April 2003

An Appeal in Good Faith: Does the Leon Good Faith Exception to the Exclusionary Rule Apply in West Virginia

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AN APPEAL IN GOOD FAITH: DOES THE LEON GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLY IN WEST VIRGINIA?

I. INTRODUCTION ........................................................................................................720

II. HISTORICAL AND SUBSTANTIVE ANALYSIS OF THE
    FOURTH AMENDMENT .............................................................................................721
    A. History of Searches, Seizures and Warrants .....................................................721
    B. The Fourth Amendment to the Constitution of the
       United States ........................................................................................................724
       1. What Is a “Search”? .......................................................................................725
       2. What Is a “Seizure”? .......................................................................................725

III. THE EXCLUSIONARY RULE ................................................................................726
    A. Development of the Exclusionary Rule ..............................................................726
    B. Purposes of the Exclusionary Rule .......................................................................727
    C. Rationale for the Application of the Exclusionary Rule .....................................728
    D. Restrictions and Exceptions to the Exclusionary Rule .....................................730
    E. The Warrant Process ..........................................................................................732

IV. UNITED STATES V. LEON AND THE GOOD FAITH EXCEPTION .....................734
    A. Facts and Procedural History ............................................................................735
    B. Social Concerns of the Majority Regarding the
       Exclusionary Rule ...............................................................................................736
    C. The Court’s Analysis of the Exclusionary Rule, Its Purpose, and the Rule’s Effect on Magistrates and Judges .................................................................738

V. ESTABLISHMENT OF THE GOOD FAITH EXCEPTION .................................739
    A. The “Objectively Reasonable” Good Faith Requirement ....................................740
    B. Inapplicability of the Good Faith Exception ......................................................741
    C. Justice Brennan’s Dissent: The Dangers of the Good Faith Exception ...............743

VI. THE SUPREME COURT’S POST-LEON APPLICATION OF THE LEON
    GOOD FAITH ANALYSIS ......................................................................................745

VII. DIVERGENT INTERPRETATIONS OF THE EXCLUSIONARY RULE
    AND GOOD FAITH EXCEPTION IN STATE CRIMINAL JURISPRUDENCE...746
    A. Good Faith Exception Adopted and Upheld ......................................................747
    B. Good Faith Exception Rejected ..........................................................................748

VIII. WEST VIRGINIA: A LEON, GOOD FAITH STATE OR NOT? ......................750
    A. Historical Analysis of West Virginia Search and
       Seizure Law ........................................................................................................750
    B. The Exclusionary Rule, the Warrant, and the Requirements
I. INTRODUCTION

As Justice Franklin D. Cleckley wrote ten years ago in his comprehensive *Handbook on West Virginia Criminal Procedure*, “[l]itigants in West Virginia deserve to know at the earliest moment the significant law of the forum” regarding the applicability of the *Leon* good faith exception to the exclusionary rule in West Virginia. ¹ Today, there is still no clear indication that West Virginia will follow or reject the “good faith” defense. This note attempts to once again call upon the Supreme Court of West Virginia to declare at its next opportunity whether or not *Leon* applies in West Virginia.

The Fourth Amendment of the United States Constitution ensures that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”² Further, the Fourth Amendment imparts that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”³ In 1914, the United States Supreme Court, in an effort to give substance to the rights guaranteed under the Fourth Amendment, introduced the exclusionary rule, a remedy barring the introduction of evidence in a federal court secured through an illegal search.⁴ In 1961, the Court, in *Mapp v. Ohio*,⁵ extended the exclusionary rule to the states in an effort to give meaning to the incorporation of the Fourth Amendment through the Fourteenth Amendment. After a gradual erosion of the breadth of the application of the exclusionary rule, the Court established the good faith exception to the exclusionary rule in *United States v. Leon*.⁶

In *Leon*, the Supreme Court held that the exclusionary rule would not bar the admission of evidence when police obtained a search warrant from a

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¹ FRANKLIN D. CLECKLEY, *HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE* 228-29 (1993). Justice Cleckley is the Arthur D. Hodges Professor of Law at the West Virginia University College of Law (1969-present) and honorably served as Associate Justice for the West Virginia Supreme Court of Appeals.

² U.S. CONST. amend. IV.

³ Id.


judicial officer later determined invalid but relied upon in good faith. Since its adoption, the good faith exception has received immense ridicule by state courts, federal judges, legal commentators and civil rights activists. Indeed, numerous state courts have rejected the good faith exception and the Supreme Court’s analysis of the exclusionary rule in *Leon*. In reaction to concerns that the good faith exception undermines Fourth Amendment protections, many state courts have refused to adopt the good faith exception on state constitutional grounds. However, many other state courts have upheld the Supreme Court’s good faith exception, determining that the states’ protection against unreasonable searches and seizures and the exclusionary rule should be read consistently with federal law. The West Virginia Supreme Court of Appeals has refused to either reject or adopt the good faith exception as a matter of state law.

This note addresses the significance of the good faith exception in criminal procedure jurisprudence. Part II traces the historical and substantive analysis of the Fourth Amendment of the United States Constitution. Part III examines the United States Supreme Court’s establishment of the exclusionary rule. Parts IV, V and VI address the United States Supreme Court’s adoption of the good faith exception and the Court’s analysis of the good faith exception since *Leon*. Part VII analyzes the divergent state court interpretations of the good faith exception. Finally, Part VIII provides a brief historical review of the West Virginia Supreme Court of Appeals’ analysis of search and seizure law and argues that the West Virginia Supreme Court of Appeals should either adopt or reject the good faith exception. The author’s intention is to beckon the West Virginia Supreme Court of Appeals to declare the law in West Virginia at the earliest instance so as to put law enforcement, the judiciary, the state bar, and state citizens on notice concerning the law of the State of West Virginia on this significant issue.

II. HISTORICAL AND SUBSTANTIVE ANALYSIS OF THE FOURTH AMENDMENT

A. History of Searches, Seizures and Warrants

“The inception of legally authorized search and seizure is shrouded in the semi-obscurity of the early English common law.”\(^7\) Indeed, the history of the Fourth Amendment to the Constitution of the United States is steeped in “free speech, tax collection, smuggling, corruption, politics, and, much later, litigation.”\(^8\) “Warrants emerged in England during the early 1300s.”\(^9\) Issued by

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\(^8\) 1 John Wesley Hall, Jr., Search and Seizure 4 (2d ed. 1993); see also Jabob W. Landynski, Search and Seizure and the Supreme Court 30-48 (1966); Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 13-20 (1937).

the king and referred to as "general warrants,"\(^{10}\) these warrants gave the king's agents broad search powers as to extent and time, generally enduring until the death of the king.\(^ {11}\)

As general warrants became increasingly used to authorize search and seizures to enforce import duty laws and seize smuggled goods, the developing English common law struggled with little success to impose limits on the expansive government power to search.\(^ {12}\) Indeed, by the commencement of the seventeenth century, English magistrates possessed the power to question anyone and "search all suspected places for papers of a threatening political nature."\(^ {13}\) However, the mounting exploitation of general warrants was not limited to England. The English Parliament, in an effort to enforce various trade restrictions on the American colonies, also granted American customs officers the same powers of search and seizure by way of general search warrants that came to be known as "writs of assistance."\(^ {14}\) Through the extreme generality of their scope, writs of assistance were intrusive and abused.\(^ {15}\) Resentment against the rigorous use of the writs of assistance grew and various challenges ensued, both in England and in the American colonies, regarding the extraordinary power of the king's agents and American officers to search.\(^ {16}\)

In *Entick v. Carrington*,\(^ {17}\) Lord Camden found a general warrant invalid and void, holding that "[t]his is the first instance of an attempt to prove a modern practice of a private office to make and execute warrants to enter a man's house, search for and take away all his books and papers in the first instance, to be law, which is not to be found in our books."\(^ {18}\) Not only did Lord Camden find the warrants lacking probable cause and too general, he declared the overly broad power of the English government was "contrary to the genius of the law of England."\(^ {19}\)

Around the same period of the English attacks on the Crown's search and seizure practices, colonial intolerance for the writs of assistance mounted.

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\(^{10}\) General warrants were issued under the government's authority and permitted "invasions of the home and privacy of the citizens and the seizure of their private papers in support of charges, real or imaginary, made against them." Weeks v. United States, 232 U.S. 383, 390 (1914).

\(^{11}\) *Palmer, supra* note 9, at 70.

\(^{12}\) See *1 Hall, supra* note 8, at 5.

\(^{13}\) *Palmer, supra* note 9, at 70.

\(^{14}\) See *id.* at 72. The writs of assistance commanded all officers and subjects of the Crown to assist in their execution, thereby fashioning their name. *Id.*

\(^{15}\) *Id.*

\(^{16}\) See *id.* at 72-73.

\(^{17}\) *Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765).*

\(^{18}\) *Id.* at 818.

\(^{19}\) *Id.* at 812.
Colonists in general, and merchants in particular, deplored not only the economic hindrance of the writs issued to colonial customs officials but also the manner in which the writs were carried out. Facing a new issuance of writs following the death of King George II in 1760, colonists turned to the colonial court system to oppose the new writs. In Paxton’s Case, several Boston merchants denounced the writs and argued for a more just form of warrants, specifying homes to be searched and particular evidence to be seized. Although the merchants lost the challenge, the arguments set forth by the merchants and colonists inspired resistance and formed a “mosaic of rebellion,” leading to widespread interference with the execution of writs and signaling steps toward an outcry for independence. The colonists’ disdain for the writs of assistance was so immense, that, on the eve of the publication of the Declaration of Independence, “John Adams cited the broad British law enforcement powers as ‘the commencement of the controversy between Great Britain and America.’”

After the American Revolutionary War and leading up to the Constitutional Convention, several states enacted protection against unreasonable searches and seizures. State constitutional provisions attempting to regulate searches and seizures included requirements of oath or affirmation and phrases such as “unreasonable searches and seizures.” Once the Constitution was ratified and George Washington was inaugurated, the founders began work on the Bill of Rights, previously guaranteed to the states upon ratification of the Constitution. Although other constitutional amendments were hotly debated and contested, the Fourth Amendment was generally well received. Submitted by Congress to the states on September 25, 1789 and ratified by the required three-fourths of the states, the Bill of Rights, including the Fourth Amendment, was declared part of the Constitution on December 25, 1791.

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20 See PALMER, supra note 9, at 72.
21 See Quincy’s Reports 51-57 (1761).
22 See id; see also PALMER, supra note 9, at 72.
23 See PALMER, supra note 9, at 73.
24 Id. at 68.
25 See 1 HALL, supra note 8, at 12.
26 See LASSON, supra note 8, at 79-81. The Virginia Constitution, adopted three weeks prior to the Declaration of Independence, was the first state to ensure some protection against unreasonable searches and seizures. Id. at 79. Massachusetts, in 1780, was the first state to use the phrase “unreasonable searches and seizures.” Id. at 82.
27 See id. at 68. “During debate over the Bill of Rights, the Founders sought to protect the new republic from the evils it had recently suffered under heavy-handed rule.” Id. Pervasive throughout adoption of the Bill of Rights was the Founders’ conception of civil liberties, control of the government’s power, and the duty to protect citizens from the intrusiveness of the government. Id.
B. The Fourth Amendment to the Constitution of the United States

Resistance to the invasions under the general warrant system in England and the writs of assistance in the American colonies "established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers."

The "fundamental law" of the Fourth Amendment to the Constitution of the United States imparts: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .\" The "course of true law pertaining to searches and seizures . . . has not – to put it mildly – run smooth.\" While substantive analysis of the Fourth Amendment has been the source of immense litigation for over 200 years, the words of the Amendment do provide a starting point in analysis of the Fourth Amendment, the exclusionary rule, and, specifically, the good faith exception.

Although the extent of its protections and prohibitions are, to say the least, arguable, the Fourth Amendment clearly proscribes "unreasonable searches and seizures" of "persons, houses, papers and effects." Specifically, "the Fourth Amendment protects people, not places." Moreover, the Fourth Amendment "protects individual privacy against certain kinds of government intrusion." Understanding what constitutes a search and a seizure, and when these acts may be considered unreasonable is required prior to further analysis of the Fourth Amendment and the exclusionary rule.

Searches and seizures are discrete acts. The Fourth Amendment and the West Virginia Constitution provide that no unreasonable search or seizure shall be made. All unlawful searches and seizures are "per se" unreasonable within the meaning of the Fourth Amendment and the relevant state provision. Thus,

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29 U.S. CONST. amend. IV.
31 U.S. CONST. amend. IV.
33 Id. at 350.
35 See State v. Wills, 114 S.E. 261 (W. Va. 1922).
“unreasonable” usually refers to those acts that are unlawful or prohibited under the Fourth Amendment.

1. What Is a “Search”?

A search is “[a]n examination of a person’s body, property, or other area that a person would reasonably be expected to consider as private, conducted by a law-enforcement officer for the purpose of finding evidence of a crime.” Early on, the Supreme Court stated that a search entails an intrusive “quest by an officer of the law.” However, in Katz v. United States, the Supreme Court formulated the “expectation of privacy” standard, and has since maintained that, in order for a search to occur, the government must intrude on a legitimate expectation of privacy. Moreover, a government’s intrusion upon a justified expectation of privacy, regardless of the “presence or absence of a physical intrusion into any given enclosure,” also constitutes a search. West Virginia’s definition of a search is in accord with the Supreme Court’s “expectation of privacy” standard. An expectation of privacy is a prerequisite to a search; thus, a court cannot find an unreasonable search if a person cannot first reasonably expect privacy.

2. What Is a “Seizure”?

A seizure constitutes “[t]he act or an instance of taking possession of property by legal right or process . . . , a confiscation or arrest that may interfere with a person’s reasonable expectation of privacy.” A seizure of property occurs when “there is some meaningful interference with an individual’s possessory interests in that property.” The common definition of seizure of a person

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36 BLACK'S LAW DICTIONARY 1351 (7th ed. 1999). Black's Law Dictionary also provides a comprehensive inventory of specific sorts of searches with accompanying definitions. See id. at 1351-52.


40 Katz, 389 U.S. at 353 (rejecting the view previously held in Olmstead v. United States, 277 U.S. 438 (1928), and Goldman v. United States, 316 U.S. 129 (1941), that the absence of physical penetration into the place being searched foreclosed further Fourth Amendment inquiry); see also United States v. Karo, 468 U.S. 705, 712-13 (1984) (finding whether a trespass has occurred is not required to prove a violation of one’s expectation of privacy but may serve as “marginally relevant to the question of whether the Fourth Amendment has been violated”).


42 BLACK'S LAW DICTIONARY 1363 (7th ed. 1999).

43 United States v. Jacobsen, 466 U.S. 109, 113 (1984); see also Soldal v. Cook County, 506
in the context of the Fourth Amendment is meaningful interference, however brief, with an individual’s freedom of movement.\textsuperscript{44}

III. THE EXCLUSIONARY RULE

A. Development of the Exclusionary Rule

At common law, “the manner in which evidence was obtained did not affect its admissibility.”\textsuperscript{45} The Supreme Court, in \textit{Weeks v. United States}, created the exclusionary rule to redress the admission of evidence seized illegally by federal agents and offered in federal court.\textsuperscript{46} However, after \textit{Weeks}, under the “silver platter doctrine,”\textsuperscript{47} evidence unlawfully seized by state agents and turned over to federal agents could be used in federal courts.\textsuperscript{48} Twenty-one years later, the Supreme Court rejected the “silver platter doctrine” in \textit{Elkins v. United States},\textsuperscript{49} holding that “no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth.”\textsuperscript{50} As the federal system increasingly approved and accepted the exclusionary rule and as states individually adopted the exclusionary rule,\textsuperscript{51} the adoption of the exclusionary rule in state prosecutions seemed inevitable. In \textit{Mapp v. Ohio},\textsuperscript{52} in 1961, the Supreme Court, in overruling \textit{Wolf v.

\textsuperscript{44} See 1 CLECKLEY, supra note 1, at 204; see also Jacobsen, 466 U.S. at 112; Macon, 472 U.S. at 463 (applying definitions of search and seizure within the context of Jacobsen); Karo, 468 U.S. at 705.

\textsuperscript{45} 1 CLECKLEY, supra note 1, at 205. Other methods of redress, such as a right of action against the perpetrator of the illegal search, proved futile and provided no deterrent to government agents. \textit{Id.} at 206; see also Adams v. New York, 192 U.S. 585 (1904).

\textsuperscript{46} 232 U.S. 383 (1914).

\textsuperscript{47} Under the “silver platter doctrine,” the federal government could use the fruits of an illegal search or seizure conducted by state officials. See Byars v. United States, 273 U.S. 28 (1927).

\textsuperscript{48} Lustig v. United States, 338 U.S. 74 (1949); see also 1 CLECKLEY, supra note 1, at 206.

\textsuperscript{49} 364 U.S. 206 (1960).

\textsuperscript{50} Id. at 215. In \textit{Elkins}, the Supreme Court cited \textit{Wolf v. Colorado}, 338 U.S. 25 (1949), in which the Court held that the Fourth Amendment had been incorporated into the due process clause of the Fourteenth Amendment, thereby finding that \textit{Wolf} removed the doctrinal foundation of the “silver platter rule.” \textit{Elkins}, 364 U.S. at 213. The holding of \textit{Elkins} was limited, in that evidence seized by state officers could not be used in federal courts. \textit{Id.}

\textsuperscript{51} See People v. Cahan, 282 P.2d 905 (Cal. 1955) (“Experience has demonstrated . . . that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures.”).

\textsuperscript{52} 367 U.S. 643 (1961) (overruling \textit{Wolf v. Colorado}, 338 U.S. 25 (1949)). In \textit{Mapp}, the Supreme Court of Ohio refused to suppress illegally seized evidence, citing the Court’s refusal to
GOOD FAITH EXCEPTION IN WEST VIRGINIA

Colorado, 53 extended the exclusionary rule to the states and held that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." 54 The basis of the Court's incorporation of the exclusionary rule to the states was threefold: 1) Most states were applying the exclusionary rule; 2) If states could use the evidence seized then the incorporation of the Fourth Amendment would be meaningless; and 3) To hold otherwise would invite anarchy. 55

B. Purposes of the Exclusionary Rule

Rights delegated to the people of the United States under the Constitution presumably entail some remedy for their violation. However, the Fourth Amendment does not explicitly or implicitly provide a remedy for the violation of a Fourth Amendment right. 56 The Supreme Court has interpreted the text of the Fourth Amendment and ultimately concluded that an exclusionary rule is the remedy for Fourth Amendment violations. 57 The exclusionary rule is a remedy "to give substance and meaning to the Fourth Amendment's prohibition against unreasonable searches and seizures." 58 From 1790, when the Fourth Amendment was adopted, until Weeks in 1914, there was no rule excluding illegally seized evidence. 59 The Supreme Court has applied various rationales for the exclusionary rule. 60 Indeed, since 1914 the Court's rationale for the exclusionary rule has evolved from its basis of judicial integrity and personal rights in Weeks, 61 to police deterrence in Wolf v. Colorado, 62 to police deterrence and selectively incorporate the exclusionary rule to the states in Wolf. Id. at 645-46. In Wolf, although the Supreme Court applied the security against unreasonable searches and seizures to the states via the due process clause of the Fourteenth Amendment, it gave the states the discretion in adopting any method to deter unreasonable searches and seizures. See 1 CLECKLEY, supra note 1, at 207.

Mapp, 367 U.S. at 655.
Id. at 655-60.
Id.
See 1 HALL, supra note 8, at 143.
Courts throughout this period, almost uniformly, did not inquire into the methods of obtaining evidence; thus, the admissibility of evidence was not affected by the illegality of the means through which a party obtained the evidence. Olmstead v. United States, 277 U.S. 438, 467-69 (1928). The first effort to suppress evidence obtained via an illegal search and seizure in the Supreme Court came in 1904 in Adams v. New York, 192 U.S. 585 (1904). The Court upheld the admission of the evidence asserting that "the courts do not stop to inquire as to the means by which the evidence was obtained." Id. at 594-95.


See 1 HALL, supra note 8, at 144-49. This author would argue that a deterrence rationale
judicial integrity in *Elkins v. United States*[^63] and *Mapp v. Ohio*,[^64] and finally, to
total reliance on the deterrence rationale in *United States v. Leon*.[^65]

C. **Rationale for the Application of the Exclusionary Rule**

In *Weeks v. United States*, the Supreme Court evidenced its intent to
protect citizens’ Fourth Amendment rights when it held, “[I]f letters and private
documents can thus be [illegally] seized and held and used in evidence against a
citizen accused of an offense, the protection of the Fourth Amendment declaring
his right to be secure against such searches and seizures is of no value.”[^66]
Supporting this proposition, the Court then noted that “[t]he efforts of the courts and
their officials to bring guilty to punishment, praiseworthy as they are, are not to
be aided by the sacrifice of those great principles established by years of en-
deavor and suffering which have resulted in their embodiment in the fundamen-
tal law of the land.”[^67]

The Court first introduced the deterrence rationale for the exclusionary
rule in *Wolf v. Colorado*[^68] in 1949. The assumption of the deterrence rationale
is that police are less likely to perform illegal searches and seizures if the exclu-
sionary rule will be applied to the illegally seized evidence in the subsequent
trial. Indeed, the deterrence rationale was used in repudiating the “silver platter
doctrine” in *Elkins v. United States*,[^69] when the Court described the purpose of
the exclusionary rule “to deter – to compel respect for the constitutional guar-
anty in the only available way – by removing the incentive to disregard it.”[^70]

In *Mapp v. Ohio*,[^71] the Supreme Court supplied two justifications for the
extension of the exclusionary rule to the states: to deter the disregard of the
rights inherent in the Fourth Amendment and to preserve judicial integrity.[^72]

[^64]: 364 U.S. 206 (1960).
[^68]: *Id.*
[^70]: *Id.* at 217; see 1 HALL, *supra* note 8, at 156.
[^72]: *Id.* at 658-60.
First, the Court emphasized the deterrence rationale as articulated by *Elkins*. The Court recognized that by not adopting an exclusionary remedy, states encouraged police misconduct and violations of citizen's Fourth Amendment rights. Thus, "by admitting evidence unlawfully seized, [states] serve to encourage disobedience to the Federal Constitution which it is bound to uphold." Just as criminal penalties likely deter many from committing violations of criminal laws, the Court reasoned the exclusionary rule may also deter police officers and others from violating constitutional rights if they know that illegally seized evidence will not be admitted in subsequent criminal trials.

A second justification for the exclusionary rule detailed in *Mapp* was "the imperative of judicial integrity." The Court noted that, although criminals may inevitably go free as a result of the suppression of illegally seized evidence, "it is the law that sets him free." To fetter anarchy and the abandonment of its own existence, the government must obey its own laws to avoid the destruction of "the entire system of constitutional restraints on which the liberties of the people rest."

Since *Mapp*, the efficacy of the deterrence rationale has been the subject of debate. In *United States v. Calandra*, the Court examined whether deterrence was served by the application of the exclusionary rule. In engaging in a cost-benefit analysis of exclusion and holding that the exclusionary rule would not be extended to grand jury proceedings, Justice Powell wrote, "We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury." Questioning the deterrence rationale's effect and conception, Justice Brennan, dissenting in *Calandra*, found the purpose of deterrence "was at best only a hoped-for effect ... Indeed, there is no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formulation." Nonethe-

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73 Id. at 656 (quoting *Elkins*, 364 U.S. at 217).
74 Id.
75 Id.
76 Id. at 659 (quoting *Elkins*, 364 U.S. at 222).
77 Id.
78 Id. at 660.
81 *See id.; see 1 HALL, supra note 8, at 157.*
82 *Calandra*, 414 U.S. at 351-52.
83 414 U.S. at 356 (Brennan, J., dissenting).
less, "Calandra marks the demise of the judicial integrity rationale and the rise of deterrence as the primary modern justification for the exclusionary rule."\textsuperscript{84}

The Rehnquist Court's de-emphasis of the judicial integrity justification of the exclusionary rule indicates that the deterrence rationale has become the primary justification for the exclusionary rule.\textsuperscript{85} The Court even held that the preservation of judicial integrity has only a "limited role... in the determination whether to apply the [exclusionary] rule in a particular context."\textsuperscript{86} The Court now generally maintains that deterrence is the "'prime purpose' of the rule, if not the sole one."\textsuperscript{87}

D. Restrictions and Exceptions to the Exclusionary Rule

Like many judicially created rules or remedies, the exclusionary rule, since its inception, has been restricted to those areas where the rule’s objectives may be accomplished.\textsuperscript{88} Generally, absent other exceptions, only evidence unlawfully seized in searches conducted in a government capacity is inadmissible per the exclusionary rule.\textsuperscript{89} Thus, evidence unlawfully seized by an individual acting in a private capacity is not within the scope of the exclusionary rule.\textsuperscript{90} The Court has limited the exclusionary rule's application to criminal trials in which the issue is guilt or innocence, thereby excluding its applicability to grand jury proceedings\textsuperscript{91} and habeas corpus proceedings.\textsuperscript{92} Similarly, the Court has restricted the exclusionary rule's application in federal civil proceedings.\textsuperscript{93} In

\textsuperscript{84} I HALL, supra note 8, at 160.  
\textsuperscript{86} Id. at 485.  
\textsuperscript{88} See United States v. Calandra, 414 U.S. 338 (1974). As discussed before, the exclusionary rule's objectives are subject to immense debate.  
\textsuperscript{89} See Burdeau v. McDowell, 256 U.S. 465 (1921).  
\textsuperscript{90} Id.; Coolidge v. New Hampshire, 403 U.S. 443 (1971); see also Comment, Seizures by Private Parties: Exclusion in Criminal Cases, 19 STAN. L. REV. 608 (1967).  
\textsuperscript{91} See Calandra, 414 U.S. 338. In Calandra, the Supreme Court declined to allow grand jury witnesses to refuse to answer questions based on evidence obtained from unlawful search or seizures. Applying a balancing test, the Court held, "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." Id. at 351.  
\textsuperscript{92} Stone v. Powell, 428 U.S. 465, 485-88 (1976). In Powell, the Court emphasized that applying the exclusionary rule in federal habeas corpus proceedings would not reduce the rule's deterrent effect or government's interest in promoting judicial integrity. United States v. Leon, 468 U.S. 897, 909 (1984), cited Powell as holding, "a state prisoner who has been afforded a full and fair opportunity to litigate a Fourth Amendment claim may not obtain federal habeas relief on the ground that unlawfully obtained evidence had been introduced at his trial."  
UNITED STATES v. JANIS,94 the Court permitted the use of illegally seized evidence in state civil proceedings because the deterrent effect on police misconduct had already been served through exclusion in the state criminal trial and further deterrence could not outweigh the substantial social costs of applying the exclusionary rule in a tax proceeding.95

Other restrictions placed upon the application of the exclusionary rule include the standing requirement and the use of illegally seized evidence for purposes of impeachment.96 In Rakas v. Illinois,97 the Court pronounced a standing requirement in which the exclusionary rule could only be applied to cases in which the fruits of the illegal search or seizure are used against the victim of the police misconduct. In United States v. Havens,98 evidence otherwise inadmissible in the state’s case-in-chief was deemed admissible to impeach statements through cross-examination made by a defendant during the defendant’s direct examination.

The Court has also applied several doctrines prescribing the reach and extent to which the exclusionary rule may be applied. Some of the significant doctrines in exclusionary rule analysis include the poisonous tree doctrine,99 the independent source doctrine,100 the causal relationship requirement,101 and the inevitable discovery rule.102 Most importantly, at least for the purposes of this note, in 1984, the Supreme Court fashioned the good faith exception to the exclusionary rule. Under the good faith exception to the exclusionary rule, the Fourth Amendment does not prohibit the introduction of evidence obtained by a police officer acting in reasonable reliance on a search warrant that subsequently

94 Id.
95 Id. at 453-55.
97 Id.
98 446 U.S. 620 (1980).
99 Segura v. United States, 468 U.S. 796 (1984). According to the “poisonous tree doctrine,” evidence later discovered and found derivative of an illegal search or seizure is subject to the exclusionary rule. Id. at 804; see also State v. Goodmon, 290 S.E.2d 260 (W. Va. 1981).
101 See Wong Sun v. United States, 371 U.S. 471 (1963). In Wong Sun, the Court found a statement otherwise subject to the exclusionary rule had become sufficiently attenuated from the illegality to dissipate the taint. For evidence to be excluded, “there must be a causal relationship between the particular violation and the discovery of the evidence sought to be excluded.” I CLECKLEY, supra note 1, at 210.
102 See Nix v. Williams, 467 U.S. 431 (1984). In adopting the inevitable discovery doctrine, the Supreme Court held, “If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.” Id. at 444.
is determined invalid. The Court justified its creation of the exclusionary rule by emphasizing the deterrence rationale in calculating the social costs of implementing the rule where police reasonably act within the perimeters of the Fourth Amendment.

E. The Warrant Process

The Supreme Court has repeatedly emphasized a constitutional preference for the warrant. Indeed, the second portion of the Fourth Amendment, in what is often referred to as the "warrant clause," states, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Generally, before a government agent can conduct a search or seizure, he must present an affidavit to obtain a warrant from a magistrate to determine whether he has adequate grounds to conduct the search or seizure. Once a warrant is approved and signed by the judge, the officer may execute the warrant.

To determine the sufficiency and validity of the warrant and the reasonableness of the search or seizure, the Court and, to some extent, the Fourth Amendment requires that the warrant be based on probable cause, supported


104 Id. at 906-08.


106 The first clause of the Fourth Amendment, providing "the right of the people to be secure against unreasonable searches and seizures, shall not be violated," is referred to as the "reasonableness clause." The relationship between the two clauses of the Fourth Amendment is subject to immense controversy. Generally, there are two schools of thought concerning the correlation between the two clauses. One analysis of the clauses is that the two clauses are linked, in that, "the Warrant Clause defines and interprets the Reasonableness Clause." Tracey Maclin, When the Cure for the Fourth Amendment Is Worse Than the Disease, 68 S. CAL. L. REV. 1, 20 (1994). A warrant is always required in order to conduct any search and seizure following this interpretation. Indeed, in endorsing this view, the Supreme Court, in Katz v. United States, 389 U.S. 347 (1967), held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . ." Id. at 357. Alternatively, the other school of thought maintains that search warrants are not constitutionally required. Accordingly, the two clauses are considered independent of each other; that is, the "reasonableness clause" only requires that the search or seizure be reasonable, and the "warrant clause" details when warrants shall not be issued. See Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757 (1994).

107 U.S. CONST. amend. IV.

108 "Probable cause" is generally defined as a sufficient quantum of evidence to convince a reasonable person that a crime has been committed and the fruits of the crime are likely to be present. BLACK'S LAW DICTIONARY 1219 (7th ed. 1999); see also Texas v. Brown, 460 U.S. 730 (1983); Berger v. New York, 388 U.S. 41 (1967). Probable cause is also determined, in situations where the probable cause is based on an informant's tip, via a "totality of the circumstances" test.
by an "Oath or affirmation," a particular description of the objects to be searched and/or seized, and that the magistrate issuing the warrant be neutral and detached. Over time, the Court’s test for sufficiency and validity of warrants has changed.

In *Aguilar v. Texas* and *Spinelli v. United States*, the Court originally developed a two-prong test (otherwise known as the "basis of knowledge" and the "veracity" prongs) to describe how hearsay involving an informant’s tip used as probable cause should be evaluated. Before *Aguilar*, a warrant could not be issued where the existence of probable cause was based upon a conclusory affidavit or mere suspicion. In *Jones v. United States*, hearsay was sufficient to serve as the basis for the warrant "so long as a substantial basis for crediting the hearsay is presented." Under *Aguilar*, the search warrant must show the informant’s "basis of knowledge" and must contain information so the magistrate can determine the informant’s veracity by showing the informant’s credibility or reliability. In *Spinelli*, the Court allowed corroborating information to support the informant’s story.

The second test utilized by the Court in determining the validity of an affidavit to obtain a search warrant was adopted in *Illinois v. Gates*. The
growing complexity of the two-prong framework to determine probable cause prompted the Court in *Gates* to adopt the "totality of the circumstances" test.\(^{120}\) The Court held the reliability and veracity elements of the informant's tip "are all highly relevant in determining the value of his report" and that "these elements should [not] be understood as entirely separate and independent requirements."\(^{121}\)

The warrant process is critical in determining the existence of probable cause that justifies the issuance of a search warrant. Because the fruits of a search conducted pursuant to a warrant lacking probable cause are subject to exclusion per the exclusionary rule, police and judges must find sufficient probable cause to ensure the admissibility of crucial evidence seized in a search.

At times, however, a warrant issued by a magistrate or judge and executed by the police in reasonable reliance of the magistrate’s determination of its validity is subsequently held invalid. In this situation the question becomes, "Does the exclusionary rule prohibit the introduction of evidence seized via a warrant subsequently determined invalid?" In *United States v. Leon*,\(^ {122}\) the Court ruled that the Fourth Amendment does not bar the introduction of the evidence obtained where the police officer conducting the search acted in reasonable reliance on a warrant that is subsequently found to be invalid.

IV.  *UNITED STATES V. LEON AND THE GOOD FAITH EXCEPTION*\(^ {123}\)

*Leon* is perhaps the most disregarded Supreme Court decision from the Rehnquist court. At issue in *Leon* was whether the exclusionary rule, as applied to the Fourth Amendment of the United States Constitution, should be modified so as to allow the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause.\(^ {124}\) Indeed, much of the Court’s opinion in *Leon* is critical of the exclusionary rule, focusing on the social costs of its application. Perhaps, most importantly, the Court, in concluding that the exclusionary rule is not a constitutionally compelled corollary of the

\(^{120}\) *Id.* at 238.

\(^{121}\) *Id.* at 230.


\(^{123}\) In fact, the Supreme Court had already adopted the good faith exception to constitutional violations. *See* 1 HALL, *supra* note 8, 178-79. In one example, *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court upheld a pre-*Miranda* confession because the officers acted in good faith in failing to comply with *Miranda*. *Id.* at 447. In finding the officers acted in good faith, the Court, in turn, held "the deterrence rationale [of the exclusionary rule] loses much of its force." *Id.; see also* Michigan v. De Fillippo, 443 U.S. 31 (1979). The *De Fillippo* Court, in declining to suppress evidence obtained pursuant to a search incident to an arrest made under a supposedly valid ordinance later held unconstitutional, held the officer was not "required to anticipate that a court would later hold the ordinance unconstitutional." *Id.* at 38.

\(^{124}\) *Leon*, 468 U.S. at 900.
Fourth Amendment,\textsuperscript{125} found additional ammunition to narrow the scope of the rule. Thus, rooted in the belief that there is insufficient justification to apply the exclusionary rule in such a case, the Court created the good faith exception, holding that "the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions."\textsuperscript{126}

\textbf{A. Facts and Procedural History}

Based on information provided to the Burbank, California police department by a confidential informant of unproven reliability, the Burbank Police instigated an extensive investigation of two individuals, Armando Sanchez and Patsy Stewart, concerning the distribution of large quantities of drugs.\textsuperscript{127} During the investigation, the police witnessed Ricardo Del Castillo arrive at and leave the other individuals' residence with a small paper sack.\textsuperscript{128} Del Castillo's probation records indicated that Alberto Leon was a former employer of Del Castillo.\textsuperscript{129} Leon, with a history of previous drug charges, became a focus of the investigation after the Burbank police learned another informant had told the Glendale, California police that Leon stored large quantities of drugs at his residence in Glendale.\textsuperscript{130} Later in the investigation, the police observed several individuals arrive at the homes of Sanchez, Stewart, and Del Castillo, and leave with small packages in hand.\textsuperscript{131}

Based on these and other observations, Officer Cyril Rombach of the Burbank Police Department prepared an application for a warrant to search the residences and automobiles of Sanchez, Stewart, Del Castillo and Leon for an extensive list of items related to drug-trafficking activities.\textsuperscript{132} After several deputy district attorneys reviewed the officer's warrant application, "a facially valid search warrant was issued in September of 1981 by a State Superior Court Judge."\textsuperscript{133} The "ensuing searches produced large quantities of drugs,"\textsuperscript{134} and other evidence relating to the trafficking of drugs, resulting in a grand jury in-

\textsuperscript{125} Id. at 905-06; see also id. at 927 (Blackmun, J., concurring) (remarking that the purpose of the exclusionary rule is not based on the Constitution, but on deterrence of unconstitutional police practices).

\textsuperscript{126} See id. at 905.

\textsuperscript{127} Id. at 901.

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 901-02.

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 902.

\textsuperscript{133} Id.

\textsuperscript{134} Id.
dictment of "conspiracy to possess and distribute cocaine and a variety of substantive counts" against all the above mentioned individuals.\textsuperscript{135}

The District Court held an evidentiary hearing and granted the defendants' motions to suppress, in part,\textsuperscript{136} the evidence seized pursuant to the warrant, concluding that the affidavit prepared by Officer Rombach was "insufficient to establish probable cause."\textsuperscript{137} However, in rejecting the prosecution's argument that the exclusionary rule should not apply where the police seized evidence in reasonable, good faith reliance on a search warrant, the court did acknowledge that Officer Rombach acted in good faith.\textsuperscript{138} The Court of Appeals for the Ninth Circuit affirmed the District Court order, concluding that the affidavit did not establish probable cause because the information provided by the informant was inadequate under both prongs of the two-part test established in \textit{Aguilar v. Texas}\textsuperscript{139} and \textit{Spinelli v. United States}.\textsuperscript{140} In the Government's petition for certiorari, it expressly declined to challenge the District Court's findings that the search warrant lacked probable cause, and only presented the question "whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective."\textsuperscript{141}

B. Social Concerns of the Majority Regarding the Exclusionary Rule

The majority in \textit{Leon},\textsuperscript{142} in finding that the exclusionary rule is not a "necessary corollary of the Fourth Amendment,"\textsuperscript{143} or perhaps even constitu-


\textsuperscript{136} \textit{Id.} at 903. The district court declined to suppress all of the evidence on the basis that none of the defendants had standing to challenge all of the searches. \textit{Id.}

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{Id.} at 903-04. The finding of good faith by the district court doubtlessly made this case an ideal one in which the government could argue for the adoption of a good-faith exception to the exclusionary rule.

\textsuperscript{139} 378 U.S. 108 (1964).

\textsuperscript{140} 393 U.S. 410 (1969). Under the \textit{Aguilar-Spinelli} test, a court determines probable cause derived from information from an informant by testing the informant's veracity. The test inquires into the informant's credibility or reliability, and how the informant acquired the information. Incidentally, the Supreme Court, in the term before hearing \textit{United States v. Leon}, abandoned the \textit{Aguilar-Spinelli} test for probable cause in \textit{Illinois v. Gates}, 462 U.S. 213 (1983), substituting a "totality of the circumstances" test.

\textsuperscript{141} \textit{Leon}, 468 U.S. at 905.


\textsuperscript{143} \textit{Id.} at 905-06 (citing Mapp v. Ohio, 367 U.S. 643, 651, 655-57 (1961); Olmstead v. United
tionally required, first acknowledged that the Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons."\textsuperscript{144} In so doing, the Court held that whether the suppression of evidence via the exclusionary rule is appropriately applied in a particular question is a separate question from whether the Fourth Amendment was violated.\textsuperscript{145} The Court held, that the former question "must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective."\textsuperscript{146}

The Court continued its balancing of the costs and benefits of applying the exclusionary rule in such a case by evaluating its concern of the "substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights."\textsuperscript{147} First, the Court recognized that an unfortunate and natural consequence of the exclusionary rule's application is that some guilty defendants go free where the courts apply such an "interference with the criminal justice system's truth-finding function."\textsuperscript{148} Indeed, the Court identified that when officers act in good faith, "the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."\textsuperscript{149} The Court, finding that the exclusionary rule had been "restricted to those areas where its remedial objectives \[were\] thought most efficaciously served,"\textsuperscript{150} in essence, held the penalty inflicted by a Fourth Amendment violation is often disproportionate to the wrong. As a result, the Court laid a foundation for an exception, holding that an "indiscriminate application of the exclusionary rule . . . may well 'generate disrespect for the law and administration of justice.'"\textsuperscript{151}

\begin{footnotesize}
\textsuperscript{145} Id. (citing Illinois v. Gates, 462 U.S. 213 (1983)).
\textsuperscript{146} Id. at 906-07.
\textsuperscript{147} Id. at 907-08.
\textsuperscript{148} Id. at 907.
\textsuperscript{149} Id. at 908 (citing Stone, 428 U.S. at 490).
\textsuperscript{151} Leon, 468 U.S. at 908 (quoting Stone, 428 U.S. at 491).
\end{footnotesize}
C. The Court's Analysis of the Exclusionary Rule, Its Purpose, and the Rule's Effect on Magistrates and Judges

The Leon Court, in defining the scope of the exclusionary rule, assessed numerous Supreme Court decisions in which the Court had either failed to extend the reach of the exclusionary rule or enlisted exceptions to the exclusionary rule. In doing so, the Court attempted to weaken the impact and scope of the exclusionary rule in order to justify its creation of the good faith exception. The Court first noted the exclusionary rule's inapplicability in habeas corpus proceedings,\(^1\) grand jury proceedings,\(^2\) federal civil proceedings,\(^3\) and evidence unlawfully seized from co-defendants or others against a defendant.\(^4\) Next, the Court addressed circumstances in which it had held evidence generally inadmissible under the exclusionary rule. For example, "evidence obtained in violation of the Fourth Amendment and inadmissible in the prosecution's case-in-chief may be used to impeach a defendant's direct testimony."\(^5\) Moreover, the Court noted that it declined to adopt a \textit{per se} inadmissibility rule that would exclude all evidence discovered through a chain of causation begun via an illegal arrest.\(^6\)

The Court's use of a balancing test considering the costs and benefits of the application of the exclusionary rule was key in the Court's restrictions of the rule's application, and ultimately provided "strong support" for the Court's adoption of the good faith modification. Acknowledging the Court's preference for warrants,\(^7\) the Court detailed three circumstances where it had inquired into the warrant process and ultimately excluded evidence unconstitutionally seized.\(^8\) However, the Court acknowledged its failure to set forth a rationale for suppressing evidence in two of these circumstances in which the errors were concededly committed by judges or magistrates: where the magistrate fails to perform his or her functions in a neutral or detached manner, or where a warrant

\(^{152}\) See Stone, 428 U.S. 465.

\(^{153}\) See Calandra, 414 U.S. 338.

\(^{154}\) See Janis, 428 U.S. 433.


\(^{156}\) Leon, 468 U.S. at 910 (citing Walder v. United States, 347 U.S. 62 (1954)).

\(^{157}\) Id. at 910-11 (citing Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S. 471 (1963)).

\(^{158}\) Id. at 913-14.

\(^{159}\) Id. at 914-15; see Illinois v. Gates, 462 U.S. 213, 239 (1983) (noting that a court may ratify a warrant even though it is void of probable cause); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-27 (1979) (noting that a court may inquire into a magistrate's failure to remain neutral and detached); Franks v. Delaware, 438 U.S. 154 (1978) (noting that a court has the power to inquire into situations involving the reckless falsity of an affidavit).
is simply issued based on a bare bones affidavit. The Court found that reliance on the exclusionary rule in these circumstances is misplaced. The Court then held that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." Thus, the fact that the police secured a warrant in Leon – admittedly a defective one – was important in the Court’s analysis of the value of the exclusionary rule in this case.

The exclusionary rule’s primary purpose is to deter police misconduct, and the Court could not conclude that excluding evidence obtained using an invalid warrant would deter magistrates or judges from misconduct or lack of care in issuing warrants. Given that judges “have no stake in the outcome of particular criminal prosecutions . . . the threat of exclusion cannot be expected significantly to deter them.” The Court could not conclude that finding the exclusionary rule inapplicable to cases of judicial misconduct would “reduce judicial officers’ professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.”

Thus, the Court held that exclusion was not warranted where the police act in good faith and the issuing magistrate fails to uphold his or her duty. Specifically, the Court held, “suppression of evidence obtained pursuant to a warrant should be ordered . . . only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.” In cases where a judge erred in issuing a warrant, the Court determined that exclusion of evidence “will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances.” In short, the Court’s analysis of the exclusionary rule was summarized when it held that, “penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”

V. ESTABLISHMENT OF THE GOOD FAITH EXCEPTION

According to Leon, evidence obtained pursuant to a search warrant later declared invalid may be introduced in a criminal trial, if a reasonable well-

161 Id. at 916.
162 Id.
163 Id. at 917.
164 Id.
165 Id. at 918.
166 Id. at 919-20.
167 Id. at 921.
trained officer would have believed that the warrant was valid. This has come
to be known as the "good faith exception." However, in adopting the good faith
exception, the Court set out parameters in defining its standard of reasonableness and exactly when the good faith exception applies.

A. The "Objectively Reasonable" Good Faith Requirement

The Court emphasized that the standard of reasonableness adopted to
test the officer's reasonable good faith is an objective one. The inquiry into
good faith is limited to the objectively ascertainable question of whether a rea-
sonably well-trained officer would have known the search was illegal despite
the magistrate's authorization. While many of the objections to a good faith
exception "assume that the exception will turn on the subjective good faith of
individual officers," the Court's analysis in Leon disposed of this assump-
tion. Evidence is not admissible merely on a finding that the individual offi-
cer(s) involved in the search honestly believed that the warrant the officer was
executing was valid. Clarifying that the officer's reliance on the magistrate's
probable cause determination and the technical sufficiency of the warrant must
be objectively reasonable, the Court noted, "it is clear that in some circum-
stances the officer will have no reasonable grounds for believing that the war-
rant was properly issued." The Court determined that all the circumstances
surrounding the application for the warrant and the search itself may be consid-
ered in the inquiry of the officer's objective reasonableness, including "whether
the warrant had previously been rejected by a different magistrate."

Undoubtedly, the Court utilized previous search and seizure cases to
identify its objective standard of reasonable good faith. "Grounding the
modification in objective reasonableness . . . retains the value of the exclusion-
ary rule as an incentive for the law enforcement profession as a whole to con-
duct themselves in accord with the Fourth Amendment." Moreover, the Court
reasoned that the objective standard requires "officers to have a reasonable

169 Id. at 919-21.
170 Id. at 919 n.20.
171 Id. at 920-22.
172 Id. at 919-22.
173 Id. at 922-23.
174 Id. at 922 n.23.
175 Id. at 922; see Harlow v. Fitzgerald, 457 U.S. 800 (1982).
176 Leon, 468 U.S. at 920 n.20 (quoting Illinois v. Gates, 462 U.S. 213, 261 n.15 (White, J.,
concurring)).
knowledge of what the law prohibits."\(^{177}\) Despite the Court’s attempt to avoid unnecessary excursions “into the minds of police officers [which] would produce a grave and fruitless misallocation of judicial resources,”\(^{178}\) the Court did suggest that a subjective bad faith may be an appropriate line of inquiry at a suppression hearing.\(^{179}\) Indeed, the Court may apply a subjective standard in those isolated cases where the executing officers subjectively understand that the warrant they are serving is invalid, even though a typical, “reasonable prudent officer” would not have known the warrant was invalid.

B. **Inapplicability of the Good Faith Exception**

Mindful of its previous emphasis of the exclusionary rule’s deterrent purposes, the Court defended the good faith exception, noting that the Fourth Amendment violations in *Leon* were premised on judicial error, rather than errors by police.\(^{180}\) This reasoning led the Court to name when and where a good faith argument will be effective and appropriate. Although *Leon* represents an exception to the exclusionary rule, the Court discussed five instances in which claims of good faith would be inapplicable.\(^{181}\) In addition to these situations detailed by the Court, the good faith exception does not apply in searches conducted without a warrant, nor does it cover improperly executed warrants.\(^{182}\)

First, the Court concluded suppression would remain an appropriate remedy “if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.”\(^{183}\) Second, the Court ruled that the *Leon* good faith exception would not apply if the magistrate failed to abide by his or her neutrality requirement such that a reasonable officer would have realized that the magistrate was failing to perform his or her duty in such a manner.\(^{184}\) Particularly, evidence is properly excluded if the “issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York.*”\(^{185}\) Third, the Court determined that an officer cannot rely on a


\(^{178}\) *Id.* at 922 n.23 (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

\(^{179}\) *Id.* at 921-23.

\(^{180}\) *Id.* at 921.

\(^{181}\) *Id.* at 923.

\(^{182}\) *Id.* at 923-24.

\(^{183}\) *Id.* at 923 (citing Franks v. Delaware, 438 U.S. 154 (1978)).

\(^{184}\) *Id.* at 923.

\(^{185}\) *Id.*; see *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). The Court in *Lo-Ji Sales* found that the magistrate violated his duty to be neutral when the magistrate accompanied the police to
warrant issued in good faith by a magistrate based on a bare bones affidavit.\textsuperscript{186} Fourth, the \textit{Leon} good faith exception would not pertain where a warrant is "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid."\textsuperscript{187} A reasonable officer may not, in good faith, rely upon a warrant that fails to particularize the place to be searched or the things to be seized – both Fourth Amendment requirements for a search warrant.\textsuperscript{188} Lastly, the Supreme Court held that the good faith exception is not applicable where the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."\textsuperscript{189}

In adopting the good faith exception to the exclusionary rule and applying it to the facts of \textit{Leon}, the Court determined that none of the circumstances listed above were present. Thus, the Court determined that:

\begin{quote}
In the absence of an allegation that the magistrate abandoned his detached and neutral role,\textsuperscript{190} in the absence of reckless or dishonest preparation of the affidavit by the officer, in the presence of a warrant application supported by much more than a "bare bones" affidavit,\textsuperscript{191} and where there was at least sufficient evidence to create some disagreement as to the existence of probable cause,\textsuperscript{192} the officers reliance on the magistrate's determination of probable cause was objectively reasonable.\textsuperscript{193}
\end{quote}

In such circumstances as these, the Court held that the "application of the extreme sanction of exclusion is inappropriate."\textsuperscript{194}

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\textsuperscript{186} United States v. Leon, 468 U.S. 897, 923 n.24 (1984) ("Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search."); see Whiteley v. Warden, 401 U.S. 560 (1971).

\textsuperscript{187} \textit{Leon}, 468 U.S. at 923.

\textsuperscript{188} In \textit{Massachusetts v. Sheppard}, 468 U.S. 981 (1984), a companion case to \textit{Leon}, the Court allowed the evidence to be introduced despite the fact the warrant was invalid on particularity grounds. In \textit{Sheppard}, the magistrate failed to cross out irrelevant portions of the warrant application but assured the officer applying for and executing the warrant that the warrant was properly filed. \textit{Id.} at 986. The Court held that the officer's reliance on the magistrate's assurances that the warrant was proper was reasonable. \textit{Id.} at 990.

\textsuperscript{189} \textit{Leon}, 468 U.S. at 923 (quoting \textit{Brown v. Illinois}, 422 U.S. 590, 610-11 (1975)).

\textsuperscript{190} \textit{Id.} at 926.

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} \textit{Id.}

\textsuperscript{194} \textit{Id.}
C. Justice Brennan's Dissent: The Dangers of the Good Faith Exception

Justice Brennan, in a dissent encompassing the Court's findings in Leon and Sheppard, complained of the Court's "gradual but determined strangulation of the [exclusionary] rule" and criticized the Court's application of a cost benefit analysis. Justice Brennan declared that the Court's assessment of the costs of excluding illegally obtained evidence were "exaggerated" and found the benefits of exclusion were "made to disappear with a mere wave of the hand." Also, Justice Brennan posited that the application of the good faith exception would have undue and unconstructive influence on the judicial integrity rationale behind the Fourth Amendment and the exclusionary rule. In addition, Justice Brennan stressed how the application of the good faith exception would adulterate Fourth Amendment protections. First, assuming that the threat of the exclusionary rule prompts police officers to provide sufficient information to establish probable cause in retaining a warrant and to pay close attention to the form of the warrant, Justice Brennan contended such "institutional incentive" to "err on the side of constitutional behavior" is now lost by the Court's newly adopted "reasonable mistake" exception to the exclusionary rule.

197 Leon, 468 U.S. at 929 (Brennan, J., dissenting).
198 Id. Justice Brennan stated: "The Court seeks to justify this result on the ground that the 'costs' of adhering to the exclusionary rule in cases like those before us exceed the 'benefits.' But the language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect." Id. Justice Brennan concluded the Court had embellished the facts of Leon in its cost benefit analysis of the exclusionary rule, because, in fact, sufficient evidence to allow the charges to go to trial were not excluded. Id.
199 Id. at 933; see 1 HALL, supra note 8, at 195.
200 Leon, 468 U.S. at 933 (Brennan, J., dissenting).
201 Id. at 955-58. Indeed, Justice Blackmun, in his concurrence, emphasized that if the good faith exception "results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here." Id. at 928 (Blackmun, J., concurring); see also 1 HALL, supra note 8, at 195.
202 Leon, 468 U.S. at 955.
Justice Brennan’s “chief” concern was the insulation of subsequent judicial review of magistrates’ decisions to issue warrants. In fact, Justice Brennan maintained that a magistrate’s determination of probable cause in the issuance of a warrant is now, after Leon, an “inconsequential chore.”

Creation of this new exception for good-faith reliance upon a warrant implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will from now on have virtually no consequence: If their decision to issue a warrant was correct, the evidence will be admitted; if their decision was incorrect but the police relied in good faith on the warrant, the evidence will also be admitted.

Moreover, Justice Brennan feared that the good faith exception would ultimately undermine the integrity of the warrant process. The dissent notes that the good faith exception would eradicate police officer’s incentive to establish probable cause adequately because now “the police need only show that it was not ‘entirely unreasonable’ under the circumstances of a particular case for them to believe that the warrant they were issued was valid.” In truth, according to Brennan, “all police conduct pursuant” to a secured warrant under circumstances once determined reasonable “will be protected from further judicial review.”

Lastly, the dissent could not justify the Court’s decision based on the Court’s belief “that police are hobbled by inflexible and hypertechnical warrant procedures . . .” Justice Brennan determined that “the relaxed standard for assessing probable cause” established in Illinois v. Gates rendered the Court’s good faith exception practically futile because a Court could not practically find a warrant invalid under the Gates standard, yet objectively reasonable under the Leon test. The concerns and consequences of the good faith exception chronicled by Justice Brennan have indubitably been grounds on which many states and federal circuits have rejected the Court’s reasoning and establishment of the good faith exception.

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203 Id. at 956.
204 Id.
205 Id.
206 Id. at 957-58.
207 Id. at 957.
208 Id. at 958.
209 Id.
211 Leon, 468 U.S. at 958-59.
VI. THE SUPREME COURT'S POST-LEON APPLICATION OF THE LEON GOOD FAITH ANALYSIS

Despite numerous changes in the Court's makeup, the Supreme Court has generally followed Leon, and there is no indication that the Court intends to limit Leon's application. The Supreme Court has extended the good faith exception to a non-warrant search and applied many of Leon's principles to sustain erroneous arrests as a result of technically invalid warrants.\(^{212}\) Indeed, the Court is inclined to follow Leon where the presence of an intermediary's error, be it a judicial officer, a court employee, or even a state's legislator, proceeds to invalidate a warrant reasonably relied upon in good faith by a police officer.\(^{213}\) However, the Court has not addressed whether the good faith exception applies to warrantless searches by police.

In Arizona v. Evans,\(^{214}\) the Court upheld a warrantless search of defendant's car upon an arrest during a routine traffic stop. The arrest was prompted by an outstanding misdemeanor warrant for defendant's arrest.\(^{215}\) Although the arrest warrant had previously been quashed because a court employee erred in updating records, the defendant's name had not been removed from the computer.\(^{216}\) The majority applied the objective good faith rule of Leon and held that the exclusionary rule did not require suppression of the drugs found during the warrantless search.\(^{217}\) The Court concluded that "there is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record."\(^{218}\)

In Maryland v. Garrison,\(^{219}\) the Court held that a search warrant authorizing a search of an entire third floor apartment building was valid when issued,

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\(^{214}\) Id.

\(^{215}\) Id. at 4.

\(^{216}\) Id. at 5.

\(^{217}\) Chief Justice Rehnquist wrote the opinion of the Court, with Justice Thomas, Justice Scalia and Justice Kennedy joining. Justice O'Connor wrote a concurring opinion, as did Justice Souter and Justice Breyer. Justice Stevens and Justice Ginsburg entered separate dissenting opinions.

\(^{218}\) Id. at 15-16. In applying the Leon good faith exception to the warrantless search, the Court recognized the historical design of the exclusionary rule as deterring police misconduct, not mistakes by court employees. Id. at 14. Second, the Court stated that there was no evidence "that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." Id. at 14-15. Third, the Court stated "there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing police that a warrant has been quashed." Id. at 15.

\(^{219}\) 480 U.S. 79 (1987). Interestingly, the opinion was authored by Justice Stevens, who dissented in Leon.
because it was reasonable to assume there was only one apartment on the floor. In *Garrison*, the police officers applied for a search warrant for a “third-floor apartment.” Utility records indicated a single bill sent to the third floor at the particular address. However, upon executing the warrant and after discovering two kitchens upon the search, the officers realized that they were searching two apartments. The Court, apparently applying the good faith exception to the exclusionary rule, held that the warrant was valid until the error was discovered because “the officers’ failure to realize the over breadth of the warrant was objectively understandable and reasonable.”

In a third case illustrating the breadth of the Court’s willingness to apply *Leon*, the Court, in *Illinois v. Krull*, reasoned that suppression of evidence collected pursuant to a legislatively-mandated warrantless search of automotive vehicle and parts dealers was unnecessary even though the statute was subsequently held to be unconstitutional. In finding *Leon* controlling, the Court explained that the exclusionary rule would be ineffective in deterring police officers from reasonably relying on the legislature’s commands.

**VII. DIVERGENT INTERPRETATIONS OF THE EXCLUSIONARY RULE AND GOOD FAITH EXCEPTION IN STATE CRIMINAL JURISPRUDENCE**

Undoubtedly, state courts adjudicate the majority of constitutional criminal claims in this country, partly due to the limited criminal jurisdiction of the federal court system. The United States Supreme Court reviews few search and seizure cases, leaving for state court systems the greatest development of search and seizure law. Thus, grounded in the principle that states may impose greater constitutional protection under state law than does the Federal Constitution, and the Supreme Court’s stance that it lacks jurisdiction to review decisions from state courts based on independent state grounds, critics of the good faith exception have found haven in state courts excluding evidence based on exclusionary rules derived from state constitutions. Indeed, numerous states have construed and applied their exclusionary rule independent of the federal exclusionary rule. Other states have found that their exclusionary rule must

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220 *Id.* at 81.

221 *Id.*

222 *Id.* at 88.


224 *Id.* at 349-50. The Court also found that the exclusionary rule could not deter legislators from passing legislation that violated the Fourth Amendment. *Id.* at 351-53.


227 State v. Malkin, 722 P.2d 943 (Alaska 1986) (recognizing distinguishable exclusionary rule
be read in conformity with the federal rule or that they lack an exclusionary rule distinct from the federal rule. As a result, since the inception of the good faith exception, state courts have tackled the laborious chore of applying the correct exclusionary rule and determining if the good faith exception is applicable, resulting in diverse and unpredictable consequences. Ironically, the Court noted that "the good faith exception... should not be difficult to apply in practice."

After concluding that the good faith exception admits evidence, otherwise inadmissible under the exclusionary rule, where a police officer reasonably relied on the warrant with objective good faith, the Court "imposed conditions on the applicability of the good faith exception and failed to explain adequately several of these conditions." Indeed, states have interpreted the good faith exception's applicability in many ways, resulting in inconsistent application of the exception.

A. Good Faith Exception Adopted and Upheld

Despite immense criticism of the good faith exception, numerous states have found that the exception is generally applicable to limit state exclusionary rules derived from state constitutions. In State v. Huber, the Kansas court, applying Section 15 of the Bill of Rights of the Kansas Constitution, adopted the good faith exception as a matter of state law. In fact, the court noted it was free

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228 See State v. Bernie, 472 So. 2d 1243 (Fla. Dist. Ct. App. 1985) (holding the substantive right to have articles or information obtained as a result of an illegal search or seizure excluded from evidence in state courts must be construed in conformity with the Federal Constitution's Fourth Amendment as interpreted by the United States Supreme Court), aff'd, 524 So. 2d 988 (Fla. 1988).


231 Robert C. Gleason, Note, Application Problems Arising from the Good Faith Exception to the Exclusionary Rule, 28 WM. & MARY L. REV. 743, 748-749 (1987). The author lists these ambiguous conditions imposed on the good faith exception as the "Reasonably Well-Trained Officer Requirement," the definition of "Objective Good Faith," and the list of "Exceptions to the Exceptions." Id.

232 See People v. Leftwich, 869 P.2d 1260 (Colo. 1994). Although the Colorado Supreme Court recognized and adopted the good faith exception, the court found no absence of good faith. See also Jackson v. State, 722 S.W.2d 831 (Ark. 1987); Mers v. State, 482 N.E.2d 778 (Ind. Ct. App. 1985); Howell, 483 A.2d at 780; State v. Wilmoth, 490 N.E.2d 1236 (Ohio 1986); Hyde v. State, 769 P.2d 376 (Wyo. 1989).

to retain stricter "pre-Leon" exclusion standards. However, the state supreme
court stance held that the scope of Section 15 was identical to that of the Fourth
Amendment of the United States Constitution, and that therefore there was no
reason to take a different position regarding the Leon good faith exception.\textsuperscript{234}

The good faith exception was also adopted in Indiana in \textit{Mers v. State}\textsuperscript{235}
when the court found no compelling reason to reject the exception to the exclu-
sionary rule. The court recognized that the state exclusionary rule\textsuperscript{236} had his-
torical ties with the federal exclusionary rule, and that Section 11 of the Indiana
Constitution contained identical language to that of the Fourth Amendment of
the United States Constitution.\textsuperscript{237} A year later, in \textit{Stanebow v. State},\textsuperscript{238}
the Indiana Court of Appeals adopted the Leon good faith exception to the exclusionary
rule.

\textbf{B. Good Faith Exception Rejected}

The good faith exception to the exclusionary rule, as articulated in Leon,
has been rejected on state law grounds in numerous states.\textsuperscript{239} Defendants have
relied on state exclusionary rules stemming from state constitutional provisions
prohibiting unreasonable searches and seizures to counter prosecutorial attempts
to enact and apply a good faith exception. Many states have granted broader
protection under their exclusionary rules by refusing to adopt a good faith ex-
ception under their respective state constitutions. To strike down the adoption
of a good faith exception, state courts have recognized that their state exclusion-
ary rules are independent of the federal exclusionary rule.

Many state courts, in declining to apply the good faith exception, are
heavily influenced by the concern that adoption of a good faith exception would
undermine law enforcement's motivation to carefully comply with all probable
cause requirements in securing a warrant.\textsuperscript{240} The Michigan Court of Appeals

\textsuperscript{234} \textit{Id}. at 1011.

\textsuperscript{235} 482 N.E.2d 778 (Ind. Ct. App. 1985).

\textsuperscript{236} \textit{See} \textit{IND. CONST}. art. I, §§ 11, 14.

\textsuperscript{237} \textit{Mers}, 482 N.E.2d at 783.

\textsuperscript{238} 495 N.E.2d 197 (Ind. Ct. App. 1986).

\textsuperscript{239} \textit{See} \textit{State v. DeWitt}, 910 P.2d 9 (Ariz. 1996); \textit{State v. Marsala}, 579 A.2d 58 (Conn. 1990);
617 N.W.2d 260 (Iowa 2000); \textit{People v. Sundling}, 395 N.W.2d 308 (Mich. Ct. App. 1986);

\textsuperscript{240} \textit{See} \textit{State v. Novembrino}, 519 A.2d 820 (N.J. 1987); \textit{see also Marsala}, 579 A.2d at 58;
\textit{Dorsey}, 761 A.2d at 807. In \textit{Marsala}, the court held the good faith exception was not compatible
with the search and seizure provision of the Connecticut Constitution. 579 A.2d at 58. In so
doing, the court was also unwilling to accept Leon's assessment of the social costs of the exclu-
declined to adopt the good faith exception in People v. Sundling,\(^{241}\) holding that the exclusionary rule was a necessary corollary of the right under the Article 1, Section 11 of the Michigan Constitution to be free from unreasonable searches and seizures. The court discussed with approval Justice Brennan’s opinion that the majority lacked sufficient statistics to support the majority’s concern regarding substantial social costs resulting from application of the exclusionary rule where police made an objectively reasonable mistake in applying for and executing the warrant.\(^{242}\) In State v. Novembrino,\(^{243}\) New Jersey also rejected the good faith exception, focusing on its concern that the good faith exception would “ultimately reduce respect for and compliance with the probable cause standard that we have steadfastly enforced.”\(^ {244}\) In Novembrino, the court held that “the erosion of the probable-cause guarantee will be a corollary to the good-faith exception.”\(^ {245}\) In State v. Guzman,\(^ {246}\) the Idaho Supreme Court rejected the good faith exception because the good faith exception conflicted with the policies supporting Idaho’s exclusionary rule; the court also disagreed with the Leon court’s balancing test.\(^ {247}\)

The Pennsylvania and North Carolina Supreme Courts have rejected the good faith exception because they felt the exception would undermine the Fourth Amendment’s protection of a right to privacy. The Pennsylvania Supreme Court rejected the good faith exception in 1991 in Commonwealth v. Edmunds.\(^ {248}\) In Edmunds, the court noted that the protection of an individual’s right to privacy is one of the purposes of the state exclusionary rule,\(^ {249}\) and held that “an invasion of privacy, in good faith or bad, is equally intrusive.”\(^ {250}\) The North Carolina Supreme Court rejected the good faith exception in 1988 in State

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\(^{242}\) Id. at 314-15.

\(^{243}\) 519 A.2d 820 (N.J. 1987).

\(^{244}\) Id. at 854.

\(^{245}\) Id. at 857.


\(^{247}\) Guzman, 842 P.2d at 671-72.


\(^{249}\) Id. at 897.

\(^{250}\) Id. at 901.
v. Carter. The Carter court, in addition to arguing that the good faith exception would interfere with the exclusionary rule’s role in preserving judicial integrity, found that the good faith exception would severely interfere with citizens’ constitutional right of privacy.

Various other states have rejected the good faith exception only in particular circumstances, so that evidence seized under such circumstances remains inadmissible as a matter of state law. In State v. Cardenas, the Indiana Supreme Court held that the good faith exception to the state exclusionary rule did not apply to a search of defendant’s home for drugs where the search warrant was a general search warrant and no reasonable person could conclude that such a warrant was valid. In State v. Martin, the New Hampshire Supreme Court denied the state’s contention that circumstances mandated a good faith exception to the exclusionary rule under the state constitution because the state’s failure to prove that a bench warrant was valid at the time of defendants arrest removed the mantle of judicial authorization.

VIII. WEST VIRGINIA: A LEON, GOOD FAITH STATE OR NOT?

A. Historical Analysis of West Virginia Search and Seizure Law

The West Virginia Constitution states:

The rights of the citizens to be secure in their houses, person, papers and affects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

The West Virginia Supreme Court has held that this section protects an individual’s reasonable expectation of privacy. “As an absolute minimum, the Fourth Amendment demands that a criminal defendant’s private papers, in

251 370 A.2d 553, 562 (N.C. 1988).
252 Id. at 559.
253 686 N.E.2d 827 (Ind. 1997).
254 Id.
256 Id.
257 W. VA. CONST. art. 3, § 6.
which there has been found to exist a reasonable expectation of privacy, cannot be seized by law enforcement officials in the absence of a valid warrant issued upon probable cause. The court also has recognized this section's similarity to the Fourth Amendment of the United States Constitution and it traditionally construes this section in accord with the Fourth Amendment. Indeed, the Supreme Court has held that the provisions of the West Virginia Constitution relating to unreasonable searches and seizures "should be given a construction in harmony with the construction of the federal provisions by the Supreme Court of the United States."

However, while acknowledging the Leon good faith exception, the West Virginia Supreme Court has not indicated whether West Virginia has adopted a good faith exception to the state exclusionary rule. In State v. Schofield, the court discussed with approval the decisions in Leon and Sheppard. In State v. Adkins, the court noted that Leon did not apply. In State v. Worley, the court neglected to adopt or reject the good faith exception as a matter of law.

B. The Exclusionary Rule, the Warrant, and the Requirements of a Valid Affidavit in West Virginia

There is little doubt that, under the common law, the manner in which evidence was obtained did not affect its admissibility at trial. It was not until 1961 that the United States Supreme Court held that all evidence obtained by searches and seizures in violation of the Fourth Amendment was inadmissible in state court. However, as early as 1921, the West Virginia Supreme Court of Appeals held that evidence obtained as a result of illegal searches and seizures was inadmissible in West Virginia courts. The West Virginia Supreme Court has clearly evidenced its strong preference that searches be conducted pursuant to a search warrant. Consequently, a warrantless search may be deemed unreasonable and the fruits of the search inadmissible pursuant to the state exclusionary rule.

262 331 S.E.2d 829 (W. Va. 1985).
264 369 S.E.2d 706, 713 n.7 (W. Va. 1988).
267 Syl. Pts. 7 & 8, State v. Wills, 114 S.E. 261 (W. Va. 1922).
The West Virginia Supreme Court has determined that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable ... - subject only to a few specifically established and well-delineated exceptions." For example, "[t]he exclusionary rule has no application when the state learns from an independent source about the evidence sought to be suppressed." Acknowledging that the Fourth Amendment and the West Virginia Constitution prohibit only unreasonable searches, the court has determined that, "unless the warrantless search comes within a recognized exception, it is unreasonable and therefore illegal.

In State v. Slat, the Court determined that, before evidence secured through a warrant could be admitted in a criminal prosecution, "it is incumbent upon the prosecution to show that the search and seizure warrant was valid."

Before a warrant may be validly issued, a showing of probable cause supported by oath or affirmation must be established before a judicial tribunal. In State

269 Id. In State v. Bruner, 105 S.E.2d 140 (W. Va. 1958), the court held that only unreasonable searches are condemned by the Federal and West Virginia Constitutions.

270 State v. Tadder, 313 S.E.2d 667, 670 (W. Va. 1984) (quoting Syl. Pt. 1, State v. Moore, 272 S.E.2d 804 (W. Va. 1980)). Exceptions to the warrant requirement are to be "jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative." Id.

271 Syl. Pt. 4, State v. Aldridge, 304 S.E.2d 671 (W. Va. 1983). Indeed, the exclusionary rule has no application where the evidence introduced has an "independent source," where the relationship between the unconstitutional police misconduct and the discovery of the evidence is "so attenuated as to dissipate the taint" of the illegality, and where the evidence would nevertheless have been "inevitably discovered." State v. Davis, 345 S.E.2d 549 (W. Va. 1986).

272 Moore, 272 S.E.2d at 808 n.3. The West Virginia Supreme Court of Appeals has acknowledged numerous situations in which a warrant is not required. In Syllabus Point I of State v. Angel, 177 S.E.2d 562 (W. Va. 1970), the court found searches of an automobile, searches made in hot pursuit, searches around an area where an arrest is made, searches of things that are obvious to the senses, searches of abandoned property, and searches that been consented to do not require a warrant. See also State v. Duvernoy, 195 S.E.2d 631 (W. Va. 1973). "Where a person voluntarily and knowingly consents to a search of a premises, such a search may be conducted in the absence of a search warrant." Syl. Pt. 1, State v. Hambrick, 350 S.E.2d 537 (W. Va. 1986). An officer may conduct a search for concealed weapons without a warrant where the officer makes a lawful investigatory stop and has reason to believe an individual is armed and dangerous. Syl. Pt. 3, State v. Choat, 363 S.E.2d 493 (W. Va. 1987). A warrant is not required where the evidence is fully disclosed and open to the senses. State v. Thomas, 143 S. E. 88, 89-90 (W. Va. 1928). "A search of an automobile may be conducted without a warrant where the police have probable cause to believe that the automobile contains contraband or evidence of a crime and where exigent circumstances prevent the obtainment of a warrant." Syl. Pt. 3, State v. Moore, 272 S.E.2d 804 (W. Va. 1980).

273 127 S. E. 191 (W. Va. 1925)

274 Id. at Syl. Pt. 1.

v. Adkins,\textsuperscript{276} the court adopted the "totality of the circumstances" test developed in Illinois v. Gates\textsuperscript{277} to determine the existence of probable cause.

The court concluded in Syllabus Point 4 of Adkins:

Under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers.\textsuperscript{278}

Further, the court in State v. Hlavacek\textsuperscript{279} held:

To constitute probable cause for the issuance of a search warrant, the affiant must set forth facts indicating the existence of criminal activities which would justify a search and further, if there is an unnamed informant, sufficient facts must be set forth demonstrating that the information obtained from the unnamed informant is reliable.\textsuperscript{280}

The West Virginia Supreme Court of Appeals has not adopted the Aguilar-Spinelli test to determine whether the affidavit for a search warrant is factually sufficient to supply probable cause for the issuance of the warrant.\textsuperscript{281} In State v. Lilly,\textsuperscript{282} the court described circumstances in which a magistrate may find probable cause:

Probable cause for the issuance of a search warrant exists if the facts and circumstances provided to a magistrate in a written affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location. It is not enough

\textsuperscript{276} 346 S.E.2d 762 (W. Va. 1986).
\textsuperscript{277} 462 U.S. 213 (1983).
\textsuperscript{278} Adkins, 346 S.E.2d at Syl. Pt. 4.
\textsuperscript{279} 407 S.E.2d 375 (W. Va. 1991).
\textsuperscript{280} Id. at Syl. Pt. 5; Syl. Pt. 1, State v. Stone, 268 S.E.2d 50 (W. Va. 1980).
\textsuperscript{281} In fact, only one case even discussed this issue after the Aguilar-Spinelli test was established. See State v. Dudick, 213 S.E.2d 458 (W. Va. 1975).
\textsuperscript{282} 461 S.E.2d 101 (W. Va. 1995).
that a magistrate believes a crime has been committed. The magistrate also must have a reasonable belief that the place or person to be searched will yield certain specific classes of items. There must be a nexus between the criminal activity and the place or person searched and thing seized. The probable cause determination does not depend solely upon individual facts; rather, it depends on the cumulative effect of the facts in the totality of circumstances.\(^\text{283}\)

However, a successful attack of a search warrant affidavit will void the search warrant and render evidence seized under the warrant inadmissible.\(^\text{284}\) In *Lilly*, the court offered guidance concerning how to formulate a successful attack.

To successfully challenge the validity of a search warrant on the basis of false information in the warrant affidavit, the defendant must establish by a preponderance of the evidence that the affiant, either knowingly and intentionally or with reckless disregard for the truth, included a false statement therein. The same analysis applies to omissions of fact. The defendant must show that the facts were intentionally omitted or were omitted in reckless disregard of whether their omission made the affidavit misleading.\(^\text{285}\)

A warrant containing a misrepresentation by the police officer may still be found valid.\(^\text{286}\) "A search warrant affidavit is not invalid even if it contains a misrepresentation, if, after striking the misrepresentation, there remains sufficient content to support a finding of probable cause."\(^\text{287}\) However, a search conducted upon a warrant lacking in probable cause or void of other necessary requirements\(^\text{288}\) is generally unreasonable and unlawful, thereby rendering evi-

\(^{283}\) *Id.* at Syl. Pt. 3.


\(^{285}\) *Lilly*, 461 S.E.2d at Syl. Pt. 1.

\(^{286}\) *Id.*

\(^{287}\) *Id.* at Syl. Pt. 2.

\(^{288}\) There are three requirements for a valid search warrant: (1) jurisdictional control over the person or property to be searched; (2) showing of probable cause where a right of privacy exists and the probable cause must be established under oath. *State v. White*, 280 S.E.2d 114 (W. Va. 1981); and (3) the warrant to search must indicate with particularity the place to be searched and the items to be seized during the search.
dence obtained from such warrant inadmissible pursuant to the exclusionary rule.

C. The West Virginia Supreme Court of Appeals’ Treatment of United States v. Leon

Although the West Virginia Supreme Court of Appeals has repeatedly referred to Leon and analyzed the good faith exception in numerous cases and under variable circumstances, it has refused to expressly adopt or reject the exception. In discussing the Leon good faith exception, the court has focused on the circumstances in which the Leon Court stated the good faith exception would not be applicable. As a result, the court has repeatedly determined that the circumstances surrounding a search warrant met one of the exceptions to the good faith exception and thus, that the good faith exception did not apply.

One year after the Supreme Court’s establishment of the good faith exception, the West Virginia Supreme Court of Appeals discussed Leon in State v. Schofield. The court noted that determining whether the facts of that case would come within the good faith exception would be “problematic.” However, the court did not reach that issue because it determined that a warrantless arrest was justified. In Schofield, the court followed the circuit court, holding that the arrest warrant was insufficient to establish probable cause for an arrest; nonetheless, the court determined that the defendant’s arrest was valid because, under the circumstances, an arrest warrant was not required. Despite this finding, the court approvingly discussed the Leon good faith exception, noting that the good faith defense does not apply to facially defective warrants. Furthermore, in analyzing the facts in Schofield, the court found that the “magistrate

1 CLECKLEY, supra note 1, at 354. The state constitution requires that a warrant particularly describe the thing to be seized and general warrants are not adequate. State ex rel. White v. Melton, 273 S.E.2d 81, 83 (W. Va. 1980). In West Virginia, section 62-1A-1 provides that

a search warrant authorized by this article may be issued by a judge of a court having jurisdiction to try criminal cases in the county, or by a justice of a county, or by the mayor or judge of the police court of the municipality wherein the property sought is located.


289 See United States v. Leon, 468 U.S. 897, 922-23 (1984); supra notes 155-61 and accompanying text; see also Hlavacek, 407 S.E.2d at 383 n.5; State v. Adkins, 346 S.E.2d 762, 774-75 (W. Va. 1986).

290 331 S.E.2d 829 (W. Va. 1985).

291 Id. at 835.

292 Id.

293 Id. at 834.

294 Id. at 835.
who issued the warrant was not misled by its admittedly scanty contents nor did the affiant believe his information was false.\textsuperscript{295}

In three cases involving the sufficiency of a warrant affidavit, the court declined to apply the Leon good faith exception because it characterized the content of the affidavit as "bare bones;" and therefore, unable to be salvaged by the exception. In \textit{State v. Adkins},\textsuperscript{296} the court held that the probable cause affidavit was insufficient to establish probable cause or to justify police officers' reliance on the warrant. The defendant, appealing his felony conviction of possession with intent to deliver a controlled substance, contended that evidence introduced at trial was obtained with an invalid search warrant because the warrant failed to establish probable cause.\textsuperscript{297} An investigator for the City of Clarksburg and a sergeant of the Harrison County Sheriff's Department presented a sworn affidavit for a search warrant to a Harrison County magistrate in which they alleged that the defendant possessed, with intent to deliver, marijuana.\textsuperscript{298}

In response to the defendant's charge that the search warrant affidavit failed to establish probable cause for the issuance of a search warrant, the state relied heavily on \textit{Illinois v. Gates}.\textsuperscript{299} In evaluating the probable cause challenge, the court traced the development of the major United States Supreme Court cases dealing with the sufficiency of information contained in a search warrant affidavit.\textsuperscript{300} Indeed, in examining West Virginia case law, the court recognized that "our search and seizure cases which involve the question of whether the affidavit for the search warrant is sufficient factually to supply probable cause for the issuance of the warrant are not very illuminating."\textsuperscript{301} However, the court

\textsuperscript{295} Id.

\textsuperscript{296} 346 S.E.2d 762 (W. Va. 1986).

\textsuperscript{297} Id. at 764.

\textsuperscript{298} Id. The basis of the officers' belief for obtaining the search warrant derived from a confidential informant who observed marijuana in the possession of the defendant in the defendant's home. Id.

\textsuperscript{299} 462 U.S. 213 (1983). In \textit{Gates}, the United States Supreme Court abandoned the two-prong test established by \textit{Aguilar} and \textit{Spinelli} and adopted a "totality of the circumstances" test in order to determine the validity of an affidavit for a search warrant. See \textit{Spinelli} v. United States, 393 U.S. 410 (1969); \textit{Aguilar} v. Texas, 378 U.S. 108 (1964). The United States Supreme Court summarized the two-prong test in \textit{Massachusetts v. Upton}, 466 U.S. 727, 730 (1984). Prior to \textit{Gates}, the Fourth Amendment was understood by many courts to require strict satisfaction of a "two-pronged test" whenever an affidavit supporting the issuance of a search warrant relies on an informant's tip. It was thought that the affidavit, first, must establish the "basis of knowledge" of the informant—the particular means by which he came by the information given in his report; and, second, that it must provide facts establishing either the general "veracity" of the informant or the specific "reliability" of his report in the particular case.

\textsuperscript{300} \textit{Adkins}, 346 S.E.2d at 769-72.

\textsuperscript{301} Id. at 772. The court acknowledged that several of its cases settled the sufficiency question by citing Syllabus Point 1 of \textit{State v. Stone}, 268 S.E.2d 50 (W. Va. 1980), which states:

To constitute probable cause for the issuance of a search warrant, the affiant
ultimately concluded that the "liberalization occasioned by the totality rule developed in Gates" subsumed the outstanding questions involving the sufficiency of an affidavit to supply probable cause in West Virginia jurisprudence. Thus, the court held that, "under the Fourth Amendment to the United States Constitution and Article III, Section 6 of the West Virginia Constitution, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it." Pursuant to the facts set forth as applied to this rule, the court concluded, "the warrant affidavit is defective under the Gates 'totality rule.'"

After finding the warrant affidavit defective, the court discussed the Leon good faith exception rather exhaustively. The court acknowledged the principles described by the United States Supreme Court in adopting the exception and specifically noted the situations in which the good faith exception would not be applicable. The court found that, regardless of the applicability of Leon, the affidavit in question was "so conclusory with regard to its probable cause information as to render it a 'bare bones' affidavit." The court concluded, per Leon, a bare bones affidavit was "not subject to rehabilitation by the good faith exception" and refused to apply the exception. Again, the court did not adopt or reject the Leon good faith exception. Justice Cleckley, in his comprehensive Handbook on West Virginia Criminal Procedure, noted, "[I]n his otherwise excellent opinion, Chief Justice Miller strikes a sour note to the Bench and Bar by the failure to declare the law in West Virginia."

must set forth facts indicating the existence of criminal activities which would justify a search and further, if there is an unnamed informant, sufficient facts must be set forth demonstrating that the information obtained from the unnamed informant is reliable.

Adkins, 346 S.E.2d at 773.

Id. Under this rule, the court also concluded "a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers." Id. at 773-74.

Id. at 774.

See id. at 774-75.

Id. (citing Leon, 468 U.S. at 923). These situations include: where the magistrate was misled by information provided by the affiant in the affidavit the affiant knew was false, where the magistrate abandons his judicial role, where the affidavit is so lacking in probable cause that belief in its existence is unreasonable, where the warrant is deficient in particularizing the scope of the search, and where the affidavit is no more than a bare bones affidavit. Id.

Adkins, 346 S.E.2d at 775.

Id.

See id. n.20 ("Because we find that the affidavit does not meet the Leon good faith exception, we do not decide the issue of whether we would adopt this rule into our jurisprudence.").

See 1 Cleckley, supra note 1, at 228 (referring to the court's failure to expressly reject or
Presented the opportunity to expressly adopt or reject the Leon good faith exception six years after Adkins, the court, relying on Adkins, refused to apply the good faith exception and again failed to expressly adopt or reject the exception. In State v. Hlavacek, the court was presented with the issue of whether the good faith exception should salvage a defective warrant. In Hlavacek, the defendant appealed his conviction of one felony count of possession of marijuana with the intent to deliver. Specifically, the defendant challenged the validity of the search warrant that was obtained by the police after his arrest and the admissibility of the evidence discovered pursuant to the search warrant. The relevant facts demonstrated that an officer met with an informant who advised the officer of the defendant's impending drug run that day. Based on this information, the officer followed the defendant and ultimately approached him and attempted to get consent to a search of his automobile. The defendant failed to give consent and the officer proceeded to obtain a search warrant of the automobile. Meanwhile, the officer conducted a protective search of the defendant's person and discovered three marijuana cigarettes. In the search of the vehicle pursuant to the warrant, the police discovered approximately one pound of marijuana.

The court determined that the affidavit presented to the magistrate was "insufficient for several reasons." In response, the state advanced several theories to "save" the warrant. Specifically, the state argued that the "defective warrant should by salvaged by applying the 'good faith' exception." Not-

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312 Id. at 378.
313 Id. In appealing his conviction, the defendant also challenged the search of his person prior to the arrest. Id. The West Virginia Supreme Court of Appeals held the circumstances did not reasonably warrant the officer's belief that his safety was in jeopardy, the breadth of the frisk was unconstitutional, and the evidence obtained in the frisk was inadmissible. Id. at 379.
314 Id.
315 Id.
316 Id.
317 Id.
318 Id.
319 Id. at 382. First, the court determined that the "factual basis for this affidavit was built almost exclusively upon the conclusory statements of an undisclosed confidential informant" where the judicial officer had no means to evaluate the informant's credibility. Id. Second, the court found "the affidavit is devoid of any information attesting to the veracity of its 'confidential informant source.'" Id.
320 Id. at 383.
321 Id.
ing circumstances in which the good faith exception is inapplicable, and explicitly referencing *Leon*’s holding that a bare bones affidavit could not survive judicial scrutiny by relying upon the good faith exception, the court, as it did in *Adkins*, found that, because the search warrant was based on a bare bones affidavit, it could not be “redeemed through resort to this exception.”

In *State v. Worley*, the court rejected the prosecution’s suggestion that a warrant lacking probable cause was salvageable by application of the good faith exception. The court first acknowledged that “a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers.” The court then noted that the affidavit failed to reveal new information that would provide any basis for substantiating the general hearsay statements in the affidavit. The court considered it a “bare bones affidavit of the type specifically rejected in *Adkins*.” As it observed in *Adkins*, the court concluded that the warrant affidavit was “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” The court did not expressly adopt or reject the good faith exception in *Worley*, but it suggested that the good faith exception may be applicable where an affiant possesses a reasonable belief that probable cause is present.

In *State v. Thompson*, the prosecution attempted to fit the conduct of the officers within the good faith exception. The court first acknowledged that the application of the good faith exception is inappropriate where the magistrate issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his disregard for the truth. It then held that the officer’s assertion that his informant was reliable “showed at least a reckless disregard for the truth if not an intentional misrepresentation.” Although it once again declined to adopt or reject the good faith exception, in dicta, it provided hints concerning a situation where *Leon* could apply. It held, “*Leon* protects police work and evidence obtained from being

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322 Id.
324 Id. at 713 n.7.
325 Id. at 712-13 (quoting Syl. Pt. 4, *State v. Adkins*, 346 S.E.2d 762 (W. Va. 1986)).
326 Id. at 713.
327 Id. at 713.
328 Id. at 713 n.7 (quoting United States v. *Leon*, 468 U.S. 897, 923 (1984)).
330 Id. at 819; see also *Leon*, 468 U.S. at 923.
331 Thompson, 358 S.E.2d at 819.
excluded because of error beyond the control of investigating officers." 332 Indeed, Thompson seems to suggest, in dicta, that Leon applies in West Virginia. The fact that this is dictum may reduce its significance, but its importance may be greater than commentators have suggested.

The court has also declined to discuss Leon's applicability in West Virginia in cases where it has found the challenged search warrant sufficient and valid. In State v. Haught, 333 the court refused to address the good faith exception because it found the description of the place to be searched "sufficiently detailed so as to allow the law enforcement officers to locate the house to be searched with reasonable probability and certainty that they would not search the wrong premises." 334

Most recently, in State v. Lilly, 335 the court refused to address the prosecution's reliance on the good faith exception to overcome the court's finding that the search warrant was invalidly obtained. Holding that the "issuance of the search warrant was not supported by probable cause," the court found two grounds for refusing to address the good faith exception. 336 First, the court found the affidavit failed to establish probable cause and was "bare bones and conclusory." 337 Second, the court found the prosecution failed to argue the issue of the good faith exception in its brief. 338

In summation, the West Virginia Supreme Court of Appeals has dodged the question of whether West Virginia recognizes the Leon good faith exception as a matter of state law. By concluding that the good faith exception was inapplicable in each of the situations in which the good faith exception was at issue, the court has deemed it unnecessary to expressly adopt or reject the Leon good faith exception.

332 Id.
334 Id. at 64 n.9
336 Id. at 111.
337 Id. at n.16 ("The 'good faith' exception does not apply to circumstances where the warrant is based on an affidavit so lacking in probable cause at to render official belief in its existence entirely unreasonable."); see also State v. Hlavacek, 407 S.E.2d 375 (W. Va. 1991); State v. Adkins, 346 S.E.2d 762 (W. Va. 1986); State v. Schofield, 331 S.E.2d 829 (W. Va. 1985).
338 Lilly, 461 S.E.2d at 111 n.16 ("[A]ppellate courts frequently refuse to address issues that appellants, or in this case the appellee, fail to develop in their brief. In fact, the issue of 'good faith' was adverted to in a perfunctory manner unaccompanied by some effort at developed argumentation.").
GOOD FAITH EXCEPTION IN WEST VIRGINIA

D. Arguments Against and in Support of West Virginia’s Adoption and Recognition of the Good Faith Exception

It may not be possible to predict whether the West Virginia Supreme Court of Appeals will adopt or reject the Leon good faith exception when presented with circumstances requiring it to resolve the issue. However, the court will undoubtedly be persuaded by its own previous discussions of the exclusionary rule and the good faith exception, as well as the stance other states have taken in adopting or rejecting the exception.

The court could follow the lead of many states and acknowledge its history of interpreting its relevant state constitutional provisions in harmony with the construction of the Fourth Amendment as its basis for adopting the good faith exception. The court has adopted the rather controversial Gates “totality of the circumstances test” in determining the existence of probable cause, evidencing its willingness to construct state search and seizure law in conformity with the United States Supreme Court. The West Virginia Supreme Court of Appeals has never expressly declared the purposes and goals of the exclusionary rule in West Virginia. In adopting the good faith exception, the court would have to accept the rationale employed by the United States Supreme Court in analyzing the purposes and effects of the exclusionary rule, as well as the Court’s cost-benefit analysis of the good faith exception. Concluding that the primary purpose of the exclusionary rule is to deter police misconduct, as the Supreme Court did in Leon, would entail a major evolutionary step in the court’s analysis of the state exclusionary rule. The court will most likely be willing to entertain the adoption of the good faith exception where the police officers are performing their duties in complete good faith. In State v. Thompson, the court suggested that Leon may apply where the error is completely beyond the control of the police officers obtaining the warrant.

Surprisingly, the court has also not taken the opportunity to criticize the rationale employed by the Court in Leon. The court could rely on any number of grounds in rejecting the good faith exception. Indeed, states rejecting the good faith exception have created abundant justifications for their holdings, including the exclusionary rule’s deprivation of citizens’ protections guaranteed under the Fourth Amendment of the United States Constitution and reciprocal provisions in state constitutions. As discussed beforehand, many states have rejected the good faith exception on state constitutional grounds to combat the decreased federal protection under the exclusionary rule Leon created. The op-

341 358 S.E.2d at 815.
342 Id. at 819.
ponents argue that the good faith exception undermines the goals of the Fourth Amendment protections against illegal searches and seizures by admitting evidence illegally seized based solely on a mistake committed by the judiciary. Exclusionary rule opponents reject the premise underlying Leon that the exclusionary rule was solely meant to deter police misconduct. They argue that the primary purpose of the exclusionary rule is to guarantee constitutional rights afforded citizens. The rejection of the good faith exception, it is argued, further protects one’s constitutional right against unreasonable searches and seizures.

IX. CONCLUSION

The Constitution of the United States of America and the West Virginia Constitution guarantee certain rights protecting citizens from the government. One of those rights is the freedom from unreasonable searches and seizures. In turn, courts have created numerous exceptions to these rights. Specifically, in United States v. Leon, the United States Supreme Court created the good faith exception to the exclusionary rule. However, numerous states, concerned with the potential diminishment of Fourth Amendment protections and the dilution of the well-received exclusionary rule, have rejected the good faith exception.

Despite numerous opportunities to discuss or criticize the United States Supreme Court’s analysis in Leon, the West Virginia Supreme Court of Appeals has declined to expressly address the exception. Instead, it has found all potential “good faith cases” inapplicable pursuant to the exceptional circumstances described in Leon. The court’s reluctance to expressly adopt or reject the exception may be reasonable considering the pervasive ramifications an adoption or rejection of such an exception may entail. However, this reluctance makes predicting whether the court will adopt or reject the good faith exception extremely difficult. The court’s reluctance to address this issue produces potential problems for defendants and prosecutors alike. Defendants and prosecutors are in a quandary as to the court’s treatment of a questionable warrant where the police assert good faith. Moreover, an express adoption or rejection of the exception could prevent the expense of significant resources in the lower courts. Just as Justice Cleckley eloquently enunciated in his Handbook on West Virginia Criminal Procedure, the court should squarely and expressly address the issue as soon as the appropriate case and controversy arises. In doing so, I also recommend that the court provide a detailed analysis of the exclusionary rule in West Virginia jurisprudence, including its adoption, its history, and its purposes as interpreted by the court.

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