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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in case 07-751, Pearson v. Callahan.

Mr. Stirba.

ORAL ARGUMENT OF PETER STIRBA,
ON BEHALF OF THE PETITIONERS

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

At the time of the arrest in this case there were three different Federal circuits and two State courts that had established it was Constitutionally permissible for police officers to enter a home without a warrant as a follow-up entry to effectuate arrest after an illegal drug transaction when a government agent had occurred and probable cause had been established.

Although the rule has become known as the doctrine of consent once removed, and the lower courts have advanced various rationales in support of the rule, the name or label is not important. What is important is that the rule is predicated upon well recognized Fourth Amendment principles, and that at the time of the arrest the consent doctrine was well established in the lower courts as settled Fourth Amendment law.

1 Thus, irrespective of how this Court rules
2 on the constitutionality of the rule itself, the
3 Petitioner officers could have reasonably believed that
4 what they were doing was lawful.

5 CHIEF JUSTICE ROBERTS: Well, because the
6 Fourth Amendment principle of consent was well
7 established? In other words, if a police officer goes
8 to the door and says "May I come in," that is -- that is
9 perfectly acceptable. Is that -- that the level of
10 generality that you think we ought to analyze this issue
11 at?

12 MR. STIRBA: No, certainly we think that the
13 generality of just pure consent is not the level at
14 which it should be determined. In fact, that was the
15 problem with the Tenth Circuit case. But it has to
16 be -- the right has to be defined in a specific clear
17 way, and it has to be -- the contours of the right have
18 to be sufficiently clear that police officers know that
19 when they engage in the conduct, they know what they're
20 doing is unlawful.

21 In this case, Mr. Chief Justice, all of the
22 law that was in existing at the time of the entry was
23 supportive of exactly what the police officers did.

24 JUSTICE SOUTER: Well, it seems to me that
25 misses the point of the case. I mean, the point of the

1 case is that consent to the police was established,
2 consent to police informants was not, and that when I
3 consent I am not consenting to the -- to the whole
4 world. If I am consenting to somebody who is not a
5 police officer, that is not equivalent to consenting to
6 a police officer. That's the point of the case; and as
7 I understand it, there was -- there was only one case at
8 the time that this occurred which equated the
9 confidential informant for the police with the police;
10 and that was the Seventh Circuit case; isn't that
11 correct?

12 MR. STIRBA: Justice Souter, we are not --
13 we are not contending this is an implied consent case,
14 although that has been a theory that has been advanced
15 in the lower courts. We believe that the way that this
16 was constitutionally lawful -- this is really a Lewis
17 case, and that is once you engage in some illegal
18 conduct with a government agent in your home, you have
19 waived any expectation of privacy.

20 JUSTICE SOUTER: No, but that -- that
21 equates -- in terms of existing law, that equates the
22 government agent, which in this case is not a police
23 officer, but a confidential informant, with a police
24 officer. And it seems to me that is the nub of the
25 case: Is that person equivalent, so that consent to one

1 in effect is consent to as many police as want to come
2 in, or is it not the case? And it seems to me what you
3 have got to argue here is that the confidential
4 informant and the police officer for Fourth Amendment
5 purposes should be treated as identical.

6 MR. STIRBA: Absolutely. And we do -- and
7 we think --

8 JUSTICE SOUTER: And there is no clear law
9 on that. That's why we are here. There's one -- at the
10 time that this search was made, as I understand it,
11 there was only one case which held there was such an
12 equivalence, is that correct?

13 MR. STIRBA: There are two points,
14 Justice Souter. First of all, with respect to the
15 lawfulness of the confidential --

16 JUSTICE SOUTER: Well, first -- I want to
17 hear what you say, but just tell me, is it correct that
18 at that time there was one case that held the
19 equivalence?

20 MR. STIRBA: No, Your Honor. There actually
21 -- there were actually three out of the Seventh Circuit,
22 the Pollard case out of the Sixth Circuit, which
23 involved a police officer and a confidential informant
24 --

25 JUSTICE SOUTER: Which was not a circuit

1 case, right?

2 MR. STIRBA: That is a circuit case.

3 JUSTICE SOUTER: District case?

4 MR. STIRBA: That was a circuit court case,
5 U.S. v. Pollard.

6 JUSTICE SOUTER: So there were three circuit
7 court holdings that the confidential informant was
8 equivalent to a police officer?

9 MR. STIRBA: There were three out of the
10 Seventh Circuit. Paul, Diaz, and I think it's Aziano
11 were all confidential information cases where the courts
12 ruled squarely that there was no difference between a
13 confidential informant and a police officer.

14 JUSTICE SOUTER: Okay, did you -- now, do
15 you have other circuits that held that?

16 MR. STIRBA: Yes, Your Honor. The Pollard
17 case involved a confidential informant --

18 JUSTICE SOUTER: Where is Pollard from?

19 MR. STIRBA: Sixth Circuit.

20 JUSTICE SOUTER: Sixth.

21 MR. STIRBA: And they cited in support the
22 confidential informant cases from the Seventh Circuit.
23 We also read Gramble -- which is a 2000 -- I'm sorry, a
24 1995 Ninth Circuit case which talked about a government
25 agent, it did not draw a distinction between a

1 confidential informant and a police officer -- as
2 supportive as well. That's exactly what Judge Kelly
3 determined in the dissenting opinion in the Tenth
4 Circuit.

5 JUSTICE SOUTER: Okay. Now why -- why are
6 they correct? Why should the confidential informant be
7 treated as equivalent to a police officer?

8 MR. STIRBA: Well, fundamentally -- and of
9 course the test for Fourth Amendments purposes is the
10 Skinner test -- that once you are a government agent or
11 a government actor, there really is no material
12 difference in terms what the confidential informant
13 would do or the undercover police officer would do.

14 JUSTICE GINSBURG: No, but there is an
15 enormous difference between the training and the
16 character of a police officer and, as this very case
17 illustrates, the confidential informants are often very
18 shady characters who can't be counted on to be
19 truth-tellers, and have a powerful incentive to get
20 someone for the police, because in most cases they are
21 seeking to have their own case dealt with
22 sympathetically. So, how can you equate a police
23 officer with a confidential informer, who is usually
24 someone who knows where the drug house is because he's a
25 dealer himself?

1 MR. STIRBA: Two points. In our reply
2 brief, pages 6 and 7, we point out the wide variety of
3 confidential informants. They come in many different
4 shapes and sizes.

5 JUSTICE GINSBURG: How about this one?
6 Wasn't this one that fits my description, the one in
7 this case?

8 MR. STIRBA: This one clearly had a drug
9 problem. This one also attended college. This one also
10 was a star athlete in high school, and this one also was
11 reliable in a previous drug transaction. Moreover --

12 JUSTICE SOUTER: He was trying -- and he was
13 trying to make a deal to get leniency with the police.

14 MR. STIRBA: Well, there is no question
15 about that. But once again, he is a government actor.
16 For purposes of Fourth Amendment liability it really
17 doesn't matter whether it's a police officer or a
18 confidential informant, as long as he is an agent of the
19 government, which clearly he was. He was a government
20 actor --

21 JUSTICE SOUTER: But you -- you certainly
22 cannot argue -- maybe you are, but I don't see how can
23 you argue in response to Justice Ginsburg that the
24 integrity to be expected from a confidential informant,
25 taking that as a category of law including all sorts of

1 informants, is the integrity that we would expect in a
2 police officer.

3 MR. STIRBA: Well, as a general proposition,
4 Justice Souter, you can't make that kind of
5 determination. We point out in section --

6 JUSTICE SOUTER: Why can't I?

7 MR. STIRBA: Because sometimes confidential
8 informants are retired police officers; sometimes
9 confidential informants are police cadets. Sometimes
10 confidential informants --

11 JUSTICE SOUTER: Then if that -- if that is
12 true, as it clearly is, they run the gamut from the good
13 to the bad. You can't make -- adopt the proposition
14 categorically that confidential informants should be
15 regarded as having the same integrity as a police
16 officer.

17 MR. STIRBA: I wouldn't want to make that
18 statement. I don't know that it's material, though, to
19 the analysis under the Fourth Amendment and whether or
20 not, once you are a government agent or a government
21 actor, there really is no legal significance that flows
22 from that to draw a distinction between one who is
23 actually employed by the police, taking a paycheck from
24 the police, and one who is not.

25 JUSTICE GINSBURG: There's one feature of

1 this is that I think is really puzzling: What this case
2 is about is the Fourth Amendment, that requires, with
3 certain exceptions, the main rule is to get a warrant.
4 And here you have a confidential informer going to the
5 place to make sure that they really do have the goods.
6 Then he goes back to the police. He spends two hours.
7 He's being wired and whatever else. Why didn't somebody
8 pick up a phone and get a warrant at that point? The
9 confidential informer could say: "I was there and I saw
10 the drugs." What -- the whole purpose of these rules is
11 to have the police get a warrant when they can. And how
12 do you explain that two hours lapse between when they
13 had probable cause and when the -- when the informant
14 returns for the second time?

15 MR. STIRBA: Well, Justice Ginsburg, the
16 officers testified why they didn't get a warrant,
17 244-245 in the joint appendix, and 256 and 257. Two
18 problems: One, they weren't sure the drugs were going
19 to be there. These are small amounts of drugs in a
20 rural area; they dissipate very quickly.

21 JUSTICE SOUTER: We're talking about
22 probable cause. If they got a warrant within an hour or
23 two of the time that that informant says he saw them
24 there, do you seriously question whether there would be
25 probable cause?

1 MR. STIRBA: I am only going on the record
2 and what these informed officers testified to.

3 JUSTICE SOUTER: But we're asking for the
4 basis. You're asking for a rule and our questions go to
5 the reason for having that rule. And the officers may
6 have said -- and I will assume they said -- in this
7 case: Oh, gee, we weren't sure the drugs would still be
8 there. But in terms of probable cause law, that's just
9 not a serious answer, is it?

10 MR. STIRBA: Well, it is. In essence we are
11 talking about an anticipatory warrant, and under U.S. v.
12 Grubbs you not only need probable cause to believe that
13 the drugs will be there --

14 JUSTICE SOUTER: They don't even need an
15 anticipatory warrant. They need a warrant to go in and
16 search that place on the grounds that there are probably
17 drugs there, and if they saw drugs there a couple of
18 hours beforehand and they had no affirmative evidence
19 which they should bring forward under the Frank standard
20 to indicate that the drugs were being taken out, is
21 there any serious question that probable cause would be
22 found?

23 MR. STIRBA: Justice -- Justice Souter, I
24 don't believe at the time, approximately 9 o'clock in
25 the evening, the police had probable cause to believe

1 the drugs were there.

2 JUSTICE SOUTER: An informant just came out
3 and said there were drugs there and they don't have
4 probable cause?

5 MR. STIRBA: At the time of 9 o'clock, I
6 don't think it was established that there were drugs --

7 JUSTICE SOUTER: Why not?

8 JUSTICE GINSBURG: I thought it was
9 established not only that there were drugs, but that he
10 actually tasted some.

11 MR. STIRBA: He never told the police that.
12 And the purpose --

13 JUSTICE GINSBURG: But --

14 MR. STIRBA: The purpose of the operation,
15 of course, was to establish that there was in fact drugs
16 in the house. The transaction would occur and that
17 would conclusively establish probable cause. I don't
18 think we should fault the police for essentially being
19 careful before they entered the home to make sure that
20 in fact they had probable cause.

21 JUSTICE SOUTER: The reason the police are
22 being faulted is that they didn't get a warrant. And
23 the warrant requirement is a generally good starting
24 place for a Fourth Amendment argument.

25 Justice Ginsburg's point is that if they had

1 an informant who had seen drugs in the place within two
2 hours, they had, if they'd been before a magistrate, the
3 basis in probable cause to get a warrant. And I still
4 haven't heard why in fact they couldn't have got one or
5 why they didn't have the probable cause.

6 MR. STIRBA: Well, as I -- as I explained
7 before, they believed the drugs in --

8 JUSTICE SOUTER: I'm not interested in what
9 they personally believed. We're talking about objective
10 Fourth Amendment standards. Did they or did they not
11 have a basis to establish probable cause at that point?

12 MR. STIRBA: We don't believe they did, Your
13 Honor. And we don't believe they could have gotten a --

14 JUSTICE SOUTER: That is --

15 MR. STIRBA: -- an anticipatory warrant.

16 JUSTICE SOUTER: I will admit that is the
17 most astonishing view of probable cause I have heard in
18 this courtroom. Of course they had.

19 MR. STIRBA: Well, the record evidence
20 doesn't substantiate that, or they would have gotten --

21 JUSTICE SOUTER: Why doesn't it?

22 MR. STIRBA: Or they would have gotten a
23 warrant.

24 JUSTICE SOUTER: Why doesn't it? As I
25 understand, the record evidence is that their informant

1 was in that guy's home, and within two hours of the
2 point that we went through, the second entry, he had
3 seen drugs. Why wasn't there probable cause within that
4 two-hour period?

5 MR. STIRBA: Because the police did not
6 believe that at the time that they could have gotten a
7 warrant, that the drugs would not have been dissipated.
8 And they -- as they testified --

9 JUSTICE SOUTER: Is that a reasonable
10 belief?

11 MR. STIRBA: Pardon me?

12 JUSTICE SOUTER: I mean, we're talking about
13 probable cause, not an establishment of mathematical
14 certainty.

15 MR. STIRBA: Here's another point. That is
16 just an option, Justice Souter, the police -- if you
17 believed the police could get a warrant. They didn't
18 have to get a warrant. They obviously were engaged in a
19 buy/bust operation, which eventually led to them to the
20 particular position where they clearly established
21 probable cause.

22 JUSTICE SOUTER: They clearly would have
23 been if they had sent a police officer in. You're
24 asking us to extend the police officer rule to include a
25 confidential informant rule. One reason for doing so

1 is, or would be, that in practical terms there is a need
2 for it. Justice Ginsburg's question was, why is there a
3 need for it, when they could have gotten a warrant? And
4 we still haven't heard an answer.

5 MR. STIRBA: In rural Utah -- and this is
6 page 47 of the joint appendix -- the officers testified
7 that one of the reasons why they need to use
8 confidential informants is because the police are all
9 known. And, therefore, if they're going to engage in
10 any drug --

11 JUSTICE SOUTER: Then why didn't they use
12 the confidential informant to get a warrant?

13 MR. STIRBA: Well, I don't know how I can
14 answer the question any more than I have,
15 Justice Souter.

16 JUSTICE SOUTER: That doesn't --

17 MR. STIRBA: They -- they chose not to, for
18 reasons they didn't believe they had probable cause and
19 they were concerned that the drugs had been dissipated.

20 CHIEF JUSTICE ROBERTS: Counsel, given --
21 given the posture of the ultimate issue in this case on
22 the underlying constitutional question, you do not have
23 to prove that you are right; isn't that correct? You
24 have to establish that the contrary principle is not
25 clearly established?

1 MR. STIRBA: That's correct. And the law at
2 the time that these officers engaged in this operation,
3 entered the home -- and once again, it was based upon
4 probable cause -- supported in fact constitutionally
5 what they did, and that it was indeed permissible. And
6 that was the basis upon which we believe, irrespective
7 of how the Court views whether they should or should not
8 have gotten a warrant and the constitutional
9 implications of that, that the law was clearly not
10 established sufficiently such that these officers were
11 entitled to qualified immunity. That was one of the
12 problems with the Tenth Circuit case. They --

13 JUSTICE GINSBURG: May I just establish one
14 thing? Tell me if I am wrong. That this argument about
15 consent once removed was not presented in the lower
16 courts. That is, in the trial court you argued exigent
17 circumstances, and then on appeal the inevitable
18 discovery rule. So there was -- in the courts below,
19 this was not given as the reason, the consent once
20 removed was not alleged as the basis -- as the
21 justification for this search?

22 MR. STIRBA: That's true. On the criminal
23 appeal, the State did not argue Lewis, did not argue
24 consent once removed. And that is part of the problem
25 with a number of cases that have been cited by the

1 Respondent. They are exigent circumstances cases where
2 the consent once removed doctrine of Lewis isn't even
3 advocated or litigated. We think that's very important.

4 Unless the justices have any other
5 questions, I'll reserve the rest of my time.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MR. STIRBA: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Stewart.

9 ORAL ARGUMENT OF MALCOLM L. STEWART

10 ON BEHALF OF THE UNITED STATES,

11 AS AMICUS CURIAE,

12 SUPPORTING THE PETITIONERS

13 MR. STEWART: Mr. Chief Justice, and may it
14 please the Court:

15 The police entry in this case was
16 constitutional and, in any event, did not infringe any
17 constitutional right that was clearly established at the
18 time the officers acted. The mandatory order of
19 decision for qualified immunity cases announced in
20 *Saucier v. Katz* should be overruled.

21 I did want to begin by clarifying the answer
22 to your question, Justice Ginsburg, because I'm not sure
23 if it was entirely clear. There were really two cases
24 here, one of which was the criminal prosecution of Mr.
25 Callahan, the Respondent in this Court. And the

1 individual officers were not parties to that case.
2 That was handled by the State of Utah. And you're
3 correct that in the criminal proceeding the consent once
4 removed argument was not made. And that led to the
5 motion to suppress ultimately being granted and
6 consequently Mr. Callahan was not subject to criminal
7 proceedings.

8 Mr. Callahan did file a civil suit against
9 the individual officers who were involved in effecting
10 the arrest, and in that civil proceeding the consent
11 once removed argument was made all the way up. It was
12 made in the district court, and it was made in the court
13 of appeals as well.

14 JUSTICE ALITO: Mr. Stewart, could I follow
15 up on one other thing that came up during the preceding
16 argument? Isn't the issue whether there was or was not
17 probable cause quite separate from the consent once
18 removed doctrine? What -- assuming that there was
19 probable cause here, there may be many instances in
20 which the consent once removed doctrine would be
21 applied, if it's a valid doctrine, where there wasn't
22 previously probable cause.

23 MR. STEWART: That's correct. I think the
24 consent once removed doctrine would have its greatest
25 utility in cases where the police suspect but don't have

1 probable cause to believe that a particular individual
2 is engaged in criminal activity, and so they send an
3 informant or an undercover police officer in to try to
4 either confirm or dispel their suspicions. They
5 wouldn't be able to get a warrant at the outset because
6 they would not have probable cause at that time of
7 ongoing criminal conduct.

8 JUSTICE SOUTER: But if our question is
9 should consent once removed be recognized as a doctrine
10 that covers the confidential informant in this case, one
11 question that we may sensibly ask is: is there a need to
12 recognize that broad a consent doctrine? And one
13 question that would bear on that would be, in these
14 cases, is there difficulty or impossibility of getting a
15 warrant under normal probable cause standards? And I
16 think that was the point of Justice Ginsburg's question.
17 Do you doubt that they could have gotten a warrant
18 within the two-hour period?

19 MR. STEWART: We certainly think that they
20 had probable cause. There was testimony from police
21 officers to the effect that magistrates in Utah would be
22 reluctant to grant warrants based on these circumstances
23 because of the possibility that the drugs would be
24 dissipated. I am not in a position to second-guess
25 their empirical experience as to the circumstances under

1 which Utah magistrates will and will not grant warrants.
2 But we think as a legal matter that there was probable
3 cause, and that a warrant should have been issued. But
4 certainly there are -- there are plenty of
5 circumstances --

6 JUSTICE GINSBURG: That's -- it's not just
7 this case. Maybe you can tell me. I thought because
8 they were dealing with a confidential informant rather
9 than a police officer, they sent him in to do the dry
10 run. I mean the -- in the police officer cases usually
11 the -- the undercover police officer goes in. The other
12 police officers are there ready to come in when he gives
13 them the signal. But the police officers don't
14 ordinarily go through this dry run that they had here
15 with the confidential informer.

16 MR. STEWART: Well, I -- I would think that
17 with either police officers or with informants you could
18 have some situations in which the undercover operative
19 has very recently attempted to confirm the presence of
20 drugs. And you can have other cases in which the
21 undercover operative, again either an informant or a
22 police officer, could hear rumors on the street that a
23 particular individual was engaged in drug-dealing, might
24 not have probable cause, and they might decide that the
25 best way to set up the operation was to send this person

1 in to attempt to make a buy at a time when probable
2 cause was lacking. But they would want to arrange the
3 operation in such a way that if the operative's
4 experience confirmed their suspicions and gave them
5 probable cause to arrest, they would be able to go in
6 immediately.

7 And our principal contention is not that the
8 consent to the entry of Bartholomew was implicit consent
9 to the later entry of the police officers. It was that
10 once a person has, even unknowingly, admitted a
11 government agent into his home, his expectation of
12 privacy is sharply reduced and the entry of the officers
13 works an insubstantial incremental invasion of privacy.

14 And I would like to return to the point that
15 Mr. Stirba was making. It's true that the informant
16 here lacked the training and skills that -- and
17 integrity, for that matter, that you would expect a
18 police officer to have. But he was for Fourth Amendment
19 purposes a government agent, a State actor. If his
20 handlers had instructed him to look for an opportunity
21 to rummage through the drawers --

22 JUSTICE STEVENS: Mr. Stewart, could I
23 interrupt you, because there is something that hasn't
24 been reached. Do you think that we should answer the
25 constitutional question first or the immunity question

1 first?

2 MR. STEWART: We think that this Court in
3 this case should address the constitutional question
4 first because it is the subject of the square circuit
5 conflict, it's been briefed and argued, it's a question
6 that independently warrants resolution.

7 JUSTICE BREYER: It is quite difficult. I
8 mean there -- we don't know quite a lot about whether
9 they would have gotten a warrant, how -- how dangerous
10 it was, whether the drugs were likely to be hidden. And
11 I was thinking of it, and that's why I am saying this,
12 is that it's a perfect reason since constitutional
13 questions in this area are -- are like the stars in the
14 sky. There are so many. Rather than having the judges
15 answer each one and getting everything mixed up, why not
16 just have them take whatever is the easier path? As a
17 judge I like to take what is the easier path.

18 MR. STEWART: Well --

19 JUSTICE BREYER: And if it's easier to deal
20 with the qualified immunity, deal with it and forget the
21 rest of it.

22 MR. STEWART: I guess the first thing I
23 would say in response to that is we think that the --
24 the balance or the way in which discretion will
25 ordinarily be exercised will typically be different in

1 the case of the lower courts than in the case of this
2 Court, because the principal role of the lower Federal
3 courts is to decide individual cases before them usually
4 in the most expeditious and noncontroversial way where
5 they --

6 JUSTICE BREYER: I see that, but unless we
7 do that here, they are never going to get the right
8 message. And so what we will have is 1,000 judges
9 trying in an average in a year 50 or 60 cases each with
10 multiple facts, and we will have approximately over a
11 10-year period hundreds of thousands. I've exaggerated,
12 but there will be many, many -- many, many conflicts,
13 many, many confusions. And unless we say, no, we are
14 not doing it ourselves, how will they ever get the
15 message?

16 MR. STEWART: Well, I think they will get
17 the message --

18 JUSTICE BREYER: We don't always have to do
19 it, but I mean once.

20 MR. STEWART: I think they will get the
21 message if the Court tells them that the mandatory rule
22 of Saucier is no longer in effect, that courts have
23 discretion to decide based on their sound judgment
24 whether it is --

25 CHIEF JUSTICE ROBERTS: Why isn't it -- why

1 isn't it an advisory opinion, if we do not have to
2 decide -- to decide the ultimate question whether this
3 is constitutional or not, but simply whether or not it
4 was clearly established whether it was unconstitutional?
5 Why isn't it purely an advisory opinion to say whether
6 it's constitutional or not?

7 MR. STEWART: I mean, in one sense it's an
8 advisory opinion, but in another sense there are --
9 there are often cases in which two alternative grounds
10 for a decision are proffered, either one of which, if
11 accepted, would compel a judgment in one litigant's
12 favor. And the fact that it would theoretically -- if
13 the court concludes in its own --

14 CHIEF JUSTICE ROBERTS: No, no. Those are
15 different grounds, it seems to me. Those are two
16 independent, as you said. Here it's kind of a -- it's a
17 progression. You first ask, either, under somebody's
18 view, I guess, Saucier, whether or not it's
19 constitutional or not and then whether it's clearly
20 established.

21 I just don't know why the first question
22 isn't purely advisory, because you don't have to know
23 whether it's constitutional or not.

24 MR. STEWART: Well, it's true that if the
25 Court announced that this search was constitutional,

1 then it would necessarily be saying: And there was no
2 clearly established constitutional law to the contrary
3 at the time the officers acted. But the Court --

4 JUSTICE BREYER: -- to the question. I
5 mean, look, if I have to answer the constitutional
6 question -- and what bothers me is this consent at one
7 remove. What? You are saying a drug seller who lets in
8 a disguised policeman in order to sell him a drug
9 because he thinks he's a druggie is suddenly consenting
10 to the entire LAPD coming into his house? I would think
11 that is the last thing he would have thought about
12 wanting, not the first.

13 MR. STEWART: But that -- that would be
14 equally true in the case of the undercover police
15 officer.

16 JUSTICE BREYER: Well, maybe they both
17 should be the same. I --

18 JUSTICE KENNEDY: That's what I wanted to
19 know, and it gets back to the merits and not Saucier.
20 We are going through two different things here.

21 Assume this is an undercover officer, not an
22 -- not a -- not an informant. The undercover officer
23 sees a crime being committed, and he is ready to make
24 the arrest. Can he automatically ask for police
25 assistance? Are the police then entitled to come into

1 the home in your view, or do there have to be some
2 exigent circumstances?

3 MR. STEWART: No. We think he could
4 automatically ask for the police to come into the home
5 because the incremental intrusion on privacy by having
6 several police officers rather than one to make the
7 arrest would be insubstantial.

8 JUSTICE SOUTER: But isn't the reason it's
9 insubstantial is that we have a rule for independent
10 reasons having nothing necessarily to do with this kind
11 of situation in which one officer's knowledge is
12 regarded as another officer's knowledge. The police are
13 regarded as a group, so that we have a rule ready, in
14 place, saying: You show one, you have shown the whole
15 department.

16 We don't, however, have any such rule with
17 respect to agents generally.

18 MR. STEWART: I think you don't have that
19 precise rule, but it is nevertheless the case that the
20 undercover operative here, the informant, was a State
21 actor. Had he been instructed to look in private places
22 without consent, his conduct would have constituted a
23 Fourth Amendment violation because he would have been
24 regarded for that purpose as -- as an agent of the
25 State, and he should, therefore, be regarded as a State

1 agent for these purposes.

2 JUSTICE KENNEDY: Just -- just to be clear,
3 if -- if I may, I know your red light is on: Your
4 position is if an undercover officer is in the premises
5 and sees a crime being committed, he automatically can
6 invite police in to assist him in making an arrest
7 without exigent circumstances?

8 MR. STEWART: That's correct.

9 JUSTICE KENNEDY: What's -- what do I read?
10 What authority do you cite me for that proposition?

11 MR. STEWART: I don't think this -- this
12 Court has ever squarely so held. I believe that the
13 Respondents concede that because they don't take issue
14 with the fact that consent once removed is applicable
15 when the person already inside is an undercover police
16 officer.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Metzler.

19 ORAL ARGUMENT OF THEODORE P. METZLER, JR.,
20 ON BEHALF OF THE RESPONDENT

21 MR. METZLER: Thank you Mr. Chief Justice,
22 and may it please the Court:

23 This is a case about consent. By consenting
24 to the entry of a confidential informant, did Mr.
25 Callahan consent to the entry of police?

1 The answer is no, and no reasonable officer
2 could have believed otherwise.

3 This Court has long held that it is
4 presumptively unreasonable for police to enter a home
5 without consent or exigent circumstances or a warrant.
6 Here there were no exigent circumstances; there was no
7 warrant, nor was there any consent.

8 CHIEF JUSTICE ROBERTS: YOU -- was Mr.
9 Stewart correct that you concede that if this person
10 entering the house were in fact a police officer, that
11 this would have been okay?

12 MR. METZLER: No, Your Honor. We think it's
13 a closer case, but if it is a -- if this confidential
14 informant had been a police officer, it would be the
15 same analysis. There is no exigent circumstance here;
16 there is no consent. And -- and the consent to be
17 competent to the police officer in your case would not
18 extend to --

19 JUSTICE KENNEDY: Well, you would agree he
20 could make the -- the arrest by himself. Assuming he
21 was a police officer --

22 MR. METZLER: Yes.

23 JUSTICE KENNEDY: -- he could make the
24 arrest by himself.

25 MR. METZLER: -- he certainly could make the

1 arrest by himself. But --

2 JUSTICE KENNEDY: But -- and -- but you are
3 saying he can't ask for assistance to make that arrest
4 effective in all cases. There has to be some exigent
5 circumstance.

6 MR. METZLER: Correct. If -- if there are
7 some sort of exigent circumstances, in this case they
8 would have planned that in advance; and police are not
9 allowed to create their own exigency to get around the
10 Fourth Amendment.

11 JUSTICE ALITO: You are advocating a rule
12 that is going to get police officers killed, aren't they
13 -- aren't you? If an undercover police officer is in a
14 house making drug buy, and you want to say that the
15 single officer who is there in an undercover capacity
16 can say, "You guys are all under arrest," he can't
17 signal for other police officers to come in and help him
18 effect the arrest without anybody being killed?

19 MR. METZLER: Of course, the safest
20 alternative for him would be to simply withdraw, get on
21 the telephone, and get a warrant to come back in, or
22 during the two hours that they were planning this entry
23 he could have gotten a warrant then or an anticipatory
24 warrant. So there are plenty of safe options.

25 JUSTICE KENNEDY: Well, it seems to me that

1 in the case that Justice Alito put, that there are
2 exigent circumstances.

3 MR. METZLER: Well, to the extent that they
4 planned it in advance, and the basis of their entry --

5 JUSTICE KENNEDY: Well, that -- that's a
6 different point and I have some question about that. It
7 seems to me the police are never quite sure exactly
8 what's going to happen.

9 MR. METZLER: Well, if they -- if they
10 planned on an exigent circumstance as being the reason
11 that they are allowed to go in, under this Court's
12 decision -- the long line of decisions in Payton and
13 Steagald saying exigent circumstances or consent are the
14 way to get in without a warrant, then it would not be
15 permissible. If --

16 JUSTICE BREYER: Imagining -- you are
17 imagining different cases. We can imagine a spectrum of
18 cases. In some cases the policeman or the confidential
19 informant will be there, and he really couldn't have
20 gotten a -- a thing in advance -- a warrant in advance.
21 It wasn't certain, and they are in there and they see a
22 lot of drug behavior going on, and the drugs are going
23 to be hidden, go, disappear the second he leaves; and if
24 he tries to arrest them, everybody is going to jump on
25 him and kill him. Okay?

1 So there are a lot of cases just like this
2 one, but with a few changes, which are -- he needs to
3 call the police, and there will be others where he
4 doesn't.

5 So that's why I am so uncertain about what
6 it is we are deciding here on the merits. We would have
7 to say on the merits this is a case where there are no
8 exigent circumstances. Can we say that? I -- would not
9 want to say "never are there."

10 MR. METZLER: I think certainly in this case
11 there were not exigent circumstances. The informant was
12 on his way out the door. He -- he wasn't attempting to
13 make an arrest. No one thought that the -- that Mr.
14 Callahan would destroy the drugs or that anyone would
15 flee. There were no -- in fact, the Petitioners
16 abandoned exigent circumstances in the court of appeals.
17 So I think you can decide this case on the merits,
18 saying there were no exigent circumstances. And then
19 ask, is it reasonable to think that because there was an
20 informant inside and because he sent out a signal that
21 there was probable cause, a drug transaction had
22 happened inside the house, does that make any difference
23 whatsoever as to whether there was consent?

24 CHIEF JUSTICE ROBERTS: That's a tough -- at
25 least I find it a very difficult question. I do not

1 find it necessarily a terribly difficult question
2 whether that -- whatever the answer is -- whether it was
3 clearly established, precisely because I find the
4 underlying question difficult. You know, you have got a
5 handful Court of Appeals decisions, you have got a
6 factual variation; the issue is whether to extend the
7 police coming in to a confidential informant, all of
8 those questions are very difficult; but precisely
9 because they are, it doesn't seem that the rule,
10 whichever rule is adopted, is clearly established.

11 Why don't -- and yet if I were on the lower
12 court of appeals, you would say -- or Saucier would say,
13 I have got to decide that very difficult constitutional
14 question and then decide what's a very easy qualified
15 immunity question. Does that -- why does that make
16 sense?

17 MR. METZLER: With respect,
18 Mr. Chief Justice, I don't think it's a difficult
19 question.

20 CHIEF JUSTICE ROBERTS: Well, I know you
21 don't because you are arguing one side of it.

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: But when you put the
24 -- concede for purposes of argument that it is a
25 difficult question. Why don't we just tell the lower

1 courts -- we do it, we go right ahead to the qualified
2 immunity question by granting cert on one. Why
3 shouldn't the lower courts have the same luxury?

4 MR. METZLER: Well, with regard to the
5 Saucier question, we think the Court should keep the
6 Saucier question, and particularly in this case where
7 there is a circuit split, the court should decide the
8 constitutional question and not move on to the clearly
9 established question --

10 CHIEF JUSTICE ROBERTS: Why, because we need
11 to provide guidance on that question?

12 MR. METZLER: Yes.

13 CHIEF JUSTICE ROBERTS: Well, do you think
14 it can't come up any other way?

15 MR. METZLER: It certainly could come up --

16 CHIEF JUSTICE ROBERTS: Yes.

17 MR. METZLER: -- in a criminal case.

18 CHIEF JUSTICE ROBERTS: Or a -- or a suit
19 against the political subdivision, right? I mean, you
20 could have sued some other political entity other than
21 the officers individually, right?

22 MR. METZLER: Certainly. Mr. Callahan did
23 sue the county in this case. But --

24 JUSTICE KENNEDY: It seems to me that this
25 is an area where the police do need guidance, and I need

1 guidance. I find this -- I find this very difficult.
2 It seems to me that we could have learned a lot if the
3 -- if the courts of appeals had addressed this question.

4 MR. METZLER: Well, this Court in Payton and
5 Steagald --

6 JUSTICE KENNEDY: Which is what they do in
7 Saucier.

8 MR. METZLER: I'm sorry, I missed that
9 question.

10 JUSTICE KENNEDY: Which is what they would
11 do under Saucier.

12 MR. METZLER: Right. Well, I mean, it's
13 important to address the constitutional question
14 first in this case and in other cases in order to make
15 sure that the -- that the law continues to elaborate
16 that potentially meritorious constitutional
17 rights are --

18 CHIEF JUSTICE ROBERTS: Well, but that was
19 my question. There are other ways for the law to
20 develop. The issue can come up on the merits in the
21 suit against the municipality which doesn't raise the
22 qualified immunity question. It can come up -- if you
23 have a search where a person sues to get whatever was
24 seized back. You know, if there's a -- and also -- and
25 if the option is -- if the question of which order to

1 proceed is optional, the law can develop if the courts
2 for good and sufficient reasons decide to reach the
3 constitutional question first.

4 I -- I'm just wondering what benefit there
5 is in an absolute rigid rule that courts of appeals -- I
6 had a few of these cases in courts of appeals; I thought
7 it was very odd that I had to go and decide a difficult
8 constitutional issue and then not worry about it because
9 in one sentence you say well, but the issue is not
10 clearly established and so it's qualified immunity.

11 MR. METZLER: Well, that would take us back
12 to before Saucier, the Court -- it's a recent decision
13 that hasn't proven to be unworkable. And in fact the
14 recent --

15 CHIEF JUSTICE ROBERTS: Well, but my point
16 though is that at least in my experience it was
17 unworkable, or at least frustrating, in that we had to
18 decide not just a factual question but a constitutional
19 question in a context where it wasn't necessary.

20 MR. METZLER: Well, it depends on your view
21 of necessity. In some cases certainly, they won't
22 really come up in other contexts and if the law is not
23 established in section 1983 suit it may never be
24 established. But here we are talking about a question
25 where there is a circuit split and the Court definitely

1 should provide guidance to the lower courts. I don't
2 it's a definite --

3 CHIEF JUSTICE ROBERTS: Doesn't the fact
4 that there is a circuit split almost by definition mean
5 that it's not clearly established?

6 MR. METZLER: Well, this Court has looked to
7 controlling -- its own precedents and controlling
8 circuit law to decide what is -- what law is clearly
9 established, and here, since Payton and Steagald the
10 courts held that there is a bright-line rule that's very
11 simple for police officers, it's easy for them to
12 understand.

13 If they would like to enter without a
14 warrant and they don't have exigent circumstances and
15 they don't have consent, then it is presumptively
16 unconstitutional. And that's a good rule and an easy
17 rule and it's also why this is not a difficult
18 constitutional question. There are no exigent
19 circumstances in this case, and no reasonable officer
20 could conclude that the presence of a confidential
21 informant inside the house means there is consent to the
22 police officer.

23 JUSTICE ALITO: What if -- what if the
24 officers in this case had read the Seventh Circuit
25 decisions, and they said these are judges on the United

1 States Court of Appeals, and they think this is
2 consistent with the Fourth Amendment? And what's more,
3 one of these is written -- one of these opinions is
4 written by Judge Posner, and he's the smartest man in
5 the world --

6 (Laughter.)

7 JUSTICE ALITO: He knows everything there is
8 to know about law and economics and jurisprudence and
9 literature and many other subjects.

10 (Laughter).

11 JUSTICE ALITO: Is it unreasonable for them
12 to follow that?

13 MR. METZLER: Well, I think the officers in
14 the Tenth Circuit need to be aware the way that our
15 Federal court system works, and the Seventh Circuit
16 decision simply isn't binding on the Tenth Circuit. And
17 with all due respect to Judge Posner, he dropped the
18 ball on this one. He said this -- this is a case where
19 -- in the United States v Paul -- there were no exigent
20 circumstances; the officers there could have gotten a
21 warrant and, he said, should have gotten a warrant but
22 he said it was justified by consent. He's saying that
23 consent to one person is consent to many. And the
24 Court's cases have said that consent is based on
25 ordinary social expectation. When you let one person

1 into your house, you just don't let in the whole world.

2 CHIEF JUSTICE ROBERTS: If the Tenth Circuit
3 says this is not allowed, and every other circuit since
4 the Tenth Circuit's decision has held that it is, is
5 that clearly established that it's not allowed in the
6 Tenth Circuit?

7 MR. METZLER: Yes. I think certainly an
8 officer in the Tenth Circuit would be bound to follow
9 the Tenth Circuit rule. I mean, it's not irrelevant
10 that other -- that other courts have decided it
11 differently, but to the extent that there is controlling
12 law in the circuit, I think that they have --

13 CHIEF JUSTICE ROBERTS: Then it is
14 irrelevant. Then it is irrelevant that ten other
15 circuits have decided it differently.

16 MR. METZLER: Well, that very well might
17 wind up in this Court if there were ten different --

18 CHIEF JUSTICE ROBERTS: Well, right, but do
19 the police officers get to decide that? Do they get to
20 decide that not only Judge Posner thinks this, but ten
21 other circuits think this, and it has been five years
22 since the Tenth Circuit. I mean, do they have to go
23 through that type of analysis?

24 MR. METZLER: Well, we don't expect officers
25 to survey the entire case law and come up with a law

1 professor's view of whether this is reasonable or not.
2 We expect them to follow the clearly -- the bright lines
3 that this Court has set down and that are set down in
4 their home jurisdiction. And if their home
5 jurisdiction says it's unconstitutional it's not
6 reasonable for them to follow some out-of-circuit
7 decision. If, for instance, the Seventh Circuit had
8 said that a warrantless home entry is okay so long as
9 the officer had breakfast in the last half-hour, that's
10 an unreasonable rule, and it wouldn't be reasonable for
11 any officer to follow that. And the facts here are
12 about as relevant to consent as whether there was --
13 the officer had breakfast that morning.

14 So the officers here are not entitled to
15 qualified immunity nor can they rely on the Seventh
16 Circuit. The Petitioners have not given you any good
17 reason to adopt a new exception here. They say that
18 this is based on a waiver theory or that it's a private
19 search or that it is incident to arrest. But all of
20 those ignore the substantial interest in the sanctity of
21 the home.

22 CHIEF JUSTICE ROBERTS: Do any of the other
23 cases involve -- the other circuit cases involve
24 confidential informants as opposed to police officers?

25 MR. METZLER: Other than the Seventh

1 Circuit?

2 CHIEF JUSTICE ROBERTS: Yes.

3 MR. METZLER: The -- one case in the Sixth
4 Circuit there was both a confidential informant and a
5 police officer were admitted. And then the later
6 case in the Sixth Circuit that did say this is okay for
7 it, which came after the events in the case.

8 CHIEF JUSTICE ROBERTS: So at the time every
9 circuit other than the -- you know, if there is a police
10 officer and a confidential informant, I think that can
11 be considered a police officer because he is going to
12 call the police in -- every court of appeals decision
13 involving a confidential informant said it was okay.

14 MR. METZLER: Actually we cited three
15 circuits where these same facts happened. In the Eighth
16 Circuit, the First Circuit and the Eleventh Circuit.

17 CHIEF JUSTICE ROBERTS: And in those
18 circuits, did the court focus on the distinction between
19 the police officer and the confidential informant?

20 MR. METZLER: Well, no. The court looked to
21 whether there were exigent circumstances or consent.
22 The courts followed this Court's decision in Payton and
23 Bramble and that line of cases.

24 CHIEF JUSTICE ROBERTS: Do you believe
25 that -- what is the appropriate level of generality to

1 look at in addressing this question, a case involving a
2 confidential informant?

3 MR. METZLER: I think the appropriate level
4 of generality is that the facts under the court -- the
5 court has covered the field when it comes to warrantless
6 home entries. If you have a warrant, you are okay. If
7 you have exigent circumstances, you are okay. And if
8 you have consent, you are okay. Everything else is
9 presumptively unconstitutional.

10 CHIEF JUSTICE ROBERTS: Why is that?

11 MR. METZLER: Because that's what --

12 CHIEF JUSTICE ROBERTS: Why isn't it that
13 the issue hasn't come up, this question of a
14 confidential informant is one that hasn't come up? Why
15 would we say that is presumptively unconstitutional?

16 MR. METZLER: Well, the Court's language is
17 that it's presumptively or per se unconstitutional; it's
18 said that many times.

19 JUSTICE GINSBURG: You are talking about the
20 main role of police is get a warrant, except -- and I
21 think the Court has said a number of times to make this
22 search reasonable, the police have to get a warrant if
23 you want to interject the judicial officer in between
24 the police and the person in jeopardy. So the main rule
25 is warrant unless -- and then you have said the

1 exceptions, but I think your point is that there is a
2 main rule.

3 MR. METZLER: Yes.

4 JUSTICE GINSBURG: Which this Court has
5 gotten from the Constitution?

6 MR. METZLER: Yes.

7 JUSTICE GINSBURG: Get a warrant if you can.

8 JUSTICE ALITO: Isn't your argument that in
9 a situation where the exigent circumstances are the
10 creation of the scenario that the police have set up,
11 the police cannot -- and you have a police officer who
12 is the undercover operative who has the power to make
13 an arrest, that police officer cannot signal for
14 other officers to come in and assist with the arrest?

15 MR. METZLER: Well, our position is that
16 would be -- the additional officer's entry would violate
17 the Constitution --

18 JUSTICE ALITO: The additional officers
19 would -- that would violate the Fourth Amendment?

20 MR. METZLER: Yes.

21 JUSTICE ALITO: Even if there is an officer
22 safety problem there?

23 MR. METZLER: Well, to the extent that they
24 have created an officer safety problem, obviously the
25 officers are going to go in to help him, no one is going

1 to get hurt. But the additional officer's entry can
2 violate the Fourth Amendment.

3 JUSTICE KENNEDY: So the police say, you
4 know, we made a mistake. We should have had a warrant,
5 but we have our man in there now, we have got to do
6 something. The police cannot send assistance?

7 MR. METZLER: No, of course, they can send
8 assistance. And they probably --

9 JUSTICE KENNEDY: No. You say they have
10 created the exigent circumstances.

11 MR. METZLER: Yes, they have, which is why
12 the additional officer's entry would violate the Fourth
13 Amendment. Now, there might be limited --

14 JUSTICE KENNEDY: So -- so my first
15 statement was correct. It's illegal for the police to
16 send their assistance, the other officers in?

17 MR. METZLER: Yes, my answer was as a
18 practical matter no -- no police officer is going to
19 leave, even if --

20 CHIEF JUSTICE ROBERTS: No, but then he is
21 going to get sued.

22 MR. METZLER: He very well may get sued and
23 there are questions of fact as to --

24 JUSTICE KENNEDY: And you say as a practical
25 matter we have to say that under the Constitution we can

1 endanger -- we must endanger the officer?

2 MR. METZLER: Well, I disagree that the
3 officer could be in danger. The safest option --

4 JUSTICE KENNEDY: No, no. The hypothetical
5 is that they have to send people in to assist him. But
6 the hypothetical also is they should have anticipated
7 this, and therefore, in your words, they created the
8 exigent circumstances.

9 MR. METZLER: They did create the exigent
10 circumstance --

11 JUSTICE KENNEDY: It seems to me that that
12 dilemma and that paradox casts considerable doubt on
13 your proposition that if the police create the exigent
14 circumstances, they cannot then rely on it. I seriously
15 question that proposition.

16 MR. METZLER: Even if -- even if you
17 disagree with me on that, it shouldn't make any
18 difference in this case where there was no exigent
19 circumstances.

20 JUSTICE KENNEDY: No, no. I want to talk
21 about the general rule.

22 MR. METZLER: Okay. Well, the general --
23 nevertheless --

24 JUSTICE KENNEDY: You want us to write an
25 opinion saying that any time police create the exigent

1 circumstances, they can't rely on them if they had had
2 the time to get a warrant. And I find that a dangerous
3 rule.

4 MR. METZLER: I don't think you would need
5 to write the opinion that would say that, because
6 exigent circumstances are not in this case.

7 JUSTICE SOUTER: Mr. Metzler, what do you
8 say to this line of reasoning: we have in prior cases
9 adopted the positions that for purposes of establishing
10 probable cause, the knowledge of one police officer is
11 also the knowledge of all police officers, at least
12 within a department or working on a particular problem.
13 So that if in a case in which there is a search without
14 a warrant, if you add up everything that individual
15 officers knew and that amounts to probable cause, then
16 the search is good.

17 Why don't we apply, in effect, the same rule
18 in the hypothetical case that you have been given, which
19 is a police officer who was admitted by consent and
20 there are other police officers outside. At the point
21 at which the police officer who has been admitted has
22 the knowledge necessary for an arrest and has that
23 knowledge as a result of the invitation and the waiver
24 of privacy as to him, why don't we regard that on sort
25 of general doctrinal grounds as a waiver of privacy with

1 respect to the police in general, just as we regard
2 police knowledge as being imputed to all police
3 officers?

4 That way you don't have the problem that,
5 for example, Justice Kennedy's hypo raises, even in the
6 absence of exigent circumstances. But it doesn't open
7 the door to what you were objecting to here. Why isn't
8 that a proper solution or proper answer to this hypo?

9 MR. METZLER: Well, if you are to adopt that
10 sort of -- I think you certainly could adopt that
11 rationale. But I don't think the way to get there is
12 through a waiver, because really there's nothing that
13 the person -- the suspect has done that he knows about
14 that would mean that he waivs the expectation that
15 additional people would come in. There might be --

16 JUSTICE SOUTER: No, you are absolutely
17 right in terms of his psychological process, the only
18 person he has invited in is the one person. The reason
19 for coming up with the answer I suggested is a broader
20 doctrinal reason. That is the reason that we have for,
21 probable cause purposes regarded the police -- or the
22 knowledge of one police officer as the knowledge for
23 all.

24 Why don't we, for the same reasons, since it
25 is privacy that is at stake in all of these cases,

1 regard the invitation of one police officer as the
2 invitation of all, or to all?

3 MR. METZLER: Again, I don't think that the
4 way to get there is through consent. If you want it to
5 balance and say, well, the government has an agent in
6 there who is making the arrest and there is safety
7 concerns and other reasons why we would want to do that,
8 that might be one way to get there. I don't think it's
9 through consent.

10 JUSTICE SOUTER: Well, it would be consent
11 to one officer plus a doctrinal basis to construe that
12 consent for Fourth Amendment purposes as a broader
13 consent.

14 MR. METZLER: Yes.

15 JUSTICE SOUTER: That's what we would be
16 doing. We wouldn't be doing it because the individual
17 in the trailer says: I am inviting in the whole L.A.
18 police department. We are doing it because he invites
19 one L.A. police officer in, and we have doctrinal basis
20 for regarding the police, as it were, collectively
21 rather than individually for probable cause purposes
22 when privacy is at stake.

23 MR. METZLER: That would be -- that would
24 certainly be a basis to allow this for police officers.

25 JUSTICE SOUTER: Would it not open the door

1 to, I guess, to what you are objecting to?

2 JUSTICE ALITO: Why would probable cause
3 solve the problem at all? There is clearly probable
4 cause here. They are listening to what goes on. So
5 they're -- do you dispute that when they hear that the
6 drug transaction is taking place, that they lack
7 probable cause?

8 MR. METZLER: No, I think they do have
9 probable cause. But in Payton, the Court said that
10 police officers who are outside who have probable cause
11 need more than probable cause to get inside. They need
12 a warrant, exigent circumstances.

13 JUSTICE SOUTER: Right. I think I may have
14 created this problem for you and -- and maybe I -- I
15 should get you out of it.

16 (Laughter.)

17 JUSTICE SOUTER: I'm not suggesting that the
18 probable cause rule is what is operative here. I'm
19 saying that for probable cause purposes we regard the
20 police collectively, and why, since our privacy is at
21 stake there and is at stake here -- why shouldn't we
22 have a collective consent rule, too?

23 MR. METZLER: You certainly could adopt that
24 rule --

25 JUSTICE SOUTER: That -- that's my proposal.

1 MR. METZLER: You certainly could adopt that
2 rule, and that would be a -- an additional reason for
3 police to enter beyond what has been thus far
4 established by this Court.

5 CHIEF JUSTICE ROBERTS: How do you decide
6 whether the confidential informant should be considered
7 an employee of the police? Let's say this is the tenth
8 undercover operation he has engaged in. They give him
9 \$100 after every undercover operation. I mean, is he an
10 employee of the police department?

11 MR. METZLER: I don't think his employment
12 status is -- is what is at issue. The question is
13 whether he is an agent of the state for the purpose that
14 he is inside -- for the purposes of making an arrest of
15 the person inside the home.

16 Here the confidential informant, all he is
17 really doing is acting as a surveillance device. He is
18 telling the officers outside what is happening inside.
19 And he gives them probable cause.

20 CHIEF JUSTICE ROBERTS: Why doesn't -- that
21 doesn't make him an agent of the police?

22 MR. METZLER: No, I don't think so. He
23 might be an agent for some purposes but he certainly is
24 not an agent for purposes of making an arrest inside,
25 which is what they want to do.

1 JUSTICE ALITO: What if there is a State
2 statute that says that confidential informants may be
3 designated by the police department to assist in making
4 arrests?

5 MR. METZLER: If there was some assist to
6 making an arrest -- of the government, then assuming
7 that we are following Justice Souter's new exception,
8 then I think that they would fall into that exception.
9 But here, of course, the confidential is no such thing.
10 This confidential informant was not acting for the
11 police. He wasn't making an arrest. There was no --

12 CHIEF JUSTICE ROBERTS: He wasn't acting on
13 his own. He was acting for the police. He didn't
14 decide I'm going to do this and -- because you know, I
15 want to do it, and it just so happens the police are
16 involved as well.

17 MR. METZLER: Well, that's true. He was
18 acting with the police but he wasn't acting for the
19 police. And nothing that the -- that the confidential
20 informant did inside, even if attributed to the police,
21 would give police the right to cross that threshold. If
22 this confidential informant were a police officer, I
23 think you would have to base it on the powers of the
24 police to make the arrest inside, the power of the State
25 to make that --

1 JUSTICE GINSBURG: Even if there is such a
2 thing as citizen's arrest, I think it was part of this
3 record that -- that they do not want confidential
4 informers to go making arrests, so that the police
5 distinguish the confidential informer.

6 MR. METZLER: That's correct,
7 Justice Ginsburg. Both the Solicitor General and the
8 Petitioners agree that confidential informants should
9 not and would not be making these arrests. So the
10 function of the confidential informant is really as I
11 said, just a surveillance device; and what is important
12 is not what he is doing but what the police are doing
13 who are outside.

14 JUSTICE GINSBURG: But going back to why
15 should we decide this question, particularly in Fourth
16 Amendment cases when these issues will come up on
17 suppression motions, so there isn't a need to decide
18 them in the -- in the civil context.

19 MR. METZLER: But I think in general we are
20 talking about a very small category of cases like this
21 one where their -- the criminal defendant won on the
22 Fourth Amendment and then the police bring up some new
23 argument on a qualified immunity defense because there
24 would already be some law on the question if it were
25 decided in the -- in the criminal case.

1 So in those limited circumstances it seems
2 to put too much of a thumb on the scale on the side of
3 police to say well, you can come up with a new theory
4 and you don't even have to show that it applies; all you
5 have to show is that nobody has ever rejected your
6 theory and then it is not clearly established. I don't
7 think in that small number of cases that the balance
8 should really tilt that far toward police. And here --
9 here it's certainly not, where the Solicitor General and
10 the Petitioners both agree that the Court should decide
11 both questions.

12 The constitutional question here is not very
13 difficult. It boils down to, in the absence of exigent
14 circumstances, could any reasonable officer have
15 believed that the two circumstances they would like to
16 see in previous cases -- that is, that a confidential
17 informant is inside, and that he sends a signal out that
18 there is probable cause -- do those make any difference
19 whatsoever to the calculation of whether there are
20 exigent circumstances or consent? The answer is no and
21 no reasonable officer could have believed otherwise. If
22 there are no further questions.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Stirba, you have three minutes
25 remaining.

1 REBUTTAL ARGUMENT BY PETER STIRBA,
2 ON BEHALF OF THE PETITIONERS

3 MR. STIRBA: Thank you. The colloquy about
4 the safety concerns when the officer or the confidential
5 informer are in the home I think highlight why the
6 distinction between a confidential informant and the
7 officer really doesn't make much meaningful headway in
8 terms of the Fourth Amendment. Obviously if the police
9 officer was acting under cover in this particular
10 situation he would not have announced -- there were
11 three arrestees who were actually in the premises at the
12 time of the follow-up entry. He would not have said
13 after the drug transaction occurred "oh, by the way, I'm
14 a police officer, I'm here to arrest you," for obvious
15 reasons connoting safety and other issues which would
16 have been attendant to that.

17 Similarly the confidential informant isn't
18 going to do that, either, for the same particular
19 problem, even if this confidential informant had arrest
20 powers under State law. The whole issue is the police
21 officer can call up for backup and assistance to
22 effectuate the arrest, which is precisely what occurred
23 here. Similarly, there is no real distinction then to
24 be drawn between a confidential informant as a
25 government actor allowing for the additional entry or

1 follow-up entry of additional officers for backup and
2 assistance to make sure the arrest is safe and secure
3 than if you have a police officer.

4 The second point I would like to make is the
5 first time any Federal circuit drew this distinction
6 between a confidential informant and a police officer
7 was the Tenth Circuit decision. They adopted consent
8 once removed. They just limited it to a police officer.
9 Obviously the police officers involved in this case
10 could not reasonably be expected to anticipate such a
11 distinction being drawn, especially given the fact that
12 there was at least a Seventh Circuit body of law, the
13 Sixth Circuit body of law, and as we argue, which we
14 think is a fair reading of Gramble -- because they cite
15 the Seventh Circuit body of law that includes the
16 confidential informant -- there were at least three
17 circuits that had rejected that distinction, and you in
18 2000 confirmed that in the Sixth Circuit there is no
19 distinction as a matter of this particular doctrine
20 between a confidential informant and a police officer.

21 And finally with respect to the exigent
22 circumstances cases, and you can look at any one that
23 was cited by the Respondent, there is no mention of
24 Lewis, there is no mention of consent once removed,
25 there is no mention of any abrogation of privacy. Those

1 issues were not raised, just like the issues were not
2 raised in the criminal appeal of Mr. Callahan's
3 conviction; and so therefore they are really not
4 relevant, they are not probative, and we are not
5 suggesting this is an exigent circumstances case, nor
6 are we suggest relying on for purposes of the Fourth
7 Amendment issue any implied consent.

8 We have rested our justification for the
9 Fourth Amendment issue on search incident and also
10 the Lewis doctrine because we think this is a Lewis
11 case. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel,
13 the case is submitted.

14 (Whereupon, at 12:06 p.m., the case in the
15 above-entitled matter was submitted.)

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