OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SHARLENE WILSON, Petitioner v. ARKANSAS.

CASE NO: No. 94-5707

PLACE: Washington, D.C.

DATE: Tuesday, March 28, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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SHARLENE WILSON, :

Petitioner :

v. : No. 94-5707

ARKANSAS :

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Washington, D.C.

Tuesday, March 28, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

JOHN WESLEY HALL, JR., ESQ., Little Rock, Arkansas; on behalf of the Petitioner.

J. WINSTON BRYANT, ESQ., Attorney General of Arkansas, Little Rock, Arkansas; on behalf of the Respondent.

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

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PROCEEDINGS

(11:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 94-5707, Sharlene Wilson v. Arkansas.

Mr. Hall

ORAL ARGUMENT OF JOHN WESLEY HALL, JR.

ON BEHALF OF THE PETITIONER

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

This case presents a fundamental issue of the interrelationship between the common law and the Bill of Rights, particularly the Fourth Amendment. The case came here on a very limited grant of cert because of the stark way the issue was decided by the Arkansas supreme court. That is, that there is no knock-and-announce requirement in the Fourth Amendment.

In response to our briefs, in response to that petition for cert and the grant of cert, my opponents have tried to turn the issue on its head, in effect turning the Fourth Amendment on its head, and I'll just cut right to the chase of the argument.

What they're saying is -- the Solicitor General says, the more drugs you've got, the more right you have to an announcement. The less drugs you've got, the less right you have to announcement, and then the State's

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position is that if you're completely innocent you really don't have any rights at all, and I submit to you that that turns the Fourth Amendment on its head.

Everybody in this country has a right to be free in their home from unreasonable searches and seizures, and this falls within the reasonableness clause whether you're innocent or you're guilty. In this particular case, there were three people in this house who were totally innocent of any wrongdoing, and they were subjected to the same search, and I direct you to page 379 of the record, where we tried to get Ricki Cates, Sharlene Wilson's son --

QUESTION: Well wait. As to the three who were totally innocent, they would have been subjected to a search that they didn't deserve even if there had been a knock-and-announce.

MR. HALL: That's true.

QUESTION: They got a warrant based on something that the fourth occupant was doing, and the other three had to be subjected to that, so that doesn't really carry a whole lot of weight, it seems to me.

MR. HALL: I think it carries weight because in the context of, the innocent inside a home have as much right to a knock-and-announce as the guilty.

QUESTION: Did the three live in the home?

MR. HALL: Ricki Cates lived in the home, her

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son. He was 11 at the time of the search.

QUESTION: Did the others you're referring to live in the home?

MR. HALL: No. They were visiting.

QUESTION: Then do you think they had the same rights as a dweller in the house?

MR. HALL: If -- the Olson case, Minnesota v. Olson, we're told that guests have standing in a house. I would say they do.

QUESTION: That was an overnight guest, wasn't it?

MR. HALL: That's true, but don't -- doesn't any guest in a home have some standing --

QUESTION: Well --

MR. HALL: -- to be free from a search?

QUESTION: -- I think you're making some generalizations that perhaps require a little more refinement than you're giving them.

QUESTION: Surely your position doesn't depend upon the presence or the absence of other people who -- persons other than are named in the warrant.

MR. HALL: It doesn't.

QUESTION: Your position is exactly the same if your client were the only person in the house, isn't that correct?

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MR. HALL: That's true, but I think it underscores the issue of the innocent having as much right as the guilty, in this case because there were three other people in the house, and as I was referring to the record, at page 379 we tried to get Ricki Cates to testify at trial. His father, who is now custodial because Sharlene is in jail, testified that he was traumatized by this arrest -- he said the arrest. He didn't say the search, but the arrest -- and was in psychological treatment as a result.

He did not want him to testify, and he did not, but it shows the impact that these arrests can have on innocent people. I suppose drug dealers consider being arrested and having their house broken into as a risk of doing business. Most of them do.

QUESTION: Do you suppose the inevitable discovery doctrine is applicable in these situations, so that evidence, in any event, wouldn't be excluded. Go back to the empty house. You say the Constitution requires knock and announce, and if the police don't do it and the house is empty, but the drugs are there and they have a search warrant for the house, they go in, they get the drugs, the evidence would have to be excluded, or would the inevitable discovery doctrine --

MR. HALL: That doesn't even --

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QUESTION: -- make it admissible?

MR. HALL: -- bring in the plaintiff inevitable discovery doctrine. That's the useless gesture exception to the knock-and-announce requirement.

But let me take this one step backward, that the State never raised an exception below.

QUESTION: Well, presumably it would be open to the Court if it had to go back.

MR. HALL: Well, you have other cases. It would be open for the trial court when it goes back, if it goes back.

QUESTION: Yes.

MR. HALL: But the State could raise, I suppose, any ground, and in this case I'll concede that all three grounds are possible.

QUESTION: Yes.

MR. HALL: But there's not any concrete proof on anything, because at the suppression hearing the State put on no evidence and cross-examined no witnesses. They made no argument. I rested my case on the motion, the trial judge said motion denied, with no findings, so we would have to go back, but I would agree that on remand the State would have the opportunity to put on proof as to all of these issues.

QUESTION: Why -- that is --

QUESTION: What proof is needed? What proof is needed? What they found would have been found with a knock, unless, of course, it had been, you know, chucked down a commode, but that would be an unlawful act, to destroy evidence like that, wouldn't it? Are you saying that that's a valid exception to the inevitable discovery rule? It might not have been discovered because somebody would have performed a criminal act that would have prevented its discovery. You wouldn't use that as an excuse, surely.

MR. HALL: No, but destruction of evidence under Arkansas law is a rather minor felony compared to the possession of a drug.

QUESTION: Well, but that isn't the point. The point is whether it is a defense to the inevitable discovery rule.

MR. HALL: Well --

QUESTION: I don't see how you -- how the unlawful destruction of contraband, unlawful destruction could possibly be a defense to the inevitable discovery principle.

MR. HALL: Well, inevitable discovery is not an issue in this case, either, because that's not within the grant of cert.

QUESTION: But what's your position on the

question? Is the destruction of evidence, or the potential thereof, an exception to the inevitable discovery rule were we to adopt one?

MR. HALL: No, because the State is using the inevitable discovery rule as an opportunity to salvage the search, but then on the other hand they argue we have to enter without announcement to make sure it's there, so if they have to enter without announcement to make sure it's there, that's not inevitable discovery. They're planning to make it there. They're trying to ensure it's there by their entry, and --

QUESTION: Mr. Hall, does it make a difference that in this case the police went through a screen door that was closed but not locked? Would there be -- is there a constitutionally relevant distinction between that and ramming the door open?

MR. HALL: There could be on the issue of reasonableness, and in this case it could also go to whether or not they could look through the door and see that they were police officers, because it was a screen door. Now, there is --

QUESTION: Well, in this case, as entries go, this was rather mild, was it not? The screen door that was shut but not locked, the police as they entered said -- identified themselves --

MR. HALL: They identified themselves. They had no weapons drawn. After they got inside they did. There is some evidence in the record, but it's not a part of the suppression hearing, that they heard Sharlene Wilson running to the bathroom to dispose of drugs, and in her cross-examination at the trial on the merits she admitted that she was in the bathroom flushing drugs after she previously denied it. She denied it and then admitted it, so --

QUESTION: Your position is, I take it, that there is a general rule that the search is unreasonable, prima facie unreasonable, if they enter without knocking and announce, in the absence of some exceptions which are not before us. Is that in a nutshell --

MR. HALL: That's correct, and the reasonableness --

QUESTION: So that's why that covers this case. This case may be on the fringes if we did not have a general rule, but if we have a general rule, this case falls within it, and that's the end of the case.

MR. HALL: It would go back to determine the reasonableness overall. The State could plead that they really knew that police were out there, therefore they were not surprised. The State could argue that the presence of a gun created a peril issue, which is

seriously in dispute because they had their own guns holstered when they came in. They didn't it -- consider they had a serious dispute.

And then the destruction of property, the destruction of the evidence, I submit to you this case is a good example that the destruction of evidence overall really doesn't mean a whole lot.

QUESTION: How much difference is there between the knock-and-announce rule as a part of the Fourth Amendment with some exceptions to it, which I gather is your position, and the position taken by the Solicitor General that the knock-and-announce rule is a factor to be considered in determining overall reasonableness?

MR. HALL: I look at it a different way, that the Fourth Amendment requires announcement. The exceptions are based on reasonableness, and the exceptions can come into play and conceivably other exceptions could be envisioned in the future.

QUESTION: Well, so what difference does it make, say, in a typical case if you apply one rule or the other?

MR. HALL: It's still -- knock-and-announce becomes a Fourth Amendment requirement because it's part of reasonableness. Arkansas rejected that completely, and you would have to -- at least if you found that, you'd

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have to remand it back to decide whether or not what the police did here was reasonable.

QUESTION: Can I ask about that? This is just a technical question, but you've been talking about what was in the suppression hearing. I don't know -- legally, does it matter if the evidence was in the suppression hearing or at the trial? That's one question. The other is, I have in my transcript here which -- you know, in the record here, a lot of evidence on page 39 and so forth that's titled "Suppression Hearing." Isn't that the suppression hearing?

MR. HALL: Yes.

QUESTION: Well, there they say, you know, was she in the bathroom, say I didn't see weapons drawn, but he says, I went straight to the bathroom where Mrs. Wilson was. Why? Apparently she'd run to the bathroom.

Now, we know she'd run to the bathroom to flush the drugs down the toilet, and so why would you have to -- and you say in your brief that it's a common law exception, destruction of evidence, because you say possible destruction of evidence, so why isn't it right there in the suppression hearing that she ran to the bathroom to flush the -- you know, you have to draw the inference she ran there to flush the drugs down the toilet.

MR. HALL: You have to draw the inference but there's no evidence of it.

QUESTION: Well, what is the evidence where he says because she'd run to the bathroom? Why isn't that evidence?

MR. HALL: Somebody told Efird that, she's gone to the bathroom. Go get her. He was --

QUESTION: So?

MR. HALL: He was next-to-last through the door, or something like that.

QUESTION: Yes, well, why isn't all that evidence?

MR. HALL: All that shows is an inference that she ran to the bathroom.

QUESTION: Right.

MR. HALL: You could guess that well, maybe she was in there flushing drugs, but even if she did flush drugs, in this case they've testified there was residue in the toilet.

QUESTION: All right. Okay, so it's evidence. There also -- wasn't it introduced in the suppression hearing, the warrant itself, and wasn't there an affidavit attached to the warrant which said that she only a few days earlier had had a chrome-handled pistol that she had used to threaten with serious physical harm the

confidential informant? Wasn't that in the suppression --

MR. HALL: That was in the affidavit --

QUESTION: And wouldn't that have been part of the evidence at the suppression hearing, because they must have introduced the warrant?

MR. HALL: I introduced the warrant. They didn't.

QUESTION: All right, but I mean, was it -- the question is -- my question --

MR. HALL: The trial --

QUESTION: -- wasn't that there in the suppression hearing, and if it was, isn't that evidence of what you call peril?

MR. HALL: It was, but --

QUESTION: Well then, why would we have to send this back?

MR. HALL: Because the exceptions weren't a part of a grant of cert, and I direct the Court to Gates v. Illinois, pages 211 through 223, where the Court sent a case -- or asked the case to be rebriefed on the question of the good faith exception.

QUESTION: Well, we can do it. We can do it, but I think our normal rule is that any judgment can be defended on any basis, whether we granted cert particularly on that or not, and --

MR. HALL: That's true.

QUESTION: We need not allow it, but we certainly may allow it.

QUESTION: And we say -- the question presented is whether the knock-and-announce rule of the common law is constitutionally mandated under the Fourth Amendment.

Now, if we were to conclude that the common rule law knock-and-announce rule is not constitutionally mandated under the Fourth Amendment, but that it is factor to be considered, then surely we can decide on these facts whether the factoring was done properly, if we choose to do so.

MR. HALL: I think you probably could, and I would concede that on remand I don't know that the proof would get much better. I would assume that all the officers that were there would be called, instead of just two of them, and also the two Cotherns, and possibly Ricki Cates, so we'd have ten additional witnesses to call.

QUESTION: Counsel, suppose the police don't have any knowledge that there was a gun in the possession of a drug dealer but he is a drug dealer, is it unreasonable for the police to assume that he probably has a gun?

MR. HALL: All the case law under the Federal statute has said possession of a gun alone is not enough,

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and we include --

QUESTION: I'm asking what the police officers can assume when they begin to make their arrest. Is it unreasonable for them to assume that the dealer might have a gun?

MR. HALL: In some cases you could make that assumption. I guess it depends on the level of the dealer. In this case, we had a low level dealer, but we did have positive evidence of a gun.

QUESTION: Is it unreasonable for the police to assume that in the case of easily disposable contraband that there is a strong probability, or a significant probability, that the contraband will be -- that there will be an attempt to dispose of it by flushing it down the drain? Is that an unreasonable assumption?

MR. HALL: It's not, but I want to counter that with another view, that in this case, for example, by the time they got the search warrant, they had charges on her for three separate sales, and she got 31 years as a result of the sales.

As a result of the search, she got an $11,000 fine and a year in jail, so the graver crimes are what give them a probable cause for making entry in the first place. By the time they go in, they've got them on something. Ninety-five times out of 100, they've done a

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drug deal somewhere else, the police have it documented, and that's what their probable cause for the entry is.

QUESTION: Well, you don't necessarily concede, do you, that destruction of the evidence is an adequate excuse for dispensing with knock-and-announce, or do you concede that?

MR. HALL: It depends, I would say -- to some extent I have to agree with the Government on that, but if it's a small quantity of drugs, you've already got them on a felony that could get them life imprisonment and you're going into possess, you're probably just as well off that they flushed it. The drugs are out of circulation. You're going to get them on a significant crime. They test the water --

QUESTION: I think we --

MR. HALL: -- say we've got residue --

QUESTION: I think we generally take these things crime by crime. I really don't think --

(Laughter.)

MR. HALL: By the time they go in, though, they've got them. What they're trying to do is --

QUESTION: I'm aware of no authority that requires the police to make a judgment as to whether or not there are some other crimes for which they might have evidence that would excuse them ignoring an ongoing crime.

QUESTION: Well, and this was a search warrant, not an arrest warrant.

QUESTION: I mean, that is a most improbable basis to ask us to base an opinion of this Court on.

MR. HALL: We're not asking them to ignore the crime. They've got the right to go in the house and conduct the search for whatever. If they find drug paraphernalia, the wrappings of drugs is going to have residue on it, they will be charged with that. They can test the water. They can turn off the water. There are all kinds of things they can do that are still going to get that person arrested.

QUESTION: With respect to water, Mr. hall, is the advent of the indoor toilet relevant to the Fourth Amendment analysis?

MR. HALL: To some extent, it is, but even at common law people had stoves, they had pots in the house that had water in it, and if you had cocaine back in the Sixteenth Century they could have disposed of it that way.

QUESTION: The disappearance of the indoor fireplace is a counterdevelopment --

(Laughter.)

QUESTION: -- that may neutralize the whole thing, right?

MR. HALL: We go from the stove in the house to

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central heat to having indoor plumbing.

QUESTION: Let me ask you this. There was -- you concede that the police did have a valid search warrant --

MR. HALL: We do.

QUESTION: -- for the house. Did they have an arrest warrant as well --

MR. HALL: They also had an arrest warrant for the sales that occurred -- the three sales that occurred prior, or at least two of the sales.

QUESTION: Okay.

MR. HALL: There may have been a third.

QUESTION: Now, if there is, indeed, an inevitable discovery doctrine that is applicable here, perhaps it isn't necessary that the case be remanded to determine what the risk of guns was, or anything of that kind, because presumably the evidence wouldn't be suppressed in any event if the inevitable discovery rule applies.

MR. HALL: If it does, in fact apply.

QUESTION: There wouldn't be a factual determination to make, right?

MR. HALL: If it applies, but I dispute that it applies because of their own admissions and the way they argued the issue, that it has -- we have to make the entry

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to make sure it's there, therefore it is the but-for reason that it's found.

QUESTION: But it's a pure legal question. It doesn't require further fact-finding to decide whether the inevitable discovery rule applies.

MR. HALL: I think not. I agree.

QUESTION: Does Arkansas have an inevitable discovery rule?

MR. HALL: It does. There was a case decided about 12 or 15 years ago where they adopted it. They said, albeit reluctantly, but they do agree with reasonable discovery, and it was I think pre Nix v. Williams, or around that time, but it does consider the rule, and I think they would possibly apply it here, though, depending on how we were to counter the argument. They didn't get that issue below.

QUESTION: I understand.

QUESTION: Why did they adopt it reluctantly? Who made them do it?

MR. HALL: Well, it's the way it was phrased in the opinion.

QUESTION: Oh.

MR. HALL: It's --

QUESTION: How would it apply in Arkansas? Suppose the police came in in the middle of the night,

they broke down the door, they were brutal to the inhabitants, but they did have a warrant, and it identified what they found. Would the inevitable discovery rule, as Arkansas has it, apply nonetheless?

MR. HALL: We don't know about Arkansas law, but I would counter that with, what about the overall reasonableness about the way this search was conducted? Can such an abuse --

QUESTION: But doesn't that -- under the inevitable discovery rule, isn't that all beside the point? They had a valid warrant. If they had been well-behaved, they could have gone in and found all those things. In fact, they wrecked the place, they were brutal --

MR. HALL: Well --

QUESTION: How does the inevitable discovery rule work in those two different settings?

MR. HALL: My response to that would be a kind of remedial response. That is, that if the reasonableness requirement is not satisfied by the way the entry is conducted because they terrorized children at gunpoint, in one case we found they did a genital search of somebody, and no drugs were found in the house, then a court could say, this is just so outrageous we can't countenance this entry, and go ahead and stress it anyway.

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QUESTION: Exclude the evidence that would have been found anyway, even if they had entered properly?

MR. HALL: If their conduct was so outrageous that it far surpassed reasonableness.

QUESTION: What if a State imposes an outrageous tax, I mean, you know, maybe an improper penalty for an outrageous collection of a tax as well? I mean, that also has nothing to do with whether the evidence would have been found or not.

MR. HALL: Well, taxes aren't normally imposed at gunpoint.

QUESTION: I see. You're only going to punish them for those irrelevant things that occur in some proximity to the entry?

MR. HALL: It's not irrelevant.

QUESTION: Well, it's irrelevant to whether the drugs would have been found or not.

MR. HALL: Well, if you say that the drugs wouldn't have been flushed in any event, if there were so many drugs they would have always been found, no matter what, you know, how do you remedy a police abuse when they come in like that?

QUESTION: Well, you have a lawsuit, don't you, under 1983? Presumably if the police are abusive, the victims have a valid civil lawsuit, do they not?

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MR. HALL: They have a possible cause of action.

QUESTION: Sure.

MR. HALL: Whether or not it would actually go anywhere, I doubt seriously.

I've litigated a few of those types of police misconduct cases, not in this exact context, but the burden of proof is so high the police officer already has every presumption in the world in his favor in a jury room. That's -- you have to prove them liable beyond a reasonable doubt for all practical purposes.

QUESTION: But that's not the legal burden of proof.

MR. HALL: No, that's the practical burden.

QUESTION: You're just talking practicalities.

MR. HALL: I'm talking the reality, because I've tried enough of them to know that in your own mind you've proved it by a preponderance, but the jury still says, well, they're police officers. We're going to give them the benefit of the doubt. That's the way it works, and to some extent that may be a valid response by a jury. Sometimes it's not.

The question of protecting the innocent inside a search in this type of case, protecting everybody from unnecessary violence, is a separate question from the authority to search. Yes, they have the authority to

search, but how they conduct it, the reasonableness of the search, is always an issue. It always has been.

There's always the question of who else may be home. In this case, there was no surveillance. The police just drove up and went right inside, and they didn't know who was in three. They could have surveilled the house, waited for somebody to come out and arrested them. Presumably the innocent parties wouldn't know where the drugs were.

QUESTION: Well, what if in the course of a very rough search the authorities physically beat up on someone who was never then charged with anything? Does that mean that the people who are charged with something and for whom they had a warrant and stuff was found in the house, that they can rely on the beating up of a person who had -- who was not charged?

MR. HALL: In the context of where somebody is, in fact, guilty of the crime, I'd say then that would not be an appropriate case for suppression of the evidence, but what I'm thinking about is the overall reasonableness of when the police come in, what do they know, what about the innocent people inside, what about the --

QUESTION: Well, when you say overall reasonableness, supposing you've got three police coming into this house, and one of them is a maverick, and he

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simply sees the first person inside the house and just hits them with his billy, or whatever they take on these raids.

The other two policemen go about their business just the way they should, find the evidence and the two people against whom the evidence they found are charged. The person who is hit with the billy club is not charged. What result there?

MR. HALL: If he is truly innocent and squeaky clean, he'd have a fairly good cause of action and could probably prevail.

QUESTION: But could the two who are -- against whom charges are made try to suppress the evidence found in the house on the basis of this one maverick officer's beating up of someone who is not charged?

MR. HALL: In your hypothetical I'd say no, because the overall reasonableness of the search that produced the evidence would not -- or that would not be unreasonable, under that situation, because it didn't involve the people who were the target of the search, and the other officers acted with restraint.

And if they said, wait a minute, you're out of control, stop whatever you're doing, if they exercise their authority as police officers, they stopped somebody out of control, and I think that could come in as being

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reasonable.

But if it just completely got out of hand like the Rodney King videotape we've seen, which obviously can happen because it happened there, then who knows, and we've given examples in the briefs from the empirical evidence of cases where some police officers actually did go berserk in houses, trashed the place, harmed people, and then find no evidence and just get up and leave without even apologizing.

I mean, it happens. It doesn't happen a lot necessarily, but not many of those cases are going to make it up here because of the nature of this Court's review.

I also submit that the rule protects police safety as well as citizen safety. One thing my opponents rely on is the fact that firearms were a lot more plentiful and a lot more effective now than they were at the time Semayne's case was decided, which is true, but if you think about Semayne's case, when they're talking about the possibility of hand-to-hand combat when somebody comes in, at least you've got an opportunity there to explain while they're arguing, or they're fighting, or they're tussling on the floor.

But when you've got a gun that holds 15 rounds, like a 9 mm does, you can empty that clip in no time before anybody can ask any questions. If they just see

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something in somebody's hand and think, that's a gun, and they open fire and it turns out to be an ashtray, as in one case where a man was shot, all these situations bear on the ultimate question of knock and announce.

Police officers have a right to be protected in their own safety. Now, they will say in response that when they come in they're a target. They're a target only when somebody's really crazy, and they know that there is, in fact, a gun inside.

Most of the time people are not going to risk violence when there's children inside the house, for instance, or a small amount of drugs. They're not going to kill somebody over a small amount of drugs. If they're drug dealers they know getting arrested is a risk, and they're going to go ahead and do their time.

The real risk, I submit to you, is from people who fear that people coming in are other people who will rob them, and that does, in fact, happen. Drug dealers rip each other off sometimes, and they come in at gunpoint and take the stuff, and when that happens, what's the normal response? A normal response is to shoot, and the police officer could get accidentally shot.

If the person knew it was the police, he says, wait a minute, I'm not going to do anything to them. I'm not going to risk a capital murder charge over a

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possession of marijuana charge.

QUESTION: Well, you let the police officer calculate those odds. You may be right, but I assume that's something the police officer takes into account when he goes crashing in.

MR. HALL: And we let them at their own folly take the risk of getting shot? That's the counter to that.

QUESTION: Well, I mean, you're asking us -- I don't find -- you have some good arguments, but I don't think that's one of them, that we should exercise the judgment of whether it's a wise thing for the policeman to go crashing in or not, from his standpoint.

MR. HALL: Well, but he could make that determination based on what he knows at the scene, starting from the principle that we have an announcement requirement, but can it be dispensed with in this case for whatever reason, and if it can be dispensed with, I'm sure they'll be able to justify it.

The exceptions, we agree, the three exceptions have been around for 150 years as well. There are common law cases recognizing these exceptions, and we don't dispute that they would apply now, and when they get there, if they have a reasonable basis for believing, by -- and I would agree, even if you get to that point,

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that reasonable suspicion has to be the standard under Bowie. If they have reasonable suspicion to believe that some violence might occur, they can come in.

QUESTION: How about reasonable suspicion that evidence will be destroyed?

MR. HALL: Possibly the same as well.

QUESTION: Isn't that --

MR. HALL: But Bowie --

QUESTION: Wouldn't that be so in so many of these narcotics cases?

MR. HALL: Well, we have to remember, Bowie is based on safety of the officer. Destruction of evidence is not based on safety of the officer, and you might end up having to have two standards: probable cause for destruction of evidence, reasonable suspicion for safety to the officer.

QUESTION: Well, why doesn't knowledge that there's a gun in the house give rise to the safety of the officer concerned and the presence of marijuana in a place with indoor plumbing to the destruction of evidence? What more would you need to come within even the traditional exceptions?

MR. HALL: Because then you're creating a blanket exception without any belief in the facts.

QUESTION: No, not a blanket exception without

any belief in the facts, these facts.

MR. HALL: Well --

QUESTION: There's a gun in that house. We know that. There's a warrant to search for narcotics.

MR. HALL: If the warrant is to search for narcotics, then you've created a blanket exception that the police can enter any time that drugs are involved, and since 42 percent of all American households have guns in them, can you say that there's a reasonable suspicion there's a gun in the house? If you say that, there's no knock and announce. There's no need for it any more. And then, if that happens, then we're all --

QUESTION: Well, what would be enough to have a concern about the safety of the officer? You say the presence of a gun, even a gun named in the warrant, is not enough. What would it have to be?

MR. HALL: In this case, I think you could say there was enough in this case because you've got an alleged threat to the informant. You've got a threat of force by the use of that gun, not just the mere presence of a gun, but a suggestion that a gun would be used, and I would agree that that would have to be enough to get over that.

QUESTION: A gun plus someone who is reasonably suspected of being a violent person willing to use that

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gun.

MR. HALL: Willing to use the gun.

QUESTION: Yes.

MR. HALL: If the guy's got a history of beating up people, I would say that would be enough, given the presence of a gun as well, but these are all hypotheticals that are way beyond the facts. But just the mere presence of a gun in the cases under the Federal statute hasn't been enough. But there's one curious case that the Solicitor General cites where a guy was wearing a bullet proof vest.

QUESTION: Thank you --

MR. HALL: That would be enough.

QUESTION: Thank you, Mr. Hall.

General Bryant, we'll hear from you.

ORAL ARGUMENT OF J. WINSTON BRYANT

ON BEHALF OF THE RESPONDENT

GENERAL BRYANT: Thank you, Mr. Chief Justice, and may it please the Court:

First, in this particular case, it's very important that the officers had a search warrant before they went on the premises, and that takes care of most of the probable cause requirements that Mr. Hall has been talking about.

Arkansas is asking this Court to categorically

balance the interests in the execution of a warrant. This Court has categorically approved officers -- approved police practices designed to protect police officers from violence. The Fourth Amendment does not require knock and announce.

QUESTION: General Bryant, do you deny that it is a relevant consideration in determining whether the entry was, and the search was reasonable?

GENERAL BRYANT: Yes, Your Honor. It is --

QUESTION: Do you deny it, or do you agree that it is a relevant consideration?

GENERAL BRYANT: Yes. The execution of the warrant is subject to the reasonableness clause. The State's primary or first position is that knock and announce is not required categorically.

QUESTION: No, but my question is, is it a relevant consideration in determining whether a search is reasonable or not? May they consider the fact that there either was a knock and announce, or there was not a knock and announce?

GENERAL BRYANT: No, Your Honor, in that instance the case is -- the State's first argument is that it is not relevant in the consideration.

QUESTION: So then under your view the State routinely could use a battering ram to knock down every

door.

GENERAL BRYANT: No, Your Honor. The use --

QUESTION: So then the way entry is affected is a component of reasonableness.

GENERAL BRYANT: In the case of a battering ram, Your Honor, that would be subject to the reasonableness clause.

QUESTION: How about kicking?

GENERAL BRYANT: It might be necessary in some instances, Your Honor, where that was the means by which the officers had to enter.

QUESTION: How about using a skeleton key?

GENERAL BRYANT: That would be --

QUESTION: All of this is without knocking, obviously.

GENERAL BRYANT: Yes. Yes. The State is asking this Court to balance the interests --

QUESTION: All of these hypotheticals I've given to you constitute reasonable entry in all cases?

GENERAL BRYANT: It could, Your Honor. It could under the State's first theory.

QUESTION: Well, that's what we're testing, is the State's --

GENERAL BRYANT: Yes.

QUESTION: -- first theory.

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GENERAL BRYANT: The --

QUESTION: I think the answer to each of my questions under your first theory is that there is no illegality in the entry.

GENERAL BRYANT: That is correct, Your Honor, that's possible. However, under the Fourth Amendment this Court --

QUESTION: Well, I -- I'd like -- we have to write the opinion. I want to know what the consequences of my opinion are, and I'm asking you whether or not the manner of entry is ever relevant as to reasonableness, the same question Justice Souter's question asked.

GENERAL BRYANT: The -- yes, Your -- well, let me answer it this way, Your Honor. Knock and announce in our position should not be a part of that inquiry. If there is --

QUESTION: I want to know if it's an element in considering the reasonableness of the search.

GENERAL BRYANT: No, Your Honor. That --

QUESTION: So literally, if the State presented evidence and said, we knocked on the door and started to say we're police officers and there's an objection, the judge would say, strike that, that is totally irrelevant evidence? I mean, you're really going that far?

GENERAL BRYANT: Under the -- yes, under the

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reasonable clause. Under that test, Your Honor, the State -- the State is saying -- the State's case is this. The Fourth Amendment requires under the reasonableness clause of balancing of the interests when you balance the interests of the State against the interest of the occupant, because this Court has recognized that when the officers are in the process of executing a warrant, they put themselves at great risk.

Police safety is a legitimate and weighty State interest to be considered, and when you categorically balance those interests, the interest weighs heavily in favor of the State, and this Court has previously adopted such rules. For example, in Pennsylvania v. Mimms, this Court said that when the police stop an automobile the police can require the occupant to get out of the car. In that particular instance, the Court balanced the interest of the State against the interest of the occupant, and utilized police safety as a basis for that rule. This Court did the same thing in Michigan -- in the Michigan v. Summers case.

In that particular case, there was a search warrant. The officers went into the house. This Court said that the officers could detain the occupants of the house for the duration of the search. In that case also there was a balancing of the interests. The Court

concluded that officer safety was a legitimate State interest and that that rule protected officer safety.

QUESTION: General Bryant, what is the purpose and effect of the Arkansas statute that says to make an arrest an officer may break open a door after having demanded admittance and explain the purpose for which admittance is desired?

GENERAL BRYANT: Your Honor, in Arkansas the supreme court has adopted rules of criminal procedure, and the supreme court has taken the position that their rules supersede those of the legislature. If there's anything the legislature passes regarding a rule, regarding criminal rules of procedure, the court's rule is the final authority.

QUESTION: But what is the court's rule in --

GENERAL BRYANT: The court's rule on arrest warrants does not require knock and announce. It's the same as --

QUESTION: But there's --

GENERAL BRYANT: -- search warrants.

QUESTION: As I understand it, the rules are silent. I could see if a rule said, you can arrest without knocking and announcing, but there is no such rule. There's a statute, and there's no rule.

GENERAL BRYANT: Yes, there is a rule on arrest

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warrants, Your Honor. That's the rule --

QUESTION: This doesn't address warrants. This addresses arrest itself. To make an arrest, an officer, et cetera. What rule addresses the officer's conduct in making the arrest that conflicts with this statute?

GENERAL BRYANT: It's the criminal rules of criminal procedure number 4, Your Honor, that's been promulgated by the Arkansas court.

QUESTION: And what does that rule say about how the officer is to make an arrest?

GENERAL BRYANT: The officer in making arrests does not have to knock and announce. There's no requirement in that rule for knock and announce, if the --

QUESTION: So then we have a silent -- we have a statute that says one thing. We have a rule that says nothing to the contrary.

GENERAL BRYANT: The State would submit, Your Honor, that based on Arkansas supreme court practice their rules would take precedence over a legislative statute.

QUESTION: General Bryant, I'm going to decide this case on the basis of whether I think there was a knock-and-announce rule at common law when the Fourth Amendment was adopted, and that it was assumed that part of the reasonableness of a search was that element. Now, do you dispute the fact that there was at common law a

general rule that you had to knock and announce in executing a warrant for a home?

GENERAL BRYANT: Yes, Your Honor. The State --

QUESTION: You do dispute that?

GENERAL BRYANT: We do dispute that.

QUESTION: What's your best case showing that such a rule did not exist?

GENERAL BRYANT: Your Honor, the State has cited two cases in the brief. One is Lonius, the Lonius case, and the other one is a case I can't recall the name of, but in those cases, Your Honor, although there was no holding that search warrants extended to -- did not extend to felony cases, there was -- the judges in both cases, certain judges in both cases did not -- stated they did not want to extend the rule in felony cases.

QUESTION: Where are they in your brief, and how old are they?

GENERAL BRYANT: Your Honor, that is located -- one case, Your Honor, is 1802, and the other case is 1819, and that --

QUESTION: Page 22 of your brief, is that it?

GENERAL BRYANT: Page 22 of the brief, Lonnick v. Brown and Ratcliffe v. Burton are the two cases.

But in addition -- but in addition to that, Your Honor, modern day commentators have taken the position

that it's not definite that knock and announce was required at common law, and in fact the modern day search warrant was not in existence in early common law, so the State's position is that common law does not require knock and announce in felony cases. However, even assuming that is true, that the common law is controlling --

QUESTION: Well --

GENERAL BRYANT: -- this Court should not follow the common law knock-and-announce rule.

QUESTION: Now, it depends on what you mean by the knock-and-announce rule. I don't read those two cases as saying that there is no general requirement of knock and announce.

It seems to me it's possible to read them entirely to be quite consistent with other cases of the period, that there is a general requirement, but we will not say that it is always applicable in the case of felonies, which would mean there's a general rule, but of course there are exceptions such as the petitioner here is perfectly willing to admit.

There's a general rule, but there's an exception for a case in which a felon is inside the house and believed to be armed. Perhaps there's an exception for destruction of evidence. But you say there is no general principle at all. Isn't that what you say?

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GENERAL BRYANT: That is correct, Your Honor.

QUESTION: What do you do about all the cases that seem to announce such a general principle?

GENERAL BRYANT: Your Honor --

QUESTION: Many cite it in the brief for petition.

GENERAL BRYANT: That is correct --

QUESTION: And for the Government.

GENERAL BRYANT: And for the Government, that is correct, but the point the State is making in that is that the authority is not conclusive or well-settled that that was the rule at common law, but even assuming that it was, this Court should not follow a common law rule that incorporates certain police practices when the Fourth Amendment was adopted or before into a black letter constitutional rule at this time.

QUESTION: Why isn't it reasonable -- you don't have to go -- they go back to Edward I. I didn't even know whether he invaded Scotland, or whatever, but they trace it back to Edward I, and even today, isn't it still a reasonable thing that you shouldn't knock down the door of somebody's house where you're not afraid of any harm, and you don't have any reason to think somebody's going to destroy evidence? I mean, why isn't that a reasonable thing, in that instance, even if it weren't going back to

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Edward I, and if you are, well, so much the stronger?

GENERAL BRYANT: Your Honor, that would be reasonable, and that's the State's position. The officers in the field should be able to make a decision, and Arkansas is not asking this Court to prohibit knock and announce.

QUESTION: You know that they'd require -- you'd require it because it's reasonable, and unreasonable not to knock and announce where they're not going to destroy any evidence, you have no reason for thinking so, you have no reason for thinking there's any danger, and there's this pedigree in history saying that it's unreasonable under those circumstances. What's the answer to that?

GENERAL BRYANT: Your Honor, in this case the officers had a search warrant, and there was a probable cause requirement met that there was illegal contraband on premises plus there was a weapon on premises, and in situations where the officers serve a warrant, they are at great risk, and the rule that Arkansas is suggesting would provide for the protection of officers, the protection of occupants by standards if present, as well as legitimate law enforcement principles of preventing the escape of suspects, preventing the destruction of evidence, and this Court has said that a categorical rule is best developed which will give the officers firm guidance in the field.

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They are not placed in the position of deciding whether I should knock or announce, or what exception applies, and the State submits that that is the reasonable approach in this case.

The Fourth Amendment does not require knock and announce, and the petitioner would have this Court elevate knock and announce as an absolute, rigid requirement of the Fourth Amendment, and Arkansas does not believe that that is proper, and it's not required by the Fourth Amendment.

QUESTION: Well, what's the matter with the proposal of the Solicitor General, that would certainly take into account the long common law tradition? I, for one, can't buy your proposal at all. You have no comment on what the Solicitor General proposes?

GENERAL BRYANT: Yes --

QUESTION: And there's a very long tradition here that has to be taken into account, and the fact that the officers don't knock and announce certainly at a minimum ought to be a factor in what's reasonable.

GENERAL BRYANT: That is essentially the U.S. Government's position, and that is the State's fall back position, that if this Court does not see fit to announce a categorical rule to protect the police officers in this instance, that a reasonable fall back would be the

position by the Solicitor, in that knock and announce would be part of the reasonableness test under the Fourth Amendment.

QUESTION: Time to fall back, General Bryant, I think.

QUESTION: Thank you, General Bryant.

Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

Our position is that the manner of entry in executing a search warrant is a component of the reasonableness analysis under the Fourth Amendment and that knock and announce is a component of that analysis.

QUESTION: Mr. Dreeben, I have the same question that the Chief Justice asked at the outset of the argument. Is there any significant difference between saying that there is a knock-and-announce rule with exigent circumstances or exceptions on the one hand, or the rule as you just phrased it, that there is a reasonableness requirement and that knocking is a component of that. Is there any significant difference for us?

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MR. DREEBEN: I think, Justice Kennedy, that's largely a semantic difference, but there is a connotation when one uses the word, exigent circumstances, that the police may have to have a particularly compelling immediate justification for dispensing with the requirement in question. That is not the way we analyze this problem.

We analyze this problem as involving a balance of what is reasonable under the circumstances for the police to do in executing a search warrant, and that there should not be a strict requirement of exigent circumstances to justify the police in making an immediate entry. The primary --

QUESTION: Mr. Dreeben, what do you want us to do in this case, just say that there is some such general requirement? You want us to affirm the decision below?

MR. DREEBEN: Yes. We think the judgment should be affirmed on the grounds that the record clearly indicates that the police had reasonable justification for believing that there were two grounds for making an immediate entry. First, the avoidance of the potential of violence, because they had knowledge that petitioner had a firearm in her house, and that she --

QUESTION: Are there findings that support that conclusion?

MR. DREEBEN: No, Justice Stevens.

QUESTION: We should make the findings de novo ourselves?

MR. DREEBEN: I don't think there's any serious dispute on that. I think petitioner's counsel today indicated there's no real serious dispute about what happened and what knowledge there was. The record is fairly complete. There is a search warrant affidavit --

QUESTION: We would at least have to read the record in full, I suppose.

MR. DREEBEN: I think you'd have to read the record of the suppression hearing. It's not my understanding that --

QUESTION: Yes.

MR. DREEBEN: -- the suppression motion was renewed at trial, and it would be appropriate to confine the record to the evidence that was adduced by the petitioner at the suppression hearing, but even that evidence clearly shows that there were two justifications known to the police, the violence risk, which I've alluded to, and the potential for destruction of evidence.

QUESTION: What's your best case for that? What's your best case, in fact your best two cases, for saying that the destruction of evidence is an exception from the general common law requirement that you knock and

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announce?

MR. DREEBEN: This Court recognized in the Sabbath case in describing the common law that destruction of evidence was a permissible ground for dispensing with knock and announce, but Justice Scalia, I think it's important to keep in mind that the common law, as it evolved in England, did not primarily consider the question of entries to effectuate search warrants. They simply weren't used very often before the Constitution was adopted, and when they were used, they tended to be the general warrant, which excited criticism for other reasons.

QUESTION: Sure.

MR. DREEBEN: Also, of course --

QUESTION: But they still knock and announce, warrant or not.

MR. DREEBEN: Yes. Well, it arose in the context of arrest warrants, and so the question of destruction of evidence by the subject of the arrest was really less of a focus, and it has to be noted that --

QUESTION: I don't understand what you're saying. You mean, they didn't search homes before the Revolution? They did it without a warrant.

MR. DREEBEN: There were no cases that evaluated the question of what sort of requirements attached to

searches by the police, and I think at common law there was no justification for searching merely for evidence at all. The only justifications were searching for contraband, and in those cases there wasn't any attention paid to the issue.

It's probably a fair inference that the police did, indeed, make immediate entries to prevent destruction of evidence, but the big difference is technological. There was no indoor plumbing, and as a result of that, it was much harder to destroy any significant quantity --

QUESTION: Except for the fireplace --

QUESTION: The fireplace.

QUESTION: -- or the hot stove.

MR. DREEBEN: -- that is --

QUESTION: They could just toss it right in.

QUESTION: You could destroy papers better in a fireplace than in the commode.

MR. DREEBEN: That is true, if it were lit, and if the police were coming on the scene at a time when it could be done.

QUESTION: Mr. Dreeben, what about the inevitable discovery notion. Do you think that that doctrine is applicable here, so that the evidence would not be suppressed in any event?

MR. DREEBEN: Yes, Justice O'Connor. Our

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position is that if the exclusionary rule issue were to be reached under cases from this Court such as Segora and Murray and New York v. Harris, it is clear that the warrant that the police possessed justified their entry into the house.

QUESTION: Well, then, what's the point of trying to decide some factual issue where there are no findings below?

MR. DREEBEN: I think it would --

QUESTION: I mean, it would be certainly much simpler to deal with it on the inevitable discovery theory.

MR. DREEBEN: There is a certain amount of ease of application of that notion. I think that police officers in the field are entitled to guidance on the question of when and under what circumstances they are authorized to make an entry without a prior knock and announce. It is not the position of the United States that they are authorized to do so in every case, even if they have no reasonable justification to believe --

QUESTION: But as I understood your brief in the case of drug dealers, there is a presumption that they have an arm and a weapon, and that they may dispose of the contraband. Do I misinterpret your brief?

MR. DREEBEN: No. I think that's a fair way to

read our brief, and the way the case law has developed under 18 U.S.C. 3109. There is --

QUESTION: In my colloquy with the defense counsel you said, well, this is a low level drug dealer. Can you give me any assistance with that? Anybody that sold drugs is a drug dealer for this purpose?

MR. DREEBEN: For this purpose, yes, Justice Kennedy. There may be a distinction, for example, if based on confidential informants the police know that all the drugs in question are stored in relatively indestructible crates, and they are executing a search warrant at a warehouse.

They probably could not assume that any destruction of the evidence that they were searching for could take place, but in the average situation, when executing a warrant to search for narcotics, the police may reasonably assume that the occupants of the dwelling will make some effort to destroy the contraband.

QUESTION: Or almost anything else. Why just narcotics?

I mean, it seems to me you're -- once you say that a valid exception to the rule is the destruction of evidence, the possible destruction of evidence, it seems to me in the average search, whether it's for narcotics or not, you could assume that once the person hears a

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knock -- you know, I'm a policeman here with a search warrant -- whatever you're looking for, with few exceptions, bales of marijuana, but if it's, you know, stolen jewelry, chuck it down the toilet, whatever.

It seems to me you're making an exception that swallows up the general rule.

MR. DREEBEN: Well, I don't think, Justice Scalia, that it entirely swallows the rule. It certainly would apply to anything that could readily and easily destroyed through indoor plumbing, or through -- for example, the cases have dealt with raids on gambling joints in which the slips are kept, the betting slips are kept on flash paper which can easily be put in water, and that's it's water soluble.

But if a search warrant were being executed for stolen televisions, there would be no reason to believe that the occupants would have any means of being able to destroy the televisions.

QUESTION: I just wonder whether that's a good enough exception to come in without knocking into a house, especially as you tell me that in common law you couldn't go in for evidence anyway, at all, even with knock and announce.

MR. DREEBEN: Well --

QUESTION: Now you're saying you can not only go

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in to get evidence, but you can do it without knocking and announcing.

MR. DREEBEN: Well, I -- my response to that is twofold. First, we believe that the exceptions to a knock-and-announce rule, if you want to put it that way, that we advocate are consistent with the way the doctrine has developed in common law cases in this country, but --

QUESTION: In that respect, do you make a difference between what the statute requires of Federal officers and what the Fourth Amendment requires of all officers? Is there something more because there's a Federal statute?

MR. DREEBEN: No, Justice Ginsburg. I think that 3109 has been interpreted by the lower courts as incorporating the same kind of reasonableness analysis as we're advocating under the theory that 3109, which was enacted in 1917, was a restatement of the common law, and that the common law recognized that when it would frustrate the object of a search to knock and announce before entering, it wasn't required, or when the police faced a risk of danger from entering with a knock --

QUESTION: May I ask a broader question based on that statement? Is it the Government's position that the Fourth Amendment rule for which you advocate would be precisely the same as this Court's construction of section

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3109 insofar as we've decided 3109 cases?

MR. DREEBEN: I don't think it would be precisely the same as this Court's construction of 3109 in every respect. The most significant respect in which I would differ from the 3109 cases is the application of the exclusionary rule.

In the cases that this Court had, Miller and Sabbath, under 3109 there was a fairly broad application of the exclusionary rule, which may have been appropriate on the facts of those cases because they involved warrantless entries to a home to make an arrest, and therefore there is a difference in these cases.

QUESTION: Apart from the question of remedy, in terms of the scope of whether there's a violation of the Fourth Amendment, would you say the law would be the same as whether there's a violation of 3109?

MR. DREEBEN: Well, none of this Court's cases under 3109 evaluated whether there were exceptions, because the facts didn't present them, and to that extent those cases simply didn't present the problem that we have here. We don't take issue with the idea that --

QUESTION: Well, let me ask you in a different way, then. If we have a -- two cases of identical facts, one under 3109 in the Federal case, and another State case like this, do you think we would apply the same rules to

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determine whether the Fourth Amendment was violated in the one case and 3109 was violated in another? Is there a difference in the approach?

MR. DREEBEN: No. We would submit that a reasonable application of 3109 would produce the same result --

QUESTION: As the Fourth Amendment.

MR. DREEBEN: -- as the Fourth Amendment.

QUESTION: Mr. Dreeben, I take it that in our decision in Warden v. Hayden, which I guess was the late sixties, we have already departed from the common law in construing the Fourth Amendment, since we there held that you could search for evidence and the common law didn't permit it.

MR. DREEBEN: That is correct, Chief Justice Rehnquist, and that was my second response to Justice Scalia's comment on the common law. The Court has not simply frozen common law rules in searches and seizures into constitutional law, but has used the common law background, departing from it when reasonable justifications existed.

QUESTION: I understand that, but that's -- but it's a further question to say not only are we going to let you go in to look for evidence when you couldn't do it before, but the obtaining of that evidence we are also

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going to allow to dispense with the common law requirement of knock and announce.

That's a big additional step, it seems to me, and I'm not sure that simply to say you can get it means that you also have to say, moreover, when -- if knocking and announce wouldn't permit you to get it, you can dispense with knock and announce. That seems to me quite an additional step.

MR. DREEBEN: Well, the American common law from very early cases in this country did recognize that when it would be counterproductive to knock and announce before making the entry, such as by provoking a felon within to use violence to repel officers who were there to arrest them, then knock and announce need not be complied with, and that is the very principle that we are contending for here today with respect to the risk of violence.

QUESTION: Do I understand you to be saying, though, that this is largely an academic discussion, because if you have a warrant, then you can break the door down, you can be brutal, it doesn't matter because of the inevitable discovery rule.

MR. DREEBEN: For most of the evidence that is acquired under a search warrant, that is true, although I wouldn't --

QUESTION: Well, why isn't the same reasoning,

then, sufficient whenever there's a search without a warrant, where a warrant would be required by general rules? You would simply argue, well, if they had done what they should have done and gotten the warrant, they would have found the evidence anyway. Isn't the structure of the argument the same in each case?

MR. DREEBEN: I don't think so, Justice Souter, because the presumption that if police had applied for a warrant they would have gotten it is a very different thing from saying they did go to the magistrate, they did get the warrant, and they are --

QUESTION: Is it any more bizarre than saying that if they had knocked and announced they would have done the right thing and they just didn't happen to knock and announce? In each case, we -- the assumption of the question is, they could have done what the Fourth Amendment requires. They didn't do it.

But the argument in each case seems to be, or the argument in the inevitable discovery application that you're arguing for is, if they had done the right thing, they would have gotten the same evidence they got by doing the wrong thing.

MR. DREEBEN: Well, the warrant that they possessed, which is the primary source of protection that the Fourth Amendment affords to privacy and against

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unreasonable searches, authorized them to acquire this evidence, so they were going to --

QUESTION: Yes, but that begs the question whether it authorized them to go in in a manner which under a general rule, or a rule that takes into consideration knock and announce, was unreasonable. It didn't authorize them to make an unreasonable search.

MR. DREEBEN: That is true.

QUESTION: It got them to the threshold, is what I'm saying. It didn't necessarily get them over the threshold.

MR. DREEBEN: That is true, but this Court's cases that have examined police entries into dwellings that were done both under warrant and not under warrant have recognized that the evidence that is acquired under warrant is the fruit of the warrant.

Even if a warrantless entry had previously occurred that enabled the police to see all of the evidence, and that thereby would justify suppression of the evidence if that's all there was, doesn't require suppression of evidence when there is a valid warrant, and that's essentially the position we're taking here.

QUESTION: Well, if that's the case, then I don't know why we're arguing about knock and announce, because the evidence is always going to be inside if they

arrived with a warrant, and it's going to be there whether they knocked or whether they didn't knock.

MR. DREEBEN: That is true, Justice Souter, as to the tangible evidence that they seize, but it may not be true as to some of the things that they observe upon making an immediate entry, and if the entry is unlawful, a court could suppress things that they observe --

QUESTION: But I was going to say, that's not what you're arguing would be inevitably discovered.

MR. DREEBEN: That's correct.

QUESTION: Yes.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dreeben.

The case is submitted.

(Whereupon, at 12:08 p.m., the case in the above-entitled matter was submitted.)

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SHARLENE WILSON, Petitioner v. ARKANSAS.

CASE NO.: 94-5707

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BY Ann Marie Federico

(REPORTER)