

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-608

TITLE ILLINOIS, Petitioner V. ALBERT KRULL, GEORGE LUCAS AND  
SALVATORE MUCERINO

PLACE Washington, D. C.

DATE November 5, 1986

PAGES 1 thru 45



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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x

3 ILLINOIS, :

4 Petitioner, :

5 V. : No. 85-608

6 ALBERT KRULL, GEORGE LUCAS AND :

7 SALVATORE MUCERINO :

8 -----x

9 Washington, D.C.

10 Wednesday, November 5, 1986

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 9:59 o'clock a.m.

14 APPEARANCES:

15 MICHAEL J. ANGARDLA, ESQ., First Assistant State's

16 Attorney, Cook County, Illinois, Chicago, Illinois;  
17 on behalf of the petitioner.

18 PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on  
20 behalf of the United States as amicus curiae supporting  
21 petitioner.

22 MIRIAM F. MIQUELON, ESQ., Chicago, Illinois; on behalf of  
23 the respondent.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

MICHAEL J. ANGOROLA, ESQ.,

on behalf of the petitioner

3

PAUL J. LARKIN, JR., ESQ.,

on behalf of the United States

as amicus curiae supporting

petitioner

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MIRIAM F. MIQUELON, ESQ.,

on behalf of respondents

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MICHAEL J. ANGOROLA, ESQ.,

on behalf of the petitioner - rebuttal

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PROCEEDINGS

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in No. 85-608, Illinois versus Krull.

Mr. Angarola, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL J. ANGAROLA, ESQ.,  
ON BEHALF OF THE PETITIONER

MR. ANGAROLA: Mr. Chief Justice, and may it please the Court, the issue in this case is whether the good faith exception to the exclusionary rule should be applied to a warrantless search conducted pursuant to a presumptively valid statute later declared unconstitutional.

Petitioners' position is that the Illinois Supreme Court erred when it required suppression of evidence seized in the search of a junkyard, thus rejecting the state's position that the exclusionary rule should not be applied where the search was made in good faith reliance of a presumptively valid statute.

The Illinois statute is a comprehensive scheme regulating used auto parts and auto metal dealers. That statute required that books and records be kept on the premises and that the premises of the yard, the junkyard, be available for inspection in order to determine the

1 accuracy of the books and records of those kinds of  
2 businesses.

3 The Illinois statute has been in existence in  
4 one form or another since 1933. The Illinois Supreme  
5 Court has not previously ruled on the statute but it has  
6 ruled on recordkeeping aspects of the statute. The  
7 facts in this case are as follows.

8 On July 5th, 1981, a Chicago police officer  
9 went to the Action Iron and Metal Junkyard and there  
10 observed a towtruck bringing cars onto the premises and  
11 leaving without cars. He entered the premises and  
12 identified himself to respondent Lucas. He asked Lucas  
13 if the yard was open for business. The Chicago police  
14 officer asked to see the books and records, and he asked  
15 to see the license of the premises.

16 Lucas said he could not locate them. Lucas  
17 showed McNally, however, a yellow pad of paper that  
18 contained a list of approximately five vehicles. The  
19 Chicago police officer asked if he could go onto the  
20 yard. Lucas said go right ahead. The Chicago police  
21 officer then recorded while on the yard vehicle  
22 identification numbers of cars on the yard.

23 He checked with the computer in the squad car  
24 and determined that three of the vehicles that he  
25 observed in the yard were listed as stolen. Those three

1 vehicles were taken from the lot. A fourth vehicle  
2 which did not have any vehicle identification number on  
3 it was also taken from the lot.

4 Thus the police officer's conduct was  
5 objectively reasonable in regard to his time of entry,  
6 the manner of entry, the fact that he identified  
7 himself, the fact that he asked if the business was open  
8 for business, the fact that he asked to see the records,  
9 and the fact that he asked to go out onto the premises  
10 of the yard.

11 On July 6th, the day after the search in this  
12 matter, 1981, in a case unrelated to the instant search,  
13 the United States District Court held the Illinois  
14 statute unconstitutional because it did not sufficiently  
15 limit the discretion of police officers who had the  
16 authority to enforce the statute.

17 On September 25th, 1981, respondents filed a  
18 motion to suppress which was sustained. The Illinois  
19 Supreme Court affirmed the trial court's holding. In  
20 affirming the trial court the Illinois Supreme Court  
21 erroneously applied the Court's case of Michigan versus  
22 DeFillippo cited at 443 US, a 1979 case.

23 DeFillippo is distinguishable from the instant  
24 case because the DeFillippo case involved the question  
25 of whether a Detroit ordinance later found

1 unconstitutional, could form the basis of probable cause  
2 to arrest. Secondly --

3 QUESTION: May I just ask a question about the  
4 Illinois Supreme Court's action in this case? Is it not  
5 correct that by the time the case reached the Illinois  
6 Supreme Court Judge Schader's order in the Federal Court  
7 had already been vacated and set aside, and so the  
8 Supreme Court of Illinois had to make its own  
9 determination of the the constitutionality of the  
10 statute. It didn't just rely on the Federal decision,  
11 but it was in this very case that the statute was held  
12 unconstitutional.

13 MR. ANGAROLA: The Illinois Supreme Court did  
14 not rule on the constitutionality of the statute.

15 QUESTION: It didn't?

16 MR. ANGAROLA: No.

17 QUESTION: In its opinion in this case?

18 MR. ANGAROLA: That's correct.

19 QUESTION: What was it doing at Pages 10 to 17  
20 of its opinion?

21 MR. ANGAROLA: My apologies, Your Honor. Of  
22 course it did rule on the constitutionality of the  
23 statute. It found the statute unconstitutional. My  
24 apology. Our position is that that is insignificant. I  
25 should not say insignificant. But it is not controlling

1 as to our position here in Court.

2 QUESTION: But it is controlling that the  
3 decision that caused this statute to be held  
4 unconstitutional was made by the Illinois Supreme Court  
5 in this very case.

6 MR. ANGAROLA: Yes, sir.

7 QUESTION: So the question, what you are  
8 really asking us to do is to say not to apply the  
9 exclusionary rule in the case in which the  
10 constitutionality of the statute itself is challenged  
11 and found invalid.

12 MR. ANGAROLA: Yes, sir. The search that  
13 occurred in the DeFillippo case was a search incident to  
14 an arrest, and the search presently before the Court  
15 involves a warrantless entry onto the premises of a  
16 closely regulated business.

17 The exclusionary rule is meant to further a  
18 logical public policy. That public policy is to deter  
19 police misconduct by applying the exclusionary rule.  
20 You can't deter police misconduct by applying the  
21 exclusionary rule to possible mistakes by the  
22 legislature.

23 United States versus Leon allowed a good faith  
24 exception to the exclusionary rule where a search which  
25 was later found defective was executed and evidence was

1 seized where the officers acted in good faith reliance  
2 on the search warrant and that court determined that the  
3 standard of reasonableness was an objective standard.

4 The statute of the sort here where the  
5 warrantless entry onto the premises of a closely  
6 regulated business is allowed, the statute stands in the  
7 place of a warrant, but the Leon court said that where  
8 some limitations on the officer's good faith reliance --  
9 excuse me, that there were some limitations on the  
10 officer's good faith reliance on a search warrant, and  
11 Leon listed three examples of those limitations, that  
12 when affidavits for a search warrant contain reckless  
13 falsities or when a magistrate abandons his neutral  
14 role, or when the affidavits do not provide a  
15 substantial basis for the existence of probable cause.

16 Thus this Court recognized some limitations to  
17 those search warrants. Those three factors articulated  
18 in Leon state a reasonableness standard, and such a  
19 standard could be applied to situations where a statute  
20 stands in the place of a warrant.

21 QUESTION: Mr. Angarola, what do you make of  
22 Footnote 8 in Leon dealing with this particular  
23 problem?

24 MR. ANGAROLA: Footnote 8, dealing with the  
25 DeFillippo or the cases of Ubara, Torres? Your Honor,

1 those cases deal with statutes that provided that there  
2 either was no need for probable cause or there was no  
3 need for aspects of a search warrant.

4 Here our situation is distinguishable because  
5 we are dealing with a closely regulated type business or  
6 a pervasively regulated type business, a category of  
7 businesses that this Court has recognized as to allowing  
8 statutes to stand in the place of search warrants. So I  
9 think that the situations here are different than the  
10 Torres case, which was, of course, a statute that  
11 required people traveling from the United States into  
12 Puerto Rico to have their luggage searched. There was  
13 no requirement of probable cause in that case, and there  
14 was no establishment or need for a warrant. The  
15 legislature there was attempting to enact a provision  
16 which would eliminate the need for a search warrant. It  
17 is not in this pervasively regulated businesses.  
18 Therefore it was something improper.

19 In Ubarra, the State of Illinois had a statute  
20 which provided for the search of all persons present at  
21 a location where a search warrant was executed. There  
22 again, this Court found that because the Illinois  
23 legislature in this case was attempting to enact the  
24 provision that eliminated probable cause, that those  
25 were improper statutes, and those statutes were

1 unconstitutional.

2 QUESTION: Does your review require us to take  
3 a different view of the constitutionality of the statute  
4 than the Illinois Supreme Court did?

5 MR. ANGAROLA: No, Your Honor, it does not.  
6 The point is that the officers acting in good faith and  
7 having good faith reliance on a statute is the  
8 significant controlling fact, and the fact whether the  
9 statute is constitutional or not is not important to our  
10 position here. In other words, it of course should be  
11 considered.

12 QUESTION: But apparently it is important in  
13 distinguishing Footnote 8 in Leon. That is my  
14 confusion, I guess.

15 MR. ANGAROLA: Well, as I said, Your Honor,  
16 Leon deals with a situation where there was an attempt  
17 to eliminate the need of a search warrant in all the  
18 cases cited there. Here, in this instance, because we  
19 are discussing these pervasively regulated businesses,  
20 closely regulated businesses, an area where this Court  
21 has allowed statutes to stand in the place of warrants,  
22 I think that those cases are distinguishable.

23 I think the substantive effect of what this  
24 Court did in Ubara and Torres would remain the same. If  
25 this Court were to consider a good faith exception where

1 police officers act in reliance upon a statute, a  
2 presumptively valid statute, the result might change,  
3 but the substantive holding of those cases would remain  
4 the same.

5 QUESTION: Mr. Angarola, who has the burden of  
6 proof of good faith on the part of the officer in  
7 relying on the statute? The state?

8 MR. ANGAROLA: The state would have the burden  
9 of proving that the officers were acting in good faith,  
10 that what would ordinarily happen, Your Honor, is that  
11 on a motion to suppress there would be allegations  
12 requiring or alleging certain facts, and the state would  
13 have the burden of proving that the police officer acted  
14 in good faith.

15 QUESTION: Are there any findings on that  
16 issue on this record?

17 MR. ANGAROLA: No, Your Honor, there are not.

18 QUESTION: Then you didn't discharge your  
19 burden of proof. Isn't that the end of the case?

20 MR. ANGAROLA: Well, Your Honor, the trial  
21 judge in this matter did not make a determination  
22 regarding good faith because he felt it did not apply.  
23 The trial court was given instructions from the Illinois  
24 appellate court to consider the possible application of  
25 the good faith exception to the exclusionary rule. When

1 the trial court examined those facts, he determined that  
2 on the basis of Gates there was not a reason to examine  
3 the good faith exception, that it did not apply, so he  
4 did not make a determination regarding good faith.

5 QUESTION: How would you go about  
6 demonstrating good faith? Wouldn't you assert that you  
7 would carry your burden simply by showing that the  
8 officer was acting pursuant to a statute that was on the  
9 books and that had not been stricken down, that had been  
10 on the books in Illinois since when, 1933?

11 MR. ANGAROLA: This statute or its  
12 predecessor, since 1933. Yes, Your Honor.

13 QUESTION: So what more would you want to show  
14 good faith, that nobody had told him it was  
15 unconstitutional?

16 MR. ANGAROLA: No, Your Honor, but I think  
17 that the objective factors regarding the entry, the  
18 identification, all the circumstances involving the  
19 warrantless entry here are factors which would go to  
20 show the good faith of the police officer.

21 QUESTION: Well, as I understand it, your  
22 opponent takes the position that the search went beyond  
23 that authorized by the statute, and you would at least,  
24 it seems to me, have to have findings that the search  
25 was that which would have been authorized pursuant to

1 this statute, and there is no such finding.

2 MR. ANGAROLA: That's correct, Your Honor. I  
3 think the record is confused in that area. I think when  
4 you look at Judge Hogan's ruling it is that he  
5 determined that because respondent Lucas did not show  
6 books and records at the time that the police officer  
7 asked for it, that he could not go on to that second  
8 stage, but I think that is incorrect, because I think  
9 that when respondent Lucas shows the police officer a  
10 yellow pad of paper containing a list of vehicles, that  
11 those are the kind of information that the Illinois  
12 statute was speaking to, and he could in fact go onto  
13 the premises, but there is no specific rule. I think  
14 the ruling is confused in that area.

15 QUESTION: Did the Illinois Supreme Court  
16 speak to that point?

17 MR. ANGAROLA: No, it did not.

18 QUESTION: It rested entirely on the fact that  
19 the statute was unconstitutional and therefore the  
20 search, even if it was within the scope, was no good.

21 MR. ANGAROLA: That's right. The Illinois  
22 Supreme Court did not address itself to the scope of the  
23 officer's activities, but we believe that implicit in  
24 what the Supreme Court did because it went on to  
25 consider the constitutionality is a determination that

1 the police officer was acting in the scope.

2 In other words, the Illinois Supreme Court  
3 could have made a determination that the police officer  
4 was not acting within the scope of his authority, but  
5 there is, Your Honor, there is no specific holding such  
6 as that in the Illinois Supreme Court.

7 QUESTION: And the Court below had found that  
8 he wasn't within his scope, wrongfully, you say, but  
9 that's what it had found.

10 MR. ANGAROLA: Yes, Your Honor.

11 QUESTION: How can we find that it was, that  
12 it was within the scope then?

13 MR. ANGAROLA: Well, Your Honor, because I  
14 believe that the facts and circumstances here indicate  
15 that the police officer did in fact act within the scope  
16 of the authority. I think the Judge's Interpretation  
17 that he had an obligation to actually see books and  
18 records, in the transcript the Judge seems to think that  
19 there is a need for the respondent Lucas to show the  
20 police officer books and records before the police  
21 officer could go onto the premises, and I think  
22 that's --

23 QUESTION: Well, it seems silly to me --

24 MR. ANGAROLA: Yes.

25 QUESTION: -- and it may seem silly to you,

1 but surely that is a matter of Illinois law, isn't it?  
2 I mean, Illinois is entitled to have a silly law if it  
3 wants.

4 MR. ANGAROLA: Illinois is entitled to have a  
5 silly law, but Your Honor, I would suggest that that  
6 interpretation would give the statute no meaning  
7 whatsoever. That would mean that a respondent or  
8 someone in the auto parts business could prevent the  
9 second stage, the inspection of the premises for  
10 determining the accuracy of the books and records by  
11 merely not having the books and records on the premises,  
12 and that would mean that the statute would have no  
13 meaning.

14 QUESTION: It would be very silly.

15 QUESTION: That is not right at all. All they  
16 would have to do, I suppose, is go get a warrant once  
17 they found they didn't have the records the statute  
18 required, and they also are in violation of the statute  
19 by not having the records. That is not so silly, is  
20 it?

21 MR. ANGAROLA: Well, Your Honor, in terms of  
22 the purpose of the statute, which is to have  
23 recordkeeping, and I think that if the statute could be  
24 avoided by simply not having books and records there,  
25 that that is avoiding --

QUESTION: Well, isn't there some sanction for

1 not having the books and records?

2 MR. ANGAROLA: Pardon me?

3 QUESTION: Doesn't the statute contain a  
4 sanction for not having the required books and records?

5 MR. ANGAROLA: Yes, Your Honor, it does.

6 QUESTION: That is not a silly sanction, is  
7 it?

8 MR. ANGAROLA: No, no. No, Your Honor, it is  
9 not a silly sanction, but I believe that the purpose and  
10 intent of the statute could not be avoided by merely not  
11 having books and records, and I also believe, Your  
12 Honor, and I submit that that yellow pad of paper is the  
13 kind of information the statute speaks of, and when the  
14 officer looked at that yellow pad of paper he then had  
15 the authority to go onto the premises.

16 In fact, he didn't do much more than a private  
17 citizen would have a right to do under any  
18 circumstances. He went in and identified himself. He  
19 asked if he could go onto the premises. I am not  
20 suggesting that that was found to be consensual because  
21 it was not, but he asked to go on. It certainly wasn't  
22 forcible entry. And under those circumstances he went  
23 onto the yard. Okay? And I would like to reserve the  
24 remaining time for rebuttal.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Angarola.

2 We will hear now from you, Mr. Larkin.

3 ORAL ARGUMENT OF PAUL J. LARKIN, JR., ESQ.,

4 ON BEHALF OF THE UNITED STATES

5 AS AMICUS CURIAE SUPPORTING PETITIONER

6 MR. LARKIN: Thank you, Mr. Chief Justice, and  
7 may it please the Court, at the outset I would like to  
8 respond to some questions asked by Justices Scalia and  
9 Stevens. There were no findings made in this case  
10 whether or not Detective McNally's conduct was  
11 objectively reasonable. The reason was both the trial  
12 court and the Illinois Supreme Court believed they were  
13 not allowed to make those types of findings because both  
14 courts concluded that the good faith exception that this  
15 Court adopted in Leon should not be extended to this  
16 context.

17 So, since they decided the threshold question  
18 against the state there was no need or reason for them  
19 to go on and make these types of findings, but they  
20 wouldn't have to be findings as to the officer's  
21 subjective intent. The factors that go into the  
22 determination of whether something is reasonable does  
23 include factors such as the length of time the statute  
24 has been on the books, the number and types of  
25 challenges that have been brought against the statute,

1 the different types of decisions within a particular  
2 state, for example, or within a particular --

3 QUESTION: Mentioning the challenges, Mr.  
4 Larkin, if you prevail in this case would a defendant in  
5 a case like this ever have any motive to challenge the  
6 constitutionality of a statute?

7 MR. LARKIN: Yes, he would, Your Honor,  
8 because whether or not the good faith exception should  
9 be applied in an individual case --

10 QUESTION: Assuming the facts clearly show  
11 good faith on the part of the officer, then he would  
12 have no motive to challenge the statute, would he?

13 MR. LARKIN: If it was clear that it was  
14 objectively reasonable for the officer to be acting in  
15 this fashion, there would be less of a likelihood that  
16 he would bring a suppression motion. However --

17 QUESTION: There would really be no point in  
18 it, would there?

19 MR. LARKIN: No, because the benefits of  
20 bringing a suppression motion, as the Court recognized  
21 in Leon, are the termination of the case. So even if  
22 viewed outside the judicial system, it would be clear  
23 that a judge should rule in the government's favor. The  
24 defense counsel is not going to be certain of that and  
25 he will still bring his motion, but in addition, in

1 statutes like this you have the possibility of  
2 challenging the statute in ways that you don't have in a  
3 criminal case.

4 For example, a declaratory judgment proceeding  
5 can be brought, and that can be brought early on and  
6 before the searches are executed, so it is possible to  
7 have the substantive rules of Fourth Amendment law in a  
8 case where there is a statute rather than a warrant  
9 authorizing the conduct to be clearly defined perhaps  
10 even before any search occurs. So in that case if the  
11 decision is clearly settled that it is permissible or  
12 not, then you have an entirely different type of  
13 calculus that goes into play.

14 The two substantive -- the two central  
15 principles that this Court adopted in Leon we believe  
16 control this case. The first is that the purpose of the  
17 exclusionary rule is to deter police misconduct, and the  
18 second and related one is that the exclusionary rule  
19 will not serve that purpose where a police officer acts  
20 in an objectively reasonable fashion.

21 In those circumstances the officer acts as any  
22 other officer would, and imposing the remedy of  
23 exclusion penalizes the officer and the government  
24 without producing any corresponding benefit to the  
25 privacy interest protected by the Fourth Amendment.

1 Now, although the question in this case involves the  
2 application of those principles that were adopted in  
3 Leon to a slightly different factual situation, we  
4 believe those principles are fully controlling here.  
5 That, I believe, is clear when you look at the question  
6 from the perspective of the officer attempting to  
7 execute the search.

8 An officer in making the decision whether an  
9 arrest or a search is lawful is concerned about the  
10 substantive rules defining his conduct, what he is  
11 permitted to do and what he is not permitted to do. He  
12 is not as concerned about who authorizes him to take  
13 certain actions. In this respect the officer will be  
14 indifferent as to whether it is a magistrate that has  
15 authorized him to enter this business or whether it is  
16 the legislature that has. He will --

17 QUESTION: Mr. Larkin, when would, in your  
18 view, the officer's action not be taken in good faith?

19 MR. LARKIN: There are --

20 QUESTION: If there were an unconstitutional  
21 statute.

22 MR. LARKIN: There are circumstances where a  
23 statute is clearly unconstitutional and no reasonable  
24 person should believe that any court would rule  
25 otherwise. A specific example, I suppose, might be the

1 statute in the Torres case, but where a legislature has  
2 made a reasonable judgment, and the legislature is  
3 required to make an independent judgment as to the  
4 constitutionality of its statutes, if it is reasonable  
5 the purposes served by the exclusionary rule will not be  
6 served by suppressing the evidence in that case.

7 QUESTION: And if there is a single trial  
8 court decision in the jurisdiction holding it  
9 unconstitutional would that then bind all police  
10 officers or would we make an inquiry into whether the  
11 officer knew of the trial court decision? Or do we wait  
12 until it is appealed, or what? How do you apply that?

13 MR. LARKIN: There are several different  
14 responses that I can give to that question. First, in  
15 terms of whether the officer knows about it, I think the  
16 officer should be deemed to know of a decision from the  
17 day it comes down. It would be difficult otherwise to  
18 define any particular rule. I think it would be  
19 arbitrary to say that the officer is entitled to 30  
20 days' notice before his actions are unlawful or  
21 otherwise. But whether or not one particular decision  
22 should eliminate any argument that the state could make  
23 that the good faith exception should be applicable may  
24 vary from case to case.

25 There are circumstances where there may be a

1 variety of decisions that have addressed this subject.  
2 If several courts have invalidated the statute and  
3 several courts have upheld the statute it may be  
4 reasonable in that context. This is the same type of  
5 inquiry the Court will have to make in the Harlow  
6 qualified immunity area just under a different heading  
7 whether a particular constitutional right is clearly  
8 established.

9 So that type of factual inquiry can vary, but  
10 here, in this case the determination of  
11 unconstitutionality was made not until after the search  
12 was conducted, so this is an easy case for the  
13 application of the good faith --

14 QUESTION: I suppose that there could be  
15 developments in constitutional law that should put  
16 people on notice that a particular state statute is a  
17 very questionable piece of legislation.

18 MR. LARKIN: That's correct, Your Honor.

19 QUESTION: And if there had been, say, a  
20 decision of the Seventh Circuit Court of Appeals  
21 striking down a very similar statute in Wisconsin I  
22 would think maybe the police ought to take notice of  
23 that.

24 MR. LARKIN: Yes, Your Honor, that sort of  
25 circumstance should be factored into the second half of

1 the inquiry that would have to be followed in this case,  
2 that is, whether this police officer acted in an  
3 objectively reasonable manner, but the threshold  
4 question of whether Leon should at all be applied in  
5 this circumstance we believe should be resolved in favor  
6 of the state.

7 QUESTION: And so you think we should just  
8 disavow Footnote 8 in Leon, or do you think we have to --

9 MR. LARKIN: No, Your Honor. I think what the  
10 Court said in Leon was that in undertaking the good  
11 faith exception, in adopting the good faith exception to  
12 the exclusionary rule the courts were adding a second  
13 step into the process of deciding whether evidence  
14 should be suppressed.

15 Under the Court's decisions in the Torres  
16 case, for example, since the statute authorized search  
17 on less than probable cause and was found invalid the  
18 substantive Fourth Amendment rule in that case is that  
19 that type of search cannot go forward, but if the good  
20 faith exception is applied to statutes, as we submit it  
21 should, the next inquiry is whether or not the police  
22 officer acted reasonably in this particular case.

23 QUESTION: So your distinction is between a  
24 statute which, a Colonnada type statute which authorizes  
25 inspection and search of a heavily regulated business on

1 the one hand and a statute which simply says, from now  
2 on you can search without probable cause?

3 MR. LARKIN: Any statute that said the latter,  
4 Your Honor, should be held unconstitutional by any  
5 court. But I would not say that our argument is limited  
6 just to administrative search inspections. It would be  
7 easier, I believe, in an individual case to establish  
8 good faith where the statute was one that fit into the  
9 administrative search exception, but our argument would  
10 allow the prosecution to argue that reliance on any type  
11 of statute would be valid.

12 QUESTION: What is your construction of  
13 Footnote 8?

14 MR. LARKIN: As we construe Footnote 8 in  
15 Leon, the Court there said that its substantive Fourth  
16 Amendment rulings in its earlier cases were not affected  
17 by adoption of the good faith exception, but that the  
18 good faith exception would require the Courts if this  
19 good faith were applied to a statutory search to make  
20 the inquiry whether a particular search was reasonable.

21 QUESTION: Well, certainly none of the cited  
22 cases in Footnote 8 concerned good faith.

23 MR. LARKIN: It is because they all preceded  
24 this Court's decision in Leon and therefore even  
25

1 Including the DeFilippo case, the Court didn't have  
2 before it the question whether or not if a good faith  
3 exception should be adopted it should be applied outside  
4 the context of a search warrant in the context of a  
5 search authorized by a statute.

6 QUESTION: No, but at the time that footnote  
7 was written the subject of the good faith exception had  
8 been before the Court in various ways for two or three  
9 years at least by 1983. We hadn't actually decided  
10 until Leon, but it had been raised several times, but  
11 not squarely presented and therefore decided, so it  
12 wasn't as though it wasn't something we would think  
13 about.

14 MR. LARKIN: No, I wasn't suggesting the Court  
15 wasn't aware of this type of problem, but it is just  
16 that until the Court decided Leon the Court didn't have  
17 the opportunity to decide how this type of exception  
18 should be applied outside the context of a search  
19 warrant.

20 QUESTION: Going back for a minute to the  
21 Torres case, were you saying that is a case where it was  
22 so obvious that the statute was unconstitutional that  
23 the police officer should have known it?

24 MR. LARKIN: I think that would be a case --

25 QUESTION: Even though the Puerto Rico Supreme

1 Court had held it constitutional?

2 MR. LARKIN: As I remember the facts of that  
3 case, there probably wasn't a majority to hold it  
4 unconstitutional, even though there was some indication  
5 that it probably would have been held unconstitutional  
6 because there was a majority of the judges sitting on  
7 the case.

8 QUESTION: I see.

9 MR. LARKIN: So I think it is a case where the  
10 good faith exception would not have applied, but I think  
11 this is a case where the good faith exception should  
12 reasonably be applied.

13 QUESTION: You are giving us a lot more  
14 litigation in all of this, aren't you? I mean, we are  
15 going to have to decide in every case not only whether  
16 the statute is unconstitutional now but how badly  
17 unconstitutional is it. Is it so badly unconstitutional  
18 that everybody should know it? I mean, the first call  
19 is hard enough. We are going to have to make a double  
20 one all the time.

21 MR. LARKIN: Well, I am not sure what number  
22 of cases -- how great that number of cases might be.  
23 The same sort of problem, for example, is going to arise  
24 in the question of qualified immunity, and so if a  
25 police officer conducts a search under a statute and is

1 thereafter sued for damages, the same sort of problem  
2 would arise.

3 QUESTION: I understand. I am not  
4 particularly happy about that. You are just saying  
5 let's double it.

6 MR. LARKIN: It is not necessarily double it.  
7 It is a different type of inquiry, but I don't know if  
8 it is necessarily going to increase the burdens on the  
9 courts, but even if it does, I think there are  
10 reasonable benefits to the prosecution from allowing  
11 this type of inquiry.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
13 Larkin.

14 We will hear now from you, Ms. Miquelon.

15 ORAL ARGUMENT OF MIRIAM F. MIQUELON, ESQ.,  
16 ON BEHALF OF THE RESPONDENTS

17 MS. MIQUELON: Mr. Chief Justice, and may it  
18 please the Court, police officers entered the premises  
19 of Action Iron and Metal for the ostensible purpose of  
20 executing a search pursuant to a procedural statute  
21 which by its own terms directly authorized a search  
22 under circumstances which did not satisfy the  
23 traditional warrant and probable cause requirements of  
24 the Fourth Amendment.

25 The officer had no search warrant and had no

1 probable cause. It was at the point of this initial  
2 unlawful intrusion that the police officer exceeded the  
3 scope of the procedural statute and engaged in the sort  
4 of widespread administrative abuses commented upon by  
5 the Federal District Court in declaring the statute  
6 unconstitutional.

7 The statute required this officer to engage in  
8 a two-step process, first, to request the records from  
9 the licensee, and then to engage in a verification  
10 limited specifically to the verification of the  
11 records. The trial court in this case explicitly held  
12 that the officer would have been within his statutory  
13 authority had he followed the two-step process.

14 However, the trial court stated, "Now, he  
15 didn't do that." Instead, the officer said to  
16 respondent Lucas, can I go in and just look around? The  
17 statute did not authorize the officer to do this, and he  
18 did not have a warrant or probable cause. Mr. Lucas  
19 replied, under the duress of the statute, sure. The  
20 trial court and the Illinois Supreme Court both rejected  
21 respondent's contention that this was a good faith  
22 search.

23 Now, the respondent -- and let me explain --

24 QUESTION: Did the Illinois Supreme Court  
25 reject the contention that he went beyond the scope

1 of -- that he was within the scope of the search that  
2 the statute allowed? The Supreme Court of Illinois  
3 didn't address that at all.

4 MS. MIQUELON: I think they did, Your Honor,  
5 and let me explain how they did it. You must understand  
6 that the petitioner in this case made a different  
7 argument in the Illinois Supreme Court in their briefs  
8 when they argued good faith to the Court at that time.  
9 They argued that it was good faith because it was a  
10 consent search. That was the argument they made in  
11 their brief. Indeed, when they filed their petition for  
12 writ of certiorari in this Court they originally started  
13 with the argument that it was a consent search.

14 QUESTION: I am not asking whether the Supreme  
15 Court of Illinois rejected the notion that it was a  
16 consent search. That is not it. It is whether,  
17 assuming that it wasn't a consent search, did it  
18 nonetheless go beyond the scope of what the statute  
19 would have allowed without consent.

20 MS. MIQUELON: Your Honor, they admitted in  
21 the Supreme Court that Judge Hogan determined it went  
22 beyond the scope of the statute.

23 QUESTION: I am not asking whether they  
24 admitted that the lower court had decided it. I am  
25 asking whether the Supreme Court of Illinois said

1 anything about it. Did the Supreme Court of Illinois  
2 decide that point?

3 MS. MIQUELON: Well, having conceded it in the  
4 Supreme Court the Supreme Court didn't reverse on that  
5 point.

6 QUESTION: They didn't say anything about that  
7 point. They didn't find it necessary to reach it,  
8 right?

9 MS. MIQUELON: Well, yes, because the state  
10 said that it was on an independent basis that they could  
11 do this, which was consent, and in response to that the  
12 Supreme Court said, well, there was no consent, and that  
13 is how they framed their argument there.

14 The Court -- and I would say former Chief  
15 Justice Burger stated in Michigan versus DeFillippo a  
16 clear proponent of the good faith exception to the  
17 exclusionary rule, and again, Justice White in the Leon  
18 decision in Footnote 8 stated that the exclusionary rule  
19 requests suppression of evidence where obtained pursuant  
20 to a statute not yet declared unconstitutional which  
21 purports to authorize a search that doesn't satisfy the  
22 traditional requirements of a warranted probable cause.

23 QUESTION: Now, both of those cases draw the  
24 distinction. Does either of them give a reason for the  
25 distinction?

1 MS. MIQUELON: Well, I think you have to --

2 QUESTION: They note that we allow this good  
3 faith exception where you have a substantive statute  
4 that is later found unconstitutional and the search is  
5 in order to enforce the substantive statute you can have  
6 a good faith exception, they say, but that is not the  
7 same thing as a statute which is not a substantive  
8 statute but a search statute.

9 Now, that is a nice distinction. Did they  
10 give any reason for the distinction?

11 MS. MIQUELON: Well, I think they do, and I  
12 think DeFillippo does.

13 QUESTION: Well, what is it?

14 MS. MIQUELON: In DeFillippo the Court  
15 specifically states that a procedural search statute,  
16 unlike a substantive criminal statute, directly  
17 authorizes a search that is in violation of the  
18 Constitution, whereas a substantive criminal statute  
19 defines some conduct and the officer --

20 QUESTION: That is another distinction. That  
21 is not a reason why in the one case it makes sense to  
22 apply a good faith exclusionary rule, a good faith  
23 exception to the exclusionary rule, and the other one  
24 there isn't. You are just giving me another  
25 distinction.

1 MS. MIQUELON: Well, I think then that --

2 QUESTION: But what is the reason why that  
3 distinction should have some bearing upon whether you  
4 allow a good faith exception?

5 MS. MIQUELON: Because you are talking about a  
6 situation where the sovereign has acted beyond its  
7 lawful discretion. It has in essence abrogated the  
8 requirements of a warrant and probable cause. It has  
9 abrogated the requirements of the Fourth Amendment  
10 completely.

11 QUESTION: It has done so in the other case,  
12 too, where it has a substantive statute that is beyond  
13 its power, and it is having its law officers enforce a  
14 statute that it has no authority to enforce, a  
15 substantive law.

16 MS. MIQUELON: I would respectfully submit,  
17 Your Honor, that that was not the analysis made by the  
18 Court in DeFilippo. The DeFilippo Court specifically  
19 found that it was by virtue of completely abrogating the  
20 operation of a constitutional -- the Amendment, the  
21 Fourth Amendment, and that a substantive criminal  
22 statute does not do that.

23 QUESTION: That is a distinction. What I am  
24 asking, what I am trying to find is a reason why that  
25 distinction should make a difference as to whether a

1 good faith exception should be applied. It is just like  
2 saying one is black and the other one is blue. Well,  
3 that is fine, but why should that have any bearing upon  
4 whether you allow a good faith exception?

5 MS. MIQUELON: Well, in my view, I mean, I  
6 feel that where the sovereign abrogates the Bill of  
7 Rights and the Constitution, I agree that the evidence  
8 should be excluded.

9 QUESTION: It abrogates the Constitution every  
10 time it passes an unconstitutional law, whether it is  
11 substantively unconstitutional or an unconstitutional  
12 search law. Both of them are bad. Both of them are  
13 wicked, if you will, but why does that have any bearing  
14 upon whether you allow a good faith exception?

15 MS. MIQUELON: Because this Court says that  
16 the search and the arrest based on a substantive  
17 unconstitutional statute in and of themselves are not  
18 unconstitutional because the officer has probable cause  
19 based on the statute to make the arrest and then the  
20 search is incident to the lawful arrest.

21 QUESTION: He has probable cause because the  
22 statute seems to him to be constitutional, even though  
23 it really isn't. You can say the same in the other  
24 situation where he is proceeding under a statute that  
25 authorizes a search. There is probable cause to believe

1 that is constitutional, too. Is there something in the  
2 function of the good faith exception that makes it more  
3 dangerous to apply it in one situation than in the  
4 other? That is what I am looking for.

5 MS. MIQUELON: I think there is another  
6 point. When you abrogate the probable cause and warrant  
7 requirements, every time a statute is conducted -- a  
8 search is conducted under the statute it is a violation  
9 of the Constitution, which leads to a widespread and  
10 continuous violation of the statute.

11 It is not the same thing where a magistrate  
12 makes a bad judgment call on a probable cause  
13 determination under a warrant, but every time in a  
14 circumstance where the unconstitutional statutory search  
15 is repeated there is a violation, and indeed in this  
16 case the Federal District Court held evidentiary  
17 hearings where it determined that the administrative  
18 abuses under this statute were so widespread that it  
19 says while administrative abuses aren't the only logic  
20 to declare a statute unconstitutional, they are so  
21 widespread and so pervasive here that it is a major  
22 point in declaring the statute unconstitutional.

23 QUESTION: Ms. Miquelon, is it your view then  
24 that there is more to fear from a legislature's  
25 departure from Fourth Amendment requirements than a

1 magistrate's?

2 MS. MIQUELON: Well, yes.

3 QUESTION: That is your position?

4 MS. MIQUELON: Yes, it is.

5 QUESTION: Do you think that separation of  
6 powers concerns enter into how we should treat the  
7 exclusionary rule vis-a-vis a legislative body's  
8 departure from the Fourth Amendment as compared to a  
9 magistrate's?

10 MS. MIQUELON: Well, I think that there is a  
11 separation of powers issue, and in our brief we sort of  
12 quote all the way back to Alexander Hamilton, who points  
13 out that very fact.

14 QUESTION: Well, should a court be more  
15 reluctant to apply the exclusionary rule when the  
16 legislative body has departed than when one of its own  
17 magistrates has departed from the Fourth Amendment --

18 MS. MIQUELON: I think it should be more  
19 willing to apply the exclusionary rule because the Court  
20 has put the legislature on notice as to what  
21 constitutional yardstick is required when you abrogate  
22 the Fourth Amendment and you want to substitute your own  
23 regulatory scheme. We are going to permit you to do  
24 that, says this Court, but only when you do it in a  
25 constitutional fashion and you reach a constitutional

1 destination, and if you don't do that then the sovereign  
2 has acted beyond its lawful discretion. The sovereign  
3 has no right to empower its agents to act in --

4 QUESTION: Well, of course, it has the right  
5 to make its own determination initially on  
6 constitutionality.

7 MS. MIQUELON: That's true, and that was done  
8 in this case. The Illinois Supreme Court and the trial  
9 court determined the statute was unconstitutional. I  
10 would also say that the good faith exception to the  
11 exclusionary rule as articulated by this Court in the  
12 Leon decision is intrinsically tied to the warrant and  
13 probable cause requirements.

14 It assumes in the first instance that a  
15 magistrate first reviews the affidavit containing the  
16 officer's statement of probable cause, makes a probable  
17 cause determination, and then issues the warrant, and as  
18 a caveat to that, the Court says, you must act within  
19 the confines of the warrant, which in this case the  
20 officer didn't even act within the confines of the  
21 regulatory scheme.

22 So by its own definition the good faith  
23 exclusion doesn't really extend beyond the warrant  
24 context.

25 QUESTION: Ms. Miquelon, what if a state

1 enacted a statute providing that the following  
2 circumstances shall constitute exigent circumstances for  
3 purposes of making arrests or searching, and then  
4 defined a number of situations which, you know, probably  
5 a lot of them would qualify as exigent circumstances  
6 under decided cases, but there was one in there that a  
7 court held this just doesn't qualify as an exigent  
8 circumstance under the Fourth Amendment.

9 Now, do you think the good faith rule would be  
10 out with that kind of a statute?

11 MS. MIQUELON: Well, I think if it directly  
12 contravenes the Fourth Amendment, I think the Court has  
13 held that the exclusionary rule would suppress the  
14 evidence, yes. As the law stands currently today the  
15 exclusionary rule would apply, and also the notion of  
16 exigent circumstances, once again, Your Honor,  
17 particularly in the search context, is again tied  
18 directly into the notion of the warrant and probable  
19 cause requirement. You may only search without a  
20 warrant when you have exigent circumstances and probable  
21 cause.

22 QUESTION: Yes, but do you think it is beyond  
23 the capacity of Congress or the Illinois legislature to  
24 say these shall be exigent circumstances? Do you think  
25 courts should pay no attention to a statute like that?

1 MS. MIQUELON: No, and in fact this -- if this  
2 Court says that there is a constitutional roadmap to  
3 follow when you are defining exigent circumstances, and  
4 you have followed our roadmap as you did in -- you  
5 provided Colonnada and Biswell and Donovan, then if the  
6 legislature follows that roadmap and reaches their  
7 constitutional destination there is no problem, but it  
8 is when they fail to do that that the Court cannot  
9 sanction the sovereign acting beyond its lawful  
10 discretion.

11 QUESTION: So that even though this Court has  
12 recognized a class of situations, heavily regulated,  
13 licensed businesses which can be examined and perhaps  
14 searched without a warrant, if a legislature makes the  
15 slightest mistake under our cases in saying this is a  
16 heavily regulated business, the good faith rule doesn't  
17 apply?

18 MS. MIQUELON: Well, when we say the slightest  
19 mistake, I think that that is a question of  
20 interpretation. In this case both the Federal District  
21 Court, the trial court, and the Illinois Supreme Court  
22 did not find there was a slight mistake.

23 QUESTION: Well, but under your analysis I  
24 understood it was kind of a black and white thing. It  
25 doesn't depend on the law being slightly

1 unconstitutional or very unconstitutional. If it is  
2 unconstitutional, period, the good faith exception can't  
3 be applied. Isn't that correct?

4 MS. MIQUELON: I have to say that is true,  
5 Your Honor, because to the -- now, that doesn't mean in  
6 your example that we have to find the whole statute  
7 unconstitutional. We can say this portion of the  
8 statute is unconstitutional. You can continue to  
9 operate under the rest of the statute. And then all the  
10 legislature has to do, Mr. Justice, is to reenact that  
11 portion of the statute and make it constitutional, and  
12 then the issue disappears.

13 I would reemphasize that there can be no  
14 objective good faith reliance on a procedural statute  
15 which is crafted by the legislature to violate the  
16 Fourth Amendment. And when a police officer acts beyond  
17 the limited authority of the regulatory inspection  
18 scheme on his own frolic and detour he is relying on no  
19 statute whatsoever, and the issue of good faith is  
20 inapposite.

21 The officer is merely acting indiscriminately,  
22 and that perhaps is the best reason why the Court should  
23 not reach the constitutional issue in this case, because  
24 this officer was indeed acting indiscriminately. He was  
25 not acting within good faith because he did not comply

1 with the requirements even of the unconstitutional  
2 regulatory scheme.

3 Also, again, I would point out that the good  
4 faith exception to the exclusionary rule has only been  
5 defined within the context of a warrant. For the Court  
6 to extend it beyond the context of a warrant would, I  
7 think, take it out of the context in which it is  
8 currently defined.

9 And therefore I would conclude by stating to  
10 the Court --

11 QUESTION: Excuse me. It has also been  
12 applied in the context of a substantive statute where  
13 the substantive statute under which the officer is  
14 operating is found to be unconstitutional.

15 MS. MIQUELON: Well, in DeFilippo the Court  
16 did not apply this good faith exception to the  
17 exclusionary rule even to a substantive statute because  
18 this good faith exception is defined in terms of the  
19 warrant requirement.

20 QUESTION: What difference would it make? You  
21 mean so long as the mistake about the statute is made by  
22 a magistrate before it is made by the officer it is all  
23 right even though the underlying mistake is not the  
24 mistake of the magistrate but of the legislature?

25 MS. MIQUELON: No, I don't -- once again, I

1 don't agree with that respectfully, Justice Scalia. I  
2 believe that the -- what the Court has said is that the  
3 officer under those circumstances has done everything  
4 that he has to do under the law. He has applied for a  
5 warrant. He has filed an affidavit for probable cause.  
6 But in the current --

7 QUESTION: And the statute is  
8 unconstitutional. That is the only thing wrong with it,  
9 right? The statute under which he is acting is  
10 unconstitutional.

11 MS. MIQUELON: That is not the only thing  
12 wrong with it. It directly authorizes a search in  
13 violation of the Fourth Amendment.

14 QUESTION: Not this one, the other situation,  
15 the DeFillippo type situation.

16 MS. MIQUELON: Well, that's correct. But  
17 again, this results in widespread abuses whereas that  
18 situation I think the Court recognizes that a magistrate  
19 may make an error in judgment as to a probable cause  
20 determination but that if the warrant is still required,  
21 the exercise of determining probable cause is still  
22 required, and in our circumstance we have abrogated  
23 those requirements.

24 You are in essence saying that if the state  
25 enacts an unconstitutional statute and authorizes a

1 warrantless search which this Court has determined is  
2 per se unreasonable, the evidence must be excluded when  
3 it violates the Fourth Amendment.

4 Thank you very much, Your Honors.

5 CHIEF JUSTICE REHNQUIST: Thank you, Ms.

6 Miquelon.

7 Mr. Angarola, do you have anything more? You  
8 have four minutes.

9 ORAL ARGUMENT OF MICHAEL J. ANGAROLA, ESQ.,

10 ON BEHALF OF THE PETITIONER - REBUTTAL

11 MR. ANGAROLA: The legislature's judgment  
12 should be entitled to deference just as a judge's  
13 judgment regarding the execution of search warrants  
14 should be given deference. There is no reason that this  
15 Court should desire a public policy that would require  
16 police to be timid in their execution of search  
17 warrants.

18 This Court, of course, has dealt with a public  
19 policy called the exclusionary rule for some time. The  
20 question is whether that public policy should be such  
21 so that police officers acting in good faith reliance  
22 upon the existence of a statute should have evidence  
23 that is seized suppressed in court, and the question is  
24 whether that public policy should be greater than a  
25 public policy of, for example, requiring police officers

1 to enforce statutes as they know them to be.

2 Trial courts are capable of answering  
3 questions which arise regarding good faith reliance on  
4 statutes. Such questions as whether the police  
5 officer's conduct was objectively reasonable, or what  
6 information regarding judicial determinations of  
7 statutes has been communicated to a reasonably well  
8 trained police officer, or whether a police officer has  
9 exceeded the scope of his authority granted by the  
10 statute, or whether the statute --

11 QUESTION: May I ask this question?

12 MR. ANGAROLA: Yes, Your Honor.

13 QUESTION: What specifically did the trial  
14 court say with respect to the good faith of the police  
15 officer, if anything?

16 MR. ANGAROLA: He said that he did not feel  
17 that a determination regarding good faith was  
18 appropriate because he felt that there was no need to  
19 determine whether the officer was acting in good faith.

20 QUESTION: So he made no express finding  
21 either way.

22 MR. ANGAROLA: That's correct. Yes, Your  
23 Honor. No finding whatsoever.

24 Citizens have greater protections against  
25 constitutionally defective statutes than against

1 defective warrants. If a statute is enacted that may be  
2 unconstitutional, an injunction can be obtained. If  
3 criminal charges occur there can be judicial review in  
4 the form of a motion to suppress, and that judicial  
5 review should be the same, I would think, to respond to  
6 Justice O'Connor's question, whether it is a motion to  
7 suppress that is filed pursuant to a search that  
8 occurred regarding a statute or whether that is  
9 regarding the execution of a search warrant.

10 Citizens can express their views to  
11 legislatures. Proposed legislation can be reviewed by  
12 legislative bodies themselves. They can be reviewed by  
13 Bar Association committees. They can be viewed by the  
14 Governor of the state, and in Illinois the Governor has  
15 the authority to mandatorily veto statutes. Thus there  
16 is a significant amount of degree of review of proposed  
17 legislation.

18 So citizens in fact have more avenue of  
19 redress and more avenues to express their views  
20 regarding statutes than they do regarding the execution  
21 of a search warrant.

22 Thus we would ask this Court to reverse the  
23 opinion of the Illinois Supreme Court.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
25 Angarola.

1                   The case is submitted.

2                   (Whereupon, at 10:47 o'clock a.m., the case in  
3 the above-entitled matter was submitted.)  
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**CERTIFICATION**

Person Reporting Company, Inc., hereby certifies that the  
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85-608 - ILLINOIS, Petitioner V. ALBERT KRULL, GEORGE LUCAS AND SALVATOR

MUCERINO

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BY Paul A. Richardson

(REPORTER)