

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

UNITED STATES, :

Petitioner :

v. : No. 02-473

LASHAWN LOWELL BANKS. :

- - - - -X

Washington, D. C.

Wednesday, October 15, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

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

RANDALL J. ROSKE, ESQ., Las Vegas, Nevada; on behalf of the Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
DAVID B. SALMONS, ESQ.	
On behalf of the Petitioner	3
RANDALL J. ROSKE, ESQ.	
On behalf of the Respondent	30
REBUTTAL ARGUMENT OF	
DAVID B. SALMONS, ESQ.	
On behalf of the Petitioner	52

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-473, the United States v. LaShawn Lowell Banks.

Mr. Salmons.

ORAL ARGUMENT OF DAVID B. SALMONS

ON BEHALF OF THE PETITIONER

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

The officers in this case went to respondent's apartment on a weekday afternoon to execute a valid search warrant for drugs. They knocked loudly and announced their purpose. They waited at least 15 to 20 seconds without hearing any response and then forcibly entered the apartment. Those actions were reasonable under the Fourth Amendment.

The Ninth Circuit concluded otherwise based on its adoption of a rigid, four-part categorical approach to knock and announce cases that is fundamentally at odds with this Court's precedents in two critical respects. First, it is inconsistent with the flexibility that is an essential feature of this Court's totality of the circumstances test, and second, it turns primarily on the need to damage some property in order to effectuate an

1 entry, a factor that under this Court's reasoning in
2 Ramirez should have no relevance to whether the entry at a
3 particular time was itself lawful.

4 QUESTION: Did the court here say that these
5 were the only -- the only four factors?

6 MR. SALMONS: No, Your Honor. What the court
7 here did -- and I would refer the Court to -- to page, I
8 believe, 6a of the appendix to the petition for
9 certiorari, actually beginning on page 5a. What the court
10 does is it first creates four basic categories of knock
11 and announce cases, and those categories are defined by
12 two factors, one being the presence of exigent
13 circumstances and the other being the need to damage
14 property.

15 And then on page 6a, what it does is it says
16 that the essential question of whether the entry was
17 reasonable is approached in the following way. First, we
18 characterize -- and this is the first full paragraph on
19 page 6a. In addressing that inquiry, we characterize
20 entries as either forced or non-forced, meaning either
21 property is damaged or not damaged. The reasonableness
22 must then be determined in light of the totality of the
23 circumstances. Now, the court does list a number of
24 factors that it thinks are relevant.

25 QUESTION: And -- and it says that -- that those
26

1 factors are not exclusive. They say they're -- they
2 include but are not limited to.

3 MR. SALMONS: That's correct, Your Honor. And
4 we take no issue with its list of non-exclusive factors in
5 terms of whether those factors are relevant to the
6 question under the totality of the circumstances test.
7 The difficulty we have with the Ninth Circuit's approach
8 in this case is that it has engrafted a rigid property
9 destruction rule onto the Fourth Amendment's flexible
10 standard of reasonableness and onto this Court's totality
11 of the circumstances test.

12 In other words, what the court of appeals does
13 is it requires that where an entry is non-forcible, again
14 meaning no property need be destroyed, then the officers
15 must wait a significant amount of time before entry. But
16 where some property damage is required, it would require,
17 quote, an explicit refusal of admittance or the lapse of
18 an even more substantial amount of time.

19 And we think that that both is inconsistent with
20 the totality of the circumstances standard because it
21 imposes this rigid rule of property damage, and it's
22 inconsistent with Ramirez which makes clear that the need
23 to damage property, although it's certainly relevant to
24 the ultimate question of whether the manner of the
25 execution of the warrant is reasonable under the Fourth
26

1 Amendment, it's not a relevant inquiry into whether the
2 entry at a particular time is itself lawful.

3 QUESTION: Doesn't -- excuse me.

4 QUESTION: Go ahead.

5 QUESTION: No, please.

6 QUESTION: I just had this -- I was just curious
7 about one aspect of property damage and so forth. If a
8 citizen's property is damaged by this, who pays for the
9 damage?

10 MR. SALMONS: Well, Your Honor, there is --
11 there is a statute that Congress has enacted and that is
12 31 U.S.C. 3724, and that authorizes the Attorney General
13 to pay out sums of money up to, I believe, \$50,000 to pay
14 for any damage to property that may result from law
15 enforcement activities. The way that it typically works,
16 as I understand it, Your Honor, is that there is a
17 significant fund set up based on forfeiture assets, and
18 that those funds are used to pay for damage to property
19 that may result during the course of -- of a search or --
20 or other law enforcement activities.

21 Typically what happens is the law enforcement
22 officers will not leave the premises until it is at least
23 secured, and then they provide forms or other information
24 so that individuals can make claims --

25 QUESTION: I see.

26

1 MR. SALMONS: -- for any property that is
2 damaged. And -- and at least with regard to Federal law
3 enforcement practices, those claims are readily paid out
4 and there are funds to do so through the forfeiture
5 proceeds.

6 QUESTION: Of course, that would have -- that
7 would not apply. This was really a State search rather
8 than a Federal search even though it was --

9 MR. SALMONS: This was a joint search, Your
10 Honor. This was a -- the -- the search was conducted by a
11 joint task force. There were both local police officers.
12 They were at the front door. There was an FBI agent at
13 the back door. We think that this search, although it's
14 not in the record -- I don't know exactly how it occurred
15 in this case with regard to whether any claims made for
16 damage to the door. But because the FBI was involved in
17 the search, typically that -- they -- they -- that
18 information would be provided.

19 QUESTION: I see.

20 QUESTION: Do they pay the claim if -- if in
21 fact the -- the person is arrested and is there and is --
22 and does have marijuana?

23 MR. SALMONS: Your Honor --

24 QUESTION: Do -- do you pay only if you're -- do
25 you get paid only if you're innocent?

26

1 MR. SALMONS: It -- it depends, Your Honor.
2 There are -- there are factors that are considered. I'm
3 -- I'm not entirely sure of -- of what all of them are.
4 If there is -- I would -- my understanding is that if
5 there is -- certainly if there was another individual that
6 lives in the home or -- or otherwise, that even though the
7 entry was -- was reasonable and the need to destroy or
8 damage property was reasonable, if there were other people
9 in the home, the officer -- the -- the Federal law
10 enforcement officials typically pay that.

11 QUESTION: Well --

12 MR. SALMONS: And even when there's not, they
13 often do as well.

14 QUESTION: Well, this is a background issue, and
15 -- and I don't mean to take you away from talking about
16 the Ninth Circuit's case in response to Justice Scalia's
17 question.

18 QUESTION: Mr. Salmons, may I ask you one
19 question on -- on your timing point? Your claim is that
20 the -- that the issue of property damage is irrelevant to
21 the question of reasonable timing as distinct from
22 reasonable execution. I understand your argument when we
23 are dealing with a situation in which there is an -- an
24 exigency, a set of circumstances that said you've got to
25 act fast.

26

1 My question, though, goes to the situation in
2 which there is no exigency. You're -- you're executing a
3 warrant for -- to seize a stolen grand piano or something.
4 No property is going to be destroyed if you wait a little
5 bit longer. In that case, where there is no exigency, not
6 at the beginning, none develops while you're waiting,
7 doesn't the issue of property damage have some relevance
8 to the question of timing? In other words, if there's no
9 risk that anything is going away, isn't it reasonable for
10 the police to say, okay, give them another minute or
11 something like that?

12 MR. SALMONS: We submit, no, Your Honor, and for
13 the following reason, that in -- typically the -- the
14 standard would -- that would be applied in this kind of a
15 context would be whether the officers had waited
16 sufficiently long so that they could reasonably conclude
17 that there was a constructive denial of admittance or
18 that, as you indicate, other law enforcement -- excuse me
19 -- other law enforcement concerns may justify a more
20 prompt entry.

21 In the hypothetical that you gave, none of those
22 other law enforcement concerns are present, and so the
23 question then, we submit, would be whether the officers
24 could reasonably conclude that they had been
25 constructively denied admittance. And there, the need to
26

1 damage some property, if it exists at all, is a
2 consequence of the denial of admittance, not a factor as
3 to whether the denial had in fact occurred.

4 QUESTION: But when -- when you're dealing --
5 let's -- let's take the case in which the exigency
6 develops while you're waiting. One reason why it is
7 reasonable to -- to suspect that you are being denied
8 admittance, let's say, in a case where drugs are easily
9 disposable is that there is good reason to believe that
10 somebody would -- another 10 or 20 or whatever seconds
11 will use the 20 seconds to get rid of the drugs, if
12 possible. You don't have any basis for drawing that kind
13 of a conclusion in the grand piano case, and there --
14 there is less reason to believe, less reason to suspect
15 that you are actually being denied admittance as opposed
16 to simply being the victim of somebody who's slow at
17 getting the -- to the door. Isn't that a fair line of
18 reasoning?

19 MR. SALMONS: I mean, I think the distinction
20 Your Honor makes between those types of cases is a
21 legitimate one. We still think though, however, that the
22 need to damage property is really not a factor that goes
23 into whether entry at a particular time was reasonable
24 under the circumstances. It's a consequence of the denial
25 -- excuse me. It's a consequence of the occupant's
26

1 failure to respond within a reasonable time period.

2 QUESTION: But -- but maybe --

3 QUESTION: Are there -- are there guidebooks?

4 Is there any manual that Federal law enforcement officers
5 use that will say in -- in a knock and announce situation,
6 these are the relevant factors? Do they suggest a time, a
7 time span that would be appropriate?

8 MR. SALMONS: Your Honor, there is training that
9 occurs, although to my understanding, there's not a
10 specific amount of time that's -- that's provided to
11 officers that they need to wait as some sort of minimum.
12 Rather, consistent with this Court's cases, the -- the
13 guidelines and -- and the training that's conducted
14 teaches the officers that they must take into account the
15 totality of the circumstances. That would include factors
16 like how large of -- of a dwelling it is, what time of day
17 it is.

18 QUESTION: But there's nothing -- nothing
19 written down that suggests how many seconds, no manual
20 that Federal law enforcement --

21 MR. SALMONS: To my knowledge, that is correct.
22 The -- it used to be the case, as I understand it, that
23 there was a suggested amount of time and that was 30
24 seconds when there are no other law enforcement concerns
25 that are at issue, but that currently the training that is
26

1 conducted just focuses on the totality of the
2 circumstances and that they need to wait a reasonable
3 period of time, and if there are no other law enforcement
4 concerns at issue, then that reasonable period of time is
5 typically considered to be how long it would take to
6 conclude that you were constructively denied admittance --

7 QUESTION: But not if there are -- but not if
8 there are other law enforcement concerns.

9 MR. SALMONS: That's correct. If there are
10 other concerns --

11 QUESTION: I mean, what troubles me is you --
12 you can't simply announce that -- that the rule is you
13 wait a reasonable amount -- what -- what constitutes a
14 reasonable of time is how long it would be expected
15 someone would take to get to the door. You -- you can't
16 adopt that as your uniform rule because otherwise, you'd
17 have to use the same amount of time whether there are
18 exigent circumstances or not.

19 MR. SALMONS: That -- that --

20 QUESTION: If it takes 20 seconds usually, it
21 takes 20 seconds.

22 MR. SALMONS: That -- you are correct, Your
23 Honor.

24 QUESTION: That's not right. Is it?

25 MR. SALMONS: And that's a function -- I'm
26

1 sorry.

2 QUESTION: That isn't quite right. Because
3 certainly in a motel room, it would be less time than it
4 would in a mansion.

5 MR. SALMONS: No. Absolutely.

6 QUESTION: No. I'm just saying the exigent
7 circumstances would not alter what is a reasonable time.

8 MR. SALMONS: And that's why we submit that the
9 relevant question is not just how long it would take for a
10 person under those circumstances to get to the door. The
11 -- the analysis must take into account as well valid law
12 enforcement concerns. And -- and all this -- what I think
13 all this illustrates is what this Court has repeatedly
14 said, which is this is a contextual analysis that has to
15 be based on the totality of the circumstances. There's no
16 mechanical rule --

17 QUESTION: Well, but may -- may I just
18 interrupt?

19 MR. SALMONS: -- or a reasoned way to apply it.

20 QUESTION: It's not how long it would take a
21 person to get to the door. It's how long a period must
22 elapse before it's reasonable to infer that the person has
23 refused to come to the door.

24 MR. SALMONS: You're correct. You're correct,
25 Your Honor. That -- and that would be -- that would be
26

1 where there are no other valid law enforcement concerns
2 that would warrant --

3 QUESTION: Well, yes, but -- but that also is
4 not affected by the existence or nonexistence of -- of
5 exigent circumstances. So the exigent circumstances sort
6 of override --

7 MR. SALMONS: Yes.

8 QUESTION: -- how long it would take a
9 reasonable person to get to the door.

10 MR. SALMONS: That -- that's -- that is my
11 understanding, Your Honor, and I think that's exactly
12 right. I would also --

13 QUESTION: Mr. Salmons, are you relying on
14 exigent circumstances here because it was a drug case or
15 not?

16 MR. SALMONS: Your Honor, in this case, let me
17 begin by pointing out that we submit that the 15 to 20
18 seconds that the officers delayed in this case is a
19 substantial amount of time. And it's no -- it's really
20 nowhere close to the constitutional line.

21 QUESTION: Well, could you answer my question?
22 Are you relying? We have to reweigh this, I assume, and
23 do you want us to treat this as an exigent circumstance
24 case or not? Yes or no?

25 MR. SALMONS: No, Your Honor, to the extent
26

1 that --

2 QUESTION: Okay.

3 MR. SALMONS: -- by your question you're
4 referring --

5 QUESTION: That's what I'm asking.

6 MR. SALMONS: The only reason I hesitated is
7 because I think the term exigent circumstances can be a
8 bit ambiguous, and this is not a case where the Government
9 has suggested that the officers were entitled to forego
10 knocking and announcing at any point in the process.

11 QUESTION: This was a small apartment, was it?

12 MR. SALMONS: Yes. This was a small apartment.
13 It was in the middle of the afternoon.

14 QUESTION: What size?

15 MR. SALMONS: It was a two-bedroom apartment.
16 I'm not sure of the square footage. There are some
17 diagrams of the apartment in the joint appendix. The
18 testimony of the officers was that it was sufficiently
19 small that the officers located in the back of the
20 apartment could hear the knock and announce at the front
21 door.

22 QUESTION: Does it make any difference if the
23 occupant says, wait a minute, I'm in the shower, I'm
24 coming?

25 MR. SALMONS: Well, certainly that would be a
26

1 factor that would then go under the totality of the
2 circumstances standard. Whether or not -- I mean, there
3 are a lot of other things that the officers would have to
4 consider, including whether they're being truthful,
5 whether they can hear water running, whether there's still
6 a risk that they may have drugs with them in the shower,
7 dumping them down the drain.

8 QUESTION: But in response to Justice O'Connor's
9 question, there are no exigent circumstances of the type
10 that would eliminate the need to knock and announce at
11 all.

12 MR. SALMONS: That's correct, but there are
13 still --

14 QUESTION: Are you going to go on to say that
15 there are some other exigent circumstances that are in the
16 background here that --

17 MR. SALMONS: Well, certainly --

18 QUESTION: -- that counsel against waiting more
19 than 20 seconds?

20 MR. SALMONS: Absolutely, Your Honor. In fact,
21 even though there may not be sufficient concerns about
22 officer safety or the destruction of evidence to forego
23 knocking and announcing altogether, those are still valid
24 law enforcement concerns in the context of a case like
25 this where the officers are there to execute a warrant for
26

1 drugs. The officers are -- have strong evidence that
2 there are, in fact, drugs in the apartment. They did a
3 controlled buy not long before they went to execute the
4 warrant, and there is the risk at a minimum of the
5 destruction of evidence, and that those are factors that
6 have to be taken into account.

7 QUESTION: And that would be true in almost any
8 drug case where the officers know that drugs are in -- are
9 -- are in the premises or have reason to believe that
10 drugs are in the premises.

11 MR. SALMONS: Certainly I think the potential
12 for that concern is present in almost all -- and not just
13 drug cases, but any case where the -- the evidence to be
14 sought through the search is subject to -- to readily
15 destruction and --

16 QUESTION: And you say that's not enough to
17 forego knock and announce, but it is enough to shorten the
18 time period that you have to wait.

19 MR. SALMONS: Yes, Your Honor, that -- that it's
20 not enough to -- at least in the context of this case,
21 that there was not enough reasonable suspicion of those
22 concerns to forego knocking and announcing altogether, but
23 those factors still have to be taken into account under
24 the totality of the circumstances in evaluating whether
25 the officers here waited a reasonable period of time.

26

1 QUESTION: Well, Mr. Salmons, as I --

2 QUESTION: It sounds to me you're asking us to
3 adopt the kind of per se rule that we rejected in the case
4 that came to us from Wisconsin in -- in the Richards -- in
5 the context of -- of determining how long is -- is --
6 they're required to wait.

7 MR. SALMONS: No. I think not, Your Honor.
8 We're not suggesting some rigid rule that applies in all
9 cases. What we're suggesting is that as part of the
10 totality of the circumstances, it -- it must be the case
11 that the officers that are going to execute the warrant
12 can take into account the fact that the evidence they're
13 seeking is readily disposable. That -- all we're
14 suggesting is that should be a factor. It should into the
15 analysis, and generally that would be a factor that would
16 tend to cut in favor of a prompter entry.

17 QUESTION: But isn't it true that the -- the
18 purpose of the analysis is to decide whether or not the
19 silence is the equivalent of a refusal? Because the
20 statute requires a refusal. And if that's true, I -- I am
21 really kind of puzzled as to why the possibility of
22 disposing of drugs affects the time period.

23 MR. SALMONS: Your Honor, I think we would
24 disagree with your characterization of the purpose of the
25 inquiry at least in part, and that is that as Justice
26

1 Souter's question earlier pointed out, in a case where
2 there are no concerns that would -- that would warrant a
3 more prompt entry, we think the question is whether a
4 reasonable officer could conclude that he had been
5 constructively denied admittance. But -- but where there
6 are those concerns, even if they don't rise to the level
7 of foregoing knocking and announcing altogether --

8 QUESTION: But isn't --

9 MR. SALMONS: -- they're factors that cut in
10 favor of a prompter entry.

11 QUESTION: But isn't it true, if you just look
12 at the language of the statute, the inquiry is always has
13 there been a refusal?

14 MR. SALMONS: That is the way --

15 QUESTION: If you're not relying on exigent
16 circumstances, when you just go on in anyway.

17 MR. SALMONS: That is the way in which the
18 statute is worded, Your Honor. This Court has --

19 QUESTION: And that's what it means too, isn't
20 it?

21 MR. SALMONS: Well, we think not, Your Honor.
22 This Court has never felt that the -- that the terms of
23 this statute are to be construed literally. In fact, if
24 the Court were to start doing so, it would need to
25 overturn a number of its prior cases, including in Miller,
26

1 where it read the statute to reach arrest warrants -- or
2 even arrests without warrants; Sabbath, where it read
3 forcibly break to not require any showing of force. What
4 the Court has held that it really --

5 QUESTION: Those -- those are all breaks in
6 favor of the -- of the citizen. This is a break that is
7 not in favor of the citizen. There -- there may be some
8 of us who are willing to twist the statute for the benefit
9 of the citizen, but not for the benefit of the Government.

10 QUESTION: Maybe others who feel equally.

11 MR. SALMONS: Your Honor, I think --

12 (Laughter.)

13 MR. SALMONS: I think there may be a more benign
14 explanation, which is this Court has recognized that what
15 this statute does is it filled a gap. There's a
16 historical explanation that this statute filled a gap that
17 then existed in Federal law because this Court had not
18 incorporated or -- or subsumed the common law principles
19 of knock and announce into the Fourth Amendment and many
20 States had. And so what Congress did was -- and this
21 Court reaffirmed this in Ramirez not long ago, that what
22 the statute does is it codifies the common law tradition
23 of knock and announce, and that includes all the
24 exceptions to knock and announce.

25 QUESTION: Mr. Salmons?

26

1 QUESTION: How do they get out of it? Because
2 how do you say -- I mean, suppose the person from behind
3 the door says, oh, police, you'd like to come in. I'll
4 let you in. Come right in, but just wait 1 minute while I
5 flush the drugs down the toilet.

6 (Laughter.)

7 QUESTION: Now, he's not refusing him
8 admittance. I mean, he's welcoming him. So how -- how is
9 the Court -- with open arms. He's delighted to have him
10 in. He says, it'll just take a second.

11 (Laughter.)

12 QUESTION: And -- now, how -- how -- how has the
13 law reconciled that which is obvious that he ought to --
14 the police ought to be able to get in there -- with the
15 statute that says they cannot come in unless he refuses
16 the police admittance? And he hasn't.

17 MR. SALMONS: Right. You point out a very good
18 point, Your Honor, and that's why this Court has said that
19 -- that the statute can't be read literally and instead --

20 QUESTION: I don't think they read it --

21 QUESTION: I don't think it's a good point at
22 all. I think refusing admittance means refusing prompt
23 admittance. It doesn't say you can come in next week.
24 That's refusing admittance. Knock, knock, I want to come
25 in. You can't come in now. You can come in next week.

26

1 MR. SALMONS: The -- the point I was attempting
2 to make, Your Honor --

3 QUESTION: That's refusing admittance.

4 MR. SALMONS: The point I was attempting to
5 make, Your Honor was that what this Court has recognized
6 repeatedly, and it said in Ramirez it was now decisively
7 holding and resolving the question, and that is that the
8 statute here, 3109, is not to be read literally but merely
9 is to be read as a codification of the common law
10 tradition of knock and announce. And as this Court
11 indicated in its decision in Wilson, that common law
12 tradition is a flexible one, and it's one --

13 QUESTION: Does that flexibility mean that there
14 really isn't this bright line between exigent and
15 nonexigent? There's kind of a spectrum. So while it's
16 not exigent enough to do away with the knock and announce,
17 there is then a difference between the case Justice Souter
18 posed of the grand piano and the warrant is to search for
19 drugs which could easily be -- be disposed of.

20 MR. SALMONS: We submit so, Your Honor. We
21 think that --

22 QUESTION: So it's not 100 percent exigent, but
23 neither can one say it's nonexigent.

24 MR. SALMONS: That's -- I believe that is our
25 position, that -- that although there were not sufficient
26

1 exigencies in this case to justify foregoing knocking and
2 announcing altogether, that the officers here were -- were
3 permitted to take into account the risks inherent in
4 executing a warrant in this kind of a context, including
5 the risk of destroying of that --

6 QUESTION: May I ask this question? Does a
7 citizen have a right to make sure that they're really
8 officers by getting a copy of the warrant or something
9 like that? Could he -- could a citizen come to the door
10 and say, slide the warrant under the door and I'll look at
11 it and I'll let you in if I think you're genuine?

12 MR. SALMONS: I'm not aware of case law on that,
13 Your Honor. I -- I -- presumably they -- they are
14 permitted to do that. Again, all of that would go into
15 the totality of the circumstances. Any response from the
16 occupants I think are things that the officers --

17 QUESTION: Because the occupant -- I can
18 conceive of situations in which an occupant might be
19 concerned that perhaps it's not a genuine law enforcement
20 officer. It's somebody who wants to hold up the house,
21 you know.

22 MR. SALMONS: Well -- well, certainly one of the
23 purposes of the knock and announce rule, Your Honor, is to
24 provide notice to the occupants that it is the police that
25 are attempting to come in so that it increases public
26

1 safety and -- and protects both the officers and the
2 occupants.

3 QUESTION: What time did this take place?

4 MR. SALMONS: This took place at 2 o'clock on a
5 Wednesday afternoon, Your Honor.

6 I think one of the remarkable things about the
7 Ninth Circuit's decision in this case is that the
8 officers' delay here really was nowhere close to the
9 constitutional line. 15 to 20 seconds is a substantial
10 delay. Even if this Court were to conclude this case
11 based only on the question of whether they had been
12 constructively denied admittance, we think these other
13 factors warranted a prompter entry here.

14 And in fact, the testimony of the officers in
15 this case suggests that. The officer from the Nevada
16 police that was at the front door stated that he waited a
17 long time in this case because he thought there was some
18 chance that the case may go to Federal court, and he
19 wanted to make sure that there were no knock and announce
20 concerns.

21 The FBI agent at the back of the -- of the
22 apartment testified that he -- he became concerned about
23 the length of the delay. He described it as unusually
24 long and stated that he was concerned that the occupant
25 might be attempting to flee from another way.

26

1 This is simply not a case that's close to the
2 line, and for the Ninth Circuit to hold that the officers
3 in this case were required to wait some additional period
4 of time that's unspecified, in addition to the 15 to 20
5 seconds, really does pose threats to law enforcement
6 officials engaged in the front-line law enforcement
7 activities in the jurisdictions covered by the Ninth
8 Circuit.

9 QUESTION: Going back to Justice Scalia's
10 initial question, the Ninth Circuit opinion is wrong
11 because?

12 MR. SALMONS: Your Honor, the Ninth Circuit
13 opinion is wrong because it adopts a rigid property
14 destruction rule and engrafts it onto the totality of the
15 circumstances test. And that rule is one not flexible
16 enough to be consistent with the totality of the
17 circumstances test and, two, is inconsistent with this
18 Court's decision in Ramirez which indicated that the
19 question of the timing of an entry is distinct from the
20 question of the manner in which the entry and the warrant
21 itself are executed. The destruction of property may very
22 well constitute a violation of the Fourth Amendment if it
23 is needless or wanton, but that, as this Court said in
24 Ramirez, does not make the entry unlawful and it doesn't
25 require suppression. And so --

26

1 QUESTION: Do you -- do you think that the
2 dissenting judge Fisher got it essentially right?

3 MR. SALMONS: Well, certainly we think that
4 Judge Fisher was correct when he indicated that one of his
5 concerns about the court of appeals -- the panel's
6 decision in this case was that it didn't follow its own
7 list of factors.

8 We also think Judge Fisher was correct when he
9 indicated that all one needs do is do a thought experiment
10 and think to yourself, police, search warrant, and count
11 out 15 to 20 seconds to see how long a period of time this
12 really was.

13 QUESTION: Do you -- do you say that the -- the
14 property line is improper only when there are exigent
15 circumstances or in all situations?

16 MR. SALMONS: Your Honor, we submit that it is
17 not relevant to the question of the timing of the entry in
18 all circumstances.

19 QUESTION: You mean a -- a police officer
20 shouldn't wait any longer before he rips my door down,
21 leaving the house exposed to -- to burglars than he --
22 than he has to wait when that isn't necessary, when the
23 door is open and he can just walk in?

24 MR. SALMONS: That -- that's correct, Your
25 Honor, and let me explain why.

26

1 QUESTION: Why isn't that part of the totality
2 of the circumstances?

3 MR. SALMONS: The reason we think, one, flows
4 from this Court's decision in Ramirez where the Court
5 differentiated between the timing of the entry and the
6 need to damage property.

7 And two, it's important to keep in mind what the
8 officers in that situation have to take into account.
9 They're -- they're waiting and they have to -- they have
10 to consider how long they have to wait to either conclude
11 that they've been constructively denied admittance --

12 QUESTION: Right.

13 MR. SALMONS: -- or that there are valid law
14 enforcement concerns that require entry at that time.

15 QUESTION: I'm -- I'm excluding the latter. I'm
16 saying there are no other exigent circumstances, not even
17 the -- the moderate exigent circumstances that are not
18 enough to enable you to go in without knock and announce.
19 There are just no other exigent circumstances.

20 MR. SALMONS: Your Honor, in that case --

21 QUESTION: There's no reason whatever. All
22 they're looking for is how long is it reasonable to wait
23 for me to come to the door. And you're -- you're telling
24 me it is just as reasonable for them to have to wait only
25 15 seconds when their entry simply requires walking in and
26

1 still 15 seconds when it requires them to bash in the
2 door. That doesn't seem to me to be a -- an application
3 of totality of the circumstances.

4 MR. SALMONS: Your Honor, we would disagree
5 because, first of all, it's -- it's going to be -- it's
6 often going to be the case that the officer, at the time
7 he makes the decision that he's been constructively denied
8 admittance, doesn't know whether the door is locked or
9 not, and he really can't be put in a position where he has
10 to check the doors and windows to see whether any are
11 unlocked before he's allowed to enter. He's -- he has a
12 warrant that authorizes him to go in, forcibly if
13 necessary, secure the premises and search for the evidence
14 covered by the warrant. That's what happened here. The
15 fact that the door happened to be locked or unlocked is
16 really not a factor that the officers can take into
17 account at that stage of the process. And it --

18 QUESTION: Should we consider these two
19 possibilities in Justice Scalia's case?

20 Possibility one, no exigency again, just take
21 his premises as -- as he gave it. Possibility one, the
22 police knock on the door; they say, police, search
23 warrant. A guy on the inside says, I don't want to see
24 you. The police say at that point, come on, we're
25 serious. We've got a warrant out here. Open up.

26

1 Possibility two, same thing. The guy says, I
2 don't want to see you. The police bash the door down.

3 Isn't the fact that the police could say, come
4 on open up, we're serious a factor to take into
5 consideration in deciding whether, at the point the fellow
6 says I don't want to see you, it's right for them to bash
7 the door down?

8 MR. SALMONS: Again, Your Honor, we think the
9 relevant inquiry is whether a reasonable officer could
10 conclude that he had been constructively denied
11 admittance.

12 QUESTION: Exactly, and if that's --

13 MR. SALMONS: And it seems to me under your
14 hypothetical, he probably could.

15 QUESTION: And I -- I think so too. That's why
16 I put it that way.

17 MR. SALMONS: And so --

18 QUESTION: If that is the only question that you
19 ask, I think you are taking a very narrow view of totality
20 of circumstance.

21 MR. SALMONS: Well, again, Your Honor, in -- in
22 -- I see my time is almost up. We think that flows from
23 the principle this Court followed in Ramirez that the
24 timing of the entry needs to be separated from the manner
25 in which the entry and the search is conducted. That's
26

1 where property concerns come into play.

2 If I may, I'd like to reserve the rest of my
3 time for rebuttal.

4 QUESTION: Very well, Mr. Salmons.

5 Mr. Roske, we'll hear from you.

6 ORAL ARGUMENT OF RANDALL J. ROSKE

7 ON BEHALF OF THE RESPONDENT

8 MR. ROSKE: Mr. Chief Justice, and may it please
9 this Court:

10 This case is about whether your door, my door,
11 and everyone's door is worth 15 seconds. This case
12 presents the component of the knock and announce statute
13 that's the refusal component that this Court has not
14 addressed previously in any of its decisions.

15 In Wilson, you said that this rule is of
16 constitutional magnitude, and in the Wisconsin v. Richards
17 case, you said there can be no blanket exceptions to knock
18 and announce just based on the -- the kind of case it is.
19 And then we see in Ramirez the Court talks about 3109 and
20 -- and so we see a line of cases where from Miller where
21 we were dealing with sort of an oversight of the -- the
22 Court's decisions overseeing the criminal justice system
23 from a Federal standpoint --

24 QUESTION: Well, now, wasn't Ramirez a no-knock
25 entry where the door --

26

1 MR. ROSKE: That's true.

2 QUESTION: -- was bashed in?

3 MR. ROSKE: That's true. And there were --

4 QUESTION: And this Court said that could comply
5 with the Fourth Amendment?

6 MR. ROSKE: Yes. And the -- the Court in -- in
7 Ramirez noted that there were all kinds of indications and
8 evidence known to the officers of the person, the suspect,
9 the fugitive that they were looking for being armed,
10 dangerous, likely to resist forcibly the officers, and
11 officer safety exceptions --

12 QUESTION: But we didn't apply the statute
13 literally there.

14 MR. ROSKE: No. You never have, as far as I
15 understand the Court's decisions, applied a literal
16 interpretation of the 3109.

17 QUESTION: Ramirez was a break-in -- a -- an
18 entry into not the house of the person who was -- who was
19 sought, but someone else's house where he was thought to
20 be staying. The -- the damage was done not -- not -- to
21 someone who was concededly innocent.

22 MR. ROSKE: Well, he wasn't concededly --

23 QUESTION: Well, he had a -- he was a felon in
24 possession they found.

25 MR. ROSKE: That is correct. That case involved
26

1 a fugitive who was not the known occupant of the
2 residence, and they had developed information that this
3 individual was, however, staying at the Ramirez residence.

4 QUESTION: One thing I thought that the Ninth
5 Circuit opinion really was contrary to Ramirez was its
6 stress on property damage, which -- which Ramirez made
7 quite clear was not determinative.

8 MR. ROSKE: Well, I think that the circuit,
9 Ninth Circuit, has focused on property damage as, you
10 know, we have a statute that talks about breaking, and it
11 sees that in -- in the context of delay as requiring more
12 time.

13 QUESTION: Well, we also have an opinion, e.g.,
14 Ramirez, which the Ninth Circuit didn't even cite, which
15 says that property damage is not controlling.

16 MR. ROSKE: Well, and that's true and I -- I
17 concede that is so. And I would submit to the Court that
18 you can decide that those guideposts cited by the Ninth
19 Circuit are flat wrong and reach the ground there that it
20 is entirely reasonable under a totality of the
21 circumstance test that you affirm the decision. You can
22 do a decision saying that the guideposts are simply wrong
23 under Ramirez, but the result under a totality of the
24 circumstances test is correct.

25 QUESTION: When you say it's wrong, well, the
26

1 argument the other way is what they said. In the lower
2 court, the Ninth Circuit says that the police waited a
3 maximum of 15 to 20 seconds, and the police say and the
4 Government says that's way more than enough time to flush
5 the drugs down the toilet. All right? So every other
6 circuit has said 10 seconds, 15 seconds, is the maximum, 6
7 seconds, and even the Ninth Circuit has normally held that
8 15 to 20 seconds is long enough to wait when it's a small
9 house, daylight so people are awake, and all it would take
10 is about 2 seconds to get rid of the evidence. So they've
11 all said that.

12 And this case, they say, is an outlier. This is
13 well beyond what every other circuit has done and doesn't
14 make any sense. All right? Because the drugs will just
15 be destroyed.

16 Now, what's your response to that? That's the
17 basic argument. I'd like to hear your response.

18 MR. ROSKE: Well, the response would be that,
19 yes, the modern marvel of indoor plumbing does provide an
20 avenue for the destruction of evidence. It also provides
21 people the opportunity to shower themselves. And this is
22 the archetype kind of activity that occurs in the home
23 which the privacy concerns are the greatest for. And --
24 and --

25 QUESTION: So your view is the Fourth Amendment
26

1 then says even though you have a warrant, probable cause
2 for believing there are drugs there, and it's easy to get
3 rid of them, there's just nothing the police can do about
4 it except not prosecute the drug cases in these
5 situations.

6 MR. ROSKE: 15 seconds is a -- is virtually no
7 time at all to respond to a door.

8 QUESTION: Why is --

9 QUESTION: What does the shower have to do with
10 it? Is -- is it your contention that a reasonable time is
11 how long it takes somebody to complete a shower?

12 MR. ROSKE: No, but that's the kind of --

13 QUESTION: Well, then -- then of what relevance
14 is the shower?

15 MR. ROSKE: The relevance --

16 QUESTION: It seems to me it's of no relevance
17 at all. This fellow said he was taking a shower. Well,
18 surely you don't have to wait as long as it takes the
19 normal person to complete a shower.

20 MR. ROSKE: I agree.

21 QUESTION: And presumably dry himself and
22 presumably put on a towel.

23 MR. ROSKE: Grab a towel. In this case, we
24 don't know how long Mr. Banks would have continued the
25 shower, whether he would have become aware of the -- of
26

1 the officers at his --

2 QUESTION: We don't know and we don't care
3 because that surely does not determine what's a reasonable
4 time to wait.

5 MR. ROSKE: Right. But the -- but the point of
6 the shower is this. Anybody that's in -- in a home, in a
7 dwelling, and in a community such as we have that's 24
8 hours, anything could be being -- sleeping and other
9 activities where that would cause someone to be unable to
10 respond within 15 seconds can occur.

11 QUESTION: First, just a quibble. But I read
12 the lower court as saying 15 to 20 seconds, and I take it
13 as 20 seconds because given that statement, had this been
14 20 seconds, they would have said it was unlawful. And so
15 if in fact you concede that 20 seconds is too long, then I
16 guess I'd have to reverse or is -- you know. So -- so
17 what I want -- I'm -- I'm taking the outer limit of what
18 they said.

19 Now, on that, I want to be sure I've got a
20 complete answer from you because I was pushing you, and so
21 far I've said all the circuits say 15 to 20 seconds is
22 certainly enough time for the policemen to wait where it's
23 a drug case, a small house, and you could easily get rid
24 of the evidence. In response to that, you said that you
25 thought that 15 seconds -- but you should say 20 -- is --
26

1 is actually -- they have to wait that long. Now, is there
2 anything other than your opinion, which I respect, but --
3 but what I'd like to know is whether there is any basis in
4 authority or reason or something, other than that, that
5 would support your position.

6 MR. ROSKE: All of the cases that were cited in
7 the briefs I tried to distinguish as having differences
8 that were fundamental to the case, the sole occupant, for
9 instance, they note --

10 QUESTION: Well, why don't we take the Ninth
11 Circuit's own subsequent case where it has a footnote?
12 This is the Chavez-Miranda --

13 MR. ROSKE: Right, Your Honor.

14 QUESTION: -- where the court said, Banks
15 appears to be a departure from our prior decisions. As
16 noted by the trial court, we have found a 10- to 20-second
17 wait to be reasonable in similar circumstances.

18 MR. ROSKE: I think that the court in Chavez-
19 Miranda focused on the fact there were numerous occupants
20 in the -- in the residence and that even if -- if one or
21 two were engaged in some kind of private activity, the
22 others would be able to respond quickly to the door.

23 QUESTION: But why is -- isn't 15 to 20 seconds
24 ample, if the question is reasonable time, in a small
25 apartment to get to the door to open it?

26

1 MR. ROSKE: It's not reasonable because it's
2 virtually no time at all. If you're in the bathroom on
3 the toilet, if you're in the bedroom naked --

4 QUESTION: It's the time -- it is the time in
5 which a telephone would ring at least twice and perhaps
6 three times. Usually people pick up a phone after the
7 second ring. If they can manage to do that, why wouldn't
8 one expect the same interval would apply in getting to the
9 door?

10 MR. ROSKE: Well, there are plenty of times that
11 you may be home and you don't get to the phone in time
12 because you're engaged in some activity that -- that
13 prevents you from immediately responding. And that's the
14 point of this case. They had --

15 QUESTION: No, but isn't -- isn't the problem
16 that -- that Justice Ginsburg is asking you about what is
17 a reasonable time, and your answers always get to the
18 point of saying, well, there are particular facts that
19 might have taken somebody longer than a reasonable time.
20 And -- and that, of course, is always true. They might
21 have been asleep at 2:00 in the afternoon. They might
22 have been sick with a virus so that they couldn't get up
23 quickly. There are all sorts of reasons. But the issue
24 is -- is an issue of a reasonable time under the
25 circumstances known to the officer. Isn't that correct?
26

1 MR. ROSKE: I believe that we cannot simply
2 measure the -- the test from the eyes of the officer. You
3 have a duty --

4 QUESTION: Well, they're the ones who have to
5 decide how long to wait.

6 MR. ROSKE: Right, and they -- what did they
7 know? They knew nothing in terms of exigent
8 circumstances. And I would like to call the Court's
9 attention --

10 QUESTION: Yes, but --

11 QUESTION: They -- they knew they were dealing
12 with drugs, that the warrant was to search for drugs.

13 MR. ROSKE: They knew that they were searching
14 for drugs, yes, and not grand pianos. But the Fourth
15 Amendment, as you -- as you interpreted it in your cases,
16 that -- you know, we just don't get rid of the refusal
17 component or the knock and announce rule simply because
18 drugs are involved.

19 QUESTION: You don't get rid of it, but as I
20 suggested to Mr. Salmons, maybe there isn't this dichotomy
21 between exigent and nonexigent, but that it's not exigent
22 enough to avoid knock and announce altogether. On the
23 other hand, it isn't like the grand piano. That's not
24 going down the toilet.

25 MR. ROSKE: Well, if you look at the appendix,
26

1 joint appendix, at page 75, and see what the officer said
2 about why he entered, he simply said that he thought that
3 15 seconds was reasonable and that this case might go
4 Federal and they've heard about problems with this. And
5 he doesn't mention anything about a concern that evidence
6 is being flushed or that he heard anything. And remember,
7 again, this is a small apartment. If he heard the toilet
8 flushing, presumably he'd heard that.

9 QUESTION: Let me -- let me talk about the small
10 apartment. Might it not be the rule that when -- when
11 there are exigent circumstances, the amount of time you
12 have to give has nothing to do with how long it takes to
13 get to the door. It has to do with how long it's
14 reasonable to wait with -- without impairing the law
15 enforcement purpose that is threatened by the exigent
16 circumstances?

17 I cannot imagine, can you, that -- that people
18 dealing with drugs are perfectly safe so long as they do
19 it in a really big house with lots of toilets?

20 (Laughter.)

21 QUESTION: Okay? So you have to wait 45
22 seconds. They could way over at the other end of the
23 house. What is a reasonable time for this house? It's 45
24 seconds. So let's do all of our -- all of our drug
25 activity in -- in a big house. That can't be the rule.

26

1 It seems to me the reasonable time is what is
2 reasonable to go in in order to prevent the exigent
3 circumstance from frustrating law enforcement. Doesn't
4 that make more sense?

5 MR. ROSKE: I think that the test should be a
6 protecting of the individual's rights from intrusions that
7 are unreasonable, and that all deference should not be
8 given to law enforcement officers' decisions. In this
9 case, he didn't suggest at all that he had to go in
10 because he thought drugs were being chucked in the
11 commode. It's not there in the record and nowhere in --
12 in -- below or in the Ninth Circuit did the Government
13 argue such a theory. They simply said it was a reasonable
14 period of time.

15 QUESTION: Well, but if -- if we're to decide
16 this case on the basis of reasonableness, certainly we've
17 got to take into consideration common sense factors that
18 may be suggested other than by the officer at the door.

19 MR. ROSKE: Well, that's correct, but I think
20 this Court has a supervisory power and it has to not
21 abdicate all decisions to the officer at the door. And
22 this officer has simply made a subjective decision there,
23 saying that was what he understood would be reasonable.
24 There was an earlier --

25 QUESTION: Mr. Roske, do you -- do you have a
26

1 period of time that you would agree was reasonable?

2 MR. ROSKE: Well, I do note that the Ward case
3 cited in my brief talked about the FBI adopting some 60-
4 second rule. Obviously, that would have been about 45
5 seconds more time than -- than was here. I think that you
6 can't set a bright line rule and -- and that it has --

7 QUESTION: Can you set a rule for the facts of
8 this case?

9 MR. ROSKE: Well, we need to set a prophylactic
10 rule that recognizes the -- the dignity and the importance
11 of the refusal component. In this case --

12 QUESTION: I know, but what do you think that
13 rule is?

14 QUESTION: Length-of-the-shower rule.

15 (Laughter.)

16 QUESTION: For this case.

17 MR. ROSKE: I'm -- I'm suggesting that --

18 QUESTION: Well, no. I think you have agreed
19 the fact he's in the shower really is irrelevant because
20 the officers didn't know it, and you must judge these
21 things ex ante not ex post.

22 MR. ROSKE: Right. And I -- I agree. Just as
23 they -- if they had heard the toilet flushing repeatedly,
24 that might be a factor to hasten their --

25 QUESTION: No, but I'm still curious if you --

26

1 if you do have a view as to what would be reasonable on
2 the facts of this case.

3 MR. ROSKE: Well, I think that -- that certainly
4 15 seconds was an unreasonably short period of time, and
5 that --

6 QUESTION: I understand you think 15 to 20
7 seconds is unreasonable. Do you have a view as to what
8 would have been reasonable?

9 MR. ROSKE: I believe that a -- a wait towards a
10 minute might be more reasonable under these facts where
11 they have absolute -- see, they're confronted with silence
12 at the door. It's not as if there's anything giving them
13 any kind --

14 QUESTION: Yes, but so you have to be contending
15 that the Constitution requires them to wait -- the
16 Constitution and the statute required them to wait a
17 certain period of time that was longer than 15 to 20
18 seconds.

19 MR. ROSKE: What we're --

20 QUESTION: And if so, I just wonder if you have
21 a theory as to how much longer.

22 MR. ROSKE: Well, I -- I --

23 QUESTION: I know say that 60 minutes -- 60
24 seconds would have been okay.

25 MR. ROSKE: Honestly, I don't know what would be
26

1 a figure to put on that. I just know that this 15 to 20
2 seconds was too little time.

3 QUESTION: Well, would you be making the same
4 argument if it had been 30 seconds? Let's put it that
5 way. Would you be here --

6 MR. ROSKE: It would --

7 QUESTION: -- making this same argument?

8 MR. ROSKE: My argument would be less strong as
9 more time passed. In this fair city, you're given 30
10 seconds to cross a major boulevard according to the -- the
11 flashing time, and Mr. Banks had less than 15 to respond
12 to his door.

13 QUESTION: I thought it was 15 to 20, the point
14 Justice Breyer made.

15 MR. ROSKE: Well --

16 QUESTION: You keep saying 15, but I thought --
17 I thought we took the facts --

18 MR. ROSKE: Well --

19 QUESTION: -- as 15 to 20. Do we not?

20 MR. ROSKE: The officer --

21 QUESTION: Is there something else?

22 MR. ROSKE: The officer conducting the entry
23 testified that it was at least 15 seconds. Now, the FBI
24 officer -- or agent in the back of the building thought it
25 was closer to 20. I submit that the officer who --

26

1 QUESTION: And what did the court below treat it
2 as?

3 MR. ROSKE: 15 to 20 seconds.

4 QUESTION: So don't we just take that as a given
5 in resolving it? You don't want us to redetermine the
6 facts, do you?

7 MR. ROSKE: No, I do not wish the Court to -- to
8 redetermine the facts. I just simply point out that of
9 the two time frames that were cited below in the record,
10 the officer at the door was in the better position, I
11 believe, to know how much time elapsed since he was
12 conducting the entry.

13 QUESTION: But -- and he says it's a minimum --
14 a minimum of 15, and you used the word maximum a few
15 times. There's no evidence of 15 maximum .

16 MR. ROSKE: At least 15 seconds is the quote
17 that I have at -- at page 75 of the joint appendix of the
18 officer Wilson.

19 And the refusal component of the -- of the knock
20 and announce statute is, of course -- it's not frozen in
21 time, I understand, but it was considered to be an
22 important element and component of the -- of the knock and
23 announce statute. It wasn't some -- it had dignity. It
24 had purpose, and its purpose is served, including the
25 protection of the officers, when they come to the door and
26

1 knock at a citizen's residence.

2 And they knock at a substantial number of
3 innocent citizens' residents, and their doors were 15
4 seconds to 20 seconds, absent any kind of exigent
5 circumstance at all, that they may just simply believe
6 that they're going to find drugs at the residence. I
7 cited in --

8 QUESTION: It's not that they believe. They've
9 -- they've established probable cause before a magistrate,
10 probable cause to believe that there's contraband in the
11 apartment.

12 MR. ROSKE: They did, Your Honor. And -- but
13 what I want to point out is that they waited 7 days from
14 the time they got the warrant to execute it. They
15 couldn't wait more -- a few more seconds at the time they
16 were at the threshold.

17 QUESTION: Well, I mean, you're not inclined to
18 flush it down the toilet when there's nobody knocking at
19 the door.

20 MR. ROSKE: Well --

21 QUESTION: I mean, this is valuable stuff.
22 You're going to get rid of it during those 7 days? You're
23 going to get rid of it after you hear somebody saying,
24 police at the door.

25 MR. ROSKE: Well, but in this case there was no
26

1 effort and there was nothing in the record to suggest
2 there was any destruction of evidence by Mr. Banks in this
3 case. And I think that it's an overbroad assumption that
4 every time the officers come on a search warrant for drugs
5 that the person that they're going to be searching is
6 going to go to the commode and chuck it.

7 QUESTION: Well, he was taking a shower. He
8 probably didn't even hear them at the door.

9 MR. ROSKE: He did not --

10 QUESTION: Had he not been taking a shower, he
11 might have been flushing the toilet.

12 MR. ROSKE: Well, we -- we know -- all we know
13 is that he was in the shower and that he made no effort,
14 upon hearing the door crash in, to -- to take any step in
15 that direction.

16 QUESTION: And given his condition when he did
17 come to the door, it's likely that 30 seconds wouldn't
18 have made any difference. Isn't it so?

19 MR. ROSKE: Well, the inevitable discovery
20 doctrine I know has been much raised here by the Solicitor
21 General's office in their brief, but it has no application
22 in a prophylactic rule that, of course, as the -- the
23 refusal component should be. Obviously, it's not a
24 situation this Court was confronted with in Nix where
25 there was an independent investigation finding a -- a
26

1 young girl's body, that the investigation by the community
2 to find that was wholly independent of the law officers'
3 efforts there to a -- a confession.

4 So it just has -- if -- if you find that there
5 is a violation here that -- that the inevitable discovery
6 doctrine simply would have no -- no purpose or effect in
7 -- in your determination, because if you do decide that,
8 as the Seventh Circuit has, that inevitable discovery
9 doctrine applies to all knock and announce issues, you'll
10 essentially have no judicial review. You have the title,
11 I suppose, 1983 actions that might be brought occasionally
12 but those are of no real deterrent to law enforcement.
13 They --

14 QUESTION: Going back to -- to not getting into
15 the inevitable discovery rule, but you have said that the
16 judgment of the Ninth Circuit was right although not its
17 opinion. So if you were to explain why that judgment is
18 right, what would you say? What would you say about
19 destroying the -- the door? What would you say about the
20 15 to 20 seconds? What would be the opinion that you
21 would write to justify this judgment?

22 MR. ROSKE: I would -- I would focus on the fact
23 that we're dealing with a dwelling and not an office, that
24 we're dealing with a habitation where private activities
25 occur and routinely, and that in this case there was
26

1 absolutely nothing to give the officers at the threshold
2 any additional reason or justification for acting with
3 haste. I would say that the court --

4 QUESTION: What about the -- the drugs, the --
5 the fact that it was a drug charge and that drugs were
6 thought to be on the premises? Do you not think that
7 gives then officers at least a factor other than the
8 simply bare bones thing?

9 MR. ROSKE: Well, yes, I -- I would agree that,
10 you know, obviously if it were televisions or if it were
11 grand pianos, the idea that somebody is going to chop them
12 into splinters or into fragments and the -- thwart the
13 officer's whole purpose would entirely evaporate. It was
14 argued by the Solicitor General that in fact they thought
15 that maybe the place wasn't even occupied and therefore
16 they were doing an -- a senseless or a needless act by --
17 by delaying and knocking and announcing repetitively. In
18 any event, I think that this case is -- is one where if
19 they truly believed it was unoccupied, that there would be
20 no harm and foul on the officer erring on the side of
21 caution and waiting.

22 QUESTION: Mr. Roske, going back to your
23 inevitable discovery point, was that raised by the
24 Government in the district court?

25 MR. ROSKE: Not at the district court, not at
26

1 the Ninth Circuit.

2 QUESTION: May I ask another question? We
3 talked about the case as though it involves just searches
4 for drugs. But isn't it true that in this case and in
5 fact in many cases, the officers will also pick up
6 substantial amounts of cash and weapons, which are not apt
7 to be -- neither of which is apt to be flushed down the
8 toilet, I wouldn't think.

9 MR. ROSKE: In -- in fact, in this case there
10 were three firearms recovered from Mr. Banks' apartment.
11 One of them was out on the couch in the front room. Two
12 weapons were back in the south -- I believe -- east bed --
13 west bedroom, excuse me. Southwest bedroom. And yes, and
14 there was about \$6,000 of currency located throughout the
15 apartment.

16 The dimensions of the apartment were not
17 developed below, but basically the place is about 20 by
18 33.

19 The -- the layout of the residence is put in a
20 diagram that's part of the appendix.

21 And I just want to point out that in -- in King
22 Edward I's reign, this is where we get the knock and
23 announce statute. He lived in unsettled times, and he was
24 actually out of his kingdom when the word that his father
25 had died came to him. He was on a trip from the Holy
26

1 Land, and he was in Genoa. And he had to rush back to his
2 kingdom to find it in disarray. His men were running
3 amuck. And the knock and announce statute, which hails
4 from the -- this ancient time, was passed, just to prevent
5 the kinds of abuses that we can see happening today.

6 There was a reverend in Boston that that lost
7 his life as a result of the law enforcement erroneously
8 searching a residence. Had he been given the knock and
9 announce and been able to respond to the door, maybe he
10 would he wouldn't be dead.

11 There's another instance I cited in my brief
12 about a Fortune 500 executive who had -- in the middle of
13 the night, had his home searched erroneously for drugs, and
14 he was shot several times defending his habitation.

15 These are important considerations that it's not
16 just the guilty that are protected by the knock and
17 announce rule. It is -- it is everyone that -- that
18 benefits, the innocent and the guilty.

19 QUESTION: Well, the guilty perhaps benefit more
20 than the innocent.

21 (Laughter.)

22 MR. ROSKE: True enough, but that -- but -- but
23 when -- when we have a suppression, when we have a case
24 where the court acts as it has in the Banks case, that
25 provides a lesson for law enforcement that they do heed,

26

1 and it has a deterrent effect. Your opinions do matter
2 greatly.

3 And I just think that the wise decision here
4 wouldn't be to create a bright line rule, to set in stone
5 any kind of time limit, that the totality of the
6 circumstances test decided by the Ninth Circuit is the one
7 that needs to be used. And I know that the Ninth Circuit
8 struggled with the fact that the common law knock and
9 announce provision, you know, dealt with concerns of
10 destruction of the door and destruction of the habitation
11 and concerns of privacy, a man's home being his castle.
12 And we do that no honor when in 15 seconds to 20 seconds
13 that door goes down.

14 And there was no refusal in this case, and the
15 record is entirely barren of that. And that component was
16 required at common law. And I understand at -- the
17 Constitution was not frozen, you know, at the time of the
18 enactment of the Bill of Rights. It has developed and
19 evolved, but all of the -- all of the exceptions that --
20 that have been applied by the lower courts in this area
21 are distinguishable from Banks.

22 And I thank the Court if the Court has no
23 further questions of me.

24 QUESTION: Thank you, Mr. Roske.

25 Mr. Salmons, you have 2 minutes remaining.

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

REBUTTAL ARGUMENT OF DAVID B. SALMONS
ON BEHALF OF THE PETITIONER

MR. SALMONS: Thank you, Mr. Chief Justice.

Unless the Court has any further questions, the Government submits that the judgment below should be reversed.

QUESTION: I have a question just with regard to your opposing counsel's last assertion. Do -- do you know whether the rule you're arguing for would have been applied in 1791?

MR. SALMONS: Well, Your Honor, what I do know is that as this Court indicated in its decision in *Wilson* where it incorporated the common law tradition into the Fourth Amendment standard of reasonableness, that the standard at common law was a flexible one. It didn't require knock and announce in all cases, and it took into account a variety of law enforcement concerns and, we would submit, including the risk that there might be dangers to the officer's safety or that evidence might be disposed of. So we think that our rule is perfectly consistent both with the common law tradition and with this Court's decision in *Wilson* that incorporated it.

QUESTION: But you don't disagree with the fact that the -- or the -- the claim that the statute does apply? There was a duty to knock and announce.

MR. SALMONS: That's correct, Your Honor. We're

1 not suggesting there was some exception to the knock and
2 announce rule.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Salmons.

5 The case is submitted.

6 (Whereupon, at 10:59 a.m., the case in the
7 above-entitled matter was submitted.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25