Application of the Good-Faith Exception in Instances of a Predicate Illegal Search: "Reasonable" Means Around the Exclusionary Rule?

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NOTE

APPLICATION OF THE GOOD-FAITH EXCEPTION IN INSTANCES OF A PREDICATE ILLEGAL SEARCH: "REASONABLE" MEANS AROUND THE EXCLUSIONARY RULE?

The exclusionary rule provides that, in general, evidence obtained in violation of the Fourth Amendment is inadmissible at a criminal trial. In *United States v. Leon*, however, the Supreme Court carved out the "good-faith exception" to this rule, which applies when a police officer reasonably relies on a warrant which is later determined to be defective due to magistrate error. Prior to *Leon*, the possibility of adopting such an exception had been a topic of repeated discussion by the Court. The exception has since been modified and expanded to apply to more situations.

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4 *Leon*, 468 U.S. at 913.

5 See infra note 25 (listing pre-1984 comments by Justices for establishing good-faith exception).

6 See infra notes 49-53 and accompanying text (discussing post-1984 development of exception).
than originally contemplated.\footnote{See Leon, 468 U.S. at 920. The Court posits that the exception is effective "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." Id.} For example, three federal circuits recently broadened the exception to include the circumstance in which a warrant was issued, and subsequently enforced, on the basis of illegally obtained evidence.\footnote{See United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989) ("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."); cert. denied, 111 S. Ct. 77 (1990); United States v. Carmona, 858 F.2d 66, 68 (2d Cir. 1988) (reasoning that officers conducting search acted in good faith on validity of warrant); United States v. Thomas, 757 F.2d 1359, 1369 (2d Cir. 1985) (stating that magistrate determines legality of search by issuance or denial of warrant; officer has no duty to look further); cert. denied, 106 U.S. 166 (1985); United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984) ("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." (quoting Leon, 468 U.S. at 913)); infra notes 56-58 (detailing cases); see also United States v. Kiser, 948 F.2d 418, 421 (8th Cir. 1991) ("The exclusionary rule should not apply to suppress evidence when an officer has acted with 'objective good faith' in obtaining a search warrant ultimately determined to be invalid."); cert. denied, 112 S. Ct. 1666 (1992).} The situations before the three circuits were similar in nature. In each case, the police gathered evidence through an illegal search or seizure and then included the material in an affidavit supporting the request for a warrant. On the basis of the affidavit, a magistrate issued a warrant, which was executed by a police officer who believed the writ to be valid.

These cases parallel Leon\footnote{See supra notes 2-4 and accompanying text (discussing original good faith exception case).} in that the executing officer relied on a defective warrant. Unlike Leon, however, the underlying defect resulted from law enforcement error, not that of the magistrate who issued the warrant.\footnote{See Leon, 468 U.S. at 906-08 (detailing facts where original good faith exception applied). The good-faith exception was originally intended to circumvent the exclusionary rule when someone other than an officer has engaged in wrongful conduct. Id. at 920-21. The rationale here is that the exclusionary rule's primary purpose of deterrence is not served because there is no need to deter officer misconduct. Id. Rather, the magistrate has erred in determining that probable cause existed, when, in fact, it did not. Id. at 922-23.} The issue in each case was whether the exception applied, despite the Fourth Amendment violation, in obtaining the information upon which the warrant was based.\footnote{See infra notes 62-98 and accompanying text (outlining cases that addressed issue). The circumstances in Leon, see supra note 7, can be contrasted with the recent
This note discusses the evolution and expansion of the good-faith exception to the exclusionary rule and forecasts its future. Part I traces the historical development of the good-faith exception. Part II outlines the application of the exception since Leon, including its recent expansion. A discussion of this recent expansion, and the lower courts' division on the issue, is presented in Part III. Finally, Part IV attempts to predict the Supreme Court's resolution of the issue and discusses whether this anticipated resolution will comport with prior Court rationale.

I. THE DEVELOPMENT OF THE GOOD-FAITH EXCEPTION

The Fourth Amendment guarantees that no person shall be subject to unreasonable searches and seizures and requires that warrants be issued only upon probable cause and with sufficient specificity. Attempts to interpret the Framers' intent with respect to this amendment have generated a controversial body of law. Since the language of the Fourth Amendment does not prescribe a remedy for infringement of the guarantees provided therein, the courts have fashioned the "exclusionary rule." Tribunals employ this legal principle in order to suppress evidence obtained in violation of the Fourth Amendment guarantees.

expansion of the good faith exception in situations where an officer violated the Fourth Amendment prior to obtaining a warrant. See supra note 8 (detailing recent expansion cases where good-faith exception was applied).

12 U.S. CONST. amend. IV.

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.

Id.


14 See Stone v. Powell, 428 U.S. 465, 486 (1976). The Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." Id.


16 See id at 659-60.
The exclusionary rule has suffered due to a disjointed development and frequently inconsistent application that has resulted in a dispute over its primary goal and its jurisprudential basis. The purposes to be served by the rule, which naturally guide its interpretation, are also disputed. It is argued that the exclusionary rule is necessary to maintain the judicial integrity of

17 See Stewart, supra note 1, at 1366. Looking back, the exclusionary rule seems a bit jerry-built—like a roller coaster track constructed while the roller coaster sped along. Each new piece of track was attached hastily and imperfectly to the one before it, just in time to prevent the roller coaster from crashing, but without the opportunity to measure the curves and dips preceding it or to contemplate the twists and turns that inevitably lay ahead. With the wisdom of hindsight, it is certainly possible to criticize opinions dealing with the exclusionary rule for misapplying or misconstruing prior precedents and for failing to consider how any given decision would affect the future development of the law.

18 See Weeks v. United States, 232 U.S. 383, 393 (1914). The exclusionary rule serves two primary goals: promoting judicial integrity, which is based on the belief that courts would be tainted by the use of illegally obtained evidence because they would be condoning the illegal conduct, id., and deterring police from engaging in illegal conduct. See Mapp, 367 U.S. at 656 ("The court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"

19 See Calandra, 414 U.S. at 348 (indicating deterrence as primary purpose); see also Stone, 428 U.S. at 485 (1976) (eliminating judicial integrity purpose). The dispute is seen most clearly in Justice Brennan's dissent in Leon. By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. . . . [T]he Court should restore to its proper place the principle framed 70 years ago in Weeks that an individual whose privacy has been invaded in violation of the Fourth Amendment has a right grounded in that Amendment to prevent the government from subsequently making use of any evidence so obtained.

Id. at 788-89. The Supreme Court adopted the second view in United States v. Calandra, 414 U.S. 338, 347-48 (1974). Although Justice Brennan argued to adopt the former view, see United States v. Leon, 468 U.S. 897, 935 (1984) (Brennan, J., dissenting), no other serious advancement of this notion has been suggested since Mapp, 367 U.S. at 662 (Black, J., concurring). Hobart, supra, at 789 n.63; see also supra note 8 (citing various interpretations of exclusionary rule and its application).
proceedings which would be compromised by the introduction of tainted evidence.\(^{20}\) The prevalent view, however, is that the exclusionary rule's sole purpose is to deter police officers from acting in violation of the Fourth Amendment;\(^{21}\) therefore, the rule should be applied only when suppression is likely to result in future deterrence.\(^{22}\) In addition, the efficacy of this deterrent function is measured by its institutional deterrent effect, rather than its effect on the individual officer.\(^{23}\)

\(^{20}\) See Leon, 468 U.S. at 943 (Brennan, J., dissenting). It is submitted that Brennan's dissent made clear that the judicial integrity view should again be considered a factor in determining whether the exclusionary rule should be applied.

\(^{21}\) See Leon, 468 U.S. at 955 (Brennan, J., dissenting).

If the overall educational effect of the exclusionary rule is considered, application of the rule to even those situations in which individual police officers have acted on the basis of a reasonable but mistaken belief that their conduct was authorized can still be expected to have a considerable long-term deterrent effect. If evidence is consistently excluded in these circumstances, police departments will surely be prompted to instruct their officers to devote greater care and attention . . . .

Id.; see also United States v. Peltier, 422 U.S. 531, 539 (1975) (stating that courts hope to deter future officers as well as those who committed violation); Elkins, 364 U.S. at 217 (holding that purpose of rule is to prevent, not repair, specific violation); H.L.A. Hart, Punishment and Responsibility 19 (1968) (refuting notion that exclusionary rule should not apply when officers believed they were acting in accordance with Fourth Amendment).

\(^{22}\) See Leon, 468 U.S. at 906-07. The Court stated: "[T]he . . . 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." Id. The Calandra Court "weigh[ed] the potential injury to the historic role and functions of the grand jury against the potential benefits of the [exclusionary] rule as applied." Calandra, 414 U.S. at 349; see also Anthony C. Amsterdam, Search, Seizure, and § 2255: A Comment, 112 U. Pa. L. Rev. 378, 389 (1964) (stating that balancing test is used upon application of exclusionary rule).

In every litigation in which exclusion is in issue, a strong public interest in deterring official illegality is balanced against a strong public interest in convicting the guilty. As the exclusionary rule is applied after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance.

Id.

Although discussion of an exception to the exclusionary rule for cases in which police officers acted in good faith had begun as early as 1974,24 the Supreme Court declined to adopt the good-faith exception until the 1984 case of United States v. Leon.25 After determining that the creation of such an exception did not render the exclusionary rule ineffective,26 the Leon Court held that evidence obtained by an officer acting pursuant to "a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause"27 is admissible in a criminal proceeding.28 In a dissenting opinion, however, Justice Brennan expressed concern over the exception's effect on institutional deterrence.29


25 468 U.S. 897 (1984). Several justices had already displayed their eagerness to accept the good-faith exception. Perhaps the most vocal was Justice White in his dissent in Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting). Justice White stated that "the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comportedit with existing law and having reasonable grounds for this belief." Id. at 538. Chief Justice Burger also proposed limiting the rule "to egregious, bad-faith conduct." Id. at 501 (Burger, C.J., concurring).

In United States v. Peltier, 422 U.S. 531 (1975), Justice Rehnquist said that the rule should only be applied when "the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Id. at 542. Finally, Justice Powell, joined by Justice Rehnquist, stated that the exclusionary rule should not be applied unless the "underlying premise" is that "the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." Brown v. Illinois, 422 U.S. 590, 612 (1975) (Powell, J., concurring in part) (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)); see Leon, 468 U.S. at 913 n.11 (1984) (detailing Justices' different opinions); LaFave, supra note 24, at 338-40 (commenting on different Justices' positions).

26 Leon, 468 U.S. at 905.

27 Id. at 900.

28 Id. at 922. "[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion . . . ." Id.

29 See id. at 957 (Brennan, J., dissenting).

Moreover, the good-faith exception will encourage police to provide only the bare minimum of information in future warrant applications. The police will now know that if they can secure a warrant, so long as the circumstances of its issuance are not "entirely unreasonable," all police conduct pursuant to that warrant will be protected from further judicial review.

Id. (citations omitted).
The original rationale for the establishment of a good-faith exception in these instances was grounded in the deterrence purpose of the exclusionary rule. Ultimately, the exception's use was determined on a case by case basis after careful consideration of the exclusionary rule's objectives and "the constitutional principles [the rule was] designed to protect." The Leon Court noted that in certain circumstances, in which an officer's reliance on the magistrate's warrant was not objectively reasonable, the interests of justice dictated that the good faith exception was inapplicable. Taken as a whole, however, the Court believed that the exception would not hinder the protection granted by the Fourth Amendment.

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30 See, e.g., Leon, 468 U.S. at 916-17. The Court advanced three reasons for applying a good faith exception. First, that the rule was not designed to punish officers for the errors of judges and magistrates. Id. at 916. The Court reasoned that since "an officer cannot [ordinarily] be expected to question the magistrate's probable-cause determination or his judgement that the form of the warrant is technically sufficient," penalizing the police officer for the judge's mistake would not add to the deterrent effect. Id. at 921. Second, the Court noted that judges were not inclined to disregard Fourth Amendment protections, so that exclusion would not serve as a deterrent when they err. Id. at 916. Finally, the Court found no proof that there would be a significant deterrent effect on magistrates and judges even if the rule were applied in these instances. Id. at 916-17.

31 Id. at 918.

32 See id. at 911 (noting that flagrancy of police conduct must be examined to determine if exclusionary rule objectives are threatened).

In short, the "dissipation of the taint" concept that the Court has applied in deciding whether exclusion is appropriate in a particular case "attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost."

Id. at 911 (quoting Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part)).

33 Id. at 922-23. The Court noted four situations in which the good-faith exception would not apply. Id. at 923. The first arises when a judge is misled by information in the affidavit which the affiant knew to be false. Id. See Franks v. Delaware, 438 U.S. 154 (1978) (officer knowingly lied in affidavit and good-faith exception was ruled inapplicable). The second occurs when the magistrate totally abandons his judicial role. Leon, 463 U.S. at 923. See also Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) (joining police in search compromised magistrate's neutral and detached role). The third situation arises when the warrant is so obviously lacking in probable cause that the officer's reliance would be unreasonable. Leon, 468 U.S. at 923. Finally, the Court noted that the good-faith exception would not apply when the warrant is deficient such that the officer could detect the defect by merely looking at it. Id.; cf. United States v. McQuagge, 787 F. Supp. 637, 651 (E.D. Tex. 1991) (summarizing where good-faith exception has been applied).

34 Leon, 468 U.S. at 924.
Writing for the *Leon* Court, Justice White recognized a long-standing preference for search warrants, and deference to the magistrates who issue them.\(^{35}\) He noted the remedial nature of the exclusionary rule and the limited situations in which it should be applied because of societal costs of lost convictions.\(^{36}\) In analyzing the exclusionary rule's role in criminal jurisprudence, the Court discussed previous cases in which the rule was deemed inappropriate.\(^{37}\) Noting the primacy of the deterrence function in applying the exclusionary rule, the Court questioned what the deterrent effect would be on magistrates and police officers if the evidence were suppressed in these cases. The Court concluded that the deterrence of magistrates was not at issue,\(^{38}\) and that there was no evidence presented that magistrates attempted to subvert the Fourth Amendment.\(^{39}\) The Court found that there would be no deterrent effect on police officers because the defect was due to magistrate error in determining probable cause rather than police illegality.\(^{40}\) Thus, the benefits of suppression did not outweigh the costs, and the "good faith exception" to the exclusionary rule became law.\(^{41}\)

In his dissent, Justice Brennan argued that the majority's analysis was misplaced.\(^{42}\) He stated that the judicial branch played an important role in preserving constitutional principles; therefore, the Court should reject evidence gathered in violation of the Fourth Amendment.\(^{43}\) He further argued that the Court's deterrence analysis was unworkable,\(^{44}\) and that it incorrectly applied the deterrence rationale by focusing on the deterrence of individual officers rather than the institutional preventative effect.\(^{45}\) Believing that institutional deterrence would not be promoted by the *Leon* holding, Justice Brennan stated that the ma-

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\(^{35}\) *Id.* at 914.

\(^{36}\) *Id.* at 907-08.

\(^{37}\) *Id.* at 909-11.

\(^{38}\) *Id.* at 916.

\(^{39}\) *Id.* at 917.

\(^{40}\) *Id.* at 920-21.

\(^{41}\) *Id.* at 922.

\(^{42}\) *Id.* at 933-34 (Brennan, J., dissenting).

\(^{43}\) *Id.* (Brennan, J., dissenting).

\(^{44}\) *Id.* at 941 (Brennan, J., dissenting). The dissent notes two reasons for the analysis' failure. First, it is argued, the Fourth Amendment itself, rather than the exclusionary rule, imposes the costs of suppressing evidence. *Id.* at 941. Second, the judiciary is unable to effectively weigh the benefits of deterrence against its costs due to the lack of empirical data. *Id.* at 942-43.

\(^{45}\) *Id.* at 952-55 (Brennan, J., dissenting).
majority's decision would promote police ignorance of the Fourth Amendment instead of education. Ultimately, Justice Brennan warned of "a host of grave consequences" which would result from the majority's decision to create a good faith exception when an officer reasonably relied on a magistrate's mistaken determination of probable cause.

II. The Expansion of the Good-Faith Exception's Application

Courts have expanded the good faith exception to govern situations beyond the immediate facts of its genesis in *Leon*.

In *Illinois v. Krull*, for example, the Supreme Court held that the good-faith exception applied to an officer's reasonable reliance on a statute that was later determined to be unconstitutional. In addition, in determining that an officer's behavior was constitutional, the Fifth Circuit has held that the exception extended to her reliance on a subsequently overturned court decision.

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46 Id. at 955 (Brennan, J., dissenting).

47 Id. at 956 (Brennan, J., dissenting).

48 Id. (Brennan, J., dissenting). Justice Brennan warned of three consequences. First, the message sent to magistrates would be that their probable cause determinations in the issuance of warrants would not be subject to further judicial review. Id. at 956. Second, the majority's decision effectively encouraged police to give minimal information in their warrant applications. Id. at 957. Finally, he argued, the ruling hampered the Court's goal of establishing greater flexibility for police in obtaining warrants. Id. at 958; see *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (discussing flexibility goal).

49 See *Illinois v. Krull*, 480 U.S. 340 (1987) (officer's reasonable reliance on unconstitutional statute justifies use of good-faith exception); *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987) (good-faith exception applied when officer's reliance on court decision later determined to be unconstitutional was reasonable), *cert. denied*, 108 S. Ct. 711 (1988); *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987) (reasonableness of federal officer's reliance on foreign law officer's assurance that search was valid).


51 See *Krull*, 480 U.S. at 349-50 (admitting evidence against defendant even though statute relied upon was judicially invalidated after search and seizure).

52 See *Jackson*, 825 F.2d at 865-66 (recognizing good-faith exception where there was reasonable reliance on court precedent validating warrantless searches).
nally, the Ninth Circuit determined that the good-faith exception applied when federal investigators relied on a foreign law enforcement officer's actions that were later determined to be violative of the foreign law.\footnote{See Peterson, 812 F.2d 492 (holding that exception triggered when officers reasonably relied on foreign law enforcement officer's representations regarding compliance with foreign law).}

In each instance, the courts decided to apply the good-faith exception after balancing the goal of deterrence against the cost of suppressing the evidence.\footnote{See Krull, 480 U.S. at 352 ("There is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the statute prior to the declaration of its invalidity will act as a significant, additional deterrent."); Jackson, 825 F.2d at 866 ("Excluding the evidence can in no way affect [the officer's] future conduct unless it is to make him less willing to do his duty." (quoting United States v. Leon, 468 U.S. 897, 920 (1984))); Peterson, 812 F.2d at 491 ("[O]ur inquiry is whether exclusion serves the rationale of deterring federal officers from unlawful conduct.").}

In each case, the courts applied the good faith exception because the deterrence purpose would not be served.\footnote{For instances where courts have declined to broaden the exception's scope, see United States v. Whaley, 781 F.2d 417, 421 (5th Cir. 1986) ("[T]o extend the exception so far as to allow evidence of a clearly unlawful warrantless search of residential property would put too great a premium on ignorance of the law and would virtually terminate the exclusionary rule."); United States v. Curzi, 867 F.2d 36, 44 (1st Cir. 1989) (good-faith exception does not apply to warrantless search of home where error is attributable solely to agents); United States v. Winsor, 846 F.2d 1569, 1579 (9th Cir. 1988) (good-faith exception only applies to searches conducted in reliance on warrant or statute); United States v. Morgan, 743 F.2d 1158, 1165 (6th Cir. 1984) (good-faith exception does not apply to warrantless entry into defendant's home resulting in arrest and seizure of gun), cert. denied, 471 U.S. 1061 (1985).} Notably, the constitutional violation was invariably made by someone other than the police.

This recent expansion of the good-faith exception suggests that it should apply when officers objectively relied on a warrant issued on the basis of an illegal predicate search. In these instances, the initial acts of the officers constituted a constitutional violation, but a warrant was subsequently issued, and a further search ensued. Ultimately, as in court decisions expanding the good-faith exception, a determination of whether the good-faith exception should be extended must turn on the balancing of the exclusionary rule's deterrent effect against the societal costs of suppression.
III. THE NEW APPLICATION AND EXTENSION OF THE GOOD-FAITH EXCEPTION

Courts that have considered the extension of the exception to cover illegal predicate searches are divided. The good-faith exception in this area has been applied by the Second,\textsuperscript{56} Eighth,\textsuperscript{57} and District of Columbia\textsuperscript{68} Circuits. Conversely, the extension of the rule was held not to apply in the Ninth Circuit,\textsuperscript{59} as well as in certain federal district\textsuperscript{60} and state\textsuperscript{61} courts.

A. Courts Extending the Application of the Exception

It is submitted that courts which have extended the good faith exception have done so without sufficient rationale for their decisions.\textsuperscript{62} The Eighth Circuit cases analyzed airport searches conducted by Drug Enforcement Agency agents.\textsuperscript{63} In \textit{United States v.}

\textsuperscript{56} See United States v. Carmona, 858 F.2d 66, 68 (2d Cir. 1988) (applying good faith exception to search warrant that resulted from illegal sweep of home); United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir.) (upholding admission of evidence when canine sniff used to obtain warrant constituted illegal search), \textit{cert. denied}, 106 S. Ct. 66 (1985).

\textsuperscript{57} See United States v. Kiser, 948 F.2d 418, 422 (8th Cir. 1991) (applying good faith exception to warrant based on information obtained in illegal detention and seizure), \textit{cert. denied}, 112 S. Ct. 1666 (1992); United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989) (declining to suppress evidence because of good faith of officers although warrant was obtained as result of DEA agents' illegal search and seizure), \textit{cert. denied}, 111 S. Ct. 77 (1990).

\textsuperscript{58} See United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984) (declining to determine whether there was predicate illegal search and applying good faith exception to admit evidence).

\textsuperscript{59} See United States v. Wanless, 882 F.2d 1459, 1466-67 (9th Cir. 1989) (finding that evidence obtained in illegal inventory and resulting illegal investigatory search may not be used to establish probable cause); United States v. Vasey, 834 F.2d 782, 789-90 (9th Cir. 1987) (suppressing evidence obtained through warrant based on illegal inventory search).

\textsuperscript{60} See United States v. Solomon, 728 F. Supp. 1544, 1549-50 (S.D. Fla. 1990) (refusing to apply good faith exception when warrant was based on illegal arrest and search); United States v. Villard, 678 F. Supp. 483, 490-93 (D.N.J. 1988) (suppressing evidence when unjustified search pursuant to arrest provided improper basis for warrant).

\textsuperscript{61} See Arizona v. Hicks, 707 P.2d 331, 333 (Ariz. Ct. App. 1985) (declining to apply good faith exception when warrant was based on unconstitutional search following justified warrantless entry).

\textsuperscript{62} See \textit{supra} note 49 (citing cases which have extended good faith exception); \textit{see also infra} notes 99-118 (analyzing case rationales and comparing them among differing courts).

\textsuperscript{63} See \textit{supra} note 57 (citing two Eighth Circuit cases extending good faith exception to predicate illegal searches).
White, for example, the court recognized that the illegal seizure and detention violated the defendant’s Fourth Amendment rights. The information obtained during the course of this detention was used, however, to apply for a warrant, which resulted in a further search and discovery of incriminating evidence. The majority denied the defendant’s motion to have the evidence suppressed, citing Leon as the applicable law. The court continued, “[w]e believe the Fourth Amendment was violated, but we also believe the facts of this case are close enough to the line of validity to make the officers’ belief in validity of the warrant objectively reasonable.”

The facts of United States v. Kiser are almost identical to those in White. In Kiser, the court failed to advance additional reasons for applying the good-faith exception and simply cited White. The defendant in Kiser argued that White should be overruled because Leon “cannot be applied to a situation where an unconstitutional detention and seizure occurred before officers obtained their search warrant.” The court responded that even if it had the power to overrule White, it would not do so because they found that court’s reasoning persuasive.

In United States v. Thornton, the District of Columbia Circuit declined to examine whether any prior illegality existed and applied the good-faith exception. The court stated that suppression was unnecessary so long as the magistrate did not abandon “his detached and neutral role.” The court applied the objective reasonableness standard established in Leon to determine

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64 890 F.2d 1413 (8th Cir. 1989), cert. denied, 111 S. Ct. 77 (1990).
65 Id. at 1414.
66 Id. at 1415.
67 Id.
68 Id. at 1414.
69 Id. at 1419.
71 Id. at 421-22.
72 Id.
73 Id. at 422.
74 Id.
75 Id. “This panel is without authority to overrule the earlier panel’s decision in White. Only the court sitting en banc has such authority.” Id.
76 Id.
77 746 F.2d 39 (D.C. Cir. 1984).
78 Id. at 49.
79 Id.
80 Id. (quoting United States v. Leon, 468 U.S. 897, 926 (1984)).
81 Leon, 468 U.S. at 922.
whether the officer's act prior to obtaining the warrant could support the writ, rather than to determine the objective reasonableness of the officer executing the warrant.

B. Courts Not Extending the Exception

The basic theory upon which these cases operated is most succinctly set forth in United States v. Vasey, in which the Ninth Circuit stated that "the magistrate's consideration of the evidence does not sanitize the taint of the illegal warrantless search." In Vasey, a judge issued a warrant on the basis of evidence found during a warrantless search of the defendant's car. The court declined to apply the good-faith exception, finding that the exclusionary rule's deterrence purpose applied, and that the magistrate who issued the writ was not in a position to evaluate the validity of the search.

The United States District Court for the District of New Jersey arrived at the same result in United States v. Villard. In Villard, the officer legally entered the premises pursuant to an arrest warrant, but later conducted an illegal search. The information found during the unlawful probe was then used in an affidavit accompanying a search warrant. The court held that it

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82 See Thornton, 746 F.2d at 49. "It was not unreasonable for the police to believe that there was probable cause that money and records were being kept at 1270 Simms Place." Id. It is submitted that this implies that the officer's seizure and search of garbage from this location, later determined to be a violation of the Fourth Amendment, was justified and reasonable, and therefore worthy of the protection of the good faith exception.

83 See Leon, 468 U.S. at 922.
84 834 F.2d 782 (9th Cir. 1987).
85 Id. at 789.
86 Id. at 784.
87 Id.
88 Id. at 789. The court determined that the officer's warrantless search, later included in the affidavit requesting a search warrant, was "activity that the exclusionary rule was meant to deter." Id.
89 Id.
90 Id.
91 Id. at 485.
92 Id. at 486.
would be inconsistent with *Leon* to apply the good-faith exception to the evidence seized in the execution of the warrant.\(^93\)

The courts deciding *United States v. Wanless*\(^94\) and *United States v. Solomon*\(^95\) reached the same conclusion after close analyses of the purposes of the exception according to *Leon*.\(^96\) In *Solomon*, the magistrate granted a search warrant on the basis of statements illegally obtained from the defendant and evidence seized during a car search in violation of the accused's Fourth Amendment rights.\(^97\) In *Wanless*, the foundation for the warrant was illegally obtained evidence gathered during a warrantless investigatory search of the defendant's car.\(^98\)

C. Analysis of Courts Considering Extension

In comparing the divergent rationales of courts considering extension of the good-faith exception, it appears that those courts refusing to expand the exception present reasoning more firmly grounded in the principles advanced in *Leon* than that of courts favoring extension. Balancing the preventive purpose against the cost of suppression is present in each of the opinions that declined to apply the exception to instances in which a predicate illegal search existed.\(^99\) This is evidenced in *Vasey*, in which an analysis of the deterrent function of the exclusionary rule and its role in

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\(^93\) Id. at 490. "*Leon* did not address the situation presented here, where the information upon which the search warrant was based was itself the product of an illegal, warrantless search by a police officer." *Id.* at 491. The court declined to apply the good faith exception, recognizing that the exclusionary rule was meant to deter future police misconduct. *Id.*

\(^94\) 882 F.2d 1459, 1466-67 (9th Cir. 1989).


\(^96\) In *Wanless*, the court held that the officer-affiant's truthfulness in applying for a warrant was insufficient to invoke the good faith exception. *Wanless*, 882 F.2d at 1466. Instead, the rule was as set forth in *Vasey*: "the search pursuant to the warrant would be valid only if the legally obtained evidence, standing alone, was sufficient to establish probable cause." *Id.* at 1467.

In *Solomon*, the court held that the good faith exception would not apply when an illegal arrest and subsequent illegal search formed the basis for the warrant application. *Solomon*, 728 F. Supp. at 1549. The warrant was invalid because the officer omitted how he obtained the evidence set forth in the affidavit. *Id.* at 1549-50. The court noted that "to excuse the officer's material omissions . . . would encourage the police to be less than candid in applying for warrants." *Id.* at 1550.

\(^97\) Id. at 1549.

\(^98\) 882 F.2d at 1461.

\(^99\) See supra notes 59-61 (cases where good faith exception was not applied where predicate violation of Fourth Amendment existed).
determining whether the good-faith exception should apply was central to the court’s holding.  

Inherent in the decisions that did not extend the exception was the application of the objective reasonableness test to an officer’s actions after the warrant had been issued rather than before. Understanding that the good-faith exception should be considered only after determining that the deterrent function would not be served, these courts noted that the necessity of discouraging the initial illegal search or seizure precluded the use of the exception. Courts that overlook this essential element of the Leon rationale may inexcusably violate an individual’s Fourth

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100 834 F.2d 782, 789 (9th Cir. 1987).

The search warrant was issued, at least in part, on the basis of this tainted evidence. The constitutional error was made by the officer in this case, not by the magistrate as in Leon. 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. Leon, 468 at 918. 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.

Id. (citations omitted).

101 See supra note 82 (describing misapplication of objective reasonableness standard).

102 See supra notes 22 and 32 (setting forth balancing test to determine if good-faith exception should preclude application of exclusionary rule); see also Michigan v. Tucker, 417 U.S. 433 (1974) (focusing on deterrence rationale in application of exclusionary rule).

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the rights of the accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Id. at 447.

103 See Solomon, 728 F. Supp. at 1549-50 (stating that good faith exception did not apply since no reasonable officer could rely on illegally obtained evidence to believe warrant was based on probable cause); Wanless, 882 F.2d at 1466-67 (“because the search warrant was issued in part on the basis of evidence obtained from an illegal search of the vehicles, the ‘good faith exception’ does not apply”); Villard, 678 F. Supp. at 492 (“The cavalier behavior . . . must be deterred. A court should not encourage such ‘carelessness’ by permitting the introduction of the resulting evidence”); Vasey, 834 F.2d at 789-90 (“we therefore conclude 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”).
Amendment rights.\textsuperscript{104} Actually, the Leon Court seemed to warn against this result.\textsuperscript{105}

Contrast these cases with the rationale of the courts that extended the good-faith exception to situations involving predicate illegal searches.\textsuperscript{106} The court in United States v. Thornton,\textsuperscript{107} for example, applied the objective reasonableness analysis to the prior illegality rather than the subsequent reliance on the warrant.\textsuperscript{108} This approach, apparent in other decisions,\textsuperscript{109} is markedly different from Leon. In Leon, the Court applied the objective reasonableness test to judge the officer's behavior after the magistrate had erred.\textsuperscript{110} The good-faith exception has previously been

\textsuperscript{104} See Craig M. Bradley, The Good Faith Exception Cases: Reasonable Exercise in Futility, 60 Ind. L.J. 287, 302 (1985). "Despite the police's good faith belief in its validity, the warrant is simply the fruit of a (warrantless) poisonous tree and the deterrent purpose of the exclusionary rule would be advanced by excluding [the evidence]." Id.

\textsuperscript{105} United States v. Leon, 468 U.S. 897, 923 (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." Id. at n.24 (citation omitted). It is suggested, therefore, that the good-faith exception should not apply if the circumstances under which the warrant was obtained were suspicious or illegal.

\textsuperscript{106} See supra notes 56-58 (citing cases).

\textsuperscript{107} 746 F.2d 39, 49 (D.C. Cir. 1984); see supra note 82 (setting forth Thornton test).

\textsuperscript{108} 746 F.2d at 49.

\textsuperscript{109} See United States v. Carmona, 858 F.2d 66, 68 (2d Cir. 1988) (original search was not justified under Fourth Amendment). The discovery of money in the Carmona search was used obtain a warrant to search the premises. Id. The Carmona court, affirming the lower court's decision, determined that "the officers conducting the search acted in good faith reliance on the validity of the warrant," and, therefore, the fruits of the search were admissible under Leon. Id. The court expressly approved the lower court's reasoning. Id. (citing United States v. Londeno, 659 F. Supp. 758 (E.D.N.Y. 1987), aff'd sub nom., United States v. Carmona, 858 F.2d 66 (2d Cir. 1988)). The district court determined that there was "no evidence that the officers knowingly or recklessly included anything false or omitted anything material in the affidavit, or that they believed any of the submitted material to have been obtained illegally." Id. at 764. It appears, therefore that the objective reasonableness was determined on the basis of the police officer's beliefs regarding the original illegal search, conducted prior to obtaining the warrant.

In United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985), cert. denied, 474 U.S. 819 (1985), a canine sniff of an apartment from the outside hallway was determined to be an illegal search under the Fourth Amendment. Id. The court held that "[t]here is nothing more the officer could have or should have done under these circumstances to be sure his search would be legal." Id. at 1368. The court determined that the exclusionary rule "'should not be applied, to deter objectively reasonable law enforcement activity.'" Id. (quoting United States v. Leon, 468 U.S. 897, 918 (1984)) Leon, however, did not involve a warrantless search. Leon, 468 U.S. at 920.

\textsuperscript{110} Leon, 468 U.S. at 902-04.
APPLICATION OF GOOD-FAITH EXCEPTION

applied in cases in which the Fourth Amendment violation was committed by someone other than the officer. Despite reliance on a warrant granted after review by a magistrate, it is submitted that Leon is not otherwise applicable to the cases in issue because of factual distinctions. Nor is the rationale established in Leon to determine when the good-faith exception should apply—by balancing the deterrent effect against the cost of suppression—used by any of these courts.

The deterrent effect should be balanced against the cost of suppressing the evidence, and the good-faith exception should apply only when there would be no dissuasive effect on the officer's behavior. In addition, the application of the exclusionary rule in these cases must be analyzed with respect to its potential for causing widespread institutional deterrence. Not only would the individual officer who conducted the predicate illegal search be deterred, but the exclusion of the evidence would also enhance police departments' knowledge and training regarding what constitutes a Fourth Amendment violation. As a result, other officers would be deterred.

Another significant consideration is the need to ensure that the illegal activity is not ratified or excused because a warrant is eventually obtained. In none of the above cases was the magistrate aware of how the evidence was obtained. An evaluation of this prior activity should be included in considering whether to apply the good-faith exception.

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111 See Krull, 480 U.S. at 345-46 (noting that search was conducted under statute, later found unconstitutional, authorizing warrantless searches); Jackson, 825 F.2d at 854 (allowing searches based on officer's good-faith reliance on caselaw that was later overruled); United States v. Peterson, 812 F.2d at 486, 492 (9th Cir. 1987) (allowing good-faith exception although authorities conducted illegal wiretap because officers relied on earlier cases which found legality of wiretaps objectively reasonable).

112 See supra notes 21-22 and accompanying text (Leon rationale).

113 See supra notes 106-11; infra notes 113-16 and accompanying text (analyzing decisions in which good faith exception extended to predicate illegal search).


115 "[I]f... the exclusionary rule does not result in appreciable deterrence, then clearly, its use in the instant situation is unwarranted." Id. at 909 (quoting United States v. Janis, 428 U.S. 433, 454 (1976)).

116 See supra note 23 (setting forth focus of institutional deterrence).

117 See LAFAYE, supra note 1, § 1.3(f), at 65-66 (commenting that Leon should not shield prior unlawful activity from full scrutiny at suppression hearing).

118 See Bradley, supra note 104, at 302. "The good faith exception should not preclude consideration of the pre-warrant evidence-gathering techniques of the police... As Leon makes clear, the function of the magistrate is to determine 'whether a
IV. How the Supreme Court Might Address the Extension of the Good-Faith Exception

In *State v. Hicks*, the Arizona Court of Appeals opined that "Leon does not hold that a subsequent warrant validates an earlier illegal search. Police officers cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate." On appeal, the United States Supreme Court declined to address this question because the appellant had not properly objected and taken exception. The High Court, therefore, has yet to directly address this issue. One may surmise, nevertheless, from previous Court decisions and statements by the Justices, that the current Court would probably extend the good-faith exception in the factual circumstances presented.

The Supreme Court has not ruled on these aspects of the good-faith exception since 1987. However, by examining a recent Court opinion dealing with the exclusionary rule, it is reasonable to assume that certain Justices would endorse the application of the exception if a predicate illegal search had arisen. In *Illinois v. Rodriguez*, the Court proffered additional means to avoid using the exclusionary rule. Writing for the Court, Justice Scalia proposed the use of an objective reasonableness test in assessing an officer's behavior with respect to an individual's authority to consent to a search. Justice Kennedy joined in this extension of the Court's Fourth Amendment jurisprudence.

particular affidavit establishes probable cause, not whether the methods used to obtain the information in that affidavit were legal." *Id.*


120 *Id.* at 333.

121 See *Hicks*, 480 U.S. at 329.

122 See supra notes 49-50 for detailed discussion of the 1987 cases.


125 *Id.* at 183, 184.

126 *Id.* at 188. As with other factual determinations bearing upon search and seizure, ascertaining consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief" that the consenting party had authority over the premises." *Id.* at 188 (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

127 *Id.* at 177.
The Rodriguez position appears analogous to expanding the good-faith exception by applying an objective reasonableness test to an officer's behavior when there has been a predicate illegal search.\(^{128}\) What is apparent in Rodriguez is the Court's increasing focus on the reasonableness aspect of the Fourth Amendment in ascertaining whether a violation has occurred.\(^{129}\) Therefore, in determining whether an officer has violated the Fourth Amendment during her search or seizure, the focus is on whether the probe was reasonable, not whether the officer correctly assessed the situation.\(^{130}\)

Justice White's position was easiest to assess, apart from the opinions in Rodriguez, since he had been the strongest advocate for the good-faith exception.\(^{131}\) Even before writing the Leon opinion, Justice White expressed a willingness to further extend the exception.\(^{132}\) Considering Justice White's recent retirement, however,\(^{133}\) these decisions are only an insight into the Court's overall development of the doctrine. More relevant to the stance of to-

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\(^{128}\) See Thomas F. Martello, Jr., Comment, Alternative Means of Protection for Fourth Amendment Rights: A Proposal for Ohio, 20 CAP. U.L. REV. 943, 953 (1991). "[The reasonableness of the officers' reliance . . . rendered the entire search reasonable . . . .]" Id. "This . . . depicts the Court's desire to find new ways around the exclusionary rule, as it results in the odd conclusion that an illegal search may nonetheless be constitutional, provided that it is reasonable." Id.

\(^{129}\) Rodriguez, 497 U.S. at 183-84.


\(^{131}\) See supra note 25 (citing Justice White's desire to create a good faith exception prior to Leon); see also Stone v. Powell, 428 U.S. 465, 540 (White, J., dissenting), cert. denied, 430 U.S. 947 (1977), habeas corpus denied, 923 F.2d 117 (8th Cir. 1991).

When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted.

Id.

\(^{132}\) See Illinois v. Gates, 462 U.S. 213, 246 (1983) (White, J., concurring) (asserting that good-faith exception should apply where officials act under reasonable belief that search and seizure is consistent with Fourth Amendment); Stone, 428 U.S. at 537-39 (White, J., dissenting) (suggesting good-faith modification of exclusionary rule).

\(^{133}\) See USA: A New Justice - Ruth Bader Ginsburg, ECONOMIST, June 19, 1993 (reporting Justice White's retirement, and President Clinton's nomination of Ruth Bader Ginsburg to vacancy on Supreme Court).
day's Court is Chief Justice Rehnquist, who expressed dissatisfaction with the exclusionary rule, yet recognized its deterrent value. The Chief Justice might extend the good faith exception if the predicate illegal act was objectively reasonable, but merely happened to violate the Fourth Amendment. Finally, Justice O'Connor has also expressed discontent with a strict application of the exclusionary rule, and may see fit to extend the good faith exception if convinced that the cost of the lost convictions would be too great.

Retiring Justice Blackmun's hesitancy in Leon indicated that he would be unlikely to accept a broad application of the good faith exception. Indeed, he originally recognized the exception as


I have previously stated why I believe the so-called “exclusionary rule” created by this Court imposes a burden out of all proportion to the Fourth Amendment values which it seeks to advance by seriously impeding the efforts of the national, state, and local governments to apprehend and convict those who have violated their laws.

Id. (citing California v. Minjares, 443 U.S. 916 (1979)).

135 See Brown v. Illinois, 422 U.S. 590, 612 (Rehnquist, J., joining Powell, J., concurring in part) "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." Id. (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)) When “this underlying premise is lacking” the exclusionary rule should not be applied. Id.

136 See supra note 8 (discussing court of appeals decisions).

137 See Linda Greenhouse, Judge O'Connor Wins Praise at Hearing, N.Y. TIMES, Sept. 11, 1981, at B12. At her confirmation hearings, Justice O'Connor stated that her experience as a trial judge “had led her to conclude that the exclusionary rule sometimes interfered with the administration of justice by requiring the exclusion of evidence obtained through a technical error.” Id.; see also LaFave, supra note 24, at 340 (commenting on O'Connor's position).

138 See Immigration and Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1041-42 (1984). Here, Justice O'Connor, relying on United States v. Janis, 428 U.S. 433 (1976), provided a framework for determining when the exclusionary rule should be used, viz., when benefits, with deterrent as one factor, outweigh costs. Id.


I write separately, however, to underscore what I regard as the unavoidably provisional nature of today's decisions . . . . Like all courts, we face institutional limitations on our ability to gather information about "legislative facts," and the exclusionary rule itself has exacerbated the shortage of hard data concerning the behavior of police officers in the absence of such a rule. Nonetheless, we cannot escape the responsibility to decide the question before us, however imperfect our information may be, and I am prepared to join the Court on the information now at hand.

Id. (citations omitted).
only a "provisional" change subject to further review. Most obvious among the Justices to disapprove the extension is Justice Stevens. His dissent in Leon sets forth a guarded view of the good-faith exception's usefulness in Fourth Amendment cases. Justice Stevens also joined Justice Marshall's dissent in Illinois v. Rodriguez, implying that the increasing focus on the reasonableness aspect of the Fourth Amendment is misplaced.

Among these Justices, therefore, one could reasonably project that Justices Scalia and Kennedy would be in favor of extending the exception's application to cases in which a predicate illegal search provided the information for the basis of a warrant. The likelihood of gaining the additional votes in support of their decision is not inconceivable.

It is difficult to predict how the newest Justices would react to a modification of the good-faith exception. In his confirmation hearing, Justice Souter defended Leon, stating that it was completely consistent with the court's analysis in Mapp. Conversely, Justice Thomas has defended the exclusionary rule as a very pragmatic step toward the protection of constitutional rights. During his own confirmation hearing, Justice Breyer, the newest Justice, was directly asked his opinion of the exclusionary rule. He expressed uncertainty as to the proper policy, noting that the rule has been "fairly widely accepted." Justice Ginsburg apparently has not voiced an opinion on this issue. It might be concluded, therefore, that Justice Souter, following the court's analysis in Leon, would endorse such a modification, while

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140 Id. at 928. See also LaFave, supra note 123, at 683 (predicting Blackmun's reluctance to apply good faith exception where there is predicate illegal search).
141 Leon, 468 U.S. at 960 (Stevens, J., dissenting). "In my opinion, an official search and seizure cannot be both 'unreasonable' and 'reasonable' at the same time." Id.
143 Id. at 190-91. The hesitancy to expand exceptions to the Fourth Amendment law on reasonableness grounds is evident in Marshall's statement that "a departure from the warrant requirement is not justified simply because an officer reasonably believes a third party has consented to a search . . . ." Id. at 190.
Justice Thomas, adhering to his view that constitutional rights need protection, would reject the modification. It is very difficult to express an opinion about the views of Justice Breyer and Justice Ginsburg on this issue.

If the Supreme Court were to endorse the exception's expansion, however, it would seem to be in stark contradiction of its reason for creating the exception. Yet, in the case of a predicate illegal search, there is by definition conduct to deter and prevent. Ultimately, the issue is an individual's Fourth Amendment rights. The costs and benefits of an illegal predicate search must be balanced to determine if an invasion of this nature justifies the admission of the evidence, or if the deterrent effect of exclusion outweighs admission. Invoking the good-faith exception in such cases would appear to make more remote the hope expressed by Justice Brennan: "[I]n time this or some later Court will restore these precious freedoms to their rightful place as a primary protection for our citizens against overreaching officialdom."

**Conclusion**

The development of the good-faith exception was carefully structured to ensure that the underlying purposes of the exclusionary rule were not eroded. Application of the exception has been narrow, consistently referring to the cost/benefit balancing approach established in *Leon*. The focus of a court in determining if it should extend the good-faith exception should be whether there is a deterrent effect on police conduct which outweighs the cost of suppressing the evidence. The circuits that have dealt with the issue of whether the good-faith exception applies when there has been an illegal predicate search are split in their conclusions. It is this author's opinion that those courts which have extended the rule have done so without reference to the balancing test set

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147 The Court fashioned the exception to recognize the governmental interest in using such evidence, but only when it outweighs the deterrent effect of the exclusionary rule. See *Leon*, 468 U.S. at 907 (referring to imposition placed on criminal justice system's truth finding function by "unbending application of exclusionary rule"); see also id. at 907 n.6 (setting forth studies on cost of exclusionary rule).

148 See infra notes 62-83 and accompanying text (detailing violation of Fourth Amendment by officer prior to seeking warrant).

149 *Leon*, 468 U.S. at 906-07 (stating cost/benefit balancing test); see also supra note 22 and accompanying text (illustrating application of test).

150 *Leon*, 468 U.S. at 960 (Brennan, J., dissenting).
forth by the Supreme Court. Interestingly enough, if this issue were to appear before the Court, it is highly possible that it would extend the good-faith exception as well.

Gretchan R. Diffendal