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NOTES

A REASONABLE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE: NO LONGER LETTING THE CRIMINAL GO FREE BECAUSE THE MAGISTRATE HAS BLUNDERED

*United States v. Leon*¹
*Massachusetts v. Sheppard*²

The United States Supreme Court recently held³ that evidence seized pursuant to a facially valid search warrant later shown to be defective is admissible in the prosecution's case-in-chief.⁴ Such evidence is admissible only if it appears that the executing officer's reliance on the defective warrant was objectively reasonable.⁵ This decision is an important step in the Court's re-

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1. 104 S. Ct. 3405 (1984).
 2. 104 S. Ct. 3424 (1984).
 3. *Leon*, 104 S. Ct. at 3421.

4. Heretofore, the exclusionary rule prohibited the use during the prosecution's case-in-chief of evidence obtained by the government in contravention of the defendant's fourth amendment rights. *E.g.*, *Weeks v. United States*, 232 U.S. 383, 398 (1914). This prohibition is applicable to both state and federal law enforcement officers and in both state and federal criminal prosecutions. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). Such evidence may be used, however, against persons other than those whose constitutional rights were invaded, *e.g.*, *Wong Sun v. United States*, 371 U.S. 471, 491-92 (1963), in grand jury proceedings, *United States v. Calandra*, 414 U.S. 338, 348 (1974), in federal civil suits, *United States v. Janis*, 428 U.S. 433, 454 (1976), in parole revocation proceedings, *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970); *cf.* *Morrissey v. Brewer* 408 U.S. 471, 480 (1972) (revocation of parole not part of criminal prosecution and a defendant therein is not entitled to the full panoply of constitutional rights afforded the accused criminal), in criminal trials to impeach the defendant's direct testimony, *Walder v. United States*, 347 U.S. 62, 65 (1954), and to impeach the defendant's testimony elicited on cross-examination. *United States v. Havens*, 446 U.S. 620, 627 (1980).

5. *Leon*, 104 S. Ct. at 3420. The Court noted, however, three situations in which the new exception would be inapplicable: 1) evidence obtained pursuant to a

cent effort to narrow the scope of the exclusionary rule.⁶ The exception created is narrowly drawn, yet it raises serious questions about the continued vitality of the rule as a protection against governmental infringement of fourth amendment rights.⁷

In September of 1981, police officers searched the residence of Alberto Leon pursuant to a facially valid search warrant.⁸ Much of the information contained in the affidavit supporting the warrant was provided by a "confidential informant of unproven reliability." The informant told the police that two persons known to him as "Armando" and "Patsy" were selling cocaine and methaqualone at their residence, and that he had witnessed a sale of methaqualone at their residence some five months previously.⁹

The search turned up large quantities of drugs. A federal grand jury indicted Leon for conspiracy to possess and distribute cocaine. Leon moved to suppress the evidence.¹⁰ The district court found that the warrant was not supported by probable cause because the reliability and credibility of the inform-

warrant issued in reliance on an affidavit secured by an affiant making knowingly false statements, or making statements in reckless disregard of their truth; 2) evidence obtained pursuant to a warrant issued by a magistrate who has abandoned his neutral and detached judicial role; 3) evidence obtained pursuant to a warrant based on a "bare bones" affidavit or a warrant so facially deficient as to render objective good faith reliance thereon impossible. *Id.* at 3421-22.

6. C. WHITEBREAD, CRIMINAL PROCEDURE, AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 20 (1980) ("There has been a marked tendency to 'narrow the thrust' of the exclusionary rule."). Justice Brennan characterized this trend as the "gradual but determined strangulation of the rule." *Leon*, 104 S. Ct. at 3430 (Brennan, J., dissenting).

7. U.S. CONST. amend. IV states:

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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

8. *Leon*, 104 S. Ct. at 3410. The officers also searched the residences of Armando Sanchez and Patsy Stewart, as well as Stewart's car and a car belonging to Ricardo Del Castillo. Drugs and other evidence were seized at all three residences and from the automobiles. *Id.*

9. *Id.* at 3409. Additionally, the affidavit summarized the results of an extensive investigation of Leon and his co-defendants prompted by the informant's tip. This investigation revealed that Del Castillo had been arrested some years earlier on drug charges. On checking his probation records, the police discovered that Del Castillo listed Leon as his employer. Leon himself had been arrested in 1980 on drug charges. This information led the police to place Leon's residence under surveillance, where they observed a number of persons including known drug offenders entering and leaving with small packages. Moreover, Sanchez and Stewart were observed to have flown from Los Angeles to Miami separately and return together. In addition a search of their luggage revealed a small amount of marijuana. *Id.* at 3410.

10. *Id.* Leon and his co-defendants argued that the search warrants were unsupported by sufficient facts to show probable cause and were therefore defective. Specifically, the defendants argued that the affidavits failed to show the credibility of the informants and that the criminal transactions reported in the warrants were stale. *Id.*

ant had not been established and the previous criminal transaction reported by the informant was stale. Therefore the drugs were excluded.¹¹ A divided panel of the Ninth Circuit Court of Appeals affirmed,¹² finding that the information provided by the informant failed to meet the two-part *Aguilar-Spinelli*¹³ test, and that this deficiency had not been cured by the information obtained during the subsequent police investigation.¹⁴ The district court expressly found that the officers performing the search had relied in good faith on the warrant, but both the district and appellate courts refused to create an exception to the exclusionary rule based on that good faith.¹⁵

In the companion case of *Massachusetts v. Sheppard* the Supreme Court held the warrant invalid because it failed to meet the fourth amendment par-

11. *Id.* at 3411 n.2.

12. *United States v. Leon*, 701 F.2d 187 (9th Cir. 1983) (mem.), *rev'd*, 104 S. Ct. 3405 (1984).

13. Under the *Aguilar-Spinelli* two-part test, the affidavit must show: 1) the reliability and credibility of the informant, and 2) facts sufficient to indicate how the informant reached his conclusions. *Aguilar v. Texas*, 378 U.S. 108, 114 (1964); *Spinelli v. United States*, 393 U.S. 410, 416 (1969). See C. WHITEBREAD, *supra* note 6 at 115-16. The information provided by the informant in *Leon* met neither prong of this test. The informant's credibility was not established and the transaction on which the informant relied in reporting the criminal activity was seven months old at the time the warrant was issued and thus "fatally stale." *Leon*, 104 S. Ct. at 3411.

The Supreme Court abandoned the *Aguilar-Spinelli* test in *Illinois v. Gates*, 103 S. Ct. 2317, 2332 (1983). Probable cause is now based on the "totality of the circumstances" presented to the magistrate. *Id.* The magistrate's determination will be sustained if on review the court finds that there was a "substantial basis" for his determination. *Id.* The *Leon* majority declined to consider whether the affidavit therein would have been sufficient under the *Gates* standard, noting that the issue had not been briefed or argued by the parties. *Leon*, 104 S. Ct. at 3412. Justice Stevens suggests in his dissenting opinion that the *Leon* affidavit would be sufficient under the new standard and argues that the Court should have remanded the case to the Court of Appeals for reconsideration in light of *Gates*. *Id.* at 3447 (Stevens, J., dissenting).

It is interesting to note that the Court heard oral argument in *Gates* twice; the second time the parties argued the issue of a good faith exception to the exclusionary rule at the Court's request. *Gates*, 103 S. Ct. at 2321. The Court did not decide that issue, however, because it had not been presented to the Illinois courts. *Id.* Justice White concurred in the majority judgment, but filed a separate opinion in which he outlined his proposed reasonable good faith exception to the exclusionary rule in substantially the same form as adopted in *Leon*. *Id.* at 2340-47 (White, J., concurring).

Justice White characterized the *Gates* "substantial basis" standard as a "variation on the good-faith theme," *id.* at 2338 (White, J., concurring), suggesting that he views the *Leon* exception as simply an extension of *Gates*. Perhaps this explains in part the Court's readiness to create the good faith exception in *Leon* and avoid deciding the case on the basis of *Gates*. Obviously the Court was eager to reach the exclusionary rule issue, else why expressly request that it be briefed and argued in *Gates*? If a majority of the Court agreed with White that the *Leon* exception is a "variation" of *Gates*, then little reason existed for the Court to confine itself to considering the probable cause issue in *Leon*. The relationship between *Leon* and *Gates* is further discussed in the text accompanying notes 117, 125-35, *infra*.

14. *Leon*, 104 S. Ct. at 3411.

15. *Id.*

ticularity requirement.¹⁶ The Boston police suspected Osborne Sheppard of having murdered his girlfriend. A detective investigating the murder prepared an affidavit to support a warrant for the search of Sheppard's residence. The affidavit specified that the officers wished to search for articles of clothing, and various items associated with or belonging to the victim.¹⁷ As the affidavit was prepared on Sunday, the police had difficulty finding the proper warrant application form. The printed form eventually used authorized a search for "controlled substances."¹⁸ The officer made some changes on the face of the warrant, as did the magistrate who approved the warrant application. Neither, however, changed the substantive portion of the warrant, which continued to refer to controlled substances. The magistrate assured the applying officer that the warrant was in the proper form to authorize a search for the items listed on the affidavit.¹⁹ The ensuing search was limited to the items noted on the affidavit and turned up several pieces of incriminating evidence.²⁰

The trial court admitted the evidence notwithstanding the defective warrant, finding that the police officers had relied in good faith on a warrant they reasonably thought valid. The Supreme Judicial Court of Massachusetts, however, held that the evidence should have been excluded because the United States Supreme Court had not recognized a good-faith exception to the exclusionary rule.²¹

16. *Sheppard*, 104 S. Ct. at 3428. "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 v. United States*, 275 U.S. 192, 196 (1927). See generally 2 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 4.6 (1978).

17. *Sheppard*, 104 S. Ct. at 3426-27. The affidavit stated that the police wished to search for

a fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that had been described as black-grey (charcoal), any possessions of Sandra A. Boulware, similar type wire and rope that match those on the body of Sandra A. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim.

Id. at 3427.

18. *Id.* The form was entitled "Search Warrant-Controlled Substance G.L. c. 276 §§ 1 through 3A." It authorized a search for "any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use and any controlled substance, and to seize and securely keep the same until final action. . . ." *Id.*

19. *Id.*

20. *Id.* at 3428. The police found blood stains on the concrete floor; they found and seized a bloodstained woman's earring, a bloodstained envelope, a bloodstained pair of men's jockey shorts, a bloodstained leotard, three types of wire and a hairpiece identified as belonging to the victim. *Id.* at 3428 n.4.

21. *Id.*; *Commonwealth v. Sheppard*, 387 Mass. 488, _____, 441 N.E.2d 725, 735-36 (1982), *rev'd sub. nom. Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984). The Massachusetts court recognized that the purpose and justification of the exclusionary rule is to deter unconstitutional conduct by law enforcement personnel. 387 Mass.

The Supreme Court reversed the decisions of both the Ninth Circuit Court of Appeals and the Massachusetts Supreme Judicial Court.²² Justice White, writing for the majority, stated that the purpose of the exclusionary rule was deterrence of police violations of the fourth amendment.²³ This purpose, he reasoned, is not served where the police reasonably rely on a facially valid search warrant.²⁴ The Court reversed the decisions below, finding that the officers' reliance in *Leon* and *Sheppard* was objectively reasonable.²⁵

The Court's new "good faith"²⁶ exception to the exclusionary rule rests on two fundamental assumptions. First, the Court assumes that the exclusionary rule is a remedial device designed solely to deter violations of the Constitution

at _____, 441 N.E.2d at 733. It further expressed doubts that this purpose was served where as here, the "misconduct" was on the part of the issuing magistrate rather than the police. *Id.* at _____, 441 N.E.2d at 735. The court reasoned however that it was bound by the decisions of the Supreme Court requiring the exclusion of evidence obtained pursuant to a warrant not meeting the particularity requirement. *Id.* at _____, 441 N.E.2d at 735-36. One Justice dissented, arguing that since admission of the evidence would not deter police misconduct the exclusionary rule should not apply. *Id.* at _____, 441 N.E.2d at 746 (Lynch, J., dissenting).

22. *Leon*, 104 S. Ct. at 3423; *Sheppard*, 104 S. Ct. at 3430.

23. 104 S. Ct. at 3418.

24. *Id.* at 3419-21.

25. *Id.* at 3423; *Sheppard*, 104 S. Ct. at 3429-30. Justice Blackmun concurred in a separate opinion. 104 S. Ct. at 3423-24 (Blackmun, J., concurring). He agreed with the majority's reasoning, but emphasized that the *Leon* rule was provisional in that it was based on empirical data concerning the effectiveness of the exclusionary rule. *Id.* He stated that the Court would observe the impact of the new exception on police practices and if "contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, [the Court would] have to reconsider what we have undertaken here." *Id.*

26. Although Justice White refers to the *Leon* rule as a "good faith" exception, *id.* at 3412, 3413, 3416, 3420, 3421, 3422, it could be more accurately characterized as an "objectively reasonable mistake" exception. As Justice White emphasized, *id.* at 3420 n.20, the standard against which the police misconduct is measured is "an objective one." *Id.* Moreover, objectivity is defined in terms of a "reasonably well-trained" police officer. *Id.* at 3422.

The Fifth Circuit Court of Appeals, sitting en banc, adopted a form of a "good faith" exception to the exclusionary rule in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). The court in alternative opinions (the first, avoiding the issue of good faith, signed by sixteen judges, the second signed by thirteen judges) held that certain evidence suppressed at trial should have been admitted. *Id.* at 839, 847. The *Williams* search was incident to an arrest, rather than pursuant to a warrant. *Id.* at 834. Arguably the *Williams* exception, though based on reasonable, good-faith police conduct, is broader than that created by the Supreme Court in *Leon*. *Id.* at 840-41. Until the Court is presented with the issue of reasonable good faith searches made without a warrant, the constitutionality of *Williams* is doubtful. For an extensive criticism of the *Williams* decision, see Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981). Professor LaFave has remarked of *Williams* that it "prove[s] for all time the wisdom of the homily that too many cooks spoil the soup." LaFave, *The Fourth Amendment in An Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 337 (1982).

by law enforcement officers. Second, the Court assumes that such violations are not deterred where the police reasonably rely on a facially valid warrant. Without a deterrent effect, the "costs" of the exclusionary rule out-weigh its marginal or non-existent "benefits" and it "cannot pay its way."²⁷ A brief review of the history of the exclusionary rule is helpful in understanding the Court's reasoning.

The exclusionary rule is not explicitly provided for in the fourth amendment.²⁸ The case in which the rule was created, *Boyd v. United States*,²⁹ was not decided until nearly 100 years after the amendment's ratification. In *Boyd*, the Supreme Court linked the fourth and fifth amendments together, noting that "they throw great light on one another."³⁰ The district court order requiring the defendants to produce certain business records was not, in the Court's opinion, "substantially different from compelling him to be a witness against himself."³¹ This case does not speak of exclusion as being appropriate or necessary under the fourth amendment alone, but only in relation to the fifth amendment.³² The combination of the two provisions required the exclusion of the evidence.³³

Twenty-eight years later, the Court, in the case of *Weeks v. United States*,³⁴ applied the exclusionary rule in the fourth amendment context separate and apart from the fifth amendment. Before his trial for selling lottery tickets through the mails, Weeks petitioned the trial court for the return of property³⁵ seized by federal marshals during a warrantless search of his residence.³⁶ The Court held³⁷ that Weeks was entitled to the return of the seized material because

[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.³⁸

27. *Leon*, 104 S. Ct. at 3413.

28. See text of fourth amendment, *supra* note 7.

29. 116 U.S. 616 (1886).

30. *Id.* at 633. The fifth amendment does contain an explicit prohibition against the admission of self-incriminating statements, "nor shall any person . . . be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

31. 116 U.S. at 633.

32. Justice Black concurring in *Mapp v. Ohio*, 367 U.S. 643 (1961), concluded that the fourth and fifth amendments *combined* give rise to a constitutional right to the exclusion of illegally seized evidence. *Id.* at 662 (Black, J., concurring). In so doing he endorsed the reasoning in *Boyd, Id.*

33. *Boyd*, 367 U.S. at 638.

34. 232 U.S. 383 (1914).

35. Weeks sought the return of several securities, currency, and other personal property. *Id.* at 387.

36. *Id.*

37. *Id.* at 398.

38. *Id.* at 392.

As the fourth amendment forbade the obtaining of the material introduced against the defendant, "there was involved in the order refusing [its return] a denial of the constitutional rights of the accused."³⁹

The Court had occasion to consider whether the exclusionary rule ought to apply to the states in *Wolf v. Colorado*.⁴⁰ The Court first held that the fourth amendment's prohibition against illegal searches and seizures is "implicit in the concept of ordered liberty" and thus enforceable against the states through the due process clause of the fourteenth amendment.⁴¹ As to the exclusionary rule, however, the Court asserted that "[i]t was not derived from the explicit requirements of the Fourth Amendment . . . [but] was a matter of judicial implication."⁴² The Court noted that thirty-one states had considered and rejected the *Weeks* doctrine, while only sixteen had adopted it.⁴³ The Court concluded,

Granting that in practice *the exclusion of evidence may be an effective way of deterring unreasonable searches*, it is not for this Court to condemn as falling below the minimal standards assured by the due process clause a State's reliance upon other methods which, if consistently enforced would be equally effective.⁴⁴

Thus, the Court stated expressly that the exclusionary rule was not mandated by the Constitution, and implied that a major purpose of the rule was deterrence of police misconduct. Arguably, this was a retreat from the broader statements in *Boyd* and *Weeks* about the constitutional nature of the rule.⁴⁵

39. *Id.* Professors Schrock and Welsh argue that this phrase stands for the proposition that the exclusionary rule is *required* by the fourth amendment and that although the Court refers to judicial integrity, 232 U.S. at 391-92, 394, *Weeks* is grounded on the command of the amendment. Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 282 (1974). Justice Stewart has suggested the converse, that *Weeks* stands for the proposition that a person from whom property has been illegally seized is entitled under the fourth amendment to its *return* rather than to its exclusion from evidence. Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1381 (1983) ("Thus, *Weeks* offers little real support for the argument that the exclusionary rule is mandated by the Constitution."). The Court's holding, however, reads, "In holding [the letters] and permitting their use upon the trial, we think prejudicial error was committed." 232 U.S. at 398; *see also* *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (admission of illegally seized evidence "reduces the Fourth Amendment to a form of words . . . the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all").

40. 338 U.S. 25 (1948).

41. *Id.* at 27-28.

42. *Id.* at 28.

43. *Id.*

44. *Id.* at 31 (emphasis added).

45. 1 W. LAFAYE, *supra* note 16, at 17. Professor LaFave suggests, however, that deterrence was an implied purpose of the rule from its inception, and is now in fact the "major thrust" of the doctrine. *Id.*; *see infra* note 67 and cases cited therein. A

Similarly, in *Elkins v. United States*⁴⁶ the Court stated that “[the exclusionary rule’s] purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it.”⁴⁷ However the Court posited an additional rationale for the rule, “the imperative of judicial integrity.”⁴⁸ The Court cited with approval the sentiments of Justices Holmes and Brandeis expressed in their dissents from the decision in *Olmstead v. United States*⁴⁹ to the effect that the government ought not give its approval, even indirectly, to illegal invasions of fourth amendment rights.⁵⁰

However, in *Mapp v. Ohio*⁵¹ the Court returned to its suggestion in *Weeks* that the exclusionary rule is a necessary corollary of the fourth amendment, though the Court’s statement that the rule is a “constitutionally required—even if judicially implied—deterrent safeguard” is somewhat ambiguous.⁵² The Court stated that the *Weeks* rule is “of constitutional origin”⁵³ and that the rule had been “posited as part and parcel of the Fourth Amendment’s limitation upon federal encroachment of individual privacy.”⁵⁴ In this case, the Court’s express holding is that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”⁵⁵ The Court however adverts to the deterrence rationale of the

third suggested rationale for the rule is that it avoids the risk of undermining public trust in government through allowing government to profit from its “lawless behavior.” See *infra* note 50.

46. 364 U.S. 206 (1960). *Elkins* concerned the “silver platter doctrine” whereby articles obtained through an illegal search and seizure conducted by state police officers could be turned over to federal officers for federal prosecutions on a “silver platter.” *Id.* at 208. The Court held that this practice was no longer permissible in part because it encouraged state police officers to violate the fourth amendment. *Id.* at 223.

47. *Id.* at 217.

48. *Id.* at 222.

49. 277 U.S. 438 (1928). The Court in *Olmstead* refused to extend the protection of the fourth amendment to information obtained by wiretapping telephone lines where the wiretapping occurred outside the defendant’s residence. *Id.* at 466. *Olmstead* was overruled by *Katz v. United States*, 389 U.S. 347 (1967).

50. *Elkins*, 364 U.S. at 222-23. Professor LaFave identifies a third rationale for the exclusionary rule, that of avoiding the risk of undermining public trust in the government through allowing government to profit from its “lawless behavior.” 1 W. LAFAVE, *supra* note 16, § 1.1, at 18 (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)). The Court in *Leon* rejected this contention outright, noting that in practice the exclusionary rule often creates public disrespect for the judicial criminal process. *Leon*, 104 S. Ct. at 3413.

The fourth rationale has already been alluded to, *supra* note 39, i.e., that the exclusionary rule is required by the Constitution. See *infra* note 55.

51. 367 U.S. 643 (1961).

52. *Id.* at 648.

53. *Id.* at 649.

54. *Id.* at 651.

55. *Id.* at 655. The suggestion that the exclusionary rule is mandated by the Constitution was embraced after some reluctance, see e.g. *Wolf v. Colorado*, 338 U.S. 25, 40 (1949) (Black, J. concurring), by Justice Black in *Mapp*. 367 U.S. at 662. He

rule noting that the double standard, state and federal, had been "an inducement to evasion" of the strictures of the fourth amendment.⁵⁶

Four years later, the Court again retreated from the position that the exclusionary rule is a concomitant of the fourth amendment. In *Linkletter v. Walker*,⁵⁷ the Court considered whether the *Mapp* rule should be made retroactive.⁵⁸ After rehearsing the long history of the rule, the Court concluded that the primary purpose of *Mapp* was the enforcement of the fourth amendment and that the exclusionary rule was "the only effective deterrent to lawless police action" in violation of the amendment.⁵⁹ The Court noted that all of its cases since *Wolf* requiring the exclusion of illegally obtained evidence had been "based on the necessity for an effective deterrent to illegal police action."⁶⁰ This deterrence rationale was not furthered by making the *Mapp* rule retroactive.⁶¹ Thus, the *Linkletter* Court effectively read *Mapp* as requiring the exclusionary rule as a matter of deterring violations of the fourth amendment only, and not as being commanded by the amendment itself.⁶²

finds such a requirement not in the fourth amendment alone, *id.* at 661, but in the fourth amendment combined with the fifth amendment ban against self-incrimination. *Id.* at 662.

A different analysis which produces the same result has been advanced by Justice Stewart. Stewart, *supra* note 39. Justice Stewart argues that the fourth amendment requires an enforcement mechanism of some sort. *Id.* at 1384. After considering various alternatives to the exclusionary rule, however, he concludes that exclusion of illegally seized evidence is the only effective means of enforcement extant. *Id.* at 1385. He therefore concludes that the rule is constitutionally required. *Id.*

Professors Schrock and Welsh suggest two alternative sources for a constitutionally mandatory rule. Schrock & Welsh, *supra* note 39. First, they argue that the search for, seizure of, and use of evidence is all part of a single governmental transaction, each part of which presupposes eventual use. *Id.* at 298. The violation of the Constitution at the time of the search does not terminate with the seizure, but continues for as long as the government makes any use of the material; "the basic right is to be free of the entire transaction." *Id.* at 301.

In the alternative Schrock and Welsh argue that the exclusionary rule is a part of the fifth and fourteenth amendment due process clauses. *Id.* at 361-62. The due process clause, which judges both state and federal swear to uphold, U.S. CONST. art. VI, § 2, forbids the government from taking a person's life, liberty, or property without due process or contrary to the "law of the land." *Id.* at 361. Part of the "law of the land" is the fourth amendment prohibition against unreasonable searches and seizures. A person may not, therefore, consistent with due process, suffer a liberty or property deprivation where the dictates of the fourth amendment have not been followed. *Id.* at 362. For a similar analysis, see Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & C. 141 (1978).

56. *Mapp*, 367 U.S. at 658. The Court also referred briefly to the judicial integrity rationale for the rule. *Id.* at 659-60.

57. 381 U.S. 618 (1965).

58. *Id.* at 619-20.

59. *Id.* at 636-37.

60. *Id.*

61. *Id.* at 637.

62. Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 630

The ascendancy of deterrence as the rationale for the exclusionary rule was reinforced in *United States v. Calandra*.⁶³ In *Calandra*, the Court considered whether evidence obtained through an unlawful search was admissible in a grand jury proceeding.⁶⁴ The Court determined that the evidence was admissible because "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best."⁶⁵ The exclusionary rule, wrote Justice White, "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."⁶⁶ The deterrence rationale has remained since *Calandra* the primary and perhaps the only justification for the exclusionary rule in the eye of the Court.⁶⁷

(1982-83).

63. 414 U.S. 338 (1974).

64. *Id.* at 339.

65. *Id.* at 351.

66. *Id.* at 348 (footnote omitted). Justice Brennan dissented from the *Calandra* decision, joined by Justices Douglas and Marshall. They perceived the exclusionary rule as being required by the fourth amendment and meeting the "twin goals" of avoiding judicial approval of official lawlessness and minimizing the risk of undermining the public's trust in the government. *Id.* at 356-57 (Brennan, J., dissenting).

Justice Brennan reiterated his position that the rule is required by the fourth amendment in his dissent in *Leon*. 104 S. Ct. at 3430-35 (Brennan, J., dissenting). He noted that since *Calandra*, in "case after case, I have watched the Court's gradual but determined strangulation of the rule." *Id.* at 3430 (Brennan, J., dissenting) (footnote omitted).

67. See *United States v. Havens*, 446 U.S. 620, 624 (1980) (no longer does the Court approve the *Silverthorne* suggestion that illegally seized evidence is not to be used at all); *Stone v. Powell*, 428 U.S. 465, 486 (1976) (the primary justification of the exclusionary rule is the deterrence of police misconduct); *United States v. Janis*, 428 U.S. 433, 446 (1976) (the prime if not the only purpose of the exclusionary rule is to deter police misconduct); *United States v. Peltier*, 422 U.S. 531, 536 (1975) (although the Court has reference to the imperative of judicial integrity from time to time, it has relied principally on deterrence as the rationale for the exclusionary rule). See generally 1 W. LAFAYETTE, *supra* note 16, § 1.1 (f).

The Court in *Leon* re-articulated the deterrence rationale for the exclusionary rule. *Leon*, 104 S. Ct. at 3412. The growth and development of the rule presents a fascinating study of the various factors that make up and contribute to a Supreme Court decision. The result the Court reaches, especially in controversial areas of the law, turns more often on the personnel of the Court, their passions, prejudices and politics, than on the logical necessity of a given decision. See generally J. ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* (1980). As is evident from the above historical review, the purpose of the exclusionary rule has been the vehicle and mechanism of its change. The rule "grew" in *Mapp*, where it was referred to as a concomitant of the fourth amendment. *Mapp*, 367 U.S. at 651. The rule "shrank" in *Calandra*, where the Court called it a deterrent remedy. *Calandra*, 414 U.S. at 348. Thus, the Court provided itself with a number of formulations of the rule's purpose from which to choose in order to facilitate reaching the result a majority of the justices desire in any given situation. That result in the past twenty years has been most often calculated to restrict the rule's scope. See *supra* note 6. The reasons behind the Court's various shifts in its position on the exclusionary rule are of course not explicitly stated in the Court's opinions. However, as the illustrious Mr. Dooley once aptly observed,

GOOD FAITH EXCEPTION

The Court in *Leon* re-affirmed the *Calandra* formulation of the exclusionary rule's purpose and used the deterrence rationale for the exception which it created.⁶⁸ The Court noted that its more recent cases had balanced the deterrent "benefit" of the rule against the "cost" of preventing the use of "inherently trustworthy" physical evidence.⁶⁹ Quoting from *Calandra*, the Court stated that the use of the exclusionary rule should be "restricted to those areas where its remedial objectives are thought most efficaciously served."⁷⁰ Examples of cases where the deterrent purpose was not "efficaciously served" included exclusion in federal habeas corpus proceedings where the defendant had already been afforded a full and fair opportunity to litigate the fourth amendment issue in a state forum,⁷¹ exclusion in grand jury hearings,⁷² exclusion in federal civil suits,⁷³ exclusion when offered against persons other than those whose fourth amendment rights have been violated in obtaining the evidence,⁷⁴ and exclusion from use in impeaching testimony on direct⁷⁵ or cross-examination.⁷⁶ The Court noted that it has not applied a balancing approach where the fourth amendment violation was substantial or deliberate.⁷⁷

The Court next focused on the balance of the rule's costs and benefits in the context of *Leon's* facts—a police officer's reasonable good-faith reliance on a facially valid warrant. The cost of exclusion is threefold:⁷⁸ it impedes the fact-finding function of judge and jury by withholding from their consideration inherently reliable tangible evidence;⁷⁹ it results in the release of guilty defen-

although nothing else about the Court's motives is clear, it is certain that "th' Supreme court follows th' iliction returns." F. DUNNE, *The Supreme Court's Decisions*, in MR. DOOLEY ON THE CHOICE OF LAW 52 (1963).

68. *Leon*, 104 S. Ct. at 3412.

69. *Id.* at 3412.

70. *Id.* at 3413 (quoting from *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

71. *Stone v. Powell*, 428 U.S. 465 (1976).

72. *United States v. Calandra*, 414 U.S. 338 (1974).

73. *United States v. Janis*, 428 U.S. 433 (1976).

74. *Rakas v. Illinois*, 439 U.S. 128 (1978).

75. *Walder v. United States*, 347 U.S. 62 (1954).

76. *United States v. Havens*, 446 U.S. 620 (1980). The Court also referred to the admission of evidence through an attenuated causal chain beginning with an unlawful arrest, *Brown v. Illinois*, 422 U.S. 590 (1975), to the admission of a witness' testimony where his identity was discovered in an unconstitutional search, *United States v. Ceccolini*, 435 U.S. 268 (1978), and to its retroactivity decisions, e.g., *United States v. Peltier*, 422 U.S. 531 (1975).

77. *Id.* at 3414 (quoting from *Franks v. Delaware*, 438 U.S. 154, 171 (1978)). The Court states that the *Leon* exception will not apply in the *Franks v. Delaware* situation, i.e., where the issuing magistrate has been misled by information in a warrant affidavit or where the affiant knowingly or recklessly provided false information. *Id.* at 3421. Further exceptions to the *Leon* rule are noted in the text accompanying notes 92-95, *infra*.

78. 104 S. Ct. at 3413.

79. But as Justice Stewart notes, while

[i]t is true that . . . the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the defendant's guilt . . . in many instances,

dants;⁸⁰ and it generates through this latter effect public disrespect for the law and the administration of justice.⁸¹

Against these costs the Court then considered "whether Fourth Amendment interests [are] advanced by the exclusion of evidence obtained in good-faith pursuant to a facially valid search warrant," whether under the circumstances of *Leon* the exclusionary rule can "pay its way."⁸² The Court first addressed the issue of whether the continued use of the rule would have a deterrent effect on magistrates charged with issuing search warrants. Their conclusion was that it would not, for three reasons.⁸³ First, the purpose of the rule is to deter police misconduct rather than the misconduct of issuing magistrates.⁸⁴ Second, the Court stated that no evidence exists suggesting that judges and magistrates are inclined to act contrary to the fourth amendment such that they as a class need deterring.⁸⁵ Third, the Court doubted that exclusion of evidence could have a deterrent effect on judicial officers as they

the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place.

Stewart, *supra* note 39, at 1392.

80. The Court acknowledged that empirical data concerning the detrimental effect of the exclusionary rule is inconclusive, *e.g.*, Narduli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 A.B.F. RES. J. 585; Davies, *A Hard Look at What We Know (And Still Need to Learn) About the "Costs" of the Exclusionary Rule: The N.I.J. Study and Other Studies of "Lost" Arrests*, 1983 A.B.F. RES. J. 611, but states that the small percentage of "lost arrests" discovered by researchers "mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures." 104 S. Ct. at 3413 n.6.

In his dissent, Justice Brennan notes that the available empirical data is somewhat confused, and can be used to support either side of the exclusionary rule debate. *Id.* at 3438 (Brennan, J., dissenting). "The extent of this Court's fidelity to Fourth Amendment requirements, however, should not turn on such statistical uncertainties." *Id.*

81. This cost of exclusion is the converse of the rationale suggested by Professor LaFave, *supra* note 50, that the approbation of police lawlessness by the courts undermines public respect for the law. *See* Schrock & Welsh, *supra* note 39, at 266. *See generally* S. SCHLESINGER, EXCLUSIONARY INJUSTICE (1977).

82. 104 S. Ct. at 3413 n.6. *But see* Kamisar, *supra* note 62, at 646-47 (it is impossible to "balance" privacy or individual liberty against efficiency in the suppression of crime because they are different kinds of interests).

83. *Leon*, 104 S. Ct. at 3418.

84. *Id.* But note that the Court expressly states that the exclusionary sanction will continue to be imposed where the magistrate abandons his neutral and impartial role. *Id.* at 3422; *cf.* *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-27 (1979) (Court found violation of "neutral and detached magistrate" requirement where issuing magistrate personally conducted search). The Court does not explain if exclusion is imposed in this situation to "deter" magistrates from so acting.

85. *Leon*, 104 S. Ct. at 3418. The Court acknowledges, however, that some commentators have argued that a good faith exception would encourage "magistrate shopping" on the part of police. *Id.* at 3418 n.14; *see* 2 W. LAFAVE, *supra* note 16, § 4.1.

“have no stake in the outcome of particular criminal prosecutions.”⁸⁶

Therefore, the Court reasoned, “[i]f exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect . . . it must alter the behavior of individual law enforcement officers or the policies of their departments,” but there exists no behavior susceptible of modification where the police conduct is objectively reasonable, “for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act under the circumstances.”⁸⁷ Excluding evidence so obtained, “can in no way affect his future conduct unless it is to make him less willing to do his duty.”⁸⁸ This is particularly true, the Court stated, when “an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope” because “[i]n most such cases there is no police illegality and thus nothing to deter.”⁸⁹

The Court was careful to emphasize that the “standard of reasonableness we adopt is an objective one,” requiring that the officers involved in the warrant application and the search must have a “reasonable knowledge of what the law prohibits.”⁹⁰ The incentive for law enforcement officials to comply with the fourth amendment is thereby retained.⁹¹

As excluding evidence obtained pursuant to a facially valid search warrant reasonably relied upon would have no (or at least “marginal”) deterrent effect, the Court concluded that the costs of exclusion were such that the rule ought no longer be applied. The Court lists certain situations where, however, reliance on the magistrate’s probable-cause determination and technical validity of the warrant would not be objectively reasonable.⁹² Thus, exclusion remains appropriate where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or provided in reckless disregard of the truth thereof,⁹³ where the issuing magistrate was not neutral and de-

86. *Leon*, 104 S. Ct. at 3418. Can this really be said of magistrates who are popularly elected?

Justice Brennan states that the *Leon* exception “tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes from now on will have virtually no consequence.” *Id.* at 3444 (Brennan, J., dissenting); see Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 395 (1984).

87. 104 S. Ct. at 3419-20 (quoting *Stone v. Powell*, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)).

88. *Id.* at 3420.

89. *Id.* (footnotes omitted). The Court added that “[i]n the ordinary case, an officer cannot be expected to question the magistrate’s probable-cause determination or his judgment that the form of the warrant is technically sufficient Penalizing the officer for the magistrate’s error rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.” *Id.* (footnote omitted).

90. *Id.* at 3420 n.20.

91. *Id.* (quoting from *Illinois v. Gates*, 103 S. Ct. 2317, 2344 n.15 (1983) (White, J., concurring)).

92. *Id.* at 3421-22.

93. *Id.*; see, e.g., *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

tached,⁹⁴ or where the warrant is so plainly lacking in the "indicia of probable cause" or so facially deficient that it may not reasonably be presumed to be valid.⁹⁵

Applying the new exception to the facts in *Leon*, the Court concluded that the evidence should have been admitted. The Court noted that the trial court had expressly found that the officers conducting the search had acted in good faith. There was no suggestion that the issuing magistrate had abandoned his detached and neutral role. And the Court noted that the warrant was not so plainly lacking in probable cause that the panel members of the court of appeals could agree that it was or was not present. Therefore, the officer's reliance was objectively reasonable and the evidence at issue should have been admitted.⁹⁶

The Court then applied the *Leon* rule to the facts in *Sheppard*. The Court stated the issue as "whether there was an objectively reasonable basis for the officers' mistaken belief" that the warrant authorized the search they conducted.⁹⁷ The officers had carefully prepared an affidavit defining the scope of the search they wished to conduct. The same officers presented the affidavit to the issuing magistrate; the magistrate assured the officers that he had made the changes necessary to cure the defects in the warrant.⁹⁸ The Court found that this was sufficient for a reasonable police officer to conclude that the warrant authorized a search for the items specified on the affidavit, and that it would not require a police officer to "disbelieve a judge who has just advised him, by word and by action, that the warrant he possessed authorized him to

94. 104 S. Ct. at 3422; see, e.g., *Lo-Ji Sales Inc. v. New York*, 442 U.S. 319, 326-27 (1979).

95. 104 S. Ct. at 3422. The Court does not define how lacking in probable cause the warrant must be before the officers' reliance thereon is not objectively reasonable. As noted by both Justice Brennan, *id.* at 3445-46 (Brennan, J., dissenting), and Justice Stevens, *id.* at 3450-51 (Stevens, J., dissenting), it is paradoxical to assume that a police officer could reasonably rely on a warrant which lacks facts sufficient to amount to probable cause under the *Gates* fair probability test for the existence of probable cause. *Gates*, 103 S. Ct. 2317, 2332. See *infra* notes 117, 125-36 and accompanying text.

As for facially defective warrants, the Court suggests two examples—failing to particularize the place to be searched and failing to particularize the things to be seized. 104 S. Ct. at 3422. However, the warrant in *Sheppard* incorrectly identified the "things to be seized" as controlled substances. *Sheppard*, 104 S. Ct. at 3427. The Court provides no indication of how inaccurate the particularization must be before a police officer may no longer reasonably rely on the warrant.

As to both facially defective warrants and warrants lacking sufficient indicia of probable cause, the key factor is the objective reasonableness of the executing officer's reliance on the warrant. *Leon*, 104 S. Ct. at 3420 n.20. The Court defines this standard of objective reasonableness in terms of a reasonably well-trained police officer with "a reasonable knowledge of what the law prohibits." *Id.*

96. 104 S. Ct. at 3423.

97. *Sheppard*, 104 S. Ct. at 3428-29.

98. See *supra* notes 17-20 and accompanying text.

conduct the search he has requested.”⁹⁹ The Court expressly reserved its opinion as to whether an officer who was less familiar with the affidavit than the officers in *Sheppard* would be justified in failing to notice a defect of the same magnitude as that therein.¹⁰⁰ The Court concluded that excluding evidence obtained in objectively reasonable reliance on a defective warrant would not further the deterrent purpose of the exclusionary rule, and reversed the decision of the Supreme Judicial Court of Massachusetts to the contrary.¹⁰¹

Justice Brennan, Justice Marshall, and Justice Stevens dissented. Justice Brennan argued that the exclusionary rule was required by the fourth amendment because the admission of evidence seized in contravention of the amendment and its initial seizure are all part of the same governmental transaction the entirety of which is prohibited.¹⁰² He focused his critique of the majority’s position, however, on their use of the deterrence rationale. Justice Brennan suggested that the Court focused only on the deterrent effect of exclusion on the officer who conducted the search while instead “the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.”¹⁰³ The Court, however, attempted to address this concern about the *Leon* exception by requiring that the reasonable mistake be that of a reasonably well-trained police officer, so as to avoid creating a disincentive for police training about the requirements of the fourth amendment.¹⁰⁴

Justice Brennan also argued that creating a reasonable reliance exception is illogical in light of the Court’s new probable cause standard created in *Illinois v. Gates*.¹⁰⁵ This point is emphasized by Justice Stevens.¹⁰⁶ He noted that

99. *Id.* at 3429.

100. *Id.* at 3429 n.6.

101. *Id.* at 3430.

102. *Id.* at 3432-33 (Brennan, J., dissenting); see *supra* note 55 and accompanying text.

103. *Id.* at 3443 (Brennan, J., dissenting). This suggestion finds support among several commentators. See 1 W. LAFAVE, *supra* note 16, § 1.2, at 28; LaFave, *supra* note 26, 347-48; Mertens & Wasserstrom, *supra* note 26, at 399; Stewart, *supra* note 39, at 1400.

104. *Leon*, 104 S. Ct. at 3420 n.20. The Court states that the standard requires that law enforcement officials have “a reasonable knowledge of what the law prohibits,” *id.*, but does not otherwise define this standard. Professor LaFave argued that the *Leon* exception, objectively reasonable reliance on a facially valid warrant, would create an incentive for official lawlessness. He suggested that the exception would encourage “magistrate shopping” and that lenient magistrates would be encouraged in their leniency by the insulation of their warrant decisions from review. 1 W. LAFAVE, *supra* note 16, § 1.2, at 12 (Supp. 1984).

Justice Brennan also argued that the *Leon* exception will encourage magistrates to devote less “care and attention” to the task of reviewing warrant applications because their mistakes will have “virtually no consequence.” 104 S. Ct. at 3444 (Brennan, J., dissenting). If their decision was correct, the evidence is admitted; if their decision was incorrect but relied on in good faith by the police officers conducting the search the evidence is still admissible. *Id.*

105. *Id.* at 3445-46 (Brennan, J., dissenting).

the import of *Gates* was to give police officers "ample room to engage in any reasonable law enforcement activity."¹⁰⁷ So, if after "paying heavy deference to the magistrate's finding and resolving all doubt in its favor, there is no probable cause . . . then by definition—as a matter of constitutional law—the officers' conduct was unreasonable."¹⁰⁸

If one accepts the two basic assumptions upon which *Leon* is based, i.e., that the sole function of the exclusionary rule is to deter police misconduct and that such misconduct is not deterred where police reasonable rely on a facially valid warrant, the Court's decision is both logical and firmly anchored to the Court's previous decisions restricting the scope of the rule. The *Leon* exception is narrowly drawn, being limited to objective good faith reliance on a search warrant.¹⁰⁹ Although the result in *Sheppard* seems to bespeak a casual attitude toward what facial defects in search warrants will still result in exclusion, the Court carefully limited its holding to the facts presented, an affidavit prepared by, submitted by, and subsequent warrant executed by the same police officers.¹¹⁰

The effect the *Leon* and *Sheppard* decisions will have on fourth amendment jurisprudence and the criminal justice system is at this time uncertain. Some evidence which was heretofore inadmissible in the prosecution's case-in-chief because it was obtained pursuant to a defective search warrant clearly will now be admissible. It is unclear, however, as a practical matter how frequently and to what extent the *Leon* exception will be applied.¹¹¹

106. *Id.* at 3450-52 (Stevens, J., dissenting). Justice Stevens also suggests that the Court should not have reached the exclusionary rule issue in that he considered *Sheppard* to be reversible because the warrant therein did not violate the warrant clause, *id.* at 3449, and *Leon* to be reversible on the issue of the existence of probable cause, in light of the *Gates* decision. *Id.* at 3447 (Stevens, J., dissenting).

107. *Id.* at 3451 (Stevens, J., dissenting).

108. *Id.*;

[A]fter *Gates*, existing law is now replete with deference. Under *Gates*, the reviewing court must uphold a warrant if, "in the totality of the circumstances," a "substantial basis" exists for the magistrate's conclusion that there was a "fair probability" that the items to be seized would be found in the places to be searched. Another layer of deference, in the form of a good faith exception for warrants found invalid even under these extraordinarily lax standards, would surely be laying it on a bit thick.

Wasserstrom, *supra* note 86, at 397. After *Gates*, "whatever argument there may once have been for the good faith exception has now vanished altogether." *Id.* at 397 n.829; see also Kamisar, *Gates*, "Probable Cause," "Good Faith" and *Beyond*, 69 IOWA L. REV. 551, 585-608 (1984). See generally *infra* notes 117, 125-36 and accompanying text.

109. Justice Brennan suggests that "the full impact of the Court's regrettable decision will not be felt until the Court attempts to extend this rule to situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances." *Leon*, 104 S. Ct. at 3446 (Brennan, J., dissenting).

110. *Id.* at 3429 n.6.

111. Professor LaFave characterizes the reasonable good faith exception as being

First, the *Leon* exception is limited on its face to searches made pursuant to a warrant.¹¹² The exclusionary rule as it applied to warrantless searches remains unaltered.¹¹³ Moreover, the *Leon* exception to the rule itself has exceptions. Evidence obtained pursuant to a warrant issued in reliance on an affidavit containing perjured statements, or statements made in reckless disregard of their truth, is still excludable.¹¹⁴ Likewise, evidence may be excluded which is obtained pursuant to a warrant issued by a judge or magistrate who has wholly abandoned his judicial role of neutrality and detachment.¹¹⁵ Also excludable is evidence obtained pursuant to a warrant so "facially deficient" that it cannot reasonable be presumed valid by the executing officers¹¹⁶ or pur-

too narrow to be "worth the candle." 1 W. LAFAYE, *supra* note 16, § 1.2, at 9 (Supp. 1984). He argues that the situations legitimately within the ambit of the exception could be dealt with by other legal doctrines. *Id.* at 9-11 (Supp. 1984). He further argues that the Court achieved a good-faith exception in effect through the lowering of the probable cause standard in *Gates*. *Id.* at 18 (Supp. 1984).

112. *Leon*, 104 S. Ct. at 3420.

113. The Court in *Leon* noted that "[t]he good faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the fourth amendment and we do not believe that it will have this effect." *Id.* at 3422.

114. *Id.* at 3421; *see, e.g., Franks v. Delaware*, 438 U.S. 154 (1978). The *Franks* exception places the burden of making a preliminary showing of the deliberate or reckless falsehoods on the defendant. *Franks*, 438 U.S. at 171. If the defendant can make this preliminary showing and can further demonstrate that absent the falsehoods there are insufficient facts on the face of the affidavit to support the initial probable cause determination, he is entitled to an evidentiary hearing on the truth of the challenged statements, and the perjury or reckless disregard of the truth by the affiant. *Id.* at 156. The burden is placed on the defendant at this hearing to prove by a preponderance of the evidence the perjury or reckless disregard of the truth; if he does so, and if the remaining allegations and statements in the affidavit are insufficient to support probable cause, the warrant must be voided and any evidence obtained pursuant to it excluded. *Id.* For a post-*Leon* opinion noting that the *Leon* exception does not apply to the *Franks* situation, see *United States v. Rule*, 594 F. Supp. 1223, 1239-41, 1247 (D. Me. 1984).

115. *Leon*, 104 S. Ct. at 3422; *see, e.g., Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-27 (1979). The Court referred directly to *Lo-Ji Sales* in noting this exception to the *Leon* rule; the Court stated that a warrant issued under the circumstances similar to those in *Lo-Ji Sales* could not be relied on in objective good faith by a reasonably well-trained police officer. *Leon*, 104 S. Ct. at 3422. In *Lo-Ji Sales*, the Court invalidated a search warrant issued by a magistrate who had directly participated in the search and seizure of various pornographic materials. 442 U.S. at 322-23. The Court characterized the magistrate as acting as an "adjunct law enforcement officer" rather than a judicial officer. *Id.* at 327. In so doing, the magistrate abandoned his judicial role of neutrality and detachment. *Id.* at 326; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971).

116. *Leon*, 104 S. Ct. at 3422. The Court provides two examples of facially deficient warrants: failure either to particularize the place to be searched or the things to be seized. *Id.* The case law concerning the fourth amendment particularity requirement is well developed. *See generally* 2 W. LAFAYE, *supra* note 16, § 4.6. However, the warrant at issue in *Sheppard* authorized on its face a search for drugs and the officers who applied for and executed the warrant intended that it authorize a search for vari-

suant to a warrant so lacking in "indicia of probable cause" as to make reliance thereon by the executing officers unreasonable.¹¹⁷ And although the Court does not specifically characterize it as an exception to the *Leon* rule, the Court notes that its discussion of the deterrent effect of the exclusionary rule assumes that the executing officers "properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant."¹¹⁸ This suggests that had the executing officers not so confined their search, or had they conducted it in an improper manner, the evidence they secured would have been inadmissible. Consequently, a number of avenues remain open to defense counsel seeking the suppression of evidence seized in contravention of their client's fourth amendment rights.¹¹⁹

ous items associated with a murder. *Sheppard*, 104 S. Ct. at 3426-28; see *supra* notes 16-20 and accompanying text. The Court carefully limited *Sheppard's* application of the *Leon* rule to its facts, noting that the officers who executed the warrant had also prepared the application and were aware of what items they wished to seize and the extent of the magistrate's authorization. *Sheppard*, 104 S. Ct. at 3429 n.6. The Court expressly reserved opinion on whether it would reach the same result where the executing officers were less familiar with the warrant application or had "unalleviated concerns about the proper scope of the search." *Id.* The Court provides no guidance as to what other defects on the face of a warrant would render the resulting search invalid and the evidence obtained thereby inadmissible.

117. *Leon*, 104 S. Ct. at 3422. The Court provides little guidance as to the meaning of this phrase. The wording comes from dictum in *Brown v. Illinois*, 422 U.S. 590, 611 (1975) (Powell, J., concurring), a case concerning a confession obtained subsequent to an illegal arrest. 422 U.S. at 594-95. The Court also characterizes the warrant in *Leon* as having been supported by more than a "bare bones" affidavit, 104 S. Ct. at 3423, implying thereby that a "bare bones" affidavit would have been insufficient to meet the test of reasonable good faith. The Court also adverted to "bare bones" affidavits in its preliminary discussion of circumstances under which a reviewing court should not defer to the issuing magistrate's determination of probable cause. *Id.* at 3417. Quoting from *Gates*, the Court stated that probable cause cannot be found legitimately where the magistrate merely ratifies "the bare conclusions of others." *Id.* at 3417 (quoting *Illinois v. Gates*, 103 S. Ct. 2317, 2332 (1983)). The illustrations of this proposition the Court in *Gates* provided are the sworn statement of an affiant that "he has cause to suspect and does believe that" contraband is located at a certain address, *Gates*, 103 S. Ct. at 2332 (quoting *Nathanson v. United States*, 290 U.S. 41, 54 (1933)), and the statement that "affiants have received reliable information from a credible person and believe" that contraband is located at a certain address. *Id.* (quoting *Aguilar v. Texas*, 378 U.S. 108, 109 (1964)). The Court's dual discussion of "bare bones" affidavits in *Leon*, relating both to the probable cause determination and the reasonable good faith of the officer's reliance, suggests a close relationship between the *Gates* "substantial basis" standard and the *Leon* reasonable good faith exception. See *infra* notes 125-38 and accompanying text.

118. *Leon*, 104 S. Ct. at 3419 n.19. The Court in *Sheppard* stated that it was not unreasonable for the officers who applied for the warrant to rely on the magistrate's assurances that the warrant he signed authorized the search they wished to conduct. *Sheppard*, 104 S. Ct. at 3429 n.6.

119. *Leon* was decided on July 5, 1984. *Leon*, 104 S. Ct. at 3405. The number of reported decisions applying the reasonable good faith exception is therefore limited. See, e.g., *United States v. Accardo*, 749 F.2d 1477, 1481 (11th Cir. 1985) (warrant

Evidence admissible in federal courts under the *Leon* exception may be excludable in state prosecutions either under state exclusionary rules, or in states whose courts decline to follow the Supreme Court's lead in *Leon*.¹²⁰ Missouri, for example, has a statutory exclusionary rule¹²¹ which provides for the suppression of evidence in the following cases: where the evidence is seized pursuant to a warrant unsupported by probable cause,¹²² where the evidence is not described in the warrant and the executing officer is not otherwise privi-

unconstitutionally "general"; case remanded to district court on issue of objective good faith); *United States v. Faul*, 748 F.2d 1204, 1220 n.11 (8th Cir. 1984) (warrant valid, but had it been invalid the evidence would have been admissible under *Leon*); *United States v. Thornton*, 746 F.2d 39, 49 (D.C. Cir. 1984) (court did not reach issue of probable cause, held officers' reliance on warrant reasonable); *United States v. Sager*, 743 F.2d 1261, 1264-67 (8th Cir. 1984) (warrant invalid under *Gates*, reliance thereon was objectively reasonable and evidence was admissible under *Leon*), *cert. denied sub nom. Harmon v. United States*, 105 S. Ct. 1196 (1985); *Fullman v. Graddick*, 739 F.2d 553, 561 (11th Cir. 1984) (police officer's reasonable good faith was defense to constitutional tort action).

120. See Annot., 50 A.L.R.2d 531 (1956) (somewhat dated review and collection of state approaches to suppression of evidence). See generally 1 W. LAFAYE, *supra* note 16, § 1.3(b). Professor LaFave noted that several state courts have declined to follow the lead of the Burger Court in interpreting state constitutional provisions analogous to the fourth amendment. *Id.* at 43 n.14. He lists, inter alia, the following cases as illustrative of that trend: *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (declining to follow *United States v. Robinson*, 414 U.S. 218 (1973)) (California's constitution has since been modified so as to preclude expansion of the exclusionary rule beyond the federal search and seizure standards, see CAL. CONST. art. 1, § 28(d)); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975) (declining to follow *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973)); *State v. Opperman*, 89 S.D. 25, 247 N.W.2d 673 (1976) (declining to follow *South Dakota v. Opperman*, 428 U.S. 364 (1976)). *Id.*

121. MO. REV. STAT. § 542.296 (1978) provides in relevant part:

1. A person aggrieved by an unlawful seizure made by an officer and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure may file a motion to suppress the use in evidence of the property or matter seized . . . 5. The motion to suppress may be based upon any one or more of the following grounds: (1) That the search and seizure were made without warrant and without lawful authority; (2) That the warrant was improper upon its face or was illegally issued, including the issuance of a warrant without proper showing of probable cause; (3) That the property seized was not that described in the warrant and that the officer was not otherwise lawfully privileged to seize the same; (4) That the warrant was illegally executed by the officer; (5) That in any other manner the search and seizure violated the rights of the movant under section 15 of article I of the constitution of Missouri, or the fourth and fourteenth amendments of the Constitution of the United States. (6) The judge shall receive evidence on any issue of fact necessary to the decision of the motion. The burden of going forward with the evidence and the risk of nonpersuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled

122. MO. REV. STAT. § 542.296.5(2) (1978).

leged to seize the evidence,¹²³ and where the evidence is obtained in a manner which otherwise is violative of the rights of the person moving for its suppression under the fourth amendment or the analogous provision of the Missouri constitution.¹²⁴

123. MO. REV. STAT. § 542.296.5(3) (1978).

124. MO. REV. STAT. § 542.296.5(5) (1978). MO. CONST. art. I, § 15 provides: That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.

The Missouri courts have generally conformed their decisions relating to search and seizure to the decisions of the United States Supreme Court, in construing both the federal and the state constitutions. *See, e.g.*, *State v. McCrary*, 621 S.W.2d 266, 273 (Mo. 1981) (en banc) (test for standing to challenge seizure same under state and federal constitutions); *State v. Moody*, 443 S.W.2d 802, 803 (Mo. 1969) (the Missouri Supreme Court considers search and seizure violations in light of the criteria established by the United States Supreme Court); *State v. Skaggs*, 650 S.W.2d 23, 25 (Mo. App., E.D. 1983) (Missouri follows federal standards in *Franks* evidentiary hearing); *State v. Nichols*, 628 S.W.2d 732, 736-37 (Mo. App., S.D. 1982) (general search and seizure principles are the same under state and federal constitutions). *See generally* Hunvald, *Applications of Federal Standards to Missouri Criminal Law*, 30 MO. L. REV. 350 (1965); Scurlock, *Basic Principles of Arrest, Searches and Seizures, Privilege Against Self-Incrimination (with particular reference to Missouri law)*, 51 UMKC L. REV. 401 (1983). The possibility exists, however, that the Missouri Supreme Court will refuse to adopt the *Leon* exception and will instead apply Missouri's statutory exclusionary rule.

First, the Missouri Supreme Court adopted the exclusionary rule in 1924, long before the states were required to do so by *Mapp*. *State v. Owens*, 302 Mo. 348, 376-78, 259 S.W. 100, 108-09 (1924). The court in so doing advanced the three traditional rationales for the exclusionary rule: deterrence of police misconduct, *id.* at 378, 259 S.W. at 109, judicial integrity, *id.* at 376, 259 S.W. at 108, and creation of public disrespect for the law, *id.* at 377, 259 S.W. at 109; *accord* *State v. Wilkerson*, 349 Mo. 205, 210-11, 159 S.W.2d 794, 797 (1942). More recently, however, the exclusionary rule has been characterized as a judicial remedy rather than a constitutional guarantee. *Willis v. State*, 630 S.W.2d 229, 234 (Mo. App., S.D. 1982); *cf.* *State v. McCrary*, 621 S.W.2d 266, 274 (Mo. 1981) (en banc) (Donnelly, C.J., dissenting) (urging that the court "wash [its] hands" of the exclusionary rule). The rationales behind the rule in Missouri have not yet, though, been narrowed to simply deterrence.

Second and more importantly, MO. REV. STAT. § 542.296 (1978) speaks in terms of suppression of illegally obtained evidence without regard to the subjective or objective good faith of the officers executing the warrant. By its terms the statute prohibits the admission of evidence obtained in violation of the fourth and fourteenth amendments of the United States Constitution, or the parallel provision of the Missouri Constitution. By definition the *Leon* exception would apply only to such evidence, i.e., evidence obtained pursuant to a warrant unsupported by probable cause, as in *Leon*, or evidence obtained pursuant to a warrant deficient on its face, as in *Sheppard*. The seizure may be conducted in reasonable good faith making the admission of the evidence inoffensive to the fourth amendment, but the seizure itself remains unconstitutional. *Leon*, 104 S. Ct. at 3417 n.13. As such the evidence obtained falls within the ambit of the statute. The language of MO. REV. STAT. § 542.296 (1978) is arguably strong enough to support the rejection of the reasonable good faith exception if the

More important is the question of how often the *Leon* exception will be invoked in light of the lower standard for probable cause enunciated by the Supreme Court in *Illinois v. Gates*.¹²⁵ In *Gates*, the Court repudiated the *Aguilar-Spinelli* two-prong test for evaluation of the existence of probable cause.¹²⁶ An appellate court, reviewing a magistrate's decision to issue a warrant, must defer to the magistrate's judgment if it finds the magistrate had a "substantial basis" for concluding that a "fair probability" existed that contraband or evidence of crime will be found in a certain place.¹²⁷ This determination is to be made based upon the "totality of circumstances" presented to the magistrate in the warrant application affidavit.¹²⁸ This standard, emphasizing a common-sense, practical judgment on the part of the issuing magistrate, is quite similar to the reasonable good faith standard as it applies to searches conducted pursuant to warrants alleged to be unsupported by probable cause.¹²⁹

Simply stated, can an officer reasonably rely on a warrant which, when read together with its supporting affidavits, does not show a "fair probability" that contraband or other evidence of crime is located at a certain place? The Court in *Leon* appears to answer this question in the negative. The circum-

Missouri courts wish to retain the exclusionary rule in its current form.

At least one Missouri Court of Appeals has elected to follow *Leon*. In *State v. Horsey*, 676 S.W.2d 847 (Mo. App., S.D. 1984), the Southern District Court of Appeals held that the warrants the defendant objected to were supported by probable cause under both the *Gates* and the *Aguilar-Spinelli* tests, *id.* at 850-52, but that had the warrants been invalid the evidence would still have been admissible under *Leon*. *Id.* at 852. Moreover, Mo. S.J. Res. 12, 83rd Gen. Assembly, 1st Sess. (1985), introduced earlier this year, would, if enacted, submit to Missouri voters a proposal to amend MO. CONST. art. I, § 15, to read in part: "No court shall suppress evidence . . . solely because this evidence was obtained in violation of the Constitution of the State of Missouri if the evidence . . . [w]as seized by a peace officer acting in good faith pursuant to a search warrant obtained from a neutral and detached judge." Mo. S.J. Res. 12, 83rd Gen. Assembly, 1st Sess. (1985). If this amendment is adopted, MO. REV. STAT. § 542.296 (1978) would no longer prevent the admission of evidence seized in violation of Mo. CONST. art. I, § 15. However, an objective reasonableness standard would probably be read into this constitutional provision because a state may not lower its search and seizure standards below the "floor" of the United States Supreme Court's construction of the fourth amendment. *Ker v. California*, 374 U.S. 23, 33-34 (1963).

125. 103 S. Ct. 2317 (1983).

126. *Id.* at 2332; see *supra* note 13.

127. *Id.* at 2332.

128. *Id.*

129. As Professor LaFave observed in considering the relationship between the *Gates* probable cause standard and the good faith exception:

If, as the *Gates* majority contends, probable cause is nothing more than a matter of "practical, common-sense" decision making, then it would seem that a probable cause determination which is erroneous and thus lacking this common sense is undeserving of the appellation "good faith" or the sympathetic reception which a "good faith" exception would allow.

1 W. LAFAVE, *supra* note 16, at 19 (Supp. 1984); see *supra* note 104 and accompanying text.

stances giving rise to the result in *Leon* were artificially contrived: the sufficiency of the warrant was judged by the pre-*Gates* standard and the officers' reliance on the warrant was judged by the post-*Gates* standard.¹³⁰ In the future, both the warrant and the officer's reasonable good faith reliance thereon will be measured by the same standard, that of a practical, common-sense determination that there is a "fair probability" the executing officers will find the evidence for which they seek.¹³¹ This conclusion is supported by the Court's use of the "bare bones" affidavit as an example of a circumstance under which no probable cause would exist to support a warrant,¹³² and no police officer could reasonably believe such a warrant was valid.¹³³ Moreover, the Court specifically excludes from the *Leon* exception reliance on a warrant so lacking in "indicia of probable cause" as to render "official belief" in its existence unreasonable.¹³⁴ This limitation on the applicability of *Leon* could subsume most of the instances where the admissibility of evidence is challenged on the basis of the warrant being unsupported by probable cause.¹³⁵ It is difficult to imagine a situation where a reviewing court would find that the issuing magistrate's "common-sense" judgment was wrong, and the executing officer's "common-sense" judgment was right; both normally will be possessed of the same information and affidavits and both will be measured against the "substantial basis"- "fair probability" standard of *Gates*.¹³⁶

130. *Leon*, 104 S. Ct. at 3411, 3423.

131. *Gates*, 103 S. Ct. at 2332; *Leon*, 104 S. Ct. at 3422. One of the most frequent criticisms of the *Aguilar-Spinelli* test was that it was overly technical and difficult to apply in practice for both magistrates and police. *Gates*, 103 S. Ct. at 2330-31. The *Gates* standard, by definition, is not difficult to apply.

132. *Leon*, 104 S. Ct. at 3417.

133. *Id.* at 3423; see *supra* note 117.

134. *Leon*, 104 S. Ct. at 3422.

135. Justice Brennan commented on the relationship between the two standards, calling it "inconceivable" that a warrant could be invalid under *Gates* and the search conducted pursuant thereto be in good faith under *Leon*. *Id.* at 3445 (Brennan, J., dissenting). To do so involves "the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant." *Id.* at 3446 (Brennan, J., dissenting). Justice Stevens agreed. *Id.* at 3451 (Stevens, J., dissenting) ("[I]f . . . even after paying heavy deference to the magistrate's finding and resolving all doubt in its favor, there is no probable cause here, then by definition . . . the officer's conduct was unreasonable."). Several commentators have suggested that a good faith exception is unnecessary and redundant after *Gates*. See *supra* note 105.

136. See *United States v. Granger*, 596 F. Supp. 665 (W.D. Wis. 1984). The court found that uncorroborated, conclusory statements from a confidential informant of unknown reliability were insufficient to establish probable cause under *Gates*. *Id.* at 670 ("The reader of the affidavit is left completely in the dark about the point of the search."). The court then found that the affidavit was so lacking in indicia of probable cause as to make it unreasonable for the officer executing the warrant to rely on it; the affidavit was no more than "the most tenuous and conclusory suggestion" that the defendant was involved in the crime. *Id.* at 671. Consequently, the court ordered the evidence obtained pursuant to the warrant suppressed. *Id.* This result conforms to the prediction of Justice Brennan, see *supra* note 135, and Professor LaFave, see *supra* note 129 and accompanying text. However, in what it characterized as a "close case,"

This analysis suggests that the *Leon* exception will be applied most frequently in situations analogous to the circumstances of *Sheppard*, a warrant invalid because of some facial deficiency.¹³⁷ However, the judicial policy against issuing advisory opinions has led some commentators to suggest that courts will not consider both the issue of probable cause and that of good faith, not wishing to waste time on the academic question of whether the constitution has been violated when the evidence will be admitted anyway.¹³⁸ The Court, however, observed in *Leon* that "it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue."¹³⁹ To the limited extent that the *Leon* exception has been raised and interpreted in the lower courts, the Supreme Court's response to this concern has been borne out. Most courts have considered both issues, finding that the evidence would be admissible even if the warrant had been unsupported by probable cause because the officer's reliance on the warrant was reasonable.¹⁴⁰

However, should the practice of considering both issues not continue, the possibility exists that the growth of fourth amendment jurisprudence will be greatly retarded.¹⁴¹ Moreover, defendants will have less incentive to raise the issue of fourth amendment violations where the probability is that the evidence will be admitted on the basis of the officer's good faith.¹⁴² The government, however, will have an incentive to raise the issue in an effort to expand its authority under the fourth amendment, resulting in the lop-sided development of the law.¹⁴³ So, rather than a frozen fourth amendment jurisprudence, the *Leon* exception could result in a *growing* body of search and seizure law. But,

the Eighth Circuit Court of Appeals has held that evidence seized pursuant to a warrant fatally deficient under *Gates* is admissible under *Leon*. *United States v. Sager*, 743 F.2d 1261, 1265-66 (8th Cir. 1984); *see also* *United States v. Hendricks*, 743 F.2d 653, 656 (9th Cir. 1984) (court found warrant invalid and evidence admissible without much explanation; element of issuing magistrate assuring the officers of the warrant's validity, as in *Sheppard*).

137. *Sheppard*, 104 S. Ct. at 3428. But note that the Court was careful to limit its holding in *Sheppard* to the precise facts presented therein. *Id.* at 3429 n.6. If the facial deficiency of the warrant is very severe, reliance thereon by the police may be unreasonable. *Leon*, 104 S. Ct. at 3422; *see supra* note 116.

138. *See, e.g.*, *Mertens & Wasserstrom*, *supra* note 26, at 450.

139. *Leon*, 104 S. Ct. 3405 (1984).

140. *See, e.g.* *United States v. Berisford*, 750 F.2d 57, 59 (10th Cir. 1984) (warrant valid under *Gates*, no need to reach issue of subjective good faith); *United States v. Faul*, 748 F.2d 1204, 1220 n.11 (8th Cir. 1984) (warrant valid, but had it been invalid the evidence would have been admissible under *Leon*); *United States v. Roberts*, 747 F.2d 537, 541 n.4 (9th Cir. 1984).

141. The Court, however, suggests that where "the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates" the issue will be reached by appellate courts anyway. *Leon*, 104 S. Ct. at 3422. Such a course of action seems contrary to judicial economy.

142. *Mertens & Wasserstrom*, *supra* note 26, at 451.

143. *Id.* at 45.

as one commentator has so aptly stated, "Like a ratchet, the law will only move in one direction."¹⁴⁴

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144. *Id.* With the government alone litigating the issue of the scope of fourth amendment guarantees and protections, the courts will be presented only with arguments that those protections should be limited, so as not to interfere unduly with the government's authority to conduct searches and seizures. Eventually, the courts will give credence to the only voice that they hear. *Id.* Justice Brennan suggests that because of the narrowness of the *Leon* exception and its close relationship to the *Gates* standard, the Court will inevitably move to expand the exception beyond the area of warrant searches. *Leon*, 104 S. Ct. at 3446 (Brennan, J., dissenting). Only then, he states, will the full impact of *Leon* be felt. *Id.*