

Spring 1985

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Recommended Citation

Ronald J. Bacigal, *The Road to Exclusion is Paved With Bad Intentions: A Bad Faith Corollary to the Good Faith Exception*, 87 W. Va. L. Rev. 747 (1985).

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THE ROAD TO EXCLUSION IS PAVED WITH BAD INTENTIONS: A BAD FAITH COROLLARY TO THE GOOD FAITH EXCEPTION

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I. INTRODUCTION

Justice Stevens: Whenever a warrant is issued, the police are justified in going forward with it?

Solicitor General: Yes, in most cases.

Justice Stevens: What would be an example where they would not be?

Solicitor General: We have to wait for one to develop.

Oral argument in *Illinois v. Gates*¹

Contrary to the Solicitor General's position, situations where the police are not justified in executing a search warrant have already developed and will continue to reappear in everyday police work. One such situation arises when the police claim discretionary authority to select the time for executing a search warrant. The cases addressing the officer's discretionary power illustrate the genesis of a concept of police bad faith which must be considered in light of the Supreme Court's adoption of a good faith exception to the exclusionary rule.

In *United States v. Leon*,² the Supreme Court's adoption of the good faith exception appears to establish police motivation³ as the *sine qua non* of the exclusionary rule. The essence of a concept of bad faith is based on simple logical symmetry: If a "technically" illegal search can be justified by good faith motivation, then a "technically" proper search can be contaminated by bad faith motivation.⁴ The law, of course, is not always symmetrical and a simplistic concept of bad faith runs contrary to the recent holding in *Oliver v. United States*.⁵ In *Oliver*, the police engaged in bad faith misconduct by illegally trespassing on private property to search for marijuana. The Court, however, found no fourth amendment violation because the trespass was into "open fields" and

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¹ *Illinois v. Gates*, 103 S. Ct. 2317 (1983). See also *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984) (oral arguments).

² *United States v. Leon*, 104 S. Ct. 3405 (1984).

³ *Leon*, 104 S. Ct. at 3420 n.20 (1984) (emphasizing that the good faith exception is grounded on an objective standard and not on the subjective good faith of individual officers).

⁴ In considering the government's misconduct in falsifying an affidavit for a search warrant, the Supreme Court stated that the warrant clause "surely takes the affiant's good faith as its premise." *Franks v. Delaware*, 438 U.S. 154, 164 (1978).

⁵ *Oliver v. United States*, 104 S. Ct. 1735 (1984).

did not intrude upon a legitimate expectation of privacy.⁶ *Oliver* stands for the proposition that police bad faith, standing alone, will not trigger fourth amendment protections.⁷

The current debate over the exclusionary rule has often confused the procedural remedy of excluding evidence with the substantive goal of controlling police conduct.⁸ Regulating the police is not merely a means to accomplish the ends of the fourth amendment. Control of the police is itself a proper goal of the amendment.⁹ History reveals that the framers of the fourth amendment were primarily concerned with police conduct which was arbitrary and capricious.¹⁰ The use and misuse of General Warrants and Writs of Assistance is recognized as one of the abuses of power which fueled the American Revolution.¹¹ These instruments gave such unfettered power to law enforcement officers that, in the words of James Otis, they placed "the liberty of every man in the hands of every petty officer."¹² Security against arbitrary police intrusions is a basic tenet of a free society and lies at the heart of the fourth amendment.¹³ The constitutional

⁶ [I]t does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. To the contrary, the common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass to public officers.

Oliver, 104 S. Ct. at 1744 n.15 (1984). See generally Moylan, *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 So. ILL. L. J. 75.

⁷ See also *United States v. Butts*, 729 F.2d 1514 (5th Cir.), cert. denied, 105 S. Ct. 181 (1984). The fourth amendment "does not purport to reach all illegal conduct by officers. . . ." *Id.* at 1518.

⁸ Compare these two statements from Justice White:

(1) "[T]he scope of the exclusionary rule cannot be divorced from the Fourth Amendment [T]he issues surrounding a proposed good faith modification are intricately and inseparably tied to the nature of the Fourth Amendment violation"

Gates, 103 S. Ct. at 2337-38 (White, J., concurring).

(2) "Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'"

Leon, 104 S. Ct. at 3412 (quoting *Gates*, 103 S. Ct. at 2324).

⁹ See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529 (1978).

¹⁰ "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy. . . ." *United States v. United States Dist. Court* 407 U.S. 297, 317 (1972). The Court has observed: "Power is a heady thing; and history shows that the police acting on their own cannot be trusted." *McDonald v. United States*, 335 U.S. 451, 456 (1948).

¹¹ See generally DICKERSON, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION* 40 (R. Morris ed. 1938).

¹² James Otis, quoted in 2 *LEGAL PAPERS OF JOHN ADAMS* 142 (L. Wroth and H. Zobel eds. 1965).

¹³ The holding in *Delaware v. Prouse*, 440 U.S. 648 (1979) is a prime example of the Court's use of the fourth amendment to regulate police conduct even when the privacy interests involved are

framers thus sought to control police power by proscribing certain conduct (unreasonable searches) and by prescribing the proper manner of conducting lawful searches (the specific commands of the warrant clause).¹⁴ The use of the concept of police bad faith is a means of controlling police power.

But if the concept of police bad faith is to be recognized by the Supreme Court, the concept must be grounded in both police misconduct and in an invasion of privacy. This Article will demonstrate that a search pursuant to a properly issued warrant may trigger application of the exclusionary rule if: (1) there is police bad faith in delaying execution of the warrant, and (2) such bad faith results in additional intrusions upon individual privacy. Although this Article is limited to a consideration of bad faith in delaying the execution of search warrants,¹⁵ the discussion points the way to application of the concept of bad faith to all aspects of fourth amendment jurisprudence.

II. DELAYED EXECUTION AND STALE PROBABLE CAUSE

The holdings in *United States v. Leon*¹⁶ and *Massachusetts v. Sheppard*¹⁷ are of little help in defining the role of police officers in executing a search warrant. At one point, the Court alluded to situations where "no reasonably well trained officer should rely on the warrant."¹⁸ At the same time, however, the Court

relatively minor. The intrusion upon privacy in *Prouse* (stopping an automobile for a registration check) was slight, and had the court chosen to determine reasonableness by use of the balancing process, this minor intrusion upon privacy could easily have been subordinated to the "weighty" interest in motor vehicle safety. Rather than focus on the privacy interests involved, the Court chose to emphasize the need to control a potentially arbitrary exercise of police power. *Id.* at 661.

¹⁴ The Supreme Court has been engaged in a long-standing controversy over the relationship of the reasonableness clause and the warrant clause. See *United States v. Rabinowitz*, 339 U.S. 56 (1950). The relationship of those two clauses need not be resolved here, because the Court has already considered police motivation when interpreting the specific commands of the warrant clause and when applying the general rubric of reasonableness.

¹⁵ Police bad faith may be relevant to many aspects of the fourth amendment, but a limited examination of delayed execution of warrants is appropriate because it encounters the concept of good faith at its strongest point, i.e., because the exclusionary rule exists to deter police misconduct, there can be no police misconduct to deter when law enforcement officials obtain a facially proper warrant. According to Justice White, the "Court has never set forth a rationale for applying the exclusionary rule to suppress evidence obtained pursuant to a search warrant . . ." *Gates*, 103 S. Ct. at 2344 (White, J., concurring), and "[t]he warrant is prima-facia proof that the officers acted reasonably in conducting the search or seizure . . ." *Id.* at 2345.

¹⁶ *Leon*, 104 S. Ct. 3405.

¹⁷ *Sheppard*, 104 S. Ct. 3424.

¹⁸ *Leon*, 104 S. Ct. at 3422. The Court identified three situations where the police would not be justified in relying upon the warrant: (1) "where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979)"; (2) where an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown v. Illinois*, 422 U.S. 590 (1975); and (3) where "a warrant may be so facially deficient—i.e. in failing to particularize the place to be searched or the things to

stated that the issuance of a warrant is "valid and binding" on the officer,¹⁹ and that "[o]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law."²⁰ The Court is in error if these latter statements indicate that the police are always justified in executing a warrant because their application for the warrant evidenced a good faith intent to comply with the dictates of the fourth amendment.²¹ Establishing good faith at the time the warrant is issued does not preclude the possibility of bad faith at the time the warrant is executed.

A search warrant may not be executed at the leisure of the police because the very essence of probable cause is a belief that the seizable items will be present at the time of the search.²² A delay, before or after the issuance of a warrant, may dissipate the reasonable belief that seizable items are currently to be found at the place to be searched. An unreasonable delay *before* the issuance of a warrant has been frequently addressed under the heading of "stale probable cause."²³ The Supreme Court considered the issue of stale probable cause in *Sgro v. United States*,²⁴ where a search warrant was properly obtained but not executed within the ten days required by existing law. Some twenty-one days after issuance, the warrant was returned to the magistrate who reissued it based on the original affidavit. The Court found the reissued warrant to be unlawful because there was no proof of facts "so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time."²⁵

The lower courts have recognized that the determination of stale probable cause turns upon an objective assessment of the circumstances of each case.²⁶

be seized—that the executing officers cannot reasonably presume it to be valid." *Cf. Sheppard*, 104 S. Ct. 3424. The Court's reference to *Sheppard* in *Leon* is interesting because the reasoning in *Sheppard* appears to relieve the police of any responsibility to examine the facial propriety of the warrant.

¹⁹ *Sheppard*, 104 S. Ct. at 3429.

²⁰ *Leon*, 104 S. Ct. at 3420 (quoting *Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring)).

²¹ *See supra* note 15.

²² "A search conducted after the expiration of probable cause is no more lawful than one for which probable cause never existed." *United States v. Bedford*, 519 F.2d 650, 657 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976), (Rosen, J., dissenting). "'Timeliness' is an essential feature of the Fourth Amendment's mandate of 'reasonableness.'" *Commonwealth v. McCants*, 220 Pa. Super. 61, 62-63, 281 A.2d 771, 772 (1971) (Spaulding, J., dissenting), *rev'd*, 450 Pa. 245, 299 A.2d 283 (1973).

²³ *See generally* Mascolo, *The Staleness of Probable Cause in Affidavits for Search Warrants: Resolving the Issue of Timeliness*, 43 *CONN. B. J.* 189 (1969); Comment, *A Fresh Look at Stale Probable Cause: Examining the Timeliness Requirement of the Fourth Amendment*, 59 *IOWA L. REV.* 1308 (1974).

²⁴ *Sgro v. United States*, 287 U.S. 206 (1932). *See also* *Berger v. New York*, 388 U.S. 41 (1967). The Court stated that extending a wiretap for two months upon a showing that such extension is in the public interest, is "insufficient without a showing of present probable cause for the continuance of the eavesdrop." *Id.* at 59.

²⁵ *Sgro*, 287 U.S. at 210.

²⁶ *See* Mascolo, *supra* note 23.

The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.²⁷

When considering the totality of the circumstances, the cases addressing stale probable cause have focused upon whether probable cause existed at the time the warrant was issued, and have not considered the good or bad faith of the police filing the affidavit.²⁸ The question of bad faith, however, has appeared in the courts' consideration of whether the warrant itself has become stale because of delays in execution.

If probable cause can dissipate in the time period between observation of the underlying facts and the issuance of a search warrant, the time lag between issuance and execution of the warrant can also dissipate probable cause.²⁹ The Supreme Court has never addressed the issue of delay in executing a search warrant, but the lower courts have employed a variety of analyses. In most jurisdictions, there is a statute or rule of court which specifies that a search warrant must be executed within a set time period.³⁰ When the police conduct the search after the statutory period has run, most courts find the search to be illegal and suppress the fruits of the search.³¹ Given the present climate of hostility to the exclusionary rule, it is surprising that such cases rarely discuss why a statutory violation necessarily invokes a constitutional rule of exclusion.³² Application of the exclusionary rule may be justified on grounds that a legislatively fixed time period alleviates the need for a judicial determination of precisely what length of delay renders a search unconstitutional. Just as fixed time periods in Speedy Trial statutes³³ relieve the courts of complex and nebulous balancing

²⁷ *Andresen v. State*, 24 Md. App. 128, 172, 331 A.2d 78, 106 (1975), *aff'd sub nom.*, *Andresen v. Maryland*, 427 U.S. 463 (1976).

²⁸ *See, e.g.*, *Hemler v. Superior Court*, 44 Cal. App. 3d 430, 118 Cal. Rptr. 564 (1975). *Cf. State v. Perkins*, 220 Mo App. 349, 285 S.W. 1021 (1926). *Franks*, 438 U.S. 154 (does not address stale probable cause but does outline the general considerations for inquiring into the bad faith or recklessness of police filing an affidavit for a search warrant).

²⁹ "The time of execution is as essential as any other element." *State v. Guthrie*, 90 Me. 448, 450, 38 A. 368, 369 (1897). "The *in praesenti* basis of the warrant requires as a matter of logical necessity that it be served without delay, for, if there is delay in execution, the property . . . may disappear." *Mitchell v. United States*, 258 F.2d 435, 437 (D.C. Cir. 1958) (Bazelon, J., concurring). An application for a search warrant "insinuates an existing violation of the law and impliedly represents that there is a necessity to search promptly." *State v. Baker*, 251 S.C. 108, 110, 160 S.E.2d 556, 557 (1968)

³⁰ *E.g.*, The Federal Rules of Criminal Procedure set ten days as the time within which to execute a search warrant. FED. R. CRIM. P. 41(c).

³¹ *See, e.g.*, *Commonwealth v. Cromer*, 365 Mass. 519, 313 N.E.2d 557 (1974).

³² *But see, State v. Yaritz*, 287 N.W.2d 13 (Minn. 1979).

³³ *See, e.g.*, Speedy Trial Act of 1974, 18 U.S.C. § 3161 (1976 & Supp. III 1979).

formulas,³⁴ legislatively fixed periods for executing a warrant allow overburdened courts to avoid the complexities of defining reasonable searches.³⁵

III. DELAYS WITHIN THE STATUTORY TIME PERIOD

Whatever the merits of extending the exclusionary rule to statutory violations, it is delays within the statutory time period which present the interesting constitutional questions and which directly relate to the issue of police bad faith. In such situations, the lower courts have adopted three distinct approaches: (1) a warrant executed within the legislatively set time period is per se constitutional;³⁶ (2) a delay in execution which dissipates probable cause renders the search unconstitutional;³⁷ and (3) a delay which does not dissipate probable cause may or may not render the search unconstitutional depending on the reasons for the delay³⁸ and the specific prejudice caused by the delay.³⁹

A. Delays which are per se constitutional

A rule recognizing that the execution of a warrant within a statutory period is per se constitutional is the corollary of the rule that searches beyond the time period are per se illegal.⁴⁰ The primary benefit of such rules is their ease of application as there is no need for a case by case examination of the nature of the delay. But such a per se rule is of doubtful constitutionality⁴¹ because it gives

³⁴ See *Barker v. Wingo*, 407 U.S. 514 (1972).

³⁵ The speedy trial statutes normally specify the sanctions to be imposed for violation of the statute. See, e.g., 18 U.S.C. § 3162 (1976 & Supp. III 1979). The statute or rules covering the execution of search warrants do not specify any remedy for violations. See, e.g., FED. R. CRIM. P. 41(c).

³⁶ See, e.g., *State v. Morgan*, 222 Kan. 149, 154, 563 P.2d 1056, 1060 (1977). "[T]he exact time of execution within [the statutory] period should be left to the discussion of the law enforcement officers." *Id.* at 154, 563 P.2d at 1056, 1061. See also *People v. Bryant*, 127 Ill. 2d 110, 261 N.E.2d 815 (1970); *State v. Carangelo*, 151 N.J. Super. 98, 376 A.2d 596 (1977).

³⁷ See, e.g., *Bedford*, 519 F.2d 650; *United States v. Wilson*, 491 F.2d 724 (6th Cir. 1974), cert. denied, 426 U.S. 907 (1976); *United States v. Nepstead*, 424 F.2d 269 (9th Cir.), cert. denied, 400 U.S. 848 (1970); *State v. Edwards*, 98 Wis. 2d 367, 297 N.W.2d 12 (1980).

³⁸ See, e.g., *United States v. Lemmons*, 527 F. 2d 662 (6th Cir. 1975), cert. denied, 429 U.S. 817 (1976), (five day delay due to officer's illness); *Wilson*, 491 F.2d 724 (six day delay to protect informant).

³⁹ See, e.g., *Bedford*, 519 F.2d at 657 n.17; *Spinelli v. United States*, 382 F.2d 871, 886 (8th Cir. 1967), rev'd on other grounds, 393 U.S. 410 (1969); *United States v. McClard*, 333 F. Supp. 158 (E.D. Ark. 1971), aff'd, 462 F.2d 488, cert. denied, 409 U.S. 988 (1972).

⁴⁰ See *supra* text accompanying note 30.

⁴¹ See, e.g., *People v. Hernandez*, 43 Cal. App. 3d 581, 118 Cal. Rptr. 53 (1974) (The trial court interpreted a state statute to preclude the court's consideration of questions of staleness so long as the warrant was executed within the statutory period. The appellate court held that such an interpretation would violate the fourth amendment as it would permit a search without probable cause at the time of execution.).

unfettered discretion to police officers to execute the warrant at their leisure, so long as they remain within the statutory period.⁴²

It is not the leisurely execution that is of constitutional concern,⁴⁴ it is the execution which occurs under circumstances which would not have been authorized by a magistrate. The magistrate's function is to review a police request to invade an individual's privacy.⁴³ When the magistrate has established that there is probable cause to search an individual's dwelling, the magistrate has necessarily determined that the existing facts establish a sufficient likelihood that seizable items will be found in the dwelling.⁴⁶ If a delay in the execution of the search warrant causes those facts to change so that there is no longer a likelihood that seizable items will be found, there is no longer any probable cause for the search. The search will thus occur under facts, which if known in the magistrate, would not have justified the issuance of the warrant.⁴⁷ The courts adopting a per se rule have failed to consider that, regardless of the statutory period for execution, a search may be unreasonable when a delay in execution dissipates probable cause.

B. Delays Which Dissipate Probable Cause

The correct approach has been adopted by those courts which reject the per se rule and recognize that probable cause must exist both at the time of issuance and at the time of execution of the search warrant. This is the correct approach because probable cause requires a reasonable belief (sufficient likelihood) that

⁴² *Morgan*, 222 Kan. at 179, 563 P.2d at 1061. Cf. *McDaniel v. State*, 197 Ind. 179, 188, 150 N.E. 50, 53 (1926) (The court determined that under the applicable statute an officer "has no discretion, but must proceed with diligence at the earliest reasonable opportunity, to make the search as commanded. . . .").

⁴³ "If the police were allowed to execute the warrant at leisure, the safeguard of judicial control over the search which the fourth amendment is intended to accomplish would be eviscerated." *Bedford*, 519 F.2d at 655.

⁴⁴ See *infra* text accompanying note 60.

⁴⁵ The protection of the warrant clause "consists in requiring that those inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

⁴⁶ The required degree of likelihood is uncertain because there have been "an exceedingly small number of cases in [the Supreme] Court indicating what suffices for probable cause." *Sibron v. New York*, 392 U.S. 40, 74 (1968). Without elaboration or precedent, Justice Rehnquist recently asserted that probable cause does not require that the reasonable belief of the police officers be "more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983). Cf. Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Geo. L. J. 365 (1981) (authors argue that probable cause does mean more probable than not).

⁴⁷ "[T]he determination of when there is probable cause must remain solely a judicial question which cannot be delegated to the police officer charged with the duty of executing the warrant." *McCants*, 220 Pa. Super. at 63, 281 A.2d at 772 (Spaulding, J., dissenting).

the benefits of the search (the seizure of evidence) will outweigh the burden of the search (the diminution of privacy).⁴⁸ If a delay dissipates probable cause, there is no longer a justification for the search because there is no longer an adequate expectation of deriving the benefits of the search. There is thus a loss of individual privacy without the offsetting societal gain of obtaining incriminating evidence.

A proper determination of whether probable cause has dissipated requires an inquiry into the good or bad faith of the police because probable cause is a state of mind—a reasonable belief that seizable items are present.⁴⁹ Thus, it is proper for the courts to require that the police executing the warrant continue to have a good faith reasonable belief that the search will produce the sought after items.⁵⁰ The police should not execute a warrant, even a properly issued warrant, when they know that the search is likely to be fruitless.⁵¹ Requiring good faith on the part of the executing officers has the benefit of increasing the protection of individual privacy with very little cost to society: police will be deterred from invading an individual's privacy only when they believe the seizable items are no longer likely to be on the premises.

Exceptions to the warrant requirement invest the police with the power to act for the magistrate and to determine probable cause when there is not time to consult a magistrate.⁵² Given such power, the police should have the concomitant responsibility to determine whether probable cause continues to exist at the time of execution. A requirement to recognize when probable cause has dissipated does not place an unconscionable burden on the police; it merely requires them to act in reasonable good faith. If the police are unaware of any major change in the circumstances, they may assume that the situation presented in the affidavit continues to exist at the time of execution. If, however, the police are aware of the dissipation of probable cause,⁵³ they must defer their search until they can return to the magistrate,⁵⁴ or they must determine if they may properly conduct

⁴⁸ See Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. F. 763.

⁴⁹ The reasonable belief must be based on objective facts. See *United States v. Cortez*, 449 U.S. 411 (1981).

⁵⁰ *Leon*, 104 S. Ct. at 3422 and *Sheppard*, 104 S. Ct. at 3429 n.6 (alluding to possible situations where police would not be permitted to execute a warrant).

⁵¹ The officer's belief that probable cause no longer exists must be based on objective facts. Thus if there is "subsequent investigation" (*United States v. Watson*, 423 U.S. 411, 432 (1976) (Powell, J., concurring)) or "intervening knowledge" of the officers (*Nepstead*, 424 F.2d at 271) "from whatever source, that the possession is no longer the fact at the time of expected execution" (*People v. Glen*, 30 N.Y.2d 252, 258, 282 N.E.2d 614, 617 (1972) (the officers may not execute the warrant.) See also *Hernandez*, 43 Cal. App. 3d at 590 n.3, 118 Cal. Rptr. at 59 n.3 (1974).

⁵² See generally Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 198 (1977).

⁵³ See *supra* note 51.

⁵⁴ If a magistrate is available "it is mandatory that the police return to the issuing authority

a warrantless search under one of the exceptions to the warrant requirement. To allow the police to search with actual knowledge that probable cause no longer exists is a blatant example of condoning police bad faith, contrary to the dictates of the fourth amendment.⁵⁵

If there is a lack of probable cause at the time of execution, the entire search is unreasonable regardless of what items are actually seized. The courts are in error when they require the defendant to establish specific prejudice;⁵⁶ for example, requiring the defendant to prove that the item seized was not on the premises on Monday and was seized only because the search was delayed until Tuesday.⁵⁷ It is wrong to require the defendant to show specific prejudice because such an approach focuses on the results of delayed execution rather than upon the relevant consideration of dissipated probable cause. Whether the seized item ultimately turned out to be present on Monday or Tuesday has nothing to do with whether there was probable cause to search on Monday or Tuesday. Focusing upon the results of the search is a post hoc determination⁵⁸ which ignores the required justification for the search at the time it is conducted. Once a lack of probable cause is established, any subsequent search is unreasonable regardless of what is seized. The defendant is prejudiced by the unlawful invasion of his privacy, and there should be no burden upon the defendant to establish specific prejudice vis-a-vis the items actually seized.

The courts may also be in error when they place the burden of proof on the police to establish a valid reason for delaying a search, at least when the police are required to establish a lack of negligence in delaying the execution of a warrant. A lack of negligence may or may not be made an explicit consideration regarding delayed execution, but it is often implicit in the courts' allocation of the burden of proof. If the defendant is charged with the burden to prove an unreasonable delay in execution, he must normally establish that probable cause dissipated during the delay.⁵⁹ In such situations, an *unreasonable* delay is equated with the constitutional standard of *unreasonableness*; that is, the absence of probable cause. But when the government has the burden to establish that the delay was reasonable, many courts erroneously equate reasonable delay with an

for a redetermination of probable cause. If this is not done, it is the police who are making the determination that probable cause still exists, and not a 'neutral and detached' magistrate." *McCants*, 450 Pa. at 249, 299 A.2d at 286.

⁵⁵ See *supra* text accompanying note 8.

⁵⁶ See, e.g., *Bedford*, 519 F.2d 650. The court held that an unreasonable delay is harmless unless the defendant can "point to some definite legal prejudice attributable to this unjustified delay." *Id.* at 657 n.17 (quoting *Spinelli*, 382 F.2d at 886).

⁵⁷ See, e.g., *McClard*, 333 F. Supp. at 166.

⁵⁸ "Unjustified attempts by the police to prejudice the suspect by delay in execution do not provide standing *unless the police are successful in their efforts.*" *Spinelli*, 382 F.2d at 886 (emphasis added).

⁵⁹ See, e.g., *Hernandez*, 43 Cal. App. 3d 581, 118 Cal. Rptr. 53.

absence of negligence.⁶⁰ This latter approach fails to distinguish reasonableness as prudent behavior from reasonableness as a standard of constitutionally permissible behavior.⁶¹ Whether a delay was reasonable under the reasonably prudent person standard is not determinative of constitutional reasonableness. It may be that society desires police to be reasonably conscientious and reasonably efficient, but neither laziness nor negligence necessarily amounts to a constitutional violation. The requirements of the warrant clause do not seek to deter laziness or negligence,⁶² but to deter searches in the absence of probable cause. If probable cause existed at the time of execution it is constitutionally irrelevant whether the delay was due to a legitimate illness⁶³ or due to the officer negligently misplacing the warrant for several days.⁶⁴ Placing the burden upon the police to come forward with some explanation for delayed execution should not be utilized to deter negligence, but to help insure that a bad faith delay will be revealed and thus subjected to judicial scrutiny. Courts are correct when they recognize that probable cause must exist when a search warrant is issued and when it is executed. But these courts must be careful not to place too heavy a burden on the defendant in requiring him to prove specific prejudice. Nor should the courts place that heavy burden on the police by requiring proof of a lack of negligence.

C. Delays Which Do Not Dissipate Probable Cause

The previous section hypothesized situations where delay in the execution of a search warrant had objectively dissipated probable cause and where the police acted in bad faith because they were aware that probable cause had dissipated. There was thus an absence of the substantive justification (probable cause) for a search, and an absence of any good faith mistake on the part of police officers. The exclusionary rule should be applied to such situations because society can thereby derive the benefit of increased protection of privacy at the cost of merely deterring the police from conducting a search with knowledge that the search is likely to be fruitless.

Remaining for consideration is the more difficult scenario where the police act in some form of bad faith, but where there continues to exist objective probable cause for some form of search. Such a scenario must be divided into

⁶⁰ See *McCants*, 450 Pa. 245, 299 A.2d 283; *Baker*, 160 S.E.2d 556.

⁶¹ See *Bacigal*, *supra* note 48.

⁶² *Franks*, 438 U.S. 265 (rejecting judicial examination of whether the police "have been merely negligent" in checking the facts establishing probable cause). *Cf.* *United States v. Peltier*, 422 U.S. 531 (1975). ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.") *Id.* at 539 (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)).

⁶³ *Lemmons*, 527 F.2d 662 (five day delay because of illness of officer).

⁶⁴ "[T]he reasonableness of the searching officers' conduct is not material to the existence of probable cause, since the probable cause will either continue or dissipate regardless of how reasonable or unreasonable the police conduct involved." *Edwards*, 98 Wis. 2d at 373, 297 N.W.2d at 15.

situations where the "bad faith" results in an additional invasion of privacy and situations where it does not do so.

Consider the following hypotheticals:

(1) The police have a reasonable belief the stolen money is hidden in the defendant's residence. The police also have an unsubstantiated hunch that there are drugs in the defendant's residence. The police obtain a search warrant for the stolen money but do not mention the drugs to the magistrate. While searching the defendant's residence, the police look in a desk drawer and discover drugs.

(2) The police obtain a valid warrant to search for stolen money in the defendant's residence. While preparing to execute the warrant on Monday, the police receive a tip that a large delivery of drugs will be made on Tuesday. The police delay their search until Tuesday when they observe the defendant carrying two suitcases into his house. The police then search the entire house, including the two suitcases, where they find a large quantity of drugs.

In both hypotheticals, the police have a valid search warrant; have continuing probable cause to execute the warrant at the time of the search; actually search only those areas which could contain the items listed in the warrant; but arguably have some form of bad faith in that they hope or expect to find an item not enumerated in the warrant. The first hypothetical raises many of the issues addressed in *Coolidge v. New Hampshire*⁶⁵ under the heading of "inadvertent plain view." Rather than repeat a discussion of the concept of inadvertent plain view,⁶⁶ this Article considers whether recognition of a good faith exception necessitates any change or clarification in this concept.

1. First Hypothetical—No Additional Invasion of Privacy

If the good faith exception recognizes police motivation as the *sine qua non* of the exclusionary rule and allows good faith to excuse "technical" violations of the fourth amendment, then it can be argued that "technical" compliance with the amendment does not excuse bad faith on the part of police officers. The courts adopting this approach have held that a search "must be directed in good faith toward finding the objects described in the search warrant."⁶⁷ Thus, although a valid search warrant may legitimately open the door to the premises,

⁶⁵ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

⁶⁶ See generally W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.11(d) (West 1978).

⁶⁷ *State v. Watkins*, 237 N.W.2d 14, 16 (S.D. 1975) (search for stolen goods found to be a pretext for a full-scale drug raid). See also *State v. Kelsey*, 592 S.W.2d 509 (Mo. 1979).

it does not allow the police to "make any kind of search they wish."⁶⁸ To allow the police to engage in subterfuge searches, by obtaining a warrant for one item while they subjectively hope to uncover another item, "would come perilously close to reviving the long discredited general warrant."⁶⁹ Applying this reasoning to the first hypothetical, the police would not be permitted to use a search warrant for stolen money to serve as a subterfuge for their search for drugs.

There is a certain appeal to such an approach because it requires our police to be pure of heart and not hide behind a "technically" proper warrant. But it is questionable whether the fourth amendment goes this far. Precisely what is it that is unconstitutional about the police manipulating a situation to take full advantage of the technicalities of the law, so long as they remain within the law?⁷⁰ The first hypothetical assumes that the subjective motivation of the police officers did not affect their conduct of the search and thus did not result in any greater invasion of privacy. That is, while subjectively hoping to find drugs, the officers looked only in areas which could contain the stolen money listed in the warrant. To apply the exclusionary rule in such situations serves to deter "evil" subjective motivation which has no objective consequences vis-a-vis the right of privacy (the areas searched). There are of course objective consequences vis-a-vis the *seizure* of the defendant's contraband drugs, but unlike a search, a seizure does not intrude upon a recognized right of privacy.⁷¹ Invocation of the exclusionary rule solely on the basis of property rights was foreclosed in *Rawlings v. Kentucky*,⁷² and, most recently, in *Segura v. United States*.⁷³

When there is no causal connection between police motivation and the scope of the search, application of the exclusionary rule to the first hypothetical would not regulate police conduct, it would merely punish the police for having "evil" thoughts. If the defendant can point to no additional invasion of privacy caused

⁶⁸ *United States v. Tranquillo*, 330 F. Supp. 871, 876 (M.D. Fla. 1971) (search warrant for stolen clothing did not authorize vice squad detectives to "drop by" and search for drugs).

⁶⁹ *United States v. Sanchez*, 509 F.2d 886, 890 (6th Cir. 1975). Local police armed with search warrant for narcotics invited a federal officer along to look for explosives. The court found there were "two simultaneous but distinct intrusions, each conducted by separate agencies for the purpose of securing different types of property. Each search had to be authorized independently by a separate warrant . . ." *Id.* at 889. See also *United States v. Belcher*, 577 F. Supp. 1241 (E.D. Va. 1983).

⁷⁰ It may be regrettable that police lie when interrogating a suspect, but such lies do not automatically make a subsequent confession inadmissible. See generally *White, Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

⁷¹ "Although our Fourth Amendment cases sometimes refer indiscriminately to searches and seizures, there are important differences between the two The Amendment protects two different interests of the citizen—the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter." *Brown*, 460 U.S. at 747 (Stevens, J., concurring). See also *Segura v. United States*, 104 S. Ct. 3380 (1984).

⁷² *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

⁷³ *Segura*, 104 S. Ct. 3380.

by the police officers' subjective bad faith, the only basis for applying the exclusionary rule is to derive whatever inherent moral good accrues in deterring all forms of police bad faith. Balanced against such potential moral good is the practical costs of a factual inquiry into subjective motivation.⁷⁴ Difficulties of proof, however, can cut both ways.

At least one court has suggested that the exclusionary rule must apply whenever there is police bad faith because of the difficulties in ascertaining whether bad faith actually caused an additional invasion of privacy. As the court noted:

Once there is evidence of lack of good faith on the part of the investigating officers, there is no standard by which a judge can ascertain whether the seized item was found while looking for the items described in the warrant or while conducting a general search for other items not described.⁷⁵

Faced with the difficulty of determining the actual effects of police bad faith, the court formulated an overinclusive rule of exclusion because any less extensive rule would be underinclusive in allowing illegal general searches to escape judicial scrutiny.⁷⁶ Such reasoning is contrary to the basic thrust of *United States v. Calandra*,⁷⁷ where the Court held that the exclusionary rule is already overinclusive and should be applied only when it will demonstrably increase the protection of individual privacy. It is thus unlikely that the Supreme Court would extend the exclusionary rule to subterfuge searches which do not demonstrably result in additional invasions of privacy.⁷⁸

2. Second Hypothetical—Additional Invasion of Privacy

It is the additional invasion of privacy in the second hypothetical which distinguishes it from the first hypothetical. In both hypotheticals, there is a form of police bad faith in that the police subjectively desire to search for and seize items not listed in the warrant. But only in the second hypothetical is there police *conduct* which objectively diminishes an aspect of individual privacy: the suitcases

⁷⁴ See *Massachusetts v. Painten*, 389 U.S. 560 (1968). Inquiry into subjective state of mind of police officers would be a costly "misallocation of judicial resources." *Id.* at 565 (White, J., dissenting).

⁷⁵ *Tranquillo*, 330 F. Supp. at 876.

⁷⁶ Professor LaFave has suggested that the holding in *Camara v. Municipal Court*, 387 U.S. 523 (1967) is overinclusive, but justifiably so because of the Court's concern that an administrative search could be used as a front for the police. LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1.

⁷⁷ *United States v. Calandra*, 414 U.S. 338 (1974).

⁷⁸ See *Scott v. United States*, 436 U.S. 128 (1978). The Court appeared to approve the government's rather broad position that "subjective intent alone, . . . , does not make otherwise lawful conduct illegal or unconstitutional." *Id.* at 137. See also *Oliver*, 104 S. Ct. 1735; *Franks*, 438 U.S. 154.

would not have been searched but for the police decision to delay the execution of the warrant until the suitcases were present on Tuesday.⁷⁹

The questions raised by such delayed searches are closely analogous to certain forms of pretext or timed arrests. In order to isolate the issue of police bad faith, it is necessary to differentiate four distinct situations which have often been included under the general heading of pretext or timed arrests.

(1) *Sham Arrests*: No probable cause exists for an arrest, but the police "manufacture" probable cause in order to search incident to arrest.⁸⁰ Such an arrest and subsequent search are unlawful, not because of the subjective bad faith inherent in police perjury, but because there is no objective probable cause for an arrest. The lack of good faith in such situations is relevant only to the extent that it discloses the absence of an objective basis for probable cause to arrest. Suppression of the fruits of a sham arrest is not designed to punish the police for their subjective bad faith, but to control their objective conduct by enforcing the substantive requirement of probable cause.

(2) *Subterfuge Arrests*: Objective grounds for arrests exist, but there is also a subjective desire to search which is not based on adequate probable cause.⁸¹ If the arrest and the search incident to arrest would have occurred irrespective of the police officer's subjective motivation,⁸² then the subjective desire to search should be deemed irrelevant because it did not alter the officer's conduct and caused no additional invasion of privacy. The questions raised by such a subterfuge arrest are identical with the issues raised by the subterfuge search in the first hypothetical.⁸³ This Article maintains that subterfuge arrests and subterfuge searches are both lawful because the subjective motivation of the police does not

⁷⁹ The additional invasion of privacy involved in a search of the suitcases is distinct from the lower courts post-hoc determination of specific prejudice. See *supra* text accompanying note 58.

⁸⁰ See *Taglavore v. United States*, 291 F.2d 262, 265 (9th Cir. 1961). The "manufacturing" of probable cause may be outright police perjury, or it may be the more subtle effect of hindsight in reconstructing the facts known to the officer at the time of the arrest. "[A]fter-the-event justification for the . . . search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

⁸¹ See, e.g., *United States v. Robinson*, 414 U.S. 218 (1973) (defendant argued that a traffic arrest was motivated by the arresting officer's unjustified desire to search for narcotics).

⁸² See, e.g., *Williams v. State*, 6 Md. App. 511, 519, 252 A.2d 262, 266 (1969), *cert. denied*, 397 U.S. 1036 (1970). "Where one motive is to make a bona fide arrest, a duality of motive will not, of itself, . . . transform the arrest into a 'pretext.'" *Id.* at 266. In *Robinson*, 414 U.S. 218, department regulations provided that the defendant should be taken into custody. Thus the arrest and search incident to arrest would have occurred regardless of the police officer's suspicions about narcotics. The situation is distinguishable when the officer makes a discretionary decision to take the defendant into custody. See *infra* note 84.

⁸³ See *supra* text accompanying note 70. See also *Coolidge*, 403 U.S. 443. The Court noted that the "inadvertent" requirement of plain view was not applicable to searches of a person incident to arrest. *Id.* at 471 n. 27.

result in any additional invasion of privacy. The very same police conduct, the arrest and/or the search, would have occurred regardless of the officer's subjective motivation. Thus to apply the exclusionary rule in such situations serves only to punish subjective bad faith on the part of the police and does not further the substantive aspects of the fourth amendment. The fourth amendment seeks to protect privacy and regulate police conduct, it does not seek to regulate thought processes.

(3) *Pretext Arrests*: Objective grounds for an arrest exist, but the arrest takes place only because of the police officer's subjective desire to search incident to arrest.⁸⁴ A pretext arrest differs from a subterfuge arrest, in that the pretext arrest would not have occurred if the police had followed departmental regulations or normal procedures.⁸⁵

(4) *Timed Arrests*: A lawful arrest is so timed as to give the arresting officers an opportunity to carry out their subjective desire to search an area that would not otherwise be subject to search. A timed arrest has been defined as "the tactic of circumventing the Fourth Amendment requirements by manipulating the time of a suspect's arrest to coincide with his presence in a place which the government agents wish to search."⁸⁶

With both a pretext arrest and a timed arrest, there is a causal relationship between police bad faith and the resulting police conduct which invades personal privacy. But for the bad faith desire to search without probable cause, there would have been no arrest and no search incident to arrest. While a pretext or timed arrest may not be "illegal in the strictest sense . . . [because objective probable cause for an arrest exists] it does not necessarily follow that all legal

⁸⁴ See, e.g., *People v. Watkins*, 19 Ill. 2d 11, 166 N.E.2d 433, cert. denied, 364 U.S. 833 (1960). The defendant was arrested for parking too close to a crosswalk, "the kind of minor traffic offense that ordinarily results in a 'parking ticket' hung on the handle of the door of the car." *Id.* at 19, 166 N.E.2d at 437. See also *Brumley v. State*, 484 P.2d 554 (Okla. 1971) (The police followed the defendant's automobile for fourteen blocks and arrested him for "lane straddling." Both the defendant and a passenger were arrested and taken to jail on the basis of the arrest.)

⁸⁵ See, e.g., *Harding v. State*, 301 So. 2d 513 (Fla. Dist. Ct. App. 1974), cert. denied, 314 SO.2d 151 (1975). State police executed a city warrant for minor traffic violations because of a drug related tip. The court held that "the arrest cannot be described as one which would have been accomplished by . . . [a city police officer] routinely acting in reasonable pursuit of his usual and normal duties . . ." *Id.* at 514.

⁸⁶ *United States v. Carriger*, 541 F.2d 545, 553 (6th Cir. 1976). At a time when the law permitted the defendant's entire premises to be searched incident to arrest, the police often delayed an arrest until the defendant was in the dwelling. See, e.g., *Rabinowitz*, 339 U.S. 56; *United States v. Harris*, 321 F.2d 739 (6th Cir. 1963). The attractiveness of such timed arrests has diminished. See, e.g., *Payton v. New York*, 445 U.S. 573 (1980) (generally requiring an arrest warrant to enter defendant's dwelling); *Chimel v. California*, 395 U.S. 752 (1969) (limiting the area that may be searched incident to arrest).

arrests are reasonable for purposes of supporting a subsequent search or seizure."⁸⁷ The pretext or timed arrest, and the delayed or timed execution of a search warrant, should be treated alike because they involve police misconduct wilfully designed to invade an *additional* aspect of personal privacy.⁸⁸

In the Supreme Court's most recent decision on plain view seizures,⁸⁹ Justice Stevens' concurring opinion identified one of "the core requirements of plain view: seizing the item must entail no significant *additional invasion of privacy*."⁹⁰ The Court also noted that the facts of the case did not suggest any form of pretext arrest or search.⁹¹ This Article contends that a search, either pursuant to a warrant or incident to arrest, should be deemed unreasonable and the exclusionary rule applied when: (1) an additional invasion of privacy occurs,⁹² and (2) there is a pretext evidencing police bad faith.⁹³ The facts in the second hypothetical present such a scenario. The delay in executing the search warrant resulted in an additional invasion of privacy (search of the suitcases) and the delay was deliberate and planned for the purpose of accomplishing that additional invasion of privacy.⁹⁴ Such a situation is "not a case where some minor technicality has been overlooked in acquiring an arrest or search warrant or where a police officer confronted with a sudden and unexpected situation has made a miscalculation in acting; . . . Here instead we have a deliberate, pre-planned attempt by the police to violate a suspect's constitutional rights by engaging in a subterfuge."⁹⁵

When the police in the second hypothetical deliberately delayed the execution of the warrant in order to search the suitcases instead of seeking a new warrant, the magistrate was precluded from granting or denying authorization to search the suitcases.⁹⁶ It is the police who manipulated the situation to provide their

⁸⁷ *Harding*, 301 So. 2d at 515.

⁸⁸ In permitting a three day delay in opening a seized container, the Supreme Court noted that it was not foreclosing the possibility that the defendant might prove that "delay in the completion of a vehicle search was unreasonable because it adversely affected a privacy or possessory interest." *United States v. Johns*, 536 U.S.L.W. 4126 (U.S. Jan. 21, 1985) (No. 83-1625). When both police misconduct and an invasion of privacy occur, there exists the precise evil the fourth amendment was designed to prevent. See *infra* text accompanying note 97.

⁸⁹ *Brown*, 460 U.S. 730.

⁹⁰ *Id.* at 748 (Stevens, J. concurring) (emphasis added).

⁹¹ *Id.* at 743.

⁹² See *Johns*, 43 U.S.L.W. 4126.

⁹³ See *Segura*, 104 S. Ct. 3380. "And there is no suggestion that the officers, in bad faith, purposely delayed obtaining the warrant." *Id.* at 3390.

⁹⁴ A delay which is "deliberate and made by the officers for the purpose of selecting their own time and for their own purpose" renders the search unreasonable. *United States v. Bradley*, 428 F.2d 1013, 1016 (5th Cir. 1970) (citing *State v. Perkins*, 285 S.W. 1021, 1024 (Mo. App. 1926)). If "the purpose of the delay was to prejudice the rights of the suspect" the search is unreasonable. *Spinelli*, 382 F.2d at 885. See also *Watkins*, 237 N.W.2d 14 (search ostensibly for stolen goods was in fact a pretext for a full-scale drug raid).

⁹⁵ *Taglavore*, 291 F.2d at 267.

⁹⁶ *Perkins*, 285 S.W. 1021 (the delay in execution was deemed unreasonable even though the delay was concurred in by the magistrate).

own authorization for this additional invasion of privacy. The police should no more be permitted to bypass the magistrate and authorize a search of the suitcases than they would be permitted to avoid the magistrate entirely and authorize their own search of the premises. To permit such a search makes the officer, not the magistrate, the "judge of the existence of probable cause for the search at the time it is made."⁹⁷ A deliberate effort to increase the invasion of privacy beyond that authorized by the magistrate is the type of deliberate bad faith (police misconduct) that the fourth amendment seeks to regulate. Regardless of how the good faith exception evolves in the future, the exclusionary rule should continue to operate when the police flaunt their power by deliberately evading the command of the fourth amendment to obtain judicial authorization for an invasion of privacy.

IV. CONCLUSION

The fourth amendment was drafted to serve two interrelated goals: (1) control of police misconduct and (2) protection of individual privacy.⁹⁸ The application of the exclusionary rule must be guided by those twin goals, and the Supreme Court may have implicitly recognized that the exclusionary rule operates only when those two goals coalesce.⁹⁹ In *Leon* and *Oliver*, the Court focused upon each goal in isolation; but when considered together, these cases may point the way to the future operation of the exclusionary rule. In *Leon*, the Court recognized that an invasion of privacy without concomitant police misconduct does not trigger application of the exclusionary rule.¹⁰⁰ In *Oliver* the Court recognized the converse: police misconduct without a concomitant invasion of privacy does not trigger fourth amendment protections.¹⁰¹ *Leon* and *Oliver* together suggest that: (1) all forms of police bad faith will not be condemned, and (2) the exclusionary rule will not be invoked to protect privacy irrespective of the underlying good or bad faith of the police officers. Only when there is both bad faith and an objectively manifested invasion of privacy caused by such bad faith, does there exist the precise evil the fourth amendment was designed to prevent, and only then will the exclusionary rule be invoked.

Adoption of the good faith exception will undoubtedly limit the scope of the exclusionary rule in many familiar areas of fourth amendment jurisprudence. Recognition of the concept of bad faith would extend the rule to some previously neglected areas such as the delayed execution of search warrants. Should the Supreme Court recognize that police motivation, good *and* bad, is relevant to the application of the exclusionary rule, the Court can equitably limit and expand the operation of the rule.

⁹⁷ *Bedford*, 519 F.2d at 658 (Rosenn, J., dissenting).

⁹⁸ See authorities cited *supra* note 90.

⁹⁹ See, e.g., *Franks*, 438 U.S. 154 (the Supreme Court required both a showing of bad faith and an absence of substantive probable cause).

¹⁰⁰ *Leon*, 104 S. Ct. at 3423.

¹⁰¹ *Oliver*, 104 S. Ct. at 1742-44.

