IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,662

THE STATE OF FLORIDA,

Petitioner,

vs.

HENRY LEE RILEY,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON MERITS

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PREFACE

The Petitioner, The State of Florida, was the Appellee in the District Court of Appeal and the prosecution in the trial court. The Respondent, Henry Lee Riley, was the Appellant in the District Court of Appeal and the Defendant in the trial court. In this brief, the parties will be referred to as they appeared before the trial court.

Following symbols are used in this brief:

(T) For the transcript of proceedings consisting of pages T1-T149.

(R) For the record-on-appeal consisting of pages R1-R41.

(SR) For the supplemental record-on-appeal consisting of pages SR1-SR12.

(A) For the appendix to the present brief of the Petitioner on the Merits.

I

STATEMENT OF THE CASE

The Defendant was charged by information with two counts of trafficking in illegal drugs; one count of sale and one count of possession. See R3-R5. The Defendant filed a Motion to Suppress which the trial court denied after a hearing. See R23-R25A. The trial court entered an extensive written order upon the Motion to Suppress. R27-R29.

The facts relative to this petition are succinctly stated in the District Court's Opinion. See A2-A3. On April 1, 1980, in the evening hours, Officer William Johnson of the Dade County Public Safety Department went to the home of a Circuit Judge in Northeast Dade County, Florida, for the purpose of securing a search warrant. Officer Johnson was armed with a detailed affidavit in support of the search warrant which tended to show a certain illegal drug dealing was taking place in a particular motel room at motel complex near the Miami International Airport. The Circuit Judge examined the affidavit presented to him by Officer Johnson, made a determination that the affidavit stated probable cause for the search warrant of the motel room in question, and issued a search warrant for Dade County Public Safety Department officers to search the motel room for contraband drugs.

While this was transpiring, two other Dade County Public Safety Department officer were standing by in a room located

across the hall from the motel room in question. Officer Johnson, upon receiving the search warrant, proceeded to the said motel room; in route he radioed his dispatchers that the judge had signed the search warrant and directed the dispatcher to so notify the two officers who were standing by. The latter officers were immediately so notified and thereafter proceeded across the hall to the motel room in question. They encountered, at that time, a women who was in the process of opening the door to the room with several bags in hand. The officers, in turn, displayed their police badges and announced: "police officers we have a search warrant for the room." The woman tried to close the door, but the officers forced the door open, stood immediately inside the door and announced that they were waiting for a search warrant for the search of the premises; the Defendant Henry Lee Riley was inside the room alone and in bed. Everyone then waited for some twenty (20) minutes at which time Officer Johnson arrived with the search warrant in hand which was then duly executed. A search thereafter ensued in which a quantity of heroin was seized and the Defendant Riley arrested.

Sergeant William Pearson, specifically testified at the Motion to Suppress that he had received the information that the warrant had been signed. T112; See, T115. He said that he had checked with the manager of the motel and learned that once the door to a room was double locked, there was no key to the door available. T117. Sergeant Pearson said that he

could not force open the steel motel door. See, T117. He said that he expected the evidence to the crime would be destroyed in the process of the officers entry to the motel room as for example, by flushing it down the toilet. See T118. Pearson also said that he was aware that the Defendant had been arrested for first degree murder within the past year and he believed that as a consequences that and his familiarity with the Defendant's "rap sheet" that the Defendant had a propensity for violence. Id. The Defendant faced a twenty-five year mandatory sentence and a $500.000 fine upon conviction for the present charges. See Section 893.135 (1)(c) Fla.Stat. Although the District Court of Appeal's opinion states that the warrant arrived some twenty (20) minutes later, there was evidence that the period of time was as little as seven (7) minutes between the confrontation with the black female and Detective Johnson's arrival with the warrant. See T115.

The trial court in its extensive written order denying the Defendant's Motion to Suppress declined to follow the dicta in Swinford v. State, 311 So.2d 727 (Fla. 4th DCA 1975) (Mager, J., concurring specially), but instead adopted the better reasoning in United State v. Cooper, 421 S.Supp. 804 (W.D. Tenn. 1976). Pursuant to the trial court's denial, the Defendant pleaded nolo contendere and appealed to the Florida Third District Court of Appeal. A3. Originally, on

November 16, 1982, (See A12), the Florida Third District Court of Appeal with Judge Hendry dissenting, affirmed the trial court's denial of the Defendant's Motion to Suppress. The District Court of Appeal's majority opinion indicated that other federal and state authorities "are virtually unanimous" in that no constitutional of violation is shown by the present or similar police conduct in executing a search warrant. Furthermore, the court noted that neither §933.11 Fla.Stat. nor §933.08 Fla.Stat. require that an officer have a warrant physically in hand at the moment he enters the premises which are authorized to search.

On March 29, 1983, the District Court granted rehearing and upon rehearing adopted the dissenting opinion of Judge Hendry as the majority court opinion. See A12. Judge Ferguson switched from the majority opinion on November 16, 1982 to the majority opinion on March 29, 1983, without explanation. The new majority opinion reasons that the Court should not approve entry by the police into a premises without a warrant because of the potential for violence. See A13-A14. Judge Hubbart, the Chief Judge for the Third District Court of Appeal, filed an extensive dissent, reasoning that:

> "Third, and more to the point, I see nothing to recommend a rule of law which seems to be based, even in part, on a fear of lawless violence if not accepted. We cannot, it seems to me, cave in to the few lawless individuals in are midst who might irrationally act

> in the manner suggested by Judge Hendry. Ours is a government of laws and not of men; our laws must be shaped by the principles of fairness and reason and not by fears, real or imagined, of irrational violence. I think the established law on subject is imminently sound; I would adhere to it as the law of this State."
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> A115.

On March 29, 1983, the Court also certified that the present decision of the District Court of Appeal passes upon a question of great public importance, to-wit:

> "Whether it is unlawful [under the federal or Florida Constitution or Florida Statutory Law] for the police, in an otherwise lawful manner, to enter upon private premises which they are authorized to search pursuant to a valid and previously search warrant, when the entering officers do not physically have the search warrant in hand upon entry, but do receive the warrant shortly thereafter and duly execute it?"
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> A116.

Judge Wilkie D. Ferguson, filed a special concurring opinion as to the certified question:

> "I think it more informative to certify the question as follows: Whether it is unlawful for the police to enter a private premises, without a search warrant, for the purpose of restraining the movement of persons therein, in the absent of exigent circumstances, where they have

knowledge that a search warrant has been signed by a magistrate, but it is not yet in their possession upon entry."

A16a.

On April 12, 1983, the District Court stayed its Mandate pending review in this Honorable Court. A17. On April 1, 1983, the undersigned filed the State's Notice upon the certified question and Notice of Intent to Seek Discretionary Review. A18.

II

QUESTION PRESENTED

WHETHER 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 THE SEARCH WARRANT IN HAND UPON ENTRY, BUT DO RECEIVE A WARRANT SHORTLY THEREAFTER AND DULY EXECUTE IT?

III

ARGUMENT

A) THE TRIAL COURT'S RULING IS CONSISTENT WITH TRADITIONAL ANALYSIS.

There is no question in the case at bar as to the fact that the officers properly announced their authority and purpose in the present circumstance. However, the officers began no search. Instead they only arrested the Defendant without a warrant as Section 901.15(4) Florida Statutes specifically authorizes them to do. The warrant herein was both an arrest warrant and a search warrant. S9. The specific provisions of Section 901.15(4), expressly provide that:

> "When arrested by officer without warrant is lawful. A peace officer may arrest a person without a warrant when:
>
> * * *
>
> (4) A warrant for the arrest has been issued and is held by another peace officer for execution." (Emphasis added).

That the door of the room was opened and the Defendant arrested before the warrant arrived, is of no consequence under the foregoing express statutory authority. The Defendant failed to present as is his burden, any evi-

dence below that the search warrant was improperly executed, as being not read to the Defendant or that a copy was not left behind. The denial of the motion to suppress was therefore proper, but for another reason. See, Stuart v. State, 360 So.2d 406, at 408 (Fla. 1978).

Additionally the present search warrant was undeniably executed by officers specifically authorized to do so by the fact of the warrant under Section 933.08 Florida Statutes which provides that:

> "The search warrant shall in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer requiring it, said officer being present and acting in its execution." [Emphasis added].

Chapter 933 provides no limitation that a warrant be physically present or read prior to the beginning of a search. Indeed there is no constitutional requirement that a warrant be served prior to a search commencing.[1] See, Walter v. United States, ___U.S.___, 100 S.Ct. 2395 at 2402, n. 10 (1980)("The inability to serve a warrant on the owner of property to be searched does not make execution of the war-

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[1] The United States Constitution and the Florida Constitution are to be interpreted identically for purposes of issues regarding search and seizure. See, Hetland v. State, 366 So.2d 831 (Fla. 2d DCA 1979), approved and adopted, in 387 So.2d 963 (Fla. 1981).

rant unlawful"); United States v. Marx, 635 F.2d 436, at 441 (5th Cir. 1981)("Failure to deliver a copy of the search warrant to the party whose premises were searched until the day after the search does not invalidate a search in the absence of a showing of prejudice"); United States v. McKenzie, 446 F.2d 949 (6th Cir. 1971).

In sum, the Defendant complains only about the ministerial act of delivery of the physical warrant, which was seven (7) minutes later and presented before any actual physical search was begun. In State v. Williams, 374 So.2d 609, 610 (Fla. 3d DCA 1979), the Court explained the applicable rule herein:

> "[T]he failure to comply with a ministerial act, required by statute in regard to a search warrant, will not invalidate the search unless prejudice can be show. See: State v. Featherstone, 246 So.2d 597 (Fla. 3d DCA 1971)." [Footnate omitted].

There was in the case at bar, manifestly no prejudice. The officers did nothing prior to arrival of the warrant seven minutes later. There was in effect no fruits gathered and hence nothing to suppress even assuming arguendo any impropriety.

The rule, which this Court should apply to the present circumstance should be derived from those jurisdictions

where like Florida, there is no statutory requirement that a warrant be served prior to its execution. See, e.g., State v. Brown, 91 W.Va. 709, 114 S.E. 372, 374 (1922); State v. Johnson, 230 A.2d 831 (R.I. 1967). In United States v. Cooper, 421 F.Supp. 804 (W.D. Tenn. 1976) as in the case at bar, the officers had received radio information that a warrant had been issued. The officers then began a search of the defendant's premises one half an hour before the warrant arrived. In rejecting the Defendant's complaint of error, the Cooper Court explained:

> "The Court is disposed to find that defendant's rights have not been violated considering circumstances and safeguards. The search was made pursuant to a valid warrant which was properly issued. The officers had been notified of the issuance and it was immaterial that the warrant was not physically present during the search."
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> 421 F.Supp. at 806.

Similarly, in State v. Johnson, 240 N.E. 2nd 574 (Ohio, 1968), the officers had begun a search after obtaining a warrant, but did not physically serve the warrant until fifteen minutes later. In rejecting the defendant's claim of error the Johnson Court explained that:

> "In this case the inability to produce the warrant at the initial state of the narcotics raid does not deprive the defendant of any substantive right. 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 made to be a valid search. The warrant issued in accordance with law is the vehicle that gives validity to the search. . . .
>
> "A search warrant does not have to be served before search, for search to be constitutionally valid. State v. Williams, 250 La. 64, 193 So.2d 787." [Emphasis added].
>
> 240 N.E. 2d at 575.

See also, State v. Wraspir, 20 Wash. App. 626, 581 P.2d 182 at 184 (1978)["Nor does the Fourth Amendment require immediate service of the warrant before the search may begin." (Emphasis added)]. In view of the express statutory authorization noted above in Section 901.151(4) and the total silence of Chapter 933, the State submits that the rule in Cooper; Walter; State v. Brown, State v. Johnson; State v. Johnson and State v. Wraspir should apply in the case at bar. It is plainly evident that by direct relationship and substantial analogy to Section 901.15, the Defendant's complaint as to the time of service of the warrant herein is without merit.

Finally the State would note that the undisputed evidence below established the existence of a small quantity of highly illicit drugs capable of being quickly destroyed. See,

T101, T117-T118. Additionally the officers were aware of the Defendant's propensity for violence and certainly mindless violence is a trademark of South Florida drug traffic. See, Royer v. State, 339 So.2d 1007, at 1023-1024 (Fla. 3d DCA 1980) (en banc) (Hubbart, J., Concurring). Therefore, the officers were absolutely justified in entering the motel room to preserve evidence and to protect themselves. See, Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963)(warrantless entry to prevent destruction of evidence); Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, at 2413 n. 6 and 7, 57 L.Ed.2d 290 (1978); Compare, State v. Johnson, 372 So.2d 536 (Fla. 4th DCA 1979); Berryman v. State, 368 So.2d 893 (Fla. 4th DCA 1979); Whisnant v. State, 303 So.2d 397 (Fla. 3d DCA 1974). In Mincey the Court specifically explained that:

> "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. (Quoting) Wayne v. United States, 115 U.S.App. D.C. 234, 241, 318 F.2d 205, 212 (opinion of Burger, J.)"
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> 437 U.S. at 392-393.

See, also, United States v. Santana, supra; Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed. 2d 777 (1964). The entry of the officers into the motel room without a warrant was thus absolutely lawful.

B) THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO NON-EGREGIOUS POLICE CONDUCT.

To extend the effect of the exclusionary rule to the present circumstance and similar causes in the future would amount to only blind imitation of the past. Even in that imitation, it is not possible that the Framers of the Constitution ever intended two hundred years later that the prohibitions of the Fourth Amendment would be extended to release narcotics couriers, rapists, murderers and other felons in the face of unimpeachable evidence of their criminality, which has been seized in good faith.

The rationality of the Exclusionary rule has been assailed since its inception.[2] Additionally, at least four members of

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[2]See, e.g., Williams, "The Exclusionary Rule under Foreign Law-England", 52 J.Crim.L. 272 (1961); Barrett, "Exclusion of Evidence Obtained by Illegal Searches-A Comment on People vs. Cahan," 43 Calif.L.Rev. 565 (1955); Burns, "Mapp v. Ohio: An All-American Mistake," 19 DePaul L.Rev. 80 (1969); Friendly, "The Bill of Rights as a Code of Criminal Procedure," 53 Calif. L.Rev. 929, 951, 952-954 (1965); F. Inbau, J. Thompson, & C. Sowle, Cases and Comments on Criminal Justice: Criminal Law Administration 1-84 (2d ed., 1968); LaFave, "Improving Police Performance Through the Exclusionary Rule" (pts 1 & 2), 30 Mo.L.Rev. 391, 566 (1965); N. Morris & G. Hawkins, "The Honest Politician's Guide to Crime Control, 101 (1970); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U.Chi.L.Rev. 665 (1970); Plumb, "Illegal Enforcement of the Law," 24 Cornell L.Q. 337 (1939); Schaefer, "The Fourteenth Amendment and Sanctity of the Person," 64 Nw.U.L.Rev. 1 (1969); Waite, "Judges and the Crime Burden," 54 Mich.L.Rev. 169 (1955);

the present Court have also noted the grave defects in the rule and have urged that the rule should be substantially modified. See, e.g., California v. Minjares, ___U.S.___, 100 S.Ct. 9 (1981) (Rehnquist, J. and Burger, J., dissenting); Stone v. Powell, 428 U.S. 465, at 496-502 (1976) (Burger, J., concurring); Id, at 537-542 (White, J., dissenting); Brewer v. Williams, 430 U.S. 419, at 420-429 (1977) (Burger, J., dissenting); Brown v. Illinois, 422 U.S. 590, 610-612 (1975) (Powell, J., concurring). In Irvine v. California, 347 U.S. 128, at 136 (1954) the Court openly recognized the patent defects in the rule:

> "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and liekly will, release the wrong-doing defendant. It depirves society of its remedy against one law-breaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."

Although the undersigned would have great difficulty in restating the problem more thoroughly or more eloquently than

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(Footnote 2 cont.) Waite, "Evidence-Police Regulation by Rules of Evidence," 42 Mich.L.Rev. 679 (1944); Wigmore, "Using Evidence Obtained by Illegal Search and Seizure," 8 A.B.A.J. 479 (1922); 8 J. Wigmore, Evidence §2184a (McNaughton rev., 1961).

the Chief Justice and Justices White, Powell and Rehnquist, the State considers that this Honorable Court should also consider the substantial message of concern and dissent from lesser courts and the rising costs of the rule to the public. Disenchantment with the seeming disarray of conflicting views upon the application of the rule and the avoidance of the truth-seeking process can be found at any level of the judicial system. In United States v. Andrews, 474 F.Supp. 456, at 462 (D.Colo. 1979), the learned trial judge wearily but conscientiously reviewed again the bulletins of the latest changes in the application of the rule and concluded that upon the facts before the court, the cause could have gone either way, to-wit:

> "This is not the appropriate case in which to consider the philosophical underpinnings, if any, of the exclusionary rule, but the "chancellor's foot veto" which was viewed with such great alarm in United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) seems presently to be inextricably stuck in the Serbonian bog of searches and seizures. As the Ninth Circuit so ably demonstrated in Fannon and Gummerlock, supra, this case could have gone either way. I must admit to a feeling of considerable foolishness in each effort to determine whether a constitutionally protected zone of privacy exists in a briefcase or a cigarette package or a cardboard box. I am tempted to pray that when I awake there will be no exclusionary rule. I am, however, bound by my best perception of what the law presently is rather than what it may become.

> "IT IS ORDERED that the defendant's motion to suppress is denied." [Emphasis added]

Similarly, in M.A.P. v. State, 403 So.2d 1384, 1387-1388 (Fla. 2d DCA 1981) Chief Judge Ott, in dissent found that the "Serbonian bog" of the exclusionary rule lead to an injust and intolerable result:

> "This would be a wonderful world if there were no crime, no need for police officers and no such thing as a search or seizure. But there is crime, increasingly, and we hire efficient police for our protection. It isn't us against the police, but us against the criminals, and the police are but our soliders in that war. Surely we know by now what happens when troops are committed to battle with their hands tied."
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> * * *
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> "It is all very well pursue freedom in ivory-tower meditation, and I most heartily subscribe to the proposition that individual freedom must be as pure as parcticality permits, but let's not lose sight of the limiting factors imposed by the real world."
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> Id. at 1387-1388.

The opinions from divergent courts in Andrews and MAP serve to illustrate the gravity of the problem. Dutiful and conscientious judges follow the rule, but repeatedly raise grave questions as to the admitted high and increasing price

and manifest injustice of the rule. In the legal "trenches," where the rule is applied daily conscientious Courts are having increasing difficulty in applying what has become a wooden and "Draconian" rule, upon an unsuspecting public.[3] See, Stone v. Powell, 428 U.S. at 496-497 (Burger, J., concurring).

At the same time, it cannot be seriously disputed that illicit narcotics traffic and gambling are the very backbone of organized crime, See, Iannelli v. United States, 420 U.S. 770 at 786-791 (1975); Gore v. United States, 357 U.S. 386, at 388-393 (1958), and that the violence and corruption of narcotices traffic is tearing at the very fabric of our society.[4]

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3. The pressure upon the courts below has only increased as the courts have become more visible and the public becomes more familiar with the role of the judiciary. Cf, Chandler v. Florida, ___U.S.___, 101 S.Ct. 802 (1981); see also Richmond Newspaper v. Virginia, ___U.S.___, 100 S.Ct. 204 (1980).

4. A noted real estate analyst has testified before the Senate that organized crime will soon control real estate in South Florida at the current rate of investment of narcotics monies by organized crime. See, "The Miami Hearld," December 13, 1979 "ANALYST: DRUG CASH SENDS HOUSE PRICES HIGHER." Sociological information is an essential element in weighing the issues before this Court. Cf. the considerations and judicial analysis in, Brown v. Board of Education, 347 U.S. 483 (1954); see also, Royer v. State, 389 So.2d at 1023-1024, n5 (Hubbart, J., concurring).

SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL, 95th CONG. 2d SESS., REPORT ON PROBLEMS OF LAW ENFORCEMENT AND ITS EFFORT TO REDUCE THE LEVEL OF DRUG TRAFFICKING IN SOUTH FLORIDA (Comm. Print 1978). In Royer v. State, supra, the State's presentation drew substantial concern from a member of the Court:

> "[T]he public interest served by the temporary seizures of air travelers under discussion, particularly at the Miami International Airport, is without a doubt an immensely important one. Indeed, any fair-minded person must surely conclude, in view of the overwhelming evidence available, that South Florida is being inundated with a multi-million dollar narcotic drug traffic derived in large part from sources outside the country. That traffic by any standard is corrupting this society and simultaneously bringing with it an unprecedented degree of violence and murder which is not unknown in the Great Miami area."
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> 389 So.2d at 1023.

The cost to society of releasing narcotics traffickers as in the case at bar, in the face of unimpeachable evidence of their guilt; is grieveous and grossly disproportionate to the single, theoretical benefit of the rule.

Undeniably under the constititutional amendment approved by Florida voters in 1982, the interprepation of the federal and state constitutions as to search and seizure issues must be identical. See, also, Hetland v. State, supra. The exclusionary rule is a court created rule, see, Weeks v. United States, 232 U.S. 383 (1914) and Mapp v. Ohio, 367 U.S. 643 (1961) and therefore this Court has the authority to repeal to modify it. The exclusionary rule is neither an "imperative of judicial integrity" nor a "constitutional requirement." United State v. Caland , 414 U.S. 338 (1974); see, also, United States v. Salvucci, ___U.S.___, 100 S.Ct. 2547 (1980); Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Caceres, 440 U.S. 741 (1979); Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Ceccolini, 435 U.S. 268 (1978); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); Harris v. New York, 401 U.S. 222 (1971). The rule is only a judicially created remedy whose sole purpose is to deter Fourth Amendment violations. Calandra, at 348. therefore, as Judge Friendly observed, the rule may be judically modified or repealed as the law becomes more sophisticated:

> "[T]he same authority that empowered the Court to supplement the [fourth] amendment by the exclusionary rule a hundred and

> twenty-five years after its adoption, likewise allows it to modify that rule as the 'lesson of experience' may teach."

Friendly, "The Bill of Rights as a Code of Criminal Procedure," 53 Calif.L.Rev. 929, 952-953 (1967); see, also, Bivens, 430 U.S. at 421 (Burger, J., dissenting). Indeed as Holmes observed, it is the duty of the Court to modify or repeal a rule where its purpose has become only a blind imitation of the past:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in time of Henry IV. It is still more the revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Holmes, "The Path of the Law," 10 Harv.L.Rev. 457, 469 (1897).

There is no evidence that the rule as it presently exists has any deterrent effect at all. See, e.g., Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U.Chi.L.Rev. 665 (1970); Schlesinger, "The Exclusionary Rule: Have Proponents Proves that it is a Deterrent to Police?" 62 Jud. 404 (1979); Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives," 2 J. Legal Stud. 243 (1973); see, also, e.g., Bivens v. Six Unknown Named Agents of Federal

Bureau of Narcotics, 403 U.S. 368, 411-416 (1971) (Burger, J., dissenting); but see, Cann and Egbert, "The Exclusionary Rule: Its Necessity in Constitutional Democracy", 23 How.L.J. 299 (1980); "Limiting the Application of the Exclusionary Rule: The Good Faith Exception", 34 Vand.L.Rev. 213, at 220 n.51 (1981). Even the best appraisal by the proponents of the rule is that empirical data is inconclusive as to deterence. See, Cann and Egbert, supra.

Directly applicable to our present analysis, however, the rule clearly has no deterrent effect at all where a law enforcement officer has acted in a good faith belief that his actions are constitutionally correct. In Stone v. Powell, 428 U.S. at 539-540, Justice White eloquently observed:

> "In most of these situations, it is hoped that the officer's judgment will be correct, but experience tells us that there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question. It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that there was not probable cause to make the arrest and to seize the evidence offered by the prosecution.

* * *

"In these situations, and perhaps many others, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that in each of them the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty. It is true that in such cases the courts have ultimately determined that in their view the officer was mistaken; but it is also true that in making constitutional judgments under the general language used in some parts of our Constitution, including the Fourth Amendment, there is much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. Surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest.

"When law enforcement personnel have acted, mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted." [Emphasis added].

See, also, Stone v. Powell, 428 U.S. at 499-503 (Burger, J., concurring); Brown v. Illinois, 422 U.S. at 610-612 (Powell, J., concurring); Brewer v. Williams, 430 U.S. at 420-429 (Burger, J., dissenting); Bivens, 403 U.S. at 411-420 (Burger, J., dissenting); United States v. Williams, 622 F.2d 830, at 840-843 (5th Cir. 1980) (en banc), cert. den. 449 U.S. 1127 (1981); Ball, "Good Faith and the Fourth Amendment: The Reasonable Exception to the Exclusionary Rule", 69 J.Crim.L. and Criminology 635 (1978); C. Wright, Must the Criminal go Free if the Constable Blunders? 50 Tex.L.R. 736 at 740 (1972). Justice White summarized his analysis with a suggestion for modification of the rule and a good faith exception:

> "The rule has bee much criticized and suggestions have been made that it should be wholly abolished, but I would overrule neither Weeks v. United States nor Mapp v. Ohio. I am nevertheless of the view that the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief."
>
> Id, at 538

See, also, ALI, Model Code of Pre-Arraignment Procedure §§558.02(2), (3), pp. 23-24 (Tent. Draft No. 4 1971).

In the case at bar the good faith exception as explained by Justice White is both squarely applicable and manifestly appropriate. The officers had diligently investigated and sought the prior written approval of a detached magistrate as required by the rule. In good faith, they sought to preserve evidence and to protect themselves. To suppress the fruits of their good faith efforts serves neither the purpose of the rule nor the poeple of Florida.

Justice White's suggestion and observations are eminently sound. This Court should adopt the good faith exception. As previously noted at least four Justices have expressly urged that a good faith exception to the exclusionary rule as delineated by Justice White should be adopted. See, Ball, supra at 635. In United States v. Williams, 622 F.2d 830, at 840-847 (5th Cir. 1980) (en banc), cert. den., 449 U.S. 1127 (1981), thirteen judges of the Court, noting Justice White's views in Stone v. Powell, have expressly adopted the "good faith" exception holding:

> "Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or anauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall apply the exclusionary rule to the evidence."
>
> Id at 846-847.

The good faith excpetion also has a sound basis in the recent substantive law. See, Michigan v. DeFillippo, 443 U.S. 31 (1979) (arrest made in good faith reliance upon constitutionality of statute upheld); United States v. Peltier, 422 U.S. 531 (1975) (no deterrent value in retroactive application of exclusionary rule to search later found to be unconstitutional); Michigan v. Tucker, 417 U.S. 433 (1974) (because police officer acted in good faith the exclusionary rule lost "much of its force"); Brown v. Illinois, 422 U.S. 590 (1975) (where police officer knew arrest was unlawful the exclusionary rule should particularly be applied).[5] As clearly demonostrated herein and in the substantive law and commentary, the rule is without a lawful basis in circumstance such as in the case at bar. Therefore, in the words of the Chief Justice in Bivens the rule should be modified and permitted to further evolve as is the great tradition of the common law:

> "Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct."
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> 403 U.S. at 420.

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5. This issue could not be approved by any lower court and to assert it there would have been futile. Hoffman v. Jones, 280

(Footnote 5 cont.) So.2d 431 (Fla. 1973), see, State v. Thomas, 405 So.2d 462, at 463, n.3 (Fla. 3d DCA 1981); Walden v. State, 397 So.2d 368 (Fla. 1st DCA 1981).

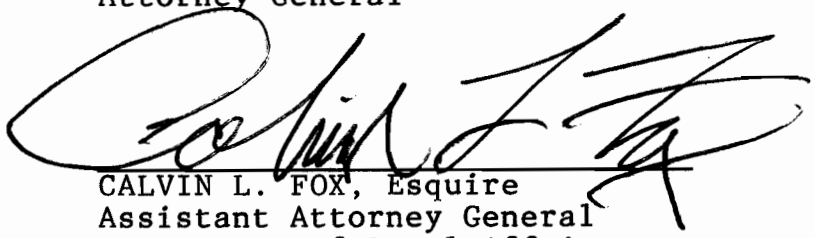
IV

CONCLUSION

WHEREFORE, upon the foregoing, the Petitioner, THE STATE OF FLORIDA, submits that the certified question should be answered in the negative, and that the decision of the District Court should be reversed and the judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED, on this 21st day of June, 1983, at Miami, Dade County, Florida.

JIM SMITH
Attorney General



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V

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER, was caused to be mailed to SHERYL LOWENTHALL JAVITTS, Esquire, Attorney for Respondent, 3628 N.E. 2nd Avenue, Miami, Florida 33137, on this 21st day of June, 1983.

CALVIN L. FOX, Esquire
Assistant Attorney General

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