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IT'S TIME TO BELIEVE: RESOLVING THE CIRCUIT SPLIT OVER THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE

Blake R. Hills*

I. INTRODUCTION

Consider a scenario in which the police obtain a warrant to search the home of a suspected murderer. During the search, the officers find the knife that was used to commit the murder and also find clothing of the suspect that has the victim’s blood on it. Based on this evidence, the prosecution charges the suspect with murder in what appears to be an open and shut case. However, the trial court subsequently concludes that the probable cause supporting the warrant was based in part on improperly obtained evidence. Should the knife and bloody clothes be suppressed and a suspected murderer set free? Or should the evidence be admissible because the police operated in good-faith reliance on the magistrate’s issuance of the search warrant?

In United States v. Leon,1 the Supreme Court held that although the exclusionary rule generally bars the introduction of evidence obtained during an improper search, the exclusionary rule does not apply when officers have acted in good-faith reliance on a search warrant even though the warrant is not supported by probable cause.2 Unfortunately, the Court failed to answer the question of whether the good-faith exception applies when the facts supporting probable cause in the warrant affidavit were obtained through a prior improper search.3 This has led to a split between the circuits, with varying answers.4 The

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2. Id. at 925-26.
3. See id. at 913-14.
4. See, e.g., United States v. Bain, 874 F.3d 1, 22-23 (1st Cir. 2017) (internal quotations

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resulting system of rules that depends on location is a significant problem that should be fixed by the Supreme Court.

This Article proceeds in several parts. Part II contains a discussion of the general principles regarding the Fourth Amendment and search warrants. Part III examines the Leon decision, with discussion on what the Supreme Court did and did not say about the good-faith exception to the exclusionary rule. Part IV surveys the split of authority amongst the federal circuit courts. Finally, Part V suggests that the Court should be guided by both its post-Leon decisions and by general policy considerations to hold that the good-faith exception applies when the prior search was objectively reasonable and the warrant affidavit truthfully conveyed the circumstances of the prior improper search to the magistrate.

II. BACKGROUND OF THE EXCLUSIONARY RULE

American search and seizure law can all be traced back to the Fourth Amendment. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no 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.

It is well-recognized that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.” Obtaining a search warrant “ensures that the inferences to support a search are ‘drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often

omitted) (holding that police officers can rely on evidence in good faith when the evidence is “close enough to the line of validity to make the officers’ belief in the validity of the warrant objectively reasonable”); United States v. Ganasia, 824 F.3d 199, 223 (2d Cir. 2016) (holding that “suppression is inappropriate where reliance on a warrant was ‘objectively reasonable’”); United States v. Mowatt, 513 F.3d 395, 405 (4th Cir. 2008) (holding that the good-faith exception does not apply when a search warrant is based on a prior, unlawful search).

5. See infra Part II.
6. See infra Part III.
7. See infra Part IV.
8. See infra Part V.
9. U.S. CONST. amend. IV.
competitive enterprise of ferreting out crime." In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.

The exclusionary rule generally provides that the prosecution cannot introduce evidence in its case-in-chief that was obtained in violation of the Fourth Amendment. The Supreme Court first adopted this rule for federal prosecutions in the 1914 case of *Weeks v. United States*. In that case, the defendant's private papers were seized during a warrantless search of his room in a private house. In holding that the improperly seized documents could not be used against the defendant at trial, the Court stated:

If letters and private documents can thus be 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, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

The Court stated that "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." However, the Court determined that the Fourth Amendment and the exclusionary rule only applied to federal and not state actors.

It was not until 1949 that the Supreme Court incorporated the Fourth Amendment against the States in *Wolf v. Colorado*. Specifically, the Court held that "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth

14. See *Illinois v. Krull*, 480 U.S. 340, 347 (1987) ("When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure.").
17. Id. at 393.
18. Id. at 394.
19. Id. at 398.
Amendment—is... implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause" of the Fourteenth Amendment.21 However, the Court held that the exclusionary rule was not enforceable against the States.22 The Court began its analysis by stating that the exclusionary rule "was not derived from the explicit requirements of the Fourth Amendment [and] it was not based on legislation expressing Congressional policy in the enforcement of the Constitution," but "was a matter of judicial implication."23 The Court noted that because "most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, [it] must hesitate to treat this remedy as an essential ingredient of the right."24 Thus, the Court ultimately concluded:

Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.25

The Supreme Court eliminated the States' discretion to come up with their own remedies for Fourth Amendment violations in Mapp v. Ohio.26 The Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."27 The Court stated that:

[O]ur holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover,... "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts."28

22. Id. at 33.
23. Id. at 28.
24. Id. at 29.
25. Id. at 31.
27. Id. at 655.
28. Id. at 657-58.
The Court noted that allowing the States to use other remedies to enforce the Fourth Amendment had proven to be of "obvious futility." Moreover:

[I]t was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the Wolf case. In short, the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

"After Mapp, it is taken for granted that the federal remedy follows the federal violation" and "[n]o state would ever hold that there was a federal violation but then apply its own state rule to remedy that violation." The basic rationale of Weeks, Wolf, and Mapp was that the exclusionary rule was mandated by the Constitution. However, this understanding of the exclusionary rule changed in 1974 in United States v. Calandra. In Calandra, the Supreme Court held that the exclusionary rule was not a "personal constitutional right," but a mere "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." Indeed, the Court stated:

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.

The Court emphasized that "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim," but rather "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and

29. Id. at 652-53.
30. Id. at 655-56.
32. See Thomas K. Clancy, The Fourth Amendment’s Exclusionary Rule as a Constitutional Right, 10 OHIO ST. J. CRIM L. 357, 357, 362, 364-66 (2013) ("[T]he rule in Weeks and many years thereafter was considered constitutionally mandated.").
34. Id. at 348.
35. Id.
With this understanding of the exclusionary rule, the Supreme Court is now better able to create exceptions to the rule when its costs outweigh its deterrence value.

III. United States v. Leon

The Supreme Court established a good-faith exception to the exclusionary rule in United States v. Leon. The case began when a confidential informant of "unproven reliability" told a police officer that two people he knew were selling large amounts of cocaine and methamphetamine out of their residence. Specifically, the informant stated that he had witnessed a sale of methaqualone at the residence five months earlier. This information led to a police investigation focusing on this residence and two other residences associated with potential suspects.

During the investigation, the police learned that the residences were occupied by people who had prior convictions for drug offenses. The police also observed that the residences were occasionally visited by other people with prior drug involvement who entered the residences and left with small packages. Based on this information, the police applied for a search warrant to search the three residences for evidence of drug-trafficking activities. A State Superior Court Judge then issued a "facially valid search warrant." The subsequent searches resulted in the discovery of large quantities of drugs at two of the residences and a small amount at a third residence. This led to the indictment of multiple defendants for conspiracy and distribution charges.

The defendants each filed motions to suppress the evidence seized pursuant to the warrant. After an evidentiary hearing, the trial court concluded that the affidavit for the search warrant was insufficient to establish probable cause. The court made it clear that the officers "had

36. Id. at 347.
38. Id. at 901.
39. Id.
40. Id.
41. Id. at 901-02.
42. Id. at 902.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id. at 903. The defendants' motions challenged the searches of all three residences and their automobiles, and any statements they made during the search. Id. at 903 n.1.
48. Id. at 903.
acted in good faith,” but the court rejected the prosecution’s argument that the exclusionary rule should not apply when evidence is seized in “reasonable, good-faith reliance on a search warrant.”

The government appealed, and the Ninth Circuit affirmed the trial court’s ruling. The Ninth Circuit held that the warrant was not supported by probable cause because the affidavit failed to establish the informant’s credibility, facts in the affidavit were stale, and these deficiencies were not cured by the police investigation. The court also declined the government’s invitation to recognize a good-faith exception to the exclusionary rule. The government then appealed to the Supreme Court. The government did not appeal the lower court’s determination that the warrant was unsupported by probable cause and only presented the question of “[w]hether 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.”

The Supreme Court began its discussion by acknowledging that “[l]anguage in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment, . . . or that the rule is required by the conjunction of the Fourth and Fifth Amendments.” The Court dispatched of this implication rather quickly by stating that “[t]he Fifth Amendment theory has not withstood critical analysis or the test of time,” and “the Fourth Amendment ‘has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.’”

The Court then turned to the costs and benefits of the exclusionary rule. The Court stated that “[w]hether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is ‘an issue separate from the question whether the Fourth Amendment

49. Id. at 904.
50. Id.
51. Id. at 904-05.
52. Id. at 905.
53. Id.
54. Id. The Supreme Court indicated that it was within its power to consider whether probable cause existed under the “totality of the circumstances” test of Illinois v. Gates, but the Court declined to do so because the issue had not been briefed or argued. Id.
55. Id. at 905-06 (citing Mapp v. Ohio, 367 U.S. 643, 651, 655-57 (1961); id. at 661-62 (Black, J., concurring); Olmstead v. United States, 277 U.S. 438, 462-63 (1928); Agnello v. United States, 269 U.S. 20, 33-34 (1925)).
56. Id. at 906 (citing Andresen v. Maryland, 427 U.S. 463, 472-74 (1976)).
57. Id. (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)).
58. Id. at 906-07.
rights of the party seeking to invoke the rule were violated by police conduct."\textsuperscript{59} In addition, the Court noted:

"Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury."\ldots Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on\ldots guilty defendants offends basic concepts of the criminal justice system. Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and administration of justice." Accordingly, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."\textsuperscript{60}

The Court concluded that a balancing of costs and benefits "forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained [with] the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment."\textsuperscript{61}

The Court ultimately held that the exclusionary rule is inapplicable "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope."\textsuperscript{62} This is because "there is no police illegality and thus nothing to deter."\textsuperscript{63} It is the magistrate’s duty to determine whether a warrant is supported by probable cause, and a police officer should not be expected to question the magistrate’s determination.\textsuperscript{64} "Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."\textsuperscript{65}

The Court did indicate that the good-faith exception would not apply in certain circumstances. Specifically, the Court stated that an officer would not be acting in good faith if the magistrate issuing the warrant was misled by information in the affidavit that the officer knew was false or should have known except for a reckless disregard of the truth.\textsuperscript{66} An officer would also not be acting in good faith if the issuing

\textsuperscript{59} Id. at 906 (citing Illinois v. Gates, 462 U.S. 213, 223 (1983)).
\textsuperscript{60} Id. at 907-08 (citations omitted).
\textsuperscript{61} Id. at 908-09 (quoting Gates, 462 U.S. at 255 (White, J., concurring in judgment)).
\textsuperscript{62} Id. at 919-20.
\textsuperscript{63} Id. at 921.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 923 (citing Franks v. Delaware, 438 U.S. 154, 168-69 (1978)).
magistrate had "wholly abandoned" her judicial role. In addition, an officer would not be acting in good faith if the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Further, an officer would not be acting in good faith if the warrant was so facially deficient that a reasonable officer could not presume the warrant to be valid. Because the officers acted in good faith reliance on the warrant, the Court held that the trial court erred when it applied the exclusionary rule and suppressed the evidence in the case.

Although the Supreme Court indicated that the good-faith exception would not be applicable in these specific situations, it did not answer the question of whether the exception applies when the facts supporting probable cause in the warrant affidavit were obtained through a prior improper search. This has led to a split between the circuits.

IV. CIRCUIT SPLIT

It is not surprising that, when left on their own, the circuit courts have taken a variety of positions on whether the good-faith exception applies when the facts supporting probable cause in the warrant affidavit were obtained through a prior improper search. Some circuits have concluded that the good-faith exception does not apply when the probable cause for the warrant is based on improperly obtained evidence. Other circuits have concluded that the good-faith exception applies if the predicate search was arguably lawful under existing precedent at the time of the search. Still others have concluded that the good-faith exception applies if the predicate search was arguably reasonable and the warrant affidavit truthfully conveyed the circumstances of the improper predicate search to the magistrate judge.

67. Id.
68. Id. (citing Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring in part)).
69. Id.
70. Id. at 903, 905, 922, 925.
71. See infra Part IV.
72. See infra Part IV.A.
73. See infra Part IV.B.
74. See infra Part IV.C.
A. Not Applicable when Probable Cause Is Based on an Improper Search

1. Fourth Circuit

The Fourth Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in *United States v. Mowatt*.75 The case began when three officers responded to a complaint that loud music and the odor of marijuana were coming from an apartment in a high-crime area.76 The officers were able to identify the apartment, and they knocked on the door.77 Mowatt initially refused to open the door, but he eventually opened it approximately twelve to thirteen inches after repeated demands from the officers.78 The officers observed that Mowatt appeared to be holding something in his hand behind his back, which caused the officers to fear for their safety.79 This led to a chain of events in which the officers entered the apartment to subdue Mowatt and the refrigerator was knocked open during the resulting struggle.80

After Mowatt was subdued, the officers noticed that a “plastic bag containing several hundred pink pills” was in the refrigerator.81 “Based on his training and experience,” one of the officers concluded that the pills were methylenedioxymethamphetamine, commonly known as ecstasy.82 Based on this observation, the officers sought and obtained a search warrant for the residence.83 During the subsequent search, officers found multiple firearms, ammunition, a body armor vest, and approximately $20,000 in cash.84 This evidence led to Mowatt being charged with multiple drug and firearm-related offenses.85

Mowatt subsequently moved to suppress the evidence, arguing that it was the fruit of an unconstitutional search.86 The prosecution argued, in part, that even if the initial entry into the apartment was unlawful, the evidence was admissible because the officers relied in good faith on the

75. 513 F.3d 395 (4th Cir. 2008), abrogated on other grounds by Kentucky v. King, 563 U.S. 452 (2011).
76. Id. at 397.
77. Id.
78. Id.
79. Id.
80. Id. at 397-98.
81. Id. at 398.
82. Id.
83. Id.
84. Id.
85. Id.
86. Id.
search warrant. The trial court denied the motion on several grounds, one being that the officers acted in good faith.

The Fourth Circuit began its analysis by concluding that the initial entry into Mowatt’s residence was an unlawful search that was not justified by exigent circumstances. The court also found that the search warrant would not have been sought, and thus not obtained, without the unlawful entry into the residence.

The court then turned to the government’s argument that the good-faith exception of Leon was applicable and the evidence should not be suppressed. The court rejected the argument, stating, “The Leon exception does not apply here because Leon only prohibits penalizing officers for their good-faith reliance on magistrates’ probable cause determinations. Here, the exclusionary rule operates to penalize the officers for their violation of Mowatt’s rights that preceded the magistrate’s involvement.”

Essentially, the court held that the good-faith exception does not apply when the government’s reason for seeking a search warrant is based on a prior, unlawful search.

2. Seventh Circuit

The Seventh Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in United States v. Scott. The case began when police officers used a confidential informant to purchase heroin from an individual named Reynolds. Rather than completing the drug sale at the arranged location at a motel, Reynolds drove the informant’s car to Scott’s home while the informant waited at a gas station. When Reynolds arrived at Scott’s home, Scott came out to the car and made several incriminating statements that were recorded by a device hidden in the car. Reynolds then returned to the informant and handed over 1.7 grams of heroin. A
subsequent controlled buy occurred five days later that was substantially similar, although there was no recording of any conversations.99

The police subsequently applied for and received a warrant to search Scott’s house.100 During the search, officers found a handgun and significant quantities of various drugs.101 Scott was indicted for firearm and drug-related charges, and he moved to suppress the evidence on the grounds that the driveway conversation was recorded illegally and without the contents of the driveway conversation, the police would not have had probable cause to obtain a search warrant.102 The motion was denied.103

The Seventh Circuit began its analysis by stating that “evidence discovered pursuant to a warrant will be inadmissible if the warrant was secured from a judicial officer through the use of illegally acquired information.”104 However, the court noted that “[a] search warrant obtained, in part, with evidence which is tainted can still support a search if the ‘untainted information, considered by itself, establishes probable cause for the warrant to issue.’”105 The court then held that because the search warrant affidavit contained sufficient facts to establish probable cause apart from the information about the recorded conversation, the search warrant was valid and the motion to suppress was properly denied.106

3. Ninth Circuit

The Ninth Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in United States v. Vasey.107 In that case, Vasey was stopped for speeding and was arrested when the officer discovered that there was an outstanding warrant for his arrest.108 When a backup officer arrived, the two officers searched Vasey’s vehicle and found $5000 and a container with three white pills.109 The officers then “terminated the search and

99. Id.
100. Id.
101. Id.
102. Id. at 662-63.
103. Id. at 662.
104. Id. at 664 (citing United States v. Oakley, 944 F.2d 384, 386 (7th Cir. 1991)).
105. Id. (citing United States v. Gray, 410 F.3d 338, 344 (7th Cir. 2005)).
106. Id. at 665-66.
107. 834 F.2d 782 (9th Cir. 1987).
108. Id. at 784.
109. Id.
decided to obtain a [search] warrant.\footnote{Id.} The warrant was approved and the officers found $71,111 in cash and three kilograms of cocaine.\footnote{Id. at 785.}

Vasey subsequently moved to suppress the evidence, arguing that the searches violated the Fourth Amendment as well as the Washington State Constitution.\footnote{Id. at 785-88.} The trial court ultimately denied the motion, finding that the initial warrantless search was proper as a search incident to arrest, and which validated the subsequent warrant.\footnote{Id. at 786-87 (citing New York v. Belton, 453 U.S. 454, 460 (1981); Chimel v. California, 395 U.S. 752, 763 (1969)).}

The Ninth Circuit began its analysis by examining the lawfulness of the initial warrantless search.\footnote{Id. at 785-88.} The court held that the search was not a proper search incident to arrest because the search was not limited to the area within Vasey's immediate control and it was not conducted contemporaneously with the arrest.\footnote{Id. at 786-87 (citing New York v. Belton, 453 U.S. 454, 460 (1981); Chimel v. California, 395 U.S. 752, 763 (1969)).} In addition, the court held that because the initial search was invalid, the evidence found during that search was tainted and should not have been included in the affidavit for the search warrant.\footnote{Id. at 788 (citing Wong Sun v. United States, 371 U.S. 471, 488, 491-92 (1963)).} Without this information in the affidavit, the remaining facts were insufficient to establish probable cause and the warrant was therefore invalid.\footnote{Id. at 789-90.} The Ninth Circuit then turned to the question of whether the evidence should be deemed admissible under the good-faith exception to the exclusionary rule.\footnote{Id. at 789.} The court held that Leon's good-faith exception did not apply because "[t]he constitutional error was made by the officer in this case, not by the magistrate as in Leon."\footnote{Id. at 789.} The court stated that in its view:

The Leon Court made it very clear that the exclusionary rule should apply (i.e. the good faith exception should not apply) if the exclusion of evidence would alter the behavior of individual law enforcement officers or the policies of their department. Officer Jensen's conducting an illegal warrantless search and including evidence found in this search in an affidavit in support of a warrant is an activity that the exclusionary rule was meant to deter.\footnote{Id. (first citing United States v. Leon, 468 U.S. 897, 918 (1984); and then citing United States v. Whiting, 781 F.2d 692, 698 (9th Cir. 1986)).}
In addition, the court concluded that “a magistrate’s consideration does not protect from exclusion evidence seized during a search under a warrant if that warrant was based on evidence seized in an unconstitutional search.” \(^\text{121}\)

4. Tenth Circuit

The Tenth Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in *United States v. Loera*. \(^\text{122}\) The case began when FBI agents obtained a warrant and searched Loera’s electronics for evidence of computer fraud. \(^\text{123}\) While they were searching, the agents discovered child pornography on four of Loera’s CDs. \(^\text{124}\) After the agents completed the search, they seized various devices that appeared to contain evidence of computer fraud, along with the four CDs that contained child pornography. \(^\text{125}\) One week later, an agent reopened the CDs that contained child pornography in order to be able to describe the images in an affidavit for a second search warrant. \(^\text{126}\) The warrant was approved, and agents found more child pornography when they executed the warrant. \(^\text{127}\)

Loera was subsequently indicted for multiple counts of possessing child pornography and filed a motion to suppress the child pornography evidence. \(^\text{128}\) The district court denied the motion, and Loera appealed, arguing that the searches conducted pursuant to the first warrant exceeded the scope of the warrant and the searches conducted pursuant to the second warrant were unlawful because the warrant was invalid. \(^\text{129}\)

The Tenth Circuit held that the initial search was valid because it was conducted pursuant to a valid search warrant. \(^\text{130}\) However, the court held that the search of the CDs one week later was improper because it was directed at finding child pornography, rather than computer fraud as authorized by the warrant. \(^\text{131}\) Without the tainted information in the

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\(^{121}\) *Id.* at 789-90.

\(^{122}\) 923 F.3d 907 (10th Cir. 2019).

\(^{123}\) *Id.* at 912.

\(^{124}\) *Id.* at 912-13.

\(^{125}\) *Id.* at 913.

\(^{126}\) *Id.*

\(^{127}\) *Id.* at 914.

\(^{128}\) *Id.*

\(^{129}\) *Id.*

\(^{130}\) *Id.* at 921-22.

\(^{131}\) *Id.* at 922.
affidavit that came from this improper search, there was insufficient evidence to support probable cause for the second warrant.\footnote{132}

The Tenth Circuit then turned to the question of whether the evidence discovered under the second search warrant was admissible under the good-faith exception.\footnote{133} The court held that the good-faith exception did not apply because “the illegality at issue stems from unlawful police conduct, rather than magistrate error, and therefore the deterrence purposes of the Fourth Amendment are best served by applying the exclusionary rule.”\footnote{134} The court concluded that penalizing an officer for her own error does contribute to the deterrence of Fourth Amendment violations.\footnote{135}

5. Eleventh Circuit

The Eleventh Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in United States v. McGough.\footnote{136} The case began when McGough locked his five-year-old daughter in his apartment and left to pick up a pizza.\footnote{137} The daughter tried to call her aunt but called 911 by mistake and abruptly hung up so she would not get in trouble.\footnote{138} This led to a chain of events in which the police responded, arrested McGough when he came back, and then entered the residence with the five-year-old to get her some shoes.\footnote{139} The entry into the residence was made over McGough’s objection.\footnote{140} Once inside the residence, officers observed marijuana and a gun that the five-year-old said McGough “uses to kill people.”\footnote{141}

The officers then sought and obtained a search warrant for the residence.\footnote{142} During the search, officers discovered firearms, marijuana, and a large amount of cash.\footnote{143} McGough was indicted for a number of crimes and subsequently filed a motion to suppress that was denied by the district court.\footnote{144}

\footnotesize
132. \textit{Id}. at 924-25.
133. \textit{Id}. at 925.
134. \textit{Id}. (emphasis added).
135. \textit{Id}. at 926. However, the court ultimately held that the evidence was admissible under the inevitable discovery doctrine because the child pornography would have eventually been discovered as agents searched for evidence of computer fraud under the original search warrant. \textit{Id}. at 927-29.
136. 412 F.3d 1232 (11th Cir. 2005).
137. \textit{Id}. at 1233.
138. \textit{Id}.
139. \textit{Id}. at 1233-34.
140. \textit{Id}. at 1234.
141. \textit{Id}.
142. \textit{Id}. at 1235.
143. \textit{Id}.
144. \textit{Id}.
The Eleventh Circuit began its analysis by holding that the five-year-old’s need for shoes was not compelling enough to justify the warrantless entry into McGough’s residence. The court then turned to the question of whether the evidence was admissible under the good-faith exception. The court stated that “[s]ince the purpose of the exclusionary rule is to deter unlawful police misconduct, when officers engage in an ‘objectively reasonable law enforcement activity’ and act in good faith and in reliance on a search warrant from a judge, the Leon good-faith exception applies.” Because the warrantless entry of the residence to obtain shoes was not an objectively reasonable police activity, the search warrant affidavit was “tainted with evidence obtained as a result of a prior, warrantless, presumptively unlawful entry into a personal dwelling.” Thus, the court held that the good-faith exception was not applicable.

B. Applicable when Prior Search Was Arguably Lawful at the Time

1. First Circuit

The First Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in United States v. Bain. The case began when agents from the Drug Enforcement Agency used a cooperating witness to make controlled buys of heroin from Bain. Police officers subsequently arrested Bain when he came out of a house, and they seized a set of keys from his person. The officers then used the keys to unlock the front door to the house and then to test the keys on the doors to three separate residential units in the house. The keys fit the door to Unit D, so the officers conducted a protective sweep and then sought and obtained a warrant for Unit D. The subsequent search produced drugs, cash, a firearm, a credit-card-making machine, drug paraphernalia, and identification materials that tied Bain to Unit D. The district court denied Bain’s

145. Id. at 1239.
146. Id.
147. Id. at 1239-40 (quoting United States v. Martin, 297 F.3d 1308, 1313 (11th Cir. 2002)).
148. Id. at 1240 (quoting United States v. Meixner, 128 F. Supp. 2d 1070, 1078 (E.D. Mich. 2001)).
149. Id.
150. 874 F.3d 1 (1st Cir. 2017).
151. Id. at 9.
152. Id. at 10.
153. Id.
154. Id.
155. Id. at 10-11.
subsequent motion to suppress, ruling that testing the key in the lock of Unit D and the resulting protective sweep were illegal searches but found that the evidence was admissible because the officers relied in good faith on legal precedent when they turned the key.156

The First Circuit began its analysis by concluding that testing the key on the lock of Unit D was a search157 that was unreasonable, and thus, violated the Fourth Amendment.158 The court then turned to the question of whether the good-faith exception applied.159 The court recited the four situations identified by Leon where the good-faith exception is not applicable160 and stated: "Here, we have a circumstance not expressly addressed in Leon: the warrant affidavit forthrightly discloses facts that establish probable cause, but one of the facts essential to establishing probable cause (the result of the key turn) was obtained as a result of an unconstitutional search."161

Because the situation was not one expressly identified by Leon, the question for the First Circuit was whether the test of the key in the lock was "close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable."162 The court concluded that because there was no clear precedent at the time of the key test indicating that such action was an unreasonable search, a reasonable officer could have concluded that the action was lawful.163 Thus, the police could rely on the warrant in good faith and the evidence was admissible.164

2. Eighth Circuit

The Eighth Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in

156. Id. at 11.
157. Id. at 14-16.
158. Id. at 19.
159. Id.
160. Id. at 21. The situations are as follows:
(1) 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[;] (2) where the issuing magistrate wholly abandoned his judicial role; (3) when an affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when, depending on the circumstances of the particular case, a warrant [is] so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. (internal quotations omitted) (citing United States v. Leon, 468 U.S. 897, 923 (1984)).
161. Id.
162. Id. at 22 (quoting United States v. Hopkins, 824 F.3d 726, 733 (8th Cir. 2016)).
163. Id. at 22-23.
164. Id. at 23, 25, 27.
The case began when a police officer had his narcotics dog sniff along the outside walls of a building in which Hopkins rented a townhome. The dog alerted at a point that was approximately six to eight inches from Hopkins’s front door. The police then applied for and obtained a search warrant for Hopkins’s residence. When the police executed the warrant, they found drugs in the townhome and both a gun and more drugs on Hopkins’s person.

After Hopkins was indicted for possession of narcotics with intent to distribute, he moved to suppress the evidence. The district court denied the motion after concluding that although the dog sniff was unlawful, the good-faith exception applied and made the evidence admissible.

Hopkins entered a conditional guilty plea while reserving his right to appeal.

The Eighth Circuit began its analysis by holding that the dog sniff was an unlawful warrantless search of the curtilage of the residence. The court then turned to whether the good-faith exception applied.

The court stated:

In order for the Leon good faith exception to apply to a warrant based on evidence obtained through a violation of the Fourth Amendment, “the detectives’ prewarrant conduct must have been close enough to the line of validity to make the officers’ belief in the validity of the warrant objectively reasonable.”

Thus, the “inquiry is confined to ‘the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate’s authorization.’”

The Eighth Circuit concluded that the officer’s “actions were ‘close enough to the line of validity’ to make his belief in the warrant’s validity objectively reasonable.” Because the governing Supreme Court case on dog sniffs concerned a single-family residence and Hopkins’s residence was in a multi-family building, the officer had an objectively
reasonable belief that the case did not apply and the search was legal. In addition, the affidavit for the search warrant disclosed all of the relevant facts about the dog sniff. Therefore, "[o]nce the state court judge considered these facts and issued the warrant, it was reasonable for the detectives to believe the warrant was valid." Based on these considerations, the court held that Leon's good-faith exception applied and the evidence was admissible.

3. Fifth Circuit

The Fifth Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in United States v. Holley. The case began when the police received a tip that Holley was distributing large quantities of marijuana. In response, an officer went to Holley's house on two occasions and had a dog conduct free air sniffs of the garage door. The dog alerted on both occasions, and the police used these alerts as a basis for obtaining a search warrant. During the subsequent search, officers found ten pounds of marijuana, $9990 in cash, a handgun, and various items that were indicative of drug distribution. This led to a chain of events in which officers conducted another dog sniff and then sought and obtained search warrants for other houses connected with Holley; the resulting searches had similar results.

Holley was indicted for drug- and firearm-related offenses. He subsequently moved to suppress the evidence, arguing that the dog sniffs violated the Fourth Amendment. The district court denied the motions.

The Fifth Circuit began its analysis by stating that the general rule is:

[E]vidence seized pursuant to a warrant is admissible—even if the warrant was the product of an illegal search—if two requirements are

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178. Id. (citing Cannon, 703 F.3d at 413-14).
179. Id. at 734.
180. Id. (quoting Cannon, 703 F.3d at 414).
181. Id.
182. 831 F.3d 322 (5th Cir. 2016).
183. Id. at 324.
184. Id.
185. Id.
186. Id.
187. Id. at 324-25.
188. Id. at 325.
189. Id.
190. Id.
met: (1) the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant must be "close enough to the line of validity" that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct, and (2) the resulting search warrant must have been sought and executed by a law enforcement officer in good faith as prescribed by Leon.191

There was no allegation that the officers did not seek the warrants in good faith, thus, the only question for the court was whether the dog sniffs were "close enough to the line of validity" that an objectively reasonable officer would not have realized that they were invalid.192 Because there was no binding precedent at the time of the dog sniffs that would indicate that such action was unlawful, the court held that they were "close enough to the line of validity."193 Therefore, the court held that the good-faith exception applied and the evidence was admissible.194

4. District of Columbia Circuit

The District of Columbia Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in United States v. Thornton.195 In that case, the police had been investigating Thornton for gambling.196 During the investigation, the police saw Thornton put a garbage bag in a trash can in the back of a residence.197 The police then removed the garbage bag from the can and discovered that it contained gambling paraphernalia.198 Based on this evidence and other information obtained through surveillance, the police applied for and obtained search warrants.199 During the execution of the search warrants, officers found large amounts of heroin as well as gambling paraphernalia.200 After Thornton was charged, he argued that the evidence seized under one of the warrants should be suppressed because there was no probable cause for the warrant.201 The trial court denied the motion.202

191. Id. at 326 (citing United States v. Massi, 761 F.3d 512, 528 (5th Cir. 2014)).
192. Id.
193. Id. at 327.
194. Id. at 326-27.
196. Id. at 41.
197. Id.
198. Id.
199. Id. at 42.
200. Id. at 42-43.
201. Id. at 43.
202. Id.
The D.C. Circuit found that it was unnecessary to address Thornton’s claim that the search of the garbage bag was unconstitutional, and without the contents of the bag, there was no probable cause for a warrant.\(^{203}\) This was because the court found that the good-faith exception was applicable.\(^{204}\) The court stated that under the Supreme Court’s recent decision in *Leon*,

> reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate...should be admissible in the prosecution’s case-in-chief. In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.\(^{205}\)

The court noted that there was no evidence the magistrate had abandoned his neutral role or that any of the statements in the affidavit were untrue.\(^{206}\) In addition, “[i]t was eminently reasonable for the Superior Court judge, and the police officers, to believe that the trash bag search was constitutional and its fruits could be used to establish probable cause.”\(^{207}\) Thus, the D.C. Circuit upheld the trial court’s ruling that the evidence was admissible.\(^{208}\)

**C. Applicable when the Prior Search Was Arguably Reasonable and the Affidavit Truthfully Conveys the Circumstances of the Prior Search**

1. Second Circuit

The Second Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in *United States v. Ganias*.\(^{209}\) That case began when Army investigators obtained a search warrant for the records of a business that was suspected of defrauding the government.\(^{210}\) Pursuant to the warrant, the investigators seized a number of materials and made mirror image copies of computer hard drives.\(^{211}\) These mirrored drives remained in government possession for approximately two and a half years, at which...
time the government sought and obtained a second search warrant to search the mirrored drives. 212 The search pursuant to this second warrant uncovered evidence that Ganias had engaged in tax evasion. 213 Ganias filed a motion to suppress, arguing that retention of the mirrored drives for two and a half years violated the Fourth Amendment. 214 The district court denied the motion after finding that there had been no violation of the Fourth Amendment. 215 The Second Circuit, sitting en banc, resolved the case on good faith grounds and did not decide whether the retention of the mirrored drives was unlawful. 216

The Second Circuit began by stating that under Leon, "exclusion of evidence is inappropriate when the government acts 'in objectively reasonable reliance' on a search warrant, even when the warrant is subsequently invalidated." 217 However, such reliance "must be objectively reasonable." 218 "Thus, to assert good faith reliance successfully, officers must, inter alia, disclose all potentially adverse information to the issuing judge." 219

After reciting its general rule, the court rejected Ganias's argument that good faith reliance on a warrant is never possible when there has been a prior constitutional violation. 220 The court held that when officers have "no 'significant reason to believe' that their predicated act was indeed unconstitutional" 221 and "the issuing magistrate was apprised of the relevant conduct, so that the magistrate was able to determine whether any predicate illegality precluded issuance of the warrant," 222 then "invoking the good faith doctrine does not 'launder [the agents'] prior unconstitutional behavior by presenting the fruits of it to a magistrate,'" as Ganias suggests. 223 In such cases, the good-faith doctrine simply reaffirms Leon's basic lesson: that suppression is inappropriate where reliance on a warrant was "objectively reasonable." 224

Because the agents who searched the mirrored hard drives fully apprised the pertinent facts to the magistrate and did not have any

212. Id. at 207, 208 n.20.
213. Id. at 207.
214. Id. at 200, 207-08.
215. Id. at 208.
216. Id. at 211.
217. Id. at 221 (quoting United States v. Leon, 468 U.S. 897, 922 (1984)).
218. Id. (citing Leon, 468 U.S. at 922).
219. Id. (citation omitted).
220. Id. at 223.
221. Id. (quoting United States v. Reilly, 76 F.3d 1271, 1281 (2d Cir. 1996)).
222. Id.
223. Id.
224. Id. (quoting Leon, 468 U.S. at 922).
reason to believe that what they had done was unconstitutional, the court held that the good-faith exception applied, and the evidence was admissible.225

2. Sixth Circuit

The Sixth Circuit addressed the applicability of the good-faith exception when probable cause is based on a prior improper search in United States v. McClain.226 That case began when a concerned neighbor called the police and reported that a light was on inside a house that had been vacant for several weeks.227 An officer responded, checked the doors and windows, and found that the front door was slightly ajar.228 When backup arrived, the two officers entered the house and observed materials that they concluded were for a marijuana growing operation.229

These observations caused the police to conduct surveillance on the house for a number of weeks.230 This led the officers to conclude that the three defendants were setting up marijuana growing operations at this location and multiple others.231 The officers prepared search warrants for those locations, and the affidavits “explicitly relied in part on evidence obtained during the initial warrantless search.”232 The officers obtained warrants and subsequently found 348 marijuana plants at the original house as well as numerous marijuana plants and plant-growing materials at the other properties.233

The three defendants were subsequently charged with a number of drug-related offenses.234 The defendants all filed motions to suppress, and the district court granted the motions based on a finding that the original warrantless search violated the Fourth Amendment and the good-faith exception did not apply.235 The government appealed.236

The Sixth Circuit began its analysis by concluding that the original warrantless search was unlawful because there was no probable cause to believe that a crime was occurring.237 The court then turned to the

225. Id. at 224-26.
226. 444 F.3d 556 (6th Cir. 2005).
227. Id. at 559.
228. Id.
229. Id. at 560.
230. Id.
231. Id.
232. Id.
233. Id.
234. Id. at 560-61.
235. Id. at 561.
236. Id.
237. Id. at 563-64. In order to justify a warrantless search, the government must demonstrate both probable cause and exigent circumstances. Id. at 564. Because there was no probable cause, the
question of whether the good-faith exception was applicable.238 The court stated that the issue boiled down to "whether the good-faith exception to the exclusionary rule can apply in a situation in which the affidavit supporting the search warrant is tainted by evidence obtained in violation of the Fourth Amendment."239 The court held that it could.240

The Sixth Circuit stated that under Leon, "evidence seized pursuant to a warrant, even if in fact obtained in violation of the Fourth Amendment, is not subject to the exclusionary rule if an objectively reasonable officer could have believed the seizure valid."241 The court stated that the officers who conducted the initial warrantless search were not objectively unreasonable in suspecting that criminal activity was occurring.242 In addition, the court noted that the "warrant affidavit fully disclosed to a neutral and detached magistrate the circumstances surrounding the initial warrantless search."243 Thus, "[t]here was indeed nothing more that [the officer] ‘could have or should have done under these circumstances to be sure that his search would be legal.’"244 Based on these considerations, the court held that the good-faith exception applied and the evidence was admissible.245

V. HAVING FAITH

The failure of the Supreme Court in Leon to specifically address the good-faith exception when a warrant is based on a prior improper search has led to a confused mixture of rules that depend on where a trial occurs. Different outcomes for identical facts based merely on the location of the court is the very definition of unfairness. This situation is untenable in a modern age when crimes frequently cross jurisdictional boundaries. The time has come for the Supreme Court to expressly recognize that the good-faith exception applies when: (1) the prior search was objectively reasonable and (2) the warrant affidavit truthfully conveys the circumstances of the prior search to the magistrate. This is the rule that is most consistent with both the Court's post-Leon decisions and with general policy considerations.

238. Id.
239. Id. at 565.
240. Id.
241. Id. at 566 (quoting United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989)).
242. Id.
243. Id.
244. Id. (quoting United States v. Thomas, 757 F.2d 1359, 1368 (1985)).
245. Id.
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A. Post-Leon

The Supreme Court has continued to expand the good-faith exception into more and more areas in its post-Leon decisions.\textsuperscript{246} The reasoning behind these decisions indicates that the good-faith exception should be applied when a warrant is based on a prior improper search as long as the prior search was objectively reasonable and the warrant affidavit truthfully conveys the circumstances of the prior search to the magistrate.

1. \textit{Massachusetts v. Sheppard}

The very next case the Supreme Court decided after \textit{Leon} was \textit{Massachusetts v. Sheppard},\textsuperscript{247} in which a detective submitted an application for a search warrant that he informed the magistrate was defective.\textsuperscript{248} Specifically, the detective needed an application for a warrant in a homicide investigation, but could only find a pre-printed application titled “Search Warrant—Controlled Substance.”\textsuperscript{249} The detective made some changes to the form and advised the magistrate of the formal discrepancies.\textsuperscript{250} The magistrate assured the detective that he would make the necessary changes to make the search warrant valid.\textsuperscript{251} However, the magistrate did not change the part of the warrant that continued to authorize a search for “controlled substances” and did not alter the form to incorporate the affidavit.\textsuperscript{252}

There was no question that the warrant was invalid,\textsuperscript{253} but the Supreme Court held that the good-faith exception applied.\textsuperscript{254} The Court stated that the detective “took every step that could reasonably be expected” of him by informing the magistrate that there were mistakes on the forms and then relying on the magistrate’s statement that he

\textsuperscript{246} See generally Kenneth J. Melilli, \textit{What Nearly a Quarter Century of Experience Has Taught Us About Leon and “Good Faith”}, 2008 UTAH L. REV. 519, 522, 527, 529, 550 (2008) (“With the arrival of [the post-Leon cases], it is obvious that the good faith principle is not limited to the Leon fact pattern. This undoubtedly surprised no one, neither proponents nor opponents of Leon itself. Nevertheless, the fact that Leon is not limited to its own circumstances merely signals the need for determining, if possible, the principle that marks the perimeters of the good faith doctrine.”).

\textsuperscript{247} 468 U.S. 981 (1984).
\textsuperscript{248} \textit{Id.} at 985-86.
\textsuperscript{249} \textit{Id.} at 984-85.
\textsuperscript{250} \textit{Id.} at 985-86.
\textsuperscript{251} \textit{Id.} at 986.
\textsuperscript{252} \textit{Id.}
\textsuperscript{253} See \textit{id.} at 988 n.5.
\textsuperscript{254} \textit{Id.} at 988.
would make the necessary changes to make the warrant valid.\textsuperscript{255} The Court added:

Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested.\textsuperscript{256}

Essentially, the Court held that the good-faith exception applied because even though the search was based on an invalid warrant, the detective had fully informed the magistrate about the improper language in the documents and had relied on the magistrate’s assurance that the warrant was valid.\textsuperscript{257} Under this reasoning, the good-faith exception should also apply when a detective fully informs a magistrate in an affidavit about the circumstances of a prior search that provides probable cause for a warrant and the magistrate issues the warrant.

2. \textit{Illinois v. Krull}

The Supreme Court expanded the reach of the good-faith exception again in \textit{Illinois v. Krull}.\textsuperscript{258} In that case, the Court upheld the admissibility of evidence obtained during a warrantless search conducted by a police officer who relied on a state statute that was later declared to be unconstitutional.\textsuperscript{259} The Court stated:

The approach used in \textit{Leon} is equally applicable to the present case. The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer’s actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. To paraphrase the Court’s comment in \textit{Leon}: “Penalizing the officer for the [legislature’s]
error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”

In short, the Court upheld the search because the detective “relied, in objective good faith, on a statute that appeared legitimately to allow a warrantless administrative search.” Likewise, a search should be upheld when an officer relies in objective good faith on a magistrate who is informed of all of the circumstances and approves of a search by issuing a warrant.

3. Arizona v. Evans

The Supreme Court expanded the good-faith exception to cover mistakes by court employees in Arizona v. Evans. Specifically, the Court held that the exclusionary rule was not applicable to evidence obtained after a police officer arrested Evans based on a computer check of a police record that erroneously indicated that Evans had an outstanding warrant for his arrest. The Court explained that “[i]f court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction [as exclusion].” In addition, the Court stated:

If it were indeed a court clerk who was responsible for the erroneous entry on the police computer, application of the exclusionary rule also could not be expected to alter the behavior of the arresting officer. As the trial court in this case stated: “I think the police officer [was] bound to arrest. I think he would [have been] derelict in his duty if he failed to arrest.”

In short, the Court held that the good-faith exception applied because there was “no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record.” Significantly, the Court declined to address the contention of amicus curiae that Leon would also apply if police personnel had been responsible for the error. The Court certainly could have taken the

260. Id. at 349-50 (quoting United States v. Leon, 468 U.S. 897, 921 (1984)).
261. Id. at 360.
263. See id. at 3-5, 15-16.
264. Id. at 14.
265. Id. at 15 (alteration in original) (citation omitted).
266. Id. at 15-16.
267. Id. at 16 n.5. The Court declined to address the issue because the record did not adequately present the issue for consideration. Id.
opportunity to definitively state that the good-faith exception did not apply when the police were responsible for the error if that was the rule.

4. **Kyllo v. United States**

The Supreme Court gave a further hint that the good-faith exception would apply to a search warrant based on a prior improper search in *Kyllo v. United States.* In that case, police officers conducted an illegal search by using a thermal imaging machine to detect heat inside a house and then presented the scan’s results to a magistrate in a warrant application. The Court held that the use of the thermal scan was unconstitutional and remanded to the district court “to determine whether, without the evidence [the thermal scan] provided, the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.” Although the Court did not mention it by name, the good-faith exception would clearly be a possible “other basis” for admission of the evidence.

5. **Hudson v. Michigan**

In *Hudson v. Michigan,* the Supreme Court eliminated any perceived notion that the exclusionary rule is always applicable when the police are at fault for an illegal search. The Court did so by holding that the exclusionary rule does not apply when officers violate the Fourth Amendment’s knock-and-announce rule while executing a search warrant. The Court stated:

Suppression of evidence... has always been our last resort, not our first impulse. The exclusionary rule generates substantial social costs which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it and have repeatedly emphasized that the rule’s costly toll upon truth-seeking and

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269. *Id.* at 29-30.
270. *Id.* at 40-41.
271. See generally Kenneth C. Halcom, *Illegal Predicate Searches and the Good Faith Exception*, 2007 U. ILL. L. REV. 467, 473-74, 476-77, 493-94 (2007) (“Obviously, the good faith exception is one possible basis for admission of the evidence seized pursuant to the warrant, but it would be dangerous to infer from this sentence that the Court intended to express a firm view on the subject.”).
273. *Id.* at 589-90, 599. The knock-and-announce rule requires officers executing a search warrant to “announce their presence and provide residents an opportunity to open the door” unless there exists “a threat of physical violence,” there is “reason to believe evidence would likely be destroyed” if the officers give notice to the residents, or if announcing their presence would be “futile.” See *id.* at 589-90 (citations omitted).
law enforcement objectives presents a high obstacle for those urging [its] application. We have rejected [i]ndiscriminate application of the rule and have held it to be applicable only where its remedial objectives are thought most efficaciously served—that is, where its deterrence benefits outweigh its substantial social costs.  

Further, the Court stated that it could not "assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago." Whatever the original goals of the exclusionary rule may have been, the Court signaled in Hudson that deterrence is the only remaining goal and it should be used only as a last resort.

6. Herring v. United States

The Supreme Court extended the good-faith exception even further for law enforcement mistakes in Herring v. United States. In that case, police officers in one jurisdiction had the sheriff's office in another jurisdiction check its database and the officers were told that there was an outstanding warrant for Herring, who was then arrested. Methamphetamine and a firearm were found during the search incident to Herring's arrest. The report of the outstanding warrant was wrong, and the warrant should have been removed from the records, but "[f]or whatever reason," had not been.

The Supreme Court held that the exclusionary rule did not apply because "the error was the result of isolated negligence attenuated from the arrest." But more significant than this specific holding, the Court stated that "suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." The Court then set forth a general rule:

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274. Id. at 591 (alterations in original) (citations and internal quotations omitted).
275. Id. at 597.
276. See Zachary C. Bolitho, Specifically Authorized by Binding Precedent Does Not Mean Suggested by Persuasive Precedent: Applying the Good-Faith Exception After Davis v. United States, 118 W. Va. L. Rev. 643, 653 (2015) ("Whereas the exclusionary rule was initially viewed as serving the dual purposes of deterrence and the maintenance of judicial integrity, Hudson not so covertly signaled that deterrence was the principal rationale going forward.").
278. Id. at 137.
279. Id.
280. Id. at 137-38.
281. Id. at 137.
282. Id.
To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.\(^{283}\)

The Court concluded by stating:

In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." In such a case, the criminal should not "go free because the constable has blundered."\(^{284}\)

A police officer who executes a search in an objectively reasonable manner and then obtains a search warrant after fully disclosing the circumstances to a magistrate is not acting in a manner that is deliberate, reckless, or grossly negligent.\(^{285}\)

7. **Davis v. United States**

The Supreme Court built on *Herring’s* general rule and recognized even broader application of the good-faith exception in *Davis v. United States*.\(^{286}\) In that case, police stopped a vehicle in which Davis was a passenger and ended up arresting him for giving a false name and the driver for driving while intoxicated.\(^{287}\) The officers then relied on binding appellate precedent to search the car pursuant to an arrest and they discovered a firearm belonging to Davis in the vehicle.\(^{288}\) Two years later, while Davis’s subsequent conviction was on appeal, the Supreme Court ruled that this sort of vehicle search was unconstitutional.\(^{289}\) Thus, the question for the court was whether the exclusionary rule should apply to prohibit the introduction of the evidence against Davis where the evidence was obtained as the result of

\(^{283}\) *Id.* at 144.

\(^{284}\) *Id.* at 147-48 (first quoting United States v. Leon, 468 U.S. 897, 907 n.6, 909-10 (1984); and then quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)).

\(^{285}\) See *id.* at 144-48.

\(^{286}\) 564 U.S. 229 (2011).

\(^{287}\) *Id.* at 235.

\(^{288}\) *Id.*

\(^{289}\) See *id.* at 233-35 (citing Arizona v. Gant, 556 U.S. 332, 343 (2009)).
a search that complied with then binding precedent that later was overruled.290 The Court held that it should not.291

The Court explained that, “[b]ecause suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.”292 The Court further stated:

The basic insight of the Leon line of cases is that the deterrence benefits of exclusion “var[y] with the culpability of the law enforcement conduct” at issue. When the police exhibit “deliberate,” “reckless,” or “grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, or when their conduct involves only simple, “isolated” negligence, the “deterrence rationale loses much of its force,” and exclusion cannot “pay its way.”293

In short, the “cost-benefit analysis in exclusion cases [focuses] the inquiry on the ‘flagrancy of the police misconduct’ at issue.”294 A police officer who executes a search in an objectively reasonable manner and then obtains a search warrant after fully disclosing the circumstances to a magistrate is not acting with the sort of flagrant misconduct that qualifies for the exclusion of evidence under Davis.


In most cases where an officer performs an improper search and uses the result of the search to seek a search warrant, the officer has made a mistake about the law regarding searches and seizures.295 Although the case did not involve a warrant, the Supreme Court

290. Id. at 232.
291. Id.
292. Id.
293. Id. at 238 (alteration in original) (quoting Herring v. United States, 555 U.S. 135, 143 (2009); United States v. Leon, 468 U.S. 897, 908 n.6, 909, 919 (1984)).
294. Id. (quoting Leon, 468 U.S. at 911).
295. See, e.g., United States v. Diaz, 854 F.3d 197, 204 (2d Cir. 2017) (police officer “believe[ed] that [an] apartment-building stairwell qualified as a ‘public place’ within the meaning of the open-container law”); United States v. Song Ja Cha, 597 F.3d 995, 1005 (9th Cir. 2010) (“[O]fficers . . . did not realize that a seizure must last ‘no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.’”); United States v. Barker, 514 F.2d 208, 211 (D.C. Cir. 1975) (stating that the “foot soldiers of the Watergate Break-in” claimed to sincerely “believe[] the operation to be a ‘national security’ mission, authorized by a ‘government intelligence agency’”).
addressed the consequences of a search and seizure based on a mistake of law in *Heien v. North Carolina.* That case began when an officer stopped a vehicle for having one faulty brake light. The officer obtained consent to search the car and found cocaine in a sandwich bag. However, the officer was mistaken in his belief that the law required two working brake lights when, in fact, it required one. Thus, the issue was whether reasonable suspicion for a seizure can be based on a mistaken understanding of the law. The Supreme Court held that it can.

The Supreme Court began its analysis by stating, "[a]s the text indicates and we have repeatedly affirmed, the ultimate touchstone of the Fourth Amendment is reasonableness." The Court went on to emphasize that, "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them ‘fair leeway for enforcing the law in the community’s protection.’" The Court had "little difficulty concluding that the officer's error of law was reasonable," and therefore the exclusionary rule was not applicable. Under this reasoning, the good-faith exception should apply when an officer makes a reasonable mistake in conducting a search and then fully discloses the circumstances to a magistrate in order to obtain a search warrant.

9. *Utah v. Strieff*

The Supreme Court limited the exclusionary rule even further in *Utah v. Strieff.* That case began when a police officer made an unconstitutional suspicionless stop of Strieff, discovered that Strieff had an outstanding warrant for his arrest, and then found methamphetamine in the subsequent search incident to arrest. The Court held that the exclusionary rule did not apply and the evidence was admissible.

The Supreme Court held that the exclusionary rule did not apply because “the evidence [the officer] seized as part of his search incident
to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest."308 The Court noted that the officer "was at most negligent" and had made "good-faith mistakes."309 Indeed, the Court stated that "it is especially significant that there is no evidence that [the officer's] illegal stop reflected flagrantly unlawful police misconduct."310

Significantly, the Court emphasized that "once [the officer] discovered the warrant, he had an obligation to arrest Strieff."311 This is because:

A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions. [The officer's] arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once [the officer] was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect [the officer's] safety.312

Essentially, the Court held that the exclusionary rule does not apply when an officer's misstep is followed by the perfectly lawful action of executing an arrest warrant.313 Likewise, the good-faith exception should apply when an officer's misstep in conducting an improper search is followed by the perfectly lawful action of disclosing all of the circumstances and obtaining a search warrant.

B. Policy

General policy considerations indicate that the good-faith exception should be applied when a warrant is based on a prior improper search as long as the prior search was objectively reasonable and the warrant affidavit truthfully conveys the circumstances of the prior search to the magistrate. The justice system is built on the policy that a police officer should trust the decision of a fully-informed magistrate who issues a search warrant.314 Indeed, the Supreme Court stated that a police officer should not be expected to "question the magistrate's probable-cause

308. Id. at 2064.
309. Id. at 2063.
310. Id.
311. Id. at 2062.
312. Id. at 2062-63 (internal quotations omitted) (citing Arizona v. Gant, 556 U.S. 332, 339 (2009); United States v. Leon, 468 U.S. 897, 920 n.21 (1984)).
313. See id. at 2063.
314. See Leon, 468 U.S. at 921.
determination" in Leon\textsuperscript{315} or "disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested" in Sheppard.\textsuperscript{316} Further, as stated by the Second Circuit in United States v. Thomas,\textsuperscript{317} the magistrate has a duty to interpret the law, and when a magistrate determines that a prior search can form the basis for probable cause of a search warrant, "it [is] reasonable for the officer to rely on this determination" and "[t]here is nothing more [an] officer could... or should... [do] under these circumstances to be sure his search would be legal."\textsuperscript{318}

Applying the good-faith exception when a warrant is based on a prior improper search as long as the prior search was objectively reasonable and the warrant affidavit truthfully conveys the circumstances of the prior search to the magistrate supports the policy of efficiency. It is far more efficient to shift the final decision of whether a warrant is valid from the trial court to the magistrate. Indeed:

\[T\]hat is where [the decision] should reside, since only the magistrate is in a position to actually prevent (rather than simply try to deter in future cases) the violation of an individual's fourth amendment rights. Since there has been reliance by the police on the magistrate's approval of the warrant, suppression at trial does not... merely put the police back where they would have been had they not violated the fourth amendment in the first place. Had the magistrate refused the warrant application as inadequate, they could, in the normal case, have obtained more evidence to support it and resubmitted it to the magistrate. By the time the trial judge invalidates the warrant, it is too late. Thus, from a law enforcement viewpoint, and in certain respects from the viewpoint of a civil libertarian, it makes sense to place the final decision in most cases in the hands of a competent magistrate.\textsuperscript{319}

Placing the decision in the hands of fully-informed magistrates reduces the number of invalid warrants and subsequent searches by identifying problems with the warrants when the police still have an opportunity to address any deficiencies.\textsuperscript{320} This in turn saves future law

\begin{enumerate}
\item\textsuperscript{315} Id.
\item\textsuperscript{316} Massachusetts v. Sheppard, 468 U.S. 981, 989-90 (1984).
\item\textsuperscript{317} 757 F.2d 1359 (2d Cir. 1985).
\item\textsuperscript{318} Id. at 1368.
\item\textsuperscript{319} Craig M. Bradley, The "Good Faith Exception" Cases: Reasonable Exercise in Futility, 60 Ind. L.J. 287, 292-93 (1985) (footnotes omitted).
\item\textsuperscript{320} Of course, this requires law-trained magistrates who can properly evaluate the legality of a prior search. See id. at 293 ("If the Court is going to place principal reliance on magistrates to guard civil liberties against police overreaching, then it is critical that the Court require that these officials be trained and competent as well as 'neutral and detached.'").
\end{enumerate}
enforcement and judicial resources from being spent on cases that are required to be dismissed.

Applying the good-faith exception when a warrant is based on a prior improper search as long as the prior search was objectively reasonable and the warrant affidavit truthfully conveys the circumstances of the prior search to the magistrate also prevents the trial court from being placed in a dilemma. As noted by the Second Circuit:

Before Leon, federal courts examining the constitutionality of a search had to choose between: (1) holding the search unconstitutional and excluding the evidence found, thereby significantly increasing the chances that a guilty person would go free, regardless of the heinousness of the crime at issue, or (2) finding the search constitutional, thereby condoning similar searches and injuring potentially innocent objects of future, highly intrusive investigations. 321

Applying the good-faith exception in this circumstance prevents the trial judge from being placed in this dilemma by allowing the police to correct the problem before the search occurs, as noted above. It also spares the trial judge from this dilemma even when the magistrate has erred in issuing a warrant by allowing the trial judge to correct the magistrate and provide guidance for the future without the cost of letting the guilty go free. 322

Lastly, applying the good-faith exception is consistent with the policy that exclusion of evidence is a "last resort" to be used only "where its deterrence benefits outweigh its substantial social costs." 323 As the Supreme Court stated in Leon, deterrence can be achieved by applying the exclusionary rule "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 324 "Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." 325 Excluding evidence when a warrant is based on a prior improper search when the search was objectively reasonable

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322. See id. ("Where good faith exists, courts may thus correct erring magistrates and provide them with guidance without incurring the social cost of letting the guilty profit from decisions that define the boundaries of the Fourth Amendment.").
325. Id. at 921 (citations omitted).
and the warrant affidavit truthfully conveyed the circumstances of the prior search to the magistrate does not promote deterrence. Rather, excluding evidence is equivalent to closing the stable door after the horse has bolted.326

VI. CONCLUSION

The failure of the Supreme Court in Leon to address the good-faith exception for warrants based on a prior improper search has led to a confused mixture of rules that depend on where a case is filed. This situation is untenable in a modern age when crimes and investigations frequently cross jurisdictional boundaries. Both defendants and law enforcement officials are entitled to consistent rules.327 As Wayne LaFave has stated, "[S]ecurity [from unreasonable searches and seizures] can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."328

From Sheppard to Strieff, the Supreme Court’s post-Leon cases have been consistent in holding that objective reasonableness is the guiding principle of when it comes to analyzing the exclusionary rule and the good-faith exception.329 Likewise, the cases have made it clear that the only current purpose of the exclusionary rule is deterrence of police misconduct, and the deterrence does not work when the police rely in good faith on the decisions of magistrates.330 Any rule regarding the application of the good-faith exception to warrants following an improper predicate search must be based on these principles.

The only fair rule based on these principles is one holding that the good-faith exception applies when the prior search was objectively reasonable and the warrant affidavit truthfully conveyed the circumstances of the prior improper search to the magistrate. This is the rule that best fits the “basic insight of the Leon line of cases . . . that the deterrence benefits of exclusion ‘var[y] with the culpability of the law enforcement conduct’ at issue.”331 An officer who performs a predicate

326. See generally Bradley, supra note 318, at 294 (“Still, if one agrees with the Court’s assumption that deterrence is the purpose of exclusion, and if deterrence does not work in these cases, then excluding the evidence would simply be shutting the barn door after the horse is gone.”).
328. Id. at 142.
329. See supra Part V.A.
330. See supra Part V.A.
search in an objectively reasonable manner and then fully discloses the circumstances of the search in an application for a search warrant has no "culpability" and thus, nothing worth deterring. As stated by the Supreme Court, "[s]uppression of evidence . . . has always been our last resort, not our first impulse" and should "be applicable only where its remedial objectives are thought most efficaciously served, that is, where its deterrence benefits outweigh its substantial social costs."332

An officer acts in good faith when the predicate search was "close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable" and "a reasonably well trained officer would [not] have known that the search was illegal."333 Because the exclusionary rule only applies to "deliberate, reckless, or grossly negligent conduct,"334 the good-faith exception applies.335

Policy considerations also indicate that the good-faith exception should apply when the prior search was objectively reasonable and the warrant affidavit truthfully conveyed the circumstances of the prior improper search to the magistrate.336 Police officers should not be expected to "question the magistrate's probable-cause determination,"337 or "disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."338 The best rule is one that encourages an officer to fully disclose the circumstances of a predicate search to a magistrate in a search warrant affidavit so deficiencies in the warrant application can be addressed before evidence is seized and a suspect is charged in a case that is subsequently dismissed.339

Of course, nothing in this proposed rule should be read to excuse or encourage deliberate illegal searches. Wise police officers should keep in mind that juries tend to have an innate sense of what is fair and what is not.340 An officer who conducts a purposefully improper search and

U.S. 135, 143 (2009)).
333. See United States v. Hopkins, 824 F.3d 726, 733 (8th Cir. 2016) (first quoting United States v. Cannon, 703 F.3d 407, 413 (8th Cir. 2013); and then quoting United States v. Leon, 468 U.S. 897, 922 n.23 (1984)).
334. Herring, 555 U.S. at 144.
335. See id. at 142.
336. See supra Part V.B.
337. Leon, 468 U.S. at 921.
339. See supra Part V.B.
340. See Mike Reck, A Community with No Conscience: The Further Reduction of a Jury's Right to Nullify in People v. Sanchez, 21 WHITTIER L. REV. 285, 307 (1999) ("In order for a jury to perform its function as the community conscience, the jurors must bring with them a sense of fairness."); Paul M. Secunda, A Public Interest Model for Applying Lost Chance Theory to
then uses the results to obtain a warrant runs the risk that the jury will conclude that the officer engaged in unfair conduct. Research has shown that even strangers who observe one party acting unfairly towards another will attempt to punish the person who is acting unfairly.\textsuperscript{341} No officer wants to be punished by a jury with a not guilty verdict for what is perceived to be unfair conduct.

Civil War General Thomas F. Meagher once stated: "Great interests demand great safeguards."\textsuperscript{342} Consistency in the criminal justice system is one of the greatest interests.\textsuperscript{343} It is time for the Supreme Court to safeguard this interest by establishing clear rules for analyzing the application of the good-faith exception to warrants based on improper predicate searches. In doing so, the Court should be guided by its own counsel that, "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'"\textsuperscript{344}

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342. See DANIEL KAHNEMAN, THINKING FAST AND SLOW 299-300 (2011) (ebook). In fact, studies have shown that this sort of altruistic punishment of unfair behavior increases activity in the pleasure centers of the brain. \textit{Id}.

343. MICHAEL CAVANAGH, MEMOIRS OF GEN. THOMAS FRANCIS MEAGHER 61 (1892).


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