The Burger Court Opinion Writing Database

United States v. Peltier

422 U.S. 531 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 17, 1975

Re: 73-2000 - U. S. v. Peltier

Dear Bill:

Please join me in your opinion. I may have a few fairly minor suggestions that we can take up later.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 30, 1975

Re: 73-2000 - U. S. v. Peltier

Dear Bill:

I can go along with your April 25 memorandum.

Regards,

WEB

Mr. Justice Rehnquist

cc: Mr. Justice White
Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 6, 1975

PERSONAL

Re: 73-2000 - United States v. Peltier

Dear Bill:

The revised dissent is somewhat extravagant with rhetoric and of course goes far beyond the subject of this case; indeed, it distorts what you have held, which it must to justify what is said. It seems largely a re-run of Tony Amsterdam's recent article. Offsetting several generations of usage, perhaps, is that several generations of doctrinal failure ought to be reason enough to consider some slight modifications of a rule to correct its deficiencies. On the other hand, it is my duty to remind you that judges appointed since 1969 are bound by a strict rule of stare decisis!

Regards,

WEB

Mr. Justice Rehnquist

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated: 3-15

No. 73-2000

Recirculated: _____

United States, Petitioner, v. James Robert Peltier. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1975]

MR. JUSTICE DOUGLAS, dissenting.

I agree with my Brother BRENNAN that *Almeida-Sanchez* was a reaffirmation of traditional Fourth Amendment principles and that the purposes of the exclusionary rule compel exclusion of the unconstitutionally seized evidence in this case. I adhere to my view that a constitutional rule made retroactive in one case must be applied retroactively in all. See my dissent in *Daniel* v. *Louisiana*, — U. S. — (74-5369, January 27, 1974), and cases cited. It is largely a matter of chance that we held the Border Patrol to the command of the Fourth Amendment in *Almeida-Sanchez* rather than in the case of this defendant. Equal justice does not permit a defendant's fate to depend upon such a fortuity. The judgment below should be affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 2, 1975

RE: No. 73-2000 United States v. Peltier

Dear Bill:

In due course I shall circulate a dissent in the above.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2000

United States, Petitioner, v. James Robert Peltier. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1975]

MR. JUSTICE BRENNAN, dissenting.

I

Until today the question of the prospective application of a decision of this Court was not deemed to be presented unless the decision "constitute[d] a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 495 (1968).[1] Measured by that test, our decision in *Almeida-Sanchez*, 413 U. S. 266 (1973), presents no question of prospectivity, and the Court errs in even addressing the question. For both the Court opinion and the concurring opinion of MR. JUSTICE POWELL in *Almeida-Sanchez* plainly applied "familiar principles of constitutional adjudication" announced 50 years ago in *Carroll* v. *United States*, 267 U. S. 132, 153–154 (1925), and merely construed 8

[1] This requirement has been variously stated. See, *e. g.*, *Desist* v. *United States*, 394 U. S. 244, 248 (1969) ("a clear break with the past."); *Milton* v. *Wainwright*, 407 U. S. 371, 381 n. 2 (1972) (STEWART, J., dissenting) ("a sharp break in the web of the law"); *Chevron Oil* v. *Huson*, 404 U. S. 97, 106 (1971) ("[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed.").

STYLISTIC CHANGES

See pgs. 9, 10, 11, 16, 19

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Brennan, J.

Circulated: _____

Recirculated: 5/30/75

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2000

United States, Petitioner, v. James Robert Peltier. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1975]

MR. JUSTICE BRENNAN, dissenting. with whom Mr. Justice Marshall joins

I

Until today the question of the prospective application of a decision of this Court was not deemed to be presented unless the decision "constitute[d] a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 495 (1968).[1] Measured by that test, our decision in *United States* v. *Almeida-Sanchez*, 413 U. S. 266 (1973), presents no question of prospectivity, and the Court errs in even addressing the question. For both the Court opinion and the concurring opinion of MR. JUSTICE POWELL in *Almeida-Sanchez* plainly applied familiar principles of constitutional adjudication announced 50 years ago in *Carroll* v. *United States*, 267 U. S. 132, 153–154 (1925), and merely

[1] This requirement has been variously stated. See, *e. g.*, *Desist* v. *United States*, 394 U. S. 244, 248 (1969) ("a clear break with the past."); *Milton* v. *Wainwright*, 407 U. S. 371, 381 n. 2 (1972) (STEWART, J., dissenting) ("a sharp break in the web of the law"); *Chevron Oil* v. *Huson*, 404 U. S. 97, 106 (1971) ("[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed.").

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 6, 1975

Re: No. 73-2000, United States v. Peltier

Dear Bill,

I should appreciate your adding the following at the foot of your opinion for the Court in this case:

> MR. JUSTICE STEWART dissents from the opinion and judgment of the Court for the reasons set out in Part I of the dissenting opinion of MR. JUSTICE BRENNAN.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 4, 1975

Re: No. 73-2000 - U.S. v. Peltier

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 6, 1975

Re: No. 73-2000 -- United States v. James Robert Peltier

Dear Bill:

Please join me.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 15, 1975

Re: No. 73-2000 - U. S. v. Peltier

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

April 28, 1975

Re: No. 73-2000 -- United States v. Peltier

Dear Bill:

The changes you propose in your letter of April 25 meet with my approval. In other words, if your opinion is revised in those two respects I am still with you.

Sincerely,

HAB

Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1975

MEMORANDUM TO THE CONFERENCE

Re: (A-996) No. 74-1222 - Wolff v. Rice

Your records will show that this case is a hold for No. 73-2000, United States v. Peltier.

I am now in receipt of an application for admission to bail pending decision on the petition for certiorari. You will recall that the respondent was convicted in state court of first degree murder of a policeman and was sentenced to life. After affirmance of his conviction, he filed a § 2254 petition alleging Fourth Amendment violations. Judge Urbom granted the writ and the CA 8 (Matthes, Bright and Stephenson) affirmed. The State of Nebraska seeks certiorari.

The killing was effected through a booby-trapped suitcase which exploded and killed the officer. He was one of several answering a telephone call about trouble in a vacant house in Omaha. Respondent apparently was the Minister of Information for the National Committee to Combat Fascism, a Black Panther offshoot. Judge Urbom denied the application for bail and the CA 8 affirmed this denial. We thus have a situation where the granting of habeas relief is on review here, but bail is denied. This has an overtone somewhat similar to the D. C. case concerning Dr. Moore.

I enclose a copy of a memorandum prepared by my law clerk. If I were handling this alone, I would be inclined to go along with the "two court rule" and deny the application for bail. Because of the sensitivity of the case, I am referring it to the Conference and have asked Mr. Rodak to place it on the supplemental list for June 12.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 3, 1975

No. 73-2000 United States v. Peltier

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

April 10, 1975

No. 73-2000 United States v. Peltier

Dear Bill:

Since our talk yesterday, I have given some further thought to my dilemma in the above case resulting from the first sentence in the first full paragraph on page 4, and the sentence in the middle of page 10, commencing "If the purpose of the exclusionary rule . . ."

If these two sentences were read out of context, I think they would be inconsistent with my concurrence in Almeida-Sanchez.

Accordingly, I am presently inclined to concur in your opinion with a brief statement along the lines of the enclosed draft. I hardly need say that I have been willing, since coming to the Court, to reexamine the scope of the exclusionary rule. I am inclined to favor the approach recommended by the ALI in its Code of Pre-Arraignment Procedure. But, for the reasons indicated in our talk yesterday, I do not think the present case properly affords this opportunity.

Accordingly, I prefer to read your opinion in light of the specific question which is now before the Court.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 10, 1975

No. 73-2000 United States v. Peltier

Dear Bill:

Since our talk yesterday, I have given some further thought to my dilemma in the above case resulting from the first sentence in the first full paragraph on page 4, and the sentence in the middle of page 10, commencing "If the purpose of the exclusionary rule . . ."

If these two sentences were read out of context, I think they would be inconsistent with my concurrence in Almeida-Sanchez.

Accordingly, I am presently inclined to concur in your opinion with a brief statement along the lines of the enclosed draft. I hardly need say that I have been willing, since coming to the Court, to reexamine the scope of the exclusionary rule. I am inclined to favor the approach recommended by the ALI in its Code of Pre-Arraignment Procedure. But, for the reasons indicated in our talk yesterday, I do not think the present case properly affords this opportunity.

Accordingly, I prefer to read your opinion in light of the specific question which is now before the Court.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

Bill: As you will note, I am still concurring in your opinion - which, except for my difficulty noted, above is excellent. L

Attached to LP

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2000

United States, Petitioner, *v.* James Robert Peltier.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1975]

MR. JUSTICE POWELL, concurring.

I write briefly to emphasize my understanding that the only question in this case is whether the holding in *Almeida-Sanchez* should be given retroactive application. For the reasons stated by the Court today, I am in full accord that the answer to this question is in the negative. This result is counseled by the prior retroactivity decisions of the Court. Moreover, it is abundantly clear that the policies of the exclusionary rule would not be served in any respect by a retroactive application of *Almeida-Sanchez*.

April 22, 1975

No. 73-2000 United States v. Peltier

Dear Bill:

Referring to our conversations and to the brief concurring opinion which I agreed not to circulate until I see your final draft, it occurs to me that possibly it would be helpful if I identified the relatively narrow area in which we may not be in full agreement.

When you asked me some time ago whether I thought the majority Conference vote against retroactivity was based on the exclusionary rule, I responded in the affirmative. And I read your opinion generally as quite consistent with this view, namely, that Almeida-Sanchez should not be applied retroactively because the deterrence policy of the exclusionary rule would not in any way be promoted.

There are two sentences in your draft which, however, could - if they remain unchanged - be read as indicating a view well beyond the retroactivity issue. These are (i) the first sentence in the first full paragraph on page 4, and (ii) the sentence on page 11 commencing "If the purpose of the exclusionary rule . . ."

As you know from our talks, if and when the Court is willing to reexamine the rationale of the exclusionary rule, I would be inclined to favor an approach along the lines recommended by the ALI in its Code of Pre-Arraignment Procedure. This would authorize courts in suppression hearings to determine the substantiality of the police violation and rule accordingly. The ALI formulation identifies factors to be considered in making such a determination. One of my reasons for considering a brief concurring opinion is a concern that the two sentences

identified above may be read to foreclose the balancing approach recommended by the ALI.

I would be helped considerably if you felt disposed to change the first full paragraph on page 4 to read substantially as follows:

> "The government contends that Almeida-Sanchez should not control this case because the policies underlying the exclusionary rule do not justify its retroactive application. We agree."

I would prefer a somewhat similar change in the sentence mentioned on page 11, but I believe the suggested change on page 4 would make it clear that the holding of this case does not go beyond the retroactivity issue. As you know, I consider this to be the only issue before us.

I also wonder about the desirability of citing (even on a cf. basis) the 1983 cases. Lower courts may think we are signaling that the exclusionary rule applies only under circumstances where police officers could be held liable for the deprivation of civil rights under 1983.

I am quite unaccustomed, as you know, to being a spokesman for the exclusionary rule. I view the rule generally with the same misgivings expressed by Dallin Oaks in his Chicago Law Review article. But apart from attempting to contain or rationalize the rule on its outer perimeters (e.g., Bustamonte and Calandra), I have accepted it as presently controlling law. Indeed, I could hardly have joined Almeida-Sanchez without thinking that the evidence there seized would be properly excluded.

In sum, while I would welcome a reexamination of the rule with the view to adopting an ALI type, common-sense position, I would prefer not to use this case - involving only the retroactivity issue - as the vehicle for such a reexamination.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

April 24, 1975

No. 73-2000 United States v. Peltier

Dear Bill:

Thank you for your letter of April 24.

The changes which you are willing to make in your opinion substantially meet my concerns. If they are acceptable to the other Justices who have joined your opinion, I will forget about my little concurrence.

Many thanks.

Sincerely,

Mr. Justice Rehnquist

LFP/gg

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–2000

United States, Petitioner, *v.* James Robert Peltier.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Four months before this Court's decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), respondent was stopped in his automobile by a roving border patrol, and three plastic garbage bags containing 270 pounds of marihuana were found in the trunk of his car by Border Patrol agents. On the basis of this evidence an indictment was returned charging him with a violation of 21 U. S. C. § 841 (a)(1). When respondent's motion to suppress the evidence was denied after a hearing, he stipulated in writing that he "did knowingly and intentionally possess, with intent to distribute, the marijuana concealed in the 1962 Chevrolet which he was driving on February 28, 1973." [1] The District Court found respondent guilty and imposed sentence. On appeal from that judgment, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed the judgment on the ground that the "rule announced by the Supreme Court in *Almeida-Sanchez* v. *United States* . . . should be applied to similar cases pending on appeal on the date the Supreme Court's decision was an-

[1] App. 28. The stipulation provided that it "would not be entered into had the [respondent's] motion to suppress in the case been granted." *Ibid.*

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–2000

United States, Petitioner, *v.* James Robert Peltier. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Four months before this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), respondent was stopped in his automobile by a roving border patrol, and three plastic garbage bags containing 270 pounds of marihuana were found in the trunk of his car by Border Patrol agents. On the basis of this evidence an indictment was returned charging him with a violation of 21 U. S. C. § 841 (a)(1). When respondent's motion to suppress the evidence was denied after a hearing, he stipulated in writing that he "did knowingly and intentionally possess, with intent to distribute, the marijuana concealed in the 1962 Chevrolet which he was driving on February 28, 1973." [1] The District Court found respondent guilty and imposed sentence. On appeal from that judgment, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed the judgment on the ground that the "rule announced by the Supreme Court in *Almeida-Sanchez* v. *United States* . . . should be applied to similar cases pending on appeal on the date the Supreme Court's decision was an-

[1] App. 28. The stipulation provided that it "would not be entered into had the [respondent's] motion to suppress in the case been granted." *Ibid.*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 24, 1975

Re: No. 73-2000 - United States v. Peltier

Dear Lewis:

I think I could go most of the way with your suggestions contained in the letter of April 22nd, if the other members of the Court who have already joined the opinion are agreeable.

I am willing to delete the case cites from the cases under § 1983 for the reasons you suggest. I am not willing to adopt your proposed change on page 4 in haec verba, because I think that would make this just another retroactivity case with no possibility of its being used at some later date in justification of a flexible application of the exclusionary rule. I think I understand your concern, though, and I am fully in agreement that we should in no way foreclose the balancing test recommended by the ALI. I would therefore suggest, if you were agreeable, substituting for the present first full paragraph on page 4 the following language:

> "Despite the conceded illegality of the search under the Almeida-Sanchez standard, the government contends that the exclusionary rule should not be mechanically applied in the case before us now because the policies underlying the rule do not justify its

retroactive application to pre-Almeida-Sanchez searches. We agree."

I am available for discussion of this at any time convenient to you; I am replying by letter simply because you suggested precise language, and I think it is better if I set out exactly what I have in mind rather than dealing in somewhat vague oral assurances that I will "try to accommodate you", or words to that effect.

Sincerely,

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 25, 1975

MEMORANDUM TO: The Chief Justice
Mr. Justice White
Mr. Justice Blackmun

Re: No. 73-2000 - United States v. Peltier

At the time Lewis joined my opinion in this case, he indicated to me that he would probably file a separate concurrence. Since we presumably only have a five man Court at most, I thought that his proposed concurrence, which stress[ed] the retroactivity aspect of the case rather than its exclusion[ary] rule aspect, tended to point in a little different direction than I had intended the opinion to point; he, on the other hand, I am sure felt that whatever narrowing effect his concurring opinion would have had was desirable in that it would confine the total effect of the case more closely to the particular facts.

Lewis has suggested, as an alternative to the filing of his concurrence, that changes be made in the present draft, and I am entirely agreeable to these changes. Before circulating a revised version, however, I wanted to make sure that they did not offend those of you who had already joined. These changes are:

(1) Substitute for the present first full paragraph on page 4 the following language:

"Despite the conceded illegality of the search under the Almeida-Sanchez standard, the government contends that the exclusionary rule should not be mechanically applied in the case before us now because the policies underlying the rule do not justify its retroactive application to pre-Almeida-Sanchez searches. We agree."

(2) Delete the Cf. cites to Pierson v. Ray, Scheuer v. Rhodes, and Wood v. Strickland, on page 11.

Sincerely,

4,11

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2000

United States, Petitioner, *v.* James Robert Peltier.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Four months before this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), respondent was stopped in his automobile by a roving border patrol, and three plastic garbage bags containing 270 pounds of marihuana were found in the trunk of his car by Border Patrol agents. On the basis of this evidence an indictment was returned charging him with a violation of 21 U. S. C. § 841 (a)(1). When respondent's motion to suppress the evidence was denied after a hearing, he stipulated in writing that he "did knowingly and intentionally possess, with intent to distribute, the marijuana concealed in the 1962 Chevrolet which he was driving on February 28, 1973." [1] The District Court found respondent guilty and imposed sentence. On appeal from that judgment, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed the judgment on the ground that the "rule announced by the Supreme Court in *Almeida-Sanchez* v. *United States* . . . should be applied to similar cases pending on appeal on the date the Supreme Court's decision was an-

[1] App. 28. The stipulation provided that it "would not be entered into had the [respondent's] motion to suppress in the case been granted." *Ibid.*

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2000

United States, Petitioner, *v.* James Robert Peltier.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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[1] App. 28. The stipulation provided that it "would not be entered into had the [respondent's] motion to suppress in the case been granted." *Ibid.*

2, 5, 11-12

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated:

Recirculated: APR 13 1975

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2000

150-3

United States, Petitioner, *v.* James Robert Peltier.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Four months before this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), respondent was stopped in his automobile by a roving border patrol, and three plastic garbage bags containing 270 pounds of marihuana were found in the trunk of his car by Border Patrol agents. On the basis of this evidence an indictment was returned charging him with a violation of 21 U. S. C. § 841 (a)(1). When respondent's motion to suppress the evidence was denied after a hearing, he stipulated in writing that he "did knowingly and intentionally possess, with intent to distribute, the marijuana concealed in the 1962 Chevrolet which he was driving on February 28, 1973."[1] The District Court found respondent guilty and imposed sentence. On appeal from that judgment, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed the judgment on the ground that the "rule announced by the Supreme Court in *Almeida-Sanchez* v. *United States* . . . should be applied to similar cases pending on appeal on the date the Supreme Court's decision was an-

[1] App. 28. The stipulation provided that it "would not be entered into had the [respondent's] motion to suppress in the case been granted." *Ibid.*

V

2, 12

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: _____

Recirculated: MAR 18 1975

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-2000

United States, Petitioner, v. James Robert Peltier. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Four months before this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973), respondent was stopped in his automobile by a roving border patrol, and three plastic garbage bags containing 270 pounds of marihuana were found in the trunk of his car by Border Patrol agents. On the basis of this evidence an indictment was returned charging him with a violation of 21 U. S. C. § 841 (a)(1). When respondent's motion to suppress the evidence was denied after a hearing, he stipulated in writing that he "did knowingly and intentionally possess, with intent to distribute, the marijuana concealed in the 1962 Chevrolet which he was driving on February 28, 1973."[1] The District Court found respondent guilty and imposed sentence. On appeal from that judgment, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed the judgment on the ground that the "rule announced by the Supreme Court in *Almeida-Sanchez* v. *United States* . . . should be applied to similar cases pending on appeal on the date the Supreme Court's decision was an-

[1] App. 28. The stipulation provided that it "would not be entered into had the [respondent's] motion to suppress in the case been granted." *Ibid.*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 23, 1975

MEMORANDUM TO THE CONFERENCE

Re: Cases Held For No. 73-200 - United States v. Peltier

Four petitions for certiorari have been held for our decision in United States v. Peltier, No. 73-2000. Two petitions involve the retroactivity of Almeida-Sanchez while the other two present challenges to the application of the exclusionary rule.

Miller v. United States, No. 73-6975. On January 16, 1972, petitioner's car was stopped by Border Patrol agents on a state highway between 50 and 60 miles from the Mexican border. Agents discovered marihuana in the trunk, and petitioner was convicted of violating 21 U.S.C. § 841(a)(1). CA 5 affirmed without opinion, and this Court vacated the judgment and remanded for reconsideration in light of Almeida-Sanchez, 414 U.S. 896. On remand CA 5 held that Almeida-Sanchez should not be applied to searches conducted prior to the date of that decision, 492 F.2d 37 (1974). Under Peltier, the result reached by CA 5 is correct, and I shall vote to deny this petition.

73-2000 Wm Brennan Oct 74

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 24, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1222 - Wolff v. Rice. Heretofore Held for No. 73-2000 - United States v. Peltier

The substitute question for that set forth in page 6 of my Hold memorandum, which I understand to have been agreed to by the four of us present at Conference this morning who voted to grant Wolff, is the following:

> "Whether the entry of respondent's premises by Omaha police officers under the circumstances of this case constituted an unlawful search of his premises properly cognizable under 28 U.S.C. § 2254."

Sincerely,

WEB

73-2000
Wm Brennan
DC 19