10-23

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. ARSENIO GARICA, Respondent.	)	CASE NO. 72,929

PETITIONER'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Florida Attorney General
Tallahassee, Florida

DEBORAH GULLER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITY

PRELIMINARY STATEMENT

Petitioner was the Appellee in the District Court of Appeal, Fourth District, and the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

The Respondent was the Appellant in the Fourth District and the defendant in the trial court.

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the state.

The following sybmol will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Arsenio Garcia was charged by information, on April 10, 1987, a refile of Case No. 86-10573 CF 10L[1], with Violation of the Racketeer Influence and Corrupt Organization Act, Conspiracy to Traffic in Cocaine in an amount of 400 grams or more and Trafficking in Cocaine in an amount of 400 grams or more. Garcia filed a Motion to Suppress Evidence Derived from Illegal Electronic Surveillance, on September 8, 1987. (R. 89-105). Garcia appended to his Motion the Application and Affidavit for the wiretap authorization (R. 106) and the Order Authorizing Interception of Oral and Wire Communications issued on July 3, 1986. (R. 162). The trial court denied the same Motion to Suppress in Case No. 86-10573 (hereinafter referred to as Davis v. State). Exhibit A.

Respondent's plea agreement, Exhibit B, includes an agreement that the parties stipulate to the Order denying the Motion to Suppress in the Davis case. Exhibit B at p. 3. Respondent reserved his right to appeal, not the finding of good faith, but rather, that portion of the order which applies the Leon "good faith" exception to the case at bar. Exhibit A at p. 3.

---

[1] Case no. 86-10573 CF 10L, on appeal, Davis v. State, 13 F.L.W. 1511 (Fla. 4th DCA June 29, 1984). Exhibit C. Davis, et. al., were co-defendants of Garcia, but ultimately the cases were heard separately.

The issue presented to the Fourth District Court of Appeal, and that certified to this Court, is limited to whether the Leon "good faith" exception is applicable to an exclusionary rule that is created legislatively, as opposed to judicially. The Fourth District first reached the question in Davis, reversing the lower court's finding of Leon's applicability. The instant case was reversed on the basis of Davis. The Fourth District certified the question as one of great public importance. Exhibit D. Notice to Invoke this Court's Jurisdiction was timely filed and jurisdiction was accepted.

SUMMARY OF THE ARGUMENT

Florida wiretap law is interpreted, pursuant to the Florida Constitution, in conformity with the United States Supreme Court's interpretation of Fourth Amendment cases. Wiretap cases fall within Fourth Amendment jurisprudence. The purpose of the exclusionary rule in the Florida and Federal statutory schemes relating to electronic surveillances is to deter police misconduct. The judicially created exclusionary rule has as its rationale the deterrence of police misconduct. Leon applied the "good faith" exception to the exclusion of evidence that was ultimately derived from a faulty search warrant, but not due to police misconduct. Leon opens the door for future courts to determine the applicability of its exception to other Fourth Amendment cases; there is no preclusion to "good faith" application to legislatively created exclusionary rules.

ARGUMENT

THE LEON "GOOD FAITH" EXCEPTION IS AS APPLICABLE TO A STATUTORY EXCLUSIONARY RULE AS IT IS TO A JUDICIALLY CREATED EXCLUSIONARY RULE.

The narrow concern of this Court is whether United States v. Leon, 468 U.S. 897 (1984) precludes application of a "good faith" exception to the Florida wiretap exclusionary provision. §934.06, Fla. Stat. The lower court found "good faith", and it is only its application to a statutory exclusionary rule that is questioned. Petitioner maintains that the Leon case formalized and expanded an ideologically existing concept of "good faith" to Fourth Amendment cases.[2] Of more importance, however, is the fact that the Leon court, in addressing the particular issue presented therein, expressly preserved the question of application, to differing Fourth Amendment cass, of the "good faith" formulation.

> As cases addressing questions of good-faith immunity under 42 U.S.C. §1983 . . . and cases involving the harmless error doctrine . . . make clear, courts have considerable discre-

---

[2] Although Leon, 468 U.S. at 913, states there has been a lack of prior recognition of good faith exception to the 4th Amendment exclusionary rule, the opinion, at fn 11, does make note of United States v. Williams, 622 F.2d 830 (5th Cir. 1980) where a good faith exception was adopted. See also, Scott v. United States, 436 U.S. 128 (1978) where a good faith analysis is applied to the federal wiretap statute; People v. Calogero, 429 N.Y.S. 2d 970 (App. Div. 1980); State v. Catania, 427 A.2d 537, 548 (N.J. 1981).

> tion in conforming their decision making processes to the exigencies of particular cases. (citations omitted).
>
> If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue.

Leon, at 468 U.S. at 924-25. Sub judice, good faith was determined below (Exhibit A); this Court is now confronted with a "particular Fourth Amendment question".

§934, FLA. STAT. QUESTIONS ARE WITHIN FOURTH AMENDMENT JURISPRUDENCE.

The question presented in Leon, and answered in the affirmative, was 'whether the Fourth Amendment exclusionary rule should be modified . . . ." Leon, 468 U.S. at 900. The Florida Constitution unequivocally incorporates "interception of private communications" in its scheme to protect the citizens of Florida against unreasonable searches and seizures, and does so in conformity with the United States Constitution.

> **§ 12. Searches and seizures**
>
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right

> shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Article 1, §12, Florida Constitution (emphasis added). Article 1, §12 has been applied in cases involving electronic surveillance. In a case involving a consensual wiretap, where the issue was whether the 1982 amendments to § 12 applied to a case where the electronic surveillance took place subsequent to those amendments, the Court in State v. Ridenour, 453 So.2d 193, 194 (Fla. 3rd DCA 1984) held that §12 applied to the contested electronic surveillance. The Ridenour Court recognzied the conformity provision as well. Id. Accord, Madsen v. State, 502 So.2d 948 (Fla. 4th DCA 1987). This Court in State v. Hume, 512 So.2d 185 (Fla. 1987) placed electronic surveillance within the rubric of Art. 1, §12, of the Florida Constitution and further held that "article 1, section 23 [right-of-privacy provision] of the Florida Constitution, does not modify the applicability of article 1, section 12 . . . ." Id. at 188. The exclusionary rule of §934.06, Fla. Stat. does not remove alleged wiretap violations from Fourth Amendment consideration.

Courts are charged with the "duty to keep legislative and constitutional provisions ambulatory . . . and to harmonize constitutional and statutory precepts with reason and good

conscience, otherwise they may become ridiculous when applied to changing concepts." State v. Herndon, 27 So.2d 833, 835 (Fla. 1946) (emphasis added). It is further understood that "[u]nder our form of constitutional government sovereignty resides in the people who may impose any limitation on the executive, the legislature or the judiciary they see fit." State v. Gay, 28 So.2d 901, 904 (Fla. 1947)(emphasis added).

By the November 2, 1982 amendment to Article 1, §12 of the Florida Constitution, the people of Florida dictated that the law governing "unreasonable interception of private communications" -- §934, Fla. Stat.-- "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. 1, §12, Florida Constitution -- The Supreme Court in Leon permitted the "good faith" exception. This amendment thereby incorporates into §934.06, Fla. Stat. a good faith exception to its exclusionary rule. Unlike the search and seizure provision of the Connecticut Constitution where an exclusionary rule is read in because of that State's stricter approach than that afforded by the Federal Constitution, infra at 14, Florida search and seizure law "imposes no higher standard than that of the Fourth Amendment to the United States Constitution." State v. Hetland, 366 So.2d 831, 836 (Fla. 2nd DCA 1979) affirmed 387 So.2d 963 (Fla. 1980).

Leon's leaving the door open to allow consideration of the instant question, and the fact that Florida's wiretap law has

been expressly incorporated under the umbrella of other Fourth Amendment rulings and precedents, allows this Court to apply the "good faith" exception to any exclusionary rule. In United States v. Donovan, 429 U.S. 413 (1977) the Supreme Court clearly interprets federal wiretap law in light of the Fourth Amendment and sets out to determine Congressional intent. Id. 425-27.

THE DECISION BELOW

The Fourth District Court of Appeal reversed the trial court's denial of Respondent's Motion to Suppress[3] based on its earlier decision in a related case.[4] The opinion in Davis v. State, 13 F.L.W. 1511 (Fla. 4th DCA June 29, 1988) resulted in a reversal of the trial court's denial of that appellant's Motion to Suppress. The same trial court order was stipulated to as being applicable to Respondent. (Exhibit B). The 4th DCA reversed based primarily on United States v. Spadaccino, 800 F.2d 292 (2nd Cir. 1986) and United States v. Orozco, 600 F.Supp. 1418 (S.D. Cal. 1986).

The Court in United States v. Spadaccino, 800 F.2d 292 (2nd Cir. 1986) seemingly addresses "on all fours" the issue currently before this Court. Petitioner maintains, however, that major variances in the respective factual circumstances renders application of Spadaccino inappropriate sub judice. Petitioner

---

[3] Garcia v. State, 13 F.L.W. 1884 (Fla. 4th DCA August 10, 1988)

[4] Davis v. State, 13 F.L.W. 1511 (Fla. 4th DCA June 29, 1988)

further maintains that Spadaccino does not require per se preclusion of Leon.

The search warrant in Spadaccino was not the ultimate reason for that Court's opinion. The violation of Connecticut law occurred subsequent to the wiretap, the warrant, and the search and seizure. The violation was of the 90 day notice provision which mandates notice to parties not named in, yet recorded pursuant to, the wiretap order, not later than 90 days after the termination of the wiretap.

> [W]e conclude that the district court was not entitled to engraft upon the notice requirement of the Connecticut wiretapping statute on exception for actions of law enforcement officers carried out in good faith.

Id. at 296 (emphasis added). The holding in Spadaccino is succinct. The Court's language regarding non-application of a judicially created exception to a statutory scheme is not the blanket exclusion with which the Court below, sub judice, has covered Respondent.

The Spadaccino Court's interpretation, and non-application, of Leon includes recognition of a judicially created exception to a judicially created rule. However, the Court also notes that the "Fourth Amendment exclusionary rule is based on the Supreme Court's weighing of the costs and benefits of the exclusion of evidence as a deterrent to police conduct that violates certain federal constitutional rights." Id. at 296 (empasis added). This recognition of the deterrence purpose

provides this Court with grounds for reversal of the lower court's decision and a substantial basis upon which to apply the Leon "good faith" exception to the statutory exclusionary rule of §934.06, Fla. Stat.

The legislative history of 18 U.S.C. §2515, and by implication of §934.06, Fla. Stat., indicates an intent to deter police misconduct as a means of protecting privacy.

> Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. The provision must, of course, be read in light of section 2518 (10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (Nardone v. United States, 58 S.Ct. 275, 302 U.S. 379 (1937)) or indirectly obtained in violation of the chapter (Nardone v. United States, 60 S.Ct. 266, 308 U.S. 338 (1939).) There is, however, no intention to change the attenuation rule. See Nardone v. United States, 127 F.2d 521 (2d) certiorari denied, 62 S.Ct. 1296, 316 U.S. 698 (1942); Wong Sun v. United States, 83 S.Ct. 407, 371 U.S. 471 (1963). **Nor generally to press the scope of the suppression role beyond present search and seizure law. See Walder v. United States, 74 S.Ct. 354, 347 U.S. 62 (1954). But it does apply across the board in both Federal and State proceeding. Compare Schwartz v. Texas, 73 S.Ct. 232, 344 U.S. 199 (1952). And it is not limited to criminal proceedings. Such a suppression rule is necessaary and proper to protect privacy.**

> **Compare Adams v. Maryland, 74 S.Ct. 442, 347 U.S. 179 (1954); Mapp v. Ohio, 81 S.Ct. 1684, 367 U.S. 643 (1961).** The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications.

S. Rep. No. 1097, 90th Cong., 2d Sess, reprinted in 1968 U.S. Code Cong. & Ad. News 2184-85 (emphasis added). The reference to Mapp v. Ohio, 364 U.S. 643 (1961), unequivocally places the §2515 exclusionary rule on an equal footing with the exclusionary rule enunciated in Weeks v. United States, 232 U.S. 383 (1914). The comparison to Adams v. Maryland, 347 U.S. 179 (1954) clarifies Congressional intent further in relation to the statement regarding the protection of privacy. As noted, Mapp recognizes that the exclusionary rule is implimented as a deterrence to police as a protection of privacy. Adams, on the other hand, is based on compulsory self-incrimination and the granting of immunity for said testimony. Pursuant to a federal statute, compelled testimony before a grand jury may not be used in any criminal proceeding. This statutory preclusion, although it looks like the instant wiretap exclusionary rule, is not based on privacy/deterrence. The comparison, therefore, places 18 U.S.C. §2515 under Mapp.

The Spadaccino Court specifically declined to apply a judicial created exception[5] designed to modify an exclusionary

[5] United States. v. Leon, 468 U.S. 897 (1984).

rule created to deter police misconduct,[6] to an exclusionary rule enacted, not to deter police misconduct, but rather, to protect unnamed parties to a wiretap order who were nonetheless inadvertently recorded.

> The Formica[7] court noted that the notice provision had been included by the state legislature in order to minimize the intrusiveness of wiretaps on the privacy of individuals, and stated as follows:
>
> > The service of the ninety day post-intercept inventory within the required time period on one who was not a named target of the tap alerts him promptly to the fact that his conversations were intercepted, thus enabling him to obtain from the panel copies of his conversations, the applications and orders 'immediately upon the filing of a motion requesting such information'; General Statutes §54-41K; and enabling him promptly to seek his civil remedies under General Statutes §54-41r.

Spadaccino, at 294-95. Logically, the Court in Spadaccino rejected the invitation to mix apples and oranges -- deterrence to police and protection of citizens created different balancing schemes wherein it would be inappropriate to weigh the costs and benefits of failing to protect citizens as opposed to the exclusion of evidence as a deterrence. Spadaccino recognizes the difference. "It would be rare for a court to find that a seizure

---

[6] Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

[7] State v. Formica, 3 Conn. App. 477, 489 A.2d 1060, cert. denied, 196 Conn. 806, 494 A.2d 903 (1985).

of evidence, pursuant to an otherwise valid search warrant, was not in good faith because thereafter notice was not timely mailed." Id. at 296 (emphasis supplied).

Spadaccino is further distinguished by the nature of the respective states' interpretation and application of their wiretap laws. Connecticut law, §54-41K, affords its citizens greater protection than does the equivalent federal notice requirement in 18 U.S.C. §2518(8)(d). Spadaccino at 295, 297. Whereas, Florida courts have interpreted §934, Fla. Stat. in conformity with federal law. Art. 1, § 12, Florida Constitution. Federal law, although falling on both sides of the instant issue, infra, is clear that the principle behind exclusion is deterrence.

> [T]he Court itself recognized that the purpose of the exclusionary rule 'is to deter -- to compel respect for the constitutional guarantee in the only effectively available way -- by removing the incentive to disregard it.' Elkins v. United States, [364 U.S. 206, 217 (1960).

Mapp at 656. Leon gives exception to the exclusionary rule. Where the purpose of the exclusionary rule, whether it be statutory or otherwise, is to deter, the logic and holding of Leon applies.

The Fourth District Court of Appeal relied on United States v. Orozco, 600 F. Supp. 1418 (S.D. Cal. 1986) as further grounds for determining that the Leon "good faith" exception to the exclusionary rule was inapplicable to §934.06, Fla. Stat.

The Orozco opinion is multifacited and is, at the very least, contrary to the U.S. Circuit Court opinion in Spadaccino as to its interpretation of 18 U.S.C §2518. The variances in state law, and in the federal courts, in the application of the federal wiretap law, provides room for this Court's clarifying Florida's statutory scheme as interpreted in light of federal wiretap law and Supreme Court Fourth Amendment cases.

Sub judice, Garcia argued below that a judicially created exception to a judically created exclusion could not be applied to a statutory exclusion. Interestingly, and as an aside, Orozco applies a judicially created requirement to the federal wiretap statue.

> Although the Franks decison concerned a search warrant affidavit, the Franks standard has been extended to affidavits accompanying electronic surveillance applications . . . .
>
> The Franks decision focused on the probable cause determination by the judge issuing the search warrant, but there is no reason why the Franks analysis should not be applied to the judge's necessity determination in the electronic surveillance context. United States v. Ippolito, 774 F.2d at 1485.[8]

Orozco at 1518-19 (citations omitted).

The Orozco Court did not apply the Leon "good faith" exception to the federal wiretap law, and continued its inquiry

---

[8] In ordering suppression of evidence derived from a wiretap, the Court in United States v. Ippolito, 774 F.2d 1482 (1985) applied the requirements of Franks v. Delaware, in much the same manner the Leon "good faith" question should be asked and answered prior to exclusion, if good faith was not found.

to find probable cause. The analysis of its rejection of Leon as applied to a statutory exclusion, is short and ostensibly negated by its reference to the legislative history of 18 U.S.C. §2515.

> The legislative history suggests that §2515 which imposes the suppression remedy for interception in violation of Title III requirements, 'largely reflects existing law' and was not generally intended to 'press the scope of the suppression remedy beyond present search and seizure law.' S. Rep. No. 1097, at 2185.

Orozco at 1522 n. 9. Even with this recognition, the lower federal Court determined Leon would not apply. Such holding is not mandated. Leon itself leaves room for interpretation of its holding as to other Fourth Amendment areas. See supra.

As with Florida's law, federal wiretape statues are to be interpreted in light of Fourth Amendment jurisprudence.

> [Supreme Court cases] found 'conversation' was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a 'search' within the meaning of the Amendment, and so we hold. In any event, Congress soon thereafter, and some say in answer to Olmstead, specifically prohibited the interception without authorization and the divulging or publishing of the contents of telephonic communications. And the Nardone cases . . . . extended the exclusionary rule to wiretap evidence offered in federal prosecutions.

Berger v. New York, 388 U.S. 41, 51 (1967) (emphasis added) (citations omitted). Justice Douglas' concurring opinion squarely places wiretapping within the Fourth Amendment.

> [T]he opinion . . . brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment.

Berger at 64.

Petitioner considers Orozco a one court decision that may well have been an exercise of judicial prudence. The Court had no reason to apply any "good faith" as they ultimately determined there was probable cause for the warrant. Orozco at 1524. To avoid the implicit double edge of judicial prudence recognized in Constitutional interpretation, Petitioner notes that in the case at bar it was determined that some statutory violations occurred and that without Leon "good faith" the trial court would have suppressed the evidence. (Exhibit A). This Court is therefore squarely confronted with the question as to whether Fourth Amendment jurisprudence includes application to legislation, whereas Orozco was not.

Notwithstanding the federal district court's reluctance to apply the "good faith" exception in Orozco, the federal district court in United States v. Errera, 616 F.Supp. 1145 (D.C. Md. 1985) did. Probable cause to issue a search warrant was based on two different wiretaps, one in Virginia and one Maryland. The Maryland wiretap was based on the evidence garnered pursuant to the Virginia wiretap. Errera motioned to suppress evidence alleging the Virginia wiretap was illegal thereby rendering the Maryland wiretap illegal, as neither established sufficient probable cause as required by 18 U.S.C. §2518(1)(b). The Errera court found probable cause, but unlike Orozco, gave the wiretapping statute a broader, Fourth Amendment,

interpretation.

> Furthermore, a deficiency in the warrant would not require exclusion of the evidence seized here as it was gathered in good faith reliance on a facially valid warrant. Leon, 104 S.Ct. at 3421.

Errera at 1152. Errera concluded that "[w]iretap and electronic surveillance activities also are subject to the Fourth Amendment,[9] . . . ." Id. at 1148.

LEON "GOOD FAITH" AS APPLIED TO STATUTORY AND CONSTITUTIONAL EXCLUSIONARY RULES.

Given that the Florida wiretap statute presents Fourth Amendment issues, application of the Leon "good faith" exception to the exclusionary rule is not precluded solely because, in Leon, the Court was addressing a "judicially" created exclusionary rule. In State v. Brown, 14 Conn. App. 605, 543 A.2d 750 (Conn. App. 1988), neither the Connecticut statutory scheme, nor its Constitution, both of which have exclusionary provisions,[10]

---

[9] See supra at 6.

[10] 5. "[General Statues] Sec. 54-33f. MOTION FOR RETURN OF UNLAWFULLY SEIZED PROPERTY AND SUPPRESSION AS EVIDENCE. (a) A person aggrieved by search and seizure may move the court which has jurisdiction of his case or, if such jurisdiction has not yet been invoked, then the court which issued the warrant, or the court in which his case is pending, for the return of the property and to suppress for use as evidence anything so obtained on the ground that: (1) The property seized without a warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, (5) the warrant was illegally executed. In no case may the judge who signed the
(Cont'd on next page)

precluded application of Leon's good-faith exception, albeit the issue was not electronic surveillance. The Brown Court first explained the State's search and seizure law.

> We conclude that the statute and the rules of practice provide only for the procedural implementation of the exclusionary rule; they do not determine its contours or limits.

Brown, 543 A.d at 760. Connecticut, prior to Mapp v. Ohio, 367 U.S. 643 (1961), did not have an avenue whereby it could suppress the fruits of an illegal search and seizure -- consequently, §54-

---

warrant preside at the hearing on the motion.

"(b) The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

"(c) The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in the evidence at any hearing or trial."

Practice Book § 821 provides: "upon motion of the defendant, the judicial authority shall suppress potential testimony or other evidence if he finds that suppression is required under the constitution or laws of the United States or the state of Connecticut."

Practice Book § 822 provides: A person aggrieved by a search and seizure may make a motion to the judicial authority who has jurisdiction of his case, or if such jurisdiction has not yet been invoked, then to the judicial authority who issued the warrant or the to the court in which his case is pending, for the return of specific items of property and to suppress their use as evidence on the grounds that: [1) The property was illegally seized without a warrant under circumstances requiring a warrant; (2) The warrant is insufficient on its face; (3) The property seized is not that described in the warrant; (4) There was not probable cause for believing the existence of the grounds on which the warrant was issued; or (5) The warrant was illegally executed.

33f, Conn. Stat. was enacted. Id. The Brown court therefore found the statute "a legislative response to fill a procedural hiatus created by the impact of Mapp v. Ohio . . . ." Id. However, the Court's analysis proceeded in its determination that the good faith exception is applicable to the state's Constitutional exclusionary rule.

> Having concluded that our Supreme Court would squarely hold that there is an exclusionary rule under article first, §7, we consider whether there is an exception to that rule for objective good faith reliance by the police on a search warrant issued by a neutral and detached magistrate. We conclude that there is such an exception.

Brown, 543 A.2d at 763-64. Noting with particularity the fact that Leon determined that the exclusionary rule was "not an inherent part of or necessary corollary to the constitutional right"[11] but rather a judicial remedy to protect Fourth Amendment rights, the Brown Court reiterated the deterrence element of the judicial rule and found that neither the language nor history of the Connecticut Constitution would suggest any variance of purpose in its exclusionary rule. Id. The Court thereby applied Leon good faith to a Constitutional exclusionary rule.

Sub judice, the Leon good faith exception was applied to a statutory exclusionary rule. Utilizing the rationale in Brown, where the allegedly incompatible "judicial" exception to a Constitutional rule was sanctioned, this Court should determine

---

[11] Id. 543 A.2d at 764.

that application of Leon "good faith" is appropriate to the §934.06, Fla. Stat. exclusionary rule, being mindful of the dictates of Article 1, §12 of the Florida Constitution.

In United States v. Peterson, 812 F.2d 486 (9th Cir. 1987) the Court was presented with a question of foreign law in that a joint investigation between the United States and the Philippine governments resulted in a conviction for drug possession. The evidence leading to the conviction, however, was the result of an illegal wiretap under Phillipine law. The Court laid the threshold upon which it addressed the issue of exclusion of evidence. "We decide the case on the assumption that the search did not comply with Phillipine law and was, as a result, not reasonable under the fourth amendment." Id. at 491. Given the Court's premise of an illegal wiretap, the Court specifically applied the Leon good faith exception to the exclusionary rule. The Court held "that the good faith exception to the exclusionary rule announced in Leon applies to the foreign search." Id. at 492. The logic of Leon's application was based on the American law enforcement officer's good faith belief that the foreign wiretap was in compliance with Philipine law. Id. at 492.

The Peterson panel was not confronted with Respondent's argument below that application of Leon is restricted to judicially created rules of exclusion. However, the Court did reference Philippines Constitutional provision Article IV, Section 4 of the Philippines Constitution.

> '(1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety and order require otherwise. (2) Any evidence obtained in violation of this or the preceding section shall be indmissible for any purpose in any proceeding.

Id. at 491. The Ninth Circuit did not find the Constitutional exclusion of illegally obtained evidence a preclusion to the Leon "good faith" exception.

Directly responding to arguments, i.e., Spadaccino, that a judicially created exception to a judicially created rule may not be applied to a statutory exclusionary rule, Petitioner maintains there are numerous cases that have done just that. Perhaps the hoped for suppression or exclusion in these cases are not on point as to the alleged violations claimed below, sub judice, but the courts do not appear reluctant to deny suppression based on "good faith," nor do they indicate that 18 U.S.C. §2515 is mandatory or without exception.

Recently, a New York case applied a "good faith" exception to the exclusion of evidence pursuant to federal tax law. Federal law, as opposed to the New York State law, prohibits electronic eavesdropping to investigate tax law violations. United States v. Levine, DC E.NY, No. 86 Cr. 304, April 12, 1988 (Exhibit C). Therefore, when an electronic surveillance, pursuant to state law, revealed a federal tax violation and prosecutors sought an amendment in their application, Levine sought suppression. Id. The Court

determined the officers acted in good faith in that the state crimes were not used solely as a subterfuge to gather evidence of violations of federal tax laws. Id. "Provided, therefore, that the officials in good faith intend to prosecute those specified crimes and do not just concoct a 'subterfuge' to gain evidence as to other crimes, there is no good reason to prohibit the use in evidence of incidentally-revealed matter even if its interception is expected." Id. Levine applied a good faith exception to the federal tax law prohibition against wiretaps.

The fact that the Court in United States v. Giordano, 416 U.S. 505 (1974) considered whether 18 U.S.C. §2516 was mandatory, or even subject to harmless error, indicates that that Court did not consider 18 U.S.C. §2515, the exclusionary provision, to be without exception. Although the suppression was granted in Giordano, it was not in a companion case, United States v. Chavez, 416 U.S. 562 (1974). Both cases addressed the federal law requirement that the United States "Attorney General, or any Assistant Attorney General specially designated . . . may authorize an application to a Federal judge of competent jurisdiction for . . an order authorizing" electronic surveillance. 18 U.S.C. §2516. In Giordano the Attorney General authorized the Executive Assistant to the Attorney General. Giordano at 525. The Court determined that application of §2515 had to be read in light of §2518(10(a) which had its own grounds for suppression, as does Florida's Statute, §934.09(9)(a). In

Chavez the Court held that "misidentifying the Assistant Attorney General as the official authorizing the wiretap application to be made does not require suppression of wiretap evidence when the Attorney General himself has actually given the approval . . . ." Chavez at 569.,

What Giordano and Chavez say, in juxaposition, is that some errors in a wiretap application do not require suppression under 18 U.S.C. §2518 pursuant to 18 U.S.C. §2515 requirements of exclusion "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. §2515. Therefore if §2515 is open to interpretation in light of what constitutes evidence subject to suppression, then §2515, and concommitantly §934.06, Fla. Stat., is open to exceptions.

Clearly, courts have applied judicially created exceptions to rules similarly promulgated by both the judiciary and the legislature. The exception enunciated in Leon is, in essence, a policy based on a balancing of the costs and benefits to society of excluding evidence where the purpose of the exclusion, deterrence, is no longer a factor. Where the judicial and legislative exclusion is based on deterring police misconduct, the logic of Leon applies as the policy remains the same. There is nothing magical in the wiretap statute that precludes application of judicially made law in the interpretation thereof.

CONCLUSION

The probable cause determination required by the wiretape statute is the same probable cause finding mandated for other search and seizure warrants. The exclusionary rule of the wiretap statute has the same goal as the "judicially" created exclusionary rule -- deterrence. The fact that Leon specifically left the door open for courts to apply its holding to other Fourth Amendment cases. and that both state and federal law have put the wiretap statutes within Fourth Amendment jurisprudence, mandates application of Leon to any exclusionary rule where appropriate. The lower courts, sub judice, have found objective good faith. The foregoing requires, a fortiori, this Court's reversal of the appellate decision below and an affirmative response to the question presented.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Florida Attorney General
Tallahassee, Florida

DEBORAH GULLER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been furnished by United States mail to SAMUEL RABIN, ESQUIRE, Counsel for Respondent, The White Building, 1 N.E. 2nd Avenue Suite 204, Miami, Florida 33132 this 28th day of September, 1988.

Of Counsel