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IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,662

THE STATE OF FLORIDA

Petitioner,

vs.

HENRY LEE RILEY,

Respondent.

On Question Certified To Be Of
Great Public Importance

BRIEF OF RESPONDENT

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INTRODUCTION

This case is before the Court on a question of first impression which has been certified by the Third District to be a question of great public importance. The Petitioner, The State of Florida, was the Appellee in the appellate court and the prosecution in the trial court. The Respondent, Henry Lee Riley, was the Appellant and the Defendant, respectively. In this Brief, Henry Lee Riley will be referred to as the Defendant or by his surname and Petitioner as the State.

References to documents in the Record on Appeal will be denoted as R.1-58, and references to courtroom proceedings as TR.1-150. The sentencing hearing of February 24, 1981 was separately bound and will be denoted as Sent.1-10. The affidavit for search warrant, the search warrant, the return and the inventory were included in a supplemental record to be denoted as SR.1-10. Documents included in the Appendix to the Brief of Petitioner will be denoted as A.1-18.

As stated by the trial judge at sentencing (Sent.7-8):

> This case has, of course, troubled me. I'm sure it will be appealed since it is a case of first impression. I don't think anyone has ever ruled on this fact situation on a warrant before. It will be interesting to see what happens on the appeal.

STATEMENT OF THE CASE

The Statement of the Case in the Brief of Petitioner is substantially correct with the following additions: The State failed to mention that when Riley changed his plea to nolo contendere, the State dropped the two trafficking counts (R.13). Riley was adjudicated guilty of sale and possession of heroin (R.13, 31) (TR.146), and following a presentence investigation, was sentenced to two concurrent four-year prison terms to be followed by two concurrent three-year terms of probation (R.14, 38) (Sent.8, 9).

Further clarification should be made concerning the circumstances surrounding the officers' entry into the motel room: Before Johnson returned with the signed warrant, Sergeant Pearson received the message that the warrant had been signed. He and D'Azevedo were still in the room across the hall from Riley's room (TR.112, 113). Shortly thereafter, the woman who had been in the room with Riley had gone down to the restaurant and returned with several bags of food. As she opened the motel room door, Sgt. Pearson and Detective D'Azevedo opened the door to their room, walked up with badges in hand and announced, "Police officers. We have a search warrant for the room." (TR.113). The woman tried to close the door but the officers forced it open, stood inside and announced "that we were awaiting a search warrant for the premises." Mr. Riley was in bed, the woman was asked to have a seat (TR.113-114). They were told they could eat. They were not restrained or handcuffed, "nor were they advised they were under arrest." (TR.120).

Defendant reserves the right to refer to additional facts in the argument portion of this Brief.

ARGUMENT

IT IS UNLAWFUL [UNDER THE FEDERAL OR FLORIDA CONSTITUTION OR FLORIDA STATUTORY LAW] FOR THE POLICE, IN AN OTHERWISE LAWFUL MANNER, TO ENTER PRIVATE PREMISES WHICH THEY ARE AUTHORIZED TO SEARCH PURSUANT TO A VALID AND PREVIOUSLY ISSUED SEARCH WARRANT, WHEN THE ENTERING OFFICERS DO NOT PHYSICALLY HAVE A SEARCH WARRANT IN HAND UPON ENTRY, BUT DO RECEIVE A WARRANT SHORTLY THEREAFTER AND DULY EXECUTE IT.

It is most respectfully suggested that the opinion of the Third District Court of Appeal, on rehearing, adopting Judge Hendry's dissent of March 29, 1983, as the Court's new majority opinion, is manifestly and eminently correct. The opinion, which answers the question in the affirmative, expresses an appreciation for the necessity of the safeguard of the search warrant as tangible evidence of official justification for a very serious intrusion on the privacy of citizens. It has already occurred in Dade County, Florida, that bands of outlaws, pretending to be police officers, invade private homes on the pretext of being on official police business, and then proceed to commit violent crimes, once they have been allowed inside the residence. To answer the question before the Court in the negative can only serve to encourage this course of conduct on the part of clever and well-informed criminals, much to the jeopardy of law-abiding citizens.

Judge Hendry's opinion has correctly construed the law of Florida, and reaches a decision in this case, which comports with the importance of the search warrant requirements and the mandate that they be strictly contrued and strictly complied with. In this day of rampant crime, the courts often overreact in an effort to solve the serious crime problems plaguing Dade County and other communities in Florida. The courts should not, however, exercise their judicial authority to legitimatize dastardly conduct on the part of the police, in an effort to help them combat the criminal element and clean up crime. Unless police officers

can present a validly executed warrant when they first seek entry into private premises, the persons inside do not know the parameters of what (or whom) the officers are looking for, the scope of the items to be sought and seized or the permitted area of the search.

Part I

A SEARCH WHICH IS COMMENCED AFTER A SEARCH WARRANT HAS BEEN ISSUED, BUT BEFORE THE SEARCH WARRANT IS PRESENT AT THE SCENE AND IN POSSESSION OF THE OFFICERS EXECUTING IT, CONSTITUTES AN ILLEGAL SEARCH IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION AND CHAPTER 933 OF THE FLORIDA STATUTES.

1. The Trial Court's Ruling.

In the order denying the motion to suppress, the trial judge made the following findings of fact: that a search was made without the search warrant being present or in the presence of the officers gaining entrance for the purposes of the search; that the search warrant had been signed by a judge before the search; that the warrant was on its way to the scene of the search before the search began; and that these facts were known to the officers conducting the search before the search commenced (R 28) (TR 137). The Court denied the Motion to Suppress on authority of United States v. Cooper, 421 F.Supp. 804 (W.D. Tenn. 1976) (R 28, 29) (TR 137, 138).

This ruling was entered "nothwithstanding" Swinford v. State, 311 So.2d 727 (Fla. 4th DCA 1975) which, in the words of the trial judge:

> ...had practically the same situation but was decided opposite to Cooper, but not on the same legal point as the case at Bar. The Court does agree, however, that Judge Mager's concurring opinion is exactly on point. In his opinion he unequivocably states 'absent circumstances where a search warrant is unnecessary, possession of a search warrant is an essential element for the performance of the search and validity of the search.'

(R 29) (TR 138, 139), emphasis in original. Judge Mager's opinion is the only correct interpretation and application of the law of Florida on this point.

2. Cooper is Distinguishable.

There are factual similarities between the Cooper case and the instant case, but there is one substantial distinguishing feature which renders Cooper inapposite. Cooper is a federal case, and the officers conducting that search were not subject to the requirements of the Constitution and the laws of the State of Florida. Rather, Cooper was decided under Rule 41(d) of the Federal Rules of Criminal Procedure, which requires that the officer taking property under a search warrant, "give to the person from whom or from whose premises the property was taken a copy of the warrant...". Failure to serve a copy of the warrant on the defendant Cooper until the next day was found to be a mere irregularity in procedure which would not void an otherwise valid search under the Federal Rules. 421 F.Supp., at 805.

Note that Rule 41(d) uses the past tense: "...the person from whom... the property was taken...". (emphasis added). Thus, by its very terms, Rule 41(d) allows for the warrant to be presented after the search.

The Question before this Court does not come under the dictates of Federal Rule 41. Rather, it is governed by Chapter 933 of the Florida Statutes, entitled, "Search Warrants".

3. Florida Law Requires Strict Compliance with Constitutional and Statutory Provisions with Respect to Search Warrants.

Florida courts have uniformly held that the constitutional and statutory provisions relating to the use of search warrants must be strictly construed and rigidly followed. State ex rel. Wilson v. Quigg, 154 Fla. 348, 17 So.2d 697, 701 (1944).

As Judge Ryder so keenly recognized in Hesselrode v. State, 369 So.2d 348, 351 (Fla. 2d DCA 1979), the suppression of evidence, the product of long hours of hard labor by law enforcement personnel is not the fault of the court. After all, the court was not present when the warrant was executed and the evidence seized. Hesselrode involved execution of a search warrant by officers who were not authorized to act under the warrant. The trial judge denied the motion to suppress. In reversing, Judge Ryder stated:

> It would be too easy for this court to approve the procedure used herein, but the record cries out that the procedure contravened the statute and was wrong.
>
> Save for the First and Fifth Amendments, the Fourth Amendment, from which we receive Section 12 to Article I of our own Florida Constitution, is probably most important to the liberty of all freedom loving citizens. One cannot sit idly by and observe its meaning be slowly eroded away even by well-meaning police and prosecutors.

Judge Ryder was not unmindful of the reluctance of the courts to suppress evidence which, if lawfully obtained would be of great importance to a felony prosecution. But the best way to insure and enforce compliance by police officers with requirements of the laws of search and seizure is to suppress evidence which is illegally obtained. Although it is as frustrating a matter for the appellate court as it is for the trial court, "...as keeper of the law, we must maintain the integrity of our constitution adopted by the people and statutes given to us by our legislators." 369 So.2d at 351.

4. Florida Law Clearly Requires that the Warrant be Present Before the Search Begins.

Among the relevant provisions of Chapter 933, Florida Statutes (1981), is Section 933.11, which provides in pertinent part:

> All search warrants shall be issued in duplicate... when the officer serves the warrant, he shall deliver a copy to the person named in the warrant. ...

> When property is taken under the warrant the officer shall deliver to such person a written inventory of the property taken...

From this language, it is plain that Florida mandates a two-step procedure which is a different procedure from that required by Federal Rule 41(d). The Federal Rule provides that a copy of the warrant be given to the person whose property was taken. The Florida Statute requires that a copy of the warrant be delivered when the warrant is served, and an inventory given after property is taken. Some Florida courts have held that the requirement of §933.11 is sufficiently met if the warrant is read but not actually given to the person before the search has begun. But, even having loosened the standard in Florida to reading the warrant aloud or placing it in the defendant's hand, the law still requires that the search warrant must physically be at the scene before the search begins. Obviously, the warrant must be there before it can be read.

In Swinford v. State, supra, 311 So.2d 727, the Fourth District reversed an order denying a motion to suppress. Judge Mager concurring specially, ruled that the search "was unreasonable on the basis that at the time the search was made the officers did not have a search warrant in their possession." 311 So.2d 727, emphasis the court's. The Swinford record reflected that at the time of the search, a search warrant had been issued, which fact was known to the officers, but the warrant did not arrive at the premises until after the search began. From reading Chapter 933 and Article I, §12 of the Florida Constitution, Judge Mager concluded that a search warrant search in Florida is improper "unless a duly issued search warrant is in the possession of the officers at the time the search is performed." 311 So.2d, at 728. The mere knowledge that a warrant was issued, opined Judge Mager, was not sufficient to meet the constitutional and statutory guarantees against unreasonable searches:

> Absent those circumstances where a search warrant is unnecessary, possession of the search warrant is an essential requirement to the performance of the search and the validity of the seizure.

Ibid., emphasis in original, citations omitted.

The search warrant must be present at the scene before commencement of the search. This is the mandate of State v. Henderson, 253 So.2d 158 (Fla. 4th DCA 1971). In Henderson, it was held to be the burden of the state to prove that even if a copy of the warrant was not timely given to the defendant, at least it was read to him before the search.

> If an original search warrant was duly signed by the proper officer and was read to the defendant in toto before the search was commenced, the act of leaving an unsigned and undated duplicate of the search warrant is solely an administerial act and not such error as would be prejudicial.

253 So.2d, at 159, emphasis added. Henderson assumed as a critical factor, "...that an original search warrant was duly issued... and that said warrant was read to the defendant in toto before the search was commenced..." Ibid., emphasis added.

In Miller v. State, 170 So.2d 319, 322 (Fla. 2d DCA 1965), the court found no violation of §933.11, where:

> Upon executing the warrant a copy was read in the presence of both the named individual... and the person apparently in possession of the premises... and was subsequently delivered to the latter.

This procedure was held to comply with the mandate of §933.11.

The Third District has held that failure to make timely return of an executed search warrant will not void the search warrant in the absence of a showing of prejudice, State v. Featherstone, 246 So.2d 597 (Fla. 3d DCA 1971), but that opinion rests upon the assumption that the search "was valid at the time it was made." 246 So.2d, at 599. Accord State v. Dotson, 349 So.2d 770 (Fla. 3d DCA 1977), in which an invalid return did not invalidate a properly executed search warrant.

It is difficult to imagine how the search in this case could be considered to be valid in light of the fact that it was commenced before the search warrant arrived at the scene. This court long ago ruled with respect to searches that:

> ...there is no process known to the law, the execution of which is more distressing to the citizen or that actuates such intense feeling of resentment on account of its humiliating and degrading consequences.
>
> * * *
>
> ...searches are usually made without the consent of the occupant of a domicile, and,... the statute authorizing it is to be strictly construed, and no presumptions of regularity are to be invoked in aid of the process under which a proper officer obeying its commands undertakes to justify.

Jackson v. State, 87 Fla. 262, 99 So. 548, 549 (1924).

5. The Law of Other Jurisdictions.

There are cases from other jurisdictions which have held searches to be legal and reasonable even if the officer conducting the search did not have the warrant in his possession at the time of the search. Those cases are readily distinguishable, however, because the laws of the states ruling in that fashion, unlike the law of Florida, do not require that the warrant be given, or even read before the search begins. In the "absence of such a statutory provision," West Virginia long ago upheld a search without the warrant being present. State v. Brown, 91 W.Va. 709, 114 S.E. 372, 374 (1922). In Rhode Island, absent a statutory provision requiring an officer executing a search warrant to read the warrant to the person whose premises were to be searched, the warrant was executed by the making of the search. State v. Johnson, 230 A.2d 831 (R.I. 1967).

All Ohio law requires is that the officer announce himself and reveal his purpose before gaining entry and conducting a search. In the administration of criminal justice, the Ohio Statutes do not require

that a search warrant be served upon demand or otherwise before the search may be held to be a valid search; it is the warrant issued in accordance with the law that gives validity to a search in Ohio. State v. Johnson, 240 N.E.2d 574 (Ct.C.P. Ohio 1968).

In a distinguishable factual situation, the Supreme Court of Colorado upheld a search where the officers arrived at the premises with a search warrant and handed it to the defendant who read it and stated that it was for the wrong address, handing it back to the officer. The officer announced, "Everybody hold it right there," and instructed some officers to remain on the premises while he went to the judge's home to have the warrant corrected. Mayorga v. People, 496 P.2d 304 (Colo. 1972). Upon the officer's return with the corrected warrant, the search was conducted. Although Mayorga was cited to the trial judge herein by the State, the fact that a warrant was presented to the defendant before the search took place renders that decision inapplicable.

In addition to United States v. Cooper, supra, relied upon by the trial judge, there are other federal decisions upholding searches under Federal Rule 41, which requires officers to serve upon the person searched a copy of the warrant, but does not invariably require that this be done before the search takes place. See United States v. Woodring, 444 F.2d 749 (9th Cir. 1971) and United States v. Marx, 635 F.2d 436 (5th Cir. 1981). Compare United States v. Lomas, 706 F.2d 886 (9th Cir. 1983); United States v. Seely, 570 F.2d 322 (10th Cir. 1978), in which a search warrant had been issued but not yet delivered to the searching officers. In Seely, the court was relieved that it did not have to reach the issue because the record showed that there was consent to the search. See also, State v. Gomez, 623 P.2d 110 (Idaho 1981), which was governed by I.C.R. 41, Idaho's counterpart to Federal Rule 41. Like the Federal Rule, the Idaho Rule does not require that the warrant be delivered before the search.

State v. Wraspir, 20 Wash.App. 626, 581 P.2d 182 (1978), held that the failure to serve a copy of the warrant upon two persons arrested following the search of a trailer did not require suppression of evidence seized pursuant to the search. The Washington appeals court held as it did, first, because the state rule requires only that the warrant and receipt be given to the person from whom or from whose premises the property is taken. The two men arrested in the trailer did not fit that description. Next, the court stated that the Fourth Amendment does not require immediate service of the warrant before the search begins. It is noteworthy, however, that Washington Criminal Rule 2.3(d) is patterned after Rule 41(d), which has no such requirement. 581 P.2d, at 184. Section 933.11, Florida Statutes does.

6. The Search Is Not Salvageable Under The Exigent Circumstances Doctrine.

Although the actual seizure of property did not take place until after Sergeant Johnson arrived with the search warrant, the trial judge recognized that the search commenced once Sergeant Pearson and Detective D'Azevedo had forced their way into Room 223.

> It makes absolutely no difference to me if they searched or didn't search. It is when they went inside the room that was illegal - if it was illegal - they could have waited for the search warrant...

(TR 120).

Pearson testified that he and D'Azevedo decided to go ahead and force their way into Room 223 when the woman opened the door because the doors are steel and can be double locked from the inside; because he believed there was evidence in the room which could be destroyed; and because he learned that Riley had previously been arrested for murder and might be violent (TR 117-119). Pearson admitted, however, that all of these facts were known to the officers before the search warrant affidavit was prepared (TR 117).

In spite of knowing this information, Johnson, Pearson and D'Azevedo still recognized the need for a search warrant. Johnson prepared a 7 page affidavit (SW 1-7) and took it all the way to northeast Dade County to secure a warrant. A further indication of the necessity for a search warrant in this case was the fact that once they entered the room, the officers did not search around inside. Rather, they called their entry "securing the premises" and they waited for Johnson to return with the search warrant before they "searched".

The premature forced entry into Room 223 was founded upon some intent to "secure" the room (TR 95). Johnson, Pearson and D'Azevedo are experienced narcotics officers who know what circumstances will permit a search without a warrant. Surely, they would not have bothered to 1) prepare the affidavit, 2) wait until it was delivered to Judge Jorgenson, 3) signed and returned to the scene before moving about Room 223 and seizing property, if they recognized it as a no-warrant situation.

These facts are similar to those in Commonwealth v. Beard, 423 A.2d 398 (Pa. Super. 1980). In Beard, the police had a valid search warrant, the execution of which would require them to knock and announce their identity and purpose, giving the occupants reasonable time in which to surrender their premises. Pennsylvania Rule of Criminal Procedure 2007, which was found to be applicable in the Beard case is analogous to §933.09, Florida Statutes. Our §933.09 provides that an officer may use force to enter premises in order to execute a search warrant, "...if after due notice of his authority and purpose he is refused admittance to said house or access to anything therein." Instead of following the rule, the police in Beard laid in wait and surprised Beard just as he was entering the premises to be searched. The police had arrived earlier, parked nearby and surveilled for about one half hour. They knew that Beard would recognize them on sight.

> As experienced narcotics detectives the police must certainly have realized that (the defendant) would run inside the house upon seeing them drive up and jump out of their vehicle.
>
> * * *
>
> The deliberate tactics of the police in this instance resulted in the creation of an opportunity to effectuate a forcible entry and to forego the knock and announce rule. The police's furtive conduct in the instant case may in some way be compared to the use of ruse or subterfuge...

423 A.2d, at 401. The Court found no necessity for the police to have accosted Beard outside. Instead, they should have waited until he entered the premises, then knocked, announced their identity and given the opportunity to surrender their privacy peacefully. 423 A.2d, at 401, 402.

To give judicial sanction to an entry such as that made by Officers Pearson and D'Azevedo completely negates the constitutional right of the people to be secure in their homes. It is an intolerable proposition and if approved by this Court will create a climate that will be nothing less than chaotic.

7. "Securing the Premises" does not Elevate the Forced Entry Into Room 223 to a Legal Search.

"Securing the premises" is a relatively new concept. It is not yet an accepted doctrine of Florida search and seizure law, and this Court should seize the opportunity to abort it before it becomes an accepted tactic of intimidation and another nail in the Fourth Amendment's coffin.

"Securing the premises" was roundly criticized by Justice Bistline in his extensive dissent to State v. Gomez, supra, 623 P.2d, at 120 to 141. Justice Bistline refers to the majority opinion, in which the doctrine was adopted and approved with "extreme ease", as going far "...in aiding and abetting the deepest intrusion on Fourth Amendment

rights that it will be the country's misfortune to have encountered in recent years - perhaps in all time since the nation was founded." 623 P.2d, at 120. Justice Bistline explained the difference between "securing" and "searching":

> ...a search is to discover evidence to be taken for later use at trial, whereas in a mere 'securing' the violated premises and occupants are seized and laid captive until the police officers arrive with the warrant which, by the doctrine... is said to legitimatize the dastardly prior conduct.

623 P.2d, at 132. "Securing the premises" gives the police license to at will invade all parts of a person's home, while keeping the occupants custodially restrained.

> The police, without being able to show any authority for their intrusion, need only declare to the occupants of a house that they are 'securing' it on the premise that such is sufficient justification for their entry. Such conduct is on a par with the much hated General Warrant visited upon the colonists by the British, which abuse played a large part in fomenting the Revolution. Nor is it any defense to suggest that the people ought not to complain because, after all, somewhere, although the warrant proving that fact is not present, there has been a determination of probable cause made by a detached and neutral magistrate. Only the presentation of a warrant at the time of the intrusive entry can be said to meet with constitutional requirements.

Ibid., emphasis supplied. Justice Bistline then wrote at 623 P.2d 133:

> Securing the premises is a new judicial doctrine totally destructive of civil and constitutional rights, and is better condemned than condoned.

The police, without being able to display a proper warrant cannot be allowed to enter private premises and justify such action on the basis that a warrant is on the way. This conduct is illegal, and its potential for violent confrontation is awesome.

8. Conflict About How Long After the Officers Entered the Room the Search Warrant Arrived is Irrelevant.

Whether the time period involved was twenty minutes or two minutes is irrelevant. The trial judge made an oral and written finding of fact on the record that:

> A search was made without the search warrant being present or in the presence of the two officers gaining entrance for the purposes of the search.

(R 28) (TR 137). The Court also stated on the record:

> It makes absolutely no difference to me if they searched or didn't search. It is when they went inside the room that was illegal - if it was illegal - they could have waited for the search warrant and done it right then and there.

(TR 120).

9. Even if They Had the Warrant in Their Possession, the Officers Were Not Justified in Forcing Their Way Into Room 223 in Violation of Florida's Knock and Announce Law.

The State contends that the officers properly announced their authority and purpose. Defendant contends they acted improperly. Section 933.09, Florida Statutes, is the "knock and announce" statute. By waiting until the woman returned to Room 223 with bags of food and then announcing themselves and just barging into the room, the officers violated the spirit and intent of the law. Just as a person enjoys the right to privacy in his own home, a guest in a motel room is entitled to the same constitutional protection against unreasonable searches and seizures. Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); Engle v. State, 391 So.2d 245 (Fla. 5th DCA 1980).

The tactics used in this case are analogous to those used by the police in Commonwealth v. Beard, supra. In Beard, rather than comply with the Pennsylvania knock and announce law, the officers waited until Beard arrived home and surprised him just as he was about to enter his house. This was done deliberately to create a situation allowing them to forego the knock and announce rule. Here, once they had the search warrant in hand, the officers should have waited until the woman entered the room, then knock, announce their identity, giving the occupants the opportunity to surrender their privacy peacefully. Compare Whisnant v. State, 303 So.2d 397 (Fla. 3d DCA 1974), in which the Court found that

the officers were justified in forcing their way into the premises because they:

> ...could reasonably believe that those within the house were attempting to destroy evidence when after announcing their authority and purpose for being there, an officer testified that shortly thereafter he heard sounds of someone running inside the house and furniture being moved.

303 So.2d at 398. There was no indication that evidence would be destroyed in the instant case.

Compare State v. Johnson, 372 So.2d 536, 537 (Fla. 4th DCA 1979), in which failure to knock and announce upon the execution of a search warrant for a residence was held to be proper. Johnson is distinguishable because first, the same residence had been the subject of another search warrant some five months earlier. One of the officers testified that during the execution of the prior warrant, after having announced their authority and purpose, the officers were thwarted in their attempts to obtain contraband because allegedly it had been flushed down the toilet. The officers heard the toilet "running" before being granted entrance. 372 So.2d at 537. Therefore, they had some reason to believe that evidence might be destroyed due to the previously observed pattern of conduct on the part of the occupant of the residence. There was no such indication in this case.

Second, and most importantly, "because of the way in which the entrance door was constructed and the type of locks utilized on the door," it was necessary for the officers in the Johnson case to enter unannounced. The officers knew about the doors and locks before the warrant was signed. The officers in the instant case also knew about the construction of, and locks on the door before the warrant was signed. In fact, Sergeant Pearson testified that he inquired of the motel manager about the locks and doors as they "were in the process of writing" the search warrant affidavit. (TR 117). The critical factor

in Johnson is that the officers, knowing about the door and locks, obtained prior judicial approval for entry without announcing. See 372 So.2d at 537, wherein Judge Moore wrote:

> The modus operandi of executing the search warrant in the instant case was described to, and orally approved by the judge who signed the warrant.

Pearson was aware of the door and lock situation while the affidavit was being written. This information could have been included in the affidavit and approval for entry without announcing could have been sought from Judge Jorgenson before he signed the warrant, but it was not.

Entry without announcing, even with prior approval of the judge signing the warrant, is considered so serious a matter by the Fourth District that:

> ...it is preferable, although not now required, that a transcript of such proceedings before the approving judge be made a part of the record whenever such methods of execution are deemed appropriate.

Ibid., emphasis added.

In Berryman v. State, 368 So.2d 893 (Fla. 4th DCA 1979), the Fourth District reversed an order denying defendants' motion to suppress evidence seized pursuant to a search warrant, where the Court found that the officers' entry into the premises failed to comply with Section 933.09. The main reason for this holding was that none of the officers had any knowledge of the amount of narcotics involved. "This residence could have contained a ton of marijuana for aught they knew." 368 So.2d at 895.

10. When the Officers Entered the Room, the Search Began.

The trial judge made specific findings of fact on the record, both oral and written, that the search began when the officers forced their way into Room 223. (TR 120, 137) (R 28). Regardless of when they

began moving about the room, they entered and announced, "we have a search warrant for the room." (TR 113-114). This commenced the search.

> ...there is no process known to the law, the execution of which is more distressing to the citizen or that actuates such intense feeling of resentment on account of its humiliating and degrading consequences.

Jackson v. State, supra, 99 So. at 549.

What compounds the illegality of this search is that the officers who entered the room not only did not prepare the search warrant affidavit, but they had not even read it over before it was taken to the judge. (TR 101, 109). This means that Pearson and D'Azevedo entered under authority of a search warrant when they did not even know the contents and scope of that warrant!

11. The State's Argument that "They Only Arrested the Defendant Without a Warrant," is Meritless.

The State contends that the officers only arrested the Defendant without a warrant as specifically authorized under Section 901.15(4), Florida Statutes. This is belied by the record. See testimony of Sergeant Pearson, TR 120:

Q. And while you were waiting, what were you doing?

A. We were standing there. I told the young lady she could eat if she wanted to because there was a table there, and I told Mr. Riley, who was lying in bed, he could get up and eat if he wanted to. They weren't restrained or handcuffed, nor were they advised they were under arrest.

(emphasis added).

Obviously, if they were not advised they were under arrest, and their rights were not read to them, the State's alleged arrest is an illegal one, and the fruits of any search pursuant to an illegal arrest must be suppressed.

12. The State's Argument That the Warrant was Both an Arrest and a Search Warrant is Meritless.

The State suggests that the following language in search warrants, turns the search warrant into an arrest warrant; an omni-form document covering all kinds of procedures:

> ...if "The Property" above-described be found there, to seize it and to arrest all persons in the unlawful possession thereof...

If this language can be considered to turn a search warrant into an arrest warrant of sorts, then certainly it does not reduce the requirements governing the search warrant part of the document to the somewhat looser standards for arrest warrants. Rather, it should serve to elevate the arrest warrant portion of the document to the same standards and requirements imposed by law for search warrants and their proper execution.

13. The State's Argument That the Defendant Failed to Meet the Burden of Showing That the Search Warrant was not Read to Defendant is Meritless.

Since the search warrant was not there when Sergeant Pearson and Detective D'Azevedo commenced the execution of the warrant, of course it was not read to the Defendant.

Florida law requires that the search warrant be present and in the possession of the officers executing it. If it is not given to the defendant before the search begins, then at least, it must be read to him before the search begins. Swinford v. State, supra, concurring opinion of Judge Mager; Miller v. State, supra; State v. Henderson, supra. Neither the giving nor the reading of the warrant was possible in this case.

The State's reference to a footnote in Walter v. United States, ___U.S.___, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), is misplaced. Walter involved federal convictions for shipping obscene films. The

record reflected that federal agents viewed the films without obtaining a warrant, after having lawfully obtained them from a party to whom they had been misdelivered. The High Court reversed because no search warrant had been obtained. However, if Walter did involve a search warrant, it would have been governed by Rule 41 of the Federal Rules of Criminal Procedure which, by its language, does not require giving the defendant a search warrant until after a search.

14. The State's Argument That Delivery of the Warrant is a Ministerial Act is not the Law of Florida.

Florida courts have held that an invalid return will not invalidate a properly executed search warrant. State v. Featherstone, 246 So.2d 597 (Fla. 3d DCA 1971); State v. Dotson, 349 So.2d 770 (Fla. 3d DCA 1977). The giving of the return, then, is a ministerial act.

To the contrary, the mandate of Section 933.11, Florida Statutes, that "when the officer serves the warrant, he shall deliver a copy to the person named..." has never been held to be ministerial in nature. Although the requirement of actually delivering the warrant to the person has been found to be satisfied by reading the warrant before the search begins, the requirement that the warrant be given or read has never been dispensed with in a Florida case. State v. Henderson, supra; Miller v. State, supra; Swinford v. State, supra.

15. The State's Contention That There was "Manifestly no Prejudice" is Meritless.

The search was clearly illegal in violation of Florida statute and case law. No prejudice need be shown.

When the officers first entered Room 223 under authority of a search warrant not in their possession, they committed a wholesale violation of the Defendant's constitutional rights to privacy and to be free from unreasonable searches and seizures. This is more than a

matter of prejudice. It is a matter of police barging in on people without a warrant explaining that a neutral and detached magistrate had determined that there is probable cause to allow these representatives of the State to intrude on their premises and negate their constitutional right to be private and secure. Only the presentation of a warrant at the time of the intrusive entry could be said to meet with constitutional and statutory requirements.

16. The State's Argument That Cases From Other Jurisdictions are Applicable to This Case Falls Wide of the mark.

The State cites numerous decisions from other jurisdictions and suggests that they are applicable to this case. All of those cases were included in the Main Brief of Appellant filed in the Third District and are in this Brief. The cases are from Ohio, Rhode Island, Washington, West Virginia, and the Federal Western District of Tennessee. They are not applicable to this case because although they present similar factual situations, and they hold that a search warrant need not be present before a search begins, none of these cases was decided under Florida Law.

At the end of this Brief is an Appendix containing the full text of the following statutes or rules governing the execution of search warrants in the jurisdictions named above. The Appendix includes:

(1) Florida Statutes, Section 933.11
(2) Ohio Revised Code, Section 2933.241, Rules of Criminal Procedure
(3) Rhode Island General Laws, Rule 41, Rules of Criminal Procedure
(4) Revised Code of Washington, Rule 2.3, Superior Court Criminal Rules
(5) West Virginia Code, Section 62-1A-4
(6) Rule 41, Federal Rules of Criminal Procedure

From reading these statutes and rules and comparing them to Florida's 933.11, it is clear that Florida is the only jurisdiction among those listed which requires that "when the officer serves the warrant, he

shall deliver a copy to the person named." All of the others specifically allow for a copy of the warrant to be given after property is or has been taken.

If the State does not approve of the procedure mandated by Florida statutory law, then it should seek relief through legislative channels. The Courts are bound to follow the law as it exists, not to judicially distort its plain meaning by ruling according to what the State believes the law ought to be.

Part II

THE EXCLUSIONARY RULE ENCOURAGES LAWFUL POLICE CONDUCT AND SHOULD BE APPLIED WHEN THERE IS UNLAWFUL POLICE CONDUCT.

1. Common Sense Tells Us That the Exclusionary Rule Encourages the Police to Comply with the Fourth Amendment.

The primary justification for the exclusionary rule is that it deters the police from violating the Fourth Amendment rights of our citizens to be free from unreasonable searches and seizures.[1] Expanding on this thesis, critics of the exclusionary rule assert that since empirical data fails to conclusively establish a deterrent effect,[2] the major justification for the exclusionary rule has collapsed. In addition, it has been argued that any deterrent effect is outweighed by the high "costs" of the rule.[3] With the critics, Respondent respectfully disagrees and asserts the position that common sense demonstrates that the exclusionary rule does deter unlawful police conduct and that furthermore, no reliable empirical data has ever been developed to refute continued reliance on

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1 Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665, 671 (1970) [hereinafter cited as Oaks].

2 Wright, Must the Criminal Go Free if the Constable Blunders, 50 Tex.L.Rev. 736, 741 (1972) [hereinafter cited as Wright].

3 See Burger, C.J., dissenting in Bivens v. Six Unknown Agents, 403 U.S. 388, 416 (1971), relying on Oaks.

the deterrent assumption.[4] Conversely, empirical data does establish that the exclusionary rule has a negligible impact in freeing persons charged with crimes.[5]

Upon adopting the excusionary rule in California, Chief Justice Traynor stated the deterrence rationale clearly and succinctly:

> Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives.
> (People v. Cahan, 44 Cal.2d 434, 448 (1955); emphasis added.)

Nobody has ever argued that either the exclusionary rule, or any other inducement, could ever compel 100% compliance with the Fourth Amendment by all magistrates, prosecutors and policemen at all times and all places in this country.[6] What the rule does accomplish is to "discourage" violation of, and encourage compliance with, the Fourth Amendment, by removing the primary incentive for conducting illegal

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4 Historically the exclusionary rule evolved as a personal constitutional right, rooted in the U.S. Supreme Court's concern for judicial integrity and the right of privacy. Boyd v. United States, 116 U.S. 616, 653 (1886); Weeks v. United States, 232 U.S. 383, 392 (1914); Elkins v. United States, 364 U.S. 206, 223 (1960); Mapp v. Ohio, 367 U.S. 543, 655-656, 658-659 (1961). While we argue that the rule's role in encouraging lawful police conduct amply justifies its existence, it need not stand on that basis alone. Any reevaluation of the exclusionary rule by this Court should consider its historic place in protecting the security and privacy of our citizens.

5 Canon, Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention, 23 So.Tex.L.J. 558, 577 (1982) [hereinafter cited as Canon, Ideology and Reality].

6 Professor Amsterdam characterizes the rule as providing "a counterweight within the criminal justice system that prevents the system from functioning as an unmitigated inducement to policemen to violate the Fourth Amendment on every occasion when there is criminal evidence to be gained by doing so." (Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 431 (1974) [hereinafter cited as Amsterdam].)

searches and seizures -- the securing of evidence which can be used to help convict persons accused of crimes. Degree of compliance with constitutional requirements will necessarily vary from state to state, from city to city, from police force to police force, and among individual officers on any force.[7] Nonetheless, what the exclusionary rule has done is simplicity itself. Violation of the Fourth Amendment is discouraged. Compliance with the Fourth Amendment is encouraged.[8]

Critics of the exclusionary rule must necessarily take an extraordinarily cynical, albeit unstated, view of this nation's police officers. At the core of this criticism is the assumption that policemen are concerned solely with "arrests" and not "convictions," and that therefore exclusion of illegally obtained evidence in the courtroom will not affect their behavior on the "streets." A necessary corrollary to that argument, in the warrant context, is that the magistrate who issues a warrant with insufficient probable cause is also indifferent to the ultimate disposition of the case and therefore cannot be encouraged to act within constitutional guidelines.

Again, common sense should intervene. There is no reason to suppose that police officers view their jobs from such a narrow perspective. On the contrary, both logic and experience suggest that the police are very concerned that criminals be arrested and convicted. It is, after all, their sworn duty to gather evidence for that purpose. It is certainly not unreasonable to assume that the police, to that practical

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[7] Amsterdam, at 431-432.

[8] Theoretically the case for the exclusionary rule's ability to encourage positive and discourage negative behavior would seem to be at least as strong as the case for the death penalty's deterrent effect. Critics of the exclusionary rule, who support the death penalty, have trouble with this dilemma (see Wright, at 739-740). Indeed, in view of the crime rate in general it could be argued that our entire criminal justice system is having little deterrent effect. (Canon, Ideology and Reality, at 564.) But few would argue that it should therefore be abandoned, or that those accused of crime be given a "good faith" exception.

end, have been encouraged by the exclusionary rule to comply with the Fourth Amendment. Clearly, no convincing empirical data has been developed to undermine that assumption.

2. Empirical Data on the Effect of the Exclusionary Rule is Consistent With the Assumption That the Rule Encourages Compliance With Constitutional Standards.

Critics of the exclusionary rule can hardly be encouraged by the fact that the principal study purporting to show by empirical data that the rule does not deter was published 13 years ago, or that it relied on statistical data now essentially 16 to 25 years out of date.[9] The thrust of Dallin Oaks' research was to study arrests for narcotics, weapons, gambling and stolen property in one city, Cincinnatti, before and after Mapp. He reasoned that if the exclusionary rule was detering unlawful conduct, arrests for these crimes, which generally required evidence to be seized, would decline. Failing to clearly find such a decline, Oaks found the results "inconclusive."[10]

The most telling criticism of the Oaks research is the extremely limited nature of his sample. Assuming he had established that the Cincinnatti police were not, immediately after Mapp, being deterred from conducting unlawful searches, that would tell us very little about the overall effect of the exclusionary rule. The reaction of the Cincinnatti police might have nothing in common with the reaction of the police forces in, for example, Boston, Buffalo, New York, Baltimore,

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9 Back in 1974, Dr. Bradley Canon was already referring to the Oaks study as dated. (Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky.L.J. 681, 699 (1974) [hereinafter cited as Canon, Is the Exclusionary Rule in Failing Health].)

10 In spite of the "inconclusive" nature of the data, Oaks stated his "personal opinion" against the rule, an opinion he specifically divorced from his research. (Oaks, at 755).

or Miami.[11] In addition, this dated material tells us nothing about how the police, even in Cincinnatti, have responded to the exclusionary rule during the last decade.

Another empirical study that is generally relied on by critics of the exclusionary rule is the work of Oaks' "successor," James Spiotto.[12] Spiotto's study was also confined to one city, Chicago, and likewise relies on statistical information that is now over 10 years out of date. It is thus subject to the same criticism as that of Oaks and also subject to a number of new ones.[13]

Spiotto's study focused on motions to suppress filed in felony cases in Chicago trial courts during a 20-year period (1950-1970). He concluded that since the number of motions increased after the Mapp decision the exclusionary rule was not having a deterrent effect. However, this ignores the fact that the exclusionary rule was introduced in Illinois in 1924 and followed continuously since that time.[14] Thus, the Illinois criminal justice system should not have been at all affected by Mapp. The researcher's conclusion was totally without a factual basis.

Spiotto also concluded that since an extremely high percentage of motions were granted by the Chicago trial courts (87% in 1969), this indicated a high degree of police misconduct.[15] However, the "windy

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11 In fact other studies demonstrate that there was a dramatic decrease in arrests following Mapp in Baltimore and Buffalo. (Cannon, Is the Exclusionary Rule in Failing Health, at 698-699, 706).

12 Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J.Legal Studies 243 (1973) [hereinafter cited as Spiotto].)

13 For a more detailed criticism of Spiotto's work see Critique, On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 N.W.U.L.Rev. 740 (1974) [hereinafter cited as Critique].)

14 Critique, at 754.

15 Spiotto, at 247.

city" can hardly be thought typical of the American Judicial System. In most other cities, only a very small percentage of motions to suppress are actually granted.[16]

Perhaps most critically, the whole notion of using statistics on motions to suppress as a gauge of the exclusionary rule's effect on police conduct is questionable. Since by definition virtually no motions will be filed prior to the advent of the exclusionary rule there can be no "base-line" to even attempt a before and after analysis.[17] And studies conducted after the rule's introduction fail to account for rival theories which might explain an increase in motions to suppress (e.g., a rise in the number of drug cases -- cases that almost always involve a search and seizure).[18]

The most recent, and extensive empirical studies of the effect of the exclusionary rule have been undertaken by Bradley Canon.[19] Unlike Oaks and Spiotto, the research was not confined to one city. The arrest statistics for "search and seizure" sensitive crimes were examined in 19 cities. In approximately half of those cities there was a dramatic

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16 In most cities motions to suppress are granted 10 percent of the time or less. (Canon, Is the Exclusionary Rule in Failing Health, at 721-722.) Chicago is in fact unique in having over 50 percent of search and seizures motions granted (id., at 722). Commentators have noted that Chicago has no prosecutorial screening prior to a case going into the docket. They have also noted that city's peculiar reputation for intentional illegal raids (id., at 720, and authorities cited in fn.113).

17 Critique, at 749-756.

18 This explanation is entirely plausible since the number of arrests in drug cases increased dramatically from 1950 to 1969. (Oaks at 685.)

19 See Canon, Ideology and Reality; Canon, Is the Exclusionary Rule in Failing Health; Canon, Testing the Effectiveness of Civil Liberties Policies at the State and Federal Level: The Case of the Exclusionary Rule, 15 Am.Pol.Q. 57 (1977) [hereinafter cited as Canon, Testing the Effectiveness]; Canon, The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?, 62 Judicature 398 (1979) [hereinafter cited as Canon, The Exclusionary Rule].

decrease in the number of arrests following Mapp, and in the other one-half the effect seemed to be minimum or absent.[20]

Canon also inquired into the issuance of search warrants in several cities before and after Mapp. He reasoned that an increase in applications for search warrants would demonstrate that less illegal searches were being conducted and that police forces in general were attempting to comply with the Fourth Amendment. He discovered that prior to Mapp, the use of search warrants in most cities was virtually non-existent. Conversely, subsequent to the Mapp decision, a substantial number of warrants were obtained.[21] In addition, Canon's survey of law enforcement leaders demonstrated a wide-spread adoption, by police departments, of policies to implement Mapp and other search and seizure decisions.[22]

Canon concluded that "--the exclusionary rule can and does have a very real, although hardly universal, deterrent effect on the police."[23] Thus, while overall the empirical data may be characterized as "inconclusive", it is, in fact, quite consistent with the continuing assumption that the exclusionary rule does encourage the police to conduct searches that comport with the Fourth Amendment.[24]

3. The Exclusionary Rule is Seldom Implicated in the Release of Persons Charged with Crimes, Particularly Crimes of Violence.

Popular rhetoric has placed upon the exclusionary rule the blame for many of the perceived ills of the criminal justice system.[25] However, the

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20 Canon, The Exclusionary Rule, at 400.

21 Canon, Ideology and Reality, at 569, citing the work of Michael Ban.

22 Canon, Ideology and Reality, at 569, citing the research of Professor Stephen Wasby.

23 Canon, The Exclusionary Rule, at 400.

24 Stone v. Powell, 428 U.S. 465, 492-493 (1976).

25 See in particular Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 214 (1978) [hereinafter, Wilkey, The Exclusionary Rule].

principle charge against the rule is that it is responsible for substantial numbers of criminals being let loose to prey on society. Therefore, it is argued the "cost" of the rule outweighs the benefit of deterring unlawful police conduct.[26] Empirical evidence shows that these charges are unfounded. Unlike the empirical data collected on the question of deterrence, this evidence is of recent vintage. It establishes that at every level of the criminal justice system the effect of the exclusionary rule, particularly on "violent" crime, is remarkably modest.

In the first instance several studies have demonstrated that a very low percentage of overall complaints are rejected by prosecutors because of search and seizure problems.[27] A 1978 report by the independent General Accounting Office reported on the impact of the exclusionary rule in federal criminal prosecutions. It was revealed that federal prosecutors dropped charges because of search and seizure problems in only .2% of all cases presented for prosecution.[28] Data developed in a recent study by the Department of Justice is consistent with the GAO report. That study considered the effect of the exclusionary rule in state criminal prosecutions in California.[29] As in the GAO report,

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26 Wilkey, Constitutional Alternatives to the Exclusionary Rule, 23 So.Tex.L.J. 590, 596 (1982).

27 Canon, Ideology and Reality, at 573-576, and studies cited.

28 Report by the Comptroller General of the United States (GAO): Impact of the Exclusionary Rule on Federal Criminal Prosecutions (1979) [hereinafter cited as GAO Report]. The report showed that .4 percent of all cases rejected by the federal prosecutiors were for search and seizure reasons. Since approximately 50 percent of all cases were rejected this means that search and seizure problems were implicated in rejecting only .2 percent of the total cases. (Id., at 13-14).

29 The Effect of the Exclusionary Rule: A Study in California, Criminal Justice Research Report (Dec.1982) [hereinafter Department of Justice Study].

less than 1% of all criminal complaints were dismissed by the prosecution for search and seizure reasons.[30]

These, and other studies also show that motions to suppress, while often made, are seldom granted,[31] and that even when granted the defendant will, in many cases, still be convicted.[32] Studies of the California appellate system reveal that the appellate courts are as likely to reverse a granting of a motion to suppress as they are to reverse a denial.[33]

The other significant fact revealed by these studies is the type of case affected by search and seizure violations. It is clear that any impact of the exclusionary rule is felt almost exclusively in the area of drug offenses and other nonviolent crimes. The principal empirical researches, Oaks, Spiotto, and Canon have all recognized that the rule's effect is limited to victimless crimes and has virtually no effect on violent crimes.[34] Both the Institute for Law and Social Research (INSLAW) Study in Washington, D.C. and the Department of Justice study in California find that over 70% of the cases dropped were drug cases.[35] [In evaluating that 70% figure it should be kept

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30 The study showed that over a three-year period, statewide, of all cases rejected for prosecution, 4.8 percent were rejected for search and seizure reasons. However, as only 17 percent of all cases presented were rejected this means that only .8 percent of the total number of felony cases were rejected for search and seizure reasons. (Dept. of Justice Study, p.10.)

31 Canon, Ideology and Reality, at 574-575.

32 Over half of the defendants whose search and seizure motions were granted in federal court were still convicted. (GAO Study, p.13.)

33 Davies, Do Criminal Due Process Principles Make a Difference?, Am.Bar Foundation Res.J. 247, 266-267. Oaks, at 754; Spiotto, Note 8, Table 2, at 250; see also Canon, at 576-577.

34 Dept. of Justice Study, p.12; GAO Report, p.7; Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027 (1974); Wright, at 741; Critique, at 774.

35 Canon, Ideology and Reality, at 576.

in mind that while most cases rejected for search and seizure reasons are drug cases, the overwhelming percentage of drug cases do not encounter any such problem and are successfully prosecuted.]

Starkly opposed to the statistics in drug cases is the role of the exclusionary rule in crimes of violence. The INSLAW Study showed that of the over 5,000 persons charged with a violent crime not one was dropped by the prosecution because of search and seizure problems.[36] The Department of Justice study showed that out of over 530,000 felony cases processed in a four-year period in California only four involved murder cases with search and seizure problems. In fact, these studies demonstrate that the great majority of felony cases are not affected at all by the exclusionary rule. They also show that the modest effect of the exclusionary rule on the criminal justice system is felt almost exclusively in the area of nonviolent crimes. The critics of the rule have, in the words of one commentator, exaggerated the costs a "hundredfold or more."[37]

4. The Notion That the Exclusionary Rule Encourages Compliance With the Fourth Amendment is Well Founded.

In 1976, a majority of the U.S. Supreme Court, speaking through Justice Powell, strongly reaffirmed its belief in the exclusionary rule.

> Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease. Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement

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36 Canon, Ideology and Reality, at 576.

37 Canon, Ideology and Reality, at 577.

> policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions.
> (Fns. omitted; Stone v. Powell, supra, at 492-493.)

It is noteworthy that the high court's continued reliance on the efficacy of the exclusionary rule was reached "[d]espite the absence of supportive empirical evidence," and with the specific recognition of the studies of Oaks, Spiotto and Canon. (Id., fn.32.) Certainly nothing in the way of empirical evidence has appeared since that decision which would support a reconsideration of that affirmation. On the other hand, as discussed in the previous section, a number of empirical studies have appeared which demonstrate that the societal "cost" of the rule is not what its critics have previously claimed.

Logic and instinct tell us that the exclusionary rule encourages the best in our police and our courts and discourages the worst. That being the case, and with the principal of stare decisis in mind, this honorable court is urged to reaffirm its faith in that rule.

5. The "Good Faith" Exception to the Exclusionary Rule Freezes the Development of Fourth Amendment Law, Adds an Additional Fact-Finding Layer to the Procedures in Criminal Cases, Brings an Ungovernable Arbitrariness to the Exclusionary Rule and Puts a Premium on Police Ignorance and Poor Training.

A good faith exception to the exclusionary rule makes eminent good sense if the purpose of that rule is to reward and punish police officials. Indeed, the point is so obvious that it would have been made by the U.S. Supreme Court in 1914 in Weeks v. United States, 232 U.S. 383 and in 1961 in Mapp v. Ohio, 367 U.S. 643 if that had been the motive of the Justices who then sat on the Court. Instead, their invocation of the rule was to condemn illegal police conduct without regard to whether

it was reasonable for the police to be aware of the illegality. True, recent decisions have limited the exclusionary rule to applications where its deterrent effect on illegal police action can be anticipated to be most effective. But the good faith exception, even in its "objectively reasonable" form, strikes at the heart of the Fourth Amendment by freezing its protections in their current form. Growth and development, a sure sign of life and health, would be denied to the Fourth Amendment.

We illustrate this point with the discussion of the recent case of Steagald v. United States, 451 U.S. 204 (1981). That case, over the dissents of two Justices, establish an extremely important point: that in the absence of exigent circumstances or consent the combination of an arrest warrant and probable cause that the subject of that warrant was present in a third party's home is not sufficient to allow police invasion of that home without the authorization of a search warrant issued by a neutral magistrate. When the police made the entry into Steagald's home to execute their arrest warrant they were not acting lawlessly or even in an area of uncertainty. Two years previous to the entry into Steagald's home, the Fifth Circuit had decided that an officer holding a valid arrest warrant who reasonably believes its subject is within a home belonging to a third party need not obtain a search warrant to enter that home to execute the warrant. United States v. Cravero, 545 F.2d 406, 421 (1976). That decision was the final authority on the subject in Atlanta, where the entry into Steagald's home was made. Obviously, the DEA officers who entered Steagald's home were in perfect "good faith."

If the good faith exception now being proposed had been in effect at the time of the entry into Steagald's home, the legality of that entry would have been a moot point for Steagald. He would have no incentive to raise the issue since he would lose whether or not the

entry had violated his rights to privacy and security under the Fourth Amendment. The Supreme Court would never have heard Steagald's case and the constitutional point might never have been decided. The warning of the majority that a rule allowing the police, acting alone, to decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant "would create a significant potential for abuse" (451 U.S. at 215) would never have been given. Steagald was the perfect case for the application of the good faith rule and is the perfect example of why it should not be applied or adopted.

A. "Good Faith" in Practice.

The brief filed by petitioner tends to play down the procedural problems which would be created by the adoption of a good faith exception to the exclusionary rule.

In the first place, if the police do not have a subjective belief in the reasonableness of the search, the courts have no reason to look beyond that police decision of unreasonableness to see if some other police officer might have had a different opinion. (See discussion in Agar v. Superior Court, 21 Cal.App.3d 24, 30 (1971).)

In every case in which a good faith exception is relied upon by the prosecutor, there would first have to be a determination of whether the police conduct in the particular case was or was not in violation of the protections of the Fourth Amendment. Only after a finding was made that the conduct of the police did violate the Fourth Amendment could the issues posited by the Attorney General come into play. First, the trial judge (and then the reviewing judges and justices) would have to decide whether the governing legal principles which were violated by the officers have been "predictably articulated." If the rule were new, difficult to understand, or rarely invoked, the argument

certainly would be made that it was not "objectively reasonable" for a policeman to be aware of it. Is it possible to avoid subjective elements and judgments in making the decision as to what legal principles have been "predictably articulated?" Will there be certain legal rules and principles which every policeman is expected to know and others which no policeman has to know? The answers to these questions show the essential arbitrariness of the good faith exception.

Of course, as to factual errors it has long been the rule that a policeman may act upon such factual conclusions as are objectively reasonable, regardless of the true state of facts. See Hill v. California, 401 U.S. 797 (1971) (officers mistakenly but reasonably arrest the wrong person and discover contraband in the course of a search incident to the arrest). To take the next step and to test whether the officer's belief in the legality of his actions was reasonable will require inquiry on quite a different level, and one which is necessarily subjective. Should it consider what training the officer has had, or what exposure he has had to recent decisions? Does it make a difference if a state attorney has advised him that his conduct is legal? If a magistrate in another case involving the same kind of conduct by a policeman has ruled that it was not in violation of the Fourth Amendment, can the policeman continue this same conduct indefinitely? The difficult decisions which would be required in answering these questions demonstrate that the good faith of arresting officers is not an easy question and testing it would add considerable complexity to each search and seizure decision.

Further, a good faith exception to the exclusionary rule would create a large burden for a conscientious police officer. The incentive provided by the good faith exception would be to encourage ignorance of Fourth Amendment guarantees.

It is sometimes argued that the exclusionary rule is too complex to be an effective deterrent to illegal police conduct. Such an argument takes the very few cases which are difficult to understand, complex and confusing and assumes those cases are representative of all search and seizure issues. In fact, every court in this nation which handles criminal cases deals with search and seizure issues on a daily basis, and disposes of those issues under well settled principles of law. It is unsound reasoning to believe the small percentage of difficult cases removes the encouragement to obey the law provided by the vast majority of cases where the search issues are clear. We may concede the exclusionary rule has not deterred all invasions of constitutionally protected rights by the police, nor has it been successful in encouraging all police agents to seek search warrants in the absence of emergency conditions. The lack of one hundred percent effectiveness is no more a good argument for the abolition of the rule than would be the argument that since rapes continue to occur the laws against them should be eliminated as ineffective. The proper focus on this case is on vindicating the constitutional rights of every citizen by applying the exclusionary rule when those rights are violated. It is upon the vindication of constitutional rights which attention should be focused, not on the punishment of a policeman.

To preserve our rights under the Fourth Amendment, it is important that the judicial system not endorse lawless methods to convict persons of crime, whether or not it might have seemed reasonable to the police at the time to use the unlawful methods.

6. A "Good Faith" Exception to the Exclusionary Rule in Warrant Cases Would Render Meaningless the Fourth Amendment's Provision that "No Warrants Shall Issue, But Upon Probable Cause".

A. The History of the Fourth Amendment Cautions Against Adoption of a "Good Faith" Exception in the Warrant Situation.

It was not primarily police misconduct which inspired the adoption of the Fourth Amendment. The Fourth Amendment, and particularly the warrant clause, was an outgrowth of the issuance of general warrants and writs of assistance by colonial magistrates. The authors of the Bill of Rights were especially concerned about abusive searches performed with the aid and encouragement of judicial officers, because that is the infringement of rights they had experienced. They wanted to prevent, by Constitutional guarantee, the kinds of systematic, court-sanctioned invasions of privacy which resulted from warrants which could issue without proof of probable cause for the search.[38]

The lessons of this history should not be ignored. If America today does not suffer from the routine issuance of invalid general warrants, it is because the framers took care to protect us from that situation. Giving magistrates carte blanche to issue warrants, free from the threat of suppression because the police had acted in good faith by securing them, would sanction by implication the very abuses the Fourth Amendment was adopted to prevent.

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38 "The purpose of the Bill of Rights was to place certain 'great rights' beyond the power of any branch of government to subvert them for the alleged good of the people. The fourth amendment, in particular, responded to the use in the colonies of general warrants granting unrestricted powers to search. Although by 1789 such warrants had been condemned not only in the new states but also in England, the states were not satisfied with a constitution which lacked specific protection against general warrants and demanded the security of an explicit guarantee in the Bill of Rights." (Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 Journal of Criminal Law & Criminology 635, 636 (1978), fns. omitted. See generally the authorities cited in Amsterdam, Perspectives on the Fourth Amendment, 58 Minnesota L.Rev. 349, 450-451, fn.168.)

B. The Deterrence Effect of the Exclusionary Rule is Likely to be Especially Great When Warrants are Sought.

As has been previously noted, the exclusionary rule encourages compliance with the Fourth Amendment by removing a primary incentive for its violation. It has, however, been suggested that the rule does not function as intended for several reasons, because the police have goals other than securing convictions (harassment, seizure of contraband, etc.) not affected by the exclusionary sanction and because, in any event, the rules governing search and seizure are so complex that even the most diligent officer is unable to apply them.

Whatever limited validity these criticisms of the exclusionary rule may have in other contexts, they are particularly inappropriate in the situation presented by the case at bench where a warrant was both sought and obtained. The seeking of a warrant in and of itself demonstrates the desire of the police to bring their case to trial. And their initiation of the warrant process involves them with legally trained individuals who can be expected, and should be required, to remedy any deficiency in the legal knowledge of the police.

If police in "stop and frisk" situations sometimes act without regard for whether evidence discovered can later be used in court, it is safe to say that police seeking a search warrant nearly always hope to develop evidence that will lead to a successful criminal prosecution. Prosecution is almost always the goal -- and therefore exclusion a meaningful sanction -- when the investigating agency seeks out a prosecutor and magistrate to obtain judicial authorization for a search.

Furthermore, any proposed exception to the exclusionary rule -- and any evaluation of its deterrent effect -- must consider more than just the role of the police officer in the warrant process. In many search warrant situations, a prosecutor has assisted or advised the

police officer in obtaining the warrant; and the warrant has been issued by a magistrate. Trained in the law, prosecutors and magistrates can be expected to be acutely aware of, and conform their actions to, the rulings of courts on the validity of search warrants.

Thus, if there is to be a "good faith" exception to the exclusionary rule, the inquiry about "good faith" cannot stop with the officer who executed the search warrant. It must include an inquiry into the state of mind of the prosecutor, if any, who assisted in the preparation of the affidavit, and the state of mind of the issuing magistrate. Questions about whether the police or prosecutor engaged in "magistrate shopping," for example, would be relevant to their good faith. Exclusion of evidence obtained under an invalid warrant will have a specific deterrent effect on the prosecutor and magistrate who participated in the issuance of that warrant.

C. The Preference Given to Warrants is a Sufficient "Reward" for the Good Faith of the Police in Seeking Judicial Authorization for their Actions.

Advocates of modification of the exclusionary rule suggest that the subjective good faith of the police should meet an objective standard. The proper objective standard of reasonableness, of course, is supplied by the Constitution: probable cause sufficient to support the issuance of a warrant. No change in current law is needed when an officer's and magistrate's good faith belief in the validity of the search is well founded.

The law already rewards the officer who seeks a warrant by making it less likely that the evidence he seizes pursuant to that warrant will be suppressed. The Supreme Court has directed that warrants be interpreted in a common sense manner and that "the resolution of doubtful or marginal cases [be] largely determined by the preference to be accorded to warrants." (United States v. Ventresca, 380 U.S. 102, 109

(1965), citation omitted.) Thus, the police officer who desires a successful prosecution is duly rewarded for his good faith in seeking a warrant. His basis for the search is given that most valuable of considerations, the benefit of the doubt.

No additional advantage should be extended. If a warrant cannot meet this minimal standard of reasonableness even after all doubts are resolved in its favor, it should not be allowed to form the justification for a search. Every invalid warrant represents an unjustified invasion of an individual's privacy, and they are not so rare that the risk can be totally discounted, even with the exclusionary rule as a sanction.

Without the exclusionary rule as a sanction, the risk of invalid warrants would be much greater. In a nation with thousands of magistrates, some inevitably will know more about Fourth Amendment guarantees than others, and be more careful in the issuance of warrants. Careful magistrates, for example, often protect citizens' rights without stifling a criminal investigation by asking the police to do further investigation before they will issue a search warrant. In the absence of the exclusionary rule, police would be encouraged to seek magistrates who knew little or nothing about Fourth Amendment law, and would issue a warrant on little more than the fact that one was sought by the police. Forum shopping is a fact of life. Unless a warrant fell below the undefined standard of "objective reasonableness," the citizens of the United States would have no real protection from unconstitutional searches authorized by such uninformed magistrates.

D. No Feasible Alternative to Exclusion Exists Where There is a Warrant.

Most discussions of modifying the exclusionary rule suggest the purposes of the Fourth Amendment can be fulfilled by some alternative remedy for violations of its provisions. Suggestions for an effective alternative remedy are conspicuously absent from the State's brief in this

case, however. Whatever the possibility of fashioning an alternative remedy for unlawful warrantless searches, there is no prospect at all of doing so for searches carried out pursuant to a warrant issued without probable cause.

By definition, searches which meet the standards of the proposed modification to the exclusionary rule are carried out in good faith. Under existing law, the subjects of such a search cannot civilly sue the agents who performed the search. The magistrate who authorized the unlawful search would presumably also have acted in good faith, and would certainly enjoy judicial immunity from civil suit. So even if a fair special tribunal could be found to hear civil search cases, and the financially strapped federal and state governments could be expected to appropriate substantial sums to pay judgments for unlawful searches -- two highly questionable assumptions -- the person whose person, home, automobile or effects were unlawfully searched pursuant to an invalid warrant would have no access to that tribunal. Nor is there any hope of an effective internal disciplinary system which would prevent searches under warrants issued without probable cause. No police department could be expected to have a rule which provided for some cross-check of the validity of warrants and ordered its officers not to execute warrants which fell short under that procedure, whatever it might be.

Magistrates, who are in state systems often independently appointed or elected judges, are simply not subject to day-to-day internal supervision. A particular magistrate who repeatedly authorized outrageous searches might eventually be removed by the appointing power or defeated in an election, but only constant and extreme violations of the Fourth Amendment would be likely to be cause for removal from office.[39] Even then, the

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[39] It is the routine violations of the Fourth Amendment, rather than the exceptional incidents which generate public outcry, which most require the exclusionary sanction. Shocking or violent intrusions can perhaps be curtailed by civil or criminal actions against the offending party, prevention of the less egregious violations must depend on exclusion of the evidence thus obtained. (Kamisar, A Defense of the Exclusionary Rule, 15 Crim.L.Bull. 5, 32-34 (1979).

crucial question would most likely be the political power of the targets of the outrageous searches, not the seriousness of the constitutional violations themselves. Removal from office would not and should not be the sanction for the occasional issuance of a search warrant which fails constitutional standards. But removal is the only possible internal sanction, and it demonstrates the futility of attempting to regulate magistrates by internal discipline, because they are not and cannot be subject to such discipline.

Where a search is conducted pursuant to unlawful execution of a search warrant, the exclusionary rule is not only the sole meaningful remedy, it is the only remedy. The exclusionary rule is the only feasible way to make the Constitution a living document instead of a dead letter.

No reevaluation of the exclusionary rule can properly ignore the history of the rule. Integral to that history is its place in protecting the rights of privacy of our citizens and vindicating Fourth Amendment rights, as well as encouraging lawful conduct by the police. Although as previously argued the deterrent effect of the exclusionary rule is supported by experience and common sense, it need not stand on that basis alone. As 1984 draws near, it is to this Court that our citizens look to "resist every encroachment upon rights expressly stipulated for in the Constitution." (James Madison, Annals of Congress 439 (1789).)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was mailed on this 8 day of July, 1983, to: CALVIN FOX, Assistant Attorney General, 401 N.W. 2nd Avenue, Miami, Florida; and OFFICE OF THE PUBLIC DEFENDER, Appellate Division, 1351 N.W. 12th Street, Miami, FL 33125.

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