

2015

State of Utah, Plaintiff/Appellant, v. Michael Rowan and Rebecca George, Defendants/Appellees

Utah Supreme Court

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Case No. 20150598-SC

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellant,

v.

MICHAEL ROWAN AND REBECCA GEORGE,
Defendants/Appellees.

Brief of Appellant

Appeal from a final order dismissing the charges against defendants, which dismissal was entered on the ground that the district court's orders suppressing evidence substantially impaired the prosecution's cases, in the Fourth Judicial District, Utah County, the Honorable Derek P. Pullan presiding

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IN THE
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STATE OF UTAH,
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v.

MICHAEL ROWAN AND REBECCA GEORGE,
Defendants/Appellees.

Brief of Appellant

STATEMENT OF JURISDICTION

The State appeals from a final order dismissing the charges against defendants following the suppression of evidence that substantially impaired the prosecution's cases. This Court has jurisdiction under Utah Code Annotated § 78A-3-102(3)(i) (West 2009) in the case against defendant Michael Rowan, and under Utah Code Annotated § 78A-3-102(3)(b) (West 2009) in the case against defendant Rebecca George.¹

¹ Although the defendants were charged in a single information, they were prosecuted in separate cases: *State v. Rowan*, Fourth Dist. Ct. Case No. 131402290, and *State v. George*, Fourth Dist. Ct. Case No. 131402291. Citations to the electronic record in *Rowan* will be designated by the letter "R" and to the record in *George* by the letter "G," each followed by the paginated number (*e.g.*, R1 or G1). This Court consolidated the two cases on appeal by order issued November 20, 2015. Although the district court's joint orders at issue on appeal appear in both records, the search warrant documents and relevant motions and memoranda appear only in the *Rowan* record.

INTRODUCTION

A confidential informant (“CI”) with pending charges against him reported to police that he knew a man named “Mike” who would sell him marijuana. The CI also detailed that Mike drove to California to obtain the drug and then sold it from his Provo home in vacuum-sealed packaging. In exchange for leniency on criminal charges, the CI agreed to make a controlled buy at Mike’s home. In the presence of police, the CI called Mike and arranged the drug buy. After giving the CI the buy money, police followed the CI in his car as he drove to and from Mike’s house. The CI returned with the agreed upon amount of marijuana. A magistrate thereafter issued a warrant to search Mike’s house. In the ensuing search, police found drugs, paraphernalia, buy-owe sheets, guns, and large sums of cash.

The trial court suppressed the evidence. Although the CI was searched before and after the buy – and police kept him in their sight as he traveled to and from the buy – the court concluded that probable cause was lacking because police did not also search the CI’s car. The court ruled that the evidence is admissible under the federal good faith exception, but suppressed it anyway after concluding that the state exclusionary rule does not include a good faith exception. In doing so, the court rejected the State’s argument that the Utah Constitution does not include an exclusionary rule.

STATEMENT OF THE ISSUES

1. Did the magistrate have a substantial basis for concluding that the search warrant was supported by probable cause?

2. If not, does the Utah Constitution require an exclusionary rule for evidence obtained as the result of a violation of Article I, § 14?

3. If so, should this Court recognize a good faith exception to the state exclusionary rule analogous to the federal exception articulated in *United States v. Leon*, 468 U.S. 897 (1984)?

Standard of Review. This Court affords great deference to the magistrate's decision to issue a search warrant. *State v. Norris*, 2001 UT 104, ¶14, 48 P.3d 872. The Court's task "is not to conduct a de novo determination of probable cause," *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984) (*per curiam*), but to "assess whether the magistrate had a 'substantial basis for determining that probable cause existed,'" based on the four corners of the supporting affidavit and read in a common sense fashion, *Norris*, 2001 UT 104, ¶14 (citation omitted).

Whether the Utah Constitution requires the exclusion of evidence for a violation of its provisions is a question of law reviewed for correctness. *See State v. Casey*, 2002 UT 29, ¶ 19, 44 P.3d 756 (holding that interpretation of Utah Constitution is question of law reviewed for correctness).

Preservation. The issue of whether the magistrate had a substantial basis for finding probable cause was preserved in defendants' first motion to suppress, R27-37, the State's opposing memorandum, R41-53, and the arguments at the May 27, 2014 hearing, R263-68 (G104). The issues of whether there should be a state exclusionary rule, and if so, whether it should include a good faith exception analogous to the federal good faith exception, were preserved in defendants' second motion to suppress and reply, R70-80,151-68, the State's opposing memorandum, R102-10,129-45, and the parties arguments at the November 4, 2014 hearing, R282-300 (G107).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV

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.

Utah Const. art. I, § 14

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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

STATEMENT OF THE CASE²

A. Summary of facts.

On August 28, 2012, a magistrate issued a warrant authorizing the search of the defendants' Provo residence, which was located within 1,000 feet of a church. R65-66. In finding probable cause for the warrant, the magistrate relied on the affidavit of Springville City police officer Steven Pratt, who had been investigating the case over the course of the previous several days. R3,60-64.

Affidavit for Search Warrant

A confidential informant (CI) with criminal charges pending against him reported to police that a man known to him only as Mike "was in possession of marijuana and would sell it" to him. R62:¶4. The CI told Officer Pratt that he has been in Mike's home and has bought drugs from him. R62:¶4. The CI said that (1) "Mike will travel to California to obtain marijuana to sell here in Utah," R62:¶6; (2) Mike then "sells [the] marijuana in bulk and his product is vacuum sealed," R62:¶4; and (3) Mike "keeps his marijuana inside his residence," though the CI was not sure exactly where in the home, R62:¶6.

² The facts are taken from the search warrant documents, R60-67 (Addendum A), and the Information's probable cause statement, R3, G1.

The CI agreed to participate in a controlled buy of marijuana in exchange for leniency on his pending criminal charges. R62:¶5. Police searched the CI before he left to conduct the controlled buy and found no drugs. R62:¶7. In the presence of police, the CI then called Mike on his cell phone and agreed to buy a specified amount of marijuana from Mike at his house for a specified amount of money. R62:¶7. Police gave the CI the buy money and the CI drove his own car to Mike's residence with police following. R62:¶7. The CI drove straight to Mike's residence without making any intervening stops and entered the home. R62:¶7.

After a short time inside, the CI left the residence and drove to a predetermined location to rendezvous with police. R62:¶8. The CI confirmed with Officer Pratt that after going in the house, he gave Mike the buy money and Mike gave him the agreed-upon amount of marijuana. R62:¶9. Police searched the CI's person and found "a distributable amount of marijuana" in the amount "agreed upon." R62:¶8. Police did not search the CI's car—either before or after the controlled buy. However, detectives working the case followed the CI to Mike's residence and to the rendezvous point with police after the buy. R62:¶¶7-8. Each time, the detectives kept the CI "in visual sight at all times" —"the whole time." R62:¶¶7-8.

Before police applied for the warrant, the CI told officers that Mike is a martial arts master; he also said that he has heard Mike talk about firearms and believed that Mike may have a firearm in his house. R62:¶9. Officer Pratt tried to determine Mike's full identity before seeking the warrant, but record checks on the residence and vehicles, as well as inquiries to other agencies, were unsuccessful. R63:¶10.

Search of Defendants' Home

After securing the warrant, police searched the defendants' home and found some four pounds of marijuana, psilocybin mushrooms, drug paraphernalia, buy-owe sheets, more than \$3,600 in cash, and two firearms—an assault rifle and a handgun. R3,67. The drugs and paraphernalia were found throughout the residence and were easily accessible to the defendants' minor child, who was present in the home when police entered to conduct the search. R3.

B. Summary of proceedings.

Defendant Michael Rowan was charged with (1) distributing marijuana in a drug-free zone, a second degree felony; (2) while having a prior drug-related conviction, possessing marijuana in a drug-free zone with intent to distribute, a first degree felony; (3) while having a prior drug-related conviction, possessing psilocybin mushrooms in a drug-free zone with in-

tent to distribute, a first degree felony; (4) possessing a firearm as a restricted person, a third degree felony; (5) possessing drug paraphernalia in a drug-free zone, a class A misdemeanor; and (6) endangering a child, a third degree felony. R1-3 (G3-1). Defendant Rebecca George was charged with one count of endangering a child, a third degree felony. R2-3 (G2-1).

Motion to Suppress on Fourth Amendment Grounds

Defendants moved to suppress the evidence seized in the search of their home, arguing that the warrant was not supported by probable cause. R27-37. In response, the State argued that the magistrate had a substantial basis for finding probable cause, but even if not, that the evidence should not be suppressed under the federal good faith exception. After hearing argument, R263-268 (G104), the trial court denied the motion, R269-81 (G105). In its written order, the court concluded that the warrant was not supported by probable cause, but refused to suppress the evidence under the federal good faith exception articulated in *United States v. Leon*, 468 U.S. 897 (1984). R226-32 (Addendum B) (G84-78).

Motion to Suppress on State Constitution Grounds

Defendants filed a second motion to suppress the evidence, this time urging the trial court to not recognize a good faith exception under Utah's exclusionary rule. R70-80. In response, the State argued that there is no basis

for an exclusionary rule under the Utah Constitution and, even if there were, it should include a good faith exception analogous to the federal exception. R88-146. After hearing argument, R282-300 (G107), the trial court granted defendants' motion to suppress—concluding that a state exclusionary rule is constitutionally required and that a good faith exception is inappropriate because it would deprive defendants of the right to a remedy, undermine the integrity of the executive and judicial branches, and weaken the warrant process, R180-94 (Addendum C) (G51-37).

Dismissal and Appeal

On the State's motion, the trial court dismissed the charges against defendants on the ground that the suppression of evidence substantially impaired the State's cases. R241,247 (G92,98). The State timely appealed both cases. R251-52 (G101-100). After this Court elected to retain the *Rowan* case on its docket, R306, the court of appeals certified the *George* case for transfer to this Court.

SUMMARY OF ARGUMENT

I. Probable cause showing for search warrant. The trial court improperly vacated the search warrant issued by the magistrate. Rather than reviewing the magistrate's probable cause decision with great deference, the court reviewed it de novo, as if it were a magistrate looking at the warrant

application for the first time. And, consequently, the trial court erroneously concluded that the affidavit failed to establish probable cause.

When the affidavit is viewed as a whole and in a common sense manner, the magistrate had a substantial basis for his probable cause finding. The tip that drugs were being sold out of Defendants' home was made by a known informant, who was thus subject to prosecution if he was lying to police. Moreover, he was promised leniency in his pending criminal charges. He thus risked losing the benefit of the bargain if his claims proved to be a tale. Added to that, the informant participated in a controlled buy at the home that yielded a distributable amount of marijuana. Police searched the informant before and after the buy, but not the car he drove to and from the buy. A car search may well have bolstered the probable cause showing. But police followed the informant to and from the buy, keeping him in visual sight at all times. Those measures were sufficient to assure that the drugs were purchased at the home, not retrieved from the car.

II. Article I, § 14 and the exclusionary remedy.

This Court should reconsider and reject a state exclusionary rule for violations of Article I, § 14. The opinion in *State v. Thompson* adopting a state exclusionary rule is bereft of analysis and relies on the plurality opinion of *State v. Larocco* as if it were binding precedent. But the *Larocco* plurality's ra-

tionale for a state exclusionary rule also does not withstand scrutiny. It is not grounded in Article I, § 14's text; it does not consider the understanding of Utah's framers at the time of the state constitution's adoption; and it is based in large part on decisions from this Court that applied the federal exclusionary rule, not a state exclusionary rule.

III. Good faith exception. This Court should reverse even if a substantial basis for the magistrate's probable cause finding was lacking, and a state exclusionary rule is a proper remedy. The evidence seized should not have been suppressed because the trial court found that the officers acted in objective good faith, reasonably relying on a warrant issued by a neutral and detached magistrate. Although the trial court acknowledged that the officers acted in good faith, it refused to recognize a good faith exception to Utah's exclusionary rule. That determination was incorrect. Like its federal counterpart, the state exclusionary rule is a judicial remedy designed to deter future constitutional violations by law enforcement officials. Accordingly, the objectives of the exclusionary rule are not served when officers rely in good faith on a search warrant issued by a neutral magistrate. Because the officers here reasonably relied on the warrant in conducting the search, the evidence should not have been suppressed.

ARGUMENT

I.

The Magistrate Had a Substantial Basis for Finding Probable Cause.

The trial court ruled that the search warrant affidavit “failed to show [that] there was probable cause” because police did not independently corroborate the CI’s claims that “Mike” was selling drugs from his Provo residence. R230-31. The court ruled that the drug buy monitored by police was insufficient to corroborate the CI’s claim because officers did not search the CI’s car before and after the drug buy. R230. The court reasoned that absent a before-and-after car search, the CI “could not be excluded as the source of the controlled substance, or as the person who retained the buy money.” R230. The court also observed that “[n]othing in the Affidavit suggests that the Confidential Informant had provided credible information in the past.” R231.

This Court should reverse the ruling of the trial court. Rather than affording the magistrate’s probable cause determination “great deference,” the trial court reviewed the probable cause affidavit de novo. This was error. And that error resulted in the trial court’s erroneous conclusion that the search warrant was not supported by probable cause.

A. The trial court erred in reviewing the search warrant affidavit de novo, rather than applying deferential review to the magistrate's probable cause determination.

The Fourth Amendment reflects a “strong preference for searches conducted pursuant to a warrant.” *Illinois v. Gates*, 462 U.S. 213, 236 (1983). When a warrant is issued, the decision that a search is justified has been made “by a neutral and detached magistrate” rather than a police officer “engaged in the often competitive [and hurried] enterprise of ferreting out crime.” *Johnson v. United States*, 333 U.S. 10, 14 (1948). The issuance of a warrant “assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.” *Groh v. Ramirez*, 540 U.S. 551, 561 (2004) (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977)).

“A grudging or negative attitude by reviewing courts towards warrants’ is inconsistent with the Fourth Amendment’s strong preference for searches conducted pursuant to a warrant.” *Gates*, 462 U.S. at 236 (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)). While warrantless searches for evidence are “presumptively unreasonable,” *Payton v. New York*, 445 U.S. 573, 586 (1980), searches conducted under the authority of a warrant are presumed to comport with Fourth Amendment requirements. See *United States v. Ross*, 456 U.S. 798, 823 n.32 (1982) (holding that “a war-

warrant issued by a magistrate normally suffices to establish” the search’s reasonableness). For this reason, reviewing courts—trial and appellate courts alike—“should pay ‘great deference’ to the magistrate’s [probable cause] decision.” *State v. Babbell*, 770 P.2d 987, 991 (Utah 1989) (quoting *Gates*, 462 U.S. at 236). Magistrates and reviewing courts thus have distinctive roles when considering probable cause for a warrant.

“The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Gates*, 462 U.S. at 238. In contrast, the reviewing court’s task “is not to conduct a de novo determination of probable cause.” *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984) (*per curiam*); accord *Babbell*, 770 P.2d at 991. Its task is only to determine whether the magistrate had a “substantial basis” for finding probable cause. *Gates*, 462 U.S. at 238-39; accord *Upton*, 466 U.S. at 728; *Babbell*, 770 P.2d at 991. And under this standard, the reviewing court may not invalidate the warrant simply because it might have reached a different result. Indeed, “the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” *Ventresca*, 380 U.S. at 109; accord *Gates*, 462 U.S. at 236-37 n.10.

The trial court in this case did not afford the magistrate's probable cause determination the deference it was due. The court failed to even acknowledge the deferential standard by which it was required to review the warrant. *See* R230-31. The court instead conducted "after-the-fact, de novo scrutiny" of the probable cause showing, as if it were the magistrate looking at the affidavit for the first time. *See Upton*, 466 U.S. at 733. And in doing so, the court improperly focused on what police did not do to bolster a probable cause showing, rather than on the facts that supported the magistrate's decision. That error resulted in the trial court's erroneous conclusion that the search warrant was not supported by probable cause.

B. The magistrate had a substantial basis for finding probable cause in support of the search warrant.

Like the magistrate, the reviewing court should "consider the search warrant affidavit in 'its entirety and in a common-sense fashion.'" *State v. Thurman*, 846 P.2d 1256, 1260 (Utah 1993) (*quoting Babbell*, 770 P.2d at 991) (other internal quotes omitted). As noted, a warrant will be invalidated on review "only if the magistrate, given the totality of the circumstances, lacked a 'substantial basis' for determining that probable cause existed." *Id.* at 1259-60 (citations omitted); *accord Gates*, 462 U.S. at 238-39. The information set forth in the affidavit, "viewed as a whole," provided a substantial basis for the magistrate's probable cause finding.

The search warrant affidavit indicated that the CI told Officer Pratt that he had made drug “purchases” from a man named Mike at Mike’s home. R62:¶4. He explained that Mike travels to California to obtain the marijuana and sells it in bulk in “vacuum sealed” bags or containers here in Utah. R62:¶¶4,6. The CI told Officer Pratt that Mike keeps the marijuana in his house, but he did not know where in the house. R62:¶6. If “adequately corroborated,” the CI’s tip no doubt supported a probable cause finding that drugs would be found in the home. *See Upton*, 466 U.S. at 731. The question is whether the magistrate had a “substantial basis” for crediting the CI’s tip. He did.

In the first place, there was reason to believe the CI. The CI was not an anonymous informer who had nothing to lose. He was a known, criminal defendant. Thus, like a citizen informant, he was “exposed to possible criminal and civil prosecution if the report [was] false.” *State v. Royball*, 2010 UT 34, ¶16, 232 P.3d 1016. Moreover, he provided the information in exchange for leniency in his criminal case. He thus risked losing the benefit of leniency in his criminal case if his report proved to be false. *See State v. Estorga*, 803 P.2d 813, 817 (Wash. App. 1991) (“Potential risk of disfavor is heightened and consequently a higher motive to be truthful exists where the information is given in exchange for a promise of leniency.”).

The reliability of the CI's report was further enhanced because (1) his report was based on first-hand knowledge—the CI had been in Mike's home; and (2) his report included a fair amount of detail regarding Mike's drug operations—Mike traveled to California to obtain the marijuana, vacuum sealed the marijuana he peddled, and sold the marijuana in bulk. R62:¶¶4,6. Thus, even if “some doubt as to [the CI's] motives” remained, “his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case.” *Gates*, 462 U.S. at 234.

Further enhancing the CI's credibility was his admission that he himself “has made drug purchases” from Mike at his home. R62:¶4. This Court has held that such statements against penal interest also bolster a confidential informant's reliability. *State v. Saddler*, 2004 UT 105, ¶18, 104 P.3d 1265. Indeed—and as this Court noted in *Saddler*, *id.*—the United States Supreme Court long ago held that “[a]dmissions of crime . . . carry their own indicia of credibility—*sufficient at least to support a finding of probable cause to search.*” *United States v. Harris*, 403 U.S. 573, 583 (1971) (emphasis added). The offer of leniency in a pending criminal case in exchange for the CI's cooperation does not alter that analysis. *Harris* held that the fact “[t]hat the in-

formant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct." *Id.*

But the police did not rely on the tip alone. Although they could not ascertain Mike's full identity through record checks and agency inquiries, R63:¶10, officers oversaw a controlled buy at the suspect residence that yielded the purchase of "a distributable amount of marijuana." R62:¶¶6-9. After searching the CI's person, police listened as the CI telephoned Mike on his cell phone and agreed to buy a "predetermined amount of marijuana . . . for a predetermined amount of money." R62:¶7. Police then gave the CI the buy money and followed the CI as he drove his car to Mike's home—keeping him "in visual sight at all times." R62:¶7. The CI went straight there and officers watched him go inside. R62:¶7. Officers then saw the CI "leaving the residence" and they followed him as he drove to a rendezvous point—again keeping him "in visual sight the whole time." R62:¶8. Police searched the CI again and found marijuana in the "distributable amount" that had been "agreed upon" during the telephone conversation. R62:¶8.

The controlled buy fully corroborated the CI's report that marijuana in bulk was being sold out of the home. *See United States v. Avery*, 295 F.3d 1158, 1168-69 (10th Cir. 2002) (holding that "affidavit's description of the controlled buy . . . strongly corroborated the informant's claim that drugs

were being sold from the residence”); *United States v. Warren*, 42 F.3d 647, 652 (D.C. 1994) (holding that “police establish probable cause for a search where they corroborate a reliable informant’s tip about drug activity at a residence by conducting a single controlled buy of illegal narcotics”).

The trial court, however, ruled that the controlled buy did not corroborate the tip. R230. The court ruled that because police allowed the CI to drive his own car and did not search it before and after the buy, the CI “could not be excluded as the source” of the drugs found on him after the buy, “or as the person who retained the buy money.” R230. The court noted that “[a] search of the vehicle before the buy could have demonstrated that the car had no drugs in it,” and that a search “after the buy could have demonstrated that the car had no cash in it.” R230. The court then opined that “[t]hese controls might have been imposed with little effort.” R230. But “an ‘affidavit is judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added.’” *United States v. Kinison*, 710 F.3d 678, 682 (6th Cir. 2013) (citation omitted). By focusing on what police could have done to bolster reliability, the trial court overlooked what police did do to enhance reliability.

Although police did not search the CI’s car before and after the buy, the affidavit disclosed that detectives kept the CI under observation “at all

times” as he drove to Defendants’ house, R62:¶7; that detectives watched the CI walk in and out of the house, R62:¶¶7-8; and that detectives kept the CI under observation “the whole time” as he drove away from the house to the rendezvous point, R62:¶8. And the affidavit did not indicate that the detectives observed anything suggesting that the CI either retrieved the marijuana from his car or stashed the buy money in his car. *See* R60-64. A before-and-after car search may very well have boosted the reliability even further. But the steps taken by police were enough to “‘reduce[] the chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting’ ” the CI’s report. *See Gates*, 462 U.S. at 244-45 (citation omitted).

In sum, it is error for a reviewing court to invalidate a warrant “by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner” where—as here—the “magistrate has found probable cause” and where—as here—the affidavit discloses “the underlying circumstances” upon which probable cause is based and gives “the reason for crediting the source of the information.” *Ventresca*, 380 U.S. at 109. Yet, that is precisely what the trial court did. Even if the probable cause showing were marginal, the trial court was required to resolve the probable cause challenge “‘by the preference to be accorded to warrants.’ ” *Gates*, 462 U.S. at 237 (quoting *Ventresca*, 380 U.S. at 109). This Court should reverse.

II.

The Utah Constitution does not require or otherwise incorporate an exclusionary remedy for violations of Article I, § 14.

Even if this Court were to uphold the trial court's probable cause ruling, suppression of the evidence is still not warranted. Relying on the "good faith exception" articulated in *United States v. Leon*, 468 U.S. 879 (1984) ("*Leon* exception"), the trial court agreed that the federal exclusionary rule does not require suppression because the officers' reliance on the warrant was "objectively reasonable." R231-32. The court nevertheless suppressed the evidence based on its conclusion that exclusion is required under the Utah Constitution's search and seizure provision—Article I, § 14. R180-94. The State contended that the Utah Constitution, properly interpreted, does not incorporate an exclusionary rule and, even if it did, should include an exception analogous to the *Leon* exception. R102-10,129-45. The trial court rejected that argument. R191-94.

Citing *State v. Thompson*, 810 P.2d 415 (Utah 1991), the trial court ruled that it did "not have authority to depart" from this Court's precedent that exclusion "is the proper remedy" for a violation of Article I, § 14. R185. The court added that "[e]ven if it could disregard precedent and strike out on its own," it would "leave the exclusionary rule firmly ensconced in state search and seizure jurisprudence." R185-86. The court concluded that two plurality

opinions—*State v. Larocco*, 794 P.2d 460 (Utah 1990), and *Sims v. Collection Div. of Utah State Tax Comm’n*, 841 P.2d 6 (Utah 1992))—suggest that the exclusionary rule “holds a more prominent place in state constitutional law” because it is not limited to “deter[ing] police misconduct.” R187. The court determined that the state exclusionary rule is also necessary to (1) provide a remedy for the defendant; (2) “protect the integrity of the judiciary”; and (3) “create incentives which improve the warrant process as a whole.” R187-88.

This Court should overrule *Thompson* and hold that the Utah Constitution does not incorporate the remedy of exclusion for a violation of Article I, § 14.

A. *Thompson* and *Larocco* are not the most weighty of opinions.

In *Thompson*, a majority of this Court held for the first time that “‘exclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14.’” *Thompson*, 810 P.2d at 419 (quoting *Larocco*, 794 P.2d at 472). The State recognizes that it bears “a substantial burden” in asking the Court to overturn this precedent. *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994). That said, this Court “‘is not inexorably bound by its own precedents.’” *Id.* at 399 (citation omitted). The Court will not hesitate to overturn prior precedent when it is “‘clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions

and that more good than harm will come by departing from precedent.’ ” *Id.* (citation omitted). Nor will the Court hesitate to reconsider prior precedent that lacks meaningful analysis. *See id.* (noting decisions that “failed to explain” departure from “long-established” precedent or that provided “little analysis and without reference to authority”). Such is the case in *Thompson*, and in the *Larocco* plurality opinion upon which it relied.

1. *Thompson* summarily adopted the state exclusionary rule based on the *Larocco* plurality opinion as if it were controlling precedent.

Thompson “is not the most weighty of precedents.” *See Menzies*, 889 P.2d at 399. In adopting a state exclusionary rule, *Thompson* did not the text or history of Article I, § 14, and failed to acknowledge, much less explain why it was departing from, this Court’s long-standing precedent rejecting a state exclusionary rule for violations of Article I, § 14.

In *State v. Aime*, 62 Utah 476, 220 P. 704 (1923) — an opinion issued just twenty-seven years after the Utah Constitution’s adoption in 1896 — this Court was asked to address whether exclusion was a necessary or proper remedy for a violation of Article I, § 14. The issue no doubt arose because nine years earlier, the United States Supreme Court had applied the exclusionary remedy to evidence obtained by federal officials in violation of the Fourth Amendment. *See Weeks v. United States*, 232 U.S. 383 (1914). *Aime* re-

fused to follow suit, holding that excluding evidence for an Article I, § 14 violation by police is neither constitutionally required, nor appropriate as a remedy in a criminal trial. 220 P. at 706-08. Almost forty years later, the Court reaffirmed *Aime* in *State v. Fair*, holding “that evidence, even though illegally obtained, is admissible.” 10 Utah 365, 366, 353 P.2d 615, 615 (1960).

Thompson failed to cite *Aime* and *Fair* altogether. And it was bereft of analysis. Instead, it quoted the *Larocco* plurality opinion as if it were binding precedent, completely overlooking that (1) the *Larocco* opinion garnered the support of only two justices, (2) the *Aime* holding had been undisturbed for almost 70 years, and (3) excluding evidence had never been recognized as a remedy for a violation of the nearly 100-year-old state constitution. *Thompson’s* “lack of acknowledgement of authority and its weak analytical underpinnings” beg for reconsideration.

2. The *Larocco* opinion failed to address *Aime’s* rationale for rejecting a state exclusionary rule and incorrectly concluded that the Court had tacitly adopted the rule.

Thompson no doubt relied on the rationale of the *Larocco* plurality opinion, but *Larocco’s* reasoning for overturning *Aime* does not fare much better than *Thompson’s*.

Almost 70 years after *Aime’s* rejection of a state exclusionary rule, the *Larocco* plurality opined that “exclusion of illegally obtained evidence is a

necessary consequence of police violations of article I, section 14.” 794 P.2d at 472. The *Larocco* plurality acknowledged this Court’s rejection of a state exclusionary rule in both *Aime* and *Fair*. *Id.* at 471. But the plurality did not discuss, let alone examine, *Aime*’s underlying rationale for rejecting a state exclusionary rule. *See id.* Nor did it discuss Article I, § 14’s text or history. Instead, the *Larocco* plurality based its opinion on two conclusions: (1) that the Utah Supreme Court has, since 1961, “‘tacitly followed the federal lead’ in adopting the exclusionary rule,” *Larocco*, 794 P.2d at 471-72 (citation omitted); and (2) that eighteen other states had “adopted an independent state constitutional exclusionary rule, *id.* at 472. The reasons identified by the *Larocco* plurality do not withstand scrutiny.

a. This Court did not tacitly adopt a state exclusionary rule in cases decided since 1961.

The *Larocco* plurality concluded that since 1961 – when the federal exclusionary rule was made applicable to state criminal trials in *Mapp v. Ohio*, 367 U.S. 643 (1961) – this Court had “‘tacitly followed the federal lead’ in adopting the exclusionary rule” for state constitutional violations. *Larocco*, 794 P.2d at 471 (quoting *State v. Hygh*, 711 P.2d 264, 273 (Utah 1985) (Zimmerman, J., concurring)). In support, the plurality cited twelve decisions from 1963 to 1987. *See id.* at 471-72. But none of those decisions can be read as tacitly approving a state exclusionary rule.

Six of the twelve cases cited by the *Larocco* plurality addressed Fourth Amendment challenges only. See *State v. Montayne*, 18 Utah 2d 38, 414 P.2d 958, 960 (1966) (affirming trial court's decision denying motion to suppress because defendant did not have "Fourth Amendment" standing to challenge search of stolen car) 432 P.2d at 66-69.); *State v. Kent*, 20 Utah 2d 1, 432 P.2d 64, 66-69 (1967) (holding that police entry into motel attic to peer into defendant's motel room violated "Fourth Amendment"); *State v. Shields*, 28 Utah 2d 405, 407-08, 503 P.2d 848,849-50 (1972) (holding that suppression not required because search of car reasonable under Fourth Amendment); *State v. Earl*, 716 P.2d 803, 804-05 (Utah 1986) (holding that inventory search of bags in trunk of car proper under Fourth Amendment); *State v. Dorsey*, 731 P.2d 1085, 1086-90 (Utah 1986) (affirming trial court's refusal to suppress evidence because search of truck was valid under Fourth Amendment); and *State v. Ashe*, 745 P.2d 1255, 1262 (Utah 1987) (recognizing that occurrence of "a fourth amendment constitutional violation . . . requir[es] suppression of evidence").

The remaining six decisions cited by the *Larocco* plurality addressed challenges that treated Fourth Amendment and Article I, § 14 rights as coextensive. See *State v. Loudon*, 15 Utah 2d 64,66-67, 387 P.2d 240,241-43 (1963) (not differentiating between Fourth Amendment and Article I, § 14 rights of

motel guest), *rev'd on Fourth Amendment grounds*, 379 U.S. 1 (1964); *State v. Criscola*, 21 Utah 2d 272, 444 P.2d 517, 518-20 & n.1 (1968) (not differentiating between Fourth Amendment and Article I, § 14 rights in connection with the inventory of a lawfully impounded car); *State v. Kaae*, 30 Utah 2d 73, 75-76, 513 P.2d 435, 436-37 (1973) (not differentiating Fourth Amendment and Article I, § 14 rights in connection with a consent search); *State v. Farnsworth*, 30 Utah 2d 435, 438-39 & n.3, 513 P.2d 244, 246-47 & n.3 (1973) (not differentiating between Fourth Amendment and Article I, § 14 rights in connection with automobile search); *State v. Lopes*, 552 P.2d 120, 121-22 (Utah 1976) (not differentiating between Fourth Amendment and Article I, § 14 search rights of arrestee); *State v. Hygh*, 711 P.2d 264, 267-70 (Utah 1985) (not differentiating between Fourth Amendment and Article I, § 14 rights in connection with inventory of a lawfully impounded car).

Because these cases addressed a Fourth Amendment challenge only, or treated Fourth Amendment and Article I, § 14 rights as coextensive, *Mapp* required the Court to exclude the evidence if it was unlawfully obtained. It thus comes as no surprise that in the cases cited by the *Larocco* plurality, this Court operated under “the principle that if evidence used against the defendant had been found to have been acquired in violation of constitutional guarantees, its exclusion would be inevitably required.” *Larocco*, 794 P.2d at

472. But contrary to the *Larocco* plurality's suggestion, exclusion's inevitability in the event of a violation did not arise from a state exclusionary rule, but rather from *Mapp*'s extension of the federal exclusionary rule to state criminal trials involving Fourth Amendment violations. See *State v. Walker*, 2011 UT 53, ¶41, 267 P.3d 210 (Lee, J., concurring) (observing that this Court's "decisions following *Mapp* necessarily acquiesced in the federal exclusionary rule"). The Utah cases cited, therefore, did not support the *Larocco* plurality's radical departure from *Aime*.

b. The cases from other jurisdictions cited by *Larocco* shed no light on the interpretation of Utah's Constitution.

The *Larocco* plurality also endorsed a state exclusionary rule because "many states had held long before *Mapp v. Ohio* that exclusion was required as a matter of state constitutional law when police conduct violated constitutional guarantees against unreasonable search and seizure." *Id.* at 472. But the plurality does not discuss the underlying rationale of those cases or why they shed light on the meaning of the Utah Constitution at the time of its framing. A review of those cases reveals that they are not as compelling as the *Larocco* plurality asserts them to be.

The Oregon case cited by *Larocco* did not adopt a state exclusionary rule at all, but expressly refused to address the question because the search

at issue was lawful. *See State v. McDaniel*, 237 P. 373, 376-77 (Or. 1925) (refusing to address “whether evidence illegally obtained is admissible”). The Vermont case upon which *Larocco* relied held that the State’s search and seizure provision, combined with the State’s trial right guarantee against being “compelled to give evidence against” oneself, required exclusion of unlawfully-obtained evidence. *State v. Slamon*, 50 A. 1097, 1099 (Vt. 1901). But that case was overruled in less than five years of its issuance—a fact the *Larocco* plurality failed to appreciate. *See State v. Krinski*, 62 A. 37, 37-38 (Vt. 1905) (limiting *Slamon* to the seizure of papers); *State v. Suitor*, 63 A. 182 (Vt. 1906) (holding that legality of search not relevant to admissibility of evidence); *State v. Stacy*, 160 A. 257, 266 (Vt. 1932) (recognizing that *Slamon* was effectively overruled by *Suitor* and other cases and holding that state constitution does “not prevent the admission in evidence of things, the possession of which tends to show the guilt of a respondent, even though obtained from him by means of a search without a warrant”).

The other two cases found a state exclusionary rule based on a combination of their search and seizure provision and their guarantee against being compelled to testify or give evidence against oneself. *See State v. Arregui*, 254 P. 788 (Idaho 1927) (resting on provisions governing search and seizure and prohibiting compelling a person to be witness against himself);

Gore v. State, 218 P. 545, 546-47 (Okla. Crim. App. 1923) (resting in part on state constitutional provision providing that “[n]o person shall be compelled to give evidence which will tend to incriminate him”) (emphasis added). But again, the *Larocco* plurality did not explain why the rationale of those cases should apply to the Utah Constitution. And indeed, as discussed below, they do not reflect the understanding of our courts at or near the time of the state constitution’s framing.

In further support of its opinion, the *Larocco* plurality noted that “eighteen states have adopted an independent state exclusionary rule.” 794 P.2d at 472 (identifying Alaska, Colorado, Connecticut, Hawaii, Kentucky, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Washington, and Wisconsin). But *Larocco* did not cite the cases, examine their reasoning, or explain why they are persuasive in interpreting the Utah Constitution. The fact that other states had adopted a state exclusionary rule is not reason for this Court to adopt a state exclusionary rule. That must be answered by examination of the Utah Constitution.

* * *

In sum, *Larocco* rationale for adopting a state exclusionary rule is no more compelling than *Thompson’s* rationale. The “weak analytical under-

pinnings” of the *Larocco* and *Thompson* precedent call for their reconsideration. See *Menzies*, 889 P.2d at 400.

B. An examination of the meaning of Article I, § 14 reveals that Utah’s framers did not anticipate an exclusionary remedy.

“The scope of Utah’s constitutional protections ‘may be broader or narrower than’ those offered by the [federal constitution], depending on our state constitution’s language, history, and interpretation.’ ” *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶9, 140 P.3d 1235 (quoting *West v. Thomson Newspapers*, 872 P.2d 999, 1004 n.4 ((Utah 1994))). When interpreting the Utah Constitution, this Court begins “with a review of the constitutional text” itself, i.e., “the text’s plain meaning.” *Id.* at ¶10. That said, the Court has also recognized “that constitutional ‘language . . . is to be read not as barren words found in a dictionary but as symbols of historic experience illuminated by the presuppositions of those who employed them.’ ” *Id.* (quoting *Dennis v. United States*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring)).

The Court thus informs its “textual interpretation with historical evidence of the framers’ intent.” *Id.* Sources of considerable significance are Utah laws adopted, and Utah court decisions issued, at or near the time of framing. Cf. *Gall v. United States*, 552 U.S. 38, 65 n.2 (2007) (Souter, J., concurring) (noting that Court has “often looked to laws passed by the First Con-

gress to aide interpretation of the Bill of Rights, which that Congress proposed”).

The Court has held that it may also “rely on whatever [other] assistance legitimate sources may provide in the interpretive process.” *State v. Tiedemann*, 2007 UT 49, ¶37, 162 P.3d 1106. The Court has thus looked to the understanding of courts in other jurisdictions—both federal and state—as reflected in “decisions made contemporaneously to the framing of Utah’s constitution.” *Id.* at ¶11. And the Court has said that it may look to “‘policy arguments in the form of economic and sociological materials to assist . . . in arriving at a proper interpretation of the provision in question.’” *Tiedemann*, 2007 UT 49, ¶37 (quoting *Soc’y of Separationists v. Whitehead*, 870 P.2d 916, 921 n.6 (Utah 1993)). But the decisions of other courts and policy arguments are only relevant insofar as they shed light on the intent and purpose of Utah’s framers when they adopted the constitutional provision. See *American Bush*, 2006 UT 40, ¶12, n.3 (“Policy arguments are relevant only to the extent they bear upon the discernment of that intent.”); *Soc’y of Separationists*, 870 P.2d at 921 n.6 (“Each of these types of evidence can help in divining the intent and purpose of the framers, a critical aspect of any constitutional interpretation.”) (emphasis added).

In sum, when interpreting the Utah Constitution, the Court must never lose sight of the ultimate goal—“to discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect.” *American Bush*, 2006 UT 40, ¶12. Applying this interpretive framework here reveals that exclusion of evidence is not a remedy contemplated by the Utah Constitution for a violation of Article I, § 14.

1. The text of Article I, § 14 does not impose or otherwise contemplate an exclusionary remedy.

The text of Article I, § 14, like its Fourth Amendment counterpart, imposes a general prohibition against unreasonable searches and seizures and imposes specific requirements designed to eliminate the use of general warrants:

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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah Const. art. I, § 14. Nowhere in the text of Article I, § 14 does it require the exclusion of evidence in the case of a violation. This point was made in *Aime*: “[T]here is nothing in the constitutional provision inhibiting unreasonable searches and seizures which lays down any rule of evidence with respect to the evidential use of property seized under search without a war-

rant, nor do we think anything in said constitutional provision can be properly construed as laying down such rule.’ ” *Aime*, 220 P. at 707 (quoting *Welchek v. State*, 247 S.W. 524, 528 (Tex. Crim. App. 1922)).³

2. The historical evidence of the framers’ intent also supports *Aime*’s conclusion that exclusion is not the proper remedy for an Article I, § 14 violation.

As noted, some courts in sister states had, near the time of *Aime*, interpreted their constitutions as requiring exclusion based on the state guarantee against being compelled to testify or give evidence against oneself. And indeed, Utah’s guarantee is similar to that found in the Oklahoma Constitution. In addition to its search and seizure provision, the Utah Constitution provides that “[t]he accused shall not be compelled to give evidence against himself.” Utah Const. art. I, § 12. But how Oklahoma understood its counterpart in 1923 does not mean that Utah’s framers had a similar understanding. Utah case law near the time of the framing suggests that they did not.

Indeed, the best evidence as to how the framers understood that provision comes from this Court’s 1912 decision in *State v. Sirmay*, 40 Utah 525,

³ *Aime* detailed the reasoning of four courts from sister states that had rejected a state exclusionary rule and quoted them extensively. 220 P. at 706-07. It then adopted their rationale: “[W]e are led by the force of what we deem the better reason to conclude with the vast majority of state courts that the admissibility of evidence is not affected by the illegality of means through which it has been obtained.” *Id.* at 708.

122 P. 748 (1912)—a mere 16 years after adoption of the Utah Constitution. Referring to the accused’s right against “be[ing] compelled to give evidence against himself,” *Sirmay* observed that “although evidence, including documents and other articles, may have been obtained in a criminal case by unfair or illegal methods, *it is nevertheless, as a general rule, admissible if relevant, provided that the accused is not thereby compelled to do any act which incriminates him . . .*” 122 P. at 753 (citing 12 Cyc. 402) (emphasis added).

Although *Aime* did not cite *Sirmay*, it reaffirmed its holding and further explained the evidentiary principles underlying the principle. *Aime* held that the admissibility of evidence “depend[s] upon its inherent probative value rather than upon outside circumstances,” such as the manner by which it was obtained. 220 P. at 708. Under the law at the time, how evidence was obtained was “‘regarded as a collateral inquiry.’” *Id.* at 707 (quoting *Commonwealth v. Wilkins*, 138 N.E. 11, 13 (Mass. 1923)). The relevance of evidence to the case was the “‘only matter considered by the court.’” *Id.* (quoting *Wilkins*, 138 N.E. at 13). Thus, in determining admissibility, “the essential test is its credibility and its value in discovering the truth.” *Id.* That was “the paramount consideration” at the time. *Id.* In short, courts were not allowed to “‘impose an indirect penalty upon competent evidence because of illegality in obtaining it.’” *Id.* (quoting *Wilkins*, 138 N.E.

at 13); accord *Adams v. New York*, 192 U.S. 585, 596 (1904) (reiterating the general rule that “[e]vidence which is pertinent to the issue is admissible, although it may have been procured in an irregular, or even in an illegal, manner”).

Aime explained that “[t]he law cannot be justly administered without a knowledge of the facts in dispute. The purpose of evidence is to establish the truth in legal tribunals, in order that justice may be done.” *Id.* To this point, the Court held that “‘the object of evidence is to elicit truth and it can never be said that the probative value of any evidentiary fact is affected in the smallest particular by the manner or the means whereby the fact itself was obtained.’” *Id.* at 706 (quoting *Banks v. State*, 93 So. 293, 299 (Ala. App. 1921)).

To say that exclusion was not contemplated by the framers in drafting Article I, § 14 is not to say that the right guaranteed by Article I, § 14 is illusory or that a violation thereof is without remedy. *Aime* recognized that “[t]he constitutional immunity against unreasonable searches and seizures is not to be diminished or disparaged.” 220 P. at 707. Under the state constitution, the right against unlawful searches and seizures “may be defended to the last limit. The man who violates it does so at his peril, and is subject to all consequences and penalties provided by law.” *Id.* But that does not

mean that “exclusion of the evidence criminating the defendant is . . . within the scope of the remedy, or the measure of redress.’” *Id.* (quoting *Shields v. State*, 16 So. 85 (Ala. 1894)).

At or near the time of the framing, a person subjected to an unlawful search or seizure was “‘entitled to his day in some court of competent jurisdiction and to a hearing of his claim for the restoration of [his] property, and for the punishment of the trespasser or the announcement that the citizen may defend against such intrusion.’” *Id.* (quoting *Welcheck*, 247 S.W. at 528); see also *Revised Statutes of Utah* § 5101 (1898) (making it a misdemeanor to “maliciously and without probable cause” secure a search warrant); *Revised Statutes of Utah* § 5102 (1898) (making it a misdemeanor to “willfully exceed . . . authority” in executing a search warrant); *Revised Statutes of Utah* § 4140 (1898) (making it a misdemeanor to arrest or detain without lawful authority). Thus, “‘the redress of grievances for invasion of constitutional rights’” did not lie in the exclusion of evidence at the defendant’s criminal trial, but rested with “‘the usual and adequate provisions of the civil and criminal law.’” *Id.* (quoting *Wilkins*, 138 N.E. at 14).⁴ Thus, given these other reme-

⁴ Indeed, at the time of the framing, “no appellate court in any state had excluded unlawfully obtained evidence under its constitution.” *Walker*, 2011 UT 53, ¶49 (Lee, J., concurring) (citing Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 Utah L. Rev. 751, 803).

dies, it cannot be fairly said, as the trial court concluded, R191-92, that admission of such evidence denies the defendant of a remedy or impairs the integrity of the courts.

Utah's framers were fully capable of adding constitutional remedies where they believed existing civil or criminal measures were inadequate. For example, among the abuses Utah settlers complained of were the raids of homes to subpoena a wife to testify against her spouse. Tracy E. Panek, *Search and Seizure in Utah: Recounting the Antipolygamy Raids*, 62 Utah Hist. Q. 316, 320-33 (1994). In response, the framers no doubt added the spousal privilege provision, not found in the federal constitution, which provided that "a wife shall not be compelled to testify against her husband, nor a husband against his wife." Utah Const. art. I, § 12. The framers chose not to provide additional remedies for violations of Article I, § 14.

* * *

In sum, nothing in the text of the Utah Constitution nor in the historical evidence relevant to the framers' understanding of the constitutional text supports an exclusionary remedy for violations of Article I, § 14. This Court should thus overrule *Thompson* and reaffirm *Aime's* holding that "the admissibility of evidence is not affected by the illegality of means through which it has been obtained." *Aime*, 220 P. at 708.

III.

Even if the Utah Constitution incorporates an exclusionary remedy, this Court should recognize a good faith exception analogous to the federal exception.

Even assuming the affidavit was insufficient to justify the search, and that exclusion is an appropriate constitutional remedy, the trial court should not have suppressed the evidence because the officers executed the warrant in good faith. Although the trial court concluded that the officers' reliance on the warrant was "objectively reasonable," R231-32, it nevertheless suppressed the evidence because it concluded that a good faith exception analogous to the *Leon* exception would be "inconsistent with the plain language of article I, section 14, and the remedy adopted to enforce its guarantees." R189.

The trial court reasoned that a good faith exception would "replace[] the probable cause standard in article I, section 14 with a lower threshold for admissibility." R190. It ruled that a State good faith exception might make sense "[i]f deterring police misconduct was the only purpose of the exclusionary rule." R191. But the court ruled that such an exception is inappropriate where exclusion is "constitutionally required . . . to remedy the individual right of the accused in the pending case." R191-92. The court also concluded that adoption of a good faith exception would "undermine[] the integrity of both the executive and judicial branches" by making them

“lawbreakers.” R192. The court added that with a good faith exception, “police have less incentive to ensure that the request for a search warrant meets the probable cause threshold, and reviewing magistrates have less incentive to make probable cause determinations with care.” R192. This Court should reverse.

A. The Good Faith Exception to the Fourth Amendment’s Exclusionary Rule.

In *Leon*, the United States Supreme Court held that absent unusual circumstances, evidence seized from a subsequently invalidated search warrant should not be suppressed when the officers conducting the search reasonably relied on the warrant. 468 U.S. at 921-22 & n.22. The Supreme Court established this good faith exception because the remedial objectives of the exclusionary rule—to deter police misconduct—are not served where police reasonably rely on a warrant issued by a neutral and detached magistrate. *Id.* at 918-19. Rather than always relying on an exception to the warrant requirement, officers are encouraged to seek the decision of a neutral magistrate on the matter. Given the Fourth Amendment’s strong preference for warrants, “searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search.” *Id.* at 922 (internal quotes omitted).

Only when a defendant can establish that the officer's reliance on the warrant was not objectively reasonable will the good faith exception not apply. *Leon* identified four circumstances where the good faith exception does not apply because suppression remains a deterrent. First, it does not apply "if the magistrate or judge issuing a warrant was misled by information in the affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth." *Id.* at 923. Second, it does not apply if "the issuing magistrate wholly abandoned his judicial role," becoming, in effect, a member of the search party team. *Id.* Third, it does not apply if the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* (internal quotes omitted). And fourth, the good faith exception does not apply if the warrant was "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." *Id.*

B. The Good Faith Exception Should Also Apply to a State Exclusionary Rule.

The reasons justifying application of the good faith exception under the federal constitution apply with equal force under the Utah Constitution.

1. The Nature of the Exclusionary Rule Under the Utah Constitution.

Before this Court can determine whether a good faith exception should exist, it must define the nature and objectives of the exclusionary rule under Article I, § 14.

The *Larocco* plurality did not explore the nature of the rule, leaving unanswered the following issues: (1) whether the exclusionary rule is a constitutional requirement or a judicial remedy designed to deter constitutional violations; and (2) whether the rule targets the conduct of law enforcement officers only, or also targets the conduct of the judiciary. *See Larocco*, 794 P.2d at 473. Reason dictates, and this Court's decisions suggest, that like its federal counterpart, the exclusionary rule is a judicial remedy designed to deter future constitutional violations by law enforcement.

Like the federal exclusionary rule, Utah's exclusionary rule is, at most, a judicial remedy, not a constitutional requirement. As noted, Article I, § 14 is nearly identical to the Fourth Amendment. *Compare* U.S. Const. amend. IV *with* Utah Const. art. I, §14; *see also State v. Thomas*, 961 P.2d 299, 303 n.4 (Utah 1998). Like the Fourth Amendment, Utah's constitutional counterpart "contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search and

seizure ‘works no new [constitutional] wrong.’” *Leon*, 468 U.S. at 906, 104 S.Ct. at 3411 (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)); accord *Aime*, 220 P. at 706 (“‘no authority . . . has suggested that the subsequent use of [unlawfully taken] articles . . . as evidence is in itself any part of the unlawful invasion of such constitutional guaranty’”) (quoting *People v. Mayen*, 205 P. 435, 440 (Cal. 1922)). Indeed, the wrong condemned by both provisions “is fully accomplished by the unlawful search or seizure itself and the exclusionary rule is neither intended *nor able* to cure the invasion of the defendant’s rights which he has already suffered.” *Leon*, 468 U.S. at 906. (emphasis added) (internal quotes and citations omitted). Thus, the exclusionary rule under the Utah Constitution can only be “‘a judicially created remedy designed to safeguard [constitutional] rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.’” *Id.* at 906 (quoting *Calandra*, 414 U.S. at 348).

Like the federal exclusionary rule, the state exclusionary rule “does not proscribe the introduction of illegally seized evidence in all proceedings or against all persons, but applies only in contexts where its remedial objectives are thought most efficaciously served.” *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) (internal quotes omitted). In *Sims*, this Court discussed when application of the rule is appropriate in civil pro-

ceedings. A plurality opined that “illegally obtained evidence should be excluded from a civil proceeding if the proceeding is in effect criminal or if the exclusion is necessary to deter future unconstitutional searches.” *Sims*, 841 P.2d at 13. In other words, the rule is not applied in traditional civil proceedings. If the exclusionary rule were a constitutional requirement, exclusion would be required no matter what the proceeding—whether administrative, civil, or criminal—and whether or not it deterred future unconstitutional searches. The *Sims* plurality opinion also implicitly recognizes that the rule is imposed in criminal proceedings because of its deterrent effect. The *Sims* plurality applied the rule to proceedings under the Illegal Drug Stamp Tax Act because like criminal laws, the Act “seeks to punish and deter those in possession of illegal drugs.” *Id.* Thus, exclusion would work as a deterrent to future unconstitutional searches.

This Court has also observed that the exclusionary rule “properly insures that article I, section 14’s prohibition against unreasonable searches and seizures will adequately protect our citizens against illegal *police* conduct.” *State v. DeBooy*, 2000 UT 32, ¶33 n.12, 996 P.2d 546 (emphasis added). This suggests that the rule targets police conduct only. Indeed, the rule as first expressed in *Larocco* specifically targets “police violations.” 794 P.2d at 473. And contrary to the trial court’s conclusion, R188-89,192, the exclusion-

ary rule under the Utah Constitution would have little or no effect on the behavior of the judiciary. As observed in *Leon*, “no evidence [exists] suggesting that judges and magistrates are inclined to ignore or subvert the [right against unreasonable searches and seizures] or that lawlessness among these actors requires application of the extreme sanction of exclusion.” *Leon*, 468 U.S. at 916. As further observed in *Leon*, it is improbable that the exclusionary rule will deter magistrates from making incorrect probable cause determinations. *Id.* In this regard, the Supreme Court observed:

Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them.

Id. at 917.

2. The Good Faith Exception Is Consistent with the Objectives of the Utah Constitution.

Because the exclusionary rule is a judicial remedy designed to deter future constitutional violations by police, application of the good faith exception in no way jeopardizes the rule’s core objective. “Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of [search and seizure] violations.” *Leon*, 468 U.S. at 921. Moreover, application of the rule serves as an appropriate balance,

factoring in society's legitimate interest in finding the truth and prosecuting the guilty. *See id.* at 906-07. The rule should therefore apply "only where its deterrence benefits outweigh its 'substantial social costs.'" *Scott*, 524 U.S. at 363 (*quoting Leon*, 468 U.S. at 907). When an officer reasonably relies on a warrant issued by a neutral and detached magistrate, any negligible deterrent in suppressing the evidence does not outweigh the substantial interest of Utah's citizenry in enforcing valid laws.

The *Sims* plurality observed that "the result reached in *Larocco* reaffirmed this court's commitment to the warrant approach under our state constitution." *Sims*, 841 P.2d at 8. The good faith exception to the exclusionary rule actually reinforces the constitution's preference for warrants. As observed in *Leon*, "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and [the Court] ha[s] thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." *Leon*, 468 U.S. at 914 (*quoting Spinelli v. United States*, 393 U.S. 410, 419 (1969)). Second-guessing those determinations may in fact encourage officers to conduct warrantless searches, relying instead on exceptions to the warrant requirement.

Moreover, because the good faith exception includes its own exceptions, deference to the magistrate's determination is not boundless. *See id.* at 914. Indeed, three of the four exceptions to the good faith exception account for the concerns of a magistrate who wholly fails to exercise his or her role in the warrant process. Thus, the good faith exception does not apply if the magistrate completely abandons his or her judicial role, if probable cause was entirely lacking, or if the warrant was deficient on its face. *See id.* at 923. The fourth exception ensures that police do not profit from their own misconduct. *See id.*

* * *

In sum, application of the *Leon* good faith exception is appropriate because it is straightforward and fundamentally sound, protecting the rights of Utah's citizens, while furthering the interest of Utah's citizenry to enforce valid laws using reliable evidence. Accordingly, should this Court conclude that the magistrate did not have a substantial basis for finding probable cause, and that exclusion of evidence is a proper remedy for Article I, § 14 violations, the Court should find a State good faith exception analogous to the *Leon* exception.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted on April 25, 2016.

SEAN D. REYES
Utah Attorney General

JEFFREY S. GRAY
Assistant Solicitor General
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

JEFFREY S. GRAY
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on April 25, 2016, two copies of the Brief of Appellant were ☒ mailed ☐ hand-delivered to:

Richard P. Gale
2155 North Freedom Blvd.
Provo, UT 84604

Douglas Thompson
Utah County Public Defender Ass'n
51 South University Ave., Ste. 206
Provo, UT 84604

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

ADDENDA

ADDENDUM A

Affidavit for Search Warrant, Search Warrant,
& Return on Search Warrant

(R60-67)

IN THE FOURTH DISTRICT COURT - ALL DEPARTMENT
IN AND FOR UTAH COUNTY, STATE OF UTAH

AFFIDAVIT FOR SEARCH WARRANT

STATE OF UTAH)
 :SS
County of Utah)

The undersigned affiant, Officer STEVEN O PRATT of Springville Police, upon an oath or written affidavit subscribed under criminal penalty, declares:

That your affiant has reason to believe:

THAT

On the premises known as 1064 North 1000 West Provo Utah 84601., further described as a single family dwelling. That the residence sits on the east side of 1000 West facing west. There is a driveway on the north side of the residence. The residence has white siding with white trim and a gray roof. There is an entry door in front of the house that is brown. There are two windows also in front of the house that face to the street. There is a brown picket fence that outlines the front of the yard. That from the street looking into the back yard, there is a black enclosed trailer. That the numbers 106 are clearly visible from the street by the front door. The number 6 appears to be drawn in with marker and the number 4 appears to be missing. That the residence, 1064 North 1000 West Provo Utah 84601, is within a drug free zone. There is an LDS church less than 1000 feet away from the residence in question. That there is also Lions Park less than a block away from the residence where during surveillance, children have been seen playing.;

On the person(s) of: "Mike" and all persons arriving to, present at, and leaving from the residence.;

On the vehicle(s) described as: all vehicle arriving to, present at, or leaving from the residence.;

In the City of Provo, County of Utah, State of Utah, there is now certain property or evidence described as:

Narcotics, marijuana, paraphernalia, buy-owe sheets, cell phones, contacts in phones, text messages or its equivalent in the cell phones relating to drug activity, cash, documents, weapons, packaging material, scales, surveillance equipment, items used for the ingestion of the above mentioned narcotics and other items associated with the use/distribution of controlled substances and related paraphernalia.

and that said property or evidence:

Was unlawfully acquired or is unlawfully possessed, or

Has been used to commit or conceal a public offense, or

Is being possessed with the purpose to use it as a means of committing or concealing a public offense, or

Consists of an item of, or constitutes evidence of, illegal conduct, possessed by a party to the illegal conduct.

Affiant believes the property and evidence described above is evidence of the crime or crimes of Possession/Distribution of Marijuana and Possession of Drug Paraphernalia..

The facts to establish the grounds for issuance of a Search Warrant are:

That your affiant is a detective from the Springville Police Department currently assigned as a drug detective, and has been employed since 2008. That prior to my employment I graduated the Utah Police Officers Standards and Training at Salt Lake Community College. That your affiant has attended and completed the Multi-Jurisdictional Task Force Training on Interview and Interrogation. That your affiant has attended and completed the Multi-Jurisdictional Task Force Training on Undercover Techniques and Survival. That your affiant has attended and completed the Crime Scene Investigations Course hosted by Sandy City Police Department. That your affiant has attended and completed the Pharmaceutical Diversion Investigations hosted by Layton Police Department. That your affiant has experience in many previous drugs cases involving narcotics and drug distributors.

2. The facts set forth in this affidavit are based on my own personal knowledge, knowledge obtained from other individuals, communications with others who have personal knowledge of the events and circumstances described herein, and information gained through my training and experience.

3. That the Springville Police Department has been investigating a male believed to be distributing marijuana into the community. This investigation has developed within the past several days.

4. That in the past 72 hours, I met a confidential informant(herein after known as CI) who stated an individual only known to the CI as Mike, was in possession of marijuana and would sell it to the CI. The CI has been in Mike's home in the past and has made drug purchases from him. The CI stated Mike sells marijuana in bulk and his product is vacuum sealed. That from your affiant's training and experience, individuals who package marijuana in this manner typically deal in large quantities.

5. The CI has provided credible information and has not said anything that would prove false or misleading. The information the CI has given has been investigated and proved credible. The CI is familiar with drug distribution and drug practices. The CI agreed to perform a controlled purchase of marijuana in exchange for leniency for pending charges against the CI.

6. The CI was placed in an unmarked police vehicle and spoke to your affiant of the drug activity inside the Mike's home. The CI stated Mike keeps his marijuana inside his residence but is unsure of exactly where. The CI stated Mike will travel to California to obtain marijuana to sell here in Utah. Mike lives with his girlfriend and three year old daughter.

7. That the CI's person was searched and no illegal items were found. The CI then communicated with Mike via cell phone and a predetermined amount of marijuana was agreed to be purchased for a predetermined amount of money. Detectives supervised this communication. The agreed upon location was to be Mike's residence located at 1064 North 1000 West Provo, Utah 84601. The CI was given the amount of money agreed upon and arrived at Mike's residence. While the CI drove in his/her own vehicle to the residence, the CI was in visual sight at all times. The CI did not make any stops prior to arriving at the residence and was followed by detectives. The CI arrived at the residence, 1064 North 1000 West Provo, Utah 84601, and went inside.

8. A short time passed and the CI was seen leaving the residence. The CI was again followed by detectives and was in visual sight the whole time. The CI traveled to a predetermined location where the CI met with me. The CI was found to be in possession of a distributable amount of marijuana upon searching the CI's person. No other illegal items were located. The amount of marijuana found on the CI's person was the agreed upon amount that was to be purchased.

9. That upon interviewing the CI, the CI stated he/she arrived at Mike's residence. The CI entered into the house and Mike gave the CI a predetermined amount of marijuana in exchange for money. The CI gave Mike the money and the CI left. That the CI stated Mike is a Martial Arts master and is very familiar with the art of combat. The CI has also heard from Mike in the past speak of firearms and believes there may be a firearm in Mike's residence.

10. That your affiant has attempted through every avenue to try and identify Mike. Records checks on the residence, registrations of vehicles, and requesting information from other agencies have all been attempted. All efforts have been exhausted and Mike's personal identification is unknown at this time.

11. That your affiant has found that drug distributors use multiple phones and send text messages to coordinate drug transactions. That your affiant knows often times drug distributors will use code names in the contact list and text messages to avoid detection. Your affiant requests to seize phones, contact lists, text messages or its equivalent at the residence and communication devices that are being used to facilitate the crime of marijuana distribution. In your affiant's experience, those who distribute marijuana and other controlled substances often use money grams, bank accounts or other paper means to launder and transfer money to further their drug distribution network. Failure to seize these items will result in valuable evidence to be lost.

12. That your affiant's experience in narcotics investigations shows that failure to search the residence, outbuilding, curtilage, persons and vehicles of individuals present and arriving to the residence located at 1064 North 1000 West Provo Utah 84601, will result in officers missing valuable evidence in this investigation. That in your affiant's experience, if persons or vehicles arriving, present or leaving the residence, where narcotics investigation is being conducted, are not searched for drugs, important evidence relating to the case can become destroyed or concealed. Your affiant expects to locate the following items: narcotics, marijuana, paraphernalia, buy-owe sheets, cell phones, contacts in phones, text messages or its equivalent in the cell phones relating to drug activity, cash, documents, weapons, packaging material, scales, surveillance equipment, items used for the ingestion of the above mentioned narcotics and other items associated with the use/distribution of controlled substances and related paraphernalia.

WHEREFORE, your affiant prays that a Search Warrant be issued for the seizure of said items at any time of the day or night because there is reason to believe it is necessary to seize the above-listed property prior to it being concealed, destroyed, damaged, or for other good reasons, to wit:

That it is your affiant's experience that persons involved in the use/distribution of marijuana or other controlled substances often plan for police raids with a plan for the quick destruction or secreting of the evidence. Allowing officers to execute the warrant at night allows a window of safety for the officers and the public in general. Allowing this search at night allows officers executing the warrant the ability to quickly secure any evidence that could otherwise be destroyed. That the residence in question is located a short distance away from a school and a park. That serving this warrant during the nighttime hours will allow for children playing and the general community around the area to most likely be inside..

FURTHER, your affiant prays that a Search Warrant be issued that does not require officers to knock and announce their presence prior to entry. The reasons for this request are:

Due to the information that was brought to your affiant's attention, Mike is well familiar with martial arts. Mike is considered to be a master and a teacher. Allowing officers the element of surprise with a No Knock warrant, gives officers a window of safety in an effort to take Mike into custody. Allowing a No Knock warrant also provides officers with a window to safely secure any firearms or other weapons that may be available to Mike or other occupants of the home.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed on: 28th day of August, 2012 by /s/ STEVEN O PRATT

IN THE FOURTH DISTRICT COURT - ALL DEPARTMENT
IN AND FOR UTAH COUNTY, STATE OF UTAH

SEARCH WARRANT

No. 1163281

COUNTY OF UTAH, STATE OF UTAH

To any peace officer in the State of Utah:

Proof by Affidavit made upon oath or written affirmation subscribed under criminal penalty of the State of Utah having been made to me by Officer STEVEN O PRATT of Springville Police, this day, I am satisfied that there is probable cause to believe

THAT

On the premises known as 1064 North 1000 West Provo Utah 84601., further described as a single family dwelling. That the residence sits on the east side of 1000 West facing west. There is a driveway on the north side of the residence. The residence has white siding with white trim and a gray roof. There is an entry door in front of the house that is brown. There are two windows also in front of the house that face to the street. There is a brown picket fence that outlines the front of the yard. That from the street looking into the back yard, there is a black enclosed trailer. That the numbers 106 are clearly visible from the street by the front door. The number 6 appears to be drawn in with marker and the number 4 appears to be missing. That the residence, 1064 North 1000 West Provo Utah 84601, is within a drug free zone. There is an LDS church less than 1000 feet away from the residence in question. That there is also Lions Park less than a block away from the residence where during surveillance, children have been seen playing.;

On the person(s) of: "Mike" and all persons arriving to, present at, and leaving from the residence.;

On the vehicle(s) described as: all vehicle arriving to, present at, or leaving from the residence.;

In the City of Provo, County of Utah, State of Utah, there is now certain property or evidence described as:

Narcotics, marijuana, paraphernalia, buy-owe sheets, cell phones, contacts in phones, text messages or its equivalent in the cell phones relating to drug activity, cash, documents, weapons, packaging material, scales, surveillance equipment, items used for the ingestion of the above mentioned narcotics and other items associated with the use/distribution of controlled substances and related paraphernalia.

and that said property or evidence:

Was unlawfully acquired or is unlawfully possessed, or

Has been used to commit or conceal a public offense, or

Is being possessed with the purpose to use it as a means of committing or concealing a public offense, or

Consists of an item of, or constitutes evidence of, illegal conduct, possessed by a party to the illegal conduct.

Affiant believes the property and evidence described above is evidence of the crime or crimes of Possession/Distribution of Marijuana and Possession of Drug Paraphernalia..

YOU ARE THEREFORE COMMANDED:

At any time of the day or night, good cause having been shown,

Without requirement of knocking and announcing or giving prior notice of authority or purpose, good cause having been shown,

to make a search of the above-named or described premises for the herein-above described property or evidence and if you find the same or any part thereof, to bring it forthwith before me at the FOURTH DISTRICT COURT - ALL DEPARTMENT, County of Utah, State of Utah, or retain such property in your custody, subject to the order of this court.

Dated: 28th day of August, 2012 /s/



RETURN TO SEARCH WARRANT

NO. 1163281

The personal property listed below or set out on the inventory attached hereto was taken from the person of "Mike" and all persons arriving to, present at, and leaving from the residence., by virtue of a search warrant dated the 28th day of August, 2012, and issued by Magistrate JAMES R TAYLOR of the FOURTH DISTRICT COURT - ALL DEPARTMENT:

Over four pounds of marijuana, psilocybin mushrooms, drug paraphernalia, a Rock River assault rifle, Glock handgun, over \$3900.00 in cash, and buy owe sheets.

I, Officer STEVEN O PRATT of Springville Police, by whom this warrant was executed, do swear that the above listed or below attached inventory contains a true and detailed account of all the property taken by me under the warrant, on the 28th day of August, 2012.

All of the property taken by virtue of said warrant will be retained in my custody subject to the order of this court or of any other court in which the offense in respect to which the property, or things taken, is triable.

I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

Executed on: 4th day of September, 2012 by /s/ STEVEN O PRATT

ADDENDUM B

Findings of Fact, Conclusions of Law and Order
[Denying] Defendants' [First] Motion to Suppress

(R226-32)

JUN 8 2015

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

REBECCA GEORGE,
MICHAEL ROWAN,

Defendants.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER RE:
DEFENDANTS' MOTION TO
SUPPRESS**

Case Nos. 131402290
131402291

Judge Derek Pullan

This matter came before the Court on the Defendants' Joint Motion to Suppress.
The State opposed the motion.

Defendants Rebecca George and Michael Rowan appeared in person and were
represented by their respective attorneys, Ms. Deborah A. Hill and Mr. Richard P. Gale.
The State was represented by Deputy Utah County Attorney Ms. Mariane O'Bryant.

The Court issued its ruling from the bench on June 17, 2014.¹ Having considered
the underlying Search Warrant, the supporting affidavit, and the papers filed, the Court
now enters the following written Order consistent with that oral ruling:

¹ At the May 27, 2014 hearing the Court stated it would take the Motion to Suppress under advisement and render a written decision. Instead, the Court entered an oral ruling at the June 17, 2014 hearing. Neither party was assigned to reduce the ruling to writing. Shortly thereafter, the Defendants filed a Motion to Suppress under the Utah Constitution, which the Court decided on November 10, 2014. The State filed a proposed Findings of Fact, Conclusions of Law, and Order regarding the June 17, 2014 hearing on December 9, 2014. Defendants' objected to the proposed order the next day, stating they were in the process of obtaining the transcript of the hearing in order to supplement the State's proposed order. A transcript of the hearing was filed on December 21, 2014. On May 18, 2015 the State noted that the Defendants' had not filed a response, and moved the Court to approve the proposed order. Unfortunately, the Defendants' failed to file their own proposed order until May 26 and 27, 2015. The Court declines to sign the State's and both the Defendants' proposed order.

FINDINGS OF FACT

1. On August 28, 2012, a district court judge authorized a search warrant for a residence located at 1064 North 1000 West in Provo, Utah.
2. The warrant issued based on the supporting affidavit of Officer Steven O. Pratt of the Springville Police Department.
3. Law enforcement officers executed the warrant on the same day it issued.
4. The information supporting the warrant came primarily from a confidential informant. ("the Confidential Informant").
5. The Confidential Informant was cooperating with the police in exchange for leniency on pending charges. (Affidavit, ¶ 4).
6. The Confidential Informant told police that a person named Mike was in possession of marijuana and would sell it to the Confidential Informant. (Transcript of June 17, 2014 Pretrial Conference, p. 2, lines 11-13).
7. The Confidential Informant stated that he had been in Mike's home in the past, but did not say when. (Transcript, p. 2, lines 13-15).
8. The Confidential Informant stated that he had purchased drugs from Mike. (Transcript, p. 2, lines 15-16).
9. The Confidential Informant further stated that (1) Mike sells marijuana in bulk; (2) Mike's product is vacuum-sealed; (3) Mike travels to California to obtain marijuana to sell in Utah; (4) Mike keeps his marijuana in a residence located at 1064 North 1000 West in Provo; (5) Mike lives at this residence with his girlfriend and three-year-old daughter; (6) Mike is a martial arts master and is very familiar with the art of combat; (7) the Confidential Informant had heard Mike speak of firearms in the past,

but did not say when; and (8) the Confidential Informant believed there may be a firearm in Mike's residence, but offered no facts to substantiate this belief.

(Transcript, p. 2-3, lines 16-25; 1-3).

10. The information provided by the Confidential Informant to police purported to be based in the Confidential Informant's personal knowledge. (Transcript, p. 3, lines 4-5).
11. The police tried to identify Mike by checking records on the residence, vehicle registrations, and other police records, but were ultimately unsuccessful in corroborating any of the information that the Confidential Informant provided. (Transcript, p. 3, lines 5-9).
12. The police did not attempt to corroborate independently any of the other information provided by the Confidential Informant.² (Transcript, p. 3, lines 9-12).
13. Instead, the police arranged for what was intended to be a "controlled" buy, although the controls were at best slipshod. (Transcript, p. 3, lines 13-14).
14. The police searched the Confidential Informant's person and found no controlled substances. (Transcript, p. 3, line 15).
15. The Confidential Informant then made a call to a person that the Confidential Informant identified as Mike. Police monitored the call. (Transcript, p. 3, lines 15-17).

² The failure of police to corroborate any of the Informant's information and failure to "control" the buy in which the Informant participated stand in stark contrast to representations in the Affidavit. There, the affiant swears that "the [Informant] has provided creditable [sic] information and has not said anything that would prove false or misleading. The information the [Informant] has given *has been investigated* and proved credible." (Affidavit, ¶ 4). The only measure police took to corroborate the Informant's claims was to conduct a buy which they failed to control. Other investigation yielded no information. At best, these representations in the Affidavit are conclusory, at worst misleading.

16. The Confidential Informant agreed to purchase a certain amount of marijuana for a certain amount of money from the person who was on the phone. (Transcript, p. 3, lines 17-20).
17. The sale would take place at the 1064 North 1000 West address in Provo. (Transcript, p. 3, lines 20-21).
18. Police issued buy money to the Confidential Informant. (Transcript, p. 3, lines 21-22).
19. For reasons that remain puzzling, police then allowed the Confidential Informant—a known user of controlled substances whose cooperation with police was given in exchange for leniency on pending charges—to get back into his own vehicle and drive to the residence at 1064 North 1000 West in Provo. (Transcript, pp. 3-4, lines 23-25, 1-2; Affidavit, ¶ 7).
20. Police did not search the vehicle for controlled substances before the Confidential Informant drove to the residence. (Transcript, p. 4, lines 3-5).
21. The Confidential Informant went into the house. A short time later, police observed the Confidential Informant exit the residence. (Transcript, p. 4, lines 5-6; Affidavit, ¶ 8).
22. Again, the Confidential Informant was allowed to drive his own vehicle from the residence to a predetermined location where he met police. (Affidavit, ¶ 8).
23. Police searched the Confidential Informant's person and discovered a controlled substance. The buy money was not discovered on the Confidential Informant's person. (Transcript, p. 4, lines 6-9; Affidavit, ¶ 8).

24. Police did not search the Confidential Informant's vehicle after the buy. (Transcript, p. 4, lines 8-9)

CONCLUSIONS OF LAW

In deciding whether a search warrant is supported by probable cause, the Court employs a flexible totality of the circumstances standard. The indicia of veracity, reliability, and basis of knowledge are non-exclusive elements to be evaluated in reaching the practical common sense decision, whether given all the circumstances there is a fair probability that the contraband will be found in the place described.

The purchase of marijuana from inside the home corroborated the Confidential Informant's information only to the extent that the purchase itself was controlled. Here the buy was not controlled because (1) police did not search the Confidential Informant's car before the buy; (2) police allowed the Confidential Informant to get back into his car and drive alone to the residence; (3) after leaving the residence, the Confidential Informant got back into his car and drove alone to a predetermined location; and (4) police failed to search the Confidential Informant's car after the buy.

A search of the vehicle before the buy could have demonstrated the car had no drugs in it. A search of the vehicle after the buy could have demonstrated the car had no cash in it. These controls might have been imposed with little effort. Police did not impose them. Their failure to do so means the Confidential Informant could not be excluded as the source of the controlled substance, or as the person who retained the buy money.

The veracity and reliability of informants who have an established track record of working with the police and providing reliable information in the past may be entitled to

greater weight than informants who have not. Nothing in the Affidavit suggests that the Confidential Informant had provided credible information in the past.

Confidential informants who claim personal knowledge and who implicate themselves in criminal conduct may be entitled to greater weight than confidential informants who do not. But these factors standing alone—without independent corroboration—cannot in this Court’s view give rise a finding of probable cause. Confidential informants routinely claim personal knowledge of criminal activity and implicate themselves in that activity

Where there is no independent corroboration, either by the police before the controlled buy or in the execution of the controlled buy, the State has failed to show there was probable cause established by the affidavit.

Having determined that the affidavit and factual circumstances did not establish probable cause to support the warrant, the Court next considers whether or not suppression is appropriate under the good faith exception to the exclusionary rule of the Fourth Amendment established in *United States v. Leon*, 468 U.S. 879 (1984).

The objective of the exclusionary rule under the Fourth Amendment is to deter police misconduct. When police seize evidence acting in good-faith reliance on a warrant that later proves defective, the evidence is not excluded because there is no police misconduct to deter.

A police officer’s good-faith reliance upon a defective warrant must be objectively reasonable. It is not objectively reasonable for officers to rely upon a warrant when they mislead the magistrate by misrepresenting facts in the affidavit, when the magistrate wholly abandons his judicial role by becoming a rubber stamp, when the

affidavit is so lacking in indicia of probable cause to render the officer's reliance unreliable, or when the affidavit fails to set forth in particularity the place to be searched or the things to be seized.


In this case none of these factors are met.

ORDER

The Defendants' motion is GRANTED IN PART. The warrant did issue without probable cause. The motion is DENIED as to Defendants' request for exclusion. The officers relied upon the deficient warrant in good faith. The good faith exception as articulated in *Leon*, saves the evidence from exclusion under the Fourth Amendment. This Order is the last judicial decision related to the Defendants' Joint Motion to Suppress. This Order and the Court's Order entered on November 10, 2014 are now final. No further action by the Court is necessary.

DATED this 8 day of June, 2015.

BY THE COURT:



JUDGE DEREK P. PULLAN
Fourth District Court Judge

ADDENDUM C

Ruling and Order Granting Defendants'
[Second] Joint Motion to Suppress
(R180-94)

NOV 10 2014

IN THE FOURTH JUDICIAL DISTRICT COURT

4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN AND FOR UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. MICHAEL ROWAN, REBECCA GEORGE Defendant.	<u>RULING AND ORDER</u> GRANTING DEFENDANTS' JOINT MOTION TO SUPPRESS Case No. 131402290 Case No. 131402291 Judge Derek P. Pullan
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This matter comes before the Court on Defendant Michael Rowan's motion to suppress. Rowan was represented by his attorney, Mr. Richard P. Gale. The State of Utah was represented by Deputy Utah County Attorney, Ms. Mariane O'Bryant. Defendant Rebecca George is a co-defendant charged in Fourth District Court case number 131402291. She was represented by her attorney, Ms. Deborah A. Hill. George joined in Rowan's motion to suppress.

The Court previously ruled that (1) the search warrant at issue was not supported by probable cause; and (2) the good faith exception to the exclusionary rule under the Fourth Amendment to the United States Constitution saved the evidence seized from exclusion. *See United States v. Leon*, 468 U.S. 897 (1984).

The only remaining issue is whether article I, section 14 of the Utah Constitution incorporates a good faith exception to the exclusionary rule. For the reasons stated below, the

Court holds that there is no good faith exception to the exclusionary rule under article I, section 14. Therefore, the Court GRANTS Defendants' joint motion to suppress.

RULING

Whether a good faith exception to the exclusionary rule exists under article I, section 14 is an issue of first impression under Utah law. To decide the issue, the Court must examine the history and purposes of the exclusionary rule under federal and state law. The Court must then decide whether the Utah Constitution affords Utah citizens greater rights than those existing under the Fourth Amendment as interpreted by the United States Supreme Court.

The Fourth Amendment and The Exclusionary Rule

The United States Supreme Court adopted the federal exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914). The Court held that exclusion of evidence seized in violation of the Fourth Amendment was necessary because use of the evidence would involve “a denial of the constitutional rights of the accused.” *Weeks*, 232 U.S. at 398. The Court recognized exclusion as a necessary corollary to the right to be free from unreasonable searches and seizures, and without this remedy the Fourth Amendment guarantees would be meaningless. *See Weeks*, 232 U.S. at 393.

In *Mapp v. Ohio*, 367 U.S. 643 (1961), the United States Supreme Court held that evidence seized in violation of the Fourth Amendment must be excluded in state prosecutions. The Court acknowledged “the obvious futility of relegating the Fourth Amendment to the protection of other remedies.” *Mapp*, 367 at 652. The Court held again that exclusion was the remedy for those whose Fourth Amendment rights had been violated and that *Weeks* unequivocally established the constitutional origin of this remedy. *Mapp*, 367 U.S. at 648-49.

The Court reasoned that exclusion of evidence seized in violation of the Fourth Amendment was necessary to deter violations and to protect judicial integrity. *Id.* at 656, 659-60 (citing *Elkins v. United States*, 364 U.S. 206, 217, 222 (1960)).

In what has been described as “revisionist history”¹ and “constitutional amnesia,”² the United States Supreme Court in 1974 disavowed the remedial nature of the exclusionary rule, concluding that its primary purpose was simply to deter police misconduct. *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). This metamorphosis of the exclusionary rule reached its zenith ten years later in *Leon*.

There, the Court held that the Fourth Amendment does not require exclusion where police execute a search warrant that is not supported by probable cause, so long as the police acted in good faith reliance upon the warrant. *Leon*, 468 U.S. at 912. Contrary to its prior holdings in *Weeks* and *Mapp*, the Court held that the exclusionary rule was not a constitutional right of the accused to remedy constitutional wrongs. *Id.* at 906. Rather, the rule was little more than a judicial remedy to be applied only when the societal costs did not outweigh the benefits of deterring police misconduct. *Id.* at 912. The Court made clear that deterring police misconduct was the sole purpose of the exclusionary rule. *Id.* at 916. As long as the police acted in good faith on the warrant, there was no police misconduct to deter. *Id.* at 918-19.

The Court recognized four instances in which police could not be deemed to have acted in good faith, and where the exclusionary rule would continue to apply: (1) when the magistrate or judge was misled by information in an affidavit that the affiant knew was false or should have known was false but for his reckless disregard for its truth; (2) when the judge issuing the

¹ *State v. Guzman*, 842 P.2d 660, 671 (Idaho 1992).

² *Leon*, at 972 (Stevens, J., dissenting).

warrant wholly abandoned his judicial role; (3) when the affidavit in support of the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when the warrant was so facially deficient that police cannot reasonably presume it to be valid. *Leon*, 468 U.S. at 923.

Thus, over a period of 70 years, the federal exclusionary rule regressed from an individual right guaranteed under the Fourth Amendment, to a judicial remedy applicable only when the societal costs of exclusion did not exceed deterrent benefits. *Id.* at 898.

The Exclusionary Rule Under Utah Law

Two years after *Weeks* was decided, the Utah Supreme Court held that it had “no disposition to disagree with the doctrine that where police officers obtained evidence by illegal methods, such as unlawful search in violation of... Article I, Section 14 of our Constitution, [the evidence] should not be used to convict a person of a crime.” *State v. Loudon*, 387 P.2d 240, 241 (Utah 1963).

Over the next twenty-five years, the Utah Supreme Court implicitly acknowledged exclusion as the appropriate remedy for the unconstitutional seizure of evidence by the police. *See State v. Montayne*, 414 P.2d 958 (1966); *State v. Kent*, 432 P.2d 64 (1967); *State v. Shields*, 503 P.2d 848 (1972); *State v. Kaae*, 513 P.2d 435 (1973); *State v. Farnsworth*, 519 P.2d 244 (1974); *State v. Lopes*, 552 P.2d 120 (Utah 1976); *State v. Hygh*, 711 P.2d 264 (Utah 1985); *State v. Criscola*, 444 P.2d 517 (1986); *State v. Dorsey*, 731 P.2d 1085 (Utah 1986); *State v. Earl*, 716 P.2d 803 (Utah 1986); *State v. Ashe*, 745 P.2d 1255 (Utah 1987).

In 1990, the Utah Supreme Court in *State v. Larocco*—with two justices joining the lead opinion and another concurring in the result—“expressly [held] that exclusion of illegally

obtained evidence is *a necessary consequence* of police violations of article I, section 14.” *State v. Larocco*, 794 P.2d 460, 472 (1990) (emphasis added). Acknowledging the changed nature and scope of the federal exclusionary rule, the *Larocco* Court identified—but did not answer—three questions important to state exclusionary rule analysis: (1) whether exclusion is a state constitutional requirement?; (2) whether deterrence is the only purpose behind exclusion?; and (3) which governmental officials are deemed to be the target of this deterrence? *Larocco*, 794 P.2d at 473.

One year later, in *State v. Thompson*, the Court affirmed the exclusionary rule as recognized in *Larocco*, but without further explanation. *State v. Thompson*, 810 P.2d 415, 419 (Utah 1991).

In 1992, the Utah Supreme Court applied the exclusionary rule in *Sims v. Collection Div. of Utah State Tax Comm’n.*, 841 P.2d 6, 14-15 (Utah 1992). There the Court acknowledged a “general need for protection of *individual rights* under article I, section 14.” *Sims*, 841 P.2d at 14 (emphasis added).

Over the next two decades Utah courts reaffirmed the exclusionary rule in *Thompson* and *Larocco*, but did not take the opportunity to further articulate any other purpose behind the rule. *See, e.g., State v. DeBooy*, 2000 UT 32, ¶ 33 n. 12; *see also State v. Yount*, 2008 UT App 102.

Most recently, in *State v. Walker*, 2011 UT 53, one Justice of the Utah Supreme Court expressed the view that both *Thompson* and *Larocco* should be revisited and overruled because the Utah Constitution never contemplated exclusion as a remedy. *Walker*, 2011 UT 53, ¶¶ 39, 46, 60 (Lee, J., concurring).

Article I, Section 14 of the Utah Constitution

In words lifted almost verbatim from the Fourth Amendment, article I, section 14 provides: “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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.”

The plain language of article I, section 14 demonstrates the Framers’ intent to protect the security of Utah citizens in their persons, houses, papers and effects against unreasonable intrusions by the police. The provision commands that this right “shall not be violated.” Search warrants—the judicial authorization for police to intrude upon the interests protected—shall not issue except upon a particular showing of probable cause. Certainly, evidence might be seized with greater efficiency resulting in more convictions and greater public safety. But article I, section 14 places a higher priority on the individual right of privacy and security.

The Exclusionary Rule And Article I, Section 14.

Exclusion Is the Remedy for Violations of Article I, Section 14

The text of the Utah Constitution is silent as to the remedy for violations of article I, section 14 committed by the government. But the Utah Supreme Court has already determined that exclusion of the evidence seized *is* the proper remedy. *See Walker*, 2011 UT 53; *Thompson*, 810 P.2d 415 (1991).

The State asks the court to revisit this question. This Court does not have authority to depart from binding precedent. Even if it could disregard precedent and strike out on its own,

this Court would for the reasons stated below leave the exclusionary rule firmly ensconced in state search and seizure jurisprudence.

Exclusion Is Constitutionally Required Under Article I, Section 14

As explained, when the United States Supreme Court first recognized exclusion as the remedy for Fourth Amendment violations, the Court held that it was constitutionally required. *See Mapp v. Ohio*, 367 U.S. 643, 649, 657 (1961) (holding that admitting unlawfully seized evidence against the accused cannot be tolerated under our constitutional system, and that the exclusionary rule is an essential part of the Fourth Amendment); *see also Weeks v. U.S.*, 232 U.S. 383, 393 (1914) (finding that if evidence can be illegally seized and used against a citizen accused of an offense, then the protection of the Fourth Amendment is of no value and might as well be stricken from the Constitution). The Court reasoned that the exclusionary rule would deter police misconduct, but this was not its only objective. *Mapp*, 367 U.S. at 651. Exclusion would also protect the integrity of the judiciary and the warrant process. *Id.* at 659.

In subsequent decisions, the constitutional right to exclusion of evidence seized in violation of the Fourth Amendment became little more than a judicial remedy applied sometimes, when societal costs of the remedy did not exceed the deterrent benefits. *U.S. v. Calandra*, 414 U.S. 338, 348 (1974).

However, language in two Utah court decisions suggests that the exclusionary rule holds a more prominent place in state constitutional law. In *Larocco*, a plurality of the Utah Supreme Court stated that exclusion is a “necessary consequence” imposed when government infringes upon the right of Utah citizens under article I, section 14 to be secure in their persons, houses,

papers, and effects. *Larocco*, 794 P.2d at 472. In *Sims*, the Court stated that exclusion was necessary to achieve the general interest in protecting “individual rights.” *Sims*, 841 P.2d at 14.

The Purposes of The State Exclusionary Rule

While one purpose of the state exclusionary rule is to deter police misconduct, the rule secures other important societal objectives. The exclusionary rule is remedial for the parties in the pending case. It places both the State of Utah and the accused in the position each occupied before the government intruded unlawfully upon the person, house, papers, or effects of the accused. Without exclusion this right to be secure—to be left alone by government absent a particular showing of probable cause and a warrant—would be rendered meaningless. *See Weeks*, 232 U.S. at 393. In the words of Justice Brennan, “The right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures.” *Leon*, at 935 (Brennan, J., dissenting).

The exclusionary rule protects the integrity of the judiciary. When evidence is seized in violation of article I, section 14 and is then used in court, Utah citizens perceive the courts as either complicit in the unconstitutional acts of the executive branch, or unwilling to accept the lawful consequences of the reviewing magistrate’s error. This undermines the confidence Utah citizens should have in the judiciary and the rule of law.

Finally, the exclusionary rule creates incentives which improve the warrant process as a whole. Knowing that exclusion of evidence seized is the remedy for error, police officers are motivated to provide more information to the magistrate—to secure a *valid* warrant supported by probable cause, not merely a judicial signature. Similarly, knowing that exclusion of evidence

seized is the remedy for error, reviewing magistrates make probable cause determinations with greater care.

There Is No Good Faith Exception To Exclusion Under Article I, Section 14

With these preliminary issues resolved, the Court turns to the question presented: Is the exclusionary rule under article I, section 14 of the Utah Constitution subject to the good faith exception recognized in *Leon*? In this Court's view, the answer is no.

Independent State Constitutional Analysis

Utah constitutional provisions can be interpreted to provide greater protections than are recognized under the United States Constitution. *Larocco*, 794 P.2d at 465. Independent state constitutional analysis is necessary to protect Utah citizens from the vagaries and inconsistencies in federal constitutional jurisprudence. *Id.* Utah courts have departed from federal constitutional interpretation in the context of search and seizure law. *Id.* at 471; *Thompson*, at 416-17.

Thus, the decision of the United States Supreme Court to disavow exclusion as a right under the Fourth Amendment and to narrowly define the purposes of exclusion as a remedy need not define the rights of Utah citizens under article I, section 14.

The Text of Article I, Section 14

Article I, section 14 reads: "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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized." Utah Const., art. I, sec. 14.

From this language, we know that the Framers placed a high value on the right of Utah citizens to be secure in their persons, houses, papers, and effects from unreasonable searches and seizures. The text commands that this right “shall not be violated.” Warrants authorizing police to intrude upon these interests—an intended procedural impediment to police efficiency—must be supported by probable cause and a particular description of the place to be searched, and the persons or things to be seized.

Nothing in the text of article I, section 14 creates an exception for instances when a warrant issues without probable cause and the police rely in good faith on the constitutionally defective warrant.

Much of the State’s brief is devoted to the history behind the adoption of article I, section 14, including statements made during Utah’s constitutional convention. However, this historical analysis provides little guidance. The exclusionary rule was not recognized under the Fourth Amendment as a necessary remedy until 1914 in *Weeks*, almost twenty years after the Utah Constitution was adopted. Utah Const. (1895). The good faith exception to the federal exclusionary rule did not emerge until 1984 in *Leon*. Determining how the Framers would have viewed these later developments in Fourth Amendment law is an exercise in speculation. The text of article I, section 14 is a more certain guide.

***A Good Faith Exception Is Inconsistent With The Probable Cause Standard
Expressly Set Out In Article I, Section 14.***

The good faith exception is inconsistent with the plain language of article I, section 14, and the remedy adopted to enforce its guarantees. Article I, section 14 requires that no warrant shall issue except upon probable cause. The good faith exception allows the government to use

evidence in a criminal case even though the warrant authorizing its seizure issued without the showing of probable cause required by article I, section 14.

The good faith exception replaces the “probable cause” standard in article I, section 14 with a lower threshold for admissibility. The fruits of the unsupported search warrant are deemed admissible so long as: (1) the magistrate did not wholly abandon her judicial role, (2) the affiant did not mislead the magistrate, (3) the affidavit in support of the warrant was not so lacking in indicia of probable cause that relying on it was entirely unreasonable, or (4) the warrant was not so facially deficient that the police could not reasonably presume it to be valid. *Leon*, 468 U.S. at 923. These alternatives are inconsistent with what the Utah Constitution expressly requires—probable cause. As the Michigan Court of Appeals observed:

A ‘good-faith’ exception to the exclusionary rule would insulate the magistrate’s decision to grant a search warrant from appellate review. In every case where a constitutionally infirm search warrant was issued, the prosecution could reasonably claim that the police acted in good faith. In effect, the constitutional language that all warrants be issued only on a showing of probable cause would become a nullity.

People v. Sundling, 395 N.W.2d 308 (Mich. App. 1986) (citing *People v. David*, 326 N.W.2d 485 (Mich. App. 1982)).

The insulation of probable cause determinations from appellate review is a serious concern. In cases where the good faith exception applies, both trial courts on a motion to suppress and appellate courts on review may simply assume error on the issue of probable cause and jump to the dispositive “good faith” analysis. This is most likely to happen in the close cases—cases in which guidance to reviewing judges on the issue of probable cause would be most helpful. *See, State v. Guzman*, 842 P.2d 660, 677 (Idaho 1992) (citing *Silas Wasserstrom &*

William Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 Am. Crim. L. Rev. 85, 112 (1984).³

A Good Faith Exception Undermines The Purposes of the State Exclusionary Rule

If deterring police misconduct was the only purpose of the exclusionary rule, a good faith exception might make sense. As the *Leon* court explained, the police have a constitutional duty to seek a warrant and did so. *Leon*, at 944. Therefore, there is no police misconduct to deter.

However, deterring police misconduct is not the sole purpose of exclusion. Exclusion is constitutionally required under article I, section 14 to remedy the individual right of the accused in the pending case. It restores both the accused and the State to the position each occupied before the government violated the accused's right to be free from unreasonable searches and seizures. Rejecting a good faith exception under the New Mexico Constitution, the New Mexico Supreme Court observed:

The right to be free from unreasonable searches and seizures is in a sense a passive right, unlike the active rights of free speech and free exercise of religion. It is perhaps this nature of the right and the context in which it arises that make troublesome judicial review of violations. While the right to speak freely is the right to actively engage in public discourse without governmental restraint, one does not actively engage in freedom from governmental intrusion; that right lies in waiting, to curb the state's zeal in execution of the criminal laws. When a court finds the government has unconstitutionally restricted a person's speech, the court orders the restraint lifted and enjoins further restraint. What we propose today does no more. Once violation of Article II, Section 10 has been established, we do no more than return the parties to where they stood before the right was violated. We do not deem judicial review of unconstitutional restraints on speech a mere "judicial remedy," nor should we so deem the exclusion of unconstitutionally seized evidence that Article II, Section 10 requires.

Surely, the framers of the Bill of Rights of the New Mexico Constitution meant to create more than "a code of ethics under an honor system." Stewart, *supra*, at 1383–84. We think it implicit in a regime of enumerated privileges and immunities that the framers intended to create rights and

³ These commentators note: "[I]t is in close fourth amendment cases that new law is made and guidance to magistrates and the police is most needed. Close cases are both the hardest to decide and the easiest to dispose of under the good faith exception; in such cases the officer's objective good faith is clearest. Thus, these are the cases that defendants are least likely to litigate and the courts most likely to dispose of without reaching the merits of the fourth amendment claim." Silas Wasserstrom & William Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 Am. Crim. L. Rev. 85, 112 (1984).

duties and that they made it imperative upon the judiciary to give meaning to those rights through judicial review of the conduct of the separate governmental bodies. As Justice Stewart has observed, “[t]he primary responsibility for enforcing the Constitution’s limits on government, at least since the time of *Marbury v. Madison*, [5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803),] has been vested in the judicial branch.” Stewart, *supra*, at 1384. The very backbone of our role in a tripartite system of government is to give vitality to the organic laws of this state by construing constitutional guarantees in the context of the exigencies and the needs of everyday life. Denying the government the fruits of unconstitutional conduct at trial best effectuates the constitutional proscription of unreasonable searches and seizures by preserving the rights of the accused to the same extent as if the government’s officers had stayed within the law.⁹ The basis we articulate today for the exclusionary rule in this state—to effectuate the constitutional right in the pending case—is incompatible with any exception based on the good-faith reliance of the officer on the magistrate’s determination either of probable cause or of the reasonableness of the search.

State v. Gutierrez, 863 P.2d 1052, ¶¶ 54-56 (N.M. 1993) (citation omitted).

A good faith exception undermines the integrity of both the executive and judicial branches. If prosecutors are permitted to use evidence seized in violation of article I, section 14 to convict, the citizenry perceives the executive and judicial branches as law-breakers. As Justice Brandeis warned nearly a century ago:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) (citing *Olmstead v. United States*, 277 U.S. 438 (1928)).

Finally, the good faith exception to the state exclusionary rule creates incentives that weaken the warrant process. Wrapped in the warm blanket of the good faith exception, police have less incentive to ensure that the request for a search warrant meets the probable cause threshold, and reviewing magistrates have less incentive to make probable cause determinations with care. In the words of the New Jersey Supreme Court:

Whatever else may be said for or against the *Leon* rule, the good-faith exception will inevitably and inexorably diminish the quality of evidence presented in search-warrant applications. By eliminating any cost for noncompliance with the constitutional requirement of probable cause, the good-faith exception assures us that the constitutional standard will be diluted.

State v. Novembrino, 519 A.2d 820, 854 (N.J. 1987).

The Law of Sister States

In holding that Article I, section 14 of the Utah Constitution does not include a good faith exception, the Court joins seventeen sister states which have reached the same conclusion under their respective state constitutions: Connecticut – *State v. Marsala*, 579 A.2d 58 (Conn. 1990); Georgia – *Gary v. State*, 422 S.E.2d 426 (Ga. 1992); Ga. Code Ann. § 17-5-30; Hawaii – *State v. Lopez*, 896 P.2d 889 (Haw. 1995); Idaho – *State v. Guzman*, 842 P.2d 660 (Idaho 1992); Iowa – *State v. Cline*, 617 N.W.2d 277 (Iowa 2000); Michigan – *People v. Sundling*, 395 N.W.2d 308 (Mich. Ct. App. 1986); Minnesota – *State v. Kahn*, 555 N.W.2d 15 (Minn. Ct. App. 1996); New Hampshire – *State v. Canelo*, 653 A.2d 1097 (N.H. 1995); New Jersey – *State v. Novembrino*, 519 A.2d 820 (N.J. 1987); New Mexico – *State v. Gutierrez*, 863 P.2d 1052 (N.M. 1993); New York – *People v. Bigelow*, 488 N.E.2d 451 (N.Y. 1985); North Carolina – *State v. Carter*, 370 S.E.2d 553 (N.C. 1988); Oklahoma – *Solis-Avila v. State*, 830 P.2d 191 (Okla. Crim. App. 1992); Pennsylvania – *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991); Vermont – *State v. Oakes*, 598 A.2d 119 (Vt. 1991); Washington – *State v. Crawley*, 808 P.2d 773 (Wash. Ct. App. 1991); Wisconsin – *State v. Longcore*, 594 N.W.2d 412 (Wis. Ct. App. 1999). The Court finds the reasoning in these cases persuasive.

However, there is no majority view on the issue. The same number of states has recognized the good faith exception either by case law or statute. California – *People v. Camarella*, 818 P.2d 63 (Cal. 1991); District of Columbia – *U.S. v. Edelen*, 529 A.2d 774 (D.C. Ct. App. 1987); Florida – *Bernie v. State*, 524 So.2d 988 (Fla. 1988); Kansas – *State v. Hoeck*, 163 P.3d 252 (Kan. 2007); Kentucky – *Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992);

Louisiana – *State v. Ebey*, 491 So.2d 498 (La Ct. App. 1986); Missouri – *State v. Brown*, 708 S.W.2d 140 (Mo. 1986); Montana – *State v. Peterson*, 741 P.2d 392 (Mont. 1987); Ohio – *State v. Wilmoth*, 490 N.E.2d 1236 (Ohio 1986); South Dakota – *State v. Saiz*, 427 N.W.2d 825 (S.D. 1988); Virginia – *McCary v. Commonwealth*, 321 S.E.2d 637 (Va. 1984); Wisconsin – *State v. Ward*, 604 N.W.2d 517 (Wis. 2000); Arizona – Ariz. Rev. Stat. Ann. § 13-3925 (1999); Colorado – Colo. Rev. Stat. Ann. § 16-3-308 (1999); Illinois – 725 Ill. Comp. Stat. Ann. 5/114-12 (1999); Indiana – Ind. Code Ann. § 35-37-4-5 (1999); Texas – Tex. Crim. P. Code Ann. Art. 38.23(b) (2000).

Conclusion

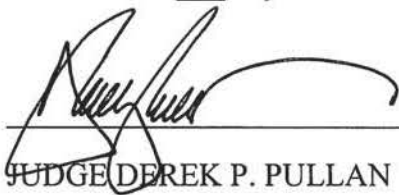
For these reasons, the Court holds that there is no good faith exception to the state exclusionary rule under article I, section 14.

ORDER

The Court grants the Defendants' joint motion to suppress.

This is the final order of the court. No further action by the court is necessary.

DATED this 10 day of November, 2014.



JUDGE DEREK P. PULLAN