DINING IN GOOD FAITH ON POISONOUS FRUIT?

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I. INTRODUCTION

A 1998 study concluded that police officers understand the law of search and seizure about as well as law students, with the two groups averaging correct response rates of 52% to 55% when confronted with hypothetical questions on the topic.[1] The statistic is troubling for more than what it suggests about the students' criminal procedure grades: police officers' difficulties in grasping search and seizure hypotheticals on paper could translate into constitutional violations in the field.[2] Fourth Amendment violations by law enforcement officers motivated the establishment of the exclusionary rule[3] and have led the Supreme Court to repeatedly emphasize the importance of the Fourth Amendment's warrant requirement.[4] Yet the Court has also acknowledged that exclusion can exact a high toll on the truth-

* J.D. 2008, Widener University School of Law. The author is grateful to Professor Leonard Sosnov for his insightful comments.

1. L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase & Ronald W. Fagan, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 728 tbl.6 (1998). The authors' empirical study comparing law enforcement officers' and law students' knowledge of the Fourth Amendment became known as the Pepperdine Study. *See, e.g.*, Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 808 (1999) (referring to the data presented in the *Iowa Law Review* article as the Pepperdine Study).

2. There are, of course, a number of problems in correlating a paper test with real-world police practices. For example, uncertain officers may err on the side of protecting Fourth Amendment rights in both contexts, producing incorrect answers on paper, but avoiding search and seizure violations in the field. *See* Gregory D. Totten, Peter D. Kossoris & Ebbe B. Ebbesen, *The Exclusionary Rule: Fix It, But Fix It Right*, 26 PEPP. L. REV. 887, 897-98 (1999) (discussing doubts as to how accurately a questionnaire such as that used in the Pepperdine Study predicts situations actually faced by law enforcement officers and officers' real-world responses). The Pepperdine Study is referenced not to propose a direct correlation between officers' scores and their real-world decision-making, but only to suggest that a significant number of search and seizure violations may be rooted in good-faith misinterpretations of the law and its application.

3. *E.g.*, Weeks v. United States, 232 U.S. 383, 392 (1914) (adopting the exclusionary rule for federal courts and holding that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts."), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961); *see also* Silas J. Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 85-87 (1984) (recounting evolution of rationales for the exclusionary rule and identifying deterrence of future unlawful police conduct as the "sole purpose" of the rule under the Court's current approach).

4. *E.g.*, United States v. Leon, 468 U.S. 897, 913-14 (1984); Johnson v. United States, 333 U.S. 10, 14 (1948) ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." (footnote omitted)).

finding function of the judiciary and on the efforts of law enforcement.[5] As a result, not all Fourth Amendment violations are treated equally—some require suppression of the evidence they yield, while others do not.[6] The Court articulated a good-faith exception to the exclusionary rule in *United States v. Leon*[7] that prevents exclusion where police act in objectively reasonable reliance upon a warrant which is subsequently found defective as a result of magisterial error.[8] One of the unsettled areas left by the *Leon* decision involved how the good-faith exception was meant to interact with the poisonous fruit doctrine where police received a warrant based upon evidence found in an inadvertently illegal search or seizure. In other words, what is the correct result when law enforcement officers attempted to "do the right thing" by securing a warrant, but based the warrant application on evidence obtained pursuant to an apparently inadvertent violation of the Fourth Amendment?

The Sixth Circuit case of *United States v. McClain*[9] provides an illustration of this gray area. In *McClain*, the Hendersonville, Tennessee Police Department received report of a light on in a home that had been vacant for several weeks.[10] The first officer dispatched confirmed that a light was on, but he found no unlocked or open points of entry and no other sign of forced entry, vandalism, or illegal activity; although the front door appeared to be cracked open by less than an inch.[11] Acting on a hunch that one officer involved would later characterize as mere "speculation," police swept the house.[12] Nobody was inside, and the officers observed no illegal substances or activity.[13] However, upon entering the basement, the officers discovered a number of items which led them to conclude that the house was being used in a marijuana grow operation. Inward-facing reflective paper lined basement windows, a junction box in one room was connected to "a substantial amount

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5. *E.g.*, Stone v. Powell, 428 U.S. 465, 490-91 (1976):

> Application of the rule . . . deflects the truthfinding process and often frees the guilty. . . . 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.

Id.

6. *E.g.*, *id.* at 486 ("[D]espite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.").

7. *Leon*, 468 U.S. at 922.

8. *Id.* at 918-20.

9. United States v. McClain, 444 F.3d 556 (6th Cir. 2005), *reh'g en banc denied*, 444 F.3d 537 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 580 (2006).

10. *Id.* at 559.

11. *Id.*

12. *Id.* at 559, 563.

13. *Id.* at 563.

of electrical wiring," and the basement contained equipment the officers believed to be plant stimulators and several boxes labeled as grow lamps.[14]

Both the district court and the Sixth Circuit found that the officers' hunch fell short of providing probable cause to enter and search the home and that none of the exceptions to the warrant requirement were met.[15] Under the exclusionary rule, the evidence of a marijuana grow operation found during this illegal search would seem to be inadmissible in the prosecution's case-in-chief.[16] However, the initial illegal search was only the start of the investigation. Based upon what they saw in the basement, officers surveilled the property for several weeks, confirming their suspicions that its owners were participating in a marijuana grow operation.[17] Officers obtained warrants to re-enter that house, as well as several other properties their investigation had linked to the operation.[18] In the warrant application, police described the initial warrantless search and relied in part upon the evidence obtained during that first entry into the house to establish probable cause.[19]

McClain and similar cases that have arisen since *Leon*[20] highlight an area of tension between the poisonous fruit doctrine and the good-faith exception to the exclusionary rule: if the direct fruits of a search in which police acted illegally are inadmissible, should evidence obtained pursuant to a warrant that relies upon those fruits to establish probable cause be admissible under the good-faith exception? In *McClain*, the Sixth Circuit found that the officers were not objectively unreasonable in suspecting criminal activity inside the house at the time of the initial entry and held that "this is one of those unique cases in which the . . . good faith exception should apply despite an earlier Fourth Amendment violation."[21] In so ruling, the Sixth Circuit joined four other circuits[22] which have similarly found the good-faith exception to the exclusionary rule applicable in some circumstances where a warrant application relied upon evidence obtained by an illegal predicate search or seizure.[23] On

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14. *Id.* at 560.

15. *McClain*, 444 F.3d at 561-64.

16. *See* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

17. *McClain*, 444 F.3d at 560.

18. *Id.*

19. *Id.*

20. *See* cases cited *infra* notes 58-62 and 66-67.

21. *McClain*, 444 F.3d at 565.

22. *See infra* notes 58-62 and accompanying text.

23. The terms "illegal predicate search" and "illegal predicate seizure" have been used to describe illegal searches and seizures which reveal evidence that serves in whole or part as the basis for a warrant. *See* United States v. Gray, 302 F. Supp. 2d 646, 652 n.7 (S.D. W. Va. 2004) (defining the term "illegal predicate search"); Gretchan R. Diffendal, *Application of the Good-Faith Exception in Instance of a Predicate Illegal Search: "Reasonable" Means Around the Exclusionary Rule?*, 68 ST. JOHN'S L. REV. 217 (1994) (using the term "illegal predicate search"). In the context of this Note's discussion of the good-faith exception, readers should assume that the initial illegality was the result of police error or misconduct and that the search or seizure was necessary to support the warrant.

It is possible to imagine a situation in which an illegal predicate search or seizure occurs but is *not* the result of police error. For instance, a state legislature could authorize

the other hand, two circuits addressing the same question have excluded the results of the warrant.[24]

The questions of whether and how the poisonous fruit doctrine mediates the good-faith exception in cases involving police error has significant repercussions for both Fourth Amendment rights and the ability of the government to present valuable evidence in prosecutions. In this Note, I will argue that the good-faith exception should not apply to warrants tainted by illegal predicate searches or seizures. The primary concern of this Note is those cases in which the warrant application would not be supported by probable cause in the absence of the illegally-obtained evidence. Such warrants fall outside the application of the independent source doctrine articulated in *Segura v. United States*.[25] Thus, although situations in which the independent source doctrine or inevitable discovery doctrine apply also arguably involve taint, I will refer throughout to warrants "tainted" by reliance upon evidence discovered in violation of the Fourth Amendment with the implication that the independent source and inevitable discovery doctrines do *not* apply to "salvage" the warrant. Furthermore, although the prospect of undisclosed deliberate police misconduct is relevant to my argument, I focus on cases in which police possessed a good-faith but mistaken belief in the legality of the predicate search or seizure; where, by contrast, a warrant depends upon evidence obtained through bad-faith, illegal police conduct to establish probable cause, *Franks v. Delaware* should apply to exclude its fruits.[26]

Part II provides background regarding the exclusionary rule and its good-faith exception under *Leon*. Part III broadly outlines the approaches lower courts have taken in cases involving warrants based on evidence illegally obtained as a result of police error. Part IV first examines why the rationale underlying *Leon* is inapplicable in such cases and then discusses how properly applying the doctrine of poisonous fruit will lead to exclusion of the results of warrants tainted by predicate illegality, including in cases where police disclose

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warrantless searches under a law which turns out to be unconstitutional. If police obtained evidence in a warrantless search authorized by the unconstitutional law and then used that evidence to obtain a warrant for a different search, the illegality of the predicate search would not be attributable to police error, but rather to the legislature's error. *See* Illinois v. Krull, 480 U.S. 340 (1987) (applying good-faith exception where officers acted in good-faith reliance upon an unconstitutional statute which appeared to authorize warrantless administrative searches). In such a case, it would appear that the good-faith exception would apply, because there was no police illegality and *Leon* and *Krull* hold that police should neither be punished for nor deterred from objectively reasonable reliance upon either magistrates or state legislators. However, for the sake of clarity and convenience, the terms discussed above will be used throughout this Note with the usual implication that the illegality results from police error, not the fault of third parties.

24. *See infra* notes 66-67 and accompanying text.

25. 468 U.S. 796 (1984). *See infra* Part IV.B (discussing application of the independent source doctrine).

26. 438 U.S. 154, 171 (1978) ("[T]he Court has not questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the State's case where a Fourth Amendment violation has been substantial and deliberate."). *See infra* note 98.

the circumstances of prior illegal searches and seizures in the warrant application.

II. BACKGROUND

A. The Fourth Amendment and the Exclusionary Rule

The Fourth Amendment secures protection for individuals against "unreasonable searches and seizures."[27] Because the Fourth Amendment lacks an explicit provision detailing how it is to be enforced, the Supreme Court adopted an exclusionary rule which prohibits introducing evidence obtained in violation of the Fourth Amendment into the government's case-in-chief.[28] The Court views a Fourth Amendment violation as "'fully accomplished' by the unlawful search or seizure itself"[29] and considers the exclusionary rule a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."[30] The exclusionary rule is not meant as a remedy for the individual defendant to "cure the invasion of . . . rights which he has already suffered."[31]

The Supreme Court has formulated limits and exceptions to the exclusionary rule to address situations in which the introduction of evidence obtained in violation of the Fourth Amendment "does not itself violate the Constitution."[32] In contexts where the exclusionary rule does apply, all evidence "derived" directly or indirectly from a Fourth Amendment violation is suppressed.[33] However, evidence causally related to an illegal search or seizure is not excluded on a but-for basis; instead, courts use the doctrine of poisonous fruit to determine the scope of exclusion by evaluating whether a piece of evidence "has been come at by exploitation of [the primary] illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[34] Evidence will not be excluded as poisonous fruit if "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'"[35]

Separate from the poisonous fruit doctrine's limitation on the reach of the exclusionary rule, the Supreme Court has defined certain exceptions to the

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27. U.S. CONST. amend. IV.

28. *See generally* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 590-667 (1983) (tracing the origins and evolution of the exclusionary rule).

29. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. 338, 354 (1974)).

30. *Calandra*, 414 U.S. at 348.

31. *Leon*, 468 U.S. at 906 (quoting Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting)).

32. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362 (1998).

33. Nardone v. United States, 308 U.S. 338, 340-41 (1939).

34. Wong Sun v. United States, 371 U.S. 471, 488 (quoting JOHN M. MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

35. *Id.* at 487 (quoting *Nardone*, 308 U.S. at 341).

rule. The Court evaluates proposed exceptions by weighing the costs and benefits of exclusion in the circumstances to which the exception would apply.[36] The primary cost is the impingement of the courts' truth-finding process when "inherently trustworthy" evidence is excluded, which can permit guilty defendants to go free or receive lightened sentences.[37] The Court has expressed concern that exclusion may "generat[e] disrespect for the law and administration of justice"[38] when the exclusionary rule is applied "indiscriminate[ly]" in situations where police officers acted in good faith or committed only minor transgressions.[39] While acknowledging that in some circumstances the costs of exclusion can be outweighed, the Court views those costs as "a high obstacle for those urging application of the rule."[40]

As the exclusionary rule was originally articulated, the two primary rationales for exclusion—those factors on the benefits side of the Court's balancing test—were protecting the integrity of the courts and deterring Fourth Amendment violations.[41] Although never explicitly abandoned, the judicial integrity rationale has essentially been absorbed into the deterrence rationale.[42] The Court will not apply the exclusionary rule unless its operation would create "substantial deterren[ce]"[43] of Fourth Amendment violations, sufficient to overcome the "substantial social costs" of exclusion.[44] In assessing the deterrent effect of applying the exclusionary rule, the Court will consider both specific deterrence of individual law enforcement officers involved in Fourth Amendment violations and systemic deterrence of the law enforcement profession generally.[45]

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36. *Leon*, 468 U.S. at 906-07; United States v. Calandra, 414 U.S. 338, 348-52 (1974) (articulating and applying balancing test); *see also* John E. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under* United States v. Leon, 54 U. KAN. L. REV. 155, 158-60 (2005) (discussing development of the balancing approach and its application in *Leon*). Justice Brennan's *Leon* dissent was sharply critical of the majority's application of the exclusionary rule balancing test, arguing that it "exaggerated" the costs of exclusion through the dubious use of empirical data while underestimating the benefits of exclusion as a constitutional protection. *Leon*, 468 U.S. at 928-30 (Brennan, J., dissenting) ("[T]he language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. . . . [W]e may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy.").

37. *Leon*, 468 U.S. at 907.

38. *Id.* at 908 (quoting Stone v. Powell, 428 U.S. 465, 491 (1976)).

39. *Id.*

40. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364-65 (1958).

41. *See* Mapp v. Ohio, 367 U.S. 643, 659 (1961); Wasserstrom & Mertens, *supra* note 3, at 85-86 (discussing historical principles underlying the exclusionary rule).

42. United States v. Janis, 428 U.S. 433, 459 n.35 (1976) (stating that the inquiry into whether judicial integrity is impinged by admitting evidence "is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.").

43. *Leon*, 468 U.S. at 908 n. 6.

44. *Id.* at 909.

45. *Id.* at 916-18.

B. The Leon Good-Faith Exception

In *Leon*, the Supreme Court carved out a good-faith exception to the exclusionary rule where police act in objectively reasonable reliance on a warrant issued by a neutral and detached magistrate which is subsequently deemed invalid because of magisterial error.[46] *Leon* involved a government challenge to a lower court's exclusion of evidence discovered pursuant to a warrant which, although a "close" case, was found to lack probable cause.[47] The Supreme Court found that exclusion of evidence found pursuant to a warrant executed in good faith would not serve an appreciable deterrent effect,[48] given that the exclusionary rule was meant to deter police misconduct—not magisterial or judicial error, which had led to the issuance of the warrant without probable cause.[49] The Court dismissed arguments that exclusion would further the deterrence rationale by encouraging officers to be circumspect in seeking warrants and accepting the issuing magistrates' decisions as "speculative."[50] Emphasizing the longstanding and strong preference for warrants as a safeguard on Fourth Amendment rights and the concomitant deference given to issuing magistrates,[51] the Court concluded that it was both improbable and undesirable that officers could be deterred from "objectively reasonable law enforcement activity."[52] Under *Leon*, "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule."[53] The Court described these "unusual cases" as involving either the magistrate's abandonment of the detached and neutral decision-maker role or significant failures by law enforcement officers

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46. *Id.* at 922. Extensive debate over the merits of a good-faith exception preceded its adoption. *See, e.g.*, William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 371 (1981) ("A good faith exception, far from having no effect on the fourth amendment [sic], would have a devastating impact on its enforcement."); Charles Alan Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 740-45 (1971) (advocating broad modification of the exclusionary rule which would take into account the flagrancy, deterrability, and willfulness of violations); Ralph E. DeJong, Note, *The Emerging Good-Faith Exception to the Exclusionary Rule*, 57 NOTRE DAME L. REV. 112 (1981) (detailing the development of the rule prior to *Leon* and arguing that the Supreme Court should not adopt a good-faith exception for mistakes which are not technical violations). The debate continued after the Court issued its decision in *Leon*. *See, e.g.*, Donald Dripps, *Living with* Leon, 95 YALE L.J. 906 (1986) (arguing that the *Leon* Court reached the correct result through incorrect reasoning); Marc W. McDonald, *The Good Faith Exception to the Exclusionary Rule:* United States v. Leon *and* Massachusetts v. Sheppard, 27 B.C. L. REV. 609 (1986) (criticizing the decision in *Leon* and its companion case, *Massachusetts v. Sheppard*). *See also* Taylor, *supra* note 36, at 158 n.8 (listing sources that discuss the historical development of the exception).

47. *Leon*, 468 U.S. at 903-05.

48. *Id.* at 915-21.

49. *Id.* at 916-17.

50. *Id.* at 918.

51. *Id.* at 913-14.

52. *Id.* at 919.

53. *Leon*, 468 U.S. at 918.

to ensure probable cause was met in the warrant application or that the subsequent warrant was valid.[54]

Leon left open a number of questions about the scope and meaning of the good-faith exception it established.[55] Subsequent cases before the Supreme Court have applied the exception to warrantless searches where police acted in good-faith reliance on a third-party mistake, on the grounds that such violations could not be deterred by exclusion.[56] In these post-*Leon* cases, the Court has displayed a willingness to broaden the *Leon* exception to warrantless searches where the error is not attributable to law enforcement officers. Whether *Leon* would also encompass warranted searches that rely upon prior illegal conduct attributable to police error to establish probable cause remains uncertain.

III. THE GOOD-FAITH EXCEPTION AND WARRANTS RELYING UPON POLICE ERROR

The Supreme Court has not yet heard a good-faith exception case involving a warrant that relied upon a predicate illegal search or seizure to establish probable cause.[57] Among the lower courts, a circuit split has developed since *Leon*. The good-faith exception has been applied to at least some situations involving illegal predicate searches or seizures in the First,[58] Second,[59] Sixth,[60]

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54. *Id.* at 923:

> Suppression therefore remains an appropriate remedy 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. . . . [Or] where the issuing magistrate wholly abandoned his judicial role . . . . Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. (internal citations omitted). *See infra* Part IV.A.1.

55. *See* Robert C. Gleason, *Application Problems Arising from the Good Faith Exception to the Exclusionary Rule*, 28 WM. & MARY L. REV. 743 (1987).

56. Arizona v. Evans, 514 U.S. 1 (1995) (extending good-faith exception where Fourth Amendment violation resulted from error in court's computer records); Illinois v. Krull, 480 U.S. 340, 349-50 (1987) (extending good-faith exception where police searched in reasonable reliance based upon statute purporting to authorize warrantless searches which was deemed unconstitutional, because error was with the legislature).

57. Arguably, the Court has heard cases in which a warrant has been "tainted" by a predicate illegal search or seizure attributable to police error or misconduct, but only in contexts in which the independent source doctrine applied. *See* Segura v. United States, 468 U.S. 796 (1984); Murray v. United States, 487 U.S. 533 (1988) (allowing fruits of warranted search to be introduced under independent source doctrine where neither the occurrence of a prior illegal search nor evidence derived from it was disclosed in the warrant application).

58. United States v. Diehl, 276 F.3d 32, 42-44 (1st Cir. 2002) (extending good-faith exception where police disclosed circumstances of illegal search in warrant application).

Eighth,[61] and D.C.[62] Circuits. Courts extending the exception to illegal predicate search or seizure cases tend to focus on officers' objectively reasonable belief in the legality of the initial search or seizure at the time it occurred, implying that good-faith police errors in the decision to search or seize, like the type of magisterial error at issue in *Leon*, cannot be deterred.[63] Results often seem to hinge upon case-specific circumstances of the flagrancy of the prior illegality and whether the circumstances of the predicate search or seizure were disclosed in the warrant application,[64] creating some uncertainty about the intended scope of the exception in those courts which have extended it. For instance, because the First Circuit extended the exception in a case where the warrant application described the circumstances of the predicate search[65] and has not heard further cases addressing the issue, it is unclear whether the good-faith exception would apply in that circuit if the issuing magistrate was unaware of the origins of the evidence.

By contrast, the Ninth[66] and Eleventh[67] Circuits, as well as several federal district courts,[68] have held that *Leon*'s good-faith exception will not apply to

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59. United States v. Carmona, 858 F.2d 66, 68 (2d Cir. 1988) (per curiam); United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985) (extending good-faith exception where DEA agents obtained a warrant based in part upon an illegal dog sniff of a dwelling).

60. United States v. McClain, 444 F.3d 556, 565-66 (6th Cir. 2005), *reh'g en banc denied*, 444 F.3d 537 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 580 (2006).

61. United States v. Fletcher, 91 F.3d 48, 51-52 (8th Cir. 1996); United States v. Kiser, 948 F.2d 418, 421-22 (8th Cir. 1991) (holding that cocaine found during warranted search of defendant's luggage following illegal detention based upon furtive behavior was admissible under *Leon* because defendant's behavior gave rise to an objectively reasonable belief that officers possessed a reasonable articulable suspicion which would validate a search warrant); United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989) (admitting evidence where "an objectively reasonable officer could have believed the seizure [which provided the evidentiary basis for the warrant was] valid").

62. United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984) (holding that good-faith exception would apply to warranted search even if predicate search of trash bag used as a basis for obtaining warrant was illegal and that, provided issuing magistrate maintained detached neutrality, the only issue was whether officers could have harbored an objectively reasonable belief in the existence of probable cause in seeking a warrant).

63. *E.g.*, *White*, 890 F.2d at 1419; *see* Diffendal, *supra* note 23, at 227-29 (discussing cases extending the good-faith exception to warrants based on predicate illegal searches).

64. *Compare* United States v. Diehl, 276 F.3d 32, 42-44 (1st Cir. 2002) (applying good-faith exception because warrant application affidavit truthfully conveyed all material circumstances of the illegal predicate search, despite inadvertent or careless mistakes in details of affidavit), *with* United States v. Reilly, 76 F.3d 1271, 1281 (2d Cir. 1996) (refusing to apply good-faith exception because the warrant application did not reveal the circumstances of the illegal predicate search).

65. *See Diehl*, 276 F.3d at 42-44.

66. United States v. Wanless, 882 F.2d 1459, 1465-67 (9th Cir. 1989); United States v. Vasey, 834 F.2d 782, 789 (9th Cir. 1987) (applying poisonous fruit doctrine rather than good-faith exception to exclude results of warranted search where warrant was based upon prior illegal warrantless search and stating that "the magistrate's consideration of the evidence does not sanitize the taint").

67. United States v. McGough**,** 412 F.3d 1232, 1239-40 (11th Cir. 2005) (refusing to apply good-faith exception where police obtained a search warrant on the basis of seeing marijuana and a revolver in defendant's home during an illegal warrantless entry).

warrants tainted by illegal predicate searches or seizures. Several states' high courts have also adopted this position.[69] Those courts finding the good-faith exception inapplicable to warrants relying upon predicate illegal searches or seizures reason that *Leon* is limited to circumstances not involving police error and that "conducting an illegal warrantless search and including evidence found in this search in an affidavit in support of a warrant is an activity that the exclusionary rule was meant to deter."[70]

IV. ANALYSIS

Predicate illegal search and seizure cases represent only a subset of potential good-faith exception cases, one that can be clearly separated from the usual good-faith fact pattern found in *Leon*. Courts should acknowledge this separation and analyze warrants tainted by illegal predicate searches and seizures under the exclusionary rule's poisonous fruit doctrine, rather than applying the good-faith exception. Unlike *Leon*, these cases involve police error which can be effectively deterred by the exclusionary rule. Excluding the results of warrants based on good-faith illegal police errors in deciding to search or seize without a warrant also creates incentives for law enforcement officers to seek warrants and ensures that courts address Fourth Amendment questions, fostering the development of Fourth Amendment jurisprudence and providing officers with important guidance for their activities.

A. Distinguishing Leon: Rationales for Refusing to Extend the Good-Faith Exception to Warrants Tainted by Predicate Illegality

1. Serving the Exclusionary Rule's Deterrence Rationale

Declining to extend the good-faith exception to cases involving police error furthers the deterrence rationale underlying the exclusionary rule. Balancing the social costs of exclusion against the possible deterrent effect on police, the *Leon* Court found that deterring officers from objectively reasonable reliance on a magistrate's finding of probable cause would be unlikely and undesirable, since "[i]n most such cases, there is no police illegality and thus nothing to deter."[71] The *Leon* Court's decision emphasized the preference for search

68. United States v. Gray, 302 F. Supp. 2d 646, 654 (S.D. W. Va. 2004); United States v. McQuagge, 787 F. Supp. 637, 657-58 (E.D. Tex. 1991), *aff'd sub nom.* United States v. Mallory 8 F.3d 23 (5th Cir. 1993); United States v. Villard, 678 F. Supp. 483, 491-92 (D.N.J. 1988), *aff'd on other grounds*, 885 F.2d 117 (3d Cir. 1989).

69. State v. Dewitt, 910 P.2d 9, 15 (Ariz. 1996); People v. Machupa, 872 P.2d 114 (Cal. 1994); State v. Johnson, 716 P.2d 1288, 1300-01 (Idaho 1986); State v. Carter, 630 N.E.2d 355, 364 (Ohio 1994) (per curiam).

70. *Vasey*, 834 F.2d at 789; *see also* Diffendal, *supra* note 23, at 229-33 (discussing cases where the good-faith exception is found inapplicable to warrants supported by predicate illegal searches and arguing that such cases "present reasoning more firmly grounded in the principles advanced in *Leon* than that of courts favoring extension").

71. United States v. Leon, 468 U.S. 897, 920-21 (1984).

warrants and the propriety of good-faith police reliance upon the decisions of neutral and detached magistrates in issuing them, "which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'"[72] For much the same reason, most circuits to address the issue refuse to extend the good-faith exception to illegal warrantless searches made as a result of good-faith police error.[73]

However, where police seek a warrant based upon illegally-obtained evidence, a law enforcement officer's "hurried"—and incorrect—judgment is relied upon in the initial search or seizure and then incorporated into the warrant application. Unlike *Leon*, which only addressed magisterial or judicial mistakes, these cases involve police error that can be deterred on both the individual and institutional levels. First, exclusion of evidence obtained pursuant to a warrant based on a predicate illegal search or seizure will deter the individual officers involved from future Fourth Amendment violations.[74] Even though the officers acted in good faith, exclusion is appropriate because it ensures that similar errors are recognized and corrected in the future. Second, exclusion serves the broader aim of widespread institutional deterrence by encouraging police departments to properly train officers in Constitutional requirements.[75] In adopting an objective reasonableness standard for police reliance upon warrants in *Leon*, the Court noted that the deterrent purpose of the exclusionary rule depends upon its effect as a spur to police training programs.[76] Education on proper procedure can reduce good-faith mistakes by ensuring that police officers who intend to protect Fourth Amendment rights understand how to do so.

The Court's focus on institutional deterrence supports exclusion where a tainted warrant is executed by officers who did not participate in the predicate illegal search or seizure that served as its basis. Although the executing officer may be unaware of the predicate illegality and thus cannot be individually deterred from reasonably relying upon the warrant, exclusion would still deter both the officer involved in the illegal conduct and the department as a whole, underscoring the need for adequate training and careful consideration of searches and seizures. Additionally, declining to apply the good-faith exception where different officers are involved in these two stages prevents an officer who participated in the predicate illegality from laundering the fruits of

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72. *Id.* at 913-14 (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)).

73. *E.g.*, United States v. Scales, 903 F.2d 765, 767-68 (10th Cir. 1990); United States v. Curzi, 867 F.2d 36, 44 (1st Cir. 1989); United States v. Warner, 843 F.2d 401, 404-05 (9th Cir. 1988); United States v. Morgan, 743 F.2d 1158, 1165 (6th Cir. 1984).

74. *See* Diffendal, *supra* note 23, at 233.

75. *Id.*; *see also* Corey Fleming Hirokawa, Comment, *Making the "Law of the Land" the Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 EMORY L.J. 295, 330-31 (2000) (examining the effect of the exclusionary rule on police training and concluding that "contrary to the conclusions drawn by [some] researchers . . . exclusionary rules do at least have the potential to have a strong effect on police behavior.").

76. *Leon*, 468 U.S. at 919-20 n.20.

the illegal search or seizure simply by ensuring that she or he is not present for the later warrant execution.[77]

Courts extending the good-faith exception to warrants tainted by predicate illegal searches or seizures have often misapplied *Leon* in determining that exclusion would not have a deterrent effect. The conclusion that a "good-faith" error as to the legality of a search or seizure cannot be deterred is dubious. Even where officers' motives are proper, exclusion can emphasize the preference for warrants,[78] create incentives for adequate investigation to eliminate errors based upon mistakes of fact, and encourage officer education and training to deter errors based upon mistakes of law. At least one commentator has noted that courts extending the good-faith exception to warrants based upon predicate illegal searches or seizures tend to examine the objective reasonableness of the illegal search or seizure, an analysis which does not match the process applied by the Supreme Court in *Leon*.[79] In *Leon* and subsequent good-faith exception cases not involving police error, officers were required to be objectively reasonable in relying upon the error of the magistrate or another outside party after receiving either a warrant or information that, were it accurate, would give rise to an exception to the warrant requirement.[80] *Leon* and subsequent Supreme Court cases expanding the good-faith exception did not address the objective reasonableness of officers' reliance upon *their* judgment as to the legality of their own conduct.[81] *Leon* also did not offer guidance for cases involving warrants based upon the fruits of illegal searches or seizures.

Lower courts should carefully question how *Leon*'s objective reasonability framework is to be applied in cases where police have obtained a warrant based upon the fruits of an illegal search or seizure. The *Leon* Court noted that the good-faith exception it outlined for magisterial error would not apply in four different scenarios: (1) where the magistrate was "misled by information in an affidavit that the affiant knew was false or would have

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77. In requiring exclusion where the magistrate was misled by information in the affidavit which the affiant knew or should have known was false, the *Leon* Court did not explicitly limit this exception to the good-faith exception to situations where the same officer both applied for and executed the warrant. *Id.* at 923. The *Leon* Court also stated that where an officer acted outside the good-faith exception by using a "bare-bones" affidavit to obtain a warrant, she or he could not "then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search" to bring the warrant within the good-faith exception. *Id.* at 923 n.24. In these situations, evidence would be excluded even if the executing officer individually was acting in good faith upon a warrant issued by a neutral decision-maker. This implies that in instances of police misconduct, institutional deterrence alone is sufficient to support an exception to the good-faith exception and, by extension, courts finding *Leon* inapplicable to warrants tainted by police error should not permit a "hand-off" at any point after the illegal search to create a means to avoid exclusion.

78. *See* discussion of good-faith and the warrant requirement, *infra* Part IV.A.2.

79. Diffendal, *supra* note 23, at 232.

80. *E.g.*, Arizona v. Evans, 514 U.S. 1, 14-15 (1995); *Leon*, 468 U.S. at 926; *see also* Diffendal, *supra* note 23, at 232-33.

81. Diffendal, *supra* note 23, at 232.

known was false except for his reckless disregard of the truth"; (2) where the magistrate abdicated the judicial role; (3) where an affidavit upon which the warrant was based was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) where the warrant was "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid."[82] In each situation, officer reliance upon the magistrate's issuance of a warrant would not be objectively reasonable and therefore fell outside the realm of good faith.[83]

While it remains unclear whether the Supreme Court's list of "exceptions to the good-faith exception" is exclusive or illustrative,[84] treating the four articulated scenarios as an exhaustive list of all cases that fall outside *Leon* would seem to undermine the good-faith exception's deterrent rationale. Instead, the four scenarios should be viewed as examples drawn from a wider range of possible cases lying beyond *Leon*'s scope. Notably, each situation described involves police error in relying upon the warrant, and the first and third situations clearly indicate that at least some types of police error in the warrant application process will preclude objectively reasonable reliance upon a warrant. Although the types of misconduct the *Leon* Court specifically mentions as beyond the good-faith exception are willful and deliberate, cases involving warrants that rely upon illegal predicate police conduct are akin to those four scenarios because of the element of deterrable police error involved and the resulting problems in applying *Leon*'s objective reasonability test. Thus, the Court's description of cases falling outside *Leon* provides another indication that antecedent illegal search or seizure cases are outside the scope of the good-faith exception.

2. Close Calls and the Warrant Requirement

Courts that have extended the good-faith exception to tainted warrants often emphasize that the predicate illegal conduct was a "close call" for probable cause, a situation in which the objectively reasonable officer could have believed his or her actions to be legal.[85] Close-call cases are likely the

82. *Leon*, 468 U.S. at 923.

83. *Id.* at 922-23.

84. *See, e.g.*, United States v. Gray, 302 F. Supp. 2d 646, 651 n.6 (S.D. W. Va. 2004) (viewing the exceptions provided in *Leon* as "a non-exhaustive list."); Gleason, *supra* note 55, at 758-60 (noting conflict in *Leon* between Court's statements that evidence should be excluded where the purposes of the exclusionary rule would be furthered and that exclusion should only occur in circumstances fitting within the four "exceptions to the [good-faith] exception.").

85. *E.g.*, United States v. McClain, 444 F.3d 556, 565-66 (6th Cir. 2005), *reh'g en banc denied*, 444 F.3d 537 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 580 (2006); United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989) ("We believe the Fourth Amendment was violated [by unlawful seizure of defendant's luggage prior to a warranted search], but we also believe the facts of this case are close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable."). *But see* United States v. McClain, 444 F.3d 537, 554-55 (6th Cir. 2006) (Martin, J., dissenting) (criticizing application of good-faith exception to warrant based on illegal predicate search of a home because "it is illogical to acknowledge that the search

only cases involving predicate illegality incorporated into a warrant application for which there is a colorable argument that the good-faith exception could apply.[86] If an officer could not have held an objectively reasonable belief in the legality of the initial search or seizure and knowingly incorporates its fruits into a warrant application, the warrant would almost certainly fall outside of *Leon*.[87] Where a Fourth Amendment violation is substantial but not deliberate, reliance upon clearly tainted evidence in the warrant application should be considered to fall outside the good-faith exception. Such a case would be effectively the same as the situations discussed in *Leon* in which an officer intentionally or recklessly misleads an issuing magistrate[88] or relies on a warrant "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[89] For a court to hold otherwise would be to countenance warrants resting upon clearly tainted evidence so long as officers claimed proper subjective motives.[90]

This proposed "close-call" limitation makes the idea of extending the good-faith exception to tainted warrants sound appealing: applying the exception would seem to give law enforcement officers a fair break when they make an objectively reasonable but incorrect decision in a close call. However, applying the exclusionary rule when police choose to search or seize illegally in a close-call situation is an invaluable means of safeguarding Fourth Amendment rights. In addition to deterring Fourth Amendment violations by promoting officer training and encouraging officers to recognize and consider the legal implications of their actions, exclusion of the fruits of tainted warrants properly creates an incentive for officers to secure warrants in close-call situations.[91]

The usual close-call question will be whether one of the exceptions to the warrant requirement[92] was met at the time of the predicate search or seizure. The *Leon* Court stated:

. . . was *presumptively unconstitutional*, but also 'close enough' to be legal" and because the "close enough" rationale requires inquiry into subjective beliefs of officers, which should be irrelevant to Fourth Amendment questions).

86. Even if a different officer executes a tainted warrant without knowledge of the predicate illegal search or seizure, exclusion would serve as a systemic deterrent. *See supra* Part IV.A.1.

87. *Leon*, 468 U.S. at 908-09 (quoting Franks v. Delaware, 438 U.S. 154, 171 (1978)).

88. *Id.* at 923.

89. *Id.* (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

90. Because the exclusionary rule applies to both the direct and indirect fruits of illegality, evidence produced by a warrant tainted by obviously illegally-obtained evidence will be excluded unless the taint is somehow dissipated, for instance by the existence of an independent source of probable cause. *See, e.g.*, Segura v. United States, 468 U.S. 796, 804-05 (1984).

91. United States v. Lefkowitz, 285 U.S. 452, 464 (1932) ("Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."); *see supra* note 4.

92. The Court's current position is that "[w]arrantless searches are presumptively unreasonable" as a general rule, though there are "a few limited exceptions" to this

> [W]e have expressed a strong preference for warrants . . . . Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination.[93]

As a result of the preference for warrants, the Supreme Court limits exceptions to the warrant requirement[94] and considers those exceptions "jealously and carefully drawn."[95] If police know that they can incorporate tainted evidence into subsequent search warrants when it was obtained without a warrant in a close call, the incentive to seek a warrant in such situations declines dramatically. The incentive to seek a warrant is lessened even further when officers are considering a warrantless seizure or search expected to yield evidence which is confirmatory or will produce further leads (*i.e.*, evidence officers would be willing to risk might be suppressed because it was found in an illegal search). The Supreme Court's insistence on the importance of warrants indicates that incentives should run in the opposite direction: in close-call situations, officers should err on the side of seeking a warrant and relying upon a detached, neutral magistrate to decide close probable cause calls. *Leon* was premised in part upon the importance of encouraging officers to rely upon warrants issued by a neutral and detached magistrate;[96] extending *Leon* to tainted warrant cases discourages officers from seeking a magistrate's participation in close-call cases, when the involvement of a neutral and detached decision-maker is most helpful and necessary.

The warrant process is implicated in another crucial area of difference between *Leon*-type fact patterns and cases involving predicate illegal searches or seizures. Extending the good-faith exception to warrants that rely upon predicate illegality creates a significantly larger and more serious potential for police abuse than exists in *Leon*-type situations involving magisterial error in warrant approvals. The interposition of a magistrate *before* a search occurs emphasizes for officers the importance of having a neutral and detached (if admittedly fallible) decision-maker determine probable cause[97] and may deter

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presumption. United States v. Karo, 468 U.S. 705, 717 (1984). The major exceptions to the warrant requirement that are of particular relevance to potential good-faith cases include exigent circumstances presenting a risk that evidence will be lost, consent searches, and inventory searches. *See generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE §4.1(b) (4th ed. 2004 & Supp. 2006) (discussing justifications for exceptions to the warrant requirement, including emergency doctrine, diminished expectation of privacy, and situations in which a magistrate's decisions is considered unnecessary).

93. *Leon*, 468 U.S. at 914.

94. United States v. Ventresca, 380 U.S. 102, 106-07 (1965).

95. Coolidge v. New Hampshire, 403 U.S. 433, 455 (1971) (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

96. *Leon*, 468 U.S. at 920-21.

97. *Karo*, 468 U.S. at 717 ("The primary reason for the warrant requirement is to interpose a 'neutral and detached magistrate' between the citizen and 'the officer engaged in the often competitive enterprise of ferreting out crime.'" (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

use of the good-faith exception to shield bad-faith conduct. An officer attempting to abuse the good-faith exception in a *Leon* scenario—for instance, by applying for a warrant with evidence he or she knows should not amount to probable cause—must "gamble" on magisterial error in approving the application before the search is carried out.[98] In cases involving predicate illegal searches and seizures, an officer with improper motives may undertake the illegal search or seizure first and devise a good-faith justification after the fact.[99]

3. The Importance of Judicial Review

The *Leon* Court acknowledged—and rejected—an argument that creating a good-faith exception could allow courts to avoid deciding important Fourth Amendment questions.[100] This risk of judicial evasion exists because reviewing courts faced with a difficult Fourth Amendment question might simply find that the good-faith exception applies even if the Fourth

98. Some commentators have further suggested that the *Leon* good-faith exception should be inapplicable in cases involving subjective bad-faith conduct by police, even where there is the possibility of demonstrating officers could have held an objective good-faith belief in the legality of their actions—although proving bad-faith motivations on the part of police presents obvious difficulties. *See, e.g.*, George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad Faith "Exception" to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21, 45-46 (1993). It seems likely that even those jurisdictions extending the good-faith exception to tainted warrant cases would hold that the good-faith exception does not apply to instances of predicate illegal searches made in bad faith, even in objectively close calls, because of the element of deliberate police misconduct. Officers could in no sense "reasonably rely" upon the magistrate's issuance of a warrant in such a case, and even those who feel good-faith illegal searches or seizures cannot be deterred would likely concede the direct applicability of the specific deterrent purposes of the exclusionary rule. If the bad-faith predicate illegality resulted in a flagrant illegality, the acknowledgement of the *Franks v. Delaware* rule against admission of the fruits of substantial and deliberate Fourth Amendment violations contained in *Leon* would almost certainly bar it. *Leon*, 468 U.S. at 908-09.

99. Extending the good-faith exception to warrants based in antecedent illegal police conduct also opens the door to abuse of the independent source doctrine. Against arguments that the independent source doctrine would encourage warrantless searches and seizures (such as confirmatory warrantless searches where police would illegally check a place they intend to search pursuant to a warrant, in order to ensure that the evidence they are looking for is present), the Court has noted that the independent source doctrine should not create incentives to such misconduct because officers who had probable cause to support a warrant would have to convince the trial judge that a prior illegal search did not influence the decision to seek the warrant or the magistrate's decision to issue it, while officers lacking probable cause would have no added incentive to search warrantlessly "since whatever he finds cannot be used to establish probable cause before a magistrate." Murray v. United States, 487 U.S. 533, 540 (1988). If good faith permits introduction of evidence found pursuant to warrants based upon illegally-obtained evidence where the government can claim officers had an objectively reasonable belief in the legality of their actions, the presumed incentives against confirmatory searches and other violations are reduced wherever there is a sufficiently "close call" that an exception to the warrant requirement could apply.

100. *Leon*, 468 U.S. at 924-25.

Amendment was violated.[101] The *Leon* Court, however, dismissed this concern, noting that "nothing will prevent reviewing courts" from addressing Fourth Amendment questions, and that "it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue."[102]

The possibility that courts will avoid deciding Fourth Amendment issues is more troubling in cases involving warrants tainted by predicate illegal searches or seizures than in *Leon*-type cases, because the tainted warrant cases present a different type of Fourth Amendment question. In *Leon*-type fact patterns involving magisterial error, the usual Fourth Amendment question concerns the magistrate's finding of probable cause.[103] To some extent, determining the validity of a magistrate's probable cause determination sends a message to law enforcement officers: as case law refines the standards for probable cause, officer education can present a clearer picture of the necessary showing to obtain a warrant, and perhaps underscore situations when a warrant would be "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[104] But because making the probable cause determination for a warrant is precisely the magistrate's task—and because the warrant preference, together with the good-faith exception itself, gives significant deference to that determination and encourages officer reliance upon it[105]—when a court decides the probable cause question raised by *Leon*-type cases involving an untainted warrant, the decision is meant to guide not only law enforcement officers, but magistrates as well. This fact is highlighted by the *Leon* decision, which recognizes that settling Fourth Amendment questions may be "necessary to guide future action by law enforcement officers and magistrates" but then specifically discusses a reviewing court's discretion to settle even "Fourth Amendment question[s] . . . not . . . of broad import" where it appears in a particular case "that *magistrates* under [the reviewing court's] supervision need to be informed of their errors."[106]

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101. *Id.*; *see* Sean R. O'Brien, United States v. Leon *and the Freezing of the Fourth Amendment*, 68 N.Y.U. L. REV. 1305 (1993) (arguing that, contrary to concerns raised by opponents of *Leon*, the decision did not result in a "freeze" of Fourth Amendment jurisprudence). *But see* Zach Bray, *Appellate Review and the Exclusionary Rule*, 113 YALE L.J. 1143, 1144 & nn.8-9 (2004) (discussing cases in which "appellate courts . . . decline to rule on the underlying issue of probable cause" in deciding on the applicability of the exclusionary rule, including difficult probable cause calls "which appellate courts simply duck by invoking *Leon's* good-faith standard.").

102. *Leon*, 468 U.S. at 925.

103. Another area of Fourth Amendment inquiry in *Leon*-type fact patterns concerns the objective reasonableness of officers' reliance upon the warrant. However, as a threshold matter, this inquiry cannot be avoided—if objective reasonableness is not met, one of the "exceptions to the good-faith exception" will apply and exclusion would be proper under *Leon*. *Id.* at 922-23.

104. *Id.* at 923 (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

105. *Id.* at 913-14.

106. *Id.* at 925 (emphasis added).

Tainted warrant cases generally raise a different Fourth Amendment probable cause issue: the legality of the initial warrantless search or seizure.[107] The decision to search or seize without obtaining a warrant is made in the field by law enforcement officers, whose choices are not accorded the same high degree of deference as a magistrate's probable cause finding on a warrant application.[108] The warrant exceptions are limited, and in many situations a warrantless search is considered presumptively unreasonable.[109] When a court decides the legality of a warrantless search or seizure, it sends a message directly to law enforcement officers. The need for the judiciary to guide the Fourth Amendment decisions of law enforcement officers and rein in abuses underlies the exclusionary rule—by contrast, such concerns are not historically associated with the decisions of warrant magistrates.[110] Arguably, the concern raised and dismissed in *Leon* that courts will avoid review of magistrates' close-call decisions—which receive strong deference—is less problematic than the possibility that courts will avoid ruling on law enforcement officers' decisions in marginal warrantless search cases. In fact, courts in jurisdictions extending the good-faith exception to warrants tainted by prior illegal searches have already used the exception to circumvent deciding the issue of whether officers had probable cause to search without a warrant.[111] In offering a means around ruling on the legality of warrantless searches and seizures, the extension of the good-faith exception to warrants incorporating the fruits of predicate illegality allows courts to avoid important opportunities to guide police conduct and define the scope of Fourth Amendment rights.

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107. *See supra* Part IV.A.2 (discussing exceptions to the warrant requirement).

108. *E.g.*, Illinois v. Gates, 462 U.S. 213, 236, 237 n.10 (1983); United States v. Ventresca, 380 U.S. 102, 106-07 (1965):

> [I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. . . . The fact that exceptions to the requirement that searches and seizures be undertaken only after obtaining a warrant are limited underscores the preference accorded police action taken under a warrant as against searches and seizures without one.

Id. (footnotes omitted).

109. *See supra* notes 91, 92 (discussing the warrant requirement and exceptions),

110. *See Leon*, 468 U.S. at 916 ("[T]here exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.").

111. *See* United States v. Kiser, 948 F.2d 418, 421 (8th Cir. 1991) (finding it "unnecessary" for appellate court to address argument as to whether law enforcement officers had reasonable articulable suspicion to detain defendant and seize his luggage because "the evidence seized from the luggage was admissible despite any [F]ourth [A]mendment violation due to the good faith exception."); United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984) (finding that because good-faith exception applied and law enforcement officers' belief in the legality of a trash bag search was objectively reasonable, "we need not reach the questions of probable cause presented").

B. Applying The Poisonous Fruit Doctrine to Warrants Based Upon Illegal Predicate Searches or Seizures

In lieu of misapplying *Leon* to evaluate the objective reasonableness of the initial illegal search or seizure, courts should recognize as the point at which *Leon* must bow to the exclusionary rule's poisonous fruit doctrine.[112] The poisonous fruit doctrine requires suppression of evidence directly or indirectly derived from exploitation of a Fourth Amendment violation unless the taint of the illegality has been dissipated.[113] Because the exclusionary rule's deterrence rationale is applicable even to good-faith police error,[114] the proper inquiry is whether the results of a tainted warrant are poisonous fruits of the initial illegality. Absent another exception to the exclusionary rule or intervening circumstances to attenuate the taint, such as the existence of an independent and legal source of probable cause or a showing of inevitable discovery of the fruits of the warrant by legal means, application of the poisonous fruit doctrine to warrants tainted by good-faith police illegality will lead to suppression, because the evidence has clearly been "come at by exploitation" of the original illegally-obtained evidence. The warrant process can only perpetuate, not attenuate, the taint of a Fourth Amendment violation.

It is worth noting that declining to extend the good-faith exception to tainted warrants would not bar operation of other exceptions to the exclusionary rule, including the inevitable discovery and independent source doctrines, which permit the introduction of evidence obtained illegally if the evidence is also discovered or would have been discovered through an untainted source.[115] Officers cannot cleanse the fruits of an illegal search or seizure simply by backtracking to obtain a warrant. However, lower courts have held that the independent source doctrine justifies introduction of evidence obtained pursuant to a warrant containing both illegally and legally-obtained information provided that the legally-obtained information on its own was sufficient to support probable cause.[116]

One potential attenuation argument might arise where police conduct additional investigation (by legal means) after conducting an illegal search but prior to applying for a warrant.[117] Such fact patterns should be analyzed as potential independent source cases, because investigation based upon illegal

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112. As one court notes, the Supreme Court in *Leon* "did not attempt to reconcile the newly-announced good faith exception with the 'fruit of the poisonous tree' doctrine." United States v. Meixner, 128 F. Supp. 2d 1070, 1076 (E.D. Mich. 2001).

113. Wong Sun v. United States, 371 U.S. 471, 488 (1963).

114. *See supra* Part IV.A.1 (discussing deterrence).

115. Murray v. United States, 487 U.S. 533, 537-39 (1988).

116. *E.g.*, United States v. Markling, 7 F.3d 1309, 1316 (7th Cir. 1993) ("[A] search warrant procured in part on the basis of illegally obtained information will still support a search if the untainted information supporting the warrant, considered alone, is sufficient to establish probable cause.").

117. *See, e.g.*, United States v. McClain, 444 F.3d 556 (6th Cir. 2005), *reh'g en banc denied*, 444 F.3d 537 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 580 (2006).

evidence will carry forward the Fourth Amendment taint.[118] Therefore, cases involving a warrant incorporating evidence obtained by investigation after a Fourth Amendment violation should hinge upon a fact-specific inquiry into whether or not the intervening investigation was the fruit of the original illegality. If not—and if the intervening investigation alone produces enough evidence to support probable cause—then evidence gathered pursuant to the warrant should be upheld on the independent source doctrine, even if the original evidence is "rediscovered" pursuant to the warrant.[119] However, courts must be wary of creating a loophole by which officers make an illegal search, investigate based upon what they find, and retrospectively "construct" probable cause to obtain a warrant.[120]

C. The Effect of Police Disclosure

Some courts and commentators have favored extending the exception when officers fully disclosed the circumstances of the illegal predicate search or seizure to the issuing magistrate.[121] Proponents of permitting good-faith exceptions in such cases argue that police reliance on a warrant is reasonable when a neutral and detached decision-maker has had an opportunity to evaluate the legality of the evidence, because there is "nothing more" that an officer "could have or should have done . . . to be sure his search would be legal."[122] Essentially, this position suggests that police disclosure itself removes the taint of the Fourth Amendment violation when a magistrate decides to issue a warrant in spite of the circumstances surrounding the predicate search or seizure.

However, police disclosure of the circumstances under which evidence presented in a warrant application was obtained does not justify extending the good-faith exception to tainted warrants. Applying the good-faith exception to cases where police profess predicate misconduct in a warrant application

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118. Nardone v. United States, 308 U.S. 338, 340-41 (1939) (holding that exclusion extends to indirect fruits of Fourth Amendment violations).

119. *Murray*, 487 U.S. at 537-39 (holding that independent source doctrine applies to evidence initially discovered during or as the result of a Fourth Amendment violation).

120. *See McClain*, 444 F.3d at 556 (Martin, C.J., dissenting) (arguing that results of warranted search should be suppressed where warrant contained both direct fruits of an illegal search and evidence obtained after intervening investigation which used the fruits of the illegality: "To apply the good-faith exception to fruits of an illegal search . . . would have the good-faith exception swallow the fruit of the poisonous tree doctrine. Fruits of initial illegal conduct are essentially always gathered in good faith.").

121. *See, e.g.*, United States v. Diehl, 276 F.3d 32, 42-43 (1st Cir. 2002) (applying good-faith exception where officer detailed circumstances of predicate search in the warrant application, even though affidavit was "not entirely accurate" and drew the incorrect legal conclusion that the officer was standing "away from the curtilage," because issuing magistrate had enough information to independently decide the issue); Thomas K. Clancy, *Extending the Good Faith Exception to the Fourth Amendment's Exclusionary Rule to Warrantless Seizures That Serve as a Basis for the Search Warrant*, 32 HOUS. L. REV. 697 (1995) (arguing for extension of the good-faith exception to warranted searches based upon disclosed illegal seizures).

122. United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985).

wrongly expands the role of the issuing magistrate and misconceives *Leon*. *Leon* did state that once a warrant had issued, there was "literally nothing more" an officer could do to ensure a search's legality, but the Court was discussing the inappropriateness of assigning responsibility for magisterial errors to officers;[123] to say there is "nothing more" an officer can do to cleanse a warrant based upon a prior illegal search or seizure wrongly presumes that the fruits of such a search can be made legal, which is the matter at issue in such cases.[124]

As one court has pithily observed, "[a] magistrate's chambers is not a confessional in which an officer can expiate constitutional sin by admitting his actions in a well-drafted warrant application."[125] A recounting of the circumstances giving rise to evidence contained in a warrant has never been constitutionally required in the warrant process, and the presence or absence of such surrounding details in the application is not correlated to good or bad faith on the part of officers.[126] If such a recounting became a means by which courts determine the applicability of the good-faith exception, officers whose pre-warrant activities had been conducted in the "best" of good faith might be least likely to receive the benefit of the good-faith exception by disclosing, because they would have a genuine and objectively reasonable belief in the legality of their actions. On the other hand, officers who knew a search or seizure had been questionable would take advantage of the possibility that their conduct could be laundered after the fact and would have little incentive to err on the side of protecting Fourth Amendment rights unless magistrates began declining applications based on their perceptions of the legality of predicate searches and seizures.[127]

Proposals to intentionally expand the magistrate's role to include preliminary determinations of search and seizure legality[128] would provide police with an ineffective yardstick and an undesirable block to efficiency. The warrant application process is meant to test probable cause for prospective police conduct, not to determine past Fourth Amendment violations.[129]

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123. United States v. Leon, 468 U.S. 897, 921 (1984) (quoting Stone v. Powell, 428 U.S 465, 498 (1976) (Burger, C. J., concurring)).

124. *See McClain*, 444 F.3d at 555 (Martin, C.J., dissenting) (discussing difficulties in applying the "nothing more the officer could have done" reasoning to a fact pattern involving a prior illegal search, given an officer in such a situation "could have avoided using evidence gained as a result of the . . . presumptively unconstitutional [warrantless] search . . . in his affidavit for the search warrant.").

125. United States v. Gray, 302 F. Supp. 2d 646, 653 (S.D. W. Va. 2004); *see also* People v. Machupa, 872 P.2d 114, 123 (Cal. 1994).

126. *Gray*, 302 F. Supp. 2d at 653.

127. *See supra* Part IV.A.2 (discussing implications for the warrant requirement when good-faith exception is extended to tainted warrants).

128. *See* Clancy, *supra* note 121.

129. United States v. Villard, 678 F. Supp. 483, 492-93 (D.N.J. 1988), *aff'd on other grounds*, 885 F.2d 117 (3d Cir. 1989). Furthermore, although issuing magistrates and judges *can* attempt a preliminary evaluation of the legality of predicate searches and seizures, they often decide warrant applications under intense time pressure to serve the needs and efficiency of law

VI. CONCLUSION

Despite the Supreme Court's apparent willingness to expand *Leon* to encompass warrantless searches involving errors not attributable to law enforcement,[130] warrants tainted by illegal predicate police searches and seizures should be considered beyond the bounds of the good-faith exception. Applying the exclusionary rule to such cases can admittedly lead to the exclusion of valuable evidence. Indeed, some commentators have argued that the cost of the exclusion in terms of lost convictions is too high in any situation and that the exclusionary rule should be modified or abandoned[131] because it does not effectively deter Fourth Amendment violations. However, statistical evidence has not borne out a nightmare picture of the costs of exclusion. One meta-analysis of studies conducted prior to the Supreme Court's decision in *Leon* found that the exclusionary rule resulted in the "loss" (nonprosecution or nonconviction) of between 0.6% and 2.35% of felony arrests.[132] At least one study of the exclusionary rule's impact found that its effects were heavily concentrated in the area of drug offenses,[133] with only 5.7% of rejected arrests related to crimes against the person.[134]

The cost of these "lost" arrests is counterbalanced by the social benefit of increased protection against unreasonable searches and seizures. To ensure this protection and serve the deterrent purpose of the exclusionary rule, courts should decline to extend the good-faith exception to warrants based on predicate illegal searches and seizures and instead analyze evidence recovered pursuant to such warrants under poisonous fruit doctrine, which will lead to

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enforcement, which may necessarily hinder such inquiries. *See* United States v. Vasey, 834 F.2d 782, 789 (9th Cir. 1987). Given the non-adversarial, time-sensitive, and narrow nature of the magistrate's inquiry, it is far from certain that an issuing magistrate's decision on the legality of a predicate search or seizure could provide a basis for reasonable reliance (or offer a reasonable means of dissipating the taint of illegality), particularly in close-call cases involving factual disputes.

130. *See supra* note 56.

131. *See, e.g.*, Perrin et al., *supra* note 1, at 736-54 (detailing possible modifications of and alternatives to the exclusionary rule).

132. Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 621 (1983). Davies notes that the relative impact of the exclusionary rule is further diminished by the fact that some portion of those "lost" felony arrests would have been dropped or reduced to misdemeanor charges for other reasons even if they had not involved an illegal search.

133. *Id.* at 622.

134. *Id.* at 624; *see also* Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 134 (2003):

> The only time the Amendment would not impose the societal costs that critics of the exclusionary rule complain about—and the only time it would not put pressure on the courts to water down the rules governing search and seizure—would be if it were "an unenforced honor code that the police may follow in their discretion.

Id. (quoting United States v. Leon, 469 U.S. 897, 978 (1984) (Stevens, J., dissenting)).

suppression of the fruits of the tainted warrant.[135] This approach creates incentives for adequate police training, serves the purposes of the warrant requirement, reduces the risk of bad-faith Fourth Amendment abuses, and ensures that courts address important Fourth Amendment questions to provide guidance for law enforcement. By refusing to launder tainted warrants via the good-faith exception, courts can encourage "cleaner" search and seizure procedures in the future.

POSTSCRIPT

As this piece was being prepared for publication, the Supreme Court issued its opinion in *Herring v. United States*.[136] In *Herring*, officers conducted a search incident to arrest in reliance upon an arrest warrant that had been recalled several months earlier. Due to a negligent bookkeeping error by police, the recall that the arresting officers depended upon in determining the warrant's status was not recorded in the computer database. The Court held that the exclusionary rule did not require suppression of the fruits of the search, because "the conduct at issue was not so objectively culpable as to require exclusion."[137]

The majority opinion in *Herring* articulated its rationale in broad terms, suggesting that the exclusionary rule may not apply to suppress the results of police errors in contexts other than negligent recordkeeping. The exclusionary rule, according to the *Herring* majority, "serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[138] By contrast, the majority stated, "[a]n error that arises from nonrecurring and attenuated negligence is . . . far removed from the core concerns that led us to adopt the rule in the first place" and does not merit exclusion.[139] As a result of this expansive language, many observers view *Herring* as a significant contraction of the exclusionary rule that could augur the rule's imminent demise.[140]

An analysis of the potential implications of *Herring* for cases involving warrants that rely upon illegal predicate searches or seizures is beyond the scope of this necessarily brief postscript. Nevertheless, with the Court having determined in *Herring* that at least some instances of ordinarily negligent police conduct are within the *Leon* good-faith exception, it is worth emphasizing that the facts of *Herring* did not implicate the poisonous fruit doctrine. The *Herring*

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135. *E.g.*, United States v. Gray, 302 F. Supp. 2d 646, 651-54 (S.D. W. Va. 2004).

136 129 S. Ct. 695 (2009).

137. *Id.* at 703.

138. *Id.* at 702.

139. *Id.*

140. *See, e.g.*, Posting of Tom Goldstein to SCOTUSblog, *The Surpassing Significance of* Herring, http://www.scotusblog.com/wp/the-surpassing-significance-of-herring/ (Jan. 14, 2009, 11:32 EST); Debra Cassens Weiss, *Herring* Decision Suggests Exclusionary Rule Could Be at Risk, ABAJOURNAL.COM, Feb. 2, 2009, http://abajournal.com/news/herring_decision_suggests_exclusionary_rule_could_be_at_risk/.

majority held that the possibility of deterring isolated incidents of negligent recordkeeping was marginal or nonexistent and did not merit the costs of exclusion.[141] The cost-benefit analysis, however, appears different when the police conduct at issue relates to reliance upon a tainted warrant. Deterrence of illegal searches and seizures is among the core concerns that gave rise to the exclusionary rule and the poisonous fruit doctrine. Furthermore, while it may be relatively easy to determine police culpability in the context of recordkeeping errors, the culpability framework set forth in *Herring* may not apply so neatly to cases in which officers relied upon tainted warrants. Finally, as this Note has argued, police conduct in carrying out illegal searches or seizures need not be highly culpable to be deterred effectively by exclusion—nor to merit deterrence for the purpose of securing Fourth Amendment rights.

141. *Herring*, 129 S. Ct. at 703.