IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
vs.	)	CASE NO. 64,038
BRUCE JOSEPH SCHIHL, Respondent.	)	

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

JAMES P. McLANE
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

STATUTES

PRELIMINARY STATEMENT

The Petitioner was the appellant in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the appellee and the defendant, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"A"	Petitioner's Appendix, being a conformed copy of the appellate court's opinion.

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by Information filed on August 12, 1982, with trafficking in cannabis contrary to Fla. Stat. §893.135(1)(a)(1), 893.03(1)(c)(3), and 893.13(1)(a)(2) (R 9).

On September 10, 1982, Respondent filed a motion to suppress evidence (R 17-19). This motion came on for hearing by the trial court on January 13, 1983 (R 1-8), at which hearing the following evidence was adduced:

Respondent was residing at a home located at 1641 N.W. 45th Street in the City of Oakland Park which he was leasing from Mr. Ray Hawford, the owner (R 2, 17). Mr. Hawford went over to the house to do some yard work and observed what he perceived to be marijuana in the storage room (R 2). He called the police who put the house under surveillance and then obtained a search warrant (R 2-3, 17). The search warrant authorized George H. Verdegem and Jeffrey E. Tozzie of the Oakland Park Police Department to search the premises and curtilage of the house at 1641 N.W. 45th Street in the City of Oakland Park (R 3, 17). These officers advised Detective William Rhodes, who was conducting the surveillance at the house, that they had just gotten the search warrant signed by a Broward County judge (R 3, 18, 21). Observing people come out of the house and change into running shoes, Detective Rhodes therefore "...determined that we should at least seal the residence and maintain control of the subjects involved until the search warrant arrived ..." (R 18, 21). The

police did in fact do so, informing the subjects that a search warrant was on its way and advising them to please rest comfortably until the search warrant could get there and the house be searched (R 3, 17-18, 21). Officer's Verdegem and Tozzie arrived with the warrant approximately ten minutes later (R 4) and conducted the search which led to the seizure of the evidence sought to be suppressed by the trial court (R 17). On January 20, 1983, the trial court entered an order granting Respondent's motion to suppress evidence (R 20-22).

Notice of appeal was timely filed on January 31, 1983 (R 23).

On June 29, 1983, the Fourth District Court of Appeal filed its opinion in this cause affirming the trial court's order granting Respondent's motion to suppress evidence (A 1). In its opinion, however, the Fourth District also certified the question here involved to be of great public importance (A 1).

Petitioner timely filed its notice to invoke discretionary jurisdiction on July 27, 1983.

POINT INVOLVED ON APPEAL

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?

ARGUMENT

IT IS NOT 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.

Petitioner, the State of Florida, is also the Petitioner in a pending related case involving the exact same point as the instant case, that case being State v. Riley, F.S.Ct. Case No. 63,662, and has therefore borrowed freely from its brief filed in that case.

A. THE RULINGS OF THE COURTS BELOW ARE INCONSISTENT 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 circumstances (R 3, 17-18, 21). However, the officers began no search. Petitioner maintains that the fact

that the door of the residence was opened and the Respondent arrested before the warrant arrived is of no consequence.

The Respondent failed to present as is his burden, any evidence below that the search warrant was improperly executed, as being not read to the Respondent or that a copy was not left behind. The granting of the motion to suppress was therefore improper.

Additionally the present search warrant was undeniably executed by officers specifically authorized to do so by the fact of the warrant under §933.08 Fla. Stat. 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 warrant 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

---

[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).

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 Respondent complains only about the ministerial act of delivery of the physical warrant, which was ten (10) minutes later and presented before any actual physical search was begun (R 4). 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 shown. See: State v. Featherstone, 246 So.2d 597 (Fla. 3d DCA 1971). (Footnote omitted).

There was in the case at bar, manifestly no prejudice. The officers did nothing prior to arrival of the warrant ten 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 in 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.
>
> 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 §901.15 (4) and the total silence of Chapter 933, Petitioner submits that the rule in Cooper; Walter; State v.

Wraspir should apply in the case at bar. It is plainly evident that by direct relationship and substantial analogy to §901.15, the Respondent's complaint as to the time of service of the warrant herein is without merit. See also, People v. Mahoney, 33 Cr.L. 2059 (N.Y. 1983).

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

[2]See, e.g., Williams, "The Exclusionary Rule under Foreign Law-England", 52 J.Crim.L. 272 (1961); Barrett, "Exclusion of Evidence Ob5ained 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

of 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, it may, and likely will, release the wrong-doing defendant. It deprives 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 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.

(Footnote 2 cont.) 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,

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)

(Footnote 2 cont.) "Judges and the Crime Burden," 54 Mich.L.Rev. 169 (1955); 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).

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 led 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 soldiers in that war. Surely we know by now what happens when troops are committed to battle with their hands tied.
>
> * * *
>
> It is all very well to pursue freedom in ivory-tower meditation, and I most heatily subscribe to the proposition that individual freedom must be as pure as practicality permits, but let's not lose sight of the limiting factors imposed by the real world.
>
> 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).

(See Footnote 3 next page)

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 narcotics traffic is tearing at the very fabric of our soceity.[4] 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, 389 So.2d 1007 (Fla. 3d DCA 1980) 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,

---

[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 Herald," 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, n. 5 (Hubbart, J., concurring).

> 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.
>
> 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 grievous and grossly disproportionate to the single, theoretical benefit of the rule.

Undeniably under the constitutional amendment approved by Florida voters in 1982, the interpretation of the federal and state constitutions as to search and seizure issues must be identical. See also, Hetland v. State, 387 So.2d 963 (Fla. 1980). 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 States 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 judicially 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 Constituional 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 been 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 people 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. 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 unauthorized, 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 exception 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 state 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 demonstrated

---

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

herein and in the substantive law and commentary, the rule is without a lawful basis in circumstances 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 inflexibily, 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.
>
> 403 U.S. at 420

CONCLUSION

WHEREFORE, based upon the foregoing reasons and turhorities cited herein, Petitioner respectfully requests this Honorable Court answer the certified question in the negative and reverse the decision of the Fourth District and the judgment of the trial court.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

James P. McLane

JAMES P. McLANE
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on the Merits has been furnished, by United States mail, to FRED HADDAD, ESQUIRE, Sandstrom & Haddad, 429 South Andrews Avenue, Fort Lauderdale, Florida 33301, this 23rd day of August, 1983.

James P. McLane
Of Counsel