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Recent Development

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RECENT DEVELOPMENT

Constitutional Law—"Good Faith" Exception to the Exclusionary Rule for Warrantless Foreign Searches Made by United States Agents Who Reasonably Rely on Assertions by Foreign Police that the Search is Valid. *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987).

I. Facts and Holding

The defendants, convicted of possessing marijuana in United States custom waters with the intent to distribute, appealed the denial of their pretrial motion to suppress the admission into evidence of marijuana alleged to have been illegally seized. The government contended that the search that uncovered the marijuana was not illegal because United States agents conducted it relying on assurances they had received from Philippine officials that it was proper.[1]

Federal agents of the Drug Enforcement Agency (DEA) learned that the defendants planned to transport a shipload of marijuana from Thailand to the West Coast of the United States via the *Pacific Star*, a ship that was presently en route to the Philippines.[2] The DEA alerted the

1. United States v. Peterson, 812 F.2d 486 (9th Cir. 1987).

2. *Id.* at 488. Through a confidential informant, DEA agents in Thailand uncovered a plan to smuggle drugs from Thailand into the United States. The Thai police wiretapped the telephones in the Bangkok apartment of defendant Falk and in a government post office in Thailand where defendant Peterson was known to make telephone calls because both men were implicated by the informant. The DEA translated the intercepted messages and learned that a ship, the *Allyson*, was to be used to transport marijuana into the United States. The DEA seized the *Allyson* off the coast of Alaska and confiscated twelve tons of marijuana. Judge Kennedy, now Associate Justice of the United States

Philippine Narcotics Command (NARCOM) which wiretapped the telephone in the Manila apartment of defendant Falk.[3] DEA agents in the Philippines asked for and received "assurances from high ranking law enforcement authorities in the Philippines that all necessary authorization [for the wiretap] was being obtained."[4] Neither NARCOM nor the DEA obtained a warrant or any other form of judicial authorization for the wiretap.[5] At trial, the DEA agents labelled their efforts a "joint investigation" of the Philippine and United States authorities.[6] DEA agents translated the intercepted phone calls on a daily basis and assessed their relevance. One caller from the United States made reference to "100 south of Cabo."[7] The DEA notified the United States Coast Guard which intercepted the *Pacific Star* as it sailed to a position 100 miles south of Cabo, San Lucas. Upon boarding, the Coast Guard confiscated the marijuana.[8]

The Federal District Court for the Southern District of California held that because the United States agents in the Philippines did not so substantially participate in the Philippine wiretap as to make the operation a "joint venture" between the United States and the Philippine Governments, any illegality of the wiretap did not require exclusion of the marijuana seized as a result of information obtained in the wiretap.[9] On appeal, the United States Court of Appeals for the Ninth Circuit, *affirmed. Held*: Although United States agents did enter into a "joint venture" with Philippine officials in the foreign wiretap, and the warrantless wiretap was illegal under Philippine law, the marijuana seized was nonetheless admissible at trial because the United States agents reasonably and in good faith relied on the erroneous assurances of high ranking Philippine law enforcement officials that the wiretap was legal under Philippine law.[10]

Supreme Court, held that the Thailand investigation was so remote from the Philippine investigation as not to "taint" the evidence seized from the *Pacific Star*. *Id.* at 488-90.

3. *Id.* at 488-89.

4. *Id.* at 492.

5. *Id.* at 491.

6. *Id.* at 490.

7. *Id.* at 489.

8. *Id.* The defendants challenged the legality of the Coast Guard's boarding of the *Pacific Star*. The court held that the boarding was based on probable cause and that since the ship was within United States custom waters as extended by agreement with the government of Panama, the Coast Guard had jurisdiction to act. *Id.* at 492-94.

9. *Id.* at 490.

10. *See id.* at 490-95.

II. LEGAL BACKGROUND

A. *The Fourth Amendment Exclusionary Rule in the Context of Foreign Searches*

The exclusionary rule requires the suppression of evidence that agents of United States Government seize abroad in violation of the fourth amendment to the United States Constitution.[11] In contrast, the exclusionary rule does not generally apply to overseas operations conducted by agents of a foreign country, even though the operation would violate the fourth amendment if conducted by United States officials.[12] This dichotomy is the result of a judicial realization that the exclusion of evidence seized by foreign police in violation of the United States Constitution and presented on a "silver platter"[13] to United States law enforcement officials cannot be expected to deter foreign police from violating United States law. The primary justification for excluding illegally seized evidence, is deterrence of unlawful police conduct.[14] Because excluding evidence seized by foreign officials would not further this goal, United States courts have not applied the exclusionary rule to such evidence.[15]

There are two widely recognized exceptions to the general rule that foreign searches conducted by foreign police are not subject to the exclusionary rule in United States courts.[16] First, courts may exclude evidence

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11. Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966); United States v. Jordan, 23 C.M.A. 525, 1 M.J. 145 (1975), *modified*, 1 M.J. 334 (1976); *see* Note, *The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries*, 16 COLUM. J. TRANSNAT'L L. 495, 495 (1977).

12. *See, e.g.*, United States v. Mount, 757 F.2d 1315, 1317 (D.C. Cir. 1985); United States v. Delaplane, 778 F.2d 570, 573 (10th Cir. 1985), *cert. denied*, 107 S. Ct. 104 (1986); Note, *Evidence Seized in Foreign Searches: When Does the Fourth Amendment Exclusionary Rule Apply?*, 25 WM. & MARY L. REV. 161, 165 (1983).

13. The term "silver platter" arose in cases that construed the exclusionary rule to be inapplicable to evidence seized by state government agents and introduced in federal courts if the federal government did not participate in the challenged search. The "silver platter" doctrine was overruled in Elkins v. United States, 364 U.S. 206 (1960). *See generally* Note, *The New International "Silver Platter" Doctrine: Admissibility in Federal Courts of Evidence Illegally Obtained by Foreign Officers in a Foreign Country.* 2 N.Y.U. J. INT'L L. & POL. 280 (1969).

14. Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Janis, 428 U.S. 433, 446 (1976); United States v. Calandra, 414 U.S. 338 (1974). *Accord Mount*, 757 F.2d at 1317.

15. *Mount*, 757 F.2d at 1317-18; Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

16. *See, e.g.*, United States v. Rosenthal, 793 F.2d 1214, 1230-31 (11th Cir. 1986), *modified in part*, 801 F.2d 378 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1377 (1987); United States v. Hensel, 699 F.2d 18, 25 (1st Cir. 1983), *cert. denied*, 461 U.S. 958

seized by foreign police if the manner in which the foreign police conducted the search or seizure was so outrageous as to shock the conscience of the court.[17] Although many courts have posited such an exception, no court has ever suppressed tangible evidence seized by foreign police on the ground of shocking police conduct.[18] Second, courts may suppress evidence that is uncovered by an illegal foreign search in which United States agents significantly participated.[19] The leading case on what constitutes significant United States participation in a search is *United States v. Stonehill*.[20] In that case, the United States Court of Appeals for the Ninth Circuit held that the fourth amendment and its attendant exclusionary rule applied foreign searches conducted with United States participation only if "Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials."[21]

There are only two cases in which courts have found the participation of United States officials to be significant enough to activate the exclusionary rule.[22] The question of whether courts should apply United

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(1983).

17. *See* Birdsell v. United States, 346 F.2d 775, 782 n.10 (5th Cir. 1965), *cert. denied*, 382 U.S. 963 (1965); *see, e.g., Rosenthal*, 793 F.2d at 1230-31; United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978). Rochin v. California, 342 U.S. 165, 172 (1952), first enunciated the doctrine that evidence seized by police conduct that was so outrageous as to be shocking to the judicial conscience should be excluded at trial. *Birdsell* first extended the shocking conduct rule to foreign searches. 346 F.2d at 782 n.10. Excluding evidence obtained through shocking conduct has two justifications: (1) maintaining judicial integrity and (2) ensuring the reliability of evidence. These two justifications, however, do not argue for having a shocking conduct exception in the context of a foreign search that produces tangible evidence. First, since foreign governments are not charged with upholding the laws of the United States, their violation of United States laws could not harm judicial integrity; and second, tangible evidence, unlike confessions or other intangible evidence, is reliable without regard to the manner in which it was seized. Note, *supra* note 12, at 167-69 (1983).

18. Best & Lerman, *Application of the Exclusionary Rule in U.S. Courts to Suppress Evidence Illegally Obtained by Foreign Officers Acting Abroad*, in A.L.I.-A.B.A. COURSE OF STUDY: INTERNATIONAL CRIMINAL LAW 71, 88-89 (1982).

19. *E.g., Rosenthal*, 793 F.2d at 1231; *Mount*, 757 F.2d at 1318; *Rose*, 570 F.2d at 1362; *Stonehill*, 405 F.2d at 743. *But see* United States v. Jordan, 23 C.M.A. 525, 1 M.J. 145 (1975), *modified*, 1 M.J. 334 (1976). In *Jordan*, the Court of Military Appeals, on rehearing, held that "whenever American officials are present at the scene of a foreign search, or even though not present, provide any information or assistance, directive or request, which sets in motion, aids, or otherwise furthers the objectives of a foreign search, the search must satisfy the fourth amendment. . . ." 1 M.J. at 338.

20. 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

21. *Id.* at 743 (citations omitted); *accord Rose*, 570 F.2d at 1362.

22. *See* Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966); *Jordan*, 23 C.M.A. 525,

States constitutional law under the fourth amendment or the law of the foreign country that was the situs of the search to judge foreign searches in which United States police significantly participated raised little discussion. Both cases assessed the validity of the foreign search against United States search and seizure law under the fourth amendment.[23] Courts in many of the other foreign search cases seem to assume that United States law is applicable.[24]

It is an established principle of constitutional law that the only powers that the United States can exercise are those which are specifically enumerated in the United States Constitution.[25] As the United States Supreme Court stated in 1957, "the United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act [at home or abroad] in accordance with all the limitations imposed by the Constitution . . . [It] has no power except that granted by the Constitution."[26] It follows that when the United States acts abroad, the measuring stick of those acts should be the Constitution. Although some commentators have criticized this all-or-nothing approach,[27] in

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1 M.J. 145, *modified*, 1 M.J. 334.

23. *Zuckert*, 366 F.2d at 640; *Jordan*, 23 C.M.A. at 527, 1 M.J. at 149. In *Zuckert*, Japanese police, along with agents of the United States Air Force Office of Special Investigations, used a Japanese search warrant to search the defendant's home. The search warrant was held to be defective in that it failed to describe with sufficient particularity the items to be seized as required by the fourth amendment. At trial, the court excluded the evidence obtained because it held that the search was constitutionally invalid. 366 F.2d at 639-40. In *Jordan*, British police conducted a warrantless search of defendant's home in the presence of United States officials. The court held this search to be constitutionally infirm because the defendant's consent to the warrantless search was not given voluntarily as required by the fourth amendment. The court therefore excluded the evidence seized in the illegal search. 23 C.M.A. at 526, 1 M.J. at 149. *See generally* Paust, *Constitutional Limitations on Extraterritorial Federal Power: Persons, Property, Due Process, and the Seizure of Evidence Abroad* in INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE (1987); Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741 (1980).

24. *E.g.*, Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

25. Saltzburg, *supra* note 23, at 742.

26. Reid v. Covert, 354 U.S. 1, 5-6, 12 (1957). "[E]verything American officials do [at home or abroad] is governed by, measured against, and must be authorized by the United States Constitution." United States v. Tiede, Nos. 78-001, 78-001A, slip op. at 27 (United States Court for Berlin Mar. 14, 1979), *reprinted in* United States: Court of Berlin Decision in *United States v. Tiede and Ruske*, 19 I.L.M. 179, 192 (1980).

27. 1 W. LAFAVE, SEARCH AND SEIZURE § 1.8(g), at 218 (2d. ed. 1987) ("Assuming a significant degree of involvement by American authorities, they should not be permitted to totally disregard the Fourth Amendment, nor should they inevitably be compelled to supervise the resulting foreign law enforcement operations to the degree

practice, once a court finds a foreign search to be a "joint venture," it will judge that search against the full panoply of fourth amendment requirements.[28] More practical reasons exist for applying United States fourth amendment law to test the validity of United States police practices overseas: foreign law often differs from law in the United States,[29] is in a foreign language, and is less well known to United States police than domestic law.[30] In contrast, applying foreign search and seizure law does violence to the tenor of several recent Supreme Court decisions which stated that search and seizure law should be as clear and simple as possible so that police may be certain of what is and what is not permissible police behavior.[31]

The Supreme Court has consistently interpreted the fourth amendment as expressing a strong preference for enforcement officials to obtain search warrants prior to conducting any search.[32] The warrant requirement interposes a "neutral and detached" magistrate between the police, whose job is to "ferret" out crime, and the subjects of an investigation, thereby protecting individual rights from possible overzealous police in-

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necessary to ensure that all procedures subsequently undertaken fit the American mold.")

28. Powell v. Zuckert, 366 F.2d 634, 640 (D.C. Cir. 1966); United States v. Jordan, 23 C.M.A. 525, 527, 1 M.J. 145, 149 (1975), *modified*, 1 M.J. 334 (1976).

29. Note, *supra* note 13, at 310-11. Search and seizure law varies from one nation to another. For example, in Germany, a suspect's dwelling may be searched on the basis of suspicion alone. In France, a suspect's dwelling may be searched without a warrant when a felony has been discovered during the very act or has just been committed. *Id.* at 310.

30. Fourth amendment search and seizure law with its fine distinctions may be a "quagmire," Davis v. United States, 327 F.2d 301, 302 (9th Cir. 1964), but at least that quagmire is in English.

31. *See, e.g.*, New York v. Belton, 453 U.S. 454, 458-60 (1981); United States v. Robinson, 414 U.S. 218, 235 (1973).

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'

Belton, 453 U.S. at 458 (quoting LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (quoting United States v. Robinson, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting))).

32. "[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure. . . ." Terry v. Ohio, 392 U.S. 1, 20 (1968) (citations omitted); *see also* United States v. Ventresca, 380 U.S. 102 (1965).

vestigation.[33] The warrant requirement, however, is not absolute and is excused under exigent circumstances when itwould be unduly burdensome to require advance judicial authorizations.[34] No exception to the warrant requirement exists for foreign searches even though a foreign country that is the situs of a search may have no law that provides for "warrant procedure."[35] One commentator has argued that some foreign searches should be similarly excused from the warrant requirement because "[i]t would be unduly burdensome and time-consuming to require the transmission of information to a U.S. magistrate before permitting search or questioning abroad,"[36] but that a warrant requirement should continue to exist for very intrusive searches, such as wiretappings.[37] Presently, the federal system recognizes warrants that are based on sworn oral testimony communicated over the telephone by police to United States magistrates.[38] Thus, for intrusive searches requiring a warrant, United States police in a foreign country could telephone a United States magistrate in order to acquire prior judicial authorization for the proposed search.

B. *The Good Faith Exception to the Exclusionary Rule*

In *United States v. Leon*,[39] the Supreme Court held that evidence seized pursuant to a facially valid search warrant, which was later found to have been invalid, would not be excluded from trial if the police reasonably and in good faith relied on the validity of the warrant. The Court's rationale was that police reliance on a warrant is reasonable in

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33. United States v. Leon, 468 U.S. 897, 913-14 (1984); United States v. Chadwick, 433 U.S. 1, 9 (1977); Johnson v. United States, 333 U.S. 10, 14 (1948). *See generally* Saltzburg, *supra* note 23, at 743-45.

34. A few of the types of searches and seizures that are excused from the warrant requirement include: seizures of evidence made in plain view, Coolidge v. New Hampshire, 403 U.S. 443 (1971); searches incident to a valid arrest, Chimel v. California, 395 U.S. 752 (1969); and searches while in hot pursuit of a suspect, Warden v. Hayden, 387 U.S. 294 (1967).

35. *See* Note, *supra* note 13, at 311.

36. Saltzburg, *supra* note 23, at 762-63.

37. *Id.* at 763 n.116.

38. FED. R. CRIM. P. 41(c)(2). To obtain a telephone search warrant, a police officer communicates the information upon which the search warrant is requested. If the magistrate believes that a search warrant should issue, he or she authorizes the police officer to prepare a duplicate warrant which is judicial authorization for the requested search. The telephone transaction must be recorded and transcribed. *See generally* 2 W. LAFAVE, *supra* note 27, § 4.3(c), at 174-77.

39. 468 U.S. 897 (1984).

most circumstances;[40] therefore, exclusion of the evidence would have little or no deterrent effect on the subsequent actions of police officers.[41] A facially valid warrant will not trigger the *Leon* good faith exception if: (1) the warrant was issued by a magistrate who had abandoned the "neutral and detached" role as an intermediary between police and citizens;[42] (2) the warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;"[43] (3) the warrant was facially deficient to a reasonably well-trained police officer;[44] or (4) the issuing magistrate was misled by recklessly false statements made by the procuring police officer.[45] The underlying requirement is that police reliance on the validity of the warrant be reasonable.[46] Thus, in order to gain the benefit of the *Leon* exception to the exclusionary rule, police must have reasonable knowledge of what the law provides.[47] Purposeful ignorance of the law is not reasonable as reasonableness is "inconsistent with closing one's mind to the possibility of illegality."[48]

In the companion case of *Massachusetts v. Sheppard*,[49] the United States Supreme Court held that evidence was admissible from a search conducted pursuant to a warrant that did not particularly describe the items to be seized as required by the fourth amendment because police reliance on the warrant was objectively reasonable. In *Sheppard*, the police sought a warrant that authorized them to search for evidence concerning a homicide. The only warrant form that the officer had available was one for a drug search. The officer told the issuing magistrate of his predicament and requested modification of the warrant form to allow for the search for homicide evidence. The magistrate agreed to change the form in the manner requested by the officer, but neglected to make the

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40. *Id.* at 922.

41. *See id.*

42. *See id.* at 923. When a magistrate abandons his or her neutrality and becomes an adjunct of the police, a determination that sufficient probable cause exists for issuing a warrant is made from a biased position and "no reasonably well-trained [police] officer" would rely on the accuracy of that determination. *Id.*

43. *Id.* (quoting Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring in part)).

44. *Id.* The *Leon* Court gives the example of a warrant that obviously fails to particularize the place to be searched or the items to be seized. *Id.*

45. *Id.*

46. *See id.* at 924.

47. *Id.* at 919 n.20.

48. *Id.* at 920 n.20 (quoting Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1413 (1977)).

49. 468 U.S. 981 (1984).

requisite changes.[50] The Supreme Judicial Court of Massachusetts excluded the evidence, holding that the police officer did act in good faith but that the United States Supreme Court had not recognized a good faith exception to the exclusionary rule.[51] The United States Supreme Court reversed, holding that the evidence was admissible under the newly announced good faith exception to the exclusionary rule. The Court "refuse[d] to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."[52] The Court found that the officer's reliance was objectively reasonable.[53]

Like *Leon*, *Sheppard* involved reasonable police reliance on authorization to search given by a neutral and detached magistrate. By its terms, the *Leon* exception is only applicable to searches that are given advance judicial authorization, upon which law enforcement officials reasonably relied constitutionally valid. Commentators reject the application of *Leon* in warrantless searches.[54] Application of the good faith exception to warrantless searches would remove the safeguard of independent review by a neutral and detached magistrate.[55] A police officer would make the initial determination whether a search is valid.[56] Therefore, no court has placed warrantless searches under the rubric of *Leon*.[57]

III. INSTANT OPINION

A. *The Applicability of the Fourth Amendment*

The Instant Opinion, written by Judge Kennedy, first considered whether United States participation in the search was substantial enough to trigger exclusionary rule analysis.[58] The relevant standard was taken from the earlier Ninth Circuit decision in *Stonehill v. United States*:[59] United States participation in the wiretap must have been so substantial

50. *Id.* at 984-87.

51. *Id.* at 987.

52. *Id.* at 989-90.

53. *Id.* at 988.

54. 1 W. LAFAVE, *supra* note 27, § 1.3(g), at 78; *cf. The Supreme Court, 1983 Term—Leading Cases*, 98 HARV. L. REV. 87, 109, 115 (1984) [hereinafter *Supreme Court*].

55. *Supreme Court, supra* note 53, at 115.

56. *Id.* at 116.

57. *See, e.g.*, United States v. Whiting, 781 F.2d 692, 698 (9th Cir. 1986); United States v. Morgan, 743 F. Supp. 1158, 1165 (6th Cir. 1984), *cert. denied*, 471 U.S. 1001 (1985).

58. United States v. Peterson, 812 F.2d 486, 490 (9th Cir. 1987).

59. 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

that it constituted a joint venture between the United States and the Philippine Governments.[60] Disagreeing with the lower court, the court of appeals held that United States involvement was sufficiently substantial as to constitute a joint venture. The court noted that United States DEA agents involved in the wiretap termed the police surveillance a "joint investigation" between themselves and the Philippine police.[61] The court further emphasized that the DEA agents were involved on a daily basis in translating the intercepted telephone messages and advising the Philippine police as to their relevancy.[62] The DEA agents in the Philippines "treated the affair as one in which the marijuana was destined for the United States, and so assumed a substantial role in the case."[63]

The court then held that Philippine search and seizure law "must be consulted at the outset as part of the determination whether or not the search was reasonable" and, therefore, in compliance with the fourth amendment to the United States Constitution.[64] Although conceding that Philippine law on the validity of warrantless wiretaps of the telephones of suspected drug smugglers was unclear[65] and that no Philippine court had ruled on the question,[66] the *Peterson* court construed the Philippine Constitution to prohibit warrantless wiretaps unless the public safety was threatened, and that "a discrete transaction to distribute drugs outside the Philippines" was not a threat to the public safety.[67] Therefore, the court found that the warrantless wiretap of the Manilla apartment was in violation of the Philippine Constitution, and, consequently in violation of the fourth amendment to the United States Constitution.[68]

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60. *Peterson,* 812 F.2d at 490.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* The court noted that the determination of the legality or illegality of the wiretap under Philippine law played only a part in determining whether the wiretap was reasonable under the fourth amendment. However, the status of the wiretap under Philippine law was the only aspect of the reasonableness of the wiretap addressed by the court. *Id.* at 490-91. The court later asserted that the local law of the Philippines "governs" whether the search is a reasonable one under the fourth amendment. *Id.* at 491.

65. *See id.* at 490.

66. *Id.* at 491.

67. *Id.* at 491. A key factor for the *Peterson* court was the "long history [of the Philippine courts] of construing their constitution in favor of individual liberties." *Id.*

68. *See id.*

B. *Extension of the Good Faith Exception to the Exclusionary Rule*

Having found the warrantless wiretap to be unconstitutional, the court next determined whether the marijuana should be excluded from trial as fruit of the unconstitutional wiretap.[69] Here the court applied the *Leon* exception to the exclusionary rule to allow admission of the evidence.[70] While recognizing that the *Leon* good faith exception to the exclusionary rule literally applied only to objectively reasonable police reliance on a facially valid warrant,[71] the court cited *Sheppard* to hold that the *Leon* reasoning applies to a foreign search in a foreign land when United States police reasonably rely on the oral assertions of foreign police that the search complied with foreign law.[72] The court reasoned that in a foreign country, United States police are at a disadvantage in judging the requirements of foreign law. The court concluded that "[h]olding them to a strict liability standard for failings of their foreign associates would be even more incongruous than holding law enforcement officials to a strict liability standard as to the adequacy of domestic warrants."[73] The reliance of the DEA agents on the "assurances of high ranking law enforcement authorities in the Philippines" that the wiretap complied with the "less than completely clear" Philippine search and seizure law was objectively reasonable in light of the "exigencies" of foreign searches[74] and, therefore, the marijuana, product of the unlawful warrantless wiretap, was properly admissible into evidence.[75]

IV. COMMENT

The *Peterson* court ignored two established precedents in holding that evidence seized in a foreign search in which United States agents substantially participated was admissible. First, the court rejected the prevailing view that the United States Constitution is the law against which United States actions abroad are to be judged and, instead, adopted the law of the country where the search was conducted as the benchmark.[76] Second, the court extended the good faith exception to foreign searches

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69. *Id.* at 491-92.

70. *Id.* "Although local law of the Philippines governs whether the search was reasonable, our law governs whether illegally obtained evidence should be excluded. . . ." *Id.* at 491.

71. *Id.* at 492.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 491; *see supra* notes 23-31 and accompanying text.

that are conducted without prior judicial authorization in contravention of the plain language of *Leon* and *Sheppard*.[77]

Aside from the disregard of the applicability of the Bill of Rights to United States actions beyond the shores of the United States, the court's adoption of foreign law as the standard against which overseas United States actions are to be judged suffers from another infirmity: United States police, operating in a foreign nation where a foreign language is used, cannot reasonably be expected to understand that nation's search and seizure law. The United States Supreme Court, in its recent fourth amendment opinions, has sought to furnish police with "bright line" rulings that clearly demarcate permissible and impermissible police behavior.[78] The *Peterson* court's adoption of foreign law, in contrast, makes police ignorance of the limits to their power almost inevitable. Indeed, police will be motivated to remain ignorant of search and seizure law. Police ignorance of the limits of their power will lead, in turn, either to police paralysis or to more frequent infringement upon individual rights.

Both *Leon* and *Sheppard* as well as their progeny have limited the good faith exception to objectively reasonable police reliance on prior judicial authorization.[79] Such authorization acts, at least theoretically, as a check against the overzealous actions of police who, in the process of ferreting out crime, may trample individual rights. To curb the functional inclination of police to stop crime at all costs, the independent and neutral magistrate rules on the validity of searches at a preliminary warrant hearing. The DEA agents in the Philippines obtained no such prior judicial authorization; instead, they relied on the assurances of Philippine law enforcement officials that the wiretap was valid. Philippine law enforcement officials, like United States law enforcement officials, are naturally more concerned with stopping crime than with safeguarding privacy rights.[80] The lack of a warrant, or any form of judicial authorization, should have foreclosed the *Leon* exception to the exclusionary rule.

However, United States agents operating overseas cannot be expected to obtain prior judicial search authorization in the usual domestic manner. It is indisputable that most foreign countries do not have the United States system of magistrates who decide whether a search is valid.[81] A better solution for meeting the exigencies of the foreign search would be

77. *See supra* notes 39-53.
78. *See supra* note 31 and accompanying text.
79. *See supra* notes 39-57 and accompanying text.
80. *See supra* note 33 and accompanying text.
81. *See supra* note 35 and accompanying text.

to craft an exception to the warrant requirement for foreign searches. Crafting such an exception would meet the exigencies inherent in the foreign search situation without applying foreign law and unduly stretching the *Leon* good faith exception. This exception for foreign searches could be justified on the ground common to most exceptions to the warrant requirement: police carrying out a search in a foreign land are not in a position to obtain a warrant.[82] In the rare searches that are so intrusive as to require prior judicial authorization, such as wiretaps that may intrude upon everything that a person says over a telephone for a long period of time, United States police could easily satisfy the warrant requirement by obtaining a telephone warrant from a United States magistrate.[83]

Jonathan Jay Cheatwood

82. *See supra* notes 35-36 and accompanying text.
83. *See supra* note 38 and accompanying text.