

2015

State of Utah, Plaintiff/Appellant, vs. Michael Rowan & Rebecca George, Defendant/Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff / Appellant,

vs.

MICHAEL ROWAN &
REBECCA GEORGE,

Defendant / Appellant.

Case No: 20150598-SC

REPLACEMENT BRIEF OF APPELLEES

STATE'S APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY,
STATE OF UTAH, FROM ORDER OF DISMISSAL OF CHARGES AGAINST
DEFENDANTS AFTER THE TRIAL COURT GRANTED DEFENDANTS'
MOTION TO SUPPRESS, BEFORE THE HONORABLE DEREK P. PULLAN

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ORAL ARGUMENT REQUESTED

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

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REBECCA GEORGE,

Defendants / Appellants.

Case No: 20150598-SC

REPLACEMENT BRIEF OF APPELLEES

JURISDICTION OF THE UTAH SUPREME COURT

The Supreme Court has appellate jurisdiction in the case involving Michael Rowan pursuant to the provisions of Utah Code §78A-3-102(3)(i) as an appeal from the district court involving a conviction or charge of a first degree felony. The Supreme Court has appellate jurisdiction in the case involving Rebecca George pursuant to the provisions of Utah Code §78A-3-102(3)(b) as a case certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals. The Court consolidated the cases on November 20, 2015 after a stipulated motion by the parties.¹

¹ The trial court prepared a record for each defendant on appeal. Many of the pleadings are contained in each record. However, there are some documents only found in Rowan's record. To the extent that some of the relevant documents are not contained in one record or another, defendants do not claim the State has

ISSUES, STANDARDS OF REVIEW, AND PRESERVATION

1. Whether the trial court erred when it found the warrant affidavit did not support probable cause. This Court will “review a district court’s assessment of a magistrate’s probable cause determination for correctness and ask whether the district court erred in concluding that the magistrate did not have a substantial basis for his or her probable cause determination.” *State v. Walker*, 2011 UT 53, ¶12, 267 P.3d 210.² The Court will review a trial court’s decision to grant or deny a motion to suppress based on an illegal search as a mixed question of law and fact. *State v. Fuller*, 2014 UT 29, ¶17, 332 P.3d 937. “We review the factual findings underlying a grant of a motion to suppress evidence under a ‘clearly erroneous’ standard, and review the trial court’s conclusions of law based thereon for correctness.” *State v. Potter*, 860 P.2d 952, 955 (Utah App 1993) (citing *State v. Brown*, 853 P.2d 851, 854-55 (Utah 1992)).

failed to preserve or provide an adequate record. The cases have been consolidated on appeal and defendants will treat the records as though they are one combined record. To be consistent with the State’s brief, citations to the electronic record from Michael Rowan’s case will be designated by the letter “R”, and citations to the electronic record from Rebecca George’s case will be designated by the letter “G”.

² Defendants contend that the “substantial basis” standard of review can be attributed to the United States Supreme Court’s interpretations of Fourth Amendment cases. See *State v. Norris*, 2001 UT ¶14, 48 P.3d 872 (the line of cases leads to *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). Because this case is being raised under the Utah Constitution, and because this Court has not yet disclosed the Utah standard of review involved in a district court’s assessment of a magistrate’s probable cause determination in issuing a warrant, Defendants suggest this Court should apply the simple standard of review applied in similar circumstances: the factual questions reviewed for clear error; and the *existence of probable cause* reviewed for correctness. An argument supporting the use of this standard will be made below.

The question of probable cause was preserved, to the extent it was preserved, by the “State’s Response to Defendant’s Motion to Suppress”. R.041-53. In its pleadings to the trial court, the State preserved four arguments: (1) the “CI” demonstrated sufficient credibility to support the warrant (R.044-47); (2) probable cause supported the search of “All Persons, All Residence” (R.047-48); and (3) the officer corroborated the “CI” information (R.048-49). At oral argument, the State submitted the initial question of probable cause “on the documentation.” R.266. Any other probable cause arguments were not preserved by the State.

2. Whether this Court should reverse its prior holdings that article I, section 14, of the Utah Constitution requires exclusion of evidence obtained from illegal searches and seizures. The State’s suggestion, that the existence of a state exclusionary rule is merely a matter of constitutional interpretation reviewed for correctness, is only half right. State’s Brief at 3. In reality, this Court is not only interpreting the Utah Constitution, it is deciding whether its current precedent regarding the Utah Constitution should be abandoned. In this circumstance the Court reviews challenges to its former interpretations of the Utah Constitution in light of the doctrine of stare decisis, and it will not overrule its precedents lightly. *State v. Guard*, 2015 UT 96, ¶33. Although courts of last resort are not bound to mechanically apply stare decisis, the “presumption against overruling” precedent can be quite weighty. *Guard*, 2015 UT 96, ¶33 (citing *Eldridge v. Johndrow*, 2015 UT 21, ¶22, 345 P.3d 553).

The State preserved this issue in its Response to Address Good Faith Exception Under Utah Constitution, where it argued the trial court should “abandon the precedent regarding the exclusionary rule under article I, section 14, of the Utah Constitution” because the precedent lacked “proper scrutiny”. R.102. The State preserved the arguments that the Utah exclusionary rule is not supported by the text of section 14, the history of the constitutional convention does not support exclusion, section 14 is not self-executing, and exclusion constitutes bad public policy. R.104-10.

3. Whether this Court should create an as-yet unrecognized good faith exception to Utah’s exclusionary rule. The question of whether Utah’s exclusionary rule is subject to a good faith exception has not been decided by this Court. *See State v. Thompson*, 810 P.2d 415, 420 (“We leave for another day the issue of whether to apply in appropriate circumstances a good faith exception to the exclusionary rule of article I, section 14 of the Utah Constitution.”). The trial court declined to create a good faith exception and this Court should review whether to create an exception for correctness.

The argument for a good faith exception was preserved by the State in its Response to Address Good Faith Exception Under Utah Constitution where it argued the trial court should apply the interstitial model of constitutional analysis, thereby foregoing any analysis of whether any independent good faith exception applies to Utah’s Constitution. R.112-28. The State also argued a good faith exception should apply to Utah’s Constitution because Utah’s exclusionary

rule, like the federal rule, “is a judicial remedy designed to deter future constitutional violations by law enforcement” and “not a constitutional requirement.” R.131.

CONTROLLING STATUTORY PROVISIONS

All controlling statutory provisions are set forth in full in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

The State of Utah appeals from the final order of the district court dismissing the charges following the suppression of evidence that substantially impaired the State’s ability to proceed to trial. The trial court ruled that the police illegally obtained evidence during an unlawful search of the defendants’ home.

B. Trial Court Proceedings and Disposition

Michael Rowan (Rowan) was charged with (1) Distribution of or Arranging to Distribute a Controlled Substance (marijuana) in a Drug Free Zone; a second degree felony; (2) Possession of a Controlled Substance (marijuana) with Intent to Distribute with Prior Conviction in a Drug Free Zone, a first degree felony; (3) Possession or Use of a Controlled Substance (psilocybin) with Prior Conviction in a Drug Free Zone, a first degree felony; (4) Possession or Use of a Firearm by Restricted Person, a third degree felony, and (5) Possession of Drug Paraphernalia in a Drug Free Zone, a class A misdemeanor. R.001-02. Both Rowan and Rebecca George (George) were charged with (6) Endangerment of a Child or Vulnerable Adult, a third degree felony. R.002, G.002.

Defendants moved to suppress the evidence seized in the search of their home, arguing that the warrant was not supported by probable cause under both the state and federal constitutions. R.027-37. The State opposed the motion. R.263-68; G.104. After argument, the trial court denied the motion, concluding that although the warrant was not supported by probable cause, the evidence should not be suppressed because of the federal good faith exception articulated in *United States v. Leon*, 468 U.S. 897 (1984). R.226-32, 269-81; G.84-78, 105. Defendants subsequently supplemented their argument and asked the trial court for a ruling on the question of the good faith exception under the Utah constitution. R.070-80. In response, the State argued that there is no basis for an exclusionary rule under the Utah Constitution and, even if there were, it should include a good faith exception analogous to the federal *Leon* exception. R.088-146. The trial court heard additional argument and then granted the Defendants' motion to suppress, declining to overrule the state exclusionary rule, and declining to recognize a good faith exception. R.180-94, 282-90; G.051-37.

On the State's motion, the trial court dismissed the charges against Defendants on the ground that suppression of evidence substantially impaired the State's cases. R.241, 247; G.092, 098.

The State timely appealed both cases. R.251-52; G.101-100. After this Court elected to retain the *Rowan* case on its docket, the court of appeals certified the *George* case for transfer to this Court and the cases were consolidated. R.306.

STATEMENT OF RELEVANT FACTS³

1. “On August 28, 2012, a district court judge authorized a search warrant for a residence located at [address deleted] in Provo, Utah.” R.227.
2. “The warrant issued based on the supporting affidavit of Officer Steven O. Pratt of the Springville Police Department.” R.227
3. “Law enforcement officers executed the warrant on the same day it issued.” R.227.
4. “The information supporting the warrant came primarily from a confidential informant. (“the Confidential Informant”).” R.227.
5. “The Confidential Informant was cooperating with the police in exchange for leniency on pending charges.” R.227, 062.
6. “The Confidential Informant told police that a person named Mike was in possession of marijuana and would sell it to the Confidential Informant.” R.227, 272.
7. “The Confidential Informant stated that he had been in Mike’s home in the past, but did not say when.” R.227, 272.
8. “The Confidential Informant stated that he had purchased drugs from Mike.

³ Defendants take this Statement of Relevant Facts verbatim from the trial court’s “Findings of Fact” within its ruling on the motion to suppress, most of which refer to the transcript of a hearing at which the court made oral findings. R.227-30.

Because the State has not alleged any errors in the trial court’s factual findings, and neither do Defendants, the trial court’s written findings of facts are definitive. To the extent the State has taken away from, or added to, the trial court’s written findings of fact, without making a challenge thereto, this Court should ignore the State’s factual recitation.

(Transcript, p.2, lines 15-16).” R.227, 272.

9. “The Confidential Informant further stated that (1) Mike sells marijuana in bulk; (2) Mike’s product is vacuum-sealed; (3) Mike travels to California to obtain marijuana to sell in Utah; (4) Mike keeps his marijuana in a residence located at [address deleted] in Provo; (6) Mike is a martial arts master and is very familiar with the art of combat; (7) the Confidential Informant has heard Mike speak of firearms in the past, but did not say when; and (8) the Confidential Informant believed there may be a firearm in Mike’s residence, but offered no facts to substantiate this belief.” R.227-28, 272-73.
10. “The information provided by the Confidential Informant to police purported to be based in the Confidential Informant’s personal knowledge.” R.228, 273.
11. “The police tried to identify Mike by checking records on the residence, vehicle registrations, and other police records, but were ultimately unsuccessful in corroborating any of the information that the Confidential Informant provided.” R.228, 273.
12. “The police did not attempt to corroborate independently any of the other information provided by the Confidential Informant.”⁴ R.228, 273.

⁴ The following was attached as a footnote to the trial court’s finding number 12. “The failure of the police to corroborate any of the Informant’s information and failure to ‘control’ the buy in which the Informant participated stand in stark contrast to representations in the Affidavit. There, the affiant swears that ‘the [Informant] has provided creditable information and has not said anything that would prove false or misleading. The information the [Informant] has given *has been investigated* and proved credible.” (Affidavit, ¶4). The only measure police took to corroborate the Informant’s claims was to conduct a buy which they failed

13. “Instead, the police arranged for what was intended to be a “controlled” buy, although the controls were at best slipshod.” R.228, 273.
14. “The police searched the Confidential Informant’s person and found no controlled substances.” R.228, 273.
15. “The Confidential Informant then made a call to a person the Confidential Informant identified as Mike. Police monitored the call.” R.228, 273.
16. “The Confidential Informant agreed to purchase a certain amount of marijuana for a certain amount of money from the person who was on the phone.” R.229, 273.
17. “The sale would take place at the [address deleted] address in Provo.” R.229, 27.
18. “Police issued buy money to the Confidential Informant.” R.229, 273.
19. “For reasons that remain puzzling, police then allowed the Confidential Informant—a known user of controlled substances whose cooperation with police was given in exchange for leniency on pending charges—to get back into his own vehicle and drive to the residence at [address deleted] in Provo.” R.229, 273-74, 062.
20. “Police did not search the vehicle for controlled substances before the Confidential Informant drove to the residence.” R.229, 274.
21. “The Confidential Informant went into the house. A short time later, police

to control. Other investigation yielded no information. At best, these representations in the Affidavit are conclusory, at worst misleading.” R.228.

observed the Confidential Informant exit the residence.” R.229, 274, 062].

22. “Again, the Confidential Informant was allowed to drive his own vehicle from the residence to a predetermined location where he met the police.” R.229, 062.

23. “Police searched the Confidential Informant’s person and discovered a controlled substance. The buy money was not discovered on the Confidential Informant’s person.” R.229, 274, 062.

24. “Police did not search the Confidential Informant’s vehicle after the buy.” R.230, 274.

In addition to the facts specifically noted in the trial court’s findings, the affidavit in support of the warrant also contained the following relevant information:

The affiant met the Confidential Informant within “the past 72 hours” of requesting the warrant. R.062. Although the Confidential Informant claimed “Mike keeps marijuana inside his residence”, the Confidential Informant admitted he did not know where it was kept. R.062.

SUMMARY OF ARGUMENT

1. The trial court correctly concluded that the warrant was not supported by probable cause because the affidavit relied upon conclusory statements, unspecific and unverified information, and a ‘controlled’ buy which was anything but controlled. The police had no reason to believe the drugs found on the Confidential Informant did not come from his car which they neglected to search.

Even under the substantial basis standard the trial court would have been correct in concluding that the magistrate's decision was erroneous because the affidavit did not demonstrate a substantial basis to believe evidence of illegal conduct would be found in the defendants' home. Under the traditional, mixed standard of review, the trial court correctly concluded the warrant was not supported by probable cause.

In the alternative, this Court could affirm because the trial court could have concluded the warrant was improper because the police omitted crucial information that misled the magistrate on issues critical to the determination of the informant's credibility. The officer's alleged that the Confidential Informant was reliable based on his record of not providing false or misleading information in the past, but the officer neglected to admit that the informant had never provided them any information before, true or false. That omission misled the magistrate into crediting the Confidential Informant as a reliable proven source rather than an unproven criminal looking to gain favor in his own case. Because the officer provided misleading information in the affidavit, this Court could strike the misleading information and conclude the affidavit was wholly inadequate to support the issuance of a search warrant.

2. This Court should not overrule the Utah cases that recognize the exclusionary rule in Article I, Section 14, of the Utah Constitution. The existence of a state exclusionary rule is supported by the text of the Utah Constitution, by the intent of the framers, and by the historical context and cases at the time of

ratification. This Court should reaffirm its precedent that violations of Article I, Section 14, are subject to exclusion as a constitutionally required remedy, not merely a judicial tool for deterrence.

3. This Court should not recognize a good faith exception to Utah's exclusionary rule. The exclusionary rule is not merely a judicially crafted remedy to deter police misconduct, it is the natural manifestation of the "right of the people to be secure in their persons, houses, papers and effects". Exclusion of illegally obtained evidence is the essence of the right. Exclusion of illegally obtained evidence puts the people back into the state which existed prior to the violation, it reestablishes a person's security guaranteed by the language of the constitution. A good faith exception undermines these purposes. A good faith exception undermines the warrant issuing process by diminishing the incentive the police have to actually establish probable cause and insulating the reviewing judges from any scrutiny. A good faith exception obliterates the fundamental constitutional requirement that no warrant shall issue but upon probable cause.

ARGUMENT

I. THE WARRANT WAS ISSUED WITHOUT PROBABLE CAUSE AND WITHOUT A SUBSTANTIAL BASIS TO FIND PROBABLE CAUSE

A. Relevant Standard of Review

The standard of review may be of interest to this Court as it considers how to interpret the Utah Constitution and how cases like this one, where a warrant was issued and then later invalidated after a motion to suppress. The State's Brief cites *Norris*, 2001 UT 104 for the proposition that reviewing courts "afford[]

great deference to the magistrate's decision to issue a search warrant." State's Brief at 3. The State goes on to cite the United States Supreme Court in support of its claim that this Court will not examine de novo whether or not probable cause existed, but only whether the magistrate had a substantial basis to conclude that probable cause existed. State's Brief at 3 (*quoting Massachusetts v. Upton*, 466 U.S. 727, 728, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984)).

"The right to be free from unreasonable searches and seizures is a civil right." *Allen v. Trueman*, 110 P.2d 355 (Utah 1941) (J. Wolfe concurring). So too would be the right to be protected from a search warrants issued without probable cause. The problem with the standard of review proposed by the State, and imposed by the federal case law, is that it destroys the probable cause standard, thereby diminishing individual civil rights. The plain language of the right is that warrants "shall not issue but upon probable cause." The obvious meaning of that language is that we have the right not to have a magistrate issue a warrant to search or seize us or our property without probable cause.

In reality, the standard of review applied under the federal constitution adds an asterisk to the Fourth Amendment, and in a small font in a footnote the federal constitution now says "*Warrants may actually issue without probable cause so long as the magistrate has a substantial basis to conclude probable cause may exist, regardless of whether or not probable cause actually does exist.*" How this standard can be said to protect one of our most inviolate and sacred rights is a mystery. Probable cause is probable cause. Halfway, or $\frac{3}{4}$ of the way to probable cause

may be a substantial basis, but it is not probable cause. Any standard that would uphold the issuance of a warrant without requiring 100 percent of probable cause should give pause to a court seeking to follow the text of the constitution.

Instead of applying the substantial basis standard, as the federal courts have applied to the Fourth Amendment, Defendants urge this Court, as it takes the opportunity to consider the section 14, to apply a standard of review that adequately accounts for the significance and simplicity of the right the government has allegedly violated. After all, if the same constitutional right is afforded a non-deferential correctness review when a search occurs without a warrant⁵ (i.e. Did probable cause exist when the police searched an automobile on the side of the road?), why should the existence of an invalid warrant undermine or diminish a person's right to be free from government interference with a less demanding standard (i.e. Even though no probable cause existed, did the magistrate have a substantial basis to find probable cause to issue the warrant?)? The obvious answer, the answer that strictly interprets the language of the constitution is that the existence of a warrant shouldn't undermine or diminish the probable cause standard. Probable cause is probable cause, whether this Court is reviewing a district court's finding of probable cause for an automobile search or a magistrate's finding of probable cause in the issuance of a

⁵ See *State v. Brake*, 2004 UT 95, ¶15, 103 P.3d 699 (Utah 2004) (this Court abandoned "the standard which extended 'some deference' to the application of law to the underlying factual findings in search and seizure cases in favor of non-deferential review.").

warrant, the right is the same and probable cause is the same, so too should be the standard of review.

However, the State in its brief and the federal case law support the distinction between the standard in warrant and non-warrant cases. The State argues that this Court “may not invalidate the warrant simply because it might have reached a different result”. State’s Brief at 14. In other words, according to the State, this Court may not invalidate a warrant even if it was not supported by probable cause. According to this federal precedent, this Court’s ability to review a challenged search or seizure based on a warrant is distinct (and constrained) as compared to its ability and practice to review a search or seizure made without a warrant.

Applying this rule, imagine the police are investigating the activity at two adjoining houses and collect the same amount of evidence in support of their intended search for each house, evidence which does not reach the level of probable cause, and the police obtain a warrant in one instance and decline to request a warrant in the other. The house without the warrant is entitled to the full protection of the probable cause standard, the search of this home would be illegal. But the house with the warrant is denied the protection of the probable cause standard, and some unclear metric, something less than probable cause, may be found to justify the search.

According to the State, this distinction is appropriate because “the resolution of doubtful or marginal cases in this area should be largely determined

by the preference to be accorded to warrants.” State’s Brief at 14 (*quoting United States v. Vantresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 13 L.Ed.2d 684). In other words, because we like warrants and we want to encourage the police to seek warrants, if it is a close case where we are not sure whether probable cause existed but a warrant was obtained, courts are going to uphold the search, regardless of the actual existence of probable cause. Apparently for the State, tie goes to the warrant, as opposed to the constitution.

But this problematic reasoning actually goes further than that. The federal courts, in an effort to encourage the police to request a warrant, have decided to reduce the amount of evidence needed to support a warrant if the officers are willing to go to the trouble of requesting it. *Vantresca*, 380 U.S. 102, 109 (“this Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a *doubtful* or marginal case a search under a warrant may be sustainable where without one it would fall”) (*emphasis added*) (*loosely citing Jones v. United States*, 362 U.S. 257, 270, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)).⁶ Put plainly, according to the State and at least some of the federal case

⁶ Defendants claim the citation in *Vantresca* to *Jones* is “loose[]” because page 270 of the *Jones* decision does not indicate the evidentiary requirement in warrant cases was lower than in non-warrant cases, although *Vantresca* seems to say that it does. What page 270 in *Jones* does indicate is that warrants should not require more evidence, or “evidence of a more judicially competent or persuasive character”, than would support probable cause without a warrant, and that in close cases “it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer”. *Jones*, 270. In other words, *Jones* wants to ensure that the police are not being disincentivised to seek a warrant. This is very different than saying

law, a search does not really need to be based on probable cause if a magistrate was willing to sign a warrant.

The standard of review distinction between probable cause and the somewhat lower standard in warrant cases is ruinous to the explicit constitutional requirement that “no warrant shall issue but upon probable cause”. This Court should take this opportunity to “support, obey and defend... the Constitution of this State” by implementing a Utah standard of review that requires warrants to be supported by probable cause, period. UTAH CONST., art. IV, sec. 10. Even if this Court feels compelled to start its analysis by examining federal precedent, any such “precedent is certainly not controlling if interpretations of the Fourth Amendment are inconsistent or confused.” *State v. Anderson*, 910 P.2d 1229, 1235 (Utah 1996) (citing *State v. Harmon*, 910 P.2d 1196, 1205-06 (Utah 1995)). Federal precedent which interprets the explicit probable cause requirement and concludes there is a distinction between probable cause to support a warrantless search and something less than probable cause to support a warrant is inconsistent with the plain language of the constitution and confused. This Court should feel no obligation follow these cases or apply the federal standard of review when reviewing challenges based on Utah’s constitution.

Defendants contend that federal efforts to encourage officers to follow the

probable cause for a warrant requires less evidence than non-warrant probable cause as *Vantresca*, and by extension the State, interprets it.

constitutional demand for warrants, while arguably motivated by proper intent, have had the (perhaps) unintended consequence of diminishing and undermining the rights and standards explicitly provided by our constitution. Attempts to follow that federal path, toward diminished constitutional protection, is at odds with an oath to support, obey, and defend Utah's constitution. Both as judges and as members of the bar we have sworn fidelity to the protection of these rights. It is in light of that duty that appellate counsel urges to the Court to consider this case as a whole, and specifically the applicable standard of proof. Defendants urge the Court to reject the standard of review propagated by the federal case law and apply this Court's traditional mixed question standard, reviewing factual findings for clear error and the existence of probable cause for correctness. "[T]his two-standard approach takes into account the relative functions of the trial and appellate courts while ensuring the consistent and uniform protection of a fundamental civil liberty." *State v. Thurman*, 846 P.2d 1256, 1270 (Utah 1993) (citing *State v. Vigil*, 815 P.2d 1296, 1299 (Utah 1991)).

B. Relevant Search and Seizure Law

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized." UTAH CONST., ART. I, SECT. 14. Despite the simplicity of the language used

in Utah's constitution, there has been great confusion about what the right actually means, how it can be vindicated, and under what circumstances the government can infringe upon the right.

Confusion about the breadth and depth of the federal counterpart in the Fourth Amendment has been propagated by years of contradictory case law. See *State v. Hygh*, 711 P.2d 264, 271-72 (Utah 1985) (J. Zimmerman concurring) (describing the federal search and seizure law as a “labyrinth of rules built upon a series of contradictory and confusing rationalizations and distinctions”). It is in this context, the confused and contradictory Fourth Amendment case law, that the Defendants in this case come before this Court seeking a simple and straightforward application of Utah's right, as a distinct and independent source of protection from government interference in the lives of the people of Utah.

Based upon the trial court's ruling and the State's appeal, the question in this section is whether, according to Utah's constitutional requirements, the magistrate had a substantial basis to conclude the warrant application established “probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.” UTAH CONST., ART. I, SECT. 14.⁷ Or, if the Court accepts Defendants' invitation and applies the constitutionally sound standard of review, the only question is

⁷ The question of whether the affidavit particularly described “the place to be searched, and the person or things to be seized” was not address in the court below and the record does not include any facts about whether the description in the affidavit is accurate. Therefore, Defendants limit their argument to the question of probable cause.

whether the trial court erred in concluding the affidavit didn't establish probable cause. Defendants assert this Court can answer both questions in the negative.

"Since our Constitution requires a showing of probable cause to support a search warrant... we hold, in line with the overwhelming weight of authority in the federal and state courts" that an affidavit is "not sufficient if it is made on information and belief, and is not corroborated or supported in any way." *Allen v. Lindbeck*, 93 P.2d 920, 923 (Utah 1939). In *Allen*, a statute authorized the issuance of a warrant if the affiant "deposes that he has reason to believe and does believe the articles are wrongfully held or used." *Allen*, 93 P.2d 920, 922. This Court concluded the statute was unconstitutional where it authorized a warrant, because probable cause was not "satisfied by an oath that one has reason to believe and does believe." *Allen*, 922.

Probable cause in Utah is more than suspicion, and it is more than reasonable belief. Probable cause is defined as 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 the property." *Allen*, 97 Utah 471, 477 (*quoting* *Cornelius on Search and Seizure*, § 83). Defendants assert that the use of the word "was" in that sentence is crucially important. The term is not 'might be' or even 'is likely'. The discreet and prudent person, based on the information he possesses, believes some set of facts 'is' the case.

The distinction between the level of evidence the statute in *Allen* required and probable cause required by section 14 is an important distinction in this case.

Having *reason to believe* something means there are facts that one can point to supporting that belief. Thus, it is not just a hunch, but is based on reason. But *reason to believe* is not probable cause. Probable cause must be based upon enough evidence that a discreet and prudent person, a person who understood that taking a position on the matter will have serious consequences to the constitutional rights of another person, would conclude that a certain set of facts actually exist, that evidence of a crime actually will be found. The difference between *reason to believe* and probable cause is what distinguishes the magistrate's reading of the affidavit from the trial court's reading.

There are no hard and fast rules delineating what amount of evidence creates probable cause. Probable cause must be based upon articulated particularized facts and circumstances. Mere conclusory statements will not suffice. The foundation of the existence of facts must be shown, the affiant must disclose the source of the facts, the reason he knows a fact to be true. If the affiant, the officer who swears to the facts alleged, does not know the facts based on his own experience, he must corroborate the allegations of his informants. *See Kaysville City v. Mulcahy*, 943 P.2d 231, 234 (Utah App 1997); *Salt Lake v. Bench*, 2008 UT App 30, ¶14, 177 P.3d 655. With those considerations in mind, courts are instructed to consider the totality of the evidence and make a practical decision whether there is a fair probability that evidence of a crime will be found in a particular place. *See State v. Espinoza*, 723 P.2d 420, 421 (Utah 1986). Defendants assert that this Court will agree with the trial court's thoughtful

decision and find the police failed to establish probable cause in the warrant application.

C. Application

1. Did the affidavit establish probable cause?

The information collected by the police came entirely from CI. And almost all the information provided by CI was conclusory, and unsupported by reference to CI's knowledge or experience. For example, the State points to the statement from CI that "Mike" travels to California to obtain marijuana to sell it in "vacuum sealed" bags. State's Brief at 16, see R.202, 062. But none of these facts are supported in the affidavit by reference to how CI knew these facts. Perhaps there is a possible inference from CI's statement that he "has been in Mike's home in the past and has made drug purchases from him." R.062. But that statement gives no time frame, nor does it make any reference to any facts that could lead the magistrate to suspect CI's claim was actually based on observation or information recent enough to support ongoing suspicion.

According to the affidavit, the CI did not say he saw drugs in vacuum sealed packages or give any facts to show how he knew that is how they were packaged, in fact the CI admitted to the police that he did not know where in the house the drugs were kept, suggesting the CI had not seen drugs in the house. R.062. The affidavit did not include evidence that the drugs CI delivered to the police were vacuum sealed or any other evidence to suggest CI's production of drugs to the police corroborated his earlier statements.

The affidavit did not include a claim that the CI observed Mike drive to California to purchase drugs, or any other facts from which anyone could conclude the CI had some personal knowledge about that fact. Nothing in the affidavit suggests the police had any information to show CI's statements about his interactions with "Mike" were anything more than mere conclusory statements from CI. According to the affidavit, CI's statements about "Mike" and his alleged distribution activities are nothing more than the "information and belief" at issue in *Allen*.

As the affidavit made clear, and as the trial court reasonably found, despite their efforts to confirm CI's statements by checking records, the officers were "ultimately unsuccessful in corroborating **any** information provided by the CI." R.202 (emphasis added). This factual finding, that the police did not corroborate any information provided by the CI, has not been challenged as clearly erroneous by the State on appeal,⁸ therefore this Court will not disturb those findings. *See State v. Gurule*, 2013 UT 58, ¶20, 321 P.3d 1039. The police did not know who "Mike" was, they did not know of his reputation or know of any prior drug involvements. And the police did not "attempt to corroborate any other innocent information provided by the informant." R.202. The officers were satisfied to

⁸ A search of the State's brief reveals no mention of the "clearly erroneous" standard of review applied to a trial court's factual findings. While the State's brief does assert that the "controlled buy fully corroborated the CI's report...", nothing in the State's brief suggests the State is actually challenging the factual findings of the trial court.

accept the CI's word, which had not been and, apparently could not be, verified or confirmed in any way.

This blind trust in CI's unsupported statements continued as the officers had CI arrange to buy drugs. After the police searched his person CI made a supervised phone call with "Mike", but that supervision does not describe whether or how officers knew who, if anyone, CI was talking to. R.062. There is no mention of the number CI dialed, there is no mention making a recording. The officers' *supervision* of the communication with "Mike" apparently consisted of listening to CI as he spoke into a cell phone and discussed purchasing "a predetermined amount of marijuana... for a predetermined amount of money" to occur at "Mike's" residence, the same residence the police had not been able to connect to any person or confirm that anyone named Mike lived there. R.062.

The police then sent CI back into his unsearched car and followed him as he drove to the house in Provo and then went into the house. There is nothing in the affidavit suggesting the officers could see what was happening in the house, or whether or not CI was even met at the door by anyone, it just says he "arrived at the residence... and went inside." R.062. "A short time passed and the CI was seen leaving the residence." R.062. Other than CI's presence at the listed address, the affidavit is devoid of any fact that would support or corroborate any of what CI later says happened in the house. After CI exited the house he got back into his unsearched car and drove back to meet up with the police. At that point CI did

not have the money on his person and did have drugs, which he said he bought from “Mike”. R.062.

The trial court considered three main factors in its totality of the circumstances review: CI’s reliability, the basis of his knowledge, and the degree to which CI’s assertions could be corroborated. R.204. In each instance the trial court found the facts presented were unpersuasive. The State, in its brief, now argues the opposite inference. State’s Brief at 16-17. However, the State’s arguments, about the reasons to believe CI, and his incentives to tell the truth, are all dependent upon the validity of the controlled buy. For example, the State argues that CI was a known defendant so he was “exposed to possible criminal and civil prosecution if the report was false.” State’s Brief at 16 (*quoting State v. Royball*, 2010 UT 34, ¶16, 232 P.3d 1016). If anything CI had said could have been verified, then perhaps this argument makes sense, but as demonstrated by the lack of any personal knowledge, CI’s statements to the police were more like the recitation of a rumor than a declaration of known facts. According to the affidavit, CI never told the police he knew or had personal experience of any of these facts, so in what way could they be false?

The State also argues that CI “risked losing the benefit of leniency in his criminal case if his report proved to be false.” State’s Brief at 16. This argument presumes the police had some way of determining whether “his report proved to be false”, and yet the facts demonstrated by the affidavit and found by the trial court showed the risk of “losing the benefit” is a fantasy. Consider the situation

of the CI, he facing his own criminal case(s) and decided he would try to cooperate with the police in order to gain some favor. There was no risk in losing something he didn't already have. Either it goes well so he gets the benefit of cooperation, or his information is not credible and doesn't pan out and he is exactly where he was to begin with. Further, there was no risk to CI because his facts were vague and unchallengeable and the police allowed him to tell a story and then failed to corroborate any part of it.

What is most flawed about the State's position regarding CI's reliability is its characterization of the information CI provided. Nothing about the affidavit reflects that the allegations CI reported were "based on his first-hand" knowledge. State's Brief at 17. Instead, most of the allegations were merely bare assertions of fact without explanation of how CI would know it. The details about "Mike's" operations were very likely not based on personal knowledge, like the California detail, or the drugs being stored in some unknown location. The affidavit reveals the police, and the magistrate, had no reason to credit CI with any degree of reliability. As the trial court noted, these weaknesses were compounded when the police were unsuccessful in their attempts to "corroborat[e] any information provided by the CI." R.202.

Finally, the State suggests CI's admission that "he himself 'has made drug purchases' from Mike at his home." State's Brief at 17. The State relies upon *State v. Saddler*, 2004 UT 105, ¶18, 104 P.3d 1265, to show that because CI admitted to committing a crime, that admission created "probable cause to search." State's

Brief at 17 (*relying upon United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971)). But the problem with that position is that the admission here, that CI purchased marijuana from “Mike” at some unknown time, is far different than the admissions which created probable cause in *Harris*. There the Court conceded that “admissions of crime do not always lend credibility to contemporaneous or later accusations of another.” *Harris*, 403 U.S. 573, 584. In fact, 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.” *Id.* CI’s admission, to having bought marijuana an undisclosed number of times without any description of when, does not rise to the level of reliability mentioned in *Harris*. His vague admission would not subject himself to the threat of criminal liability and thus not make his statements more credible.

The State dismisses the trial court’s concerns about the lack of “control” because “an affidavit is judged on the adequacy of what it does contain” not what a “critic might say should have been added.” State’s Brief at 19 (*quoting United States v. Kinson*, 710 F.3d 678, 682 (6th Cir. 2013)). The State thinks the trial court’s criticism of the “controlled” buy has to do with what affidavit does not contain; it thinks the court had doubts about probable cause because it wanted the officers to have done something other than what they did. That isn’t it. The Court had doubts about probable cause because of what the officers did do. The

officers saw CI drive up in his car without any idea what was in his car. The officers allowed CI get back into his car, still having no idea what was in his car. The officers allowed CI to spend time in the car, alone. This is not a matter of the trial court imagining and demanding the perfect scenario, it is recognizing how the facts recited by the officers undermine a reasonable belief that what CI said happened was the truth.

When all these factors are considered, CI's lack of credibility, the officer's failure to corroborate any of his claims, and the complete lack of control over the buy, the trial court's conclusion that the affidavit did not establish probable cause is correct. *Compare State v. Potter*, 860 P.2d 952 (Utah App. 1993). This Court should affirm the trial court's decision.

2. Did the magistrate have a substantial basis to conclude the affidavit established probable cause?

As argued above, Defendants contend that the "substantial basis" standard of review is unconstitutional because it reduces the level of evidence needed to support a warrant, and that this Court should apply a correctness review on the question of whether the affidavit established probable cause. However, if the Court is content to apply the federal standard of review, Defendants maintain, for all the reasons explained above, that the magistrate would not have had a substantial basis to conclude there was probable cause evidence of a crime would be found in the house.

To the extent that "a substantial basis" for probable cause is a lower standard than probable cause there are federal cases applying this standard

which demonstrate the lack of substantial basis. In addition to the concerns argued above, the magistrate would not have had a substantial basis to conclude probable cause existed because the affidavit contained significant errors that called into question the officer's own credibility. For example, the officer acknowledges he has only recently met CI "in the past 72 hours". R.062. In the next paragraph he claims "[t]he CI has provided creditable information and has not said anything that would prove false or misleading. The information the CI has given has been investigated and proved credible." R.062.

One might ask, what information has been investigated and proved credible? Obviously, it was not the fact that "Mike" lived at the address, because officers had "attempted through every avenue to try and identify Mike", including "[r]ecords checks on the residence, registrations of vehicles, and requesting information from other agencies", all of which failed to corroborate CI's claims. R.063. It was not the information CI provided about prior drug buys from "Mike", nor was it the fact that "Mike" packages his products in vacuum sealed bags. In fact, the only fact that CI provided to the officers that was verified in any way was the claim that, on the day of the buy, CI bought marijuana from this unknown person at the house and then CI presented marijuana to the officers. But that corroboration was significantly undermined by the lack of control. Obviously, the drugs could have come from CI, the person "familiar with drug distribution and drug practices" who was currently seeking "leniency for pending charges". R.062.

The magistrate would not have had a substantial basis to believe anything at all would be found at that house, that “Mike” was a real person, or that anyone, other than CI, had access to marijuana. Even under the lower “substantial basis” standard of review, this Court should affirm the trial court’s decision by finding the warrant was improperly issued by the magistrate.

II. THE UTAH CONSTITUTION REQUIRES EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE

A. *Larocco, Sims, Thompson, Debooy*

The State acknowledges *Larocco, Thompson, Sims, and Debooy* as cases in which this Court has recognized the independent exclusionary rule for violations of article I, section 14. State’s Brief at 22-24. And whatever criticism may be made about the underlying reasoning of any or all of those cases, the fact of the matter cannot be doubted, the current state of the law in Utah is that “exclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14.” *State v. Thompson*, 810 P.2d 415 (Utah 1991) (*quoting State v. Larocco*, 794 P.2d 460 (Utah 1990)). As it stands, the trial court was correct when it concluded it did not have “authority to depart from binding precedent.” R.185. Defendants assert that this precedent is still binding, on every court in this state, unless and until this Court reverses these former decisions.

B. This Court should not overturn its precedent

1. Stare decisis

“Stare decisis ‘is a cornerstone of Anglo-American jurisprudence’ because it

‘is crucial to the predictability of the law and fairness of adjudication.’” *Eldridge*, 2015 UT 21, ¶21 (quoting *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993)). Thus, this Court will not overturn its own precedents “lightly”; instead it will only do so if the precedent is not considered “weighty” because it was not (1) based on persuasive authority and reasoning, and is not (2) firmly established in the law since it was handed down. *Eldridge*, 2015 UT 21, ¶22. Defendants now assert that this Court should not overrule the above cited precedent establishing a state exclusionary rule arising from article I, section 14. Defendants assert the Utah exclusionary rule was based upon sound authority and reasoning and is firmly established in Utah’s constitutional case law.

There can be little doubt that this Court’s decision, recognizing the state exclusionary rule, in *Larocco*, and repeated in *Sims* and *Thompson*, has been the subject of debate and criticism.⁹ But that criticism has not resulted in overturning the precedent. Utah constitutional law, as it currently stands, provides that “[e]xclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14.” *Larocco*, 794 P.2d at 472 (and repeated verbatim by four justices in *State v. Thompson*, 810 P.2d 415, 419).

Because of that status, in order to overturn these cases and reverse course away from the constitutional requirement of exclusion, this Court must not only find that the prior precedent is lightweight enough to be overturned, but it must also find that it should be overturned, that some alternative to exclusion is a more

⁹ See *State v. Walker*, 2011 UT 53, ¶¶27-58 (J. Lee, concurring).

sound and constitutionally viable path. Defendants assert that the *Larocco/Thompson* precedent is weighty enough to withstand scrutiny, and if not, given the opportunity to determine the scope of our constitutional protection, this Court should still reach the same result. As the trial court put it, “[e]ven if it could disregard precedent and strike out on its own, this Court [should] for the reasons stated below leave the exclusionary rule firmly ensconced in state search and seizure jurisprudence.” R.185-86.

The State claims the *Thompson* decision is “not the most weighty of precedents” because it “did not [analyze]¹⁰ the text or history of Article I, § 14, and failed to acknowledge, much less explain why it was departing from, this Court’s long-standing precedent rejecting a state exclusionary rule for violations of Article I, § 14.” State’s Brief at 23. Defendants’ reading of *Thompson* is different. *Thompson* relied upon the reasoning of *Larocco* to recognize the exclusionary rule of section 14, and by extension, it relied upon *Larocco*’s explanation. *See Thompson*, 419. The decision in *Larocco* certainly *did* examine the text of section 14, and considered how the two clauses related to each other and how different courts at different times have applied different approaches. *Larocco*, 467. Defendants defend this Court’s holding in *Thompson*, and the plurality’s reasoning in *Larocco*, as well reasoned, weighty, and capable of supporting the conclusion that violations of section 14 are subject to exclusion of

¹⁰ There appears to be a typographical error in this sentence of the State’s Brief. Without wanting to alter the meaning of the State’s argument, appellant counsel inserted the term “analyze” to make sense of the sentence.

illegally obtained evidence.

The interesting thing about the State's position about *Thompson* is that it begs the question, did "this Court's long-standing precedent rejecting a state exclusionary rule" analyze the text or history of Article I? In other words, this long-standing precedent, *State v. Aime*, when it rejected the idea of exclusion, did the Court consider the 24 years of precedent the text of section 14 had established, did it analyze the text of the constitution, did it consider the original intent of the drafters? The State's attempt to criticize the holding in *Thompson* as not being weighty enough ignores the absolute dearth of textual analysis or reasoning in *Aime*.

While the decision in *Aime* does devote several pages citing decisions from other jurisdictions, those citations focus primarily on the principle that courts "will not take notice of the manner in which a witness has possessed himself of papers or other chattles" because to do so "would halt the orderly progress of a cause in the consideration of an incidental question". *Aime*, 220 P. 703, 706 (citing *Banks v. State*, 93 So. 293 (Ala. 1921)). The text of section 14 is nowhere to be found in the *Aime* decision, nor is there any mention of what, if any, remedy the constitutional framers intended section 14 to create.

This criticism demonstrates the real crux of the problem with early Utah constitutional law in general. This Court's decisions have not always met the high standard its recent case law has established. Defendants encourage the Court to take this opportunity, to leave no stone unturned and issue a decision that will

clarify the meaning of section 14 and the justifications upon which it depends.

2. The text of the Utah Constitution supports exclusion

If the Court is inclined to find that the precedent of *Larocco*, *Sims*, *Thompson*, and *Debooy* should not be followed as a matter of stare decisis, and that the doctrine of an independent state exclusionary rule should be reconsidered, Defendants believe that this Court's analysis of section 14 should *reestablish* exclusion as the necessary and proper remedy for violations of Utah's search and seizure protections.

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized." UTAH CONST., ART. I, SECT. 14. For the purposes of this brief Defendants will divide section 14 into two main sections, the security section, and the probable cause section. Neither of those sections explicitly require the Court to exclude evidence obtained from a violation of the rights. However, Defendants contend that the meaning of the text, the meaning of the rights, implies exclusion as fundamental to the right.

First, the probable cause section. The plain text requires that no warrant shall issue without probable cause. There is no room for debate, warrants shall not issue without probable cause. But what if a warrant does issue without probable cause? It happens, it happened in this case. Then what? The State

argues that the text of section 14 “does not impose or otherwise contemplate an exclusionary remedy.” According to the State, because the text does not explicitly create a “rule of evidence” making illegally obtained evidence inadmissible, there is not textual support for exclusion. State’s Brief at 33-34 (*citing Aime*, 220 P. at 707). Put simply, from the State’s perspective, because the language of section 14 does not use the words *suppression* or *exclusion* there is no way such a remedy is required by the constitution. Defendants contend that exclusion is not the equivalent of a rule of evidence and that the language of the constitution does not need be explicit for exclusion to be constitutionally required.

Exclusion is not about admissibility; it is not as though illegally obtained evidence is being excluded because the Court has misgivings about the evidence’s reliability, as if it were a concern about foundation, reliability, or authentication. Admissibility and the rules of evidence have as their aim the admission of reliable and competent evidence, so as to get as near to the truth as possible. Illegally obtained evidence may be very reliable. In many cases, evidence discovered by violating the constitution may be the most reliable source of evidence about what the defendant is accused of doing. Reliability has no bearing on the question of whether the government should be allowed to use it as evidence at trial. As unpleasant as it may sound, exclusion is not about the truth, exclusion is about the fundamental right of individuals to security in their homes, in the privacy of their own lives, past, present, and future. Reliable or not, exclusion of illegally obtained evidence is about the fundamental and invaluable limits on the powers

of the government. Exclusion of evidence is about the fundamental value in maintaining a government which obeys its own laws.¹¹

Exclusion does not make evidence merely inadmissible, it makes it utterly unavailable to the state. Exclusion removes from the government the power to use the fruits of its own crimes in any way, and restores to the individual the security guaranteed by the constitution, curing the past harm as well as protecting against present and future violations. Exclusion is about undoing the government's wrongs, cleaning the government's hands, and re-securing an individual's person and property.

Presumably, according to the State's logic, because section 14 does not explicitly describe the process of exclusion, the rights in section 14 are merely lofty goals for the government to aspire to, that have no constitutional means of enforcement. See State's Brief at 33. The State's position presumes that the constitutional framers intentionally designed these constitutional rights to be impotent, and without any remedy. Defendants implore the Court to reject this logic as destructive to the fundamental rights we, as a constitutionally based society, hold most sacred.

Instead, Defendants propose the alternative logic of 'where there is a right, there is a remedy.'¹² Defendants propose that the constitutional framers intended

¹¹ See *State v. Buckley*, 258 P. 1030 (Wash. 1927) ("it is beneath the dignity of the state, and contrary to public policy, for the state to use for its own profit evidence that has been obtained in violation of the law.")

the rights recognized in section 14 to be self-executing. Security in one's home and person and property is its own remedy, the right is the remedy. The right to security and the remedy of exclusion of evidence in a criminal case are synonymous. Exclusion 'breathes life' into the right to security. *See Brierley v. Layton City*, 2016 UT 46, ¶20. Exclusion is the vindication or the restoration of the right to security. When the government breaks the law, and violates one's right to security in one's home, exclusion is at least a partial restoration of that security.

The State would have the Court adopt the faulty reasoning in *Leon* that pretends that once the police have violated a person's rights by unlawfully entering and searching his home, or seizing himself or his property, the damage is done, or "fully accomplished", and exclusion "is neither intended *nor able* to cure the invasion of the defendant's rights which he has already suffered." State's Brief at 43 (*citing Leon*, 468 U.S. at 906). This argument fails to comprehend the scope of the right to security, and the potential for ongoing violations created by the government's use of illegal evidence.

Defendants assert that right to security enshrined in section 14 does not evaporate once the government violates it. The fact that the government violated Defendants' rights to be secure in their home, and to the privacy enjoyed therein,

¹² *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury... Blackstone states [that]... 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'").

on August 28, 2012 does not forever extinguish those rights. Michael Rowan and Rebecca George are still entitled to security in their home and the privacy they had there, even today, even years after the government violated those rights. At this very moment, by virtue of section 14 Defendants maintain the right to be secure from unreasonable searches of their home, past, present, and future. That includes the right in the future to be secure from the government's past illegal conduct. At this moment Defendants maintain the right to demand security in their home, and to demand that judicial officers not allow the government to expose private details from their home. Security means the government cannot continue to violate one's rights long after the police drive away from the house by using evidence derived from illegal conduct.

Exclusion puts the Defendants, whose security has been violated, back into the legal standing they enjoyed before the government destroyed the sanctity and security of their home. Exclusion vindicates the ongoing right to privacy, to security in the home, to security in the privacy of the contents and activities in the home. And while exclusion may not perfectly restore a person to his pre-violation status, while his door may still be smashed-in and his property flung from drawers, exclusion does restore the legal circumstances by removing the evidence collected from the violation from the government's use, where it would have been if the violation had not occurred. While exclusion does not perfectly replace every item disturbed or confiscated by illegal government conduct, it at least returns a

defendant to same security status, where the government is not allowed continued access to use the secure details of his private life against him.

Without exclusion, Defendants' right to security and privacy is repeatedly violated, over and over, as the details of their private lives are exposed to attorneys and clerks, and journalists to judges and jurors, and to the public at large. Without exclusion, Defendants' right to security in the past, present, and future is permanently denied. Exclusion not only specifically remedies the prior illegal conduct (by attempting to repair the harm done to defendant and removing the ill-gotten advantage gained by the government) but it also stops the government's ongoing violation by ending the government's access to and use of a defendant's person or property. In this way exclusion gives meaning to the right;¹³ without exclusion Defendants' right to security is repeatedly and endlessly violated. Without the remedy of exclusion, the substantive right to security in one's own home is merely aspirational, merely a suggestion. This Court should not accept the State's position that language of our constitutional right, the right to be secure from illegal search and seizure, to be a right without any real life meaning or function.

When the framers of the Utah Constitution wrote section 14, they would have understood that the right to be secure from unreasonable searches was an actual right, not merely an empty aspirational goal for the government to do its

¹³ See Douglas Laycock, MODERN AMERICAN REMEDIES 1 (4th ed. 2010) ("Remedies give meaning to obligations imposed by the rest of the substantive law... [Remedies are] the means by which legal obligations are given effect.").

best to comply with, except when it didn't suit its investigative purposes. The Utah framers would have understood that security in one's home and personal effects was an ongoing right and did not end after the government committed a violation. In order to give meaning to those real and ongoing rights, the framers would have understood there must be a way to protect and enforce that right, into the future, especially for those whose rights had been violated. The framers, in light of *Boyd* (*see infra*), would have imbued the language of section 14 with an understanding that security in one's home includes preventing the government from continued intrusion by using illegally obtained evidence at a trial. The framers would have understood that exclusion is part and parcel of the right of the people to be secure from government crimes.

3. The historical context supports exclusion

The historical context of 1890's search and seizure law supports the conclusion that the framers of the Utah constitution intended section 14 to require exclusion of evidence.

The Utah Constitution of 1895 was the last in a long line of attempts by the Territory of Utah/Deseret to become a state. Beginning as early as 1849¹⁴ the settlers assembled in constitutional conventions and repeatedly attempted to establish a constitution. While those efforts resulted in numerous iterations of a proposed constitution, none of these proposals were accepted by the United States. It wasn't until after the Congress passed the Enabling Act in 1894 that

¹⁴ See Dale Morgan, *State of Deseret*, Utah Historical Quarterly, 8 (1940), page 85.

Utah had any chance of becoming a state. The final 1895 version of the Utah Constitution, including the Declaration of Rights of article I, had been evolving for forty-five years, with small changes to structure and content, usually borrowing portions from the federal and other state constitutions, including those of recently added sister states.¹⁵ “The convention borrowed heavily from earlier Utah constitutions and other state constitutions, particularly those of Nevada, Washington, Illinois, and New York and retained the antigovernment philosophy which marked Utah’s Constitutions of 1872, 1882, and 1887.” John Flynn, *Federalism and Viable State Government -- The History of Utah’s Constitution*, 1966 UTAH L. REV. 311, 323.

“The development of Utah constitutional thought thus shows familiarity with constitutional development on other states, and demonstrates that Utah, despite her experiments in marriage and economic relationships, was not ready to depart from the traditional forms of American government”. HICKMAN, at 74. This familiarity of constitutional development would have included the framers being familiar the United States Supreme Court’s decisions.

4. *Boyd v. United States*

In 1895, when the framers of Utah’s constitution were basing section 14 upon the text and meaning of the Fourth Amendment, exclusion was part of the Fourth Amendment.

¹⁵ See MARTIN HICKMAN, *Utah Constitutional Law*, 40-78 (unpublished doctoral dissertation available at the University of Utah J. Williard Marriott Library and the Brigham Young University Harold B. Lee Library).

Right in the middle of Utah's constitutional evolution, in 1886, the United States Supreme Court considered the case of *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), where the defendant claimed an 1874 law requiring him to produce his private books and papers in a case against him violated the Fourth Amendment. At trial he objected to the government requiring him to provide this evidence but his argument failed and he lost the trial based upon that evidence. In its opinion, the Supreme Court recalled the "recent history of the controversies on the subject, both in this country and in England" related to the issuance of writs of assistance allowing the authorities to search for evidence of smuggled goods. *Boyd*, 116 U.S. 616, 624-25. The Court concluded that application of the law constituted an illegal search or seizure and that the Fourth and Fifth Amendment prevented the federal government from forcing a person to produce evidence in this manner. Most importantly for the purposes of this case, the Court ordered that the "judgment of the Circuit Court should be reversed, and the cause remanded, with directions to award a new trial." *Boyd*, 116 U.S. 616, 638.

In other words, the illegal search and seizure of property *and* the use of the illegally obtained evidence at trial violated the Fourth Amendment. The Court ordered a new trial which would have to proceed without the use of the illegally seized evidence because "its admission in evidence by the court, [was] erroneous and unconstitutional proceedings." *Boyd*, 116 U.S. 616, 638. Without using the terms *suppression* or *exclusion*, the United States Supreme Court, in 1886, ruled

that evidence obtained in violation the Fourth Amendment must not be used in a criminal trial. In 1886, and relevantly in 1895, the language of the Fourth Amendment meant that search and seizure violations resulted in exclusion. This is the meaning of language of the federal constitution that the Utah framers would have been looking to.

Justice Stewart, in his concurring opinion in *State v. Anderson*, 910 P.2d 1229 (Utah 1996) wrote a thoughtful statement about how the framers of the Utah Constitution must have felt about the rights they were enshrining in article I. Because the federal Bill of Rights was not incorporated into the Due Process Clause of the Fourteenth Amendment until much later, “the framers of the Utah Constitution... viewed their own state constitutional provisions as the sole source of constitutional protection for those individual liberties enshrined” in our state declaration of rights. *Anderson*, 910 P.2d at 1240 (J. Stewart, concurring in the result). Those framers would not have had any reason to expect that the citizens of Utah would be protected from state actors by the Fourth Amendment or by the exclusionary rule announced in *Boyd*. Because of that lack of protection, these constitutional authors wanted to protect the citizens of Utah from the same kinds of state government overreach that the Fourth Amendment provided from the federal government. If the framers of the Utah Constitution only wanted the citizens of Utah to be protected from the federal government and not from the action of state authorities, there would have been no need to enact article I, section 14, no need to repeat the language that had been interpreted to require

exclusion of illegally obtained evidence. But those framers enacted section 14 demonstrating an obvious desire to protect the people of Utah from the actions of the state government.

This protection would have been made in light of the holding in *Boyd*, and the then existing exclusionary function of the language of the Fourth Amendment. It would have been made considering the United State Supreme Court's rejection of the earlier longstanding proposition that illegally seized evidence could still be admitted. Instead, understanding that the Fourth Amendment protected Boyd from the use of illegally obtained evidence by US Marshalls at his trial, the Utah framers used nearly identical language to protect Utahans from state actors using illegally obtained evidence in state cases.

The State points to Justice Lee's concurring opinion in *Walker*, 2011 UT 53, ¶49, where he points out that "no appellate court in any state had excluded unlawfully obtained evidence under its constitution" in 1895. State's Brief at 37, fn.4. Presumably this suggests that other states did not believe their constitutions required exclusion, and therefore neither would have the Utah framers. But this fact means very little in context because *Boyd*, and its recognition of exclusion as a constitutionally mandated remedy, was issued in 1886, long after most states had adopted their constitutions with a pre-*Boyd* understanding of the Fourth Amendment. The framers of those earlier state constitutions would arguably not have understood their own constitutions, though similar to the federal constitution, to require exclusion because, at the time they were ratified,

exclusion under the Fourth Amendment was not yet recognized. But in 1895, nine years after *Boyd*, Utah's constitutional framers who looked to the language of the Fourth Amendment and its recognized meaning *at the time* would have understood that exclusion was part and parcel of the Fourth Amendment's right against illegal search and seizure. The fact that earlier states had not interpreted their own constitutions, ratified before *Boyd*, to require exclusion should not mean Utah's framers would have had a similar intent.

Defendants dispute the State's position that exclusion as a constitutional requirement would have been foreign to the drafters of the Utah Constitution. Based on the historical setting and the state of the Fourth Amendment case law after *Boyd* in 1889, exclusion was the constitutionally required remedy for violations of search and seizure under the Fourth Amendment. Utah's drafters would have been aware of the United States Supreme Court's interpretation of the Fourth Amendment. The framers would have understood that, according to *Boyd*, if evidence had been illegally obtained any judgment based on that evidence was illegitimate and should result in reversal and a new trial without the illegal evidence.

"It is not the breaking of his doors, and the rummaging of his drawers, that constitutes essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property,... it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's Judgment. Breaking into a house and opening boxes and drawers are

circumstances of aggravation; but any forcible and compulsory extortion of a man's... private papers to be used as evidence to convict him of crime... is within the condemnation of that judgment."

Boyd, 630. The framers would have understood that the similar language they used in section 14 would have had the same meaning.

Defendants assert that this Court should not overturn the precedent of *Larocco* and *Thompson*. The Court should reaffirm the authority of the Utah Constitution to protect our citizens from the unreasonable and unwarranted intrusions of an at times overzealous government, independent of the inconsistent and unpredictable federal exclusionary rule. This Court should take an active role in supporting, obeying, and defending the rights of Utahans as it interprets the meaning of our own founding document. Defendants ask the Court to contemplate what security from unreasonable search and seizure means if a violation has no consequence. Defendants ask the Court to consider whether the use of illegally obtained evidence would not be itself another violation of the right to be secure in one's home, papers, and effects. Does one lose the right of security in these places and property for ever after once the government commits the initial violation? Defendants ask the Court to defend our security from government intrusion, even after the intrusion occurs. Defendants assert that exclusion of evidence is not a mere a judicial remedy tacked on the back end to try to deter future violations. Exclusion is a continuation of the right to security; exclusion is security from unlawful state

action after a violation has occurred. The right of the people to be secure in their persons, homes, and property includes the right to prevent the government from using illegally obtained evidence.

III. THIS COURT SHOULD NOT RECOGNIZE A GOOD FAITH EXCEPTION TO UTAH’S EXCLUSIONARY RULE

A. Prior precedent implicitly shows there is no good faith exception to Utah’s exclusionary rule

This Court has previously stated that it has yet to decide whether the state exclusionary rule is subject to a good faith exception. “We leave for another day the issue of whether to apply in appropriate circumstances a good faith exception to the exclusionary rule to article I, section 14 of the Utah Constitution.” *Thompson*, 810 P.2d 415, 420. However, when faced with the opportunity to recognize a good faith exception the Court did not do so.

In *State v. Debooy*, 2000 UT 546, ¶1, the defendant was convicted of drug possession charges and appealed his case challenging the constitutionality of a checkpoint where the police discovered evidence of crimes. The police filed an application with a magistrate requesting authorization to conduct an “administrative highway checkpoint” with the intent to inspect or detect traffic and safety related violations, and “[o]ther alcohol and/or controlled substance violations.” *Debooy*, ¶2. The magistrate authorized the checkpoint and the defendant was investigated when he was stopped. *Id.*, ¶¶3-4. While stopped at the checkpoint the officers asked consent to search, received it, and discovered “contraband in a backpack in the trunk.” *Id.*, ¶4.

On appeal this Court found that the section 14 and the Fourth Amendment have not “always been interpreted the same way” and that this Court “will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state’s citizens.” *Id.*, ¶12. The Court considered federal cases examining checkpoints but “solely for their persuasive value, and [did] not regard them as binding for purposes of state law.” *Id.*, ¶19. The Court recognized the interest section 14 has in protecting against practices similar to general warrants where officers were given authority to search without specified probable cause. *Id.*, at ¶26.

Eventually the Court concluded that the police checkpoint violated section 14 prohibition that against unreasonable searches and seizures in section 14. *Id.*, ¶33. Implicitly, the Court found that the police action was not protected by their good faith reliance upon the magistrate’s authorization. Presumably, if a good faith exception were to exist under Utah’s Constitution, *Debooy* would have been an opportunity to recognize and apply it.

Defendants assert that the erroneous judicial authorization of an administrative checkpoint that is later executed by the police in good faith is analogous to the issuance of a warrant that lacks probable cause that is later executed in good faith by the police. In both instances the constitutional error is caused by a judicial officer authorizing police action. In both instances the police have done nothing wrong. And in both instances the defendant’s right to be secure from unreasonable search or seizure and from warrants without probable

cause is violated. *Debooy* demonstrates that section 14 is concerned more about protecting an individual's right than it is about punishing the person or government agency responsible for the violation of the right. Because this Court did not recognize a good faith exception to section 14 in *Debooy* when it could have, the Court should not recognize one here.

B. A good faith exception is inconsistent with the text of Utah's Constitution

The text of section 14 requires that “no warrant shall issue but upon probable cause”. UTAH CONST., ART. I, SECT. 14. If the Court were to adopt a good faith exception to the exclusionary rule it would allow the government use warrants issued without probable cause, in direct defiance of the language of section 14. A good faith exception would lower the explicit constitutional requirement of probable cause to some other ‘standard’. What could be more offensive to the explicit probable cause standard than to judicially acknowledge the validity of warrants executed without probable cause? As argued in the standard of proof argument above, the creation of a good faith exception defies the plain text of section 14 and replaces it. The State would have the Court effectively amend section 14 as follows: *Warrants may issue without probable cause so long as law enforcement executes the warrant in good faith*. This perversion of one of the most basic tenants of constitutional law should not be adopted. This Court should defend the language of section 14 and firmly establish that warrants are invalid if they are not supported by probable cause and when the government executes an invalid warrant it has violated section 14.

C. A good faith exception is inconsistent with the purposes of the exclusionary rule

The State would have the Court adopt the reasoning of the U.S. Supreme Court's decision in *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, (1974) and find that the only purpose of an exclusionary rule is to deter future constitutional violations by law enforcement. See State's Brief at 42-43. But such a conclusion would be to neuter the constitution and ignore the historical meaning of exclusion.

Defendants ask the Court to reject *Calandria* and the relatively modern view that exclusion is merely a judicial remedy, rather than constitutionally required. "[T]he *Leon* holding could not have been reached but for the [U.S.] Supreme Court's narrow justification for the exclusionary rule", that was accomplished by rewriting history and limiting the purpose of the rule to only deterring future unlawful police conduct. *State v. Guzman*, 842 P.2d 660, 671 (Idaho 1992) (referring to *Calandra*). Prior to the rewriting of history, the United States Supreme Court stated in many cases that there were several *purposes* of the exclusionary rule, including to protect a person's Fourth Amendment guarantees by deterring lawless conduct by police officers *and* to close the courthouse doors "to any use of evidence unconstitutionally obtained." *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).¹⁶

¹⁶ See also *Brown v. Illinois*, 422 U.S. 590, 599, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (the dual considerations of deterrence and judicial integrity are commonplace purposes of the exclusionary rule); *Terry v. Ohio*, 392 U.S. 1, 12-13, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (The exclusionary rule serves to deter

Defendants now assert, and many jurisdictions have agreed, that the U.S. Supreme Court’s “revisionist history of the exclusionary rule” is inaccurate and untrue to the spirit and previously acknowledged purposes of the Fourth Amendment exclusion. *Guzman*, 842 P.2d 660, 671. That same limited view of article I, section 14 proposed by the State should not be adopted in Utah. Rather, unlike the current federal majority vision of the federal exclusionary rule, Utah’s exclusionary rule has multiple purposes and justifications beyond deterrence of future police conduct and creating a good faith exception would defeat those other purposes and justifications.

The exclusionary rule is a vindication of individual constitutional rights. As explained in *Weeks*, the prosecution’s use of illegally seized evidence involved “a denial of the constitutional rights of the accused.” *Weeks v. United States*, 232 U.S. 383, 393, 34 S.Ct. 341, 58 L.Ed. 652 (1914). That would have been similar to the purpose for exclusion in *Boyd*, where the U.S. Supreme Court reviewed “a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen”. *Boyd*, 618.

That same purpose was recognized in New Jersey when its supreme court rejected the *Leon* exception too. The exclusionary “rule also serves as the indispensable mechanism for vindicating the constitutional right to be free from

police misconduct *and* preserve judicial integrity, to prevent the courts from being “made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions”); *Elkins v. United States*, 364 U.S. 206, 222, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960) (The exclusionary rule also serves “the imperative of judicial integrity.”).

unreasonable searches.” *State v. Novembrino*, 519 A.2d 820, 857 (N.J. 1987). In New Mexico the supreme court’s finding of an independent exclusionary rule did not focus “on deterrence or judicial integrity, nor do we propose a judicial remedy; instead, our focus is to effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure.” *State v. Gutierrez*, 863 P.2d 1052, 1067 (N.M. 1993).

With these additional purposes of the exclusionary rule firmly established, based in case law, history, and logic, there is no reason to create a good faith exception. The State’s attempt to do so cannot be said to come from any reverence to the constitution, but instead from a desire to minimize and dilute the rights of the people and enlarge power of the government. Given this Court’s unique responsibility to the Utah Constitution and the rights of the people of Utah, this Court should view the State’s request very skeptically.

Finally, the history of Utah’s settlers and their experiences with local and federal government agents in the years immediately preceding 1895 should be considered when examining what the language of section 14 means. There can be little doubt that many of the framers were intimately familiar with government abuses of search and seizure, including the use of general or unsupported warrants.¹⁷ These abuses give critical insight into why the framers would not want to insulate from review the issuance of an illegal warrant.

¹⁷ See Tracey Panek, *Search and Seizure in Utah: Recounting the Antipolygamy Raids*, Utah Historical Quarterly, Fall 1994, 319-334.

CONCLUSION AND PRECISE RELIEF SOUGHT

Because the trial court correctly concluded the affidavit failed to support probable cause, or because the magistrate did not have a substantial basis to find probable cause, this court should affirm the granting of Defendant's motion to dismiss. This Court should not reverse its cases recognizing the state exclusionary rule nor create a good faith exception thereto. This Court should affirm.

RESPECTFULLY SUBMITTED this 25th day of November, 2016.

Douglas Thompson

CERTIFICATE OF MAILING

I herby certify that I mailed two copies of the foregoing brief, and a disc containing a PDF version, postage prepaid to the Utah State Attorney General, Appeals Division, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 25th day of November, 2016.

Utah Const. Art. I, § 14

Current through the 2016 3rd Special Session

Utah Code Annotated > Constitution of Utah > Article I Declaration of Rights

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]

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.

History

Const. 1896.

Utah Code Annotated

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USCS Const. Amend. 4

Current through PL 114-219, approved 7/29/16

United States Code Service - Constitution of the United States > CONSTITUTION OF THE UNITED STATES OF AMERICA > AMENDMENTS > AMENDMENT 4

Notice

 *Part 1 of 11.* You are viewing a very large document that has been divided into parts.

Unreasonable searches and seizures.

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.

UNITED STATES CODE SERVICE

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