ARTICLE

EXTENDING THE GOOD FAITH EXCEPTION TO THE FOURTH AMENDMENT’S EXCLUSIONARY RULE TO WARRANTLESS SEIZURES THAT SERVE AS A BASIS FOR THE SEARCH WARRANT

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This Article proposes an extension of the good faith exception to the Fourth Amendment’s exclusionary rule. This extension would cover situations where the police, notwithstanding their efforts to conform to the law, illegally seize and detain persons or their effects, such as luggage, thereafter fully disclose the facts surrounding the seizure and detention to a

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magistrate in an application for a search warrant, and then recover evidence as a result of the warrant's execution.

Part I of this Article discusses the Supreme Court's current view of the purpose of the Fourth Amendment's exclusionary rule and reviews the good faith exception to that rule. The Supreme Court has not had occasion to decide whether to extend the good faith exception to warrantless seizures that serve as the basis for a subsequent application for a search warrant. The lower court cases that have addressed the issue, however, have reached conflicting results. This Article then examines the application of the good faith exception to those prior warrantless seizures. Part II distinguishes United States v. Leon, the case in which the Supreme Court announced the good faith exception, from the circumstances that are the subject of this Article. Part III explores the policies supporting the preference for a warrant. That Part concludes that extension of good faith to the situations detailed above is justified, premised on two important considerations, which are detailed in Parts III and IV: First, there must be a recognition that a magistrate may deny the warrant if illegal activity is disclosed in the application. Second, the affidavit must accurately and fully detail the circumstances that gave rise to the illegal seizure. These Parts argue that such a rule would bring about two socially valuable consequences. First, recourse to warrants would be encouraged, resulting in early intervention and review by the judiciary of police actions, thereby placing the judiciary between the citizen and the police. Second, the need for the ultimate sanction of exclusion, with its high costs to society, would be reduced. Part V illustrates the application of the proposed extension of the good faith exception, and Part VI contains some concluding remarks.

I. THE EXCLUSIONARY RULE AND THE GOOD FAITH EXCEPTION

The Fourth Amendment protects individuals from unreasonable searches and seizures by governmental agents. The chief enforcement mechanism to insure compliance with the
amendment is the exclusionary rule, which prohibits the introduction of illegally obtained evidence in the government’s case-in-chief. The Supreme Court believes that the question of whether the exclusionary sanction is appropriately imposed in a particular case is separate from the question of whether the Fourth Amendment rights of the party seeking to invoke the rule have been violated.

The exclusionary rule, according to the Court’s current view, is a judicially created remedy designed to deter future police misconduct. The determination whether the exclusionary sanction is required in a given case is made by balancing the costs and benefits of preventing the use in the prosecution’s case-in-chief. The exclusion of such evidence

3. Terry v. Ohio, 392 U.S. 1, 12-13 (1968). However, illegally obtained evidence may be used for other purposes. See United States v. Havens, 446 U.S. 620, 627-28 (1980) (permitting admission of suppressed evidence to impeach a defendant’s testimony).


5. Evans, 115 S. Ct. at 1191; Leon, 468 U.S. at 906. The Court at one time believed that the protection of judicial integrity and other purposes were served by the exclusionary rule. See William J. Mertens & Silas Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailling the Law, 70 GEO. L.J. 365, 376-78 (1981) (listing judicial integrity, unfairness to the defendant, prevention of governmental benefit from illegal searches, and protection of the defendant’s privacy as original goals of the exclusionary rule); see also Weeks v. United States, 232 U.S. 383, 393 (1914) (reasoning that the Fourth Amendment might as well be "stricken" from the Constitution if evidence seized in violation of it can be used in court). In more recent cases, however, the Court has explicitly limited the justification for exclusion to be the deterrence of police misconduct. Evans, 115 S. Ct. at 1191; Stone v. Powell, 448 U.S. 288, 485 (1976). Also, the Court does not consider the exclusionary rule a personal constitutional right of the accused. Leon, 468 U.S. at 906; Stone, 428 U.S. at 485.

There are many critics of the Court’s premises regarding the bases of and purposes served by the exclusionary rule. Mertens & Wasserstrom, supra, at 365-66. However, this Article accepts that these premises will remain major pillars of the Court’s analysis for the foreseeable future. Therefore, this Article proceeds on the assumption that the exclusionary rule is only a remedial device rather than an integral part of the Fourth Amendment and that the sole purpose of the exclusionary rule is to deter police misconduct. Working within that framework, the question becomes whether the Fourth Amendment’s fundamental command to protect the individual from unreasonable searches and seizures would be furthered by expanding the role of the magistrate and encouraging the police to obtain early review of their warrantless activities by extending the good faith exception to those activities.

6. Leon, 468 U.S. at 906-07; see also Illinois v. Krull, 486 U.S. 340, 347 (1987) (observing that in past decisions the Court has sought to determine whether the rule’s deterrent effect will be achieved and has balanced the “likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process”). But see 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 1.3(b)-(d) (1987) (pointing out distortions in the Supreme Court’s Fourth Amendment cost-benefit analysis).
"exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case" and permits "some guilty defendants [to] go free or receive reduced sentences as a result of favorable plea bargains." Thus, the Supreme Court has restricted application of the exclusionary rule to instances where its "remedial objectives are thought most efficaciously served." Where the exclusionary rule does not result in appreciable deterrence, the Court views its use as unwarranted. The efficacy of suppression's deterrent function on law enforcement is measured by whether it alters the behavior of individual officers or the policies of law enforcement agencies.

In United States v. Leon, the Supreme Court held that the exclusionary rule is inapplicable to evidence obtained by an officer acting in reasonable reliance on a facially valid search warrant issued by a detached and neutral magistrate, even if that warrant is ultimately found to be invalid. That case was the genesis of the "good-faith" doctrine. In Leon, the officer prepared an affidavit that arguably provided probable cause to search the location specified in the warrant. Despite the subsequent determination that the warrant was not supported by probable cause, the drugs and incriminating evidence seized pursuant to the warrant were not suppressed because the Court believed that the officer's reliance on the

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9. Id. at 908 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).
11. Leon, 468 U.S. at 918.
12. Id. at 922; see also Massachusetts v. Sheppard, 466 U.S. 981, 987-88 (1984) (applying the Leon rule). The Supreme Court had the opportunity to recognize the good faith exception prior to Leon, but declined to do so. 1 LAFAVE, supra note 6, § 1.3, at 46-47.
13. The label "good-faith" is misleading to the extent that it suggests that the actual belief of the officer is examined. Instead, the inquiry focuses "expressly and exclusively on the objective reasonableness of an officer's conduct, not on his or her subjective 'good faith' (or 'bad faith')." People v. Machupa, 872 P.2d 114, 115 n.1 (Cal. 1994); see also Leon, 468 U.S. at 918 (stating that the Court has "frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment"). However, labeling the officer's conduct as "objectively reasonable" has also been criticized as misleading. For example, Justice Stevens has taken issue with the Court's characterization of the police's conduct as being objectively reasonable, even if they have not complied with the Fourth Amendment, because "when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know that they are violating the Constitution." Id. at 975 (Stevens, J., dissenting).
The magistrate's determination that probable cause existed was objectively reasonable. The Court reasoned:

[In most cases] when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, ... there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. ... Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

The Court therefore concluded that the costs of preventing use of the trustworthy, tangible evidence in the prosecution's case-in-chief outweighed the benefits of exclusion.

Despite the creation of the good faith exception for searches conducted pursuant to warrants, the Court in Leon recognized that suppression was an appropriate remedy in four situations. First, suppression remains an appropriate remedy where the affidavit states bare-bones conclusions or is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Second, the good faith exception does not apply to situations where the issuing magistrate was not neutral and detached. Third, a warrant may be so facially deficient that the executing officers cannot reasonably presume it to be valid. Finally, the exclusionary rule applies where the judge, in issuing the warrant, was misled by information in an affidavit the affiant knew was false or would have known was false except for the affiant's reckless disregard of the truth.

15. Id.
16. Id. at 920-21 (citations omitted).
17. Id. at 906-07.
18. Id. at 923.
20. Id.; see also Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-27 (1979) (concluding that the objective set of facts indicated that the Town Justice did not act with the "neutrality and detachment demanded of a judicial officer").
21. Leon, 468 U.S. at 923. For example, the warrant may fail to particularize the place to be searched or the things to be seized. Id. But see Massachusetts v. Sheppard, 468 U.S. 981, 984-87 (1984) (concluding that an officer relied in good faith on a warrant later invalidated because the wrong pre-printed search warrant form was used).
22. Leon, 468 U.S. at 923; see also Franks v. Delaware, 438 U.S. 154, 171-72
The Supreme Court has not decided whether the good faith exception to the exclusionary rule should be extended to apply to circumstances where the police make an illegal seizure that later serves as a basis for the probable cause contained in a search warrant application, disclose the facts surrounding the seizure and detention in the application, and thereafter, obtain evidence as a result of the warrant's execution. Lower court cases, based on remarkably similar facts, are in direct conflict on this issue. Some courts have held that the good faith doctrine applies to the execution of a search warrant issued upon information obtained as a result of an illegal seizure. These courts explain that reliance on the warrant is reasonable because the police have done everything they could by presenting the facts to a magistrate for approval. Other courts have

(1978) (detailing circumstances where it is permissible to go behind the averments of the affidavit based upon misrepresentations by the affiant).

23. Previous Supreme Court cases are inapplicable because they have only discussed the effect of an illegal warrantless search that took place prior to the warranted search. See Murray v. United States, 487 U.S. 533, 542-43 (1988) (applying the independent source rule to uphold a search warrant when the warrant application did not include evidence from the prior illegal search); United States v. Place, 462 U.S. 696 (1983) (holding that a warrantless 90-minute detention of a traveler's luggage exceeded the bounds of an "investigative stop" and violated the Fourth Amendment).

24. Compare United States v. Kiser, 948 F.2d 418, 422 (8th Cir. 1991) (allowing admission of evidence obtained after the issuance of a search warrant based on arguably invalid search), cert. denied, 503 U.S. 983 (1992) with United States v. Scales, 903 F.2d 765, 766-67 (10th Cir. 1990) (suppressing evidence obtained after the issuance of a search warrant based on arguably invalid search). See generally 3 LAFAVE, supra note 6, § 9.6(c) (discussing courts' handling of evidence obtained through brief warrantless seizure of objects).

25. See Kiser, 948 F.2d at 422 (concluding that under the circumstances, the officers held an objectively reasonable belief that they possessed a reasonably articulable suspicion that would make the search warrant valid); United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989) ("We believe the Fourth Amendment was violated, but we also believe the facts of this case are close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable.").

26. For example, in Thomas, the court reasoned:

We cannot find that the "totality of the circumstances"—apart from the dog's alert—provided a sufficient basis for the issuance of a search warrant. This does not end our inquiry. We must consider whether the agent who conducted the search acted in good faith reliance on the search warrant...
eschewed the good faith doctrine in these circumstances and have adhered to the fruit of the poisonous tree doctrine.27 These courts reason that the issuance of the warrant neither insulates the prior illegal activity from review nor vitiates the effect of the preceding illegality.28 Still other courts do not

The DEA agent brought his evidence, including the positive "alert" from the canine, to a neutral and detached magistrate. That magistrate determined that probable cause to search existed, and issued a search warrant. There is nothing more the officer could have or should have done under these circumstances to be sure his search would be legal.

757 F.2d at 1388 (emphasis added) (internal citations omitted).

27. Stated broadly, this doctrine provides that if the causal relationship of the illegal conduct to the evidence obtained is sufficiently close, then the evidence may be excluded as a "fruit" of that conduct. See Alderman v. United States, 394 U.S. 165, 183 (1969) (holding that a defendant is entitled to law-enforcement evidence to help him prove that the case against him is built on the fruit of the poisonous tree). The question is not whether the evidence would not be discovered "but for" the law enforcement officer's illegal conduct; rather, "the more apt question . . . is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (quoting John M. Maguire, Evidence of Guilt: Restrictions Upon Its Discovery Or Compulsory Disclosure § 5.07, at 221 (1959)). Thus, despite prior illegal conduct, evidence may be admitted if, inter alia, it has an "attenuated link" to the underlying illegality. Licon, 468 U.S. at 911 ("[T]he 'dissipation of the taint' concept that the Court has applied in deciding whether exclusion is appropriate in a particular place 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.'" (quoting Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part)). Attenuation of taint can occur in a variety of ways. See generally 4 LaFave, supra note 6, § 11.4(a) (1987 & Supp. 1995) (discussing the courts' use of tests such as: "but for"); "attenuated connection"; "independent source"; and "inevitable discovery").

28. See Scales, 903 F.2d at 768 (declaring that the officers' "illegality" was not a function of a good faith reliance on a presumptively valid warrant and that the fact that the officers eventually obtained a warrant does not prevent an evaluation of the agents' behavior prior to the search warrant); United States v. Wanless, 882 F.2d 1459, 1466-67 (9th Cir. 1989) (holding that the good faith exception did not apply where probable cause was based on evidence from an illegal search of vehicle); United States v. Vasey, 834 F.2d 782, 789-90 (9th Cir. 1987) (holding the good faith doctrine inapplicable when a search pursuant to a warrant followed an illegal warrantless search, although the first search was detailed in the affidavit in support of the search warrant); United States v. McQuagge, 787 F. Supp. 637, 657 (E.D. Tex. 1992) (finding no good faith reliance on a search warrant based on an illegal warrantless arrest), aff'd, 8 F.3d 23 (5th Cir. 1993); United States v. Solomon, 728 F. Supp. 1544, 1549-50 (S.D. Fla. 1990) (finding that good faith reliance on a search warrant issued after an illegal detention did not exist because, inter alia, the warrant application omitted the circumstances surrounding the detention); People v. Machupa, 872 P.2d 114, 124 (Cal. 1994) (finding the good faith exception inapplicable to a search warrant premised in part on prior illegal search); State v. Carter, 630 N.E.2d 355, 364 (Ohio 1994) (following Scales, Wanless, and Vasey); see also Maryland v. Darden, 612 A.2d 339, 351-54 (Md. Ct. Spec. App. 1992) (finding good faith reliance on a search warrant, issued after illegal detention of a train passenger's luggage, did not exist even though the application set forth all the circumstances surrounding the detention), pet. denied, 614 A.2d 974 (Md. 1992), cert.
address the good faith question at all. After determining that there has been an illegal seizure, these courts, with little or no analysis, mechanically suppress the evidence recovered pursuant to the search warrant.\[^{29}\]

II. **LEON DISTINGUISHED**

*L. Leon* is distinct from the situation where the police engage in an illegal seizure and then request a warrant based on information obtained as a result of that seizure. In *Leon*, there was no illegal police activity prior to the issuance of the warrant.\[^{30}\] Also, the error in *Leon* was at least partly shared by the magistrate, who erroneously believed that the warrant application contained probable cause.\[^{31}\] Given that the Court believes that the purpose of the exclusionary rule is to deter police misconduct and not errors by a magistrate,\[^{32}\] it was but a small step

denied, 113 S. Ct. 2459 (1993); 1 LaFave, supra note 6, § 1.3(f), at 65-66 (recognizing the split of authority and stating that there is “good reason” to doubt that there can be good faith reliance on warrant based on prior illegal activity); Gretchen R. Diffendal, Note, Application of the Good-Faith Exception in Instances of a Predicate Illegal Search: “Reasonable” Means Around the Exclusionary Rule?, 68 St. John’s L. Rev. 217, 288-39 (1994) (arguing that the good faith exception should not be extended to instances where there has been an illegal search that serves as a predicate for the warrant).

29. See United States v. Hall, 978 F.2d 616, 621-22 (10th Cir. 1992) (suppressing the fruits of a search pursuant to a warrant following the illegal seizure of train passenger’s luggage); United States v. Millan, 912 F.2d 1014, 1018 (8th Cir. 1990) (suppressing evidence that resulted from warrantless search of jacket and garment bag after an initial illegal detention); United States v. Dicesare, 765 F.2d 890, 898-99 (recognizing that although seizures and searches implicate different interests, evidence should be suppressed because dog sniff that provided basis of probable cause for warrant to search apartment occurred during unlawful seizure of apartment), modified on other grounds, 777 F.2d 543 (9th Cir. 1985); Illinois v. Breeding, 579 N.E.2d 1128, 1135-36 (Ill. App. 1991) (concluding that when a train traveler’s bag was seized, temporarily detained for dog sniff, and a search warrant issued based on positive alert, the drugs subsequently found in the bag should be suppressed because no articulable suspicion supported bag’s seizure), pet. denied, 587 N.E.2d 1018 (Ill. 1992), cert. denied, 112 S. Ct. 3034 (1992); cf. Millan, 912 F.2d at 1022-23 (Magill, J., dissenting) (complaining about the majority’s failure to address good faith).

30. See United States v. Leon, 468 U.S. 897, 900 (1984) (framing the question presented as whether the exclusionary rule should be modified when the police rely on a search warrant later determined to be unsupported by probable cause).

31. The Court in *Leon* viewed the error as solely that of the magistrate. See id. at 925-26 (noting the lower court’s finding that the magistrate erred in issuing the challenged warrant and finding the officer’s reliance on the warrant reasonable). Presumably, however, the police would not have presented the affidavit to a magistrate unless they had an objective basis for believing that probable cause to support the application existed.

32. Id. at 916-17 (reasoning that the exclusionary rule is designed to deter police misconduct rather than magistrate errors and that no evidence exists suggesting that magistrates are inclined to ignore or subvert the Fourth Amendment).
to apply the good faith exception to the Leon situation. Because police officers are not ordinarily "expected to question the magistrate's probable-cause determination," this was not a situation involving police misconduct; the police were merely executing a judicially approved warrant. Accordingly, the Court narrowly ruled that the good faith exception was effective "when an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope."

If one accepts the Court's rationale, then good faith applies only when the magistrate errs. One problem with expanding good faith to include pre-warrant activities by the police is the current role of the magistrate. The magistrate must find that probable cause is present and that the formalities attending the warrant process are satisfied. The magistrate's role does not include insuring that the police have acted legally when obtaining the information that serves as the basis of the probable cause detailed in the warrant application. In

33. Id. at 921.
34. Id. at 902.
35. Id. at 920. The Court has now also extended good faith to situations where the officer believes there is a valid outstanding warrant based on an erroneous computer record prepared by court employees even though, in fact, the warrant has been quashed. Arizona v. Evans, 115 S. Ct. 1185, 1193-94 (1995).
36. Leon was authored by Justice White, who was a strong advocate of extending good faith to a variety of situations. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032, 1056 (1984) (White, J., dissenting) (arguing for the application of the exclusionary rule and the good faith exception in civil deportation proceedings). Thus, some of the language chosen by White in Leon can be interpreted broadly. Indeed, some of the courts extending good faith do not premise the extension on the police officer's reliance on the magistrate's decision, reasoning instead that the police's actions were within the range of objective reasonableness even though they violated the literal command of the Fourth Amendment. See United States v. De Leon-Reyna, 930 F.2d 396, 400-01 (5th Cir. 1991) (concluding that a police officer's good faith and objectively reasonable belief that he has an adequate foundation to stop a citizen is sufficient to invoke the good faith exception).
37. See United States v. Vasey, 834 F.2d 782, 789 (9th Cir. 1987) (stating that a magistrate's role is to evaluate a warrant application to determine whether probable cause exists).
38. See, e.g., Fed. R. CRIM. P. 41(c)(1) (requiring that the affidavit in support of the warrant be sworn to before the magistrate and that the warrant describe the person or place to be searched and the person or property to be seized).
39. The Federal Rules of Criminal Procedure provide that a warrant "shall" issue if the magistrate "is satisfied that grounds for the application exist or that there is probable cause to believe that they exist." Fed. R. CRIM. P. 41(c)(1); see also United States v. Deaner, 1 F.3d 192, 196-97 (3d Cir. 1993) (rejecting contention that affidavit must establish that evidence used in support of warrant was acquired constitutionally); Commonwealth v. D'Onofrio, 488 N.E.2d 410, 412 (Mass. 1986) (concluding that no jurisdiction requires affidavits to establish that information contained in the warrant application was obtained constitutionally); Craig M. Bradley, The "Good Faith Exception" Cases: Reasonable Exercises in Futility, 60 IND. L.J. 287, 302
contrast, it is the magistrate's role to determine if probable cause existed;\(^\text{40}\) thus, under Leon the police are entitled to rely on the magistrate's determination in good faith.\(^\text{41}\) In illegal warrantless seizure situations, the magistrate does not determine if any illegality has infected the process of obtaining the information that supports probable cause.\(^\text{42}\) Therefore, in reliance by the police on the magistrate's decision would be justified: the error was made by the police officer and not shared by—or ratified by—the magistrate.\(^\text{43}\)

This distinction has persuaded several courts to refuse to extend good faith to the prior warrantless activities of the police,\(^\text{44}\) but it has not proved an obstacle to those courts that have extended good faith.\(^\text{45}\) A few other courts have also suggested that if the police had informed the magistrate how the information had been obtained, then good faith might be extended.\(^\text{46}\) The reasoning of the courts willing to extend good faith is difficult to defend to the extent that those courts base their decisions on police reliance of judicial approval of their prior warrantless activities.\(^\text{47}\) Based on current practice, there is no such approval. This, however, does not end the inquiry.

\(^{185}\) (noting that the magistrate must determine probable cause, not whether the methods used to obtain the information in the affidavit were legal).


\(^{41}\) Id.; see also United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir.) (citing Leon and finding that the magistrate had the duty to interpret the law, and the officer's reliance on the determination of probable cause was reasonable), cert. denied, 474 U.S. 819 (1985), and cert. denied, 479 U.S. 813 (1986).

\(^{42}\) See United States v. Vasey, 834 F.2d 782, 789 (9th Cir. 1987) (reasoning that a magistrate is not in a position to evaluate the legality of a prior warrantless search because of time constraints and the lack of adversarial hearings on the issue).

\(^{43}\) See, e.g., id. (recognizing that Leon was inapplicable because the constitutional error resulted from the officer's illegal warrantless search, not any action by the magistrate); People v. Machupa, 872 F.2d 114, 121 (Cal. 1994) (reasoning that when the error is made by police officers, they "cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate") (quoting State v. Hicks, 707 F.2d 331, 333 (Ariz. Ct. App. 1985), aff'd, 480 U.S. 321 (1987)).

\(^{44}\) See Machupa, 872 F.2d at 121 (collecting cases in which the good faith exception is not extended to prior warrantless searches).

\(^{45}\) See Thomas, 757 F.2d at 1368 (applying the good faith exception to a prior warrantless search).

\(^{46}\) See United States v. Solomon, 728 F. Supp. 1544, 1549-50 (S.D. Fla. 1990) ("Moreover, to excuse the officer's material omission [of an illegal search] . . . would encourage the police to be less candid in applying for warrants.").

\(^{47}\) See, e.g., United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984) (applying good faith because "[i]t was eminently reasonable for the [issuing] judge, and the police officers, to believe that the trash bag search was constitutional and its fruits could be used to establish probable cause"); see also Vasey, 834 F.2d at 789 (recognizing that because of frequent time constraints and the lack of adversarial hearings, a magistrate often is not in the best position to evaluate the legality of a prior warrantless search).
III. Why Good Faith Should be Extended

Prior to Leon, the Supreme Court opined that the Warrant Clause was not "an inconvenience to be somehow 'weighed' against the claims of police efficiency." The Court believed that obtaining a warrant should be "an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly over-zealous executive officers' who are part of any system of law enforcement." Accordingly, the Court often encouraged officers to use a warrant. That preference has, at times, been so strong as to invalidate a search or seizure carried out on a suspect's premises merely because the law enforcement officer did not first obtain a warrant.

This view makes warrantless searches and seizures per se unreasonable, subject to enumerated exceptions, and it has been losing ground to a competing view that the Fourth Amendment does not mandate a warrant as a necessary condition for a search or seizure. Following that latter view, the Court has rejected a "categorical warrant requirement" and has

49. Coolidge, 403 U.S. at 481 (quoting Gouled v. United States, 255 U.S. 298, 304 (1921)).
50. Supreme Court opinions are replete with references to a preference for a warrant. Leon, 468 U.S. at 914 (noting that "we have expressed a strong preference for warrants"); see, e.g., Illinois v. Gates, 462 U.S. 213, 236 (1983) (acknowledging the court's "preference for the warrant process" and stating that the Fourth Amendment requires no more than some substantial basis to conclude "that a search would uncover evidence of wrongdoing"); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (declaring warrantless searches per se unreasonable under the Fourth Amendment, subject to a few well-delineated exceptions); Katz v. United States, 389 U.S. 347, 357 (1967) (emphasizing that warrantless searches are per se unreasonable under the Fourth Amendment). See generally Thomas K. Clancy, The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures, 25 MEMPHIS L. REV. 483, 517-28 (1995) (concluding that the debate over whether the relationship of the two clauses of the Fourth Amendment created a preference for a warrant is largely misplaced because the amendment was drafted at a time when it was assumed that a warrant would be used).
51. See Coolidge, 403 U.S. at 474 (recognizing the general rule that a search or seizure carried out on a subject's premises without first obtaining a warrant is a per se violation of the Fourth Amendment).
52. Given the preference for securing search warrants, it would seem that the government bears a heavy burden of justifying exceptions to the specifications of the warrant clause. However, the list of exceptions has continued to grow. See California v. Acevedo, 500 U.S. 516, 522 (1991) (Scalia, J., concurring) (listing the growing exceptions to the per se rule); United States v. Ross, 456 U.S. 798, 824-25 (1982) (approving of warrantless searches and reasoning that the probable cause requirement provides ample protection).
looked to "reasonableness alone" to measure the validity of the
government's activities.53 This view, which may now command
a majority of adherents on the Court, has severed the warrant
requirement and the reasonableness requirement completely.
Under this view reasonableness is judged not in terms of the
substantive requirements of the warrant clause, but is based on
what the majority believes is reasonable under the circumstanc-
es.54 Accordingly, the Court has sometimes stated: "The rele-
vant test is not whether it is reasonable to procure a search
warrant, but whether the search was reasonable. That criterion
in turn depends upon the facts and circumstances—the total
atmosphere of the case."55 Following this view, when the police
seize a person's effects, they can search those effects immedi-
ately, without obtaining a warrant.56

53. See Nadine Strossen, The Fourth Amendment in the Balance: Accurately
Setting the Scales Through the Least Intrusive Alternative Analysis, 63 N.Y.U.L. Rev.
1173, 1181-82 (1988) (describing the Court's shift from a categorical approach to a
reasonableness approach); cf. Acevedo, 500 U.S. at 582 (Scalia, J., concurring) (de-
scribing the cases as "lurch[ing] back and forth" between the two views); Texas v.
Brown, 460 U.S. 730, 745 (1983) (Powell, J., concurring in judgment) (recognizing the
inconsistency of the Court's emphasis on the warrant clause).

54. See Strossen, supra note 53, at 1181-82 ("[T]he Court has evaluated an in-
creasing range of search and seizure issues on this ad hoc basis, according to a uti-
litarian cost-benefit balancing calculus.").

55. United States v. Rabinowitz, 339 U.S. 56, 66 (1950). In that case, the
Court added:
What is a reasonable search is not to be determined by any fixed formula.
The Constitution does not define what are "unreasonable" searches and, re-
grettably, in our discipline we have no ready litmus-paper test. The recur-
ring questions of the reasonableness of searches must find resolution in the
facts and circumstances of each case.

Id. at 63.

The Court, in other cases, has also opined that the specifications of the war-
rant clause are not the sine qua non of reasonableness. Instead, "[t]he fundamental
command of the Fourth Amendment is that searches and seizures be reasonable."
New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); see United States v. Montoya de
Hernandez, 473 U.S. 531, 537 (1985) (explaining that reasonableness is dependent
upon the circumstances and the nature of the search and seizure); United States v.
Villamonte-Marrquez, 462 U.S. 579, 588 (1983) (explaining that "reasonableness" of the
"type of governmental intrusion" is the focus when interpreting customs laws that
allow warrantless searches and seizures); see also Carroll v. United States, 267 U.S.
132, 147 (1925) (finding that the Fourth Amendment "does not denounce all searches
and seizures, but only such as are unreasonable"). The test of reasonableness, the
Court has declared, "is not capable of precise definition or mechanical application."
Bell v. Wolfish, 441 U.S. 520, 558-59 (1979). Rather, in defining the contours of the
right to be free from unreasonable searches and seizures, "the specific content and
incidents of this right must be shaped by the context in which it is asserted."
Wyman v. James, 400 U.S. 309, 318 (1971) (quoting Terry v. Ohio, 392 U.S. 1, 9
(1968)); see also T.L.O., 469 U.S. at 337 (stating that "what is reasonable depends on
the context within which a search takes place").

56. Rabinowitz, 339 U.S. at 434 (stating that an officer may not be bound to
produce a search warrant if the search and seizure was otherwise reasonable); cf.
The question of whether a warrant is required is different from the question of whether a warrant is preferred. Regardless of whether one subscribes to either of the two competing schools of thought regarding whether a warrant should be required, there remain many benefits to first obtaining a warrant before searching and seizing. First, a warrant promotes a shared role for the judiciary: “[A] governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence of wrongful acts is sufficient to justify invasion of a citizen’s private premises.”

Second, a search warrant is also desirable because it “provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.” Indeed, the exclusionary rule is “calculated to prevent, not repair.” It is therefore important that a neutral party review the case before an infringement of liberty occurs. Moreover, advance judicial review prevents the magistrate from being influenced by “the familiar shortcomings of hindsight judgment.” Indeed, one of the most important aspects of a warrant is that it forces the police to stop, think, write down their evidence, and submit it to someone else for approval. Aside from the obvious salutary effect that those requirements have in curbing police impetuosity, they also make it more difficult for the police to fabricate probable cause on the basis of what was found instead of what was actually known in advance.

Finally, the possession of a warrant by law enforcement officers assures the individual whose property is being searched or

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Acevedo, 500 U.S. at 584-85 (Scalia, J., concurring) (seeking to abandon any requirement for a warrant and permit police to search containers, such as briefcases, without a warrant as long as the police have probable cause to believe the container harbors contraband).


60. 1 LAFAVE, supra note 6, § 3.1(c), at 549.

61. Id. (quoting Beck v. Ohio, 379 U.S. 89, 96 (1964)).

seized of "the lawful authority of the executing officer, his need to search, and the limits of his power to search." 63

To encourage law enforcement officials to obtain warrants, reviewing courts accord great deference to the magistrate's decision that sufficient justification exists to issue the warrant. 64 Thus, when reviewing a magistrate's decision to issue a warrant, the question is not whether probable cause existed to support the search, but whether there was a substantial basis for the issuing magistrate to believe that probable cause existed. 65 Moreover, suppression of the evidence is only appropriate for lack of probable cause when the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." 66

Any requirement or preference for a warrant has not prevented the rise of warrantless searches and seizures. Today, the warrant plays a minor role in law enforcement activities. One large category of intrusions, the stop and frisk, by its very nature, is not subject to the warrant requirement. 67 Routine felony arrests outside the home do not require a warrant. 68 Searches have also become largely excepted from any requirement for a warrant. 69


64. See Massachusetts v. Upton, 466 U.S. 727, 733 (1984) (contending that a deferential standard promotes the preference for warrants); Gates, 462 U.S. at 236 (emphasizing that review of a magistrate's determination of probable cause should be given "great deference" and should not take de novo form).

65. See, e.g., Gates, 462 U.S. at 238-39 (framing the reviewing court's query as whether the magistrate had a substantial basis for concluding that probable cause existed); State v. Amerman, 581 A.2d 19, 20 (Md. Ct. Spec. App. 1990) ("The issue is no longer the familiar one of whether probable cause exists; that has already been determined by someone else. The distinct issue, at the reviewing level, is whether that earlier decision now being reviewed was or was not legally in error."); see also id. at 24 ("The 'substantial basis' standard is less demanding than even the familiar 'clearly erroneous' standard by which appellate courts review judicial fact finding in a trial setting.").


67. See generally 3 LAFAVE, supra note 6, § 9.1(a)-(e) (discussing the Fourth Amendment issues raised by stop and frisk procedures).

68. See United States v. Watson, 423 U.S. 411, 421-22 (1976) (recognizing the continuing vitality of the common law authorization for felony arrests based on probable cause). See generally 2 LAFAVE, supra note 6, § 5.1(b) (discussing arrests without a warrant).

69. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 49(B)[3] (1991) (noting that "the overwhelming majority of lawful searches today occur in the absence of a warrant"); Craig M. Bradley, Two Models of the Fourth Amendment, MICH. L. REV. 1468, 1473-74 (1985) (listing over twenty exceptions to the warrant requirement for searches); see also 2 LAFAVE, supra note 6, § 4.1(a) (discussing warrantless searches).
To promote survival of the warrant process and the salutary effects it has, recourse by the police to warrants should be encouraged. Reviewing courts could achieve this, in part, by extending the current deferential standard of review to the decisions of issuing courts and extending good faith reliance by the police on those decisions. This extension would include the prior warrantless activities of the police that served as the basis for the justification for the warrant, if those activities are disclosed to the magistrate.\textsuperscript{70} As will be discussed, this extension is limited and subject to the recognition of an expanded role for an issuing magistrate to review the application for pre-existing illegal activity.

There are several advantages to such a rule. It would give magistrates more power and encourage the police to seek early judicial review of their actions.\textsuperscript{71} Judges generally want to do their duty, which the Fourth Amendment defines as the protection of individuals from unreasonable searches and seizures.\textsuperscript{72} There is no evidence that magistrates attempt to subvert the Fourth Amendment.\textsuperscript{73} Imposing the additional duty to review the legality of the police's evidence-gathering techniques would place magistrates on notice that they must exercise greater care in reviewing warrant applications because their granting or denial would have additional, significant consequences.\textsuperscript{74} Moreover, extending good faith based on pre-issuance review of the application for illegality would further the purposes of the preference for police officers utilizing warrants: advance a shared role for the judiciary;\textsuperscript{75} provide the reliable safeguard of the

\textsuperscript{70} Any determination by an issuing court of the legality of evidence contained in an affidavit is not given deference. See United States v. McQuagge, 787 F. Supp. 637, 657 (E.D. Tex. 1991) (pointing out that even if a magistrate judge determined that a prior warrantless activity was legal, "it would be a legal ruling subject to de novo review, not the deference accorded a finding of probable cause").

\textsuperscript{71} Cf. United States v. Vasey, 834 F.2d 782, 789 (9th Cir. 1987) (reasoning that the magistrate's role does not include determining the legality of a warrantless search).

\textsuperscript{72} See United States v. Leon, 468 U.S. 897, 916 n.14 (suggesting that no problem of major proportions exists with judges being rubber stamps for the police); id. at 917 n.18 (asserting that magistrates may actually take greater care because of the good faith exception and adding that "[w]e doubt that magistrates are more desirous of avoiding the exclusion of evidence obtained pursuant to warrants they have issued than of avoiding invasions of privacy").

\textsuperscript{73} See id. at 917 (claiming that no evidence exists suggesting that judges and magistrates are "inclined to ignore or subvert the Fourth Amendment").

\textsuperscript{74} See id. at 917 n.18 (predicting that magistrates may exercise greater care when the good faith exception applies).

\textsuperscript{75} United States v. United States Dist. Court, 407 U.S. 297, 316 (1972) (declaring that a search and seizure should represent the efforts of both the police and the judiciary).
detached scrutiny of a neutral magistrate, encourage the police to be detailed and accurate in their representations to the magistrate, and increase public assurance that the police are exercising lawful authority. Also, the purpose of the exclusionary rule is to promote specific and systemic deterrence, thereby deterring individual officers and creating an incentive for law enforcement departments to establish procedures for training law enforcement officers to comply with the Fourth Amendment. Therefore, recognition of good faith under the circumstances outlined here would be consistent with these purposes. It would encourage law enforcement departments to train officers to obtain warrants prior to searching and to prepare warrant applications with care by detailing in the application all of the facts that support their pre-warrant seizures. Moreover, it would prevent unjustified intrusions. By giving a magistrate the power to review for pre-warrant legality, if the warrant is denied, the citizen obtains early return of the detained property and is subject to less intrusion because no search has occurred.

Searches and seizures affect different interests of persons. A search occurs when an individual's reasonable expectation of

76. Leon, 468 U.S. at 913-14 (emphasizing the need for a detached, neutral magistrate).

77. Bradley, supra note 39, at 292 (arguing detailed representations to the magistrate prevent police abuse); cf. United States v. Solomon, 728 F. Supp. 1544, 1549-50 (S.D. Fla. 1990) (refusing to excuse police officer's "material omissions" because it might "encourage police to be less than candid when applying for warrants").


79. See Elkins v. United States, 364 U.S. 206, 217 (1960) (observing that the exclusionary rule is designed "to prevent, to repair"); Potter Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 85 COLUM. L. REV. 1365, 1400 (1985) (describing how systemic deterrence works by influencing the larger governmental law enforcement entity to implement training and education of officers to further its goal of the successful prosecution of criminals).

80. See Mertens & Wasserstrom, supra note 5, at 399 (contending that the exclusionary rule encourages Fourth Amendment training to increase the number of successful prosecutions).

81. Cf. 1 LAFAVE, supra note 6, § 1.3(d), at 58 (commenting on the pre-Leon "very sound practice of going through the warrant issuing process with the greatest of care, often by having the affidavit reviewed by individuals other than the magistrate").

82. See Segura v. United States, 468 U.S. 796, 806 (1984) (opinion of Burger, C.J.) (recognizing that seizures are generally less intrusive than searches); see also United States v. Chadwick, 433 U.S. 1, 13 n.8 (1977) (reasoning that the search of the interior of respondent's footlocker is a far greater intrusion than the impoundment of the locker).
privacy is infringed. A seizure of property takes place "when[n] there is some meaningful interference with an individual's possessory interests in that property." Seizures are generally less intrusive than are searches, and the "heightened protection . . . accord[ed] to privacy interests is simply not implicated where a seizure . . . , not a search, is at issue." If good faith were extended, only possessory interests in bags and other containers would be infringed by the warrantless actions of law enforcement officials. The more intrusive privacy invasion would only occur pursuant to a search warrant. On the other hand, if magistrates are denied the power to review for pre-existing illegality, the opposite occurs: The warrant is issued; a search occurs; if evidence is found, the property is detained; and the individual may be subject to arrest.

IV. LIMITATIONS ON EXPANSION OF GOOD FAITH

The conclusion that good faith should be extended to warrantless seizures that serve as the basis for the probable cause contained in a warrant application does not suggest that all pre-warrant illegal activity should be insulated from the exclusionary sanction. Several important limitations and conditions are associated with the extension of good faith proposed in this Article. One primary condition would include a change in the role of the issuing magistrate. The magistrate must recognize that she has the power and duty to review the affidavit to determine if the police acted lawfully. By expanding the role of the magistrate, the situation becomes more Leon-like because the magistrate joins in the police officer's error.

In addition, the affidavit in support of the warrant must

84. Id.
85. See Segura, 468 U.S. at 807 (opinion of Burger, C.J.).
86. Id. at 810. A seizure implicates a person's interest in possession of property and a search implicates the person's interest in maintaining privacy: "Significantly, the two protected interests are not always present to the same extent; for example, the seizure of a locked suitcase does not necessarily compromise the secrecy of its contents, and the search of a stopped vehicle does not necessarily deprive its owner of possession." Texas v. Brown, 460 U.S. 730, 747-48 (1983) (Stevens, J., dissenting).
87. See United States v. Deamer, 1 F.3d 192, 197 (3d Cir. 1993) (explaining that the current function of the magistrate, when deciding to issue a warrant, is to look at the circumstances set forth in the affidavit to see if there is a "fair probability that contraband or evidence of a crime will be found" and rejecting the contention that the affidavit must show that evidence was constitutionally seized).
88. The Leon Court viewed the error as solely that of the magistrate. See United States v. Leon, 468 U.S. 897, 925-26 (1984). In addition, suppression would remain a remedy in the four situations detailed in Leon. Refer to notes 18-22 supra and accompanying text.
contain a full and an accurate account of the relevant facts regarding the pre-warrant seizure. The accuracy and completeness of the affidavit would be an issue to be addressed at the subsequent hearing on any motion to suppress. There can be no good faith reliance if important facts that would change the determination of whether the prior warrantless activities were legal are not disclosed in the affidavit. This disclosure is necessary because an officer cannot rely on the magistrate's assessment of the legality of pre-warrant activities if those activities have not been presented for review. Good faith would apply to the police officer's reliance on the magistrate's legal determination based on the circumstances alleged in the affidavit, but it would not preclude later challenges to those alleged facts. Disputed questions of fact would have to be resolved at a contested hearing. An issuing magistrate is not in a position to resolve disputed questions of fact on the basis of ex parte submissions and police officers cannot insulate their actions merely by asserting as fact their version of the events. If important facts are misrepresented or not disclosed, the analysis would be no different from the current exception to good faith for misrepresentations justifying suppression. The rule proposed here would not encourage police

89. Cf. Leon, 468 U.S. at 957 (Brennan, J., dissenting) (arguing that recognition of the good faith exception would encourage the police to provide only the bare minimum in warrant applications because "[t]he police will now know that if they secure a warrant, so long as the circumstances of its issuance are not ‘entirely unreasonable,’ all police conduct pursuant to that warrant will be protected from further judicial review" (citations omitted)).

90. Cf. id. at 923 (declaring that good faith does not apply when the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable").

91. United States v. Vasey, 834 F.2d 782, 789 (9th Cir. 1987) ("[W]e are mindful of the limitations on a magistrate's fact-finding ability . . . ."); see also Bruce A. Green, The Good-Faith Exception to the Fruit of the Poisonous Tree Doctrine, 26 CRIM. L. BULL. 509, 530 (1990) (stating that questions which, "in an adversary setting, would be likely to engender disagreements about the credibility of witnesses, factual disputes about the conduct of the officers, or arguments about the inferences to be drawn from particular facts could not reasonably be resolved in an ex parte proceeding").

92. See, e.g., Vasey, 834 F.2d at 790 n.4 (holding that even if good faith could be applied to save a warranted search that followed an illegal warrantless search, the evidence recovered must still be suppressed because of officer's intentional misrepresentation); United States v. McQuagge, 787 F. Supp. 637, 657-58 (E.D. Tex. 1992) (reasoning that even if good faith applied to save a warranted search that followed an illegal arrest, good faith would not apply when the officers misrepresented facts surrounding the arrest in the affidavit).

93. See Leon, 468 U.S. at 923 (stating that suppression is the appropriate remedy when facts in the affidavit have been misrepresented by intentional or reckless disregard for the truth); see also Frankev. v. Delaware, 438 U.S. 154, 171 (1978) (entitling defendants to an evidentiary hearing only when they provide an allegation of
misrepresentations. Instead, it is premised on a determination at the suppression hearing that, in fact, the police did provide a full and accurate description of the circumstances surrounding any seizure that served as the basis for the affidavit.

Finally, the circumstances of the case must be "close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable." 94 In other words, there must be no significant departure from the applicable reasonableness standard95 prior to obtaining the warrant.96 This is consistent with the Supreme Court's view that the benefit of exclusion "offends basic concepts of the criminal justice system"97 when "law enforcement officers have acted in objective good faith or their transgressions have been minor."98 Accordingly, the Court has often questioned the deterrent effect of the exclusionary rule when the offending officers had an objectively reasonable belief that their acts did not violate the Fourth Amendment.99 This contrasts to the Court's acceptance of the remedy of exclusion when the Fourth Amendment violation has been "substantial and deliberate."100 It follows that "an assessment of the flagrancy of the police misconduct" constitutes an important step in determining whether the exclusionary rule should be applied in a given situation.101 Thus, consistent with Leon, suppression would remain a remedy when the officer's warrantless seizure was so lacking in justification as to render the officer's belief in its existence to be entirely unreasonable.102

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94. United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989).

95. The reasonableness standard may be met by "articulable suspicion," see Florida v. Rodriguez, 469 U.S. 1, 5 (1984); Florida v. Royer, 460 U.S. 491, 498 (1983), probable cause, see Texas v. Brown, 460 U.S. 730, 735 (1983); Terry v. Ohio, 392 U.S. 1, 20 (1968), or the application of a balancing test when individualized suspicion is not required. See, e.g., Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding that individualized suspicion is not required to stop vehicles at sobriety checkpoints). See generally Clancy, supra note 50, at 549-84 (detailing extensive list of circumstances where individualized suspicion for search or seizure is not required).

96. Cf. United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984) (opining that "it was not unreasonable for the police to believe that there was probable cause that money and records were being kept" in the place for which the police sought to obtain a search warrant).


98. Id.; see also id. at 919 n.20 (emphasizing that reasonableness is an objective standard).

99. Id. at 918.

100. Id. at 908-09 (quoting Franks v. Delaware, 438 U.S. 154, 171 (1978)).

101. Id. at 911.

102. Id. at 923; see United States v. O'Neal, 17 F.3d 239, 242-43 n.6 (8th Cir.)
V. APPLICATION OF THE PROPOSED EXTENSION OF GOOD FAITH

The facts of two cases illustrate application of the proposed extension of good faith endorsed by this Article. The first case, People v. Machupa,103 is an example of a situation where the police could not obtain the benefit of good faith as suggested in this Article. The second case, State v. Darden,104 demonstrates where application of good faith to the pre-warrant activities of the police would make suppression inappropriate.

In Machupa, a police officer composed an ambiguous warrant application to search Machupa's house based on the police's plain view observations of drugs in the house.105 At one point in the affidavit, the officer stated that Machupa had "invited" the police into his residence to retrieve some guns.106 At another point, however, the officer stated that Machupa was told by an officer that the police "would have to go with him" to retrieve the weapons.107 The question before the California Supreme Court was whether the police could rely in good faith on the issuance of the search warrant, even though it was later determined at the hearing on the motion to suppress that Machupa did not consent to the police's entry into his home.108

The state argued that the affidavit presented to the magistrate was a "balanced account" of the entry into the defendant's premises and, therefore, the issuing magistrate implicitly determined that the entry was consensual.109 Although it expressed doubt whether good faith could ever apply to prior warrantless activities,110 the court assumed that it could and rejected its application in Machupa for several reasons. First, the court

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(Recognizing that the actions of the police must be close enough to the line of validity before good faith can apply to searches conducted under a warrant based on evidence obtained in violation of the Fourth Amendment), cert. denied, 115 S. Ct. 418 (1994). "If the method by which evidence supporting a search warrant is seized is clearly illegal, then . . . evidence obtained under the resulting warrant should be excluded." Id. at 243 n.6.

103. 872 P.2d 114 (Cal. 1994).
105. See Machupa, 872 P.2d at 115-16 (emphasizing the different ways the officer characterized the circumstances surrounding his entry of the subject's house).
106. Id. at 115.
107. Id. at 116.
108. Id. at 117.
109. Id. at 123.
110. Id. at 123-24. The court's primary rationale for rejecting good faith appeared to rest, in part, on the belief that the function of magistrates reviewing applications is not "to determine whether the facts alleged in the affidavit were lawfully obtained." Id.
believed that neither the text nor the organization of the affidavit supported the inference that the magistrate was aware of the inconsistencies regarding the defendant's consent to the entry.\textsuperscript{111} Second, the court recognized that the question of consent was highly factual in nature.\textsuperscript{112} Given that characteristic, whether or not there was consent is "not easily susceptible to reliable ex parte, non-adversarial resolution by a warrant magistrate."\textsuperscript{113} The court therefore concluded that the application did not clearly present to the magistrate the opportunity to assess the legality of the antecedent warrantless search.\textsuperscript{114}

The decision in \textit{Machupa} was undoubtedly correct even if a magistrate had the power to review the application for pre-warrant illegality. This is so because the legality of the police's warrantless actions turned on the question of consent, which was disputed and ultimately found not to have been given.\textsuperscript{115} Police officers cannot insulate their actions merely by asserting that the defendant consented.\textsuperscript{116} That question of fact should be resolved at a contested hearing\textsuperscript{117} because an issuing magistrate is not in position to resolve disputed questions of fact on the basis of ex parte submissions.\textsuperscript{118}

The circumstances in \textit{Machupa} are in contrast to the full and accurate accounting given by the police in \textit{Darden}\textsuperscript{119} and the careful attempt by the police in \textit{Darden} to comply with the dictates of the Fourth Amendment.\textsuperscript{120} In \textit{Darden}, police officers T.N. Mallory and Thomas Call were conducting drug interdiction operations at a train station in a suburb of Washington, D.C., attempting to stop the flow of illegal narcotics coming from New York, a known source city.\textsuperscript{121} Darden, who had disembarked from a train that had just arrived from New York,

\textsuperscript{111} \textit{Id.} at 123.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at 124.
\textsuperscript{115} \textit{Id.} at 125.
\textsuperscript{116} In \textit{Machupa}, the court below specifically found that the officers' belief that consent had been given was not objectively reasonable. \textit{Id.}
\textsuperscript{117} \textit{See} Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (indicating that the question whether consent is valid is a factual question based on the totality of the circumstances).
\textsuperscript{118} \textit{See} \textit{Machupa}, 872 P.2d at 124 ("[I]t is not the magistrate's function to determine whether the facts alleged in the affidavit were lawfully obtained.").
\textsuperscript{120} \textit{See id.} at 350 n.3, 351-52 (noting that the officers did not arrest the subject earlier because the officers knew they lacked the requisite probable cause and stating that the facts in the officer's affidavit were "simply a narration of the events surrounding the illegal seizure").
\textsuperscript{121} \textit{Id.} at 341, 345.
walked past Mallory and drew Mallory's attention. As Mallory followed him for a short distance, Darden looked over his shoulder four times, each time making eye contact with Mallory. Darden became very nervous and started to shake.

Mallory approached Darden, identified himself as a police officer, and asked to speak with him. Darden agreed to talk and he was not seized at any time during the subsequent encounter. Mallory explained that he was doing drug interdiction "to stop the illegal flow of narcotics coming from New York City into the metropolitan area." Darden was shaking and sweating profusely, which was inconsistent with the temperature in the air-conditioned station. Mallory asked Darden for his train ticket but Darden replied that he did not have one. After Mallory advised Darden that one needs a ticket to ride the train, Darden "fumble[d]" for it in his wallet. Because of his nervousness, Darden had difficulty removing the ticket.

Darden gave the ticket to Mallory, who determined that Darden had boarded the train in New York City. In response to Mallory's question, Darden identified himself, spelling his last name as D-A-R-D-O-N. Darden then produced an identification card, which had his last name spelled as D-A-R-D-E-N. Mallory returned the card and asked where Darden was going. Darden replied that he was traveling to his residence in Bowie, Maryland. When questioned by Mallory, Darden denied carrying a large amount of money or drugs on his person or in the sports bag he was carrying. Mallory then asked permission to search the bag and Darden consented. When Mallory opened the bag and began to search it,
Darden asked Officer Call, who was standing nearby, if he had to consent to the search. After Call advised Darden that he did not have to consent, Darden nervously told Mallory that he did not want his bag searched. Mallory thereupon stopped his examination of the bag.

Darden grabbed the bag and began to walk away quickly. Mallory then seized the bag and informed Darden that he was going to detain it temporarily until a narcotics detection dog could perform an exterior inspection. Mallory informed Darden that he was free to leave or stay until the dog inspected the bag, advising Darden that it would take 10 to 20 minutes for the dog to arrive. Mallory asked Darden for an address and a telephone number so that, if the dog did not indicate the presence of drugs, the bag could be returned to him. Darden provided an address and left.

The narcotics detection dog arrived about 20 minutes after the bag was detained. The dog performed an exterior inspection of the bag and, by scratching aggressively, indicated the presence of a controlled dangerous substance inside the bag. After that positive reaction, Mallory took the bag to a police station and prepared an application for a warrant to search the bag. The application detailed all of the facts surrounding the encounter with Darden and the seizure and detention of the bag. The completed application was approved over the telephone by an Assistant State's Attorney after it was read to her. Mallory thereafter went to a judge's residence, affirmed the facts under oath, and signed the application. After the judge signed the warrant and gave it to Mallory, Mallory returned to the police station and searched the bag, recovering suspected cocaine.

The motion court granted Darden's subsequent motion to suppress, reasoning that the police did not possess articulable

139. Id. at 341-42.
140. Id. at 342.
141. Id.
142. Id.
143. Id.
144. Id.
145. Id.
146. Id.
147. Id.
148. Id.
149. Id.
150. Id. at 351-52.
151. Id. at 342.
152. Id.
153. Id.
suspicion of criminal activity when Mallory seized the bag.\textsuperscript{154} It therefore suppressed the cocaine found in the sports bag and other subsequently discovered evidence.\textsuperscript{155} The Court of Special Appeals of Maryland affirmed the motion court's ruling and reasoning and held that the good faith doctrine was inapplicable because the bag's illegal seizure preceded the issuance of the search warrant.\textsuperscript{156}

The \textit{Darden} situation illustrates the benefit of applying the good faith doctrine when a search warrant is issued based in part upon an unlawful seizure. The application for the warrant accurately detailed all of the circumstances surrounding the accosting of Darden, the detention of his bag, and the dog sniff. The issuing court, therefore, had knowledge of all of the circumstances surrounding the initial detention. It had to resolve no disputed questions of fact. This is the type of situation where a magistrate should have the power to review the application for any illegal pre-warrant seizure and, if the warrant is issued, the officer should be entitled to rely on the magistrate's decision.

Moreover, the circumstances in \textit{Darden} provided sufficient indicia of justification that the police could objectively believe that they had complied with the Fourth Amendment and thus rely on the warrant. Indeed, at the time the police detained Darden's bag to permit the dog sniff,\textsuperscript{157} they knew, \textit{inter alia}, that he had come from a source city; had exhibited extreme nervousness; had falsely denied having a ticket from that source city; and had misspelled his name.\textsuperscript{158} Buttressing the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 343.
\item Id.
\item Id. at 350-56. The state's subsequent petitions for writs of certiorari to the Court of Appeals of Maryland, 614 A.2d 974 (Md. 1992), and the United States Supreme Court, 113 S. Ct. 2459 (1993), were denied. In the Supreme Court, only Justices White and Thomas would have granted the petition. Id.
\item Dog sniffs in these circumstances are not considered searches. United States v. Place, 462 U.S. 696, 707 (1983).
\item Refer to notes 142-46 supra and accompanying text. Investigatory stops are justified when there is some "objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, 449 U.S. 411, 417 (1981). Based on all the circumstances, "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id. at 417-18. In United States v. Sokolow, 490 U.S. 1 (1989), the Court stated that the officer "must be able to articulate something more than an 'inchoate and unpolarized suspicion or 'hunch'." Id. at 7 (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)). The Court continued:
\end{enumerate}
\end{footnotesize}
officers' belief in the legality of their actions was the initial review of the affidavit by a prosecutor. The Maryland intermediate appellate court even acknowledged that the police "attempted to conform" their actions to "accepted practices in the interdiction of drug couriers." Darden thus illustrates the type of situation where extension of the magistrate's role and a corresponding application of good faith would be appropriate. The police, notwithstanding their efforts to conform to the law, illegally seized and detained a person's effects, fully disclosed the facts surrounding the seizure and detention to a magistrate in an application for a search warrant, and then recovered evidence as a result of the warrant's execution. Even though a reviewing court ultimately concluded that the seizure was not justified, the purposes of the exclusionary rule were not furthered by suppression of the evidence.

VI. CONCLUSION

Because of the conflicting views expressed by the lower courts, the Supreme Court ultimately will have to determine whether suppression is an appropriate sanction when an illegal seizure serves as the predicate for the probable cause contained in a subsequently issued search warrant. The Court should take the occasion to expand the role of issuing magistrates and give them explicit authority to review the application for any illegal seizure that serves as the basis for the probable cause to

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a crime will be found," and the level of suspicion required for a Terry stop is obviously less demanding than that for probable cause.

Id. (citations omitted).

All of the factors justifying a Terry stop, examined separately, can be "quite consistent" with innocent behavior but, when examined together, can still "amount to reasonable suspicion." Sokolow, 490 U.S. at 9. The amount of information available to the officer at the time of the stop need not be great. See Timms v. Maryland, 573 A.2d 397, 398 (Md. Ct. Spec. App.) (finding sufficient probable cause where two men were seen talking in an alley in a designated drug-free zone at 5:30 a.m.), pet. denied, 580 A.2d 219 (Md. 1990). Indeed, in Terry v. Ohio, in which the Supreme Court first addressed the propriety of stops and frisks, the officer only observed the suspects pacing back and forth in front of a store for a period of time, conferring, and looking in the store's windows. Terry, 392 U.S. at 5-6. The officer was an experienced veteran and that experience provided meaning to the men's actions: He believed that criminal activity, that is, a plan to rob the store, was afoot. Id. His stop and frisk of the men was upheld. See id. at 29-30.

159. Darden, 612 A.2d at 342; see United States v. Leon, 468 U.S. 897, 902 (noting that the officer's application for a search warrant had been reviewed by several Deputy District Attorneys); State v. Jacobs, 591 A.2d 252, 259 (Md. Ct. Spec. App.) (emphasizing that one element of officer's good faith reliance on warrant included fact that the warrant had been approved by the State's Attorney prior to its submission to magistrate), pet. denied, 592 A.2d 178 (Md. 1991).

160. Darden, 612 A.2d at 350 n.3.
search.

Expanding the role of the magistrate will give new vitality to the warrant process and will lead to two beneficial consequences. First, recourse to warrants will be encouraged, resulting in early intervention and review of police actions by the judiciary, thereby placing the judiciary between the citizen and the police. Second, courts will need to resort less frequently to the ultimate sanction of exclusion, with its high costs to society. If the police have obtained a warrant prior to a search, have taken measured steps to insure compliance with the Fourth Amendment, and have fully disclosed their activities to a magistrate, and if the magistrate has reviewed that warrant for illegality, then the deterrent purpose of the exclusionary rule is not served. Therefore, the ultimate sanction of exclusion should not apply even though later courts determine that the activities of the police prior to securing the warrant did not comply with the Reasonableness Clause.