

lfp/ss 03/04/86 PEMM SALLY-POW
MEMORANDUM

TO: Mike DATE: March 4, 1986

FROM: Lewis F. Powell, Jr.
84-1160 Pembaur v. City of Cincinnati

In view of Byron's completely revised concurring opinion, what do you think of adding to our opinion a footnote along the following lines:

if Justice White's assumptions were factually correct, there is much to be said for his concurring opinion with respect to the "policy" question. Apparently he thinks that, since Steagald had not been decided and in view of the law in the Sixth Circuit, the "policy" of forceful entry to make an otherwise lawful arrest was entirely consistent with relevant county policy. The difficulty with this reasoning is that apparently neither the sheriffs who had been denied entry, nor the assistant county prosecutor, knew of any such policy. Otherwise, one of the sheriffs would not have called the prosecutor's office, and certainly the assistant prosecutor would not have thought it necessary to put the question to the prosecutor. Nor did the prosecutor, when asked, say that

The Chief Justice
Justice G. S. Williams
Justice White
Justice Marshall
Justice Brennan
Justice Black
Justice Douglas
Justice Harlan
Justice Stewart
Justice Thurgood Marshall
Justice Warren

the county's policy was to force an entry when necessary to serve a valid arrest warrant. Rather, he simply said "Go in and get them" - the sort of spontaneous reply that a busy official might make quite thoughtlessly. Moreover, and also contrary to Justice White's assumption, the Court's opinion is quite explicit in holding that this single action by the prosecutor himself established the policy. Infra, at ____.

Justice White does not address the retroactivity of Steagald on the ground that the county had not relied on this contention. In my view, although we need not address this retroactivity issue, there is no question as to our right to do so - especially in view of the unfairness of holding the respondent liable for not anticipating Steagald. (Mike, cite cases).

L.F.P., Jr.

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