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APPLICATION PROBLEMS ARISING FROM THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

On July 5, 1984, the Supreme Court decided two landmark cases: United States v. Leon\(^1\) and its companion, Massachusetts v. Sheppard.\(^2\) The Court adopted a good faith exception to the exclusionary rule in Leon\(^3\) and applied it in Sheppard.\(^4\) Since that day, lower courts have faced the arduous task of applying this exception. As might be expected, the United States courts of appeals and state supreme courts have encountered some difficulty with this exception, which has resulted in varying and inconsistent results.\(^5\)

This Note first examines the history of the good faith exception and shows that its adoption by the Supreme Court was not unexpected, given the developing trend in a long line of Supreme Court cases and in commentaries on this issue.\(^6\) Next, the Note analyzes the Leon case, examining the good faith exception as adopted and applied. Third, the Note identifies three ambiguities in the good faith exception and explains how these ambiguities have led to application problems. Finally, the Note recommends solutions to the three ambiguities that would eliminate many of these application problems.

3. “We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.” Leon, 468 U.S. at 922.
4. 468 U.S. at 983.
5. See infra notes 55-167 and accompanying text. Ironically, the Court said in Leon that “the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice.” 468 U.S. at 924.
6. Compare, e.g., Hanscom, Admissibility of Illegally Seized Evidence in Civil Cases: Could This Be the Path Out of the Labyrinth of the Exclusionary Rule?, 9 PEPPERDINE L. REV. 799 (1982) (proposing a good faith balancing test to determine admissibility) with Note, The Emerging Good Faith Exception to the Exclusionary Rule, 57 NOTRE DAME LAW. 112 (1981) (urging the Court not to adopt a good faith mistake exception to the exclusionary rule).
ORIGINS OF THE GOOD FAITH EXCEPTION

The good faith exception to the exclusionary rule did not come as a great surprise to the legal community. Because of developments in Supreme Court decisions since the adoption of the exclusionary rule, the only question seemed to be when the Court would adopt a good faith exception.7

The exclusionary rule dates back more than 100 years to Boyd v. United States.8 In that case, the Supreme Court held that a compulsory surrender of private records forces a witness to testify against himself and is an unreasonable search and seizure, violating the fifth and fourth amendments.9 The Court therefore suppressed the evidence obtained by such compulsory surrender, marking the first suppression of evidence based on the manner of discovery.10 The Court, however, did not formally adopt the exclusionary rule until its 1914 decision in Weeks v. United States.11 In Weeks, the Court held that the government's refusal to return seized property to the accused amounted to prejudicial error.12 To correct this error, the Court excluded the evidence from the government's case.13

In Elkins v. United States,14 a decision applying the exclusionary rule, the Court stated that the rule was designed to deter violations of the fourth amendment15 and to preserve judicial integrity.16 Over time, however, the judicial integrity purpose faded, and the Court focused solely on deterring fourth amendment viola-

7. One year before the Court recognized a good faith exception to the exclusionary rule, Professor Ashdown said, "The United States Supreme Court's current exclusive focus on the deterrent function of the exclusionary rule suggests that a good faith exception to the rule's application may be near adoption." Ashdown, Good Faith, the Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process, 24 WM. & MARY L. REV. 335, 338-39 (1983) (footnotes omitted).
8. 116 U.S. 616 (1886).
9. Id. at 634-35.
12. Id. at 398.
13. Id.
15. See id. at 217.
16. Id. at 222-23.
tions.\textsuperscript{17} In \textit{Linkletter v. Walker,}\textsuperscript{18} for example, the Court said that modern cases “requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action.”\textsuperscript{19} The Supreme Court never expressly abandoned the notion that judicial integrity is a purpose of the exclusionary rule,\textsuperscript{20} but modern Supreme Court cases have ignored it and have emphasized instead the deterrent goal.\textsuperscript{21} This shift in focus foreshadowed the recognition of a good faith exception to the exclusionary rule because, theoretically, the threat of exclusion of evidence will not deter police officers who sincerely, but mistakenly, believe that their search is legal.\textsuperscript{22} In light of this shift, commentators recognized that a good faith exception was on the horizon.\textsuperscript{23}

Another shift in the Court’s thinking that made the good faith exception possible occurred when the Court held that the exclusionary rule is a judicially created remedy rather than an individual constitutional right.\textsuperscript{24} Originally, in \textit{Mapp v. Ohio,}\textsuperscript{25} the Court said that the exclusionary rule was a “clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard.”\textsuperscript{26} Later, however, in \textit{Stone v. Powell},\textsuperscript{27} the Court stated that it no longer considered the exclusionary rule to be a personal

\begin{thebibliography}{99}
\bibitem{18} 381 U.S. 618 (1965).
\bibitem{19} \textit{Id.} at 636-37.
\bibitem{20} \textit{See, e.g.}, Note, \textit{supra} note 6, at 129 (arguing that preserving judicial integrity is still an important purpose of the exclusionary rule).
\bibitem{21} \textit{See, e.g.}, United States v. Peltier, 422 U.S. 531, 538-39 (1975) (stating that the exclusionary rule safeguards the fourth amendment through its deterrent effect); United States v. Calandra, 414 U.S. 338, 347 (1974) (stating that the rule’s primary purpose is to deter unlawful police conduct); Terry v. Ohio, 392 U.S. 1, 29 (1968) (discussing the deterrence purpose of the rule).
\bibitem{22} When the Supreme Court adopted the good faith exception, it in fact relied on deterrence of police misconduct as the purpose of the exclusionary rule. The Court said, “[W]hen an officer act[s] with objective good faith . . . there is no police illegality and thus nothing to deter.” United States v. Leon, 468 U.S. 897, 920-21 (1984).
\bibitem{25} 367 U.S. 643 (1961).
\bibitem{26} \textit{Id.} at 648 (emphasis added).
\bibitem{27} 428 U.S. 465 (1976).
\end{thebibliography}
constitutional right. Failure to apply the exclusionary rule, therefore, is not itself a constitutional violation. Exceptions to the exclusionary rule thus became more likely.

Once the Court decided that deterrence was the major purpose of the exclusionary rule and that the Constitution did not require suppression of illegally seized evidence, the Court began to carve out exceptions to the general prohibition of using illegally seized evidence in court. In the decade before the recognition of the good faith exception in 1984, the Supreme Court held that the exclusionary rule did not apply to grand jury proceedings, habeas corpus proceedings, or civil proceedings and that prosecutors could use illegally seized evidence to impeach witnesses. A general exception to the exclusionary rule was not a big step from these specific exceptions. In light of this fact, the extensive confusion caused by the good faith exception appears ironic. Because courts anticipated the exception, they should have been better prepared to deal with the new rule when it finally came.

United States v. Leon: The Adoption of the Good Faith Exception

The Supreme Court adopted the good faith exception to the exclusionary rule in United States v. Leon. In that case, “a confidential informant of unproven reliability” told the Burbank Police Department of two individuals selling large amounts of drugs from

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28. Id. at 486; see also United States v. Calandra, 414 U.S. 338, 348 (1974).
29. Note, supra note 6, at 113-14.
30. See generally Note, supra note 24, at 172-75 (analyzing pre-Leon Supreme Court erosions of the exclusionary rule).
35. “This concept of a reasonable, good faith exception to application of the exclusionary rule is not new to the United States Supreme Court. On the contrary, the basic premises supporting adoption of such a doctrine have been discussed in several court decisions during the past decade.” Jensen & Hart, supra note 17, at 930; see also Note, supra note 24, at 178. But see Comment, supra note 10 (arguing that although adoption of a good faith exception has been “evident for years,” id. at 368, the Leon decision is a break from the past because it is the “first time evidence obtained in an illegal search will be admitted against a defendant at trial in the prosecution’s case-in-chief.” Id. at 345 (footnote omitted)).
their residence. The informant also told the police that he had witnessed a sale of methaqualone by one of the two approximately five months before and that the two usually kept a small amount of drugs at their residence, storing the remainder somewhere else in Burbank.

Based on this information, the police began an investigation that uncovered a connection between one of the two individuals, Ricardo Del Castillo, and Alberto Leon, who had been arrested previously on drug charges and who reportedly kept a large quantity of methaqualone at his residence. Subsequent police observation disclosed a variety of suspicious activity at Del Castillo's residence, at Leon's residence, and at a third residence in Burbank. Based on these observations and others, Officer Cyril Rombach, "an experienced and well-trained narcotics investigator," prepared an application for a search warrant. Several Deputy District Attorneys revised this application before submitting it to a state Superior Court judge.

The resulting warrant led to a search that uncovered a substantial quantity of drugs and other incriminating evidence. Pursuant to a motion by the defendants, however, the district court determined that the magistrate had issued the warrant without probable cause, and excluded a majority of the evidence. The court expressly stated that Officer Rombach had acted in good faith, but denied the government's request to recognize a good faith exception.

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision without opinion.

In petitioning for certiorari, the government expressly declined to appeal the probable cause issue and instead appealed only one question: whether the court should alter the exclusionary rule to

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37. Id. at 901.
38. Id.
39. Del Castillo had listed Leon's telephone number on his probation record as that of his employer. Id.
40. Id. at 901-02.
41. Id. at 902.
42. Id.
43. Id.
44. Id. at 903.
45. Id. at 904.
admit evidence obtained in good faith reliance on a warrant later deemed invalid.\textsuperscript{47} The Supreme Court agreed to limit its consideration to this issue.\textsuperscript{48}

In a lengthy opinion by Justice White, the Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."\textsuperscript{49} The Court based this conclusion on the notion that the exclusionary rule is not a constitutionally-compelled rule\textsuperscript{50} and on the rule's purpose of deterring police misconduct.\textsuperscript{51} The Court said, "If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect . . . it must alter the behavior of individual law enforcement officers or the policies of their departments."\textsuperscript{52} The Court concluded that when officers reasonably rely on a warrant, excluding the evidence they seize pursuant to that warrant does not serve this deterrent function.\textsuperscript{53} Additionally, the Court concluded that excluding such evidence would have no deterrent effect on judges and magistrates because they have no stake in the outcome of a criminal investigation.\textsuperscript{54} The Court therefore admitted the evidence obtained in the search despite the invalid warrant.

**Ambiguities in the Good Faith Exception and the Resulting Inconsistent Applications**

The good faith exception admits evidence seized under an invalid search warrant, which would otherwise be inadmissible under the exclusionary rule, whenever a police officer relied on that warrant with objective good faith. Nevertheless, the Court imposed conditions on the applicability of the good faith exception and

\textsuperscript{47} 468 U.S. at 905.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 922. The Court feared that "indiscriminate application" of the exclusionary rule, leading to societal disrespect for the law, would be the "substantial costs of exclusion." Id. at 907-08.
\textsuperscript{50} Id. at 906.
\textsuperscript{51} Id. at 916.
\textsuperscript{52} Id. at 918.
\textsuperscript{53} Id. See supra notes 30-35 and accompanying text.
\textsuperscript{54} Id. at 917.
failed to explain adequately several of these conditions. As a result, lower courts have adopted divergent interpretations of these conditions, resulting in inconsistent applications of the good faith exception.

The "Reasonably Well-Trained Officer" Requirement

The first ambiguity results from the requirement that law enforcement officers "have a reasonable knowledge of what the law prohibits." The Court, however, did not explain what constituted "reasonable knowledge" of the law. For example, the Court did not specify whether the officer must be familiar with case law and/or statutes. Additionally, the Court did not specify whether lower courts should apply a national standard or one that varied from police department to police department. This failure on the part of the Supreme Court gives lower courts a great deal of discretion and opens the door for potential problems.

By setting the standard of knowledge too low, a lower court essentially would absolve individual police officers of all responsibility for determining whether a given search violates the fourth amendment. Instead of the officer evaluating the validity of the search himself, he can simply defer to the decision of the judge or magistrate who issued the warrant. The Leon opinion clearly states, however, that the Court did not intend to absolve individual officers of all responsibility for upholding the fourth amendment.

On the other hand, lower courts may err by setting the requisite standard of knowledge too high. The result would be a total emas-
calculation of the good faith exception because one always can claim that the officer should have known his search was invalid whenever a court subsequently holds a warrant to be deficient. One commentator has recognized that a high knowledge requirement would make officers unsure of what they can and cannot do, especially in light of the confused state of fourth amendment law.57 This commentator further stated:

With so little judicial guidance, it is not surprising that inadvertent errors of judgment and honest mistakes occur when officers in the field are required to make quick decisions on whether the requisite probable cause exists to support an arrest or search. Arguably, it is wrong to penalize, through the suppression of probative evidence, the officer's reasonable mistakes which a judge in hindsight deems to be unconstitutional.58

In fact, the Supreme Court's failure to specify what a police officer should know about the fourth amendment has led to inconsistent applications of the good faith exception. Lower courts looking to Leon and its companion case, Massachusetts v. Sheppard,59 have found no guidance. The three circuit courts and one state supreme court that have considered the issue of what a reasonably well-trained police officer must know have established different standards.60

In United States v. Savoca,61 for example, the United States Court of Appeals for the Sixth Circuit imposed a fairly heavy burden of knowledge on police officers. The court, finding insufficient probable cause, nevertheless held that the many varying opinions in the area of probable cause may have misled the officer, making reasonable his determination that probable cause existed in this case.62 The court said, "[W]ith only a little effort one may locate cases upholding searches in which the supporting affidavit's con-

58. Id. at 1121-22.
62. Id. at 297-98.
nection of the person suspected of a crime with the evidence sought and the place to be searched is skeletal. There is little to distinguish these cases from . . . cases which have ruled such a search illegal." The court thereby implied that an officer must be familiar with case law. Although the police officer need not be capable of making the same fine distinctions between cases that courts make, the Sixth Circuit assumed from the outset that officers have a general knowledge of fourth amendment case law.

The Ninth Circuit similarly requires police officers to be familiar with case law. In United States v. Hale, the court held that the officers conducting a search should have known that the search was illegal, despite the magistrate’s authorization. The warrant authorized the officers to search for specific pornographic material and for pornographic material in general. The officers seized several items, including a magazine entitled "Joe and His Uncle." Because the warrant did not expressly mention this magazine, however, the court excluded it from evidence, stating that the fourth amendment must be "applied with 'scrupulous exactitude'" to searches and seizures of material presumptively protected by the first amendment. In response to the government’s argument that the good faith exception allowed admission of the magazine, the court said, "Our holding that the warrant was impermissibly overbroad with respect to any material arguably protected by the First Amendment other than that specifically named rests on well-established current law, and it is not unreasonable to require executing officers to know it."

The Arkansas Supreme Court has established a different standard. In State v. Anderson, the court held a warrant invalid.

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63. Id.
64. This is implicit in the court’s reasoning that the officer, although clearly wrong in his belief about the existence of probable cause, acted reasonably because the cases could be misleading. The court said, “The factual gradations in this type of case are often difficult to discern even after a studied examination of the various judicial opinions.” Id. at 298.
65. Id.
66. 784 F.2d 1465 (9th Cir. 1986).
67. Id. at 1470.
68. Id. at 1468.
69. Id. at 1469 (quoting Maryland v. Macon, 105 S. Ct. 2778, 2781-82 (1985)).
70. Id. at 1470.
71. 286 Ark. 58, 688 S.W.2d 947 (1985).
because the Arkansas Rules of Criminal Procedure require either an affidavit or sworn testimony, both of which were lacking in this case. The court said that the rules of criminal procedure should be common knowledge to police officers and to judicial officers charged with authorizing searches. The officer knew that no affidavit or sworn testimony existed, thereby precluding good faith reliance on the warrant. The Arkansas Supreme Court thus believes that a reasonably well-trained police officer is familiar with the rules of criminal procedure.

The Arkansas court's standard, obviously, is not nearly as stringent as that imposed by the Sixth Circuit. As the Arkansas court said, the rules of criminal procedure establish "a concise, correct set of rules governing searches, seizures, which . . . set forth the procedural aspects of criminal law . . . . The forms and procedure are not complex . . . ." Policemen in Arkansas are not required to be familiar with voluminous and ever-changing case law. They simply must know the Arkansas Rules of Criminal Procedure, a single source that does not require the extensive interpretation that case law does.

**The Definition of "Objective Good Faith"**

The second problem with the good faith exception is that the Supreme Court failed to define "objective good faith" with any precision. In fact, the Court at times seemed to contradict itself. At one point in the *Leon* opinion the Court indicated that finding

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72. *Id.* at ____, 688 S.W.2d at 950-51.
74. 286 Ark. at ____, 688 S.W.2d at 950.
75. *Id.* at ____, 688 S.W.2d at 950. The court considered this issue solely in dicta. The court primarily held that the presence of an affidavit is a threshold requirement that officers must satisfy before the court will consider the issue of good faith. *Id.* at ____, 688 S.W.2d at 950. This position is consistent with the United States Supreme Court's ruling in *Leon*. In enumerating the "exceptions to the good faith exception," the Court assumed that an affidavit was present. United States v. *Leon*, 468 U.S. 897, 914-15 (1984).
76. 286 Ark. at ____, 688 S.W.2d at 950.
77. *See supra* notes 61-65 and accompanying text.
78. 286 Ark. at ____, 688 S.W.2d at 950.
79. *See Bradley,* supra note 55, at 294-95 (suggesting that the concept of "objective good faith" is not well defined). *See generally* Wasserstrom & Merters, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 *Am. Crim. L. Rev.* 85, 120-22 (1985) (explaining objective good faith as used in the *Leon* decision).
objective good faith reliance on a warrant should be almost automatic. The Court stated, "When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time."\(^{80}\) The Court then explained, however, that Officer Rombach's search was based on an "extensive investigation" that "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause."\(^{81}\) This language suggests that the Supreme Court may not be quick to find objective good faith, despite its previous statement. If the prosecution must show that the officer was misled into thinking the warrant was valid by "evidence sufficient to create disagreement among thoughtful and competent judges"—judges who presumably are thoroughly familiar with the laws of search and seizure—then the prosecution faces a substantial burden of proof.

The Court did not say that this type of evidence is necessary for a finding of objective good faith. The opinion simply stated that such evidence was present in *Leon* and that it therefore established objective good faith.\(^{82}\) Nevertheless, a lower court reasonably could interpret *Leon* as requiring prosecutors to present such evidence; thus, the *Leon* decision effectively gave lower courts discretion to decide the objective good faith issue. Judges can impose burdens of proof on the prosecutor ranging from easy to almost impossible.

In *Massachusetts v. Sheppard*\(^{83}\) the Court found objective good faith based on the fact that "[t]he officers took every step that could reasonably be expected of them" in obtaining the warrant.

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One commentator said that "the good faith exception requires objectively reasonable conduct based upon objectively reasonable knowledge of what the law prohibits." Note, *supra* note 24, at 177. Assuming that this statement is indeed the Court's definition of objective good faith, one readily can see that it is not very helpful. As discussed, what a reasonably well-trained officer should know is itself an ambiguous standard. Using one ambiguous concept to define another does not provide much aid, but in fact further confuses the issue.

The Court identified several circumstances in which an officer could not have acted with objective good faith. These circumstances, however, do not go very far toward defining objective good faith, and they are difficult to apply. See *infra* notes 109-113 and accompanying text.

81. *Id.* at 926.
82. *Id*.
and carrying out the search.\(^8^4\) Once again, the Court did not say that officers must do everything they can in order to act with objective good faith, but a lower court reasonably could make that interpretation. A court interpreting Sheppard in this manner also tremendously increases the prosecution’s burden of proof. Showing that officers have done everything that could reasonably be expected of them is extremely difficult, if not impossible. The defense always can argue that the officer should have investigated longer or put more facts into the affidavit.

In sum, the two Supreme Court cases applying the good faith exception do not define objective good faith adequately. Instead of defining the concept, the Court simply held that good faith existed under the facts presented, thus forcing lower courts to define objective good faith for themselves. Judges can focus on the language in Leon which indicates that objective good faith is found easily,\(^8^5\) they can limit Leon and Sheppard to their facts and thus make a finding of objective good faith more difficult,\(^8^6\) or they can find objective good faith based on factors not present in either Leon or Sheppard.

In fact, lower courts addressing the objective good faith issue have separated themselves into these three categories. The United States Court of Appeals for the Fifth Circuit, for example, directly quoted language from Leon indicating that the presence of a warrant normally establishes objective good faith.\(^8^7\) In another case, United States v. Gant,\(^8^8\) the Fifth Circuit used an expanded definition, holding that police officers’ reliance on a warrant is valid unless it is “entirely unreasonable” for the officers to rely on the magistrate’s determination, reflected in the warrant, that probable cause exists.\(^8^9\) Such a standard for objective good faith is extremely

\(^8^4\) Id. at 989.
\(^8^5\) See supra note 80 and accompanying text.
\(^8^6\) See supra notes 81-84 and accompanying text.
\(^8^7\) United States v. Merida, 765 F.2d 1205, 1214 (5th Cir. 1985).
\(^8^8\) 759 F.2d 484 (5th Cir. 1985).
\(^8^9\) Id. at 488. Whether an officer’s reliance on a warrant is entirely unreasonable usually depends on an examination of the affidavit supporting the warrant. id. at 487-88.

United States v. Barrington, 806 F.2d 529 (5th Cir. 1986), demonstrated what the Fifth Circuit considers to be unreasonable reliance on a warrant. In Barrington, a magistrate issued a search warrant based on an affidavit which simply said that the affiant “received information from a [known] confidential informant . . . [who] has provided information in
easy to satisfy. If the officer had any reason whatsoever to think that the warrant was valid, then he exhibited objective good faith.

Other courts fall into the second category and decide the objective good faith issue by strictly interpreting Leon and Sheppard. In United States v. Thomas, the United States Court of Appeals for the Second Circuit focused on language in Sheppard stating that “[t]he officers took every step that could reasonably be expected of them” in obtaining the warrant and conducting the search. Because “there [was] nothing more that the officer could have or should have done under these circumstances to be sure his search would be legal,” the court held that he acted reasonably in relying on the warrant he was issued. The United States Court of Appeals for the Eleventh Circuit also seized on this same language from Sheppard in United States v. Accardo. Because the agents “took every step that could reasonably be expected of them,” they acted with objective good faith.

In United States v. Sager, the United States Court of Appeals for the Eighth Circuit exhibited a similar tendency to read Leon and Sheppard narrowly, but focused on different language in the opinions to do so. Instead of relying on the language in Sheppard requiring the officers to do all they could in preparing the affidavit and conducting the search, the court focused on the phrase in Leon the past that has led to arrest and convictions.” Id. at 531. The court held that a warrant based on such a “bare bones” affidavit was invalid and that the officer could not have relied on the warrant in good faith. As a result, the court excluded the evidence seized during the search. Id. at 532.

The Barrington case thus provides an example of when the Fifth Circuit will deem an officer’s reliance on a search warrant “entirely reasonable.” If the affidavit provides no facts whatsoever to enable a magistrate to make a probable cause determination, police officers may not rely in good faith on a warrant issued pursuant to that affidavit. This obviously is not a very high standard.

90. 757 F.2d 1359 (2d Cir. 1985).
91. Sheppard, 468 U.S. at 989.
92. 757 F.2d at 1368; see also United States v. Fama, 758 F.2d 834, 837 (2d Cir. 1985) (comparing the facts of the case to those of Leon to find objective good faith). The court in Fama indicated that the expert opinion of the law enforcement agent “should . . . be considered as a factor contributing to objective good faith.” Id. at 838. Although similar to Leon’s “experienced and well-trained narcotics investigator,” 468 U.S. at 902, this factor may signal a departure from a strict following of Leon and Sheppard.
93. 749 F.2d 1477 (11th Cir. 1985).
94. Id. at 1480.
95. 743 F.2d 1261 (8th Cir. 1984).
that "the affidavit . . . provided evidence sufficient to create disagree-ment among thoughtful and competent judges as to the existence of probable cause." Following this approach or the one taken by the Second and Eleventh Circuits severely limits the applicability of the good faith exception because the standards these three circuits impose are extremely difficult to meet.

Two other courts have shown a tendency to limit Leon and Sheppard to their facts in deciding the objective good faith issue, but they did so by actually comparing the facts of the case before them to the facts in Leon and Sheppard. In State v. Thompson, the Supreme Court of North Dakota found no objective good faith because the pre-warrant investigation in the case did not produce nearly as much incriminating evidence as the investigation in Leon produced. The court said, "In our view, the investigation in Leon produced much more possibly incriminating information leading to a conclusion that a search warrant was justified than the investigation in this case." The North Dakota Supreme Court's opinion clearly evidences a tendency to compare the case at hand to Leon in order to decide the issue. If the facts of a given case do not resemble those of Leon in terms of the information supplied in obtaining the warrant and the steps taken in carrying out the search, the court will not find that the officer acted with objective good faith.

In United States v. Strand, the Eighth Circuit also found no objective good faith by distinguishing Leon and Sheppard. In Strand, as in Sheppard, the officers conducting the search seized items not expressly authorized by the warrant. The circuit court held that they did not manifest good faith, distinguishing Sheppard on the grounds that the officers in Sheppard had expressly asked the issuing magistrate if they were authorized to seize the items in question, but the searching officers in Strand had not.

96. Id. at 1266 (quoting United States v. Leon, 468 U.S. 897, 926 (1984)).
97. 369 N.W.2d 363 (N.D. 1985).
98. Id. at 372. The court added, "[U]nder these circumstances, the officer's reliance on the magistrate's determination of probable cause was objectively unreasonable." Id.
99. 761 F.2d 449 (8th Cir. 1985).
100. 468 U.S. at 986-87.
101. 761 F.2d at 452-53.
102. Id. at 456-57.
Despite the fact that the items seized in *Strand* corresponded to the investigating officers' list of stolen goods,\(^{103}\) the court refused to find good faith, clearly indicating a tendency to limit *Leon* and *Sheppard* to their facts.\(^{104}\)

One court falls into the third category, which examines good faith based on factors extraneous to *Leon* and *Sheppard*. In *United States v. Merchant*,\(^ {105}\) the United States Court of Appeals for the Ninth Circuit found objective good faith lacking because the stated purpose of the search was not the real reason for the search.\(^ {106}\) Although the court in *Merchant* did not define objective good faith, the opinion indicated that the court would not follow the simple "warrant equals good faith" formula,\(^ {107}\) nor would it limit itself to the facts of *Leon* and *Sheppard*. The Ninth Circuit will look to the facts of each individual case in determining whether to admit evidence under the good faith exception.

These cases indicate that the Supreme Court failed to define objective good faith adequately, leaving lower courts the task of creating their own definitions. As a result, several different definitions have emerged, creating serious problems because these different definitions result in different standards of proof. When a criminal defendant's constitutional rights are at issue, due process requires uniformity of law, and until a uniform definition of objective good faith is adopted, a criminal defendant's ability to exclude evidence against him seized under an invalid warrant will depend largely on where he is tried.

\(^{103}\) *Id.* at 451.

\(^{104}\) *See also* *United States v. Sager*, 743 F.2d 1261 (8th Cir. 1984). In this case the Eighth Circuit again tended to analyze the objective good faith issue by comparing the facts of the instant case to those of *Leon*.

\(^{105}\) 760 F.2d 963 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 3293 (1986).

\(^{106}\) *Id.* at 969. The stated purpose of the search was to supervise Merchant's probation pursuant to a condition of that probation allowing periodic searches. *Id.* at 964-65. The court, however, held that because the state had never made any efforts to rehabilitate Merchant, the police must have conducted the search because of reports of gunfire at Merchant's residence. As a result, the searching officers reasonably could not have believed that the search was designed to achieve its stated purpose. *Id.* at 969.

\(^{107}\) In fact, no warrant existed in *Merchant*. Because good faith was lacking anyway, the court declined to decide whether the good faith exception applied to warrantless searches. *Id.* at 968 n.6.
The List of "Exceptions to the Exception"

The Leon decision has a third and final ambiguity that has led to inconsistent application of the good faith exception by lower courts. This ambiguity is related so closely to the Court's failure to define objective good faith\footnote{108. See supra notes 79-107 and accompanying text.} that the two at times seem to merge. It arises from the Court's failure to explain adequately the function of the "exceptions to the exception" that appear in the Leon decision.

Although the Court did not define objective good faith, the opinion listed several instances in which good faith cannot be found. The Court said that suppression of evidence is permissible if: (1) the person issuing the warrant was "misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;"\footnote{109. United States v. Leon, 468 U.S. 897, 923 (1984). In such cases, the affiant not only fails to manifest objective good faith, but acts in bad faith.} (2) the person issuing the warrant "wholly abandoned his judicial role;"\footnote{110. Id. The Court said that "in such circumstances no reasonably well-trained officer should rely on the warrant." Id.} (3) the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;"\footnote{111. Id. (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).} or (4) the warrant is "so facially deficient—\textit{i.e.}, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."\footnote{112. Id.} In these four circumstances, the deficiencies in the warrant are so obvious and fundamental that any officer relying on the warrant is not acting in good faith.

This list creates two problems. First, the Court did not clarify whether these four instances are the \textit{only} ones in which suppression of the evidence is still appropriate.\footnote{113. \textit{Compare} Comment, supra note 10, at 365 (implying that these four exceptions are exclusive) with Hartman, The Death of the Fourth Amendment, TRIAL, Jan. 1985, at 50, 53 (claiming that these instances are merely dicta and thus may change).} Second, the "exceptions to the exception" themselves are not defined sufficiently.
The Exclusiveness of the List of Exceptions

The issue of whether these "exceptions to the exception" are exclusive arises because of inconsistencies within the Leon opinion. At one point the Court said, "We . . . conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." That statement indicates that courts should suppress the evidence any time the facts of the case are such that suppression would further the deterrent purpose of the rule. At another point in the opinion, however, the Court contradicted itself and said, "In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." This language simply restates the "exceptions to the exception" that the Court had previously listed. Lower courts, therefore, cannot be sure whether they are free to decide for themselves when to suppress evidence—on the grounds that such suppression would deter police misconduct—or whether they must limit themselves to the situations specified in Leon. As with the other ambiguities in the Leon decision, lower courts have developed differing interpretations about the exclusivity of the list of exceptions. The majority of courts have ruled that the "exceptions to the exception" are exclusive, but the Ninth Circuit has held that the court's list is not exclusive.

114. Leon, 468 U.S. at 918 (emphasis added) (footnote omitted). The "purpose of the exclusionary rule" to which the Court refers is the deterrence of police misconduct in conducting searches. See supra notes 17-21 and accompanying text.
115. Id. at 926 (emphasis added).
116. If the list is exclusive, then arguably the list itself provides by negative implication the definition of "objective good faith" that this Note claims is missing. See supra notes 79-82 and accompanying text. The last two of the four situations specified by the Court, however, require so much interpretation that in essence the Court said objective good faith exists when reliance on the warrant is reasonable. See supra notes 111-12 and accompanying text. Even if this list is the definition of objective good faith, therefore, lower courts still face the problem of interpreting and applying the definition.
117. See, e.g., United States v. Harper, 802 F.2d 115, 119 (5th Cir. 1986); United States v. Edwards, 798 F.2d 686, 690 (4th Cir. 1986); United States v. Maggitt, 778 F.2d 1029, 1034 (5th Cir. 1985); United States v. Gant, 759 F.2d 484, 487 (5th Cir. 1985); United States v.
In *United States v. Merchant*, the Ninth Circuit found that officers conducting a search did not act with objective good faith because "the search was a subterfuge for conducting a criminal investigation." Because the officers in this case conducted the search pursuant to a condition of Merchant's parole, no affidavit or warrant existed. *Leon*'s "exceptions to the exception" pertain to the conduct of judges, magistrates, and law enforcement officers in connection with affidavits and warrants and therefore did not apply to this case. Nevertheless, the court said in dicta that the conduct of the officers should be deterred, indicating that it will suppress evidence whenever such suppression will deter police misconduct. The Ninth Circuit, therefore, will exclude evidence not only when one of the specific circumstances set forth in *Leon* is present, but whenever suppression will advance the deterrent purpose of the exclusionary rule.


118. 760 F.2d 963 (9th Cir. 1985), cert. granted, 106 S. Ct. 3293 (1986).
119. Id. at 969.
120. Id. at 964-65.
122. 760 F.2d at 969.
123. *But see* United States v. Michaelian, 803 F.2d 1042, 1047 (9th Cir. 1986) ("In the absence of abandonment of the detached and neutral magisterial role, suppression is proper only where the officers were dishonest or reckless in preparing their affidavit, or could not have harbored an objectively reasonable belief in the existence of probable cause due to a facial deficiency in the warrant.").
124. *See also* State v. Johnson, 110 Idaho 516, 528-29, 716 P.2d 1288, 1300 (1986) (indicating that the list is not exclusive). The Supreme Court of Colorado also may believe that the circumstances specifically exempted from the good faith exception in *Leon* are not exclusive. *See* People v. Deitchman, 695 P.2d 1146, 1165 (Colo. 1985) (Quinn, J., concurring). Justice Erickson's concurrence in that case also implies that the list is not exclusive. *Id.* at 1151 n.8 (Erickson, J., concurring). Because this case is a plurality opinion, because Justice Erickson's position is not completely clear, and because not all of the Justices commented on this issue, however, one cannot state with certainty exactly how the Colorado court ultimately will rule.

The remaining courts that have applied the good faith exception have not clearly set forth their position on the exclusivity of the list in *Leon*. See, e.g., United States v. Savoca, 761 F.2d 292 (6th Cir.), cert. denied, 106 S. Ct. 153 (1985); United States v. Fama, 758 F.2d 834 (2d Cir. 1985).
Interpreting the Exception
The Intentionally or Recklessly False Affidavit

Lower courts also have had great difficulty interpreting and applying the "exceptions to the exception" listed in Leon. For example, three courts considering whether to suppress evidence because the affiant knew or should have known that the facts in his affidavit were false resolved the issue in two different ways. Two of these courts, the Eighth Circuit and the Supreme Court of Arkansas, decided this issue in a way that violated the purpose of the exclusionary rule.

In Lincoln v. State, the defendant claimed that false information in the affidavit underlying the search warrant rendered certain evidence inadmissible. Even though the Arkansas Supreme Court claimed to examine the issue of reckless or intentional falsity in preparing the affidavit, a standard which centers on the conduct of the affiant, the court instead focused on the conduct of the judge issuing the warrant. The court reasoned that the false information in the affidavit did not invalidate the search because "[t]here is no reason to think the circuit judge who issued the warrant would have acted differently had the affidavit been exact."

Likewise, the Eighth Circuit allowed a search based on an allegedly false affidavit because "the affidavit, even with the alleged misstatements excised, would still have justified the officers' conduct in this case under the Leon standard." In other words, the Eighth Circuit looked at the true statements in the affidavit, rather than at the conduct of the affiants, to determine whether to exclude the evidence.

By interpreting this "exception to the exception" without reference to the behavior of the officers, both courts ignored the fact that the stated purpose of the exclusionary rule is to deter police misconduct. Under such interpretations courts conceivably could

125. See Leon, 468 U.S. at 923.
126. 285 Ark. 107, 685 S.W.2d 166 (1985).
127. Id. at 108, 685 S.W.2d at 167.
128. Id. at 108-09, 685 S.W.2d at 167.
129. Id. at 109, 685 S.W.2d at 167.
131. See supra notes 17-21 and accompanying text.
admit evidence even if officers intentionally lied in their affidavits, thus thwarting the deterrence goal of the exclusionary rule.\textsuperscript{132}

The Supreme Court of Virginia is the other court which has discussed the willful or reckless falsity of an affidavit. In \textit{McCary v. Commonwealth},\textsuperscript{133} the affiant erroneously checked the box on the affidavit indicating that he had personal knowledge of the facts in the affidavit when in fact he had received his knowledge from other officers.\textsuperscript{134} Because the officer had informed the magistrate orally that he did not have personal knowledge when he applied for the warrant,\textsuperscript{135} however, the court held that the officer reasonably could have believed that the search was validly authorized.\textsuperscript{136} This decision focused on the conduct of the officer in order to interpret the reckless or intentional falsity issue and, therefore, is consistent with the deterrent purpose of the exclusionary rule.\textsuperscript{137}

\textbf{Abandonment of the Judicial Role}

Three courts have considered whether evidence should be suppressed because the issuing judge or magistrate “wholly abandoned his judicial role.”\textsuperscript{138} In \textit{United States v. Hendricks},\textsuperscript{139} a Ninth Circuit case, police intercepted a box containing drugs on its way to Hendricks in Tucson, Arizona.\textsuperscript{140} Knowing that the box was in custody, a magistrate issued a warrant to search Hendricks's house if the box ever arrived there. The box ultimately did arrive because

\begin{itemize}
\item \textsuperscript{132} The Eighth Circuit redeemed itself somewhat by holding that the officers' conduct was not willful or reckless. \textit{Sager}, 743 F.2d at 1266. By focusing on the validity of the affidavit with the erroneous facts removed, however, the court opened the door for admission of evidence despite an officer's intentional or reckless falsity. In order to serve the deterrent goal of the exclusionary rule, whenever officers recklessly or intentionally include falsities in their affidavits courts should exclude the evidence seized, even if true statements in the affidavit would be sufficient to support a warrant. \textit{See also State v. Schaffer}, 107 Idaho 812, 822, 693 P.2d 458, 468 (Ct. App. 1984) (holding that a judge can admit evidence if the magistrate's finding of probable cause is still reasonable after the deliberately or recklessly false information in the affidavit is excised).
\item \textsuperscript{133} 228 Va. 219, 321 S.E.2d 637 (1984).
\item \textsuperscript{134} \textit{Id.} at 230, 321 S.E.2d at 643.
\item \textsuperscript{135} \textit{Id.}, 321 S.E.2d at 643.
\item \textsuperscript{136} \textit{Id.} at 232, 321 S.E.2d at 644.
\item \textsuperscript{137} \textit{See supra} notes 17-21 and accompanying text.
\item \textsuperscript{138} \textit{Leon}, 468 U.S. at 923.
\item \textsuperscript{139} 743 F.2d 653 (9th Cir. 1984), \textit{cert. denied}, 470 U.S. 1006 (1985).
\item \textsuperscript{140} \textit{Id.} at 653.
\end{itemize}
of a ruse by Drug Enforcement Agency officers. The defendant challenged the applicability of the good faith exception to validate the ensuing search on the grounds that the magistrate abandoned his neutral judicial role to the DEA. The defendant argued that the warrant enabled the DEA to decide when probable cause existed by allowing the agency to search if the box arrived at Hendrick's house. The court nevertheless ruled that the magistrate did not abandon his neutral role, even though he did delegate an element of the probable cause determination impermissibly; the court reasoned that the magistrate issued the warrant in an effort to limit official conduct, not expand it. The Ninth Circuit, then, will not find that a magistrate abandoned his neutral role if he delegated authority in an effort to uphold the fourth amendment. In other words, the Ninth Circuit looks at the motives of the magistrate in issuing the warrant and therefore misses the point that the purpose of the exclusionary rule is to deter police misconduct.

The Eighth Circuit adopted a different approach to this “exception to the exception” in United States v. Sager. Citing Lo-Ji Sales, Inc. v. New York, a case cited with approval in Leon, the court held that a magistrate must become involved somehow in the actual search in order to abandon his neutral role. The defendant in Sager argued that the affidavit was so insufficient that anyone issuing a search warrant based on it could not have been neutral. The court said that such an argument does not satisfy the Supreme Court’s definition of a non-neutral magistrate. The Eighth Circuit's approach is thus extremely rigid: Unless the person issuing the search warrant becomes involved in the search or engages in some like behavior, the court will not find that he abandoned his neutral role.

141. Id. at 654.
142. Id. at 656.
143. Id.
144. 743 F.2d 1261 (8th Cir. 1984), cert. denied, 469 U.S. 1217 (1985).
146. 468 U.S. at 923. The Court pointed to the facts in Lo-Ji as an example of when a judge has abandoned his neutral role. Id.
147. 743 F.2d at 1266.
148. 743 F.2d at 1266-67.
149. Id. at 1267.
In *United States v. Breckinridge*, the Fifth Circuit gave yet another example of when a magistrate abandons his detached and neutral role in issuing a search warrant. The court said that "the 'absence of a neutral and detached magistrate' exception to *Leon*'s good faith may also extend to situations in which officers while presenting the affidavit realize that the magistrate served only to rubber stamp a previous decision reached by the police." The court thus indicated that a magistrate's neutrality could be measured by what the officer applying for the warrant knows or should know. In other words, if the officer applying for the warrant knows or should know that the magistrate has abandoned his neutral role, then the court should exclude the evidence. Such a test comports with *Leon*'s statement that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."

**Affidavit Lacking Indicia of Probable Cause**

The third "exception to the exception" in *Leon* is that good faith cannot be found if the affidavit is so clearly without facts supporting probable cause that reliance is unreasonable. Only the Eighth Circuit has interpreted this exception. In *United States v. Sager*, the defendant argued that the court should not admit certain evidence against him under the good faith exception because this "exception to the exception" applied. In analyzing this argument, the court pointed out that the affidavit was similar to the one in *Leon* and noted that it provided enough evidence to create disagreement among judges about the existence of probable cause. As a result, the officers manifested objective good faith and the third "exception to the exception" did not apply. The
Eighth Circuit thus compared the facts of the instant case to those of *Leon* in order to decide if a reasonable person could have believed that probable cause existed. In other words, the circuit court applied its definition of objective reasonableness in order to decide whether the affidavit was so faulty that reliance on a warrant issued pursuant to it was unreasonable.\(^1\) Such an approach to this issue is logical. Because the purpose of the exclusionary rule is to deter police misconduct, courts should resolve this issue by deciding whether the officer knew or should have known that the affidavit was insufficient. The problem, however, is that many different definitions of objective good faith exist.\(^2\) Until the courts adopt a unified definition, this issue will produce many varying results.

**The Facially Deficient Warrant**

The final "exception to the exception" listed in *Leon* is a problem with the warrant itself. If the warrant is significantly deficient on its face, then a police officer does not manifest objective good faith by relying on it.\(^3\) The difficulty with this exception is that the Supreme Court did not explain when courts should deem a warrant too facially deficient for good faith reliance. Although the Court cited failure to particularize the place to be searched or the items to be seized as examples of a facially deficient warrant,\(^4\) the opinion did not specify how much particularity is required. Lower courts, therefore, are free to determine this issue on their own. Presumably, lower courts will decide this issue by applying their definition of objective good faith to determine whether the officers relied in good faith on the warrant, in light of its facial deficiencies. As previously demonstrated, such a practice will lead to a variety of results.\(^5\)

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158. See *supra* notes 99-104 and accompanying text.
159. See *supra* notes 87-107 and accompanying text.
161. *Id*.
162. See *supra* notes 87-107 and accompanying text.
The only court that has addressed this issue is the Eleventh Circuit, considering a case that involved a search warrant authorizing FBI agents to search for "all corporate records" under the control of the defendant.\textsuperscript{163} Even though this language was too general,\textsuperscript{164} the court found the agents' reliance on the warrant reasonable because it was not "plainly evident" that the judge should not have issued the warrant.\textsuperscript{165} The court derived this test from explicit language in \textit{Sheppard},\textsuperscript{166} which reflects a tendency to read \textit{Leon} and \textit{Sheppard} narrowly and to seize upon key phrases in the opinions. Because the Eleventh Circuit defines objective good faith by this same method,\textsuperscript{167} this case arguably reflects a tendency toward deciding the final "exception to the exception" by applying an objective good faith definition. As with the previous "exception to the exception," such an approach is logical in light of the stated purpose of the exclusionary rule. Until courts adopt a single standard for objective good faith, however, results will vary. As with the other three "exceptions," the Court's failure to explain the exact meaning of a "sufficiently deficient warrant" creates the potential for varying interpretations.

\textit{Summary}

The "exceptions to the exception" enumerated in \textit{Leon}, therefore, present two very significant problems. First, lower courts are not sure whether this list is exclusive or whether they are free to expand the list as they see fit. Second, the "exceptions to the exception" are not well defined, leading to different applications in different jurisdictions.


\textsuperscript{164} The court said that "all corporate records" was arguably more general than the "any controlled substance" language which officers reasonably relied on in \textit{Sheppard}. \textit{Id.} (quoting Massachusetts v. Sheppard, 468 U.S. 981, 987-88 (1984)).

\textsuperscript{165} \textit{Accardo}, 749 F.2d at 1481 (citing Massachusetts v. Sheppard, 468 U.S. 981, 990 n.7 (1984)).

\textsuperscript{166} 468 U.S. at 990 n.7. The Court said, "This is not an instance in which 'it is plainly evident that a magistrate or judge had no business issuing a warrant.'" \textit{Id.} (quoting Illinois v. Gates, 462 U.S. 213, 264 (1983)).

\textsuperscript{167} See supra notes 93-94 and accompanying text.
The Knowledge Requirement of a “Reasonably Well-Trained” Officer

The first problem with the good faith exception is the lack of clarity about what a reasonably well-trained officer must know. Clearly, courts must require law enforcement officers to have some knowledge about conduct which violates the fourth amendment. The Leon decision clearly stated that good faith does not exist if: (1) the officer lied or acted with reckless disregard of the truth in preparing his affidavit; (2) the magistrate abandoned his neutral role; (3) the affidavit was lacking indicia of probable cause; or (4) the warrant was facially deficient. At a minimum, therefore, a reasonably well-trained officer must understand that he cannot lie on the affidavit and that he must not be reckless in preparing the affidavit—which means that he must have some understanding of what constitutes “recklessness.” He also must be able to recognize a magistrate who has abandoned his neutral role, which requires knowledge of a magistrate’s typical role; an affidavit totally lacking indicia of probable cause, which requires some knowledge about probable cause; and a facially deficient warrant, which requires some knowledge of what a proper warrant includes. In other words, an officer may not defer totally to a judge or magistrate on the decision of whether a given search will violate the fourth amend-

168. See supra notes 55-78 and accompanying text.
Such complete deference would relieve police officers of their duty to act as additional safeguards of fourth amendment rights.

On the other hand, the Supreme Court did not intend to impose an extremely high knowledge requirement. The Court said, "'[A] warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.'"170 As a result, when the magistrate or judge has issued a warrant, excluding evidence because a reasonably well-trained officer should have known that the search was invalid should be the exception, not the rule.

Requiring officers to be familiar with the intricacies of fourth amendment case law, as the Sixth Circuit did in United States v. Savoca,171 is thus too high a standard. Because magistrates and judges make their decisions primarily based upon judicial precedent, requiring law enforcement officers to be familiar with case law makes them responsible for the same basic source of knowledge. Under this standard, whenever a search warrant subsequently is held invalid because the issuing judge or magistrate made an error, the officer acting upon that warrant presumably made the same error; therefore, good faith arguably is not present whenever the warrant is invalidated. Such a result emasculates the good faith exception and is clearly not what the Supreme Court intended.172

Requiring an officer to be familiar with case law also would create practical problems. Keeping abreast of the ever-changing case law would compel law enforcement officers to take time away from other duties. Law enforcement agencies could hire legal staffs to track these changes and inform the field officers, but such programs probably would be cost-prohibitive.

170. Id. at 923 (quoting United States v. Ross, 456 U.S. 798, 823 n.32 (1982)). The Court also said, "When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." Id. at 924.


172. Even if the officer is not required to be as familiar with case law as judges and magistrates are, a standard based on this same source of knowledge probably would result in more findings of bad faith than the Court intended. In addition, trying to distinguish the case law a magistrate or judge should know from the case law a police officer must know would be extremely difficult.
The Arkansas Supreme Court rule\textsuperscript{173} requiring officers to be familiar with the rules of criminal procedure, however, appears reasonable. Such a standard gives officers a particular source to examine in order to determine the propriety of their actions, yet relieves them of the difficult task of knowing every court decision. In addition, training programs designed to pass this information along to field officers would not be nearly as expensive as those providing knowledge of case law, because case law changes more rapidly than statutory rules and generally requires more interpretation, explanation, and updating. Under a standard requiring knowledge of statutes, however, a training class that explains the current statutes on search and seizure and tells officers where to find the statutes would be sufficient. Agencies could disseminate any pertinent amendments or changes through notices or refresher courses.\textsuperscript{174}

Requiring a reasonably well-trained officer to be familiar with statutes fully satisfies the \textit{Leon} requirements.\textsuperscript{175} Under this standard, officers are responsible for upholding the fourth amendment to some degree and cannot simply defer to judges and magistrates; however, they are not held to such a high standard that courts rarely will admit evidence seized pursuant to an invalid warrant. In addition, this standard gives courts a yardstick by which they can measure the good faith of an officer’s conduct.

\textit{The Definition of Objective Good Faith}

Based on the preceding standard of what a reasonably well-trained officer should know, the definition of objective good faith becomes fairly simple to discern. If the officer complies with the standards he is expected to know, then he has acted in good faith. In other words, as long as the officer’s conduct in obtaining and relying on the warrant does not violate a statute, such as the rules of criminal procedure, the officer acts in good faith.

\textsuperscript{173} See State v. Anderson, 286 Ark. 58, 688 S.W.2d 947 (1985); see also supra notes 71-78 and accompanying text.

\textsuperscript{174} See generally Comment, supra note 57, at 1121.

\textsuperscript{175} Presumably, such statutes explain the role of the magistrate in issuing a warrant, the procedure for filing an affidavit, and the requirements for probable cause to such an extent as to cover the “exceptions to the exception” in \textit{Leon}. See 468 U.S. at 923.
Defining objective good faith by comparing the officer’s conduct to what he should know fully comports with the *Leon* decision. Each court faced with the issue would make this comparison on a case-by-case basis, in accordance with the Supreme Court’s opinion in *Leon*, which held that “suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.” Measuring the officer’s conduct by the required standard of knowledge results in a case-by-case determination of the officer’s *individual* good faith. The three approaches currently used by lower courts to define objective good faith, however, do not involve case-by-case analysis.

The simple “reliance on a warrant equals objective good faith” standard clearly is faulty. Such a standard relieves the officer of any responsibility for upholding the fourth amendment, a result the Supreme Court did not contemplate.

Comparing the facts of a given case to those of *Leon* and *Sheppard* in order to decide whether the officer exercised objective good faith also is faulty. Such an approach focuses on the facts of the case at the expense of examining the officer’s individual good faith. Suppose, for example, a case in which the facts are identical to those of *Leon* except for one detail: the rules of criminal procedure in the jurisdiction state that search warrants based on information provided by witnesses of unproven reliability are invalid. If the test for objective good faith in this fictitious jurisdiction called for comparison with the facts of *Leon*, the court would hold that the officer acted with good faith. If the standard of knowledge that this Note advocates was adopted, however, the officer presumably would be familiar with the rules of criminal procedure. As a result, the officer would not have acted in good faith because he had knowledge that the warrant was invalid. The factual comparison test, therefore, would result in an erroneous decision. One just as easily can imagine a situation in which the officer does act in good faith but the facts of *Leon* and *Sheppard* do not apply.

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176. *Id.* at 918.
177. See supra notes 87-107 and accompanying text.
178. In *Leon*, the informant whose information ultimately led to the investigation and arrest of Alberto Leon was deemed to be of “unproven reliability.” *Leon*, 468 U.S. at 901.
Allowing lower courts to define objective good faith by applying their own criteria provides no improvement over the previous two approaches. Although such a procedure satisfies the "case-by-case" language in *Leon*, it fails to provide courts with an ascertainable standard. This approach, in essence, relies on the notion that courts will know bad faith when they see it. Courts employing this standard would determine the issue on an ad hoc basis, thereby resulting in waste of judicial resources and conflicting precedent. Additionally, law enforcement officers could never be sure whether their actions amounted to good faith conduct. As a result, they most likely would proceed with the search and let a court decide the propriety of their actions later, which could create more fourth amendment violations.

The test this Note proposes, on the other hand, is simple, and courts can apply it without a substantial waste of resources. In addition, law enforcement officers would refrain from proscribed activities because they would know what they can and cannot do. Because the test would encourage officers to refrain from proscribed activities such as illegal searches, the test would prevent fourth amendment wrongs.

*The Exclusivity and Interpretation of the "Exceptions to the Exception"

At one point in *Leon*, the Court indicated that suppression is appropriate only when at least one of the four "exceptions to the exception" is present. The Court also said, however, that suppression should be ordered "only in those unusual cases in which exclusion will further the [deterrent] purposes of the exclusionary rule." These two passages contradict each other unless the Court sees the "exceptions to the exception" as the only circumstances in which suppression of evidence would deter police misconduct. In other words, these two statements are reconcilable only if the "exceptions to the exception" are the sole situations in which police officers can be found to have acted in bad faith.

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179. See supra note 176 and accompanying text.
181. *Id.* at 918 (footnote omitted).
As exemplified by United States v. Merchant,\textsuperscript{182} however, instances can arise where officers act in bad faith but none of the “exceptions to the exception” apply. As a result, courts should not consider the list exclusive, despite the substantial trend to the contrary.\textsuperscript{183} If the Supreme Court truly believed that the list of factors in Leon covered every circumstance in which bad faith may be found, it clearly was wrong. The list of “exceptions to the exception” does not cover every instance of bad faith; nevertheless, the list is valuable because it covers a substantial number of circumstances in which bad faith may occur. The “exceptions to the exception,” therefore, must be applied uniformly.

Under this Note’s proposed test—comparing the officer’s actual conduct with a well-defined model of what he is expected to know—the list becomes easy to interpret. For example, this test easily resolves any difficulty encountered in determining the existence of insufficient probable cause and facial deficiencies in the warrant that render objective reliance on the warrant impossible.\textsuperscript{184} A court simply would look to the statutes applicable to the officers involved. The court should suppress the evidence if, in light of the statutory provisions, the affidavit plainly lacks indicia of probable cause or the warrant is obviously deficient.

Suppressing evidence because the judge or magistrate abandons his neutral role\textsuperscript{185} is a more difficult issue because officers will have difficulty recognizing the absence of judicial neutrality. The test used for this determination, however, should focus on what the individual officer knows or should know about the magistrate’s neutrality and not on the actual neutrality of the magistrate. Any other test would not comport with the purpose of the exclusionary rule—deterrence of police misconduct.\textsuperscript{186} In Leon, the Supreme Court gave one example of when an officer should recognize a non-neutral judge. The Court said, “The exception we recognize today

\textsuperscript{182} 760 F.2d 963 (9th Cir. 1985), cert. granted, 106 S. Ct. 3293 (1986); see supra notes 118-23 and accompanying text.

\textsuperscript{183} See supra note 117 and accompanying text. But see Wasserstrom & Merters, supra note 79 at 116-17 (explaining potential problems that will result if the list of exceptions in Leon is considered exhaustive).

\textsuperscript{184} See supra notes 153-67 and accompanying text.

\textsuperscript{185} Leon, 468 U.S. at 923.

\textsuperscript{186} Id.
will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in Lo-Ji Sales, Inc. v. New York." 187 In Lo-Ji Sales, the Town Justice who issued the warrant actually was present with the officers during the execution of the search. 188 The Supreme Court thus indicated that a court should not decide lightly that a judicial officer abandoned his neutral role. A court should make such a decision only if the magistrate behaved in such a way that the officer applying for the search warrant knew or should have known that the magistrate had abandoned his neutral role.

The final "exception to the exception," suppressing evidence because an officer lied or acted in reckless disregard of the truth in preparing an affidavit, 189 also is easy to apply in light of the proposed standard. An officer easily can tell from statutes and rules, as well as from common sense, that he may not lie and that he must exercise some care in preparing his affidavit. Courts have erred in applying this rule by focusing on the effect of the affidavit on the magistrate or officer instead of on the individual conduct of the officer. 190 Because the purpose of the exclusionary rule is to "deter police misconduct rather than to punish the errors of judges and magistrates," 191 the analysis should focus on the officer's conduct. This Note's recommended test does focus upon conduct by the officer.

CONCLUSION

The good faith exception to the exclusionary rule, as adopted by the Supreme Court, contains several ambiguities: failure to describe what a reasonably well-trained police officer should know, failure to define objective good faith, and failure to explain the purpose and interpretation of the list of "exceptions to the exception." These ambiguities have led to widely divergent applications of the good faith exception by lower courts. Courts must interpret and apply the good faith exception accurately and in a uniform

187. Id. (emphasis added).
189. Leon, 468 U.S. at 923.
190. See supra notes 125-32 and accompanying text.
191. Leon, 468 U.S. at 916 (emphasis added).
manner because the exception is related so closely to fourth amendments rights. The inconsistent applications of the rule by circuit courts and state supreme courts must be eliminated. By recommending solutions to these ambiguities, this Note suggests a simple and uniform way to apply the good faith exception in order to minimize fourth amendment violations.

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