IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

WILLIAM E. PETERSON,

Respondent.

CASE NO. 92,692

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, William E. Peterson, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of three volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. "R" will refer to the clerk's record and "T" will refer to the two volumes of trial transcript A citation to a volume will be followed by any appropriate page number within the volume.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

William Edward Peterson, was charged by information signed July 11, 1996, with possession with intent to sell, manufacture, or deliver cannabis, in violation of Section 893.13(1)(a), Florida Statutes; possession of more than 20 grams of cannabis, in violation of Section 893.13(6)(a), Florida Statutes; possession with intent to sell, manufacture, or deliver lysergic

acid diethylamide (LSD), in violation of Section 893.13(1)(a), Florida Statutes; possession of lysergic acid diethylamide (LSD), in violation of Section 893.13(6)(a), Florida Statutes; and possession of drug paraphernalia in violation of Section 893.147(1), Florida Statutes. (R-1-2)

The charges arose after a search of Mr. Peterson's dwelling revealed the presence of cannabis, LSD, and paraphernalia. The search was authorized by a search warrant. The search warrant named Jorge McCormick as its target and the warrant affidavit stated in pertinent part:

> That the facts tending to establish the grounds for this application and the probable cause of the affiant believing that such facts exist are as follows:
>
> Your affiant is a sworn law enforcement officer that is currently employed as a Deputy Sheriff with the Escambia County Sheriff's Office. Your affiant has been so employed since May of 1993. Prior to May of 1993 your affiant was employed with the State of Florida as a investigator with the Public Defenders Office. Your affiant is currently assigned as an investigator to the Sheriff's Office narcotics unit, and has been so assigned for the past two years. Your affiant has received over 180 hours of formal narcotics investigation training, including the Drug Enforcement Administration two week law enforcement training school. Your affiant has conducted or assisted in over 200 investigations involving the illegal sale and distribution of marijuana. Your affiant's participation in these investigations include, but was not limited to, the preparation of search warrant affidavits, arrest warrant affidavits, search warrant executions, and the processing of seized evidence.
>
> Your affiant was contacted by a reliable confidential informant, hereafter referred to as RCI. The RCI has provided information to law enforcement on at least twenty occasions regarding illegal criminal activities occurring in Escambia County, Florida that has proven to be accurate and true. The

RCI stated that the RCI has observed marijuana on at least 100 occasions and the RCI is familiar with its physical appearance and smell. The RCI is responsible for the arrest of four individuals and the seizure of $400.00 in illegal controlled substances. The RCI stated within the past ten days, the RCI was inside the above described location and observed Jorge McCormick in possession of a large quantity of marijuana. The RCI stated that Jorge McCormick lives at the above described location. The RCI stated that the RCI did observe 1/4 to ½ pound of marijuana packaged for distribution. This is consistent with the quantities kept by distributors of marijuana. The RCI stated that the RCI has on several occasions observed Jorge McCormick within the past six months in possession of large quantities of marijuana. The RCI also stated to your affiant that the RCI has observed Jorge McCormick within the past 15 days in possession of a quantity of Acid (lysergic acid diethylamide, LSD).

Your affiant caused a criminal history inquiry to be conducted on Jorge McCormick. The criminal history inquiry revealed that Jorge McCormick has been arrested for possession with intent to distribute dangerous drugs to wit, Acid in 1989. Jorge McCormick was also arrested for possession with intent to distribute marijuana and LSD in 1991. In 1995 Jorge McCormick was arrested for possession of marijuana.

(R 67-71)

Mr. Peterson filed a motion to suppress on October 10, 1996. (R-8-12) The motion requested that the court suppress contraband "including but not limited to alleged marijuana, alleged LSD, Darvon, and any and all other evidence that was seized pursuant to the issuance and execution of an invalid search warrant". (R-8)

The motion included the information that the search warrant, signed by Circuit Judge William Green, was executed at the residence of William E. Peterson, at 3005 West DeSoto Street, a single-family dwelling. The defense contended in the motion that

Mr. Peterson had a reasonable expectation to privacy in his home and that the application for the search warrant and the probable cause stated therein were not sufficient as a matter of law to support the issuance of the search warrant. (R-9)

The defense argued in the motion that the affidavit for search warrant did not "set forth sufficient facts such that the magistrate could find that the affiant had personal knowledge of the confidential informant's reliability or facts which corroborate the reliability of the confidential informant from an independent source". (R-9) (R-10-11)

The motion asserted that the affidavit in support of the warrant failed to "show the reliability of the informant supplying the information for issuance of the warrant". (R-11) The defense requested that the court suppress any and all evidence seized as a result of the invalid search warrant issued on or about June 20, 1996 (R-12)

The hearing on the motion to suppress was held on October 16, 1996. (R-13) Deputy Greg Nesmith of the Escambia County Sheriff's Office testified for the state. (R-16) He said that the confidential informant referred to in the affidavit had provided information to him on at least ten occasions which turned out to be true and correct. (R-17-18) Further, Deputy Nesmith maintained that other Escambia County Sheriff's deputies had told him that the confidential informant had provided them information which was accurate on at least ten occasions. (R-18) He claimed that the language used in the affidavit relating to

the confidential informants previous reliability was standard language which he always used in affidavits for search warrants. He further claimed that search warrants had been issued on the basis of such language. (R-19-20)

When the assistant state attorney asked Deputy Nesmith, "Has a judge ever given you any indication that there was a problem with your affidavits or with language like that?", the defense objected on the basis that was precisely what the court was there to determine at the hearing. The state responded that the good faith exception to the exclusionary rule applied. The court admitted Deputy Nesmith's testimony that the language had not been questioned in the past for the limited purpose of the good faith exception to the exclusionary rule. (R-20-21)
He also admitted that the arrest of four individuals and seizure of $400 in illegal controlled substances was another officer's case. (R-22-23) He did, however, say that he assisted with the case. (R-23)

Deputy Nesmith conceded that the only basis for believing that Jorge McCormick lived on the premises was the RCI's statement to that effect and that he had made no attempt to corroborate that information. (R-23-25)

The state then called Deputy Tony Bain of the Escambia County Sheriff's Department who was allowed to testify over defense objection that he had used language similar to that used by Deputy Nesmith in the affidavit for search warrant with success

in the past and that courts had granted search warrants based on the language. (R-28-31)

The defense attorney argued that the affidavit did not show that the affiant had personal knowledge of the informant's reliability and did not supply facts from an independent source to corroborate the informant's reliability. (R-32-33)

The defense attorney also argued that only Jorge McCormick was mentioned in the affidavit. Mr. Peterson was not included at all. The defense attorney argued that when the warrant was executed on June 20, 1996, the only person present was Mr. Peterson. The affidavit stated the Jorge McCormick lived at the address but provided insufficient information upon which the issuing judge could conclude that the marijuana and LSD seen by the RCI was located at the address in question. (R-37-38)

The state argued that the exclusionary rule was not a tool "to let clearly guilty defendants of free for hyper-technical reasons". (R-41) Further, the assistant state attorney argued that suppressing the evidence in this case would go against common sense. (R-41) According to the state, the purpose of the exclusionary rule was to deter police conduct, rather than punish errors committed by judges and magistrates. (R41-42)

After hearing testimony and the arguments of counsel, the judge found:

> [T]he attach on this affidavit and search warrant is not one predicated on a misstatement of a material fact or any intentional deception that would fall under Delaware v. Frank. The Court also notes that the reading and interpretation of the supporting affidavit to which the defendant would ascribe to it would be stilted and

> distorted. This affidavit must be read in the totality of circumstances under Illinois v. Gates. And using that reasonable interpretation and the totality of the circumstances alleged, the Court finds that this affidavit easily passes -- and search warrant easily passes or that they easily pass constitutional muster and that the motion to suppress should be denied." [Citation omitted in original.]

(R-48-49) The court later stated that it based its decision to deny the motion on the sufficiency of the affidavit, as well as on the basis that "even if it were to be found legally insufficient, that there's a good faith exception that exists".

Mr. Peterson's trial was held on November 1, 1996. At trial, Mr Peterson renewed his search and seizure objections. The jury convicted him of possession of marijuana with the intent to sell, (count I), possession of LSD with the intent to sell, count III), and possession of paraphernalia, (count V). (R 78)

On appeal, Peterson asserted that the evidence should have been excluded because the warrant affidavit did not indicated that the officer had personal knowledge of the informant's reliability.

The state maintained that the warrant affidavit was sufficient to support the finding of probable cause. Alternatively, the state maintained that even if it was not sufficient the good faith doctrine precluded exclusion of the evidence.

The appellate court reversed the conviction based on its case law which holds that the warrant affidavit must indicate that the affiant officer had personal knowledge of the informant's reliability. Peterson v. State, 23 Fla L. Weekly 649 (Fla. 1st

DCA February 26, 1998) This case law holds that such deficiencies are so great that no officer could in good faith rely upon the warrant. However, the Court noted that the circumstances were similar to the circumstance in Leon. In its opinion, the lower tribunal certified the following question as one of great importance:

> 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)

After receipt of the certified question, the state timely invoked the jurisdiction of this Court.

SUMMARY OF ARGUMENT

ISSUE I.

This Court should answer the certified question in the affirmative and determine that the good faith doctrine of Leon allows an officer to rely on a warrant issued by a neutral magistrate where the only error is that the officer who personally knew the informant was reliable did not indicate in the warrant affidavit that he was personally aware of the informant's reliability

Answering the question in the affirmative does not expand the scope of the good faith doctrine. This Court has previously held that this type of attestation error is the type of judicial error for which the good faith exception was created. Additionally, this Court has previously held that information known to other officers under the fellow officer rule must be considered when evaluating whether the good faith doctrine applies. Applying these principles to the facts of this case mandates the question posed by the lower tribunal be answered in the affirmative.

Moreover, the purpose behind the exclusionary rule is to restrain or punish police misconduct. There is no police misconduct in this case, thus, there is no legitimate basis for excluding the evidence obtained by the officers who executed this warrant. The lower tribunal misapplied the law relating to the existence of probable cause and the application of the good faith doctrine and therefore, this Court should answer the question in the affirmative and quash the decision below.

ISSUE II

The District Court held that a warrant affidavit fails to establish probable cause when the only error is that the officer who personally knew the informant was reliable did not indicate in the warrant affidavit that he had personal knowledge of the informant's reliability. The state maintains that this rule misapplies the law pertaining to warrant affidavits and probable cause.

The rule is that in determining probable cause officers are entitled to rely on information and representations made by other law enforcement personnel. The position of the lower tribunal that such information cannot provide the basis for a magistrate's determination of probable cause is in direct conflict with decisions of this Court and the United States Supreme Court on this issue.

Additionally, the lower tribunal applies this as a bright line test. If the affiant fails to include that the informant's reliability is personally known, probable cause does not exist. Such a bright line test violates the principle that probable cause is to be determined by the totality of the circumstances.

Moreover, it contravenes established case law on how probable cause is determined and upon what an officer can rely in establishing probable cause. Since, the lower tribunal's decision is based on a disapproved methodology and misapplies controlling precedent this Court should quash the decision.

ARGUMENT

ISSUE I

DOES THE GOOD FAITH DOCTRINE ADOPTED IN LEON ALLOW A POLICE OFFICER TO RELY ON A MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE WHEN THE WARRANT AFFIDAVIT INDICATES FACTS ESTABLISHING THE INFORMANT'S RELIABILITY BUT FAILS TO INDICATE THE AFFIANT'S PERSONAL KNOWLEDGE OF THE INFORMANT'S RELIABILITY?

The state asserts that this Court should answer the certified question in the affirmative and determine that the good faith doctrine of Leon allows an officer to rely on a warrant issued by a neutral magistrate where the only error is that the officer who personally knew the informant was reliable did not indicate in the warrant affidavit that he was personally aware of the informant's reliability

Jurisdiction

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." The District Court of Appeal of Florida, First District has certified the following 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)

Therefore, this Court has jurisdiction.

Merits

This Court has repeatedly recognized that Article I § 12 of the Florida Constitution requires that search and seizure issues are to be decided in conformance with the decisions of the United States Supreme Court. In dealing with Fourth Amendment cases this Court has accepted and applied United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), to various factual situations. The certified question deals with another application of the good faith rule of Leon.

The leading Florida case on the application of Leon is Johnson v. State, 660 So.2d 648 (Fla. 1995). In Johnson, this Court was confronted with a situation where the trial court found the officer's affidavit invalid and suppressed evidence based on the defendant's assertion that the oath was improper. This Court determined that the good faith exception applied and the lower tribunal erred by suppressing the evidence. The state asserts that like the situation in Johnson the situation in the instant case involves at worst a technical irregularity in the warrant and that the evidence should not be suppressed.

In order to understand the issue presented by the certified question an examination of Leon and this Court's application of Leon is necessary. In Leon, the United States Supreme Court

determined that the exclusionary rule should not generally be applied when evidence was seized pursuant to a warrant even when the warrant is later determined to be inadequate. The Court discussed when evidence obtained pursuant to a warrant should be excluded and stated:

> We find such arguments speculative and conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. (FN19

Id. at 3418

Thus, when a warrant has been obtained from a magistrate, the strong preference for warrants, the deference to the magistrate, and the policies behind the exclusionary rule authorize police officers to rely on the magistrate's determination of the adequacy of the warrant. In Leon, the Court specifically rejected the idea that exclusion of the evidence was an appropriate methodology to be employed as a means of making the warrant affidavits more complete. The Court found that errors such as existed in Leon, where the magistrate found probable cause but a reviewing court subsequently determined the affidavit insufficient to establish probable cause, were judicial errors for which the exclusionary rule was not to be applied.

The Supreme Court in Leon, identified four situations involving warrants where continued use of the exclusionary rule was proper. The Court held that exclusion is proper in the following situations:

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was

> misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Brown v. Illinois, 422 U.S., at 610-611, 95 S.Ct., at 2265-2266 (POWELL, J., concurring in part); see Illinois v. Gates, supra, 462 U.S., at 263-264, 103 S.Ct., at 2345-2346 (WHITE, J., concurring in the judgment). Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid. Cf. Massachusetts v. Sheppard, 468 U.S., at 988-991, 104 S.Ct., at 3428-3430.

Id. at 104 S.Ct. 3421

Subsequent to the United States Supreme Court's decision in Leon, this Court has had several occasions to discuss the circumstance under which the use of the exclusionary rule is still appropriate. Other than Johnson, this Court has addressed the issue in Green v. State, 688 So.2d 381 (Fla. 1996), where this Court acknowledged the applicability of Leon, however, found that because the warrant was facially invalid (it did not describe the property to be seized), the Leon good faith test could not save it.

Likewise in State v. White, 660 So.2d 664 (Fla. 1995), the Court discussed the Leon good faith test. In White, a defendant

has been arrested on a void warrant. The warrant had previously been served but this fact had not been entered into the computer. Thus, the computer indicated that White had a outstanding warrant. This court applied the fellow officer rule, which imputes specific knowledge possessed by some officers to other officers, and held that under the fellow officer rule the police had constructive notice that the warrant was void and could not rely on the good faith doctrine because good faith cannot save a warrant the police in their collective knowledge knew was void.

Each time it has addressed the applicability of the good faith doctrine, this Court has examined the facts of the case to determine whether the purposes behind the exclusionary rule were served by excluding the questioned evidence. As this Court indicated in Johnson, the purpose of the rule is to deter police misconduct.

The District Court's application of the Leon test is in direct contrast to the manner in which this Court and the United States Supreme Court apply Leon. In fact, the district court noted that application of its own case law was contradictory to Leon itself.

The district court held that the warrant was not based on probable cause because the officer did not indicate in his affidavit that he had personal knowledge of the informant's reliability.[1] The warrant affidavit provided in pertinent part:

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[1] The validity of this determination will be discussed in issue II

That the facts tending to establish the grounds for this application and the probable cause of the affiant believing that such facts exist are as follows:

Your affiant is a sworn law enforcement officer that is currently employed as a Deputy Sheriff with the Escambia County Sheriff's Office. Your affiant has been so employed since May of 1993. Prior to May of 1993 your affiant was employed with the State of Florida as a investigator with the Public Defenders Office. Your affiant is currently assigned as an investigator to the Sheriff's Office narcotics unit, and has been so assigned for the past two years. Your affiant has received over 180 hours of formal narcotics investigation training, including the Drug Enforcement Administration two week law enforcement training school. Your affiant has conducted or assisted in over 200 investigations involving the illegal sale and distribution of marijuana. Your affiant's participation in these investigations include, but was not limited to, the preparation of search warrant affidavits, arrest warrant affidavits, search warrant executions, and the processing of seized evidence.

Your affiant was contacted by a reliable confidential informant, hereafter referred to as RCI. The RCI has provided information to law enforcement on at least twenty occasions regarding illegal criminal activities occurring in Escambia County, Florida that has proven to be accurate and true. The RCI stated that the RCI has observed marijuana on at least 100 occasions and the RCI is familiar with its physical appearance and smell. The RCI is responsible for the arrest of four individuals and the seizure of $400.00 in illegal controlled substances. The RCI stated within the past ten days, the RCI was inside the above described location and observed Jorge McCormick in possession of a large quantity of marijuana. The RCI stated that Jorge McCormick lives at the above described location. The RCI stated that the RCI did observe 1/4 to ½ pound of marijuana packaged for distribution. This is consistent with the quantities kept by distributors of marijuana. The RCI stated that the RCI has on several occasions observed Jorge McCormick within the past six months in possession of large quantities of marijuana. The RCI also stated to your affiant that the RCI has observed Jorge McCormick within the past 15 days in possession of a quantity of Acid (lysergic acid diethylamide, LSD).

> Your affiant caused a criminal history inquiry to be conducted on Jorge McCormick. The criminal history inquiry revealed that Jorge McCormick has been arrested for possession with intent to distribute dangerous drugs to wit, Acid in 1989. Jorge McCormick was also arrested for possession with intent to distribute marijuana and LSD in 1991. In 1995 Jorge McCormick was arrested for possession of marijuana.

(R 67-71)

The district court held that under its precedent, See McNeely v. State, 690 So.2d 1337, 1339 (Fla. 1st DCA 1997), when a warrant affidavit based on information from a confidential informant fails to indicate that the affiant had **personal** knowledge of the informant's reliability then the warrant is so lacking in indicia of probable cause that no officer can manifest a good faith reliance on the defective warrant. However, the district court noted that this precedent fails to take into consideration that the United States Supreme Court in Leon when faced with almost identical facts concerning the deficiency of a warrant affidavit (an affidavit which failed to establish the reliability of the informant and was alleged to be stale) found the officer's reliance on the magistrate's determination of probable cause objectively reasonable and held the exclusionary rule was not to be applied. In effect, the district court relied on its precedent to overrule a decision of the United States Supreme Court on an issue where the United States Supreme Court precedent controls.

The lower tribunal's application of Leon is also erroneous in the manner in which the court applied its prior precedent. The

court has applied this precedent as a bright line rule failing to examine the totality of the circumstances. This too contravenes Leon and Gates which provide that no one factor is determinative and that probable cause must be determined under the totality of the circumstances.

An examination of the case law establishes that the district's court's application of Leon cannot withstand scrutiny. First of all, the district court's interpretation of the informant's reliability requirement is flawed. The holding utterly ignores the well established fellow officer rule which allows the affiant to provide in the affidavit hearsay information upon which the magistrate may find probable cause. Johnson But even if the district court were correct about this requirement, its Leon analysis is improper. There is no claim of falsity in this affidavit or reckless disregard for the truth. There is no claim that the magistrate was not performing the function of a magistrate or that the warrant failed to designate the place to be searched or the items sought. Thus, three of the situations where continued use of the exclusionary rule was approved by the United States Supreme Court are utterly inapplicable. The holding by the district court was that the warrant affidavit was so lacking in indicia of probable cause such as to render official belief in its existence entirely unreasonable. However, the facts of the instant case are exactly the situation where application of the exclusionary rule is inappropriate. The exclusionary rule operates to punish police misconduct. There

was no police misconduct in this case. The police did not conduct any pre-warrant searches in violation of the Constitution. The police obtained information from a known reliable source and sought a warrant. The officer used a format for the affidavit that had been previously used by him. A format no magistrate had told him was improper. (R 19-20, 28-30) The affidavit provided the magistrate with specific facts. The facts established that the informant provided accurate information on twenty occasions and the information resulted in the arrest of four individuals and the seizure of $400 in controlled substances. The affidavit indicated how the information of the possession of drugs was obtained by the informant and how old the information was. The investigation and affidavit also indicated that the sought after individual has an extensive criminal history for possession and sale of illegal drugs. This is not a bare bones affidavit. It does not require the magistrate to approve the judgement of the officer that the informant is reliable, it provides information from which the magistrate could determine the informant is reliable.

The opinion of the lower tribunal ignored what the Court meant in Leon by an affidavit lacking in probable cause. Proper interpretation of this criteria requires an examination of the Court's decision in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) In Gates, the Court abolished the

stringent and unworkable two part Aguilar-Spinelli [2] test for determining probable cause and replaced it with the totality of the circumstances test. In discussing the change, the Court noted that the bare bones assertion by an officer that the informant was known to him to be reliable was insufficient because it did not provide the magistrate with facts upon which the magistrate could determine reliability. Thus, affidavits which lack indicia of probable cause under Leon are affidavits which do not provide facts upon which a magistrate could find probable cause.

In the instant case, the affidavit provided the magistrate a factual basis to find probable cause. If any error occurred it was an error by the magistrate who did not inform the officer that the affidavit needed a personal attestation of reliability by the officer. This was a judicial error which the testimony at the suppression hearing shows could have and would have been readily fixed. At the hearing, the officer testified that he personally knew of ten instances in which the informant had provided reliable information and was told of ten others by other officers. Further, the officer testified that he had participated in the case where the informant's information was used to arrest.

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[2] Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

If any error occurred in the drafting of the affidavit, it was an attestation error of the type this Court examined in Johnson and found did not warrant exclusion. Further, it is the exact type of error which existed in Leon and which the United States Supreme Court held did not warrant use of the exclusionary rule.

Therefore, this Court should answer the certified question in the affirmative.

Summary

This Court should answer the certified question in the affirmative and determine that the good faith doctrine of Leon allows an officer to rely on a warrant issued by a neutral magistrate where the only error is that the officer who personally knew the informant was reliable did not indicate in the warrant affidavit that he was personally aware of the informant's reliability

Answering the question in the affirmative does not expand the scope of the good faith doctrine. This Court has previously held that this type of attestation error is the type of judicial error for which the good faith exception was created. Additionally, this Court has previously held that information known to other officers under the fellow officer rule must be considered when evaluating whether the good faith doctrine applies. Applying these principles to the facts of this case mandates the question posed by the lower tribunal be answered in the affirmative.

Moreover, the purpose behind the exclusionary rule is to restrain or punish police misconduct. There is no police

misconduct in this case, thus, there is no legitimate basis for excluding the evidence obtained by the officers who executed this warrant. The lower tribunal misapplied the law relating to the existence of probable cause and the application of the good faith doctrine and therefore, this Court should answer the question in the affirmative and quash the decision below.

This Court can do so on any one of several basis. First, it could answer the certified question in the affirmative by holding that the good faith doctrine allows an officer to rely on a warrant issued by a neutral and detached magistrate which like the affidavit in this case provides the magistrate a factual basis for finding the informant reliable even if the affidavit does not indicate personal knowledge of the officer.

Or, the Court could hold that the exclusionary rule should not be used to exclude evidence obtained by the use of a warrant affidavit which does not indicate the personal knowledge of the officer when upon being challenged the officer establishes that he had prior personal knowledge of the reliability of the informant.

Or, the Court could answer the certified question in the affirmative and hold that under the fellow officer rule, the affiant may attest to facts about the reliability of an informant known to law enforcement as a basis for the finding of probable cause and such warrant affidavits are sufficient to establish probable cause.

ISSUE II

IS A WARRANT AFFIDAVIT SUFFICIENT TO ESTABLISH PROBABLE CAUSE IF THE AFFIDAVIT PROVIDES FACTS RELATING TO AN INFORMANT'S RELIABILITY BUT OMITS THE FACT THAT THE INFORMANT IS PERSONALLY KNOWN TO BE RELIABLE BY THE AFFIANT?

The state asserts that this Court should review the decision of the District Court which holds that a warrant affidavit fails to establish probable cause when the only error is that the officer who personally knew the informant was reliable did not indicate in the warrant affidavit that he had personal knowledge of the informant's reliability. The state maintains that this rule misapplies the law pertaining to warrant affidavits and probable cause.

Jurisdiction

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." Furthermore, this Court has held that when it acquires jurisdiction over a case, it has jurisdiction to decide any issues in the case. Feller v. State, 637 So.2d 911, (Fla. 1994) The District Court of Appeal, First District certified a question of great public importance in this case. Therefore, this Court has jurisdiction to decide any corollary issues.

The state acknowledges that this Court does not have to decide additional issues raised. However, this issue is not an

unrelated issue which the state is attempting to obtain review of, but, a issue that was integral to the decision below.

Therefore, this Court should exercise its jurisdiction and review this issue.

Merits

The state acknowledges that an affidavit for a warrant must provide the magistrate with information upon which the magistrate can find probable cause. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) The lower tribunal's position is that an affidavit for a warrant discussing the reliability of an informant is insufficient unless it informs the magistrate of the affiant's personal knowledge of the informant's reliability. The lower tribunal's position is that informing the magistrate of reliable information provided by the informant to other officers is insufficient to establish probable cause. The lower tribunal has held that even when the source of the information is identified in the affidavit as the sheriff this is insufficient. McKneely v. State, 690 So.2d 1337, 1339 (Fla. 1st DCA 1997)

The state asserts that this proposition is wrong. Probable cause has long been held to be a fluid concept not susceptible to rigid definition. It has been described as

> Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a "practical, nontechnical conception." Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949). "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Id., at 175, 69 S.Ct., at 1310. Our

> observation in United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981), regarding "particularized suspicion," is also applicable to the probable cause standard:
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same--and [462 U.S. 232] so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Gates at 103 S.Ct. 2328-2329

This Court has routinely applied the same definition. See Walker v. State, 707 So.2d 300, (Fla. 1997) The lower tribunal's rigid application is incompatible with this definition.

Moreover, in developing probable cause, an officer is entitled to rely on information possessed by other officers. This Court in Johnson held that the fellow officer rule imputed knowledge from one officer to another in developing probable cause. This Court also applied the fellow officer rule in White to impute knowledge to the state that the warrant the officers served was void because it had previously been executed.

If under the fellow officer rule an officer can rely upon information known to other officers in developing probable cause for making an warrantless arrest, and for other aspects of probable cause, See Johnson,, Voorhees v. State, 699 So.2d 602 (Fla. 1997), there is no logical reason that an officer could not rely on information from fellow officers in developing and

presenting to the magistrate the facts relating to the reliability of an informant.

The holding of the lower tribunal also overlooks the fact that in Gates, the United States Supreme Court, abolished the rigid Aguilar/Spinelli test and replaced it with the totality of the circumstances. The lower tribunal has misapplied the totality of the circumstance test by created its own absolute requirement for warrant affidavits. The lower tribunal's creation and reliance on this bright line rule in an area where such rule are inappropriate warrants reversal.

The United States Supreme Court in Gates adopted the totality of the circumstances test for evaluating warrant affidavits. By adopting this test, it quashed all previous attempts to create bright line rules or technical tests which must be met before a warrant could be found to be valid. In particular, it overruled the Aguilar-Spinelli test which required that before an informant's information could be relied upon for the issuance of a warrant it had to provide the basis of knowledge of the informant and facts establishing the veracity of the informant or alternatively the reliability of the report in the particular case. The Supreme Court held that while an informant's veracity, reliability, and, basis of knowledge are highly relevant in determining the value of his report, they are not separate and independent requirements to be rigidly exacted in every case. The Court held that these are issues which may illuminate the common sense, practical question of whether there is probable

cause to believe that contraband or evidence is located in a particular place. The court reiterated the practical common sense nature of the probable cause standard and then returned to the issue of the issues of veracity and reliability. It held that a deficiency in one area may be compensated for by a strong showing as to the other or by some other indicia of reliability

In Gates, the Court reiterated the great deference to be given to the magistrate's decision and then set the limits beyond which the magistrate could not go. It reaffirmed cases which held barebones statements such as, "the affiant has cause to suspect and does believe that liquor illegally brought into the United States is located on certain premises" are not sufficient. The Court stated that the affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause and the wholly conclusory statements of a barebones affidavit are insufficient. The Court stated that sufficient information must be presented to the magistrate to allow that official to determine probable cause and his action cannot be a mere ratification of the bare conclusions of others.

Examined in this light, the affidavit was sufficient to establish probable cause. This is not a barebones affidavit. The factual information provided to the magistrate established that the informant who was familiar with marijuana and other drugs had recently been inside the residence and observed marijuana packaged for sale or distribution. The information established that Jorge McCormick lived at the residence and the

informant had observed McCormick on several occasion with large quantities of marijuana and on one occasion with LSD. The information of repeated contacts established that McCormick's connection with drugs was not an isolated incident or an accident. Moreover, the affidavit established that the informant had provided information to law enforcement twenty times that proved to be accurate and true. Further, affidavit provided the factual information that the informant was responsible for the arrest of four individuals and the seizure of $400 in illegal controlled substances. The affidavit also provided the factual information that the affiant checked the criminal record of Mr. McCormick and determined that he had a history of drug charges. (R 67-71)

In denying the motion to suppress, the trial court ruled that:

> THE COURT: All right. First, the Court needs to note that the attack on this affidavit and search warrant is not one predicated on a misstatement of a material fact or any intentional deception that would fall under Delaware vs. Frank. The Court also notes that the reading and interpretation of the supporting affidavit to which the defendant would ascribe to it would be stilted and distorted. This affidavit must be read in the totality of circumstances under Illinois v. Gates. And using that reasonable interpretation and the totality of the circumstances alleged, the Court finds that this affidavit easily passes -- and search warrant easily passes or that they easily pass constitutional muster and that the motion to suppress should be denied.

As the United States Supreme Court repeatedly has held there is **no** dispositive factor in evaluating the totality of the circumstances under the Fourth Amendment. See Florida v. Bostick, 501 U.S. 429 (1991). The issue is whether the affidavit

provides sufficient facts for a magistrate to determine the existence of probable cause. To the extent that the cases decided by the lower tribunal, such as McKneely, hold that a particular bright line test must be met to ensure an informant's reliability the holding conflicts with United States Supreme Court precedent and they should be quashed by this Court.

In any event, the lower tribunal's cases are distinguishable from the instant case. See McKneely, St Angelo v. State, 532 So.2d 1346 (Fla. 1st DCA 1988) In the cases cited, the affidavits while not barebones affidavits did not contain a subtantial amount of information upon which the magistrate could find the informant reliable. However, the affidavit in this case provided significant factual information not found in barebones affidavits. The affidavit contained factual information relating to the presence of drugs providing a basis for the magistrate to independently determine that the informant had knowledge of the existence of the drugs. The informant had been in the described house and observed McCormick in possession of marijuana packaged for sale. Moreover, the affidavit provided information establishing a basis for the magistrate to conclude that the informant was credible. The affidavit indicated that the informant had provided accurate information twenty times and had provided information leading to the arrest of four people and the seizure of $400 worth of narcotics. Finally, the informants information about the involvement of McCormick in the drug trade was confirmed by the police records check. .

Furthermore, lower tribunal's interpretation of the meaning of personal knowledge violates the cardinal rule of Fourth Amendment jurisprudence. The United States Supreme Court has repeatedly stated that the touchstone of Fourth Amendment jurisprudence is reasonableness and that hypertechnical interpretations have no place. A requirement that a police officer state in a warrant affidavit his personal knowledge about the informant is both hypertechnical and violative of the primary directive for warrant affidavits set out by Gates. Gates primary command is that the factual information be provided for the magistrate. The affidavit provided the information necessary for the magistrate to decide. The affidavit indicated that the informant had given accurate information twenty times and the information had been used to make four arrests and to seize illegal narcotics. The affiant had knowledge of this information even though he did not personally work all twenty cases. In fact, he testified at the hearing that he was involved in about half of the twenty cases and worked on the case where four arrests were made. (R 17, 18, 22)

More importantly, the Court in Gates indicated when examining warrant affidavits we are dealing with issues of probable cause. In determining probable cause for arrest or probable cause for warrants, police officers are entitled to rely on representations of others. In Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d. 697 (1960), the United States Supreme Court approved the use of information in the affidavit that was

obtained from an informant rejecting the concept that the officer had to have personal knowledge of the facts. In United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), the Court overturned a decision of the lower federal court which had held the affidavit was insufficient because the affidavit did not articulate whether the observations were observations of the affiant, other officers, or hearsay statements of unreliable informant. The Supreme Court utterly rejected the lower court's approach to the interpretation of warrant affidavits. It held that technical requirements of elaborate specificity have no proper place in this area. It held that where the circumstances are detailed, where reason for crediting the source of the information is given and when a magistrate has found probable cause, the court should not invalidate a warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner. This Court should apply that common sense approach found in Gates and quash the interpretation of the lower tribunal

Like the United States Supreme Court, Florida Courts have long recognizes that officers may rely on information from "fellow officers" for the purpose of probable cause. This Court in Johnson v. State, 660 So.2d 648 (Fla. 1995), and White recognized the import of the Jones and Ventresca cases when evaluating warrant affidavits. The Court stated that under the "fellow officer rule" hearsay from other officers can be repeated and used by the affiant officer in a warrant affidavit and is sufficient to establish probable cause. Therefore, it is clear

that the affiant does not have to have personal knowledge of the twenty times the informant gave accurate information in order to rely on this information in a probable cause affidavit for a warrant. This Court reiterated the broad scope of the fellow officer rule in Voorhees. This doctrine provides that information known to one officer is imputed to other officers involved in the case. Based on this case law approving a broad scope to the fellow officer rule Deputy Nesmith is imputed to know what other law enforcement officers know about this informant. Thus, an affidavit such as presented which described the reliability of the informant known to law enforcement is a sufficient statement of the personal knowledge of the affiant, and cannot be challenged on the basis that the affidavit lacks a statement that the reliability of the informant was "personally" known by the affiant.

Therefore, this Court should quash the decision of the lower tribunal.

Summary

The District Court held that a warrant affidavit fails to establish probable cause when the only error is that the officer who personally knew the informant was reliable did not indicate in the warrant affidavit that he had personal knowledge of the informant's reliability. The state maintains that this rule misapplies the law pertaining to warrant affidavits and probable cause.

The rule is that in determining probable cause officers are entitled to rely on information and representations made by other law enforcement personnel. The position of the lower tribunal that such information cannot provide the basis for a magistrate's determination of probable cause is in direct conflict with decisions of this Court and the United States Supreme Court on this issue.

Additionally, the lower tribunal applies this as a bright line test. If the affiant fails to include that the informant's reliability is personally known, probable cause does not exist. Such a bright line test violates the principle that probable cause is to be determined by the totality of the circumstances.

Moreover, it contravenes established case law on how probable cause is determined and upon what an officer can rely in establishing probable cause. Since, the lower tribunal's decision is based on a disapproved methodology and misapplies controlling precedent this Court should quash the decision.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative, the decision of the District Court of Appeal reported as Peterson v. State, 23 Fla. L. Weekly 649 (Fla. 1st DCA February 26, 1998) should be disapproved, and, the judgement entered in the trial court should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Kathleen A. Stover, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 13th day of May, 1998.

Edward C. Hill, Jr.
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