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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 99-1132, Illinois v. Charles McArthur.

5 Mr. Bertocchi.

6 ORAL ARGUMENT OF JOEL D. BERTOCCHI

7 ON BEHALF OF THE PETITIONER

8 GENERAL BERTOCCHI: Thank you. Good morning,
9 Mr. Chief Justice, and may it please the Court:

10 In this case, a police officer who had probable
11 cause to believe that readily destructible evidence was
12 concealed in Charles McArthur's home secured that home
13 from the outside while his partner went to see the judge
14 to get a warrant. By doing so, the police officer,
15 Officer Love, prevented what, as it turned out, would have
16 been the certain destruction of that evidence.

17 He also avoided doing something that this Court
18 has often condemned in its Fourth Amendment cases.

19 QUESTION: May I stop you there, please,
20 counsel? As it turns out, and you mentioned, at the end
21 of the day the respondent would have entered the home and
22 destroyed the evidence if he'd had the chance, but the
23 police didn't know that at the time, did they?

24 GENERAL BERTOCCHI: I don't think they knew it,
25 certainly, Your Honor.

1 QUESTION: And I think that we have to take the
2 case on the assumption that they didn't know.

3 GENERAL BERTOCCHI: Correct.

4 QUESTION: Isn't that right?

5 GENERAL BERTOCCHI: I agree.

6 QUESTION: So I don't think we should look at
7 the fact that he said that later in resolving the case.

8 GENERAL BERTOCCHI: Your Honor, by mentioning
9 that I didn't mean to suggest that the Court should. I
10 think that demonstrates something about the fact that
11 people can intend to destroy evidence without telegraphing
12 it.

13 QUESTION: Yes.

14 GENERAL BERTOCCHI: But I agree that the
15 officers certainly didn't know it. Mr. McArthur didn't
16 say so.

17 QUESTION: Well, can we take the case on the
18 assumption that there's a substantial risk that in this
19 context he would have destroyed the evidence?

20 GENERAL BERTOCCHI: I agree, Your Honor. I
21 believe that the police believed that, that they were
22 concerned about the risk to evidence, but I can't say that
23 they could read his mind.

24 QUESTION: Well, but didn't the evidence that
25 they had before them establish at least exigent

1 circumstances? Could they have gone in on an exigent
2 circumstances exception?

3 GENERAL BERTOCCHI: Well, Your Honor, I believe
4 in this case they could have, although I would emphasize
5 again that they never actually went in at all except
6 briefly with --

7 QUESTION: No, I realize that, but I mean, in
8 deciding the reasonableness of the -- of blocking the
9 individual from going back in, it seems to me we ought to
10 consider that they could have gone in themselves under an
11 exigent circumstances theory, if that is so.

12 GENERAL BERTOCCHI: I believe that is so, Your
13 Honor, and certainly it demonstrates that the intrusion
14 that we're asking for here is amply justified.

15 QUESTION: But then you run up against your
16 opponent's argument that the police themselves created the
17 exigent circumstances, because they told -- they told the,
18 later, defendant that his wife had snitched on him, and if
19 he didn't know that, then he wouldn't have any incentive.

20 GENERAL BERTOCCHI: I understand that argument,
21 Your Honor, and I don't believe it applies in this case
22 for a couple of reasons. One is that I believe the
23 officers had genuine concern sufficient to allow them to
24 impound, certainly, and perhaps to go in even before they
25 spoke with him.

1 Mrs. McArthur told the officers that she had
2 just seen Mr. McArthur conceal the marijuana under the
3 couch. She told them that when she came out into the
4 house, and I believe that that told the officers not only
5 that there was marijuana inside, which provided them with
6 probable cause to search, I think that also demonstrated
7 to them that Mr. McArthur, or at least would give them
8 reasonable grounds to suspect that Mr. McArthur was
9 interested in preventing them from getting access to the
10 evidence and had already at least once translated that
11 idea into action.

12 QUESTION: Well, I want to know how fine you're
13 slicing it when you say reasonable cause to believe. Do
14 you mean probable cause?

15 GENERAL BERTOCCHI: No, I don't, Your Honor.

16 QUESTION: Well, if you don't mean probable
17 cause, then I think your response to Justice Ginsburg is,
18 there were no exigent circumstances sufficient to support
19 an entry but for the police's statement to him that they
20 knew about the drugs and they wanted to go in. Am I
21 right?

22 GENERAL BERTOCCHI: I -- Your Honor, I -- that
23 isn't what I intended to say, I'm sorry.

24 QUESTION: Okay. Now, assume they did not --
25 assume we remove from consideration the fact that they

1 told him that the wife had snitched on him and they would
2 like to search. Did they have probable cause to make an
3 exigent circumstances search?

4 GENERAL BERTOCCHI: Your Honor, I don't
5 believe -- I do believe that they did. I don't -- I do
6 believe --

7 QUESTION: And the reasons are? The reasons
8 are?

9 GENERAL BERTOCCHI: The reasons are, Your Honor,
10 that they -- as I indicated, that they had -- they were
11 aware that Mr. McArthur, while they were present, and he
12 knew they were present, had already taken action to
13 conceal the evidence from them, and I think it would be
14 reasonable for them to believe that he might take
15 additional action, or decide that that action wasn't
16 sufficient.

17 QUESTION: Okay.

18 GENERAL BERTOCCHI: In addition, Your Honor, I
19 would suggest to the Court that --

20 QUESTION: When you say he knew they were
21 present --

22 GENERAL BERTOCCHI: Yes, Your Honor. He -- the
23 police had been outside for some time while Mrs. McArthur
24 was moving her items out, and they wouldn't have been very
25 good peacekeepers if they didn't let it be known, or she

1 didn't let it be known that the police were outside while
2 she was moving her items out.

3 So at the time Mrs. McArthur came out and said
4 all this, the police knew that Mr. McArthur knew they had
5 been outside for some time, that they were in the company
6 of his wife, who was angry at him and might be motivated
7 to snitch on him, and she also told them that he had
8 already taken at least some action to conceal marijuana,
9 the marijuana that was inside, from them.

10 QUESTION: Did she indicate how much marijuana,
11 because much is made by McArthur that this was -- this is
12 very small stakes.

13 GENERAL BERTOCCHI: Your Honor, she did not say
14 anything -- there is no testimony in the record that she
15 said anything other than that it was marijuana, and that
16 is really one of our central points in response to that
17 argument, is that the officers had no reason to know just
18 what the stakes would be for any number of reasons. One
19 of them was that.

20 It is certainly unlikely that if they had asked
21 her Mrs. McArthur could have said 2.3 grams. At most she
22 might have said, a little, but a little can rise to the
23 level of a felony in Illinois, and even a little little is
24 a jailable crime.

25 QUESTION: But in any case she didn't say

1 anything one way or the other about quantity --

2 GENERAL BERTOCCHI: Correct.

3 QUESTION: -- as far as the record tells us.

4 GENERAL BERTOCCHI: Correct, Your Honor.

5 QUESTION: Is that correct?

6 GENERAL BERTOCCHI: That is correct.

7 Your Honors, Officer Love's conduct in this case
8 was restrained and, indeed, specifically calibrated to
9 intrude no more than necessary while giving full effect to
10 the warrant requirement, and we ask that this Court
11 approve that conduct because it will both protect both
12 evidence and privacy.

13 There are two facts that we believe demonstrate
14 that Officer Love's conduct fell clearly within the limits
15 of reasonable conduct under the Fourth Amendment. One of
16 them, of course, is that there was no entry necessary in
17 this case, and we believe that that substantially lesser
18 intrusion is very important. It interfered only with
19 Mr. McArthur's possessory interest in his home, and while
20 those interests are certainly protected by the Fourth
21 Amendment, the -- they are not -- they do not receive the
22 high level of protection that privacy interests do,
23 particularly where a home is concerned.

24 QUESTION: May I ask if, in your view, the
25 length of time that it takes to get the warrant is

1 relevant at all?

2 GENERAL BERTOCCHI: I believe it is, Your Honor.

3 QUESTION: And in this case, what was it?

4 GENERAL BERTOCCHI: Your Honor, I think on this
5 record the most you could say would be 2 hours, but I
6 believe that the more justified conclusion would be about
7 an hour and 15 minutes from the time the impoundment was
8 imposed to the time that the warrant was signed.

9 QUESTION: If it took, say, 8 or 10 hours, you
10 would say that's probably unreasonable?

11 GENERAL BERTOCCHI: Your Honor, I would say that
12 was a much harder case, but it would depend on the
13 circumstances that caused it to take that long.

14 QUESTION: Yes.

15 GENERAL BERTOCCHI: I think this is an amount of
16 time that you could almost say was per se reasonable. I
17 think, in fact, that it was surprisingly brief, in --
18 particularly in light of the fact that this is a small
19 rural jurisdiction with a small police force and --

20 QUESTION: But you would say the length of time
21 would be a relevant consideration?

22 GENERAL BERTOCCHI: Certainly, Your Honor. I
23 know the Court has said on many occasions that an
24 intrusion on Fourth Amendment rights can start off okay
25 and become unreasonable by degree.

1 QUESTION: Would you also -- what is your
2 position on whether the quantity of drugs is relevant to
3 the inquiry? I mean, if it was a bomb about to explode
4 you take one view, and an ounce of marijuana you can get a
5 little different reaction intuitively, but do you think
6 legally it should make any difference?

7 GENERAL BERTOCCHI: Your Honor, I think under
8 Welsh you can't say that it doesn't figure into the Fourth
9 Amendment calculus. We believe that there was ample
10 justification in this case in light of the quantity of
11 marijuana. This is a case which the State of Illinois
12 legislature has decided you can go to jail for. This is a
13 case that the county prosecutor, who is the original
14 jurisdiction prosecutor in the county, has decided was
15 worth a search warrant --

16 QUESTION: If it were different -- if, for
17 example -- some counties around the country don't
18 prosecute on cases like this, or maybe the quantity would
19 have to be a little smaller. If they had a policy of not
20 prosecuting minimal amounts of possession of marijuana,
21 then I take it, it would or would not be reasonable to go
22 in?

23 GENERAL BERTOCCHI: Your Honor, I think if they
24 had a blanket policy that was known to the police
25 officers, then I think they would -- you know, before they

1 even got to that question they would doubt, or be sure
2 that they couldn't get the prosecutor to approve the
3 search warrant in the first place.

4 QUESTION: Could they have arrested this
5 defendant without a warrant, without an arrest warrant --

6 GENERAL BERTOCCHI: Yes, Your Honor.

7 QUESTION: -- based on the information that they
8 had?

9 GENERAL BERTOCCHI: I believe that they could
10 have. I believe they had probable cause both to search
11 the house and to arrest Mr. McArthur.

12 QUESTION: Mr. Bertocchi, how far did the police
13 have to go geographically to get a warrant in this case?

14 GENERAL BERTOCCHI: Your Honor, I am not aware
15 of that. I know that Mr. McArthur lived in Sullivan, and
16 that Sullivan is the county seat of Moultrie County, so
17 they didn't have to leave the town of Sullivan to get to
18 the courthouse.

19 QUESTION: Mr. Bertocchi, I guess your case is
20 easy if you assume, as you do, that they had authority to
21 enter without a warrant on the basis of exigent
22 circumstances, but assuming I don't agree with you on that
23 point, I'm concerned about complicating the criminal law
24 more than is necessary.

25 You're asking us to establish some standards

1 below the exigent circumstances standard which would
2 dispense with a warrant, and you're saying if you don't
3 actually go into the house we want yet another test that's
4 a little bit less than exigent circumstances. I'm not
5 sure that human beings are capable of entertaining as many
6 variations and figuring out what is less than exigent
7 circumstances but still enough to justify this.

8 Why shouldn't we just have one single rule?
9 It's an exigent circumstances rule. If there are exigent
10 circumstances, you can either go in the house or exclude
11 the homeowner from going back in himself.

12 GENERAL BERTOCCHI: Your Honor, I agree that
13 impoundment does present something of a complication, but
14 I don't think it's that serious, and I think that the test
15 is not all that different, because it's a balancing test
16 ultimately, always. I think that in this case we also
17 distinguish, as does --

18 QUESTION: Well, it's not a balancing test with
19 exigent circumstances. If there are exigent circumstances
20 you can go in. You don't have to say, you know, well, is
21 it a really expensive house, or is it a less-expensive
22 house, or, you know, is this person really concerned with
23 his privacy, or is he the kind of guy who leaves his
24 window shades up anyway? You don't balance anything. If
25 there are exigent circumstances, you go in.

1 GENERAL BERTOCCHI: I understand --

2 QUESTION: And when you have that test the
3 courts know how to deal with it. Why don't we just have a
4 flat rule, if there are exigent circumstances, you can
5 either go in or you can stop him from going in?

6 GENERAL BERTOCCHI: Well, Your Honor, it's our
7 position --

8 QUESTION: Life is too complicated. We can't
9 engage in all of these myriad levels of police activity.

10 GENERAL BERTOCCHI: Your Honor, if the Court
11 were to agree with me that exigent circumstances were --
12 particularized exigent circumstances were present here,
13 sufficient to allow an entry, that would be very
14 satisfactory, because I'm sure that would result in the --

15 QUESTION: But the question presented is, is it
16 reasonable under the Fourth Amendment for police officers
17 who have probable cause to believe a residence contains
18 evidence enough to secure the residence from the outside,
19 so your question certainly assumes the existence of
20 probable cause.

21 GENERAL BERTOCCHI: Yes, Your Honor.

22 QUESTION: It doesn't really say anything about
23 exigent circumstances.

24 GENERAL BERTOCCHI: Your Honor, our position is
25 that no specific or particularized exigent circumstances

1 were required to do what Officer Love did.

2 QUESTION: You say probable cause is enough.

3 GENERAL BERTOCCHI: Probable cause is enough
4 that you don't have to make an entry, yes, Your Honor.

5 Your Honors, as I was indicating in response to
6 Justice Stevens, the intrusion in this case lasted a
7 surprisingly brief amount of time, but another important
8 aspect of its limitation is that it was always intended
9 only as a step on the way to getting a warrant.

10 Impoundment is really not capable of analytical
11 separation from getting a search warrant. It is a step in
12 its execution which is designed to assure that if there is
13 evidence in the house at the time probable cause arises,
14 it will still be there by the time the judge -- the
15 officers come back with the warrant if the judge signs it.

16 QUESTION: Suppose that the wife had told the
17 police officers not that he had hidden some contraband
18 under the sofa but, rather, that he had it in his pocket.
19 Are we going to have to, in the next case, ask whether,
20 although the police could not arrest him without a warrant
21 on the basis of just that probable cause, they could
22 nonetheless prevent him from putting his hand in his
23 pocket or, you know, follow him around and make sure that
24 he doesn't put his hand in his pocket, which is a lesser
25 intrusion than arresting him, arguably a lesser intrusion

1 than stopping him -- I mean, is there any end to the
2 number of variations of lesser, lesser, lesser intrusion
3 that we'll be confronted with?

4 GENERAL BERTOCCHI: Well, Your Honor, in this
5 case I think if -- that once he had come outside the house
6 they could have arrested him because they had probable
7 cause to arrest him and then, incident to that, I think
8 they could have reached into his pocket. So in those
9 situations where there is probable cause to arrest,
10 personal search issues are going to be subsumed in search
11 of the person incident to arrest.

12 QUESTION: You think they didn't need an arrest
13 warrant, they could just have --

14 GENERAL BERTOCCHI: I believe that when they had
15 this -- that -- the record demonstrates that Mr. McArthur
16 came out of his house to speak with the officers, and I
17 believe that at that point he was in a public place and
18 could be arrested without a warrant, yes, Your Honor.

19 QUESTION: Of course, your theory, I take it, is
20 that he could have been arrested in the house without a
21 warrant because the indication that the police had was
22 that he was possessing drugs inside, but they didn't have
23 particularized knowledge that the amount of drugs was
24 only -- only carried the offense to the misdemeanor level,
25 so I take it you would have said he could have gone --

1 they could have gone in and arrested without a warrant.

2 GENERAL BERTOCCHI: I believe that -- I believe
3 that they could have, again based on the exigent --

4 QUESTION: Why shouldn't -- given the fact that
5 we do have -- we do make a distinction between arrest with
6 or without warrant in one's own home, why shouldn't the
7 police have the burden of demonstrating that they had
8 probable cause to believe that the drugs were in a felony
9 quantity before they went in to arrest?

10 GENERAL BERTOCCHI: Your Honor, I believe that
11 in this instance had they gone in to --

12 QUESTION: No, but even apart from this, and
13 just as a general rule, why shouldn't that be the general
14 rule, that the police would have to establish a felony
15 level before they go into a house to arrest without a
16 warrant?

17 GENERAL BERTOCCHI: Your Honor, I believe that
18 in some cases that might very well be a difficult rule to
19 administer, and I think this is a good example of that,
20 Your Honor. I don't think Mrs. McArthur would likely
21 have been able to give them, even if they had asked, the
22 detail --

23 QUESTION: Well, that's right, and therefore
24 they couldn't have gone in. It would not be difficult to
25 administer, it would be easier to administer, but you'd

1 lose.

2 GENERAL BERTOCCHI: Your Honor, I believe that
3 they did have sufficient cause in this case had they
4 needed to enter to effectuate this impoundment, but I
5 don't believe that they needed it to do it in the way that
6 they did.

7 If there are no other questions I would reserve
8 the remainder of my time, if I could.

9 QUESTION: Very well, Mr. Bertocchi.

10 GENERAL BERTOCCHI: Thank you.

11 QUESTION: Mr. Roberts, we'll hear from you.

12 ORAL ARGUMENT OF MATTHEW D. ROBERTS

13 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

14 SUPPORTING THE PETITIONER

15 MR. ROBERTS: Thank you, Mr. Chief Justice, and
16 may it please the Court:

17 For three reasons, police officers who have
18 probable cause to believe that a residence contains
19 incriminating evidence may prevent entry for a reasonable
20 period of time in order to preserve the evidence while
21 they obtain a search warrant.

22 First, there's a strong law enforcement interest
23 in preserving evidence pending issuance of a warrant.

24 Second, securing the premises from the outside
25 by preventing entry is a limited and temporary intrusion.

1 Third, it's less intrusive than other means of
2 preserving evidence, and it promotes fidelity to the
3 Fourth Amendment's preference that searches be authorized
4 by a warrant.

5 When a residence contains evidence of a crime,
6 there's an inherent danger that the evidence may be
7 damaged or destroyed if people are allowed on the
8 premises, and therefore, unless police have a means to
9 protect the evidence during the time that it takes to
10 obtain a warrant, the search pursuant to the warrant may
11 often be fruitless.

12 QUESTION: Mr. Roberts, do you think all
13 evidence is fungible?

14 MR. ROBERTS: No, all evidence is not fungible,
15 Your Honor, but almost all evidence is capable of
16 alteration or destruction, or damage in some way.

17 QUESTION: Is all evidence that's capable of
18 alteration or destruction fungible?

19 MR. ROBERTS: No.

20 (Laughter.)

21 MR. ROBERTS: All evidence that's capable of
22 alteration or destruction isn't fungible either, but
23 there's a sufficient inherent danger of some kind of
24 damage with -- damage or destruction of evidence under the
25 circumstances that the risk would be too great in enough

1 cases to warrant asking for some particularized --

2 QUESTION: Let me make the question a little
3 more precise. Does the seriousness of the offense weigh
4 into the analysis at all in your view?

5 MR. ROBERTS: Certainly not when all we're
6 talking about is temporarily preventing entry for a
7 limited period of time.

8 QUESTION: Mr. Roberts, you say that, you know,
9 there's a great law enforcement interest in preserving the
10 evidence, but there's also a considerable interest on the
11 part of the individual in going into his own home.

12 MR. ROBERTS: Yes, and --

13 QUESTION: What if he tells the police officer,
14 gee, I have to get back in there, I have something on the
15 stove that's going to burn. Or, you know, I have a child
16 in there that I have to attend to.

17 Now, are we going to have to weigh all of those
18 additional factors in this subtle balancing test once we
19 abandon the exigent circumstances rule and ask in each
20 case, well, this isn't just getting back into his home,
21 it's getting back into his home to turn off his computer,
22 or to take care of a child. We're going to go crazy
23 trying to balance these things all the time. Why not just
24 stick with the exigent circumstances rule?

25 MR. ROBERTS: Our rule that we're proposing here

1 that has already been reflected in cases involving
2 containers, vehicles, and evidence in plain view, and the
3 Court suggested in dicta it applies to securing residences
4 as well, is easily applied. The issue is, is there
5 probable cause to believe that the residence contains
6 evidence of a crime, and if there is probable cause to
7 believe that, then there is a consequent --

8 QUESTION: Even if there's a child in there that
9 needs taking care of, right?

10 MR. ROBERTS: Well, the Court's made clear --

11 QUESTION: That's a clear rule, then. You're
12 going to take that position?

13 MR. ROBERTS: The Court's made clear that any
14 search or seizure, even one that's justified by a warrant,
15 can be rendered unreasonable by the manner in which it's
16 executed, and one factor that you would consider in
17 determining whether the seizure --

18 QUESTION: Well, that's not a manner of
19 executing it. They're executing it by not letting him go
20 into the house, but you're saying it isn't just the house
21 you have to consider, it's also all these other factors,
22 why he wants to go in, right?

23 MR. ROBERTS: No, Your Honor. The basic
24 principle would still apply, but the police officers have
25 to act reasonably. That's, the fundamental principle of

1 the Fourth Amendment is reasonableness, and if under the
2 circumstances reasonableness required some accommodation
3 of the needs that were -- that the occupants were impeded
4 from addressing because of the seizure, the police would
5 have to reasonably address that. If there was a child
6 inside, I think that would create exigent circumstances
7 that would justify them going in to take care of the child
8 if there were some need to do that.

9 QUESTION: But in effect you're saying that yes,
10 balancing is going to have to be done in the field, so I
11 think your answer to Justice Scalia is, we don't have just
12 a simple rule that if there's probable cause they can
13 impound. Your rule is, there's a general rule that if
14 there's probable cause they can impound, but there may be
15 circumstances which vary the permissible application of
16 that rule.

17 MR. ROBERTS: There may be circumstances which
18 require the police to take other actions to address the
19 needs as reasonable, but the fundamental rule remains the
20 same, and I don't think that is different than in any
21 other circumstance, any other kind of --

22 QUESTION: That rule would depend on the facts
23 as they are known to the officer, even -- so that so long
24 as the homeowner says, I have a kid in there, even if he
25 doesn't have a kid in there, it would be unreasonable for

1 the police officer to stop him from going in, I assume.

2 MR. ROBERTS: I think that if -- if -- unless
3 the officer had -- knew that there wasn't a kid in there,
4 which in this case he might know because the wife --

5 QUESTION: Well, maybe the police officer could
6 go in himself and bring the kid outside.

7 MR. ROBERTS: He could. He could accompany him
8 inside. That's what I was trying to say before, Mr. Chief
9 Justice. If there was a child who was -- who needed
10 protection that much that required the respondent to
11 enter, then that would justify the police officer going in
12 in the interest of public safety.

13 QUESTION: What if the child is old enough to
14 destroy the evidence and sees what's happening?

15 (Laughter.)

16 QUESTION: Can the police go in and make the
17 child come out, too?

18 MR. ROBERTS: If the child were outside and
19 wanted to go in and was old enough --

20 QUESTION: No, no, no, the child is inside, and
21 the officer realizes, well, maybe he'll destroy the
22 evidence.

23 MR. ROBERTS: Oh, the officer could ask the
24 child to come out under those circumstances.

25 QUESTION: He could ask him to, but the child

1 says I'm too busy destroying evidence.

2 (Laughter.)

3 MR. ROBERTS: Well then, that would certainly
4 create exigent circumstances that would justify going in
5 to secure the premises from the inside, but this case
6 involves a very different and much more limited situation,
7 where all that was necessary was to prevent entry and that
8 kind of intrusion is extremely more limited, because it's
9 only possessory interest in the premises. It lasts only
10 long enough to get the judicial determination about
11 whether there's probable cause to search and seize, and
12 it's far less intrusive than the other alternatives.

13 For instance, if the police officers here had
14 arrested respondent, that would have invaded his personal
15 privacy and his liberty.

16 QUESTION: The other thing I wondered about is,
17 what would have happened -- this case arose out of an
18 argument between the husband and wife, as I remember.
19 What if she changed her mind when she got to the
20 magistrate and decided not to support the probable cause
21 and they never got the warrant, would the seizure then
22 have been unlawful?

23 MR. ROBERTS: The --

24 QUESTION: Does the legality depend on the fact
25 that the warrant was ultimately issued?

1 MR. ROBERTS: The legality depends on the
2 presence of probable cause. I think at the time that they
3 conducted the seizure they would have had probable cause
4 and the seizure would be legal.

5 QUESTION: Even if the warrant were not issued?

6 MR. ROBERTS: Even if the warrant were not
7 issued.

8 As I was saying before, the -- part of the
9 reason that the intrusion is so small, is limited here,
10 and that this is particularly reasonable, is that the
11 other alternatives such as arresting the occupants, such
12 as a warrantless entry, are more intrusive, involve
13 invasions of privacy. They're more serious, and by
14 providing an alternative to immediate warrantless entry
15 this external impoundment option actually encourages
16 police officers to seek a warrant before they search. The
17 Court has therefore recognized a principle that the
18 interest in protecting evidence can temporarily supersede
19 possessory interest in property for the time that it takes
20 to get a warrant in a variety of contexts.

21 As I noted before, the Court's done it in dictum
22 in situations involving securing premises, but the Court's
23 held that that's true in a variety of cases like container
24 cases, where the Court has held that if the police have
25 probable cause to believe the container holds evidence

1 they can seize the container pending a warrant to search
2 it, and the Court's held that if the police have probable
3 cause to believe that evidence that's in plain view is
4 associated with criminal activity, they can seize it.

5 The same principle that underlies that, the
6 interest in protecting the evidence, the inherent danger
7 that the evidence may be damaged or destroyed if there
8 isn't an ability to freeze the status quo while the police
9 get a warrant, the fact that the police are getting the
10 warrant here, all point to the fact that it's eminently
11 reasonable for the police to be able to secure the
12 premises from the outside for a temporary time while they
13 obtain a warrant to search.

14 If there are no further questions --

15 QUESTION: Thank you, Mr. Roberts.

16 Ms. Jones, we'll hear from you.

17 ORAL ARGUMENT OF DEANNE F. JONES

18 ON BEHALF OF THE RESPONDENTS

19 MS. JONES: Thank you, Mr. Chief Justice, may it
20 please the Court:

21 The question presented by these facts is, what
22 analysis should this Court employ in determining under
23 what circumstances and by what method the police can seize
24 a home in order to preserve evidence of a crime?

25 The State of Illinois and the United States of

1 America want this Court to issue a broad rule that it is
2 always all right for police officers to seize a home on
3 the basis of probable cause alone. This Court should find
4 that such a rule violates the Fourth Amendment for two
5 reasons. First of all, it does not take into account the
6 high esteem in which this Court's decisions place the
7 home, and it is also not a logical extension of other
8 cases concerning the seizure of property.

9 QUESTION: Well, it was suggested in Segura, I
10 guess, as a possible rule.

11 MS. JONES: Your Honor, in the dicta in Segura
12 there is some suggestion that external seizure of the home
13 would have been justified in Segura's case, and perhaps
14 that is because everyone with a possessory interest in the
15 apartment in Segura was in custody and therefore the
16 police really weren't interfering with anyone's possessory
17 right.

18 In this case you do have the homeowner present,
19 and his possessory rights in the home are being
20 substantially interfered with, and the Government's test
21 of probable cause only simply does not take in to account
22 the high esteem in which the home is held and the fact
23 that it's very intrusive.

24 QUESTION: Well, what should the police have
25 done to preserve evidence that they know is at risk?

1 MS. JONES: Your Honor, there were two
2 alternatives for the police in this case. First of all,
3 once Mrs. McArthur told the officers that she saw her
4 husband slide marijuana under the couch, the first thing
5 they could have done is simply left with Mrs. McArthur,
6 went down to the courthouse, and obtained a search
7 warrant. The second alternative was to --

8 QUESTION: Well, but they knew of the risk of
9 destruction of the evidence. My question is, what could
10 they do to preserve the evidence in these circumstances,
11 nothing?

12 MS. JONES: No, Your Honor, there is nothing
13 they could do, and the reason I'm suggesting that is, in
14 Welsh v. Wisconsin the officers on that scene were faced
15 with a similar dilemma. The only way they had to preserve
16 evidence of Mr. Welsh's blood alcohol level is to do what
17 they did, which was to enter the home without a warrant
18 and arrest him before his blood alcohol level went down.

19 This Court found that because that was a minor
20 offense, the police officers could not do that in order
21 to --

22 QUESTION: Well, the offense in Welsh was quite
23 different than the one here. Here, according to your
24 colleague at any rate, this -- the -- it could -- was
25 grounds for arrest, and also he could have served time in

1 jail.

2 MS. JONES: Your Honor, there is a distinction
3 between the offense here and the one in Welsh. Welsh was
4 a nonjailable offense, that's true. Here, we have a class
5 C misdemeanor, which is the lowest category of crime.

6 QUESTION: Well, is that important, Ms. Jones,
7 to your argument? I mean, supposing there had been a
8 large stash of heroin. Would that make this case
9 different?

10 MS. JONES: Yes, Your Honor, it would make this
11 case different, for two reasons. First of all, I'm
12 suggesting you reject the probable cause only test and
13 stick with the probable cause plus exigent circumstances
14 test, and the reason the quantity of the drugs would be
15 important is because that goes to the exigency. As this
16 Court observed in Welsh v. Wisconsin, the prevention of
17 the destruction of evidence is not an exigent circumstance
18 when you're talking about a minor offense. Presumably,
19 then, it is when you're talking about a major crime.

20 QUESTION: But the police had no way of knowing
21 the quantity at that point. I think you just told us, and
22 correct me if I'm wrong, that if the crime would be a
23 felony, then what was done here was okay. Secure the
24 premises pending receipt of a warrant by the police
25 officer. But if the crime is only a misdemeanor, then,

1 too bad, you have to take the risk that the evidence will
2 be destroyed. I think that's the line you're drawing.

3 MS. JONES: Two responses to that, Your Honor.
4 First of all, the line that I'm drawing is that the
5 officers have to have probable cause and exigent
6 circumstances. In this case, it's my position that they
7 had neither, but the line I'm asking the Court to draw
8 again is probable cause and exigent circumstances.

9 QUESTION: Well, is it exigent circumstances if
10 it's a felony but not if it's a misdemeanor? That's what
11 I don't fathom, because I thought from your brief and from
12 what you said before that you were making a distinction
13 between lesser offenses and felonies.

14 MS. JONES: I am, Your Honor, that's true, and
15 the reason I make the distinction is again, it's part of
16 that analysis of whether or not the exigent circumstance
17 of destruction of evidence is present. That's at least
18 what the Welsh decision suggests, that if you're trying to
19 preserve evidence of a minor crime, then the officers are
20 not justified in entering the home to preserve evidence of
21 that crime, so it's a factor of determining whether or not
22 there's an exigent circumstance of destruction of
23 evidence.

24 QUESTION: Why isn't -- sorry.

25 MS. JONES: Your Honor, if I may, she had a

1 question before that. You had also asked me about if the
2 officers knew about the quantity of marijuana at the
3 scene. The officers I'm sure did not know that there were
4 precisely 2.3 grams of marijuana present. However, the
5 officers could easily have asked Mrs. McArthur about the
6 quantity she saw, and the fact that nobody really seemed
7 to be taking this incident very seriously suggests that
8 the officers knew they weren't talking about --

9 QUESTION: Why are they not taking it seriously?
10 They immediately go off to get a warrant.

11 MS. JONES: Your Honor, if they -- they didn't
12 ask Mrs. McArthur questions about the quantity. They
13 didn't ask her questions about whether her husband was
14 dealing drugs. If they thought they had a serious offense
15 and they thought they had probable cause at the scene they
16 could have placed Mr. McArthur under arrest immediately.
17 Mr. McArthur evidently --

18 QUESTION: Well, I'm surprised you say that no
19 one was taking this seriously when the police went to get
20 a warrant and secured the house.

21 MS. JONES: Your Honor, they did go and get a
22 warrant, but what I'm suggesting is, you're not taking
23 about a major crime here where the police felt that they
24 had the immediate need to make an arrest of Mr. McArthur.

25 QUESTION: Well, but you know, there's always a

1 great deal of second-guessing in these Fourth Amendment
2 cases. If the police do A, they should have done B, and
3 if they do B, they should have done A. So I think you
4 have to base your case on the infirmities in what the
5 police actually did.

6 MS. JONES: Yes, Your --

7 QUESTION: Wouldn't an arrest have been more
8 intrusive?

9 MS. JONES: Your Honor --

10 QUESTION: I would have thought so. I would
11 have thought that the police were acting in a restrained
12 fashion by getting a search warrant, finding out what they
13 had, and then taking action. An immediate arrest would
14 have I think been more of a personal intrusion.

15 MS. JONES: Your Honor, again I'm suggesting
16 that because the officers did not have probable cause at
17 the scene they could not arrest --

18 QUESTION: Well, I don't think I agree with
19 that. They had been told that he had marijuana in his
20 possession and I don't know what-all, and that's probable
21 cause, isn't it, to suspect that he was in possession of
22 marijuana?

23 MS. JONES: Your Honor, I respectfully disagree
24 for two reasons. First of all, Mr. -- or, excuse me,
25 Officer Love did not ask Mrs. McArthur that very important

1 question of whether she was familiar with what marijuana
2 looked like. Under Illinois law, when you gather
3 information from an informant about the existence of
4 contraband, Illinois law generally requires that you have
5 some indication --

6 QUESTION: Well, wasn't a warrant obtained from
7 a magistrate here?

8 MS. JONES: Your Honor, it was, and if you --

9 QUESTION: And was it obtained without probable
10 cause?

11 MS. JONES: No. Your Honor, there was probable
12 cause for the search warrant, and if you compare the
13 search warrant application and the affidavit submitted --
14 you'll find those in the joint appendix, I believe
15 beginning on page 5. If you look at the application for a
16 search warrant and the affidavits, there's a lot of
17 information contained in those affidavits that were not --
18 that was not given to Officer Love at the scene.

19 For example, in the application for a search
20 warrant the State's Attorney thinks it's important enough
21 to put in there that Mrs. McArthur is familiar with the
22 appearance of marijuana. The State's Attorney also
23 includes in there that Mrs. McArthur has seen marijuana on
24 the presence -- or on the premises several times. He has
25 her put in the affidavit that she has seen her husband use

1 marijuana on several occasions.

2 None of that information was given to Officer
3 Love at the scene. All Officer Love had at the scene was
4 a woman who Officer Love admits was predisposed into
5 getting our husband into trouble tell him as she's
6 leaving, oh, by the way, I just saw him slide some dope
7 under the couch.

8 QUESTION: All right. Suppose -- is it -- all
9 right, the wife says, I -- you know, she lives in the
10 trailer with her husband, and the wife says, he hides dope
11 under the couch, okay? And he's -- there's some there.

12 MS. JONES: I'm sorry.

13 QUESTION: She -- the wife says, who lives in
14 the trailer with the husband, that her husband has put pot
15 under the couch.

16 MS. JONES: Mm-hmm.

17 QUESTION: That's what happened.

18 MS. JONES: Yes.

19 QUESTION: Okay. Now, why wouldn't the officer
20 think that if I say goodbye, I'm going off to get a search
21 warrant, the husband would take the dope and flush it down
22 the toilet. That's what I would think. I mean, why
23 wouldn't he think that?

24 MS. JONES: Your Honor, in this case there
25 were --

1 QUESTION: In fact, if he's intelligent, that's
2 what the man would have done.

3 MS. JONES: Well, Your Honor, from the record,
4 what we know what Mr. McArthur did is when the police
5 arrived in the scene, he didn't flush the marijuana.

6 QUESTION: But he hadn't been let into the
7 house, right? He hadn't had time, or had he had time?

8 MS. JONES: The officers had not been let into
9 the house, but they were certainly outside, and Mr.
10 McArthur was aware of their presence, yet he didn't take
11 any steps to destroy the evidence. He simply hid it under
12 his couch.

13 QUESTION: All right. I'm just saying, is there
14 any reason why the police wouldn't think, if he gets back
15 in the house, he will go take the marijuana and put it
16 down the toilet? Is there anything here that would make
17 that an unreasonable thing to think?

18 MS. JONES: Your Honor, it may be a reasonable
19 thing to think, but that certainly does not then give the
20 police the power to take the next step, which is to either
21 seize the home or make a warrantless arrest.

22 QUESTION: Why isn't that -- and this is now a
23 legal question. I was trying to -- why isn't that an
24 exigent circumstance that would give the policeman the
25 right to go in and preserve the evidence?

1 MS. JONES: Your Honor, the reason why it's not
2 is --

3 QUESTION: Because?

4 MS. JONES: -- this Court's holding in *Vale v.*
5 *Louisiana* suggests that evidence has to be in the process
6 of destruction before it's considered to be an exigent
7 circumstance permitting the officer to make a warrantless
8 entry inside.

9 QUESTION: You mean, they've got to hear the
10 sound of the water flushing, or something like that --

11 (Laughter.)

12 QUESTION: -- before they can go in?

13 MS. JONES: No, Your Honor. I'm not --

14 QUESTION: No, but seriously, I mean, what --
15 how could that standard ever be satisfied in the case
16 Justice Breyer gave you, except on -- you know, some silly
17 assumption like that?

18 MS. JONES: Your Honor, I agree that the
19 evidence having to be in the process of destruction is a
20 high standard for the police to meet, and that's why lower
21 courts have taken the *Vale* case and have reduced that
22 somewhat to require a fear that the evidence is in
23 imminent danger of destruction.

24 QUESTION: All right, why -- going back to his
25 question, why wasn't there a basis for -- to conclude that

1 it was in imminent risk of destruction?

2 MS. JONES: I'm sorry, I'd like to clarify. Are
3 you asking in my particular case, or are you asking in
4 general?

5 QUESTION: Yes, your particular -- well, I'm
6 talking about Justice Breyer's hypo, which I think
7 responded to your case.

8 MS. JONES: First of all, the reason why this
9 Court should continue with that standard that the evidence
10 has to be in imminent danger of destruction --

11 QUESTION: No, but assuming we -- assuming that
12 is the standard, why isn't it satisfied in the
13 hypothetical that you gave, which I think is descriptive
14 of what we know about this case?

15 MS. JONES: Your Honor, the reason the officers
16 should not have considered the evidence to be in imminent
17 danger of destruction is, again, Mr. McArthur took no
18 steps with regard to that --

19 QUESTION: No, but you're saying that -- and I'm
20 not quite sure why, but you're saying we know for a fact
21 that at a given moment he had not taken a step to destroy
22 the evidence, but the hypothetical is, and I think the
23 facts of the -- in the record support the hypothetical,
24 that the wife from whom he is estranged and who has an
25 obviously rocky relationship with him, has just been in

1 the trailer, has seen the drugs, is now outside talking to
2 police officers.

3 Isn't a person of any intelligence going to say,
4 she is very likely to tell them what she saw, I'd better
5 get rid of the drugs? The question is not whether at any
6 given moment he had actually started flushing them away.
7 The question is whether there was probable cause to
8 believe that he would do that, and why isn't there, or why
9 wasn't there in this case?

10 MS. JONES: Your Honor, first of all -- I
11 believe this is in the joint appendix, and I'm sorry I
12 don't remember the page number for this, but Officer Love
13 or Mr. McArthur, one of them was asked the question
14 whether or not Mrs. McArthur saw him conceal the
15 marijuana, and nobody knew the answer to that, so first of
16 all maybe Mr. McArthur --

17 QUESTION: Well, she had come out and said,
18 there are drugs under the sofa, after having been in the
19 trailer extracting personal possessions. Isn't it
20 reasonable to assume, to infer that she had seen them?
21 She'd just been there.

22 MS. JONES: Your Honor, I would disagree that
23 it's reasonable to infer that she saw them.

24 QUESTION: All right. So your claim is there
25 was no probable cause.

1 MS. JONES: Your Honor, I'm claiming there was
2 no probable cause and no exigent circumstances, and a
3 probable --

4 QUESTION: I thought you had conceded that there
5 was probable cause to get the warrant.

6 MS. JONES: There was probable cause to get the
7 warrant because the information that was given to Judge
8 Flannel was different than the information that Officer
9 Love had at the time that he made the determination to
10 seize the home.

11 QUESTION: All right. Now what I'm trying to --

12 QUESTION: Well, could I come to the question
13 presented here, which -- I had thought, frankly, that the
14 question presented posed neither the issue of exigent
15 circumstances, nor the issue of probable cause. I mean,
16 it seems to me this is not a hard case if there were
17 exigent circumstances. If you -- if the police officer --
18 you would acknowledge, I think, that if he could have gone
19 into the house, he could do the lesser thing of stopping
20 your client from going into the house.

21 MS. JONES: Your Honor, yes, if probable cause
22 and exigent circumstances --

23 QUESTION: Right.

24 MS. JONES: -- existed, yes.

25 QUESTION: So I mean, there's no reason to take

1 this case if there were exigent circumstances. And as for
2 probable cause, the way I read the question presented, is
3 it reasonable under the Fourth Amendment for police
4 officers who have probable cause to believe that a
5 residence contains evidence that could readily be
6 destroyed, to secure the residence by preventing its
7 occupant and others from entering unaccompanied.

8 I thought that -- you're not conceding the
9 existence of probable cause to believe that a residence
10 contained evidence that could readily be destroyed?

11 MS. JONES: Your Honor, I'm not conceding that
12 probable cause existed in this case, and I'm also
13 asserting that a rule that permits external seizure of the
14 home on probable cause only does not take into account,
15 first of all, this Court's holdings with respect to the
16 home and second of all, does not really weigh, or doesn't
17 fairly balance the State's interest in prosecuting the
18 particular kind of issue.

19 QUESTION: Did you challenge the question
20 presented in your brief in opposition?

21 MS. JONES: Your Honor, we -- we're still
22 sticking with the question presented, whether this is
23 reasonable under the Fourth Amendment.

24 QUESTION: Yes, and -- but it is -- is it
25 reasonable under the -- for police officers who have

1 probable cause, so that is the premise of the question
2 presented, that the police officers have probable cause.
3 Unless you disputed that, you're not in a position now to
4 challenge probable cause.

5 MS. JONES: Your Honor, I understand what the
6 question presented is and, as a general rule, we disagree
7 that that ought to be the rule that applies in all
8 seizure-of-the-home cases. The Court, or excuse me, the
9 State of Illinois and the United States of America is
10 asking this Court to permit seizures of the home on
11 probable cause only, and it is our contention that this
12 Court should not adopt such a rule.

13 QUESTION: Well now, that is obviously an
14 argument you're very much entitled to make, but I think
15 you've been making a different one, that there was no
16 probable cause, and I think it's questionable whether
17 you're entitled to make that argument here.

18 MS. JONES: Your Honor, I guess what I'm doing
19 is, I'm suggesting that no matter which rule you adopt,
20 the one advocated by the State or the one that we're
21 presenting, when you apply that rule to our case in
22 determining whether or not the Illinois Appellate Court
23 should be affirmed, I'm suggesting to you reasons that, no
24 matter which rule you adopt, the decision of the Illinois
25 court --

1 QUESTION: Well, you're basically arguing, then,
2 if you say there's no probable -- that the decision should
3 be affirmed on an alternate ground?

4 MS. JONES: Yes, Your Honor, I'm --

5 QUESTION: Well, Ms. Jones, how can you do that?
6 The Appellate Court of Illinois found that the police had
7 probable cause here. You didn't take a cross-appeal from
8 that.

9 QUESTION: In fact, at page 7 of your --

10 QUESTION: I would assume we would accept that
11 finding. I don't know why you're here arguing there was
12 no probable cause at the scene. That seems to be both
13 contrary to what the Illinois, Appellate Court of Illinois
14 found, and contrary to the assumption made in the question
15 on certiorari.

16 QUESTION: In fact, in your brief in opposition
17 you said, although probable cause existed, and the police,
18 so forth, so on. You did, I think in your brief in
19 opposition, you assumed there was probable cause.

20 MS. JONES: Your Honor, again, we're not
21 contesting probable cause to issue the search warrant, and
22 that's true the Illinois Appellate Court --

23 QUESTION: Well, but the question presented
24 says, is it reasonable under the Fourth Amendment for a
25 police officer who had probable cause to believe a -- this

1 is probable cause for the police officers to act.

2 MS. JONES: Yes.

3 QUESTION: So the fact you say you concede
4 there's probable cause to issue the search warrant doesn't
5 really get to that point, does it?

6 MS. JONES: No, Your Honor. You have to look at
7 the probable cause at the time that the home was seized.

8 QUESTION: Precisely, and that's what the
9 question raises, and that's what the lower courts found
10 against you. That's what you've conceded in your brief in
11 opposition.

12 MS. JONES: Your Honor, in our brief in
13 opposition we do state that the Illinois Appellate Court
14 was incorrect in finding that we never contested probable
15 cause.

16 QUESTION: We're talking about your brief in
17 opposition to the petition, not the brief in opposition on
18 the merits, and you do say on page 7 of your brief in
19 opposition to the petition, and that's the basis on which
20 we decide whether or not to accept these petitions, what
21 is the issue presented. We don't -- we wouldn't have
22 taken this case to decide whether in -- on these
23 particular facts there was probable cause or not. That's
24 not the kind of thing we normally do here.

25 But you had said in your opposition, although

1 probable cause existed, and the police entry was made
2 peaceably. You're obviously talking about before the
3 warrant was issued, and I took that to mean accepting the
4 question presented, is it reasonable for police officers
5 who have probable cause to believe. If you were going to
6 contest that, you should have made that clear when you
7 opposed the petition.

8 MS. JONES: Your Honor, again, let me state that
9 I do accept the question presented as it is, and it's our
10 argument that this Court should not adopt a rule that
11 permits a seizure of the home on probable cause alone.

12 QUESTION: All right --

13 QUESTION: Can you tell me this -- out of a
14 very -- say, just a person who knew nothing about the law
15 approaches this and says, the wife says there's -- he put
16 some pot under the sofa. The policeman then goes to the
17 door and says, did you put pot under the sofa? He says,
18 no. Okay? Off to get a search warrant.

19 If I were a policeman I would think, he's going
20 to flush that right down the toilet. That's where we left
21 off, right?

22 MS. JONES: Okay.

23 QUESTION: Okay. Now, I would think that
24 instead of going into the house, which I'm not sure why he
25 couldn't have done it, he says, look, I'll just keep you

1 outside the house. That way I don't have to go into the
2 house. I would think he might have gotten a Fourth
3 Amendment medal, instead of Fourth Amendment criticism,
4 because what he's doing is, he's trying to do the least
5 restrictive thing possible consistent with the evidence
6 being preserved.

7 Now, why isn't what he did a good thing rather
8 than a bad thing from a Fourth Amendment point of view,
9 and what is the case that makes it impossible for him to
10 do that thing?

11 MS. JONES: Your Honor, first of all, if you
12 adopt that rule, then you're agreeing with the State and
13 the United States of America that probable --

14 QUESTION: I haven't said what a rule was. I
15 just wanted to say, the common sense of it seeming to be
16 that he should keep the person outside rather than go in
17 the house, and the only alternative being that you have to
18 let these people who have marijuana in violation of the
19 law destroy the evidence. Those seem to me to be the two
20 alternatives.

21 MS. JONES: Your Honor, if he's keeping the
22 person outside of the home because he believes it contains
23 marijuana and he's concerned that the marijuana is going
24 to be destroyed --

25 QUESTION: Right.

1 MS. JONES: -- then he's making the seizure on
2 probable cause and exigent circumstances, and that's the
3 test that we want this Court to adopt with respect to
4 seizures of the home, and --

5 QUESTION: I don't understand. I'm saying why
6 exactly can't he just keep the person outside? I would
7 say from a Fourth Amendment point of view you'd say yes,
8 he can keep the person outside because it's the least
9 restrictive way to preserve the evidence. The only
10 alternative is to let him preserve the evidence.

11 Now, the thing that would be wrong with that
12 hypothetical rule is what? I'm not saying I adopt it. I
13 just want to get what's the objection to it.

14 MS. JONES: Your Honor, if there's probable
15 cause and exigent circumstances, there's nothing wrong
16 with that, and also what the Court should keep in mind is
17 external seizure of the home may not always be --

18 QUESTION: All right, so you say there's nothing
19 wrong with my rule.

20 Now, you must think there's something wrong with
21 it, because you want to come out the other way. Now, one
22 thing you'd say was wrong with it was because he didn't
23 have probable cause. We've discussed that enough. The
24 second thing you think is wrong with it is because the
25 circumstances don't justify it.

1 You use this word exigent, but the reason why
2 they don't justify it, what he's got before him is, the
3 wife's told him there's pot under the sofa, the man lives
4 in a trailer, he's told the man he's looking for the pot,
5 and his knowledge of human nature. All right. Those are
6 the things he has before him. Now, why isn't that enough?

7 MS. JONES: If you're asking me why that isn't
8 exigent circumstances in this particular case --

9 QUESTION: Asking you why that isn't enough to
10 justify keeping the man outside the trailer so he won't
11 destroy the evidence. That's my question.

12 MS. JONES: Probable cause and exigent
13 circumstances would be sufficient to seize a home. What
14 I'm arguing is, that's the rule we want you to adopt,
15 probable cause and exigent circumstances.

16 Now, when that's specifically applied to our
17 case, the reason there are no exigent circumstances here
18 are twofold. One, Officer Love is the person that created
19 the exigency of the destruction of evidence, and several
20 lower courts have held that when police officers create
21 the exigency of destruction of evidence, they cannot then
22 use that exigency to turn around and enter a person's home
23 without a warrant in order to preserve that evidence.

24 Here, Officer Love admitted --

25 QUESTION: May I stop you at that point, because

1 I think you're telling the police, don't be candid with
2 the people who you suspect about what's going on. It
3 seems to me here the officers did everything by the book.
4 They asked him whether he had contraband. When he said no
5 they said, we're going off to get a warrant, and it seems
6 what you're saying right now is that the police would have
7 been in a better position vis-a-vis the Fourth Amendment
8 if they had not told him what's up.

9 MS. JONES: That's correct, Your Honor, I am
10 suggesting that. Several lower courts, including the
11 Seventh Circuit in United States v. Roselli, have held
12 that when it is reasonable or it is foreseeable that
13 evidence will be destroyed if you ask for permission to
14 search, if you go ahead and take that step and ask for
15 consent and it's denied, you can't then turn around and
16 use that exigency to enter the home without a warrant,
17 because the police have created the exigency.

18 Here, if you look on page 20 of the joint
19 appendix, Officer Love testifies that at the time Mrs.
20 McArthur told him that Mr. McArthur hid marijuana under
21 the couch, Mr. -- or Mr. McArthur was still free to come
22 and go from his home. However, once Officer Love asks
23 Mr. McArthur for permission to search and is denied, from
24 that point on, Mr. McArthur can't go in because now
25 Officer Love is concerned that the evidence is about to be

1 destroyed.

2 QUESTION: I suppose we could posit a situation
3 in which officers think that a really big drug ring is
4 cutting heroin in a particular apartment, and you
5 certainly wouldn't expect them to knock on the door and
6 say, you know, are you guys cutting heroin in there, do
7 you mind if we come in and look, and they say no, we don't
8 want you to come in and look. Whereupon, they burst in on
9 the basis of exigent circumstances. I suppose we wouldn't
10 allow that, would we, so you don't have to be frank with
11 the criminal. It's sometimes a good idea not to be frank
12 with the criminal.

13 MS. JONES: Your Honor, if you know that there's
14 an apartment where people are cutting drugs, then the step
15 that the officers should take in that hypothetical --

16 QUESTION: Is get a warrant.

17 MS. JONES: -- they should have went and gotten
18 a warrant.

19 QUESTION: I agree.

20 QUESTION: Okay, but the officer -- let me
21 change the hypothetical slightly which I think is -- in a
22 way that I think is also supported by the record.
23 Consider only these facts. They -- the police are outside
24 the trailer. They are in plain view, so it's reasonable
25 to suppose that he inside the trailer, he knows they're

1 there.

2 The wife goes in. The wife comes out and says
3 to the police, there's marijuana under the sofa. He sees
4 the wife talking to the police. Don't the police at that
5 point have exigent circumstances to believe that he will
6 destroy the evidence?

7 MS. JONES: No.

8 QUESTION: Wouldn't any sensible person destroy
9 the evidence? I mean, wouldn't he reasonably say, she has
10 just been in here, she has seen the drugs under the sofa,
11 she's talking to the cops, she hates my guts, she is
12 probably going to tell the cops what she saw in here, I'd
13 better get rid of it? Isn't that a reasonable thought
14 process for someone in his position?

15 MS. JONES: Your Honor, the problem with having
16 that be the standard to determine the exigent circumstance
17 of the destruction of evidence is that you could say that
18 in any case where someone has evidence of a crime inside
19 of their home. I believe Justice Stevens --

20 QUESTION: No, you can't say that. What makes
21 this exigent is the confluence at a particular point in
22 time in which the -- it isn't merely a case in which he
23 has drugs, he knows somebody knows that he has drugs, he
24 knows that maybe that somebody may go to the police. It's
25 all happening in front of him at that time. He has the

1 drugs, the person who's going to snitch on him has just
2 seen the drugs, he can see the person outside his trailer
3 talking to the police. It is sort of the temporal unity
4 of all of this that gives it the exigency, and why
5 doesn't -- that's my argument. Why doesn't it give a
6 sufficient exigency?

7 MS. JONES: Your Honor, two reasons why it
8 wouldn't give a sufficient exigency. First of all, the
9 police were out at the McArthurs for a while and again,
10 Mrs. McArthur was coming and going out of the trailer this
11 whole time the police were there. Evidently Mr. McArthur,
12 from whatever he could gather from what was occurring
13 there, wasn't concerned enough that his possession of
14 marijuana was going to be reported that --

15 QUESTION: No, but you're trying to answer the
16 hypothetical by adding facts about something that was
17 going on in the trailer that the police could not know,
18 and if the police didn't know it, it doesn't get into the
19 analysis. I don't see how it affects the fact that they
20 could infer an exigency.

21 I guess your time is up.

22 QUESTION: Thank you, Ms. Jones.

23 MS. JONES: Thank you.

24 QUESTION: Mr. Bertocchi, you have 4 minutes
25 remaining.

1 REBUTTAL ARGUMENT OF JOEL D. BERTOCCHI

2 ON BEHALF OF THE PETITIONER

3 GENERAL BERTOCCHI: Thank you, Your Honor.

4 QUESTION: Mr. Bertocchi, I would not normally
5 intrude upon your time, but you know, I've just criticized
6 or discussed with Ms. Jones whether she wasn't altering
7 the question presented. I have the same question for you.

8 I had frankly thought that this case involved
9 neither the question about whether there was probable
10 cause, nor the question about whether there were exigent
11 circumstances. If there were exigent circumstances so the
12 policeman could have gone in, this is an easy case. But
13 you come up and argue exigent circumstances. It was not
14 argued in your petition for certiorari. It was not
15 contained in the question presented for review in your
16 petition for certiorari, which is, by the way, different
17 from the question that you show in your blue brief.

18 What are we talking about here? All of a sudden
19 I'm discussing a case that bears no resemblance to the
20 case that I thought we were going to hear.

21 GENERAL BERTOCCHI: Your Honor, I believe when I
22 was addressing the question of exigent circumstances that
23 I was doing so in response to specific questions about the
24 facts of this case, and it is our position that if the
25 Court were to determine that particularized exigent

1 circumstances were necessary, then they were present if
2 the Court wanted to ask that.

3 We do stand behind the question presented. We
4 do believe that the officer had --

5 QUESTION: Even without exigent circumstances
6 you think that he could have made the exclusion from the
7 house?

8 GENERAL BERTOCCHI: Yes, I believe that, Your
9 Honor. That is our position, and if I may speak up for
10 the question presented and for the rule it proposes, I
11 would submit that that is not going to be a difficult rule
12 to apply, because it will only require police officers to
13 know two things, 1) that they have probable cause to
14 search, and 2) the character of the evidence, and if they
15 don't know that, then they shouldn't be looking for a
16 warrant, and if they shouldn't be looking for a warrant,
17 they would have no basis and no need to impound.

18 Thank you, Your Honors.

19 CHIEF JUSTICE REHNQUIST: Thank you,
20 Mr. Bertocchi. The case is submitted.

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

23

24

25