Campbell Law Review

Volume 21
Issue 2 *Spring 1999*

Article 3

January 1999

I-95 A/K/A the Drug Trafficker's Freeway and Its Impact on State Constitutional Law

The Honorable Robert H. Hobgood

I-95 A/K/A THE DRUG TRAFFICKER'S FREEWAY, AND ITS IMPACT ON STATE CONSTITUTIONAL LAW

THE HONORABLE ROBERT H. HOBGOOD*

INTRODUCTION

This article tests the proposition that since July 5, 1984, the date the United States Supreme Court handed down its ruling in *United States. v. Leon*,[1] a criminal defendant in a search and seizure case can expect disparate results in different state trial courts although identical factual situations exist. First, this article hypothetically pits two drug mules against a reasonably well-trained officer with a defective search warrant. It then assumes that a search warrant has been issued erroneously by a magistrate and further that the defendant moves to suppress evidence in six state trial courts: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey.

The defect in the search warrant is that the affidavit attached to the search warrant fails to establish probable cause to believe that controlled substances will be found in a particular place due to staleness of the information and insufficient sworn statements concerning the reliability of the confidential informant. One constant in this hypothetical is that a reasonably well-trained officer would not know that the warrant is defective and could reasonably act in objective good faith in searching for and seizing the controlled substances described in the search warrant.

The defective search warrant is challenged in state trial court by a defense motion to suppress the admission into evidence of the seized controlled substances. The state trial judge conducts a pretrial hearing at which evidence, including the search warrant with affidavit attached, is presented. In a written order, the state trial judge makes findings of facts. On the basis of the findings of facts, the state trial judge then makes conclusions of law. Analysis of the law requires the judge to review the Fourth Amendment to the

* Judge Hobgood is currently the Senior Resident Superior Court Judge of the Ninth Judicial District of North Carolina. He received both his A.B. and J.D. degrees from the University of North Carolina at Chapel Hill.

1. 468 U.S. 897 (1984).

United States Constitution; search and seizure provisions in that state's constitution; state statutes concerning: criminal procedure, search and seizure and the exclusionary rule; and state and federal case law.

The state trial judge then allows or denies the defendant's motion to suppress. If the motion is allowed, then the seized controlled substances are inadmissible at trial. Conversely, if the motion is denied, the seized controlled substances are admissible at trial. Either ruling is appealable to a state appellate court. However, a denial ruling is appealable only after a conviction at trial, or after a plea of guilty by the defendant reserving the right to appeal the suppression issue.

This hypothetical assumes that the state trial judge indeed allows the motion to suppress the evidence, and that the state district attorney, or commonwealth attorney, appeals the ruling to the appropriate appellate court. The state district attorney urges that the trial judge erred in failing to apply the good faith exception to the exclusionary rule as set forth in the United States Supreme Court case of *United States v. Leon.*

Section I presents and traces the history of discussion on this issue. Significant federal cases and relevant state cases are cited, and law review articles provide scholarly comment. Section II traces the hypothetical journey of the two "mules" transporting controlled substances on Interstate 95 from Miami International Airport to Newark, New Jersey and their arrest in six states: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey. Analysis will begin in Section III with Florida and progress northward to Georgia in Section IV, South Carolina in Section V, North Carolina in Section VI, Virginia in Section VII, and New Jersey in Section VIII.

This article argues that a criminal in a search and seizure case can expect disparate results in different state trial courts although identical factual situations exist. The good faith exception to the exclusionary rule adopted by the United States Supreme Court in *United States v. Leon* has not been applied with uniformity in state courts. Furthermore, this article finds that some state courts, relying on "adequate and independent" state grounds, have afforded criminal defendants greater protection under state constitutions and statutes than they would receive in other state courts or federal district courts. Finally, this article argues that state appellate courts must write their opinions with clarity.

I. LITERATURE REVIEW

The Fourth Amendment to the United States Constitution provides that:

> 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.[2]

Unquestionably, probable cause is the constitutionally imposed standard for determining whether a search and seizure is lawful. Most state constitutions contain search and seizure provisions with a probable cause standard.

Weeks v. United States,[3] created the exclusionary rule in federal court.[4] The exclusionary rule bars the use of evidence secured through an illegal search and seizure.[5] "Convictions by means of unlawful seizures . . . should find no sanction in the judgments of the courts . . ."[6] *Mapp v. Ohio*[7] applied the exclusionary rule to all state courts pursuant to the due process clause in the Fourteenth Amendment, thereby creating a national standard for police conduct and a meaningful national system of individual rights in the field of search and seizure.[8]

Until 1983, courts could rely on the *Aguilar-Spinelli* test in determining probable cause. In *Aguilar v. Texas*,[9] the United States Supreme Court created standards that required magistrates to examine and verify the basis of an informant's information and the credibility of an informant.[10] *Aguilar* established a two-pronged test: knowledge and veracity.[11] The basis of the knowledge prong requires the police to reveal the informant's source of information.[12] The veracity prong requires the police to show the magistrate proof of the informant's credibility.[13] In

2. U.S. CONST. amend IV.
3. 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).
4. *Id.*
5. *Id.* at 392, 398.
6. *Id.* at 392.
7. 367 U.S. 643 (1961).
8. *Id.* at 655-57.
9. 378 U.S. 108 (1964).
10. *Id.* at 114.
11. *Id.*
12. *Id.*
13. *Id.*

Spinelli v. U.S.,[14] the Supreme Court held that the knowledge prong could be satisfied if the information provided was sufficiently detailed.[15] Furthermore, the veracity prong could be satisfied if the information provided was enhanced by corroborative information produced by the police.[16]

In 1983, the Supreme Court replaced the two pronged test of *Aguilar-Spinelli* with a "totality of the circumstances" test.[17] Under this test, the magistrate considers all of the circumstances, including the credibility of the informant and the basis of his knowledge, in determining probable cause.[18]

The exclusionary rule does not appear in the United States Constitution, but rather is a judicially created remedy for Fourth Amendment violations.[19] It may be classified as a constitutionally required judicial rule. The exclusionary rule has been controversial over the years. Its sharpest critic was Judge Cardozo, who stated that "the criminal is to go free because the constable has blundered."[20] Justice Brandeis, dissenting in *Olmstead v. United States*,[21] argued in favor of the exclusionary rule stating, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes the lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[22]

United States v. Leon created a "good faith" exception to the exclusionary rule.[23] Under this exception, the exclusionary rule cannot be applied to bar evidence in the state's case in chief, although the search warrant subsequently is ruled invalid.[24] The rationale behind the exception is that police officers who reasonably rely in good faith on search warrants issued by neutral and detached magistrates do not intentionally violate the Fourth

14. 393 U.S. 410 (1969).
15. *Id.* at 415.
16. *Id.*
17. Illinois v. Gates, 462 U.S. 213 (1983).
18. *Id.* at 214.
19. United States v. Calandra, 414 U.S. 338 (1974).
20. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).
21. 277 U.S. 438 (1928).
22. *Id.* at 468 (Brandeis, J., dissenting).
23. Leon, 468 U.S. 897, 913 (1984).
24. *Id.* at 897.

Amendment. Therefore, the purpose of the exclusionary rule, to deter police misconduct,[25] should not apply to them.[26]

State constitutions contain search and seizure provisions which are interpreted by state supreme courts independent of the United States Supreme Court. At the time of the *Mapp* decision in 1961, twenty-four state courts and the territories of Alaska and Hawaii already excluded evidence illegally seized on the basis of case law or statutes. Thus, a body of state law on the exclusionary rule existed in each of those states and territories before 1961. That state law was not modified by *Leon*.

By contrast, however, some states, such as New Hampshire, had no statutory exclusionary rule prior to *Mapp*. New Hampshire, like a majority of jurisdictions, subscribed to the strict common law rule that a court must admit all competent and probative evidence regardless of its source.[27] Subsequent to *Mapp*, all state trial courts and federal district courts applied the exclusionary rule to enforce a national standard for police conduct in search and seizure cases.

The rights of defendants in search and seizure law reached apogee during the era of Chief Justice Earl Warren.[28] When Warren Burger was sworn in as Chief Justice of the United Supreme Court in 1969, many court observers anticipated a conservative, law and order shift in the decisions of the United States Supreme Court. However, *stare decisis* requires courts to follow established precedents, unless previous case holdings are reversed. Thus, *stare decisis* slows change. Furthermore, a presidential appointee to the Supreme Court does not initiate change in case law until he or she is part of a majority on the court.

In 1977, Justice William J. Brennan, Jr., signaled a method to defense lawyers for retaining individual rights expanded by the Warren Court, but under retrenchment by the Burger Court he stated:

> Of late, . . more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely

25. *Id.* at 916.

26. *Id.* at 919-20 (citing United States v. Peltier, 422 U.S. 531, 542 (1975)).

27. State v. Mara, 78 A. 2d 922, 924 (N.H. 1951).

28. *The Warren Court, A Retrospective* (Bernard Schwartz ed., Oxford University Press 1996).

an important and highly significant development for our constitutional jurisprudence and for our concept of federalism.[29]

In 1982, the United States Supreme Court in *Michigan v. Long*,[30] set forth how state supreme court justices should write their opinions when they are based on "bona fide separate, adequate, and independent [state] grounds."[31]

Beginning in 1983, New Hampshire, and other state supreme courts, "in reaction to federal decisions narrowing the scope and content of fourth amendment rights, . . . repeatedly emphasized the importance of undertaking independent interpretation of our State constitutional guarantees."[32] These courts held that the good faith exception is inconsistent with state constitutional requirements of probable cause.[33]

State appellate courts must clearly state on the face of the opinion the adequacy and independence of any possible state law ground.

When 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.'[34]

---

29. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

30. 463 U.S. 1032 (1982).

31. *Id.* at 1040-41.

32. State v. Canelo, 653 A.2d 1097, 1104 (N.H. 1995) (citing State v. Ball, 471 A.2d 347, 350-52 (N.H. 1983); State v. Bradberry, 522 A.2d 1380, 1982 (N.H. 1986); State v. Koppel, 499 A.2d 977, 979-80 (N.H. 1985); State v. Sidebothem, 474 A.2d 1377, 1379-80 (N.H. 1984); State v. Settle, 447 A.2d 1284, 1285-86 (N.H. 1982) (plurality opinion)) (holding that a good faith exception is incompatible with the guarantees contained in part I, article 19 of the New Hampshire Constitution).

33. *See* State v. Marsala, 579 A.2d 58 (Conn. 1990); State v. Gutierrez, 863 P.2d 1052 (1993); State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988); and Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991). *See also,* State v. Guzman, 842 P.2d 660 (Idaho 1992); People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985); and State v. Oakes, 598 A.2d 119 (Vt. 1991).

34. Ohio v. Robinette, 519 U.S. 33, 37 (1996) (citing Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)) (decision clearly relied on federal law rather than Ohio Constitution). *See also* Pennsylvania v. Labron, 518 U.S. 938, 941 (1996) (Pennsylvania Supreme Court decisions rest on an incorrect reading of the Fourth Amendment's warrant requirement, and the adequacy and independence of any possible state law ground is not clear from the face of the opinion).

II. METHODOLOGY: A HYPOTHETICAL[35]

The moon rises slowly as two men busily transfer contraband drugs from the stash house into the trunk of a late model Cadillac. The Miami drug lord fingers the trigger of his UZI machine gun as he surveys the scene, located somewhere between the Miami International Airport and Hialeah Park Race Track. After receiving their delivery schedule and telephone numbers, the two "mules" drive off to the east until they arrive at Interstate 95, the "Golden Alley." They turn north and set the cruise control. Within twelve hours they will deliver cocaine in six states: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey.

These foreign nationals have not read the United States Constitution, Bill of Rights, or the constitutions of the six states in which they will make deliveries. They do know, however, that if stopped they are not to speak English except to ask for a lawyer.

This hypothetical assumes that in a city in each of the six states, the following occurs: On that same night a confidential informant of unproven reliability informs an officer of the (insert city) police department that two persons known to him as "Armando" and "Patsy" are selling large quantities of cocaine from their residence at 620 Noveau Riche Drive in downtown (insert name of same city). The informant also indicates that he witnessed a sale of cocaine by Patsy at the residence approximately five months earlier. At that time, he saw a shoe box containing a large amount of cash that belonged to Patsy. He says that Armando and Patsy generally keep only small quantities of drugs at their residence and store the remainder at another location in (insert name of same city). The police put Armando and Patsy under surveillance and determine that the cars parked at the Noveau Riche residence belong to Armando Sanchez, who previously has been arrested for possession of cocaine, and Patsy Stewart, who has no criminal record. That night officers observe a late model Cadillac arrive at the Noveau Riche Drive residence. Two males exit the vehicle and walk into the residence. Each man holds a small package which resembles a fast food restaurant bag. A quick check of the license tag number through the police information network reveals that the Cadillac is owned by Richard Castle, who has been arrested previously for possession of fifty pounds of marijuana. Officers see another automobile arrive. A

35. These facts are designed to resemble the factual situation in *United States v. Leon*, 468 U.S. 897 (1984).

male exits this automobile, rushes inside the residence at 620 Noveau Riche Drive, and shortly thereafter leaves carrying a small paper sack. Activity increases. At two a.m., after all area businesses have closed, three more automobiles arrive. The occupants rush inside the 620 Noveau Riche Drive residence and leave holding paper bags. The police recognize one of those persons as a probationer with prior drug involvement.

While officers continue to keep the residence under surveillance, one officer rushes to a magistrate. The officer presents an affidavit reciting the information obtained from the confidential informant, the officers' personal observations at 620 Noveau Riche Drive, and the record checks obtained. The magistrate issues a search warrant to search the house and vehicles at 629 Noveau Riche Drive, (insert name of city), for controlled substances. The affidavit contains no facts indicating the basis for the informant's statements concerning prior criminal activity and is devoid of information establishing the informant's reliability.

The officer returns to the scene with the search warrant and all officers search the house and the Cadillac. The officers seize two kilos of cocaine in the house at 620 Noveau Riche Drive and eight kilos of cocaine in the trunk of the Cadillac, all wrapped in fast food restaurant bags.

Armando, Patsy and the two "mules" are arrested inside the house and exercise their right to remain silent. Appointed counsel files a motion to suppress the cocaine on the grounds that the search warrant was not supported by probable cause.

How does this hypothetical impact state constitutional law? To answer that question it is necessary to examine the evidence at the suppression hearing through the lens of the state trial judge in each state. The hypothetical assumes that each defendant has standing to object to the admissibility of at least part of the cocaine.

As we trace this hypothetical journey from state to state, we will examine the legal response of state trial court judges based on search and seizure provisions in state constitutions, state statutes and case law. The state trial court judge will look first to the Fourth Amendment of the United States Constitution.

The state trial judge in each case determines that the search warrant is defective under the Fourth Amendment. The magistrate did not have probable cause to issue the search warrant, because there was no proof of the credibility of the informant and his information was stale. However, the trial judge knows that

suppressing the evidence will have no deterrent effect on the police. The police officer who obtained the search warrant was well-trained and relied on the search warrant in objective good faith. The ruling in *United States v. Leon* would indicate that the motion to suppress should be denied.[36]

The trial judge will attempt to determine if the motion to suppress can be allowed on "adequate and independent" state grounds. The method of analysis is analytical and comparative. It is a useful method, because it studies the disparate responses to the issue by six state supreme courts.

This article follows the hypothetical pair northward from Florida to New Jersey, evaluating state constitutional law, state statutory law and state case law, looking for inconsistencies and anomalies. Interestingly, we begin with an anomaly: the search and seizure provision of the Florida Constitution, Article I, Section 12.

III. FLORIDA

Article I, Section 12, of the Florida Constitution, as amended in 1982, effective January 3, 1983, provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. *Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*[37]

The 1982 amendment to Article I, Section 12, of the Florida Constitution appears in italics type. This 1982 amendment was adopted by vote of the electorate at the November, 1982 general election. The other part of Article I, Section 12 appeared without

36. *See supra* notes 23-26.

37. FLA. CONST. art. 1, § 12.

substantial difference in all the prior Florida Constitutions.[38] Prior to passage of this amendment, Florida courts "were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution."[39]

Section 933.18 of the Florida Statutes governs the issuance of a search warrant for a private home and provides:

> No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:
>
> . . . .
>
> (5) The law relating to narcotics or drug abuse is being violated therein;
>
> . . . No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some credible witness that he has reason to believe that one of said conditions exists, which affidavit shall set forth the facts on which such reason for belief is based.[40]

State v. Lavazzoli[41] interpreted the 1982 amendment to Article I, Section 12 of the Florida Constitution as linking Florida's exclusionary rule to the federal exclusionary rule.[42] Thus, the good faith exception to the search warrant requirement as set out in *United States v. Leon*[43] and *Massachusetts v. Sheppard*[44] became the law in Florida.

With this amendment, however, we are bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment, and provide no greater protection than those interpretations. Indeed, an exclusionary rule that was once constitutionally mandated in Florida can now be eliminated by judicial decision of the United States Supreme Court.[45]

The effect of making the exclusionary rule a part of the Florida Constitution in 1968 was to give the existing exclusionary rule

38. FLA. CONST. of 1838, art. I, § 7 (1968); FLA. CONST. of 1861, art. I, § 7 (1968); FLA. CONST. of 1865, art. I, § 7 (1968); FLA. CONST. of 1868, decl. of rights, § 19 (1968).

39. State v. Lavazzoli, 434 So.2d 321, 323 (Fla. 1983).

40. FLA. STAT. CH. 933.18 (1985).

41. 434 So.2d 321 (Fla. 1983).

42. *Id.* at 323.

43. 468 U.S. 897 (1984).

44. 468 U.S. 981 (1984).

45. State v. Bernie, 524 So.2d 988, 990-91 (Fla. 1988).

constitutional dimension, supposedly immunizing it from possible future retreat from the United States Supreme Court's constitutional holding in *Mapp*.

However, with the *Bernie* decision in 1988, the Florida Supreme Court held that the language of the amended Article I, Section 12 of the Florida Constitution indicated an intention to apply all United States Supreme Court decisions to Florida search and seizure cases regardless of when rendered.[46] In *Bernie*, Emery Air Freight received an envelope addressed to Vickie Bernie.[47] The envelope had broken in transit, revealing a suspicious substance.[48] Emery notified a drug enforcement agent, who tested the substance and identified it as cocaine.[49] Emery then notified the Sarasota County Sheriff's Office.[50] Bruce Bernie came to Emery's Tampa office to check on the whereabouts of the package, and Emery's employees told him that the package would be delivered the next day, October 14, 1983.[51] On October 14, 1983, based on an affidavit setting forth the preceding facts, the police obtained a search warrant for the Bernies' residence.[52] Probable cause was based on the prospective delivery of cocaine under police control.[53] A few minutes after the controlled delivery, police executed the search warrant at the residence, arrested the Bernies, and charged them with possession of cocaine.[54]

The Bernies moved to suppress the cocaine on the grounds that it was the product of an unreasonable search and seizure, relying on the provisions of Section 933.18, Florida Statutes.[55] The Bernies contended that at the time the search warrant was issued there was no violation of any narcotics law in their dwelling.[56]

Nevertheless, the court in *Bernie* held that the anticipatory search warrant issued was valid and did not violate the Fourth Amendment of the United States Constitution, Article I, Section 12 of the Florida Constitution or Section 933.18 of the Florida

46. *Id.* at 991.
47. *Id.* at 989.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Bernie*, 524 So.2d at 989.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 990.

Statutes.[57] *Bernie* also held that the 1982 amendment to Article I, Section 12, of the Florida Constitution conformed Florida's search and seizure laws with all decisions of the United States Supreme Court rendered before and subsequent to the adoption of that amendment. (emphasis added).[58]

In 1989, one year after *Bernie*, a Florida appellate court in *Renckley v. Florida*[59] found an anticipatory search warrant invalid under Section 933.18.[60] The good faith exception argument of the State failed because the affidavit did not provide sufficient evidence for a magistrate to find probable cause to issue a search warrant.[61] Therefore, the officer's search of the dwelling was not in "objectively reasonable reliance" on the warrant.[62]

More recently, the 1995 case of *Pazos v. Florida*[63] applied the good faith exception to the exclusionary rule in an anticipatory search case.[64] Technically, no narcotics or drug abuse law was being violated when the magistrate issued the search warrant.[65] The court found that the officer reasonably relied on the magistrate's finding of probable cause.[66] The informant had bought drugs before from the occupants of the dwelling.[67] "[T]he officers had the informant in sight constantly except while he was inside the dwelling."[68] "[T]here was a firm connection between the contraband and the premises."[69] The affidavit contained no false statements.[70] The motion to suppress under Florida Statutes Section 933.18 (5) was denied.[71]

In Florida, the task of the issuing magistrate is simply to make a practical, common-sense decision; whether given all the circumstances set forth in the affidavit, including the "veracity" and the "basis of knowledge" of persons supplying hearsay infor-

57. *Bernie*, 524 So.2d at 992.
58. *Id.*
59. 538 So.2d 1340 (Fla. 1989).
60. *Id* at 1342.
61. *Id* at 1342-43.
62. *Id.* at 1343.
63. 654 So.2d 1000 (Fla. 1995).
64. *Id.* at 1001.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Pazos*, 654 So.2d at 1001.
70. *Id.*
71. *Id.* at 1000.

mation, there is a fair probability that contraband or evidence of a crime will be found in a particular place. "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed" considering the totality of the circumstances.[72]

State v. Wildes[73] applied the good faith exception enunciated in *United States v. Leon* when the information in the affidavit was obtained by a police officer from an unidentified confidential informant.[74] "The affidavit contained no specific facts regarding the reliability of the informant although the facts themselves contained considerable detail indicating the presence of contraband at the residence authorized to be searched."[75] The Court applied the good faith exception, noting that the search warrant was regular on its face.[76] It also noted that "the affidavit upon which [the search warrant] was based was not so lacking in indicia of probable cause that the officer executing the warrant could not with reasonable objectivity rely in good faith on the magistrate's probable cause determination and on the technical sufficiency of the warrant."[77]

Florida v. Kingston[78] applied the *Leon* good faith exception in 1993, even though the judge issued a search warrant, in which he had drawn a diagonal line across a blank space where the description of the place to be searched was omitted.[79] The detective believed the judge had corrected whatever was wrong.[80] A nine page affidavit was stapled to the search warrant.[81] Apparently, when read in a common sense, non-technical way, the search warrant set forth ample facts to establish probable cause and enable the searcher, with reasonable effort, to identify the place to be searched.[82] In Florida, "the test is practical accuracy, not technical nicety."[83]

72. Illinois v. Gates, 462 U.S. 213, 238 (1983) (citing Jones v. United States, 362 U.S. 257, 271 (1960)).
73. 468 So.2d 550 (Fla. 1985).
74. *Id.* at 550-51.
75. *Id.* at 550
76. *Id.* at 551.
77. *Id. See also* State v. Harris, 629 So.2d 983 (Fla. 1993).
78. 617 So.2d 414 (Fla. 1993).
79. *Id.* at 415.
80. *Id.* at 416.
81. *Id.*
82. *Id.*
83. *Id.* at 415.

In the 1996 case of *Florida v. Howard*,[84] the search warrant stated that facts showing probable cause were set forth in a written affidavit.[85] The search warrant failed to incorporate by reference the facts in the affidavit.[86] However, the court deemed the search warrant valid, because evidence at the suppression hearing suggested the affidavit had been attached to the warrant and had been reviewed by the issuing judge.[87]

Florida courts have refused to follow the good faith exception to the exclusionary rule in some cases. In *State v. Ross,*[88] a search warrant, due to a word processing error, neglected to include a description of specific property for which the search was authorized.[89] The search warrant was facially invalid.[90] The executing officer could not reasonably have presumed the search warrant to have been valid.[91] Therefore, the State could not resort to the good faith exception to the exclusionary rule enunciated in *United States v. Leon.*[92] The next year, the court in *Vasquez v. State*[93] refused to apply the good faith exception, because the affidavit for a search warrant contained no information about the informant's credibility and no independent police corroboration.[94] No officer could in objective good faith rely on the search warrant.[95] In *Delacruz v. Florida,*[96] the affidavit for a search warrant was insufficient to establish probable cause, because it contained no information about the reliability of the confidential informant.[97]

The *Leon* good faith exception to the exclusionary rule does not apply to the exclusionary provisions of the Florida wiretap law set out in chapter 934, Florida Statutes. The statutorily mandated exclusionary rule in "[c]hapter 934, Florida Statutes, pertaining to security of communications, unequivocally expresses

84. 670 So. 2d 1004 (Fla. 1996).
85. *Id.* at 1005.
86. *Id.*
87. *Id.* at 1005-06.
88. 471 So.2d 196 (Fla. 1985).
89. *Id.* at 196.
90. *Id.*
91. *Id.* (citing United States v. Leon, 468 U.S. 897, 926 (1984)).
92. *Id.*
93. 491 So.2d 297 (Fla. 3d DCA), *rev. denied*, 500 So.2d 545 (Fla. 1986).
94. *Id.* at 301.
95. *Id.* at 300.
96. 603 So.2d 707 (Fla. 1992).
97. *Id.* at 707.

the Legislature's desire to suppress evidence obtained in violation of that chapter."[98]

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . if the disclosure of that information would be in violation of this chapter.[99]

Florida state courts have adopted the good faith exception to the exclusionary rule in accordance with the 1982 amendment to Article I, Section 12, of the Florida Constitution. Prior to 1983, the exclusionary rule was a state constitutional provision. The good faith exception to the exclusionary rule, as set forth in *Leon*, became state law in Florida by virtue of the language in Article I, Section 12, of the Florida Constitution: "This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

In the hypothetical discussed in section II of this article, the state trial judge's order allowing the motion to suppress would be reversed by the Florida appellate courts. Thus, Armando and Patsy would likely be convicted in Florida.

IV. GEORGIA

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 warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.[100]

The Georgia state constitutional provision on search and seizure has not impacted analysis by the Georgia Supreme Court of the *Leon* good faith exception to the exclusionary rule. That is not to say that the *Leon* good faith exception to the exclusionary rule applies in Georgia state courts.

The federal exclusionary rule, applicable only when evidence has been seized pursuant to an unlawful search, operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . ."[101] Any

98. *State v. Garcia*, 547 So.2d 628, 630 (Fla. 1989).
99. *Id.* (citing FLA. STAT. CH. 934.06 (1985)).
100. GA. CONST. art. I, § 1.
101. United States v. Calandra, 414 U.S. 338, 348 (1974).

exception to the federal exclusionary rule arises only when evidence has been seized pursuant to an unlawful search. In *Leon,* the Supreme Court of the United States held that the exclusionary rule does not bar the introduction in the State's case in chief of "evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate that ultimately found to be invalid."[102]

The *Leon* "good faith exception" does not apply in Georgia. The Official Code of Georgia Annotated (OCGA) section 17-5-30 is Georgia's exclusionary rule.[103] The Georgia state legislature has mandated the exclusionary rule in OCGA section 17-5-30.[104] "By its terms, OCGA section 17-5-30 authorizes no exception to Georgia's exclusionary rule when evidence has been seized unlawfully. OCGA section 17-5-30 (a)(1) and (2) clearly provides that '[a] defendant aggrieved by an unlawful search and seizure was entitled to suppression of the evidence regardless of whether the unlawful search and seizure was accomplished with or without a warrant.'"[105]

By passage in 1966 of an act "to provide for searches and seizures and for suppression of evidence illegally seized" the State of Georgia has chosen to impose greater requirements upon its law enforcement officers than that required by the U.S. Constitution, as interpreted by the U.S. Supreme Court.[106]

OCGA section 17-5-30(a)(2) applies in situations where it is alleged that a search conducted pursuant to a search warrant was unlawful because the search warrant itself was either insufficient on its face, was issued without probable cause, or was illegally executed.

In determining whether an affidavit sufficiently establishes the probable cause necessary for issuance of a warrant, Georgia courts employ the 'totality of the circumstances' analysis enunciated in *Illinois v. Gates*, and adopted by Georgia in *State v. Stephens*, with the admonition that '[p]rudence counsels that *Gates* be considered as the outer limit of probable cause.' Under that

102. *Leon*, 468 U.S. 897, 897 (1984).

103. *See* State v. Slaughter, 315 S.E.2d 865, 870 (Ga. 1984); and King v. State, 438 S.E.2d 93, 94-95 (Ga. App. 1993).

104. *See* Gary v. State, 422 S.E.2d 426, 430 (Ga. 1992); and Hestley v. State, 455 S.E.2d 333, 340 (Ga. App. 1995).

105. State v. Harvey, 469 S.E.2d 176, 178 (Ga. 1996).

106. *Gary*, 422 S.E.2d at 428 (noting that "[o]ur decision in this case is based on our construction of OCGA § 17-5-30").

analysis, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.[107]

Georgia law does allow a defendant to plead guilty, reserving the right to appeal the trial court's denial of his motion to suppress.[108]

Prior to the Georgia Supreme Court ruling in *Gary* on November 5, 1992, some Georgia appellate cases had approved and utilized the *Leon* good faith exception to the exclusionary rule.[109] Interestingly, in *Adams v. State,*[110] Chief Judge Carley was careful to specify: "[i]t should be pointed out that the State Constitution and state law are not involved."[111] Furthermore, some of the cases[112] mistakenly cite *State v. Stringer.*[113] In *Stringer*, Chief Justice Marshall referred to the *Leon* good faith exception to the exclusionary rule in *dictum*.[114] The holding in *Stringer* did not adopt the *Leon* good faith exception rule.[115]

In conclusion, the United States Supreme Court's decision in *United States v. Leon*,[116] which judicially creates a "good faith" exception the exclusionary rule, does not apply in Georgia, because Georgia's exclusionary rule is legislatively created. The state statute, OCGA section 17-5-30, imposes greater requirements upon Georgia law enforcement officers than that required

107. *Id.* at 429-30.

108. *See* State v. McCullough, 438 S.E.2d 369 (Ga. App. 1993); Mims v. State, 410 S.E.2d 824 (Ga. App. 1991).

109. Taylor v. State, 419 S.E.2d 56, 58 (Ga. App. 1992); Talley v. State, 408 S.E.2d 463, 465-466 (Ga. App. 1991); State v. Morris, 402 S.E.2d 288, 290 (Ga. App. 1991); Adams v. State, 383 S.E.2d 378, 379-380 (Ga. App. 1989); State v. Evans, 384 S.E.2d 404, 409 (Ga. App. 1989); Debey v. State, 385 S.E.2d 694 (Ga. App. 1989).

110. 383 S.E.2d 378 (Ga. App. 1989).

111. *Id.* at 380.

112. *See supra* note 110.

113. 372 S.E.2d 426 (Ga. 1988).

114. *Id.* at 606.

115. *Id.* at 606-07.

116. 468 U.S. 897 (1984).

by the Fourth Amendment to the United States Constitution as interpreted by the United States Supreme Court in *Leon*. The *Leon* good faith exception to the exclusionary rule has not been applied in Georgia state courts since the Georgia Supreme Court ruling in *Gary* on November 5, 1992. These state courts, using adequate and independent state grounds, have resolved search and seizure questions in total reliance on the state statute without considering *Leon*.

In the absence of drug evidence in the hypothetical set out in section II of this article, Armando and Patsy would not be tried or the case would be dismissed at the close of the State's evidence.

V. South Carolina

Article I, section 10 of the South Carolina Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy 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, the person or thing to be seized, and the information to be obtained.

The present version of Article I, section 10 was adopted in 1971. South Carolina Statute section 17-13-140 provides:

> Any magistrate or recorder or city judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize . . . . (5) any narcotic drugs, barbiturates, amphetamines or other drugs restricted to sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any of the laws of this State or of the United States. . . . A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant. If the magistrate, municipal judge, or other judicial officer above mentioned is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

The constitutional prohibition against the issuance of a warrant except "upon probable cause supported by oath or affirmation" is not a grant of power. It is part and parcel of the historic

provision securing the people against unreasonable searches and seizures and its only office is to prescribe minimum standards for the issuance of a warrant. The requirement of an affidavit complies with these standards and is a procedural detail. The determination of whether or not there is probable cause must be made by the officer empowered to issue the search warrant, and not by a police officer or other individual who seeks the warrant.[117] A trial court, in reviewing a magistrate's finding of probable cause, may not consider information which was not set forth in the affidavit unless the search warrant specifies that a sworn oral statement was presented to the magistrate.[118] An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding that probable cause existed. If the search warrant affidavit does not show a reliable confidential informant, then the magistrate cannot find probable cause to issue the search warrant.[119]

In determining the existence of probable cause, a non-confidential informant possesses a higher level of credibility because he exposes himself to public view and to possible civil and criminal liability should the information prove to be false.[120]

A 1991 case, *State v. Scott,*[121] held that a search warrant affidavit articulated sufficient probable cause for the magistrate to issue a search warrant to search the defendant's home.[122] In *Scott*, the affidavit stated that investigators saw the defendant leave his residence; stopped the defendant; the defendant possessed more than twenty grams of cocaine; and the investigators maintained visual contact with the defendant from the time he left his residence until the time of the stop.[123]

If a search warrant affidavit alone is insufficient to establish probable cause, it may be supplemented before the magistrate by sworn oral testimony.[124] However, sworn oral testimony, standing alone, does not satisfy South Carolina's search warrant statute.[125] In *State v. McKnight,* a 1987 case, the officers were aware of the statutory requirement that an affidavit support a search warrant,

117. State v. York, 156 S.E.2d 326 (S.C. 1967).
118. State v. Arnold, 460 S.E.2d 403 (S.C. 1995).
119. State v. Philpot, 454 S.E.2d 905 (S.C. 1995).
120. State v.Bellamy, 473 S.E.2d 838 (S.C. 1996).
121. State v. Scott, 400 S.E.2d 784 (S.C. Ct. App. 1991).
122. *Id.* at 786.
123. *Id.* at 785-786.
124. State v. McKnight, 352 S.E.2d 471, 472 (S.C. 1987).
125. S.C. Code Ann. §17-13-140 (Law Co-op. 1985).

but made no effort to comply.[126] Thus, the good faith exception to the exclusionary rule did not apply when the search warrant was adjudged defective under section 17-13-140 of the South Carolina code, rather than on Fourth Amendment grounds.[127] *Leon* did not apply. The South Carolina Supreme Court found that exclusion of the evidence was appropriate.[128]

In *State v. Johnson,*[129] a 1990 case, the affidavit in support of the search warrant was insufficient to support the magistrate's determination of probable cause.[130] In *Johnson,* the confidential informant's allegations were not corroborated and the reliability of the informant was not set forth.[131] This case was remanded to the trial court.[132] The South Carolina Supreme Court felt that the dispositive issue was whether sworn oral testimony about the informant's reliability was presented to the magistrate.[133] If such information was not given, then the *Johnson* court felt that the magistrate in this case would have served only as a "rubber stamp" for the police rather than as a neutral and detached official.[134] Under such circumstances, *Leon* would specifically preclude application of the good faith exception.[135]

The South Carolina Court of Appeals, in the 1994 case, *State v. Adolphe*,[136] reversed the trial judge's ruling that the *Leon* good faith exception to the exclusionary rule applied.[137] The confidential informant, Richard "Tex" Chung, made a controlled buy of crack at a trailer.[138] Michael Donnell, a man unknown to and not assisting the police at that time, went with Chung into the trailer and acted as an intermediary in the buy.[139] After the buy, Chung met with his supervising officer, turned over the crack and gave a detailed description of the man who had sold the crack to him.[140]

126. *McKnight*, 352 S.E.2d at 471.
127. *Id.* at 473.
128. *Id.*
129. State v. Johnson, 395 S.E.2d 167 (S.C. 1990).
130. *Id.* at 169.
131. *Id.*
132. *Id.* at 170.
133. *Id.*
134. *Id.*
135. *Id.*
136. State v. Adolphe, 441 S.E.2d 832 (S.C. Ct. App. 1994).
137. *Id.* at 834.
138. *Id.* at 833.
139. *Id.*
140. *Id.*

Immediately after receiving the crack from Chung, Officer Young obtained a search warrant for the trailer.[141] Police went to the trailer and arrested several people, including Donnell.[142] Donnell offered to help the police, stating that Adolphe had fled to Adolphe's "stash house."[143] Donnell led police to the alleged house, where the police entered with the consent of one of the occupants.[144] The police arrested Adolphe as he was trying to escape out the back door.[145] Adolphe matched the description of the man who had made the sale to Chung, and Donnell identified Adolphe as the person who sold the crack at the trailer.[146] Minutes later, an officer arrived at the stash house with a search warrant.[147] Officer Young had obtained the information for the search warrant from a radio transmission which he and the magistrate monitored via a police radio at the magistrate's office.[148]

The affidavit of Officer Young stated:

> An individual positively identified by a confidential informant as having sold crack cocaine to the confidential informant within the last 48 hours and being observed by drug agents fleeing the location of the previous bust, was located at this location within minutes after fleeing previous location on the night of 1-2, October, 1991. C.I. and others describe this residence as a stash house where money and drugs are stored after sale from previous location is completed.[149]

The trial court found that the search warrant was deficient on its face and conducted a suppression hearing.[150] At the hearing the only witness was the affiant, Officer Young.[151] Young's testimony only established that Donnell was the person who positively identified Adolphe.[152] Although Young's testimony did not cure the deficiencies in the search warrant, the trial court denied the defense's motion to suppress, applying the *Leon* good faith excep-

141. *Adolphe,* 441 S.E.2d at 833.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Adolphe,* 441 S.E.2d at 833.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 834.
151. *Id.*
152. *Id.*

tion to the exclusionary rule.[153] The Court of Appeals reversed the trial court, applying the *Gates*[154] "totality of the circumstances test."[155] The Court of Appeals concluded that the search warrant should not have been issued because the affidavit, coupled with the suppression hearing, failed to supply facts creating probable cause.[156] The *Adolphe* court stated that the "affidavit did not demonstrate the confidential informant's reliability and the informant's allegations were never corroborated by any identifiable individuals."[157] The Court went on to say that "our Supreme Court (South Carolina) declined to apply the good faith exception if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause."[158]

In *State v Austin,*[159] decided in 1991, the South Carolina Court of Appeals held that marijuana seized pursuant to a defective search warrant was not admissible under the *Leon* good faith exception to the exclusionary rule.[160] Crucial to this case were the facts that the officer testified at the suppression hearing that he actually knew that the affidavit was insufficient and that the affidavit, itself, contained no information about the reliability of the informant.[161] Consequently, the Court held that the officer did not act in reasonable reliance on the search warrant.[162]

In conclusion, South Carolina Constitution Article I, section 10 closely resembles the Fourth Amendment of the U.S. Constitution. Article I, section 10 does contain a specific phrase prohibiting unreasonable invasions of privacy that is not in the Fourth Amendment. The South Carolina Constitution and South Carolina Statute section 17-13-140 governing searches and seizures both require a finding of probable cause by a judicial official for a search warrant to issue. As a matter of state criminal procedure developed by state case law, magistrates may consider sworn oral statements to supplement affidavits in determining probable

153. *Id.*

154. Illinois v. Gates, 462 U.S. 213 (1983).

155. *Adolphe,* 441 S.E.2d at 834.

156. *Id.*

157. *Id.*

158. *Id.* (*quoting* State v. Johnson, 395 S.E.2d 167, 170 (S.C. 1990) and State v. Austin, 409 S.E.2d 811 (S.C. Ct. App. 1991)).

159. *Austin,* 409 S.E.2d 811 (S.C. Ct. App. 1991).

160. *Id.* at 816.

161. *Id.*

162. *Id.*

cause.[163] At suppression hearings, trial courts may conduct suppression hearings to determine what sworn oral statements a magistrate considered in finding probable cause. Few appellate cases in South Carolina discuss the *Leon* good faith exception to the exclusionary rule.[164] The South Carolina Supreme Court has declined to apply the *Leon* good faith exception if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause.[165]

South Carolina appellate courts would affirm the state trial judge's order allowing the motion to suppress in our hypothetical. Armando and Patsy would not face trial in South Carolina, or if tried, a motion to dismiss at the close of the State's case would be allowed.

VI. North Carolina

Article I, Section 20 of the North Carolina Constitution provides:

> General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.[166]

The North Carolina Supreme Court has interpreted the search and seizure provision of its state constitution, Article I, Section 20, to provide broader rights than those required by the Fourth Amendment to the United States Constitution. In *State v. Carter*,[167] a 1988 case, the North Carolina Supreme Court refused to adopt the *Leon* good faith exception to the exclusionary rule.[168] The North Carolina Supreme Court's analysis in the Carter case specifically addresses "adequate and independent" state constitutional grounds:

> Because we decide this case on adequate and independent state constitutional grounds, we do not reach or decide the question of whether the challenged search violated defendant's fourth and fourteenth amendment rights under the Federal Constitution.

163. State v. McKnight, 352 S.E.2d 471, 472 (S.C. 1987).

164. State v. Adolphe, 441 S.E.2d 832, 834 (S.C. Ct. App. 1994).

165. *Austin,* 409 S.E.2d 811 (S.C. Ct. App. 1991); State v. Johnson, 395 S.E.2d 167 (S.C. 1990).

166. N.C. CONST. ART. 1, § 20.

167. State v. Carter 370 S.E.2d 553 (N.C. 1988).

168. *Id.* at 562.

> The federal cases cited or discussed are being used only for the purpose of guidance and they do not compel the result that this Court has reached.[169]

Justice Martin, writing for a four to three majority in *Carter,* recognized that the language in Article I, Section 20 of the North Carolina Constitution differs somewhat from that of the Fourth Amendment to the United States Constitution. To emphasize the court's inherent power to decide the case solely on the state constitution, Justice Martin stated: "Even were the two provisions identical, we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision."[170]

The position of the North Carolina Supreme Court is not surprising. The North Carolina General Assembly enacted a statutory exclusionary rule in 1937, North Carolina General Statute section 15-37, some twenty five years before *Mapp*[171] mandated that the states apply the exclusionary rule under the due process clause of the fourteenth amendment. *Elkins v. U.S.*,[172] the famous "silver platter" decision in 1960, listed North Carolina as one of twenty six states that excluded evidence illegally seized by state officers.[173] Prior to *Elkins*, evidence illegally seized by state officers was admissible in federal trials; thus the evidence was said to be handed over to federal officers by state officers on a "silver platter."

The North Carolina General Assembly amended the statute adopting the exclusionary rule in 1951 to extend the rule to apply to warrantless searches.[174] The amended statute was repealed in 1969 and replaced, effective 1975, by North Carolina General Statute section 15A-974 which provides in part: "[u]pon timely motion, evidence must be suppressed if: (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina."[175] The General Assembly of

169. *Id.* at 555 (*citing* Michigan v. Long, 463 U.S. 1032 (1983); Jackson v. Housing Authority 364 S.E.2d 416 (N.C. 1988)).

170. *Carter,* 370 S.E.2d at 555 (*citing* Michigan v. Long, 463 U.S. 1032 (1983) *and* State v. Arrington 319 S.E.2d 254, 260 (1984)).

171. Mapp v. Ohio, 367 U.S. 643 (1961).

172. Elkins v. U.S., 364 U.S. 206 (1960).

173. *Id.* at 224 (*citing* State v. Mills 98 S.E.2d 329 (N.C. 1957)).

174. N.C. GEN. STAT. § 15-37 (1957) (repealed 1969).

175. N.C. GEN. STAT. § 15A-974(1) (1973).

North Carolina sets the public policy of the state. Since 1937, the expressed public policy of North Carolina has been to exclude evidence obtained by law enforcement officers in violation of state or federal constitutional rights.

The exclusionary rule continues to be a debated issue in North Carolina, though its legal status is clearly established when the court rules only on the basis of state constitutional law. The *Leon* good faith exception to the exclusionary rule was approved in 1988 in *State v. Welch*[176] and *State v. Witherspoon*,[177] when the court applied federal constitutional law. Unquestionably, *Welch* has been overruled by *Carter*. Both *Welch* and *Carter* involved officers obtaining blood samples from persons in custody using non-testimonial identification orders rather than search warrants.[178]

In *State v. Hyleman*,[179] a 1988 case, the North Carolina Court of Appeals used the *Leon* good faith exception to the exclusionary rule to uphold the trial court's denial of the defendant's motion to suppress. On appeal, the North Carolina Supreme Court, in an opinion written by Justice Martin, reversed the Court of Appeals.[180] The North Carolina Supreme Court did not reach the federal constitutional question. The Court found that the affidavit and application for a search warrant failed to comply with the state search and seizure statute, North Carolina General statute section 15A-244.[181] Justice Martin's opinion reasoned: "[h]aving decided upon statutory grounds that defendant's motion to suppress should have been allowed, this Court will not decide the same issue on constitutional grounds. . . . It follows that the good faith exception to the exclusionary rule is not applicable. The good faith exception to the exclusionary rule arises upon the exclusion of evidence based upon federal constitutional grounds."[182]

Justice Mitchell's dissent in *Carter*, vigorously attacked the rationale used by the majority in *Carter* and subsequently in *Hyleman*. In his dissent in *Carter* Justice Mitchell stated:

176. State v. Welch, 342 S.E.2d 789 (N.C. 1986).

177. State v. Witherspoon, 429 S.E.2d 783 (N.C. App. 1993).

178. *Welch,* 342 S.E.2d at 793; *Carter,* 429 S.E.2d at 554.

179. State v. Hyleman, 366 S.E.2d 530 (N.C. App. 1988), *rev'd*, 379 S.E.2d 830 (N.C. 1989).

180. *Hyleman,* 379 S.E.2d 830 (N.C. 1989).

181. *Id.* at 833.

182. *Id.*

> In the context of cases such as this, the majority's doctrinaire application of our exclusionary rule truly becomes a 'mere technicality' applied with a vengeance to block enforcement of the criminal laws for no good reason. Application of the exclusionary rule here will not deter any future misconduct by anyone or lessen the likelihood of future infringements upon anyone's constitutional rights. The only effect of the majority's rejection of a good faith exception to the exclusionary rule in cases such as this is to punish the public by impeding the truth-finding function of its courts. This drastic choice by the majority does not lead to any corresponding societal or constitutional gain for anyone other than criminal defendants lucky enough to have officers make honest errors in their cases. This diminishes the integrity of the judicial branch of government.[183]

Furthermore, Justice Meyer additional dissent in *Carter* contended that there is no reason for the court to find there to be different exclusionary standards under the North Carolina Constitution than the United States Constitution.[184] Justice Meyer wrote that "a dual set of rules and exclusionary standards will create a burdensome set of highly sophisticated rules which in no way furthers the objectives of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution."[185]

In conclusion, when North Carolina State Courts evaluate motions to suppress, their rulings depend on whether the courts rely on "adequate and independent" state grounds. Since there is no *Leon* good faith exception to the exclusionary rule in Article I, Section 20 of the North Carolina Constitution, *Carter*. Armando and Patsy's motion to suppress in a North Carolina court would begranted.

VII. VIRGINIA

The Virginia State Constitution provides:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.[186]

183. State v. Carter, 370 S.E.2d 553, 565 (N.C. 1988) (Mitchell, J., dissenting).
184. *Id.* at 567(Meyer, J., dissenting).
185. *Id.*
186. VA. CONST. ART. 1, § 10.

General warrants are proscribed by both the Fourth Amendment[187] and Virginia's statutory law.[188] The purpose of this proscription is to limit the discretion police officers may exercise when engaging in a "fishing expedition" or an "exploratory rummaging in a person's belongings."[189] To protect against this danger, the Fourth Amendment requires "a particular description of the thing to be seized."[190] The Virginia statutes controlling the issuance of search warrants have been interpreted to impose the same search warrant requirements as the Fourth Amendment.[191]

Virginia magistrates have an additional incentive to exercise care in the issuance of search warrants. Section 19.2-55 of Virginia's code provides that "any person having authority to issue criminal warrants who willfully and knowingly issues a general search warrant or a search warrant without the affidavit required by Section 19.2-54 shall be deemed guilty of a malfeasance."[192]

The Fourth Amendment specifically mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."[193] Article I, Section 10 of the Virginia Constitution prohibits a general search of "suspected places without evidence of a fact committed."[194] Although the words, "probable cause," do not appear in the search and seizure provision of the Virginia State Constitution, the words "probable cause" in the Fourth Amendment came from a Virginia document. The Virginia Declaration of Rights, adopted June 12, 1776, rebelled against the practice of police control taking the place of judicial control.

Virginia Code Section 19.2-45(2) gives magistrates the power to issue search warrants in accord with the provisions of Sections 19.2-52 to 19.2-60.[195] Section 19.2-52 provides that:

> search warrants, based upon complaint on oath supported by an affidavit as required in Section 19.2-54, may be issued by any judge, magistrate or other person having authority to issue criminal warrants, if he be satisfied from such complaint and affidavit

187. Andresen v. Maryland, 421 U.S. 463, 480 (1976).

188. VA. CODE ANN. § 19.2-54 (Michie 1987).

189. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

190. U.S. CONST. , AMEND. IV.

191. Kirby v. Commonwealth, 167 S.E.2d 411, 412 (Va. 1969); Morke v. Commonwealth, 419 S.E.2d 410 (Va. Ct. App. 1992).

192. VA. CODE ANN. § 19.2-55 (Michie 1975).

193. U.S. CONST. , AMEND. IV.

194. VA. CONST. ART. 1, § 10.

195. VA. CODE ANN. § 19.2-45(2) (Michie 1985).

that there is reasonable and probable cause for the issuance of such search warrant.[196]

Section 19.2-54 of the Virginia Code specifies the essential requirements of the affidavit:

> No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably describing the place, thing, or person to be searched, the things or persons to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such search is to be made and that the object, thing or person searched for constitutes evidence of the commission of such offense. . . . No warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued. The term 'affidavit' as used in this section, means statements made under oath or affirmation and presented verbatim.[197]

Virginia courts have applied common sense to the reasonableness requirement of probable cause.[198] Probable cause is a nontechnical concept.[199] Probable cause is based on probabilities, not legal technicalities.[200] The "totality of the circumstances" test set forth in *Gates*[201] should be evaluated by factual and practical considerations of everyday life on which reasonable and prudent men rely.[202] Virginia magistrates and other judicial officials evaluating probable cause for the issuance of search warrants under the Fourth Amendment and state constitutional search and seizure provisions have to apply their best analysis and common sense to an infinite variety of factual situations.[203] Virginia appellate courts have made a policy decision that when an affidavit for a search warrant provides evidence sufficient to create a disagreement among thoughtful and competent judges as to the existence of probable cause, then the officers could have harbored an objec-

196. VA. CODE ANN. § 19.2-55 (Michie 1986).

197. VA. CODE ANN. § 19.2-54 (Michie 1989).

198. Derr v. Commonwealth, 410 S.E. 2d 662, 666 (Va. 1991).

199. *Id.*

200. *Id.*

201. Illinois v. Gates, 462 U.S. at 231.

202. *Derr*, 410 S.E.2d at 666.

203. Potter 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, 1393 (1983).

tively reasonable belief in the existence of probable cause to support the search warrant.[204]

Virginia courts have adopted the good faith exception to the search warrant requirement as set forth in *Leon*.[205] If a search warrant was erroneously issued by a magistrate but reasonably relied on by a law enforcement officer, there could be no deterrent value in excluding the evidence seized.[206] The deterrent effect of the exclusionary rule "is absent where an officer, acting in objective good faith, obtains a search warrant from a magistrate and acts within the scope of the warrant."[207] In the 1995 case of *Robinson v. Commonwealth,*[208] the officer swore in an affidavit that he knew the defendant was selling drugs from his motel room and that the officer had consulted with an expert in hotel-motel drug distribution.[209] The magistrate issued a search warrant, and the officer reasonably relied on the search warrant and acted in objective good faith.[210] The Virginia Court of Appeals held that the evidence found during a search of the defendant's motel room was admissible under the good faith exception to the exclusionary rule.[211]

Trial court scrutiny of the sufficiency of an affidavit to establish probable cause for the issuance of a search warrant does not take the form of *de novo* review in Virginia.[212] The magistrate's determination of probable cause is paid great deference by the reviewing court.[213] The United States Supreme Court has held, however, that on appeal, a trial court's determinations as to whether, for purposes of the Fourth Amendment, law enforcement officers had reasonable suspicion to stop persons and probable cause to make a warrantless search, are to be reviewed *de* novo, rather than "deferentially" and "for clear error."[214] When an affidavit contains a detailed description of the nature of the offense, the premises to be searched, the items for which officers are

204. Tart v. Commonwealth, 437 S.E.2d 219, 223 (Va. Ct. App. 1993).
205. *See* McCary v. Commonwealth, 321 S.E.2d 637 (Va. 1984); Derr v. Commonwealth, 410 S.E.2d 662 (Va. 1991).
206. *Tart,* 437 S.E.2d at 222.
207. *Derr*, 410 S.E. 2d at 667.
208. Robinson v. Commonwealth, 453 S.E.2d 916 (Va. Ct. App. 1995).
209. *Id.* at 917.
210. *Id.* at 918-919.
211. *Id.* at 919.
212. Tart v. Commonwealth, 437 S.E.2d 219, 221 (Va. Ct. App. 1993).
213. *Id.*
214. Ornelas v. United States, 517 U.S. 690 (1996).

searching, and the transaction which led the informant to believe drugs would be in the apartment, then the affidavit is sufficient for a reasonably well-trained police officer to believe that probable cause exists. Evidence seized pursuant to a search warrant based on such an affidavit, even if the affidavit is defective, is admissible in Virginia under the good faith exception to the exclusionary rule.[215]

Trial courts should be alert to the staleness of the information in the affidavit. When an affidavit contains information that a confidential informant was in a motel room where drugs were present within the past seventy-two hours, that information is not so stale that a magistrate cannot find probable cause to issue a search warrant.[216] Virginia courts have noticed that the phrase "within the past seventy-two hours" is often used to protect the identity of confidential informants.[217]

Virginia statutes allow a defendant the right to have a pre-trial hearing on a motion to suppress evidence seized pursuant to a search warrant.[218] If the motion to suppress is denied, the defendant can plead guilty and challenge the denial of the motion to suppress on appeal.[219]

In a dissenting opinion in *Tart*, J. Benton argued that "[A] State is free as a matter of its own law to impose greater restrictions on police activity than those the United States Supreme Court holds to be necessary upon federal constitutional standards."[220] "The requirements for the issuance of a search warrant may be determined by the legislature as a matter of state law and may 'impose higher standards on searches and seizures than required' under federal law."[221] Judge Benton contended that the Virginia Code does not allow a search to be made with a search warrant absent probable cause, stating that:

> If a search and seizure are made pursuant to a warrant and in the absence of probable cause, the legislature has provided a statutory right to suppress the seized evidence. See Code Section 19.2-60. Thus, Virginia law provides an adequate and independent ground for excluding the fruits of this search. (Emphasis

215. Atkins v. Commonwealth, 389 S.E.2d 179, 180 (Va. Ct. App. 1990).
216. *See Tart* , 437 S.E.2d at 221-222.
217. *Id.* at 222.
218. VA. CODE ANN. § 19.2-60 (Michie 1970).
219. Cherry v. Commonwealth, 462 S.E.2d 574 (Va. Ct. App. 1995).
220. *Tart,* 437 S.E.2d at 227 (*citing* Oregon v. Hass, 420 U.S. 714, 719 (1975)).
221. *Tart,* 437 S.E.2d at 229 (*citing* Cooper v. California, 386 U.S. 58, 62 (1967)).

> added). . . . In addition, federal case law does not control the interpretation or application of the Virginia suppression statute. The Virginia warrant statute does not codify 'good faith' as an exception to the probable cause requirement. In the absence of a legislative expression that 'good faith' is an exception to the statutory command, decisions by the courts in Virginia that infuse the *Leon* good faith exception into the statute constitute judicial legislation. Absent probable cause, the search warrant should not have been issued and the search should not have been conducted. Searches that are conducted in the absence of probable cause are precisely the type of 'unlawful search or seizure' that is contemplated by our statute.[222]

The reasoning and argument of this dissenting opinion in Tart is identical to the majority opinion in Georgia,[223] South Carolina[224] and North Carolina.[225]

The good faith exception is not available in Virginia in four instances:

> 1. Where the magistrate was misled by information in the affidavit which the affiant knew was false or should have known was false,
>
> 2. where the issuing magistrate totally abandoned his judicial role,
>
> 3. where the warrant was based on an affidavit 'so lacking in indicia of probable cause' as to render official belief in its existence unreasonable, or
>
> 4. where the warrant was so facially deficient that an executing officer could not reasonably have assumed it was valid.[226]

The four instances specified above in *Robinson*, come directly from *Leon*. They apply in any state that has adopted the good faith exception to the exclusionary rule.

In conclusion, Virginia courts have embraced the good faith exception as "accepted component of Virginia law."[227] "No justifi-

---

222. *Tart*, 437 S.E.2d at 227 (*quoting* Gary v. State, 422 S.E.2d 426 (Ga. 1992); *citing* VA. CODE ANN. § 19.2-60 (Michie 1970); State v. Guzman, 842 P.2d 660 (Id. 1992) (finding no 'good faith' exception in the Idaho Constitution and statutes); Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985) (finding no 'good faith' exception in the Massachusetts suppression statute); State v. Carter, 370 S.E.2d 553 (N.C. 1988) (finding no 'good faith' exception in the North Carolina suppression statute)).

223. Gary v. State, 422 S.E.2d 426 (Ga. 1992).

224. State v. McKnight, 352 S.E.2d 471 (S.C. 1987).

225. State v. Carter, 370 S.E.2d 553 (N.C. 1988).

226. Robinson v. Commonwealth, 453 S.E.2d 916, 918 (Va. Ct. App. 1995).

227. *Tart*, 437 S.E.2d. at 224.

cation exists for drawing a distinction between the two constitutional provisions for purposes of good faith analysis."[228]

The Virginia trial judge's order allowing the defendants' motion to suppress would be reversed on appeal. The drugs seized by virtue of the defective search warrants would be admissible at trial under the *Leon* good faith exception to the exclusionary rule. Armando and Patsy probably would be convicted in Virginia.

VIII. NEW JERSEY

Article I, paragraph 7 of the New Jersey Constitution provides:

> 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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.[229]

This language tracks the language of the Fourth Amendment to the United States Constitution. The standard by which courts measure the affidavit in support of a search warrant is probable cause. The term "probable cause" appears in both the Fourth Amendment and in Article I, paragraph 7 of the New Jersey Constitution.

New Jersey courts have consistently characterized probable cause as a common-sense, practical standard for determining the validity of a search warrant.[230] The New Jersey Supreme Court has been unwavering in its insistence that affidavits submitted in support of a warrant application allege specific facts so that the issuing judge can determine independently whether or not probable cause has been established.[231]

State constitutions may be a source of individual liberties more expansive than those conferred by the Federal Constitution. In the 1987 case of *State v. Novembrino,*[232] the New Jersey Supreme Court interpreted Article I, paragraph 7 of the New Jersey Constitution to provide more expansive rights to criminal

228. Janis v. Commonwealth, 472 S.E.2d 649, 651 (Va. Ct. App. 1996).

229. N.J. CONST. ART. 1, § 7.

230. State v. Kasabucki, 244 A.2d 101, 104 (N.J. 1968).

231. State v. Macri, 188 A.2d 389, 393 (N.J. 1963), *disapproved of by* State v. Fariello, 366 A.2d 1313 (N.J. 1976); *see also* State v. Novembrino, 519 A.2d 820, 835 (N.J. 1987).

232. State v. Novembrino, 159 A.2d 820 (N.J. 1987).

defendants (and citizens) than the United States Supreme Court found in *Leon* under the Fourth Amendment to the United States Constitution, although the provisions were almost identical.[233]

New Jersey was the third colony to adopt a state constitution.[234] The New Jersey Constitution of 1776 did not include provisions equivalent to the Bill of Rights.[235] The New Jersey Constitution of 1844 incorporated a protection against unreasonable searches and seizures virtually identical to the Fourth Amendment and to Article I, paragraph 7 of the 1947 Constitution.[236] New Jersey did not apply the exclusionary rule.[237] In fact, during the Constitutional Convention of 1947 an amendment to Article I, paragraph 7 was proposed that would have incorporated the exclusionary rule into the Constitution: "Nothing obtained in violation thereof shall be received into evidence."[238] The amendment was defeated by a vote of 46 to 25.[239]

New Jersey first applied the exclusionary rule in *State v. Valentin*,[240] after *Mapp* held the exclusionary rule applicable to the states under the due process clause of the Fourteenth Amendment.[241] The exclusionary rule is now embedded in New Jersey law. "One obvious consequence of the application of the exclusionary rule in New Jersey has been the encouragement of law-enforcement officials to comply with the constitutionally-mandated probable-cause standard in order to avoid the suppression of evidence."[242]

The New Jersey Supreme Court applies a totality of the circumstances test analogous to that set forth in *Illinois v. Gates*[243] to test the validity of search warrants under the probable cause standard set forth in Article I, paragraph 7 of the New Jersey Constitution. In *Novembrino* the New Jersey Supreme Court stated, "the 'totality-of-the-circumstances' test that we endorse and apply in this case is a principle of state constitutional law used to test determinations of probable cause pursuant to Article I, paragraph

233. *Id.* at 857.
234. *Id.* at 850 n.28.
235. *Id.* at 850.
236. *Id.*
237. *Id.*
238. *Novembrino*, 519 A.2d at 851.
239. *Id.*
240. Sate v. Valentin, 174 A.2d 737 (N.J. 1961).
241. *Id.* at 737-738.
242. *Novembrino,* 519 A.2d at 854.
243. Illinois v. Gates, 462 US 213 (1983).

7 of the New Jersey Constitution. We assume that the application of this standard will be substantially consistent with the criteria set forth in Illinois v. Gates."[244]

Novembrino called upon the New Jersey Supreme Court to decide if Article I, paragraph 7 of the New Jersey Constitution, which incorporates almost verbatim the protection against unreasonable searches and seizures set forth in the Fourth Amendment, would tolerate a modification of the exclusionary rule that recognizes the good faith exception established by the United States Supreme Court in *Leon*. The *Novembrino* Court in its discussion of this issue stated:

"Ultimately, we focus on the inevitable tension between the proposed good-faith exception and the guarantee contained in our State Constitution that search warrants shall not issue except upon probable cause. In the twenty-five years during which we have applied the exclusionary rule in New Jersey, we have perceived no dilution of our probable cause standard; rather, efforts to comply with the constitutional mandate have been enhanced. Nor do we perceive that the application of the exclusionary rule has in any significant way impaired the ability of law-enforcement officials to enforce the criminal laws."[245]

The New Jersey Supreme Court does not recognize a good faith exception to the exclusionary rule as it interprets Article I, paragraph 7 of the New Jersey Constitution. In *Novembrino* New Jersey's Supreme Court iterated this by stating:

"Because we believe that the good faith exception to the exclusionary rule adopted in *Leon* would tend to undermine the constitutionally guaranteed standard of probable cause, and in the process disrupt the highly effective procedures employed by our criminal justice system to accommodate that constitutional guarantee without impairing law enforcement, we decline to recognize a good faith exception to the exclusionary rule."[246]

The New Jersey appellate courts would affirm the trial judge's suppression order applying "adequate and independent" state constitutional grounds, under Article I, paragraph 7 of the New Jersey Constitution. Armando and Patsy would not be convicted in New Jersey

244. *Novembrino*, 519 A.2d at 837n.11.

245. *Id.* at 855.

246. *Id.* at 856-857.

IX. Summary & Recommendations

The Florida constitutional amendment which construes state constitutional search and seizure rights "in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court," mandates uniformity of interpretation and application. In fact, it enslaves Article I, section 12 of the Florida Constitution and the Florida State Courts to interpretations of the Fourth Amendment by the United States Supreme Court. The *Leon* good faith exception to the exclusionary rule ensnares Armando and Patsy in Florida. The state trial judge's order allowing the motion to suppress would be reversed by the Florida appellate courts. Armando and Patsy probably would be convicted in Florida.

The Georgia State legislature mandates the exclusionary rule in the OCGA section 17-5-30. The Georgia Supreme Court, in *Gary*, did not apply the *Leon* good faith exception to the exclusionary rule. The judicially created *Leon* good faith exception to the exclusionary rule does not apply in Georgia because Georgia's exclusionary rule is legislatively created. Georgia State courts, using adequate and independent state grounds, OCGA section 17-5-30, resolve search and seizure questions in total reliance on the state statute without considering *Leon*. The state statute, OCGA section 17-5-30, imposes greater requirements upon Georgia law enforcement officers than that required by the Fourth Amendment as interpreted by the United States Supreme Court in *Leon*. The state trial judge in Georgia allows the defense motion to suppress on the basis of OCGA section 17-5-30. Georgia appellate courts would affirm, by also applying the state statute.

The South Carolina Supreme Court declines to apply the *Leon* good faith exception to the exclusionary rule if the underlying affidavit does not include sufficient information to allow a magistrate to determine probable cause. If a *Johnson* hearing produces no evidence of oral sworn testimony having been presented to the magistrate regarding the informant's reliability, then the South Carolina trial judge's order of suppression would be affirmed by the South Carolina appellate courts. Either Article I, section 10 of the South Carolina Constitution or South Carolina Statute section 17-13-140 provides an adequate and independent state ground for the ruling.

North Carolina State courts interpret search and seizure questions by applying "adequate and independent" state grounds. There is no *Leon* good faith exception to the exclusionary rule in

Article I, section 20 of the North Carolina Constitution. North Carolina appellate courts would affirm the trial court's order allowing the motion to suppress.

Virginia courts embrace the *Leon* good faith exception to the exclusionary rule as "an accepted component of Virginia law."[247] No distinction is drawn between Article I, section 10 of the Virginia Constitution and the Fourth Amendment for purposes of good faith analysis.[248] Virginia appellate courts would reverse the trial court's order allowing the motion to suppress. The evidence would be admissible at trial under the *Leon* good faith exception to the exclusionary rule. Armando and Patsy probably would be convicted in Virginia.

The New Jersey Supreme Court does not recognize a good faith exception to the exclusionary rule as it interprets Article I, paragraph 7 of the New Jersey Constitution.[249] New Jersey appellate courts would affirm the trial judge's order of suppression.

X. CONCLUSION

This thesis proves that a criminal defendant, in a factual situation that resembles *Leon,* can expect disparate results on a motion to suppress in six eastern seaboard state courts: Florida, Georgia, South Carolina, North Carolina, Virginia and New Jersey. The state supreme courts in each of these states assess probable cause by use of search and seizure provisions in state constitutions and statutes. State courts that adopt the *Leon* good faith exception to the exclusionary rule would convict the defendants (Florida and Virginia). The defendants would succeed in an appellate review of a suppression hearing in New Jersey, North Carolina, South Carolina and Georgia, if the state supreme court applies "adequate and independent" state grounds to decide the case.

The "adequate and independent" state grounds include the state constitution in New Jersey (Article I, paragraph 7) and in North Carolina (Article I, section 20). Georgia courts apply a legislatively mandated exclusionary rule, OCGA section 17-5-30. Either Article I, section 10 of the South Carolina Constitution or the Code of Laws of South Carolina section 17-13-140 provides an

247. Tart v. Commonwealth, 437 S.E.2d 219, 224 (Va. Ct. App. 1968).
248. Janis v. Commonwealth, 472 S.E.2d 649, 652 (Va. Ct. App. 1996).
249. State v. Novembrino, 519 A.2d 820, 856 (N.J. 1987).

"adequate and independent" state ground for the South Carolina Supreme Court to reject the *Leon* good faith exception to the exclusionary rule, if the underlying affidavit and a "*Johnson*" hearing fail to establish probable cause.

Is it good or bad that disparate outcomes result in various state trial courts faced with the same facts? The six states in this thesis are separate and distinct sovereignties. Each state has its own constitution. Each state supreme court may interpret its own state constitution and statutes without regard to the federal constitution, so long as Federal Constitutional rights are not diminished.

The disparity also exists between some state trial courts and federal district courts. The principle of federalism envisions two separate and independent judicial systems: federal courts, which construe federal law, and state courts, which construe state law. Prior to *Mapp,* the exclusionary rule did not apply to a state unless that state, on its own initiative, adopted an exclusionary rule by statute or case law. Thus, disparate results in search and seizure cases are part of our legal history.

Senator Sam J. Ervin, Jr., of Watergate fame, formerly a Justice of the North Carolina Supreme Court, explained the historical significance of the exclusionary rule.

> This constitutional guaranty against unreasonable searches and seizures has its roots deeply implanted in the human heart, the common law of England, and the tyrannies perpetrated by government on the people of England and the colonies.
>
> The oldest and deepest hunger of the human heart is for a place where one may dwell in peace and security and keep inviolate from public scrutiny one's innermost aspirations and thoughts, one's most intimate associations and communications, and one's most private activities. This truth was documented by Micah, the prophet, 2,700 years ago when he described the Mountain of the Lord as a place where 'they shall sit every man under his own vine and fig tree and none shall make them afraid.
>
> The common law of England originated in the instincts, the habits, and the customs of the people. Hence, it is not surprising that on emerging from the mists of unrecorded history, the English common law embraced as a fundamental principle that every man's home is his castle and the correlative rule that every man may resist to the utmost unidentified persons who seek to enter his home against his will.
>
> The common-law courts of England . . . authorized searches and seizures only by special warrants, which were based on oaths

> disclosing the reasons for their issuance and describing the places to be searched and the persons or things to be seized.
>
> The courts of England that were independent of the common law, such as the Court of Star Chamber . . . and the Court of High Commission . . . did not respect the principle of the common law that every man's home is his castle.
>
> They authorized searches and seizures by general warrants, which were based on mere suspicion and commanded searches and seizures for the enforcement of particular laws without specifying the places to be searched or the persons or things to be seized. In so doing, the general warrants delegated to the persons executing them the autocratic power to decide according to their own notions what places should be searched, what persons should be arrested, and what things should be seized. . . .
>
> Despite honest beliefs of sincere persons to the contrary, the exclusionary rule is an essential ingredient of the Fourth Amendment. Apart from it, the Amendment's guaranty against unreasonable searches and seizures is worse than solemn mockery, and the Amendment might well be expunged from the Constitution as a meaningless expression of a merely pious hope. . . .
>
> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[250]

Should all trial courts, state and federal, determine and apply probable cause with a uniform standard? Justice Meyer's dissent in *Carter*[251] complained about lack of uniformity. His dissent stated "our state courts create different exclusionary rules depending upon whether the state or federal Constitutions are invoked by a defendant making a suppression motion."[252] *Mapp* mandated that the exclusionary rule would apply in all state courts under the due process clause of the Fourteenth Amendment. *Mapp* created a uniform national standard. *Leon* created a good faith exception to the exclusionary rule that has been adopted in some states and rejected in others. The exception threatens to swallow the rule.

Trial judges know that probable cause review is fact-intensive. As Justice Scalia, dissenting in *Ornelas*, pointed out:

---

250. Sam J. Ervin, Jr. *The Exclusionary Rule: An Essential Ingredient of The Fourth Amendment,* 1983 SUP. CT. REV. 283, 283-284, 287.

251. *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988).

252. *Id.* at 732, 370 S.E.2d at 567 (Meyer, J., dissenting).

"First, a court must identify all of the relevant historical facts known to the officer at the time of the stop or search; and second, it must decide whether, under a standard of objective reasonableness, those facts would give rise to a reasonable suspicion justifying a stop or probable cause to search."[253]

The majority opinion, written by Chief Justice Rehnquist, stated that trial judges' determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal, but that "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[254] The majority opinion cites the need to "maintain control of, and to clarify the legal principles," and "to provid[e] law enforcement officers with a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[255]

State trial judges must follow the law established by their state supreme courts with regard to the exclusionary rule in search and seizure cases. State supreme courts must write clear decisions. Justice Potter Stewart advised all judges:

"The occupation of a judge requires application of its (the Fourth Amendment) sweeping language to cases presenting the infinite variety of factual situations that arise in real life. The art of being a judge, if there is such an art, is in announcing clear rules in the context of these infinitely varied cases, rules that can be understood and observed by conscientious government officials."[256]

If State Legislatures and Judiciaries will follow this eloquent advice, law-enforcement officials and the citizenry as a whole will be the beneficiaries of clarity, uniformity and consistency in the law.

253. Ornelas v. United States, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting).

254. *Id.* at 698.

255. *Id.* at 697-698.

256. Potter 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, 1393 (1983).