

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-759

TITLE MARYLAND, Petitioner V. HAROLD GARRISON

PLACE Washington, D. C.

DATE November 5, 1986

PAGES 1 thru 57



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARYLAND, :

4 Petitioner, :

5 V. : No. 85-759

6 HAROLD GARRISON :

7 - - - - -x

8 Washington, D.C.

9 Wednesday, November 5, 1986

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 12:46 o'clock p.m.

13 APPEARANCES:

14 STEPHEN H. SACHS, ESQ., Attorney General of Maryland,
15 Baltimore, Maryland; on behalf of the petitioner.

16 GERALD A. KROOP, ESQ., Baltimore, Maryland; on behalf
17 of the respondent.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
STEPHEN H. SACHS, ESQ.,	
on behalf of the petitioner	3
GERALD A. KRCOP, ESQ.,	
on behalf of the respondent	24
STEPHEN H. SACHS, ESQ.,	
on behalf of the petitioner - rebuttal	53

1 PROCEEDINGS

2 CHIEF JUSTICE REHNQUIST: We will hear
3 argument next in Maryland versus Garrison.

4 General Sachs, you may proceed whenever you
5 are ready.

6 ORAL ARGUMENT OF STEPHEN H. SACHS, ESQ.,
7 ON BEHALF OF THE PETITIONER

8 MR. SACHS: Thank you very much, Mr. Chief
9 Justice, and may it please the Court, we are here on a
10 writ of certiorari to the Court of Appeals of Maryland
11 which reversed the conviction of respondent Garrison
12 because in the judgment of the Maryland Court of Appeals
13 the evidence necessary to sustain that conviction was
14 the product of an unconstitutional search of respondent
15 Garrison's apartment.

16 The search and seizure warrant in question
17 issued by a District Court judge, state judge in
18 Baltimore issued for the person of one Lawrence Mcwebb,
19 a suspected marijuana dealer, and his premises, 2036
20 Park Avenue, third floor apartment. It was issued, we
21 believe respondent concedes, with ample probable cause
22 for Mcwebb and for that search. It was issued, however,
23 on the assumption and executed on the assumption that
24 only one apartment existed on the third floor at 2036
25 Park Avenue and it was the apartment of Mcwebb.

1 It turned out that that assumption was, in the
2 words of Hill v. California, quite wrong. There were
3 two apartments, one McWebb's, the other Garrison's, and
4 the question before the Court is whether the police
5 behavior here in this case falls within the margin for
6 reasonable error allowable by the Fourth Amendment as
7 recognized in the opinions of this Court like Hill
8 against California, in Brinegar, and in others.

9 We submit that the conduct of the police here
10 clearly does fall within that reasonableness standard.
11 It is helpful, we think, Your Honors, to analyze what
12 the police did here in three separate stages, the
13 investigation stage which led to the obtaining and
14 issuance of the warrant, the arrival at 2036 Park
15 Avenue, arrival at the premises, and finally the entry
16 into the third floor premises themselves.

17 Each of these stages reinforced, we submit,
18 the assumption at the beginning that there was one
19 apartment on the third floor and it was McWebb's, and
20 each of these stages, we also submit, Your Honors, was
21 dominated by a crucial fact, an overwhelming fact, a
22 central fact that categorized, characterized each
23 stage. In the first stage the verification from the
24 public utility, the Baltimore Gas and Electric Company,
25 that there was only one apartment on the third floor,

1 that was McWebb's.

2 At the second stage it was the arrival of
3 McWebb himself, the very subject of the -- intended
4 subject of the search, who arrived on the scene
5 fortuitously. He had been out of his apartment, came to
6 the scene, and in effect led the officers up the
7 stairs.

8 And finally, in the third stage, it was the
9 appearance of the premises once the police went through
10 the door, which we suggest gave the appearance for all
11 the world that this is one apartment and only one
12 apartment.

13 Now, the facts begin with a tip from an
14 informant of Officer Marcus that the informant had been
15 buying marijuana for a long time, I believe, six months
16 from someone he knew as Red Cross, street name Red
17 Cross, from his apartment on the third floor of 2036
18 Park Avenue. The informant said nothing about the
19 existence on that floor of two separate apartments.

20 The informant had bought marijuana as recently
21 as the day before Officer Marcus proceeds to get his
22 affidavit. Officer Marcus then does an eminently
23 reasonable thing. He checks with -- first, he looks at
24 the premises, sees that it is a three-story brick
25 building with 2036 on the outside, which the informant

1 had said, and then he checks with the public utility.

2 He calls up the Baltimore Gas and Electric
3 Company to find out who lived on the third floor. All
4 he had was the street name, Red Cross. And he recites
5 in his affidavit for the warrant that he called and he
6 discovered, he says the word "discovered," that the
7 premises 2036, third floor, was in the name of Lawrence
8 McWebb.

9 He on examination at the motion to suppress --
10 Officer Marcus says he expressly asked Baltimore Gas and
11 Electric Company, was there a front and a middle and a
12 back, or words very much to that effect, and "They told
13 me," and this is a quote from Marcus in the suppression
14 hearing, "They told me," he says, "one third floor was
15 only listed to Lawrence McWebb," not perhaps the most
16 grammatical or artful expression of what we think the
17 evidence is clear it meant. What he was saying was,
18 there is only one guy who lives there, there is only one
19 apartment, it is McWebb

20 *****McWebb to the informant. He says that is
21 Red Cross. And Marcus gets his warrant. It is
22 difficult, may I suggest at this stage, Your Honor, to
23 imagine a police officer acting more reasonably under
24 the precedents of this court and the preference for the
25 warrant requirement and the reasons for it in the first

1 place.

2 Of course, he could have done more. He could
3 have checked with the phone company, I suppose. He
4 could have made supplementary checks. But the mistake
5 here was the mistake, we suggest, of BG&E. It was not
6 the mistake of the police. His reliance on that mistake
7 was appropriate and was consistent with the informant.
8 There was no reason to question, and the BG&E was indeed
9 the verification, as the Court of Special Appeals in
10 this case held, the verification of the information that
11 he needed.

12 Stage Two is the arrival at the premises,
13 2036, of the police raiding party. While Officer Shea,
14 one of the first officer on the scene, was examining the
15 outside door to the premises, the exterior door that led
16 to the street, and was trying to gain entry into that
17 door without breaking it down -- at one point he said he
18 punched all seven bells to try to get somebody to press
19 the release buzzer so he could get in without breaking
20 down the door.

21 While that is going on -- and incidentally he
22 testified and the Court found as a fact that McWebb's
23 name was at none of those bells -- while that is going
24 on, who should arrive but McWebb himself, by vehicle.
25 He is detained, of course. He is informed of the search

1 warrant, of course, and what then happens is, he leads
2 the raiding party -- his key is used to open the
3 exterior door. He leads the raiding party up the --
4 into the first floor, onto the second floor landing,
5 onto the third floor, and it is his key that opens the
6 door to the third floor apartment as it appeared to the
7 police at that time.

8 Significantly, on the way up and throughout
9 this entire episode McWebb never says, my apartment is
10 third floor rear. Never does he indicate that there are
11 two apartments. Never, as we will see in a moment, does
12 Garrison so indicate. But as they are going up these
13 stairs the police are also seeing on the first and the
14 second floor, the evidence shows, doors leading from the
15 landings to what must have appeared to them to be
16 apartments, but when they get to the third floor, this
17 is not the lady and the tiger.

18 We are not here talking about options that the
19 police have. There is one door and one door only on the
20 third floor appearing for all the world to them to be
21 the door of the apartment of the man McWebb who is the
22 subject of the search who is now leading them into the
23 premises itself. There is an interesting --

24 QUESTION: Unlike the appearances on the first
25 and second floors.

1 MR. SACHS: Absolutely. Absolutely. Officer
2 Marcus -- Shea does not recall in his testimony, Your
3 Honor, whether there were or were not doors on the other
4 floors, but Officer Marcus expressly, and we cite the
5 references at Page 10 of our reply brief, expressly
6 talks about there being "other doors," "a lot of
7 doors." I think he is talking about the second floor in
8 particular, perhaps the first, but certainly the third.
9 I think he is talking mostly the second floor, options,
10 but on the third one door and one door only.

11 In an exchange between counsel for Garrison,
12 the respondent, and Officer Shea at the motion to
13 suppress counsel says, well, didn't it occur to you,
14 officer, that as you got to the third floor there might
15 be more than one apartment? Shea replies, not when I
16 saw that one door, no.

17 It is also important, we suggest, Your Honors,
18 to remember this in analyzing this case. This is not a
19 situation in which the police should have been expected
20 to ask as they were proceeding, should we, shouldn't
21 we. This was not analysis of where are we each stage of
22 the way. They had a valid warrant as far as they knew.
23 They were proceeding up the stairs with the very subject
24 of that warrant. There was not a reason for them to be
25 self-examining their conduct because nothing had gone

1 off to alert them of the need to do so.

2 And so here we have at Stage Two the arrival
3 at the moment of truth with -- led by the very subject
4 of the search itself, and now we come through the door.
5 It is the key of McWebb that allows them to come in,
6 although Officer Marcus recalled that he thought
7 Garrison himself might have opened the door, but what
8 they see when they come in further ratifies and
9 reinforces the assumption that they had been making from
10 the beginning, the validity of this warrant for the one
11 apartment on the third floor.

12 On the right -- they enter a tiny foyer, four
13 by five feet, as I think the description -- at the
14 appendix in our petition for certiorari is a diagram,
15 Appendix Page 44 in the petition for certiorari, but
16 what they see -- they are in this small, tiny foyer, and
17 to their right they see an open doorway with a bedroom.
18 To their left they see an open doorway with a
19 livingroom, and no doors were visible. That is a
20 finding of fact of the trial court in this case. No
21 doors were visible.

22 In fact, as it turns out there were doors to
23 those two, doorways, the bedroom and the livingroom, but
24 they were wide open, and they opened inward, and the
25 evidence is, as I say, the court found as a fact that no

1 doors were visible.

2 May I also add at this point, Your Honors,
3 that it is not unreasonable that it should have seemed
4 to them to be one premises occupied by a common -- one
5 apartment. It is, after all, and as a matter of record
6 in this case, that this had been a building, as many
7 buildings on that block are, this had been a building
8 that had been a one-family building.

9 This building was built for one family and had
10 been broken down into apartments, but I suggest to you
11 that you should not have in your mind the notion of some
12 corridor with doors going off to various apartments. So
13 you have only the two doors, and the two doors are wide
14 open, with no doors visible at all. The doorways are
15 wide open.

16 And lo and behold, directly in front of them,
17 not in what turned out to be his apartment, not even in
18 the bedroom that they saw on their right, but directly
19 in front of them is the respondent Garrison. He is in
20 pajamas, and he is in a body cast because he had had
21 recent spinal surgery. He is asked to identify himself,
22 and he does. He is silent with respect to, wait a
23 minute, now, I am a neighbor here, this is not -- what
24 are you doing here in my place. He is absolutely silent
25 on that question.

1 He is detained, and taken off to the living
2 room thing that I described on the left, and the police
3 at this moment see, as they are into this tiny car, they
4 see marijuana on the bureau in the bedroom, what they
5 think is marijuana on the bureau in the bedroom of
6 Garrison. The very thing they had the probable cause to
7 believe was being sold by McWebb from his apartment they
8 now see in a bedroom on a bureau five, six feet away
9 from where they were.

10 It is reasonable, it is reasonable, we
11 suggest, and that is the standard and, we suggest, the
12 only standard that needs apply here, for the police to
13 have assumed that Garrison was a housemate, Garrison was
14 a roommate, Garrison was a convalescing cousin come to
15 call. He was not a neighbor who had some independent
16 living arrangement over there.

17 Now, there were other indicia that developed
18 in the course of this episode that are more ambiguous in
19 terms of the timing, but they cut very much in favor of
20 the state. The phone in Garrison's bedroom on the right
21 rings. It is a phone call for Red Cross, Mcwebb.
22 Clothes are found hanging on what was the exterior door
23 to Garrison's apartment, the one on the right.

24 . QUESTION: Mr. Attorney General, looking at
25 this diagram, you have Garrison's name here at the

1 right, a bedroom. Is that the entire apartment?

2 MR. SACHS: No, Your Honor, the entire
3 apartment, as it turns out, and as the police, as they
4 did their securing tour of the premises later
5 discovered, but only after the heroin was discovered in
6 the bedroom, the entire apartment, Your Honor, would be
7 -- the bedroom of Garrison would be what is marked
8 "bedroom." The living room immediately behind it is
9 Garrison's -- is the living room of that apartment. You
10 see a kitchen down on the left and a bathroom.

11 Indeed, it was when the sergeant saw two
12 kitchens as he went through this entire operation and
13 noticed that there was the opportunity -- the two
14 bathrooms with an opportunity to lock a bolt that was
15 open but nonetheless he saw that, and --

16 QUESTION: But did you have to get into
17 Garrison's apartment by that common stairway?

18 MR. SACHS: Oh, absolutely, Your Honor.

19 QUESTION: You did?

20 MR. SACHS: Oh, absolutely. The only way to
21 get into Garrison's apartment was through the doorway,
22 wide open, as I described, that shows immediately to the
23 right of the stairs.

24 QUESTION: Did you have to pass through the
25 other apartment to get into Garrison's?

1 MR. SACHS: No, Your Honor, absolutely not.
2 The two apartments turn out to be an apartment on the
3 right, Garrison's, and an apartment on the left,
4 McWebb's. The point is that we didn't realize that --

5 CHIEF JUSTICE REHNQUIST: General Sachs, we
6 will resume there at 1:00 o'clock.

7 (Whereupon, at 12:00 o'clock noon, the Court
8 was recessed, to reconvene at 1:00 o'clock p.m. of the
9 same day.)
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1 QUESTION: -- into the apartment.

2 MR. SACHS: There was one door, Mr. Justice,
3 that led, only one door on the third floor that entered
4 into what we now know to be the two apartments of McWebb
5 and Garrison. It was a locked door, and it was through
6 that door that McWebb's key and McWebb led the officers.
7 That enters, that one door, as opposed to the second and
8 first floors, where there are many doors, that one door,
9 and I am referring here to the petition for certiorari,
10 Appendix Page 44, that one door leads to a very small
11 foyer. It is marked hallway.

12 QUESTION: Off which there are doors?

13 MR. SACHS: Off which there are doors, but at
14 the moment they entered all the police saw, so the Court
15 found, was two doorways, not even doors, two doorways,
16 the one on the right into Garrison's bedroom, and what
17 we know to be his apartment, and on the left into
18 McWebb's. In fact, Mr. Justice Brennan, we now know
19 that the door on the right, once we are into the third
20 floor, now, the door on the right was in fact the door
21 to a Garrison apartment. The door on the left was a
22 door into a McWebb apartment.

23 QUESTION: (Inaudible.)

24 MR. SACHS: Well, there were doorways, and all
25 that was visible to the police were doorways. In fact,

1 there were doors but they were fully opened and they
2 opened inward so that they were not visible to the
3 searching officers. Indeed, Mr. Justice Scalia, the
4 evidence is that at some point during the presence of
5 the police officers in the Garrison bedroom they noticed
6 clothes, they noticed the door finally, and there were
7 clothes hanging on its exterior, so that -- and the
8 police -- it was a further indicia, we suggest, that
9 this was not a separate apartment. Who hangs clothes
10 over the outside door to one's own apartment? We don't
11 press it too hard, frankly, sir, because it is a little
12 ambiguous as to the precise point at which they noticed
13 that particular feature.

14 We ask this, Mr. Chief Justice and members of
15 the Court. It is customary for counsel such as myself
16 in defense of searches by police in the argument of
17 reasonableness to invoke, to really plea for
18 understanding from courts because of the obvious
19 tenseness of the situations, because of the danger of
20 the situations, because of the kind of considerations
21 this Court recognized in Michigan against Summers and
22 others, the split second -- the need for split second
23 decisionmaking.

24 All of that is true here, and of course we
25 urge that those considerations be part of the analysis

1 of the Court, but we have so much more here. We are not
2 left with only those indulgences that we ask of courts
3 for police conduct. We had a warrant. These police had
4 a warrant that they believed to be valid, and they
5 reasonably believed it to be valid, and they reasonably
6 believed that they were executing it valid.

7 QUESTION: Well, what do you do with the
8 judicial finding that the warrant covered only McWebb's
9 apartment?

10 MR. SACHS: The Court of Appeals --

11 QUESTION: How did the Court of Appeals know
12 it covered only McWebb's apartment?

13 MR. SACHS: The Court of Appeals, with all
14 respect to it, from hindsight. That is how, Mr. Justice
15 White. The Court of Appeals -- nobody can change
16 what --

17 QUESTION: Maybe they thought if they could
18 tell, maybe the officer should have told.

19 MR. SACHS: What is striking about the Court
20 of Appeals opinion, Mr. Justice White, is that it
21 absolutely eschews any analysis of reasonableness
22 whatsoever. It is precisely the vice of the Court of
23 Appeals opinion that it encants a conclusion. You did
24 not have a warrant for the premises. There was no
25 warrant for the search in Hill. It is always after the

1 fact. One can always say, if one finds fault one can
2 say with respect to any such analysis there was no
3 warrant.

4 The point here is, did they reasonably believe
5 they had a valid warrant? The issue in this case, sir,
6 is whether or not the mistake made by the police was
7 reasonable. That is an analysis the Court of Appeals
8 never made.

9 QUESTION: Well, suppose that it would have
10 been perfectly clear to anybody that there were two
11 apartments on the third floor.

12 MR. SACHS: Then we should have lost this case
13 and we would not be arguing what we are here arguing.
14 The Court of Appeals did not conclude that it would have
15 been or should have been reasonable to anyone. The
16 Court of Special -- the trial court found
17 reasonableness. The Court of Special Appeals affirmed
18 that finding. The Court of Appeals never asked the
19 question, and that's the --

20 QUESTION: The warrant actually authorized a
21 search of the premises of McWebb, didn't it, at 2036
22 Park Avenue, third floor apartment?

23 MR. SACHS: That was its intention clearly.

24 QUESTION: Is that what it said?

25 MR. SACHS: What it said literally, Mr.

1 Justice White, is this, "For the person of." There is a
2 printed warrant that is at the beginning -- you will
3 find it in the Joint Appendix at Page 4.

4 QUESTION: All right.

5 MR. SACHS: It reads, "For the person of," and
6 then the name McWebb is there.

7 QUESTION: Yes.

8 MR. SACHS: And then it says "for the premises
9 known as." It doesn't say his, it simply says "for the
10 premises known as 2036 Park Avenue, third floor
11 apartment." There is no question that the assumption of
12 the warrant and of the officers was that the intention
13 was only to search McWebb's apartment. There is no
14 question about that. If they had known of a Garrison
15 apartment, 2A --

16 QUESTION: Does the warrant tell you that you
17 are entitled to search -- that the assumption is that
18 McWebb lives on the whole third floor?

19 MR. SACHS: The warrant doesn't address
20 literally that, sir, but the warrant assumption is, the
21 affidavit recites the information received from the gas
22 and electric company. The warrant assumes without
23 stating, but it was the clear assumption of the warrant
24 that the entire -- that the McWebb apartment in question
25 was the third floor.

1 QUESTION: And obviously if they had arrived
2 at the third floor and there actually was only one
3 apartment, you could have searched the whole apartment.

4 MR. SACHS: Exactly so, and had they arrived
5 at the third floor and suddenly found two closed doors,
6 one of which said McWebb and the other Garrison, they
7 should not have --

8 QUESTION: They should have found out which
9 one to search.

10 MR. SACHS: Absolutely.

11 QUESTION: But they arrived and you think it
12 is just like there was only one apartment because it was
13 reasonable to think so.

14 MR. SACHS: Yes, sir. It was reasonable to
15 get the warrant on that assumption, it was reasonable to
16 assume it going up those stairs.

17 QUESTION: So this is just no violation of the
18 Fourth Amendment.

19 MR. SACHS: Precisely so.

20 QUESTION: You don't have to get any farther.

21 MR. SACHS: Precisely, Your Honor.

22 QUESTION: Like Hill.

23 MR. SACHS: Precisely like Hill, and exactly
24 as in Hill, officers' -- the recognition that Officers'
25 mistakes can be understandable. Sufficient probability,

1 not certainty, is the touchstone of reasonableness, as
2 this Court said, and that is precisely the doctrine that
3 we think needs to be applied here. This is not a case
4 for new doctrine. This is not a case for extension of
5 any present doctrine. This is not a case for
6 newfangled -- some would call it newfangled notions.
7 This is an old-fashioned traditional --

8 QUESTION: General Sachs, you argue in the
9 alternative, as I read your brief, that this is a
10 reasonable search and therefore not a violation of the
11 Fourth Amendment, and B, this is a reasonable search and
12 therefore -- and you are entitled to the good faith
13 exception.

14 In your view is there a difference in the test
15 of reasonableness under the two different arguments?

16 MR. SACHS: In this -- certainly not in a case
17 that involves an alleged mistake of fact. It is the
18 heart of our position that when you are addressing the
19 issue of reasonableness or not of a factual mistake
20 there is no difference whatsoever between the merits
21 test and the good faith test.

22 If the police reasonably, with objective
23 reasonableness, the language of Leon, believed here that
24 there was one apartment and only one and it was
25 McWebb's, then there was no Fourth Amendment violation.

1 We don't have to get into the problem of the different
2 voices that have been discussed in some other sense in
3 Leon, in a dissent in Leon, with respect to this issue,
4 this case. Other cases may present the question of how
5 and under what circumstances the police can be said to
6 be objectively reasonable, notwithstanding the fact of a
7 Fourth Amendment violation. Leon and Shepherd do that
8 very thing.

9 That, we urge Your Honors --

10 QUESTION: (Inaudible) making a mistake that
11 these facts add up to probable cause.

12 MR. SACHS: The legal judgment is a much
13 tougher situation. Where Leon goes from here with
14 respect to analyzing the police's good faith objective
15 reasonableness in making legal conclusions is a problem
16 but not a problem for us, we respectfully suggest, in
17 this case. This is a mistake of fact case. It is
18 Hill. It is heavily influenced by if not controlled by
19 the decision in Hill.

20 Room, this Court said in Brinegar, must be
21 allowed for reasonable mistakes on the part of police
22 officers. Such reasonable mistake was made here, and we
23 think that the judgment of the Maryland Court of
24 Appeals, which never even asked the question of
25 reasonableness, should be reversed.

1 I would like to reserve unless --

2 QUESTION: Mr. Attorney General, not that it
3 matters to this case, do you remember what block of Park
4 Avenue this was?

5 MR. SACHS: Twenty-six thirty.

6 QUESTION: Twenty-sixth?

7 MR. SACHS: I am sorry, 2036 Park Avenue. It
8 is just below the reservoir, Mr. Justice Marshall. It
9 is now known, I think, as Reservoir Hill.

10 QUESTION: Thank you, General Sachs.

11 We will hear next from you, Mr. Kroop.

12 ORAL ARGUMENT OF GERALD A. KROOP, ESQ.,

13 ON BEHALF OF THE RESPONDENT

14 MR. KROOP: Mr. Chief Justice, and Honorable
15 Justices of the Court, good afternoon.

16 This case, and this Court has struggled for
17 over 70 years in a very deep, dramatic, and using legal
18 minds throughout these years to try and balance what we
19 are trying to do today.

20 On the one side we want that Fourth Amendment
21 where it says the right of the people to be secure in
22 their persons, houses, and effects against unreasonable
23 searches and seizures to still be viable, but on the
24 other hand we do not want to handcuff the police to such
25 an extent that it is going to frustrate them and deter

1 them the opposite way from going ahead and trying to
2 ferret out criminals and be brought to justice by using
3 evidence that is recovered against them.

4 Now, in this great back and forth stress ever
5 since Weeks to the present time, many positions have
6 been taken. As a defense lawyer my heyday was back in
7 the Warren Court. Today I find it a much more difficult
8 uphill battle the way the Court is leaning, but that is
9 fine. We have to adjust. But the Court is still
10 desperately trying to strike this balance, and I think
11 if you step back from what the Court has done, I think
12 the Court very clearly during its period of time over
13 this 70 some years has said that warrantless searches,
14 and you still say warrantless searches are per se
15 unreasonable.

16 The touchstone of the Fourth Amendment indeed
17 is reasonable because the Fourth Amendment says the
18 right of the people to be secure against unreasonable
19 searches and seizures. So the question is, is this an
20 unreasonable search, and we submit without any
21 equivocation it is, because it was indeed a warrantless
22 search.

23 To say that they had a warrant for Garrison's
24 apartment would be just picking themselves up by its own
25 bootstraps. If, for instance, the police would have

1 gone with a warrant into the wrong place first and then
2 they discovered it, went into the right place, nobody
3 would have a problem with that because the warrant
4 indeed was for McWebb.

5 If the police didn't really know where to go,
6 and there was, say, only one apartment, and nothing was
7 seized from Garrison because it said McWebb, and as
8 Justice White pointed out, the affidavit clearly says
9 McWebb and third floor.

10 An inference is there. What is the
11 inference? The person to be seized is that person who
12 lives at that apartment on the third floor. So this
13 indeed was a warrantless search. Sure, they had a
14 warrant.

15 QUESTION: May I just interrupt for a second,
16 Mr. Kroop?

17 MR. KROOP: Certainly.

18 QUESTION: As I read the warrant, which I
19 think, incidentally, is on Page 9, not Page 4 of the
20 Joint Appendix, the premises, a description of the
21 premises, the premises known as 2036 Park Avenue, third
22 floor apartment, described as a three-story building
23 with the numerals 2036.

24 MR. KROOP: That's correct.

25 QUESTION: And so they did search within the

1 area described in the warrant.

2 MR. KROOP: They searched within the area
3 described in the warrant, but they also, as General
4 Sachs pointed out, there is a place on the warrant.
5 Indeed, the affidavit, which we can incorporate by
6 reference, mentions McWebb, McWebb, McWebb.

7 QUESTION: Yes, but it doesn't say the
8 premises --

9 MR. KROOP: No, it does not. If it said
10 that --

11 QUESTION: It doesn't identify, associate the
12 premises with him.

13 MR. KROOP: That's correct.

14 QUESTION: Okay.

15 MR. KROOP: What they were looking for truly,
16 we know for a fact, was McWebb's premises, not
17 Garrison's or not anybody else's.

18 QUESTION: Didn't the Maryland courts read the
19 warrant as authorizing only the search of McWebb's
20 apartment?

21 MR. KROOP: Do you know what the Maryland
22 courts, Justice White --

23 QUESTION: What about my question?

24 MR. KROOP: I don't think so.

25 QUESTION: All right.

1 MR. KROOP: Yes. Yes, they did. The answer
2 is yes, and what they did, that's correct, what they
3 did, without any equivocation stated is what I just
4 started with. Warrantless searches are per se
5 unreasonable. There was no warrant.

6 QUESTION: Because the warrant authorized only
7 the search of McWebb's apartment.

8 MR. KROOP: That's correct. They felt --

9 QUESTION: Is that what they held?

10 MR. KROOP: -- very similarly to what I am
11 arguing to the Court today, that because McWebb is
12 mentioned, and the affidavit, we can't forget that.
13 That is the guts of why you get the warrant. It talks
14 about McWebb. It describes him. The police knew who he
15 was to such an extent when he walked up, they knew right
16 away who he was.

17 QUESTION: Yes, but it also describes the
18 premises the same way the warrant does.

19 MR. KROOP: That's correct. It says -- the
20 facts presented by General Sachs to you are absolutely
21 correct. That is the finding. It describes a third
22 floor apartment. That's correct. What was wrong when
23 Judge Landon signed the warrant and what was wrong when
24 they finally got to the third floor, there turned out to
25 be two separate, distinct apartments, one belonging to

1 Harold Garrison, which he has an absolute unequivocal
2 right against trespassing by police officers who are
3 walking into his premises without a warrant.

4 That was not the intention or the
5 contemplation of the judge nor was it the contemplation
6 or the intention of the police officers when they
7 entered the premises. They didn't go in looking for
8 Garrison. They were looking for Mr. McWebb, and they
9 had him, he led them upstairs, and lo and behold, there
10 they are.

11 I am not going to argue to this Court
12 certainly as if it were a jury, but our Court of Appeals
13 when I argued the case couldn't understand why the
14 police, who can see around corners and see into bags
15 that are opaque, couldn't see the numbers on the doors.
16 They found trouble with that. They looked at this case
17 as a self-serving, as a bootstrap case for the police to
18 get themselves into a premises and to make a warrant
19 sustain itself where it didn't belong.

20 We are not deterring the police in this case.

21 QUESTION: Was McWebb ever arrested?

22 MR. KROOP: That is just what I was getting
23 to, Justice Brennan. Yes, he was. He was convicted.
24 Why? Because our officer who represented him pled him
25 guilty. The warrant was good. The search was good.

1 But of his apartment. And he -- that is exactly my
2 point. We are not deterring the police from
3 frustration. We are not having them being frustrated,
4 because McWebb, the target was brought to justice, pled
5 guilty, was convicted, and met the full justice of the
6 court below.

7 QUESTION: Mr. Kroop, what if an arrest
8 warrant were put out for a specific individual and the
9 police in fact arrested someone who matched the
10 description but didn't turn out to be in fact the one
11 arrested, and they search, and in the process discover
12 drugs.

13 MR. KROOP: The simple answer, I think --

14 QUESTION: Mistake of fact. Reasonable.

15 MR. KROOP: Yes.

16 QUESTION: Why don't we apply exactly the same
17 sort of thing with the search of the premises, a
18 reasonable mistake?

19 MR. KROOP: Because the Court never has. The
20 Court has never elevated the citizen on the street --

21 QUESTION: But shouldn't we? Is there any
22 reason not to?

23 MR. KROOP: Well, yes, because if you elevate
24 the citizen on the street being arrested to the
25 premises, which you never have, nor have you done it

1 with a vehicle or a motor home, which Chief Justice
2 Burger struggled to make a distinction between that
3 mobile home and a vehicle, why struggle? The
4 distinction is this, to answer you directly. Where will
5 it lead?

6 The police officer stops the policeman, the
7 suspect on the street. He makes a mistake. Pursuant to
8 that, under the common law and Chimel versus California,
9 he searches. We say you cannot stop and frisk a house.
10 Is that where it is going to lead, in other words? We
11 talk about probable cause and the Fourth Amendment, and
12 now we are diminished down to articulable, reasonable
13 suspicion, which --

14 QUESTION: Well, we are talking about a
15 warrant and whether there is room for making a
16 reasonable mistake when all the outward circumstances
17 would indicate there is one apartment on the third
18 floor.

19 MR. KROOP: I think with the individual,
20 without question, to answer you, yes, because this Court
21 has seen fit that the individual does not have that same
22 degree of protection under the Fourth Amendment nor does
23 a car, nor does anything traveling out on the street,
24 including that mobile home again.

25 So, without any question if you elevate it to

1 the premises you are taking away the very place where
2 the human being -- everybody can find sanctity.

3 QUESTION: We are protecting the premises more
4 than the individual?

5 MR. KROOP: This Court has.

6 QUESTION: You are saying --

7 MR. KROOP: Why?

8 QUESTION: -- it is a good thing. You are not
9 saying it is funny we have done it.

10 MR. KROOP: I happen to disagree with the Hill
11 decision.

12 QUESTION: You are saying we should do it.

13 MR. KROOP: I think you should not. I think
14 the individual on the street should be secure from
15 unreasonable searches and seizures the same as my
16 premise.

17 QUESTION: You think Hill was wrong,
18 basically.

19 MR. KROOP: Was it wrong? In my opinion,
20 yes. But the difference in Hill, let --

21 QUESTION: That is the second time you have
22 said it.

23 MR. KROOP: Let me go back to Hill for a
24 minute to show you why. What happened in Hill, if you
25 recall, is that when they arrested Hill and made the

1 subsequent search it wasn't of his person, it was way
2 beyond his reach, lunge, or grasp, which would now
3 violate Chimel versus California, so the whole crux of
4 Hill would not even be viable today because Hill really
5 didn't care about being arrested. He cared about the
6 evidence that was used against him, and that evidence
7 was out of his reach, lunge, or grasp, and under Chimel
8 versus California this Court would say nice try but you
9 went too far.

10 QUESTION: That is the only reason you think
11 it is wrong?

12 MR. KROOP: No.

13 QUESTION: That isn't what I meant.

14 MR. KROOP: No, I don't. I think the Fourth
15 Amendment --

16 QUESTION: You think the arrest shouldn't have
17 been allowed, too?

18 MR. KROOP: I think the Fourth Amendment says
19 what it says. The right of the people to be secure in
-20 their persons, in their houses, in their papers, and
21 their effects. The Court has made the distinction. I
22 live by it.

23 QUESTION: From unreasonable searches and
24 seizures.

25 MR. KROOP: That's correct.

1 QUESTION: You acknowledge that you can
2 wrongfully issue a warrant because you think that the
3 warrant is proper and in fact it is not proper.

4 Nonetheless --

5 MR. KROOP: There is a big distinction --

6 QUESTION: What is a difference?

7 MR. KROOP: -- in that, too, Justice Scalia.
8 Let me say why. When you go to get a warrant from a
9 detached, neutral magistrate, a policeman is doing
10 precisely what this Court for 70 some years has begged
11 him to do and urged him to do. He went to that neutral
12 and detached magistrate, and when he went there he gave
13 the magistrate with his knowledge the opportunity to act
14 as a buffer between the overzealous police that defense
15 would always argue and the citizen's rights.

16 So we have that protection. Justice O'Connor
17 touched on that very thing in the first case today of
18 Krull. In a statute, for instance, in Krull we have at
19 least, at least the legislature intervening, using their
20 knowledge and wisdom to give guidance to a policeman.
21 At least we have that, but in this case we have the
22 unbridled, sole judgment of a police officer trying to
23 do his job in good faith.

24 QUESTION: Mr. Kroop, let's take this step by
25 step, and you tell me when the police went wrong. When

1 they went up to the house, at the front door.

2 MR. KROOP: So far, so good.

3 QUESTION: And when the man gave them the
4 key. So good?

5 MR. KROOP: McWebb, incidentally, was named in
6 the warrant.

7 QUESTION: Is that your case?

8 MR. KROOP: Yes. Absolutely, yes.

9 QUESTION: We go up to the third floor, he is
10 still okay?

11 MR. KROOP: Yes.

12 QUESTION: And he opens the one door with the
13 key.

14 MR. KROOP: Yes.

15 QUESTION: He is okay. Now, where did he go
16 wrong?

17 MR. KROOP: Went wrong the moment he walked in
18 through that threshold of that house that this Court has
19 always held above everything else. The moment he walked
20 through the threshold.

21 QUESTION: How would he know that was wrong?

22 MR. KROOP: Didn't know. Were we to reward
23 him for his mistake? He didn't even have probable
24 cause, and that is -- the Constitution says probable
25 cause. Now when he walks in with a blunder we are

1 saying we are going to reward a blunder? If the surgeon
2 cuts off the wrong arm we don't reward him.

3 QUESTION: This Court has said the blunder is
4 not enough.

5 MR. KROOP: The blunder of the magistrate.

6 QUESTION: That's right.

7 MR. KROOP: There's a difference, because you
8 have that neutral --

9 QUESTION: Oh, you say the error now is the
10 magistrate?

11 MR. KROOP: I am sorry, sir?

12 QUESTION: The error was of the magistrate?

13 MR. KROOP: No, not in this case. No.

14 QUESTION: Well, I am talking about this
15 case.

16 MR. KROOP: In this case, the error --

17 QUESTION: Once they went in --

18 MR. KROOP: -- even though in good faith, was
19 the police.

20 QUESTION: If they had gone in the other door
21 it would have bene okay?

22 MR. KROOP: Absolutely, because Mcwebb by
23 inference, by the affidavit, we can't disregard the
24 affidavit or the fact that it mentioned Mcwebb. We are
25 talking about a man's house. We are not talking about

1 his car, which is subject to license and regulation. We
2 are not talking about walking on the street.

3 QUESTION: (Inaudible) man is given his key.

4 MR. KRCOP: No, that's McWebb. Mcwebb did not
5 give the key to Garrison's apartment. Garrison's
6 apartment was open to the police because his door was
7 open.

8 QUESTION: Did Garrison's apartment have a
9 separate key?

10 MR. KRCOP: Did Garrison ever accept the key?

11 QUESTION: Did Garrison's apartment have a
12 separate key?

13 MR. KRCOP: I believe it was clear that -- not
14 on the record, but I think it is very clear without any
15 equivocation that they were two separate, absolutely
16 distinct apartments.

17 QUESTION: With the same door.

18 MR. KRCOP: With the same common door.

19 QUESTION: The same lock.

20 MR. KRCOP: Most respectfully, Your Honor --

21 QUESTION: The same lock, and the same key.

22 MR. KRCOP: Let me say this to answer that.

23 QUESTION: Is that correct or not?

24 MR. KRCOP: Correct.

25 QUESTION: Thank you.

1 MR. KROOP: Also on the first floor, all seven
2 apartments had the same door with the same lock and the
3 same key. By your analysis, most respectfully, we
4 cannot draw an inference that they could walk into all
5 seven.

6 QUESTION: (Inaudible) if they were closed,
7 and for all we know lockable.

8 MR. KROOP: That is true. I am not arguing
9 the facts. I am not saying that the police didn't act
10 reasonably. I think they did, as far as what was in
11 front of them.

12 QUESTION: Mr. Kroop, it is no big deal in
13 this case. I mean, we are just talking about a little
14 bit of marijuana, right, but --

15 MR. KROOP: Well, no.

16 QUESTION: -- your argument would be the same
17 had they found -- had they found in walking into the
18 wrong apartment, which they thought was the right one,
19 they are behaving properly, and they find a murderer
20 there, the same thing would be the case. You have to
21 let the fellow go.

22 MR. KROOP: Absolutely.

23 QUESTION: You don't want to reward them for
24 their mistake.

25 MR. KROOP: That's correct.

1 QUESTION: And therefore you have to turn the
2 murderer loose.

3 MR. KROOP: That's correct. The Court of
4 Appeals --

5 QUESTION: Because otherwise you would be
6 rewarding them for their mistake.

7 MR. KROOP: No, because we want to look out to
8 the future to protect the other people. Sure, one
9 murderer may go free.

10 QUESTION: You are not protecting anybody.
11 These people are doing all that they possibly could.
12 What are you protecting them from?

13 MR. KROOP: I don't agree with that. I don't
14 think the police did all they could in this case.

15 QUESTION: Well, now you are arguing whether
16 it was reasonable or not, but we are assuming it was
17 reasonable.

18 MR. KROOP: I am saying assuming arguendo it
19 was, I still believe without any equivocation --

20 QUESTION: Who are you protecting then? They
21 are going to make the same mistake in the future.

22 MR. KROOP: I am protecting you when you go
23 into your chambers so when the police walk in for a
24 warrant for Chief Justice Rehnquist they don't bungle
25 into yours by mistake.

1 QUESTION: They are going to make the same
2 mistake because it was reasonable. Anybody would have
3 made that mistake. It looked like one apartment, so how
4 are you protecting me in the future? They are going to
5 make exactly the same mistake.

6 MR. KROOP: Not if we set up new guidelines.
7 For instance, let me address that. In a multiple
8 dwelling unit where we have approximately, I would
9 think, 60 to 70 million people that we are talking
10 about, and these people live that way in multiple
11 dwelling units. They leave the doors open. It is
12 convenient.

13 It is secure, very often, unlike Mr. Sachs,
14 perhaps, they drape their clothes over their doors.
15 They do many things that you wouldn't do in your
16 castle. Now, when the police come into a multiple
17 dwelling unit, especially that unit, now, let's look
18 at --

19 QUESTION: A buzzer goes off and says I am a
20 multiple dwelling unit.

21 MR. KROOP: No, no.

22 QUESTION: They didn't know it was a multiple
23 dwelling unit.

24 MR. KROOP: Yes, they did.

25 QUESTION: How did they know it?

1 MR. KROOP: There were seven mailboxes and
2 seven bells outside. That triggered it off. Here is
3 what I am saying, that this multiple dwelling unit,
4 unlike one of the fine units you find in Washington,
5 where you have guards, and each unit is separate, this
6 is an old home. This is a home that used to be the
7 residence of one person. So therefore it doesn't have
8 the same integrity or outward appearance as the
9 wonderful new condominiums would.

10 QUESTION: You are arguing it was not a
11 reasonable mistake then. I mean if you want to argue
12 that, that is fine. That is a merits argument that this
13 was not a reasonable --

14 MR. KROOP: I am arguing -- I am arguing
15 obviously two ways. First, I am arguing that I feel
16 that the search was per se unreasonable because there
17 was no warrant. If the Court feels that I am offbase on
18 there then I retract, take one step back, and say I
19 don't think the search itself or -- not the search
20 itself but the actions of the police were reasonable.

21 A solution when they walk into a multiple
22 dwelling unit, especially ones in our cities that are
23 absolutely inundated with multiple units, indeed, some
24 of them probably within themselves have rooms where
25 borders are rooming, the first thing they should do, and

1 I don't think this is unreasonable, is to walk in, come
2 up to this third floor, and instead of scanning out and
3 searching and seizing, the first thing they do is detain
4 Garrison and detain McWebb. Michigan versus Summers
5 says they can. Fine. Let's do that.

6 Then fan out, walk through the apartments to
7 see precisely where they are, also for their own
8 protection. Walk through to make sure there is no one
9 else hidden that is going to kill them. Walk through to
10 make sure there isn't contraband being destroyed. So it
11 serves a dual purpose, and when they walk through, and
12 before they search, and before they seize, they see the
13 two kitchens, they see the bathrooms, and that triggers,
14 we've got the wrong place.

15 They stop there, before they search and
16 seize. Then they inquire.

17 QUESTION: What if in the process of just
18 walking around for this security check they see
19 contraband --

20 MR. KROOP: Coolidge versus New Hampshire. I
21 am saying that they have a right to walk in and they
22 have a right to neutralize the premises and something is
23 in plain view and it was stumbled upon, as this --

24 QUESTION: Do you think they were rightfully
25 in Garrison's apartment?

1 MR. KROOP: No. First I argued no --

2 QUESTION: I thought you said they were.

3 MR. KROOP: No, I said if I have to retract
4 that. I say as soon as they went through his threshold
5 without probable cause for his apartment --

6 QUESTION: I understand.

7 MR. KROOP: -- they violate it. If you feel I
8 am wrong I step back and say the entry into --

9 QUESTION: Garrison's apartment was all
10 right?

11 MR. KROOP: In what regard, sir?

12 QUESTION: Well, do you say it was all right
13 to enter Garrison's apartment on your fallback
14 position?

15 MR. KROOP: No, I do not. I say it is per se
16 unreasonable because they didn't have a warrant for his
17 apartment.

18 QUESTION: I know, but what about your
19 fallback argument?

20 MR. KROOP: Fallback, I say if we allow them
21 to walk in we have to put some guidelines on them, some
22 bridles. We can't let them just run around a multiple
23 unit searching and seizing and arresting.

24 QUESTION: So if they find --

25 MR. KROOP: In open view.

1 QUESTION: -- after walking around as you say
2 they could on your fallback argument, if they see a gun
3 lying on the table they can't seize it?

4 MR. KROOP: No. A gun I don't think is
5 contraband.

6 QUESTION: You don't say that or not?

7 MR. KROOP: I say they cannot seize it because
8 it is not contraband under Article 2736(b) of our
9 Maryland law, for instance.

10 QUESTION: All right, let's get something else
11 that is contraband.

12 MR. KROOP: Let's get something that is
13 obvious, heroin.

14 QUESTION: Yes, all right. You don't know
15 really -- you can't smell it.

16 MR. KROOP: Well, it is marked heroin and it
17 looks euphoric.

18 QUESTION: Yeah, it's got a sign on it.

19 MR. KROOP: I mean, I am trying to say, yes,
20 if they truly --

21 QUESTION: The bag says "Plain View Heroin."

22 MR. KROOP: Right, that's it.

23 (General laughter.)

24 MR. KROOP: That's it. That's precisely what
25 I was getting to, but -- then they can pick it up under

1 Coolidge versus --

2 MR. KROOP: And seize it. And seize it, but
3 stop the search.

4 QUESTION: All right.

5 MR. KROOP: Now go back to a magistrate, where
6 you have always urged the police to do, get that neutral
7 and detached magistrate, and say, look what happened to
8 us. While fanning out in this multiple unit we
9 discovered heroin marked "Heroin, Do Not Touch Unless
10 You Are An Addict."

11 QUESTION: Or unless you are a police
12 officer.

13 MR. KROOP: We picked it up. Here it is. We
14 want a warrant to search the rest. Why is that not the
15 reasonable way to handle it?

16 QUESTION: Well, what is supposed to have been
17 happening to the place while they went back to the
18 magistrate?

19 MR. KROOP: They secure it. There were six
20 people on the team, Chief Justice Rehnquist. They can
21 secure that place. They can secure it. They can take
22 Garrison and McWebb away, detain them all they want.
23 Remember, criminals don't --

24 QUESTION: Okay, your position is that the
25 warrant simply didn't cover Garrison.

1 MR. KROOP: That's correct.

2 QUESTION: If you are right, why can they take
3 Garrison away?

4 MR. KROOP: Well, they can detain him.

5 QUESTION: Why?

6 MR. KROOP: Because you said so in your case
7 of Michigan versus Summers. You said it is reasonable
8 when you walk in and have probable cause. When you
9 don't determine who Mr. Garrison is in his cast, you can
10 stop and detain him while you then go around searching
11 while you have probable cause.

12 QUESTION: Well, where was the probable -- but
13 I thought under your analysis there was no probable
14 cause to search --

15 MR. KROOP: There is not. I am taking my one
16 step back.

17 QUESTION: Will you wait until I finish my
18 question, please, and slow down just a little?

19 MR. KROOP: Excuse me. Yes, Your Honor.

20 QUESTION: I thought that under your analysis
21 there was no probable cause for entering Garrison's
22 apartment.

23 MR. KROOP: That's correct, and I stand by
24 that as my first proposition. If this Court feels there
25 was probable cause because they relied in good faith

1 objectively on a warrant and had no way of knowing that
2 it was not the correct McWebb apartment, then they
3 walked in. So I am saying at that point they had a
4 right to walk through the threshold.

5 QUESTION: But where is the probable cause to
6 arrest Garrison?

7 MR. KROOP: There is not. He is not arrested,
8 he is detained.

9 QUESTION: Well, what is the level at which
10 they have to have to detain him?

11 MR. KROOP: They have a warrant, which this
12 Court feels, many of the members, that that should give
13 the police the right to search. Certainly if they have
14 the right to go to the privacy of the search itself they
15 should have at least a right to detain. That is an
16 infringement on his Constitutional rights.

17 QUESTION: It seems to me that your argument
18 on this point is quite contrary to your argument on the
19 rest of the case.

20 MR. KROOP: It is. Yes, it is. I agree with
21 that. It is very contrary to the rest of the argument.
22 I am trying to find two positions. The position I am
23 trying to drive home to this Court, we talk about the
24 good faith reliance in Leon. To me that -- as a defense
25 lawyer I wasn't ecstatic with it, but it is reasonable.

1 It is logical. It makes sense, because, as I said, for
2 70 years we have been urging the police to go to that
3 neutral detached magistrate, seek him out. If he makes
4 a mistake, if he doesn't apply the old ad valorem
5 Spinelli two-pronged test, that is not the policeman's
6 fault. The policeman, armed, in good faith, believing
7 he has the right, comes in, so that makes sense to me.
8 That, I believe, is reasonable.

9 QUESTION: Mr. Kroop, what if the policeman
10 who goes to get the warrant is acting on the basis of
11 information given him by a reliable informant who
12 happens to be wrong, dead wrong, but the informant says
13 you will find the marijuana in Mr. Garrison's
14 apartment. A warrant is obtained for Garrison's
15 apartment and the police search pursuant to it.

16 Now, that is a mistake made by the police --

17 MR. KROOP: That's correct.

18 QUESTION: -- but we are going to hold that
19 that is okay?

20 MR. KROOP: I do not hold that okay. I still
21 say if it -- I am sorry. If the police -- it is the
22 correct apartment.

23 QUESTION: They get the warrant for the
24 Garrison apartment --

25 MR. KROOP: Yes, because --

1 QUESTION: -- but it has been on a mistake
2 made by the police and their informant.

3 MR. KROOP: Well, you have already touched on
4 that, I believe, in the case of Franks versus Delaware.

5 QUESTION: Yes, we have said that is all
6 right.

7 MR. KROOP: That's okay. And I can live with
8 that.

9 QUESTION: So that is a case of a reasonable
10 mistake that is comparable to what is being urged here,
11 is it not?

12 MR. KROOP: I don't think it is. I don't
13 think it is anywhere near the same, Your Honor, most
14 respectfully. That informant said go here, you will
15 find X, Y, and Z. They went to that location where the
16 magistrate said, you go there. He did go there. But in
17 our case --

18 QUESTION: I thought you were taking the
19 position that we had never permitted a mistake of fact
20 on the part of the police or their informants --

21 MR. KROOP: Oh, you did, you have.

22 QUESTION: -- to reach into the premises.

23 MR. KROOP: That's correct. I know of no case
24 that allows that.

25 QUESTION: Well, Franks versus Delaware.

1 MR. KROOP: No, Franks versus Delaware did not
2 -- Franks versus Delaware allowed you to go beyond the
3 four corners of the warrant to show that the police
4 willfully and wantonly presented facts into the
5 warrant. If the informant gives information that is
6 totally, totally unreliable and not true but the
7 policeman in good faith believes that, you have
8 sustained the warrant, I think, but remember, it goes to
9 the special place.

10 See, we are talking about the particularity
11 clause. Remember, if we continue with the Fourth
12 Amendment wording it particularly describes the place to
13 be searched or the person or property to be seized. He
14 went beyond that. Even, if I recall, Justice White in
15 his Leon opinion gave a caveat. He said --

16 QUESTION: (Inaudible.)

17 MR. KROOP: Well, in the opinion that you
18 wrote, Your Honor, that's correct. The caveat was that
19 the particularity clause still must be served. You
20 still, Mr. Constable, must go to the right place and
21 seize the right person and the right things that I say
22 you can, and in this case they did not do that.

23 So, if it please the Court, if there are no
24 more questions, I thank the Court for the opportunity to
25 present.

1 QUESTION: Let me just ask you one more if I
2 may.

3 MR. KROOP: Yes.

4 QUESTION: Do you think the warrant would be
5 valid if it had left out the reference to McWebb? What
6 it says is, he has reason to believe --

7 MR. KROOP: No.

8 QUESTION: -- on the person of McWebb there
9 is, and so forth, and that on the premises known as, and
10 so forth. If you left out all the references to the
11 individual which merely describe the premises the way
12 the premises are described, would you then make the same
13 argument?

14 MR. KROOP: I think the argument -- we would
15 have to look at the affidavit. If the affidavit is
16 signed --

17 QUESTION: The same thing in the affidavit.

18 MR. KROOP: Pardon me?

19 QUESTION: The affidavit is written the same
20 way.

21 MR. KROOP: Well, the affidavit mentions
22 McWebb, McWebb, McWebb.

23 QUESTION: Yes.

24 MR. KROOP: Now, if the affidavit was totally
25 silent and they didn't know who they were looking for, I

1 think there is a much stronger argument for this good
2 faith or objective reasonableness. Yes, I do. I think
3 that would make a difference, and maybe one day I will
4 be back to argue that.

5 If I may, in light of the question, I still
6 have time -- I don't want to belabor this --

7 QUESTION: Let me ask you, then, while you are
8 at it --

9 MR. KROOP: Yes, sir.

10 QUESTION: -- on your fallback argument, let's
11 assume that it was proper to enter Garrison's
12 apartment. At that point they saw marijuana.

13 MR. KROOP: Well, again --

14 QUESTION: Well, that is what the evidence
15 is.

16 MR. KROOP: That's correct. That's correct.

17 QUESTION: And then they went ahead and that
18 officer continued to search and found some other
19 things.

20 MR. KROOP: But that marijuana does not give
21 him the right to search.

22 QUESTION: But let's assume all he did was
23 seize the marijuana.

24 MR. KROOP: Yes. That's correct. On my
25 fallback argument Mr. Garrison could be convicted of

1 marijuana.

2 QUESTION: Yes.

3 MR. KROOP: As it was he was found guilty of
4 the heroin found in his dresser drawer.

5 QUESTION: Exactly.

6 MR. KROOP: He shouldn't have had it. He
7 wasn't obeying the law. But the officer shouldn't have
8 been there to find it.

9 Thank you, Your Honors.

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

12 General Sachs, do you have any more? You have
13 five minutes.

14 ORAL ARGUMENT OF STEPHEN H. SACHS, ESQ.,

15 ON BEHALF OF THE PETITIONER - REBUTTAL

16 MR. SACHS: Just briefly, if I may, Mr. Chief
17 Justice.

18 The warrant was issued on the assumption that
19 one third floor apartment existed and it was McWebb's.
20 That assumption turned out to be a mistake. The issue
21 and the only issue is whether that mistake was a
22 reasonable one or not. With respect to Justice
23 O'Connor's point with respect to Hill, Hill resulted in
24 the search of a premises. It resulted in the kind of
25 intrusion that Mr. Krupp was concerned about. It was

1 permitted because albeit it wasn't a warrant case but it
2 was permitted because the mistake in the belief that
3 Miller was Hill was a reasonable one. It led to, under
4 the then existing scope of law, it led to the kind of
5 search that we have here.

6 The heart of the matter, and a per se test
7 will not answer the question. Mr. Krupp in effect urges
8 a per se test. If the warrant turns out to have been
9 mistaken it can never be good. It is only a conclusion
10 to say it was warrantless or it was beyond the scope.
11 The question that we must ask is why was it, if you want
12 to analyze it as warrantless, warrantless, and why was
13 it, if you want to analyze it as beyond the scope,
14 beyond the scope?

15 The exceptions to the warrant requirement, the
16 warrant requirement, warrants are presumptively
17 reasonable. Not to have one is presumptively
18 unreasonable. But all of the exceptions to the warrant
19 requirement result in warrantless searches which are
20 held by this Court to be reasonable because exigent,
21 because hot pursuit, because consent --

22 QUESTION: General Sachs, with respect to your
23 first argument, not the good faith one, is your
24 argument, do you think, entirely consistent with
25 Massachusetts against Shepherd? Wasn't the same sort of

1 defect in the warrant there just kind of somebody
2 bungled a little bit?

3 MR. SACHS: Well, I read Massachusetts against
4 Shepherd, Mr. Justice Stevens, as a defect of law. This
5 was a legally -- this was a legally invalid warrant.
6 This Court has held that.

7 QUESTION: But for the same sort of reason
8 that you have here, there was a kind of a mechanical
9 error.

10 MR. SACHS: Well, it falls in a sort of sui
11 generis category that some could call a technical
12 error. I don't think it is our burden to have to define
13 whether it was or was not a technical error, but it is
14 very distinguishable from this case. It was not a
15 mistake in the assumptions and facts that led to the
16 signing and the execution of the warrant. It was a
17 ministerial mistake, perhaps, in the putting together of
18 the papers for the warrant for which the police have
19 been held by this Court not to be responsible.

20 QUESTION: General, could I --

21 MR. SACHS: Yes, sir.

22 QUESTION: Suppose it was perfectly clear
23 there were two apartments on the third floor and
24 everybody knew it at the time the warrant was issued,
25 but all you knew was that drugs were being sold out of

1 the third floor, and everybody concedes there was
2 probable cause to believe that drugs were being sold out
3 of the third floor, but they didn't know which
4 apartment, and the warrant then authorized the search of
5 both apartments.

6 MR. SACHS: It doesn't sound to me in your
7 hypothetical, Mr. Justice, that you have described
8 sufficient probable cause to enter two different -- two
9 persons' places just because one of them -- this is the
10 lady and the tiger -- just because one of them is likely
11 to be dealing drugs.

12 That is not this case. This case is bottomed
13 on the assumption, reasonable, we say, that only McWebb
14 lived on that floor and there was only one apartment on
15 that floor. If we are wrong about that, if that was
16 unreasonable, then the Court of Appeals was right, but
17 for the wrong reasons, because it never asked the
18 question, nor did it analyze it.

19 In asking ourselves this question, Mr. Chief
20 Justice and members of the Court, we posited the
21 Halloween prank. Suppose that the numbers on all the
22 doors in the 20 hundred block of Park Avenue were
23 changed, reasonably, looking good, so that an objective
24 observer couldn't tell the difference, and the police
25 simply went to the wrong house and found heroin.

1 That is a terrible intrusion on the innocent
2 victims -- not so innocent in terms of heroin, but
3 innocent in terms of any probable cause of that search,
4 and we come to the conclusion, and I hope by using this
5 hypothetical I make the right assumption about what this
6 Court would do, there is nothing the police did wrong.
7 There is nothing unreasonable about their conduct. That
8 is Hill, and that is this case.

9 Thank you very much.

10 CHIEF JUSTICE REHNQUIST: Thank you, General
11 Sachs. The case is submitted.

12 (Whereupon, at 1:39 p.m., the case in the
13 above-entitled matter was submitted.)
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CERTIFICATION

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#85-759 - MARYLAND, Petitioner V. HAROLD GARRISON

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BY Paul A. Richardson

(REPORTER)