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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JOHN H. DAVIS, et al.,

Respondents.

Case No. 73,048

ANSWER BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

Respondents were the defendants in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, and the appellants in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the 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 in case 87-631
of the Fourth District Court of Appeal

S = Supplemental Record on Appeal in case 87-631
of the Fourth District Court of Appeal

STATEMENT OF THE CASE AND FACTS

On July 3, 1986, Detective Stephen Robitaille of the Broward County Sheriff's Office signed a sworn application for authorization of a wiretap on a telephone located at the home of James Davis. S130-86. He submitted the application to a circuit court judge, who entered an order authorizing the wiretap. S99-102. Approximately 10,000 telephone conversations were intercepted for approximately 125 hours of taped conversations. R121-22, 113. Eventually the respondents were arrested and charged with various offenses relating to dealing in cocaine. R812. They then moved to suppress the evidence obtained pursuant to the wiretap. After an extensive evidentiary hearing, the trial court denied the motion in a detailed written order.

In the order the court found that Detective Robitaille had made numerous misstatements and omissions. R837. It further found that many communications were improperly intercepted, that the officers began to set up the wiretap before receiving proper authorization from the circuit judge, and that there were other violations of the wiretap statute. R837-38. Nevertheless, the court concluded:

> The Court is troubled by Detective Robataille's [sic] omissions and errors in this case, but finds that these were not the result of bad faith. Since the purpose of the exclusionary rule is merely to deter the police from further invasions of privacy, a good faith exception is applicable in those cases where officers apply for and receive a facially valid warrant. Such rule from U.S. v. Leon, 104 S.Ct. 3405 (1984) and U.S. v. Williams, 622 F.2d 830 (5th Cir.

> 1980) compels the Court to deny all the motions to suppress. Were Leon's good faith exception not to apply to wiretap cases, then under the totality of the circumstances the Court would suppress all taped conversation.

R838. Pursuant to a plea agreement, the respondents entered pleas of nolo contendere to various charges reserving their right to appeal the denial of the motion to suppress. The prosecution stipulated that the issue was dispositive.

On appeal, the district court of appeal reversed, holding that the "good faith" exception did not apply to the wiretap statute. On rehearing, the court certified the case to this Court as one involving a question of great public importance. The state then invoked the discretionary jurisdiction of this Court. This cause was consolidated with case 72,929 of this Court.

SUMMARY OF ARGUMENT

Chapter 934, Florida Statutes governs wiretaps. Section 934.09(9)(a) sets out a statutory exclusionary rule prohibiting the evidentiary use of improperly intercepted communications. The statute contains no "good faith" exception. The Congress and the Legislature have shown no intent to establish such an exception, and the courts have not created one. Since the statutory exclusionary rule was created by the legislative branch, only the legislative branch has the power to create such an exception to it. Hence, the lower court was correct in holding that there is no such exception to the statute. Even if there were such an exception, it would not apply to the case at bar.

ARGUMENT

Section 934.09(9)(a), Florida Statutes prohibits the use of improperly intercepted wire communications as evidence. The certified question before this Court is whether the "good faith" exception to the fourth amendment set out in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) applies to this statutory exclusionary rule.[1] Respondents assert that neither the legislative branch nor the judiciary have created such an exception, and that it would be improper for this Court to create such an exception now. In any event, such an exception would not apply to the case at bar.

As a preface to this argument, it is necessary to point out a substantial disagreement between the positions of the respondents in this case with that of the respondent in case 72,929. Although this disagreement should not ultimately affect the

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[1] Respondents emphasize that the statutory exclusionary rule is not identical with the constitutional exclusionary rule. The Court noted in United States v. Giordano, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974) that the protections of the statutory exclusionary rule are greater than those of the fourth amendment exclusionary rule: "The words 'unlawfully intercepted' are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 416 U.S. at 527. Although there is some overlap, the analysis respecting violation of the statute is different from the analysis respecting violation of the fourth amendment. See United States v. Chun, 503 F.2d 533, 536 n. 4 (9th Cir. 1974).

outcome of this cause, it does involve the fundamental issue of what is meant by the terms "wire communication" and "electronic communication."

A. Neither the Congress nor the Legislature has created a good faith exception to the statutory prohibition against the use as evidence of improperly intercepted "wire communications."

Both chapter 119 of title 18 of the United States Code and chapter 934 of Florida Statutes, as they existed at the time of the offenses here in question, governed the interception of "wire or oral communications." These terms, as defined by 18 U.S.C. 2510 and section 934.02, Florida Statutes, referred basically to communications by telephone via a common carrier. The statutes contain no hint of any intent to create a good faith exception to the exclusionary rules set out in 18 U.S.C. 2518(10)(a) and Section 934.09(9)(a), Florida Statutes. Nevertheless, it has been asserted in the brief of Respondent Garcia that the Congress subsequently created a "good faith" exception to the federal statute. A review of legislative history reveals that nothing of the sort has occurred.

In 1986, cognizant of the revolution in communication technology, the Congress acted to govern the interception of new forms of communication in Public Law 99-508. The Senate Report pertaining to Public Law 99-508, which is set out at pages 3555-3606 of volume 5 of the 1986 U.S. Code Congressional and Administrative News, lists some of these forms of "electronic communications" as follows: large-scale electronic mail opera-

tions, computer-to-computer data transmissions, cellular and cordless telephones, paging devices, and video conferencing. 1986 U.S. Code Cong. Ad. News, 3556.[2] The effect of the new law was to safeguard these and other forms of electronic communications. The new law did not in any way alter or amend section 2518(10)(a) which provided for the suppression of illegally intercepted "wire or oral communications." Instead it added section 2518(c) pertaining only to "electronic communication":

> (c) The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

(Emphasis added.) Thus section 2518(c) has nothing to do with the interception of telephone conversations at bar. It has nothing whatsoever to do with creating for a "good faith" exception to the interception of telephone conversations. The Senate Report makes clear that there was no intent to amend the

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2 Section 101 of Public Law 99-508 amended section 2510 of Title 18 to provide technical definitions for "electronic communications." These definitions -- which include the sorts of communications systems mentioned above -- make clear that "electronic communications" constitute a different sort of beast than "wire or oral communications," the sort of telephone conversations mentioned at bar. Section 2510(12)(B), as amended, specifically provides that "electronic communication" does not include "wire or oral communication."

As the Senate report stated: "As a general rule, a communication is an electronic communication protected by the federal wiretap law if it is not carried by sound waves and cannot fairly be characterized as containing the human voice. Communications consisting solely of data, for example, and all communications transmitted only by radio are electronic communications." 1986 U.S. Code Cong. & Ad. News 3568.

provisions pertaining to the exclusion of evidence of improperly intercepted "wire or oral communications" under section 2518(10)(a) (which was enacted in the Omnibus Crime Control and Safe Streets Act of 1968):

> Subsection 101(e) of the Electronic Communications Privacy Act amends subsection 2518(10) of title 18 to add a paragraph (c) which provides that with respect to the interception of electronic communications, the remedies and sanctions described in this chapter are the only judicial remedies and sanctions available for nonconstitutional violations of this chapter involving such communications. In the event that there is a violation of law of a constitutional magnitude, the court involved in a subsequent trial will apply the existing Constitutional law with respect to the exclusionary rule.
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> The purpose of this provision is to underscore that, as a result of discussions with the Justice Department, the Electronic Communications Privacy Act does not apply the statutory exclusionary rule contained in title III of the Omnibus Crime Control and Safe Streets Act of 1968 to the interception of electronic communications.
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> Similarly, the Electronic Communications Privacy Act does not amend the Communications Act of 1934. Conduct in violation of that statute, will continue to be governed by that statute.

1986 U.S. Code Cong. Ad. News 3577 (emphasis added).[3]

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[3] Here we arrive at the substantial difference between respondents' position and the position of Arsenio Garcia, the respondent in case 72,929. Mr. Garcia's position, at pages 14-15 of his brief, is that section 2518(10)(c) somehow created a "good faith" exception to the statutory exclusionary rule pertaining to "wire or oral communications." As is shown above, subsection (c) has nothing to do with wire communications. Mr. Garcia's assertion at page 14 of his brief that "it is clear that this statutory change was made to apply the 'good faith' exception described in United States v. Leon" has no support in this legislative history. Neither Congress nor the Legislature has shown any interest in creating such an exception with respect to wire communica-

In 1988, the Legislature followed Congress's lead and incorporated into chapter 934 similar provisions pertaining to "electronic communication." Section 934.02 was amended to include (at subparagraph 12) a definition of "electronic communication" which specifically excluded "wire or oral communication." The only change in the statutory exclusionary rule of section 934.09(9)(a) was to include "electronic communication" within its protections. The Legislature evinced no intent to create any exception to the statutory exclusionary rule. There is no legislatively enacted exception to the rule.

B. The courts have not created a good faith exception to the statutory exclusionary rule.

Florida courts have not amended section 934.09(9)(a) to include a good faith exception. It would seem that the analysis of section 934.09(9)(a) should end there, but in its motion for rehearing in the lower court, petitioner argued for the first time that the federal courts had read a good faith exception into the statutory exclusionary rule, relying principally on United States v. Chun, 503 F.2d 533 (9th Cir. 1974).[4] Petitioner cited Chun for the following proposition: "Although a good faith exception is not specifically articulated in the federal statute,

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tions. Even if it did enact such an exception, that exception could not be applied retroactively to the case at bar for the reasons set forth in Mr. Garcia's brief.

4 Although petitioner has not served an initial brief on them, respondents assume that petitioner's argument is the same as its argument in the lower court.

such an exception has been read in to it." Motion for rehearing, page 4. It also cited Chun for the proposition that "the analysis to be followed in determining if exclusion is warranted involves a determination regarding any deliberate attempt to ignore the statutory requirement." Motion for rehearing, page 6.

Chun simply does not support these propositions. The court simply noted that, where the government has deliberately ignored a statutory requirement of the wiretap statute, such deliberate misfeasance "may have a bearing" on the issue of suppression. Id. 542. The court scarcely read a good faith exception into the statutory exclusionary rule.

In any event, the Supreme Court laid to rest the proposition that police officers' subjective good or bad faith is dispositive of a suppression motion under the wiretap statute in Scott v. United States, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). Ultimately, of course, the federal courts' interpretation of the federal statute have little bearing on this issue.

C. It would be improper for the judiciary to incorporate the United States v. Leon "good faith" exception into the wiretap statute.

There is a fundamental difference between the fourth amendment exclusionary rule and the statutory exclusionary rule at bar. The constitutional exclusionary rule was devised by the judiciary for policy reasons. Accordingly, the judiciary has the power to alter or even abolish the exclusionary rule as it deems appropriate for policy reasons. The statutory exclusionary rule

at bar, however, is in effect a rule of evidence devised by the Legislature. So long as the statute is constitutional, the judiciary does not have the authority to alter or abolish it. As this Court noted in another context, a court is not a forum for the debate of wise public policy. State v. DiGuilio, 491 So.2d 1129, 1137 (Fla. 1986). Such matters are committed to the Legislature and this Court cannot substitute its judgment for that of the Legislature and create an exception to chapter 934. State v. Walls, 356 So.2d 294, 296 (Fla. 1978).

In any event, there are substantial reasons for having different approaches to the statutory and fourth amendment exclusionary rules. A fourth amendment case typically involves a discrete action -- a search of a particular area pursuant to a search warrant or of a person on the basis of probable cause. A wiretap, on the other hand, involves an ongoing activity of intercepting many (several thousand in this case) private communications over many days or weeks. The wiretap typically involves listening in on the private communications of innocent persons who call the telephone under investigation. The potential for fudging or even outright abuse during a wiretap operation is much greater than that during the service of a search warrant.[5] Hence the protection of the statutory exclusionary rule should be, and is, greater.

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[5] Thus at bar, as the trial court found, the police improperly listened in on privileged communications between an attorney and his client concerning an unrelated matter. R837.

D. Even if United States v. Leon applied to the wiretap statute, it would not apply to the case at bar.

The Leon "good faith" exception applies where the police have relied in good faith on an impartial magistrate's determination that there is probable cause for issuance of a search warrant. The good faith exception does not (and logically it could not) apply where the police have misrepresented the facts to the court. 468 U.S. at 914. At bar, the police misrepresented material facts to the court. Further, they did not comply with the requirements of the order -- among other things, they improperly intercepted privileged attorney-client communications. Hence, the Leon "good faith" exception does not apply.