OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SAUL ORNELAS AND ISMAEL ORNELAS-LEDESMA, Petitioners v. UNITED STATES

CASE NO: 95-5257

PLACE: Washington, D.C.

DATE: Tuesday, March 26, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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SAUL ORNELAS AND ISMAEL :

ORNELAS-LEDESMA, :

Petitioners :

v. : No. 95-5257

UNITED STATES :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, March 26, 1996

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

APPEARANCES:

ROBERT G. LeBELL, ESQ., Milwaukee, Wisconsin; on behalf of the Petitioners.

CORNELIA T. L. PILLARD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

PETER D. ISAKOFF, ESQ., Washington, D.C.; by invitation of the Court as amicus curiae, in support of the judgment below.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 95-5257, Saul Ornelas and Ismael Ornelas-Ledesma v. The United States.

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

ORAL ARGUMENT OF ROBERT G. LeBELL

ON BEHALF OF THE PETITIONERS

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

We believe this Court should maintain the de novo review standard for Fourth Amendment warrantless cases as it has previously done in First Amendment cases, Fourth Amendment cases, Fifth Amendment cases, and Sixth Amendment cases.

We believe that the recently enunciated decision in Keohane is instructive in how the principle is evolved in determining that de novo review is appropriate in warrantless Fourth Amendment cases.

QUESTION: Mr. LeBell, it seems to me in -- either the magistrate or the district judge made a finding of fact as to credibility. You wouldn't suggest that that particular finding be reviewed de novo, would you?

MR. LeBELL: No, Justice Rehnquist. I believe

that that is historical fact, and that an historical fact determined below is to be given deference. What we take issue with is the determination, legal determination whether the law was correctly applied, and that mixed question of law and fact we believe should be accorded de novo review.

QUESTION: We believe that there are three sound reasons why de novo review should be accorded warrantless Fourth Amendment cases. First of all, historically this Court has given de novo review for constitutionally enshrouded issues.

Secondly, de novo review furthers the appellate directive of developing the law, making consistency in the law, and basically in error-correcting, and thirdly, we believe that the decision, or, strike that, the de novo review standard is consistent with the principles enunciated in Gates v. Illinois.

This Court has in the past addressed issues that are encapsulated in the Fifth Amendment, and basically it has determined that de novo review is appropriate.

In the Keohane decision, this Court basically said, although the issue of voluntary -- strike that, of custody is fact-laden, in other words, the issue is a question of what facts occurred during the course of the custody, still we believe that the question of whether, in

fact, the person was in custody for the purposes of Miranda requires de novo review.

QUESTION: That was Federal habeas, though, under a statute, wasn't it?

MR. LeBELL: That is correct. It was a question of whether there was a presumption of correctness under 2254(d), but still the Court --

QUESTION: This is a direct appeal.

MR. LeBELL: That is correct. We do not believe that the differentiation between a habeas action or a direct appeal should in any way prevent this Court from according de novo review or plenary review in Fourth Amendment warrantless cases.

QUESTION: Well, I can see why you argue naturally for plenary review, but I don't see how you could derive much support from a holding that was based on the Federal habeas statute, which this isn't.

MR. LeBELL: I believe I'm looking at the words that were enunciated in that decision. Those cases, that case was also backed up in this Court's decision in Ker, this Court's decision in Beck, Carroll, and Brineger, all of those --

QUESTION: Maybe those would be better cases for you to rely on, then.

MR. LeBELL: Certainly.

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Those Fourth Amendment cases that have been previously been decided basically, whether the Court actually spoke the words de novo, it certainly conducted an independent review.

In the Ker case, in fact, the Court said that when it is to be -- it's considering a constitutionally enshrouded issue, and specifically Fourth Amendment, it's going to be an independent review, and the importance of that is to assure that the Fourth Amendment as a constitutional right is, in fact, upheld.

Similarly, the Court decided the same principle in Beck.

In Carroll and Brineger, again, those two decisions were based on a fundamental reevaluation of the law and, based on that reevaluation of the law, some of the cases were overturned, and some of them were affirmed.

In the Cortez case, which was a case decided by this Court, the lower court determined that the decision satisfied the definition of clearly erroneous. When it got to this tribunal, this Court showed no deference to the clearly erroneous determination and, in fact, reviewed the determination de novo.

QUESTION: You -- what court made the determination of clearly erroneous in Cortez?

MR. LeBELL: The lower court.

QUESTION: The district court, or the court of appeals?

MR. LeBELL: No, the court of appeals, and upon reviewing the district court's decision determined that there was no clear error, and therefore it affirmed the decision, and this Court then reversed, showing, in essence, no deference to the decision by the court of appeals.

QUESTION: Well, surely there are no aspects of Fourth Amendment doctrine, be it the lawfulness of the stop, the lawfulness of the search that follows the stop, that couldn't and wouldn't have been developed had we used the de novo -- pardon me, a clearly erroneous standard of review in the circuit courts all this time.

MR. LeBELL: It is our position -- you're correct that certainly the law will develop. We believe that the law can most effectively develop through the de novo review standard.

QUESTION: Well, doesn't it develop in the same way? Do you really think that the doctrine of the Fourth Amendment search and seizure would look any different today had we been proceeding under a clearly erroneous review standard?

MR. LeBELL: I believe it would look differently.

QUESTION: Why is that, and in what respects?

MR. LeBELL: I can point the Court to this particular case, where the circuit, or the circuit court of appeals specifically said, we find this to be a close case, but because we are bound by the clearly erroneous standard, we're going to have to affirm, and that was in light of the fact that on two occasions the district court reversed the finding of the magistrate judge, who had listened to 4 days of testimony, reversed the finding of probable cause.

QUESTION: But that's going to be the case where there are multifarious factors, and there, a court of appeals may well reverse the district court, but to assume that that's of any use to the system you have to posit a following case that has the same multifarious factors, which doesn't very often happen.

Where you have a single factor, like one case we had 9 or -- 8 or 9 years ago involving whether it's an unreasonable search when an officer who is in a room lawfully sees a turntable in plain view and opens it up, you know, turns it over to look at the bottom to get the serial number, that issue -- couldn't that issue be decided just as well and established just as well under a clearly erroneous standard? It's an isolated, discrete legal issue.

MR. LeBELL: I do not believe so --

QUESTION: Why not?

MR. LeBELL: -- and I don't believe so because it's my understanding and my concept of Fourth Amendment development that there's a waxing and a waning. There are some entrenchments, there are some developments based on technological changes, based on societal changes, and in order to allow for these changes I think that each case, in and of itself, has precedential value.

QUESTION: Well, tell me -- tell me how the turntable case could not have been decided just as well under a clearly erroneous standard.

MR. LeBELL: If the court had, I assume in that particular case looked at the facts and determined that those didn't satisfy probable cause.

QUESTION: Well, the lower court simply held that if -- that the police officer is lawfully in the room, this isn't a search and seizure because it's a minimal disruption, and whether you apply clearly erroneous or de novo, the fact is that it's clearly erroneous to say that a minimal disruption is not a disruption.

MR. LeBELL: That is correct. However, if the court had been -- not had its hand tied, and had allowed a de novo review, it could have perhaps addressed other

issues, and it could have considered it in light of some --

QUESTION: It really seems to me that the only advantage for making law that de novo review contains is an advantage when you assume that the very same multiplicity of factors will be replicated in the future, which doesn't very often happen, it seems to me.

MR. LeBELL: Justice Scalia, I would disagree with that proposition, because I believe that each of these cases, while they are specific and of paramount importance to the litigants, ultimately have a place in the compendium of cases that result in changes in the Fourth Amendment.

QUESTION: Well, take this case. Judge Posner's opinion was very, very helpful and lucid. If he had been operating under a different standard, the one that you contend for, de novo review, would he have said anything different? Would any different legal positions have emerged that would be more helpful to the system?

MR. LeBELL: My response would be, I don't know, because he was bound by the clearly erroneous standard. I can speculate, and my speculation would be in his discussion of the NADDIS, the use of NADDIS, whether NADDIS was appropriate, whether there should be more discussion of NADDIS, whether the defendants should have

been allowed access to the hard copy of the NADDIS, same thing in the drug courier profile, whether under those circumstances, perhaps this was an occasion the drug courier profile should not have been applicable.

QUESTION: Well -- sorry.

MR. LeBELL: Yes, Justice Breyer.

QUESTION: Were you finished?

MR. LeBELL: I'm done.

QUESTION: The -- what I thought -- I agreed with Justice Kennedy, I thought where the issue is one of elaborating the law, elaborating it, there, certainly the court of appeals, apparently, as Judge Posner did, feels free to do that under the deferential standard, and that's certainly appropriate. It's a very interesting opinion on statistics, and elaborating the law.

We're only talking, I take it, where it's pure application of a label to a set of facts. Is that what we're talking about?

MR. LeBELL: We're talking about a situation --

QUESTION: The application of a legal label to a set of facts?

MR. LeBELL: That's correct.

QUESTION: Well, in that respect, should we not pay more attention to district courts that deal with these things regularly, that understand the sort of impossible-

to-set-down-in-writing factors, and try to prevent too many absolute elaborations by appeals judges, who know less about it?

MR. LeBELL: I would like to reserve 2 minutes.

I don't believe that the district court in this position -- in this particular case, nor in any other case, is better suited to decide --

QUESTION: If you want to go ahead, you go ahead, because there's other people who could answer that, I realize, if you don't want to --

MR. LeBELL: I can answer the question.

I don't believe that the district court in this case, or in any other case, is better suited to make an application of the fundamental legal principles to the facts.

In fact, Salve Regina, decided by this Court, is instructive in that respect, in that the courts of appeals are better situated because of their fundamental acts, because of their institutional values, that they can pause, they can reflect and spend the time, once the facts have been developed below, to address the legal concepts and develop those legal concepts.

So I don't believe that deference of the legal decision could be accorded the district courts, especially in this particular case, where the district court

basically, without hearing a single witness, and on the first occasion with only hearing one transcript which emanated out of 4 days of testimony, reversed the decision, which was a well-reasoned decision by the magistrate.

I realize that under the Magistrate Act that the court was entitled to do that, but I think it was inappropriate.

QUESTION: Absolutely. I think that is de novo, isn't it?

MR. LeBELL: Yes, it is.

QUESTION: But you take some offense at the district court reversing de novo the magistrate, but you want the court of appeals to reverse de novo the district court.

MR. LeBELL: Well --

QUESTION: I find that -- you know.

MR. LeBELL: -- I think that when you talk about a de novo review that's allowed under the Magistrate Act, I think it is assumed that there's going to be full compliance, and clearly, the first time round, when Judge Randa reviewed the appeal by the petitioners, there was not a de novo review as it was contemplated by the Magistrate Act.

I would reserve my last few minutes.

QUESTION: Very well, Mr. LeBell.

Ms. Pillard.

ORAL ARGUMENT OF CORNELIA T. L. PILLARD

ON BEHALF OF THE UNITED STATES

MS. PILLARD: Thank you, Mr. Chief Justice, and may it please the Court:

Our position is that determinations of reasonable suspicion and probable cause to search without a warrant are subject to de novo review in the courts of appeals, and there are three closely related reasons why de novo review is the correct standard here.

First is the role of the courts of appeals as an expositor of the law. The level of suspicion required to justify a stop or a search is a very general standard, and it's only through the process of case-by-case adjudication that specific content over patterns of cases can be given to the --

QUESTION: Well, why do we need specific content to be given? Why isn't it sufficient to say reasonable suspicion, and just have an ad hoc decision in every case? Why do we need more elaboration of the law?

MS. PILLARD: I think there are two reasons for that, Justice Rehnquist. First is the need to have uniform standards from court to court, and the second is the need of law enforcement in applying those very general

standards to have some guidance as to what those standards mean, and this case is a good example of that.

Because the court of appeals applied the clear error standard, we're left not really knowing what the court of appeals itself thought was the correct result. It thought that the district court's decision fell within a range of permissible results, but we don't know whether the court thought it was ideal, and that leaves law enforcement officers, when they do confront this type of situation again, not knowing whether, if the district court in the other -- in the second case were to suppress, would the court of appeals reverse that or not.

So we're left with a more murky standard than we would have if the court of appeals had affirmed under the de novo standard. We'd have clearer guidance, and Federal law enforcement officers --

QUESTION: Oh, undoubted -- I mean, if you say, you know, whether once in a blue moon you wouldn't get clearer guidance, I'm sure you would, but that argues for de novo review in every case. You'd get some marginal improvement in legal certainties.

MS. PILLARD: We think that it's worth the effort that in de novo review you do get clearer guidance and that, in fact, the experience of law enforcement --

QUESTION: You do that for all constitutional

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issues, is that the position you take?

MS. PILLARD: We're here arguing that you do this for reasonable suspicion and for probable cause, for the reasons that this Court has used in analyzing the standard of review question, that we think there is important precedent to be generated, and that the guidance that that gives to law enforcement is very helpful. Law enforcement --

QUESTION: Well, I suppose that just as the courts of appeals have to bring some unity to the district courts, we have, you know, a lot of courts of appeals. I suppose we should grant a significant number of petitions for certiorari for the same reason in these cases to decide whether probable -- you know, no particular issue, but just whether this combination of factors is enough to constitute probable cause. I suppose that the Solicitor General would urge us to accept cert in a fair number of cases.

MS. PILLARD: We're not arguing for a change in the certiorari standard. It may be that there are situations where you see a repeat pattern, airport stops, bus stops, or traffic stops without a traffic violation, where the Court will think, this is something that's come up so many times --

QUESTION: That's a simple, isolable issue which

would come up under clearly erroneous review --

MS. PILLARD: Well --

QUESTION: -- like the turntable example. If there is a single factor that is improperly used, clearly erroneous will get that, won't it?

MS. PILLARD: It's true that some general rules, under the outlines of the Fourth Amendment standard will emerge under the clear error standard, but the plain review doctrine is a much more distinctly legal doctrine. Here, people are really focusing on the application of this very general probable cause standard, and how do we give that content.

It's important to note that the experience of the Federal Government in training our officers, the FBA officers -- FBI officers and the DEA agents is that in training them on what the content is of probably cause and reasonable suspicion, they have to teach by illustration. They take the kinds of circumstances that these officers run into, and they give them decided court cases to show them this --

QUESTION: Well, you could have done that with Judge Posner's opinion in this case, could you not?

MS. PILLARD: You could, but the precedential value would be clearer. As I mentioned, I think, if the -- it we knew that the Seventh Circuit thought that

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this was the right way to conduct this stop and this search, then the officers --

QUESTION: You would use that for FBI agents in the Fifth Circuit as well, as I assume, right?

MS. PILLARD: This -- these are national standards, and the --

QUESTION: The Seventh Circuit promulgates national standards?

MS. PILLARD: The probable cause and reasonable suspicion do mean the same thing.

QUESTION: But I mean, my point is, you're still telling the FBI agents to take a chance that what the Seventh Circuit has said will be applied in the Third Circuit.

MS. PILLARD: You are, but the circuits in fact are very much guided by one another. If you look at the courts of appeals cases, they cross-cite, and the State cases cross-cite as well. What they do is, they look for closely analogous fact circumstances, and they ask themselves, well, we have a few different facts here, we do need to look at the totality, but are we on the more suspicious side of the line here or the less suspicious.

QUESTION: You're right, I --

MS. PILLARD: That's the standard form of reasoning in these cases.

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QUESTION: I think you're right that if the Seventh were talking solely about the application of a label to a set of facts, if circuit courts do it you will get better precedent. I agree with you.

That also has a down side. There will be less flexibility in the law, and the other down side, which I don't know how much weight to give it, is that district judges would then feel that they have to really write out every last detailed fact, including matters of mood and that -- very hard to write down.

What they do now very often is, they just say, probable cause, that's it, and they don't feel they have to go and write every last little bit down.

So how do we weigh that? On the one side, you're right about it being more binding precedent. On the other side, it's going to be quite a complicated thing in many cases to try to write everything down -- you know, every last little detail-- because the three judges up there who know nothing about it are going to start second-guessing it.

So that's an administrative -- I mean, I'm sort of -- I don't know which way. You see one thing on one side, one on the other.

MS. PILLARD: In the context of the Fourth Amendment of searches and stops, there's a Fourth

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Amendment requirement of articulation of the reasons for the stop and the search. The officer -- it's not enough that the officer, in fact, has reasons. The officer has to articulate those reasons, and they should be reflected in the record.

QUESTION: He says, look, there is a screw here, and there wasn't that much rust on it. I thought it was rust. It probably had been scraped, and besides that, there's this thing in the door that looked a little odd, all right, and so the judge, trial judge is sitting there, and he says, jeez, I better say exactly what angle it was at, what's the oddness about it, he sort of made a funny expression when he said that, maybe that has -- you see, I'm worried about complicating the law an awful lot when they try to -- is that a legitimate concern, or to what extent --

MS. PILLARD: Well, given, in particular in this area, that the norm of requiring articulation, I think that that's something that is going to be less likely to be lost here in the translation, and you know, the countervailing concerns are that these are followed as precedent and that, yes, there will be bases for distinguishing, and you see courts all the time saying yes, this looks close, but we have more here, or we have less here.

But given that there's some scope in choosing the de novo standard for having the kind of additional clarity the importance of which this Court emphasized as recently as the Thompson v. Keohane case --

QUESTION: Well, Ms. Pillard, take probable cause, which is certainly very much tied up with the Fourth Amendment. With the exception of one-half sentence from an opinion of John Marshall, we have never defined probable cause, and we get along fine.

MS. PILLARD: Well, I would beg to differ. I think this Court has in opinion after opinion --

QUESTION: We've --

MS. PILLARD: -- given definition to probable cause --

QUESTION: Well --

MS. PILLARD: -- in certain fact settings.

QUESTION: In certain -- but what, in your view, is the way this Court has defined -- how have we defined probable cause?

MS. PILLARD: In a case-by-case elaboration process. For example --

QUESTION: Well, but you agree, then, that there has been no overriding or sweeping definition of probable cause, just in words.

MS. PILLARD: Well, there have been subrules,

for example, that the inferences should be drawn from the perspective of a reasonable law enforcement officer rather than from the perspective of a law person or law professor --

QUESTION: Yes, but --

MS. PILLARD: -- and those kinds of rules --

QUESTION: -- has this Court said, what is probable cause? Has it answered that question?

MS. PILLARD: I don't think so.

QUESTION: No, I don't think --

MS. PILLARD: I think it's answered it in a bunch of fact patterns.

QUESTION: Well, very fact-specific ways, and is there any reason why we just shouldn't keep on doing that in the area of probable cause?

MS. PILLARD: I think that we should and we will keep on doing that, and the question is whether, when the Court does that, for example as it did in the Carroll case dealing with the illegal transportation of liquor, and then came up with a fact pattern in Brineger which the Court viewed as indistinguishable from the Carroll case, in Brineger the Court said if probable cause is to mean the same thing from one courtroom to another, we're going to have to reverse the district court's finding of no probable cause in this case and follow Carroll, and that's

the kind of development of the law that we think the de novo standard facilitates, and we think the Court should continue to carry on in that case.

QUESTION: Is it relevant for us to consider the present work load of the court of appeals in deciding this case?

MS. PILLARD: Well, we don't think that it would be appreciably more work to have --

QUESTION: Suppose we disagree with that. Is it a relevant consideration?

MS. PILLARD: No, I don't think it's a relevant --

QUESTION: In other words, we decide this case quite without regard to the comparative efficiencies of requiring either the court of appeals or the district courts to write all these things out, as Justice Breyer has explained.

MS. PILLARD: It's worth note in that regard that in my most recent check I think every court of appeals except for the Seventh Circuit in their most current statements of the rule are applying the de novo--

QUESTION: Well, I assume that's because they think that that's what we would require, but the question --

MS. PILLARD: I think they often find it useful.

I think they find it useful for precisely the reasons that I've been arguing, that they think it's needed to advance clarity in this area and to give some uniform guidance and some stability to precedent.

QUESTION: Ms. Pillard, you said there were two other reasons, and your time is running out, so perhaps you might mention them.

MS. PILLARD: I've had some opportunity to cover them. They are the guidance that's needed by law enforcement, and the uniformity of the law, that the Fourth Amendment should not mean different things in different courtrooms simply because one judge takes a position that a certain quantum of information amounts to reasonable suspicion and another judge dealing with identical facts --

QUESTION: The last reason surely proves too much. I mean, you can say that about every single Federal legal standard, probable cause, anything, any constitutional injury, it should not mean different things in different courtrooms --

MS. PILLARD: Yes, but --

QUESTION: -- and therefore they should all be reviewed de novo.

MS. PILLARD: Not exactly. This Court in Pierce v. Underwood and in Cooter & Gell looked at the kinds of

fact situations involved there, which were the application of Rule 11 in a particular litigation, or the application of the Equal Access to Justice Act, and to --

QUESTION: And concluded that it was okay if it meant different things in different courtrooms, right?

MS. PILLARD: Well, determined really that you don't have the kind of VP fact patterns that create any kind of meaningful disuniformity from courtroom to courtroom.

So it was more that when you look at the whole litigation you're dealing with a much more unique animal than when you deal with the kinds of patterns of crime that law enforcement are investigating where they see the same kinds of indicia again and again, and the same kinds of groups of factors again and again, and they really need to have some guidance in applying these very, very general standards.

You know, what starts to be enough, and what isn't, and when are we going to be confident that when we --

QUESTION: I don't know what you mean by the same groups of factors. I mean, could --

MS. PILLARD: Well, for example --

QUESTION: If, indeed, the fact of a rusted screw is not enough, you know, then you can say in the

clearly erroneous review, a rusted screw is not enough.

MS. PILLARD: Particularly when the screw turns out not to have been rusted.

QUESTION: Right.

MS. PILLARD: But we do see examples of VP factors. The court of appeals cases are full of them. And this Court, in fact, in the United States v. Sokolow dealt with a narcotics stop at an airport where there was a purchase of an airplane ticket with cash in small bills, travel from a source State city for drugs, an individual who traveled under an alias, appeared nervous, and did not put his address on his checked luggage, and the Court looked back to Florida v. Royer, where it had confronted a situation where an individual had purchased a ticket with small bills, traveled from a source city for drugs under an alias --

QUESTION: Well, Ms. Pillard --

MS. PILLARD: And --

QUESTION: Ms. Pillard, why is it that we need to either opt for de novo review or deference? Why don't we just keep on reviewing these cases the way we have, and the court repeals the way we -- it may not always be neat, but it seems to work pretty well.

MS. PILLARD: I think this Court has been exercising de novo review, so to that extent I think that

the Court should continue to do what it's been doing.

QUESTION: Well, we've certainly never said we exercise de novo review in Fourth Amendment, in particular Fourth Amendment cases, have we?

MS. PILLARD: Well, in Carroll and in Beck the Court did say that independent and plenary review was the standard, and I think in practice you see in analyzing the cases that the Court has exercised its own judgment and not referred to the need to defer to any district court, or --

QUESTION: Is it different from the standard that's used when the Court is determining whether a warrant was backed by probable cause?

MS. PILLARD: It is different. In Illinois v. Gates, the Court said that there should be deference in that circumstance to the issuing magistrate.

Now, it's -- it doesn't necessarily follow from Gates that the court of appeals defers to the district court. The court of appeals, I think, also defers to the issuing magistrate, and in that case that's based on the policy favoring warrants, a strong Fourth Amendment policy that a search pursuant to a warrant is the preferred form of privacy intrusion, and so to that extent, when you don't have the magistrate issuing the warrant, you don't have that form of deference.

If there are no further questions --

QUESTION: Thank you, Ms. Pillard.

Mr. Isakoff.

ORAL ARGUMENT OF PETER D. ISAKOFF

BY INVITATION OF THE COURT AS AMICUS CURIAE,

IN SUPPORT OF THE JUDGMENT BELOW

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

The issue before the Court is whether a Federal court, Federal district court conclusion as to the existence or nonexistence of probable cause or reasonable suspicion ought to be reviewed under the clearly erroneous standard or de novo. The circuits are divided on this. They have been shifting somewhat. They've been inconsistent among themselves, or within their own circuits.

The Seventh Circuit staked out a very clear position for clearly erroneous review in this particular context, and I submit that this Court should affirm.

It is helpful in addressing this issue just to briefly review the characteristics of the opposing standards. De novo review means that when you get to the bottom line, if the court of appeals thinks that the district court applied probable cause and reasonable suspicion in the wrong way to the facts, that it would

reverse.

Clearly erroneous review is, by definition, more deferential. The reviewing court may not reverse simply because it thinks it would have decided the case differently. Where there's more than one permissible view of the evidence, it is obliged to defer, but I think that it's implicit in some of the questions that I heard addressed to opposing counsel that clearly erroneous review is not tantamount to no review.

Where an appellate court sees that there's been a legal error, or that there's a legal principle that would decide the case differently --

QUESTION: But the legal errors are going to be rather few and far between. I mean, the ultimate legal error is simply the ultimate issue of probable cause or not probable cause, and that's a pretty blunt instrument.

MR. ISAKOFF: Well, I think that's correct, Justice Souter.

QUESTION: Isn't the case that when we say, as some people here have suggested, and I suppose as I have on some times, that you can still give your views as a court if you're applying a clearly erroneous standard?

Isn't it really the case that courts that do that are indulging in a lot of dicta, that they're going to have a lot to say, and they're either going to have to

follow that by saying, nonetheless, that isn't the way the lower court viewed it and even though we think it would have been better if they had concluded another way, we'll let it stand, or they're going to say, yes, we think they applied it rather badly, and it's so bad that we're going to call it clear error, in which case they're not really going to be following a clear error standard at all, they're going to kind of jump into de novo whenever they want to come up with an illustrative case, while still calling it clear error.

Isn't that the kind of, sort of protean court of appeals review that we're going to get, either a lot of dicta, or a lot of departure from doing what we're saying we're doing?

MR. ISAKOFF: Well, it's certainly possible that you could get that kind of review. It seems to me that this could be the occasion for defining what a court of appeals is supposed to do in performing a clearly erroneous review, and when I was talking about questions of law perhaps affecting the analysis of the probable cause issue, I think of Justice Scalia's example of the turntable, with whether or not you've got something, whether it amounts to a search.

That narrow question can be considered to be a legal question, when you pick up the turntable and look at

the thing that's not in plain view.

QUESTION: Yes, but the question in that case was the degree of intrusion, and you're going to say, well, there was just a wee bit of intrusion when he looked under it, and therefore it was clearly erroneous to say that you had not sort of departed from your reasonable standard. That's kind of tough. I think that that strikes me as sort of crossing the line into de novo review, even though you're not saying that's what you're doing.

MR. ISAKOFF: Well, you -- there may be a distinction between whether something constitutes a search for purposes of whether you pick the de novo or clearly erroneous review versus probable cause or reasonable suspicion determinations.

And part of the reason for that is the history that was recited by this Court in Illinois v. Gates, where this Court had attempted to look for recurring fact patterns and to try to develop a set of rules that would provide the kind of guidance that opposing counsel have suggested is provided in each one of these highly fact-specific cases.

And the Court's experience was that it was becoming impossible to kind of draw these distinctions on appeal, and that we have to adopt a totality of the

circumstances rule specifically recognizing that these fact patterns really do vary from situation to situation and that, while you think you may be identifying a common fact pattern, in fact there may be many, many variables.

QUESTION: But that gets us into the different issue which Ms. Pillard raised, and that is, there is a good reason to have a more intrusive review standard when one is reviewing a warrantless search than in the case of a search with a warrant and therefore, even though it may in fact, and I'm not sure I am convinced of this, but even though it may, in fact, be more difficult, really, to do de novo review, there's a good reason to do it in order to preserve that distinction, isn't there?

MR. ISAKOFF: Well, I --

QUESTION: You want to encourage warrants.

MR. ISAKOFF: I think that there's a point that is lost in that argument Ms. Pillard made, and that is that nobody is talking about adopting the clearly erroneous standard of review on appeal, of deferring to the actions of a police officer. Nobody is suggesting that unless the police officer was clearly erroneous, we're going to permit the evidence in.

This is a question of deferring to the decision of the district court Article III judge after a full adversary presentation, which I would submit is far more

extensive even than considered by magistrates, and the whole point of it is that you're deferring not to a police officer but to a district court.

And in terms of encouraging the exercise of warrants, the very fact that there might be uncertainty in the Seventh Circuit in this case as to whether or not, when you have all of these circumstances, were they ever to arise again, suggests that these police officers, if they want to be certain, should go out and get a warrant, and once they get a warrant, then they've got all of the protection of --

QUESTION: Mr. Isakoff, this is a typical sort of a mixed fact-law matter, isn't it, probable cause and reasonable suspicion?

MR. ISAKOFF: Yes.

QUESTION: And we certainly have traditionally at least said that mixed questions of fact and law will be reviewed by the appellate court on a de novo standard.

MR. ISAKOFF: Well, I think that that's not quite correct, Your Honor. I think that in habeas corpus cases, where you are defining what is a fact issue by 2254(d), which then goes back to Townsend v. Sain, and where you're looking at how much you're going to give to the State courts to do without independent Federal review there, I think all -- in all of the situations where

you're looking at juror bias or that kind of thing, you are saying mixed questions of fact and law are subject to de novo review by a Federal district court in habeas corpus, okay. That's one situation.

But the other situation, even though it's the same type of issue, I submit has been resolved differently by this Court, that the criterion that the Court has used is, who's in the best position to decide the question, and is the decision going to be of precedential significance, because as long as you're going to have three judges spend their time trying to scratch their heads and decide whether the court was right or not in close cases, you ought to at least be getting something for it.

And I would suggest also that we are talking about the close cases by definition, since it's only in the cases where two permissible results could be the outcome that there's a difference between the de novo standard and the clearly erroneous standard, so it's hard to see how you're going to get very many precedents coming out of just those close cases.

QUESTION: I had thought that our Bose line of authority on the First Amendment, where we said that in that area we will review these mixed questions de novo, I had thought that was somewhat by way of exception, that we at least implied that ordinarily that would not be the

case.

MR. ISAKOFF: Certainly the Bose and the Hardhanks decision that followed it and Justice Stevens' very clear language was that this was a unique interest that's being protected by the actual malice standard, that this Court in particular has an obligation to be sure that this core value of being able to criticize public officials be given the fullest protection.

I would submit that, in contrast to the probable cause and reasonable suspicion type determinations, which are specifically nontechnical in nature, that until at least this Court has given guidance perhaps in a series of cases, that the First Amendment cases simply pose a different type of issue, and I would agree that it is an exception.

QUESTION: Is it -- this is -- I can't work out how this makes any difference whether it's decided one way or the other. That's my basic problem. I mean, I take it that the -- we're all agreed that any kind of question of law that would require an elaboration of the law as contrasted with simply applying a label to a set of facts is for the court of appeals --

MR. ISAKOFF: Correct.

QUESTION: -- de novo. So we're only talking about applying a label to the facts.

Now, if you were to lose on this, is this what would happen? Normally the district judge just says, the panel was askew. There was an odd light shining through. The defendant looked nervous.

All right, all depends on how nervous, how askew. You can't really -- so I, as a court of appeals judge, get those findings, and you say apply de novo, I say, okay, I apply it de novo. It all depends on how askew, so I assume that it was very askew, you see, because I defer on the factual matter, and then I affirm.

If we go your way, I affirm again, I guess. I mean, I -- what's the difference?

MR. ISAKOFF: Well, the --

QUESTION: In the one case you're -- because they don't write out all the facts, that's true.

MR. ISAKOFF: No, they --

QUESTION: What's the difference? Is there a way to leave the law as we find it, or how -- what the Chief Justice suggested.

MR. ISAKOFF: Well, I --

QUESTION: What's the difference?

MR. ISAKOFF: Well, I think the difference is in the case where the court of appeals gets to the bottom line, they've looked at the historical facts as they've been found or conceded to be and where there is more than

one permissible view, where the question is close, that that's the case you leave it to the district court.

QUESTION: Of course, the difficulty, and the whole thing that leads them to want the review is, in most instances the judges just write, he looked nervous. They don't say how nervous. The panel was askew. They don't say how much. There is no way to say how much --

MR. ISAKOFF: Well, in fact --

QUESTION: -- in writing, and then as long as that's true, we defer anyway at the court of appeals. Whether you call it deferring on the basis that there could be different factual findings on subtleties, or whether you call it deferring on the ground that we're supposed to give reasonable weight to their ultimate finding, who cares?

MR. ISAKOFF: Well, the difference, I think, Justice Breyer, is that the -- you're supposed to be reviewing a totality of the circumstances kind of a judgment, and it seems to me that the district court is in the best position because he's at least had the chance to ask how askew, or even look at how askew, and then weighing all of that together --

QUESTION: So you think it's more honest, in other words, to say --

MR. ISAKOFF: I think that the district court

really is in the better position to do it, and then these cases that are close, you're not really getting the precedentially significant decisions out of the court of appeals.

QUESTION: Well, courts really were never troubled with this problem until either some appellate judges school said let's figure out what the standard of review is, and then we say, well, it's deferential, or it's de novo. Courts never bothered to think about that for a long time, and they got along fine.

MR. ISAKOFF: Well, it's interesting, Your Honor, because I think that courts of appeals, whether prompted by this Court or otherwise, have been paying much more attention to standard review issues.

I know that, for example, the Third Circuit has a rule that in every brief you must have a little introductory section on the standard of review, and I was in an oral argument last week where I was listening to somebody else's case and they were saying, well, you know, we might come out one way if it's abuse of discretion and another way if it's de novo or if it's plenary.

And I think the courts of appeals are paying a great deal of attention to it, and frankly I think they are highlighting an issue of, you know, Federal judicial administration here, really, who is in the best position

to decide these questions.

QUESTION: Mr. Isakoff, doesn't this very case, though, illustrate that the court of appeals sometimes is?

I'm really puzzled by the significance of the labels, too, as are other people, but if I ever saw a nice precedent it was Judge Posner's here, because he said, if you have these four, five factors, and you didn't have the two NADDIS hits, it wouldn't be enough.

So now the district court knows that this one, two, three, four, five, if that's all you have, it's not enough. It's a really nice precedential decision, and yet this is described as deferential review. It's very puzzling.

MR. ISAKOFF: Well, I think what's deferential is when you get to the bottom line, because the bottom line in this case I think is arguably close.

I think at the point where if you leave out the NADDIS hits and all you've got is an automobile in Milwaukee with California license plates in December, and that's all you've got, then what the court of appeals is essentially saying is, if you found probable cause or reasonable suspicion on that basis alone, we would be saying that's clearly erroneous.

And I think that it underscores, frankly, that the whole notion that the court of appeals must be

exercising de novo review in order to have this expositor of the law function is wrong.

QUESTION: Do you think maybe something like this has been going on at least before we got the courts of appeals got to the point of articulation, that in most cases they did engage in deferential review?

Every once in a while they would get a case in which they would say, the trial court seems to be straying pretty far from what we generally think of as probable cause here, and we've got to take this case as an illustration to show that they should have analyzed their facts differently, or concluded differently, or whatnot, and in those cases they engaged in de novo review. They were selecting cases for de novo review, and that's the way we've gotten along the way we've gotten along.

Every once in a while the courts of appeals would take an illustrative case and they'd really rake it over. Would there be anything wrong with leaving a system -- a) do you think that's what's been going on, before we got to the labeling era, and b) would there be anything wrong in leaving it that way and saying yes, you can pick one out once in a while?

MR. ISAKOFF: Well, the only problem with picking one out, Your Honor, is that I don't think the courts of appeals have the luxury that this Court does of

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picking and choosing the cases that come before it.

QUESTION: No, I'm not saying that they pick and choose the cases that come before them, but they do seem, I think -- I'm guessing -- that they really did exercise some discretion in deciding just how picky a standard to apply when they did review them.

And if the reason for saying, in some cases we're going to be fairly deferential but in others we're going to be very picky because we think something can be gained by using this as an illustration, if that's a legitimate ground of choice, would it be wrong for us to leave them to make that choice, even though they have to review, on one standard or another, every case that comes?

MR. ISAKOFF: Well, I think Your Honor makes a good point that, whether you call it clearly erroneous or de novo review, the ultimate bottom line is, are you going to -- do you think that the district court's in the better position or not.

But I think that the development of these labels has come to the point where these concepts have enough meaning that when you've got the development of the law to the point where probable cause and reasonable suspicion have, and you see that it's a fact-bound area that resists specific rules, that it's appropriate specifically to tell the courts of appeals that this is an area where we think

that the district courts are in the better position, and we don't think that in most cases you're going to have much precedential significance to drawing the line in these close cases one way or the other because these situations are not going to arise exactly the same way again.

QUESTION: Mr. Isakoff, can I ask you a question that occurred to me listening to your opponents? She suggested that what this Court has, in fact, done in cases like Brineger and all the airport search cases where they reversed and so forth, they just explained -- the court explained its conclusion why there was, in fact, probable cause, and usually reversed in most of those cases I remember.

But they never said anything about a deferential standard. They just went ahead and did it, which seems to imply that the Court itself, this Court, has applied a de novo standard.

MR. ISAKOFF: Well, I think that -- I think there's some truth to that, particularly when you go back to cases as far as Brineger and before you had the history that led up through Aguilar and Spinelli to Illinois v. Gates, where I think there may have been a recognition that the probable cause and reasonable suspicion determinations were really not susceptible of the kind of

precedential significance that I think in Brineger the majority of the Court found, and in that case, it was different from that, Justice Stevens.

In that case, they lined up the facts in Carroll, and they lined up the facts in Brineger, and they said, unless we're going to say that this is for the trial court to decide, we can't distinguish these, and therefore we must reverse, and Justice Jackson in dissent made the very point that I'm frankly arguing for today, which is that the difference is that we only said in Carroll that it was permissible to make this finding, and I think that's a big difference.

In this case, I would affirm because it's permissible, but you didn't have to find it, and I think that that dissent was very prescient. I think that it picked up the theme that later drove the Court's decision in Illinois v. Gates to reject Aguilar and Spinelli.

So I think that the law has progressed somewhat, in that I think there is something useful to be said to the courts of appeals and in response, I believe to Justice Kennedy, there was a question, I believe whether the Court should take into account deficiencies that a clearly erroneous rule would have.

I would suggest that certainly that that would not be a justification in and of itself. I would suggest

that where the district court is in a better position to decide the question and the courts of appeals are not really making precedent, that it's certainly not unreasonable to give the guidance to say, look, you don't have to try to make these fine distinctions on appeal, particularly since you weren't there to raise what additional questions might have come to mind like, how loose was the panel, and so on.

QUESTION: Mr. Isakoff, do you think it's appropriate to have a different standard, whatever the label is, to review more closely in a case where there is no warrant?

MR. ISAKOFF: I think that the district court, in reviewing the case where there is no warrant, is not going to be applying nearly the same kind of standard that you would be doing on review of a magistrate's order. In other words, the district court will be using the word de novo, will be employing de novo review and reviewing the work of the police.

QUESTION: But once you get past the district court level, it should make no difference whether it's a warrant case or a warrantless search.

MR. ISAKOFF: That's correct, Your Honor. That point you've got an extremely fact-bound totality of the circumstances decision that's been made by the person

who's had the opportunity to ask the questions, to develop the record as he or she sees fit, who is in a position to make the kind of weighted assessment, and where you're really not going to be getting -- look, if the district court is wrong, and is clearly wrong, or has made a legal error that affects the analysis or has said something isn't a search when it is a search, then the clearly erroneous standard is perfectly adequate to correct that.

QUESTION: Mr. Isakoff, this case presents a situation where the magistrate made one finding of fact and the district court on review, without having heard the evidence directly, made a different one, changed the result.

MR. ISAKOFF: Well --

QUESTION: To whom should the appellate court defer?

MR. ISAKOFF: The appellate court should defer to the district court for the following reason.

The district court was obliged, by reason of the statute and this Court's decision in United States v. Raddatz, to make a de novo determination, and as long as he was not rejecting any credibility findings of the magistrate, it's settled that he does not need to rehear that testimony.

He certainly read, and it's clear that he did,

the testimony of the one officer who had felt this loose panel and whose testimony was really the pivot point of this case, and you know, we've -- the court in Anderson v. Bessemer says you've got to defer to the trial court among other things because the trial court's the one who develops the expertise of doing this kind of fact-intensive decisionmaking on an every day basis.

QUESTION: Is there any split of authority in the circuits, to your knowledge, that turns on this peculiar situation of the district court differing from the magistrate?

MR. ISAKOFF: Not that I'm aware of, because -- and I honestly don't know the answer to that.

QUESTION: There's a lot of authority in the agency context, Universal Canberra, and so the question, did the district court on remand hear any of the witnesses?

MR. ISAKOFF: No, Your Honor --

QUESTION: No.

MR. ISAKOFF: -- because the only --

QUESTION: So that would -- I mean, if you use the analogy, you'd say look, the reason that one wants to defer to a district court in the legal task of applying a legal label to facts as given is that the district judge has heard, not necessarily just credibility, but he sat

there, and he listened to the story unfold, and that gives him a degree of expertise in these matters, but there's none here.

MR. ISAKOFF: Well, there's two points. First of all, the expertise the Court was talking about in Anderson v. Bessemer wasn't talking about expertise in the particular case, but because that's the district court's every day job, and the second point is that even though the district court here chose not to hear any testimony, he was certainly in a position to do so if he wanted, which is not an option that was available to the court of appeals.

QUESTION: But as a court of appeals in this case you'd say, what in heaven's name does the district judge know that I don't know? Certainly the magistrate may know quite a lot that I don't, but not the district judge.

MR. ISAKOFF: There's no question that when you look at this particular case you could reach that conclusion and decide that, well, we ought to maybe have one standard for when the district court hear's the testimony and another standard for when the magistrate hears the testimony, and yet another standard for when they disagree with one another only on the label but not on the credibility.

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But I think of Your Honors' decision last term, and the name of the case doesn't come to mind right now, but where you, I believe, suggested that you should not have -- it was the arbitration case, where you said it would be unduly complicated to have so many different standards, but I think that the possibility of error may be greater in reviewing a district court where he has not heard the testimony.

QUESTION: Mr. Isakoff, help me out on this. If I'm wrong, tell me. I assumed that the deference which was given in a warrant case to the conclusions, or the -- in the old conclusion of the issuing magistrate was the kind of deference which I would describe by filling in the blanks in a way that was favorable to the magistrate's conclusion.

If, for example, the magistrate says the -- there was something funny about the panel, and we don't know whether it was funny enough really to excite a high degree of suspicion or not, when a court reviews that, it's going to say, well, we assume the magistrate meant that it was very funny, it was very strange.

It was enough to say, whoops, there's something -- any reasonable person would have said there's something really wrong with that panel. People have been tampering. Is there -- I thought there was that sort of

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filling-in-the-blanks, or expanding-on-the-statement sort of deference, as distinct from every -- any deference as to what, if you expand or fill in the blanks, amounts to probable cause or not.

MR. ISAKOFF: Oh, I --

QUESTION: As --- do you understand that to be the process of deference that goes on?

MR. ISAKOFF: I certainly do not -- I'm not aware of any decision of this Court that has suggested that the deference is limited in the manner Your Honor suggests.

I have certainly read Illinois v. Gates as saying that there's a substantial basis for the warrant, we're going to defer to the magistrate's decision to issue it, and when you consider that that was then followed by United States v. Leon, where a police officer acting, you know, with a facially valid warrant is going to --

QUESTION: But that was a different policy, wasn't it? I mean, that was the get-the-warrant policy as opposed to the standard-of-review policy.

MR. ISAKOFF: Well, I'm not sure it's a different policy because I --

QUESTION: Maybe you can't draw the line. I guess you can't draw the line.

MR. ISAKOFF: It seems to me that it's the same

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policy --

QUESTION: Yes.

MR. ISAKOFF: -- that in both cases the Court was coming very strongly, as it has historically, in favor of encouraging people to get warrants.

QUESTION: No, wait a minute, maybe I misspoke. I thought in Leon the deference was to the capacity of the police officer to believe that the warrant he had was a validly issued warrant, so that it was in that respect that the policy was different, isn't that correct?

MR. ISAKOFF: Yes. I mean --

QUESTION: Okay.

MR. ISAKOFF: -- I think at that point, if you're looking at a police officer who knows that he has lied to the magistrate --

QUESTION: Right. Right.

MR. ISAKOFF: -- that that would be a different thing, but I think in both cases that there's no suggestion that the type of deference that Your Honor was suggesting has been limited to simply filling in the blanks. I don't think the Court was that specific in either case.

Unless the Court has further questions, I ask that the judgment be affirmed.

QUESTION: Thank you, Mr. Isakoff. We

appreciate your appearing as amicus.

Mr. LeBell, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF ROBERT G. LeBELL

ON BEHALF OF THE PETITIONERS

MR. LeBELL: It was suggested by Justice Souter that in the past the practice has been by the circuit courts of appeal that basically it's an ad hoc basis, and that the determination whether it's going to be clearly erroneous, or where it's going to be de novo, is sort of on, we're going to call them as we see them, and I think that's -- and the question was posed, why couldn't that just continue to work.

I don't believe it could continue to work. First of all, it --

QUESTION: Has -- do you think that's what has been going on --

MR. LeBELL: As a practical matter?

QUESTION: -- prior to the labeling era?

MR. LeBELL: Yes, Your Honor, I do. As a practical matter, that's precisely what has been going on, and I think the resultant effect is that there is no continuity in decisions, and there's a disparity in these decisions and the application of Fourth Amendment principles.

More importantly, it was posed by counsel that

perhaps this should be an opportunity for the Court to more clearly define the definition of clearly erroneous, as was announced in Bessemer.

I don't believe that there is any more workable standard by which to determine when something is clearly erroneous or is not. There's no way to quantify by setting a certain specific value, and basically what it comes down to is a court of appeal judge saying, I think this is clearly erroneous, and I think it's a totally subjective standard, and I think it's unworkable in the sense of saying we should leave it on an ad hoc basis.

Counsel also alludes to the principles enunciated in Gates v. Illinois, and it is our position as petitioners that to accord the clearly erroneous standard in warrantless Fourth Amendment cases would be inconsistent with the principles of Gates.

In Gates, obviously the Court, citing Ventresca, was trying to encourage police officers, the front line law enforcement individuals, to rely on the warrant. To now say to police officers, or send the same message, well, if we're going to -- if you're going to rely on a nonwarrant situation, basically we're going to accord the same deference to that decision, I think it's --

QUESTION: But it's not his decision. I -- frankly, I think this is a -- I'm not sure whether police

officers -- I'm not sure whether they'd be on your side or on the other side. It helps the district judge who disfavors the police officers as well as the district judge who favors them.

MR. LeBELL: I believe that when the Court based Gates on the belief that law enforcement officers were, in fact, going to rely on warrants because they had been given deference, I believe that principle was appropriate, and I also conversely believe that the exact opposite message is going to be disseminated by police officers.

QUESTION: Why -- I mean -- and they pick the judges they go to for the warrants, whereas they don't pick the judge that's ultimately going to make this determination.

MR. LeBELL: Sometimes they pick the judges that they go to for warrants.

QUESTION: The police officers? Well --

MR. LeBELL: That's correct.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. LeBell.

MR. LeBELL: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)