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Comments: Blessed Are the Faithful: An Analysis of the Scope and Applicability of the Good Faith Exception to the Exclusionary Rule

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COMMENTS

BLESSED ARE THE FAITHFUL: AN ANALYSIS OF THE SCOPE AND APPLICABILITY OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

The fourth amendment gives the people the right to be secure from unreasonable searches and seizures of their person, houses, papers, and effects. For years, the Supreme Court has mandated that any property seized in violation of the fourth amendment be excluded from evidence at the defendant's trial. Recently, however, the Supreme Court has created a good faith exception to the exclusionary rule and caused uncertainty regarding the new exception's application. The author reviews the development of the exclusionary rule and analyzes the effect of the good faith exception. The author also discusses the application of the exception to searches and seizures conducted with and without warrants, and considers the proper course for Maryland courts to follow.

I. INTRODUCTION

The adoption of the good faith exception[1] is the latest in a recent line of Supreme Court rulings limiting the scope and applicability of the exclusionary rule.[2] The amorphous concept of "good faith" creates significant uncertainty regarding the application of the exception and the possible extension of the exception to searches and seizures conducted without a warrant.[3] Expansion of the good faith exception could change

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1. *See* United States v. Leon, 104 S. Ct. 3405 (1984); Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984).
2. *See, e.g.*, Segura v. United States, 104 S. Ct. 3380 (1984) (exclusionary rule not applicable to suppress evidence discovered during the execution of a subsequently issued search warrant, where there had been a prior unlawful entry and warrantless seizure, if the probable cause for the search warrant came from an independent source); Nix v. Williams, 104 S. Ct. 2501 (1984) (exclusionary rule not applicable to exclude physical evidence that inevitably would have been discovered); INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984) (exclusionary rule not applicable to deportation hearings).
3. In INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984), the Supreme Court held that the exclusionary rule is inapplicable to civil deportation hearings held by the Immigration and Naturalization Service. *Id.* at 3490. The *Lopez-Mendoza* case involved an allegedly illegal arrest, not an illegal search warrant. In his dissent, which centered on his belief that the majority's conclusion was based on an incorrect assessment of the costs and benefits of applying the rule in deportation hearings, Justice White stated:

> In *United States v. Leon* . . . we have held that the exclusionary rule is not applicable when officers are acting in objective good faith. Thus, if the agents neither know nor should have known that they were acting contrary to the dictates of the Fourth Amendment, evidence will not be suppressed even if it is held that their conduct was illegal.
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> *Id.* at 3493 (White, J., dissenting) (citations omitted).

In a separate dissent Justice Stevens stated: "Because the Court has not yet

materially the protections provided by the fourth amendment.

This comment begins by tracing the development of the exclusionary rule and reviewing the purposes underlying the good faith exception.[4] Following this review, the discussion focuses on the value of the good faith exception[5] and examines the current scope and application of the exception.[6] This comment then analyzes the propriety of a possible extension of the exception to warrantless searches and seizures.[7] Finally, Maryland's position is considered and a course for the state courts to follow is proposed.[8]

II. AN HISTORICAL OVERVIEW

A. The Development of the Exclusionary Rule

The seminal case in the establishment of the exclusionary rule is *Weeks v. United States*.[9] There, a Federal Marshal searched the defendant's room without a warrant and seized certain letters and envelopes.[10] The materials seized were introduced into evidence over the defendant's objection that the evidence was inadmissible because it was obtained in violation of the fourth and fifth amendments.[11] In reversing the trial court's decision to admit the evidence, the *Weeks* Court, relying on the history of the fourth amendment, reasoned that:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, . . . under limitations and restraints. . . . The tendency of those who execute the criminal laws of this country to obtain convictions by means of unlawful seizures and enforced confessions, . . . should find no sanction in the judgments of the courts. . . .[12]

The Court held that when an official of the United States obtains evi-

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held that the rule of *United States v. Leon* . . . has any application to warrantless searches, I do not join the portion of Justice White's opinion that relies on that case. I do, however, agree with the remainder of his dissenting opinion." *Id.* at 3496 (Stevens, J., dissenting).

4. Three rationales have been cited in support of the exclusionary rule. First, it is the constitutionally guaranteed remedy of the accused. *See* Mapp v. Ohio, 367 U.S. 643 (1961). Second, it is the imperative of judicial integrity. *See* McNabb v. United States, 318 U.S. 332 (1943). Third, it serves only to deter similar future violations of the fourth amendment by police. *See* Stone v. Powell, 428 U.S. 65 (1976).
5. *See infra* notes 75-103 and accompanying text.
6. *See infra* notes 104-77 and accompanying text.
7. *See infra* notes 178-203 and accompanying text.
8. *See infra* notes 204-21 and accompanying text.
9. 232 U.S. 383 (1914). In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court found the seizure of an individual's private books and papers violative of the fourth amendment right against unreasonable searches and seizures and the fifth amendment right against compelled self-incrimination. *Boyd*, 116 U.S. at 633; *see infra* note 42.
10. *Weeks*, 232 U.S. at 386.
11. *Id.* at 388.
12. *Id.* at 391-92.

dence in a manner that violates the constitutional mandate prohibiting unreasonable searches and seizures, such evidence must be excluded from trial.[13]

The Court's ruling evoked spirited response from legal commentators.[14] Support for the Court's holding was predicated upon the proposition that the government should not violate the law or encourage future lawlessness by using illegally obtained evidence at trial.[15] Opponents of the Court's new rule reasoned that exclusion of the evidence did nothing to punish an official who unlawfully seized evidence but often resulted in the release of a guilty defendant.[16] The logic in support of the rule prevailed, and the development of the exclusionary rule continued.

B. The Applicability of the Exclusionary Rule to the States

Under *Weeks*, the exclusionary rule applied only to actions by officers of the federal government.[17] In *Wolf v. Colorado*,[18] the Court first

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13. *Id.* at 398.
14. Justices Brandeis and Holmes both supported the rule. *See infra* note 15. Judge Cardozo and Justice Jackson, as well as evidence scholar John Henry Wigmore, opposed the rule. *See infra* note 16.
15. Justice Brandeis, in his dissenting opinion in Olmstead v. United States, stated:
    > Crime is contagious. If the Government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it promotes anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution.

    27 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
    Justice Holmes, in his dissenting opinion in Olmstead v. United States, stated:
    > It is desirable that criminals should be detected, and to that end that all evidence shall be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . We have to choose, and for my part I think it is a less evil that some criminals should escape than that the Government should play an ignoble part.

    277 U.S. 438, 470 (1928) (Holmes, J., dissenting).
16. Then Judge Cardozo, speaking for the majority in People v. Defore, stated: "The criminal is to go free because the constable blundered. . . . A room is searched against the law, and the body of the murdered man is found. . . . The privacy of the home has been infringed and the murderer goes free." 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587-88 (1926). Justice Jackson, speaking for the majority in Irvine v. California, noted: "Rejection of the evidence does nothing to punish the wrong-doing defendant official, while it may, and likely will release the wrong-doing defendant." 347 U.S. 128, 137-38 (1954). Professor Wigmore noted:
    > Titus, you have been found guilty of conducting a lottery, Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime and Flavious for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall so by reversing Titus' conviction.

    8 J. WIGMORE, WIGMORE ON EVIDENCE, § 2184 (3d ed. 1940).
17. 232 U.S. at 398. The fourth amendment does not apply to searches and seizures by private citizens, United States v. Jacobsen, 104 S. Ct. 1652, 1656 (1984) (quoting Walter v. United States, 447 U.S. 649, 662 (Blackmun, J., dissenting)), but does

addressed the applicability of the rule to officers of state governments.[19] In *Wolf*, the Court asserted that state approval of police conduct that violated the fourth amendment contravened the fourteenth amendment.[20] Nevertheless, the Court held that, although the exclusion of evidence may be an effective method of deterring illegal searches, it was not for the Court to condemn a state's reliance upon other methods of deterrence, which, if consistently enforced, would be as effective as the exclusion of illegally obtained evidence at trial.[21] Consequently, the Court did not require state courts to adopt the exclusionary rule.[22]

Thirty-seven years later, in *Mapp v. Ohio*,[23] the Supreme Court changed its position and held that the exclusionary rule was mandatory in state courts.[24] Justice Clark, writing the plurality opinion, reasoned that the exclusionary rule was applicable to the states because it was an essential part of both the fourth and fourteenth amendments.[25] Justice Clark stated that the factual grounds upon which *Wolf* was based were no longer controlling[26] and that "the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence . . . ."[27]

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apply to officers of all branches of the government. New Jersey v. T.L.O., 105 S. Ct. 733, 739-41 (1984); *see infra* note 58.

18. 338 U.S. 25 (1949).
19. *Id.*
20. *Id.* at 31. Prior to the *Wolf* decision 31 states had rejected the *Weeks* doctrine and 16 states had accepted it. *Id.* at 29-30.

    The *Wolf* decision led to what has been called the "silver platter" doctrine. Because the exclusionary rule was applicable only to federal officers and federal courts, and not to state officers or state courts, any evidence recovered by state police during illegal searches could be used against a defendant in state or federal courts. In addition, if federal agents conducted impermissible searches, any discovered evidence could be given to state agents to be used against a defendant in state courts. These practices were eliminated by Elkins v. United States, 364 U.S. 206 (1960) and Rea v. United States, 350 U.S. 214 (1956). In *Elkins*, the Court held that evidence obtained by state officers in violation of an individual's fourth amendment rights was inadmissible in a federal trial. 364 U.S. at 223. The Court relied on the concept of judicial integrity, reasoning that the acceptance of evidence secured through a flagrant disregard of an individual's constitutional rights made courts accomplices to wrongdoing and created federal action sufficient to invoke the exclusionary rule. *Id.* In *Rea*, the Court held that the exclusion of illegally seized evidence was an appropriate remedy against a federal agent who planned to use his illegal search and seizure as the basis of his testimony in state court. 350 U.S. at 217-18.
21. *Wolf*, 338 U.S. at 31-32.
22. *Id.* at 33.
23. 367 U.S. 643 (1961).
24. *Id.* at 650-53. Justice Clark noted that, at the time of the *Wolf* decision, "[t]he contrariety of views of the States was . . . particularly impressive." *Id.* at 651 (quoting *Wolf*, 338 U.S. at 29); *see supra* note 22. However, more than half of the states passing on the question since *Wolf* had wholly or partly adhered to the *Weeks* doctrine. *Id.*
25. *Id.* at 657.
26. *Id.* at 653.
27. *Id.* at 656.

Although the *Mapp* decision never has been overruled, the reasoning behind its holding — that the exclusionary rule is a constitutionally mandated remedy of the aggrieved — has been abandoned.[28]

C. *The Purposes of the Exclusionary Rule*

Three arguments have been advanced to justify the exclusionary rule: (1) the rule is a constitutionally guaranteed remedy of the aggrieved;[29] (2) the rule is necessary to maintain judicial integrity;[30] and (3) the rule serves as a deterrent to future violations of the fourth amendment by government officials.[31]

1. The exclusion of evidence is not a constitutionally guaranteed remedy

The constitutional remedy argument has its origins in *Boyd v. United States*.[32] The *Boyd* Court held that to require someone to produce his private papers to be used against him in evidence is analogous to compelling someone to testify against himself and, thus, constitutes an unreasonable search and seizure under the fourth amendment.[33] In *Weeks*, the Court noted: "If letters and private documents can thus be

28. *E.g.*, United States v. Leon, 104 S. Ct. 3405, 3412 (1984) (fourth amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands); Stone v. Powell, 428 U.S. 465, 540 (1976) (exclusion of evidence does not cure the invasion of the defendant's fourth amendment rights); United States v. Calandra, 414 U.S. 338, 354 (1974) (use of the fruits of past unlawful search or seizure works no new fourth amendment wrong).
29. United States v. Leon, 104 S. Ct. 3405, 3430-31 (1984) (Brennan, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 657 (1961); Weeks v. United States, 232 U.S. 383, 391-92 (1914).
30. Elkins v. United States, 364 U.S. 206, 222-23 (1960); McNabb v. United States, 318 U.S. 332, 345 (1943); Weeks v. United States, 232 U.S. 383, 392 (1914).
31. *E.g.*, Stone v. Powell, 428 U.S. 465, 484 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974); Elkins v. United States, 364 U.S. 206, 217 (1960).
32. 116 U.S. 616 (1886) *see* C. Moylan, *The Supreme Court, the Fourth Amendment and the Exclusionary Rule*, The Daily Record, July 12, 1984 at 1, col. 4.
33. *Id.* at 621-30. Justice Bradley, writing for the majority in *Boyd*, conducted an in-depth historical analysis of the developments of the fourth and fifth amendments, tracing the protected rights back to Lord Camden's interpretation of the British Constitution in 1765. 116 U.S. at 621-33. Justice Bradley concluded that the two amendments "throw great light on each other." "The unreasonable searches and seizures condemned by the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself which is condemned by the fifth amendment." *Id.* at 633.

The rationale of *Boyd* was eroded severely by the Supreme Court's opinion in Adams v. New York, 192 U.S. 585, 598 (1904), which held that the use of an individual's papers found in a legal search is not compelled self-incrimination. *See also* Doe v. United States, 465 U.S. 605 (1984) (grand jury subpoena of business records is not compelled self-incrimination); Andresen v. Maryland, 427 U.S. 463, 470-77 (1976) (use of defendant's business records, seized pursuant to office search did not offend fifth amendment); Fisher v. United States, 425 U.S. 391, 396-401 (1976) (a summons requiring the production of a taxpayer's records did not violate the fifth amendment proscription against compelled self-incrimination).

seized and held and used in evidence, . . . the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, . . . might as well be stricken from the Constitution."[34] The *Weeks* Court stated that failure to return items taken from the defendant's house pursuant to an illegal search constituted "a denial of the constitutional rights of the accused."[35]

The *Wolf* decision was the first to distinguish between the constitutional protection afforded the individual by the fourth amendment and the use of the exclusionary rule as a nonconstitutionally required device for deterring violations.[36] The *Wolf* Court recognized that the fourth amendment is enforceable against the states through the Due Process Clause of the fourteenth amendment.[37] That Court then refused to apply the exclusionary rule to the states, however, reasoning that the methods of protecting a defendant's fourth amendment right should be left to the discretion of the states.[38] The Court noted that the *Weeks* rule barring evidence secured through an illegal search "was not derived from the explicit requirements of the Fourth Amendment. . . . The decision was a matter of judicial implication."[39]

In the later *Mapp* decision, the Court held that the exclusionary rule is an essential part of the fourth and fourteenth amendments.[40] Justice Black, concurring in *Mapp*, recognized that although the rule is not required by the express language of the Constitution, the rule "is amply justified from an historical standpoint [and] soundly based in reason. . . ."[41]

Decisions since *Mapp* have reverted to the *Wolf* analysis that the exclusionary rule is a nonconstitutionally required device for deterring fourth amendment violations. In holding that *Mapp* should not be applied retrospectively, Justice Clark, writing for the majority of the Court in *Linkletter v. Walker*,[42] stated that *Mapp*'s primary purpose was to provide for enforcement of fourth amendment guarantees through the use of the exclusionary rule.[43] Justice Clark further stated that although the exclusion of illegally seized evidence was the only effective deterrent to lawless police action, this deterrent purpose would not be advanced by applying the rule retrospectively.[44] Thus, the *Linkletter* decision aban-

34. *Weeks*, 232 U.S. at 393.
35. *Id.* at 398.
36. *See supra* notes 20-22 and accompanying text.
37. *Wolf*, 338 U.S. at 27-28.
38. *Id.* at 28.
39. *Id.*
40. *Mapp*, 367 U.S. at 657. The Court noted that "our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense." *Id.*
41. *Id.* at 662 (Black, J., concurring).
42. 381 U.S. 618 (1965).
43. *Id.* at 636.
44. *Id.* at 636-37. The *Linkletter* interpretation of *Mapp* would be less persuasive had Justice Clark not written both opinions. Because Justice Clark did write both opin-

doned the constitutional remedy argument and became the first of many cases to rely on the deterrent theory.[45]

United States v. Calandra [46] was the first case to state explicitly that the exclusionary rule is not a constitutional right of the aggrieved. Quoting *Linkletter*, the Court stated that the purpose of the rule is not to redress an injury to the privacy of the aggrieved: "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."[47] Instead, the Court found the primary purpose of the exclusionary rule to be deterrence of future conduct that violates the fourth amendment.[48] The Court held that the rule does not apply to exclude illegally seized evidence from grand jury hearings, because the damage to such proceedings created by the exclusion of evidence greatly outweighs any possible incremental deterrent effect.[49]

The constitutionally guaranteed remedy theory was short-lived. It served its purpose in *Mapp*, when the Court needed a rationale to support the logical extension of the exclusionary rule to the states, but was abandoned because strict adherence to it would require exclusion of evidence in cases where exclusion would have little or no deterrent effect.[50]

2. The rule is not the imperative of judicial integrity

A second argument for applying the exclusionary rule is that it is the imperative of judicial integrity. This argument dates back to the original reasoning in support of the exclusionary rule.[51] The rationale behind this idea is that, by accepting evidence acquired through illegal means, courts become accomplices in the illegal police activity and encourage the continuation of illegal evidence-gathering techniques.

This argument was accepted by the Supreme Court in *McNabb v.*

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ions, it seems likely that the *Linkletter* decision is merely an interpretation of *Mapp*, not a departure from it.

45. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405, 3413-16 (1984) (to exclude evidence seized in objective good faith pursuant to a technically invalid search warrant does not serve a deterrent purpose); Stone v. Powell, 428 U.S. 465, 492-94 (1976) (raising search and seizure claims in federal habeas corpus review would not serve a deterrent purpose); United States v. Janis, 428 U.S. 433, 447-60 (1976) (exclusion of illegally seized evidence from civil trials would not serve a deterrent purpose); United States v. Calandra, 414 U.S. 338, 349-52 (1974) (extending exclusionary rule to grand jury proceedings would achieve only a speculative deterrent effect at the expense of substantially impeding the grand jury's role).

46. 414 U.S. 338 (1974).

47. *Id.* at 347 (quoting *Linkletter*, 381 U.S. at 637).

48. *Id.*

49. *Id.* at 354. Similarly, in Stone v. Powell, 428 U.S. 465 (1976), the Court held that the exclusionary rule was not applicable to habeas corpus proceedings. *Id.* at 494. Citing *Linkletter* and *Calandra*, the opinion stated that "[p]ost-*Mapp* decisions have established that the rule is not a personal constitutional right." *Id.* at 486.

50. *See infra* notes 68, 77.

51. In Weeks v. United States, 232 U.S. 383 (1914), the Court stated: "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials . . . under limitations and restraints as to the exercise of [their] authority." *Id.* at 392; *see supra* notes 13-17 and accompanying text.

United States,[52] where the Court held that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of the law."[53]

In *Elkins v. United States*,[54] the Court relied on the language of *McNabb* and held that federal courts could not accept evidence obtained illegally by state officers.[55] The Court held that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's [fourth amendment rights] is inadmissible over a defendant's timely objection in a federal criminal trial."[56] Because the exclusionary rule was not then applicable to the states, the Court used the judicial integrity reasoning to support its holding in *Elkins*.[57]

When the judicial integrity argument is extended to its logical conclusion, the weakness of the argument is revealed. If courts are precluded from accepting any evidence seized illegally, courts would not be able to accept evidence obtained illegally by private persons, although not in violation of the fourth amendment. This extension, however, has never been adopted by the Court. The Court has limited the exclusionary rule to governmental conduct in violation of the fourth amendment.[58]

The judicial integrity argument, like the constitutionally guaranteed remedy argument, was used by the Court to solve the practical problem presented by the facts in *Elkins*, but discarded when it became a barrier to other policy decisions.[59] In *Stone v. Powell*,[60] the Court stated that

52. 318 U.S. 332 (1943). In *McNabb*, federal agents questioned prisoners accused of killing a federal revenue agent in violation of a Congressional command making it the duty of all federal agents to take prisoners to a judicial officer before questioning. *Id.* at 342. *McNabb*'s judicial integrity language, although not involving a Constitutional violation, became the basis for applying the judicial integrity argument to fourth amendment violations. *See infra* notes 54-57 and accompanying text.

53. *McNabb*, 318 U.S. at 345.

54. 364 U.S. 206 (1960); *see supra* note 20.

55. *Id.* at 223; *see supra* note 20.

56. *Id.*

57. Because the *Elkins* decision was before Mapp v. Ohio, 367 U.S. 643 (1961), the exclusionary rule was not yet applicable to the fruits of unconstitutional searches made by state officers.

58. The fourth amendment applies only to actions by the government, "it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.' " United States v. Jacobsen, 104 S. Ct. 1652, 1656 (1984) (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)). The fourth amendment does apply, however, to civil as well as criminal authorities of the government. New Jersey v. T.L.O., 105 S. Ct. 733, 740 (1984) (school teachers); Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (building inspectors); Marshall v. Bailow's, Inc., 436 U.S. 307, 312-13 (1978) (Occupational Safety and Health Administration inspectors); Michigan v. Tyler, 436 U.S. 499, 506 (1978) (firefighters).

59. *See infra* note 61.

"although our decisions often have alluded to the 'imperative of judicial integrity' . . . this concern has limited force as a justification for the exclusion of highly probative evidence."[61]

3. The purpose of the rule is to deter illegal police conduct

The only surviving purpose for the existence of the exclusionary rule is to deter future fourth amendment violations. This purpose has been cited frequently, even by those decisions that also had advanced the constitutionally guaranteed remedy or judicial integrity arguments.[62] Under the deterrence argument, evidence illegally obtained is excluded only if exclusion will deter future police violations of fourth amendment rights.[63] The Court regularly has refused to apply the exclusionary rule when it would not serve as a deterrent to such conduct.[64] The Court's

60. 428 U.S. 465 (1976).

61. Stone v. Powell, 428 U.S. at 485.

Justice Powell cited numerous situations where the judicial integrity theory, if logically extended, would require different results. *Id.* It would require abandonment of the standing requirement to argue exclusion. *But see* United States v. Payner, 447 U.S. 727, 733-37 (1980) (supervisory power of the federal courts does not authorize suppression of otherwise admissible evidence on the grounds that it was seized illegally from a third party not before the court); Rakas v. Illinois, 439 U.S. 128, 133-38 (1978) (a person aggrieved by an illegal search and seizure only through the introduction of evidence procured through an illegal search of a third person's premises has not had his fourth amendment rights infringed). It would require exclusion of evidence for impeachment purposes. *But see* United States v. Havens, 446 U.S. 620, 624-28 (1980) (a defendant's statements made in response to proper cross-examination, reasonably suggested by defendant's direct examination, are subject to impeachment by the use of illegally obtained evidence); Walden v. United States, 347 U.S. 62, 62-66 (1954) (illegally seized evidence admissible for the limited purpose of impeaching defendant's credibility, once the door is opened by defendant's own statements). It would require that judicial proceedings abate when the defendant's person is unconstitutionally seized. *But see* Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (illegal arrest does not void a subsequent conviction); Frisbie v. Collins, 342 U.S. 519, 522 (1952) (power of a court to try a person for crime is not impaired by the fact that he was brought into the court's jurisdiction by force). It would require exclusion of evidence from grand jury proceedings. *But see* United States v. Calandra, 414 U.S. 338, 353-55 (1974) (grand jury questions based on evidence obtained from an unlawful search and seizure involve no new fourth amendment wrong). Finally, it would require exclusion of evidence despite the defendant's lack of objection. *But see* Henry v. Mississippi, 379 U.S. 443, 449-53 (1965) (failure to object to a Constitutional breach of rights effects a waiver thereof).

62. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court noted: "Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter — to compel respect for the constitutional guarantee in the only available way — by removing the incentive to disregard it.' " *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960). For a discussion of *Mapp*'s constitutionally guaranteed remedy theory, see *supra* notes 47, 48 and accompanying text. For a discussion of *Elkins*' judicial integrity theory, see *supra* notes 54-57 and accompanying text.

63. *E.g.*, United States v. Leon, 104 S. Ct. 3405, 3412 (1984); United States v. Calandra, 414 U.S. 338, 347-48 (1974); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965).

64. The exclusionary rule has not been applied to evidence discovered during the execution of a subsequently issued search warrant where there had been a prior unlawful entry and warrantless seizure if the probable cause for the search warrant came from an independent source. Segura v. United States, 104 S. Ct. 3380 (1984). Nor

adoption of the good faith exception to the exclusionary rule[65] follows from the Court's acceptance of the deterrence rationale. Unfortunately, the good faith exception is stated in broad terms and is open to misapplication by lower courts.[66]

III. THE GOOD FAITH EXCEPTION TO SEARCHES PURSUANT TO A WARRANT

In *United States v. Leon*,[67] the Supreme Court established an exception to the exclusionary rule. In August, 1981, a confidential informant of unproven reliability informed an officer of the Burbank Police Department that two persons known to him as "Armando" and "Patsy" were selling large quantities of cocaine and methaqualone from their residence in Burbank.[68] The Burbank police then conducted an investigation that resulted in several observations supporting the informant's story.[69] Based on the information supplied by the informant and the information compiled during the investigation, a facially valid search warrant was issued in September, 1981, by a state superior court judge.[70] The United States District Court for the Central District of California suppressed some of the evidence because the warrant was insufficient to establish

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has it been applied at a deportation hearing, INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984), to exclude physical evidence that would have been inevitably discovered, Nix v. Williams, 104 S. Ct. 2501 (1984), to impeachment situations, United States v. Havens, 446 U.S. 620 (1980); Walder v. United States, 347 U.S. 62 (1954), to situations where police enforce a law later declared to be unconstitutional, Michigan v. Defillippo, 443 U.S. 31 (1979), to the use of a live witness discovered by an unconstitutional search, United States v. Ceccolini, 435 U.S. 268 (1978); Michigan v. Tucker, 417 U.S. 433 (1974), to federal habeas corpus review, Stone v. Powell, 428 U.S. 465 (1976), to civil proceedings, United States v. Janis, 428 U.S. 433 (1976), to grand jury proceedings, United States v. Calandra, 414 U.S. 338 (1974), or retroactively, Linkletter v. Walker, 381 U.S. 618 (1965).

65. United States v. Leon, 104 S. Ct. 3405 (1984).
66. *See infra* notes 128-36, 158-66, 188-92 and accompanying text.
67. 104 S. Ct. 3405 (1984).
68. *Id.* at 3409-10. The informant also indicated that he had witnessed a sale of methaqualone by "Patsy" at the residence approximately five months earlier and observed at that time a shoebox containing a large amount of cash that belonged to "Patsy." He also said the "Armando" and "Patsy" kept only small quantities of drugs at their residence and stored the remainder at another location in Burbank. *Id.* at 3410.
69. *Id.* The Burbank police investigated the residence described by the informant. Cars parked at the residence were determined to belong to Armando Sanchez and Patsy Stewart. The police also observed a man convicted of possession of marijuana in large quantitites enter the house and exit shortly with a small paper sack. An investigation of that man led police to Alberto Lear, who had been arrested on drug charges in 1980, and whom police had an independent basis for believing had a large quantity of methaqualone at his residence and was heavily involved in the importation of drugs. The police also observed several persons, at least one of whom had prior drug involvements, arriving at the residence and leaving with small packages. *Id.*
70. The ensuing searches produced large quantities of drugs from several residences and in cars belonging to those accused. *Id.*

probable cause[71] and a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed.[72] Both courts refused the government's invitation to recognize a good faith exception to the exclusionary rule.[73] The Supreme Court reversed, holding that evidence will not be excluded in situations where a police officer acts in good faith, in both the application for, and the execution of, a subsequently invalidated search warrant.[74]

A. Is the Good Faith Exception Sound?

The basis of the good faith exception rests in the acceptance of deterrence of police misconduct as the purpose of the exclusionary rule. In *Leon*,[75] the Court reaffirmed the proposition that deterrence is the reason for invoking the exclusionary rule.[76] The Court also reaffirmed that the deterrent effect of the rule must be weighed against the high cost of excluding evidence and losing convictions.[77] The *Leon* Court determined that the deterrent effect of excluding evidence is minimal and greatly outweighed by the high cost of excluding relevant evidence where an officer relied, in good faith, upon the decision of a magistrate.[78]

The problem with the Court's cost/benefit analysis is that there is very little empirical data showing that either the "costs" are too high or the "benefits" are too low.[79] According to Justice Brennan, the majority has created "an illusion of technical precision and ineluctability," notwithstanding that no empirical method of evaluating the costs and benefits of the exclusionary rule has been devised.[80]

Absent any hard data, the cost/benefit analysis can be conducted only by weighing what the Supreme Court Justices believe to be the costs and benefits associated with the exclusion of evidence. Justice White, speaking for the majority in *Leon*, stated that it is unreasonable to expect a police officer to question the decision of a magistrate once the magistrate assures the officer that a warrant complies with the fourth amendment. Exclusion of evidence in such a situation, therefore, would serve

71. *Id.* at 3411 n.2.
72. The warrant was invalidated by the two lower courts using the two-pronged test established in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). That test was abandoned by the Supreme Court in favor of a less technical "totality of the circumstances" test in Illinois v. Gates, 462 U.S. 213 (1983). For a brief discussion of *Gates*, see *infra* notes 139-51 and accompanying text.
73. *Leon*,104 S. Ct. at 3411. In response to a request of the government, the district court made it clear that Officer Rombach had acted in good faith. *Id.*
74. *Id.* at 3420-21.
75. *Id.*
76. *Id.* at 3412.
77. *Id.* at 3412-13.
78. *Id.* at 3419.
79. *See id.* at 3413 n.6; *id.* at 3437 n.9 (Brennan, J., dissenting).
80. *Id.* at 3430 (Brennan, J., dissenting).

no deterrent purpose.[81]

The majority's reasoning is grounded on the premise that only the police, not issuing magistrates, are to be deterred by the exclusionary rule.[82] The majority found that this premise does not offend the idea that the deterrent effect is "systemic."[83] "The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole — not the aberrant individual officer — to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights."[84]

Justice White explained that systemic deterrence is not offended by the good faith exception because "[j]udges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion cannot be expected significantly to deter them."[85]

Justice White also suggested that professional incentives, such as professional ethics or fear of removal, will deter judicial officers from issuing improper warrants.[86] This logic is faulty, however, because not all magistrates are required to be judges or even lawyers.[87] Moreover, all magistrates bring with them whatever ideas they have regarding law and order, inevitably resulting in different results from different magistrates, absent some deterrent guidelines.

In *Shadwick v. City of Tampa*,[88] the Court held that a municipal clerk, who was neither a lawyer nor a judge, could issue warrants legitimately for nonfelonies.[89] Magistrates who are not lawyers or judges are not subject to the same professional incentives that Justice White suggested. Moreover, the lay magistrate will not have the benefit of a legal education and is thus more likely to have, and be affected by, personal ideas about law and order. It is unrealistic and naive to suggest that each

81. *Id.* at 3420.
82. The cornerstone of the *Leon* decision is that it is the police, not the magistrate, who are to be deterred by the exclusion of evidence. *Id.* at 3418 n.15. Justice White dismissed the idea that the rule had any deterrent effect on magistrates or others who issue search warrants. *Id.* at 3418 n.17.
83. *See* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 399-401 (1981).
84. Dunaway v. New York, 442 U.S. 200, 221 (1979) (Stevens, J., concurring).
85. *Leon*, 104 S. Ct. at 3418. Justice White's reasoning seems to be based on the "neutral and detached" requirement established in Coolidge v. New Hampshire, 403 U.S. 443 (1971). In *Coolidge*, the Supreme Court held that probable cause determinations and the issuance of a search warrant must be made by a "neutral and detached magistrate." The Court there invalidated a warrant issued by an attorney general. *Id.* at 449-53.
86. *Leon*, 104 S. Ct. at 3418-19 n.18. Justice White stated that federal magistrates, for example, are subject to supervision of the district courts. "They may be removed for 'incompetency, misconduct, neglect of duty, or physical or mental disability.' " *Id.* at 3419 n.18 (quoting 28 U.S.C. § 631(i)).
87. Shadwick v. City of Tampa, 407 U.S. 345 (1972) (search warrant issued by municipal clerk upheld so long as neutral and detached).
88. *Id.*
89. *Id.* at 352.

magistrate, even those subject to scrutiny under federal law, does not have his own ideas about criminal law enforcement that influence his daily decisions. No one would assert that Justice Rehnquist and Justice Brennan have the same philosophy about the proper balance between criminal law enforcement and the rights of the citizen; their differing philosophies are obvious from their respective judicial opinions. It is unreasonable to suggest that magistrates are any different. If the deterrent effect were extended to issuing magistrates, inconsistent decisions on the same set of facts by different magistrates would be less likely to occur.

Another reason used to support the good faith exception is that police officers should be rewarded for following procedures that have been authorized by either the judiciary or the legislature. It has been argued that when a police officer has complied with the relevant legal rules for searches and seizures but the evidence he gathers still is excluded from trial, the officer easily becomes contemptuous of the warrant requirement and is encouraged to resort to warrantless searches, with the hope that some exception to the warrant requirement might develop at the time of the search.[90]

The idea that police should be rewarded for following presumptively correct procedures has its origins in *Michigan v. Defillippo*.[91] There the Court held that where a police officer has made an arrest pursuant to a substantive criminal statute subsequently declared unconstitutional, the fruits of a search incident to that arrest should not be suppressed.[92] The Court reasoned that to hold otherwise would encourage police officers to speculate concerning the constitutionality of every law they sought to enforce.[93] "Society would be ill-served if its police officers took it upon themselves to determine which laws are and which laws are not constitutionally entitled to enforcement."[94]

Thus, in the context of either an existing presumptively valid statute or a presumptively valid warrant, it is unreasonable and illogical to expect a police officer to question the authority that he is dutifully following. To do so would make a policeman's job impossible. If he questioned the authority he would be guilty of derelection of duty, if he did not

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90. Illinois v. Gates, 462 U.S. 213, 236 (1983). The Court noted:

> If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of search. In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring 'the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."

Id. (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)).

91. 443 U.S. 31 (1979).

92. *Id.* at 37-38.

93. *Id.* at 38.

94. *Id.*

question the authority the evidence would be suppressed.[95]

In sum, the weakest point in the argument for the good faith exception is its failure to recognize the deterrent effect the exclusionary rule would have on a magistrate to prevent him from issuing invalid warrants. This weakness is outweighed, however, by the necessity of encouraging police officers to adhere to the warrant requirement of the fourth amendment by submitting their factual basis for probable cause to a neutral and detached magistrate before invading an area protected by the fourth amendment.

B. Opposition to the Good Faith Exception

Those who oppose the good faith exception argue that deterrence is not the primary purpose or goal of the exclusionary rule. In his dissent in *Leon*, Justice Brennan, with whom Justice Marshall joined, clung to the argument that the exclusionary rule is an integral part of the fourth amendment.[96] Justice Brennan stated that "[a] proper understanding of the broad purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the Court's deterrence rationale."[97] Unfortunately, in relying on the constitutional remedy theory, Justice Brennan is "refighting old battles that have long since been lost."[98]

Another argument against the exception is the similarly moribund proposition that the rule is the imperative of judicial integrity. The Court often has stated that when more important issues present themselves, judicial integrity must give ground.[99] Like the constitutional remedy theory, the judicial integrity theory is unpersuasive.

Another argument in opposition to the good faith exception is that it promotes magistrate shopping and inconsistent results. Because the magistrate's decision is not subject to judicial review, magistrates are free to issue warrants in accordance with their own subjective standards. Thus the different personal beliefs of magistrates will result in different decisions on the same set of facts. An officer who knows that magistrate A is more likely to issue a warrant than magistrate B, will seek a warrant from magistrate A. Justice White dismissed this practical problem as "speculative" and concluded that suppression of evidence should be decided on a case-by-case basis.[100] This implies that if magistrate shopping

95. *Id.* at 38.
96. *Leon*, 104 S. Ct. at 3430-31 (Brennan, J., dissenting).
97. *Id.* at 3431.
98. C. Moylan, *The Supreme Court, the Fourth Amendment and The Exclusionary Rule*, The Daily Record, July 12, 1984 at 4, col. 5; *see supra* text accompanying notes 32-50.
99. *See supra* text accompanying notes 51-61.
100. *Id.* at 3419.

can be proved in a particular case, a reviewing court will be correct in finding bad faith.

Finally, one theoretical argument against the good faith exception is that a reviewing court operating under the exception will never reach any novel fourth amendment claims, because the only question to be answered by an appellate court is whether there was objective good faith on the part of the police officer.[101] Justice White countered this argument by saying that "[t]here is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated."[102] If the reviewing court believed that no important fourth amendment questions were at issue, the court simply could decide the case by turning immediately to the consideration of the officer's good faith.[103] This seems to give the reviewing court the choice of whether or not to address a fourth amendment claim, which is exactly what critics fear. Justice White should have set up a two-step approach, in order to assure that the fourth amendment claims be addressed before turning to the question of the officer's good faith.

C. The Scope and Application of the Good Faith Exception

1. The Good Faith Exception is Limited to Warrants

Although some of the reasoning relied upon by the *Leon* Court in accepting the good faith exception also has been cited in support of extending the exception to warrantless searches,[104] the Supreme Court in *Leon* and its companion case, *Massachusetts v. Sheppard*,[105] stated that the good faith exception is applicable "when the officer conducting the search acted in objectively reasonable reliance on a *warrant* issued by a detached and neutral magistrate that subsequently is determined to be invalid."[106] Justice Stevens has stated that "the Court has not yet held that the rule of *United States v. Leon* . . . has any application to warrantless searches."[107] As such, the good faith exception currently is applicable only to searches incident to a warrant.

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101. Mr. Mertens and Professor Wasserstrom argue that had the good faith exception existed "the fourth amendment issues resolved in such cases as Chimel v. California, 395 U.S. 752 (1969); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Delaware v. Prouse, 440 U.S. 648 (1979); and Payton v. New York, 445 U.S. 573 (1980); might never have been decided." Mertens & Wasserstrom, *supra* note 83, at 371.

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

103. *Id.* at 3423.

104. *See* United States v. Williams, 622 F.2d 830 (5th Cir. 1980); United States v. Peltier, 422 U.S. 531 (1975).

105. 104 S. Ct. 3424, 3426 (1984).

106. *Id.* at 3428 (emphasis added).

107. INS v. Lopez-Mendoza, 104 S. Ct. 3479, 3496 (1984) (Stevens, J., dissenting).

2. The standard is one of objective reasonableness

In determining whether the good faith exception has been met, the subjective good faith of the officer is not controlling. As the Court stated in *Leon*, "the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable."[108]

The *Leon* test is analogous to the second prong of the expectation of privacy test set forth by the Court in *Katz v. United States*.[109] The *Katz* Court stated that to determine whether a search or seizure involved an area protected by the fourth amendment, a court must apply the two-part expectation of privacy test: first, that a person exhibit an actual, subjective, expectation of privacy; and second, that the expectation be one society is prepared to recognize as "reasonable." Since the *Katz* decision, the Court has been forced to interpret what society, through the voice of the Court, is prepared to recognize as reasonable.[110] It is likely that the Court will face a series of *Leon* progeny cases interpreting what society, through the nine-member Supreme Court, is prepared to recognize as "reasonable" police reliance on a search warrant.

3. What is Unreasonableness?

The *Leon* Court presented three specific situations where no objectively reasonable grounds exist for believing a warrant is proper: (1) where the judge or magistrate is mislead by information in an affidavit that the affiant knew or should have known, absent a reckless disregard of the truth, was false; (2) where a magistrate abandons his neutral and detached role; and (3) where a warrant is so lacking in the indicia of probable cause or so facially invalid that no officer reasonably could rely upon it.[111]

a. Misrepresentations to the issuing Magistrate: when is it enough to suppress the evidence?

Under *Leon*, if the judge or magistrate is mislead by an affidavit containing information that the affiant knew or would have known, absent a reckless disregard for the truth, was false, suppression of the evidence is still an appropriate remedy. To defeat a good faith claim by the police, the defendant must challenge the truthfulness of the factual statements made in the affidavit supporting the warrant.[112] In *Franks v. Delaware*,[113] the Supreme Court determined when a criminal defendant has

108. *Leon*, 104 S. Ct. at 3421.
109. 389 U.S. 347 (1967).
110. *Id.* at 360-61; *see also* Smith v. Maryland, 442 U.S. 735, 739-41 (1979).
111. *Leon*, 104 S. Ct. at 3421-22. There are actually four examples, but the author is treating the last two — bare bones affidavit and facially deficient warrant — as one.
112. *Id.* at 3421.
113. 438 U.S. 154 (1978).

the right to make that challenge.[114]

The *Franks* Court held that a movant applying for suppression of evidence must meet two tests before a hearing on the issue of suppression is required. The defendant must make a substantial preliminary showing that:[115] (1) the magistrate was mislead by a false statement that was knowingly and intentionally, or with reckless disregard for the truth, included by the affiant in the affidavit; and (2) absent the false statement, the affidavit does not contain sufficient facts to support a probable cause determination.[116] At the hearing, if the defendant establishes proof of the allegations by a preponderance of the evidence, and if the remaining facts are insufficient to support a probable cause determination, the warrant is voided and the fruits thereof excluded.[117]

The police action condemned in *Franks* — an officer's deliberate perjury or reckless disregard for the truth — is a blatant example of bad faith and is precisely the conduct sought to be deterred by the exclusionary rule.[118] Unfortunately, the *Franks* rule does not ensure adequately that this bad faith will result in the exclusion of evidence at trial. Under the second prong of the *Franks* test, it is assumed that if the issuing magistrate had known that the officer was lying about one fact, the magistrate still would assign the same weight to the other facts in the affidavit, and the magistrate would believe the other facts, and determine that probable cause existed. A more likely conclusion is that if the issuing magistrate had known of the misrepresentation in the affidavit, he would have been less likely to believe other facts in the affidavit and he would have denied the warrant application.[119]

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114. *Id.* at 155. The Supreme Court of Delaware held, as a matter of first impression, that under no circumstances may a defendant challenge the veracity of a sworn statement. 373 A.2d 578, 579-80 (Del. 1977).

115. The requirement of a substantial preliminary showing is to prevent the misuse of a veracity hearing for the purposes of discovery or obstruction. 438 U.S. at 167.

116. *Id.* at 155-56.

117. *Id.* at 156.

118. The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct that has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those officers, or in their counterparts, a greater degree of care toward the rights of the accused. *Leon*, 104 S. Ct. 3419 (quoting United States v. Peltier, 422 U.S. 531, 539 (1975)).

119. This is the corollary of the logic behind the self-verifying detail aspect of the probable cause test of Illinois v. Gates, 462 U.S. 213 (1983). If an informant is correct about some facts, he is probably correct about others. *Id.* at 244 (quoting *Spinelli*, 393 U.S. at 427 (White, J., concurring)).

The *Franks* requirement that the affidavit be lacking probable cause without the illegally obtained facts has been extended to other types of illegal activity. In United States v. Karo, 104 S. Ct. 3296 (1984), several facts in the affidavit had been obtained by the unconstitutional use of a beeper. The *Karo* Court cited *Franks* for the proposition that a warrant is not voided so long as there remains sufficient untainted facts in the affidavit to support probable cause. That test is more sensible in *Karo* than in *Franks*. In *Karo*, the illegally obtained facts did not taint the affidavit itself because there were sufficient independently obtained facts to support probable cause. In *Franks*, the misrepresentations by the affiant officer rendered the whole

b. When does the magistrate abandon his role as a neutral decision maker?

Leon provides that where a magistrate abandons his neutral and detached function, the good faith exception to the exclusionary rule does not apply. Unfortunately, there is no clear test to determine when a magistrate has abandoned his neutral and detached role.

In *Leon*, the Supreme Court cited *Lo-Ji Sales, Inc. v. New York* and held that a police officer cannot reasonably rely on a warrant resulting from action by a magistrate who has acted inconsistently with his role as an impartial judge.[120] In *Lo-Ji Sales*, the investigating officers requested a warrant to seize films and books from an "adult bookstore." The officer had viewed two reels of film purchased from the store, taken them to the town justice, and requested a warrant to seize copies of the two films and other "similar" films in the store. The warrant application also included a request that the town justice accompany the investigator to determine which of the other films were obscene.[121] Accordingly, the magistrate included in the warrant the phrase: "The following items that the court independently [on examination] has determined to be possessed in violation of [the New York State obscenity law.]"[122] The magistrate, along with three state police officers, the investigator, three local police officers, and three members of the local prosecutor's office, entered the store to determine which films and books should be seized. The magistrate viewed twenty-three films and other materials and concluded that there was probable cause to believe that the material was obscene.[123]

According to the Supreme Court, the magistrate in *Lo-Ji Sales* "allowed himself to become a member, if not the leader, of the search party."[124] Because the town justice undertook to "telescope the process of the application for a warrant, the issuance of the warrant and its execution,"[125] the Court found that the town justice had abandoned his "neutral and detached role" and thus held that the evidence should be excluded.[126]

The *Leon* Court decided that no reasonable police officer could believe that a magistrate's action such as the type in *Lo-Ji Sales* constituted an *independent* determination of probable cause and, therefore, no police officer could be said to rely on such a warrant in good faith.[127] The Court, however, has not provided a test to determine when, short of ac-

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affidavit suspect because the remaining information also came from the untruthful affiant.

120. *Leon*, 104 S. Ct. at 3422 (citing Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)).
121. *Lo-Ji Sales*, 442 U.S. at 321.
122. *Id.* at 321-22.
123. *Id.* at 322-23.
124. *Id.* at 327.
125. *Id.* at 328.
126. *Id.* at 329.
127. 104 S. Ct. at 3422.

tual involvement in the physical investigation, a magistrate abandons his neutral role.

The Ninth Circuit was faced recently with this issue in *United States v. Hendricks*.[128] On May 10, 1983, a customs agent in Los Angeles inspected a cardboard box arriving from Brazil and addressed to Hendricks. The address on the box was Hendricks's home address, and was there for identification purposes only; the box was shipped in a manner that required him to pick it up personally.[129] Inside the box was a suitcase in which the inspector found five to seven pounds of cocaine. The customs agent sent the box on to Tucson, Arizona where it was turned over to Drug Enforcement Agency (DEA) officials.[130] While the DEA agents were holding the box, they gathered other information that was included in an affidavit for a search warrant for Hendricks's residence. That information tended to show that Hendricks operated a company called Brazilian Imports, and that a small amount of cocaine previously had been sent to the company by mail.[131] There were no facts even remotely suggesting any evidence of a crime at Hendricks's residence.[132]

Based on this information and *knowing that the box was at the airport in the possession of the DEA agents*, the magistrate issued a warrant for a search of Hendricks's residence. The warrant stated: "on the premises known as 2835 North Sidney . . . *there is now being concealed* . . . a . . . cardboard box containing cocaine."[133] The warrant further stated that "this search warrant is to be executed only upon the condition that the above described box *is brought to* the aforesaid premises."[134] The warrant was executed and cocaine was found. Hendricks entered a conditional guilty plea, appealing only the denial of his suppression motion.[135]

The *Hendricks* court stated that the effort by the magistrate to limit his official conduct, not expand it, kept the magistrate within his judicial role.[136] Consequently, the good faith exception was applicable, and the cocaine seized at Hendricks's residence was not required to be excluded at trial. *Lo-Ji Sales* thus properly is limited to its facts by *Hendricks*.

c. Appellate review of a "bare bones" affidavit

The *Leon* Court stated that where a warrant is lacking facially in the indicia of probable cause and reliance on it is unreasonable, there is an

128. 743 F.2d 653 (9th Cir. 1984).
129. *Id.* at 653.
130. *Id.*
131. *Id.*
132. *Id.* at 656.
133. *Id.* at 654 (emphasis supplied by the court).
134. *Id.* (emphasis supplied by the court).
135. *Id.* The court stressed the good faith of the officers in executing the search, but did not list expressly what was seized, or even if the box itself was seized. We must infer that cocaine was seized from Hendricks's conditional plea of guilty.
136. *Id.* at 656.

absence of good faith. Thus, if an affidavit contains so few facts that it is a "mere ratification of the bare conclusions of others,"[137] a police officer cannot have manifested objective good faith in either applying for or executing the warrant.[138] The current test for appellate review of a magistrate's probable cause determination, as set forth by the Supreme Court in *Illinois v. Gates*,[139] has so relaxed the standard of appellate review of warrants that a discussion of that test is necessary to understand the scope of the *Leon* "bare bones" test.

In *Gates*, the Supreme Court revised the standard for determining when a warrant is supported by probable cause. The Court stated that an issuing magistrate must apply a two-part test: first, the magistrate must decide whether the affidavit contains sufficient facts on which to make a probable cause decision; and second, the magistrate must review the "totality of the circumstances" to determine if probable cause exists.[140] The Court found that the job of a reviewing court, however, is limited to "ensur[ing] that the magistrate had a 'substantial basis for conclud[ing]' that probable cause existed."[141] If the appellate court decides that there are sufficient facts to support a probable cause determination, the appellate court's job is over; the reviewing court should not substitute its interpretation of the evidence for that of the magistrate.[142]

The *Gates* Court noted that the earlier Supreme Court cases of *Nathanson v. United States*[143] and *Aguilar v. Texas*[144] "illustrate the limits beyond which a magistrate may not venture in issuing a warrant."[145] The affidavits at issue in *Nathanson* and *Aguilar* failed to provide the

137. *Leon*, 104 S. Ct. at 3417 (citing Illinois v. Gates, 462 U.S. 213 (1983)).

138. *See Leon*, 104 S. Ct. at 3421 n. 24. The rationale here is based on the assumption that police are trained to know that an affidavit must contain sufficient facts to support a probable cause determination. *Id.* at 3421. If a magistrate issues a warrant upon an affidavit that is so facially deficient of facts that any police officer would know that the affidavit could not possibly support an independent probable cause determination, then no police officer may rely reasonably upon that warrant and execute it in good faith. *Id.* at 3422.

139. 462 U.S. 213 (1983).

140. The Court's statement of the magistrate's task is as follows: "The task of the magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. at 238. The author's interpretation of the task as two faceted comes from an analysis of the two *Gates* requirements: (1) great deference should be given to the magistrate's decision, 462 U.S. at 213; and (2) the totality of the circumstances test. 462 U.S. at 230, 238.

141. 462 U.S. at 238 (quoting Jones v. United States, 362 U.S. 257, 271 (1960)).

142. The Court stated: "Similarly, we have repeatedly said that after-the-fact scrutiny of the sufficiency of an affidavit should not take the form of a *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' " *Id.* at 236 (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).

143. 260 U.S. 41 (1933).

144. 378 U.S. 108 (1964).

145. *Gates*, 462 U.S. at 239.

magistrate with a substantial basis for determining probable cause. The *Nathanson* warrant contained the following language:

> Whereas said Francis B. Laughin has stated under his oath that he has cause to suspect and does believe that . . . liquors of foreign origin . . . upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, . . . is [sic] now deposited and contained within the premises . . . .[146]

The *Aguilar* affidavit contained "[a]n officer's statement that [a]ffiants have reviewed reliable information from a credible person and do believe that heroin is stored in a home . . . ."[147] The *Gates* Court noted that when the evidence goes beyond *Nathanson* and *Aguilar*, no prescribed set of rules is feasible.[148] This statement, together with the requirement that a magistrate's determination be given great deference,[149] implies that an appellate reversal under *Gates* will only occur where there is a "bare bones" affidavit.

The *Gates* decision relates directly to the "bare bones" example discussed in *Leon*. In *Leon*, the Court stated that a facially invalid warrant exists where no reasonable assertion of objective good faith can be made. If the *Gates* probable cause test and standard of review effectively has narrowed the probable cause standard of review to a finding of "no facts upon which a magistrate can base a decision," then it is essentially the same test that Justice White, in *Leon*, suggests for finding a lack of good faith. As such, the standard of review under *Leon* should be the same as the standard set forth in *Gates*.

Justice White stated in *Leon* that "[e]ven if the warrant application is supported by more than a 'bare bones' affidavit a reviewing court properly may conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect."[150] That a reviewing court may find no probable cause despite more than "barebones," is at best a rationalization of, and at worst a misinterpretation of, the standard set forth in *Gates*. In contrast, a warrant invalidated for a technical problem with the form of the warrant, is exactly when the good faith exception should be applied.[151]

The ability of an appellate court to overturn a trial court's factually supportable probable cause determination is questionable particularly in light of the more recent Supreme Court case of *Massachusetts v.*

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146. *Nathanson*, 290 U.S. at 44.
147. *Gates*, 462 U.S. at 213 (quoting *Aguilar*, 378 U.S. at 108).
148. *Id.* at 239.
149. *Id.* at 236; *see infra* notes 152-57 and accompanying text.
150. *Leon*, 104 S. Ct. at 3417.
151. *See infra* notes 167-77 and accompanying text.

Upton.[152] In *Upton*, the Court interpreted and applied the *Gates* standard of review in a search and seizure case. The *Upton* Court found that the Massachusetts court erred in failing to give deference to the magistrate's decision because the Massachusetts court did not limit its decision to "whether the evidence viewed as a whole provided a 'substantial basis' for the magistrate's finding of probable cause."[153] Instead, the Massachusetts court engaged in a *de novo* probable cause determination.[154] The Supreme Court stated that the job of interpreting and weighing each fact and drawing inferences from those facts is the magistrate's alone, and it is enough that the inferences drawn be reasonable and conform with the other pieces of evidence making up the total showing of probable cause.[155] The Court added that "[i]n concluding that there was probable cause for the issuance of this warrant, the magistrate can hardly be accused of approving a mere 'hunch' or bare *recital of legal conclusions*."[156] This suggests that in order for a probable cause determination to be reversed properly under *Gates/Upton*, the magistrate's probable cause determination must be based on hunches or bare recitals of legal conclusions.[157] Thus, a valid finding of no probable cause should not coincide with a finding of objective good faith.

The Ninth Circuit's *Hendricks*[158] decision applies the correct standard of appellate review for probable cause, but reaches the wrong conclusion regarding the good faith exception. The *Hendricks* court properly recognized that its probable cause review was limited to determining whether the magistrate had a substantial basis for concluding that the box was at Hendricks's house *at the time the warrant was issued*.[159] Under the *Gates/Upton* test, although the facts in the affidavit could support a determination that Hendricks was involved in crime, there was not a single fact that could support a probable cause determination that the box was at his house or on its way to his house.[160] In fact, the magistrate knew the box was not at the house, but rather in the

152. 104 S. Ct. 2085 (1984) (per curiam).

153. The Supreme Court pointed out that the Supreme Judicial Court of Massachusetts, in Commonwealth v. Upton, 390 Mass. 562, 458 N.E.2d 717 (1983), had misinterpreted the *Gates* holding in both respects: (1) the state court did not believe that *Gates* abandoned the *Aguilar/Spinelli* test; and (2) the state court did not give deference to the magistrate's decision. *Id.* at 2088.

154. *Id.*

155. *Id.* at 2088-89.

156. *Id.* (emphasis added).

157. *See Gates*, 462 U.S. 213 at 239.

158. 743 F.2d 653 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1362 (1985); *see supra* notes 128-36 and accompanying text.

159. 743 F.2d at 654-56.

160. *Id.* at 654. The court distinguished this case from "controlled delivery" cases, where the government knows that the object is on a sure course to the house, for example by mail. *See* United States v. Goff, 681 F.2d 1238 (9th Cir. 1982); United States v. Lowe, 575 F.2d 1193 (6th Cir.), *cert. denied*, 439 U.S. 869 (1978); United States *ex rel.* Beal v. Skaff, 418 F.2d 430 (7th Cir. 1969).

hands of the DEA agents.[161] Consequently, the Ninth Circuit found that probable cause did not exist because there was no basis for a probable cause determination.[162] The Ninth Circuit also stated that although the warrant was invalid, the evidence was not excludable because of the good faith exception.

The appellant in *Hendricks* argued that the magistrate had abandoned his judicial role, but did not argue that either of the other two *Leon* limitations on the good faith exception applied.[163] Therefore, the court decided only that the magistrate had not abandoned his neutral and detached role and that there was good faith reliance by the officer on the warrant.

Although the point was not argued by the parties, the court should have concluded that the *Hendricks* case was a prime example of "a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' "[164] The court suggested that the sentence in the warrant, "this search warrant is to be executed only upon the condition that the above described box is brought to the aforesaid premises," established good faith on the part of the officers.[165] If anything, however, there was not only objective bad faith but also subjective bad faith; the officers knew at the time they applied for the warrant that the box was not at, or on its way to, Hendricks's house.

The *Hendricks* decision seems to be an example of the kind of misapplication of the good faith exception that Justice Blackmun, in his concurring opinion in *Leon*, feared would occur. Although Justice Blackmun agreed that the good faith exception was unavoidable because the exclusionary rule was not mandated constitutionally, he expressed a concern that police compliance with the fourth amendment might be "materially changed" as a result.[166] In *Hendricks*, it appears that his fears have become a reality. Conversely, the second part of Justice White's statement in *Leon*, that a warrant may be invalidated because of a technical problem with the form of the warrant,[167] is the exact situation

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161. 743 F.2d at 654.
162. *Id.* at 655-56.
163. *Id.* at 656.
164. *Leon*, 104 S. Ct. at 3422 (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (Powell, J., concurring in part)).
165. *Hendricks*, 743 F.2d at 654, 656.
166. Justice Blackmun stated:

> By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here.

Leon, 104 S. Ct. at 3424 (Blackmun, J., concurring).
167. *See supra* text accompanying note 151.

where the good faith exception should apply.

This was precisely the situation involved in *Massachusetts v. Sheppard*.[168] There, a police officer had gathered evidence in the investigation of a homicide and had drafted an affidavit to support an application for an arrest warrant and a search warrant.[169] The affidavit stated that the police wished to search for certain described items, including clothing of the victim and a possible weapon.[170] Because it was Sunday, the officer had a difficult time finding a warrant application form. The detective used a form previously used in drug cases.[171] After making some changes, the officer submitted the form to the judge, telling the judge that it might need to be changed. The judge then concluded that the affidavit established probable cause and assured the officer that he would make whatever changes to the form of the affidavit required to make it proper.[172] The judge made some changes, but not enough to withstand a strict technical attack.[173] The ensuing search was limited to those items listed in the affidavit and some evidence was recovered.[174] At the pretrial suppression hearing the trial judge ruled the evidence admissible, because of the officer's good faith. The Supreme Judicial Court of Massachusetts reversed.[175] The Supreme Court, however, upheld the trial judge's ruling of admissibility.[176]

Sheppard is the precise example of objective good faith on the part of the police. The officer had gathered all the information necessary to establish probable cause. He was investigating a brutal murder; was of the essence. The affidavit contained a description of what was to be seized, but because the judge failed to incorporate the affidavit by reference on the form, the warrant was technically invalid.[177]

Sheppard is distinguishable from the facts of *Hendricks* in that the police officer in *Sheppard* had sufficient evidence to establish probable cause and satisfy the "particularity of items to be seized" requirement for the issuance of a warrant. In *Sheppard*, suppression of the evidence could not possibly serve any deterrent purpose. The officer had satisfied all of the requirements of the fourth amendment and been assured that the form was correct. The officer even expressed his concern that the form of the warrant be corrected if necessary. In *Hendricks*, the deterrent effect served would be to prevent police officers from applying for warrants unless there was evidence that the contraband was on the premises to be searched.

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168. 104 U.S. 3424 (1984).
169. *Id.* at 3427.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 3428.
175. *Id.*; Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982).
176. *Sheppard*, 104 U.S. at 3430.
177. *Id.* at 3429 n.7.

In sum, when a warrant is so lacking in the indicia of probable cause that it fails the *Gates* test, it also should fail the *Leon* good faith test. Where, however, an officer has acquired all relevant evidence to support the probable cause and particularity requirements of the fourth amendment but the warrant is technically invalid in form, the good faith exception should be applied.

IV. A GOOD FAITH EXCEPTION TO WARRANTLESS SEARCHES

The fourth amendment provides that no searches may be conducted without a warrant. On many occasions, however, the Court has created exceptions to the warrant requirement.[178] Although the *Leon* Court created a good faith exception only for searches pursuant to a warrant, the Court did not preclude the possibility of extending the exception to warrantless searches.

A. The Fifth Circuit's Adoption of a Good Faith Exception to Warrantless Searches

In *United States v. Williams*,[179] the Fifth Circuit explicitly adopted a good faith exception to warrantless searches and seizures.[180] In *Williams*, the appellant was arrested in Atlanta for violation of an order prohibiting travel from Ohio. In a search incident to her arrest, a packet of heroin was found in her coat. Based upon that information, the DEA officer requested and received a warrant to search her bags. This search revealed a larger quantity of heroin.[181] Williams claimed that all the evidence was excludable because her arrest was illegal and the resulting search and information upon which the search warrant was based were, therefore, tainted.[182] The court found that the arrest was legal[183] and

178. The Supreme Court has recognized six exceptions to the warrant requirement: (1) searches incident to a lawful arrest; New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1983); Chimel v. California, 395 U.S. 752 (1969); (2) "automobile" searches; United States v. Ross, 456 U.S. 798 (1982); Carroll v. United States, 267 U.S. 132 (1925); (3) "hot pursuit" and other exigent circumstances; Warden v. Hayden, 387 U.S. 294 (1967); *cf.* Mincey v. Arizona, 437 U.S. 385 (1978); (4) consent searches; Schneckloth v. Bustamonte, 412 U.S. 218 (1973); (5) "stop and frisk" searches; Terry v. Ohio, 392 U.S. 1 (1968); Bumper v. North Carolina, 391 U.S. 543 (1968); and (6) "plain view" searches; Texas v. Brown, 460 U.S. 730 (1983); Coolidge v. New Hampshire, 403 U.S. 443 (1971). For a complete discussion of exceptions to the warrant requirement, see 2 W. LAFAVE, SEARCH AND SEIZURE 5.1-8.6 (1978 & Supp. 1985); 3 W. LAFAVE, SEARCH AND SEIZURE 9.1-9.6 (1978 & Supp. 1985).

179. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

180. *Id.* at 840-48. This was the holding of Part II of the *Williams* opinion. In Part I of the opinion, the court found that the arrest had in fact been legal. *Id.* at 839. This raises a question as to whether Part II is an alternative ground for the decision or dictum. *See Williams*, 622 F.2d at 848-49 (Rubin, J., concurring).

181. 622 F.2d at 834.

182. *Id.* at 835.

183. *Id.* at 833-39.

that the good faith exception should be adopted for warrantless searches and seizures.[184] The *Williams* court set out two facets to the good faith exception: "technical violation" and "good faith mistake."[185] The technical violation applies when an officer relies upon: (1) a statute that is declared unconstitutional; (2) a warrant that is later declared invalid; or (3) a court precedent that is later overruled.[186] The good faith mistake applies when an officer makes a judgmental error concerning the existence of probable cause.[187] The technical violation facet of the good faith

184. *Id.* at 840-47.

185. *Id.* at 841.

186. *Id.* This is the same rationale behind the Supreme Court holdings in Michigan v. DeFillippo, 443 U.S. 31 (1979) (good faith reliance on presumptively constitutional statute), United States v. Leon, 104 S. Ct. 3405 (1984) (good faith reliance on search warrant), and United States v. Peltier, 422 U.S. 531 (1975) (good faith reliance on prior court decisions).

187. *Williams*, 622 F.2d at 840. The only fourth amendment Supreme Court cases cited by the *Williams* court in support of its "good faith mistake" rule were United States v. Janis, 428 U.S. 433 (1976), and Michigan v. Tucker, 417 U.S. 433 (1974). Neither the holdings nor rationales of either of these cases support the rule. Both *Janis* and *Tucker* were decided on grounds other than the good or bad faith of the police officers; in both cases good faith was not determinate of the propriety of suppression.

In *Janis*, the Supreme Court held the exclusionary rule inapplicable to civil proceedings. The rationale behind that ruling is that law enforcement officers are concerned primarily with enforcing the criminal, not civil, law and thus the exclusion in a civil case of evidence seized by police will have no deterrent effect. The *Williams* court seized upon the mention of "good faith" by the *Janis* court to suggest that the good faith of the officers was the basis for the *Janis* opinion. What the *Williams* court ignored, however, is that under *Janis* the exclusionary rule is inapplicable to civil proceedings irrespective of the good or bad faith of the officers. The *Janis* Court concluded that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police officer to outweigh the societal costs imposed by exclusion. *Janis*, 428 U.S. at 454.

In *Tucker*, the Supreme Court held it improper to suppress the testimony of a witness whose identity was discovered by a violation of the defendant's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court reasoned that the deterrent effect of the exclusionary rule was fulfilled by suppressing the accused's own words. *Tucker*, 417 U.S. at 448. The *Tucker* case was very narrow in the respect that the case involved a change of law subsequent to the police conduct. What the officer did was legal under the old law, but illegal under the change. It is interesting that the *Williams* court cited the rather narrow *Tucker* case but ignored the more broad holding of United States v. Ceccolini, 435 U.S. 268 (1977), where the Supreme Court held that whenever a witness's identity is discovered by a constitutional violation, that witness's testimony will not be excluded absent a direct link between the illegality and the resulting testimony, 435 U.S. at 278-80. The Court noted that, in determining whether the testimony of a live witness found by unconstitutional methods should be suppressed, factors to be considered are the length of the "road" between the violation and the witness's testimony (attenuation) and the degree of free will exercised by the witness. *Id.* at 276-79. Good faith is not listed as a factor.

Moreover, in quoting the *Janis* and *Tucker* dictum out of context, the *Williams* court ignored the "neutral and detached" magistrate requirement of the fourth amendment. Shadwick v. City of Tampa, 497 U.S. 345 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Johnson v. United States, 333 U.S. 10 (1948); *see infra* note 193 and accompanying text.

exception is supported by both the deterrent purpose of the exclusionary rule and Supreme Court precedent; the good faith mistake facet is supported by neither.

In support of the "technical violation" facet of the good faith exception, the court relied in part upon *Michigan v. DeFillippo*,[188] which held that evidence seized pursuant to a statute later declared unconstitutional should not be suppressed.[189] The logic behind that holding, and the technical violation aspect of the good faith exception as well, is that a police officer has done all that is required of him — he has followed the law as it existed at the time of his actions.[190] There is no possible deterrent effect in suppressing evidence seized pursuant to a presumptively valid statute.[191] This is the same reasoning relied upon by the Supreme Court in *United States v. Leon*.[192]

In situations like *Defillippo* and *Leon*, the police officer has no choice but to follow the path laid for him by another governmental body or officer. Those situations are very different from the situation in which the officer must make the choice of which path to follow. What the *Williams* court failed to consider in adopting the "good faith mistake" facet of the good faith exception is that the fourth amendment not only guards against searches without probable cause, but also against searches where the probable cause determination is made by someone other than a neutral and detached magistrate.[193] As Justice Jackson stated in *Johnson v. United States*:[194]

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[195]

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188. 443 U.S. 31 (1979).
189. *Id.*
190. *Id.* at 36-38.
191. *Williams*, 622 F.2d at 842; *DeFillippo*, 443 U.S. at 38.
192. 104 S. Ct. 3405 (1984). The Fifth Circuit has relied upon the broad language in *United States v. Peltier*, 422 U.S. 531 (1975), which stated "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Williams*, 622 F.2d at 843. That statement taken out of context would seem to support all actions where the police have a good faith belief that their conduct is not violative of the fourth amendment. The *Peltier* case, however, dealt with the situation where a law enforcement officer relied upon an administrative process that consistently had been approved. The *Peltier* decision was actually a refusal of the Court to apply retroactively the decision that overruled the rule relied upon by the officer.
193. Shadwick v. City of Tampa, 497 U.S. 345 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Johnson v. United States, 333 U.S. 10 (1948).
194. 333 U.S. 10 (1948).
195. *Id.* at 13-14.

C. *The Constitutionality of a Good Faith Exception to Warrantless Searches and Seizures*

A good faith exception to warrantless searches and seizures could be recognized in two situations: (1) where the officer reasonably believes that there is probable cause and fails to obtain a warrant; and (2) where the officer reasonably believes that the search falls into one of the exceptions to the warrant requirement.

To allow an officer in the field to make a probable cause decision without obtaining a warrant, absent one of the recognized exceptions to the warrant requirement, would contradict directly the "neutral and detached magistrate" requirement of *Johnson*.[196] Because the purpose of the exclusionary rule is to deter unconstitutional police conduct,[197] it follows that an officer's independent probable cause determination is precisely the conduct to be deterred. The exclusionary rule deters not only wrong decisions in the execution of a warrant, but also the mere making of a decision where the officer should apply for a warrant.[198] Because exclusion of evidence in such a case furthers the deterrent purpose of the exclusionary rule, an extension of the good faith exception to such situations would be improper.

The extension of the good faith exception to an officer's reasonable belief that one of the warrantless exceptions exists would hinder the deterrent effect of the exclusionary rule and be unnecessary. If the extension is made, the officer who is not sure whether the circumstances support a warrantless exception, would, in essence, be rewarded for conducting a search in good faith. Suppression of evidence, however, would deter illegal police action by discouraging police from making judgments regarding warrantless exceptions.

On several occasions the Supreme Court has opted for a "bright-line" rule approach to warrantless searches instead of proceeding on a factual case-by-case determination. When one of the prescribed situations allowing a warrantless search exists, the search should be upheld without addressing whether each of the original reasons behind the particular warrantless exception exists.[199] This creates a system of "bright-line" rules that police may follow, instead of making in-the-field judgments as to the exigencies of each situation. In support of this rule-oriented approach, the Court has upheld searches incident to lawful arrests where the danger to the policeman was minimal.[200] Additionally, the Court has upheld automobile searches even where the owner has been

196. *Id.*

197. *E.g.*, United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1974); United States v. Calandra, 414 U.S. 338 (1974).

198. *Johnson*, 333 U.S. at 13-14.

199. *See* C. WHITEBREAD, CRIMINAL PROCEDURE § 6.01 at 33 (1980).

200. United States v. Robinson, 414 U.S. 281 (1973) (defendant stopped for traffic violation).

separated from his automobile.[201] These holdings not only make the job of the policeman easier, they also follow the premise that, absent some predetermined authority, the decision to stop and search should be made by a neutral and detached magistrate.

Additionally, it is unnecessary to extend the good faith exception to warrantless searches because each of the present exceptions to the warrant requirement already contain a reasonableness requirement. For instance, the search incident to arrest is limited by the *reasonableness* of the scope and intensity of the search.[202] Similarly, the hot pursuit or exigency exception requires that the search not continue beyond a *reasonable* period of time.[203] Because of the inherent objective reasonableness justifying each of the warrantless exceptions, and the deterrent effect of suppressing evidence obtained where an officer has acted upon probable cause but without a warrant, the good faith exception should not be extended to warrantless searches.

V. MARYLAND'S TREATMENT OF THE GOOD FAITH EXCEPTION

There has been an emerging trend among state appellate courts to afford citizens greater protection under their state constitutions than the Supreme Court has afforded under the federal constitution.[204] The Supreme Court of Oregon, has been a leader in this trend. In *State v. Davis*,[205] the Supreme Court of Oregon, relying on prior Oregon precedent, rejected the United States Supreme Court's deterrent analysis regarding the exclusionary rule.[206] To counteract this trend among the state courts, the United States Supreme Court in *Michigan v. Long*[207]

201. Chambers v. Maroney, 399 U.S. 42 (1970); *see* United States v. Roth, 456 U.S. 798 (1983).

202. *See* United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); Marron v. United States, 275 U.S. 192 (1927).

203. Michigan v. Tyler, 436 U.S. 499 (1978); Mincey v. Arizona, 437 U.S. 385 (1978). Also, the automobile exception, although allowing searches after the exigency apparently has dissipated, Chambers v. Maroney, 399 U.S. 42 (1970), still requires that there be some exigency at the point of confrontation. *See* Coolidge v. New Hampshire, 393 U.S. at 42, 52. The stop and frisk exception requires articulable suspicion, an objective test that will not be satisfied by mere "hunches." Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968). The plain view doctrine requires not only a reasonable initial intrusion, but also a reasonable inadvertence in discovering the evidence. *Coolidge*, 339 U.S. at 469-71. *But see* Texas v. Brown, 103 S. Ct. 1535 (1983). Consent searches require that the consent be obtained reasonably and voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

204. In Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981), the Oregon court granted prison inmates a higher level of privacy under the state constitution than would have been applicable under the federal constitution. *Id.* at 126-33. The court reasoned that, "the proper sequence is to analyze the state's law, including its constitutional law before reaching a federal constitutional claim." *Id.* at 126.

205. 295 Or. 227, 666 P.2d 802 (1983).

206. *Id.* at 235, 666 P.2d at 807.

207. 463 U.S. 1032 (1983).

held that a state court decision is based presumptively on federal grounds and, therefore, reviewable unless it is shown explicitly in the state court opinion that the decision is based only on the state constitution or supporting state precedent.[208]

Maryland courts have consistently followed the Supreme Court's interpretations of the fourth amendment. In *Potts v. State*,[209] the Court of Appeals of Maryland followed the Supreme Court's analysis in *Illinois v. Gates*[210] and refused to offer the defendant more protection under article 26 of the Maryland Declaration of Rights.[211] The *Potts* court stated that article 26 and the fourth amendment developed from the same historical background and that article 26 is *in pari materia* with its federal counterpart. Based on this reasoning, the court adopted the totality of circumstances standard of review as set forth in *Gates*.[212]

The Court of Special Appeals of Maryland already has adopted the good faith exception. In *Randall Book Corp. v. State*,[213] that court interpreted *Leon* as requiring that a warrant be suppressed "only if the officers were dishonest or reckless or could not have harbored an objectively reasonable belief in the existence of probable cause."[214] The court also noted that there was no assertion that the judge who issued the warrant had abandoned his proper role.[215] Thus, the Court of Special Appeals of Maryland listed the same three examples of bad faith stated in Leon: the officer recklessly misleading the magistrate,[216] the magistrate abandoning his neutral and detached role,[217] and the "bare bones" affidavit.[218]

In *Randall Book Corp.*, the court addressed the problem in the proper procedural manner. The court decided that there had been a fourth amendment violation;[219] the court then concluded that the good faith exception prohibited exclusion of the evidence.[220] This is the correct procedure because it allows appellate courts to provide guidance to the magistrates regarding the adequacy of issued warrants. If the case were decided on good faith alone, judges would be unable to ascertain any new constitutional violations.[221]

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208. *Id.* at 3474-78.
209. 300 Md. 567, 479 A.2d 1335 (1984).
210. 462 U.S. 213 (1983).
211. *Potts*, 300 Md. at 576-77, 479 A.2d at 1340.
212. *Id.*
213. 64 Md. App. 589, 497 A.2d 1174 (1985), *cert. denied*, 305 Md. 175, 452 A.2d 187 (1986).
214. *Id.* at 602, 497 A.2d at 1180.
215. *Id.*
216. *See supra* notes 112-19 and accompanying text.
217. *See supra* notes 120-36 and accompanying text.
218. *See supra* notes 137-77 and accompanying text.
219. 64 Md. App. at 600-01, 497 A.2d at 1179.
220. *Id.* at 602, 497 A.2d at 1180.
221. *See supra* notes 101-03 and accompanying text.

VI. CONCLUSION

In *United States v. Leon*,[222] the Supreme Court adopted the good faith exception to the exclusionary rule. The test set forth to determine good faith is an objective one.

Adopting a good faith exception for technically invalid warrants is consistent with the concept of deterring police misconduct. Extension of a good faith exception to warrantless searches that violate the fourth amendment, however, would be inconsistent with the deterrence rationale of the exclusionary rule. That extension would encourage police officers to make probable cause determinations themselves, one of the evils prohibited by the Supreme Court's interpretation of the fourth amendment. The good faith exception does not, and should not, apply to warrantless searches. Rather, it should be restricted to technical violations in the form of the search warrant such as the violation in *Massachusetts v. Sheppard*.[223]

The future of the good faith exception appears to be in the hands of the police officers themselves. As Justice Blackman expressed it in his concurrence in *Leon*:

> If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here . . . .
>
> If a single principle may be drawn from this Court's exclusionary rule decisions . . . it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom. It is incumbent on the Nation's law enforcement officers, who must continue to observe the Fourth Amendment in the wake of today's decisions, to recognize the double-edged nature of that principle.[224]

Thomas Page Lloyd

222. 104 S. Ct. 3405 (1984).
223. Massachusetts v. Sheppard, 104 S. Ct. 3427 (1984); *see supra* notes 167-77 and accompanying text.
224. United States v. Leon, 104 S. Ct. 3405, 3424 (1984) (Blackman, J., concurring).