ORIGINAL

In the

Supreme Court of the United States

THEODORE PATON,

APPELLANT,

V.

NEW YORK,

APPELLEE.

No 78-5420

OBIE RIDDICK,

APPELLANT,

V.

NEW YORK,

APPELLEE.

No. 78-5421

Washington, D. C.
October 9, 1979

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THEODORE PAYTON, Appellant, v. NEW YORK, Appellee.	No. 78-5420
OBIE RIDDICK, Appellant, v. NEW YORK, Appellee.	No. 78-5421

Washington, D. C.

Tuesday, October 9, 1979.

The above-entitled matters came on for oral argument at 1:29 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM E. HELLERSTEIN, ESQ., The Legal Aid Society, 15 Park Row, New York, New York 10038; on behalf of the Appellants.

PETER L. ZIMROTH, ESQ., Chief Assistant District Attorney, New York County, 155 Leonard Street, New York, New York 10013; on behalf of the Appellee.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 78-5420 and 78-5421, Theodore Payton v. New York, and Obie Riddick v. New York.

Mr. Hellerstein, I think you may proceed when you are ready.

ORAL ARGUMENT OF WILLIAM E. HELLERSTEIN, ESQ.,

ON BEHALF OF THE APPELLANTS

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

These cases are before you on reargument. They are appeals from the New York Court of Appeals which by a vote of four-to-three sustained the constitutionality of New York's arrest statutes which allow, even in the absence of exigent circumstances, a warrantless entry into the home for the purposes of arrest.

Briefly I will state the facts which I think in both cases are manifestations of the operations of the statute, that in real terms demonstrate the importance of the warrant requirement which I think this Court will require or should require.

In the Payton case, you had a situation where on January 12, 1970, there was a homicide in the course of a robbery at an upper East Side gas station in New York City. Two days later, the investigating police obtained information

as to who they could believe was the probable cause to have committed the crime. That information led them that date to go to the premises, to have the premises pointed out to them and to do nothing, to spend the rest of the afternoon, the entire evening, until 7:30 the next morning when then a substantially group of detectives went to the premises, an apartment on the fifth floor in a building in the South Bronx -- in Manhattan, I'm sorry, and after trying to force the door open and unable to do so, called for assistance which arrived a half hour later and with the use of crowbars the door was forced open.

Once they police entered the premises and they saw that Mr. Payton not even there, they proceeded to ransack the apartment, seized a number of items and all of which was suppressed by the trial consent on consent of the prosecution except for a .30 caliber cartridge that was found in plain view on top of the stereo set.

The lower courts and the majority of the New York Court of Appeals, finding that the police were lawfully in the premises since they did not need a warrant, could have seized what they saw in plain view.

The Riddick case is another striking in some respects example of the essentiality of a warrant requirement. In Riddick, the crime was committed four years prior to the arrest. The police had a probable cause and could have

known and could have gotten Mr. Riddick a long time before they went into his apartment. They waited two months before they decided to arrest him in his apartment without a warrant, even though they knew his address.

They went in -- his three-year-old son answered the door, they entered, Mr. Riddick was sitting in his bed with some underwear on but naked to the waist, and he was arrested.

I think the entries in both of these cases are cardinal examples of why, as I understand where this Court has gone so far with respect to warrants, the warrant requirement should and must be imposed with respect to entry in non-exigent circumstances into private premises.

QUESTION: If the police had had a warrant, that wouldn't have prevented them from arresting the latter petitioner in his underwear, would it?

MR. HELLERSTEIN: No, Mr. Justice White. They didn't arrest him in his underwear. I mean they let him get dressed to leave. I just -- the reason I emphasized his underwear is that we are talking about the home and this is the heart of privacy and in order to enter a home and seize citizens in that context I think, as I understand the warrant requirement, it has always been to insure that a magistrate has determined even before that type of entry is made. The probable cause determination should be made by someone other than a police officer who has to make subjective judgments

that are not always correct.

QUESTION: Could you make the same argument if this were a motel? You would make the same argument if this were a motel?

MR. HELLERSTEIN: Oh, yes, I would, depending on the expectation of privacy that the residents of that motel may have.

QUESTION: So that the word "home" doesn't have any particular magic in it?

MR. HELLERSTEIN: I think that the Court has said quite clearly that the Fourth Amendment protects people, not places, but people in the context of where their expectation of privacy is the highest and we would draw no distinction with respect to motels and homes. So it should be actual residence, and I think a motel room can be home to a person who is there, that there would be no distinction.

QUESTION: In each of these cases, the petitioner. both Payton and Riddick, were arrested in their own residences, were they not?

MR. HELLERSTEIN: No, Mr. Payton was -- he turned himself in. He was not home.

QUESTION: Oh, that's right. But in any event, the entry was into the residence of each of Payton and Riddick as well.

MR. HELLERSTEIN: Yes, sir. You are correct, Mr.

Justice Stewart.

QUESTION: And in each case the residence was what, an apartment in New York City?

MR. HELLERSTEIN: In Payton's it was a multiple dwelling tenement, fifth floor, apartment 5-A. I would say it is a typical New York, Manhattan tenement. In Riddick, it was a two-family private house in Queens.

QUESTION: Half a house.

MR. HELLERSTEIN: The majority below approached the case along the lines that an entry to arrest is less intrusive than an entry to search. That was its first premise. Its second premise was that an arrest in the home is less embarrassing than an arrest in public and therefore this Court's concern in Watson was even less forceful. For reasons I will state, I disagree with both.

Again, the Court of Appeals thought that the common law was very one-sided in terms of trying to ascertain the -- the claim was one-sided -- the common law allowed entries. I submit, I think in our brief extensively we come to quite an opposite conclusion. So we think these assumptions were wrong, they are erroneous.

I think it is noteworthy that since the opinion of the Court of Appeals in this case, a number of the courts, high appellate courts have refused to follow it, I think because it is a bitter pill for a lot of courts to follow, a

warrantless entry of this kind. And the Eighth Circuit has just recently, in the Houle case, which is in our supplemental brief, refused to allow warrantless entires, and the high courts of Wisconsin and Pennsylvania also refused to follow the Payton case as decided by the majority.

There is some significance I think at least in the sensitivity of a number of courts as to the federal issue.

Our basic line, basic view is that if one thing is clear about this Court's decision is that physical entries of the home is the chief evil against which the Fourth Amendment stands, and that is what this case is about.

The arrest warrant provides protection at the very least against that type of entry without a manner of determination that on the facts known to the officer there is probable cause to believe that a defendant has committed a crime.

I think for us the logical starting point for our argument has to be the plurality opinion in the Coolidge case, where the Court said that no warrant for an entry to arrest was per se unreasonable in line withthe Court's decisions, and absent well-defined exigent circumstances there could be no warrantless entry.

Further than the Coolidge case, the Court said in Warden v. Hayden, which has come to be known as a "hot pursuit" type of case, stands by which negative implication

that an arrest warrant is required. These two statements of the plurality in Collidge have led most if not all, but a substantial and predominant number of courts to read the language in Coolidge to come to a conclusion quite opposite that which did the majority below.

QUESTION: Which is what? These courts have come to what conclusion?

MR. HELLERSTEIN: Quite opposite the --

QUESTION: Which is what?

MR. HELLERSTEIN: Which is that a warrant is required.

QUESTION: What kind of a warrant?

MR. HELLERSTEIN: That I think, Mr. Justice White, is a little more difficult question than the initial question.

QUESTION: Well, I just ask you what the -- I didn't want to argue -- what are those cases that are --

MR. HELLERSTEIN: Most courts have held that an arrest warrant. The Ninth Circuit, in United States v. Prescott, has said we don't care what you call it as long as it has two things, it requires a determination by the magistrate as to entry of premises as well as probable cause of a crime. But most courts either gloss over what type of warrant or specifically say arrest warrants. The Second Circuit --

QUESTION: Which is just probable cause to believe this particular person committed a crime?

MR. HELLERSTEIN: Yes.

QUESTION: Not that he is in the house.

MR. HELLERSTEIN: Not that he is in the house. That is a determination when it is an arrest warrant, that when the warrant is being executed.

QUESTION: Does any court, do you know, require search warrants?

MR. HELLERSTEIN: The Ninth Circuit requires a warrant that requires the magistrate to do both. A number of other --

QUESTION: Which is do both what, the probable cause to --

MR. HELLERSTEIN: It is really a search warrant.

QUESTION: -- to enter the house because there is probable cause to believe the man is there?

MR. HELLERSTEIN: Well --

QUESTION: Is that your position?

MR. HELLERSTEIN: My position is that maximally a search warrant would make the most sense in terms of the --

QUESTION: How about minimally?

MR. HELLERSTEIN: Minimally an arrest warrant plus reasonable cause when a warrant is executed by an officer to believe that the defendant is --

QUESTION: So minimally the Ninth Circuit position.

MR. HELLERSTEIN: No, the Ninth Circuit would go a

little bit more, and I was glad to have it, but I would take the position that I think was at least touched upon in this Court's opinion in the Dalia case.

QUESTION: Which one? Which case?

MR. HELLERSTEIN: Dalia v. United States, a surreptitious entry case, where Mr. Justice Powell, writing for the Court, specifically noted that an arrest warrant, first of all, is a useful document. Secondly, a magistrate cannot always focus on every aspect of the privacy intrusion but that the important thing is an arrest warrant in the officer's hand.

Now, as far as I see it in a case such as this, where there is no warrant at all is required as a predicate for entry, at the very least the Fourth Amendment should require and does require an arrest warrant.

QUESTION: Mr. Hellerstein, are there some courts that say that all you need is an arrest warrant or that -- say there is a court that says you need only probable cause to enter the house, you don't need a warrant at all. But do they say -- don't some of those courts say that at the time you enter the house you must have probable cause not only to arrest but to believe the man is in the house?

MR. HELLERSTEIN: I think, yes, I think there is a -- I don't recall if they specifically talk about the second aspect, but I would say that it would be fair to guess that

even a court such as I think the Seventh Circuit which does not require a warrant, would say that even though you are going with probable cause on a crime, also have to believe that the fellow is on the premises.

QUESTION: Is that what the New York courts held here?

MR. HELLERSTEIN: The New York -- that issue did not come up in terms of these cases.

QUESTION: Because you can take him -- the light was on and you could hear a radio or something.

MR. HELLERSTEIN: Yes.

QUESTION: So they did have reason to believe there was somebody in there.

MR. HELLERSTEIN: Yes, Mr. Justice.

QUESTION: In each of these cases, you concede that there was probable cause?

MR. HELLERSTEIN: Of the crime.

QUESTION: Yes, and therefore that an arrest warrant could have properly issued?

MR. HELLERSTEIN: Yes, I do. I think the information as to both --

QUESTION: What about the probable cause to believe that somebody is -- that the defendant is in the premises?

MR. HELLERSTEIN: I think that the officers, had they gotten a warrant would have, if it was an arrest warrant,

would have had probable cause in both cases to execute that warrant.

QUESTION: So that the narrow issue here is whether you need some kind of a warrant.

MR. HELLERSTEIN: That's correct.

QUESTION: Mr. Hellerstein, earlier in your argument you placed great stress on using Coolidge v. New Hampshire, Justice Stewart's opinion as a starting point. I take it Justice Harlan's concurring opinion wasn't necessary to make that a majority opinion?

MR. HELLERSTEIN: Yes.

QUESTION: And as I read his opinion, he starts out by saying from the several opinions that have been filed in this case, it is apparent that the law of search and seizure is due for an overhauling and then he goes on and says I would begin this process of reevaluation by overruling Map v. Ohio and Kerr v. California. Now, I take it if one were to follow Justice Harlan's views, which were necessary to make a majority, that you wouldn't have much of a case.

MR. HELLERSTEIN: I guess it would depend upon the composition of the Court at the time, first of all, Mr. Justice Rehnquist. I think that -- and I don't presume to speak for Mr. Justice Harlan -- that considerations that he spoke to in those cases were his views of federalism and the Fourth Amendment, and I know that you for one do share

perhaps with respect to Map at least that view, but I think often in Mr. Justice Harlan's opinion he was extremely sensitive as he says in Jones, too, forcible entry into the home to make an arrest, he said a great constitutional question is presented by that issue which is the issue we have here.

The approach which the Court of Appeals below took in the majority opinion by Judge Jones really I think denegrated it or underestimated tremendously the nature of warrantless entry. For the court to be able to say that an arrest entry is less intrusive than a search entry, this doesn't square factually with arrest entries or the facts of this case.

First of all, when police enter a dwelling, as they did in these cases, they are affecting the privacy of all of the people where there may be more than just the defendant. But the manner of the entry is not designed to safeguard the privacy interest but to minimize it. We have in our brief cited manuals, standard operating manuals of what police are supposed to do when they go into a premises to arrest a felon to protect themselves. They are to fan out and engage in protective sweeps. That is pretty intrusive and can be very often much more intrusive than a search in which you find the item or items that are specified in the search warrant, to be very unobtrusive. The entire premises are open to scrutiny, items that people hold dear to them are

private, have nothing to do with whatever they are being sought for, can be seen by officers. The search incident to an arrest can be very intrusive.

On the other hand, a search can be minimal. There was nothing minimal about the entry in these two cases.

QUESTION: Well, in these two cases, even if the state is correct, that wouldn't lead to a lot of intensive indiscriminate searching. The search incident to the arrest would be limited by the contours delineated in the Chimel case and --

MR. HELLERSTEIN: Yes, Your Honor.

QUESTION: -- and anything else would just be subject to plain view.

MR. HELLERSTEIN: That's correct.

QUESTION: Isn't that right?

MR. HELLERSTEIN: But I think what is important is the point that --

QUESTION: You don't have here, even if the state is correct, a threat of an intensive search throughout the house.

MR. HELLERSTEIN: Well, you have that -- I think that is a point that Chief Judge Cook was trying to make in his dissent. I think there is some value in it. He said if the officers here had an arrest warrant, they would have known on paper that they were going to arrest Payton and they

would not have --

QUESTION: And that was their only purpose.

MR. HELLERSTEIN: Right.

QUESTION: Any search would be limited to the limitations of Chimel plus they could have seized anything in plain view.

MR. HELLERSTEIN: That's correct.

QUESTION: If the state is correct, period. Is that right?

MR. HELLERSTEIN: That's correct. But I think it was sort of in a way a psychological point that the Chief Judge was making and that is a warrant itself has a value of limiting, telling the officers or directing them that when you have this fellow and you have probable cause to believe he has committed a crime, you go and arrest him, that is all you are supposed to be doing. We are not going to leave it to the suppression at a trial to take care of everything else you ransacked the place for. That I think would be the --

QUESTION: The plain view doctrine would be an exception to all of that.

MR. HELLERSTEIN: Yes.

QUESTION: If while they are standing inside the door of the arrestee, and he says let me get my clothes on, they see a pistol or whatever, they can take that, of course,

can't they?

MR. HELLERSTEIN: Yes. I am not saying --

QUESTION: It is unlawfully there.

MR. HELLERSTEIN: Yes, unlawfully there. Our position is that in this case they were not lawfully there without a warrant. And as I stated earlier, as I see it, the minimum requirement is for an arrest warrant, is what this Court in the majority in the Dalia case have given meaning to an arrest warrant, then that is the kind of warrant that should be required and is required with respect to arrest entires.

QUESTION: How about arresting somebody in the third person's home?

MR. HELLERSTEIN: There I think, at least in terms of the way scholarly discussion has gone, in some circuits, such as the Third Circuit, there is a greater concern that in that situation particularly, perhaps only a search warrant will do the job because there the magistrate is not even focusing on the person whose premises it is. I don't think this Court has to get into that in this case. These two cases involve arrest entries on premises --

QUESTION: Well, would the magistrate ordinarily focus on whose home other than his own the person might be in?

MR. HELLERSTEIN: Not in an arrest warrant context.

He would if he were required to get a search warrant.

QUESTION: Would you be satisfied with an arrest warrant even to support the search, the breaking in the home of John Smith because the officers suspected that the object of the warrant might be there?

MR. HELLERSTEIN: Some courts have so held --

QUESTION: Or Mary Smith?

QUESTION: Some courts have so held that again I think the logic would be that it still requires, once you have a valid arrest warrant, the judgment left to the officer under an arrest warrant that the person is in the premises sought must be based upon probable cause. I don't think that is an optimum solution, I want to make myself clear, but for the purposes of this case and the issues presented, I don't think I have got to convince you that you need go further.

I would point out that the Court has amended Rule 41 of the Federal Rules of Criminal Procedure to provide for search warrants, not arrest warrants, when persons are being sought, without limiting it to third person premises. I can only say that there is logic to that amendment and it would be wrong for me to say anything other than that. But furthermore, if the Court had a desire to harmonize Rule 41, which at least you at times said implemented Fourth Amendment concerns, then the most sensible reconciliation of the difficult

issue would be to require a search warrant so that Rule 41 would totally conform with what the Fourth Amendment requires, but I do not think that it is necessary in this case.

The prosecution -- Mr. Zimroth talks a great deal about the burden to police if you impose either type of requirement. I know that in the warrant context you heard that argument many times and you rejected it many times. You rejected it many times because you placed the importance of that warrant requirement in the constitutional scheme in a very high level, and when you combine that with the home, the premises, parts of the home, I think the prosecution should have an insurmountable burden in terms of policy arguments.

If we start with the premise that we are talking non-exigent circumstances, then I can see no weight at all to Mr. Zimroth's argument that a warrant requirement imposed by this Court would be a burden to any legitimate concern of police officers.

If it is not exigent, circumstances are not exigent, then the police have time to do a number of things and I think these two cases pointed out -- in Riddick they had an awful lot of time to make a slight detour and get an arrest warrant.

QUESTION: In our Watson decision, certainly we didn't decide that on the basis that it would be just a

terrible burden on the police to go get a warrant to arrest a man in a public place. We went on the tradition that it had always been done that way, and that is what the Constitution must have meant.

MR. HELLERSTEIN: I think in Watson you must have felt yourself freer to do it based on the fairly one-sided, almost exclusively so, history of the common law with respect to arrest. That is no so with respect to going into homes to make arrests. I think that at the very least, and I think the Court in Miller v. United States a long time ago, 1957, pointed out that the law with respect to arrest entries into the home was not letter clear.

QUESTION: Miller was a statutory case.

MR. HELLERSTEIN: Yes, that was section 3109. But in a footnote of Mr. Justice Brennan, in writing for the Court, acknowledged -- first of all, he pointed to Judge Prettyman's opinion in the Akaweno case where Judge Prettyman I think makes a very substantial brief that the common law was very one-sided our way. And if I had to argue I would, but I don't think that what was available to the Court in Watson, the common law going the other way, can possibly be available here, and it is not.

QUESTION: Don't you think it is quite important that under section 3109 Congress had given specific instructions to federal officers as to the precise, very precise manner in

which the warrant was to be executed?

MR. HELLERSTEIN: That was with respect to knock and announce and --

QUESTION: It was more than that, announce their purpose and their authority and their identity --

MR. HELLERSTEIN: Purpose and authority, yes.

QUESTION: -- but I think the opinion said a few more words would have sufficed. They announced part of what the statute required but not all, if I recall correctly.

MR. HELLERSTEIN: I think the Court was quite clear in Miller that that was a very important intention by Congress in 2109, but what was not before the Court --

QUESTION: Congress expanded what the Constitution required.

MR. HELLERSTEIN: Well, the Court did not hold in Miller, as I understand it, Mr. Chief Justice, that it was construing the Constitution in terms of knock and announce. It was --

QUESTION: No, I say Congress expanded what the Constitution required and the officers had not met that expanded requirement.

MR. HELLERSTEIN: It may well be. It may well be, but that has nothing to do with the issue in this case in the sense of the question of being able to enter without a warrant. It was not presented.

The prosecution in closing out its brief, I don't think the arguments of a rush to get the warrant -- we are not talking about exigent circumstances which can be very substantial. It talks about such things as the rubber stamp, that if you hold that the warrant is required for a felony arrest within the home in this case, the magistrate is going to begin to rubber stamp these things.

I think that is entirely out of sync. It is not synchronized with what this Court feels about the role of the magistrates and the importance of the independent judgment of the magistrate.

Another argument that the prosecution makes is that if you require a warrant -- I call it the irrevocable arrest of the innocent argument, which Mr. Zimroth puts forth, that once a warrant is issued it must be executed, that if an officer gets a warrant that says you are directed to bring to the court this fellow, he must do so, but that is not true. It is not true under the New York law, and it is not true under any law that I know. If an officer gets information that undercuts the basis for that warrant, he isn't obligated to go and arrest an innocent man.

There are two arguments that the prosecution makes that --

QUESTION: But he is still authorized to arrest the man whom he now thinks is --

MR. HELLERSTEIN: But he doesn't have to do it. He can --

QUESTION: It is an authorization, not a command, that is your point.

MR. HELLERSTEIN: Yes, sir.

The last two arguments that Mr. Zimroth makes is that if you require a warrant you are going to reduce the scope of suppression hearings because there will be less for defense lawyers to do. And tied to that is the reduction of possible damage suits against officers because they now have warrants.

I should have thought of those arguments. I am sorry I didn't in my brief. But those seem to be exactly the kinds of arguments that should come as a logical consequence of the warrant -- it should be a desirable outcome. Why should we have to have extensive suppression hearings based on who did what, to whom, and if there is a warrant that a magistrate has passed upon? More importantly, why should police have to be at their peril with respect to making these judgments?

QUESTION: Wouldn't it just transfer all the focus of the suppression hearing from the grounds to the warrant to whether or not there were probable cause to enter the home though?

MR. HELLERSTEIN: It has been my experience that

hearings which are directed to contraverting warrants, and my experience has been greater in the search warrant area, are much more limited, namely they really go to whether it is perjury in the underlying affidavits. They do not rehatch all of the factual determinations which were presented to the magistrate unless there is a -- I think this Court has so held --

QUESTION: Well, Aguilar held more than that.

MR. HELLERSTEIN: Well, I think --

QUESTION: It held that a warrant --

MR. HELLERSTEIN: -- policy arguments simply do not support the source from which they come is my only point. That being the case, I would say none of the policy arguments are worth this Court declining to follow the logic of the decisions and to hold that a warrant is required in non-exigent circumstances for an arrest in the home.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Zimroth.

ORAL ARGUMENT OF PETER L. ZIMROTH, ESQ.,

ON BEHALF OF THE APPELLEE

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

Mr. Hellerstein is asking this Court to in a very drastic manner change the balance of accommodating interests that have been with us from the earliest of recorded history

on this subject until relatively recently.

The accepted manner in which the lawfulness of an entry into a home to make an arrest of a felon was quite clear, and that is that the officers brought the defendant into custody and then the judicial system mobilized in a very substantial manner to test two things, first the factual predicate for the arrest, and, second, the manner of execution of the arrest.

This was a judgment of people who were very sensitive to the needs of privacy and in fact the very same people created the protections that subsequently became the protections of the Fourth Amendment with respect to search warrants. In fact, the system that I have outlined, if I may borrow the words of Mr. Justice Powell in the Gursten v. Pugh case, where he said there are indications that the framers of the Bill of Rights regarded it -- meaning this system that I have just outlined -- as the model of a reasonable seizure under the Fourth Amendment.

Mr. Hellerstein I think is simply incorrect when he says that there was a substantial dispute about this prior to the adoption of the Fourth Amendment. There were many disputes about the manner in which the lawfulness of arrests were to be tested, but those disputes were about the standards to be applied in the litigation after the defendant was brought into custody and not disputes about whether or not

there should be a magistrate interposed in the on-going system of -- on-going investigation.

The entire -- the common law authorities and the framers of the Fourth Amendment recognized that this was an accommodation of competing interests, it was a substantial protection against illegal arrest in the home and elsewhere. There was an additional protection against illegal arrests in the home by the requirement that the officers knock and announce their authority, as the Chief Justice mentioned earlier, which is now law in most states, in many states by statute, and the purpose was to minimize the need for force, to give the people inside the ability to submit peacefully to the authorities of the officer, but again these standards were tested in litigation after the defendant or the subject was brought into custody.

The entire burden I think of Mr. Hellerstein's argument is that we have a search warrant requirement and therefore we must have an arrest warrant requirement. And if I may summarize the many reasons I think that those two powers and warrants are vastly different before I get into the argument.

In the first place, the community's interests are vastly different in the two kinds of powers. The effect on the law enforcement function are vastly different; and, thirdly, the search power is much more extensive and more

intrusive than the arrest power and the need for a warrant requirement is much greater. These are the very reasons why the two powers have been treated differently for so much of our history.

Mr. Hellerstein says that there will be no burden on law enforcement if you interpose a magistrate before the arrest. This Court has examined that argument twice relatively recently, once in gersten v. Pugh, where Mr. Justice Powell called this an intolerable handicap for legitimate law enforcement. That characterization was repeated in Watson both by the majority and then by Mr. Justice Powell in concurrence again where he said that the interposition of a magistrate will "severely hamper effective law enforcement," and in fact it would severely hamper effective law enforcement. Any one requirement will have to be seen from the perspective of the police officers who are going to have to live with this requirement.

Just as an example, where Mr. Hellerstein criticizes the police in Payton for not getting a warrant after the afternoon of January 14th, he says that they knew the name of the defendant and that they knew -- they looked at his building and he says they did nothing. He says they did nothing after that until the next morning.

Well, that is simply untrue. What they were doing is further investigation, the kind of investigation that

should be fostered by this Court, and the police should not be diverted from that kind of investigation in order to go get a warrant which would be a very time-consuming process. In fact, what they were doing was trying to put together a photo array so that they could know what the defendant looks like and also what they were doing was to try to find out where the defendant was. Knowing where the defendant's apartment is is very different from knowing where the defendant is.

Here we have a defendant who two days earlier shot and killed the manager of a gas station and on that same night he goes to his friend and admits to the friend that he did it and also tells the friend that he is going "somewhere." This is the same defendant who must have known that two, perhaps three people in the gas station knew the defendant. It seems to me knowing the defendant's address in a circumstance like that is, as I say, very different from knowing where he is at any particular moment.

It also seems to me that that is exactly the kind of situation in which the police should be encouraged to do further investigation and should not be diverted from that investigation by the very time-consuming process in which a warrant would be.

QUESTION: How long does it take to get a warrant in New York?

MR. ZIMROTH: Mr. Justice Marshall, in this particular

case, since there was no warrant requirement, there is nothing in the record; however, in a case --

QUESTION: But since you and I both know Manhattan, I wonder how long --

MR. ZIMROTH: I think it would be a very substantial amount of time. Can I go through for you the steps that the police would have to do to get a warrant, so you could see how substantial it would be?

The first thing the police would have to do from the moment they decide, well, now is the time we have to get a warrant, they would have to gather together all the facts. Now, in this particular investigation there were many police officers who were doing this investigation, not just one. They would have to gather those facts and put them into some presentable form to present to a prosecutor, not to a judge but first to a prosecutor. And the reason for that is that under New York law, as is true in some other states, you cannot get an arrest warrant until you initiate the criminal prosecution. That is not a police decision, that is a prosecutorial decision.

So you have to take all of those facts and you have to go down to the prosecutor's office. Now, I have personally been involved in questioning police officers about their investigations. It is not a process which any responsible prosecutor would just slough off because it is the initiation

of a criminal prosecution that is at stake, and the more complicated the investigation, the more complicated the questioning in --

QUESTION: Did he do all of this before he broke in the man's door?

MR. ZIMROTH: Your Honor --

QUESTION: Did he do all of this before he got the crowbars and tore the man's door off?

MR. ZIMROTH: No, sir, he did not. There was no warrant requirement.

QUESTION: Well, shouldn't he have?

MR. ZIMROTH: No, sir, he should not have because it --

QUESTION: He shouldn't have thought over very carefully as to whether he had the right man or not?

MR. ZIMROTH: Of course he should have thought very carefully whether he had the right man.

QUESTION: I thought so. But after that couldn't he have just dropped by the magistrate's office?

MR. ZIMROTH: Absolutely not. He cannot drop by the magistrate's office. He has to first drop by the prosecutor's office and --

QUESTION: Well, did he drop by the prosecutor's office before he tore the man's door down?

MR. ZIMROTH: No, sir.

QUESTION: So he can tear the man's door down without going by the -- not only without getting a warrant, but he doesn't even have to check with the prosecutor to tear a man's door down.

MR. ZIMROTH: Under the law --

QUESTION: Isn't that your theory? Isn't that your theory of the law in New York?

MR. ZIMROTH: Absolutely, it is, yes. After he goes to the prosecutor's office in order to get a warrant, there is still much more that has to be -- then at that time you first get into the problem --

QUESTION: May I just be sure I follow your argument. Are you saying in substance that there are a good many cases in which police officers think they have probable cause but the prosecutor says there isn't enough here to justify a warrant?

MR. ZIMROTH: No, sir, but there are cases in which the prosecutor would say you have probable cause but I am not going to authorize the initiation of a criminal prosecution because I don't think we have enough to convict.

QUESTION: Then in those cases would it be appropriate for the police officer to go out and arrest him?

MR. ZIMROTH: Yes, it might. It might, because, for example, one reason might be that the typical situation is if there has been a photo array, as there was in this case.

We know, as prosecutors, that photo arrays, although there may may not be probable cause, are not the most reliable in terms of convincing a jury. The police may have to get the defendant into custody first so that they can have a lineup. In order to have a lineup and if the complainant picks the defendant out of the lineup, then you obviously have a much stronger case.

So all I am suggesting is that this warrant process is not a one, two, three affair. It is a very time-consuming situation --

QUESTION: I don't know that you finished really. You say that it is a several step process, and I think you have just given us the first step, you go to the prosecutor. I assume you persuade the prosecutor that there is enough evidence for him to initiate a criminal prosecution. Then what?

MR. ZIMROTH: Then you have all of the paper work attendant to filing the case in court, and if you are lucky the court will be open at that time. You can't get --

QUESTION: This is a matter of New York law, a matter of New York law, all of this has to precede the issuance of an arrest warrant?

MR. ZIMROTH: Yes, sir.

QUESTION: Is that your point?

MR. ZIMROTH: Yes, sir. You can't --

QUESTION: Constitutionally it doesn't.

MR. ZIMROTH: No.

QUESTION: It is just a matter of New York law.

MR. ZIMROTH: Yes, but --

QUESTION: Practice and procedure.

MR. ZIMROTH: It is a matter of New York law which says that you can't get an arrest warrant until you have a criminal action that is begun.

QUESTION: Initiated.

MR. ZIMROTH: Initiated, that's true.

QUESTION: So then the prosecutor files the --

MR. ZIMROTH: I don't know how many other states have that, but I do know that New York is not alone in this.

QUESTION: So he files the information -- New York does not require grand jury indictment, does it?

MR. ZIMROTH: For a felony, yes, it has to be --

QUESTION: For the purposes of a search warrant, it can be just information.

MR. ZIMROTH: For an arrest warrant, yes.

QUESTION: I mean an arrest warrant.

MR. ZIMROTH: Yes.

QUESTION: And then information is filed and then what happens?

MR. ZIMROTH: Then the case would go to a grand jury. Oh, you mean --

QUESTION: To get an arrest warrant.

MR. ZIMROTH: To get an arrest warrant, you go into court and you have to docket the case and then you have to wait your turn on the calendar, you go before a judge and the statute then says --

QUESTION: Who is "you" now? Who has to wait?

MR. ZIMROTH: The prosecutor and the policeman --

QUESTION: The prosecutor or the policeman?

MR. ZIMROTH: It will be a prosecutor probably and a policeman. Then you go into court and if the judge -- who by the way is doing a lot of other things at that time -- will see you, he then has the option to question the police officer or question the basis. Prior to this criminal procedure law, there was some suggestion in the law that he was required to go beyond just what was before him on paper and question the police officer, and then if he is satisfied that there is probable cause he would issue the warrant.

QUESTION: And only a judge can issue a warrant in the state of New York? Do you have magistrates or --

MR. ZIMROTH: Well, the magistrates are the criminal court judges.

QUESTION: Period, there are no other magistrates?

MR. ZIMROTH: In New York City, I am pretty sure that is true.

QUESTION: Are you telling me there are no magistrates

in New York City?

MR. ZIMROTH: I am saying that the magistrates are the criminal court judges, which is --

QUESTION: Aren't there magistrates holding magistrate court --

MR. ZIMROTH: Those courts have been --

QUESTION: It is the same man who is now a judge?

MR. ZIMROTH: Yes, sir, the same man is now a judge.

QUESTION: Mr. Zimroth, the Second Circuit doesn't seem to be too worried about the impact of such a constitutional holding on police practices.

MR. ZIMROTH: Yes, they are.

QUESTION: What?

MR. ZIMROTH: Yes, they are, and --

QUESTION: I know, but they know that in habeas corpus they are going to be facing this same issue out of the New York courts. I suppose they are not going to say that it is unconstitutional for federal marshalls or for the FBI to arrest without a warrant, and yet it is all right for a state officer.

MR. ZIMROTH: I can't account for their --

QUESTION: And certainly the people who have joined in those opinions in the Second Circuit have been -- they are New York lawyers.

MR. ZIMROTH: But their experiences are really with

a different system, Your Honor. I was an Assistant United States Attorney and now I am a state prosecutor. There are a lot of differences, the resources are much different --

QUESTION: Have the Second Circuit or the federal courts applied the Second Circuit rule in federal habeas corpus proceedings?

MR. ZIMROTH: I am not aware of any, Your Honor.

QUESTION: Well --

MR. ZIMROTH: I am not aware of any decision and also my colleague points out to you that I think they would be foreclosed from applying this rule in federal habeas corpus proceedings --

QUESTION: Stone.

MR. ZIMROTH: Stone v. Townley. So it is a very different --

QUESTION: Meanwhile, while all of these things are going on, what is happening out at the ranch, as it were?

MR. ZIMROTH: That is exactly the problem.

QUESTION: What is happening?

MR. ZIMROTH: Well, what is happening is that the defendant is --

QUESTION: Well, I suppose they could get four or five policemen and surround the house, couln't they?

MR. ZIMROTH: They could do that, but on the other hand it seems to me that it would be very wrong for the court

require that kind of conduct. It is dangerous --

QUESTION: I am just asking you what they would do to prevent the man from getting out.

MR. ZIMROTH: Realistically --

QUESTION: If he then tries to walk out of the house, they can, of course, arrest him, I take it.

MR. ZIMROTH: Yes. That is required in a stakeout, and I think that is a very dangerous thing; whether they would do it, I don't know. I suppose in some cases they would and in other cases they would --

QUESTION: It would depend upon the severity of the crime, I suppose?

MR. ZIMROTH: And the manpower of that particular squad. That is another problem with this arrest warrant requirement, because it is going to be applied to in the neighborhood of 22,000 police departments around the United States and also in an infinite variety of investigations, so that really it is unpredictable in any particular case, it is unpredictable.

QUESTION: In this case, could he have gotten it in 18 hours?

MR. ZIMROTH: Could he have gotten the warrant in 18 hours?

QUESTION: Yes, sir.

MR. ZIMROTH: I assume so.

QUESTION: Well, why didn't he?

MR. ZIMROTH: The facts --

QUESTION: The facts were given to him at noon on one day and they broke into his place at 7:30 the next morning.

MR. ZIMROTH: The facts were not given to him at noon on one day. They were given to him at noon on the day before, but they had one person saying that he recognized the man who did the job --

QUESTION: Didn't he take them to the place and show them the building?

MR. ZIMROTH: That was much later.

QUESTION: It was?

MR. ZIMROTH: Yes, sir.

QUESTION: How much later?

MR. ZIMROTH: That was well into the afternoon, into the evening.

QUESTION: In a minute he would be where he could get it to a magistrate.

MR. ZIMROTH: Excuse me?

QUESTION: In a minute, if a guy is as expeditious as he was, he could have gotten a warrant.

MR. ZIMROTH: The issue isn't really --

QUESTION: The difference is very simple, with the warrant the man keeps his door and his privacy. Without the

warrant, he loses his door.

MR. ZIMROTH: Not necessarily. The warrant does not protect privacy in that manner. You can butt down the door with a warrant, too. What would have happened if the police had a warrant in this case, they would have busted down the door in exactly the same way, because they saw --

QUESTION: But they might not have gotten the warrant. They might not have been able to convince the magistrate that they were entitled to it. Wouldn't he have kept his door then?

MR. ZIMROTH: Well, if you say they wouldn't have gone to arrest this man, obviously they wouldn't have broken down his door, that's true. I don't think that it is fair to suggest, however, that the requirement will somehow be a quantum of additional protection to what the residents already have. I mean it seems to me you have to be concerned with the fact that you are talking about thousands and thousands of cases and the possibility of trivializing the warrant process.

QUESTION: Mr. Zimroth, do either of the respondents challenge the probable cause for arrest in these cases?

MR. ZIMROTH: No, sir. Nor, I heard Mr. Hellerstein say, was there probable cause to believe that the defendant was in a particular location which is, by the way, a requirement under the state law,by statute.

QUESTION: Even though it is his own residence?

MR. ZIMROTH: You need --

QUESTION: I can understand the requirement of probable cause to believe that he is somewhere else --

MR. ZIMROTH: No, sir.

QUESTION: -- but does state law require probable cause to believe that he is in his own home?

MR. ZIMROTH: Absolutely. It is in some ways one of my points, more protection than a warrant requirement would be.

QUESTION: Except that a warrant requirement requires the disinterested third person to evaluate probable cause, that is the protection.

MR. ZIMROTH: Probable cause to believe that the defendant committed the crime, it is not probable cause to believe that the defendant is in a particular location which is required in the state law which is, as I say, more protective than the warrant requirement would be, assuming that it is an arrest warrant -- which, by the way, Mr. Justice Rehnquist asked this question -- every court that I am aware of has held that there needs to be a warrant requirement, says there has to be an arrest warrant requirement. The Prescott case, which is a Ninth Circuit case, that Mr. Hellerstein refers to, was a case of an entering of a third party's residence. Although I do concede that there is dictum

in that case which suggests that the Ninth Circuit would require a full blown --

QUESTION: It is based on dictum when it says the warrant, whatever it is, the warrant must describt the place to be searched and the thing to be seized, which in this case is a person.

MR. ZIMROTH: I agree. I mean that particular entry I think was in the girl friend's house of the defendant, it wasn't the defendant's apartment or house in that case.

QUESTION: Well, what do you conceive to be the real practical difference, if you want to talk practicalities, between the jurisprudence that your prudential approach on persons and things? You say historically you don't need a warrant to enter a house to make an arrest, but I take it -- I guess you were going to say because people are so mobile and can escape. But how about things? They can leave the person with the person.

MR. ZIMROTH: It is not only that the people are mobile and can escape, but in many situations when you talk about arrest, it is fair to suppose that the defendant or suspect knows of the police interest before the police -- at the very same time that the police are examining the evidence, it is fair to suppose that the defendant knows of the police interest makes it a very volatile situation which is very different from the search warrant situation. If you take

take eavesdropping, for example, which is the arch typical search warrant situation, the --

QUESTION: Yes, but that would lead, let's say, that you wouldn't need a warrant to go in a house to get a gun. You think the gun is in the house, you can get a search warrant, you have probable cause but you need the warrant, although the man that you suspect could easily leave the house with the gun.

MR. ZIMROTH: I am not suggesting --

QUESTION: You just don't have probable cause to arrest him yet, you have probable cause to believe the gun is in the house though.

MR. ZIMROTH: I am not suggesting that there won't be any situations in which a search would not be volatile. Obviously there will be suchsituations, and I am talking about as a gross matter, and that is why the judgment was made.

There is a second very important point and that is the point of numbers. Take New York City, for example. In New York City last year, there were 107,000 felony arrests. In New York County, which is Manhattan, one of the five counties of New York City, there were 36,000 felony arrests. There were in the order of 600 search warrants issued in New York County last year.

QUESTION: So you suggest that even if there are a lot of cases, when you think that a warrant might reasonably

be required, you just say that you need a broad rule that people can -- a bright line of some kind.

MR. ZIMROTH: Absolutely, because --

QUESTION: Do you know how many of those arrests were in public places, or do you know how many of them were under exigent circumstances?

MR. ZIMROTH: No, I don't. But --.

QUESTION: Wouldn't you guess that a large proportion were one or the other or both?

MR. ZIMROTH: No. I do know that Mr. Hellerstein cited a study -- and we cited the same study in our brief -- that finds that fully half the felony arrests in urban centers in this country take place two hours or more after the commission of a crime. So I think it is fair to say that the police officers do not necessarily know in advance where to find the defendant. So those are the situations, at least that is the universe from which the police officers are going to have to go get a warrant because they are not going to know in advance where to find him.

QUESTION: Isn't part of the montage or whatever you want to call it, the argument analogous to Mr. Justice Stewart's comment in the earlier case that perhaps the most logical thing to do in connection with the Fifth Amendment is to ask the suspect did you do it or not, and if not tell us where you were and so forth? It is logical, but the Fifth

Amendment prohibits it, and there are lot of things in the Constitution that are prohibited that perhaps if we were to reexamine them today we wouldn't necessarily incorporate. But by the same token --

MR. ZIMROTH: What it means by its terms is it talks about reasonableness.

QUESTION: Yes, but by the same token it dervies historical antecedence and if there are a long chain of historical antecedents perhaps you would say that logically one situation may not be too different from another, but it has been long established that you need probable cause to get a search warrant for a gun in a house and the contrary may be true if --

MR. ZIMROTH: Absolutely, I think they are both true, but it is not only historical antedecence, I think there is great logic to it, and the logic of the difference between the way that the two situations are treated is, as I have suggested that the arrest situation is much more volatile, also the community's interest in the two situations is very different.

Obviously, it is very important for police officers to gather evidence to convict someone of a crime, but that interest it seems to me palls next to the interest of the community in getting the defendant into custody so that the civilizing processes of law can be brought to bear on his

particular case, so guilt or innocence can be decided by a court. There is no -- in my judgment, there is no law enforcement or community interest that is greater than that, and that is another reason why -- and there is a third reason why -- and maybe I am up to the fourth or fifth reason why there is a big difference, and that is that the power to search is a much broader power. Evidence of a crime can be anything, it can be anywhere, and it can be in anybody's custody, especially now.

The need for a requirement, even independent of the finding of probable cause, to limit the scope of the search, to tell the police officer what he can look for and where, and also to tell the subjects of the search what can be looked for and where is crucially important, and that is very different from the arrest power which is by its nature very, very limited. It is obvious to everybody concerned, you don't need a warrant to tell police officers what the object is. It is one particular person, and what to do with that person is to bring him before a court, and those are some of the reasons for the historical difference, Mr. Justice Rehnquist.

And unless there are any further questions --

QUESTION: Well, you make a point in your supplementary brief that I suppose would lead to the consequence that even if we decide against you, our decision should be

prospective only?

MR. ZIMROTH: It should not apply to this particular case.

QUESTION: It should not apply to these cases.

MR. ZIMROTH: Yes, sir.

QUESTION: Relying, as you do, upon a decision of the Court late last term.

MR. ZIMROTH: Among others.

QUESTION: Well --

MR. ZIMROTH: For that reason, we made that point in our --

QUESTION: Michigan v. DeFillippo.

MR. ZIMROTH: Yes. We made that same argument in the --

QUESTION: In your original --

MR. ZIMROTH: -- in the original brief, but we just updated it withe DeFillippo and --

QUESTION: You haven't addressed yourself orally to that point at all.

MR. ZIMROTH: No, sir. What I can say about that, Your Honor, is that in 1970, when these officers made entry into this apartment, there was almost nothing that they could have seen around them that would have led them to believe that they should not follow the statute that they were following. That statute had been on the books for a hundred

years, it was not a dead letter, it was part of the living law of the state of New York. It was not a jarring exception. Thirty out of thirty-six states that had legislated on this subject had precisely the same authorization. There wasn't a hint in anything in this Court that any sort of that conduct was illegal in any way.

QUESTION: Well, there were hints from this Court, weren't there, in 1970?

MR. ZIMROTH: Certainly one, and that is Coolidge.

QUESTION: How about Jones.

MR. ZIMROTH: Jones was a nighttime infringement, and the Court was very specific --

QUESTION: When was Warden v. Hayden decided?

MR. ZIMROTH: Warden v. Hayden was previous, but I think it is fair to say that it wasn't until -- wasn't it previously -- well, I think it is fair to say that it wasn't until your decision in Coolidge --

QUESTION: You submit that there were no hints --

MR. ZIMROTH: That was a hint.

QUESTION: Yes.

MR. ZIMROTH: So --

QUESTION: Well, what is New York law said -- what if a statute of New York said in this state no warrants of any kind shall be required for any searches and seizures of any kind, the law had been clear for a hundred years?

MR. ZIMROTH: There is no law enforcement official in this country who would not tell a police officer, I don't care what that statute says, you had better watch out, there is trouble ahead if you obey that statute. If these police officers had come to a group of law enforcement officials and professors of law and judges at that time and said, what should we do, shall we follow this statute, I think what those people would have said is absolutely, it is the law and --

QUESTION: Well, you are employees, you are officers of the state of New York and that is the legislature of the state of New York. That is very natural advice to give. So it would also I guess with my hypothetical statute.

MR. ZIMROTH: No, sir, not true. For example, myself as a prosecutor, if a police officer came to me in that situation that you posited, I would say -- probably I would say don't follow the statute, but if I didn't say that, I would at least say follow it at your risk, and I wouldn't have said that in 1970 in this situation, and I don't think anybody else would have said it, either.

QUESTION: Well, it doesn't apply to this case because they didn't go to any official.

MR. ZIMROTH: I have nothing further.

MR. CHIEF JUSTICE BURGER: Mr. Hellerstein, do you have anything further?

ORAL ARGUMENT OF WILLIAM E. HELLERSTEIN, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. HELLERSTEIN: I have nothing further, sir.

MR. CHIEF JUSTICE BURGER: Very well.

QUESTION: Mr. Hellerstein, I have a question, Mr. Chief Justice, if I may.

MR. CHIEF JUSTICE BURGER: By all means.

QUESTION: Do you agree with him about how long it takes to get a warrant?

MR. HELLERSTEIN: Not at all.

QUESTION: I didn't think you did.

MR. HELLERSTEIN: First of all, just to answer that, Mr. Zimroth is talking within the context of our existing statutory framework that says the court will only give you warrants when you commence prosecution, you have to see the prosecutor. But that isn't what this case is about. We are police officers, can get warrants without having to see the prosecutor as they do in those jurisdictions.

QUESTION: Thank you.

MR. HELLERSTEIN: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:28 o'clock p.m., the case in the above-entitled matter was submitted.)

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