



Summer 6-1-2015

Does It Stay, or Does It Go?: Application of the Good-Faith Exception When the Warrant Relied Upon Is Fruit of the Poisonous Tree

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Does It Stay, or Does It Go?: Application of the Good-Faith Exception When the Warrant Relied Upon Is Fruit of the Poisonous Tree

Alyson M. Cox*

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* Candidate for J.D., Washington and Lee University School of Law, May 2016. I would like to thank Professor Jon Shapiro for serving as my Note advisor and providing valuable input from a practitioner's perspective; Michael Finnell for reviewing multiple drafts and offering indispensable advice; and finally, my family and friends for their constant encouragement.

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I. Introduction

Consider the following scenario. During his evening patrol, Officer Jones pulls over a car for speeding. After approaching the driver's window, Officer Jones notices the driver quickly put out a lit item. Immediately suspicious, the officer asks the man what he had been smoking, to which he replies, "None of your business." Officer Jones searches the man's car for what he suspects to be marijuana. Though the officer does not locate any marijuana, he finds large bags of cocaine under the car's rear seats.

Based on the quantity of cocaine located in the man's car, Officer Jones suspects the man's connection with a significant cocaine distribution ring recently discovered in the area. Thus, he decides to obtain a warrant to search the man's residence. Officer Jones presents an affidavit to the magistrate describing the events that led to his discovery of the cocaine. He gives the magistrate little detail, other than noting his assumption that the man had put out a hand-rolled joint. The magistrate issues a search warrant.

Officer Jones and a few other police officers conduct a search of the man's home pursuant to the issued warrant.¹ The officers discover hundreds of pounds of cocaine throughout the apartment. The officers arrest the man and charge him with possession with

1. For the purposes of this Note's analysis, assume that a court would determine that a sufficient nexus existed between the man's car and his home to validate issuance of the warrant, based on the amount of cocaine found and the ongoing, large-scale narcotics investigation.

the intent to distribute a controlled substance. During pre-trial proceedings, defense counsel files a motion to suppress evidence obtained from the defendant's residence. Counsel argues that the search warrant is based on information obtained in an unconstitutional search of the defendant's car. The court determines that this original search was unconstitutional, but Officer Jones and the other officers relied upon the search warrant in good faith in searching the defendant's residence.

The court now has a decision to make. After concluding that the initial search of the defendant's car was unconstitutional, the court must determine whether the cocaine found within the defendant's home is constitutionally admissible as evidence against him. The court can either exclude the evidence as fruit-of-the-poisonous-tree pursuant to Officer Jones's original unconstitutional search, or admit the evidence due to the officers' good-faith reliance on the search warrant. In order to resolve this issue, one must examine implications of the exclusionary rule² and the good-faith exception³ with respect to this scenario.

The purpose of the exclusionary rule is to influence police behavior and deter unlawful police conduct in order to protect citizens' Fourth Amendment rights.⁴ The Supreme Court has determined that when officers act in good-faith reliance on a search warrant issued by a neutral and detached magistrate, the good-faith exception applies and the exclusionary rule is to be disregarded because such situations do not serve the primary

2. See BLACK'S LAW DICTIONARY 1855 (9th ed. 2009) ("A rule that excludes or suppresses evidence obtained in violation of an accused person's constitutional rights."); see also Michael J. Reed, Jr., *Florida v. Bostick: The Fourth Amendment Takes a Back Seat to the Drug War*, 27 NEW ENG. L. REV. 825, 836 n.109 (1993) ("The exclusionary rule refers to the legal requirement that any evidence obtained in an illegal manner be excluded at trial regardless of how reliable the evidence may be.").

3. See BLACK'S LAW DICTIONARY, *supra* note 2, at 1980 ("An exception to the exclusionary rule whereby evidence obtained under a warrant later found to be invalid (esp. because it is not supported by probable cause) is nonetheless admissible if the police reasonably relied on the notion that the warrant was valid.").

4. See *United States v. Leon*, 468 U.S. 897, 919–21 (1984) (explaining the main purpose of the exclusionary rule); Wayne R. LaFave & Jerold H. Israel, *Crim. Proc.* § 3.1, at 107 (2d ed. 1992) ("The deterrence of unreasonable searches and seizures is a major purpose of the exclusionary rule . . ." (quoting *Elkins v. United States*, 364 U.S. 206 (1960))).

purpose of the exclusionary rule.⁵ Consequently, when determining whether to apply the exclusionary rule, courts must consider whether its purpose is met.⁶

The application of the exclusionary rule requires a fact-specific analysis.⁷ The resolution of whether evidence should be excluded in Officer Jones's scenario largely hinges on who is at fault for the tainted warrant: the magistrate judge for incorrectly concluding that probable cause existed when it actually did not;⁸ or the police officer, for committing an unconstitutional search or seizure or intentionally presenting tainted evidence to the magistrate.⁹ Circuit courts rule differently in similar fact scenarios regarding whether the officers who applied for the search warrant must be an entirely separate group from those who committed the initial unconstitutional act.¹⁰ Circuit courts are also split on whether the good-faith exception applies in any instance where evidence obtained pursuant to an unconstitutional search or seizure taints a subsequent warrant.¹¹

5. See *Leon*, 468 U.S. at 919–21 (noting that exclusion of the evidence in such instances in no way furthers the exclusionary rule's purpose).

6. See Stanley Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith,"* 36 VAND. L. REV. 1511, 1517–18 (1983) (“[B]efore a decision to exclude evidence is justifiable a court must answer the following two questions: First, will the suppression of evidence in a specific case enhance deterrence of illegal police behavior? Second, is the deterrence sufficient to outweigh the damage to other goals of the criminal justice system?”).

7. See *Leon*, 468 U.S. at 918 (“[S]uppression 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.”).

8. See *id.* at 921 (“Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”).

9. See *id.* at 916 (“[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.”).

10. Compare *United States v. McClain*, 444 F.3d 556, 566 (6th Cir. 2006) (“More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search, and Officer Murphy’s warrant affidavit fully disclosed to a neutral and detached magistrate the circumstances surrounding the initial warrantless search.”), with *United States v. Massi*, 761 F.3d 512, 527–28 (5th Cir. 2014) (applying the good-faith exception when the same group of officers who conducted the unconstitutional seizure filed the affidavit seeking a search warrant).

11. See *infra* Part III (demonstrating the circuit split between the Fifth and Sixth Circuits, which apply the exception, the Ninth and Eleventh Circuits, which

This Note evaluates the circuit split regarding the interaction between the good-faith exception to the exclusionary rule and the fruit-of-the-poisonous-tree doctrine. Additionally, this Note argues that the good-faith exception should apply when officers rely on a warrant contaminated by an unconstitutional search or seizure only when (1) the officers who executed the original unconstitutional search or seizure did so in good faith;¹² (2) the officers who applied for the warrant and executed the search pursuant to it were not in any capacity the same officers who committed the initial unconstitutional act (unless certain specifically delineated circumstances are present); and (3) the

do not apply the exception, and the Second and Eighth Circuits, which vary in their conclusions); *see also* *Franks v. Delaware*, 438 U.S. 154, 155 (1978) (noting that this issue does not matter if the affidavit contained sufficient evidence when the tainted evidence is removed to nevertheless establish probable cause).

12. In essence, this prong of the proposed test requires the initial search or seizure to itself be valid and its evidence admissible. If officers conducted the original search pursuant to a warrant, statute, or administrative order that is later deemed unconstitutional, their reliance must have been in good faith under the mandates of *Leon*. If, however, the officers conducted the original search without a warrant, and this warrantless search was actually unreasonable and thus unconstitutional, the officers must have subjectively believed that the act was reasonable and this mistake must have been “understandable” and a “reasonable response to the situation facing them at the time.” *See Hill v. California*, 401 U.S. 797, 803–04 (1971) (upholding a search incident to arrest even though the arrest was made of the wrong person). In *Hill*, the officers believed one man was another in good faith and arrested the wrong man by mistake. *Id.* Although the court determined that their subjective good faith would not alone justify the warrantless search, it asserted that “sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers’ mistake was understandable and the arrest a reasonable response to the situation facing them at the time.” *Id.* The Supreme Court has noted on multiple occasions that

in order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable.

Illinois v. Rodriguez, 497 U.S. 177, 185 (1990). “Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.” *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

officers relied on the issued warrant in good faith, based on *United States v. Leon*.¹³ For the purposes of this proposed test, this Note will assume that the warrant relied upon did not contain sufficient information to establish probable cause absent the tainted evidence.¹⁴ Additionally, it will presuppose that the officers were not deliberately dishonest in the affidavit presented to the magistrate.¹⁵

Part II discusses the relevant background law, including the legal basis for the exclusionary rule, the fruit-of-the-poisonous-tree doctrine, and the good-faith exception to the exclusionary rule.¹⁶ Part III examines the circuit split at issue.¹⁷ Finally, Part IV proposes a novel test for determining the application of the good-faith exception under these circumstances.¹⁸

II. Background Law

A. The Exclusionary Rule

The exclusionary rule, established in *Weeks v. United States*,¹⁹ operates as a “judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.”²⁰ In *Weeks*, the defendant was charged with mailing lottery tickets.²¹ The United States District Court for the Western District of Missouri denied his motion to suppress evidence seized in a warrantless search of his bedroom.²² The Supreme Court reversed,

13. 468 U.S. 897 (1984).

14. See *Segura v. United States*, 468 U.S. 796, 805 (1984) (establishing the independent source doctrine).

15. See generally *Franks v. Delaware*, 438 U.S. 154 (1978) (refusing to admit evidence when the affidavit was based on intentional misrepresentations made by law enforcement).

16. See *infra* Part II (setting forth the background law section of the Note).

17. See *infra* Part III (delineating the circuit split on this issue).

18. See *infra* Part IV (outlining this Note’s argument concerning whether the good-faith exception should be applied and if so, what test courts should invoke).

19. 232 U.S. 383 (1914).

20. *United States v. Leon*, 468 U.S. 897, 906 (1984).

21. See *Weeks*, 232 U.S. at 386 (stating that Weeks was convicted at the United States District Court for the Western District of Missouri).

22. See *id.* at 387–88 (“[W]hile plaintiff was absent . . . certain officers of the government . . . unlawfully and without warrant or authority so to do, broke open

however, finding that the evidence should have been suppressed because otherwise, the “Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution.”²³ Thus, the *Weeks* Court demonstrated the importance of maintaining balance between strict police enforcement and zealous protection of citizens’ constitutional rights. To remedy a Fourth Amendment violation, courts must exclude evidence gained from illegal searches and seizures.²⁴

In *Mapp v. Ohio*,²⁵ the Supreme Court extended *Weeks*’s exclusionary rule to state officials.²⁶ Noting the magnitude of the Fourth Amendment in connection with citizens’ liberties, the Court adamantly reemphasized that the Fourth Amendment applies to all government invasions of citizens’ homes and private realms because the problem “is the invasion of his inalienable right of personal security, personal liberty and private property.”²⁷ Since the establishment of the exclusionary rule in *Weeks* and its extension to the states in *Mapp*, the Court has attempted to strike an ideal balance between effective police enforcement and the defense of citizens’ Fourth Amendment rights. In response to this goal, the Court has gradually accepted various exceptions to the exclusionary rule, to the point that some commentators believe the rule to be essentially lifeless.²⁸ The Supreme Court permitted the

the door to plaintiff’s said home and seized . . . [his belongings] . . . in violation of . . . the 4th and 5th Amendments.”).

23. See *id.* at 391–93 (“This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.”).

24. See *Leon*, 468 U.S. at 908 (“As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.”).

25. 367 U.S. 643 (1961).

26. See *id.* at 656 (“This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial . . .” (citation omitted)).

27. *Id.* at 646–47 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

28. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2511 (1996) (“Whether or not one agrees with the Court’s calculus, it is apparent that the sum of the exceptions generated in the name of finetuning deterrence has created a Fourth Amendment enforcement regime quite different from the one imagined by the Warren Court in *Mapp* and the early post-*Mapp* days.”); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago*

greatest and most far-reaching exception to the exclusionary rule in *United States v. Leon*:²⁹ the good-faith exception.³⁰ This exception led to the scenarios specifically addressed by this Note and will be dealt with in greater detail below.

B. The Fruit-of-the-Poisonous-Tree Doctrine

The fruit-of-the-poisonous-tree doctrine works in concert with the exclusionary rule to exclude secondary evidence obtained as “fruit” of an unconstitutional act, as opposed to evidence with a primary relationship with the unconstitutional conduct.³¹ The Supreme Court set forth this doctrine³² in *Nardone v. United States*.³³ In *Nardone*, the government had obtained evidence in its case against the defendant for fraud through the use of intercepted telephone messages.³⁴ The Supreme Court affirmed the crucial balance between effective police enforcement and the protection of Fourth Amendment rights through its conclusion that evidence seized pursuant to an unconstitutional search or seizure cannot be used against defendants in any fashion, including evidence acquired as a result of the initial constitutional violation.³⁵ In sum, the fruit-of-the-poisonous tree doctrine holds that “evidence unlawfully obtained, including all derivative evidence flowing from

Narcotics Officers, 54 U. CHI. L. REV. 1016, 1019 (1987) (“It now appears that only powerful evidence of the rule’s deterrent effect will save it from further dilution.”).

29. 468 U.S. 897 (1984).

30. See *infra* Part II.C (explaining the good-faith exception in-depth).

31. See WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 3 CRIM. PROC. § 9.3(a) (3d ed. 2014) (explaining the function of the fruit-of-the-poisonous-tree doctrine in relation to the exclusionary rule).

32. See BLACK’S LAW DICTIONARY, *supra* note 2, at 1948 (“The rule that evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence (the ‘fruit’) was tainted by the illegality (the ‘poisonous tree’).”); see also STEPHEN E. ARTHUR & ROBERT S. HUNTER, 1 FEDERAL TRIAL HANDBOOK: CRIMINAL § 33:8 (4th ed. 2014) (“[U]nder the ‘fruit of the poisonous tree’ doctrine, evidence which is located by the police as a result of information or leads obtained from illegally seized evidence is inadmissible in a criminal prosecution.”).

33. 308 U.S. 338 (1939).

34. *Id.* at 339.

35. *Id.* at 340–41.

it, should be suppressed.”³⁶ The Supreme Court has created three exceptions to the fruit-of-the-poisonous-tree doctrine, including the independent source doctrine,³⁷ the inevitable discovery doctrine,³⁸ and the dissipation of the taint doctrine.³⁹ Some scholars pose that the fruit-of-the-poisonous-tree doctrine has been substantially eroded by these various limitations.⁴⁰

C. The Good-Faith Exception

The Supreme Court established the good-faith exception to the exclusionary rule in *United States v. Leon*.⁴¹ *Leon* held that the

36. *United States v. McClain*, 444 F.3d 556, 564 (6th Cir. 2006) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)).

37. See Gary D. Spivey, “Fruit of the Poisonous Tree” Doctrine Excluding Evidence Derived From Information Gained in Illegal Search, 43 A.L.R.3D 385, at I.2a (1978) (“The independent source limitation thus recognizes that proffered evidence which is the product of concurrent, independently conducted investigative processes is not inadmissible under the fruit of the poisonous tree doctrine merely because one of the investigative processes was conducted in an unlawful manner.”). See generally 2 CRIMINAL CONSTITUTIONAL LAW § 11.02(2) (2015) (explaining the origin and reasoning behind the independent source doctrine).

38. See Martin J. McMahon, *What Circumstances Fall Within “Inevitable Discovery” Exception to Rule Precluding Admission, in Criminal Case, of Evidence Obtained in Violation of Federal Constitution*, 81 A.L.R. FED. 331, at I.2 (1978) (“The ‘inevitable discovery’ rule, based on what the police would have discovered eventually, has allowed information obtained in an unlawful search . . . to be admitted, where the evidence would have been discovered in any event through lawful means, even if there had been no violation of a constitutional provision.”). See generally CRIMINAL CONSTITUTIONAL LAW, *supra* note 37 (delineating the rationale and justification for this exception).

39. See CRIMINAL CONSTITUTIONAL LAW, *supra* note 37, at I.2 (“[T]he causal connection between the evidence and the illegality is so attenuated as to dissipate the taint.”); *Segura*, 468 U.S. at 829 (quoting *Brown v. Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part)) (“[T]he notion of the dissipation of the taint 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.”).

40. See generally Mark E. Cammack, *The Rise and Fall of the Constitutional Exclusionary Rule in the United States*, 58 AM. J. COMP. L. 631 (2010) (“Over the past fifty years, however, the constitutional foundations of the exclusionary rules have shifted and their scope has narrowed.”); Alan Copelin, *A Time to Act: Statutory Exceptions to State-Created Exclusionary Rules*, 20 AM. J. CRIM. L. 339 (1993) (“Clearly the deterrent effect of the exclusionary remedy has been diluted by its limitation in scope and its exceptions.”).

41. 468 U.S. 897 (1984). Justice White delivered the majority opinion of the

exclusionary rule does not apply to evidence obtained by a police officer who conducts a search in reasonable reliance on a search warrant issued by a neutral, detached magistrate, which is later determined to be unsupported by probable cause.⁴² In order to resolve the issue of whether or not the exclusionary rule should apply, the Court “consider[ed] once again the tension between the sometimes competing goals of, on the one hand, deterring official misconduct and removing inducements to unreasonable invasions of privacy and, on the other, establishing procedures under which criminal defendants are ‘acquitted or convicted on the basis of all the evidence which exposes the truth.’”⁴³

The Court asserted that the good-faith exception does not resolve whether a constitutional right has been violated.⁴⁴ Rather, the exception involves a judicial determination that exclusion of evidence does not advance the interest of deterring unlawful police conduct and thus does not serve the main purpose of the exclusionary rule.⁴⁵ Despite affirming the good-faith exception’s existence, the Court described four hypothetical situations in which application of the exception would be inappropriate: (1) “if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth;”⁴⁶ (2) if the “issuing magistrate wholly abandoned his judicial role;”⁴⁷ (3) if the warrant was “so facially deficient . . . that

Court, joined by Justices Burger, Blackmun, Powell, Rehnquist, and O’Connor. *Id.* at 899. Justices Brennan, Marshall, and Stevens dissented. *Id.*

42. *See id.* at 920–22 (“In most such cases, 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.”).

43. *Id.* at 900 (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)).

44. *See id.* at 977 (Stevens, J., concurring in part and dissenting in part) (“Today, for the first time, this Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding.”).

45. *See id.* at 909 (majority opinion) (“[If] . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted.”).

46. *Id.* at 923.

47. *Id.*

the executing officers cannot reasonably presume it to be valid;⁴⁸ and (4) if the affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.”⁴⁹

The dissenting Justices voiced concerns regarding the exception’s potential negative effect on police behavior.⁵⁰ Justice Brennan asserted that the good-faith exception will “encourage police to provide only the bare minimum of information in future warrant applications” because they know that if the magistrates grants them a warrant, “all police conduct pursuant to that warrant will be protected from further judicial review” if the circumstances surrounding the warrant’s issuance are not “entirely unreasonable.”⁵¹ Thus, although the Court established an exception to the exclusionary rule, doubts remained concerning the exception’s possible detrimental effect on police behavior.

III. Problem at Issue

A. Circuits That Have Held the Good-Faith Exception Applies

1. U.S. Court of Appeals for the Sixth Circuit

In *United States v. McClain*,⁵² the U.S. Court of Appeals for the Sixth Circuit confronted the issue of whether the good-faith exception to the exclusionary rule permits admission of evidence seized pursuant to a search warrant that was based on an unconstitutional search or seizure.⁵³ A police officer responded to a neighbor’s complaint that lights were on and activity was occurring at a residence that had been vacant for some time.⁵⁴

48. *Id.*

49. *Id.*

50. *See id.* at 944 (Brennan, J., dissenting) (“[T]he Warrant Clause . . . is, or should be, an important working part of our machinery of government, operating as a matter of course to check the ‘well-intentioned but mistakenly overzealous executive officers’ who are part of any system of law enforcement.”).

51. *Id.* at 957.

52. 444 F.3d 556 (6th Cir. 2006).

53. *See id.* at 564 (outlining this issue of first impression within the context of the court’s good-faith exception analysis).

54. *See id.* at 559 (recounting the neighbor of 123 Imperial Point’s complaint that lead to the subsequent police investigation).

When the officer arrived at the scene, he did not notice any signs of movement or criminal activity in the home, but saw that the door was cracked open.⁵⁵ After the officer's backup arrived, they entered the home and found evidence of a marijuana-growing operation in the basement.⁵⁶

Later that night, the responding officer informed the Drug Task Force of this evidence, and the Task Force investigated the possible drug operation.⁵⁷ Weeks later, a drug enforcement officer obtained a warrant to search the defendant's house and five other properties allegedly involved.⁵⁸ The warrant affidavit explicitly relied in part on evidence obtained during the initial warrantless search of the defendant's house⁵⁹ and described the circumstances of that search.⁶⁰ When the warrants were executed, officers recovered 348 marijuana plants and growing equipment.⁶¹

In determining whether to affirm the U.S. District Court for the Middle District of Tennessee's suppression of evidence, the Sixth Circuit recognized the issue as one of first impression.⁶² The

55. *See id.* at 559–60 (“Although Officer Germany had seen no movement in or around the house, or any signs of forced entry or vandalism, or any kind of criminal activity, he was nevertheless concerned that the open door and the lights might be signs that a burglary was in progress . . .”).

56. *See id.* (noting that the officers “observed that the windows were covered with inward-facing reflective paper and that a large room contained a substantial amount of electrical wiring connected to a junction box and what appeared to be plant stimulators”).

57. *See id.* (“While neither officer saw any marijuana in the house or observed any illegal activity, both concluded that a marijuana grow operation was being set up in the basement of the house.”).

58. *See id.* (stating that Officer Murphy of the drug enforcement task force requested the warrant after the property had been under off-and-on surveillance for several weeks).

59. The court determined that the initial warrantless search was unconstitutional because neither probable cause nor exigent circumstances justified it. *See id.* at 562. (“[T]he undisputed facts in this case demonstrate that the police did not have probable cause to believe that a burglary was in progress; hence there was no exigency as a consequence of the possible burglary such that *Johnson* would support the warrantless entry.”).

60. *Id.*

61. *See id.* at 559–61 (noting that the federal grand jury indicted the three defendants for “conspiring to manufacture and to possess with intent to distribute more than 1,000 marijuana plants . . . manufacturing and possessing with intent to distribute 1,000 or more marijuana plants . . . ; and possessing with intent to distribute less than 50 kilograms of marijuana . . .”).

62. *See id.* at 564 (“[W]e must reconcile the ‘good faith’ exception established

court adopted a two-part test for determining the admissibility of evidence via the good-faith exception: (1) the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant must be “close enough to the line of validity” that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct;⁶³ and (2) the resulting search warrant must have been sought and executed by a law enforcement officer in good faith as prescribed by *Leon*.⁶⁴ Applying this test, the court ruled that the good-faith exception applied because the officers who sought and executed the warrants acted in good faith, and the facts surrounding the initial warrantless search were “close enough to the line of validity” to make reliance on the validity of the search warrants objectively reasonable.⁶⁵ The court determined this to be “one of those unique cases in which the *Leon* good faith exception should apply despite an earlier Fourth Amendment violation.”⁶⁶ The court specifically stated, “The facts surrounding these officers’ warrantless entry into the house . . . were not sufficient to establish probable cause to believe a burglary was in progress, but we do not believe that the officers were objectively unreasonable in suspecting that criminal activity was occurring.”⁶⁷ The Sixth Circuit also noted, “[W]e find no evidence that the officers knew they were violating the Fourth Amendment by performing a protective sweep of the home.”⁶⁸

The court asserted that this inquiry is very fact-specific and involves an evaluation of how close the Fourth Amendment

in *Leon* with the ‘fruit-of-the-poisonous-tree’ doctrine first coined in *Nardone v. United States*.” (citations omitted).

63. See *id.* at 563 (“Sometimes the line between good police work and a constitutional violation is fine indeed.”).

64. See *id.* at 565–66 (concluding that “despite the initial Fourth Amendment violation, the *Leon* exception bars application of the exclusionary rule in this case”).

65. See *id.* at 566 (“[E]vidence seized pursuant to a warrant, even if in fact obtained in violation of the Fourth Amendment, is not subject to the exclusionary rule if an objectively reasonable officer could have believed the seizure valid.” (quoting *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989))).

66. *Id.* at 565.

67. *Id.* at 566.

68. *Id.*

violation was to the line of validity, based on the officer's reasonable belief.⁶⁹ The court also emphasized that the officers who conducted the search pursuant to the warrant were not the same as those who committed to original unconstitutional search.⁷⁰ Though the court does not mention this point until late in the opinion, it seems to find this fact particularly compelling. After the court stated that it did "not believe that the officers were objectively unreasonable in suspecting that criminal activity was occurring inside [the defendant's] home" and found "no evidence that the officers knew they were violating the Fourth Amendment by performing a protective sweep of the home," the court asserted that it was even more important that "the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search."⁷¹ Thus, this distinction appears to be of vital importance to the Sixth Circuit in this case.

2. U.S. Court of Appeals for the Fifth Circuit

In *United States v. Woerner*,⁷² the defendant was convicted of possession and distribution of child pornography as the result of independent state and federal investigations monitoring peer-to-peer file sharing.⁷³ State police officers informed local law enforcement that the defendant might be distributing child pornography after tracing videos and pictures of minors engaged in sexual activity to the defendant's computer.⁷⁴ The local officers then conducted a search of the defendant's computers pursuant to

69. The officers who conducted the original search or seizure necessarily could not have thought that they were violating the Constitution, and their actions could not have been objectively unreasonable. *See id.* at 565 (explaining that the circumstances surrounding both the unconstitutional search or seizure and the following issuance of the warrant must be close enough to the line of validity that the officers reasonably believed the initial search was appropriate and the warrant issued was valid).

70. *See id.* at 566 ("More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search . . .").

71. *Id.* at 566.

72. 709 F.3d 527 (5th Cir. 2013).

73. *Id.* at 530–31.

74. *Id.* at 531.

a warrant that they knew was expired.⁷⁵ They found child pornography and arrested the defendant.⁷⁶ Simultaneously, FBI officers obtained a warrant to search the defendant's property after conducting their own undercover operation.⁷⁷ Prior to conducting the search, the FBI agents learned of the prior search and arrest conducted by local officials.⁷⁸ The federal agents went ahead with the search and seized additional evidence.⁷⁹ The FBI agents then interviewed the defendant, and he admitted to having sexual relations with a minor and sharing child pornography.⁸⁰ Special agents obtained warrants to search the defendant's flash drive, external hard drive, and email accounts that had not been seized during prior state and federal searches.⁸¹ The FBI search warrant was partially based on evidence obtained during the original unconstitutional search committed by local law enforcement.⁸²

The defendant moved to suppress the emails seized during the execution of the expired state search warrant along with the fruits of that search.⁸³ Although evidence obtained from the original illegal search was suppressed, the district court refused to suppress evidence obtained pursuant to the third federal search

75. *See id.* (noting that the officers received a warrant to search the defendant's property on July 6, 2010, and knew that it expired in three days, yet conducted the search on July 12, 2010).

76. *Id.*

77. *Id.*

78. *See id.* (stating that FBI agents were preparing to conduct their own search pursuant to a warrant on July 13, 2010, when they were informed of the local search carried out the previous day).

79. *Id.* at 532.

80. *See id.* at 531–32 (noting that the defendant made this confession the following day after two hours of interrogation).

81. *See id.* at 532 (referring to this as “the second federal search warrant”).

82. *See id.* at 534

Statements made by [the defendant] during the custodial interrogation, which were later suppressed as fruits of the unlawful July 12 search, appear in . . . the warrant affidavit supporting the third federal search warrant. . . . [S]uch statements were the only evidence in the warrant affidavit specifically linking [the defendant's] possession of child pornography to the fantastikaktion account.

83. *See id.* at 532–33 (stating that the court suppressed evidence seized from the defendant's home and statements made to the FBI because they were tainted by the unconstitutional search but did not suppress evidence from the FBI's interview of the victim or the later search of the defendant's home).

warrant because “the evidence at issue fell within the good-faith exception to the exclusionary rule.”⁸⁴

In reviewing the U.S. District Court for the Southern District of Texas’s denial of the defendant’s suppression motion, the Fifth Circuit declined to assign a categorical rule concerning application of the good-faith exception, but held that the good-faith exception applied to evidence obtained pursuant to a federal search warrant based on information garnered in an illegal search by state officers.⁸⁵ The court applied the good-faith exception in this case partially because the federal officers were not informed of the local police investigation until after the original unlawful search had been conducted.⁸⁶ Furthermore, no evidence suggested that local authorities intentionally sought to circumvent the exclusionary rule by giving the illegally obtained evidence to the FBI.⁸⁷ Unlike in *McClain*,⁸⁸ the local officers who conducted the original warrant in *Woerner* knew that it was invalid; thus, their search was not conducted in good-faith.⁸⁹ However, the Fifth Circuit still affirmed application of the good-faith exception to the subsequent searches because the FBI agents were unaware of the illegality of this prior search and did not act negligently in their use of its fruits.⁹⁰

The Fifth Circuit noted the four situations in which the good-faith exception does not apply, as set forth in *Leon*⁹¹: (1) “when the issuing magistrate was misled by information in an affidavit that the affiant knew or reasonably should have known was false;”⁹² (2) “when the issuing magistrate wholly abandoned his judicial role;”⁹³ (3) “when the warrant affidavit is so lacking in indicia of

84. *Id.* at 533.

85. *See id.* (stating that suppression of evidence was not justified under the facts of the case at hand).

86. *Id.* at 534.

87. *Id.* at 534–35.

88. *See supra* Part III.A.1 (analyzing *McClain*).

89. *See United States v. Woerner*, 709 F.3d 527, 531 (5th Cir. 2013) (“On July 12, 2010, believing the warrant to be expired, Rodriguez and other state officers executed the expired search warrant . . .”).

90. *See id.* at 535 (noting that the FBI agents could not have known the tainted nature of the warrant).

91. 468 U.S. 897 (1984).

92. *Woerner*, 709 F.3d at 533–34.

93. *Id.*

probable cause as to render official belief in its existence unreasonable;⁹⁴ and (4) “when the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that executing officers cannot reasonably presume it to be valid.”⁹⁵ The Fifth Circuit stated, however, that the case at hand “calls upon us to answer whether the good-faith exception applies . . . when the magistrate’s probable cause finding is based on evidence that was the product of an illegal search or seizure.”⁹⁶ Allowing the good-faith exception to apply in this case, but declining to state a general rule, the Court noted two specific instances when the exception would not apply: (1) “if the officer applying for the warrant knew or had reason to know that the information was tainted and included it anyway without full disclosure and explanation,” or (2) “if the officer responsible for the illegal predicate search provided information—knowing it to be tainted, but concealing that fact—to a second officer for use in a successive search warrant application.”⁹⁷

The Fifth Circuit addressed this convergence of the fruit-of-the-poisonous-tree doctrine and the good-faith exception again in *United States v. Massi*.⁹⁸ In *Massi*, the Air Marine Operations Center requested that local police conduct a “ramp check”⁹⁹ on the defendant’s plane while it was stopped in Texas en route from Las Vegas to Orlando.¹⁰⁰ At 6:20 PM, the Homeland Security Investigations directorate was contacted and arrived at the scene.¹⁰¹ The defendant and his pilot refused to consent to a search

94. *Id.*

95. *Id.*

96. *See id.* at 534 (noting that statements made by the defendant that were later suppressed as fruits of the unlawful search were included in the affidavit supporting the third federal search warrant and were admittedly “the only evidence in the warrant affidavit specifically linking [the defendant’s] possession of child pornography to the fantastikaktion account”).

97. *Id.*

98. 761 F.3d 512 (5th Cir. 2014).

99. *See id.* at 518 (describing the ramp check procedure).

100. *See id.* at 517–18 (stating that the AMOC investigated the defendant’s plane because (1) it had flown from Orlando to Las Vegas, made six stops, and stayed in Las Vegas for only a few hours; (2) the plane’s owner was previously convicted of drug trafficking; and (3) the defendant had recently traveled from Mexico into the U.S.).

101. *See id.* at 518 (noting that the local police officers questioned the defendant and his pilot and asked for their documentation prior to Homeland

of the interior of the plane.¹⁰² Approximately one hour later, federal agent Howard arrived and gained permission from the U.S. Attorney General to request a search warrant.¹⁰³ He obtained the signed warrant at 11:30 PM.¹⁰⁴ Officers conducted a search pursuant to the warrant at midnight and found a large amount of marijuana.¹⁰⁵ The officers detained the defendant during the entire investigation.¹⁰⁶ The defendant argued that this lengthy detention amounted to an illegal seizure and “his unconstitutional detention taints evidence obtained as a result of the search warrant’s execution and that such evidence should be excluded as fruit of the poisonous tree.”¹⁰⁷

In determining whether the U.S. District Court for the Western District of Texas erred in denying the defendant’s motion to suppress the marijuana,¹⁰⁸ the Fifth Circuit acknowledged the lack of jurisprudence on the application of the good-faith exception for evidence acquired based on a tainted warrant.¹⁰⁹ As in *Woerner*, the Fifth Circuit concluded that the situation should not be viewed

Security’s arrival).

102. *See id.* at 519 (stating that the defendant quickly attempted to shut the plane door, and officers noticed a large box inside of the plane, which the defendant initially denied knowledge of, but later admitted ownership of).

103. *See id.* (noting that Agent Howard investigated the scene for two hours prior to gaining permission to obtain a warrant but did not interrogate the defendant, though the defendant and his pilot were required to stay at the airport).

104. *Id.*

105. *See id.* (“Nineteen sealed bags of marijuana with a total weight of 10.50 kilograms were found within the cardboard box. Upon this discovery, Massi and Sanchez were immediately arrested, informed of their rights, and taken into custody.”).

106. *See id.* at 517–19 (delineating the timeline of the investigation, which lasted approximately six hours).

107. *See id.* at 520 (noting that the defendant contended that “his detention was without reasonable suspicion, lacked probable cause, and was of a length that violated the Fourth Amendment . . . and that his unconstitutional detention taints evidence obtained as a result of the search warrant’s execution”).

108. *See id.* at 520 (“The court held that there was ‘initial reasonable suspicion to make the stop and that it developed into probable cause’ justifying continuing the stop.”).

109. *See id.* at 536–37 (“The question of whether the good faith exception can permit the admissibility of evidence over a possible taint caused by an earlier-in-time detention in violation of the Fourth Amendment that would otherwise warrant exclusion as fruit of the poisonous tree, is not territory frequented in our jurisprudence.”).

as a fifth instance where the good-faith exception would not apply, but as a corollary to the first scenario listed in *Leon*, where the affiant misled the magistrate.¹¹⁰ The Fifth Circuit adopted the following two-part test to determine whether the good-faith exception should apply:

(1) [T]he prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant must be ‘close enough to the line of validity’ that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct, and (2) the resulting search warrant must have been sought and executed by a law enforcement officer in good faith as prescribed by *Leon*.¹¹¹

The Fifth Circuit determined that suppressing the evidence would not serve the purpose of the exclusionary rule because the federal agent in the present case “did not have the benefit of our judicial hindsight as he worked to obtain and execute a search warrant”¹¹² Thus, the Fifth Circuit in this case essentially adopted the test and reasoning coined by the Sixth Circuit in *McClain*.¹¹³

B. Circuits That Have Held the Good-Faith Exception Does Not Apply

1. U.S. Court of Appeals for the Ninth Circuit

In *United States v. Vasey*,¹¹⁴ an officer pulled over the defendant for speeding.¹¹⁵ The defendant acted suspiciously, so the

110. *Id.* at 526, 531–32 (“We conclude that the issue presented by Massi’s circumstances is more easily considered under *Leon* by equating the misleading of the issuing magistrate as to a possible constitutional violation through an omission with the first *Leon* scenario, submission of an affidavit with affirmatively misleading information.”).

111. *Id.* at 528.

112. *Id.* at 532.

113. 444 F.3d 556 (6th Cir. 2005); *see also supra* Part III.A.1. (explaining the test used by the Sixth Circuit).

114. 834 F.2d 782 (9th Cir. 1987).

115. *Id.* at 784.

officer handcuffed him and searched his car.¹¹⁶ He then arrested the defendant due to an outstanding felony drug warrant.¹¹⁷ Following the arrest, the officer asked the defendant if he could search the car, and the defendant denied consent.¹¹⁸ Nevertheless, after another officer arrived,¹¹⁹ they conducted a warrantless inventory search of the car.¹²⁰ Based on an affidavit outlining these events, the officers obtained a search warrant to conduct a more in-depth search of the defendant's car.¹²¹ That search unveiled \$71,111 in cash and three kilograms of cocaine.¹²²

The U.S. District Court for the Western District of Washington initially found that both the warrantless and warrant-backed searches of the defendant's car violated his Fourth Amendment rights.¹²³ On the government's appeal, the Ninth Circuit found that the initial warrantless search was unconstitutional.¹²⁴ The court held that the subsequently obtained warrant was not supported by probable cause without the evidence obtained from the warrantless search.¹²⁵ The court rejected the government's argument that the

116. *See id.* ("As he approached the car, Officer Jensen believed he saw Vasey stuffing his hand between the seats and handling something furtively on the right rear floorboard. Vasey contends he was merely unfastening his seatbelt and reaching for his wallet to retrieve his license.").

117. *Id.*

118. *Id.*

119. *See id.* (stating that the officers were suspicious that the defendant was engaged in drug-related activities and noticed a container of pills through the window, though the bottle was labeled as food supplement and the defendant told the officers he sold them for a living).

120. *See id.* at 784–85 (noting that the officers located \$1,128 in cash on the defendant, and \$5,000 and a gold watch underneath the driver's seat).

121. *Id.* at 785.

122. *Id.*

123. *See id.* (finding that the warrantless search was not covered by an exception to the warrant requirement, and therefore the \$5,000 and gold watch were illegally obtained, and the warrant was not supported by probable cause once mention of these items were excluded from the affidavit).

124. *See id.* at 787 (asserting that "the search was not properly limited to the area within [the defendant's] immediate control" and thus was not allowed as incident to arrest, nor was the search protected by the prophylactic rule because the officers conducted the search thirty to forty-five minutes after the defendant's arrest).

125. *See id.* ("[I]nclusion of tainted evidence in an affidavit does not, by itself, taint the warrant or the evidence seized pursuant to the warrant. . . . A reviewing court should excise the tainted evidence and determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to

good-faith exception should protect evidence obtained pursuant to the search warrant.¹²⁶

The Ninth Circuit distinguished *Vasey* from *Leon* by emphasizing that the officer in *Leon* acted in good faith both when obtaining the evidence and presenting it to the magistrate.¹²⁷ The Ninth Circuit noted that in *Leon* “[t]he only error in the entire process was the magistrate’s erroneous finding that the evidence established probable cause.”¹²⁸ The officer in *Vasey*, however, conducted an illegal warrantless search, which the magistrate knew of, and the magistrate issued the warrant partially based on the tainted evidence from the initial illegal search.¹²⁹ Therefore, the court refused to apply the good-faith exception because application of the exclusionary rule would deter intentionally unconstitutional police conduct.¹³⁰

2. U.S. Court of Appeals for the Eleventh Circuit

In *United States v. McGough*,¹³¹ the Eleventh Circuit addressed the issue of whether the good-faith exception applied when a prior unconstitutional search of the defendant’s residence tainted the subsequently obtained search warrant.¹³² Officers responded to the defendant’s apartment pursuant to an accidental call by the defendant’s daughter, who had been locked inside the apartment while the defendant went to pick up pizza.¹³³ When the

issue a warrant.”).

126. *See id.* at 789 (“This argument is without merit. . . . The *Leon* analysis and good-faith exception are not applicable to this case.”).

127. *See id.* (“The evidence obtained in the warrant search was deemed admissible by the *Leon* Court, however, because the officer acted in good faith.”).

128. *Id.*

129. *See id.* (“The constitutional error was made by the officer in this case, not by the magistrate as in *Leon*.”).

130. *See id.* (“The *Leon* Court made it very clear that the exclusionary rule should apply (i.e. the good-faith exception should not apply) if the exclusion of evidence would alter the behavior of individual law enforcement officers or the policies of their department.”).

131. 412 F.3d 1232 (11th Cir. 2005).

132. *See id.* at 1235–36 (outlining the issues raised by the defendant on appeal concerning the lower court’s refusal to suppress evidence).

133. *See id.* at 1233 (stating that the five-year-old had meant to call her aunt and hung up when she realized that she had called 911 instead).

defendant returned home, officers arrested the defendant for reckless conduct.¹³⁴ While waiting for the daughter's aunt to arrive, the officers asked the defendant permission to search his apartment, which he refused.¹³⁵ When an officer took the defendant's daughter back inside to get her belongings, he noticed marijuana and a handgun.¹³⁶ The officers then obtained a warrant and found more marijuana and cash within the apartment.¹³⁷ The U.S. District Court for the Northern District of Georgia denied the defendant's motion to suppress.¹³⁸

The Eleventh Circuit ruled that the officers' re-entry into the apartment was unconstitutional¹³⁹ and the good-faith exception did not apply.¹⁴⁰ Citing *Leon*, the court held that the police conduct in this case did not qualify as "objectively reasonable law enforcement activity."¹⁴¹ The court held that the good-faith exception did not apply because the officer's entry into the apartment to get the defendant's daughter's belongings was objectively unreasonable.¹⁴² The Eleventh Circuit created a dichotomy between "objectively reasonable law enforcement activity" and unlawful searches and thus refused to apply the good-faith exception where "the search affidavit was tainted with

134. *See id.* at 1234 (noting that the officers thought the defendant's daughter looked scared and like she wanted to get out of the apartment).

135. *See id.* (stating that from this time forward, the defendant was in custody and in the back of the squad car).

136. *See id.* (asserting that the magistrate "found that there was no immediate threat or danger that necessitated the officers entering [the defendant's] apartment").

137. *See id.* at 1235 (stating that in total, the officers found marijuana in four different locations around the apartment, a 12 gauge shotgun, a .25 caliber handgun, several rounds of ammunition, and bags of cash).

138. *See id.* (noting that the defendant "argued that the officers had no legal authority to enter his apartment, and that Officer Brock's search warrant could not be used to retroactively validate the prior illegal entry and search").

139. *See id.* at 1236–39 (rejecting the government's argument that the warrantless search was valid pursuant to the officers' community caretaking function because no immediate threat necessitated the officers' entry).

140. *See id.* at 1239–40 (making this determination based on a fact-specific analysis of the case at hand).

141. *Id.* at 1240.

142. *See id.* at 1239 ("[T]he exigencies of the situation—[the daughter's] need for her shoes—are not compelling enough to find that the officers' warrantless entry into [the defendant's] apartment was objectively reasonable.").

evidence obtained as a result of a prior, warrantless, presumptively unlawful entry into a personal dwelling.”¹⁴³ The court excluded the evidence solely because the officers were not legally permitted to enter the defendant’s apartment under the circumstances.¹⁴⁴

C. Circuits That Have Held Both Ways

1. U.S. Court of Appeals for the Second Circuit

In *United States v. Thomas*,¹⁴⁵ eight defendants were charged with serious narcotics, firearm, and RICO violations.¹⁴⁶ At trial, the government presented evidence obtained from nine extensive undercover investigations and various searches over the course of nine years, including searches of two of the defendants’ apartments.¹⁴⁷ One of these searches was conducted pursuant to a warrant,¹⁴⁸ for which probable cause was established largely due to a canine sniff outside the apartment.¹⁴⁹ The officers did not locate narcotics in the apartment, but did obtain “papers pertaining to auto registration, insurance, taxes and the like” and a bullet-proof vest.¹⁵⁰ The defendant claimed that the canine search was illegal, and therefore evidence obtained from his apartment should have been suppressed.¹⁵¹

143. *Id.* (quoting *United States v. Meixner*, 128 F. Supp. 2d 1070, 1078 (E.D. Mich. 2001)).

144. *See id.* (“The evidence obtained as a result of the police officers unlawful entry into [the defendant’s] apartment should be suppressed.”).

145. 757 F.2d 1359 (2d Cir. 1985).

146. *Id.* at 1361.

147. *See id.* at 1365 (explaining the extent of the evidence presented, including the testimony of 121 witnesses).

148. *See id.* at 1366 (“The underlying affidavit also stated that Wheelings had been identified by a reliable informant as a narcotics dealer . . . and that when arrested the previous day, he had quickly closed the door of his apartment behind him in a suspicious manner, indicating the existence inside of contraband.”).

149. *See id.* (indicating that the canine sniff alerted officers that narcotics were present in the apartment).

150. *Id.*

151. *See id.* at 1365–66 (stating that this claim was based on the assertion that untainted probable cause did not exist to issue the warrant).

The Second Circuit held that the dog sniff constituted an illegal search of the defendant's apartment,¹⁵² and evidence obtained pursuant to it could not be relied upon in evaluating the search warrant.¹⁵³ The court also found that the affidavit did not contain sufficient information to establish probable cause after removing the tainted evidence from consideration.¹⁵⁴ Yet the court concluded that the good-faith exception applied to the case at hand because there was "nothing more the officer could have or should have done under these circumstances to be sure his search would be legal."¹⁵⁵ The officer brought evidence of narcotics within the apartment based on the canine sniff to a neutral magistrate, who determined that probable cause existed.¹⁵⁶ The Second Circuit concluded that it was reasonable for the officer to rely upon the magistrate's determination in his execution of the warrant.¹⁵⁷

The Second Circuit addressed this issue again in *United States v. Reilly*.¹⁵⁸ Here, officers smelled the odor of marijuana coming from the defendant's cottage on his property.¹⁵⁹ They then found a clearing about one-hundred feet from the cottage that contained

152. *See id.* at 1367 ("Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation.").

153. *Id.*

154. *See id.* at 1368 (asserting that the "totality of the circumstances" does not establish probable cause in this instance).

155. *Id.* In the case at hand, the underlying illegal search consisted of a dog sniff outside of the defendant's apartment. Keeping in mind the amount of precedent that deems dog sniffs to be less intrusive than other searches, the Second Circuit presumptively considered the police officers' misunderstanding of Fourth Amendment jurisprudence in this realm to be reasonable. *See id.* at 1366 ("Canine sniffs are recognized as being less intrusive than a typical search used to determine the presence of contraband, and the practice of using trained dogs to sniff baggage at airports has been held not to constitute a search."). Though the court ultimately held this dog sniff to be unconstitutional due to heightened privacy interests within the home, the importance of this element might not have been readily apparent to the police officers. *See id.* ("It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can never be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy.").

156. *Id.*

157. *Id.*

158. 76 F.3d 1271 (2d Cir. 2006).

159. *See id.* at 1274 (noting that the officers visited the cottage a year earlier and smelled marijuana but did not enter the property because a dog was present).

approximately twenty marijuana plants.¹⁶⁰ Later that day, the officers obtained a search warrant for the cottage and the defendant's main residence and found more marijuana plants.¹⁶¹ The Second Circuit first found that the officers violated the defendant's Fourth Amendment rights in their search of his curtilage¹⁶² and that the good-faith exception did not save the evidence obtained pursuant to the warrant.¹⁶³ The Second Circuit did not overrule its decision in *Thomas*, but rather differentiated the two cases on the facts.¹⁶⁴ Unlike the officers in *Thomas*, who presented evidence to the magistrate concerning the dog sniff in good faith,¹⁶⁵ the officers in this case had every reason to know that the Fourth Amendment protects curtilage and "undertook a search that caused them to invade what they could not fail to have known was potentially [the defendant's] curtilage."¹⁶⁶ Additionally, the officers failed to provide the issuing magistrate with a detailed account of their actions.¹⁶⁷ Based on these facts, "there was a lot more the officers could have or should have done . . . to be sure [their] search was legal."¹⁶⁸

Thus, as demonstrated by the Second Circuit's analysis, evidence should not be excluded in cases where an officer does everything in his or her power to make sure the search is legal.¹⁶⁹

160. See *id.* (stating that the officers left the property after finding the plants).

161. See *id.* (relaying that the officers found around fifteen marijuana plants in the cottage and one-hundred-and-fifteen plants growing in the wooded area).

162. See *id.* at 1276–79 (using the four elements identified in *United States v. Dunn*, 480 U.S. 294, 301 (1987)—proximity, enclosure, use, and visibility—to determine whether the searched area qualified as curtilage).

163. See *id.* at 1280 ("Though we are sympathetic to the good-faith exception and to the notion that evidence seized under a warrant should not be excluded simply because the magistrate erred in issuing the warrant, we find that the good-faith exception does not apply in this case." (citation omitted)).

164. See *id.* at 1283 ("But this is neither the time nor the place to reconsider our holding in *Thomas* and we do not wish to do so.").

165. See *id.* at 1281 ("[The officer in *Thomas*] did not have any significant reason to believe that what he had done was unconstitutional.").

166. *Id.*

167. See *id.* at 1280–81 ("The affidavit gave no description of the cottage, pond, gazebo, or other characteristics of the area. At no time did it provide any information regarding distances or internal fencing.").

168. *Id.* at 1281.

169. See *id.* at 1282 ("By recognizing that, in this case, good faith was precluded by the officers' failure to provide the issuing judge with the details of

Therefore, according to the Second Circuit, it matters whether or not the warrant was received in good faith, not only relied upon in good faith.¹⁷⁰ The court emphasized that “the good-faith exception requires a sincerely held and objectively reasonable belief that the warrant is based on a valid application of the law to *all the known facts*.”¹⁷¹ Without information concerning the lay of the land and the officers’ actions, the court determined that the magistrate “could not possibly make a valid assessment of the legality of the warrant that he was asked to issue.”¹⁷² However, the Second Circuit did not rule that “the fruit of illegal searches can never be the basis for a search warrant that the police can subsequently use in good faith.”¹⁷³ Rather, whether or not the good-faith exception should apply depends on which party is to blame for defects within the issued warrant.¹⁷⁴

2. U.S. Court of Appeals for the Eighth Circuit

In *United States v. White*,¹⁷⁵ officers stopped the defendant at an airport due to his suspicious behavior.¹⁷⁶ The defendant agreed to speak with them but did not allow them to search his luggage.¹⁷⁷ He repeatedly asked if he could leave with his luggage,¹⁷⁸ but the

their dubious pre-warrant conduct, we affirm the *Thomas* principle . . .”).

170. See *id.* at 1280 (“Good faith is not a magic lamp for police officers to rub whenever they find themselves in trouble.”).

171. *Id.* at 1273.

172. See *id.* (“Here, information about the distances involved, the layout, conditions, and other like particulars of Reilly’s land was crucial.”).

173. *Id.* at 1280–81.

174. See *id.* at 1281 (“[I]t is one thing to admit evidence innocently obtained by officers who rely on warrants later found invalid due to a magistrate’s error. It is an entirely different matter when the officers are themselves ultimately responsible for the defects in the warrant.”).

175. 890 F.2d 1413 (8th Cir. 1989).

176. See *id.* at 1414–15 (noting that the officers observed that the defendant exited the flight close to last, was traveling alone, carrying a small bag, looked around often, and appeared nervous).

177. See *id.* at 1415 (stating that the officers told the defendant that he exhibited the characteristics of someone trafficking narcotics and “that the search would be brief”).

178. See *id.* (noting that the defendant supposedly asked to leave with his bags six or seven times).

officers told the defendant that while he was free to go, he could not take his bags with him.¹⁷⁹ A dog alerted the presence of drugs in the carry-on bag.¹⁸⁰ The defendant left without his luggage, and the officers obtained a warrant to search it the following morning.¹⁸¹ The officers found a package of cocaine in the carry-on bag and used that evidence to apply for a warrant to search the larger bag, which ultimately was found to contain no evidence of narcotics trafficking.¹⁸²

The Eighth Circuit held that the officers did not have an adequate basis to conduct a *Terry* stop in this case, and thus the detention was an unlawful seizure.¹⁸³ However, the court applied the good-faith exception¹⁸⁴ because “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.”¹⁸⁵ The court held that “[i]t was objectively reasonable (even though legally incorrect) for the officers to believe that the information contained in the affidavit for the warrant was lawfully obtained.”¹⁸⁶ The facts surrounding the original search¹⁸⁷ were “close enough to the line of validity” that the court determined, despite the Fourth Amendment violation, the fruits of the search should be entered into evidence.¹⁸⁸ The court asserted that various factors in this case push it “into the gray area created by *Leon*.”¹⁸⁹

179. *See id.* (“The bags would have to stay in order to allow a narcotics detection dog to sniff them.”).

180. *Id.*

181. *Id.*

182. *Id.*

183. *See id.* at 1416–17 (asserting that the initial consensual encounter transformed into a *Terry* stop and the officers did not have “sufficient grounds to form a reasonable, articulable suspicion of criminal activity in order to detain [the defendant’s] bags,” though this was a “very close case”).

184. *See id.* at 1414 (upholding the district court’s refusal to suppress evidence obtained pursuant to the warrant).

185. *Id.* at 1419.

186. *Id.* at 1414.

187. *See id.* at 1419 (listing factors such as “[t]he purchase of the ticket for cash, plus the incremental effect of the other factors present in this case”).

188. *Id.*

189. *Id.*

The Eighth Circuit revisited this issue again in *United States v. O'Neal*.¹⁹⁰ In *O'Neal*, officers at a bus stop watching for possible drug transactions approached the defendant and his brother.¹⁹¹ While the suspects were being questioned, an officer seized the defendant's carry-on bag in order to conduct a canine sniff test.¹⁹² The defendant then admitted that the bag contained cocaine.¹⁹³ A dog alerted the presence of drugs in the bag, and the officers obtained a search warrant, yielding cocaine.¹⁹⁴

The Eighth Circuit found that although the officers did not have sufficient reasonable suspicion to seize the defendant's bag,¹⁹⁵ the defendant's admission that drugs were in the bag provided a valid basis for issuance of the warrant.¹⁹⁶ Determining the validity of a search warrant involves consideration of all the facts, and the defendant's confession provided a sufficient basis for probable cause.¹⁹⁷

However, the Eighth Circuit found it important to note its rejection of the government's good-faith argument in this case.¹⁹⁸ The court followed its prior ruling in *White*, while reaching the opposite outcome based on the facts at hand.¹⁹⁹ Unlike in *White*,

190. 17 F.3d 239 (8th Cir. 1994).

191. *See id.* at 240 (stating that the defendant and his brother had traveled from Chicago to Minneapolis).

192. *Id.*

193. *See id.* (asserting that the defendant made this admission to another officer once his bag had been seized).

194. *See id.* (noting that the defendant was arrested before the officers obtained the search warrant).

195. *See id.* at 241–42 (“There is nothing in the evidence to suggest that [the defendant's] conduct prior to the seizure was anything but unremarkable.”).

196. *See id.* at 243 (“[The defendant] does not challenge the admission on appeal, and we therefore must accept the lower court's determination that the admission was voluntarily given in a non-custodial encounter with the police.”).

197. *See id.* at 244 (“Clearly, a voluntary statement admitting to a police officer that one's bag contains drugs is adequate to support a finding of probable cause.”).

198. *See id.* at 243 n.6 (“The government urges on appeal that ‘even if this Court disagrees with the district court's finding of a reasonable suspicion, the denial of the defendant's motion to suppress should still be affirmed’ under the good-faith rule of *United States v. Leon* . . .”).

199. *See id.* (stating that no officer could believe in good faith that the defendant was engaged in criminal conduct, and that “[i]f the method by which evidence supporting a search warrant is seized is clearly illegal . . . evidence obtained under the resulting warrant should be excluded”).

where the facts were “close enough to the line of validity” that the officers were entitled to a good faith belief that reasonable suspicion existed, the facts in *O’Neal*, according to the court, did not place the case “into the gray area created by *Leon*.”²⁰⁰ It noted that “[i]f the method by which evidence supporting a search warrant is seized is clearly illegal, then even under *Leon* and *White*, evidence obtained under the resulting warrant should be excluded.”²⁰¹ The court ruled that a magistrate’s issuance of a search warrant could not sanitize prior illegal conduct when the method used to seize the evidence supporting the search warrant was clearly illegal.²⁰² Noting the purpose of the exclusionary rule as stated in *Leon*, the Eighth Circuit asserted that police misconduct was the underlying problem in this case, and thus the good-faith exception should not apply.²⁰³

IV. *The Importance of Resolving the Current Circuit Split*

In *United States v. Leon*, the Supreme Court established deterrence of unlawful police behavior as the main purpose of the exclusionary rule.²⁰⁴ The rule as applied should influence and shape law enforcement activity in order to discourage Fourth Amendment violations.²⁰⁵ The Court warned that this goal should

200. See *id.* (“No facts prior to the seizure of O’Neal’s bag could reasonably support the seizure. No officer could in good faith believe that the facts would lead a reasonable person to believe that O’Neal was involved in criminal activity.”).

201. *Id.*

202. See *id.* (asserting that the facts of this case are not close enough to the “line of validity” for the good-faith exception to apply).

203. See *id.* (“If clearly illegal police behavior can be sanitized by the issuance of a search warrant, then there will be no deterrence, and the protective aims of the exclusionary rule will be severely impaired if not eliminated.”).

204. See *supra* Part II.A (explaining the purpose behind the exclusionary rule); see also Dep’t of Justice, “*Truth in Criminal Justice*” Series Office of Legal Policy: *The Search and Seizure Exclusionary Rule*, 22 U. MICH. J.L. REFORM 573, 605 (1989) (“The *Leon* opinion justified the creation of a ‘good faith’ exception almost totally with reference to deterrence, which the majority now clearly sees as the *raison d’être* of the exclusionary rule.”).

205. See Dep’t of Justice, *supra* note 204, at 577 (noting that deterrence of Fourth Amendment violations through removing incentive for police misconduct serves as the most common rationale for continuance of the exclusionary rule); Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MIL. L. REV. 211, 217 (2012) (examining specific and

not be pursued single-mindedly, however.²⁰⁶ Though exclusion of evidence ideally leads to reduced police misconduct, courts must balance this against the “substantial social costs exacted” by an “unbending application of the exclusionary sanction” that unnecessarily impedes the truth-finding function of the justice system.²⁰⁷ Thus, when applying the exclusionary rule, courts must balance two central interests:²⁰⁸ (1) the Fourth Amendment protections awarded to citizens, which embody deeply valued privacy interests, and (2) efficient and effective police enforcement.²⁰⁹

This reasoning led the *Leon* Court to establish the good-faith exception to the exclusionary rule.²¹⁰ Though deliberate and significant police misconduct justifies exclusion of evidence,²¹¹ the

general deterrence implicated by the exclusion of evidence illegally gathered); Thomas K. Clancy, *Extending the Good Faith Exception to the Fourth Amendment's Exclusionary Rule to Warrantless Seizures That Serves as a Basis for the Search Warrant*, 32 HOUS. L. REV. 697, 712 (1995) (“[T]he purpose of the exclusionary rule is to promote specific and systemic deterrence.”).

206. See Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good-Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 490–91 (2006) (“To let the guilty go free . . . because of the defense’s using the hammer of the suppression motion to enhance its defense bargaining power would . . . generate disrespect for the law and administration of justice, at least where police transgressions . . . were done in objectively reasonable good faith.” (internal quotation omitted)); *Stone v. Powell*, 428 U.S. 465, 490–91 (1976) (“Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.”).

207. *United States v. Leon*, 468 U.S. 897, 907 (1984) (quoting *United States v. Payner*, 447 U.S. 727, 734 (1980)).

208. See *id.* (“[The Court] has evaluated suppression questions by weighing whether exclusion in a particular context would result in sufficient deterrence of future misconduct to counterbalance the cost to society in freeing the guilty. It was exactly this ‘balancing’ approach that led to the ‘good faith’ exceptions in *Sheppard* and *Leon*.”); Gretchan R. Diffendal, *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, 233 (1994) (“The deterrent effect should be balanced against the cost of suppressing the evidence, and the good-faith exception should apply only when there would be no dissuasive effect on the officer’s behavior.”).

209. *Id.*

210. See Part II.C (explaining the good-faith exception as established in *Leon*).

211. See Milhizer, *supra* note 205, at 217 (“[B]ecause police are ‘engaged in the often competitive enterprise of ferreting out crime,’ the threat that illegally

exclusionary rule's goal of deterrence is not served when officers rely on a warrant in objective good faith.²¹² Rather, this would only deter police officers from fulfilling their duties.²¹³ The Court noted that "[w]here the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force."²¹⁴ Thus, the good-faith exception maintains the same purpose as its parent, the exclusionary rule. Both doctrines aim to positively influence police behavior and strike an ideal balance between the protection of Fourth Amendment rights and effective law enforcement.²¹⁵

Consequently, the current circuit split bears real and practical implications regarding police action.²¹⁶ When courts apply the good-faith exception to cases where warrants are fruit of the poisonous tree, concerns arise regarding whether this behavior can be, and should be, deterred. This inconsistency in federal case law has existed for years,²¹⁷ but the split has perpetuated this issue

gathered evidence would be excluded will restrain egregious ferreting and cause police to stay within constitutional bounds.").

212. *But see Leon*, 468 U.S. at 955 (Brennan, J., dissenting) (arguing that the good-faith exception will encourage police ignorance of the Fourth Amendment). This concern of Justice Brennan's must be kept in mind while fashioning tests concerning when the good-faith exception applies. Proposed tests must strike a balance between effective police enforcement and protection of Fourth Amendment rights, and not neglect the fervent guarding of citizens' rights, as was Justice Brennan's concern in adopting the good-faith exception. *See id.* at 960 ("In time this or some later Court will restore these precious freedoms to their rightful place as a primary protection for our citizens against overreaching officialdom.").

213. *See Taslitz*, *supra* note 206, at 492 ("Similarly, police who act in good faith could not have, and therefore will not in the future have, their behavior altered by suppression, unless exclusion makes them less willing to do their duty, an undesirable outcome.").

214. *United States v. Leon*, 468 U.S. 897, 919 (1984).

215. *See* Brian D. Smith, *Constitutional Law—Fourth Amendment—Good Faith Exception to the Exclusionary Rule*, 34 DUQ. L. REV. 231, 243 (1995) ("Courts must balance the purposes of the good faith exception with the possible erosion of Fourth Amendment rights due to judicial and political abuse. The good faith exception cannot become a legal excuse for police to abuse inalienable rights to be free from unreasonable searches and seizures.").

216. This inconsistency could arguably lead to some people, depending on where they reside, receiving greater constitutional protections than others.

217. This specific issue has been analyzed by scholars in the past, but with respect to a slighter amount of case law. The longer the circuit split perpetuates, the greater the issue becomes due to the introduction of new tests and approaches by the courts, and thus the urgency of the problem at hand increases. *See generally* Janine L. Hochberg, *Dining in Good Faith on Poisonous Fruit?* 15 WIDENER L. REV. 301 (2009) (addressing the intersection of the good-faith

and become more drastic as additional tests are created by the courts.²¹⁸ For instance, in 2013 the Fifth Circuit in *United States v. Woerner*²¹⁹ applied the good-faith exception in a complex scenario where federal officers relied upon a search warrant that depended on evidence obtained by local police officers during execution of a search warrant that the local officers knew to be expired.²²⁰ Admission of evidence in this factual situation raises issues concerning parallel investigations previously unaddressed.

Confronted with this same issue a year later, the Fifth Circuit in *United States v. Massi*²²¹ purported to follow the Sixth Circuit ruling *United States v. McClain*.²²² However, the Fifth Circuit applied the good-faith exception despite the fact that the same officers who committed the unconstitutional seizure applied for the warrant and conducted the search pursuant to it, while the Sixth Circuit in *McClain* specifically emphasized that the officers who conducted the search pursuant to the warrant were different than those who committed to original unconstitutional search.²²³ Thus, the issue remains unsettled and grows more exaggerated with time. In order to successfully influence police action, the Supreme Court must determine whether the good-faith exception can bar the admission of evidence in these instances, and if so, under what circumstances.²²⁴ Otherwise, inconsistent application will inevitably lead to unpredictable law enforcement and unequal

exception and the fruit-of-the-poisonous-tree doctrine prior to the rulings in *Massi* and *Woerner*); Clancy, *supra* note 205 (arguing that the good-faith exception should apply in these cases in order to encourage officers to obtain search warrants).

218. See *supra* Part III (outlining the various tests adopted by courts in dealing with the present issue).

219. 709 F.3d 527 (5th Cir. 2013).

220. See *supra* Part III.A.2 (explaining the facts of *Woerner* in greater detail).

221. 761 F.3d 512 (5th Cir. 2014).

222. 444 F.3d 556 (6th Cir. 2006).

223. See *id.* at 566 (“More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search . . .”).

224. Because this issue has persisted for several years and the circuit courts’ perspectives grow further from each other with time, it seems extremely unlikely that the courts of appeal will ever reach a consensus. Thus, the Supreme Court should grant certiorari and directly address this narrow issue at the next available opportunity.

protection of citizens' Fourth Amendment rights across the nation.²²⁵

V. Resolution

In order to resolve this pressing issue, this Note proposes the following test as a compromise between the various circuits. The good-faith exception should apply in cases where officers rely on a warrant containing tainted evidence only when: (1) the officers who executed the original unconstitutional search or seizure did so in good faith;²²⁶ (2) the officers who applied for the warrant and executed the search pursuant to it were not in any capacity the same officers who committed the initial unconstitutional act (unless certain specifically delineated circumstances are present); and (3) the officers relied on the warrant in good faith, based on *Leon*. To fully explain the proposed test, this Note will proceed by explaining each prong in detail and then addressing counterarguments.

A. Good-Faith Execution of the Original Search or Seizure

This element of the test highly resembles the Sixth Circuit's first prong in *United States v. McClain*:²²⁷ the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant must be "close enough to the line of validity" that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct.²²⁸ However, analysis under this proposed standard

225. See Robert C. Gleason, *Application Problems Arising from the Good Faith Exception to the Exclusionary Rule*, 28 WM. & MARY L. REV. 743, 773–74 (1987) ("Courts must interpret and apply the good faith exception accurately and in a uniform manner because the exception is related so closely to Fourth Amendment rights.").

226. As previously noted, "good faith" in this context varies based on whether the original search or seizure was illegal in spite of a warrant, or illegal due to lack of a warrant. *Supra* note 12 and accompanying text.

227. 444 F.3d 556 (6th Cir. 2006).

228. *Id.* at 563.

involves two separate requirements: (1) subjective good faith—the officers did not realize that their actions were unconstitutional; and (2) objective good faith—a reasonable officer may not have known the search or seizure was unconstitutional under the given circumstances.

In order for the search to satisfy the subjective good faith prerequisite, the officers conducting the search must not have realized the illegality of their conduct. The officers in *McClain* would meet this standard because they believed their warrantless search was justified.²²⁹ In contrast, the police conduct in *United States v. Woerner*²³⁰ would not have satisfied the subjective good faith standard because they knew the warrant was expired and chose to conduct the search regardless.²³¹ Thus, under the proposed test, a court's analysis would stop here and uphold suppression of the evidence obtained pursuant to the warrant relied upon under the circumstances of *Woerner*. The rationale for this requirement is as follows: If officers conduct a search in subjective bad faith, courts should suppress the evidence obtained as well as the fruits of such evidence because exclusion furthers the purpose of the exclusionary rule in this scenario—it deters conscious Fourth Amendment violations.²³² The Ninth Circuit addressed this requirement in *United States v. Vasey*.²³³ The court in *Vasey* refused to apply the good-faith exception largely because the court believed that the officers did not act in good faith when obtaining the evidence.²³⁴ Thus, the court refused to apply the good-faith exception because application of the exclusionary rule would deter

229. *Id.* at 566.

230. 709 F.3d 527 (5th Cir. 2013).

231. See note 73 and accompanying text (explaining the facts of *Woerner*).

232. See Diffendal, *supra* note 208, at 231–32 (“[T]he good-faith exception should be considered only after determining that the deterrent function would not be served.”); *United States v. Leon*, 468 U.S. 897, 919 (1984)

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)).

233. 834 F.2d 782 (9th Cir. 1987).

234. See Part III.B.1 (discussing the court's holding in *Vasey*).

intentionally unconstitutional police conduct under these circumstances.²³⁵

The objective good faith prong of the proposed test looks similar to the “close enough to the line of validity” test used in *McClain* and subsequent case law.²³⁶ In order for a court to admit evidence under this standard, the initial search must have appeared objectively reasonable to a reasonable police officer.²³⁷ If another group of reasonable officers would have concluded that the act was unmistakably illegal, a court must suppress the fruits of this search.²³⁸ As stated by the Second Circuit in *United States v. O’Neal*,²³⁹ “If the method by which evidence supporting a search warrant is seized is clearly illegal,” the evidence obtained pursuant to the warrant must be suppressed.²⁴⁰ This particular problem largely led the Eleventh Circuit to reject application of the good-faith exception in *United States v. McGough*.²⁴¹ The court in *McGough* determined that the original warrantless search was not “objectively reasonable law enforcement activity,”²⁴² and therefore refused to apply the good-faith exception and admit subsequently obtained evidence.²⁴³ Exclusion of evidence when officers should have objectively realized their actions were unconstitutional furthers the purpose of the exclusionary rule as it encourages education of law enforcement on Fourth Amendment

235. See *Vasey*, 834 F.2d at 789–90 (“[A] magistrate’s consideration does not protect from exclusion evidence seized during a search under a warrant if that warrant was based on evidence seized in an unconstitutional search.”).

236. See, *i.e.*, Part III.C.2 (describing this test as used by the Eighth Circuit in *United States v. White*).

237. This analysis resembles the standard used in Fourth Amendment excessive force jurisprudence. See, *e.g.*, *Graham v. Connor*, 490 U.S. 386, 387 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”).

238. See Clancy, *supra* note 205, at 715 (contrasting this type of behavior with “substantial and deliberate conduct,” for which suppression should remain a remedy).

239. 17 F.3d 239 (8th Cir. 1994).

240. *Id.* at 243 n.6.

241. 412 F.3d 1232 (11th Cir. 2005).

242. *Id.* at 1240.

243. See Part III.B.2 (outlining the Eleventh Circuit’s reasoning in *McGough*).

requirements²⁴⁴ while also deterring individual unlawful conduct.²⁴⁵

B. Different Groups of Officers Conducted the Searches

This prong of the proposed test is relatively straight-forward. If an officer who committed the original unconstitutional search or seizure then applies for a warrant and conducts a search pursuant to it, evidence obtained from the second search must be suppressed *unless* the same officers disclosed all of the circumstances of the original search or seizure in adequately sufficient detail to the issuing magistrate. Ideally, the officer who conducted the warrantless search or seizure then passes along evidence obtained to another officer, who then applies for a subsequent warrant. In such cases, the evidence survives this part of the test.

Therefore, in fact scenarios such as *United States v. Massi*²⁴⁶ where the same group of officers who conducted the unconstitutional seizure filed the affidavit seeking a search warrant,²⁴⁷ courts must usually suppress evidence obtained pursuant to the second search. However, courts need not suppress evidence under this prong in circumstances like *United States v. Woerner*,²⁴⁸ where state police officers passed along information to federal agents who then applied for a search warrant based partially on the tainted information.²⁴⁹ The Sixth Circuit

244. See Diffendal, *supra* note 208, at 233

[T]he application of the exclusionary rule in these cases must be analyzed with respect to its potential for causing widespread institutional deterrence. Not only would the individual officer who conducted the predicate illegal search be deterred, but the exclusion of the evidence would also enhance police departments' knowledge and training regarding what constitutes a Fourth Amendment violation. As a result, other officers would be deterred.

245. See *United States v. Leon*, 468 U.S. 897, 918 (1984) (noting that if exclusion could not influence a magistrate's actions, it could only be justified by its ability to "alter the behavior of individual law enforcement officers or the policies of their departments").

246. 761 F.3d 512 (5th Cir. 2014).

247. See notes 99–106 and accompanying text (outlining the facts in *Massi*).

248. 709 F.3d 527 (5th Cir. 2013).

249. See Part III.A.2 (analyzing *Woerner*).

specifically emphasized this point in *United States v. McClain*,²⁵⁰ noting that the officers who conducted the searches were completely different.²⁵¹ This requirement solves the concern that officers will seek warrants in order to cleanse unconstitutional acts.²⁵² If courts allowed law enforcement to commit an illegal search or seizure and then apply for a warrant based on information tainted by the unconstitutional act, it would perpetuate unlawful police conduct.²⁵³ Where the officers that conducted the unlawful search or seizure are in any capacity the same as those who applied for, or conducted, the search pursuant to the obtained warrant, the purpose of the exclusionary rule is served by suppression of the evidence.²⁵⁴

However, as noted previously, an exception to this prong exists. In scenarios where the same officers conducted both searches, courts should admit the evidence if the officers disclosed all of the circumstances of the original search or seizure in adequately sufficient detail to the issuing magistrate.²⁵⁵ The presented affidavit cannot exclude any relevant aspects of the situation, meaning it cannot appear that the officers may have

250. 444 F.3d 556 (6th Cir. 2006).

251. *See id.* at 566 (“More importantly, the officers who sought and executed the search warrants were not the same officers who performed the initial warrantless search, and Officer Murphy’s warrant affidavit fully disclosed to a neutral and detached magistrate the circumstances surrounding the initial warrantless search.”).

252. *See supra* note 202 and accompanying text (expressing the foregoing concern); *see also* Hochberg, *supra* note 217, at 319 (“Officers cannot cleanse the fruits of an illegal search or seizure simply by backtracking to obtain a warrant.”).

253. *See* Hochberg, *supra* note 217, at 319 (“The warrant process can only perpetuate, not attenuate, the taint of a Fourth Amendment violation.”).

254. Since its ruling in *Leon*, the Supreme Court has been more likely to apply the exclusionary rule in cases of highly culpable police conduct. *See* *Herring v. United States*, 129 S. Ct. 695, 702–04 (2009) (noting that cases in which the Supreme Court had applied the exclusionary rule, the actions portrayed “intentional conduct that was patently unconstitutional”). Thus, in cases such as the foregoing fact scenario that imply intentional misconduct by police officers, the Court would likely exclude the obtained evidence.

255. *See* Clancy, *supra* note 205, at 714 (“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. . . . [A]n officer cannot rely on the magistrate’s assessment of the legality of pre-warrant activities if those activities have not been presented for review.”).

possibly intended to mislead the magistrate.²⁵⁶ This exception highly resembles the Second Circuit's analysis in *United States v. Reilly*.²⁵⁷ In *Reilly*, the court suppressed evidence partially due to the inadequacy of information presented to the magistrate.²⁵⁸ The officers who committed the unconstitutional search did not describe their actions in sufficient detail.²⁵⁹ Without information concerning the lay of the land and the officer's actions, the court determined that the magistrate "could not possibly make a valid assessment of the legality of the warrant that he was asked to issue."²⁶⁰ This analysis bears a resemblance to *Leon*'s "facially deficient" warrant exception,²⁶¹ but is a heightened standard. Under the proposed test, affidavits require greater detail than what is expected under more ideal circumstances when different officers conducted the unconstitutional search and the search pursuant to the issued warrant. Courts should carefully evaluate the amount of detail presented to the magistrate when the same officers commit the original unconstitutional act and apply for the search warrant.²⁶²

C. Good-Faith Reliance Under *Leon*

Last, once a court determines that the prior two prongs have been satisfied, it must analyze the situation under the *Leon* good-faith standard.²⁶³ If the groups of police officers are entirely

256. See *id.* ("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.").

257. 76 F.3d 1271 (2d Cir. 2006).

258. See Part III.C.1 (outlining the facts of *Reilly*).

259. See Part III.C.1 (describing the court's dissatisfaction with the officers' presented affidavit).

260. See *Reilly*, at 1273 ("Here, information about the distances involved, the layout, conditions, and other like particulars of Reilly's land was crucial.").

261. See *supra* note 48 and accompanying text (delineating this scenario where the good-faith exception should not be applied under *Leon*).

262. This requirement of heightened scrutiny reflects concerns that officers would use a neutral magistrate to rectify their prior unconstitutional search or seizure. If the same officers act in true good faith, and the original search or seizure was close to the line of validity, then they should not hesitate to provide the magistrate with an extraordinarily detailed account of their prior search.

263. See Part II.C (detailing the good-faith exception established in *Leon*).

distinct—as preferred under this standard—two additional requirements must be met in order for the good-faith exception to apply. First, the information serving as the basis for the warrant must have been passed to the next group of officers in good faith.²⁶⁴ The police officers who committed the initial search or seizure still must not have known that their actions were unconstitutional at the time they presented other law enforcement officials with the information, and a reasonable officer would not have known the actions were unconstitutional under the circumstances.²⁶⁵ Second, the information also must have been received in good faith. The officers who gained information from the prior search must not have known that the information was tainted, and a reasonable officer could not have realized that it was based on unconstitutionally obtained information. Like the Second Circuit’s standard adopted in *Reilly*,²⁶⁶ it matters whether or not the warrant was received in good faith, not only relied upon in good faith.²⁶⁷

The officers who conducted the search must have reasonably relied upon the warrant and did not suspect that the warrant was tainted.²⁶⁸ Under *Leon*, the issue involves “whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate’s authorization.”²⁶⁹ A court must consider “all of the circumstances” and assume that the officer has “a reasonable knowledge of what the law prohibits.”²⁷⁰ Additionally, none of the four exceptions to application of the good-faith

264. See *United States v. Leon*, 468 U.S. 897, 923 n.24 (1984) (“Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a ‘bare bones’ affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.”).

265. This standard of reasonableness is the same as under prong one of the proposed test. See *supra* note 237 (noting that reasonableness should be judged from the perspective of an officer on the scene).

266. See Part III.C.1 (explaining the Second Circuit’s standard used in *Reilly*).

267. See *supra* note 170 and accompanying text (outlining this notion as stated by the court in *Reilly*).

268. James P. Fleissner, *Glide Path to an “Inclusionary Rule”: How Expansion of the Good Faith Exception Threatens to Fundamentally Change the Exclusionary Rule*, 48 *MERCER L. REV.* 1023, 1032 (1997) (“This means that the warrant presented to the magistrate for review must be one that a reasonably well trained officer could believe to be based on probable cause.”).

269. *Leon*, 468 U.S. at 922 n.23.

270. *Id.* at 919 n.20.

exception may be present.²⁷¹ If the magistrate was misled by information in the officer's affidavit, courts should suppress the evidence.²⁷² If the magistrate "wholly abandoned his judicial role," courts should suppress the evidence.²⁷³ If the warrant was so deficient that the officers who conducted the search pursuant to it could not have thought it was valid, courts should suppress the evidence.²⁷⁴ And lastly, if the affidavit presented to the magistrate completely lacked sufficient information to establish probable cause, courts should suppress the evidence.²⁷⁵ If, however, none of these exceptions from *Leon* apply to the case at hand, and the prior two prongs under this proposed test have been satisfied, the court should admit the evidence under the good-faith exception.

D. Counterarguments

Though the foregoing proposed standard embodies an arguably ideal combination of existing tests, some scholars could undoubtedly raise issues concerning its application. Firstly, the proposed test appears excessively complicated on its face. Legal minds generally agree that Fourth Amendment standards must be simple in order to achieve their purported goals.²⁷⁶ As stated by Wayne LaFave, "[S]ecurity [from unreasonable searches and seizures] can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."²⁷⁷ Thus, some might

271. *Id.* at 923.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 375 (1974) ("The problem . . . in shaping . . . the law of the fourth amendment is that the variety of situations with which [it] deal[s] is mindboggling. . . . [But] if some categorization is not done . . . then we shall have a fourth amendment with all of the character and consistency of a Rorschach blot.")

277. Wayne LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142 (1974).

say that the foregoing standard would prove ineffective because it would be difficult for law enforcement to follow.

However, the proposed test can be boiled down to one simple notion: Good faith is required at every step of the process. During the initial search or seizure, during the transmission of information between officers, during application for a warrant, and during the search pursuant to the warrant, officers must act in good faith. Although the details of the test seem complex, police officers must simply know established Fourth Amendment requirements and act in good faith at all times. Therefore, the standard would encourage in-depth law enforcement training in this area²⁷⁸ and compel each individual officer to act in good faith at every juncture of his job. Additionally, as noted by Kenneth Halcom in defense of his proposed standard in this area, the foregoing proposal does not alter substantive Fourth Amendment jurisprudence.²⁷⁹ The proposed test does not change the current standard regarding the legality of searches and seizures, but rather, “is a device for guiding the ex post facto analysis of trial judges.”²⁸⁰ Therefore, “the amount and type of knowledge required of the ordinary police officer does not change one whit under this proposal.”²⁸¹ Although Halcom’s proposed standard differs substantially from the instant test,²⁸² his response to this

278. Studies have shown that application of the exclusionary rule—and consequently the exclusion of evidence under the proposed standard—has led to more extensive law enforcement education. See L. Timothy Perrina, H. Mitchell Caldwell, Carol A. Chase & Ronald W. Fagan, *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 671–73 (1998) (“At a minimum, the rule has led to some additional officer training concerning the law of search and seizure. Additionally, there is evidence that officers have developed a greater preference for search warrants after *Mapp*.”); Orfield, *supra* note 28, at 1017 (“This study . . . documents the exclusionary rule’s significant deterrent effects. On an institutional level, the rule has changed police, prosecutorial, and judicial procedures; on an individual level, it has educated police officers in the requirements of the fourth amendment and has punished them when they have violated those requirements.”).

279. Kenneth C. Halcom, *Illegal Predicate Searches and the Good-Faith Exception*, 2007 U. ILL. L. REV. 467, 495 (2007).

280. *Id.* at 495–96.

281. *Id.* at 496.

282. Halcom’s proposed test consists of three simple steps: (1) “Was there an illegal predicate search?” (2) “Would the warrant be supported by probable cause

counterargument proves relevant for this Note's argument as well. Although the proposed test appears complex at first glance, it does not change the substantive law that police officers are bound to follow.

Also, one could argue that the rule is overly complicated and consequently difficult for courts to apply. However, the standard must be specific enough to deal with the fact-determinative nature of the issue at hand. It must have the capability to address an infinite combination of circumstances.²⁸³ When permitting an expansion of an exception to the exclusionary rule, courts should be required to conduct an in-depth factual analysis.²⁸⁴ Current standards, such as the one used by the Fifth and Sixth Circuits, are overly vague and do not sufficiently protect citizens' Fourth Amendment rights. The proposed rule mandates an appropriately detailed analysis in the most straightforward manner feasible. The rule's three prongs advance in chronological order and are organized in a rational manner. The proposed standard could easily be translated into a flowchart or checklist. Therefore, it is complex enough to address all possible scenarios while simultaneously methodical enough for courts to apply it with general ease.

One could also contend that the good-faith exception should simply not be applied in this scenario.²⁸⁵ Some authors have

apart from the fruits of the illegal predicate search?" and (3) "Could the diminished warrant application have supported good faith reliance?" *Id.* at 492–93. According to Halcom, the key question is: "Had the illegally obtained evidence never been presented to the magistrate, would an officer have been reasonable to accept the magistrate's judgment that the application established probable cause?" *Id.* at 493. Though Halcom addresses some concerns involved in application of the good-faith exception in these scenarios, it presents an overly simplified solution.

283. Previously discussed case law demonstrates the variety of these factual scenarios. *See supra* Part III (highlighting the various circumstances under which this issue arises).

284. Many scholars have warned of the potential negative effects stemming from expansion of exceptions to the exclusionary rule. *See, e.g.,* Fleissner, *supra* note 268, at 1024 ("[Embracing] the arguments for extending the holding of *Leon* . . . would seriously undermine the protections of the Constitution by eliminating incentives for the law enforcement establishment to properly train officers and for individual officers to adhere strictly to the directives of that training.").

285. *See* Diffendal, *supra* note 208, at 230 ("In comparing the divergent rationales of courts considering extension of the good-faith exception, it appears

asserted that reliance on warrants tainted by an unconstitutional search or seizure is the type of behavior the exclusionary rule is meant to deter, and thus the good-faith exception should not apply at all.²⁸⁶ While this would be a much simpler solution, the situations at issue do not encompass the type of behavior the exclusionary rule is meant to deter.²⁸⁷ When each officer throughout the investigation has acted in good faith, and the only flaws in the process are the unintentional unconstitutional search or seizure and the magistrate's issuance of a warrant on that basis, exclusion of evidence in no way deters unreasonable police behavior. Also, the absolute exclusion of evidence in each of these situations does not reflect a proper balance between protection against unlawful searches and seizures and effective police enforcement. Such a bar leans too far towards the first interest while unduly harming the second.

VI. Conclusion

The issue of whether the good-faith exception saves evidence from exclusion when the warrant relied upon is based on an unconstitutional act has important practical effects.²⁸⁸ If the evidence is admitted in some of these scenarios, law enforcement could begin to assume that warrants cleanse prior unconstitutional actions, thus allowing illegal warrantless searches to continue and increase in frequency.²⁸⁹ If evidence is excluded in each of these situations, law enforcement would be unreasonably crippled and

that those courts refusing to expand the exception present reasoning more firmly grounded in the principles advanced in *Leon* than that of courts favoring extension.”).

286. See Hochberg, *supra* note 217, at 310 (arguing that the good-faith exception should never apply in these cases).

287. Authors who endorse a complete bar of the good-faith exception in these cases assume that the illegal search could be deterred. See Diffendal, *supra* note 208, at 238 (“[I]n the case of a predicate illegal search, there is by definition conduct to deter and prevent.”). However, when the officers reasonably interpreted the initial search or seizure as constitutional, deterrence from exclusion of the evidence is impossible.

288. See *supra* Part IV (explaining the significance of this issue in practice).

289. See *supra* notes 202–03 and accompanying text (expressing the concern that officers will use warrants to sanitize prior unconstitutional behavior).

objective good faith would be punished.²⁹⁰ The current disagreement among courts of appeal concerning whether the exception applies presumably leads to inconsistent police behavior.²⁹¹ By allowing good faith to sustain evidence in some jurisdictions but not in others, citizens' Fourth Amendment rights are unevenly protected and law enforcement is unevenly hampered. Thus, it is exceedingly important that the Supreme Court adopt a uniform standard to confront this novel legal issue in order to consistently protect citizens' individual liberties under the Fourth Amendment and promote uniform, efficient police enforcement.

This Note's proposed solution promotes these two interests and solves unpredictability issues. It requires good faith at every step of the process and therefore allows admission of evidence only when deterrence of unlawful police conduct is unattainable. Good faith must permeate every aspect of the investigation: during execution of the original search or seizure, during transmission of information to other law enforcement officials, during the filing of an affidavit with a neutral magistrate, and during execution of the obtained search warrant. The foregoing test is specific enough that courts can consistently apply it in a variety of factual scenarios. It promotes the goal of deterring unlawful police conduct by excluding evidence obtained pursuant to any act of bad faith on the part of law enforcement. The proposed test therefore strikes the ideal balance between deterring unlawful police conduct and allowing efficient law enforcement when committed in good faith.²⁹² Therefore, the Court should adopt a similar proposal at the next appropriate opportunity to end the inevitable unpredictability stemming from the present circuit split.

290. See *supra* note 213 and accompanying text (noting that the application of the exclusionary rule in cases of good-faith reliance would only deter officers from fulfilling their duties).

291. See *supra* note 225 (noting that uneven application of the good-faith exception leads to unequal protection of citizens' Fourth Amendment rights).

292. See *supra* note 215 and accompanying text (asserting that both the exclusionary rule and the good-faith exception aim to achieve balance between these two competing interests).