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PROCEEDINGS BEFORE

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**THE SUPREME COURT
OF THE
UNITED STATES**

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CAPTION: ILLINOIS, Petitioner v. EDWARD RODRIGUEZ

CASE NO: 88-2018

PLACE: Washington, D.C.

DATE: March 20, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ILLINOIS, :

4 Petitioner :

5 v. : No. 88-2018

6 EDWARD RODRIGUEZ :

7 - - - - -x

8 Washington, D.C.

9 Tuesday, March 20, 1990

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:05 a.m.

13 APPEARANCES:

14 JOSEPH CLAPS, ESQ., First Assistant Attorney General of
15 Illinois, Chicago, Illinois; on behalf of the
16 Petitioner.

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19 behalf of United States as amicus curiae, supporting
20 the Petitioner.

21 JAMES W. REILLEY, ESQ., DesPlaines, Illinois; on behalf of
22 the Respondent.

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1 Wolcott in Chicago, which was the home of Dorothy Johnson,
2 the stepmother of Gail Fisher. The police found at that
3 location the victim of a brutal, aggravated battery. They
4 saw her jaw swollen, her jaw distorted, black eye and
5 bruises on her neck.

6 They learned from this victim that the assailant
7 in this matter, Ed Rodriguez, was at an apartment that she
8 described as "our apartment." She further told the police
9 that this aggravated battery had occurred that day in that
10 apartment that she described as "our."

11 She went on to tell the police that she would
12 sign complaints for aggravated battery and allow the
13 officers to enter that apartment to effectuate the arrest
14 of Ed Rodriguez. She indicated to the police officers
15 that she would allow them to enter through the use of a
16 key that she described as "my key."

17 She also told the officers that items of her
18 personal ownership -- furniture, stove, a refrigerator and
19 other personal property -- was still present in that
20 apartment.

21 QUESTION: Did the officers ask her if she was
22 currently living in the apartment?

23 MR. CLAPS: That specific problem -- that
24 specific question was not directly asked. I believe in
25 the record that's before you the police officer indicated

1 that based, on what he asked her and her statements in
2 describing the apartment as "our" and "their," that it was
3 his belief that she was still living there.

4 That, coupled with the fact that the victim told
5 the police officer --

6 QUESTION: But he didn't ask that question?

7 MR. CLAPS: He didn't ask that specific
8 question.

9 QUESTION: That was his assumption.

10 MR. CLAPS: He had said that -- he described
11 what she said as using the words she "had been living
12 there."

13 QUESTION: Do you think that under some apparent
14 authority doctrine that there would be an obligation on
15 the part of the police if there is any ambiguity present
16 to ask appropriate questions to determine the basis of the
17 person's assumption of authority?

18 MR. CLAPS: We believe that the test should be
19 an objective test of what the police officers knew and
20 should have known in light of the facts and circumstances
21 at the time. In this particular case --

22 QUESTION: Well, can they proceed on the
23 assumption that ignorance is bliss or do they have some
24 obligation to inquire?

25 MR. CLAPS: They have -- they cannot proceed on

1 the fact that ignorance is bliss. I think that's
2 primarily the ruling in Stoner v. California. You can't
3 ignore the fact that a person who is a motel clerk does
4 not have the ability to gain -- to give entry into an
5 apartment.

6 But in this case, I don't believe we have
7 ignorance is bliss. In this case the victim, whose jaw we
8 later found was broken, certainly was distorted and
9 extended, the victim of a brutal, aggravated battery,
10 indicated to the police that this had just occurred in an
11 apartment that she described as "our apartment."

12 And so it was reasonable under the information
13 given to the police, including the fact that most of her
14 belongings were still in that apartment, that we don't
15 have in this case a situation where ignorance is bliss.
16 It is certainly has to be a test -- an objective test of
17 what the police knew at the time. So --

18 QUESTION: It has to be more than an objective
19 test of what they knew at the time. I mean, suppose they
20 -- they meet somebody walking along the street who says,
21 you know, I'd -- I'd like -- I give you permission to go
22 into my house over there -- and that's all he tells him --
23 my house over there. On the basis of all that they
24 objectively know, that's his house. I mean, they have no
25 reason to think it's not.

1 MR. CLAPS: Well --

2 QUESTION: Is that enough to let them go in?

3 MR. CLAPS: In that particular fact --
4 situation, Justice, I would say no. And what I'm talking
5 about --

6 QUESTION: So it's not just what they know.
7 It's -- it's -- they do have some positive obligation to
8 make inquiry, don't they?

9 MR. CLAPS: Yes, they do. The apparent
10 authority doctrine, which, by the way, is utilized by the
11 majority of courts, state and Federal, that have reviewed
12 it -- it's -- it's clearly a test that's been working in
13 other parts of the country. Illinois is in the minority in
14 terms of rejecting the apparent authority.

15 But it's -- it's -- in terms of your question,
16 if I -- If I was standing in a doorway of an apartment and
17 I told you -- the police -- that this was my apartment,
18 showed them a lease, showed them identification, all which
19 turned out to be false, that certainly shouldn't be held
20 against the police.

21 They have -- you have to review in terms of what
22 they knew or should have known in light of the facts and
23 circumstances.

24 QUESTION: Well, we -- we have two different
25 questions here, I suppose. Apparent authority, if we

1 adopt that, means that there has been no Fourth Amendment
2 violation whatever.

3 MR. CLAPS: That's true.

4 QUESTION: And the other doctrine of good faith
5 would mean that there has been but the evidence just won't
6 be excluded.

7 MR. CLAPS: That's true.

8 QUESTION: Now, might not we want to have a much
9 higher standard for the one than for the other?

10 MR. CLAPS: How much higher standard for the --

11 QUESTION: To say that --

12 MR. CLAPS: -- for the intrusion?

13 QUESTION: -- that there is no Fourth Amendment
14 violation at all. Why shouldn't we say it's up to the
15 police to make substantial inquiry in order to -- to
16 justifiably go into an apartment? But even if they don't
17 make that much inquiry, if they were operating in good
18 faith and they do go in wrongfully, we might let the
19 evidence come in in a trial.

20 MR. CLAPS: It would necessarily --

21 QUESTION: In other words, I feel much different
22 about your apparent authority argument than I do about
23 your good faith argument.

24 MR. CLAPS: I -- I understand. The -- the --
25 when I say the objective test in terms of reasonableness

1 in light of all the facts and circumstances, I'm not
2 suggesting that the police could carelessly accept someone
3 walking down the street who says, that's my car or that's
4 my apartment, go ahead and search it. It has to be
5 reviewed in light of practical terms.

6 QUESTION: Whether there is real apparent
7 authority? Are you talking real apparent authority as
8 it's --

9 MR. CLAPS: No, what I'm talking about --

10 QUESTION: -- commonly understood in the common
11 law?

12 MR. CLAPS: No, what I am talking about -- it
13 should not be a test -- the police officer shouldn't
14 involve in guessing games. We shouldn't evaluate what
15 they do with the time in light of complicated marital or
16 property rights. It's not that. But it's a test that
17 this Court has used in all warrantless searches.

18 What did the police know at the time to base
19 their decision on? And where in this case you have the
20 victim of an aggravated battery who -- the aggravated
21 battery occurred at this apartment and she has a key, and
22 she has told the police that that's where she lives --

23 QUESTION: But for ordinary apparent authority
24 you'd need more than that. Nobody has apparent authority
25 to act with respect to my property unless I have given

1 that person the apparent authority.

2 Now, in this case if the defendant had given his
3 key to the woman, then I might -- I might agree with you
4 that he had clothed her with apparent authority. But she
5 stole the key.

6 MR. CLAPS: But I --

7 QUESTION: I shouldn't be -- be tagged with --
8 with somebody acting on my behalf or with apparent
9 authority unless I have -- it's my fault for giving that
10 person apparent authority. Now, where was -- where was
11 the fault here?

12 MR. CLAPS: Well, I don't think that the
13 record's clear as to how she obtained the key, and I think
14 the record shows that even the trial court was not -- did
15 not make a finding as to when and how she obtained the key
16 because there was a -- even a change in testimony by Gail
17 Fisher as to how she obtained the fee -- the key.

18 QUESTION: Well. I thought her last story was
19 that she took it off the dresser. It was his key and --

20 MR. CLAPS: That was -- that was her last story.

21 QUESTION: Well, I'll take the last one.

22 MR. CLAPS: Well, we don't always take the last
23 one. But --

24 QUESTION: Didn't she say she used to live
25 there?

1 MR. CLAPS: Justice, there was some testimony --
2 the first testimony by the police officer where he
3 characterized it as "used." But when -- during the
4 suppression hearing, the police officer said that she --
5 her -- his recollection was that she "had been living
6 there" and it was his, belief based on what she told him,
7 that she was residing --

8 QUESTION: Well, there were --

9 MR. CLAPS: -- at that residence.

10 QUESTION: -- two different stories then, right?

11 MR. CLAPS: I wouldn't suggest there were two
12 different stories. I think it was a characterization that
13 the police officer used.

14 QUESTION: But doesn't the police -- didn't the
15 police require to show present apparent authority as
16 contrasted to she used to live there?

17 MR. CLAPS: The rule should be that -- that the
18 police believed at the time that they made the intrusion
19 that that person had authority. Yes.

20 QUESTION: And the policeman is going to justify
21 it as best he can.

22 MR. CLAPS: But -- and the policeman --

23 QUESTION: Could that account --

24 MR. CLAPS: -- is going to testify and the
25 person who gave the consent.

1 QUESTION: Could that account for the fact that
2 later on he said she testified that she lived there?

3 MR. CLAPS: He said that --

4 QUESTION: Couldn't that, Counselor?

5 MR. CLAPS: -- she had been living there, which
6 was, by the way, corroborated by the stepmother in this
7 case, Dorothy Johnson. She also testified that she
8 believed that her stepdaughter was living at that
9 apartment, not with her.

10 QUESTION: Well, obviously, she said whatever
11 the police asked her to say. Don't you gather that from
12 reading it?

13 MR. CLAPS: Gail Fisher or Dorothy Johnson?

14 QUESTION: Huh?

15 MR. CLAPS: Gail Fisher or Dorothy Johnson?

16 QUESTION: The witness you're relying on.

17 MR. CLAPS: Dorothy Johnson, the stepmother. I
18 don't think it is apparent that she said whatever the
19 police wanted. She was the stepmother of the victim.
20 That's the information that she said she heard --

21 QUESTION: So she had an interest in the case.

22 MR. CLAPS: She has some interest. It was her
23 stepdaughter.

24 QUESTION: Sure.

25 MR. CLAPS: So did Gail Fisher who, depending on

1 what point in time we're talking about, was either living
2 with him or not.

3 QUESTION: In some part it says "I used to live
4 there." I used to. How long ago was the used to?

5 MR. CLAPS: Well, it's our position that, again,
6 that was a characterization and it wasn't a past tense; it
7 was a present tense.

8 QUESTION: But she said she used to live there
9 at one time. She said that.

10 MR. CLAPS: I'm not sure that the record's clear
11 that that's what she said.

12 QUESTION: But didn't the --

13 MR. CLAPS: The police officer's testimony was
14 that she had been living there.

15 QUESTION: It was testimony that she did say it?

16 MR. CLAPS: Yes.

17 QUESTION: So there's a -- it's not a clear-cut
18 point.

19 MR. CLAPS: It may not be.

20 QUESTION: Well, ordinarily I -- it's hard to
21 imagine someone saying "I use to live there." It's very
22 easy to imagine them saying "I used to live there." What
23 -- what does the -- does the transcript show one thing or
24 the other here?

25 MR. CLAPS: It -- it does not.

1 QUESTION: Well, does it show the word u-s-e
2 somewhere?

3 MR. CLAPS: It shows u-s-e-d. That's the word
4 that's printed in the transcript. She used --

5 QUESTION: Well, isn't that -- isn't that the
6 natural way to read that expression? I used to, meaning I
7 did but I don't anymore?

8 MR. CLAPS: It might, but when the police
9 officer -- that was the testimony at the preliminary
10 hearing and the motion to suppress. When confronted with
11 that different language, the police officer said that it
12 was his recollection that she said she had been living
13 there. She didn't use the word "used." It was his word.

14 QUESTION: Yeah. So, he may have a different
15 recollection at some other time. But ordinarily, if -- if
16 one actually says I used to it means something happened in
17 the past. You would agree with that?

18 MR. CLAPS: Ordinarily. Yes.

19 QUESTION: In fact, not just -- can you think of
20 any exception to the proposition that when you say "I used
21 to," it in means in the past?

22 MR. CLAPS: No, I can't. No. It would be past.

23 The fact that consents are well established has
24 been the ruling of this Court since the case in
25 Schneckloth v. Bustamonte. What the Illinois courts fail

1 to accept in apparent authority is the exact issue that
2 was left open by this Court in the Matlock case.

3 What the police need to be able to use when
4 deciding an issue on consent is some practical use that
5 they can have to make a decision. The police have a right
6 to know whether their conduct is going to violate the
7 Constitution or the Fourth Amendment.

8 QUESTION: Well, it's still not clear to me.
9 Are -- are you relying on apparent authority as we use it
10 in agency law?

11 MR. CLAPS: No. No. It's a -- it's an
12 objective test, a reasonableness standard based on the
13 facts and circumstances and the reasons why the police
14 acted the way they did, the same type of test that's
15 utilized in all warrantless search situations by the --

16 QUESTION: So -- so it's apparent -- it's an
17 apparent authority doctrine for Fourth Amendment search
18 purposes that is quite divorced from agency law purposes,
19 I take it?

20 MR. CLAPS: Yes.

21 QUESTION: Well, is it just a Leon sort of
22 approach?

23 MR. CLAPS: Well, you begin with --

24 QUESTION: Good faith belief?

25 MR. CLAPS: You begin with the -- the cases that

1 this Court has found in Hill v. California and Maryland v.
2 Garrison. A mistake of fact should not be held against
3 the police in terms of a Fourth Amendment violation when
4 it's done in good faith.

5 In terms of the exclusionary rule being invoked
6 in this case, then we're talking about Leon and Illinois
7 v. --

8 QUESTION: Was Leon ever relied on at all by the
9 state?

10 MR. CLAPS: Yes. It was. And in fact in the
11 trial court, the state did argue that, notwithstanding
12 everything else, the exclusionary rule should not be
13 invoked in this case because there is no police misconduct
14 to deter.

15 QUESTION: They did that in the trial court, but
16 how about the appellate court? Did they rely on Leon in
17 the appellate court and argue for an exception from the
18 exclusionary rule?

19 MR. CLAPS: Well, but the -- the --

20 QUESTION: I don't read the opinion --

21 MR. CLAPS: -- the appellate court opinion was
22 not published but they relied on the trial court. The
23 appellate court said the trial court was right in
24 rejecting apparent authority based on Matlock.

25 QUESTION: And also in your questions presented

1 you just make a Fourth Amendment argument. You don't make
2 a good faith exclusion from -- from the exclusionary
3 rule --

4 MR. CLAPS: Well, we state --

5 QUESTION: -- in your questions presented.

6 MR. CLAPS: -- we state in our question that the
7 good faith actions of the police officers to accept
8 apparent authority --

9 QUESTION: Is a valid exception to the warrant
10 requirement --

11 MR. CLAPS: The warrant requirement.

12 QUESTION: -- of the Fourth Amendment.

13 MR. CLAPS: That's right.

14 QUESTION: Which, as you pointed out with
15 Justice Scalia, is a very different question from whether
16 it's a Leon-type exception from the exclusionary rule.

17 MR. CLAPS: In the cert. petition. But in our
18 brief --

19 QUESTION: Yes, I know. In your brief you
20 argued something --

21 MR. CLAPS: Yes.

22 QUESTION: -- you didn't preserve in the cert.
23 petition.

24 MR. CLAPS: In the cert. petition. That's
25 correct.

1 I would like to remain -- keep the remaining
2 time for rebuttal.

3 QUESTION: Very well, Mr. Claps.

4 Mr. Dreeben, we'll hear from you.

5 ORAL ARGUMENT OF MICHAEL R. DREEBEN

6 ON BEHALF OF UNITED STATES

7 AS AMICUS CURIAE SUPPORTING THE PETITIONER

8 MR. DREEBEN: Thank you, Mr. Chief Justice and
9 may it please the Court:

10 A search that is supported by the reasonable
11 appearance of consent based on objective facts is a
12 reasonable search within the meaning of the Fourth
13 Amendment.

14 That rule follows from this Court's decisions in
15 Hill v. California and Maryland v. Garrison which, accept
16 the proposition that reasonable mistakes of fact in the
17 course of making arrests and executing warrants do not
18 violate the Fourth Amendment. And the rule serves and is
19 supported by two principle considerations.

20 First, requiring the police to have a reasonable
21 basis for believing that consent is present, based on
22 objective facts, cabins the actions of police officers so
23 that arbitrary actions and intrusions of rights will not
24 occur. The police must have a reasonable basis based on
25 objective facts in order to satisfy this rule.

1 QUESTION: To what extent in your view do the
2 police have a duty of inquiry in order to support the
3 reasonableness of their decision?

4 MR. DREEBEN: Justice Stevens, we do not believe
5 that the police should have a mandatory duty of inquiry in
6 each case. Each case should be judged on it's particular
7 facts, based on the facts that are available to the police
8 when they make their decision.

9 In an ambiguous situation where no reasonable
10 police officer could assume that consent is present
11 without asking further clarifying questions, then I think
12 there would be a duty for the police officers to clarify
13 the situation by asking some appropriate questions.

14 This shouldn't entail, however, a requirement
15 that the police trace down drivers' licenses, look up real
16 estate records and otherwise engage in elaborate
17 investigation that would essentially thwart the police's
18 reliance on consents. These kinds of consent searches
19 develop on a day-to-day basis with frequency when the
20 police are out on a beat and are dealing with situations
21 that are presented to them.

22 QUESTION: In this case, do you think the police
23 officer had any duty to ask the young lady if she lived
24 there?

25 MR. DREEBEN: I think that in the facts of this

1 case, the police officers acted quite reasonably.

2 QUESTION: . Well, I understand that. Do you
3 think they had any duty to ask her if she lived there?

4 MR. DREEBEN: No. I don't think that they did,
5 Justice Stevens. And the reason that they didn't have a
6 specific duty to ask that particular question is that they
7 were summoned to the scene of what they understood was a
8 battery victim. They spoke with a woman. They learned
9 that she had been beaten by her boyfriend at an apartment
10 that they -- she described as "our apartment."

11 There's testimony that she said that many of her
12 things were there. It's not clear in connection with what
13 question she made that response. But she said that she
14 had a key to the apartment, and she would let the police
15 officers in.

16 This must be a situation that police officers
17 around the country face hundreds of times every day. It's
18 unfortunate, but it is true that there are many domestic
19 situations like this in which a battered spouse or a
20 battered companion seeks the help of the police and seeks
21 the police to place the perpetrator under arrest.

22 And the police in this case were presented with
23 that kind of a model, that kind of a framework. I think
24 it --

25 QUESTION: Well, it would have been pretty

1 simple for them to ask a few more questions, wouldn't it?

2 MR. DREEBEN: Yes, Justice O'Connor --

3 QUESTION: And you're asking for an exception to
4 the warrant requirement which is something paramount in
5 the Fourth Amendment requirements. It seems to me you're
6 suggesting that we just open the door wide without any
7 corresponding obligation on the part of the police to make
8 reasonable inquiry.

9 MR. DREEBEN: Justice O'Connor, I think it would
10 be fully appropriate for this Court to hold that
11 appropriate inquiry is necessary when the facts are
12 ambiguous and clarification is what a reasonable police
13 officer would do.

14 To establish a prophylactic rule, a Miranda-
15 type rule, that the police officers must ask this list of
16 questions or the search, based on consent, is invalid, I
17 don't think is necessary to protect Fourth Amendment
18 rights and I don't think it would be an appropriate
19 implementation of the Fourth Amendment in this context.

20 In *Schneckloth v. Bustamonte* this Court avoided
21 a warning requirement which would have insisted that the
22 police inform people that they have the right to decline
23 to consent to a search. And the major rationale of
24 refusing to apply that kind of a warning requirement is
25 that it would essentially frustrate the validity of the

1 police being able to act on consents.

2 These just aren't the type of searches that --
3 that come about in a structure kind of environment, where
4 a police officer will routinely think of pulling out a
5 card and reading a list of questions.

6 But that's not to suggest that in an appropriate
7 case, questions wouldn't be appropriate. It is not, for
8 example, our position that a neighbor who has a key to let
9 in -- you know, to water the plants while someone is away
10 could call the police up and consent to a search and the
11 police would have absolutely no duty or responsibility --

12 QUESTION: Well, Counsel --

13 MR. DREEBEN: -- to find out a little bit.

14 QUESTION: -- I have a hypothetical. The police
15 come up to a guy -- man standing outside of a door and
16 says, we want to go in there and lock up somebody and see
17 if there's any dope in there, is it okay with you?

18 MR. DREEBEN: Justice Marshall, I don't think --

19 QUESTION: Would you let me finish?

20 He says is it okay with you? You say -- and he
21 says, yes. You say he's not obliged to ask any questions?

22 MR. DREEBEN: No. I think in that situation,
23 Justice Marshall, it probably would be appropriate. The
24 only Federal case --

25 QUESTION: Well, this is the same case.

1 MR. DREEBEN: No, this is not the same case
2 because there is a context involved here.

3 QUESTION: All right. Well, the man was beaten
4 up and he asks them, can I go in there. Is that enough,
5 the fact that he was beaten up?

6 MR. DREEBEN: In this case the victim of the
7 battery described the apartment as being her apartment and
8 she produced a key. She brought the police officers to
9 the apartment and she let them in. This would have
10 readily fit in with a reasonable understanding --

11 QUESTION: She said she used to live there. Was
12 that a question that was asked of her?

13 MR. DREEBEN: Well, there -- there's -- I would
14 like to clarify the record for --

15 QUESTION: Is it your position that the police
16 shouldn't have such a question?

17 MR. DREEBEN: In this case I do not think it was
18 required for the police to ask, but I think that is a
19 question that the Illinois courts --

20 QUESTION: So the police can just walk in
21 wherever they want to walk in?

22 MR. DREEBEN: No, not if they don't have a
23 reasonable basis for doing that.

24 QUESTION: They're going to get killed one of
25 these days.

1 MR. DREEBEN: The question that arose as to
2 whether the transcript reflects that the police testified
3 that she used to live there --

4 QUESTION: She said she didn't. She inherently
5 said she didn't live there.

6 MR. DREEBEN: The testimony reflects that the
7 police understood her to say that she had been living
8 there and she had a key and she would let them in.

9 QUESTION: Which meant she didn't live there
10 then.

11 MR. DREEBEN: Well, the Illinois courts did not
12 reach that finding. And as the case comes to this Court,
13 the question is whether a reasonable belief by the police
14 officers would have justified the entry, not whether in
15 fact on the facts of this case --

16 QUESTION: And she had just been beaten up the
17 night before?

18 MR. DREEBEN: She had been beaten up that very
19 day.

20 QUESTION: Yeah, that very day in that
21 apartment.

22 MR. DREEBEN: Yes. That's correct. We --

23 QUESTION: Mr. Dreeben, what other cases do we
24 have where -- where reasonableness of -- of -- of
25 proceeding without a warrant or the reasonableness of the

1 search and seizure is determined not on the basis of
2 objective fact reasonableness but just on the basis of
3 mental impression reasonableness?

4 MR. DREEBEN: Well, Justice Scalia, I would
5 suggest that this is based on objective fact. It's based
6 on all the facts that are known to the officers or that
7 they should have known. But I believe that it's quite
8 clear that in an exigent circumstances case, for example,
9 the test is whether the police have reason to believe that
10 going into a house is needed to preserve safety or to
11 preserve evidence.

12 If in fact it turned out that they heard screams
13 inside the house and it was coming from a television set,
14 I don't think that that would invalidate an entry that was
15 otherwise properly based on probable cause and exigent
16 circumstances.

17 Again, in Maryland v. Garrison, this Court asked
18 the question whether a warrant that permitted entry into
19 one house but not another, but was inadvertently executed
20 by entering the second house, was a valid entry and the
21 Court held that it was a valid entry because in the
22 process of executing a warrant the officers will make
23 reasonable mistakes and, provided that the mistake that
24 they make is reasonable, the Fourth Amendment is not
25 offended.

1 We think that that is a preferable rule to
2 holding that some sort of good faith exception to the
3 exclusionary rule would be extended and should cover this
4 case. The major reason is that police officers do want to
5 and do try to comply with the Fourth Amendment as they are
6 instructed it applies to them.

7 If this Court should hold that the reasonable
8 appearance of authority is not sufficient, responsible
9 police officers and their supervisors will be forced to
10 instruct their officers: no matter how reasonable it
11 appears to you on the street to accept a consent and go in
12 and take care of enforcing the criminal laws as you see
13 them, you should hesitate and perhaps you should come back
14 and discuss with us, perhaps you should go through and
15 wait to see whether probable cause develops and whether
16 you can get a warrant.

17 And that would be quite a substantial disruption
18 of law enforcement --

19 QUESTION: (Inaudible) some suggestion that they
20 didn't have probable cause in this case?

21 MR. DREEBEN: No, I think, Justice White, in
22 this case they --

23 QUESTION: Well, I mean if they didn't have
24 probable cause, they had no business going in the house at
25 all.

1 MR. DREEBEN: No, I think, Justice White, an
2 entry based on consent of someone who has authority to do
3 it or --

4 QUESTION: I know, but they went there -- they
5 went there to arrest the man.

6 MR. DREEBEN: That's correct, Justice White.

7 QUESTION: And they thought they had probable
8 cause, and I guess they did.

9 MR. DREEBEN: Yes. I believe that they had
10 properly a probable cause to arrest him and they believe
11 that they had the authority to enter the house, because
12 the person who --

13 QUESTION: Without a warrant in order to make
14 the arrest.

15 MR. DREEBEN: That's correct, because it was a
16 consensual entry based on the authority of one who
17 appeared to have the ability to do that.

18 QUESTION: But the position you're taking is
19 that they could have gone in there without probable cause.
20 They could have gone in there just because they wanted to
21 look around the apartment.

22 MR. DREEBEN: Provided --

23 QUESTION: Since she -- since she let them in.

24 MR. DREEBEN: That's correct.

25 QUESTION: And you say on these facts, if they -

1 - even if -- even if there hadn't been the beating -- the
2 beating is really quite irrelevant, isn't it?

3 MR. DREEBEN: That's certainly not a necessary
4 pre-condition --

5 QUESTION: Right. So without the beating, if
6 they just wanted to snoop around the apartment, so long as
7 what happened here happened, they would have been able to
8 go in and look all around.

9 MR. DREEBEN: I see that my time has expired.
10 Thank you.

11 QUESTION: Thank you, Mr. Dreeben.

12 Mr. Reilley.

13 ORAL ARGUMENT OF JAMES W. REILLEY

14 ON BEHALF OF THE RESPONDENT

15 MR. REILLEY: Mr. Chief Justice and may it
16 please the Court:

17 When the Chicago police made the physical entry
18 without a search warrant into Mr. Rodriguez's apartment --

19 QUESTION: (Inaudible) search warrant?

20 MR. REILLEY: Without a search warrant. Without
21 a search warrant.

22 QUESTION: Search warrant to go in and arrest
23 him?

24 MR. REILLEY: Not to arrest him, no. But they
25 could not have gone in to arrest him. They could have

1 knocked on the door and if he answered the door, they
2 could have arrested him at the door.

3 QUESTION: Well, I know, but they --

4 MR. REILLEY: The Hill case --

5 QUESTION: -- they didn't need a search warrant
6 to go in -- go in the apartment to arrest him.

7 MR. REILLEY: No, they did not.

8 QUESTION: Which is why they went there.

9 MR. REILLEY: That's correct. But when they did
10 enter the apartment without a search warrant, with the key
11 -- and we're going to talk about the consent -- that did
12 trigger the Fourth Amendment and it obviously calls them
13 for the question of whether the search ensuing entry was
14 reasonable or whether it feel in one of the carefully
15 delineated exceptions to the warrant or arrest warrant
16 requirement.

17 In this case, the government chooses to argue
18 that it was based upon consent, which would require
19 voluntary consent by a person having common authority over
20 the premises. And I think it's obvious in this case that
21 the common authority or actual authority of Gail Fisher
22 did not exist.

23 Consent is really a waiver of a constitutional
24 right, and as we have been instructed in Matlock, the
25 normal situation of a consent would be the defendant

1 himself consenting. In Matlock, it would be a third-
2 party consent, which is what we have here.

3 So it would require the police to ask more
4 questions to determine if the third-party consenting has
5 actual common authority over the premises to be searched.
6 In this case, the consent or purported consent took place
7 off the premises, not at the residence where the ultimate
8 arrest and search took place.

9 QUESTION: Do you think the -- do you think that
10 the lady's consent would have been adequate while she was
11 living there?

12 MR. REILLEY: While she was living there?

13 QUESTION: Uh-huh.

14 MR. REILLEY: That question, of course, really
15 not in the record because we don't know when she moved
16 out. Well, we know she moved out on July 1, 1985. Prior
17 to that if she had been living there, and Mr. Rodriguez
18 had given her whatever authority it was he gave her, then
19 perhaps she could have consented in a limited fashion.

20 QUESTION: Well, she did have the key -- she did
21 have the key for a while anyway.

22 MR. REILLEY: She had a key for a while and then
23 the record reflects, I believe as Justice Scalia stated,
24 that she did indicate she stole it and the reason she
25 stole it is so she could get out of the apartment during

1 the times when they had arguments. Apparently he would
2 lock her in from the inside.

3 So she did have a key, but the key alone -- the
4 key without common actual authority is no different than a
5 sledgehammer. If she has a key but has no authority to
6 enter the premises for any purpose or for all purposes, it
7 might as well have been a sledgehammer and not a key.

8 QUESTION: Well, it's certainly different from
9 the standpoint of the objective appearances to the
10 officer.

11 MR. REILLEY: Yes, sir. That's correct. The
12 key, however, would dictate along with the scenario of
13 what happened at the scene of the confrontation with the
14 police about the battery that more questions should have
15 been asked. As the record reflects --

16 QUESTION: Well, if more questions had been
17 asked and she had been asked by the police whether she was
18 living there at the time and had authority to enter and
19 allow others to enter, and she said yes, yes, yes, I --
20 that's where I live and I have that authority, would it be
21 all right then for the police to enter?

22 MR. REILLEY: Well, I think what Your Honor --
23 you're suggesting, Justice O'Connor, is that if she lied
24 to them -- because we now know that the facts dictate she
25 did not -- if she lied to the police and carefully

1 structured her lie so that the police actually thought she
2 lived -- of course, her answers were different at the
3 scene -- she said "I used to live there."

4 But if she had not said that at all and had lied
5 completely, I think that would be the one rare exception
6 that doesn't exist and that I don't believe would happen
7 more often than maybe once every 20 years.

8 QUESTION: But the police could --

9 MR. REILLY: But the police would not --

10 QUESTION: -- act on the basis of -- of that
11 kind of information if it were objectively reasonable.

12 MR. REILLY: Well, if the -- if the lies took
13 place at her mother's house, Dorothy Jackson, and not at
14 Mr. Rodriguez's house, I still think the police would be
15 required to go further because she's not there. They
16 would have to ask, well, why are you here? Your children
17 are here. Why are your children here?

18 Obviously she was hostile in this case, as
19 opposed to Matlock. She was hostile. She had been beaten
20 up. She had bruises on her face. And I think the
21 hostility of that confrontation would dictate that the
22 police should go even further.

23 In Matlock, there was no hostility. It was on
24 the premises. The girlfriend of Mr. Matlock came to the
25 door in a bathrobe, as the Court will recall, with a baby

1 in her hand and said, I live upstairs with him and we
2 slept there last night, held herself out as his wife on
3 occasion. There is not question that was in fact common,
4 actual authority.

5 But the -- the lie situation, if -- again, given
6 the circumstances of this case, the police would still
7 have to go further into it to determine whether she was
8 lying or whether this was the truth.

9 QUESTION: I wonder if that's right, Mr.
10 Reilley, as a matter of Illinois law. Wasn't the rule in
11 the Shambley case in those subsequent cases that they
12 always inquired into the actual authority -- the person --
13 usually those are husband and wife cases.

14 MR. REILLEY: Yes, that's correct, Justice --

15 QUESTION: There are a lot of times where the
16 wife gave consent and they always asked whether she had
17 authority to do it.

18 MR. REILLEY: That's correct. The actual
19 authority.

20 QUESTION: Yeah.

21 MR. REILLEY: What I'm suggesting is the --
22 Justice O'Connor --

23 QUESTION: I mean, I'm -- I'm just wondering
24 whether you're correct in saying that the Illinois courts
25 in these cases would have -- would have allowed the entry

1 based on falsehoods told by the wife or the -- or the
2 woman who lived there.

3 MR. REILLEY: No. I -- I didn't say that.

4 QUESTION: Oh.

5 MR. REILLEY: What I'm saying -- Illinois courts
6 -- when the determination was made later, not on the
7 scene, that in fact that was a lie, the Illinois courts
8 have and consistently applied the doctrine of actual
9 authority.

10 QUESTION: They've always said actual authority
11 is the rule in Illinois.

12 MR. REILLEY: Yes, it is, and always has been.
13 But I -- I -- I think the only circumstance where one
14 could at least suggest that they understand why the police
15 acted the way they did is if someone does lie. Of course,
16 that is not the case before us. There is no indication
17 she lied.

18 And I would like to -- by the way, Justice
19 Marshall had asked the -- whether the language was in the
20 transcript that she stated she used to live there. I
21 filed a supplemental record with this Court which was
22 allowed and which was the preliminary hearing that took
23 place September 11, 1985, about two months after the
24 incident. In that transcript Officer Entress states when
25 asked the question, "Did you ask her where she lived," he

1 stated -- quote -- "she stated she used to live there."
2 That's in the supplemental record, page 16.

3 Later on, a year later at the suppression
4 hearing, Officer Entress was again on the stand and stated
5 in response to the same question, "she stated to me she
6 had been living there." That's on the joint appendix,
7 page 10.

8 I impeached him with that testimony and he did
9 indicate in questioning that, yes, he did say that a year
10 before when his memory was better of what she said. I
11 think, however, that both of those statements imply that
12 she didn't live there. One may be stronger than the
13 other, and I suggest that the first one is the correct
14 one. But in any event, they didn't ask further questions
15 like where do you live today. They never did do that.
16 But that is in the record.

17 Again I would like to go to the -- to the scene
18 of what occurred when Dorothy Jackson called the police.
19 Dorothy Jackson, of course, being also a deputy sheriff as
20 we learned. The police arrived at about 2:30 in the
21 afternoon on a Friday. It's not a court holiday. The
22 courts are open. Judges are available. Prosecutors are
23 available. And upon arrival, Officer Tenza, who did not
24 testify in these proceedings, is a beat officer in a
25 uniform and he questions Dorothy Jackson and Gail Fisher

1 for a few moments and then calls a tactical team as a
2 backup.

3 Tactical officers, among other chores, are drug
4 investigators. They come to the scene and speak to her
5 and I think this -- this is an important thing to note --
6 that the whole conversation between Officers Entress and
7 Gutierrez, the two tactical officers, and Gail Fisher and
8 her mother lasted between five and ten minutes.

9 Now, if we are going to talk about reasonable
10 police behavior, it would seem that if the conversation
11 only lasted five to ten minutes and they had to discuss
12 the battery, where the battery took place, and then, as
13 the Court will note, they brought up the question of
14 drugs.

15 And I suggest to the Court that the battery
16 arrest was not the reason that those two officers came
17 there. Something happened in the conversation with
18 Dorothy Jackson, the mother, and Gail Fisher. We know
19 that now because Dorothy Jackson testified. The police
20 said, "I heard about Rodriguez before. Isn't he involved
21 in drugs?"

22 And then Entress asked Gail Fisher, "Doesn't he
23 have drugs in the house?" I think he used a foul word and
24 she didn't want to repeat that word but she used the word
25 drugs. Didn't he have drugs in the house?

1 Officer Entress, curiously enough, answers that
2 Gail Fisher did not respond. But Dorothy Jackson, the
3 mother, the police officer mother, says, no, my daughter
4 said yes he has drugs in the house, and I concurred and
5 suggested that there were.

6 Now, I -- I would suggest to the Court that at
7 that point we now have a battery situation, but now it has
8 arisen to officers' appearance that there may be drugs
9 here.

10 I suggest that if they had pursued -- at this
11 point they still don't have authority -- they're more
12 concerned about that -- they're not questioning any
13 further with regard -- during that five to ten minutes.
14 As a matter of fact, even Officer Entress made a
15 statement, and I --

16 QUESTION: Mr. Reilley --

17 MR. REILLEY: Yes.

18 QUESTION: -- is this part of your argument
19 devoted to the proposition that, assuming that apparent
20 authority or reasonable belief objectively is enough, that
21 wasn't present here?

22 MR. REILLEY: This argument, Mr. Chief Justice,
23 is directed at the fact that the police officers did not
24 do the necessary work they should have done in a
25 nonexigent circumstance on the scene to obtain valid

1 actual authority to consent.

2 QUESTION: Well, but I don't -- I don't think
3 that the -- the petitioner is really contending that there
4 was actually authority to consent. I mean, the
5 proposition they raise in their petition for certiorari is
6 good faith reliance on a third-party's apparent authority.

7 MR. REILLEY: Yes. So, all right. If the -- if
8 there -- if they concede, which they obviously do, and all
9 the lower courts have found no actual authority existed,
10 my suggestion is that the circumstances here and what the
11 police were doing do not even give rise to the question
12 that they reasonably believed authority existed, because
13 they weren't concentrating on that.

14 They -- they didn't ask the right questions. It
15 would have been in a situation where there was no reason
16 to rush, it was three-and-a-half hours later that they
17 arrived there. The record reflects this beating took
18 place at 11:00 n the morning, by one of the officers, and
19 this is now 2:30. So there's no -- there's no exigency,
20 there's no danger of flight. In fact, she said Rodriguez
21 is asleep in the apartment.

22 They could have spent another five or ten
23 minutes asking the right questions. And then they -- if
24 they got lies, then, of course, the Illinois courts would
25 not approve that, but they could have found out probably

1 that Gail Fisher would have said no, I don't live there, I
2 moved out three weeks ago.

3 And if they had inquired of that, then they
4 would not have gone in with any type of consent and they
5 could have gone and done what they should have done and
6 that is to either arrest him at the door, obtain an arrest
7 warrant, or if they pursued the line of questioning
8 regarding the drugs, I suggest that under Gates, they
9 perhaps could have applied for a search warrant and with
10 the totality test of Gates perhaps would have gotten it.

11 QUESTION: (Inaudible) doing there that day?

12 MR. REILLEY: I'm sorry, Justice White. I
13 didn't hear you.

14 QUESTION: If she has moved out, what was she
15 doing over there that day? I suppose that's -- that is a
16 fact to be taken into consideration.

17 MR. REILLEY: Well, according to the record she
18 testified that between three to five times during that
19 three-week period, she had gone over there and came home
20 late at night according to her mother --

21 QUESTION: That's what she testified to.

22 MR. REILLEY: Yes. Yes.

23 QUESTION: But --

24 MR. REILLEY: That she did stay there sometimes.

25 QUESTION: Wasn't that -- just the fact that she

1 had been beaten up in that apartment that day, wasn't that
2 something, a fact that the officers were entitled to
3 consider about her in -- in terms of her authority?

4 MR. REILLEY: The fact that she was beaten up
5 would indicate, at best, that she was there. She was
6 perhaps a visitor. We know that if she was beaten up
7 there she was a visitor or a guest or an invitee but not
8 necessarily a person with common authority for general
9 purposes to search.

10 QUESTION: But it's just a fact.

11 MR. REILLEY: They were still friendly. There's
12 no question about that, friendly to the extent that he
13 beat up as often as he did. But she was there and she
14 came home and I recalled she said to her mother, "We have
15 to talk."

16 The suggestion, by the way, in one of the briefs
17 for the government that she was hysterical is simply not
18 supported by any of the evidence in the record because
19 there's no evidence of it at all. She was calmly there
20 talking to her mother, who called the police, and then the
21 police arrived.

22 QUESTION: Well, we're going -- I -- I take it
23 this discussion goes to whether or not there was a Fourth
24 Amendment violation.

25 MR. REILLEY: There's no question in our minds

1 there was a Fourth Amendment violation. The -- the
2 crossing of the threshold of that door without any
3 authority at all is certainly not a reasonable reliance
4 authority by these officers.

5 QUESTION: Well, suppose it was -- suppose we
6 agree with you that it was, does that determine the
7 admissibility?

8 MR. REILLEY: Well, I think Your Honor is asking
9 whether or not the exclusionary rule should apply in this
10 circumstance. I would suggest that the cases that we have
11 been instructed by this Court suggest that under Leon or
12 under Maryland v. Garrison that (inaudible) --

13 QUESTION: But does that --

14 MR. REILLEY: -- it should apply in this case.

15 QUESTION: Is that issue still open? Let's
16 suppose we agree with you there was a Fourth Amendment
17 violation, is the case over or is admissibility still to
18 be considered on some other ground?

19 MR. REILLEY: I don't what other ground except
20 what the government --

21 QUESTION: Leon.

22 MR. REILLEY: Under Leon? All right. The -- I
23 would suggest that the purpose of the rule, as this Court
24 has said, is to deter unlawful police conduct. I cannot
25 think of a more precise case --

1 QUESTION: Well, that isn't my --

2 MR. REILLEY: -- for this is the -- this is the
3 rule --

4 QUESTION: -- that isn't my question, whether
5 Leon should apply. But is the -- is the issue of whether
6 Leon applies still open? Has that ever been determined in
7 this case?

8 MR. REILLEY: The government, as far as I know,
9 has never raised that issue whether Leon applies. The
10 lower court -- in the trial court, as I -- as I recollect
11 for certain, the government argued that there was actual
12 authority. And then, we, of course, argued that there was
13 not and that the Illinois law is clear on that point.

14 It was Judge Schreier in his comments inviting
15 counsel for both sides to discuss whether the doctrine of
16 apparent authority, using that word loosely perhaps --

17 QUESTION: Yes?

18 MR. REILLEY: -- but apparent authority applies
19 or whether there should be some exception to that. He
20 ruled that there was not. He didn't get into Leon or any
21 exception. The appellate court, the intermediate court,
22 in an unpublished opinion, did not discuss the Leon
23 exception.

24 QUESTION: Did the state argue Leon --

25 MR. REILLEY: They did not.

1 QUESTION: -- in the appellate court?

2 MR. REILLEY: They did not. It was not
3 mentioned, and the court cited --

4 QUESTION: Was it argued in the trial court?

5 MR. REILLEY: It was not.

6 The appellate court cited Matlock and cited
7 perhaps six or seven Illinois state court cases on the
8 subject of actual authority. So the issue of Leon was
9 never raised at any level.

10 I think it would be appropriate to distinguish,
11 as the Solicitor talked about, Maryland v. Garrison. As
12 this Court is aware, Garrison involved a search warrant,
13 where the police had done an extensive investigation prior
14 to obtaining the search warrant to determine who resided
15 on the third floor of that building.

16 They went to the building itself and checked the
17 description of the building, which matched the
18 informant's. They went to the gas and electric company to
19 see if there was anyone other than McWebb, the proposed
20 defendant, living on the third floor. They got a negative
21 answer.

22 They checked with police records and found that
23 the address and physical description matched the
24 description of the informant. This is the work that they
25 did. When the warrant was executed, of course, we know

1 that they found two apartments on the third floor and then
2 made a mistake.

3 I suggest that that's relevant here because the
4 officers here had certainly ample time to not only ask the
5 right questions, but to do a little further checking.
6 They could have -- they could have checked when they got
7 over there to see if -- who was on the doorbell. They
8 could have asked the landlord, perhaps, who was on the
9 lease. I mean -- or make a phone call or ask the right
10 questions.

11 They had the opportunity to ask the mother, who
12 moved her daughter out three weeks before -- and her
13 children out. And Judge Schreier found that to be very
14 convincing -- that her children were present at all times
15 -- in fact were there that morning. Dorothy Jackson had
16 to have a friend come over to babysit the two young
17 children while she and Gail Fisher were told by the police
18 to go back to Mr. Rodriguez's apartment. If she wanted to
19 press charges for battery, she had open the door with the
20 key. She was misled and told that.

21 That, of course, was not true. They did not
22 need her for that purpose. If they wanted to arrest him
23 for battery, which they certainly could have, there would
24 have been a different way to do it and a proper way to do
25 it. Either by, under Hill, knocking, when answers to

1 arrest him. Or obtaining an arrest warrant, which was
2 certainly proper. Or even under Illinois law, they could
3 have sent him a summons in the mail to appear in court for
4 at that time a misdemeanor. And I note that no felony
5 battery charge was ever filed against him.

6 I suggest to this Court that in Payton the Court
7 stated that the magistrate's determination of probably
8 cause will protect the citizen from the zealous officer.
9 I suggest these were zealous officers but the pretext of
10 their going to Rodriguez's apartment was to look for
11 drugs.

12 The record certainly supports that assumption.
13 And again, I suggest that if they wanted to that, they
14 could have avoided all of this problem we have now with
15 this case. And they could have obtained, or at least
16 attempted to obtain a search warrant, if they had pursued
17 it correctly. And I am certain that that warrant probably
18 would have been upheld.

19 I hypothetically suggest to you that if the --
20 Gail Fisher had been charged with possession of the
21 cocaine in this house and the marijuana, and she moved to
22 suppress the evidence, that the government would be
23 standing here suggesting to you that she didn't have
24 standing to object to that search because under the facts
25 as we know, she probably did not.

1 She didn't live there. She had a key, but
2 again, the key without authority is meaningless. And I
3 would suggest that no general authority for common
4 purposes that she probably would not have standing, and I
5 believe standing is a mirror of consent. The same
6 elements would apply, in my judgment.

7 Judge Schreier specifically found that -- and I
8 think these findings are important, they were upheld by
9 our intermediate appellate court and, of course, the
10 Illinois Supreme Court refused to review it -- that Gail
11 Fisher was not a usual resident, let alone an exclusive
12 resident; that she was rather infrequent a visitor, a
13 guest or an invitee; that she did not contribute to the
14 rent; that she was not on the lease -- the fact of her
15 having the key was not a substantial piece of information
16 to Judge Schreier; that she was not allowed to be in the
17 apartment when he was not there; that she was like a guest
18 who only had access to the apartment when the host was
19 present.

20 QUESTION: Of course, Judge Schreier was
21 discussing the thing in terms of actual authority, wasn't
22 he?

23 MR. REILLEY: Yes.

24 QUESTION: Because that's all Illinois law
25 allowed.

1 MR. REILLEY: Yes, Mr. Chief Justice, that's
2 correct.

3 QUESTION: And if -- if we were to find that
4 this apparent authority -- or Hill, Garrison, that sort of
5 thing that you have been discussing -- maybe these facts
6 would have different significance.

7 MR. REILLEY: Well, I think he was -- obviously,
8 he was discussing it in terms of Illinois law and he so
9 stated. That is for sure.

10 But I think the factual findings are things
11 that, in addition to his feeling about Illinois law, he's
12 also indicating what the police officers didn't do, what
13 they didn't learn from this. They could have found out
14 some of these things. Maybe not in precise a detail as a
15 lawyer or a judge may ask, but certainly, the collective
16 judgment of those officers had to be at least 20 to 25
17 years of experience.

18 And if we're going to take out the buffer of a
19 -- in Leon, of a judge signing a warrant or the buffer in
20 Krull of a legislature passing an ordinance, then we
21 certainly must adopt some standard that the police should
22 not go below in terms of asking the right questions.

23 They certainly didn't ask any questions in this
24 case, which would bring them to -- even be able to argue
25 to this Court that they had a reasonable belief that there

1 was authority, especially in view of the red flags that
2 were noted to them at the scene. The hostility, the
3 beating, off the premises where she allegedly consented,
4 the fact that she said "I used to live there," her
5 children being present, her clothing being present.

6 All those red flags and the police didn't
7 inquire. I can't believe they could stand here and
8 suggest to this Court that they had a reasonable belief
9 based upon reasonable conduct. Their conduct was not
10 reasonable.

11 QUESTION: Did the police know at the site or at
12 the scene that some of her belongings were still in the
13 apartment?

14 MR. REILLEY: They didn't inquire about the
15 belongings at the scene.

16 QUESTION: Well, did they know it? Did she ever
17 suggest that or not?

18 MR. REILLEY: No. In fact, the --

19 QUESTION: This -- this just came out at the
20 suppression hearing?

21 MR. REILLEY: It came out at the hearing,
22 Justice White, that she had some of her heavy belongings
23 -- her stove, her refrigerator, whatever -- where left
24 there either on loan or being stored. But the court
25 didn't feel in its findings that that was even important.

1 Judge Schreier made no findings concerning that. He was
2 more, I think, concerned with the fact that she moved her
3 children out and her clothing.

4 I would suggest that the doctrine of suppression
5 should apply here because the officers' conduct, the
6 standard that the state suggests, simply would not apply
7 to this set of circumstances. The police did not act in
8 any reasonable good faith and their conduct would seem to
9 be a direct affront to the Fourth Amendment.

10 It would seem that suppression here would be
11 direct to the police, would be a direct line from
12 Washington to the police departments, who certainly are
13 educated by prosecutors. They have seminars. They knew
14 about consent because they asked for it in this case, or
15 at least thought they were asking for it. So they must
16 have know about the Schneckloth case, or maybe not the
17 name, but they knew the doctrine.

18 So there is no doubt that the theories of this
19 Court get down to the police on the street. And if
20 suppression is upheld in this case, they'll learn that the
21 next time they have a situation like this, they should ask
22 the right questions and perhaps later on some other rule
23 might apply.

24 I would respectfully ask this Court to uphold
25 the decision of the Illinois appellate court.

1 QUESTION: Thank you, Mr. Reilley.

2 Mr. Claps, do you have rebuttal?

3 MR. CLAPS: Yes, Justice -- Chief Justice.

4 QUESTION: You have four minutes remaining.

5 REBUTTAL ARGUMENT OF JOSEPH CLAPS

6 ON BEHALF OF THE PETITIONER

7 MR. CLAPS: I want to first say that the
8 statement by counsel, although I'm sure it wasn't on
9 purpose, is not correct about what was argued before the
10 trial judge in the suppression hearing.

11 And although it's not in the joint appendix, I
12 believe it is in the record that the Court has on page
13 137, the assistant state's attorney, Gibbons, in arguing
14 to the judge said, "In that case, Judge, the reason for
15 applying the exclusionary rule in such instances of good
16 faith relied upon the police" -- "relied upon by the
17 police, it would do little in terms of deterring this
18 conduct and future protections afforded by the Fourth
19 Amendment." And he goes on to cite United States v. Leon
20 and Massachusetts v. Sheppard.

21 So the exclusionary concept was argued before
22 the trial judge and it was in our appellate brief -- not
23 Leon, but we cited United States v. Calandra and stated
24 the purpose of the exclusionary rule would not be served
25 by the suppression of evidence. So we did make that

1 argument in the appellate court and the trial court.

2 And although we didn't put it directly in the
3 question for review in the cert. petition, we did in the
4 body of the cert. petition cite Leon and argue that its
5 the -- invoke the exclusionary rule would not -- would not
6 be a purpose here to deter any police misconduct. And to
7 suggest to this Court that it would deter police
8 misconduct, I think is not true. Where they reasonably,
9 under the circumstances -- an objective test in a
10 balancing -- where they act based on the information
11 before them, the Fourth Amendment should not be invoked.

12 It's not true that the police officers were not
13 aware that she had property there. In the testimony of
14 the police officer Entress, he said she told him that her
15 items of personnel -- personal property were still there.

16 And in terms of what counsel argues to you about
17 the reverse of this case -- that is, a privacy interest by
18 Gail Fisher. She would have a privacy interest. You
19 don't have just have one place, one premise, one piece of
20 property that you can invoke a privacy interest in and
21 therefore seek the protection of the Fourth Amendment. It
22 is very possible that -- in fact, I believe it's true that
23 Gail Fisher would have had a privacy interest in that
24 apartment on California Avenue to have sought the
25 protection of the Fourth Amendment, just as she would

1 perhaps in the apartment that she was staying in.

2 She was -- there was testimony she at that
3 apartment every day. She stayed there a few nights, but
4 she was there every single day. If there was anybody that
5 was excluded from that apartment during the time period,
6 it was her children, not her.

7 So her privacy interest was still there, and if
8 she had a privacy interest there, then certainly under the
9 cases that this Court have found, she would have the
10 ability to give consent or at least, in terms of the
11 police conduct, for them to rely on her permission, her
12 consent to allow the entry for the arrest.

13 This isn't a case about drugs. This is a case
14 about the police acting immediately to arrest a person who
15 committed a brutal, aggravated battery, and what was found
16 incident to that lawful entry should not be suppressed.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Claps.

18 The case is submitted.

19 (Whereupon, at 11:58 a.m., the case in the
20 above-entitled matter was submitted.)

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CERTIFICATION

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

No. 88-2018 - ILLINOIS, Petitioner V. EDWARD RODRIGUEZ

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

BY *Lona M. May*

(REPORTER)

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