ACTING IN GOOD FAITH: THE EFFECTS OF *UNITED STATES V. LEON* ON THE POLICE AND COURTS*

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INTRODUCTION

In *United States v. Leon*[1] the United States Supreme Court held that the exclusionary rule need not be applied to remedy fourth amendment violations where law enforcement officers obtain evidence in reasonable, good-faith reliance on a search warrant later found to be defective. The decision, issued in July, 1984, raised important questions about the good-faith doctrine, the exclusionary rule, and the potential effects of the decision upon the search warrant process.

The primary focus of this Article is to identify the effects of the decision on the policies and practices of the police, prosecutors, and courts regarding search warrants. A secondary objective is to report the impact state court rulings have had after *Leon*. Finally, this Article will examine whether law enforcement administrators have responded to the decision with new methods to supervise and control the search warrant process.

A previous study on the search warrant process conducted by the National Center for State Courts (NCSC)[2] provided the background for this study. Using the seven sites examined by the NCSC and an additional thirty

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1. 468 U.S. 897 (1984).

2. R. Van Duizend, L.P. Sutton & C. Carter, The Search Warrant Process: Preconceptions, Perceptions, and Practices (National Center for State Courts, 1986) [hereinafter NCSC study].

randomly selected cities across the country, this Article analyzes the impact of the reasonable, good-faith exception to the exclusionary rule. Archival review of search warrant application, in-person interviews with key criminal justice personnel, telephone interviews with police and prosecutors, and a case law review of recent state supreme court decisions are the primary sources of information for this study.

BACKGROUND

In 1914, in *Weeks v. United States*,[3] the United States Supreme Court first promulgated the exclusionary rule as a remedy for fourth amendment violations. In *Weeks*, the Court ruled that the United States could not use at a criminal trial evidence seized in violation of the fourth amendment on the ground that the use of such evidence would taint the integrity of the judicial process.[4] This understanding of the decision was confirmed as late as 1964 in an article by Chief Justice Warren Burger, who wrote that *Weeks* "rest[s] on the Court's unwillingness to give even tacit approval to official defiance of constitutional provisions by admitting evidence secured in violation of the Constitution. The idea of deterrence may be lurking between the lines of the opinion but is not expressed."[5]

In 1949, the Court in *Wolf v. Colorado*[6] found the fourth amendment to be binding on state and local law enforcement.[7] Despite the rationale of *Weeks*, however, the Court declined at that time to extend the exclusionary rule to the states. The states were left to fashion for themselves remedies for violations of the fourth amendment.[8] However, only twelve years later, in *Mapp v. Ohio*,[9] the Court overruled *Wolf* and extended the exclusionary rule to the states. In so holding the Court considered: (1) the "imperative of judicial integrity";[10] (2) a trend among states following *Wolf* to adopt the *Weeks* rule on the grounds that alternative remedies were inadequate;[11] (3) an assumption that states that admit illegally seized evidence encourage fourth amendment violations;[12] and (4) the absence of evidence, based on both the experience of the United States under *Weeks* and states voluntarily

3. 232 U.S. 383 (1914).
4. *Id.* at 391-92.
5. Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 5 (1964).
6. 338 U.S. 25 (1949).
7. *Id.* at 27-28.
8. Underlying the Court's decision in *Wolf* were several factors. First, the Court deferred to the principles of "federalism". *Id.* at 28. Second, the Court observed that the rule results in the exclusion of logically relevant evidence. *Id.* Third, 31 states had refused to extend *Weeks* to fourth amendment violations by state law enforcement officers, while only 16 applied the exclusionary rule to such violations. *Id.* at 29. And finally, the Court noted that a number of alternative remedies to the rule were available in those states rejecting *Weeks*—remedies that, in the Court's view, were "equally effective" in discouraging fourth amendment violations "if consistently enforced." *Id.* at 31.
9. 367 U.S. 643 (1961).
10. *Id.* at 659 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).
11. The Court observed that "in 1949, prior to the *Wolf* case, almost two-thirds of the states were opposed to the use of the exclusionary rule, now despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule." *Id.*
12. *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

adopting *Weeks*, that the exclusionary rule impairs the effectiveness of law enforcement.[13]

Since *Mapp*, both the Warren Court[14] and the Burger Court[15] modified the exclusionary rule. Most recently, in *United States v. Leon*[16] and its companion case, *Massachusetts v. Sheppard*,[17] the Supreme Court created an exception to the exclusionary rule.

THE *LEON* DECISION AND ITS RESEARCH IMPLICATIONS

In *United States v. Leon*,[18] the District Court for the Central District of California suppressed drugs found during the execution of a facially valid search warrant, on the ground that the affidavit for the warrant did not establish probable cause.[19] The Court of Appeals for the Ninth Circuit affirmed that decision and refused the government's invitation to recognize a good-faith exception to the exclusionary rule.[20] The Supreme Court, in a six to three decision reversed, holding that the "Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[21] Because the affidavit in *Leon* related the results of an extensive investigation and consequently "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause,"[22] the Court concluded that "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate."[23]

In *Leon's* companion case, *Massachusetts v. Sheppard*,[24] the Court again applied the exception, holding that the exclusionary rule is inapplicable when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid on its face.[25] Thus, the Court concluded in *Sheppard* that the evidence was admissible even though the warrant was

13. *Id.* at 659-60.

14. *See, e.g.*, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965) (exclusionary rule applies to forfeiture proceedings).

15. *See, e.g.*, Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984) (exclusionary rule does not apply in a civil deportation hearing); United States v. Janis, 428 U.S. 433 (1976) (civil tax assessment could be applied even though the assessment was based on illegally seized evidence); United States v. Calandra, 414 U.S. 338 (1974) (grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained from him in an earlier unlawful search).

16. 468 U.S. 897 (1984).

17. 468 U.S. 981 (1984).

18. 468 U.S. 897 (1984).

19. *Id.* at 903.

20. *Id.* at 905.

21. *Id.* at 900.

22. *Id.* at 926.

23. *Id.*

24. 468 U.S. 981 (1984).

25. *Id.* at 988.

defective in misstating the items that could be seized.[26] The Court noted that the affiant had properly set out those items in his affidavit and had reasonably relied upon the magistrate's representations that the warrant authorized him to conduct the search he had requested.[27]

In ruling that evidence seized in good faith is admissible, the *Leon* Court relied primarily upon the language of the fourth amendment and a balancing process that contained a number of premises. First, because the exclusionary rule is not expressly prescribed by the fourth amendment, it should be viewed as a judicially-created remedy designed to deter police misconduct.[28] Second, in the case of physical evidence, the rule, which excludes inherently trustworthy evidence, impedes the truth-seeking function of criminal trials and allows guilty persons either to go free or to receive reduced sentences.[29] Ultimately, in the Court's view, such consequences may lead to disrespect for the judicial process. Third, the Court pointed to the absence of evidence that the exclusionary rule substantially deters law enforcement officers from violating the fourth amendment.[30]

More particularly, the Court was not persuaded that imposition of the exclusionary rule to evidence seized by a police officer in reasonable, good-faith reliance on a search warrant issued by a neutral and detached magistrate would deter unlawful police conduct.[31] The presence of a neutral and detached magistrate acting prior to a search was, in the Court's view, an effective, albeit imperfect, alternative to the exclusionary rule.[32]

The implicit premise of the Court that magistrates constitute a sufficiently effective alternative to the exclusionary rule rested on several assumptions. First, the Court stated that the purpose of the exclusionary rule is to deter police misconduct and not to punish the errors of judges and magistrates who mistakenly issue warrants.[33] Second, the Court relied on the absence of any evidence in the record before it that judges and magistrates act "lawlessly" in reviewing applications for search warrants or in issuing the warrants themselves.[34] Third, the Court stated that there was no reason to believe that application of the exclusionary rule to evidence seized pursuant to a warrant would have a significant deterrent effect on judges and magistrates.[35] The last statement was, in turn, based on three factors: (1) judges and magistrates have no stake in the outcome of criminal prosecutions; (2) the exclusionary rule is not necessary to inform them of errors in issuing warrants; and (3) professional incentives exist that will encourage them to enforce the requirements of the fourth amendment even if no exclusionary remedy is applied in cases like *Leon*.[36] Finally, the Court rejected as

26. *Id.*
27. *Id.* at 989-90.
28. *Id.* at 906.
29. *Id.* at 907.
30. *Id.* at 907 n.6.
31. *Id.* at 919.
32. *Id.* at 920-21.
33. *Id.* at 916.
34. *Id.*
35. *Id.*
36. *Id.* at 917.

"speculative" the argument that application of the exclusionary rule to cases like *Leon* and *Sheppard* would discourage "forum shopping" and encourage police officers to scrutinize search warrants themselves in order to detect errors.[37]

The Court's determination in *Leon* was based in substantial part on premises about the behavior of police officers and magistrates that were not affirmatively supported by evidence. This was a point made not only by the dissent,[38] but also by Justice Blackmun in a concurring opinion:

> If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.[39]

This is not to say that there was no evidence before the Court about the behavior of law enforcement officers and magistrates. In fact, both the majority and the dissenters in *Leon* relied upon a draft of the National Center for State Courts' study entitled *The Search Warrant Process: Preconceptions, Perceptions, and Practices.*[40] In a footnote, the Court recognized that "there are assertions that some magistrates become rubber stamps for the police and others may be unable to effectively screen police conduct", but, nevertheless, relied upon the draft in support of its statement that it was "not convinced that this is a problem of major proportions."[41] By contrast, two of the dissenters cited the same document for the following proposition:

> The authors of a recent study of the warrant process . . . concluded that application of a good faith exception where an officer relies upon a warrant 'would further encourage police officers to seek out the less inquisitive magistrates and to rely on boilerplate formulae, thereby lessening the value of search warrants overall. Consequently, the benefits of adoption of a broad good faith exception in terms of a few additional prosecutions appears to be outweighed by the harm to the quality of the entire search warrant process and the criminal justice system in general.'[42]

Whatever the draft report prepared by NCSC may have stated, it is apparent that its final report, issued after the *Leon* decision, raises questions about the factual premises of that case. Among other matters, the final report discloses the following information:

— magistrates took an average length of time of two minutes and forty-eight seconds to review each affidavit, and the median time was two minutes and twelve seconds;[43]

— a not insignificant proportion (11.4%) of magistrates viewed their role in the search warrant process as merely giving formal approval to a

37. *Id.* at 918.
38. *Leon*, 468 U.S. at 942 (Brennan, J., dissenting).
39. *Leon*, 468 U.S. at 928 (Blackmun, J., concurring).
40. NCSC study, *supra* note 2.
41. *Leon*, 468 U.S. at 916 n.14.
42. *Leon*, 468 U.S. at 955-56 n.14 (Brennan, J., dissenting).
43. NCSC study, *supra* note 2, at 26.

course of action deemed reasonable by police officers;[44]

— as a practical matter, the role that this 11.4% of magistrates play in the search warrant process is enlarged in some jurisdictions by the police practice of "forum shopping";[45]

— even among magistrates who "recognized their constitutional responsibilities," there was a tendency to accord less strict review of, or more deference to, a warrant application presented by a police officer who had established in their minds a reputation for honesty;[46]

— even among the more conscientious magistrates, the level of scrutiny of warrant applications might vary depending on the nature of the offense at issue or its seriousness;[47] and

— applications frequently are based in substantial part on boilerplate language.[48]

Based on these factors, the report concludes that the application review procedure "is more suggestive of a routinized administrative procedure . . . than a constitutional check on police power."[49]

Some of the officers and officials who were interviewed made the following negative observations about a good-faith exception to the exclusionary rule: (1) such an exception is already tacitly in effect, and is therefore unnecessary; (2) such an exception will foster "lawlessness" on the part of the police; (3) good faith will be difficult to define and apply especially when an application for a search warrant is based on information supplied by confidential informants; and (4) the quality of police work will be diminished.[50]

The views of the Court, the decision itself, and the NCSC study raised important empirical questions about the impact of the *Leon* ruling: What has been the effect of the decision on search warrant policies and practices? How have the state courts responded to *Leon*? How have police and prosecutorial administrators responded to any imperfections in the search warrant process? These three basic research questions in turn generate additional questions for exploration. Remaining sections of this Article will address these areas more specifically.

RESEARCH DESIGN

A multi-faceted research methodology was employed to investigate the effects of the *Leon* decision. The principal data collection strategy consisted of an intense, in-depth study of reactions to *Leon* in seven cities located throughout the country. These sites, previously used in the NCSC study, remain anonymous and are referred to as Border City, Forest City, Harbor City, Hill City, Mountain City, Plains City and River City. Brief characteristics of each are presented in Table 1.

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44. *Id.* at 55.
45. *Id.* at 104.
46. *Id.* at 48.
47. *Id.* at 49.
48. *Id.* at 51.
49. *Id.* at 62.
50. *Id.* at 90-91.

TABLE 1

CHARACTERISTICS OF PROJECT SITES

Site	Population (1984, est.)	Index Crime Rate (per 1,000)	Number of Sworn Officers (1984, est.)
Border City	750,000 to 1,000,000	65 to 75	1000-1500
Harbor City	750,000 to 1,000,000	75 to 85	2500-3000
River City	500,000 to 750,000	75 to 85	1000-1500
Plains City	500,000 to 750,000	95 to 105	1000-1500
Forest City	250,000 to 500,000	105 to 115	500-1000
Hill City	250,000 to 500,000	120 to 120	500-1000
Mountain City	100,000 to 250,000	100 to 110	250-500

Source: FBI, *Crime in the United States: 1984*, Washington, D.C.: Government Printing Office, 1985.

At each site all search warrant applications made during a three-month period in the months that preceded the *Leon* decision and a comparable period after the decision were reviewed. Because the Court rendered its decision in July, 1984, search warrant applications for January to March of 1984 (pre-*Leon* warrants) and January to March of 1985 (post-*Leon* warrants) were examined. These applications were then tracked through the criminal justice system to their disposition. The tracking process yielded a complete picture of warrant activity in these jurisdictions. A total of 2,115 warrant applications were examined, coded, keypunched, and analyzed.

The unit of analysis was the "primary" search warrant (of which there were 1,748). In all seven jurisdictions, law enforcement officers were involved, at times, in cases that required the search of more than one person, place or vehicle. As a result, a number of search warrant applications were linked to the same case. When multiple warrants were related to one investigation, a "primary" warrant was selected to avoid overlap and misrepresentation of warrant activity.

At each site, research staff conducted structured interviews with a wide range of individuals involved in the search warrant process. Among those interviewed were police administrators, supervisors, detectives, and patrol officers; chief prosecutors and assistant district attorneys; lower court judges and magistrates responsible for reviewing warrants and trial court judges that ruled on suppression motions; and defense attorneys. The research staff interviewed 187 individuals in these jurisdictions. Table 2 summarizes the types of individuals interviewed in each project site.

TABLE 2
ON-SITE INTERVIEWS

Site	Chief of Police	Chief of Detectives	Detectives	Other	Patrol Offs.	Pros.	Judges	Def. Attys.	Total
Border City	1	1	5	—	11	5	2	0	25
Harbor City	1	—	12	1	11	4	1	1	31
River City	1	—	7	2	10	3	2	2	27
Plains City	1	1	4	1	11	4	2	3	27
Forest City	1	2	4	1	8	2	2	4	24
Hill City	1	1	8	—	7	4	2	1	24
Mountain City	1	1	8	2	11	3	2	1	29
Totals	7	6	48	7	69	25	13	12	187

In addition to the seven sites studied intensively, researchers telephoned individuals in thirty randomly selected jurisdictions to obtain a national picture of the effects of the *Leon* decision. Of these, twenty locations were drawn from large cities with populations from 100,000 to 249,999 and ten were chosen from the largest cities, those with populations over 250,000. Within each of these cities the chief of police, chief of detectives, the legal or training officer, and detective were usually interviewed. In addition, a representative of the prosecutor's office in each location was interviewed. The information gathered from the thirty sites was limited to the search warrant process, knowledge of *Leon* and good faith, and the impact of the decision on police and prosecutorial practices.

A third aspect of the study involved a comprehensive examination of the status of the good-faith exception in the states. This included a review of state supreme court decisions citing the *Leon* decision or discussing other good-faith issues dealing with the exclusion of evidence under the fourth amendment or analogous state constitutional or statutory provisions.[51]

Two limitations in this study's research design should be kept in mind while reviewing the findings. First, the study was conducted shortly after the *Leon* decision. In measuring the impact of a Supreme Court decision, the length of time since the date the decision is handed down is likely to be a crucial factor. A second design limitation pertains to the difficulty of ascribing certain changes to the *Leon* decision. This research did not involve a design which would allow for attribution of observed effects to a single intervention. Changes in police procedures or fluctuations in enforcement priorities occurring independently of *Leon* may have arisen in the sites which could have caused differences in the search warrant process to appear. In particular, *Illinois v. Gates*,[52] which authorizes a "totality-of-circumstances" approach for review of warrants, may have resulted in changes which might erroneously be attributed to *Leon*.[53]

51. To determine whether state supreme court decisions adopted *Leon*, research staff reviewed pertinent case law during the period of July, 1984, to April, 1988.

52. 462 U.S. 213 (1983).

53. Illinois v. Gates established the "totality-of-circumstances" test for determining the existence of reasonable cause for the issuance of a search warrant. *Id.* It is not unlikely that the *Gates* decision to move from the "two-pronged" test promulgated in Aguilar v. Texas, 378 U.S. 108 (1964),

To adjust for each of these limitations, the research team interviewed key criminal justice personnel during the latter part of 1985 and through the summer of 1986. This meant that at least one year had passed since the *Leon* ruling when interviews were first conducted, and as much as two years in some instances. Follow-up interviews were also done to insure that the early interviews accurately reflected the attitudes of a particular jurisdiction. The content of these follow-up interviews helped determine whether changes in the search warrant process were attributable to the *Leon* decision. The research staff asked police executives, district attorneys, and administrative judges specific questions regarding procedural changes and their origins.

Lastly, tracking all search warrant applications to final court disposition meant that some cases that originated in January to March of 1985 (six to nine months after *Leon*) extended into September, 1986 (twenty-six months after *Leon*). Thus, in a number of cases, at least two years had passed since the *Leon* decision. While these search warrants may not reflect changes in police behavior, prosecutorial decisions and motions to suppress may have been affected as time passed.

RESPONSE OF THE HIGHEST STATE COURTS

In contrast to *Wolf v. Colorado,*[54] in which the United States Supreme Court ruled the fourth amendment binding on the states, and *Mapp v. Ohio,*[55] in which the Court held that states must exclude from criminal trials evidence seized in violation of the fourth amendment, the Court's ruling in *Leon* is not binding on the states. Moreover, *Leon* has no necessary application to violations of state constitutional and statutory provisions analogous to the fourth amendment. As a result, the application of *Leon* to local law enforcement is left to the states themselves, particularly the highest court of each state which is responsible for interpreting both the fourth amendment and similar state constitutional and statutory provisions.

The highest state courts of fourteen states and the District of Columbia[56] appear to have adopted the reasonable, good-faith exception to the exclusionary rule for violations of the fourth amendment or their state law equivalent: Alabama,[57] Arizona,[58] Arkansas,[59] California,[60] Flor-

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and affirmed in Spinelli v. United States, 393 U.S. 410 (1969), to the totality-of-circumstances test could lead to an increased level of warrant activity. Because *Gates* is less restrictive than the two-pronged test, officers may be more willing to seek a warrant than before. Any observed increases in the post-*Leon* period may then be partially or even wholly attributable to *Gates* rather than to *Leon*—an important fact to remember when assessing the impact of *Leon*.

54. 338 U.S. 25 (1949).

55. 367 U.S. 643 (1961).

56. United States v. Edelen, 529 A.2d 774, 775 (D.C. App. 1987) (adopts the good-faith exception enunciated in *Leon*, but remands the case with directions that a hearing take place to determine whether police acted in an "objectively reasonable" manner).

57. *See* State v. Crittenden, 476 So. 2d 632, 634-45 (Ala. 1985). *See infra* note 94.

58. State v. Bolt, 142 Ariz. 260, 267-69, 689 P.2d 519, 526-28 (1984) (approving a cost-benefit analysis in determining whether the exclusionary rule should be applied, suggesting that the court would be required to follow federal exclusionary rule in case of violations of fourth amendment, and "hold[ing] for the present, that the exclusionary rule to be applied as a matter of state law is no broader than the federal rule").

59. Since *Leon* was decided the Arkansas Supreme Court has considered the doctrine in seven cases. In three of the cases the court refused to apply the good-faith rationale: Stewart v. State, 289

ida,[61] Illinois,[62] Indiana,[63] Louisiana,[64] Missouri,[65] North Carolina,[66] Ohio,[67] Utah,[68] Virginia,[69] and Wyoming.[70]

Ark. 272, 711 S.W.2d 787 (1986) (police did not act in good faith and issuing magistrate wholly abandoned his judicial role); Herrington v. State, 287 Ark. 228, 697 S.W.2d 899 (1985) (affidavit contained no indication of the date on which the criminal activity was allegedly observed); State v. Anderson, 286 Ark. 58, 688 S.W.2d 947 (1985) (good faith cannot be gauged where there is no affidavit or recorded testimony to support the warrant). In the remaining four cases the court applied *Leon*: Jackson v. State, 291 Ark. 98, 722 S.W.2d 831 (1987) (overruling broad language of State v. Anderson, 286 Ark. 58, 688 S.W.2d 947 and applying good-faith exception to insufficient warrant affidavit); Toland v. State, 285 Ark. 415, 417, 688 S.W.2d 718, 719-20, *cert. denied*, 474 U.S. 945 (1985) (evidence not suppressed even though confidential informant was not alleged to be reliable and the directions on the warrant were impossible to follow); Lincoln v. State, 285 Ark. 107, 109, 685 S.W.2d 166, 167 (1985); McFarland v. State, 284 Ark. 533, 684 S.W.2d 233 (1985) (officer acted in good faith even though he failed to return the executed warrant to the issuing magistrate, violating state law).

60. *See* In re Lance W., 37 Cal. 3d 873, 879, 694 P.2d 744, 747, 210 Cal. Rptr. 631, 634 (1985) (California necessarily adopts *Leon* because its constitution provides: " 'Except as [otherwise] provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . .' " (quoting CAL. CONST. art. I, § 28(d)). This provision has been construed by the California Supreme Court as "eliminat[ing] a judicially created remedy for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled." *Id.* at 886-87, 694 P.2d at 752, 210 Cal. Rptr. at 639.).

Recent California case law indicates that the Court of Appeals of California is willing to adopt the *Leon* rule. In People v. Fortune, 197 Cal. App. 3d 941, 243 Cal. Rptr. 189 (1988), the Fifth Appellate District Court of California reversed a lower court decision that suppressed evidence because the oral affidavit made in support of a telephonic search warrant had not been recorded and transcribed. The Court of Appeals agreed with the argument of the People, that the "instant case is a good faith case under United States v. Leon." *Id.* at 942, 243 Cal. Rptr. at 190.

61. Bernie v. State, No. 67,535, slip op. at 3 (Fla. filed Jan. 7, 1988) (upholding the Second District Court's ruling "linking Florida's exclusionary rule to the federal exclusionary rule and determining that United States v. Leon and Massachusetts v. Sheppard were applicable". *Id.* at 9.).

62. *See* People v. Stewart, 104 Ill. 2d 463, 477, 473 N.E.2d 1227, 1233 (1984), *cert. denied*, 471 U.S. 1120 (1985) (dictum) (warrants found valid, but court concluded that even assuming defective affidavits, FBI agents' reasonable and good-faith belief that a search was authorized would "insulate" the searches from a suppression motion).

63. *See* Blalock v. State, 483 N.E.2d 439, 444 (Ind. 1985) (dictum) (finding that probable cause existed but concluding that even if affidavit found deficient, the good-faith exception articulated in *Leon* would render evidence admissible).

64. *See* State v. Matthieu, 506 So. 2d 1209, 1212-13 (La. 1987) (evidence not suppressed because defendant's residence was located outside territorial jurisdiction of court which issued warrant and, although search was not objectively reasonable, there was no constitutional violation and error was due to confusion as to parish in which defendant's home was located).

65. *See* State v. Brown, 708 S.W.2d 140, 145 (Mo. 1986); State v. Sweeney, 701 S.W.2d 420, 426 (Mo. 1985).

66. *See* State v. Welch, 316 N.C. 578, 589, 342 S.E.2d 789, 795 (1986) (court ruled that a blood sample taken from defendant was admissible under good-faith exception to exclusionary rule, where police officer reasonably relied on nontestimonial identification order erroneously issued by superior court judge).

67. *See* State v. Wilmoth, 22 Ohio St. 3d 251, 264, 490 N.E.2d 1236, 1246 (1986).

68. The Utah Supreme Court adopts the standards of good faith applied in *Leon*, while simultaneously finding that its state laws regarding good faith are unconstitutional. In 1982, the Utah state legislature established a statutory "good faith" exception to the exclusionary rule as part of its "Fourth Amendment Enforcement Act." In State v. Mendoza, 748 P.2d 181, 186 (Utah 1987), however, the Utah Supreme Court found the statute unconstitutional.

Utah law provided:

> Pursuant to the standards described in section 77-35-12(g) property or evidence seized pursuant to a search warrant shall not be suppressed . . . unless the unlawful conduct of the peace officer is shown to be substantial. Any unlawful search or seizure shall be considered substantial and in bad faith if the warrant was obtained with malicious purpose and without probable cause or was executed maliciously and willfully beyond the authority of the warrant or with unnecessary severity.

UTAH CODE ANN. § 77-23-12 (1982).

Section 77-35-12(g) prescribed:

(g)(1) In any motion concerning the admissibility of evidence or the suppression of evidence pursuant to this section or at trial, upon grounds of unlawful search and seizure, the suppression of evidence shall not be granted unless the court finds the violation upon which it is based to be both a substantial violation and not committed in good faith . . . .

(g)(2) An unlawful search or seizure shall in all cases be deemed substantial if one or more of the following is established by the defendant or applicant by a preponderance of the evidence:

(i) The violation was grossly negligent, willful, malicious, shocking to the conscience of the court or was a result of the practice of the law enforcement agency pursuant to a general order of that agency; [or]

(ii) The violation was intended only to harass without legitimate law enforcement purposes.

(3) In determining whether a peace officer was acting in good faith . . ., the court shall consider, in addition to any other relevant factors, some or all of the following:

(i) The extent of deviation from legal search and seizure standards;

(ii) The extent to which exclusion will tend to deter future violations of search and seizure standards;

(iii) Whether or not the officer was proceeding by way of a search warrant, arrest warrant, or relying on previous specific directions of a magistrate or prosecutor; or

(iv) The extent to which privacy was invaded.

(4) If the defendant or applicant establishes that the search or seizure was unlawful and substantial by a preponderance of the evidence, the peace officer or governmental agency must then, by a preponderance of the evidence, prove the good faith actions of the peace officer.

UTAH CODE ANN. § 77-35-12(g) (1982).

In *Mendoza*, border patrol officers stopped a vehicle on the interstate without reasonable suspicion. The trial court ruled that the "Latin descent" of the occupants of the vehicle, the time of day, time of year, California license plates, and "erratic" driving behavior did not meet the "reasonable suspicion" standard for a stop. As a result, the 51 bags of marijuana seized during the subsequent search were suppressed. On appeal, the State challenged the trial court's suppression of evidence and the trial court's failure to make findings pursuant to UTAH CODE ANN. § 77-35-12(g) described above. The Utah Supreme Court affirmed the trial court's suppression of the evidence and found the statute unconstitutional.

Based on the facts of the case, the court found that "the investigatory stop violated defendants' fourth amendment rights." State v. Mendoza, 748 P.2d 181, 184 (Utah 1987). The court then addressed the State's challenge to the trial court's failure to make the findings required by statute. (Based on state law, the trial court could only suppress evidence when it found a substantial fourth amendment violation not made in good faith. A defendant must prove a substantial violation by a preponderance of the evidence. The State must then prove good faith on the part of the officer in order to prevent suppression of the evidence. The trial court was further required to state its reasons for finding a substantial violation and a lack of good faith. *Id.* at 184-85.).

To determine the assignment of error, the court first decided whether the statute met federal constitutional standards. Using *Leon* as the standard, the court ruled that the good-faith exception could not apply to "a warrantless search of the kind involved in this case." *Id.* at 185. Citing United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (permitting the use of evidence obtained during a search conducted after an investigatory stop only when articulable facts give rise to a reasonable suspicion), the court found that "because no reasonable suspicion exists to justify an investigatory stop, rendering a subsequent search illegal, then the officer whose conduct is in question could not have acted reasonably." *Id.* at 186. Furthermore, the court observed "[b]ecause *Leon* could never apply to investigatory stops and searches, and because the Fourth Amendment Enforcement Act purports to create a 'good faith' exception to such searches, that Act violates the fourth amendment to the United States Constitution." *Id.*

The Utah Supreme Court went one step further and ruled that the statutes in question were unconstitutional because they went beyond the scope of good faith established in *Leon*:

> Because *Leon* is an exception to the application of the exclusionary rule, the State must prove the necessary elements of the 'good faith' exception. Section 77-35-12(g), however, shifts the burden of proof to the defendant, who must prove the equivalent of police conduct made in bad faith before the court can apply the exclusionary rule.
>
> Subsections (i) and (ii) of section 77-35-12(g)(2) also exceed the bounds established in *Leon* because both require less than objectively reasonable conduct in order for section 77-35-12(g) to provide an exception. Pursuant to the broad reading of *Leon*, a court will not admit the illegally-seized evidence if it finds the police conduct objectively unreasonable. Conduct that is objectively unreasonable, however, is not equivalent to grossly negligent,

Two states, Arizona[71] and Colorado,[72] have modified the exclusionary rule by statute. The Arizona and Colorado statutes provide that evidence

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willful, or malicious conduct; nor does it always arise from either an intent to harass or pursuant to department policy. Because subsections (i) and (ii) . . . validate conduct that is not objectively reasonable under *Leon*, they are unconstitutional. *Id.* at 186.

69. *See* McCary v. Commonwealth, 228 Va. 219, 232, 321 S.E.2d 637, 644 (1984).

70. *See* Patterson v. State, 691 P.2d 253, 259-60 (Wyo. 1984), *cert. denied sub nom.* Spoon v. Wyoming, 471 U.S. 1020 (1985).

71. Arizona law provides in pertinent part:

A. If a party in a criminal proceeding seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the proponent of the evidence may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact if otherwise admissible.

B. The trial court shall not suppress evidence which is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer as a result of a good faith mistake or technical violation.

C. In this section:

1. "Good faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.

2. "Technical violation" means a reasonable good faith reliance upon:

(a) A statute which is subsequently ruled unconstitutional.

(b) A warrant which is later invalidated due to a good faith mistake.

(c) A controlling court precedent which is later overruled, unless the court overruling the precedent orders the new precedent to be applied retroactively.

. . . .

E. This section does not apply to unlawful electronic eavesdropping or wiretapping.

ARIZ. REV. STAT. ANN. § 13-3925 (Supp. 1987).

72. Colorado law provides in pertinent part:

(1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer . . . as a result of a good faith mistake or of a technical violation.

(2) As used in subsection (1) of this section:

(a) "Good faith mistake" means a reasonable judgmental error concerning the existence of facts or law which if true would be sufficient to constitute probable cause.

(b) "Technical violation" means a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

. . . .

(4)(a) It is hereby declared to be the public policy of . . . Colorado that, when evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper, and in such instances the evidence so discovered should not be kept from the trier of fact if otherwise admissible . . . .

COLO. REV. STAT. § 16-3-308 (1986).

Several points should be made about this statute. First, it is in one respect narrower than *Leon* and *Sheppard* because the good-faith mistake exception to the exclusionary rule applies only to mistakes of fact, not of law. *See* People v. Brewer, 690 P.2d 860, 864 (Colo. 1984). Second, the constitutionality of the statute is unclear. *See* People v. Deitchman, 695 P.2d 1146, 1148 (Colo. 1985). In *Deitchman*, the Colorado Supreme Court, through four concurring opinions, ruled as follows: Chief Justice Erickson, joined by Justice Rovira, voted to uphold the statute in cases of violations of the search and seizure provision of the Colorado Constitution and to adopt *Leon* in the case of violations of the United States and Colorado Constitutions. *Id.* at 1153-54 (Erickson, J., concurring); Justice Dubofsky, joined by Justice Lohr, voted to recognize a limited good-faith exception in the case of a warrant based on an affidavit that fails to establish probable cause when the police officer seeking the warrant in fact had probable cause. *Id.* at 1157, 1163 (Dubofsky, J., concurring). In other instances, these justices would leave open the question whether the Colorado good-faith statute is consistent with the Colorado Constitution. *Id.* at 1159, 1160 n.3, 1163; Justice Quinn voted to leave open the question whether the Colorado Constitution bars a good-faith exception. *Id.* at 1168 (Quinn, J., concurring); Justice Neighbors would also leave open the question whether the Colorado statute is compatible with the Colorado Constitution. *Id.* at 1172 n.4 (Neighbors, J., concurring); finally,

may not be excluded when it was seized (1) as a result of a reasonable, good-faith factual error, or (2) in reasonable, good-faith reliance upon a statute that is subsequently declared unconstitutional, or in reliance on a controlling judicial precedent that is subsequently overruled.[73]

By contrast, the highest courts of five states have rejected the reasonable, good-faith exception as a matter of judicial policy: Massachusetts,[74] Michigan,[75] New Jersey,[76] New York,[77] and Wisconsin.[78] Two other state courts, Oregon and Montana, seem likely to reject the exception.[79] One

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Justice Kirshbaum expressed no views whatsoever on the matter. *Id.* at 1170 (Quinn, J., concurring).

Accordingly, it appears a majority of the Colorado Supreme Court would apply a good-faith exception in the case of a warrant based on an affidavit that fails to establish probable cause if the government in fact had probable cause and the police officer executed the warrant in a reasonable, good-faith belief that the warrant was valid. In all other circumstances, the Colorado Supreme Court has declined to decide whether a reasonable, good-faith exception would comport with the Colorado's Constitution.

Finally, the Colorado statute goes beyond *Leon* in two respects. In the case of technical violations, it permits the admission of evidence seized pursuant to a statute that is subsequently ruled unconstitutional. In addition, it is not limited to evidence seized pursuant to a warrant.

73. *See supra* notes 71 and 72.

74. *See* Commonwealth v. Upton, 394 Mass. 363, 375, 476 N.E.2d 548, 551 (1985) *on remand from* Massachusetts v. Upton, 466 U.S. 727 (1984) (remanding for reconsideration in light of Illinois v. Gates, 462 U.S. 213 (1983)). On remand, the Massachusetts high court ruled, *inter alia*, that a "statutory exclusionary rule requiring the exclusion of evidence seized without a showing of probable cause (unless there is some other basis for justifying the search)" governs in all cases raising state law claims and that, accordingly, it need not decide whether the state constitutional provision analogous to the fourth amendment would in and of itself require exclusion. *Id.* at 374, 476 N.E.2d at 550-51.

See also Commonwealth v. Sheppard, 394 Mass. 381, 476 N.E.2d 541 (1985), *on remand from* Massachusetts v. Sheppard, 468 U.S. 981 (1984). On remand, the Massachusetts Supreme Court ruled that the search warrant failed to meet the written particularity requirement of both state legislation (MASS. GEN. L. ch. 276, § 2) and the state constitution (MASS. CONST. art. XIV). Nevertheless, exclusion was not required because the warrant, together with the affidavit, satisfied the purposes of the requirement: (1) to prevent general searches; and (2) to allow a defendant to challenge the validity of a search based on the written material alone. Accordingly, because these dual objectives were "substantially satisfied," the search was not unreasonable and exclusion was not required. 394 Mass. at 385, 476 N.E.2d at 545, 546-47. Significantly, the court contrasted the defect in the *Sheppard* warrant with an erroneous determination of probable cause for which exclusion would be required because such a violation would be "substantial."

75. People v. Sundling, 153 Mich. App. 277, 290-91, 395 N.W.2d 308, 314 (1986) (refusing to incorporate the good-faith exception into the Michigan Constitution on the ground that it would render the probable cause requirement "a nullity").

76. State v. Novembrino, 105 N.J. 95, 157-58, 519 A.2d 820, 856-57 (1987) (declining to follow *Leon* because the exclusionary rule, unmodified by a good-faith statute, is an integral element of the state constitutional guarantee that search warrants will not be issued without probable cause).

77. *See* People v. Bigelow, 66 N.Y.2d 417, 422-27, 488 N.E.2d 451, 455-58 (1985) (declining to adopt good-faith exception on state constitutional grounds because "if the People are permitted to use the seized evidence, the exclusionary rule's purpose is completely frustrated, a premium is placed on illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future").

78. State v. Grawein, 123 Wis. 2d 428, 431-32, 367 N.W.2d 816, 817-18 (Ct. App. 1985) (a good-faith exception would be violative of state constitutional jurisprudence).

79. *See* State v. Davis, 295 Or. 227, 235, 666 P.2d 802, 807 (1983) (" '. . . the deterrent effect on future practices against others, though a desired consequence, is not the constitutional basis for respecting the rights of a defendant against whom the state proposes to use evidence already seized. In demanding a trial without such evidence, the defendant invokes rights personal to himself.' " *Id.* at 235, 666 P.2d 372, 374 (1981)); *see also* State v. Tanner, 304 Or. 312, 315, 745 P.2d 757, 758 (1987) (upholding the *Davis* court's refusal to adopt the deterrence rationale of the exclusionary rule); State v. Van Haele, 649 P.2d 1311, 1315 (Mont. 1982) (rejecting, prior to *Leon*, good-faith exception to the exclusionary rule for violations of the Montana Constitution).

state, Mississippi,[80] at first rejected *Leon*, but on reconsideration expressly declined to determine whether or not to adopt the exception.

Finally, the highest courts of nine states have expressly declined to decide the issue: Idaho,[81] Minnesota,[82] Mississippi,[83] Nebraska,[84] New Mexico,[85] North Dakota,[86] Pennsylvania,[87] Utah,[88] and West Virginia.[89] Colorado has taken a similar approach—although it statutorily recognizes a limited good-faith exception to the exclusionary rule;[90] the Colorado Supreme Court has not yet decided whether that exception fully comports with the Colorado Constitution. When the Connecticut Supreme Court addressed the issue, it assumed that *Leon* controlled, but decided as a factual matter that reasonable, good faith had not been established.[91] Delaware has referred to *Leon* in the context of search and seizure but has yet to formally accept or reject its holding.[92] The remaining highest state courts have either not had or taken the opportunity to hear a case squarely presenting the good faith issue.[93]

The Content of State Supreme Court Decisions

The highest state courts have considered the reasonable, good-faith exception to the exclusionary rule in a variety of contexts. The exception is most often considered in connection with the probable cause requirement,[94]

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80. Stringer v. State, No. 54-805 (Miss. filed Feb. 27, 1985) (LEXIS, Genfed library, Dist. file) (rejecting *Leon*). Subsequently, however, the court reheard the case, withdrew its original opinion, and expressly declined to determine whether to adopt the exception. *Stringer v. State*, 491 So. 2d 837, 841-51 (Miss. 1986).

81. *See* State v. Johnson, 110 Idaho 516, 528-29, 716 P.2d 1288, 1300-01 (1986); *but see* State v. Lewis, 107 Idaho 616, 618, 691 P.2d 1231, 1233 (1984) (court assumed that it must adopt *Leon* when a fourth amendment violation is alleged).

82. *See* State v. Wiley, 366 N.W.2d 265, 269 n.2 (Minn. 1985).

83. *See* Stringer, 491 So. 2d at 841-51.

84. *See* State v. Abraham, 218 Neb. 475, 477, 356 N.W.2d 877, 879 (1984).

85. *See* State v. Herrera, 102 N.M. 254, 258 n.1, 694 P.2d 510, 514 n.1, *cert. denied*, 471 U.S. 1103 (1985).

86. *See* State v. Riedinger, 374 N.W.2d 866, 876 n.10 (N.D. 1985); State v. Ronngren, 361 N.W.2d 224, 230 n.1 (N.D. 1985). *But see* State v. Sakellson, 379 N.W.2d 779, 784-85 (N.D. 1985) (without expressly deciding that it would accept *Leon*, court concluded that good faith exception was of no help in the present case because the conduct of the police was not objectively reasonable); State v. Thompson, 369 N.W.2d 363, 370 n.4 (N.D. 1985) (noting that *Leon* "restricts the Fourth Amendment benefits afforded defendants"); State v. Gronlund, 356 N.W.2d 144, 145-46 (N.D. 1984).

87. *See* Commonwealth v. Mason, 507 Pa. 396, 405-06 n.2, 490 A.2d 421, 425-26 n.2 (1985).

88. *See* State v. Gallegos, 712 P.2d 207, 209 n.7 (Utah 1985).

89. State v. Schofield, 331 S.E.2d 829, 835 (W. Va. 1985) (stating that applicability of the good-faith exception to facts of the case would be "problematic" but not expressly stating whether it would adopt *Leon*).

90. *See supra* note 72.

91. State v. Couture, 194 Conn. 530, 482 A.2d 300, *cert. denied*, Connecticut v. Couture, 469 U.S. 1192 (1984).

92. Jensen v. State, 482 A.2d 105, 114 (Del. 1984) (even if defendant demonstrates that affidavit for search warrant contains knowing or reckless falsehoods and that affidavit, without that information, fails to establish probable cause, the defendant still may not prevail).

93. One would expect that virtually all of the highest state courts possessed an opportunity to decide a case raising the issue of reasonable, good faith. A failure to take advantage of such an opportunity may reflect a decision to await the judgment of other state courts and the results of the experimentation permitted by *Leon*.

94. In State v. Crittenden, 476 So. 2d 632 (Ala. 1985), the Alabama Supreme Court ruled that the affidavit submitted in support of the warrant for defendant's arrest did not establish probable

oath and similar procedural requirements,[95] and the warrant particularity requirement.[96] Other cases involve claims that police activities preceding initiation of the search warrant process were improper.[97]

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cause. The court also rejected on the merits the government's claim of reasonable, good-faith reliance. In rejecting the state's argument that the warrant should be upheld under *Gates* and *Leon*, the court characterized it as a "bare-bones" affidavit not establishing even a substantial basis for probable cause within the meaning of *Gates*. Additionally, for the same reason, it could not be said that the police officer executing the warrant did so in reasonable, good faith within the meaning of *Leon*. *Id.* at 634-35.

In Herrington v. State, 287 Ark. 228, 697 S.W.2d 899 (1985), the Arkansas Supreme Court found that an affidavit submitted in support of a search warrant did not establish probable cause because it did not mention the time during which the drugs sought by the warrant had been observed. In ruling that the affidavit did not establish probable cause and that *Leon* was not applicable, the court relied on statements in *Leon* and *Gates* that "sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Id.* at 230, 697 S.W.2d at 901. The failure of the affidavit to refer to the length of the observation period or to any facts from which the length could be inferred precluded not only a finding of probable cause but also a finding of reasonable, good-faith reliance on the warrant.

The North Dakota Supreme Court, in State v. Thompson, 369 N.W.2d 363 (N.D. 1985), determined that the affidavit at issue was insufficient under *Gates* and that even if *Leon* were adopted in North Dakota, the reasonable, good-faith exception would not save the search because the "affidavit was 'so lacking in indicia of probable cause' that it was unreasonable" for the police officer "to rely on it." *Id.* at 372.

In People v. Stewart, 104 Ill. 2d 463, 473 N.E.2d 1227 (1984), *cert. denied*, 471 U.S. 1120 (1985), defendant, who was convicted of murder, appealed his conviction, arguing that the warrants for the search of his automobile, luggage, and trailer were not supported by probable cause. The Illinois Supreme Court, applying the "totality-of-the-circumstances" test, found probable cause, and then, citing *Leon*, held in the alternative that "[e]ven if one assumes a want of particularity in the affidavits, the agents' reasonable and good-faith belief, although a possibly mistaken one, that the searches were authorized under the warrants, insulated the searches from motions to suppress." *Id.* at 477, 473 N.E.2d at 1233.

In Blalock v. State, 483 N.E.2d 439 (Ind. 1985), the Indiana Supreme Court rejected the defendant's appeal that the affidavit supporting the search warrant did not establish probable cause. The court rejected the appeal based on the merits and cited *Leon*. *Id.* at 444.

95. State v. Anderson, 286 Ark. 58, 60, 688 S.W.2d 947, 949-50 (1985) (seizure of incriminating evidence from defendant's home pursuant to a warrant was invalid because the warrant was supported only by the unrecorded testimony of a police officer in violation of a state statute requiring that warrants be supported by written affidavit or recorded testimony—subsequently overruled in Jackson v. State, 291 Ark. 98, 722 S.W.2d 831 (1987)); State v. Brown, 708 S.W.2d 140, 144-45 (Mo. 1986) (court rejected a claim that a search warrant was invalid under both federal and state constitutional provisions as well as a Missouri statute because it was issued without a verified application in proper form); State v. Wilmoth, 22 Ohio St. 3d 251, 254, 490 N.E.2d 1236, 1238 (1986) (court rejected a challenge to the admission of evidence seized pursuant to a search warrant based on a claim that the oral statements of the police officers that supported the warrant were not made under oath and thus violated the Ohio Constitution and the fourth amendment).

96. Toland v. State, 285 Ark. 415, 417, 688 S.W.2d 718, 720 (1985) (search upheld based on good faith even though the directions to the defendant's home were "impossible to follow" and that "[n]o person could have followed the directions and ended up at the site where the search was supposed to have been conducted").

97. State v. Johnson, 110 Idaho 516, 716 P.2d 1288 (1986). This case arose from a landlord-tenant dispute over rent in which the landlord, supposedly checking to see whether the defendant had moved out, discovered some "suspicious" plants in the apartment and reported his "suspicions" to the police. The landlord then improperly permitted a police officer to inspect the apartment. After the officer discovered the marijuana through an improper search, he sought and secured a warrant pursuant to which the plants were seized. In upholding suppression of the evidence, the Idaho Supreme Court, although declining to decide whether it would recognize a reasonable, good-faith exception to the exclusionary rule, offered three justifications for not applying the *Leon* exception. First, it noted that the examples given by the Supreme Court in *Leon* of instances in which good faith could not be found were not exhaustive. Accordingly, the court ruled that a finding of good faith was inappropriate where an illegal search provided the information necessary to establish probable cause. Second, because the search was clearly illegal, the court found that application of

A number of courts, without expressly acknowledging the good-faith exception, have extended *Leon* to cases of pure police error. The most egregious examples of this misinterpretation of *Leon* involved situations in which a defendant claimed that an affidavit contained a knowing or reckless falsehood. In the two cases in which the defendant raised this argument, the courts indicated that the reasonable, good-faith exception could apply in such instances—a determination that seems clearly contrary to the decisions of the Supreme Court.[98] Additionally, in two different cases, courts have substituted the reasonable, good-faith exception to the exclusionary rule for the traditional analysis that is applicable in determining whether a police officer has exceeded or has reasonably interpreted the authority granted by a

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the exclusionary rule would further the rule's deterrence objective. Third, the error was not attributable to the judge who authorized the warrant but to law enforcement personnel. *Id.* at 528-29, 716 P.2d at 1300-01.

98. In Lincoln v. State, 285 Ark. 107, 685 S.W.2d 166 (1985), the affidavit stated that the affiant-police officer had been told by an informant that she had purchased a sample of cocaine from the defendant and that she was aware of the "penal implications" of her statement. *Id.* at 109, 685 S.W.2d at 167. In fact, however, as the affiant later admitted, "he should have said that the informant obtained the sample from somebody else who reported to his informant that it had come from" the defendant. *Id.* In evaluating the affidavit, the court recognized that under *Leon*, "deference to the magistrate's judgment does not preclude inquiry into the knowing or reckless falsity of the affidavit." *Id. Leon*, however, did not require reversal because:

> There is no reason to think that the circuit judge who issued the warrant would have acted differently had the affidavit been exact. To the contrary, the really vital statement in the affidavit was that another informant who had been in [the defendant's]. . . residence that very evening said she had purchased cocaine from [the defendant] . . . at that time and that [defendant] . . . had stated he had more cocaine available, but it was selling fast.

Id. at 167.

In addition, the court decided to "attach no importance to the fact that the affidavit said that the informant had knowledge of 'the penal implications' of her statement, for even though she was released without being charged, her release was conditioned on her promise to cooperate in the prosecution of" defendant. *Id.*

In McCary v. Commonwealth, 228 Va. 219, 321 S.E.2d 637, 640 (1984), the defendant argued that the affidavit supporting a search warrant contained a factual misstatement and that the affiant-police officer had personal knowledge of the misstated facts contained in the affidavit. The Virginia Supreme Court rejected this argument, ruling the warrant valid under the fourth amendment and state legislation. The court observed that although the police officer had erroneously checked the box on the affidavit form indicating that he had personal knowledge of the facts, he testified that he had, in fact, told the issuing magistrate that he had received the information from other police officers. Accordingly, there was no violation of the fourth amendment because under Whitely v. Warden, 401 U.S. 560, 565 n.8 (1971), and Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964), "an insufficient affidavit may be supplemented or rehabilitated by information disclosed to the issuing magistrate upon application for the search warrant." *McCary*, 228 Va. at 231, 321 S.E.2d at 643. Furthermore, there was no violation of the state statute which does not require a statement of the source of the affiant's information. In the alternative, the court ruled that the search was valid under *Sheppard* which also involved an inaccurate form about which the judge was apprised.

Although *Lincoln* and *McCary* reach the same result, the cases are quite different except insofar as they both erroneously hold that the reasonable, good-faith exception is potentially applicable to an affidavit containing a knowing or reckless falsehood. In *McCary*, although the police officer mistakenly checked the box on the affidavit form indicating that the information was based on personal knowledge, he in fact informed the magistrate that the information was obtained from other police officers before the warrant was issued. As a result, the magistrate was not misinformed, the warrant was valid, and the court unnecessarily reached the reasonable, good-faith issue. By contrast, the police officer in *Lincoln*, operating under the *Aguilar-Spinelli* regime (the search occurred in 1981), knowingly misrepresented the basis of his informant's knowledge, misidentified the ultimate source of the information, failed to provide any information about the reliability of that source, and misled the magistrate into believing that his informant acted contrary to her penal interests. Accordingly, *Lincoln* is a case of police, not magistrate, error and outside the scope of *Leon*.

warrant.[99] In one of these cases, it appears that the reasonable, good-faith concept is more flexible than traditional analysis,[100] an indication perhaps of what might happen should the Supreme Court extend *Leon* to warrantless searches and seizures.

In those cases where the highest state courts have construed the reasonable, good-faith concept, the results are mixed. For the most part, in cases factually similar to *Leon* and *Sheppard*, the courts have found reasonable, good faith only when they also have found no violation of the fourth amendment or an analogous state constitutional provision. Conversely, the courts have been reluctant to find reasonable, good faith when they have found a violation of these provisions.[101] Accordingly, as a practical matter, the reasonable, good-faith exception in these contexts has had little impact on the admission of evidence. At the very least, it appears that those state courts adopting the reasonable, good-faith exception are not disposed to an expansive construction of that concept in factual contexts similar to those of *Leon* and *Sheppard*.

Finally, there are a few questionable decisions in which the courts relied on *Leon* as a back-up argument to a determination adverse to the defendant on the merits.[102] In these cases, however, it may be that the courts did not carefully consider the issue of reasonable, good faith and that in a similar case, squarely presenting the issue, they will rule differently.

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99. *See* State v. Sakellson, 379 N.W.2d 779 (N.D. 1985); State v. Gronlund, 356 N.W.2d 144 (N.D. 1984).

100. In State v. Gronlund, 356 N.W.2d 144 (N.D. 1984), the North Dakota Supreme Court considered an order granting a motion to suppress evidence seized from a five-gallon container located in the trunk of the defendant's automobile for which the police had obtained a warrant authorizing a search for a walking cane believed to have been used in an assault. Noting that the police officers had been told by the victim that the cane may have been broken during the beating, the court ruled that "the officers could reasonably have believed that pieces of a broken walking cane might be found in the pail." *Id.* at 146. The police officers, however, had not disclosed the possibility of a broken cane to the magistrate and the search warrant did not authorize a search for pieces of a cane. In permitting examination of the pail, the court stated only that its conclusion "is in keeping with the United States Supreme Court's recent cases emphasizing reasonable reliance and finding 'good faith' exceptions to the exclusionary rule." *Id.* The court nevertheless remanded the question whether the police should have opened and searched small, sealed containers found in the pail because it seemed unlikely that the police could have reasonably believed that pieces of the cane could be found in these containers.

The decision in *Gronlund* that the reasonable, good-faith exception to the exclusionary rule is potentially applicable to the facts of the case is erroneous. The warrant was valid and there was no magistrate error. Nevertheless, even prior to *Leon* and *Sheppard*, police officers were allowed some leeway in executing search warrants, so that the underlying approach of the case and the results are not necessarily wrong. But on the merits, *Gronlund* appears erroneous. A reasonable police officer acting in good faith should have disclosed to the magistrate from whom the warrant was sought that the cane may have been broken. In addition, a police officer relying in reasonable, good faith on the warrant that was issued would not have searched a five-gallon pail for the walking cane specified in the warrant. It is one matter to search those parts of an automobile in which a full cane might be found; it is quite another to search additional parts of an automobile in which pieces of a cane might be found. The court seemed to acknowledge this point, at least in part, by remanding for further consideration the question whether the officers executing the warrant could have acted reasonably and in good faith in examining the small, sealed containers in the pail.

101. *See* State v. Crittenden, 476 So. 2d 632, 635 (Ala. 1985).

102. *See, e.g.*, People v. Stewart, 104 Ill. 2d 463, 477, 473 N.E.2d 1227, 1233 (1984), *cert. denied*, 471 U.S. 1120 (1985); Blalock v. State, 483 N.E.2d 439, 444 (Ind. 1985).

THE IMPACT OF *LEON* ON LAW ENFORCEMENT

The PERF project next examined the effects of *Leon* on law enforcement search warrant policies and practices. From the interviews with police personnel and the data collected from the search warrant applications, the study determined whether changes occurred in the following areas: in the search warrant process itself; in the number and content of search warrants; in the use of confidential informants; and in the amount of judicial forum shopping. In addition, from the telephone interviews and on-site interviews, the study assessed the ability of the police to define good faith and determined their level of knowledge about *Leon*.

To a certain extent, the level of impact on local law enforcement is determined by the highest state court's treatment of the reasonable good-faith exception. In two sites located within one state—Border City and Hill City—the state supreme court has adopted *Leon*. In two other jurisdictions—Plains City and Forest City—the state supreme courts have not adopted *Leon*, nor is it likely that they will. Thus, local law enforcement agencies in these two jurisdictions have not been affected by the *Leon* decision. In River City the state supreme court is currently reviewing a case similar to *Leon*, but has not yet reached a decision. A statutory provision that modifies the exclusionary rule applies in Mountain City, though the state supreme court has expressly declined to decide the issue. Finally, the highest court in Harbor City's state has not considered the reasonable good-faith exception.

Impact on the Search Warrant Process

The search warrant process begins when the police, during the course of an investigation, become aware of the necessity to seek a warrant. Once the decision to seek a warrant is made, the usual procedure is to return to the stationhouse or precinct and write the application, affidavit, and warrant. In most situations, a detective prepares the search warrant. In all jurisdictions, a supervisor or another knowledgeable detective reviews the completed warrant application. In Plains and Border Cities a deputy district attorney routinely reviews the warrant prior to submission to the magistrate. In other jurisdictions (Forest, Harbor, and Hill Cities, and at times in Mountain City), a prosecutor is available for review upon the request of the officer. In River City the prosecuting attorney's office is not a part of the review process.

Once the preliminary review is completed, the officer goes to a judge for presentation of the application, warrant, and affidavit. Some jurisdictions use a duty-judge system.[103] In others, police officers are free to contact judges at their own discretion. After examining the application and affidavit and perhaps questioning the officer, the judge upon his/her determination of probable cause, signs the warrant. The study found only one instance in which a judge rejected a warrant application (out of 2,115 warrants). Usu-

103. At night and on weekends one judge is available to review arrest and search warrants through an on-call system. This duty is rotated among the judges on the lower court bench in six of the seven sites.

ally, rejected applications are destroyed or revised by the police rather than kept on file and for this reason are not available for scrutiny. Given this situation, it was impossible to determine the rejection rate. However, in Border City which used telephonic warrant applications, a transcript of one rejected warrant was on file.

The police have three to ten days to execute a warrant after judicial approval has been granted. In most jurisdictions, police serve the warrants within a day or two, but in Border City detectives often wait the full length of time (ten days in this case) before serving the warrant. After executing the warrant, the officer has another ten days to file a "return" with the court. The return indicates whether the warrant was executed, the date and time of the execution, and an inventory of the items seized. In six of seven jurisdictions, police regularly filed returns; only in River City were returns often missing.

Following the execution and filing of a search warrant, police usually reported that arrests were made and criminal cases filed. However, the data indicate that the percentage of warrants filed to culminate in arrests ranged from a low of fifty percent in Mountain City in the first quarter of 1984 to a high of 100% in the same location in the following year. The filing of criminal cases ranged from a low of thirty-six percent of the warrants filed in the first quarter of 1985 in Hill City to a high of seventy-five percent of the warrants filed in Border City in 1984.

Overall, in the seven intensively studied sites, no changes occurred in the search warrant process as a result of the *Leon* ruling. Similarly, in the national sample of police agencies, law enforcement officers reported no changes as a result of *Leon*. Interviews with police personnel in thirty-seven jurisdictions revealed that the steps in getting a warrant remained essentially the same from 1984 to 1985. One change occurred in River City, which required narcotics officers to have their warrants reviewed by a supervisor, but that change was attributable to a policy change introduced by a new lieutenant, independent of *Leon*. Moreover, it appears that no substantive changes have occurred in the process since at least 1980, the year the warrants examined by the NCSC were filed.

Impact on Warrant Activity

The *Leon* decision gives the police added incentive to secure warrants. The incentives stem from the Court's ruling that searches conducted in objective good-faith reliance on a warrant will result, with limited exception, in the use of evidence at trial, even if the warrant is later found to be defective. Given the protection from subsequent motions to suppress afforded warrant-based searches, does *Leon* result in an increase in warrant activity? Are police more willing to apply for search warrants knowing that once judicial approval has been obtained, the evidence will stand up in court?

In the two jurisdictions where *Leon* has been adopted by the state court, the level of search warrant activity remained unchanged in Hill City, but increased in Border City. In sites where *Leon* has not been adopted by the courts, but is still an issue, warrant activity has either not changed (River

and Harbor Cities) or has increased (Mountain City). For the two sites that have not adopted *Leon* and where the courts do not seem likely to do so, an increase in warrant activity occurred in Plains City and a decrease took place in Forest City.

In River, Hill, and Harbor Cities the number of primary search warrants the police obtained in the first quarters of 1984 and 1985 remained virtually the same (Table 3). In River City, the numbers and percentages are similar across all dimensions of warrant-related activity—primary warrants, executed warrants, those that resulted in arrests and criminal cases, motions to suppress, and appeals. The only noticeable change occurred in the number of successful appeals by defendants. In 1984, two cases were successfully appealed, but in 1985 no defendants won their appeals. Harbor and Hill Cities experienced increases in execution of warrants, but declines took place in percentages of arrests and case filings.

Overall, increases in warrant activity took place in three sites, one of which (Border City) has adopted *Leon*. In the first quarter of 1985, Border City's warrant activity increased fifty percent over the previous year. However, the increases were not attributable to *Leon*. In Border City, a change in policy and personnel in the narcotics units independent of the *Leon* decision led to the growth. Interviews with detectives and administrators revealed that "street teams" were established in mid-1984. The "street teams" decentralized detective divisions and investigations and ultimately led to more warrant activity.

In Plains City, located in a state where *Leon* has yet to be adopted, the number of primary warrants rose from 110 in the first quarter of 1984 to 154 in 1985—a forty percent increase. With respect to the other dimensions of the search warrant process—executions, arrests, criminal case filings, and appeals—the activity remained stable. The increase in the number of primary warrants cannot be ascribed to the *Leon* ruling, however, because the state supreme court has not decided a case involving the good-faith exception. The increase is primarily attributable to the search warrant policy of the chief of police and chief of detectives. Since 1981 the policy of the department has been to prepare search warrants in all situations where officers believe them to be necessary. As a result of the policy, training of officers in warrant preparation has increased, which, in turn, has led to more officer involvement in search warrants at all levels. Since 1981 an increase in warrant preparation has occurred annually. That increase can be attributed to the emphasis placed on search warrants by the police administration rather than to the *Leon* decision.

Finally, in one jurisdiction, Forest City, a slight decline in warrant activity took place. In the first quarter of 1984, police secured ninety-five primary warrants, but during the same period in 1985, eighty-seven warrants were obtained. Based on an analysis of case law and interviews with prosecutors, defense attorneys, and the police, the decline cannot be attributed to *Leon*. In this jurisdiction, the state supreme court has a more restrictive view of search and seizure law than the Supreme Court and is therefore unwilling to extend the reasonable, good-faith exception to search warrant situations.

TABLE 3

WARRANT-BASED CASE FLOW JANUARY THROUGH MARCH 1984 AND 1985

TYPE OF WARRANT	BORDER CITY		FOREST CITY		HARBOR CITY		HILL CITY		MOUNT. CITY		PLAINS CITY		RIVER CITY	
	1984	1985	1984	1985	1984	1985	1984	1985	1984	1985	1984	1985	1984	1985
TOTAL WARRANTS	135	175	109	99	368	356	125	129	38	47	119	181	113	121
PRIMARY WARRANTS	106	159	95	87	269	274	114	119	30	40	110	154	95	96
EXECUTED WARRANTS	94	140	94	82	248	263	93	105	29	39	108	145	64	67
ARRESTS	86	87	70	52	173	152	60	73	15	40	93	126	70	71
CASES FILED	74	76	50	32	164	151	45	43	14	27	72	98	45	48
MOTIONS TO SUPPRESS	5	5	14	10	32	21	18	24	2	1	16	11	26	27
APPEALS	6	0	4	6	4	2	2	0	1	0	1	2	7	7
OUTCOMES FOR MOTIONS TO SUPPRESS EVIDENCE														
SUCCESSFUL MOTIONS	0	0	2	0	0	1	0	0	0	0	2	2	3	3
WARRANT-RELATED APPEALS	1	0	2	0	0	0	2	0	1	0	0	0	3	3
SUCCESSFUL APPEALS (WARRANT RELATED)	0	0	0	0	0	0	0	0	0	0	0	0	2	0

The Use of Confidential Informants

Police use confidential informants (CIs) as sources of information, primarily in drug and theft-related offenses, in all seven sites. The important inquiry in this area is whether the quality of warrants, as measured by levels of corroboration of CIs, changed because of the *Leon* decision. Did the police corroborate statements regarding the type of crime and the location of the crime any differently after *Leon* than before? Did the outcomes of warrants based on CIs change? That is, did changes occur in the seizure of materials they were looking for? Did changes occur in arrests or criminal case filings?

Table 4 reveals the changes in the use of CIs by site for the first quarters of 1984 and 1985. Clearly the use of CIs, the levels of corroboration of the crime, and the location of the crime varied across the jurisdictions. Using the number of warrants with a CI as the unit of analysis, the data indicate that overall, levels of corroboration did not change over the period. In River and Border Cities, slight increases occurred in the level of corroboration of the crime. The level slightly decreased in Plains and Mountain Cities, but stayed the same in Hill City. In Forest City, police almost never corroborated information regarding the type of crime, regardless of the year.

Warrant outcomes changed significantly in one site that has adopted *Leon*—Border City. Declines occurred in arrests and criminal cases filed. The findings, however, cannot be ascribed to *Leon*. In this site, narcotics "street teams"—made up of five officers—were developed and formed in 1984, just prior to the *Leon* decision. Unlike vice-narcotics detectives, members of the street teams execute search warrants almost ten days after judicial approval is given. As a result, contraband sought by the police may be moved or sold by the suspect, leading to a lesser chance of seizing material and arresting the offender. Members of the street teams noted that if they executed the warrant immediately, the suspect could deduce the identity of the CI. By waiting ten days, the officers felt that the informant would be partially protected. At the same time, however, they acknowledged that arrests and criminal case filings might suffer. Nonetheless, the officers opted for waiting rather than serving the warrants immediately.

Overall, *Leon* has not changed the use of confidential informants. Thus, in terms of this index, the quality of the warrants has not diminished.

Judicial Selection

A hypothesis generated by Justice Brennan in his dissent[104] and the NCSC report[105] was that "forum shopping" might increase as a result of *Leon*. That is, law enforcement officers may be inclined to secure more warrants from sympathetic magistrates. For reasons to be discussed, the study could not determine whether "judge shopping" occurs in a systematic manner in any of the jurisdictions, nor could it be shown that it has increased or decreased in the post-*Leon* period. While police admit to various levels of

104. *Leon*, 468 U.S. at 928, 955-56 (Brennan, J., dissenting).
105. NCSC study, *supra* note 2, at 91.

TABLE 4

USE OF CONFIDENTIAL INFORMANTS BY PRIMARY WARRANTS

VARIABLE	BORDER CITY 1984	BORDER CITY 1985	FOREST CITY 1984	FOREST CITY 1985	HARBOR CITY 1984	HARBOR CITY 1985	HILL CITY 1984	HILL CITY 1985	MOUNT CITY 1984	MOUNT CITY 1985	PLAINS CITY 1984	PLAINS CITY 1985	RIVER CITY 1984	RIVER CITY 1985
# PRIMARY WARRANTS	106	159	95	87	269	274	114	119	30	40	110	154	95	96
# WARRANTS W/CI	50	91	22	20	162	164	59	81	1	11	21	46	54	36
CRIME CORROBORATED	40	84	1	0	134	129	28	37	1	10	19	37	41	31
	80%	92%	5%	—	83%	79%	47%	47%	100%	91%	90%	80%	76%	86%
SITE CORROBORATED	40	84	17	11	142	157	27	37	1	10	21	45	48	29
	80%	92%	77%	55%	88%	96%	46%	47%	100%	91%	100%	98%	89%	81%
MATERIAL SEIZED	41	62	20	19	136	145	42	64	1	11	21	42	40	24
	82%	68%	91%	95%	84%	88%	86%	51%	100%	100%	100%	91%	74%	67%
ARREST MADE	36	40	18	14	102	101	28	51	1	8	15	38	42	31
	72%	44%	82%	70%	63%	62%	47%	63%	100%	73%	71%	83%	78%	86%
CASE FILED	34	35	13	6	98	100	23	26	1	8	11	26	31	25
	68%	38%	59%	30%	60%	61%	39%	32%	100%	73%	52%	57%	57%	69%

judicial selection across all sites, a conclusion that forum shopping has changed since *Leon* cannot be drawn.

During normal working hours the practice of determining which judge to go to for approval varied by jurisdiction. Border, River and Hill Cities determined judicial review by a rotating system established by the judges themselves. Border and Hill Cities gave the arraignment judges the responsibility of search warrant review. In River City, one district court judge is selected by his colleagues to review warrants. He is assisted by four magistrates in approving warrants.

In Harbor City, most warrants are reviewed by district court (misdemeanor court) judges, who are located in all parts of the city. Higher court (felony court) judges are also available, but used only on occasion. In Plains City, arraignment court judges see the most warrants because they are located adjacent to police headquarters. Forest City police officers take their warrants to municipal court judges because the court is located in police headquarters and because higher court judges choose not to review and sign warrants. In Mountain City, no formal policy exists regarding judicial review; officers are free to go to judges of their choice.

At night and on weekends, each of the sites uses a duty judge system. One judge is available to review arrest and search warrants through an on-call system. This duty is rotated among the judges on the lower court bench in six of the seven sites. In River City a magistrate is available at the courthouse all night and all weekend for warrant review and bail hearings.

From the data collected, it is difficult to determine whether police officers have changed their method of selection of judges as a result of *Leon*. During the pre- and post-*Leon* periods, judicial review varied across all sites. For each year and for each site one or two different judges approved more warrants than others, but no determination could be made whether this occurred because of the rotating systems within sites, or because of forum shopping by law enforcement.

The interviews, however, suggest that a certain amount of judge shopping exists. In each jurisdiction, the police acknowledged (as did prosecutors) that one or two judges were "easy" in their review, and that one or two other judges were "difficult." Some detectives with experience in the process explained that judicial selection depended on the type of investigation, the seriousness of the offense, and the time devoted to the warrant. If a quick review was sought, the officers knew which judge to approach. If an important case required a thorough review, they looked for the difficult judge. Other detectives simply said they avoided the "tough" judges routinely, while still others said they went to them consistently. Even with *Leon* in place, however, it does not appear that their selection process has changed.[106]

106. Some detectives said that they used the same approach both before and after *Leon*. While *Leon* provides the assurance that evidence seized in the course of the search will be upheld in court, some detectives still sought reviews from "tough" judges because they wanted to insure that their case would lead to a "good" conviction. These detectives were not only concerned about making proper arrests and seizures, but wanted "quality" convictions as well. Thorough reviews of their affidavits helped to solidify cases.

Knowledge of Leon

Familiarity with the *Leon* decision among law enforcement varied across and within the seven jurisdictions. In all seven sites the chiefs expressed their knowledge of the decision. Below the chief, however, the level of understanding varied. In the two sites that have adopted *Leon*, Hill City and Border City, police appeared to be the most knowledgeable. The Hill City captain of criminal investigations and the detectives in homicide, narcotics, and other units knew about the decision from bulletins received from the district attorney's office. Border City police learned of the decision through the district attorney liaison, whose office is located in police headquarters. In both sites, however, the police did not recall any instances of its use nor did they believe that the case would have an impact on the warrant process.

In Mountain City, while the chief and deputy chief were familiar with the ruling, only two detectives understood *Leon*. In River City, one supervisor knew the details of the case through a state training seminar, but others had only "heard of it." Harbor City detectives had minimal knowledge of *Leon*. One detective admitted reading the case just prior to the interview, while others indicated that they had read about it in the newspapers but could not recall specifics.

In Plains City, the level of knowledge about *Leon* was high among detectives and supervisors, even though the case has not been adopted in this jurisdiction. Since at least 1980, the Plains City chief of police and chief of the criminal investigations division emphasized the use of search warrants to detectives and patrol officers. A training bulletin, legal updates from the district attorney liaison, and overall interest in search and seizure kept officers abreast of current search warrant practices and policies. As a result, the officers could talk about the decision and its ramifications.

Conversely, in Forest City, where *Leon* has also not been adopted, police detectives and supervisors had limited information about the decision. Though the chief and legal officer spoke in detail about the case, the detectives had no real understanding of *Leon*. Most had heard of it, but could not elaborate upon it. Because the state supreme court has not taken the opportunity to rule upon the case, the impact of *Leon* is minimal here, accounting for the variation in understanding about the decision.

Nationally, police knowledge of *Leon* also varied both between and within sites. From the telephone survey, roughly one-third of the police interviewed were very familiar with the ruling, a third somewhat familiar, and a third relatively unfamiliar, at least with the meaning behind the ruling.

Summary

Leon's limited impact on police policies and practices was observed across the seven sites and nationally. Anticipated changes in the quantity and quality of search warrants have not materialized. Though the number of primary warrants in Border City and Plains City has increased, the increase cannot be attributed to *Leon* but instead are apparently due to the local legal environment and police personnel changes. The quality of war-

rants, measured by warrant outcomes and the use of confidential informants, has not undergone change over the period of study, nor could conclusions be made that "judge shopping" has increased or decreased in the seven sites.

Law enforcement administrators have not changed their policies regarding the search warrant process as a result of *Leon*. Because the decision has had little impact, administrators see no need to make adjustments in the procedures.

Overall, the decision has had no impact other than a symbolic one. Chief executives, detectives, and some informed patrol officers regarded the decision as a positive one for law enforcement, but recognized that it would have little effect on day-to-day operations.

IMPACT ON COURTS, PROSECUTORS AND DEFENSE ATTORNEYS

One of the areas in which the impact of *Leon* is likely to be observed is in the judicial suppression of evidence. According to the decision, if a search has been conducted in objective good faith pursuant to a search warrant, the trial court judge is bound to uphold the validity of the search unless there is evidence that the police were dishonest or reckless in the preparation of the affidavit, or the magistrate abandoned his detached and neutral role.[107] Matters of probable cause and other issues involving the legal sufficiency of the warrant are therefore, as a practical matter, beyond the defendant's reach at trial. Thus, with these areas of potential challenge no longer available to the defendants, one would expect that fewer successful motions to suppress would occur in the post-*Leon* period, at least in those jurisdictions in which the good-faith ruling is followed.

However, the impact of *Leon* on judicial suppression of evidence is virtually non-existent. In three sites (Border City, Hill City, and Mountain City), while motions to suppress increased as a result of an increase in the number of primary warrants, none of the motions was successful in either 1984 or 1985 (Table 5).

In River City, no change occurred in either the number of motions to suppress or in the number allowed. In 1984, suppression motions were filed with respect to twenty-seven percent of the primary warrants, while in 1985, the proportion increased slightly to twenty-eight percent.[108] In each year, three motions were successful.

In Harbor City, while the percentage of motions to suppress declined from twelve percent in the first quarter of 1984 to eight percent in 1985, only one was successful, and that occurred in 1985. Clearly this runs counter to the expected outcome.

In Forest City, motions to suppress were filed with respect to fifteen percent of the primary warrants in 1984 and eleven percent of those in 1985. Two of the motions were granted in 1984 and none in 1985. In Plains City, a similar pattern developed. Motions to suppress were filed with respect to fifteen percent of the primary warrants in 1984 and seven percent of those in

107. *Leon*, 468 U.S. at 911.
108. *See* Table 3, *supra*.

TABLE 5
MOTIONS TO SUPPRESS

VARIABLE	CITIES AND YEARS BORDER 84	BORDER 85	FOREST 84	FOREST 85	HARBOR 84	HARBOR 85	HILL 84	HILL 85	MOUNT 84	MOUNT 85	PLAINS 84	PLAINS 85	RIVER 84	RIVER 85
TOTAL # OF DEFS	128	103	76	47	217	201	64	59	22	39	88	112	73	81
TOTAL DEFS W/MTS*	8	5	20	22	39	29	22	33	3	1	19	12	40	42
TOTAL SUCCESSFUL DEFS	0	0	2	0	0	1	0	0	0	0	2	2	3	3

*MTS = MOTIONS TO SUPPRESS

1985. In each year, two motions were granted. In these jurisdictions, however, *Leon* is not applicable because of uncertainty whether the state supreme court will adopt a stricter rule under their respective state constitutions. Thus, changes cannot be attributed to the *Leon* ruling.

The legal environment in each of the sites played an important role in determining the impact of the *Leon* ruling on the courts, prosecutors, and defense attorneys. In two sites, Forest City and Plains City, no impact occurred because of the stance taken by the state supreme courts. In Hill City, judges, prosecutors, and public defenders were substantially aware of the *Leon* decision and as a result the reasonable, good-faith exception has been raised at suppression hearings. In Border City, on the other hand, there was considerable potential for use because of the knowledge of the district attorney's office and some judges, but this fact had not yet manifested in actual increased usage. In the remaining three sites, there was little or no use of the exception either because the state prosecutor hesitated to litigate the good-faith issue (Harbor City) or because the prosecutor perceived that there was little need to base arguments on good faith (Mountain City and River City).

In spite of these differences in use, there was considerable agreement across sites regarding the *likely* impact of the decision. First, district attorneys, judges and public defenders believed that the principal impact would be to strengthen the presumption of validity attached to search warrants. Cases based upon evidence obtained through the execution of a search warrant were viewed as being even less subject to challenge given the principles of *Leon*. Second, courtroom practitioners widely believed that there would be little day-to-day impact upon the processing of criminal cases. Since evidence obtained through a search warrant is rarely excluded from consideration and since cases are rarely lost because of exclusion, the impact of *Leon* is likely to be limited to a small number of cases involving unusual situations.

Third, although the practical implications of *Leon* are limited, there has been a much greater symbolic impact of the decision. From the perspectives of both prosecutors and defense attorneys, the importance of the decision extends far beyond the actual cases that are influenced by the good-faith

exception. Prosecutors across all sites saw the good-faith exception as a "safety net" and expressed support for this additional "tool" available to them. To others, the ruling represented an almost impenetrable shield protecting evidence seized through the execution of a search warrant, thereby insulating the case from dismissal due to improper search "technicalities." Thus, some prosecutors reported an increase in their confidence in accepting cases which would have been declined previously. Although not shown by an empirical assessment of the decision, the perception and attitude of prosecutors has been substantially influenced in jurisdictions in which the good-faith rule is applicable.

Defense attorneys, however, paint a different picture of the symbolic impact of the decision. For them, the decision represents a further assault upon the fourth amendment and constitutes a challenge to individual liberties. Although defense attorneys also note the limited practical significance of *Leon*, they mourn the loss of the avenues of challenge to search warrants—avenues which the decision foreclosed. For defense attorneys, the *Leon* decision symbolizes the Supreme Court's continued tendency to side with the prosecution and the further withdrawal of rights from the defendant.

CONCLUSIONS AND REMAINING ISSUES

Overall, the empirical effects of the *Leon* decision have been minimal. Police practices regarding search warrants apparently have not changed as a result of the decision. The number, content and quality of search warrants as measured through quantitative data have not been affected by the decision. Nor have practices changed at the trial level. Motions to suppress have not declined in number or in success rate because of the *Leon* ruling. Police administrators and prosecutors have not altered their policies regarding search warrant procedures as a result of the decision.

The ruling has had a symbolic impact for police, prosecutors, and defense attorneys. Police view the decision as a positive step by the Court, while prosecutors see the ruling as a "tool" that is available to them if they need it. Defense attorneys, as expected, see the *Leon* case as another assault on individual liberties.

These findings represent the principal and immediate effects of the *Leon* decision. Because of the constraints of the short span of time since the *Leon* decision and the non-experimental design of the study, no determination could be made of the lasting effects of the ruling. However, as states resolve the questions surrounding the decision, a more substantial impact may be observed in the future.

Of principal concern in subsequent analysis is the degree to which state courts uphold the reasonable good-faith exception as applicable in their jurisdictions. During the period of data collection (1985-86), the status of *Leon* was uncertain in at least three of the intensively studied sites (Harbor City, Mountain City, and River City). Since that time, *Leon* has been adopted by the state supreme courts with jurisdiction over Mountain City and River City. Prosecutors in these locations may be more willing to argue

for admissibility on a good-faith basis. Thus, the use of *Leon* may result in the same outcomes observed in Hill City. On the other hand, if prosecutors, due to the local legal environment, are unwilling to prosecute cases using a good-faith argument, the additional impact of *Leon* will be minimal.

Another important issue is the developing definition of good faith. While a consistent, operational definition has yet to be determined, one may emerge given the continuing litigation of the concept. As the meaning of good faith is clarified, specific areas of applicability should become delineated. These areas will raise some important empirical questions: In what situations and circumstances is good faith applicable? What specific behavior constitutes a good-faith mistake? As these concerns are resolved, one must again raise the issue of the resulting impact of good faith on police behavior and prosecutor decisions.

A final issue concerns the extension of the good-faith concept to nonwarrant situations. In *Illinois v. Krull*,[109] the Court extended the good-faith exception to the exclusionary rule to situations where officers act in objectively reasonable reliance on a statute authorizing warrantless administrative searches, but where the statute is ultimately found to violate the fourth amendment.[110] Interviews in the seven intensively studied sites showed that there is considerable interest and concern regarding the extension of the good-faith exception to warrantless searches. Police and prosecutors argued that the major impact of the good-faith exception would be observed in nonwarrant situations. They believed that most cases that are excluded due to search and seizure difficulties arise from warrantless searches and that there could be a substantial recovery of "lost" cases from such an extension. At this point, however, knowledge of warrantless searches is limited.

No research has yet adequately addressed the issues surrounding good faith, police search behavior in general, and the system-wide costs of the exclusionary rule.[111] More specifically, little is known about the area of warrantless searches: how frequently are such searches conducted, in what types of situations, and with what outcomes? How frequently are arrests "lost" through declined prosecution or suppression of evidence in court? Once these questions are addressed through empirical research, the effects of the extension of the good-faith exception to warrantless searches will be known.

109. 107 S. Ct. 1160 (1987).

110. *Id.* at 1167.

111. While a number of empirical studies regarding the exclusionary rule have been recently conducted, methodological flaws abound and raise questions about validity and reliability. *See* Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of Lost Arrests*, 3 AM. B. FOUND. RES. J. 611 (1983).