

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CORDELL PEARSON, ET AL., :

4 Petitioners :

5 v. : No. 07-751

6 AFTON CALLAHAN. :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, October 14, 2008

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:08 a.m.

14 APPEARANCES:

15 PETER STIRBA, ESQ., Salt Lake City, Utah; on behalf of
16 the Petitioners.

17 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting the
20 Petitioners.

21 THEODORE P. METZLER, JR., ESQ., Washington, D.C.; on
22 behalf of the Respondent.

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

2 (11:08 a.m.)

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

5 Mr. Stirba.

6 ORAL ARGUMENT OF PETER STIRBA,
7 ON BEHALF OF THE PETITIONERS

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

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

18 Although the rule has become known as the
19 doctrine of consent once removed, and the lower courts
20 have banned various rationales in support of the rule,
21 the name or label is not important. What is important
22 is that the rule is predicated upon well recognized
23 Fourth Amendment principles, and that at the time of the
24 arrest the consent doctrine was well established in the
25 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
20 they're 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 tell me, is it correct that at
18 that time there was one case that held the equivalence?

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

24 JUSTICE SOUTER: Which was not a circuit
25 case, right?

1 MR. STIRBA: That is a circuit case.

2 JUSTICE SOUTER: District case?

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

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

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

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

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

17 JUSTICE SOUTER: Where is Pollard from?

18 MR. STIRBA: Sixth Circuit.

19 JUSTICE SOUTER: Sixth.

20 MR. STIRBA: And they cited in support the
21 confidential informant cases from the Seventh Circuit.
22 We also read Gramble -- this is a 2000 -- I'm sorry, a
23 995 Ninth Circuit case which talked about a government
24 agent, it did not draw a distinction between a
25 confidential informant and a police officer -- as

1 supportive as well. That's exactly what Judge Kelly
2 determined in the dissenting opinion in the Tenth
3 Circuit.

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

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

13 JUSTICE GINSBURG: Oh, but there is an
14 enormous difference between the training and the
15 character of a police officer and, as this very case
16 illustrates, the confidential informants are often very
17 shady characters who can't be counted on to be
18 truth-tellers, and have a powerful incentive to get
19 someone for the police, because in most cases they are
20 seeking to have their own case dealt with
21 sympathetically. So, how can you equate a police
22 officer with a confidential informer, who is usually
23 someone who knows where the drug house is because he's a
24 dealer himself?

25 MR. STIRBA: Two points. In our reply

1 brief, pages 6 and 7, we point out the wide variety of
2 confidential informants. They come in many different
3 shapes and sizes.

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

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

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

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

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

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

4 JUSTICE SOUTER: Why can't I?

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

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

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

23 JUSTICE GINSBURG: There's one feature of
24 this is that I think is really puzzling: What this case
25 is about is the Fourth Amendment, that requires, with

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

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

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

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

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

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

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

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

25 JUSTICE SOUTER: An informant just came out

1 and said there were drugs there and they don't have
2 probable cause?

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

5 JUSTICE SOUTER: Why not?

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

9 MR. STIRBA: He never told the police that.
10 And the purpose --

11 JUSTICE GINSBURG: But --

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

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

23 Justice Ginsburg's point is that if they had
24 an informant who had seen drugs in the place within two
25 hours, they had, if they'd been before a magistrate, the

1 basis in probable cause to get a warrant. And I still
2 haven't heard why in fact they couldn't have got one or
3 why they didn't have the probable cause.

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

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

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

12 JUSTICE SOUTER: That is --

13 MR. STIRBA: -- an anticipatory warrant.

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

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

19 JUSTICE SOUTER: Why doesn't it?

20 MR. STIRBA: Or they would have gotten a
21 warrant.

22 JUSTICE SOUTER: Why doesn't it? As I
23 understand, the record evidence is that their informant
24 was in that guy's home, and within two hours of the
25 point that we went through, the second entry, he had

1 seen drugs. Why wasn't there probable cause within that
2 two-hour period?

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

7 JUSTICE SOUTER: Is that a reasonable
8 belief?

9 MR. STIRBA: Pardon me?

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

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

20 JUSTICE SOUTER: They clearly would have
21 been if they had sent a police officer in. You're
22 asking us to extend the police officer rule to include a
23 confidential informant rule. One reason for doing so
24 is, or would be, that in practical terms there is a need
25 for it. Justice Ginsburg's question was, why is there a

1 need for it, when they could have gotten a warrant? And
2 we still haven't heard an answer.

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

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

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

14 JUSTICE SOUTER: That doesn't --

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

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

24 MR. STIRBA: That's correct. And the law at
25 the time that these officers engaged in this operation,

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

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

20 MR. STIRBA: That's true. On the criminal
21 appeal, the State did not argue Lewis, did not argue
22 consent once removed. And that is part of the problem
23 with a number of cases that have been cited by the
24 Respondent. They are exigent circumstances cases where
25 the consent once removed doctrine of Lewis isn't even

1 advocated or litigated. We think that's very important.

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

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. STIRBA: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Stewart.

7 ORAL ARGUMENT OF MALCOLM L. STEWART

8 ON BEHALF OF THE UNITED STATES,

9 AS AMICUS CURIAE,

10 SUPPORTING THE PETITIONERS

11 MR. STEWART: Mr. Chief Justice, and may it
12 please the Court:

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

19 I did want to begin by clarifying the answer
20 to your question, Justice Ginsburg, because I'm not sure
21 if it was entirely clear. There were really two cases
22 here, one of which was the criminal prosecution of Mr.
23 Callahan, the Respondent in this Court. And the
24 individual officers were not parties as to that case.
25 That was handled by the State of Utah. And you're

1 correct that in the criminal proceeding the consent once
2 removed argument was not made. And that led to the
3 motion to suppress ultimately being granted and
4 consequently Mr. Callahan was not subject to criminal
5 proceedings.

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

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

21 MR. STEWART: That's correct. I think the
22 consent once removed doctrine would have its greatest
23 utility in cases where the police suspect but don't have
24 probable cause to believe that a particular individual
25 is engaged in criminal activity, and so they send an

1 informant or an undercover police officer in to try to
2 either confirm or dispel their suspicions. They
3 wouldn't be able to get a warrant at the outset because
4 they would not have probable cause at that time of
5 ongoing criminal conduct.

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

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

1 cause, and that a warrant should have been issued. But
2 certainly there are -- there are plenty of
3 circumstances --

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

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

1 operation in such a way that if the operative's
2 experience confirmed their suspicions and gave them
3 probable cause to arrest, they would be able to go in
4 immediately.

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

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

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

25 MR. STEWART: We think that this Court in

1 this case should address the constitutional question
2 first because it is the subject of the square circuit
3 conflict, it's been briefed and argued, it's a question
4 that independently warrants resolution.

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

16 MR. STEWART: Well --

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

20 MR. STEWART: I guess the first thing I
21 would say in response to that is we think that the --
22 the balance or the way in which discretion will
23 ordinarily be exercised will typically be different in
24 the case of the lower courts than in the case of this
25 Court, because the principal role of the lower Federal

1 courts is to decide individual cases before them usually
2 in the most expeditious and noncontroversial way where
3 they --

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

14 MR. STEWART: Well, I think they will get
15 the message --

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

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

23 CHIEF JUSTICE ROBERTS: Why isn't it -- why
24 isn't it an advisory opinion, if we do not have to
25 decide -- to decide the ultimate question whether this

1 is constitutional or not, but simply whether or not it
2 was clearly established whether it was unconstitutional?
3 Why isn't it purely an advisory opinion to say whether
4 it's constitutional or not?

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

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

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

22 MR. STEWART: Well, it's true that if the
23 Court announced that this search was constitutional,
24 that it would necessarily be saying: And there was no
25 clearly established constitutional law to the contrary

1 at the time the officers acted. But the Court --

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

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

14 JUSTICE BREYER: Well, maybe they both
15 should be the same. I --

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

19 Assume this is an undercover officer, not an
20 -- not a -- not an informant. Now, the undercover
21 officer sees a crime being committed, and he is ready to
22 make the arrest. Can he automatically ask for police
23 assistance and -- and other policemen? Are the police
24 then entitled to come into the home in your view, or do
25 there have to be some exigent circumstances?

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

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

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

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

25 JUSTICE KENNEDY: Just -- just to be clear,

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

6 MR. STEWART: That's correct.

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Mr. Metzler?

17 ORAL ARGUMENT OF THEODORE P. METZLER, JR.,
18 ON BEHALF OF THE RESPONDENT

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

21 This is a case about consent. By consenting
22 to the entry of a confidential informant, that Mr.
23 Callahan consented to the entry of police.

24 The answer is no, and no reasonable officer
25 could have believed otherwise.

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

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

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

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

21 MR. METZLER: Yes.

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

24 MR. METZLER: -- he could make the arrest by
25 himself. But --

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

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

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

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

24 JUSTICE KENNEDY: Well, it seems to me that
25 in the case that Justice Alito put, that there are

1 exigent circumstances.

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

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

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

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

25 So there are a lot of cases just like this

1 one, but with a few changes, which are -- he needs to
2 call the police, and there will be others where he
3 doesn't.

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

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

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

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

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

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

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

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: But concede for
23 purposes of argument that it is a difficult question.
24 Why don't we just tell the lower courts -- we do it, we
25 go right ahead to the qualified immunity question by not

1 granting cert on one. Why shouldn't the lower courts
2 have the same luxury?

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

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

11 MR. METZLER: Yes.

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

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

15 CHIEF JUSTICE ROBERTS: Yes.

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

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

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

23 JUSTICE KENNEDY: It seems to me that this
24 is an area where the police do need guidance, and I need
25 guidance. I find this -- I find this very difficult.

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

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

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

7 MR. METZLER: I didn't hear the Justice's
8 questions.

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

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

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

1 for good and sufficient reason decide to reach the
2 constitutional question first.

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

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

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

18 MR. METZLER: Well, it depends on your view
19 of necessity. In some cases certainly, it won't really
20 come up in other contexts and the law is not established
21 in section 1983; it may never be established. But here
22 we are talking about a question where there is a circuit
23 split and the Court definitely should provide guidance
24 to the lower courts. I don't think that --

25 CHIEF JUSTICE ROBERTS: Doesn't the fact

1 that there is a circuit split almost by definition mean
2 that it's not clearly established?

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

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

18 JUSTICE ALITO: What if -- what if the
19 officers in this case had read the Seventh Circuit
20 decision, and they said these are judges on the United
21 States Court of Appeals, and they think this is
22 consistent with the Fourth Amendment? And what's more,
23 one of these is written -- one of these opinions is
24 written by Judge Posner, and he's the smartest man in
25 the world --

1 (Laughter.)

2 JUSTICE ALITO: He knows everything there is
3 to know about law and economics and jurisprudence and
4 literature and many other subjects.

5 (Laughter).

6 JUSTICE ALITO: Is it unreasonable for them
7 to follow that?

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

22 CHIEF JUSTICE ROBERTS: If the Tenth Circuit
23 says this is not allowed, and every other circuit since
24 the Tenth Circuit's decision has held that it is, is
25 that clearly established that it's not allowed in the

1 Tenth Circuit?

2 MR. METZLER: Yes. I think certainly an
3 officer in the Tenth Circuit would be bound to follow
4 the Tenth Circuit rule. I mean, it's not irrelevant
5 that other -- that other courts have decided it
6 differently, but to the extent that there is controlling
7 law in the circuit, I think that --

8 CHIEF JUSTICE ROBERTS: Then it is
9 irrelevant. Then it is irrelevant that ten other
10 circuits have decided it differently.

11 MR. METZLER: Well, that very well might
12 wind up in this Court if --

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

19 MR. METZLER: Well, we don't expect officers
20 to survey the entire case law and come up with a law
21 professor's view of whether this is reasonable or not.
22 We expect them to follow the clearly -- the bright lines
23 that this Court has set down and that are set down in
24 their home jurisdictions. And if their home
25 jurisdiction says it's unconstitutional it's not

1 reasonable for them to follow some out-of-circuit
2 decision. If, for instance, the Seventh Circuit had
3 said that a warrantless home entry is okay so long as
4 the officer had breakfast in the last half-hour, that's
5 an unreasonable rule, and it wouldn't be reasonable for
6 any officer to follow that. And the facts here are
7 about as relevant to consent as to whether there was --
8 the officer had breakfast that morning.

9 So the officers here are not entitled to
10 qualify -- nor can they rely on the Seventh Circuit.
11 The Petitioners have not given you any reason to adopt a
12 new exception here. They say this is based on a waiver
13 theory or that it's a private search or that it is
14 incident to arrest. But all of those ignore the
15 substantial interest in the sanctity of the home.

16 CHIEF JUSTICE ROBERTS: Do any of the other
17 cases involve -- the other circuit cases involve
18 confidential informants as opposed to police officers?

19 MR. METZLER: Other than the Seventh
20 Circuit?

21 CHIEF JUSTICE ROBERTS: Yes.

22 MR. METZLER: The -- one case in the Sixth
23 Circuit there was both a confidential informant and a
24 police officer were admitted. And then there's a later
25 case in the Sixth Circuit that did say this is okay for

1 it, which came after this case.

2 CHIEF JUSTICE ROBERTS: So at the time every
3 circuit other than the -- you know, if there is a police
4 officer and a confidential informant, I think that could
5 be considered a police officer because he is going to
6 call the police in -- every court of appeals decision
7 involving a confidential informant said it was okay.

8 MR. METZLER: Actually we have cited three
9 circuits where these same facts happened. In the Eighth
10 Circuit, the First Circuit and the Eleventh Circuit.

11 CHIEF JUSTICE ROBERTS: And in those
12 circuits, did the court focus on the distinction between
13 the police officer and the confidential informant?

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

18 CHIEF JUSTICE ROBERTS: Do you believe
19 that -- what is the appropriate level of generality to
20 look at in addressing this question, a case involving a
21 confidential informant?

22 MR. METZLER: I think the appropriate level
23 of generality is that the facts under the court -- the
24 court has covered the field when it comes to warrantless
25 home entries. If you have a warrant, you are okay. If

1 you have exigent circumstances, you are okay. And if
2 you have consent, you are okay. Everything else is
3 presumptively unconstitutional.

4 CHIEF JUSTICE ROBERTS: Why is that?

5 MR. METZLER: That's a good question.

6 CHIEF JUSTICE ROBERTS: Why isn't it that
7 the issue hasn't come up, this question of a
8 confidential informant is one that hasn't come up? Why
9 would we say that is presumptively unconstitutional?

10 MR. METZLER: Well, the Court's language is
11 presumptively unconstitutional has said that many times.

12 JUSTICE GINSBURG: You are talking about the
13 main role of police is get a warrant, except -- and I
14 think the Court has said a number of times to make this
15 search reasonable, the police have to get a warrant if
16 you want to interject the judicial between police and
17 the person in jeopardy. So the main rule is warrant
18 unless -- and then you have exceptions, but I think your
19 point is that there is a main rule.

20 MR. METZLER: Yes.

21 JUSTICE GINSBURG: This Court has gotten
22 from the Constitution?

23 MR. METZLER: Yes.

24 JUSTICE GINSBURG: Get a warrant if you can.

25 JUSTICE ALITO: Isn't your argument that in

1 a situation where the exigent circumstances are the
2 creation of the scenario that the police have set up,
3 the police cannot -- and you have a police officer who
4 is being the undercover operative who has the power to
5 make an arrest, that police officer cannot signal for
6 other officers to come in and assist with the arrest?

7 MR. METZLER: Well, our position is that
8 would be -- the additional officer entry would violate
9 the Constitution --

10 JUSTICE ALITO: The additional officers
11 would -- that would violate the Fourth Amendment?

12 MR. METZLER: Yes.

13 JUSTICE ALITO: Even if there is an officer
14 safety problem there?

15 MR. METZLER: Well, to the extent that they
16 have created an officer safety problem, obviously the
17 officers are going to go in to help him, no one is going
18 to get hurt. But the additional officer's entry can
19 violate the Fourth Amendment.

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

24 MR. METZLER: No, of course, they can send
25 assistance. And they probably --

1 JUSTICE KENNEDY: No. You say they have
2 created the exigent circumstances.

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

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

9 MR. METZLER: Yes, my answer was as a
10 practical matter no -- no police officer is going to
11 leave, even if --

12 CHIEF JUSTICE ROBERTS: No, but then he is
13 going to get sued.

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

16 JUSTICE KENNEDY: And you say as a practical
17 matter we have to say that under the Constitution we can
18 endanger -- we must endanger the officer?

19 MR. METZLER: Well, I disagree that the
20 officer could be in danger --

21 JUSTICE KENNEDY: No, no. The hypothetical
22 is that they have to send people in to assist him. But
23 the hypothetical also is they should have anticipated
24 this, and therefore, in your words, they created exigent
25 circumstances.

1 MR. METZLER: They did create the exigent
2 circumstance --

3 JUSTICE KENNEDY: It seems to me that
4 dilemma and that paradox casts considerable doubt on
5 your proposition that if the police create the exigent
6 circumstances, they cannot rely on it. I seriously
7 question that proposition.

8 MR. METZLER: Even if -- even if you
9 disagree with me on that, it shouldn't make any
10 difference in this case where there was no exigent
11 circumstances.

12 JUSTICE KENNEDY: No, no. I want to talk
13 about the general rule.

14 MR. METZLER: Okay. Well, the general --
15 never mind --

16 JUSTICE KENNEDY: You want us to write an
17 opinion saying that any time police create the exigent
18 circumstances, they can't rely on them if they had had
19 the time to get a warrant. And I find that a dangerous
20 rule.

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

24 JUSTICE SOUTER: Mr. Metzler, what do you
25 say to this line of reasoning, we have in prior cases

1 adopted the positions that for purposes of establishing
2 probable cause, the knowledge of one police officer is
3 also the knowledge of all police officers, at least
4 within a department or working on a particular problem.
5 So that if in a case in which there is a search without
6 a warrant, if you add up everything that individual
7 officers knew and that amounts to probable cause, then
8 the search is good.

9 Why don't we apply, in effect, the same rule
10 in the hypothetical case that you have been given, which
11 is a police officer who was admitted by consent and
12 there are other police officers outside. At the point
13 at which the police officer who has been admitted has
14 the knowledge necessary for an arrest and has that
15 knowledge as a result of the invitation and the waiver
16 of privacy as to him, why don't we regard that on sort
17 of general doctrinal grounds as a waiver of privacy with
18 respect to the police in general, just as we regard
19 police knowledge as being imputed to all police
20 officers?

21 That way you don't have the problem that,
22 for example, Justice Kennedy's hypo raises, even in the
23 case of exigent circumstances. But it doesn't open the
24 door to what you were objecting to here. Why isn't that
25 a proper solution or proper answer to this hypo?

1 MR. METZLER: Well, if you are to adopt that
2 sort of -- I think you certainly could adopt that
3 rationale. But I don't think the way to get there is
4 through a waiver, because real there's nothing that the
5 person -- the suspect has done that he knows about that
6 would mean that he waived the expectation that
7 additional people would come in. There might be --

8 JUSTICE SOUTER: No, you are absolutely
9 right in terms of his psychological process, the only
10 person he has invited in is the one person. The reason
11 for coming up with the answer I suggested is a broader
12 doctrinal reason. That is the reason that we have for
13 probable cause purposes regarded the police -- or the
14 knowledge of one police officer as the knowledge for
15 all.

16 Why don't we, for the same reasons, since it
17 is privacy that is at stake in all of these cases,
18 regard the invitation of one police officer as the
19 invitation of all, or to all?

20 MR. METZLER: Again, I don't think that the
21 way to get there is through consent. If you want it to
22 balance and say, well, the government has an agent in
23 there who is making the arrest and there is safety
24 concerns and other reasons why we would want to do that,
25 that might be one way to get there. I don't think it's

1 through consent.

2 JUSTICE SOUTER: It would be consent to one
3 officer plus a doctrinal basis to construe that consent
4 for Fourth Amendment purposes as a broader consent.

5 MR. METZLER: Yes.

6 JUSTICE SOUTER: That's what we would be
7 doing. We wouldn't be doing it because the individual
8 in the trailer says I am inviting in the whole L.A.
9 police department. We are doing it because he invites
10 one L.A. police officer in, and we have doctrinal basis
11 for regarding the police, as it were, collectively
12 rather than individually for probable cause purposes
13 when privacy is at stake.

14 MR. METZLER: That would be -- that would
15 certainly be a basis to allow for police officers.

16 JUSTICE SOUTER: Would it not open the door
17 to, I guess, to what you are objecting to?

18 JUSTICE ALITO: Why would probable cause
19 solve the problem at all? There is clearly probable
20 cause here. They are listening to what goes on. So
21 they're -- do you dispute that when they hear that the
22 drug transaction is taking place, that they lack
23 probable cause?

24 MR. METZLER: No, I think they do have
25 probable cause. But in Payton, the Court said that

1 police officers who are outside who have probable cause
2 need more than probable cause to get inside. They need
3 a warrant, exigent circumstances.

4 JUSTICE SOUTER: Right. I think I may have
5 created this problem for you and -- and maybe I -- I
6 should get you out of it.

7 (Laughter.)

8 JUSTICE SOUTER: I'm not suggesting that the
9 probable cause rule is what is operative here. I'm
10 saying that for probable cause purposes we regard the
11 police collectively, and why, since our privacy is at
12 stake there and is at stake here -- why shouldn't we
13 have a collective consent rule, too?

14 MR. METZLER: You certainly could --

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

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

20 CHIEF JUSTICE ROBERTS: How do you decide
21 whether the confidential informant should be considered
22 an employee of the police? Let's say this is the tenth
23 undercover operation he has engaged in. They give him
24 \$100 after every undercover operation. I mean, is he an
25 employee of the police department?

1 MR. METZLER: I don't think his employment
2 status is -- is what is at issue. The question is
3 whether he is an agent of the state for the purpose that
4 he is inside -- for the purposes of making an arrest of
5 the person inside the home.

6 Here the confidential informant, all he is
7 really doing is acting as a surveillance device. He is
8 telling the officers outside what is happening inside.
9 And he gives them probable cause.

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

12 MR. METZLER: No, I don't think so. He
13 might be an agent for some purposes but he is not an
14 agent for purposes of making an arrest inside, which is
15 what they want to do.

16 JUSTICE ALITO: What is it there is a State
17 statute that says that confidential informants may be
18 designated by the police department to assist in making
19 arrests?

20 MR. METZLER: If there was some assist to
21 making an arrest -- of the government, then assuming we
22 are following Justice Souter's few exceptions, then I
23 think that they would fall into that exception. But
24 here, of course, the confidential informant is no such
25 thing. This confidential informant was not active

1 politically. He wasn't making an arrest. There was
2 no --

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

8 MR. METZLER: Well, that's true. He was
9 acting with the police but he wasn't acting for the
10 police. And nothing that the -- that the confidential
11 informant did inside, even if attributed to the police,
12 would give police the right to cross that threshold. If
13 this confidential informant were a police officer, I
14 think you would have to base it on the power of the
15 police to make the arrest inside, the power of the State
16 to make that --

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

22 MR. METZLER: That's correct,
23 Justice Ginsburg. Both the Solicitor General and the
24 Petitioners agree that confidential informants should
25 not and would not be making these arrests. So the

1 function of the confidential informant is really as I
2 said, just a surveillance device; and what is important
3 is not what he is doing but what the police are doing
4 who are outside.

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

10 MR. METZLER: But I think in general we are
11 talking about a very small category of cases like this
12 one where their -- the criminal defendant won on the
13 Fourth Amendment and then the police bring up some new
14 argument on a qualified immunity defense because there
15 would already be some law on the questions that were
16 decided in the -- in the criminal case.

17 So in those limited circumstances it seems
18 to put too much of a thumb on the scale on the side of
19 police that says well, you can come up with a new theory
20 and you don't even have to show that it applies; all you
21 have to show is that nobody has ever rejected your
22 theory and then it is not fairly established. I don't
23 think in that small number of cases that the balance
24 should really tilt that far towards police. And here,
25 here it's certainly not, where the Solicitor General and

1 the Petitioners both agree that the Court should decide
2 both questions.

3 The constitutional question here is not very
4 difficult. It boils down to, in the absence of exigent
5 circumstances, could any reasonable officer have
6 believed that the two circumstances they would like to
7 see in previous cases -- that is, that a confidential
8 informant is inside, and that he sends a signal out that
9 there is probable cause -- do those make any difference
10 whatsoever to the calculation of whether there are
11 exigent circumstances or consent? The answer is no and
12 no reasonable officer could have believed otherwise. If
13 there are no further questions.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Stirba, you have three minutes
16 remaining.

17 REBUTTAL ARGUMENT BY PETER STIRBA,

18 ON BEHALF OF THE PETITIONERS

19 MR. STIRBA: The colloquy about the safety
20 concerns when the officer or the confidential informer
21 are in the home I think highlight why the distinction
22 between a confidential informant and the officer really
23 doesn't make much meaningful headway in terms of the
24 Fourth Amendment. Obviously if the police officer was
25 acting under cover in this particular situation he would

1 not have announced -- there were three arrestees who
2 were actually in the premises at the time of the
3 follow-up entry. He would not have said after the drug
4 transaction occurred "oh, by the way, I'm a police
5 officer, I'm here to arrest you," for obvious reasons
6 connoting safety and other issues which would have been
7 attendant to them.

8 Similarly the confidential informant isn't
9 going to do that, either, for the same particular
10 problem, even if the confidential informant had arrested
11 powers under State law. The issue is the police officer
12 can call up for backup and assistance to effectuate
13 arrest, which is specifically what occurred here.
14 Similarly, there is no really distinction to be drawn
15 between a confidential informant as a government actor
16 allowing for the additional entry or follow-up entry of
17 additional officers for backup and assistance to make
18 sure the arrest is safe and secure than if you have a
19 police officer.

20 The second point I would like to make is the
21 first time any Federal circuit drew this distinction
22 between a confidential informant and a police officer
23 was the Tenth Circuit decision. They adopted consent
24 once removed. They just limited it to a police officer.
25 Obviously the police officers involved in this case

1 could not reasonably be expected to anticipate such a
2 distinction being drawn, especially given the fact that
3 there was at least a Seventh Circuit body of law, the
4 Sixth Circuit body of law, and as we argue, which we
5 think is a fair reading of Gramble -- because they cite
6 the Seventh Circuit body of law that includes the
7 confidential informant -- there were at least three
8 circuits that rejected that distinction, and you in 2000
9 confirmed that in the Sixth Circuit there is no
10 distinction as a matter of this particular doctrine
11 between a confidential informant and a police officer.

12 And finally with respect to the exigent
13 circumstances cases, and you can look at any one that
14 was cited by the Respondent, there is no mention of
15 Lewis, there is no mention of consent once removed,
16 there is no mention of any abrogation of privacy. Those
17 issues were not raised, just like the issues were not
18 raised in the criminal appeal of Mr. Callahan's
19 conviction; and so therefore they are really not
20 relevant, they are not probative, and we are not
21 suggesting this is an exigent circumstances case, nor
22 are we suggest relying on for purposes of the Fourth
23 Amendment issue any implied consent.

24 We have rested our -- the justification for
25 the Fourth Amendment issue on search incident and also

1 the Lewis doctrine because we think this is a Lewis
2 case. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel,
4 the case is submitted.

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

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