

2015

State of Utah, Plaintiff/Appellant, v. Michael Rowan and Rebecca George, Defendant/Appellee

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,
Defendant/Appellee.

Reply Brief of Appellant

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Reply Brief of Appellant

Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to new matters raised in the appellee's brief.

ARGUMENT

I.

The magistrate issuing the search warrant had a substantial basis for finding probable cause.

The State has argued that contrary to the trial court's conclusions, the search warrant affidavit satisfied the Fourth Amendment probable cause requirement. Aplt.Brf. 12-20. But Defendants argue that the affidavit did not satisfy the probable cause requirement of Article I, § 14 ("Section 14") and that this Court should conduct de novo review under the State constitution. Aplt.Brf. 12-22. Neither claim was made below.

In their first motion to suppress, Defendants argued that the affidavit did not establish probable cause under either the Fourth Amendment or Section 14. R27-37. But Defendants' Section 14 claim was nominal, claiming only that it "'provides a greater expectation of privacy than the Fourth Amendment as interpreted by the United States Supreme Court.'" R36-37 (quoting *State v. Brake*, 2004 UT 95, ¶15, 103 P.3d 699, and *State v. DeBooy*, 996 P.2d 546, 549 (Utah 2000)). Not surprisingly, the district court did not address Defendants' state constitutional claim in its order denying the motion to suppress. It simply ruled that the warrant was not supported by probable cause but admitted the evidence under the Fourth Amendment's good faith exception, as articulated in *United States v. Leon*, 468 U.S. 879 (1984). See R226-32.

Apparently seeking relief on alternative grounds, Defendants for the first time on appeal propose new, distinct state constitutional standards for both probable cause and the review of a magistrate's probable cause determination. They argue that (1) Section 14's probable cause requirement is more demanding than the Fourth Amendment's probable cause requirement, Aple.Brf. 18-22, and (2) the magistrate's probable cause determination should be reviewed de novo, not with "great deference" as under the Fourth Amendment, Aple.Brf. 12-18. Defendants now make these claims

despite the fact that in their motion to suppress, they relied on State cases that treated the state and federal standards the same. *See* R27-37 *and cases cited therein*.

Defendants' request that the Court affirm the trial court's ruling on their proposed, distinct constitutional standards seems to stretch the appellate doctrine of affirming on alternative grounds beyond its contemplated limits—i.e., asking the Court to affirm on a basis in the law that has never before been recognized by the Court. That said, this Court should reject different standards under the State constitution.

A. Section 14's probable cause requirement is the same as the Fourth Amendment's probable cause requirement.

Defendants argue that the probable cause requirement for warrants under Section 14 is more demanding than that under the Fourth Amendment. Aple.Brf. 18-22. To the contrary, when the framers of the Utah Constitution drafted Section 14, they intended to afford the same protections guaranteed under the Fourth Amendment.

This Court has observed that “federal Fourth Amendment protections *may* differ from those guaranteed our citizens by [Section 14 of] our state constitution.” *Brigham City v. Stuart*, 2005 UT 13, ¶ 10, 122 P.3d 506 (emphasis added), *overruled on other grounds*, 547 U.S. 398 (2006). That said, the Court has historically “considered the protections afforded to be one and

the same.” *State v. Watts*, 750 P.2d 1219, 1221 (Utah 1988). Even in those rare cases where the Court has examined an issue under an independent state constitutional analysis, it has generally adopted the Fourth Amendment doctrine. *See, e.g., State v. DeBooy*, 2000 UT 32, ¶ 19, 996 P.2d 546 (adopting “analysis and rationale” of Fourth Amendment jurisprudence in examining administrative highway checkpoints); *Watts*, 750 P.2d at 1221 (holding that like Fourth Amendment, Section 14 does not protect against unreasonable private searches); *Sims v. Collection Div. of the Utah State Tax Comm’n*, 841 P.2d 6, 10, 14-15 (Utah 1992) (plurality opinion) (adopting analysis and rationale of *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), in concluding that quasi-criminal proceedings are subject to exclusionary rule).

In only one circumstance has a majority of this Court held that Section 14 provides greater protection than the Fourth Amendment. In *State v. Thompson*, the Court held that unlike the Fourth Amendment, Section 14 recognizes a legitimate expectation of privacy in bank records. 810 P.2d 415, 417-18 (Utah 1991) (rejecting rationale of *United States v. Miller*, 425 U.S. 435 442 (1976)). Another case often cited as an example of providing greater protections garnered the support of only a plurality: *State v. Larocco*, 794 P.2d 460, 464-71 (Utah 1990) (plurality opinion) (concluding that car thief had reasonable expectation of privacy in stolen car).

In sum, “the truism that article I, section 14 may provide greater protections to Utah citizens than the Fourth Amendment,” *State v. Worwood*, 2007 UT 47, ¶19, 164 P.3d 397, does not mean that it provides broader protections generally. Indeed, a review of Section 14’s text, its evolution, and its historical backdrop reveals that the framers’ intended that it provide the same protections as those guaranteed under the Fourth Amendment.

1. When interpreting Section 14, this Court should look to its text and to the purpose and intent of its framers and the people who ratified it.

The threshold question is whether this Court should concern itself at all with Fourth Amendment jurisprudence when examining Section 14, and if so, under what circumstances it should “depart from federal Fourth Amendment doctrine and chart [its] own course.” *State v. Brake*, 2004 UT 95, ¶16 n.2, 2004 UT 95. As the State explained in its opening brief, this Court should answer that question by turning first to the constitutional text itself, and then to historical evidence of the framers’ intent and the intent of the people who ratified the state constitution. *See* Aplt.Brf. 31-33.

This Court has suggested that federal analysis which is flawed, confusing, or inconsistent may also justify independent analysis. *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106 (citing *Larocco*, 794 P.2d at 467-70, and *Watts*, 750 P.2d at 1221 n.8). But a perceived flaw in federal analysis is

not a principled basis for departing from the federal standard. Indeed, interpreting the state provision differently simply because the court believes the federal analysis to be flawed is not an interpretive framework at all. It is reactive and result-oriented, and irrelevant to a determination of the framers' intent.

As explained in Justice Durrant's concurring opinion in *American Bush v. City of South Salt Lake*, "a historical analysis of our state constitution is the most appropriate interpretive course to follow when confronted with constitutional questions." 2006 UT 40, at ¶ 86, 2006 UT 40 (Durrant, J., concurring). In this context, it is the most appropriate method for determining whether Section 14 provides broader search and seizure protections than the Fourth Amendment. This interpretive framework anchors the judicial enterprise "to the text of the constitution as understood and intended by its framers and the voters who ratified it" and "provides stability to state government while remaining true to the principle that it is the people of this state who should ultimately determine how our society should be structured." *Id.* at ¶¶ 83-84; accord Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 Utah L. Rev. 751, 774-80 (1993) (endorsing "historically-based" approach that incorporates neutral principles).

2. Section 14 was generally intended to provide the same protections afforded under the Fourth Amendment.

An examination of the text, background, and history of Section 14 reveals that its framers, and the people who ratified it, generally intended to preserve the same protections guaranteed under the Fourth Amendment.

a. The text of Section 14 is the surest indication that the protections afforded thereunder were intended to mirror those of the Fourth Amendment.

The language of Section 14 “contains the surest indication of the intent of its framers and the citizens of Utah who voted it into effect.” *American Bush*, 2006 UT 40, ¶16. In all relevant respects, Section 14 is identical to the Fourth Amendment. It differs only in punctuation, capitalization, and the omission of the unnecessary “and” that precedes “particularly” in the Fourth Amendment:

Fourth Amendment (*differences identified with editing marks*)

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.

Article I, Section 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.

Nothing in the text of Section 14 indicates any enlargement or expansion of rights beyond those afforded under the Fourth Amendment. Like the Fourth Amendment, Section 14 secures the right of the people “against unreasonable searches and seizures,” and like the Fourth Amendment, it requires that warrants be based “upon probable cause,” be “supported by oath or affirmation,” and “particularly describ[e] the place to be searched[,] and the person(s) or thing(s) to be seized.” *Id.* As further explained below, this identity of language is strongly indicative of the framers’ intent to provide protections identical to those of the Fourth Amendment.

b. The evolution of Utah’s search and seizure provision suggests that Utah’s framers intended to provide protections that mirrored the Fourth Amendment.

The evolution of Utah’s search and seizure provision also suggests that the framers intended to provide Utah citizens with the same protections as those afforded under the Fourth Amendment. The constitutional convention of 1895 represented the territory’s sixth attempt at statehood. *See Linda Thatcher, A Chronology of Utah Statehood, Beehive History* 21, at 28-32 (1995). The search and seizure provision of the territory’s six proposed constitutions evolved from a version unlike the Fourth Amendment to a version that is, in all material respects, identical to the Fourth Amendment:

1849 Draft. The people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures.¹

1862 Draft. The people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures.²

1872 Draft. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized.³

1882 Draft. 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 on probable cause, supported by oath or affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things, to be seized.⁴

1887 Draft. 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 on probable cause, supported by oath or affirmation, par-

¹ 1849 Draft Constitution of the State of Deseret, Art. VIII, sec. 6, reproduced in Laws of Utah 44, 55 (1855) [hereinafter "1849 Draft Const., art. VIII, § 6"].

² 1862 Draft Constitution of the State of Deseret, Art. II, sec. 5, as reported in THE DESERET NEWS, Jan. 29, 1862, at 242 [hereinafter "1862 Draft Const., art. II, § 5."].

³ 1872 Draft Constitution of the State of Deseret, art. I, sec. 18, as reported in THE DESERET NEWS, Mar. 6, 1872, at 53 [hereinafter "1872 Draft Const., art. I, § 18"].

⁴ 1882 Draft Constitution of the State of Deseret, art. I, sec. 16, as reported in Constitution of the State of Utah: Adopted by the Convention, April 27, 1882 [hereinafter "1882 Draft Const., art. I, § 16"].

ticularly describing the place to be searched, and the persons or things to be seized.⁵

1895. 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.⁶

The 1849 and 1862 drafts were identical, and included only a reasonableness clause. They did not include a warrant clause, as found in the Fourth Amendment and almost all state constitutions of the time. *See* State-by-State Comparison Chart [hereinafter “CC”] (Addendum). And rather than tracking the reasonableness language of the Fourth Amendment, the 1849 and 1862 versions tracked the language found in the Delaware, Pennsylvania, and Connecticut constitutions (using active voice and referring to “possessions” rather than “effects”). *See* CC, 1-2.⁷

⁵ 1887 Draft Constitution of the State of Utah, art. I, sec. 19, as reported in THE DESERET NEWS, Jul. 13, 1887, at 412 [hereinafter “1887 Draft Const., art. I, § 19”].

⁶ Utah Const. art. I, sec. 14; 2 Proceedings at 1856.

⁷ The constitutions of Massachusetts, South Carolina, New Hampshire, Kentucky, Tennessee, Mississippi, Alabama, Maine, Michigan, and Texas also substantially tracked the reasonableness clause language of Delaware, Pennsylvania, and Connecticut. *See* CC, at B2-7. The Rhode Island, Vermont, and Ohio constitutions referred to “possessions” rather than “effects,” but used the passive “shall not be violated” language. *See* CC, at B4-5.

Subsequent drafts adopted the format of the Fourth Amendment, incorporating both a reasonableness clause and a warrant clause. These versions also abandoned the constitutional language of Delaware, Pennsylvania, and Connecticut, in favor of Fourth Amendment phraseology. While similar to the Fourth Amendment, the 1872 version appears to have “simply incorporated Nevada’s search and seizure guarantee.” Paul G. Cassell, *Search and Seizure and the Utah Constitution: The Irrelevance of the Antipolygamy Raids*, 1995 BYU L. Rev. 1, 3 (1995). “More than 120 copies of the Nevada Constitution were printed and distributed to the delegates” at the convention. *Id.* The 1872 delegates thereafter adopted a search and seizure provision that, but for some differences in capitalization, was identical to that found in the Nevada Constitution, with its somewhat unique and awkward language.⁸ It thus secured the right against unreasonable “*seizures and searches*” and provided that warrants may not issue “but *on* probable cause, . . . particularly describing *the place or places to be searched, and the person or persons, and thing or things to be seized.*” 1872 Draft Const., art. I, sec. 18 (emphasized language denoting differences from Fourth Amendment); CC, at 9.

⁸ Utah’s version only differed in that unlike the Nevada provision, it did not capitalize “oath” or “affirmation.” See CC, at B9.

The 1882 version abandoned the “seizures and searches” language of the Nevada model, adopting instead the “searches and seizures” language of the Fourth Amendment. *See* 1882 Draft Const., art. I, § 16. Other than some punctuation differences, it made no other changes to the Nevada model. The 1887 version moved further away from the Nevada model, discarding the awkward warrant clause language. *See* CC, at 9. The 1887 version instead tracked the language of the Fourth Amendment, requiring that warrants “particularly describ[e] the place to be searched, and the persons or things to be seized.” 1887 Draft Const., art. I, § 19; U.S. Const. amend. IV.

The final and current search and seizure provision, adopted at the 1895 Constitutional Convention, represented a final repudiation of the Nevada model, replacing “on probable cause” with the Fourth Amendment language, “upon probable cause.” *Id.* As explained above, the 1895 version is materially identical to the Fourth Amendment, making only minor stylistic changes to the Fourth Amendment language.

In sum, the framers chose to mirror the language of the Fourth Amendment even though they had a variety of other models to choose from. They might have chosen to pattern Section 14 after the more broadly worded Washington provision, which stated that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of

law.” Wash. Const. art. I, § 7 (Oct. 1, 1889); *see also Utah Example, supra*, at 751, 801 & n.312. They might have specified that the probable cause showing be made in writing or by affidavit, as required under the constitutions of Rhode Island, Illinois, Missouri, Colorado, South Dakota, Montana, Idaho, and Wyoming. *See CC*, at 4,6,9-10. They might have chosen to adopt the language used by some of the original thirteen states. *See CC*, at 1-4. Or, they might have added to the wording of the Fourth Amendment, as did Nevada and other states. *See, generally, CC*, at 4-9. Instead, they adhered to the language of the Fourth Amendment.

The evolution of Utah’s search and seizure provision—from a single reasonableness clause, to the Nevada model, to the near replica of the Fourth Amendment—suggests that Utah’s framers were satisfied with the protections afforded under the Fourth Amendment and intended to secure for Utahns those same protections. Indeed, given the evolving history of Utah’s provision, which culminated in the adoption of a provision mirroring the Fourth Amendment, “it is difficult to argue that the Utah provision should be more broadly interpreted.” *Antipolygamy Raids, supra*, at 5.

- c. **Historical evidence suggests that both the framers and the people of Utah intended that Section 14 afford the same Fourth Amendment protections.**

Historical evidence also supports the conclusion that both the framers of the Utah Constitution and the people who ratified it intended that Section 14 afford the same protections guaranteed under the Fourth Amendment. In approving the state constitution, Utahns understood that Section 14 was inspired by the Fourth Amendment. And the debates at the constitutional convention make it clear that when the framers copied the constitution, they meant to afford the same rights.

In adopting the Utah Constitution, the framers also adopted “an address to the people of Utah, to accompany the Constitution,” when it was presented to the people for a vote on ratification. 2 *Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March, 1895, to Adopt a Constitution for the State of Utah* 1847 (Salt Lake City, Star Printing Co. 1898) [hereinafter “*Proceedings*”]. That address made plain to Utahns that the inspiration behind Section 14 came from the Fourth Amendment:

The inspiration behind the declaration of rights came from the great parent bill of rights framed by the fathers of our country.

2 *Proceedings* 1847. Where the language of Section 14 copied the Fourth Amendment, Utahns surely understood the guarantees of the two provisions to be one and the same.

The debates at the convention also underscored an intent that Section 14 afford the same rights guaranteed by the Fourth Amendment. As noted, the Bill of Rights was the “inspiration,” i.e., the starting point or foundation, upon which the declaration of rights was built. And an examination of the declaration of rights, as adopted by the Convention, reveals that the framers generally retained the fundamental guarantees of the Bill of Rights. But the framers also understood that they were not obligated to provide protections identical to the Bill of Rights. Thus, Dennis Clay Eichnor, a member of the Rights Committee, “consulted [all] forty-four state constitutions, in preparing [the] declaration of rights. *Id.* at 102. In many instances, the framers borrowed liberally from other state constitutions to clarify, supplement, or oth-

erwise modify the federal right.⁹ In other words, they built upon the foundation of the “great parent bill of rights.” 2 *Proceedings* 1847.

⁹ See, e.g. Utah Const. art. I, § 1 (adding that all men have right “to worship according to the dictates of their consciences” and “to communicate freely their thoughts and opinions, being responsible for the abuse of that right”); Utah Const. art. I, § 4 (incorporating First Amendment religious liberty clauses but adding that “[t]he rights of conscience shall never be infringed,” that “[t]here shall be no union of church and State,” that participation in elections and juries may not be conditioned on religious beliefs, and that money may not be appropriated for religious functions or establishments); Utah Const. art. I, § 6 (specifying that people’s right to bear arms is “for their security and defense”); Utah Const. art. I, § 9 (prohibiting “unnecessary rigor” of prisoners in addition to prohibiting excessive bails and fines, and cruel and unusual punishment, as found in Eighth Amendment); Utah Const. art. I, § 10 (expounding on right to jury trial); Utah Const. art. I, § 12 (adding right to have “a copy” of the accusation, “the right to appear and defend in person,” the right “to testify in [one’s] own behalf,” and “the right to appeal in all cases,” providing that “the accused, before final judgment, [could not] be compelled to advance money or fees to secure the[se] rights,” and adding that “a wife shall not be compelled to testify against her husband, nor a husband against his wife”); Utah Const. art. I, § 13 (permitting initiation of criminal prosecution by grand jury indictment or, unlike Fifth Amendment, “by information after an examination and commitment by a magistrate”); Utah Const. art. I, § 15 (adding that freedom of speech and of press may not be restrained and setting parameters for defamation law); Utah Const. art. I, § 19 (defining treason using same terminology as U.S. Const., art. III, § 3, but unlike art. III, § 3, not recognizing that a conviction for treason can be based on traitor’s confession in open court); Utah Const. art. I, § 20 (providing same rights of Third Amendment regarding quartering of soldiers, but adding provision that “[t]he military shall be in strict subordination to the civil power”); Utah Const. art. I, § 22 (prohibiting taking of private property for public use without just compensation, as in Fifth Amendment, but adding that private property may not be “damaged for public use without just compensation”).

In other instances, the language of federal provisions was left unaltered (save for stylistic changes). As discussed, the framers left unaltered the language of the Fourth Amendment in Section 14. That section “was read and passed without amendment” or discussion. ¹ *Proceedings*, at 319. But the framers’ intent that Section 14 afford the same protections guaranteed by the Fourth Amendment is evidenced in their debates on other provisions that were not altered from the federal language.

Section 21 (proposed as section 22) was proposed by the Rights Committee to read:

Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in this State.

¹ *Proceedings* 326. This tracked the language of the Thirteenth Amendment:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been unduly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. Const. amend. XIII. Orson Whitney moved to amend the proposed provision, so “that the word ‘whereof’ be stricken out and the words, ‘of which’ be substituted.” ¹ *Proceedings* 326. This proposal to amend was swiftly opposed:

Mr. EICHNOR. I think that this is the language of the Constitution of the United States.

Mr. WELLS: Exactly.

Mr. EICHNOR: *I believe in adhering to the Constitution of the United States when we copy it.*

Mr. WHITNEY: It is a hundred years old.

1 *Proceedings* 326 (emphasis added). Following this discussion, the question was taken on the motion and “the amendment was rejected.” 1 *Proceedings* 326.

The debate regarding Section 5 reveals why the delegates believed in adhering to federal constitutional language when they copied it. Unlike Section 21, Section 5 was originally proposed in language that differed from the United States Constitution:

The privilege of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion or invasion, the public safety *imperatively demands it*.

1 *Proceedings* 252 (emphasis denoting difference from U.S. Const. art. I, § 9). On objection of one of the delegates, the word “imperative” was stricken, as it was not found in any of the other constitutions. 1 *Proceedings* 252. Another delegate proposed that the provision be amended “by adding ‘in such a manner as shall be prescribed by law.’” 1 *Proceedings* 252-53. But Charles Varian opposed the amendment, asking why it “cannot . . . be safely left to such occasions and to be exercised in accordance with the general precedent and history of its exercise in this country.” 1 *Proceedings* 252-53. Others op-

posed the amendment on grounds that both the United States Constitution and most state constitutions did not include such language. See 1 *Proceedings* 253-57. The proposed amendment was thus rejected. Delegate Evans from Weber County then proposed that the words “demands it” be replaced with the words, “requires it,” as provided in the United States Constitution:

I just want to say that is the exact language of the Constitution of the United States and [“demands it”] might be considered in a different way. The words, ‘requires it’ have a well understood meaning by the construction of the courts. Now it may be considered differently if we use the words ‘demands it,’ because it might be that there should be some demand made upon the authorities whenever the public safety requires it. For that reason, I think it would be better to use the usual language.

1 *Proceedings* 257. The question was thereafter taken upon the motion and the amendment was adopted by the Convention, resulting in a provision that tracked the language of the United States Constitution. 1 *Proceedings* 257.

Another example was the debate on Section 12, which set forth the accused’s right “to be confronted by the witnesses against him.” Utah Const. art. I, § 12. Mr. Van Horne proposed an exception to the confrontation right, where “evidence by deposition may be authorized by law.” 1 *Proceedings* 306. This proposed amendment was met with fierce opposition on the grounds that it represented a departure from established precedent. In opposing the amendment, Charles Varian remarked that it “proposed to

interpolate something new here involving something that puts us all at sea; again, requiring, as of necessity it will, other judicial construction, and interpretation" 1 *Proceedings* 307. Concluding his remarks, Mr. Varian asked:

Why not leave it as it is? *Why not leave it within the ancient landmarks, so that every lawyer and every layman may know just what this does mean? Judicial decision after decision, all in one line, particularly have determined the meaning of this language as the committee have reported it here. Why should we stray away and put something in there that will tend to bring about and will doubtless bring about this confusion and conflict in interpretation?*

1 *Proceedings* 307-08 (emphasis added). The proposed amendment was thereafter rejected. 1 *Proceedings* 308. Once again, the framers rejected language that would inject uncertainty in the right provided, in favor of language whose meaning was well established.

The debates on these unaltered sections reveal that when the framers copied language from the United States Constitution, they did so to ensure that the provision would not "be considered in a different way." 1 *Proceedings* 257. When using language from the United States Constitution, or other constitutions, they did not seek to recognize rights that might be interpreted differently, but rather to guarantee rights that were firmly established by the courts. They sought stability and uniformity.

In sum, the framers set as their inspiration the Bill of Rights and did not depart from the language of that charter in drafting Section 14. Absent evidence to the contrary, this Court should thus presume that the Constitution's framers, and the people who ratified it, intended that the protections afforded under the Fourth Amendment and Section 14 "be one and the same." *Watts*, 750 P.2d at 1221.

3. The cases cited by Defendants do not support the proposition that the probable cause requirement of Section 14 is more demanding than that of the Fourth Amendment.

In support of their claim that Section 14's probable cause requirement is more demanding than that of the Fourth Amendment, Defendants rely heavily on *Allen v. Lindbeck*, 97 Utah 471, 93 P.2d 920 (1939). *See* Aple.Brf. 20-21. They misread that case.

At issue in *Lindbeck* was a statute that required judges to issue a search warrant "[w]henever any person shall make affidavit ... that he has reason to believe that any receptacle (e.g., milk bottles) ... is in the possession of " another business without lawful authority. 93 P.2d at 921 (quoting Rev. Stat. Utah § 95-2-10 (1933)). *Lindbeck* held that this provision "does not meet the constitutional requirements [of probable cause] and is therefore invalid." *Id.* at 923. Based on *Lindbeck's* holding, Defendants argue that "[h]aving *reason to believe* something means there are facts that one can point

to supporting that belief,” but that “*reason to believe* is not probable cause.” Aple.Brf. 21. This is a misreading of *Lindbeck*.

The Court did not read the statute as requiring that the affidavit include “the facts that one can point to supporting [a reasonable] belief.” Aple.Brf. 21. It read the statute as omitting such a requirement: “the statute here in question ... merely [requires] that the affiant ‘has reason to believe and does believe,’ without requiring him to furnish any evidence or cause” for that belief. *Id.* at 923. And that omission was the statute’s fatal flaw: “A warrant to search and seize, which follows upon a statement based solely upon the belief of the affiant, rests upon the reasoning of the affiant, based upon the secret facts of which he may have knowledge, and the conclusion which results from such reasoning is affiant’s, not that of the judicial officer.” *Id.* at 924.

Lindbeck held that probable cause exists where there is “an apparent state of facts that a discreet and prudent man would be led to the belief that the accused, at the time of the application for the warrant, was in possession of property.” *Id.* at 923 (citation omitted). Defendants contend that *Lindbeck*’s probable cause formulation is somehow different than the probable cause formulation of the Fourth Amendment—that based on the facts, a reasonable person “*would conclude* ... that evidence of a crime actually will be

found.” Aple.Brf. 21 (emphasis added). But that formulation is no different than the Fourth Amendment formulation, requiring that there be “a *fair probability* that contraband or evidence of a crime will be found.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (emphasis added). And Defendant ultimately agrees. See Aple.Brf. 21 (observing that courts must consider “the totality of the circumstances and make a practical decision whether there is a fair probability that evidence of a crime will be found in a particular place”). Indeed, *Lindbeck’s* formulation is the same used by the U.S. Supreme Court in a case issued fourteen years before *Lindbeck*:

“[T]he question [is] whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched, and if the apparent facts set out in the affidavit are such *that a reasonably discreet and prudent man would be led to believe* that there *was* a commission of the offense charged

Dumbra v. United States, 268 U.S. 435, 441 (1925) (emphasis added).

Defendants cite three other Utah cases in support of his claim of a more demanding probable cause standard under the state constitution: *State v. Espinoza*, 723 P.2d 420 (Utah 1986); *Kaysville City v. Mulcahy*, 943 P.2d 231 (Utah App. 1997); and *Salt Lake City v. Bench*, 2008 UT App 30, 177 P.3d 655. But those cases either addressed the Fourth Amendment only, or treated the Fourth Amendment and Section 14 as coextensive. See *Espinoza*, 723 P.2d at 421 (addressing probable cause challenge under *Gates’s* Fourth Amendment

formulation); *Mulcahy*, 943 P.2d at 234 (addressing reasonable suspicion challenge under Fourth Amendment); *Bench*, 2008 UT App 30, ¶7 (treating reasonable suspicion under Fourth Amendment and Section 14 as coextensive). Those cases, therefore, also do not support Defendants' claim of a more demanding probable cause standard under the Utah Constitution.

B. This Court should pay great deference to the magistrate's probable cause determination on a warrant.

Defendants also argue that this Court should conduct a de novo review of the magistrate's probable cause determination. Aplt.Br. 12-18. Defendants urge the Court to reject the standard of review applied for Fourth Amendment probable cause determinations on a warrant, i.e., whether "the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed." *Gates*, 462 U.S. at 238-39 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). They argue that anything less "destroys the probable cause standard, thereby diminishing individual civil rights." Aple.Br. 13. Defendants fundamentally misunderstand the nature of appellate review.

A standard of review does not alter the law or the requirements of the law. Rather, it is a policy decision, the "primary function" of which "is to apportion power and, consequently, responsibility between trial and appellate courts for determining an issue or a class of issues. Put another way, a standard of review allocates discretion between trial and appellate courts."

State v. Thurmond, 846 P.2d 1256, 1265-66 (Utah 1993) (internal citations omitted). The appropriate standard of review for a given class of issues thus “turn[s] on a determination that, *as a matter of the sound administration of justice*, one judicial actor is better positioned than another to decide the issue in question.’” *Id.* at 1266 (citation omitted) (emphasis added). The sound administration of justice dictates that the probable cause determination of magistrates on a warrant be reviewed deferentially.

Whether an affidavit establishes probable cause is a mixed question of fact and law. In its more recent cases, this Court has held that the applicable standard of review for mixed questions depends on whether the mixed question is “law-like or fact-like.” *Sawyer v. Dep’t of Workforce Services*, 2015 UT 33, ¶11, 345 P.3d 1253. “Law-like mixed questions are reviewed de novo, while fact-like mixed questions are reviewed deferentially.” *Id.* To determine whether a mixed question is law-like or fact-like, this Court “evaluate[s] the ‘marginal costs and benefits’ of conducting either a searching de novo review or a deferential review of a lower tribunal’s resolution of the mixed question.” *Id.* at ¶12. That cost-benefit analysis entails the balancing of three factors:

- (1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court’s application of the legal rule relies on facts observed by the trial judge, such as a witness’s appearance and demeanor,

relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts; and (3) other policy reasons that weigh for or against granting discretion to trial courts.

State v. Levin, 2006 UT 50, ¶25, 144 P.3d 1096 (internal quotation marks and citations omitted).

In cases involving a warrantless search or seizure, this Court applies de novo review. *State v. Duran*, 2007 UT 23, ¶5, 156 P.3d 795. The Court reviews warrantless cases nondeferentially even though the first two factors favor appellate deference—“search and seizure issues are highly fact sensitive,” *State v. Lopez*, 873 P.2d 1127, 1130 (Utah 1994), and the facts upon which reasonableness is judged frequently depend on “a trial court’s credibility assessments that cannot be adequately reflected in the record,” *Levin*, 2006 UT 50, ¶26. But the Court has concluded that the third factor—policy considerations—outweighs the first two factors. The Court has reasoned that non-deferential review is warranted in these cases “ ‘given the substantial Fourth Amendment interests’ ” at stake and “ ‘the interest in having uniform legal rules’ ” that govern an officer’s warrantless actions.

Warrant-based searches, like warrantless searches, are also fact-intensive, “com[ing] in many shapes and sizes from many different types” of informants, *Gates*, 462 U.S. at 232, which again favors deferential review.

And like warrantless searches, the judge (acting as magistrate) is in the better position to judge the facts supporting probable cause. It is true that the probable cause showing for a warrant-based search is generally judged not on testimony before trial courts after-the-fact, but on “the information presented in the four corners of the affidavit.” *United States v. Jackson*, 470 F.3d 299, 306 (6th Cir. 2006). This would seem to favor de novo review, inasmuch as the appellate court seems just as capable of reviewing the factual allegations in an affidavit as a magistrate. But such a conclusion would ignore the fact that when an officer applies for a warrant, the magistrate is in a position to question the affiant to assure the accuracy of, or clarify, the factual allegations in the affidavit. *Franks v. Delaware*, 438 U.S. 154, 166-67 (1978). Although the nature of this inquiry is *ex parte*, and does “not always permit the magistrate to make an extended independent examination,” *id.* at 169, the information gleaned from such an inquiry, as well as the magistrate’s likely familiarity with the officer, “cannot be adequately reflected in the record available to appellate courts.” *Levin*, 2006 UT 50, ¶25. So, once again, this factor favors deferential review. *Id.*

Unlike warrantless searches, the policy considerations for warrant-based searches also favor deferential review. In the case of a warrantless search or seizure, police act while “engaged in the often competitive enter-

prise of ferreting out crime” — *absent* any review “by a neutral and detached magistrate.” *Johnson v. United States*, 333 U.S. 10, 14 (1948). But a warrant-based search or seizure protects citizens in the first instance “by interposing, *ex ante*, the ‘deliberate, impartial judgment of a judicial officer ... between the citizen and the police.’” *United States v. Grubbs*, 547 U.S. 90, 99 (2006) (quoting *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963)). For this reason, both the Fourth Amendment, and thus by definition, Section 14 (*supra*, at, 3-24), express a strong preference for warrants. *Gates*, 462 U.S. at 236 (holding that Fourth Amendment embodies a “strong preference for searches conducted pursuant to a warrant”).

But if, on review, searches and seizures conducted with warrants were treated no differently than warrantless police action, the result would be a “grudging or negative attitude ... toward warrants.” *Id.* (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)). Such an approach “is inconsistent with the ... strong preference for searches conducted pursuant to a warrant.” *Id.* When officers secure a warrant, they act under the authority of a disinterested judiciary — satisfied that the search is supported by probable cause and that it is sufficiently limited in scope. *Id.* And when this occurs, “intrusion upon interests protected by the Fourth Amendment,” and thus by Section 14, “is less severe than otherwise may be the case.” *Id.* at 237 n.10.

Moreover, and as Defendants seem to concede, *see* Aple.Brf. 21, the precise meaning of probable cause “cannot be articulated with precision.” *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). As its very name implies, probable cause does not deal in certainties, but “turn[s] on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” *Gates*, 462 U.S. at 232. As a result, “[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause” *United States v. Leon*, 468 U.S. 897, 914 (1984). For this reason, a magistrate’s probable cause determination should not be upset on review “so long as the magistrate had a ‘substantial basis for ... conclud[ing]’ that a search would uncover evidence of wrongdoing.” *Gates*, 462 U.S. at 236 (citation omitted). Where reasonable minds may differ, it cannot be said that such a search is unreasonable, the “touchstone” of any search and seizure inquiry. *See State v. Moreno*, 2009 UT 15, ¶22, 203 P.3d 1000 (recognizing that reasonableness is touchstone of constitutionality of any governmental search).

In sum, the strong, constitutional preference for warrants is best served by granting “‘great deference,’” to the probable cause determination of magistrates. *Gates*, 462 U.S. at 236 (citation omitted). This standard of review does not, as Defendants contend, weaken the probable cause standard.

It simply apportions greater responsibility to magistrates in determining probable cause given a magistrate's advantaged position to assess the facts; the reality that the probable cause standard is "not readily, or even usefully, reduced to a neat set of legal rules," *id.* at 232; and, most of all, given the strong preference for warrants.

C. The magistrate had a substantial basis for concluding that the warrant was supported by probable cause.

The trial court concluded that based on its review of the search warrant affidavit, police "were 'ultimately unsuccessful in corroborating *any* information provided by the CI.'" Aple.Brf. 23 (quoting R202) (emphasis supplied by Defendants).

Defendants allege that the affiant was "satisfied to accept the CI's word, which had not been and, apparently could not be, verified or confirmed in any way." Aple.Brf. 24. But the affiant did not simply "accept the CI's word" or exhibit "blind trust" in his statements, as Defendants incorrectly claim. Aple.Brf. 24. The affidavit demonstrates that police attempted to verify the facts they could and, when those efforts proved unsuccessful, conducted a controlled buy to corroborate the CI's claim. For example, police "attempted through every avenue to try and identify Mike" by conducting "[r]ecords checks on the residence, registrations of vehicles, and requesting information from other agencies." R63:¶10. But even after they "ex-

hausted” those checks, Mike’s “personal identification” could not be verified. R63:¶10 (noting that Mike’s identity remained “unknown”). The affidavit then demonstrates that police conducted a controlled buy to corroborate the CI’s claim.

Defendants’ argument challenging the probable cause showing in the affidavit is the very sort of hypertechnical approach our courts have long disdained. *United States v. Ventresca*, 380 U.S. 102, 109 (1965) (holding that “the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner”); *accord Gates*, 462 U.S. at 236 (same); *State v. Anderson*, 701 P.2d 1099, 1101 (Utah 1985) (recognizing that Supreme Court has rejected examination of warrant affidavit that is “‘hypertechnical and divorced from [reality]’”) (quoting *Massachusetts v. Upton*, 466 U.S. 727, 732 (1984)). Instead, “affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion.” *Ventresca*, 380 U.S. at 109. That is what the trial court, and Defendants on appeal, have failed to do.

Defendants complain that the affidavit does not say when Mike was selling the drugs, how he knew where Mike kept the drugs, or how he knew about how the drugs were packaged. Aple.Brf. 22. They thus argue that

“[n]othing about the affidavit reflects that the allegations CI reported were ‘based on his first-hand knowledge.’” Aple.Brf. 26 (quoting Aplt.Brf. 17). Not so. From the CI’s statement that Mike “was in possession of marijuana and would sell it to the CI,” the magistrate reasonably inferred that Mike was presently in possession of marijuana. R62:¶4. From the CI’s claim that he “has been in Mike’s home in the past and has made drug purchases from him,” the magistrate reasonably inferred that the CI saw the drugs inside Mike’s house, saw that Mike had the drugs in bulk, and saw how they were packaged (vacuum sealed). R62:¶4. And the description of vacuum-sealed packaging was, based on the officer’s training and experience, consistent with dealers of large quantities of marijuana. R62:¶4 (“from your affiant’s training and experience, individuals who package marijuana in this manner typically deal in large quantities”).¹⁰

Defendants, however, essentially ask the Court to “parse[] several statements in the affidavit to reach the ... conclusion” that probable cause does not exist. *State v. Saddler*, 2004 UT 105, ¶16, 104 P.3d 1265. For example, Defendants contend that the basis of the CI’s knowledge is unknown because the affidavit does not say that the CI specifically said that Mike had

¹⁰ The magistrate could also reasonably infer that the CI’s claim that Mike “travel[ed] to California to obtain marijuana to sell here in Utah” came from conversations with Mike. R62:¶6.

the drugs currently, that the CI saw the marijuana in the house, or that the CI saw how the drugs were packaged. Aple.Brf. 22. And from the CI's admission that he was "unsure of exactly where" in the house Mike kept the drugs, R62:¶6, Defendants would have the Court infer that "the CI had not seen drugs in the house," Aple.Brf. 22—even though the CI said Mike "keeps his marijuana inside his residence," R62:¶6. Defendants ignore the reasonable inference that when the CI has purchased drugs from Mike, the CI remained in one room of the house while Mike went somewhere else in the house and returned with the drugs.

In short, Defendants ask the Court to "construe[] passages in the affidavit against the [magistrate's] reasonable construction." *Saddler*, 2004 UT 105, ¶17. But the "[e]xcessive technical dissection of an informant's tip or of the nontechnical language in the officer's affidavit" is contrary to this Court's task in construing the search warrant affidavit "in a common sense, reasonable manner." *State v. Hansen*, 732 P.2d 127, 130 (Utah 1987). "[R]eviewing courts should rely on a magistrate's 'reasonable construction' of ambiguity in an affidavit," not draw inferences that would defeat probable cause. *Saddler*, 2005 UT 105, ¶16. To do so is to take a "grudging or negative attitude" toward warrants. *Gates*, 462 U.S. at 236.

Defendants also ask the Court to draw inferences against a probable cause finding when they argue that “the affidavit contained significant errors that called into question the officer’s own credibility.” Aple.Brf. 29. Specifically, Defendants point to the affiant’s statements concluding that (1) “[t]he CI has provided creditable information and has not said anything that would prove false or misleading,” and (2) “[t]he information the CI has given has been investigated and proved credible.” R62:¶5. Defendants argue that these representations of the officer draw his credibility into question because he was unable to verify anything the CI said concerning Mike’s drug operations or identity. Aple.Brf. 29.

On this issue, the trial court observed that “[a]t best, these representations in the Affidavit are conclusory, at worst misleading.” R228:¶12 n.2. But the court ultimately rejected any claim that the officer “misle[d] the magistrate by misrepresenting facts in the affidavit.” R231-32; *accord* R275-76 (“I’m not persuaded this is a case in which the magistrate was mislead [sic] by information in the affidavit or that information was presented that the affiant knew was false or should have known was false.”). And indeed, the affiant’s credibility representations were no more than the conclusions of the officer based on the controlled buy.

After asserting that the CI's information had been investigated and proved credible, R62:¶5, the affiant explained that the CI had agreed to participate in a controlled buy in exchange for leniency on his charges, R62:¶5, described the steps taken during the controlled buy, and related the result of the controlled buy, R62:¶¶6-9. In other words, given the results of the controlled buy, the affiant merely claimed that "Mike was in possession of marijuana and would sell it to the CI" had "proved credible" and nothing the CI said proved to be "false or misleading." R62:¶¶5-9. This is a "reasonable construction" of the affidavit. *Saddler*, 2004 UT 105, ¶16. To construe it otherwise is error.

Defendants also take issue with the State's contention that the CI's credibility was bolstered by his admission that he had purchased drugs from Defendant, Aplt.Brf. 17-18. Specifically, Defendants argue that the State's reliance on *United States v. Harris*, 403 U.S. 573, 584 (1971), is misplaced. Aple.Brf. 26-27. He contends that "it was only because the informant's admissions in *Harris* was of ongoing and long term illegal activity, 'that over a long period and currently he had been buying illicit liquor on certain premises, itself and without more, implicated that property and furnished probable cause.'" Aple.Brf. 27. But *Harris* did not suggest that an admission of criminal wrongdoing supports probable cause only if the ad-

mission is “of ongoing and long term illegal activity,” as Defendants argue. Aple.Brf. 27.

Certainly, “admissions of crime do not always lend credibility to contemporaneous or later accusations of another.” *Harris*, 403 U.S. at 584. But *Harris* did not suggest that a criminal admission contributes to probable cause only if it is of ongoing and long-term activity. If it is, the admission “*itself and without more, ... furnish[es] probable cause to search.*” *Harris*, 403 U.S. at 584 (emphasis added). But even if it doesn’t, a criminal admission is generally “sufficient at least to *support* a finding of probable cause to search.” *Id.* at 583 (emphasis added). Certainly such is the case if the crime has not yet been prosecuted. *Harris* thus went on to observe that even if an informant’s criminal admission could not be used at the defendant’s trial, such a rule “should not be extended to warrant proceedings to prevent magistrates from crediting, *in all circumstances*, statements of a declarant containing admissions of criminal conduct.” *Id.* at 584 (emphasis added).

In any event, the CI’s admission here suggests that his drug purchases were both long term and ongoing. The CI had criminal charges pending against him and he admitted that he “has made drug *purchases*” from Defendant. R62:¶¶4-5. Moreover, the CI reported that Defendant “was in possession of marijuana,” suggesting that he had recently been there to buy

drugs. R62:¶4 (emphasis added). “Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions.” *Harris*, 403 U.S. at 583.¹¹

II.

Section 14 contemplates the usual remedies of statutory and common law, not exclusion at trial.

Defendants acknowledge, as they must, that the text of Section 14 does not mention the suppression or exclusion of evidence as a remedy for a violation of its provisions. Aple.Brf. 35. But Defendants argue that Section 14’s “language does not need to be explicit for exclusion to be constitutionally required.” Aple.Brf. 35. Defendants claim that “the meaning of the text, the meaning of the rights, implies exclusion as fundamental to the right.” Aple.Brf. 34. Their analysis is unpersuasive.

¹¹ Defendants also take issue with the State’s contention that the CI “risked losing the benefit of leniency in his criminal case if his report proved to be false.” Aplt.Brf. 16. They argue that “the risk of ‘losing the benefit’ [of leniency] is a fantasy” because police had no way of determining whether his report was false. Aple.Brf. 25-26. Not true: “The CI agreed to perform a controlled purchase of marijuana in exchange for leniency for pending charges against the CI.” R62:¶5. Accordingly, had the CI been unable to consummate the drug buy, he would not receive the benefit of leniency. That was clear.

Defendants' "textual" argument for a state exclusionary rule rests on the premise that Utah's framers could not have intended to create a constitutional right for which no remedy exists. Aple.Brf. 36. The State does not disagree. But the fact that the constitution contemplates a remedy does not mean that it contemplates exclusion as that remedy. It does not.

Defendants argue that Utah's framers "would have understood there must be a way to protect and enforce" Section 14 rights. Aple.Brf. 40, 36. They assert that the framers "intended the rights recognized in section 14 to be self-executing." Aple.Brf. 37. They reason therefrom that the search and seizure rights of Section 14 are "synonymous" with the remedy of exclusion, i.e., "exclusion is part and parcel of the right of the people to be secure from government crimes." Aple.Brf. 37, 40. But while Section 14 is self-executing, it does not follow that the constitutional remedy for a violation is exclusion.

This Court has recognized that Section 14 is indeed "self-executing." *In re Jensen*, 2011 UT 17, ¶63, 250 P.3d 465. The provision "directly prohibits unreasonable searches and seizures without probable cause for a warrant" and thus "sufficiently gives effect to the underlying rights and duties without implementing legislation." *Id.* But nothing in Section 14, nor in this Court's treatment of self-executing constitutional rights, suggest that exclusion is an appropriate, let alone a required, remedy. Rather, as explained in

In re Jensen, “a plaintiff’s remedy for state constitutional violation *rests in the common law*,” i.e., a claim for damages. *Id.* at ¶57 (emphasis added). Thus, less than 30 years after the constitution’s adoption, this Court recognized that a defendant’s remedy for a Section 14 violation is not exclusion, but suit “‘for the restoration of [his or her] property, and for the punishment of the trespasser or the announcement that the citizen may defend against such intrusion.’” *State v. Aime*, 62 Utah 476, 220 P. 704, 707 (1923) (citation omitted).

An exclusionary remedy for a Section 14 violation would have been a radical departure from the practice and understanding of the time. *See State v. Walker*, 2011 UT 53, ¶49, 267 P.3d 210 (Lee, J., concurring) (observing that “no appellate court in any state had excluded unlawfully obtained evidence under its constitution”). Had Utah’s framers intended to impose an exclusionary remedy, surely they would have done so explicitly. They did so twice in Article I, § 12: “The accused shall not be compelled to give evidence against himself; [and] a wife shall not be compelled to testify against her husband, nor a husband against his wife” Thus, like the Fifth Amendment right against self-incrimination, Utah’s self-incrimination and spousal privilege rights “contain[] a self-executing rule commanding the exclusion of evidence derived from such communications.” *Oregon v. Elstad*, 470 U.S.

298, 350 (1985). The absence of similar language in Section 14 bespeaks an intent not to impose an exclusionary remedy for violations of that provision, leaving it to “ ‘the usual and adequate provisions of the civil and criminal law.’ ” *Aime*, 220 P. at 702 (citation omitted).¹²

Defendants also claim that exclusion is necessary to “cur[e] the past harm, as well as protect[] against present and future violations.” *Aple.Brf.* 36. They argue that absent exclusion, their rights would be “forever extinguish[ed]” – the privacy invasion continuing with the evidence’s admission at trial. *Aple.Brf.* 36-39. According to Defendants, “[e]xclusion is about undoing the government’s wrongs ... and re-securing an individual’s person and property.” *Aple.Brf.* 36. But again, nothing in the language of Section 14, or in the practices of the day, supports the notion that Section 14 requires exclusion for violation of its provisions. Nor does Defendants’ reasoning withstand scrutiny.

As explained in the State’s opening brief, exclusion of the evidence cannot cure past harm. *See Aplt.Brf.* 43. And contrary to Defendants’ argu-

¹² Defendants also assert that the exclusionary rule “does not make evidence merely inadmissible, it makes it utterly unavailable to the state.” *Aple.Brf.* 36. But even under this Court’s current jurisprudence, that is not true. The Court has held that the scope of the state exclusionary rule is limited, applying only to criminal and quasi-criminal proceedings. *Sims v. Collection Division of the Utah State Tax Comm’n*, 841 P.2d 6, 13 (Utah 1992) (plurality opinion); *Beller v. Rolfe*, 2008 UT 68, ¶¶11-33 & n.2, 194 P.3d 949.

ment, “the use of fruits of a past unlawful search or seizure ‘works no new ... harm.’” *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)). Specifically, the privacy invasion occasioned by the search of Defendants’ home does not continue following the State’s seizure of contraband to which Defendants were never lawfully entitled. The State “has decided—and there is no question about its power to do so—to treat the interest in ‘privately’ possessing [illegal drugs] as illegitimate.” *United States v. Jacobsen*, 466 U.S. 109, 123 (1984). Accordingly, the privacy invasion occasioned by the allegedly unlawful search does not continue by use of the contraband in court.

The U.S. Supreme Court’s decision in *Jacobsen* illustrates the point. There, Federal Express employees discovered a package containing a suspicious white substance and turned it over to federal agents. *Id.* at 111. The agents did not simply examine what had been exposed to the employees, but field tested the substance and confirmed that it was cocaine. *Id.* at 111-12. The U.S. Supreme Court held that even though the federal agents exceeded the scope of the private search, “the additional intrusion occasioned by the field test” did not implicate a reasonable expectation of privacy because defendant did not have “any legitimate interest in privacy” in the contraband. *Id.* at 122-23. Thus in this case, the State’s use of the contraband

as evidence works no new privacy invasion. *See also Trupiano v. United States*, 334 U.S. 699, 710 (1948) (recognizing that even though the illegal distillery may be suppressed under federal exclusionary rule, defendants had “no right to have it returned to them” because the illegal still “was contraband”).¹³

Citing *Boyd v. United States*, 116 U.S. 616 (1886), Defendants claim that at the time of the Utah Constitution’s adoption, exclusion at trial was in fact the remedy for Fourth Amendment violations and that Section 14, which uses “nearly identical language,” was intended to follow suit. Aple.Brf. 41-47. But as Justice Lee explained in his concurring opinion in *Walker*, there is “little ground for attributing to the framers of section 14” based on *Boyd* “that evidence collected in violation of its terms would be deemed inadmissible in court.” 2011 UT 53, ¶58 (Lee, J., concurring).

First and foremost, the precise question in *Boyd* was never whether the remedy of exclusion is appropriate for failure to meet the requirements of the Fourth Amendment.

¹³ Accordingly, the federal exclusionary rule would apply in this case if the warrant-based search were unlawful—subject to the good faith exception—based on the deterrent rationale of the federal rule, not on a continuing privacy invasion.

At issue in *Boyd* was an 1874 law that compelled a defendant in a forfeiture action to produce books and papers alleged to contain evidence of fraud against revenue and customs laws, and that if he did not produce them, the allegations of fraud would be deemed confessed. *Id.* at 619-20. The 1874 law was a successor to two prior statutes (from 1863 and 1867) which, instead of compelling the papers' production, authorized the issuance of a search warrant for their seizure. *Id.* at 620-21. Concluding that "the fourth and fifth amendments run almost into each other," *Boyd* held that none of the statutes could withstand constitutional scrutiny because the search for, and seizure of, private papers to produce testimonial evidence are *per se* unreasonable. *See id.*

In sum, even though the *Boyd* decision resulted in exclusion of the evidence in the *subsequent* forfeiture case, that outcome did not equate to a decision that as a remedial matter, the fruits of an unlawful search must be suppressed. *Boyd* merely held that the statute and the processes thereunder upon which the government relied in pursuing forfeiture "were unconstitutional and void" under the Fourth and Fifth Amendments. *Id.* at 638.

The U.S. Supreme Court in *Adams v. New York*, 192 U.S. 585 (1904), read *Boyd* similarly. In *Adams*, the Court specifically addressed whether exclusion at trial was constitutionally required when agents seized personal

letters during a warrant-based search for illegal gambling slips. Answering in the negative, *Adams* held that “the courts do not stop to inquire as to the means by which the evidence was obtained.” *Id.* at 594. In support, it cited state and federal cases as far back as 1811 and through the 1890s. *See id.* at 595. The Court held that the evidence is admissible at trial so long as it is relevant:

“If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence if they were pertinent to the issue”

Id. (quoting *Commonwealth v. Dana*, 43 Mass. (2 Metcalf) 329, 337 (1841)).

Adams recognized *Boyd’s* holding that the statutory “procedure” at issue “was in violation of both the 4th and 5th Amendments” and thus “unconstitutional and void as applied.” *Id.* at 596-97. However, *Adams* concluded that the Fourth and Fifth Amendments were not designed to exclude evidence unlawfully obtained, but “to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect.” *Id.* at 598 (emphasis added).

Even *if* it could be said that *Boyd* created an exclusionary rule, its reach was clearly limited to the seizure of incriminating *papers* and did not extend to contraband. As noted, *Boyd* held that the statute at issue was *per se* unreasonable under the Fourth Amendment because it authorized the search and seizure of “a man’s private papers to establish a criminal charge against him, or to forfeit his property.” *Id.* at 622, 630. But *Boyd* concluded that the Fourth Amendment treated contraband differently. It held that “the search and seizure of articles and things *which it is unlawful for a person to have in his possession* for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not with [the] category” of unreasonable searches and seizures. *Id.* at 623-24 (emphasis added). Thus, to the extent *Boyd* created an exclusionary rule at all, it clearly limited application of the rule to those cases that would violate the spirit of the Fifth Amendment. The seizure of personal papers is not at issue here.

III.

A good faith exception to the exclusionary rule would, in any event, be consistent with the intent of the framers and the people of Utah who ratified the state constitution.

Should this Court conclude that the magistrate did not have a substantial basis for finding probable cause, and should it further conclude that exclusion is a proper remedy for a violation of Section 14, the Court should

hold that exclusion is not appropriate here where the officer's reliance on the warrant was objectively reasonable. *See* Aplt.Brf. 39-47.

As explained, *supra*, at 39-47, Aplt.Brf. 21-38, Section 14 does not incorporate an exclusionary remedy for a violation of its provisions. Utah's framers left the redress of grievances for violations to "the usual and adequate provisions of the civil and criminal law." *Aime*, 220 P. at 707 (citation omitted); *see* Aplt.Brf. 37-38. Nor is there a need now to create a judicial remedy because adequate remedies still exist today. *See, e.g.*, Utah Code Ann. § 76-8-201 (West 2015) (official misconduct); *supra*, at 40-41 (civil remedies).

But even if this Court were to recognize a judicial remedy similar to the federal exclusionary rule, suppression for a warrant-based search later deemed unlawful is appropriate only where the warrant is flagrantly unlawful. Indeed, such a rule is consistent with the approach taken in the criminal and civil arena at the time of the framing. Criminal laws governing unlawful warrants applied only in the case of willful or malicious violations. *See 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). And civil redress requires fla-

grant police misconduct. *See In re Jensen*, 2011 UT 17, ¶65 (holding that damages are appropriate only if aggrieved party suffered a flagrant violation). Moreover, the deterrence rationale of exclusion loses its force in the case of less severe violations. *See* Aplt.Brf. 39-41.

Defendants contend that this Court's decision in *State v. DeBooy*, 2000 UT 32, 996 P.2d 546, implicitly recognizes that absent probable cause, "police action [is] not protected by ... good faith reliance upon the magistrate's authorization." Aple.Brf. 48. Not so. Defendants treat judicial authorization of an administrative traffic checkpoint as a warrant, but this Court did not treat it as a warrant. The Court judged the checkpoints under the reasonableness clause of Section 14. *See DeBooy*, 2000 UT 32, ¶31 n.11 (observing that its decision governed "suspicionless, investigatory, nonemergency checkpoints"). *DeBooy*, therefore, offers no support for Defendants' claim that exclusion is inappropriate notwithstanding an officer's objective, good faith reliance on a warrant.

CONCLUSION

For the foregoing reasons and those stated in the State's opening brief, the Court should reverse.

Respectfully submitted on January 26, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 10,822 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 Solicitor General

CERTIFICATE OF SERVICE

I certify that on January 26, 2017, two copies of the Reply Brief of Appellant were ☒ mailed ☐ hand-delivered to:

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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.

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.

- | | | |
|--|--|--|
| 1 | DE Del. Const. art. I, § 6
Dec. 7, 1787 (Dec. 2, 1831) | The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures, and no warrant to search any place, or to seize any person or things, shall issue without describing them as particularly as may be, nor then, unless there be probable cause supported by oath or affirmation. |
| http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='DE'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895 ¹ | | |
| 2 | PA Penn. Const. art. I, § 8
Dec. 12, 1787 (Jan. 1, 1874) | The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant. |
| http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='PA'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895 | | |
| 3 | NJ N.J. Const. art. I, § 6
Dec. 18, 1787 (Aug. 13, 1844) | 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, and particularly describing the place to be searched and the papers and things to be seized. |
| http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='NJ'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895 | | |

¹ This Addendum sets forth the search and seizure provisions of the various states as of 1895. The date below the State represents its admission date. The date below the state constitutional provision represents the version of that constitution. Sources are generally from governmental, historical, or educational websites, including the NBER/University of Maryland State Constitutions Project, “a portal to the texts of the state constitutions of the United States.” See www.stateconstitutions.umd.edu.

4	GA Jan. 2, 1788	Geo. Const. § 1, par. XVI (1877) (as ratified without subsequent amendments)	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 except upon probable cause, supported by oath, or affirmation, particularly describing the place, or places, to be searched, and the persons or things to be seized. http://www.cviog.uga.edu/Projects/gainfo/con1877b.htm (University of Georgia—Carl Vinson Institute of Government)
5	CN Jan. 9, 1788	Conn. Const. art. I, § 8 (Oct. 12, 1818)	The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches or seizures, and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation. http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='CT'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895
6	MA Feb. 6, 1788	Mass. Const. Part the First, art. XIV (1780)	Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws. http://www.founding.com/library/lbody.cfm?id=478&parent=475
7	MD Apr. 28, 1788	Mary. Const. Dec. Rts. art. 26 (Aug. 17, 1867)	That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, an ought not to be granted. [Note: The Declaration of Rights to the 1867 Constitution includes 45 "articles," and no sections. Because the constitution then continues with Article I, we have coded these articles as sections in the 9002 article representing the Declaration of Rights.] http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='MD'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895

8	SC May 23, 1788	S.C. Const. art. I, § 22 (Apr. 16, 1868)	All persons have a right to be secure from unreasonable searches or seizures of their persons, houses, papers or possessions. All warrants shall be supported by oath or affirmation, and the order of the warrant to a civil officer to make search or seizure in suspected places, or to arrest one or more suspected persons, or to seize their property, shall be accompanied with a special designation of the persons or objects of search, arrest or seizure; and no warrant shall be issued but in the cases and with the formalities prescribed by the laws.
	http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='SC'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895		
9	NH June 21, 1788	N.H. Const. art. I, § 19 (Sep. 5, 1792)	Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions; <i>Therefore</i> , All warrants to search suspected places, or arrest a person for examination or trial, in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in a warrant to a civil officer to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or object of search, arrest, or seizure; and no warrant ought to be issued but in cases and with the formalities prescribed by law.
	http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='NH'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895		
10	VA June 25, 1788	Vir. Const. art. I, § 10 (1870)	That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.
	http://www.harbornet.com/rights/virginia.txt		
11	NY July 26, 1788	N.Y. Const. (Nov. 6, 1894)	*No search protection provided.
	http://www.stateconstitutions.umd.edu/Search/Search.aspx		

12	NC Nov. 21, 1789	N.C. Const. art. I, § 15 (July 1, 1868)	General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any persons not named, whose offence is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted. http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='NC'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895
13	RI May 29, 1790	R.I. Const. art. I, § 6 (May 3, 1843)	The right of the people to be secure in their persons, papers and possessions, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but on complaint in writing, upon probable cause, supported by oath or affirmation and describing as nearly as may be, the place to be searched, and the persons or things to be seized. http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='RI'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895
14	VT Mar. 4, 1791	Ver. Const. chap. I, art. 11 (as established July 9, 1793 and amended through Nov. 5, 2002)	That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath[s] or affirmation[s] first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted. http://www.leg.state.vt.us/statutes/const2.htm ; http://vermont-archives.org/govhistory/constitut/con93.htm
15	KY June 1, 1792	Kent. Const. § 10 (as ratified on Aug. 3, 1891, and revised Sep. 28, 1891)	The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation. http://www.lrc.state.ky.us/Legresou/constitu/010.htm

16	TN June 1, 1796	Tenn. Const. art. I, § 7 (adopted Feb. 23, 1870 and ratified on the fourth Saturday of Mar., 1870) http://www.state.tn.us/sos/bluebook/online/section5/tnconst.pdf	That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted. http://www.tngenweb.org/law/constitution1870.html
17	OH Mar. 1, 1803	Ohio Const. art. I, § 14 (ratified Mar. 10, 1851)	The right of the people to be secure in their persons, houses, papers, and possessions, 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 and things to be seized. http://www.ohiohistory.org/online/doc/ohgovernment/constitution/cnst1851.html
18	LA Apr. 30, 1812	Louis. Const. Bill Rts., Art. 2 (ratified Dec. 8, 1879)	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 except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized. http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='LA'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895
19	IN Dec. 11, 1816	Ind. Const. art. I, § 11 (ratified Nov. 1, 1851)	The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized. http://www.law.indiana.edu/uslawdocs/inconst/art-1.html#sec-11 http://www.statelib.lib.in.us/www/ihb/resources/constarticle1.html
20	MS Dec. 10, 1817	Miss. Const. art. III, § 23 (adopted Nov. 1, 1890)	The people shall be secure in their persons, houses, and possessions from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized. http://www.sos.state.ms.us/ed_pubs/Constitution/2007/Mississippi%20Constitution.pdf ; http://www.sos.state.ms.us/pubs/constitution/constitution.asp

21	IL Dec. 3, 1818	Ill. Const. art. II, § 6 (Aug. 8, 1870) art. I., § 6 (ratified 1970)	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 without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized. http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='IL'&CID=116,117,118,139,119,124,179,246,247,248,249,251,151,231,193,173,157,158,159,153,154,155,156,101,102,103,104,100,105,259,260,261,262,108,109,110,111,125,126,127,128,107,106,161,162,160,120,121,122,123,178,209,207,215,210,211,212,213,214,216,218,176,163,164,165,172,190,198,197,192,184,185,239,240,241,242,238,244,245,188,235,236,237,112,113,114,269,145,146,147,148,149,183,181,182,257,258,199,263,171,252,253,254,255,256,194,195,200,201,202,203,204,205,206,223,264,265,267,268,243,115,225,230,177&art=&sec=&amd=&key=&Yr=03/04/1895
22	AL Dec. 14, 1819	Ala. Const. art. I, § 6 (ratified Nov. 16, 1875)	That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrant shall issue to search any place, or to seize any person or thing, without probable cause, supported by oath or affirmation. http://www.legislature.state.al.us/misc/history/constitutions/1875/1875_1.html
23	ME Mar. 15, 1820	*Maine Const. art. I, § 5 (1820) (last modified 1/1/2003)	The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause, supported by oath or affirmation. http://www.stateconstitutions.umd.edu/Search/showASM.aspx?CID=176&AID=2001&SID=16654&MID=-1&key=search
24	MO Aug. 10, 1821	Missouri Const. art. II, § 11 (1875)	That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation. http://www.moga.mo.gov/const/A01015.HTM
25	AR June 15, 1836	Ark. Const. art. II, § 15 (1874)	The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized. http://www.arkleg.state.ar.us/data/constitution/ArkansasConstitution1874.pdf

26	MI Jan. 26, 1837	Mich. Const. art. VI, § 26 (adopted Aug. 15, 1850)	The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things, shall issue without describing them, or without probable cause, supported by oath or affirmation. http://www.legislature.mi.gov/documents/historical/miconstitution1850.htm
27	FL Mar. 3, 1845	Fla. Const. Decl. Rts., § 22 (1885) *art. I, § 12 as amended in 1982	The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated, and no warrants issued but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized. http://www.law.fsu.edu/crc/conhist/1885con.html (Florida State University)
28	TX Dec. 29, 1845	Tex. Const. art. I, § 9 (1876)	The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation. http://tarlton.law.utexas.edu/constitutions/text/IART01.html (University of Texas at Austin - Tarton Law Library)
29	IA Dec. 28, 1846	Iowa Const. art. I, § 8 (1857)	The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized. http://www.legis.state.ia.us/Constitution.html#a1s8
30	WI May 29, 1848	Wisc. Const. art. I, § 11 (1848)	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, and particularly describing the place to be searched and the persons or things to be seized. http://www.legis.state.wi.us/rsb/unannotated_wisconst.pdf

31	CA Sep. 9, 1850	Cal. Const. art. I, § 19 (ratified 1849) (revised in 1879)	The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.
			http://www.sos.ca.gov/archives/level3_const1849txt.html
32	MN May 11, 1858	Minn. Const. art. I, § 10 (adopted 1857)	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, and particularly describing the place to be searched, and the person or things to be seized.
			http://www.mnhs.org/library/constitution/transcriptpages/rt.html ; http://www.mnhs.org/library/constitution/index.html
33	OR Feb. 14, 1859	Ore. Const. art. I, § 9 (1859)	No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.
			http://bluebook.state.or.us/state/constitution/orig/bill_rights3.htm
34	KS Jan. 29, 1861	Kan. Const. Bill of Rts, § 15 (adopted at Wyandotte July 29, 1859)	The right of the people to be secure in their persons and property against unreasonable searches and seizures shall be inviolate, and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and property to be seized.
			http://www.kshs.org/research/collections/documents/online/wyandotteconstitution.htm#billrights (Kansas State Historical Society)
35	WV June 20, 1863	W.V. Const. art. II, § 3 (ratified Apr. 24, 1862)	The right of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.
			http://www.wvculture.org/HISTORY/statehood/constitution.html (West Virginia Division of Culture and History); http://www.stateconstitutions.umd.edu/Search/showASM.aspx?CID=225&AID=2977&SID=27352&MID=-1&key=search

36	NV Oct. 31, 1864	Nev. Const. art. I, § 18 (ratified Sep. 1, 1864)	The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by Oath or Affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized. http://www.leg.state.nv.us/Const/NvConst.html#Art1
37	NE Mar. 1, 1867	Neb. Const. art. I, § 7 (1875).	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, and particularly describing the place to be searched, and the person or thing to be seized. http://uniweb.legislature.ne.gov/legaldocs/view.php?page=c0101007000
38	CO Aug. 1, 1876	Colo. Const. art. II, § 7 (adopted by convention Mar. 14, 1876)	That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation, reduced to writing. http://www.colorado.gov/dpa/doit/archives/constitution/1876.pdf
39	ND Nov. 2, 1889	N.D. Const. art. I, § 18 (Aug. 17, 1889)	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 persons and things to be seized. http://www.stateconstitutions.umd.edu/Search/showASM.aspx?CID=257&AID=3637&SID=34752&MID=-1&key=search (Univ. of Maryland NBER/Maryland State Constitutions Project)
40	SD Nov. 2, 1889	S.D. Const. art. VI, § 11 (ratified Oct. 1, 1889)	The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches any seizures, shall not be violated, and no warrant shall issued but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized. http://www.stateconstitutions.umd.edu/Search/results.aspx?srch=6&state='SD'&CID=223&art=&sec=&amd=&key=&Yr=03/04/1895

41	MT Nov. 8, 1889	Mont. Const. art. III, § 7 (ratified Oct. 1, 1889)	The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing.
			http://www.umt.edu/Law/library/1889%20Montana%20Constitution.pdf
42	WA Nov. 11, 1889	Wash. Const. art. I, § 7 (approved Oct. 1, 1889)	No person shall be disturbed in his private affairs, or his home invaded, without authority of law.
			http://www.secstate.wa.gov/history/constitution_view.aspx?i=1889
43	ID July 3, 1890	Ida. Const. art. I, § 17 (ratified July 3, 1890)	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 without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.
			http://dfm.idaho.gov/cdfy2007/OtherDocuments/id-constitution.pdf
44	WY July 10, 1890	Wyo. Const. art. I, § 4 (ratified Nov. 5, 1889)	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 affidavit, particularly describing the place to be searched or the person or thing to be seized.
			http://soswy.state.wy.us/informat/07Const.pdf
45	UT Jan. 4, 1896	Utah Const. art. I, § 14 (adopted May 8, 1895 and ratified 1895)	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, particularly describing the place to be searched and the persons or things to be seized.
			http://www.le.utah.gov/documents/conconv/66.htm 2 Official Report of the Proceedings and Debates of the Convention Assembled to Adopt a Constitution for the State of Utah 1856