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"Wrong But Reasonable": The Fourth Amendment Particularity Requirement After United States v. Leon

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"WRONG BUT REASONABLE": THE FOURTH AMENDMENT PARTICULARITY REQUIREMENT AFTER *UNITED STATES V. LEON*

I. Introduction

The fourth amendment to the United States Constitution requires that warrants describe with particularity the places to be searched and the things to be seized.[1] The insertion of this clause into the Constitution stemmed from the Revolutionary War era antipathy toward highly intrusive general searches.[2] The particularity clause guaranteed that government agents could no longer rely on indiscriminate or overbroad warrants to engage in "general, exploratory rummaging in a person's belongings."[3] Since 1914, the federal remedy for violations of this particularity requirement has been the exclu-

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1. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*" U.S. CONST. amend. IV (emphasis added).

2. Boyd v. United States, 116 U.S. 616, 624-27 (1886); *see also* Maryland v. Garrison, 107 S. Ct. 1013, 1017 (1987); Marron v. United States, 275 U.S. 192, 195-96 (1927); Weeks v. United States, 232 U.S. 383, 390 (1914). The colonial aversion to general searches arose from the enormous invasions to possessory and privacy interests occasioned by colonial "writs of assistance." Modeled after the general warrants used by the British domestically to search for evidence of sedition, these writs gave the government virtually unfettered authority to search for and seize smuggled goods. *Boyd*, 116 U.S. at 624-25. In response to such practices, the framers drafted the fourth amendment to "deny to government . . . desired means, efficient means, and means that must inevitably appear from time to time . . . to be the absolutely necessary means, for government to obtain legitimate and laudable objectives." Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974); *see also* Galloway, *Fourth Amendment Ban on General Searches and Seizures*, 10 SEARCH & SEIZURE L. REP. 141, 141-48 (1983) [hereinafter Galloway].

3. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). The Supreme Court effectively summarized the purpose of the particularity clause in *Marron*: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron*, 275 U.S. at 196; *see also* Galloway, *supra* note 2, at 144.

sionary rule, which requires the exclusion of unlawfully obtained evidence from use at trial.[4]

The Supreme Court created a "good-faith exception" to the fourth amendment exclusionary rule in *United States v. Leon*.[5] Under this exception, the exclusionary rule does not apply when law enforcement officers have acted in objective "reasonable reliance"[6] on a warrant subsequently found to be invalid.[7] The purpose of the exclusionary rule is to deter law enforcement officers from engaging in unlawful police practices.[8] The Court reasoned that it is therefore both impractical and illogical to impose the costs of exclusion on officers who have not engaged in the type of unreasonable behavior that the exclusionary rule was designed to prevent.[9]

In *Leon*, the Supreme Court held that the suppression of evidence will continue to be appropriate "only if it can be said that the law enforcement officer had knowledge, *or may properly be charged with knowledge*, that the search was unconstitutional under the

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4. *See* Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court extended the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

5. 468 U.S. 897 (1984). Courts used the term "good-faith exception" prior to *Leon*. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 255 (1983). Currently, under *Leon*, the terms "reasonable reliance" and "good-faith" exception are used interchangeably. United States v. Savoca, 761 F.2d 292, 294 n.1 (6th Cir.), *cert. denied*, 474 U.S. 852 (1985).

6. *Leon*, 468 U.S. at 922.

7. *Id.*

8. *See, e.g., id.* at 906; United States v. Calandra, 414 U.S. 338, 347 (1974); Elkins v. United States, 364 U.S. 206, 217 (1960). *Leon* concluded that because the exclusion of evidence can have no deterrent effect on the issuing magistrate, the exclusionary rule should never apply when the magistrate is the source of the warrant's illegality. *Leon*, 468 U.S. at 916-17. The good-faith exception also can be justified on a cost-benefit analysis, wherein the court determines that the cost of the loss of probative evidence would outweigh any minimal benefit derived from applying the exclusionary rule when officers have acted reasonably. *Id.* at 922.

The Court has justifed the exclusionary rule as a personal constitutional right of the aggrieved party. *See, e.g., Leon*, 468 U.S. at 934-38 (Brennan, J., dissenting); *Mapp*, 367 U.S. at 655-57; *Weeks*, 232 U.S. at 393, 398. One commentator has observed that by extending the exclusionary rule to the states via the 14th amendment in *Mapp*, the Supreme Court acknowledged the rule as an "indispensable element of individual fourth amendment protections." Bloom, United States v. Leon *And Its Ramifications*, 56 U. COLO. L. REV. 247, 249 (1985) [hereinafter Bloom]. Nevertheless, the deterrence rationale is the approach currently favored by the Court. *Leon*, 468 U.S. at 916; *Calandra*, 414 U.S. at 347. Reliance on any other theory behind the exclusionary rule would render a discussion of the good-faith exception unnecessary because no other policy justifies admission of unconstitutionally obtained evidence.

9. United States v. Leon, 468 U.S. 897, 918-22 (1984).

[f]ourth [a]mendment."[10] The Court described four situations in which it would be reasonable to charge an officer with knowledge that a search was illegal.[11] One such situation is when "a warrant [is] . . . so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."[12] The first case to deal with the application of the good-faith exception to a particularity-defective warrant was *Massachusetts v. Sheppard*,[13] decided the same day as *Leon*.

This Note analyzes the application of the good-faith exception to particularity violations. The question compelled by *Leon* and *Sheppard* is when, if ever, a particularity-defective warrant will sustain an officer's "reasonable reliance."[14] Part II of the Note briefly discusses how "particularity" traditionally has been assessed under the fourth amendment. Part III examines the Supreme Court's holding in *Massachusetts v. Sheppard*, and contrasts several circuit court cases that have applied *Sheppard*'s "objectively reasonable" standard of good faith to warrants involving particularity defects. Part IV then compares these cases with a recent Second Circuit opinion, *United States v. Buck*,[15] which utilized a somewhat different approach in finding reasonable reliance. Finally, the Note concludes that the approach taken by the court in *Buck* is preferable because it encourages courts to establish clearer standards for the particularity of warrants under the fourth amendment.

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10. *Id.* at 919 (quoting United States v. Peltier, 422 U.S. 531, 542 (1975)) (emphasis added).

11. *See Leon*, 468 U.S. at 923.

12. *Id.* The Court noted three other situations, not specifically addressed in this Note, in which the good-faith exception does not apply: (1) when the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit; (2) when the magistrate has wholly abandoned his judicial role and failed to perform a neutral and detached function; and (3) when the warrant is so lacking in indicia of probable cause as to render official belief in it unreasonable. *Id.* For a general discussion of the holding in *Leon*, see LaFave, *"The Seductive Call Of Expediency": United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895 [hereinafter LaFave].

13. 468 U.S. 981 (1984).

14. *Leon*, 468 U.S. at 922-23; *Sheppard*, 468 U.S. at 988. Chief Judge Patricia Wald of the Court of Appeals for the District of Columbia has noted the "semantic paradox in making courts decide—as *Leon* will require them to do—whether the police behaved reasonably in conducting an unreasonable search." Wald, *The Unreasonable Reasonableness Test for Fourth Amendment Searches*, 4 CRIM. JUST. ETHICS 2, 2 (1985) [hereinafter Wald].

15. 813 F.2d 588 (2d Cir.), *cert. denied*, 108 S. Ct. 167 (1987).

II. Traditional Fourth Amendment Standards for Particularity

The courts address the question of whether a warrant is particular enough under the fourth amendment on a case-by-case basis.[16] The ultimate inquiry, however, always is whether the terms of the warrant limited the discretion of the officer who executed it.[17] This ensures that an unconstitutional general search did not occur.[18] Thus, courts traditionally have considered a variety of circumstantial factors, in addition to the actual language of the warrant itself, in order to assess a warrant's compliance with the fourth amendment particularity requirement.[19] These factors include: (1) whether probable cause existed to support seizure of or a search for all items or places described in the warrant;[20] (2) whether, in light of the nature of the crime[21] and of the evidence sought,[22] the warrant contains objective standards by which searchers can differentiate items that can be seized from those that cannot;[23] (3) whether the warrant contains sufficient information to preclude a mistaken search of the wrong premises;[24] and (4) whether certain items or places could have been

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16. *See* United States v. Johnson, 541 F.2d 1311, 1314 (8th Cir. 1976).

17. Marron v. United States, 275 U.S. 192, 196 (1927).

18. *See supra* notes 2-3 and accompanying text.

19. *See generally* 2 W. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 4.5-4.6, at 206-60 (1978 & Supp. 1987) [hereinafter LAFAVE, TREATISE].

20. Maryland v. Garrison, 107 S. Ct. 1013, 1017 (1987) (quoting United States v. Ross, 456 U.S. 798, 824 (1982)) ("the scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found' "); United States v. Hinton, 219 F.2d 324, 325 (7th Cir. 1955) ("[t]he command to search can never include more than is covered by the showing of probable cause to search"); *see also* Andresen v. Maryland, 427 U.S. 463, 481 n.10 (1976); Steele v. United States, 267 U.S. 498 (1925); United States v. Bentley, 825 F.2d 1104, 1110 (7th Cir.), *cert. denied*, 108 S. Ct. 240 (1987); *In re* Grand Jury Proceedings, 716 F.2d 493 (8th Cir. 1983); United States v. Offices Known as 50 State Distrib. Co., 708 F.2d 1371, 1374 (9th Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984); United States v. Cortellesso, 601 F.2d 28, 32 (1st Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

21. *See, e.g.*, United States v. Weinstein, 762 F.2d 1522, 1532 n.4 (11th Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986); *50 State*, 708 F.2d at 1374; United States v. Wuagneux, 683 F.2d 1343, 1349 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); United States v. Hillyard, 677 F.2d 1336, 1340 (9th Cir. 1982); *Cortellesso*, 601 F.2d at 32.

22. United States v. Cook, 657 F.2d 730, 733 (5th Cir.), *reh'g denied*, 664 F.2d 289 (1981).

23. *Id.* at 733 ("warrant must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized"); *see also Wuagneux*, 683 F.2d at 1348.

24. *Steele*, 267 U.S. at 503 (description must be "such that the officer with a

more particularly described in light of the information available at the time.[25] In addition, an inadequacy in the warrant's language may be cured by prior experience or personal knowledge on the part of the executing officers[26] or by the existence of a more detailed affidavit attached to or incorporated into the warrant.[27]

Courts customarily apply these general criteria "with a practical margin of flexibility."[28] The courts tolerate some degree of ambiguity in a warrant's descriptiveness if law enforcement officers did the

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search warrant can with reasonable effort ascertain and identify the place intended"). The determining factor as to whether the premises to be searched are described adequately is:

> [N]ot whether the description given is technically accurate in every detail but rather whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched which is not the one intended to be searched.

United States v. Darensbourg, 520 F.2d 985, 987 (5th Cir. 1975); *see also* United States v. Ellison, 793 F.2d 942, 947 (8th Cir.), *cert. denied*, 107 S. Ct. 415 (1986); United States v. Gitcho, 601 F.2d 369, 371 (8th Cir.), *cert. denied*, 444 U.S. 871 (1979); United States v. Prout, 526 F.2d 380, 387-88 (5th Cir.), *cert. denied*, 429 U.S. 840 (1976).

25. *See* Maryland v. Garrison, 107 S. Ct. 1013, 1017 (1987); United States v. Young, 745 F.2d 733, 759 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); United States v. Offices Known as 50 State Distrib. Co., 708 F.2d 1371, 1374 (9th Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984); United States v. Cortellesso, 601 F.2d 28, 32 (1st Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980); United States v. Johnson, 541 F.2d 1311, 1314 (8th Cir. 1976).

26. *See* United States v. Bonner, 808 F.2d 864, 865-66 (1st Cir. 1986), *cert. denied*, 107 S. Ct. 1632 (1987); United States v. Burke, 784 F.2d 1090, 1093 (11th Cir.), *cert. denied*, 476 U.S. 1174 (1986); United States v. Turner, 770 F.2d 1508, 1511 (9th Cir. 1985), *cert. denied*, 475 U.S. 1026 (1986); United States v. McCain, 677 F.2d 657 (8th Cir. 1982). In evaluating the sufficiency of a description, courts may consider the coincidence of an officer both swearing the affidavit and executing the warrant, because the affiant officer usually has greater knowledge about the proper scope of the warrant. State v. Sapp, 110 Idaho 153, 155, 715 P.2d 366, 368 (Ct. App. 1986).

27. *See, e.g.*, United States v. Fannin, 817 F.2d 1379, 1383 (9th Cir. 1987); United States v. Hayes, 794 F.2d 1348, 1354-55 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1289 (1987); *50 State*, 708 F.2d at 1375; United States v. Hillyard, 677 F.2d 1336, 1340 (9th Cir. 1982). *But see* United States v. Wuagnuex, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982) (when agents had prior opportunity to read affidavit and brought it to search, requirement that affidavit be incorporated and attached is flexible), *cert. denied*, 464 U.S. 814 (1983).

28. *Wuagnuex*, 683 F.2d at 1349. The fourth amendment does not require that legal descriptions possess the same degree of detail as would be necessary in property transactions; warrants are sufficiently descriptive when they "provide reasonable guidance to the exercise of informed discretion in the officer executing the warrant." United States v. Faul, 748 F.2d 1204, 1219 (8th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *see also Ellison*, 793 F.2d at 947.

best they reasonably could have done under the circumstances.[29] For instance, police must have acquired all the descriptive facts that a reasonable investigation would be expected to uncover,[30] and have made sure that all those facts were included in the warrant.[31]

A. Descriptions of Places

Warrants authorizing a search of a place must contain a description sufficient to prevent a search of the wrong premises.[32] Particularity as applied to a place refers to a single living unit or residence.[33] When a building contains more than one occupancy unit, the warrant must describe the particular units or subunits for which there is probable cause to search, unless the officers could not possibly have detected or known of the building's multi-occupancy character beforehand.[34]

In *Maryland v. Garrison*,[35] the Supreme Court upheld the constitutionality of a search conducted pursuant to a warrant that authorized a search of "the premises known as 2036 Park Avenue third floor apartment."[36] Although there actually were two separate apartments on the third floor, all of the information reasonably available to the police at the time they applied for the warrant indicated that the sole occupant of the third floor was Lawrence McWebb, whose apartment was the legitimate object of the search.[37] Thus, despite the overbreadth of the warrant's description and the resulting search of an apartment other than McWebb's, the court nevertheless held that the search did not violate the fourth amendment.[38]

A warrant that contains an incorrect street address will not necessarily render the entire warrant invalid.[39] This is because there are

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29. United States v. Young, 745 F.2d 733, 759 (2d Cir. 1984).
30. *Id.*
31. *Id.*; *see also* LAFAVE, TREATISE, *supra* note 19, § 4.6(a), at 238.
32. *See supra* note 24 and accompanying text.
33. United States v. Hinton, 219 F.2d 324, 326 (7th Cir. 1955).
34. United States v. Parmenter, 531 F. Supp. 975, 978-79 (D. Mass. 1982).
35. 107 S. Ct. 1013 (1987).
36. *Id.* at 1015.
37. *Id.* at 1015, 1018-19.
38. *Id.* at 1019. The Court observed that any knowledge, acquired after the officers obtained the warrant, regarding the possibility that there was more than one apartment on the third floor could have no bearing on whether the warrant was valid as originally issued. *See id.* at 1017.
39. *See, e.g.*, United States v. Burke, 784 F.2d 1090, 1092-93 (11th Cir.), *cert. denied*, 476 U.S. 1174 (1986); United States v. Figueroa, 720 F.2d 1239, 1243 n.5 (11th Cir. 1983), *reh'g denied*, 726 F.2d 755 (1984); United States v. Melancon, 462 F.2d 82, 94 (5th Cir.), *cert. denied*, 409 U.S. 1038 (1972).

a number of other factors that can cure such a defect so as to ensure that the correct place is actually the one searched. These supplementary factors include: (1) a highly particular description in the warrant of the place to be searched;[40] (2) an address in the warrant reasonably descriptive of the location intended;[41] (3) surveillance of the premises prior to the search;[42] and (4) execution of the warrant by an officer who had participated in applying for the warrant and who personally knew which premises was the one intended to be searched.[43]

The presence of any or all of these factors provides objective guidance as to the lawful scope of the search,[44] thereby enabling the search to comply with the fourth amendment requirement that the search be limited to the place actually intended.[45] Thus, in *United States v. Burke*,[46] the Eleventh Circuit held that a search of an apartment for stolen payroll checks did not violate the fourth amendment, despite the fact that the affidavit and the warrant each authorized a search of apartment 840 at "[thirty-eight] Throop Street."[47] Brenda Burke actually lived in apartment 840 at "[forty-eight] Troup Street," which was part of a housing project.[48] This defect did not invalidate the warrant because, as the search progressed, the executing officer was directed to the correct apartment by the officer who originally applied for the warrant, and who in turn had been shown the location of the apartment by an informant.[49] Furthermore, no "Throop Street" existed in Atlanta, and there was only one apartment 840 in the entire housing project.[50] Finally, the warrant contained a detailed physical description of the facade of the apartment, thus ensuring that the officers would locate the correct premises despite the defect in the warrant.[51]

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40. United States v. Turner, 770 F.2d 1508, 1511 (9th Cir. 1985), *cert. denied*, 475 U.S. 1026 (1986).

41. *Id.*

42. *Id.*

43. *Burke*, 784 F.2d at 1092-93. *Burke* is a post-*Leon* case in which a challenged warrant was declared constitutional. The *Burke* court held that in evaluating the effect of an incorrect street address, a court may consider the personal knowledge of the executing officer, even if that knowledge is not reflected in either the warrant or the affidavit. *Id.* at 1093.

44. *See* LAFAVE, TREATISE, *supra* note 19, § 4.5(a), at 208-15.

45. *See supra* note 24 and accompanying text.

46. 784 F.2d 1090 (11th Cir.), *cert. denied*, 476 U.S. 1174 (1986).

47. *Id.* at 1091-93.

48. *Id.*

49. *Id.* at 1091-92.

50. *Id.* at 1092.

51. *Id.* at 1092-93. Courts have upheld searches in similar instances: (1) where

B. Descriptions of Property

1. Intrinsic Limitations on the Warrant

The constitutional requirements for the description of the property to be seized also are liberally applied.[52] All-inclusive "catch-all" terms used to authorize the seizure of a broad category of property may be saved from unconstitutional overbreadth by the use of limiting language or references.[53] For instance, the Supreme Court has held that the descriptive phrase, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown,"[54] did not render a warrant unconstitutional despite its "catch-all" tail. The phrase had to be read in the context of the earlier portions of the warrant, in which the crime was fully described and the targeted property listed.[55] Thus, even if certain phrases by themselves would be too general, a search will not be constitutionally infirm as long as its lawful scope can be understood from a reading of the warrant as a whole.[56]

Reference in a warrant to a crime by statute may also limit the scope of the search.[57] The named statute, however, must specifically

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one part of the description was inaccurate, but the remainder absolutely identified the premises, United States v. Shropshire, 498 F.2d 137 (6th Cir. 1974), *cert. dismissed*, 420 U.S. 901 (1975); (2) where the premises to be searched adjoined those described and both were under the defendant's control, United States v. Melancon, 462 F.2d 82 (5th Cir.), *cert. denied*, 409 U.S. 1038 (1972); and (3) where an incorrect address which was reasonably close to the location intended did not exist, making a search of the wrong place impossible and making a search of the right place likely, United States v. Gitcho, 601 F.2d 369 (8th Cir.), *cert. denied*, 444 U.S. 871 (1979).

52. *See generally* LAFAVE, TREATISE, *supra* note 19, § 4.6(a), at 234.

53. Andresen v. Maryland, 427 U.S. 463 (1975); United States v. Young, 745 F.2d 733 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); United States v. Dunloy, 584 F.2d 6 (2d Cir. 1978).

54. *Andresen*, 427 U.S. at 479.

55. *Id.* at 480-81. The challenged warrant in *Andresen* referred in great detail to extensive documentary evidence of fraudulent real estate transactions which violated specific Maryland statutes. *Id.*

56. *Id.*; *see also* United States v. Jacob, 657 F.2d 49, 52 (4th Cir. 1981) ("a sufficiently particular qualifying phrase may have the effect of bringing an otherwise 'general' warrant within the constitutional standard"), *cert. denied*, 455 U.S. 942 (1982); United States v. Abrams, 615 F.2d 541, 547 (1st Cir. 1980) (reading *Andresen* to mean that general "tail" of search warrant will not defeat sufficiently particular body of warrant).

57. *See, e.g.*, Rickert v. Sweeney, 813 F.2d 907, 909 (8th Cir. 1987); *In re* Grand Jury Proceedings, 716 F.2d 493, 499 (8th Cir. 1983). *But see* United States v. Mankani, 738 F.2d 538, 546 (2d Cir. 1984) (warrant authorizing seizure of all invoices and records as evidence of violations of specific fraudulent transaction held not overbroad).

refer to an identifiable offense, rather than to a broad range of crimes, so that the instrumentalities of the crime may readily be ascertained.[58] For instance, a warrant's references to the general conspiracy statute, section 371 of title 18 of the United States Code, and to the general tax evasion statutes, sections 7201 and 7206(2) of title 26 of the United States Code, were held not to provide any substantive limit on a search; rather, they authorized a general rummaging through all of a company's business records,[59] which was inappropriate in view of the fact that there was probable cause to seize only evidence of tax evasion in one particular project.[60]

The use of generic language to describe the items subject to seizure does not necessarily make the warrant overbroad, if a more specific description is not possible.[61] For instance, when there is probable cause to believe that the premises to be searched contain a class of generic items or goods, a portion of which are suspected of being stolen or contraband, a warrant may authorize inspection of the entire class of goods.[62] Such a general authorization, however, must be accompanied by certain articulated standards that enable the executing officers to distinguish between legally and illegally possessed property.[63]

In *United States v. Hillyard*,[64] the warrant at issue authorized a search of all vehicles at a particular location, and seizure of those suspected of being stolen, based on the fact that there was probable cause to believe that vehicles other than those known to be actually present had been stolen.[65] In addition, it was known that the suspect, Hillyard, had a seven-year history of transporting stolen vehicles.[66] The Ninth Circuit held that the search was constitutional because the affidavit contained instructions whereby the officers could dis-

58. *Rickert*, 813 F.2d at 909; *see also* United States v. Leary, 846 F.2d 592, 602 (10th Cir. 1988) ("[a]n unadorned reference to a broad federal statute does not sufficiently limit the scope of a search warrant").

59. *Rickert*, 813 F.2d at 909.

60. *Id.*

61. *See, e.g.*, United States v. Bentley, 825 F.2d 1104, 1110 (7th Cir.), *cert. denied*, 108 S. Ct. 240 (1987); United States v. Hillyard, 677 F.2d 1336, 1339 (9th Cir. 1982); United States v. Cook, 657 F.2d 730, 733 (5th Cir.), *reh'g denied*, 664 F.2d 289 (1981).

62. *Hillyard*, 677 F.2d at 1340; *Cook*, 657 F.2d at 733.

63. *Hillyard*, 677 F.2d at 1339.

64. 677 F.2d 1336 (9th Cir. 1982).

65. *Id.* at 1340.

66. *Id.*

tinguish stolen from legally possessed vehicles by comparing altered identification numbers with lists of true numbers.[67]

Finally, when a business is searched for documents or records, enough specificity is required to ensure that only those documents that pertain to the crime will be seized, and that other papers will remain private.[68] Thus, in *United States v. Cardwell*,[69] the warrant's specification that the business papers sought be evidence of violations of the general tax evasion statute was deemed to be an insufficient limitation on the search.[70] Instead, the court held that the "warrant must contain some guidelines to aid the determination of what may or may not be seized."[71]

2. *Extrinsic Limitations on the Warrant*

Despite the fundamental requirement that a warrant provide some way to distinguish the specific objects of the search, warrants containing generic descriptions of property that do not also provide methods by which to differentiate between unlawful and legitimately possessed goods have been upheld under the fourth amendment in several types of situations. Where there is probable cause to believe that unlawful items of a common nature dominate the area or property subject to the search, generic language is permissible.[72] In such a case, "there is no obligation to show that the [items] sought . . . necessarily are the ones stolen [or otherwise unlawful], but only to show circumstances indicating this to be likely."[73]

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67. *Id.* at 1341; *cf.* Montilla Records of Puerto Rico v. Morales, 575 F.2d 324 (1st Cir. 1978) (warrant authorizing seizure of sound recordings manufactured in violation of Copyright Act held insufficiently particular because it failed to limit search to products bearing Motown label, the only items for which there was probable cause to search); United States v. Klein, 565 F.2d 183, 188 (1st Cir. 1977) (warrant authorizing seizure of "certain 8-track tapes and tape cartridges which are unauthorized 'pirate' reproductions" held insufficiently particular because it contained no clear method by which searching officer could identify the "pirated" tapes prior to seizure).

68. United States v. Leary, 846 F.2d 592, 603 n.18 (10th Cir. 1988); United States v. Cardwell, 680 F.2d 75, 77-78 (9th Cir. 1982).

69. 680 F.2d 75 (9th Cir. 1982).

70. *Id.* at 77.

71. *Id.* at 78. In *Cardwell*, the IRS agents had done a thorough investigation, and knew exactly which records were needed to satisfy the search. *Id.*

72. *See, e.g.*, United States v. Cortellesso, 601 F.2d 28, 31-32 (1st Cir. 1979) (warrant that failed to provide means by which to differentiate between stolen and legitimate goods held valid because there was sufficient evidence to demonstrate large number of stolen goods warehoused in premises to be searched, and premises were maintained solely for this purpose), *cert. denied*, 444 U.S. 1072 (1980).

73. Vitali v. United States, 383 F.2d 121, 122 (1st Cir. 1967); *see also* United

In addition, no differentiating mechanism is necessary when the "items described are contraband by their very nature,"[74] such as "illegal narcotic drugs,"[75] or "when the circumstances of the crime make an exact description of the fruits and instrumentalities a virtual impossibility."[76] Stolen property, however, can usually be precisely described prior to the search, based on the owner's description.[77] Moreover, unlike obvious varieties of contraband such as narcotic drugs, stolen property may appear innocent on its face, thus requiring a clearer description in order to prevent wrongful seizure of legitimately possessed goods.[78] A generic description of stolen goods may suffice only when such items cannot for some reason be described with the otherwise requisite specificity.[79]

A relaxed level of particularity is also acceptable in cases where there is probable cause to believe the existence of a business or enterprise characterized by pervasive fraud or illegality.[80] When the

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States v. Vastola, 670 F. Supp. 1244, 1273-74 (D.N.J. 1987) (warrant that authorized search for fruits of copyright violations but failed to indicate means by which to differentiate between legitimate and unlawful property was immunized by probable cause to infer that illegal items were "dominant elements" of business inventory); *cf.* Montilla Records of Puerto Rico v. Morales, 575 F.2d 324, 326 (1st Cir. 1978) (officers' failure to indicate which recordings were illegitimate where it would have been easy to do so rendered warrant's description fatally overbroad); United States v. Klein, 565 F.2d 183 (1st Cir. 1977) (warrant neither established existence of large collection of similar contraband on premises, nor explained known method by which to distinguish contraband from legitimate goods).

74. State v. Connard, 81 N.C. App. 327, 330, 344 S.E.2d 568, 570 (Ct. App. 1986), *aff 'd*, 319 N.C. 392, 354 S.E.2d 238 (1987).

75. *Id.*

76. Spinelli v. United States, 382 F.2d 871, 887 (8th Cir. 1967) (description of "bookmaking paraphernalia" held adequate in search for secreted gaming equipment, precise nature of which police could not know prior to search), *rev'd on other grounds*, 393 U.S. 410 (1969); *see also* United States v. Faul, 748 F.2d 1204, 1219 (8th Cir. 1984) (search for "any and all firearms" adequate when ballistics test had not yet been performed because all weapons found on premises were potential evidence of crime), *cert. denied*, 472 U.S. 1027 (1985).

77. United States v. Johnson, 541 F.2d 1311, 1314 (8th Cir. 1976).

78. United States v. Burch, 432 F. Supp. 961, 963 (D. Del. 1977), *aff 'd*, 577 F.2d 729 (2d Cir. 1978) (mem.).

79. *See, e.g.*, United States v. Cortellesso, 601 F.2d 28, 32 (1st Cir. 1979) (labels torn out of stolen clothing made more precise description impossible), *cert. denied*, 444 U.S. 1072 (1980). *But see* United States v. Fuccillo, 808 F.2d 173 (1st Cir.) (warrant too general because it lacked clearly available references to brands and types of clothing sought, thereby permitting mass seizure of all clothes stored on premises), *cert. denied*, 107 S. Ct. 2481 (1987).

80. *See, e.g.*, United States v. Offices Known as 50 State Distrib. Co., 708 F.2d 1371, 1374-75 (9th Cir. 1983) (warrant authorizing seizure of all business-related records, books and other papers held valid because affidavit detailed probable cause to believe business was permeated by fraud, and no business records were

entire business under investigation involves fraud, "the warrant may be broad because it is unnecessary to distinguish things that may be taken from those that must be left undisturbed."[81] The investigation of white-collar crimes usually fits this category because it requires the assembly of a "paper puzzle" from many pieces of seemingly innocuous information.[82]

Generic language will not render a warrant invalid when a sufficiently detailed affidavit accompanies and is incorporated by reference into the warrant.[83] The opportunity to refer to an affidavit for supplementary information provides both the executing officer and the person whose premises are to be searched with greater information regarding the authorized objective and scope of the search.[84]

The cases discussed above thus demonstrate that courts have never imposed a uniform requirement for a certain type of language or description that will in all cases satisfy the fourth amendment particularity clause.[85] Instead, "particularity" is comprised of numerous factors, all of which serve one essential purpose—to ensure that the scope of every governmental intrusion is limited only to that for which there is probable cause.[86] This goal has been accomplished primarily by ensuring that something either in the language of the

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segregable from any others), *cert. denied*, 465 U.S. 1021 (1984); United States v. Wuagneux, 683 F.2d 1343, 1349 (11th Cir. 1982) (presence of complex financial transactions and allegations of widespread fraud justified warrant's authorization of seizure of 11 categories of records), *cert. denied*, 464 U.S. 814 (1983).

81. United States v. Bentley, 825 F.2d 1104, 1110 (7th Cir.) (warrant setting out 21 categories of documents, which collectively covered every business document likely to be in files but excluded personal documents, held not overbroad because every business transaction was potential evidence of fraud), *cert. denied*, 108 S. Ct. 240 (1987). Belief that the business *is* so pervasively fraudulent, however, must rest on probable cause; merely restricting the searcher's discretion to select which business documents to seize does not itself make the warrant sufficiently particular. *In re* Grand Jury Proceedings, 716 F.2d 493, 499 (8th Cir. 1983).

82. *See, e.g.*, Andresen v. Maryland, 427 U.S. 463, 481 n.10 (1975); *Wuagneux*, 683 F.2d at 1349.

83. *See, e.g.*, United States v. Leary, 846 F.2d 592, 603 (10th Cir. 1988); United States v. Hillyard, 677 F.2d 1336, 1340 (9th Cir. 1982); United States v. Klein, 565 F.2d 183, 186 n.3 (1st Cir. 1977); *cf. Wuagneux*, 683 F.2d at 1351 n.6 (affidavit need not be attached and incorporated when executing agents brought affidavit to search, and had prior opportunity to read it); *Cortellesso*, 601 F.2d at 32 (affidavit, although unattached, provided necessary guidance as to scope of search).

84. United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); United States v. Haydel, 649 F.2d 1152, 1157 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982).

85. *See supra* notes 16-31 and accompanying text.

86. *See supra* notes 17-84 and accompanying text.

warrant or accompanying affidavit,[87] or else something inherent in the circumstances leading up to or surrounding the execution of the warrant,[88] limits the searchers' discretion to go beyond the search or seizure intended.[89]

III. Reasonable Reliance on Particularity-Defective Warrants

A. *Massachusetts v. Sheppard*

The Supreme Court first applied the good-faith exception to a particularity violation in *Massachusetts v. Sheppard*,[90] which was *United States v. Leon*'s companion case.[91] The challenged warrant in *Sheppard* authorized a homicide investigation.[92] In their haste, however, the officers could find only a preprinted warrant form for a narcotics search.[93] The officers advised the judge about the special nature of the warrant.[94] The judge made some changes but, notably, failed to remove references to controlled substances in the body of the warrant.[95] Nevertheless, he assured the officers that he had made all the necessary changes, and that the warrant was valid both in form and content.[96]

The Court held that although the search pursuant to the warrant violated the fourth amendment, the officers had behaved reasonably in carrying it out.[97] Despite the warrant's facial overbreadth, the officers were reasonable in relying on it because they "took every step that could reasonably be expected of them"[98] in order to dispel their doubts about the warrant's validity.[99] The fact that the officers consulted with the judge and obtained his guarantee that the warrant was proper provided the officers with an objectively reasonable basis

87. *See supra* notes 53-71, 83-84 and accompanying text.
88. *See supra* notes 34-51, 72-82 and accompanying text.
89. *See In re* Grand Jury Proceedings, 716 F.2d 493 (8th Cir. 1983) (despite authorization to take "everything," fact that officer lacks discretion in deciding what items to seize does not by itself legitimize warrant, unless there also is probable cause to seize all).
90. 468 U.S. 981 (1984).
91. *See supra* notes 5-12 and accompanying text.
92. *Sheppard*, 468 U.S. at 984.
93. *Id.* at 985.
94. *Id.* at 986.
95. *Id.*
96. *Id.*
97. *Id.* at 990.
98. *Id.* at 989.
99. *Id.*

to rely on the warrant.[100] The Court declared the following:

> Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested.[101]

In addition, because the executing officers themselves had applied for the warrant, they could be presumed to have had greater knowledge about the proper object and scope of the search.[102] They therefore had adequate guidance in executing the admittedly overbroad warrant.[103]

These two factors—the judge's express assurances and the officers' personal knowledge about the investigation[104]—were adequate to sustain the officers' reasonable reliance on the overbroad warrant.[105] The Court declined to speculate "[w]hether an officer who is less familiar with the warrant application or who has unalleviated concerns about the proper scope of the search would be justified in

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100. *Id.* at 989-90. Exclusion in such a case would be appropriate only if a reasonably well-trained officer would have perceived that the magistrate had behaved in an objectively unreasonable manner, such as by issuing a warrant so devoid of particularity as to authorize a general search. Misner, *Limiting* Leon*: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507, 516 (1986).

101. Massachusetts v. Sheppard, 468 U.S. 981, 989-90 (1984).

102. *Id.* at 989; *see also* LaFave, *supra* note 12, at 918. As Professor LaFave has pointed out, inquiry into the officer's knowledge blurs the line between *Leon*'s purportedly objective inquiry and a subjective one. *Id.* The question under *Leon* thus becomes: what would a reasonably well-trained officer know or deduce from *this* officer's experience? *Id.* at 914.

103. *Sheppard*, 468 U.S. at 988-89. Conceivably, because the defect in the warrant was that it described more items than those for which there was probable cause to search, the part of the warrant referring to controlled substances could have been severed from the portion that described the specific evidence of homicide sought. Under the doctrine of partial suppression, "where invalid portions of a warrant may be stricken and the remaining portions held valid, seizures pursuant to the valid portions will be sustained." United States v. Spilotro, 800 F.2d 959, 967 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1289 (1987); *see also* United States v. Diaz, 841 F.2d 1, 4 (1st Cir. 1988); United States v. Faul, 748 F.2d 1204, 1219 (8th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). If no portion of the warrant, [however], is sufficiently particularized to pass constitutional muster, then total suppression is required." United States v. Cardwell, 680 F.2d 75, 78 (9th Cir. 1982). In *Spilotro*, for example, no portion of the warrant was sufficient to permit severance. *See infra* notes 137-48 and accompanying text.

104. *Sheppard*, 468 U.S. at 988-89.

105. *Id.* at 990.

failing to notice a defect like the one in the warrant in this case."[106]

B. Reasonable Reliance After *Massachusetts v. Sheppard*

In *Sheppard*,[107] the Supreme Court held that the officers' reliance on a constitutionally overbroad warrant came within the good-faith exception because they had "an objectively reasonable basis for [their] mistaken belief"[108] that the warrant was sufficiently particular.[109] In *Sheppard*, the officers' primary basis for reasonable reliance was the judge's assurance that the warrant was valid as issued.[110] The officers sought assurance because the circumstances surrounding their application for the warrant put them on notice of the potential for problems with it.[111] Had the officers failed to

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106. *Id.* at 989 n.6. The Court also avoided the issues of whether an affiant who was not aware of a potential problem with the warrant has any duty to inquire about it, and whether an executor who was not also the affiant has any obligation to read the affidavit and compare it with the warrant. Presumably, in either situation, the officer would be unconcerned about the warrant, and therefore would be free to execute it with the protection of the good-faith exception. *See, e.g.*, United States v. Accardo, 749 F.2d 1477 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985). Because the law requires merely that the officer act reasonably, he need only seek reassurance when he has some objective basis to doubt the warrant's validity. The Court did note, however, that "[n]ormally, when an officer who has not been involved in the application stage receives a warrant, he will read it in order to determine the object of the search." *Sheppard*, 468 U.S. at 989 n.6. Professor LaFave, on the other hand, concluded that under *Sheppard* an affiant, unaware of problems in the warrant, will be excused from reading the warrant before he executes it, even if he has received no assurances as to the warrant's validity. LaFave, *supra* note 12, at 919.

107. 468 U.S. 981 (1984).

108. *Id.* at 988.

109. *Id.*

110. *Id.* at 989-90. Review of a warrant by a government attorney also has served as a basis for reasonable reliance. The courts in United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986), United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986), and United States v. Accardo, 749 F.2d 1477 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985), each based a finding of reasonable reliance partially on the fact that the officers had sought and obtained approval by United States or local government attorneys prior to submitting the warrant application for approval by the magistrate. *See Michaelian*, 803 F.2d at 1047; *Freitas*, 800 F.2d at 1457; *Accardo*, 749 F.2d at 1480; *see also* United States v. Fama, 758 F.2d 834 (2d Cir. 1985) (approval of warrant by lawyers may form basis for reasonable reliance). Government attorneys, however, are just as involved in "the often competitive enterprise of ferreting out crime," Johnson v. United States, 333 U.S. 10, 14 (1948), as are police, so their assurances may not reflect the ideal of objectivity and neutrality embodied by a magistrate.

111. Massachusetts v. Sheppard, 468 U.S. 981, 986 (1984).

take such actions, their execution of the warrant presumably could not have been in good faith.[112]

Under cases prior to *Leon*, a search's actual compliance with the fourth amendment's ban on general searches, rather than the officer's good-faith belief in the legality of the search, was the sole issue to be determined.[113] Since *Leon* and *Sheppard* were decided, several circuit courts have adopted the "objectively reasonable" standard for applying the good-faith exception to other instances of particularity violations.[114] This has required these cases to distinguish between warrants that are "so facially deficient"[115] as to bar reliance completely[116] and those that contain mere "technical" defects.[117] A "technical" defect in this context refers to an ambiguity, inaccuracy

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112. *Id.* at 989. Assurance by the magistrate is not, however, indispensable. In *United States v. Accardo*, the Eleventh Circuit held that absent an unusual level of suspicion or doubt about the propriety of the warrant such as that expressed by the officers in *Sheppard*, officers have no duty to inquire about the sufficiency of the warrant. *Accardo*, 749 F.2d at 1480-81. Nevertheless, an officer may not rely on either the word or action of a judge who has abdicated his neutral and detached role. *See* Lo-Ji Sales v. New York, 442 U.S. 319 (1979).

113. *See supra* notes 16-86 and accompanying text; *cf.* United States v. Accardo, 749 F.2d 1477, 1481 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985) ("[t]he question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it").

114. *See infra* notes 122-259 and accompanying text. Professor LaFave sees *Sheppard* as more representative of a probable cause deficiency than a particularity violation because the description in the warrant encompassed classes of items beyond those for which there was probable cause to seize. LaFave, *supra* note 12, at 920-21. This interpretation is problematic, however, because the police in the case made no effort to establish probable cause for narcotics. Therefore, probable cause actually may have existed. *See Sheppard*, 468 U.S. at 985. The problem in *Sheppard* more closely resembles the type of particularity violation classified as "general rummaging," which is characterized by an overly broad, and thus inadequate, description. *See* Galloway, *supra* note 2, at 144-45.

Alternatively, LaFave questions whether *Sheppard* actually involved any fourth amendment violation. In his opinion, "[d]eciding the *Sheppard* case on a good-faith basis apparently was . . . unnecessary. Considerable authority already existed to the effect that a defective or erroneous description in a warrant is cured by a proper description in an affidavit incorporated by reference and attached to the warrant." LaFave, *supra* note 12, at 911. Although in *Sheppard*, the judge failed to incorporate the affidavit into the warrant, 468 U.S. at 986 (1984), LaFave's point—that by providing the officers with adequate guidance concerning the legitimate scope of the search, the warrant did comply with the fourth amendment—applies equally to other cases where the good-faith exception may have been applied unnecessarily. *See, e.g.*, United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986); United States v. Accardo, 749 F.2d 1477 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985).

115. United States v. Leon, 468 U.S. 897, 923 (1984).

116. *See infra* notes 122-93 and accompanying text.

117. *See supra* notes 90-112; *infra* notes 194-216 and accompanying text.

or generality in the actual language of the warrant that would render the warrant unreliable, if not for the presence of some extrinsic or intrinsic limitation on the scope of the search.[118]

Based on this distinction, some courts have concluded that although a warrant containing a technical defect violated the fourth amendment, the good-faith exception should apply.[119] In other situations, courts have held that the good-faith exception could not apply because the warrant's description of the legitimate objects of the search itself was so ambiguous that, unlike the officers in *Sheppard*, a well-trained officer must be presumed to have harbored doubts about it.[120] In such cases, the "lack of particularity in the warrant tells the officer he has been given insufficient direction, and thus he can hardly reasonably rely upon the warrant."[121] A comparison of these two categories of cases yields markedly different ways of viewing the good-faith exception and, by extension, the fourth amendment.

1. Cases Where No Basis for Reasonable Reliance Existed

a. United States v. Crozier

The Ninth Circuit on several occasions has confronted warrants containing descriptions devoid of adequately particularized language and, moreover, lacking any extrinsic limitation on the warrant's scope that could serve as an objectively reasonable basis for reliance.[122] In *United States v. Crozier*,[123] drug enforcement agents obtained warrants to search the homes of two individuals, Stein and Crozier, whom they suspected of manufacturing narcotics.[124] In addition to a specific list of items and equipment normally used in the manufacture of amphetamines,[125] the warrant for Crozier's home

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118. *See supra* notes 19-89 and accompanying text.

119. *See, e.g.*, United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986); United States v. Accardo, 749 F.2d 1477 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985); *cf.* United States v. Buck, 813 F.2d 588 (2d Cir.) (good-faith exception applied to defect in warrant that was more than merely technical), *cert. denied*, 108 S. Ct. 167 (1987).

120. *See infra* notes 122-93 and accompanying text.

121. LaFave, *supra* note 12, at 921. This exemplifies what LaFave sees as a true particularity violation. *See supra* note 114.

122. *See infra* notes 123-62 and accompanying text.

123. 777 F.2d 1376 (9th Cir. 1985).

124. *Id.* at 1378.

125. The Crozier warrant authorized a search for "[a]mphetamine, precursor chemicals including [m]ethylamine, P-2-P, [e]ther, and [a]lcohol, and laboratory apparatus, notes, formulas, as well as any indicia of ownership and control of the premises." *Id.* at 1380.

authorized the seizure of "any indicia of ownership and control of the premises."[126] Pursuant to this authority, the agents seized papers, letters, greeting cards and bank statements.[127] The warrant for Stein's home, however, directed the agents to seize "[m]aterial evidence of violation [of sections 841, 846 of title 21 of the United States Code] ([m]anufacture and [p]ossession with intent to distribute [a]mphetamine and [c]onspiracy)."[128] As a result, the agents seized Stein's tax returns and real estate records, and took photographs of gold coins and jewelry, for which they then obtained a warrant to seize.[129] Although the Crozier warrant was deemed sufficiently detailed under the fourth amendment to justify the search that resulted, the court held that the Stein warrant authorized a general search for evidence of an amphetamine business, in violation of the fourth amendment.[130]

The court then distinguished the facial overbreadth in the Stein warrant from the "technical error" committed by the magistrate in *Sheppard*.[131] The *Crozier* court held that there could be no reasonable reliance on the Stein warrant because it lacked any description of particular property whatsoever,[132] even though the amount of information the agents had acquired made a more precise description possible of the items sought.[133] The court observed that although the affidavit supporting the Stein warrant contained the same list of items as that which appeared in the Crozier warrant, the agents did not have the affidavit with them when they searched Stein's home.[134] Unlike the situation in *Sheppard*, however, the failure to include all the known information in the warrant was that of the agents, rather than the magistrate.[135] Therefore, in *Crozier* the rationale for applying the good-faith exception was not present.[136]

b. United States v. Spilotro

Similarly, in *United States v. Spilotro*,[137] the Ninth Circuit refused to apply the good-faith exception to a "hopelessly general" warrant

126. *Id.* Evidence that indicates ownership or control of the premises to be searched has been deemed a proper subject for seizure. United States v. Whitten, 706 F.2d 1000, 1009 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).
127. *Crozier*, 777 F.2d at 1378.
128. *Id.* at 1381.
129. *Id.* at 1379.
130. *Id.* at 1381.
131. *Id.* at 1382; *see* Massachusetts v. Sheppard, 468 U.S. 981, 984 (1984).
132. United States v. Crozier, 777 F.2d 1376, 1379 (9th Cir. 1985).
133. *Id.* at 1381.
134. *Id.*
135. *Id.*
136. *Id.* at 1382; *see supra* notes 4-12 and accompanying text.
137. 800 F.2d 959 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1289 (1987).

that authorized seizure of evidence of violations of thirteen broad criminal statutes.[138] The warrant did not satisfy the fourth amendment because a more precise definition of the items sought was possible.[139] For instance, the warrant either could have described "in greater detail the items one commonly expects to find on premises used for the criminal activities in question," or referred to the specific criminal behavior charged.[140] The use of generic language in this case was not acceptable because the nature of the many crimes encompassed by the referenced criminal statutes was not described.[141] Moreover, the police could not rely on the affidavit to cure the warrant's generality, because it was neither attached to the warrant nor incorporated by reference.[142]

Following its earlier holding in *Crozier*, the Ninth Circuit declined to apply the good-faith exception to this situation, noting the absence of any assurances by the magistrate that "the overbreadth concern was without merit."[143] Here, as in *Crozier*,[144] no reasonably well-

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138. *Id.* at 960-61. The warrant in *Spilotro* authorized seizure of many items:

> [C]ertain property, namely notebooks, notes, documents, address books and other records; safe deposit box keys, cash, gemstones and other items of jewelry and other assets; photographs, equipment including electronic scanning devices, and other items and paraphernalia, which are evidence of violations of 18 U.S.C. [§§] 1084, 1952, 1955, 892-894, 371, 1503, 1511, 2314, 2315, 1962-1963, and which are or may be: (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

Id. at 961. The court held that this warrant authorized "wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide[d] no guidelines to distinguish items used lawfully from those the government had probable cause to seize." *Id.* at 964.

139. *Spilotro*, 800 F.2d at 964.

140. *Id.*; *see also* United States v. Fannin, 817 F.2d 1379, 1381 (9th Cir. 1987) (phrase, "other evidence, at this time unknown," sufficiently clear because crimes had been discussed and specific suspect items described in attached and incorporated warrant).

141. *Spilotro*, 800 F.2d at 964. *Contra* United States v. Hayes, 794 F.2d 1348 (9th Cir. 1986) (mere references to criminal statutes sufficient because evidence sought clearly related only to activities involving controlled substances, rather than broad range of criminal acts), *cert. denied*, 107 S. Ct. 1289 (1987); United States v. Mankani, 738 F.2d 538 (2d Cir. 1984) (reference to statute clearly limited to specific drug transactions).

142. *Spilotro*, 800 F.2d at 967. Had the affidavit been attached it probably would not have been much help because it was a nonindexed, unorganized, daily narration, and was 157 pages in length with neither a specific list nor detailed description of the items. *Id.*

143. United States v. Spilotro, 800 F.2d 959, 968 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1289 (1987).

144. United States v. Crozier, 777 F.2d 1376, 1382 (9th Cir. 1985).

trained officer who relied on language this vague could be presumed to have acted reasonably.[145] This type of situation differed from that present in *Sheppard* because in *Spilotro* the warrant failed to describe enough, while the *Sheppard* warrant described too much. In *Sheppard*, the officers had independent knowledge about the purpose of the search and the crime that had been committed.[146] This at least gave them some guidance as to the type of evidence for which there was probable cause to search. The *Spilotro* warrant, however, contained such a dearth of information that no reasonably well-trained officer could conclude that it authorized a legal search.[147] The officers' failure to dispel this presumed doubt further served to deprive them of the protection of the good-faith exception.[148]

c. *United States v. Washington*

In *United States v. Washington*,[149] the Ninth Circuit held that two out of three challenged sections of a warrant were unconstitutional as well as so facially deficient as to bar reasonable reliance.[150] *Washington* involved a search for business records pertaining to a multi-state prostitution ring.[151] Although the court viewed one questionable section of the warrant as limited enough to satisfy the fourth amendment,[152] it held two other sections constitutionally overbroad.[153] These two sections authorized officers to search for evidence "tending to establish the wealth and financial status of Ralph Huey Washington"[154]

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145. *Spilotro*, 800 F.2d at 968.
146. Massachusetts v. Sheppard, 468 U.S. 981, 984-85 (1984).
147. *Spilotro*, 800 F.2d at 964.
148. *Id.* at 968.
149. 797 F.2d 1461 (9th Cir. 1986).
150. *Id.* at 1471-73.
151. *Id.* at 1463.
152. *Id.* at 1472. This section authorized the seizure of "records, notes [and] documents indicating Ralph Washington's involvement and control of prostitution activity including *but not limited to*, photographs, handwritten notes, ledger books, transportation vouchers and tickets, hotel registration, receipts, bank documents [such] as deposit slips, checks and records, toll records, bail bondsman's receipts and medical billings . . . . " *Id.* (emphasis added). The court held that the challenged phrase, "but not limited to," did not invalidate the warrant, because the phrase, "'involvement and control of prostitution activity,' effectively [told] the officers to seize only items indicating prostitution activity." *Id.*
153. *Id.* at 1472-73.
154. *Id.* at 1472. This section authorized the following seizure:

> [A]rticles of personal property *tending to establish the wealth and financial status* of Ralph Huey Washington including but not limited to jewelry, cash, furs, documents showing ownership of stock, bonds, companies, real estate and other personal property; documents tending to show

and of his association with an indefinite number of people.[155]

The court in *Washington* summarily refused to apply the good-faith exception to either of these unconstitutional sections. The only reason the court gave for its holding was that both sections resembled the type of warrant *Leon* described as being "so facially deficient"[156] as to bar any presumption of reasonable reliance.[157] Although the section regarding Washington's wealth and financial status did include a lengthy list of items, the description nevertheless was open-ended, and therefore permitted the police to search far beyond the items listed.[158] In the other invalidated section, the warrant listed no specific examples of evidence at all.[159]

The court also noted that the affiant for the warrant had crossed out and initialed the phrase, "but not limited to [the following persons]," in one of the challenged sections.[160] This indicated to the court that the officer had manifested some doubt as to the legitimacy of those words.[161] The officer therefore could not have been objectively reasonable in executing at least that questionable portion of the warrant.[162]

d. United States v. Fuccillo

In *United States v. Fuccillo*,[163] the First Circuit held that the good-faith exception did not apply to three separate, identical warrants,

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> ownership or control of companies or corporations including but not limited to Funky Denim, Washington Enterprises, and Francisco-Louisiana Incorporated; any documents tending to show the preparation of or basis for United States Department of Treasury, Internal Revenue Service Tax Returns.

Id. (emphasis added). The court invalidated this section for lack of probable cause to suggest a pervasively fraudulent scheme, which would necessarily implicate such a broad category of evidence. *Id.* at 1473.

155. *Id.* This section authorized seizure of "evidence of association of [Ralph Washington] with the following persons, *but not limited to* [the following persons]." *Id.* (emphasis added). The court upheld a challenge to this section because "[a] warrant that permits officers to seize evidence of association between a suspect and any other person is patently overbroad." *Id.*

156. United States v. Leon, 468 U.S. 897, 923 (1984).

157. United States v. Washington, 797 F.2d 1461, 1473 (9th Cir. 1986).

158. *Id.* at 1472-73.

159. *Id.* at 1473.

160. *Id.* at 1473 n.16.

161. *Id.* at 1473.

162. *Id.*

163. 808 F.2d 173 (1st Cir.), *cert. denied*, 107 S. Ct. 2481 (1987).

each of which authorized the seizure of stolen cartons of clothing.[164] There was probable cause to believe that the stolen goods were present in three locations: (1) a wholesale distributorship; (2) a warehouse; and (3) a retail clothing store. All three sites were owned by the same person.[165] An informant and the manager of a store that was to have received the clothing had told the Federal Bureau of Investigation (FBI) agents which specific items of clothing had been stolen, based on their observations of the items at the suspect premises.[166] In fact, many of the cartons could be identified by shipping labels attached to them, which indicated their legitimate destination.[167]

The court held that these warrants were not particular enough under the fourth amendment because each failed to include all the information available to the officers at the time.[168] The affidavit for the warrants indicated that cartons containing the stolen items could be identified by information printed on the shipping labels attached to them.[169] Also, the manager of the store which was to have received the goods legitimately had provided the FBI with a list of the specific styles and labels of some of the stolen garments.[170] The warrant, however, contained none of this information.[171] As a result, the agents seized the *entire* contents of the warehouse, papers and receipts from the store, and men's clothing, a category of items that had not even been mentioned in the warrant or affidavit.[172] Thus, the searchers clearly did not consider that the warrant limited their authority to any significant degree.[173] Because the warrant lacked any mechanisms by which the agents could distinguish stolen from lawfully-possessed goods, the warrant utterly failed to comply with

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164. *Id.* at 174. Each of the warrants authorized FBI agents to seize the following items:

> [C]artons of women's clothing, the contents of those cartons, lists identifying the contents of the cartons, and control slips identifying the stores intended to receive these cartons, such items being contraband and evidence of a violation of [t]itle 18, United States Code, [§] 659, Possession of Goods Stolen from Interstate Shipments.

Id.

165. *Id.*

166. *Id.*

167. *Id.* at 174-75.

168. *Id.* at 177; *see supra* notes 29-31 and accompanying text.

169. United States v. Fuccillo, 808 F.2d 173, 178 (1st Cir.), *cert. denied*, 107 S. Ct. 2481 (1987).

170. *Id.*

171. *Id.*

172. *Id.* at 177.

173. *Id.* at 176-77.

established fourth amendment requirements of which the officers presumably should have been aware.[174]

Another reason the good-faith exception could not apply was that the agents' failure to include any of this readily available particularized information in either the affidavit or the warrant actually contributed to the warrant's deficiency.[175] Because the agents clearly had more precise information about the stolen items sought at their disposal, their reliance on the warrants as issued could not be said to have been reasonable.[176]

Fuccillo, however, is not really a legitimate application of the reasonable reliance test. The officers in this case were reckless in failing to include all the known information in the warrant application.[177] By seizing men's clothing, they also went beyond that which was clear from the face of the warrant.[178] Under *Leon*, this type of police misfeasance and bad-faith execution bars application of the good-faith exception, apart from any particularity violation.[179]

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174. *Id.* at 176; *accord* Montilla Records of Puerto Rico v. Morales, 575 F.2d 324 (1st Cir. 1978); United States v. Klein, 565 F.2d 183 (1st Cir. 1977); *see supra* notes 61-67 and accompanying text. *Contra* United States v. Shoffner, 826 F.2d 619 (7th Cir.) (better description would have thwarted rather than aided investigation, due to nature of continuing auto theft scheme in which some named vehicles would no longer be at site of search), *cert. denied*, 108 S. Ct. 356 (1987).

175. *Fuccillo*, 808 F.2d at 176-77. Negligence by police cannot be considered objectively reasonable; when facts are misstated or summarily presented, suppression remains an appropriate remedy. Bradley, *The 'Good Faith Exception' Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 297 (1985).

176. United States v. Fuccillo, 808 F.2d 173, 178 (1st Cir.), *cert. denied*, 107 S. Ct. 2481 (1987).

177. *Id.*

178. *Id.* at 177.

179. United States v. Leon, 468 U.S. 897, 923 (1984). *Leon* expressly provided that the good-faith exception should not apply in such a case. *Id.* at 918 n.19, 923.

A similar situation occurred in United States v. Strand, 761 F.2d 449 (8th Cir. 1985). The challenged warrant authorized a seizure of "stolen mail," *id.* at 452, but the postal inspectors who executed the warrant seized a variety of household items they suspected of having been stolen *from* the mail, *id.* at 453. The court held that although the warrant was specific enough to cover the seizure of items clearly identifiable as stolen mail (*e.g.*, parcels and letters), that term did not literally encompass the other items seized. *Id.* at 453-54. The court therefore refused to apply the good-faith exception because the seizure far exceeded that contemplated either by the warrant or the affidavit. *Id.* at 456-57. Moreover, the affidavit, which had not been incorporated into the warrant, contained a list of items far too general to limit the scope of the search effectively. Also, the officers seized items not even mentioned in the affidavit. *Id.* at 457. The inspectors failed to demonstrate that the household items could not have been described with greater particularity. *Id.*

e. United States v. Leary

In *United States v. Leary*,[180] the Tenth Circuit refused to apply the good-faith exception to a particularity-defective warrant, analogizing the circumstances before it to those of *Fuccillo*.[181] *Leary* involved a search by customs agents of the offices of F.L. Kleinberg Company, a Boulder, Colorado export company which was suspected of attempting to illegally export the Micro-Tel, an electronic measuring device. The officers obtained a warrant[182] based on an affidavit that alleged a scheme to export the Micro-Tel to the People's Republic of China, without the required license, through sham "front" companies in Hong Kong.[183] The affidavit mentioned no other transactions or items.[184] The agents ultimately seized twenty boxes of business records, including some pertaining to irrelevant business dealings, as well as personal loan and insurance documents.[185]

The court held that the warrant was overbroad under the fourth amendment because the "limitations [in the warrant] provide no limitation at all."[186] Furthermore, the agents' behavior in executing the warrant could not fall within the good-faith exception for the same reasons as those given by the *Fuccillo* court.[187] First, the language of the warrant failed to distinguish which items were to be seized, and thus gave the agents license to search for more than there was probable cause to suspect of being evidence of the alleged crime.[188] Also, by not specifying that the scope of the search was to be limited to records related to the export of the Micro-Tel, the

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180. 846 F.2d 592 (10th Cir. 1988).

181. *Id.* at 608.

182. The warrant authorized the officers to seize the following:

> Correspondence, Telex messages, contracts, invoices, purchase orders, shipping documents, payment records, export documents, packing slips, technical data, recorded notations and other records and communications relating to the purchase, sale and illegal exportation of materials in violation of the Arms Export Control Act, 22 U.S.C. [§] 2778, and the Export Administration Act of 1979, 50 U.S.C. App. [§] 2410.

846 F.2d at 594.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 601. Although the warrant mentioned two specific statutes alleged to have been violated, reference to them was insufficient to limit the warrant's scope because they covered too broad a range of activity. *Id.* These references would have been sufficient, however, if, in addition, there was a more specific list of items to be seized. *Id.* at 601 n.15.

187. United States v. Leary, 846 F.2d 592 (10th Cir. 1988); *see* United States v. Fuccillo, 808 F.2d 173, 177-78 (1st Cir.), *cert. denied*, 107 S. Ct. 2481 (1987).

188. *Leary*, 846 F.2d at 605.

agents failed to include in the warrant the more precise information that was known to them.[189] Finally, the court found that the agents actually went beyond the scope of the warrant by seizing documents entirely unrelated to business transactions.[190]

The court based its holding on the Supreme Court's presumption in *Leon* that "officers have a reasonable knowledge of what the law prohibits."[191] Without requiring officers to speculate as to future innovations in the law, the Tenth Circuit held that, at a minimum, "[a] reasonably well-trained officer should know that a warrant must provide guidelines for determining what evidence may be seized."[192] The absence of any such guidelines in the *Leary* warrant made it impossible for the agents to demonstrate reasonable reliance.[193]

2. *Application of the Good-Faith Exception*

a. *United States v. Accardo*

In *United States v. Accardo*,[194] the Eleventh Circuit held that the phrase, "all corporate records,"[195] was too vague to satisfy the fourth amendment, but not so overbroad as to bar reasonable reliance.[196] In *Accardo*, federal agents had probable cause to suspect labor racketeering among several health care service companies.[197] An informant had told the agents about kickbacks being paid to union officials, and the diversion of revenues for this purpose by channeling funds through two sham companies, Pinckard and Fortune.[198] The agents obtained a warrant authorizing a search of the administrative offices of both companies for "all corporate records," resulting in the seizure of a great number of documents.[199]

In the case of both companies, the government had probable cause to believe in the existence of widespread fraud[200]—a situation that typically has justified a less stringent particularity requirement under

189. *Id.* at 604.
190. *Id.* at 608-09.
191. United States v. Leon, 468 U.S. 897, 919 n.20 (1984).
192. *Leary*, 846 F.2d at 609.
193. *Id.*
194. 749 F.2d 1477 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985).
195. *Id.* at 1481.
196. *Id.*
197. *Id.* at 1478.
198. *Id.*
199. *Id.* at 1479.
200. *Id.* at 1481.

the fourth amendment.[201] The court discussed the similarity between the *Accardo* warrant and the one at issue in *United States v. Offices Known as 50 State Distributing Co.*,[202] a case decided prior to *Leon*. In *50 State*, the warrant's authorization of an extensive search for the records of a business alleged to be pervasively fraudulent was held to satisfy the fourth amendment requirement that the description be "as specific as the circumstances and nature of activity under investigation permit."[203]

The *Accardo* court noted that, in light of the holding in *50 State*, "the magistrate who issued these warrants might have had reason to authorize the seizure of 'all corporate records.' "[204] Nevertheless, the Eleventh Circuit chose to apply the good-faith exception, maintaining that "[t]he question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it."[205] As in *Sheppard*, the agents in *Accardo* took every step they could to ensure that the warrant complied with the fourth amendment.[206] They submitted a detailed affidavit to a neutral magistrate, after having it reviewed by government attorneys.[207] Unlike *Sheppard*, however, no special assurance by the magistrate was necessary because there was no potential defect or overbreadth in the form of the warrant of which the officers were or should have been aware prior to its review by the magistrate.[208] Finally, the breadth of probable cause, of which the officers *were* aware, signaled to them that the phrase, "all corporate records," was not necessarily overbroad in this situation. Because the officers knew how extensive the fraud was, it was reasonable for them to believe that this entire category of items was to be seized.[209]

Had the court applied the traditionally accepted standards for particularity under the fourth amendment as articulated in *50 State*, the warrant could have been held valid under the fourth amendment, and thus the search would have been constitutional. The requirements for particularity under the fourth amendment have been interpreted

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201. *See supra* notes 80-82 and accompanying text.
202. 708 F.2d 1371 (9th Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984).
203. United States v. Wuagnuex, 683 F.2d 1343, 1349 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); *see 50 State*, 708 F.2d at 1374.
204. United States v. Accardo, 749 F.2d 1477, 1479 n.3 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985).
205. *Id.* at 1481.
206. *Id.* at 1480.
207. *Id.*
208. *Id.* at 1480-81.
209. *Id.* at 1481.

flexibly enough to permit this type of search, without resort to the good-faith exception.[210]

b. *United States v. Michaelian*

The Ninth Circuit did apply the good-faith exception to a particularity violation in *United States v. Michaelian*.[211] *Michaelian* involved a "cash-skimming" scheme in which the defendant's business issued bogus checks and then claimed the payments as tax-deductible expenses.[212] The court let stand the district court's determination that the warrant was unconstitutionally overbroad.[213] Nevertheless, the court applied the good-faith exception because the warrant and affidavit each had been reviewed and approved by four levels of government attorneys.[214] Moreover, the degree of the warrant's facial

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210. *See supra* notes 16-31, 52-89 and accompanying text.

211. 803 F.2d 1042 (9th Cir. 1986).

212. *Id.* at 1044.

213. *Id.* at 1046. The warrant in *Michaelian* read in pertinent part as follows:

> [C]ertain documents and records of Ara Michaelian and Ara Explorations, Inc., . . . including the cancelled checks, bank statements and deposit slips, check registers, check stubs, customer order records and inventory records, lists of employees, cash disbursements journals, general ledgers, copies of federal and California state income tax returns and accountants work papers for . . . Ara Michaelian, d/b/a Ara Valve and Fitting Co., for the years 1978 through 1980, and Ara Explorations, Inc., for the years 1981 through the present, which are fruits, evidence and instrumentalities of criminal offenses against the United States, namely, attempts to evade or defeat federal income tax and aiding, assisting and advising the preparation of false and fraudulent income tax returns, in violation of [t]itle 26, United States Code, [§§] 7201 and 7206(2) and conspiring to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Treasury Department in the collection of income taxes, in violation of [t]itle 18, United States Code, [§] 371 and any and all fruits, instrumentalities and evidence (at this time unknown) of the crimes which facts recited in the accompanying affidavit make out.

Id. at 1046 n.1. The court held this warrant unconstitutional because it could have been more specific in light of the extensive investigation conducted. *Id.* at 1046.

214. *Id.* at 1047. In rejecting the respondent's contention that the good-faith exception should not apply because the affiant officers caused the deficiency in the warrant, the court in *Michaelian* held that *Sheppard* does not "limit the circumstances in which an officer's reliance may be reasonable to a situation in which the judge is the source of the warrant's deficiency; it only holds that such a situation may present such circumstances." *Id.* Although it agreed with the statement in *Leon* that an affiant cannot submit a "bare-bones" affidavit and then rely on good-faith execution by an unsuspecting fellow officer, United States v. Leon, 468 U.S. 897, 923 n.24 (1984), the *Michaelian* court implied that an inadvertent mistake by an affiant will not spoil good-faith execution by a fellow officer. *Michaelian*, 803 F.2d at 1047. This view diverges somewhat from the main thrust

deficiency did not approach that present in *Crozier*.[215] The warrant's authorization to seize documents was limited to that period of years in which the defendant controlled the suspect enterprise, and it did not include more general categories of documents, such as correspondence.[216]

Based on the facts of *Michaelian*, it is not clear why the Ninth Circuit simply did not uphold the search under the fourth amendment, rather than the good-faith exception. One possible reason is that the court could achieve its desired result—that of sanctioning the search and allowing the use of its results—without reversing the conclusion of the lower court.[217] It seems clear, however, that—as in *Accardo*—the degree of descriptiveness in this warrant and the fact that specific criminal offenses were listed by statute and described, could permit a finding that the warrant was valid under the fourth amendment.[218]

c. *United States v. Buck*

In *United States v. Buck*,[219] the Second Circuit took a different approach to finding a basis for reasonable reliance. The case involved Marilyn Buck's participation in two 1981 robberies of Brinks armored cars.[220] The warrant in question authorized the police to search for and seize "any papers, things or property of any kind relating to previously described crime."[221] The judge had dictated the warrant

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of *Leon*, which extended the good-faith exception to situations where the deterrent effect of exclusion would be more than marginal, including those in which police officers are responsible for the deficiency in a warrant. *Leon*, 468 U.S. at 923.

Moreover, the court in *Michaelian* could have found this warrant constitutional because the existence of a complex scheme involving fraudulent transactions rendered the description in the warrant sufficiently particular. *See supra* notes 80-82, 200-04 and accompanying text.

215. United States v. Michaelian, 803 F.2d 1042, 1047 (9th Cir. 1986).

216. *Id.*

217. *Id.* at 1046.

218. *See supra* notes 16-31, 57-60 and accompanying text.

219. 813 F.2d 588 (2d Cir.), *cert. denied*, 108 S. Ct. 167 (1987).

220. *Id.* at 589-90. The indictment charged several crimes, including: (1) eight counts of conspiracy to violate RICO; (2) participation in a racketeering enterprise in violation of 18 U.S.C. §§ 1961, 1962(c), 1962(d); and (3) bank robbery, armed bank robbery and murder during an armed bank robbery in violation of 18 U.S.C. §§ 2113(a), 2113(d) and 2113(e), respectively. *Buck*, 813 F.2d at 589.

221. *Buck*, 813 F.2d at 590. The items actually seized from Buck's home in reliance on the warrant included a .45 caliber semiautomatic rifle, 9 mm. handgun, bowie knife, blowgun, chuka sticks, ammunition, gun-cleaning kits, sawed-off shotgun barrel and butt, wigs, a false mustache and make-up kit, insurance documents covering the white Oldsmobile in which Buck was seen escaping from the

to a police detective over the telephone, based on the detective's verbal description of the crimes and of his evidentiary basis for suspecting Buck.[222]

The court in *Buck* found the warrant unconstitutionally overbroad because it was "*all* in general boilerplate terms, without either explicit or implicit limitation on the scope of the search."[223] In addition, as in *Fuccillo*,[224] the officers "clearly did not insure that all the known facts were included in the warrant."[225] Nevertheless, the Second Circuit applied the good-faith exception in *Buck* despite the warrant's use of a patently inadequate "catch-all" phrase,[226] because the officers had made "considerable efforts to comply with the dictates of the [f]ourth [a]mendment."[227]

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crime, detailed bomb-making diagrams, a bomb-detonating device and several household items that the diagram indicated would be of some use in making a homemade bomb. *Id.*

222. *Id.* at 589-90.

223. *Id.* at 591; *cf.* Andresen v. Maryland, 427 U.S. 463, 479 (1976) (warrant authorizing search for "other fruits, instrumentalities and evidence of crime at this [time] unknown" was limited adequately by preceding detailed list of documents, and context clearly indicated that "crime" referred specifically to charges involving fraudulent real estate transactions); United States v. Young, 745 F.2d 733, 758 (2d Cir. 1984) (warrant containing challenged phrase, "and other evidence of a conspiracy to distribute and of the distribution and possession with intent to distribute of narcotic drug controlled substances," upheld because this list was preceded by list of specific items), *cert. denied*, 470 U.S. 1084 (1985); United States v. Dunloy, 584 F.2d 6, 8, 10 (2d Cir. 1978) (warrant to search bank safe deposit box containing "'a quantity of cocaine, and additionally, all narcotic drug controlled substances, documents, records and other evidence of distribution and possession with intent to distribute narcotic drug controlled substances'" upheld because more particular description of box's contents was impossible, and area to be searched was "extremely confined").

224. *See supra* notes 163-79 and accompanying text.

225. United States v. Buck, 813 F.2d 588, 592 (2d Cir.), *cert. denied*, 108 S. Ct. 167 (1987); *see also Young*, 745 F.2d at 759.

226. *Buck*, 813 F.2d at 593. *Contra* United States v. Crozier, 777 F.2d 1376, 1381-82 (9th Cir. 1985) (authorization in affidavit to search for "any indicia of ownership and control of the premises" coupled with no description of specific property in warrant held to bar reasonable reliance); United States v. Viers, 637 F. Supp. 1343, 1348-50 (W.D. Ky. 1986) (description including words "other things of value" leaves so much discretion in officer that reasonably well-trained officer would not believe it had been properly issued).

227. *Buck*, 813 F.2d at 592. These "considerable efforts" included: (1) seeking out a neutral magistrate; (2) tape-recording the conversation with the magistrate to ensure accuracy; (3) outlining the crime for the magistrate; (4) describing the evidence that led them to Buck's home; and (5) swearing to their assertions under oath. *Id.* at 592-93. Such efforts seem less "considerable" than those that are minimally required of reasonably well-trained officers. For example, the court noted that the officers "clearly did not insure that all the known facts were included in the warrant." *Id.* at 592. This undermines the court's conclusion that the officers'

The officers' only failure, according to the court, was their inability to predict that the court would find such "catch-all" phrases unconstitutional.[228] No reasonably well-trained officer could be expected to anticipate a prospective judicial determination that catch-all terms violate the fourth amendment.[229] Therefore, in the absence of any clearly established law to the contrary, these officers had no reason *not* to "rely upon the objectively reasonable legal conclusions of an issuing judge."[230]

The Second Circuit appears to have adopted its reasoning in *Buck* from a series of Supreme Court cases that essentially form a civil analog to *Leon*.[231] These cases applied an "objectively reasonable" standard to claims of good-faith immunity from civil damages under section 1983 of title 42 of the United States Code.[232] The first of these cases, *Harlow v. Fitzgerald*,[233] held that government officials should be immune from civil damages in the performance of discretionary functions based on the "objective reasonableness of an official's conduct, as measured by reference to clearly established laws."[234] The Court in *Harlow* presumed that "a reasonably com-

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efforts were "considerable." In fact, such an omission more closely resembles the type of behavior contemplated by *Leon* as barring application of the good-faith exception. United States v. Leon, 468 U.S. 897, 923 (1984); *see also* United States v. Fuccillo, 808 F.2d 173, 178 (1st Cir.), *cert. denied*, 107 S. Ct. 2481 (1987). *But see* United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986) (some police error will not necessarily preclude application of good-faith exception).

228. *Buck*, 813 F.2d at 593.

229. *Id.*

230. *Id.*; *see also* Massachusetts v. Sheppard, 468 U.S. 981, 989-90 (1984) (officers not required to doubt assurances of magistrate that warrant was valid as issued). In *Sheppard*, however, the officers requested the magistrate's assurances in order to dispel their doubts about the warrant's validity—doubts that had been raised by their own awareness of the warrant's possible overbreadth. *Id.* In *Buck*, only the general language itself would have put the officers on notice of the warrant's potential invalidity. *Buck*, 813 F.2d at 592-93.

231. *See, e.g.*, Anderson v. Creighton, 107 S. Ct. 3034 (1987); Malley v. Briggs, 106 S. Ct. 1092 (1986); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

232. *Anderson*, 107 S. Ct. at 3038; *Malley*, 106 S. Ct. at 1098; *Harlow*, 457 U.S. at 818.

233. 457 U.S. 800 (1982).

234. *Id.* at 818. The Second Circuit's language in *Buck*, 813 F.2d at 593 ("[w]hat the officers failed to do was anticipate our holding today that the particularity clause of the [f]ourth [a]mendment prohibits the use of a catch-all description in a search warrant"), is a fair echo of that used by the Supreme Court in *Harlow*, 457 U.S. at 818 ("[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct previously identified as unlawful").

petent public official should know the law governing his conduct,"[235] but would hold government officials liable only for violations of those "*clearly established* statutory or constitutional rights of which a reasonable person would have known."[236]

The Court applied this rule in a criminal context in *Malley v. Briggs*,[237] which held that a police officer who applies for an arrest warrant by submitting an affidavit to a judge is not automatically entitled to qualified immunity.[238] Instead, the officer must have some objectively reasonable basis to believe that there is a sufficient legal foundation for the warrant to issue, independent of the judge's approval.[239] This notion—that the act of applying for a warrant is not *per se* objectively reasonable[240]—was stated expressly in *Leon* as well.[241]

Thus, in *Buck*, the officers could not be charged with the knowledge that the warrant was too general[242] because "the existing cases left considerable ambiguity as to the exact requirements of the particularity clause going far beyond the ambiguity inherent in every new application of the law."[243] There was Second Circuit and Supreme Court precedent to suggest that the type of "catch-all" phrase invalidated in *Buck* could not pass constitutional muster without some type of limitation. As the *Buck* court itself observed, the Second Circuit previously had upheld warrants containing similarly broad language as constitutional, only because the warrants contained some intrinsic limitation on their language.[244] In addition, the Supreme Court in *Andresen v. Maryland*[245] had required the presence

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235. *Id.* at 819.
236. *Id.* at 818 (emphasis added).
237. 106 S. Ct. 1092 (1986).
238. *Id.* at 1096.
239. *Id.*
240. *Id.* at 1093.
241. United States v. Leon, 468 U.S. 897, 922 n.23 (officer may be held to knowledge of warrant's unconstitutionality "despite the magistrate's authorization").
242. *Id.* at 923.
243. United States v. Buck, 813 F.2d 588, 593 (2d Cir.), *cert. denied*, 108 S. Ct. 167 (1987). *Buck* noted that the Third Circuit—the jurisdiction in which the search was conducted—had not "spelled out the particularity requirement." *Id.*
244. *See, e.g.*, United States v. Young, 745 F.2d 733, 758 (2d Cir. 1984) (phrase, "*and other evidence* of a conspiracy to distribute . . . narcotic controlled substances," upheld because it followed a list of specific items (emphasis added)), *cert. denied*, 470 U.S. 1084 (1985); United States v. Dunloy, 584 F.2d 6, 8, 10-11 (2d Cir. 1978) (authorization to seize "other evidence of distribution and possession with intent to distribute narcotic controlled substances" upheld because it was preceded by a list of some specific items, and the area to be searched, a bank safe deposit box, was extremely limited).
245. 427 U.S. 463 (1975).

of some limiting language or list of items when a catch-all "tail" was used.[246]

Until *Buck*, however, no court had proscribed the use of certain inherently unparticular language in all situations.[247] In interpreting the particularity requirement under the fourth amendment, courts traditionally had been concerned with whether the warrant, taken as a whole, either gave the searchers authority to go beyond that for which there was probable cause to search, or allowed them to use discretion in selecting which items or places satisfied an ambiguous description.[248] Later, under the good-faith exception, courts considered whether an insufficiently particularized warrant nevertheless gave officers some reasonable basis to presume that they had the proper authority to search.[249] The only "clearly established law" that officers had to be aware of was the basic constitutional requirement that the warrant not give rise to a general search.[250] Beyond that, however, there was no clear law regarding what specific form of language either was required or prohibited under the fourth amendment, such that reliance on it would be *per se* unreasonable. Instead, the reasonableness of any search depended upon many factors apart from the actual wording of the warrant.[251]

In *Anderson v. Creighton*,[252] another civil good-faith case, the Supreme Court held that under the "clearly established law" standard, whether an official will be "objectively reasonable," and therefore in good faith, "depends substantially upon the level of generality at which the relevant legal rule is to be identified."[253] Although the Court held that the particular circumstances of a case are relevant to a determination of what information an officer possessed,[254] "[t]he contours of the right must be sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right."[255]

It therefore appears that under *Buck*, nothing less than an absolute prohibition on an unlimited "catch-all" phrase would satisfy the Supreme Court's requirement that "the unlawfulness must be ap-

246. *See supra* notes 53-56 and accompanying text.
247. *See supra* notes 16-89, 122-218 and accompanying text.
248. *See supra* notes 16-89 and accompanying text.
249. *See supra* notes 90-230 and accompanying text.
250. *See supra* notes 1-3, 16-89 and accompanying text.
251. *See supra* notes 16-89 and accompanying text.
252. 107 S. Ct. 3034 (1987).
253. *Id.* at 3038.
254. *Id.* at 3040.
255. *Id.* at 3039.

parent."[256] Neither the inherent vagueness of the *Buck* warrant's unlimited command to search for "any papers, things or property of any kind relating to previously described crime,"[257] nor the earlier holdings that suggested that similarly broad phrases require some specific list of items,[258] would be sufficient for a court to charge a reasonably well-trained officer with knowledge that the warrant violated the fourth amendment.[259]

IV. The Effect of *United States v. Buck* on the Reasonable Reliance Exception

The Second Circuit's holding in *United States v. Buck* that, absent "clearly established law" to the contrary, an officer may presume a warrant valid, represents a departure from the approach taken in the other "reasonable reliance" cases, including *Massachusetts v. Sheppard*. Prior to *Buck*, the "reasonable reliance" inquiry focused on whether the warrant was so substantially deficient in particularity that, in light of all the circumstances surrounding his application for and execution of the warrant, a reasonably well-trained officer should have doubted his authority to search under the warrant, "despite the magistrate's authorization."[260]

The practical result of this approach to "reasonable reliance," however, has been that the good-faith exception has been applied in situations where there may have been no particularity violation to begin with.[261] This is because many of the factors that limit an officer's discretion, and thus enable a search to comply with the fourth amendment,[262] are the same as those that courts consider

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256. *Id.* In a footnote to *Buck*, the Second Circuit stated the following:

> [O]ur decision today means that, with respect to searches conducted hereafter, police officers may no longer invoke the reasonable reliance exception to the exclusionary rule when they attempt to introduce as evidence the fruits of searches undertaken on the basis of warrants containing only a catch-all description of the property to be seized.

United States v. Buck, 813 F.2d 588, 593 n.2 (2d Cir.), *cert. denied*, 108 S. Ct. 167 (1987).

257. *Buck*, 813 F.2d at 590.

258. *See supra* notes 244-46 and accompanying text.

259. Although *Leon* spoke of a "reasonably well-trained officer," 468 U.S. 897, 923 (1984), *Harlow v. Fitzgerald* referred to those rights of which "a reasonable person" would have known, 457 U.S. 800, 818 (1982). This raises the question of whether a police officer, educated both by experience and departmental regulations, should be held to a higher standard of knowledge than a "reasonable person."

260. *Leon*, 468 U.S. at 922 n.23.

261. *See, e.g.*, United States v. Accardo, 749 F.2d 1477 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985).

262. *See supra* notes 16-89 and accompanying text.

when deciding whether an officer exhibited the requisite "reasonable reliance" for the good-faith exception to apply.[263] Traditional analysis under the fourth amendment considers only whether the language used in the warrant, considering all of the circumstances surrounding the application for and execution of the warrant, provides enough guidance for the searcher in order to prevent a general search.[264] The standard used by a majority of the circuits for applying the good-faith exception to particularity defects is substantially the same, except that the court need only find that the language was sufficiently particular to permit the officer to *presume* that the authorized search was legal.[265] This malleable standard for particularity has produced such anomalous results as *United States v. Accardo*,[266] in which the Eleventh Circuit applied the good-faith exception because the existence of probable cause to suspect extensive fraud rendered a general authorization to search for "all corporate records" reliable under those circumstances.[267] This clearly was a case in which the court could simply have upheld the search under the fourth amendment, rather than the good-faith exception.[268]

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263. *See supra* notes 104-218 and accompanying text.

264. *See supra* notes 16-89 and accompanying text.

265. *See supra* notes 90-259 and accompanying text.

266. 749 F.2d 1477 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985).

267. *See supra* notes 194-210 and accompanying text.

268. *See supra* notes 80-82 and accompanying text. Professor LaFave has observed that the Supreme Court's application of the good-faith exception in *Sheppard*—which, he contends, presented no fourth amendment violation, *see supra* note 114—invited lower courts to apply the exception in other situations in which the legality of the search could be sustained on constitutional grounds instead. LaFave, *supra* note 12, at 912-14, 930. "The temptation will be great," he wrote, "to treat virtually any grant of search authority by a judicial officer as an iron-clad barrier to any meaningful inquiry into the [c]onstitutionality of that authorization." *Id.* at 930.

Experience seems to have borne out LaFave's fears. Neither the *Michaelian* court nor the *Accardo* court engaged in any meaningful discussion of what made the warrants in question unconstitutional, before progressing to a reasonable reliance analysis. *See* United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986); United States v. Accardo, 749 F.2d 1477 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985); *see also* United States v. Maggitt, 778 F.2d 1029, 1033 (5th Cir. 1985) (determination of search warrant's invalidity not always necessary before reaching issue of good-faith exception), *cert. denied*, 476 U.S. 1184 (1986). In United States v. Bonner, 808 F.2d 864 (1st Cir. 1986), *cert. denied*, 107 S. Ct. 1632 (1987), the court actually applied the good-faith exception after finding the warrant constitutional. *Id.* at 867. In 1984, Professor LaFave wrote that he found it "disturbing . . . that the Court would adopt a good-faith rule . . . where, in all likelihood, there was no fourth amendment violation in the first place." LaFave, *supra* note 12, at 911. No doubt, several of the decisions since rendered would serve to intensify his disturbance.

Buck, on the other hand, involved precisely the type of warrant *Leon* and *Sheppard* contemplated as being "so facially deficient" that an officer could not reasonably presume it to be valid.[269] The use of a catch-all phrase with no specific listing of items clearly permitted what amounted to "general rummaging."[270] Neither the actual language of the warrant in *Buck*[271] nor the circumstances surrounding its execution[272] adequately limited the officers' discretion in searching Buck's home or in seizing her property.[273] Nevertheless, the court sanctioned the execution of this patently overbroad warrant because, absent any clearly established legal precedent barring the use of such language, the officer was entitled to rely on the judge's authorization.[274]

The situation in *Buck* resembled that of *United States v. Leary*,[275] in which the Tenth Circuit did not apply the good-faith exception.[276] While it noted the Second Circuit's earlier holding in *Buck*, the *Leary* court held the searchers responsible for knowing that a warrant must contain at least some guidelines for determining what may be seized.[277] The court held that it was "not expecting the agents to anticipate legal determinations or resolve ambiguities in the law" by presuming that officers possess this basic degree of knowledge.[278]

In view of both the decision in *Leary* and Second Circuit precedent in the area of particularity,[279] *Buck* appears to have set an artificially high threshhold for how explicit the law must be in order to qualify as "clearly established." In addition, *Buck* failed to recognize that some warrants provide so little direction or guidance as to what the scope of the search should be that no objectively reasonable officer could presume the warrant's authorization to search was valid, apart

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269. *See supra* notes 10-13, 98-106 and accompanying text.

270. United States v. Buck, 813 F.2d 588 (2d Cir.), *cert. denied*, 108 S. Ct. 167 (1987). "General rummaging" may occur in one of three ways: (1) where there is a failure to describe the objects sought with sufficient particularity; (2) where all objects in a class must be examined in order to locate a specific thing; or (3) via "general exploratory rummaging," in which there is no specific object of the search. Galloway, *supra* note 2, at 141-45.

271. *See, e.g.*, United States v. Michaelian, 803 F.2d 1042 (9th Cir. 1986); United States v. Strand, 761 F.2d 449 (8th Cir. 1985).

272. *See, e.g*, United States v. Accardo, 749 F.2d 1477 (11th Cir.), *cert. denied*, 474 U.S. 949 (1985).

273. *See supra* note 221 and accompanying text.

274. *See supra* notes 226-59 and accompanying text.

275. 846 F.2d 592 (10th Cir. 1988).

276. *See supra* notes 180-93 and accompanying text.

277. *See supra* notes 191-93 and accompanying text.

278. *Leary*, 846 F.2d at 609.

279. *See supra* notes 53-56, 244-46 and accompanying text.

from whether there was any clearly established law in that jurisdiction.[280] Under the logic of *Buck*, even if further scrutiny of such a warrant would demonstrate to the officers that it provides them with inadequate guidance to search, the very fact that the magistrate issued such a warrant *would* be sufficient to dispel this presumed doubt, assuming no clearly established law in that jurisdiction of which the officer should have been aware.[281]

Nevertheless, the Second Circuit's reference to clearly established law as a basis for reasonable reliance ultimately is preferable to the *ad hoc* approach taken by other courts.[282] The holding in *Buck* addresses the concern that "[w]ithout some articulate guidelines, a freestanding reasonableness standard is difficult and perhaps even dangerous for appellate judges to apply."[283] Under the rationale of *Buck*, once the law in a particular jurisdiction clearly states that a certain type of description violates the fourth amendment, apparently *nothing* else will justify an officer's execution of that warrant.[284] This will make it more difficult for officers to be "wrong but reasonable" in relying on a defective warrant, because a court need only consider whether the law in that jurisdiction was clearly established regarding the type of warrant at issue before evaluating the legitimacy of the search. Thus, *Buck* actually encourages those courts that desire to protect the exclusionary rule from encroachment by the reasonable reliance exception to establish clearer standards for particularity. Moreover, the creation of clear prohibitions on certain types of language may discourage officers from executing

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280. United States v. Leon, 468 U.S. 897, 923 (1984). Shortly after the decision in *Sheppard*, which she called a "bizarre situation," Chief Judge Patricia Wald interpreted the opinion to mean that "when a magistrate has already found that probable cause exists and has issued a warrant, a police officer's reliance on the magistrate's decision will apparently be objectively reasonable on almost any facts." Wald, *supra* note 14, at 88. This observation seems particularly prescient in light of *Buck*.

281. United States v. Buck, 813 F.2d 588, 593 (2d Cir.), *cert. denied*, 108 S. Ct. 167 (1987). Professor LaFave has expressed concern that such use of the reasonable reliance exception would encourage magistrate-shopping. LaFave, *supra* note 12, at 914; *see also* Bloom, *supra* note 8, at 252. *But see Leon*, 468 U.S. at 922 n.23 (rejection of warrant by one magistrate undermines officer's ability to reasonably rely on approval by subsequent magistrate).

282. A magistrate who abdicates his neutral and detached role creates an independent basis for suspension of the good-faith exception. *Leon*, 468 U.S. at 923; *see also* Lo-Ji Sales v. New York, 442 U.S. 319, 327 (1979). Under *Leon*, whether a warrant is facially sufficient to support official belief in its validity is a separate inquiry from whether the magistrate acted properly. *Leon*, 468 U.S. at 923.

283. Wald, *supra* note 14, at 88.

284. *Buck*, 813 F.2d at 593.

questionable warrants due to the likelihood that the good-faith exception will be unavailable.

Buck erred only in setting too stringent a standard for how clear the established law regarding particularity must be. Rather than looking to see whether certain language has been expressly invalidated, courts adopting the clearly established law standard should charge all officers with knowledge of the clearly established fourth amendment requirement that warrants provide some guidelines for the search, as *Leary* held.[285] A presumption of this basic knowledge of what the fourth amendment *does* require in all cases[286] would result in a more consistent application of the exclusionary rule to those warrants that *Leon* and *Sheppard* anticipated as being inherently unreliable.

V. Conclusion

The definition of "particularity" traditionally has been dealt with as a concept, rather than as a rule. While a flexible notion of particularity is appropriate under a conventional fourth amendment analysis because of the great variety of situations in which searches occur, application of the good-faith exception demands a greater degree of regularity and predictability. By predicating reasonable reliance on the existence of some clearly established law regarding particularity, *Buck* injects a desirable consistency and clarity into application of the good-faith exception.

Martha Applebaum

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285. *See supra* notes 180-93 and accompanying text.
286. *See supra* notes 17-89 and accompanying text.