IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE	**)**	
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	)	**No. E-2013-02309-SC-R9-CD**
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CORRIN KATHLEEN REYNOLDS	**)**	

AMICUS CURIAE BRIEF
OF THE TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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STATEMENT OF AMICUS CURIAE

The Tennessee Association of Criminal Defense Lawyers is a non-profit corporation chartered in Tennessee in 1973. It has over 750 members statewide, mostly lawyers actively representing citizens accused of criminal offenses. TACDL seeks to promote study and provide assistance within its membership in the field of criminal law. TACDL is committed to advocating the fair and effective administration of criminal justice. Its mission includes education, training, and support to criminal defense lawyers, as well as advocacy before courts and the legislature of reforms calculated to improve the administration of criminal justice in Tennessee.

The Tennessee Association of Criminal Defense Lawyers offers its assistance to the Court on the important question of adoption of a good-faith exception to the Tennessee's exclusionary rule. TACDL participated previously as amicus on the same important question considered 27-years ago in *State v. Lonnie Taylor*, No. 86-114-III, 1987 WL 25417, 1987 Tenn. Crim. App. LEXIS 2763 (Tenn. Crim. App., Dec. 4, 1987).

ISSUES ADDRESSED BY AMICUS CURIAE

I. WHETHER TENNESSEE RULE OF CRIMINAL PROCEDURE 41(g)(1) OR ARTICLE I, SECTIONS 7 AND 17 OF THE TENNESSEE CONSTITUTION CAN ACCOMMODATE ADOPTION OF ONE OR MORE OF THE FEDERAL GOOD FAITH EXCEPTIONS TO EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE.

II. WHETHER *LEON*'S FEDERAL GOOD FAITH EXCEPTION ENGENDERED A UNIVERSAL GROUND SWELL OF SUPPORT.

III. WHETHER *ILLINOIS V. KRULL*'S GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE POSES AN EVEN GREATER THREAT TO THE INDIVIDUAL'S RIGHTS TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND POSSESSIONS THAT THE GOOD FAITH EXCEPTION RECOGNIZED IN *LEON*.

IV. WHETHER RESPECT FOR PRECEDENT AND STARE DECISIS MILITATES AGAINST ADOPTION OF A FEDERAL GOOD FAITH EXCEPTION.

ARGUMENT AND POSITION OF AMICUS CURIAE

I. NEITHER TENNESSEE RULE OF CRIMINAL PROCEDURE 41(g)(1) NOR ARTICLE I, SECTIONS 7 AND 17 OF THE TENNESSEE CONSTITUTION CAN ACCOMMODATE ADOPTION OF ONE OR MORE OF THE FEDERAL GOOD FAITH EXCEPTIONS TO EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE.

A. Introduction

By Order filed March 16, 2015, this Court, in connection with granting Rule 11 permission to appeal, included the following directive:

> In addition to the other issues raised in Mr. Reynolds' application for permission to appeal, the Court is particularly interested in briefing and argument on the following questions: (1) whether the Court should adopt a good-faith exception to the exclusionary rule, *see United States v. Leon*, 468 U.S. 897 (1984); and (2) if so whether the good-faith exception would preclude application of the exclusionary rule in this case.

There is no all-encompassing *Leon* good-faith exception to the exclusionary rule in the context of the Fourth Amendment to the United States Constitution. In *United States v. Leon*, 468 U.S. 897 (1984), the Court held that the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be defective. In a companion case, *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S. Ct. 3424 (1984), the Court held that the exclusionary rule did not apply when a warrant was invalid because a judge forgot to make "clerical corrections" to it.

Following *Leon* and over the ensuing 30 years, the Supreme Court has deviated from the "suppression" norm in the name of "good faith" only a handful of times and in limited, atypical circumstances. *See Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185 (1995) (database erroneously

informed police that warrant existed); *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695 (2009) (negligent failure to update database to reflect recall of arrest warrants); *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160 (1987) (unconstitutional statute purported to authorize the search); *Davis v. United States*, 131 S. Ct. 2419 (2011) (search was conducted in objectively reasonable reliance on binding appellate precedent).

Respectfully, Amicus suggests that in considering the question posed by the Court in the instant case, it is important to review the history and development of the limited deviations from the suppression norm recognized by the United States Supreme Court. It is equally important to examine whether Tennessee Rule of Criminal of Procedure 41(g)(1) can accommodate the adoption of one or more of the good-faith deviations from the suppression norm and whether Tennessee's exclusionary rule can **constitutionally** accommodate the adoption of one or more of the good-faith deviations from the suppression norm. Amicus submits that such an accommodation cannot be made.

B. <u>Tennessee Rule of Criminal Procedure 41(g)(1)</u>

Tenn. R. Crim. P. 41(g)(1) provides that a Defendant's motion to suppress "evidence obtained in [an] unlawful search . . . shall be granted . . . if the evidence in support of the motion shows that . . . the search . . . was made illegally without a search warrant[.]" In the instant case, the evidence demonstrates that the state's search was conducted illegally and without a search warrant.[1] Consequently, Tenn. R. Crim. P. 41(g)(1) mandates suppression. Remarkably, the matter is truly that simple.

[1] The trial court's well-supported findings that the Government lacked probable cause to conduct an involuntary search of the Defendant's blood are entitled to deference on appeal. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)

Even so, the state insists that the fruits of its illegal search should be admitted anyway, because "[t]he good-faith exception should apply." State's Brief at 26. Rule 41(g), however, neither permits nor contemplates a "good-faith" exception to suppression. Instead, it instructs with unmistakable clarity that a Defendant's motion to suppress the fruits of an illegal search "shall be granted . . . if the evidence in support of the motion shows that . . . the search . . . was made illegally without a search warrant." Consequently, in the first instance and based on the doctrine of constitutional avoidance, whether the Tennessee Constitution contemplates a "good faith" exception to the exclusionary rule is a question for another day.[2]

In insisting that Rule 41(g) contemplates a "good faith" exception, however, the state makes two contrary arguments. Each is unpersuasive.

(i) <u>The State misinterprets the word "protection."</u>

To begin, the state insists – without citation – that the clause of Rule 41(g)(1) that states: ". . . or in any other way in violation of the constitutional protection against unreasonable searches and seizures" embodies the good-faith exception, because "the 'protection' from the Fourth Amendment and Article I, §7, is the exclusion of evidence under the exclusionary rule." *See* Government's Brief at 27. There are, however, at least four major problems with this premise, and for the reasons that follow, the state's suggested interpretation of the word "protection" cannot withstand scrutiny.

[2] *See, e.g., Keough v. State*, 356 S.W.3d 366, 371 (Tenn. 2011) ("This Court decides constitutional issues only when absolutely necessary for determination of the case and the rights of the parties. Where an appeal can be resolved on non-constitutional grounds, we avoid deciding constitutional issues.") (citation omitted). *See also Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) ("[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.") (quotation omitted) (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.")).

First, if the state's position was correct, Rule 41(g)(1) would be entirely superfluous. According to the state, Rule 41(g)(1) is merely coextensive with the exclusionary rule, even though the exclusionary rule is already a constitutional requirement. Because "the canon against surplusage . . . favors that interpretation which avoids surplusage," however, *see Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043 (2012), this Court must presume that Rule (41)(g)(1) was not meant to be substantively vacuous. *Id.*

Second, the plain meaning of the word "protection" does not comport with the state's desired interpretation. Indeed, considered in context, the state's proposed definition of "protection" is entirely unnatural. A brief survey of this Court's jurisprudence reflects that when referring to constitutional provisions, the word "protection" is frequently used interchangeably with – and as a synonym for – the word "guarantee." *See, e.g.*, *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 13 (Tenn. 2000) ("The[] protections contained in our Declaration of Rights are more particularly stated than those stated in the federal Bill of Rights. For example, the explicit guarantee of freedom of worship found under the United States Constitution occupies but sixteen words in an amendment generally guaranteeing freedom of worship, freedom of speech, freedom of the press, the right to assemble, and the right to petition the government for redress of grievances.*"); Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979) ("we may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees"); *State v. AAA Aaron's Action Agency Bail Bonds, Inc.*, 993 S.W.2d 81, 85 (Tenn. Crim. App. 1998) ("The Due Process Clause of the Fourteenth Amendment and Article I, Section 8 of the Tennessee Constitution embody similar procedural protections and guarantees."); *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005), *as amended on reh'g in part* (Feb. 21, 2006) ("[T]he state equal protection

guarantee is co-extensive with the equal protection provisions of the Fifth and Fourteenth Amendments of the U.S. Constitution.").

Of note, such interchangeable usage is also common in the context of the constitutional protection/guarantee against unreasonable searches in particular. *Compare Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 718 (Tenn. 1997) (referring to "the state constitutional guarantee of privacy"), *with State v. Donaldson*, 380 S.W.3d 86, 91 (Tenn. 2012) (referring to the "state and federal constitution[al] protection from unreasonable searches and seizures."). *See also Nolan v. State*, 588 S.W.2d 777, 779-80 (Tenn. Crim. App. 1979) ("In search and seizure questions the guarantees of the Fourth Amendment of the United States Constitution and Article I, § VII of the State Constitution must be liberally construed in favor of the citizen. . . . The protection or security from unreasonable searches inures without exception, alike to all citizens regardless of their station in life."). *Cf. State v. Wert*, 550 S.W.2d 1 (Tenn. Crim. App. 1977) (referring to the "constitutional guarantees against unreasonable searches and seizures" in the case caption, but using "protection," "protects," "protected" and "unprotected" to describe such guarantees).

Thus, because the Fourth Amendment and Article I, § 7 protection/guarantee that citizens will be free from unreasonable government searches is far broader than merely requiring suppression of evidence in certain criminal cases, *see, e.g., City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 192 L.Ed.2d 435, 446 (2015) (holding that civil requirement that hotels maintain and divulge guest logs was facially unconstitutional under the Fourth Amendment because it failed to provide hotel operators with an opportunity for precompliance review); *cf. Planned Parenthood*, 38 S.W.3d at 13 (discussing effect of Article I, § 7's guarantees on the right to have an abortion), the state's suggestion that "the [only] 'protection' from the Fourth Amendment and article I, § 7, is the exclusion of evidence under the exclusionary rule" is provably wrong.

Third, in interpreting the provisions of Rule 41(g)(1), fundamental principles of statutory interpretation compel the presumption that its drafters: "d[id] not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). In this instance, the state's proposed interpretation of the word "protection" – which, as noted above, is not supported by the context in which it appears – dramatically changes the meaning of Rule 41(g)(1), with absolutely no evidence that such meaning was ever intended. If the authors of Rule (41)(g)(1) had actually intended to restrict its application to the much narrower terms of the Constitution's exclusionary rule, however, they could rather easily have done so simply by saying so. With this reality in mind, it seems highly implausible that by using the term "protection" in reference to citizens' constitutional rights against unreasonable searches, the authors of Rule 41(g)(1) intended to dramatically alter its meaning.

Last, the state's desired definition of the word "protection" is only even plausible on a theoretical basis if one ignores the rest of Rule 41(g)(1). In full, Rule 41(g)(1) actually provides that suppression is required if: "the search or seizure was made illegally without a search warrant or illegally with an invalid search warrant, ***or in any other way*** in violation of the constitutional protection against unreasonable searches and seizures." *Id.* (Emphasis added). This fairly straightforward sentence structure indicates that a "search or seizure made illegally without a search warrant" is itself an example of a "violation of the constitutional protection against unreasonable searches and seizures." And that fact alone renders the state's desired interpretation of the word "protection" impossible, because if a "search or seizure [] made illegally without a search warrant" necessarily represents an example of a violation of "the constitutional protection against unreasonable searches and seizures" – and Rule 41(g)(1) plainly states that it does – then

the state's proposed interpretation of Rule 41(g)(1) renders its first and second clauses inconsistent with one another.[3]

(ii) *State v. Carter* and *State v. Hill* do not narrow Rule (41)(g)(1).

The state also insists that because "the courts of this state have long concluded that [certain evidence that was unreasonably seized] is admissible in a criminal trial. . . . [R]ule [41(g)(1)] does not disallow admission of evidence that would otherwise qualify under [a] good-faith exception[.]" *See* State's Brief at 27. In support of this proposition, the state cites both *State v. Carter*, 160 S. W.3d 526, 532-33 (Tenn. 2005), and *State v. Hill*, 333 S.W.3d 106, 122-23 (Tenn. Crim. App. 2010), which held, respectively, that Tennessee's Constitution permits evidence to be admitted pursuant to the inevitable-discovery and independent-source doctrines. Based on these two holdings, the state argues Rule 41(g)(1) cannot *actually* mean what it says when it categorically compels suppression of evidence obtained as a result of a "search or seizure [that] was made illegally without a search warrant."

A cursory examination of *Carter* and *Hill* quickly exposes the weakness of this argument. Rule 41 was never mentioned in either case. Neither case discusses the application of Rule 41 or the interplay between Rule 41 and the Tennessee Constitution's exclusionary rule. To the contrary, it appears that neither the defendant in *Carter* nor the defendant in *Hill* even raised the issue, meaning that Rule 41 was never considered by this Court in those cases at all. Put simply: Neither

[3] Equally puzzling is the state's assertion, "But if evidence is admissible the under a valid exception to the exclusionary rule, despite the fact that an unreasonable search has occurred, then its admission does not offend the "protection" of the Fourth Amendment. State's Brief at 27. The first question always is whether the search which yielded the incriminating evidence was valid. A warrantless search is per se unreasonable, unless it falls into one of the narrowly defined and carefully drawn "exceptions" to the warrant requirement, i.e., searches incident to a lawful arrest, those made by consent, in the "hot pursuit" of a fleeing criminal, "stop and frisk" searches, and those based on probable cause in the presence of exigent circumstances. *State v. Shaw*, 603 S.W.2d 741, 742 (Tenn. Crim. App. 1980). If one or more of the "exceptions" apply, the search is constitutionally "reasonable," and the question of applying some "exception" to the exclusionary rule is never reached. The United States Supreme Court has never ruled that the Fourth Amendment permits admission of evidence from all warrantless, unreasonable searches.

Carter nor *Hill* speaks to Rule 41(g)(1) in any way. Thus, there is no conflict of any kind between *Carter's* and *Hill's* conclusion that the Tennessee Constitution does not compel suppression under all circumstances following an unreasonable search, and the Defendant's argument in this case that Rule (41)(g)(1) does.

Of note, there is a defined, functioning process for reforming Rule 41(g)(1) if such a reform is considered worthwhile, but at least to this point, neither this Court nor the legislature has seen fit to change it. Rather than adhering to this established process or allowing the General Assembly to amend Rule (41)(g)(1) through the legislative process, however, it would be highly improper for this Court to accept the Government's invitation to rewrite Rule 41(g)(1) unilaterally by holding that it means something that it plainly does not say.

C. Constitutional Origins of the Exclusionary Rule in Tennessee

The exclusionary rule blocks the admission in a criminal trial of evidence obtained through constitutionally unreasonable searches and seizures. The evidence, in other words, is suppressed. Citizens in Tennessee are protected against unreasonable searches and seizures pursuant to the Fourth Amendment to the United States Constitution and Article I, § 7 of the Tennessee Constitution.

On the federal level, the United States Supreme Court first devised the exclusionary rule in *Weeks v. United States*, decided in 1914. By that decision, the government in federal prosecutions was not allowed to introduce evidence seized in violation of an accused's Fourth Amendment rights. *Weeks v. United* States, 232 U.S. 383 (1914). Forty-seven years later, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court then extended the exclusionary rule to state prosecutions via the Due Process Clause of the Fourteenth Amendment.

Long before the decision in *Mapp v. Ohio*, however, and based on the Tennessee Constitution, our courts recognized that evidence obtained by illegal searches and seizures is inadmissible in the courts of this State. The origins of this accepted principle can be traced back at least as far as 1921, when this Court in *Hughes v. State*, 238 S.W. 588 (1922), proclaimed,

> The state having through its executive representatives produced the evidence of a violation of the law by one of its citizens by means prohibited by the Constitution, cannot be permitted through its judicial tribunal to utilize the wrong thus committed against the citizen for his wrong; for it was only by violating his constitutionally protected rights that his wrong has been discovered. It is no answer to say that it matters not how a citizen's sins have been found out. Security from unlawful search is the right guaranteed to the citizen, even for the discovery of the citizen's sins. This right we must protect, unless we may with impunity disregard our oath to support and enforce the Constitution . . . .

Id. at 594.

One year later, in *Hampton v. State*, 252 S.W. 1007 (1923), this Court found deficiencies in an affidavit and warrant which it attributed to the "carelessness" or "oversight" of the magistrate issuing the warrant. Even though this Court determined that "the officers acting in [the] case did so in good faith," it held that the evidence seized under the invalid warrant should have been excluded. *Id*. at 1008-09. This Court noted that the requirements of the constitution and statutes regarding search warrants and affidavits were not difficult and should be followed. *Id*. at 1008.

Two years later in *Tenpenny v. State*, 279 S.W. 989 (Tenn. 1924), this Court reemphasized,

> Illegal practices should find no sanction in the judgment of the courts, which are charged at all times with the support of the Constitution, and to which the people have a right to appeal for the maintenance of fundamental rights. Hence the rule that illegal evidence cannot be received to produce a verdict of guilty.

Id. at 989-90.

By 1925, the exclusion of illegally obtained evidence was so well established in this State that in *State v. Bass* 281 S.W. 936 (Tenn. 1925), this Court observed:

> Contrary to the practice in most of the jurisdictions referred to, our courts pause in the midst of the trial upon an indictment to determine by a preliminary inquiry, if necessary, whether the search and seizure through which the evidence offered was obtained in violation of the constitutional rights of the accused . . . . And if it appears that the seizure was illegal, and the evidence unlawfully obtained, it will be excluded. . . .

Id. at 939.

From these cases, it is abundantly clear that under the Tennessee Constitution this Court has considered the exclusion of evidence to be required to prevent the courts from becoming accomplices in illegal conduct and lest the integrity and responsibilities of the judiciary, which is charged with the support of the Constitution, be undermined. Tennessee's exclusionary rule, moreover, reflects the lessons learned from history and embodied in Article I, Section 7 of the Tennessee Constitution, which provides:

> That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

Tenn. Const. art. I, § 7.

In *Craven v. State*, 256 S.W. 431 (Tenn. 1923), this Court in "plain and unpretentious form," outlined and highlighted the history of the words embodied in Article I, section 7.

> The enforcement of no statute is of sufficient importance to justify indifference to the basic principles of our government. The better class of our ancestors at one time thought there could be no more heinous sin that questioning the divine right and will of the king. Later the majority of them regarded all dealings with the exiled

> house of Stuart as calling for the most severe methods of repression, and many of a later generation believed that the libels of Wilkes and his associates upon the ministry were so dangerous to good order that they should be suppressed by any means. Likewise there was little general sympathy with the earlier violations of the imposts laws in the colonies.
>
> . . . .
>
> There is little doubt but that at the beginning of each of these crises predominant moral sentiment supported the crown. But violent methods outraged and antagonized the people, and either made impossible or postponed the end sought to be reached. Much turmoil arose, much blood flowed, but little progress was made in law enforcement. The observance of no law has been promoted by tyranny, nor do we suppose ever will be in an English-speaking country.
>
> These lessons from the past, as well as the constitution which rules us all, admonish that this court should set itself unfalteringly against any disturbance of the security of the people in "their persons, houses, papers and possessions" by unreasonable searches and seizures.

Id. at 432.

Time has not diminished or dampened these sentiments and convictions. Those convictions were borne of experience, and they hold true today as they did when this country and state were founded.

In addition to nearly 100 years of precedence regarding Tennessee's exclusionary rule under Article I, section 7 of the Tennessee Constitution, Article I, section 17 of the Tennessee Constitution bears on the matter. Article I, section 17 provides:

> That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

This constitutional provision speaks to three topics: open courts, redress of injuries, and suits against the State.

Well over 100 years ago, this Court explained that "[t]he obvious meaning of Tenn. Const. art. I, § 17 is that there shall be established courts proceeding according to the course of the common law, or some system of well established judicature to which all the citizens of the state may resort for the enforcement of rights denied or redress of wrongs done them." *Staples v. Brown*, 85 S.W. 254, 255 (Tenn. 1904). It is "a mandate to the judiciary." *Scott v. Nashville Bridge Co.*, 223 S.W. 844, 852 (Tenn. 1919). And, it is settled that "[t]he phrase 'an injury done him' necessarily means a legal injury, that is, a violation of his legal rights in some way, or a violation of law that affects him adversely." *Barnes v. Kyle*, 306 S.W.2d 1, 3 (Tenn. 1957).

Thus has Tennessee had a long, emphatic, and independent tradition of excluding from use at trial evidence that is the product of a violation of the right of the people to be secure in their persons, houses, papers, and effects. Under the judicial integrity theory, our Constitution demands the exclusion of illegally seized evidence. The courts cannot condone or participate in the protection of those who violate the constitutional rights of others.

D. <u>Federal Good Faith Exception to the Exclusionary Rule</u>

Fast forward to 1984, when the United States Supreme Court created a good-faith exception to the federal exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984). This frequently misunderstood exception holds that the exclusionary rule should be modified so as to allow the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. The reasoning was based upon three factors: the alleged historic purpose of the "federal" exclusionary rule to deter misconduct by law enforcement; the absence of evidence

suggesting that judicial officers are inclined to ignore Fourth Amendment limitations; and the absence of any basis for believing that the exclusionary rule significantly deters Fourth Amendment violations by judicial officers in the search warrant context. A companion case, *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S. Ct. 3424 (1984), held that the exclusionary rule did not apply when a warrant was invalid because a judge forgot to make "clerical corrections" to it.

In 1987, in *Illinois v. Krull*, 480 U.S. 340, 362, 107 S. Ct. 1160 (1987), the Supreme Court then created a good faith-exception to the exclusionary rule when officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment.

Eight years later, in *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185 (1995), the exclusionary rule was held not to require suppression of evidence seized in violation of Fourth Amendment where erroneous information leading to search resulted from clerical error of court employees. In a related fashion in *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695 (2009), the erroneous information resulted from a police record keeping error, and an exception to the suppression norm was recognized.

Finally, in *Davis v. United States*, 131 S. Ct. 2419 (2011), the Court held that suppression was not required when a search was conducted in objectively reasonable reliance on binding appellate precedent.

It is worth noting that *Leon* was a 6 – 3 decision; *Sheppard* was a 7 – 2 decision; *Krull* was a 5 – 4 decision; *Evans* was a 7 – 2 decision; *Herring* was a 5 – 4 decision; and *Davis* was a 7 – 2 decision. The different alignments reflect an abiding disagreement within the Court as to why and

when an exception to the suppression norm should be recognized. *Krull* and *Herring*, by far, are the most divisive of the group.

E. <u>Tennessee and Good Faith</u>

From time to time Tennessee courts have mentioned the good faith exception to the federal exclusionary rule established in *Leon*. In *State v. Carter*, 16 S.W.3d 762, 768 n.8 (Tenn. 2000), this Court acknowledged that it has yet to adopt the exception, and it "decline[d] to address its validity under the Tennessee Constitution until the issue is squarely presented." *See also State v. Moats*, 403 S.W.3d 170, 187 n.8 (2013) ("Tennessee has never recognized the 'good faith' exception to the exclusionary rule" adopted in *Leon*, citing *Carter*). [4]

Leon was decided in 1984. Research discloses that the earliest mention of *Leon* in Tennessee case law appears in *State v. Barry Charles Vassar*, No. 85-12-111, 1985 Tenn. Crim. App. LEXIS 3198 (Tenn. Crim. App., Nashville, July 26, 1985). *Barry Charles Vassar* involved a search warrant, but unlike *Leon*, the magistrate did not blunder; rather, the officers executing the warrant exceeded the express scope of the warrant. The state urged the Court of Criminal Appeals to follow the holding of *Leon*. Judge Joe D. Duncan, writing for the panel, rejected the invitation (1) inasmuch as the defendant relied on Article I, section 7 of the Tennessee Constitution; and (2)

[4] It is no answer that in 2011 the legislature enacted Tennessee Code section 40-6-108, entitled "Exclusionary Rule Reform Act." To be charitable, the statute is poorly drafted. Subsection (a) speaks of evidence that is seized as a result of executing a search warrant and the court determining that the violation was a result of a good faith mistake or technical violation. Subsection (b) addresses civil remedies. Subsection (c) purports to be a definitional guide to the meaning of "good faith mistake or technical violation." The first two definitions refer to the search warrant context, consistent with the statement in subsection (a). Then, however, a third definition inexplicably trails off into statutes subsequently ruled unconstitutional and controlling court precedent that is overruled – nothing connected to search warrants. The statute, moreover, qualifies and limits its effect to those situations "not in violation of the constitution of the United States or Tennessee." A somewhat tortured Attorney General Opinion (2011 Tenn. AG Opinion No. 11-32), concluded that the statute was constitutional but only because it would not authorize the admission of evidence that is otherwise inadmissible because it was unreasonably seized in violation of the Fourth Amendment and/or Article I, section 7 of the Tennessee Constitution. Hence, all roads lead back to Tennessee's constitutional basis for the exclusionary rule.

because the search issue did not involve an error by the magistrate, which was the fact pattern in *Leon.*

By far, the most thorough considerations of *Leon*'s validity under the Tennessee Constitution appear in *State v. Lonnie Taylor*, No. 86-114-III, 1987 WL 25417, 1987 Tenn. Crim. App. LEXIS 2763 (Tenn. Crim. App., Dec. 4, 1987), and *State v. Huskey*, 177 S.W.3d 868 (Tenn. Crim. App. 2005).

The issues in *Lonnie Taylor* were whether the search warrant affidavits stated sufficient facts to establish probable cause for issuance of a search warrant, and, if not, whether a finding that the affidavits failed to establish probable cause required exclusion of the evidence. The Court of Criminal Appeals agreed with the trial judge that the affidavits were insufficient to satisfy the probable cause requirement. Regarding exclusion of the evidence, the intermediate appellate court held that the trial court erred when it invoked the "good faith" exception and refused to suppress the evidence. As a threshold matter, the Court of Criminal Appeals ruled that an inferior court lacks authority to create such an exception that had never before been recognized by the Tennessee Supreme Court. In terms of whether Tennessee should and/or could adopt a good-faith exception in the future, the Court of Criminal Appeals reviewed and discussed at length the development of Tennessee's exclusionary rule per *Hughes*, *Tenpenny*, and *Craven* and explained, *inter alia*:

- The exclusionary rule is firmly embedded in Tennessee's jurisprudence;
- Relaxing the exclusionary rule would impugn the integrity of the judicial branch of government;
- The probable cause requirements of our Constitution, statutes, rules of procedure, and common law rules are not difficult;

- Adoption of good-faith exception would seriously undermine the motivation of law enforcement officials to comply with the constitutional requirements of probable cause; and
- The miniscule number of individuals who are either not prosecuted or convicted as a direct result of an unreasonable search and seizure does not warrant such a radical change in the exclusionary rule of this State.

In *Huskey*, the state asserted that the officers acted in good faith on the capias purportedly issued by the Knoxville City Court for the defendant's failure to appear in court. The state essentially requested that the Court of Criminal Appeals adopt the *Leon* good faith exception to the exclusionary rule. The Court of Criminal Appeals declined, and in the course of its opinion reviewed, as was done in *Lonnie Taylor*, the long and well-established history behind Tennessee's exclusionary rule, adopted long before *Mapp v. Ohio*. In addition, the intermediate appellate court discussed Rule 41(c) of the Tennessee Rules of Criminal Procedure, adopted in 1978, as demonstrating the commitment in Tennessee to securing our citizens against carelessness and abuse in the issuance and execution of search warrants.

In 2005, in *State v. Aaron Edward Aytes*, No. E2004-01051-CCA-R9-CD, 2005 WL 636650, 2005 Tenn. Crim. App. LEXIS 235 (Tenn. Crim. App., Knoxville, March 18, 2005), the state urged the Court of Criminal Appeals to adopt the *Herring* good faith exception for police database error. The intermediate appellate court declined, citing lack of precedent.

In 2014, in *State v. Jerry Brandon Phifer*, No. M2013-01401-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 903 (Tenn. Crim. App., Nashville, Sept. 23, 2014), the state urged adoption of the *Davis* good faith exception for binding appellate precedence. The intermediate appellate court again declined, citing lack of precedent.

In the *Reynolds* case presently under consideration, the Court of Criminal Appeals suggested that the facts and posture of this case seem to fit squarely within the limited exceptions to the application of the exclusionary rule set forth in both *Davis* and *Krull*. *Davis* and *Krull*, however, are not interchangeable; they cannot be conflated into a single good faith exception. As noted previously, *Krull* was a 5 to 4 decision; *Davis* was a 7 to 2 decision.

II. *LEON*'S FEDERAL GOOD FAITH EXCEPTION DID NOT ENGENDER A UNIVERSAL GROUND SWELL OF SUPPORT.

In the wake of *Leon*, the highest courts of 15 sister states have rejected the good-faith exception, based on the protections found in their state constitutions.[5] The highest courts in 23 states have accepted the validity of the good-faith exception, although over two-thirds of these states have done so without reference to their state constitutions or any particular analysis.[6] Three states have opinions from intermediate appellate courts "applying" good-faith.[7] Five states have affirmatively chosen not to decide whether their constitution permits a good-faith exception.[8] Two states, Alaska and Montana, do not appear to have specifically addressed the issue on its merits.[9]

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[5] *State v. Koivu*, 272 P.3d 483 (Idaho 2012); *Commonwealth v. Hernandez*, 924 N.E.2d 709 (Mass. 2010); *State v. Afana*, 233 P.3d 879 (Wash. 2010); *Dorsey v. State*, 761 A.2d 807 (Del. 2000); *State v. Cline*, 617 N.W.2d 277 (Iowa 2000); *State v. Lopez*, 896 P.2d 889 (Hawaii 1995); *State v. Canelo*, 653 A.2d 1097 (N.H. 1995); *State v. Gutierrez*, 863 P.2d 1052 (N.M. 1993); *Gary v. State*, 422 S.E.2d 426 (Ga. 1992); *Com. v. Edmunds*, 586 A.2d 887 (Penn. 1991); *State v. Oakes*, 598 A.2d 119 (Vt. 1991); *State v. Marsala*, 579 A.2d 58 (Conn. 1990); *State v. Carter*, 370 S.E.2d 553 (N.C. 1988); *State v. Novembrino*, 519 A.2d 820 (N.J. 1987); *People v. Bigelow*, 488 N.E.2d 451 (N.Y. App. 1985).

[6] *State v. Brown*, 28 N.E.3d 81 (Ohio 2015); *Parker v. Commonwealth*, 440 S.W.3d 381, 387 (Ky. 2014); *State v. Hill*, 851 N.W.2d 670 (Neb. 2014); *Byars v. State*, 336 P.3d 939 (Nev. 2014); *State v. Edwards*, 853 N.W.2d 246 (S.D. 2014); *State v. Harris*, 58 So.3d 408 (Fla.App. 1st 2011); *Briscoe v. State*, 30 A.3d 870, 882 (Md. 2011); *State v. Daniel*, 242 P.3d 1186 (Kan. 2010); *Adams v. Com.*, 657 S.E.2d 87 (Va. 2008); *People v. Pacheco*, 175 P.3d 91(Col. 2006); *People v. Goldston*, 682 N.W.2d 479 (Mich. 2004); *White v. State*, 842 So.2d 565 (Miss. 2003); *People v. Willis*, 46 P.3d 898 (Cal. 2002); *State v. Eason*, 629 N.W.2d 625 (Wis. 2001); *State v. Weston*, 494 S.E.2d 801 (S.C. 1997); *State v. Hyde*, 921 P.2d 655 (Ariz. 1996); *State v. Varnado*, 675 So.2d 268, 270 (La. 1996); *State v. Tarantino*, 587 A.2d 1095, 1098 (Me. 1991); *Hall v. State*, 789 S.W.2d 456 (Ark. 1990); *State v. Adkins*, 346 S.E.2d 762 (W.Va. 1986); *Blalock v. State*, 483 N.E.2d 439 (Ind. 1985); *State v. Murphy*, 693 S.W.2d 255 (Mo. 1985); *People v. Stewart*, 473 N.E.2d 1227 (Ill. 1984).

[7] *State v. Gonzales*, 337 P.3d 129 (Ore.App. 2014); *State v. Sittingdown*, 240 P.3d 714 (Ok.Crim.App. 2010); *State v. Martin*, 833 S.W.2d 129 (Tex.Crim.App. 1992).

[8] *Snell v. State*, 322 P.3d 38 (Wyo. 2014); *State v. Walker*, 267 P.2d 210 (Utah 2011); *State v. Story*, 8 A.3d 454 (R.I. 2010); *State v. Jackson*, 742 N.W.2d 163, 180 n.10 (Minn. 2007); *State v. Lunde*, 752 N.W.2d 630 (N.D. 2008).

[9] *State v. Koen*, 152 P.3d 1148 (Alaska 2007) (mentions good-faith in passing, but search upheld on other grounds); *State v. Vickers*, 964 P.2d 756 (Mont. 1998) (declines to apply good-faith, as warrants were void ab initio—no other opinions address it).

Two other states do not easily fit as either adopters or rejecters, and employ their own unique systems.[10]

Twelve (12) states have similar search and seizure protections to Tennessee that begin with "That the people shall be secure…" or "The people shall be secure…."[11] However, no other state has Tennessee's uniquely powerful language regarding general warrants being "dangerous to liberty." Tenn. Const., Art. I, § 7.

Five of those states with textually similar provisions, have affirmatively chosen to reject the good-faith exception. *Dosey v. State*, 761 A.2d 807 (Del. 2000); *State v. Gutierrez*, 863 P.2d 1052 (N.M. 1993); *Com. v. Edmunds*, 586 A.2d 887 (Penn. 1991); *State v. Oakes*, 598 A.2d 119 (Vt. 1991); *State v. Marsala*, 579 A.2d 58 (Conn. 1990). Those states did so in powerful opinions, any one of which could be the focus of an entire brief. However, a few pertinent quotations and observations from each opinion may give a flavor of their logic.

Connecticut: Close Enough Isn't Good Enough.

Connecticut in *Marsala* rejected the logic of *Leon*, finding that empirical research failed to demonstrate that the exclusionary rule imposed "substantial costs." 579 A.2d at 65-66. The court went on to make the following points:

> [1] …although we are confident that most police officers take very seriously their obligation to present a reviewing authority with a constitutionally adequate basis for the issuance of a warrant, the

[10] *State v. Eason*, 629 N.W.2d 625, 648 (Wis.2001) (good-faith exception applies only "if the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney [other than the issuing magistrate]."); *Ex parte State*, 121 So.3d 337, 357 (Ala. 2013) (in dicta observing that *Leon* good-faith exception could preclude exclusion of evidence) versus *Ex parte Lemus*, 802 So.2d 1073, 1075 (Ala. 2001) and *Ex parte Turner*, 792 So.2d 1141, 1150-51 (Ala. 2000) (both holding: "Suppression of evidence seized pursuant to a search warrant issued contrary to the rule of law is necessary to preserve the rule of law itself.").

[11] Alabama Const., Art. I, § 5;, Colorado, Const., Art. 2, § 7; Connecticut Const., Art. I, § 7; Delaware Const., Art. I, § 6; Maine Const., Art. I, § 5; Mississippi Const., Art. 3, § 23; Missouri Const., Art. I, § 15; Montana Const., Art. 2, § 11; New Mexico Const., Art. 2, § 10; Pennsylvania Const., Art. I, § 8; Texas Const., Art. I, § 9; Vermont Const., Ch. 1, Art. 11.

> good faith exception would encourage some police officers to expend less effort in establishing the necessary probable cause to search and more effort in locating a judge who might be less exacting than some others when ruling on whether an affidavit has established the requisite level of probable cause.
>
> [2] [T]he "exception for good faith reliance upon a warrant implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will from now on have virtually no consequence...."
>
> [3] [I]t is unlikely "that overburdened trial and appellate courts will take the time and effort to write advisory opinions on search and seizure law when they can just as easily admit the evidence under the good faith exception."
>
> [4] [A]pplication of the rule to even those situations in which individual police officers have acted on the basis of a reasonable but mistaken belief that their conduct was authorized can still be expected to have a considerable long-term deterrent effect…[P]olice departments will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued.

Id. at 67-68 (internal citations deleted).

Marsala concluded as follows:

> In short, we are simply unable to sanction a practice in which the validity of search warrants might be determined under a standard of "close enough is good enough" instead of under the "probable cause" standard mandated by article first, § 7, of our state constitution.

Id. at 68.

Delaware: A right without a remedy is an oxymoron.

In *Dorsey*, the Delaware Supreme Court strongly asserted the doctrine of dual sovereignty and (like Connecticut and Pennsylvania, as well) observed that their constitution pre-dated the enactment of the Bill of Rights. 761 A.2d at 814-817. The court then addressed (and rejected) the logic of *Leon*, while holding:

> The Delaware Constitution requires actual probable cause for the issuance of a search warrant not "a good faith belief in probable cause." This Court cannot disregard the probable cause requirement explicitly set forth in the Delaware Constitution.

761 A.2d at 820.

Finally, and very pertinently, *Dorsey* concluded:

> [T]he government of Delaware is also a government of laws. Without a constitutional remedy, a Delaware "constitutional right" is an oxymoron that could unravel the entire fabric of protections in Delaware's two hundred and twenty-five year old Declaration of Rights.

761 A.2d at 821.

New Mexico: We do no more than restore the parties to the position they were in before the constitutional violation.

In *Gutierrez,* the New Mexico Supreme Court reviewed the history of the exclusionary rule both nationally and in their state, and concluded that the good-faith exception was "incompatible with the guarantees of the New Mexico Constitution." 863 P.2d at 1068 (N.M. 1993). The court noted that "the rule we announce today is not premised on policy concerns of judicial integrity or deterrence, [however] we cannot deny that the rule advances those important state policies." *Id*. at 1068. New Mexico's Supreme Court explained its reason for rejecting good-faith:

> Surely, the framers of the Bill of Rights of the New Mexico Constitution meant to create more than "a code of ethics under an honor system." We think it implicit in a regime of enumerated privileges and immunities that the framers intended to create rights and duties and that they made it imperative upon the judiciary to give meaning to those rights through judicial review of the conduct of the separate governmental bodies. As Justice Stewart has observed, "[t]he primary responsibility for enforcing the Constitution's limits on government, at least since the time of *Marbury v. Madison*, has been vested in the judicial branch." The very backbone of our role in a tripartite system of government is to give vitality to the organic laws of this state by construing constitutional guarantees in the context of the exigencies and the needs of everyday life. Denying the government the fruits of

> unconstitutional conduct at trial best effectuates the constitutional proscription of unreasonable searches and seizures by preserving the rights of the accused to the same extent as if the government's officers had stayed within the law.

Id. at 1068 (internal citations omitted).

Pennsylvania: If the Government becomes a lawbreaker, it breeds contempt for law and invites anarchy.

In *Edmunds,* the Pennsylvania Supreme Court explained that their Article One, § 8 embodies "a strong notion of privacy, carefully safeguarded in this Commonwealth for the past two centuries" and a "paramount concern for privacy." 586 A.2d at 897. Importantly, Pennsylvania's high court had no doubt that its police and magistrates always acted in good-faith, and thus deterrence had never been the primary purpose of exclusion:

> Indeed, we disagree with [the U.S. Supreme] Court's suggestion in *Leon* that we in Pennsylvania have been employing the exclusionary rule all these years to deter police corruption. We flatly reject this notion. We have no reason to believe that police officers or district justices in the Commonwealth of Pennsylvania do not engage in "good faith" in carrying out their duties. What is significant, however, is that our Constitution has historically been interpreted to incorporate a strong right of privacy, and an equally strong adherence to the requirement of probable cause under Article 1, Section 8. Citizens in this Commonwealth possess such rights, even where a police officer in "good faith" carrying out his or her duties inadvertently invades the privacy or circumvents the strictures of probable cause. To adopt a "good faith" exception to the exclusionary rule, we believe, would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years.

Id. at 899.

Following a deconstruction of *Leon*, and a rejection of its logic, Pennsylvania's Supreme Court concluded their *Edmunds* opinion with this:

> Justice Brandeis, in his eloquent dissent in *Olmstead v. United States*…reminded us over a half-century ago:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.
>
> Although the exclusionary rule may place a duty of thoroughness and care upon police officers and district justices in this Commonwealth, in order to safeguard the rights of citizens under Article I, Section 8, that is a small price to pay, we believe, for a democracy.

Id. at 905 (internal citations deleted).

Vermont: Empirical pronouncements without empirical support are not persuasive.

Vermont's Supreme Court engaged in one of the more in-depth deconstructions of *Leon*'s logic, which it found woefully lacking. *State v. Oakes*, 598 A.2d 119 (Vt. 1991). The first key observation in *Oakes* was:

> [T]here is an inconsistency between the Court's labelling the exclusionary rule's costs as "substantial" and the Court's concession that many of the researchers upon whom it relies have concluded that the costs are "insubstantial."

598 A.2d at 123.

The Vermont Supreme Court looked at the actual data cited in *Leon*, which purported to show a rate of nonprosecution or nonconviction of between 0.6 and 2.35%. *Id*. at 123. The court examined the report from which that data was derived, and quoted as follows:

> While those loss rates should not be viewed as trivial, they do not amount to a "major impact" on criminal justice—especially when one considers that these loss rates relate to arrests and that many such lost arrests would have been dropped or downgraded to misdemeanors for other reasons even if there were no illegal search problems. Indeed ... it is likely that in some proportion of these "lost" arrests, the police were not concerned with making arrests that would "stick." ..... All the available evidence ... indicates that the

> general level of the rule's effects on criminal prosecutions is marginal at most.

Id. at 124 (quoting Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 Am. B. Found. Res. J. 611, 621).

The *Oakes* court's next point:

> More fundamentally, we are hesitant to label the nonprosecution or nonconviction of felony arrests a cost of the exclusionary rule as opposed to a cost of the constitutional prohibition itself. As former Justice Stewart wrote:
>
> > Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the Fourth Amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics sometimes fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the Fourth Amendment in the first place….
> >
> > ... The exclusionary rule places no limitations on the actions of the police. The Fourth Amendment does.

Oakes, 598 A.2d at 124 (quoting 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, 1392–93 (1983)).

The *Oakes* court made the following additional points before deciding that Vermont would reject the good-faith exception:

> There have also been substantial doubts raised concerning the Court's conclusion that excluding evidence seized by a police officer in objectively reasonable reliance on a subsequently invalidated warrant would be of "marginal or nonexistent" benefit in promoting compliance with the Constitution….The exclusionary rule's deterrent effect, however, does not rest primarily on

> "penalizing" an individual officer into future conformity with the Constitution. Rather, it rests on "its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally… It creates an incentive for the police as an institution to train its officers to conform with the Constitution. Consequently, the important question is not whether it is of any benefit to "penalize" the objectively reasonable conduct of an individual officer, but rather whether failure to do so will lower the incentive for institutional compliance.

Id. at 124-125 (internal citations omitted).

North Carolina: Judicial adoption of good-faith contravenes clearly mandated public policy.

In *Carter*, the North Carolina Supreme Court held that there is no good-faith exception under its state constitution, and that a blood sample taken from the defendant without a search warrant should have been excluded. After distinguishing *Krull* as "involv[ing] the least intrusive of searches," in contrast to "the *most* intrusive search, the invasion of defendant's body and the withdrawal of defendant's blood[,]" 370 S.E.2d at 722 (emphasis original), the court noted its statutory recognition of exclusion similar to Tennessee's Rule 41, and concluded as follows:

> It must be remembered that it is not only the rights of this criminal defendant that are at issue, but the rights of all persons under our state constitution. The clearly mandated policy of our state is to exclude evidence obtained in violation of our state constitution. N.C.G.S. § 15A-974(1). This policy has existed since 1937. If a good faith exception is to be applied to this public policy, let it be done by the legislature, the body politic responsible for the formation and expression of matters of public policy.

Id. at 724.

III. *ILLINOIS V. KRULL*'S GOOD FAITH EXCEPTION TO THE EXCLUSONARY RULE POSES AN EVEN GREATER THREAT TO THE INDIVIDUAL'S RIGHTS TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND POSSESSIONS THAN THE GOOD FAITH EXCEPTION RECOGNIZED IN *LEON*.

In *Illinois v. Krull*, the Supreme Court ruled that evidence obtained by law enforcement officers during a warrantless search may be admitted in the search victim's criminal trial if the officers acted in good faith reliance on a statute, later found to violate the Fourth Amendment, which authorized their activity. Inasmuch as *Krull* continued after *Leon* to declare the supremacy of the of the deterrence rationale for the federal exclusionary rule, Tennessee's judicial integrity basis for our exclusionary rule cannot accommodate the good faith exception created in *Krull.*

Tennessee's judicial integrity basis for exclusion envisions a unitary system of government in which the judiciary has an obligation to halt the violation of an individual's rights to be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures. Typically our courts fulfill this responsibility by nullifying the actions of the executive branch. On facts such as *Krull*, however, a court must confront an even greater threat to the individual's rights to be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; two branches of government -- the legislative and the executive -- have acted in tandem to bring about the unreasonable search and seizure. If a court disregards that this evidence has been procured by the police under legislative authority and permits its introduction at trial, nothing less than a tripartite violation of a search victim's rights would result

Furthermore, Tennessee should not recognize an exception to our state exclusionary rule that would provide a grace period for unconstitutional search and seizure legislation, during which time our citizens' prized constitutional rights can be violated with impunity. Such a grace period could last for several years and affect large numbers of people. This concern largely drove Justice

O'Connor and three other Justices (Brennan, Marshall, and Stevens) in *Krull* to part ways with the majority.

> Judicial authorization of a particular search does not threaten the liberty of everyone, but rather authorizes a single search under particular circumstances. The legislative act, on the other hand, sweeps broadly, authorizing whole classes of searches, without any particularized showing. A judicial officer's unreasonable authorization of a search affects one person at a time; a legislature's unreasonable authorization of searches may affect thousands or millions and will almost always affect more than one. Certainly the latter poses a greater threat to liberty.

Krull, 480 U.S. at 365 (O'Connor, J., dissenting, joined by Brennan, Marshall and Stevens, JJ.).

Moreover, Justice O'Connor persuasively argued, "Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment." *Id*. at 362 (O'Connor, J., dissenting, joined by Brennan, Marshall and Stevens, JJ.).

> This Court has repeatedly noted that reaction against the ancient Act of Parliament authorizing indiscriminate general searches by writ of assistance, 7 & 8 Wm. III, c. 22, § 6 (1696), was the moving force behind the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 583-584, and n. 21 (1980); *Stanford v. Texas*, 379 U.S. 476, 481-482 (1965); *Boyd v. United States*, 116 U.S. 616, 624-630 (1886). James Otis' argument to the royal Superior Court in Boston against such overreaching laws is as powerful today as it was in 1761:
>
> ". . . I will to my dying day oppose with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villany on the other, as this writ of assistance is. . . .
>
> . . . .
>
> ". . . It is a power that places the liberty of every man in the hands of every petty officer. . . .
>
> ". . . No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the constitution is void." 2 Works of John Adams 523-525 (C. Adams ed. 1850).

> *See Paxton's Case*, Quincy 51 (Mass. 1761). James Otis lost the case he argued; and, even had he won it, no exclusionary rule existed to prevent the admission of evidence gathered pursuant to a writ of assistance in a later trial. But, history's court has vindicated Otis. The principle that no legislative Act can authorize an unreasonable search became embodied in the Fourth Amendment.

Krull, 480 U.S. at 362-63 (O'Connor, J., dissenting, joined by Brennan, Marshall and Stevens, JJ.). Justice O'Connor's reminder was similarly staked out by this Court in 1923 in *Craven*: "The enforcement of no statute is of sufficient importance to justify indifference to the basic principles of our government." 256 S.W. at 432.

Justice O'Connor further observed that the majority's decision was at odds with the retroactivity principles in *Griffith v. Kentucky*, 479 U.S. 314 (1987), which held that "'basic norms of constitutional adjudication' and fairness to similarly situated defendants" required that opinions announcing new constitutional rules in criminal cases apply to all cases pending on direct review at the time the new rule is declared. *Krull*, 480 U.S. at 368 (O'Connor, J., dissenting, joined by Brennan, Marshall and Stevens, JJ.) (quoting *Griffith*, 479 U.S. at 322). Under the novel approach taken by the *Krull* majority, "no effective remedy is to be provided in the very case in which the statute at issue was held unconstitutional." *Krull*, 480 U.S. at 368 (O'Connor, J., dissenting, joined by Brennan, Marshall and Stevens, JJ.)). Such a result would plainly contravene the provisions of Article I, Section 17 of the Tennessee Constitution.[12]

[12] To the extent the state advocates adoption of a good faith exception in this case consistent with *Davis*, that position is definitely problematic. As the defense correctly points out in its Reply Brief, "The *Davis* exception presumes . . . that the only purpose of the exclusionary rule is to deter culpable activity by individual police officers, which . . . is contrary to both the history and underlying principles of the exclusionary rule[.]" Appellant's Reply Brief at p. 13. The defense also correctly explains, "Even if this version of the good-faith exception were adopted in Tennessee, it would not help the State here. There was, in fact, no binding precedent upholding this kind of search in Tennessee." *Id*.

IV. RESPECT FOR PRECEDENT AND STARE DECISIS MILITATES AGAINST ADOPTION OF A FEDERAL GOOD FAITH EXCEPTION.

To the extent that there is a division of opinion about whether Tennessee's constitutional protections regarding searches and seizures are identical in intent and purpose to those in the federal constitution, history conclusively shows that in constitutional matters of search and seizure, Tennessee is not in lockstep with United States Supreme Court decisions. *See, e.g., State v. Lakin*, 588 S.W.2d 544 (Tenn. 1979) (restricting application of open fields doctrine); *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989) (rejecting federal test for probable cause); *State v. Randolph*, 74 S.W.3d 330 (Tenn. 2002) (rejecting the federal definition of "seizure" established in *California v. Hodari D.*, 499 U.S. 621 (1991)). That is not to say that Tennessee or this Court is "contrarian." Instead, this Court historically has departed from federal precedent when adopting federal Fourth Amendment standards would require overruling "a settled development of state constitutional law," and when linguistic differences justify distinct interpretations of state and federal constitutional provisions. *See State v. Moats*, 403 S.W.3d 170, 182 (Tenn. 2013).

"Overruling precedent is never a small matter. Stare decisis—in English, the idea that today's Court should stand by yesterday's decisions—is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entertainment, LLC*, 135 U.S. 2401, 192 L.Ed.2d 463, 471 (2015) (quoting *Michigan v. Bay Mills Indian Community*, 572 U. S. ___, 134 S. Ct. 2024, 188 L.Ed.2d 1071, 1089 (2014)). Adopting for Tennessee *Krull*'s good faith exception would drastically change Tennessee's constitutional law. Adoption would jettison nearly 100 years of constitutional precedent and stare decisis. Such an action should not be taken lightly or without measured consideration of what constitutional damage likely will ensue. In the words of one author/jurist:

> The Fourth Amendment exclusionary rule has one foot in the grave and one on a wet bar of soap. The Supreme Court as presently constituted sees the circumstances to which the exclusionary rule

> should be applicable as so rare as to make the appearance of Halley's Comet a commonplace by comparison.

The Hon. Milton Hirsch, "Better the Mob and the Ku-Klux": A History of the Law of Search and Seizure in Florida, forthcoming 27 St. Thomas L. Rev. ___, ___ (2015).

This Court would have to repudiate the original reasons that led to the adoption of the exclusionary rule in Tennessee. Those reasons are not ambiguous or open to interpretation. This Court is **not** writing on a clean slate. Ironically, with good faith, this Court would then embrace the idea that Tennessee Courts can and should be the final conduits for illegal action.

Justice O'Connor put it thusly:

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. *See* B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. *See* Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

Justice Stevens' impassioned dissent in *Citizens United v. FEC*, 558 U.S. 310 (2010), brought into sharp focus the respect that stare decisis should and must command, because it is vital to the proper exercise of the judicial function. If it "is to do any meaningful work in supporting the rule of law," he wrote, "it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine." 558 U.S. at 408 (Stevens, J., dissenting). The standard considerations used to determine stare decisis value include "the

antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake." *Id*. at 411 (Stevens, J., dissenting).

As previously discussed, Tennessee's exclusionary rule has a lengthy pedigree, dating back almost 100 years. There have been no intervening changes in circumstances in Tennessee that warrant abandoning our judicial-integrity basis for exclusion. There is no evidence that Tennessee's exclusionary rule has proven unworkable or impracticable.[13] As for the reliance interests at stake, the citizens of Tennessee traditionally have looked to and relied upon our courts to guard against illegal encroachment of rights and to refuse admission of illegally obtained evidence. Thus, adopting some version of the federal good faith exception strikes at the core of stare decisis, the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion that permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.

RESPECTFULLY SUBMITTED

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[13] The State suggests that a failure to adopt the good faith exception will inflict "unreasonable and unnecessary harm." Brief of Appellee at 25. The State does not explain what exactly this harm may be. Following *Leon*, multiple state supreme courts examined the "substantial costs" argument, and the data underlying it, and found it unpersuasive. *State v. Guzman*, 842 P.2d 660, 674-75 (Id. 1992); *Com. v. Edmonds*, 586 A.2d 887, 904 (Penn. 1991); *State v. Oakes*, 598 A.2d 119, 124-125 (Vt. 1991); *State v. Marsala*, 579 A.2d 58, 64-65 (Conn. 1990).

The State fails to present any evidence that this "harm" exists. Indeed, no government agency appears to have even tried to determine whether the harm of exclusion that was hypothesized in *Leon* really exists. Thirty years after *Leon* and there is no empirical proof that the good-faith exception does anything useful for society. A radical constitutional change should not rest on such flimsy science.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class mail, postage prepaid and by email to the following parties:

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