial entry.

QUESTION: Why?

MR. ENGLERT: Which -- as I understand the plain view doctrine, the plain view doctrine applies when agents are aware they have a right lawfully to be.

QUESTION: Yes.

MR. ENGLERT: And if they had a right lawfully to be in the warehouse, then, of course, the plain view seizure would be valid.

QUESTION: All right. So, you just get -- I don't know what inevitable discovery has to do with it, though. It's just a question of whether they were lawfully there, and if they were lawfully there, it's a plain view seizure. Whether they are lawfully there may turn on whether their entry is tainted by the form of search.

MR. ENGLERT: If they are not unlawfully there, as assumed in Segura and as is being assumed arguendo in this case, that's when the question of independent source and

inevitable discovery arise. One must assume a prior invalid action in order to get into a question of causation, questions of independent source and inevitable discovery.

(Pause)

MR. ENGLERT: Again, Your Honor, we are turning to the question of whether a warrant would have been obtained in this case in the absence of the assumedly unlawful warrantless entry.

It really is all together implausible to suggest on the facts of this case that the warehouse would have been left alone and nothing would have been done if this warrantless entry, this warrantless protective sweep had not occurred. That suggests that these agents, after conducting surveillance, would have abandoned their interest in the warehouse, even though they had probable cause.

As I say, there are scenarios in which that would be plausible, but those are not the scenarios in this case. That is why we submit that this Court should affirm the judgment of the Court of Appeals, not remand for further factual findings, because the inference from the findings that have been made that the warrant would have been obtained is, we submit, inescapable in these facts.

Contrary to Petitioner's submission, we submit that that inference is sufficient to support admission under the independent source and inevitable discovery doctrine, and we

submit that the judgment should be affirmed.

QUESTION: Mr. Englert, would you just say a word? You've covered it briefly, I guess, but I'd like to hear a little more about it. Whether if we agree with you, we aren't making it painless for the Government to behave in this fashion?

I mean, let's assume we agree with you on causality and all of that but, nonetheless, the exclusionary rule is a deterrent and are we eliminating all of the deterrent effect if we say, you know, so long as you have -- can convince a court that you had a prior intent to get a warrant anyway, you have nothing to lose by going in unlawfully.

MR. ENGLERT: The answer is no, Your Honor. It is not eliminating all the deterrent effect because it remains the Government's burden of proof to show a lack of causal connection once the illegal entry is established or is assumed.

The Government bears the litigation risk that it will fail in that burden of proof, and that is one of the risks brought about the exclusionary rule that doesn't make --

QUESTION: Well, Mr. Englert, you wouldn't fail very often because you have the officers there to testify and certainly the defense can't contest what they say.

MR. ENGLERT: Well, the defense can contest what they say and, indeed, such factors as whether they physically --

QUESTION: Well, they don't have their own evidence.

All they can do is say to the Court or the jury, don't believe the officers.

MR. ENGLERT: But such factors as to whether they actually seized the evidence during their entry or left it alone and immediately went and got the warrant bear on the credibility of the assertion that it was inevitable from the start that a warrant would be obtained. There are extrinsic factors that can be used to test the credibility of such an assertion.

QUESTION: But if you accept your facts and assume you can make them even more clear, you had an Assistant U.S. Attorney involved in these decisions. Supposing they actually drafted the warrant application before they broke in and sent some people out and they had very strong probable cause and knew it was -- they were confident they would get the warrant. Is there any reason then to await the actual getting of the warrant?

They have written evidence of the application prepared in advance and they all sign in blood that we've agreed to do this before we go in.

MR. ENGLERT: There is a reason to await the discovery of the evidence, but we will admit it's not an exclusionary rule.

QUESTION: I see, but the exclusionary rule has no deterrent effect. You have other reasons like civil sanctions.

MR. ENGLERT: In the precise circumstances you pose, that's correct, but there's nothing novel about the proposition that there may be situations in which the exclusionary rule has no deterrent effect.

QUESTION: Let me ask you another question. You say you also might run a risk if the officers would seize the evidence if they got in there and that would be a -- but why logically should you not make the inevitable seizure argument? If they're going to get the warrant and the authority to seize, why should you suppress the seized evidence?

MR. ENGLERT: You shouldn't necessarily. It depends on how strong --

QUESTION: So, then, that additional sanction you mentioned, you really are not maintaining.

MR. ENGLERT: No, I think not, Your Honor, because the finder of fact has to find inevitably, has to find a lack of causation, and that bears on --

QUESTION: Why does the fact it might have been -- say they had seized the marijuana here before they got the warrant, why should that make a difference? Would it make a difference in your view?

MR. ENGLERT: It would make a difference in the analysis. It might be admitted anyway.

QUESTION: You think it should be admitted anyway, don't you, because it is inevitable that they would have seized

it if they had gone ahead and gotten the warrant?

MR. ENGLERT: On a sufficient showing of the inevitability, yes.

QUESTION: And it's exactly the same showing that you need to justify the entry.

MR. ENGLERT: Except that the showing of inevitability is somewhat undermined, this factual question. It will be harder for the Government to carry its burden of proof on this factual question in those circumstances.

QUESTION: Why?

MR. ENGLERT: Because, in a case like this, in which a brief tour was made and nothing was seized, that tends to confirm the Government's assertion that the plan from the start was to go get a warrant. In a case in which they go in and start seizing things, that tends to suggest that they're grabbing what they can while they may and they haven't thought about what's going to come later or they haven't made any decision as to what's going to come later.

It bears on the factual inference made by the District Court. I should also say, Justice Stevens, in -- about the deterrence question, there's nothing new about the proposition that there are situations that the exclusionary rule just doesn't reach.

Standing is a good example. In the Alderman case, the opinion of the Court --

QUESTION: Yes, I understand it, but basically what you're saying is we should not rely on the exclusionary rule for the deterrent for warrantless entries when there's (a) probable cause and (b) intent to get a warrant as soon as it's convenient to do so. The exclusionary rule will no longer have a part to play in those warrantless entries.

MR. ENGLERT: In cases in which the Government makes a sufficient showing, that's right, because the purpose of the exclusionary rule is to exclude evidence come about by illegality. It's not to compensate for invasion of privacy. That's what civil remedies are for, and in cases in which there is no causation, the evidence is not going to come about by exploitation of an illegality. There has been an illegality, but that illegality has resulted in an invasion of privacy, not in the seizure of evidence, and that's why a civil remedy is appropriate in that case and an exclusionary remedy is appropriate only in the case in which the causation element can be established.

If the Court has no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Englert.

Mr. Randolph, you have eleven minutes remaining.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH

ON BEHALF OF PETITIONERS - REBUTTAL

MR. RANDOLPH: Thank you, Mr. Chief Justice.

I have never maintained, we had never maintained that

had it not been for the warrantless search of the warehouse, the warehouse would have been left alone. That's not our proposition.

The one thing that's clear in this case, without any doubt whatsoever, is that warehouse was going to be searched. The police or the agents had probable cause. Just like they had probable cause in case after case that we cited on page 32 to 34 of our brief.

Question was, was it going to be searched legally or was it going to be searched illegally. Now, the answer to that question is it was searched illegally, and evidence was discovered, marijuana. The Government says there's no causal connection between the two. Why not? Because later on, they got a warrant and searched it legally.

It's like saying Christopher Columbus didn't discover America. Why not? Because somebody else could have later on. The fact of the matter is they did discover the evidence. That's the causal connection. It's discovery of evidence during the course of a constitutional violation, but aside from all that, take a look at where the road the Government is seeking to lead the Court down and the shambles it would make of Fourth Amendment law.

A couple examples. A case I argued here ten years ago, Chadwick. The trunk in Boston coming out of a car. Police search it without a warrant. The Court suppressed the evidence

because they had to get a warrant. But under the Government's theory, consider this: the police do exactly the same thing, but -- and nothing changes except the argument, and the argument will be it was inevitable that they were going to find what was in the trunk. Why? Well, every time we take property back that's been close to an automobile, we do an inventory search. So, it was inevitable that we would have found it.

Or take Chimel, Justice Stewart's famous opinion, confining the scope of the search to the areas within the immediate control of the person arrested and not allowing an arrest to serve as a pretext for running through an entire house, even though they have probable cause. That case. That case would be decided differently under the Government's argument. Why? The Government could say, well, the fact that we searched the entire house upon the arrest is of no consequence whatsoever. We had probable cause and we could have gotten a warrant and, in fact, agent, go get one now. So, all this evidence shall be admitted.

Again and again, in every case, that could happen. It is a self-fulfilling prophecy. The warrant is obtained not for authorization to enter the premises, which is what it was designed for, and at least some people thought we fought for, it's obtained so the evidence can get admitted into a court of law because they've already been inside.

Now, the Government says time and again, that the

evidence wasn't seized. Now, I've addressed that and I think I neglected to cite the statute which says contraband found with or without court order is property of the United States in the custody of the Attorney General through his designees, the DEA and the FBI, and is deemed seized. This statute is 21 USC Section 881(f).

QUESTION: Do you think property found means property looked at in the statute?

MR. RANDOLPH: I would think so. Otherwise, one runs into the following situation: if -- suppose the magistrate didn't issue the warrant in this case, suppose the magistrate looked at it and said there's no probable cause here, I'm sorry, I'm not issuing that warrant, do you think the agents would have then have said oh, close the door and leave, here's your marijuana, do with it as you please, we don't have probable cause? No. They would have seized it anyway. They had to. They had an obligation to, just as if they found heroin or cocaine or anything under the drug control statute.

QUESTION: Mr. Randolph, what if they open a window and see it and then they realize they have no probable cause to enter, no warrant, do you think they'd still have an obligation to go in there because of the statute?

MR. RANDOLPH: Well, if they look in the window and see it, there's certainly a probable cause. The question is whether they --

QUESTION: You think they should go in and seize it?

MR. RANDOLPH: Not without a warrant.

QUESTION: Why is that different in this case?

MR. RANDOLPH: Because they didn't find it till they got inside. They broke through the door. I can stand outside the windows of any government building in Washington and look in and see things, but that doesn't mean that I have a right to break down the door and go in, and that's what they did in this case, and that's what warrants are designed to stop.

QUESTION: Mr. Randolph, I don't understand your seizure argument because it seems to me that if we agree with the Government in this case, that inevitably they would have seized it as well as seen it, and I think they had -- it would cure the illegal seizure much as it cures illegal search.

MR. RANDOLPH: I fully agree, Justice Stevens. My only point is they are using this argument to show there's no causal connection. They're using it in their independent source, no causal connection part. They're not using the argument as I understand it in their inevitable discovery. The two are different.

Inevitable discovery is really a hypothetical independent source whereas independent source means you've got it somewhere else. So, I find myself being inconsistent because the positions of the Government are inconsistent.

I'd like to make two final points. The arguments

that we've heard here today from the Government are not new. Those arguments have been made before in this Court, and they have been made very vigorously in situations that were far more compelling, I would think, than this case.

In the National Security Wiretap case and in Katz, the Government argued strenuously that it should be permitted to get after-the-search warrants, that it should be able to search first, get a warrant later, admit the evidence, and the Court rejected, particularly in the U.S. District Court, in the stirring opinion by Justice Powell, rejected that position flat out.

The other point I'd like to make is there really is not very much need to speculate in this case about what would happen if you unleash agents, police, from the warrant requirement, from the constraints of the exclusionary rule.

One doesn't have to speculate. The --

QUESTION: How is your theory consistent with Segura? Why is Segura all right under your analysis?

MR. RANDOLPH: Segura can rest on the following proposition, that what was not seen was not seized within -- unreasonably seized within the apartment, and the following example --

QUESTION: So, unless we agree with you that there's a seizure here, then Segura covers this case?

MR. RANDOLPH: Segura does not cover this case.

Segura rested on the independent source. The warrant was an independent source for finding things that remained unseen. Segura did not address the next point, although Justice O'Connor and Chief Justice -- I'll give you an example that maybe is the best I can do.

If the police had gone into Segura's apartment and there was an individual hiding in a closet, I don't think -- a secret room, I don't think one could say that individual had been arrested; that is, seized from the moment they were there and the nineteen hours they remained. Therefore, because they were in there illegally, there was no connection between that individual and the police, but when the warrant arrives, they break down the secret room and they find the individual, then I think at that point there is an independent source so long as the warrant itself rested on probable cause before the entry.

I think that's the best I can do, but when they find things illegally, when they're in there, then if they're not suppressed, then we're not deterring, we're giving an incentive for illegal entries, we're giving an incentive for searches beyond the scope, and I might add, I might add that even the illegal entry part of the proposition is not necessary under what I'm contending here.

The entry could be legal. For example in the Chimel case, and then the scope of the search is wider, and the Government would still come back and say inevitably we could

have gotten a warrant.

The last points I wanted to make, I was leading up to, was the experiences in Colorado and California. In the majority opinion in the California Supreme Court and in the concurring and dissenting opinion that we cited, this situation, this factual situation came up, and both the majority and the concurring opinion pointed out that they had to put a stop to it because it had become standard police practice to go in before the warrant arrived. They stopped it.

California had the same experience. They had initially in one case allowed -- accepted the Government's argument here, and what they found after a few years was it had become standard police practice, and I'd also, and this is speculation, I admit, but one has to wonder why suddenly we find case after case after case with this factual situation coming up.

Take a look at the cases that we've cited in our brief. There are tons of them. They are coming out of the woodwork now, and there's -- I would submit to the Court that the reason is once you allow this to happen, once you allow warrantless illegal searches to be duplicated by a search later and that allows the evidence to come in, then what you will find inevitably, inevitably, is that searches with warrants will be preceded by illegal searches without warrants.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Randolph.

The case is submitted.

(Whereupon, at 10:46 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

DOCKET NUMBER: 86-995/86-1016

CASE TITLE: Michael F. Murray v. United States,
James D. Carter v. United States

HEARING DATE: December 8, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States, and that this is a true and accurate transcript of the case.

Date: 12/8/87

Margaret Daly
Official Reporter

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