ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-430

TITLE ILLINOIS, Petitioner
v.
LANCE GATES, ET UX.

PLACE Washington, D. C.

DATE March 1, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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ILLINOIS, :

Petitioner :

v. : No. 81-430

LANCE GATES, ET UX. :

- -x

Washington, D. C.

Tuesday, March 1, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

PAUL P. BIEBEL, JR., ESQ., First Assistant Attorney General of Illinois, Chicago, Illinois; on behalf of the Petitioner.

REX E. LEE, ESQ., Solicitor General of the U. S. Department of Justice, Washington D. C.; on behalf of U. S., as amicus curiae.

JAMES W. REILLEY, ESQ., Chicago, Illionis; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Biebel, you may proceed whenever you are ready.

ORAL ARGUMENT OF PAUL P. BIEBEL, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. BIEBEL: Thank you very much, Your Honor.

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

This case was originally argued before this Court on October 13, 1982, and the question of the applicability of the Aguilar-Spinelli standard to this case where an anonymous letter was involved.

However, on November 29, 1982, this case was restored to the calendar for reargument to consider the additional question: whether the exclusionary rule as enunciated in Mapp and Weeks should to any extent be modified so, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure was consistent with the Fourth Amendment.

We are back before the Court today to consider this additional important issue.

Before I started my argument I would simply like to indicate that our argument in a nut shell is this:

Determinations of probable cause are practical, factual judgments of probability. It is the function of the magistrate or the judge to make decisions prior to a search. Because of the factual nature of this determination, because of the respect for the magistrate's function in this regard, and because of society's interest in avoiding the exclusionary rule's harsh costs, these determinations should be given great deference on motions to suppress.

Evidence should not be excluded if any reasonable person could have concluded that there was probable cause on the basis of the totality of the circumstances and judged by the practical and factual considerations of everyday life.

In short, if there's a reasonable basis for the finding of probable cause the exclusionary rules should not apply.

Any analysis of the exclusionary rule, we believe, must consider the context in which the exclusionary rule was born.

Around the turn of the century there was a great concern about flagrant and egregious police misconduct.

In cases like Weeks in 1914 and Silverthorne Lumber Company in 1920, you had situations where persons

were arrested and while they were in custody the police went to their homes or went to their businesses and searched without probable cause of any sort and without warrants. And obtained through their appropriated papers and effects evidence that was used against them.

In Rochin versus California in 1952, this Court's conscience was shocked when the police took Mr. Rochin to the hospital and had his stomach pumped in order to obtain the morphine capsules which he had swallowed after the police had forced their way into his house without a warrant.

And, finally, in Mapp versus Ohio in 1961 which reversed Wolf versus Colorado, of course, and applied the exclusionary rule to the states, you had a situation where the police attempted to enter Mrs. Mapp's house with her consent. Upon the advice of her attorney she refused that consent. The police a few hours later forced their way into the house, searched the entire premises and found four pamphlets and a few photographs, all allegedly pornographic.

Each of these cases which ultimately led up to Weeks -- lead up to Mapp, involved flagrant acts of police misconduct for which this Court indicated the exclusionary rule ought to apply.

But the exclusionary rule which was meant to

deter such serious misconduct by police has come to mean much more as it's been applied by trial courts and review in courts around this country.

The new rule -- the rule now applies to evidence -- to exclude evidence at trial no matter what the error, large or small, committed by police and by magistrates.

Now, if the primary intent of the exclusionary rule is meant to deter police misconduct -- and this Court has said that on may occasions starting with Elkins in 1960 -- then the world simply does not work in a situation as here where it's hard to see what the police did wrong.

We argued in our initial briefs that we didn't believe the Aguilar-Spinelli two-prong test even if applicable to our case was violated because of the extensive corroboration of the letter and because of the determination of probable cause made by Judge Lewis when he issued the search warrant.

But even if this Court were to find that the Aguilar-Spinelli test was violated, we would nevertheless contend that in this instance the exclusionary rule should not be applied because the anonymous letter coupled with ample corroboration amounted to probable cause under the definition as

historically enunciated by this Court.

QUESTION: Did you argue this before the Illinois Courts, Mr. Biebel?

MR. BIEBEL: What was argued before the Illinois Courts was the Aguilar-Spinelli standard, Your Honor. And we argued that in that instance the Aguilar-Spinelli standard was met. I --

QUESTION: And not the exclusionary rule question?

MR. BIEBEL: The exclusionary rule is really here for the first time, Your Honor. It was not mentioned in oral argument the first time before this Court. We were focusing in on Aguilar-Spinelli but in a sense we were focusing in an indirect fashion on the consideration of probable cause.

What we are doing in our approach today is looking at that probable cause aspect of this case in a closer way.

QUESTION: In general while you are talking about what happened to Lowe, the brief of your opponent suggests that the Constitution of Illinois has an exclusionary rule and that this case was decided on the basis of it. That might come first, logically.

MR. BIEBEL: Your Honor, there is no doubt that the Supreme Court of Illinois established the

exclusionary rule in 1923 in People versus Brocamp.

QUESTION: That was even before Wolf in Colorado, wasn't it?

MR. BIEBEL: Yes, it was after Weeks, before Wolf.

QUESTION: And certainly long before Mapp?

MR. BIEBEL: Long before Mapp, Your Honor. That's correct.

But, this Court has defined that rule in People versus Demorrow in 1974 to follow the standards enunciated by the Supreme Court of the United States.

The analysis that was made in this case, as a matter of fact, in the Aguilar-Spinelli issue, took into consideration the federal guidelines that took place. So, Illinois does track the Federal Fourth Amendement law with regard to the exclusionary rule and follow -- has followed it closely. We believe that that is consistent with whatever the Court would do today.

There's no doubt that the law of search and siezure has become complicated and confusing. And one of the more confusing areas involves the application of the Aguilar-Spinelli standard. Professor Lafate has 140 pages in his treatise on hearsay evidence with regard to this problem.

Because it was confusing we have cases like

People versus Bell where a district court held that the affidavit with regard to an eyewitness identification didn't support the credibility and reliability of that eyewitness in case -- and consequently that evidence was suppressed. The Fifth Circuit said that's simply wrong, that Aguilar-Spinelli ought to be limited to informant situations.

In our case, too, we have an obvious confusion with regard to Aguilar-Spinelli because both the police and the judge felt that the letter could be utilized in order to determine whether probable cause exists or not.

To hold in this case that the exclusionary rule applies where the police made a diligent and a reasonable effort to fulfill their responsibilities is in effect to place form over substance. The essence and the analysis of whether the search warrant should issue is whether or not there's probable cause.

All three Illinois Courts considering this issue talked in terms of probable cause but they analyzed it in light of the two-pronged Aguilar-Spinelli test which we discussed the last time we were before this Court.

However, we suggest in this case that this Court ought to consider stating affirmatively that they're going to return to the unadorned probable cause

standard which was enunciated in Carroll and in Brinegar.

In Brinegar, this Court stated that when you're dealing with probable cause you're dealing with probabilities. These are not technical considerations. They are factual and practical concerns of everyday life in which reasonable and prudent men, and not legal technicians, act.

Put in another light, this concept of probable cause merely requires an objectively reasonable assessment that it's more probable than not that the search warrant covered evidence of the crime.

This basic probable cause standard is a realization that police and magistrates deal in factual contexts in which they simply don't have all the answers, but nevertheless may be required to act if they believe there's probable cause.

Mr. Justice White put it well in his dissent in Stone versus Powell where he said, making arrests in circumstances in which the police officer feels he has probable cause is precisely what the community expects of him. Neither police officers nor judges issuing warrants need delay until unquestioned proof is accumulated. The officer may be shirking his duty if he does so.

That same philosophy has been reiterated in

Draper where this Court said the police would be derelict in their duty if they didn't follow up on leads.

QUESTION: That's the first time you mentioned Draper. All your remarks up to this point have been Aguilar and Spinelli.

Have you unhooked from Draper?

MR. BIEBEL: No, we haven't unhooked from Draper at all. We certainly discussed Draper at length the last time, Your Honor. And we feel that the Draper analysis, which is consistent with the Carroll-Brinegar analysis which takes into consideration the totality of the circumstances, really what we're talking about today you've got to look at the whole picture. We think that Draper amply supports our position in this case as to the analysis to be used.

QUESTION: Do you contend, Mr. Biebel, that you can look at any circumstances after the warrant issued?

MR. BIEBEL: We believe the probable cause determination is made by the circumstances which were given to the magistrate, or in our instance, the judge at the time he considers whether or not to issue a warrant.

QUESTION: So, then, in this case the fact that the car came back to Chicago after the warrant was

issued was not relevant.

MR. BIEBEL: There was a presumption that the car was on its way back to Chicago.

QUESTION: Well, but, you didn't know it till it got back to Chicago --

MR. BIEBEL: Didn't know it --

QUESTION: Yeah.

MR. BIEBEL: But, in view of the fact and circumstances --

QUESTION: All you knew was that it left Florida, actually.

MR. BIEBEL: That's right.

And, due to the facts and circumstances you had at the time, we believed that there was enough evidence to indicate.

QUESTION: So, whatever information the police obtained after the warrant was issued you do not ask us to consider, that's all I'm asking.

MR. BIEBEL: That's right.

We believe that probable cause is established on the basis of what they knew when the judge issued the search warrant.

Since probable cause means only a probability and not unquestioned proof, and, since many situations which confront police officers are more or less

ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men acting on facts which lead sensibly to conclusions of probability as this Court mentioned in Brinegar --

QUESTION: But, whose mistake are we looking at here, the magistrate's or the police?

MR. BIEDEL: Within the -- within the standard that we are talking about here, it could be argued and the Supreme Court said that the magistrate perhaps in applying the Aguilar-Spinelli two-prong test made a mistake in this conclusion of probable cause. We would contend that --

QUESTION: And do you contend that the Court, if it reaches the question here of the good faith exception, should focus in on some good faith exception of the magistrate?

MR. BIEDEL: We're saying that our position is somewhat different than the solicitor's in this regard. And what we're saying is that within the context of cases like this that we're talking about which are basically factual cases. The solicitors is talking in a broader scope which, of course, his role as amicus would do.

We're saying within the factual circumstances

that we have here, we think that the analysis ought to be back to a totality of the circumstances analysis. And the review of that should be a reasonable basis review.

QUESTION: Well, if -- if that's your position I'm surprised that you answered Justice Steven's question the way you did. If you're talking about totality of the circumstances, reasonable basis, I would think that a far less sweeping change then you're urging would simply be to say that the police may consider, after developing facts, that when -- between the time of the issuance of the warrant and the search or siezure that might not have been available to the magistrate.

MR. BIEDEL: I think -- I think your point is well taken. I think the law as it stands now would seem to indicate that the facts and circumstances have to be that which leads up to the issuance of the warrant but certainly if you look at the facts and circumstances in our case it would certainly indicate that a round trip -- a non-stop trip from Florida occurred in those, you know, a great deal found in the car.

So, facts and circumstances certainly would lend support to the finding of probable cause that Judge Lewis made in this case when he issued the search warrants.

We're saying that even though there may have been a mistake, that that shouldn't make any difference in this case.

If you take the case of People versus Hill which was cited by this Court in 1971 you had exactly that situation. The police went to Mr. Hill's apartment and they arrested a man that resembled Hill. He said his name was Miller. He showed identification. The police didn't believe him. He said he didn't know anything about weapons. There appeared to be a gun in the house. They arrested Miller who they thought was Hill, searched the apartment. It was prior to Schimel, and, consequently, was a proper search. And, they found evidence indicative of the guilt of Hill.

This Court said that even though there had been a mistake as to who had been arrested there was nevertheless probable cause because the police reasonably believed that the man arrested was Hill.

The Court cited Brinegar's standard, and, said that what we're looking at here is a factual and practical rather than a legal technical view -- legally technical view, and, consequently, that mistake shouldn't make any difference in the finding of probable cause which is actually the determination of probabilities.

Because this is a practical consideration, the issuance of a warrant is entitled to great deference as this Court has stated in cases such as Jones and Ventresca.

And, consequently, since there is deference paid to the Court the review of the finding of probable cause is in effect a review of the finding of fact, and, therefore, should be reviewed on a reasonable basis standard rather than demobile review as you would have with questions of law.

This, we would observe is the same basic standard that courts use in determining whether or not probable cause exists on appeal. As this Court --

QUESTION: Counsel, if the purpose of the exclusionary rule was, as you suggested earlier in your remarks, deterrence of improper police conduct, then how does application of a good faith exception to a magistrate's decision in issuing the warrant further the deterrence of the police?

MR. BIEDEL: What we're basically saying, here, is that in these cases the deterrence, yes, but, comes in this way, if it may please the Court, that the police activity in this case was reasonable. It was thorough. It was done over a short period of time.

That is basically the deterrence -- I'm sorry,

the good faith aspect of this case is basically what the solicitor is putting forward. What we're saying is in these types of cases that what we've got to look at is the factual context in which the probable cause finding is made, and if there's a reasonable basis for it.

And many cases, I might add, involved this exact question on motions to suppress, was the evidence sufficient to show probable cause.

What we're saying is that even though we're asking the Court to mutilate what it said before, we think the laws become confused in this area. And we think the Court ought to clearly establish what the role of probable cause is in search warrants, what the standard is, and what the role of -- what the basis of review ought to be.

If that's the case, then, a lot of these aberrant decisions which have come down in the search and siezure area I think would be changed if those considerations were made in light of the standard we're asking the Court to enunciate in this case.

Getting back. The standard in criminal cases is not whether the reviewing Court feels that the defendent is proved guilty beyond a reasonable doubt, but, rather where there was substantial evidence to show that as this Court pointed out in Woodby versus the

Immigration and Naturalization Service in 1966.

And, in 1979, this was reiterated in Jackson versus Virginia. Mr. Justice Stewert issued the opinion in that case in somewhat different language where he said, the issue was whether any rational tryer of fact could have determined guilt beyond a reasonable doubt.

Using that basic phylosophy of deference for the factfinder, we apply that to this case involving probable cause.

This Court said, for example, in Jones versus United States in 1960 that the standard of review with regard to probable cause is whether there is a substantial basis to believe that the narcotics were probably present in the apartment.

Now, by using the substantial or reasonable or rational basis the focus becomes not what the reviewing judge thought, but what a reasonable, a rational police officer or magistrate could have believed when he made the determination of probable cause.

And if that determination is probable, it ought to be respected by the Court.

QUESTION: Haven't a number of cases added another factor, as seen by a policeman in light of his experience, not in the light of the judge's experience.

MR. BIEDEL: That's right, police officers are

are on the streets. They obviously are professionals in what they do and that's different from what we all do. And, we think that what they've learned in experience in the street has a great deal to do with whether or not they believe there's probable cause which exists in these cases.

QUESTION: Well, what do you do with the Nathanson case in which the officer was confident that there was probable cause, but the magistrate disagreed -- I mean the magistrate, based on what the officer's conclusions was enough. Would you -- are you asking us to reexamine that case?

MR. BIEDEL: I don't think that Nathanson needs reexamination, Your Honor, because all it was was a conclusory statement of probable cause. There was not --

QUESTION: By -- by the police officer?

MR. BIEDEL: By the police officer. There was nothing --

QUESTION: And, to this day, we presumedly believe he had probable cause.

MR. BIEDEL: That's right.

We have much more than that here. We've got evidence, facts and all the supporting evidence to the light of which indicated --

QUESTION: You're not contending, in other words, that the good faith of the police officer is enough?

MR. BIEDEL: I don't think the subjective police officer's good faith is enough, that's correct.

Michigan versus Tucker declared that the defendent is not entitled to a perfect trial. And, consequently, you can't require police officers to make no mistakes whatsoever. The pressures of law enforcement simply don't permit that kind of expectation.

Importantly, I would point out that Michigan versus Tucker also talked about the deterrence rationale of the exclusionary rule and assumed the police acted in willful or at least negligent ways when the -- when this rule is to apply. If there's good faith in the actions of the police officer in that case, that is the absence of any malice, then we would say the rule shouldn't apply.

When this deterrent rationale we've talked about here is considered in conjunction with the reviewing standard that we've said that probable cause ought to have, we find that it's clear in this case that the motion to suppress should not have been granted in this case.

First of all, there's no evidence whatsoever

the police acted in a willful and negligent way which is the kind of action that the exclusionary rule was meant to deter.

QUESTION: Was there any inquiry under that aspect in the Court below?

MR. BIEBEL: There wasn't any inquiry, Judge. I think that in reading the record that we see we can find that is a conclusion that can reasonably be drawn.

Their actions in this case, I think, can only be characterized as thorough and professional.

They had an anonymous letter which said that Mr. and Mrs. Gates were drug couriers. The letter was received on May 3, 1978, and it said that Mrs. Gates was leaving for Florida that very day. It said that Mr. Gates would be going a few days later. The police had a very difficult job to do, and that was to determine whether the letter had any validity at all.

They didn't know, for example, whether anybody by the name of Gates lived in Bloomingdale, Illinois. And so they had to check with the secretary of state to find out if there was anybody by the name of Gates in Bloomingdale. They did. And, they found out that Lance Gates lived there, but on a different street than the letter said.

They updated that information through a

confidential informant who had financial information, who said that the Gates had moved and indeed lived on Greenway Terrace like the letter said.

They checked with the Chicago police department who ascertained that a man by the name of Gates was leaving for Florida two days later on Eastern Airlines, just like the letter said.

They checked with the phone company. The phone number the man had given in his reservation for the airline checked out as an unlisted number to Lance Gates on Greenway Drive in Bloomingdale.

They then went to the drug enforcement administration and had an agent at the plane who had a description of Gates, and saw a man answering that description saying he was Gates get on the plane.

They had an agent at the other end of the trip, waiting, observing Gates get off. He spent an hour in the airport and went to meet his wife. And went to a room where a woman was registered in his wife's name, which proved out was Susan Gates.

They observed that he stayed in Florida for about ten or ten and a half hours. And there's no evidence he left the motel at all.

And then drove back on the interstate to Chicago, presumably toward Chicago.

The police went on the basis of that information which was all consistent with the letter. And all done over a day and a half or a two-day stretch and asked a judge to issue a warrant on the basis of probable cause. The judge said that he felt there was probable cause in this case and issued a warrant for both the car and for the house.

This is clearly not the kind of activity the exclusionary rule is meant to deter. This was thorough professional police work over a day and a half or two-day period involving three police agencies, the Illinois Secretary of State, the phone company and a confidential informant.

The the imposition of the exclusionary rule in this case for purely technical reasons would deter police officers, it seems to us, from doing their job.

And, certainly deter police officers from going to get warrants because if the warrant is not going to be given the kind of respect that this Court said it should have from Jones and Ventresca, then the warrant process is really meaningless from the point of view of the police officer and under those circumstances he may resort to warrantless searches which, of course, we -- this Court has frowned upon.

We think that there is a problem with the

probable cause standard. The courts have issued aberrant opinions in this regard. They have used artificial standards, Aguilar-Spinelli, whatever, they used artificial standards in this regard. We will say that the study of these aberrant opinions which we have cited in our reply brief are such to indicate there is confusion in this area. We would ask Your Honors to take this basic probable cause standard that you've talked about in years past and apply it in this situation and give due deference to the determination of probable cause made by the magistrate in this case.

If there are no further questions, we respecfullly would reserve whatever time we have left for rebuttal.

Thank you very much.

CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.

ON BEHALF OF THE UNITED STATES

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

This Court's question as stated in its order of November 29, is keyed to the officers' reasonable belief. As so stated the question has been answered by this Court's precedents which make it quite clear that the exclusionary rule necessarily applies only where,

and, I'm quoting from Michigan versus Tucker, the police have engaged in willful or at the very least negligent conduct.

It is elementary law that the willful and the negligent occupy different parts of the legal and behavorial universe from that which is reasonable. So that by very definition the question has been answered by this Court's decisions.

The conduct of a law enforcement officer in Weeks and Mapp as Mr. Biebel has told us was flagrantly abusive. It was intentional. Because it was intentional it was susceptible of being deterred.

The present case is at the opposite end of the spectrum from Weeks and Mapp. The police officers' conduct in this case was not flagrant. It was not intentional. It is the kind of conduct which even if technically violative of the Fourth Amendment involves only disagreements among judges over subtle and elusive issues of law. This is simply not the kind of case to which the exclusionary rule was intended to apply or which achieves its deterrence objectives.

And under those circumstances this case is controlled by a firmly established principle, established by this Court in a consistant line of decisions reaching back for at least fourteen years

which teaches that since the paramount and probably the sole purpose of the exclusionary rule is to deter unlawful police conduct, the rule applies only to those situations where its deterrence benefits outwiegh the costs of suppressing highly probative evidence.

This Court's precedents reject the notion that the exclusionary rule applies to any violation of the Fourth Amendment or that it must be applied whenever there is any possibility of deterrence however slight.

The answer, the Court said in Stone versus Powell, is to be found by weighing the utility of the exclusionary rule against the costs of extending it.

Now, let's apply that task.

QUESTION: Mr. Solicitor General, let me just ask one question. Your brief doesn't cite the Nathanson case.

MR. LEE: No.

QUESTION: How do you put that into your scheme of things.

MR. LEE: Under our scheme, once a warrant has been obtained, if the warrant had been issued in that case, then in all except the most unusual of circumstances, and we do hold open the possibility that there could be some unusual circumstance, that should be a virtual categorical reasonable kind of police type

conduct, and therefore, one to which the reasonable belief modification would apply.

Now, in the event that the warrant did not issue, not in that case, then you would have to judge it under the more rule of reason type approach to ask whether there was or was not a reasonable belief.

QUESTION: I must confess, I'm not clear.

Do you say we should overrule the Nathanson case or follow it?

MR. LEE: I think it should be followed in the circumstance.

QUESTION: Even though there was -- I don't quite understand why.

MR. LEE: Well, whether there -- whether this --

QUESTION: Because there was no misconduct, no negligence or willfulness there.

MR. LEE: No. In the event that the Court would conclude that the conduct of the police was reasonable, and I think it very likely that the conduct was reasonable in that case, then the modification should apply.

QUESTION: In other words we should overrule the case?

MR. LEE: That is right. Not as rationale,

but, it's -- the actual holding of the case.

QUESTION: If the same facts arose again we should decide it differently.

MR. LEE: That's right.

QUESTION: What happened in Nathanson? Did the police officer go to a magistrate and the magisterate turned him down?

MR. LEE: That's my recollection is that they did not get the warrant in that case.

QUESTION: Then they did get the warrant in the Nathanson case.

QUESTION: They did get a warrant?

QUESTION: Yes.

QUESTION: Mr. Lee, what happens under your approach in this case to improper determinations, even flagrant ones, by the magistrate?

MR. LEE: Let me address that question --

QUESTION: Determanations that are completely wrong and unsupportable. Now under your view, it would be perfectly all right for the police officer to take such a warrant and follow it.

MR. LEE: Not necessarily perfectly all right, Justice O'Connor. Let me make two comments in that respect.

One is that the principal focus should be on

the conduct of the police rather than on the conduct of the magistrate for two reasons.

The first is that insofar as deterrence is concerned this Court's decisions have made it rather clear that it is the police officers with whose conduct we are to be concerned. On the assumption --

QUESTION: So there is a secondary interest in making sure the government itself isn't involved in wrongdoing.

MR. LEE: That is correct. That is correct.

And for that reason as we set forth in our brief, we hold open the possibility that in some future case there could be conduct in which it -- not only the conduct of the police, but also that of the magistrate might be taken into account in determining whether the totality of governmental conduct, both police and magistrates, might result in the modification which we urge not being applicable.

But those would be unusual circumstances for this reason. On the assumption which underlies necessarily the exclusionary rule that there is a linkage between the deterrence of the police and the unavailability of the use of the evidence at the trial, there is at least a logical linkage because the police are part of, in one view, the overall law enforcement

effort. The linkage is much more loose and indeed there is some question as to whether it even exists when you focus not on the law enforcement officer but rather on the magistrate.

The magistrate's responsibility is not to convict. The magistrate's responsibility is -- he is not part of the overall law enforcement process. Rather his responsibility improves the accommodation of both society's interests and also the individual's interests. And as a consequence, it simply is not true that the deterrence of the magistrate fits in the same category as does deterrence of the police.

I'd like now to turn to the application of this Court's truth suppression balancing against deterrence of improper police conduct to the facts in this case.

First of all on the cost side, Mr. and Mrs. Gates were indicted on the charge of possession of marijuana. Illinois has some evidence in its possession that is rather relevant to whether they are guilty.

The Illinois police in executing the search warrant found 350 pounds of marijuana in the Gates' trunk and more incriminating evidence in their home.

The only question is whether this highly relevant and probitive evidence is to be kept from the

jury. Surely judicial integrity suffers serious damage when facts known to the judge, the lawyers on both sides and to the defendent are withheld solely from the only participants in the courtroom who need it the most.

On the deterrent side of the scale assuming arguendo that the drugs and other items were received in violations of the Fourth Amendment, it is difficult to perceive any adequate deterrent effect on future police misconduct from suppressing this evidence.

The reason is that the police did in this case exactly what any reasonable police officers should do, what our society wants them to do and what this Court has said on many occasions that they should do wherever possible.

They obtained a search warrant so that the probable cause judgment is made by one whose governmental obligation includes the protection of the constitutional rights of the individual.

QUESTION: General Lee, are there any statistics showing by what percentage of times a magistrate turns down a request for a search warrant?

MR. LEE: If there are, Justice Rehnquist, I'm not aware of them.

Consider if you will, the course which the present law requires the policeman to steer when he is

operating as he usually is within that indistinct Fourth Amendment boundary between the lawful and the unlawful.

On the one hand we require him not to be too aggressive and very properly so lest individual Fourth Amendment rights not be violated.

It is equally important however that he not be overly timid lest criminal activity go unpunished, undetected, or worst of all, unprevented.

That kind of obligation to steer between the scylla of his law enforcement obligation and the charybdis of the Fourth Amendment is probably unavoidable. But what is not unavoidable is the consequence that we impose on him if by hindsight we discover that he has made even the slightest technical deviation from the perfect course.

If we turn our backs on the evidence that he has obtained just because he has not been successful in forecasting judicial decisions, then that is not only freeing the criminal because the constable has blundered. That is freeing the criminal because the constable is something less than omniscient.

QUESTION: Well, you can't just blame Mapp, you have to blame all of those Illinois cases.

MR. LEE: And indeed --

QUESTION: That were decided before Mapp,

don't you?

MR. LEE: And, indeed, Justice Marshall, it is not terribly profitable to place the blame. And indeed the nub of the solution to the problem is contained within this Court's decisions, at least a dozen of them, which have made it very clear that the proper approach in this instance is to take into account that kind of dilemma that the police officer faces. And ask whether, in fact, he is going to be deterred by excluding this evidence in this particular instance.

And by definition, if we believe what this Court said in Michigan versus Tucker, and I submit it is absolutely correct, that it can only be to deter either negligent or willful conduct. Then by very definition, this Court's answer has to be given in our favor.

QUESTION: General, how can you deter the policeman? What other method do you have?

MR. LEE: Well, there are other methods of course, Justice Marshall.

QUESTION: Can you name one that was ever used, ever?

MR. LEE: There are of course the possibilities of tort remedies and many trials to be held, after the trial. And those kinds of issues would have to be taken into account if we were urging the

abolition of the exclusionary rule itself. We are not.

That issue is not before the court. It is simply -- it is fairly a close question as to whether the exclusionary rule itself is justifiable. And that has excited debate both scholarly and judicial.

But this case presents a much easier question. And it is in those instances where by very definition, being keyed as it is to reasonable belief, the deterrent effect varies somewhere between the non-existent and the very minimal, then the balancing test that this Court has set down in such cases as Calandra and Janis, Stone, and many others, operates to permit the evidence.

QUESTION: Mr. Solicitor General, you're talking entirely, as I understand your argument, about deterrence effect on the police. Is there any mechanism or do you think there should be to deter magistrates from violating the explicit words of the Fourth Amendment, no warrant shall issue expect on probable cause. What deterrent should be applied?

MR. LEE: There are two deterrents.

One is, of course, judicial review of the magistrate's decision.

QUESTION: Well, if you think the magistrate's decision is not supported by probable cause, should the

judge then set aside the warrant.

MR. LEE: In appropriate instances that would be one of the remedies.

QUESTION: But I thought your whole argument is that even though there is no probable cause here the warrant should stand.

MR. LEE: That brings me to another question that I do want to discuss. And that is, in appropriate instances where the reasonable belief modification might be dispositive of the particular case, but nonetheless, the reviewing court might conclude that it is appropriate to review, to not go immediately to the reasonable belief modification issue but rather consider first the substantive Fourth Amendment issue, either the propriety of the warrant or the meaning of the Fourth Amendment in that context.

QUESTION: It's going a little too fast for me, Mr. Solicitor General. Whose reasonable belief are we talking about?

MR. LEE: Let me answer that one. I think in the great majority of cases we are talking about the reasonable belief of the police. However --

QUESTION: I am talking about this case.

MR. LEE: In this case we are talking about the reasonable belief of the police.

I see no indication whatever that Judge Lewis acted improperly. We are not ruling out the possibility that it could be taken into account in some cases. We think that ought to be resolved on a case to case basis.

QUESTION: Well, assume for a moment -- what is your position. Was there or was there not probable cause for the warrant?

MR. LEE: In our view there was probable cause for the warrant.

QUESTION: Then how do we reach all these other issues?

MR. LEE: If you reach that conclusion and you decide that you want to base your decision on that issue then of course, that can be done. But I had inferred from the fact that the case was set down for reargument, that there was a purpose in in searching out this additional issue. And, this issue, of course, also can be a basis for deciding the case in the future.

QUESTION: Well, now, let me ask it this way. Assuming there was not probable cause arguendo for the warrant, would you say that the magistrate's action was nevertheless proper?

MR. LEE: Yes, yes.

QUESTION: Then, you're saying that it's proper for a magistrate to issue a warrant on less than

probable cause.

MR. LEE: Certainly -- excuse me, proper for what?

(General laughter.)

QUESTION: For a magistrate to issue a warrant on less than probable cause.

MR. LEE: No, certainly not. But, what we are saying is that on the facts of this case, there certainly was probable cause for Judge Lewis to issue the warrant that he did.

QUESTION: Well, I understand you said that. But if you also assume because the case is being reargued and all, that there was not probable cause for the warrant. Under that assumption did the magistrate act properly or improperly?

MR. LEE: Improperly, could not issue a warrant on less than probable cause.

Let me just deal briefly --

QUESTION: Then there's another step for the policeman to take. The policeman has the warrant in his hand. He is not a lawyer.

MR. LEE: Under the --

QUESTION: It was presumptively valid at that time, was it not?

MR. LEE: That is correct, that is correct.

There will be additional opportunities --

QUESTION: Let's be sure I understand. You're saying that whenever a warrant issues, the police officer's justification is justified in going forward with the search.

MR. LEE: In the great majority of instances that will be true. We don't know whether there will be exceptions or not. Certainly if there has been a judgment by a judge --

QUESTION: Well, that -- that's all this has been in the hypothesis if you've got a warrant.

What, if any, would be a situation in which the officer should not execute the warrant?

MR. LEE: I don't know if there would be any. I think that those should await the further development of --

QUESTION: But you clearly are overruling the Nathanson case. That is clear.

MR. LEE: I think that's correct.

There will be other opportunities for this Court to decide Fourth Amendment cases even if it should rule and in this case as -- as in our view the Court should.

In the first place there are alleged Fourth Amendment violations involving a pan of practice of

official conduct can often be challenged in a civil suit or declaratorium injunctive release. For example, in Torres versus Puerto Rico in which this Court held unconstitutional a Puerto Rican statute making it -- authorizing police to search the luggage of any person arriving in Puerto Rico from the United States could have been resolved in an action for declaratory judgment relief by a regular traveler to Puerto Rico.

Similarlyunder section 1983, suits can be dropped against municipalities for constitutional torts resulting from implementation of local ordinances, regulations, policies, or even customary practices.

In addition, there is at least some likelihood that some states would decline as a matter of state law to adopt a reasonable belief modification to their own state exclusionary rules. And the ruling of the courts of those states on underlying Fourth Amendment issues could be reviewed by this Court.

And, finally even in the prosecutions themselves, we see no credential or constitutional impediment to the courts deciding the substantive issue rather than going immediately to the remedial issue.

We would call in this respect to the Court's attention the case of O'Conner versus Donaldson which is not cited in our brief, 422 U.S. 563, in which the Court

did exactly that in a civil damage suit. It reached the constitutional issue first, and then remanded for determination whether there was a good faith immunity defense available to the defendent under the circumstances of that case. ..

Closing, within a fairly short time after Mapp versus Ohio came down and consistently ever since then the Court has consistently identified instances in which the exclusionary rule does not apply because its truth seeking costs out weigh its deterrence benefits.

Those individual holdings have been sufficient in number and sufficient in their consistency that it is now apparent that they constitute more than just parts of a whole.

That there is, in addition, a whole principle itself. It remains only to declare the existence of that principle which is clearly applicable to this case where the action of the police officers was reasonable. Under those circumstances the judgment of the Illinois Supreme Court should be reversed and the case remanded to that Court.

CHIEF JUSTICE BURGER: Mr. Reilley

ORAL ARGUMENT OF JAMES W. REILLEY, ESQ.

ON BEHALF OF THE RESPONDENT

MR. REILLEY: Good afternoon, Mr. Chief

Justice and may it please the Court.

Any decision by this Court, directed at the question asked of us on November 29, to modify the Federal exclusionary rule can have no effect on the Illinois statutory exclusionary rule which constitutes inadequate and independent state ground for the decisioin of the Court below. Approximately --

QUESTION: Why didn't the Court decide it on that ground exclusively, then?

MR. REILLEY: I believe that at that time the issued was not raised, Mr. Chief Justice, therefore, it was kind of not -- unnecessary for the Court to even mention something that was so obvious.

The statute that I referred to was adopted twenty years ago and is included in the appendix to our original brief, Appendix 1A, and incorporated by reference into our brief on reargument.

If I may briefly read the pertinent parts of that statute to the Court. It is entitled, Motion to Suppress Evidence Illegally Siezed. And it reads briefly as follows.

A defendent agrieved by an unlawful search and siezure may move the Court to suppress as evidence anything so obtained on the ground that the search and siezure with a warrant was illegal, because the warrant

is insufficient on its face or there was not probable cause for the issuance of the warrant.

It goes further and substantively states if the motion is granted the property shall not be admissable in evidence against the movant at any trial.

There is a further part of that statute which requires the motion to be made only before a court with jurisdiction to try the offense. In Illinois, that would be a full circuit court judge in a felony situation. And it requires further that the judge who enters the order make findings of fact and conclusions of law so that the order and judgment may be reviewed by a higher court.

Based upon the statute, the trial courts in Illinois must test the facial sufficiency of search warrants against a probable cause standard and nothing less. The statute allows in a brief party to make a motion contesting a warrant's validity to a trial court in an adversary setting.

It commands that if the motion is granted that the evidence shall not be admissable against the defendent at a trial.

The Illinois appellant courts in construing this statute have viewed it as giving a defendent the right to move the court to suppress unlawfully siezed

evidence and recognizes this statute as the basis for pre-trial motions to suppress in Illinois.

The case that indicates that is in an appellant court opinion, People versus Lebon, at 299 Northeast 2nd 336. The Illinois Supreme Court, in the opinion by Justice Schafer, has recognized this statute as the codification of the exclusionary rule first announced in People versus Brocamp which was mentioned by I believe Mr. Biebel.

The decision of the Illinois Supreme Court in 1923, nine years after Weeks and forty years before Mapp and as such is the statutory exclusionary rule in Illinois as was indicated in Brocamp.

That case was People versus Vanderalston at 349 Northeast 2nd, page 16, a 1976 opinion. The Illinois appellant courts in construing this statute have stated that this statute necessarily implies that the hearing judge has the authority to overturn the finding of the issuing judge on the probable cause question.

That case indicating that is People v. Martin which is cited in our original brief on page 25. There's a substantial quote from Martin in that particular page.

And that such a review over the issuing

judge's decision to issue the warrant is necessarily proper and necessary. A case construing that is People v. Tatman in 1980, again an appellant court decision of 406 Northeast 2nd, page 619.

Further, on reviewing a trial court's ruling on a motion to suppress illegally siezed evidence the appellant court now reviewing the trial court's determination has a duty to affirm the trial court's decision unless the decision is manifestily erroneous. That decision is People v. Smithers at 394 Northeast 2nd, 590, in 1979, Illinois public case.

Petitioner urges this Court to adopt the standard such that if the issuing magistrate made a mistake in his determination of probable cause, the evidence siezed pursuant to the warrant should nevertheless be admissable.

Petitioner is thus requesting this Court, not the Illinois Supreme Court when they argued there, to ignore the Illinois Constitution, to ignore the Illinois Statute and to ignore the Illinois Supreme Court's opinion in Brocamp 60 years ago.

Further, petitioner's suggestion that search warrants deficient on their face should not be overturned flies in the face of this Court's language in Franks v. Delaware in dealing with the ex parte nature

of the warrant process itself this Court and the dissent even indicated that it makes a good deal of sense to review search warrants issued by magistrates because of the ex parte nature and also because of Chadwick v. City of Tampa. Magistrates need not be trained lawyers.

QUESTION: Do you agree, Mr. Reilley, that a warrant once issued on the question for this is presumptively valid?

MR. REILLEY: I think a police officer has no choice once the warrant is issued because the warrant's language commands that the officer shall search the person and place named. I don't believe he has any descretion at that point. If he feels the warrant's invalid his feeling is irrelevant at that point since the magistrate already signed it and he is, as a matter of fact, obligated, I believe, to follow the signature of that search warrant because it commands him to do so.

Prior to, as I indicated earlier -- prior to the adoption of the statutory exclusionary rule in Illinois the Supreme Court adopted the exclusionary rule nine years after Weeks in Brocamp, again which is cited in our brief. The Brocamp decision was followed by many others including Peoples v. Castree which is cited in this Court's appendix in the Elkins decision.

At that time there was a reference to cases

that states that excluded and did not exclude evidence both before and after Wolf and before and after Weeks.

Because of the Illinois exclusionary rules independent and prior existence to this Court's decision in Mapp v. Ohio, the question of whether the federal exclusionary rule should to any extent be modified in this case makes any such decision advisory because such a decision would have no effect on the statutorily and judicially mandated requirement in the State of Illinois that evidence siezed without probable cause be excluded based upon the constitutional language which tracks the Fourth Amendment, the statutory language and the decisions.

In summary, any modification of the rule can have no effect on the Illinois constitutionally judicially declared and legislatively enacted exclusionary rule.

This Court in Cooper v. California made the statement which I feel is appropriate with regard to this state ground argument. A decision by this Court, of course, does not affect the state's power to impose higher standards on searches and siezures than required by the Federal Constitution if it chooses to do so.

Considering this jurisdictional question, I also urge the Court to read that portion of the brief

submitted by the State Public Defender of California and the National Association of Criminal Defense Lawyers dealing with 28 United States code 1257, certiorari jurisdiction only to the extent that the language indicates that the Court will entertain a question over the rights or priviledges which are specially set up in a state court.

It's the respondent's contention that the State of Illinois never raised this question at any level in the state proceedings.

That the State of Illinois is or should be aware of the fact that there has been an exclusionary rule in the State of Illinois for 60 years.

That a judge has no choice if he finds no probable cause, under the law of the State of Illinois he must suppress the evidence. There is no good faith or reasonable belief exception. The statute is very clear on its face and we believe, the respondents believe, that the statute controls in this case.

The petitioner's brief tells this Court, as I believe counsel indicated, that they're not asking for a good faith exception.

They agree that the exclusionary rule should apply if the mistake is a question of law. I think there is no doubt about the fact that the determination

of the existence or not of probable cause is a question of law. Certainly, it may be a mixture in that you have to look at facts, you have to look sometimes at hearsay declarations, but all in all the determination of the existence or not of probable cause is a question of law. So therefore, under counsel's own statement in his brief, if that is true then the exclusionary rule should apply.

Counsel indicates that he believes that the exclusionary rule or the question of probable cause is a question of fact. Certainly, that cannot be true.

If you look at Franks v. Delaware, again you look the language of this Court, seen in deciding that Franks should now apply a principle of going behind the search warrant getting to the integrity of the statements made to determine if there's an intentional or reckless mistatement. The Court in the majority opinion discuss the fact that there is no difference between looking at the sufficiency or facial sufficiency of the search warrant or to go behind the warrant and determine if there is something wrong with the integrity of the warrant.

In other words, the exclusionary rule should apply in both circumstances.

The case that I mentioned a moment ago, People

v. Martin, which was cited in the respondents' original brief at page 25, is important for another reason.

The other reason is that apparently the State of Illinois in that decision tried to do in the state court what the petitioner is now trying to do in this Court. And I believe the language is appropriate to repeat at this point.

The substance of the state's argument on appeal is that Judge Stiegment's finding that probable cause to issue the warrant did not exist, was merely a substitution of his views for the findings previously made by Judge Munsch in issuing the warrant.

The state would have us rule that once a magistrate issues a search warrant which he finds to be based on probable cause another trial judge may not overturn that decision in ruling on a motion to suppress.

The Illinois appellant court stated then, we cannot agree with the state's argument. Such a holding would immunize the reexamination of the warrant process and determine the ruling upon a motion to suppress.

Counsel never urged that in the Illinois courts. He's now urging this Court perhaps to overrule the statutory framework that all judges in the State of Illinois work under.

That is very simply stated a standard of

probable cause based upon the judgements of reviewing trial judges and later appellant judges reviewing under that manifestly eroneous standard that the Court has adopted.

I think it's important to, at this time, look at the question that is really before this Court. We are dealing here with the warrant process. We are not dealing with the situation, such as Hill v. California where an officer reasonably thought that the person he was arresting looked remarkebly like the defendent who he had probable cause to arrest. We are dealing with a very delicate Fourth Amendment warrant requirement.

I believe it's important now to direct certain comments to that issue.

The Fourth Amendment talks about reasonableness.

The Fourth Amendment has a warrant clause which specifically requires that probable cause be the standard, that the warrant be signed by a neutral and detached magistrate, and that there be specificity in the warrant.

By definition, a search warrant issued upon less than probable cause is per say unreasonable under the Fourth Amendment.

To permit the introduction of evidence seized

pursuant to an officer's inaccurate reasonable belief that he acted in compliance with the Fourth Amendment would establish a lesser standard than probable cause, best described as we did in our brief a reasonably unreasonable search.

The Fourth Amendment standard of probable cause would become diluted and in effect would become whatever the officer thought it was.

Dunnaway v. New York spoke to the question of probable cause and indicated there was a long history of testing the standard of probable cause against the standard of reasonableness as required by the Fourth Amendment.

Dunnaway also said that the exclusionary rules should be based upon an objective rather than a subjective test. The key part of the warrant I believe is reasonableness.

It makes no sense to ask that an exception to the rule be adopted when the word reasonableness is already included in the Fourth Amendment.

And this Court has, with regard again to the warrant process, has dealt with the question of reasonableness in cases such as Ventresca in which the Court will give more credence to a judge's determination which has been upheld upon review in lower courts.

And allow a little bit of leeway because we all understand that police officers are not legally trained. Therefore, the warrant process has already a built-in degree of sway between left and right, perhaps five degrees, to allow that reasonableness to already apply.

Again, as I indicated earlier, the warrant process is ex parte. It necessarily implies that there are no adversary conversations to convince or not the magistrate to sign or not sign a search warrant.

Common sense indicates it is basically a police officer who presents the search warrant to the issuing magistrate, and it is based upon the statements of the police officer that the magistrate makes his decision.

I don't believe we are talking about the good faith of the magistrate when we talk about the question posed by this Court. Certainly, the magistrate made a decision. He made the decision based upon whatever training and whatever belief he had.

However, the purpose for the review process under the Illinois statute and under this Court's determinations in Aguilar and Spinelli is to determine if the magistrate's decision to sign the warrant was in fact consistent with the standard of probable cause as

applied to search warrants.

I believe the question was asked on the argument of my opponents whether Nathanson should be overrruled. I think, consistent with the argument of my opponents, this Court should therefore overrule Aguilar and Spinelli.

Spinelli was a gambling case. Aguilar was a drug case. There was nothing egregious about that type of situation. Based upon the warrants in Aguilar and Nathanson were very very vague and did not describe probable cause to the sufficient standards that the trial court and the appellant court and this Court thought were proper.

The exclusionary rule in search warrant cases does not apply merely to egregious conduct. It applies to the basic statement of the Fourth Amendment that no warrant shall issue but upon probable cause.

And, if this Court or a reviewing court feels there is no probable cause, then the exclusionary rule applies.

QUESTION: Isn't there a certain, at least partial irony in your position, Mr. Reilley?

The law is supposed to encourage police officers to go and get a warrant rather than simply go ahead on probable cause without -- what they think is

probable cause without a warrant.

And, yet, under the rule that you're advocating and I think many of the court's decisions undoubtly support you the -- if a police officer goes and gets a warrant he has to put in black and white once and for all his view of what facts amounts to a probable cause.

And it's very easy to simply review it as the moment it was presented to the magistrate. But if he simply goes out on a basis of probable cause, it's a much more fluid situation where he can come into court two weeks later and testify what he thought was probable cause, and perhaps put a better face on the evidence that he has.

MR. REILLEY: Well, this Court's statements as you indicated, Mr. Justice, is that there is a preference for search warrants. That there is a preference for the police officer to take whatever facts unless one of the exceptions applies, for example, in an emergency or exigent circumstances, to take the facts to a magistrate, have the magistrate review them in a neutral and detached fashion to determine whether or not the officer is correct in his opinion at that time.

And I believe -- and, of course, the statements of the officer are then memorialized on the

four corners of the affidavit in support of the search warrant so that a reviewing court may review them later.

I agree that sometimes warrants may not be necessary, but this Court has already set out and delineated several exceptions to the warrant requirement which do not apply in a circumstance such as this where you're talking about searching a home and searching an automobile. But an automobile, not in the context of Ross or Changis but the automobile in the context of parked on the driveway somewhat in the respect of Coolidge, because of the way the facts happened in this case. The police didn't follow that car back from Florida. They waited for it to arrive on the driveway of the residence of the Gates'.

QUESTION: In your experience have you ever known of a magistrate to refuse a request for a search warrant?

MR. REILLEY: Yes, I have. Yes, sir.

QUESTION: Does it happen often in Illinois?

MR. REILLEY: It has happened in my experience on several occasions when I myself was a prosecutor about 12 years ago.

QUESTION: Do you remember what sort of rate of acceptance you had --

MR. REILLEY: Well, at that time I think there

was a learning process of the standards of Aguilar and Spinelli going on in Cook county. And once that learning process developed a little further the rate became less and less because everyone was kind of learning together, how to apply it in the narcotics court in Chicago. So yes, there was that degree of turning away by judges and magistratesm who were familiar with the standards of this Court.

I believe that counsel's argument in terms of this search warrant is asking the Court totally to overlook what you said in Aguilar and Spinelli.

And they argued the first time that this Court should overrule those standards. But now they're saying that if the magistrate makes a reasonable mistake and signs the warrant, but his mistake was reasonable, then the warrant should be good. They are totally asking this Court to avoid review, and they're totally asking this Court to avoid what is consistent with the Jones decision of saying hearsay can be the basis for a search warrant. They are forgetting that when they write the brief.

If we're going to use the direct observations of a police officer, then we can despense with the requirements of Aguilar and Spinelli to a degree. But if you're going to use hearsay, and in this case even

more than hearsay, you're using a letter, the substance of which is contained -- the police officers do not know who the writer is. The normal affidavit for a search warrant, at least the policeman knows who it is and he can establish the reliability of that informant by various statments about his past conduct.

QUESTION: To what extent did the subsequent events bear out the accuracy of the anonymous letter?

MR. REILLEY: By subsequent to the search warrant being signed?

The only thing that happened subsequent, if I recall correctly, is that once the car left West Palm Beach, Florida, and started heading in a northerly direction, the only other event that took place was that 23 hours later the car pulled up on the driveway.

There was nothing else observed by the police. They ended their surveillance in Florida and did nothing until the car actually arrived. There was nothing else that was done.

I assume Your Honor is not referring to the fact that they stopped them and then they opened the trunk and found the marijuana. That, of course, happened, but that was long after the warrant was signed. But there are no other events and we argued before and we argued in the Supreme Court of Illinois

that the activities that they observed were innocent. As a matter of fact, not consistent with the letter.

The letter writer said that Susan Gates would drop the car off and fly back home. Lance would drive it back by himself. Well, that did not happen.

And I believe that we discussed the possibility of a self-verifying detailed for comparing Draper to this case. But that particular detail was critical. That was the area where the marijuana was supposed to have been placed in the trunk and if one would think logically that the letter writer said that Lance would drive it back by himself. Well, the letter writer was wrong. That fact was not verified. In fact, it was totally contradicted by the facts of the case.

So therefore, there was nothing that was done after the warrant was signed that would in any way, shape or form add to the credibility or reliability of it.

QUESTION: Mr. Reilley?

MR. REILLEY: Yes, sir.

QUESTION: This case involves police reliance on a search warrant. What would you think of a case where the police relied on the validity of a statute that subsequently was held invalid?

MR. REILLEY: Well, this Court has directed to

that question and I fully agree that that would be a different circumstance.

QUESTION: Entirely different.

MR. REILLEY: Entirely different.

I cite as this Court has discussed in DeFillippo and the language of the conduct in the Peltier decision regarding the border search or roving boarder patrols. I feel that --

QUESTION: Would you -- would you think it appropriate to modify the exclusionary rule when police do rely on a statute subsequently held unconstitutional?

MR. REILLEY: I believe, this Court has already directed their attention to saying that a policeman acting reasonably on a statute of a state that he was told was a proper statute by the legislature of that state, that reversing that decision as to that case is not going to deter police officers, because they're acting in conformance with the law of the state that is established specifically by a statute. And I believe this Court has indicated that. That makes sense.

However, the legislature was wrong, apparently, if this Court feels that the statute was unconstitutional later. I see a difference, however, in that type of a situation.

QUESTION: In Stone against Powell, the Ninth

Circuit Court of Appeals, a habeas case, invalidated the arrest of an individual, I think it was in another state, perhaps Arizona, where the warrant subject to the ordinance upon which the policeman had acted subsequently was declared invalid.

So I take it you would agree that the Ninth Circuit Court of Appeals made an error in that case.

MR. REILLEY: Well, only based upon this Court's decision in DeFillippo.

QUESTION: Right.

MR. REILLEY: The petitioner in his reply brief makes reference to a case called On Lee v. the United States regarding the use of informants. And since we're on that subject I wish to comment on On Lee.

On Lee dealt with the use of informants as witnesses at a trial. And the question there was whether they should testify. And if so, what credibililty should the trier of fact give to the testimony of an informant. I don't know what relevance that case has to the case before this Court.

Of course we're talking about informants, but we're talking about them in the context of Aguilar and Spinelli, which makes sense when you're reviewing a hearsay statement to determine what seems to be logical. If the hearsay declarant is a reliable person

that can be believed, and what he says comes from some personal knowledge or comes from hearsay observations or statements by someone else, the On Lee case has nothing to do with that type of credibility.

They say also U. S. v. Matlock, stating that this case applies to a search warrant procedure and judge's decisions to give whatever right he wants to an anonymous letter.

The Matlock Court was dealing with the use of hearsay statements at a motion to suppress in a trial Court. That again, has nothing to do with the weight to be given to an anonymous letter, the source of which is unknown to the police, the magistrate, and everyone else.

The recent cases -- getting to the question of the non-application of the rule -- in respondent's opinion, the recent cases of Havens, Janis and Calandra do not support the position of the petitioner and the solicitor general in that the Court had stated in those cases that there was no possible deterrent function that could arise from the lack of use of -- for the use, rather, of unlawfully seized evidence in, for example, a grand jury setting.

A grand jury setting being totally without an adversary situation; an investigory body, the police officer's function or the police officer's deterrence

really not effected by that type of a situation. Since, obviously, if an indictment arises from the grand jury, that evidence could not be used at a trial.

However, the mere perfunctory function of a grand jury to indict and to formally charge someone, the deterrent effect would not be violated.

Similarly in Havens the gentleman who was stopped at the airport who denied later at trial that the tee-shirt which was found in his suitcase had the pieces cut out of it which contained the cocaine in his partner's suitcase, when he got up and lied before a jury and said that tee-shirt wasn't his, although it was suppressed in a lower Court, this Court ruled rightly that he should be impeached by that because the fact finding and truth finding process of a trial makes more sense.

Again in Janis the use of suppressed evidence in a federal civil tax case also makes sense.

And as the Justice asked me, Stone v. Powell, in a habeas review, if the state had given a full and fair hearing to the Fourth Amendment question all the way up the state's highest Court, then there is no need to review it in a habeas corpus proceeding. That again does not destroy the deterrent function.

I distinguish in the brief, and I say again

that the cases such as U. S. v. Williams, which everyone seems to be relying on to ask this Court to adopt an exception, can be distinguished totally -- again a non-warrant case -- that's the difference.

Williams, the larger majority felt there was probable cause in that case. And it's understandable if one reads it that the officer who made the arrest, Mr. Marconey, knew the arrestee because he had arrested her before. And, I believe it was a reasonable mistake a fact and that's what the Court held. However, I believe, he had probable cause as did the larger majority in the Williams court.

The Court has already indicated several exceptions to the warrant requirement incident to a valid arrest, plain view cases, auto search cases, inventories, border searches, consent searches, exigent circumstances, and, even, in Terry v. Ohio there was a carved out exception under certain circumstances of articulable suspicion.

It seems to us that the petitioner and the solicitor general are asking the Court to carve out another exception to make, if a good faith test is the basis for an admittedly no probable cause warrant, then, what good is the warrant process itself.

They indicate a warrant can be lacking in

probable cause, but still good anyhow if the officer thought it was. I don't believe the Court is going to adopt such a standard in light of the language of the Fourth Amendment itself.

As this Court said in the United States v. Ross last year, good faith is not enough to constitute probable cause. That faith must be grounded on facts within the knowledge of the officer which in the judgment of the Court would make his faith reasonable.

It's not just the judgment of the officer. It has to be reviewed because of the ex parte nature of the warrant process itself.

To our defenders of the rule, I believe, the -- one of the most important defender was a little six page brief filed by Mr. Johnston, the prosecutor in Polk County, Iowa. If one were to want to ask about statistics, and I don't necessarily believe in the empirical studies and I know this Court has indicated in its opinions that there may not be any that are really viable.

But Mr. Johnston said as a prosecutor that the rule has served no serious impediment to prosecuting the guilty. The rule has fostered police professionalism. He cites in his brief in 1980 over 6,487 cases prosecuted in his office, only thirteen of which were

dismissed and only nine of those involved narcotic cases. That's two out of a thousand that were dismissed because of the exclusionary rule. I think that is probably the most meaningful statistic that I've ever seen.

As a prosecutor, he feels that the Mapp case was a firm admonishment, that even a worthy law enforcement end cannot justify an unconstitutional means. He feels that police are better trained since then.

He says the result of any exception would be a signal to law enforcement to take the forth amendment not so seriously.

I know the Court is familiar with the statments of others who have testified before or written letters to the senate subcommittee on the exclusionary rule. Steven Saks is another example, the attorney general of Maryland says there is much more corporation between prosecutors and agents of law enforcement as a result of the exclusionary rule.

The bottom line is the prosecutor and the policeman want to convict if the evidence can stand up in court. So, it would be as stated by Judge Stern, it would be a slander on the police, and a slander on the FBI and the district attorney and the United States

attorney, to say that they would not follow this Court's decisions when they know that the exclusionary rule would apply if they did not.

Even Professor Ball, a proponent of good faith, concedes that the rule has accomplished increased police training and awareness about their responsibilities.

Commissioner Murphy, after the Mapp decision said there was a total reconstruction in his police department in New York as a -- from the top down to the foot patrolman as a result of the Court's decision.

To what weight the Court will give it I do not know, but we cite in our brief a footnote 10A and obviously this as 10A came as an afterthought only because the quote came in a newspaper shortly before the brief was completed.

The detective who authored the affidavit in this case was quoted in a Chicago newspaper as saying, if he knew then what he knew now about the exclusionary rule he would have better corroborated the information.

This Court need only look to the array of a amici briefs filed in this case on behalf of the petitioner and on behalf of the respondent as evidence of the fact that the rule does in fact deter. Thirty-four states have either filed or joined in the

filing of amicus briefs in this case.

The International Association of Chiefs of Police have filed. The National District Attorneys Association has filed as well as an array of amici on behalf of the respondent.

That indicates, I believe, that there is attention drawn to this only because of the effect of the exclusionary rule itself, the deterrent function.

Perhaps the amici on the petitioners side are complaining because the rule works too well.

If such a modification were adopted, even on an objective rationale, the practical effect in police departments will be that instead of strict compliance with decisions of this Court police will err more in favor of every questionable conduct and not even in close cases, thus making their own law.

The police will really be telling the Court what the Fourth Amendment means. Review will be extremely tedious because of the standard of being objective will require someone to develop criteria against which the standard can be measured.

Thus, Fourth Amendment law will be reduced to a series of Ad Hoc decisions instead of on a categorical basis so that law enforcement officials can have workable rules. And that conduct, of course, was

shunned upon in the Dunnaway decision.

The Fourth Amendment body of law cannot be Ad Hoc decisions. It must be a categorical body of law so that the institution of police, not just the individual police officer, can understand what this Court says is proper under the Fourth Amendment.

This Court should not modify the exclusionary rule in this case.

The warrant process contains sufficient leeway in the context of reasonableness in its definition of probable cause. Any lesser standard will encourage police not to comport their conduct to the standard of probable cause.

The cost of keeping the rule in terms of freeing some defendents is small in contrast to the overall benefit to society of keeping law enforcement in check and maintaining the delicate balance between individual freedom and the effective law enforcement.

Unless there are some questions, I have no further comments.

CHIEF JUSTICE BURGER: Very well, thank you.

Mr. Solicitor General, excuse me, Mr. Attorney General, there is only one minute remaining. Do you wish to make any use of that?

ORAL ARGUMENT OF PAUL P. BIEBEL, JR., ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. BIEBEL: Thank you, Your Honor.

The issue from our perspective involves an analysis of this case according to a probable cause standard. We feel that when historical definition of probable cause is taken into consideration which envisions all the facts and circumstances presented to the Court and to the police, we feel that a judgment in this case would be different.

We feel that artificial rules often get in the way and cause situations where there are aberrant opinions which come down which defy common sense because courts feel compelled to imply hypertechnical evaluations of the rules of this Court.

Mr. Reilley talks about the Amicus Brief and the county eye of a prosecutor who indicates that he's had very few cases involving suppressions. That may well be true. But we have one here and we have a serious case, here.

We have people who are undoubtedly drug couriers, the evidence of which has been suppressed. Three hundred and fifty pounds of marijuana, seven hand guns and rifles in their house and large amounts of drug related evidence in their house.

Even though the cases -- even though there may

be some dispute as to the amount of cases, the point is they do involve serious situations in many instances. And, this is certainly one of them.

We feel that the price that the rule exacts in this case, the exclusionary rule exacts, is simply too high. This Court has ruled.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentleman.

The case is submitted.

(Whereupon, at 2:16 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

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and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pierce Hammond

(REPORTER)