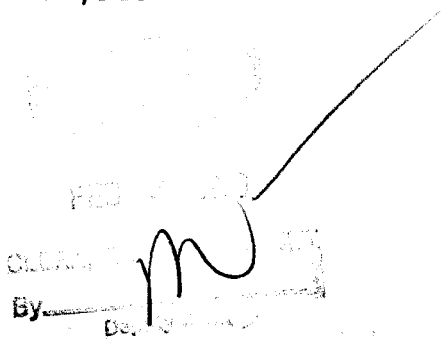
IN THE SUPREME COURT OF FLORIDA

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



PETITIONER'S REPLY BRIEF ON THE MERITS

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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 symbol will be used:

"R" Record on Appeal.

STATEMENT OF CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts presented in its Initial Brief on the Merits at pages 2-3.

SUMMARY OF ARGUMENT

Newly amended §934, Fla. Stat. does not effect the wiretap exclusionary rule, §934.06, Fla. Stat. The amendments relate to new, highly sophisticated "electronic communications." The Federal amendments likewise relate to electronic communications. The Florida Constitution, Article 1, §12, mandates compliance with U.S. Supreme Court decisions on fourth amendment issues, without greater protection then that Court's interpretations provide.

ARGUMENT

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

A) THE INAPPLICABILITY OF §934.09(a)(c), Fla.Stat., TO TELEPHONE WIRETAPS.

Respondent's contention that the Florida legislature's disinclination to include in its 1988 amendment to §934.09 (9), Fla. Stat., the limiting language used in the federal counterpart to Florida's law is a declaration, by the legislature, of Florida's more restrictive approach to the exclusion of alleged violations of that statute. Petitioner, however, carries the interpretation a step further and points out that the language of §934.09(9)(c) applies only to electronic communications. Exhibit A. The definition section of Florida's wiretap law, §934.02, Fla. Stat. clearly puts telephone call interceptions in a class other than electronic communication.

> "Electronic Communication' means any transfer of signs, signals, writing images, sounds, data, or intelligence of a nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic, or phototypical system that affects intrastate, interstate, or foreign commerce, but does not include:
>
> (a) The radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;
>
> (b) Any wire or oral communication;
>
> (c) . . . .

(d) . . . .

§934.02(12), Fla. Stat. (emphasis added). This subsection is a new provision. Amended §934.02(2), Fla. Stat. specifically precludes electronic communication from the definition of "oral communication". The 1988 Amendments to §934 are replete with the addition of "electronic communication." However, §934.06, Fla. Stat., the exclusionary provision at issue, sub judice, was not amended. §934.06 makes no reference to electronic communication; electronic communication is the sole subject matter of §934.09(9)(c), Fla. Stat.

A fortiori, the legislature, by enacting §934.09(9)(c), did not intend telephone wiretaps to be included in its limitation of remedies.[1] Florida legislators, as did Congress, sought to preclude introduction of the more sophisticated intrusions if obtained in violation of §§934.03-934.10; the legislature had no intention of changing §934.06, Fla. Stat. to include electronic communications. Nor did the legislature, in adding the new definition, "electronic communication", remove telephone wiretaps from preexisting coverage.

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[1] Petitioner disagrees with the importance attributed by Respondent to his statement "that at the same time [the legislature] omitted the key word 'unconstitutional,' the Florida legislature did adopt the 'good faith' defense to a civil action . . . ." Respondent's brief at p. 16. §934.10, Fla. Stat. speaks to civil remedies and gives alleged "violators" a good faith defense. This is not a new section. The 1988 amendments to §934, Fla. Stat. added sections 934.21- .28. These sections are new and deal with "electronic communications", which are the gist of all the 1988 amendments to §934.

Respondent's argument that §934.09(9)(c), Fla. Stat., as amended, would preclude a good faith exception to the exclusionary rule is erroneous. The amendments relate to electronic communications -- hence the Short Title: Electronic Communications Privacy Act of 1986,[2] -- an area of high sophistication that does not encompass telephone wiretaps. Exhibit B. Neither the federal statute, 18 U.S.C. §2515, nor the Florida counterpart, §934.06, were amended to incorporate electronic communications. Therefore, §934.09(9)(c), Fla. Stat. does not preclude application of the good faith exception to the exclusionary rule.

B). ARTICLE I §12, FLORIDA CONSTITUTION

Respondent correctly points out that federal revision of its statutory scheme provides for a good faith exception to "constitutional" violations of Title III.[3] Respondent's argument fails to recognize, however, that this Court mandates, pursuant to Article 1, §12, Fla. Const., compliance with "the interpretations of the United States Supreme Court with relation to the fourth amendment, and [does not] provide ... greater protection than those interpretations." Bernie v. State, 524 So.2d 988, 990-91 (Fla. 1988) (emphasis added).

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[2] Respondent's Exhibit 1.

[3] See Respondent's Answer Brief at p. 14, 15; Respondent's Appendix, Exh. 1.

> Indeed, an exclusionary rule that was once constitutionally mandated in Florida can now be eliminated by judicial decision of the United States Supreme Court.

Id. at 991. Petitioner recognizes the difference between the omission in the Florida Statute, as compared to the federal statute, on the one hand, and a possible, future failure to follow a United States Supreme Court decision interpreting the federal law, on the other. However "[t]he language of article 1, section 12, clearly indicates an intention to apply to all United States Supreme Court decisions regardless of when they are rendered." Id.

Supreme Court decisions have permitted a good faith exception to the wiretap laws. Preliminarily, however, a key link between wiretap laws and fourth amendment jurisprudence has been established.

> The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope. As was said in Osborn v. United States, 385 U.S. 323 ... (1966), the 'indiscriminate use of such devices inlaw enforcement raises grave constitutional questions under the Fourth and Fifth Amendments, ...

Berger v. New York, 388 U.S. 41, 56 (1967) (emphasis added).

> It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the "fruits" of eavesdropping devices are barred under the Amendment. On the other hand this Court has in the past, under

> specific conditions and circumstances, sustained the use of eavesdropping devices. See Goldman v. United States, 316 U.S. 129 ...; On Lee v. United States, 343 U.S. 747 ...; Lopez v. United States, supra; and Osborn v. Untied States, supra. In the later case the eavesdropping device was permitted where the 'commission of the specific offense' was charged, its use was 'under the most precise and discriminate circumstances' and the effective administration of justice in a federal court was at stake. ... The Fourth Amendment does not make the 'precincts of the home or the office . . . sanctuaries where the law can never reach,' [citation omitted], but it does prescribe a constitutional standard that must be met before official invasion is permissible. Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment.

Berger at 63, 64. This link, pursuant to Florida Constitution, Article 1, §12, requires application of the Leon good faith exception to the exclusionary rule.

In United States v. Donovan, 429 U.S. 413 (1977), motions to suppress evidence derived from wiretaps were granted by the District Court. The basis of the suppression was that the intercept order did not provide notice nor did it identify the subjects thereof by name. The Court of Appeals affirmed. Id. at 421. The Supreme Court noted that "[a]lthough both statutory requirements are undoubtedly important, we do not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements." Id. at 434.

> Although the Government was required to identify respondents ... in the December 26 application for an extension of the initial intercept, failure to do so in the circumstances here presented did not warrant suppression under §2518 (10) (a) (i). Nor was suppression justified with respect to respondents ... simply because the government inadvertently omitted their names ... .

Id. at 439. Clearly Donovan was pre-Leon; yet the Court's reference to inadvertence looks ahead to the concept of good faith.

In Scott v. United States, 436 U.S. 128 (1978), the Court addressed the question of Title III requirements of minimization where the District Court suppressed the intercepted calls because of knowing noncompliance. The Court of Appeals reversed "concluding that an assessment of the reasonableness of the efforts at minimization first requires an evaluation of the reasonableness of the actual interceptions in light of the purpose of the wiretap and the totality of the circumstances before any inquiry is made into the subjective intent of the agents conducting the surveillance." Id. at 131. The Supreme Court affirmed the appellate court. Interestingly, in a footnote, the Court recognized good faith.

> This is not to say, of course, that the question of motive plays absolutely no part in the suppression inquiry. On occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule. For example, in United States v. Janis, 428 US 433, 458, 49 L Ed 2d 1046, 96 S Ct 3021 (1976), we ruled that

> evidence unconstitutionally seized by state police could be introduced in federal civil tax proceedings because "the imposition of the exclusionary rule . . . is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officers zone of primary interest.' See also United States v. Ceccolini, 435 US 268, 276-277, 55 L Ed 2d 268, 98 S Ct 1054 (1978). This focus on intent, however, becomes relevant only after it has been determined that the Constitution was in fact violated. We also have little doubt that as a practical matter the judge's assessment of the motives of the officers may occasionally influence his judgment regarding the credibility of the officers' claims with respect to what information was or was not available to them at the time of the incident in question. But the assessment and use of motive in this limited manner is irrelevant to our analysis of the questions at issue in this case.

Id. at 139 n. 13 (emphasis added). The Scott Court additionally noted that §2515 of the Federal Act, after which Florida's law was modeled, "was not intended 'generally to press the scope of the suppression role beyond present search and seizure law.'" Id. at 139.

In United States v. Malekzadeh, 855 F.2d 1492 (11th Cir. 1988), the Court applied good faith to an officers use of facts from a 1980 case for probable cause to obtain a wiretap application.

> Suppression of the 1986 wiretaps for alleged illegality in the 1980 search of Webbs home would afford none of the deterrence served by the exclusionary rule. The record shows that the 1986 application was devoid of deliberately false or recklessly false information that

> would provide a sufficient basis to apply the rule.

Id. at 1497. In its application of Leon and Franks v. Delaware, 438 U.S. 154 (1978), the Court did not address the propriety of the application of a judicially created exclusion to a judicially created rule, to a statutory exclusionary rule. The Court did, however, and Petitioner urges this Court to follow suit, recognize the deterrent basis of the exclusionary rule, and concomitantly, the futility of applying an exclusionary rule where an officer acted in good faith. Id.

CONCLUSION

Petitioner respectfully requests this Court to uphold the application of the Leon good faith exception to the exclusionary rule -- whether the exclusion is statutory or judicial in nature. Exclusionary rules are based on deterrence regardless of origin. Newly amended §934, Fla. Stat. is not meant to cover telephone wiretaps; its consideration camouflages the issue presented. Petitioner therefore requests this Court's reversal of the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply 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 6th day of February, 1989.

Deborah Fuller
Of Counsel