ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v. HERNAN RAMIREZ

CASE NO: 96-1469

PLACE: Washington, D.C.

DATE: Tuesday, January 13, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 96-1469

HERNAN RAMIREZ :

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

Washington, D.C.

Tuesday, January 13, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:13 a.m.

APPEARANCES:

DAVID C. FREDERICK, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MICHAEL R. LEVINE, ESQ., Portland, Oregon; on behalf of the Respondent.

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P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 96-1469, United States v. Hernan Ramirez.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE PETITIONER

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

This case concerns whether police officers must have a higher justification than reasonable suspicion if they damage property while making a no-knock entry to execute a search warrant.

The officers here sought to apprehend an escaped convict who had committed numerous violent acts and had stated that he would never return to prison. While executing a no-knock entry at respondent's house to execute a search warrant to look for that fugitive, the officers broke a single garage door windowpane. Based on that property damage, the Ninth Circuit held that the officers must have a higher justification for foregoing with the general principle of knock and announcement.

QUESTION: Just a preliminary question: is the warrant in the record? I couldn't find it.

MR. FREDERICK: The warrant itself is lodged by

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respondent in the brief in opposition. There was a lodging made by respondent. It's at lodging number F.

QUESTION: Thank you.

MR. FREDERICK: And it is lodged with the clerk.

QUESTION: And another preliminary matter. Do you accept the notion that the Fourth Amendment does impose some kind of restraints on the amount of force that officers can use in effecting a no-knock entry?

MR. FREDERICK: Yes, Justice O'Connor. The two questions are distinct, in our view. If the officers have reasonable suspicion to forego knocking and announcing, they may use the force reasonably necessary to effectuate the entry.

A case of excessive or wholly needless property damage would be assessed under a reasonableness standard that took into account whether or not it was actually reasonable to go through the door or to go through the window, or to engage in some other property damage.

QUESTION: Another preliminary question. Assume probable cause. This case is the same with or without the warrant, is it not, or is that incorrect?

MR. FREDERICK: With or without probable cause to make --

QUESTION: No, no. Assume that it's probable cause.

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MR. FREDERICK: Yes, to conduct the search or --

QUESTION: Your argument here would be the same if there were no warrant but the police had probable cause, would it not?

MR. FREDERICK: Our answer is the same with respect to the no-knock clause of the warrant, Justice Kennedy, if that is what your question is getting at. The officers here had probable cause to search the premises.

QUESTION: I understand.

MR. FREDERICK: And the magistrate put a no-knock provision in the warrant. Our view is that when the officers executed the entry, they had reasonable suspicion to believe that they would face danger if they knocked and announced, so if I understand --

QUESTION: But you would -- the -- you would make the same argument here whether or not the no-knock waiver was in the warrant or not?

MR. FREDERICK: Yes. Yes. As the Court made clear in Richards, the question is whether the officers' reasonable suspicion at the time they make the entry.

There may be circumstances that dissipate that reasonable suspicion if the officers have gone to the magistrate, the magistrate authorizes a no-knock entry, and what the Court made clear in Richards is that if those circumstances dissipate the reasonable suspicion, it would

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not be reasonable for the officers to forego knocking and announcing, notwithstanding that the warrant contained a no-knock clause.

As the Court made clear in Richards, reasonable suspicion is the standard by which to judge foregoing with knocking and announcing.

QUESTION: Mr. Frederick, may I go back to the question that was -- I think Justice O'Connor asked you, and that is, you said that there could be a Fourth Amendment control of excessive force. What would be the implementation of that?

Suppose the agents here had come in like gangbusters and destroyed everything in their path, and also picked up some incriminating evidence, what would be the consequences?

You said the Fourth Amendment is involved, how? Do we exclude the evidence that would be garnered in such an unreasonable search?

MR. FREDERICK: I think your question poses two distinct points, and let me address them separately, if I may.

The reasonableness of the method of making the entry would be assessed by looking at what force was necessary to get in quickly.

The remedy that might occur if the officers

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engaged in excessive property damage, we submit, would be compensation for the damaged property and not necessarily the exclusion of the evidence, for if the officers had properly made a no-knock entry supported by reasonable suspicion but not engaged in the unnecessary property damage, they still would have found the same evidence, and they would have found the same evidence at the same time, so the remedy that would be appropriate in the case of needless property damage would be compensation and not the imposition of the exclusionary rule.

QUESTION: But supposing there is authority, though, and there's no Fourth Amendment violation, and they break the door down of a third party, don't they have to pay for the damage?

MR. FREDERICK: Yes, Justice --

QUESTION: So the obligation to pay for the damage isn't dependent at all on whether it was justified or not.

MR. FREDERICK: No, Justice Stevens. In fact, the statute that you may be referring to is 31 U.S.C. 3724 provides -- Congress has provided that where a law enforcement activity has resulted in property damage to an innocent third party, the Attorney General can pay compensation for that law enforcement activity.

That would not necessarily be the case for a

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criminal wrongdoer. There would not be an obligation on the part of the Government to pay for property damage that occurred for a wrongdoer, so --

QUESTION: Well, it would -- is this person -- at the time of the entry, this -- the property owner was not a wrongdoer. Of course, you found out later he had some stuff in the house, but --

MR. FREDERICK: That's correct. I mean, the officers are always operating on the information that they have when they make the entry.

The question, you know, to be clear, is that if the officers have reasonable suspicion to believe that there would be a danger if they knocked and announced, that carries with it the authority to make whatever property damage is reasonably necessary to effectuate that entry.

The case that Justice Ginsburg posits is where the officers have engaged in wholly needless property damage that's unrelated to --

QUESTION: What did the officers do here by way of property damage?

MR. FREDERICK: They broke a single garage door windowpane, Mr. Chief Justice, and they did so because they had information from a confidential, reliable informant that guns were kept in the garage, or that they

might be kept in the garage, and the purpose of making that break in the garage door windowpane was so that an officer could secure the garage in the event that the people in the house went to the garage to get the guns.

QUESTION: Mr. Frederick, I am less concerned about -- well, just as concerned, I suppose, but I am less troubled by what the Fourth Amendment might provide than I am by section 3109, which says the officer may break open any outer or inner door or window or any part of the house, or anything therein, to execute a search warrant if, after notice of his authority and purpose, he is refused admittance, which didn't occur here, or when necessary to liberate himself or a person aiding him in the execution of the warrant, which didn't occur here.

I don't see what the purpose of that statute is unless it is meant to exclude other break-ins, which isn't to say that the other break-ins would exclude all the evidence that's found, and I assume that your answer to what would happen if there's a violation of 3109 is the same thing as your answer to what happens if you use excessive force, right?

MR. FREDERICK: Yes, it would be, Justice Scalia.

QUESTION: The exclusionary rule would not apply, but you'd be liable for whatever damage you've

caused.

MR. FREDERICK: That's correct.

QUESTION: Okay. Well, why shouldn't I read 3109 that way, saying these are the only -- these are the only reasons why a Federal officer can break anything in a house?

MR. FREDERICK: For two reasons. The first is that for 40 years this Court, starting in Miller v. United States in 1958, has read the language of 3109 which we have set forth in our opening brief at page 2, to essentially codify the common law rule of knock and announcement and its exceptions.

QUESTION: Well, it -- but it clearly doesn't, unless you're wrong about what the common law allows.

MR. FREDERICK: Well, our view, Justice Scalia, is that the Court has never construed the terms of this statute literally. It read into --

QUESTION: I see. We've never construed it to mean what it says.

MR. FREDERICK: Absolutely. That's correct, and if you were to start -- if you were to start reading this language literally, there are several decisions that would have to overruled. Miller v. United States read into this a requirement that knock and announce be done for arrest warrants. It read into the statute an exclusionary rule.

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In Sabbath this Court read into the statute a requirement that not -- force did not have to be used, notwithstanding that it says, may break open, so the Court has read this language and has stated several times that the language is to be understood against the backdrop of principles of common law that have been in effect for hundreds of years, and that the language is not to be read literally, and our view is that there's no reason at this point to go back to a literal, textual reading of section 3109 when the Court has never --

QUESTION: What effect does 3109 have if we do that? Is it just a superfluous statute?

MR. FREDERICK: Well, the --

QUESTION: Just sort of there to say, you don't really mean just this, do whatever you like?

MR. FREDERICK: No. The language is an expression of congressional policy that Federal officers should conduct their entries by using the general principle of knock and announcement unless there are reasons that would just -- be justified in not doing so.

QUESTION: It doesn't say that.

MR. FREDERICK: I understand, Justice Scalia.

QUESTION: Does it do anything other than what our decision says the Fourth Amendment does with respect to the States?

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MR. FREDERICK: Well, I think, Justice Ginsburg, the answer to your question is that -- first, our position is that the statute is coextensive with the Fourth Amendment requirements, so that the requirements on Federal law enforcement officers are no greater or lesser than they are on State officers as prescribed under the Fourth Amendment's reasonableness provision.

QUESTION: So then you really don't -- this is just kind of a statement that doesn't matter, because the Fourth Amendment certainly binds Federal officers.

MR. FREDERICK: That's true. As a matter of history, the language in the statute came well before the Supreme Court began to interpret the Fourth Amendment's reasonableness requirement to impose a knock and announce requirement constitutionally, so as a matter of history there is a reason for section 3109.

It's just that as it has been construed by this Court, the statute itself does not impose a higher requirement on Federal officers than it would on State officers, who are in the dangerous situation of executing warrants.

In fact, all Federal courts of appeals, including the Ninth Circuit, have recognized an exception for officer safety under section 3109, notwithstanding that the textual language does not contain such an

exception.

QUESTION: We're talking about whether you have to pay for the window or the door. I mean, you're not talking about letting the culprit skip away under the exclusionary rule if this provision has been violated.

MR. FREDERICK: I'm sorry, I don't understand the question.

QUESTION: If the provision -- I mean, I don't know that there is such a massive importance in interpreting 3109 so broadly, because if it has been violated, the only consequence is that the window has to be paid for, or the door that's broken down has to be paid for.

MR. FREDERICK: That would certainly be our view if the Court were not to accept its prior cases, which hold that the common law rule of knock and announcement has been, in effect, codified by section 3109.

I'd like to emphasize two other points.

QUESTION: Let me ask you one question. Did the Sabbath case take any position on whether there might be an exclusionary rule in connection with the violation of 3109?

MR. FREDERICK: I -- yes, I -- although I'm -- I actually don't recall, Justice Scalia. I think that as this Court noted in --

QUESTION: Well, no -- I see now in the first paragraph it says, we hold the method of entry vitiated the arrest and therefore that evidence seized in the subsequent search should not have been admitted at petitioner's trial.

MR. FREDERICK: Yes.

QUESTION: So that if we say this violates 3109, unless we do something to Sabbath you get an exclusionary rule right along with it.

MR. FREDERICK: That's correct, and in Sabbath itself the Court read the words forcibly break essentially out of this statute, because the facts there were that the officer entered an unlocked door.

I would like to underscore that the Ninth Circuit's teaching --

QUESTION: That wasn't a holding of the case, of course. That wasn't a holding of the case. It was just an assumption which never had to be applied.

QUESTION: Oh, I don't think that they reversed the judgment of the lower court. This -- you know, the first paragraph --

QUESTION: They didn't exclude the evidence --

QUESTION: They said in the first paragraph the evidence will have to be excluded. I mean --

MR. FREDERICK: In any event, if this Court were

to do something with 3109 it would have to encounter its prior decisions in Miller and in Sabbath with respect to questions such as whether it goes beyond the common law in terms of restricting this --

QUESTION: Where did it come from --

MR. FREDERICK: -- with respect to the exclusionary rule.

QUESTION: 3109 doesn't forbid anything.

MR. FREDERICK: That's correct, Justice Breyer.

QUESTION: All right. So it must -- it says it came from the field code in New York in 1880, or something, and so at that time they must have think -- thought there was some different rule of law that forbids something, and then they said, despite that different rule of law, this permits something.

How did it work? What were they thinking, do you know? You may not know --

MR. FREDERICK: Well, as the law of knock and announce developed, it developed in the law of civil trespass where property owners brought trespass actions against law enforcement officers for unlawfully entering premises.

Now, the legislative history, even into the New York statute, is not clear as to why the New York drafters of their statutes put it into the law, but one theory

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might be that the -- New York and in Congress wanted to create an affirmative grant of authority to officers so that they could avoid trespass actions.

But that's just speculation on our part, because there is -- the historical evidence simply is not clear as to why certain aspects of the common law of knock and announcement were specifically written into 3109 and others that had been well-recognized, including officer safety, from the 1822 decision of Reed v. Case, were not, so I think that it would be pure speculation as to exactly why an affirmative grant was placed into the statutory provisions, Justice Breyer.

Let me point out that the Ninth Circuit's two-tier rule places an unreasonable burden on law enforcement officers. No-knock entries routinely involve some damage to property.

In the Richards case, for instance, the officers had to ram the door and kick it in in order to make the entry. If officers need more than reasonable suspicion to justify a no-knock entry involving property damage, they may have to face the choices of having evidence suppressed at trial or facing greater personal risks when knocking and announcement. We submit that the officer should not be forced to make that kind of calculus at a dangerous situation such as executing warrants.

Moreover, the Ninth Circuit's approach provides no practical guidance to officers. Warrant execution entails high risks and requires split-second judgments. It is unclear what level of information will meet the higher tier of specificity required by the Ninth Circuit.

The level of justification for a no-knock entry should not turn on the fortuity of the officers encountering an unlocked door or window. Reasonable, just suspicion justifies the property damage that is reasonably necessary to effectuate that entry and, in fact, if the Ninth Circuit's rule is accepted by this Court that something more than reasonable suspicion is necessary if property damage is the result of the no-knock entry, that will, in effect, swallow the rule that this Court announced in Richards.

QUESTION: Well, if we say that reading the record in all of the circumstances here the entry was reasonable, you would prevail in this case. That -- I'm not sure that that would answer the question you wanted answered, or am I incorrect?

MR. FREDERICK: Well --

QUESTION: Would that be a perfectly satisfactory disposition, or would it still leave the two-tier rule in effect?

MR. FREDERICK: I think it -- it would not be

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clear to the courts below exactly what this Court was saying with respect to that question, Justice Kennedy, and we petitioned for certiorari for the express purpose of having this Court say that the two-tier rule was not the rule that should govern in cases of property damage.

QUESTION: But in the course of saying that, it seems to me that we will still -- we would still say, if we agreed with you, that the ultimate standard is reasonableness, that the -- you cannot destroy more property than is reasonably necessary, given all of the circumstances and given the necessity to protect your officers.

MR. FREDERICK: That's correct, Justice Kennedy, but I hope that, when you do write that opinion saying that, you distinguish between the reasons that the officers have for foregoing with knocking and announcement and the reasons that they have for the particular method of getting into the premises.

A fortified door that is barricaded, has steel reinforcements, will require a different tactical method than a door that is a screen door, that may be wide open. Our view is that reasonable suspicion justifies getting the officers inside the premises as quickly as possible. How they go about doing that, though, is going to turn on the reasonableness of the fortifications that they

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encounter when they execute the search warrant.

QUESTION: Or that they believe they encounter.

MR. FREDERICK: That's correct, that are objectively reasonable based on the circumstances.

QUESTION: You said the reasonableness of the fortifications. You don't mean that, do you?

MR. FREDERICK: No, I do not mean that the fortifications themselves were reasonable, Mr. Chief Justice, but that the officers need to --

QUESTION: Reacting to them.

MR. FREDERICK: Exactly. It should not be the rule that if people engaged in criminal conduct use some of the fruits of their activity to fortify their homes, which would there -- or premises, and thereby lead to greater property destruction if officers have reasonable suspicion to make a no-knock entry, should entitle them to greater Fourth Amendment protection than people who do not engage in such fortifications.

What -- and our view is that those two questions should be decoupled so that it is clear to all that officers may dispense with knocking and announcement if they have reasonable suspicion.

Unless the Court has any further questions at this time, I'd like to save remaining time for rebuttal.

QUESTION: Thank you, Mr. Frederick.

Mr. Levine, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. LEVINE

ON BEHALF OF THE RESPONDENT

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

At 6:15 in the morning of November 5th, 45 armed officers surrounded the home of Mr. Ramirez. They planned this. This wasn't something that arose spontaneously at the door, like in Richards v. Wisconsin. This wasn't a case where they were recognized as officers where they had to take an immediate action, kick in the door. This was a planned breaking of a window of a residence.

Who among us would not have risen to the defense of our wives? Who among us would not have arisen to the defense of our children? 50 Percent of Americans have guns in their homes. The Government should have thought this through a little better.

The norm, this Honorable Court, the norm from time immemorial, from Semayne's Case and even -- even before, as Wilson points out, the norm has been that before officers may break and enter the home, our last refuge in this world that's shrinking smaller and smaller all the time, before they can make that entry, they have to announce their identity, they have to announce their purpose --

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QUESTION: Well, but I suppose that if the door had been unlocked here and they just burst through the door and everything else was the same, the fear of the occupants would have been precisely the same.

MR. LEVINE: It's a weighing standard. The Ninth Circuit is not applying a two-tiered test. The Ninth Circuit is applying a weighing standard. It's balancing the scope of the intrusion and the risks of the intrusion against the need that the Government has to go in.

QUESTION: But unless you disagree with my suggestion in my hypothetical, all we're talking about here is a broken windowpane.

MR. LEVINE: No, Your Honor, we're not talking about a broken windowpane. We're talking about a broken windowpane that the foreseeable consequences of which -- the foreseeable consequences of which create danger of life --

QUESTION: Well, that same danger would have been applied if they'd burst through the door, assuming the door's unlocked, or they had a pass key -- they have a pass key.

MR. LEVINE: It may well. It may well, but generally speaking, Justice Kennedy, generally speaking the destruction of a door or a window is going to create a

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much greater risk than going through a pass key, because the --

QUESTION: I just don't think there's any empirical evidence for that. I just find it very difficult to write an opinion based on that assumption.

MR. LEVINE: Well, I think the assump -- the purpose of the knock and announce rule has -- one of its fundamental purposes is the protection of property. The reason is that -- and the protection of the safety of the residents. Common law recognized that when people break property, people will be frightened and will spring to the defense of themselves and their family, and will engage in a shoot-out. Things will escalate.

QUESTION: Well, what if the officers were just clumsy and negligent and poked a hole through a window by virtue of their negligence, and it frightened the homeowner and -- should we apply some higher standard for the resulting entry?

MR. LEVINE: You would look at a balancing test, Your Honor. The Ninth Circuit is simply saying, as it has done for 23 years, case after case after case, the Ninth Circuit has a million variations on these themes. It has a general rule that helps guide its application of the rule of reason. The general rule is that where's there's damage to property, and the Ninth Circuit understands that

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they're not talking about a scratch on the door, or they're not talking about a piece of wood or a flower that's stepped on --

QUESTION: Mr. Levine --

MR. LEVINE: Yes, Your Honor.

QUESTION: -- I didn't understand the difference between a kicked-down door, which was -- which case was that? That was Richards --

MR. LEVINE: Yes.

QUESTION: -- and a rammed door. It seems to me that that does more damage than breaking one windowpane.

MR. LEVINE: Well, depending on all the circumstances again, Your Honor, I mean, there are thousands of hypotheticals which will --

QUESTION: But are you suggesting that the standard that this Court said was proper in those two cases wasn't tight enough because there was damage to property?

MR. LEVINE: Are you referring to Richards v. Wisconsin, Your Honor?

QUESTION: Yes, and in Wilson, too.

MR. LEVINE: Well --

QUESTION: But they both involved, not just walking through a door gently.

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MR. LEVINE: The statement in Richards v. Wisconsin, the test of reasonable suspicion that the Government talks about and that this Court talked about, though, in the context of destruction of evidence, that has to be construed at least with regard to a planned assault on a residence, as opposed to a spontaneous happening at the door, that has to be construed, it seems to me, to include the manner of entry and the degree of danger.

It's like Tennessee v. Garner. The Government just wants to have a quantum reasonable suspicion, but that's not what you did in Tennessee v. Garner. That was the case where you said the police officer couldn't shoot the fleeting felon. You have to consider the end result, the fleeing of the -- the death of the felon.

In Winston v. Lee, which Garner cites, you recall that was the case where the police wanted to compel surgery to remove a bullet from the suspected robber, and they said they need to get the bullet, and this Court said quite clearly that, wait a minute, what's the danger if we remove the bullet? We have to balance that. What is the Government's interest in getting the bullet? And at first the bullet was only half an inch, and they said, well, that's okay, go ahead, but then it turned out the bullet was a lot closer, this person might die.

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Justice Scalia, writing for a unanimous court in Whren, I believe last term, you said that there's a certain class of cases, a narrow class of cases like Tennessee v. Garner, like Winston v. Lee, like Welsh v. Wisconsin, the case where the police chased a man in through the house without a warrant to get -- they wanted to arrest him for drunk driving in order to get -- they said, we have to preserve the evidence.

You put in that class no-knock entry, Wilson v. Arkansas, because you said in that narrow class of cases we have to do a full balancing test, and that was a unanimous Court.

QUESTION: Isn't the test that applies, though -- is there some disagreement about this, that -- I'm reading from Richards v. Wisconsin. It says, to justify a no-knock entry the police must have a reasonable suspicion that knocking and announcing under the particular circumstances would be dangerous or futile, or would inhibit the effective investigation of the crime.

MR. LEVINE: If --

QUESTION: Well, that's the test. We just -- I mean --

MR. LEVINE: Well --

QUESTION: That's what it is, isn't it? That's what it says.

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MR. LEVINE: No, Your Honor. If --

QUESTION: That's not the test?

MR. LEVINE: If that test -- first of all, you did not consider any safety interests in Richards v. Wisconsin, understandably.

QUESTION: So you're saying we should overrule -- overturn that, or --

MR. LEVINE: No. No. You should -- you either have to modify the test or interpret the test to mean reasonable suspicion under the circumstances, including the method of entry, sort of a la -- sort of like, excuse me, Winston v. Lee, incorporating the manner of entry into the circumstances, or you have to adjust the other end. When you say danger, well, what kind of danger?

QUESTION: Well, but --

MR. LEVINE: Dangerous to whom?

QUESTION: -- but Richards involved a forcible entry.

MR. LEVINE: It did, Your Honor.

QUESTION: I just don't think that the Ninth Circuit opinion is faithful to that. I mean, for you to prevail, I guess you're right, we'd have to change Richards.

MR. LEVINE: Well, you have to flesh out Richards, I guess would be my terminol --

QUESTION: Well, what's the problem? That is to say, presumably, as I read it so far -- and you're much more familiar --

MR. LEVINE: I'm sorry, Your Honor.

QUESTION: Are you -- you are much more familiar with the record than I am.

MR. LEVINE: Yes.

QUESTION: I thought here that the police thought that this person that they wanted to arrest was somewhat dangerous -- he had assaulted people, he had violently escaped before -- that they came to arrest him and they didn't want to announce themselves because they thought there's a person in the house whom we need to take by surprise or he may pick up a gun and shoot somebody.

MR. LEVINE: Your Honor --

QUESTION: Or who knows what he'll do.

MR. LEVINE: There's no question that Mr. Shelby was not a model citizen. There's no question that he was a -- in the past he had committed violent and horrible crimes. There's no --

QUESTION: Then they had reasonable suspicion that he was dangerous, so why isn't that --

MR. LEVINE: But that's not --

QUESTION: -- the end of it?

All right. Yes, all right.

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MR. LEVINE: That's not the question. That shouldn't be the test. The test has to be, do they have -- in light of the way they entered -- in light of the way they entered, do they have, at the very least, a reasonable belief that he presents a present imminent danger to the police.

If the standard is simply danger --

QUESTION: No, no, obviously you're right, that he has to present a danger, i.e., he might hurt somebody now, okay. So they think, here's a person who's hurt people in the past, here is a person who's violently escaped in the past, here is a person who might have a gun, and we're afraid that if we announce ourselves he's going to shoot somebody, now.

MR. LEVINE: I understand their --

QUESTION: Now, how is that not --

MR. LEVINE: Well, that's not enough, because there has to be evidence in the record to show the basis for their belief. There's no testimony at the hearing. There was -- the district court found that there was no evidence that Mr. Shelby was presently armed in the residence, or that he presented the threat --

QUESTION: You mean presently armed in the sense of right then at 6:00 in the morning he had a gun on him?

MR. LEVINE: Well, many of the -- most of the

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cases that talk about -- let's take a look at --

QUESTION: Well, can you first answer my question?

MR. LEVINE: Yes, Your Honor. I'm sorry.

QUESTION: You say the district court found that Mr. Shelby was not "presently" armed. Are you suggesting that this finding means that at 6:15 in the morning he was not presently armed?

MR. LEVINE: Well, it finds -- it means that he was not presently -- there was no evidence that he was presently armed or that he --

QUESTION: So you would have -- you would then require, in order to break the window of a garage door, that the police have reason to believe that the person was armed, I suppose carrying a gun, at the very moment they were going to break in?

MR. LEVINE: Or, unless there was evidence that he had ready access to a gun and there was no evidence of that. The only evidence in this case was that -- was a supposition, Your Honor.

QUESTION: Well, but they quote --

MR. LEVINE: The record is clear.

QUESTION: They quote on this. I mean, in the dissent, Judge Kozinski's quoting from somewhere. I thought it was the record. Shelby was a major

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methamphetamine manufacturer and has had access to large caches of weapons.

MR. LEVINE: In the past, it's true. In the past. But there was no evidence that he possessed a gun while in the Ramirez residence. If you make an exception for dangerous people you're creating the very blanket rule that you condemned in Richards. It's not --

QUESTION: I haven't heard you make one argument that wouldn't apply equally to the application for the no-knock warrant in and of itself.

MR. LEVINE: Well, the no-knock --

QUESTION: It seems to me what you're saying to me is that the officers should have knocked and announced.

MR. LEVINE: No, I -- no. I'm not getting into tactics. I --

QUESTION: All right. So --

MR. LEVINE: What I'm saying is the officer -- frankly, Your Honor, the officer --

QUESTION: -- we have to take this case on the premise that a knock and announce was not required. That's because there were some exigent circumstances, some indications of danger.

Now, you want us to parse this and say, well, there are two levels. You want us --

MR. LEVINE: No. No, I don't want you --

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QUESTION: You don't agree that --

MR. LEVINE: No. No. I don't want you to parse this and say there are two levels. I --

QUESTION: Would you agree with this statement in Becker: to justify what the Ninth Circuit case --

MR. LEVINE: Yes.

QUESTION: -- that preceded McConney. To justify physical destruction of property, more specific inferences of exigency are necessary.

MR. LEVINE: That's what they say, and that's their way of helping them in the balancing test. That's informing their balancing test.

I point, Your Honor, to petitioner's appendix 11a, where the Ninth Circuit also says, we have touched upon all of these cases because our review is necessarily fact-bound. Our cases do not describe a simple straight line. Police must have some leeway in balancing the demands of the knock and announce requirement against other safety considerations. Nevertheless, the courts must ultimately determine whether the police struck that balance properly.

I read that language as saying they're doing a balancing, and this word, this mild exigency showing more is simply saying, if there's a greater intrusion, give us more evidence justifying the intrusion. That's all

they're doing.

And if you read McConney, the en banc decision of the Court in 1973, you see that they begin immediately saying that the test is a reasonable belief in danger, but as a specific application of that test we look to whether -- one factor, an important factor is what they're saying, ultimately. An important factor is property damage, and it generally is an important factor.

QUESTION: Well, but doesn't the court of appeals say that they want more specific evidence of danger if there's going to be property damage?

MR. LEVINE: Yes. Yes, and generally speaking that's true. Generally speaking, if you're going to break in a door we want to have a higher justifi --

QUESTION: Or break in a garage window.

MR. LEVINE: A -- Your Honor, we are most vulnerable -- yes, is the answer to your question. We are most vulnerable when we are asleep with our families. When we hear the shattering of glass at 6:15 in the morning, we are terrified, we -- and the record is clear here that these folks, just like many of us -- maybe not all of us -- would think we were being burglarized. We -- we were being invaded. We defend our children with our lives, if necessary. The officers should have thought about that.

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QUESTION: Okay, but also in the agreed stipulation of facts, to which your client apparently agreed, it said that other information from the Government's informant indicated that the defendant, Ramirez, was possibly involved in drugs which he kept in the garage. The informant also indicated there were supposed to be several guns in the garage, and what we had here was breaking of a windowpane in the garage so that this -- officers could surveil -- conduct surveillance of that space as they entered.

MR. LEVINE: I understand.

QUESTION: Now, how is that -- how does that fail the reasonability test required by --

MR. LEVINE: Well -- well, first of all --

QUESTION: -- this Court's cases?

MR. LEVINE: Let's look at the factual predicate. I agree, we have stipulated, and we stand by the stipulation. That is the record. The informant said there were supposed to be guns in the garage. The informant, this reliable informant is giving the best case, presumably.

Now, he's not saying I saw Shelby with a gun. He's not saying, I overheard Shelby to say he was going to shoot police when he comes in, and remember, the origin of the officer safety exception comes from Reed v. Case,

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where you have a situation precisely like that, where the person is saying, I'm going to shoot anybody who comes in the house. That's the officer safety exception.

The informant said this man was possibly involved in drugs. Now, what is -- here's a confidential, reliable informant is saying, he's possibly involved in drugs. That doesn't sound like --

QUESTION: Why isn't that -- isn't -- obviously at the bottom you say, if only they'd announced this, there was less of a chance of somebody getting hurt.

MR. LEVINE: Why did they have --

QUESTION: They think if the way to stop people from getting hurt was to see if somebody ran for a gun the second that we go into the building, so we want to go and see if somebody's running for a gun. So we have a difference of opinion about the best way to stop somebody from getting hurt.

MR. LEVINE: Well, Your Honor --

QUESTION: Now, as long as theirs is a reasonable way of going about it here, that they think theirs is the best way to stop somebody from getting hurt, and they -- you know, on the basis of --

MR. LEVINE: Yes.

QUESTION: -- reasonable facts and so forth --

MR. LEVINE: Yes.

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QUESTION: -- then legally don't we have to go along with it?

MR. LEVINE: No, Your Honor. You don't defer to the police. We -- the Fourth Amendment says --

QUESTION: I'm not saying defer. I thought the ground was whether they had a reasonable suspicion.

MR. LEVINE: Well, I'm saying that that -- that isn't the test as posited by the Government, but assuming the test is under the totality of circumstances -- I'm sorry, Your Honor, I lost the train of your question.

QUESTION: I was thinking that you keep saying that the best way to get -- keep people safe was to announce, but they're just denying that. They think the best way was to break the window to look and see if somebody went for a gun.

MR. LEVINE: Well, Your Honor --

QUESTION: Now, my problem is, I -- given the standard --

MR. LEVINE: -- with due respect --

QUESTION: Yes.

MR. LEVINE: With due respect, Your Honor, a thousand years of common law -- a thousand years of common law -- the experience of this country with the no-knock statute of 1970, which was repealed in 1974, and that congressional record is well worth reading, and I've tried

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to put part of it before this Court of the experience that came about from that court, the contemporary accounts of tragedies, I suggest says no.

The police don't always -- the norm is knock and announce. If we allow this kind of level reasonable suspicion to justify the breaking into the house, we are making the exception the rule. We are fundamentally changing the political relationship between the State and the people.

These are innocent people we are talking about. I'm not just advocating -- I'm a lawyer for Mr. Ramirez, but I'm advocating for myself and my family and for all of our families. We just can't let the police say, there's a danger here, we've got to go in and break a garage window at 6:15 in the morning, without giving some thought, at least thinking now, wait a minute. Wait a minute.

QUESTION: Well, Mr. Levine, you're saying, then, it's not reasonable for the police to break a garage window, a pane of glass, after they've been informed that there may be guns in the garage and that Shelby is armed and -- could be armed and dangerous?

MR. LEVINE: Your Honor, what's reasonable -- it wasn't reasonable under these circumstances, based on the information they had. Far more reasonable, frankly, would have been to do nothing, to simply -- I'm not -- I realize

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that police make tactics on the field, but they could telephone in, they could say the -- Remsburg, cited by amicus --

QUESTION: Well, but --

MR. LEVINE: -- says the last thing you do when there's someone in the house with guns --

QUESTION: Mr. -- just a minute.

MR. LEVINE: I'm sorry, Your Honor.

QUESTION: Calm down.

MR. LEVINE: Pardon me. I'm sorry.

QUESTION: You're not suggesting that the police have to do what is most reasonable, are you? The test is whether what they did was "reasonable."

MR. LEVINE: Yes, I agree with, Your Honor, but it seems to me that in determining whether what they did was reasonable, it's not -- doesn't seem illogical to look at some of the alternatives. I'm not saying they -- now, if we look at some of the alternatives, it -- they seem to thrust out at you that this would be more likely.

I mean, Justice Breyer, your argument before almost suggested in order to save the children we have to go in. This sounds -- historically there's a lot of instances we have to kill --

QUESTION: I mean, I'm saying I have no idea, frankly. I wasn't there. I don't know, based on what

I've read. I have no more reason to think that the police were careless in hurting people than they were helpful in trying to hurt people, trying to prevent them from helping -- you see, look, the difficult judgment: there are guns in the place, and this person has assaulted people previously and has had guns previously. I can understand --

MR. LEVINE: There are supposed to be guns --

QUESTION: I can understand why a policeman, knowing that, might think he ought to see if somebody's going to run for a gun, and if I can understand that based on this record, then it seems to me the standard makes the answer favorable to the Government, so that's what I was asking you to respond to.

MR. LEVINE: Well, there are supposed to be guns in the garage. They're not -- guns are not in the garage. This would be a different case and a different balance might well have been struck, but there are supposed to be guns in the garage, and the district court made a finding of fact based on a stipulation, and the finding was that there was no evidence that Mr. Shelby was armed while in the residence or that he presented a danger to the 45 officers.

If I may, I'd like to turn to the statutory argument.

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Your Honors, 18 United -- oh, this case, of course, is a Federal case, so we are also controlled by the Federal no-knock statute, 18 United States Code section 3109, and if the Court should decide -- actually, the Court doesn't even have to reach the constitutional question if it decides my way on the statute.

Now, under the plain meaning of the statute, as was pointed out earlier, no-knock -- knock and announce was required. If you compare the, as a matter of fact, the statute with the New York statute that it was based on, which can be found in, Your Honors, at page 44 of my brief -- page 44 of my brief, if you look at the statute that was enacted as part of the field code, you can see that the Federal statute tracks verbatim the New York statute, except for the last sentence.

Now, the last sentence, we see Congress is changing the New York statute. It adds on the statement that officers can also -- another exception is to go in and rescue, or liberate, as they say, a person who's trapped in the house, so we have Congress, Congress making a specific decision to enact specific exceptions.

They enacted this one particular exception to liberate, which comes from a common law case, I believe in 1619, the Wilshire case, which Justice Thomas cited in his opinion for the Court in Wilson. That's where a bailiff

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was trapped in the house and the other bailiffs had to go in and rescue him.

But we see, then, that this lends support to the argument that Congress knows exactly what it's doing. This is officer safety. This is the consideration that Congress is taking into account. Congress is making the political judgment. As Justice Breyer pointed out, these are difficult judgments. Congress, the representatives of the people, are making a judgment here.

The judgment is this: in general, officer safety, or apprehension, officer safety is best assured and the safety of the people is best assured when they comply with the rule of Semayne's Case.

QUESTION: The Government says that to read the statute as literally as you suggest would be inconsistent with our Miller opinion in '58. What's your response to that?

MR. LEVINE: I don't see that. It's true that the Court, this Court has interpreted the statute to broaden its coverage. It's true that the Court has done that. Other court -- this Court has done that in the past to broaden the coverage to further what this Court saw as the fundamental values behind the statute, so the Court did say that it also covers arrest warrants even though the terms only say search warrants. The Court did

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say that it covers the case of just walking into the front door instead of breaking in the front door in Sabbath.

But that was always a -- let me say that the Court didn't have the benefit, maybe, of this Court's understanding of plain meaning of language. That's number 1, and --

QUESTION: Well, it's the same Court.

MR. LEVINE: It is the same Court. Let me say that the law has evolved. The law has evolved such that we look at the specific words in the statute. We --

QUESTION: The statute says nothing about excluding evidence that was obtained in violation of it.

MR. LEVINE: Well, that's true, Your Honor, and of course, though, in Sabbath the Court held -- as pointed out earlier, the Court held that exclusion is the remedy, and the Government has never claimed, has never argued in any of its briefs before this Court, never raised it, that exclusion is not the remedy. They've never made an argument -- it seems to me they've waived any argument.

But Sabbath holds that exclusion is the remedy, so it seems to me that that's what the remedy is.

QUESTION: I think Mr. Frederick said something about inevitable discovery.

MR. LEVINE: Well --

QUESTION: That they were authorized to go in

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without knocking and announcing. If they had simply done that and not broken the window as well, they would have found the same things.

MR. LEVINE: Well, they haven't raised inevitable discovery in their brief, and I think inevitable discovery is going to do away with the knock and announce rule altogether, because you can always say, what's the point of having a knock and announce? You can always get it at some point anyway. There's no rule. If you invoke inevitable discovery, it's gone.

The common law at the time of the framing of the Constitution, which this Court often looks to for guidance, does not contain, as far as I can determine, an exception for officer safety, that is, in the sense of apprehension of danger.

QUESTION: So if that's so, if this statute, although it's phrased not to forbid anything --

MR. LEVINE: I'm sorry, Your Honor.

QUESTION: If we read the statute as forbidding something, namely that which it doesn't permit, which is what you're doing, 3109 -- you're reading it as forbidding that which it doesn't permit.

MR. LEVINE: Yes. Yes.

QUESTION: Does that mean that then a police officer who knows that if he announces himself there'll be

a hail of bullets, he knows that, that he would still have to announce himself?

MR. LEVINE: No. He wouldn't announce himself.

QUESTION: Well, why wouldn't -- the statute doesn't give an exception, does it, for officer safety?

MR. LEVINE: Because the statute says in general the safety of the officer is best assured --

QUESTION: So then in your view if the policeman knows that if he announces himself he will be killed instantly, in your --

MR. LEVINE: No.

QUESTION: All right. Of course, it would be absurd.

MR. LEVINE: No, of course he wouldn't --

QUESTION: Yes, so -- but then, that's why I'm confused about how the statute's actually supposed to work.

QUESTION: You've just abandoned your statutory argument, in other words. You have to take the -- well, the bitter with the sweet.

MR. LEVINE: Well --

QUESTION: If you want us to read the statute literally, that is what it says.

MR. LEVINE: Well, if that's the outcome, if that's the outcome then Congress had better do some work.

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That's my suggestion, and I have no doubt that Congress will do some work, but -- that's all I can say, Your Honors.

QUESTION: Thank you, Mr. Levine.

Mr. Frederick.

REBUTTAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE PETITIONER

QUESTION: Mr. Frederick, may I ask you this question: you know, I can understand the Government's feeling that on the facts this case shouldn't have come out this way, and that was also what the dissenting opinion of Judge Kozinski said, but he didn't say that you cannot take into account -- he didn't criticize the general rule of the Ninth Circuit that you can't take into account the manner of entry, including the breaking of property, in deciding whether it's an unreasonable search and seizure.

I don't understand what new rule to replace the California formulation of the test you want us to adopt. I -- I'm -- which makes it hard to write an opinion.

MR. FREDERICK: We would like this Court to say that reasonable suspicion justifies a reasonable entry into the dwelling even if that involves some property damage, and if --

QUESTION: Well, that's fine, but that -- does

mere reasonable suspicion and not a higher degree of suspicion become necessary if you're going to do substantial property damage?

I mean, let's say the only way to get in without knocking and announcing is to blow up one side of the house. Now, I can understand that -- you do it, if it's a serial murderer in there and you've been looking for him for 10 years, there's no other way to get him, and you're very sure he's there.

But do you mean if it's just ordi -- the same reasonable suspicion that would justify breaking the window would justify taking out the whole side of the house?

MR. FREDERICK: Yes.

QUESTION: Wow.

MR. FREDERICK: And let me explain why. If the wall is barricaded and a person has put fortifications up so that a reasonable means of entry entails taking the wall out, that would be judged separately from the justifications that the officers have for fearing their safety.

That's -- the Court has long held that the manner of the search can be treated distinct from the justifications that the officers have for getting probable cause for a warrant, for example.

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QUESTION: Well, sure, what manner you use depends on those other factors, how sure you are the guy is there.

MR. FREDERICK: Well, those would be the circumstances as to how the officers tactically needed to make the decision to get into the dwelling, but there should not be a sliding scale or a higher tier if the officers face fortifications but the person is of the same dangerousness as Alan Shelby was in this case.

QUESTION: They're not as sure that he's there.

MR. FREDERICK: They have probable cause --

QUESTION: You know, maybe he's staying at Scalia's house. I don't mind they're taking away one of my walls if they think they're going after, you know, Jack the Ripper, but if they're really not sure he's there, I would like that wall of my house to still be there.

MR. FREDERICK: Justice Scalia, two points. Number 1, two Federal agents had identified Shelby at the respondent's home, and they have confidence in the reliable informant, and second --

QUESTION: I'm not quarreling with you -- I'm not quarreling with you on the facts here.

MR. FREDERICK: It's --

QUESTION: I agree with Judge Kozinski. But to set forth a rule that you don't, you know, property

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damage --

QUESTION: There is no -- you wouldn't do that.

QUESTION: -- does not take --

MR. FREDERICK: My --

QUESTION: -- does not affect the degree -- you want us to say the property damage does not affect the degree of probable cause that you need?

MR. FREDERICK: Yes. The remedy, Justice Scalia, is to put your wall back up, or to repair your wall, not to require --

QUESTION: Why do you say that? Why --

MR. FREDERICK: -- not to require officers to have proof to a near certainty, or proof beyond a reasonable doubt that you or someone in your home poses a danger to officers if they knock and announce their presence.

QUESTION: Well, if property damage does not have to affect probable cause, does it affect the exigent circumstances that are necessary for the extraordinary means of entry?

MR. FREDERICK: We would suggest that the use of the term, exigent circumstances, creates and has created problems, and so we would suggest a different analytical formulation.

QUESTION: Well, the special circumstances one.

MR. FREDERICK: What we would suggest is that the means of entry be analyzed separately so that if the officers have information that they are facing barricades or that one particular part of the dwelling is fortified but another part is not, that that would be the reasonable circumstance that should be --

QUESTION: I'm not sure how that's so different from what the Ninth Circuit said.

MR. FREDERICK: What the Ninth Circuit held was that the officers needed to have higher evidence of the danger to themselves. A person can live behind a fortified dwelling and not pose any threat to anybody.

QUESTION: You're saying the same degree of certainty that this criminal is in there, only the same degree -- 20 percent chance he's in there -- you need that to break a little window, and you also need that, and no more than that, to take out a wall.

MR. FREDERICK: Yes, Justice Scalia. If the officers have reason to believe that if they knock and announce they are going to face danger, the fact that the persons inside who posed that danger to them, have put fortifications up that require more property damage, should not entitle them to higher Fourth Amendment protection.

The officers, if they have a reasonable

suspicion, should be able to take the means reasonably necessary to make the entry even if that damages a lot of property if the property is -- if that means is reasonably calibrated to the need to get inside.

QUESTION: If you get me to adopt that rule I may well up my interpretation of what a reasonable suspicion consists of. If I know that the consequence of a reasonable suspicion is I'm going to lose the side of my house, I might well require your agents to be a lot more sure than I otherwise would.

MR. FREDERICK: And Justice Scalia, we're wrestling with that question right now in the lower Federal courts as to whether a reasonable suspicion to forego knocking and announcing -- you know, what exactly that consists of.

It certainly is different than a Terry pat-down frisk.

QUESTION: Well, it ought to be -- it ought to be fairly substantial, should it not, in light of the long tradition of knock and announce? I mean, I don't --

MR. FREDERICK: Yes.

QUESTION: I don't see how that can be some casual standard there.

MR. FREDERICK: It is not, Justice O'Connor, and that is why our office has struggled with --

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QUESTION: We all have in mind what happened at Waco. I think we do have some concerns here.

MR. FREDERICK: No, and we share those concerns, Justice O'Connor. It's just that the standard should not be a fluid one.

It should be one reasonable suspicion standard, however that comes to be defined by the courts as they struggle with those instances when the officers need to invoke the exception to the general rule of knock and announcement, and that will evolve as courts wrestle with this.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Frederick. The case is submitted.

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

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UNITED STATES, Petitioner v. HERNAN RAMIREZ
CASE NO: 96-1469

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BY Ann Marie Federico

(REPORTER)