

1991

Utah v. Rowe : Brief of Appellant

Utah Supreme Court

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BRIEF

910165
DOCKET NO. 910165 - IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH :

Plaintiff-Petitioner, : Case No. 910165

v. :

KEELEY L. ROWE, : Category No. 14

Defendant-Respondent. :

BRIEF OF PETITIONER
- - - - -

ON WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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UTAH

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BRIEF OF PETITIONER
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JURISDICTION AND NATURE OF PROCEEDINGS

This case is before the Court on a writ of certiorari to the Utah Court of Appeals. This Court has jurisdiction to hear the case under Utah Code Ann. § 78-2-2(3)(a) (Supp. 1991).

STATEMENT OF ISSUES PRESENTED ON APPEAL

AND STANDARDS OF APPELLATE REVIEW

The following issues are presented for review:

1. Did the majority of the court of appeals erroneously conclude that a violation of the nighttime search warrant authorization provision, Utah Code Ann. § 77-23-5 (1990), constitutes a constitutional violation such that the "exclusionary rule" is applicable? Did the majority of the court of appeals erroneously conclude that the officers acted in "bad faith" in executing the search warrant, in view of their contemporaneous valid arrest of the home's owner?

The determination of whether a violation of a rule of criminal procedure amounts to a constitutional violation requiring the exclusion of evidence is a question of law and is

reviewed on appeal under a correction of error standard. State v. Fixel, 744 P.2d 1366 (Utah 1987); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

2. Did the majority of the court of appeals erroneously conclude that the mere status of being an "invited guest" in a third-party's home "vests" the guest with a legitimate expectation of privacy in the residence such that the guest may challenge the validity of a search warrant for the home? Did the majority improperly adopt a "legitimately on the premises" test for determining if a defendant's fourth amendment rights are implicated in a search?

The decision to grant a motion to suppress and preclude the introduction of evidence seized is a matter of law and reviewed on appeal under a correction of error standard; however, the underlying factual determinations of the trial court should be given deference and are reversed only if clearly erroneous. State v. Ramirez, 159 Utah Adv. Rep. 7, 16 n.3 (Utah April 23, 1991); State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987).

3. Did the majority of the court of appeals erroneously conclude that the state must prove a defendant's abandonment of an expectation of privacy by "clear, unequivocal and decisive evidence;" and did the majority erroneously apply a subjective standard in evaluating whether abandonment occurred by improperly requiring the state to prove that defendant did not abandon the property "to avoid self-incrimination?"

This is a question of law, subject to the standard of

review delineated in paragraph 2.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Relevant constitutional provisions, statutes and rules for a determination of this case are, in pertinent part:

Utah Code Ann. § 77-7-5 (1990). Issuance of warrant - Time and place arrests may be made.

A magistrate may issue a warrant for arrest upon finding probable cause to believe that the person to be arrested has committed a public offense. If the offense charge is:

(1) a felony, the arrest upon a warrant may be made at any time of the day or night.

Utah Code Ann. § 77-23-5 (1990). Time for service - Officer may request assistance.

(1) The magistrate must insert a direction in the [search] warrant that it be served in the daytime, unless the affidavits or oral testimony state a reasonable cause to believe a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason; in which case he may insert a direction that it be served any time of the day or night. An officer may request other persons to assist him in conducting the search.

Utah Code Ann. § 77-23-10 (1990). Force used in executing warrant - Notice of authority prerequisite, when.

When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:

(1) If, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness; or

(2) Without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the

officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.

STATEMENT OF THE CASE

Defendant, Keeley Laursen Rowe, was charged with possession of a controlled substance (methamphetamine), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) and (b)(ii) (Supp. 1989) (R. 10). Prior to trial, defendant moved to suppress the evidence seized pursuant to a search warrant executed on a third-party's home in which she was present (R. 28-31). Consistent with local rule, the matter was considered by the court without hearing, on the written memoranda submitted by the parties, and denied (R. 32-41, 51-55, 60-61). Subsequently, defendant waived her right to a jury; a bench trial was held on March 21, 1989, in the Fifth Judicial District Court, Washington County, Utah (R. 50, 62-65; T. 5). During trial, defendant reasserted her motion to suppress the evidence (T. 7-8, 104-05). The motion was again denied (T. 108). Defendant was convicted as charged (R. 65; T. 181). Defendant was sentenced to the statutory indeterminate term of zero to five years; but, imprisonment was stayed and defendant was placed on probation (R. 80-84).

On appeal, the Utah Court of Appeals, in a split decision, reversed defendant's conviction and remanded the case for a new trial, concluding that (1) the search warrant improperly authorized a nighttime search, (2) the remedy for a

defective nighttime search authorization was suppression, (3) the officers' reliance on the magistrate's authorization for a nighttime search was unreasonable, (4) defendant, as an "invited guest" in a third-party's home, had an expectation of privacy in the home sufficient to allow her to challenge the search warrant, and (5) defendant had not abandoned an expectation of privacy in her purse left in the home. State v. Rowe, 806 P.2d 730 (Utah App.), cert. granted, 167 Utah Adv. Rep. 26 (Utah July 3, 1991).

On April 9, 1991, the state timely filed a petition for writ of certiorari in this Court. On July 3, 1991, the petition was granted.

STATEMENT OF THE FACTS

The state accepts the statement of the facts contained in the opinion of the court of appeals with the following additions.

On October 6, 1989, a confidential informant told the police that Stan Swickey, the individual whose home was subsequently searched, had a large quantity of methamphetamine and marijuana at his residence in Leeds, Utah, and had offered to sell the informant "whatever he wanted" (R. 56-57; T. 12). Based on this information and prior police monitored drug purchases from Swickey, a felony arrest warrant for Swickey and a search warrant for his residence were obtained on the night of October 7, 1989 (T. 9-12, 14). The search warrant authorized the officers to execute it at night and without announcing their presence (R. 57). Within hours, the officers entered the Swickey

home to arrest Mr. Swickey and execute the search warrant (T. 15, 18).

Upon entering the home, the officers unexpectedly encountered eight other individuals in the home for what appeared to be a party (T. 16). Defendant was standing in the kitchen and the others were seated around a table in the living room (T. 16, 21). Drugs were in plain view in a cup on the living room table (T. 26, 57-58, 126).¹ The officers arrested Swickey pursuant to the arrest warrant and informed him of the search warrant (T. 17, 22).

The remaining guests, including defendant, were told that they were free to leave the premises (T. 30). Defendant asked if she could get her shoes. An officer accompanied her to a bedroom, where

[f]rom a pile of clothing next to the file cabinet she -- in which this purse was a part of that pile, she removed her shoes in that pile. In that pile there were some pants, some women's temple garments, several other items. She picked those up and her shoes up, and [the officer] asked her, "Is that everything of yours in this room? She said that was, and exited the room and [the officers] permitted her to leave.

(T. 30-31).

After defendant and the others had left, the officers conducted a search of the home (T. 31, 44). Drugs were found throughout the house, including a pile of methamphetamine on the

¹ Edwin Davis was arrested for possession of the drugs in his cup on the table. He was tried with defendant and convicted of the lesser included offense of resorting (T. 181).

dresser in the room from which defendant had retrieved her shoes. A vial of methamphetamine was found in the purse which had been left on the floor. When subsequently questioned by the police, defendant admitted that the purse and vial were hers. She stated that she had been "ripping off" Swickey during the party by filling the vial from the supply of methamphetamine on the dresser without Swickey's knowledge and without payment to him (T. 35, 49).

SUMMARY OF ARGUMENT

The fundamental error of the Rowe majority is their conclusion that the search and seizure in question implicated the fourth amendment. This error was predicated on the court of appeals' misconstruction of the nature of the procedural rules governing the execution of search warrants and the nature of the remedy for their violation. By equating a violation of the nighttime search warrant authorization provision to a constitutional violation, the majority improperly rejected this Court's prior determinations that a violation of the procedural rules governing the execution of search warrants does not implicate constitutional rights such that the exclusionary rule is applicable. Further, the majority erred in concluding, under the facts of this case, that the officers acted unreasonably in relying on the magistrate's nighttime search authorization.

Based on its conclusion that any procedural violation was of constitutional magnitude, the majority of the court of appeals next considered and erroneously concluded that defendant,

as a social guest, had a sufficient expectation of privacy under the fourth amendment in the third-party home so as to permit a challenge to the validity of the search warrant. By doing so, the majority adopted a "legitimately on the premises" test for determining whether any constitutionally protected interest of defendant's had been infringed by the police action. The application of such a test for fourth amendment analysis is in conflict with established law.

The majority of the court of appeals erroneously concluded that, before a defendant may be found to have abandoned a constitutionally protected interest in property, the state must prove by clear and convincing evidence that the defendant did not abandon the property to "avoid self-incrimination." This conclusion erroneously applies a subjective analysis to abandonment and is contrary to the prevailing view.

Accordingly, this Court should reverse the court of appeals' holding which suppressed the evidence seized and reversed defendant's conviction, and should reinstate and affirm defendant's conviction.

ARGUMENT

POINT I

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE EXCLUSIONARY RULE WAS APPLICABLE TO A PROCEDURAL VIOLATION OF THE NIGHTTIME SEARCH WARRANT PROVISION, UTAH CODE ANN. § 77-23-5 (1990).

In challenging the search warrant for the Swickey home, defendant never raised an issue of the warrant's substantive

statutory grounds of whether the affidavit in support of the search warrant contained sufficient justification for a no-knock entry, pursuant to Utah Code Ann. § 77-23-10 (1990), and for a nighttime search, pursuant to Utah Code Ann. § 77-23-5 (1990).² (See Constitutional Provisions and Statutes, supra at 4, for complete text of statutory provisions.) On appeal, the majority of the Rowe panel upheld the lower court's determination that sufficient justification existed for an unannounced entry, but overruled the magistrate's conclusion that a nighttime search was permissible. State v. Rowe, 806 P.2d 730, 732-33 (Utah App.), cert. granted, 167 Utah Adv. Rep. 26 (Utah July 3, 1991).³

Finding that the affidavit in question did not contain a sufficient justification for the nighttime entry, the majority then erroneously concluded that any violation of the statutory provision was of constitutional magnitude. Id. at 738-39. This

² Defendant also claimed that the search warrant contained the wrong date. Both the trial and appellate courts summarily discounted this argument.

³ The appellate court concluded that the mere presence of narcotics was insufficient justification for a nighttime search in that the affidavit did not establish that the "contraband was likely to be destroyed, concealed, damaged, or altered during the night." Rowe, 806 P.2d at 734. For purposes of this review, the state is not challenging the court's conclusion that there was insufficient written factual justification for the nighttime entry. However, § 77-23-5 does not require that the grounds stated for the nighttime entry override the preference for a daytime entry. Instead, the statute requires the issuing magistrate to be provided with the officer's reason for wanting a nighttime entry so that the magistrate may independently determine if the request constitutes a "good reason" for the more intrusive entry. As noted by the court of appeals, some recognized reasons are safety concerns, the dangerousness of the offender, or the likely quick removal of the evidence. Id. at 734 and n.5.

error is fundamental to the court's decision. For by concluding that the violation was of constitutional dimension, the majority also erroneously considered defendant's expectation of privacy under the fourth amendment.⁴ Both predicates are false.

The court of appeals' conclusion that noncompliance with a statutory procedural provision requires suppression of the evidence ignores Utah precedent and is in conflict with federal law. In State v. Fixel, 744 P.2d 1366, 1369 (Utah 1987), this Court concluded that despite an officer clearly acting outside of his statutory geographical authority in an undercover purchase of narcotics, suppression of the evidence obtained would be "a remedy out of all proportion to the benefits gained to the end of obtaining justice while preserving individual liberties unimpaired." This holding was based on a recognition that

[o]nly a 'fundamental' violation of a rule of criminal procedure requires automatic suppression, and a violation is 'fundamental' only where it, in effect, renders the search unconstitutional under traditional fourth

⁴ The validity of the majority's conclusion that defendant had an expectation of privacy in the Swickey home sufficient to challenge the manner of entry will be discussed in Point II of this brief. However, the majority also implicitly assumed that defendant would have standing to challenge the manner of entry even if viewed as only a procedural violation. This assumption is incorrect. Under traditional standing concepts, a movant must establish a "causal relationship alleged between the injury to [the party], the governmental actions and the relief requested." Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983). (See also footnote 7, infra at 19, for discussion of analytical differences between traditional standing and a fourth amendment expectation of privacy.) But, even if it is assumed that defendant has standing to challenge the search on the procedural ground that § 77-23-5 was violated, as will be more fully discussed, defendant's interests would not be affected by whether the search occurred in the day or night.

only where it, in effect, renders the search unconstitutional under traditional fourth amendment standards. Where the alleged violation . . . is not 'fundamental' suppression is required only where:

(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision of the rule.

It is only where the violation also implicated fundamental, constitutional concerns, is conducted in bad-faith or has substantially prejudiced the defendant that exclusion *may* be an appropriate remedy.

Id. at 1368-69 (quoting Commonwealth v. Mason, 507 Pa. 396, 490 A.2d 421 (1985)) (emphasis in original). Accord United States v. Schoenheit, 856 F.2d 74, 76-77 (8th Cir. 1988) (noncompliance with nighttime authorization prerequisites does not automatically require suppression of evidence); United States v. Searp, 586 F.2d 1117, 1125 (6th Cir. 1978), cert. denied, 440 U.S. 921 (1979) (violation of nighttime provision is procedural and does not require suppression; cited with approval in Fixel); United States v. Shelton, 742 F.Supp. 1491, 1502-03 (D. Wyo. 1990) (violation of nighttime search provision is statutory and does not require suppression; citing Fixel as being in accord). See also Allen v. State, 85 Md.App. 657, 584 A.2d 1279, 1286, cert. denied, 323 Md. 1, 590 A.2d 158 (1991) (failure to comply with statutory provisions governing questioning to proceed with pat-down is procedural violation and does not require suppression); State v. Ford, 801 P.2d. 754, 764-66 (Or. 1990) (failure to comply with no-knock statutory provision was excusable and did not violate the federal or state constitution); People v. Dyla,

536 N.Y.S.2d 799, 808-09, 142 A.D.2d 423 (N.Y. App. 1988) (distinct trend is towards a recognition that violation of procedural rule does not implicate fourth amendment rights and therefore suppression is not appropriate); Commonwealth v. Mason, 507 Pa. 396, 490 A.2d 421, 423-24 (1985) (suppression not appropriate remedy for technical violations of procedural rules governing the execution of search warrants); State v. Brock, 294 Or. 15, 653 P.2d 543, 547 (1982) (suppression not required for violation of nighttime search provisions); Commonwealth v. Musi, 486 Pa. 102, 404 A.2d 378, 384-85 (1979) (suppression not required for violation of procedural rules governing execution and return on search warrant).

Despite this case law, the court of appeals concluded the § 77-23-5 was not ministerial or technical in nature because it "established procedures for protection of substantive rights." Rowe, 806 P.2d at 738. While certainly the nighttime authorization provision was "designed . . . to govern the conduct of . . . officers" and encompasses "statutory conditions which explicate fundamental purposes of the Fourth Amendment," this does not mean that the statute is of constitutional stature. United States v. Searp, 586 F.2d at 1124, and cases cited above. Instead, the clear intent of § 77-23-5 is simply

to ensure that the fact that a nighttime search is contemplated by the police is brought to the attention of a magistrate and that he or she consciously decide whether such a particularly abrasive intrusion is called for in a given situation.

United States v. Searp, 586 F.2d at 1121 (commenting on identical

federal rule). For this reason,

it is important to differentiate between the *right* to be free from unnecessary and frightening intrusions by the State into our homes in the middle of the night and the *procedures* which have been established to protect that right.

Id. at 1122 (emphasis in original). Accord United States v. Schoenheit, 856 F.2d at 77 (the nighttime search authorization rule and the fourth amendment are "not coextensive"). Thus, the court's reliance on general comments that non-warrant nighttime searches were abhorred under the common law or that a night intrusion is one element in considering the reasonableness of a search is misplaced. See Rowe, 806 P.2d at 738-39. For here, assuming arguendo that the police failed to comply with the procedural requirements of § 77-23-5, "the search was nevertheless 'reasonable,' in the constitutional sense, because it was conducted pursuant to a valid state warrant, and met the requirements of the fourth amendment." United States v. Searp, 586 F.2d at 1122. Accord United States v. Schoenheit, 856 F.2d at 77 (there is "no authority for concluding that a search is *per se* unconstitutional simply because it was conducted" at night).

The purpose of the statutory search warrant entry requirements is to minimize the invasion of privacy which is being authorized by the issuance of the warrant and to protect the safety of the persons and property involved. State v. Buck, 756 P.2d 700, 701 (Utah 1988). Here, the issue is not whether Swickey's home could be searched, but simply when.

Contemporaneously with the issuance of the search warrant, the

magistrate also issued a felony arrest warrant for Swickey, the owner/occupant (T. 9-12, 14; R. 57). Since under Utah Code Ann. § 77-7-5 (1990), a felony arrest warrant may be executed "at any time of the day or night," the intrusive nighttime entry was already statutorily permitted under the felony arrest warrant. Under these facts, to forgo the nighttime search authorization would have resulted in a greater invasion of privacy to the resident of the home and target of the warrants. The officers could have proceeded to validly enter Swickey's home during the night to arrest him, and then could have permissibly secured his home until dawn when a non-nighttime search warrant could be executed. Such a delay would not have preserved any additional constitutional rights or served any practical usefulness. Accord State v. Buck, 756 P.2d at 702-03 (a violation of the no-knock provision does not require suppression where the violation does "not contribute to the invasion of privacy"). Certainly as to this defendant, whether the search was conducted contemporaneously with the nighttime arrest or in the morning, the facts would have remained the same. Since she was not a resident of the house, she would have been asked to leave the home with the other guests once Swickey was arrested; and, she would have had no right to re-enter the home and remove any property from the premises prior to the search taking place in the morning. Accord United States v. Schoenheit, 856 F.2d at 77 (to show prejudice, a defendant must establish that, absent the nighttime entry, "the search would not have otherwise occurred or

would not have been so abrasive if the Rule had been followed"). See also Utah R. Crim. P. 30 ("any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded").

The majority also erroneously concluded that the officers in question had acted in "bad faith" in relying on the magistrate's authorization and executing the search warrant at night. Rowe, 806 P.2d at 738. The appellate court addressed the issue because the trial court had concluded that even if a violation had occurred, the officers had acted in good faith under United States v. Leon, 468 U.S. 897 (1984), such that an exception to the exclusionary rule would be applicable. But the issue is not whether a Leon-type good faith is applicable, as no constitutional violation occurred. Fixel, 744 P.2d at 1368-69, and cases cited therein. Accord State v. Thompson, 810 P.2d 415, 419 (Utah 1991) (good faith exception is only applicable to fourth amendment violations). Thus, Judge Orme's appendix discussion questioning the propriety of a good faith exception to the exclusionary rule, Rowe, 806 P.2d at 740-43, is irrelevant to any determination in this case.⁵

What has been considered under the procedural violation analysis, discussed above, is whether the defendant has been prejudiced by the nighttime search and whether the police acted

⁵ Despite the Rowe appendix, it is clear that the majority opinion only considered the good faith exception under the federal standard as no state constitutional issue of good faith was raised or argued.

in "bad faith" by intentionally and deliberately disregarding the statutory rule. State v. Fixel, 744 P.2d at 1368; United States v. Schoenheit, 856 F.2d at 77; United States v. Searp, 586 F.2d at 1125. "Bad faith" has further been defined as acting with an "intent to avoid the limitations of the fourth amendment," Searp, 586 F.2d at 1120, or as involving instances where the "intolerable government conduct . . . is widespread and cannot otherwise be controlled," Commonwealth v. Musi, 404 A.2d at 384. Here, the only factual predicate for the court's conclusion that the officers acted unreasonably was that police officers are presumed to know the requirements for authorization of a night search and so this officer should have been aware of deficiencies in the affidavit. Rowe, 806 P.2d at 738. But this presumption must be tempered with the fact that, arguably, a justifiable reason for a night search existed in that the officers were already making a nighttime entry to arrest the owner/occupant of the premises.⁶ While the affidavit in support of the search warrant did not specifically contain this information, it is reasonable to assume that any magistrate, given such facts, would have authorized a contemporaneous search. See United States v. Searp, 586 F.2d at 1122 (a factor to be considered in evaluating the extent of non-compliance with the nighttime authorization provision is whether given the facts omitted, a reasonable magistrate would have authorized the night search). As such, any

⁶ The state is not claiming that this is the only basis upon which the magistrate could have authorized the nighttime search warrant.

failure to provide written justification for the authorization was "ministerial" and does not fall qualify as "outrageous" police conduct. Accord Fixel, 744 P.2d at 1369; Searp, 586 F.2d at 1122.

For these reasons, the majority opinion's conclusion that a violation of the entry requirements for execution of a search warrant is of constitutional magnitude and "mandates" suppression is erroneous and should be reversed. For even assuming a violation occurred and that a remedy for this defendant is appropriate, that remedy should be limited to "official sanctions, discipline, and/or civil and criminal liability." Fixel, 744 P.2d at 1369.

POINT II

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE STATUS OF INVITED GUEST IN A THIRD PARTY HOME VESTS THE GUEST WITH A LEGITIMATE EXPECTATION OF PRIVACY IN THE RESIDENCE SUCH THAT THE GUEST HAS THE RIGHT TO CHALLENGE THE VALIDITY OF A SEARCH WARRANT FOR THE HOME.

Based on its conclusion that there was a violation of the nighttime search authorization provision and that the violation was of constitutional magnitude, the court of appeals considered whether defendant had an expectation of privacy in the Swickey home based on her status as a guest. In concluding that she did, the court ruled that defendant's fourth amendment rights were violated by the night search of the Swickey home and the subsequent seizure of her purse which she left in the residence after the police arrested Swickey. Assuming this Court agrees that a violation of the nighttime search authorization provision

constitutes a fourth amendment violation, the court of appeals' conclusion that defendant's fourth amendment rights were violated should be reviewed.

Because constitutional protections against unlawful searches and seizures are "personal rights which . . . may not be vicariously asserted," Rakas v. Illinois, 439 U.S. 128, 133-34 (1978) (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)), "[t]he touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" California v. Ciraolo, 476 U.S. 207, 211 (1986) (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Any inquiry into whether a challenged search has violated the fourth amendment rights of a criminal defendant must necessarily involve, therefore, a determination of "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Rakas, 439 U.S. at 140. As part of this substantive determination, a court must inquire "first, whether the proponent of a particular legal right has alleged 'injury in fact,' and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties." Id. at 139.

Beginning with Katz, the issue of whose fourth amendment rights may be implicated shifted from a separate analysis of traditional "standing" principles to the "substance of the defendant's claim that he or she possessed a 'legitimate

expectation of privacy' in the area searched."⁷ Rawlings v. Kentucky, 448 U.S. 98, 104 (1980). To establish a constitutionally legitimate expectation of privacy, a defendant must first exhibit "an actual (subjective) expectation of privacy and, second, . . . the expectation [must] be one that society is prepared to recognize as 'reasonable.'" Katz, 389 U.S. at 361 (Harlan, J., concurring). Accord Rakas, 439 U.S. at 143 n.12. Therefore, as part of a defendant's substantive claim that fourth amendment protections are at issue, a defendant must establish that his legitimate expectation of privacy was invaded by the challenged police conduct. Rawlings, 448 U.S. at 104; Rakas, 439 U.S. at 131 n.1.

At trial and on appeal, the state argued that defendant lacked a sufficient constitutional privacy interest in the Swickey residence so as to challenge the adequacy of the search

⁷ The Rowe court, as did the state in its initial briefing and petition, utilized the term "standing" interchangeably with the concept of "expectation of privacy." This is analytically improper. Standing, in its traditional sense, involves a procedural determination separate and apart from the substantive claim. See Terracor v. Utah Bd. of State Lands, 716 P.2d 796, 798 (Utah 1986) ("[t]he doctrine of standing is intended to assure the procedural integrity of judicial adjudications by requiring that the parties to a lawsuit have a sufficient interest in the subject matter of the dispute and sufficient adverseness that the legal and factual issues which must be resolved will be thoroughly explored"). However, an expectation of privacy for purposes of search and seizure law is a component part of the substantive determination of whether fourth amendment rights were implicated by a search. Rakas, 439 U.S. at 428. Accord State v. Schlosser, 774 P.2d 1132, 1138 (Utah 1989) ("standing" is not a jurisdictional issue but a "substantive doctrine that identifies those who may assert rights against unlawful searches and seizures").

warrant for the home.⁸ Rowe, 806 P.2d at 735. In a split decision rejecting the state's position, a majority of the court of appeals concluded:

[D]efendant's status as an invited guest in the home vested her with a reasonable expectation of privacy in the home and she thereby gained sufficient standing to challenge the validity of the search warrant and the resulting search.

Rowe, 806 P.2d at 736. Despite the court's use of the accepted terminology of "reasonable expectation of privacy," the majority's opinion amounts to no more than an application of the formerly rejected "legitimately on the premises" doctrine and is in conflict with proper fourth amendment analysis. Minnesota v. Olson, 110 S.Ct 1684, 1688 (1990) (to claim fourth amendment

⁸ Despite the clear pronouncements, cited above, that a defendant has the burden of establishing his privacy interest, several panels of the Utah Court of Appeals have imposed the obligation on the state to affirmatively challenge a defendant's "standing" at trial or be barred from raising the issue on appeal. Rowe, 806 P.2d at 733. See also State v. Marshall, 791 P.2d 880, 885-86 and n.8, cert. denied, 800 P.2d 1105 (Utah App. 1990); State v. Taylor, 169 Utah Adv. Rep. 62 (Utah App. Sept. 12, 1991).

The court of appeals predicates its rulings on State v. Schlosser, 774 P.2d at 1138-39, in which this Court concluded that the state had waived any challenge to the defendant's "standing" to contest the search by failing to raise the issue at trial or in the state's appeal. However, the state would submit that Schlosser stands for the unremarkable proposition that an *appellant* may be barred from raising new issues on appeal, but an *appellee* may raise additional arguments as alternative grounds for affirming a lower court's decision.

This Court should clarify that the state is under no obligation to give "notice" at the trial level that a defendant will be put to his burden of establishing a legitimate expectation of privacy. See State v. Marshall, 791 P.2d at 885-86. Instead, defendants must assume their burden of demonstrating that they have an expectation of privacy in the place or object as part of their overall substantive challenge to the constitutional validity of the search or seizure.

protections, a defendant must establish not merely that he is legitimately on the premises but that he has a "legally sufficient interest" in the premises searched); Rawlings, 448 U.S. at 105 ("'arcane' concepts of property law" are not determinative of the legal right to claim fourth amendment protection"); Rakas, 439 U.S. at 142 (rejecting the concept of "legitimately on [the] premises. . . [as] too broad a gauge for measurement of Fourth Amendment rights"); Katz, 389 U.S. at 353 (rejecting traditional property rights in the invaded place as determinative of fourth amendment implications). (See also Rakas, 439 U.S. at 145-46 nn. 13 and 14, for numerous criticisms by commentators and inconsistent applications by courts of "legitimately on the premises" test.)

Defendant did not produce any evidence that she had a greater expectation of privacy in the home than any of the other seven party guests present when the police entered the home (T. 30-31, 96-97, 105-107). The court of appeals agreed that defendant was simply an invited social guest in the home and that there was no evidence that "would lead to the conclusion that she intended, or might have been invited, to remain overnight on the night of the search." Rowe, 806 P.2d at 735. But, the court concluded that this status, alone, was sufficient to establish a constitutional expectation of privacy in the entire home. In so ruling, the majority relied on Minnesota v. Olson and analyzed only federal supreme court decisions interpreting fourth

amendment rights.⁹

In Olson, the United States Supreme Court held that an overnight guest had a sufficient expectation of privacy in his host's home so as to require an arrest warrant to enter the third-party home and arrest the guest. 110 S.Ct. at 1688. The Supreme Court concluded that an overnight guest is "much more than just legitimately on the premises." Id. at 1688. Instead, an objective expectation of privacy is associated with being

⁹ The state recognizes the at least two justices of this Court have recently stated that federal case law on standing is not binding precedent on state courts. State v. Thompson, 157 Utah Adv. Rep. 6, 10 (Utah March 21, 1991) (Zimmerman, J., concurring, joined by Durham, J.). This view is predicated on the differences between federal constitution case and controversy application and state constitution separation of powers analysis. See Utah Rest. Ass'n. v. Davis Cty. Bd. of Health, 709 P.2d 1159, 1163 (Utah 1985) (standing of an association to bring a declaratory judgment action on behalf of its members); Terracor v. Utah Bd. of State Lands, 716 P.2d 796, 798-99 (Utah 1986) (comparing "case and controversy" language of federal constitution with separation of powers provisions of Utah Constitution); Provo City Corp. v. Willden, 768 P.2d 455, 456-57 (Utah 1989) (application of standing principles to "overbreadth" statutory claim). It has also been applied in determining state search and seizure claims under article I, § 14 of the Utah Constitution. See State v. Larocco, 794 P.2d 460, 469-70 (Utah 1990) (determining on state constitutional grounds that a warrant was required before a search of the interior of a vehicle parked at a residence could occur); State v. Thompson, 810 P.2d at 418 (determining on state constitutional grounds that defendants had an expectation of privacy in bank records secured, unconstitutionally, under the Utah Subpoena Powers Act).

Here, defendant never asserted a state constitutional claim at trial. On appeal to the Utah Court of Appeals, no issue of state constitutional law was raised or argued. As such, the majority in Rowe properly limited its opinion to an interpretation of federal case law and fourth amendment analysis. Under fourth amendment analysis, no separate procedural issue of standing exists. Instead, the formerly distinct issue of standing merges into and becomes "invariably intertwined" with "substantive Fourth Amendment jurisprudence." Rawlings v. Kentucky, 448 U.S. at 111-12. For these reasons, this Court should limit its review to the issue of the correctness of the court of appeals' interpretation and application of federal law.

permitted to reside overnight since "[w]e are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings." Id. at 1689.

Despite the limited holding of Olson, the majority of the court of appeals broadly and erroneously interpreted the opinion so as to confer fourth amendment protections on persons who are simply consensually present in a home at the time of the search.¹⁰ Significantly, the majority failed to cite any support for this expansive interpretation. Every other court which has interpreted Olson, has required more than an invited guest presence in the third-party home. United States v. Davis, 932 F.2d 752, 757 (9th Cir. 1991) (a defendant who had previously

¹⁰ While the concurring opinion in Rowe disclaims that the main opinion should be construed "so broadly as to guarantee every person invited into a home the type of privacy protected by the fourth amendment," 806 P.2d at 739, nothing in the main opinion curtails this application. Indeed, the holding is explicit that the mere status of being an invited guest is sufficient to create an expectation of privacy in the home. Rowe, 806 P.2d at 736.

While social guest status, *per se*, is insufficient for constitutional purposes, the state does not contend that Olson mandates that a guest stay overnight to gain an expectation of privacy. Accord United States v. Davis, 932 F.2d 752, 757 n.3 (9th Cir. 1991) (Olson does not modify Rakas and pre-existing law that a person may have a "legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place"); Davis v. Florida, 582 So.2d 61 (Fla. App. 1991) (recognizing that Olson does not preclude a non-overnight guest from establishing a valid expectation of privacy but finds under the facts, insufficient evidence of any constitutional interest). Rather, the totality of the circumstances must be analyzed to determine if a defendant has a legitimate expectation of privacy in the place searched aside from his mere invited presence. Olson, 110 S.Ct. at 1688. Here, the state contends that defendant failed to carry her burden to establish sufficient facts supporting an expectation of privacy and, therefore, the court of appeals had an insufficient factual basis from which to legally conclude that such an interest existed.

lived in an apartment, continued to pay part of its rent, retained a key to the premises, had independent access to the apartment, and continued to store personal items there, including storing some items in a locked safe to assure privacy, had a legitimate expectation of privacy in the apartment); Lewis v. United States, 594 A.2d 542, 544 (D.C. App. 1991) (a party guest who fell asleep on a bed for several hours was not an overnight guest and did not have a legitimate expectation of privacy in the apartment); United States v. McNeal, 735 F.Supp. 738, 741-42 (N.D. Ohio 1990) (a defendant did not have "standing" to contest his warrantless arrest in his lover's apartment despite his possession of a key to the apartment, where no evidence was presented that he was intending to spend that particular night and he claimed he was only in the apartment to use the phone); State v. Cortis, 237 Neb. 97, 465 N.W.2d 132, 138-39 (1991) (the boyfriend and codefendant of the owner of a home did not have interest sufficient to challenge a search warrant for the home since he was not a "current overnight guest at the time of the police intrusion," even though he had spent the night at the home on previous occasions); State v. Whitrock, 468 N.W.2d 696, 702-05 (Wis. 1991) (under the totality of the circumstances, a defendant who occasionally stayed overnight at a duplex failed to establish sufficient other facts to support any constitutionally protected interest in the duplex); State v. Brosnan, 589 A.2d 1234, 1236-37 (Conn. App. 1991) (an overnight guest who was sleeping on the owner's bed when the police entered the apartment had a

reasonable expectation of privacy in the apartment); Owens v. State, 589 A.2d 59, 64 (Md. App. 1991), cert. pending, ___ A.2d ___, (Md. 1991), (a defendant who had spent the night before in an apartment, left his suitcase there but was not spending the night at the time of the search, did not have an expectation of privacy in the apartment); People v. Bass, 1991 WL 190380 (Ill. App. Sept. 27, 1991) (transitory presence in premises does not create an expectation of privacy); Commonwealth v. Ferretti, 395 Pa.Super. 629, 577 A.2d 1375, 1380 (1990) (a mere friend, guest or visitor in a home does not have standing to contest a search warrant for the home); Crisp v. State, 195 Ga.App. 786, 395 S.E.2d 47, 48 (1990) (mere presence in a hotel room when it is searched is insufficient to establish any expectation of privacy); People v. Harris, 797 P.2d 816, 817 (Colo. App. 1990) (a social guest, as opposed to an overnight guest, does not have a legitimate expectation of privacy in the host's apartment). See also United States v. Donnes, 752 F.Supp 411, 417 (D. Wyo. 1990) (a defendant who had lived in the searched home continuously for several months, had left furniture and belongings in it, and had padlocked the home when he left it sometime prior to the search, had a reasonable expectation of privacy to contest its search); People v. Murray, 565 N.Y.Supp.2d 212, 213 (N.Y. App. 1991) (a defendant had standing to challenge his warrantless arrest in his girlfriend's apartment where he was spending the night); Harless v. State, 577 N.E.2d 245, 248 (Ind. App. 1991) (defendant who stayed frequently overnight at his

girlfriend's home and paid some of the utility bills had an expectation of privacy in the home); People v. Olson, 198 Ill.App.3d 675, 144 Ill.Dec. 806, 556 N.E.2d 273, 276-77 (1990) (a defendant who was sleeping in a bed in his underwear had a reasonable expectation of privacy in another's hotel room); State v. Carter, 22 Conn.App. 118, 576 A.2d 572, 574-75 (1990) (a defendant who was "clearly more than a transient houseguest" had standing to challenge the search of his host's apartment); State v. Corpier, 793 S.W.2d 430, 436-37 (Mo. App. 1990) (a defendant who spent three to four nights a week at a friend's apartment for "liaisons with his girlfriend" was more than a casual guest or visitor and so had a reasonable expectation of privacy in the apartment); State v. Tapio, 459 N.W.2d 406, 413 (S.D. 1990) (a defendant had standing to challenge the search of his girlfriend's trailer in which he was spending the night); State v. Walker, 236 Neb. 155, 459 N.W.2d 527, 531 (1990) (a defendant who was an overnight guest had standing to challenge a search of the premises).

In conflict with this consensus view, the Rowe opinion states:

Olson squarely holds that an overnight guest has . . . standing, but nothing in Olson suggests that a social visit of a duration less than overnight would deprive a guest of standing. While an overnight stay may connote a qualitatively greater expectation of privacy than some social visits, given the typical characteristics of overnight stays such as showering, changing clothes, and the use of toilet facilities, the distinction is really more one of degree than of kind. For example, the seclusion extended to a parent

who pauses to feed or diaper an infant while visiting friends implies a reasonable expectation of privacy, although the visit might be a short one, and certainly less than an overnight stay. Visitors of comparatively short duration may nap, change, use the toilet, or dine without any expectation of interference from the world at large. *In this case, defendant felt secure enough in the home to remove her shoes, leave her purse beyond her view, and roam to rooms other than where her fellow guests were playing cards.*

Rowe, 806 P.2d at 735-36 (emphasis added). This analysis fails to consider the constitutionally required objective reasonableness of any subjective expectation of privacy.

California v. Greenwood, 486 U.S. 35, 39 (1988).

The facts relied on by the majority do not establish that defendant had a legitimate expectation of privacy in Swickey's home at the time of the search. The actions of having one's shoes off, standing in the kitchen, and having one's purse in another room are not uncommon for any individuals familiar with each other in a home, especially when the apparent purpose of the gathering was to casually gamble, drink and use drugs (T. 16). Further, the court's conclusion that defendant left her purse in the bedroom because she "felt secure" in the home is inconsistent with the evidence. By defendant's own admission, she was using the purse to secrete the drugs which she was stealing from her host throughout the evening (T. 35). By having the purse in the bedroom, she could more easily accomplish her illegal activities since the methamphetamine she was stealing was located on the dresser in the bedroom (T. 35). A legitimate

expectation of privacy cannot be justified by subjective hopes of concealing illegal conduct. Rakas v. Illinois, 439 U.S. at 143 n.12; State v. Lee, 633 P.2d 48, 51 (Utah), cert. denied, Lee v. Utah, 454 U.S. 1057 (1981).

The only distinction alluded to by the majority, between defendant and the other party guests, is that defendant and Swickey had an "intimate relationship" in the past "which may have continued to the time" of the search. Rowe, 806 P.2d at 735. But, the fact that such a relationship may have existed at some time remote from the search is not relevant to the inquiry of whether defendant had a legitimate expectation of privacy in Swickey's home on the night in question. "Any other conclusion would result in an overnight guest's having a permanently protected fourth amendment interest in a place he or she once stayed, no matter how remote in time." State v. Cortis, 465 N.W.2d at 139.

It is defendant who has the burden of establishing facts supporting a claim that her personal rights were violated. Society of Prof. Journalists v. Bullock, 743 P.2d 1166, 1171 (Utah 1987); State v. Valdez, 689 P.2d 1334, 1335 (Utah 1984). Mere speculative possibilities will not suffice. State v. Constantino, 732 P.2d 125, 126-27 (Utah 1987) (permissive use for purposes of "standing"¹¹ will not be inferred for the driver of another's vehicle); State v. Iacono, 725 P.2d 1375, 1377 (Utah

¹¹ See footnote 7, infra at 19, discussing the analytically improper use of "standing" in determining substantive fourth amendment law.

1986) (son's "standing" not presumed from the fact that the trailer searched was his mother's and his clothing was found inside); State v. Grueber, 776 P.2d 70, 75 (Utah App.), cert. denied, 783 P.2d 53 (Utah 1989) (defendant's live-in relationship with the owner of the vehicle and weapon searched and seized insufficient to establish a constitutional right to challenge the search); State v. DeAlo, 748 P.2d 194, 196 (Utah Ct. App. 1987) (permissive use for the driver of a vehicle not inferred from the owner's permission for the passenger to use the vehicle). Here, the facts simply established that defendant was an "invited guest" who, along with seven other guests, was legitimately on the premises at the time of the search. Without more, this status is legally insufficient to establish a fourth amendment interest.

POINT III

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT EVIDENCE OF ABANDONMENT MUST BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE, AND ERRONEOUSLY APPLIED A SUBJECTIVE STANDARD BY REQUIRING THAT "ABANDONMENT IN THE FOURTH AMENDMENT SENSE" COULD ONLY BE ESTABLISHED IF THE STATE PROVED THAT DEFENDANT DID NOT ABANDON THE PROPERTY TO "AVOID SELF-INCRIMINATION."

While a party guest would not have a legitimate expectation of privacy in the host's home, a guest could retain a reasonable privacy interest in the guest's personal possessions in the home. In the court of appeals, the state argued that any legitimate expectation of privacy which defendant may have had in her purse was abandoned by defendant disclaiming ownership of the

purse and leaving it on the floor in the bedroom when she left the home prior to the police commencing their search.

In rejecting the state's argument, the majority concluded that the state must prove that a defendant abandoned any legitimate expectation of privacy by "clear, unequivocal and decisive evidence." Rowe, 806 P.2d at 736. While the issue is one of first impression in Utah, the better and more consistent standard of proof would be proof by "a preponderance of the evidence."

Only a minority of jurisdictions have directly articulated the standard of proof applicable to a determination of abandonment. The court of appeals relied on Friedman v. United States, 347 F.2d 697, 704 (8th Cir.), cert. denied, 382 U.S. 946 (1965), which, without discussion, cites a "clear and convincing" standard as appropriate. However, Friedman would appear to be inconsistent with the majority position that in considering the admissibility of evidence, a "preponderance" standard is applicable. Nix v. Williams, 467 U.S. 431, 445 (1984) ("preponderance of the evidence" standard is applicable in considering the inevitable discovery exception to the exclusionary rule); United States v. Matlock, 415 U.S. 164, 177 n.14 (1974) (in reviewing the voluntariness of a consent to search, the "controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence").

But even if a "clear and convincing" standard of proof

were determined to be appropriate by this Court, the court of appeals' conclusion that the state had failed to prove abandonment would be erroneous.

The majority opinion relied on two false predicates in reaching its conclusion. First, the court concluded that evidence in support of abandonment must be "measured from the vantage point of the defendant, and not the police . . . [as] [i]t is only the defendant's state of mind that counts," citing in support Narain v. State, 79 Md. App. 385, 556 A.2d 1158, 1161 n.4, cert. denied, 317 Md. 71, 562 A.2d 718 (1989). Rowe, 806 P.2d at 736. If Narain truly stands for the proposition that abandonment is solely a subjective determination,¹² it is in conflict with the overwhelmingly accepted view that

the test to be applied in determining whether a person has abandoned property is an objective one - the words used, the conduct exhibited, and other objective facts such as where and for what length of time the property is relinquished and the condition of the property.

O'Shaughnessy v. State, 420 So.2d 377, 379 (Fla. App. 1982).
Accord United States v. Thomas, 864 F.2d 843 (D.C. Cir. 1989);
United States v. Oswald, 783 F.2d 663, 668 (6th Cir. 1986);
United States v. Jones, 707 F.2d 1169, 1172 (10th Cir. 1983),
cert. denied, 464 U.S. 859 (1983); United States v. Kendall, 655 F.2d 199, 201 (9th Cir. 1981), cert. denied, 455 U.S. 941 (1982);

¹² The language quoted is dicta contained in a footnote discussing the issue of the voluntariness of an abandonment occurring in the context of prior illegal police conduct. Narain, 556 A.2d at 1161 n.4. Narain has not been cited or approved of by any other court.

United States v. David, 756 F.Supp. 1385, 1390 n.1 (D. Nev. 1991); United States v. Walker, 624 F.Supp. 99, 101 (D. Md. 1985).

While the majority opinion correctly stated that proof of abandonment is a factual determination "inferred from 'words spoken, acts done, and other objective facts,'" a consideration of the court's second false predicate makes clear that the majority erroneously applied a subjective standard in assessing abandonment. In concluding that the state failed to carry its burden of proof, the court considered defendant's denial of ownership of the purse and then stated:

That repudiation of interest in property located in the bedroom is consistent with a conclusion of abandonment. It is not, however, inconsistent with a conclusion of a mere disclaimer of interest to avoid self-incrimination.

Rowe, 806 P.2d at 736-37. This creates an impossible standard to meet as most fourth amendment abandonment occurs for the singular reason that a defendant does not wish to incriminate himself by retaining possession of contraband or instrumentalities of crime. The proper and critical inquiry is not the subjective reason or intent for the abandonment but "whether the person prejudiced by the search . . . voluntarily discarded, left behind, or otherwise *relinquished his interest in the property* in question so that he could no longer retain a reasonable expectation of privacy with regard to it *at the time of the search*." United States v. McKennon, 814 F.2d 1539, 1546 (11th Cir. 1987) (emphasis in original).


Further, the majority of the court of appeals' panel factually erred in only considering defendant's disclaimer of ownership of the purse. Defendant did not simply deny that the purse was hers, she physically left it on the floor knowing that a search was to be conducted after she departed. This combination of "words spoken and acts done" clearly established that defendant abandoned any reasonable expectation of privacy in her purse prior to the search commencing. Again, the majority cited no case law to support its contention that a disclaimer of ownership combined with a relinquishment of physical control does not constitute "abandonment in the fourth amendment sense."

CONCLUSION

For the foregoing reasons, the state respectfully requests this Court to reverse the court of appeals' decision and affirm defendant's conviction.

RESPECTFULLY submitted this TH day of October, 1991.

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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee, was mailed, postage prepaid to Sheldon R. Carter, attorney for respondent, 3325 North University Ave., Suite 200, Provo, Utah 84604, this 15th day of October, 1991.



ADDENDUM

STATE of Utah, Plaintiff and Appellee,

v.

Keeley Laursen ROWE, Defendant
and Appellant.

No. 890396-CA.

Court of Appeals of Utah.

Feb. 8, 1991.

Defendant was convicted of possession of controlled substance before the Washington County Court, Fifth District Court, Robert T. Braithwaite, Circuit Court Judge, sitting by special assignment, and she appealed. The Court of Appeals, Orme, J., held that: (1) information presented in supporting affidavit was sufficient to justify inclusion of "no-knock" provision in search warrant; (2) information presented in supporting affidavit was not sufficient to justify inclusion of nighttime search provision in search warrant; (3) defendant had standing to challenge adequacy of warrant authorizing search of third party's home; (4) evidence failed to establish that defendant abandoned any standing she might have had to challenge search of third party's home; and (5) evidence gained during search would be suppressed.

Reversed and remanded for new trial.

Garff, J., concurred and issued an opinion.

Jackson, J., dissented.

1. Drugs and Narcotics ⇐189(3)

Magistrate had sufficient basis to issue "no-knock" warrant on basis of factual information presented in supporting affidavit, even though affidavit was sparse; it was clear from affidavit that object of search was drugs located in residence, and magistrate could readily and properly infer that drugs could be quickly destroyed if notice was given. U.C.A.1953, 77-23-10.

2. Drugs and Narcotics ⇐189(2)

Affidavit lacked sufficient factual information to support nighttime search warrant for drugs in residence, where there

was nothing in affidavit supporting inclusion of nighttime service authority other than preprinted language and information received from confidential informant, and there was nothing inherent in narcotics search which would necessitate search at night. U.C.A.1953, 77-23-5(1); U.C.A. 1953, 77-54-11 (Repealed).

3. Criminal Law ⇐1031(1)

For State to assert on appeal that defendant had no standing to challenge adequacy of search warrant, State must raise standing issue at trial. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures ⇐164

Defendant had standing to challenge adequacy of warrant authorizing search of third party's home, where evidence indicated that defendant had intimate relationship with third party and had stayed overnight in home on several prior occasions, and defendant felt secure enough in home to remove her shoes, leave her purse beyond her view, and roam to rooms other than where her fellow guests were playing cards, even though there was no evidence that defendant intended to remain overnight on night of search. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures ⇐164

Evidence failed to establish that defendant abandoned any standing she might have had to challenge search of third party's home which resulted in seizure of her purse, even though police officer asked defendant if anything else belonged to her and she stated that she had retrieved everything in bedroom that was hers; defendant's statement was not inconsistent with conclusion of mere disclaimer of interest to avoid self-incrimination. U.S.C.A. Const. Amend. 4.

6. Criminal Law ⇐394.4(8)

Items seized during search of home pursuant to invalid warrant could not be excepted from exclusionary rule based on officer's good faith reliance on deficient warrant, where although warrant allowed nighttime search, there was nothing in affidavit that would offer any basis to magis-

trate for finding of probable cause to allow nighttime search, and same officer prepared affidavit, secured warrant, and executed search, thus he had personal knowledge of affidavit's contents. U.S.C.A. Const.Amend. 4.

7. Searches and Seizures ⇐101, 141

Mere ministerial and technical errors in preparation or execution of search warrants will not, without more, invalidate warrant. U.S.C.A. Const.Amend. 4.

8. Criminal Law ⇐394.4(1)

Where statute dealing with searches establishes procedures for protection of substantive rights, violation of statute cannot be dismissed as technical or ministerial in nature and suppression of evidence gained from challenged search is appropriate remedy. U.S.C.A. Const.Amend. 4.

9. Criminal Law ⇐394.4(8)

Evidence gained during search conducted pursuant to invalid warrant would be suppressed; warrant authorized nighttime search when there was nothing in affidavit that would offer basis for finding of probable cause to allow nighttime search. U.C.A.1953, 77-23-5; U.S.C.A. Const.Amend. 4.

Shelden R. Carter (argued), Harris, Carter & Harrison, Provo, for defendant and appellant.

R. Paul Van Dam, Atty. Gen., Christine F. Soltis (argued), Asst. Atty. Gen., Salt Lake City, for plaintiff and appellee.

Before GARFF, JACKSON and ORME, JJ.

OPINION

ORME, Judge:

Defendant appeals her conviction of possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), (b)(ii) (1989). We reverse.

1. While the date on the search warrant and supporting affidavit is October 8, 1988, it is clear from trial testimony that this was an er-

FACTS

On October 7, 1988, a search warrant was issued and executed which authorized police to search for narcotics in the residence of Stan Swickey in Leeds, Utah. The warrant contained provisions which allowed police to enter "day or night," and to effect the search without notice, i.e., on a "no-knock" basis. The warrant was issued based on information in the officer's supporting affidavit that a confidential informant had been contacted by Swickey, who told the informant that he, Swickey, had picked up a quantity of methamphetamine and marijuana that was being stored at his home in Leeds. The affidavit in support of the warrant contained preprinted language which stated that the affiant reasonably believed that the property sought could be easily destroyed or hidden or that harm to officers could result from notice. Following this language are two boxes that the affiant can check, and which were checked, to request nighttime and "no-knock" authority. No other factual information supports these requests.

The warrant was executed on a "no-knock" basis on October 7, 1988,¹ at approximately 11:30 p.m. When police entered Swickey's apartment, they found eight people, in addition to Swickey, in the home. Everyone except defendant was in the living room playing cards around a table. Defendant was in the kitchen. After securing the home, the officers had defendant join the other people in the living room, while Swickey was taken into the kitchen and placed under arrest, pursuant to an arrest warrant, and advised of the search warrant. Another individual was arrested when the officers saw drugs nearby, in plain view. The remaining individuals, including defendant, were told they could leave the premises. Defendant did not have her shoes, and asked if she could go to the bedroom to retrieve them. An officer accompanied her to the room, where she took the shoes from a pile of items.

ror, and the date of issuance was actually October 7.

The officer asked her if she had everything that was hers from that room. Defendant replied that she did.

After defendant left, the officers conducted a search of the home. Narcotics were found throughout the house. A purse was seized from the pile in the bedroom from which defendant had retrieved her shoes. Inside the purse was a small brown vial which contained methamphetamine. Also in the purse were several documents that revealed that the purse belonged to defendant.

Police contacted defendant the next day and advised her that they had a purse that belonged to her. She came down to the station and was arrested. After being advised of her *Miranda* rights, defendant admitted that the purse and vial of drugs were hers. She told police that she had been "ripping off" drugs from Swickey.

Prior to trial, defendant filed a motion to suppress the vial and other contents seized from her purse. The motion was accompanied by a memorandum of points and authorities. The state filed a memorandum opposing defendant's motion to suppress, and requested a ruling on defendant's motion. On March 17, 1989, the court issued a written order denying defendant's motion.

Defendant waived her right to a jury trial, and a bench trial commenced on March 21, 1989. During the trial defendant again renewed her motion to suppress. The basis of her argument was that the search warrant was defective since the supporting affidavit did not support the nighttime or "no-knock" authorization. The state argued that "Mr. Swickey would be the only one to have standing to object to that," and also argued the merits of the claim. The court denied the renewed motion. Defendant was convicted as charged.

Defendant raises three issues on appeal, all of which challenge the district court's failure to suppress the items seized from defendant's purse: 1) Whether there was

sufficient factual information in the supporting affidavit to authorize a nighttime search, 2) whether there was sufficient factual information in the supporting affidavit to authorize a "no-knock" search, and 3) whether the search was defective since the warrant was dated subsequent to the search.²

"NO-KNOCK" SEARCH

[1] Defendant argues there was insufficient factual information presented in the supporting affidavit to justify the inclusion of a "no-knock" provision in the search warrant. Utah Code Ann. § 77-23-10 (1990) provides, in pertinent part, as follows:

When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:

....

(2) Without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.

The affiant in this case requested a warrant to search for narcotics believed located in a residence, by checking a preprinted provision on the affidavit form. A "no-knock" warrant was requested based on the affiant's statement that such narcotics could be easily destroyed. Defendant argues that this statement alone is insufficient to justify issuance of a "no-knock" warrant. However, reading the affidavit "in a common sense manner and as a whole," *State v. Paul*, 225 Neb. 432, 405 N.W.2d 608, 610 (1987) (quoting *People v. Mardian*, 47 Cal.App.3d 16, 35, 121 Cal. Rptr. 269, 281 (1975)), we conclude that the

2. Defendant addresses the third contention in a cursory, one paragraph argument. She cites no authority for her position that the erroneous date invalidates the warrant, nor does she re-

spond to testimony given at trial that the date the warrant was issued was actually October 7, 1988. We therefore decline to address this issue.

magistrate had sufficient basis to issue a "no-knock" warrant.

Although the affidavit is sparse, it is clear that the object of the search was drugs located in a residence. The small amount of drugs ordinarily found in a residential setting can be easily and quickly destroyed with even the briefest notice. Therefore, issuance of a "no-knock" warrant is justified if the affidavit suggests that a small, readily disposable, quantity of drugs in a residence is the object of the search.³ The magistrate can readily and properly infer that such drugs could be quickly destroyed if notice is given. *State v. Spisak*, 520 P.2d 561 (Utah 1974); *State v. Miller*, 740 P.2d 1363 (Utah Ct.App. 1987). While a detailed and factually specific affidavit is commendable and may facilitate subsequent review by an appellate court, it is not strictly necessary for the officer to elaborate on the obvious in the affidavit.

NIGHTTIME SEARCH

[2] Defendant also argues that the supporting affidavit lacked sufficient factual information to support a nighttime search. Utah Code Ann. § 77-23-5(1) (1990) provides in pertinent part:

The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits or oral testimony state a reasonable cause to believe a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason; in which case he may insert a direction that it be served any time of the day or night.

Previous Utah case law on this issue construed a different code provision which required that a warrant be served in the daytime "unless the affidavits are positive that the property is on the person or in the place to searched." Utah Code Ann. § 77-54-11 (1953). See, e.g., *State v.*

Treadway, 28 Utah 2d 160, 499 P.2d 846, 848-49 (1972). No Utah cases are drawn to our attention which have addressed the present code provision.

The showing required by the present statute focuses not upon a positive showing that the property is at the place to be searched, but upon whether there are special circumstances which would justify a search at night. The statute does not specify how elaborate or detailed this showing must be, but merely requires that the "affidavits or oral testimony" must support a "reasonable cause" determination that a nighttime search is necessary. The precise quantum of information which would support this determination is not defined in the statute or in Utah case law and, as has been observed elsewhere, it is difficult "to anticipate all of the numerous factors that may justify the authorization of a nighttime search." *People v. Kimble*, 44 Cal.3d 480, 749 P.2d 803, 810, 244 Cal.Rptr. 148, 155, cert. denied, 488 U.S. 871, 109 S.Ct. 188, 102 L.Ed.2d 157 (1988). Nonetheless, the statute clearly requires a particularized showing either that 1) a search is required in the night because the property is on the verge of being "concealed, destroyed, damaged, or altered," or 2) "for other good reason." Utah Code Ann. § 77-23-5(1) (1990).

Defendant argues that this particularized showing was not made in this case. We agree. Nothing in the supporting affidavit supported the inclusion of the nighttime service authority other than the preprinted language referred to above and the information received from the confidential informant. Contrary to our view that little more is required to justify a "no-knock" warrant than that the search is for narcotics at a residence, we see nothing inherent in a narcotics search which would necessitate a search at night, even though circumstances can easily be imagined which would suggest the propriety of such a search

3. A more particularized showing may well be required if, for example, a large quantity of drugs is sought. In such cases, as where the

affiant has information of the on-going cultivation or manufacture of drugs, the exigency of

being made at night.⁴

In interpreting a similar statutory provision which allows a magistrate to authorize a nighttime search upon a showing of "good cause," one appellate court observed:

(1) A magistrate cannot make a neutral and independent determination of whether authorization of nighttime service is necessary when faced with only conclusory and ambiguous allegations in the affidavit; and (2) an affiant's averment that in his experience (generally) particular types of contraband are easily disposed of does not, in itself, constitute a sufficient showing for the necessity of a nighttime search: a particular and specific reason for nighttime service must be set forth.

People v. Mardian, 47 Cal.App.3d 16, 34, 121 Cal.Rptr. 269, 281 (1975).

In *Mardian*, the court held that the magistrate had "good cause" to issue a nighttime search warrant based on information provided in the affidavit that the contraband was in the process of being removed from the premises, and that the occupants would be able to remove the remainder of the contraband before a daytime warrant

ready destructability, inherent with small quantities of drugs, may not be present.

4. For example, if the supporting affidavit made a particularized showing that drugs were likely to be sold or consumed over the course of the night and evidence thereby lost, or that the supply was likely to be imminently moved en masse to a different location during the night, or that a safer search was likely at night because the house was abustle with activity during the day and no one but the occupant was likely to be home at night, then the propriety of a nighttime search becomes manifest. We caution that a mere incantation of such circumstances will not justify a nighttime search—the required factual showing is not one which is conducive, for example, to preprinted language. Officers must "state a reasonable cause to believe a [nighttime] search is necessary...." Utah Code Ann. § 77-23-5 (1990).
5. Though we find it unnecessary to define what "other good reason" might encompass, *but see* note 4, *supra*, clearly one reason why a nighttime search might be authorized is where a nighttime search would increase the safety of the officers executing the warrant or the safety of the general public.

could be served since the occupants would be leaving at 6:00 a.m. *Id.* 121 Cal.Rptr. at 282. *See also Kimble*, 749 P.2d at 810, 244 Cal.Rptr. at 155 (magistrate could infer that persons who had recently stolen stereo equipment would attempt to get rid of it quickly, since the theft was tied to a double homicide); *State v. Paul*, 225 Neb. 432, 405 N.W.2d 608 (1987) (affiant's statement that he smelled a strong odor of burnt marijuana coming from inside the residence in the afternoon supported an inference that marijuana was being consumed and thus destroyed). *See generally* Annotation, *Propriety of Execution of Search Warrant at Nighttime*, 26 A.L.R.3d 951 (1969 & Supp. 1990), 1 C. Torcia, *Wharton's Criminal Procedure* § 166 (13th ed. 1989); 2 W. LaFave, *Search and Seizure* § 4.7(b) (2d ed. 1987 & Supp.1990).

The affidavit in this case contained no facts from which a magistrate could infer that the contraband was likely to be destroyed, concealed, damaged, or altered during the night. Additionally, we find nothing in the affidavit from which a magistrate could reasonably infer that there was any "other good reason" to justify issuance of a nighttime search warrant.⁵ We therefore hold that it was error for the

Of course, ordinarily a nighttime search would pose a heightened safety risk since people may tend to overreact to an entry by force in the dead of night. Darkness may exacerbate the reaction or heighten the confusion inherent in a search, especially one conducted on a "no-knock" basis. Nonetheless, a specific showing that the safety of the public or the officers will be increased has been held a sufficient basis for a search at night. *See, e.g., Kimble*, 749 P.2d at 810, 244 Cal.Rptr. at 155 (magistrate could conclude that permitting police to expedite their investigation was an exceptionally compelling reason to allow a nighttime search where dangerous killer or killers were still at large). We note that other courts have rejected less compelling kinds of "other good reason," such as because "appellant did not get home until '6:00 or after' and that appellant was not always present at his house," *People v. Watson*, 75 Cal.App.3d 592, 595, 142 Cal.Rptr. 245, 246 (1977); because the officer applying for the warrant "was on duty at night," *Wiggin v. State*, 755 P.2d 115, 116-17 (Okla.Crim.App.1988); and because "it [was] unknown when the person described [in the affidavit] will be at the premises." *State v. Lien*, 265 N.W.2d 833, 840 (Minn.1978).

magistrate to authorize a nighttime search based on the facts in the affidavit presented to him.

STANDING, ABANDONMENT, "GOOD FAITH," AND SUPPRESSION

The state argues that any inadequacy in the warrant is immaterial since 1) defendant has no standing to challenge the adequacy of the warrant to search Swickey's apartment since she was only a guest in the apartment; 2) any expectation of privacy she had in the contents of her purse was abandoned when she told the officer she had everything that was hers when she departed Swickey's bedroom, leaving the purse behind; 3) any technical defects in the warrant were overcome by the officer's good faith reliance on the warrant in conducting the search; and 4) any failure of the warrant to satisfy merely statutory requirements does not necessitate the suppression of evidence, as would be the case where constitutional requirements are offended.

A. Standing

[3] In her reply brief, defendant claims the state did not raise standing at trial. While we reaffirm that such a failure would be fatal to the state's position, *see State v. Marshall*, 791 P.2d 880, 885-86 & n. 8 (Utah Ct.App.1990), defendant's claim is not borne out by the record. As indicated above, the prosecutor specifically argued that "Mr. Swickey would be the only one to have standing to object to [the nighttime and 'no-knock' provisions of the warrant]."

[4] Since the contention was adequately raised at trial, we now address the state's standing argument. The state argues that defendant has no standing to challenge the adequacy of a warrant authorizing the search of a third-party's home since she was only a party guest in the home. We disagree.

Since the decision in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), it has been the law that "capacity to claim the protection of the Fourth Amendment depends ...

upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). A subjective expectation of privacy is legitimate if it is "[o]ne that society is prepared to recognize as 'reasonable.'" *Id.* at 143-144 n. 12, 99 S.Ct. at 430 n. 12, quoting *Katz, supra*, at 361, 88 S.Ct. at 516 (Harlan, J., concurring).

Minnesota v. Olson, — U.S. —, 110 S.Ct. 1684, 1687, 109 L.Ed.2d 85 (1990). The state's position that defendant failed to establish standing based on the nature of her presence in Swickey's home is arguable, but not compelling.

In *Olson*, the Supreme Court concluded "that Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." *Id.* 110 S.Ct. at 1688. In this case, the evidence did not establish that defendant was an overnight guest in Swickey's home on the night of the search. There is, however, uncontroverted evidence that defendant had an intimate relationship with Swickey, which may have continued to the time of the incident giving rise to this case, and had stayed overnight in the home on several prior occasions. However, the record lacks facts which would lead to the conclusion that she intended, or might have been invited, to remain overnight on the night of the search.

But as we read *Olson*, there is no talismanic significance, in determining standing, to the length of time a social guest is in the home. *Olson* squarely holds that an overnight guest has such standing, but nothing in *Olson* suggests that a social visit of a duration less than overnight would deprive a guest of standing. While an overnight stay may connote a qualitatively greater expectation of privacy than some social visits, given the typical characteristics of overnight stays such as showering, changing clothes, and the use of toilet facilities, the distinction is really more one of degree than of kind. For example, the seclusion extended to a parent who pauses

to feed or diaper an infant while visiting friends implies a reasonable expectation of privacy, although the visit might be a short one, and certainly less than an overnight stay. Visitors of comparatively short duration may nap, change, use the toilet, or dine without any expectation of interference from the world at large. In this case, defendant felt secure enough in the home to remove her shoes, leave her purse beyond her view, and roam to rooms other than where her fellow guests were playing cards. Eschewing an analysis based on free access and right to exclude others, the *Olson* Court focused on the social tradition that

hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household. *Id.* at 1689.

A standing challenge in the search and seizure context is resolved by a determination of "whether governmental officials violated any legitimate expectation of privacy." *Rawlings v. Kentucky*, 448 U.S. 98, 106, 100 S.Ct. 2556, 2562, 65 L.Ed.2d 633 (1980). We conclude that defendant's status as an invited guest in the home vested her with a reasonable expectation of privacy in the home and she thereby gained sufficient standing to challenge the validity of the search warrant and the resulting search.

B. Abandonment

[5] The state argues that even if defendant might otherwise have standing to challenge the search warrant, she abandoned the purse, and thus abandoned any standing she might otherwise have had to challenge the search which resulted in seizure of her purse. We disagree.

"When individuals voluntarily abandon property, they forfeit any expectation of privacy in it that they might have had." *United States v. Thomas*, 864 F.2d 843, 845 (D.C.Cir.1989) (quoting *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir.),

cert. denied, 464 U.S. 859, 104 S.Ct. 184, 78 L.Ed.2d 163 (1983)). However, "abandonment must be distinguished from a mere disclaimer of a property interest made to the police prior to the search, which under the better view does not defeat standing." *United States v. Morales*, 737 F.2d 761, 763-64 (8th Cir.1984) (quoting 3 W. LaFare, *Search and Seizure* § 11.3, at 548-49 (1978)).

Whether defendant had abandoned her purse, under search and seizure analysis, is primarily a factual question of intent to voluntarily relinquish a reasonable expectation of privacy, which may be inferred from "words spoken, acts done, and other objective facts." *Thomas*, 864 F.2d at 846 (quoting *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir.1973)). See also *Gurgel v. Nichol*, 19 Utah 2d 200, 429 P.2d 47, 48 (1967) (abandonment ordinarily a question for the factfinder to be determined from the facts and circumstances). The burden of proving abandonment falls on the state, *People v. Contreras*, 210 Cal.App.3d 450, 259 Cal.Rptr. 290, 293 (1989), and must be shown by "clear, unequivocal and decisive evidence." *Friedman v. United States*, 347 F.2d 697, 704, (8th Cir.1965). See also *United States v. Boswell*, 347 A.2d 270, 274 (D.C.1975); *O'Shaughnessy v. State*, 420 So.2d 377, 379 (Fla.Dist.Ct.App.1982). It "is measured from the vantage point" of the defendant, and not the police. *Narain v. State*, 79 Md.App. 385, 556 A.2d 1158, 1161 n. 4 (1989). "It is only the [defendant's] state of mind that counts." *Id.*

Defendant was allowed to leave the party along with Swickey's other guests. She was conducted to the bedroom to retrieve her shoes and was given the opportunity to claim any other property belonging to her. When asked by the police officer if anything else belonged to her, she stated that she had retrieved everything in the bedroom that was hers. That repudiation of interest in property located in the bedroom is consistent with a conclusion of abandonment. It is not, however, inconsistent with a conclusion of a mere disclaimer of interest to avoid self-incrimination. The state failed to produce evidence which would de-

velop this issue and perhaps meet its burden of proving abandonment under search and seizure analysis. Accordingly, abandonment in the Fourth Amendment sense was not established by the state.⁶

C. Good Faith

[6] The state further claims the search can be validated by the officer's good faith reliance on the deficient warrant. *United States v. Leon*, 468 U.S. 897, 920-23, 104 S.Ct. 3405, 3419-20, 82 L.Ed.2d 677 (1984). In *Leon*, the Supreme Court held that the

exclusionary rule, aimed at deterring unlawful police conduct,⁷ does not bar evidence obtained by officers acting in good faith reliance on a defective warrant.⁸ *Id.* But the *Leon* doctrine is not without limitations. When the magistrate reviewing the affidavit in support of the search warrant is not presented with sufficient facts to determine probable cause, the warrant cannot be relied upon by searching officers. *Id.* 468 U.S. at 915, 104 S.Ct. at 3417. We have determined that there was nothing in the affidavit in this case that would offer

6. It is not entirely clear that even if the state had proven abandonment defendant would be deprived of standing to challenge the seizure of her purse. "Property abandoned as a direct result of an unlawful intrusion into a person's right to be free from governmental interference cannot be lawfully seized." *State v. Nichols*, 563 So.2d 1283, 1286-87 (La.Ct.App.1990). See also *United States v. Roman*, 849 F.2d 920, 923 (5th Cir.1988); *United States v. Tolbert*, 692 F.2d 1041, 1045 (6th Cir.1982), cert. denied, 464 U.S. 933, 104 S.Ct. 337, 78 L.Ed.2d 306 (1983); *State v. Jones*, 553 So.2d 928, 931 (La.Ct.App.1989); *Narain v. State*, 79 Md.App. 385, 556 A.2d 1158, 1160-61 (1989); *State v. Huether*, 453 N.W.2d 778, 781-82 (N.D.1990); *State v. Whitaker*, 58 Wash.App. 851, 795 P.2d 182, 183 (Wash.Ct.App. 1990). Under this view, even if defendant abandoned her purse, she still would have standing since the abandonment was precipitated by an unlawful search of the residence in which her purse was located.

7. Many have questioned the *Leon* Court's narrow interpretation of the exclusionary rule's purpose. See, e.g., *United States v. Leon*, 468 U.S. 897, 928-60, 104 S.Ct. 3430, 3430-45, 82 L.Ed.2d 677 (1984) (Brennan, J., dissenting); *id.* at 960-80, 104 S.Ct. at 3445-56 (Stevens, J., dissenting); *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820, 853-57 (1987); 1 W. LaFave, *Search & Seizure* § 1.3, at 46 n. 5 (1987) (citing extensive critical authority); Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?*, 22 Am.Crim.L.Rev. 85, 106-07 (1984). See also *State v. Mendoza*, 748 P.2d 181, 185 & n. 2 (Utah 1987) (criticizing the breadth of the language in *Leon*). The *Leon* rationale, viewed from a historical perspective, is treated at greater length in the Appendix to this opinion.

8. We note that neither party addressed Utah's exclusionary rule, premised on Article I, Section 14, of the Utah Constitution. See *State v. Larocco*, 794 P.2d 460, 472 (Utah 1990) ("exclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14."). To date, neither the Utah Supreme Court nor this court has held that a parallel doctrine

to the *Leon* exception would apply in the context of Utah's exclusionary rule. See *State v. Mendoza*, 748 P.2d 181, 187 (Utah 1987) (Zimmerman, J., concurring) (Court has not yet considered *Leon*-type exception under Article I, Section 14, of the Utah Constitution). See also *State v. Thompson*, 751 P.2d 805, 809 (Utah Ct.App.1988) (concluding in dicta that *Mendoza* did not invalidate applicability of *Leon*). Many state courts have determined that exclusionary rules existing by virtue of state constitutional provisions are not subject to a *Leon*-type "good faith" exception. See, e.g., *State v. Marsala*, 216 Conn. 150, 579 A.2d 58, 68 (1990); *People v. Sundling*, 153 Mich.App. 277, 395 N.W.2d 308, 315 (1986), appeal denied, 428 Mich. 887 (1987); *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988); *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820, 857 (1987); *People v. Bigelow*, 66 N.Y.2d 417, 497 N.Y.S.2d 630, 636-37, 488 N.E.2d 451, 457-58 (1985). At least one court has construed a statutory exclusionary rule to reject the *Leon* exception. See, e.g., *Commonwealth v. Upton*, 394 Mass. 363, 370 n. 5, 476 N.E.2d 548, 554 n. 5 (1985).

Notwithstanding any dicta to the contrary in our decision in *State v. Thompson*, 751 P.2d 805, 809 (Utah Ct.App.1988), it is far from clear whether the *Leon* exception has any vitality under a state law analysis, especially since the basis and scope of our state exclusionary rule is somewhat unsettled. See *State v. Larocco*, 794 P.2d 460, 472-73 (Utah 1990). There may well be sound reasons for state court interpretation at variance with the federal search and seizure rules. See generally, Durham, *Employing the Utah Constitution*, 2 Utah B.J. 25 (Nov.1989); *State v. Larocco*, 794 P.2d 460 (Utah 1990); *State v. Warts*, 750 P.2d 1219, 1221 n. 8 (Utah 1988). See also *State v. Larocco*, 742 P.2d 89, 104-05 (Utah Ct.App.1987) (Billings, J., concurring and dissenting) ("[s]tate courts responding to the confusing and restrictive new federal interpretations are relying on an analysis of their own search and seizure provisions to expand constitutional protection beyond those mandated by the fourth amendment, often directly avoiding applicable United States Supreme Court precedent").

any basis to the magistrate for a finding of probable cause to allow a nighttime search. It appears from the record that the endorsement of the nighttime authorization was done in impermissible "rubber stamp" fashion. See *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 1512, 12 L.Ed.2d 723 (1964).

The question of the officer's good faith reliance is subject to de novo determination by this court. *United States v. Freitas*, 800 F.2d 1451, 1454 (9th Cir.1986). The conduct of the officers executing the search warrant must be objectively reasonable. *Leon*, 468 U.S. at 919, 104 S.Ct. at 3419. Police officers cannot ignore an unambiguous statutory directive to present the magistrate with "reasonable cause to believe a search is necessary in the night," Utah Code Ann. § 77-23-5(1) (1990), and then claim that their very failure to do so is objectively reasonable conduct on their part. See *Leon*, 468 U.S. at 919 n. 20, 104 S.Ct. at 3419/n. 20 (objective standard requires reasonable knowledge of the law by police officers); *United States v. Freitas*, 610 F.Supp. 1560, 1572 (N.D.Cal.1985) (police agency must train officers, who have obligation to ensure that warrant comports with constitutional law), *aff'd*, 800 F.2d 1451 (9th Cir.1986). In this case, the same officer prepared the affidavit, secured the warrant, and executed the search.⁹ He had personal knowledge of the affidavit's contents. This further persuades us that reliance on the warrant cannot be termed "reasonable" and thus the *Leon* exception does not apply in this case.

D. Appropriate Remedy

[7] Having so concluded, we must now turn our attention to whether the warrant's issuance in violation of the nighttime search requirements necessitates suppression of the evidence seized, namely the drugs and other items found in defendant's

purse. We recognize that mere ministerial and technical errors in the preparation or execution of search warrants will not, without more, invalidate the warrant. See, e.g., *State v. Buck*, 756 P.2d 700, 702-03 (Utah 1988) (violation of "knock-and-announce" rule did not require suppression when no one was at home at the time of the search to respond to the knock). Cf. *State v. Kirn*, 70 Haw. 206, 767 P.2d 1238, 1239-40 (1989) (suppression may be appropriate for violation of constitution, statute, or administrative regulation).

[8] However, where a statute establishes procedures for protection of substantive rights, such as section 77-23-5 does, violation of the statute cannot be dismissed as technical or ministerial in nature and suppression of the evidence gained from the challenged search is the appropriate remedy. *Awaya v. State*, 5 Haw.App. 547, 705 P.2d 54, 59 (seizure of evidence not particularly described in the warrant required suppression), *cert. denied*, 67 Haw. 685, 744 P.2d 781 (1985); *Wiggin v. State*, 755 P.2d 115, 117 (Okla.Crim.App.1988) (violation of statute similar to section 77-23-5 mandates suppression); *State v. Coyle*, 95 Wash.2d 1, 621 P.2d 1256, 1263 (1980) (suppression required for violation of notice requirement). But see *State v. Brock*, 294 Or. 15, 653 P.2d 543, 545-46 (1982) (warrant allowing nighttime search without any showing of reasonable necessity not invalid and suppression not required, when legislature had considered and declined to enact specific exclusionary rule for such circumstances).

[9] The historical character of a nighttime search further persuades us that violation of the statute requires suppression. See *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 283-84, 69 L.Ed. 543 (1925) (question of reasonableness of a search must be viewed not only from the particular facts, but also with an eye toward what was considered reasonable at

9. We hasten to caution that the objective reasonableness of both the affiant officers and the executing officers must be considered in any review where the *Leon* doctrine is asserted. Were a subterfuge to be employed to insulate the affiant from actual service of the warrant in order to support a claim of good faith reliance

by executing officers, we would not hesitate to fashion an appropriate remedy. See *State v. Buck*, 756 P.2d 700, 703 (Utah 1988) (Zimmerman, J., concurring) (where officers purposefully serve a search warrant in order to avoid giving notice of authority and purpose, court will fashion a judicial remedy).

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the time of the adoption of the Fourth Amendment). Searches of homes were soundly condemned by the drafters of the Bill of Rights and under English common law.¹⁰ See *United States ex rel. Boyance v. Myers*, 398 F.2d 896, 897-98 (3d Cir. 1968). "Night-time search was the evil in its most obnoxious form." *Monroe v. Pape*, 365 U.S. 167, 210, 81 S.Ct. 473, 496, 5 L.Ed.2d 492 (1961) (Frankfurter, J., dissenting). The propriety of executing a search of an occupied dwelling at night is "sensitively related to the reasonableness" prong of the Fourth Amendment. *United States v. Gibbons*, 607 F.2d 1320, 1326 (10th Cir. 1979). See also *State v. Lindner*, 100 Idaho 37, 592 P.2d 852, 857 (1979) ("entry into an occupied dwelling in the middle of the night is clearly a greater invasion of privacy than entry executed during the day-time").

We hold that an unmitigated violation of Utah Code Ann. § 77-23-5 (1990), as is present in this case, requires suppression of all evidence gained in the search executed pursuant to the defective warrant.¹¹

CONCLUSION

The warrant was unlawful insofar as it authorized a search at night. Defendant has standing to challenge that deficiency by virtue of her status as a guest in the home. The unlawful search cannot be saved on "good faith" or abandonment grounds. It follows that the evidence found in defendant's purse should have been suppressed. Her conviction is accordingly reversed and the case is remanded for a new trial.

10. In an often-quoted speech condemning general warrants, Lord Chatham stated:

The poorest man may, in his cottage, bid defiance to all forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement.

1 T. Cooley, *A Treatise on Constitutional Limitations* 611 (8th ed. 1927). See also Appendix to this opinion.

11. It may well be that section 77-23-5 merely codifies that which is already required under

GARFF, Judge (concurring):

I concur in the main opinion but make three further comments. First, one should not construe the main opinion so broadly as to guarantee every person invited into a home the type of privacy protected by the fourth amendment. Any number of possibilities arise where one might be classified as an "invited guest," but may not necessarily be entitled to a constitutional expectation of privacy. For example, a Fuller Brush sales person, invited into a home to demonstrate a product, may not have standing to challenge an illegal search warrant. The emphasis in *Olson*, as here, is that the circumstances that create a legitimate expectation of privacy in the home must be such that society is prepared to recognize them as reasonable. That determination is fact sensitive and the test need not be overly complex. In *Olson* it was the mere fact that defendant was an overnight guest. As an overnight guest, he had the reasonable expectation that he and his possessions would not be disturbed by anyone, and that when he was asleep and most vulnerable, he would be safe from any unwarranted intrusion. Although here we are not sure whether defendant was intended to be an overnight guest, circumstances suggest that she was in a more privileged position in the house than a casual, card playing guest: she had a close relationship with the home owner, had been there on other occasions, had free run of the house, and felt comfortable enough to "make herself at home," in a literal sense.

The second point I would make is that whenever a "canned," or preprinted affidavit is presented to a magistrate, he or she

the Fourth Amendment. See *Gooding v. United States*, 416 U.S. 430, 464, 94 S.Ct. 1780, 1797, 40 L.Ed.2d 250 (1974) (Marshall J., dissenting) (principle of requiring a showing of particularized need to conduct a nighttime search may now be a "constitutional imperative"). See also *State v. Menke*, 787 P.2d 537, 541 (Utah Ct.App. 1990) (Utah Code Ann. § 77-7-15 codifies constitutional requirements for investigative stops). But see Davis & Wallentine, *A Model for Analyzing the Constitutionality of Sobriety Roadblock Stops in Utah*, 3 B.Y.U.J.Pub.L. 357, 363 (1989) (section 77-7-15 requirement is more strict than the Fourth Amendment).

has an affirmative responsibility to scrutinize the factual circumstances justifying the search warrant. Conclusory or ambiguous statements in the affidavit are insufficient. This is particularly critical when the warrant authorizes nighttime intrusion into a person's home.

Finally, while the analysis in the Appendix to our opinion is good food for thought in a case where the state has argued the applicability of the good faith exception to the exclusionary rule, in joining the court's opinion I emphasize its narrow application, and in no sense intimate any view on whether the *Leon* exception does or does not make good policy, much less on whether it should or not have any vitality under our state constitution. Those questions are reserved for another day.

JACKSON, J., dissents.

APPENDIX

The *Leon* Court, perhaps alarmed at society's prospects of failure in the so-called "drug war," premised the good faith exception on expediency. The Court concluded that the exclusionary rule's sole purpose was to deter police misconduct. This view minimizes the history of the adoption of the Fourth Amendment and the development of the exclusionary rule itself. Origins of the Fourth Amendment are based not so much upon law enforcement misconduct in executing warrantless searches, as in concerns about the unreasonable issuance of general search warrants. The exclusionary rule was born as a constitutional remedy for violations of the Fourth Amendment generally, with no particular emphasis on police behavior.

General Warrants

General warrants have their derivation in thirteenth century universal authorizations granted to innkeepers to search guests for counterfeit currency. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part One*, 3 U.Rich.L.Rev. 278, 283 (1969). With the onset of the Age of Enlightenment and accompanying reform movements, Eng-

land's threatened monarchs issued sweeping general warrants to search papers, books, and documents for evidence of sedition and libel against the Crown. For nearly a century, members of the private printer's guild used these warrants to seize and destroy the presses of printers who failed to join their union. Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum.L.Rev. 1365, 1369 (1983).

James I, Charles I, and Charles II, rulers during the seventeenth century, instituted unprecedented general warrants allowing agents of the notorious Court of the Star Chamber to search virtually at any time and any place for seditious printed matter. See *Marcus v. Search Warrants*, 367 U.S. 717, 726, 81 S.Ct. 1708, 1713, 6 L.Ed.2d 1127 (1961). Tax collectors were granted general warrants to enter castles and cottages, at any time without notice, to enforce the hearth tax. Not until a revolution which placed a reform king, William of Orange, upon the throne, and a suit for trespass by a member of Parliament, did judicial review effectively limit the reach of general warrants. Chief Justice Pratt (Lord Camden) concluded in *Wilkes v. Wood*, 98 Eng.Rep. 489 (1763):

The defendants claimed a right, under precedents, to force persons houses, break open escrutores, seize their papers & c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. [Such power] is totally subversive of the liberty of the subject.

Id. at 498. See also *Entick v. Carrington*, 95 Eng.Rep. 807 (1765). These cases were known to the authors of the Fourth Amendment, and *Wilkes v. Wood* is generally regarded to be the formative inspiration for the passage of the Fourth Amendment. See *Boyd v. United States*, 116 U.S. 616, 631, 6 S.Ct. 524, 533, 29 L.Ed. 746 (1886).

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Colonial Writs of Assistance

In the American colonies, particular exception was taken to the practice of granting writs of assistance to customs officers. These writs, granted by King George II, were valid for the King's lifetime and granted unlimited power to the officers to search at any place and any time without the need for judicial review or subsequent proceedings. Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum.L.Rev. 1365, 1370 (1983).

In 1760, King George II died and new writs were required. The colonists sought judicial relief from the new writs. James Otis, a prominent attorney in the service of the Crown whose position required him to seek the writs from the Superior Court, instead resigned his post and argued the cause on behalf of sixty-three Boston citizens. N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 58-59 (1937, Johns Hopkins Press; reprinted 1970, Dacapo Press). Years later, John Adams claimed it was James Otis's fiery denunciation of general warrants in open court that provided the spark for the American Revolution. *Id.*

This historical review suggests that the issuance of flawed warrants was of greater concern to the drafters of the Fourth Amendment than was the conduct of officers charged with the duty to execute such warrants. See *Warden v. Hayden*, 387 U.S. 294, 316, 87 S.Ct. 1642, 1655, 18 L.Ed.2d 782 (1967) (Fortas, J., dissenting) (describing the text of the original draft of the Fourth Amendment).

The Exclusionary Rule

An exclusionary rule was first applied in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886). It is instructive that *Boyd* involved no issue of police action or misconduct. The challenge in *Boyd* was to a judicially-issued subpoena in a civil forfeiture case. Paralleling the circumstances under which the writs of assist-

ance were condemned, *Boyd* involved a subpoena for books and papers of merchants accused of unlawfully importing glass. *Id.* at 621, 6 S.Ct. at 527. The Supreme Court concluded that because the papers were sought for what was essentially a criminal process, forfeiture for customs duties, the Fourth Amendment applied. However, the Court did not order suppression directly on Fourth Amendment grounds. Rather, the Court reasoned that the forced production of incriminatory papers and documents would violate the Fifth Amendment and accordingly ordered suppression of the material obtained under the subpoena.

Twenty-two years later, a unanimous Court decided *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), which firmly established the exclusionary rule as a fundamental principle of Fourth Amendment law. Defendant Weeks had been convicted of gambling, on the basis of personal papers which were unlawfully seized. Before trial, Weeks moved for the return of his illegally seized papers. The Court held that the government was constitutionally bound to return the improperly seized documents, which could not then be subpoenaed by the prosecution, and reversed Weeks' conviction. *Id.* at 398, 34 S.Ct. at 346. See also Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn.L.Rev. 251, 295-308 (1974) (discussing the impact of the *Weeks* decision).

A few years later, the Court decided *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), and *Gouled v. United States*, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921). The combined cases framed the exclusionary rule as barring any use whatsoever of improperly seized evidence. Writing for the Court in *Silverthorne*, Justice Oliver Wendell Holmes stated: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 U.S. at 392, 40 S.Ct. at 183. Ultimately, and after further refinement, the Fourth Amendment exclu-

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sionary rule was applied to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).

Against this background, it would seem appropriate that courts considering the scope of the Fourth Amendment exclusionary rule be mindful of the process of review and issuance of the warrant, as well as the lawfulness of the police officer's execution thereof.

The Trouble with *Leon*

It is viewed from this historical perspective that *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), represents such a qualitative change in the development of exclusionary rule jurisprudence. Writing for the Court, Justice White offered three justifications for the conclusion that the exclusionary rule was aimed at police misconduct and had no impact on the judicial review of warrant applications. First, he declared that the exclusionary rule was not designed to deter judges from error. *Id.* at 916, 104 S.Ct. at 3417. "Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment...." *Id.* Finally, and "most important," judges are neutral judicial officers, not adjuncts to law enforcement administration, and the exclusionary rule will have no practical deterrent effect on them. *Id.* at 916-17, 104 S.Ct. at 3417.

The first and third assertions seem at odds with the fact that the exclusionary rule, as first "designed" in *Boyd*, was expressly created as a remedy for judicial error. Moreover, these assertions discount the historical concerns about the issuance of general warrants and writs of assistance. In the instant case, there is no allegation of police misconduct in the warrant application process. The defect in the warrant might have been easily cured by careful questioning by an attentive magistrate. This is likely the more common scenario when a warrant's validity is challenged. See *State v. Marsala*, 216 Conn. 150, 579 A.2d 58, 67 (1990). Often the reviewing

judge will simply evaluate the warrant application for gross errors of law or something out of the ordinary, acting, in effect, as a rubber stamp. See Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U.L.Rev. 1173, 1182 (1987); Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?*, 22 Am.Crim.L.Rev. 85, 108-09 (1984) (citing statistical evidence of lax warrant review standards). Much of the exclusionary rule's vigor prior to *Leon* was in requiring the magistrate to assiduously exercise his or her Fourth Amendment duty by carefully scrutinizing warrant applications.

Justice White's second assertion, if true, calls into serious question the practical need for the *Leon* exception to the exclusionary rule. He gives high marks to judges and magistrates, claiming that few issue warrants not firmly grounded in probable cause. If indeed this is so, but see *id.*, the exclusionary rule would almost never be invoked in warrant-based searches, even without the *Leon* doctrine, since the magistrate will have scrutinized the application and issued the warrant only upon a detailed and well-supported showing of probable cause. Thus, the societal costs of the exclusionary rule, a great concern for the *Leon* Court, will be minuscule in the context of cases where a warrant is obtained.

It may additionally be questioned whether the societal costs of the exclusionary rule are as onerous as Justice White believes them to be. The *Leon* Court reasoned that the "marginal or nonexistent benefits produced by suppressing evidence ... cannot justify the substantial costs of exclusion." 468 U.S. at 922, 104 S.Ct. at 3420. But several scholars who have examined *Leon*'s "economic" conclusions refute them as groundless in fact. See Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U.Ill.L.Rev. 223, 239 (exclusionary rule accounts for less than two percent of case attrition); 1 W. LaFare, *Search & Seizure* § 1.3 at 46 n. 5 (2d ed. 1987 & Supp.1990). Moreover, while the societal cost of suppressing evidence may in some respects be more tangi-

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ble—it surely prompts an understandable visceral reaction by many—the system's use of illegally obtained evidence is not without societal costs of its own. True, it may be, that freeing a criminal because the constable (or magistrate) erred is not an entirely satisfactory state of affairs. But in a society committed to the notion that governmental action as well as citizen behavior is subject to the rule of law, it should also be regarded as an unsatisfactory state of affairs to countenance the use of evidence that should not have been uncovered, under our rules, to convict a citizen of some crime.

We believe the exclusionary rule may well have, as a substantial purpose, the objective of requiring careful judicial scrutiny of warrant applications. Simply put, it is unlikely magistrates are any more pleased to have their warrants "thrown out" by reviewing courts than are the police to have their evidence "thrown out." Such stimulation extends also to appellate review. Rigorous appellate review of search warrants and the accompanying benefit of defining search and seizure law would be effectively precluded if *Leon* were given wide rein, as the court would have little occasion to proceed beyond an inquiry into the trial court's finding of the officer's good faith. Similarly, issuing magistrates who are less than zealous in their devotion to the Fourth Amendment would have little motivation to look beyond the face of the warrant, knowing that as long as the warrant is facially proper, the appellate court would not interfere in view of the officer's good faith in executing a facially proper warrant.

Were an officer permitted to rely on a facially valid warrant without more being required of him or her, there would be no incentive for advanced training which would enable officers to better fulfill their duty to uphold the constitutions of the United States and of this state. Moreover, the well-trained officer or prosecutor securing a warrant will be in a position to prevent the very harm which led to the good faith exception. An officer who is motivat-

ed to prepare a constitutionally adequate warrant application will be less likely to rush through a warrant application, and will more carefully evaluate the sufficiency of probable cause, so that the warrant will withstand ultimate review and not merely gain the signature of an issuing magistrate. Similarly, the prosecutors who must argue the validity of warrants in court will be circumspect in their assessment of the sufficiency of probable cause when asked for advice before a warrant application is presented.

Fourth Amendment Conclusion

It may be persuasively argued that the exclusionary rule serves purposes beyond influencing the behavior of individual officers and officials. See, e.g., *United States v. Leon*, 468 U.S. 897, 975-80, 104 S.Ct. 3430, 3453-56, 82 L.Ed.2d 677 (1984) (Stevens, J. dissenting) (noting justifications for exclusionary rule not tempered with "good faith" exception as also including assurance of some remedy for violation of constitutional rights and as placing judiciary beyond the "dirty business" of using the fruits of unlawful searches to secure convictions). But insofar as its purpose is to influence behavior, the rule can serve to promote discipline, thoroughness, and care on the part of *all* actors in the process—police who secure warrants, prosecutors who aid in that process, magistrates who issue warrants, and police who execute warrants. Any exception to the rule which focuses on the rule's impact on only one of those groups, officers who carry out searches, is open to legitimate criticism.

As and when the appellate courts of this state are squarely confronted with the question of whether the exclusionary rule existing by virtue of Article I, Section 14, of the Utah Constitution is subject to a *Leon*-type "good faith" exception, a healthy skepticism should permeate the courts' consideration in view of the troublesome analysis in *Leon*.

