The Good Faith Exception as Applied to Illegal Predicate Searches: A Free Pass to Institutional Ignorance

Andrew Z. Lipson
Notes

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ANDREW Z. LIPSON*

INTRODUCTION

In *Herring v. United States*, the Supreme Court recently held that when an unlawful search is conducted by a police officer reasonably relying on a police clerk's mistaken report that an individual has an outstanding arrest warrant, the evidence obtained from the search is not excludable at trial. While many have heralded *Herring* as a massive blow to the once robust exclusionary rule, the case is unremarkable as it conforms with the good faith exception jurisprudence that exclusion is only justified when it will meaningfully deter future police misconduct. Although *Herring* is the first occasion where the Court applied the good faith exception to evidence obtained by an illegal search based on a mistake made by a law enforcement employee, it did not address the application of the exception to situations where it is the officer himself who was responsible for the violation.

There is a split among the circuit courts of appeals about whether it is appropriate to apply the good faith exception to the exclusionary rule

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1. 129 S. Ct. 695, 698 (2009).
to illegal searches resulting from police officer errors. Some circuits have ruled that when a police officer violates an individual's Fourth Amendment rights by conducting a search without articulable suspicion or probable cause, the evidence obtained from that search is still admissible if the police officer's own error was objectively reasonable. These courts recognize that some searches, although illegal, are so close to the line of validity that the officer's actions were still reasonable. Since the exclusion of evidence obtained in violation of an individual's Fourth Amendment rights is justified only when it would substantially deter future similar misconduct, evidence should not be suppressed when the officer's actions were reasonable. Other circuits have disagreed however, finding that when a police officer is wholly responsible for misapplying the law when conducting a search without the requisite articulable suspicion or probable cause, the state is per se precluded from seeking the good faith exception to the exclusionary rule. These courts have ruled that the exclusionary rule is specifically aimed at deterring police misconduct, and when police officers are responsible for the violation of the individual's Fourth Amendment rights, it is in these very situations that the exclusionary rule has its most meaningful effect. There are several circuit courts that have yet to address this issue, as well as the Supreme Court.

This Note seeks to determine whether the exclusionary rule is applicable to an illegal predicate search. An illegal predicate search is an unlawful warrantless seizure that uncovers evidence that later serves as a basis for an application for a search warrant.\(^3\) Although an unlawful seizure by a police officer in violation of the Fourth Amendment normally invokes the exclusionary rule, the good faith exception bars suppression of evidence where the search and seizure were conducted in good faith and were objectively reasonable.\(^4\) The Supreme Court has only applied the good faith exception when an officer has reasonably relied on another individual's error rather than on his own.\(^5\) Illegal predicate searches, however, typically involve an officer's reliance on their own erroneous understanding of the lawfulness of a search and seizure under the Fourth Amendment.\(^6\) Therefore, in order to honor the deterrent purposes of the exclusionary rule, and in order to deter institutional ignorance of the lawfulness of search and seizure law of the Fourth Amendment, courts must not extend the good faith exception to cases where there has been an illegal predicate search. If courts fail to

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4. See infra Part I.B.

5. See infra Part I.B.

6. See Diffendal, supra note 3.
suppress illegally obtained evidence resulting from police errors when conducting searches, they will institutionally memorialize law enforcement's ignorance of the law, and our privacy secured by the Fourth Amendment will be eroded.

In Part I of this Note, I will discuss the background of the exclusionary rule and the good faith exception as defined by Supreme Court jurisprudence and respected commentary. In Part II, I will set forth the landscape of the split among the circuit courts in applying the good faith exception to illegal predicate searches. And finally, in Part III, I will argue that in order to comport with the purposes of the exclusionary rule and the good faith exception, future courts addressing this issue must suppress evidence obtained pursuant to warrants substantially based on evidence obtained by an illegal predicate search.

I. THE EXCLUSIONARY RULE AND THE GOOD FAITH EXCEPTION

A brief account of the development of the exclusionary rule is necessary to understand its purpose, and thus the reasoning behind its various exceptions. Exclusion is not intended to remedy the constitutional wrongs suffered by the accused, but rather it is a judicially created mechanism to incentivize police officers to obey the law. Accordingly, the Court crafted various exceptions where exclusion does not effectively deter future police violations of the Fourth Amendment. The good faith exception will be discussed in depth below.

A. THE EXCLUSIONARY RULE

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\(^7\)

To enforce the provisions of the Fourth Amendment, the Supreme Court fashioned the exclusionary rule. The exclusionary rule provides that evidence seized in violation of an individual's Fourth Amendment rights cannot be used against him in his prosecution.\(^8\) Although the Supreme Court incorporated the Fourth Amendment against the states via the

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7. U.S. Const. amend. IV.
8. Weeks v. United States, 232 U.S. 383, 398 (1914) ("We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of office ... and that the court should have restored these letters to the accused."). Individuals whose Fourth Amendment rights have been violated may also seek civil damages under 42 U.S.C. § 1983. See Hudson v. Michigan, 547 U.S. 586, 597–98 (2006); Bivens v. Six Unknown Fed. Narcotic Agents, 403 U.S. 388 (1971). But see Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting) ("The exclusionary rule ... is often the only remedy effective to redress a Fourth Amendment violation.") (citations omitted)).
Fourteenth Amendment in *Wolf v. Colorado*, it was not until twelve years later, in *Mapp v. Ohio*, that the states were required to implement the exclusionary rule as well. This disjointed relationship between the protections afforded by the Fourth Amendment and the application of the exclusionary rule underscores the disagreements within the Supreme Court, and among courts around the country, as to when it is appropriate to invoke the exclusionary rule.

The Supreme Court has explained that the exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." Exclusion creates a system of incentives for those who have violated an individual's Fourth Amendment rights not to do so in the future. Since the incorporation of the exclusionary rule against the states in *Mapp*, however, the Court has remained mindful of the dangers of overapplication, and wary of the "substantial social costs" of "letting guilty and possibly dangerous defendants go free." Despite this perpetual balancing act, the United States stands almost alone in the application of a meaningful exclusionary rule when an individual's rights are violated.

There is considerable debate about whether the exclusionary rule effectively deters police misconduct. Likewise, there is skepticism about whether there is a substantial cost to society in granting such a powerful remedy to violated constitutional rights. These subjects are beyond the scope of this Note. Despite Jeremy Bentham's caution that to "exclude

11. See Illinois v. Gates, 462 U.S. 213, 223 (1983) ("[Applying the exclusionary rule is] an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.").
13. See id. at 347-55.
16. See Sanchez-Llamas v. Oregon, 548 U.S. 331, 343-44 (2006) ("The exclusionary rule as we know it is an entirely American legal creation. More than 40 years after the drafting of the [Vienna] Convention, the automatic exclusionary rule applied in our courts is still 'universally rejected' by other countries." (citations omitted)); see also Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 451 (1992) ("We are not the only country to exclude reliable evidence in order to further collateral objectives, yet the scope, complexity, and stringent operation of our exclusionary rules suggests that no other country has so little regard for the accuracy of its criminal trial results."); id. at 452-55 (citing various countries that do not exclude evidence in various circumstances where it is well established under American law that to do so would be unconstitutional and violative of an individual's fundamental rights).
18. See id. at 1375 (citing several studies that show that only a small fraction of prosecutions prove unsuccessful as a result of the application of the exclusionary rule).
evidence, you exclude justice,'"19 the exclusionary rule remains the most vital protection for the American populace against convictions based upon illegal searches and seizures.

B. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

Where the purposes of the exclusionary rule cease to be served by suppressing evidence, the Supreme Court has recognized various exceptions to its application.20 One such exception, good faith, has been expanded over the years to include various violations of an individual's Fourth Amendment rights. In United States v. Leon, the Supreme Court held that the exclusionary remedy is not to be applied where an officer illegally obtains evidence relying on "a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."21 In creating the good faith exception, the Court explained that no appreciable deterrent effect on police misconduct would be served by suppressing evidence seized in good faith by an offending officer.22

The Court supported its finding of a good faith exception with five observations. First, the exclusionary rule is meant to "deter police misconduct rather than to punish the errors of judges and magistrates."23 Second, there is no evidence that magistrates ignore or attempt to subvert the protections of the Fourth Amendment.24 Third, there is no reason to believe exclusion of "evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate."25 Fourth, excluding evidence cannot deter reasonable police conduct "unless it is to make [them] less willing to do [their] duty."26 And finally, police officers are reasonable when relying on a magistrate's determination of probable cause.27

The Court emphasized "that the standard of reasonableness ... is an objective one" when determining whether a police officer acted in good faith when conducting an illegal search.28 An inquiry into the subjective intent of the officer at the time of the search is outside the province of

19. 5 Jeremy Bentham, Rationale of Judicial Evidence 1 (1827).
21. 468 U.S. at 900.
22. Id. at 908.
23. Id. at 916.
24. Id.
25. Id.
27. Id. at 921.
28. Id. at 919 n.20.
courts, and ultimately, an objective test “‘retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.’”

This objective standard, however, requires that “officers have a reasonable knowledge of what the law prohibits.” In support of this contention, the Court cited an article by Professor Jerold Israel, which stated that “[t]he key to the [exclusionary] rule’s effectiveness as a deterrent lies, I believe, in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits.”

The same day Leon was decided, the Court applied the newly crafted good faith exception to another case where a police officer relied in good faith on a warrant that a magistrate judge assured him was not defective. In Massachusetts v. Sheppard, a police officer submitted a warrant application form to a magistrate judge. The officer sought the warrant on a Sunday, the one day of the week that the local courthouse was closed, and thus he was not able to obtain a basic search warrant application. Instead, he submitted a form to the judge that was specifically tailored to search for controlled substances, a type of search that was outside the scope of his investigation. The warrant-issuing judge assured the police officer that crossing out the words “controlled substance” on the application form would render the application valid, a determination that was later declared incorrect by the Massachusetts courts. As in Leon, the Court found that the police officer’s reliance on the warrant was in good faith and objectively reasonable, and therefore ruled that applying the exclusionary rule was not appropriate in such a case.

Since Leon and Sheppard, the Supreme Court has extended the good faith exception to three other situations where a police officer was objectively reasonable in conducting a search. In Illinois v. Krull, the Court admitted evidence obtained during an illegal search conducted by a police officer pursuant to a state statute that was later declared unconstitutional. As in Leon, the Court found that no appreciable

30. Id. at 920 n.20 (citing United States v. Peltier, 422 U.S. 531, 542 (1975)).
31. Id. (citing Jerold Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich. L. Rev. 1319, 1412 (1977)).
33. Id. at 985.
34. Id.
35. Id.
36. Id. at 986–87.
37. Id. at 991.
deterrent effect could be attained by suppressing the evidence. It was the state legislature that erred in passing an unconstitutional statute that caused the Fourth Amendment violation rather than any mistake by the police officer. The Court was wary that exclusion of evidence would encourage police officers to question the laws passed by the state legislature, laws that they are compelled to execute in the performance of their duties.

Subsequently, in Arizona v. Evans, the Court refused to apply the exclusionary rule to evidence obtained after a police officer relied in good faith on an error in the state’s computer system, which erroneously indicated that the defendant had an outstanding warrant for his arrest. Refusing to suppress the evidence obtained from the illegal search, the Court explained that “[i]f court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction [as exclusion].” The Court reasoned that since court employees have no vested interest in violating Fourth Amendment rights, exclusion in this situation would not deter future police misconduct, the very conduct that the exclusionary rule aims to deter.

Most recently, in Herring v. United States, the Court ruled that evidence seized by an officer who relied on a police clerk’s mistaken report that the defendant had an outstanding warrant for his arrest was admissible. The facts bear striking resemblance to those in Evans, except that in Herring, the mistake was made by police personnel rather than court employees. Since these errors were not “routine or widespread,” were at most negligent, and exclusion would only have a

39. Id. at 349.
40. See id. at 349–53.
41. Id.
42. 514 U.S. 1, 3–4 (1995).
43. Id. at 14.
44. Id. at 15–16.
45. 129 S. Ct. 695, 698 (2009).
46. Id. at 710 (Breyer, J., dissenting). The application of the good faith exception to the situation presented in Herring, at least for two Justices, represented a crucial departure from its application in Leon and its progeny. See id. (“The rationale for our decision [in Evans] was premised on a distinction between judicial errors and police errors, and we gave several reasons for recognizing that distinction.”); see also 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.5(d) (4th ed. 2004) (noting that the outcome of Evans would change if the police had been responsible for the error because the “rationale would seem inapplicable whenever the mistake was instead attributable to the law enforcement agency”); id. (discussing Carter v. State, 305 A.2d 856, 860 (Md. Ct. Spec. App. 1973), where the Court of Special Appeals of Maryland held that the fault of the police department in general is imputed to an arresting officer when effectuating an arrest pursuant to a false outstanding warrant). In People v. Ramirez, the California Supreme Court held that “if we impute to the arresting officer the collective knowledge of law enforcement agencies for the purpose of establishing probable cause, we must also charge him with knowledge of information exonerating a suspect formerly wanted in connection with a crime.” 668 P.2d 761, 764 (Cal. 1983).
marginal deterrent impact on future mistakes, the Court ruled that the large societal impact of evidence suppression could not be justified. As Herring represents the most recent interpretation of the scope of the good faith exception, it will be quite influential in determining the exception’s application in a host of unaddressed situations, such as the one contemplated by this Note.

In the five instances where the Supreme Court has applied the good faith exception, a police officer relied in good faith on another actor in determining whether or not to conduct a search. These situations, despite Justice Brennan’s dissent in Leon, highlight the primary purpose of the exclusionary rule: deterring police misconduct rather than maintaining judicial integrity and cross-institutional deterrence. Commenting on the deterrent nature of the exclusionary rule, Professor Wayne LaFave has recognized that “because Leon rests upon the notion that the exclusionary rule is not implicated where there is no police misconduct to deter, that case does ‘not allow law enforcement authorities to rely on an error of their own making.’” LaFave, a well-respected scholar on the Fourth Amendment, has noted that this concept was “carried to an extreme” in the Supreme Court’s decision in Groh v. Ramirez. In Groh, a police officer prepared a warrant application with specific references to the place to be searched and the items to be seized. The officer also completed the warrant form, but “failed to identify any of the items that [he] intended to seize.” The defendant sought a section 1983 remedy for violation of his Fourth Amendment rights. The Court stated that “the same standard of objective reasonableness that... applies in the context of a suppression hearing in Leon defines the qualified immunity accorded an officer” in a civil damages action. Ruling for the plaintiff, the Court concluded that “because [the affiant] himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate’s assurance that the warrant contained an adequate description of the things to be seized and was therefore valid.”

The distinction between a police officer’s good faith reliance on a third party actor and a police officer’s good faith reliance on his own

47. Herring, 129 S. Ct. at 704.
48. 468 U.S. 897, 953 (1984) (Brennan, J., dissenting) ("[T]he chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.").
50. Id. at n.68 (citing 540 U.S. 551 (2004)).
51. 540 U.S. at 554.
52. Id.
53. Id. at 555.
54. Id. at 565 n.8 (quoting Malley v. Briggs, 475 U.S. 335, 344 (1986)).
55. Id. at 564 (emphasis added).
understanding of the law is apparent from the Fourth Amendment warrant requirement and the Supreme Court's jurisprudence. The Court has interpreted the Fourth Amendment's probable cause and warrant requirement to check police power by requiring judicial magistrates to act as an intermediary between the individual and the state. The Supreme Court has explained that the Fourth Amendment's "protection consists in requiring that those inferences [of probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Underlying this principle is the notion that "[s]ecurity against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

The Supreme Court has yet to directly address the issue of whether or not the good faith exception to the exclusionary rule should apply in situations where the illegal police search was conducted in reliance on the officer's own understanding of search and seizure law. Illegal predicate searches often present this very situation and thus are analyzed in the next Part. Given the very technical and disputed applications of the Fourth Amendment over the last sixty years, it is not surprising that many police officers have difficulty in discerning the exact protections afforded by the Amendment. This difficulty, however, does not absolve police departments from effectively training police officers and apprising them of the contours of our Fourth Amendment rights. Several articles have been written on the subject of illegal predicate searches, however none have specifically addressed the current circuit split and advocated that the good faith exception must not be invoked when a police officer relies in good faith on their own error with regards to search and seizure law. Now more than ever, this Note is particularly relevant as circuit courts are weighing in on this particular issue. It is necessary that future courts uniformly reject the application of the good faith exception to

58. See, e.g., Thomas K. Clancy, Extending the Good Faith Exception to the Fourth Amendment's Exclusionary Rule to Warrantless Seizures that Serve as a Basis for the Search Warrant, 32 Hous. L. REV. 697 (1995) (arguing that magistrate judges should assume a more involved role in the search-warrant-issuing process—extensively reviewing predicate police activity—which would justify subsequent reliance on search warrants issued on the basis of an illegal search); Diffendal, supra note 3, at 234–39 (opining on the way in which the then-situated Supreme Court would rule on the developing issue of illegal predicate searches based on individual Justice's prior decisions); Kenneth C. Halcom, Note, Illegal Predicate Searches and the Good Faith Exception, 2007 U. Ill. L. Rev. 467 (2007) (arguing that although the illegally obtained evidence should be dismissed from the warrant application, courts should create a legal fiction that assumes that the warrant was issued anyway, absent the illegally obtained evidence, and that courts should then review whether a police officer could have, in good faith, reasonably relied on the warrant).
situations where the Fourth Amendment violation results from mistakes solely attributable to the searching officer. Naturally, the Supreme Court's recent decision in *Herring* will influence future decisions in this area.

II. **Illegal Predicate Searches: Two Approaches to *Leon***

Federal courts around the country have taken direction from *Leon* and its progeny and have developed different interpretations. These different interpretations of the good faith exception have resulted in disparate applications of its reach. Several circuits refuse to suppress evidence where the illegal search was objectively reasonable, even if the officer is solely responsible for the constitutional violation. Other courts, however, have ruled that when the illegal search is the fault of the officer, the state is per se precluded from invoking the good faith exception. A break down of the various circuits that have had the opportunity to rule on this issue and their rules highlights their respective rationales.

A. **The Good Faith Exception Extends to Police Officers' Reliance on Their Own Understanding of the Law**

1. **The Sixth Circuit**

In 2005, the Sixth Circuit Court of Appeals ruled that the good faith exception applies to situations where the police were solely responsible for a Fourth Amendment violation. In *United States v. McClain*, a police officer entered the defendant's house in violation of his Fourth Amendment rights. Officers responded to a call from a concerned neighbor who saw a light on in an abandoned house. Arriving on the scene, the officer observed the light, and saw that the door was slightly ajar. After waiting for backup, two officers conducted a protective sweep of the house, which turned out to be empty. During the protective sweep, however, they observed equipment that suggested that a marijuana growing operation was being set up. Based on this information, a surveillance investigation was conducted. With the information obtained that night and during the surveillance investigation, a search warrant was obtained and the premises were searched. The postwarrant search led to the discovery of 348 marijuana plants.

59. 444 F.3d 556, 564 (6th Cir. 2005).
60. *Id.* at 559.
61. *Id.*
62. *Id.* at 560.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
district court found that the initial search of the residence violated the defendant’s rights under the Fourth Amendment, and granted suppression of all subsequently obtained evidence.67

The government appealed and the Sixth Circuit reversed.68 Although the police officer conducted an illegal predicate search, the evidence obtained from the postwarrant search was not excludable because the initial violation was “close enough to the line of validity,” and therefore no exclusion was justified.69 Specifically the court stated, “we do not believe that the officers were objectively unreasonable in suspecting that criminal activity was occurring inside McClain’s home, and we find no evidence that the officers knew they were violating the Fourth Amendment by performing a protective sweep of the home.”70 The Sixth Circuit adopted this broad reading of the Leon exception despite a rather persuasive concurring opinion by Chief Judge Boggs, who found that the initial search was reasonable under the exigent circumstances exception to the warrant requirement.71 The court could have overturned the lower court’s decision relying on Judge Boggs’ exigent circumstances theory, but chose not to. Perhaps the majority was trying to limit the expansion of exigent circumstances doctrine, but more likely the court had been looking for an opportunity to expand the good faith exception doctrine.

2. The Eighth Circuit

The rule in McClain was adopted from a decision handed down by the Eighth Circuit Court of Appeals in United States v. White.72 In White, the court interpreted the Leon exception to mean that “evidence seized pursuant to a warrant, even if in fact obtained in violation of the Fourth Amendment, is not subject to the exclusionary rule if an objectively reasonable police officer could have believed the seizure valid.”73 In deciding not to suppress, the White court determined that the violation at issue was “close enough to the line of validity to make the officers’ belief in the validity of the warrant objectively reasonable.”74 In White, police officers witnessed the defendant disembark from a plane at St. Louis’ Lambert International Airport.75 Observing the defendant (1) leave the plane clutching his bag in his arms rather than hanging on his shoulder; (2) look over his shoulder on three separate occasions while walking to baggage claim; and (3) appear “agitated,” officers approached him and

67. Id. at 561.
68. Id. at 559.
69. Id. at 566.
70. Id.
71. Id. at 569 (Boggs, C.J., concurring in judgment).
72. 890 F.2d 1413 (8th Cir. 1989).
73. Id. at 1419.
74. Id.
75. Id. at 1414.
began to ask him questions. Despite the fact that they did not have a warrant, the police refused to allow the defendant to leave the airport with his luggage upon learning that he had purchased his one-way ticket from Los Angeles with cash. The White court found that the police officers did not have the requisite articulable suspicion to detain the defendant or his luggage, yet posited that "[t]he purchase of the ticket for cash, plus the incremental effect of the other factors present in this case, pushes this case into the gray area created by Leon."

This rule was subsequently applied by the Eighth Circuit in United States v. Kiser. The facts in Kiser were similar to those in White; in Kiser, the defendant was stopped by police officers in Chicago's O'Hare Airport. After he disembarked a plane from Miami, police observed the defendant walking down the concourse, anxiously stopping at two different water fountains to look over his shoulder despite not drinking any water. An investigation ensued at the car rental station, where it became apparent that the defendant was using a credit card belonging to a relative and that he had traveled under a fictitious name. Seeing that the defendant was nervous, the officers asked to search the defendant's bag, a request that was denied. The officers then seized his luggage and subjected it to a sniff test, which turned out positive, a fact later used to obtain a search warrant to search the bag. On appeal, the Eighth Circuit once again held that although the defendant's Fourth Amendment rights were violated, "the circumstances gave the officers an objectively reasonable belief that they possessed . . . articulable suspicion that would make the search warrant valid," and therefore this "push[es] this case into the gray area created by Leon."

 Likewise, in United States v. Fletcher, the Eighth Circuit found that the good faith exception applied to police misconduct in another baggage seizure at an airport. In Fletcher, police officers seized the defendant's bag in Des Moines Airport. The police conducted the seizure based on the following circumstances:

(1) Fletcher arrived from Phoenix, a drug source city; (2) he was first off the plane (3) and proceeded directly to the restroom; (4) he was

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76. Id. at 1414–15.  
77. Id. at 1415.  
78. Id. at 1419.  
79. 948 F.2d 418 (8th Cir. 1991).  
80. Id. at 421.  
81. Id. at 422.  
82. Id.  
83. Id.  
84. Id.  
85. Id. (citing United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989)).  
86. 91 F.3d 48, 51–52 (8th Cir. 1996).  
87. Id. at 49.
connected to a white pick-up truck with supplemental gas tanks and Arizona license plates; (5) he told the police he had a round trip ticket when the officers believed he had a one way ticket purchased with cash; (6) Fletcher withdrew his consent after initially agreeing to a search; and (7) he was associated with a woman at a local address where a narcotics complaint had been made.\textsuperscript{88}

The court of appeals agreed with the district court that the officers lacked articulable suspicion that the defendant was engaged in illegal activity, but did not grant suppression pursuant to 

\textit{Leon} because the "facts surrounding reasonable suspicion [were] close enough to the line of validity."\textsuperscript{89} The court further found that "[t]he purpose of the exclusionary rule, deterrence of police misconduct, will not be served by its application to this case."\textsuperscript{90}

Underlying the rule in each of these three cases is the idea that suppression of evidence seized illegally, yet close to the line of validity, would not have an appreciable deterrent effect of future police conduct. Essential to this argument is an assumption that there are illegal searches that are objectively reasonable. Relying on this understanding, the Eighth Circuit found that where the illegal search was so close to the point at which the police conduct would have been legal, then exclusion would do nothing to prevent further privacy abuses by law enforcement.

3. \textit{The Second Circuit}

The Second Circuit Court of Appeals has arguably adopted a rule applying the good faith exception to illegal predicate searches.\textsuperscript{91} The Second Circuit briefly addressed this issue in \textit{United States v. Thomas} shortly after \textit{Leon} was handed down by the Supreme Court.\textsuperscript{92} In \textit{Thomas}, police officers applied for a search warrant based on an informant's tip that indicated (1) that the defendant was a narcotics dealer, (2) that the defendant acted suspiciously the prior day when he was arrested, and (3) a positive canine sniff.\textsuperscript{93} Although the court found that the canine sniff violated the defendant's Fourth Amendment rights, the court denied suppression because it found that "[t]here [was] nothing more the officer could have or should have done under these circumstances to be sure his search would be legal."\textsuperscript{94} Judge Martin of the Sixth Circuit has argued, however, that this case is different than the above-mentioned cases because "no court in the Second Circuit had held that canine sniffs

\textsuperscript{88} \textit{Id.} at 51.
\textsuperscript{89} \textit{Id.} (internal quotations marks omitted).
\textsuperscript{90} \textit{Id.} at 52.
\textsuperscript{91} \textit{See United States v. Reilly, 76 F.3d 1271, 1280 (2d Cir. 1996); United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985).
\textsuperscript{92} 757 F.2d at 1359.
\textsuperscript{93} \textit{Id.} at 1366.
\textsuperscript{94} \textit{Id.} at 1368.
violated the Fourth Amendment."95 Given the lack of development in the law regarding canine sniffs in the Second Circuit, the officer "did not have any significant reason to believe that what he had done was unconstitutional."96

In *United States v. Reilly*, Judge Guido Calabresi stated that "[g]ood faith is not a magic lamp for police officers to rub whenever they find themselves in trouble."97 In *Reilly*, the court excluded evidence obtained pursuant to a search warrant issued upon evidence that was obtained by violating the defendant’s Fourth Amendment rights. Police officers walked onto the defendant’s property and viewed approximately twenty marijuana plants, a fact that was subsequently used to obtain a search warrant.98 The Second Circuit found that the predicate search encroached on the curtilage of the defendant’s property and therefore violated his Fourth Amendment rights.99 The court declined to apply the good faith exception, finding that the police officers omitted certain facts in their application for a search warrant in a manner that was “almost calculated to mislead” the magistrate judge.100 These seemingly intentional omissions precluded their good faith reliance on the subsequently issued warrant.101 Despite ruling that exclusion was appropriate in this case, the court explained that “we do not [reach the question of whether] the fruit of illegal searches can never be the basis for a search warrant that police can subsequently use in good faith.”102 It has been argued, in light of these statements, that the *Reilly* opinion stands for the proposition that the good faith exception can apply to illegal predicate searches as long as there is full disclosure to a magistrate judge of the attendant circumstances of the illegal search.103 However, this interpretation of *Reilly* runs contrary to another observation made by the *Reilly* court, where it held that “it is one thing to admit evidence innocently obtained by officers who rely on warrants later found invalid to magistrate error...[,] but it is an entirely different matter when the officers are

96. Id. at 545 (quoting *Reilly*, 76 F.3d at 1281).
97. *Reilly*, 76 F.3d at 1280.
98. Id. at 1274.
99. Id. at 1279 (citing United States v. Dunn, 480 U.S. 294, 300 (1987)).
100. Id. at 1280.
101. Id.
102. Id. at 1280–81.
103. Halcom, *supra* note 58, at 490. This approach has been advocated by another commentator who envisions an enlarged role of the magistrate judge in expanding the application of the good faith exception. See Clancy, *supra* note 58, at 722. This concept has been criticized by the Ninth Circuit Court of Appeals in *United States v. Vasey*, where it was held that a "magistrate's consideration of the evidence does not sanitize the taint of the illegal warrantless search." 834 F.2d 782, 789 (9th Cir. 1987). This would also place too much of an administrative burden on magistrates judges who already must process a very high volume of search warrant applications. Halcom, *supra* note 58, at 491.
themselves ultimately responsible for the defects in the warrant.\footnote{Reilly, 76 F.3d at 1281. The dissent from the denial of rehearing in McClain also indicates that Reilly does not stand for the proposition that as long as the illegal circumstances of the search are disclosed in the application for the search warrant, the good faith exception can therefore be applied. United States v. McClain, 444 F.3d 537, 544 (6th Cir. 2006) (order denying rehearing en banc) (Martin, J., dissenting). Rather, the dissent argued that the key distinction is the officers' reliance on their own assessment of the Fourth Amendment, rather than another institutional actor whose deterrence does not invoke the exclusionary rule. Id.} Whatever the reasoning of the court, it did not specifically adopt a rule that allows the good faith exception to apply to evidence seized pursuant to a search warrant issued upon illegally obtained evidence.

4. The D.C. Circuit

It has also been argued that the District of Columbia Circuit Court of Appeals has adopted a reading of \textit{Leon} under which the good faith exception could be applied to illegal predicate searches.\footnote{Halcom, supra note 58, at 480 (citing United States v. Thornton, 746 F.2d 39 (D.C. Cir. 1984)).} \textit{In United States v. Thornton}, an officer conducted a warrantless search of an individual's trash in order to obtain evidence that was later used to support probable cause for a search warrant.\footnote{Thornton, 746 F.2d at 49. This case occurred four years prior to the Supreme Court's ruling in \textit{California v. Greenwood}, which held that there is no reasonable expectation of privacy in one's own trash. 486 U.S. 35, 37 (1988).} The court held that:

\begin{quote}
It was eminently reasonable for the Superior Court judge, and the police officers, to believe that the trash bag search was constitutional and its fruits could be used to establish probable cause, given that the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home and the curtilge thereof.\footnote{Thornton, 746 F.2d at 49.}
\end{quote}

Although the court discussed the reasonableness of the officers' perception of the constitutionality of the trash search, it appears that this ruling was made upon the grounds that the superior court judge aided the probable cause determination, and that the court expressed its own reservations for recognizing a reasonable expectation of privacy in one's own discarded trash.\footnote{See id. at 49 & n.11.}

5. Summary of an Expanded Application of the Good Faith Exception

Thus far, the Eighth, and now the Sixth Circuit have extended the good faith exception to illegal predicate searches—searches where the illegality was premised on the officer's own mistake in honoring the protections of the Fourth Amendment. While the Second Circuit has arguably instituted a taint-cleansing rule by requiring disclosure of the circumstances of the illegal search to a magistrate judge, it is clear that illegally obtained evidence can, under some circumstances, be used to
obtain a search warrant.\textsuperscript{109} Also, the D.C. Circuit has held that in a situation where a superior court judge and a police officer both believe a search is valid based on the "overwhelming weight of authority," exclusion is not a proper remedy under the \textit{Leon} exception.\textsuperscript{110} Underlying each of these decisions is the premise that the good faith exception protects reasonable police conduct in borderline situations that do not ultimately pass constitutional muster. Since exclusion arguably would not have any deterrent effect in these situations, suppression is not the appropriate remedy. Other circuits, however, have addressed this issue and have come to a very different understanding of the nature of \textit{Leon}'s good faith exception.

B. \textbf{AN ILLEGAL PREDICATE SEARCH PRECLUDES THE APPLICATION OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE}

\textbf{i. The Ninth Circuit}

In \textit{United States v. Vasey}, the Ninth Circuit Court of Appeals rejected the application of the good faith exception to illegal predicate searches.\textsuperscript{111} In \textit{Vasey}, the defendant was pulled over for speeding, and was subsequently arrested when a warrants check revealed an outstanding warrant for his arrest.\textsuperscript{112} Forty-five minutes after placing the defendant in the back of the police vehicle, suspicious of drug related activity, the police officers decided to impound the car and perform an inventory search of the vehicle on the side of the road.\textsuperscript{113} The inventory search uncovered $5000 in cash and a gold watch, after which the police officers terminated the search and used the evidence obtained to apply for a search warrant.\textsuperscript{114} The postwarrant search revealed $71,111 in cash and three kilograms of cocaine.\textsuperscript{115} The district court first granted suppression, but later reversed its decision holding that the initial search was a valid search incident to arrest.\textsuperscript{116} The Ninth Circuit, however, found that the initial search was "not conducted contemporaneously with the arrest" and therefore the subsequent postwarrant search was made without probable cause.\textsuperscript{117} In so holding, the court declared that "[t]he fact that . . . [the officer] conducted a warrantless search of the vehicle which violated . . . [the defendant's] Fourth Amendment rights precludes any reliance on the good faith exception."\textsuperscript{118} Distinguishing \textit{Leon}, the

\begin{itemize}
  \item \textsuperscript{109} \textit{Reilly}, 76 F.3d at 1280-81.
  \item \textsuperscript{110} \textit{Thornton}, 746 F.2d at 49.
  \item \textsuperscript{111} 834 F.2d 782, 784 (9th Cir. 1987).
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id. at 785.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Id. at 786, 788.
  \item \textsuperscript{118} Id. at 789.
\end{itemize}
Ninth Circuit recognized that the "constitutional error was made by the officer," not a magistrate judge, and thus was "an activity that the exclusionary rule was meant to deter." Furthermore, the court rejected the notion that a "magistrate's consideration of the evidence . . . sanitize[s] the taint of the illegal warrantless search," thus rejecting adoption of the rule set forth in Reilly.

The Ninth Circuit later decided United States v. Wanless on the same grounds. In Wanless, highway patrol officers conducted a warrantless investigative search of two pulled-over vehicles without probable cause. Although the officers used the evidence uncovered to obtain a search warrant that later uncovered more contraband, the court stated that "the good faith exception does not apply where a search warrant is issued on the basis of evidence obtained as the result of an illegal search." Since the police officers were solely responsible for the Fourth Amendment violation, the state was precluded from relying on the good faith exception.

2. The Eleventh Circuit

In United States v. McGough, the Eleventh Circuit Court of Appeals also rejected the application of the good faith exception to illegal predicate searches. In McGough, the circuit court reversed the lower court for failure to suppress after it misapplied the community caretaking exception to the warrant requirement. In the case, a five-year-old girl called the police after she was locked in her apartment by her father who had gone out to purchase groceries. Arriving on the scene, a police officer called the fire department to have the door pried open; however, the defendant arrived before the door was opened. The defendant was arrested for reckless conduct and placed in a police car with his daughter. Although the defendant refused to allow the officers to search his home, two officers entered the residence when they accompanied the girl into the apartment to retrieve her shoes. Once inside the apartment, officers saw in plain view a large bag of marijuana

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119. Id.
120. Id.
121. 882 F.2d 1459 (9th Cir. 1989).
122. Id. at 1465.
123. Id. at 1466 (citing Vasey, 834 F.2d at 789).
124. See id.
125. 412 F.3d 1232 (11th Cir. 2005).
126. Id. at 1239; see also Cady v. Dombrowski, 413 U.S. 433, 441 (1973) (excepting a search from the warrant requirement that is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute").
127. McGough, 412 F.3d at 1233.
128. Id. at 1233–34.
129. Id. at 1234.
130. Id.
and a firearm. At this point, an officer left the scene to obtain a search warrant, and included the observations made within the home in his affidavit. After the warrant was secured, the officers searched the apartment and found more drugs and firearms, as well as large amounts of cash. A magistrate judge recommended that the evidence be suppressed, but the district court judge denied suppression, and the defendant was convicted and sentenced to 160 months in prison. The Eleventh Circuit reversed, finding that "the exigencies of the situation—[defendant's daughter's] need for her shoes—are not compelling enough to find that the officers’ warrantless entry... was objectively reasonable." The Eleventh Circuit, however, considered the argument that the good faith exception should apply, but ruled that "it was not an 'objectively reasonable law enforcement activity' but rather the officers' unlawful entry into McGough's apartment that led to...[the] request for a search warrant." The court relied on Wanless and Reilly in holding that the good faith exception may not apply when the search warrant was obtained on the basis of an unlawful search.

3. The Tenth Circuit

The Tenth Circuit Court of Appeals recently rejected the application of the good faith exception to illegal predicate searches. In United States v. Herrera, a police officer pulled over the defendant in his pick-up truck and conducted a search pursuant to a Kansas regulatory scheme that authorized random inspection of commercial vehicles. However, the defendant’s truck was not a commercial vehicle for purposes of the law and therefore did not fall under the regulation. The Tenth Circuit found that the defendant’s Fourth Amendment rights were violated and that the good faith exception did not apply despite the fact that the trooper was only mistaken by one pound in his assessment of whether or not the truck was a commercial vehicle. This determination was made in light of "the officer’s mistaken good-faith factual belief... that the vehicle being searched was a commercial vehicle." Looking to the instances where the Supreme Court applied the good faith exception, the court concluded that:

131. Id.
132. Id. at 1235.
133. Id.
134. Id.
135. Id. at 1239.
136. Id. at 1240 (quoting United States v. Leon, 468 U.S. 897, 919–20 (1984)).
137. Id.
138. United States v. Herrera, 444 F.3d 1238 (10th Cir. 2006).
139. Id. at 1241.
140. Id.
141. Id. at 1246.
142. Id. at 1254.
[The] application of Leon's good-faith exception to the exclusionary rule turns to a great extent on whose mistake produces the Fourth Amendment violation. And because the purpose underlying this good-faith exception is to deter police conduct, logically Leon's exception most frequently applies where the mistake was made by someone other than the officer executing the search that violated the Fourth Amendment.\textsuperscript{43}

The court went further, stating that "[i]his third party judgment provides a neutral check on the officer's conduct."\textsuperscript{144} The court concluded that "Leon's good-faith exception applies only narrowly, and ordinarily only where an officer relies, in an objectively reasonable manner, on a mistake made by someone other than the officer."\textsuperscript{145} The court did reflect that there might be "very unusual circumstances" when the good faith exception could apply when an officer is relying on his own error; however, the court did not address what those circumstances were.\textsuperscript{146}

The Tenth Circuit's rule in \textit{Herrera} was affirmed in a subsequent case, \textit{United States v. Cos.}\textsuperscript{147} In \textit{Cos}, police officers unlawfully entered the defendant's apartment after obtaining consent from a friend of the defendant who was not authorized to give consent.\textsuperscript{148} Upon entering the apartment, the officers observed a shotgun under the defendant's bed, a fact that was later used to obtain a search warrant for the household.\textsuperscript{149} The court of appeals found that the search violated the defendant's Fourth Amendment rights and that the good faith exception was inapplicable.\textsuperscript{150} Applying the \textit{Herrera} rule, the court concluded that for "violations of the Fourth Amendment that are caused by the officers' mistakes rather that [sic] by those of a third party, the good faith exception ordinarily remains inapplicable."\textsuperscript{151} The court went on to address \textit{McClain}, holding that the "close to the line of validity" test "conflicts with the law of this circuit."\textsuperscript{152}

4. Summary of the Narrow Application of the Good Faith Exception

Thus, the Ninth, Tenth, and Eleventh Circuits have all firmly stated that a police officer's misconduct in securing evidence later used to establish probable cause for a search warrant precludes the application of the good faith exception to the exclusionary rule.\textsuperscript{153} Focusing on the actor

\textsuperscript{143.} Id. at 1250.  
\textsuperscript{144.} Id. at 1253.  
\textsuperscript{145.} Id. at 1249.  
\textsuperscript{146.} Id. at 1253.  
\textsuperscript{147.} 498 F.3d 1115 (10th Cir. 2007).  
\textsuperscript{148.} Id. at 1118.  
\textsuperscript{149.} Id.  
\textsuperscript{150.} Id. at 1133.  
\textsuperscript{151.} Id. at 1132 n.3 (citing Herrera, 444 F.3d at 1249).  
\textsuperscript{152.} Id. at 1133 (citing United States v. McClain, 444 F.3d 556, 566 (6th Cir. 2006)).  
\textsuperscript{153.} Herrera, 444 F.3d at 1255; United States v. McGough, 412 F.3d 1232, 1240 (11th Cir. 2005);
that was responsible for the unlawful conduct in procuring the illegally obtained evidence, those circuits have held that *Leon* is inapplicable to good faith misconduct by police officers since they are the focus of the deterrent goals of the exclusionary rule.

III. **HONORING THE PROTECTIONS OF THE FOURTH AMENDMENT AND PREVENTING INSTITUTIONAL IGNORANCE**

There are two distinct camps with regards to applying the good faith exception to illegal predicate searches. In the first camp, which includes the Eighth, Sixth, and arguably the Second and D.C. Circuits,\(^\text{154}\) a police officer may rely on his own misinterpretation of the Fourth Amendment and still receive the benefits of the good faith exception to the exclusionary rule. These courts claim that when the infraction is “close to the line of validity,”\(^\text{155}\) or when “there [was] nothing more the officer could have or should have done ... to be sure his search would be legal,”\(^\text{156}\) the unlawful search was so reasonable that the deterrent purposes of the exclusionary rule would no longer be appreciable. Although the Supreme Court has never extended the good faith exception to an officer’s good faith reliance on his own mistaken understanding of the constitutional line of validity under the Fourth Amendment, these courts have held that if no appreciable deterrent effect can be had, then exclusion is not the proper remedy under *Leon*. In the other camp, which includes the Ninth, Tenth, and Eleventh Circuits,\(^\text{157}\) there is a bright-line rule that once an officer “conduct[s] a warrantless search” that violates an individual’s Fourth Amendment rights, it “precludes any reliance on the good faith exception.”\(^\text{158}\)

Looking to Supreme Court rulings and the nature of the deterrent effect of the exclusionary rule, the good faith exception must not be extended by future courts to illegal predicate searches where the illegality is premised on the officer’s mistaken understanding of the requisite amount of suspicion they needed to conduct the search.

A. **MECHANICS OF THE EXCLUSIONARY RULE AND GOOD FAITH**

The five situations where the Supreme Court has applied the good faith exception to the exclusionary rule have involved a police officer relying on a third party’s error in the determination of the law under the Fourth Amendment. In *Leon*, an officer relied on the erroneous

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\(^\text{154}\) United States v. Vasey, 834 F.2d 782, 789-90 (9th Cir. 1987).

\(^\text{155}\) See supra Part II.A.1–4.

\(^\text{156}\) United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989).

\(^\text{157}\) United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985).

\(^\text{158}\) See supra Part II.B.1–3.

\(^\text{158}\) Vasey, 834 F.2d at 789.
probable cause determination by a magistrate judge.\textsuperscript{159} In \textit{Sheppard}, a police officer similarly relied on a magistrate judge's insistence that a particular warrant application form did not invalidate the search warrant.\textsuperscript{160} In \textit{Krull}, an officer relied on a state search statute that was later declared unconstitutional, an error made by the Illinois legislature.\textsuperscript{161} In \textit{Evans}, an officer relied in good faith on a computer record maintained by the judicial branch of Arizona that erroneously indicated the defendant had an outstanding warrant.\textsuperscript{162} Finally, in \textit{Herring}, a police officer relied on a police clerk's negligently provided information that a suspect had an outstanding warrant for his arrest when in fact that warrant had been recalled.\textsuperscript{163} In \textit{Herring}, the Court acknowledged that suppression should be granted "'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'"\textsuperscript{164} In assessing the culpability of an officer in committing the Fourth Amendment violation—a necessary analysis in determining whether or not the exclusionary rule should be applied—the officer's action must be found to be "deliberate, reckless, or grossly negligent."\textsuperscript{165} In addition, although normally not considered a good faith case, \textit{Groh} arguably stands for the proposition that good faith may not be invoked when it is a police officer that is at fault for the Fourth Amendment transgression.\textsuperscript{166}

If future courts extend the good faith exception to illegal predicate searches, as the Eighth, Sixth, and arguably the Second and D.C. Circuits have done, they will depart dramatically from \textit{Leon} and its progeny. When an illegal predicate search occurs, a police officer violates an individual's rights under the Fourth Amendment because of his own misapplication of the law. The individual making the error is the police officer, the very person whose conduct the exclusionary rule is aimed at deterring. This departs from prior good faith jurisprudence because the mistake is committed by the very person who has a vested interest in transgressing the Fourth Amendment rights of the citizenry. Police officers have a different stake and role in law enforcement than do judges, legislatures, and clerical employees of the state. The recognition that police are engaged in the "competitive enterprise of ferreting out crime" should indicate that police officers lack the sagacity to make

\textsuperscript{159} 468 U.S. 897, 900 (1984).
\textsuperscript{161} 480 U.S. 340, 343 (1986).
\textsuperscript{162} 514 U.S. 1, 4 (1995).
\textsuperscript{163} 129 S. Ct. 695, 698 (2009).
\textsuperscript{164} Id. at 701–02 (quoting \textit{Krull}, 480 U.S. at 348–49).
\textsuperscript{165} Id. at 702.
\textsuperscript{166} \textit{See supra} notes 50–55 and accompanying text.
reasoned determinations of the correct application of the Fourth Amendment.\textsuperscript{167} Although police officers in many circumstances may believe that they are complying with the Fourth Amendment, especially in close cases, it does not follow that their determination must be given the benefit of the doubt so as to deny the most meaningful deterrent for Fourth Amendment violations—the exclusionary rule. In fact, the law should provide mechanisms to encourage police officers engaged in this competitive enterprise to err on the side of caution when potentially violating an individual's fundamental rights. Failing to exclude evidence illegally obtained, even though it was "close to the line of validity,"\textsuperscript{168} encourages police misconduct in the future. This disregards the Supreme Court's clear directive in \textit{Leon} that where there is police misconduct that violates the Fourth Amendment to be deterred, and that deterrence is meaningful, then exclusion is the proper remedy.\textsuperscript{169}

Judge Martin put it best when he stated that the Fourth Amendment has "more holes in it than a piece of Swiss cheese."\textsuperscript{170} It is true that the line at which police conduct violates our Fourth Amendment rights is not clear. Although the law is applied uniformly by the Supreme Court, there are difficult determinations and exceptions that make its application on the streets difficult for police officers. To apply the good faith exception in situations where the police have erred will derogate those reasonable expectations of privacy afforded by the Fourth Amendment, and create a gray area where our rights are not clear but rather are interpreted by arresting and searching officers. Most importantly, failure to suppress evidence unlawfully obtained in these situations encourages institutional ignorance of people's Fourth Amendment rights. It is unacceptable to place the power to define our rights in the hands of the very individuals who are most likely to want to violate those rights. It is ironic that the Eighth Circuit has found that when a violation is "close to the line of validity" it pushes the case into the "gray area created by \textit{Leon},"\textsuperscript{171} when in fact it is the court blurring the lines of \textit{Leon}'s application, and ultimately our rights under the Fourth Amendment.

B. THE EIGHTH CIRCUIT: A BRIEF CASE STUDY

The justification for extending the good faith exception to illegal predicate searches is that suppression would not serve its deterrent purpose because the actions of the police officers were objectively

\begin{footnotesize}
168. United States v. McClain, 444 F.3d 556, 566 (6th Cir. 2006); United States v. White, 890 F.2d 143, 1419 (8th Cir. 1989).
171. \textit{White}, 890 F.2d at 1419.
\end{footnotesize}
reasonable. To suppress would in no way serve to alter future conduct of police officers and, therefore, no advantage would be gained by excluding the evidence. When the infraction is “so close to the line of validity,” and there is nothing more that a police officer may do to ensure that their conduct comports with the Fourth Amendment, what future misconduct would change through suppression of evidence? Looking to the good faith jurisprudence of the Eighth Circuit alone, however, where this line of reasoning originated, it is clear that the same police misconduct occurs over and over again because of a failure to apply the proper remedy. Not coincidentally, in all three Eighth Circuit cases that have applied the good faith exception, police officers violated the defendants’ rights by seizing luggage at airports without the requisite amount of articulable suspicion. Both Kiser and Fletcher followed the rule in White, and it appears that the police forces in those cases did nothing to change their practices in airports in order to comport with the law. This shows that the “close to the line of validity” test espoused in White encourages institutional ignorance of the true line of validity of articulable suspicion in airports. Although individually, each case represented police officers’ good faith belief that they were comporting with the Fourth Amendment requirements, it is clear that the failure to suppress in White had a demonstrable effect, or lack thereof, on the activities by future officers in future cases. As Jerold Israel explained, the deterrent purposes of exclusion must be played out in the training programs for police departments. Without exclusion, there is no reason for police departments and their officers to change their practices of violating the law. Therefore, extension of the good faith exception to illegal predicate searches institutionally memorializes police officers’ mistakes. Moreover, these mistakes involve a constitutional violation of a right that has been deemed fundamental by the Supreme Court, a situation that is unacceptable.

C. SCIENTER: THE HERRING AND FRANKS FRAMEWORK

The Supreme Court recently clarified the scope of the good faith exception in Herring v. United States, and thus future good faith arguments will have to conform to its analysis. Chief Justice Roberts’

172. See supra Part II.A.2.

173. See supra Part II.A.2.

174. In Kiser, the search occurred on May 6, 1980 in Chicago's O'Hare Airport. 948 F.2d 418, 421 (8th Cir. 1991). In White, the illegal search occurred on March 14, 1988 in Lambert International Airport in St Louis. 890 F.2d at 1414. Finally, in Fletcher, the illegal search occurred on July 7, 1995 at the Des Moines airport. 91 F.3d 48, 49 (8th Cir. 1996). Failure to suppress in both Kiser and White condoned the type of police misconduct that ultimately led to the violation of Mr. Fletcher's Fourth Amendment rights. Looking to all of these cases, where all three searches bear striking resemblance to each other, it can be argued that failure to suppress evidence led to persistent illegal police activity.

opinion seemingly establishes a scienter requirement when evaluating whether the police violation is egregious enough to trigger exclusion. Much like the Court’s analysis in Delaware v. Franks, the Court determined that mere “negligence or innocent mistake” would not suffice to warrant exclusion. Chief Justice Roberts explained that exclusion is meant to “deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”

The question must then be asked: Can a police officer’s misapplication of the law when deciding to conduct a search be considered negligent? In Franks and Herring, the police were guilty of negligently supplying incorrect information that led to an illegal search. In Franks, a police officer negligently supplied misinformation in his affidavit, and in Herring a police clerk gave false information because of a mistake in the local warrant recording procedure. Can this scienter requirement be applied to a negligently conducted illegal search? Surely this would discourage effective police training programs, a chief concern expressed by the Court in Leon. Likewise, from the perspective of the judiciary, can judges ever view a police officer’s failure to know the true line of validity as mere negligence? As explained in Leon, “officers [must] have a reasonable knowledge of what the law prohibits.”

Lower courts applying Herring will have to decide whether or not the scienter requirement applies equally to police officers’ own mistakes in honoring the protections of the Fourth Amendment. As argued above, in order to comport with the protections of the exclusionary rule and previous good faith jurisprudence, suppression must be granted in cases of illegal predicate searches. Therefore, courts should either relegate the Herring scienter requirement to police provision of misinformation that leads to an illegal search, or they should rule that illegal predicate searches are per se reckless or grossly negligent. Then again, given the widespread concern that Herring has jeopardized the existence of the exclusionary rule, it could be the first case of several that further clarify the application of the exclusionary rule in good faith cases. In the

176. Herring v. United States, 129 S. Ct. 695, 702 (2009) (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”).
178. Herring, 129 S. Ct. at 703.
179. Id. at 702.
180. See 438 U.S. at 157–58.
181. 129 S. Ct. at 704.
183. Id. (citing United States v. Peltier, 422 U.S. 531, 542 (1975)).
184. See supra Part III.A–B.
185. See sources cited supra note 2.
meantime, however, courts should safeguard the application of the exclusionary remedy to illegal predicate searches, lest the exception swallow the rule.

CONCLUSION

There is a dramatic split in the circuit courts concerning the application of the good faith exception to the exclusionary rule. Once a rule that was limited only to an officer’s reliance on third party actors with no personal stake in law enforcement, the reach of the exception has moved unlawful police conduct with no such reliance beyond the grasp of the exclusionary rule. The Fourth Amendment has experienced a disjointed application in the last sixty years from the high Court, and therefore it is not quite clear when it protects individuals under suspicion by police officers. It is difficult to apply in courtrooms by educated lawyers and judges, let alone by police officers zealously enforcing the law in the field. Although we cannot assume that police officers purposefully violate the Fourth Amendment, it is important that we check the immense power that we grant officers by requiring a narrow reading of the good faith exception. Officers must err on the side of caution when presented with situations where our fundamental rights are at stake. To hold otherwise would create a judicial mechanism that would literally encourage institutional ignorance of the true line of protection afforded by the Fourth Amendment. This undesirable situation exists today in various areas of the country under jurisdiction of the Eighth and Sixth Circuits, and perhaps in the Second and D.C. Circuits. Thus, courts must not defer to police officers’ interpretation of the Fourth Amendment when conducting searches, and must not allow the good faith exception to the exclusionary rule to extend to illegal predicate searches.