OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CHARLES K. ELDER, Petitionerv. R. D. HOLLOWAY, ET AL.

CASE NO: No. 92-8579

PLACE: Washington, D.C.

DATE: Monday, January 10, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES K. ELDER, :

Petitioner :

v. : No. 92-8579

R. D. HOLLOWAY, ET AL. :

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Washington, D.C.

Monday, January 10, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

MICHAEL E. TANKERSLEY, ESQ., Washington, D.C.; on behalf of the Petitioner.

JAMES J. DAVIS, ESQ., Boise, Idaho; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 92-8579, Charles Elder v. R. D. Holloway.

Mr. Tankersley.

ORAL ARGUMENT OF MICHAEL E. TANKERSLEY

ON BEHALF OF THE PETITIONER

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

This case presents the question of whether the qualified immunity issue in civil rights actions is governed by a special rule that requires that appellate courts treat legal authorities as if they were facts such that the appellate court is required to blind itself to relevant and potentially controlling legal authorities if those authorities were not presented to or considered by the district court below.

In the proceedings below the Ninth Circuit ruled that the qualified immunity issue -- on appeal, the legal authorities that are relevant to that must be treated as if they are no other legal authorities other than those that were cited to or discovered by the district court. The appellate court, according to this ruling, may not consider other legal authorities it is aware of even if those authorities demonstrate that, contrary to the

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district court's ruling, there is no qualified immunity because at the time of the incident it was clearly established that the officer's conduct violated the plaintiff's civil rights.

This is a special rule established only for the qualified immunity issue in civil rights cases.

QUESTION: Why do you say that's a special rule? I -- it's been a long time, but my recollection is that foreign law, for example, is a question of fact in the courts.

MR. TANKERSLEY: That is true.

QUESTION: And might not prior law also be -- certainly current law is not -- is not a question of fact, but what was the state of prior law at a particular point in time, why can't that be a -- why isn't that a question of fact?

MR. TANKERSLEY: Well, it's a question of law because in all of this -- this Court's cases dealing with the qualified immunity issue, this Court has stated that it's a pure question of law. And the ascertainment of that is governed, as with any other question of law, by have -- by looking at decisions precedent, statutes, other sources of legal authority. Foreign law --

QUESTION: But it is a question of law for that purpose. That is to say you determine it by looking at

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legal authorities. But the issue of whether it's a question of law for the purpose before us here, just as the question of whether it's a question of law for purposes of whether it's a jury or the judge, there are all sorts of different contexts in which that issue could come up.

And it seems to me that we're looking for an essentially factual matter here, aren't we? What was -- on the basis of legal authorities, what was the understood nature -- not what was the real law, because the real law hasn't changed, it's always been the same, but what was the understood nature of the law at that time? That's a question of fact, it seems to me.

MR. TANKERSLEY: No, I believe that's a question of law, because it's a question which does not go to trying to ascertain evidence in the sense of evidence that may be impeached or contradicted or contradictory. Proof -- burdens of proof ordinarily deal with that kind of problem, dealing with the risk of uncertainty in trying to ascertain from evidence whether or not a particular fact occurred.

QUESTION: So foreign law is a question of -- is a question of law, then.

MR. TANKERSLEY: Foreign law is a question that is --

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QUESTION: It's a question of law --

QUESTION: Well --

QUESTION: -- That's proved like a question of fact, because the materials are often not accessible to the decisionmaker because they're in a foreign language and in a foreign legal culture. So they're proved through witnesses --

MR. TANKERSLEY: That's true --

QUESTION: -- So to that extent you can call them -- but they're not questions of fact in that they're submitted to a jury to decide.

MR. TANKERSLEY: That's correct.

QUESTION: And under Rule 44 they are questions of law, aren't they?

MR. TANKERSLEY: Foreign law is a question of law, but this Court's decisions have also repeatedly emphasized that certainly questions of Federal law are questions of law, ascertaining what the legal authorities. And, indeed, in Federal courts questions of ascertaining what the State law is is also a question of law on which principles of forfeiture or estoppel because a party didn't introduce particular facts in the proceedings below simply are inapplicable.

The Court has repeatedly said that in dealing with deciding a question of law, courts are not limited to

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merely selecting among what has been presented by the parties or the contrasting interpretations of the authorities that have been presented, but have an independent obligation to ascertain what the correct rule of law is. And that applies equally in the context of the qualified immunity question where the --

QUESTION: But -- excuse me, but this isn't -- we're not looking for what the correct rule of law is. We know what the correct rule of law is now. There is a constitutional right. We are looking for a state of understanding, a state of past understanding, not a state of law. And I don't see how any analogies to what the law is bear upon that question.

MR. TANKERSLEY: Because the process for determining what the law was is essentially the same process as a court now going to decide what the question is.

QUESTION: We're looking for what the law was thought to be, not for what the law was.

MR. TANKERSLEY: And the process is the same. If the question was what is the law, the first question a court would have to address is is there a prior precedent or statute or other source of authority that clearly establishes what the law in this particular is -- issue is. And in the qualified immunity context, the inquiry

stops there, but it is the same inquiry as in addressing any other question of law. The sources that the court looks to are the same, the canons of construction that the court uses are the same, the principles that apply are the same. What this rule does is it alters and, indeed, distorts the appellate inquiry.

QUESTION: Well, let's -- let's assume that one of the basic elements of the law at that time consisted of a documents, let's say records of the convention or something, that showed that a particular right was a constitutional right, but that document was -- had not yet been discovered at the time this lawsuit was in action. Now, the issue of when it was discovered is crucial to what the understanding of the law was. It's not crucial to what the law was, it's crucial to the understanding. Do you deny that that's a matter of fact, when was the document discovered?

MR. TANKERSLEY: That would -- I'm not sure that that would necessarily go to a question of fact. That --

QUESTION: When -- when the decision was pronounced, whether a Supreme Court decision came down before -- before this litigation or after this, isn't that a question of fact?

MR. TANKERSLEY: The date that an authority becomes known is a factual matter in the sense that it

happens on a particular date. It is not a factual matter in the sense that rules of estoppel or preclusion apply to prohibit an appellate court from considering that on appeal.

What was done in the Ninth Circuit here is to translate the concept of burden of proof that applies to fact, in the sense that parties should not be able to introduce new facts into the record on -- in the appellate process, a process that would introduce unfairness into the proceedings because the new facts could not be cross-examined, the other side would not have the same opportunity to rebut those facts in the record.

The Ninth Circuit took those principles and translated them to legal authorities where they are inappropriate, whether authorities are equally accessible to both the appellate and the district courts, and to both sides in the litigation. And what was done here is establishing a rule that says an appellate court must announce and, indeed, affirm a legal ruling that is -- that is incorrect as a matter of law, demonstrably incorrect, because the authorities necessary to identify the error were not identified below.

QUESTION: What -- but it's not incorrect as a matter of law. It's incorrect as a matter of fact. The court's determination of what the understanding of the law

was back then will be wrong. I give you that it will be wrong. But will it be wrong as a matter of law or wrong as a matter of fact?

MR. TANKERSLEY: It will be an incorrect statement of what the law is, and resolution of what this Court has said is a purely legal issue.

QUESTION: Well, you're -- you're saying, I think, that there may be more -- there may be several questions involved as subsidiary questions in determining whether ultimately a given proposition of law was clearly understood at the time in question. And your argument, if I understand it is, that when there is no question about the availability of the legal materials on which this -- this question turns, when the legal materials are, in fact, published law reports, that the only issue that has -- the only question that has to be answered was was there a clear statement of law at that time, and that is itself a question of law. Is that your position?

MR. TANKERSLEY: Yes, it is.

QUESTION: Okay. And in this case you don't have to get beyond that -- that question. That's implicit in what you're saying.

MR. TANKERSLEY: No. There is no issue in this case --

QUESTION: There's no claim that the -- that

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the -- that the -- that the law reports had been hidden or locked away from people.

MR. TANKERSLEY: No.

QUESTION: Okay.

MR. TANKERSLEY: There is no claim that it was inaccessible, and what the Ninth Circuit did here is say that you only look to the district court record, defining the record as being the legal authorities that were also cited.

QUESTION: And I take it the test is an objective test as to what a reasonable officer should know.

MR. TANKERSLEY: It is the same objective test announced in all this Court's qualified immunity cases, in terms of what was the announced law at that time in the reporters or other authorities that are accessible and establish law. Was it reasonably anticipated -- clearly established from those authorities that what -- that the conduct violated the plaintiff's civil rights.

QUESTION: Well, if -- if the decision came down a day after the officer acted, I take it he could still defend that at the time he acted the decision had not been --

MR. TANKERSLEY: Authorities that come down after the conduct would not be ones that could be looked

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to for answering this question. We agree that it's only authorities that are available in the reporters, in the statute books, as of the day of the conduct.

QUESTION: Do the cases talk much about what "clearly established" means? If there's a -- if it's the law in two or three circuits but not in the Ninth Circuit, do you have to wait for a Ninth Circuit case?

MR. TANKERSLEY: They do not talk about inter-circuit conflicts. The situation in this particular case is that as of the time of the incident there were three circuit court opinions addressing similar factual situations, all of which came out the same way, saying that in a situation where an individual is in a residence and the officers go to arrest him at that residence and effectuate the arrest by surrounding it and ordering him to come out with a show of force, a warrant is required in order to effectuate that arrest, absente exigent circumstances.

Since that time there's been one additional decision which also has come out the same way. There's no inter-circuit conflict on this. But what the Ninth --

QUESTION: The Ninth Circuit itself just relied on one, didn't it, that Al-Azzawy opinion?

MR. TANKERSLEY: Yes. What was at issue here was the fact that there was a Ninth Circuit opinion

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directly addressing this issue which was not considered by the district court and which the Ninth Circuit acknowledged might control the outcome in this case.

QUESTION: Well, it was not considered because counsel didn't bring it to the court's attention, I assume.

MR. TANKERSLEY: That's correct.

QUESTION: And one can understand a certain degree of frustration when you have counsel that doesn't call attention to the court an obvious controlling precedent.

MR. TANKERSLEY: That's correct, Your Honor. But this is not about the court's frustration, but about what the proper rule for ascertaining what the correct resolution of the legal issue is here. And what the Ninth Circuit did was establish a special rule which essentially says that every appellate court decision issued under this rule only establishes a precedent and announces the rule of law for those particular parties with respect to the particular authorities that were cited in the district court.

So in order to properly ascertain the precedential effect of an appellate court decision under this rule, you would have to have an appendix identifying the precise authorities that were considered. And as the

Ninth Circuit acknowledged, a subsequent case coming up where other authorities were cited would not be governed by that appellate court ruling.

The effect of this is that if two individuals were arrested in this particular residence at the time that the petitioner was arrested and the second individual brought a separate 1983 action for damages, assigned to a separate district court judge who was aware of the Al-Azzawy decision, and that judge also dismissed the case on the grounds of qualified immunity, in review of that case the Ninth Circuit would be compelled to consider the Al-Azzawy decision and potentially reach a totally different outcome, whereas in this case it was not considered and not part of the legal -- the resolution of the legal issue.

QUESTION: Well, Mr. Tankersley, supposing we agree with you on your main point, what can the district courts or the Ninth Circuit do, if anything, about a situation where a party simply doesn't -- fails to call the district court's attention to what may be a controlling case and raises it for the first time on appeal? Are they just stuck with that?

MR. TANKERSLEY: Well, Your Honor, I don't think it's a big problem, because the incentives for plaintiffs to cite every possible helpful authority are already

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there. There's no incentive for -- particularly a plaintiff in this situation, to not cite helpful authority that they're aware of in --

QUESTION: Well, but here -- here the district court was really mousetrapped. I mean, the -- surely a district judge has a right to assume, just as you say, that the parties will have submitted all the relevant authorities. He rules on the basis of those authorities and it turns out that there is an authority on the other side which was never even mentioned to him by -- by the parties.

MR. TANKERSLEY: That's correct, Your Honor. But the only effect of this rule and the fact that you're able to consider this additional authority on appeal is that the appellate court may decide that the district court's resolution of the legal issue was wrong. That --

QUESTION: Well --

MR. TANKERSLEY: That is something which follows from the fact that it is the role of appellate courts to correct legal errors, even if they are due to an oversight in the proceedings in the district court.

QUESTION: Well an oversight on the part of counsel who have simply failed to do their job.

MR. TANKERSLEY: It -- it was an oversight on the part of counsel, but it was also a matter of fact that

this case was on the books and in opinions that the district court also relied upon. The fact of the --

QUESTION: May I ask, Mr. Tankersley, do you understand the Ninth Circuit's rule to apply only to the qualified immunity defense, or is it a general rule that applies to any kind of comparable situation?

MR. TANKERSLEY: I understand this rule to apply -- to be a interpretation of this Court's language in Davis v. Scherer, and for that reason to apply only to the qualified immunity defense on the basis that they interpreted that language, which says that the plaintiff must show that the law was clearly established, as providing that legal authorities in this unique context are to be treated as if they were matters of fact, legal facts. So it does not extend to other contexts.

Although the issue that Justice -- Justice Rehnquist has -- or Mr. Chief Justice has raised has -- applies equally to other contexts where legal issues are at stake. Where there is a motion to dismiss presented or a motion for summary judgment, it is also the case that the parties, as a matter of persuading the court, have to bring before the court whatever helpful legal authorities they have.

If there was a real concern that the way to deal with parties failing to -- deal with that and cite the

helpful authorities in the district court proceedings, there would have to be a general rule. But it has never been the general rule that in deciding a legal issue, whether it be for the plaintiff or the defendant, the appellate court is only to consider the authorities that were presented in the district court below.

QUESTION: But certainly the general rule for all sorts of issues -- legal issues, that can simply be waived by the district court by not being raised --

MR. TANKERSLEY: Legal issues --

QUESTION: -- Even though the law on it is clear, the court of appeals will say, well, that may be, but we'll treat it as though the law is otherwise simply because you did not bring it to the district court's attention.

MR. TANKERSLEY: Legal issues can be raised, but legal issues present a different matter than legal arguments. Because this Court itself has repeatedly emphasized that arguments that go to a particular issue are not foreclosed merely because they were not raised below.

As long as the issue was raised below, the parties can raise any argument that goes to the proper resolution of that issue and, indeed, the court, whether it be a district court, appellate court, or this court,

can consider any arguments, issues, or authorities that help resolve that issue. Because the imperative in the context of legal issues is to get the resolution of the issue right.

QUESTION: Well, that depends --

QUESTION: Mr. Tankersley, why are we assuming this was an oversight on the part of counsel? One of the problems with that Al-Azzawy authority is it came out, in the end, against the position that the plaintiff would have to win on here. That is, the bottom line of that case was there were exigent circumstances so that the arrest could proceed without a warrant. Why isn't it likely here that counsel knew about the precedent, didn't want to cite it, because here too there was a substantial question of exigent circumstances?

MR. TANKERSLEY: This goes beyond the record, but that was not the case here. But our basic --

QUESTION: Why? Wasn't the house full of guns? Wasn't there some evidence that the house was full of guns?

MR. TANKERSLEY: Your Honor, we acknowledge, and it's clear from the district court opinion, that in order to prevail in this case we have to overcome the exigent circumstances issue. But Al-Azzawy is distinguishable on the exigent circumstances issue because that was an

instance where the arrest was made after getting a call the morning of the arrest.

In this case the officers had information about the petitioner, about the fact that he was in town, where he was living, 5 days beforehand. They went out to surveil the residence the weekend before, located the petitioner there, and during the course of this entire conduct in planning, making the arrest, made no effort to get an arrest warrant.

The exigent circumstances issue is one that the district court decided not to resolve because the facts were disputed, and there's -- we don't dispute that that portion of the Al-Azzawy decision is one that we have to distinguish on in prevailing on this qualified immunity issue. But the important point here is that the fact that it has that language does not preclude it being an authority on the issue of whether or not a warrant was required to effectuate the arrest in the first place.

The other aspect of this rule that is offensive and strikes at the very balance that this Court has struck in qualified immunity cases, is it disrupts the balance that the objective standard tries to strike between the -- protecting the legitimate exercise of official discretion and the opposing interest of making sure that there's a remedy when official misconduct violates clearly

established Federal rights.

The premise of qualified immunity is that the conduct should be judged based on an objective standard that is predictable and is not the standard of what the officer thought the law should be or what the court determines in hindsight it should be. What this rule does is change that standard to a rule of pleading.

Where there is what is essentially a subjective standard, the rule of law can change for each individual plaintiff depending on the citations that are made in the district court after the fact. It's also an unpredictable standard. There's no way that an officer at the time of the conduct can anticipate what set of authorities will be cited, and therefore what rule of law will be applied.

QUESTION: Well, you can assume the worst. I mean, I don't see how it's going to have any effect upon officers' conduct. They will assume that all the extant authority will be cited. But that doesn't answer the question of what should happen when all of it hasn't been.

MR. TANKERSLEY: But it also -- it does answer the question that there is nothing about this rule that serves the interests that are behind qualified immunity. As you observe, it doesn't do anything to protect the exercise of official discretion or enhance deterrence. What it does do, however, is deny claims, meritorious

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claims by civil rights plaintiffs merely on the fact that the authority was not cited below.

The effect of this is that an appellate court will be required to affirm the dismissal of a civil rights claim by a victim of a civil rights violation, not on the basis that the official's conduct should be subject to an immunity under the balance of the interests that this Court has identified, but solely on the basis that the necessary authorities were not cited in the court below.

This results in an unjust resolution of cases, because it is -- it has to be accepted that the proper application of these interests and the test established in Harlow results in the proper disposition of civil rights cases where the qualified immunity issue is presented. But this rule provides that there will be a different resolution in particular cases, depending upon what the citations of authority in the district court were.

As enunciated by the Ninth Circuit, this rule applies regardless of whether the party is represented or not, regardless of how severe the official misconduct is, and regardless of how serious the injury that the civil rights plaintiff suffered. It is an imperfection in our system that the outcome of a party's case often turns on the thoroughness of the legal research in the district court, and that is an imperfection that is visited most

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harshly on pro se plaintiffs and individuals who have limited access to legal representation, but what this rule does is elevate that imperfection into a rule of law.

In summary, the rule that's been announced by the Ninth Circuit is wrong precisely because it alters the appellate process so that legal research during the district court proceedings will alter the appellate court's responsibility of correcting legal errors and making sure that legal issues were determined based on all the authorities that the appellate court is aware of. It is also wrong because there is no justification for denying a meritorious civil rights claim or creating an immunity for an officer based on what particular authorities were cited in the district court.

QUESTION: May I ask you a question about Ninth Circuit practice, Mr. Tankersley? Do they have a practice of nonpublishing opinions from time to time?

MR. TANKERSLEY: Yes, they do.

QUESTION: Do they have a no citation rule?

MR. TANKERSLEY: I believe the rule is that the opinion cannot be used as authority for subsequent precedents.

QUESTION: Do you know what the duty of counsel would be before the district court if he had an unpublished opinion squarely in point? Say the -- say

they had not published the Al-Azzawy opinion, what do you suppose counsel's duty would have been?

MR. TANKERSLEY: Your Honor --

QUESTION: Under the Ninth Circuit rule?

MR. TANKERSLEY: Under the Ninth Circuit rule the -- it could not --

QUESTION: On one hand, he's forbidden to cite it and on the other hand he's compelled to cite it.

MR. TANKERSLEY: Well, I think it could not be relied upon for authority and the issue would then arise whether or not an unpublished opinion is relevant for the clearly established determination, which is one that, thankfully, is not presented in this case, and as far as I know has not been addressed by this Court or the courts of appeal.

QUESTION: Mr. Tankersley, on the -- on the issue of whether there can be any precedential value to decisions under the Ninth Circuit's regime, as I understand the Ninth Circuit it is not mandatory that you -- that you not take account of opinions not cited, it's simply optional. So if the court chooses to, it could say we are conducting a thoroughgoing review of this issue on our own, not simply relying upon the cases cited by counsel, and having done that, we find that the law was certain or was uncertain. And that decision would

certainly have precedential effects.

MR. TANKERSLEY: I disagree with that, in that, as I read the Ninth Circuit opinion, at the appellate level they read this Court's decision in Davis v. Scherer as mandating that the appellate court is not to take into account other decisions that it's aware of, that it believes are relevant, that, in fact, it thinks may be controlling, if those decisions were not cited in the court below.

QUESTION: Okay.

MR. TANKERSLEY: If there are not further questions, I'd like to save the balance of my time for rebuttal.

QUESTION: Very well, Mr. Tankersley.

Mr. Davis, we'll hear from you.

ORAL ARGUMENT OF JAMES J. DAVIS

ON BEHALF OF THE RESPONDENT

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

My client, R. D. Holloway, was neither plainly incompetent nor did he knowingly violate the law. That is the issue we ask this Court to examine in deciding this case. Overlaid upon that issue are two procedural issues which were raised and decided by the Ninth Circuit panel, and that is who has the burden of proof when qualified

immunity is raised by pretrial motion and what appellate standard of review should be employed in reviewing an order resolving a pretrial motion on the qualified immunity issue.

First, then, we would like to address the qualified immunity issue.

QUESTION: Well, Mr. Davis, the question presented in the petition for certiorari is basically the one I believe Mr. Tankersley was arguing, that is whether the appeals court should be able to disregard legal authorities that were not cited to the district court. I presume you're going to deal with that question, are you not?

MR. DAVIS: I do intend to do that, Your Honor, yes.

QUESTION: And fairly soon?

MR. DAVIS: I will, Your Honor, thank you.

We are guided on the qualified immunity issue by four recent Supreme Court cases. In a nutshell, those cases instruct us that Mr. Holloway was entitled to qualified immunity if any reasonable officer -- any reasonable officer could have believed the arrest was lawful in light of clearly established law.

The inquiry, as established by this Court, is twofold. You first have to look at the information the

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officer possessed at the time he committed the act he committed, and secondly you look at the law to determine whether it was clearly established. To look at the information that was within Holloway's possession, we need to focus six days before he was arrested --

QUESTION: Mr. Davis -- I think I speak for my colleagues as well -- if the Ninth Circuit had simply decided this qualified immunity issue on the merits one way or the other, we never would have granted certiorari. The point we granted certiorari on was the Ninth Circuit's rule that if a case wasn't cited to the district court on the basis -- to show the existing state of the law at the time, it couldn't be relied upon by the court of appeals. That's what we want to try to decide here.

MR. DAVIS: Mr. Chief Justice, I will -- I'm familiar with the Washington Yakima Indian Nation case, which would allow the party who was successful below to rely on any grounds, but in deference to the Court I will proceed to address the issue.

What petitioner would ask this Court to do is decide the standard of review question in a vacuum. The Ninth Circuit didn't get to that question until it first resolved the burden of proof question, which it raised on its own.

QUESTION: Well, is it your submission that if

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there were an identical case to yours in another district court and the Izumi case or the -- this Ninth Circuit case had been cited, that the results should be different?

MR. DAVIS: The answer to that is, yes, that can happen, but it can happen any time a court of appeals exercises the abuse of discretion standard or any time that a counsel mistakenly doesn't present either a factual basis or a legal basis for their claim.

QUESTION: Well, are rulings of the district court in the Ninth Circuit on the issue of what the clearly established law is, reviewable for abuse of discretion?

MR. DAVIS: I'm sorry?

QUESTION: Are rulings of district courts in the Ninth Circuit on the issue of what is or is not clearly established law reviewable by an abuse of discretion standard?

MR. DAVIS: My understanding is that it is a de novo standard.

QUESTION: De novo determination of law, correct?

MR. DAVIS: That's correct. What the Ninth Circuit did -- and I'm jumping ahead and I will come back to it. What the Ninth Circuit did was it applied a limited de novo standard for review of the burden of proof

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issue.

QUESTION: Mr. Davis, could -- could this district judge have found that case and applied it on his own and said the law is clearly established?

MR. DAVIS: Yes, I believe --

QUESTION: So the law -- so it really turns on not simply what counsel present, but what the judge found or failed to find on her own and what the law clerk found or missed?

MR. DAVIS: Yes.

QUESTION: So we get different results for the very same case in different courts depending upon the diligence of the judge and of the law clerk?

MR. DAVIS: Unfortunately, I think that happens in our system, but we already have that unfortunate circumstance as a result of --

QUESTION: I thought we agreed that this was a special position that the Ninth Circuit has taken with respect to the qualified immunity defense because of that line in the Scherer opinion. That ordinarily if the district court meant -- missed a controlling precedent, the court of appeals would, of course, say, district court, you missed our clearly established law, and reverse.

MR. DAVIS: On -- as I understand the Ninth

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Circuit's decision, which we did not request, it was that there is a limited scope of review under the de novo standard whenever the determination is made that the plaintiff did not meet their burden of proof. Did that answer your question?

QUESTION: And we would apply the same rule -- in this case defendant -- plaintiff was counseled, but many 1983 cases are brought up pro se prisoners who may not have the latest law reports in the library, and the same thing would go there?

MR. DAVIS: That's correct.

Again, I would like to go back and advise the Court that this decision was not made in a vacuum. The court of appeals first determined that the plaintiff has the burden of proof or burden of persuasion as to what clearly established law is. Having made that decision, which I believe is justified by this Court's decisions and by the policy considerations cited in the brief, the issue it had to address, and which this Court granted certiorari on, is the standard of review to be applied. The burden of proof would be a meaningless decision placed on the plaintiff if the plaintiff was allowed at some later time to amend or add additional authorities.

QUESTION: So you're going back -- you keep talking about burden of proof, so you're treating law as

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fact then, if you're talking burden of proof language.

MR. DAVIS: I am not treating it as fact. I am -- as I understand this Court's precedents and as all of the circuit courts, except for the Third, have understood this Court's precedents, it is up to the plaintiff to make some showing in response to a defendant's motion for summary judgment that there was a clearly established right. And I am not likening --

QUESTION: But you've already said it's really not up to the plaintiff because if the judge had found the law on her own or his own, then the plaintiff could have prevailed.

MR. DAVIS: Certainly, the district court judge has the right to --

QUESTION: But the district judge doesn't have the right to satisfy the plaintiff's burden of proof on matters of fact.

MR. DAVIS: That's correct.

The -- if this Court adopts the burden of proof standard that the Ninth Circuit has put in place and that all of the other circuits have put in place, that the plaintiff must show the clearly established law, then the limited review which the court of appeals has advanced is a logical extension of that rule.

But in this situation I think more than the

burden of proof, the problem here was the failure of plaintiff's counsel to locate the case that was ultimately found by the court of appeals. It was invited error. The standard that the Ninth Circuit adopted here was the result of the failure to cite case law which clearly established that my officer acted unreasonably. That is what prompted this decision.

QUESTION: Well, I'm not sure whether the term invited error really applies. I'm just trying to think the thing through. I think of invited error as being typically a -- when you yourself request an instruction to a jury that you later -- that you later regret, and there you have something quite different here, that it can't be corrected because the jury has already finished its deliberations.

But here there was never any relinquishment, as I understand it, by the plaintiff of their claim of violation or their assertion that clearly established law established their right. It was just a failure to find a case supporting that proposition. Do you think that fairly fits into the head of -- under the head of invited error?

MR. DAVIS: I think it's no different, Mr. Chief Justice, than the circumstance where the plaintiff fails to find the appropriate jury instructions and fails to

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offer them to the district court. Whether it's a failure to find a particular case and cite it to the court or it's a failure to find case law and jury instructions which support your position, the result should be the same.

QUESTION: Of course, this is kind of interesting because both sides failed to call it to the attention of the court, and it'd be relevant on a couple of issues, yet helpful to one on one and helpful to the other on the other. How do you explain the defendant's failure to cite the case?

MR. DAVIS: I was aware of the decision. I didn't argue the case.

QUESTION: You were aware of it and you did not call it to the district court's attention.

MR. DAVIS: I did not argue the case and I advised --

QUESTION: But was the person who argued aware of the case and didn't call it to the district court's attention.

MR. DAVIS: That is correct.

QUESTION: Was that consistent with normal practice in California?

MR. DAVIS: It's in Idaho.

QUESTION: Idaho, pardon me.

MR. DAVIS: No, it isn't. The reason that I

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wanted the case to be offered was because I felt that on the exigent circumstances portion of our motion for summary judgment before the district court it was extremely helpful.

QUESTION: Well, I understand it helps you there, but what about your duty as an advisor and an officer of the court? If you know there's a case in point on the other issue, even if it's against you, do you think you have any obligation to advise the court?

MR. DAVIS: Absolutely.

QUESTION: You do. So you did not discharge that obligation in this case.

MR. DAVIS: In this instance I did not argue the motion and I do not --

QUESTION: All right. But the lawyer who did argue it did not discharge a very elementary professional obligation.

MR. DAVIS: I would have to say, Your Honor, that it is a case that -- if I had been there, I would have provided to the district court judge. However, I believe that the Al-Azzawy decision is distinguishable from the case that we presented, and that -- and the ethical distinction --

QUESTION: Sure it's distinguishable, but we affirmed the district court's ruling that Al-Azzawy was

arrested inside his residence without a warrant. That's pretty close in point to this case.

MR. DAVIS: The -- the other circumstance that all of these cases have relied upon is that there was direct excessive coercion which required the person to come outside the residence. In the Ninth Circuit we had a case, United States v. Botero, where the officers had gone up and knocked on the door and the suspect came to the door and he was arrested and it was determined that that was an appropriate arrest under the Fourth Amendment.

What my officers did was they had the suspect's case -- suspect's brother in this case get on the telephone and call him and ask him to come out. I don't see how using the telephone and asking him to come out can be any more intrusive than going and knocking on the door and having the suspect come out. Certainly, after U.S. v. Botero the law was not clearly established in the Ninth Circuit that what my officer did did not -- would not allow him to have qualified immunity in this case.

The one thing that I do want to caution this Court to be wary of is plaintiff's argument -- is the petitioner's argument that the appellate court has a duty to consider law not cited by the parties.

QUESTION: Mr. Davis, just -- I want to go back to one thing you said. You said that you found the cases

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distinguishable because -- because was it Elder's brother had been the one to make the telephone call? But in the facts as the Ninth Circuit reported them, Holloway, that's the defendant, advised him, him being Elder, that if he was unable to walk out of the house, he should crawl.

MR. DAVIS: That is correct. The record establishes that the initial telephone contact was made by the brother, and it was after the brother had talked to his -- to Mr. Elder, the suspect who was in the house, that the officer got on the phone to ask him what the problem was. Because at that point Mr. Elder was saying that he'd had a seizure and had been injured inside the home.

The problem with the --

QUESTION: But the -- that -- that indicates it was the officer who got him to come out of the house and not the brother.

MR. DAVIS: That's correct, Your Honor. My point was not who made the contact. My point was in the Ninth Circuit we had a case, U.S. v. Botero, where the officers knocked on the door and the suspect came out and he was arrested, and that was held to be an appropriate arrest under the Fourth Amendment. My point is what my officers did was have the brother, or the officer, talk to him and ask him to come out, and I don't see how that is

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any more intrusive than the circumstance where the officer knocks on the door.

And it's certainly consistent, at least according to the Ninth Circuit, with United States v. Santana, in which it was held that a person standing in the threshold of the doorway could legally --

QUESTION: You don't see a difference between an officer knocking on the door and asking someone politely to come out and an officer saying to someone inside of a house if you can't stand up, crawl out?

MR. DAVIS: At the time that statement was made the man claimed that he had had a seizure, and the officer was telling him to crawl out so that he didn't risk injury. In the record, Holloway's wife is an epileptic, so he was familiar with epilepsy and he was simply advising him to come out in a safe manner.

My concern, again, is that this Court should be wary of Elder's position. He would impose a duty upon any court of appeal, including this Court, to consider law not cited by the parties, even if the failure was strategic or constituted invited error. Such a position would limit the discretion of this Court. It would be compelled, as would any court of appeals, to become the researchers for the litigants.

QUESTION: You agree with petitioners, do you

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not, that the rule of the Ninth Circuit was a rule that you must not consider it, not that you need not?

MR. DAVIS: That's correct.

QUESTION: The Ninth Circuit does not let you consider it at all on appeal.

MR. DAVIS: That is my understanding under the circumstances of this case. If you look at the way the Ninth Circuit framed the issue, they framed it by saying failed to cite to the district court and failed to cite to us on appeal, and I think they were exasperated and frustrated by the fact that at oral argument they said here's this Al-Azzawy case, and plaintiff's counsel distinguished it instead of adopting it. So I think their position was motivated by error, by invited error.

The panel decision does maintain the court as a neutral arbitrator. Instead of going out and doing the research for the litigants, it is to decide the legal question of what the law was based upon the record that's presented to it. The panel decision also advances the social policies that this Court announced in Harlow and would also advance the burden of proof issues.

In the final analysis -- since I'm addressing the issue that the Court asked me to address rather than the merits of the case, I'm going to finish a little early. In the final analysis, the Court should affirm the

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panel because my deputy, Holloway, acted reasonably. He was not plainly incompetent and he did not knowingly violate the law.

Thank you very much.

QUESTION: Thank you, Mr. Davis.

Mr. Tankersley, you have 4 minutes remaining.

MR. TANKERSLEY: Unless there are any other further questions, I have nothing further.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tankersley.

The case is submitted.

(Whereupon, at 1:45 p.m., the case in the above-entitled matter was submitted.)

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NO. 92-8579

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BY Ann Mari Federico

(REPORTER)