OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1771

TITLE UNITED STATES, Petitioner v. ALBERTO ANTONIO LEON, ET AL.

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner, :

v. : No. 82-1771

ALBERTO ANTONIO LEON, ET AL. :

- -x

Washington, D.C.

Tuesday, January 17, 1983

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

APPEARANCES:

REX E. LEE, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.; on behalf of petitioner.

BARRY TARLOW, ESQ., Los Angeles, California; on behalf of respondent Leon.

ROGER L. COSSACK, ESQ., Los Angeles, California; on behalf of respondents Stewart et al.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in United States against Leon.

Mr. Solicitor General, you may proceed when you are ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LEE: Mr. Chief Justice, and may it please the Court, before I state the facts of this case, I would like first just briefly briefly to review the governing principle of law against whose background the statement of facts should be more helpful.

The exclusionary rule emerged from cases like Weeks versus the United States and Mapp v. Ohio in which law enforcement officers committed flagrantly abusive violations of the defendant's Fourth Amendment rights. The officers knew or should have known that what they were doing was a violation of the Fourth Amendment but they did it anyway.

The rule rests on the assumption that the best way to deter that kind of conduct is to deny its evidentiary fruits to the law enforcement officers who perpetrated it. Neither the exclusionary rule nor its underlying deterrence assumption is being challenged in this case. Its applicability to cases of wilful

misconduct, like Weeks and Mapp, would be left undisturbed by the rule which we propose.

The net result of Weeks and Mapp is that we are willing to let some criminals go free as the necessary price for deterring the constable from violating the Fourth Amendment, but it is a heavy price, and this Court has clarified that it is a heavy price, and that we do not pay it beyond those cases to which its underlying deterrence rationale extends.

The exception for which we contend comes into play by its very definition only in those cases where deterrence would be inappropriate, where the police have acted as a reasonably well trained officer would have acted under the circumstances. In that kind of case, to whatever extent, excluding the evidence, where the police have acted reasonably deters, it deters too much. It overdeters.

It is just as likely to deter the police from performing their duty as it is to encourage compliance with the Fourth Amendment.

Therefore, it will not deter future Fourth Amendment violations so long as the police do their duty.

This Court's precedents make it very clear that since the paramount and perhaps the sole purpose of

the exclusionary rule is to deter, the rule applies only to those situations where the deterrence benefits outweigh the costs of depressing highly probative evidence.

In Stone v. Powell and United States v. Janis, for example, it was conceded that there would have been some additional evidence, some additional deterrence from the unavailability of the illegally seized evidence at a subsequent habeas corpus proceeding or a civil trial by a different sovereign.

In both of those cases and others, the existence of some marginal deterrence from application of the exclusionary rule to those additional proceedings or to those additional contexts was conceded. Nevertheless, the rule was held inapplicable because it could not pay its way in a cost benefit analysis. The marginal evidentiary cost exceeded the marginal deterrence benefit that would result from applying an exclusionary rule to those proceedings.

And it is this Court's deterrence-based cost benefit principle which squarely governs this case, to whose facts I now turn.

On the cost side, the four respondents here have been charged with offenses that include the possession and distribution of drugs. The evidence that

they seek to exclude, large quantities of drugs and drug dealing paraphernalia found in their residences, is highly relevant to the issue of their guilt or innocence.

On the deterrence side, it is really quite difficult to perceive just what it is that the police did wrong in this case, or perhaps more appropriately said, what it is that we would want them to do differently in the next case.

After receiving a tip from an informant that --

QUESTION: Well, on that basis -- perhaps we just ought to reverse on that basis, that they acted consistently with the Fourth Amendment.

MR. LEE: That brings into play, Justice White --

QUESTION: Another Illinois against Gates.

MR. LEE: Another Illinois against Gates, and of course my response to that is twofold. The first is that the question is not before the Court in the sense that it is not one of the questions presented, and the second is that after Gates, it involves nothing more than a fact bound probable cause issue which does not -- which after Gates really does not warrant attention as one of the 150 cases that this Court each year will review on the merits.

We have acted consistent --

QUESTION: So you assume that we wanted to do something else.

MR. LEE: Exactly, and I will also assure you that if you are interested in reviewing fact bound probable cause cases from the Ninth Circuit, we can bring many more of them here.

(General laughter.)

MR. LEE: But --

QUESTION: May I ask, though, along the same vein, Mr. Solicitor General, supposing we decide this case exactly as you urge the Court to do, and a magistrate in the future is confronted with an identical fact pattern. Should the magistrate issue the warrant or not?

MR. LEE: Whether the magistrate should issue the warrant or not depends on factors other than what the Court would give in deciding this particular case, because the relevant decision in guiding the magistrate whether to issue the warrant or not would be Illinois versus Gates, and not this case.

QUESTION: Well, but if this case is -- Assume an exact duplicate of the facts of this case, which are quite different from Illinois against Gates. He must either decide that does constitute probable cause or

does not.

MR. LEE: That is correct.

QUESTION: And we don't reach the good faith rule unless we first decide, it seems to me, that there is no probable cause.

MR. LEE: Well, in our view, those are two completely separate issues. The one goes to the wrong, and the other goes to the remedy. The one goes to the question, has there or has there not been a substantive Fourth Amendment violation, and the other goes to the question whether, assuming that there is a Fourth Amendment violation, what should be the remedy. Should the evidence or should it not be excluded?

The Illinois versus Gates went to one, and United States versus Leon should go to the other.

QUESTION: Well, you haven't challenged here the Ninth Circuit's determination that there was a violation of the Fourth Amendment. The only question you present in your petition is the good faith rule. Isn't that right?

MR. LEE: That is exactly right, and -- that is exactly right. It is the only issue that is before the Court, and of course, while the Court --

QUESTION: I guess your answer to my question is, you are really not quite sure what the magistrate

should do.

MR. LEE: Well, and that that is not an issue -- We deliberately have not briefed it. We have not reached it. We urge the Court not to reach it.

QUESTION: Well, you know what magistrates in the Ninth Circuit would be bound to do. They would be bound not to issue the warrant.

MR. LEE: That is correct, and if that is a serious enough --

QUESTION: And in other circuits, if the rule was different, they would not issue the warrant.

MR. LEE: Precisely. And if that is a serious enough problem for law enforcement, and if after Illinois versus Gates it involves a serious recurrent legal issue of the kind that this Court should resolve, we will bring it here.

QUESTION: General Lee, I guess this case was decided before Illinois versus Gates?

MR. LEE: That is correct.

QUESTION: And does the record in this case establish that the police actually had information available about the reliability and credibility of the informer? Was that information available to them, according to the record?

MR. LEE: We have characterized this informant

under the usual standards as an informant of unproven reliability, the same as in Illinois versus Gates.

After receiving a tip from an informant that two of the respondents were selling drugs in large quantities, Officer Cyril Raumbach and other officers of the Burbank Police Department conducted a month-long investigation of two residences and a condominium, observed activities generally consistent with the informant's information, and conducted background checks on persons whom they observed.

Based on that information, on his years of experience as a narcotics officer, and on his specialized training in narcotics investigations, Officer Raumbach concluded that the condominium was being used as a distribution point, referred to as a stash pad, to store large quantities of narcotics which were then transported in smaller amounts to respondents' residences for distribution.

After consulting with three other experienced investigators and three deputy district attorneys, he applied for a search warrant, which was issued by a California Superior Court judge.

Now, as I say, whether the magistrate's judgment in this case correctly assessed the presence of probable cause is not before the Court, but whether the

totality of those circumstances did or did not amount to probable cause, it certainly could not be said that it should have been clear to Officer Raumbach that there was no probable cause or that applying for a warrant would be improper in the circumstances.

He prepared his affidavit, and presented it to a magistrate, so that the decision whether to search or not to search was made as this Court has stated so frequently that it should be made, by a judicial officer, in this case a judge, rather than an executive officer.

I would invite the Court's attention to Officer Raumbach's detailed, carefully prepared 18-page affidavit, Pages 34 to 52 of the Joint Appendix, which shows that the constable in this case was a cautious, highly trained, and experienced narcotics expert who brought his experience and training to bear on his decision to apply for the warrant.

One of the strengths of the rule we propose is that it encourages that kind of high quality police work. Far from placing a premium on ignorance, as has been suggested, an objective, reasonable good faith exception, an exception which is keyed to the reasonably well trained officer, would place a premium on reasonableness and on training.

QUESTION: What does it do to encourage proper action by the magistrate?

MR. LEE: Let me turn to that. Very little. And the reason is that whatever problem you have, Justice O'Connor, at the magistrate level is a problem that is simply outside the ambit of what the exclusionary rule was ever intended to accomplish and what it is by its very nature capable of accomplishing.

Magistrates are judicial officers. They are members of, if you will, the Article III branch, the judicial branch. In both the cases before the Court today, they were judges, and the way --

QUESTION: If I may interrupt --

MR. LEE: Yes.

QUESTION: -- I assume that is usually the case. In the City of Tampa case ten years ago, we said it was all right for a city clerk to be a magistrate.

MR. LEE: That is correct. But even there, the Court clarified that there are two requirements that magistrates must meet. One of them is that they must be neutral and unbiased, and the other is that they have to be capable of making the probable cause judgement. Now, as long as those two requirements are met, those are the two requirements that are essential to the magistrate's job.

But regardless of the level of the training, as long as they are neutral and detached, and as long as they are capable of making the probable cause judgment, they are judges. They are part of the judicial branch. And the way our system --

QUESTION: Maybe it is enough, Mr. Solicitor General --

MR. LEE: Excuse me.

QUESTION: -- to say they are performing a judicial function in that particular setting.

MR. LEE: That is absolutely right. That is absolutely right. They are performing as judges. And the way that our system corrects their past errors and prevents their future errors is to reverse their decisions on appeal.

Now, I recognize that it has been suggested by the respondents and the amici that reversal of magistrate decisions is not an adequate corrective, but however adequate it is or it is not to upgrade the quality of magistrates, it is certainly more closely linked to the magistrate function than is the exclusion of evidence, which imposes the remedy and its burden on another branch of government and on society as a whole.

QUESTION: How does one appeal from the finding of a magistrate? Are you talking now about the

challenge to the admissibility of the evidence? Is that what you consider the appeal?

MR. LEE: Well, whatever the system --

QUESTION: Well, but search warrants are issued ex parte. At least they always were in my experience.

MR. LEE: That is correct. That is correct. But at a later point in time, magistrates can be -- their decision can be attacked in the trial.

QUESTION: I don't understand how that would come up. If the purpose of changing the exclusionary rule is to admit the evidence, I fail to see how you would ever have occasion to determine the propriety of the magistrate's action.

MR. LEE: Well, on the later occasion when the evidence either is or is not admitted, then the decision of the magistrate would be reviewed in the normal course of events, but it is not simply a matter, we submit, of excluding the evidence.

QUESTION: But the issue before us now is the conduct of the -- not of the judicial officer, but of the police officer in acting in good faith on a presumptively valid warrant. Is that not the issue?

MR. LEE: That is correct. Regardless of whether there would or would not be the opportunity to

review what the magistrate has done, that is the issue, Mr. Chief Justice, as to whether the evidence should be excluded. The exclusionary rule is a remedy. As a remedy, it has its limitations. And it would simply be a mistake, I submit, every time there is some mistake somewhere in the criminal justice system to conclude that the solution is to exclude some probative evidence.

To use it as a device for correcting judicial error would just not be an application of the exclusionary rule. It would, rather, be an extension, because it is not a question then of whether the exclusionary rule in its present form would apply to the magistrate. It would involve an extension, a substantial extension and an inappropriate one.

QUESTION: Well, Mr. Lee, one of the arguments your opponents make to the adoption of a good faith exception to the exclusion rule is that it would prevent the development of Fourth Amendment law because the typical judge at a suppression hearing, faced with the question of, was there a Fourth Amendment violation, was it in good faith and reasonable, is going to answer the question, it was in good faith and reasonable, and so we don't have to get to the -- Now, if you don't feel there is a lot of Fourth Amendment law that needs to be

developed in view of the fact that there is only one sentence in the Constitution, that may not bother you much, but it seems to me that it does kind of go against your idea that magistrates' findings are somehow reviewable in some other forum, you know not where, is, I guess, what your answer is.

MR. LEE: Well, leave the magistrates aside, because I am really a bit uncertain as to what extent those would be reviewable or not, but the -- or in exactly what context, but taking the issue that you have now raised, which is whether the adoption of a reasonable belief exception would freeze the development of the Fourth Amendment law, I think it is a legitimate concern, and one that ought to be faced.

On its face, however, I would note that it has to be taken in perspective, given the Court's consistent caution against the unnecessary resolution of constitutional issues, and that if the rule is otherwise appropriate for adoption, that certainly it is not a persuasive reason not to adopt it, because the consequence would be that this Court would have fewer opportunities to decide constitutional questions.

But to whatever extent it is a legitimate concern, and I start from the premise that it is, there are several avenues by which substantive Fourth

Amendment issues will continue to come before this Court. Three of those categories are discussed in our reply brief, and in the interest of time I will simply refer you to those categories that are discussed in our brief.

But I would emphasize orally that in addition to those three specific categories, the Court is free to reach the substantive Fourth Amendment issue before it reaches the remedial issue in those cases where in the Court's judgment that perfectly logical ordering of issue consideration, namely, consideration first of whether there has been a substantive Fourth Amendment violation, and second, whether there has been a -- whether the exclusionary rule should apply, involves only a prudential use of the Court's resources, and that is exactly what the Court has done in several analogous circumstances.

In the harmless error cases, for example, the Court has sometimes considered first whether a wrong was committed, and sometimes it has not. Those harmless error cases are discussed in our opening brief, both cases coming out of this Court and also out of the Courts of Appeals, and the respondents really have not had any response or any -- they have not answered the persuasiveness of those harmless error cases.

And in O'Connor versus Donaldson, which was a civil damage suit, the Court first held that the respondent's confinement was unconstitutional, and then remanded the case to the Court of Appeals to consider the petitioner's claim of a good faith immunity defense in light of the intervening decision handed down the same term in Wood versus Strickland.

Now, if there were an Article III constitutional limitation on reaching the substantive issue in a case in which the remedial issue might dispose of the case, you would have to overrule both the harmless error cases and also Wood versus Strickland.

The question therefore concerns the requirements of judicial prudence and not of Article III --

QUESTION: Well, Mr. Solicitor General, that is really not -- that is not quite right on Wood against Strickland. There it's an affirmative defense good faith. You have to decide whether there is a prima facie case first. Then you turn to the affirmative defense.

MR. LEE: There is that distinction, but they are alike, Justice Stevens, in this sense, that either of the grounds would have disposed of the case.

QUESTION: Yes, but you don't normally decide

affirmative defenses before you decide whether there is a claim made by the claiming party.

MR. LEE: Neither do you normally decide the remedy before you decide whether there has been a wrong that has been committed.

QUESTION: Except in this case.

(General laughter.)

MR. LEE: Well, we have traditionally done it in this case, but I am here to advise you that in doing so -- well, perhaps you should have followed another approach in the interest of judicial prudence, and that is really what it comes down to. It is a question of judicial prudence, and not of Article III. In a case like this one, given Gates, it simply would not be prudent for this Court to review a fact bound probable cause determination.

In other cases, it would be prudent for the Court to decide important, recurrent, and unsettled substantive Fourth Amendment questions prior to reaching the remedy issue, and nothing in the Constitution prevents it. The contrary assertion, really, on analysis, would require overruling this Court's harmless error cases.

Just one final point. It is very clear, I submit, that the respondents' position cannot withstand

analysis under the deterrence-based cost benefit rationale that has been the foundation of this Court's exclusionary rule decisions for at least 15 years.

The only rationale which would deny a reasonable good faith exception is one that would say that federal courts simply cannot consider evidence which has been tainted by an unlawful search. It would be a per se rule that the unlawful search always disqualifies the evidence, and that simply is not the law.

This Court's holdings in Alderman, Calandra, Janis, Stone v. Powell, Havens, and others show that the imperative of judicial integrity does not prevent the courts from considering all evidence seized in violation of the Fourth Amendment.

Indeed, I submit those cases establish that it is just as offensive to be imperative of judicial integrity that facts known to the judge, to the lawyers on both sides, and to the defendant, and to every participant in the courtroom except the participants who need that information in order to perform their duty is withheld only from those people who do need it in order to perform their job.

And there is a larger sense in which the imperative of judicial integrity is involved in this

case. We pay a price for technical rules that our citizens are unable to understand and respect. We demean the Fourth Amendment when its values depends on things whose relevance the common citizen has a hard time understanding.

People can understand that some useful purpose is served when evidence obtained in flagrant violation of a defendant's rights is suppressed. They have much more difficulty accepting the validity of suppression when it is done in response to a minor departure from rather technical and unclear requirements, or when the police have acted in reasonable good faith.

I will reserve the rest of my time, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Mr. Tarlow.

ORAL ARGUMENT OF BARRY TARLOW, ESQ.,

ON BEHALF OF RESPONDENT LEON

MR. TARLOW: Mr. Chief Justice, and may it please the Court, the proposition advanced by petitioner in this case as well as being unconstitutional is unnecessary, unmanageable, and illogical. Its consequences, among other things, would include nullifying the primary purpose of the warrant clause, undermining the systemic deterrence rationale, abandoning the continued scrutiny of magistrates which

in Gates was declared to be so essential, and would generate burdensome and cumbersome litigation.

The foundation of petitioner's argument seems to rest on the proposition of how can you deter a police officer who is acting in objective good faith, or who is acting in good faith? This assumes that the officer is acting in subjective good faith, and we can avoid a subjective inquiry, but yet petitioner's standard or test proposes that it only be an objective test, and we do not explore the minds of police officers.

Petitioner's argument ignores the systemic deterrence value of suppression, the fact that we are appealing to wider audiences, that the police officer should do some additional screening, some additional investigation. Perhaps the police officer at the time of Agular was acting in reasonable, objective good faith, but nevertheless the effect of the decision was to see to it that the warrants complied with the constitutional mandate.

Finally, the position ignores that it is the police officer who managed to obtain a warrant once he believed that he had sufficient probable cause to pass a standard. Now, the magistrate is not the legal advisor of the police department. This is police error. Magistrate shopping does in fact occur in our system.

The police officer did not set out to get the most impartial opinion that he could find about whether the warrant was valid. He set out to get a magistrate who would sign his signature on a warrant that the police officer believed would hold up in court, and if we look at the --

QUESTION: How do we reach that conclusion?

MR. TARLOW: Well, the realities --

QUESTION: Is there some testimony on that?

MR. TARLOW: There is not testimony, Your Honor, but there is --

QUESTION: I mean, it is judge shopping the way prosecutors and defense counsel do it?

MR. TARLOW: I think that the cases, at least, Caranccs in the Second Circuit, the studies that have been done, all recognize that -- and no one is saying that all magistrates are rubber stamps. No one is saying that everyone magistrate shops. But the studies, particularly the Van Dusen study that was just prepared by the -- with NIJ funding, involving 900 warrants in six cities across the country, establish that in 71 percent of the time warrants were signed in three minutes or less.

Maybe the nature of the warrant process that we see in the courts can explain how something as

bizarre as what happened in the Shepherd case occurred, how all these people can be involved in the process and nobody read the piece of paper, but as we look at the reports of the people who have gone out and studied the magistrate process, magistrate shopping does in fact occur, and the point, at least, in Agular and Spinnelli was that the Court wanted to be sure to eliminate the phenomena of the rubber stamp magistrate.

The good faith exception is certainly -- or proposal is certainly nothing new. It was rejected in Beck versus Ohio, and a similar argument seemed to be rejected in Justice Blackmun's opinion in U.S. versus Johnson. In effect, it would turn the warrant requirement on its head. It would be the police officer's judgment which determines whether in fact the evidence would be admissible in court, not the Constitution.

The concept that the law is too complicated simply does not meet with present day reality. The petitioner has pointed out that all federal warrants are reviewed by attorneys. This happens in state cases. In this case, three DA's looked at the warrant. This wasn't a warrant prepared in haste. It was prepared over a one-month period. And it seems that they could have got it right in that period of time. If they

didn't have enough, the answer was, don't go to the magistrate with it.

QUESTION: There is either something wrong with them or something wrong with the law, I suppose, if they couldn't get it right in a month.

MR. TARLOW: It was something wrong with the facts, that they couldn't show that there was probable cause to believe that contraband would be found in a particular location. If the evidence is not there, the answer to me does not seem to be that you can go to a magistrate and see if you can get a signature anyway.

QUESTION: If you were a magistrate, would you have issued this warrant?

MR. TARLOW: A magistrate --

QUESTION: Do you think a reasonable magistrate could have issued this warrant after --

MR. TARLOW: As to my client --

QUESTION: -- after Illinois against Gates?

MR. TARLOW: It was issued before Illinois versus Gates.

QUESTION: I mean, but after Illinois.

MR. TARLOW: After Illinois versus Gates, as to Defendant Del Castillo and as to my client, a reasonable magistrate would not have issued that warrant. Take Del Castillo, Your Honor, which is the

simplest of the fact patterns. All that -- and my client becomes a little more complicated, but it still is nowhere near being sufficient. All they have in Del Castillo is this. No informant. He was seen at the house. His car was seen at the house of a suspected narcotics dealer three times, and one of those times he was seen on the porch, and two years before he was arrested for marijuana. All that is is mere association. It is nothing. There is --

QUESTION: Well, but all probable cause is is a certain degree of association, and there is no magic cutoff point between what -- The Court of Appeals there was just as consistent with innocence as guilt. All the strands that go to make up probable cause are often just as consistent with innocence as they are with guilt.

MR. TARLOW: Your Honor, mere association I didn't think was consistent with innocence as guilt.

QUESTION: Well, certainly association with a narcotics dealer, being seen with him is some evidence that you may have some propensities of that kind yourself.

MR. TARLOW: Well, I don't think that this Court has ever held, Your Honor, on any facts, anything close to this, you can get a warrant for a man's car or a man's house, and if that is the case, if this case

comes within either Gates or within a supposed good faith exception, there is nothing left to the warrant clause. Only Aguilar --

QUESTION: Well, you could, on that basis, you could win, I suppose, win your case even with a good faith exception, because any -- what you are submitting is that any fool would know you shouldn't get a warrant on these facts.

MR. TARLOW: I am saying -- we did argue in our brief as to my client that even within a good faith exception we would win, but that, as I was arguing --

QUESTION: Well, you could still win, right here, even if the government wins.

MR. TARLOW: That might be, Your Honor, but it seems to me that there are overriding considerations. Of course, my primary responsibility is whether my client's -- the outcome of my client's case.

QUESTION: Exactly. Exactly.

MR. TARLOW: Nevertheless, as this Court speaks, it sends a message to law enforcement officers, to the public about our constitutional rights. Enacting something such as good faith would seem to me to send out a message which would encourage police officers --

QUESTION: Well, what kind of a message would it send out if we said, there is a good faith exception,

but it doesn't do the government any good here. Anybody should have known there wasn't probable cause in connection with Mr. -- what is it, Costello, Castillo?

MR. TARLOW: Well, I said Mr. Del Castillo. Mr. Leon is my client. But it was Mr. Leon and Mr. Del Castillo. The message would be that instead of, as this Court has said, that the imperative of judicial integrity, which might be co-extensive with the --

QUESTION: Well, it certainly wouldn't say --

MR. TARLOW: -- exclusionary --

QUESTION: It certainly wouldn't suggest you ought to be careless.

MR. TARLOW: What it would say, though --

QUESTION: It would suggest that you ought to be careful.

MR. TARLOW: You didn't make it this time, but if you have to make a mistake, don't make it on the side of constitutional behavior, make that mistake on the side of unconstitutional behavior, because if you are wrong, the evidence can still be admissible. Don't try to satisfy the Fourth Amendment. Just see if you can come close.

The message to the police officer would simply be this in a good faith case, I would think, in almost all cases. If you get a warrant, the evidence would be

admissible.

QUESTION: Well, isn't that true under Illinois against Gates now?

MR. TARLOW: Well, if that is true -- One point. Your Honor mentioned Illinois versus Gates. You struck -- Your duty was to strike the balance true, and that's what you did there. If that was so, and if a good faith exception was ever needed before Illinois versus Gates, it certainly isn't needed now, after Illinois versus Gates.

QUESTION: If this gentleman had been seen on the porch of this dealer five times in seven days, how would that affect your position?

MR. TARLOW: It wouldn't affect it at all.

QUESTION: Twelve days. Twelve times, twelve days.

MR. TARLOW: Well, of course, I suppose, obviously -- he was seen one time in one month, but I suppose -- Well, I don't -- Your Honor, if he was seen 12 times in 12 days, I don't think that means you could search his car. Maybe he lives there. Maybe he is a neighbor. Maybe he is dating the daughter. Any other thing. Being seen in the company of somebody, and nothing more --

QUESTION: Let's make it 12 days at 12:00

noon, which would eliminate the daughter, probably.

(General laughter.)

MR. TARLOW: Maybe she has graduated from school and is in between things, and is home at 12:00. But, no, I don't see how mere association could ever establish either probable cause or good faith.

QUESTION: With known drug dealers, you are talking about? Asscciation with a known drug dealer is insignificant?

MR. TARLOW: It is not probable cause or close to it, at least under any case that I have ever seen either from this Court or from any other court. I am sure if I am wrong the Solicitor could point out where some court has held that because in a one-month period you have been around, your car was seen three times and you were on someone's porch, that means they can search your car.

Now, history, I believe, has taught us one thing, at least, about the exclusionary rule. If there is no remedy, if we just say that there will be a violation, the Constitution prohibits it, but no exclusionary rule, the police conduct will be unrestrained. That is what happened between Wolf versus Colorado and Mapp. It is what everyone recognizes. The Court recognized what happened. The people, like the

Commissioner of Police in New York, who said, why bother before Mapp. That was their position, and unless there is a remedy imposed by this Court, the Constitution will be nothing more than hollow words. It will just be, the search is illegal, but it doesn't matter.

Particularly if there is a good faith exception, what remedy could possibly exist? There could be no remedy within the criminal proceeding. And there could be no remedy civilly, because the same good faith would prevent any kind of civil remedy, even if in some etherial or mystical sense a civil remedy really was available to people who have been illegally searched.

QUESTION: You think there would not be a civil suit against the magistrate because of his judicial immunity?

MR. TARLOW: He is immune. The officer is immune if he acted in good faith.

QUESTION: Immune from a civil damage suit?

MR. TARLOW: As I understand the law. Certainly I am far from being an expert on understanding Harlow versus Fitzgerald, but at least I understand that if the officer acts in good faith in conducting the search, he is immune.

QUESTION: That doesn't mean he is immune from

the suit.

MR. TARLOW: Well, then all that happens is that you -- well, but there is a finding within the criminal case that he acted in good faith. It would seem to me someone would -- it certainly would make no sense, and it would be difficult to find a lawyer who would ever pursue a remedy like that.

In addition, the requirement of judicial integrity seems to require that the Court discourage, not encourage constitutional violations. Now, how can a good faith exception possibly discourage constitutional violations? It will be, as Justice Stewart, former Justice Stewart mentioned in his article. The focus will not be on the Fourth Amendment, but what violations will be condoned.

The effects of the rule and the impact of the exclusionary rule have certainly been grossly exaggerated. Now, I do not want to go through all of the studies which we have listed in our brief. One part, though, becomes important. The centerpiece or a centerpiece of the Solicitor's brief is a quote from Justice White's Footnote 13 in Gates, where Justice White, observing the comments of the Solicitor as an amicus in Gates, Justice White then made the statement that 30 percent of all felony drug prosecutions in

California are dismissed or are not prosecuted for search and seizure reasons.

Now, this is quite simply a mistake. Not only is it a mistake, it is exaggerated 14 times. In Davies' study of the California arrest proceedings, the actual rate in California is 2.3 percent of the drug arrests, not of all arrests, just drug arrests, 2.3 percent are not prosecuted. Of all arrests, it is only .8 percent are not prosecuted, and this is in a state where there is no standing requirement of any kind, where independent state grounds are urged all the time, and where we even have protections in our garbage cans sitting in front of our houses.

This supposed good faith exception would abandon review of the magistrate. It will not be the inferences drawn by the magistrates which will become the center of the hearings. It will be the inferences drawn by the police officer, and obviously the Constitution should encourage and this Court should encourage the use of warrants, but it seems at the same time you must encourage maintaining the integrity of the warrant process. It is not just to encourage the use of a piece of paper, but to encourage a valid warrant.

Good faith would provide for no meaningful review of magistrates' decisions. Justice Rehnquist

reccgnized the need for continued review of magistrates' decisions in Gates, talked about the non-lawyer magistrate situatien. We cutlined this in cur brief. I don't know if at the time of Gates you were or were not aware cf the extent of the problem, but there are over 10,000 magistrates in this country who are not lawyers, who can issue warrants, some without even high schccl educations. Many cf these warrants are admissible in federal court. All the evidence would be admissible in federal court in the event federal officers didn't participate in the search, but many of these magistrates can issue warrants under Rule 41.

The review of magistrates in the view cf people who -- of authorities, sources who have considered the problem does in fact deter the magistrates. It makes them more careful. This was the basis for U.S. versus Caranthos, where the Second Circuit rejected this same contention in 1976, and concluded that review plus the exclusionary rule induces magistrates to scrutinize warrants and avoids rubber stamps.

This is the same opinion that former Justice Stewart reached. The good faith standard that the prosecutor, that the petitioner proposes is just simply unworkable. In the words of Justice Powell, it would

confound the confusion to try and apply that. Is it objective or is it subjective? It is easy to say, omit the subjective component. But that won't work because the premise of petitioner's argument is that the individual is acting in subjective good faith.

What is the standard for the reasonable police officer? For example, petitioner's brief, when we said, what do you do with a rural sheriff from Alaska, petitioner says, if the sheriff is testifying in New York City, the standard is the standard in New York City. And if that same sheriff were testifying apparently in the federal court in Alaska, we would have a totally different standard as to what the good faith rule requires.

What do you do with a Whitley versus Warden situation, where a bad warrant which Justice White would say would not pass the good faith test was communicated to an officer over a telephone call or on a radio, and the officer never even saw the warrant. Is that officer at the end of the phone acting reasonably, even though there is no probable cause? There are just simply layers and layers of problems.

If it is shown to a police officer, or to a U.S. attorney, is it a reasonable police officer, or is it a reasonable U.S. attorney that we are talking

about? Clearly, the cases have established -- or history has established there is no meaningful alternative remedy. Civil suits don't work. Injunctions don't work in the absence of municipal policy. The government's argument, to say the least, is disingenuous in view of some of these bills that are pending in Congress which would strip away all the protections.

CHIEF JUSTICE BURGER: Very well.

MR. TARLOW: Thank you.

CHIEF JUSTICE BURGER: Mr. Cossack.

ORAL ARGUMENT OF ROGER L. COSSACK, ESQ.,
ON BEHALF OF RESPONDENTS STEWART ET AL.

MR. COSSACK: Mr. Chief Justice, and Members of the Court, I would first like to start by answering Justice Rehnquist's question as to whether or not probable cause would be found under the Gates decision as to my clients, Mr. Sanchez and Ms. Stewart, who were the object of the tip.

I would categorically say that probable cause would not be found, and that is the crux of what the problem is in the government's presentation. The government -- In Gates, as you know, there was a tip for immediate action. I believe the tip came in, the letter came in on May 3rd, and by May 5th corroborative events

had taken place. The Court in upholding the Gates decision relied on United States versus Draper, and as the Court knows in that case they were able to also predict immediately what the activities of Mr. Draper would do with uncanny accuracy, the same train station, the same clothes, et cetera, and things like that. In Gates, they were able to predict what Mr. Gates would do immediately and where Mrs. Gates would be found.

The problem is our case is that the tip came in five months after the act, so that the police officers were armed with a stale tip that they went out to corroborate. There was no evidence of future corroboration. There was no evidence of immediate corroboration, as there was in Gates and as there was in Draper, yet the government would have us adopt a rule, have you adopt a rule that said even though under Gates there would be no -- as under Gates, there would be no probable cause, there would be -- it would be all right to admit the evidence in this matter solely based upon some kind of, I suppose, knee-jerk reaction that when a police officer finds a magistrate who has erred the evidence should come in.

That can do nothing but denigrate that part of the Fourth Amendment which gives us as individuals of the citizenry the right to be protected in our home and

in our cars and in our personal things from an unwarranted invasion by police officers.

I believe that deterrence is the sole rationale in a search warrant case that is conceptually flawed. The Fourth Amendment, like the entire Bill of Rights, exists to prohibit the government from using certain means to effect goals that the public believes are legitimate. There is no question that the public believes these goals are legitimate, but no matter how legitimate these goals are, and no matter how good the goals are, they cannot be done by means which are prohibited by the Fourth Amendment.

Now, that, the lynch pin of the Fourth Amendment is probable cause. There is the cost benefit analysis of the Fourth Amendment. It is that part of the Fourth -- it is that part of the amendment which gives the -- which describes that particular time when the individual's right to be secure in their home must give way to society's collective good to promote the general welfare and control crime.

Now, once a violation of the Fourth Amendment is found, then I believe that a remedy has to take place or else we have a statement of a right without any effective way of having a remedy. And what we have here is, we have a situation in which there is no question

that a violation of the Fourth Amendment was found. There was no probable cause. The government concedes there was no probable cause. They do not even ask at any time that this case should be reviewed under the Gates theory. They concede, I suppose, that even under Gates there was no probable cause.

But yet they wish to say that because a magistrate erred, that part of the Fourth Amendment which keeps us secure in our home and secure in our rights as citizens under the Fourth Amendment should not occur. I believe that again the cost benefit analysis that I indicate is proper when deciding the scope of who the Fourth Amendment may apply to as, for example, this Court did in the Standing cases. But I do not believe that a cost benefit analysis is proper once a violation has been found. And that is what we have here.

The exclusionary rule, I believe, as it stands, is correct. It should deter unconstitutional police activity, and the reasons that it may not in particular situations are invalid. We have heard statements that the police feel frustrated, and that they don't understand the opinions, and that they see our courts as nitpickers who are preventing them from doing what they should be doing.

Certainly sociological studies have indicated

-- I am referring particularly to Mr. Skolech and Mr. Goldstein's studies -- that police feel as a group disassociated from the common society. They are seeing themselves as authority figures. They see themselves as individuals who are doing the correct thing and are stopped from doing it by decisions of this Court and other courts which prevent them from doing it.

It is impossible to think, therefore, that they would be deterred by any internal police activity, especially if they think that they are acting in good faith. It therefore becomes incumbent upon the Court not to back down from the rule which is attempting to effectuate a goal which everyone believes is a correct goal, that is, to deter unconstitutional police behavior, but to have a rule which would be better communicated to the police, and also to set up training programs, which I suppose would include the police and understand their function in our society and their function vis-a-vis the Bill of Rights and the Constitution, so that they will not feel, as studies seem to indicate, disassociated from the rest of us when decisions go against them.

Now, implicit in the government's position is that alternative remedies can effectuate the same thing that the exclusionary rule can do by -- and there are

such things as alternative remedies. As Justice Murphy pointed out, the very nature of alternative remedies implies that there are equal remedies that would effectuate the same things that we want the exclusionary rule to do.

In fact, that isn't true. As co-counsel has indicated, immunity and tort violations really are not very effective.

QUESTION: Mr. Cossack, if the thrust of the Fourth Amendment inquiry is probable cause, what about the case where there is in fact probable cause but the magistrate simply makes some kind of a mistake or error, a slip of the pen?

MR. COSSACK: Are you suggesting that --

QUESTION: Is there no room there for any kind of a so-called good faith exception for the officer executing such a warrant?

MR. COSSACK: Are you suggesting a situation, Your Honor, where there was probable cause in fact, the magistrate reviewed it, and decided there wasn't probable cause?

QUESTION: Or maybe even decided there was and made some error on the warrant. Are you suggesting that there is no room for any good faith exception?

MR. COSSACK: I think, Your Honor, as -- I am

referring to the case that we heard this morning, which is fresh in my mind -- there may be limited applicability of a good faith exception.

QUESTION: How about the case, then, where there is in fact probable cause but the police officer made an error in filling out the affidavit?

MR. COSSACK: So that --

QUESTION: And the magistrate acts on it erroneously and issues a warrant. Now, is that a case where there is room for an exception?

MR. COSSACK: Are you suggesting, Your Honor, that the magistrate acted erroneously on an incorrect warrant and came to the conclusion that there was probable cause when in fact the police officer in good faith misstated facts?

Well, I believe, Your Honor, that in those kinds of situations, the courts have held that upon review of the ex parte proceeding, that both sides would be allowed to bring out that fact, and the true facts would then be presented to the magistrate, and if probable cause was not present, then I suppose the warrant should be suppressed. If probable cause was present, then the warrant should not be suppressed.

QUESTION: Is it your view that error was committed both by the magistrate and the police?

MR. COSSACK: Well, it is certainly my view that error was committed by the magistrate.

QUESTION: Primarily?

MR. COSSACK: Primarily by the magistrate. I am not -- I am sorry.

QUESTION: The police actually appeared tc act with ccnsiderable diligence, once they got the tip.

MR. COSSACK: Yes, Your Honor. I guess cne could qualify their activities as acting with diligence. I would say that they surveilled for nine days and saw four different activities of traffic, two of which were by people who were not included in this case. I also suggest to this Court that it was clear that the pclice, if you read the affidavit, that the police thought that whatever the narcotics were, they ere being brought in from Flcrida.

They stopped my clients at the Los Angeles International Airport after viewing them leave for Flcrida and return from Flcrida, received a ccnsent search to examine their suitcases, did so, and found a small, de minimis amount of marijuana, which was not filed upon by the police department. I suppose it was under an ounce, and in our state that isn't a crime.

They found ncne cf the drugs that were described by the informant, none of the qualudes, none

of the cocaine, and it was immediately thereafter that they went to the magistrate and asked for the warrant, I believe basically because at that time they obviously knew that their investigation, their under cover investigation or underground investigation, if you will, was recognized, and they had to take with what they had to go get the very best warrant they could.

QUESTION: Have we ever held explicitly that the exclusionary rule applies to the action of the magistrate?

MR. COSSACK: No, Your Honor, but you have suppressed cases in which the magistrate has found probable cause where there isn't probable cause, so in effect by implication you have said that it goes to the --

QUESTION: I think you are asking us to make a finding we have never had occasion to make before.

MR. COSSACK: No, I am asking you to say, Your Honor, that the -- to go ahead with what I believe you -- this policy has always been -- the exclusionary rule does go to magistrates and their activities, and I believe that that is based upon the grounding that the Fourth Amendment not only -- or that the exclusionary rule not only deters police conduct but upholds the integrity of the probable cause area of the Fourth

Amendment.

QUESTION: Well, apart from the integrity point, I think this Court has said a half a dozen times at least that the purpose of the exclusionary rule is to deter unlawful police conduct.

MR. COSSACK: That's correct, Your Honor.

QUESTION: Have we ever said the purpose was to deter unlawful conduct by the magistrate?

MR. COSSACK: No, Your Honor, but I don't think you have ever had presented to this Court a situation where the government is attempting to say that because a magistrate erred and not a police erred, there is -- somehow that the rights of the individual are somewhat less affected as they are today.

QUESTION: Yes. So however right you may be, this is a new issue for us to consider, explicitly.

MR. COSSACK: Yes, Your Honor.

QUESTION: Right. I will ask you one other question. Do you think deterrence is an appropriate remedy for a magistrate who is removed, at least it seems to me, from the same sort of atmosphere that a police officer -- in which the police officer acts? He is a judicial officer. So my inquiry is whether the exclusionary rule, the purpose of which is to deter conduct, would apply equally to a magistrate as to a

police officer?

MR. COSSACK: Your Honor, I believe that the way I can answer that question is that, is that it should, because the net effect of it is that somewhere an individual's rights guaranteed as probable cause are being affected, and therefore it is imperative upon us to recognize those rights, whether they are hurt by improper police conduct or improper magistrate conduct.

QUESTION: Thank you.

CHIEF JUSTICE BURGER: You have six minutes remaining, Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. LEE: It should not take that long, Mr. Chief Justice.

First, with respect to magistrate shopping, the argument is nothing more nor less than an attack on the warrant procedure itself and on this Court's consistent advice that it has given over the years that the decision of whether to search or not after the police have done their job should not be done by the police preferably, but it should be a decision that should be made by a neutral judicial officer.

Nothing has happened in the interim to change the propriety or the correctness of that advice. There

is a limit to the extent to which society's ills can be cured by excluding evidence. The advice that the Court has consistently given that warrants are the preferred method by which probable cause judgments should be made has not changed, and it would be ironic in the extreme now to base -- now to reject an otherwise very sound principle on the ground that would be inconsistent with the consistent assumption that has been made by the Court that what the police should do is exactly what they did in this instance, after they have done all of their own careful work, to submit that judgment to a magistrate.

Now, the final question is whether we really need this rule. Given the deference to magistrates on the substantive Fourth Amendment issue after Illinois versus Gates, we think that we do. One of the reasons is that from a theoretical standpoint, at least, they are two completely separate issues. This Court made that very clear in Illinois versus Gates, that one goes to the wrong, the other goes to the remedy.

The problem here is with an exclusionary rule that simply does not make sense in the kind of case -- in United States versus Leon, Massachusetts versus Shepherd, and some others. You do not correct that kind of inadequate theory by adjusting somewhere else, and

particularly where that adjustment is to a substantive constitutional provision.

Now, from a practical standpoint, the Court reminded us in course that what it was doing in Gates was not requiring new law, but simply clarifying what had been the law all along. We had Jones and Ventresca. We are not certain to what extent the courts will be able to apply with any greater degree, or to what extent there will be a real difference between the Jones, Ventresca, Gates standard prior to Illinois versus Gates, and to what extent it will be different.

But in any event, there is a conceptual difference. Certainly, certainly there are cases to which the rule that should arise from United States versus Leon will apply, notwithstanding Illinois versus Gates, and the only real issue is how large the application of that rule would be.

Under those circumstances, it is clearly appropriate that such a rule be declared to be the basis of the decision in this case.

Unless the Court has any further questions, Mr. Chief Justice, I have nothing else.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:00 o'clock 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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