Denver Law Review

Volume 62 | Issue 3 Article 10

February 2021

People v. Mitchell: The Good Faith Exception in Colorado

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PEOPLE V. MITCHELL: THE GOOD FAITH EXCEPTION IN COLORADO

INTRODUCTION

In *People v. Mitchell*,[1] the Colorado Supreme Court affirmed the trial court's suppression of evidence seized in the course of executing an arrest warrant later held invalid. Relying on *Whiteley v. Warden*,[2] the court held that the arrest warrant was void and could not support a search incident to the arrest. Of greater interest and contrary to the state's assertion, the court found that the facts in the case did not warrant application of the Colorado statutory good faith exception to the exclusionary rule.[3]

I. BACKGROUND

The recently enacted good faith statute is Colorado's response to a national trend toward limiting the exclusionary remedy to those situations in which the police officer seizing the evidence has reason to believe he is violating the fourth amendment. Despite its proponents' claims that only the remedy is affected, an analysis of the exclusionary rule's constitutional basis reveals the dangers posed by the good faith exception to well-established fourth amendment principles.

A. *Development of the Exclusionary Rule*

Although *Weeks v. United States*[4] is often cited as the seminal exclusionary rule case, *Weeks* was only one of several early Supreme Court cases that developed the exclusionary remedy for fourth amendment violations. In *Boyd v. United States*,[5] decided before *Weeks*, the Supreme Court excluded evidence "seized" pursuant to a government subpoena because the subpoena violated defendant's fifth amendment right against self-incrimination. In *Weeks*, the Court excluded evidence seized in an illegal search and held that exclusion of wrongfully seized evidence from federal court proceedings was required by the Constitution[6] and

1. 678 P.2d 990 (Colo. 1984).

2. 401 U.S. 560 (1971). In that case, the United States Supreme Court suppressed evidence seized in a search incident to an arrest because the arrest warrant was issued based on an insufficient affidavit of probable cause.

3. COLO. REV. STAT. § 16-3-308 (Supp. 1984).

4. 232 U.S. 383 (1914).

5. 116 U.S. 616 (1886).

6. The Court in *Weeks* held the exclusionary rule to be constitutionally required:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Weeks, 232 U.S. at 393.

by considerations of judicial integrity.[7]

It was not until 1949 that the Supreme Court addressed the issue of whether the fourth amendment, including the exclusionary rule, also applied to state courts.[8] In a departure from its earlier stated constitutional basis for the exclusionary rule, the Court separated the right from the remedy and held that although states were compelled to observe fourth amendment rights through the fourteenth amendment, they were free to develop alternative remedies for fourth amendment violations.[9] Twelve years later in *Mapp v. Ohio*,[10] the Court overruled its decision in *Wolf* and held that state courts were obliged to exclude unconstitutionally seized evidence.[11] Thus, at the time of the *Mapp* decision, the exclusionary rule had become an inseparable element of the fourth amendment. It was not long, however, before the attack began.

B. *The Deterrence Rationale*

While much of the Court's opinion in *Mapp* was grounded in concerns for the preservation of judicial integrity[12] and in the need to ensure that victims of fourth amendment violations were accorded a meaningful remedy,[13] subsequent Court decisions have significantly eroded *Mapp* by limiting the holding to a narrow concept of deterring police misconduct.[14] In effect, the deterrence rationale has replaced the judicial integrity rationale that was of paramount importance to the court in *Mapp* as the primary, if not sole, rationale for invoking the exclusionary rule.[15]

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7. The Court was also concerned with the integrity of the courts:
> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

Id. at 392.

8. Wolf v. Colorado, 338 U.S. 25 (1949).

9. *Id.* at 31.

10. 367 U.S. 643 (1961).

11. The issue of whether Wolf v. Colorado should be overruled and the exclusionary rule applied to the states was not argued at the state court level by the defendant. Rather, it was first raised in an amicus curiae brief to the Supreme Court. *Id.* at 646 n.3.

12. The Court warned that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Id.* at 659.

13. Referring to the application of the fourth amendment to the states in *Wolf*, the Court held that "we can no longer permit that right to remain an empty promise." *Id.* at 660.

14. While critics of the exclusionary rule have narrowed the concept of deterrence to the behavior of the individual police officer at the time he or she is committing the fourth amendment violation, proponents of the exclusionary rule argue that the deterrent rationale is valid only if it encompasses a system-wide deterrence achieved by the knowledge that all evidence seized in violation of the fourth amendment will be excluded. *See* Ashdown, *Good Faith, The Exclusionary Remedy, and Rule Oriented Adjudication in the Criminal Process*, 24 WM. & MARY L. REV. 335, 339 n.14 (1983); Ingber, *Defending The Citadel: The Dangerous Attack of "Reasonable Good Faith"*, 36 VAND. L. REV. 1511, 1542-44 (1983); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 431-32 (1981).

15. It is felt by some that, for all practical purposes, the judicial integrity rationale has

The substitution of the deterrence rationale has resulted in the Court admitting evidence despite fourth amendment violations in those instances where it has felt that suppression of the evidence would not deter future unlawful police conduct.[16] Thus, for example, unlawfully obtained evidence is admissible in grand jury proceedings,[17] in federal civil proceedings,[18] to impeach defendant's testimony at trial,[19] when seized pursuant to a statute that is later declared unconstitutional,[20] and when it is used against someone other than the person whose fourth amendment rights were violated.[21]

Closely connected to the emergence of the deterrence rationale is the Court's use of a balancing test to determine whether the exclusionary rule should be invoked in cases of police misconduct. The exclusionary remedy is now available when there is a violation of fourth amendment rights and when, in the Court's judgment, the benefits of increased deterrence outweigh the costs of freeing criminals.[22] In this way, the Court has significantly limited the application of the exclusionary remedy, leaving in doubt the degree to which the exclusionary rule is perceived as a constitutionally required remedy.[23]

C. *The Good Faith Exception*

The latest effort to restrict the exclusionary rule is the reasonable good faith exception. Proponents of this exception argue that the deterrence goal is not furthered when a police officer, acting in good faith, does not know he is violating the fourth amendment.[24] Appended to

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been abandoned. *See* Ashdown, *supra* note 14, at 338; Jensen and Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916, 918 (1982). *But see* Terry v. Ohio, 392 U.S. 1, 13 (1968), in which the Courts warned that "[c]ourts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

16. *But see* United States v. Johnson, 457 U.S. 537 (1982), which retroactively applied the holding in Payton v. New York, 445 U.S. 573 (1980), that police must obtain a search warrant before entering a suspect's home to make an arrest. In rejecting the government's argument that retroactive application would not serve the purposes of the exclusionary rule, the Court explained that "[i]f, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior." *Johnson*, 457 U.S. at 561 (footnote omitted).

17. United States v. Calandra, 414 U.S. 338 (1974).

18. United States v. Janis, 428 U.S. 433 (1976).

19. United States v. Havens, 446 U.S. 620 (1980).

20. Michigan v. DeFillippo, 443 U.S. 31 (1979).

21. Rakas v. Illinois, 439 U.S. 128 (1978).

22. In all the cases cited *supra* notes 17-21, the Court applied the balancing test and held that the benefits could not justify the costs of suppressing the evidence.

23. In a recent law review article, former Supreme Court Justice Stewart explored the basis of the exclusionary rule and concluded that the exclusionary rule is a remedy required by the fourth amendment. For further development of this theory, as well as others, see 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, 1380-89 (1983).

24. United States v. Leon, 104 S. Ct. 3405, 3419 (1984); United States v. Peltier, 422 U.S. 531, 542 (1975). It has been suggested by many that the solution does not lie in further limiting of the exclusionary rule, but rather in creating so-called "bright lines"

this subjective standard is the objective requirement that such ignorance be reasonable. Due in part to the primacy of the deterrence rationale and the balancing test, and in part because of the growing realization among criminal justice experts that the Court opinions which form much of fourth amendment law are unclear and difficult to apply,[25] the good faith exception has become a major topic in fourth amendment law.

Although the exact origins of the good faith exception are unclear,[26] the reasonable good faith exception first received national attention as a result of Justice White's dissent in *Stone v. Powell*.[27] He suggested that the time had come to modify the exclusionary rule by incorporating therein a two-pronged subjective/objective good faith standard. In Justice White's view, a police officer should first have to show a good faith belief that his conduct was in accordance with the law.[28] He should next be obligated to show reasonable grounds to support that belief.[29] Thus, if the officer knew or should have known that the search was unconstitutional under the fourth amendment, the exclusionary rule would result in suppression of the evidence.

Four years later, in *United States v. Williams*,[30] considered the landmark case on the good faith exception, the Fifth Circuit Court of Appeals adopted a reasonable good faith exception to the exclusionary rule in an alternate disposition of the case. Explaining that no deterrence would be achieved by suppression and that the costs to society could not justify the benefits where a good faith error was made,[31] the Fifth Circuit became the first federal court to adopt the good faith exception.

Although there was some expression of support among the Supreme Court justices for the good faith exception,[32] it took some time for those favoring the exception to gather the necessary majority. In

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which are clear-cut guidelines articulating permissible investigatory practices. In this way, a police officer who has violated the fourth amendment cannot be said to have done so in good faith if his behavior lay outside those practices declared permissible. For greater development of this theory, see LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127.

25. Jensen & Hart, *supra* note 15, at 924-28. *See also* Coolidge v. New Hampshire, 403 U.S. 443, 490-91 (1971) (Harlan, J., concurring).

26. In Michigan v. Tucker, 417 U.S. 433, 447 (1974), the Court observed that "[w]here the official action was pursued in complete good faith, . . . the deterrence rationale loses much of its force." Given the Court's predilection for not invoking the exclusionary rule where police deterrence is deemed unlikely (*see supra* notes 17-21 and accompanying text) this observation by the Court in *Tucker* created the necessary basis for a good faith exception.

27. 428 U.S. 465, 536 (1976) (White, J., dissenting).

28. *Id.* at 538.

29. *Id.*

30. 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

31. "[T]he exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also. The costs to society of applying the rule beyond the purposes it exists to serve are simply too high . . . ." *Id.* at 840.

32. *See* Illinois v. Gates, 462 U.S. 213, 246 (1983) (White, J., concurring); Stone v. Powell, 428 U.S. at 501-02 (Burger, C.J., concurring); Brown v. Illinois, 422 U.S. 590, 611-

1982, after hearing oral arguments on the fourth amendment violation at issue in *Illinois v. Gates*,[33] the Supreme Court set the case for reargument on the issue of whether a reasonable, good faith exception to the exclusionary rule should be adopted.[34] The Court subsequently opted, however, to decide the case on other grounds because the good faith issue had not been raised at the state court level.[35]

Finally, in *United States v. Leon*,[36] the Supreme Court adopted a reasonable good faith exception to the exclusionary rule.[37] Beginning with the premise that the exclusionary rule is not constitutionally required, and by following the deterrent rationale and balancing test approaches, the Court determined that an analysis of the costs and benefits of excluding evidence seized by officers relying in good faith on a warrant "leads to the conclusion that such evidence should be admissible in the prosecution's case-in-chief."[38]

In applying the good faith exception rule, the Court indicated that courts should focus upon the objective reasonableness of the officer's conduct, rather than upon the officer's subjective good faith.[39] The Court ruled that each trial court must decide whether its good faith analysis will follow an inquiry into the fourth amendment violation pleaded in the case.[40] While it remains for future courts to interpret the extent to which the good faith exception of *Leon* will apply, it is already apparent that by adopting the good faith exception to the exclusionary rule, the Court has reduced the protection of the fourth amendment.[41]

II. FACTS

The relevant facts in *People v. Mitchell*[42] were undisputed. The defendant was stopped by a Greenwood Village police officer for speeding.

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12 (1975) (Powell, J., concurring); United States v. Peltier, 422 U.S. at 542 (1975) (Rehnquist, J.).

33. 462 U.S. 213 (1983).

34. *Gates*, 459 U.S. 1028 (1982) (mem.).

35. *Gates*, 462 U.S. at 217.

36. 104 S. Ct. 3405 (1984).

37. On that same day, the Court applied the *Leon* good faith exception to a companion case, Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984), in which the search warrant had been held invalid for failure to identify with particularity the items for which the police were searching.

38. *Leon*, 104 S. Ct. at 3416.

39. In opting for an objective standard, the Court quoted from Justice White's concurring opinion in *Gates*: "Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." *Id.* at 3420 n.20 (quoting *Gates*, 462 U.S. at 261 n.15 (White, J., concurring)).

40. 104 S. Ct. at 3422-23. One wonders what will happen to the development of fourth amendment law if courts are free to apply an exception to the remedy for a fourth amendment violation, without ever deciding that a violation has occurred. *See* Ashdown, *supra* note 14, at 343.

41. Justice Brennan expressed the fears of many by lamenting that "in case after case, I have witnessed the Court's gradual but determined strangulation of the rule. It now appears that the Court's victory over the Fourth Amendment is complete." 104 S. Ct. at 3430 (Brennan, J., dissenting) (footnote omitted).

42. 678 P.2d 990 (Colo. 1984).

Following established procedure, the officer took defendant's driver's license and radioed the police station to determine whether there were any outstanding arrest warrants for defendant. Upon searching the computer files, the dispatcher determined that a Greenwood Village arrest warrant had been issued in defendant's name for failure to pay a traffic fine. This information was confirmed by the dispatcher's manual check of the warrant files.[43]

On the basis of this information, the officer arrested the defendant and transported him to the Greenwood Village police station. During a search of the defendant, a small vial was discovered in his pocket and seized. An analysis revealed that the vial contained cocaine, and the defendant was charged with possession of a controlled substance.[44] After the search, it was discovered that the original arrest warrant had been issued in error; prior to the issuance of the arrest warrant the defendant had paid the traffic fine.[45] Upon this discovery, the defendant filed a motion to suppress the evidence seized from the search incident to his arrest.[46]

At the suppression hearing the state agreed that the defendant had "timely paid the traffic fine" and that the arrest warrant had been erroneously issued.[47] The district court granted the defendant's motion to suppress since the defendant had been arrested pursuant to a void warrant. From that ruling the state took an interlocutory appeal to the state supreme court alleging that the Colorado good faith statute[48] was applicable to the case and that the district court erred in not applying that statute to what the state alleged had been a "good faith mistake" or "technical violation" on the part of the arresting officer.

III. INSTANT CASE

A. *Majority Opinion*

The Colorado Supreme Court's resolution of two issues in *Mitchell*

43. *Id.* at 991.

44. *Id.* at 992. *See* COLO. REV. STAT. §§ 12-22-310(1)(a)(v), 18-18-105(1)(a) (Supp. 1984).

45. Justice Rovira, in his dissenting opinion, raises the question of whether the traffic fine was, in fact, paid prior to the issuance of the warrant, and states that the record is unclear on that point. *Mitchell*, 678 P.2d at 999 n.2 (Rovira, J., dissenting). He concludes that such a determination is irrelevant. *Id.* However, that issue is of major importance. It was Mitchell's paying of the fine *prior* to the issuance of the warrant that rendered the warrant void for lack of any facts supporting its issuance. *Id.* at 992 n.2. The record is not ambiguous as to which event occurred first, the payment of the fine or the issuance of the warrant, *id.*, and both parties agreed in their briefs to the Colorado Supreme Court that the traffic fine was timely paid, and that the arrest warrant had been issued in error. *See* Plaintiff-Appellant's Opening Brief at 2, People v. Mitchell, 678 P.2d 990 (Colo. 1984); Answer Brief of Defendant-Appellee at 2, People v. Mitchell, 678 P.2d 990 (Colo. 1984).

46. 678 P.2d at 992.

47. *Id.*

48. COLO. REV. STAT. § 16-3-308 (Supp. 1984). In pertinent part, that statute provides "[e]vidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer . . . as a result of a good faith mistake or of a technical violation."

summarily foreclosed the state's argument that the district court had erred in suppressing the evidence. Thus, the court affirmed the district court's ruling.

1. Constitutional Standards

The first issue addressed by the court was whether the arrest violated the fourth amendment as an unlawful seizure of a person.[49] Relying exclusively on the United States Supreme Court decision in *Whiteley v. Warden*,[50] the Colorado court concluded that the suppression of evidence under the facts in *Whiteley* required a similar result in the instant case. The *Whiteley* decision concerned an arrest warrant issued on the basis of a conclusory complaint that did not provide support for probable cause.[51] A radio bulletin was issued announcing the warrant and an officer in another part of the state, relying on the bulletin, arrested Whiteley.

In the course of a search incident to the arrest, burglary tools and items taken in the burglary were seized. In addition to finding that the information acquired by the arresting officer was not corroborative of the fact that Whiteley had committed the crime, the Court rejected the state's argument that the police bulletin itself constituted the requisite probable cause for the arrest.[52] Contrary to the state's suggestion, the arrest warrant was fatally deficient from its inception, and the fact that other officers had no choice but to rely on it could not make constitutionally valid that which was unconstitutional.[53]

Following *Whiteley*, the court in *Mitchell* found unpersuasive the fact that the arresting officer was required to arrest Mitchell based on the information relayed to him by the dispatcher. An arrest warrant issued

49. The Colorado Constitution has a provision identical to the fourth amendment, COLO. CONST. art. II, § 7, and it also was deemed violated by the arrest here. *Mitchell*, 678 P.2d at 996.

50. 401 U.S. 560 (1971).

51. *Id.* at 565.

In *Whiteley*, the Court noted that "[t]he actual basis for Sheriff Ogburn's conclusion was an informer's tip, but that fact, as well as every other operative fact, is omitted from the complaint." *Id.* Although the determination of whether probable cause exists in a particular situation is fraught with uncertainty, the definition of probable cause is well-settled. Probable cause to arrest exists when the officer has knowledge of facts and circumstances from reasonably trustworthy information and those facts and circumstances are sufficient in themselves to warrant in a man of reasonable caution the belief that the accused has committed an offense or is committing an offense. *E.g.* McCray v. Illinois, 386 U.S. 300 (1967); Beck v. Ohio, 379 U.S. 89 (1964). As its very name implies, probable cause involves probabilities, and the information known to the officer need not be sufficient to establish guilt. Wong Sun v. United States, 371 U.S. 471 (1963); Henry v. United States, 361 U.S. 98 (1959). Magistrates issuing arrest warrants are similarly obligated to determine whether the officer's affidavit alleges facts sufficient upon which to base a finding of probable cause. Giordenello v. United States, 357 U.S. 480 (1958); FED. R. CRIM. P. 4(a).

52. *Whiteley*, 401 U.S. at 567-68.

53. In acknowledging the propriety of the arresting officer's conduct, the court warned that although police officers are entitled to assume that an arrest warrant taken out by a fellow officer is supported by probable cause, "[w]here . . . the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Id.* at 568.

without probable cause is void *ab initio* and any evidence seized thereunder must be suppressed.[54] The court found the rule in *Whiteley* to be even more readily applicable to Mitchell's situation because there was *no* factual basis of any kind for the arrest warrant issued by Greenwood Village.[55]

In continuing its analysis, the court distinguished *Hill v. California*.[56] In that case, probable cause existed for the issuance of the arrest warrant. The mere fact that the officers arrested another, thinking he was Hill, could not defeat the validity of the underlying warrant. Finding that it was reasonably probable that the person arrested was Hill, the Court held the officers' actions to be constitutional and permitted the evidence seized in the search to be used against Hill.[57] The *Mitchell* court concluded that *Hill* did not address the issue of the validity of an arrest warrant which was not founded on probable cause, while *Whiteley* addressed precisely that issue.[58] Accordingly, applying *Whiteley*, the court found that Mitchell's arrest violated his constitutional right to be free from unreasonable searches and seizures.

2. Applicability of the Good Faith Statute

In ruling that Colorado's good faith statute[59] did not apply to the facts in *Mitchell*, the court pointed out that it was merely applying the statute as written and was not ruling on its constitutionality.[60] The good faith statute is divided into good faith mistakes and technical violations each of which was discussed separately by the court.

The court noted that the statutory definition of "good faith mistake"—an error in facts that if true would otherwise be probable cause—was merely a redefinition of probable cause and would not operate to change federal exclusionary rule law.[61] There was no evidence, the court concluded, that the arresting officer had relied on mistaken facts. Rather, he had relied on a warrant that had been mistakenly issued. The court ruled that a good faith mistake could not be found within the meaning of the Colorado good faith statute without a showing of factual error underlying the issuance of the warrant.[62]

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54. *Mitchell*, 678 P.2d at 992 n.2.
55. *Id.* at 993.
56. 401 U.S. 797 (1971).
57. *Id.* at 804.
58. *Mitchell*, 678 P.2d at 994.
59. COLO. REV. STAT. § 16-3-308 (Supp. 1984).
60. 678 P.2d at 994-95.
61. *Id.* at 995.

Noting that the statutory definition of good faith mistake includes "reasonable judgmental errors of fact made by an officer in applying for or in executing a warrant, or similar factual errors made by a court in issuing a warrant," the court found that, "[v]iewed in this light, the statutory definition of 'good faith mistake' serves to make explicit what is already implicit in federal exclusionary rule doctrine." *Id.* (citation omitted).

62. The court noted that no evidence was presented at the suppression hearing concerning the reason the arrest warrant was mistakenly issued. Without such a "factual predicate" the court had no basis to find a "good faith mistake" on the part of the arresting officer. The court, thus, at least suggests that its ruling might have been different if the reasons behind the issuance of the arrest warrant were known. *Id.* at 995-96.

In concluding that there had been no technical violation, the court relied in part on its conclusion that there were no facts to support a finding of good faith mistake. Technical violation, as applicable to the facts in *Mitchell*,[63] is defined as "a reasonable good faith reliance upon . . . a warrant which is later invalidated due to a good faith mistake . . . ."[64] Again, the court pointed out that there was no evidence that the warrant had been issued in reliance on certain facts which later proved to be false. Instead, the warrant failed because the evidence showed that there had been no facts to justify its issuance.[65] In sum, the majority concluded that the Colorado good faith statute would not permit the introduction of evidence seized during an arrest based on an invalid arrest warrant.

B. *Dissenting Opinion*

Justice Rovira's dissenting opinion[66] relied on *Hill v. California*[67] and on decisions by several state courts[68] for the proposition that, by the existence of the warrant, whether issued erroneously or not, the officer in *Mitchell* had probable cause to make the arrest.[69] Although the Court in *Hill* found that probable cause existed for the issuance of the arrest warrant and that no fourth amendment violation had occurred, Justice Rovira concluded that *Hill* was applicable to the facts of *Mitchell*. He argued that the exclusionary rule should not be applied to *Mitchell* because no deterrence would be achieved by doing so.[70] This position is confusing because under *Hill* the arrest in *Mitchell* would not have violated the fourth amendment. Without a fourth amendment violation, there is no need to apply the exclusionary rule and no need to determine whether deterrence would be achieved by its application.

The dissenting justice further argued that when other jurisdictions were faced with facts similar to those in *Mitchell*, they found the initial

63. The definition of technical violation in section 16-3-308(2)(b) of the Colorado Revised Statutes includes a good faith reliance on a statute later ruled unconstitutional and a good faith reliance on a court precedent later overturned, neither of which is applicable to the situation in *Mitchell*. COLO. REV. STAT. § 16-3-308(2)(b) (Supp. 1984).

64. *Id.*

65. The court concluded that:

> Whatever the outer limit of the "technical violation" exception might be, we are satisfied that it was not intended to encompass an arrest warrant that is totally devoid of any factual support and comes into being only as the result of some unexplained mistake on the part of the issuing court. The defect in such a warrant is a fundamental one, far beyond the purview of a "technical violation."

Mitchell, 678 P.2d at 996.

66. *Id.* at 996 (Rovira, J., dissenting).

67. 401 U.S. 797 (1971).

68. Childress v. United States, 381 A.2d 614 (D.C. 1977); Patterson v. United States, 301 A.2d 67 (D.C. 1973); New Jersey v. Cross, 164 N.J. Super. 368, 396 A.2d 604 (1978); People v. Lent, 105 Misc. 2d 831, 433 N.Y.S.2d 538 (1980), *rev'd*, 92 A.D.2d 941, 460 N.Y.S.2d 369 (1983); State v. Somfleth, 8 Or. App. 171, 492 P.2d 808 (1972); Commonwealth v. Riley, 284 Pa. Super. 280, 425 A.2d 813 (1981).

69. 678 P.2d at 997.

70. *Id.* at 998. Essentially he argues that no deterrence would be achieved by applying the exclusionary rule to *Mitchell* and that "the cost of applying the rule in a case such as this would outweigh any deterrent effect it might achieve." *Id.* (Rovira, J., dissenting).

arrest to be supported by probable cause and, therefore, not a violation of the fourth amendment.[71] Justice Rovira cited six state court cases in which the information upon which the arrest was based later turned out to be incorrect. In all six cases the state courts permitted introduction of evidence seized in the course of the arrest.[72] However, there is a critical distinction between those cases and the *Mitchell* case. In all but one of those cases, the original arrest warrants or stolen car reports were validly issued, but were rendered incorrect because of events which followed their issuance.[73] In the remaining case, *State v. Somfleth*,[74] based on reliable information and suspicious behavior by defendant,[75] the officers suspected the defendant of being involved in a recent narcotics burglary and, thus, approached him for questioning.[76] A routine check showed that the defendant was absent without leave from the military service and he was detained on the basis of that information.[77] After a search at the station house in which illegal drugs were discovered on the defendant, the AWOL report was found to be incorrect.[78] Because the Court in *Somfleth* held that the officers had probable cause to arrest and search defendant based on the drug-related information and observations,[79] that case is inapposite to the facts of *Mitchell*.

Justice Rovira concludes his dissent by indicating that he and the majority view the exclusionary rule differently: while he favors a case-by-case analysis of whether the rule's deterrent effect would be achieved, the majority, he believes, has adopted a *per se* approach.[80] Because of his differing approach to the exclusionary rule, Justice Rovira would find that there was probable cause to arrest Mitchell.[81]

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71. *Id.* at 998-99.

72. *Id.* at 999-1000.

73. Childress v. United States, 381 A.2d 614 (D.C. 1977); People v. Lent, 105 Misc. 2d 831, 433 N.Y.S.2d 538 (1980) rev'd, 92 A.D.2d 941, 460 N.Y.S.2d 369 (1983); and Commonwealth v. Riley, 284 Pa. Super. 280, 425 A.2d 813 (1981), all involved arrest warrants that were satisfied through actions of the defendants, but were not canceled on nationwide information systems or other police records. In *Riley* and *Childress* the defendants were arrested four days after the warrants should have been canceled and in *Lent* the delay was a matter of nine hours. Patterson v. United States, 301 A.2d 67 (D.C. 1973) and New Jersey v. Cross, 164 N.J. Super. 368, 396 A.2d 604 (1978) concerned stolen car reports which were not canceled after the stolen cars at issue had been retrieved.

74. 8 Or. App. 171, 492 P.2d 808 (1972).

75. The officers observed defendant stomping a hypodermic needle into the pavement and noted his difficulty in locating his billfold and papers after being asked for identification. 492 P.2d at 809.

76. *Id.*

77. *Id.* at 809-10.

78. The facts as set forth in the opinion are unclear whether there was ever any basis for the AWOL report or whether defendant had already dealt with the military authorities on the AWOL question. *Id.* at 810.

79. *Id.* at 811. When the officers asked defendant to get out of his car, they additionally noted that he exhibited signs of being under the influence of alcohol and in possession of narcotics. Defendant's walk was uncertain, his speech was slurred and incoherent, and although he claimed to have been drinking heavily, the officers could not detect any sign of alcohol. *Id.*

80. *Mitchell*, 678 P.2d at 1000.

81. Justice Rovira failed to make the important distinction between whether a fourth amendment violation had occurred, and whether a particular fourth amendment violation is entitled to the sanction of the exclusionary rule.

IV. ANALYSIS

It is difficult to pinpoint exactly when the demise of the exclusionary rule began, but there can be no doubt that the exclusionary rule is no longer the stronghold of fourth amendment guarantees that it was at the time of *Mapp v. Ohio*.[82] This is clearly illustrated in the state and dissent arguments in *Mitchell*.[83] The state argued that a search pursuant to an arrest, which blatantly violated one of defendant's constitutional rights,[84] should be upheld because the police officer could not have known the arrest warrant was invalid and, thus, acted in good faith.

Despite Justice Rovira's dissenting opinion, the court could not have reached any other conclusion under the facts in *Mitchell*. At the time of the *Mitchell* opinion, the United States Supreme Court had not adopted a good faith exception to the exclusionary rule and, thus, the Colorado court's analysis was limited to the applicability of the good faith statute.[85] In order for the statute to survive constitutional scrutiny,[86] it could not diminish fourth amendment rights[87] by dispensing with the requirement of probable cause. That, in effect, would be the result of denying the remedy of suppression to one whose privacy was unreasonably invaded by an arrest and search unsupported by probable cause.[88] Accordingly, the court correctly limited the Colorado statute to those situations already excepted from application of the exclusionary rule.[89]

A. *Probable Cause*

Those who disagree with the majority opinion in *Mitchell* ignore the fact that there was no factual basis for the arrest warrant issued by Greenwood Village, and that, therefore, the arrest warrant was unsupported by probable cause. Without probable cause, an arrest warrant cannot survive fourth amendment scrutiny. Neither the courts nor the legislature can cure a constitutionally defective arrest warrant.

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82. 367 U.S. 643 (1961).

83. 678 P.2d 990 (Colo. 1984).

84. U.S. CONST. amend. IV; COLO. CONST. art. 2, § 7. Because Colorado's constitutional provision is identical to the fourth amendment, and the decision in *Mitchell* concerned both constitutional provisions, this section will only refer to the fourth amendment.

85. COLO. REV. STAT. § 16-3-308 (Supp. 1984).

86. *See supra* note 60 and accompanying text.

87. *See* Sibron v. New York, 392 U.S. 40, 61 (1968) ("The question in this Court upon review of a state-approved search or seizure 'is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment.' ") (quoting Cooper v. California, 386 U.S. 58, 61 (1967)).

88. The Bill of Rights developed as a system of protecting the minority from certain abuses of the majority. The cost-benefit analysis used with the exclusionary rule ignores the fact that constitutional rights are granted irrespective of the cost to society. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974); *see also Mapp*, 367 U.S. at 660 (the fourth amendment relies on the exclusionary remedy for its legitimacy).

89. For the proposition that the Colorado statute merely redefines probable cause since probable cause is not concerned with truth but reasonable appearances, see Note, *The Colorado Statutory Good-Faith Exception to the Exclusionary Rule: A Step Too Far?*, 53 U. COLO. L. REV. 809, 816-17 (1982).

As the Colorado court correctly pointed out, the distinguishing feature between *Whiteley v. Warden*,[90] a case in which the Court suppressed the evidence, and *Hill v. California*,[91] in which the Court admitted the evidence, was the existence of probable cause in the issuance of the arrest warrant.[92] In *Hill*, despite the arresting officer's mistake in identifying his suspect, the fact remained that there was probable cause for the issuance of the arrest warrant in Hill's name. The underlying validity of the warrant was not altered when the officer made an error in executing the arrest. The fourth amendment's requirement that one be protected from unreasonable seizures of his person, except for probable cause, was met when an arrest warrant for Hill was obtained by establishing probable cause to the satisfaction of the issuing magistrate and subsequent reviewing courts.

Whiteley presented the opposite circumstance: the facts underlying the warrant were insufficient to constitute probable cause, but the arresting officer made no error in the execution thereof. However, the constitutionality of searches and seizures within the fourth amendment is determined by an analysis of the facts known at the time of the search; subsequent events cannot cure an otherwise defective warrant.[93] Thus, the Court excluded evidence that had been seized from Whiteley without probable cause and similarly, the Colorado Supreme Court excluded the evidence that had been seized from Mitchell.[94]

B. *The Exclusionary Rule as a Constitutional Requirement*

Once the *Mitchell* court acknowledged the fourth amendment violation, it was required to apply the remedy for such violations first announced in *Mapp*: exclusion of all wrongfully seized evidence. As the Court in *Mapp* aptly pointed out, the exclusionary rule, although not expressly provided for by the Constitution, is nonetheless a constitutionally required remedy for fourth amendment violations.[95] This view

90. 401 U.S. 560 (1971).

91. 401 U.S. 797 (1971).

92. *Mitchell*, 678 P.2d at 994.

93. *See* United States v. Jacobsen, 104 S. Ct. 1652, 1657 (1984) and cases cited therein at note 9.

94. Justice Rovira exhibits his misunderstanding of the essential issue in *Mitchell* by opting to apply *Hill* rather than *Whiteley* to the fourth amendment question. At no point in his dissent is it acknowledged that the arrest warrant for Mitchell was unsupported by probable cause as was the case in *Whiteley*. *See supra* note 65 and accompanying text. This misapplication is made all the more glaring after careful analysis of the state court cases used by Rovira to support his argument that no fourth amendment violation occurred in *Mitchell*. In all but one of the cases, probable cause existed for the issuance of the documents upon which the arrests were based. In the one case in which the arrest document was not founded on probable cause, the court cited other factors which constituted probable cause for the arrest. *See supra* notes 74-75 and accompanying text.

95. In discussing the origins of the exclusionary rule, the Court in *Mapp* noted that:

> This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a "form of words."

Mapp, 367 U.S. at 648.

of the exclusionary rule as a constitutionally required remedy is not an aberration of the *Mapp* decision, but is the interpretation given the exclusionary rule by many constitutional scholars.[96]

The issue of whether the exclusionary rule is constitutionally required depends on whether other adequate remedies exist for fourth amendment violations.[97] While the *Mapp* Court concluded that other remedies did not exist,[98] today's courts must believe there are other means of remedying the fourth amendment wrong.[99] However, an analysis of the alternatives to the exclusionary rule reveals that which the rule's critics can only deny: there are no other adequate remedies for fourth amendment violations.

C. *Alternative Remedies*

A damage suit in tort against the individual police officer and his employer, the city, is one remedy often proposed.[100] The disadvantages of the damage suit reveal its inadequacy: (1) much of the harm suffered by the tort victim is immeasurable in monetary terms;[101] (2) the police may be immobilized through fear of ruinous civil damage judgments; (3) many officers will be judgment proof; and (4) to collect a judgment against the city, the plaintiff is required to show that the violation was a result of the city's official policy.[102]

A suit seeking an injunction is even less satisfactory as a remedial device, primarily because the case law has placed a nearly impossible burden of proof on the plaintiff. In *Rizzo v. Goode*,[103] the Court held that one must show that widespread constitutional violations result from a policy of the government agency against which the injunction is sought.

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96. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405, 3430 (1984) (Brennan, J., dissenting); Stewart, *supra* note 23. For a constitutional interpretation of Weeks v. United States, 232 U.S. 383 (1914), see Schrock & Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 295-307 (1974).

97. Stewart, *supra* note 23, at 1384.

98. *Mapp*, 367 U.S. at 652-53.

99. One of the more respected critics of the exclusionary rule contends that alternative remedies must be found because "[i]t would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 756 (1970).

100. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); Katz, *The Jurisprudence of Remedies: Constitutional Legality and The Law of Torts in* Bell v. Hood, 117 U. PA. L. REV. 1, 8-33 (1968); Stewart, *supra* note 23, at 1398.

One commentator has proposed that Congress establish a joint liability plan by statute whereby one whose fourth amendment rights are violated by the police would be entitled to compensation in a fixed amount plus an additional amount for actual damages. If the police violation were intentional, reckless, or grossly negligent, the police officer would be liable for payment of the entire amount, as well as subject to administrative sanctions. Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 74 (1974).

101. Stewart, *supra* note 23, at 1398.

102. *See* Owen v. City of Independence, 445 U.S. 622, 650-56 (1980). For a general discussion of the inadequacies of the tort remedy, see Ingber, *supra* note 14, at 1540-41 and Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1386-96 (1981).

103. 423 U.S. 362 (1976).

Moreover, *City of Los Angeles v. Lyons*,[104] established a requirement that essentially forecloses all injunction actions against offending police departments. In *Lyons*, the Court held that a plaintiff must show he is likely to be injured in the future by the police department's practices.[105]

A more drastic and therefore less acceptable remedy is criminal prosecution of the individual officer.[106] However, no one wants to punish officers who are working to protect society from crime by declaring that they are criminals.[107] Moreover, in *Screws v. United States*,[108] the Court held that only willful violations of constitutional rights were actionable.

Informal remedies such as internal administrative review and civilian review boards are equally ineffective. It is doubtful that an internal police review board would be willing to sanction one of its own for doing what any other officer might have done.[109] Citizen review boards would be difficult to establish and maintain primarily because of police resistance to review by outsiders.[110]

In sum, the exclusionary rule, despite its deficiencies,[111] is the only remedy for fourth amendment violations that balances desirable crime enforcement techniques[112] with the individual's right to be free from unreasonable searches and seizures.[113] As the only adequate remedy for fourth amendment violations, the exclusionary rules must be seen as an inseparable element of the fourth amendment, and not as just another remedy to be separated from the right.

D. *The Good Faith Exception*

Because the exclusionary rule is a constitutionally required remedy,

104. 461 U.S. 95 (1983).

105. *Id.* at 102.

106. 18 U.S.C. § 242 (1982) provides that it is a crime for anyone acting under color of law to deprive a person of his constitutional rights.

107. *See* Note, *Grievance Response Mechanisms for Police Misconduct*, 55 VA. L. REV. 909, 928 (1969).

108. 325 U.S. 91 (1945).

109. For a detailed exploration of the problems inherent in police review boards, see Schroeder, *supra* note 102, at 1401-07. One commentator has proposed that the invocation of the exclusionary rule be tied to police department programs aimed at reducing fourth amendment violations. The more aggressive an officer's police department is in punishing and deterring fourth amendment violations, the more likely the court would admit the illegally seized evidence. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1050-55 (1974).

110. Note, *supra* note 107, at 943. For a discussion of citizen review boards, see Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROBS. 515 (1971).

111. For various criticisms of the exclusionary rule, see Ingber, *supra* note 14, at 1519-21; Jensen & Hart, *supra* note 15, at 921-29; Comment, *The Evolution and Confusion of Exclusion: Does "Good Faith" Make Good Sense Under the Fourth Amendment?*, 4 DET. C.L. REV. 1587, 1602-06 (1983).

112. Remedies more effective at deterring fourth amendment violations would severely restrict the police's ability to fight crime. *See* Ingber, *supra* note 14, at 1555-56; Stewart, *supra* note 23, at 1388-89.

113. Justice Murphy warned that "[a]lternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all." *Wolf*, 338 U.S. at 41 (Murphy, J., dissenting).

the good faith exception, which would permit certain fourth amendment violations to go unremedied, presents a significant reduction of individual fourth amendment rights. The unfairness of applying the good faith exception to the facts in *Mitchell*[114] magnifies that which is fundamentally wrong with the good faith exception. By framing the issue in terms of denying a remedy, the courts have succeeded in limiting fourth amendment guarantees without addressing that limitation. It is the fourth amendment standard of probable cause that declares a police officer's good faith actions to be unreasonable and thus violative of the fourth amendment. Denying a remedy to the victim because the officer acted in good faith allows the court to find that no constitutional right was violated[115] without having to address openly the fourth amendment issue.[116]

As society becomes increasingly concerned with the rising crime rate, it may be willing to sacrifice some individual privacy guarantees for greater police protection. That issue must, however, be addressed on its merits and in the context of reducing the level of probable cause required by the fourth amendment for searches and seizures. We must not allow so fundamental an issue to be decided unwittingly. The good faith exception is more than another exception to a fourth amendment remedy; it represents a potentially significant reduction in fourth amendment guarantees.

CONCLUSION

Under then-existing fourth amendment doctrine, the Colorado Supreme Court correctly affirmed the suppression of evidence in *People v. Mitchell*. Now that fourth amendment guarantees have been radically

114. In contrast to the situation in *Leon*, where two judges merely differed on whether probable cause existed and the reviewing court determined that the search warrant was based on insufficient probable cause, in *Mitchell*, there were no facts supporting issuance of the arrest warrant. In fact, the Court in *Leon* strongly implies that the rule of *Whiteley* would remain unchanged under its newly announced good faith rule. Officers who rely on a warrant issued on another officer's affidavit and are ignorant of the warrant's underlying basis are not entitled to the protection of the good faith exception. *Leon*, 104 S. Ct. at 3421 n.24.

115. Justice Stevens' dissent in *Leon* points out the paradox of disallowing a remedy for a violation of the fourth amendment because the court determines that the violation was reasonable. *Leon*, 104 S. Ct. at 3446-47 (Stevens, J., dissenting).

116. Until the decision in *Leon*, it was well settled that mere good faith on the part of the officer did not constitute the level of probable cause required by the fourth amendment. *E.g.*, Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959); Director General of Railroads v. Kastenbaum, 263 U.S. 25 (1923). Although the *Leon* Court did not acknowledge that its decision will probably result in reducing the level of probable cause, that is the practical effect of its recognition of a good faith exception. It now appears that good faith will constitute probable cause. Unwittingly, Justice Rovira, in his dissenting opinion, makes the connection between the exclusionary rule and the fourth amendment which most exclusionary rule critics attempt to avoid, but which is the necessary result of the good faith exception. In essence, he argued that no fourth amendment violation occurred because deterrence would not be furthered by application of the exclusionary rule. Justice Rovira would seemingly limit the requirement of probable cause to those situations where the exclusion remedy would deter future fourth amendment violations. *Mitchell*, 678 P.2d at 997-98 (Rovira, J., dissenting).

altered by the United States Supreme Court in *United States v. Leon*, the Colorado courts must be persuaded to deny recognition to the good faith exception as announced in that decision. Adoption of such an exception not only denies a remedy for acknowledged fourth amendment violations, it confuses fourth amendment analysis by dealing with what are essentially fourth amendment problems in the less controversial context of reducing the availability of the exclusionary remedy.

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