

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1672

TITLE UNITED STATES, Petitioner V. WILLIAM D. MERCHANT

PLACE Washington, D. C.

DATE March 4, 1987

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(202) 628-9300

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X

3 UNITED STATES, :

4 Petitioner, :

5 v. : No. 85-1672

6 WILLIAM D. MERCHANT :

7 -----X

8 Washington, D.C.

9 Wednesday, March 4, 1987

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 10:01 a.m.

13 APPEARANCES:

14 PAUL J. LARKIN, ESQ., Assistant to the Solicitor  
15 General, Department of Justice, Washington,  
16 D.C; on behalf of the petitioner.

17 MS. PENELOPE M. COOPER, ESQ., Berkeley, California;  
18 on behalf of the respondent.

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1 or modification of the original order of a stay entered  
2 by the trial court.

3 At that hearing, respondent's counsel was  
4 present, and he had been notified.

5 Respondent, however, had not been notified of  
6 the hearing, and he was not there.

7 At the hearing, which was very brief, the  
8 state municipal court stated that it would grant the  
9 motion for clarification and that the conditions of  
10 probation were reinstated.

11 The search of respondent's farmhouse was  
12 carried out four days later. During the search, the  
13 members of the team discovered a large cache of firearms  
14 and ammunition, and a narcotics laboratory.

15 After respondent was prosecuted in federal  
16 court on several narcotics charges, he moved to suppress  
17 the evidence seized in the search.

18 The district court denied the suppression  
19 motion for two, independent reasons. First, the  
20 district court concluded that respondent was on  
21 probation at the time of the search, and that the search  
22 was lawful under the consent to search clause in his  
23 judgment of probation.

24 Second, and in any event, the district court  
25 concluded that the members of the search team, and

1 indeed, even respondent's own attorney, all held a  
2 reasonable and good faith belief that they were  
3 authorized to conduct a search by virtue of the February  
4 27 order entered by the municipal court.

5 The Court of Appeals for the Ninth Circuit  
6 reversed. At the outset, the court concluded that  
7 respondent was not, in fact, on probation at the time of  
8 the search, because the original sentence had been  
9 stayed in its entirety, and not just to period of  
10 confinement.

11 The court then went on to address the order  
12 entered at the February 27 hearing. The Ninth Circuit  
13 held that the order entered at that proceeding, and its  
14 terms, was a nullity because respondent was not  
15 personally notified about the hearing.

16 The Court of Appeals, after entering that  
17 ruling, went on to address the government's argument  
18 that the good faith exception that this Court adopted in  
19 Leon should be applicable to this type of search.

20 The Court of Appeals concluded that it should  
21 not, because it believes that the offices could not have  
22 had an objectively reasonable belief that this was a  
23 search related to probation. In the Court of Appeals  
24 view, this was a subterfuge for a criminal  
25 investigation.

1           The Court of Appeals granted our petition,  
2   which presented both the notice and the good faith  
3   questions. Respondent has sought to defend the judgment  
4   below on an additional grounds, namely --

5           QUESTION: You mean, this Court granted your  
6   petition, not the Court of Appeals?

7           MR. LARKIN: Oh, if I misspoke, I'm sorry.  
8   This Court granted the petition limited to those two  
9   questions.

10           And respondent has sought to defend the  
11   judgment below on the additional ground that the  
12   February 27 hearing was invalid because he wasn't  
13   present.

14           Now, there are several different ways this  
15   Court could resolve the issues in this case.

16           Technically speaking, if this Court were to  
17   disagree with the Ninth Circuit insofar as the Ninth  
18   Circuit held personal notice of a hearing is required,  
19   this Court could reverse the judgment below on that  
20   ground alone.

21           However, the Court could also, we believe,  
22   decide the case solely on the good faith grounds that  
23   the Court of Appeals rested its decision in part on.

24           QUESTION: Don't we have to get to the good  
25   faith ground anyway? I don't understand how the Court

1 of Appeals felt it had to do both of those issues.

2 If it wasn't a good faith probation search, it  
3 didn't matter whether he was on probation or not.

4 MR. LARKIN: Well, the Court of Appeals  
5 analysis in that part of its opinion contained several  
6 different elements, we believe.

7 The Court started out its analysis by talking  
8 about whether the officers could have reasonably relied  
9 on the February 27 order. And it ended up its analysis  
10 by saying that the good faith exception should not apply  
11 because this is the type of conduct we want to deter.

12 But in between the Court of Appeals added in  
13 two additional elements into its consideration. The  
14 Court of Appeals seemed to say that this was an invalid  
15 probation search because it went beyond the scope of the  
16 authority that a police officer has.

17 QUESTION: Isn't that the end of the matter,  
18 though? If -- if it was a pretextual search, wouldn't  
19 it be unnecessary to reach the other issues? Or would  
20 it still be necessary to reach some of the others?

21 MR. LARKIN: Well, the way the Court of  
22 Appeals seemed to address the case --

23 QUESTION: Never mind how they did it. I  
24 mean, as a real world matter. If you find that it was a  
25 pretextual search, wouldn't that be an end of the case?



1 MR. LARKIN: And if the pretextual nature of  
2 the search was important to this case.

3 We haven't challenged the Court of Appeals'  
4 assumption that the pretextual nature of a search would  
5 invalidate a probation search.

6 QUESTION: Okay.

7 MR. LARKIN: That deals with the substantive  
8 law of probation searches.

9 QUESTION: Right.

10 MR. LARKIN: And that's a question that the  
11 Court will address in the Griffin case.

12 Insofar as this case goes, given that  
13 assumption, if this Court were to find that it was  
14 pretextual, I believe you would be right; that would end  
15 it.

16 But there is no basis in fact or in law for  
17 the Court of Appeals' conclusion that this was a  
18 pretextual search.

19 QUESTION: Mr. Larkin, what do you mean when  
20 you use the word "pretextual"?

21 MR. LARKIN: Well, the Court of Appeals seemed  
22 to be believing that the purpose of this search was not  
23 to enforce his probation, but was to conduct a criminal  
24 investigation of something else.

25 QUESTION: Are those totally distinct?

1 MR. LARKIN: In our view, they shouldn't be.  
2 The reason is, here, for example, if respondent -- if  
3 there was reasonable cause to believe that he had  
4 violated some of the law, then it perhaps would be  
5 possible to conduct a probation search on that ground.

6 The Court of Appeals seemed to be adding into  
7 the calculus on this part of the issue certain factors  
8 that are just wrong under California law that's clearly  
9 established; and it also seemed to be making a factual  
10 finding that's inconsistent with what the district court  
11 found.

12 The district court found that the police  
13 officers and the prosecutor had an objectively  
14 reasonable and a subjectively reasonable good faith  
15 belief that this was valid.

16 The Court of Appeals seemed to say that  
17 because there were certain elements not present in this  
18 type of search that it believed should be present, it  
19 couldn't have been a probation search.

20 The Court of Appeals pointed to the fact that  
21 he hadn't been assigned a probation officer, but that's  
22 irrelevant under California law.

23 A police officer doesn't need the  
24 authorization of a probation officer to carry out a  
25 search of this type, and a probation officer doesn't

1 need to accompany a police officer.

2 In addition, the facts under California law  
3 that a probation officer has not been assigned to a  
4 probationer doesn't invalidate the judgment of  
5 probation.

6 That type of fact the Court of Appeals relied  
7 on is irrelevant.

8 QUESTION: Mr. Larkin, do you think the  
9 pretext issue --

10 QUESTION: Does the record show when the  
11 respondent here first knew of this probation business?

12 MR. LARKIN: That it first knew of the order  
13 on February 27?

14 QUESTION: Yes.

15 MR. LARKIN: I believe when he was told at the  
16 door was probably the first time. He didn't know of --

17 QUESTION: That was the first he knew about it?

18 MR. LARKIN: Yes. Now, that is not in our  
19 view --

20 QUESTION: That doesn't give you any problem,  
21 does it?

22 MR. LARKIN: It would give me a problem if  
23 they tried to revoke his probation for violating a  
24 condition of his probation. Because then it would be  
25 unfair to punish him for something he didn't know about.

1 But we're not prosecuting him in this case for  
2 possessing firearms. We're prosecuting him in this case  
3 for having a narcotics lab. And that's a matter that,  
4 independently of this, he should know that he's not  
5 entitled to possess in his house.

6 So the fact that he didn't know of the entry  
7 of the February 27 order --

8 QUESTION: So he lost his rights without even  
9 knowing that he had lost them?

10 MR. LARKIN: No, I would disagree with that,  
11 Your Honor. He was sentenced on November 14. At that  
12 time, the trial judge clearly told him that the  
13 probation conditions included, one, that he not possess  
14 firearms; two, that he consent to a search.

15 He was there. He did not object to either of  
16 those. He objected only to the six month period of  
17 incarceration.

18 In fact, at the next page of the Joint  
19 Appendix, he also objected to the trial judge's order  
20 that the firearm that was --

21 QUESTION: I'm not talking about when he was  
22 there. I'm talking about when he was not there.

23 MR. LARKIN: Well, he was not at the February  
24 27 hearing, and he was not notified about it.

25 QUESTION: And he didn't know about that until



1 they came to his door?

2 MR. LARKIN: Correct. But that --

3 QUESTION: And two minutes later they went to  
4 search him?

5 MR. LARKIN: That's correct. It's our  
6 position that the California Superior Court appellate  
7 division got it right when it said that he couldn't have  
8 his probation revoked for failing to comply with the  
9 terms of his probation; but that didn't mean that a  
10 probation officer, in this case a police officer, could  
11 not cross the threshold of his home once the February 27  
12 order was entered.

13 QUESTION: (Inaudible.)

14 MR. LARKIN: That's right. But under  
15 California law, either a probation officer or a police  
16 officer can conduct a search.

17 QUESTION: Well, we aren't interested in the  
18 California law as it -- at least I'm not -- apply to  
19 probation. I want to know how it applies to the people  
20 that did this. They were police officers.

21 MR. LARKIN: Well, at the time of the search  
22 in this case, Your Honor, and I will directly address  
23 now the good faith argument that we've made in our  
24 brief. I will not address the notice argument that  
25 we've made in our brief, because I think there's

1 virtually nothing that can be said in defense of the  
2 Court of Appeals' ruling, and respondent has made no  
3 serious effort to do so.

4 QUESTION: But may I verify, Mr. Larkin, if we  
5 felt that the Court of Appeals was wrong on the notice  
6 rule that it made, we could reverse on that ground, and  
7 that would be the end of the matter?

8 MR. LARKIN: I believe technically speaking  
9 that would end the matter at this time.

10 However, the Court of Appeals in our view has  
11 clearly signalled, for the reasons I explained to  
12 Justice Scalia, how it views this case.

13 And I think there's no doubt that if the case  
14 goes back on remand, the Court of Appeals will rely on  
15 some of the reasons given in the second part of its  
16 opinion to find that the search here was unlawful  
17 nonetheless.

18 But I will not address the notice point any  
19 further, and will speak now only to the good faith point.

20 QUESTION: Well, on the notice point, do you  
21 ask us to disagree with the Court of Appeals that under  
22 California law, the judge stayed the entire sentence  
23 rather than -- stayed the entire judgment, rather than  
24 just a sentence?

25 MR. LARKIN: We do not ask the Court to

1 disagree with that. We have not petitioned on that  
2 issue. We have not challenged the Court of Appeals'  
3 ruling.

4 Our only argument on the notice issue is that,  
5 for the reasons we've explained, notice to a defendant's  
6 attorney in a criminal case of any proceeding that  
7 occurs during that case is sufficient to satisfy any due  
8 process notice requirement.

9 QUESTION: So that even if -- even if this was  
10 an original sentencing hearing, notice to the attorneys  
11 is enough?

12 MR. LARKIN: It would be enough for the  
13 purpose of notice.

14 QUESTION: Yes, exactly.

15 MR. LARKIN: It may not be for the purpose of  
16 presence. The defendant may have a valid claim if he  
17 wasn't present at the sentencing hearing.

18 But for the purpose of notice, that would be  
19 sufficient in our view.

20 QUESTION: Mr. Larkin, before you leave the  
21 notice aspect of the case, let's assume that you're dead  
22 right, that the order is not a nullity. But rather,  
23 perhaps, one could ask, what is the effective date of  
24 the order, insofar as it imposes conditions of probation  
25 on the defendant?

1           And I understood you -- I want to be sure I  
2 get this right -- that if the probation had, say, two  
3 conditions in it, one, may not associate with certain  
4 undesirable characters, and they name them, and two, you  
5 have to consent to a search. And if he didn't get  
6 actual notice of the order, just in the interval between  
7 the Friday and the Tuesday when they came out, and in  
8 the meantime had associated with people that he was  
9 forbidden to associate by terms of the order, I think  
10 you have said he could not have his probation revoked  
11 because he wouldn't have known that that was in effect  
12 yet.

13           MR. LARKIN: That's right. We --

14           QUESTION: Well, then, aren't you saying that  
15 the -- that the -- insofar as the conditions of the  
16 probation affect his personal conduct, he's entitled to  
17 notice of that before the order becomes effective as to  
18 him? And if so, how do you distinguish between  
19 associating with other people and taking care of the  
20 privacy of his home and rearranging his affairs if he  
21 knows somebody might bust in without a warrant?

22           MR. LARKIN: Well, the order in this case, the  
23 February 27 order, was -- dealt with a stay that had  
24 originally been imposed.

25           QUESTION: I understand. But you've in effect



1 said it did not become effective, as to conditions which  
2 might require affirmative conduct on his part, until he  
3 had notice of it.

4 MR. LARKIN: No, I said he couldn't be -- if  
5 the conditions --

6 QUESTION: Well, why couldn't you revoke it if  
7 it was effective? I mean, I don't understand that. If  
8 the order is effective to govern his conduct, and he  
9 violates a term of the probation, you can revoke his  
10 probation.

11 Now why is it effective for some purposes and  
12 not others?

13 MR. LARKIN: In our view, it would be  
14 effective for bringing into play the authorization that  
15 was contained in the November 14 sentencing order.

16 Respondent, in our view, at that time --

17 QUESTION: But why wouldn't it also be  
18 effective as to saying you can't associate with Mr. X?  
19 I don't understand how it can be partially effective and  
20 not totally effective.

21 MR. LARKIN: Because of the different things,  
22 the consequences, that flow from the order coming into  
23 being. The -- it's our position --

24 QUESTION: It's important to know about some  
25 but not others? He's supposed to know that he can't

1 associate with someone, but he's not supposed to know  
2 that someone can walk into his living room?

3 MR. LARKIN: Well, he's -- it would be, I'm  
4 sure, important to him to know both of these. But the  
5 question is whether the officer who then walks into the  
6 room has committed a Fourth Amendment violation.

7 In this case, he waived his rights --

8 QUESTION: Well, he hasn't, because the man  
9 has consented to it, under your --

10 MR. LARKIN: That's right.

11 QUESTION: But hasn't he also consented not to  
12 associate with Mr. X?

13 MR. LARKIN: Well, I'm not sure I understand  
14 the difference, Your Honor, that you're -- the point  
15 that you're making. Because it seems to me it would be  
16 unfair to penalize him for something he didn't know  
17 about.

18 But you're not penalizing him by --

19 QUESTION: Well, he's going to go to jail.

20 MR. LARKIN: -- conducting a probation search.

21 QUESTION: Let's say he had private things  
22 there he didn't want the officers to see. You wouldn't  
23 consider that a penalty to just have to expose to view  
24 things he considered private.

25 That's not a penalty? That's the difference?

1 MR. LARKIN: That's the -- it's not part of  
2 any type of affirmative disability that you're imposing  
3 on him for violating some type of condition that's been  
4 imposed on his liberty.

5 If he can't associate with someone and doesn't  
6 know about it, it would be unfair to penalize him for  
7 it. But you're not penalizing him by allowing the  
8 probation officer, or in this case, the police officer,  
9 simply to cross the threshold --

10 QUESTION: You don't think there are adverse  
11 consequences in an unwarranted search?

12 MR. LARKIN: Well, the adverse consequences in  
13 this case flowed --

14 QUESTION: I mean, just assuming he doesn't go  
15 to jail for it, just, you go into his living room when  
16 he doesn't expect anybody to walk in?

17 Why is that different? Well, I guess I  
18 understand.

19 MR. LARKIN: Well, I think it's -- maybe it's  
20 not a difference in -- even if it's not a difference in  
21 kind, it's certainly at least a difference in degree  
22 between a probation officer just entering your home, and  
23 then a probation officer using the information against  
24 you to serve as the basis for revoking your probation  
25 and putting you in jail.

1 QUESTION: I thought the point you were  
2 making, Mr. Larkin, was that you need notice for those  
3 matters that would affect your primary conduct.

4 And whether he can own firearms or not affects  
5 his primary conduct. But whether he has drugs on his  
6 property or not is totally unaffected by this order,  
7 isn't it? He's not supposed to have drugs on his  
8 property anyway.

9 There's another law that already makes it  
10 improper for him to do that.

11 MR. LARKIN: No, I agree. I'm not taking that  
12 point in anyway. I was just trying to address Justice  
13 Stevens' point that --

14 QUESTION: It isn't that you weren't taking it  
15 back. I thought -- didn't think you were explaining  
16 it. I thought that that was the -- I thought that that  
17 was the distinction here.

18 MR. LARKIN: Well, that certainly is one of  
19 the distinctions. But Justice Stevens, I thought, was  
20 focussing on whether it's somehow unfair to allow the  
21 probation officer just to cross the threshold. And to  
22 that extent --

23 QUESTION: Well, and also, to what extent is  
24 the order effective. And Justice Scalia suggests it's  
25 effective to the extent it affects his primary conduct.



1           And I suppose that means that a person is not  
2   -- his primary conduct is unaffected by knowledge that  
3   his home can be entered at anytime by a law enforcement  
4   officer. I question -- I wonder if that's a valid  
5   distinction.

6           MR. LARKIN: In our view, for the reasons that  
7   I've tried to explain, the fact that you're just  
8   entering is not sufficiently comparable to the fact that  
9   you are ultimately put in prison, to say that the entry  
10   is itself a type of penalty of which you need some type  
11   of notice.

12           QUESTION: Mr. Larkin, I'm getting confused by  
13   this discussion.

14           Now, I thought the defendant was personally  
15   present at his original sentencing hearing, when the  
16   terms and conditions of probation were presented to him;  
17   and he looked it over and accepted it and consented to  
18   the probation terms.

19           Is that correct or not?

20           MR. LARKIN: That's our position, Your Honor,  
21   yes.

22           QUESTION: Well, and the record seems to  
23   support that. He was also given a companion jail  
24   sentence of six months.

25           His lawyer objected to the jail sentence.

1 Following that, the court entered a stay of his  
2 sentence, and it was the position taken by the Court of  
3 Appeals later that that stay apparently was effective  
4 for both probation and the jail term.

5 The state moved for a clarification of that,  
6 and the defendant was not personally present at the  
7 hearing on clarification. But if we conclude that he  
8 didn't have to be present, and if the court then vacated  
9 its stay or corrected itself so that the stay was not  
10 effective on the probation, then why wouldn't the  
11 probation be in full effect from that moment on?

12 MR. LARKIN: If there is no procedural flaw in  
13 the February 27 hearing --

14 QUESTION: Right.

15 MR. LARKIN: -- either of notice or presence,  
16 the order in our view would be valid.

17 QUESTION: Right.

18 MR. LARKIN: Respondent has challenged, in the  
19 lower courts but not in this court, that order to the  
20 consent to search provision entered at the original  
21 proceeding on the ground that that's substantively  
22 invalid. But that issue isn't before the Court --

23 QUESTION: But that's not before us at all?

24 MR. LARKIN: -- in this case; no, that's  
25 correct.

1           So in our view, if there were no procedural  
2 obstacles to that, the order would be valid at that  
3 time. But for the purpose of the good faith exception,  
4 there are at least I think three questions, or at least  
5 three positions we've taken that relate to this type of  
6 problem.

7           The first is that it's objectively reasonable  
8 for the officers to rely on the authority that they were  
9 granted by --

10          QUESTION: But I think Justice O'Connor's  
11 question is, if you -- or at least that's the way I  
12 understood it -- if you find that the consent to search  
13 provision and the probation decree has no flaw in it,  
14 you don't need to get to any good faith exceptions.

15          MR. LARKIN: You could end the case at this  
16 time simply by ruling on the notice and/or the presence  
17 grounds.

18          QUESTION: Yes.

19          MR. LARKIN: This Court would not need to go  
20 further than that. But for the reasons I've given you  
21 earlier, it seems to me the Court of Appeals has clearly  
22 signalled how they view this case.

23          QUESTION: Well, if we say this was a valid  
24 search, I would think the Court of Appeals would have  
25 difficulty saying it was an invalid search after our

1 opinion.

2 MR. LARKIN: No, by that what I mean, Your  
3 Honor, is, respondent has an issue that he raised in the  
4 Court of Appeals that he's not reasserted here.

5 He has raised in the Court of Appeals the  
6 question, whether the consent to search provision is  
7 substantively invalid under the Fourth Amendment.

8 QUESTION: Well, if we decided it wasn't, I  
9 doubt that the Court of Appeals would contradict us.

10 MR. LARKIN: I fully agree. But that question  
11 is not before the Court in this case. The notice and  
12 presence questions relate to the procedural regularity  
13 of the February 27 hearing.

14 The other question that I mentioned that is  
15 mentioned in the last footnote of the Court of Appeals'  
16 opinion deals with the substantive validity of these  
17 conditions at all.

18 QUESTION: And that's coming up in another  
19 case this term.

20 MR. LARKIN: Correct. That will come up in  
21 the Griffin case.

22 So the Court will decide -- perhaps decide  
23 that type of issue in the Griffin case. But I don't  
24 think that issue is before the Court in this particular  
25 case.



1           Now, it's our view that the officers, as I  
2 said, had an objectively reasonable belief that the  
3 consent to search clause imposed in respondent's  
4 November 14 judgment of probation authorized a search in  
5 this case.

6           These types of conditions are not unique to  
7 this type of proceeding. They're well established in  
8 California law.

9           For nearly a decade prior to the search in  
10 this case, consent to search conditions had been held to  
11 be valid both as legitimate conditions of probation and  
12 as lawful under the Fourth Amendment.

13           California Supreme Court expressly addressed  
14 the validity under the Fourth Amendment of these types  
15 of conditions in the Mason case in 1971, and between the  
16 date of that case and the date of the search in this  
17 case, neither the California Supreme Court nor any lower  
18 California court said that these were disfavored sources  
19 of authority.

20           In these circumstances, we believe that the  
21 principles that the Court discussed in Leon are fully  
22 applicable. In our view, the two central principles on  
23 which the Court decision there rested were, first, that  
24 the purpose of the exclusionary rule is to deter police  
25 misconduct; and second, that the exclusionary rule

1 cannot serve that purpose where the officers act in an  
2 objectively reasonable belief that their conduct is  
3 lawful.

4 It's also our belief that the officers will  
5 not be -- should not be required to draw distinctions  
6 among the different types of authority that they are  
7 given, between the authority granted by a statute or the  
8 authority granted by a search warrant or the authority  
9 granted by consent to search clause.

10 But even if we're wrong in that, and even if  
11 there should be some type of distinctions police  
12 officers should be required to make, it would be  
13 unreasonable to demand that a police officer distinguish  
14 between the types of authority that a judge gives him to  
15 search, between a search warrant and a consent to search  
16 clause. And that's particularly true in this case,  
17 where there had been -- a substantial number of years  
18 had intervened, showing that this type of condition was  
19 lawful.

20 Now respondents and amici have argued that the  
21 reasonable mistake exception should not apply to this  
22 type of authority for several reasons. We believe those  
23 contentions are unpersuasive.

24 Respondent and amici first argue that the  
25 decision in Leon rested on the proposition of

1 encouraging the police officers to secure warrants. In  
2 our view, that misreads the decision.

3 The decision in Leon, we believe, rested on  
4 the deterrent effect of the exclusionary rule in  
5 different contexts, and not on the question whether or  
6 not the police should be required to resort to warrants,  
7 because that's a question of substantive Fourth  
8 Amendment law.

9 Respondent argues that it's too difficult to  
10 determine whether a police officer acted in good faith  
11 in this context, to decide whether or not the good faith  
12 exception should apply. And we believe he's greatly  
13 overstated the difficulty.

14 The orders are presumptively valid, and a  
15 police officer can be required to know of any  
16 intervening developments in the law. In this case there  
17 were none.

18 The decision on which the Court of Appeals  
19 relied to rule that respondent was not on probation from  
20 the outset was handed down after the search in this  
21 case; and therefore, no member of the search team can  
22 reasonably be deemed to have been aware of it.

23 Respondent and amici also argue that there are  
24 already exceptions to the warrant requirement that  
25 authorizes reasonable police conduct. In our view, that

1 misfocusses the inquiry.

2 If as we believe Leon rested on a deterrent  
3 rationale, then a police officer will not be deterred  
4 from engaging in objectively reasonable conduct, with or  
5 without a warrant.

6 If that's true, the fact that there are types  
7 of warrantless police actions that are themselves lawful  
8 does not mean that the exclusionary rule should be an  
9 effective deterrent in other types of circumstances.

10 QUESTION: Mr. Larkin, there weren't just  
11 police there. There was a prosecutor there, wasn't  
12 there?

13 MR. LARKIN: Correct, Your Honor.

14 QUESTION: So I mean they weren't without  
15 legal advice?

16 MR. LARKIN: That's true. They had a law  
17 enforcement there.

18 QUESTION: Who knew the facts of the case.

19 MR. LARKIN: That's correct.

20 QUESTION: And who knew that the respondent  
21 was not in court.

22 MR. LARKIN: That's correct. But there's no  
23 reason for those facts, for her to have assumed that the  
24 February 27 order was invalid.

25 It was a purely legal hearing. The prosecutor



1 introduced no facts to support her motion. She  
2 introduced none at the hearing.

3 Respondent's counsel said -- did not say that  
4 any factual development was necessary.

5 QUESTION: (Inaudible) objects to the legality  
6 of the hearing. The respondent objects to not knowing  
7 about the hearing. Those are two different points, I  
8 think.

9 MR. LARKIN: Well, I think he also objects to  
10 the --

11 QUESTION: If he had been at the hearing, he  
12 would have no case at all, right?

13 MR. LARKIN: I believe so.

14 QUESTION: But if he wasn't at the hearing,  
15 that doesn't help him at all, you say?

16 MR. LARKIN: No.

17 QUESTION: Well, why should he be there?

18 MR. LARKIN: Well, it's a purely legal hearing  
19 on a stay; the same type of hearing that could take  
20 place in an appellate court. If the prosecutor had  
21 appealed a trial court order to an appellate court, the  
22 defendant would not have the right to be present.

23 QUESTION: (Inaudible.)

24 MR. LARKIN: Well --

25 QUESTION: Mr. Larkin, wasn't it that the

1 effect of the second hearing was to confer his  
2 agreement? I mean, was it clear that he would have  
3 agreed to the probation if he had known that the terms  
4 of it included that he couldn't have guns and consented  
5 to a search, both?

6 MR. LARKIN: Yes, it's our view that the  
7 record and the state law makes it clear that he  
8 consented at the time the order was originally entered  
9 November 14.

10 The judge told him about the conditions. He  
11 didn't object to those. He objected only going to jail  
12 and having to get rid of one of his guns.

13 QUESTION: What if I agree with you that  
14 notice was not necessary so long as the attorney was  
15 advised, but I think he should have had a right to be  
16 present at the second hearing.

17 How would that affect my decision in this case?

18 MR. LARKIN: The next question then is whether  
19 the officers had an objectively reasonable belief that  
20 the order entered was valid and therefore authorized the  
21 search.

22 You would move on to the second question.

23 QUESTION: May I just ask this final  
24 question? Did I understand you earlier to say that you  
25 do not challenge the finding of the Court of Appeals

1 under California law that the order of February 27 was  
2 the order that we have to look at primarily here?

3 In other words, that was the order, as I  
4 understand it, that the court below considered to be the  
5 initial imposition of probation.

6 Do you challenge that?

7 MR. LARKIN: I agree, Your Honor, that the  
8 Court of Appeals said that the November 14 order was  
9 stayed in its entirety.

10 QUESTION: Yes.

11 MR. LARKIN: And we have not challenged that.  
12 So that it's correct to look to the February 27 order.

13 QUESTION: Mr. Larkin, do you read the Court  
14 of Appeals as holding that the search was objectively  
15 unreasonable because it was pretextual?

16 MR. LARKIN: Yes. What they said was --

17 QUESTION: So if we reach the Leon matter, for  
18 you to win, we have to say the Court of Appeals was  
19 wrong on holding, what, that it was pretextual, or that  
20 what?

21 MR. LARKIN: Well, the Court of Appeals added  
22 that type of scienter inquiry into the analysis. And we  
23 think it's unsupported in the record, and it's  
24 completely inconsistent with the district court's  
25 finding.

1 QUESTION: So we do have to disagree with it,  
2 say the Court of Appeals was wrong in finding that it  
3 was pretextual and therefore unreasonable?

4 MR. LARKIN: If you get to that second  
5 question.

6 QUESTION: Yes.

7 QUESTION: Well, we would have to say the  
8 Court of Appeals was wrong in finding that it did not  
9 comply with the good faith objectives, and whatever the  
10 word "pretextual" might mean.

11 MR. LARKIN: That's right.

12 QUESTION: Mr. Larkin, before you sit down, on  
13 the good faith issue, is the test -- because there was a  
14 lawyer who was involved in the decision to make the  
15 search, as I understand -- is the test -- and assume for  
16 a moment that the lawyer knew that the -- A, that there  
17 was no actual notice to the defendant, and B, that the  
18 Court of Appeals might at least think there's a question  
19 about whether, given the absence of notice to the  
20 defendant, the search would be proper. But the police  
21 officers didn't realize that. The police officers just  
22 rely on the face of the order.

23 Do we test it by the judgment of the lawyer,  
24 or by the judgment of the police officers?

25 MR. LARKIN: The lawyer.



1 QUESTION: The lawyer.

2 MR. LARKIN: It's the same way as if one  
3 police officer knew of that problem.

4 QUESTION: So the question then is whether a  
5 lawyer, having knowledge that there wasn't actual notice  
6 to the defendant, might have thought there was a  
7 question about the validity of the search?

8 MR. LARKIN: I think that would be reasonable.  
9 I'd like to reserve the balance of my time.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
11 Larkin.

12 We'll hear now from you, Ms. Cooper.

13 ORAL ARGUMENT OF PENELOPE M. COOPER, ESQ.,

14 ON BEHALF OF THE RESPONDENT

15 MS. COOPER: Mr. Chief Justice, and may it  
16 please the Court:

17 The facts and the law in this case establish  
18 that there was not a lawful probation search under the  
19 law of the State of California; that the respondent in  
20 this case was never on probation under California law;  
21 and that he never waived his Fourth Amendment rights.

22 Further, the facts and the law establish that  
23 the search was conducted in bad faith, and was  
24 objectively unreasonable.

25 This Court would not even have to look at the

1 notice issue, this Court would not have to look at  
2 whether or not the February 27th order was effective,  
3 and I direct this specifically to Justice O'Connor,  
4 because regardless -- regardless of what this Court  
5 decides about the effectiveness of the order that was  
6 arrived at on February 27, this search was not justified  
7 as a probation search.

8 Under the law of the State of California,  
9 there must be reasonable belief that a person is in  
10 violation of a condition of probation, and the alleged  
11 violations that were brought to the court in this case  
12 all occurred prior to February 27th, prior to the date  
13 of that order.

14 There was never any allegation that there was  
15 any violation of probation or any terms thereof during  
16 the term of probation, which in this case, assuming the  
17 best for the government, is between February 27, and the  
18 date of the search, March 3rd.

19 QUESTION: Ms. Cooper, did the Court of  
20 Appeals rest its judgment on the ground that you've just  
21 stated?

22 MS. COOPER: The Court of Appeals rested in  
23 judgment in part on the ground --

24 QUESTION: On the ground -- I asked you a  
25 question I think you can answer by yes or no.

1 MS. COOPER: They did, Your Honor. But they  
2 couched this under the rubric of good faith. And you'll  
3 find that all of the discussion about good faith, when  
4 the Court has asked before about pretextual search,  
5 that's precisely what it's talking about.

6 This was not a search that was taken for the  
7 purposes of probation supervision or violation, because  
8 there was absolutely allegation of any violation that  
9 took place from the date of the reinstatement order.

10 And the Court of Appeals' decision is replete  
11 with this information. But they discussed it under the  
12 objects of good faith.

13 And I think this goes to both good faith, but  
14 it also goes to the grounds that this is not a proper  
15 probation search under California law. It provides this  
16 Court with an independent State ground to disregard  
17 every other issue in this case and to affirm the  
18 decision below.

19 And the case law is absolutely clear on this.  
20 People v. Bremmer. United States v. Johnson. The  
21 suspicion must be grounded on present activity.

22 QUESTION: (Inaudible) state law ground.

23 MS. COOPER: The Court of Appeals used this in  
24 their decision to show why these officers were not  
25 objectively in good faith.

1 QUESTION: They were talking about the Fourth  
2 Amendment.

3 MS. COOPER: They were talking about the  
4 Fourth Amendment. But it's clear from all the facts in  
5 this case that it wasn't a probation search, and it  
6 can't be justified.

7 And that would end the matter.

8 Further --

9 QUESTION: Well, what if the officers thought  
10 that the -- that the original probation order was the  
11 one that was valid?

12 MS. COOPER: The officer --

13 QUESTION: Then -- then the -- then the  
14 information that they had, which they'd acquired earlier  
15 about his having firearms, would in their mind have been  
16 a violation of probation.

17 MS. COOPER: The officer in this case was in  
18 fact Ms. Bazar, the prosecutor. Her sins must be  
19 visited on the other executing officers, as I'm sure  
20 we'll all agree.

21 She was present at the February 27th hearing.  
22 And she knew what the order of the court was  
23 reinstated. And as a matter of fact, when she got to  
24 the door and she had an exchange with the defendant, she  
25 corroborated this, not by saying, you've always been on



1 probation, Mr. Merchant. But what she said was, notice  
2 last week to your lawyer was notice to you.

3 She knew that he hadn't been on probation  
4 prior to February 27th. And it's clear from her  
5 conversation that there wasn't any question but that he  
6 was on probation.

7 QUESTION: I thought that it was not clear at  
8 all in the record whether she had conceded the position  
9 that the original order wasn't effective, and that the  
10 later one was just to make doubly sure, so to speak.

11 MS. COOPER: Well, what she really --

12 QUESTION: Is it clear from the record that  
13 she had conceded that there was nothing in effect until  
14 February 27?

15 MS. COOPER: Well, she heard the judge. She  
16 was in court on February 27th, and she heard the judge  
17 say, reinstate it.

18 Further, her -- she indicated she didn't know

19 --

20 QUESTION: What does "reinstated" mean?

21 MS. COOPER: "Reinstated" means to start from  
22 now.

23 QUESTION: Start from now? I think to the  
24 contrary. I would think it means, it's been around and  
25 I'm renewing it now.

1 MS. COOPER: Well, she knew that he had never  
2 been assigned a probation officer. The Solicitor  
3 General's argument that this is common in California is  
4 absolutely contrary to California law, because there is  
5 no case of formal probation where a person isn't  
6 assigned a formal probation.

7 The record in this case indicates that when  
8 the probation department received the document on the  
9 sentencing proceedings of November 14th, that they made  
10 a notation that all of the proceedings were suspended  
11 pending appeal.

12 Because he wasn't on probation. He had no  
13 probation officer. She knew that. And when she saw him  
14 on March 3rd, she didn't say, you've always been on  
15 probation. She said, didn't your lawyer tell you about  
16 the hearing last week when you were placed on probation.

17 And the reason she didn't do a search  
18 originally was because she knew he wasn't on probation.

19 QUESTION: Well, I think it's at least a hard  
20 question. Did the Court of Appeals make a -- hold on  
21 the point as to what she knew?

22 MS. COOPER: They did not. They just  
23 indicated that he didn't have notice of the proceeding  
24 on February 27th.

25 But she's absolutely responsible to know what

1 the state of the law in California is. She's a lawyer.  
2 And the state of the California law is clear --

3 QUESTION: But she can make a mistake, just  
4 the way police officers can mistakes.

5 MS. COOPER: She can also, though, be in bad  
6 faith and try to get a search when she has no probable  
7 cause or no exigency, which is precisely what we claim  
8 she did in this case.

9 Because when she went to the court on February  
10 27, she did not for a moment tell the court what her  
11 intention was; not that she should be subject to  
12 probation supervision, Justice Scalia, but that she  
13 wanted to do search.

14 And the record and the Joint Appendix in this  
15 case indicates that she knew she wanted to do a search  
16 before she went down there to reinstate. And she had an  
17 obligation, if she was unsure, to say to that judge on  
18 February, your honor, are you ruling that he was on  
19 probation, or are you putting him on probation now.

20 She purposely didn't do that. She couched  
21 that motion, clarification, reinstatement, both. She  
22 got an order reinstating. She didn't tell the judge  
23 what she was going to do. She didn't tell the lawyer  
24 what she was going to do.

25 But she told her buddies in the police

1 department before she got there, I'll go get this thing  
2 done in court because I'm not sure, and then we'll do a  
3 search.

4 QUESTION: Is it clear that she didn't advise  
5 -- I thought she had advised the court that she wanted  
6 to --

7 MS. COOPER: She did not, Your Honor.

8 The government in its reply brief and in part  
9 in its opening brief misstates the basis for the  
10 California law regarding individuals' rights with  
11 respect to probation.

12 And it's clear that it is a contract theory on  
13 which the State of California proceeds. In other words,  
14 it's a quid pro quo. We give up a little bit maybe in  
15 terms of doing time, and we accept certain conditions of  
16 probation.

17 It is not the situation where your parole  
18 search is slapped on you like it is in the case that he  
19 cites, the Bergerman case, and that you have absolutely  
20 no question about whether or not you have to comply.

21 You must consent. And I say that there is  
22 absolutely no consent in this record to the terms and  
23 conditions of probation.

24 QUESTION: Well, what about the -- the record  
25 that indicates that at the original sentencing, the



1 respondent was present and signed the form acknowledging  
2 that he understood and consented to the search and  
3 firearm conditions of probation?

4 MS. COOPER: No, he did not sign anything,  
5 Your Honor, that said that he consented. He said, I  
6 have received, I have read, I have understood. He never  
7 consented.

8 And the reason he didn't consent, and it  
9 should be noted, that he signed that form after the stay  
10 was granted, knowing of course that the stay would be  
11 granted.

12 Because bail on appeal is a matter of right on  
13 a misdemeanor in California.

14 After the stay is granted, he signs. Never a  
15 consent. And it's critical to note that one of the  
16 rights he has under the State of California law, and I  
17 cite In re Osslo, is that he can reject the terms of  
18 probation, and he need not do that at the time of the  
19 initial sentencing; he can do that after the appeal.

20 And that's a very, very, very substantial  
21 right that he knew that he possessed. And there is  
22 absolutely no specific knowing waiver in the record of  
23 this case that he ever consented to the terms of  
24 probation.

25 The fact that he received and he read and he --

1 QUESTION: Well, I guess the courts below  
2 didn't deal with that state law question.

3 MS. COOPER: That is true, Justice.

4 QUESTION: And so conceivably that could be  
5 open on any remand.

6 MS. COOPER: That's true.

7 QUESTION: But I don't think that that would  
8 necessarily govern our decision on whether notice to  
9 defendant's counsel of the February 27th hearing was  
10 sufficient for purposes of due process.

11 MS. COOPER: Well, it's our position, that  
12 hearing that was conducted on February 27th, first of  
13 all the order that the judge gave confirmed that he was  
14 not on probation prior to February 27th, because it  
15 reinstated.

16 Second, the order was defective for five  
17 reasons. First of all, it violated the state law of  
18 this case in People v. Merchant, that he had a right to  
19 have notice. It basically was the time set for an  
20 initial imposition of sentencing, and there's no way an  
21 attorney, without a waiver on file, can proceed in that  
22 fashion, when he has a right to defend and be present,  
23 and where there are very, very substantial rights to be  
24 taken away in such a proceeding.

25 QUESTION: Is that a -- is your statement

1 there based on what you conceive federal constitutional  
2 law to be?

3 MS. COOPER: It is, Your Honor. It's based on  
4 both federal constitutional law and it's based on state  
5 law. And it's based on the line of federal cases which  
6 say that whenever rights to defend and to be present are  
7 implicated, that you have a right to be there.

8 QUESTION: Insofar as it's based on state law,  
9 our Court, I think, is very unlikely to decide this case  
10 here in this Court on any state law basis that was not a  
11 basis for the Court of Appeals decision.

12 MS. COOPER: Well, it was a very important  
13 part of the Court of Appeals' decision. Because what  
14 happened is, the Superior Court, the appellate  
15 department of the Superior Court in the county in which  
16 this probation violation took place, issued its  
17 appellate decision in the case of People v. Merchant,  
18 Superior Court, which said that he had no notice of  
19 these proceedings and it violated California law.

20 And that is a major part of the decision in  
21 the Ninth Circuit.

22 Further, it's our position that it violated  
23 state law -- his state law right to be present at the  
24 proceedings. And he has an absolute right to be present  
25 under the state law of California.

1           There was no waiver on file, nor at that  
2 proceeding did the judge ever stop, or did counsel ever  
3 say --

4           QUESTION: No, he had a right to be present.  
5 No one deprived him of his right to be present. His  
6 lawyer was advised.

7           If it was anyone's fault, it was his lawyer's  
8 fault.

9           MS. COOPER: Well, it was --

10          QUESTION: There are a lot of rights that you  
11 have at a trial which are not exercised. And so long as  
12 your lawyer is advised that the proceeding is to be  
13 held, if he doesn't tell you, is that the state's fault?

14          MS. COOPER: It's our position that the trial  
15 judge and the court has to proceed in a fair manner, and  
16 has to be assured that the defendant's rights are  
17 protected.

18          In this case, there was never any inquiry at  
19 all about whether or not Mr. Merchant had consented;  
20 whether or not the lawyer had permission for him to be  
21 there.

22          QUESTION: (Inaudible) innumerable things that  
23 go on in a trial, civil or criminal, where the court  
24 relies on the attorney to advise the client.

25          Does the court have to call up the client



1     everytime and say, has your lawyer told you thus and  
2     such?

3             MS. COOPER: The answer is, when  
4     constitutional rights are being implicated, as they were  
5     here, the right to give up his right to be free from  
6     unreasonable searches and seizures, his right to bear  
7     arms, which was quite critical to him, being a gun  
8     collector, those are not the kinds of things that under  
9     state or federal law, that the state -- that the judge  
10    can do without at least an inquiry as to whether or not  
11    this is in his interest.

12            QUESTION: That's your test, when  
13    constitutional rights are implicated? How are you going  
14    to draw that line? When are constitutional rights not  
15    implicated in a criminal trial? What stages of the  
16    criminal trial won't the court have to check to see that  
17    the client was advised of everything by the lawyer?

18            MS. COOPER: Well, I think one of the cases  
19    cited by -- cited in the briefs is United States v.  
20    Gagnon. There was an inquiry into, for example, the  
21    jury room for a second, where nobody was being examined,  
22    there was some inquiry about the conduct of a juror.  
23    The defendant wasn't present. The court rules no  
24    problem.

25            But here, this is very, very critical.

1 Because the defendant in this case basically could  
2 dictate the outcome of those proceedings by rejecting  
3 probation, or seeking a modification.

4 And he had a right to ensure that that would  
5 not occur until his stay had evaporated, until his  
6 appeal was over.

7 He had a contract with the court. If he has  
8 -- if the court rules that there was a consent, he had a  
9 contract. And the contract is, was a condition  
10 precedent. I don't have to give up these rights until  
11 my appeal is over.

12 QUESTION: I understand all that. But what I  
13 find it hard to discover is why it's the state's fault.  
14 No maybe it's his lawyer's fault for not telling him.

15 Surely he didn't have to be there. The court  
16 could go ahead. If the lawyer had told him and he had  
17 said, I don't want to go to that hearing; you go for  
18 me. That would have been legal, right? There's nothing  
19 in the Constitution that says the trial can't proceed  
20 without him present at that moment?

21 MS. COOPER: I think as long as it's voluntary  
22 on the defendant's part.

23 QUESTION: Right, okay. So the judge doesn't  
24 know that the defendant must be there. Maybe he just  
25 didn't want to come.

1                   So why isn't it the lawyer's fault? And maybe  
2 he has a cause of action against his lawyer for -- for  
3 malrepresentation? Maybe he has some remedy for  
4 inadequate assistance of counsel. But why is it the  
5 state's fault?

6                   MS. COOPER: Because the court has the  
7 obligation to ensure that the proceedings are fair. And  
8 without that inquiry by anybody, by the prosecutor or by  
9 the court, Mr. Merchant's constitutional rights were  
10 terribly implicated when he had a right at that hearing  
11 to dictate the outcome by refusing that probation.

12                  QUESTION: (Inaudible) probation and insist on  
13 going to jail. Is that what you're saying?

14                  MS. COOPER: He could. And as a matter of  
15 fact, in this case, they couldn't have imposed the jail  
16 sentence, because he has an automatic right to bail,  
17 pending appeal, on a misdemeanor. And the appeal was  
18 pending at the time.

19                  It's clear in this case that the government  
20 was guided by bad faith all along. And I think if the  
21 Court looks at the transcript of the hearing and  
22 determines what Ms. Bazar, who is in fact law  
23 enforcement in this case, what her purpose was. Her  
24 purpose was always to do a search. Never, ever, to be  
25 sure that he was complying with the actual terms of

1 probation.

2 She got a court order to do a search without a  
3 warrant, without probable cause, and without any  
4 emergency. It was not assist in compliance with any of  
5 the terms of probation.

6 Now, she was in court, and she knew the  
7 sentence had been stayed on November 14th. She said she  
8 was unclear what that meant.

9 She also knew on February 11th that he had  
10 never been assigned to a probation officer. And it's  
11 totally disingenuous for the Solicitor General -- for  
12 the court to say that that is typical; because it's not  
13 typical.

14 And she knew it. And she knew he wasn't on  
15 probation. And she even testified that one of the  
16 officers said, does he have a probation officer.

17 This is a search of a private residence based  
18 on a pretextual probation search without a probation  
19 officer.

20 This is not a circumstance where somebody  
21 wants to do a probation search out in the field, a  
22 moving vehicle, and they've got to act on the moment.  
23 This is a considered decision to do a search. And she  
24 had it in her mind prior to the reinstatement  
25 proceedings.



1 QUESTION: Counsel, could -- suppose the  
2 judgment and the sentence had not been stayed at all.  
3 There had just been an appeal, but she was on probation.

4 MS. COOPER: I'm sorry, suppose there had been  
5 no stay?

6 QUESTION: Yes. And this prosecutor took the  
7 police out, and knowing that there was a probation --  
8 that probation was in existence, just carried out this  
9 same search, but there hadn't been any probation officer  
10 assigned, and her whole purpose was to search for  
11 criminal --

12 MS. COOPER: The case was pending on appeal,  
13 but there hadn't been a stay?

14 QUESTION: Yes.

15 MS. COOPER: And the judge had denied a stay,  
16 and said you're on probation?

17 QUESTION: Yes.

18 MS. COOPER: And there'd been no probation  
19 officer. Then I think it's a case where you'd have to  
20 look into the objectively reasonable acts that occurred  
21 on that --

22 QUESTION: That's what I'm asking you. What  
23 about the case then?

24 MS. COOPER: Well, if she -- if in fact there  
25 was --

1 QUESTION: She knows -- she knows that the  
2 defendant is on probation.

3 MS. COOPER: The answer to the question is,  
4 what complaints did she have? What reasonable cause did  
5 she have to search between the time of the imposition of  
6 probation and the time of that search?

7 If she has reasonable cause, that's a factor.  
8 And the fact that he doesn't have a probation officer is  
9 a major factor --

10 QUESTION: No, but that reasonable cause  
11 requirement is a state law, isn't it?

12 MS. COOPER: Absolutely.

13 QUESTION: Do you think that's Fourth  
14 Amendment law? You don't know that yet, do you?

15 MS. COOPER: I don't know that, yet. But I  
16 know that the -- that the federal courts protect their  
17 probationers, because under federal law, without a  
18 probation officer, this search would be totally illegal.

19 QUESTION: You don't think it could possibly  
20 be objectively reasonable on the facts I posited?

21 MS. COOPER: If she had reasonable cause to  
22 believe that there was a violation, postdating the date  
23 of the imposition of probation, I say fine. Why didn't  
24 he have a probation officer?

25 That's just one inquiry to be made. But it's

1 possible that the reason --

2 QUESTION: You mean then -- then you could  
3 always consider it to be a probation search?

4 MS. COOPER: There are certain standards to  
5 make a probation search legitimate. One is that it has  
6 to be reasonably related to probation supervision. And  
7 there has to be a reasonable suspicion of a probation  
8 violation.

9 If there was a reasonable suspicion of a  
10 violation, post-sentencing, and prior to the time that  
11 he was able to connect up with his probation officer, I  
12 think it could be reasonable.

13 QUESTION: But suppose the Fourth Amendment --  
14 suppose the Fourth Amendment just permits probation  
15 officers to make random searches?

16 MS. COOPER: Then I think it's reasonable, if  
17 the Fourth Amendment says you can do that. That isn't  
18 what happened in this case.

19 QUESTION: But again, assuming that the  
20 probation was in effect, and if one of the conditions of  
21 probation were that he obey the law, and the probation  
22 search -- or the search was based on reasonable grounds  
23 to think that he was manufacturing illegal drugs, would  
24 you say that that was not connected with a condition of  
25 his probation?

1 MS. COOPER: Oh, that would certainly be  
2 connected with a condition of his probation.

3 QUESTION: In view of that condition, I  
4 suppose?

5 MS. COOPER: Sure, he has to obey all laws, of  
6 course.

7 QUESTION: The consent to search is just a  
8 consent to search without a warrant, it's not a consent  
9 to search without reasonable suspicion?

10 MS. COOPER: It's couched in different ways in  
11 different clauses. And the courts have been --

12 QUESTION: Well, what was this consent -- what  
13 was the consent to search in this case?

14 MS. COOPER: The consent to search in this  
15 case was, with or without reasonable cause by a police  
16 officer or probation officer -- excuse me, with or  
17 without probable cause, but there must be reasonable  
18 cause.

19 QUESTION: Under California law.

20 MS. COOPER: Absolutely.

21 QUESTION: Even if there's consent, that's  
22 only -- that consent does not waive reasonable cause?

23 MS. COOPER: That's correct. For all of the  
24 reasons in the cases cited in our brief.

25 QUESTION: Or reasonable suspicion, or



1 whatever you call it.

2 MS. COOPER: There must be a reasonable  
3 suspicion of a probation violation. It must be  
4 reasonably related to probation supervision. And the  
5 scope must be appropriate.

6 On February 27th in this -- again, going to  
7 the good faith issue -- when Ms. Bazar was in court, she  
8 knew the defendant wasn't present. She knew that there  
9 was absolutely no waiver on file.

10 She knew that the judge had issued an order  
11 reinstating him. She never told the judge what she  
12 intended to do, not to make sure he was abiding by  
13 probation, but to do a search.

14 She basically, in our view, committed a fraud  
15 upon the court because what she really wanted was a  
16 warrantless search of his house, and she didn't tell the  
17 judge.

18 All of the complaints, by the time that March  
19 3rd rolls around, all of the complaints are post -- are  
20 pre-February 27. There are no current complaints. As a  
21 matter of fact, the complaints were in January and very  
22 early February. They're at least a month old.

23 She knows when she gets to the door that the  
24 defendant does not think that he is on probation.

25 And what happens at the door in -- at the door

1 of the search in this case is quite extraordinary. This  
2 is not a case where there's knock knock knock, bang  
3 right in and do your search. There is a 20-minute --  
4 not two or three minutes -- 20-minute colloquy between  
5 this prosecutor and various other individuals.

6 One of the people is Mr. Merchant. This is  
7 supposed to be a consent search. Mr. Merchant says, I  
8 didn't consent, and I'm not on probation.

9 She didn't say, forget that, we're doing this  
10 search. She said, didn't your lawyer tell you? He  
11 says, no, and then he calls his lawyer, and that lawyer  
12 confirms to that prosecutor right then and there, prior  
13 to the search, that he is not on probation.

14 This Court just last week ruled in Maryland v.  
15 Garrison that the objectively reasonable facts are  
16 critical. And this court commented that in that case  
17 the two individuals that were seen in the hallway,  
18 neither of them said anything, neither of them warned  
19 these officers that there were really two apartments  
20 there, not one apartment.

21 Mr. Merchant said, no, I don't have notice.  
22 Mr. Foster, the lawyer, I don't have notice. She knew  
23 it. She didn't say, oh, you've had notice all along.  
24 She said, too bad. In my legal judgment, notice to your  
25 lawyer is notice to you.

1 But that isn't the end of this case. Because  
2 then what happened is the lawyer, Mr. Foster, in a state  
3 of frenzy, called the judge. And the judge had a  
4 conversation with this prosecutor, prior to the  
5 instigation of this search, which puts new meaning of  
6 the word, bad faith.

7 And what this judge said, prior to the  
8 instigation of this search was, quote, and he said it  
9 many times, according to the prosecutor: Don't take this  
10 conversation to mean that I have any opinion as to  
11 whether you should or should not be doing this search.

12 I liken this to the case of United States v.  
13 Leon, and I say, can you imagine the judge in Leon  
14 signing a document that's supposed to make out probable  
15 cause. And he gives him a piece of paper, and he says,  
16 don't take this piece of paper to mean that I have any  
17 opinion as to whether or not you should or should not be  
18 doing this search.

19 The judge's imprimatur was totally lacking on  
20 this search. It lacked good faith.

21 QUESTION: And this is all in the record, I  
22 take it?

23 MS. COOPER: It is indeed. If there are no  
24 other questions?

25 CHIEF JUSTICE REHNQUIST: Thank you, Ms.

1 Cooper.

2 Mr. Larkin, you have one minute remaining.

3 REBUTTAL ARGUMENT OF PAUL J. LARKIN, ESQ.,

4 ON BEHALF OF THE PETITIONER

5 MR. LARKIN: Thank you, Your Honor.

6 The first thing I'd like to say is, there  
7 plainly was reasonable cause to believe that a probation  
8 search was related to probation.

9 There'd been gunfire reported on the  
10 respondent's neighborhood. In the Britton case we cited  
11 in our brief is virtually on all fours with this type of  
12 case.

13 QUESTION: Yes, but that was before he was on  
14 probation. The gunfire was back in January, wasn't it?

15 MR. LARKIN: The gunfire was at a time when  
16 the prosecutor could have reasonably believed that he  
17 was on probation.

18 QUESTION: Anyway, it was in January. It  
19 wasn't after February 27th?

20 MR. LARKIN: That's right. But that's just a  
21 recasting of their stale evidence argument.

22 QUESTION: Well, but means that it's essential  
23 for you to establish not merely that the prosecutor when  
24 she went in thought that the February 27th order was  
25 valid without notice, but also that she thought when she



1 went in that that order did not do anything new; that  
2 the probation was in effect way back from, when was it,  
3 January.

4 MR. LARKIN: Well, she had -- which -- as part  
5 of that, she had a reasonable belief that he still had  
6 firearms. To that extent, I think under either  
7 interpretation she would have a reasonable belief.

8 Thank you very much.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
10 Larkin.

11 The case is submitted.

12 (Whereupon, at 10:56 a.m., the case in the  
13 above-entitled matter was submitted.)  
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# CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:  
85-1672 - UNITED STATES, Petitioner V. WILLIAM D. MERCHANT

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BY Paul A. Richardson

(REPORTER)

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