IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. 92,692

WILLIAM E. PETERSON, :

Respondent. :

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This is the state's appeal from the decision below of the First District Court of Appeal. Peterson v. State, no. 96-4995 (Fla. 1st DCA Feb. 26, 1998).

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement of the case and facts as reasonably supported by the record.

III SUMMARY OF ARGUMENT

The police sought and obtained a search warrant to search respondent's residence. The warrant was invalid, however, because the affidavit relied solely on the uncorroborated hearsay tip of a confidential informant (CI) **and** failed to say that the affiant officer personally knew the informant, or

personally knew him to be reliable, or to state any facts on which the magistrate could reasonably find him to be reliable.

Because the affidavit was based solely on uncorroborated hearsay from the informant, the informant's credibility and veracity were crucial to finding probable cause, and the utter failure to establish this factor by personal knowledge or objective facts, rather than repeating yet more hearsay, was no mere technicality or trivial omission. Rather, it went to the heart of the reliability of the warrant itself.

The search cannot be saved by the officer's testimony at the suppression hearing that he personally knew the informant and the informant had given him personally accurate information in the past. The affidavit and the warrant are legally set in stone when the warrant is signed. If a search could be justified after the fact, that would effectively emasculate the warrant requirement, a crucial component of the constitutional protections against unreasonable search and seizure.

Further, the testimony of Officer Nesmith and a second officer that they routinely use similar language in affidavits makes the issue worse, not better, for they are admitting (although apparently without realizing it) that their affidavits are routinely insufficient. While this omission is not as egregious an error as the police making false statements in affidavits, it is nevertheless police misconduct which this court must condemn, or see it become routine, if it is not already. The affidavit here relied solely on **uncorroborated**

hearsay, and did not bother to state personal knowledge that the informant was reliable or truthful. While not as serious as false statement, its carelessness, even recklessness, along with its routineness, judging by the officers' testimony, makes it an appropriate case for application of the exclusionary rule.

The fellow officer rule does not save the warrant, because that rule applies to probable cause to arrest, with or without a warrant. It permits an officer, who has no personal knowledge of probable cause, nevertheless to stop or arrest someone, or take someone to the hospital for a blood alcohol test, as long as he is directed to do so by an officer who does have probable cause. The search of a house requires a warrant and cannot be justified by probable cause alone without a warrant. Therefore, the question of when an officer has probable cause to arrest based on information from a fellow officer is not analogous to the search warrant situation.

Nor does Leon's good-faith exception save the search here, because the wholesale omission of any showing that the informant was reliable makes it unreasonable for the officer to rely on the warrant. Rather, the district court applied well-settled legal principles in reversing respondent's conviction, and that decision should be upheld.

The district court was inaccurate in characterizing Leon as having "almost identical" facts to the instant case. Leon's facts are "almost identical" only if one focuses solely on the

fact that the reliability of the informant was not corroborated and ignores all the other facts.

It is true that Leon was initiated by information from an unproven informant, which indeed is analogous to the omission of reliability evidence here. That is where the similarity ends. Completely unlike the instant case, the information provided by the informant in Leon launched the police into an "extensive investigation" which apparently lasted over some period of time, and which resulted in the corroboration of many facts by the police, and which is detailed in the opinion. If the police had bothered to investigate the claims of the CI here, or corroborated any information he had given them, this case might not now be before the court. In light of the extensive police investigation in Leon, the unproven informant and his somewhat stale information were not important. That is not the situation here, where all the police offered was the uncorroborated hearsay testimony of the informant.

IV ARGUMENT

CERTIFIED QUESTION

> WHETHER AN AFFIANT OFFICER'S ASSERTIONS IN A SEARCH WARRANT AFFIDAVIT TO THE EFFECT THAT A CONFIDENTIAL INFORMANT HAS PROVIDED ACCURATE AND TRUE INFORMATION TO LAW ENFORCEMENT ON AT LEAST TWENTY OCCASIONS IN THE PAST REGARDING ILLEGAL CRIMINAL ACTIVITIES LEADING TO SUCCESSFUL ARRESTS AND CRIMINAL PROPERTY SEIZURES, TOGETHER WITH SUPPRESSION HEARING TESTIMONY FROM THAT OFFICER TO THE EFFECT THAT HE HAD PERSONAL KNOWLEDGE OF THE RELIABILITY OF THE CONFIDENTIAL INFORMANT WHEN HE BOTH SWORE OUT THE SEARCH WARRANT AFFIDAVIT AND WHEN HE HELPED EXECUTE THE SEARCH WARRANT, CAN SUPPORT A FINDING THAT AN OFFICER IN THE AFFIANT/EXECUTING OFFICER'S POSITION COULD HAVE RELIED IN GOOD FAITH ON THE RESULTING SEARCH WARRANT AND THAT SUCH RELIANCE WOULD HAVE BEEN OBJECTIVELY REASONABLE FOR PURPOSES OF ESTABLISHING THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE ANNOUNCED IN UNITED STATES V. LEON, 468 U.S. 897, 104 S.CT. 3405, 82 L.ED.2D 677 (1984)?

In response to this too-lengthy certified question, the state has raised two issues in its brief, which can be summarized as follows:

> 1) Is a search warrant affidavit sufficient where it relies solely on informant hearsay, but fails to say whether the affiant personally knows the informant, or to provide any other facts supporting reliability?
>
> 2) If the affidavit is deficient, can Leon's good faith exception save it?

It is possible the first issue is not properly before this court, but as undersigned can hardly see them as discrete issues, it does not matter.

As the state puts the question of the good-faith exception

unchronologically first, this could be viewed as a tacit admission by the state that the warrant is not valid. On the other hand, if the good faith exception saves it, it almost does not matter whether the affidavit and hence the warrant was valid, and that illustrates what is wrong with this case, why the First District Court was correct to reverse respondent's conviction, and why this court should affirm the decision below.

The state's position is that the omission here of any claim in the affidavit that the informant was personally known to the affiant, or personally known to be reliable, or any other facts on which he could be found to be reliable, was trivial, was corrected by the officer's testimony at the suppression hearing, and in any event, is saved by Leon's good-faith exception. United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The state compares the omission here to the trivial attestation error in Johnson, in which officer swore the claims in the affidavit were true to the best of his knowledge, rather than that they were true. Johnson v. State, 660 So.2d 648 (Fla. 1995), cert. denied, 517 U.S. 1159, 116 S.Ct. 1550, 134 L.Ed.2d 653 (1996). This court forgave that omission, in part because an officer cannot really vouch for the truth of hearsay. He can vouch only that the statement was made to him.

In contrast, respondent contends the error was obviously not merely an attestation error. Not was it a mere techni-

cality or trivial omission. Rather, it went to the heart of the reliability of the warrant itself. Instead of comparing it to an inconsequential error in the oath, respondent would ask this court to focus on the affiant's total lack of personal knowledge concerning the case and the wholesale lack of corroboration of any relevant fact in the affidavit.

It piles hearsay on hearsay and asks the magistrate to accept the informant's uncorroborated hearsay as alone providing probable cause, and the officer's word for it that the informant is reliable, although the officer does not claim personal knowledge of this. The importance of reliable information cannot be overstated, since a search warrant affidavit is already an ex parte communication, and in this case was based solely on hearsay. Therefore, the affiant is obliged to give the magistrate significant assurances of the informant's reliability, and he did not. As a consequence, the search was not saved by the good-faith exception. Moreover, this case blazes no new constitutional trails, but follows the well trod path created by several United States Supreme Court opinions and decisions of this and other appellate courts of this state.

An omission of an essential component from a search warrant affidavit is a serious matter, because by law, this court's review is limited to the "four corners" of the affidavit. § 933.18, Fla.Stat.; Schmitt v. State, 590 So.2d 404, 409 (Fla. 1991), cert. denied, 503 U.S. 964, 112 S.Ct. 1572, 118 L.Ed.2d 216 (1992); Delacruz v. State, 603 So.2d 707 (Fla.

2d DCA 1992). Testimony from a later suppression hearing cannot be used to bolster the affidavit. If this were true, and a search could be justified after the fact, it would basically be the end of the warrant requirement. Yet, of course, the warrant requirement is firmly a imbedded part of the constitutional protection against unreasonable search and seizure in the federal and state constitutions. U.S. Const., am. 4; Fla. Const., art. I, § 12. Moreover,

> It has been long well-settled law that statutes authorizing searches and seizures must be strictly construed and affidavits and search warrants issued thereunder must strictly conform to the constitutional and statutory provisions authorizing their making and issuance.

Hesselrode v. State, 369 So.2d 348, 350 (Fla. 2d DCA 1979), cert. denied, 381 So.2d 766 (Fla.1980).

The state has seemingly ignored this requirement. It has cited no reason why this principle would not apply to the reliability component of the affidavit, as opposed to any other part. Therefore, additional information provided by the officer at the suppression hearing has no relevance in measuring whether the affidavit provided sufficient reasons to justify an intrusion into and search of Peterson's home. Thus, the fact that Officer Nesmith testified at the hearing that the CI had personally given him correct information about illegal drug activity at least ten times in the past is irrelevant to whether the affidavit was sufficient because that information was not contained in the affidavit. The same is true of his

testimony that he assisted another officer wherein information from the CI led to the arrest of four people and the seizure of $400.00 in controlled substances (R 22-23).

The opinion contains the whole affidavit of the officer, and the state has also included it in its brief twice (State's Brief (SB), p.2-3,16-17). Respondent analyzes the affidavit as follows: The first paragraph lists the qualifications of the officer. Identifying the affiant may be an essential threshold requirement of an affidavit, but none of this information in any way contributes to finding probable cause.

Insofar as the district court appears to believe that the officer's qualifications are relevant to the probable cause determination, respondent disagrees. The court said:

> Officer Nesmith alleged in his affidavit that the referenced premises were "occupied by or under the control of white male Jorge McCormick and/or persons unknown to your affiant" and that he believed, based on his qualifications as a narcotics investigator and information given to him by a confidential informant, that marijuana, LSD, drug paraphernalia, and evidence of drug sales would be found at the premises.

Peterson v. State, slip op. at 2. Because the officer made no personal observations relating to the case, corroborated nothing except that McCormick had a criminal record (which cannot alone establish probable cause), and instead relied solely on hearsay, the officer's own expertise in investigating drug crimes is irrelevant to the probable cause determination. That is, having not used his expertise for anything, it contributes nothing to probable cause.

The second paragraph states the confidential informant (CI) contacted the affiant, and has provided information regarding illegal criminal activities to law enforcement 20 times in the past that has proven to be accurate and true. The CI is familiar with marijuana and has been responsible for the arrest of 4 people and the seizure of $400 of contraband.

These conclusory statements fail to allege that the affiant personally knew the CI, or that he had had any previous personal contact with him, or that the CI had previously supplied the affiant with accurate information about criminal activities. The affiant did not state the basis of his belief concerning the CI's reliability. Nor did he provide any information which corroborated the informant's reliability or the information he provided.

Moreover, respondent would note a discrepancy between the claim that the CI had provided accurate information relating to criminal activities on 20 occasions, but this had resulted in only four arrests. What about the other 16 occasions of "accurate information"? Was there was no arrest, and why not? Or do those other 16 times not count, or was the affiant's hearsay information about the CI's reliability not accurate, or what?

The next part of the second paragraph repeats the CI's hearsay facts concerning having observed within the previous 10 days Jorge McCormick (obviously not the respondent sub judice) in possession of 1/4 to 1/2 pound of marijuana "packaged for distribution," and to having seen McCormick in possession of

marijuana and LSD on other occasions. None of these allegations were corroborated in any manner by the affiant.

The third paragraph detailed the criminal history of McCormick, the object of the search warrant. The fact that a person has a prior record in no way constitutes probable cause that he is currently committing a crime. Otherwise a criminal record alone would provide the police with probable cause of anything at any time. At no point in the affidavit did the officer provide sufficient information from which a judge could reasonably conclude that the informant had been tested and proved reliable in the past, or that his present information was reliable.

Johnson, the case the state calls the "leading Florida case on the application of Leon" (SB-12) is distinguishable from the instant case because it involved an arrest warrant, not a search warrant, and the rules are laxer on the question of probable cause to arrest than on probable cause to search a house. The origin of this distinction has not been easy to determine. It may arise simply from the fact that, just like automobiles, people are much more mobile than real estate.

In any event, Johnson relies on the "fellow officer rule," and the state claims that rule saves the affidavit here. The "fellow officer rule," however, applies primarily to arrest, with or without a warrant, but it does not apply to search warrants, at least not in the manner argued by the state.

The "fellow officer rule" originated with the issue of

probable cause **to arrest**, not search. The seminal case appears to be Whiteley v. Warden of Wyoming Penitentiary, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). Sometimes the cases involved an arrest warrant, but sometimes the issue was merely probable cause to arrest. Probable cause to arrest is simply not analogous to the situation where search of a house **requires** a warrant. The Third District has explained Whiteley thus:

> Whiteley involved the "fellow officer" or "collective knowledge" rule under which the propriety of a warrantless arrest is determined not alone by whether the arresting officer has personal knowledge of facts which show probable cause, but by whether other policemen who have directed the arrest do so.

Albo v. State, 477 So.2d 1071, 1073 (Fla. 3d DCA 1985). Voorhees v. State, 699 So.2d 602 (Fla. 1997), also cited by the state, also involves probable cause to arrest. The fellow officer rule allows an officer who has no personal knowledge of probable cause nevertheless to stop or arrest someone, or take someone to the hospital for a blood alcohol test, when directed to do so by a fellow officer who does have probable cause. The rule does not apply to search warrants; at least not for the purpose for which the state has cited it here.

The case cited by the state which most closely approaches applying a "fellow officer rule" to a search warrant is United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). It is, however, distinguishable. Ventresca was convicted of operating an illegal distillery. On appeal, the federal appellate court reversed his conviction on the ground

the affidavit supporting the search warrant was insufficient to establish probable cause. The U.S. Supreme Court reversed, thereby reinstating the conviction.

The affidavit was sworn to by Walter Mazaka, an investigator with the Alcohol and Tobacco Tax Division of the Internal Revenue Service. The affidavit said that "[b]ased on observation made by me, and based upon information received officially from other Investigators. . .assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made." The affidavit, which is an appendix to the opinion, described in elaborate detail many trips by cars loaded with empty tin cans, then appearing heavily loaded, the delivery of large loads of sugar, the odor of fermenting mash, etc. Id., 380 U.S. at 103.

The Court of Appeals had thought the affidavit did not clearly indicate whether it was reporting the personal observations of the affiant and other investigators, as opposed to reporting information which unknown sources had passed on to the investigators. The Supreme Court rejected this view and found the affidavit sufficiently indicated it was reporting the personal observations of the affiant and other investigators. Id., 380 U.S. at 111, 85 S.Ct. at 747.

Ventresca does not save the search warrant here. If Ventresca were to have any application to the situation in the instant case, it would be this: Unlike the instant case, in

which the affiant did not state that he personally knew the informant, or personally knew him to be reliable and truthful, the "informants" in Ventresca were official colleagues of the affiant. They were personally known to the affiant and personally known by him to be reliable and truthful, and their observations were corroborated by the affiant's personal observations of Ventresca. If the informant in the instant case had been a police officer known to the affiant, and/or the affidavit had provided the level of corroboration present in Ventresca, this case would not now be before the court. Failing that, Ventresca is not applicable here.

The state would naturally repeat this opinion of the district court concerning prior decisions of Florida courts:

> These decisions, however, do not take into consideration that the Leon court, when faced with almost identical facts as exist in this case concerning the deficiency of a search warrant affidavit (an affidavit which fails to establish the reliability of the informant), held that the executing officers' reliance on the magistrate's probable cause determination had been objectively reasonable and precluded application of the exclusionary rule.

Slip op. at 7, cited at SB-17.

Each of the three blind men can "see" only that part of the elephant which he can feel directly in front of him (one feels his trunk, one his side, one his ear), but because they are blind, they cannot see the whole elephant and thus each is misled in his own way as to what an elephant is. Leon has facts "almost identical" to the instant case only if one

focuses solely on the fact that the reliability of the informant was not corroborated and ignores all the other facts.

It is true that Leon was initiated by information from an unproven informant, which indeed is analogous to the omission in the instant case of any proof that the CI was reliable. That is where the similarity ends. Completely unlike the instant case, the information provided by the informant in Leon launched the police into an "extensive investigation" which apparently lasted over some period of time, and which resulted in corroboration of many facts by the police, and which is detailed in the opinion.

If the police had bothered to investigate the claims of the CI here, or corroborated any information he had given them, this case might not now be before the court. In light of the extensive police investigation in Leon, the unproven informant and his somewhat stale information were not important. That is not the situation here, where all the police offered was the uncorroborated hearsay testimony of the informant. The claim that Leon has "almost identical" facts as the instant case does not withstand scrutiny.

The state's argument that the First District has applied its precedent as a bright-line rule, without considering the totality of the circumstances, is not accurate. The state's argument is based on its failure to acknowledge how few circumstances it provided, so that even in totality, they do not amount to much - the affidavit is based on totally uncorro-

orated hearsay from an informant, of whom the officer omits any claim of personal knowledge as to his reliability. Within the four corners of the affidavit, that leaves the magistrate with uncorroborated hearsay from an unnamed informant of unproven reliability. Leon does not say that courts must or should overlook such omissions.

The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Leon, 104 S.Ct. at 3417. Respondent concedes that the instant case does not involve the most egregious police misconduct, such as intentional misstatements of fact, but the instant case reveals deplorable official carelessness of a degree which this court should not approve. If this court were to overturn the district court's decision, it should consider what message it would be sending to law enforcement officers - that an affidavit solely dependent on uncorroborated hearsay where they do not bother to say how they know the informant to be reliable - is sufficient?

The prosecutor elicited testimony at the suppression hearing that not only Officer Nesmith, but another officer as well, had made similar statements in other affidavits and search warrants had been signed in those other cases (R 20-21, 23-25). The prosecutor obviously thought that made any omission here less culpable, but respondent thinks it makes the situation worse, not better. It amounts to a concession that the officers' affidavits are routinely insufficient, at least

on the issue of the reliability of the informant. It demands guidance from this court that such an affidavit is unacceptable.

While this omission is not as egregious an error as the police making false statements in affidavits, it is nevertheless police misconduct which this court must condemn, or see it become routine, if it is not already. The affidavit here relied solely on **uncorroborated** hearsay, and did not bother to state personal knowledge that the informant was reliable or truthful. While not as serious as false statement, its carelessness, even recklessness, along with its routineness, judging by the officer's testimony, makes it an appropriate case for application of the exclusionary rule. The police have the capacity and are supposed to investigate crime, but there is no evidence that the police here made any effort to investigate or corroborate the CI's testimony. The court is not obliged to uphold such an affidavit.

The totality of the circumstances do not justify upholding the warrant. To the contrary, evidence seized pursuant to the warrant is properly subject to the exclusionary rule.

The First District relied for its decision here on its previous decisions in McNeely v. State, 690 So.2d 1337 (Fla. 1st DCA 1997) and St. Angelo v. State, 532 So.2d 1346 (Fla. 1st DCA 1988). In both cases, the affiant police officer relied solely on the hearsay report of an informant when the officer had no personal knowledge of the informant's reliability. Like

the instant case, the officer either did not bother to corroborate any of the information, or corroborated such innocent details that they had no bearing on determining whether the informant was reliable. In both cases, the First District held that Leon's good-faith exception could not save the warrants because the affidavits were too totally deficient to justify the officers' reliance. See also Smith v. State, 637 So.2d 351 (Fla. 1st DCA 1994); Fellows v. State, 612 So.2d 686 (Fla. 2d DCA 1993); Brown v. State, 561 So.2d 1248 (Fla. 2d DCA 1990). These holdings were based on well-established federal and Florida case law, and should be followed in the instant case as well.

Other cases perhaps have put the issue more clearly. For example, in Blue v. State, 441 So.2d 165 (Fla. 3d DCA 1983), of a reasonably similar affidavit, the Third District said:

> Clearly the affidavit tells us nothing of the informant's credibility or of the reliability of his information. While it is certainly arguable that when, as the affidavit states, the "confidential informant turned the second sample of marijuana from the premises over to affiant," the police could have reasonably inferred that the informant himself observed that about which he spoke, there is not a single circumstance set forth in the affidavit from which the issuing magistrate could conclude that it was probable that the informant was speaking the truth. The fact that one can infer from the informant's statement that he personally observed marijuana on the premises does nothing to further the probability that marijuana was in fact on the premises in the absence of some circumstance from which we can credit the informant's story. In other words, while the informant's basis of knowledge may be used

> to supplement his otherwise proven veracity, **it is the informant's veracity, not his stated basis of knowledge, which remains the sine qua non of the probability of marijuana being on the premises.** (emphasis added; cites & footnote omitted)

Id., 441 So.2d at 167-68. See also Delacruz, 603 So.2d at 709; Roper v. State, 588 So.2d 330, 334 (Fla. 5th DCA 1991)(veracity or reliability of the informants and their information is still an integral part of the totality of the circumstances that must be considered).

Blue continued:

> Moreover, there is not the slightest detail of innocuous activity in the affidavit which, even if corroborated, would lead one to believe that the informant's assertions of criminal activity on the defendants' premises were true. As the court recognized in Illinois v. Gates, "[o]ur decisions applying the totality of circumstances analysis ... have consistently recognized the value of corroboration of details of an informant's tip by independent police work." --- U.S. at ----, 103 S.Ct. at 2334, 76 L.Ed.2d at 550. Yet here the only fact that was corroborated is that the substance given to the detective by the informant was marijuana, a fact which proves nothing about the reliability of the informant. As it has been succinctly stated in a similar context, "[t]here is no logical connection between the fact that the test showed the powder was cocaine and the reliability of the informant's statement that it was taken from the defendant's apartment." (cites & footnote omitted)

Id. at 168. In other words, even where the informant produces contraband and says it came from the defendant's house, this does not resolve the question of whether the informant is worthy of belief. Here, the affidavit does not allege that the

informant produced any contraband, rather it relies solely on his verbal claim that he had seen McCormick in possession of contraband.

The Third District continued:

> The critical inquiry, then, is not whether the substance was probably marijuana, but whether there is a demonstrated probability that this marijuana came from the defendants' nursery as the informant alleged. Quite obviously, this inquiry could have been, but was not, answered, for example, by an undercover agent of the police going on the open-to-the-public premises to see for himself or, alternatively, by corroborating the fact that the informant, when he obtained the second sample, entered the premises empty-handed and came out with the marijuana, or, at the very least, by corroborating the fact that the informant entered the premises and came out with the marijuana. (cites omitted)

Id. More importantly:

> Nor does the fact that the informant brought marijuana to the detective prove anything about the informant's reliability. This act is not one which we consider to be against the informant's penal interest so as to allow a magistrate to find trustworthy the informant's further statement that the marijuana came from the defendants' premises.

Id.

As to whether the good-faith exception could save such a warrant, the Third District has said:

> We find that no officer could "manifest objective good faith in relying on [this] warrant [which was] based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Leon, 468 U.S. at ----, 104 S.Ct. at 3422, 82 L.Ed.2d at 677. There were insufficient facts before the

> judge upon which she could exercise her "neutral and detached" function of determining the existence of probable cause. For these reasons, the officers' reliance on the warrant may not be categorized as within the "good faith" exception to the warrant requirement.

Vasquez v. State, 491 So.2d 297,300 (Fla. 3d DCA), review denied, 500 So.2d 545 (Fla. 1986). The court continued:

> As the second district points out in [Bernie, infra], Leon enunciates a balancing approach:
>
> > [W]hether the exclusionary rule should be imposed depends on whether the likely social benefits of excluding unlawfully seized but "inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective" outweighed the likely costs, "particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor." ... In utilizing this balancing approach, the court must determine whether the purposes of the exclusionary rule will be furthered; i.e., whether the likelihood of deterring police misconduct is sufficient to justify the substantial social costs concomitant with the loss of probative evidence, the high risk of an erroneous verdict, and the possible generation of disrespect for the law and the administration of justice among the judicial system's constituency. (cites omitted)

Vasquez, 491 So.2d at 300-01, quoting State v. Bernie, 472 So.2d 1243 (Fla. 2d DCA 1985), app'd, 524 So.2d 988 (Fla. 1988) (note that Bernie's facts are inapplicable here, for it approved an "anticipatory warrant," i.e., the contraband will be there when the intercepted package has been delivered). Vasquez continued:

> In Bernie, the second district applied the Leon cost-benefit approach and determined that the evidence in question should not be suppressed because the police acted in good faith, the officer conducted an independent investigation, and the officer submitted the results of the investigation to a judge who issued a facially valid search warrant. **These facts are not present in the case before us.** Here, the judge was not furnished sufficient facts to determine the veracity of the source or the accuracy of his information, **and no independent investigation was attempted by the officers.** Under these circumstances, the Leon "good faith exception" is inapplicable, and the lower court erred in denying Vasquez's motion to suppress the weapons. Cf. State v. Wildes, 468 So.2d 550 (Fla. 5th DCA 1985) (good faith exception exists where affidavit included considerable detail indicating presence of contraband). (emphases added)

Vasquez, 491 So.2d at 301.

Similarly here, for all the reasons stated, this court should find the affidavit was so defective that it invalidated the warrant, and made it unreasonable for the officer to rely upon the warrant. This Court should affirm the district court's opinion and answer the certified question in the negative.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court answer the certified question in the negative and affirm the decision of the First District Court of Appeal below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Edward C. Hill, Jr., Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. William E. Peterson, 5141 W. Jackson St., Pensacola, Florida 32506, this 8 day of June, 1998.

KATHLEEN STOVER