

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF WEST COVINA, Petitioner v. LAWRENCE
PERKINS, ET AL.

CASE NO: 97-1230 *c.*

PLACE: Washington, D.C.

DATE: Tuesday, November 3, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY OF WEST COVINA, :

4 Petitioner :

5 v. : No. 97-1230

6 LAWRENCE PERKINS, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, November 3, 1998

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:07 a.m.

13 APPEARANCES:

14 DAVID D. LAWRENCE, ESQ., Pasadena, California; on behalf
15 of the Petitioner.

16 JEFFREY S. SUTTON, ESQ., Columbus, Ohio; for Ohio, et al.,
17 as amici curiae, supporting the Petitioner.

18 PATRICK S. SMITH, ESQ., Los Angeles, California; on behalf
19 of the Respondents.

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 97-1230, the City of West Covina
5 v. Lawrence Perkins.

6 Mr. Lawrence.

7 ORAL ARGUMENT OF DAVID D. LAWRENCE

8 ON BEHALF OF THE PETITIONER

9 MR. LAWRENCE: Mr. Chief Justice, and may it
10 please the Court:

11 This case involves the valid service of a search
12 warrant and murder investigation in which the West Covina
13 Police Department lawfully seized 17 items of property
14 which they believed were evidence in that investigation.

15 The residents of the home, the respondents in
16 this case, were not at home when the home was searched.
17 The officers left a notification of the search which
18 provided a great deal of information. It stated that the
19 home had been searched. It set forth the date of the
20 search. It provided that the search warrant was issued
21 pursuant to the authority of the Citrus Municipal Court.
22 It identified the judge, Judge Oki, who had signed the
23 search warrant. It identified two West Covina police
24 officers and their telephone numbers who could be
25 contacted if the owners of the property had inquiries, and

1 it set forth a specific list of the 17 items of property
2 which had been seized.

3 Under California law, these police officers did
4 not have the discretion to release that property once it
5 had been seized. Penal Code section 1536 required that
6 they maintain custody of that property subject to an order
7 of the court.

8 Shortly after seizure of this property, one of
9 the respondents, Mr. Perkins, contacted the West Covina
10 Police Department and advised that he was interested in
11 obtaining return of some of that property. The record is
12 undisputed that when he made that call and when he
13 contacted those officers, that he was advised that he
14 would need to get a court order to get that property back.
15 The record is also undisputed that he was advised that he
16 would have to contact Judge Oki in order to do so.

17 The record is also undisputed that at most the
18 respondent, Mr. Perkins, went to the Citrus Municipal
19 Court on one occasion, approximately 1 month after the
20 seizure of the property. The record shows that he asked
21 for Judge Oki. He was advised that Judge Oki was on
22 vacation and might be back in a week, and he said that he
23 attempted to find another judge who could release his
24 property. He was told that there was no file in his name
25 and that another judge could not do that.

1 The record is also undisputed that he took no
2 further actions to obtain return of that property.

3 QUESTION: Because he didn't have the warrant
4 number. And I was wondering why, since you -- as you
5 stated, you provided notice that there had been the
6 seizure, why it wouldn't be a good idea simply to have the
7 warrant number on the notice that's left and then we would
8 have avoided this great Federal case.

9 MR. LAWRENCE: Justice Ginsburg, I don't believe
10 the record is clear that the warrant number or the absence
11 of it really prevented the respondents from obtaining the
12 return of the property.

13 QUESTION: But whether that's so or not, it
14 would make it easier if you had the warrant number to look
15 up.

16 MR. LAWRENCE: It might. It might, but the
17 record is really bare as to what those procedures were at
18 the municipal court in terms of locating a file or
19 something of that nature.

20 And in fact, as we submitted, one of the
21 postdeprivation remedies the Ninth Circuit found to be
22 adequate in this case is the procedure of mandamus.
23 Certainly a search warrant is not necessary for that.
24 Mandamus is a proceeding that compels a public officer
25 like a judge to do their duty. Penal Code section 1540

1 imposes upon judges who issue search warrants the
2 obligation of returning property to those people if it has
3 been taken without probable cause or is not the property
4 identified in the warrant. A mandamus proceeding provided
5 all the process that was due to the respondents in this
6 case because they knew the name of the judge. They knew
7 the courthouse. They knew the property that -- that --

8 QUESTION: Well, Mr. Lawrence, I -- that's all
9 well and good and it may not violate the Constitution to
10 do what the city did, but like Justice Ginsburg, I wonder
11 why the city doesn't want to help its citizens by giving
12 them the information that would be useful, like a correct
13 warrant number. I mean, that's very easy to do, and the
14 city's position seems very peculiar. Oh, go bring a
15 mandamus action. Well, that takes legal help and all
16 kinds of stuff. Now, why doesn't the city want to just
17 supply some simple information?

18 MR. LAWRENCE: Your Honor, the record does not
19 show that it is a policy of the city not to provide a
20 search warrant number. The record in this case is
21 unclear. Detective Ferrari in one part of the record said
22 that he believed he did not give the warrant number. In
23 another part of the record, he said that he did. In fact,
24 Mr. Perkins in his deposition testified that he was given
25 a number, but he felt that it was the wrong number. The

1 record is really unclear as to what number was given to
2 Mr. Perkins and whether he received it or not.

3 QUESTION: But if you have the number, as I
4 understand it, it's the Federal practice they leave you a
5 copy of the warrant so you have it, just a copy of the
6 warrant, right there.

7 MR. LAWRENCE: That's correct. The --

8 QUESTION: All it takes is a piece of carbon
9 paper and it seems so simple and would avoid snafus like
10 this.

11 MR. LAWRENCE: But, Your Honor, the record also
12 shows that the warrant number was not the only way to
13 access that information at the courthouse. The record
14 shows that the information was listed not only by the
15 warrant number, but by the address where the search took
16 place and by the date of the return. And the respondents
17 had both of those pieces of information. So, maybe the
18 warrant number would have assisted the respondents in
19 getting their property back, but the record also shows
20 that even after they were provided with that information
21 as early as January of 1994, they did nothing to get their
22 property back.

23 QUESTION: Do you think that the Ninth Circuit
24 in this case erred in a principle of law that it stated or
25 was its error simply an improper application of a correct

1 principle of law?

2 MR. LAWRENCE: I believe it was an error of law.

3 QUESTION: And what was that error of law?

4 MR. LAWRENCE: The error of law is that notice
5 is required in the postdeprivation Parratt-Hudson context.
6 There is no authority for that proposition. The Ninth
7 Circuit --

8 QUESTION: Well, is notice required that there
9 has been a seizure?

10 MR. LAWRENCE: Pardon me?

11 QUESTION: Does the State have to give notice
12 that a seizure has occurred?

13 MR. LAWRENCE: That's one of the issues in our
14 brief. I believe that the Fourth Amendment, in order for
15 the search to be reasonable, that there has to be notice
16 of a search. And I think --

17 QUESTION: Well, I guess we could turn this into
18 a Fourth Amendment case. It would seem to me that if the
19 State has taken your property for any reason, in
20 circumstances where you might not otherwise know -- know
21 who did it, that the State, as a -- as a minimum
22 requirement, ought to say that we took your property. We
23 seized your bank account. We entered your house. We
24 bulldozed your tree over.

25 MR. LAWRENCE: I agree that there are -- there

1 are cases where a person might be unaware that a property
2 right has been affected and that some sort of notice in
3 that context might be appropriate. I submit that that is
4 not the kind of notice that this Court has spoken of.

5 QUESTION: But even -- you know, even where you
6 realize your property has been taken, if you come home and
7 find your house has been ransacked, you still want to know
8 who did it.

9 MR. LAWRENCE: Absolutely. I agree with that.
10 And that --

11 QUESTION: Well, what if the city -- if it -- if
12 we were in a predeprivation situation and the city wanted
13 to take property of the -- the person, the citizen, now
14 you agree that due process would require giving some
15 notice to the person of the State's or the city's
16 intention to take their property.

17 MR. LAWRENCE: Generally I would agree. It
18 would depend on the circumstances. Due process is a
19 flexible concept. But if it's not practicable, yes. Then
20 the State does need to give notice and an opportunity to
21 be heard before --

22 QUESTION: Well, at a minimum, the State --

23 QUESTION: Now -- and -- and -- if that's the
24 case, then what changes in the postdeprivation context?

25 MR. LAWRENCE: In the postdeprivation context,

1 the Mathews v. Eldridge balancing test has already taken
2 place. In the search warrant context, the predeprivation
3 process is not practicable. For one --

4 QUESTION: But maybe some notice is still
5 required that the property was taken and who took it and
6 when.

7 MR. LAWRENCE: And there was that notice
8 provided in this case.

9 QUESTION: So, then the principle is there must
10 be some notice which gives the citizen the basis for
11 proceeding to claim the property that's been taken.

12 MR. LAWRENCE: I think --

13 QUESTION: Would you agree with that?

14 MR. LAWRENCE: I think in a case like our case
15 where they weren't home, that it would be unreasonable to
16 go into the home to search, to take items of property, and
17 to leave --

18 QUESTION: Well, whether or not a search, it
19 would be unreasonable to take it under any context, and
20 then we're back in the Fourteenth Amendment not to search.
21 You want to make this a search case. Your certiorari
22 petition talks about due process, and that's what the --
23 the Ninth Circuit talked about. And I -- I think there's
24 a substantial likelihood we're going to write the opinion
25 -- or at least I would make my judgement -- based on the

1 Due Process Clause.

2 MR. LAWRENCE: I understand.

3 QUESTION: And I want to know what the minimum
4 principle is. The minimum principle is, it seems to me,
5 you have to give notice sufficient to the citizen so that
6 the citizen can ask for the return of the property. And
7 if that's so, then the only error the Ninth Circuit made
8 was, in your view, an over-application or an improper
9 application of the principle.

10 MR. LAWRENCE: If this Court views that sort of
11 notice, that factual notice, that a search has taken place
12 and that the property has been seized as due process
13 notice, then I agree, and I submit that the notice that
14 was provided in this case is certainly adequate.

15 QUESTION: All right. Why do you draw the line
16 there? You've conceded that it is reasonable for due
17 process purposes to require at least an identification of
18 the person who took the property so that the property
19 owner doesn't have to start, in effect, searching the
20 world for -- for the -- for the perpetrator.

21 Why isn't it equally sensible to narrow down
22 things one step more and say the way to get it back is to
23 apply to the judge for property seized under warrant
24 number X? That prevents the citizen from having to do
25 what this one does and that was perhaps not very

1 efficiently, but basically sort of go from pillar to post
2 and saying go to the judge. You go to the judge.
3 Somebody says, well, the judge isn't there and you can't
4 get it back this way. Nobody ever seems, until sort of
5 the final act here, to tell him just how to -- how to do
6 it.

7 Why not then -- going back to my question, why
8 not then say fairness requires for due process purposes
9 not only an identification of the perpetrator, but at
10 least this simple bit of information which would make it
11 clerically easy to do what you have a right to do?

12 MR. LAWRENCE: Because, Justice Souter, that --
13 that analysis looks at the facts of the case in a post
14 hoc basis. In this case we know -- or at least we assumed
15 that the owner of the property was Mr. Perkins, but when
16 the search occurs, like in this case, the officers don't
17 know who owns that property. They don't know --

18 QUESTION: What difference does -- does that
19 make? They can't -- they can't give notice to someone who
20 is unidentified to them, but they can give notice, as you
21 have conceded it is -- it is fundamentally reasonable for
22 them to do, to the person from whose premises the property
23 is taken. If therefore that is a sensible due process
24 result, why not take it a baby step further and say, if
25 you want to get it back, use this number and ask X?

1 MR. LAWRENCE: Well, if -- if you're talking
2 about simply providing a telephone number to call
3 somebody --

4 QUESTION: I was talking about the warrant
5 number which Justice Ginsburg and Justice O'Connor spoke
6 of.

7 MR. LAWRENCE: The reason is that there are a
8 variety of methods for getting that property back, and
9 whether one can get it back in the method that one follows
10 depends on --

11 QUESTION: Yes, but it's up to you, it seems to
12 me. It's up to the government to decide what the method
13 for getting the property back is. Once you've decided
14 what that method is, go to the judge, go to the police
15 department, go somewhere else -- that's your -- that's
16 your choice, but once you've decided it, why don't you
17 give the -- why isn't it reasonable to expect you to give
18 the information that will allow the person to take an
19 efficient first step as opposed to running the risk of
20 getting this kind of runaround?

21 MR. LAWRENCE: For example, if there is a
22 prosecution, there is a Penal Code section 1538.5, and if
23 the Court looked at that, it is a tremendously lengthy
24 statute and whether one can get the property back --

25 QUESTION: Mr. Lawrence, may I ask if you agree

1 with the proposition that appears in the brief filed by 30
2 States? And it says, upon seizing respondent's property
3 in the course of a criminal investigation, due process
4 required the city to provide notice reasonably calculated
5 to inform the residents where the property was and how to
6 get it back. Would you say -- would you agree that that
7 is the proposition of law and the question in this case is
8 how to apply it, or do you disagree?

9 MR. LAWRENCE: I disagree. On the portion of
10 how to get it back, that is legal advice that this Court
11 has never required. This Court --

12 QUESTION: Well, it depends on what you mean by
13 notice, doesn't it? I mean, you've -- if the way to get
14 it back is mandamus and you have statutes which give
15 notice to the entire public at large, you're given notice
16 of how to get it back, haven't you?

17 MR. LAWRENCE: The public statute provides for
18 notice, yes.

19 QUESTION: The public statute provides the
20 notice.

21 Does the State have any obligation to provide a
22 means of getting it back short of suing the State for it?

23 MR. LAWRENCE: I don't believe it does.

24 QUESTION: So -- so, what we're arguing about is
25 whether the State has to leave a note that says, sue me -

1 -

2 MR. LAWRENCE: Exactly.

3 QUESTION: -- instead of having public statutes
4 that provide for mandamus actions.

5 MR. LAWRENCE: A suit that says, sue me and
6 here's how to do it.

7 QUESTION: Well, I take it that would be fairly
8 difficult because there were several -- there was not just
9 one remedy under California law, but there were several
10 different avenues that could have been preferred. So, it
11 wasn't just a question of you could pick out one sentence
12 and say -- if you -- you're certainly not going to decide
13 to choose yourself among the remedies that the State has
14 provided.

15 MR. LAWRENCE: That's correct, Your Honor.
16 There were a variety of remedies that these respondents
17 could have used, and there were a variety of other
18 remedies that persons in situations slightly different
19 than those in which the respondents were in --

20 QUESTION: Mr. Lawrence, can I ask? Because I
21 think when one responds to a lot of different questions
22 from the Court, you sometimes take positions that are not
23 entirely consistent with one another.

24 At one time I thought you had conceded to the
25 Chief Justice the Constitution did require some notice,

1 but that this notice was adequate, and other times you
2 seem to be saying the Constitution does not require any
3 notice. Which is your position?

4 MR. LAWRENCE: What I'm saying is that the
5 Fourteenth Amendment Due Process Clause does not provide a
6 requirement of notice in this postdeprivation context.

7 QUESTION: So, your position is no notice is
8 required by the Constitution.

9 MR. LAWRENCE: Not -- not by the Fourteenth
10 Amendment --

11 QUESTION: Well, by -- excuse me. Could I just
12 finish? Or by the Fourth Amendment? Is there any
13 constitutional requirement of any notice in your view?

14 MR. LAWRENCE: I believe the Fourth Amendment,
15 in the context of a surreptitious search, requires that
16 some sort of notice be provided, and that would -- that
17 makes the -- the seizure and the search reasonable.

18 QUESTION: Can we be more precise? Are we
19 talking about notice of the taking of the property or
20 notice of how to get the property back?

21 MR. LAWRENCE: Notice --

22 QUESTION: Are we talking about both?

23 MR. LAWRENCE: Notice that the search has been
24 taken and what has been taken.

25 QUESTION: That was my question to you. Notice

1 as to who had taken property in the home of an absent
2 property owner.

3 MR. LAWRENCE: Right, and I think -- I think it
4 -- it is reasonable under the Fourth Amendment for the
5 police to at least advise the absent homeowner that they
6 have been there, searched --

7 QUESTION: Reasonable or required? Reasonable
8 or required?

9 MR. LAWRENCE: I believe it's required --

10 QUESTION: Because I think you -- you answered
11 me before that it would be reasonable to provide the
12 warrant notice, but not --

13 MR. LAWRENCE: There are situations in which it
14 would not be required because there are things such as
15 sneak and peak warrants. So, I cannot say in all cases
16 that the Fourth Amendment requires that notice.

17 QUESTION: Well, give the devil its due here.
18 You -- you concede that it would be unreasonable not to
19 let somebody know that the State has taken his property,
20 and therefore it would be an unreasonable search and
21 seizure and would violate the First Amendment.

22 MR. LAWRENCE: The Fourth Amendment, yes, Your
23 Honor.

24 QUESTION: Fourth Amendment.

25 MR. LAWRENCE: Correct.

1 QUESTION: If you did not let them know.

2 MR. LAWRENCE: Yes.

3 QUESTION: And the reason for drawing the line
4 between that Fourth Amendment position and the due process
5 position that you take I assume is this, but correct me if
6 I'm wrong. It's reasonable under the Fourth Amendment --
7 it is a requirement of reasonableness under the Fourth
8 Amendment to identify the perpetrator, otherwise the --
9 the individual has no idea where to look, whereas it is
10 not a requirement of reasonability to reveal the process
11 necessary to get it back because anyone who has been
12 deprived of property and knows the State deprived him of
13 it can look up the law and find out how to do it. Is that
14 the reason you draw the line?

15 MR. LAWRENCE: Yes, Justice Souter, I agree with
16 that.

17 I'd like to reserve the remainder of my time for
18 rebuttal.

19 QUESTION: Very well, Mr. Lawrence.

20 Mr. Sutton, we'll hear from you.

21 ORAL ARGUMENT OF JEFFREY S. SUTTON

22 AS AMICI CURIAE, SUPPORTING THE PETITIONER

23 MR. SUTTON: Thank you, Mr. Chief Justice, and
24 may it please the Court:

25 I'd -- I'd like to ask -- answer the hardest

1 question first raised by Justice O'Connor and Justice
2 Souter and Justice Ginsburg. Why not just do it? Why not
3 just put the darned search warrant number on the search?
4 It would have solved their problems.

5 Well, first of all, that's not an answer that
6 would solve the problems throughout this country in every
7 city, county, and State. Ohio is a good example. They
8 don't even know the search warrant number at the time they
9 do the search. The reason is they figure out the search
10 warrant when they come back and file the return of
11 service.

12 Secondly, it wouldn't even have made a
13 difference in this case. The problem is --

14 QUESTION: Excuse me. Don't the officers have
15 to have a search warrant in order to make the search?

16 MR. SUTTON: Absolutely, Your Honor, and I hope
17 I didn't misspeak. What I'm saying is that the search
18 warrant number was the missing piece of information here,
19 and I'm saying in many --

20 QUESTION: In order to have the search warrant,
21 wouldn't it be apparent on the face of it what the number
22 is?

23 MR. SUTTON: No, that's what I'm saying. Many
24 States, Ohio being one, don't even have a search warrant
25 number at the time of the search.

1 QUESTION: Yes, but it would be easy to prepare
2 forms that have numbers on them. That can't be the --
3 that can't be a very significant due process fact.

4 QUESTION: Well, the point, Justice Souter --
5 and I want to answer your question, the suggestion, why
6 not just let the city figure out a procedure and then
7 align all of its notice with that procedure so you know
8 every single item in it. And the point I would like to
9 make is that in a criminal investigation, here a murder
10 investigation, it's not that easy. In order to do it
11 correctly, you need several pages of forms to spell out
12 each of the different rights for each of the different
13 types of people searched and the different types of
14 remedies they might have.

15 For example, there's a very -- very big
16 difference as to whether an indictment has been charged.
17 The City of West Covina, the record shows in this case,
18 tried itself to get the property back, filed a 1540
19 motion, went to the wrong court. They went to Judge Oki.
20 Why was that the wrong court? By then an indictment had
21 been filed, a murder charge against Mr. Marsh. They had
22 to refile it again in the California Superior Court which
23 has jurisdiction --

24 QUESTION: Mr. Sutton, you're making this seem
25 so terribly complex, and I was thinking, well, it isn't -

1 - whether constitutionally required, it's standard
2 operating procedure for agencies, say, Federal agencies,
3 to have appeal instructions. So, you lost and they give
4 you a little statement, about five lines, that tells you
5 if you want to appeal this, this is what you do. And that
6 -- that is done routinely without having these horrendous
7 complications. So, I -- I -- you could make it so, but it
8 doesn't have to be that way.

9 MR. SUTTON: Justice Ginsburg, I would submit
10 that the process and the policy that is under attack here
11 would have worked fine, but in this case the problem that
12 West Covina had and the Perkins had was not the policy.
13 The problem was misadvice by employees of the West Covina
14 municipal court and the police department. No policy is
15 going to anticipate every blunder by a city employee in
16 every city and county and State in this country. The
17 policy would have worked fine --

18 QUESTION: What do you think is the -- is the
19 basic applicable rule here, and is it under the Fourth or
20 the Fourteenth Amendment?

21 MR. SUTTON: If I could answer the second
22 question first. I would submit it is under the Fourteenth
23 Amendment due process, and one hypothetical I think proves
24 it.

25 If you look at the facts of Parratt, you've got

1 a prisoner. Fourth Amendment rights don't always apply in
2 the prison setting. Let's assume it doesn't apply. Let's
3 say the prison warden comes into the individual's -- the
4 chambers, takes something for some legitimate reason,
5 doesn't leave any notice as to what has been done. That
6 inmate has no Fourth Amendment right, let's assume for the
7 purposes of this hypothetical, but yet the State would
8 have a burden to let the individual know they'd taken
9 something.

10 And that's why I think it really does have to be
11 procedural due process. It may be both. As Sodall
12 indicates, that they're not always mutually exclusive.

13 QUESTION: All right. So, under the Fourteenth
14 Amendment, what is the base principle?

15 MR. SUTTON: The principle is this, Your Honor.
16 One, you have got to give notice under the Due Process
17 Clause of the fact of injury, and here there was actual
18 notice of the fact of injury. That's exactly what the
19 search warrant notice told them.

20 At that point in time, we've got two relevant
21 traditions that I think inform the answer to this case.

22 The first tradition. Since 1868 --

23 QUESTION: No requirement as to who obtained it?

24 MR. SUTTON: Oh, I'm sorry. I -- I spoke too
25 quickly, Your Honor. You're right.

1 QUESTION: I still would like to know what the
2 basic principle is, like Justice Kennedy.

3 MR. SUTTON: The -- the basic principle is that
4 you've got to tell them the fact of the search, what was
5 taken, and who took it. I would submit West Covina went
6 further here by giving information about courts and all
7 the detectives. I would say at a bare minimum, the rule
8 is you need to let them know there's been a deprivation,
9 who was responsible, and I think the inventory does have
10 to identify each piece of property taken. At that point I
11 would submit there's inquiry notice, which would trust
12 every citizen in this country to figure out for themselves
13 as to what rights or remedies they may have.

14 QUESTION: Well, what if there were some
15 procedural requirement of the city for return of property
16 that is not generally known because it isn't a matter of
17 public law? The city requires some little requirement for
18 somebody to get the property back, but you -- you wouldn't
19 know it by looking at the law.

20 MR. SUTTON: Your Honor, that's --

21 QUESTION: Do they have to include that item?

22 MR. SUTTON: That's Memphis Light, and yes, you
23 would be under that burden. Memphis Light was a great
24 example of that point where the internal dispute
25 resolution procedure provided by the utility was only

1 known by the utility, not the public or not the customers
2 of the utility. That's like the Roman emperor that
3 printed the laws in such fine type and so high on the wall
4 that no one could figure them out. There you would have
5 to give notice.

6 QUESTION: Well, is the warrant number in that
7 category, do you think, here?

8 MR. SUTTON: No, Your Honor, because that's not
9 all you need. You also need to know the property address
10 which surely the residents, the Perkinses, knew. It was
11 their property.

12 I would submit all you needed in this case was a
13 written motion filed at the court.

14 And that goes to another problem with this case
15 fundamentally, and that's not the notice. It's the type
16 of procedure required in order to get the property back.
17 California law required a court order. It makes sense to
18 require a court order. We want to make sure that the
19 property gets back to its rightful owners, and we want to
20 make sure that a legitimate criminal investigation is not
21 interrupted. It makes good sense to give an awful lot of
22 process in that setting, and I think that -- that
23 justifies this.

24 It also seems paradoxical in the 1990's to
25 abandon a long tradition in this country that when people

1 know they have been injured, they've got the good sense to
2 figure out what their rights and remedies are. Rich or
3 poor, meek or brazen, smart or not so smart, we Americans
4 are finding ways to get to the courthouse and certainly
5 doing it in the 1990's in droves.

6 QUESTION: Do you think, Mr. Sutton, that it's
7 just surplusage or worse, pampering, or -- to have these
8 standard notices that tell people what is the next step in
9 a procedure if they lose at one stage? That's what it --
10 that's what your argument sounds like.

11 MR. SUTTON: Well, Your Honor, I'm not here to
12 say that if it takes too much work, the government doesn't
13 to do it. I'll be fired the next day if I ever made that
14 statement in public. That's not the point. I think the
15 question is what the Constitution requires. I -- I think
16 democracy requires some leap of faith here and --

17 QUESTION: I know we have to separate those two
18 things, but it sounded from your argument like you were
19 going way beyond that. You were talking about good
20 citizens should read the statute books and therefore
21 shouldn't be pampered, indulged by telling them what their
22 appeal rights are.

23 MR. SUTTON: Well, West Covina is certainly
24 entitled to do that. I just -- I think what this Court's
25 cases suggest is that it's condescending to require it.

1 There -- there -- we -- I don't think we need to make the
2 assumption that the Perkinses can't figure out what their
3 legal rights and remedies are. They knew they had been
4 injured. It doesn't take intelligence or money to get a
5 remedy. It just takes an interest in self-protection, and
6 if someone doesn't have that, I think the rule of due
7 process I propose is going to be the least of their
8 worries.

9 QUESTION: Of course, it didn't work out in this
10 case.

11 MR. SUTTON: It didn't work out in this case,
12 and Justice Stevens, the reason it didn't work out in this
13 case was the alleged misfeasance and negligence of certain
14 court employees and the bad luck that Judge Oki happened
15 to be on vacation the day they went down to the
16 courthouse. But I would submit each time a judge takes a
17 vacation, each time an employee gives poor advice -- and
18 poor advice was given here -- that doesn't state a due
19 process claim and certainly doesn't state a 1983 claim.

20 That strikes me as the heart of this matter, and
21 I don't think there's any policy for Monell purposes that
22 a city, State, or county could put together that would
23 anticipate each of the problems that led to the Perkinses'
24 plight.

25 And I think the tradition here is relevant. I

1 mean, we've been having searches and seizures since long
2 before 1868. There's no custom nor any statute that I'm
3 aware of from then to the present, at least prior to this
4 decision, in which a city, county, or State has required
5 the police not only to inform them of the fact of the
6 seizure, but them to inform them of their rights, for
7 example, a right under the Fourth Amendment or a right to
8 get the property back.

9 QUESTION: You're not retreating in any way, or
10 are you, from this brief that you signed that -- that says
11 that there are two things required and one is that notice
12 and the other -- a notice reasonably calculated to apprise
13 the residents, one, where the property was and, two, whom
14 to contact about its return? You're not --

15 MR. SUTTON: I'm not because that's what -- that
16 happened here. I mean, if -- it's true --

17 QUESTION: But that is the minimum
18 constitutional requirement.

19 MR. SUTTON: Absolutely, absolutely. And that
20 was --

21 QUESTION: Why -- why do you -- why do you
22 concede that the notice of the person whom to contact is
23 required? I mean, if -- if you give them notice that the
24 State has taken their property on the reasoning that you
25 were espousing a few moments ago, why isn't it enough to

1 say the Perkins as good Americans should be able to figure
2 out how to get it back?

3 MR. SUTTON: Well, I may not have spoke as
4 clearly as I should have, and I think I made the same
5 mistake in responding to a question by Justice O'Connor.
6 But the question is you've got to -- you've got to make
7 sure that the notice is enough to let them know the fact
8 of the property seizure and who did it. If you know who
9 did it, you know how to get -- get it back.

10 Thank you.

11 QUESTION: Thank you, Mr. Sutton.

12 Mr. Smith, we'll hear from you.

13 ORAL ARGUMENT OF PATRICK S. SMITH

14 ON BEHALF OF THE RESPONDENTS

15 MR. SMITH: Mr. Chief Justice, and may it please
16 the Court:

17 With regard to this fundamental question, what
18 is the proper standard by which this Court should judge
19 this case, I think it's important to understand two
20 things. The first is, is that in this case the search
21 warrant number was an absolute essential piece of
22 information that the Perkins family needed in order to get
23 their property back. That is the first requirement that
24 they needed in order to access what is an otherwise State
25 remedy.

1 QUESTION: Well, now, just a minute. You -- you
2 make that assertion. However, the trial court found I
3 believe that there is no evidence either way about whether
4 one must have the warrant number in order to obtain a
5 court order releasing seized property.

6 MR. SMITH: I believe --

7 QUESTION: Now, the court specifically made that
8 finding.

9 MR. SMITH: I don't believe that the court was
10 making a finding there, Your Honor. I believe what the
11 court was doing at that point was indicating that the
12 statutes in question, 1536, 1540, did not indicate that a
13 search warrant number was needed in this case. However,
14 the record is clear that Mr. Perkins went to the
15 courthouse in an attempt to get the property back. He was
16 told that he needed some identifying information in order
17 to get the property back. He went back to the detective
18 to get that information. They gave him maybe
19 misinformation, but he couldn't get that essential
20 information.

21 QUESTION: Well, the trial court said that
22 Perkins was given all the information he needed to submit
23 an informal request to the court for the return of his
24 property, and that having the address of where the
25 property was taken would have done it. Now, that was the

1 finding of the court.

2 MR. SMITH: Your Honor, Justice O'Connor, I
3 respectfully submit to the court that the record does not
4 reveal that, and the record reveals that Mr. Perkins went
5 to the courthouse to get the property, that he couldn't
6 get the property back, that the clerk would not --

7 QUESTION: Are you saying the district court's
8 finding was wrong?

9 MR. SMITH: I don't believe, Your Honor, that
10 that was a finding. I believe that -- I believe that what
11 we have here is a circumstance where the district court
12 has indicated that it doesn't appear that he needed the
13 search warrant number. However, I don't believe that that
14 is a finding that is set in -- in such a way that it is
15 binding on this Court, number one, because I don't believe
16 it's a finding. I think it's a reference.

17 QUESTION: Why shouldn't we accept it whether
18 it's binding on us or not? There's -- certainly a
19 district judge is what we might call a neutral arbitrator
20 rather than either of the parties to the case.

21 MR. SMITH: Because the record, Your Honor, that
22 is before this Court clearly indicates that what we have
23 in this case is -- is a family that went down, was -- was
24 thwarted on two occasions --

25 QUESTION: The family all went -- are you

1 suggesting the family all went together?

2 MR. SMITH: Mr. and Mrs. Perkins went on one
3 occasion, and Mr. Perkins and his daughter on another
4 occasion. That's correct.

5 QUESTION: I just can't believe that the
6 California courts would say no ticket, no laundry.

7 (Laughter.)

8 MR. SMITH: Well --

9 QUESTION: They -- they -- they would -- there
10 are procedures where if the man has lost the search
11 warrant, if he doesn't know the number, the court is going
12 to give it back to him.

13 MR. SMITH: In order to --

14 QUESTION: Everybody knows that.

15 MR. SMITH: Yes. In order to answer that
16 question, Justice Kennedy, I think what we need to look at
17 here is the notice that was provided. The note that was
18 left at the residence merely gave the identity of the
19 officers who served the warrant, who got -- procured the
20 warrant, and the court who signed it.

21 Then the policy of the City of West Covina at
22 that point was to leave it up to the discretion of the
23 police officer to decide what information to give to Mr.
24 Perkins.

25 QUESTION: Well, of course, in many cases you

1 can't get the property back.

2 MR. SMITH: Well --

3 QUESTION: This vicious little doctrine of
4 custodia legis means the police can hold onto it for
5 years, if they need it.

6 MR. SMITH: Well, that's correct, but in this
7 case what we have is everybody admits that it was the
8 Perkinses' property, that it should be returned to them.
9 And consequently, the issue is not whether the Perkinses
10 would get their property back but whether they can access
11 the otherwise adequate State remedy.

12 QUESTION: What if they left the wrong -- the
13 wrong warrant number? You wouldn't be here. You'd say,
14 well --

15 MR. SMITH: No, I wouldn't be here.

16 QUESTION: -- it was a good try.

17 MR. SMITH: Justice --

18 QUESTION: At least they tried to give proper
19 notice and just made a mistake.

20 MR. SMITH: Right. But there's two answers to
21 that question, Justice Scalia, because Mr. Sutton
22 indicated that this was a case where they got wrong
23 information. I don't agree with that. If in fact the
24 police officers had a policy or the -- West Covina had a
25 policy of providing the search warrant number, which they

1 clearly didn't -- it was to leave it to the discretion --

2
3 QUESTION: If they did and gave the wrong
4 number --

5 MR. SMITH: Then --

6 QUESTION: -- that would be okay.

7 MR. SMITH: That would be okay because there was
8 a procedure in place.

9 QUESTION: And -- but isn't there a procedure in
10 place here? They -- they went down to the -- to the
11 police station and were given the wrong number at the
12 police station instead of being given the wrong number at
13 their house when the -- when the seizure was taken.

14 MR. SMITH: Well --

15 QUESTION: Does that make a constitutional
16 difference?

17 MR. SMITH: What makes the constitutional
18 difference, Justice Scalia, is that the City of West
19 Covina did -- had a policy of leaving it up to the
20 discretion of the police officer. The police officer
21 doesn't remember. At one point he says, I may have gave
22 -- given the number; at another point, he didn't.

23 QUESTION: But so what? What sent this case
24 awry was that when they went down to the police station,
25 they were given the wrong number.

1 MR. SMITH: No.

2 QUESTION: Was their policy to give -- was there
3 a policy to give people the wrong number when they went to
4 the police station? Then I could understand how you might
5 have some problem. But it seems to me your case boils
6 down to, I insist upon being given the wrong number at the
7 time the property is taken rather than being given the
8 wrong number when I go to the police station.

9 MR. SMITH: Your Honor, what the record reveals
10 I think is that the policy of the City of West Covina was,
11 one, to leave it to the discretion of the police officers
12 to give them what information they think the person
13 needed.

14 The second thing was, was that it's clear from
15 the record that detective who gave him that information at
16 one point indicated I didn't give them the search warrant
17 number. At another point he indicates I may have given
18 it. So, it's clear that the policy is to leave it to the
19 discretion of the police officer and that --

20 QUESTION: Mr. Smith, just to narrow this
21 controversy, you pointed twice in your brief to the
22 Federal rule 41(d) as a model. That being the case, then
23 you must also agree that the Ninth Circuit went too far.

24 MR. SMITH: Well --

25 QUESTION: The Ninth Circuit went considerably

1 beyond rule 41(d) in what it required.

2 MR. SMITH: What the Ninth Circuit -- I will
3 submit that that is certainly something that this Court
4 could hold obviously, but what I will tell you, Justice
5 Ginsburg -- Ginsburg, is that what the Ninth Circuit did
6 was they found a situation where the due process rights of
7 the Perkinses was -- were violated because they weren't
8 given the information under Mullane which was reasonably
9 calculated to allow them for an opportunity for a hearing.

10 Now, what the Ninth Circuit then did is decide
11 what standard should we apply to decide what notice is
12 appropriate, the questions that were asked before. And
13 the question then is what standard. The Ninth Circuit
14 chose the Mathews v. Eldridge standard, and why did they?
15 I think --

16 QUESTION: I'm not talking about the standard.
17 I'm talking about the precise instructions that the Ninth
18 Circuit gave. They said everything that you gave him on
19 the form that was left and in addition -- and that was not
20 talking about balancing this, that, or the other thing --
21 specific items that were supposed to be included. The
22 Ninth Circuit said this notice is deficient because
23 specific things have to be added to it, and I don't see
24 any of those specific things in rule 41(d).

25 MR. SMITH: No, you don't see them in rule

1 41(d), Your Honor, but what you do see is you see that
2 rule 41(d) requires that search warrant be left at the
3 location. And if the Court would look at joint appendix
4 92 through 99, it's a copy of the search warrant, and the
5 search warrant says at the bottom, it gives the
6 information. It is now in the custody of the court. You
7 need to seek the court who has the property.

8 The most difficult thing about this case -- and
9 I believe that in this case is that maybe the Ninth
10 Circuit, in requiring that information, maybe went too
11 far, but what the court was doing was using the Mathews
12 balancing test to determine what notice should be given.
13 And I think that even if the Court believes that the Ninth
14 Circuit went too far in giving all of this information,
15 still the affirmance of the judgment in this case is
16 appropriate because under Mullane, which everybody admits
17 would be the standard, it was -- the information lacked
18 the search warrant number.

19 QUESTION: I don't see why Mullane should be the
20 standard here, Mr. Smith. It seems to me that Mullane is
21 a predeprivation situation, what kind of notice you have
22 to give prior to deprivation, not a postdeprivation at
23 all.

24 MR. SMITH: The problem, Mr. --

25 QUESTION: Do you agree with that or not?

1 MR. SMITH: I agree it's a -- it's a --

2 QUESTION: Predeprivation.

3 MR. SMITH: -- predeprivation case, absolutely.

4 QUESTION: Then why -- why should it be
5 applicable here?

6 MR. SMITH: Because we don't have, or at least
7 this Court has not expounded, a principle that would be
8 directly applicable to this case I believe, and I believe
9 that under Mullane, it talks about notice. Memphis Light
10 talked about notice, and if you can extrapolate the
11 discussion by this Court on notice, it provides a standard
12 of what is reasonably calculated to give adequate
13 information to the person to access their otherwise
14 adequate --

15 QUESTION: So, you say there really is no
16 difference between predeprivation and postdeprivation.

17 MR. SMITH: No, there is, Your Honor. The
18 difference -- however, with regard to notice, when you're
19 dealing with a circumstance of what is the quintessential
20 governmental intrusion into an unoccupied residence and
21 seizing of property, I believe that this case where the
22 government seizes it, clearly minimally they have to give
23 notice that the property was seized or that -- that the
24 police were in the house. I don't think anybody disagrees
25 with that.

1 QUESTION: Well, let me just question that this
2 -- with this example. Supposing you're parked in a no
3 parking zone, and the police come along and haul your car
4 away to the -- to some lot. Do they have to give you
5 notice that they've done it?

6 MR. SMITH: No. You have --

7 QUESTION: What's the difference?

8 MR. SMITH: You have your driver's -- you have
9 the license plate number of your car, Your Honor.

10 QUESTION: And you call the police and ask what
11 happened to the car, and they'll tell you. Why isn't that
12 the same remedy if somebody breaks into your house and a
13 lot of stuff is rummaged around? Why don't you just call
14 the police and they'll tell you they were the ones who did
15 it?

16 MR. SMITH: Mr. Perkins did not have the license
17 plate to his search warrant. He didn't have a search
18 warrant number.

19 QUESTION: Well, but he had his address. He had
20 his address. And is it the case that the clerk could have
21 found the search warrant based on the home address?

22 MR. SMITH: No, it's not --

23 QUESTION: There's something in the record to
24 the effect that that's the --

25 MR. SMITH: It is, Your Honor, that there is

1 testimony by Detective Ferrari who indicates that there's
2 a record or a registry at the court. However, what
3 Detective -- what that evidence fails to mention, which is
4 clear at joint appendix 76 and 77, is the declaration
5 submitted by the plaintiffs that if -- if the search
6 warrant was sealed, you couldn't get the information out
7 of the registry. So, clearly there is perhaps a registry
8 there. We don't dispute that there may be. However, when
9 it's sealed, the evidence is overwhelming and clear I
10 believe that you can't get the search warrant number even
11 with your address, and that is the difficulty in this
12 case.

13 QUESTION: Well, but the district court was very
14 clear. It said Perkins -- the plaintiffs want the court
15 simply to assume -- this is at E6 of the petition for the
16 writ of certiorari. Plaintiffs want the court simply to
17 assume that if Perkins had filed a request with the court,
18 it would have been denied because he did not have the
19 warrant number. There is no evidence to support that
20 speculation.

21 MR. SMITH: What -- what I think the court is
22 saying there, Justice Kennedy, is that there -- there --
23 that the Perkins perhaps could have filed a motion with
24 the court. However, the evidence is clear I think from
25 the record that the Perkins family did not have the

1 adequate information. Now, what the Perkinses could have
2 done with regard to filing a motion --

3 QUESTION: They knew where the court was. They
4 went to the courthouse.

5 MR. SMITH: And they went to the courthouse on
6 two occasions and the clerk would not allow them into the
7 courthouse. Now, perhaps Mr. Perkins could have just
8 filed the written motion with the court.

9 But the question then really becomes is what
10 does due process or what does the notice require. Should
11 Mr. Perkins have gone ahead and filed a writ of mandate in
12 the court? I don't think so. The statute -- the
13 legislative enactments by California specifically set a
14 procedure for doing exactly what Mr. Perkins did.

15 QUESTION: Suppose Mr. Perkins was -- was
16 driving his car and he was struck by a -- by a vehicle
17 belonging to the City of West Covina. And he jumps out of
18 the car and goes to the driver and he says, you've struck
19 my car and -- and damaged my property. You owe me
20 compensation. The driver says, you know, I'm -- I'm the
21 City of West Covina. We're self-insurers. We don't have
22 an insurance company. What -- what other information does
23 the driver have to provide?

24 MR. SMITH: Well, I don't think the driver
25 has --

1 QUESTION: Other than -- other than sue me.

2 MR. SMITH: I don't think the driver even has to
3 tell him to sue me in that circumstance.

4 QUESTION: Well, why is that different?

5 MR. SMITH: That case is different for a couple
6 reasons.

7 QUESTION: You know -- you know who's -- who's
8 harmed you, who's taken your property. You know there's a
9 system of law for -- for getting compensated. Does the
10 city have to provide you with -- with legal advice?

11 MR. SMITH: I don't -- no.

12 QUESTION: That's what we're talking about.

13 MR. SMITH: The city does not.

14 But there's two distinctions, Justice Scalia.
15 The first one is, is that Mr. Perkins can identify the
16 problem that he is facing when he's hit by another car.
17 He can get the license plate number, the description of
18 the person or the car. He can't get the -- the number of
19 the warrant. He can't get a description sufficient to
20 allow the clerk or even Judge Oki or any judge on a writ
21 of mandate to identify the property as being seized under
22 which warrant so it can make a determination as to whether
23 or not it was appropriately seized or not.

24 QUESTION: That -- that can all be determined in
25 court just the way the extent of the damage to his

1 vehicle --

2 MR. SMITH: Well --

3 QUESTION: -- and who did it can be determined
4 in court. I don't see that there's any difference between
5 the two cases.

6 MR. SMITH: Except that Mr. Perkins could not
7 get into court. He didn't have the search warrant number.

8 QUESTION: But the district court said he didn't
9 need it.

10 MR. SMITH: Well --

11 QUESTION: You keep asserting that, and yet
12 several of us have pointed out from the bench the district
13 court said that he had not proved that he needed it.

14 MR. SMITH: Well --

15 QUESTION: What do you mean he couldn't get into
16 court? I cannot believe it. He could not bring a
17 lawsuit?

18 MR. SMITH: Well, he could, Your Honor, get
19 in --

20 QUESTION: You're thrown out of court because
21 you don't have a number?

22 MR. SMITH: No. He couldn't get into court
23 under the procedures enacted by the California
24 legislature, 1536, 1540, a specific procedure designed for
25 a person to get their property back. He goes to court.

1 We need the number. The record is clear. He goes back to
2 the detective. The detective tells him he's not sure if
3 he told him a number or not. Perkins goes back. He still
4 can't get into court.

5 QUESTION: Well, that's your denial of due
6 process then. You can't -- you can't bring a suit to get
7 your money back without a magic number. That's clearly a
8 denial of due process. Now, if you had come here with
9 that complaint, I'd be more sympathetic.

10 MR. SMITH: Well, what happens, though, is -- is
11 the issue in this case really comes down to whether or not
12 the policy of the City of West Covina -- I think that, if
13 I can backtrack for a moment, why -- if the question is
14 asked, why should the City of West Covina provide this
15 information? Now, the question really is, is if you
16 answer that they should, the City of West Covina doesn't
17 want to admit it. The question is whether due process
18 requires it. And if you had analyzed this case under the
19 Fourteenth Amendment or the Fourth Amendment, they're both
20 reasonableness standards, and so if the City of West
21 Covina could provide that and they already leave a notice
22 at the location and you do a balancing test that is it a
23 burden on the City of West Covina to do that? No, it's
24 not.

25 And in fact, the Los Angeles County Sheriff's

1 Department in the motion for judicial notice of their
2 document shows this Court that it in it shows -- it has a
3 receipt for seized property and a notice for retrieving
4 property. It shows a line for the search warrant number,
5 for a URN file number by the police department. Then what
6 has been characterized as legal advice is -- essentially
7 comes to about 20 words, that they can --

8 QUESTION: What is your principle? That
9 whenever the State takes property, it must -- it must do
10 all those things that are reasonable to make it easy to
11 get the property back.

12 MR. SMITH: No.

13 QUESTION: Is that the constitutional principle?

14 MR. SMITH: My principle is in the context of a
15 search warrant, a seizure from someone's home, that when
16 -- there has to be basic notice, and the basic notice has
17 to be reasonably calculated to give the information to the
18 Perkinses sufficient -- or anyone -- to get a reasonable
19 access to an otherwise adequate State remedy. That would
20 include not only the search warrant number, but who they
21 -- they proceed before because the police --

22 QUESTION: An otherwise adequate State remedy
23 could -- could be limited to suing in court. Is that
24 right?

25 MR. SMITH: It could be, but the California

1 legislature has not done that. They've enacted a specific
2 procedure under 1536.

3 QUESTION: Yes, but if that -- is it your
4 position that if that procedure has been frustrated by,
5 for example, the failure to provide the warrant number,
6 there is no other procedure under California law whereby
7 this -- this property could have been recovered?

8 MR. SMITH: No. It -- certainly it's under a
9 writ of mandate, and I don't dispute that a writ of
10 mandate is another procedure which potentially could have
11 been employed. The question is, however, if the State
12 provides a number of remedies and there's a more specific
13 remedy, a remedy for 1536 specifically to get your
14 property back, and that's the avenue that the Perkins
15 took, that's the universe of this case.

16 QUESTION: And that's a constitutional violation
17 even though there is another way to get your property
18 back.

19 MR. SMITH: If -- if the city has a policy of
20 leaving it to the discretion of the officers to give what
21 information is necessary to access that adequate State
22 remedy, then yes. The essential thing is, Justice Scalia,
23 is this, is that what amici and -- and the petitioner are
24 arguing in this case is that there's this beautiful car
25 that you have, this beautiful vehicle with which they

1 could have gotten their property back, and there it is
2 sitting in the driveway. The problem is, is they didn't
3 give them the keys to engage the vehicle.

4 QUESTION: Well, but Mr. --

5 QUESTION: May I ask about those keys? Because
6 maybe I'm misunderstanding the facts but I thought that on
7 the side of the police, if they gave the warrant number,
8 that would do. On the side of Mr. Perkins, if he had just
9 said, here's my address, that that would have done. So,
10 we're talking about just one further step on either side,
11 and the key -- the door would have been unlocked.

12 MR. SMITH: That's correct, except he couldn't
13 provide the address to the clerk because the warrant was
14 sealed and he couldn't get that information.

15 QUESTION: But he knows his address.

16 MR. SMITH: He does.

17 QUESTION: And so, you're saying we -- there's
18 something wrong about my understanding of this case, that
19 if he had provided his address, then the warrant would
20 have been found?

21 MR. SMITH: No. My position, Your Honor, is
22 that even if he had provided the address, which I believe
23 he did -- he provided the notice of search warrant that
24 was left by the City of West Covina, that the clerk's
25 office would not allow him because -- to get the search

1 warrant number, the key to the vehicle, because the search
2 warrant was sealed.

3 QUESTION: But you are arguing about the
4 ineffectiveness of a procedure which you didn't invoke.

5 MR. SMITH: Except --

6 QUESTION: You did not go to the court. You
7 went to the courthouse, but not to the court.

8 MR. SMITH: And --

9 QUESTION: And it seems to me that ends your
10 case.

11 MR. SMITH: Except, Justice Kennedy, this, that
12 what is it that a person has to do? And I'll admit that's
13 what the district court found, but the question is, he
14 goes to the court. What is a citizen to do? You can't go
15 into the courtroom and stand up, Your Honor, I want my
16 property back. You have to go through a procedure. He
17 goes to the clerk's office. In order to get on calendar,
18 in order to be heard in that court, in order to engage
19 this vehicle, he needs to have this number to get the
20 search warrant, and that's my position.

21 QUESTION: Mr. Smith, may I ask perhaps an
22 unfair question, but supposing instead of trying to do all
23 this himself, he'd come to you and said, they took my
24 property. How long do you think it would have taken you
25 to get the property back?

1 MR. SMITH: Well, I probably could not have
2 gotten the property back.

3 QUESTION: Really?

4 MR. SMITH: Because the search warrant was
5 sealed and you couldn't get the number.

6 Now, maybe we could have filed a writ of mandate
7 with the court, but unfortunately, there's been no -- I
8 would believe that there has been no indication that the
9 court would deny him the return of the property.

10 QUESTION: You think he was just as effective in
11 getting his property back as you would have been in the
12 same circumstances.

13 MR. SMITH: I think the information that was
14 relayed -- obviously, a lawyer would perhaps use a little
15 more ingenuity. Maybe he would know somebody at the
16 court. Maybe he could just file a lawsuit at the court or
17 something to that effect. But that's not -- that doesn't
18 -- the question is appropriate, but I don't think it helps
19 in this case because of the fact that there was a
20 procedure by California. And when he goes into court to
21 implement this procedure, he's elected a procedure that
22 the State of California has provided, but the City of West
23 Covina's policy was inadequate to give him that
24 information and he couldn't get into court.

25 QUESTION: No, but I thought you just conceded

1 in the earlier part of your answer to Justice Stevens that
2 if you had been doing it, I think the way you put it, I
3 might have filed a writ of mandate. I might have filed -
4 - I take it you mean by that -- a document with the court
5 saying, look, I need a number in order to get my client's
6 property back. They haven't given me the number. I
7 presume you would have gotten some relief if you had filed
8 that. And if that is so, why really isn't that the end of
9 your case?

10 MR. SMITH: Because I don't believe I
11 necessarily would have gotten the number.

12 QUESTION: Well, we don't know whether you would
13 have gotten the number or not, but I think aren't we
14 entitled to assume, in the absence of a demonstration to
15 the contrary, that the court would have done something
16 other than throw you out and say I'm not going to help
17 you. Too bad.

18 MR. SMITH: Well, the information is in the
19 record, is that the document was sealed, and the clerk's
20 office, the declaration of the joint appendix, 76-77, is
21 that you couldn't get the warrant number because the
22 document was sealed.

23 Now --

24 QUESTION: Well, the document I presume -- and
25 you correct me if I'm wrong -- is under the control of the

1 court, isn't it?

2 MR. SMITH: Yes.

3 QUESTION: Okay. So, if you -- you admit that
4 -- that there is a procedure whereby you could have gone
5 -- you could have addressed the court with a pleading and
6 said, I need this number that you have in order to get
7 back property that they took from me that they're not
8 entitled to keep. And in the absence of some
9 demonstration that you would have been turned away
10 arbitrarily, we have to assume, I think, that there is a
11 process by which you could have gotten what you wanted,
12 and ultimately you would have -- your client would have
13 gotten the property back.

14 And if that is so, I don't understand what the
15 premise would be for constructing a due process right to
16 an alternative to that.

17 MR. SMITH: The question is, Your Honor, is does
18 it require essentially -- and I don't mean to be facetious
19 -- some herculean effort by a citizen to get the property
20 back. Does the citizen have to invoke the services of a
21 lawyer who could be creative in terms of getting that
22 property back? Does the Due Process Clause require that?
23 I don't believe the Due Process Clause requires that. In
24 fact, I believe that what the Due Process Clause requires
25 or the Fourth Amendment is information which would

1 reasonably calculated to give the person --

2 QUESTION: Well, that's one -- that's one way of
3 -- of stating the conclusion, but I would have thought
4 that what you have to demonstrated to get the due process
5 right that you claim is that it is fundamentally unfair
6 for the State to take the property, telling you that it is
7 they, the State, that have taken it, and then leave it to
8 you to figure out what the procedure under State law is
9 for its return. Is that fundamentally unfair?

10 MR. SMITH: No, I don't believe that that
11 necessarily -- this Court does not have to find that as
12 fundamentally unfair. What is fundamentally unfair is not
13 giving him the information that is needed in order to
14 access this remedy.

15 Now, the Ninth Circuit did find it's
16 fundamentally unfair --

17 QUESTION: It's fundamentally unfair in a case
18 in which there has been perhaps a -- a -- a negligent
19 runaround, as occurred here. It's fundamentally unfair in
20 your view to require the -- the property owner to address
21 the court with a mandamus petition saying give me what I
22 need to know in order to get the property back? That is
23 fundamentally unfair?

24 MR. SMITH: I believe what is fundamentally
25 unfair about it -- yes, Your Honor -- is that it is

1 fundamentally unfair not to allow -- not to give the
2 Perkinses the necessary information. What we have here is
3 a policy by the City of West Covina to leave it to the
4 discretion of the officer, and that is what's unfair.
5 What needs to be -- what has to happen here is that the
6 Court I think needs to indicate that the city -- that due
7 process requires a policy where information is imparted to
8 a person to allow him to access the remedy.

9 QUESTION: But we don't see any kind of abuse of
10 that discretion, if it was that, because the -- the police
11 officer did say the property is in -- in the court's
12 custody, so you have to go there to get it. So, it wasn't
13 any misleading by the police except with respect to this
14 number.

15 MR. SMITH: That's correct, and the police was
16 -- the police were right. He did have to go to court
17 because if you got this note left at your residence, you
18 would think you would have to go to the police department.
19 So, I think it would be incumbent upon the city to tell
20 them what court you have to go to. They did that, and I
21 think that that's required.

22 The question is did they give them the
23 information that was necessary to access the remedy. And
24 I understand what Justice Kennedy is asking, but I don't
25 believe that it is fundamental for the Due Process Clause

1 to require the person, in order to not waive his rights,
2 to get in and -- and talk actually to the judge in the
3 courtroom.

4 QUESTION: Would we -- would it have been okay
5 if they gave him the warrant number and it was the city's
6 policy to give him the warrant number not at the time a
7 warrant is left, but rather at the police station when he
8 comes to the police station?

9 MR. SMITH: That would be fine, Your Honor.

10 QUESTION: That would be fine.

11 MR. SMITH: Because of the fact --

12 QUESTION: Well, but that was done here, only
13 they gave him the wrong warrant number.

14 MR. SMITH: No. Well, that's a disputed --
15 that's an issue that isn't -- he says that -- that same
16 detective who says he may have given them a number isn't
17 sure he gave them the number. He indicated at one point I
18 did not give them a number. At another point he says I
19 may have.

20 QUESTION: But Mr. Perkins thought he got a
21 number. And he thought he got a number and he said it was
22 the wrong one.

23 MR. SMITH: He said he got a -- I think the word
24 he used was a case number. He got some sort of a number
25 from Ferrari, but went there and they said that was no

1 number at all. What the problem is, is that it's an
2 arbitrary -- it's a policy that leaves it to the
3 discretion of the police officer. If there's a policy by
4 the City of West Covina to leave -- not to leave it, but
5 they have to give them that information, then I wouldn't
6 be here because there would be a policy which implicates
7 or somehow allows the person to go and access the
8 otherwise adequate State remedy. That's not what happened
9 here. What happened is they left it to the discretion of
10 the police officer.

11 But I think even under a Fourth Amendment
12 standard or a Fourteenth Amendment standard here, the
13 policy of the City of West Covina is deficient, and it's
14 deficient because, number one, if the Court looks at
15 Mullane -- and I think the Court is looking for a standard
16 on how to decide this case. We can't just stand here and
17 say, well, if he had gotten the number, if he hadn't
18 gotten the number, that's sufficient. The Court has given
19 us a -- a formula by which to look at this case and judge
20 what notice is required. That's I believe under -- under
21 a Mullane type of standard, reasonableness.

22 And I think that the Mathews v. Eldridge
23 balancing is appropriate. If you look at that --

24 QUESTION: If you have given us such a -- you
25 know, examples often work more forcibly on the mind than

1 precepts, and you have given us the example of 41(d). So,
2 why are we talking nebulously about not using balancing
3 and all that when we have a concrete example of what you
4 say here's what does it, here's adequate notice?

5 MR. SMITH: I -- I agree that that's a concrete
6 standard, that I believe that probably when the -- the
7 enactors of Federal Rule of Criminal Procedure 41 probably
8 went through what notice is required in order to
9 adequately inform the person or give them the information
10 to access the remedy. 41 --

11 QUESTION: And it's a very simple. It's a copy
12 of the warrant.

13 MR. SMITH: Exactly. That's our position, that
14 the City of West Covina should come into line with what
15 the Federal Government does and what the rest of the
16 country -- most of the country does, is leave a copy of
17 the warrant at the location. If he had the copy of the
18 warrant, we wouldn't be here today because it does have
19 the search warrant number on it, and it has who to
20 contact, who signed --

21 QUESTION: Yes, but some of these search
22 warrants are sealed. Certainly the affidavits are. It
23 may well have been that if this murder investigation is
24 still underway, he's not entitled to the property back.

25 MR. SMITH: Well, in this case --

1 QUESTION: I mean, we don't know --

2 MR. SMITH: -- in this -- that may be the case,
3 but I'm not asserting in this case, Justice Kennedy, that
4 Mr. Perkins had to get his property back. He only needed
5 to get into court in order to address the issue. In this
6 case it's undisputed that it wasn't evidence of the crime
7 and they were going to give it back to him, and I think
8 that's what's critical.

9 But I think that this Court has indicated,
10 albeit it in -- in -- in -- by Justice of the Court, by
11 Justice O'Connor, and I believe also by Justice Souter,
12 that the Mathews analysis is an analysis that can be used
13 in this case. The burden on the city --

14 QUESTION: Thank you very much, Mr. Smith.

15 Mr. Lawrence, you have 2 minutes remaining.

16 REBUTTAL ARGUMENT OF DAVID D. LAWRENCE

17 ON BEHALF OF THE PETITIONER

18 MR. LAWRENCE: If I could make a couple of
19 points.

20 One, my opposing counsel states that all of us
21 agree that Mullane is the proper test here. We do not
22 agree that Mullane is the proper test. Mullane is a
23 predeprivation case. That's a test that's applied to
24 determine whether or not notice is sufficient in the
25 predeprivation context.

1 Further, in that case, the Court stated that
2 notice is a necessary element of due process when there is
3 a final adjudication, and the notice is to give the person
4 whose property rights are at issue an opportunity to
5 appear and to contest that hearing or to choose not to
6 appear. That is not the case here because we did not have
7 a final adjudication or a hearing that notice could be
8 given up.

9 My opposing counsel states that they did not get
10 the property back or they could not get the property
11 because they did not get it, and the record shows that
12 even after receiving the search warrant number and even
13 after getting advice of counsel, myself, as to how to get
14 it back, they did nothing to get it back. So, I submit
15 that that's not a very good test to determine whether or
16 not it was possible for counsel or the respondents to
17 obtain the return of their property.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Lawrence.

21 The case is submitted.

22 (Whereupon, at 11:06 a.m., the case in the
23 above-entitled matter was submitted.)
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

CITY OF WEST COVINA, Petitioner v. LAWRENCE PERKINS, ET AL.
CASE NO: 97-1230

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.